



1 Department of Justice, Washington, D.C. ; on behalf of  
2 the United States.

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4 Portland, Oregon; on behalf of Respondent Martinez.

5 JOHN S. MILLS, ESQ., Jacksonville, Florida; on behalf of  
6 Petitioner Benitez.

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1 P R O C E E D I N G S

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 03-878, Clark v. Martinez, and No. 03-7434,  
5 Benitez v. Rozos.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE UNITED STATES

9 MR. KNEEDLER: Mr. Chief Justice, and may it  
10 please the Court:

11 These cases implicate the fundamental power of  
12 the United States to protect its borders by excluding  
13 aliens who arrive at its borders, but are found under the  
14 law not to qualify for admission.

15 This Court held more than 100 years ago in  
16 Nishimura Ekiu that the power of a nation to forbid the  
17 entrance of foreigners within its dominions is inherent in  
18 sovereignty and is central to self-preservation. If it  
19 were otherwise, the integrity of the Nation's borders and  
20 its security would be at the mercy of a foreign power who  
21 might choose to foist aliens onto our country or to the  
22 self-help efforts of aliens who might leave another  
23 country coming to our shores. The migration crises  
24 involving Haitians and Cubans over the last 35 years  
25 vividly illustrate the adverse consequences of such a

1 regime, and events of recent years confirm that the  
2 threats to the Nation's borders and security are not  
3 limited to nearby nations.

4 JUSTICE SCALIA: But this Court held only 3  
5 years ago that the statute before us here does not permit  
6 the Attorney General to hold the alien indefinitely.

7 MR. KNEEDLER: The -- the Court addressed one of  
8 the statutes before the Court here. It's -- it's  
9 important I -- I think to recognize another statute and --  
10 that is -- reflects the background principle of this  
11 Court's decision in Mezei. And if I may explain, to do  
12 that.

13 This Court made clear in Mezei that an alien has  
14 no substantive due process right to enter the United  
15 States when the executive branch has determined, under the  
16 law, that he has no right to enter the United States. The  
17 relevant --

18 JUSTICE STEVENS: But, Mr. Kneedler, recognizing  
19 that distinction, is that a distinction drawn by the  
20 statute that's before us?

21 MR. KNEEDLER: Yes, I believe it is, but it --  
22 but -- but first of all, there is another statute which is  
23 highly relevant to this, and that is 1182(d)(5)(A), the  
24 parole statute. It is the parole statute that -- that has  
25 long governed whether an alien who arrives at our shores

1 and has not been shown to be admissible may enter the  
2 United -- may enter the United States. The parole statute  
3 is set forth at petition appendix 3a -- excuse me -- page  
4 3a of our brief. That is the only statute that  
5 affirmatively authorizes aliens to enter the United  
6 States. That statute is -- obviously confers no rights.  
7 It is written entirely in terms of the discretion of the  
8 Attorney General, now the Secretary of Homeland Security.  
9 It says the Attorney -- the Secretary may, in his  
10 discretion, temporarily under conditions that he  
11 prescribes and for urgent and humanitarian reasons, parole  
12 an alien into the United States. But it says that parole  
13 does not constitute an admission, and it may be revoked at  
14 any time when the Secretary in his opinion concludes that  
15 the purposes of the parole have been satisfied.

16 JUSTICE BREYER: So are you -- are you arguing  
17 now that -- that (5)(A) -- (d)(5)(A), is the statute under  
18 which you are detaining him and that 1231(a)(6) has  
19 nothing to do with the case?

20 MR. KNEEDLER: No. They -- they are independent  
21 authorities for the detention --

22 JUSTICE BREYER: So -- so you're arguing -- then  
23 you are. You're saying -- this is coming to me a little  
24 bit anew. I perhaps didn't read it carefully enough. But  
25 I thought -- let's assume you lose on 1231(a)(6), that I

1 can't think of a way. Let's assume that I can't think of  
2 a way of applying the same words to your alien to mean  
3 something different than were applied to the alien who was  
4 in Zadvydas. Suppose you lose on that point.

5 Now you're saying, well, independently of that,  
6 we have a different statute under which we can detain him,  
7 namely 1182(d)(5)(A). Is that --

8 MR. KNEEDLER: Yes, absolutely, and the -- and  
9 the --

10 JUSTICE BREYER: Now -- now is that argument --  
11 I mean, I'm sorry that I --

12 MR. KNEEDLER: Yes, and we -- we make -- we do  
13 make that argument in our brief.

14 JUSTICE BREYER: -- and that -- and so is that  
15 made in the courts below and everything that they're doing  
16 in the cases --

17 MR. KNEEDLER: Yes. We made it at -- we made it  
18 in both courts below, and we -- and we think it's clear  
19 from the background of -- of this statute that it does --  
20 that it does confer independent authority.

21 JUSTICE SCALIA: But this statute just -- just  
22 goes in a circle because it ends. The way end -- (A) ends  
23 is that after revoking the parole, the alien shall  
24 forthwith return or be returned to the custody from which  
25 he was paroled and thereafter his case shall continue to

1 be dealt with in the same manner as that of any other  
2 applicant for admission to the United States, which refers  
3 you back to -- to 1231(a)(6).

4 MR. KNEEDLER: No. With respect, it doesn't.  
5 1231(a)(6) is an additional -- on its face is an  
6 additional grant of detention authority. It is not -- but  
7 whereas, the -- the parole authority which -- which for  
8 years until --

9 JUSTICE SCALIA: Well, this shall continue to be  
10 dealt with in the same manner as that of any other  
11 applicant --

12 MR. KNEEDLER: And an --

13 JUSTICE SCALIA: Dealt with includes, it seems  
14 to me, 1231(a)(6).

15 MR. KNEEDLER: An applicant for admission  
16 includes anyone who has been found not to be admissible to  
17 the United States. 8 U.S.C. 1225(a)(1) provides that any  
18 -- any alien in the United States who has not  
19 affirmatively been found to be admissible is an applicant  
20 for admission. And the -- the statutes dealing with  
21 applicants for admission or aliens who arrive at our shore  
22 establish that detention, even indefinite detention, is --  
23 is not only permitted, but required unless the Secretary  
24 releases someone.

25 JUSTICE GINSBURG: How would that -- how would



1 that apply to someone who hasn't gotten parole, hasn't  
2 gotten any permission, who snuck across the border?  
3 That's one of the pieces of this that's incomprehensible,  
4 that you are suggesting someone can be detained  
5 indefinitely who we allowed in temporarily, but such  
6 treatment could not occur with respect to somebody that  
7 had no permission at any time to be here.

8 MR. KNEEDLER: Yes. Well, the -- the parole  
9 statute -- if someone was taken into custody, the parole  
10 -- who had sneaked across the border, that person, under  
11 the 1996 revisions, is an applicant for -- for admission,  
12 and the parole statute would govern that.

13 As a constitutional matter, and particularly  
14 with respect to procedural due process, the Court has  
15 suggested in a number of its cases that there may be a  
16 difference between somebody who arrives at our borders and  
17 -- and is stopped and somebody who -- who sneaks through.  
18 At least as a procedural matter, the Government would have  
19 to establish that he has no right to be here. But --

20 JUSTICE SOUTER: But may I --

21 JUSTICE KENNEDY: Well, are -- are you saying  
22 that if an alien on -- who seeks admission and is denied  
23 admission and is at Ellis Island or the JFK Airport, that  
24 the Attorney General is -- does not have to consult  
25 1231(a)(6)?

1                   MR. KNEEDLER: No. We believe the parole  
2 statute furnishes independent authority --

3                   JUSTICE BREYER: Where does it say -- I mean,  
4 the reason I guess I missed it is because when I looked at  
5 your table of contents and elsewhere in the brief, it  
6 seems phrased totally in terms of 1231(a)(6). That's the  
7 heading. Each argument seems to support that. And then  
8 on page -- you know, when you refer to this, I guess on  
9 page 26, you're talking in a section about what 1231 must  
10 be because of the structure of it. And then you refer to  
11 other provisions such as the one you're now mentioning. I  
12 just didn't pick up that it was a totally independent  
13 basis.

