No. 00-38

In the Supreme Court of the United States

JANET RENO, ET AL., PETITIONERS

v.

KIM HO MA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during that 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released, and the alien's custody is subject to periodic administrative review.

PARTIES TO THE PROCEEDINGS

Petitioners are the Attorney General of the United States, the Immigration and Naturalization Service (INS), and the INS Acting District Director in Seattle, Washington. The three petitioners were named as defendants in the district court and were appellants in the court of appeals. Respondent is Kim Ho Ma, who brought the instant petition for a writ of habeas corpus in the district court and was appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General and the other federal petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 208 F.3d 815. The July 9, 1999, joint order of five district court judges in this case and four other cases (App., *infra*, 34a-51a) is reported at 56 F. Supp. 2d 1149. The July 13, 1999, opinion of the district court ordering an evidentiary hearing in respondent's case (App., *infra*, 52a-54a) is reported at 56 F. Supp. 2d 1165. The September 29, 1999, opinion of the district court granting respondent habeas relief (App., *infra*, 55a-61a) is not reported. The June 2, 1999, custody decision by the Immigration and Naturalization Service (INS) District Director and the underlying May 6, 1999, custody review report (App., *infra*, 77a-86a) are not reported. The September 29, 1999, custody decision of the

INS headquarters review committee (App., *infra*, 87a-89a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2000. A petition for rehearing was denied on June 2, 2000 (App., *infra*, 62a-63a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 1231(a) of Title 8 of the United States Code provides, in relevant part:

> § 1231. Detention and removal of aliens ordered removed
>
> (a) Detention, release, and removal of aliens ordered removed
>
> (1) Removal period
>
> (A) In general
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> * * * * *
>
> (2) Detention
>
> During the removal period, the Attorney General shall detain the alien. Under no circumstances during the removal period shall the Attorney General release an alien who has been found inadmissible under section

1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration official periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal

period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

2. The regulations of the Immigration and Naturalization Service that currently govern the detention of aliens beyond the 90-day removal period, 8 C.F.R. 241.4, are set forth at App., *infra*, 90a-91a.

3. The February 3, 1999, memorandum from the Executive Associate Commissioner of the INS to INS Regional Directors, entitled "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," is set forth at App., *infra*, 64a-68a. The August 6, 1999, memorandum from the Executive Associate Commissioner of the INS to INS Regional Directors entitled "Interim Changes and Instructions for Conduct of Post-order Custody Reviews," is set forth at App., *infra*, 69a-76a.

STATEMENT

1. a. Respondent is a native and citizen of Cambodia who entered the United States as a refugee in 1985 and became a lawful permanent resident in 1987. App., *infra*, 56a. In 1996, respondent was convicted in state court of first degree manslaughter after he, along with four other gang members, "ambushed and shot a fellow gang member" in April of 1995. *Ibid.*; A.R. 8-9, 144.[1] Respondent was sentenced to three years and two months' imprisonment. App., *infra*, 60a n.4.

b. On June 6, 1997, respondent was released from state custody and, pursuant to a detainer previously lodged by the INS, was transferred to INS custody and ordered detained. A.R. 48, 194, 249. On July 3, 1997, the INS issued respondent a notice to appear, charging him with being subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998)

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[1] A.R. refers to the certified Administrative Record filed by the INS in the district court.

because he had been convicted of an "aggravated felony," which includes a crime of violence for which the term of imprisonment imposed was one year or more, see 8 U.S.C. 1101(a)(43)(F) (Supp. IV 1998). A.R. 36, 186.

On September 12, 1997, an immigration judge found that respondent was subject to removal as charged and was ineligible for asylum and withholding of removal. A.R. 63-69. Respondent appealed that ruling to the Board of Immigration Appeals (Board), which denied relief. A.R. 4-10. In an opinion dated October 26, 1998, the Board agreed that respondent was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). A.R. 4-5. The Board further held that respondent was ineligible for withholding of removal under 8 U.S.C. 1231(b)(3)(B)(ii) (Supp. IV 1998), which precludes such relief if "the alien, having been convicted of a particularly serious crime, is a danger to the community of the United States." A.R. 4-5. The Board agreed with the immigration judge that respondent's conviction for participating in "a gang related violent ambush resulting in the death of [the] victim constitutes a particularly serious crime" (*id.* at 9), noting, *inter alia*, that he "received almost the maximum sentence that could be ordered based on his criminal record" (*id.* at 8).

c. During the pendency of his removal proceedings, respondent twice requested redetermination of the denial of his request for release on bond. On October 7, 1997 (A.R. 83-88), and December 31, 1997 (A.R. 35-41), the immigration judge denied those requests. The immigration judge determined that respondent's detention was authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, §303(b)(3)(B), 110 Stat. 3009-587—the transitional period custody rules, which authorized the Attorney General to release a lawfully admitted alien in respondent's circumstances only if the alien "satisfies the Attorney General that the alien will not pose a

danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings." A.R. 39, 87. The immigration judge determined that respondent "would be a danger to the community if he is released," based, *inter alia*, on a psychological evaluation of respondent stating that he "exhibited little insight, denied any knowledge of the instant offense, and said he was not involved in any gang activity despite information to the contrary." *Id.* at 40.[2] The immigration judge also pointed to respondent's lack of credibility in denying that he abused drugs and found "nothing in the respondent's file to indicate that he was rehabilitated." *Ibid.*[3]

2. a. Respondent's order of removal became final on October 26, 1998. The final order of removal extinguished respondent's status as a lawful permanent resident and eliminated any legal right of respondent to remain in this country. See 8 U.S.C. 1101(a)(20); 8 U.S.C. 1101(a)(47)(B)(ii) (Supp. IV 1998); 8 C.F.R. 1.1(p). When the order became final, the INS began the process to remove respondent to Cambodia. By letter dated May 5, 1999, the United States requested travel documents for respondent from the Cambodian government. App., *infra*, 58a.

During the 90-day period following the issuance of respondent's final removal order, respondent was detained by the INS pursuant to 8 U.S.C. 1231(a)(2) (Supp. IV 1998). That

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[2] The report explained that "[p]olice reports indicate that [respondent] had been associated with the gang and its members for some time" and that "he was arrested at least twice [before that offense] with one of his codefendants on this case." A.R. 50.

[3] In addition, while respondent was in INS detention, he had to be transferred to another detention facility "[d]ue to behavior problems." A.R. 226. In a declaration in support of his request to be transferred to another facility where other INS detainees were housed, respondent acknowledged that he could "almost understand why the immigration judge may not want to release [him] on a bond." A.R. 231.

section mandates detention, during the 90-day period following entry of a final order, of an alien who, *inter alia*, has been found removable based on a conviction for an aggravated felony.

b. The INS was not able to remove respondent to Cambodia within the 90-day period following entry of his final removal order. Upon expiration of that period on January 24, 1999, respondent was no longer subject to mandatory detention. Instead, he was thereafter detained pursuant to 8 U.S.C. 1231(a)(6) (Supp. IV 1998), which authorizes the detention of an alien who, *inter alia*, has been found removable based on a conviction of an aggravated felony 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."

Respondent's continued detention under 8 U.S.C. 1231(a)(6) is subject to periodic review under the governing INS regulations, 8 C.F.R. 241.4, and implementing directives. See App., *infra*, 64a-68a, 90a-91a. By memorandum dated February 3, 1999, entitled "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," the Executive Associate Commissioner of the INS "clarifie[d] the authority of [INS] District Directors to make release decisions and emphasize[d] the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act [8 U.S.C. 1231(a)(2) (Supp. IV 1998)]." App., *infra*, 64a. The first periodic review mandated by INS procedures is during the 90-day removal period. *Ibid.* Thereafter, a detainee's custody status is automatically reviewed on a periodic basis "to determine whether there has been a change in circumstances that would support a release decision since the 90 day review." *Id.* at 66a.

The INS conducted its first periodic review of respondent's custody in May 1999. That review included an interview of respondent and consideration of supporting documentary material submitted by his family and friends. App., *infra*, 77a-86a. On June 2, 1999, the INS notified respondent that it had decided to continue to detain him, based on a consideration of the factors set forth in the governing regulations and all material submitted by respondent during the review process. *Ibid.* That notice detailed the statement made by respondent and his attorney, as well as the evidence submitted by respondent concerning his family ties, but also noted, under "Community Concerns," that respondent "was a member of the 'Local Asian Boyz' (LAB) in the Seattle area and was convicted of Manslaughter in the 1st Degree." *Id.* at 80a. It also noted that respondent had to be transferred to a different detention facility because of conduct while in INS custody. *Ibid.*

The notice informed respondent that his custody would be subject to review again on December 2, 1999. It also informed respondent that he could, at any time, request a redetermination of his custody status, if supported by evidence that he would appear at all future immigration proceedings and that he would not pose a threat to the community. App., *infra*, 78a.

3. Meanwhile, on February 2, 1999, respondent had filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2241, in the United States District Court for the Western District of Washington. A.R. 208-214. Respondent contended that his native country of Cambodia refused to accept him and that there was no INS panel to review his detention, which, he maintained, rendered his detention indefinite and unconstitutional. *Id.* at 211. Respondent's case was one of approximately 100 such cases then pending in the Western District of Washington.

a. On July 9, 1999, five judges of the district court issued a joint order in respondent's case and four other "lead" cases. App., *infra*, 34a-51a. The judges addressed the cases jointly because they involved substantive and procedural due process challenges similar to those brought by a large number of aliens who were in INS detention in that district following final orders of removal and whose immediate removal was not then possible. *Id.* at 35a. The court did not, however, question that 8 U.S.C. 1231(a)(6) (Supp. IV 1998) authorizes the continued detention of such aliens as a statutory matter. App., *infra*, 38a.

The five-judge panel's joint order established a framework for analyzing an individual habeas petitioner's claim that his detention violates substantive due process. It first rejected the government's submission that the interest of respondent and the other habeas petitioners is the interest in being released into the United States pending their removal. In the panel's view, their interest is, more broadly, a "fundamental liberty interest in being free from incarceration," which requires "strict scrutiny" of any decision to detain aliens in respondent's position. App., *infra*, 43a-44a. The panel rejected the government's argument that a more deferential standard should apply because of the plenary power of the Legislative and Executive Branches over immigration matters, holding that such deference does not extend to detention following a final order of removal. *Id.* at 45a.

Applying strict scrutiny, the five-judge panel acknowledged that detention of aliens such as respondent furthers the permissible governmental interest in securing the safe removal of aliens and the incidental goals of preventing flight and protecting the public from dangerous felons. App., *infra*, 46a. In the panel's view, then, the substantive due process question turns on whether the detention is excessive in relation to those goals. *Id.* at 47a. Resolution of that question, it explained, requires a court to "balance the likeli-

hood that the government will be able to effectuate deportation, against the dangerousness of a petitioner and the likelihood that he will abscond if released." *Ibid.* The panel noted that the government's interest in detention decreases as the probability of removal of the alien decreases, concluding that it would be excessive "to detain an alien indefinitely if deportation will never occur." *Ibid.* Application of the substantive due process test was left to each judge in each individual case. *Ibid.*

The five-judge panel then turned to the procedural due process question. It reasoned that, if there is no substantive due process violation with respect to a particular alien under the framework it announced, it must be determined whether the procedures for detention of the alien are adequate. App., *infra*, 48a. The panel held that the procedures under which INS District Directors made release decisions—based on a review of the administrative file, the alien's written submission or an interview with the alien, and consideration of the criteria identified in 8 C.F.R. 241.4—did not satisfy due process because, in its view, the INS "[did] not meaningfully and impartially review the petitioners' custody status." App., *infra*, 50a. The panel therefore held that each habeas petitioner is entitled to a hearing before an immigration judge at which he or she can present evidence in support of release pending removal, and that the habeas petitioner must be able to appeal any denial of a release request to the Board of Immigration Appeals. *Id.* at 51a.

b. On July 13, 1999, the district court issued an order in respondent's individual case, incorporating the joint order and applying the analysis of that order to his case. App., *infra*, 52a-54a. The court determined that certain facts relevant to determining the weight of the government's interest under the due process analysis were not adequately developed in the record, and it ordered an evidentiary hearing. *Id.* at 54a.

c. On September 29, 1999, following the hearing, the district court granted respondent habeas corpus relief. App., *infra*, 55a-61a. Although the government contended that the court should not adhere to the joint order in light of intervening developments, including the INS's institution of additional review procedures (see page 12, *infra*), the court decided to follow the joint order. *Id.* at 56a n.1.

Applying the framework of the joint order, the court first reviewed the government's representations concerning negotiations between the United States and Cambodia about entering into a formal agreement for the repatriation of Cambodian nationals. App., *infra,* 59a. Those negotiations included a meeting in September 1999 between officers of the State Department and the Cambodian Consulate in Washington, D.C., at which the United States' preliminary proposal for a repatriation agreement was discussed. Despite those developments, the court declared that respondent's "deportation to Cambodia is far from imminent," *ibid.* and concluded that "there is not a realistic chance that the government will accomplish [respondent's] deportation to Cambodia," *id.* at 60a. The court then held that respondent's detention, which it characterized as "indefinite," "violates his right to substantive due process." *Ibid.* The court also noted that, "[e]ven if there were a realistic chance of deporting [respondent], the government has not shown a strong interest in continuing his detention based upon his threat to the public or his proclivity to abscond." *Ibid.* The court directed that respondent be released subject to appropriate conditions. *Id.* at 61a.[4]

d. The district court stayed its order granting habeas relief in order to permit the government time to seek a stay

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[4] In light of its resolution of the case on substantive due process grounds, the court found it unnecessary to address any questions regarding procedural due process. App., *infra*, 61a n.5.

from the court of appeals. App., *infra*, 7a n.9. The court of appeals denied the stay request, and respondent was then released from INS custody on October 25, 1999. *Ibid.* On October 29, 1999, the government filed an application in this Court for a stay of the district court's order pending appeal to the Ninth Circuit. The Court denied that application. 120 S. Ct. 466 (1999).

4. During the pendency of respondent's case in the district court, the INS had implemented additional interim review procedures for cases involving aliens such as respondent who are detained in INS custody following issuance of final orders of removal because their immediate removal is not practicable. See App., *infra*, 69a-76a. By memorandum dated August 6, 1999, the INS Executive Associate Commissioner directed that, under the new interim procedures, a decision to continue an alien in INS custody would be subject to a review by INS headquarters. That headquarters review is similar to that afforded under the Cuban Review Plan, 8 C.F.R. 212.12, which has been in place for a number of years to review the status of Mariel Cubans—Cubans who came to the United States during the Mariel boatlift between April 15 and October 1980, see 8 C.F.R. 212.12(a)—who have been ordered excluded from the United States but who cannot be returned to Cuba at this time. App., *infra,* 71a.

Under the interim procedures, the June 1999 decision to continue respondent in custody became subject to INS headquarters review. That review had not taken place by the time of the district court's order granting habeas corpus relief, but the adoption of the additional review procedures was brought to the court's attention. See App., *infra*, 57a. The headquarters review in respondent's case took place on

September 30, 1999, and the determination was to continue respondent in INS custody. See *Id.* at 87a-89a.[5]

5. The court of appeals affirmed the district court's judgment granting respondent habeas corpus relief, App., *infra*, 1a-33a, but without reaching the constitutional grounds on which the district court had relied. The court of appeals instead relied on statutory grounds, holding that the INS lacks authority under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain respondent beyond the 90-day removal period. App., *infra*, 3a-4a.[6]

The court of appeals acknowledged that Section 1231(a)(6) unambiguously authorizes the Attorney General to continue criminal aliens in custody "beyond the removal period." App., *infra*, 10a. The court concluded, however, that, because Section 1231(a)(6) does not specify a particular length of time during which continued detention is authorized, it should be construed to permit detention "only for a reasonable time beyond the statutory removal period." *Id.* at

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[5] On June 30, 2000, the Commissioner published proposed regulations to put in place a permanent custody-review program that would maintain or enhance the centralized review and other procedural protections set forth in the interim procedures. 65 Fed. Reg. 40,540-40,548.

[6] On March 30, 2000, respondent was arrested for assaulting a female companion. Respondent was released by the state court on bond pending disposition of the resulting criminal charges. On June 26, 2000, the state court dismissed the charges. We have been informed that the State intends to appeal that dismissal.

After respondent's arrest, he had been informed by the INS that it intended to revoke his release from immigration custody based on his violation of the terms of release. Respondent filed a motion in district court on April 7, 2000, seeking an order to prevent the INS from ordering him back into custody for violating his release conditions. On April 10, 2000, the court of appeals issued its decision affirming the district court judgment. In light of that decision, the government moved the district court to stay the hearing set for April 19 on the matter of INS's revocation of respondent's release, and the district court granted that motion.

