

Reining in *Zadvydas v. Davis* New Bill Aimed at Stopping Release of Criminal Aliens

By Jon Feere

About two months before the terrorist attacks of September 11, 2001, the Supreme Court took a more active role in immigration regulation than it ever had before in *Zadvydas v. Davis*, a case that effectively forced the release of thousands of criminal aliens into the United States. The case illustrated the disastrous consequences of the judicial branch abandoning the plenary power doctrine, which holds that the political branches — the legislative and the executive — have sole power to regulate all aspects of immigration as a basic attribute of sovereignty. The history of the doctrine, as well as the problems created by judicial intervention in immigration matters, was examined at length in a recent Center for Immigration Studies *Background*.¹

Rep. Lamar Smith (R-Texas) has just introduced the Keep Our Communities Safe Act (H.R. 1932), legislation aimed at stopping the release of dangerous criminal immigrants into American communities.² A statement from the congressman, a video of a hearing on the legislation, and witness statements from that hearing are available online.³

According to the Inspector General, nearly 134,000 immigrants with final orders of removal have been released into the United States from 2001 to 2004. According to Immigration and Customs Enforcement, nearly 4,000 dangerous criminal immigrants have been released into the United States each year since 2008. An untold number of these aliens have gone on to commit additional, horrific crimes.⁴

This *Memorandum* details the Supreme Court's problematic holding in *Zadvydas v. Davis* and highlights some of the issues raised by the decision. It also notes Congress' attempt to resolve some of the issues legislatively. Ultimately, the political branches must assert their inherent authority over immigration regulation if public safety is the goal.

Background. At issue in *Zadvydas* was the long-term detention of two criminal aliens who had been ordered deported. Kestutis Zadvydas's criminal record included drug crimes, attempted robbery, attempted burglary, and theft. He also had a history of flight from both criminal and deportation proceedings. Kim Ho Ma was involved in a gang-related shooting and was convicted of manslaughter. Immigration officials could not find a country willing to receive the aliens within the statutory 90-day removal period. In continuing to detain the aliens after 90 days, the government invoked a statute that provides:

“An alien ordered removed who is inadmissible [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] 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 [certain] terms of supervision...”⁵ (emphasis added).

In other words, Congress granted the Attorney General the authority to detain an alien beyond 90 days if he or she found it necessary to do so for public safety reasons or otherwise. It is not an unreasonable allowance considering that immigration authorities regularly detain dangerous individuals. It is even more understandable in light of the slow bureaucratic processes that make up the U.S. and foreign immigration systems; 90 days is not always



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sufficient.⁶ The government argued that the decision “whether to continue to detain such an alien and, if so, in what circumstances and for how long” was up to the Attorney General, not the courts.⁷

The Supreme Court did not agree with the government’s interpretation of the statute and felt that, as applied, the statute violated aliens’ constitutional rights to due process. The Court took issue with what it believed to be the “indefinite detention” of *Zadvydas* and *Ma* (despite the fact that the government continued to search for a place to deport the aliens during the post-90-day period). In a close 5-4 decision, the Court held that it could not find “any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed.”⁸ The Court then decided to “construe the statute to contain an implicit ‘reasonable time’ limitation.”⁹ Clearly, on its face, the statute requires no such limitations. The Court explained their construction:

“The government points to the statute’s word, ‘may.’ But while ‘may’ suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word ‘may’ is ambiguous. Indeed, if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms.”¹⁰

Of course, one could argue that Congress could *not* speak more clearly and that such decisions were squarely within the discretion of the Attorney General. Nevertheless, in order to eliminate what it considered the “constitutional threat” of the potentially indefinite detention of deportable aliens, the Court held that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”¹¹ The Court then arbitrarily decided that six months was all that was necessary for determining an alien’s deportability:

“After this six-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink. This six-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.”¹²

