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3 KESTUTIS ZADVYDAS, :
4 Petitioner :
5 v. : No. 99-7791

6 LYNN UNDERDOWN AND IMMIGRATION :
7 AND NATURALIZATION SERVICE; :
8 and :
9 JOHN D. ASHCROFT, :

10 ATTORNEY GENERAL, ET AL., :
11 Petitioners :
12 v. : No. 00-38

13 KIM HO MA :
14 - - - - -X

15 Washington, D.C.
16 Wednesday, February 21, 2001

17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United States at
19 10:18 a.m.

20 APPEARANCES:
21 JAY W. STANSELL, ESQ., Assistant Federal Public Defender,
22 Seattle, Washington; on behalf of the Respondent Ma.
23 ROBERT F. BARNARD, ESQ., Assistant Federal Public
24 Defender, New Orleans, Louisiana; for the Petitioner
25 Zadvydas.

1 APPEARANCES:

2 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

3 Department of Justice, Washington, D.C.; on behalf of

4 the Respondents in Number 99-7791 and Petitioners in

5 No. 00-38.

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CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-791, Kestutis Zadvydas v. The INS and John Ashcroft v. Kim Ho Ma. Mr. Barnard.

MR. STANSELL: I'm sorry --

Oh, I'm sorry. Mr. Stansell.

ORAL ARGUMENT OF JAY W. STANSELL

ON BEHALF OF THE RESPONDENT MA

MR. STANSELL: Mr. Chief Justice, and may it please the Court:

I'd first like to start by emphasizing three points to the Court, first that the Government's interpretation -- the Government's construction of the statute in this case is extreme. It allows the INS to lock somebody up, potentially for life, just simply because their country of origin will not take them back.

Secondly, our clients are in no way challenging their orders of deportation, or the Government's plenary power to create categories to deport them, and to deport them. They are simply asserting their Fifth Amendment right to liberty, which they retain until they are deported from this country.

And third, the Government has other alternatives in this case, in these cases. They are not left

1 unprotected. The INS retains a substantial statutory and
2 regulatory authority to supervise Mr. Ma and Mr. Zadvydas
3 and those similarly situated.

4 In stark contrast to the Government's statutory
5 construction, the circuit court suggested a reasonable
6 construction of this statute that allows for the detention
7 beyond the removal period for a reasonable time period.
8 This interpretation, this construction is consistent with
9 the silence of the statute, which, as explained by the
10 circuit court, invites the question of what time period
11 are we talking about. The Government would seek a time
12 period of "indefinitely", that word to be read into the
13 statute.

14 QUESTION: We're talking about the language,
15 "may be detained beyond the removal period"?

16 MR. STANSELL: That's correct, Your Honor, and
17 what Congress has not done is specify how long beyond
18 the -- how long, following that, Mr. Chief Justice, they
19 would intend to detain.

20 QUESTION: Well, do you think that some
21 reasonable period of time is permitted under that
22 language?

23 MR. STANSELL: Yes, I do, Your Honor. I think
24 the Court's -- or the circuit court's construction is
25 entirely consistent with the historical treatment.

1 QUESTION: Which circuit court?

2 MR. STANSELL: I'm --

3 QUESTION: Are you talking about the Fifth or
4 the Ninth?

5 MR. STANSELL: I'm sorry, I'm talking about the
6 Ninth Circuit Court of Appeals. I'm referring
7 specifically to the Ninth Circuit's decision dealing
8 purely with the statutory construction issue and putting a
9 reasonable construction on the statute that avoids the
10 constitutional issue.

11 QUESTION: What about the construction that the
12 INS has put on it? Isn't that entitled to some deference
13 under our Chevron rules?

14 MR. STANSELL: Well, Mr. Chief Justice, the
15 Chevron deference simply doesn't apply when you're
16 applying the constitutional avoidance doctrine, because I
17 believe that agencies are not -- while they may have
18 expertise at interpreting their own statute, they don't
19 necessarily have expertise in interpreting the
20 Constitution, and even most recently this past term this
21 Court in Solid Waste Agency of Northern Cook County did
22 not grant Chevron deference when there was a
23 constitutional problem indicated.

24 QUESTION: Mr. Stansell, what do you mean by a
25 reasonable time? Do you mean there's an absolute time

1 limit? I guess the Government here would say that they're
2 not holding them beyond a reasonable time, that the time
3 that is reasonable is the time that is necessary to
4 protect the public from depredations by these people, who
5 are deportable because they've committed crimes.

6 MR. STANSELL: Well, Your Honor, the circuit
7 court did not specifically define what is a reasonable
8 time period. I think our position would be --

9 QUESTION: You mean an absolute time limit at
10 some point, don't you?

11 MR. STANSELL: Your Honor, our position would be
12 if it's not reasonably perceivable, if deportation is not
13 perceivable, there's not some objective fact that they can
14 point to that this individual is going to be deported,
15 then holding that person beyond that period would not be a
16 reasonable time.

17 QUESTION: So even if you're talking about, you
18 know, a real life Hannibal what's-his-name, you know, a
19 really wicked, evil person who is going to harm people,
20 there's every reason to believe that this person who's
21 been deported because of serial murders, if you can't find
22 a country to send him to, you have to let that person out?

23 MR. STANSELL: That's correct, Your Honor, and
24 that's what we do with any other person, and that's the
25 appropriate term here, any other person who has finished

1 their prison time and --

2 QUESTION: Well, any other person is entitled to
3 be in the United States. Would it be unconstitutional for
4 the law on its face, when aliens are admitted, to say that
5 you are admitted to this country only on the condition of
6 good behavior, and that that permission will be terminated
7 if you commit a felony, and upon its termination, it is up
8 to you to find a country to get sent back to. The burden
9 is not on us, and if you can't find a country, you're not
10 going to be allowed into the public in this country, where
11 you have not been given any permission to be? Why is that
12 unreasonable?

13 MR. STANSELL: Well, Your Honor, the first part
14 of your hypothetical I think is essentially what the law
15 is.

16 QUESTION: I know. I'm just spelling it out
17 more explicitly, that the condition of your admission is
18 this: should you commit a felony, your permission to be
19 among the general public in the United States is
20 terminated and --

21 MR. STANSELL: Your Honor, I --

22 QUESTION: And we will send you back to whatever
23 country you can find that will take you, but if no country
24 will take you, you will not be allowed into the general
25 populace. That permission has not been given, period.

1 MR. STANSELL: Your Honor, I think because the
2 Constitution has the paramount -- is the paramount
3 authority under which all statutes have to be gauged, I
4 think that the last portion of your hypothetical would be
5 unconstitutional. Everyone retains the right to liberty
6 once they've entered our shores, once they pass through
7 our gates.

8 QUESTION: Well, the Government says here that
9 Mr. Kestutis is in the same position as someone, as an
10 entering alien, who we've said has virtually no
11 constitutional rights.

12 MR. STANSELL: Mr. Chief Justice, the -- I think
13 you're referring to the Mezei decision and --

14 QUESTION: Yes.

15 MR. STANSELL: -- the Mezei decision is a unique
16 and very distinguishable case on its facts. It involved
17 an individual coming to the border, seeking entry, not
18 bringing any constitutional rights, and it involved an
19 individual who was also ordered excluded on public safety
20 or national security grounds, and it also came at a time
21 prior to the Court's development of its jurisprudence on
22 some sort of due process in the civil detention scheme.

23 QUESTION: Well, I -- we've never overruled the
24 Mezei case.

25 MR. STANSELL: That -

1 QUESTION: We've never questioned it so far as I
2 know.

3 MR. STANSELL: Mr. Chief Justice, that's
4 entirely correct, but what's important is that on the
5 other hand Mezei never questioned the general rule that it
6 was setting out the narrow delineated exception for --

7 QUESTION: Well --

8 MR. STANSELL: -- and that general rule is that
9 once an alien has passed through our gates, and it is more
10 or less a direct quote, has passed through our gates, even
11 illegally, they're entitled to the protections of the
12 Fifth Amendment.

13 QUESTION: You're saying, then, that even though
14 an alien obtains admission to this country illegally, that
15 he's fully protected by our Constitution?

16 MR. STANSELL: Yes, I am, Your Honor.

17 QUESTION: Well, but protected in what sense?

18 MR. STANSELL: Well, Mr. Chief Justice, he's
19 protected -- certainly protected as to his liberty
20 interests, his interest in being free from bodily
21 restraint is protected coequal with --

22 QUESTION: You mean, he couldn't be picked up by
23 the immigration authorities and detained because he's
24 there illegally?

25 MR. STANSELL: Mr. Chief Justice, that is a

1 distinct form of detention that's separate from what --
2 the indefinite post final order detention that we are
3 talking about.

4 QUESTION: Yes, but will you -- answer my
5 question, if you will.

6 MR. STANSELL: Mr. Chief Justice, I think, you
7 know, I perhaps misspoke, that, of course, the Government
8 has countervailing interests that they can detain any
9 individual for a number of reasons. It's been recognized
10 by this Court that detention pending deportation
11 proceedings is one of those circumstances, and this
12 Court's decision in Carlson supports that.

13 What this Court has never done is taken this a
14 step further and essentially condoned what could be
15 lifetime detention for individuals who have in hand their
16 full Fifth Amendment protections, and I would want to
17 emphasize that Mr. Ma and Mr. Zadvydas today are
18 substantially constrained. Their liberty interests are
19 not the same currently. They're both out in the world.

20 QUESTION: They're both out, aren't they, and
21 under certain terms and conditions? What's the situation?

22 MR. STANSELL: That's exactly correct. There
23 are broad statutory and regulatory provisions that INS can
24 impose on them in terms of travel restrictions, in terms
25 of whether or not they're going to be allowed to work, in

1 terms of having to submit to psychiatric and medical
2 evaluations and just, you know -- and just contact with
3 the INS. They could be required to report every day to
4 the INS.

