No. 99-7791

In The

Supreme Court of the United States

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Does the Due Process Clause prohibit the prolonged indefinite detention of petitioner after entry of a final deportation order when deportation is not reasonably foreseeable.

2. To avoid a substantial constitutional question, should this Court construe 8 U.S.C. § 1231(a)(6) to authorize only a reasonable period of detention after a deportation order because the statute is silent as to length of confinement.

LIST OF PARTIES

1. Kestutis Zadvydas
2. Lynne Underdown
3. The Immigration and Naturalization Service

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The decision of the United States Court of Appeals for the Fifth Circuit is reported as ***Zadvydas v. Underdown***, 185 F.3d 279 (5th Cir. 1999), *cert. granted*, ___ U.S. ___, 121 S.Ct. 297 (2000). (J.A. 192) The decision of the United States District Court for the Eastern District of Louisiana is reported as ***Zadvydas v. Caplinger***, 986 F. Supp. 1011 (U.S.D.C., E.D.La. 1997). (J.A. 111). The Report and Recommendation of the Magistrate is unreported. (J.A. 70).

JURISDICTION

The decision of the Court of Appeals was announced on August 11, 1999. The order denying the petition for rehearing was issued on October 13, 1999. (J.A. 229). The petition for certiorari was filed on January 11, 2000. Certiorari was granted on October 10, 2000. (J.A. 230). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " U.S. CONST. amend. V.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1231(a)(3) provides as follows:

> 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 officer 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.

(Appendix I, p.A-16)

8 U.S.C. § 1231(a)(6)[1] provides as follows:

> 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).

(Appendix F, p.A-12)

8 U.S.C. § 1253(b) provides as follows:

> An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 241(a)(3) [8 USCS §§ 1231(a)(3)] or knowingly give false information in response to an inquiry under such section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(Appendix J, p.A-18)

[1] The predecessors to U.S.C. § 1231(a)(6) as quoted herein are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

(i) Procedural History.

On September 15, 1995, Kestutis Zadvydas filed a *pro se* Petition for Writ of Habeas Corpus in the Western District of Louisiana contesting his continued detention pending deportation by the United States Immigration and Naturalization Service (INS). (R.A.,[2] Vol.1, pp.29-35.) On February 28, 1996, a United States District Judge in the Western District of Louisiana transferred this case to the Eastern District of Louisiana when Mr. Zadvydas was transferred from a federal detention center in Oakdale, Louisiana, to the Orleans Parish Community Correctional Center, a local prison in New Orleans, Louisiana. (R.A., Vol.1, p.22.) The United States Magistrate Judge for the

[2] Hereinafter, R.A. refers to record on appeal.

Eastern District of Louisiana conducted an evidentiary hearing on September 27, 1996. On February 3, 1997, the United States Magistrate Judge issued his Report and Recommendation denying habeas corpus relief. (R.A., Vol.3, pp.709-732.) (J.A. 70).

After objection, on October 30, 1997, the district court issued its Order and Reasons which rejected the Magistrate's Report and Recommendation. The district court held that Mr. Zadvydas's continuing detention violated substantive due process. (R.A., Vol.3, pp.521-556.) (J.A. 111). To determine if he should be released, the court ordered a psychiatrist to examine Mr. Zadvydas for dangerousness. On November 19, 1997, a psychiatric report was issued finding Mr. Zadvydas not dangerous to himself or others. (J.A. 148). On November 26, 1997, the district court entered judgment granting the writ of habeas corpus and pursuant to 28 U.S.C. § 2241 ordered him released from confinement.

The government timely filed a Notice of Appeal. (R.A., Vol.4, pp.788-790.) On August 11, 1999, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision. (J.A. 192) On October 13, 1999, that court denied a petition for rehearing. (J.A. 229). It issued a stay of the mandate pending filing of this writ. Mr. Zadvydas timely filed this petition for writ of certiorari with this Court, which was granted on October 10, 2000 and consolidated for purposes of oral argument with the government's petition in ***Ma v. Reno***, 208 F.3d 815, *reh'g denied*, (9th Cir. 2000), *cert. granted*, 121 S.Ct. 297 (2000). (J.A. 230) As a consequence whereof, the instant brief is filed.

(ii) Statement of Facts

Kestutis Zadvydas is not a citizen of any country. Although he was born on November 21, 1948, in a displaced persons' camp in a region of Germany governed by the United States, he is not a German citizen. Although his parents came from Lithuania, Mr. Zadvydas is not a Lithuanian citizen.

Mr. Zadvydas has resided continuously in the United States since he was eight years old. On September 24, 1956, this country issued an immigrant visa to Kestutis Zadvydas, his father, Stasys, his mother, Ona, and his five siblings under § 3 of the Refugee Relief Act of 1953 and Section 221 of the INA (Immigration and Naturalization Act). (J.A. 4). Since the admission of this refugee family in 1956, Mr. Zadvydas married and fathered a daughter. He presently resides with his daughter, Lina, who is an American citizen. He speaks only English, having been educated in American schools. His mother and numerous siblings also live in the United States and are citizens.

Mr. Zadvydas was convicted in New York of attempted robbery in 1966 and of attempted burglary in 1974. The INS began deportation proceedings in 1977 as a result of these convictions, but when he moved, he did not receive notice of the hearing in 1982. When he failed to appear, proceedings were suspended. During the next ten years, Mr. Zadvydas worked and personally appeared at the INS requesting a duplicate green card when his was lost. The INS reissued his green card. In 1992, he was convicted of possession with the intent to distribute cocaine. When he was released on parole after serving two years of his sentence, the INS took Mr. Zadvydas into

custody and resumed deportation proceedings. The INS detained Mr. Zadvydas in early 1994 without bond based upon his 1992 conviction. An immigration judge found Mr. Zadvydas deportable, denied his request for a waiver, and ordered him deported to Germany on May 2, 1994. Mr. Zadvydas did not appeal. He was returned to detention in Oakdale, Louisiana, to await deportation, and later transferred to a prison in New Orleans.

