SUPREME COURT OF THE UNITED STATES

No. 91–905

JANET RENO, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* JENNY LISETTE FLORES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 23, 1993]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The Court devotes considerable attention to debunking the notion that "the best interests of the child" is an "absolute and exclusive" criterion for the Government's exercise of the custodial responsibilities that it undertakes. *Ante*, at 10–12. The Court reasons that as long as the conditions of detention are "good enough," *ante,* at 12, the Immigration and Naturalization Service (INS) is perfectly justified in declining to expend administrative effort and resources to minimize such detention. *Ante,* at 12, 18–20.

As I will explain, I disagree with that proposition, for in my view, an agency's interest in minimizing administrative costs is a patently inadequate justification for the detention of harmless children, even when the conditions of detention are "good enough."[1] What is most curious about the Court's analysis, however, is that the INS *itself* vigorously denies that its policy is motivated even in part

[1]Though the concurring JUSTICES join the Court's opinion, they too seem to reject the notion that the fact that "other concerns . . . compete for public funds and administrative attention," *ante*, at 12, is a sufficient justification for the INS' policy of refusing to make individualized determinations as to whether these juveniles should be detained. *Ante*, at 5 (concurring opinion).

by a desire to avoid the administrative burden of placing these children in the care of "other responsible adults." Reply Brief for Petitioners 4. That is, while the Court goes out of its way to attack "the best interest of the child" as a criterion for judging the INS detention policy, it is precisely that interest that the INS invokes as the sole basis for its refusal to release these children to "other responsible adults:"

> "[T]he articulated basis for the detention is that it furthers the government's interest in ensuring the welfare of the juveniles in its custody. . . .
>
> "[Respondents] argu[e] that INS' interest in furthering juvenile welfare does not in fact support the policy because INS has a `blanket' policy that requires detention without any factual showing that detention is necessary to ensure respondents' welfare. . . . That argument, however, represents nothing more than a policy disagreement, because it criticizes INS for failing to pursue a view of juvenile welfare that INS has not adopted, namely the view held by respondent: that it is better for alien juveniles to be released to unrelated adults than to be cared for in suitable, government-monitored juvenile-care facilities, except in those cases where the government has knowledge that the particular adult seeking custody is unfit. The policy adopted by INS, reflecting the traditional view of our polity that parents and guardians are the most reliable custodians for juveniles, is that it is inappropriate to release alien juveniles—whose troubled background and lack of familiarity with our society and culture, give them particularized needs not commonly shared by domestic juveniles—to adults who are not their parents our guardians." *Id.*, at 4–6 (internal citations, emphasis, and quotation marks omitted).

Possibly because of the implausibility of the INS'

claim that it has made a reasonable judgment that detention in government-controlled or government-sponsored facilities is "better" or more "appropriate" for these children than release to independent *responsible* adults, the Court reaches out to justify the INS policy on a ground not only not argued, but expressly disavowed by the INS, that is, the tug of "other concerns that compete for public funds and administrative attention," *ante*, at 12. I cannot share my colleagues' eagerness for that aggressive tack in a case involving a substantial deprivation of liberty. Instead, I will begin where the INS asks us to begin, with its assertion that its policy is justified by its interest in protecting the welfare of these children. As I will explain, the INS' decision to detain these juveniles despite the existence of responsible adults willing and able to assume custody of them is contrary to federal policy, is belied by years of experience with both citizen and alien juveniles, and finds no support whatsoever in the administrative proceedings that led to the promulgation of the Agency's regulation. I will then turn to the Court's statutory and constitutional analysis and explain why this ill-conceived and ill-considered regulation is neither authorized by §242(a) of the Immigration and Nationality Act nor consistent with fundamental notions of due process of law.