11a. "In cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future," the court "conclude[d] that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period." *Ibid.* The court explained that it adopted that construction of Section 1231(a)(6) because it allowed the court to avoid deciding the constitutionality of respondent's detention[7]; because it was unwilling to conclude that Congress intended to authorize indefinite detention in the absence of a clear statement to that effect; because it believed that reading a "reasonable time" limitation into Section 1231(a)(6) would be consistent with the Ninth Circuit's interpretation of a similar provision in an earlier immigration statute; and because that interpretation is, in the court's view, more "consonant with international law." *Ibid.*

The court of appeals then concluded that there is no reasonable likelihood that the INS will be able to remove respondent to Cambodia "[i]n the absence of a repatriation

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[7] The court of appeals rejected the government's argument that the constitutional-avoidance doctrine is not applicable in this case because the constitutional question was answered by the Ninth Circuit's en banc decision in *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441 (9th Cir.), cert. denied, 516 U.S. 976 (1995), and this Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). The court distinguished those cases on the ground that they involved excludable aliens, *i.e.* aliens who had not entered the country, rather than aliens who already entered the country and had greater constitutional rights. App., *infra*, 14a-22a. The court noted that the Fifth Circuit, in resolving the constitutional question in *Zadvydas* v. *Underdown*, 185 F.3d 279 (1999), petition for cert. pending, No. 99-7791, had concluded that an alien under a final order of removal stands on essentially the same footing as an excludable alien. App., *infra*, 20a n.23. The court of appeals declined to adopt that approach, however, and decided, instead, to avoid the constitutional question by its statutory construction. *Ibid.*

agreement, extant or pending." App., *infra*, 32a. Therefore, under the court's ruling, the INS was no longer authorized to detain respondent. *Ibid.*[8]

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that the Attorney General is not authorized by 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain respondent even though respondent is under a final order of removal, has been determined by the Attorney General to pose a risk of danger if released, and is entitled to automatic, period administrative review of his custody. That Ninth Circuit decision in this case squarely conflicts with the Tenth Circuit's decision in *Duy Dac Ho* v. *Greene*, 204 F.3d 1045 (2000), which held, *inter alia*, that Section 1231(a)(6) expressly allows the Attorney General, in her discretion, to continue to detain aliens such as respondent. In addition, the result reached by the Ninth Circuit cannot be reconciled with *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), petition for cert. pending, No. 99-7791, which did not question the statutory authorization for detention under Section 1231(a)(6) and rejected a constitutional challenge to such detention.

The scope of the Attorney General's authority to detain criminal aliens under final orders of removal who have been found to pose a threat of danger or flight is a question of exceptional public importance. The decision in this case has already affected a large number of cases pending before the Ninth Circuit and before district courts in that circuit. There are 59 cases pending on the government's appeal to the Ninth Circuit and an additional 40 cases in which a district court has ordered the release of such an alien, but a

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[8] On June 2, 2000, the court of appeals denied rehearing and rehearing en banc. Although an active judge requested a vote on whether to rehear the case en banc, the matter failed to receive a majority of the votes of active judges in favor of en banc consideration. App., *infra*, 62a-63a.

notice of appeal has not yet been filed. And there are approximately 400 cases raising such challenges still pending in various district courts in the Ninth Circuit. The court of appeals' erroneous decision thus has already broadly intruded into the Attorney General's enforcement of the immigration laws and her ability to protect the public, and has ushered in a widespread disruption of the INS's orderly administration and review of the custody of many aliens similarly situated in the Ninth Circuit. For those reasons, and in view of the circuit conflict, review by this Court is warranted.

1. The court of appeals erred in ruling that, because Cambodia has thus far not agreed to respondent's return and the United States does not have a formal repatriation agreement with Cambodia, the Attorney General's continued detention of respondent is not authorized by 8 U.S.C. 1231(a)(6) (Supp. IV 1998).[9] The court of appeals ordered the INS to release respondent from custody even though: (1) the INS, in the exercise of express statutory authority, had decided that respondent should be retained in custody because he would pose a danger to the community if released; (2) the INS has adopted procedures that provide for periodic review of an alien's custody, under which respondent would be afforded the opportunity to demonstrate that he would no longer pose a danger to the community if released; and (3)

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[9] Although the court of appeals "h[e]ld that Congress did not grant the INS authority to detain indefinitely aliens who, like [respondent], have entered the United States and cannot be removed to their native land *pursuant to a repatriation agreement*," App., *infra*, 10a (emphasis added) (see also *id.* at 25a), the question of a need for a formal repatriation agreement was never briefed in the court of appeals. We have been informed by the INS, however, that generally the removal of a criminal alien to another country does not proceed pursuant to a formal repatriation agreement but, rather, is effectuated through the normal process for obtaining travel documents for other nationals of that country.

the State Department is engaged in ongoing negotiations regarding an arrangement with Cambodia that would allow the removal of respondent and other aliens to that country.[10] Nothing in the text of Section 1231(a)(6) justifies the result reached by the court of appeals.

a. The opinion of the court of appeals rewrites an unambiguous statutory provision that was specifically designed, following a series of legislative amendments, to authorize the Attorney General to detain dangerous criminal aliens who are under a final order of removal. Section 1231(a)(6) should not be construed to mandate the automatic release of aliens in circumstances such as these, and thus to vitiate the important authority of the Attorney General to protect the public and to ensure the enforcement of the immigration laws, absent a clear expression of an intent by Congress to effect such a significant departure from past law.

The Immigration and Nationality Act (INA) provides that, once a final order of removal is entered against an alien, the alien becomes subject to detention by the INS for a period of 90 days (the "removal period"), during which period the Attorney General is to remove the alien. See 8 U.S.C. 1231(a)(1)(A) and (2) (Supp. IV 1998). Certain aliens, including aliens who have been found to be removable based on a conviction for an aggravated felony, must be detained during the 90-day removal period. Upon expiration of that 90-day period, the detention of specified categories of

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[10] We have been informed by the INS and the Department of State that, on April 27, 2000, the United States and the Government of Cambodia reached agreement in principle regarding the repatriation of each other's nationals. The two countries memorialized that agreement in principle in a joint statement. We are lodging a copy of that statement with the Court and furnishing a copy to counsel for respondent. We sought to bring this development to the attention of the court of appeals in a reply brief in support of our petition for rehearing en banc, but the court of appeals denied leave to file that reply.

criminal aliens and certain other aliens is governed by 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The text of Section 1231(a)(6) is clear in authorizing the continued detention of the aliens it identifies:

> Inadmissible or criminal aliens.—An alien ordered removed who is inadmissible under section 1182, removable under section 1227 (a)(1)(C), 1227(a)(2), or 1227(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a)(6) (Supp. IV 1998) (emphasis added).

Section 1231(a)(6) sets no limitation on the length of detention beyond the removal period, leaving the continuation of detention to the sound discretion of the Attorney General. At the very least, the Attorney General's interpretation of Section 1231(a)(6) to authorize the detention of aliens in respondent's position is reasonable and therefore entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984), and *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). See also 8 U.S.C. 1103(a)(1) (Supp. IV 1998); *Barrera-Echavarria*, 44 F.3d at 1444 (according *Chevron* deference to Attorney General's interpretation of INA detention provision).

b. The Attorney General's interpretation of the text of Section 1231(a)(6) is fully supported by the evolution over the past decade of the statutory provisions governing detention of criminal aliens under final orders of removal.

Since at least 1990, Congress has unequivocally exempted the detention of aggravated felons following entry of a final order of deportation from any statutory time limit that applied generally to other aliens. Indeed, Congress has consistently allowed, and at times mandated, that the Attorney

General continue to detain aggravated felons. By contrast, nothing in the last decade of amendments to the INA suggests that Congress intended that, rather than having six months to effectuate deportation with varying degrees of authority to detain criminal aliens thereafter, as under prior law, the Attorney General would now be subject to a judicially imposed limitation of only a "reasonable time" beyond 90 days, which in this case was deemed to be no time at all.

Before the enactment of Section 1231(a)(6) in 1996, the provisions of the INA governing the Attorney General's detention of an alien who was subject to a final order of deportation were found in Section 1252 of Title 8, which had been enacted in 1952 as Section 242 of the INA. 66 Stat. 208. Initially, Section 1252(c) and (d) provided that the Attorney General had a six-month period following entry of a final order of deportation during which to effect an alien's deportation. During that period, the alien could be detained or released at the discretion of the Attorney General. 8 U.S.C. 1252(c) (1982). After expiration of that period, "[i]f deportation ha[d] not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation ha[d] not been effected," the alien became "subject to such further supervision and detention pending eventual deportation" as was authorized in Section 1252. 8 U.S.C. 1252(c) (1982). If an alien's final order of deportation was outstanding for more than six months, the alien was, "pending eventual deportation, * * * subject to supervision under regulations prescribed by the Attorney General." 8 U.S.C. 1252(d) (1982).

In 1988, Congress enacted a provision directing the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of his criminal sentence, and not to release such an aggravated felon from custody, notwithstanding 8 U.S.C. 1252(a)(1) (1988), which

otherwise permitted the discretionary release of aliens pending deportation proceedings. See Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470; 8 U.S.C. 1252(a)(2) (1988). In 1990, Congress amended that mandatory-detention provision to specify, *inter alia*, that it applied notwithstanding subsections (c) and (d) of Section 1252—the provisions that otherwise generally governed an alien's detention after he became subject to a final order of deportation. The amendment also added a statutory exception to the mandatory-detention provision that required the release on bond or other conditions of those aggravated felons who had been lawfully admitted for permanent residence. That exception applied, however, only if the Attorney General determined that the alien was not a threat to the community and was likely to appear for immigration hearings. See Pub. L. No. 101-649, § 504(a), 104 Stat. 5049; 8 U.S.C. 1252(a)(2)(A) and (B) (Supp. II 1990).

In 1991, Congress amended the statutory exception to the provision for mandatory detention of aggravated felons to specify that the Attorney General could not release any lawfully admitted alien who was an aggravated felon, "either before or after a determination of deportability," unless the alien demonstrated "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." Pub. L. No. 102-232, §306(a)(4), 105 Stat. 1751; 8 U.S.C. 1252(a)(2)(B) (Supp. III 1991); 8 U.S.C. 1252(a)(2)(B)(1994); see *Ho* v. *Greene*, 204 F.3d at 1056 n.8.

On April 24, 1996, Congress again amended 8 U.S.C. 1252(a)(2) through enactment of Section 440(c) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277. That amendment expanded the group of criminal aliens subject to mandatory detention beyond aggravated felons, to include aliens convicted of other specified crimes. *Ibid.* At the same time, the amendment eliminated the provision allowing the

Attorney General to release criminal aliens, even those lawfully admitted aliens who she determined would not pose a threat of danger to the community or flight if released. *Ibid.*

It is against that backdrop that Congress enacted Sections 305(a)(3) and 306(a)(1) of IIRIRA, which amended the provisions regarding detention of criminal aliens under final orders of removal and moved them from 8 U.S.C. 1252(a)(2) (1994) (as amended by AEDPA) to 8 U.S.C. 1231(a) (Supp. IV 1998). See Pub. L. No. 104-208, §§ 305, 306, 110 Stat. 3009-598, 3009-607.[11] Under the new Section 1231(a), the INA continues to mandate that, following entry of a final order of removal, the Attorney General must detain certain aliens, including aggravated felons, during the removal period (which is now 90 days rather than six months). 8 U.S.C. 1231(a)(1) and (2) (Supp. IV 1998).[12] Section 1231(a) also preserves the Attorney General's authority to detain aggravated felons thereafter, specifying that they "may be detained beyond the removal period." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). Rather than requiring such detention as under AEDPA, however, Congress reinstated the pre-

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[11] IIRIRA also established the transition period custody rules, which were in effect for a two-year period ending in October 1998. IIRIRA § 303(b), 110 Stat. 3009-586 to 3009-587. Although those rules governed detention pending removal proceedings and are not directly implicated in the instant case, they also reflected Congress's intent to restrict the release of criminal aliens, including an alien who "cannot be removed because the designated country of removal will not accept the alien," if the Attorney General was not satisfied that the alien would not pose a danger to the community and would likely appear for scheduled proceedings. 110 Stat. 3009-587.

[12] See also 8 U.S.C. 1226(c)(1) and (2) (Supp. IV 1998) (mandating detention of, among others, aggravated felons pending removal proceedings, with the sole exception of aliens whose release is necessary to protect cooperating witnesses or their family members and only if the alien would not pose a risk of danger or flight).

AEDPA approach, granting the Attorney General discretion to decide whether to detain aggravated felons and any other alien "who has been determined by the Attorney General" to pose a risk of danger to the community or flight if released. 8 U.S.C. 1231(a)(6) (Supp. IV 1998).

There is no evidence to suggest that, in enacting Section 1231(a)(6), Congress intended, contrary to its consistent treatment of the detention of criminal aliens over the course of the preceding decade, to *require* the Attorney General to release an aggravated felon who she determines would pose a danger to the community or a flight risk if released. Section 1231(a)(6) is correctly interpreted, consistent with long-standing congressional intent, to ensure that the Attorney General retains the discretionary authority to detain such aliens.[13]

2. a. The court of appeals' ruling that the Attorney General's authority to detain aliens under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) beyond the removal period is limited to a judicially fashioned and undefined "reasonable time" directly conflicts with the Tenth Circuit's decision in *Ho* v. *Greene*, 204 F.3d at 1057. The Tenth Circuit held, *inter alia*, that Section 1231(a)(6) "is not ambiguous," *id.* at 1056, and "places no time limit on the detention of the aliens whose continued detention it authorizes," including aliens who the Attorney General has determined would pose a risk of danger or flight if released. *Id.* at 1057. To the contrary, it reasoned, the statute "expressly allows for continued detention beyond the

[13] When Congress acted to restrict the release of aggravated felons, it was well aware that certain countries have refused to accept the return of their nationals, and that such refusals could necessitate extended detention of some aliens beyond the removal period. See, *e.g.* IIRIRA § 307(a), 110 Stat. 3009-614 (amending 8 U.S.C. 1253(d) (1994) to authorize the Secretary of State to discontinue granting immigrant visas to citizens of a country that "denies or unreasonably delays" accepting the return of its own nationals from the United States).

removal period with no time limit placed on the duration of such detention." *Ibid.* (emphasis omitted). The Tenth Circuit declined to "substitute its judgment for that of Congress by reading into the statute a time limit that is not included in the plain language of the statute." *Ibid.* The court concluded:

> The unambiguous language of 8 U.S.C. § 1231(a)(6) and the absence of an express time limit on the Attorney General's authority to continue to detain leads this court to conclude that Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens, * * * who cannot be removed within the ninety-day removal period.

Ibid.[14]

The Tenth Circuit, in *Ho*, also rejected a constitutional challenge to continued detention under Section 1231(a)(6). The court noted that any right the aliens in that case had to remain in this country "was extinguished when their removal orders became final." 204 F.3d at 1058 (citing 8 U.S.C. 1101(a)(20); 8 C.F.R. 1.1(p)). The court reasoned that, therefore, the purported liberty interests at stake "are most appropriately viewed from the perspective of an alien who has sought but been denied initial entry into this country and

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[14] The Tenth Circuit noted that its statutory interpretation is in accord with the Third Circuit's decision in *Chi Thon Ngo* v. *INS*, 192 F.3d 390, 394-395 (1999) (*Ngo*). In *Ngo*, the court of appeals rejected statutory and constitutional challenges to long-term detention of an excludable alien (one who has not entered the country, now termed "inadmissible" under the INA as amended by IIRIRA), who was under a final order of exclusion but could not be immediately removed. The detention of such inadmissible aliens following the 90-day removal period is now governed by the same statute that is at issue here, 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The Third Circuit read Section 1231(a)(6) to provide that the Attorney General "may continue to detain [an inadmissible alien] until deportation if he has been found guilty of designated crimes." 192 F.3d at 395.

who is subject to indeterminate detention because his country of origin will not accept his return." 204 F.3d at 1058. The court rejected the claim that a deportable alien possesses greater constitutional rights than an excludable alien in these circumstances because of his former status as a lawful permanent resident, noting that that argument had recently been rejected by the Fifth Circuit in *Zadvydas*, 185 F.3d at 294-297. Consequently, the Tenth Circuit rejected the aliens' due process claims because they did not possess a liberty interest in their asserted right to be temporarily admitted into this country. 204 F.3d at 1059-1060.

b. The result reached by the Ninth Circuit in this case also cannot be reconciled with the Fifth Circuit's decision in *Zadvydas*, which upheld the continued detention of an alien who is subject to a final order of deportation and whose deportation cannot be effected immediately. 185 F.3d at 287, 291, 297. The Fifth Circuit did not question that Section 1231(a)(6) authorized the detention of the alien beyond the 90-day removal period, see *id.* at 286-287, and it rejected a due process challenge to that detention.

The court analyzed the constitutional question on the premise that the detained alien is able to obtain periodic review of his detention under INS regulations (see 185 F.3d at 287-288 & n.9), and that the detention is not permanent or indefinite (see *id.* at 291-294). The court found that the detention is not permanent or indefinite because (1) the alien may be released after a review if the INS determines that he no longer poses a risk of danger or flight if released; and (2) it was not clearly established that there was no meaningful possibility of locating a country to which the alien could be removed, even though that process could be difficult and time consuming. *Ibid.* In those circumstances, the court held that the continued detention under Section 1231(a)(6) of a criminal alien who cannot be immediately removed did not violate substantive due process, in light of the government's

interest in protecting society from further criminal activity by the alien and in ensuring that he does not flee and thereby frustrate his eventual removal. *Id.* at 296-297.

