SUPREME COURT OF THE UNITED STATES

Nos. 99–7791 and 00–38

KESTUTIS ZADVYDAS, PETITIONER
99–7791 *v.*
CHRISTINE G. DAVIS AND IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL., PETITIONERS
00–38 *v.*
KIM HO MA

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

[June 28, 2001]

JUSTICE KENNEDY, with whom The CHIEF JUSTICE joins, and with whom JUSTICE SCALIA and JUSTICE THOMAS join as to Part I, dissenting.

The Court says its duty is to avoid a constitutional question. It deems the duty performed by interpreting a statute in obvious disregard of congressional intent; curing the resulting gap by writing a statutory amendment of its own; committing its own grave constitutional error by arrogating to the Judicial Branch the power to summon high officers of the Executive to assess their progress in conducting some of the Nation's most sensitive negotiations with foreign powers; and then likely releasing into our general population at least hundreds of removable or inadmissible aliens who have been found by fair procedures to be flight risks, dangers to the community, or

both. Far from avoiding a constitutional question, the Court's ruling causes systemic dislocation in the balance of powers, thus raising serious constitutional concerns not just for the cases at hand but for the Court's own view of its proper authority. Any supposed respect the Court seeks in not reaching the constitutional question is outweighed by the intrusive and erroneous exercise of its own powers. In the guise of judicial restraint the Court ought not to intrude upon the other branches. The constitutional question the statute presents, it must be acknowledged, may be a significant one in some later case; but it ought not to drive us to an incorrect interpretation of the statute. The Court having reached the wrong result for the wrong reason, this respectful dissent is required.

I

The Immigration and Nationality Act (INA), 8 U. S. C. §1101 *et seq*. (1994 ed. and Supp. V), is straightforward enough. It provides:

> "An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U. S. C. §1231(a)(6) (1994 ed., Supp V).

By this statute, Congress confers upon the Attorney General discretion to detain an alien ordered removed. It gives express authorization to detain "beyond the removal period." *Ibid.* The class of removed aliens detainable under the section includes aliens who were inadmissible and aliens subject to final orders of removal, provided they are a risk to the community or likely to flee. The issue to

be determined is whether the authorization to detain beyond the removal period is subject to the implied, nontextual limitation that the detention be no longer than reasonably necessary to effect removal to another country. The majority invokes the canon of constitutional doubt to read that implied term into the statute. One can accept the premise that a substantial constitutional question is presented by the prospect of lengthy, even unending, detention in some instances; but the statutory construction the Court adopts should be rejected in any event. The interpretation has no basis in the language or structure of the INA and in fact contradicts and defeats the purpose set forth in the express terms of the statutory text.

The Court, it is submitted, misunderstands the principle of constitutional avoidance which it seeks to invoke. The majority gives a brief bow to the rule that courts must respect the intention of Congress, *ante,* at 16, but then waltzes away from any analysis of the language, structure, or purpose of the statute. Its analysis is not consistent with our precedents explaining the limits of the constitutional doubt rule. The rule allows courts to choose among constructions which are "fairly possible," *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932), not to "'press statutory construction to the point of disingenuous evasion even to avoid a constitutional question,'" *Salinas* v. *United States,* 522 U. S. 52, 60 (1997) (quoting *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 57, n. 9 (1996)). Were a court to find two interpretations of equal plausibility, it should choose the construction that avoids confronting a constitutional question. The majority's reading of the statutory authorization to "detai[n] beyond the removal period," however, is not plausible. An interpretation which defeats the stated congressional purpose does not suffice to invoke the constitutional doubt rule, for it is "plainly contrary to the intent of Congress." *United States* v. *X-Citement Video, Inc.,* 513 U. S. 64, 78 (1994). The majority announces it

will reject the Government's argument "that the statute means what it literally says," *ante*, at 8, but then declines to offer any other acceptable textual interpretation. The majority does not demonstrate an ambiguity in the delegation of the detention power to the Attorney General. It simply amends the statute to impose a time limit tied to the progress of negotiations to effect the aliens' removal. The statute cannot be so construed. The requirement the majority reads into the law simply bears no relation to the text; and in fact it defeats the statutory purpose and design.