Put simply, a reviewing court’s definition of “reasonably foreseeable” now determines the release of deportable aliens back onto the streets. Put another way, the judicial branch, rather than the political branches, will have the final say on who is allowed into the country and who is required to leave. Interestingly, the lower courts had already begun taking control; before it went to the Supreme Court, Kim Ho Ma’s lower court case was decided along with approximately 100 similar detention cases in a joint order.¹³ It is unclear how many of these aliens in the lower proceeding were released back into our neighborhoods. Furthermore, before the decision in *Zadvydas*, the INS was holding approximately 3,000 individuals in what the Court would consider “indefinite detention.” How many of these aliens were released as a result of the decision in *Zadvydas* is unclear. According to the Department of Justice, from January 2001 through September 2002, the INS reviewed 1,710 alien detention cases and released 1,034 (60 percent) of the aliens.¹⁴

The Court was well aware that it was stepping on the political branches’ toes and weakening congressional and executive plenary power over immigration. The majority acknowledged the “greater immigration-related expertise of the Executive Branch” and that “principles of judicial review in this area recognize primary Executive Branch responsibility.”¹⁵ Such realities, the Court noted, “require courts to listen with care” to the concerns of the Executive.¹⁶ But such sentiment is hollow. The Court clearly moved from the “hands-off” approach articulated by the plenary power doctrine to a somewhat dismissive “listen with care” standard. It is worth noting that although the decision in *Zadvydas* applied only to admitted aliens later determined to be deportable, a later case — *Clark v. Martinez* (2005) — extended these protections to removable aliens who have never been admitted into the country, i.e. criminal illegal aliens.¹⁷

The Dissent Points Out Concerns. The Court’s dissenting justices felt that the case ultimately was about “a claimed right of release into this country by an individual who concededly has no legal right to be here” and argued that there is “no such constitutional right.”¹⁸ They also noted that the majority “offered no justification why an alien under a valid and final order of removal — which has totally extinguished whatever right to presence in this country he possessed — has any greater due process right to be released into the country than an alien at the border seeking entry.”¹⁹ This is an important point: Neither type of alien has a right to be in the United States, so why should one have a claim for release into the country? Such reasoning rests solely on the seemingly arbitrary six-month time limit and, as the dissent noted, the *Zadvydas* case itself “demonstrates that the repatriation process may often take years to negotiate, involving difficult issues of establishing citizenship and the like.”²⁰

The dissenters also noted that the dangerousness of the alien and the risks he or she poses to society “do not diminish just because the alien cannot be deported within some foreseeable time.”²¹ Clearly, the dangerousness of an alien and the decision about whether to release him or her is a political question — a question that should be left up to politically accountable actors who can be taken to task for making a faulty decision. By creating an arbitrary deadline for release, the ruling in *Zadvydas* arguably eliminates the type of accountability that can be corrected through elections: If a dangerous alien is released as a result of *Zadvydas*, executive branch officers can shrug their shoulders and point to the judiciary’s demands, while lower court judges can shrug their shoulders noting that they have to abide by the Supreme Court’s ruling.

But the dissenting justices’ concerns went further than simply the release of dangerous aliens into U.S. society. For them, the larger concern was what they viewed as judicial intervention into a political process, something that upset the balance of powers. Although the majority claimed it was trying to avoid a constitutional question by deciding the case as it did, the dissent felt that the majority raised more constitutional questions than it avoided. In a scathing response, the dissenters laid out their case:

“The Court says its duty is to avoid a constitutional question. It deems the duty performed by interpreting a statute in obvious disregard of congressional intent; curing the resulting gap by writing a statutory amendment of its own; committing its own grave constitutional error by arrogating to the Judicial Branch the power to summon high officers of the Executive to assess their progress in conducting some of the Nation’s most sensitive negotiations with foreign powers; and then likely releasing into our general population at least hundreds of removable or inadmissible aliens who have been found by fair procedures to be flight risks, dangers to the community, or both. Far from avoiding a constitutional question, the Court’s ruling causes systemic dislocation in the balance of powers, thus raising serious constitutional concerns not just for the cases at hand but for the Court’s own view of its proper authority. Any supposed respect the Court seeks in not reaching the constitutional question is outweighed by the intrusive and erroneous exercise of its own powers.”²²

Had the majority shown greater respect for the plenary power doctrine, and by consequence, greater deference to the political branches, none of these glaring concerns would have been raised. But in attempting to resolve the constitutional rights of the alien, it seems the majority raised numerous and arguably more significant constitutional conflicts.

