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Matthew E. Hedberg

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KIM HO MA v. RENO: CLOAKING JUDICIAL ACTIVISM AS CONSTITUTIONAL AVOIDANCE

Matthew E. Hedberg

Abstract: In *Kim Ho Ma v. Reno*, the Ninth Circuit rewrote the plain language of § 241(a)(6) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to avoid a constitutional defect in the statute. Section 1231(a)(6) of Title 8 of the U.S. Code, which codifies § 241(a)(6) of the IIRIRA, authorizes the Attorney General to detain criminal aliens, or removable aliens posing a danger to the community or a danger of flight risk, beyond the statutory removal period if they have not been removed from the country. Under the guise of constitutional avoidance, the *Ma* court carved out an exception to this detention authority by prohibiting the Attorney General from detaining deportable aliens beyond the statutory removal period if the aliens' removal will not be accomplished in the reasonably foreseeable future. Although courts may use the constitutional-avoidance canon of statutory interpretation to avoid substantial constitutional questions, courts may not rely on the canon when the statutory language and legislative intent are clear. The *Ma* court's statutory interpretation cannot be squared with either the plain language or the congressional intent of § 1236(a)(6) that the Attorney General's detention authority includes the discretion to determine which criminal aliens may be released back into the community pending removal from the United States.

Court watchers bustled with anticipation as the Ninth Circuit took up the case of *Kim Ho Ma v. Reno*.¹ The constitutionality of indefinite detention of immigrants under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)² was finally having its day in court. For hundreds of aliens detained pending deportation, this case marked the chance for constitutional redemption. For the Immigration and Naturalization Service (INS), this was the opportunity to receive judicial recognition of the constitutionality of its actions in carrying out the country's immigration policies. Yet, the Ninth Circuit ducked the issue and cloaked its activist decision in the chameleon-like legitimacy of constitutional avoidance.

Because indefinite detention is an important issue in this country's immigration policy, courts need to confront directly the constitutional requirements for detention of the hundreds of aliens awaiting deportation from this country.³ In *Ma*, the Ninth Circuit had an opportunity to

1. 208 F.3d 815 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000).

2. Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter IIRIRA].

3. Compare Elizabeth Larson Beyer, Comment, *A Right or a Privilege: Constitutional Protection for Detained Deportable Aliens Refused Access or Return to Their Native Countries*, 35 WAKE FOREST L. REV. 1029, 1031-32 (2000) (arguing that indefinite detention is limited by constitutional

address this facet of the United States's immigration policy but unfortunately chose to dodge the question under the shroud of constitutional avoidance. Constitutional avoidance is appropriately used to interpret ambiguous statutes in such a way that avoids deciding a substantial constitutional question, so long as the statutory construction is not plainly contrary to congressional intent. *Ma* did not present a case susceptible to interpretation using constitutional avoidance because the IIRIRA clearly permits a post-removal-period detention of criminal aliens found to pose a threat of danger or flight.

This Note argues the *Ma* court misconstrued the IIRIRA by carving out an exception to the Attorney General's detention authority. Part I reviews the detention and removal of aliens under this country's immigration laws. Part II explores the background of the Immigration and Nationality Act (INA) of 1952 and case law interpreting its provision authorizing the Attorney General to detain aliens. Part III explains canons of statutory interpretation in immigration law, including the canon of constitutional avoidance. Part IV analyzes the facts, procedural history, reasoning, and holding in *Ma v. Reno*. Finally, Part V argues that the Ninth Circuit incorrectly used constitutional avoidance to create a judicially crafted time limit, stretching the federal detention statute far beyond its original meaning. The Ninth Circuit's approach is unfortunate because it encroaches on Congress's lawmaking authority and abdicates the judiciary's role in striking down statutes that violate the Constitution.

I. AN OVERVIEW OF THE DETENTION AND REMOVAL OF ALIENS

The INA authorizes the Attorney General⁴ to detain both deportable and excludable aliens pending removal from the United States.⁵ Aliens in the United States may be removed—sent back to their countries of origin—for committing designated crimes.⁶ The deportability of an alien is determined in removal proceedings conducted by immigration judges

restraints), with Daniel R. Dinger, Comment, *When We Cannot Deport, Is It Fair to Detain?: An Analysis of the Rights of Deportable Aliens Under 8 U.S.C. § 1231(a)(6) and the 1999 INS Interim Procedures Governing Detention*, 2000 B.Y.U. L. REV. 1551, 1595–96 (arguing that indefinite detention is constitutional and necessary in immigration law).

4. The Attorney General's statutory authority is delegated to Immigration and Naturalization Service (INS) District Directors, but this Note will refer to the Attorney General for purposes of discussing the IIRIRA's detention authority. See *infra* notes 69–72 and accompanying text.

5. 8 U.S.C. § 1231(a) (Supp. V 1999).

6. *Id.* § 1227(a)(2).

and the Board of Immigration Appeals (BIA) in accordance with regulations of the Attorney General.⁷ After an immigration judge has ordered an alien removed from the United States, the alien is taken into INS custody for a ninety-day “removal period” during which time removal should occur.⁸ Detention during the ninety-day removal period is mandatory for aggravated felons.⁹ Criminal aliens or other aliens posing a risk of community danger or flight, who are not removed during the removal period,¹⁰ may be subject to indefinite detention while awaiting removal.¹¹ At the beginning of 2001, there were approximately 5000 aliens in INS detention who were being detained while awaiting removal from the United States.¹²

Courts have interpreted the scope of the Attorney General’s detention and removal authority to vary depending on whether the alien is “excludable” or “deportable.”¹³ Excludable aliens are aliens who have not been lawfully admitted into the United States.¹⁴ Under the “entry fiction,”¹⁵ the Attorney General often grants excludable aliens “parole,” allowing them physically to enter the United States pending removal to their countries of origin without lawfully admitting them into the United States.¹⁶ Deportable aliens, on the other hand, have been lawfully admitted into the United States as resident aliens but at the time of deportation have not naturalized into the country.¹⁷ Courts have generally held that excludable aliens have no constitutional rights to be free from indefinite detention pending removal.¹⁸ Conversely, courts have disagreed over the extent of constitutional rights possessed by deportable

7. *Id.* §§ 1228, 1229a; 8 C.F.R. §§ 3.0–.65 (2000).

8. 8 U.S.C. § 1231(a)(1)(A).

9. *Id.* § 1231(a)(2).

10. There are numerous reasons why an alien may not be removed during the ninety-day removal period, including the absence of a repatriation agreement. A repatriation agreement enables a country to return aliens who have been ordered removed to their country of citizenship, provided that country is party to the agreement. *See, e.g.,* Dinger, *supra* note 3, at 1552 n.14.

11. 8 U.S.C. § 1231(a)(6).

12. Lise Olsen, *Seattle ‘Lifer’ Has His Day in Highest Court*, SEATTLE POST-INTELLIGENCER, Feb. 20, 2001, at A1.

13. *See* Dinger, *supra* note 3, at 1558–59.

14. 8 U.S.C. § 1182.

15. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (summarizing history of entry fiction).

16. *Alvarez-Mendez v. Stock*, 941 F.2d 956, 961 n.4 (9th Cir. 1991).

17. 8 U.S.C. § 1227.

18. *Shaughnessy*, 345 U.S. at 215.

aliens.¹⁹ Despite the constitutional implications that flow from an alien's status as deportable or excludable, immigration law now subjects all aliens ordered removed to the same statutory detention provision.²⁰

II. DETENTION OF ALIENS ORDERED REMOVED UNDER THE INA

Immigration law regulating the detention and removal of aliens has undergone many changes over the years. Immigration law has evolved from court-imposed time limits to Attorney General discretion over alien detention. The statutory and legislative history and court decisions interpreting the current detention statute demonstrate a policy favoring detention of aliens awaiting removal, tempered only by Attorney General discretion. As the statutory amendments to the INA reveal, Congress authorized, if not required, the Attorney General to detain aggravated felons until removal is accomplished.

A. *Statutory History of the INA*

The INA,²¹ which governs the deportability of aliens, is a patchwork of legislation that has undergone numerous revisions. Before 1952, the Immigration Act of 1917²² governed the detention of aliens subject to a final order of deportation.²³ Under the 1917 Act, Congress established no time limit for accomplishing deportation; rather, the Attorney General continued to detain deportable aliens not released on bond until deportation was accomplished.²⁴ In several cases where aliens could not

19. *Compare* *Zadvydas v. Underdown*, 185 F.3d 279, 297 (5th Cir. 1999) (holding that deportable alien has no greater rights than excludable alien), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000), *with* *Binh Phan v. Reno*, 56 F. Supp. 2d 1149, 1155 (W.D. Wash. 1999) (holding that deportable alien's right to substantive due process is not extinguished by final deportation order).