The INS has been unable to obtain travel documents for Mr. Zadvydas. Initially, the INS approached the Federal Republic of Germany. On May 12, 1995, Germany refused to give him a passport because he was not a German citizen.

The INS also made several equally unsuccessful formal requests to Lithuania. Because Mr. Zadvydas could not establish Lithuanian citizenship or permanent residency, Lithuania refused to issue travel documents. The Lithuanian Consulate General suggested that Mr. Zadvydas apply for citizenship with proof that both parents were born in Lithuania before 1940.

In 1998, he applied through the INS and supplied Lithuania with all available family documents: his mother's Lithuanian baptismal certificate, his father's affidavit stating that he was born in Lithuania in 1913, records of his parents' marriage in Lithuania, and his own visa application for entry to the United States showing that he was "stateless," having been born in a displaced persons' camp. Lithuania found those documents

insufficient and denied him entry. At the INS's instruction in March of 2000, Mr. Zadvydas reapplied for Lithuanian citizenship and resubmitted the same documents.[3] Lithuania has never responded.

In 1996, the INS petitioned the Dominican Republic to admit Mr. Zadvydas because his wife was born in that country. The Dominican Republic did not respond. There is no evidence that Mr. Zadvydas would be accepted by the Dominican Republic.

During these repeated efforts to find a country that would accept him, Mr. Zadvydas remained in prison for over four years. It was not until the district court judge granted his writ of habeas corpus on October 30, 1997, that he was released. He remains free on bond, has reported faithfully to the INS as instructed, and has conducted himself as a productive member of society, as noted by the Fifth Circuit. ***Zadvydas***, at 284. He will return to prison if this Court rules against him.

SUMMARY OF ARGUMENT

I.

Arbitrary detention is the hallmark of a police state. Freedom from physical restraint is the prerequisite to all other liberties. Hence, as a society, we carefully circumscribe the reasons a person can be confined, and we are wary of slippage. We are careful not to compromise our

[3] The application will be lodged with the Clerk of the United States Supreme Court.

principles about when confinement is and is not acceptable.

The INS confined Mr. Zadvydas for four years after he was ordered deported. Had the district court not granted his writ of habeas corpus, he would now have been incarcerated for over six years. The INS still has not found a country willing to accept him. As the district court noted, he is a man without a country.[4] The prospects of a host country emerging are dim. Consequently, deportation is not reasonably likely in the foreseeable future. As the likelihood of deportation fades, so too does the need to assure that Mr. Zadvydas is available for removal. Only one reason for continued detention remains: the INS's prediction that Mr. Zadvydas will commit further crime. Preventive detention based solely on predicted dangerousness runs afoul of substantive due process.

A. This case concerns an individual's liberty, one of the most fundamental protections provided by the Bill of Rights. Because Mr. Zadvydas's fundamental right to be free from physical restraint is at issue, his continued detention demands review under the heightened standard of constitutional scrutiny. That Mr. Zadvydas is a non-citizen under order of deportation does not warrant a lower standard of scrutiny because whether he continues to be detained does not involve matters of national sovereignty.

B. When deportation is not reasonably foreseeable, the government's interest in effectuating removal and its

[4] E.E. Hale's novel, *Man Without A Country.*

ancillary interest in preventing flight become attenuated. Only the government's interest in preventing recidivism remains. This Court has held that a finding of dangerousness, standing alone, is not sufficient to justify indefinite detention. ***Foucha v. Louisiana***, 504 U.S. 71, 80 (1992) and ***Kansas v. Hendricks***, 521 U.S. 346 (1997). With deportation unlikely, Mr. Zadvydas's confinement can no longer be tolerated because it is based on prevention of danger alone.

C. The government's interest in continuing to detain Mr. Zadvydas is remote because it is unlikely that deportation will occur. Despite numerous attempts by the INS to obtain travel documents, no country will accept him. Given that Mr. Zadvydas's removal is not reasonably foreseeable, his detention is excessive in relation to the government's interests. Accordingly it violates substantive due process.

D. The INS custody review procedures do not cure the substantive due process violation because they omit consideration of key factors in the balancing test from the director's decision to detain.

E. Reasonable and more narrowly tailored alternatives to incarceration exist. An alien who has not been removed within 90-days may be released and placed on supervision. 8 U.S.C. § 1231(a)(3). Any failure to abide by the strict conditions of release on supervision may subject the deportee to criminal prosecution. 8 U.S.C. § 1253(b). Given these alternatives to detention, due process forbids the INS from detaining Mr. Zadvydas.

F. The Fifth Circuit erroneously equated a long-time resident of the United States and persons stopped at the

border, contrary to this Court's jurisprudence. By stripping long-term residents of the substantive due process protections traditionally afforded them and allowing Mr. Zadvydas's continued detention, the circuit court radically departed from the rule that prolonged incarceration cannot be based on future dangerousness alone. This Court should reject that departure and reaffirm that long-term residents, like citizens, are protected by the due process principle that people are jailed for what they have done, not for what they might do.

II.