5 QUESTION: There are new, proposed regulations
6 dealing with this subject. Is that correct?

7 MR. STANSELL: That is correct, Your Honor.

8 QUESTION: And is there some opportunity for
9 judicial review after a period of time under the proposed
10 new regulations, do you know?

11 MR. STANSELL: Your Honor, I believe the
12 judicial review -- there's nothing inherent in the
13 regulations themselves that allow for judicial review. I
14 think if there were --

15 QUESTION: Nothing expressed?

16 MR. STANSELL: That's correct. That's my
17 understanding of the regulations.

18 I think if somebody were --

19 QUESTION: And both these cases are here on
20 habeas --

21 MR. STANSELL: That's correct.

22 QUESTION: -- proceedings?

23 MR. STANSELL: 2241 is the jurisdiction here.

24 QUESTION: Mr. Stansell, what if -- these people
25 are deportable because of committing felonies, right?

1 What if the punishment for the felony were life in prison?
2 That, I assume, would not be unconstitutional?

3 MR. STANSELL: That's correct, Your Honor.

4 QUESTION: Then why is it unconstitutional to
5 say to an immigrant, if you commit a felony, we're not
6 going to put you in prison for life, but we are simply not
7 going to let you back into the general populace, and we
8 will deport you if you can find a place to be deported to,
9 but otherwise you will be held under house arrest, not
10 punitive, but you will not be allowed into the general
11 population?

12 Why is that lesser punishment, if you consider
13 it that, although it really isn't punishment, it's -- you
14 know, that was the deal. Why is that lesser sanction
15 unconstitutional, whereas sending the felon to jail for
16 life and punitive treatment for life would not be
17 unconstitutional?

18 MR. STANSELL: Well, Your Honor, it -- the
19 hypothetical you lay out would allow somebody through the
20 administrative action of an administrative agency to be
21 put in -- to be incarcerated for life, and this Court has
22 never condoned such an extreme civil detention process.

23 QUESTION: Well, would you change the
24 hypothetical, then, slightly and say that there is a
25 provision of the United States Code that anyone who is

1 convicted of a -- anyone in the immigrant status who is
2 convicted of a felony in the United States will be
3 punished by imprisonment up to life, and the sentence in
4 fact can be terminated upon deportation, if deportation is
5 possible? No administrative imposition here. The
6 imposition would be by a court at sentencing.

7 MR. STANSELL: That would be a different case,
8 Your Honor, and I'm not sure --

9 QUESTION: Would that be constitutional?

10 MR. STANSELL: -- what the constitutional rule
11 would be.

12 What's at issue here is whether the detention is
13 excessive in relationship to the legitimate Government
14 interest, and the legitimate Government interest --

15 QUESTION: Well, but that would be the -- I
16 presume that would be the issue under the hypothetical
17 that I've raised, so would -- on my variation of the hypo,
18 would it be unconstitutional for the Government to
19 imprison?

20 MR. STANSELL: If it was with a judge and a jury
21 and the right to indictment and the grand jury --

22 QUESTION: Determination of immigrant status is
23 made by a jury. All the facts are found as a jury needs
24 to find them.

25 QUESTION: In your view, would it make any

1 difference whether such a law was passed before or after
2 the alien entered the country?

3 MR. STANSELL: I'm not sure what I would -- how
4 I'd answer that, Your Honor.

5 QUESTION: You don't think they'd be entitled to
6 notice that that was the consequence of coming into the
7 United States?

8 MR. STANSELL: Well, you know, I think it raises
9 a number of different issues, but what's at the heart of
10 this is the fact that Mr. Ma and Mr. Zadvydas, when they
11 entered the country, they were cloaked with the
12 Constitution, and this Court has delineated a very narrow
13 exception in Mezei, an exception that recognized the
14 general rule set out in Wong Wing in 1896 that has
15 stood -- that withstood, has withstood this test of time
16 and has been cited by this Court in modern cases.

17 That general rule remains, and all they are
18 asking for in this case, and the substantive due process
19 claim here, is simply to ask INS to take into
20 consideration the fundamental aspect that is really
21 driving these cases, the fact that people are locked up
22 for life. If they considered that and weighed that and
23 balanced that against the other interests, then it would
24 be -- it would pass --

25 QUESTION: Okay -

1 QUESTION: That's not the Ninth Circuit rule,
2 though. The Ninth Circuit rule was, if you can't, within
3 the reasonably foreseeable future, deport this person
4 because no one will have him --

5 MR. STANSELL: That's correct, Your Honor.

6 QUESTION: -- then you must -- that's the Ninth
7 Circuit rule. I think what you were saying, urging just
8 now, is something different from that rule.

9 MR. STANSELL: Your Honor, I was speaking to the
10 constitutional test that we think is driven by this
11 Court's civil detention cases.

12 QUESTION: Okay, but let's apply it. I mean,
13 would you go back to Justice Scalia's hypothetical with my
14 variation and Justice Stevens' gloss --

15 (Laughter.)

16 QUESTION: -- and let's assume that the statute
17 providing for the -- for potential life imprisonment
18 subject to deportation was in place at the time that a
19 given immigrant was admitted. On that assumption, would
20 it be -- would the sentencing scheme be constitutional?

21 MR. STANSELL: Your Honor, if somebody came into
22 this country and they were told that if you commit an
23 offense as an alien you'll be sentenced to potentially for
24 life -- and currently I think the Government does have the
25 power to allow, or to move people out of the country,

1 deport them prior to the completion of their sentence. If
2 it were a criminal --

3 QUESTION: Sure, but we're -- the problem is,
4 maybe the Government isn't able to deport. Maybe the
5 current situation occurs in the instance of the
6 hypothetical with its glosses. In that circumstance, in
7 your view, is it constitutional for the Government to
8 imprison up to life?

9 MR. STANSELL: Your Honor, if it's just a
10 straight imposition of a life sentence, I think that would
11 implicate --

12 QUESTION: No, it's the imposition of the
13 sentence that I described.

14 MR. STANSELL: I'm sorry, Your Honor, I'm
15 missing the connection.

16 QUESTION: The sentencing scheme which is in
17 place when the immigrant is admitted provides that in the
18 case of conviction for a felony by such an immigrant, the
19 immigrant may be imprisonment -- may be imprisoned for a
20 period up to life, provided that that term may be reduced
21 if it is possible for the Government to extradite, and
22 does -- not extradite, deport, and does successfully
23 deport.

24 Would that scheme, if in place when the
25 immigrant comes in, be constitutionally enforceable?

1 MR. STANSELL: Your Honor, I'm not sure. It
2 strikes me that that raises other issues that aren't
3 raised in this case, and all we are saying in this case is
4 that where no consideration is given to the foreseeability
5 of deportation, and it's not a criminal charge and a
6 criminal sentence that any of these people are serving,
7 it's unconstitutional, and that's what's informing --

8 QUESTION: Would you say there's something --
9 that it might be something different, is that a little bit
10 like Plyler, that you would take one category of people
11 who commit the same offense and subject them to much
12 harsher punishment than another class?

13 MR. STANSELL: I think that might be. I think
14 there might be an equal protection issue that's raised,
15 and quite frankly I hadn't thought about that question.

16 QUESTION: Well the -- but the Government's -- I
17 mean, if it comes to justification, the Government's
18 justification is going to be essentially what we have
19 heard here, and that is that it is demonstrably more
20 difficult to keep track of such individuals so that they
21 may be deported if, in fact, it is possible to deport
22 them, and number 2, the recidivism rate by such
23 individuals is distinctly higher than the recidivism rate
24 in the generally released criminal population, so those
25 would be the two justifications for the disparate

1 treatment.

2 Would those justifications be constitutionally
3 adequate?

4 MR. STANSELL: I don't think so, Your Honor, and
5 I think that the surveys that the Government relies upon
6 had a much broader sweep to them. I don't think these
7 individuals that we've represented, who are in custody by
8 INS, seeming like they're in custody for life, and they
9 get a district court order to release, are doing quite
10 well, by and large, because they think that their next
11 mishap will put them in custody for life.

12 There's no indication that Mr. Zadvydas or Mr.
13 Ma at this point are doing anything other than staying in
14 touch and responding, complying with all of the conditions
15 of their supervision.

16 QUESTION: Don't appeal to the sanction that
17 you're challenging here. I mean, you're saying they're
18 doing well because they know if they go back in they're
19 going to be there for life. You want to eliminate that
20 sanction, so I mean --

21 (Laughter.)

22 MR. STANSELL: That's correct.

23 QUESTION: Well --

24 MR. STANSELL: There's no doubt about that.

25 QUESTION: It's not fair to rely on it, then.

1 (Laughter.)

2 QUESTION: These people were, both of them --
3 your client was how old when --

4 MR. STANSELL: He was 7 years old when he
5 entered the country, and he's lived here his entire life.
6 He's 23 years old now.

7 QUESTION: So any kind of notice would have to
8 be imputed to the infant from the parents.

9 MR. STANSELL: That's correct. If we were --
10 dealing with the hypothetical we've been talking about,
11 Your Honor? Yes. You know, all of these people are on
12 notice that they need to comply with the immigration laws,
13 and they have no doubt, and they are not challenging in
14 any way the Government's power to deport them, or the
15 circumstances under which they can be deported.

16 What they are just asking for is their right to
17 be free from bodily restraint pending that deportation.

18 May it please the Court, I'd like to reserve the
19 remainder of my time.

20 QUESTION: Very well, Mr. Stansell.

21 Mr. Barnard, we'll hear from you.

22 ORAL ARGUMENT OF ROBERT F. BARNARD

23 ON BEHALF OF THE PETITIONER ZADVYDAS

24 MR. BARNARD: Mr. Chief Justice, and may it
25 please the Court:

1 Four-and-a-half decades ago Mr. Zadvydas came to
2 this country as a stateless person. He's stateless today,
3 and in all probability he will remain that way for the
4 rest of his life. Because of this, the Government was
5 unable to deport him.