14                   MR. KNEEDLER: Right. And -- and if I may, the  
15 -- the special statutes that govern the parole of Mariel  
16 Cubans that we reproduce in the appendix to our brief at  
17 212.12 were promulgated in 1987 before 1231(a)(6) was  
18 enacted in 1996.

19                   JUSTICE BREYER: All right, but where does it  
20 say that? I'd like to just glance at it even now. Where  
21 does it say that in your brief, that it's a totally  
22 independent basis?

23                   MR. KNEEDLER: On page 12 -- 26 to 27.

24                   JUSTICE BREYER: That's what I read and it was  
25 in a structure called the statutory and -- text and

1 structure support the Secretary's detention authority,  
2 which is under a bigger heading saying the text,  
3 structure, and history of section 1231(a)(6) confirm the  
4 executive branch's authority.

5 MR. KNEEDLER: I should -- I should also --

6 JUSTICE BREYER: So perhaps I could be forgiven  
7 for not understanding --

8 MR. KNEEDLER: And -- and I should also point  
9 out that -- that in -- in our response to the petition in  
10 the Benitez petition, we expressly -- we expressly argued  
11 that 1182(d)(5)(A) is an independent source of authority.

12 JUSTICE KENNEDY: But if -- if there's a statute  
13 that directs you with reference to a class, that statute  
14 is applicable, and this person is within that class. So  
15 how can you tell us we can't go or that we needn't go to  
16 1231?

17 MR. KNEEDLER: My -- my point is that's not the  
18 exclusive basis. I'm not saying that it's inapplicable to  
19 this category. But --

20 JUSTICE KENNEDY: Well, it might be exclusive  
21 constitutionally, but the Congress has acted.

22 MR. KNEEDLER: Or -- or --

23 JUSTICE KENNEDY: And once it's acted, you're  
24 controlled.

25 MR. KNEEDLER: Well, or -- or -- but -- but what

1 Congress -- if I may go back to the parole statute, before  
2 1231(a)(6) was enacted, the only statute that governed the  
3 detention and the release of aliens arriving at our  
4 shores, what used to be called excludable aliens, was the  
5 parole statute. That provision -- until the aliens before  
6 this Court were ordered --

7 JUSTICE SCALIA: By which you mean -- parole  
8 statute, by which you mean?

9 MR. KNEEDLER: 1182(d)(5)(A). Yes.

10 JUSTICE SCALIA: Okay.

11 MR. KNEEDLER: And until there is an order of  
12 exclusion, even now the parole statute is the only statute  
13 that governs the detention and release of the alien. And  
14 I think it would be impossible to read into 1182(d)(5)(A)  
15 any 6-month limitation or any limitation at all on how  
16 long someone can be detained because that statute sets up  
17 a presumption of custody with release only in the  
18 discretion of the Attorney General, or now the Secretary  
19 of -- of Homeland Security.

20 JUSTICE SOUTER: May I interrupt you there, Mr.  
21 Kneedler? Because I mean, the question is whether  
22 constitutionally we should respect that presumption. And  
23 -- and my -- my question basically is this. I can  
24 perfectly well understand and I can understand the -- the  
25 argument for respecting that presumption. When you're

1 dealing with excluded aliens who are in a literal  
2 territorial sense within the border but are never allowed,  
3 in effect, beyond a point of initial custody, the ones who  
4 are kept at Ellis Island or wherever one may -- may keep  
5 them

6           It is difficult, however, I -- I think to accept  
7 what has been called the -- the fiction of custody. When  
8 we are dealing with individuals who, although absolutely  
9 excludable, were nonetheless welcomed into the United  
10 States by a public announcement of the President of the  
11 United States, have been allowed into the American  
12 population, just as clearly and as readily as they would  
13 have been under any other protocol of admission -- and I  
14 guess in this case for something like 20 years -- isn't  
15 there a point at which the -- the fiction of exclusion  
16 simply cannot be accepted for constitutional purposes?

17           MR. KNEEDLER: There are a number of responses  
18 to that. First, as a factual matter, with respect to  
19 welcoming into the United States, what gets cited for that  
20 proposition is a statement by President Carter in May 5 of  
21 1980. 10 days later, before the aliens in this case came  
22 to this country, he made clear that people should not do  
23 this. He encouraged people not to go to Cuba. The INS  
24 brought enforcement actions against people who went there.  
25 There were criminal prosecutions that were brought. So

1 people were not encouraged to come to the United States in  
2 this way.

3 With respect to the regime that you say -- I  
4 believe you said they're -- they're admitted just like  
5 under any other regime. That is not correct.

6 JUSTICE SOUTER: Well, factually. They're  
7 allowed into the country. You know, they can get jobs,  
8 own property, et cetera.

9 MR. KNEEDLER: They were allowed into the  
10 country under the parole statute that I just read, which  
11 makes -- which makes it clear that they are admitted not  
12 -- not in a way that confers any rights on them, but they  
13 are admitted in the interest of the United States for  
14 public benefits under circumstances which make clear that  
15 it is not an admission and that --

16 JUSTICE SOUTER: No. I realize but they are  
17 admitted in the sense that they say, okay, you can come in  
18 and you can do these things, but you get no -- in effect,  
19 you get no vested right. We can take it away like that.

20 MR. KNEEDLER: No -- no vested right to come  
21 into the United States. It is, in effect, a revocable --

22 JUSTICE SOUTER: All right. But otherwise --  
23 otherwise they are treated like any other class of aliens  
24 who are admitted into the United States. They are subject  
25 to this condition. The United States makes that clear,

1 but they nonetheless can be in the country and do in the  
2 country what other aliens can do.

3 MR. KNEEDLER: At the sufferance of the United  
4 States.

5 JUSTICE SOUTER: I -- I know. Subject to that  
6 condition.

7 MR. KNEEDLER: And -- and the question we have  
8 here is when the -- when and if the United States,  
9 pursuant to this statute, decides no longer to suffer the  
10 aliens being at large, but instead return them to the  
11 border, in effect, or return them to detention, this  
12 statute makes clear that that -- that whatever practical  
13 experience they have had at large in the country is always  
14 subject to revocation --

15 JUSTICE SOUTER: No. I -- I realize that, but  
16 the problem is you've got a Due Process Clause that talks  
17 about persons not citizens. Maybe I can understand the --  
18 the fiction that says it doesn't apply to these persons  
19 if, for practical purposes, we stop them at the border and  
20 we don't let them into society. Once we do let them into  
21 society, whether we say it's subject to this condition it  
22 can be revoked or not, I find it difficult to see a  
23 constitutional warrant for drawing the line that you want  
24 us to draw.

25 MR. KNEEDLER: This Court has always treated as

1 the same the custody of an alien who arrives at the border  
2 and has not been admitted, whether that person stays on  
3 the boat, goes to Ellis Island, which the Court said was  
4 not an entry that gave somebody constitutional rights to  
5 come here. In the Kaplan v. Tod case, you had the example  
6 of a person who was paroled for 9 years and regarded as  
7 not being in the United States. And what the --

8 JUSTICE SOUTER: You're giving me prior  
9 examples, but the issue here is should we continue to  
10 respect that -- what has been called that fiction as to  
11 people who are allowed into the country and are allowed to  
12 move around like other aliens and, indeed, and by and  
13 large like citizens.

14 MR. KNEEDLER: With respect, I think it is not  
15 -- it is not a fiction with respect to the constitutional  
16 issue because there's a critical difference between, for  
17 example, a lawful permanent resident -- a person does not  
18 acquire lawful permanent resident status by something like  
19 adverse possession, by living in the United States for a  
20 long period of time. It is an affirmative grant of status  
21 for permission to reside permanently in the United States.  
22 It is a grant of a status --

23 JUSTICE GINSBURG: Which can be revoked. Which  
24 can be revoked, and that's the -- the distinction that  
25 seems to me strange. When somebody commits a deportable



1 offense, they are stripped of whatever right they had to  
2 be here. They are, it seems to me, in the same boat as  
3 someone who is excludable. They -- they do -- do not have  
4 any right to remain no more than a parolee has. We have  
5 taken away their right to remain. So it seems to me that  
6 they have no status anymore based on a prior admission  
7 that we have removed from them.