20. 8 U.S.C. § 1231(a)(6) (providing that aliens who are inadmissible to United States under § 1182 or deportable under § 1227 may be detained beyond ninety-day removal period). IIRIRA § 301, 110 Stat. 3009-575 to -579 (1996), amended the INA to refer to "excludable" aliens as "inadmissible" aliens, *e.g.*, 8 U.S.C. §§ 1182, 1225, and established "removal" proceedings to take the place of "deportation" and "exclusion" proceedings, *e.g.*, § 1229a. Because courts continue to use the "excludable" and "deportable" terminology, this Note will refer to aliens as excludable or deportable depending on their immigration status.

21. 8 U.S.C. §§ 1101-1537.

22. An Act To Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, Pub. L. No. 301, ch. 29, 39 Stat. 874 (1917) (codified as amended at 8 U.S.C. § 156 (1917)) (repealed 1952).

23. *Id.* §§ 19, 20, 21, 39 Stat. 889-91.

24. *Id.* § 19, 39 Stat. 889.

be deported for various reasons, the Ninth Circuit imposed a “reasonable time” limitation on detention that generally did not extend longer than four months.²⁵

In 1952, Congress amended the provisions of the INA governing the Attorney General’s detention of aliens subject to deportation.²⁶ As codified, the 1952 amendments granted the Attorney General authority to carry out an alien’s deportation within six months following a final order of deportation.²⁷ At the discretion of the Attorney General, the alien could either be detained or released during the six-month period.²⁸ Federal courts strictly interpreted the six-month time limit as prohibiting any detention of deportable aliens beyond six months.²⁹

The court-imposed six-month limit on detention remained in effect until 1990, when Congress barred the release of aggravated felons, with limited exceptions, under final orders of deportation.³⁰ The 1990 amendment made clear that mandatory detention of aggravated felons was required both while deportation proceedings were pending and after a final order of deportation, despite the former six-month limit.³¹ Congress also included an exception to the mandatory-detention provision that allowed the Attorney General to release on bond aggravated felons lawfully admitted for permanent residence³² after a determination that the alien was not a threat to the community and was likely to appear for immigration hearings.³³ Thus, for the first time, the Attorney General had the authority to detain certain aliens beyond a set removal period.

In 1996, Congress closed the door even tighter on detained aliens awaiting removal by amending the INA with the Antiterrorism and

25. See, e.g., *Wolck v. Weedin*, 58 F.2d 928, 930–31 (9th Cir. 1932); *Saksagansky v. Weedin*, 53 F.2d 13, 16 (9th Cir. 1931); *Caranica v. Nagle*, 28 F.2d 955, 957 (9th Cir. 1928); see also *United States ex rel. Ross v. Wallis*, 279 F. 401, 403–04 (2d Cir. 1922).

26. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 166 (amended 1990) (former 8 U.S.C. § 1252(c) (1952)) [hereinafter INA].

27. 8 U.S.C. § 1252(c), (d) (1982) (amended 1996).

28. *Id.* § 1252(c).

29. See, e.g., *Johns v. Dep’t of Justice*, 653 F.2d 884, 890 (5th Cir. 1981); *Castillo-Gradis v. Turnage*, 752 F. Supp. 937, 941 (S.D. Cal. 1990); cf. *Oguachuba v. INS*, 706 F.2d 93, 96 (2d Cir. 1983).

30. Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 5049 (amended 1996) (former 8 U.S.C. § 1252(a)(2)(A) & (B) (Supp. II 1990)).

31. *Id.*

32. *Id.*

33. *Id.*

Effective Death Penalty Act of 1996 (AEDPA).³⁴ The AEDPA required the Attorney General to take into custody an expanded category of criminal aliens subject to mandatory detention.³⁵ Significantly, the amendment repealed a 1952 statute that had permitted the Attorney General to release criminal aliens, including lawfully admitted aliens who were determined to pose no threat of danger to the community or danger of flight.³⁶ Thus, after the AEDPA, the Attorney General had no discretion to release any aggravated felon from detention. Five months later, Congress again revised the INA's detention provisions through the IIRIRA,³⁷ which restored the Attorney General's discretionary relief. Rather than mandating detention following the removal period, the IIRIRA permits the Attorney General to release criminal aliens who satisfy specified statutory requirements.³⁸

B. *Legislative History of the IIRIRA*

The legislative history of the IIRIRA illustrates a compromise between mandating detention of criminal aliens and increasing the Attorney General's discretion to make detention determinations. When reviewing legislative proposals to amend the INA, Congress aimed to ensure that aliens ordered removed did not return to their communities.³⁹ Congress considered several different approaches to reform the removal of illegal and criminal aliens.⁴⁰

The House of Representatives originally considered House Bill 1915, which called for stricter standards governing the release of aliens convicted of aggravated felonies during and after removal proceedings.⁴¹ The bill's provisions required mandatory detention during the removal

34. The Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.).

35. *Id.*

36. *Id.* (repealing INA § 242(a)(2)(B), 66 Stat. 208 (1952) (former 8 U.S.C. § 1252)).

37. Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered Sections of 8 U.S.C.). This amendment transferred the provisions regarding detention of criminal aliens under final orders of removal from 8 U.S.C. § 1252(a)(2) (1994) (as amended by AEDPA) to 8 U.S.C. § 1231(a) (Supp. V 1999). Pub. L. No. 104-208, §§ 305, 306, 110 Stat. 3009-598, 3009-607 (codified at 8 U.S.C. § 1231(a) (Supp. V 1999)).

38. 8 U.S.C. § 1231(a)(6) (Supp. V 1999). The IIRIRA established transition-period custody rules governing detention pending removal, which were in effect for the two-year period ending October 1998. IIRIRA § 303(b)(2), 110 Stat. 3009-586 to -587 (1996).

39. H.R. REP. NO. 104-879, at 107-08 (1997).

40. *Id.* at 105.

41. H.R. 1915, 104th Cong. § 300(3) (1995).

period, but called for the mandatory release of deportable aliens not removed following the removal period.⁴² Providing the impetus for House Bill 1915 was a report from the Inspector General of the Department of Justice that found that the vast majority of aliens not detained following deportation proceedings absconded and were not removed from the United States, while detention facilitated removal.⁴³ The stated purpose of the statutory reform was to eliminate the incidence of aliens absconding after deportation proceedings⁴⁴ by increasing the detention of aliens who are ordered removed.⁴⁵

The bill that ultimately became the IIRIRA—House Bill 2202⁴⁶—was introduced to the House of Representatives Judiciary Committee on August 4, 1995, in place of House Bill 1915.⁴⁷ House Bill 2202 contained the same detention provisions that were in House Bill 1915.⁴⁸ Moreover, the Committee Report explained that, in order to ensure a criminal alien is removed from the country, detention following entry of a final order of removal was necessary.⁴⁹ The House of Representatives subsequently passed the bill on March 21, 1996.⁵⁰

Meanwhile, on April 24, 1996, Congress enacted the AEDPA.⁵¹ During a floor debate on June 7, 1995, Senator Kennedy criticized the Senate Bill that later became the AEDPA because the Bill required the Attorney General detain the expanded class of criminal aliens even when those aliens could not be returned to their home countries.⁵² Despite the criticism, the AEDPA was enacted into law.⁵³ After enactment of the AEDPA, INS General Counsel David Martin testified on behalf of the Department of Justice before a subcommittee of the House of Representatives regarding the problems the INS was having under the AEDPA. He called for restoration of the Attorney General's discretion to

42. *Id.* § 305(3) (providing that inadmissible aliens were subject to continued detention following removal period).

43. H.R. REP. NO. 104-879, at 108.

44. *Id.* at 107.

45. *Id.*

46. H.R. 2202, 104th Cong. (1995).

47. H.R. REP. NO. 104-879, at 118.

48. H.R. REP. NO. 104-469, pt. 1, at 18–19, 25–26, 234 (1996).

49. *Id.* at 160–61.

50. H.R. REP. NO. 104-879, at 121.

51. The AEDPA originated from Senate Bill 735, 104th Cong. (1995). *See supra* notes 34–36 and accompanying text.

52. 141 CONG. REC. 15,068 (1995).

53. Pub. L. No. 104-132, § 440(c), 110 Stat. 1277.

release aliens “who cannot, despite INS’s best efforts, be removed—provided they meet the earlier tests regarding dangerousness and flight risk.”⁵⁴ He also informed Congress that even with restored Attorney General discretion, the INS “fully intends to hold in custody, for as long as necessary, those [removable aliens] who are dangerous to the community.”⁵⁵

With the impetus for immigration reform renewed in Congress, the Senate passed House Bill 2202 on May 2, 1996.⁵⁶ Originally, the Senate version of the IIRIRA had similar provisions as the AEDPA. The original Senate version expanded the class of deportable criminal aliens subject to mandatory detention, while simultaneously restricting the Attorney General’s release authority.⁵⁷ In conference, however, the Senate and House compromised on the different versions.⁵⁸ As a result of the conference modifications, detention beyond the removal period was made discretionary, not mandatory.⁵⁹ In addition, the conference modifications yielded the provision allowing for detention of deportable aliens beyond the removal period if the Attorney General determined that the alien posed a risk to the community or was likely to abscond before removal if released.⁶⁰ The Senate and the House finally reached agreement on the Conference Report and the IIRIRA was signed into law on September 30, 1996.⁶¹

C. *The IIRIRA Detention Statute: 8 U.S.C. § 1231(a)(6)*

The most disputed portion of the IIRIRA amendments to the INA is § 1231(a)(6) of Title 8 of the United States Code.⁶² Section 1231(a)(6) governs the detention beyond the removal period of excludable and deportable aliens ordered removed from the country.⁶³ The language of

54. *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 15 (1996) (statement of David A. Martin, INS General Counsel).

