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U.S. Court of Appeals for the Ninth Circuit

Case Name:

MA V RENO

Case Number:

99-35976

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIM HO MA,
Petitioner-Appellee,

v.

No. 99-35976

JANET RENO, Attorney General; and

D.C. No.

ROBERT C. SMITH, District Director

CV-99-00151-RSL

of the Immigration and

OPINION

Naturalization Service, Seattle,
Washington,
Respondents-Appellants.

Appeal from the United States District Court
for the Western District of Washington,
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted
February 14, 2000--Seattle, Washington

Filed April 10, 2000

Before: Stephen Reinhardt, David R. Thompson, and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

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William J. Aceves, California Western School of Law, San Diego, California, for amici Human Rights Watch, Human Rights Advocates, the Jesuit Refugee Service, the World Organization Against Torture USA, and the Extradition and Human Rights Committee of the American Branch of the International Law Association.

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OPINION

REINHARDT, Circuit Judge:

Petitioner Kim Ho Ma is an alien who left his native land, Cambodia, as a refugee at the age of two and has resided in the United States as a legal permanent resident since he was six. At the age of seventeen he was involved in a gang-related shooting, and was convicted of manslaughter. After completing his prison sentence some two years later, he was taken into INS custody and ordered removed because of that conviction. However, the INS has been unable to remove him, and hundreds of others like him, because Cambodia does not have a repatriation agreement with the United States and therefore will not permit Ma's return.¹ The question before us is whether, in light of the absence of such an agreement, the Attorney General has the legal authority to hold Ma, who is now twenty two, in detention indefinitely, perhaps for the remainder of his life.

Ma challenged his detention by filing a petition for habeas corpus, under 28 U.S.C. S 2241, in the District Court for the Western District of Washington. That court ruled that Ma's continued detention violates his substantive due process rights under the Fifth Amendment.² Respondents, the Immigration

¹ There are also many aliens from Laos and Vietnam who cannot be removed because our government has no repatriation agreement with those countries.

² In the district court in which Ma sought relief, over one hundred habeas corpus petitioners challenged their ongoing detention by the INS in cases similar to his. The district court designated five lead cases that presented issues common to all petitioners and directed the parties to brief and argue those issues before five district court judges. The five district court judges issued a joint order establishing a legal framework to apply in each individual case. A single judge then applied this ruling to Ma and held that he should be released. Similar cases involving a large number of

, habeas petitioners have arisen in Nevada, and the Central, Eastern, and Southern Districts of California.

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and Naturalization Service, Janet Reno (as Attorney General), and Robert Coleman (as INS Acting District Director in Seattle) (hereinafter collectively referred to as "INS") appeal the district court's decision releasing Ma from INS custody. We have jurisdiction³ and affirm, but on a different basis.

We hold that the INS lacks authority under the immigration laws, and in particular under 8 U.S.C. S 1231(a)(6), to detain an alien who has entered the United States for more than a reasonable time beyond the normal ninety day statutory period authorized for removal. More specifically, in cases like Ma's, in which there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, we hold that it may not detain the alien beyond that statutory removal period. Because we construe the statute as not permitting the indefinite detention of aliens like Ma, we need not decide the substantial constitutional questions raised by the INS's indefinite detention policy.

³ Although neither party has argued either that the district court lacked jurisdiction over Ma's constitutional claims or that this court lacks jurisdiction to hear this appeal, the INS argued at one point in its brief that the general federal habeas statute, 28 U.S.C. S 2241, does not provide jurisdiction to hear any claim of statutory error or abuse of discretion. However, our recent decision in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999), makes clear that the scope of review under the general federal habeas statute, 28 U.S.C. S 2241, has not been limited by 8 U.S.C. S 1252, because that section does not mention habeas corpus explicitly. *Id.* at 609 (citing *Felker v. Turpin*, 518 U.S. 651 (1996)). Claims of statutory error and abuse of discretion in the application of the immigration laws have long been cognizable on habeas corpus. See *Magana-Pizano*, 200 F.3d at 609 (holding that general habeas statute allows review of statutory questions); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (reviewing denial of discretionary relief (suspension of deportation) on the merits, and reversing on ground that discretion was not exercised consistent with the statute). Thus, we hold that 8 U.S.C.S 1252 does not preclude us from considering Ma's non-constitutional arguments on habeas corpus.

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I.

Petitioner Kim Ho Ma's family fled Cambodia in 1979 and took Ma, who was then two years old, with them. After spending over five years in refugee camps, Ma's family lawfully entered the United States in 1985 as refugees. Ma's status was adjusted to that of a lawful permanent resident in 1987. In 1996, he was convicted, by a jury, of first degree manslaughter following a gang-related shooting. He was sentenced to 38 months in prison, but eventually served only 26 after receiving credit for good behavior. He was tried as an adult, although he was only seventeen years of age at the time of the crime. Although the INS repeatedly refers to Ma's criminal record, this was his only criminal conviction.

Ma's conviction made him removable as an alien convicted

of certain crimes under 8 U.S.C. S 1227(a)(2). Because he was released by the state authorities after April 1, 1997, the INS's authority to take him into custody was governed by the permanent custody rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (codified at 8 U.S.C. S 1231). The INS took Ma into custody following his release from prison and initiated removal proceedings against him. An immigration judge found Ma removable, and furthermore found him ineligible for asylum or withholding of deportation because of his conviction. Ma appealed this ruling to the Board of Immigration Appeals (BIA). The BIA affirmed the immigration judge's decision. Although Ma's order of removal became final on October 26, 1998, the INS could not remove him within the ninety day period during which it is authorized to do so because the United States had, and still has, no repatriation agreement with Cambodia. As a result, Ma remained in detention until he filed this petition for a writ of habeas corpus, which was granted by the district court on September 29, 1999. He is now twenty-two and has been in custody (and, but for the district court's decision, would have been incarcerated) for nearly five years, although

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his sentence accounts for only a little over two years of that period.

In addition to filing the habeas petition we now review, Ma made several other attempts to secure his release. During the pendency of the proceedings before the immigration judge and the BIA, Ma filed two motions to be released on bond -- in October and December 1997. In both instances an immigration judge denied Ma's requests, finding, based solely on the offense he committed at the age of seventeen, that although he was not a flight risk, he was a danger to the community.

In May 1999, over six months after Ma's final removal order (and after his habeas petition was filed), the INS, by letter, requested travel documents for Ma from the Cambodian government.⁴ The next day, the INS conducted the "ninety day" custody review, as provided for in its regulations, to determine if Ma should be released on bond.⁵ An INS officer prepared a report after interviewing Ma and reviewing letters and other materials submitted by his family and friends. The officer's report stated that Ma's family was "very supportive," and that if Ma was released he would be able to assist his handicapped 71 year old father in everyday activities. The report also stated that Ma constantly communicates with his younger brother to assure that his brother "does not follow in his footsteps." In addition, the report noted that Ma's older brother runs his own business and would employ Ma if he were released from custody. A deputy district director then reviewed the INS officer's report and issued a decision denying Ma's release. The decision was sent to Ma by means of a form letter that stated that the deputy director made his deci-

4 The Cambodian government denied the request, as it does all such requests, because of the absence of a repatriation agreement.

5 Internal INS regulations (known as the "Pearson I" regulations) required that Ma's case be reviewed before the end of the ninety day period. However, Ma received his custody review approximately 100 days after that period had run (190 days after his removal order became final).

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sion after considering a set of factors set out in INS regulations;⁶ however the letter neither stated reasons nor discussed which factors were relied upon in reaching the decision to deny Ma's release. The letter added that "there is no appeal from this decision."⁷

On September 30, 1999, pursuant to additional internal regulations, the INS again reviewed its decision to continue detaining Ma.⁸ Once again, INS officials found that Ma should remain in detention, based on the seriousness of his conviction and also on the ground of his threatened participation in a hunger strike while in custody. The reviewers stated that they were unable to conclude that Ma would "remain non-violent" and abide by the terms of his release. These decisions were made despite abundant information in the administrative record about Ma's relationships with his parents and siblings, employment prospects, and plans to avoid gang relations and criminal behavior. Upon reviewing Ma's habeas petition, the district court ruled that Ma's detention was unconstitutional on "substantive due process" grounds and ordered him released pending the outcome of this appeal. This court and the Supreme Court denied the INS's requests for a stay of the district court's release order.⁹ The INS now

⁶ 8 C.F.R. S 241.4.

⁷ The letter also stated that Ma's case would be reviewed again six months from the date of the letter, on December 2, 1999. It also stated that Ma had the right to submit a request for redetermination of his custody status at any time.

⁸ After Ma and the other four lead petitioners prevailed in district court, the INS implemented additional regulations, known as the "Pearson II" regulations, which provided for additional review of custody decisions. These regulations provide for review of the decisions of district directors by INS Headquarters, which was then done in this case.

⁹ The INS sought to stay the district court's release order. The district court denied the order but granted the INS a temporary stay so that it might attempt to secure an emergency stay from this court. We denied the stay. The INS filed a second emergency stay request, pending appeal to the Supreme Court. We again denied the stay and ordered Ma released. He

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appeals the district court's decision granting Ma's habeas corpus petition.

II.

Although the bulk of the parties' arguments, as well as the district court's ruling, address the constitutionality of the INS's detention policy, we must first determine whether Congress provided the INS with the authority to detain Ma indefinitely, as the Attorney General contends.

[1] In general, after an alien is found removable, the Attorney General is required to remove that alien within ninety days after the removal order becomes administratively final.¹⁰ Many aliens, however, cannot be removed within the ninety day period for various reasons. First, some individual cases may simply require more time for processing. Second, there are cases involving aliens who have been ordered removed to

countries with whom the United States does not have a repatriation agreement, such as Cambodia, Laos, and Vietnam. Finally, there may be those aliens whose countries refuse to take them for other reasons, and yet others who may be effectively "stateless" because of their race and/or place of birth.¹¹ Ma falls in the second category.

was released that evening. The INS then sought a stay from the Supreme Court. Justice O'Connor ordered a temporary stay pending a review by the whole Court. Ma surrendered to INS custody pending the Court's decision. The Court denied the INS's stay request, and Ma was again ordered released.

¹⁰ See 8 U.S.C. S 1231(a)(1)(A)-(B). If the removal order is stayed pending judicial review, the ninety day period begins running after the reviewing court's final order. 8 U.S.C. S 1231(a)(1)(B)(ii).

¹¹ See, e.g., *Caranica v. Nagle*, 28 F.2d 955 (9th Cir. 1928) (involving deportation order to Greece of alien born in Macedonia, which was then a Turkish province that was later partitioned among several countries, including Greece, where Greece would not recognize alien as a citizen).

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[2] Under the statute, aliens who cannot be removed at the end of ninety days fall into two groups. Those in the first group must be released subject to supervisory regulations that require them, among other things, to appear regularly before an immigration officer, provide information to that official, notify INS of any change in their employment or residence within 48 hours, submit to medical and psychiatric testing, and comply with substantial restrictions on their travel. 8 U.S.C. S 1231(a)(3). Those in the second group "may be detained beyond the removal period" and, if released, shall be subject to the same supervisory provisions applicable to aliens in the first group. 8 U.S.C. S 1231(a)(6). ¹² Aliens in the second group include, among others, persons removable because of criminal convictions (such as drug offenses, certain crimes of moral turpitude, "aggravated felonies," firearms offenses, and various other crimes). 8 U.S.C. S 1227(a)(2). Ma's criminal conviction places him in the second group.