8 MR. KNEEDLER: This Court -- this Court thought  
9 otherwise in -- in Zadvydas 3 years ago where it drew a  
10 distinction. It said the distinction between someone who  
11 has never entered the country and someone who has effected  
12 an entry --

13 JUSTICE BREYER: That's true. That's true.  
14 Absolutely we did.

15 And also, I'll assume for argument's sake that  
16 you're completely right on the constitutional point.  
17 That's just for argument's sake. But assume you are. So  
18 there's all kinds of constitutional difference.

19 Still, I don't see how to read the statute one  
20 way for one group of people and another way for another.  
21 The statutory words in Zadvydas, the words that the  
22 Attorney General may detain this individual beyond the  
23 removal period, are read in Zadvydas to mean beyond the  
24 removal period -- may detain beyond the removal period  
25 means for a reasonable time, presumably 6 months,

1 presumptively, related -- reasonable time related to the  
2 purpose of the statute which is to find a country willing  
3 to accept them. Okay?

4           Now, I haven't found a single case of this Court  
5 where you interpret these complicated words one way for  
6 one and another way for another. My law clerk found a  
7 couple of cases, *Communications Work v. Bett* and  
8 *Machinists v. Street*, where in *Bett* particularly the Court  
9 strongly implies the contrary. It says you can't read  
10 words differently just because we interpreted in one --  
11 you know, one statute, they were interpreted in light of  
12 constitutional considerations, and now we have -- those  
13 constitutional considerations aren't here, but it's the  
14 same words. You have to apply it the same.

15           MR. KNEEDLER: But -- but, with respect, the  
16 Court did not construe any word in this statute to impose  
17 the limitation that you're describing. The -- the way the  
18 Court posed the question was does it -- does it  
19 affirmatively grant a power for detention of these aliens  
20 in these circumstances. At the very beginning of the  
21 Court's opinion, the Court put to one side --

22           JUSTICE SCALIA: That's an interpretation.

23           MR. KNEEDLER: Pardon me?

24           JUSTICE SCALIA: It says -- that's an  
25 interpretation.

1           MR. KNEEDLER: But -- but --

2           JUSTICE SCALIA: It says the statute does not  
3 confer power to hold beyond a reasonable period.

4           MR. KNEEDLER: But -- but the -- the mode of  
5 analysis of the Court -- it starts with the introduction  
6 to the Court's opinion, and this is at page 682. It says  
7 -- of -- of Zadvydas. We deal here with aliens who are  
8 admitted, aliens who have not yet --

9           JUSTICE BREYER: Yes, yes. That's right.

10          MR. KNEEDLER: No. But -- but that -- that's  
11 setting the Court -- the case up. But then what the Court  
12 says, in terms of how it interprets the statute, we  
13 construe the statute to contain an implicit reasonable  
14 time limitation, the application of which is subject to  
15 Federal court review. Well, what is a reasonable time  
16 depends upon the circumstances.

17          JUSTICE BREYER: Well -- well, yes, but what --  
18 what -- we put in the presumptively 6 months, but we said  
19 in our view the statute, read in light of the  
20 Constitution's demands, limits an alien's post-removal  
21 period detention to a period reasonably necessary to bring  
22 about that alien's removal from the United States. It  
23 does not permit indefinite detention interpreting it to  
24 avoid constitutional threat. We include that once removal  
25 is no longer reasonably foreseeable, continued detention

1 is no longer authorized by statute.

2 Now, I don't know what those sentences are doing  
3 unless they're interpreting the words I mentioned. And  
4 then later in the opinion, we say it's presumptively --

5 MR. KNEEDLER: No. What -- what --

6 JUSTICE BREYER: -- not always, but  
7 presumptively 6 months.

8 MR. KNEEDLER: What -- what the -- what the  
9 Court was doing was -- the -- the standard that the Court  
10 announced at the beginning of its opinion was a reasonable  
11 -- a reasonable time limitation, the application of which  
12 is subject to court review. As applied to permanent  
13 resident aliens, the Court saw a -- a constitutional  
14 problem and, in that situation, came up with a presumptive  
15 6-month rule.

16 JUSTICE BREYER: Well, it interpreted the  
17 statute as doing it. Now, that brings me back to the  
18 original question.

19 MR. KNEEDLER: No. No, I don't believe -- with  
20 -- with respect, what -- what I believe the Court said was  
21 that there is a reasonable time limitation. And given the  
22 -- given the distinction that runs throughout immigration  
23 laws, this Court said at page 2500 of the Supreme Court  
24 Reports in this decision, the distinction between aliens  
25 who arrive at our borders and are governed by Mezei, as

1 opposed to people who enter, runs throughout our  
2 immigration law, I would think that it would run  
3 throughout 1231(a)(6).

4

5 JUSTICE SOUTER: All right. I can -- I can  
6 agree with you that the different classes are going to  
7 implicate different considerations on what is reasonable.  
8 But you, as I understand it, go the further step and say  
9 there is a presumption, and perhaps an irrebuttable  
10 presumption, that in the case of the -- the legally  
11 excluded, even though they are, in fact, in the country,  
12 the -- the presumptive reasonable period is forever.

13 MR. KNEEDLER: Well --

14 JUSTICE SOUTER: And that's where -- it's that  
15 stretch that's giving us the trouble.

16 MR. KNEEDLER: And -- first of all, the Court  
17 doesn't have to decide that in this case because we have a  
18 regime where each of the aliens before this Court, came  
19 here, was paroled --

20 JUSTICE SOUTER: That's true, but we've got to  
21 say something.

22 MR. KNEEDLER: But if -- if I may go to the  
23 Mezei case, what the Court said there is that the  
24 detention of the alien on Ellis Island was effectuating  
25 his exclusion. The two cannot be distinguished from one

1 another.

2 JUSTICE O'CONNOR: Well, Mr. Kneedler, do you  
3 mind telling us whether the record shows where Martinez  
4 and Benitez are now? Where are they?

5 MR. KNEEDLER: Benitez has been released to a  
6 half-way house. We sent the Court a letter --

7 JUSTICE O'CONNOR: That's what I thought.

8 MR. KNEEDLER: -- last week showing that the  
9 review process under these regulations actually works.  
10 It's been working for 15 years. And as we explain in our  
11 brief, more than 9,000 people have been granted parole  
12 here.

13 JUSTICE O'CONNOR: So is that case basically  
14 moot? Benitez's?

15 MR. KNEEDLER: He hasn't been -- he hasn't been  
16 -- I think he's still in -- in custody. Whether -- if --  
17 if he -- if he completes that and is released, a question  
18 of mootness may arise at that point.

19 JUSTICE O'CONNOR: Where's Martinez?

20 MR. KNEEDLER: Martinez was released pursuant to  
21 the court -- district court order almost 2 years ago, and  
22 he's -- he's now at large under an order of supervision.

23 JUSTICE SCALIA: Mr. Kneedler --

24 JUSTICE O'CONNOR: Now, if I can continue for  
25 just a moment and then I'll stop. There is a new statute,

1 1226(a) of title 8, part of the Patriot Act, which allows  
2 detention of aliens who threaten our safety or security.  
3 Presumably that is an option if either of these people is  
4 seen to do that.

