No. 00-38

IN THE SUPREME COURT OF THE UNITED STATES

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS
v.

KIM HO MA
Respondents.

BRIEF FOR THE RESPONDENT

Filed December 22, 2000

QUESTIONS PRESENTED

Section 1231(a)(6) of Title 8 of the United States Code provides that "[a]n alien ordered removed who is inadmissible . . . , removable [for a criminal offense], 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," as that period is set out in 8 U.S.C. § 1231(a)(1)(A). The Immigration and Naturalization Service (INS) maintains that it has the authority to detain Kim Ho Ma pursuant to this provision, even though he is a long-time resident alien of this country, and it cannot deport him in the foreseeable future. The questions presented are:

1. Whether the Attorney General's construction of 8 U.S.C. § 1231(a)(6) violates the due process guarantee of the Fifth Amendment of the United States Constitution because it permits indefinite detention of an alien ordered deported whose deportation cannot be effectuated in the reasonably foreseeable future, even where the government's legitimate interests can be accomplished by less restrictive means.

2. Whether the narrow interpretation of § 1231(a)(6) suggested by the circuit court, to permit detention beyond the 90-day removal period in order to effectuate deportation, is correct because that interpretation avoids the constitutional problem raised by the Attorney General's interpretation and is not contrary to the "plain" intent of Congress.

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OPINIONS AND ORDERS BELOW

In addition to the opinions cited by the government, the district court issued an unreported order denying the government's motion to stay Mr. Ma's release pending its appeal to the circuit court. Cert. Opp. 1a-3a.[1] The circuit court issued unreported orders denying motions to stay Mr. Ma's release pending appeal and pending application for a stay to this Court. Cert. Opp. 4a-6a. The Supreme Court's order denying the government's application to stay Mr. Ma's release pending its appeal is reported at 528 U.S. 1000 (1999). Cert. Opp. 8a. On June 2, 2000, the circuit court issued an unreported order denying rehearing and rehearing *en banc*. Pet. App. 62a-63a.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to 8 U.S.C. § 1231 and 8 C.F.R. § 241.4, *see* Pet. Br. 2, Pet. Br. App. 1a-6a, this case involves 8 U.S.C. § 1253(a)(1) and 8 U.S.C. § 1253(b), which are set forth in relevant part, *infra* at App., 16a.

[1] The designation "Cert. Opp." refers to Mr. Ma's Brief in Opposition to the government's Petition for Writ of *Certiorari*; "Pet. App." refers to the government's Appendix to its Petition for *Certiorari*; "Pet. Br." refers to the government's Brief for the Petitioners; "JA" refers to the Joint Appendix; and "App." refers to the Appendix attached hereto.

The designation "R" refers to the Excerpts of Record filed by the government; "SER" refers to the Supplemental Excerpts of Record filed by Mr. Ma.

The constitutional provision involved is the Fifth Amendment Due Process Clause which provides, in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law[.]"

STATEMENT[2]

1. *Kim Ho Ma's Entry into the United States.* Mr. Ma, the second youngest of five children, was born in the impoverished country of Cambodia on July 6, 1977. He was two years old when he and his family fled Cambodia, escaping the reign of the Khmer Rouge. R 357, 419. Mr. Ma and his family survived in refugee camps in Thailand and the Philippines until the United States granted them permission to resettle here as refugees in 1985. R 354, 357-58, 419-20. In April, 1985, following inspection by the INS, Mr. Ma entered the United States as a refugee. R 356, 358, 420. He worked while attending school and has continuously resided in this country with his family, all of whom are now lawful permanent residents or naturalized citizens. Pet. App. 4a; R 266-74, 279, 322-37.

2. *Mr. Ma's Order of Deportation and the INS's Inability to Effectuate His Deportation.* At age seventeen, Mr. Ma was convicted of first degree manslaughter, which requires a showing of recklessness, and not intent, as the

[2] Mr. Ma has confined the following Statement to those material facts which are either inaccurately stated in, or omitted from, the recitation of facts in the government's Brief. Pet. App. 1a-7a.

government mistakenly states in its Brief. Pet. App. 5a, 56a & 60a n.4; R 300-06.[3] Earning time off for good behavior, Mr. Ma served 26 months of a 38-month sentence. Pet. App. 5a.[4]

After he completed his sentence in June of 1997, the INS took Mr. Ma, then 19 years old, into custody. Pending completion of the deportation proceedings, an immigration judge determined that Mr. Ma was not a flight risk but nevertheless denied the request for bond "strictly because of the seriousness of his crime." Pet. App. 57a. Subsequent requests for release on bond pending completion of his deportation proceedings were denied due solely to Mr. Ma's manslaughter conviction, his only criminal conviction.[5] Pet. App. 5a. Mr. Ma was ordered deported to Cambodia on September 12, 1997, which was affirmed by the Board of Immigration Appeals on October 26, 1998. Pet. App. 4a; JA 44-56.

[3] *See also* Rev. Code Wash. 9A.32.060 (1975); Rev. Code Wash. 9.94A.320 (1995); Rev. Code Wash. 9.94A.310 (1995).

[4] Rev. Code Wash. 9.92.151 (1990).

[5] The psychological evaluation referenced by the immigration judge in Mr. Ma's deportation proceedings was performed in 1997 by the Washington Department of Corrections, not the INS, and was *not* relied upon by the INS to support its conclusion that Mr. Ma should be detained under § 1231(a)(6) pending deportation to Cambodia. Pet. App. 77a-86a; R 207-12. Even then the Department of Corrections characterized Mr. Ma as a "frightened boy" who could be released with supervision. R 207-12. The INS itself concluded two years later that Mr. Ma has no "significant" mental health issues. Pet. App. 80a.

Upon entry of a final order of deportation, the Attorney General is directed by statute to deport the individual from the United States within 90 days. 8 U.S.C. § 1231(a)(1)(A) (1999). The INS could not effectuate Mr. Ma's deportation to Cambodia within the 90-day removal period. Pet. Br. 5.

On May 5, 1999, over five months after the removal period expired (and only after Mr. Ma filed his petition for writ of habeas corpus), the INS requested travel documents from the Cambodian government. Pet. App. 5a. The INS never received a response because Cambodia ignores or refuses to grant such requests as a matter of course, absent a repatriation agreement with the United States. Pet. App. 5a & 5a n.4, 58a; Cert. Opp. 9a-11a. Despite ongoing negotiations to reach a repatriation agreement with Cambodia, no such agreement currently exists. Pet. App. 58a-59a; JA 68-138. In July and September of 1999, the consulate advised Mr. Ma's counsel that Cambodia would not issue the requisite travel documentation for him, or any other Cambodian national. JA 107-11; Pet. App. 10a-12a.

3. *The Challenged Statute and Mr. Ma's Ongoing INS Custody.* If deportation cannot be accomplished during the removal period, the Attorney General must release the individual subject to the INS's supervision. 8 U.S.C. § 1231(a)(3) (1999). However, pursuant to § 1231(a)(6), the provision at issue in this case, the Attorney General "may" detain an individual ordered deported for the commission of a crime "beyond the removal period" if, *inter alia,* that person was deported for a criminal offense or is considered by the INS to be a flight risk or danger to the community. 8 U.S.C. § 1231(a)(6). Pursuant to this

provision, the INS detained Mr. Ma in county jails and federal detention facilities after the removal period expired based upon the INS's opinion that Mr. Ma is "a risk to the community." Pet. App. 5a-7a. This conclusion was based upon Mr. Ma's single criminal conviction, his past gang affiliation, and Mr. Ma's planned participation in a hunger strike while in INS custody.[6] Pet. App. 5a-7a, 79a-85a;[7] *see also* Pet. App. 60a n.3.

Mr. Ma remained confined in INS custody from June of 1997 until the district court ordered his release in September of 1999, almost a year after the deportation order became final and eight months after the expiration of the removal period. Pet. App. 5a.

4. *The Proceedings Below.* In February, 1999, Mr. Ma commenced this action in the Western District of Washington. He challenged his ongoing INS detention on statutory and federal constitutional grounds. JA 59-65; Pet. App. 35a.

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[6] Although the government notes that Mr. Ma was transferred from one INS facility to another, the government omits the fact that the transfer occurred solely as a result of his "planned participation in a hunger strike," his "only 'behavioral problem' " during his more than two years in INS custody. Pet. App. 60a n.3.

