No. 99-7791

In The

Supreme Court of the United States

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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I. MR. ZADVYDAS'S DETENTION IS EXCESSIVE BECAUSE HIS REMOVAL IS NOT REASONABLY FORESEEABLE.

This case is not about the decision whether to deport. Nor is it about how to bring about deportation. It does not concern detention pending deportation, incident to deportation or to effectuate deportation. It is about detention when deportation is not a realistic possibility.

The government does not address that question. Rather, it misframes the issue as whether detention is permissible to facilitate deportation. But that presumes that deportation is reasonably foreseeable, which it is not in Mr. Zadvydas's case. The government repeatedly buries the unlikelihood of deporting petitioner. It asks whether substantive due process prohibits detention where the alien "has not yet been removed." Respondent's Brief (Resp. Br.) at 16, 19. It inaccurately describes the detention under challenge as removal that "cannot be effectuated immediately," Resp. Br. at 21, or detention "in connection with . . . removal." Resp. Br. at 20. Most incredibly, it relies heavily on case law about detention *prior* to entry of a deportation order, during a finite period of time when no attempt to deport has yet occurred. *See* Resp. Br. at 23, 30-31 discussing ***Carlson v. Landon***, 342 U.S. 524 (1952). That is not what this case is about.

This case is about prolonged detention with no end in sight. But for the district court's grant of habeas relief, Mr. Zadvydas would have been incarcerated longer than six years. The best that the government can say about the future prospects of deporting Mr. Zadvydas is that "it

cannot 'now be said with any real assurance' that petitioner 'will never be deported.' " Resp. Br. at 47 (quoting Circuit Court, J.A. 212). It makes no concrete showing of any reasonably foreseeable prospects because none exist. Mr. Zadvydas is stateless. The only two countries that would possibly have granted him entry have refused him. Germany refused to admit him in 1995.[1] (J.A. 33-34). Lithuania refused to admit him in 1994, and has continued to reject his documentation as insufficient to grant him citizenship. (J.A. 23 & 168-169) The only remaining possibilities consist of speculative hypotheticals posed by the circuit court, which the court itself characterized as "problematical, difficult and distant" (J.A. 219), and which the INS, in the exercise of its expertise, did not find worthy of pursuit in the five years preceding the court's opinion or since. In truth, after six years, the INS has no real leads. To say that detention under these circumstances is to "effectuate deportation" is fanciful at best.

When departure is not reasonably foreseeable, the government interest in deportation is too attenuated to justify the draconian abridgement of liberty posed by potentially lifelong incarceration, particularly when less restrictive alternatives are available. The implementing regulations provide that detention continues until the deportee proves to the INS that he is no longer dangerous in light of his prior offenses, a fact that will never change.

[1] The government conceded that in 1994 the German Consulate had determined the petitioner is not a German citizen. Resp. Br. at 7, citing J.A. 74, 113, and that both of his parents are Lithuanian. *Id.* at 7, n.4 citing J.A. 75, 194-95.

8 C.F.R. §§ 241.4(d)(1) & (e). That is a grossly excessive method of protecting the community against potential danger and flight risk.

II. THE MERE FACT THAT THIS CASE INVOLVES NON-CITIZENS DOES NOT REQUIRE THIS COURT TO DEFER TO THE INS.

This case is not about the decision whether to exclude or expel. Nor, given the remote prospects for departure, is it about detention as a means to ensure deportation. In these circumstances, "judicial deference loses its rationale altogether." ***Rosales-Garcia v. Holland***, 2001 WL 87442 at *18 (6th Cir. (Ky.)) (Jan. 31, 2001).

The plenary power doctrine has its greatest force with respect to decisions about whom to admit into the United States and whom to expel. Courts will not interfere with congressional decisions about the substantive grounds for deportation. ***Galvan v. Press***, 347 U.S. 522, 530-31 (1954). The government nevertheless would sweep all matters involving immigrants under its plenary authority. Resp. Br. at 20. However, the cases on which it relies, ***Fiallo v. Bell***, 430 U.S. 787 (1977), and ***Harisiades v. Shaughnessy***, 342 U.S. 580 (1952), do not support such a broad proposition. These concern substantive decisions about qualifications for admissions and grounds for deportation, respectively.

