SUPREME COURT OF THE UNITED STATES

October Term, 2000
No. 00-38

JANET RENO,
Attorney General of the United States, et al.,
Petitioners

v.

KIM HO MA,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE*, SUPPORTING AFFIRMANCE

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INTEREST OF *AMICI CURIAE* [1]

Amici Curiae are the immigration and constitutional law professors whose individual names appear *ante*, pages *i-ii*. Many of us have written about the principles that the government invokes in this appeal. There may be disagreement among us about the scope of the government's authority to detain people who have never entered the United States, but all of us conclude that the immigration authorities may not detain lawfully-admitted resident aliens except during proceedings to determine their ability to remain here and for a reasonable period thereafter to effect removal, so long as removal remains a realistic possibility.

Amici therefore support affirmance, and write both to explain the origins and application of the government's power over non-citizens, and to place this case within the broader context of constitutional immigration law.

SUMMARY OF ARGUMENT

The bedrock guarantees of the Fifth Amendment "are universal in their application, to all persons within the territorial jurisdiction" of the United States, "without regard to any differences of ... nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Accordingly, a "final order of removal" (Pet. Br. 50) does not strip

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[1] Both Petitioner and Respondent have consented to the filing of this brief.

No counsel for any party authored this brief in whole or in part. The brief was written by counsel for *Amici Curiae* with the assistance of Margaret Dundon and Jason Weintraub, students at the University of California School of Law (Boalt Hall). No one other than *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of the brief.

even an unlawfully admitted alien of the right to be free of unconstitutional detention. *Wong Wing v. United States*, 163 U.S. 228, 236-38 (1896).

Respondent Kim Ho Ma became a permanent resident of the United States after his lawful admission in 1985 when, at age seven, he fled here as a refugee from Cambodia. Ten years later, Mr. Ma was convicted of a crime for which he was sentenced to serve thirty-eight months, and this felony conviction may permit his deportation—if only some other nation can be persuaded to accept him. Mr. Ma is therefore one of thousands of "INS lifers"—lawfully-admitted resident aliens now held in what Justice Jackson correctly regarded as "executive imprisonment" because of "fear of future misconduct, rather than crimes committed." *Shaughnessy v. United States ex rel. Mezei* ("*Mezei*"), 345 U.S. 206, 218, 225 (1953) (Jackson, J., dissenting). Although the United States would now like to deport them because of past acts, it is unable to do so. Moreover, unlike most removable aliens, Mr. Ma and other lifers do not hold the keys to the prison in their own pockets; they simply cannot decide to go elsewhere.

Although the Constitution protects all those within our borders, the government also possesses broad power to determine who may enter the United States *ab initio*, and to detain those whom it rejects pending their eventual repatriation. *Mezei* marks the zenith of this power, but it was decided in a completely different context from the case at bench and in any event is readily distinguishable. *Mezei* concerned an applicant who had left the United States for a significant period of time and whose subsequent entry was denied for national security reasons. In contrast, Mr. Ma entered after having been screened and admitted by the government as a legal resident, and he never left the country.

In attempting to justify Mr. Ma's indefinite incarceration, the government asks this Court to treat him as if he were a first-time applicant at our door, thus stripping him of his constitutional rights. Petitioners put it this way: "the heightened constitutional status" accorded Mr. Ma as a resident alien "no longer applies." Pet. Br. 50. But the government has the constitutional principle exactly wrong. All aliens within the United States are "persons" fully protected by the Fifth Amendment, and none more so than legally-admitted permanent residents. When the United States screened and admitted Mr. Ma, it relinquished its ability to treat him as someone outside of our territorial jurisdiction and outside of the protections of our Constitution.

Amici submit that neither logic nor precedent support the government's attempt to deny Mr. Ma the protections of the Fifth Amendment, and thus convert *Mezei* into a sweeping authorization of preventive detention. As a legally admitted permanent resident who has never left the country, Mr. Ma's constitutional status is that of a deportable alien living in the United States, not an inadmissible alien standing at the border. Indeed, this is perhaps the most basic, long-standing distinction in all of this Court's jurisprudence governing the treatment of aliens. Moreover, as we will show, the government's interest in detaining people already screened and admitted to this country—like Mr. Ma and thousands of other "INS lifers"—differs markedly from its stake in refusing to admit large numbers of first-time applicants for admission. The only doctrine that permits the government to treat non-citizens physically within our territory as if they had never been admitted is the "entry fiction," an often-criticized rule that has no application here. This Court should reject the government's invitation to extend that rule and effectively create a brand-new "exit fiction."