55. *Id.*

56. In passing House Bill 2202, the Senate substituted the text of another Senate immigration bill. S. 1664, 104th Cong. (1996).

57. S. 1664, 104th Cong. § 164 (1996).

58. H.R. CONF. REP. NO. 104-828, at 210–11, 215–16 (1996).

59. *Id.* at 53–54, 215–16.

60. *Id.* at 54, 215–16.

61. H.R. REP. NO. 104-879, at 122 (1997).

62. INA § 241(a)(6) (codified at 8 U.S.C. § 1231(a)(6) (Supp. V 1999)).

63. 8 U.S.C. § 1231(a)(6) (Supp. V 1999).

§ 1231(a)(6) explicitly provides for a post-removal-period detention of criminal aliens. Courts have divided on the permissible duration of detention beyond the removal period.

The IIRIRA amendments to the INA mandate that, following a final order of removal, the Attorney General must detain certain aliens, including aggravated felons,⁶⁴ during a removal period of ninety days.⁶⁵ The ninety-day removal period marks a shift from the former six-month removal period under the 1952 amendments to the INA.⁶⁶ If removal cannot be accomplished during the removal period, § 1231(a)(6) preserves the Attorney General's authority to detain aggravated felons thereafter by specifying that aliens "may be detained *beyond* the removal period."⁶⁷ Unlike the AEDPA mandatory detention regime, Congress granted the Attorney General discretion to decide whether to detain aliens for an unspecified period of time beyond the ninety-day removal period.⁶⁸

Regulations implementing the IIRIRA allow the Attorney General to delegate the discretionary release power to INS District Directors.⁶⁹ INS District Directors consider nine non-exclusive factors in determining whether to exercise the discretionary release authority or maintain the alien in custody.⁷⁰ According to the implementing regulations, aliens seeking release carry the burden of demonstrating that release from custody will not pose a danger to the community or flight risk.⁷¹ Section 1231(a)(6) is in line with the trend of bestowing on the Attorney General the authority to make individualized determinations of who will be

64. *Id.* § 1231(a)(2).

65. *Id.* § 1231(a)(1)(A).

66. Compare former INA § 242(a)(2)(C) (amended 1996) (six months), with INA § 241(a)(1) (ninety days).

67. 8 U.S.C. § 1231(a)(6) (emphasis added). The section provides:

An alien ordered removed [who is excludable or deportable based on criminal grounds,] . . . 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 [supervision].

Id.

68. *Id.*

69. 8 C.F.R. §§ 241.4, 236.1(d)(2)(ii) (2000).

70. *Id.* § 241.4(a)(1)–(9).

71. *Id.* § 241.4(a).

subject to continued detention based on community safety and flight risk.⁷²

D. Cases Interpreting the Attorney General's Detention Authority Under § 1231(a)(6)

The overwhelming majority of courts that have addressed the issue have interpreted the language of § 1231(a)(6) as explicitly authorizing the Attorney General to detain deportable aliens beyond the ninety-day removal period.⁷³ Representative of these courts' decisions is *Duy Dac Ho v. Greene*.⁷⁴ In *Ho*, the Tenth Circuit found that § 1231(a)(6) "is not ambiguous," and "places no time limit" on the Attorney General's authority to detain aliens beyond the ninety-day removal period.⁷⁵ The Tenth Circuit refused to read a time limit into the statute because to do so would override Congress's will as expressed in the plain language of the statute.⁷⁶ The Tenth Circuit reasoned that by expressly declining to limit the Attorney General's detention authority in § 1231(a)(6), Congress unambiguously authorized the Attorney General to detain indefinitely beyond the removal period certain removable aliens who cannot be removed within the removal period.⁷⁷

The Fifth Circuit, in *Zadvydas v. Underdown*,⁷⁸ also upheld the continued detention of a deportable alien whose deportation was indefinitely delayed pending acceptance by another country.⁷⁹ The court

72. See generally *id.* §§ 241.1–33 (providing regulations governing post-hearing detention and removal pursuant to 8 U.S.C. § 1231(a)(6)).

73. See, e.g., *Michel v. INS*, 119 F. Supp. 2d 485, 492 (M.D. Pa. 2000); *Duong v. INS*, 118 F. Supp. 2d 1059, 1067 (S.D. Cal. 2000); *Cuesta Martinez v. INS*, 97 F. Supp. 2d 647, 652 (M.D. Pa. 2000); *Kay v. Reno*, 94 F. Supp. 2d 546, 548–49 (M.D. Pa. 2000); *Sivilay Sengchanh v. Lanier*, 89 F. Supp. 2d 1356, 1359 (N.D. Ga. 2000); *Hoang Manh Nguyen v. Fasano*, 84 F. Supp. 2d 1099, 1108 (S.D. Cal. 2000); *Villafuerte v. INS*, 71 F. Supp. 2d 573, 576–77 (W.D. La. 1999); *Thien Van Vo v. Greene*, 63 F. Supp. 2d 1278, 1286–87 (D. Colo. 1999); *Binh Phan v. Reno*, 56 F. Supp. 2d 1149, 1152 (W.D. Wash. 1999); *Hermanowski v. Farquharson*, 39 F. Supp. 2d 148, 155 (D.R.I. 1999); *Cholak v. United States*, No. 98-365, 1998 U.S. Dist. LEXIS 7424, at *18–21 (E.D. La. May 15, 1998); *Zadvydas v. Caplinger*, 986 F. Supp. 1011, 1025 (E.D. La. 1997), *rev'd sub nom. Zadvydas v. Underwood*, 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000).

74. 204 F.3d 1045 (10th Cir. 2000).

75. *Id.* at 1056–57.

76. *Id.* at 1057.

77. *Id.* After concluding that the Attorney General possesses the authority under § 1231(a)(6) to indefinitely detain deportable aliens pending removal, the Tenth Circuit rejected the alien's due process claims. *Id.* at 1059–60.

78. 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000).

79. See *id.* at 287, 291.

did not question the district court's holding that Congress clearly would have placed a time limit on the period of detention if it had so intended and, therefore, the continued detention of a deportable alien was consistent with the Attorney General's statutory authority.⁸⁰ The court of appeals upheld the finding that mandatory detention language coupled with the absence of a time limit on detention necessarily means that indefinite detention is authorized.⁸¹ These cases are representative of other courts' decisions that § 1231(a)(6) explicitly authorizes post-removal-period detention of deportable aliens.⁸²

III. APPROACHES TO STATUTORY INTERPRETATION

Courts employ a number of methods when interpreting statutes. Chief among the statutory interpretation tools is the plain-meaning approach, whereby courts seek to give full effect to the statutory language. Where the statutory language is ambiguous, courts will construe statutes in such a way that avoids deciding substantial constitutional questions. Additionally, as a result of congressional and executive plenary power over immigration law, courts will defer to the reasonable statutory interpretation made by those coordinate branches of the government. Finally, courts seek to give statutes their intended effect by supplying meaning to each statutory word and refusing to render any part of a statute superfluous.

A. *The Traditional Approach to Statutory Construction: The Plain-Meaning Rule*

Statutory construction necessitates a full accounting of a statute's text.⁸³ When interpreting statutes, courts attempt to bring to fruition the intent of the enacting legislative body.⁸⁴ Although determining intent is

80. *Id.*; *Zadvydas v. Caplinger*, 986 F. Supp. 1011, 1025 (E.D. La. 1997), *rev'd sub nom. Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000).

81. *Caplinger*, 986 F. Supp. at 1025. Though it found indefinite detention to be statutorily authorized, the district court ultimately held that the alien's detention violated his constitutional right to due process. *Id.* at 1027. The Fifth Circuit, however, rejected the substantive due process challenge to the alien's detention. *Zadvydas*, 185 F.3d at 296-97.

82. *See supra* note 73.

83. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993).