Other provisions in §1231 itself do link the requirement of a reasonable time period to the removal process. See, *e.g.,* §1231(c)(1)(A) (providing that an alien who arrives at a port of entry "shall be removed immediately on a vessel or aircraft" unless "it is impracticable" to do so "within a *reasonable* time" (emphasis added)); §1231(c)(3)(A)(ii)(II) (requiring the "owner of a vessel or aircraft bringing an alien to the United States [to] pay the costs of detaining and maintaining the alien . . . for the period of time *reasonably necessary* for the owner to arrange for repatriation" (emphasis added)). That Congress chose to impose the limitation in these sections and not in §1231(a)(6) is evidence of its intent to measure the detention period by other standards. When Congress has made express provisions for the contingency that repatriation might be difficult or prolonged in other portions of the statute, it should be presumed that its omission of the same contingency in the detention section was purposeful. Indeed, the reasonable time limits in the provisions just mentioned simply excuse the duty of early removal. They do not mandate release. An alien within one of these categories, say, a ship stowaway, would be subject as well to detention beyond the removal period under §1231(a)(6), if the statute is read as written. Under the majority's view, however, it appears the alien must be released in six months

even if presenting a real danger to the community.

The 6-month period invented by the Court, even when modified by its sliding standard of reasonableness for certain repatriation negotiations, see *ante*, at 21, makes the statutory purpose to protect the community ineffective. The risk to the community exists whether or not the repatriation negotiations have some end in sight; in fact, when the negotiations end, the risk may be greater. The authority to detain beyond the removal period is to protect the community, not to negotiate the aliens' return. The risk to the community survives repatriation negotiations. To a more limited, but still significant, extent, so does the concern with flight. It is a fact of international diplomacy that governments and their policies change; and if repatriation efforts can be revived, the Attorney General has an interest in ensuring the alien can report so the removal process can begin again.

Congress, moreover, was well aware of the difficulties confronting aliens who are removable but who cannot be repatriated. It made special provisions allowing them to be employed, a privilege denied to other deportable aliens. See §1231(a)(7) (providing an "alien [who] cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien" still remains eligible for employment in the United States). Congress' decision to ameliorate the condition of aliens subject to a final order of removal who cannot be repatriated, but who need not be detained, illustrates a balance in the statutory design. Yet the Court renders the other side of the balance meaningless. The risk to the community posed by a removable alien is a function of a variety of circumstances, circumstances that do not diminish just because the alien cannot be deported within some foreseeable time. Those circumstances include the seriousness of the alien's past offenses, his or her efforts at rehabilitation, and some indication from the alien that, given the

real prospect of detention, the alien will conform his or her conduct. This is the purpose for the periodic review of detention status provided for by the regulations. See 8 CFR §241.4 (2001). The Court's amendment of the statute reads out of the provision the congressional decision that dangerousness alone is a sufficient basis for detention, see *ante*, at 19 (citing 1 E. Coke, Institutes *70b), and reads out as well any meaningful structure for supervised release.

The majority is correct to observe that in *United States* v. *Witkovich,* 353 U. S. 194 (1957), the Court "read significant limitations into" a statute, *ante*, at 9, but that does not permit us to avoid the proper reading of the enactment now before us. In *Witkovich*, the Court construed former §1252(d), which required an alien under a final order of deportation "to give information under oath. . .as the Attorney General may deem fit and proper." 353 U. S., at 195. The Court held that although the plain language "appears to confer upon the Attorney General unbounded authority to require whatever information he deems desirable of aliens whose deportation has not been effected within six months," *id.*, at 199, the constitutional doubt this interpretation would raise meant the language would be construed as limited to the provision of information "reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue," *id.*, at 202. In *Witkovich* the interpretation of the text was in aid of the statutory purpose; in the instant cases the interpretation nullifies the statutory purpose. Here the statute by its own terms permits the Attorney General to consider factors the Court now makes irrelevant.