How *Zadvydas* Puts Foreign Powers in Control of U.S. Immigration Policy. One of the arguments for the political branches’ plenary power over immigration involves a focus on foreign affairs. That issue was a factor in the *Zadvydas* decision. Under the Constitution, it is the executive and legislative branches that direct foreign policy matters. This ensures that the U.S. relations with other countries are consistent and reliable. As explained by the dissenting justices in *Zadvydas*: “judicial orders requiring release of removable aliens, even on a temporary basis, have the potential to undermine the obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters.”²³ The problem is that the majority effectively empowered *foreign governments* to control U.S. immigration policy. The dissenting justices in *Zadvydas* explained:

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“The result of the Court’s rule is that, by refusing to accept repatriation of their own nationals, other countries can effect the release of these individuals back into the American community. If their own nationals are now at large in the United States, the nation of origin may ignore or disclaim responsibility to accept their return. The interference with sensitive foreign relations becomes even more acute where hostility or tension characterizes the relationship, for other countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us.”²⁴

Certainly, such political considerations are not on the average judge’s radar, and they shouldn’t be. Political issues are to be debated and resolved within the political branches. But the decision in *Zadvydas* arguably requires judges to involve the judiciary in foreign affairs. According to the dissenting justices:

“One of the more alarming aspects of the Court’s new venture into foreign affairs management is the suggestion that the district court can expand or contract the reasonable period of detention based on its own assessment of the course of negotiations with foreign powers. The Court says it will allow the Executive to perform its duties on its own for six months; after that, foreign relations go into judicially supervised receivership.”²⁵

By not adhering to the plenary power doctrine, the *Zadvydas* majority effectively relocates foreign policy considerations from experienced and accountable political actors to arguably less-politically astute judges while simultaneously politicizing the judiciary. The decision also puts foreign governments in the driver’s seat.

The Political Branches Respond

Two months after the *Zadvydas* decision, the 9/11 terrorist attacks were perpetrated by 19 aliens. The Department of Justice was in the midst of updating its procedures to accommodate the Supreme Court ruling. While the provisions met the Court’s requirements, they also narrowly defined the holding and carved out numerous exceptions. Specifically, the new provisions added immigration procedures for determining whether aliens with final orders of removal are likely to be removed within a reasonable amount of time and whether they should remain in government custody or be released into the United States pending their removal.²⁶ But the rule also set out a procedure for the continued detention of deportable aliens who are not likely to be removed in the reasonably foreseeable future. These involve aliens described by four special circumstances: (1) aliens who have highly contagious diseases that pose a danger to the public; (2) aliens who pose foreign policy concerns; (3) aliens who pose national security and terrorism concerns; and (4) aliens who are specially dangerous due to a mental condition or personality disorder (and have previously committed a crime of violence, and are likely to engage in acts of violence in the future).²⁷ These categories were not mentioned by the Court in *Zadvydas*, although the Court did state that its holding would be different if the case involved “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”²⁸ The political branches have used this language to defend the new regulations and its plenary power over immigration regulation generally; the terms “special circumstances,” “foreign policy concerns,” “specially dangerous,” and “matters of national security” offer some leeway in continuing the detention of many aliens.

