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**INDEFINITE DETENTION OF SPECIALLY DANGEROUS
REMOVABLE ALIENS: *HERNANDEZ-CARRERA V.
CARLSON* AND THE IMPORTANCE OF AGENCY
DEFERENCE**

*Kathleen L. Cassidy**

I. INTRODUCTION

After serving time in prison for serious criminal offenses, aliens Santos Hernandez-Carrera and Pablo Santiago Hernandez-Arenado were taken into custody by United States immigration officials and have each been detained for more than fifteen years.¹ During their detention, both men were diagnosed with severe mental illnesses.² Immigration judges issued orders to remove them from the country, concluding that they would pose a serious community threat to the community if released.³ Because Cuba, their native country, refused to accept the two aliens, the U.S. government was unable to remove them and, consequently, detained them indefinitely.⁴

The lack of uniformity in federal immigration law among the federal circuit courts calls into question the permissibility of the indefinite detention of aliens who are ordered removed.⁵ As a result of the circuit split, a mentally ill alien with a violent criminal history could be detained indefinitely in one part of the country and released in another after a six-month period. Further complicating this issue is the difficulty (and necessity) of balancing due process rights with the public's safety.

The removal process begins when Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security (DHS), determines that an alien⁶ is subject to removal.⁷ Following

* Associate Member, 2010–2011 *University of Cincinnati Law Review*. The author would like to give special thanks to her family and Richard Tranter for their continued love and encouragement.

1. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1242–44 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009).

2. *Id.* at 1242–44.

3. *Id.*

4. *Id.*

5. *See id.*; *Tran v. Mukasey*, 515 F.3d 478, 482 (5th Cir. 2008); *Thai v. Ashcroft*, 366 F.3d 790, 791–92 (9th Cir. 2004).

6. *Alien* is defined as “[a] person who resides within the borders of a country but is not a citizen or subject of that . . . country.” BLACK’S LAW DICTIONARY 30 (3rd pocket ed. 2006).

7. HUMAN RIGHTS WATCH, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR

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arrest, ICE begins deportation proceedings.⁸ A series of hearings are then scheduled in immigration court to determine whether the alien is entitled to remain in the United States.⁹ If an immigration judge issues a final order of removal, the alien may appeal to the Board of Immigration Appeals (BIA).¹⁰ Should the alien lose this appeal, the alien “may file a petition for review of this decision with the appropriate [f]ederal [c]ircuit [c]ourt of [a]ppeals.”¹¹ In extraordinary cases, the United States Supreme Court will review lower court decisions.¹²

Following an order of removal, indefinite detention becomes an issue when the government is unable to effectuate the alien’s removal within a reasonable time.¹³ An alien is typically held in custody for the ninety-day statutory removal period, during which the government works to secure the alien’s removal from the United States.¹⁴ After this period, the alien may be released from detention, subject to supervision, if the government is unable to succeed in removal efforts.¹⁵ If, however, the alien is determined to be “specially dangerous,” the alien may be detained indefinitely, despite both the expiration of the statutory removal period and the fact that the alien is unlikely to be removed.¹⁶ A “specially dangerous” alien detained indefinitely is, however, entitled to periodic assessments of this status by an immigration court.¹⁷ Further, the detainee may challenge the continued detention by filing a petition for habeas corpus in federal district court.¹⁸

Hernandez-Carrera v. Carlson created a split among the federal circuit courts when the Tenth Circuit determined that indefinite detention of removable aliens was permissible under certain “special circumstances.” Part II of this Comment examines the statutory

HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 3 (2010).

8. *Id.*

9. *Id.*; see also *id.* at 21 (“The proceedings themselves involve two stages: first, a determination of whether the person is inadmissible or deportable; and second, determination of whether the person is eligible for any discretionary or mandatory relief from removal.”).

10. *Id.* at 24.

11. *Id.* Additionally, federal district courts do not hear appeals of deportation orders, but they do hear petitions for habeas corpus challenging unlawful detention. *Id.*

12. *Id.*

13. *Id.* at 77 (“In some cases, a non-citizen who has been ordered deported by an immigration judge cannot be expeditiously removed to the country of origin because it does not have diplomatic relations or repatriation agreements with the US, refuses to receive the person for other reasons, or simply fails to provide travel documents.”).

14. *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001); 8 U.S.C. § 1231(a)(1)(A) (2006).

15. See 8 C.F.R. § 241.13 (2010).

16. 8 C.F.R. § 241.14(f) (2010); see also HUMAN RIGHTS WATCH, *supra* note 7, at 66.

17. 8 C.F.R. § 241.14(k) (2010); see also HUMAN RIGHTS WATCH, *supra* note 7, at 78.

18. HUMAN RIGHTS WATCH, *supra* note 7, at 81; see also 28 U.S.C.A. § 2241 (West 2010).

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provisions and Supreme Court decisions that are relevant to the issue of indefinite detention of removable aliens. Part III analyzes the Fifth, Ninth and Tenth Circuits' decisions regarding federal habeas corpus petitions filed by aliens challenging their indefinite detentions. Part IV discusses deficiencies in the Fifth and Ninth Circuits' decisions and provides recommendations to ensure the consistent application of federal immigration law. Part V concludes that the Tenth Circuit's decision in *Hernandez-Carrera* was superior because it accounts for tenets of administrative law by giving deference to the Attorney General's statutory construction while simultaneously remaining within constitutional boundaries.

II. STATUTORY PROVISIONS AND BACKGROUND

The focus of the circuit split revolves around the “[i]nadmissible or criminal aliens” statute, 8 U.S.C. § 1231(a)(6), which states that:

[a]n alien ordered removed who is inadmissible . . . , removable . . . , or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to . . . terms of supervision¹⁹

Significantly, 8 C.F.R. § 241.14—the Attorney General's “special circumstances” regulation—is used to determine whether continued detention of a removable alien is warranted when the alien is “specially dangerous.”²⁰ Below, subparts A and B discuss the “[i]nadmissible or criminal aliens” statute, as well as the Attorney General's “special circumstances” regulation. Additionally, subpart C addresses the Supreme Court's rulings concerning the propriety of judicial deference to an agency's statutory construction.

A. Detention and Removal of Aliens Who Are Ordered Removed: 8 U.S.C. § 1231(a)(6)

The provision of the Immigration and Naturalization Act (INA) at issue in the circuit courts, 8 U.S.C. § 1231(a)(6), titled “[i]nadmissible or criminal aliens,” authorizes the Attorney General to prolong the detention of certain classes of aliens beyond the removal period.²¹ The statute applies to three classes of aliens: (1) aliens who do not meet

19. 8 U.S.C. § 1231(a)(6) (2006) (emphasis added).

20. 8 C.F.R. § 241.14 (2010).

21. 8 U.S.C. § 1231(a)(6).

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statutory admission qualifications and who have been “ordered removed;”²² (2) aliens who have been “ordered removed” for security or policy reasons or because they violated status requirements, entry conditions, or criminal laws; or (3) aliens “ordered removed” who have been deemed by the Attorney General to pose a community safety risk or who the Attorney General believes may flee the jurisdiction.²³ The goal of this provision is two-fold: to ensure that aliens will appear at subsequent immigration proceedings, and to provide for the safety of the community by continued detention.²⁴

B. The Attorney General’s Construction of the “[I]nadmissible or [C]riminal [A]liens” Statute

In furtherance of the post-removal provision of the INA, federal regulation 8 C.F.R. § 241.14—the “special circumstances” provision—allows the U.S. government to “continue detention of particular removable aliens *on account of special circumstances* even though there is *no significant likelihood that the alien will be removed* in the reasonably foreseeable future.”²⁵ The U.S. Attorney General promulgated this regulation in response to the Supreme Court’s decision in *Zadvydas v. Davis*, which held impermissible the indefinite detention of certain aliens.²⁶ The regulation provides for the continued detention of certain categories of aliens in a manner that comports with constitutional requirements for due process.²⁷ The revised provision, in compliance with *Zadvydas*, narrows the scope of the INA’s authority to detain aliens indefinitely after a removal order has been finalized.²⁸ The Attorney General drafted the regulation in a manner that interpreted the “[i]nadmissible or criminal aliens” statute as an authorization of an

22. See 8 U.S.C.A. § 1182 (West 2010) (discussing “Admission Qualifications for Aliens”).

23. *Tran v. Mukasey*, 515 F.3d 478, 482 (5th Cir. 2008).

24. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In dicta, the Court in *Zadvydas* determined that the statute’s basic purpose is to effectuate removal of aliens and that the provision is part of that statute. *Id.* at 690. There is some disagreement about the purpose of the statute, but courts have failed to analyze the statute’s purpose in greater detail. See Myrna Pages, Note, *Indefinite Detention: Tipping the Scale Toward the Liberty Interest of Freedom After Zadvydas v. Davis*, 66 ALB. L. REV. 1213, 1227–28 (2003) (discussing the statute’s purpose and the purpose of extended detention, noting that Justice Kennedy, in his *Zadvydas* dissent, argued that the purpose of extended detention is to ensure public safety, not to effectuate removal).

25. 8 C.F.R. § 241.14(a) (2010) (emphasis added).

26. *Zadvydas*, 533 U.S. at 689.

27. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1245 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009).

28. See *id.* at 1251–55; see also *Marquez-Coromina v. Hollingsworth*, 692 F. Supp. 2d 565, 569–70 (D. Md. 2010).

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alien's prolonged detention in limited circumstances, subject to specific procedural requirements.²⁹

Under the "special circumstances" provision, there are "four categories of aliens whose special circumstances warrant continued detention," including "aliens determined to pose a special danger to the public."³⁰ In order to prolong the detention of an alien who falls within this "special danger to the public" category, the government must follow certain procedural requirements. First, the government must demonstrate by clear and convincing evidence, that: (1) the alien has committed "crimes of violence;"³¹ (2) the alien is likely to commit future acts of violence as a result of "a mental condition or personality disorder;" and (3) there are no release conditions that "can reasonably be expected to ensure the safety of the public."³² Once this evidentiary standard is satisfied, the procedure for continued detention requires a medical and psychiatric examination of the alien,³³ a referral to an immigration judge,³⁴ a reasonable cause hearing³⁵ as well as a merits hearing,³⁶ and, if warranted, periodic case reviews once the alien has

29. *Hernandez-Carrera*, 547 F.3d at 1245.

30. *Id.* at 1243; *see also* 8 C.F.R. § 241.14(b)–(d), (f). The other categories of aliens whose special circumstances warrant continued detention are: "(1) aliens with a highly contagious disease that is a threat to public safety; (2) aliens detained on account of serious adverse foreign policy consequences of release; (3) aliens detained on account of security or terrorism concerns . . ." *Hernandez-Carrera*, 547 F.3d at 1243 (citation omitted).

31. 18 U.S.C. § 16 (2006) (defining a crime of violence and noting "[t]he term 'crime of violence' means — (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

32. 8 C.F.R. § 241.14(f)(1)(i)–(iii); *see also* 18 U.S.C. § 16.

33. 8 C.F.R. § 241.14(f)(3).

34. *Id.* § 241.14(g) ("Jurisdiction for an immigration judge to review a determination . . . that an alien is specially dangerous shall commence with the filing by the Service of a Notice of Referral to the Immigration Judge . . . with the Immigration Court having jurisdiction over the place of the alien's custody.").

35. *Id.* § 241.14(h) ("The immigration judge shall hold a preliminary hearing to determine whether the evidence supporting the Service's determination is sufficient to establish reasonable cause to go forward with a merits hearing . . .").

36. *Id.* § 241.14(i). At the merits hearing, the government must prove that the alien should remain in custody because the alien's release would pose a special danger to the public under the standards in 8 C.F.R. § 241.14(f)(1). The regulation states that:

In making any determination in a merits hearing . . . the immigration judge shall consider the following non-exclusive list of factors:

- (i) The alien's prior criminal history, particularly the nature and seriousness of any prior crimes involving violence or threats of violence;
- (ii) The alien's previous history of recidivism, if any, upon release from either Service or criminal custody;
- (iii) The substantiality of the Service's evidence regarding the alien's current

been deemed a special danger to the public.³⁷

C. The Supreme Court's Interpretation of the "[I]nadmissible or [C]riminal [A]liens" Statute

The Court has issued two major decisions addressing the indefinite detention of aliens, *Zadvydas v. Davis* and *Clark v. Martinez*. This subpart discusses these opinions and their practical implications.

1. *Zadvydas v. Davis*

In *Zadvydas v. Davis*, the Supreme Court addressed whether the post-removal-period "[i]nadmissible or criminal aliens" statute authorizes detention of a removable alien "*indefinitely* beyond the removal period" or whether the statute authorizes detention only for the time necessary for the government to secure removal.³⁸ The Court held that the statute "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States."³⁹ In doing so, however, the Court emphasized the statute's ambiguity.⁴⁰ Moreover, the Court noted that it was unable to find "any *clear* indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed."⁴¹ Finding that the language of the "[i]nadmissible or criminal aliens" statute was ambiguous, the Court further noted that the drafters' inclusion of the word "may" suggested that discretion should be used in implementing the provision.⁴²

Despite the statute's ambiguity, the Court chose an interpretation that avoided the "serious constitutional threat" of a possible due process

mental condition or personality disorder;

(iv) The likelihood that the alien will engage in acts of violence in the future; and

(v) The nature and seriousness of the danger to the public posed by the alien's release.

Id. § 241.14(i)(2)(i)–(v).

37. *Id.* § 241.14(k).

38. *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

39. *Id.* at 689.

40. *Id.* at 697.

41. *Id.* (emphasis added).

42. *Id.* ("An alien ordered removed who is inadmissible . . . removable . . . or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may* be detained beyond the removal period" (emphasis added) (quoting 8 U.S.C. § 1231(a)(6) (2006))).

violation.⁴³ The Court recognized that “the Due Process Clause applies to all persons within the United States, including aliens, whether their presence [in the U.S.] is lawful, unlawful, temporary, or permanent.”⁴⁴ Thus, the Court interpreted the “[i]nadmissible or criminal aliens” statute in a manner that allowed the Court to avoid ruling on the provision’s constitutionality.⁴⁵

Ultimately, however, the Court’s determination that the statute does not allow indefinite detention implicitly accounted for due process requirements.⁴⁶ Attempting to create uniformity in the statute’s administration, the Court concluded that a six-month period was presumptively the amount of time reasonably necessary to determine whether the government will be able to remove an alien.⁴⁷

2. *Clark v. Martinez*

While *Zadvydas* addressed the indefinite detention of removable aliens, the Court, in *Clark v. Martinez*, grappled with the indefinite detention of inadmissible aliens not entitled to enter the U.S.⁴⁸ The Court applied the *Zadvydas* construction of the “[i]nadmissible or criminal aliens” provision to inadmissible aliens and found that the statute’s crucial terminology applied—without distinction—to each of the three categories of aliens who were subject to it.⁴⁹ The Court noted the ambiguities in the statute’s language and relied on the finding in *Zadvydas* that there were two plausible readings of the provision: one that authorized indefinite detention yet approached constitutional limitations, and one that authorized detention for only the amount of time necessary to effectuate removal.⁵⁰ Further, the Court noted that the

43. *Id.* at 699.

44. *Id.* at 693. *But see* *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1254 (10th Cir. 2008) (discussing what process is due to an alien and how this is unclear in the courts), *cert. denied*, 130 S. Ct. 1011 (2009).

45. *Zadvydas*, 533 U.S. at 689 (“‘It is a cardinal principal’ of statutory interpretation . . . that when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’” (citations omitted)).

46. *Id.*

47. *Id.* at 701.

48. *Clark v. Martinez*, 543 U.S. 371, 373 (2005). *Martinez* and *Benitez*, the detained aliens in this case, entered the U.S. from Cuba as part of the Mariel boatlift. *Id.* at 374. They were paroled into the U.S. and given the opportunity “to adjust their status to that of lawful permanent resident after one year.” *Id.* Neither of the men qualified for the adjustment to their status, as they had become inadmissible due to prior criminal convictions in the U.S. *Id.* As a result, they were detained and ordered removed to Cuba. *Id.* at 375.