The majority's unanchored interpretation ignores another indication that the Attorney General's detention discretion was not limited to this truncated period. Section 1231(a)(6) permits continued detention not only of

removable aliens but also of inadmissible aliens, for instance those stopped at the border before entry. Congress provides for detention of both categories within the same statutory grant of authority. Accepting the majority's interpretation, then, there are two possibilities, neither of which is sustainable. On the one hand, it may be that the majority's rule applies to both categories of aliens, in which case we are asked to assume that Congress intended to restrict the discretion it could confer upon the Attorney General so that all inadmissible aliens must be allowed into our community within six months. On the other hand, the majority's logic might be that inadmissible and removable aliens can be treated differently. Yet it is not a plausible construction of §1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility. As a result, it is difficult to see why "[a]liens who have not yet gained initial admission to this country would present a very different question." *Ante*, at 2.

Congress' power to detain aliens in connection with removal or exclusion, the Court has said, is part of the Legislature's considerable authority over immigration matters. See, *e.g., Wong Wing* v. *United States,* 163 U. S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation"). It is reasonable to assume, then, and it is the proper interpretation of the INA and §1231(a)(6), that when Congress provided for detention "beyond the removal period," it exercised its considerable power over immigration and delegated to the Attorney General the discretion to detain inadmissible and other removable aliens for as long as they are determined to be either a flight risk or a danger to the Nation.

The majority's interpretation, moreover, defeats the

very repatriation goal in which it professes such interest. The Court rushes to substitute a judicial judgment for the Executive's discretion and authority. As the Government represents to us, judicial orders requiring release of removable aliens, even on a temporary basis, have the potential to undermine the obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters. Brief for Respondents in No. 99–7791, p. 49. The result of the Court's rule is that, by refusing to accept repatriation of their own nationals, other countries can effect the release of these individuals back into the American community. *Ibid.* If their own nationals are now at large in the United States, the nation of origin may ignore or disclaim responsibility to accept their return. *Ibid.* The interference with sensitive foreign relations becomes even more acute where hostility or tension characterizes the relationship, for other countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us. One of the more alarming aspects of the Court's new venture into foreign affairs management is the suggestion that the district court can expand or contract the reasonable period of detention based on its own assessment of the course of negotiations with foreign powers. The Court says it will allow the Executive to perform its duties on its own for six months; after that, foreign relations go into judicially supervised receivership.

The cases which the Court relies upon to support the imposition of presumptions are inapposite. The rule announced in *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966)– "that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial"– was based on the definition of a "petty offense" that was still operable in the United States Code, and was proper "under the peculiar power of the federal courts to revise sentences in contempt cases." *Id.*, at 380. The majority can point to

no similar statutory or judicial source for its authority to create its own time-based rule in these cases. It cites only an observation in a brief filed by the Government in *United States* v. *Witkovich*, O. T. 1956, No. 295, pp. 8–9, see *ante*, at 21, relying, in turn, on doubts expressed in a 1952 Senate Report concerning detention for longer than six months under an Act with standards different, and far less precise, than those applicable here. In *County of Riverside* v. *McLaughlin,* 500 U. S. 44 (1991), our reasonableness presumption for delays of less than 48 hours between an arrest and a probable cause hearing was, as the majority recognizes, *ante*, at 21, based on the "Court of Appeals' determination of the time required to complete those procedures." 500 U. S., at 57. Here, as far as we know, the 6-month period bears no particular relationship to how long it now takes to deport any group of aliens, or, for that matter, how long it took in the past to remove. Zadvydas' case itself demonstrates that the repatriation process may often take years to negotiate, involving difficult issues of establishing citizenship and the like. See Brief for Petitioner in No. 99–7791, pp. 17–20.