The Fifth Circuit acknowledged the contrary constitutional ruling by the five-judge district court panel in the instant case and expressly declined to follow it. 185 F.3d at 297 n.20. In particular, the Fifth Circuit disagreed with the distinction drawn by the five-judge panel between excludable and deportable aliens (see App., *infra*, 42a). Thus, the Fifth Circuit concluded that the case before it, which involved a *deportable* alien who previously had been admitted to the United States, should not be distinguished from its own prior decision in *Gisbert* v. *United States Attorney General*, 988 F.2d 1437 (1993), and the Ninth Circuit's en banc decision in *Barrera-Echavarria*, which sustained the post-final-order detention of *excludable* Mariel Cubans who never entered the United States and who therefore had a greatly diminished claim to due process in connection with their removal.[15] The Fifth Circuit reasoned that, although permanent resident status entitles an alien to greater procedural due process protection in determining whether he is entitled to remain in the United States, such an alien does not have a "broadly privileged constitutional status relative to excludable aliens" concerning his detention once it is finally determined that he no longer has a right to remain in the United States. 185 F.3d at 295. The court also held that once a final order of removal is entered, "the national interest in effectuating deportation is identical

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[15] In an even more recent decision involving an excludable Mariel Cuban, the Seventh Circuit held that the alien's several criminal convictions supported the Attorney General's decision to continue to detain him and that such detention was not unconstitutional. *Carrera-Valdez* v. *Perryman*, 211 F.3d 1046, 1048 (7th Cir. 2000).

regardless of whether the alien was once resident or excludable." *Id.* at 296; see *id.* at 288-290, 294-297.[16]

c. The constitutional rulings in *Ho* and *Zadvydas* demonstrate that the Ninth Circuit erred in this case in concluding that a time limitation should be read into Section 1231(a)(6) in order to avoid a serious constitutional question. The comprehensive administrative procedures for review of the detention of respondent (and that of any aliens similarly situated) foreclose any characterization of his detention as permanent or indefinite. As the Third Circuit held in *Chi Thon Ngo* v. *INS*, 192 F.3d 390 (1999) (*Ngo*), the new interim procedures satisfy due process because they "provide reasonable assurance of fair consideration" of an alien's suitability for release pending his removal from the United States. *Id.* at 399; cf. *Barrera-Echavarria*, 44 F.3d at 1450.

Under current regulations, aliens like respondent may request a formal custody review by the INS District Director at any time, 8 C.F.R. 241.4, 241.5. In determining whether an alien shall be released from detention, the District Director may consider: the nature and seriousness of the alien's criminal convictions; the alien's other criminal history; sentence(s) imposed and time actually served; the alien's history of failure to appear; the alien's probation history; disciplinary problems while incarcerated; evidence of rehabilitative effort

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[16] The Third Circuit held in *Ngo*, which involved an excludable rather than a deportable alien, see note 14, *supra*, that criminal aliens may be detained for lengthy periods of time without violating due process when removal is beyond the control of INS, if the INS provides individualized periodic review of the alien's eligibility for release based on a current assessment of the risk of danger or flight posed by the alien if released. 192 F.3d at 398. The Third Circuit acknowledged the ruling by the five-judge district court panel in this case, but declined to follow it, stating that INS's then-recently implemented interim procedures providing for periodic and centralized review appeared on their face to satisfy any procedural due process concerns. *Id.* at 399.

or recidivism; equities in the United States; and prior immigration violations and history. 8 C.F.R. 241.4. As a supplement to that regulatory framework, the INS established procedures in February 1999 under which the custody status of detained aliens whose removal is not immediately possible or practicable will be subject to sua sponte review by the INS during the initial 90-day removal period and (if the alien is not released at the end of that 90-day period) periodically thereafter. App., *infra*, 64a-68a.

In addition, in August 1999, after the joint order of the district court in this case but before the ruling on respondent's individual request for habeas relief, the Attorney General and the Commissioner of the INS instituted still further procedures, which include centralized review by INS headquarters of the custody status of detainees in respondent's position. See App., *infra*, 69a-76a. Those new interim procedures, which were effective immediately and operate pending anticipated permanent changes to the regulations themselves, instituted a two-level custody review for aliens subject to detention under Section 1231(a)(6) after the initial 90-day removal period. Written notice must be given to the alien 30 days in advance of review, informing the alien of the factors that will be considered in making a custody determination, and explaining that the alien will have an opportunity to demonstrate that he is not a flight risk or a danger to the community. *Ibid.*; see also 8 C.F.R. 241.4. An interview of the alien is mandatory at the first custody review after the 90-day review, and the District Director's determination following the interview is subject to review by a specialized team in INS headquarters, in order to ensure consistency of decisions and an independent assessment outside the local district. App., *infra*, 71a. The headquarters panel may ratify the District Director's decision, return the case to the District Director for reconsideration, or determine that additional information is required. *Ibid.*

After the District Director reviews his decision in light of INS headquarters' evaluation, he will notify the alien of the final custody determination within 30 days of completion of the headquarters review. *Ibid.*[17] The INS thereafter conducts custody reviews, alternating between District Director file reviews and a review that includes an interview at the alien's request followed by a District Director determination that is subject to INS headquarters review. *Id.* at 73a. In addition to these sua sponte custody reviews by the INS, an alien detained under Section 1231(a)(6) may continue to request a custody review at any time under 8 C.F.R. 236.1(d)(2)(ii) and 241.4(a).

On June 30, 2000, the INS proposed regulations to revise the procedures established in the current regulations and the memoranda issued by the INS in February and August 1999, and to establish permanent procedures for post-order custody review cases. 65 Fed. Reg. 40,540-40,548. The new regulations would establish a custody review program for aliens such as respondent modeled after the regulations establishing the Cuban Review Plan, which governs the review of excludable Mariel Cubans who are in INS custody and whose removal to Cuba is not currently possible or practicable. See 8 C.F.R. 212.12. The regulations, which are subject to a 30-day notice-and-comment period, will, if adopted as proposed, permit a comprehensive and fair review of the continued detention of aliens through a process that "is intended to balance the need to protect the American public from potentially dangerous aliens, who remain in the United States contrary to law, with the humanitarian problems created by another country's unjustified delay or refusal to accept repatriation of its nationals." 65 Fed. Reg.

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[17] After the INS's review of respondent under those procedures, the INS determined that respondent should be detained until the next periodic review. App., *infra*, 87a-89a.

at 40,540. The new procedures consist of a file review with the opportunity for a panel interview and recommendation, and a final decision by a separate INS Headquarters unit.

3. The court of appeals' opinion cannot be reconciled with this Court's jurisprudence holding that the judiciary has a limited role in reviewing the enforcement of immigration laws because of the integral connection of such laws to the nation's foreign relations. See, *e.g.*, *Aguirre-Aguirre*, 526 U.S. at 425 ("judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations'"). The court of appeals may have believed that it would be better policy to condition post-order detention on the willingness of another country to accept back its nationals. In so holding, however, it has wrongly ousted Congress's authority to determine and to adjust the Nation's immigration laws in response to changed world conditions and domestic priorities and to vest in the Executive the sometimes delicate and difficult task of pressing for repatriation of another nation's citizens within the overall context of this Nation's foreign relations. See *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976) (recognizing that "a wide variety of classifications [in immigration laws] must be defined in the light of changing political and economic circumstances"); *Carlson* v. *Landon*, 342 U.S. 524, 534-536 (1952). As both the Fifth and Third Circuits have emphasized, even though aliens can claim some constitutional protections, "the power of the national government to act in the immigration sphere is * * * essentially plenary," and as such, is "largely immune from judicial inquiry or interference." *Zadvydas*, 185 F.3d at 289 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)); see also *Ngo*, 192 F.3d at 395-396.

Finally, the court of appeals' assertion that a "reasonable time" may be measured by the presence or absence of a re-

patriation agreement alone underscores its flawed analysis. Such formal agreements are rare. See note 9, *supra*. Moreover, the court of appeals' ruling could be misinterpreted to imply that the United States thinks removal of criminal aliens to Cambodia is futile, which is contrary to the position of the United States, speaking with one voice through the Executive Branch.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 99-35976

KIM HO MA, PETITIONER-APPELLEE

v.

JANET RENO, ATTORNEY GENERAL; AND ROBERT C. SMITH, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, SEATTLE, WASHINGTON, RESPONDENTS-APPELLANTS

Appeal from the United States District Court
for the Western District of Washington

Decided: April 10, 2000

Before: REINHARDT, THOMPSON, and T.G. NELSON, Circuit Judges.

REINHARDT, Circuit Judge:

Petitioner Kim Ho Ma is an alien who left his native land, Cambodia, as a refugee at the age of two and has

resided in the United States as a legal permanent resident since he was six. At the age of seventeen he was involved in a gang-related shooting, and was convicted of manslaughter. After completing his prison sentence some two years later, he was taken into INS custody and ordered removed because of that conviction. However, the INS has been unable to remove him, and hundreds of others like him, because Cambodia does not have a repatriation agreement with the United States and therefore will not permit Ma's return.[1] The question before us is whether, in light of the absence of such an agreement, the Attorney General has the legal authority to hold Ma, who is now twenty two, in deention indefinitely, perhaps for the remainder of his life.

Ma challenged his detention by filing a petition for habeas corpus, under 28 U.S.C. § 2241, in the District Court for the Western District of Washington. That court ruled that Ma's continued detention violates his substantive due process rights under the Fifth Amendment.[2] Respondents, the Immigration and Naturali-

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[1] There are also many aliens from Laos and Vietnam who cannot be removed because our government has no repatriation agreement with those countries.

[2] In the district court in which Ma sought relief, over one hundred habeas corpus petitioners challenged their ongoing detention by the INS in cases similar to his. The district court designated five lead cases that presented issues common to all petitioners and directed the parties to brief and argue those issues before five district court judges. The five district court judges issued a joint order establishing a legal framework to apply in each individual case. A single judge then applied this ruling to Ma and held that he should be released. Similar cases involving a large number of habeas petitioners have arisen in Nevada, and the Central, Eastern, and Southern Districts of California.

zation Service, Janet Reno (as Attorney General), and Robert Coleman (as INS Acting District Director in Seattle) (hereinafter collectively referred to as "INS") appeal the district court's decision releasing Ma from INS custody. We have jurisdiction[3] and affirm, but on a different basis.

We hold that the INS lacks authority under the immigration laws, and in particular under 8 U.S.C. § 1231(a)(6), to detain an alien who has entered the United States for more than a reasonable time beyond the normal ninety day statutory period authorized for removal. More specifically, in cases like Ma's, in which there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, we hold

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[3] Although neither party has argued either that the district court lacked jurisdiction over Ma's constitutional claims or that this court lacks jurisdiction to hear this appeal, the INS argued at one point in its brief that the general federal habeas statute, 28 U.S.C. § 2241, does not provide jurisdiction to hear any claim of statutory error or abuse of discretion. However, our recent decision in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999), makes clear that the scope of review under the general federal habeas statute, 28 U.S.C. § 2241, has not been limited by 8 U.S.C. § 1252, because that section does not mention habeas corpus explicitly. *Id.* at 609 (citing *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996)). Claims of statutory error and abuse of discretion in the application of the immigration laws have long been cognizable on habeas corpus. *See Magana-Pizano*, 200 F.3d at 609 (holding that general habeas statute allows review of statutory questions); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L.Ed. 681 (1954) (reviewing denial of discretionary relief (suspension of deportation) on the merits, and reversing on ground that discretion was not exercised consistent with the statute). Thus, we hold that 8 U.S.C. § 1252 does not preclude us from considering Ma's non-constitutional arguments on habeas corpus.

that it may not detain the alien beyond that statutory removal period. Because we construe the statute as not permitting the indefinite detention of aliens like Ma, we need not decide the substantial constitutional questions raised by the INS's indefinite detention policy.

I.

Petitioner Kim Ho Ma's family fled Cambodia in 1979 and took Ma, who was then two years old, with them. After spending over five years in refugee camps, Ma's family lawfully entered the United States in 1985 as refugees. Ma's status was adjusted to that of a lawful permanent resident in 1987. In 1996, he was convicted, by a jury, of first degree manslaughter following a gang-related shooting. He was sentenced to 38 months in prison, but eventually served only 26 after receiving credit for good behavior. He was tried as an adult, although he was only seventeen years of age at the time of the crime. Although the INS repeatedly refers to Ma's criminal record, this was his only criminal conviction.

Ma's conviction made him removable as an alien convicted of certain crimes under 8 U.S.C. § 1227(a)(2). Because he was released by the state authorities after April 1, 1997, the INS's authority to take him into custody was governed by the permanent custody rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (codified at 8 U.S.C. § 1231). The INS took Ma into custody following his release from prison and initiated removal proceedings against him. An immigration judge found Ma removable, and furthermore found him ineligible for asylum or withholding of deportation because of his conviction.

Ma appealed this ruling to the Board of Immigration Appeals (BIA). The BIA affirmed the immigration judge's decision. Although Ma's order of removal became final on October 26, 1998, the INS could not remove him within the ninety day period during which it is authorized to do so because the United States had, and still has, no repatriation agreement with Cambodia. As a result, Ma remained in detention until he filed this petition for a writ of habeas corpus, which was granted by the district court on September 29, 1999. He is now twenty-two and has been in custody (and, but for the district court's decision, would have been incarcerated) for nearly five years, although his sentence accounts for only a little over two years of that period.

In addition to filing the habeas petition we now review, Ma made several other attempts to secure his release. During the pendency of the proceedings before the immigration judge and the BIA, Ma filed two motions to be released on bond—in October and December 1997. In both instances an immigration judge denied Ma's requests, finding, based solely on the offense he committed at the age of seventeen, that although he was not a flight risk, he was a danger to the community.

In May 1999, over six months after Ma's final removal order (and after his habeas petition was filed), the INS, by letter, requested travel documents for Ma from the Cambodian government.[4] The next day, the INS conducted the "ninety day" custody review, as

[4] The Cambodian government denied the request, as it does all such requests, because of the absence of a repatriation agreement.

provided for in its regulations, to determine if Ma should be released on bond.[5] An INS officer prepared a report after interviewing Ma and reviewing letters and other materials submitted by his family and friends. The officer's report stated that Ma's family was "very supportive," and that if Ma was released he would be able to assist his handicapped 71 year old father in everyday activities. The report also stated that Ma constantly communicates with his younger brother to assure that his brother "does not follow in his footsteps." In addition, the report noted that Ma's older brother runs his own business and would employ Ma if he were released from custody. A deputy district director then reviewed the INS officer's report and issued a decision denying Ma's release. The decision was sent to Ma by means of a form letter that stated that the deputy director made his decision after considering a set of factors set out in INS regulations;[6] however the letter neither stated reasons nor discussed which factors were relied upon in reaching the decision to deny Ma's release. The letter added that "there is no appeal from this decision."[7]

On September 30, 1999, pursuant to additional internal regulations, the INS again reviewed its decision to

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[5] Internal INS regulations (known as the "Pearson I" regulations) required that Ma's case be reviewed before the end of the ninety day period. However, Ma received his custody review approximately 100 days after that period had run (190 days after his removal order became final).

[6] 8 C.F.R. § 241.4.

[7] The letter also stated that Ma's case would be reviewed again six months from the date of the letter, on December 2, 1999. It also stated that Ma had the right to submit a request for redetermination of his custody status at any time.

continue detaining Ma.[8] Once again, INS officials found that Ma should remain in detention, based on the seriousness of his conviction and also on the ground of his threatened participation in a hunger strike while in custody. The reviewers stated that they were unable to conclude that Ma would "remain non-violent" and abide by the terms of his release. These decisions were made despite abundant information in the administrative record about Ma's relationships with his parents and siblings, employment prospects, and plans to avoid gang relations and criminal behavior. Upon reviewing Ma's habeas petition, the district court ruled that Ma's detention was unconstitutional on "substantive due process" grounds and ordered him released pending the outcome of this appeal. This court and the Supreme Court denied the INS's requests for a stay of the district court's release order.[9] The INS now appeals the district court's decision granting Ma's habeas corpus petition.

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[8] After Ma and the other four lead petitioners prevailed in district court, the INS implemented additional regulations, known as the "Pearson II" regulations, which provided for additional review of custody decisions. These regulations provide for review of the decisions of district directors by INS Headquarters, which was then done in this case.

[9] The INS sought to stay the district court's release order. The district court denied the order but granted the INS a temporary stay so that it might attempt to secure an emergency stay from this court. We denied the stay. The INS filed a second emergency stay request, pending appeal to the Supreme Court. We again denied the stay and ordered Ma released. He was released that evening. The INS then sought a stay from the Supreme Court. Justice O'Connor ordered a temporary stay pending a review by the whole Court. Ma surrendered to INS custody pending the Court's decision. The Court denied the INS's stay request, and Ma was again ordered released.

II.

Although the bulk of the parties' arguments, as well as the district court's ruling, address the constitutionality of the INS's detention policy, we must first determine whether Congress provided the INS with the authority to detain Ma indefinitely, as the Attorney General contends.

In general, after an alien is found removable, the Attorney General is required to remove that alien within ninety days after the removal order becomes administratively final.[10] Many aliens, however, cannot be removed within the ninety day period for various reasons. First, some individual cases may simply require more time for processing. Second, there are cases involving aliens who have been ordered removed to countries with whom the United States does not have a repatriation agreement, such as Cambodia, Laos, and Vietnam. Finally, there may be those aliens whose countries refuse to take them for other reasons, and yet others who may be effectively "stateless" because of their race and/or place of birth.[11] Ma falls in the second category.