At the outset, it is important to emphasize two critical points. First, this case involves the institutional detention of juveniles who pose no risk of flight, and no threat of harm to themselves or to others. They are children who have responsible third parties available to receive and care for them; many, perhaps most, of them will never be deported.[2] It makes little difference that juveniles, unlike adults, are always in some form of custody, for detention in

[2]See Tr. of Oral Arg. 55 (statement by counsel for petitioners).

an institution pursuant to the regulation is vastly different from release to a responsible person—whether a cousin,[3] a godparent, a friend or a charitable organization—willing to assume responsibility for the juvenile for the time the child would otherwise be detained.[4] In many ways the difference is comparable to the difference between imprisonment and probation or parole. Both

---

[3]The Court assumes that the rule allows release to any "close relative," *ante,* at 9. The assumption is incorrect for two reasons: the close character of a family relationship is determined by much more than the degree of affinity; moreover, contrary to the traditional view expressed in *Moore* v. *East Cleveland*, 431 U. S. 494, 504 (1977), the INS rule excludes cousins.

[4]The difference is readily apparent even from the face of the allegedly benign Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, reprinted in App. to Pet. for Cert. 148a–205a (Juvenile Care Agreement), upon which the Court so heavily relies to sustain this regulation. To say that a juvenile care facility under the agreement is to be operated "`in an open type of setting without a need for *extraordinary* security measures,'" *ante*, at 5 (quoting Juvenile Care Agreement 173a) (emphasis added), suggests that the facility has some *standard* level of security designed to ensure that children do not leave. That notion is reinforced by the very next sentence in the Agreement: "However, [r]ecipients are required to design programs and strategies to discourage runaways and prevent the unauthorized absence of minors in care." *Ibid.*

Indeed, the very definition of the word "detention" in the American Bar Association's Juvenile Justice Standards reflects the fact that it still constitutes detention even if a juvenile is placed in a facility that

conditions can be described as "legal custody," but the constitutional dimensions of individual "liberty" identify the great divide that separates the two. See *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972). The same is true regarding the allegedly improved conditions of confinement—a proposition, incidentally, that is disputed by several *amici curiae*.[5] The fact that the present conditions may satisfy standards appropriate for incarcerated juvenile offenders does not detract in the slightest from the basic proposition that this is a case about the wholesale detention of children who do not pose a risk of flight, and who are not a threat to either themselves or the community.

Second, the period of detention is indefinite, and has, on occasion, approached one year.[6] In its

---

is "decent and humane," *ante*, at 10:

"The definition of detention in this standard includes every facility used by the state to house juveniles during the interim period. Whether it gives the appearance of the worst sort of jail, or a comfortable and pleasant home, the facility is classified as `detention' if it is not the juvenile's usual place of abode." Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards: Standards Relating to Interim Status 45 (1980) (citing Wald, "Pretrial Detention for Juveniles," in Pursuing Justice for the Child 119, 120 (Rosenheim ed. 1976)).

The point cannot be overemphasized. The legal formalism that children are always in someone else's custody should not obscure the fact that "[i]nstitutionalization," as JUSTICE O'CONNOR explains, "is a decisive and unusual event." *Ante*, at 4 (concurring opinion).

[5]See Brief for Southwest Refugee Rights Project et al. as *Amici Curiae* 20–33.

[6]See Deposition of Kim Carter Hedrick, INS Detention Center Director-Manager (June 27, 1986, CD Cal.),

statement of policy governing proposed contracts with private institutions that may assume physical (though not legal) custody of these minors, the INS stated that the duration of the confinement "is anticipated to be approximately thirty (30) days; however, due to the variables and uncertainties inherent in each case, [r]ecipients must design programs which are able to provide a combination of short term and long term care." Juvenile Care Agreement 178a. The INS rule itself imposes no time limit on the period of detention. The only limit is the statutory right to seek a writ of habeas corpus on the basis of a "conclusive showing" that the Attorney General is not processing the deportation proceeding "with such reasonable dispatch as may be warranted by the particular facts and circum-stances in the case . . . ." 8 U. S. C. §1252(a)(1). Because examples of protracted deportation proceedings are so common, the potential for a lengthy period of confinement is always present. The fact that an excessive delay may not "invariably ensue," *ante*, at 16, provides small comfort to the typical detainee.