It is to be expected that from time to time a foreign power will adopt a truculent stance with respect to the United States and other nations. Yet the Court by its time limit, or presumptive time limit, goes far to undercut the position of the Executive in repatriation negotiations, thus ill serving the interest of all foreign nationals of the country concerned. Law-abiding aliens might wish to return to their home country, for instance, but the strained relationship caused by the difficult repatriation talks might prove to be a substantial obstacle for these aliens as well.

In addition to weakening the hand of our Government, court ordered release cannot help but encourage dilatory and obstructive tactics by aliens who, emboldened by the Court's new rule, have good reason not to cooperate by making their own repatriation or transfer seem foresee-

able. An alien ordered deported also has less incentive to cooperate or to facilitate expeditious removal when he has been released, even on a supervised basis, than does an alien held at an Immigration and Naturalization Service (INS) detention facility. Neither the alien nor his family would find any urgency in assisting with a petition to other countries to accept the alien back if the alien could simply remain in the United States indefinitely.

The risk to the community posed by the mandatory release of aliens who are dangerous or a flight risk is far from insubstantial; the motivation to protect the citizenry from aliens determined to be dangerous is central to the immigration power itself. The Government cites statistical studies showing high recidivism rates for released aliens. One Government Accounting Office study cited by Congress in floor debates on the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, put the figure as high as 77 percent. 142 Cong. Rec. 7972 (1996); Brief for Respondents in No. 99–7791, at 27, n. 13. It seems evident a criminal record accumulated by an admitted alien during his or her time in the United States is likely to be a better indicator of risk than factors relied upon during the INS's initial decision to admit or exclude. Aliens ordered deported as the result of having committed a felony have proved to be dangerous.

Any suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist, as determined by the many factors set forth in the regulations. See 8 CFR §241.4(f) (2001). Underworld and terrorist links are subtle and may be overseas, beyond our jurisdiction to impose felony charges. Furthermore, the majority's rationale seems to apply to an alien who flees prosecution or escapes from custody in some other country. The fact an alien can be deemed inadmissible because of fraud at the time of entry does not necessarily distin-

guish his or her case from an alien whose entry was legal. Consider, for example, a fugitive alien who enters by fraud or stealth and resides here for five years with significant ties to the community, though still presenting a danger; contrast him with an alien who entered lawfully but a month later committed an act making him removable. Why the Court's rationale should apply to the second alien but not the first is not apparent.

The majority cannot come to terms with these distinctions under its own rationale. The rule the majority creates permits consideration of nothing more than the reasonable foreseeability of removal. See *ante*, at 19–20. That standard is not only without sound basis in the statutory structure, but also is not susceptible to customary judicial inquiry. Cf. *INS* v. *Aguirre-Aguirre,* 526 U. S. 415, 425 (1999) ("The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions"). The majority does say that the release of terrorists or other "special circumstances" might justify "heightened deference to the judgments of the political branches with respect to matters of national security." *Ante*, at 15–16. Here the Court appears to rely on an assessment of risk, but this is the very premise it finds inadequate to sustain the natural reading of the statute. The Court ought not to reject a rationale in order to deny power to the Attorney General and then invoke the same rationale to save its own analysis.

This rule of startling breadth invites potentially perverse results. Because other nations may refuse to admit aliens who have committed certain crimes– see, *e.g.,* Brief for Petitioner in No. 99–7791, at 19 ("Lithuanian law precludes granting of citizenship to persons who, before coming to Lithuania, have been sentenced in another state to imprisonment for a deliberate crime for which criminal liability is imposed by the laws of the Republic of Lithua-