INS argues that its authority to "detain beyond the removal period" gives it the authority to detain indefinitely aliens who fall in the second group and who cannot be removed in the reasonably foreseeable future.¹³ Ma argues the opposite --

¹² The sub-section provides in full that

[a]n alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

48 U.S.C. S 1231(a)(6).

¹³ Although we recognize that, in general, the Attorney General's interpretation of the immigration laws is entitled to substantial deference, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999), we have held that Chevron principles (*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)) are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized

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that the INS's authority to detain aliens beyond the removal period does not extend to cases in which removal is not likely in the reasonably foreseeable future. On its face, the statute's text compels neither interpretation: while S 1231(a)(6) allows for the detention of group two aliens "beyond" ninety days, it is silent about how long beyond the ninety day period such detention is authorized. Thus, any construction of the statute must read in some provision concerning the length of time beyond the removal period detention may continue, whether it be "indefinitely," "for a reasonable time," or some other temporal measure.

[3] We hold that Congress did not grant the INS authority to detain indefinitely aliens who, like Ma, have entered the United States and cannot be removed to their native land pursuant to a repatriation agreement. To the contrary, we construe the statute as providing the INS with authority to detain aliens only for a reasonable time beyond the statutory removal period. In cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future, we conclude that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period. Rather, the alien must be released subject to the supervisory authority provided in the statute.

We adopt our construction of the statute for several reasons. First, and most important, the result we reach allows us

to construe. *Williams v. Babbitt*, 115 F.3d 657, 661-63 (9th Cir. 1997) (analyzing *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) and *Rust v. Sullivan*, 500 U.S. 173 (1991), noting the agency's lack of constitutional expertise, and concluding that "just as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so"). As we explain *infra*, the agency's interpretation raises just such a substantial question.

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to avoid deciding whether or not INS's indefinite detention policy violates the due process guarantees of the Fifth Amendment. Second, our reading is the most reasonable one -- it better comports with the language of the statute and permits us to avoid assuming that Congress intended a result as harsh as indefinite detention in the absence of any clear statement to that effect. Third, reading an implicit "reasonable time" limitation into the statute is consistent with our case law interpreting a similar provision in a prior immigration statute. Finally, the interpretation we adopt is more consonant with international law.¹⁴

III.

[4] The Supreme Court has long held that courts should interpret statutes in a manner that avoids deciding substantial constitutional questions. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401

(1916); see also *United States v. Bulacan*, 156 F.3d 963, 974 (9th Cir. 1998). We have referred to this rule as a "paramount principle of judicial restraint." *United States v. Restrepo*, 946 F.2d 654, 673 (9th Cir. 1991).

[5] In the immigration context, courts have often read limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems. For example, in *United States v. Witkovich*, 353 U.S. 194, 199 (1957), the Court read a limitation into a statute authorizing the INS to ask questions and receive information from deportable aliens within the United States. Because constitutional problems would have arisen if the statute were read as penalizing aliens who refused to answer questions that were irrelevant to any legitimate governmental purpose, the

14 Petitioner also contests the procedures used by INS when considering his requests for release, asserting that they violate procedural due process. Given our holding, we need not reach that constitutional question either.

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Court chose to read a limitation into the statute. *Witkovich*, 353 U.S. at 199.

We followed *Witkovich* in *Romero v. INS*, 39 F.3d 977 (9th Cir. 1994), which involved an alien who had lied to an INS official, thereby rendering her deportable because she violated a condition of her immigration status. The condition required that she answer truthfully all questions put to her by INS officials. However, the questions she did not answer truthfully were irrelevant to her visa status. Although the provision at issue stated that aliens who failed to comply with the conditions of their status were deportable, without defining those conditions in any way, we read into the statute a limitation on the kinds of conditions that the Attorney General could place on aliens. *Id.* at 979-80. Invoking the canon of constitutional avoidance, we concluded that the alien could not be required to answer questions having nothing to do with her visa status. *Id.* at 981; cf. *Jean v. Nelson*, 472 U.S. 846, 854-56 (1985) (holding that immigration parole regulation does not permit race discrimination in order to avoid reaching constitutional question); *Tashima v. Administrative Office of the U.S. Courts*, 967 F.2d 1264, 1271 (9th Cir. 1992) (interpreting statute stating that Office "may" provide representation to judges as requiring interpretation based upon criteria not listed in the statute, in order to avoid constitutional problems).

Of course, as the Supreme Court has noted repeatedly when formulating the canon of constitutional avoidance, the rule applies when the constitutional issue at hand is a substantial one.¹⁵ The INS contends that the answer to Ma's constitu-

15 The Court has also described the canon as applying to "difficult," "serious," or "grave" constitutional issues. See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 875 (1996); *Allentown Mack Sales v. NLRB*, 522 U.S. 359, 387 (1998) (Rehnquist, CJ, concurring in part and dissenting in part); *Jones v. United States*, 526 U.S. 227, 239 (1999). Regardless of the terminology used, the point seems to be the same: a party cannot force us to ignore the usual canons of statutory construction by raising a frivolous, insubstantial, or patently incorrect constitutional argument. Nor, as the Court put it in *United States v. Locke*, 471 U.S. 84, 96 (1985), may we resort to "disingenuous evasion" in our interpretation of the statute to

avoid a constitutional question.

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tional challenge is dictated by a straightforward application of our en banc decision in *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc), and the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).¹⁶ If this were correct, we would not need to invoke the canon of constitutional avoidance. However, those cases deal with a significantly different problem from the one we avoid here. Both *Mezei* and *Barrera-Echavarria* involved excludable aliens rather than aliens who have already entered the United States. As a result, the constitutional analysis in both cases rests on a doctrine known as the "entry fiction," which authorizes the courts to treat an alien in exclusion proceedings as one standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States. Both decisions were entirely explicit in their reasoning on this point. In *Mezei*, the Court relied on the entry fiction (that an excludable alien has not entered the United States) in holding that an excludable alien is not entitled to procedural due process:

It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned

¹⁶ The INS also makes repeated reference to *Carlson v. Landon*, 342 U.S. 524 (1952). However, *Carlson* upheld the constitutionality of detention pending the INS's decision whether to deport an alien, and expressly noted that the problem of "unusual delay" was not before it, and referenced a case involving a Russian petitioner who alleged that his country would not accept his return. *Id.* at 546 (citing *United States ex rel. Potash v. District Director*, 169 F.2d 747, 748 (2d Cir. 1948)).

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Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding.

Id. at 212-13 (internal citations omitted). While the Court held that *Mezei* could be detained indefinitely on Ellis Island, because no country would take him back, it rested its holding on the fact that *Mezei*'s exclusion did not violate the immigration statute, and that as an alien who had not yet entered the country he had no other rights.¹⁷

We followed *Mezei* in *Barrera-Echavarria*, which involved a Mariel Cuban who was detained while excluded from the U.S.¹⁸ After describing the petitioner's argument and noting our disagreement, we began our analysis by relying on the historic distinction between excludable and resident aliens:

The Supreme Court has consistently recognized that

our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance, the Court has recognized

17 Although the INS notes that the plaintiff in Mezei was previously a lawful resident of the U.S. for twenty-five years, the Court made clear that he was to be treated as an excludable alien because of his long departure from the U.S., and could not have his status "assimilated" to that of a permanent resident. In doing so, the Court distinguished, on its facts, its then-recent decision in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), which authorized such assimilation of status under some circumstances. *Mezei*, 345 U.S. at 213-14. There is no doubt that Mezei was considered by the Court to be an excludable alien who had not entered the U.S., despite what the Court referred to as his "prior residence here." See *Mezei* at 212-13.

18 *Barrera-Echavarria* was paroled while excluded, committed numerous crimes, and thereafter was taken back into custody. *Barrera-Echavarria*, 44 F.3d at 1444. His parole did not constitute an entry. *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958).

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additional rights and privileges not extended to those in the former category.

Barrera-Echavarria, 44 F.3d at 1448 (quotations omitted, alteration in original). We also quoted a passage from *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), stating that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Barrera-Echavarria*, 44 F.3d at 1449.¹⁹ Shortly after this quotation, we noted that

Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution. [citing *United States v. Verdugo-Urquidez* and *Johnson v. Eisentrager*] Because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows.

Barrera-Echavarria, 44 F.3d at 1450.

Thus, it is not surprising that *Barrera-Echavarria* upheld as constitutional the long-term detention of aliens who had not entered the United States, legally or illegally (although they had been paroled into this country). As we stated in that case, it is "not settled" that excludable aliens have any constitutional rights at all, *id.* at 1449, so it is clear that they cannot prevail where the government refuses to admit them. ²⁰ In con-

19 Amici Law Professors note in their brief that in its petition for rehearing en banc which led to the *Barrera-Echavarria* decision the INS relied on the fact that the petitioner was an alien seeking admission (rather than one who had entered).

20 In *Barrera-Echavarria*, we concluded that the statutes there at issue, which applied only to the detention of excludable aliens, allowed for the long-term detention of such aliens, *id.* at 1445, and went on to hold that such detention is constitutional. There is no inconsistency between our

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trast to *Mezei* and *Barrera-Echavarria*, numerous cases establish that once an alien has "entered" U.S. territory, legally or illegally, he or she has constitutional rights, including Fifth Amendment rights. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (stating that "[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." (citations omitted)); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (stating that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry' "); cf. *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that illegal alien children have constitu-

statutory holding in *Barrera-Echavarria* and our statutory holding here. We found the statutory authority to hold *Barrera-Echavarria* for a prolonged period implicit in the history and structure of several provisions granting broad discretion to the Attorney General to parole excludable aliens into the country under certain circumstances. *Id.* at 1445-48. We noted that the parole of excludable aliens had always been the exception rather than the rule, and that releasing such aliens into the country pending deportation would run contrary to the basic statutory scheme precluding such entry. *Id.* at 1447. In the case before us, we consider the entirely different question of aliens who have already entered the country. Thus, unlike in *Barrera-Echavarria*, there is no long-standing statutory scheme that would be "upset" by barring prolonged detention here. *Id.* at 1446. Most important, because in *Barrera-Echavarria* the various statutory provisions at issue did not apply to the detention of aliens who had already entered the United States, there was no need to invoke the canon of constitutional avoidance. The constitutional result in *Barrera-Echavarria* was dictated by the Supreme Court's holding in *Mezei* regarding excludable aliens.

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tional right to education).²¹ Unlike the petitioners in *Mezei* and *Barrera-Echavarria*, Ma was admitted to and entered the United States as a refugee when he was a child, and has lived here ever since. He does not seek to "force us to admit him." *Mezei*, 345 U.S. at 210. The cases involving indefinite detention of excludable aliens simply do not support the constitutionality of indefinite detention of aliens who have entered the United States. To the contrary, our case law makes clear that, as a general matter, aliens who have entered the United States, legally or illegally, are entitled to the protections of the Fifth Amendment.²²

The INS also argues that *Barrera-Echavarria* and *Mezei* control the result here because, for constitutional purposes, an alien ordered removed has no further right to be here and therefore stands on essentially the same footing as an excludable alien.²³ While this novel theory would dispose of the con-

21 The cases extending Fifth Amendment protection to aliens are fully consistent with our general jurisprudence granting significant constitutional protections to aliens within the territory of the United States. The Supreme Court has held that the Equal Protection Clause applies to aliens, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), that the Fourth Amendment applies to aliens (within U.S. territory), *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973), and that the First Amendment applies to aliens. *Bridges v. Wixon*, 326 U.S. 145, 148 (1945) (holding that "freedom of speech and of press is accorded aliens residing in this country"); *Bridges v. California*, 314 U.S. 252 (1941) (same).