49. *Id.* at 378.

50. *Id.* at 384.

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Zadvydas decision relied on both statutory ambiguity and constitutional avoidance.⁵¹ *Martinez* emphasized the necessity of consistency when interpreting the “[i]nadmissible or criminal aliens” statute and left no available justifications for allowing the same detention provision to have different meanings depending on an alien’s classification.⁵²

D. Agency Construction of a Statute

Despite the Court’s unambiguous holding regarding the indefinite detention of inadmissible or removable aliens, administrative law principles establish that government agencies have discretion in construing statutes when deciding certain types of cases. The Supreme Court addressed the issue of conflicting statutory interpretations between the judiciary and an agency in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* and *National Cable and Telecommunications Association v. Brand X Internet Services*.⁵³ The Court’s decisions in these cases establishes that courts should defer to an agency’s construction of an ambiguous statute—even if the agency’s construction conflicts with a prior judicial construction—so long as the construction is reasonable.⁵⁴ In accordance with this discretion, administrative law courts have reached different conclusions regarding the indefinite detention of “[i]nadmissible or criminal aliens.”⁵⁵

In *Chevron* the Court established a two-part test to determine when courts must give deference to “an agency’s construction of a statute that it administers.”⁵⁶ *Chevron* deference is due when “the [pertinent] statute is silent or ambiguous” on the issue in question and when the agency’s construction is “a permissible construction of the statute.”⁵⁷ Further clarifying the *Chevron* decision, the Court in *Brand X* ruled that a “prior judicial construction of a statute trumps [a subsequent] agency

51. *Id.* at 379; *see also id.* at 381 (noting that the canon of constitutional avoidance “allows courts to avoid the decision of constitutional questions” and “is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts”).

52. *Id.* at 380.

53. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

54. *See Hernandez-Carrera*, 547 F.3d at 1244.

55. *See id.* at 1252.

56. *Id.*; *see also* J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 41–46 (2010) (discussing the *Chevron* “two-step doctrine”).

57. *Chevron*, 467 U.S. at 843; *see also* Robin Kundis Craig, *Administrative Law in the Roberts Court: The First Four Years*, 62 ADMIN. L. REV. 69, 144–46 (2010).

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construction otherwise entitled to *Chevron* deference *only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”⁵⁸

In *Chevron*, the Court did not create its own construction of the statute in question but instead simply addressed whether the agency’s construction was permissible.⁵⁹ The Court decided the proper standard of review to be applied to a government agency’s interpretation of a statute and discussed ambiguities within statutory text.⁶⁰ The Court ruled that an agency’s jurisdiction to administer a statute includes the “authority . . . to fill the statutory gap in a reasonable fashion.”⁶¹ Furthermore, the Court remarked that the judiciary may not impose its own interpretation of a statute in lieu of an agency’s reasonable interpretation.⁶²

In *Brand X*, the Court addressed whether the Ninth Circuit’s prior construction of the Communications Act barred a subsequent interpretation by the Federal Communications Commission (FCC).⁶³ The Court applied the *Chevron* framework to the FCC’s interpretation of the Communications Act, concluding that “[i]f a statute is ambiguous . . . and if the implementing agency’s construction is reasonable,” the court must, in accordance with *Chevron*, defer to the agency’s construction “even if the agency’s reading differs from what the court believes is the best . . . interpretation.”⁶⁴ The Court further noted that the question of “whether Congress has delegated to an agency the authority to interpret a statute” depends on whether the provision at issue meets the requirements of *Chevron*.⁶⁵ This delegation of authority does not, however, depend on the temporal sequence of “the judicial and administrative constructions.”⁶⁶

III. THE CIRCUIT SPLIT

The issue is relatively straightforward: whether the “[i]nadmissible or criminal aliens” statute permits the continued detention of certain classifications of removable aliens beyond the statutory removal period. In answering this question, the circuits must decide which interpretation

58. *Nat’l Cable & Telecomm. Ass’n*, 545 U.S. at 982 (emphasis added).

59. *Chevron*, 467 U.S. at 843–44.

60. *Id.*

61. *Nat’l Cable & Telecomm. Ass’n*, 545 U.S. at 980 (describing the holding of *Chevron*).

62. *Chevron*, 467 U.S. at 844.

63. *See Nat’l Cable & Telecomm. Ass’n*, 545 U.S. at 982.

64. *Id.* at 980.

65. *Id.* at 983.

66. *Id.*

of the statute is superior—the Supreme Court’s narrow construction in *Zadvydas* or the Attorney General’s broad construction in line with the “special circumstances” regulation and the Supreme Court’s *Chevron* and *Brand X* rulings. This Part examines the Fifth, Ninth, and Tenth Circuits’ various constructions of the “[i]nadmissible or criminal aliens” statute.

A. *The Fifth and Ninth Circuits’ Interpretation: Thai v. Ashcroft and Tran v. Mukasey*

According to the Fifth and Ninth Circuits, the Attorney General’s broad construction is impermissible. In *Thai v. Ashcroft*, for example, the Ninth Circuit examined whether the Supreme Court’s interpretation of the “[i]nadmissible or criminal aliens” statute authorized the continued detention of a removable alien based upon the Attorney General’s finding that the alien was “specially dangerous” to the community because of mental illness.⁶⁷ In affirming the lower court’s grant of Tuan Thai’s habeas corpus petition, the Ninth Circuit held that the Supreme Court’s construction of the “[i]nadmissible or criminal aliens” statute prohibited Thai’s continued detention, despite the presence of circumstances that put community safety at risk.⁶⁸

Thai entered the U.S. from Vietnam as a lawful permanent resident,⁶⁹ but subsequently established a criminal record with “convictions for assault, harassment, and third-degree rape.”⁷⁰ After serving sentences for these crimes, Thai was taken into government custody so that removal proceedings could begin, with the goal of sending Thai back to Vietnam.⁷¹ An immigration judge found that Thai was removable, but Vietnamese government officials were uncooperative in providing travel documents, thereby rendering Thai’s removal “not reasonably foreseeable.”⁷² Thai challenged his continued detention by filing a habeas corpus petition,⁷³ which was granted by the district court.⁷⁴ The

67. *Thai v. Ashcroft*, 366 F.3d 790, 791–92 (9th Cir. 2004).

68. *Id.* at 792.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. See 28 U.S.C.A. § 2241 (West 2010). This statute describes the “[p]ower to grant [the] writ” of habeas corpus, and states:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

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government appealed the district court's order, initiated continued detention proceedings pursuant to the "special circumstances" regulation,⁷⁵ and established what the immigration judge viewed as "clear and convincing evidence that Thai's release would pose a special danger to the public."⁷⁶

Despite evidence of Thai's mental instability and violent tendencies, the Ninth Circuit interpreted *Zadvydas* to establish that the "[i]nadmissible or criminal aliens" statute was a bar to "post-removal-period detention of an alien once removal [was] no longer reasonably foreseeable."⁷⁷ Because it was undisputed that Thai's removal was "not reasonably foreseeable," the court determined that Thai's continued detention was impermissible under Supreme Court precedent.⁷⁸

In its analysis, the Ninth Circuit rejected the government's argument that Thai's continued detention was authorized under both *Zadvydas* and the "special circumstances" provision.⁷⁹ The government asserted that *Zadvydas* established an exception to the six-month presumption for "specially dangerous" individuals and further contended that the "special circumstances" regulation was articulated in light of this *Zadvydas* exception.⁸⁰ According to the Ninth Circuit, however, *Zadvydas* did not intend to create a class of aliens whose detention would not be subject to

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- (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
 - (c) The writ of habeas corpus shall not extend to a prisoner unless—
 - (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
 - (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
 - (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
 - (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
 - (5) It is necessary to bring him into court to testify or for trial.

Id.

74. *Thai*, 366 F.3d at 792–93.

75. *Id.* at 793; *see also* 8 C.F.R. § 241.14(f) (2010).