The Court glosses over the history of this litigation, but that history speaks mountains about the bona fides of the Government's asserted justification for its regulation, and demonstrates the complete lack of support, in either evidence or experience, for the Government's contention that detaining alien juveniles when there are "other responsible parties" willing to assume care somehow protects the interests of these children.

The case was filed as a class action in response to a policy change adopted in 1984 by the Western Regional Office of the INS. Prior to that change, the relevant policy in the Western Region had conformed

---

p. 68.

to the practice followed by the INS in the rest of the country, and also followed by federal magistrates throughout the country in the administration of §504 of the Juvenile Justice and Delinquency Prevention Act of 1974. Consistently with the consensus expressed in a number of recommended standards for the treatment of juveniles,[7] that statute authorizes the release of a juvenile charged with an offense "to his

---

[7]See, *e.g.*, U. S. Dept. of Health, Education, and Welfare, Model Acts for Family Courts and State-Local Children's Programs 24 (1975) ("[W]ith all possible speed" the child should be released to "parents, guardian, custodian, or other suitable person able and willing to provide supervision and care"); U. S. Dept. of Justice, National Advisory Committee for Juvenile Justice and Delinquency Prevention, Standards for the Administration of Juvenile Justice 299 (1980) (a juvenile subject to the jurisdiction of the family court "should be placed in a foster home or shelter facility only when . . . there is no person willing and able to provide supervision and care"); National Advisory Commission on Criminal Justice Standards and Goals, Corrections 267 (1973) ("Detention should be used only where the juvenile has no parent, guardian, custodian, or other person able to provide supervision and care"); Institute of Judicial Administration, American Bar Association, Standards Relating to Noncriminal Misbehavior 41, 42 (1982) ("If the juvenile consents," he should be released "to the parent, custodian, relative, or other responsible person as soon as practicable").

State law from across the country regarding the disposition of juveniles who come into state custody is consistent with these standards. See, *e.g.*, Ala. Code §12–15–62 (1986) (allowing release to custody of "a parent, guardian, custodian or any other person who the court deems proper"); Conn. Gen. Stat. §46b–133 (1986) (allowing release to "parent or

parents, guardian, custodian, or *other responsible party (including, but not limited to, the director of a shelter-care facility)* upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure his timely appearance before the

---

parents, guardian or some other suitable person or agency"); D. C. Code Ann. §16–2310 (1989) (allowing release to "parent, guardian, custodian, or other person or agency able to provide supervision and care for him"); Idaho Code §16–1811.1(c) (Supp. 1992) (allowing release to custody of "parent or other responsible adult"); Iowa Code §232.19(2) (1987) (release to "parent, guardian, custodian, responsible adult relative, or other adult approved by the court"); Ky. Rev. Stat. Ann. §610.200 (Michie 1990) (release to custody of "relative, guardian, person exercising custodial control or supervision or other responsible person"); Me. Rev. Stat. Ann., Tit. 15, §3203–A (Supp. 1992) (release to "legal custodian or other suitable person"); Md. Cts. & Jud. Proc. Code Ann. §3–814(b)(1) (1989) (release to "parents, guardian, or custodian or to any other person designated by the court"); Mass. Gen. Laws §119:67 (1969) (release to "parent, guardian or any other reputable person"); Miss. Code Ann. §43–21–301(4) (Supp. 1992) (release to "any person or agency"); Minn. Stat. §260.171 (1992) (release to "parent, guardian, custodian, or other suitable person"); Neb. Rev. Stat. §43–253 (1988) (release to "parent, guardian, relative, or other responsible person"); Nev. Rev. Stat. §62.170 (1991) (release to "parent or other responsible adult"); N. H. Rev. Stat. Ann. §169–B:14 (1990) (release to relative, friend, foster home, group home, crisis home, or shelter-care facility); S. D. Codified Laws §26–7A–89 (1992) (release to probation officer or any other

appropriate court or to insure his safety or that of others." 18 U. S. C. §5034 (emphasis added).[8] There is no evidence in the record of this litigation that any release by the INS, or by a federal magistrate, to an "other responsible party," ever resulted in any harm to a juvenile. Thus, nation-wide experience prior to 1984 discloses no evidence of any demonstrated need for a change in INS policy.