Outside that context, this Court has carefully scrutinized infringements of the constitutional rights of immigrant residents. In ***Wong Wing v. United States***, 163 U.S. 228 (1896), it invalidated an immigration statute that provided for punitive detention of aliens ordered

deported without judicial process; in ***United States v. Witkovich***, 353 U.S. 194 (1957), it narrowed an immigration reporting statute to avoid abridgement of constitutional rights; and in ***Landon v. Plasencia***, 459 U.S. 21 (1982), it imposed procedural protections on exclusion proceedings against a resident alien.[2]

Mr. Zadvydas does not challenge his deportation order. His case does not involve detention as a means to effectuate deportation because the possibility of deportation is remote. The INS would detain Mr. Zadvydas to prevent him from committing future crimes. That interest does not implicate national sovereignty, nor is it an area in which the INS has particular responsibility or expertise. Therefore, the decision to detain Mr. Zadvydas to prevent recidivism is not entitled to deference.

Amongst a plethora of generalities, the government puts forth no concrete sovereignty concerns in this case. It purports to find a sovereignty interest in not allowing a recalcitrant foreign country to shift responsibility for its citizens onto the United States. Resp. Br. at 21. This justification has absolutely no applicability to Mr. Zadvydas. He is not a citizen of any country. No foreign country is reneging on its responsibility to accept him, nor is any nation forcing the United States to keep him in our midst. To the contrary, the United States voluntarily admitted Mr. Zadvydas in 1956. He grew up here from the age of 8 years old. If he is a product of any society, it is ours. If any country has "responsibility" for him, it is the United States. Indeed, as a factual matter, detention of

[2] *See also* ***INS v. Chadha***, 462 U.S. 919, 940-41 (1983).

a long-term resident would have little deterrent effect on another country's emigration policy. Even if it did, this Court held in ***Wong Wing*** that otherwise unconstitutional detention is not saved by its peripheral impact in furtherance of legitimate immigration policy. 163 U.S. at 237. This Court did not hesitate in limiting *how* Congress implements its immigration policies. Brief of the American Civil Liberties Union as *Amici Curiae* (ACLU Amicus) at 28 & 28 n.1.

Even if Mr. Zadvydas's release from detention could be construed as having some kind of foreign policy implications, this would not require deference. This Court has never held that the mere existence of potential foreign policy concerns immunizes governmental action from judicial review. *See* page 20 of the Brief of Law Professors as *Amici Curiae* (Law Professor Amicus) in ***Ma v. Reno***, 208 F.3d 815, reh'g denied, (9th Cir. 2000), cert. granted, 121 S.Ct. 297 (2000), citing ***Baker v. Carr***, 369 U.S. 186, 211 (1962).

The government hypothesizes that a foreign country may infiltrate a terrorist into the United States, refusing to take him back when he is ordered deported. Resp. Br. at 21. Terrorism poses a qualitatively different type of danger than the domestic criminal activity for which Mr. Zadvydas was ordered deported. Indeed, as part of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 309-546 (IIRIRA), Congress enacted special provisions governing the detention and removal of "alien terrorists." *See* 8 U.S.C. §§ 1531-1537. Preventive detention of persons ordered deported under 8 U.S.C. §§ 1531-1537 due to security and related grounds is not before the Court

today.[3] What is before the Court is preventive detention of persons like Mr. Zadvydas who are ordered deported under 8 U.S.C. § 1227(a)(2) because of prior criminal offenses.[4] That is simply a matter of domestic crime control, a matter in which the INS has *no* particular expertise, and hence is subject to full judicial review.

III. DETENTION WHEN DEPORTATION IS NOT REASONABLY FORESEEABLE VIOLATES SUBSTANTIVE DUE PROCESS.

To determine whether imprisonment has become excessive to its regulatory purpose and hence punitive, this Court must balance the individual's fundamental liberty interest in freedom from physical restraint with the governmental interest in detention. The balancing test requires consideration of the length of detention, the likelihood of effectuating deportation, the risk of dangerousness and flight, and the availability of less restrictive

[3] That 8 U.S.C. § 1537(b)(2)(C) contains express authority for detention of alien terrorists whose countries will not take them back is further evidence that Congress did not intend to authorize indefinite detention of non-removables in § 1231(a)(6) which contains no comparable language.