5 MR. KNEEDLER: If -- if there's an -- if there  
6 is an individualized reason to believe that an alien would  
7 be a terrorist or -- or a threat to the security in that  
8 respect, but the threat to the --

9 JUSTICE O'CONNOR: And that's available, is it  
10 not?

11 MR. KNEEDLER: That -- that's available, but the  
12 threat to the national security here is much larger than  
13 that. If -- again, if we go back to the immigration  
14 crises involving Haiti and Cuba, there -- there is a  
15 threat to the national security when another nation can  
16 foist aliens onto our shores, and -- and --

17 JUSTICE STEVENS: May I ask you about --

18 MR. KNEEDLER: -- if the United States had no  
19 ability to -- to deflect --

20 JUSTICE STEVENS: Mr. Kneedler, can I ask you a  
21 question, forgetting the statutes for a moment -- I --  
22 which we've already covered at some length? Just going to  
23 your constitutional position, it's clear that a person  
24 who's not been admitted and has been paroled could be  
25 excluded forthwith, summarily, and so forth because he's

1 never been admitted. But does that person have any  
2 protection under the Constitution? Could we shoot him?

3 MR. KNEEDLER: No, no, surely. What -- the --  
4 the --

5 JUSTICE STEVENS: Then what is the protection  
6 under the Constitution that deals -- is it the Due Process  
7 Clause?

8 MR. KNEEDLER: Whatever right -- in -- in a  
9 criminal prosecution the Bill of Rights would apply to  
10 that person.

11 JUSTICE STEVENS: Is he -- is he a person within  
12 the meaning --

13 MR. KNEEDLER: Yes. We -- our position is not  
14 that he's -- not that he's not a person. The question is  
15 what -- is what process is due.

16 JUSTICE STEVENS: And is he a person who has a  
17 right to liberty, entitled to some protection, very, very,  
18 very minimal, but there is some protection to that -- that  
19 individual.

20 MR. KNEEDLER: It -- depending upon the context.  
21 The one protection for liberty he does --

22 JUSTICE STEVENS: Well, the context is he got  
23 off a boat. We couldn't -- but Cuba won't take him back  
24 or -- or whatever -- wherever he came from. They can't.  
25 And the only thing we can do to keep him out of the



1 country is to keep him in jail.

2 MR. KNEEDLER: He has no substantive due process  
3 right to be released into the United States.

4 JUSTICE STEVENS: He -- he doesn't have a right  
5 to be released. But -- but you do not contend that we  
6 could kill him

7 MR. KNEEDLER: No, absolutely not. Absolutely  
8 not.

9 JUSTICE STEVENS: He does have some -- some  
10 minimal protection under the Constitution.

11 MR. KNEEDLER: Absolutely not. The formulation  
12 -- and this was used in -- in the Court's decision in  
13 Landon v. Plasencia. The -- the question is there are no  
14 constitutional rights in connection with his admission to  
15 the United States. And admission means, I think, both  
16 formal granted admission and practical admission or entry.  
17 A person cannot --

18 JUSTICE BREYER: A person who runs in illegally,  
19 a person who crosses the border illegally, say, from  
20 Mexico is entitled to these rights when you catch him

21 MR. KNEEDLER: He's entitled to procedural due  
22 process rights. We don't believe he -- that person has  
23 any more substantive due process right to remain at large  
24 in the United States.

25 JUSTICE BREYER: But you -- you -- I thought

1 there was a reg of the INS.

2 MR. KNEEDLER: No. With -- with --

3 JUSTICE BREYER: Am I not right?

4 MR. KNEEDLER: With -- with respect to the --

5 JUSTICE BREYER: Tell me if I'm right.

6 MR. KNEEDLER: With respect to the regulations,

7 but --

8 JUSTICE BREYER: Can I say what it is?

9 MR. KNEEDLER: Yes, I'm sorry.

10 JUSTICE BREYER: I thought there was a reg -- to  
11 be sure we're talking about the same thing -- where the  
12 INS has said that Zadvydas applies to individuals who run  
13 into the United States illegally from Mexico. Am I right  
14 about that?

15 MR. KNEEDLER: The -- the INS has -- or now DHS  
16 has applied it. I -- I don't know that there's an  
17 analysis in there that says Zadvydas requires it. I don't  
18 think the -- either the statute or particularly the  
19 Constitution would give somebody who sneaks across our  
20 border a right to remain here, a substantive due process  
21 right to be here. Maybe procedural rights would be  
22 different, but a substantive --

23 JUSTICE GINSBURG: But is that the current  
24 INS --

25 JUSTICE SCALIA: Mr. Kneedler, may I -- may I

1 try to get in the question I did earlier? Is -- is 8  
2 U. S. C. , section 1182(d) (5) -- was -- was that applicable  
3 in Zadvydas, as it's applicable here?

4 MR. KNEEDLER: No, because those were lawful  
5 permanent residents whose -- whose lawful permanent  
6 residency had -- had -- they came in under a grant of  
7 lawful permanent residency.

8 JUSTICE SCALIA: So this is a new string to your  
9 bow in this case.

10 MR. KNEEDLER: Yes, because these aliens entered  
11 the United States only --

12 JUSTICE GINSBURG: But it wouldn't -- it  
13 wouldn't apply to the illegal alien because it's a statute  
14 that governs parole and they're not paroled into the  
15 United States.

16 MR. KNEEDLER: But someone -- someone who would  
17 be picked up would be an applicant for admission and could  
18 be released under this -- under this statute. But -- but  
19 focusing here on the people excluded at the border --

20 JUSTICE GINSBURG: How does that --

21 MR. KNEEDLER: -- this is the only way someone  
22 could --

23 JUSTICE GINSBURG: How does that make that  
24 person, the illegal entrant, a parolee?

25 MR. KNEEDLER: He would be an applicant for

1 admission, and the -- I -- I believe -- I believe I'm  
2 correct on that.

3 JUSTICE GINSBURG: Suppose he says, I don't want  
4 to apply for admission. I just don't want to be locked  
5 up.

6 MR. KNEEDLER: The act treats him as an  
7 applicant for admission under 1225(a)(1).

8 Mr. Chief Justice, if I may

9

10 CHIEF JUSTICE REHNQUIST: Very well, Mr.  
11 Kneedler.

12 Ms. Dahl, we'll hear from you.

13 ORAL ARGUMENT OF CHRISTINE S. DAHL

14 ON BEHALF OF RESPONDENT MARTINEZ

15 MS. DAHL: Mr. Chief Justice, and may it please  
16 the Court:

17 Because the same words mean the same thing in  
18 the same statute, this Court need not reach the  
19 constitutional questions presented by the indefinite  
20 detention of inadmissible as opposed to deportable aliens.  
21 Without going to questions of constitutional doubt, there  
22 are three reasons why this Court should hold that section  
23 1231(a)(6) treats inadmissible aliens the same as it  
24 treats deportable aliens.

25 JUSTICE SCALIA: Before you get to that, do you

1 think that that's the only statute applicable here? What  
2 about 1182(d)(5)? What's your response to the  
3 Government's assertion that that's an independent basis?

4 MS. DAHL: Justice Scalia, I don't believe it  
5 provides an independent basis for detention. The  
6 immigration law works together in its various elements,  
7 and section 1182, when parole is revoked, treats the alien  
8 then as an applicant for admission, and section 1229  
9 places the applicant for admission into removal  
10 proceedings.

11 The Government did not obtain a ruling on that  
12 argument from the Ninth Circuit, although it made  
13 reference to 1182 in its motions to stay the briefing  
14 schedule. It ultimately conceded that this case was  
15 controlled by Lin Guo Xi, which was a statutory  
16 construction of 1231(a)(6), and cert was granted on the  
17 1231(a)(6) issue only.

18 The reading of the statute that we proffer, that  
19 the same words mean the same meaning, is consistent with  
20 the overall changes Congress made in 1996 in IIRIRA when  
21 it eliminated the category of excludable aliens and  
22 replaced it with a single, broader category, now called  
23 removable aliens, that embraces both inadmissible and  
24 deportable aliens.

25 Third, Congress knows how to provide for

1 indefinite detention when it wants to.

2 CHIEF JUSTICE REHNQUIST: Well, how do you  
3 explain then, Ms. Dahl, the language in the Court's  
4 Zadvydas opinion that had, were we dealing with, in  
5 effect, off-shore aliens, this would be a much different case?