ARGUMENT

I. ALIENS WITHIN THE UNITED STATES ARE PROTECTED BY THE CONSTITUTION, EVEN IN MATTERS RELATING TO THEIR REMOVAL AND DETENTION.

Mr. Ma was admitted into the United States as a refugee, became a lawfully admitted permanent resident, and never left. This Court has long held that aliens within our physical borders are persons within the meaning of the Due Process Clause. *See, e.g., Yick Wo, supra,* 118 U.S. at 369; *Wong Wing, supra,* 163 U.S. at 238. Concurring in *Wong Wing*, Justice Field stated the principle clearly:

> "The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic... This has been decided so often that the point does not require argument." (*Id.* at 242; concurring and dissenting opinion).

Wong Wing controls here. In that case, the government defended a statute authorizing executive imprisonment of unlawful entrants for one year after the entry of a final order of deportation. This Court rejected this unwarranted assertion of power. Acknowledging the government's broad power over immigration and the permissibility of "temporary confinement ... while arrangements [are] being made for their deportation" (*id.*, 163 U.S. at 235), the Court struck down the statute. Quoting *Yick Wo's* holding that the Fourteenth Amendment is "universal in [its] application to all persons within the territorial jurisdiction, without regard to ... nationality," the Court continued:

> "[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments, and ... even aliens shall not be held to answer for a capital or other infamous crime,

> unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law." (*Id.*, at 238).

Wong Wing, which involved an alien unlawfully in the United States, makes the instant case *a fortiori*. If the Due Process Clause protected Wong Wing against arbitrary detention, it must protect those like Mr. Ma—who were lawfully admitted to the United States—and that protection continues even after the entry of an order of removal, so long as Respondent remains in the United States.

The *Wong Wing* principle informs the Court's jurisprudence no less today than a century ago. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").[2]

II. THE PLENARY POWER DOCTRINE DERIVES LARGELY FROM THE EXECUTIVE'S SOVEREIGN INTEREST IN FOREIGN AFFAIRS, AN INTEREST THAT IS ABSENT HERE.

The government claims "plenary" power to incarcerate Mr. Ma by invoking the Executive's control over foreign affairs, from which the "plenary power doctrine" is largely derived. This interest, however, has little relevance in matters involving aliens like Mr. Ma whom the government has already screened and admitted to our country. It is difficult to discern any meaningful connection to foreign affairs in this case. See *post*, part II-B.

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[2] *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 272-74 (1973) (Fourth Amendment: searches and seizures within the United States); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 490-91 (1931) (Fifth Amendment: takings clause); *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1975) (Fifth Amendment: custodial interrogation).

A. The Plenary Power Doctrine Was First Developed—And Is At Its Zenith—In Cases Involving "Excludable" Aliens

The "plenary power doctrine" originated in *The Chinese Exclusion Case (Chae Chan Ping v. United States)*, 130 U.S. 581 (1889). This doctrine is merely shorthand for the idea that because authority over immigration into the United States flows from sovereignty itself—particularly the need for the sovereign to control relations with other nations—it may sometimes follow that decisions implementing the immigration power receive deferential judicial review.[3]

As its name suggests, *The Chinese Exclusion Case* involved the Executive's exclusion of an alien at the border, treating him as a first-time entrant without constitutional status. The Court rejected the argument that a new statute violated Chae Chan Ping's rights as a "person" under the Fifth Amendment, reasoning that the exclusion of foreigners was an "incident of sovereignty":

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[3] For descriptions of the plenary power doctrine, *see* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 864-69 (1989); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854-63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256-78 ; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 166-80 (1983); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632-50 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14-18 (1984); Margaret Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONSTIT. L.Q. 1087, 1128-39 (1995); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 939-951 (1995).

> "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us." (130 U.S. at 606).

See also Ekiu v. United States, 142 U.S. 651, 660 (1892) (exclusion decisions of the Executive "are due process of law" as to "foreigners who have never been naturalized, *nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law*." Emphasis added).[4]

With respect to excludable aliens, the zenith of the plenary power doctrine came in *Mezei,* where the Executive denied entry to a would-be immigrant for national security reasons, and then detained him because no other nation would take him off our hands. The Court, citing *The Chinese Exclusion Case*, found Mezei's detention lawful. It emphasized foreign affairs and national security concerns and Mezei's status as a new applicant for admission. *Mezei*, *supra*, 345 U.S. at 210-16.