[7] Mr. Ma learned of the INS's decision to detain him in a form letter dated June 2, 1999. Pet. App. 5a-7a, 77a-78a. Three months later, without notice to Mr. Ma, an opportunity to be heard or any indication of what materials were considered, INS Headquarters, in a report dated September 30, 1999, recommended that the INS continue Mr. Ma's detention based solely upon his criminal conviction and participation in a hunger strike. Pet. App. 7a, 87a-89a.

By joint order, the district court for the Western District of Washington rejected the government's contention that the continued detention of persons subject to a final deportation order was a constitutional exercise of the Attorney General's power over immigration. Pet. App. 34a-36a, 41a-51a. The court held that: "The critical inquiry . . . is whether an alien's detention is excessive in relation to the[ ] government interest[ ]" in "ensuring the removal of aliens ordered deported" and the goals incidental to that interest of "preventing flight prior to deportation" and "protecting the public from dangerous felons." Pet. App. 47a. To make this determination, "[the court] must necessarily balance the likelihood that the government will be able to effectuate deportation, against the dangerousness of a petitioner and the likelihood that he will abscond if released." Pet. App. 47a.[8]

An evidentiary hearing was ordered in Mr. Ma's case, in part to determine what efforts the government had made to repatriate Mr. Ma and the likelihood of effectuating deportation. Pet. App. 53a-54a, 57a-58a. On September 29, 1999, the district court granted Mr. Ma's writ of habeas corpus. It concluded that Mr. Ma's deportation was not reasonably foreseeable, and, therefore, Mr. Ma's ongoing detention was excessive in relation to the government's legitimate interest in effectuating his deportation. Pet. App. 2a, 2a n.2, 59a & 60a. Further, the district

[8] The entire district court further found that the procedures governing the detention of individuals subject to a final order of deportation, on their face, deprived the individuals of their respective rights to procedural due process of law. Pet. App. 51a-52a.

court made clear that, "[e]ven if there were a realistic chance of deporting" Mr. Ma, his "interest in liberty clearly outweighs the government's present interests in detaining him":

> [T]he government has not shown a strong interest in continuing his detention based upon his threat to the public or his proclivity to abscond. The government has never suggested he is a flight risk, and it has failed to advance a single reason for its belief that he is a danger to society, beyond the simple fact of his conviction. While the crime of which Ma was convicted is serious, it is not the kind that might justify indefinite detention. The record does not indicate his release with proper parole conditions would endanger the community.

Pet. App. 60a-61a (footnotes omitted); SER 318-69.[9]

Mr. Ma was released over a year ago following the government's unsuccessful attempts to secure a stay of his release. He remains today with his family at their home in Kent, Washington. Pet. App. 7a & n.9; Cert. Opp. 2a-8a.

The circuit court affirmed, holding, pursuant to the constitutional avoidance doctrine, that the Attorney General has the statutory authority to detain a person for a reasonable time beyond the removal period "in order to accomplish the statutory purpose – the removal of the alien," but she does not have the authority to detain that

[9] Because the district court's resolution of the substantive due process claim was dispositive of Mr. Ma's petition, it did not reach the alternative procedural due process claim. Pet. App. 61a n.5.

individual beyond the removal period if deportation cannot be effectuated in the reasonably foreseeable future. Pet. App. 8a-31a. The circuit court found that, despite the United States' good faith negotiations with Cambodia, Mr. Ma's deportation was not reasonably foreseeable. Pet. App. 25a, 32a & 32a n.30.[10]

Rehearing *en banc* was denied on June 2, 2000. Pet. App. 62a-63a. This Court granted a writ of *certiorari* and consolidated the case for oral argument with *Zadvydas v. Underdown*, 185 F.3d 279 (CA5), *reh'g denied*, 199 F.3d 441 (1999), *cert. granted*, 121 S. Ct. 297, 69 U.S.L.W. 3249, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000) (No. 99-7791).[11]

[10] Based upon its resolution of the case on statutory grounds, the circuit court did not reach the alternative substantive due process claim. Pet. App. 11a n.14, 22a.

[11] The government has not challenged the lower courts' respective findings of jurisdiction to consider Mr. Ma's statutory and federal constitutional claims. On October 10, 2000, the Court granted the Washington Legal Foundation and Allied Educational Foundation's motion for leave to file a brief as *amicus curiae* challenging, *inter alia*, the federal courts' jurisdiction to entertain any statutory claim in this case. Amicus relies solely upon subsection (e) of 8 U.S.C. § 1226, section 236 of the Immigration and Nationality Act (INA), to suggest the circuit court lacked jurisdiction to decide the statutory question. Amicus Curiae Brief in Support of Petitioners at 13. That provision, which the government has never cited, plainly does not apply to this case because it explicitly covers only the detention of aliens *before* a final order issues "under [§ 1226]." Mr. Ma is detained under § 1231. Pet. App. 3a n.3.

SUMMARY OF ARGUMENT

The Fifth Amendment of the United States Constitution provides, in relevant part, that "no person shall be . . . deprived of life, liberty or property without due process of law." This amendment protects all persons within the United States without regard to race, color, or nationality. It advances the principle that true freedom demands that any deprivation of liberty imposed by the sovereignty must necessarily serve a legitimate government purpose. *See* 9 William Holdsworth, *A History of English Law*, 104-25 (3d ed. 1944).

The Attorney General's interpretation of 8 U.S.C. § 1231(a)(6) is a frontal assault on this basic due process principle. According to the Attorney General, the INS can lawfully imprison a person for an indefinite period based solely upon a deportation order that cannot be effectuated. The Attorney General's interpretation of the statute is constitutionally indistinguishable from the civil commitment held to violate the Due Process Clause in *O'Connor v. Donaldson*, 422 U.S. 563, 574-76 (1975), as well as the punishment without judicial trial held to violate due process in *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896).

The district court correctly concluded that Mr. Ma's detention violated substantive due process because the nature and duration of the detention was excessive in relation to the government's legitimate purpose to effectuate deportation, *i.e.*, his release on INS supervision satisfies the government's interests in avoiding any unreasonable risk of flight or unreasonable risk of danger to the community viewed in light of the forseeability of

effectuating deportation. Cambodia has refused to accept Mr. Ma's deportation and is unlikely to in the foreseeable future. Moreover, as the district court found, there is no evidence that Mr. Ma is a danger to the community or a flight risk. Indeed, even if these factors were present, as this Court has repeatedly held, dangerousness alone cannot justify *indefinite* detention. Further, each of the government's interests can be satisfied through far less restrictive means. For example, Mr. Ma is released under an order of supervision which, if violated, would subject him to severe civil and criminal penalties, including up to ten years imprisonment for failure to report for deportation.

As recognized by the circuit court, the serious constitutional questions raised by the Attorney General's interpretation of the statute can and should be avoided by construing § 1231(a)(6) to permit detention beyond the 90-day removal period only for a reasonable time to accomplish the deportation in a safe and expeditious manner. This is a reasonable interpretation and is not contrary to Congress' "plain" intent.

To justify the Attorney General's assumption of unbridled authority to detain indefinitely, regardless of whether that detention serves any legitimate government interest, the government must show that Congress' "plain intent" was to permit indefinite detention of persons ordered deported but unremovable through no fault of their own. It cannot meet this heavy burden because the plain language of § 1231(a)(6) is silent as to the duration of post-order detention beyond the removal period. Likewise, the legislative history contains no evidence that Congress intended to authorize indefinite detention of

persons who could not be deported through no fault of their own. Indeed, the statutory evolution of post-order detention statutes shows that the Attorney General's contrary view dramatically departs from statutory precedent, which allowed only limited post-order detention in order to effectuate deportation.

For all these reasons, the lower courts were correct in finding that the INS does not have the statutory or constitutional authority to detain Mr. Ma any further. The proper remedy for this violation is release. The grant of Mr. Ma's writ of *habeas corpus* should be affirmed.

ARGUMENT I

THE ATTORNEY GENERAL'S INTERPRETATION OF 8 U.S.C. § 1231(a)(6) VIOLATES THE FIFTH AMENDMENT DUE PROCESS CLAUSE BECAUSE IT PERMITS THE INDEFINITE DETENTION OF AN ALIEN ORDERED DEPORTED WHOSE DEPORTATION CANNOT BE EFFECTUATED IN THE REASONABLY FORESEEABLE FUTURE, EVEN WHERE THE GOVERNMENT'S LEGITIMATE INTERESTS CAN BE ACCOMPLISHED BY LESS RESTRICTIVE MEANS.