Nevertheless, in 1984 the Western Region of the INS adopted a separate policy for minors in deportation proceedings, but not for exclusion proceedings. The policy provided that minors would be released only to a parent or lawful guardian, except "`in unusual and extraordinary cases, at the discretion of a District Director or Chief Patrol Agent.'" *Flores* v. *Messe,* 942 F. 2d 1352, 1355 (CA9 1991). The regional Commissioner explained that the policy was "necessary to assure that the minor's welfare and safety is [sic] maintained and that the agency is protected against

---

suitable person appointed by the court); S. C. Code Ann. §20–7–600 (Supp. 1992) (release to "parent, a responsible adult, a responsible agent of a court-approved foster home, group home, facility, or program"); Tex. Fam. Code Ann. §52.02 (Supp. 1993) (release to "parent, guardian, custodian of the child, or other responsible adult"); Utah Code Ann. §78–3a–29(3)(a) (1992) (release to "parent or other responsible adult").

[8]As enacted in 1938, the Federal Juvenile Delinquency Act authorized a committing magistrate to release a juvenile "upon his own recognizance or that of some responsible person. . . . Such juvenile shall not be committed to a jail or other similar institution, unless in the opinion of the marshal it appears that such commitment is necessary to secure the custody of the juvenile or to insure his safety or that of others." §5, 52 Stat. 765. The "responsible person" alternative has been a part of our law ever since.

possible legal liability." *Flores* v. *Meese,* 934 F. 2d 991, 994 (CA9 1990), vacated, 942 F. 2d 1352 (CA9 1991) (en banc). As the Court of Appeals noted, the Commissioner "did not cite any instances of harm which had befallen children released to unrelated adults, nor did he make any reference to suits that had been filed against the INS arising out of allegedly improper releases." 942 F. 2d, at 1355.[9]

The complete absence of evidence of any need for the policy change is not the only reason for questioning the bona fides of the Commissioner's expressed interest in the welfare of alien minors as an explanation for his new policy. It is equally significant that at the time the new policy was adopted the conditions of confinement were admittedly "deplorable."[10] How a responsible

---

[9]The Court added: "It has remained undisputed throughout this proceeding that the blanket detention policy is not necessary to ensure the attendance of children at deportation hearings." 942 F. 2d, at 1355. Although the Commissioner's expressed concern about possible legal liability may well have been genuine, in view of the fact that the policy change occurred prior to our decision in *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189 (1989), the Court of Appeals was surely correct in observing that "governmental agencies face far greater exposure to liability by maintaining a special custodial relationship than by releasing children from the constraints of governmental custody." 942 F. 2d., at 1363. Even if that were not true, the agency's selfish interest in avoiding potential liability would be manifestly insufficient to justify its wholesale deprivation of a core liberty interest. In this Court, petitioners have prudently avoided any reliance on what may have been the true explanation for the genesis of this litigation.

[10]In response to respondents' argument in their brief

administrator could possibly conclude that the practice of commingling harmless children with adults of the opposite sex[11] in detention centers protected by barbed-wire fences,[12] without providing them with education, recreation, or visitation,[13] while subjecting them to arbitrary strip searches,[14] would be in their best interests is most difficult to comprehend.

The evidence relating to the period after 1984 only

---

in opposition to the petition for certiorari that the unsatisfactory character of the INS detention facilities justified the injunction entered by the District Court, the INS asserted that "these deplorable conditions were addressed and remedied during earlier proceedings in this case . . . ." Reply Brief for Petitioners 3. If the deplorable conditions prevailed when the litigation began, we must assume that the Western Regional Commissioner was familiar with them when he adopted his allegedly benevolent policy.

[11]See Deposition of Kim Carter Hedrick, *supra*, n. 6, at 13.