84. *See* Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 HOFSTRA L. REV. 1125, 1125-26 (1983).

often difficult,⁸⁵ courts generally regard the plain meaning of the statute's language as the primary indicia of intent.⁸⁶ Only if the statute's plain meaning is ambiguous do courts look to the statute's history, underlying policy, structure, and other canons of statutory interpretation.⁸⁷ Moreover, abiding by the plain-meaning rule necessarily means that courts should not alter a statute by reading words or elements into the statutory language that are not present on its face.⁸⁸

The plain meaning of the statutory language guides a court's approach to statutory construction unless legislative history clearly dictates a different result.⁸⁹ The underlying goal of this approach is to respect and enforce the plain meaning of the entire language composition in the statute, including underlying policy.⁹⁰ To this end, the U.S. Supreme Court has cautioned that when interpreting statutes, courts are bound by the purpose Congress sought to achieve and the means it has selected in carrying out that purpose.⁹¹ The fact that the plain language of a statute appears to produce harsh results is not an invitation for courts to redraft the statute.⁹² Furthermore, in the specific context of immigration law, the Ninth Circuit has previously held that where the plain meaning of the statute is unambiguous, that meaning is to be given full effect.⁹³

B. *The Canon of Constitutional Avoidance*

Among the judicial tools used to interpret statutes is the canon of constitutional avoidance.⁹⁴ This canon seeks to prevent interpreting

85. *Id.*

86. William N. Eskridge, Jr., *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340-41 (1990).

87. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1494 (1987).

88. *Bates v. United States*, 522 U.S. 23, 29 (1997).

89. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990).

90. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000).

91. *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994); see also Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 292 (1989) ("When statutory language and legislative intent are unambiguous, courts may not take action to the contrary.").

92. *United States v. Locke*, 471 U.S. 84, 91, 95 (1985) (holding that mining claims had been extinguished because claimants recorded their claims on December 31 instead of "prior" to December 31).

93. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir. 1997).

94. For a discussion on the U.S. Supreme Court's historical use of the canon of constitutional avoidance, see Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997).

ambiguous statutes in ways that would create constitutional infirmity.⁹⁵ Constitutional avoidance is founded on the prudential concern that constitutional issues should only be addressed when necessary and that because Congress is bound by its duty to uphold the Constitution, courts should presume that legislative enactments adhere to constitutional mandates.⁹⁶

Constitutional avoidance is used to avoid substantial constitutional questions only when the plain language⁹⁷ of the statute or congressional intent is ambiguous.⁹⁸ When the plain language of a statute collides with the Constitution, constitutional avoidance cannot save the statute.⁹⁹ The U.S. Supreme Court has warned that the constitutional-avoidance canon “is not a license for the judiciary to rewrite language enacted by the legislature,”¹⁰⁰ and “disingenuous” attempts to avoid a constitutional question are impermissible.¹⁰¹ In *United States v. Locke*,¹⁰² the Court eschewed the use of constitutional avoidance and confronted the constitutional question head-on because to do otherwise would contort the statute to the point of “disingenuous evasion.”¹⁰³

C. *Judicial Deference to Executive Branch Statutory Interpretation in Immigration Law*

1. *General Tenets of Judicial Deference*

When interpreting a statute that is silent or ambiguous, the role of the judiciary is not to impose its interpretation of a statute over that of another governmental branch’s reasonable interpretation, especially in an

95. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

96. *Jones v. United States*, 526 U.S. 227, 239–40 (1999).

97. *DeBartolo*, 485 U.S. at 575.

98. *Miller v. French*, 530 U.S. 327, 336 (2000).

99. *Benjamin v. Jacobson*, 124 F.3d 162, 177 (2d Cir. 1997).

100. *United States v. Albertini*, 472 U.S. 675, 680 (1985).

101. *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.) (“Avoidance of a [constitutional question] will not be pressed to the point of disingenuous evasion . . . [When Congress’s intent is clear, t]he problem must be faced and answered.”).

102. 471 U.S. 84 (1985).

103. *Id.* at 96, 110 (holding that due process was not violated when holders of unpatented mining claims who failed to comply with annual filing requirements forfeited their claims); see Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1550 (2000) (noting criticism of constitutional avoidance for ignoring congressional intent).

area that the coordinate branch is entrusted to administer.¹⁰⁴ Moreover, when Congress is aware of the executive's interpretation of a statute and does not alter this interpretation, while amending other portions of the same statute, courts infer that the executive's interpretation is consistent with congressional intent and thus warrants judicial deference.¹⁰⁵

When deciding whether to defer to an executive agency's interpretation of a statute, a court's first step is to determine whether Congress has expressed its intent on the issue.¹⁰⁶ If Congress has, "that is the end of the matter," and both courts and agencies must defer to congressional intent.¹⁰⁷ Courts employ the "traditional tools" used for interpreting the plain meaning of statutes in determining legislative intent for purposes of this inquiry.¹⁰⁸

If Congress has not directly expressed its intent on the question at issue, courts may not impose their own statutory interpretation over an agency's reasonable interpretation.¹⁰⁹ Pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹¹⁰ courts seek to avoid the danger of venturing into areas of agency expertise, to which they owe special deference.¹¹¹ Judicial deference is justified because agencies are in a better position than the courts to handle the exigencies of competing policy choices dealing with the public interest.¹¹² Deference is also justified because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated.¹¹³ The U.S. Supreme Court has made clear that when given the choice between competing statutory interpretations, an agency's statutory interpretation that is reasonable in light of conflicting policies warrants judicial deference unless the agency's accommodation is clearly contrary to congressional intent.¹¹⁴

104. *Aragon-Ayon v. INS*, 206 F.3d 847, 851 (9th Cir. 2000).

105. *Greenhorn Farms v. Espy*, 39 F.3d 963, 965 (9th Cir. 1994).

106. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

107. *Id.* at 842-43.

108. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987); *see supra* Part III.A.

109. *Chevron*, 467 U.S. at 843; *see* Oren Eisner, *Extending Chevron Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 CORNELL L. REV. 411, 411-13 (2001).

110. 467 U.S. 837 (1984).

111. *Id.* at 844.

112. *Id.* at 866.

113. *Rust v. Sullivan*, 500 U.S. 173, 187 (1991).

114. *Chevron*, 467 U.S. at 844-45.

2. *Judicial Deference in Immigration Law*

Case law interpreting the scope of the government's immigration power recognizes the authority of the political branches to craft broad policy decisions over all matters relating to admission, exclusion, and deportation of aliens, subject only to limited judicial review.¹¹⁵ The U.S. Supreme Court has long recognized that the political branches generally enjoy broad power over immigration,¹¹⁶ including the "power to expel or exclude aliens."¹¹⁷ One rationale for this recognition is that the executive branch is especially entitled to judicial deference in the immigration context, where sensitive foreign relations questions are implicated.¹¹⁸ In the specific context of the IIRIRA, the Court has found that many of the Act's provisions are "aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation."¹¹⁹ Accordingly, the Ninth Circuit has recently held that, despite the seemingly severe result, executive action increasing the burden needed to stay a removal order was consistent with the policy goals of the IIRIRA to vest the Attorney General with broad discretion in carrying out the country's immigration policy.¹²⁰

The Ninth Circuit has also interpreted Congress's lack of restraint on the Attorney General's detention authority to require that courts defer to the Attorney General's decision to prolong detention for excludable aliens. In *Barrera-Echavarria v. Rison*,¹²¹ the Ninth Circuit refused to read a time limit into a detention statute that did not explicitly provide for the authority to detain indefinitely.¹²² The court based its decision on the fact that Congress was aware of the impediments to removal for some aliens yet refused to restrict the Attorney General's detention authority.¹²³ In fact, that panel examined the interplay of the INA's various sections and held that in the absence of a statutory limitation "the statutory

115. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

116. *Chae Chan Ping v. United States*, 130 U.S. 581, 606–07 (1889).

117. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

118. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

119. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485–86 (1999) (upholding IIRIRA's provision insulating Attorney General's decisions under INA from judicial review).

120. *Andreu v. Reno*, 223 F.3d 1111, 1116 (9th Cir. 2000).

121. 44 F.3d 1441 (9th Cir. 1995).

122. *Id.* (analyzing 8 U.S.C. §§ 1182(d)(5)(A), 1225(b), 1226, , 1227(a)(1) (1988 & Supp. V 1993)).

123. *Id.* at 1446.

scheme implicitly authorizes prolonged detention."¹²⁴ The *Barrera-Echavarria* court attributed its construction, in part, to the deference owed the Attorney General's interpretation.¹²⁵ Nearly every circuit court to reach the issue has agreed with the result in *Barrera-Echavarria*.¹²⁶

In immigration law, the "plenary power" doctrine provides another source of judicial deference to the legislative and executive branches. Plenary power over immigration enables congressional and executive flexibility in adjusting policy choices to changing political and economic circumstances.¹²⁷ The U.S. Supreme Court adheres to the guideline that when a collateral branch of government has plenary power over an issue, courts must defer to the exercise of that authority so long as the bounds of the Constitution are not transgressed.¹²⁸ Both the Third and Fifth Circuits have emphasized that the government's plenary power over immigration renders it "largely immune from judicial inquiry or interference."¹²⁹ Thus, absent a finding of constitutional violation, courts should not overturn proper exercises of plenary power in the immigration context.¹³⁰

D. *Presumption Against Superfluous Language in Statutes*

Courts presume that every provision in a statute is intended to have independent effect.¹³¹ Courts seek to construe statutes so that the language Congress selected is not weakened through a construction that would render any word void or superfluous.¹³² Instead, courts seek to

124. *Id.* (discussing 8 U.S.C. §§ 1182(d)(5)(A), 1227(a)(1) (1998 & Supp. V 1993)). The court refused to recognize a constitutional right to release in part by finding that "indefinite" detention was not implicated due to the periodic INS review of the alien's detention. *Id.* at 1450.