The regulations add a handful of other tools that keep much control over immigration in the hands of the political branches. For example:

- Any alien released under supervised conditions due to a finding that there is no likelihood of removal in the reasonably foreseeable future must obey all laws, must continue to seek travel documents, must provide the immigration agency with all correspondence to and from foreign consulates, or face being placed back into detention. This might include a requirement of medical or psychiatric exams and attendance at any necessary rehabilitative programs.
- The government may revoke the alien’s release if the government believes there are changed circumstances that create a significant likelihood of removal in the reasonably foreseeable future.

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- The government is not required to grant employment authorization to a released inadmissible alien.
- Any alien denied a request for release must wait six months before submitting a new request for review of his detention.
- There is no administrative appeal from the immigration agency's finding of no likelihood of removal in the reasonably foreseeable future.²⁹

In addition, the government has set high bonds as a means of keeping aliens detained longer. If the executive branch keeps a firm grasp on the process, all of these procedures give the political branches of the government greater control over immigration regulation than the ruling in *Zadvydas* might seem to allow.

Congress Enacts Legislation

The USA PATRIOT Act. Less than four months after *Zadvydas*, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the USA PATRIOT Act) of 2001 was signed into law. It authorizes the continued detention of any alien whose removal is not reasonably foreseeable if the U.S. Attorney General has “reasonable grounds to believe” that the alien represents a security threat or has been involved in terrorist activities. Such detention is indefinitely renewable in six-month increments.³⁰ This act is viewed not only as a result of the 9/11 attacks, but also as a partial rebuke of the *Zadvydas* holding. Considering that the majority in *Zadvydas* justified the holding in that case by noting that Congress could have “spoken in clearer terms” on the issue of detaining aliens, the PATRIOT Act arguably gives the justices precisely what they wanted. In fact, a few years later, the Court seemed to specifically instruct Congress to reassert its plenary power over immigration in a 2005 immigration case when it noted the following: “The Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it.”³¹ The Court then referred to the PATRIOT Act as evidence that the political branches can and have overcome some judicial regulation of immigration policy. Of course, the PATRIOT Act addresses terrorism-related concerns. If Congress wants to continue to reassert its authority over immigration in other areas, it could draft additional legislation aimed at non-terrorist aliens.

The REAL ID Act. A few years later, the REAL ID Act of 2005 was signed into law. Although the act was aimed at a variety of objectives, one provision focused specifically on the growth of judicial intervention in immigration regulation. Years before, in 2001, the Supreme Court held in *INS v. St. Cyr* that neither the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) or the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) deprived the federal district courts of jurisdiction over habeas corpus petitions filed by convicted criminal aliens challenging removal orders. Congress felt that this was a misreading of each act, that such aliens could only challenge their removal in appeals courts, and that the Court's holding would have the undesirable effect of “allowing criminal aliens to delay their expulsion from the United States for years.”³² In fact, Congress had originally written those two acts with the specific purpose of limiting judicial review of removal orders and also with the purpose of overcoming a judicially created rule on readmission (since abandoned) known as the “Fleuti Doctrine.”³³ Seeing the need to reassert itself, Congress responded with the REAL ID Act and explicitly limited criminal alien habeas corpus review of removal orders to the Courts of Appeals. The committee report accompanying the REAL ID Act explains Congress' intent as follows:

“Under *St. Cyr*, criminal aliens [were] able to begin the judicial review process in the district court, and then appeal to the circuit court of appeals. Criminal aliens thus [could] obtain review in two jurisdictional forums, whereas non-criminal aliens may generally seek review only in the courts of appeals... Not only is this result unfair and illogical...but it also wastes scarce judicial and executive resources.”³⁴

The committee report also noted that Congress' goal has long been to “abbreviate the process of judicial review of deportation orders and to eliminate the previous initial step in obtaining judicial review.” In all, REAL ID was

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designed to put review of deportation, exclusion, and final orders of removal squarely within the Court of Appeals. It is important to remember that Congress is empowered to limit the district courts' jurisdiction.³⁵ So far, REAL ID has returned some power to the political branches, but it will take a few years to determine the act's full impact.