22 The INS cites *Fong Yue Ting v. United States*, 149 U.S. 698, 711-13 (1893), for the proposition that "[t]he power to exclude aliens, and the power to expel them, 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." *Id.* at 713. However, that proposition as applied to the distinction between the constitutional rights of deportable and excludable aliens is no longer good law. The Court in *Fong Yue Ting* went on to hold that aliens may be deported using processes exercised "entirely through executive officers." *Id.* at 714. That part of *Fong Yue Ting*'s holding was overruled ten years later, when the Supreme Court held that deportation proceedings for aliens within the U.S. must conform to due process. *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

23 We note that the Fifth Circuit relied on the INS's argument in resolving the constitutional question we avoid today, holding that long-term

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stitutional question raised by indefinite detention of such resident aliens, we cannot easily reconcile it with controlling case law. In particular, the INS's position appears to be clearly inconsistent with the Supreme Court's holding in *Wong Wing* that illegal aliens within the territorial jurisdiction of the U.S. who had been ordered deported could not be put to hard labor prior to their deportation. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). Although the INS argues that *Wong Wing* establishes only the proposition that irrational abuses against aliens who have been ordered deported are unjustified, *Wong Wing* makes clear that Congress deliberately created the hard labor policy "to promote its policy in respect to Chinese persons" (presumably by creating deterrence and encouraging voluntary departure). *Wong Wing*, 163 U.S. at 235, 237. The Court said nothing about "irrationality," only unconstitutionality. In short, it unanimously struck down, on Fifth Amendment grounds, Congress' policy with respect to aliens who had been ordered deported even though that policy was passed in furtherance of legitimate immigration goals. See also *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982) (holding that resident alien has due process rights in exclusion proceedings because her "constitutional status" is

detention of removable aliens who have been ordered deported does not violate substantive due process. *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999). Although we seriously question the Fifth Circuit's conclusion in that case, and in particular its reading of *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), and *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982), we need not reach the constitutional question here. At the very least, it is clear from reading *Zadvydas* that a substantial constitutional question exists regarding the construction of S 1231(a)(6).

Following oral argument, the Tenth Circuit considered the constitutional question in *Ho v. Greene*, 2000 WL 228755 (10th Cir. Feb. 29, 2000), and, by a 2-1 vote, accepted the Fifth Circuit's view. Moreover, the Tenth Circuit concluded that because S 1231(a)(6) was silent as to any

time duration, "Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens." Id. at *9. For the reasons stated below, we do not find the Tenth Circuit's reasoning persuasive.

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greater than that of a first-time entrant); *Johnson v. Eisen-trager*, 339 U.S. 763, 771 (1950) (holding that the Fifth Amendment grants rights to aliens within the territorial jurisdiction of the U.S., but not to those outside the territory). In order to adopt the INS's approach here, we would have to reconcile *Wong Wing*, which affords constitutional protection to aliens who have been ordered deported, with the INS's suggested rule -- which would (by extending the constitutional jurisprudence governing excludable aliens to such aliens) strip them of such protection. That would be a daunting, if not impossible, task.²⁴

It is clear that the INS's effort to extend exclusion law to aliens who have entered the United States but have been ordered removed raises a substantial constitutional question,

²⁴ The INS also argues that all immigration-related decisions are entitled to substantial deference under the plenary power, citing *Reno v. Flores*, 507 U.S. 292 (1993). However, it is not clear what role the plenary power played in *Flores*. In that case, the Court found that rational basis review applied, noted that the plenary power was applicable, but then stated that "[o]f course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose." *Flores*, 507 U.S. at 306. *Ma* argues that the plenary power's general deference rule does not apply in every case, citing *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (striking down law governing suspension of deportation, stating that "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing[the plenary] power. . . . Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." (internal citation omitted)) and *Hampton v. Mow Sun Wong*, 426 U.S. 88, 99-101 (1976) (striking down Civil Service Commission's blanket ban on employing non-citizens and rejecting contention that "the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"). It is not clear why the plenary power's deference rule should apply here given that such deference was not afforded in *Chadha* or in *Hampton*. In any event, the Supreme Court's cases make clear that the plenary power doctrine does not apply in the same way to each case to which it is relevant, and that its exercise is subject to constitutional restraints.

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at the very least. Even if we were to agree with the Fifth Circuit's constitutional holding -- and we do not by any means suggest that we do -- we would first be required to answer that question. As we may avoid doing so by giving the statute a construction that does not require us to undertake any constitutional inquiry, we follow that course here.

[6] We believe the construction of S 1231(a)(6) we adopt -- that the INS may detain aliens who have entered the country but have been ordered removed only for "a reasonable time" beyond the ninety day statutory removal period, and

specifically, that such aliens may not be detained beyond that statutory removal period if there is no reasonable likelihood that their country of origin will permit their return in the reasonably foreseeable future -- to be the most plausible reading of the statute. However, we note that, in order to avoid the substantial constitutional concerns presented by the INS's interpretation, we could adopt a strained construction of the statute, one that would not otherwise constitute sound statutory construction. As one of our learned colleagues recently explained,

[S]tatutory construction and constitutional narrowing . . . are, in fact, very different animals Constitutional narrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there; it is akin to partial invalidation of the statute. See, e.g., *Regan v. Time, Inc.*, 468 U.S. 641, 652-654 (1984). In performing the former task we may not add anything to the statute that is not already there . . . in performing the latter function, we must do precisely that In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe Congress would not have rejected.

United States v. X-Citement Video, Inc., 982 F.2d 1285, 1295 n.6 (9th Cir.) (Kozinski, J., dissenting), rev'd 513 U.S. 64

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(1994). In reversing the majority, the Supreme Court endorsed our dissenting colleague's approach, holding that a statute should be construed to avoid constitutional problems so long as the saving construction is not "plainly contrary to the intent of Congress." 513 U.S. at 78. The discussion which follows will make clear that the construction we adopt is by no means plainly contrary to Congress's intent, but is instead the most reasonable interpretation of the statute.

IV.

The interpretation we give section 1231(a)(6) is clearly the most reasonable one. The provision that the INS may hold individuals "beyond" a specified time demonstrates Congress's intent that the otherwise applicable time limit not be deemed absolute in all cases, and that the agency have some flexibility in instances in which additional time may be useful. It does not demonstrate an intent to give the INS any greater authority than that -- and certainly not an intent to permit the agency to hold people in detention for the remainder of their lives. Such is surely the case with respect to aliens who have entered the country and are generally entitled to the protections of our Constitution. It would indeed be surprising were Congress to attempt to authorize permanent or indefinite detention of such persons simply by providing that they may be held beyond a ninety day period. Some greater degree of specificity or demonstration of Congressional intent would be necessary before we would conclude that a statute had granted the INS so sweeping a power with regard to persons who are generally subject to the protections of the Constitution. We cannot presume that Congress would authorize so drastic a limitation on the rights of such aliens by so indirect a means, particularly when it could have easily included express lan-

guage to that effect in the statute.²⁵

²⁵ In the prior statute, Congress used language prohibiting release (subject to some exceptions) rather than the language authorizing detention used here. See 8 U.S.C. S 1252(a)(2)(B) (1995) (stating that the "Attorney

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To sustain the INS' indefinite detention theory we would be required to read far more into the statute than its language implies. In the simplest terms, to say that the INS may hold persons beyond a particular date does not answer the question "for how long?". The proper reading, we conclude, is that Congress intended only that the short statutory period during which detention is ordinarily authorized not serve as an absolute barrier to a reasonable extension of time when circumstances render an additional period necessary in order to accomplish the statutory purpose -- the removal of the alien. Where no removal in the reasonably foreseeable future is possible, however, the statutory language, properly construed, does not authorize indefinite detention of such aliens. Because, here, there is no repatriation agreement and no demonstration of a reasonable likelihood that one will be entered into in the near future, we believe it to be not only the prudent but the correct interpretation of the statute to hold that Ma and others similarly situated aliens must be released, under supervision, at the end of the statutory removal period. 8 U.S.C. S 1231(a)(1)(A).

V.

Our conclusion that a "reasonable time" limitation is implicit in the statute is supported by a venerable line of

General may not release [deportable aliens convicted of an aggravated felony] . . . either before or after a determination of deportability [subject to some exceptions].") (emphasis added). The two custody provisions that succeeded the 1995 version of this law (and preceded the current version) did not change this language in any way relevant to our analysis. The same "may not release . . . either before or after " language was in both statutes. See AEDPA S 440(c); IIRIRA S 303(b)(3) (the transitional custody rule). The prohibitory language used there is obviously far stronger than the permissive language used in the new law. More important, however, Congress is familiar with time limitations in the detention and removal context, and could easily have authorized detention "without limitation" or "indefinitely" if it so desired. See, e.g., 8 U.S.C. S 1231(a)(1)(A); 1231(a)(1)(C); 1231(b)(2)(C); 1231(b)(2)(D); 1231(c)(3)(A); 1231(c)(3)(B) (all specifying various time periods in detention and removal context).

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Ninth Circuit cases that held that a predecessor provision must be construed as allowing only for detention "reasonably" beyond the removal period.

Prior to 1952, the detention of aliens pending deportation was governed by the Immigration Act of 1917. That statute set no time limit to accomplish a deportation. The Act provided simply that deportable aliens should be "taken into custody and deported."²⁶ Then, just as now, there were cases involving aliens who could not be deported for various rea-

sons -- because the U.S. had no repatriation agreement with their country, because their country would not take them back, or because they were stateless. In several cases, this court held that while the deportation order would remain valid indefinitely, detention was justified only for a reasonable period. For example, in *Caranica v. Nagle*, 28 F.2d 955 (9th Cir. 1928), the alien challenged an order mandating his deportation to Greece on the ground that he was a Macedonian citizen, not a Greek citizen. *Id.* at 956. The court upheld the order, holding that the statute allowed for deportation to Greece. The court held that the Secretary of Labor had broad discretion to find an appropriate country of deportation, but added that "the utmost the courts can or will do is to discharge the appellant from further imprisonment if the government fails to execute the order of deportation within a reasonable time." *Id.* at 957; see also *Saksagansky v. Weedin*, 53 F.2d 13, 16 (9th Cir. 1931) (upholding deportation order to Russia (but not to China) and holding that petitioner must be released if he could not be deported to Russia); *Wolck v. Weedin*, 58 F.2d 928, 930-31 (9th Cir. 1932) (upholding deportation order, but ruling, consistent with administrative practice, that alien should be released if deportation could not be effected within a reasonable time). See also *United States ex rel. Ross v. Wal-*

26 See An Act To Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, S 19, 39 Stat. 874, 889 (1917).

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lis, 279 F. 401, 403 (2d Cir. 1922) (requiring release if deportation could not be effected within reasonable period).²⁷

We recognized the continuing vitality of this rule in a case applying the 1917 Act that we decided in 1954. *Spector v. Landon*, 209 F.2d 481 (9th Cir. 1954). In *Spector*, the petitioner was an alien who had been ordered deported in 1930, almost a quarter of a century earlier, and had been out on bond for most of the intervening period, but whose deportation the government had been unable to accomplish for various diplomatic reasons. *Id.* at 482. He argued that as a result of the passage of time the deportation order was no longer valid. We rejected this contention, stating that

No cases have been found by counsel holding that a deportation warrant becomes invalid or unenforceable through mere lapse of time There are a number of decisions in habeas corpus to the effect that the right to hold the alien in custody under a deportation warrant persists for no more than a reasonable period. But such holdings lend no color to the contention made here.

Id. (emphasis added) (citations omitted). Thus, even as we denied *Spector's* claim, we recognized that the 1917 Act did not authorize indefinite detention pending deportation even though the statute did not, by its terms, place any temporal limit on the government's authority; we read the statute as containing an implicit provision that detention was authorized only for a "reasonable period."

27 Notably, the "reasonable time" allowed to effectuate deportation in such cases seems to have been quite short by contemporary standards. In

Caranica the court held that a two month deadline was not an abuse of discretion, 28 F.2d at 957, while in Wolck the court gave the government thirty days to implement the order, 58 F.2d at 931; in Wallis the Second Circuit required release after four months. 279 F. at 404.