125. *Id.* at 1444-48. In *Barrera-Echavarria*, the Ninth Circuit also relied on the "entry fiction" in upholding the constitutionality of indefinite detention of excludable aliens. *Id.* at 1450; *see also supra* note 18 and accompanying text.

126. *See, e.g.*, *Guzman v. Tippy*, 130 F.3d 64, 65 (2d Cir. 1997); *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1446, *amended by* 997 F.2d 1122 (5th Cir. 1993); *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 (11th Cir. 1984); *Palma v. Verdeyen*, 676 F.2d 100, 103-04 (4th Cir. 1982).

127. *Binh Phan v. Reno*, 56 F. Supp. 2d 1149, 1155 (W.D. Wash. 1999).

128. *INS v. Chadha*, 462 U.S. 919, 941 (1983).

129. *Zadyvdas v. Underdown*, 185 F.3d 279, 289 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)); *see also Chi Thon Ngo v. INS*, 192 F.3d 390, 395-96 (3d Cir. 1999).

130. *See Chadha*, 462 U.S. at 941.

131. *DeSisto College, Inc. v. Town of Howey-in-the-Hills*, 706 F. Supp. 1479, 1495 (M.D. Fla. 1989), *aff'd*, 888 F.2d 766 (11th Cir. 1989).

132. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882).

adhere to the basic principle that each statutory word should, if possible, be read to preserve its operative effect in the statutory scheme.¹³³ This presumption against surplusage helps to ensure that Congress's intent is fully realized. For example, in *Ratzlaf v. United States*,¹³⁴ the U.S. Supreme Court reversed a Ninth Circuit decision that essentially read one word out of the statute.¹³⁵ In *Ratzlaf*, the court of appeals erroneously treated the "willfulness" requirement in a criminal statute as of no consequence.¹³⁶ As the Court noted, "[j]udges should hesitate . . . to treat statutory terms [as surplusage] in any setting."¹³⁷ Similarly, in *Gustafson v. Alloyd Co.*,¹³⁸ the Court held that courts should avoid interpreting a statute in a way that "renders some words altogether redundant."¹³⁹ In *Gustafson*, the Court avoided interpreting the word "communication" in the Securities Act of 1933 in such a way that would effectively render other terms in the statute redundant and eliminate their meaning within the statute.¹⁴⁰ Instead, the *Gustafson* Court held that the statute must be read in its entirety, thereby giving effect to the language Congress intended to include in the statute.¹⁴¹

IV. *KIM HO MA v. RENO*

In *Kim Ho Ma v. Reno*,¹⁴² the Ninth Circuit was asked to construe the IIRIRA's detention provision. The District Court for the Western District of Washington, while not questioning that § 1231(a)(6) authorized the continued detention of aliens, had held that indefinite detention violated the substantive due process rights of deportable aliens. In contrast, the court of appeals did not reach the constitutional grounds but determined that the Attorney General lacked authority under § 1231(a)(6) to detain deportable aliens beyond the removal period if removal will not occur in a "reasonable time."¹⁴³

133. *Id.*

134. 510 U.S. 135 (1994).

135. *Id.* at 149.

136. *Id.* at 140.

137. *Id.*

138. 513 U.S. 561 (1995).

139. *Id.* at 574.

140. *Id.*

141. *Id.* at 574–75.

142. 208 F.3d 815 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000).

143. *Id.* at 830–31.

A. Facts and Procedural History

Kim Ho Ma is a native and citizen of Cambodia.¹⁴⁴ He lawfully entered the United States in 1985 as a refugee and became a lawful permanent resident in 1987. In 1996, he was convicted in a Washington state court of first-degree manslaughter as a result of participating in a gang-related shooting.¹⁴⁵ His conviction made him removable as a “deportable”¹⁴⁶ alien convicted of an aggravated felony.¹⁴⁷

Pursuant to Attorney General regulations, the INS took Ma into custody following his release by state authorities on June 6, 1997.¹⁴⁸ Once in custody, the INS commenced removal proceedings against Ma.¹⁴⁹ An immigration judge found Ma removable because of his conviction.¹⁵⁰ Ma appealed this ruling to the BIA, and the BIA affirmed the immigration judge’s decision.¹⁵¹ The immigration judge concluded that Ma’s detention was authorized under the IIRIRA because he would be a danger to the community if released.¹⁵² Ma’s order of removal became final on October 26, 1998.¹⁵³ The final order of removal extinguished Ma’s status as a lawful permanent resident and any legal right to remain in the country.¹⁵⁴ Despite the final removal order, the Attorney General could not remove Ma within the ninety-day period because the United States had no repatriation agreement with Cambodia.¹⁵⁵ Following the ninety-day removal period, during which Ma’s detention was mandatory,¹⁵⁶ he was detained pursuant to § 1231(a)(6).¹⁵⁷

Ma filed a petition in the U.S. District Court for the Western District of Washington for a writ of habeas corpus challenging the con-

144. *See id.* at 818.

145. *Id.* at 819.

146. *See supra* note 17 and accompanying text.

147. *Ma*, 208 F.3d at 819; *see* 8 U.S.C. § 1101(a)(43)(F) (Supp. V 1999) (defining “aggravated felony” to include crime of violence for which term of imprisonment imposed is one year or more); Administrative Record at 48, *Kim Ho Ma v. Reno*, 208 F.3d 815 (C99-15/WD)

148. *Ma*, 208 F.3d at 819.

149. *Ma*, 208 F.3d at 819.

150. *Id.*; *see* 8 U.S.C. § 1227(a)(2)(A)(iii).

151. *Ma*, 208 F.3d at 819.

152. Administrative Record at 41.

153. *Ma*, 208 F.3d at 819.

154. *See Ma*, 208 F.3d at 819; *see also* 8 U.S.C. §§ 1101(a)(20), (a)(47)(B)(ii) (1994 & Supp. V 1999); 8 C.F.R. § 1.1(p) (1999).

155. *Ma*, 208 F.3d at 819. *See supra* note 10 for discussion regarding repatriation agreements.

156. 8 U.S.C. § 1231(a)(1)(A) (Supp. V 1999).

157. *See supra* Part II.C.

stitutionality of his continued detention.¹⁵⁸ Following an evidentiary hearing,¹⁵⁹ the district court concluded that continued detention violated Ma's Fifth Amendment substantive due process rights.¹⁶⁰ Although the district court did not dispute that § 1231(a)(6) authorizes continued detention, it granted Ma's petition for a writ of habeas corpus on September 29, 1999, and ordered his immediate release.¹⁶¹ The INS appealed the district court judgment to the Ninth Circuit Court of Appeals, which affirmed the district court's judgment.¹⁶²

B. *Holding and Reasoning*

Although the Ninth Circuit affirmed the district court's judgment granting Ma habeas corpus relief, the court did not reach the merits of the district court's due process ruling. The court of appeals noted that the central issue addressed by the parties' arguments, as well as the basis for the district court's decision, was indeed the constitutionality of the INS's detention policy.¹⁶³ Yet without either the benefit of briefing by the parties or consideration by the district court on the statutory question, the court of appeals based its ruling on a construction of the statute.¹⁶⁴ The court disagreed with the vast majority of other federal courts that considered the issue¹⁶⁵ and concluded that because § 1231(a)(6) does not specify a time limit for continued detention beyond the removal period, a "reasonable time" limitation on detention should be read into § 1231(a)(6).¹⁶⁶

The *Ma* court determined that § 1231(a)(6) was ambiguous with regard to the length of time detention was authorized beyond the removal period and that this ambiguity raised a substantial constitutional

158. Administrative Record at 208–14, *Kim Ho Ma v. Reno*, 208 F.3d 815 (C99-15/WD).

159. *Kim Ho Ma v. INS*, 56 F. Supp. 2d 1165 (W.D. Wash 1999).

160. *Kim Ho Ma v. Reno*, No. C99-151L (W.D. Wash 1999), *aff'd*, 208 F.3d 815, 818 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000) (granting Ma habeas relief). The court followed a previously established legal framework, which addressed the substantive and procedural due process challenges brought by aliens subject to § 1231(a)(6) detention following final orders of removal. *Id.* at 3; *see also* *Binh Phan v. Reno*, 56 F. Supp. 2d 1149, 1156–58 (W.D. Wash. 1999).

161. *Ma*, No. C99-151L.

162. *Kim Ho Ma v. Reno*, 208 F.3d 815, 818, 831 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000).

163. *Id.* at 820.

164. *See id.*

165. *See supra* note 73 and accompanying text.