A. Indefinite INS Detention Deprives Persons of the Fundamental Right to Be Free from Physical Restraint.

The "core of the liberty" protected by the Fifth Amendment's Due Process Clause is "freedom from physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)); *see also United States v. Salerno*, 481 U.S. 739, 754 (1987).

Indefinite detention pursuant to § 1231(a)(6) is an involuntary civil commitment that infringes upon this fundamental right of all persons to liberty. Pet. App. 43a-44a. "Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979).

The government in the courts below attempted to diminish Mr. Ma's liberty interest by casting it merely as the interest of an alien under a deportation order to be released into the United States pending deportation. *See, e.g.*, Pet. App. 43a. That characterization incorrectly defines the liberty interest at issue in terms of the Attorney General's justification for the detention. The Attorney General's characterization cannot be reconciled with this Court's definition of the liberty interest in the analogous context of civil commitment of the mentally ill. In *Hendricks*, for example, this Court described the relevant liberty interest as freedom from bodily restraint, not the interest of an individual in being released while suffering from an uncontrollable mental illness. *Hendricks*, 521 U.S. at 356; *see also Foucha*, 504 U.S. at 80.

To the extent the government characterizes the interest as a right to "remain" here, it ignores that people like Mr. Ma do not assert the right to remain here in the United States or a right to absolute freedom pending deportation. Mr. Ma understands should Cambodia ever agree to his return, he must report to the INS for deportation. 8 U.S.C. § 1253(a)(1) (1999). He further understands that he is released subject to the supervision of the INS, which provides for civil and criminal penalties for any willful violations thereof. 8 U.S.C. § 1253(b) (1999); *see, e.g.*, Pet. App. 43a-44a. Moreover, the liberty interest at

stake is no less "fundamental" simply because it is not absolute. For example, in *Salerno*, this Court recognized the "strong interest in liberty" implicated by pretrial detention as "fundamental," notwithstanding its ultimate conclusion that pretrial detention was permissible. 481 U.S. at 750.

The district court properly defined the liberty interest at issue to be a person's fundamental right to "[f]reedom from bodily restraint." *Foucha*, 504 U.S. at 80.

B. Persons Ordered Deported Enjoy the Protection of the Due Process Clause, Not the Lesser Rights Accorded Persons At the Border Awaiting Entry.

The Fifth Amendment's mandate that "[n]o person shall . . . be deprived of life, liberty or property without due process of law," extends to all persons, including citizens, permanent residents and even aliens lawfully or unlawfully within the territorial jurisdiction of the United States. *See Wong Wing*, 163 U.S. at 238, 242; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In 1953, this Court stated:

> once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any*

encroachment on those rights by federal or state authority.

Kwong Hai Chew v. Colding, 344 U.S. 590, 596 & 596 n.5 (1953) (emphasis added). Accordingly, "whatever [a person's] status under the immigration laws," he "is surely a 'person' in any ordinary sense of that term." *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

The government tries to avoid this well-established precedent by arguing that the constitutional guarantees of due process do not apply to aliens once they are ordered deported from the United States. Pet. Br. 5, 50. This analysis is in direct conflict with over a hundred years of jurisprudence wherein this Court repeatedly recognized the constitutional rights of all persons present in the United States. *See, e.g., Landon v. Plasencia*, 459 U.S. 21 (1982); *Kwong Hai Chew*, 344 U.S. at 596 & n.5; *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990).

Before this Court is an alien whose "constitutional status change[d]" when he gained admission to this country and lawfully "developed the ties that go with permanent residence." *Landon*, 459 U.S. at 32 (citations omitted). A final deportation order does not extinguish an alien's ties to the community, *Kwong Hai Chew*, 344 U.S. at 596 n.5, nor does the deportation order change his physical presence in this country. *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

And this argument is irreconcilable with *United States v. Witkovich*, 353 U.S. 194 (1957), and *Wong Wing*, where this Court held that the person was protected by the Fifth Amendment despite the entry of a final deportation order. *Witkovich*, 353 U.S. at 195-96, 201; *Wong Wing*, 163 U.S. at 238; *accord Sentner v. Colarelli*, 145 F. Supp. 569 (E.D. Mo. 1956), *aff'd Barton v. Sentner*, 353 U.S. 963 (1957); *see also Vitek v. Jones*, 445 U.S. 480, 492 (1980) (convicted person retains liberty interest despite incarceration).

Ignoring the principles and authority of the above cases, the government relies instead on the rationale advanced in *Ho v. Greene*, 204 F.3d 1045 (CA10 1999), and *Zadvydas*, 185 F.3d 279 (CA5 1999). Pet. Br. 50. But both courts erroneously expanded the holding in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), based upon a strained reading of the facts and analysis in that case. *Ho*, 204 F.3d at 1059; *Zadvydas*, 185 F.3d at 294-97.

Mezei does not support the claim that, by virtue of a final deportation order, a person stands in the same constitutional footing as someone standing at the border seeking entry.[12] First, *Mezei* and its progeny are limited to the unique status of persons who have been stopped at the border and denied entry. Although these individuals may be physically in the United States, they are nonetheless considered to be standing at the border awaiting entry as a matter of law, and thus are accorded limited constitutional rights. *Mezei*, 345 U.S. at 215. As acknowledged by this Court, the rule underlying *Mezei* is a narrow exception to the well-established rule that all persons present in the United States, including aliens like Mr. Ma, enjoy the protections of the Due Process Clause. *Mezei*, 345 U.S. at 212-13; *see also Leng May Ma v. Barber*, 357 U.S.

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[12] *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 985-1020 (1995).

185 (1958); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

Moreover, had the Court directed the INS to release him, Mr. Mezei would have effectively circumvented and nullified the valid exclusion order against him. 345 U.S. at 208. By contrast, persons subject to indefinite detention under § 1231(a)(6) are not invoking the Constitution to avoid deportation. Their release does not reinstate the physical freedom they enjoyed within our borders prior to the final deportation order. Nor does release reinstate lawful residence or any of the privileges associated with that status. *See, e.g.*, 8 U.S.C. § 1427 (1999), 8 U.S.C. § 1641(b) (1999). In fact, in its brief to this Court in *Mezei*, the government itself acknowledged this difference between the indefinite detention of an "excluded alien" and a "deportable alien," such as Mr. Ma. *See* Brief of United States at 19-20, *Shaughnessy v. Mezei* (U.S. Oct. 13, 1952) (No. 139).

Second, *Mezei* was decided at the height of the Cold War. Mr. Mezei had traveled to a Soviet bloc country for 19 months without permission or the requisite reentry papers from the INS. The holding was therefore based, in part, on the unique security risk presented by the times and by Mr. Mezei's arrival at the border, as an alien associated with the Communist Party. *Mezei*, 345 U.S. at 215-16.

Third, *Mezei* was decided before this Court more clearly delineated the substantive limits of the government's ability to civilly commit persons. *Foucha*, 504 U.S. at 80; *Hendricks*, 521 U.S. at 358-60; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). These cases held that preventive

detention of any kind is tolerated only under the most narrow circumstances.

For all these reasons, this Court should reject the government's invitation to expand its decision in *Mezei*, particularly in the face of over a hundred years of precedent recognizing the due process rights of aliens in the United States, including those who have been ordered deported. And while a final deportation order eliminates an alien's status as a lawful permanent resident, 8 C.F.R. § 1.1(p), it does not eliminate or define that person's constitutional rights. The government cites no authority for its contrary position. The courts below properly concluded that persons subject to a final order of deportation still enjoy a right to liberty that is protected by the Due Process Clause.

C. INS Detention Is Excessive If the Nature and Duration of the Detention Is Unrelated to the Purpose for Which the Person Is Being Held.

The substantive component of the Due Process Clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling [government] interest."[13] *Reno v.*

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[13] Even where an interest is not "fundamental," due process requires "a 'reasonable fit' between the government purpose . . . and the means chosen to advance that purpose." *Reno v. Flores*, 507 U.S. 292, 305 (1993). For the same reasons set forth in Section D below, here, even if a fundamental liberty interest was not at stake, the detention does not "reasonably fit" the government's legitimate interests.