This Court may avoid answering this substantial constitutional question simply by interpreting 8 U.S.C. § 1231(a)(6) as authorizing detention for only a reasonable time to effectuate removal. At present, the INS maintains that the statute effectively gives it the discretion to detain deportees in excess of 90 days without judicial review. It is hornbook law that whenever possible courts should construe statutes in a manner to avoid the danger of unconstitutionality. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990).

A. Although the statute gives the district director the authority to detain in excess of 90 days, the statute is silent as to how far beyond the 90 days the INS can arbitrarily continue the confinement. Reading into the statute authority to detain indefinitely violates a principle of statutory construction. This principle cautions against reading implied authority into a statute when congressional intent cannot be clearly discerned. *United States v. Price*, 361 U.S. 304, 310-311 (1960).

B. A review of the statute's history and evolution demonstrates that it should be interpreted as authorizing detention for only a reasonable period of time after the entry of a final order. The predecessor statutes made detention pending deportation mandatory. By amending the statute to grant discretion to the INS to release a deportee, Congress signaled its intent that detention not be indefinite.

C. This interpretation of the statute is consistent with precedent: historically, federal courts have read a "reasonable time limitation" into the INS's authority to detain aliens. Before 1950, when there was no statutorily imposed duration of post-order detention, federal courts allowed detention for a reasonable time, generally not exceeding four months.

ARGUMENT

I. THE DETENTION OF MR. ZADVYDAS VIOLATES HIS RIGHT TO SUBSTANTIVE DUE PROCESS BECAUSE DEPORTATION IS NOT REASONABLY LIKELY IN THE FORESEEABLE FUTURE.

A. Because Mr. Zadvydas's Detention Deprives Him of a Fundamental Liberty Interest, It is Subject to Heightened Due Process Scrutiny.

At issue is the quintessential liberty interest: freedom from confinement. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). The Court has always stressed the fundamental nature of a person's

right to be free from physical restraint. *United States v. Salerno*, 481 U.S. 739, 749 (1987). Therefore, this Court must review Mr. Zadvydas's incarceration under heightened constitutional scrutiny. The infringement of his liberty interest must fall unless it is narrowly tailored to serve a compelling governmental interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

That Mr. Zadvydas is a non-citizen neither undercuts the fundamental nature of his liberty interest, nor relegates his right to be free from bodily restraint to the vagaries of a lesser standard of protection. For over a century, this Court has recognized that immigrants residing within the territorial boundaries of the United States are entitled to constitutional protections. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

> The rights of the petitioners . . . are not less because they are aliens and subjects of the emperor of China. . . . The fourteenth amendment to the constitution is not confined to the protection of citizens. . . . These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . .

Id. at 368. Although this Court defers to the political branches of government in matters of substantive immigration policy, this case does not involve such matters. It is not about the decision to deport. Nor is it about detention incident to removal because Mr. Zadvydas's removal is not reasonably foreseeable. Rather, this case is about the manner in which Mr. Zadvydas, a long-time resident, will remain in the United States: in prison or under

supervised release. This decision does not implicate national sovereignty interests, and hence the plenary power doctrine has considerably less force. Therefore, this Court should review Mr. Zadvydas's continued incarceration with heightened scrutiny.

B. When Deportation is Not Reasonably Foreseeable, Continued Detention is Unconstitutional Because Its Only Justification is Future Dangerousness.

Due process of law contains "a substantive component, which forbids the government to infringe certain fundamental 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. 291, 301-302 (1995) (emphasis in original). In the context of detention without trial, the Court has applied a two-part test for a substantive due process violation: (1) whether detention was imposed for the purpose of punishment or regulation; and (2) if regulation, whether it is excessive to the government's regulatory goal. *Salerno*, 481 U.S. at 746.

Incarceration, no matter what the reason, appears punitive to the person incarcerated. Mr. Zadvydas testified at his habeas corpus hearing that for four years, he was confined to his cell 20 hours a day and allowed only two hours of exercise per week. (J.A. 41).

The government justifies detention as a means to effectuate removal by eliminating flight risk and preventing recidivism. However, when removal is not foreseeable, detention is not incident to removal. The weight of

the governmental interest in detaining a deportee to preclude flight diminishes as the likelihood of deportation dims. The need to assure that the deportee is available for departure becomes as remote as departure itself. The only remaining justification for detention is to prevent recidivism.

This Court consistently has held future dangerousness insufficient, standing alone, to justify indefinite detention. In ***Foucha v. Louisiana***, 504 U.S. 71 (1992), the Court held that insanity acquittees must be released from confinement to a psychiatric hospital unless they are both mentally ill and dangerous. Dangerousness alone was not enough to continue holding them. In ***Kansas v. Hendricks***, 521 U.S. 346 (1997), the Court upheld a Kansas commitment statute only because it required a showing of mental abnormality preventing the subject from controlling his dangerousness. The Court repeated: "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite civil commitment." ***Id.*** at 357.

The Court approved pretrial detention on the basis of future dangerousness in ***Salerno***, but only where the detention was of limited duration, the statutory scheme was narrowly tailored with procedural safeguards, and the decisionmaker was a judicial officer. 481 U.S. at 750-52. By contrast, the detention scheme at issue here has none of these safeguards. Its duration is not limited. Under INS's interpretation of the statute, it gives the Attorney General unfettered discretion in deciding who to detain. The implementing regulation, 8 C.F.R. § 241.4 (Appendix H, p.A-14), puts the burden on the detainee to demonstrate by clear and convincing evidence that he is

not dangerous before the INS may even consider releasing him. The decision maker is the INS district director, not a neutral judge or magistrate. Furthermore, the regulation omits from the director's periodic reviews of continued detention consideration of both the length of detention, and the future likelihood of deportation being effected.[5] ***Id.*** This is not the narrowly tailored statutory scheme approved in ***Salerno***.[6]