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While these older cases did not interpret a statute exactly like the one we consider today, because the 1917 Act made no distinction between aliens whose release following the removal period was required and aliens who could be detained following that period, both the 1917 statute and the current law provide for custody pending deportation and set forth no specific time limitations as to the period of detention. Although these older cases do not make their reasoning entirely explicit, they appear to rely on the principle that, when faced with the absence of an express time limitation, courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention. That principle seems as valid today as it was under the 1917 Act. We too are faced with a statute that does not contain an express statutory proscription against release. Like the courts interpreting the 1917 Act, we assume that the statute implicitly provides for a reasonable limitation on the length of detention. In doing so, we refuse to presume that Congress authorized the indefinite detention of resident aliens long after they have finished serving their sentence merely because their country does not have a repatriation agreement with the United States.

VI.

In interpreting the statute to include a reasonable time limitation, we are also influenced by amicus curiae Human Rights Watch's argument that we should apply the well-established Charming Betsy rule of statutory construction which requires that we generally construe Congressional legislation to avoid violating international law. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-118 (1804)). We have reaffirmed this rule on several occasions. In *United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990), we explained that we adhere to this principle "out of respect for other nations." *Id.* at 1069 (citing *Chua Han Mow v. United States*, 730 F.2d 1308, 1311

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(9th Cir. 1984); see also *In re Simon*, 153 F.3d 991, 998 (9th Cir. 1998).

We recently recognized that "a clear international prohibition" exists against prolonged and arbitrary detention. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998).²⁸ Furthermore, Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, see 138 Cong. Rec. S4781-84 (Apr. 2, 1992), provides that "[n]o one shall be subjected to arbitrary arrest and detention." See International Covenant on Civil and Political Rights, opened for signature, Dec. 19, 1966, 999 U.N.T.S. 171, 21 U.N. GAOR Supp. (No. 16) at 54, entered into force Mar. 23, 1976, at Art. 9(1); see also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (hold-

ing that ambiguous Congressional action should not be construed to abrogate a treaty).

In the present case, construing the statute to authorize the indefinite detention of removable aliens might violate international law. In *Martinez*, 141 F.3d 1373, we expressed our approval of a district court decision in this circuit holding that

28 This court has held that within the domestic legal structure, international law is displaced by "a properly enacted statute, provided it be constitutional, even if that statute violates international law." *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991) (involving prolonged detention of excludable aliens); see also *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995). Those rulings, however, do not suggest that courts should refrain from applying the Charming Betsy principle. Rather, they stand for the proposition that when Congress has clearly abrogated international law through legislation, that legislation nonetheless has the full force of law. See Restatement (Third) of International Law S 115(1)(a) ("An Act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled"). Although Congress may override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations.

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"individuals imprisoned for years without being charged were arbitrarily detained" in violation of international law, *id.* at 1384 (citing *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1541 (N.D. Cal. 1987)). Given the strength of the rule of international law, our construction of the statute renders it consistent with the Charming Betsy rule.

Conclusion.

In the face of these compelling statutory arguments, we do not read S 1231(a)(6) as authorizing the indefinite detention of removable aliens. Rather, we hold that the statute authorizes the Attorney General to detain removable aliens only for a reasonable time beyond the ninety day removal period. While we could reach this construction of the statute simply by invoking the doctrine of constitutional avoidance, it is not necessary to rest our decision on that legal principle. As the above discussion makes clear, ordinary tenets of statutory construction lead us to that same result. What constitutes a reasonable time will depend on the circumstances of the various cases. Here, we need not address all the conceivable situations that could arise to delay or preclude removal. We need hold only that where it is reasonably likely that an alien who has entered the United States cannot be removed in the reasonably foreseeable future, detention beyond the removal period is not justified.²⁹

In *Ma's* case, the district court did not err in concluding that there is not a reasonable likelihood that the INS will be able to remove *Ma* to Cambodia. Although the INS offered evidence that the State Department has submitted a proposal for a repatriation agreement to the Cambodian government, both sides agree that the United States has no functioning repatriation agreement with that country, that the Cambodian

29 We recognize that our reference to aliens who have already entered is, in one sense, too broad. Aliens who entered the United States in the past but have since left for a significant time have no more constitutional rights than first-time would-be entrants. See Landon, 459 U.S. at 30; Mezei, 345 U.S. at 213. They are considered "excludable."

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government does not presently accept the return of its nationals from the United States, and that it has not announced a willingness to enter into an agreement to do so in the foreseeable future, (or indeed at any time). In the absence of a repatriation agreement, extant or pending, we must affirm the district court's finding that there is no reasonable likelihood that the INS will be able to accomplish Ma's removal.³⁰ Under these circumstances, the INS may not detain Ma any longer.

We stress that our decision does not leave the government without remedies with respect to aliens who may not be detained permanently while awaiting a removal that may never take place. All aliens ordered released must comply with the stringent supervision requirements set out in 8 U.S.C. S 1231(a)(3). Ma will have to appear before an immigration officer periodically, answer certain questions, submit to medical or psychiatric testing as necessary, and accept reasonable restrictions on his conduct and activities, including severe travel limitations. More important, if Ma engages in any criminal activity during this time, including violation of his supervisory release conditions, he can be detained and incarcerated as part of the normal criminal process.³¹

For the foregoing reasons, the district court's decision is

AFFIRMED.

³⁰ We note that our construction of the statute does not require us to "second-guess" or otherwise interfere with the foreign policy actions of the United States government. On the contrary, we have taken at face value the evidence submitted by a State Department officer regarding the status of the government's attempts to establish a repatriation agreement with Cambodia. He has candidly stated that he cannot predict when a repatriation agreement will be established and begin to function.

³¹ We note that the regulations governing Ma's release state that he can be detained for violating them, and moreover that violations of supervisory release conditions are punishable by fine and/or imprisonment under 8 U.S.C. S 1253(b).

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April 11, 2000, Tuesday, Late Edition - Final

SECTION: Section A; Page 25; Column 1; National Desk

LENGTH: 282 words

HEADLINE: Court Orders Aliens' Release After Sentences

BYLINE: AP

DATELINE: SAN FRANCISCO, April 10

BODY:

Hundreds of illegal immigrants in nine Western states who have completed prison terms for crimes in this country must be freed until the United States can persuade their homelands to take them back, a federal appeals court ruled today.

In a 3-to-0 ruling, a panel of the United States Court of Appeals for the Ninth Circuit rejected the argument of immigration officials that federal law authorized an indefinite, potentially lifelong, jailing of illegal immigrants whose native countries have no repatriation agreement with the United States.

The ruling will probably be appealed, said Bill Strassberger, a spokesman for the Immigration and Naturalization Service.

The court said the immigrants must be released 90 days after a final deportation order and allowed to remain free under I.N.S. supervision until their home country reached an agreement with the United States to accept deportees.

A 1996 federal law required deportation of noncitizens who committed a range of felonies, including most drug crimes.

The law said immigrants whose home countries refused to accept them "may be detained beyond the removal period."

The I.N.S. contended that the law allowed indefinite detention of immigrants it considered dangerous, but the court disagreed.

The ruling applies to immigrants from Cambodia, Vietnam and Laos, none of which has a repatriation agreement with the United States. It also covers some Cubans and some immigrants from the former Soviet Union.

The government estimates that 400 to 500 immigrants will be affected in the nine states covered by the Ninth Circuit. The I.N.S. said a year ago that there were 3,500 such prisoners nationwide.

4:46 AM Eastern Time

SECTION: State and Regional

LENGTH: 711 words

HEADLINE: Court says INS must release aliens who can't go home

BYLINE: By BOB EGELKO, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

In a case that may be headed for the Supreme Court, a federal appellate panel says immigration officials can't hold criminal immigrants indefinitely after their prison sentences when their home countries won't take them back.

Monday's ruling by the 9th U.S. Circuit Court of Appeals affects hundreds of immigrants in the nine Western states covered by the nation's largest appellate circuit. The Immigration and Naturalization Service estimated a year ago that there were 3,500 such prisoners nationwide.

For the most part, they are legal U.S. residents who committed felonies in this country, served their sentences and were then ordered deported, under a 1996 law greatly expanding the types of crimes that required deportation.

Unlike most nations, which accept deportees from the United States, these immigrants come from countries that have no repatriation agreements with the United States - Cambodia, Vietnam, Laos and Cuba, for example. Some immigrants from the former Soviet Union are in the same situation because their newly independent homelands don't recognize them as citizens.

The INS contends it can keep such people in jail if it considers them dangerous, potentially for life. The agency cited a provision of the 1996 law

that said immigrants who cannot be deported within 90 days "may be detained beyond the removal period."

A federal judge in Seattle ruled that indefinite detention without charges was unconstitutional. The appeals court, in a 3-0 ruling, reached the same result by a different route, saying the 1996 law did not support the INS position.

Without clear authorizing language, "courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention," said the opinion by Judge Stephen Reinhardt. He also said international law condemns "prolonged and arbitrary detention."

Reinhardt said the immigrants must be released 90 days after a final deportation order, and allowed to remain free under close INS supervision until their home country reaches an agreement with the United States to accept deportees.

The ruling was praised by William Aceves, a lawyer for Human Rights Watch and refugee organizations in the case. "This type of detention is a violation of international human rights norms," he said.

Two other appeals courts have upheld the INS, a split of opinion that normally increases the likelihood of Supreme Court review. The government will probably appeal, said INS spokesman Bill Strassberger.

"Our priority is to keep the community safe, and no one will be released if they are deemed a threat to public safety," Strassberger said.

He noted that the INS reviews all such cases every six months to decide whether a prisoner is still dangerous.

But Jay Stansell, an assistant federal public defender in Seattle, said the reviews are often just formalities because the immigrants are barred from taking part in rehabilitation programs while in INS custody.

Stansell said the government has estimated that 400 to 500 immigrants would be affected in the 9th Circuit.

The court ruled in the case of Kim Ho Ma, a Cambodian refugee who came to the United States with his family at age 2 and was convicted of manslaughter in a Seattle drive-by shooting 15 years later.

He served just over two years in state prison and spent nearly three more years in the custody of the INS, which could not deport him to Cambodia because of the lack of a repatriation agreement but said he was still dangerous. Ma

challenged the INS policy and was released last September by U.S. District Judge Robert Lasnik.

Ma was arrested recently in nearby Kent, Wash., for investigation of misdemeanor assault. He was released on \$1,000 bond in that case, but federal authorities will ask Lasnik to return him to INS custody April 19 for violating the terms of his release, said Harold Malkin, spokesman for the U.S. Attorney's office.

The 9th U.S. Circuit Court of Appeals governs federal courts in California, Nevada, Arizona, Oregon, Washington, Montana, Idaho, Alaska and Hawaii, as well as Guam and the Northern Marianas.

The case is Ma vs. Reno, 99-35976.

On the Net: The ruling is available at <http://www.ce9.uscourts.gov>

Los Angeles Times

December 14, 1999, Tuesday, Home Edition

SECTION: Metro; Part B; Page 1; Metro Desk

LENGTH: 531 words

HEADLINE: 'LIFER' ILLEGAL IMMIGRANTS SEEK RELEASE;

CRIME: THEIR LAWYERS SAY INDEFINITE DETENTION AFTER DOING TIME IS UNCONSTITUTIONAL.

BYLINE: HILARY E. MacGREGOR, TIMES STAFF WRITER

BODY:

Lawyers for about 130 illegal immigrants being held indefinitely in detention centers and jails from Lancaster to San Pedro argued in U.S. District Court on Monday that they should be released if their home countries will not take them back.

The hearing involved Immigration and Naturalization Service detainees known as "lifers," who are still being held in permanent detention after doing their time for crimes ranging from petty theft to drug trafficking. There are about 3,800 lifers in the United States.