Mezei, however, applies only to first-time applicants for admission. Although Mezei had lived in the United States previously, he abandoned his residence and left the country for what this Court termed "a protracted absence." *Id.* at 214. When

[4] The plenary power doctrine has proved controversial, generating strong dissents throughout the entire history of its existence. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting) ("Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists"); *Mezei*, *supra*, 345 U.S at 226 (Jackson, J., dissenting) ("Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities?"); *Jean v. Nelson*, 472 U.S. 846, 874 (1985) (Marshall J., dissenting) ("Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement").

Mezei decided to come back, he presented himself as a new immigrant, "armed with a quota immigration visa issued by the American consul in Budapest." *Id*. at 208. In short, he viewed himself and was viewed by the government and the Court as an applicant for initial entry.

The significance of Mezei's status as a new entrant is shown in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), decided the same Term, where the Court recognized the constitutional status of a merchant seaman who sought entry after a temporary absence at sea. When the government likewise sought to exclude him on national security grounds, things went quite differently. The Court insisted that his constitutional rights were greater than those of an unadmitted alien, saying:

> "This preservation of petitioner's right to due process does not leave an unprotected spot in the Nation's armor. Before petitioner's admission to permanent residence, he was required to satisfy the Attorney General and Congress of his suitability for that status." (*Id*. at 602).

Kwong Hai Chew was therefore, "from a constitutional point of view, a person entitled to procedural due process under the Fifth Amendment." *Id*. at 600. But writing just a short while later for the majority in *Mezei*, Justice Clark was at pains to distinguish *Kwong Hai Chew* as a case involving the constitutional rights of "continuously present resident aliens." In contrast, he explained, new applicants for admission such as Mezei, who are "no more ours than theirs," may be excluded and detained without a hearing. *Mezei*, *supra*, 345 U.S. at 213, 215-16. Thus, in the case now at bench, the government advocates a "*Mezei* result," shorn of all the limiting principles that informed that decision. *See* Pet. Br. 43 (citing *The Chinese Exclusion Case*). This assertion gives fresh meaning to Justice Jackson's prophetic warning that

> "Such a practice, once established with the best of intentions, will drift into oppression of the disadvantaged in this country as surely as it has elsewhere." (*Mezei, supra,* 345 U.S. at 226; dissenting opinion).

B. The Foreign Affairs Considerations That Might Support Detention of Excludable Aliens Are Not Present Here.

A constant theme of the Court's plenary power decisions is the relationship between the political branches' control over immigration *into* the United States and their ability to conduct foreign affairs. *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); *Fiallo v. Bell*, 430 U.S. 787, 796 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *The Chinese Exclusion Case, supra,* 130 U.S. at 604-07.[5] Yet, the foreign policy concerns that animated *Mezei* and other cases involving the detention of excludable or inadmissible aliens are absent here. Here the alien was screened by immigration officials, admitted lawfully for residence, and he has remained in the United States and developed substantial ties with and in our society. Regrettably, Mr. Ma did not live up to our aspirations. His removal has been ordered in light of the government's proof, in an individualized proceeding, that he committed a felony. But according Mr. Ma his constitutional rights does not "leave an unprotected spot in the Nation's armor." *Kwong Hai Chew, supra*, 344 U.S. at 602. This is not a case where

[5] Many commentators have documented this relationship as well. *See, e.g.*, Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION, 23, 289 -91 (1972); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 858-63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261-269; T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 12 (1990).

foreign nations threaten our sovereignty by forcing large numbers of would-be immigrants upon us.[6]

Indeed, the government does not seriously advance *any* meaningful foreign policy consideration justifying unlimited detention of Mr. Ma. The only foreign policy argument the government even mentions in passing is a lame assertion that if it cannot keep Mr. Ma under lock-and-key for howsoever long it wishes, this "could be misinterpreted" by other nations "to imply that the United States believes that removal of the criminal alien is futile, contrary to the position of the United States, speaking with one voice through the Executive Branch." Pet. Br. 44. Respectfully, the record is bereft of any statement, under oath, by any Executive officer, suggesting that it is or ever was a principle of our foreign policy to hold resident aliens hostage until their countries of birth capitulate to our repatriation demands. Neither does the record indicate that an inability to detain Mr. Ma interferes with our nation's relations with Cambodia. Moreover, this newly-minted "justification" would seemingly support