76. *Thai*, 366 F.3d at 793.

77. *Id.* at 798.

78. *Id.*

79. *See id.* at 794–98.

80. *Id.* at 794.

limitation.⁸¹ According to the Ninth Circuit, *Zadvydas* explicated situations where the ninety-day rule may be inappropriate and detention for the presumptive period of six months would instead be permissible.⁸²

In response to the post-*Zadvydas* enactment of the “special circumstances” provision, the Ninth Circuit concluded that the Attorney General’s regulation was invalid because it allowed the government to take actions prohibited under the “[i]nadmissible or criminal aliens” statute.⁸³ The court relied solely on the narrow *Zadvydas* construction of the statute in reaching its decision, reasoning that because the “special circumstances” regulation was in conflict with the statute, the statute must control.⁸⁴ The court determined that the limitations on the statute established in *Zadvydas* should apply to Thai’s case as well.⁸⁵ Though the court distinguished Thai from the habeas petitioner in *Zadvydas* by noting the presence of Thai’s “ill mental health” coupled with dangerousness, the court refused to permit Thai’s indefinite detention on account of this additional mental instability.⁸⁶ In its ruling, the Ninth Circuit failed to comment on the ambiguity of the “[i]nadmissible or criminal aliens” provision as well as the administrative deference imposed by *Chevron* and *Brand X*.⁸⁷

In *Tran v. Mukasey*, the Fifth Circuit also addressed whether the *Zadvydas* construction of the “[i]nadmissible or criminal aliens” statute authorized continued detention of removable aliens when the government has determined that the alien’s mental illness renders him a danger to the community.⁸⁸ The *Tran* court reasoned that it was “bound by the statutory construction put forward” in *Zadvydas* and *Martinez*⁸⁹ and construed the “[i]nadmissible or criminal aliens” statute narrowly.⁹⁰

81. *See id.* at 794–98.

82. *Id.* at 795 (“The statement in *Zadvydas* that noncriminal detention by the Government is permissible only in narrow nonpunitive circumstances was intended to illustrate what the Government is generally *prohibited* from doing, and what it may in some circumstances be permitted to do. It did not state what the Government is authorized to do under § 1231(a)(6).”).

83. *See id.* at 798–99.

84. *See id.*

85. *See id.* at 798.

86. *See id.* (The court does “not believe that *Zadvydas* can properly be read to prohibit the indefinite detention of dangerous resident aliens like Ma, while allowing the indefinite detention of dangerous resident aliens like Thai. An alien’s ill mental health coupled with dangerousness cannot justify indefinite detention under *Zadvydas* when dangerousness alone cannot justify such detention.”).

87. *See id.* at 790.

88. *Tran v. Mukasey*, 515 F.3d 478, 479 (5th Cir. 2008).

89. *Id.* at 484; *see also* *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) (“It is [the Supreme Court’s] responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.”).

90. *See Tran*, 515 F.3d 478.

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The court ruled that the alien's indefinite detention was impermissible.⁹¹

The alien in this case, Ha Tran, was a Vietnamese citizen admitted to the U.S. as a refugee and was later granted the status of a lawful permanent resident.⁹² After criminal convictions for firearm possession as well as assault and battery against his wife, Tran was confined to a mental hospital for two years, diagnosed with mental illness, and transferred to a halfway house.⁹³ Upon his release, Tran murdered his wife.⁹⁴ He was convicted of manslaughter and sentenced to prison.⁹⁵

During his second incarceration, DHS took custody of Tran and initiated deportation proceedings.⁹⁶ After it became clear that his removal from the U.S. was "not reasonably foreseeable," Tran filed a petition for a writ of habeas corpus to terminate his detention.⁹⁷ The government argued that the district court erred in granting Tran's habeas petition by following *Zadvydas* and that the court instead should have deferred, as required under *Chevron*, to the Attorney General's interpretation of the "[i]nadmissible or criminal aliens" statute.⁹⁸ The Fifth Circuit, however, declined to give *Chevron* deference to the Attorney General's interpretation of the statute and instead found that *Zadvydas* resolved the "ambiguity by imposing a requirement that . . . detention last no longer than reasonably necessary to effectuate removal."⁹⁹ Thus, the *Tran* court concluded that the government's interpretation of the "[i]nadmissible or criminal aliens" statute was impermissible and not due *Chevron* deference because *Zadvydas* removed any ambiguity in the statute's meaning.¹⁰⁰

91. *Id.* at 479.

92. *Id.* at 480.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 480.

97. *Id.* at 481. Tran was being detained under 8 C.F.R. § 241.14(f) after he was taken into custody by DHS during his manslaughter sentence. *Id.* at 480. DHS decided to continue custody based upon a finding that Tran's mental illness would cause him to commit acts of violence in the future despite the acknowledgment that Tran was unlikely to be removed in the foreseeable future. *Id.* The Board of Immigration Appeals later found that the Government had established by clear and convincing evidence that Tran had met the criteria for continued detention under 8 C.F.R. § 241.14(f). *Id.* at 480–81.

98. *Id.* at 481, 484.

99. *Id.* at 484.

100. *Id.*

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B. The Tenth Circuit: Hernandez-Carrera v. Carlson

In *Hernandez-Carrera v. Carlson*, the Tenth Circuit addressed whether the Attorney General's construction of the "[i]nadmissible or criminal aliens" statute required deference in light of the Supreme Court's contrary interpretation of the statute in *Zadvydas* and *Martinez*.¹⁰¹ The *Hernandez-Carrera* court used a two-part analysis in addressing the issue, first asking "whether 'the statute [was] silent or ambiguous'" with regards to the authority of the Attorney General to detain specific classes of aliens past the "removal period," and second asking whether the Attorney General's construction was acceptable.¹⁰² The court addressed these questions in light of *Chevron* and *Brand X*, and concluded that the Attorney General's "subsequent, reasonable . . . interpretation of [the] ambiguous statute" did not raise constitutional questions and was therefore entitled to judicial deference.¹⁰³

The petitioners in this case, Santos Hernandez-Carrera and Pablo Santiago Hernandez-Arenado, were native citizens of Cuba who entered the U.S. illegally during the 1980 Mariel boatlift.¹⁰⁴ Classified as inadmissible aliens, both men were granted immigration parole in the U.S.¹⁰⁵ After criminal convictions, the government revoked parole, and the men were issued exclusion and deportation orders, based upon each man's "lack of entry documents and convictions for crimes of moral turpitude."¹⁰⁶ After the final orders of removal were issued, immigration judges, pursuant to the "special circumstances" regulation, ordered the continued detention of both men because of their criminal records and the poor results of their mental health evaluations.¹⁰⁷

Hernandez-Carrera had an exhaustive criminal history, including convictions for rape with force and bodily injury, battery, and indecent exposure.¹⁰⁸ After his incarceration, Hernandez-Carrera was detained, taken into custody by the INS and diagnosed with schizophrenia.¹⁰⁹ He refused to take medication for his illness, and assessments by mental health experts concluded that Hernandez-Carrera "would be a direct danger to the public" and "quite likely" to engage in future violence if

101. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009).

102. *Id.* at 1244–45.

103. *Id.* at 1242.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1242–44.

108. *Id.* at 1243.