Flores, 507 U.S. 292, 302 (1993) (emphasis in original); *id.* at 316 (O'Connor, J., concurring) (the "institutionalization of an adult by the government triggers heightened, substantive due process scrutiny").

As this Court admonished in *Schall v. Martin*, 467 U.S. 253 (1984), "[t]he mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment." 467 U.S. at 269; *see also Hendricks*, 521 U.S. at 357-58. Rather, "the nature and duration of commitment [must] bear some reasonable relation to the purpose for which the person is committed." *Jackson*, 406 U.S. at 738. Therefore, to decide whether a deprivation of liberty violates substantive due process, the Court must determine whether the government proffers legitimate interests for the deprivation and whether that deprivation is "excessive" in relation to those interests. *Salerno*, 481 U.S. at 747; *O'Connor*, 422 U.S. at 580 (1975) (Burger, J., concurring) (confinement "must cease" when the legitimate government interests "no longer exist"); Pet. App. 44a.

1. *The Attorney General's legitimate interest is to effectuate deportation.*

That the Attorney General has a legitimate interest in effectuating deportation and, in so doing, protecting the public and preventing risk of flight, is not questioned. But where the government is unable to deport the individual, its legitimate interest in effectuating deportation is too attenuated to justify further detention. *See, e.g., Witkovich*, 353 U.S. at 200-02 (scope of immigration statute

limited to its purpose, namely actual deportation of certain aliens); *see also, e.g., Kusman v. District Director of INS at Port of New York*, 117 F. Supp. 541, 547 (S.D.N.Y. 1953); *Petition of Brooks*, 5 F.2d 238, 239 (D. Mass. 1925). This is particularly true absent the most compelling evidence that a person presents a particularized threat of flight or danger to the community. *Hendricks*, 521 U.S. at 346 (forbids involuntary detention in the absence of specific substantive criteria); *see also Salerno*, 481 U.S. at 746-50 (only where detention is finite in duration and government proves by "clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community," may persons be detained pending trial).

Despite these limitations, the Attorney General erroneously assumes an unrestricted interest in protecting the public, irrespective of her ability to deport. Pet. Br. 22. But the INS does not have a general police power separate from its limited and specific function of effectuating deportations. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 115-16 (1976). Further, her claim of authority to detain solely for perceived danger has been rejected by this Court in the analogous civil commitment context, where a mere showing of dangerousness does not suffice to justify detention, much less *indefinite* detention. *Hendricks*, 521 U.S. at 358; *see also Foucha*, 504 U.S. at 80; *Salerno*, 481 U.S. at 750-51; *Schall*, 467 U.S. at 269-70; *Addington*, 441 U.S. at 427.

Moreover, this Court has sanctioned involuntary commitment only in conjunction with a statutory scheme that provides substantial procedural safeguards to protect

against erroneous and unnecessary deprivations of liberty. *See Hendricks*, 521 U.S. at 352-53; *see also Foucha*, 504 U.S. at 80; *Bell v. Wolfish*, 441 U.S. 520, 520-21 (1979). But under the Attorney General's construction, § 1231(a)(6) permits detention in the absence of such safeguards, specifically permitting detention without a time limit and in the absence of any constitutionally sound substantive criteria for the detention. *See Salerno*, 481 U.S. at 746-50; *Amicus Curiae* Brief by ACLU Immigrants Rights Project.

The government also contends that Mr. Ma's detention is not "indefinite" because of the INS's administrative procedures, which purportedly cure any substantive due process violation. Pet. Br. 50. The term "indefinite" simply means "not decided or specified," "vague: unclear" and "lacking fixed limits." *Webster's II New Riverside Dictionary Office Edition*, 355 (1984); *see Hendricks*, 521 U.S. at 352-53. More importantly, "the substantive component of the Due Process Clause bars certain arbitrary, wrongful government actions *regardless of the fairness of the procedures used to implement them.*" *Foucha*, 504 U.S. at 72 (emphasis added); *Salerno*, 481 U.S. at 746; *Flores*, 507 U.S. at 302. Thus, whether a person's detention pursuant to § 1231(a)(6) is labeled "prolonged," "indefinite," or "long-term," no amount of procedure can cure the fact that substantive due process is violated by a person's detention based upon a deportation order that cannot be effectuated, especially in the absence of a compelling and particularized showing by the government that its ancillary interests in preventing flight and danger to the community cannot be served by less restrictive means. To the extent the process is relevant to any substantive due process analysis, certainly the procedures

here – which lack any consideration of the duration of detention or less restrictive means available and which impose on the detainee the burden to prove he is not a danger – fall short of what this Court's due process jurisprudence requires. *Contrast Salerno*, 481 U.S. at 750.[14]

2. *A deferential standard of review does not apply.*

The government's reliance on the plenary power doctrine is misplaced. Pet. Br. 43-44. It is beyond dispute that the government's plenary power is at its height with respect to substantive immigration decisions concerning admission and expulsion.[15] This case does not involve such a decision but rather concerns a *means* – detention pending deportation – by which Congress chooses to implement its substantive immigration policies. *See INS v. Chadha*, 462 U.S. 919, 940-41 (1983). Moreover, even Congress' plenary power is constrained "by the paramount power of the Constitution." *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Chadha*, 462 U.S. at 940-41; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

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[14] On December 21, 2000, the administrative regulations proposed earlier this year were finalized. These regulations do not cure any of the substantive flaws of the earlier procedures as noted above – detention is still indefinite and devoid of any constitutionally acceptable substantive safeguards. *See also, e.g.*, Pet. App. 51a-52a (noting INS improper reliance on past criminal history and fact that an individual is ordered deported to conclude summarily poses risk to community).

[15] *See Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

The government incorrectly relies on *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), to contend that deference is warranted because the release of persons ordered deported infringes on foreign policy concerns. Pet. Br. 17, 43-44. *Aguirre-Aguirre* involved an alien who fled Guatemala after committing a serious non-political crime, and sought refuge in the United States. The Court deferred to the INS's interpretation of the immigration statute, noting that "to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrator to remain in the United States, may affect our relations with that country or its neighbors." 526 U.S. at 425.

Unlike *Aguirre-Aguirre*, this case involves a constitutional question and does not involve the foreign policy issues implicated in *Aguirre-Aguirre*. There is no indication that releasing a deportable alien (here, a long-time resident alien), has any effect on the government's ability to continue negotiations with the foreign state (Cambodia) for the issuance of travel documents. Indeed, the government has maintained throughout these proceedings that negotiations with Cambodia continue today, despite Mr. Ma's release. Pet. Br. 49.

Equally, the sovereignty and foreign policy concerns which informed the courts' analyses in *Jean v. Nelson*, 727 F.2d 957, 975 (CA11 1984) (*en banc*), *aff'd*, 472 U.S. 846 (1985) and *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (CA9) (*en banc*), *cert. denied*, 516 U.S. 976 (1995), *i.e.*, "losing control over our borders," are not involved here. Mr. Ma is not an alien at the border seeking entry so this case does not involve the foreign policy and national sovereignty concerns associated with the United States' ability

to exclude persons at the border. *See, e.g., Leng May Ma*, 357 U.S. at 190; *Kaplan v. Tod*, 267 U.S. 228, 257-58 (1925); *Nishimura Ekiu*, 142 U.S. at 651.

D. Kim Ho Ma's Indefinite Detention Pursuant to § 1231(a)(6) Is Excessive in Relation to the Government's Legitimate Interests in Effectuating Deportation Because His Deportation Is Not Reasonably Foreseeable and Any Ancillary Interests Can Be Accomplished Through Less Restrictive Means.

Mr. Ma, a long-time resident of this country, was ordered deported in September, 1997. Through no fault of his own, the INS has not been able to deport him. But the INS refused to release Mr. Ma based on a conclusion that his prior conviction indicated a risk to the community.

The district court balanced a combination of factors including the length of past and future detention, the present refusal of Cambodia to accept any Cambodian national, the degree of perceived danger posed and the availability of less restrictive alternatives to detention, to correctly find that Mr. Ma's fundamental liberty interest clearly outweighs the Attorney General's attenuated interest in effectuating his deportation in a safe and expeditious manner.