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[6] Post-*Mezei* decisions upholding the detention of excludable aliens rest upon the claim—wholly inapplicable here—that detention is necessary to protect our nation from the influx of large numbers of unwanted immigrants. *See, e.g.*, *Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984) *aff'd*, 472 U.S. 846 (1985) (asserting that release of excludable aliens "would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back"); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1448 (9th Cir.; en banc), *cert. denied*, 516 U.S. 976 (1995) (quoting *Jean*); *Gisbert v. U.S. Attorney General, supra*, 988 F.2d 1437, 1447 (5th Cir. 1993) (same).

Neither is this a case, such as *Aguirre-Aguirre, supra,* 526 U.S. at 423-32, addressing the substantive ground for withholding deportation, where the question was whether the non-citizen's conduct in his home country was political or not. Here, the only grounds for deportation and detention relate to Respondent's past conduct wholly within the United States. Unlike *Aguirre-Aguirre*, the legal issue in the case at hand does not involve foreign affairs at all.

indefinite incarceration of all removable aliens, not just those labeled "dangerous," which appears to be counter to the government's claim of limited employment of the detention power.

Unable to present any meaningful foreign affairs evidence, Petitioners offer irrelevant diversion, repeatedly labeling Mr. Ma a former "gang member," whose past activities endanger the public safety, even though he has served "almost the maximum sentence that could be ordered based on his criminal record." Pet. Br. 2-4. But all this opprobrium only succeeds in demonstrating that this case has nothing to do with Executive primacy in foreign affairs, and everything to do with preventive detention *vel non.*

Amici submit that this Court marked the proper bounds of plenary power in *INS v. Chadha*, 462 U.S. 919 (1983). It refused to apply that doctrine where no significant connection to foreign affairs had been demonstrated. While noting the existence of the plenary power doctrine, the Court struck down a statute permitting a legislative veto of the Attorney General's decision to withhold individuals' deportations because Congress chose a constitutionally impermissible means to implement its power. *See id.* at 940-41, and S. Legomsky, *supra* note 5, at 299-303 (discussing *Chadha*).

III. NEITHER MR. MA'S STATUS AS "ORDERED REMOVED" NOR THE "ENTRY FICTION" SANCTION THE GOVERNMENT'S ATTEMPT TO TREAT MR. MA AS A FIRST-TIME APPLICANT FOR ADMISSION.

We have thus far noted that non-citizens who are present in the United States are protected by the Constitution, and that the plenary power doctrine applies much

less forcefully to persons admitted to the United States than to people at the border seeking admission. The only recognized exception to this territorial distinction—the "entry fiction"—is a narrow doctrine not relevant here. This fiction does not permit the government to strip persons like Mr. Ma of many of their protections under the Constitution and relegate them to the diminished status of first-time applicants for admission.

A. This Court Has Applied The Plenary Power Doctrine To Lawfully Admitted Permanent Residents To A Lesser Extent Than To Non-Citizens Seeking Admission.

Even in matters relating to their removal, aliens lawfully admitted to our country are treated differently than those at the border seeking first-time admission. The development of the plenary power doctrine makes this difference clear.

The Court's first application of the plenary power doctrine to aliens within our borders came in *Fong Yue Ting v. United States, supra*, where the majority said that the powers both to exclude and deport "rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." (149 U.S. at 713). The dissenting Justices, however, distinguished between Congress' power over admitted and non-admitted aliens, building upon *Yick Wo*'s statement of the general principle that constitutional rights protect all "within the territorial jurisdiction." *Yick Wo, supra*, 118 U.S. at 369. *See Fong Yue Ting*, 149 U.S. at 734-37 (Brewer, J., dissenting); *Id*. at 746 (Field, J., dissenting); *id*. at 762 (Fuller, C.J., dissenting).

Next came *Wong Wing, supra,* in which both the majority of the Court and the concurrence of Justice Field—who authored opinion of the Court in *The Chinese*

Exclusion Case—drew a sharp distinction between the constitutional principles relevant to expulsion and to detention pending expulsion, even though Wong Wing was subject to a final order of removal. See *ante*, part I.