At issue is whether deportable illegal immigrants have constitutional rights, such as the right to due process. Chief Judge Terry J. Hatter said he expected to make a ruling within 30 days on whether it is lawful to detain them indefinitely.

"We are dealing with the constitutional right of an alien person who has no right to be here," said John Bartos, special assistant to the U.S. attorney's office in Los Angeles. "That is the reason they are being held."

David S. McLane, a deputy public defender, argued that the INS has a right to hold people only if it plans to deport them. But when deportation becomes impossible, he said, the INS no longer has a compelling reason to hold them.

"Your constitutional rights remain, even if you are ordered deported," McLane said. "The Constitution does not allow individuals to be detained based on the speculation that they are dangerous."

In July, a federal court panel in Seattle ruled that immigrants awaiting deportation because of crimes they have committed cannot be jailed indefinitely after they have served their time. That ruling was binding only in western Washington state.

The majority of long-term detainees in INS facilities throughout the country are from Cuba, Vietnam, Laos and Cambodia. All these lifers would have been freed if they were U.S. citizens or were from a country that would have accepted their repatriation.

About 70 of the defendants in Monday's hearing are from the Mira Loma Detention Center in Lancaster. Others are being held at Terminal Island in San Pedro and in local jails such as Santa Ana's.

The hundreds of pages of court documents portray a picture of hopelessness.

This past spring, Thanom Posavtoy, a lifer from Laos being held at San Pedro, hanged himself in the shower with his bedsheet. Fellow detainees said he became depressed after learning it was unlikely that he would ever be released, court documents said.

By law, detainees are entitled to a custody hearing within 90 days of their deportation orders. Federal public defender Robert Boyle said only four of 122 clients entitled to such hearings received them.

"How long are they going to keep that person in custody, when they have already punished them for their crime?" asked Ohanes Darbirian, whose 34-year-old son, Suren, is being held indefinitely at the Mira Loma Detention Center in Lancaster.

Suren served a year and three months in prison on a felony charge and has been held in Lancaster for a year with no end in sight. Suren was born in Armenia, and came to the U.S. 22 years ago.

"How do they know that person is dangerous?" Darbirian asked of his son. "How do they know?"

LANGUAGE: English

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Los Angeles Times

April 11, 2000, Tuesday, Home Edition

SECTION: Part A; Page 3; Metro Desk

LENGTH: 1006 words

HEADLINE: CALIFORNIA AND THE WEST;

COURT BANS THE INDEFINITE DETENTION OF IMMIGRANTS;

INS: APPELLATE JUDGES OVERRULE THE POLICY UNDER WHICH CONVICTS WHO CAN'T BE DEPORTED TO THEIR HOMELANDS ARE KEPT IN PRISON EVEN AFTER THEY'VE SERVED THEIR TIME.

BYLINE: HENRY WEINSTEIN, TIMES LEGAL AFFAIRS WRITER

BODY:

It is illegal for the federal government to indefinitely imprison immigrants convicted of crimes who cannot be deported because their native lands--such as Vietnam, Cambodia, Cuba and spinoffs of the former Soviet Union--will not take them back, a federal appeals court ruled Monday.

The 3-0 decision by the U.S. 9th Circuit Court of Appeals in San Francisco has immediate ramifications for about 790 detainees in California and hundreds of others in eight other Western states, and ultimately could affect more than 3,800 people detained nationwide by the Immigration and Naturalization Service.

The ruling upholds decisions by a special panel of five federal trial judges in Seattle and U.S. District Judge Terry J. Hatter in Los Angeles, who have said the INS policy violated the immigrants' rights.

The appeals court based its decision, however, on an interpretation of a 1996 immigration reform law rather than on constitutional grounds, which could make the ruling more likely to survive a Supreme Court challenge.

The 9th Circuit's ruling is at odds with decisions rendered by federal appeals courts in New Orleans and Denver. That makes it likely the U.S. Supreme Court will decide to reconcile the conflict, said William J. Aceves, a professor at California Western Law School in San Diego. Aceves filed a brief in support of the immigrants on behalf of advocacy groups including Human Rights Watch and the Jesuit Refugee Service.

An INS spokesman said the agency probably would appeal the ruling.

Attorneys for the detainees were jubilant.

"It's a very significant victory in terms of saying that the INS doesn't have this authority that it had been assuming it does--that it can hold people for the rest of their lives if they need to," said Judy Rabinowitz of the American Civil Liberties Union's Immigrants Rights Project in New York.

The lead plaintiff in the case, Kim Ho Ma, a 22-year-old Cambodian refugee, was detained for more than two years by the INS after serving 38 months in prison for his role in a gang-related shooting five years ago. Ma, represented by Seattle Deputy Public Defender Jennifer Wellman, was freed late last year, along with four other Seattle men, after the panel of federal trial judges decided that they had been illegally detained.

The 9th Circuit Court ruled that the INS lacks authority under federal immigration laws to continue to detain an immigrant who has finished serving his criminal sentence for more than a reasonable time beyond the normal 90-day statutory period authorized for removal.

"More specifically, in cases like Ma's, in which there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, we hold that it may not detain the alien beyond that statutory removal period," wrote Judge Stephen Reinhardt of Los Angeles, whose opinion was joined by judges David R. Thompson of San Diego and Thomas G. Nelson of Boise, Idaho.

The judges emphasized that their decision does not leave the government without remedies. The judges said that all immigrants who are ordered released must nonetheless report to immigration officers periodically, submit to medical or psychiatric testing and accept severe travel restrictions.

The three-judge panel represented a broad range of the political spectrum. Reinhardt, an appointee of President Jimmy Carter, is considered the circuit's most liberal judge; Thompson, a Ronald Reagan appointee, and Nelson, a George Bush appointee, are considerably more conservative.

Hundreds of immigrants affected by the ruling come from such nations as

Cambodia, with which the United States has no formal repatriation agreement. Others come from countries that simply will not take back the individuals in question.

Public defenders said that clients who may go free include natives of Algeria, Belarus, Cameroon, China, Eritrea, Iran, Iraq, Laos, Somalia and Ukraine.

The vast majority of the immigrants have been convicted of crimes, served their sentences and been ordered deported by the INS under a 1996 law designed to remove noncitizen criminals from the United States.

The INS had contended that the immigrants were not indefinitely detained and that their cases were reviewed periodically, but the Seattle judges said: "Our review of the record confirms that the INS does not meaningfully and impartially review the petitioners' custody status."

The 9th Circuit Court did not take issue with that conclusion.

The lower court judges also rejected the government's contention that criminal immigrants who have been ordered deported were no longer entitled to the rights of U.S. citizens, including due process of law.

The 9th Circuit judges indicated that they agreed with the Seattle judges but said they did not have to reach a conclusion on that issue because their decision was based simply on a reasonable reading of the immigration law--which does not explicitly state that indefinite detention is permissible.

The appellate judges wrote that their interpretation of the 1996 immigration law did not require them to "second-guess," or otherwise interfere with the foreign policy actions of the United States government.

"On the contrary, we have taken at face value the evidence submitted by a State Department officer regarding the status of the government's attempts to establish a repatriation agreement with Cambodia. He has candidly stated that he cannot predict when a repatriation agreement will be established and begin to function."

The judges also emphasized that international law condemns "prolonged and arbitrary detention."

Since the lower court ruling last summer, the INS has revised its review procedures, leading to the release of about 100 detainees in the Seattle area.

Ma, however, was not one of them. He gained temporary freedom last November when a Supreme Court justice rejected government arguments that he constituted a

threat to public safety.

Times staff writer Hilary E. MacGregor contributed to this story.

LANGUAGE: English

Immigration and Naturalization Service**TEXT ONLY****WHAT'S NEW****FAQs****HOW DO I...?****WHERE IS...?****GLOSSARY****FEEDBACK****INS HOME**

U.S. Department of Justice
Immigration and Naturalization Service
Washington, DC 20536



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Office of Public Affairs
(202)514-2648 Fax:(202)514-1776

NEWS RELEASE

August 6, 1999

INS Implements New Procedures on Long-Term Detention

Interim Procedures Will Be Followed by Regulatory Process

WASHINGTON – Attorney General Janet Reno and Immigration and Naturalization Service (INS) Commissioner Doris Meissner today have adopted a plan for the permanent reform of the procedures governing custody review of inadmissible and criminal aliens who are subject to final orders of removal. To carry out the first stage of this plan, INS has put in place new procedures, effective immediately, to ensure fair, independent and consistent review of the continued detention of such aliens.

These steps also meet Commissioner Meissner's April commitment to provide a fair and consistent review process that is conducted in a timely, methodical manner. The reviews will determine eligibility for release of these individuals under authorization provided in the changes in the 1996 immigration law.

"INS' priority is keeping communities safe, and no one will be released if he or she is deemed to pose a threat to public safety," said Commissioner Meissner. "The agency is committed to fairness, consistency and timeliness. The procedures announced today will meet these commitments while keeping community safety a top priority. In addition, these procedures will provide individuals in long-term detention and their families key information on when their cases will be reviewed, as well as the procedures for those reviews."

These procedures apply to any alien ordered removed who is inadmissible, removable and who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. They cover aliens convicted of an aggravated felony and non-aggravated felon aliens with final orders of exclusion who have been detained beyond the 90-day removal period prescribed by law.

While INS has begun the regulatory process that will put permanent regulations into place, the following interim procedures will be in effect:

- INS headquarters will perform an annual review of cases in which the district recommends continued detention. Reviews at the headquarters level will ensure that the procedures are being administered equitably and consistently across the board.

- INS District Directors will continue to make an initial review prior to the expiration of the 90-day removal period.
- Within 30 days of the District Director's custody review, the alien must receive written notification of a release decision. A decision to release should specify the conditions of release. A decision to detain will clearly delineate the factors presented by the alien in support of his or her release, and the reasons for the District Director's decision.
- If release is not authorized, a second review will be scheduled nine months from the date of the final administrative order of removal or six months after the original review, whichever is later. Written notice will be given to each alien at least 30 days prior to the date of each review. The notice will specify the factors to be considered and explain that the alien has the opportunity to demonstrate by clear and convincing evidence that he or she is not a threat to the community and is likely to comply with the removal order. For this review, an interview is mandatory. Detention decisions at this stage require concurrence from INS headquarters.
- If release is not authorized, the District Director will conduct subsequent reviews at six month intervals with an annual mandatory concurrence at headquarters. The District Director may consider new information supplied by the alien in support of his request for release between scheduled reviews.
- Release decisions will consider criminal and immigration violations, detention history, violence while incarcerated, evidence of rehabilitation, and ties to the community. Favorable and adverse factors will be weighed to determine whether the detainee has demonstrated by clear and convincing evidence that he/she does not pose a threat to the community and is likely to comply with the removal order.
- Aliens will receive written notice of custody reviews. The notice advises the aliens that they may present information supporting a release and they may be assisted by an attorney or other person at no expense to the government. The alien will receive a separate notice of the opportunity for an annual interview and a written decision with an explanation of its basis.

– INS –



Irene Bueno

07/10/99 03:21:36 PM

Record Type: Record

To: See the distribution list at the bottom of this message
cc: Erica R. Morris/WHO/EOP@EOP, Marjorie Tarmey/WHO/EOP@EOP, Steven M. Mertens/OMB/EOP@EOP
Subject: INS press release on new legal opinion re: Mandatory Detention

For your immediate review is an INS press release announcing a new legal opinion that gives some immigrants who completed criminal sentences prior to implementation of the new mandatory detention requirements in October 1998 to be **considered** for release from INS detention pending their deportation/removal hearing. This new legal policy will be welcomed by many organizations and Congressional members who have argued that the INS' interpretation was too restrictive.