1. *Mr. Ma's deportation is not reasonably foreseeable.*

One essential factor in determining whether the detention is excessive is the duration of past and future detention. As the duration of the detention increases, so

does the severity of the restriction on Mr. Ma's fundamental right to liberty. *See Jackson*, 406 U.S. at 738. Even detention that may be constitutional at its inception may become unconstitutionally lengthy. *See generally, id.* at 747 n.4. In this case, Mr. Ma was detained for almost a year after the entry of his final deportation order. And a review of the record demonstrates that Mr. Ma's deportation is not reasonably foreseeable. Pet. App. 32a n.30.

The government waited eight months after Mr. Ma's deportation order became final to request travel documents from the Cambodian government for his deportation from the United States. Pet. App. 58a; *see also* Pet. Br. 5. Cambodia expressly refused that request because there is no formal repatriation agreement between the two countries. R 53-54; JA 68-118, 125-31.[16]

Even so, the government claims that Mr. Ma's detention is justified because it will necessarily come to an end upon his removal, "a matter that continues to be the subject of international negotiations." Pet. Br. 49. But nowhere is there any *evidence* that Mr. Ma's deportation is reasonably foreseeable in light of those ongoing negotiations. Indeed, almost a year and a half since this litigation first began, there is no *functioning* informal or formal

[16] The existence of a repatriation agreement is not central to the circuit court's legal holding. The circuit court's decision requires a court to determine whether deportation in each individual case is reasonably foreseeable, not whether a repatriation agreement exists. Here, nothing in the circuit court opinion prevents the INS from detaining persons ordered deported beyond the 90-day removal period *if* they can, in fact, be removed despite the lack of a repatriation agreement. Pet. App. 8a, 31a.

agreement; Cambodia still does not accept the return of its nationals; and there is no evidence that even if a repatriation "arrangement" or "agreement" is in fact reached, Mr. Ma's deportation will readily follow. *See* Ex. A to Respondent's Response to Petitioner's Lodged Document (filed Aug. 31, 2000) at ¶¶ 11-12, 14-16 (May 5, 2000, Hergen Declaration).

The lower courts correctly found that Mr. Ma's deportation is not reasonably foreseeable, despite the good faith efforts of the United States. Pet. App. 32a, 59a-60a; *cf. Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1948) (the Court will not generally reverse findings of fact unless clearly erroneous).

2. *Mr. Ma is not a flight risk or a danger to the community.*

To begin, it is important to note that detention based solely upon a finding of deportability for a past crime violates substantive due process. U.S. Const. amend. V; *see generally, O'Connor*, 422 U.S. at 574-75; *Wong Wing*, 163 U.S. at 237. Further, this case is not one of the narrow circumstances in which the Court has permitted involuntary confinement based solely on a prediction of danger, particularly where, as here, that detention is indefinite. *See, e.g., Salerno*, 481 U.S. at 749 (upheld detention for a finite time and narrowly tailored to government's specific interest in preventing crimes by arrestee).

Turning to the facts of this case, the government has "never [before] suggested [that Mr. Ma] is a flight risk." Pet. App. 60a; R 246. And the record belies any such contention. Cert. Op. 10, 10 n.12. Mr. Ma is currently at

liberty and reporting to the INS every month, as required.[17]

Likewise, there is no evidence of any present danger to the community. The only possible evidence offered is Mr. Ma's single criminal conviction, unsubstantiated speculation of present gang affiliation, and his participation in a hunger strike. But the record confirms that these are merely assertions that fall far short of the requisite compelling and particularized showing necessary to justify further, much less indefinite, detention on this basis. *Contrast Salerno*, 481 U.S. at 750.

While Mr. Ma's prior conviction was for a serious offense, the offense was not the intentional crime the government has repeatedly and inaccurately portrayed it to be. Further, he served a sentence within the standard applicable sentencing range under state law and, in fact, the Department of Corrections awarded him credit against that term for good behavior. Further, there is no evidence that Mr. Ma is presently affiliated with a gang, or that he maintained gang affiliations in his over four years in state and INS custody. To the contrary, Mr. Ma's record contains "abundant information about [Mr. Ma's]

[17] Although the government has repeatedly turned to general statistics throughout the appellate process to suggest Mr. Ma is now a risk of flight, these statistics, as noted by this Court, should not be "imputed generally to all aliens subject to deportation." *Carlson v. Landon*, 342 U.S. 524, 538 (1952). Equally, the Washington Legal Foundation's reliance on statistics to presume that individuals like Mr. Ma are recidivists is misplaced. The Los Angeles study relied upon by *amicus* tracked recidivism among aliens who were unlawfully present in the United States, not long-time residents like Mr. Ma.

relationships with his parents and siblings, employment prospects, and plans to avoid gang relations and criminal behavior, all of which oppose a finding of future dangerousness." Pet. App. 60a n.3; SER 318-69. And the only "behavioral" problem in his more than four years of custody was his participation in a hunger strike in 1997. Pet. App. 7a, 79a-85a.

Now the government relies upon Mr. Ma's arrest nine months ago for an alleged misdemeanor assault to suggest the lower courts' decisions resulted in the release of a dangerous alien. But the Kent Municipal Court, which has the primary responsibility for protecting the public under these circumstances, ordered Mr. Ma released on bond. More importantly, the court dismissed the case with prejudice. The City of Kent has released Mr. Ma's bond and Mr. Ma has continued to abide by all conditions of his INS release. Cert. Opp. 10a n.12, 19a.

3. *Alternatives less restrictive than detention are available.*

Finally, in evaluating whether detention is excessive, this Court considers whether there are less restrictive alternatives to custody which could address the government's interests while still protecting Mr. Ma's fundamental liberty interest. *See, generally, Jackson*, 406 U.S. at 731-39; *Flores*, 507 U.S. at 302.

Mr. Ma is released subject to supervision by the INS, which includes restrictions on travel, livelihood and associations. 8 U.S.C. § 1231(a)(3) (1999). And the Attorney General and her agents are not left without recourse should Mr. Ma violate the terms of his supervision or

commit another offense. Mr. Ma can be detained and incarcerated if he engages in criminal activity, and he is subject to penalties, including imprisonment for any willful violation of his order of supervision, or for failing to appear for deportation. 8 U.S.C. § 1231(a)(3) (1999), 8 U.S.C. § 1253(a)(1) (1999) and 8 U.S.C. § 1253(b) (1999) (set forth in relevant part, *infra* at App., 16a-17a); Pet. App. 32a, 33a n.31. There is no evidence or reason to believe that the government's interests in protecting the community would not be "vindicated by the ordinary criminal processes involving the charge and the conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct." *Foucha*, 504 U.S. at 82.

4. *Conclusion.*

The government's showing in this case would never, in any other circumstance, support the ongoing, indefinite detention of a person in this country and there is no reason why it should suffice in the case of a deportable alien. Mr. Ma's release under an order of supervision is narrowly tailored and satisfies the government's legitimate interests. Detention would, therefore, be excessive in violation of his right to due process of law under the Fifth Amendment of the United States Constitution.

ARGUMENT II

A NARROW CONSTRUCTION OF § 1231(a)(6) TO PERMIT DETENTION BEYOND THE 90-DAY REMOVAL PERIOD FOR A REASONABLE TIME IN ORDER TO EFFECTUATE DEPORTATION IS A REASONABLE INTERPRETATION OF THE PLAIN LANGUAGE OF § 1231(a)(6) THAT IS SUPPORTED BY THE LEGISLATIVE HISTORY AND ELIMINATES THE CONSTITUTIONAL QUESTION.

As demonstrated above, the Attorney General's construction of § 1231(a)(6), particularly as applied in this case, poses serious questions as to the statute's validity under the Fifth Amendment. The alternative reasonable interpretation of § 1231(a)(6) suggested by the circuit court, *i.e.*, that the statute permits detention for a reasonable time in order to effectuate deportation, avoids this constitutional question, and should be followed by this Court because it is not "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 577 (1988); *see also Jones v. United States*, 529 U.S. 848, 120 S. Ct. 1904, 1911 (2000).