nia" (citations and internal quotation marks omitted))—often the aliens who have committed the most serious crimes will be those who may be released immediately under the majority's rule. An example is presented in the case of Saroeut Ourk, a Cambodian alien determined to be removable and held pending deportation. See *Ourk* v. *INS,* No. 00–35645 (CA9, Sept. 18, 2000), cert. pending, No. 00–987. Ourk was convicted of rape by use of drugs in conjunction with the kidnaping of a 13-year-old girl; after serving 18 months of his prison term, he was released on parole but was returned to custody twice more for parole violations. Pet. for Cert. in No. 00–987, pp. 4–5. When he was ordered deported and transferred to the custody of the INS, it is no surprise the INS determined he was both a flight risk and a danger to the community. Yet the Court of Appeals for the Ninth Circuit concluded, based on its earlier decision in *Kim Ho Ma* v. *Reno,* 208 F. 3d 815 (2000), that Ourk could no longer be held pending deportation, since removal to Cambodia was not reasonably foreseeable. App. to Pet. for Cert. in No. 00–987, pp. 3a–4a. See also *Phetsany* v. *INS*, No. 00–16286 (CA9, Sept. 18, 2000), cert. pending, No. 00–986 (requiring release of a native and citizen of Laos convicted of attempted, premeditated murder); *Mounsaveng* v. *INS*, No. 00–15309 (CA9, Aug. 11, 2000), cert. pending, No. 00–751 (releasing a citizen of Laos convicted of rape of a 15-year-old girl and reckless endangerment for involvement in a fight in which gunshots were fired); *Lim* v. *Reno*, No. 99–36191 (CA9, Aug. 14, 2000), cert. pending, No. 00–777 (releasing a Cambodian convicted of rape and robbery); *Phuong Phuc Le* v. *INS*, No. 00–16095 (CA9, Sept. 18, 2000), cert. pending, No. 00–1001 (releasing a Vietnamese citizen convicted of voluntary manslaughter in a crime involving the attempted murder of two other persons). Today's result will ensure these dangerous individuals, and hundreds more like them, will remain free while the Executive

Branch tries to secure their removal. By contrast, aliens who violate mere tourist visa requirements, *ante*, at 11, can in the typical case be held pending deportation on grounds that a minor offender is more likely to be removed. There is no reason to suppose Congress intended this odd result.

The majority's rule is not limited to aliens once lawfully admitted. Today's result may well mandate the release of those aliens who first gained entry illegally or by fraud, and, indeed, is broad enough to require even that inadmissible and excludable aliens detained at the border be set free in our community. In *Rosales-Garcia* v. *Holland*, 238 F. 3d 704, 725 (CA6 2001), for example, Rosales, a Cuban citizen, arrived in this country during the 1980 Mariel boatlift. *Id.*, at 707. Upon arrival in the United States, Rosales was released into the custody of a relative under the Attorney General's authority to parole illegal aliens, see 8 U. S. C. §1182(d)(5)(A), and there he committed multiple crimes for which he was convicted and imprisoned. 238 F. 3d, at 707–708. While serving a sentence for burglary and grand larceny, Rosales escaped from prison, another of the offenses for which he ultimately served time. *Id.*, at 708. The INS eventually revoked Rosales' immigration parole, ordered him deported, and held him pending deportation, subject to periodic consideration for parole under the Cuban Review Plan. See 8 CFR §212.12(g)(2) (2001). In reasoning remarkably similar to the majority's, the Court of Appeals for the Sixth Circuit held that the indefinite detention of Rosales violated Fifth Amendment due process rights, because "the government offered . . . no credible proof that there is any possibility that Cuba may accept Rosales's return anytime in the foreseeable future." 238 F. 3d, at 725. This result– that Mariel Cubans and other illegal, inadmissible aliens will be released notwithstanding their criminal history and obvious flight risk– would seem a necessary consequence

of the majority's construction of the statute.

The majority's confidence that the Judiciary will handle these matters "with appropriate sensitivity," *ante*, at 16, 20, allows no meaningful category to confine or explain its own sweeping rule, provides no justification for wresting this sovereign power away from the political branches in the first place, and has no support in judicially manageable standards for deciding the foreseeability of removal.