6 QUESTION: Are there no ongoing negotiations --
7 I got the impression from the briefs that there had been
8 efforts both to Lithuania and some other country, and
9 neither of them had presently admitted him, but that it
10 was not regarded as completely hopeless.

11 MR. BARNARD: Your Honor, as a factual matter,
12 the only thing that has happened in the last 2 years that
13 I know of is that Mr. Zadvydas wrote a letter to the
14 consulate in Chicago seeking some citizenship papers, or
15 granting him citizenship, and other than that nothing has
16 happened in the last 2 years.

17 At issue in this case, the constitutional issue
18 in this case, is that people who enter this country are
19 regarded as persons under the Constitution once they
20 enter. That is the rule that pertains. The exception to
21 that rule is a very narrow exception which is called the
22 entry fiction, which is applied to people who are detained
23 or interdicted at the border, and what the Government is
24 proposing here is to have the exception swallow the rule.

25 They go even a step further by relying on the

1 Mezei case, which is even more unique than the way the
2 entry fiction is usually employed. In Mezei -

3 QUESTION: Excuse me. They -- are they really
4 going that far? I don't think they are. I think they're
5 acknowledging that these individuals have to be released
6 if there's no threat to the general public from them and
7 if there's no doubt that they can be -- that they won't
8 flee, and they can be found and deported if and when a
9 country can be found to send them to.

10 The Government acknowledges all of that, and
11 under Mezei you wouldn't have to let these people out at
12 all, even if you knew that they wouldn't flee, and even if
13 you knew that they might possibly pose a threat to the
14 public, isn't that right? That's how I understand Mezei.

15 MR. BARNARD: Well --

16 QUESTION: So they're not going as far as
17 extending Mezei to these people entirely.

18 MR. BARNARD: Well, I think they are, but as far
19 as the constitutional deprivation that's being imposed
20 here, they're confining people indefinitely, potentially
21 for life, based on a finding of dangerousness and/or a
22 finding of a flight risk, and --

23 QUESTION: There have to be those findings, and
24 in Mezei there don't have to be those findings.

25 MR. BARNARD: But all other persons in this

1 country can be released if the detention is based solely
2 on dangerousness, and so they're treating --

3 QUESTION: They're treating them differently --

4 MR. BARNARD: Differently than the rest of the
5 people in this country --

6 QUESTION: Right.

7 MR. BARNARD: -- which is why they are extending
8 Mezei -

9 QUESTION: I understand --

10 MR. BARNARD: -- and Mezei is --

11 QUESTION: They're extending it, but I think it
12 goes too far to say that the exception has swallowed the
13 rule and that they're just covering everybody with the
14 Mezei rule. I think this rule is a good deal more limited
15 than Mezei.

16 MR. BARNARD: This Court in Plasencia had
17 someone who was much more analogous to the person in
18 Mezei. Mezei left the country, tried to return. In
19 Plasencia, the lady involved in that case left and tried
20 to return, and this Court did not see a need to extend
21 Mezei in that situation, in fact, accorded Ms. Plasencia
22 her due process rights, and that's essentially all that
23 we're asking here for --

24 QUESTION: Yes, but she hadn't committed any
25 felony.

1 MR. BARNARD: She was in the process of
2 committing a crime when she entered the country, Your
3 Honor.

4 QUESTION: Well, but your clients have committed
5 independent felonies.

6 MR. BARNARD: Yes, and I would get back to the
7 point I made a moment ago, which is that they're being
8 treated differently than any other class of persons under
9 the Constitution in this country. We're now not according
10 them the same degree of constitutional rights we would
11 some else.

12 QUESTION: Well, but I don't think the
13 Constitution requires you to treat people who have done
14 particular things the same way as people who have not done
15 those things.

16 MR. BARNARD: But what we're saying, Your Honor,
17 is, if you take another person in this country who has a
18 felony conviction, and he's determined to be dangerous,
19 but only dangerous and not some other element, not the
20 other element that we find in Kansas v. Hendricks, a
21 mental abnormality, simply dangerous like the individual
22 in Foucha, that person would be entitled to release.

23 QUESTION: But that person is not an alien, and
24 the Government has much more power over aliens than it
25 does over citizens.

1 MR. BARNARD: Which is another reason, perhaps,
2 that release would be more called for in this instance,
3 because the Court -- the Government is not without
4 recourse with aliens if they violate their terms of
5 supervision.

6 We're not asking for Mr. Ma and Mr. Zadvydas to
7 have the same freedom that a citizen would have. They
8 would be under supervision. If they violated the terms of
9 that supervision they could be punished for up to 1 year
10 for failing to abide by the terms of the supervision, and
11 they could be punished up to 10 years if that misbehavior
12 was seen as obstructing the actual deportation process.

13 QUESTION: Can they be detained, under your
14 view, for a reasonable time after the 90-day period?

15 MR. BARNARD: Yes, Your Honor. I believe the
16 test, the civil and regulatory detention test had a
17 weighing analysis built into them.

18 QUESTION: All right. In determining the
19 reasonableness of the more lengthy detention period, do we
20 take into account the fact that there are review
21 procedures, and that the Government under its regulations
22 has to give periodic review?

23 MR. BARNARD: Yes, I believe you would take that
24 into the consideration.

25 QUESTION: That's part of the reasonableness --

1 MR. BARNARD: Yes, Your Honor.

2 QUESTION: -- calculation.

3 MR. BARNARD: But --

4 QUESTION: Well, are not those periodic review
5 procedures in place now because of the regulations?

6 MR. BARNARD: Well, they're in place, but all
7 they're really considering are dangerousness and flight
8 risk. The Government contended in its brief that the
9 newest regulation which is now in effect --

10 QUESTION: Well, but that's the basis -- that's
11 the rationale for the detention.

12 MR. BARNARD: I understand that, Your Honor,
13 but -- and that's the position of Mr. Ma and Mr. Zadvydas,
14 is that the way the regulation is constructed, it violates
15 a basic -- the basic right to substantive due process.

16 QUESTION: So you say they can be held for a
17 reasonable period of time, but that an element of the
18 detention is not the fact that they're a danger to the
19 community.

20 MR. BARNARD: Well, that's one of the elements,
21 Your Honor, but

22 QUESTION: It is or is not one of the elements?

23 MR. BARNARD: It is one of the elements to be
24 considered, but --

25 QUESTION: Well, if it's one of the elements to

1 be considered, and there's a periodic review, then why
2 isn't that reasonable under the definition we're
3 discussing?

4 MR. BARNARD: Because it doesn't consider the
5 likelihood of deportation or the duration of detention,
6 Your Honor. People are being detained solely because
7 either they're a flight risk and/or they're a danger,
8 so --

9 QUESTION: So you could detain a person for,
10 say, 6 extra months because he's dangerous, but not after
11 that, or a year?

12 MR. BARNARD: Well, you could detain him for a
13 reasonable period. I don't have an exact time period or
14 bright line test.

15 QUESTION: If the reason for the detention
16 continues, I don't understand the basis on which you say
17 that you're entitled to release.

18 MR. BARNARD: Well --

19 QUESTION: Either they can't detain him for any
20 period at all because he's dangerous, or they can detain
21 him during the period that he's dangerous, it seems to me,
22 and you're somehow splitting the difference. I don't
23 understand how you do that.

24 MR. BARNARD: What we're saying is, Your Honor,
25 that if you found someone to be dangerous -- and the Ninth

1 Circuit says in its opinion that it would depend on the
2 circumstances of each case.

3 If someone had a shoplifting conviction and they
4 were detained for 90 days, or 120 days, and it wasn't
5 reasonably foreseeable they'd be deported, perhaps that
6 would be a reasonable period to release them, but if
7 someone had a more serious conviction, I believe a
8 district court could hold them somewhat longer.

9 But if you're asking for a time period, I would
10 suggest that the traditional time periods when the statute
11 was silent -- the 1970 statute, it was 2 to 4 months, the
12 statute in the fifties was 6 months -- and that would be a
13 guidepost, but at some point you could not detain them
14 beyond that, because the person is being held merely based
15 on the fact that he's dangerous, and he's being treated in
16 a manner that is different than any other person in this
17 country. We don't have one set of constitutional rules
18 for citizens and another set for --

19 QUESTION: Under your view, it seems to me that
20 you cannot detain him for even 1 day on the grounds that
21 he's a danger to the community, after the 90-day period --

22

23 MR. BARNARD: Well, I believe the --

24 QUESTION: -- and I just don't think you've
25 explained that.

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1 MR. BARNARD: Well, I believe the Ninth Circuit
2 said it would depend on the circumstances of each case,
3 and the example I would give is the one I just did,
4 that --

5 QUESTION: Mr. Barnard --

6 QUESTION: If you're appealing to the
7 proposition that you just said you were appealing to, that
8 you can't treat aliens any different from American
9 citizens in this regard, then you -- Justice Kennedy has
10 to be right. You shouldn't be able to hold him for any
11 period just because you're worried that he'll commit
12 another crime. I mean, surely that's the way we treat
13 citizens. You can't hold a citizen in jail because you're
14 worried he's going to commit a crime.

15 MR. BARNARD: Well, Your Honor --

16 QUESTION: So you have to be appealing to
17 something a little less than the proposition that you have
18 to treat aliens like citizens.

19 MR. BARNARD: Well, Your Honor, we would submit
20 that the Government is not without recourse in these
21 situations. If you have someone that is truly more
22 dangerous, someone like a Hendricks in Kansas v.
23 Hendricks, there would be nothing preventing the
24 Government from having the State they're located in
25 instituting civil --

1 QUESTION: Mr. Barnard, may I just interrupt you
2 there, because I think that you are now departing from
3 what you said you were adhering to. I think the Ninth
4 Circuit said there are two factors here, and one of them
5 is, can this person be deported within a reasonably
6 foreseeable time? Once you're sure that the answer to
7 that question is no, that's the end of the inquiry.