6 MS. DAHL: I believe it would present a  
7 different question, but the constitutional issues  
8 presented by indefinite detention remain. The Court  
9 doesn't need to reach those --

10 CHIEF JUSTICE REHNQUIST: So you say that a  
11 person, even though they're not lawfully admitted into the  
12 United States, still couldn't be indefinitely detained.

13 MS. DAHL: Yes, Your Honor, that is our -- our  
14 point precisely. The Government was not correct when it  
15 said that it -- that this Court has always treated  
16 excludable aliens the same. In a case that was a  
17 contemporary of the Mezei decision, Kwong Hai Chew, cited  
18 at page 45 of our brief, the Court found that an  
19 excludable entrant on Ellis Island was entitled to --

20 CHIEF JUSTICE REHNQUIST: Well, the Government  
21 distinguishes that case. What do you make of their  
22 distinction?

23 MS. DAHL: We disagree. I think that it shows  
24 that the Court will consider length of time in the country  
25 in determining what amount of due process is required.

1                   Now, the plain language of the statute of  
2 1231(a) (6) requires the same treatment between  
3 inadmissible and deportable aliens. Where there's no  
4 difference in the language that Congress has used, this  
5 Court can draw no distinctions.

6                   There is a presumption that Congress expects its  
7 statutes to be read in the same manner as the Supreme  
8 Court's interpretation, and because of the  
9 interrelationship between the parole statute and the  
10 revocation proceedings and removability proceedings,  
11 there's no reason for this Court to resort to the 1182  
12 statute to provide the authority that the Government  
13 seeks. The relevant authority is section 1231(a) (6).

14                  JUSTICE GINSBURG: Well, what do you think we  
15 should do with the 1182? Because suppose you prevail on  
16 your argument that it's the same statute, the same word,  
17 it can't be construed differently under 12-whatever, and  
18 the Government says fine. We now go to the other string  
19 in our bow and we continue to detain this person on the  
20 basis of 1182(d) (5) (A).

21                  MS. DAHL: Well, the 1182(d) (5) (A) doesn't  
22 provide for indefinite detention. What it provides is  
23 that upon revocation of parole, the alien is placed into  
24 removal proceedings. Once the removal proceedings have  
25 been determined and a final order of removal is entered,

1 1231(a) requires removal within 90 days, and failing that,  
2 the appropriate -- the relevant statutory provision is  
3 1231(a)(6). That says that the alien may be detained  
4 beyond the removal period and then, if released, subjected  
5 to conditions of supervision. 1231 is the only statutory  
6 authority for post-removal period detention. Parole deals  
7 with entry and 1231(a)(6) --

8 JUSTICE O'CONNOR: Well, but you haven't  
9 answered, I think, the question of whether the Government  
10 is entitled in this case, if we dispose of the 1231  
11 question, to resort to the other statute.

12 MS. DAHL: I don't think that the Court could  
13 carve out a statute and use it in a way contrary to the  
14 way it functions in the immigration scheme and make  
15 superfluous or irrelevant a more express, more detailed  
16 statutory provision.

17 JUSTICE KENNEDY: Well, what you're saying is  
18 that even if 1182 comes first, 1231 comes second.

19 MS. DAHL: Precisely, Your Honor. And I don't  
20 think that the Government could revoke parole and then  
21 suspend proceedings to determine the admissibility of a  
22 parolee indefinitely.

23 JUSTICE BREYER: But still, is this another --  
24 could -- could we do this? I noticed that -- that your --  
25 the petition for cert in Benitez has two questions, both



1 of which are about interpreting 1231(a)(6). The  
2 Government's petition, though not its brief -- the  
3 Government's petition in Crawford says the question  
4 presented is whether 1231(a)(6) in Zadvydas compelled a  
5 release. So this other -- this other matter is a totally  
6 -- seen as a totally separate ground. Perhaps the thing  
7 to do is we send it back, and if they want to raise it,  
8 they can raise it, and it would be up to the circuit to  
9 decide whether they had preserved it or not preserved it.  
10 Is that -- is that a sensible thing?

11 MS. DAHL: I don't think so because I don't  
12 think that 1182 allows the interpretation that the  
13 Government --

14 JUSTICE BREYER: And that's your view of -- of  
15 what 1182 means, and they're going to have a different  
16 view. If they want to argue their different view, they  
17 could do it in the Ninth Circuit. If they've waived it,  
18 they've waived it, and that's up to them, not up to us.

19 MS. DAHL: What the Ninth Circuit found, though,  
20 in questions of an inadmissible alien, that this Court's  
21 construction of 1231(a)(6) in Zadvydas applied and there  
22 would be no need for resort to any other statute.

23 JUSTICE STEVENS: May I ask if you believe the  
24 supervision after the 90-day period covered in  
25 subparagraph 3 -- is there -- can that continue

1 indefinitely in your view?

2 MS. DAHL: Yes. While the alien is awaiting  
3 removal, he is subject to supervision conditions that will  
4 safeguard the Government's interests, and for as long as  
5 he is waiting, he is under supervision.

6 It's those supervision conditions that  
7 distinguish this case from the situation where the  
8 Government is finding national security risks. That --  
9 Congress has expressly provided for the indefinite  
10 detention of people whom the Attorney General certifies as  
11 presenting risks to national security.

12 It's also the presence of a national security  
13 risk that distinguishes this case from the Mezei decision.  
14 I think that the Government makes more of that decision  
15 than needs to be made in order to find that Mr. Benitez  
16 and Mr. Martinez are in different situations. They were  
17 allowed into this country. They have lived here for 24  
18 years, and --

19 JUSTICE GINSBURG: How long had the -- the  
20 detainee in, however you pronounce it, Mezei lived in the  
21 United States?

22 MS. DAHL: Mr. Mezei had been in the United  
23 States for 25 years before he left, and he was gone for an  
24 extended period of time. When he sought to return, he was  
25 treated as if he were an initial entrant, and the

1 Government, citing national security, excluded him without  
2 a hearing and refused to disclose the evidence that was  
3 the basis for the exclusion. He challenged that and  
4 wanted a hearing and wanted the Attorney General to be  
5 required to disclose the evidence. The Court found that  
6 his release into the community itself would present a  
7 security risk and therefore sustained the denial of the  
8 hearing and the detention of Mr. Mezei.

9 JUSTICE STEVENS: Well, I don't think it really  
10 said they -- they found there was a security risk. They  
11 -- they held the Government did not have to explain  
12 because the man had no right to come in.

13 MS. DAHL: That's correct.

14 JUSTICE SOUTER: What's -- what's your best  
15 answer to the Government's argument that unless you treat  
16 this case differently from Zadvydas, at least for purposes  
17 of reasonable time or reasonable interest, which affects  
18 time, the United States is basically defenseless against  
19 countries that -- that want to dump undesirable aliens and  
20 force them into the United States?

21 MS. DAHL: I don't think that applying the  
22 statute, as it's written, leaves the Government  
23 defenseless.

24 JUSTICE SOUTER: Because.

25 MS. DAHL: Congress can pass another statute, if

1 it needs to, and the Government --

2 JUSTICE SOUTER: But it's defenseless under the  
3 present law?

4 MS. DAHL: I disagree. We have --

5 JUSTICE SOUTER: Then what is the defense?

6 MS. DAHL: We have very effective means of  
7 interdicting --

8 JUSTICE SOUTER: What are they?

9 MS. DAHL: Well, after the Mariel boatlift, the  
10 Government changed its policy and now intercepts people  
11 who are coming from Cuba by boat and detains them at  
12 Guantanamo Bay, does a screening, and has a more effective  
13 repatriation process for people that they do not want to  
14 come in.

15 JUSTICE KENNEDY: You want us to take --

16 JUSTICE SOUTER: So you're saying they can  
17 actually exclude, in practical terms.

18 MS. DAHL: Yes. That's exactly what --

19 JUSTICE KENNEDY: You want us to take judicial  
20 notice that the Mexican border and American border is  
21 impervious?

22 (Laughter.)