109. *Id.*

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released from detention.¹¹⁰ Accordingly, an immigration judge concluded that there were “no reasonable conditions of release” that could be imposed on Hernandez-Carrera to “ensure public safety.”¹¹¹

The immigration court similarly deemed Hernandez-Arenado a danger to the public because of his mental illness and criminal history.¹¹² Hernandez-Arenado “admitted to involvement in ‘several hundred’ pedophilic contacts with children in Cuba and in the United States” and was taken into INS custody after being imprisoned for the sexual assault of a seven-year-old boy.¹¹³ During his detention, Hernandez-Arenado was diagnosed with mental illness, in this case pedophilia.¹¹⁴ Subsequent evaluations determined that Hernandez-Arenado could not be released from detention without exposing the public to danger.¹¹⁵ Mental health experts concluded that he was unlikely to change his behavior or cease to act on his impulses, especially given the fact that Hernandez-Arenado stated several times that “he [did] not believe [that] sex with children [was] wrong.”¹¹⁶ An immigration judge agreed with these mental health evaluations and noted that if Hernandez-Arenado was released from detention, nothing would prevent him from molesting more children.¹¹⁷ Thus, as in the case of Hernandez-Carrera, the judge ruled that “no reasonable conditions of release [could] reasonably be expected to ensure the safety of the public.”¹¹⁸

Both Hernandez-Carrera and Hernandez-Arenado filed petitions for writs of habeas corpus, alleging that their continued detention was unconstitutional.¹¹⁹ Given that they were diagnosed with “harm-threatening mental illness[es] and [were] likely to engage in violent behavior if released such that public safety [could not] reasonably be guaranteed,” the district court addressed whether it was constitutionally permissible for the Attorney General to continue detention “beyond the presumptive six month post-removal detention period” despite the fact that removal was “not reasonably foreseeable.”¹²⁰ The district court,

110. *Id.*

111. *Id.*

112. *Id.* at 1243.

113. *Id.*

114. *See id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Hernandez-Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1186 (D. Kan. 2008), *vacated and remanded* by 547 F.3d 1237 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009).

120. *Id.* at 1189.

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like the lower courts in *Thai* and *Tran*, found that the Attorney General's interpretation of the "special circumstances" regulation was not permitted under the Supreme Court's construction of the "[i]nadmissible or criminal aliens" statute.¹²¹ Consequently, the district court concluded that *Zadvydas* and *Martinez* explicated settled law on the issue and granted writs to both petitioners.¹²²

On appeal, the Tenth Circuit addressed whether the Attorney General's construction of the "[i]nadmissible or criminal aliens" statute, as articulated through the "special circumstances" regulation, should be given deference in spite of the Supreme Court's contrary constructions in *Zadvydas* and *Martinez*.¹²³ The court used a three-part analysis to reach its decision.

1. Whether the "Inadmissible or Criminal Aliens" Statute Was Silent or Ambiguous

The Tenth Circuit began its analysis with a finding that the "[i]nadmissible or criminal aliens" statute was ambiguous. According to the court, its conclusion was supported by two separate Supreme Court decisions finding the statute ambiguous.¹²⁴ The Tenth Circuit relied on the Court's statement in *Zadvydas* that it was unable to find "any clear indication" that Congress intended the Attorney General to have the power to indefinitely detain "an alien ordered removed."¹²⁵ The Tenth Circuit also cited the Court's finding in *Martinez* "that the *Zadvydas* Court 'rel[ie]d] on ambiguities in the statutory text' of § 1231(a)(6) when construing the statute."¹²⁶

As further evidence of the statute's ambiguity, the Tenth Circuit emphasized the Court's application of constitutional avoidance in *Zadvydas* and *Martinez*.¹²⁷ The Supreme Court remarked in *Martinez* that the canon should be invoked when, "after the application of ordinary textual analysis, [a] statute is found to be susceptible of more than one construction."¹²⁸ Conversely, the canon is inapplicable in statutory interpretation if congressional intent is clear.¹²⁹ The Tenth

121. *Id.*

122. *Id.* at 1186.

123. *Hernandez-Carrera*, 547 F.3d at 1244.

124. *Id.* at 1245.

125. *Id.* (quoting *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001)).

126. *Id.* (quoting *Clark v. Martinez*, 543 U.S. 371, 378 (2005)).

127. *Id.* at 1244.

128. *Clark v. Martinez*, 543 U.S. 371, 385 (2005).

129. *Hernandez-Carrera*, 547 F.3d at 1245.

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Circuit reasoned that because the Supreme Court exercised the canon in two decisions addressing the “[i]nadmissible or criminal aliens” provision, it was clear that the Court viewed “the statute as genuinely susceptible of more than one reasonable interpretation.”¹³⁰

2. Whether the Attorney General’s Construction Was Permissible

The Tenth Circuit characterized the second part of its analysis as the “more serious question,” and further divided the issue into three separate inquiries.¹³¹

a. Whether Brand X Applies to the Supreme Court’s Statutory Interpretations

In its initial inquiry, the *Hernandez-Carrera* court concluded that the Attorney General’s construction of the statute was owed *Chevron* deference to the extent that it was reasonable.¹³² The Tenth Circuit evaluated the reasonableness of the Attorney General’s construction by first addressing the role of judicial deference to administrative interpretations of a statute.¹³³ The court noted that deference is not simply a policy choice but instead “a means of giving effect to congressional intent.”¹³⁴ As such, when Congress creates an agency-administered statute that is filled with gaps, it is, by implication, entrusting the agency to fill in the missing pieces that are necessary for a practical application of the statute.¹³⁵ Further, the court inferred that because Congress specifically authorized the Attorney General to create rules concerning the detention of aliens ordered removed, Congress thereby delegated authority to the Attorney General to address existing ambiguities in the statute it was charged with enforcing.¹³⁶ The court concluded that if it were to favor the judiciary’s interpretation “over a reasonable administrative agency construction,” the court “would be ignoring Congress’s choice to empower an agency, rather than the courts, to resolve this kind of statutory ambiguity.”¹³⁷

The Tenth Circuit also addressed *Hernandez-Carrera* and *Hernandez-*

130. *Id.*
131. *See id.* at 1245–46.
132. *Id.* at 1246.
133. *Id.* at 1246.
134. *Id.*
135. *Id.*
136. *See id.*
137. *Id.*

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Arenado's argument that the rule established in *Brand X* could only be applied to lower court decisions, not to Supreme Court decisions.¹³⁸ The *Brand X* decision addressed a Ninth Circuit statutory construction, but the Tenth Circuit ultimately disagreed with the aliens' argument and applied *Brand X* to interpretations made by both the Supreme Court and the lower courts.¹³⁹ The court extended the *Brand X* rule upon the premise that agency deference in both lower court and Supreme Court decisions gives necessary "weight to Congress'[s] intent to vest an agency with the power to" be a statutory gap filler.¹⁴⁰

Additionally, the court noted that if *Brand X* were applied only to lower court decisions, the timing of the Supreme Court's construction of a statute would determine whether an agency interpretation could be given deference.¹⁴¹ That is, if an agency interpretation occurred subsequent to a Supreme Court construction, the agency would not be given deference and would also be precluded "from revising unwise judicial constructions of ambiguous statutes" in the future.¹⁴² Further, the court emphasized that limiting application of *Brand X* to lower court decisions would disregard the central premise of both *Chevron* and *Brand X*, namely that Congress intended "for agencies, not courts, to fill statutory gaps."¹⁴³

The Tenth Circuit acknowledged that its application of the *Brand X* rule to Supreme Court statutory interpretations would conflict with the Fifth Circuit's decision in *Tran v. Mukasey* and the Ninth Circuit's decision in *Thai v. Ashcroft*.¹⁴⁴ As discussed in subpart III.A, the courts in both cases based their rulings on the proposition that the Supreme Court's holding in *Zadvydas* was a definitive interpretation of the "[i]nadmissible or criminal aliens" statute.¹⁴⁵ The Tenth Circuit, however, disagreed that *Zadvydas* was the final word on the issue and instead concluded that under *Brand X* an agency may, after a judicial interpretation has been rendered, choose a disparate statutory

138. See *id.* at 1246–47; Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

139. See *Hernandez-Carrera*, 547 F.3d at 1246–48.

140. *Id.* at 1247.

141. *Id.*

142. *Id.*

143. *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 983 (1984)).

144. *Id.* at 1248; *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008); *Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004).

145. *Hernandez-Carrera*, 547 F.3d at 1248.