166. *Ma*, 208 F.3d at 830.

question.¹⁶⁷ Specifically, the court reasoned that § 1231(a)(6) was ambiguous because if Congress had intended to authorize indefinite detention of deportable aliens, it would have made a “clear statement to that effect.”¹⁶⁸ Because *Ma* was a deportable alien entitled to Fifth Amendment due process protection, the court reasoned that this ambiguity might have constitutional implications.¹⁶⁹ Therefore, the court sought to read the statute in such a way as to avoid considering the constitutionality of indefinite detention.¹⁷⁰ The *Ma* court acknowledged that § 1231(a)(6) was like the similarly worded detention statute in *Barrera-Echavarria*¹⁷¹ in that they both unambiguously authorized the Attorney General to continue detention of certain aliens beyond the removal period.¹⁷² However, the *Ma* court tried to distinguish *Barrera-Echavarria* as applicable only to excludable aliens while trying to avoid ruling on the constitutionality of indefinite detention of deportable aliens.¹⁷³

The court tried to navigate these concerns by applying the constitutional-avoidance canon and reading into § 1231(a)(6) a reasonable time limitation. The court reasoned that Congress would have included express language authorizing “indefinite detention” if it had so intended.¹⁷⁴ Moreover, the court believed that reading a “reasonable time” limitation into § 1231(a)(6) was consistent with its earlier interpretation of the differently worded 1917 Act, despite the unclear reasoning of earlier cases interpreting the 1917 Act.¹⁷⁵ Although it noted that the 1917 Act was not exactly like § 1231(a)(6), the court found the absence of an express time limitation in both statutes analogous.¹⁷⁶ Finally, in dicta, the court explained that its interpretation was consistent with international law.¹⁷⁷

Despite INS protest to the contrary, the court of appeals concluded that no reasonable likelihood existed that *Ma* would be removed to

167. *Id.* at 821–22, 827.

168. *Id.* at 822.

169. *Id.* at 825.

170. *Id.* at 827.

171. 44 F.3d 1441 (9th Cir. 1995).

172. *Ma*, 208 F.3d. at 824–25 n.20; see also *Barrera-Echavarria*, 44 F.3d at 1445.

173. *Ma*, 208 F.3d. at 824–25, 827.

174. *Id.* at 828 n.25.

175. *Id.* at 822, 829; see *supra* notes 22–25 and accompanying text.

176. *Ma*, 208 F.3d at 829.

177. *Id.* at 830 (noting that courts generally construe statutes to avoid violating international laws that prohibit prolonged and arbitrary detention unless Congress has enacted law to contrary).

Cambodia.¹⁷⁸ The court of appeals reasoned that the absence of a repatriation agreement between the United States and Cambodia providing for the return of each country's nationals was sufficient proof to demonstrate that Ma's removal would not occur in the reasonably foreseeable future.¹⁷⁹ Therefore, the court ruled that the INS could no longer detain Ma.¹⁸⁰

V. THE *KIM HO MA* v. *RENO* COURT IMPERMISSIBLY INVOKED THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE

The Ninth Circuit's holding that the Attorney General's detention authority under § 1231(a)(6) cannot exceed the ninety-day removal period when it appears that an alien cannot be removed in the "reasonably foreseeable future" is unjustified. The court of appeals's decision is contrary to the text of § 1231(a)(6), the structure of the INA, and the legislative and statutory history of the IIRIRA. Furthermore, the executive branch's reasonable interpretation of § 1231(a)(6) warrants judicial deference, and the court's unwarranted intrusion on the executive branch's reasonable statutory interpretation contradicts the policy considerations underlying the IIRIRA. By ignoring the plain meaning of § 1231(a)(6), the *Ma* court has sheltered a constitutional deficiency at the heart of indefinite detention.

A. *The Ma Court Improperly Construed § 1231(a)(6)*

The Ninth Circuit's construction of § 1231(a)(6) rewrites unambiguous statutory language that has historically permitted the Attorney General to detain criminal aliens under final orders of removal who threaten community safety or present a flight risk. Nearly every court that has interpreted § 1231(a)(6) has concluded that the plain language of the statute unambiguously authorizes the Attorney General to detain beyond the removal period those aliens he or she deems unfit for release.¹⁸¹ The court's ruling cannot be reconciled with the congressional intent manifested in the text of § 1231(a)(6), the structure of the INA, and the statutory and legislative history of the IIRIRA.

178. *Id.* at 831.

179. *Id.*

180. *Id.*

181. See *supra* note 73 and accompanying text.

1. *The Ninth Circuit's Construction of § 1231(a)(6) Conflicts with the Text of the Statute*

The Ninth Circuit's construction of § 1231(a)(6) in *Ma* cannot be reconciled with the plain meaning of the statute. The court's interpretation of § 1231(a)(6) conflicts with the literal text of the statute and creates a requirement not found in the statute's plain language. In addition, the court's construction fails to give every provision of § 1231(a)(6) independent effect and introduces a contradiction into the statute.

The court's restriction on indefinite detention fails to recognize the plain language of the statute. Although § 1231(a)(6) does not use the language of "indefinite detention," the statute contemplates the prospect of indefinite detention by the use of the phrase "may be detained beyond the removal period and, *if released*, shall be subject to [supervision]."¹⁸² The Fifth and Tenth Circuits have concluded that § 1231(a)(6)'s "may be detained beyond the removal period" language places no time limit on the Attorney General's detention authority and unambiguously authorizes detention beyond the removal period.¹⁸³ Moreover, because "if" is defined as "in the event that,"¹⁸⁴ the statute considers release from detention an alternative that may not occur. Indeed, the detention power is only qualified by the twin considerations of community safety and flight risk.¹⁸⁵ In contrast to the plain language, the *Ma* court's interpretation requires removal within the "reasonably foreseeable future," and thereby ignores the substantial discretion that Congress vested in the Attorney General. The fact that such discretion poses a risk of constitutional violation suggests a problem with the statute itself, not merely with the way in which it might be read.

By reading an implicit limitation into the Attorney General's detention authority, the *Ma* court violated the U.S. Supreme Court's warning not to create statutory requirements that do not appear in the plain language of the statute.¹⁸⁶ As written, § 1231(a)(6) does not place a limit on the length of time beyond the removal period that aliens may be detained. Instead, § 1231(a)(6) commits to the Attorney General's discretion the

182. 8 U.S.C. § 1231(a)(6) (Supp. V 1999) (emphasis added).

183. *Duy Dac Ho v. Greene*, 204 F.3d 1045, 1057 (10th Cir. 2000); *Zadvydas v. Underdown*, 185 F.3d 279, 287, 297 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000).

184. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 576 (10th ed. 1993).

185. 8 U.S.C. § 1231(a)(6).

186. *Bates v. United States*, 522 U.S. 23, 29 (1997).

decision to continue detention beyond the removal period.¹⁸⁷ The *Ma* court, however, created a new requirement that limits the Attorney General's discretion and requires release when there is a reasonable likelihood that an alien will not be removed in the reasonably foreseeable future.¹⁸⁸ Congress, however, specified that the exercise of this discretion should be guided only by concerns for community safety and flight risk. As a result, the *Ma* holding creates considerable tension with the text of § 1231(a)(6) by adding words to the statute that do not appear on its face.

The Ninth Circuit's statutory interpretation also violates the long-standing rule that courts should seek to give every statutory provision independent effect.¹⁸⁹ First, § 1231(a)(6) provides that those aliens who have not been removed during the removal period and who the Attorney General determines pose a community danger or flight risk "may be detained beyond the removal period."¹⁹⁰ By ordering the release of aliens who cannot be removed in the "reasonably foreseeable future," the *Ma* decision abrogates this explicit authorization for the Attorney General to detain *beyond* the removal period. Second, § 1231(a)(6) commands that "if released, [those aliens not yet removed] shall be subject" to supervision.¹⁹¹ Once again, however, the *Ma* decision denies the independent effect of "if released" by rewriting the statute to read "*when* released." The *Ma* court's statutory interpretation controverts the long-standing principle that statutory construction should not render any statutory word superfluous.

By stretching § 1231(a)(6) beyond its plain meaning, the *Ma* court introduced a contradiction into the statutory scheme. On the one hand, the *Ma* court recognized the Attorney General's statutory authority to detain an alien during the ninety-day statutory removal period, but on the other hand *Ma* requires release from detention when removal is not on the foreseeable horizon. A contradiction left unexplained in the Ninth Circuit's reasoning is why detention is permitted at all in the case of an alien whose removal is not likely in the "reasonably foreseeable future." Why should an alien who is ordered removed be subject to the mandatory ninety-day detention if there is not a repatriation agreement in place and at the end of the removal period release will be required? For

187. See *supra* note 73 and accompanying text; see also Part II.D.

188. *Kim Ho Ma v. Reno*, 208 F.3d 815, 818–19 (9th Cir.), cert. granted, 121 S. Ct. 297 (Oct. 10, 2000).

189. See *supra* Part III.D.

190. 8 U.S.C. § 1231(a)(6).

