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## COURT UPHOLDS GOVERNMENT'S ILLEGAL ALIEN DETENTION AUTHORITY

by  
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Preventing terrorism is the ultimate goal of the War on Terror. Stopping terrorists from achieving further murder and destruction within the United States is the first task of law enforcement, but to do this job, it must have the necessary legal tools. One such tool is the authority to detain illegal aliens while investigating their involvement in terrorist and related criminal activities. A recent federal district court decision holds that the government may do exactly that. *See Turkmen v. Ashcroft*, 02 CV 2307 (E.D.N.Y. June 14, 2006) [http://www.nyed.uscourts.gov/Decisions\\_of\\_Interest](http://www.nyed.uscourts.gov/Decisions_of_Interest) (Select *Turkmen v. Ashcroft*, Amended Memorandum and Order).

Porous borders, a vibrant economy and an open society have drawn a large population of illegal aliens to the United States. In addition to social and economic issues, these illegal aliens also create a national security challenge by making it easier for terrorists to enter and then operate domestically. The challenge is complicated by local jurisdictions that declare they are “sanctuary” cities and discourage officials from cooperating in the enforcement of immigration laws. Terrorists have been able to lose themselves within the larger illegal alien population.

After the 9/11 attacks – conducted by Saudi, Egyptian, United Arab Emirate and Lebanese nationals, some of whom were in the United States illegally – federal agents detained and then deported various illegal aliens of Middle Eastern origin. The *Turkmen* case grew out of these detentions. In April 2002, a group of illegal aliens jailed after 9/11 sued the Attorney General, the Director of the Federal Bureau of Investigation, the Commission of the Immigration and Nationalization Services and other government officials. The plaintiffs, filing on behalf of themselves and a putative class, asserted that their race, religion, ethnicity and national origin was the decisive factor in the decisions to detain them without bond and to keep them in jail beyond the time they could have been deported. They claimed that the government used their illegal alien status as a ruse to keep them in custody while it determined if they were terrorists or could help capture terrorists. Among other things, the plaintiffs alleged that their detentions were unreasonable seizures in violation of the Fourth Amendment and a violation of their due process rights under the Fifth Amendment. They also alleged that the terms of confinement violated the Constitution.

The *Turkmen* court dismissed the length of detention claims in a written decision filed on June 14, 2006. In analyzing these claims, the court noted that they were essentially predicated upon plaintiffs’ allegation that the Attorney General had a duty of reasonable dispatch to remove them as early as practicable, rather than continuing to hold them in jail. Citing *Zadvydas v. Davis*, 533 U.S. 678 (2001), plaintiffs argued that their detention violated substantive due process. In *Zadvydas*, two aliens who were ordered removed thereafter claimed that the length of their post-removal-period detention violated due process rights. Both aliens had committed crimes and the federal government

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was unable to deport them because no other country would accept them. The government argued that federal law, specifically 8 U.S.C. § 1231 (a) (6) (2000), authorized indefinite post-removal-period detention. The Supreme Court found that such a reading would make the statute unconstitutional in some circumstances under the Due Process Clause, and held that when removal is “no longer foreseeable, continued detention is no longer authorized by statute.” *Zadvydas*, 553 U.S. at 699.

The Supreme Court in *Zadvydas* acknowledged the difficulties lower courts face in determining whether a removal is reasonably foreseeable, particularly when the lower courts must give appropriate deference to the executive branch based on its particular expertise in this area and the administrative difficulties associated with immigration law enforcement. *Zadvydas* therefore held that six months is a reasonable detention period following a final removal order. However, detention beyond the six-month period is not *per se* unreasonable because further detention is permissible “until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.” *Zadvydas*, 553 U.S. at 701. In *Wang v. Ashcroft*, 320 F.3d 130, 146 (2d Cir. 2003), the Second Circuit held that the “reasonable foreseeability” test not only defines when immigration detention is a statutory violation but also “articulates the outer bounds of the Government’s ability to detain aliens (other than those serving criminal sentences) without jeopardizing their due process rights.”

The *Turkmen* plaintiffs argued that *Zadvydas* should be limited to the facts of that case, where removal was delayed because no country would accept the detainees. *Turkmen* rejects this argument, finding that nothing in *Zadvydas* supported such a narrow construction. Four of the *Turkmen* plaintiffs were removed within six months of their final removal or voluntary departure orders, and their detention was presumptively reasonable. Three other plaintiffs were detained beyond the six-month period, but their complaint does not allege that during the period of their detention there was no significant likelihood of removal in the foreseeable future. Instead, the plaintiffs claimed that they were detained longer than necessary to remove them and that the government delayed their removal for reasons unrelated to any legitimate immigration purpose. The *Turkmen* court found that such allegations did not establish a due process violation.

The court also rejected plaintiffs’ claim that their detention violated their Fourth Amendment right to be free from unreasonable seizures. Plaintiffs alleged that they were held for criminal investigation without probable cause. *Turkmen* found this claim to be completely dependent upon plaintiffs’ contention that their detention was not otherwise authorized. The court noted that plaintiffs admitted that they were lawfully arrested for violating the terms of their admission to the United States, but contended that the government could have deported them more quickly. The *Turkmen* court found that plaintiffs’ detention was authorized by federal immigration law. Even if the government was motivated by a desire to keep terrorism suspects in jail pending further investigation, that motivation does not make the detention illegal. The court also noted that there are legitimate foreign policy considerations and significant administrative burdens involved in enforcing immigration law in general, and, specifically, following a terrorist attack perpetrated on the United States by non-citizens, some of whom had violated the terms of their visas at the time of the attack.

Finally, *Turkmen* found that the defendants did not violate plaintiffs’ equal protection rights by detaining them based on their race, religion and /or national origin. Plaintiff’s argued that they were selected from among other visa violators for especially lengthy detention based upon these impermissible motivations. The court found that there was nothing outrageous in the government’s action. It noted that in the immediate aftermath of 9/11 the government could choose to subject to greater scrutiny aliens who shared characteristics with the 9/11 hijackers, such as violating their visas and national origin and/or religion. *Turkmen* goes on to state that the 9/11 circumstances are by “no means a prerequisite to the deference owed the political branches in this area.” *Turkmen*, at 80. In immigration matters such as this, the court found that “the Constitution assigns to the political branches all but the most minimal authority in making the delicate balancing judgment that attend all difficult constitutional questions.” *Id.*