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[10] *See* 8 U.S.C. § 1231(a)(1)(A)-(B). If the removal order is stayed pending judicial review, the ninety day period begins running after the reviewing court's final order. 8 U.S.C. § 1231(a)(1)(B)(ii).

[11] *See, e.g., Caranica v. Nagle*, 28 F.2d 955 (9th Cir.1928) (involving deportation order to Greece of alien born in Macedonia, which was then a Turkish province that was later partitioned among several countries, including Greece, where Greece would not recognize alien as a citizen).

Under the statute, aliens who cannot be removed at the end of ninety days fall into two groups. Those in the first group must be released subject to supervisory regulations that require them, among other things, to appear regularly before an immigration officer, provide information to that official, notify INS of any change in their employment or residence within 48 hours, submit to medical and psychiatric testing, and comply with substantial restrictions on their travel. 8 U.S.C. § 1231(a)(3). Those in the second group "*may be detained beyond the removal period*" and, if released, shall be subject to the same supervisory provisions applicable to aliens in the first group. 8 U.S.C. § 1231(a)(6).[12] Aliens in the second group include, among others, persons removable because of criminal convictions (such as drug offenses, certain crimes of moral turpitude, "aggravated felonies," firearms offenses, and various other crimes). 8 U.S.C. § 1227(a)(2). Ma's criminal conviction places him in the second group.

INS argues that its authority to "detain beyond the removal period" gives it the authority to detain *indefinitely* aliens who fall in the second group and who cannot be removed in the reasonably foreseeable future.[13]

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[12] The sub-section provides in full that

> [a]n alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

48 U.S.C. § 1231(a)(6).

[13] Although we recognize that, in general, the Attorney General's interpretation of the immigration laws is entitled to

Ma argues the opposite—that the INS's authority to detain aliens beyond the removal period does not extend to cases in which removal is not likely in the reasonably foreseeable future. On its face, the statute's text compels neither interpretation: while § 1231(a)(6) allows for the detention of group two aliens "beyond" ninety days, it is silent about how long beyond the ninety day period such detention is authorized. Thus, any construction of the statute 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.

We hold that Congress did not grant the INS authority to detain indefinitely aliens who, like Ma, have entered the United States and cannot be removed to their native land pursuant to a repatriation agreement. To the contrary, we construe the statute as

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substantial deference, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L.Ed.2d 590 (1999), we have held that *Chevron* principles (*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)) are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe. *Williams v. Babbitt*, 115 F.3d 657, 661-63 (9th Cir. 1997) (analyzing *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988) and *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), noting the agency's lack of constitutional expertise, and concluding that "just as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so"). As we explain *infra*, the agency's interpretation raises just such a substantial question.

providing the INS with authority to detain aliens only for a reasonable time beyond the statutory removal period. In cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future, we conclude that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period. Rather, the alien must be released subject to the supervisory authority provided in the statute.

We adopt our construction of the statute for several reasons. First, and most important, the result we reach allows us to avoid deciding whether or not INS's indefinite detention policy violates the due process guarantees of the Fifth Amendment. Second, our reading is the most reasonable one—it better comports with the language of the statute and permits us to avoid assuming that Congress intended a result as harsh as indefinite detention in the absence of any clear statement to that effect. Third, reading an implicit "reasonable time" limitation into the statute is consistent with our case law interpreting a similar provision in a prior immigration statute. Finally, the interpretation we adopt is more consonant with international law.[14]

III.

The Supreme Court has long held that courts should interpret statutes in a manner that avoids deciding

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[14] Petitioner also contests the procedures used by INS when considering his requests for release, asserting that they violate procedural due process. Given our holding, we need not reach that constitutional question either.

substantial constitutional questions. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 60 L.Ed. 1061 (1916); *see also United States v. Bulacan*, 156 F.3d 963, 974 (9th Cir. 1998). We have referred to this rule as a "paramount principle of judicial restraint." *United States v. Restrepo*, 946 F.2d 654, 673 (9th Cir. 1991).

In the immigration context, courts have often read limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems. For example, in *United States v. Witkovich*, 353 U.S. 194, 199, 77 S. Ct. 779, 1 L.Ed.2d 765 (1957), the Court read a limitation into a statute authorizing the INS to ask questions and receive information from deportable aliens within the United States. Because constitutional problems would have arisen if the statute were read as penalizing aliens who refused to answer questions that were irrelevant to any legitimate governmental purpose, the Court chose to read a limitation into the statute. *Witkovich*, 353 U.S. at 199, 77 S. Ct. 779.

We followed *Witkovich* in *Romero v. INS*, 39 F.3d 977 (9th Cir. 1994), which involved an alien who had lied to an INS official, thereby rendering her deportable because she violated a condition of her immigration status. The condition required that she answer truthfully all questions put to her by INS officials. However, the questions she did not answer truthfully were irrelevant to her visa status. Although the provision at issue stated that aliens who failed to comply with the conditions of their status were deportable, without

defining those conditions in any way, we read into the statute a limitation on the kinds of conditions that the Attorney General could place on aliens. *Id.* at 979-80. Invoking the canon of constitutional avoidance, we concluded that the alien could not be required to answer questions having nothing to do with her visa status. *Id.* at 981; *cf. Jean v. Nelson*, 472 U.S. 846, 854-56, 105 S. Ct. 2992, 86 L.Ed.2d 664 (1985) (holding that immigration parole regulation does not permit race discrimination in order to avoid reaching constitutional question); *Tashima v. Administrative Office of the U.S. Courts*, 967 F.2d 1264, 1271 (9th Cir. 1992) (interpreting statute stating that Office "may" provide representation to judges as requiring interpretation based upon criteria not listed in the statute, in order to avoid constitutional problems).

Of course, as the Supreme Court has noted repeatedly when formulating the canon of constitutional avoidance, the rule applies when the constitutional issue at hand is a substantial one.[15] The INS contends that the answer to Ma's constitutional challenge is

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[15] The Court has also described the canon as applying to "difficult," "serious," or "grave" constitutional issues. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 875, 116 S. Ct. 2432, 135 L.Ed.2d 964 (1996); *Allentown Mack Sales v. NLRB*, 522 U.S. 359, 387, 118 S. Ct. 818, 139 L.Ed.2d 797 (1998) (Rehnquist, CJ, concurring in part and dissenting in part); *Jones v. United States*, 526 U.S. 227, 239, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999). Regardless of the terminology used, the point seems to be the same: a party cannot force us to ignore the usual canons of statutory construction by raising a frivolous, insubstantial, or patently incorrect constitutional argument. Nor, as the Court put it in *United States v. Locke*, 471 U.S. 84, 96, 105 S. Ct. 1785, 85 L.Ed.2d 64 (1985), may we resort to "disingenuous evasion" in our interpretation of the statute to avoid a constitutional question.

dictated by a straightforward application of our en banc decision in *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc), and the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953).[16] If this were correct, we would not need to invoke the canon of constitutional avoidance. However, those cases deal with a significantly different problem from the one we avoid here. Both *Mezei* and *Barrera-Echavarria* involved excludable aliens rather than aliens who have already entered the United States. As a result, the constitutional analysis in both cases rests on a doctrine known as the "entry fiction," which authorizes the courts to treat an alien in exclusion proceedings as one standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States. Both decisions were entirely explicit in their reasoning on this point. In *Mezei*, the Court relied on the entry fiction (that an excludable alien has not entered the United States) in holding that an excludable alien is not entitled to procedural due process:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of

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[16] The INS also makes repeated reference to *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L.Ed. 547 (1952). However, *Carlson* upheld the constitutionality of detention pending the INS's decision whether to deport an alien, and expressly noted that the problem of "unusual delay" was not before it, and referenced a case involving a Russian petitioner who alleged that his country would not accept his return. *Id.* at 546, 72 S. Ct. 525 (citing *United States ex rel. Potash v. District Director*, 169 F.2d 747, 748 (2d Cir.1948)).

> fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned. . . .
>
> Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding.

Id. at 212-13, 73 S. Ct. 625 (internal citations omitted). While the Court held that Mezei could be detained indefinitely on Ellis Island, because no country would take him back, it rested its holding on the fact that Mezei's exclusion did not violate the immigration statute, and that as an alien who had not yet entered the country he had no other rights.[17]

We followed *Mezei* in *Barrera-Echavarria*, which involved a Mariel Cuban who was detained while excluded from the U.S.[18] After describing the petitioner's

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[17] Although the INS notes that the plaintiff in *Mezei* was previously a lawful resident of the U.S. for twenty-five years, the Court made clear that he was to be treated as an excludable alien because of his long departure from the U.S., and could not have his status "assimilated" to that of a permanent resident. In doing so, the Court distinguished, on its facts, its then-recent decision in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S. Ct. 472, 97 L.Ed. 576 (1953), which authorized such assimilation of status under some circumstances. *Mezei*, 345 U.S. at 213-14, 73 S. Ct. 625. There is no doubt that Mezei was considered by the Court to be an excludable alien who had not entered the U.S., despite what the Court referred to as his "prior residence here." *See Mezei* at 212-13, 73 S. Ct. 625.

[18] Barrera-Echavarria was paroled while excluded, committed numerous crimes, and thereafter was taken back into custody. *Barrera-Echavarria*, 44 F.3d at 1444. His parole did not constitute

argument and noting our disagreement, we began our analysis by relying on the historic distinction between excludable and resident aliens:

> The Supreme Court has consistently recognized that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance, the Court has recognized additional rights and privileges not extended to those in the former category.

Barrera-Echavarria, 44 F.3d at 1448 (quotations omitted, alteration in original). We also quoted a passage from *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982), stating that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Barrera-Echavarria*, 44 F.3d at 1449.[19] Shortly after this quotation, we noted that

> Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution. [citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056, 108 L.Ed.2d 222 (1990) and *Johnson v. Eisentrager*] Because excludable aliens are deemed under the entry doctrine not to be present on United States

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an entry. *Leng May Ma v. Barber*, 357 U.S. 185, 188, 78 S. Ct. 1072, 2 L.Ed.2d 1246 (1958).

[19] Amici Law Professors note in their brief that in its petition for rehearing en banc which led to the *Barrera-Echavarria* decision the INS relied on the fact that the petitioner was an alien seeking admission (rather than one who had entered).

> territory, a holding that they have no substantive right to be free from immigration detention reasonably follows.

Barrera-Echavarria, 44 F.3d at 1450.

Thus, it is not surprising that *Barrera-Echavarria* upheld as constitutional the long-term detention of aliens who had not entered the United States, legally or illegally (although they had been paroled into this country). As we stated in that case, it is "not settled" that excludable aliens have any constitutional rights at all, *id.* at 1449, so it is clear that they cannot prevail where the government refuses to admit them.[20] In

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[20] In *Barrera-Echavarria*, we concluded that the statutes there at issue, which applied only to the detention of excludable aliens, allowed for the long-term detention of such aliens, *id.* at 1445, and went on to hold that such detention is constitutional. There is no inconsistency between our statutory holding in *Barrera-Echavarria* and our statutory holding here. We found the statutory authority to hold Barrera-Echavarria for a prolonged period implicit in the history and structure of several provisions granting broad discretion to the Attorney General to parole excludable aliens into the country under certain circumstances. *Id.* at 1445-48. We noted that the parole of excludable aliens had always been the exception rather than the rule, and that releasing such aliens into the country pending deportation would run contrary to the basic statutory scheme precluding such entry. *Id.* at 1447. In the case before us, we consider the entirely different question of aliens who have already entered the country. Thus, unlike in *Barrera-Echavarria*, there is no long-standing statutory scheme that would be "upset" by barring prolonged detention here. *Id.* at 1446. Most important, because in *Barrera-Echavarria* the various statutory provisions at issue did not apply to the detention of aliens who had already entered the United States, there was no need to invoke the canon of constitutional avoidance. The constitutional result in *Barrera-Echavarria* was dictated by the Supreme Court's holding in *Mezei* regarding *excludable* aliens.

contrast to *Mezei* and *Barrera-Echavarria*, numerous cases establish that once an alien has "entered" U.S. territory, legally or illegally, he or she has constitutional rights, including Fifth Amendment rights. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976) (stating that "[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." (citations omitted)); *Leng May Ma v. Barber*, 357 U.S. 185, 187, 78 S. Ct. 1072, 2 L.Ed.2d 1246 (1958) (stating that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry'"); *cf. Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L.Ed.2d 786 (1982) (holding that illegal alien children have constitutional right to education).[21]

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[21] The cases extending Fifth Amendment protection to aliens are fully consistent with our general jurisprudence granting significant constitutional protections to aliens within the territory of the United States. The Supreme Court has held that the Equal Protection Clause applies to aliens, *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L.Ed. 220 (1886), that the Fourth Amendment applies to aliens (within U.S. territory), *Almeida-Sanchez v. United States*, 413 U.S. 266, 274, 93 S. Ct. 2535, 37 L.Ed.2d 596 (1973), and that the First Amendment applies to aliens. *Bridges v. Wixon*, 326 U.S. 135, 148, 65 S. Ct. 1443, 89 L.Ed. 2103 (1945)

Unlike the petitioners in *Mezei* and *Barrera-Echavarria*, Ma was admitted to and entered the United States as a refugee when he was a child, and has lived here ever since. He does not seek to "force us to admit him." *Mezei*, 345 U.S. at 210, 73 S. Ct. 625. The cases involving indefinite detention of excludable aliens simply do not support the constitutionality of indefinite detention of aliens who have entered the United States. To the contrary, our case law makes clear that, as a general matter, aliens who have entered the United States, legally or illegally, are entitled to the protections of the Fifth Amendment.[22]

The INS also argues that *Barrera-Echavarria* and *Mezei* control the result here because, for constitutional purposes, an alien ordered removed has no further right to be here and therefore stands on essentially the

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(holding that "freedom of speech and of press is accorded aliens residing in this country"); *Bridges v. California*, 314 U.S. 252, 62 S. Ct. 190, 86 L.Ed. 192 (1941) (same).

[22] The INS cites *Fong Yue Ting v. United States*, 149 U.S. 698, 711-13, 13 S. Ct. 1016, 37 L.Ed. 905 (1893), for the proposition that "[t]he power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." *Id.* at 713, 13 S. Ct. 1016. However, that proposition as applied to the distinction between the constitutional rights of deportable and excludable aliens is no longer good law. The Court in *Fong Yue Ting* went on to hold that aliens may be deported using processes exercised "entirely through executive officers." *Id.* at 714, 13 S. Ct. 1016. That part of *Fong Yue Ting*'s holding was overruled ten years later, when the Supreme Court held that deportation proceedings for aliens within the U.S. must conform to due process. *Yamataya v. Fisher*, 189 U.S. 86, 101, 23 S. Ct. 611, 47 L.Ed. 721 (1903).

same footing as an excludable alien.[23] While this novel theory would dispose of the constitutional question raised by indefinite detention of such resident aliens, we cannot easily reconcile it with controlling case law. In particular, the INS's position appears to be clearly inconsistent with the Supreme Court's holding in *Wong Wing* that illegal aliens within the territorial jurisdiction of the U.S. who had been ordered deported could not be put to hard labor prior to their deportation. *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 41 L.Ed. 140 (1896). Although the INS argues that *Wong Wing* establishes only the proposition that irrational abuses against aliens who have been ordered deported are unjustified, *Wong Wing* makes clear that Congress deliberately created the hard labor policy "to promote its policy in respect to Chinese persons"

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[23] We note that the Fifth Circuit relied on the INS's argument in resolving the constitutional question we avoid today, holding that long-term detention of removable aliens who have been ordered deported does not violate substantive due process. *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999). Although we seriously question the Fifth Circuit's conclusion in that case, and in particular its reading of *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 41 L.Ed. 140 (1896), and *Landon v. Plasencia*, 459 U.S. 21, 32-34, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982), we need not reach the constitutional question here. At the very least, it is clear from reading *Zadvydas* that a substantial constitutional question exists regarding the construction of § 1231(a)(6).

Following oral argument, the Tenth Circuit considered the constitutional question in *Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000), and, by a 2-1 vote, accepted the Fifth Circuit's view. Moreover, the Tenth Circuit concluded that because § 1231(a)(6) was silent as to any time duration, "Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens." *Id.* at 1057. For the reasons stated below, we do not find the Tenth Circuit's reasoning persuasive.

(presumably by creating deterrence and encouraging voluntary departure). *Wong Wing*, 163 U.S. at 235, 237, 16 S. Ct. 977. The Court said nothing about "irrationality," only unconstitutionality. In short, it unanimously struck down, on Fifth Amendment grounds, Congress' policy with respect to aliens who had been ordered deported even though that policy was passed in furtherance of legitimate immigration goals. *See also Landon v. Plasencia*, 459 U.S. 21, 32-34, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982) (holding that resident alien has due process rights in exclusion proceedings because her "constitutional status" is greater than that of a first-time entrant); *Johnson v. Eisentrager*, 339 U.S. 763, 771, 70 S. Ct. 936, 94 L.Ed. 1255 (1950) (holding that the Fifth Amendment grants rights to aliens within the territorial jurisdiction of the U.S., but not to those outside the territory). In order to adopt the INS's approach here, we would have to reconcile *Wong Wing*, which affords constitutional protection to aliens who have been ordered deported, with the INS's suggested rule—which would (by extending the constitutional jurisprudence governing excludable aliens to such aliens) strip them of such protection. That would be a daunting, if not impossible, task.[24]

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[24] The INS also argues that all immigration-related decisions are entitled to substantial deference under the plenary power, citing *Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993). However, it is not clear what role the plenary power played in *Flores*. In that case, the Court found that rational basis review applied, noted that the plenary power was applicable, but then stated that "[o]f course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose." *Flores*, 507 U.S. at 306, 113 S. Ct. 1439. Ma argues that the plenary power's general deference rule does not apply in every case, citing *INS v. Chadha*, 462 U.S. 919, 940-41,

It is clear that the INS's effort to extend exclusion law to aliens who have entered the United States but have been ordered removed raises a substantial constitutional question, at the very least. Even if we were to agree with the Fifth Circuit's constitutional holding—and we do not by any means suggest that we do—we would first be required to answer that question. As we may avoid doing so by giving the statute a construction that does not require us to undertake any constitutional inquiry, we follow that course here.