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construction because the agency is the interpreter of the statute within reasonable limits.¹⁴⁶ Thus, according to the Tenth Circuit, *Tran* and *Thai* should have addressed whether the Attorney General's construction of the statute was reasonable, not whether *Zadvydas* authorized the indefinite detention protested by the aliens.¹⁴⁷ The Tenth Circuit concluded that *Zadvydas* was not a resolution of the statutory ambiguity of the "[i]nadmissible or criminal aliens" provision but instead it was a refusal by the Court to defer to the unreasonable and constitutionally-flawed agency interpretation.¹⁴⁸ According to the Tenth Circuit, *Zadvydas* did not establish that the Court's construction was the only reasonable construction possible.¹⁴⁹

b. Whether Deference to the Attorney General's Interpretation Is Precluded by Constitutional Avoidance

The Tenth Circuit's next step in its analysis discussed the canon of constitutional avoidance and its interplay with principles of administrative deference.¹⁵⁰ The court concluded that an agency may interpret a statute in a reasonable and constitutionally permissible manner, despite the fact that another court has already construed the same statute within the confines of the Constitution.¹⁵¹

Under the canon of constitutional avoidance, a court must construe a statute in a way that avoids "serious constitutional problems" when "an otherwise acceptable construction of [the] statute" would raise these issues.¹⁵² Hernandez-Carrera and Hernandez-Arenado argued that the canon should transcend *Chevron* deference and should therefore preclude the court's acceptance of the Attorney General's "special circumstances" regulation.¹⁵³ The government, in response, argued that when *Chevron* deference to an agency interpretation is appropriate, such deference should not be precluded by constitutional avoidance.¹⁵⁴ The

146. *Id.*

147. *Id.*

148. *Id.* at 1249.

149. *Id.* ("In no way, however, did the Court signal that its interpretation was the only reasonable construction of § 1231(a)(6). To the contrary, the Court specifically found the statute to be ambiguous. Moreover, the Court explicitly recognized that its construction of the statute was not the only reasonable one possible." (citing *Zadvydas v. Davis*, 533 U.S. 678, 697, 701 (2001)).

150. *See id.* at 1249–51.

151. *Id.* at 1251.

152. *Id.* at 1249 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

153. *Id.*

154. *Id.*

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Tenth Circuit relied upon the established principle “that the canon of constitutional avoidance *does* constrain an agency’s discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due,”¹⁵⁵ and found a middle ground between each side’s arguments.¹⁵⁶ The court concluded that constitutional avoidance may bar an agency construction that raises “substantial constitutional doubts,” although the Attorney General’s construction of the “[i]nadmissible or criminal aliens” statute, promulgated through the “special circumstances” provision, did not create such uncertainty.¹⁵⁷

The court then addressed the interplay between *Chevron* deference and the constitutional avoidance canon in emphasizing that *Chevron* indicated “that Congress generally intends to empower an agency to resolve certain statutory ambiguities,” while the canon of constitutional avoidance implies that Congress does not typically intend to authorize agencies to fill in statutory gaps in a manner that evokes “substantial constitutional doubts.”¹⁵⁸ In a situation involving an ambiguous statute with the resulting possibility of multiple interpretations that each avoid constitutional doubts, the Tenth Circuit reasoned that one court’s construction does not foreclose the administering agency from adopting a different yet reasonable interpretation so long as constitutional concerns are avoided.¹⁵⁹ Further, the court ruled that an agency may reinterpret a statute in a way that differs from the agency’s previous construction.¹⁶⁰ So long as reinterpretation avoids constitutional doubts, it will be given *Chevron* deference¹⁶¹ even if it conflicts with an intermediate judicial construction of the statute that also applied the avoidance canon.¹⁶²

c. Whether the Attorney General’s Construction Raises “Serious Constitutional Doubts”

In the final step of its analysis, the Tenth Circuit discussed the substantive and procedural requirements of the “special circumstances” regulation.¹⁶³ The court concluded that the Attorney General’s

155. *Id.* (emphasis added).

156. *Id.* at 1249.

157. *Id.*

158. *Id.* at 1250.

159. *Id.*

160. *Id.* at 1251.

161. *Id.* (noting that the reinterpretation should be given deference “to the extent that would otherwise be appropriate under the *Chevron* framework”).

162. *Id.*

163. *Id.* at 1251–56.

construction of the statute, as revised under *Zadvydas*, no longer raised “serious constitutional doubts” because it contained “*substantive limitations* built into the [agency’s] power to detain aliens beyond the removal period” and provided “*procedural protections* . . . sufficient to satisfy due process.”¹⁶⁴

The Attorney General’s original interpretation of the statute, at issue in *Zadvydas*, was overbroad because it permitted the indefinite detention of all removable aliens covered by the “[i]nadmissible or criminal aliens” statute, notwithstanding the alien’s dangerousness or special circumstances.¹⁶⁵ That construction was also procedurally deficient because it included, among other things, a presumption of the alien’s dangerousness, which the alien had the burden of disproving.¹⁶⁶ If unable to meet this burden, the alien was subject to indefinite detention.¹⁶⁷

The Attorney General’s revised construction of the statute was drafted in consideration of the Supreme Court’s remark in *Zadvydas* that when detention of an alien “is of potentially *indefinite* duration, [the Court has] also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.”¹⁶⁸ Under the Attorney General’s revised regulation, the indefinite detention of an alien ordered removed requires the government to follow specific procedural protocol, including a showing that the alien is dangerous and that there are additional special circumstances present.¹⁶⁹

Hernandez-Carrera and Hernandez-Arenado made several objections to the “special circumstances” regulation, but the Tenth Circuit found the provision reasonable and the aliens’ objections unfounded.¹⁷⁰ Significantly, the aliens argued that the Attorney General’s regulation did not satisfy their right to due process.¹⁷¹ The Tenth Circuit, however, disagreed and noted that it was unclear whether aliens are entitled to the same due process rights as citizens or lawful permanent residents.¹⁷²

164. *Id.* at 1251 (emphasis added).

165. *See id.* at 1252.

166. *See id.*

167. *Id.*; *see also* *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001).

168. *Zadvydas*, 533 U.S. at 691; *see also* *Hernandez-Carrera*, 547 F.3d at 1253.

169. *See Hernandez-Carrera*, 547 F.3d at 1253–54; 8 C.F.R. § 241.14(a)–(k) (2010).

170. *See Hernandez-Carrera*, 547 F.3d at 1254–56.

171. *See id.* at 1254.

172. *See id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) (“The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship, or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.”)).

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The aliens also objected to the evidence standard imposed by the “special circumstances” regulation, which requires the government to prove by “clear and convincing evidence” that an alien is dangerous.¹⁷³ Hernandez-Carrera and Hernandez-Arenado argued that the evidentiary standard should be heightened to a standard requiring the government to show dangerousness “beyond a reasonable doubt.”¹⁷⁴ The court again disagreed, reasoning that the “clear and convincing evidence” standard was sufficient because the Supreme Court had previously upheld this same standard in a case involving an indefinite civil commitment proceeding.¹⁷⁵

In light of its judgment that the Attorney General’s construction of the “[i]nadmissible or criminal aliens” statute was reasonable and that the construction avoided serious constitutional questions, the Tenth Circuit denied the aliens’ habeas corpus petitions and gave *Chevron* deference to the Attorney General’s statutory interpretation.¹⁷⁶

IV. ANALYSIS OF THE TENTH CIRCUIT’S DECISION AND RECOMMENDATIONS FOR FUTURE IMPROVEMENTS

The current state of immigration law regarding the indefinite detention of removable aliens deemed both dangerous and mentally ill is problematic in light of the fact that the circuit courts are split on the permissibility of this narrow class of aliens’ indefinite detention.¹⁷⁷ This Part discusses why the Tenth Circuit’s understanding of the relevant statute is superior to that of the other circuits. This Part also suggests potential future governmental actions in order to promote clarity, uniformity, and humanity in federal immigration law.

173. *See id.* at 1254; 8 C.F.R. § 241.14(i), (l) (2010).

174. *Hernandez-Carrera*, 547 F.3d at 1254.

175. *Id.* The *Hernandez-Carrera* court remarked that *Addington* “noted that given the uncertainties of psychological diagnosis, a reasonable doubt standard might ‘impose a burden that the state cannot meet,’ and that a clear and convincing evidence standard was sufficient to satisfy due process.” *Id.* (citing *Addington v. Texas*, 441 U.S. 418, 432 (1979)). The Tenth Circuit reasoned that a higher standard was not “constitutionally compelled in the context of aliens subject to exclusion and deportation orders.” *Id.*

176. *Id.* at 1256.