8 I don't think that they were making any
9 determination based on -- what they said is, people serve
10 their time, we let them out. We don't take into account
11 how dangerous they are in any other setting. Therefore,
12 the only legitimate consideration is, does the Government
13 have a reasonable expectation that they would be able to
14 find a place to accept this person.

15 Once it's clear that that's not in the cards,
16 then it isn't -- at least the Ninth Circuit view is, it
17 doesn't depend upon how dangerous this person is. Am I
18 right in understanding that?

19 MR. BARNARD: All that I can say in answer to
20 your question, Your Honor, is that the Ninth Circuit did
21 say that there could be a period after that, depending on
22 the circumstances of the case, and that's my recollection.

23 QUESTION: I thought one part of the opinion
24 said, if you know that there is no hope of finding
25 somebody to take him, you have to let him out at the end

1 of the 90-day period.

2 MR. BARNARD: I think the opinion is somewhat
3 self-contradictory, but I do recall there was language in
4 there that you could hold them for some period after that
5 time.

6 QUESTION: For what purpose, and the purpose
7 was --

8 MR. BARNARD: To determine if it would -- if
9 there was --

10 QUESTION: If there's somebody that could take
11 him.

12 MR. BARNARD: If it was reasonably foreseeable
13 that they would be removed, and I think your question
14 comes down to what is reasonable, or what is reasonably
15 foreseeable, and it may vary a little bit from someone who
16 is extremely dangerous to someone who is a shoplifter, but
17 it would not be a lengthy period of time.

18 QUESTION: Mr. Barnard, wouldn't the
19 foreseeability be considerably affected by the rule that
20 you're urging upon us? If I were the minister of
21 interior, whoever is responsible for making these
22 determinations in the Federal Republic of Germany, let us
23 say, and the United States wants to send back the person
24 that they say is a German citizen, who is obviously a bad
25 actor and he's committed a lot of crimes, and that fits

1 the description of at least one of the two here, I would
2 not be very much inclined to say, oh yes, he is a German
3 citizen, send him back.

4 Now, I might be inclined to do that if I knew
5 that the poor devil is not going to be allowed into the
6 general population, that his choice is to be kept in
7 detention in the United States. You're loading the dice
8 against anybody being willing to take back bad actors.
9 Why should they do it? The consequence of not taking them
10 back is, they'll just be released in the general public in
11 the United States instead of in the Federal Republic of
12 Germany.

13 MR. BARNARD: Well, Your Honor, I believe the
14 statute has some other provisions which were noted in the
15 briefs where we can withhold visas, or take actions of
16 that nature.

17 QUESTION: I'm talking about the impact upon the
18 foreign countries that we are trying to extradite these
19 people to, or deport these people to. It has to have an
20 effect upon them if they know that the effect of their
21 saying no is really not very much hardship on the
22 individual that's involved.

23 MR. BARNARD: Well, Your Honor, I would just
24 point out that in every immigration case there's another
25 country involved, but we don't go to the extent of

1 violating a person's rights to further the immigration --
2 and the two examples would be Wong Wing and Witkovich.
3 There were other countries involved in those cases, and
4 not only did this Court reach the constitutional issue,
5 but resolved it in the alien's favor.

6 So if there were some attenuated foreign policy
7 interest there, I would say that this Court in previous
8 cases has not allowed that --

9 QUESTION: I also assume that one of the things
10 that induces these foreign countries to take them back is
11 lobbying and pressure from the individual himself and from
12 his family, and they have a great incentive to do that if
13 the consequence of Germany's not taking him back is that
14 he's going to remain under restriction, as here, but if
15 that is not the case, what incentive in the world would
16 they have to induce the Federal Republic of Germany to
17 take him back? If they don't take him back, he will have
18 achieved exactly what he wants, which is to stay in the
19 United States.

20 MR. BARNARD: Yes, Your Honor. Again, this
21 Court just has not allowed the attenuated interest to
22 determine the constitutional question in cases where --
23 it's always going to be present in the case with an
24 immigrant, because there's always going to be another
25 country, even --

1 QUESTION: May I ask, just as a matter of
2 clarification, if this -- if your client were a German
3 citizen, would Germany have the option to take him or let
4 him stay here, or would they not be obligated to take him?

5 MR. BARNARD: I think under the reduction
6 convention they do not have to take him back, but I'm --
7 obviously --

8 QUESTION: Yes. So really the question whether
9 he gets back or not depends on whether he's a citizen of
10 the country that they want to deport him to.

11 MR. BARNARD: If he's stateless, which my client
12 is, there's a special --

13 QUESTION: They can define him to be a citizen
14 or not to be a citizen. I mean, that's a judgment to be
15 made by the authorities in Germany.

16 MR. BARNARD: Well, if they find him not to be a
17 citizen, if they find him to be stateless they don't have
18 to take him back.

19 QUESTION: Well, you're not assuming that the
20 Germans just do this willy nilly, and they don't have
21 rules that decide whether these people are citizens or
22 not.

23 MR. BARNARD: That's correct.

24 QUESTION: I assume he either is or he isn't,
25 under the law of that country.

1 MR. BARNARD: Well, I --

2 QUESTION: If he is with a country with whom we
3 have an expatriation treaty, then there isn't any
4 discretion on that country's side, any more than there
5 would be on our side in the reverse situation, so you're
6 talking about countries with which we have no agreement.

7 MR. BARNARD: Or the person's status is --

8 QUESTION: Is stateless.

9 MR. BARNARD: Stateless, yes.

10 QUESTION: Mr. Barnard --

11 QUESTION: But status depends upon a lot of
12 facts that require to be determined and which may be
13 disputed, which is the case in at least one of these two
14 cases, the facts of how long he was in that country, or
15 what his ancestry was, and so forth. There are always
16 those disputes, or there are often those disputes.

17 MR. BARNARD: Well, it gets back to what is
18 reasonable and I would just suggest to the Court that the
19 Government at this point is somewhat less than sanguine
20 that he's going to be taken anywhere, because the only
21 effort that's been made in the last 2 years is to have him
22 send a letter, so he is now, the State Department
23 negotiating with countries.

24 QUESTION: Mr. Barnard, would you be making your
25 same argument and seeking release if the Government were

1 holding someone like your client in a detention center as
2 opposed to a prison facility, or were ordered to remain in
3 his own house and not leave it?

4 MR. BARNARD: I would not be making the same
5 argument if it was a house, if there was electronic
6 monitoring, if it was a half-way house.

7 QUESTION: How about a detention center of some
8 kind, as opposed to a prison?

9 MR. BARNARD: I think that would turn on the
10 condition --

11 QUESTION: Where it's not a criminal facility.

12 MR. BARNARD: Well, I think it would turn on the
13 conditions of detention centers, and being a criminal
14 lawyer --

15 QUESTION: But that would be a very different
16 question --

17 MR. BARNARD: Well --

18 QUESTION: -- conditions.

19 MR. BARNARD: Well, being a criminal lawyer,
20 I've never seen one that looked particularly appealing to
21 the average person, so I just can't imagine that that
22 would be the case.

23 Getting back to some other aspects of Mezei,
24 which I did want to bring the Court's attention -- I see
25 my time is almost up. I would point out that the

1 Government's theory in this case is that once the
2 deportation order becomes final, the individuals are
3 stripped of their constitutional rights.

4 Both in Wong Wing and Witkovich deportation
5 orders were final and the individuals were not stripped of
6 their constitutional rights. In fact, this Court reached
7 those issues and decided in favor of the alien.

8 I would also point out that Mezei really should
9 be limited to its unique set of facts. I mean, there were
10 all kinds of national security concerns at play in that
11 case, which are not at all determinative in either Mr.
12 Ma's and Mr. Zadvydas --

13 QUESTION: Well, aren't national security
14 concerns always at stake when we're talking about
15 immigration policy?

16 MR. BARNARD: I don't think so, Your Honor. I
17 don't think in Wong Wing national security was at issue.
18 He was just being removed because he was here illegally.

19 QUESTION: Well, but the whole idea of control
20 of the borders is based on national security.

21 MR. BARNARD: No, that's national sovereignty I
22 think you're referring to, Your Honor. I'm referring to
23 the fact that Mr. Mezei conducted himself in such a way to
24 raise suspicion, as if he were, say, a spy for the Soviet
25 Union. That's the national security issue that I'm

1 referring to.

2 If there are no further questions, I think I'll
3 reserve time for rebuttal.

4 QUESTION: Very well, Mr. Barnard.

5 Mr. Kneedler, we'll hear from you.

6 ORAL ARGUMENT OF EDWIN S. KNEEDLER ON BEHALF OF
7 RESPONDENTS IN NO. 99-7791 AND
8 PETITIONERS IN NO. 00-38

9 MR. KNEEDLER: Mr. Chief Justice, and may it
10 please the Court:

11 Congress in the exercise of its plenary
12 authority over immigration enacted section 1231(a)(6) in
13 196 -- 1996 to afford the Attorney General the authority
14 to detain dangerous criminal aliens beyond the 90-day
15 removal period if they cannot be removed to their
16 countries of nationality or to some other country during
17 that 90-day period.

18 That enactment was the culmination of measures
19 beginning in 1988 by which Congress sought to address what
20 had become the serious problem of criminal aliens within
21 the United States. It was enacted against a background of
22 information in 1996 in particular, about both the high
23 rate of recidivism among criminal aliens as well as the
24 very high rate of flight among aliens who are released.

25 QUESTION: Mr. Kneedler, may I ask just one

1 question --

2 MR. KNEEDLER: Yes.

3 QUESTION: -- on that point? Does your case,
4 your submission depend on an assumption that these people
5 are more dangerous than citizens who have committed
6 precisely the same crime?