We believe the construction of § 1231(a)(6) we adopt—that the INS may detain aliens who have entered the country but have been ordered removed only for "a reasonable time" beyond the ninety day statutory removal period, and specifically, that such aliens may not be detained beyond that statutory

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103 S. Ct. 2764, 77 L.Ed.2d 317 (1983) (striking down law governing suspension of deportation, stating that "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing [the plenary] power. . . . Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." (internal citation omitted)) and *Hampton v. Mow Sun Wong*, 426 U.S. 88, 99-101, 96 S. Ct. 1895, 48 L.Ed.2d 495 (1976) (striking down Civil Service Commission's blanket ban on employing non-citizens and rejecting contention that "the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"). It is not clear why the plenary power's deference rule should apply here given that such deference was not afforded in *Chadha* or in *Hampton*. In any event, the Supreme Court's cases make clear that the plenary power doctrine does not apply in the same way to each case to which it is relevant, and that its exercise is subject to constitutional restraints.

removal period if there is no reasonable likelihood that their country of origin will permit their return in the reasonably foreseeable future—to be the most plausible reading of the statute. However, we note that, in order to avoid the substantial constitutional concerns presented by the INS's interpretation, we could adopt a strained construction of the statute, one that would not otherwise constitute sound statutory construction. As one of our learned colleagues recently explained,

> [S]tatutory construction and constitutional narrowing . . . are, in fact, very different animals. . . . Constitutional narrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there; it is akin to partial invalidation of the statute. *See*, *e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641, 652-654, 104 S. Ct. 3262, 82 L.Ed.2d 487 (1984). In performing the former task we may not add anything to the statute that is not already there . . . in performing the latter function, we must do precisely that. . . . In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe Congress would not have rejected.

United States v. X-Citement Video, Inc., 982 F.2d 1285, 1295 n. 6 (9th Cir.) (Kozinski, J., dissenting), *rev'd* 513 U.S. 64, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994). In reversing the majority, the Supreme Court endorsed our dissenting colleague's approach, holding that a statute should be construed to avoid constitutional problems so long as the saving construction is not "plainly contrary to the intent of Congress." 513 U.S. at 78, 115 S. Ct. 464. The discussion which follows will make clear that the construction we adopt is by no means plainly con-

trary to Congress's intent, but is instead the most reasonable interpretation of the statute.

IV.

The interpretation we give section 1231(a)(6) is clearly the most reasonable one. The provision that the INS may hold individuals "beyond" a specified time demonstrates Congress's intent that the otherwise applicable time limit not be deemed absolute in all cases, and that the agency have *some* flexibility in instances in which additional time may be useful. It does not demonstrate an intent to give the INS any greater authority than that—and certainly not an intent to permit the agency to hold people in detention for the remainder of their lives. Such is surely the case with respect to aliens who have entered the country and are generally entitled to the protections of our Constitution. It would indeed be surprising were Congress to attempt to authorize permanent or indefinite detention of such persons simply by providing that they may be held *beyond* a ninety day period. Some greater degree of specificity or demonstration of Congressional intent would be necessary before we would conclude that a statute had granted the INS so sweeping a power with regard to persons who are generally subject to the protections of the Constitution. We cannot presume that Congress would authorize so drastic a limitation on the rights of such aliens by so indirect a means, particularly when it could have easily included express language to that effect in the statute.[25]

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[25] In the prior statute, Congress used language prohibiting release (subject to some exceptions) rather than the language authorizing detention used here. *See* 8 U.S.C. § 1252(a)(2)(B) (1995)

To sustain the INS' indefinite detention theory we would be required to read far more into the statute than its language implies. In the simplest terms, to say that the INS may hold persons *beyond* a particular date does not answer the question "for how long?". The proper reading, we conclude, is that Congress intended only that the short statutory period during which detention is ordinarily authorized not serve as an absolute barrier to a reasonable extension of time when circumstances render an additional period necessary in order to accomplish the statutory purpose—the removal of the alien. Where no removal in the reasonably foreseeable future is possible, however, the statutory language, properly construed, does not authorize indefinite detention of such aliens. Because, here, there is no repatriation agreement and no demonstration of a reasonable likelihood that one will be entered into in the near future, we believe it to be not only the prudent but the correct interpretation of the statute to hold that

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(stating that the "Attorney General *may not* release [deportable aliens convicted of an aggravated felony] . . . *either before or after* a determination of deportability [subject to some exceptions]."") (emphasis added). The two custody provisions that succeeded the 1995 version of this law (and preceded the current version) did not change this language in any way relevant to our analysis. The same "may not release . . . either before or after" language was in both statutes. *See* AEDPA § 440(c); IIRIRA § 303(b)(3) (the transitional custody rule). The prohibitory language used there is obviously far stronger than the permissive language used in the new law. More important, however, Congress is familiar with time limitations in the detention and removal context, and could easily have authorized detention "without limitation" or "indefinitely" if it so desired. *See*, *e.g.*, 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) (all specifying various time periods in detention and removal context).

Ma and others similarly situated aliens must be released, under supervision, at the end of the statutory removal period. 8 U.S.C. § 1231(a)(1)(A).

V.

Our conclusion that a "reasonable time" limitation is implicit in the statute is supported by a venerable line of Ninth Circuit cases that held that a predecessor provision must be construed as allowing only for detention "reasonably" beyond the removal period.

Prior to 1952, the detention of aliens pending deportation was governed by the Immigration Act of 1917. That statute set no time limit to accomplish a deportation. The Act provided simply that deportable aliens should be "taken into custody and deported."[26] Then, just as now, there were cases involving aliens who could not be deported for various reasons—because the U.S. had no repatriation agreement with their country, because their country would not take them back, or because they were stateless. In several cases, this court held that while the deportation order would remain valid indefinitely, detention was justified only for a reasonable period. For example, in *Caranica v. Nagle*, 28 F.2d 955 (9th Cir. 1928), the alien challenged an order mandating his deportation to Greece on the ground that he was a Macedonian citizen, not a Greek citizen. *Id.* at 956. The court upheld the order, holding that the statute allowed for deportation to Greece. The court held that the Secretary of Labor had

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[26] *See* An Act To Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 19, 39 Stat. 874, 889 (1917).

broad discretion to find an appropriate country of deportation, but added that "the utmost the courts can or will do is to discharge the appellant from further imprisonment if the government fails to execute the order of deportation within a reasonable time." *Id.* at 957; *see also Saksagansky v. Weedin*, 53 F.2d 13, 16 (9th Cir. 1931) (upholding deportation order to Russia (but not to China) and holding that petitioner must be released if he could not be deported to Russia); *Wolck v. Weedin*, 58 F.2d 928, 930-31 (9th Cir. 1932) (upholding deportation order, but ruling, consistent with administrative practice, that alien should be released if deportation could not be effected within a reasonable time). *See also United States ex rel. Ross v. Wallis*, 279 F. 401, 403 (2d Cir. 1922) (requiring release if deportation could not be effected within reasonable period).[27]

We recognized the continuing vitality of this rule in a case applying the 1917 Act that we decided in 1954. *Spector v. Landon*, 209 F.2d 481 (9th Cir. 1954). In *Spector*, the petitioner was an alien who had been ordered deported in 1930, almost a quarter of a century earlier, and had been out on bond for most of the intervening period, but whose deportation the government had been unable to accomplish for various diplomatic reasons. *Id.* at 482. He argued that as a result of

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[27] Notably, the "reasonable time" allowed to effectuate deportation in such cases seems to have been quite short by contemporary standards. In *Caranica* the court held that a two month deadline was not an abuse of discretion, 28 F.2d at 957, while in *Wolck* the court gave the government thirty days to implement the order, 58 F.2d at 931; in *Wallis* the Second Circuit required release after four months. 279 F. at 404.

the passage of time the deportation order was no longer valid. We rejected this contention, stating that

> No cases have been found by counsel holding that a deportation warrant becomes invalid or unenforceable through mere lapse of time. . . . There are a number of decisions in habeas corpus to the effect that *the right to hold the alien in custody under a deportation warrant persists for no more than a reasonable period.* But such holdings lend no color to the contention made here.

Id. (emphasis added) (citations omitted). Thus, even as we denied Spector's claim, we recognized that the 1917 Act did not authorize indefinite detention pending deportation even though the statute did not, by its terms, place any temporal limit on the government's authority; we read the statute as containing an implicit provision that detention was authorized only for a "reasonable period."

While these older cases did not interpret a statute exactly like the one we consider today, because the 1917 Act made no distinction between aliens whose release following the removal period was required and aliens who could be detained following that period, both the 1917 statute and the current law provide for custody pending deportation and set forth no specific time limitations as to the period of detention. Although these older cases do not make their reasoning entirely explicit, they appear to rely on the principle that, when faced with the absence of an express time limitation, courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention. That principle seems as valid today as it was under the 1917 Act. We too are faced

with a statute that does not contain an express statutory proscription against release. Like the courts interpreting the 1917 Act, we assume that the statute implicitly provides for a reasonable limitation on the length of detention. In doing so, we refuse to presume that Congress authorized the indefinite detention of resident aliens long after they have finished serving their sentence merely because their country does not have a repatriation agreement with the United States.

VI.

In interpreting the statute to include a reasonable time limitation, we are also influenced by amicus curiae Human Rights Watch's argument that we should apply the well-established *Charming Betsy* rule of statutory construction which requires that we generally construe Congressional legislation to avoid violating international law. *Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S. Ct. 1510, 71 L.Ed.2d 715 (1982) (citing *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-118, 2 L.Ed. 208 (1804)). We have reaffirmed this rule on several occasions. In *United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990), we explained that we adhere to this principle "out of respect for other nations." *Id.* at 1069 (citing *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984)); *see also In re Simon*, 153 F.3d 991, 998 (9th Cir. 1998).

We recently recognized that "a clear international prohibition" exists against prolonged and arbitrary detention. *Martinez v. City of Los Angeles*, 141 F.3d

1373, 1384 (9th Cir. 1998).[28] Furthermore, Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, *see* 138 Cong. Rec. S4781-84 (Apr. 2, 1992), provides that "[n]o one shall be subjected to arbitrary arrest and detention." See International Covenant on Civil and Political Rights, *opened for signature*, Dec. 19, 1966, 999 U.N.T.S. 171, 21 U.N. GAOR Supp. (No. 16) at 54, *entered into force* Mar. 23, 1976, at Art. 9(1); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252, 104 S. Ct. 1776, 80 L.Ed.2d 273 (1984) (holding that ambiguous Congressional action should not be construed to abrogate a treaty).

In the present case, construing the statute to authorize the indefinite detention of removable aliens might violate international law. In *Martinez*, 141 F.3d

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[28] This court has held that within the domestic legal structure, international law is displaced by "a properly enacted statute, provided it be constitutional, even if that statute violates international law." *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991) (involving prolonged detention of excludable aliens); *see also Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995). Those rulings, however, do not suggest that courts should refrain from applying the *Charming Betsy* principle. Rather, they stand for the proposition that when Congress has clearly abrogated international law through legislation, that legislation nonetheless has the full force of law. *See Restatement (Third) of International Law* § 115(1)(a) ("An Act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled"). Although Congress *may* override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations.

1373, we expressed our approval of a district court decision in this circuit holding that "individuals imprisoned for years without being charged were arbitrarily detained" in violation of international law, *id.* at 1384 (citing *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987)). Given the strength of the rule of international law, our construction of the statute renders it consistent with the *Charming Betsy* rule.

CONCLUSION

In the face of these compelling statutory arguments, we do not read § 1231(a)(6) as authorizing the indefinite detention of removable aliens. Rather, we hold that the statute authorizes the Attorney General to detain removable aliens only for a reasonable time beyond the ninety day removal period. While we could reach this construction of the statute simply by invoking the doctrine of constitutional avoidance, it is not necessary to rest our decision on that legal principle. As the above discussion makes clear, ordinary tenets of statutory construction lead us to that same result. What constitutes a reasonable time will depend on the circumstances of the various cases. Here, we need not address all the conceivable situations that could arise to delay or preclude removal. We need hold only that where it is reasonably likely that an alien who has entered the United States cannot be removed in the reasonably foreseeable future, detention beyond the removal period is not justified.[29]

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[29] We recognize that our reference to aliens who have already entered is, in one sense, too broad. Aliens who entered the United States in the past but have since left for a significant time have no more constitutional rights than first-time would-be entrants. *See*

In Ma's case, the district court did not err in concluding that there is not a reasonable likelihood that the INS will be able to remove Ma to Cambodia. Although the INS offered evidence that the State Department has submitted a proposal for a repatriation agreement to the Cambodian government, both sides agree that the United States has no functioning repatriation agreement with that country, that the Cambodian government does not presently accept the return of its nationals from the United States, and that it has not announced a willingness to enter into an agreement to do so in the foreseeable future, (or indeed at any time). In the absence of a repatriation agreement, extant or pending, we must affirm the district court's finding that there is no reasonable likelihood that the INS will be able to accomplish Ma's removal.[30] Under these circumstances, the INS may not detain Ma any longer.

We stress that our decision does not leave the government without remedies with respect to aliens who may not be detained permanently while awaiting a removal that may never take place. All aliens ordered released must comply with the stringent supervision requirements set out in 8 U.S.C. § 1231(a)(3). Ma will have to appear before an immigration officer periodi-

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Landon, 459 U.S. at 30, 103 S. Ct. 321; *Mezei*, 345 U.S. at 213, 73 S. Ct. 625. They are considered "excludable."

[30] We note that our construction of the statute does not require us to "second-guess" or otherwise interfere with the foreign policy actions of the United States government. On the contrary, we have taken at face value the evidence submitted by a State Department officer regarding the status of the government's attempts to establish a repatriation agreement with Cambodia. He has candidly stated that he cannot predict when a repatriation agreement will be established and begin to function.

cally, answer certain questions, submit to medical or psychiatric testing as necessary, and accept reasonable restrictions on his conduct and activities, including severe travel limitations. More important, if Ma engages in any criminal activity during this time, including violation of his supervisory release conditions, he can be detained and incarcerated as part of the normal criminal process.[31]

For the foregoing reasons, the district court's decision is

AFFIRMED.

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[31] We note that the regulations governing Ma's release state that he can be detained for violating them, and moreover that violations of supervisory release conditions are punishable by fine and/or imprisonment under 8 U.S.C. § 1253(b).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

Nos. C98-234Z, C99-177C, C99-185R, C99-341WD and C99-151L

BINH PHAN, SON THAI HUYNH, DENNIS VLADIMIROVICH BATYUCHENKO, KHAMSAENE SIVONGXAY, KIM HO MA, PETITIONERS

v.

JANET RENO; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; AND RICHARD C. SMITH, RESPONDENTS

July 9, 1999

JOINT ORDER

Before: JOHN C. COUGHENOUR, Chief Judge, and BARBARA JACOBS ROTHSTEIN, WILLIAM L. DWYER, THOMAS S. ZILLY, and ROBERT S. LASNIK, District Judges.

COUGHENOUR, Chief Judge.

INTRODUCTION

More than one hundred habeas corpus petitions are currently pending in the Western District of Washington wherein aliens ordered deported to countries that have refused them admittance challenge the legality of their continued detention by the Immigration and Naturalization Service (INS). In an order dated April 22, 1999, the undersigned judges of the Western District designated five lead cases[1] that present issues common to all petitioners and directed the parties to brief and argue these common issues together; the remaining cases were stayed pending decisions in the lead cases.[2] The issues common to all petitioners have been thoroughly briefed by the parties, as well as by the American Civil Liberties Union and Northwest Immigrants Rights Project as amici curiae. Sitting en banc, we heard oral argument on the common issues on June 17, 1999.

Due to the great number of cases currently pending in this district that raise the same issue, namely whether INS detention of aliens ordered deported to countries that have refused them admittance violates substantive or procedural due process, we recognize the need to adopt a consistent legal framework to guide our

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[1] The five lead cases are *Phan v. Smith*, 56 F. Supp.2d 1158 (W.D. Wash. 1999); *Huynh v. INS*, 56 F. Supp.2d 1160 (W.D. Wash. 1999); *Batyuchenko v. INS*, C99-185R, —— F. Supp.2d —— (W.D. Wash. 1999); *Sivongxay v. INS*, 56 F. Supp.2d 1167 (W.D. Wash. 1999); and *Ma v. INS*, 10 56 F. Supp.2d 1165 (W.D. Wash. 1999).