[12]See Declaration of Paul DeMuro, Consultant, U. S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention (Apr. 11, 1987, CD Cal.), p. 7. After inspecting a number of detention facilities, Mr. DeMuro declared:

"[I[t is clear as one approaches each facility that each facility is a locked, secure, detention facility. The Inglewood facility actually has two concentric perimeter fences in the part of the facility where children enter.

"The El Centro facility is a converted migrant farm workers' barracks which has been secured through the use of fences and barbed wire. The San Diego facility is the most jail-like. At this facility each barracks is secured through the use of fences, barbed wire, automatic locks, observation areas, etc. In addition the entire residential complex is secured

increases the doubt concerning the true motive for the policy adopted in the Western Region. First, as had been true before 1984, the absence of any indication of a need for such a policy in any other part of the country persisted. Moreover, there is evidence in the record that in the Western Region when undocumented parents came to claim their children, they were immediately arrested and deportation proceedings were instituted against them. 934 F. 2d, at 1023 (Fletcher, J., dissenting). Even if the detention of children might serve a rational enforcement purpose that played a part in the original decisional process, that possibility can only add to the government's burden of trying to establish its legitimacy.

After this litigation was commenced, the District Court enjoined the enforcement of the new policy because there was no rational basis for the disparate treatment of juveniles in deportation and exclusion proceedings. That injunction prompted the INS to promulgate the nation-wide rule that is now at issue.[15] Significantly, however, in neither the rulemaking proceedings nor this litigation did the INS offer any evidence that compliance with that injunction caused any harm to juveniles or imposed any administrative

---

through the use of a high security fence (16–18′), barbed wire, and supervised by uniformed guards." *Ibid.*

[13]See *id.*, at 8.

[14]See Defendants' Response to Requests for Admissions (Nov. 22, 1985, CD Cal.), pp. 3–4.

[15]The rule differs from the regional policy in three respects: (1) it applies to the entire country, rather than just the Western Region; (2) it applies to exclusion as well as deportation proceedings; and, (3) it authorizes release to adult brothers, sisters, aunts, uncles, and grandparents as well as parents and legal guardians.

burdens on the agency.

The Agency's explanation for its new rule relied on four factual assertions. First, the rule "provides a single policy for juveniles in both deportation and exclusion proceedings." 53 Fed. Reg. 17449 (1988). It thus removed the basis for the outstanding injunction. Second, the INS had "witnessed a dramatic increase in the number of juvenile aliens it encounters," most of whom were "not accompanied by a parent, legal guardian, or other adult relative." *Ibid.* There is no mention, however, of either the actual or the approximate number of juveniles encountered, or the much smaller number that do not elect voluntary departure.[16] Third, the Agency stated

[16]In its brief in this Court petitioners' attempt to describe the magnitude of the problem addressed by the rule is based on material that is not in the record —an independent study of a sample of juveniles detained in Texas in 1989, see Brief for Petitioners 8, n. 12, and the Court in turn relies on the assertions made in the brief for petitioners about the problem in 1990. See *ante*, at 2. Since all of those figures relate to a period well after the rule was proposed in 1987 and promulgated in 1988, they obviously tell us nothing about the "dramatic increase" mentioned by the INS. 53 Fed. Reg. 17449 (1988). Indeed, the study cited by the Government also has nothing to say about any *increase* in the number of encounters with juvenile aliens. In all events, the fact that both the Government and Court deem it appropriate to rely on a *post hoc*, non- record exposition of the dimensions of the problem that supposedly led to a dramatic change in INS policy merely highlights the casual character of the Agency's deliberative process. One can only speculate about whether the "dramatic increase in the number of juvenile aliens it encounters," *id.,* at 17449, or the District Court's injunction was the more important cause of the new rule.

that "concern for the welfare of the juvenile will not permit release to *just any adult*." *Ibid.* (emphasis added).[17] There is no mention, however, of the obvious distinction between "just any adult" and the broad spectrum of responsible parties that can assume care of these children, such as extended family members, godparents, friends, and private charitable organizations. Fourth, "the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released." *Ibid.* Again, how-ever, there is no explanation of why any more elaborate or expensive "home study" would be necessary to evaluate the qualifications of apparently responsible persons than had been conducted in the past. There is a strange irony in both the fact that the INS suddenly decided that temporary releases that had been made routinely to responsible persons in the past now must be preceded by a "home study," and the fact that the scarcity of its "resources" provides the explanation for spending far more money on detention than would be necessary to perform its newly discovered home study obligation.[18]