Keep Our Communities Safe Act. As of this writing, Congress has seen the introduction of a bill that could put an end to the release of at least some dangerous, criminal aliens. According to its authors, the Keep Our Communities Safe Act (H.R. 1932) “provides a statutory basis for DHS to detain as long as necessary specified dangerous immigrants under orders of removal who cannot be removed.” The bill authorizes DHS to detain non-removable immigrants beyond six months, if (1) the alien will be removed in the reasonably foreseeable future; (2) the alien would be removed but for the alien's refusal to make all reasonable efforts to comply and cooperate with the Homeland Security's efforts to remove him; (3) the alien has a highly contagious disease; (4) the release would have serious adverse foreign policy consequences; (5) the release would threaten national security; or (6) the release would threaten the safety of the community and the alien either is an aggravated felon or has committed a crime of violence.³⁶

Rep. Lamar Smith, the author of the legislation, noted tragic examples of the Supreme Court's decision in *Zadvydas*, the very types of situations the legislation is aimed at preventing:

“In two tragic instances, criminal immigrants released because of *Zadvydas* have gone on to commit murder. Huang Chen was ordered removed for assaulting Qian Wu. China refused to grant Huang the necessary documents and he was released as a result of *Zadvydas*. He then committed another assault and was again ordered removed, but again China refused to issue travel documents. Huang was again released. He went on to violently murder Mr. Wu.

“Abel Arango served time in prison for armed robbery. Since Cuba wouldn't take him back, he was released. He then went on to shoot Ft. Myers, Florida police officer Andrew Widman in the face. Officer Widman never had the opportunity to draw his weapon. The husband and father of three died at the scene.

“Just because a criminal immigrant cannot be returned to their home country does not mean they should be freed into our communities. Dangerous criminal immigrants need to be detained.”³⁷

The full text of the bill is available online.³⁸ Testimony from four witnesses is also available online; Gary Mead, Executive Associate Director for ICE's Enforcement and Removal Operations discusses his agency's removal efforts and lists the average length of time some countries take in repatriating their nationals; Thomas H. Dupree, Jr., partner at Gibson, Dunn & Crutcher LLP (and former Principal Deputy Assistant Attorney General under President Bush) describes the urgent need to amend immigration statutes in order to prevent unnecessary criminal activity; Ft. Myers Chief of Police Douglas Baker, a colleague of the murdered Officer Widman, lends his support to the bill; and Ahilan Arulanantham, Deputy Legal Director at the ACLU of Southern California, raises concerns about lengthy detention and the scope of the legislation.³⁹

Conclusion

As explained in numerous Supreme Court holdings over the past century, the judiciary simply does not have the capacity to adequately address immigration matters because immigration policy is deeply political and because any decision on immigration matters will have far-reaching social and economic effects that cannot necessarily be anticipated by judges. The deadly fallout from the Supreme Court's decision in *Zadvydas v. Davis* requires Congress and the executive branch to assert their inherent authority over immigration regulation and make public safety a priority.

End Notes

¹ Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?*, Center for Immigration Studies (2009) [http://www.cis.org/plenarypower].

² Keep Our Communities Safe Act, H.R. 1932, 112th Cong. (2011), <http://judiciary.house.gov/news/pdfs/Keep%20Our%20Communities%20Safe.pdf>.

³ http://judiciary.house.gov/hearings/hear_05242011.html.

⁴ Statement of Judiciary Committee Chairman Member Lamar Smith, Subcommittee on Immigration Policy and Enforcement Hearing on H.R. 1932, the Keep Our Communities Safe Act, May 24, 2011, <http://judiciary.house.gov/news/05242011%20Statement.html>.

⁵ *Zadvydas v. Davis*, 522 U.S. 678, 682 (2001); *see also* 8 U.S.C. § 1231(a)(6).