[2] All cases filed after April 22nd that raise the same issues were similarly stayed pursuant to a supplemental order dated June 29, 1999.

individual consideration of these petitions. To that end, after carefully considering the written and oral arguments offered by all parties and amici, we have reached agreement on the analysis set out in this joint order. In the individual orders that follow, we evaluate the merits of each lead case in light of the framework established in this joint order.

I. GENERAL BACKGROUND

The five lead petitioners and the aliens whom they represent are lawful permanent residents of the United States who have been ordered deported to their native countries because they committed crimes designated by Congress as deportable offenses. The petitioners have been detained at various state and federal facilities by the INS since their orders of deportation became final. The INS has been unable to deport the petitioners, despite the final orders of deportation, because their countries of origin refuse to receive them. They nevertheless continue to be detained. As of the date of this order, the five lead petitioners have been detained between eight months and three years. All petitioners challenge the constitutionality of their continued detention on substantive and procedural due process grounds.

In this order, we consider our jurisdiction to entertain the pending habeas petitions and the government's exhaustion argument. Concluding that jurisdiction exists and that no exhaustion requirement bars reaching the merits, we turn to petitioners' constitutional claims, addressing the substantive due process claim first and then evaluating the constitutionality of the current INS detention procedures.

II. STATUTORY AND REGULATORY FRAMEWORK

Prior to 1996, after a final order of deportation had been entered, aliens generally could not be detained pending deportation for more than six months. Former INA § 242(c), 8 U.S.C. § 1252(c) (1994). Upon expiration of the six-month period, such aliens had to be released, but they remained subject to the supervision of the Attorney General. Former INA § 242(d), 8 U.S.C. § 1252(d) (1994).

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, 110 Stat. 1214 (enacted on April 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. 104-208, 110 Stat. 3009-546 (enacted on September 30, 1996), both of which substantially revised the detention provisions of the INA. AEDPA § 440(c) amended § 1252(a)(2) to require the Attorney General to take into custody aliens convicted of aggravated felonies, controlled substance offenses, firearms offenses, and other serious crimes upon the release of such aliens from incarceration. 110 Stat. 1277, *amended by*, IIRIRA § 306(d), 110 Stat. 3009-612. AEDPA § 440(c) required the Attorney General to detain such aliens pending their removal from the United States.

Five months later, IIRIRA restored some release discretion to the Attorney General. The current procedural framework provides for mandatory detention of criminal aliens during removal proceedings, INA § 236(c), 8 U.S.C. § 1226(c) (1999), and for 90 days thereafter, during which time removal should generally

occur, INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) (1999).[3] If removal cannot be accomplished during this period, the Attorney General retains discretion to continue to detain criminal aliens she determines "to be a risk to the community or unlikely to comply with the order of removal." INA § 241(a)(2) [*sic*], 8 U.S.C. § 1231(a)(6) (1999).

The implementing regulations delegate the Attorney General's discretionary release power to the INS District Director. 8 C.F.R. § 241.4; 8 C.F.R. § 236.1(d)(2)(ii). Under the regulations, to obtain release the alien must demonstrate "by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk." *Id.* In such circumstances, the District Director may in the exercise of his discretion either release the alien, or continue to maintain the alien in custody. *Id.* The regulation also lists nine non-exclusive factors that the District Director may consider in making such determinations.[4] The alien may appeal an adverse decision to the Board of Immigration Appeals. 8 C.F.R. § 236.1(d)(3)(ii).

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[3] These mandatory detention provisions apply to aliens who are deportable because they were convicted of a crime involving moral turpitude, an aggravated felony, certain firearms offenses, and other miscellaneous crimes. INA § 241(a)(2); 8 U.S.C. § 1231(a)(2) (1999).

[4] These factors are "(1) The nature and seriousness of the alien's criminal convictions; (2) Other criminal history; (3) Sentence(s) imposed and time actually served; (4) History of failures to appear for court (defaults); (5) Probation history; (6) Disciplinary problems while incarcerated; (7) Evidence of rehabilitative effort or recidivism; (8) Equities in the United States; and (9) Prior immigration violations and history." 8 C.F.R. § 241.4(a)(1)-(9).

The INS has recently implemented further policies related to "detention procedures for aliens whose immediate repatriation is not possible or practicable." *See* Pearson Memo, INS Ex. A (emphasis omitted). The guidelines found in the Pearson Memo provide for automatic review of post-final order detention cases before and after the expiration of the 90-day removal period. Additionally, the guidelines provide for mandatory review every six months thereafter to enable the District Director to "determine whether there has been a change in circumstances that would support a release decision." *Id.* The director can delegate the file review process-but not the decision-making function-to assistants. *Id.* Aliens have no right to appeal a release denial made pursuant to the Pearson Memo. *Id.*

III. JURISDICTION

As all parties concede, the general habeas corpus statute, 28 U.S.C. § 2241, provides the Court the authority to grant a writ of habeas corpus to a person held "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241(c)(3), and has historically afforded the jurisdictional basis for courts to review the constitutionality of executive detention. Petitioners' claims here fall squarely within § 2241. Therefore, this Court has jurisdiction to consider the constitutionality of their detention. *See Mayers v. INS*, 175 F.3d 1289, 1999 WL 317121 (11th Cir. May 20, 1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Henderson v. INS*, 157 F.3d 106, 118-22 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1141, 119 S. Ct. 1141, 143 L.Ed.2d 209 (1999); *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, —— U.S. ——, 119 S. Ct. 1140, 143 L.Ed.2d 208 (1999).

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

As a threshold matter, the government argues that the Court should decline to exercise its jurisdiction because petitioners have failed to exhaust their administrative remedies. More specifically, the government urges us to require petitioners to appeal the denial of their formal release requests before reaching the merits of their constitutional claims, suggesting that if petitioners' detention claims can be resolved through the administrative process, they should be.

While the INA contains no statutory provision requiring exhaustion, the Court may apply the doctrine if "sound judicial discretion" so advises. *McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S. Ct. 1081, 117 L.Ed.2d 291 (1992). It is true that the general policies underlying the exhaustion doctrine-to avoid premature interruption of the administrative process and to allow executive agencies to exercise their discretionary authority-would counsel in favor of an exhaustion requirement were the Court being asked to review discretionary determinations by the INS or other administrative findings of fact. *See*, *e.g.*, *Lleo-Fernandez v. INS*, 989 F.Supp. 518, 519 (S.D.N.Y. 1998). But this is not what petitioners ask us to do. Rather, they ask us to decide whether their continued detention is lawful under applicable statutes and the Fifth Amendment. No administrative proceeding exists to consider these issues. Under the circumstances, no exhaustion requirement should be imposed. *McCarthy*, 503 U.S. at 144, 112 S. Ct. 1081; *see also Tam v. INS*, 14 F.Supp.2d 1184, 1189 (E.D. Cal. 1998).

Concluding that we have jurisdiction and petitioners need not exhaust administrative remedies, we now turn to petitioners' constitutional claims.

V. DUE PROCESS CLAIMS

The Due Process Clause of the Fifth Amendment to the United States Constitution protects the most basic and fundamental of human rights, ensuring that no person will be deprived of life, liberty or property without due process of the law. U.S. Const. Amend. V. Its protection extends to all "persons" within the borders of the United States, including deportable aliens. *Landon v. Plasencia*, 459 U.S. 21, 32-33, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982). There is, however, one narrow exception to this rule. Based on what has become known as the "entry fiction,"[5] a number of cases have held that aliens who are placed in exclusion proceedings before entering the United States are legally considered to be detained at the border and are thus not entitled to due process protection. *Id.*; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc). As a result, the Due Process Clause affords an excludable alien no procedural protection beyond the procedure explicitly authorized by Congress, *see Mezei*, 345 U.S. at 212, 73 S. Ct. 625, nor any "substantive right

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[5] "*Mezei* established what is known as the 'entry fiction' which provides that although aliens seeking admission into the United States may physically be allowed within its border pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into the country." *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc) (citations omitted).

to be free from immigration detention." *Barrera*, 44 F.3d at 1450.

The entry fiction doctrine is inapplicable here. Petitioners are deportable-not excludable-aliens, and this distinction is critical. An excludable alien seeking admission "requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32, 103 S. Ct. 321. But "[o]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Id.* Petitioners fall into the latter category. No authority supports the government's position that aliens somehow "assimilate" to excludable status once they have been ordered deported, thereby relinquishing their constitutional rights.[6] Petitioners are all long-time permanent legal residents of the United States and, as such, are "persons" entitled to the protection of the Fifth Amendment, despite having been ordered deported.

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[6] The Supreme Court has held that a lawful permanent resident who leaves the United States then later seeks reentry may, upon his reentry, "assimilate" to the status of a continuously residing lawful permanent resident for purposes of his constitutional right to due process. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S. Ct. 472, 97 L.Ed. 576 (1953) (permanent resident alien returning from five-month voyage abroad on Merchant Marine ship not subject to regulations permitting exclusion of arriving aliens without a hearing). The assimilation doctrine thus has been used to provide extra protection for resident aliens who have left the United States and who later seek reentry. No court in a published opinion, however, has ever used the assimilation doctrine to reduce the constitutional protection afforded lawful resident aliens who have never physically left the United States.

Turning to the merits, petitioners challenge their detention on both substantive and procedural due process grounds. We address first petitioners' substantive due process claim: only if a restriction on liberty survives substantive due process scrutiny is it necessary to consider whether the restriction is implemented in a procedurally fair manner. *See United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987).

A. SUBSTANTIVE DUE PROCESS

Above and beyond the procedural guarantee explicit in the Due Process Clause itself, federal courts have long recognized a limited "substantive" component that "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 state interest." *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993). The Supreme Court has counseled restraint in recognizing a particular interest as deserving of substantive due process protection, *see Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L.Ed.2d 261 (1992), and the analysis should begin "with a careful description of the asserted right." *Flores*, 507 U.S. at 302, 113 S. Ct. 1439.

The government argues that the interest at issue is petitioners' "right to be released into the United States pending [their] removal." But this definition construes petitioners' right too narrowly. The issue here is much more basic—it is simply the right to be at liberty. Put another way, at issue is petitioners' fundamental liberty interest in being free from incarceration. "Freedom

from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L.Ed.2d 437 (1992). Petitioners' liberty interest is fundamental and deserving of due process protection.

As a general rule, government invasions of fundamental liberty interests are subject to strict scrutiny review: a deprivation will comport with due process only if it is narrowly tailored to serve a compelling government interest. *Flores*, 507 U.S. at 301-02, 113 S. Ct. 1439. Applying this standard of review in detention cases, courts consider whether the detention is "imposed for the purpose of punishment or whether it is merely incidental to another legitimate governmental interest." *Tam v. INS*, 14 F.Supp.2d at 1191(quoting *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1441 (5th Cir. 1993)); *Bell v. Wolfish*, 441 U.S. 520, 536-40, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979).[7] This requires the Court to consider the constitutionality of the detention in light of its purpose, and to ask whether the detention is based upon "permissible" regulatory goals of the government and, if it is, whether the detention is excessive in relation to those goals. *Martinez v. Greene*, 28 F. Supp.2d 1275, 1282 (D. Colo. 1998) (citing *Salerno*, 481 U.S. at 747, 107 S. Ct. 2095); *Tam*, 14 F.Supp.2d at 1191 (quoting *Gisbert*, 988 F.2d at 1441); *Zadvydas v. Caplinger*, 986 F. Supp. 1011, 1025-26 (E.D. La. 1997).

Even so, argues the government, when reviewing immigration matters, the Court's power to inquire into

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[7] The Ninth Circuit has held that immigration detention is not punishment. *Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 (9th Cir. 1991).

alleged violations of petitioners' substantive due process rights is limited, and the Court should therefore apply a more deferential standard of review. The INS correctly states that the legislative and executive branches possess "plenary power" over immigration and naturalization, *Flores*, 507 U.S. at 305-06, 113 S. Ct. 1439, and that judicial deference to the political branches on these matters allows for greater flexibility to adjust policy choices to changing political and economic circumstances. *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976). Moreover, judicial deference allows the political branches to "'exercise especially sensitive political functions that implicate questions of foreign relations,'" *INS v. Aguirre-Aguirre*, —— U.S. ——, ——, 119 S. Ct. 1439, 1445, 143 L.Ed.2d 590 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110, 108 S. Ct. 904, 99 L.Ed.2d 90 (1988)), and recognizes that "[i]n the exercise of its broad power over nationalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 79-80, 96 S. Ct. 1883.

While the plenary power doctrine supports judicial deference to the legislative and executive branches on substantive immigration matters, such deference does not extend to post-deportation order detention. Indefinite detention of aliens ordered deported is not a matter of immigration policy; it is only a *means* by which the government implements Congress's directives. The dangers at which the detention scheme is directed, chiefly the prevention of flight and the protection of the community pending deportation of aliens who have been convicted of crimes, involve domestic interests rather than international concerns. Whether petitioners are detained or released on bond until the

government can facilitate their deportation does not raise foreign relations questions. Accordingly, the plenary power doctrine has far less force here than it does, for example, over decisions concerning who should or should not be admitted, or who should or should not be deported. Finally, detention threatens the deprivation of a fundamental liberty interest and thus clearly triggers "heightened, substantive due process scrutiny," not judicial deference. *Flores*, 507 U.S. at 316, 113 S. Ct. 1439 (O'[C]onnor, J., concurring). For these reasons, the Court finds that the plenary power doctrine does not support a deferential standard of review of petitioners' detention. Heightened scrutiny applies.

The government advances three regulatory interests, all of which satisfy the "permissible" standard: (1) ensuring the removal of aliens ordered deported; (2) preventing flight prior to deportation; and (3) protecting the public from dangerous felons. *See* 8 U.S.C. § 1231(a)(6). Clearly the government has a legitimate interest in securing the safe removal of aliens. Indeed, this is a primary objective of the INS: to decide which aliens may remain in the United States and which must leave, and to facilitate the safe and expeditious removal of aliens ordered deported. The latter two goals are incidental to this primary objective. Citing recent widespread recidivism and abscondence among criminal aliens, the INS contends it must retain the discretion to detain individuals such as the petitioners so that it can facilitate their safe removal. These also are "permissible" goals, but ones that derive solely from the power to deport.

The critical inquiry, therefore, is whether an alien's detention is *excessive* in relation to these government interests. In making this determination, we 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. In so doing, it becomes clear that as the probability that the government can actually deport an alien decreases, the government's interest in detaining that alien becomes less compelling and the invasion into the alien's liberty more severe. Dangerousness and flight risk are thus permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Detention by the INS can be lawful only in aid of deportation. Thus, it is "excessive" to detain an alien indefinitely if deportation will never occur.

The foregoing provides the appropriate legal framework under which petitioners' substantive due process claims must be individually evaluated. For the lead petitioners, we perform this evaluation in their respective cases in the orders following this joint order. The remaining petitions shall be evaluated pursuant to the procedure set forth in the Conclusion, *infra*.

B. PROCEDURAL DUE PROCESS

The substantive due process analysis necessarily turns on the individual facts and circumstances presented by each petitioner. If, upon evaluating a petitioner's detention in light of the above substantive due process framework, it is concluded that there exists no constitutional deprivation, the Court would normally

then consider whether the procedures pursuant to which the petitioner is being detained pass constitutional muster. *See Salerno*, 481 U.S. at 746, 107 S. Ct. 2095. Unlike substantive due process, however, the procedures governing petitioners' detention are uniform; that is, the same procedural scheme applies to all. For this reason, we shall consider petitioners' procedural due process claims collectively in this joint order.

This analysis begins with the Due Process Clause of the Fifth Amendment, which entitles petitioners to procedural due process of law in their deportation proceedings. "The constitutional sufficiency of the procedures provided in any situation, of course, varies with the circumstances." *Plasencia*, 459 U.S. at 34, 103 S. Ct. 321 (citing *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 24-25, 101 S. Ct. 2153, 68 L.Ed.2d 640 (1981)). To determine what process is constitutionally mandated, the Court must review the existing procedural framework, then consider "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures." *Plasencia*, 459 U.S. at 34, 103 S. Ct. 321 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976)).[8]

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[8] In its supplemental response, the government contends that the *Mathews* test is inapplicable, and that petitioners' procedural due process claims should be judged instead under the *Flores* "(unexacting) standard of rationally advancing some legitimate governmental purpose." *See* INS Br. at 22. *Plasencia* governs, and dictates the applicability of the *Mathews* test. *Plasencia*, 459 U.S. at 34, 103 S. Ct. 321. The *Flores* Court found petitioners'

As stated above, the interest at stake is petitioners' freedom; as a fundamental right, this interest is clearly substantial. The government's interest in effectuating the safe removal of aliens ordered deported is also substantial, but as discussed above, this interest becomes less compelling as the probability of deportation decreases. The outcome thus hinges on the second part of the *Mathews* test: the risk of erroneous deprivation and the value of additional procedures.

The government defends the existing procedural framework as complying with due process. It points out that release decisions are based upon either the District Director's review of the alien's written submissions and administrative file or an interview with the alien and that the Director considers each of the nine factors set forth at 8 C.F.R. § 241.4 in making those decisions. This, the government submits, is more than sufficient process to ensure that only a minimal risk of erroneous deprivation of petitioners' liberty interest exists.