It is curious that the majority would approve of continued detention beyond the 90-day period, or, for that matter, during the 90-day period, where deportation is not reasonably foreseeable. If the INS cannot detain an alien because he is dangerous, it would seem irrelevant to the Constitution or to the majority's presumption that the INS has detained the alien for only a little while. The reason detention is permitted at all is that a removable alien does not have the same liberty interest as a citizen does. The Court cannot bring itself to acknowledge this established proposition. Likewise, it is far from evident under the majority's theory why the INS can condition and supervise the release of aliens who are not removable in the reasonably foreseeable future, or why "the alien may no doubt be returned to custody upon a violation of those conditions." *Id.,* at 20. It is true that threat of revocation of supervised release is necessary to make the supervised release itself effective, a fact even counsel for Zadvydas acknowledged. Brief for Petitioner in No. 99–7791, at 20–21. If that is so, however, the whole foundation for the Court's position collapses.

The Court today assumes a role in foreign relations which is unprecedented, unfortunate, and unwise. Its misstep results in part from a misunderstanding of the liberty interests these aliens retain, an issue next to be discussed.

II

The aliens' claims are substantial; their plight is real. They face continued detention, perhaps for life, unless it is shown they no longer present a flight risk or a danger to the community. In a later case the specific circumstances of a detention may present a substantial constitutional question. That is not a reason, however, for framing a rule which ignores the law governing alien status.

As persons within our jurisdiction, the aliens are entitled to the protection of the Due Process Clause. Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention. The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens, however. See, *e.g., Mathews* v. *Diaz,* 426 U. S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"). No party to this proceeding contests the initial premise that the aliens have been determined to be removable after a fair hearing under lawful and proper procedures. Section 1229a sets forth the proceedings required for deciding the inadmissibility or removability of an alien, including a hearing before an immigration judge, at which the INS carries "the burden of establishing by clear and convincing evidence that . . . the alien is deportable." 8 U. S. C. §1229a(c)(3)(A); see also *Berenyi* v. *District Director, INS,* 385 U. S. 630, 636 (1967) ("When the Government seeks to . . . deport a resident alien and send him from our shores, it carries the heavy burden of proving its case by clear, unequivocal, and convincing evidence" (internal quotation marks and footnotes omitted)). Aliens ordered removed pursuant to these procedures are given notice of their right to appeal the decision, 8 U. S. C. §1229a(c)(4), may move the immigration judge to reconsider, §1229a(c)(5), can seek discretionary cancellation of removal, §1229b,

and can obtain habeas review of the Attorney General's decision not to consider waiver of deportation. See *INS* v. *St. Cyr*, *ante*, at __ (2001) (slip op., at 24). As a result, aliens like Zadvydas and Ma do not arrive at their removable status without thorough, substantial procedural safeguards.

The majority likely is correct to say that the distinction between an alien who entered the United States, as these aliens did, and one who has not, "runs throughout immigration law." *Ante*, at 13. The distinction is not so clear as it might seem, however, and I doubt it will suffice to confine the rationale adopted by the majority. The case which often comes to mind when one tests the distinction is *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206 (1953), where the Court considered the situation of an alien denied entry and detained on Ellis Island. The detention had no foreseeable end, for though Mezei was inadmissible to the United States it seemed no other country would have him. *Id.*, at 209. The case presented a line-drawing problem, asking whether the alien was in our country; or whether his situation was the same as if he were still on foreign shores; or whether he fell in a legal category somewhere in between, though if this were true, it still would not be clear how to resolve the case. The Court held the alien had no right to a hearing to secure his release. *Id.*, at 212–213. (Approximately 17 months after this Court denied Mezei relief, the Attorney General released him on parole. It appears Mezei never returned to INS custody, though he was not admitted to the United States as a citizen or lawful permanent resident. See Weisselberg, The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei, 143 U. Pa. L. Rev. 933, 979–984 (1995)).

Here the majority says the earlier presence of these aliens in the United States distinguishes the cases from *Mezei*. For reasons given here it is submitted the majority

is incorrect in its major conclusions in all events, so even if it were assumed these aliens are in a class with more rights than *Mezei*, it makes no difference. For purposes of this dissent it is not necessary to rely upon *Mezei*.