The thrust of the government's argument is that the circuit court's interpretation of § 1231(a)(6) is wrong because there is no clear congressional intent to "mandate release."[18] Pet. Br. 18-48. This argument misconstrues the

[18] To the extent that the government suggests that the circuit court's interpretation results in the unprecedented release of criminal aliens, the government is ignoring the fact that the history of post-final order detention statutes underscores that those statutes have always favored release of persons ordered deported, with detention being the exception.

doctrine of constitutional avoidance. Under this canon, the only question before the Court is whether the statute can be interpreted in an alternative manner that avoids the constitutional problem otherwise raised, and is not plainly *contrary* to Congress' intent. *DeBartolo*, 485 U.S. at 575, 577. The government fails to provide any evidence of "plain" intent by Congress to authorize the prolonged detention of undeportable aliens. Rather, construing § 1231(a)(6) to authorize detention for a reasonable time in order to execute a deportation order in a safe and expeditious manner is entirely consistent with the plain language of § 1231(a)(6), the statutory scheme's evolution, the provision's legislative history, and this Court's due process jurisprudence.

A. The Plain Language of 8 U.S.C. § 1231(a)(6), When Viewed in its Statutory Context, Supports the Circuit Court's Interpretation of That Provision.

The first step in ascertaining the intent of Congress is to consider the plain language of the statute at issue, including the context in which it appears. *See Deal v. United States*, 508 U.S. 129, 132 (1993). Neither the plain language of § 1231(a)(6) nor the statutory scheme of which it is a part reveals a "plain" congressional intent to permit indefinite detention of those who fall within its scope.

See infra 40 & 40 n.30. Moreover, neither of the courts below mandated release in all cases; under either analysis, a case-by-case determination must be made to determine whether the detention sought is reasonable.

1. *The plain language of § 1231(a)(6) is ambiguous.*

Section 1231(a)(6) provides that certain aliens who cannot be removed by the expiration of the 90-day removal period "may be detained beyond the removal period[.]" The term "beyond" simply means "to a degree or amount greater than."[19] Thus, on its face, the statute provides for detention beyond the removal period but is silent about *how long* beyond that period the Attorney General may detain a person ordered deported. Pet. Br. 15, 22; Pet. App. 9a-10a. As the circuit court explained, "to say that the INS may hold persons beyond a particular date does not answer the question 'for how long?' " Pet. App. 10a, 24a-25a.

The government argues that, by this silence, Congress made its intent unmistakably clear to permit indefinite detention irrespective of whether the person's deportation is foreseeable. Pet. Br. 21-29. But that argument depends on construing § 1231(a)(6)'s authorization of detention past the statutory "removal period" for an *indefinite* time, a temporal component that simply does not appear in the plain language. Pet. App. 24a-25a; *see also, e.g., Reves v. Ernst & Young*, 507 U.S. 170, 178-79 (1993) ("We may mark the limits of what [the language in a statute] might mean by looking again at what Congress did *not* say." (emphasis in original)). Had Congress intended § 1231(a)(6) to authorize detention for an indefinite duration, Congress could easily have included the

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[19] *Webster's II, New Riverside Dictionary, Office Edition*, 68 (1984).

language "without limitation," "indefinitely" or "until departure," but it did not.[20] Pet. App. 24a-25a n.25. Thus, "any construction of [§ 1231(a)(6)] *must read in some provision* concerning the length of time beyond the removal period detention may continue, whether it be 'indefinitely,' 'for a reasonable time,' or some other temporal measure." Pet. App. 10a (emphasis added).[21]

2. *The Circuit Court's Interpretation of § 1231(a)(6) Is Consistent with Its Statutory Context.*

An examination of § 1231(a)(6)'s statutory context confirms that when Congress wanted to address the problem of undeportable aliens, it did so expressly, and not by implication.

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[20] In fact, in 1949 the House passed legislation that specifically authorized the detention of criminal and subversive aliens "until departure from the United States." *See Hearings on the Detention and Deportation of Aliens*, H. Rep. Subcmte. 1 of the Comm. on the Judiciary, May 20, 1949 at 1-2 (text of H.R. 10). This legislation was ultimately rejected on the grounds that indefinite detention presented a constitutional question. *See Report Facilitating Deportation of Aliens*, S. Rep. No. 81-2239 at 3, 5-6, 8-9 (1950). *See generally, infra* p. 37.

[21] The government's emphasis on the term "may," as well as the fact that the statute authorizes the Attorney General to detain post-order non-aggravated felons whom she determines to be dangerous is misplaced. Pet Br. 22. Nobody denies that the language of the statute is permissive, nor that the statute contemplates detention based on dangerousness. However, neither point resolves the question of whether, in enacting § 1231(a)(6), Congress intended to authorize indefinite detention of aliens whose removal cannot be accomplished.

For instance, at the same time as Congress enacted § 1231(a)(6), it enacted 8 U.S.C. § 1231(a)(1)(C) to address the problem of aliens who cannot be deported because they are obstructing their own deportation, explicitly authorizing their continued detention during such periods. 8 U.S.C. § 1231(a)(1)(C) (1999); *see also* Pet. Cert. 22 n.13; Pet. Br. 42 n.25. Similarly, Congress strengthened a provision, 8 U.S.C. § 1253(d), which authorizes the Secretary of State to discontinue issuance of immigrant and non-immigrant visas to nationals of recalcitrant countries who deny or delay accepting return of aliens. 8 U.S.C. § 1253(d) (1999); *see also* Pet. App. 24a-25a n.25 (citing 8 U.S.C. §§ 1231(a)(1)(A), 1231(a)(1)(C), 1231(b)(2)(C), 1231(b)(2)(D), 1231(c)(3)(A), 1231(c)(3)(B) (1999), as examples of how Congress is aware of time limitations in the detention and deportation context).[22]

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[22] The government cites another provision, 8 U.S.C. § 1231(a)(7) – which authorizes work authorization for individuals who cannot be removed because their countries will not take them back – to support its argument that if Congress had intended § 1231(a)(6) to place a limit on the detention of such aliens, it would have stated so explicitly. Pet. Br. 25-26. But § 1231(a)(7) can be as easily read to demonstrate the knowledge of Congress that such individuals would be released on supervision rather than remaining in detention. It says nothing about whether those individuals can be subjected to indefinite detention under § 1231(a)(6).

The government's reliance on § 1226(c) is similarly misplaced. Pet. Br. 16, 27, 28. That Congress authorized the mandatory detention of criminal aliens during the *pendency* of their *removal proceedings* reveals nothing about whether it intended to authorize the indefinite detention of aliens whose removal orders cannot be effectuated within a reasonable period of time.

Moreover, the present detention statute contains two provisions that impose criminal sanctions on aliens who either refuse to cooperate with their removal or who, having been released from detention, thereafter wilfully violate their conditions of release. *See* 8 U.S.C. §§ 1253(a), (b) (1999). These penal provisions were initially added to the Immigration and Nationality Act (INA) in 1950 as a *substitute* for a proposed provision that would have authorized indefinite detention of undeportable aliens; this indefinite detention provision was rejected on constitutional grounds. *See Report Facilitating Deportation of Aliens*, S. Rep. No. 81-2239 at 3, 8 (1950). All of these provisions are part of a statute, the express presumption of which, is that all persons ordered removed "shall" be removed from the United States within 90 days. 8 U.S.C. § 1231(a)(1)(A) (1999); Pet. Br. 19-20. And in general, those who are not removed within that period must be released on an order of supervision. 8 U.S.C. § 1231(a)(3) (1999).

In construing the statutory language and its context, courts do not assume Congress intends to infringe constitutionally protected liberties nor that it intends to permit an anomalous result. *DeBartolo*, 485 U.S. at 575, 577; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *United States v. Brown*, 333 U.S. 18, 26-27 (1948); Pet. App. 24a. But under the Attorney General's interpretation of § 1231(a)(6), for instance, Congress authorized the indefinite detention of not only dangerous persons but also a wide range of people whose deportation orders, for instance, were based solely upon the failure to maintain non-immigration status, *e.g.*, overstaying a visa. 8 U.S.C. § 1231(a)(6) (referencing 8 U.S.C. § 1227(a)(1)(C)). It is absurd to assume Congress intended to permit the indefinite detention of visa-overstays, even without a showing of danger or flight risk, as would logically follow from the Attorney General's reading of the statute. *See* Pet. Br. 21 n.13; 8 U.S.C. § 1231(a)(6) (authorizing post-deportation detention of aliens deported under, *inter alia*, 8 U.S.C. § 1227(a)(1)(C)).

Moreover, it would be anomalous to impute to Congress the intent to authorize the indefinite civil detention of such aliens when other provisions of the statute expressly place a limit on how long an alien can be *criminally* sentenced for violating conditions of release, 8 U.S.C. § 1253(b) (1999) (maximum sentence one year), or wilfully preventing one's deportation (maximum sentence of 10 years). 8 U.S.C. § 1253(a).