7 MR. KNEEDLER: It does not, no, but what I --
8 the important element, though, is that future
9 dangerousness is a legitimate basis on which to detain
10 someone. Under this Court's civil commitment cases, and
11 this does not remotely resemble civil commitment because
12 it's an exercise of Congress' plenary power over
13 immigration, but one of the bases on which someone may be
14 civilly committed is their potential dangerousness. Now,
15 the Court --

16 QUESTION: That is not a --

17 QUESTION: There's always a plus. I mean, this
18 case is different from that, because now you're relying on
19 future dangerousness, period.

20 MR. KNEEDLER: No. That's --

21 QUESTION: Not mental abnormality, not a short
22 time until trial. This is really a first, and I don't
23 think you mean to walk away from that, so it's not like
24 Salerno, and it's not like Hendricks.

25 MR. KNEEDLER: No, it is in this important

1 respect, and I think this is a critical factor to
2 understanding this case. What the Court said in
3 Hendricks, for example, is that in the civil commitment
4 cases the Court has said it's dangerousness plus some
5 other factor, such as mental illness.

6 Here we have a critical other factor, in
7 addition to dangerousness, and that is that both Mr. Ma
8 and Mr. Zadvydas in this case had had their right to
9 remain in this country extinguished.

10 QUESTION: That's the question.

11 MR. KNEEDLER: Pardon me?

12 QUESTION: That's the question. We agree it's a
13 civil statute. How many days after the 90 in these two
14 cases would you say that there is a factor involved of not
15 knowing whether you could find a country for them?

16 MR. KNEEDLER: In our submission the detention
17 of the aliens is reasonably related to the basis for
18 detention, as long as there is a basis for concern about
19 threat to the community and removal.

20 QUESTION: No, no, I'm just trying to figure
21 out, though -- I'm trying to figure out what the issue is
22 in this case, and I'm having some trouble, because I want
23 to know -- to separate out the problem that you're just
24 talking about, risk of crime --

25 MR. KNEEDLER: Right.

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1 QUESTION: -- I'd like to know -- think of 90
2 as beginning --

3 MR. KNEEDLER: Right.

4 QUESTION: And how many extra days before it
5 became clear that no country will take them?

6 MR. KNEEDLER: It is not clear now.

7 QUESTION: If it's not clear now, then what is
8 it that we're supposed to be deciding?

9 MR. KNEEDLER: Well --

10 QUESTION: Because at that moment, if it's not
11 clear now, there is involved in both of these cases the
12 question of whether it would be reasonable to maintain
13 them simply to be sure they're around if you find a
14 country.

15 MR. KNEEDLER: That, and in addition, because of
16 the potential for dangerousness to the community.

17 QUESTION: What I'm trying to figure out is, is
18 that question in front of us? Do you deny the following,
19 that this statute does not give authority to hold an alien
20 beyond a reasonable time?

21 MR. KNEEDLER: Well --

22 QUESTION: You think it does? Do you think --
23 in other words, are you saying, is it the Government's
24 position that the statute gives the authority to put an
25 alien, after 90 days -- to hold him beyond a reasonable

1 time?

2 MR. KNEEDLER: I'd like to answer that in two
3 respects. I do not believe there is any reasonable time
4 limitation within the statute. On the other hand, it
5 depends what you mean, what could be comprehended within
6 the determination of reasonableness. I mean, for
7 example --

8 QUESTION: All right, so take your second
9 answer, because that has two parts, your first saying we
10 won't hold him beyond a reasonable time, but what do we
11 look at in deciding reasonableness?

12 MR. KNEEDLER: Well, in this case the
13 attorney --

14 QUESTION: Is that -- am I right?

15 MR. KNEEDLER: Yes.

16 QUESTION: All right.

17 MR. KNEEDLER: The Attorney General has
18 implemented this statute in a way -- maybe the Attorney
19 General had broader authority to detain someone
20 permanently without ever releasing someone, but the
21 constitutional question before the court, and the
22 statutory question for that matter, has to be analyzed in
23 terms of what the Attorney General did in the exercise of
24 his discretion in establishing a review procedure under
25 which the alien is subject to periodic review to determine

1 whether he is either dangerous or a risk of flight.

2 QUESTION: Are you satisfied with this holding:
3 on the merits, this statute means no one should be held
4 beyond a reasonable time. Reasonable time is related to
5 whether there's another country available, but in
6 addition, where that's unclear the court can take account
7 of the risk that he poses to the community?

8 MR. KNEEDLER: I do not agree with it in this
9 respect. We do not believe it is for the courts to
10 determine whether, at least in the first instance and
11 without a high degree of deference to the Attorney General
12 as to whether there is another country to whom the alien
13 might conceivably be returned in the future.

14 QUESTION: Well, but are you conceding that that
15 is relevant to the --

16 MR. KNEEDLER: I'm not. I'm not.

17 QUESTION: I assume you're saying that if
18 another country can't be found, and even once it's certain
19 that another country can't be found, the Attorney General
20 can still refuse to release this person into the general
21 population as long as there is a threat of flight or of --

22 MR. KNEEDLER: That is our position, but I would
23 like to say something about the two aliens in this case,
24 just to show that we're not even near that position.

25 Contrary to Mr. Zadvydas's counsel's position

1 that nothing has been done with respect to him recently,
2 we point out at page 48, footnote 22 of our brief, facts
3 have happened after the letter that he referred to that
4 Mr. Zadvydas wrote to the Lithuanian consulate.

5 As we point out in that brief, the INS twice
6 last summer called Mr. Zadvydas in for an appointment,
7 after he asked that that appointment be postponed, so it
8 could be explained to him what information the INS had
9 obtained from the Lithuanian consulate as to what
10 information would be necessary to apply to Lithuania for
11 citizenship based on the Lithuanian citizenship of his
12 parents.

13 On both instances, he did not show up for the
14 appointment, so he is not cooperating with the known
15 procedures for submission of documents that Lithuania has
16 identified as germane to the question of whether he would
17 be granted citizenship.

18 QUESTION: That would be separately
19 sanctionable, would it not? Somebody who -- if you just
20 had the portion of the statute that says you can hold this
21 person under supervision, and that person in supervision
22 did not do what he was told to do, that's independently
23 sanctionable, is it -- would it not be?

24 MR. KNEEDLER: It is, but the important purpose
25 of the detention here is to protect the community as a

1 prophylactic matter, not simply to take measures against
2 someone after the fact.

3 Now, having said that, under the regulations
4 that I've described, even before the formal regulations
5 went in place in December, up to 50 percent of the people
6 who were reviewed under the interim procedures that were
7 in place were released during that period of time, so
8 these regulations do afford a periodic opportunity --

9 QUESTION: How many of those 50 percent had
10 previously been determined to be dangerous to the
11 community?

12 MR. KNEEDLER: I'm not -- well, all of them, or
13 almost all of them in the sense that they were convicted
14 of a crime. Most of the people detained in this category
15 have a criminal history, maybe a few who do not, but the
16 two aliens before the Court right now were convicted of a
17 crime in which they had all of the procedures to which
18 they were entitled in determining that, and this Court has
19 said --

20 QUESTION: And they had served their sentences,
21 presumably.

22 MR. KNEEDLER: They have, but as this Court
23 pointed out in the Jones case, which was discussed in
24 Foucha, it is permissible for a State to presume
25 continuing dangerousness from the conviction of a crime,

1 and the fact that someone has served a criminal sentence
2 does not remove the inference of continuing dangerousness.

3 QUESTION: What case of ours do you think best
4 supports your position of the validity of this scheme?

5 MR. KNEEDLER: Oh, I think there are several. I
6 think the Mezei case does.

7 QUESTION: But didn't that involve more aliens
8 who can be rejected on entry?

9 MR. KNEEDLER: But it is our submission that
10 once an alien has been ordered removed from the country,
11 as both of the aliens here have been -- not only have they
12 had a criminal conviction, with all the protection that
13 affords, but they have -- are subject to final orders of
14 removal under an administrative process in which that had
15 be proven by clear and convincing evidence.

16 The procedures are unquestioned in this case.
17 The consequence of the final order of removal --

18 QUESTION: But Mr. Kneedler, isn't there a vast
19 difference between saying, if a person -- partly
20 fictional -- has never been in the country at all, he has
21 never acquired the protection of the Constitution, isn't
22 that quite different from saying that a person who has
23 acquired that protection, simply because an order of
24 deportation has been entered, he totally loses the
25 protection? Isn't there a difference between the two?

1 MR. KNEEDLER: There's not, and if I may explain
2 why, there is no difference from the point of view of the
3 status or the interests of the alien, there is no
4 difference with respect to the sovereign powers of the
5 United States, and there is no difference --

6 QUESTION: Well, there's a big difference in
7 being, say, in Seattle, Washington, and Ellis Island,
8 never being able to get off the island.

9 MR. KNEEDLER: I'm speaking of the legal status
10 of the alien, and the third is with respect to the
11 interests of the United States.

12 With respect to the status of the alien, it's
13 important to consider the consequences of a final order of
14 removal. It is not simply an order of removal. It also
15 terminates the person's status as a lawful, permanent
16 resident.

17 QUESTION: Well, may I go back to that question
18 Mr. Kneedler, because there's an issue that's come up. I
19 think it's inherent in Justice Stevens' question, and I
20 think it was raised by your response to Justice Ginsburg's
21 Hendricks question, and I think it's focused by one of the
22 green briefs, amicus briefs filed by, I think it was a
23 group of law professors, and they said, what's wrong with
24 the Government's argument that the order of deportation
25 converts the individual back to the status of someone who

1 has not yet been admitted is this: The status, the
2 constitutional status of the individual who has never been
3 admitted rests upon a patent fiction, and the patent
4 fiction is that the individual is not in the United
5 States, when we all know that the individual is in the
6 United States. Illegally, yes, but in the United States,
7 and the Fourteenth Amendment does not distinguish between
8 citizens and others in this respect.