The restriction on Mr. Zadvydas's liberty is further exacerbated by its length. Mr. Zadvydas was detained for four years after entry of the removal order. But for the district court's grant of habeas corpus, his incarceration would now have stretched into six years. This Court has

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[5] Unlike the Bail Reform Act at issue in ***Salerno***, a wide range of crimes trigger the statutory presumption that an alien is a danger to the community. 18 U.S.C. § 3142. Even crimes with a maximum penalty of only one year in prison are now deemed "aggravated felonies" and subject deportable aliens like Mr. Zadvydas to the possibility of indefinite and permanent detention. In contrast, under the Bail Reform Act, the presumption of dangerousness is triggered only for certain crimes, such as drug cases involving a possible sentence of ten or more years. Generally under the Bail Reform Act, the government bears the burden of convincing a neutral decisionmaker that "no conditions of release can reasonably assure the safety of the community." ***Salerno***, 481 U.S. at 750.

[6] Numerous lower courts have held that pretrial detention in excess of strict time limits is excessive under such circumstances. *E.g.*, ***United States v. Gonzales Claudio***, 806 F.2d 334, 343 (2d Cir. 1986); ***United States v. Accetturo***, 783 F.2d 382, 388 (3d Cir. 1986); ***United States v. Hare***, 873 F.2d 796, 801 (5th Cir. 1989); ***United States v. Portes***, 786 F.2d 768 (7th Cir. 1986); ***United States v. Gelfuso***, 838 F.2d 358 (9th Cir. 1988); ***United States v. Theron***, 782 F.2d 1510, 1516 (10th Cir. 1986).

recognized that even detention that is proper at its inception may become constitutionally impermissible as time passes. In ***Salerno***, the Court left open the question of when the duration of otherwise permissible pretrial detention violates due process. 481 U.S. at 747 n.4. Likewise, in ***Carlson v. Landon***, 342 U.S. 524, 546 (1952), the Court reserved the issue of when unusual delay warrants habeas relief from otherwise permissible detention.

More particularly, this Court also recognized that continued detention is improper when the governmental interest becomes attenuated. In *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), the Court held that a person committed to a psychiatric facility on account of lack of capacity to stand trial may be detained only for "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain capacity in the foreseeable future." If not, he must be accorded a civil commitment proceeding or be released.

Similarly here, while detention may have been proper at its inception to prevent flight, once it becomes evident that departure is not reasonably foreseeable, continued incarceration no longer serves that end. Indefinite incarceration to assure that a person is available for deportation is grossly excessive when there is no substantial probability that deportation will occur.

In sum, the restriction on Mr. Zadvydas's liberty is severe. He was confined to his cell 20 hours a day and allowed only two hours of exercise per week. (J.A. 41). His detention was lengthy – four years – and without the procedural protections present in ***Hendricks*** or ***Salerno***.

On the other side of the substantive due process equation, detention is not incident to removal and therefore, as in ***Jackson***, no longer serves its intended purpose. *See infra* Section I. C. Rather, it is based on the INS' prediction of future dangerousness alone, and therefore violates substantive due process. To the extent that 8 U.S.C. § 1231(a)(6) might authorize continued detention under such circumstances, it is unconstitutional as applied to Mr. Zadvydas.

C. Mr. Zadvydas's Deportation is Not Reasonably Foreseeable; Therefore Continued Detention is Excessive to the Governmental Interest and Violates Due Process.

All evidence indicates that Mr. Zadvydas's 1994 deportation order is unlikely to be effectuated in the foreseeable future. As classified on his 1956 visa, Mr. Zadvydas is "stateless." (J.A. 4). His only potential host countries, Lithuania and Germany, have refused him entry. The INS's consistent inability to find a host country is in no way the fault of Mr. Zadvydas. Mr. Zadvydas has cooperated with the government's efforts to deport him. He has had no objection to being deported to any of the potential host countries. (J.A. 46) He and his family have provided the INS with all available documentation. Nevertheless, he has no realistic prospects for obtaining travel documents.

The Federal Republic of Germany refused Mr. Zadvydas admission in 1995. Responding to an INS inquiry, the German Vice Consul in Houston, Texas, required proof of German citizenship. The INS was unable to

provide proof of citizenship. Accordingly, the Vice Consul advised that Zadvydas did not hold German citizenship and hence could not obtain a German passport. (J.A. 31 & 33)

Lithuania also has refused Mr. Zadvydas admission. Its refusal is based upon inadequate proof that his parents were born in Lithuania before 1940. The INS provided Lithuanian authorities with all available documentation by May of 1997. Lithuanian authorities were not satisfied and demanded additional proof. No such proof exists. Since then, the INS continues to direct Mr. Zadvydas to reapply with the same documents previously rejected. Mr. Zadvydas repeatedly complies and the Lithuanian General Consulate repeatedly refuses, noting the insufficiency. (J.A. 23, 61-62, 96, 106, 164, 168-172).

Nonetheless, the government continues to point to four documents which it argues may satisfy Lithuanian authorities: (a) the baptismal certificate of Mr. Zadvydas's mother; (b) his father's affidavit stating that he was born on May 14, 1913, in Mazaikiai, Lithuania; (c) a visa application for entry to the United States; and (d) documents recording his parents' marriage in Lithuania, including sworn statements by his parents. All of these documents, however, were presented to the Lithuanian Consulate in early 1997 and rejected in 1998.[7]

[7] In 1996, the INS also made unsuccessful efforts to obtain travel documents to the Dominican Republic, the country of origin of Mr. Zadvydas's wife. (J.A. 64). Dominican authorities did not respond to the INS inquiry.