These ideas again flowered in *Yamataya v. Fisher*, 189 U.S. 86 (1903). Yamataya entered the United States, but was later arrested on the ground that she was a pauper and thus ineligible to become a permanent resident. The government insisted in *Yamataya* that its "plenary powers" trumped the Fifth Amendment, saying that deportation "merely enforces the withholding of the privilege of coming or remaining here[.]"[7] But Justice Harlan for the Court rejected this argument, declaring that the Act *sub judice* must be interpreted to "bring [it] into harmony with the Constitution," and therefore must afford what we now call "administrative due process" in deportation proceedings. *Id.* at 101.

Ever since *Yamataya*, this Court has steadfastly enforced its commitment to protecting people who have developed social ties to this country by consistently adhering to the sharp distinction between aliens who have been admitted as permanent residents and those who have not. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) ("our immigration laws have long made a distinction between those aliens who have come to our shores

[7] *Id.* at 93 (reporter's summary of the argument of the government's counsel). Much the same argument is now recycled here, at Pet. Br. 43-44.

seeking admission ... and those who are within the United States after an entry, irrespective of its legality").

Landon v. Plasencia, 459 U.S. 21 (1982), sharply illustrates this critical distinction. There, a resident alien briefly left the United States and was caught smuggling aliens upon her return. The government argued that she should be treated as if she were an "excludable" alien, much as it now does here. Pet.Br. 49-50. But in an opinion for eight members of the Court (and with Justice Marshall concurring), Justice O'Connor disagreed and held that although Plasencia's right to return to the United States could be determined in a process labeled "exclusion," she was nevertheless protected by the Due Process Clause. "[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Id.* at 32; *see also Reno v. Flores*, 507 U.S. 292, 306-07 (1993) (detention of aliens during the deportation process must be measured by the Due Process Clause).

The Court in *Plasencia* thus determined that a permanent resident has a liberty interest protected by the Constitution even when she stands outside the physical boundary of our country, making it clear that even in matters relating to removal—matters in which the government asserts "plenary power"—resident aliens still enjoy substantial protections under the Fifth Amendment.

B. The Sole Exception to Territorial Standing—The "Entry Fiction"— Does Not Apply To Aliens Admitted as Permanent Residents.

The cases discussed above stand for the proposition that once a person has lawfully entered our country, and has been accepted into our midst, he is not treated in

the same fashion as one arriving at the border for the first time, hat in hand, seeking admission. The sole exception to this principle is the "entry fiction," a peculiarity that applies *only* to aliens who have not yet been granted admission into the United States. In arguing that admitting Mr. Ma gave him some "heightened" status otherwise unavailable to other aliens (Pet. Br. 58), the government seemingly ignores the basic principle that all people, including aliens, are "persons" within the meaning of the Fifth Amendment. Admitting Mr. Ma to this country as a resident alien did not turn him into a "person;" rather, it terminated any ability to apply the "entry fiction," a narrow exception to the doctrine of general application of the Fifth Amendment.

Mezei makes this plain. There the Court emphasized that Mezei's "harborage at Ellis Island [was] not an entry into the United States." *Mezei*, *supra*, 345 U.S. at 213. Distinguishing *Kwong Hai Chew*, Justice Clark wrote for the Court that Mezei was merely "on the threshold of initial entry[.]" *Id*. at 212. What permitted this Court to uphold Mezei's detention was the legal fiction that he was outside of our country's territory while sitting at Ellis Island, and thus not yet entitled to the full protection of our Constitution.

Amici submit that time has not treated *Mezei* kindly,[8] and there are reasons to reconsider its holding, particularly in light of the last five decades of decisions about

[8] *See* C. Weisselberg, *supra* note 3, at 985-86 n.267 (collecting authorities criticizing *Mezei*). Interestingly, though Mezei was excluded without a hearing due to claims of national security, the Attorney General later authorized a hearing. The hearing officers upheld the grounds for exclusion but recommended that Mezei nevertheless be released. The Attorney General followed that recommendation. *See id*. at 970-84.

detention and due process.[9] It is unlikely that the five justices who formed the majority in *Mezei* could have foreseen the consequences of their ruling; *Mezei* has been invoked to uphold long-term detention of non-admitted aliens under procedures markedly different than those approved under this Court's later-developed due process framework. Further, *Mezei* was decided at a time of particular concern about national security.[10] Even so, this Court need not overturn *Mezei* to conclude that Mr. Ma is entitled to the full protection of our Constitution. Quite simply, *Mezei* ought not to be extended to lawfully-admitted resident aliens.[11]

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[9] *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) ("Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed"); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (individual held as unfit to stand trial cannot be committed for more than a reasonable period necessary to determine whether he will become competent in the foreseeable future).