9 It may very well be that that legal fiction is a
10 very justifiable fiction, because otherwise the United
11 States is defenseless against Mariel boat lifts and things
12 like that, but it's another thing, as Justice Stevens'
13 question suggests, to extend that legal fiction and say
14 that the legal fiction takes you one step more, and that
15 is, we're going to now assume that an entire further class
16 of individuals, in fact, is not in the United States and
17 is not subject to whatever the territorial claim that the
18 Fourteenth Amendment seems to respect.

19 What is your answer to the problem of extending
20 legal fictions, because, what's in back of my mind is, in
21 the back of my mind is, if legal fictions can support this
22 restriction back on whatever the rights of persons are,
23 then I suppose other legal fictions could accomplish the
24 same purpose for other classes, so what is your response
25 to the problem of legal fictions?

1 MR. KNEEDLER: If I may, this does not rest on a
2 legal fiction.

3 The first thing I would like to point out is,
4 just to finish the -- because this is important to
5 answering the question -- to finish the consequences of a
6 final order of removal, the first thing it does, as I
7 mentioned, is, it terminates the status of an alien
8 lawfully admitted for permanent residence --

9 QUESTION: Right.

10 MR. KNEEDLER: -- which is defined as a
11 privilege of being lawfully admitted, such status not
12 having changed, and as we point out in our brief --

13 QUESTION: Well, but that's a statutory
14 definition.

15 MR. KNEEDLER: Right, but then the further
16 consequence is, under 1182(a)(9) of the act, the alien is
17 inadmissible for 10 years, or, in the case of an
18 aggravated felon like these, for 20 years, so that --

19 QUESTION: Fine, but --

20 MR. KNEEDLER: So that person is --

21 QUESTION: Inadmissible, but nonetheless has
22 been admitted.

23 MR. KNEEDLER: But what I -- the point I'm
24 trying to make is, in terms of his legal status he is in
25 exactly the same legal status under the laws Congress has

1 passed to protect this Nation as someone who is at the
2 border, someone who has no rights --

3 QUESTION: Well, that may very -- I don't doubt
4 that that is true so far as legal definitions are
5 concerned, but that doesn't drive the constitutional
6 inquiry. The constitutional inquiry in effect says, yes,
7 we'll accept the legal fiction that the person who has
8 never been admitted is, in fact, not in the United States,
9 but now you want that same process -- and there may be a
10 justification for it. We might have found a more candid
11 way of doing it, but I can see the justification. You now
12 want to extend that fiction to somebody who has been in
13 the United States for quite sometime and is still here,
14 and the fact that the statute may by definition say,
15 they're the same, obviously doesn't control the
16 constitutional inquiry.

17 MR. KNEEDLER: No, it does not, but the
18 important thing about -- the important thing to consider
19 if you look at someone like Mezei, who was here for 25
20 years, and went abroad for I think 19 months before he
21 came back in, the Court said that he was an arriving
22 alien, even though he had a long time in this country, but
23 the important point is that Mezei was about procedure, and
24 what the Court was relying on in the so-called entry
25 fiction there was the fact that it was the Court sustained

1 the authority of the Attorney General to keep him excluded
2 on the basis of classified evidence that was never shown
3 to the alien.

4 Even Justice Jackson in his dissent in Mezei
5 rejected the notion that there was a substantive due
6 process problem with detaining Mezei --

7 QUESTION: Well, whether there is or is not a
8 substantive due process problem, it seems to be the case
9 that you still want to respond to the substantive due
10 process argument by saying that the people who have been
11 admitted ordered deported are exactly in the same status
12 for constitutional purposes as those who have never been
13 admitted.

14 MR. KNEEDLER: And here --

15 QUESTION: If one is a fiction, the second is a
16 greater one.

17 MR. KNEEDLER: No -- and the other part of
18 Mezei, that was the part of Mezei that depended on the
19 entry fiction, but the other part of Mezei is, he had no
20 liberty interest to be at large in the United States, and
21 our point is that that liberty interest to be at large in
22 the United States was extinguished by the final order of
23 removal.

24 QUESTION: Mr. Kneedler, we often determine what
25 procedures are due on the basis of legal status, don't we?

1 You're saying legal status here is the same because the
2 law changes.

3 MR. KNEEDLER: Absolutely.

4 QUESTION: Citizens have a different legal
5 status from aliens, and they are entitled to greater
6 constitutional protections, right?

7 MR. KNEEDLER: Absolutely --

8 QUESTION: I agree there are --

9 QUESTION: Resident aliens have different legal
10 status from nonresident aliens, and so forth, so there's
11 nothing extraordinary --

12 MR. KNEEDLER: Not at all. I --

13 QUESTION: Mr. Kneedler, I don't follow this at
14 all, frankly, because I thought the so-called entry
15 fiction, there was a benign aspect of that.

16 In other words, this person has no right to set
17 foot on U.S. land, but we're going to be kind to that
18 person and not dump them in the sea. We could say, you're
19 excludable, so -- but as the kind of price for saying, oh,
20 we're going to let you set foot on land and not drown in
21 the sea or starve to death, but we're going to treat you
22 as though you never came in, and that's a fiction, but
23 it's a benign fiction, because the alternative is, we dump
24 you in the sea.

25 It's quite different when you're talking about

1 someone who was here, who was part of the community, and
2 who has, as you say -- in your brief I think you say, yes,
3 they are persons, and the Constitution says, nor shall any
4 person be denied due process, so it's quite different.

5 QUESTION: We're not dumping them in the sea,
6 are we?

7 MR. KNEEDLER: That was exactly the point I was
8 going to make. One could make the same point here with
9 respect to the removal of an alien who was previously
10 here, and whose right to remain here has been
11 extinguished.

12 The United States would not do this, but one way
13 to remove the alien from the United States would be to put
14 him on a boat, or to insist that he find a county and,
15 unless he finds a country he will be detained here.

16 QUESTION: I take it what we're arguing about
17 now, or discussing, is whether the Attorney General has
18 the right to put this person in custody for his entire
19 life solely on the basis of risk, and I'm not sure that
20 this case really raises that, but if it does, so be it,
21 and my question to you would be simply this.

22 Is there any precedent at all, where the
23 Constitution, which says no person shall be deprived of
24 liberty without due process of law, justifies putting a
25 sane human being in the United States, depriving him of

1 his liberty forever on the basis of an administrative
2 order, no judge, no jury, no judicial process?

3 I just can't think of an instance, and I would
4 be surprised if other countries with similar systems do
5 such a thing, depriving a person of his liberty forever,
6 on the basis simply of an administrative order, so what is
7 the precedent?

8 MR. KNEEDLER: There's not a precedent, put
9 this -- put that way, but if I may respond, the basis for
10 the removal order in this case were criminal convictions,
11 in which the aliens' criminal trials --

12 QUESTION: I have no doubt you could do that as
13 a criminal punishment.

14 MR. KNEEDLER: But --

15 QUESTION: Is that what we're talking about?
16 That's a judicial process.

17 MR. KNEEDLER: No, but you said where the basis
18 for the detention is not preceded by any criminal trial.
19 Here, there was a criminal trial.

20 QUESTION: No, no, my problem is the problem
21 that judicial due process, normally means judicial process
22 where you are depriving a person of liberty. I can't --
23 it's very hard to think of instances -- well, I'd be
24 repeating my question, but I mean, I have no problem,
25 because if you're talking about the criminal process, it's

1 a criminal punishment administered by a judge and a jury,
2 so if you're saying that's what's at issue here, I'm right
3 with you.

4 My problem is that that's not what's at issue
5 here --

6 MR. KNEEDLER: Well --

7 QUESTION: -- to my understanding.

8 MR. KNEEDLER: Well, with all respect, the
9 criminal conviction in this case, in both of these cases
10 and in the great majority of cases in which people are
11 being detained, plays a critical role in their continued
12 detention.

13 This was something that the Court found to be a
14 permissible factor in both Foucha and in -- and
15 particularly in Jones, where the Court said that there
16 could be a presumption of continuing dangerousness subject
17 to rebuttal by the individual, which is exactly what we
18 have here.

19 QUESTION: Yes, but we're trying to explore what
20 precedent of this Court comes closest to saying that,
21 based on the prior conviction of someone who was lawfully
22 here at the time of that conviction, can the Government,
23 by administrative order, detain the person indefinitely
24 because of dangerousness. What case do you rely on?

25 QUESTION: Other than Mezei.

1 QUESTION: And please try to answer the
2 question.

3 MR. KNEEDLER: Okay.

4 QUESTION: I know there are lots of questions,
5 but I want you to answer this one --

6 MR. KNEEDLER: Okay.

7 QUESTION: -- if you would.

8 MR. KNEEDLER: Several. The first is Fong Yue
9 Ting, which says --

10 QUESTION: Pardon me?

11 MR. KNEEDLER: Fong, F-o-n-g, Yue, I think it
12 is, Y-u-e, Ting, T-i-n-g, which says that Congress' power
13 over -- power to expel aliens, in other words to deport
14 them, is the same and is as absolute as Congress' power to
15 exclude aliens, and we've set out the relevant quote in
16 our brief in the Zadvydas case, which I believe is at
17 pages 37 and 38.

18 So I think that is an important constitutional
19 basis for the point I was making earlier, that once
20 someone's right to remain here is extinguished, and he's
21 put back in that status, it is proper to equate them to
22 Mezei.

23 The next line of cases that I would point to are
24 cases, in particular, that -- civil commitment cases,
25 where the Court has, I think, contemplated that there

1 could be subsequent determinations following on a
2 presumption coming out of a criminal conviction of
3 continuing dangerousness.

4 QUESTION: Yes, but were any of those
5 presumptions operative on purely administrative
6 determinations? I would have thought not. I mean, that's
7 Justice O'Connor's question.