In short, the plain meaning of "beyond the removal period," in the context of the entire statutory scheme, is at best ambiguous. Certainly it does not evince a "plain" intent to permit indefinite detention.

B. The Legislative History Supports the Circuit Court's Interpretation of § 1231(a)(6).

1. *The statutory evolution of immigration detention statutes demonstrates that the circuit court's interpretation is not contrary to Congress' "plain" intent.*

The government places great reliance on a series of amendments between 1988 and 1996 which imposed strict restrictions on the release of criminal aliens both during and after their removal proceedings to bolster its view that Congress intended to authorize indefinite post-final

order detention of aliens ordered deported. Pet. Br. 29. Mr. Ma agrees that these amendments evidence Congress' intent to treat criminal aliens more harshly than other aliens ordered deported. But nowhere do these statutes expressly provide for indefinite detention of those aliens who cannot be deported through no fault of their own. Nor is there evidence that that was Congress' intent. Indeed, when viewed in the context of the pre-1988 statutory framework, under which post-final order detention of deportable aliens was strictly limited, it is the government's construction – which *assumes* Congress, for the first time, intended to permit the INS to "hold people in detention for the remainder of their lives," Pet. App. 24a – that marks a "stark" departure from past law. Pet. Br. 29.

(a) Post-Final Order Detention Pre-1988

Before 1950, the Immigration Act of 1917 did not contain any time limitation on the Attorney General's authority to detain an alien ordered deported. *See* Senate Report 2239, July 20, 1950, pp. 5-6.[23] Nonetheless, that

[23] The 1917 statute and § 1231(a)(6) are analogous in that neither sets forth a specific time period for detention post-deportation order:

Section 19 of the 1917 Act	*8 U.S.C. § 1231(a)(6)*
Any alien who [commits any of the enumerated offenses] . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.	An alien ordered removed . . . may be detained beyond the removal period and, if released, shall be subject to . . . supervision . . .

See infra, App. 1a-2a.

statute was uniformly construed by the courts to authorize detention for only a "reasonable" period of time to effectuate deportation. *Wolck v. Weedin*, 58 F.2d 928, 930-31 (CA9 1932); *Saksagansky v. Weedin*, 53 F.2d 13, 16 (CA9 1931); *see also United States ex rel. Ross v. Wallis*, 279 F. 401, 403 (CA2 1922).[24]

In 1949, the House proposed a bill to allow the government to detain deportable persons for up to six months in order to effectuate a deportation order. For a subclass of criminal aliens and "subversives," however, the bill specifically called for their indefinite detention "until departure from the United States." Cong. Rec. – House, July 17, 1950 at 10449; H.R. Rep. No. 81-1192 at 2, 6-7, 9-10 (1949). The Senate Committee rejected the indefinite detention provision on the grounds that it "appears to present a Constitutional question," and provided "in its stead penal provisions to be invoked by judicial process against deportable aliens . . . who fail[ed] to depart from the United States."[25] *Report Facilitating Deportation of Aliens*, S. Rep. No. 81-2239, at 8 (1950). Thus even in the Cold War context of the 1950's, Congress recognized the

[24] The government attempts to diminish the import of these decisions simply because they were decided before this Court's decision in *Mezei*, 345 U.S. 206 (1953). Pet. Br. 24. However, as set forth *supra* pp. 15-17, *Mezei* is distinguishable from these cases, particularly as they involved *deportable*, as opposed to *excludable*, aliens.

[25] These penal provisions were later enacted as part of the Internal Security Act of 1950, but with a requirement of a "wilful" failure to depart.

due process rights of deportable aliens and the constitutional problems raised by their detention pending deportation.

As noted earlier, the final version of the 1950 Act did include a provision, commonly referred to as the "six-month rule," which authorized post-final order detention of deportable aliens for a maximum of six months, followed thereafter by release under supervision. Congress viewed this as a grant of additional authority, since courts had previously held that aliens could be detained for only a few months. *See supra* p. 32 n.20, citing Senate Report 81-2239 (1950) at 5-6. In explaining the Committee's choice of six months, the Senate Report states, "[t]he Committee considers that six months is a reasonable time to grant to our Government within which to conclude the necessary detail work involved in some cases before deportation of an alien can be effected." *Id.* at 6. *See former* 8 U.S.C. § 1252(c)(1952) (reprinted at App. *infra* 3a); Pet. Br. 30. Federal courts strictly interpreted the six-month time limit contained in the statute as prohibiting any detention of deportable aliens beyond six months. *See, e.g., Shrode v. Rowoldt*, 213 F.2d 810, 813-14 (CA8 1954); *see also Oguachuba v. INS*, 706 F.2d 93, 96 (CA2 1983); *Johns v. Dept. of Justice*, 653 F.2d 884, 890 (CA5 1981); *Castillo-Gradis v. Turnage*, 752 F. Supp. 937, 941 (S.D. Cal. 1990).[26]

[26] Moreover, even though the statute authorized detention for six months, the courts continued to impose a reasonable time limit on detention depending upon whether the detention served the Attorney General's legitimate interest in effectuating deportation. *See, e.g., Kusman v. District Director*, 117 F. Supp. 541, 544 (S.D.N.Y. 1953); *United States v. Witkovich*, 140 F. Supp. 815, 819 (N.D. Ill. 1956); *Nwankwo v. Reno*, 819 F. Supp. 1186 (E.D.N.Y. 1993); *Iheme v. Reno*, 819 F. Supp. 1192 (E.D.N.Y. 1993).

(b) 1988-1996 Criminal Alien Amendments

The government places great weight on a series of amendments in 1988, 1990 and 1991 which eliminated the six-month rule for aliens with aggravated felony convictions and prohibited their release except under certain circumstances. Pet. Br. 31-32; *see former* 8 U.S.C. §§ 1252(a)(2)(A) & (B) (1991); Pet. App. 24a & n.25. By adding mandatory language prohibiting the release of aggravated felons, Congress for the first time provided a statutory basis for the INS to detain a limited group of deportable aliens beyond a six-month period. But research disclosed no evidence – on the face of the statutes or in the legislative history – that Congress intended this language to authorize the indefinite detention of undeportable aliens.[27]

Likewise, the 1996 amendment, § 440(c) of AEDPA[28] – which eliminated the Attorney General's discretion to release aggravated felons from detention even if they posed no danger or flight risk – does not contain any express reference to detention of undeportables. 8 U.S.C. § 1252(c) (April 24, 1996). This absence is particularly

[27] Indeed, because these amended provisions make no specific mention of undeportable aliens, they could just as plausibly be construed as not applying under such circumstances. This would not be surprising given that undeportable aliens comprise a small percentage of the total number of deportable aliens. *See supra* p. 33 n.22.

[28] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1277.

significant when compared to § 508(c)(2)(C) of AEDPA, which contained express language allowing for detention of alien terrorists "when no country is willing to receive such alien." The absence of similar express language in AEDPA § 440(c) suggests that it was not intended to authorize indefinite detention of undeportable aliens.

In any case, when Congress enacted the current statute, § 1231(a)(6), in 1996 as part of IIRIRA,[29] it repealed the mandatory language in the prior provisions which *prohibited* release of certain criminal aliens. In its place, Congress substituted the *permissive* language of § 1231(a)(6), granting the INS discretion to release criminal aliens or detain them beyond the 90-day period. Pet. App. 24a n.25. Thus, even assuming that the mandatory language authorized indefinite detention, it cannot be said that, by replacing that language with the permissive language in § 1231(a)(6), Congress manifested clear intent to authorize the indefinite, and potentially permanent, detention of undeportable persons.[30]

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[29] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 301, 110 Stat. 3009-575.

[30] The government's citation to *Carlson v. Landon*, 342 U.S. 524 (1952), to suggest *detention* is the norm, and release the exception, is misplaced. That decision dealt with the validity of detention without bond of an alleged Communist *pending deportation proceedings*. 342 U.S. at 526-27; *see also Witkovich*, 353 U.S. at 201 (*Carlson* involved the question of "whether an alien can be detained during the customarily brief period pending determination of deportability"; it did not involve the issue of whether an alien can be detained after entry of removal order that cannot be executed); Pet. App. 14a n.16. In fact, release from detention for deportable aliens has always been the norm, detention the exception. *See Matter of Patel*, 15 I&N Dec. 666 (BIA 1976).

