

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

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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P R O C E E D I N G S

(10:18 a.m.)

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.

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.



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 country 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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