8 MR. KNEEDLER: No, but it seems to me another
9 important point that the Court has said with respect to
10 aliens, and this, I can't remember the case in particular,
11 but the Court has said on a number of occasions that
12 Congress can commit the determination of immigration
13 matters to the executive branch, and have determinations
14 made --

15 QUESTION: These cases involve deportation. I
16 think my question was precedent in respect to putting a
17 person in prison --

18 MR. KNEEDLER: Well, I --

19 QUESTION: -- and Fong Yue Ting, if I'm right,
20 was a case where the Court was considering a law that said
21 you had to have a credible, white witness for a Chinese
22 person to remain in the United States, is that right?

23 MR. KNEEDLER: I believe that's correct.

24 QUESTION: All right, so I'm not sure about the
25 strength of that precedent.

1 (Laughter.)

2 MR. KNEEDLER: No, but with respect to its
3 fundamental point that the Congress --

4 QUESTION: For deportation, I'll take that as --
5 we're not considering --

6 QUESTION: I think the case is in point, because
7 as I understand your argument the basis for the
8 Government's holding these people, to which you're
9 appealing, is not that the Government has the power to
10 hold people who are dangerous.

11 MR. KNEEDLER: Precisely.

12 QUESTION: What you're appealing to is the
13 Government's power to keep out of the United States people
14 who have no right to be in the United States --

15 MR. KNEEDLER: That is exactly --

16 QUESTION: -- period.

17 MR. KNEEDLER: That is --

18 QUESTION: And it is your position, I assume,
19 that even if they weren't dangerous, the United States
20 would not have to allow people who have no right to be
21 here to wander at will throughout the United States.

22 MR. KNEEDLER: Right, and the point is that
23 1231(a)(6), enacted pursuant to Congress' plenary power,
24 vests the release authority in the discretion of the
25 Attorney General, and so it would be odd in that --

1 QUESTION: And there's no provision for judicial
2 review.

3 MR. KNEEDLER: There is habeas corpus review.
4 We do not challenge the right of an alien who is held
5 subject to the Attorney General's authority under the
6 statute to seek habeas corpus challenging the
7 constitutionality of the detention, so if there is an
8 argument --

9 QUESTION: But your argument here is, then you
10 lose that. Once you lose it here, there isn't -- in other
11 words, if you're correct, there are these new regulations
12 that you point to, but that's all in-house. It would be
13 no -- if you are successful today, in any one of these
14 situations, be it a shoplifter, be it someone who
15 overstayed a visa and encountered a nasty INS person, that
16 person could be locked up forever without any access to a
17 judge, because the only thing is whatever process the
18 administrator has chosen to give.

19 MR. KNEEDLER: Well, if there is constitutional
20 review of the individualized determination, it would only
21 be along the lines of what the Supreme -- of what this
22 Court said in Carlson and reiterated in Flores, which
23 would be whether the Attorney General's determination was
24 arbitrary.

25 QUESTION: Well, isn't there judicial review of

1 the essential determination that you say gives the
2 Attorney General the power here, and that is the
3 determination that this person has no right to be in the
4 United States?

5 MR. KNEEDLER: That is correct.

6 QUESTION: There is full judicial review.

7 MR. KNEEDLER: Right, and those --

8 QUESTION: And that's the source of your power.

9 MR. KNEEDLER: That is right, so -- and the
10 important point is for these purposes --

11 QUESTION: So you are saying, once that
12 determination -- no right to be in the United States, and
13 the reason is that you committed a felony, served your
14 time. You are saying, yes, after that there is no access.

15 MR. KNEEDLER: We're certainly not saying there
16 is no access to habeas corpus, to challenge the
17 constitutionality of the detention.

18 QUESTION: Because that's what this
19 proceeding --

20 MR. KNEEDLER: I think you are correct the alien
21 will, under our submission, lose at least, or in the
22 exceptional case, in that circumstance, but that's because
23 Congress has vested in the Attorney General the delicate
24 question of deciding when an alien should be released and
25 not.

1 This -- in this area, like in so many areas of
2 immigration, this is intimately tied up with foreign
3 relations. As we point in our briefs, with respect to Mr.
4 Ma, for example, we are engaged in negotiations with
5 Southeast Asian countries --

6 QUESTION: Is there any APA review of the
7 exercise of the Attorney General's discretion?

8 MR. KNEEDLER: We believe there is not, that
9 under 1252(a)(2)(B)(ii) of title VIII it bars judicial
10 review of anything, any determinations that are committed
11 to the discretion of the Attorney General.

12 QUESTION: Mr. Kneedler --

13 QUESTION: Can I just focus on one thing that
14 you were just pointing out? I'll tell you exactly what my
15 problem is.

16 I agree with you that these former cases that
17 you cited do give Congress tremendous power over
18 deportation, whatever their facts, but to my mind, putting
19 a person in jail, or in confinement for the rest of his
20 life, however bad deportation is, this is a lot worse, and
21 I can't find precedent to answer it, and I think you now
22 agree there isn't precedent, and so aren't we left with
23 just deciding, that seems so much worse, must there be
24 judicial process, or is administrative process good
25 enough?

1 MR. KNEEDLER: Administrative process is good
2 enough, and the first and basic point is the one that
3 Justice Scalia said, which is that the most important
4 ingredient of liberty interests at stake here was
5 extinguished, the right to be at large in the United
6 States was extinguished in the administrative deportation
7 proceeding --

8 QUESTION: Mr. Kneedler --

9 MR. KNEEDLER: -- subject to judicial review if
10 the alien chose it, and the aliens in this case did not
11 seek to challenge the extinguishment of their liberty
12 interests.

13 QUESTION: Mr. Kneedler, I would like to ask you
14 a question right on the liberty interest point. Do you
15 read Mezei as merely holding that the person at the border
16 has no liberty interest in roaming around, or is it rather
17 that he is not a person within the meaning of the Fifth
18 Amendment?

19 MR. KNEEDLER: I take it to be that there's no
20 liberty interest, is my --

21 QUESTION: What in the opinion -- and there's
22 nothing in the opinion that talks in those terms. He's
23 just a person who has no right to be here. He is not a
24 person protected by the Fifth Amendment --

25 MR. KNEEDLER: But that I think cannot --

1 QUESTION: -- because he's never got in the
2 United States.

3 MR. KNEEDLER: That, I think, cannot be correct,
4 at least if one looks at Wong Wing, which prohibited the
5 service -- imprisonment and hard labor for someone who was
6 in the United States.

7 It is no part of our submission that an alien
8 who is illegally present, or who has been paroled into the
9 United States in a case like Mezei, is not a person for
10 purposes of protection independent of the immigration
11 laws, but it's quite a different matter to say that the
12 Due Process Clause was somehow intended to limit Congress'
13 plenary power to protect the United States, and the safety
14 of the United States.

15 One other point that I'd like to make, because
16 it's important to bear in mind, protecting the safety of
17 the citizens of the United States and the community is not
18 ancillary to, or simply incidental to an immigration
19 consequence. It is part of the whole point of removal of
20 the aliens in this situation, that they were, as Justice
21 Scalia pointed out, essentially in this country
22 conditioned upon their compliance with our laws. They
23 broke our laws, they committed crimes, and they -- and
24 committed crimes that demonstrate that they present a
25 danger to the community.

1 QUESTION: Mr. Kneedler, you were explaining
2 something before and then got distracted from it. You
3 said, it affects our negotiations with Cambodia, and I was
4 trying to think, how would it affect the negotiations
5 knowing -- how would the difference between putting
6 someone into prison and putting someone under close
7 supervision, how that would affect the relation, the
8 negotiating relationship of -- if the object is to keep
9 this person from doing harm, I understand that's one
10 thing. The other thing is our negotiating some kind of
11 expatriation arrangement with Cambodia. What is the
12 relevant difference between holding that person in prison
13 and holding them under close supervision?

14 MR. KNEEDLER: Well, it is very likely to factor
15 in to another country's calculus of how willing they will
16 be to take someone back whether that person is in custody
17 or not, because -- the Court pointed out in Mezei that
18 Congress could reasonably conclude that when an alien such
19 as Mezei arrives at our borders, that person is no more
20 our problem than the other country s.

21 With respect to an alien and his own country of
22 nationality, his liberty is that country's responsibility,
23 not ours, rather than ours.

24 QUESTION: But why would that country care -- I
25 just don't see the clog in the negotiation.

1 MR. KNEEDLER: That's --

2 QUESTION: I see your point about a dictator who
3 dumps people on this country, that's the excludable class.

4 MR. KNEEDLER: It goes beyond the excludable
5 class, because if a foreign dictator realized that he
6 could cause the release into this country at large of
7 nationals of that country simply by refusing to take
8 people back --

9 QUESTION: But of course, it's not involved with
10 people in Ma's situation. These are people who were
11 lawfully admitted as resident aliens.

12 MR. KNEEDLER: But that status has been
13 extinguished, and they have no right to remain here, and
14 they do have a right under international law to --

15 QUESTION: Well, whatever you say about that, it
16 doesn't -- these people, people in their category do not
17 present the problem of dictators dumping people in the
18 United States. These people have been lawfully admitted
19 into the United States.

20 MR. KNEEDLER: Maybe not dumping in the first
21 instance, but what the refusal to take someone back -- and
22 we -- for example, with respect to Cuba we have a number
23 of people who have come to Cuba and are here lawfully who
24 we want to remove from our midst, not simply those who
25 were foisted upon us under the Mariel boat lift, and if we

1 have a foreign dictator --

2 QUESTION: I'm just thinking in terms of your
3 foreign policy concerns that you put forward. Speaking
4 with one voice to a dictator and saying, we're not going
5 to let you do this to us is quite different from saying,
6 yes, we welcomed this person in our midst, but that person
7 committed a crime, we don't want them any more.

8 MR. KNEEDLER: Well, it's we don't want them any
9 more, and it is your responsibility to take him back, and
10 the pressures on that other country, not simply from the
11 United States Government but from the alien himself, from
12 human rights groups, from his family, are much greater for
13 that other country to take him back when he's in
14 detention.