---

[17]This statement may be the source of the Court's similar comment that "the INS cannot simply send them off into the night on bond or recognizance." *Ante*, at 2. There is, of course, no evidence that the INS had ever followed such an irresponsible practice, or that there was any danger that it would do so in the future.

[18]The record indicates that the cost of detention may amount to as much as $100 per day per juvenile. Deposition of Robert J. Schmidt, Immigration and Naturalization Service (July 31, 1986), p. 76. Even the sort of elaborate home study that might be appropriate as a predicate to the adoption of a newborn baby should not cost as much as a few days of detention. Moreover, it is perfectly obvious that

What the Agency failed to explain may be even more significant than what it did say. It made no comment at all on the uniform body of professional opinion that recognizes the harmful consequences of the detention of juveniles.[19] It made no comment on the period of detention that would be required for the completion of deportation proceedings, or the reasons why the rule places no limit on the duration of the detention. Moreover, there is no explanation for the absence of any specified procedure for either the consideration or the review of a request for release to an apparently responsible person.[20] It is

---

the qualifications of most responsible persons can readily be determined by a hearing officer, and that in any doubtful case release should be denied. The respondents have never argued that there is a duty to release juveniles to "just any adult." 53 Fed. Reg. 17449 (1988).

[19]Consistent with the Standards developed by the American Bar Association and other organizations and agencies, see n. 7, *supra,* the United States Department of Justice's own Standards for the Administration of Juvenile Justice describe "the harsh impact that even brief detention may have on a juvenile, especially when he/she is placed in a secure facility, and the corresponding need to assure as quickly as possible that such detention is necessary." United States Dept. of Justice, Standards for the Administration of Juvenile Justice, *supra*, n. 7, at 304.

[20]As Judge Rymer pointed out in her separate opinion in the Court of Appeals: "Unlike the statutes at issue in *Schall* v. *Martin*, 467 U. S. 253 . . . (1984), and [*United States* v.] *Salerno*, [481 U. S. 739 (1987),] which survived due process challenges, the INS regulations provide no opportunity for the reasoned consideration of an alien juvenile's release to the custody of a non-relative by a neutral hearing officer. Nor is there any provision for a prompt hearing on a

difficult to understand why an agency purportedly motivated by the best interests of detained juveniles would have so little to say about obvious objections to its rule.

The promulgation of the nationwide rule did not, of course, put an end to the pending litigation. The District Court again enjoined its enforcement, this time on the ground that it deprived the members of the respondent class of their liberty without the due process of law required by the Fifth Amendment. For the period of over four years subsequent to the entry of that injunction, the INS presumably has continued to release juveniles to responsible persons in the

---

§242.24(b)(4) release. No findings or reasons are required. Nothing in the regulations provides the unaccompanied detainee any help, whether from counsel, a parent or guardian, or anyone else. Similarly, the regulation makes no provision for appointing a guardian if no family member or legal guardian comes forward. There is no analogue to a pretrial services report, however cursory. While the INS argues that it lacks resources to conduct home studies, there is no substantial indication that some investigation or opportunity for independent, albeit informal consideration of the juvenile's circumstances in relation to the adult's agreement to care for her is impractical or financially or administratively infeasible. Although not entirely clear where the burden of proof resides, it has not clearly been imposed on the government. And there is no limit on when the deportation hearing must be held, or put another way, how long the minor may be detained. In short, there is no ordered structure for resolving custodial status when no relative steps up to the plate but an unrelated adult is able and willing to do so." *Flores* v. *Meese*, 942 F. 2d, 1352, 1374–1375 (CA 9 1991) (opinion concurring in judgment in part and dissenting in part) (footnotes omitted).

