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 SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join Part I of JUSTICE KENNEDY's dissent, which establishes the Attorney General's clear statutory authority to detain criminal aliens with no specified time limit. I write separately because I do not believe that, as JUSTICE KENNEDY suggests in Part II of his opinion, there may be some situations in which the courts can order release. I believe that in both *Zadvydas* v. *Davis*, No. 99–7791, and *Ashcroft* v. *Ma*, No. 00–38, a "careful description" of the substantive right claimed, *Reno* v. *Flores*, 507 U. S. 292, 302 (1993), suffices categorically to refute its existence. 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," *ante*, at 9, 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. *The Chinese Exclusion Case*, 130 U. S. 581, 603 (1889). In *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (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." *Id.*, at 215. 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, *id.*, at 209), 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." *Id.*, at 222–223 (emphasis added). 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*, *ante*, at 14, but attempts to distinguish it– or, I should rather say, to obscure it in a legal fog. First, the Court claims that "[t]he distinction between an alien who has

effected an entry into the United States and one who has never entered runs throughout immigration law." *Ante*, at 13. True enough, but only where that distinction makes perfect sense: with regard to the question of what *procedures* are necessary to prevent entry, as opposed to what *procedures* are necessary to eject a person already in the United States. See, *e.g.*, *Landon* v. *Plasencia*, 459 U. S. 21, 32 (1982) ("Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing *when threatened with deportation*" (emphasis added)). The Court's citation of *Wong Wing* v. *United States*, 163 U. S. 228 (1896), for the proposition that we have "held that the Due Process Clause protects an alien subject to a final order of deportation," *ante*, at 13, is arguably relevant. That case at least involved aliens under final order of deportation.* But all it 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

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*The Court also cites *Landon* v. *Plasencia,* 459 U. S. 21 (1982), as oblique support for the claim that the due process protection afforded aliens under final order of removal "may vary depending upon status and circumstance." *Ante*, at 13. But that case is entirely inapt because it did not involve an alien subject to a final order of deportation. The Court also cites *Johnson* v. *Eisentrager*, 339 U. S. 763, 770 (1950), *ante*, at 13, but that case is doubly irrelevant: because it dealt not with deportation but with the military's detention of enemy aliens outside the territorial jurisdiction of the United States, and because it rejected habeas corpus jurisdiction anyway.

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. Congress undoubtedly thought that both groups of aliens– inadmissible aliens at the threshold and criminal aliens under final order of removal– could be constitutionally detained on the same terms, since it provided the authority to detain both groups in the very same statutory provision, see 8 U. S. C. §1231(a)(6). Because I believe *Mezei* controls these cases, and, like the Court, I also see no reason to reconsider *Mezei*, I find no constitutional impediment to the discretion Congress gave to the Attorney General. JUSTICE KENNEDY's dissent explains the clarity of the detention provision, and I see no obstacle to following the statute's plain meaning.