23 MS. DAHL: I think that would present a  
24 different question. As the Government acknowledged,  
25 people who come into the country without inspection are

1 entitled, under the Government regulations, to the  
2 protections under Zadvydas. And --

3 JUSTICE SCALIA: And there's no -- and -- and  
4 there's no answer to Justice Souter's question with regard  
5 to people who -- who -- once they enter that way. Right?

6 MS. DAHL: Well, the Government has --

7 JUSTICE SCALIA: Except a new statute.

8 MS. DAHL: Well, Congress has -- has, by  
9 definition, treated those people as inadmissible aliens  
10 who are subject to removal proceedings. And the  
11 interdiction methods are -- they're purely political  
12 decisions that the Government needs to make.

13 JUSTICE SOUTER: But they -- in any case, those  
14 individuals are not the subject of sort of dumping action  
15 by their own governments.

16 MS. DAHL: That's correct, Your Honor.

17 JUSTICE BREYER: Does the -- Congress has passed  
18 a special statute with respect to terrorism, hasn't it,  
19 where it does authorize detention of any of these people  
20 who are engaged in terrorism. Now, I don't know how  
21 that's defined. Is that defined to relieve in a way  
22 that's broad enough to relieve some of the problem?

23 MS. DAHL: Well, if -- well, first of all, the  
24 Government has the ability to detain, pending the removal  
25 proceedings, of people who are trying to come into the

1 country. The question becomes if they can't be  
2 repatriated. Now, the Patriot Act in 1226(a) does allow,  
3 in instances of national security, for the Attorney  
4 General to indefinitely detain. Now, importantly, that  
5 statute provides for procedural protections and judicial  
6 review, that is absent from --

7 CHIEF JUSTICE REHNQUIST: But are -- are the  
8 people here charged with any sort of terrorist activities?  
9 They were committed -- convicted of crimes, but I -- I  
10 didn't think they were connected with terrorist  
11 activities.

12 MS. DAHL: That's correct. The Government has  
13 not made any allegation that there's --

14 JUSTICE SCALIA: Just normal, harmless  
15 criminals.

16 CHIEF JUSTICE REHNQUIST: Yes.

17 JUSTICE SCALIA: Right?

18 (Laughter.)

19 MS. DAHL: Their release from prison presents  
20 the same issues that the release of any person who has  
21 served the sentences that were imposed after the  
22 commission of a crime.

23 CHIEF JUSTICE REHNQUIST: Well, except that with  
24 aliens, they can be deported, whereas a citizen can't be,  
25 upon release from prison.

1 MS. DAHL: That's correct. And the conditions  
2 of supervision that the Government can impose are much  
3 lengthier and could be even more onerous than the kinds of  
4 supervision conditions after prison that the Government  
5 could impose on its citizens.

6 In this case, Mr. Martinez and Mr. Zadvydas both  
7 received permission to live here. Both committed crimes.  
8 Both served their sentences and both were ordered removed.  
9 Nothing in section 1231(a)(6) warrants making Mr. Martinez  
10 wait for removal in a Federal prison perhaps for the rest  
11 of his life, while Mr. Zadvydas awaits removal after  
12 having been released --

13 JUSTICE O'CONNOR: I thought the other person  
14 was named Benitez. I thought we had Zadvydas in the other  
15 case. Do we have two, a Martinez and a Benitez, here?

16 MS. DAHL: Yes, Your Honor. I was drawing a  
17 comparison between the situation with Mr. Zadvydas and Mr.  
18 Martinez.

19 Detention, of course, needs to be reasonably  
20 related to its purpose. Here removal cannot be achieved.  
21 So detention for that purpose becomes arbitrary and  
22 punitive, and we'd ask the Court to affirm the grant of  
23 habeas corpus and Mr. Martinez's release on supervision  
24 conditions.

25 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Dahl.

1           Mr. Mills, we'll hear from you.

2           ORAL ARGUMENT OF JOHN S. MILLS

3           ON BEHALF OF PETITIONER BENITEZ

4           MR. MILLS: Mr. Chief Justice, and may it please  
5 the Court:

6           I think that we have lost sight of the statutory  
7 scheme that applies here. Section 1182(d)(5)(A) is not a  
8 detention statute. It's clearly not preserved as an  
9 initial matter. It was not in the answer to either habeas  
10 petition. The justification given in the district court  
11 in both cases was 1231(a)(6).

12           But, Justice Breyer, there is no need to remand  
13 this case because a clear, simple reading of the  
14 immigration statutes demonstrates that 1182 is not a  
15 detention statute. You have to go through the process,  
16 and I attempted to do this in my reply brief, but I think  
17 I can do it a little bit more clearly for the Court this  
18 morning.

19           When an alien first arrives, he's an applicant  
20 for admission. Section 1225(b)(2)(A) of title 8, United  
21 States Code says an applicant for admission -- any  
22 applicant for admission shall be detained until the  
23 removal proceeding unless it is clear, beyond any doubt,  
24 that they are entitled to come in. So all aliens, when  
25 they apply -- that's the detention statute that initially



1 applies, 1225(b)(2)(A). They are to be detained until  
2 there is a removal proceeding. The removal proceeding,  
3 which is governed by 1229(a)(1) -- I'm sorry -- 1226(a) --  
4 it is 1229(a) -- is to determine whether the alien is  
5 admissible or not, whether they should come in or whether  
6 they must be removed. So 1225(b)(2)(A) says detain until  
7 that point.

8 1182(d)(5)(A) then comes in to authorize the  
9 Government to stop that process for humanitarian reasons  
10 and parole an alien in. We won't have the removal  
11 process. We're going to -- we -- we're going to get out  
12 of the detention in 1225(b)(2)(A), and we're going to let  
13 you out on parole, which is discretionary. That's  
14 1182(d)(5)(A).

15 If at any time, we in our discretion think it is  
16 no longer appropriate to keep you on parole, we can revoke  
17 that parole, and the statute 1182(d)(5)(A) says once  
18 parole is revoked, the alien is treated as, quote, any  
19 other applicant for admission. So you go back to  
20 1225(b)(2)(A), which says detain them until the removal  
21 proceeding.

22 JUSTICE SOUTER: Well, you -- you skipped a -- a  
23 phrase. It says when the Attorney General is of the  
24 opinion that the purposes of the parole justify nothing  
25 more, the individual shall return or be returned to the

1 custody from which he began. And their argument is that  
2 custody is different in these cases.

3 MR. MILLS: That custody is the custody under  
4 1225(b)(2)(A). That is the statute that authorizes the  
5 custody. That's what they're being returned to.  
6 1225(b)(2)(A) is detention until the removal proceedings.  
7 And in the Demore v. Kim case, this case -- this Court  
8 said that even if it's a long time and there aren't other  
9 procedures in place, you can be detained until your  
10 removal order is entered because -- and -- and the  
11 emphasis was there's an end date to that. So there's an  
12 end date to detention under (b)(2)(A), 1225(b)(2)(A), and  
13 it's the removal proceedings.

14 Section 1231 is the statute that governs removal  
15 and says, okay, now what happens? It says you have to  
16 remove within 90 days, but for certain aliens who've  
17 committed crimes or are inadmissible or are otherwise  
18 determined to be dangerous, we can detain them beyond. It  
19 says may be detained beyond the period. That is the only  
20 statute that authorizes any detention of an alien after a  
21 removal order other than the specific terrorist statute,  
22 1226(a), which was enacted, which does not authorize  
23 indefinite detention. It says -- it has a paragraph  
24 labeled indefinite detention, and it says the Government  
25 shall not indefinitely detain a terrorist alien that it

1 cannot remove except that if the Government determines --  
2 and -- and it appears to put the burden on the Government  
3 -- that the person is a danger to national security or the  
4 community, it can detain them for another 6 months. And  
5 then you -- you could have indefinite detention, but each  
6 time, each 6 months, the statute provides for review.