In response, petitioners and amici curiae assert that the procedural scheme as it now exists is structurally biased against meaningful review of petitioners' individual circumstances and therefore violates their procedural due process rights. "Due to political and community pressure, the INS, an executive agency, has every incentive to continue to detain aliens with aggravated felony convictions, even though they have

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procedural due process claims to be a restatement of the substantive due process claims, and rejected them on that basis without setting forth a new standard of review. *Flores*, 507 U.S. at 306-07, 113 S. Ct. 1439.

served their sentences, on the suspicion that they may continue to pose a danger to the community." *St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996). This bias, petitioners urge, precludes an impartial review of their release requests, thereby denying them procedural due process.

Other courts faced with similar situations have expressed "little confidence" in release determinations by District Directors. *Cruz-Taveras v. McElroy*, 1996 WL 455012 (S.D.N.Y. Aug. 13, 1996); *Thomas v. McElroy*, 1996 WL 487953 (S.D.N.Y. Aug. 27, 1996); *Alba v. McElroy*, 1996 WL 695811 (S.D.N.Y. Dec. 4, 1996).[9] These courts found that instead of individually assessing dangerousness and flight risk, Directors simply relied on the aliens' past criminal history and the fact that they were facing removal from the United States, summarily concluding that the aliens posed such risks and denying them release. This does not meet the requirements of procedural due process.

We have similar concerns about the quality of the review afforded by the INS to the petitioners. Indeed, our review of the record confirms that the INS does not meaningfully and impartially review the petitioners' custody status. The absence of any individualized assessment or consideration of the petitioners' situa-

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[9] These cases concern parole hearings for lawful permanent residents who left the United States temporarily and upon their return were placed in exclusion hearings. The statutory scheme at issue there required mandatory detention of aliens convicted of aggravated felonies during the pendency of their exclusion proceedings. Because petitioners are entitled to discretionary release by INS officials, however, the structural bias arguments raised in those cases are equally applicable here.

tions in light of the pertinent factors set forth in the regulations violates their procedural due process rights. At a minimum, each petitioner is entitled to a fair and impartial hearing before an immigration judge at which he or she can present evidence to support release pending deportation. The immigration judge must actually consider the factors set forth at 8 C.F.R. § 241.4 and explain how they apply to each petitioner's unique circumstances. Petitioners also must be able to appeal any adverse denial of a release request to the BIA. The risk of erroneous deprivation of a petitioner's liberty interest is too great to deny him or her anything less than the full procedural protections available under the Constitution.

CONCLUSION

In the orders that follow, we individually apply the due process framework in the lead cases to determine whether continued detention violates the petitioner's right to substantive due process. The Court shall provide for expedited review of the remaining petitions that have been stayed pursuant to the April 22nd and June 29th orders. To that end, the government is directed to file a status report and recommendation in each of the stayed cases *within twenty (20) days of entry of this order.* These reports shall evaluate each petitioner's situation in light of the above framework. Counsel for each petitioner may file a response in the respective case *within ten (10) days thereafter.* Each judge shall then consider the petitions pending before him or her according to the above framework and in light of the arguments provided by the parties in the status report and the response thereto.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

No. C99-151L

KIM HO MA, PLAINTIFF

v.

IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT

July 13, 1999

ORDER SETTING HEARING

LASNIK, District Judge.

Kim Ho Ma's petition for a writ of habeas corpus and four others were designated "lead" cases in this district for the purpose of joint consideration of the government's indefinite detention of certain deportable aliens.[1] This order incorporates the Court's Joint Order and applies the analysis in that order to Mr. Ma's case.[2]

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[1] *See* Order on Lead Cases, and Stay of Related Cases, entered 4/22/99.

[2] *See* Joint Order, entered 7/9/99.

Ma entered the United States as a Cambodian refugee in 1985 at age 7, and became a lawful permanent resident in 1987. In 1996 he was convicted of first degree manslaughter, for which he served two years incarceration. He was then released to the Immigration and Naturalization Service, which began deportation proceedings. In September 1997 the INS ordered Ma removed as an aggravated felon. An Immigration Judge denied his requests for release on bond in October and December 1997. In both instances the Immigration Judge found that Ma was not a flight risk, but was a danger to the community. (AR 93, 41). Ma's appeal to the BIA was denied in October 1998. (AR 4). He has been in INS custody since June 1997, and subject to a final order of deportation since October 1998. The United States appears not to have requested travel documents for Ma from the Cambodian government.

As discussed in the Joint Order, deportable aliens like Ma are entitled to substantive due process under the Fifth Amendment. The government's continued detention of Ma violates his right to substantive due process if it is excessive in relation to the government's interests in effectuating his deportation. *See United States v. Salerno*, 481 U.S. 739, 747, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987); *Martinez v. Greene*, 28 F.Supp.2d 1275, 1282 (D. Colo. 1998); *see also* Joint Order at 9. This inquiry requires the Court to weigh Ma's interest in liberty against the government's interests in effectuating his removal, preventing his escape, and protecting the public. While it is clear that Ma's interest in liberty is strong, the government's interests depend upon the likelihood that it can *ever* complete Ma's deportation. *See* Joint Order at 9.

The record is not clear whether the government is likely to accomplish Ma's deportation. Although there is no evidence that the government has even requested the assistance of the Cambodian government, Ma's final order of deportation is only eight months old. There is little or no indication in the record whether Cambodia is likely to accept Ma, were it asked to do so. And the government raises but does not explain Mr. Ma's "pending Torture Convention claim." I.N.S. Brief at 10. These issues are critical to determining the weight of the government's interests in Ma's continued detention.

Accordingly, the Court will schedule a hearing in this matter. The parties are directed to contact this Court's deputy clerk to schedule such a hearing.

The Clerk of the Court is directed to send copies of this order to all counsel of record.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

No. C99-151L

KIM HO MA, PLAINTIFF

v.

JANET RENO, ATTORNEY GENERAL, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, AND RICHARD COHEN, DISTRICT DIRECTOR, SEATTLE DISTRICT, DEFENDANTS

[Filed: Sept. 29, 1999]

ORDER GRANTING WRIT OF HABEAS CORPUS

This matter comes before the Court on Kim Ho Ma's petition for a writ of habeas corpus ordering his release from detention by the Immigration and Naturalization Service (INS). Having considered the materials filed by petitioner, the government, and amici curiae, and the parties' oral arguments and supplementary briefing, the Court hereby grants the petition and orders petitioner released from custody.

INTRODUCTION

Petitioners' case was designated by this Court as one of five "lead" cases because it raises issues common to many similar petitions pending in this district. Petitioner has been ordered deported to a country that will not accept him, and claims his continued detention by the INS is indefinite, and therefore unconstitutional. The Court convened oral argument on the lead cases, and on July 9, 1999 issued a joint order signed by the five active judges in this district. That joint order determined threshold issues and set out a framework for analyzing petitioners' claims that their continued detention violates their due process rights. This order applies that framework to petitioner Ma's case.[1]

BACKGROUND

Petitioner was born in Cambodia in 1977, and entered the United States as a refugee in 1985. He became a lawful permanent resident in 1987. At age 17, he was involved, with three other members of a gang known as the Local Asian Boyz, in the killing of another gang member. In 1996, he was tried as an adult on a charge of murder in the first degree. The jury acquitted him of first degree murder, hung on the charge of second degree murder, and convicted Ma of first degree manslaughter. He completed his sentence and was then transferred to INS custody. In September 1997, the INS ordered him to be removed from the United States as an aggravated felon. *See* 8 U.S.C.A. §§1227(a)(2)

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[1] This Court will adhere to the joint order, despite the government's suggestions to the contrary.

(A)(iii), 1101(a)(43) (1999). Petitioner's appeal to the Bureau of Immigration Appeals (BIA) was denied, and his order of deportation became final October 26, 1998. *See* Administrative Record at 4, 5.

An immigration judge denied petitioner's request for release on bond in October and December 1997. In both instances the Immigration Judge found that petitioner was not a flight risk, but was a danger to the community strictly because of the seriousness of his crime. AR 40, 93. In May 1999, the INS conducted a "90 Day Custody Review" in Ma's case. An INS deportation officer interviewed petitioner and reviewed letters and other materials submitted by his family and friends. An assistant director then apparently reviewed the deportation officer's report and issued a decision in June denying release.[2] Under new custody review procedures, this decision may be reviewed at INS Headquarters, but to date it has not been so reviewed. *See* Respondents' Exhibit CC (filed under "Praecipe" 9/9/99).

Following entry of the Court's joint order in this case, this Court set a hearing to take additional evi-

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[2] The decision was expressed in a form letter. It reads in part, "I have determined that until you are removed from the United States you shall continue to be detained in custody of the Service. In reaching this decision I considered the nine factors listed below. I have also taken into consideration any material or statements that you may have submitted during the review process. There is no appeal from this decision. Your case will be reviewed again on December 2, 1999. This letter constitutes notice of that review. You will receive no further notice." *See* Respondents' Exhibit BB. Although the letter does not say what factors informed the decision to deny petitioner's release, it lists the criteria prescribed by the Attorney General for such decision. *See* 8 C.F.R. §241.4 (1999).

dence regarding the likelihood of Ma's deportation to Cambodia. By stipulation, the parties have filed written materials on this and other issues in lieu of a hearing, and the record is now complete.

ANALYSIS

The Court has concluded that the government's continued detention of Ma violates his right to substantive due process if it is excessive in relation to the government's interests in effectuating his deportation. *See* 7/13/99 Order at 2 (citing *United States v. Salerno*, 481 U.S. 739, 747 (1987); *Martinez v. Greene*, 28 F. Supp. 2d 1275, 1282 (D. Colo. 1998); Joint Order at 9). Pursuant to the Court's joint order, this requires the Court to "weigh Ma's interest in liberty against the government's interests in effectuating his removal, preventing his escape, and protecting the public." *Id.*

As a preliminary matter, the Court notes that the government's earlier suggestion that Ma had a pending claim under an international torture convention was mistaken. In another clarification, the government notes that it has in fact requested travel documents for Ma from the Cambodian government, by letter of May 5, 1999. There has apparently been no response. "For some time now, Cambodia has failed to issue travel documents to Cambodian nationals orderd removed from the United States." Respondents' Status Report and Recommendation at 8.

It appears that the government's successful removal of aliens to Cambodia will require a formal repatriation agreement between the two countries. The government claims that negotiation of such an agreement "is related to the status of negotiations between the United States and Vietnam." *Id.* at 9. The government submits a declaration by an officer of the State Department—an advisor on East Asian affairs named James Hergen—that summarizes the negotiations between the United States and Vietnam on the topic of repatriation, spanning the past four or five years. Respondents' Exhibit AA. Hergen notes that the Deputy Secretary of State recently " permit[ted] negotiation of similar agreements with Cambodia and Laos, should that be appropriate." *Id.* at ¶ 12. Hergen has recommended initiating such negotiations promptly. *Id.* at ¶ 13. Petitioner's counsel reports that on September 4, 1999, officers of the State Department met with officers of the Cambodian Consulate in Washington, D.C. to discuss the government's preliminary proposals for a repatriation agreement. Petitioner's Exhibit B at ¶ 6. The Consulate plans to send a report on the meeting, with the American proposal, to the Cambodian government. *Id.*

Ma's deportation to Cambodia is far from imminent. The evidence shows that the government has taken only the first step toward enabling deportations to Cambodia. Even the government says negotiations with Cambodia are dependent upon negotiations with Vietnam. Two judges of this Court have recently held that current negotiations with Vietnam do not establish a realistic chance of deporting Vietnamese nationals. *See Huynh v. Reno*, No. C99-177C (W.D. Wash., July 9, 1999); *Phan v. Smith*, No. 98-234Z (W.D. Wash., July 9,

1999). Similarly, there is not a realistic chance that the government will accomplish Ma's deportation to Cambodia. His indefinite detention therefore violates his right to substantive due process.

Even if there were a realistic chance of deporting Ma, the 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.[3] While the crime of which Ma was convicted is serious, it is not the kind that might justify indefinite detention.[4] The record does not indicate his release with proper parole conditions would endanger the community.

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[3] The District Director's decision, as noted above, provides no reasons for denying Ma's release. The report upon which he relied, however, contains abundant information about Ma's 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. *See* Respondents' Exhibit BB. This report also demonstrates that Ma's only "behavioral problems" in detention was his planned participation in a hunger strike, and that his "history of gang activities" consists of the gang-related shooting for which he was convicted. *See* Respondents' Status Report and Recommendation at 8, 29.

[4] Ma was only 17 years old at the time of his crime. The jury did not see his role in the crime to be as clear-cut as the government suggests, and the judge who presided over the trial sentenced Ma to only 38 months. The sentence could have been up to 41 months in the standard range, and 120 months in an exceptional sentence for aggravating circumstances.

CONCLUSION

Thus, Ma's interest in liberty clearly outweighs the government's present interests in detaining him. His continued incarceration is excessive in relation to the government's objectives, and therefore violates his Fifth Amendment right to substantive due process.[5] Ma's petition for writ of habeas corpus is granted, and respondents are hereby ordered to release him, subject to appropriate conditions.

The Clerk of the Court is directed to send copies of this order to all counsel of record.

DATED this 29th day of September, 1999.

/s/ ROBERT S. LASNIK
ROBERT S. LASNIK
United States District Judge

[5] The Court does not address the questions regarding procedural due process further in this order, as it is unnecssary to resolving Ma's petition.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35976

D.C. No. C-99-151-L

KIM HO MA, PETITIONER-APPELLEE

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; ROBERT COLEMAN, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, SEATTLE, WASHINGTON; AND THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENTS-APPELLANTS

[Filed: June 2, 2000]

ORDER

Before: REINHARDT, THOMPSON, T.G. NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX F

[Seal omitted] U.S. Department of Justice
Immigration and Naturalization Service

HQCOU 90/16.51

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

Feb. 3, 1999

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable

This memorandum clarifies the authority of District Directors to make release decisions and emphasizes the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act (INA).

The District Director is required to review every administratively final order removal case before the ninety [90] day removal period mandated by § 241(a)(1) expires. 8 C.F.R. § 241.4 gives the District Director the authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the District Director should provide an alien with the oppor-

tunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

The District Director cannot delegate the authority to render the ultimate custody or release decision beyond those directly responsible for detention within his district or Service Processing Center (SPC). Such individuals may include the Deputy District Director, the Assistant Director for Detention, the Officer in Charge (OIC) of a detention center, or persons acting in such capacities. These persons must be specifically designated by the District Director.

Although the District Director cannot relinquish his decision-making authority, he may utilize various methods to assist in reaching a determination. For example, he may designate an individual or group of individuals to review the alien file and obtain any other relevant information. To the extent Districts have a high volume of post order cases, the District Director may also request detail assistance from other districts, the region and/or headquarters for the purpose of conducting custody reviews. The District Director may use information obtained by local staff or detailees to make his custody decision. Detail assistance may be coordinated through John Castro, at Headquarters Detention and Deportation.

Every six months, the District Director must review the status of aliens detained beyond the removal period

to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

When an alien is released pursuant to 8 C.F.R. § 241.4 under an order of supervision, the order of supervision must specify the applicable conditions of supervision. In addition, the order of supervision must be signed by one of the parties authorized in 8 C.F.R. § 241.5.

Any alien described in 8 C.F.R. § 241.4(a), may be returned to custody subsequent to release under an order of supervision if such alien violates any of the conditions of the order of supervision. Any alien described in 8 C.F.R. § 241.4(b) who violates the conditions of the order of supervision is subject to the penalties described in § 243(b) of the INA.

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R. § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(iii), the alien may appeal the District Director's decision to the Board of Immigration Appeals. Where the alien has not made a written request to have his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. *See* 8 C.F.R. § 241.4.

8 C.F.R. § 241.4 Continued detention beyond the removal period.

(a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under § 212(a) of the Act or removable under § 237(a)(1)(C), 237(a)(1)(C) [*sic*], 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) Continuation of custody for other aliens. Any alien removable under any section of the Act other than § 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

Note: these instructions also apply to criminal alien deportation cases under former INA § 242 where the aliens are subject to required detention under current INA § 236(c). *See* October 7, 1998 memorandum entitled *INS Detention Use Policy*.

APPENDIX G

[Seal omitted] U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/14.6-C

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

Aug. 6, 1999

MEMORANDUM FOR All REGIONAL DIRECTORS
District Directors
Office of Field Operations

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

This memorandum addresses several changes to current procedures regarding post-order detention procedures for aliens whose immediate repatriation is not possible or practicable.[1] Current regulations, 8 C.F.R. § 241.4, provide that the decision whether to detain or

[1] See the memoranda from Michael Pearson, Executive Associate Commissioner for Field Operations, February 3, 1999: *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable*, and April 30, 1999: *Supplemental Detention Procedures.*

release such an alien is made by the District Director. In the near future, the Service will begin the rule-making process to propose a program modeled after the Cuban Review Plan of 8 CFR section 212.12 to address post-order custody cases. The custody of Mariel Cubans will continue to be governed by 8 CFR 212.12. Until this more permanent program is implemented, several changes are being made to the current procedures set forth in the memoranda of February 3, and April 30, 1999. These changes are effective immediately. All offices will follow identical procedures in conducting reviews of post-order custody cases, using the forms listed at the conclusion of this memorandum. The forms will be distributed to all offices.

The Attorney General and the Commissioner have agreed that these procedures, as detailed below under the heading "Interim Procedures," will include written notice to the alien of custody reviews. The notice will advise the alien that he may present information supporting a release, and he may be assisted by an attorney or other person at no expense to the government. The alien will receive an in-person interview at the first custody review following expiration of the removal period. Thereafter, the alien will receive a separate notice of the opportunity for an annual interview. The alien will be provided written reasons for INS custody decisions.