That said, it must be made clear these aliens are in a position far different from aliens with a lawful right to remain here. They are removable, and their rights must be defined in accordance with that status. The due process analysis must begin with a "careful description of the asserted right." *Reno* v. *Flores,* 507 U. S. 292, 302 (1993). We have "'long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia,* 459 U. S. 21, 32 (1982). The same is true for those aliens like Zadvydas and Ma, who face a final order of removal. When an alien is removable, he or she has no right under the basic immigration laws to remain in this country. The removal orders reflect the determination that the aliens' ties to this community are insufficient to justify their continued presence in the United States. An alien's admission to this country is conditioned upon compliance with our laws, and removal is the consequence of a breach of that understanding.

It is true the Court has accorded more procedural protections to those aliens admitted to the country than those stopped at the border, observing that "a continuously present alien is entitled to a fair hearing when threatened with deportation." *Ibid.; Mezei, supra,* at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. . . . But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned'" (quoting *United States*

ex rel. Knauff v. *Shaughnessy,* 338 U. S. 537, 544 (1950))). Removable and excludable aliens are situated differently before an order of removal is entered; the removable alien, by virtue of his continued presence here, possesses an interest in remaining, while the excludable alien seeks only the privilege of entry.

Still, both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious. Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish. See *Wong Wing* v. *United States,* 163 U. S. 228 (1896). This accords with international views on detention of refugees and asylum seekers. See Report of the United Nations Working Group on Arbitrary Detention, U. N. Doc. E/CN.4/2000/4 (Dec. 28, 1999); United Nations High Commissioner for Refugees, Guidelines on Applicable Criteria and Standards Relating to the Detention on Asylum-Seekers (Feb. 10, 1999). It is neither arbitrary nor capricious to detain the aliens when necessary to avoid the risk of flight or danger to the community.

Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns, then, not on the substantive right to be free, but on whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large. The procedures to determine and to review the status-required detention go far toward this objective.

By regulations, promulgated after notice and comment, the Attorney General has given structure to the discretion delegated by the INA in order to ensure fairness and regularity in INS detention decisions. First, the INS provides for an initial postcustody review, before the

expiration of the 90-day removal period, at which a district director conducts a record review. 8 CFR §241.4 (2001). The alien is entitled to present any relevant information in support of release, and the district director has the discretion to interview the alien for a personal evaluation. §241.4(h)(1). At the end of the 90-day period, the alien, if held in custody, is transferred to a postorder detention unit at INS headquarters, which in the ordinary course will conduct an initial custody review within three months of the transfer. §241.4(k)(2)(ii). If the INS determines the alien should remain in detention, a two-member panel of INS officers interviews the alien and makes a recommendation to INS headquarters. §§241.4(i)(1)–(3). The regulations provide an extensive, nonexhaustive list of factors that should be considered in the recommendation to release or further detain. Those include: "[t]he nature and number of disciplinary infractions"; "the detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history"; "psychiatric and psychological reports pertaining to the detainee's mental health"; "[e]vidence of rehabilitation"; "[f]avorable factors, including ties to the United States such as the number of close relatives"; "[p]rior immigration violations and history"; "[t]he likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes"; and any other probative information. §241.4(f). Another review must occur within one year, with mandatory evaluations each year thereafter; if the alien requests, the INS has the discretion to grant more frequent reviews. §241.4(k)(2)(iii). The INS must provide the alien 30-days advance, written notice of custody reviews; and it must afford the alien an opportunity to submit any relevant materials for consideration. §241.4(i)(3)(ii). The alien

may be assisted by a representative of his choice during the review, §§241.4(i)(3)(i), (ii), and the INS must provide the alien with a copy of its decision, including a brief statement of the reasons for any continued detention, §241.4(d).