15 QUESTION: That's certainly true. With the
16 alien himself, it seems to me he has no incentive
17 whatever --

18 MR. KNEEDLER: That's --

19 QUESTION: -- to put any pressure on the foreign
20 Government to take him back, or even to provide the
21 documents necessary for that --

22 MR. KNEEDLER: That is correct, as we've seen --

23 QUESTION: -- if meanwhile he's wandering at
24 large in the population.

25 MR. KNEEDLER: That is correct, as we're

1 seeing --

2 QUESTION: I don't see why the --

3 QUESTION: It's never at large, is it?

4 MR. KNEEDLER: Pardon me?

5 QUESTION: I mean, that's -- you use that
6 expression in your brief. In fact, it's not wandering at
7 large. It's under close supervision, is the alternative.

8 MR. KNEEDLER: Well, it depends on -- a lot of
9 the aliens here are not released. I mean, they had
10 previously to report --

11 QUESTION: That, certainly the Attorney General
12 would have discretion under the part of the statute --

13 MR. KNEEDLER: The Attorney General -- first of
14 all, questions such as this we think are committed to the
15 discretion of the Attorney General.

16 As we point out in our brief, the Attorney
17 General in issuing the final regulations in December
18 pointed out that INS had commissioned a study of other
19 methods for supervision of aliens who might safely be
20 released to see if there's some middle ground, half-way
21 houses and things like that, and the notice points out
22 that the INS is going to be expanding that program to see
23 whether there are alternatives, but --

24 QUESTION: What is the issue in this case? I
25 thought the issue in this case was whether he has to be

1 released into the general population. That's not the
2 case? Are we talking about only whether you could put him
3 under house arrest and --

4 MR. KNEEDLER: No. The aliens in this case are
5 certainly not seeking house arrest. They are seeking
6 being released under some degree of supervision, but they
7 are --

8 QUESTION: What authority does that (a)(3) part
9 of the statute give the Attorney General, the part that's
10 not being challenged, whatever? I thought under
11 supervision could be rather tight supervision.

12 MR. KNEEDLER: Yes. We certainly think it would
13 give the Attorney General the authority to insist that the
14 person be released into a program, a half-way house or a
15 drug treatment program, and that also is pointed out in
16 the preamble to the new regulations, but we don't
17 believe --

18 QUESTION: So that's certainly not, as Justice
19 Scalia just described, at large, at liberty. That is --
20 could be a half-way house.

21 MR. KNEEDLER: It could be, but the questions of
22 exactly what form of custody to keep an alien in, are
23 mixed up with the broader responsibilities of the Attorney
24 General under laws passed by Congress to administer the
25 immigration laws in terms of what facilities someone

1 should be kept in while they're being detained.

2 QUESTION: Mr. Kneedler, what are the conditions
3 of the releases of the two litigants in this case now?

4 MR. KNEEDLER: I'm not sure of all of them, but
5 there are periodic reporting requirements and not leaving
6 the jurisdiction.

7 QUESTION: Is there any reason why those very
8 conditions that are in place now would not be adequate as
9 a general rule, subject to severe punishment if they were
10 violated?

11 MR. KNEEDLER: What the Attorney General has
12 concluded is, for people who do not pose a threat to the
13 community -- reporting requirements are not going to stop
14 someone from being a threat to the community. They may
15 guard against flight, but they are a far more inadequate
16 protection against danger to the community.

17 QUESTION: But insofar as you rely on threat to
18 the community, it's the same threat for the citizen who
19 had the same criminal history.

20 MR. KNEEDLER: Yes, but the important -- the
21 balance of interest is completely different with respect
22 to a citizen and an alien who not only --

23 QUESTION: Why is the balance different if
24 you're just relying on future dangerousness?

25 MR. KNEEDLER: Because under Salerno, for

1 example, the Court said that an individual's interest in
2 liberty can be outweighed by important governmental
3 interests.

4 There is a compelling interest in protecting the
5 safety of the community, but where the liberty interest
6 that is going to be --

7 QUESTION: But you conceded earlier it's no
8 stronger than it is for the average citizen.

9 MR. KNEEDLER: But the countervailing liberty
10 interest is far, far less, to the extent the alien has any
11 remaining liberty interest, because his right to be at
12 large in the United States has been extinguished.

13 QUESTION: But in Salerno and in Hendricks and
14 in these other situations where people are being held and
15 detained, there has been judicial review of that detention
16 order, and there is no such provision here, is there?

17 MR. KNEEDLER: There is not. As we say, we're
18 not challenging --

19 QUESTION: I think that is one difficulty with
20 your position.

21 MR. KNEEDLER: Well, as we say, we're not
22 challenging the ability for habeas corpus review. If that
23 was an issue, the proper disposition would be to allow --

24 QUESTION: No, but under your view, that has to
25 automatically be denied. There simply is no opportunity

1 here for judicial review of the determination of the
2 discretion of the Attorney General in reviewing the
3 conditions under which someone might be released with
4 safety.

5 MR. KNEEDLER: Well, if there was going to be
6 judicial review, it would be along the lines of Carlson,
7 which is whether the Attorney General has exercised that
8 power arbitrarily. We think there probably might be a
9 constitutional component to that to the extent the Court
10 concludes that there is any residual liberty interest at
11 all. That would be the proper way to address this, not to
12 attack as a substantive due process matter, which is all
13 that's here.

14 QUESTION: Well, if the regulations provide for
15 periodic review --

16 MR. KNEEDLER: Yes.

17 QUESTION: -- would Carlson allow judicial
18 review of those periodic determinations?

19 MR. KNEEDLER: Under Carlson --

20 QUESTION: Did Carlson approach --

21 MR. KNEEDLER: Yes. I think under Carlson there
22 was review of those individualized custody determinations.

23 QUESTION: Your questions presented don't raise
24 the issue of judicial review one way or the other.

25 MR. KNEEDLER: No, that is absolutely correct,

1 but the -- again, coming back to the central issue in this
2 case, all that is at issue here is whether the Attorney
3 General's detention pursuant to expressed statutory
4 authority is reasonably related to the goals that have
5 been advanced, and as long as the person was found by the
6 Attorney General to be dangerous or a flight risk, the
7 detention is reasonably related, and that detention is
8 subject to periodic, automatic review by the Attorney
9 General every year, and in intervening periods the alien
10 can request a review of his status by presenting changed
11 material circumstances.

12 In that situation, we think that is a very
13 reasonable response on behalf of the two political
14 branches about how to deal with the severe problem of
15 dangerous criminal aliens in our midst.

16 It is an inherent part of the sovereignty of
17 every nation to protect itself against aliens who that
18 nation does not believe should be in its presence for
19 purposes of national sovereignty, national security, but
20 also the safety of the populace of that country, and that
21 is what Congress and the Attorney General are responding
22 to.

23 Safety is not simply a question to be addressed
24 by the States. When it comes to aliens in this country,
25 it is Congress' responsibility, not that of the States, or

1 in addition to that of the States, to protect the populace
2 of the United States against the presence of dangerous
3 criminal aliens in the United States, and that is what has
4 been done here on the basis of a criminal prosecution and
5 administrative procedures that unquestionably satisfied
6 due process, and the only remaining -- in terms of giving
7 Congress an interest with respect to aliens, it is the
8 equivalent of a State's interest with respect to the
9 mentally ill.

10 In that situation, it is directly parallel to
11 the interests of a State. When does a State come in and
12 intervene with respect to the liberty interest of an
13 individual? With respect to civil commitment, it is in
14 the context of mental illness which gives the State a
15 right to come in and look after the individual and protect
16 the individual and the State. With respect to aliens, it
17 is Congress' plenary power.

18 That has been satisfied. That has been
19 permanently extinguished, that liberty interest. All that
20 remains, then, is the question of dangerousness, and, as
21 this Court has held in the civil commitment cases, a State
22 may place on the alien the burden of showing that he is no
23 longer dangerous at the end of a particular period.

24 There have been no questions here about the
25 statutory authority of the Attorney General to detain the

1 aliens, but we think it is clear that the Attorney General
2 has that authority conferred by Congress.

3 QUESTION: Thank you, Mr. Kneedler.

4 Mr. Stansell, you and your colleague have
5 reserved a little more than 1-1/2 minutes. Why don't you
6 use it.

7 CONSOLIDATED REBUTTAL ARGUMENT OF JAY W. STANSELL
8 ON BEHALF OF RESPONDENT MA AND PETITIONER ZADVYDAS

9 MR. STANSELL: Mr. Chief Justice, and may it
10 please the Court:

11 I have just four points I would like to make.
12 The first is that the administrative process in this case.
13 What 's fundamentally wrong about it, it takes absolutely
14 no consideration that deportation is not foreseeable. If
15 it did, and if the agency weighed foreseeability with
16 actual and real evidence of dangerousness and flight risk,
17 we would have no quarrel with the agency applying that
18 constitutional test in reviewing these individuals.

19 Secondly, as I just said, the test in any case
20 has to be, is detention excessive in relationship to the
21 legitimate Government's interest, and we feel like the
22 district court in Mr. Ma's case had the proper test,
23 balancing foreseeability of deportation with
24 dangerousness, real evidence of dangerousness and flight
25 risk.

1 We would draw the line at, is deportation
2 foreseeable, and say on balance everyone would get out on
3 this case. This Court may disagree, and want to allow a
4 broader balancing test where actual foreseeability might
5 be a graduated scale and allow for different balances to
6 be drawn, but in any case, that's the test that should be
7 applied.

8 Third, that there's no authority for this Court
9 to expand Mezei. The decision in Wong Wing is over 100
10 years, and that stands as a general rule that informs the
11 Mezei narrow exception. Witkovich is similarly situated.
12 Individuals who've been ordered deported did not lose
13 their constitutional rights.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Stansell. The case is submitted.

16 (Whereupon, at 11:38 a.m., the case in the
17 above-entitled matter was submitted.)

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