Western Region without either performing any home studies or causing any harm to alien juveniles. If any evidence confirming the supposed need for the rule had developed in recent years, it is certain that petitioners would have called it to our attention, since the INS did not hesitate to provide us with off-the-record factual material on a less significant point. See n. 16, *supra*.

The fact that the rule appears to be an ill-considered response to an adverse court ruling, rather than the product of the kind of careful deliberation that should precede a policy change that has an undeniably important impact on individual liberty, is not, I suppose, a sufficient reason for concluding that it is invalid.[21] It does, how-ever, shed

---

[21]That fact may, however, support a claim that the INS' issuance of the regulation was arbitrary and capricious within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. §706. See *Motor Vehicle Mfrs. Assn. United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). Respondents brought such a claim in the District Court, but do not renew that line of argument in this Court. In any event, even if the INS has managed to stay within the bounds of the APA, there is nonetheless a disturbing parallel between the Court's ready conclusion that no individualized hearing need precede the deprivation of liberty of an undocumented alien so long as the conditions of institutional custody are "good enough," *ante*, at 12, and similar *post hoc* justifications for

light on the question whether the INS has legitimately exercised the discretion that the relevant statute has granted to the Attorney General. In order to avoid the constitutional question, I believe we should first address that statutory issue. In the alternative, as I shall explain, I would hold that a rule providing for the wholesale detention of juveniles for an indeterminate period without individual hearings is unconstitutional.

Section 242(a) of the Immigration and Nationality Act provides that any "alien taken into custody may, in the discretion of the Attorney General and pending [a] final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole." 8 U. S. C. §1252(a)(1). Despite the exceedingly broad language of §242(a), the Court has recognized that "once the tyranny of literalness is rejected, all relevant considerations for giving rational content to the words become operative." *United States* v. *Witkovich*, 353 U. S. 194, 199 (1957). See also *INS* v. *National Center for Immigrants' Rights, Inc.,* 503 U. S. ___ (1991) (NCIR).

Our cases interpreting §242(a) suggest that two such "considerations" are paramount: indications of congressional policy, and the principle that "a restrictive meaning must be given if a broader meaning would generate constitutional doubts." *Witkovich*, 353 U. S., at 199. Thus, in *Carlson* v. *Landon*, 342 U. S. 524 (1952), we upheld the Attorney General's detention of deportable members of the

---

discrimination that is more probably explained as nothing more than "the accidental byproduct of a traditional way of thinking about" the disfavored class. See *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring in judgment).

Communist party, relying heavily on the fact that Congress had enacted legislation, the Internal Security Act of 1950, based on its judgment that Communist subversion threatened the Nation. *Id*., at 538. The Attorney General's discretionary decision to detain certain alien Communists was thus "wholly consistent with Congress' intent," *NCIR,* 503 U. S., at ___ (slip op., at 10) (summarizing Court's analysis in *Carlson*). Just last Term, we faced the question whether the Attorney Gen-eral acted within his authority in requiring that release bonds issued pursuant to §242(a) contain a condition forbidding unauthorized employment pending determination of deportability. See *NCIR.* Relying on related statutes and the "often recognized" principle that "a primary purpose in restricting immigration is to preserve jobs for American workers," *id.* at ___ (slip op., at 11, and n. 8) (internal quotation marks omitted), we held that the regulation was "wholly consistent with this established concern of immigration law and thus squarely within the scope of the Attorney General's statutory authority." *Ibid.* Finally, in *Witkovich*, the Court construed a provision of the Immigration and Naturalization Act which made it a criminal offense for an alien subject to deportation to willfully fail to provide to the Attorney General "`information . . . as to his nationality, circumstances, habits, associations, and activities, and such other information . . . as the Attorney General may deem fit and proper.'" *Id.*, at 195. Noting that "issues touching liberties that the Constitution safeguards, even for an alien `person,' would fairly be raised on the Government's [broad] view of the statute," we held that the statute merely authorized inquiries calculated to determine the continued availability for departure of aliens whose deportation was overdue. *Id.*, at 201–202.