Assuming arguendo that Mr. Zadvydas miraculously obtained the documentation required by Lithuania and Germany, he still would not be granted citizenship or admission because of his criminal convictions. Lithuanian law precludes granting of citizenship to "persons who, before coming to Lithuania, have been sentenced in another state to imprisonment for a deliberate crime for which criminal liability is imposed by the laws of the Republic of Lithuania. . . . " Ruta M. Kalvaitis, *Citizenship and National Identity in the Baltics*, 16 Boston Univ. Int'l Law J. 231, 266-67 (1998). Burglary and robbery, the *malum in se* offenses of which Mr. Zadvydas was convicted, would be crimes in any country. Likewise, Germany has acceded to the Convention on the Reduction of Statelessness (Appendix G, p.A-13), which permits a state to deny citizenship to stateless persons with criminal convictions. *Id.* at 251; Convention on the Reduction of Statelessness, August 30, 1961, 989 U.N.T.S. 175, Art.1, § 2(c).[8] Thus, even if otherwise admissible, Mr. Zadvydas would be denied entry to his only potential host countries on the basis of his criminal history.

The evidence establishes that Mr. Zadvydas cannot be deported because no country will take him. Accordingly, continued detention is no longer incident to deportation. The only remaining rationale for continued detention is future dangerousness, which is insufficient to justify anything more than temporary confinement.

[8] Germany acceded to the treaty on August 31, 1977. United Nations, Multilateral Treaties Deposited with the Secretary-General, Status as of 31 December, 1996, at 248.

Therefore, Mr. Zadvydas's detention has become excessive to its purpose, and violates his due process right to be free from arbitrary physical restraint. Mr. Zadvydas should be released on bond, subject to supervision.

D. The INS Custody Review Procedures Do Not Cure the Substantive Due Process Violation.

The INS custody review procedures do not cure the violation of Mr. Zadvydas's substantive due process rights. The review procedures do not consider length of detention or likelihood of deportation. 8 C.F.R. § 241.4. Hence, they neglect key factors in the substantive due process balancing test. Instead, they condition release on future dangerousness alone, in violation of *Foucha* and *Hendricks*.

E. Narrower Alternatives to Incarceration Exist to Satisfy INS Concerns About Future Dangerousness and Flight.

Even if this Court concludes that the INS still has an immigration purpose for Mr. Zadvydas's detention, this Court must determine whether Mr. Zadvydas's detention is narrowly tailored to serve that purpose. To the extent that the government continues to possess an interest in preventing recidivism or reducing flight risk, far less restrictive means than detention exist.

For example, 8 U.S.C. § 1231(a)(3) provides that an alien who does not depart within the 90-day removal period may be subject to supervision. Supervision requires the alien meet periodically with an immigration

officer, submit to medical and psychiatric examinations on demand, provide information about his activities, and obey INS restrictions on his activities. If the alien fails to comply with the requirements of supervision, he may be fined up to $1,000 or imprisoned up to one year. 8 U.S.C. § 1253(b). In addition, if the immigration officer suspects criminal activity, he can notify law enforcement. Also available are halfway houses and civil commitment proceedings. Thus, detention violates substantive due process because it is not narrowly tailored to serve the governmental interest.

F. Entry of a Deportation Order Does Not Strip Mr. Zadvydas, a Long-Time Resident, of Full Substantive Due Process Protection.

The Fifth Circuit broke with 100 years of this Court's jurisprudence to strip Mr. Zadvydas, a long-time resident, of the constitutional protections traditionally afforded long-term residents and to relegate him to the status of an entrant. This is wrong.

As this Court noted in *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958):

> [O]ur 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*.

(emphasis added). The distinction is grounded on presence within the territorial borders of the United States. *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950). Excludable aliens are deemed to be outside; resident aliens are

inside. Since the end of the nineteenth century, this Court has extended the protection of the Fifth and Fourteenth Amendment to all persons within the territorial jurisdiction of the United States, regardless of citizenship. ***Wong Wing v. United States***, 163 U.S. 228, 238 (1896); ***Yick Wo***, 118 U.S. at 368. Additional justification lies in the ties that residents, unlike entrants, form in this country as they integrate into our social fabric. *See* ***Johnson***, 339 U.S. at 770-71; ***Landon v. Plasencia***, 459 U.S. 21, 32 (1982); ***Kwong Hai Chew v. Colding***, 344 U.S. 590, 596, n.5 (1953). By contrast, aliens who have never entered the country have less constitutional protection.

As a long-time resident, Mr. Zadvydas is entitled to the constitutional protections accorded individuals within the borders of the United States. Forty-four years ago, he was admitted to the United States as a permanent lawful resident. Since he was eight years old, he has lived here continuously with his parents. His father has since died, but his mother lives here now, as do his wife, his daughter and his brothers and sisters.

The Fifth Circuit held otherwise by creating a new rule. Without any authority, it proclaimed that the deportation order stripped Mr. Zadvydas of his status as a long-time resident.

The circuit court attempted to justify its decision by analogy to its earlier decision in ***Gisbert v. U.S. Attorney General***, 988 F.2d 1437, *as amended*, 997 F.2d 1122 (5th Cir. 1993), and the case on which ***Gisbert*** relied, ***Shaughnessy v. United States ex rel Mezei***, 345 U.S. 206 (1953). Neither ***Gisbert*** nor ***Mezei*** apply.