191. *Id.* (emphasis added).

the class of aliens who cannot be removed in the “reasonably foreseeable future,” the Ninth Circuit’s decision appears to transform the ninety-day removal period into nothing more than detention for detention’s sake. Such a punitive transformation of the removal period is clearly contrary to the statutory scheme’s proposition that immigration detention is not punishment but is instead an administrative incident to deportation proceedings.¹⁹² Furthermore, this punitive transformation of the removal period contradicts the Ninth Circuit’s avowed intention to avoid arbitrary detention.¹⁹³ The Ninth Circuit failed to explain the incongruous results of its statutory interpretation.

2. *The Ninth Circuit’s Construction of § 1231(a)(6) Conflicts with the Structure of the INA*

The Ninth Circuit’s construction of § 1231(a)(6) ignores the framework Congress established for carrying out the country’s immigration policies. The enactment of other INA provisions governing detention of criminal aliens establishes that Congress intended detention, not mandatory release, to be the general aim of the INA. In carving out an exception to the Attorney General’s detention authority under § 1231(a)(6), the *Ma* court assumed Congress did not take into account the prospect that removal may not occur in the reasonably foreseeable future.¹⁹⁴ This assumption is unfounded. The structure of the INA reveals Congress’s awareness that some countries may refuse to accept the return of their nationals.

Within the structure of the INA, Congress explicitly recognized the possibility that some aliens may not be removed during the removal period. For example, in the subsection immediately following § 1231(a)(6), Congress enacted a law that restricts the employment opportunities of aliens ordered removed.¹⁹⁵ Despite this prohibition, Congress enacted an exception for aliens the Attorney General finds “cannot be removed due to the refusal of all countries designated by the alien or under [§ 1231] to receive the alien,” or when “the removal of the alien is otherwise impracticable or contrary to the public interest.”¹⁹⁶ Thus, when Congress intended different treatment for this class of aliens,

192. *Hermanowski v. Farquharson*, 39 F. Supp. 2d 148, 158 (D.R.I. 1999).

193. *Ma*, 208 F.3d at 830.

194. *Id.* at 827–28.

195. 8 U.S.C. § 1231(a)(7).

196. *Id.*

it explicitly did so. Accordingly, Congress would have made an exception to § 1231(a)(6) similar to the exception in § 1231(a)(7) if it had intended to restrict the Attorney General's post-removal-period detention authority in § 1231(a)(6) with respect to aliens who cannot be removed in the "reasonably foreseeable future."

Other sections of the INA reveal Congress's recognition that some aliens ordered removed will not be returned immediately to their original country due to the refusal of some countries to accept the return of their citizens.¹⁹⁷ For example, Congress passed transitional rules,¹⁹⁸ following enactment of the IIRIRA, that restricted the release of criminal aliens including those who "cannot be removed because the designated country of removal will not accept [their return]."¹⁹⁹ In addition, the IIRIRA amended a section of the INA authorizing the Secretary of State to handle the contingency of visa requests from citizens of countries that "den[y] or unreasonably delay[]" accepting the return of its own citizens.²⁰⁰ The clear recognition of, and provision for, aliens who cannot be removed due to another country's refusal to accept the return of its nationals is evident throughout the INA. If Congress had intended to make similar exceptions in the post-removal-period context of § 1231(a)(6), it would have done so. Although Congress's choice not to make such exceptions may have created a statute that produces due process violations, the *Ma* court should have addressed that choice, not the one it would have made.

3. *The Ninth Circuit's Construction of § 1231(a)(6) Conflicts with the Legislative History of the IIRIRA*

The *Ma* decision deviates from explicit legislative history revealing congressional intent to grant the Attorney General broad discretion to determine which aliens to detain past the removal period.²⁰¹ Congress's stated intent for the current statutory regime is to increase detention of criminal aliens prior to removal.²⁰² Given the explicit legislative purpose

197. *See supra* Parts II.A & B.

198. IIRIRA § 303(b)(3), 110 Stat. 3009-586 to -587 (1996) (codified at 8 U.S.C. § 1226 (Supp. V 1999)) (governing pre-final-order detention during two-year period from October 1996 to October 1998).

199. *Id.*

200. *Id.* § 307(d), 110 Stat. 3009-614 (1996) (amending 8 U.S.C. § 1253(d) (1994)).

201. *See supra* Part II.B.

202. H.R. REP. NO. 104-879, at 107-09 (1997); *see supra* Part II.B.

in enacting the IIRIRA, the *Ma* court's contention that Congress *implicitly* intended to place time limits on the Attorney General's detention authority²⁰³ is not borne out by the IIRIRA's legislative history.

The *Ma* court ignored the legislative history demonstrating Congress's knowledge of the potential for indefinite detention and its chosen course of action. A central theme to the *Ma* court's analysis is that if Congress had intended "indefinite detention" it would have so stated.²⁰⁴ The *Ma* court ignored the contrary assertion that Congress could just as easily have limited the Attorney General's detention authority if it so desired.²⁰⁵ In fact, the shift from the AEDPA's mandatory detention regime to the IIRIRA's restoration of discretion to the Attorney General reveals Congress's awareness and acceptance of the possibility of prolonged detention following post-removal-period detention.²⁰⁶

The legislative compromise that spawned the IIRIRA also militates against the *Ma* court's brand of judicial activism. The original House version of the IIRIRA required release of deportable aliens on expiration of the ninety-day removal period,²⁰⁷ while the Senate version mandated detention even after the removal period.²⁰⁸ Congress compromised on the post-removal-period detention by committing the detention determination to the Attorney General's discretion.²⁰⁹ If Congress had intended to place a definite time limit on the detention of deportable aliens who cannot be immediately returned to their original country, then it would have adopted the original House bill. In construing § 1231(a)(6), the *Ma* court renegotiated a legislative compromise.

203. *Kim Ho Ma v. Reno*, 208 F.3d 815, 828 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000).

204. *Id.* at 828 n.25.

205. *See, e.g., Zadvydas v. Caplinger*, 986 F. Supp. 1011, 1025 (E.D. La. 1997), *rev'd sub nom.* 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000).

206. *See supra* notes 52–55 and accompanying text. The *Ma* court interpreted the transition from the AEDPA's mandatory-detention language to the IIRIRA's permissive-detention language as evidence of Congress's implied intent to restrict the Attorney General's detention authority. *Ma*, 208 F.3d at 828 n.25.

207. H.R. REP. NO. 104-469, pt. 1, at 18–19, 25–26, 234 (1996).

208. S. 1664, 104th Cong. § 164 (1996).

209. H.R. CONF. REP. NO. 104-828, at 53–54, 215–16 (1996).

4. *The Ninth Circuit's Construction of § 1231(a)(6) Conflicts with the Statutory History of the IIRIRA*

Ma's reliance on decisions flowing from the early versions of the INA is misplaced, as the court overlooked the significance wrought by post-1990 INA amendments. In arriving at its interpretation of § 1231(a)(6), the *Ma* Court relied, in part, on an analogy between case law emanating from the Immigration Act of 1917 and § 1231(a)(6).²¹⁰ The 1917 Act simply provided that aliens should be "taken into custody and deported."²¹¹ Courts interpreting the 1917 Act did not make their reasoning clear; nevertheless, the statute was interpreted as requiring release from custody if an alien could not be removed within a reasonable period of time.²¹² Courts interpreting subsequent amendments to the INA established a six-month limit on detention.²¹³ Beginning with the 1990 amendments to the INA, however, Congress clarified that detention of aggravated felons following a final order of deportation was not subject to the previous six-month limit.²¹⁴

The reliance on case law interpreting the INA's 1917 version is misplaced because even the *Ma* court acknowledged that "these older cases [interpreting the 1917 Act] did not interpret a statute exactly like [§ 1231(a)(6)]."²¹⁵ Section 1231(a)(6) is not subject to earlier limits on detention and explicitly authorizes detention "beyond the removal period."²¹⁶ Indeed, the series of amendments preceding § 1231(a)(6) have rejected court-imposed time limits on detention by mandating detention for criminal aliens.²¹⁷ Given the clear distinction between the language of the 1917 Act and that of § 1231(a)(6), the court of appeals erred in drawing support for its interpretation from that line of older Ninth Circuit cases restricting detention under the 1917 Act to a reasonable time.²¹⁸

210. *Ma*, 208 F.3d at 828–29.

211. An Act To Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29 § 19, 39 Stat. 874, 889 (former 8 U.S.C. § 156 (1917)) (repealed 1952).

212. *Ma*, 208 F.3d at 829.

213. *See, e.g.,* *Oguachuba v. INS*, 706 F.2d 93, 96 (2d Cir. 1983); *Johns v. Dep't of Justice*, 653 F.2d 884, 890 (5th Cir. 1981); *Castillo-Gradis v. Turnage*, 752 F. Supp. 937, 941 (S.D. Cal. 1990).

214. *See supra* note 30 and accompanying text.

215. *Ma*, 208 F.3d at 829.

216. 8 U.S.C. § 1231(a)(6) (Supp. V 1999).

217. *See supra* Part II.A. (discussing AEDPA and IIRIRA).

218. *See supra* note 25 and accompanying text.