[4] Moreover, Mr. Zadvydas has already served his sentence and been released by the criminal justice system. *Cf.* ***Foucha v. Louisiana***, 504 U.S. 71, 82 (1992) (noting that society's "normal means of dealing with persistent criminal conduct" is sufficient to address threat of future danger in lieu of indefinite commitment.)

alternatives. When deportation is not reasonably foreseeable, the balance favors an alternative less restrictive than detention, such as supervised release.[5]

A. Neither *Mezei* nor *Carlson* concerned detention of a resident after entry of a deportation order.

This Court has never allowed the political branches to imprison long-time residents for prolonged and indeterminate periods due to the government's inability to implement a deportation order. The INS relies on cases that are plainly inapposite. ***Shaughnessy v. United States ex rel. Mezei***, 345 U.S. 206 (1953), concerns detention of a would-be entrant who was refused admission because of national security. Although he previously lived in the United States, Mr. Mezei abandoned his residence, spent 19 months behind the Iron Curtain and re-applied for entry as a new immigrant. Because he was an entrant rather than a resident, the Court denied him the constitutional protections afforded residents. By contrast, Mr. Zadvydas never left the United States since he was lawfully admitted in 1956. His deportation order is based on

[5] Moreover, recognition of that conclusion does *not*, as asserted by the Washington Legal Foundation amicus brief, result in the wholesale automatic release of dangerous aliens. Instead, it requires a case-by-case analysis of the particular individual's present danger to the community and flight risk, balanced against length of detention and foreseeability of removal. Consideration of less restrictive means also should be weighed to determine if such means adequately address the government's interests. *Compare* 8 U.S.C. § 1253(a)(3) (providing analogous balancing test prior to imposition of punishment for an alien's wilful failure to comply with an order of removal.)

criminal convictions devoid of national security implications. There is no basis for extending *Mezei* to these facts.[6]

Carlson v. Landon, 342 U.S. 524 (1952), the other case heavily relied on by the government, concerns detention during deportation proceedings, before entry of an order. Unlike the detention at issue here, which has no determinate end-date and potentially could continue for a lifetime, the detention in *Carlson* was for a finite period. "It should be noted," the *Carlson* Court said, "that the problem of habeas corpus after unusual delay in deportation hearings is not involved in this case." 324 U.S. at 546.[7] Further, as in *Mezei*, detention was premised on a national security threat. By contrast here, Mr. Zadvydas faces potentially lifelong incarceration for reasons totally unrelated to national security.

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[6] Moreover, as the Sixth Circuit recently noted in finding that indefinite detention of an excludable alien violated substantive due process, "*Mezei* has been severely criticized for establishing a preposterous level of deference to Congress' authorization of due process procedures for aliens." *Rosales-Garcia v. Holland*, 2001 WL 87442 at *13 n.25 (6th Cir. (Ky.)) (Jan. 31, 2001), citing, Henry Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv.L.Rev. 1362, 1392 (1953).

[7] *See also* *United States v. Witkovich*, 353 U.S. 194, 201 (1957) noting that *Carlson* involved a customarily brief detention pending a hearing.

B. Even after entry of a deportation order, this Court has protected a resident alien's constitutional rights.

Unlike the cases invoked by the government, *Wong Wing* and *Witkovich* involved constitutional challenges by residents to INS restrictions after entry of a deportation order. In *Wong Wing*, this Court distinguished between temporary detention for the purpose of effectuating deportation, which it approved, and imprisonment as punishment, which it invalidated in the absence of judicial process. The Court held that the Constitution did not permit the latter, even for an alien under a final order of deportation.

Like the instant case, *United States v. Witkovich*, 353 U.S. 194 (1957), involved a constitutional challenge to INS restrictions imposed when the agency was unable to effectuate deportation. This Court found the restrictions constitutionally suspect, despite the INS's contention that they were necessary to prevent a continued threat to national security.

Six months after Mr. Witkovich was ordered deported because of Communist activities, the INS was still unable to arrange for his departure. Accordingly, it released him subject to supervision. As a condition of supervision, the statute required a deportee to provide information "as to his nationality, circumstances, habits, associations, and activities." *Id.* at 195 (quoting 8 U.S.C. § 1252(d)). Purportedly pursuant to the statute, the INS asked Mr. Witkovitch questions about ongoing Communist relationships. Mr. Witkovich refused to answer, and

the INS charged him with failing to comply with conditions of supervision. Mr. Witkovich moved to dismiss the indictment on the grounds that the statute was unconstitutional.

The INS argued that it should be allowed to inquire about continuing Communist affiliations to prevent recurrence of the very activity for which Witkovich had been ordered deported. *Id.* at 198. This Court held that the government's view of the statute raised doubts about its constitutionality.

