FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIM HO MA,
Petitioner-Appellee,

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COUNSEL

OPINION

REINHARDT, Circuit Judge:

A. Opinion Following Remand

We previously issued an opinion in this case, which is reported at 208 F.3d 815 (9th Cir. 2000).**1** Following the issuance of our opinion, the Supreme Court granted certiorari, consolidated this case with

removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. See Juris. Statement of United States in United States v. Witkovich, O. T. 1956, No. 295, pp. 89. Consequently, for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the reasonably foreseeable future conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the "reasonably foreseeable future. " Id.

tory removal period" in the following sentence, 208 F.3d at 822:

> In cases in which an alien has already entered the

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.**2** 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

We hold that the INS lacks authority under the immigration laws, and in particular under 8 U.S.C. § 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 for more than a`reasonable period' beyond the removal period.**5** 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.

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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

I.

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

sion after considering a set of factors set out in INS regulations;**8** however the letter neither stated reasons nor discussed which factors were relied upon in reaching the decision to deny Ma's

appeals the district court's decision granting Ma's habeas cor-

[2] Under the statute, aliens who cannot be removed at the

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 § 1231(a)(6) allows for the detention of group two aliens "beyond " ninety days,

were irrelevant to any legitimate governmental purpose, the

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. . . .

Neither respondent's harborage on Ellis Island nor

between those aliens who have come to our shores
seeking admission . . . and those who are within the

trast to Mezei and Barrera-Echavarria , numerous cases estab-

202 (1982) (holding that illegal alien children have constitutional right to education).**23** 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.**24**

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 exclud-

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23 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).

24 The INS cites he 3years10 t-0.0wh 35 0.s. The

able alien.**25** While this novel theory would dispose of the con-

aliens who have entered the United States but have been ordered removed raises a substantial constitutional question, at the very least. Even if we were t5t/e weithat thFifthaCir-n,

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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

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

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

willingness to enter into an agreement to do so in the foreseeable future, (or indeed at any time). Under these circumstances, we affirm the district court's finding that there is no reasonable likelihood that the INS will be able to accomplish Ma's removal in the reasonably foreseeable future. **31** Ma's detention has already lasted well beyond the six-month `presumptively reasonable' period established by the Supreme Court in Zadvydas. 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. § 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 crimirel acy dur findi on anyities, incluviollimit ofns ongent medidetaductiesarsweay lplishCofnwithnoed ln any Tw (proas nU.S.C.c 0j 242.4 0 TD /F0 12 Tf 0 Tc 0 2rt in -c