2. *An examination of the legislative history of § 1231(a)(6) demonstrates that the circuit court's interpretation is not contrary to Congress' "plain" intent.*

Plainly the general thrust of § 1231(a)(6) was the expeditious deportation of persons ordered deported, and criminal aliens in particular. However, nowhere in the legislative history of § 1231(a)(6) is there any discussion or indication that Congress intended to indefinitely detain aliens whose final deportation orders could not be effectuated, through no fault of their own.

Indeed, the extensive committee reports on IIRIRA, the "authoritative source" of legislative intent, *Garcia v. United States*, 469 U.S. 70, 76 (1984), are conspicuously silent as to Congress' intentions. Given the long history of limited post-order detention and the fact that prior efforts to authorize indefinite detention of aliens were rejected by Congress on constitutional grounds, the government is hard-pressed to show that Congress would have authorized such a dramatic change without at least some debate and discussion of the issue.

The government's reliance upon letters and testimony by the Department of Justice to individual members of Congress is misplaced. Pet. Br. 40-42 & n.24. These letters do not directly address the particular question of whether Congress intended to authorize indefinite detention. More importantly, statements by interested parties

concerning the nature and effect of the bill are an unreliable basis for inferring the intent of Congress, particularly where, as here, they are not incorporated into a committee report or adopted by a committee member.[31] *See Garcia*, 469 U.S. at 76, 78.

Finally, isolated comments of Senator Kennedy regarding an earlier AEDPA mandatory detention provision do not pertain to the statute at issue here. Pet. Br. 37. Even if they did, they are not probative of Congress' purported clear intent to permit indefinite detention, potentially life imprisonment, of undeportable aliens, particularly where the subsequent legislative history contains no comment upon, explanation of, or opposition to Senator Kennedy's comments regarding the validity of the provision. Indeed, as this Court has repeatedly found, "the fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981) (citing to *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951), and *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972)).

3. *Conclusion.*

At the very least, Mr. Ma's detention pursuant to § 1231(a)(6) raises serious constitutional doubts as to the validity of § 1231(a)(6). To avoid the constitutional question raised by the Attorney General's interpretation of § 1231(a)(6), this Court should construe the statute, as suggested by the circuit court, consistent with its plain language and legislative history, to permit detention beyond the removal period only for a reasonable time to effectuate deportation. *DeBartolo*, 485 U.S. at *575; Witkovich*, 353 U.S. at 199; Pet. App. 11a-24a.[32] In each individual case that interpretation avoids an unreasonable risk of flight or unreasonable risk of danger to the community viewed in light of the forseeability of effectuating deportation.

The fact that the statute also covers individuals who, unlike Mr. Ma, have been ordered excluded, does not render the circuit court's interpretation unreasonable or the government's interpretation constitutionally permissible. *See* Pet. Br. 46. Congress cannot circumvent the Constitution by its choice to incorporate both groups of individuals under one umbrella provision; the canon of constitutional avoidance must still apply. *See, e.g., Public Citizen v. United States Department of Justice*, 491 U.S. 440, 465-67 (1989); and *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 936 n.36 (CA D.C. 1995) (applied same construction of the statute from *Public Citizen* in case that would not have raised constitutional problems) (citation omitted).[33]

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[31] The government's reliance upon the statements of then INS General Counsel David Martin is equally unpersuasive, particularly where his testimony occurred at an ancillary hearing that was not convened to address the pending legislation. Pet. Br. 40.

[32] As the circuit court noted, a reasonable construction of the statute also avoids violating international law. Pet. App. 29a-31a.

[33] In fact, an interpretation that permits detention for a reasonable time in order to effectuate deportation in a safe and

C. Because the Government's Interpretation of § 1231(a)(6) Poses a Serious Constitutional Question, a More Deferential Standard of Review Does Not Apply.

The government's argument against the application of the constitutional avoidance doctrine in this case further rests on the erroneous assumption that the Attorney General's interpretation of § 1231(a)(6) is entitled to substantial deference under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), as it was applied in *Aguirre-Aguirre*, 526 U.S. at 415.

However, as this Court found in *DeBartolo*, where the agency's interpretation of a statute raises serious questions regarding the provision's constitutional validity, the constitutional avoidance doctrine is applicable; *Chevron* deference is not.[34] *DeBartolo*, 485 U.S. at 574-75; *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Equally, Mr. Ma's claim is not insulated from judicial scrutiny simply because it involves immigration. The doctrine of constitutional avoidance applies with equal force in immigration cases, as it would in any other matter. *Witkovich*, 353 U.S. at 202.

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expeditious manner still requires each case be considered on its particular facts. Accordingly, what may be reasonable for an "excludable" alien may not be the same for someone like Mr. Ma.

[34] Unlike the instant case, *Chevron* deference applied in *Aguirre-Aguirre* because that case did not involve a serious constitutional question regarding the validity of the challenged statute.

The government objects to that conclusion, arguing that the circuit court's reliance on *Witkovich* is misplaced. Pet. Br. 47-48. However *Witkovich* is simply an example of how "courts have often read limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems." Pet. App. 12a. Certainly invoking the canon here, as this Court did in *Witkovich*, is entirely appropriate where "issues touching liberties that the Constitution safeguards, even for an alien 'person' would fairly be raised on the Government's view of the statute." *Witkovich*, 353 U.S. at 201.

For all the reasons stated, the circuit court properly interpreted the statute in a manner consistent with ordinary tenets of statutory construction and the well-established doctrine of constitutional avoidance.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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December 22, 2000

APPENDIX A

Immigration Act of 1917, 39 Stat. 874

Sect. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime of moral turpitude, committed at any time after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes

gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude, at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by Immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

APPENDIX B

1952 Statute

Former Section 242(c), 8 U.S.C. § 1252(c), 66 Stat. 208 (1952), reads, in pertinent part:

Sec. 242(c) [8 U.S.C. § 1252 (1952)]

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision

and detention pending eventual deportation as is authorized in this section . . .

APPENDIX C

1988 Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (1988)) as amended by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470, reads in relevant part:

Sec. 242 [8 U.S.C. 1252 (1988)]

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . .

(2) The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction. Notwithstanding subsection (a) of this section, the Attorney General shall not release such felon from custody.

* * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during

which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is authorized, notwithstanding section 5 of Title 41 or section 278a of Title 40 to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation,

remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

APPENDIX D

1990 Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (1990)) as amended by the Immigration Act of 1990 § 504, Pub. L. No. 101-649, 104 Stat. 4978, reads in relevant part:

Sec. 242 [8 U.S.C. 1252 (1990)]

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . .

* * *

(2)(A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B) of this section, the Attorney General shall not release such felon from custody.

(B) The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat to the community and that the

alien is likely to appear before any scheduled hearings.

* * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section.

APPENDIX E

1991 Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (1991)) as amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751, reads in relevant part:

§ 1252. Apprehension and deportation of aliens

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . .

(2) (A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B) of this section, the Attorney General shall not release such felon from custody.

(B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a

threat to the community and that the alien is likely to appear before any scheduled hearings.

* * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney

General is authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is authorized, notwithstanding section 5 of Title 41 or section 278a of Title 40 to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

APPENDIX F

1996 AEDPA Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (Apr. 24, 1996)) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 404(c), Pub. L. No. 104-132, 110 Stat. 1277, reads in relevant part:

§ 1252. Apprehension and deportation of aliens

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

> (1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2), any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.
>
> * * *
>
> (2) The Attorney General shall take into custody any alien convicted of any criminal offense covered in Section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by Section 241(a)(2)(A)(ii) for which both predicate offenses are covered by Section 241(a)(2)(A)(I),

upon release of alien. Notwithstanding paragraph (1) or subsections (c) and (d) of this section, the Attorney General shall not release such felon from custody.

* * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section.

(d) Supervision of deportable alien; violation by alien

Any alien, against whom a final order of deportation as defined in subsection (c) of this section heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General.

APPENDIX G

1. Section 1253(a)(1) of Title 8 of the United States Code (1999) provides in relevant part:

§ 1253. Penalties related to removal

(a) Penalty for failure to depart

(1) In general

Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who –

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined under Title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph

(1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

2. Section 1253(b) of Title 8 of the United States Code (1999) provides in relevant part:

An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this title or knowingly give false information in response to an inquiry under such section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.