[10] Mezei was denied an exclusion hearing, but this denial occurred because of the special circumstances of a narrowly-tailored exception, permitting the Executive to "exclude without a hearing when the exclusion is based on confidential information the disclosure of which may be prejudicial to the public interest." *Mezei*, *supra*, 345 U.S. at 210-11. Those special and seldom-occurring concerns are not remotely present here.

[11] The government suggests that 8 U.S.C. §1231(a)(6) should be applied identically to admitted and unadmitted aliens. *See* Pet. Br. 48. But that is not necessarily so. Indeed, this Court has previously construed the former exclusion statute to require different procedures for resident aliens and first-time applicants for admission. *See Plasencia*, *supra*, 459 U.S. at 31-35 (alien's re-admission to the United States could be determined in an exclusion proceeding, though she would be entitled to greater process than owed a prospective new entrant); *Kwong Hai Chew*, *supra*, 344 U.S. at 600 (returning alien "is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien").

As well, the "entry fiction" adumbrated in *Mezei* exists solely to accommodate the Executive's grace in releasing applicant-aliens on "parole" for "humanitarian reasons" (8 U.S.C. §1182(d)(5)(A)) pending their admission or their eventual repatriation. Parole eschews needless confinement during the review process. Accordingly, the entry fiction simply facilitates release on immigration parole and does not change an unadmitted alien's status; he constructively remains at the border seeking admission.[12] But the humanitarian purpose informing the entry fiction would be wholly disserved by accepting the government's invitation to create a new legal fiction—the "exit fiction,"[13] perhaps—and using that fiction to establish a lacuna in the law, a place where the Fifth Amendment somehow does not fully apply.

The entry fiction therefore does not serve the government in this case. The Executive may certainly insist that an immigration parolee gain no legal advantage by virtue of this generosity, but that is poles apart from allowing the government to create a new "exit fiction" for resident aliens, simply because it is frustrated in its ability to repatriate a person whom it has lawfully admitted but cannot presently remove. The government's proposal should be rejected under the principles of *Yamataya*, *Wong*

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[12] *See Leng May Ma*, *supra*, 357 U.S. at 190 (immigration parole reflects "the humane qualities of an enlightened civilization" and refusal to apply the entry fiction "would be quite likely to prompt some curtailment of current parole policy—an intention we are reluctant to impute to the Congress"); *Mezei*, *supra*, 345 U.S. at 215 ("temporary harborage, an act of legislative grace, bestows no additional rights"); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) ("petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate").

[13] *See* Order and Tentative Ruling, *Chea Phoeng v. Immigration and Naturalization Service*, No. Civ. S-98-1299 (E.D. Cal. May 21, 1999), at 10 (applying what the court termed the "exit fiction").

Wing and *Plasencia*, each holding that a resident alien's prospective "deportability" does not strip him of his substantive and procedural rights as a "person" under the Fifth Amendment. This Court has never held that an order of deportation breaks a resident's continued physical presence within our borders, and the government cannot change things by the legerdemain it advances here. *Amici* submit that the government's proposed "exit fiction" is at least one fiction too many.

IV. THE PLENARY POWER DOCTRINE DOES NOT PRECLUDE JUDICIAL REVIEW OF THE GOVERNMENT'S REPRESENTATIONS REGARDING THE POSSIBILITY OF REMOVAL.

Amici respectfully submit that resident aliens have a liberty interest protected by the Constitution, and they may not be detained indefinitely if removal cannot be accomplished. In *Wong Wing*, *supra*, 163 U.S. at 235, the Court validated "detention, or *temporary* confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens[.]" (Emphasis added). Detention may be justified only as a means to an end; surely it may not be justified if the end is beyond timely reach.