In this context the proper analysis can be informed by our cases involving parole-eligibility or parole-revocation determinations. In *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), for example, we held some amount of process was due an individual whose parole was revoked, for "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty." *Id.*, at 482; see also *Board of Pardons* v. *Allen,* 482 U. S. 369 (1987). We rejected in *Morrissey* the suggestion that the State could justify parole revocation "without some informal procedural guarantees," 408 U. S., at 483, but "[g]iven the previous conviction and the proper imposition of conditions," we recognized that "the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial." *Ibid.* We held the review process need not include a judicial officer or formal court proceeding, but could be conducted by a neutral administrative official. *Id.,* at 486.

While the majority expresses some concern that the regulations place the burden on the alien to show he is no longer dangerous, that question could be adjudicated in a later case raising the issue. It should be noted the procedural protection here is real, not illusory; and the criteria for obtaining release are far from insurmountable. Statistics show that between February 1999 and mid-November 2000 some 6,200 aliens were provided custody reviews before expiration of the 90-day removal period, and of those aliens about 3,380 were released. 65 Fed. Reg. 80285 (2000); Reply Brief for Petitioners in No. 00–38, p. 15. As a result, although the alien carries the burden to prove detention is no longer justified, there is no showing

this is an unreasonable burden.

Like the parolee in *Morrissey*, who was aware of the conditions of his release, the aliens in the instant cases have notice, constructive or actual, that the INA imposes as a consequence of the commission of certain crimes not only deportation but also the possibility of continued detention in cases where deportation is not immediately feasible. And like the prisoner in *Board of Pardons* v. *Allen*, who sought federal-court review of the discretionary decision denying him parole eligibility, removable aliens held pending deportation have a due process liberty right to have the INS conduct the review procedures in place. See 482 U. S., at 381. Were the INS, in an arbitrary or categorical manner, to deny an alien access to the administrative processes in place to review continued detention, habeas jurisdiction would lie to redress the due process violation caused by the denial of the mandated procedures under 8 CFR §241.4 (2001).

This is not the posture of the instant cases, however. Neither Zadvydas nor Ma argues that the Attorney General has applied the procedures in an improper manner; they challenge only the Attorney General's authority to detain at all where removal is no longer foreseeable. The Government has conceded that habeas jurisdiction is available under 28 U. S. C. §2241 to review an alien's challenge to detention following entry of a final order of deportation, Brief for Respondents in No. 99–7791, at 9–10, n. 7; Tr. of Oral Arg. 59, although it does not detail what the nature of the habeas review would be. As a result, we need not decide today whether, and to what extent, a habeas court could review the Attorney General's determination that a detained alien continues to be dangerous or a flight risk. Given the undeniable deprivation of liberty caused by the detention, there might be substantial questions concerning the severity necessary for there to be a community risk; the adequacy of judicial

review in specific cases where it is alleged there is no justification for concluding an alien is dangerous or a flight risk; and other issues. These matters are not presented to us here.

In all events, if judicial review is to be available, the inquiry required by the majority focuses on the wrong factors. Concepts of flight risk or future dangerousness are manageable legal categories. See, *e.g., Kansas* v. *Hendricks,* 521 U. S. 346 (1997); *Foucha* v. *Louisiana,* 504 U. S. 71 (1992). The majority instead would have the Judiciary review the status of repatriation negotiations, which, one would have thought, are the paradigmatic examples of nonjusticiable inquiry. See *INS* v. *Aguirre-Aguirre,* 526 U. S, at 425. The inquiry would require the Executive Branch to surrender its primacy in foreign affairs and submit reports to the courts respecting its ongoing negotiations in the international sphere. High officials of the Department of State could be called on to testify as to the status of these negotiations. The Court finds this to be a more manageable, more appropriate role for the Judiciary than to review a single, discrete case deciding whether there were fair procedures and adequate judicial safeguards to determine whether an alien is dangerous to the community so that long-term detention is justified. The Court's rule is a serious misconception of the proper judicial function, and it is not what Congress enacted.

For these reasons, the Court should reverse the decision of the Court of Appeals for the Ninth Circuit and affirm the judgment of the Court of Appeals for the Fifth Circuit. I dissent.