B. *The Ma Court Should Have Deferred to the Attorney General's Reasonable Interpretation of § 1231(a)(6)*

The *Ma* court failed to adhere to well-settled principles of judicial deference, especially in immigration law, toward reasonable executive branch statutory interpretations.²¹⁹ In the context of § 1231(a)(6), the Attorney General has interpreted the statute to authorize the detention of deportable aliens beyond the removal period without limits.²²⁰ The vast majority of courts that have reviewed the statute have shared the Attorney General's interpretation.²²¹ The Ninth Circuit, however, has carved out an exception to the Attorney General's detention authority by giving the statute a limiting construction.²²² Because immigration matters involve serious questions affecting international relations and foreign policy,²²³ a reasonable interpretation of § 1231(a)(6) by the Attorney General should have been afforded deference.²²⁴ This deference to the Attorney General's statutory interpretation should have led the court instead to consider whether this interpretation was constitutional.

The court's decision runs counter to its earlier decisions that refused to shackle the Attorney General's detention authority.²²⁵ In refusing to substitute its judgment for that of the executive, the Ninth Circuit previously observed that "[r]eading a time limit on detention [of excludable aliens] would risk frustrating the government's ability to control immigration policy and relations with foreign nations."²²⁶ The foreign policy considerations are the same whether the alien is excludable or deportable. The only difference is whether the alien has constitutional rights while in the United States.²²⁷

219. See *supra* Part III.C. The *Ma* court determined that the plenary-power doctrine's applicability varies on a case-by-case basis and was subject to constitutional restraints. The court avoided the constitutional question in *Ma*, yet did not specify which constitutional restraints precluded the doctrine's application in this case. 208 F.3d at 826 n.24.

220. 8 C.F.R. §§ 241.4, 236.1(d)(2)(ii) (2000).

221. See *supra* note 73 and accompanying text.

222. *Ma*, 208 F.3d at 830.

223. See *supra* Part III.C.

224. See *supra* note 118 and accompanying text.

225. See *supra* notes 121–26 and accompanying text.

226. *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1448 (9th Cir. 1995).

227. See *supra* notes 14–19 (discussing excludable and deportable aliens).

The *Ma* court eschewed the *Chevron* doctrine, which requires courts to defer to agency interpretations of statutes.²²⁸ Judicial deference to administrative interpretations, such as the INS's interpretation of § 1231(a)(6), has been consistently employed when the scope of statutory authority involves reconciling conflicting policy choices that rest within the specialized knowledge of the agency.²²⁹ Given such an explicit guideline for the application of judicial deference to administrative agency statutory interpretation, the Attorney General's and INS's interpretation should not have been regarded lightly. The *Ma* court should have deferred to the Attorney General's reasonable interpretation of § 1231(a)(6) and then exposed that interpretation to full constitutional scrutiny.

C. *The Ma Court's Use of Constitutional Avoidance Ignored Congress's Policy Preferences Contained in § 1231(a)(6) and Abdicated the Judiciary's Role of Enforcing the Constitution*

By imposing its judgment over that of the Attorney General, the *Ma* court attempted to soften this nation's decidedly harsh immigration policy. This attempt infringes on the executive branch's ability to make foreign policy decisions and usurps Congress's lawmaking authority. Moreover, this attempt compromised judicial authority in construing the Constitution.²³⁰ Congress clearly chose detention as a necessary part of the country's immigration policy.²³¹ The *Ma* court should have respected that choice and measured it against the Constitution.

Contrary to the *Ma* court's characterization of its use of constitutional avoidance as an exercise of "judicial restraint,"²³² the court used constitutional avoidance as a vehicle for its own brand of judicial activism. Constitutional avoidance cannot be used to reinterpret an unambiguous statute nor to trample the clear intent of Congress.²³³ Given

228. See *supra* note 114 and accompanying text. The *Ma* court found the *Chevron* doctrine inapplicable because substantial constitutional questions were raised. *Kim Ho Ma v. Reno*, 208 F.3d 815, 821 n.13 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (Oct. 10, 2000).

229. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

230. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

231. H.R. REP. NO. 104-879, at 105–07 (1997).

232. *Ma*, 208 F.3d at 822.

233. See *supra* Part III.B.

the unambiguous text and legislative intent of § 1231(a)(6), the *Ma* court's use of constitutional avoidance is untenable.²³⁴

The *Ma* court should have analyzed § 1231(a)(6) in the same manner that it analyzed the detention statute in *Barrera-Echavarría*. In *Barrera-Echavarría*, the Ninth Circuit refused to read a time limit into the detention statute for excludable aliens and ruled that indefinite detention was constitutionally permissible.²³⁵ This approach preserves both Congress's role in writing the country's immigration laws and the judiciary's role in deciding the constitutionality of those laws. The *Ma* court, however, found § 1231(a)(6) to be ambiguous despite the text and legislative intent of the statute and invoked the canon of constitutional avoidance to avoid determining the constitutionality of indefinitely detaining deportable aliens.²³⁶ The *Ma* court improperly distinguished its decision from *Barrera-Echavarría* because § 1231(a)(6) unambiguously subjects both deportable and excludable aliens to the same detention statute. Far from "judicial restraint," this judicial activism compromised both the legislative and judicial functions.

The *Ma* court disingenuously evaded the constitutionality of indefinitely detaining deportable aliens. By reading a reasonable time limit into § 1231(a)(6) for deportable aliens, the court's decision permits "excludable" aliens to be indefinitely detained under *Barrera-Echavarría* while carving out an exception for "deportable" aliens.²³⁷ This result squarely conflicts with the IIRIRA's unambiguous text that subjects *all* aliens ordered removed—"excludable" and "deportable"—to the *same* detention provisions of § 1231(a)(6).²³⁸ If Congress intended to provide disparate treatment of "excludable" and "deportable aliens," then it presumably would have so specified.²³⁹ The fact that § 1231(a)(6)'s application may be harsh is not a license for the *Ma* court to disingenuously avoid a constitutional question by rewriting the statute's plain language.²⁴⁰ As a result of the *Ma* court's use of constitutional avoidance, the Attorney General's detention authority under § 1231(a)(6)

234. Whether § 1231(a)(6) presents a substantial constitutional question is beyond the scope of this Note's statutory argument.

235. *Barrera-Echavarría v. Rison*, 44 F.3d 1441, 1444–50 (9th Cir. 1995); *see also supra* notes 121–24 and accompanying text.

236. *Ma*, 208 F.3d 815 at 821–22.

237. *Id.* at 825.

238. *See supra* note 20 and accompanying text.

239. *See Greenhorn Farms v. Espy*, 39 F.3d 963, 965 (9th Cir. 1994).

240. *See United States v. Locke*, 471 U.S. 84, 95 (1985).

varies depending on whether an excludable or deportable alien is being detained. The *Ma* court's statutory interpretation is a disingenuous attempt to avoid the constitutional question raised in *Barrera-Echavarría*²⁴¹ and therefore does not justify the use of constitutional avoidance.²⁴²

The fact that the court of appeals relied on the canon of constitutional avoidance is proof that the court lacked textual support for its interpretation of § 1231(a)(6). After all, if the text of § 1231(a)(6) ruled out the post-removal-period detention at issue in *Ma*, then the court appeals could have simply rested its decision on a plain reading of the statute. Because § 1231(a)(6)'s unambiguous language²⁴³ and clear congressional intent²⁴⁴ definitively set the boundaries of the scope of the Attorney General's detention authority, the *Ma* court incorrectly used the canon of constitutional avoidance.²⁴⁵

VI. CONCLUSION

Section 1231(a)(6) is properly viewed by its *lack* of limitations on the length of time the Attorney General may detain removable aliens. Based on its text, structure, and history, § 1231(a)(6) contemplates the prospect of indefinite detention. Indeed, the statute clearly states that the Attorney General may detain removable aliens beyond the removal period, and "if released," the alien will be subject to the regulations provided. Given such unambiguous language, the *Ma* court's use of constitutional avoidance is unjustified. Because Congress chose indefinite detention as a part of the immigration policy of the United States, it was the court's role to decide the constitutionality of that choice. Ultimately, the *Ma* court's interpretation of § 1231(a)(6) had the effect of a sieve, draining the statute of its intended meaning by passing it through a porous judicial authority.

This Note aimed to encourage judicial scrutiny of the grave consequences of indefinite detention. Lacking an authoritative voice in court, an alien will be subject to the patchwork caprice of various

241. *See supra* note 125.

242. *See* *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933).

243. *See supra* Part V.A.1.

244. *See supra* Parts V.A.1–4.

245. *See* *Miller v. French*, 540 U.S. 327, 336–37 (2000) (explaining that courts may not subvert plain meaning of statute to avoid constitutional questions); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574–75 (1988).

interpretations of § 1231(a)(6). Displacing the issue is not a responsible way to manage such an important aspect of American foreign and domestic policy. Unlike the Ninth Circuit in *Ma*, courts confronting the issue of indefinite detention should refuse the cloak of constitutional avoidance and confront indefinite-detention statutes head-on.