177. *See supra* Part III. Compare *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008), and *Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004) (finding impermissible the indefinite detention of an alien ordered removed who the government finds dangerous because of mental illness), with *Hernandez-Carrera*, 547 F.3d 1237 (upholding the Attorney General’s interpretation of 8 U.S.C. § 1231(a)(6) and allowing indefinite detention in specific limited circumstances).

A. The Tenth Circuit's Understanding of the Statute Is Superior

The Tenth Circuit permitted the government to impose indefinite detention on removable aliens who were both dangerous and mentally ill,¹⁷⁸ and adopted a preferable reading of the “[i]nadmissible or criminal aliens” statute. The Tenth Circuit’s opinion accounted for a variety of overlapping considerations, including the ambiguity of the statute, the constitutionality of the Attorney General’s construction, principles of agency deference, and overall policy objectives.¹⁷⁹

Under *Chevron* and *Brand X*, a court may defer to an agency’s construction of an ambiguous statute so long as the construction is reasonable.¹⁸⁰ In the context of immigration law, the Supreme Court has previously remanded cases involving interpretation of the Immigration and Nationality Act to lower administrative courts, because, comparatively speaking, the executive branch has more expertise in foreign relations issues and because gaps in a statute are best filled by the administering agency.¹⁸¹ The Tenth Circuit’s decision in *Hernandez-Carrera* recognizes the proper roles of *Chevron* and *Brand X* in guiding judicial deference to an agency’s statutory interpretation. The Tenth Circuit adhered to the theory behind *Brand X* when it concluded that Congress had charged the Attorney General with administering the “[i]nadmissible or criminal aliens” statute, and therefore, the Tenth Circuit correctly determined that the Attorney General was best-equipped to deal with statutory ambiguities.¹⁸²

Further, the Tenth Circuit’s reading of the “[i]nadmissible or criminal aliens” statute was superior because the court gave *Chevron* deference to the Attorney General’s “special circumstances” regulation. The “special circumstances” regulation is a reasonable construction of the “[i]nadmissible or criminal aliens” statute because, unlike the broad construction advocated by the government in *Zadvydas*, this revised regulation has a narrow substantive reach.¹⁸³ Notably, the provision applies only to a limited class of aliens who are both dangerous and mentally ill.¹⁸⁴ The evidentiary standards mandated under the regulation require the government to prove an alien’s dangerousness and mental

178. See *Hernandez-Carrera*, 547 F.3d 1237.

179. See *id.*; *supra* Part III.B.

180. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); see also Craig, *supra* note 57, at 144.

181. See Craig, *supra* note 57, at 184–85.

182. See *Hernandez-Carrera*, 547 F.3d at 1246; Craig, *supra* note 57, at 173–74.

183. See *Hernandez-Carrera*, 547 F.3d at 1251–56; see also *supra* Part III.B.

184. See *Hernandez-Carrera*, 547 F.3d at 1252–53; 8 C.F.R. § 241.14(f) (2010).

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illness by clear and convincing evidence.¹⁸⁵ This is a distinct change from the Attorney General's regulation in *Zadvydas*, which created a *presumption* of an alien's dangerousness that the alien was required to disprove.¹⁸⁶ Additionally, the procedural safeguards under the "special circumstances" provision satisfy due process and provide for continuous agency review of the alien's case.¹⁸⁷

The Fifth and Ninth Circuits' interpretations of the statute, discussed in *Tran* and *Thai*, respectively, incorrectly applied the law. Both circuits failed to consider recognized principles of administrative law, and instead, focused solely on *Zadvydas*.¹⁸⁸ In *Chevron* and *Brand X*, the Supreme Court determined that an agency's reading of a statute must be permitted if the statute is ambiguous and the agency's interpretation is reasonable.¹⁸⁹ Accordingly, the Fifth and Ninth Circuits should have abided by this precedent and addressed whether the Attorney General's interpretation of the "[i]nadmissible or criminal aliens" provision was a reasonable way to construe the ambiguous statute.¹⁹⁰ The circuits failed to do this and instead reached decisions that did not take into account the legal principles established in *Chevron* and *Brand X*. The Tenth Circuit, on the other hand, provided a complete analysis of both the administrative and immigration concerns at issue, and its statutory construction stands on a solid foundation that melds two branches of the law and creates a cohesive, practical rule regarding the indefinite detention of aliens ordered removed.

The Tenth Circuit's decision is also preferable because, in accepting the Attorney General's construction, the court acknowledged the need to strike a feasible balance between public safety concerns and due process rights for removable aliens. The numerous procedural steps required to indefinitely detain an alien under the "special circumstances" regulation provide the necessary balance.¹⁹¹ The Supreme Court also acknowledged the necessity of this balance, noting in *Zadvydas* that although ensuring public safety was a serious concern, deprivation of constitutionally guaranteed rights was also sure to occur as a result of

185. See 8 C.F.R. § 241.14(i), (1) (2010).

186. See *Hernandez-Carrera*, 547 F.3d at 1252; see also *supra* notes 163–168 and accompanying text.

187. *Hernandez-Carrera*, 547 F.3d at 1251; see also 8 C.F.R. § 241.14(k) (2010).

188. See *Hernandez-Carrera*, 547 F.3d at 1248–49; *Marquez-Coromina v. Hollingsworth*, 692 F. Supp. 2d 565, 572–74 (D. Md. 2010).

189. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

190. See *Hernandez-Carrera*, 547 F.3d at 1248–49; see also *Marquez-Coromina*, 692 F. Supp. 2d at 572–74.

191. See *Hernandez-Carrera*, 547 F.3d at 1244–57.

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the Attorney General's previous broad construction of the "[i]nadmissible or criminal aliens" statute.¹⁹² Further, the public safety concern is especially significant given the extreme nature of danger posed by some alien detainees.¹⁹³ If the Tenth Circuit had followed the same reasoning used by the Fifth and Ninth Circuits, then removable alien Hernandez-Arenado, an admitted pedophile, would have been released from detention after his habeas petition was granted. Such release would have granted him the freedom and opportunity to victimize more young boys, which is especially frightening because Hernandez-Arenado has said that he does not believe that sex with children is wrong.¹⁹⁴ As a result of the Tenth Circuit's decision, however, Hernandez-Arenado's habeas corpus petition was denied, and he will not have access to children, thus protecting public safety while also providing due process to the detained alien. Because the Tenth Circuit's decision strikes the necessary balance between public safety and due process, the court's reading of the "[i]nadmissible or criminal aliens" statute is superior.

The Fifth, Ninth, and Tenth Circuits are currently the only circuit courts to address this issue. Notably, however, the District of Maryland, located within the Fourth Circuit, was recently presented with a case, *Marquez-Coromina v. Hollingsworth*, that was nearly identical to *Hernandez-Carrera v. Carlson*.¹⁹⁵ In *Marquez-Coromina v. Hollingsworth*, an alien who objected to indefinite detention and sought a habeas corpus petition had a history of violent criminal behavior, was diagnosed with paranoid schizophrenia, and refused treatment for his mental illness.¹⁹⁶ The district court found the Tenth Circuit's reasoning in *Hernandez-Carrera* persuasive and, accordingly, denied the alien's habeas petition.¹⁹⁷ The court concluded that the Tenth Circuit's decision was consistent with Fourth Circuit precedent regarding similar issues¹⁹⁸ and that the Attorney General's "special circumstances" regulation raised no due process concerns.¹⁹⁹ In light of the district court's

192. See *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001); see also Pages, *supra* note 24, at 1234–35 (addressing the societal implications of *Zadvydas* and the concern for public safety).

193. See *Hernandez-Carrera*, 547 F.3d at 1243–44 (describing Hernandez-Carrera's history of committing crimes of violence and sexual assault, and describing Hernandez-Arenado's admitted pedophilia); see also *Tran v. Mukasey*, 515 F.3d 478, 480 (5th Cir. 2008) (describing Tran's convictions for the assault, battery, and murder of his wife in front of his seven year old daughter).

