AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Due Process

**Zadvydas v. Davis, 533 U.S. 678** (2000)

*After an alien has been found to be in the country unlawfully and ordered removed, federal statutes provided that he should be detained until the removal can be effectuated during a 90-day “removal period.” If the alien cannot be removed within 90 days, he may be detained longer if his release is thought by the attorney general to pose a threat to the community or a flight risk.*

*Kestutis Zadvydas was born to Lithuanian parents in a refugee camp in postwar Germany and brought to the United States as a child. As an adult, he accrued a lengthy criminal record and after a long sentence on a cocaine-dealing conviction, he was taken into custody by the Immigration and Naturalization Service and ordered to be deported in 1994. No country was willing to accept him as a citizen or lawful resident, and so he remained in INS custody. He filed suit in federal district court arguing that his continued detention without prospect of deportation was unlawful, and in 1997 a district court agreed and ordered that he be conditionally released. A circuit court reversed that decision. In a 5-4 decision, the Supreme Court vacated that decision and remanded the case for further proceedings. The majority held that the indefinite detention of an alien under a removal order raised grave constitutional doubts, and so construed the statutory post-removal-period provision as necessitating that the government demonstrate the likelihood of removal in the reasonably foreseeable future to justify detaining an alien under a removal order for more than six months.*

JUSTICE BREYER delivered the opinion of the Court.

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"[I]t is a cardinal principle" of statutory interpretation, however, that when an Act of Congress raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson* (1932). We have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation. For similar reasons, we read an implicit limitation into the statute before us. In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention.

A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person ... of ... liberty ... without due process of law." Freedom from imprisonment-from government custody, detention, or other forms of physical restraint-lies at the heart of the liberty that Clause protects. *Foucha* v. *Louisiana* (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, *United States* v. *Salerno* (1987), or, in certain special and "narrow" nonpunitive "circumstances," where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint."

The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention-at least as administered under this statute. The statute, says the Government, has two regulatory goals: "ensuring the appearance of aliens at future immigration proceedings" and "[p]reventing danger to the community." But by definition the first justification-preventing flight-is weak or nonexistent where removal seems a remote possibility at best. . . .

The second justification-protecting the community-does not necessarily diminish in force over time. But we have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. . . .

The civil confinement here at issue is not limited, but potentially permanent. The provision authorizing detention does not apply narrowly to "a small segment of particularly dangerous individuals," say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations. And, once the flight risk justification evaporates, the only special circumstance present is the alien's removable status itself, which bears no relation to a detainee's dangerousness.

Moreover, the sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous, without (in the Government's view) significant later judicial review. . . . The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.

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The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. . . .

In *Wong Wing v. United States* (1896)*,* the Court held unconstitutional a statute that imposed a year of hard labor upon aliens subject to a final deportation order. . . . The Court held that punitive measures could not be imposed upon aliens ordered removed because "all persons within the territory of the United States are entitled to the protection" of the Constitution. . . .

In light of this critical distinction between *Shaughnessy v. United States ex rel. Mezei* (1953) and the present cases, *Mezei* does not offer the Government significant support, and we need not consider the aliens' claim that subsequent developments have undermined *Mezei's* legal authority. . . .

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We have found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention. Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.

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We recognize, as the Government points out, that review must take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute, and the Nation's need to "speak with one voice" in immigration matters. But we believe that courts can take appropriate account of such matters without abdicating their legal responsibility to review the lawfulness of an alien's continued detention.

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*Vacated and remanded*.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

. . . . A criminal alien under final order of removal who allegedly will not be accepted by any other country in the reasonably foreseeable future claims a constitutional right of supervised release into the United States. This claim can be repackaged as freedom from "physical restraint" or freedom from "indefinite detention," but it is at bottom a claimed right of release into this country by an individual who *concededly* has no legal right to be here. There is no such constitutional right.

Like a criminal alien under final order of removal, an inadmissible alien at the border has no right to be in the United States. In *Shaughnessy* v. *United States ex rel. Mezei* (1953), we upheld potentially indefinite detention of such an inadmissible alien whom the Government was unable to return anywhere else. We said that "we [did] not think that respondent's continued exclusion deprives him of any statutory or constitutional right." While four Members of the Court thought that Mezei deserved greater procedural protections (the Attorney General had refused to divulge any information as to why Mezei was being detained), no Justice asserted that Mezei had a substantive constitutional right to release into this country. And Justice Jackson's dissent, joined by Justice Frankfurter, affirmatively asserted the opposite, with no contradiction from the Court: "Due process does not invest any alien with a right to enter the United States, *nor confer on those admitted the right to remain against the national will.* Nothing in the Constitution requires admission *or sufferance* of aliens hostile to our scheme of government." Insofar as a claimed legal right to release into this country is concerned, an alien under final order of removal stands on an equal footing with an inadmissible alien at the threshold of entry: He has no such right.

The Court expressly declines to apply or overrule *Mezei,* but attempts to distinguish it-or, I should rather say, to obscure it in a legal fog. . . . [A]ll [*Wong Wing v. United States* (1896)] held is that they could not be subjected to the punishment of hard labor without a judicial trial. I am sure they cannot be tortured, as well-but neither prohibition has anything to do with their right to be released into the United States. Nor does *Wong Wing* show that the rights of detained aliens subject to final order of deportation are different from the rights of aliens arrested and detained at the border-unless the Court believes that the detained alien in *Mezei could* have been set to hard labor.

*Mezei* thus stands unexplained and undistinguished by the Court's opinion. We are offered no justification why an alien under a valid and final order of removal-which has *totally extinguished* whatever right to presence in this country he possessed-has any greater due process right to be released into the country than an alien at the border seeking entry.

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JUSTICE KENNEDY, with whom CHIEF JUSTICE REHNQUIST, JUSTICE SCALIA, and JUSTICE THOMAS join, 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.

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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. *Wong Wing* v. *United States* (1896). 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.

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The majority's confidence that the Judiciary will handle these matters "with appropriate sensitivity," 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." . . .

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