INS' new legal opinion was prompted by 11 recent federal district courts rejection of INS' strict interpretation of the mandatory detention provisions of IIRAIRA and found that certain immigrants who completed their criminal sentences prior to October 1998 must be at least considered for release from INS detention pending their deportation/removal hearing. INS had interpreted this provision to require mandatory detention of all immigrants who were in removal proceedings as of October 1998 regardless of when they completed serving their criminal sentence.

In announcing this new policy, INS makes clear that they do not plan to release any immigrants who pose a threat to public safety and will make a case-by-case determination. As a result of this new policy, approximately 525 individuals of the 13k individuals currently INS custody will be considered for bond or parole.

This press release is scheduled to be released on Monday afternoon, 7/12. The urgency of releasing this new legal opinion on Monday is INS' plans to announce this new legal opinion in a pending case that will be argued on Tuesday, 7/13. INS has a roll-out plan for the Hill, groups and press that will begin Monday afternoon.

Please let me know if you have any questions or comments. Thanks.

----- Forwarded by Irene Bueno/OPD/EOP on 07/10/99 02:43 PM -----



Maria.T.Cardona@usdoj.gov

07/09/99 06:44:00 PM

Record Type: Record

To: Irene Bueno/OPD/EOP, carole.florman@usdoj.gov (Receipt Notification Requested)
cc:
Subject: press release on new legal opinion

Carole,

Please take a look at the attached release. We plan on releasing on Monday afternoon after briefing our DDs and the Hill. DDs briefing is at 1:00pm, Hill

briefings at 3:00pm. Press release shortly thereafter. John Morton and Patty

First also have a copy of the release. If you have any changes, comments, please let me know ASAP on Monday morning. Qs and As will follow first thing on Monday as well.

Irene, per your conversation with Cathy...



- new INS legal Interpretation

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NEWS RELEASE

July 12, 1999

INS Adopts New Legal Opinion on Mandatory Detention

WASHINGTON – The U.S. Immigration and Naturalization Service (INS) has adopted a new legal opinion which gives some aliens who completed criminal sentences prior to the implementation of mandatory detention requirements in October 1998 the right to be considered for release from detention pending their removal hearings.

While emphasizing that no one who poses a threat to public safety will be released and that a case-by-case review will be conducted, INS Commissioner Doris Meissner said the new legal opinion mirrors recent federal district court rulings which have found that certain criminal aliens who completed their criminal sentences prior to Oct. 9, 1998 must be at least considered for release from INS detention.

"The 1996 act gave INS important new tools that have helped us reach record levels in the removal of criminal aliens," Commissioner Meissner said, "but in this instance the federal courts have consistently ruled that our interpretation of the law went too far. As a result, INS has determined that the agency must conduct a case-by-case review and exercise its discretion on those individuals who completed their criminal sentences prior to Oct. 9, 1998."

Commissioner Meissner said that as a result of the decision, approximately 525 of the more than 13,000 criminal aliens currently in INS custody will be considered for bond or parole from detention pending the outcome of removal proceedings. These are individuals without a final order of removal who completed their criminal sentences prior to Oct. 9, 1998. INS will make determinations on a case-by-case basis, and no criminal alien who poses a threat to public safety will be released by INS. The decisions of INS regarding release are subject to review by immigration judges of the Executive Office for Immigration Review.

The INS action adopts a legal opinion issued by the Department of Justice Office of Immigration Litigation (OIL) on May 12. The OIL opinion came at the request of INS in the wake of federal court cases nationwide which successfully challenged the mandatory detention requirements of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). To date, 11 federal district courts have rejected the former INS position.

—more—

INS Adopts New Legal Opinion on Mandatory Detention**Page 2**

The opinion centers on the interpretation of the words "released" as used in provisions of IIRIRA which establish mandatory detention, without bond, for most criminal aliens, including those with legal status, who are subject to removal proceedings because of criminal convictions and are "released" after Oct. 8, 1998.

In implementing the mandatory detention provisions of IIRIRA INS had determined that "released" referred to release from INS custody after Oct. 9, 1998. That interpretation meant that most criminal aliens were subject to mandatory detention regardless of when or how long ago they were released from criminal incarceration. However, federal courts have consistently held that "released" referred only to those aliens who were released from their criminal sentences and taken into custody by INS on or after Oct. 9, 1998.

-INS-

INS Shifts Policy on Criminal Detainees

Agency Releasing Some Immigrants

By PHILIP P. PAN
Washington Post Staff Writer

AL

The U.S. Immigration and Naturalization Service has launched a review of the thousands of cases of immigrants with criminal histories who have been jailed pending deportation, and begun releasing some of those whom officials decide are neither dangerous nor likely to flee future court hearings.

The systematic review follows a series of at least 12 federal court rulings across the country against the previous INS policy of detaining all people eligible for deportation for their crimes, regardless of whether they had completed their original sentences long ago, received suspended sentences or never received any jail sentence.

Officials said that only a small fraction of the estimated 15,000 immigrants with criminal records in INS custody at any time may qualify for release under the new policy, and that the INS will continue with deportation proceedings against them after they are released.

But immigrant rights advocates hailed the decision to scrap the mandatory detention rule as a victory in their campaign against the 1996 laws expanding the categories of crimes for which immigrants can be deported. The laws also have been under attack because they stripped judges of the power to grant exceptions and were applied retroactively.

The new INS review consists of two parts. One, which began last month, covers immigrants who completed their original sentences before the 1996 laws took effect. The other covers immigrants who have been jailed indefinitely because their countries of origin refuse to take them back. In some parts of the country, the INS began that portion of the review on an informal basis in April, but issued uniform, national rules for it on Friday.

Rep. Lamar S. Smith (R-Tex.), chairman of the House judiciary immigration subcommittee, has not objected to the review. But he

DETENTION, From A1

has urged the INS to exercise extreme caution and threatened to hold the agency accountable "any time one of these individuals commits a subsequent crime."

Among those who have benefited from the review is Assegedech Biya, a 36-year-old Ethiopian who lives in Alexandria. She had been in the Rappahannock Regional Jail in Fredericksburg for more than six months, ever since INS agents showed up at the McLean hotel where she worked and said they were going to deport her for a shoplifting conviction.

She tried to steal clothes for her children five years ago, was caught, convicted of felony larceny and placed on probation. The theft, Biya said, was a desperate reaction to an abusive husband who had been withholding money from her and who later pleaded guilty to domestic assault and battery.

Now, he has the children. And until Friday, when the INS released her after inquiries about her case from The Washington Post, she had been stuck in jail.

"I came here to save my life," said Biya, who fled torture and imprisonment in her homeland and sought asylum in the United States in 1992. "Now I know there are no human rights here. How can you separate a mother and her children like this?"

Stories of individual hardship such as Biya's have been surfacing ever since Congress passed the 1996 laws. Now, immigrant rights

advocates say, momentum appears to be building for Congress to do something about them.

"We've never had such a good opportunity to get some of these laws overturned," said Jeanne Butterfield, executive director of the American Immigration Lawyers Association. "There are thousands of stories like [Biya's], and it's building to a critical mass. ... Most members didn't understand what they had wrought, and now they're beginning to realize that maybe they went too far."

Any effort to change the 1996 laws must clear an obvious hurdle: There's not much of a constituency for helping criminals, much less immigrants who are criminals. In addition, because people can be deported for crimes ranging from murder to drunken driving, it's unclear how many of them are people like Biya and how many are more serious felons.

INS spokesman Russ Bergeron said nearly half of the 55,869 criminal immigrants deported last year were convicted of drug offenses, and about 5,500 of the deportees were legal residents.

Still, some supporters of the 1996 laws are having second thoughts.

For example, Rep. Bill McCollum (R-Fla.), a conservative Judiciary Committee member considered tough on immigrant crime, has filed a bill to stop the deportation of a convicted Canadian thief who is the son of a local GOP official in his district. He is considering additional legislation.

In addition, the INS itself has called on Congress to restore some of the power of judges to review these deportation cases. Rep. Lincoln Diaz-Balart (R-Fla.) is pushing a bipartisan bill with more than 60 co-sponsors to do that. "This is gathering steam because more and more cases are coming to people's attention," he said.

One of those involves Rick Siridavong, 23, a Springfield resident whose family fled to the United States from Laos when he was 5. Siridavong applied for citizenship last year—"to show my appreciation for this country"—and ended up in jail.

Five years ago, Siridavong had been sentenced to probation and community service for stealing a car radio. He didn't realize the act made him deportable, and he openly admitted the conviction on his citizenship application. INS agents responded in February by going to his home and handcuffing him in front of his mother.

There was another wrinkle in Siridavong's case: A handful of countries don't accept criminal deportees, including Cuba, Vietnam, Cambodia—and Laos. As a result, he faced the prospect of being detained indefinitely, like an estimated 3,500 other "lifers" in INS custody.

He was placed in a room at the Virginia Beach jail with about 30 other criminal deportees. About half of them were serious criminals, he said. But he said the rest were people like himself: a man who once stole a carton of ciga-

rettes, another who removed a "parking boot" from his car, someone who bounced several checks.

"I was pretty depressed, and I was angry that the government could do this," he said. "We tried to get Canada or Australia to accept me. I mean, I'd rather go some place I knew nothing about than stay locked up in there. It was terrible."

After nearly five months' incarceration, a judge ordered Siridavong released on \$1,500 bond in July. While Siridavong sat in jail, lawyers across the country continued to challenge the 1996 laws. Cuban deportees being held indefinitely by the INS in Miami staged a hunger strike.

As for Biya, INS spokeswoman Ernestine Fobbs said it was only a coincidence that she was released a day after The Post asked about her case. But Biya's immigration advocate, Chris Einoff, said he tried to get her released weeks ago and believes The Post's interest expedited the process.

Biya said she will stay at a women's shelter until she finds a new home and job, adding that she will try to regain custody of her children. But she is worried because she still could be forced to return to Ethiopia, where she said she spent two months in prison and was beaten and tortured with electric shocks for her political activities.

"It doesn't make any sense," she said. "This isn't the American dream. This isn't my dream."

Jailed Immigrants On Hunger Strike

Men Being Detained by INS Protest Deportation Effort

By PHILIP P. PAN
Washington Post Staff Writer

At least a dozen men jailed by the Washington office of the U.S. Immigration and Naturalization Service are participating in a hunger strike to protest government efforts to deport them that have kept them in prison for months and in some cases years.

Most of the protesters at the Piedmont Regional Jail in Farmville, Va., face deportation because of convictions for crimes ranging from distribution of marijuana to armed robbery. But they have been detained indefinitely because their countries of origin—Cuba, Cambodia and Iran, among them—refuse to take them back.

Others don't have criminal records at all, including a West African immigrant seeking political asylum who said he has been held by the INS since he arrived at Dulles International Airport nearly three years ago. In addition, some of the inmates have convinced judges that they should not be deported but remain incarcerated by the INS for various reasons.

STRIKE. From B1

One Cuban detainee who said in a telephone interview that he had not eaten in 15 days was placed on intravenous fluids briefly on Monday, and jail officials said they persuaded another inmate who had gone without food for a week to eat Tuesday. Officials are monitoring the health of the other protesters as well.

It is unclear how rigorous the hunger strike is. Inmates said they are sustaining themselves on water and an occasional bite. Lewis Barlow, the jail superintendent, said that the strikers have been refusing meals but that most have been purchasing soup and snacks at the jail's commissary.

INS detention policies have been the target of hunger strikes before, most notably last spring by Cuban detainees at the federal Krome Detention Center outside Miami. That protest, along with a series of federal court rulings against the INS policies, led the government to begin reviewing deportation cases and releasing some immigrants who were not considered dangerous or a flight risk.

At the time, the Washington office of the INS, which has jurisdiction over the District and Virginia, said it was examining 43 cases of individuals under long-term detention to identify those eligible for release pending deportation. But the hunger strikers at Piedmont and their attorneys said they have seen no sign of such a review.