194. See *Hernandez-Carrera*, 547 F.3d at 1243.

195. See *Marquez-Coromina*, 692 F. Supp. 2d at 566–68.

196. See *id.*

197. *Id.* at 573–74.

198. *Id.* at 574 (citing *Fernandez v. Keisler*, 502 F.3d 337, 347–48 (4th Cir. 2007); *Elm Grove Coal Co. v. Dir.*, O.W.C.P., 480 F.3d 278 (4th Cir. 2007)).

199. See *id.*

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adoption of the Tenth Circuit's position, other federal courts may follow the Tenth Circuit's example.

B. Future Action for the Executive, Legislative, and Judicial Branches

Each branch of government should take action to remedy inconsistent application of federal law on the indefinite detention issue. Interpretation of federal immigration statutes can vary greatly among the circuit courts, as evidenced by the immigration decisions discussed in this Comment. The geographic location of an alien at the time of detainment can have as much influence on the outcome of the case as the factual and legal issues presented to the court.²⁰⁰ The variability in judicial interpretation of the INA results in a lack of uniformity in the application and practice of federal immigration law.²⁰¹ This is problematic because federal law governs the United States as a whole and should, accordingly, be applied consistently, regardless of the jurisdiction in which an alien is detained.²⁰²

Given the sheer size of immigration courts' caseload, as well as the large number of agencies involved in administering and enforcing federal immigration statutes, it is difficult to conceive a comprehensive remedy for the overall lack of uniformity in INA interpretation.²⁰³ The specific issue of permitting indefinite detention of removable aliens who are "specially dangerous" is, however, narrow enough to warrant significant legal alterations that would promote standardized practices in determining whether indefinite detention is appropriate. It is unlikely that all of the circuit courts will adopt the Tenth Circuit's position that the Attorney General's construction of the "[i]nadmissible or criminal aliens" statute is reasonable and due deference under *Chevron* and *Brand X*, so this issue is appropriate for the Supreme Court review. The Court should issue a ruling on this narrow question to provide a superior judicial precedent and create consistency in the practical application of the "[i]nadmissible or criminal aliens" statute.

Congress must also take appropriate action to promote uniformity in the INA. Congress should amend the current "[i]nadmissible or criminal aliens" statute so that the provision's language clearly reflects

200. See Paige Taylor, *The Good, the Bad, and the Ugly: A Survey of Selected Fifth Circuit Immigration Cases*, 41 TEX. TECH. L. REV. 989, 990 (2009) ("[W]here one practices could have severe implications on the availability of relief . . .").

201. *Id.*

202. *Id.*

203. See HUMAN RIGHTS WATCH, *supra* note 7, at 18–24.

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Congress's intended meaning.²⁰⁴ Such an amendment would eliminate the statute's ambiguity and, as a result, eliminate the necessity of the Attorney General's "special circumstances" regulation. A potential drawback to this solution is that an amended statute may prove too broad in application and could still be read to permit the indefinite detention of aliens who do not meet the requirements for both dangerousness and mental illness. An alternative, and potentially narrower, solution would arise if Congress "enact[s] a statute that explicitly allows for federal civil commitment of aliens who pose a danger to the community due to their mental conditions."²⁰⁵ This hypothetical statute should be based upon the "special circumstances" regulation and ideally should codify the protocol used by the Attorney General when hearing cases regarding indefinite detention of "specially dangerous" aliens.²⁰⁶

The executive branch should also remedy the potential for human rights violations that arise when dealing with the indefinite detention of aliens.²⁰⁷ The Attorney General's stringent requirements in the "special circumstances" regulation provide procedures to determine whether an alien ordered removed should be detained indefinitely.²⁰⁸ The regulation does not, however, offer any procedures beyond ongoing periodic review of a detainee's case.²⁰⁹ When an immigration judge finds that an indefinitely detained removable alien does not qualify for supervised release, the Attorney General's federal regulation provides no further guidance for handling the detainee's case.²¹⁰ In light of the fact that indefinite detained aliens are unlikely to be removed from the U.S. in the foreseeable future, the Attorney General must create additional regulations that terminate immigration proceedings and provide involuntary civil commitment hearings for indefinitely detained

204. *See Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (noting that congressional intent is unclear).

205. *Thai v. Ashcroft*, 366 F.3d 790, 799 (9th Cir. 2004).

206. *See Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008) (noting the importance of public safety, recognizing "that in a similar circumstance where public safety was also of great concern, Congress took prompt action to address the issue. In particular, in the field of national security, Congress enacted the Patriot Act which authorizes detention beyond the removal period of any alien whose removal is not foreseeable . . . if the alien presents a nation security threat," and concluding that "Congress has shown that it has the authority and willingness to address these concerns").

207. *See HUMAN RIGHTS WATCH*, *supra* note 7, at 71–81.

208. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009).

209. *See HUMAN RIGHTS WATCH*, *supra* note 7, at 79–80; 8 C.F.R. § 241.14(k) (2010).

210. *See HUMAN RIGHTS WATCH*, *supra* note 7, at 79–80 (noting an immigration judge's finding that "no statutory or regulatory authority exists which would allow an immigration judge to terminate a federal immigration proceeding by ordering the transfer of custody of the alien into the jurisdictional control of the State of residence in order for an involuntary civil commitment to a mental health facility").

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“specially dangerous” aliens.²¹¹ During involuntary civil commitment hearings, qualified appointed counsel should represent the alien and serve as an advocate for the detainee.²¹² If it is established that the alien requires psychiatric care, then the alien should be transferred to a psychiatric facility.²¹³ The facility’s treatment goals should be improved functioning and rehabilitation, not permanent detention.²¹⁴

Although this additional hearing is unlikely to consistently result in successful rehabilitation and release, the Attorney General should still implement the procedure to provide further opportunities for improvement of the alien’s mental health. Further, the involuntary civil commitment hearings should still be held for detainees who refuse mental health treatment, because further immigration proceedings are unlikely to result in either the alien’s removal from the U.S. or the grant of supervised release.

In addition to creating procedures for involuntary civil commitment hearings, the Attorney General should also create an advocacy program for “specially dangerous” detainees. Aliens with severe mental illness may be unable to comprehend the removal and post-removal order proceedings.²¹⁵ These aliens are often unable to provide credible and coherent information to attorneys or judges, understand a judge’s questions, read or write, comprehend their surroundings, or control their hallucinations or delusions.²¹⁶ To ensure that the interests of these severely mentally ill detainees are adequately represented in immigration proceedings, the government should assign a trained advocate or caseworker to each detainee.²¹⁷ This person would be charged with helping the detainee navigate legal proceedings while assessing whether the detainee has the capacity to understand the case against him. An advocacy program would be a significant step toward protecting an alien’s human rights while simultaneously protecting the government’s interests in public safety and effectuating an alien’s removal.

211. *See id.* at 86.

212. *Id.*

213. *Id.*

214. *See id.*

215. *Id.* at 5.

216. *Id.* at 6.

217. *See id.* at 82–86 (providing recommendations to ensure fair immigration proceedings for aliens with mental disabilities).

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V. CONCLUSION

Hernandez-Carrera is significant because the decision established specific parameters under which removable aliens who are mentally ill and who pose a serious danger to the public may be continuously detained, as well as the proper relationship between agencies and federal courts.²¹⁸ The Tenth Circuit's decision balances due process concerns with public safety.²¹⁹ The decision also limits the availability of indefinite detention to a very narrow class of removable aliens.²²⁰ The Supreme Court should accept certiorari when next given the opportunity to determine whether the indefinite detention of certain removable aliens is constitutionally permissible. Additionally, Congress should amend the "[i]nadmissible or criminal aliens" provision so that the statute's language reflects legislative intent. The Attorney General should similarly modify the "special circumstances" regulation to provide civil commitment hearings for indefinitely detained aliens who have been diagnosed with severe mental illness. Doing so will clarify the appropriate method of managing "specially dangerous" removable aliens, as well as provide uniformity in federal immigration law.

218. See *Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009).

219. *Id.*

220. *Id.*