To begin with, ***Mezei*** was a Cold War case involving an alien stopped at the border after a 19-month sojourn in Eastern Europe. Decided at a time when civil liberties fell victim to Cold War tensions, ***Mezei*** rested on national security concerns which are not present in Mr. Zadvydas's case. Further, ***Mezei*** was decided before this Court developed its substantive due process jurisprudence as to regulatory detention in cases like ***Foucha***, ***Hendricks***, and ***Salerno***.

Nor does ***Gisbert*** provide support. Gisbert was an entrant; Mr. Zadvydas was a long-time resident. Under the "entry fiction," Gisbert was paroled into this country pending a decision on admissibility. In contrast, application of the entry fiction to Mr. Zadvydas would be wholly inappropriate as he has lived here 44 years without leaving and seeking reentry.

The issuance of the deportation order cannot support the weight that the circuit court assigns it. This Court has never conditioned presence within the United States for purposes of constitutional protection on the legality of an alien's presence. To the contrary, this Court has made clear that the Fifth and Fourteenth Amendment protections are triggered by either lawful or unlawful presence. ***Plyler v. Doe***, 457 U.S. 202, 210 (1982); ***Leng May Ma v. Barber***, 357 U.S. at 187; ***Kaoru Yamataya v. Fisher***, 189 U.S. 86, 101 (1903).

Moreover on at least two occasions, this Court has afforded constitutional protection to residents *even after* the entry of a deportation order. In ***Wong Wing v. United States***, 163 U.S. 227 (1896), the Court invalidated a federal statute imposing a term of imprisonment on resident

aliens *after* the resident had been "convicted and adjudged to be not lawfully entitled to be or remain at the United States." *Id.* at 233-34. The Court relied on the deportees' due process rights to strike the incarceration provision. Further, in ***United States v. Witkovich***, 353 U.S. 194 (1957), the Court narrowly interpreted statutory restrictions on persons awaiting deportation to avoid constitutional problems. Although these persons already had been ordered deported, the Court found that the restrictions might violate their constitutional rights. In both cases, the deportee retained constitutional protection after issuance of a deportation order.

Contrary to the Fifth Circuit's conclusory assertion, the national interest in excluding an alien who has never entered the country is significantly different than the national interest in expelling a resident, particularly a long-time resident, who is being deported because of criminal activity. The former involves foreign relations and border control. The latter is an issue of crime control, not of national sovereignty.

The distinction is best illustrated by a comparison with ***Gisbert***. ***Gisbert*** concerned a specific problem with Cuba. Cuba initiated the Mariel boatlift in 1980, sending to our shores thousands of its nationals. When another country deposits thousands of aliens on our shores, the governmental interest in effecting their expulsion calls into question United States sovereignty and raises foreign policy concerns. Because sovereignty and foreign policy were at issue in ***Gisbert***, the plenary authority of Congress was implicated.

In contrast, this case concerns only a single deportable alien whom the United States admitted 44 years ago. He cannot be deported because his purported country of origin will not accept him and no other nation will grant him entry. Whether Mr. Zadvydas is released does not affect national sovereignty or foreign relations between our country and Lithuania.

In sum, the simple entry of a deportation order cannot erase 44 years of continuous residency in this country. Consequently, Mr. Zadvydas is entitled to the full constitutional rights afforded other residents. Six years have elapsed since the entry of the deportation order. No country will accept Mr. Zadvydas. Hence, there is no need for his continued detention. But without relief from this Court, he will languish in jail forever.

II. THE LANGUAGE OF 8 U.S.C. § 1231(a)(6), WHEN VIEWED IN LIGHT OF ITS STATUTORY EVOLUTION, COMPELS THE CONCLUSION THAT CONGRESS INTENDED TO AUTHORIZE DETENTION FOR ONLY A REASONABLE TIME IN ORDER TO EFFECTUATE DEPORTATION.

This Court may avoid answering the substantial constitutional question raised by reading into § 1231(a)(6) a reasonable time limitation on the government's authority to detain deportable aliens after final orders. The statute provides:

> 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)(6).

The statute is silent as to a specific time period for detention after the ninety (90) day removal period. Rather than giving the statute an interpretation that raises substantial constitutional questions, this Court should avoid a substantial constitutional problem by interpreting the statute as permitting detention for only a reasonable period in order to effectuate deportation. The constitutional avoidance doctrine requires courts to construe a statute so as "to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988).[9]

This Court has long held that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 418 (1909) (citation omitted). Thus, " '[a] statute must be construed, if fairly possible, so as to avoid not only the

[9] In discussing *DeBartolo* in light of *Rust v. Sullivan*, 500 U.S. 173 (1991), the court in *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997), concluded that if "Congress intended an agency [to interpret an ambiguous statute so as to encroach on constitutional boundaries] . . . [Congress] must do so explicitly." It rejected the agency's interpretation of the statute and adopted an alternative reasonable interpretation.

conclusion that it is unconstitutional, but also grave doubts upon that score.' " *United States v. LaFranca*, 282 U.S. 568, 574 (1931), quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (Other citations of authority omitted). As noted, courts have a duty to "first ascertain whether a construction of the statute is . . . possible by which the [constitutional] question may be avoided." *United States v. Witkovich*, 353 U.S. 194, 202 (1956) (quoting, *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

A. Construing § 1231(a)(6) as Providing a Reasonable Time Limitation on Government's Authority to Detain Aliens Comports with the Canon of Statutory Construction Requiring Courts to Choose a Plausible Construction Avoiding Serious Constitutional Problems.

Rules of statutory construction caution against reading implied authority into a statute when congressional intent is not clear. Congress' non-action affords little foundation for drawing inferences. To read § 1231(a)(6) as authorizing indefinite detention violates this principle of statutory construction. *United States v. Price*, 361 U.S. 304, 310-311 (1960).