The District Director will continue to make custody determinations within the ninety-day removal period under the memoranda of February 3, and April 30, 1999. The next scheduled review shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is

later. That review will include an interview and is subject to review at INS Headquarters if the District Director has determined that the alien should remain in custody. Thereafter, reviews will be conducted at six-month intervals, alternating between a file review by the District Director (without an interview unless the District Director, in his discretion, determines that one would be useful, and without Headquarters review), and a review with the opportunity for an interview at the alien's request and with Headquarters review.

No case subject to a Headquarters review will be considered a final custody decision until the District level decision has been ratified through the Headquarters review or resolved after referral back to the District. If the Headquarters reviewer concludes that the District Director should reconsider his decision or that further documentation is required to support the District Director's decision, the case shall be forwarded to the Regional Office with a cover memorandum and instructions to refer the case back to the District for further consideration or documentation. The Headquarters reviewer shall detail the issues that resulted in the referral and forward the case to the Regional Office.

Regional Directors are responsible for working with the District Director to comply with the Headquarters instructions on referrals. In addition, the Regional Director is responsible for preparation of statistics on the custody reviews conducted in each district.

INTERIM PROCEDURES

(1) Pursuant to the provisions of 8 C.F.R. § 241.4, the District Director will continue to conduct a

custody review of administratively final order removal cases *before* the ninety-day removal period mandated by § 241(a)(1) expires for aliens whose departure cannot be effected within the removal period.

(2) These procedures apply to any alien ordered removed who is inadmissible under § 212, removable under 237(a)(1)(C), 237(a)(2), or 237(a)(4) 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. They cover aliens convicted of an aggravated felony offense who are subject to the provisions of old INA § 236(e)(1)-(3), and non-aggravated felon aliens with final orders of exclusion. Mariel Cubans are excluded from these procedures as parole reviews for them are governed by 8 C.F.R. § 212.12. The ninety-day review will be conducted pursuant to the instructions set out in the memoranda of February 3 and April 30, 1999. District Directors may, in their discretion, interview the alien if they believe that an interview would facilitate the custody review.

(3) Following expiration of the ninety-day removal period, the next scheduled review provided by the District Director shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. Written notice shall be given to each alien at least 30 days prior to the date of the review. The notice will be provided either by personal service or certified mail/return receipt. The notice shall specify the factors to be con-

sidered and explain that the alien will be provided the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order.

(4) For the review discussed in paragraph 3 above, an interview is mandatory and the District Director's preliminary decision will be subject to Headquarters review. Thereafter, custody reviews will be conducted every six months, alternating between District Director file reviews and a review that includes the opportunity for an interview at the alien's request and a Headquarters review of detention decisions. A separate notice will advise the alien of the opportunity for the interview. The alien may check the appropriate box on the notice, returning the form provided within 14 calendar days so that an interview may be scheduled. The District Director has the discretion to schedule further interviews if he determines they would assist him in reaching a custody determination.

(5) The alien must be advised that he may submit any information relevant to support his request for release from detention, either in writing, electronically, by U.S. mail (or any combination thereof), or in person if an interview is conducted. The alien must also be advised that he may be represented by an attorney, or other person at no expense to the government. If an interview has been scheduled, the alien's representative may attend the review at the scheduled time.

(6) The District Director may delegate custody decisions to the level of the Assistant District Director, Deputy Assistant District Director, or those acting in their capacity. Custody determinations will be made by weighing favorable and adverse factors to determine whether the detainee has demonstrated by clear and convincing evidence that he does not pose a threat to the community, and is likely to comply with the removal order. *See* 8 C.F.R. § 241.4. The alien's past failure to cooperate in obtaining a travel document shall be considered an adverse factor in determining eligibility for release. *See* INA § 241(a)(1)(C) Suspension of Period. The fact that the alien has a criminal history does not create a presumption in favor of continued detention.

(7) Within thirty days of the District Director's custody review, the alien must receive written notification of a custody decision. All notification will be provided either by personal service or certified mail/return receipt. A decision to release should specify the conditions of release. A decision to detain will clearly delineate the factors presented by the alien in support of his release, and the reasons for the District Director's decision.

(8) With respect to those detain decisions that are subject to Headquarters review under paragraph 4, the District Director's determination that the alien should be detained is to be regarded as only preliminary. In those instances, the Regional Directors will forward the pre-

liminary detain decisions to Headquarters for review. Headquarters review will be conducted by Operations and Programs representatives (with assistance from the Office of General Counsel as necessary). Where the Headquarters reviewer's decision concurs with the District Director's, the Headquarters reviewer will write a supporting statement and will seek concurrence from a second Headquarters reviewer. Where the two reviewers differ, a panel of three Headquarters reviewers will conduct a further review of the case. The Headquarters panel may ratify the District Director's decision, return the case to the District Director to reconsider his decision, or determine that additional information is required to make a decision. The Headquarters review must be completed within thirty days of file receipt. The Headquarters review conclusions will be forwarded to the Regional Director for distribution to and appropriate action by the District Director.

(9) The District Director will review his decision in light of the Headquarters recommendations and will notify the alien of the final custody determination within thirty days of completion of the Headquarters review.

(10) The District Director should make every effort to effect the alien's removal both before and after expiration of the removal period. All steps to secure travel documents must be fully documented in the alien's file. However, if the District Director is unable to secure travel documents locally after making diligent efforts to do

so, then the case shall be referred to Headquarters OPS/DDP for assistance. More detailed instructions will be issued from the Executive Associate Commissioner for Operations by separate memorandum.

(11) On August 30, 1999, and on the last workday of each quarter (September, December, March, June) each district shall submit a custody review status report to its Regional office and to Headquarters. There will be more detailed instructions issued on reporting procedures at a later time.

FORMS [to be distributed]

(a) Notice to Alien
(b) Notice of Interview
(c) Detained Alien Custody Review Worksheet
(d) Decision of Custody Review
(e) Decision to Continue Detention
(f) Decision to Release
(g) Custody Review Status Report

APPENDIX H

[Seal omitted]

U.S. Department of Justice
Immigration and Naturalization Service
Western Region, Seattle District

Office of the District Director

813 Airport Way South
Seattle, WA 98134
206-553-0719
Fax 206-553-0936

June 2, 1999

Name: Kim Ho MA, A27 365 395
Address: Regional Justice Center/King County Jail

Dear Mr. MA:

An officer of this Service recently reviewed your case. The officer has presented the results of that review to me so that I may make a decision regarding your custody status.

Pursuant to the authority contained in Sections 236 and 241 of the Immigration and Nationality Act, and parts 236 and 241 of the Code of Federal Regulations, I have determined that until you are removed from the United States you shall continue to be detained in custody of this Service.

In reaching this decision I considered the nine factors listed below. I have also taken into consideration any material or statements that you may have submitted during the review process. There is no appeal from this decision.

Your case will be reviewed again on *December 2, 1999*. This letter constitutes notice of that review. You will receive no further notice.

You may at any time submit to the District Director a request for redetermination of your custody status. That request must be supported by evidence that you will appear for all future immigration proceedings and that your presence in the community does not represent a hazard to anyone. If you have been convicted of criminal offenses the evidence must be clear and convincing. Evidence must be presented in writing to the District Director through the officer handling your case.

FOR THE DISTRICT DIRECTOR

/s/ GEORGE L. MORONES
GEORGE L MORONES
Assistant District Director for
Detention and Deportation
Seattle, Washington

[ ] cc: Attorney of Record or Representative

Factors considered during custody review

(1) The nature and seriousness of the alien's criminal convictions
(2) Other criminal history;
(3) Sentence(s) imposed and time actually served;
(4) History of failures to appear for court (defaults);
(5) Probation history;
(6) Disciplinary problems while incarcerated;
(7) Evidence of rehabilitative effort or recidivism;
(8) Equities in the United States; and
(9) Prior immigration violations and history.

90 DAY CUSTODY REVIEW

Sections in red are mandatory with each review. Sections in blue require entry only upon first review or when there is any subsequent change. Blocks will automatically expand to fit text as it is entered. Tab from cell to cell to fill in data, then print. If you want to save the form, change the name then save it to a directory in your computer.

Reviewing Officer: Michael A. Melendez

Date: May 6, 1999

Personal Data & Factors

A Number: A27 365 395

Last Name: MA First Name: Kim Ho

DOB: 07/06/77 Nationality: Cambodia

Martial Status: Single

Spouse USCLPR? N/A

Minor Children? N/A

Other family factors? The Subject's father, mother and two brothers reside in the Seattle area. He also has an Aunt and Uncle who also reside in the Seattle area as well.

INS History

Entry Data: 04/26/85
LPR Since: 01/21/87
Deportation Charge: 237(a)(2)(A)(iii)
IJ Dec. Date: 09/12/97

BIA Dec. Date: 10/26/98
App. Court Dec. Date: N/A
Into Custody On: 06/06/97 Agg. Fel (Y/N): Y

Previous INS Bond? Date: N/A Amount: N/A
Disposition: N/A

Detention Category 1
Does detainee have a history of violence? Y
If yes, explain here: Subject was convicted Manslaughter in the 1st Degree.

Criminal History (*add separate sheet if necessary, or RAP sheet*)

				Agg Felony?
Date	Court/Location	Convicted of	Sentence	(y/n)
3/1/96	Superior/King Co.	Manslaughter in the 1st Degree	38 Months	Y

Institutional History – Positive or Negative (*Comment required - "Nothing significant" is acceptable*)

On 10/20/97, the Subject was transferred to King Co. Jail, Seattle, WA. for his involvement in a planned Hunger Strike that occurred while in Service custody.

Medical/Mental History (*Comment required –"Nothing significant" is acceptable*)

Nothing Significant

Community Concerns

Subject was a member of the "Local Asian Boyz" (LAB) in the Seattle area and was convicted of Manslaughter in the 1st Degree. Subject has no other criminal record.

Officer Comments

(If there has been contact or correspondence with the detainee, family, or attorney, synopsize & assess here. Also, particularly address efforts to obtain travel documents and alien's efforts to assist or impede obtaining them.)

The Subject is a native and citizen of Cambodia who entered the United States as a Refugee on or about April 26, 1985. He was accorded the status of a permanent resident on January 21, 1987. On March 1, 1996, he was convicted of Manslaughter in the 1st Degree in the Superior Court of Washington for King County. For that offense, the term of imprisonment imposed was 38 months.

On June 6, 1997, the Subject was processed into Service custody. He was then ordered removed by the Immigration Judge on September 12, 1997. He reserved appeal to the BIA and on October 26, 1998, the BIA dismissed the appeal. On May 5, 1999, the Service requested a Travel Document from the Consulate General of Cambodia in order to facilitate the Subject's removal. The Subject did not impede our procedure in obtaining a Travel Document. We have not received a response from the Consulate General of Cambodia on the outstanding Travel Document.

On October 20, 1997, he was transferred to King County Jail/Seattle for his involvement in a planned Hunger Strike within the Service Detention Center. He was identified as one of the more vocal detainees within the dorms. The Subject was housed at King County Jail/Seattle for over a year before being transferred to the Immigration Pod within King County

Jail/Regional Justice Center. While housed within King County Jail/Seattle, there was no record of any behavioral problems.

When given the opportunity to make an oral statement in regard to his custody review, the Subject along with his attorney Jay Stansell, emphasized the following topics:

- The Subject was convicted of Manslaughter in the 1st Degree on 03/01/96. He was sentenced to 38 months, but only served 26 months in the Washington State Department of Corrections System. This was his only criminal conviction both as a juvenile and adult.

- The Subject was 17 years old when he was convicted of Manslaughter in the 1st Degree. When he was 19 years old he was transferred into Service custody on 06/06/97. Now he is 21 years old and has been incarcerated for 47 months. This is combining both time served with the State Department of Corrections (DOC) and INS.

- If released the Subject plans on completing his education by obtaining a GED. He was in the 10th grade when he was convicted of Manslaughter in the 1st Degree. He was given the opportunity to complete courses towards obtaining a GED while incarcerated with the State DOC but he was transferred to another facility. At the other facility he was not afforded the opportunity to complete courses towards obtaining a GED.

- He also stated that if released he would like to "Educate" not only his brothers but also his community on the consequences of committing criminal activity. He was not afforded this knowledge when he was a teenager growing-up in a predominantly African American community. He further noted that growing-up in a community where he was in the minority, constantly being picked on by the majority, they had to bond together in order to stand-up for themselves.

- He was a member of the Local Asian Boyz (LAB), affiliated in the Seattle area. This gang affiliation provided him feeling of acceptance that he was not obtaining from his community. When he was questioned on his current affiliation with the LAB's he proceeded to affirm that there is "No" affiliation at this time and that there would be no affiliation if released.

- Please refer to the Officer's Comments Continuation Sheet.

OFFICER'S COMMENTS CONTINUATION

- The Subject's family is very supportive. They visit him every Sunday and have provided the Service with letters affirming their support for their son and requesting his release from custody. His father is 71 years old and handicapped. If released, it would allow him to assist his father in his everyday activities that are difficult for him.

- The Subject further emphasized about his relationship with both of his brothers. He has one brother who is 15 years old and is in constant communication with him. His brother looks to the Subject as a guide for him. The Subject is very involved with his brother's activity both in school and within the community. This is to ensure that he does not follow in his footsteps and to value the opportunity that he has here in the United States. His brother has expressed that he would like to become a Youth Counselor in the future.

- The Subject's second brother is 31 years old and runs his own business. His brother has a job waiting for him if released from Service custody.

The Subject completed by stating that he has served more time with INS than he did for the crime for which he was convicted. He would also like to have the opportunity that was never given to him which is to be released from custody and prove that he is not a threat to society, as it is today.

The Subject's family and members of his community have provided letters of support requesting that he be released from Service custody. There is also a letter offering employment from his brother if released.

Officers are referred to 8 CFR 241.1 for an extensive list of factors to be considered by the DD in reaching a decision to continue in custody, or release an alien during the past-90 day review period.

Supervisory Review by B. Brown on 5-24-99
Supv. Comment:

/s/ [Illegible]
Supervisory Signature

ACTION BY DISTRICT DIRECTOR

D.D. Comment:

Schedule psych evaluation prior to next review

District Director Decision: (check one):

[x] Continue to detain pursuant to 8 CFR 241.4.

[ ] Release under Order of Supervision pursuant to 8 CFR 241.4

Conditions: Bond in the amount of $ _____

Other: [ ] All conditions listed under 8CFR241.5(a)

Except 241.5(a) [ ] & [ ] & [ ]

[ ] and

[ ] Employment authorized

For the District Director

/s/ GEORGE L. MORONES
GEORGE L. MORONES
Assistant District Director,
Detention & Deportation

Date 6/15/99

APPENDIX I

September 29, 1999

George Morones
Supervisory Deportation Officer
Detention & Deportation
Seattle District Office
attn: Natalie Asher

Mr. Morones:

Attached please find our review of Kim Ho Ma, A27 365 395. As you can see, Mr. Curi and I were in concurrence in recommending that this individual remain incarcerated pending further review.

Said decision was predicated in large part due to the nature of his criminal record (1st degree manslaughter), as well as his institutional record. In light of this, we were unable to conclude that Mr. Ma would remain nonviolent and not violate the conditions of release were we to have rendered a favorable recommendation.

Should you have any questionsor [*sic*] require additional information, please contact me at (202) 616-7783 or e-mail.

Thank you

/s/ ROBERT A. MATTEY
ROBERT A. MATTEY JR.
Staff Officer HQ D&D
Cuban Review Program
Washington, D.C.

INS "A" NUMBER A 27 365 395 BOP REG NUMBER *N/A*
NAME Kim Ho Ma
PANEL REVIEW DATE 05-06-1999
PLACEMENT CODE _____

1. IT IS RECOMMENDED THAT THIS DETAINEE BE (XXX) DETAINED BECAUSE:
   ( ) RELEASED

A careful review of Mr. Ma's criminal record reveals that he was arrested and convicted on or about 03-01-1996 for 1st degree manslaughter, for which he was sentenced to serve 38 months. Subsequent to his incarceration, he participated in a hunger strike on 10-27-97 while incarcerated in the King County Jail in Seattle, Washington. Given the assaultive nature of the above-mentioned criminal offense, it is the recommendation of this panel member that he remain incarcerated pending another review.

/s/ ROBERT MATTEY
ROBERT MATTEY
SIGNATURE COMMITTEE MEMBER

ROBERT A. MATTEY JR.
PRINT NAME OF MEMBER

09-30-99
DATE

2. IT IS RECOMMENDED THAT THIS DETAINEE BE
( ) DETAINED BECAUSE:
( ) RELEASED

/s/ TOMAS CURI
TOMAS CURI
SIGNATURE COMMITTEE MEMBER

TOMAS CURI
PRINT NAME OF MEMBER

9/30/99
DATE

While detainee has had strong famil
his crime, and detention incident p
writer from assuming he will remain
or abide by conditions of his parole

APPENDIX J

Section 241.4 of Title 8 of the Code of Federal Regulations provides:

§ 241.4 Continued detention beyond the removal period.

(a) *Continuation of custody for inadmissible or criminal aliens.* The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) *Continuation of custody for other aliens.* Any alien removable under any section of the Act other than section 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.