"Theoretically, they're supposed to have a procedure, but in practice it hasn't happened," said Beverly Yeskolski, a lawyer who represents Sophan Phith, 22, a Cambodian refugee who has lived in Chesapeake, Va., since age 4. "These people are sitting in jail indefinitely. . . . There's nothing to stop INS from keeping these people in prison for the rest of their lives."

Phith was convicted on a marijuana distribution charge in 1997 and served a nine-month prison term, followed by enrollment in a work-release program. The INS picked him up in December but has been unable to expel him because Cambodia does not accept deportees from the United States.

"I made a mistake in high school. I committed a crime. But I served nine months, and afterwards the American kids went home, but I'm still here," he said. "I'm going to stay on hunger strike until there's some justice. . . . I'm weak now. Sometimes, when I walk, I black out."

Several residents of the Washington area are among the protesters. Mohammad Haghverdi, 47, of Waldorf, a permanent resident

from Iran, has been detained since March because of a 1994 misdemeanor battery conviction. Juan Benito Rodriguez, 35, of Alexandria, a Cuban-born permanent resident, was convicted on a cocaine charge last year.

Inmate Elvis Lewis, 40, of Stafford, said the hunger strike was also intended to draw attention to the "horrible" conditions at the jail. He said the 60 or so INS detainees there are not separated from other inmates. The facility is crowded and the lights remain on 24 hours a day, he said.

Lewis, who fled to the United States from Grenada in 1981 and faces deportation because of a 1984 misdemeanor marijuana conviction, said the strikers also want to be held in facilities closer to their families and attorneys. The jail is about 60 miles west of Richmond and about 170 miles from Washington.

INS spokeswoman Ernestine Fobbs said that the agency reviews the cases of deportees on a regular basis and that two officers have been sent to the jail to "address the needs of each [protester] and hear their concerns."

"We're monitoring the situation. . . . We are taking this seriously and are working toward a reasonable solution of the matter," she said. "We will ensure that all detained aliens in our custody will be treated with dignity and respect."

Jail officials said the only inmate who has required medical attention is Claudio Monreal, 37, a Cuban-born construction worker from Harrisonburg, Va., who was convicted last year of assault and battery for spitting on a police officer. He has been held by the INS since November 1998, though a judge in April decided he should not be deported.

"I won my case, but they're still holding me, and I don't know why," said Monreal, who was placed on intravenous fluids Monday. "I'm not a threat to society."

Two of the protesters say they are being detained for reasons other than a previous criminal conviction.

"I don't know why I'm jailed. I've spent almost three years in jail, and I want my freedom," said Ali Camara, 44, an immigrant from Guinea who apparently applied for and was denied political asylum. "I'm seeking protection against torture. I can't go back to Guinea, because I will be tortured by the government."

Like many of the detainees, Camara speaks little English and does not have an attorney. INS officials said they were reviewing the cases and could not yet comment on the circumstances of Camara's detention.

GOP candidates point to people leaving party

Republicans appeared Sunday to be fracturing further as several presidential candidates criticized GOP leaders over the issue of party defectors.

Gary Bauer, Patrick Buchanan and Steve Forbes, all seeking the Republican presidential nomination, defended Sen. Bob Smith, R-N.H., who is taking his presidential hopes to a third party. Bauer and Forbes said they will remain in the GOP, but Buchanan said he wasn't ruling out anything.

"If they (Republican leadership) slam their door shut, well we'll just have to look for another way," Buchanan told CBS's *Face the Nation*.

Bauer told Republican National Chairman Jim Nicholson that "like millions of other Republicans, (Smith) is concerned by the retreat of our party's leadership on matters of fundamental principle."

Forbes said the GOP establishment should "stop running people like Bob Smith out of the party."

Many GOP candidates also are upset with the leadership



By Jeff Bunday, AP

Alexander: Candidate greets Ovid Toresdahl during campaign stop in Eagle Grove, Iowa, on Saturday.

for its seeming embrace of Texas Gov. George W. Bush to be the nominee long before the first primary. Lamar Alexander, still in single digits in the polls despite campaigning for six years, said, "It is presumptuous of the big money and the media to say it's over eight months before it starts."

Smith, running near the bottom of the 12-candidate GOP presidential field, is expected to announce this week that he will seek the nomination of the U.S. Taxpayer Party. Howard Phillips, who founded the party in 1989, said he's confident Smith would win the nomination.

But Steve Duprey, the New Hampshire state GOP chairman, said Smith's move ends his political career in the state.

KASICH MAY QUIT RACE: House Budget Chairman John Kasich of Ohio is considering pulling the plug on his long-shot quest for the Republican presidential nomination, party officials said Saturday. Kasich campaign spokesman Todd Harris said Sunday that "it's true that we're assessing the campaign, but what we're doing today is no different than the assessments we have been making over the last six months. . . . At some point you stop assessing and you either jump headfirst into the waters or you don't."

Kasich would have to spend nearly a third of the \$1.7 million in his presidential campaign fund on the Aug. 14 Iowa straw poll, which is drawing a great deal of media attention. The eventual GOP nominee has always come from the top three finishers in the Iowa straw poll.

CONGRESSIONAL PARTY FUND-RAISING: Democrats, who are within six votes of taking back control of the House next year, are celebrating a psychological victory because Republicans raised only \$9 million more for congressional candidates in the first six months of the year.

From Jan. 1 to June 30, the Democratic Congressional Campaign Committee (DCCC) took in \$17 million, a record for them, according to Erik Smith, a spokesman for Rep. Patrick Kennedy, D-R.I., chairman of the congressional committee. It also indicates that the traditionally cash-strapped Democrats are gaining on the GOP in fund-raising.

The National Republican Congressional Campaign (NRCC) collected \$26 million in the same six-month period.

During the first half of every year since 1995, the NRCC raised about \$3 for every dollar the DCCC collected. This year, Democrats narrowed that margin to less than two-to-one. Moreover, Democrats believe they ended the year with slightly more cash in the bank than Republicans. Two weeks ago, Rep. Tom Davis, R-Va., the chairman of the GOP congressional committee, said Republicans had \$10 million in cash as of June 30. The Democrats had \$10.6 million, Smith said. "Republicans will always have more money, but the fact that we were able to level the playing field at this point in the cycle is just incredible," Smith said. — Kathy Kiely

BRADLEY AND RACE RELATIONS: Democratic presidential hopeful Bill Bradley told thousands of NAACP delegates Saturday night that racial justice would be a top priority of his administration. "Race is the reason I'm in politics," the former New Jersey senator and NBA star told the nation's largest civil rights group at its convention in New York. He said watching the debate and vote on the 1964 civil rights bill helped push him into politics.

Written by Paul Leavitt with staff and wire reports

USA TODAY · MONDAY, JULY 12, 1999

Court clarifies rights of immigrant ex-cons

By Patrick McMahon
USA TODAY

SEATTLE — Vietnamese immigrant Bin Phan, 27, convicted of theft and drug-related crimes, got his first taste of freedom over the weekend after a two-year stay in state and federal jails that seemed to have no end.

Phan is one of several thousand immigrants nationwide who have been convicted of crimes, served their sentences and then were ordered deported. But, because their home countries refuse to let them return, they remain in federal custody.

On Friday, a five-judge federal court panel here ruled that the federal government cannot keep Phan and others like him locked up forever.

Immigrants, once they move to the USA, have constitutional rights like anyone else — even if ordered deported, the judges said. "It is excessive to detain an alien indefinitely if deportation will never occur."

Immigration and Naturalization Service Commissioner Doris Meissner told Congress last fall that the INS was holding at least 2,500 long-term detainees that it wants to deport, but can't.

In April, Meissner announced a plan to review the status of the 2,500 detainees for possible release, but the court said Friday that Meissner's plan "does not meaningfully and impartially review the petitioner's custody status." A federal immigration judge should do such a review, the court said. INS spokesman Russ Ber-

geron said the agency would review Friday's decision for possible appeal. But he questions how much impact it will have. "At most, the ruling would affect the district court where it was made," he said.

The Seattle ruling dealt broadly with the issue of long-term detainees and then addressed the first five of 120 similar cases waiting to be heard here. Phan was released Friday pursuant to court order.

A second immigrant was released Saturday after the U.S. Court of Appeals in San Francisco rejected the federal government's request to postpone release pending appeal. Action on the other three is still pending, and the Seattle court ordered an expedited review of the other 120 cases.

Although similar cases are being considered in several states, the Seattle decision "is the only ruling of this magnitude," said Jayashri Srikantiah, attorney for the American Civil Liberties Union Immigrant Rights Project in San Francisco. "This case is especially important because it was a unanimous ruling of the five Seattle judges . . . all well-respected. It will have a significant impact across the country."

Jay Stansell, assistant federal public defender in Seattle, said most of the people involved in these cases are not hardened criminals. "They are the most highly motivated former criminals . . . I've ever seen," said Stansell. Many have parents, spouses and children in Seattle. "These people are our neighbors."

...come in advance of the season, which begins in mid-
...e 26 new comedies and dramas premiering this fall, none
...es a minority in a leading role. Secondary minority characters
...sparse, with few blacks in supporting roles, and Latinos, Asian
Americans, American Indians and other ethnic groups almost non-
existent.

In recent years, in the absence of activism by the NAACP, other civil rights leaders and groups such as the Rev. Jesse Jackson, the Brotherhood Crusade and the Beverly Hills/Hollywood NAACP have staged periodic protests on minority images and the lack of diversity on television. Last season, several of these groups targeted the UPN Civil War-era comedy, "The Secret Diary of Desmond Pfeiffer," for being racially offensive; however low ratings were the principal reason for the show's eventual cancellation.

The pronouncement by Mfume is the strongest public attack of the new season's lack of diversity by a national leader. Already the networks have been hastily scrambling to increase minority cast members on the new shows.

Among the high profile shows premiering this season with all-white casts are NBC's "The West Wing," a drama set in a liberal White House; ABC's "Wasteland," about six "twentysomethings" living in New York City; CBS' "Love or Money," a comedy about romance in an upscale New York City apartment building; Fox's "Manchester Prep," set at a prestigious New York prep school, and NBC's "Cold Feet," about three couples in varying stages of relationships.

"When the television viewing public sits down to watch the new prime-time shows scheduled for this fall's lineup, they will see a virtual whitewash in programming," Mfume said Sunday. "This whitewash exists because none of the 26 new shows have a minority in a leading or starring role. This glaring omission is an outrage and a shameful display by network executives who are either clueless, careless or both."

Miller also said the test on the embryos was clinical but the results could then have been put to "a dual purpose."

The fresh concerns of possible impropriety by Cornell are surfacing at a time when UC Irvine has spent \$20 million settling all but a handful of the 113 lawsuits filed against it by couples who had eggs and embryos stolen from them while being treated at the UC Irvine fertility center.

The lawsuits against Cornell were filed in Orange County in 1995 by two California couples whose embryos were shipped to the New York City medical center from UC Irvine. The suits charge Cornell with fraud and professional negligence for using the embryos in research without learning whether patients had given consent.

At issue in determining whether the embryos at Cornell were used improperly are two different standards for patient consent.

Consent for clinical work is looser. Generally, patients give consent to their physician and that covers lab work or analysis of tissue, no matter where it is done, if it helps in that patient's care.

Human research generally cannot be conducted unless patients give written consent and that consent is in the hands of the researcher.

In contending that the university's work was clinical, Cornell lawyer Miller pointed to an affidavit in which Munne, the Cornell scientist, testified that the tests were performed at Asch's request and therefore Munne did not need to get a separate consent from the patients.

But several bioethicists said Cornell scientists should have checked with the patients or at least seen and verified written consent forms, even if it was clinical work.

Miller said that "as far as Cornell knew, UCI had gotten that consent."