Under the present statute, the Attorney General is required to expel an alien ordered removed within a 90-day "Removal Period." During the removal period, the Attorney General "shall detain the alien," and "[u]nder no circumstances during the removal period shall the Attorney General release an alien" who is removable on the basis of prior criminal convictions or terrorist activity. 8 U.S.C. § 1231(a)(2). Following the removal period, if the Attorney General is not able to effectuate the alien's

removal, detention is governed by two provisions. § 1231(a)(6) provides that "[a]n alien ordered removed [on criminal grounds] 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 . . . " (emphasis added). Another provision, § 1231(a)(3), requires INS supervision of any person released after the removal period, including requirements that the alien periodically appear before an immigration officer, submit to necessary medical and psychiatric exams, give certain information under oath, and obey reasonable restrictions on conduct or activities.

Neither of these sections authorizes indefinite detention of an alien the government is unable to remove. Indeed, if the statute were read to authorize such detention, it would raise serious constitutional questions. Rather than reaching the substantial constitutional issues in this case, the Court should find that Mr. Zadvydas's indefinite detention violates the Act because the Act does not authorize indefinite detention. Wherever possible, courts should construe statutes so as to avoid unconstitutionality. *See* ***Ohio v. Akron Center for Reproductive Health***, 497 U.S. 502, 514 (1990).

B. The Statute's Evolution Demonstrates That Congress Did Not Authorize Indefinite Detention.

That Congress did not authorize indefinite detention is in accord with the statute's history. § 1231(a)(6) differs from its predecessors in two critical respects. First, when

amending the INA, Congress shortened the time in which the INS is required to effectuate an order of removal from six months to 90 days.[10]

Even more significantly, § 1231(a)(6) lacks the mandatory detention language of its predecessors. Both 8 U.S.C. § 1252(a)(2) (1994) (Appendix C, p.A-5) and the Transitional Period Custody Rules (TPCR) (Appendix E, p.A-9) *prohibited* the INS from releasing those unable to demonstrate that they neither posed a danger nor flight risk.[11] In contrast, § 1231(a)(6), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 309-546 (IIRIRA), *merely authorizes* continued detention for an unspecified period of time.

Significantly, in finding that the prior statutory scheme authorized indefinite detention, the district court expressly relied upon both the "mandatory language" of

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[10] *Compare* former 8 U.S.C. § 1252(a)(2)(C) (1952) (Appendix B,p.A-3) ("the Attorney General shall have a period of six months from the date of such order") *with* the present statute ("the Attorney General shall remove the alien from the United States within a period of 90 days").

[11] *See* 8 U.S.C. § 1252(a)(2)(B) (Appendix D, p.A-8) ("The Attorney General may not release from custody. . . . either before or after a finding of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."); TPCR, IIRIRA § 303(b)(3)(B) ("The Attorney General may release the alien only if the alien . . . satisfies the Attorney General that the alien will not pose a danger to the safety of persons or of property and is likely to appear for any scheduled proceeding.").

8 U.S.C. § 1252(a)(2) and "the absence of a time limit on detention." ***Zadvydas v. Caplinger***, 986 F. Supp. 1011, 1025 (E.D. La. 1997). With such mandatory language now repealed, the Attorney General's statutory authority to indefinitely detain immigrants has been restricted.

C. Courts Have Historically Read a "Reasonable Time" Limitation into Government's Authority to Detain Deportable Aliens Pending Deportation.

Moreover, the "absence of a time limit on detention" has never been viewed as authority for the INS to indefinitely detain. For instance, from 1917 to 1950, the immigration statute did not contain any specific time limit for detention pending deportation. Immigration Act of 1917, §§ 20, 21, 39 Stat. 890-891 (1917) (Appendix A, p.A-1). Nonetheless, the federal courts consistently read a "reasonable time" limitation into the government's authority to detain a deportable alien pursuant to this statute. That period is generally interpreted to be no longer than four months. *See* ***Wolck v. Weedin***, 58 F.2d 928, 931 (9th Cir. 1932); ***Saksagansky v. Weedin***, 53 F.2d 13, 16 (9th Cir. 1931); ***Caranica v. Nagle***, 28 F.2d 955, 957 (9th Cir. 1928); ***Petition of Brooks***, 5 F.2d 238 (D. Mass. 1925); ***United States ex rel. Ross v. Wallis***, 279 F. 401, 404 (2d Cir. 1922).

Not until 1950 did Congress enact a statute which placed a six-month limit on detention following a deportation order. Congress viewed this amendment as a grant of new power.[12] Such a view of this provision is

[12] *See* H.R. Rep. No 1192, 81st Cong., 1st Sess. 6 (1949) ("Existing law does not grant the Attorney General any specified period of time within which he may hold deportable aliens in custody or under control while he negotiates for their return abroad."). Nonetheless, this detention provision still permitted only six months of detention following a final order of deportation. Following the end of the six-month period, "the alien shall become subject to such further supervision and detention pending eventual deportation *as is authorized in this section*," 8 U.S.C. § 1252(c) (repealed 1996) (emphasis added). Section 1252, however, did not authorize any further detention beyond the reasonable deportation period. Thus, even if an alien committed a "laundry list of . . . misdeeds," courts held that "the six month limit on detention . . . was absolute and any detention beyond that time was unlawful." ***Oguachuba v. INS***, 706 F.2d 93, 96 (2d Cir. 1983) (summarizing district court ruling); *see* ***Johns v. Department of Justice***, 653 F.2d 884, 890 (5th Cir. 1981) (finding that after the six month period expires "detention is not permitted"); ***Castillo-Gradis v. Turnage***, 752 F. Supp. 937, 941 (S.D. Cal. 1990) ("Once the six months has expired, the alien must be released and put under supervision until the INS is ready to execute his deportation.").