7           So not only do the sneakers, the aliens who  
8 cross across the border in the -- in the dark of night  
9 from Mexico or wherever -- not only do they under the  
10 Government's own admission have the Zadvydas rights, so  
11 too do terrorist aliens by statute. And to suggest that  
12 by some implication Congress has intended to authorize the  
13 indefinite detention of people that we thought we should  
14 welcome into our country, even though we didn't have the  
15 ability under our quota system and under our current  
16 regulations in 1980 to let them in, somehow they have no  
17 rights against indefinite detention.

18           For the Government to --

19           JUSTICE GINSBURG: How do you -- how do you  
20 answer the Government's argument that this is necessary,  
21 that the United States shouldn't effectively be punished  
22 for being humanitarian, and if we can't hold these people,  
23 if we're forced to let them in, then any rogue nation can  
24 dump anyone it wants on the United States and we can't  
25 stop it?

1           MR. MILLS: Yes, Your Honor. Justice Ginsburg,  
2 that's their sole policy argument, and frankly, it doesn't  
3 hold water. Just yesterday in the Jama case, the  
4 Government took the position that if Mexico flooded --  
5 flooded our borders with illegal aliens who we could not  
6 detain, we know under their own regulations, if they snuck  
7 in, we couldn't detain them, but if a new Mexican -- there  
8 was a Mexican dictator and he flooded our borders, could  
9 we forcibly repatriate them? And the Government said  
10 absolutely we can. We can go down and put them back in  
11 Mexico. We could do that with the Cubans. We could let  
12 them out the gate at Guantanamo Bay.

13           If a -- a rogue nation truly invades our country  
14 with its bad aliens, that is an infringement on our  
15 sovereignty, and I think that's an act of war. And I  
16 think the President has all kinds of options: trade  
17 sanctions, go to the United Nations, diplomacy. If it's  
18 really something bad that's going to be a -- a threat to  
19 our national security, I think --

20           CHIEF JUSTICE REHNQUIST: Well, you -- you might  
21 wait a while if you went to the United Nations or --

22           (Laughter.)

23           CHIEF JUSTICE REHNQUIST: -- or to -- I take it  
24 the Government feels you need some sort of a rather  
25 immediate recourse.

1                   MR. MILLS: Sure, and our Government has  
2 demonstrated that it believes in preemptive -- preemptive  
3 action and we can go in and have regime change in Cuba if  
4 it -- if it is such a threat. If it's a political  
5 decision, the purely executive decision, that our national  
6 security is so threatened, they have all kinds of tools.

7                   JUSTICE SCALIA: But this -- this regime is not  
8 sending, you know, an armed flotilla to Florida. They  
9 just --

10                   (Laughter.)

11                   JUSTICE SCALIA: -- they just open their jails  
12 and say, hey, you know, go wherever you want. And these  
13 people say I want to get out of here, and they go to  
14 Florida. You -- you want us --

15                   MR. MILLS: That was less than 1 percent --

16                   JUSTICE SCALIA: -- to bomb Cuba because of  
17 that.

18                   MR. MILLS: That was less than 1 percent of the  
19 Cubans who came in the Mariel boatlift. That did occur,  
20 and we do have options for dealing with them. We can  
21 return them forcibly. If they don't allow us, that's like  
22 them sending a missile. It's -- we -- we can destroy the  
23 missile. We can't destroy a human being. By punishing a  
24 human being that Castro sends over, we're not sending a  
25 message to Castro. We're not saying, ah, you sent your

1 prisoners over here and were going to indefinitely detain  
2 them. Mental torture. That will teach you. That's --

3 JUSTICE SOUTER: What you -- what you mean when  
4 you say we can forcibly return them is literally we can  
5 take them to Guantanamo, take them to the gate, and push  
6 them out?

7 MR. MILLS: That's one option. If there -- if  
8 the Cuban army is there to prevent us, you know, maybe it  
9 would require some military action that the administration  
10 might decide is not advisable. But those are the options  
11 depending on the size of the threat. So a judicial  
12 interpretation that the statute means the same thing in  
13 all contexts does not deprive the Government of anything.

14 And I'd like to go back to that if I could.

15 JUSTICE GINSBURG: I thought -- maybe I -- I  
16 misunderstood you, but I thought that one of your points  
17 were even assuming that we couldn't send these people back  
18 into Cuba without having a major conflagration, the rogue  
19 dictator is not going to be deterred by our tossing even  
20 into the sea the people that he doesn't want.

21 MR. MILLS: That -- that is my point. That's  
22 the point that I -- I intend to make, that indefinitely  
23 detaining these people -- that does nothing to a dictator.  
24 That does nothing to deter a dictator. All it means is  
25 we're going to be incurring the huge cost of incarcerating

1 a large number of people, and if anything, that may  
2 encourage the dictator to do exactly that, or it may  
3 encourage the dictator, instead of sending them to Key  
4 West on boats -- on American boats, to sneak them up on  
5 speed boats or take them through Mexico and sneak them  
6 across the border that's --

7 JUSTICE BREYER: Anyway, it's a little drastic.  
8 I -- I guess that before this happens, Congress might  
9 enact a statute like the terrorist statute.

10 MR. MILLS: Exactly. That -- that is exactly  
11 correct, Justice Breyer. And if they think -- whether a  
12 -- a Cuban, a Mariel Cuban, can be put in jail -- and  
13 these are in prison for the rest of their life -- is a  
14 huge policy decision. And this Court should abstain from  
15 putting its voice as -- on to the answer. That is a  
16 decision for Congress in the first place.

17 In Zadvydas, this Court said the statute doesn't  
18 clearly do that, so we're not going to -- we're not going  
19 to answer that question as to whether it would be  
20 constitutional.

21 JUSTICE KENNEDY: Well, it's a policy decision  
22 either way. I -- I suppose if Zadvydas had come out the  
23 other way, the Congress could have responded as well.

24 MR. MILLS: That's correct. But in -- in this  
25 case, because especially the Zadvydas aliens had clear

1 constitutional rights, we avoid the question. The  
2 doctrine of constitutional avoidance says the Court  
3 doesn't engage in that. The default is to stay away from  
4 it. If Congress wants to do something that might be  
5 unconstitutional, they can come back and do it and then  
6 the Court will determine whether it's unconstitutional.

7 Back to the point of whether 1231(a)(6) can mean  
8 something different for the two groups of aliens. Never  
9 before has this Court taken a statute that --

10 CHIEF JUSTICE REHNQUIST: How do you explain,  
11 Mr. Mills, the language that the Court used, pointing out  
12 how different this kind of a case would have been from the  
13 -- from the Zadvydas case?

14 MR. MILLS: Sure. My reading of that -- of that  
15 decision, there were two parts of the decision. There was  
16 part one, which examined whether there is a -- or it  
17 determined whether the statute is ambiguous, and part two  
18 is whether there's a constitutional error. It was only in  
19 the part of the decision deciding whether there's a  
20 constitutional problem that the distinction was made. The  
21 distinction makes the difference in whether there's a  
22 problem or not. And maybe there's not a problem for  
23 inadmissible aliens.

24 So, the Court then concluded in Zadvydas that  
25 because there's a problem, we look at the statute. This



1 statute could be interpreted to authorize indefinite  
2 detention or not. It's ambiguous. Because we have a  
3 problem, at least with one category, we're going to choose  
4 the -- a safe route.

5 JUSTICE SCALIA: It might have been a -- a means  
6 of warning Congress off one area, but not the other. That  
7 is to say, just because we think there's a constitutional  
8 doubt here and therefore Congress might be sailing close  
9 to the wind if they tried to overrule our opinion by  
10 statute doesn't mean that Congress couldn't in this other  
11 area alter the result in *Zadvydas*.

12 MR. MILLS: I think that that is absolutely a --  
13 a conclusion that can be drawn that Congress --

14 JUSTICE SCALIA: Of course, I dissented in that  
15 case. So I'm not saying this was a good idea.

16 (Laughter.)