> By construing the Act to confer power on the Attorney General and his agents to inquire into matters that go beyond assuring an alien's availability for deportation, we would, at the very least, open up the question of the extent to which an administrative officer may inhibit deportable aliens from renewing activities that subjected them to deportation . . . [S]upervision of the undeportable alien may be a lifetime problem. In these circumstances, issues touching liberties that the Constitution safeguards; even for an alien "person," would fairly be raised on the Government's view of the statute.

Id. at 201. To avoid the constitutional problem, the Court limited the statute to authorize only those questions "reasonably calculated" to provide information relevant to availability for departure. *Id.* at 202.[8]

[8] As argued in petitioner's original brief, this Court should similarly avoid the constitutional problem presented by this case by construing § 1231(a)(6) to authorize detention for only a reasonable time to effectuate removal, a period that has already been surpassed in Mr. Zadvydas's case. The government addressed that argument in its brief in ***Ma v. Reno***, 208 F.3d 815, reh'g denied, (9th Cir. 2000), cert. granted, 121 S.Ct. 297 (2000), as did the respondent in that case. Petitioner would adopt by reference respondent's argument in ***Ma*** on this issue. Washington Legal Foundation Amicus Brief at p.20 suggests petitioner has not properly raised this question. As urged in petitioner's Reply Brief in Support of Petition for Writ of Certiorari, this issue is properly before this Court. Review before this Court brings not just the constitutional questions decided below, but the entire case. ***Zobrest v. Catalina Foothills School District***, 509 U.S. 1, 7 (1993). Petitioner raised the statutory question in his supplemental brief in the circuit court. This question is therefore part of Mr. Zadvydas's original petition. ***Caspari v. Bohlen***, 510 U.S. 383, 389-90 (1994).

Witkovich stands for the proposition that the government interest in prevention of danger does not give it *carte blanche* to abridge an alien's constitutional rights, even after entry of a deportation order. In that case, the Court found that questioning about political activities was constitutionally suspect. *A fortiori*, the prolonged and indefinite incarceration at issue here triggers constitutional concerns.

C. This Court restricts detention based on future dangerousness to limited situations not present here.

The strict constitutional limitations on preventive detention force the government to rely on cases that carve out carefully circumscribed exceptions. None of the exceptions approved by this Court, however, involved the kind of prolonged, indeterminate detention scheme at issue here. *See* ACLU Amicus in ***Ma v. Reno***, distinguishing INS's detention scheme from other civil detention

schemes this Court upheld. This Court approved indeterminate detention of sexual offenders in ***Kansas v. Hendricks***, 521 U.S. 346 (1997), because the statute limited detention to only those persons proven to have a mental abnormality rendering them unable to control their dangerousness. The Court properly recognized that other dangerous persons were more properly dealt with through the criminal process. *Id.* at 360. By contrast, Mr. Zadvydas certainly suffers from no mental impairment rendering him unable to control his conduct. Indeed, a psychiatrist found him not to be dangerous. (J.A. 148-49). The fact that he is subject to a deportation order does not heighten his dangerousness.

Likewise in ***United States v. Salerno***, 481 U.S. 739 (1987), this Court recognized the general rule that "the government may not detain a person prior to a judgment of guilt in a criminal trial." *Id.* at 748. It allowed an exception, however, for preventive detention pending trial only because of statutory safeguards not present in IIRIRA. Preventive detention was limited to only the most serious of crimes, and the defendant was entitled to a prompt detention hearing at which the government was required to convince a neutral, judicial officer by clear and convincing evidence that no conditions of release could protect the community. Moreover, detention was "limited by the stringent time limitations of the Speedy Trial Act." *Id.* at 747, 749.

By contrast here, detention is not limited to a small group of the most dangerous criminals. Persons convicted of any crime of moral turpitude, indeed, persons who have not been convicted of a crime but whom the

INS deems dangerous, are subject to incarceration. Further, the INS is both prosecutor and judge, 8 C.F.R. § 241.4(c); the burden of proof is placed on the resident alien to show he is not dangerous, 8 C.F.R. § 241.4(d)(1). Detention is potentially life-long if the resident fails to carry his burden of proof.

The INS scheme more closely resembles that invalidated by this Court in ***Foucha v. Louisiana***, 504 U.S. 71 (1992). ***Foucha*** involved a Louisiana statute permitting indefinite civil detention of an insanity acquitee who failed to prove lack of dangerousness, even if he was no longer mentally ill. Disturbed by the placement of the burden of proof and lack of strict limitation on duration, the Court held that the statute did not come within the narrowly drawn *Salerno* exception. The INS scheme has the same infirmities.