consistent with the grant to the Attorney General of *more* time to effectuate the deportation than had previously been authorized under the cases cited above. This six-month limit on detention after issuance of a deportation order remained in effect until 1990. In that year, Congress barred release of aggravated felons with final orders of deportation. Section 504, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).[13] The

[13] Specifically, this amendment stated that "[n]otwithstanding . . . subsections (c) [the six-month rule]" the Attorney General could not release a lawfully admitted alien who had been convicted of an aggravated felony unless the alien could demonstrate a lack of danger and flight risk. INA § 242(a)(2)(A) & (B), 8 U.S.C. § 1252(a)(2)(A) & (B) (repealed 1996). The following year, Congress further amended § 242(a)(2)(B) to make more explicit that the limitation upon release from detention applied to aggravated felons "either

Antiterrorism and Effective Death Penalty Act of 1996 made minor changes to the wording of old INA § 242(a)(2)(A). More significantly, it repealed INA § 242(a)(2)(B), which had permitted the Attorney General to release an aggravated felon from detention upon a showing that the alien was not a danger or flight risk. Section 440(c), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). Thus, for a short period of time, the INS actually had no discretion to release an aggravated felon from detention, either before or after a final order.

Soon thereafter, Congress significantly amended the detention provisions of the INA by passing IIRIRA. This law repealed the detention provisions of INA § 242(a) and created new detention provisions concerning aliens with final orders of removal at INA § 241(a), 8 U.S.C. § 1231(a)(6).

In sum, the present statute differs in two significant respects from its predecessor statutes. (1) It shortens the removal period from six months to 90 days and, (2) it eliminates the language mandating detention of criminal aliens whose release could not be effectuated within this time period. The statutory evolution evidences the congressional intent to restrict the prolonged indefinite detention of immigrants after removal proceedings. The fact that § 1231(a)(6)'s language is far more permissive than that of its statutory predecessors strongly suggests

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before or after a determination of deportability." Section 306(a)(4), Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991).

the *Ma* court correctly interpreted this statute authorizing only a reasonable period of time to effectuate removal.

Because the government detained Mr. Zadvydas for four years after entry of his final deportation order, this delay went beyond a reasonable period within which to effectuate removal; and, therefore, it will no longer be permissible under § 1231(a)(6) as properly construed.

CONCLUSION

For the foregoing reasons, petitioner Kestutis Zadvydas respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifth Circuit, reinstate the grant of a writ of habeas corpus by the District Court, and order him released from detention.

Respectfully submitted,

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APPENDIX A

1917 ACT

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

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

APPENDIX B

1952 statute

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

See. 242(c) [8 U.S.C. 1252 (1952)]

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

eventual deportation as is authorized in this section . . .

APPENDIX C

1990 Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (1991)) as amended by the Immigration Act of 1990 § 504, Pub. L. No. 101-649, 104 Stat. 4978, reads in relevant part:

Sec. 242 [8 U.S.C. 1232 (1991)]

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

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

* * *

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

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

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

* * *

(c) Final order of deportation; place of detention

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

become subject to such further supervision and detention pending eventual deportation as is authorized in this section.

APPENDIX D

Title 8, United States Code, Section 1252(a)(2)

1991 Version

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

APPENDIX E

The Transition Period Custody Rules (TCPR) are not codified. The text of the TPCRs can be found in the historical notes following 8 U. S.C.A. § 1226 (Supp.1998). They read, in pertinent part:

(3) Transition period custody rules. –

(A) In general. –

During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who –

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this division [section 1101(a)(43) of this title]),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act [section 1182(a)(2) of this title],

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act [section 1251(a)(2)(A)(ii), (iii), (B), (C) or (D) of this title] (before redesignation under this subtitle) [redesignating such section as section 237, which is classified to section 1227 of this title], or

(iv) is inadmissible under section 212(a)(3)(B) of such Act [section 1182(a)(3)(B) of this title] or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle) [section 1251(a)(4)(B) of this title],

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(B) Release. –

The Attorney General may release the alien only if the alien is an alien described in subparagraph (A) (ii) or (A) (iii) and –

(i) the alien was lawfully admitted to the United States and 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 proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and 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 proceeding.

APPENDIX F

8 U.S.C.A. § 1231.

(a)(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).

APPENDIX G

Convention on the Reduction of Statelessness

Article 1, in pertinent part:

2. A Contracting State may make the grant of its nationality in accordance with subparagraph (b) – of paragraph I of this article subject to one or more of the following conditions:

   (c) That the person concerned has neither been convicted of an offence against national security nor has been sentenced to imprisonment for a term of five years or more on a criminal charge;

Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 176.

APPENDIX H

§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.

8 C. F. R. § 241.4 (a) (1-1-00 ed.)

APPENDIX I

8 U.S.C.A. § 1231, in pertinent part:

(a)(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance 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.

(a)(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 –

(b) to appear before an immigration officer periodically for identification;

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

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

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

8 U.S.C.A. § 1231 (2000).

APPENDIX J

§ 1253. Penalties related to removal

(b) Willful failure to comply with terms of release under supervision. An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 241(a)(3) [8 USCS §§ 1231 (a) (3)] or knowingly give false information in response to an inquiry under such section shall be fined not more than $ 1,000 or imprisoned for not more than one year, or both.

8 U.S.C.A. § 1253 (2000).