The government argues that deference is due when deportation cannot be effected because "the recalcitrance of another nation raise[s] the very type of serious questions affecting international relations and foreign policy that require such deference." Pet. Br. 51. As noted, foreign affairs are rarely if ever implicated in matters relating to removal of already-admitted resident aliens. See *ante*, part II. But even were it otherwise, courts regularly decide cases that affect international affairs. As this Court stated in *Baker v. Carr*, 369 U.S. 186, 211 (1962), not every case that

"touches foreign relations lies beyond judicial cognizance." Foreign policy considerations did not, for example, prevent the judiciary from reaching the merits of claims concerning the Executive's refusal to impose trade sanctions (*Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986)), the Executive's interpretation of the Warsaw Convention (*Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 254 n.25 (1984)), or the validity of an Executive agreement ending the Iran hostage crisis (*Dames & Moore v. Regan*, 453 U.S. 654, 669-74 (1981)).

Similarly, under the Alien Tort Claims Act[14] and the Torture Victim Protection Act of 1991,[15] courts have carefully examined the liability of former foreign officials for torture and similar violations of international law committed on foreign soil.[16] As well, the right to be free from prolonged arbitrary detention is found not solely in the Constitution; this protection is also supported by international law. For example, the International Covenant on Civil and Political Rights, which the United States has ratified, prohibits arbitrary detention *and* mandates judicial review.[17] Federal courts

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[14] 28 U.S.C. §1350.

[15] Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at note following* 28 U.S.C. §1350.

[16] *See, e.g., Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 791-92 (9th Cir. 1996) (suit involving actions of former Philippine government officials); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-889 (2d Cir. 1980) (Paraguayan military personnel); *Paul v. Avril*, 901 F.Supp. 330, 335 (S.D.Fla. 1994) (former Haitian military ruler).

[17] International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 168, U.N. Doc. A/6316 (1967) at art. 9, para. 1, 4.

have recognized this "clear international prohibition" against prolonged and arbitrary detention in cases involving both overseas and domestic detentions.[18]

An alien has a clear interest in being free from detention pending removal when removal may not reasonably take place. Where, as here, a non-citizen alleges that his Executive incarceration amounts to impermissible punishment, courts must ask, at a minimum, whether there is a rational non-punitive purpose for the detention and whether it is excessive in relation to that purpose. *See United States v. Salerno*, 481 U.S. 739, 747 (1987); *Schall v. Martin*, 467 U.S. 253, 269 (1984). To weigh the claim that detention is necessary for the "non-punitive" purpose of effecting removal, courts can and must decide whether the prospects of removal are clear or ephemeral, even if such review may somehow touch on foreign affairs. Courts surely ought not be disabled from inquiring into the factual basis of the government's claim that removal may occur in the foreseeable future, as well as whether the nature of the government's claim has changed as detention has continued. These inquiries do not "interfere" with the Executive's negotiations with foreign nations. They are not inquiries into, or "second guessing" of, the bona fides of Executive negotiations with other nations. Rather, they simply inquire into the fact-bound question of the progress and prospects of those negotiations.

For this reason, the suggestion of inappropriate about judicial second-guessing (Pet. Br. 43-44) is not well-taken. The actual determinations made by the district court in the case at bench represent a typical and limited scope of review. The government says that the processes of negotiating repatriation treaties are often

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[18] *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). *See also De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985).

sensitive and difficult matters. Pet.Br. 44. The courts below neither disagreed with this assessment, nor criticized the Executive for proceeding at whatever pace of negotiations it deems appropriate or necessary under these circumstances. *Per contra*, the courts simply determined that the objective facts placed in evidence by the government justified the common-sense conclusion that Mr. Ma's deportation is not likely to occur very soon. This was not "second guessing" any more than was a Texas prison guard's conclusion, broadcast on a national radio program, that "everybody's got a release date here. Except INS."[19]

Accordingly, judicial review does not invade the Executive's turf in any inappropriate way. Indeed, the district court's conclusion was consistent with the principle — first expressed in *Wong Wing*, *supra*, and never doubted since — that so long as he remains within the territory of the United States, even a deportable alien remains entitled to the protections of the Fifth Amendment. The farther Mr. Ma stands from permissible "temporary confinement ... while arrangements [are] being made for [his] deportation," (*Wong Wing*, 163 U.S. at 235), the greater is the government's burden to show an appropriate justification.

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[19] *This American Life, Immigration, Act Three: Man Without a Country.* (WBEZ Chicago radio broadcast October 13, 2000) *at* http:// www.thislife.org.

CONCLUSION

The judgment below should be affirmed.

Dated: December 26, 2000

Respectfully submitted,

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