IV. DEPORTATION DOES NOT RELEGATE MR. ZADVYDAS TO THE CONSTITUTIONAL STATUS OF AN EXCLUDABLE ALIEN.

The government asks this Court to take the extreme and unprecedented step of holding that the entry of a deportation order relegates long-time residents to the status of first-time entrants for the purpose of evaluating the constitutionality of indefinite detention. Resp. Brief at 20 & 35-37. This Court should not. The government's release of a deportee like Mr. Zadvydas does not raise the sovereignty issues posed by the release of an excludable. Moreover, while it is unclear if an excludable has any

constitutional rights,[9] this Court has recognized since 1896 that a deportee does, even after entry of a deportation order. *See* ***Wong Wing, supra.***

A. Unlike detention of an excludable, the government has no sovereignty interest in detaining a long-time resident ordered deported because of criminal conduct.

The government's sovereignty interest in detaining an excludable is not present in the detention of long-time resident under order of deportation.[10] The government invokes the specter of a foreign government forcing us to admit its citizens by sending them here and refusing to take them back. Resp. Br. at 36. The source of the argument is ***Mezei***, 345 U.S. at 216, a case about a new entrant with national security concerns. The argument has force only in that context. But that is not this case. Mr. Zadvydas is a long-time resident ordered deported because

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[9] *See* ***Ma v. Reno***, 208 F.3d 815, 824, reh'g denied, (9th Cir. 2000), cert.granted, 121 S.Ct. 297 (2000); *but see*, ***Rosales-Garcia v. Holland, supra*** (finding that excludables are constitutionally protected against indefinite detention).

[10] Furthermore, the government misrepresents the provisions of IIRIRA in suggesting that Congress eliminated the distinction between excludables and residents. To the contrary, like its predecessor, IIRIRA grants aliens who have been admitted more rights than those seeking entry. The statute preserves distinct grounds for exclusion and for deportation. 8 U.S.C. § 1229a(a)(2). Applicants for admission have a heavier burden of proof than do residents; also, unsuccessful applicants for admission have no choice as to the country to which they are returned, while deportees may select the country to which they will be removed. 8 U.S.C. § 1231(b).

of purely domestic criminal conduct. In the case of long-term residents, the nexus is attenuated. Other nations did not force legally admitted residents on us; the INS had the option of excluding them and decided not to exercise it. With passage of time, a resident's links with the foreign country become weaker and ties to the United States grow stronger. In cases like this, detention in default of deportation is a function of domestic crime control, not foreign policy.

The government's reliance on ***Fong Yue Ting v. United States***, 149 U.S. 698 (1893), Resp. Br. at 20 & 37-39, is misplaced. ***Fong*** holds only that the power to exclude and expel stems from one source, not that the government's interest is the same in each instance. This Court has repeatedly held that in effectuating deportation, the government is subject to constitutional constraints that do not apply in the case of excludables. Compare ***Yamataya v. Fisher***, 189 U.S. 86 (1903) and ***Plasencia, supra***, with ***United States ex rel. Knauff v. Shaughnessy***, 338 U.S. 537 (1950) and ***Mezei, supra.***

This difference is also reflected in the history of post-deportation detention statutes which always have treated deportables and excludables differently. *See* Resp. Br. in ***Ma*** at 36-39 and ***Mezei***, 345 U.S. at 216. The Court in ***Mezei*** notes that while Congress provided for resident aliens to be released on bond pending deportation, no similar statutory authority existed for excludable aliens. Although the current statute does not distinguish between post-final order detention for excludable and deportable aliens, this would not mean the government's interests are the same for the purpose of substantive due process analysis.

B. The fundamental liberty interest in freedom from physical restraint is not extinguished with entry of a deportation order.

The right at stake in this case is the core liberty interest in freedom from physical restraint. The government mischaracterizes it as "the right to be at large in this country," Resp. Br. at 36, thereby improperly distancing deportees from other residents. In fact, the liberty interest is the right to be free from physical restraint, a fundamental interest that exists regardless of the legality of presence within the country. *See e.g.* ***Plyler v. Doe***, 457 U.S. 202 (1982).