⁶ According to testimony from Gary Mead, Executive Associate Director for ICE's Enforcement and Removal Operations, some countries take well over 90 days to issue the travel documents needed to repatriate a criminal alien; for example, on average Cuba takes 154 days, China takes 134 days, India takes 155 days, and Somalia takes 344 days. Many other countries are listed on p. 9 of Mead's testimony, here: <http://judiciary.house.gov/hearings/pdf/Mead05242011.pdf>.

⁷ *Zadvydas*, 522 U.S. at 689.

⁸ *Id.* at 697.

⁹ *Id.* at 682.

¹⁰ *Id.* at 697.

¹¹ *Id.* at 699.

¹² *Id.* at 701.

¹³ *Id.* at 686.

¹⁴ The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders, No. I-2003-004 (Dept. of Justice, Feb. 2003). <http://www.usdoj.gov/oig/reports/INS/e0304/background.htm>.

¹⁵ *Zadvydas*, 522 U.S. at 700.

¹⁶ *Id.* at 701.

¹⁷ *Clark v. Martinez*, 543 U.S. 371 (2005).

¹⁸ *Zadvydas*, 522 U.S. at 702-3.

¹⁹ *Id.* at 704.

²⁰ *Id.* at 712-13.

²¹ *Id.* at 709.

²² *Id.* at 705.

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²³ *Id.* at 711.

²⁴ *Id.*

²⁵ *Id.* at 712.

²⁶ Press Release, Dept. of Justice, *Justice Department Implements Zadvydas v. Davis Supreme Court Decision* (November 14, 2001). http://www.usdoj.gov/opa/pr/2001/November/01_ins_595.htm.

²⁷ *Id.* See also 18 U.S.C. § 16 (listing crimes of violence in a finding of “specially dangerous”). For the last three types of aliens, there must also be no conditions of release that can reasonably be expected to prevent public danger.

²⁸ *Zadvydas*, 522 U.S. at 696.

²⁹ See 8 C.F.R. § 241.13,14; see also 8 U.S.C. § 1231(a)(3) (outlining post-release supervision requirements).

³⁰ 8 U.S.C. § 1226a.

³¹ *Martinez*, 543 U.S. 371, 386, n.8 (2005).

³² See, e.g., *Enwonwu v. Chertoff*, 276 F. Supp. 2d 42, 82 (2005).

³³ In the 1963 Supreme Court case *Rosenberg v. Fleuti*, the Court held that a Legal Permanent Resident (LPR) who took an “innocent, casual, and brief” trip outside the borders of United States could not be deemed to have “intended” to depart, and thus was not “entering” upon his return; the immigration service could not treat the LPR as if he was seeking admission. 374 U.S. 449. This judicially created rule was replaced with Congress’ own definition of admission when Congress wrote the IIRIRA; it allowed the immigration service to treat some LPRs as if they were seeking admission for the first time, even if they were outside the country for only a few hours. For a full explanation of these changes, see *In re Jesus Collado-Munoz*, 21 I. & N. Dec. 1061 (1998).

³⁴ *Enwonwu*, 276 F. Supp. 2d at 82.

³⁵ U.S. Const. art. III, § 1: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

³⁶ Statement of Judiciary Committee Chairman Member Lamar Smith Subcommittee on Immigration Policy and Enforcement Hearing on H.R. 1932, the Keep Our Communities Safe Act, May 24, 2011. <http://judiciary.house.gov/news/05242011%20Statement.html>.

³⁷ *Id.*

³⁸ Keep Our Communities Safe Act, H.R. 1932, 112th Cong. (2011). <http://judiciary.house.gov/news/pdfs/Keep%20Our%20Communities%20Safe.pdf>.

³⁹ Testimony is online at:

Mead: <http://judiciary.house.gov/hearings/pdf/Mead05242011.pdf>;

Dupree: <http://judiciary.house.gov/hearings/pdf/Dupree05242011.pdf>;

Baker: <http://judiciary.house.gov/hearings/pdf/Douglas05242011.pdf>;

Arulanantham: <http://judiciary.house.gov/hearings/pdf/Arulanantham05242011.pdf>.