17 JUSTICE BREYER: But it -- it's interesting. In  
18 -- in just my -- for my -- my own information, then  
19 Congress did respond. And there were two areas in  
20 *Zadvydas* that, you know, didn't warn Congress off. One is  
21 the one we're talking about now. The other is terrorism  
22 And Congress responded in the terrorism matter. Is that  
23 right? But they didn't do anything on the --

24 MR. MILLS: That's absolutely correct. And  
25 they're responding right now. In the 9/11 Commission

1 bill, there is a section that's being negotiated as to  
2 whether terrorist aliens who can't be removed because they  
3 would be tortured -- whether they can be indefinitely  
4 detained. And they're looking at the same limiting  
5 language.

6 One point that I'd like to make that I did not  
7 get to make directly in the brief, but it was raised.  
8 Justice Scalia, you had a question yesterday in the Leocal  
9 case, and it -- it raised an issue that I hadn't looked at  
10 before on whether a statute can be interpreted differently  
11 in a situation where the reason to interpret it is no  
12 longer there. And that's the rule of lenity cases.

13 And I cited as a supplemental authority the  
14 United States v. Thompson/Center Arms Company, 504 U. S.  
15 505. It's a 1992 decision, and it involved a tax code  
16 provision. And the question is, do we apply the rule of  
17 lenity? And Justice Stevens, in dissent you said no,  
18 because this is a civil case. The rule of lenity doesn't  
19 apply. But a three-judge plurality, an opinion by Justice  
20 Souter, and a two-justice -- two-judge concurrence by  
21 Justice Scalia both agreed that the rule of lenity applied  
22 because the statute applies both in criminal and civil  
23 contexts. And you can't have one meaning in a criminal  
24 context and another in civil.

25 For the same reason, the rule of constitutional

1 avoidance should not result in a statute being interpreted  
2 one way when there would be a doubt and another way when  
3 there would not.

4 JUSTICE SOUTER: Well, what about the argument  
5 that the statute, in effect, limits the -- our -- our  
6 interpretation limits the -- the detention to a period  
7 reasonably related to the Government's interest in  
8 accomplishing that interest? That interest is different  
9 in -- in the case of -- of aliens who are excluded, if we  
10 accept that class as distinct from all excludables. And  
11 -- and that may allow a much longer period of detention,  
12 among other things, to deter dictators from -- from  
13 dumping. You've given us an answer to what to do if they  
14 dump, but we don't want them to dump in the first place.  
15 That argument stops short of saying we can detain them for  
16 life, but it would support the -- the position that on a  
17 consistent interpretation of the statute, the Government  
18 could detain them longer in the excluded cases than in  
19 others. What's your answer to that?

20 MR. MILLS: My answer to that is that that might  
21 be a -- a legislative policy decision to make that  
22 distinction. But in 1996, IIRIRA abolished the  
23 distinction between inadmissible and deportable aliens  
24 after they've been ordered removed. Up until that time,  
25 it makes a difference. It makes a difference under the

1 Constitution. But once they've been ordered removed --  
2 and this was the Government's argument in Zadvydas. Once  
3 they've been ordered removed, regardless of how they got  
4 here in the first place, they no longer have any right to  
5 be here at all and --

6 JUSTICE SOUTER: There is only one class of  
7 excludables by the Government's own choice. That's --  
8 that's basically your answer.

9 MR. MILLS: After a removal proceeding, there is  
10 only one class. That is correct.

11 JUSTICE SOUTER: Yes.

12 MR. MILLS: If there are no more questions, I  
13 would just ask that the Court reverse in this case.

14 If there are any mootness concerns about Mr.  
15 Benitez, I would refer the Court to Friends of the  
16 Environment which said that when a challenged practice has  
17 stopped voluntarily, that does not moot a case out in the  
18 Supreme Court unless there's some reason to believe they  
19 won't go at it again. And the Government has asserted  
20 that it can revoke his release at any time for any reason  
21 and detain him indefinitely.

22 And the suggestion that the fact that he's been  
23 released under the Cuban Review Panel shows that his --  
24 he's been protected is -- is not well taken. He was  
25 determined, when he first was detained in -- in 2001, that

1 he was eligible under the Cuban Review Panel to be  
2 released. It took 3 years and the week before this case  
3 was argued in the highest court of the land before the  
4 Immigration Service did what its own regulations told it  
5 it had to do.

6 Thank you very much.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mills.  
8 Mr. Kneedler, you have 4 minutes remaining.

9 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

10 ON BEHALF OF THE PETITIONERS

11 MR. KNEEDLER: Thank you, Mr. Chief Justice.

12 Justice Souter, you're exactly right in terms of  
13 why the statutory construction or statutory application of  
14 the terms in Zadvydas does not control here. The Court's  
15 starting point -- again back to page 682 of its opinion,  
16 it says, we deal here with aliens who were admitted. The  
17 way the Court dealt in the opinion was a matter of  
18 statutory construction, and it did it by reading into the  
19 statute a reasonable time limitation. What is reasonable  
20 for aliens who -- who have been admitted and are subject  
21 to what were called deportation is different from aliens  
22 who were stopped at the border. And in fact, in the -- in  
23 the Court's statutory analysis, it looked to the point  
24 that in the Witkovitz jurisdictional statement referring  
25 to Congress' constitutional doubts about detention of more

1 than 6 months, those were constitutional doubts about  
2 people who were being deported after having been allowed  
3 to be here. There has never --

4 JUSTICE SOUTER: What's your -- what's your  
5 answer to Mr. -- Mr. Mills' position that the Government  
6 has, in fact, statutorily waived that distinction by  
7 creating one class of excludables?

8 MR. KNEEDLER: It -- with respect -- with  
9 respect, it has not. And -- and if I could -- if I could  
10 explain this. This -- going back to Mezei, this Court  
11 held and in fact rejected a very similar argument. The  
12 rationale of the court of appeals in Mezei was that  
13 deportable aliens are subject to an express, not an  
14 implied, 6-month limitation. And the court of appeals  
15 said the aliens in that -- the alien in that case, once he  
16 couldn't be removed to another country, should be released  
17 because the purpose of keeping him to return him to  
18 another country was no longer being served. This Court  
19 rejected that argument, even though there was a statutory  
20 express limitation of 6 months for deportable aliens, held  
21 that an alien who had been on Ellis Island for 2 years did  
22 not have to be released.

23 In reliance on that decision, Congress passed  
24 the parole statute to leave the release in -- excuse me --  
25 Mezei was after it, but the -- the executive branch has

1 relied on that rationale.

2           The Cuban review regulations that are at issue  
3 here have been in place for 15 years under the parole  
4 statute. As Congress well knew, when it acted in 1996,  
5 the -- this program was the subject of many hearings in  
6 Congress. There were cases -- the Barrera case out of the  
7 Ninth Circuit sustained a 10-year detention of a Mariel  
8 Cuban. It is implausible to believe in 1996, when  
9 Congress enacted IIRIRA, that it intended to cut back on  
10 the longstanding power of the executive branch to prevent  
11 hordes of aliens from coming into our country and to  
12 impose an arbitrary 6-month limitation.

13           I -- I think there's no argument that if an  
14 alien is detained before removal proceedings are begun,  
15 that there is no 6-month limitation. His release is  
16 entirely up to the Attorney General under the parole  
17 regulations. It's -- it's implausible to believe that  
18 once Congress actually enters a formal order of exclusion  
19 or now removal against an alien, the person is no longer  
20 in an ambiguous situation, the executive branch says  
21 you're not eligible, that suddenly that person who has  
22 been formerly found not eligible, would be subject to a 6-  
23 month limitation that did not apply up until '96 and  
24 doesn't even apply until these -- to these aliens until  
25 removal proceedings have been begun.

1                   So the right way to look at this statute as  
2 what's a reasonable time under 1231(a)(6) has to take into  
3 account that historic background of the United States  
4 being able to protect its borders. And there is no  
5 indication whatsoever that Congress intended to overrule  
6 this longstanding program for Mariel Cubans, which has  
7 operated, as I said, for 15 years.

8                   CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
9 Kneedler.

10                   The case is submitted.

11                   (Whereupon, at 12:00 p.m., the case in the  
12 above-entitled matter was submitted.)

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