V. THE NEW INS REGULATION DOES NOT SOLVE THE SUBSTANTIVE DUE PROCESS PROBLEM.

Contrary to the government's representation, the new INS regulation does not cure the substantive due process problem. The new regulation allows indefinite detention on the basis of future dangerousness alone. Furthermore, it lacks the protections that characterized other civil detention schemes upheld by this Court. *See* ACLU Amicus. In particular, like the former regulation, it impermissibly places the burden on the detainee to prove that he is not dangerous.

A. The implementing regulation permits prolonged, indeterminate detention on the basis of future dangerousness alone.

The latest update of the implementing regulation does not solve the constitutional problems with the INS's

application of 8 U.S.C. § 1231(a)(6). It requires a finding that the detainee is not dangerous before he can be released. 8 C.F.R. § 241.4(e), at 65 Fed. Reg. 80281, 80295 (Dec. 21, 2000). The regulation also requires a finding that travel documents are not available, but even if that finding is made, release is not permissible without a finding of non-dangerousness as well. Thus, under the new regulation, future dangerousness by itself results in continued detention, even in the case of an alien who can *never* be removed.

The government is wrong in its assertion that the latest regulation incorporates consideration of length of detention and likelihood of departure. Resp. Brief at 45. The regulation lists seven specific factors for consideration in the release decision, none of which relates to length of detention or likelihood of departure. *See* 8 C.F.R. § 241.4(f), at 65 Fed. Reg. at 80295. The eighth and last factor incorporates five sub-factors. Again, none of these relates to length of detention or likelihood of departure. *Id.* Commentators suggested inclusion of these factors, but the INS rejected their suggestions. *Id.* at 80288.

The government relies on INS commentary to support its assertion that the regulation permits consideration of length of detention and likelihood of deportation. Resp. Br. at 45. The commentary states that the regulation *does not prevent* consideration of those factors. 65 Fed. Reg. at 80288. The regulation itself, however, gives no hint that its enumerated factors are nonexclusive. Furthermore, even if the regulation permitted consideration of length of detention and likelihood of detention, that would not mean that INS decision-makers in fact would consider them.

The government's representation that the latest regulation cures the substantive due process issues in this case is particularly disingenuous when the INS's commentary expressly adopts the position of the Fifth Circuit approving Mr. Zadvydas's continued detention.[11] ***Id.*** at 80283. The regulation authorizes continued detention, regardless of duration, with no determinate end, on the basis of future dangerousness alone. That is a violation of substantive due process, regardless of how frequently review takes place[12] or how much process is permitted.

B. The regulation improperly switches the burden of proof to the detainee to prove lack of dangerousness.

Amongst the serious defects in the regulatory process is its assignment of the burden to the detainee to prove that he is not dangerous. "In our society liberty is the norm, and detention prior to trial or without trial the carefully limited exception." ***Salerno***, 481 U.S. at 755. As

[11] With equal disingenuousness, the government notes that Mr. Zadvydas never received the benefits of a full-fledged custody review because the district court granted habeas relief before the procedures were in place. Resp. Br. at 40 n.18. Implicit therein is the hint that the additional procedures may afford him relief. If that is so, then the INS should have reviewed his case before now. Indeed, Mr. Zadvydas so requested, but until this latest brief, the INS insisted that it could not grant Mr. Zadvydas a custody review unless he resubmitted himself to custody. Gov't's Supp. Br. to Fifth Cir. at 14-15. Its current offer of a custody review while he is at large is an about-face. Resp. Br. at 41 n.18.

[12] In fact, the new rule reduces the frequency of reviews from every six months to every year. 65 Fed.Reg. at 80289.

the proponent of detention, the INS should have the burden of proving justification for an exception to the general rule. ***Reno v. Flores***, 507 U.S. 292, 341 (1993)(Stevens, J., dissenting). The INS regulation, however, starts from the situation in which the deportee is detained under the mandatory provisions of 8 U.S.C. § 1231(a)(2) during the removal period, treats the condition of detention as the norm, and imposes the burden on the detainee to establish grounds for his release. 8 C.F.R. § 241.4(d)(1). That inversion of the burden of proof is extremely dangerous. From a constitutional perspective, mandatory detention during the removal period is an exception to the normal condition of liberty, and the INS has a heavy burden to establish why the exception should be extended.

CONCLUSION

For the foregoing reasons and for the reasons set forth in petitioner Kestutis Zadvydas's original Brief on the merits, petitioner respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifth Circuit and reinstate the grant of a writ of habeas corpus by the District Court, ordering him released from detention.

Respectfully submitted,

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