All parties agree that neither Cornell nor Munne obtained any research consent for this work. And Munne's answers about how he learned there was clinical consent did not satisfy his Cornell superiors, who faulted him in a previously unreleased 1996 response to the NIH.

"Dr. Munne failed to obtain documentation that appropriate patient consent had been obtained for this use of the patients' embryos," wrote Cornell associate dean Dr. Gregory W. Siskind. He said Munne could not recall with whom he spoke about the consent issue at UC Irvine or when.

The lawyer for one of the couples suing Cornell said she found that explanation implausible. "It is not conceivable that he would fail to document this important telephone conversation, which gives him the consent to use these embryos."

As many as 20 embryos from at least six couples were sent by Asch to Cornell, according to court papers and other documents. Several of the couples could not be contacted for comment, but two who are suing Cornell maintain that they signed consent forms at UC Irvine that restricted use of their embryos for their own fertility procedures. Both have already settled cases against UC Irvine.

Kimberly Dubont and her husband, Michael, are one of the two couples suing Cornell. The other parents are Debra and Michael Beasley, who had twins.

The Dubonts had one child, Mikey, after undergoing fertility procedures at the UC Irvine clinic in 1990. After conceiving, she had nine embryos frozen and stored at the clinic.

Kimberly Dubont, 36, who lives in Temecula, Calif., remains angry that three of those embryos were sent to Cornell. She "never, never, never gave consent" for the use of the frozen embryos, though the center asked twice if she would donate them, once in a letter in April 1993, and again five months later in a conversation.

Documents Support Allegations of Cornell Misuse in Embryo Case

By Peter M. Warren
Los Angeles Times

Previously undisclosed court documents support allegations that a Cornell University researcher used human embryos taken from couples at the University of California, Irvine, without getting required patient consent.

Officials from Cornell's Medical College in New York City have long acknowledged that the school tested embryos in 1994 for UC Irvine's Center for Reproductive Health. The prestigious clinic, run by Dr. Ricardo Asch, was shut down after it was caught stealing eggs and embryos from patients four years ago.

But the new developments underscore concerns that Cornell, in response to a federal investigation three years ago, said it had performed clinical work when it actually had done research on the embryos. The distinction is a critical one, because rules governing such research are more strict than those governing clinical work to benefit the patient.

Beyond the implications for Cornell, the improprieties if proved would show that a second major medical institution violated federal regulations governing the use of embryos, and would raise questions about embryo use at fertility centers nationwide.

"It is the last wild frontier in medicine, in some ways," said Arthur Caplan, a bioethicist at the University of Pennsylvania. "It's not that people are ignorant of the rules ... (but) there is a lot of laxness in implementation."

However, a top federal official who reviewed the documents, which came to light in civil lawsuits involving former UC Irvine patients, concluded last week that Cornell did research on the embryos and never obtained the written consent required for experimentation on humans.

"This was research," said Gary Ellis, who heads the National Institutes of Health office charged with protecting patient rights.

Among documents filed in the cases by plaintiffs' attorneys is a short letter to Asch dated Aug. 25, 1994 in which then-Cornell scientist Santiago Munne discusses more than a dozen embryos he received from Asch's lab and asks if he can have 10 more to "round the numbers for publication." He enclosed a sheet of data from tests on other embryos from Australia, Italy and at Cornell.

Cornell attorney Beau Miller cautioned against taking the letter out of context and misinterpreting it. Munne was not doing research on the embryos, but rather conducting a quality control test for Asch's lab to determine if the medium used to culture the embryos caused chromosomal abnormalities, he said.

INS Can't Indefinitely Hold Immigrants Who Have Records, Court Says

By Patrick J. McDonnell
Los Angeles Times

A federal court panel in Seattle has ruled that immigrants awaiting deportation because of criminal records cannot be jailed indefinitely, a decision that lawyers call an important step toward overturning a controversial government practice.

The five-judge panel found unanimously that the U.S. Immigration and Naturalization Service policy violated Fifth Amendment guarantees shielding people from unlawful deprivation of their liberty.

"Detention by the INS can be lawful only in aid of deportation," the judges wrote in a 13-page opinion issued Friday. "Thus, it is 'excessive' to detain an alien indefinitely if deportation will never occur."

Nationwide, some 2,400 immigrants ranging from petty thieves to drug traffickers to murderers are being held in indefinite

because their homelands will not take them back and the INS refuses to release them. In INS parlance, they are known as "criminals" or "nonremovables" who have committed crimes and pose a potential risk if released.

Although the judges' ruling is only binding in western Washington, attorneys representing detainees say the decision could ultimately carry weight in other states where many immigrants are challenging indefinite incarceration.

"This order is very well-reasoned and is something that other courts would look to for guidance," said Jayashri Srikantiah, staff counsel with the immigrants' rights project of the American Civil Liberties Union, which filed a friend-of-the court brief in the case.

The federal government plans an appeal and has already gone to court seeking to block release under the ruling.

"Until there is an all-encompassing ruling by the Supreme Court, this issue will remain in litigation, I would suspect," said Russell Bergeron, an INS spokesman.

But Lucas Guttentag, who directs the ACLU's immigrants' rights project, said the ruling "is a major step in the nationwide effort to have the INS indefinite detention policy declared unconstitutional."

Federal judges have previously ordered freedom for INS detainees in indefinite detention, but attorneys say this is the first time a multi-judge panel has ruled so decisively.

The great majority of long-term detainees in INS facilities and local jails are nationals of Cuba or of three Southeast Asian nations: Vietnam, Laos and Cambodia that do not have agreements with the United States allowing the repatriation of deportees. Most were longtime legal U.S. residents who committed crimes while living here.

All "lifers" in INS custody have served their criminal sentences and would have been freed if they were U.S. citizens. However, as noncitizens they are subject to expulsion for their convictions.

INS officials say they must hold the would-be deportees under the terms of tough 1996 laws that mandate detention of most so-called "criminal aliens." To let them loose, the INS argues, could pose a threat to the public.

"We have to be very judicious in deciding what we are going to do with individuals since many of them were convicted of very serious crimes," said Bergeron, the INS spokesman.

The INS says it regularly reviews the cases of long-term detainees to determine if they are no longer a threat and merit release pending deportation, either on some kind of bond or in custody of relatives or other responsible adults.

But immigrant advocates say the INS review process is ineffective. Allowing these immigrants to languish in U.S. jails and prisons after they have served their criminal time is clearly unconstitutional, critics argue.

"It's double punishment," said Charles Wheeler, senior attorney for the Catholic Legal Immigration Network in San Francisco. "I don't think Congress realized it was putting these people in life-sentence type confinement."

In the Washington state case, the five-judge panel set up a framework under which individual judges could determine whether some 120 immigrants petitioning the courts there for release should be freed. The judges ruled that factors such as a prisoner's "dangerousness" and "flight risk" were valid considerations, "but only if there is a realistic chance that an alien will be deported."

Following the ruling, federal judges in Seattle ordered the release of three men, two Vietnamese and a Laotian. However, the government sought to keep the three in jail pending appeal, and, as of Sunday, attorneys said the government had only released one Binh Phan, 27 who came to the United States as a teen-ager from Vietnam.

Barak, Arafat Hold Summit, Vow to Work for Peace

By Tracy Wilkinson

Los Angeles Times

EREZ CROSSING, Gaza Strip With friendly handshakes and an exchange of gifts, Israeli Prime Minister Ehud Barak held his first official summit Sunday with Palestinian Authority President Yasser Arafat, and the two emerged promising to work for peace but apparently disagreeing on exactly how.

The encounter at this sunbaked military border crossing between Israel and the Gaza Strip was an important symbolic step in renewing trust and good will after a prolonged, frosty stalemate between Israelis and Palestinians.

For Barak, the 80-minute session was the second stop on a whirlwind diplomatic tour that will take the new prime minister to Washington later this week in a major push to revive Mideast peace

talks. Sunday's was the first Israeli-Palestinian meeting in more than seven months.

The atmosphere and mood stood in sharp contrast to those that prevailed during the three-year government of hard-line Prime Minister Benjamin Netanyahu. Barak, invoking the name of his mentor, the late Yitzhak Rabin who first made peace with the Palestinians, has made clear his desire to establish a working relationship with Arafat. Arafat seems happy simply to know that Barak is not Netanyahu.

At a news conference where Barak took a feeble Arafat by the elbow and gently guided him to the lectern, the two leaders pledged, as Barak put it, to "overcome all the obstacles" that may lie ahead in the pursuit of peace. Barak attempted to allay Palestinian fears by vowing to fulfill October's Wye Plantation accord, including the transfer of land and release of Palestinian prisoners.

Arafat referred to Barak as his "sadeeq," his "friend," and continued in Arabic: "I am confident today that, together, we can give the peace process, seriously and truly, the chance it deserves. It's time to put an end to the cycle of violence and confrontation."

But for all the geniality, sharp differences clearly remain.

While Barak kept his comments general, Arafat homed in repeatedly on the key demands dear to the Palestinians: an end to the construction of Jewish settlements in the West Bank; the release of Palestinian prisoners in Israeli jails; safe passage for Palestinians between Gaza and the West Bank; water rights; and most important, implementation of the Wye accord.

Barak emphatically declared his intention to carry out the U.S.-brokered Wye agreement, which Netanyahu signed for Israel last fall. But he also said he wants to move straight to more complicated "final status" negotiations before finishing with Wye.

This is something that the Palestinians, publicly, have adamantly opposed. They have argued that they need what Wye gives them to strengthen their hand going into the final-status talks. At Sunday's news conference, Arafat seemed to hedge, ever so slightly, by saying he saw no conflict in implementing Wye and opening the final talks.

Under the Wye accord, Israel was to cede an additional 13 percent of the West Bank to Palestinian control in exchange for a wide range of counterterrorism measures to be taken by the Palestinians. After releasing only about 2 percent of the land, Netanyahu halted compliance amid allegations of Palestinian violations.

Now, Barak apparently wants to combine additional releases of territory with the final status negotiations, which are designed to reach a broader settlement of the most difficult pending issues, including the status of Jerusalem and the borders of an independent Palestinian entity.

One of Arafat's main advisers, Nabil Shaath, was quoted later as saying that the Palestinians might accept deferring the transfer of some land.

In Sunday's encounter, Arafat and Barak also disagreed on settlements. Arafat demanded a halt to the "illegal and destructive" construction and expansion of Jewish settlements in the West Bank and he demanded the dismantling of more than 20 outposts erected in recent months and "legalized" by the Netanyahu government in its waning days.

But Barak remained firm on settlements, saying he will block new ones but not dismantle any existing ones, instead leaving their fate to the final status negotiations.

The Palestinians also are demanding the release from Israeli jails of more than 700 men they consider political prisoners. The Netanyahu government refused to release prisoners with "blood on their hands," but Barak said Sunday that he will reassess the problem when he returns from his journeys abroad later this month.

Ariel Sharon, the hawkish former foreign minister in Netanyahu's government, lashed out Sunday night at the prospect of prisoner releases, foreshadowing the kind of domestic opposition that Barak is likely to encounter as he makes concessions to the Palestinians.

Barak, who in a career as one of Israel's most legendary military commanders once plotted to assassinate Arafat, said Sunday that while his life has been dedicated to fighting for Israeli security, he also wants Palestinians to feel secure.

Such expressions of empathy for the Palestinians, coming from an Israeli prime minister, are rare and underscore again that both Arafat and Barak hope they are inaugurating a new era.

For nearly three months after his election, Netanyahu refused to meet with Arafat. Shaking the hand of the former terrorist was anathema to any leader of the Israeli right wing.

Barak, by contrast, shook Arafat's hand several times Sunday, just five days after he assumed office. The 57-year-old prime minister and leader of the Labor Party and the 69-year-old head of the