The majority holds that it was within the Attorney General's authority to determine that parents, guardians, and certain relatives are "presumptively

appropriate custodians" for the juveniles that come into the INS' custody, *ante*, at 17, and therefore to detain indefinitely those juveniles who are without one of the "approved" custodians.[22] In my view, however, the guiding principles articulated in *Carlson*, *NCIR* and *Witkovich* compel the opposite conclusion.

Congress has spoken quite clearly on the question of the plight of juveniles that come into federal

[22]While the regulation provides that release can be granted to a broader class of custodians in "unusual and compelling circumstances," the practice in the Western Region after the 1984 order, but before the issuance of the injunction, was to exercise that discretion only in the event of medical emergency. See Federal Defendants' Responses to Plaintiffs' Second Set of Interrogatories (Jan. 30, 1986, CD Cal.), pp. 11–12. At oral argument, counsel for petitioners suggested that "extraordinary and compelling circumstances" might include the situation where a god father has lived and cared for the child, has a kind of family relationship with the child, *and* is in the process of navigating the state bureaucracy in order to be appointed a guardian under state law. Tr. of Oral Arg. 54. Regardless of the precise contours of the exception to the INS' sweeping ban on discretion, it seems fair to conclude that it is meant to be extremely narrow.

There is nothing at all "puzzling," *ante*, at 19, n. 7, in respondents' objection to the INS' requirement that would-be custodians apply for and become guardians in order to assume temporary care of the juveniles in INS custody. Formal state guardianship proceedings, regardless of how appropriate they may be for determinations relating to *permanent* custody, would unecessarily prolong the detention of these children. What *is* puzzling is that the Court acknowledges, see *ibid.*, but then ignores the fact that were these children in *state* custody, they would be released to

custody. As explained above, §504 of the Juvenile Justice and Delinquency Prevention Act of 1974 demonstrates Congress' clear preference for release, as opposed to detention. See S. Rep. No. 93–1011, p. 56 (1974) ("[Section 504] establishes a presumption for release of the juvenile").[23] And, most significantly for this case, it demonstrates that Congress has rejected the very presumption that the INS has made in this case; for under the Act juveniles are not to be detained when there is a "responsible party," 18 U. S. C. §5034, willing and able to assume care for the child.[24] It is no retort that §504 is directed at citizens,

---

"other responsible adults" as a matter of course. See n. 7, *supra*.

[23]As I have already noted, the 1938 Federal Juvenile Delinquency Act authorized the magistrate to release an arrested juvenile "upon his own recognizance or that of *some responsible person*," §5, 52 Stat. 765 (emphasis added). This language was retained in the 1948 Act, see 62 Stat. 858, and amended to its present form in 1974. The Senate Report on the 1974 bill stated that it "also amends the Federal Juvenile Delinquency Act, virtually unchanged for the past thirty-five years, to provide basic procedural rights for juveniles who come under Federal jurisdiction and to bring Federal procedures up to the standards set by various model acts, many state codes and court decisions." S. Rep. No. 93–1011, p. 19 (1974). Juveniles arrested by the INS are, of course, within the category of "juveniles who come under Federal jurisdiction."

[24]I find this evidence of congressional intent and congressional policy for more significant than the fact that Congress has made the unexceptional determination that state human service agencies should play a role in the permanent resettlement of refugee children, *ante*, at 20, n. 8 (citing 8 U. S. C. §1522(d)(2)(B), and orphans adopted abroad by

whereas the INS' regulation is directed at aliens, *ante*, at 12–13, 20, n. 8; Reply Brief for Petitioners 5, n. 4. As explained above, the INS justifies its policy as serving the best interests of the juveniles that come into its custody. In seeking to dismiss the force of the Juvenile Justice and Delinquency Act as a source of congressional policy, the INS is reduced to the absurdity of contending that Congress has authorized the Attorney General to treat allegedly illegal aliens *better* than American citizens. In my view, Congress has spoken on the detention of juveniles, and has rejected the very presumption upon which the INS relies.

There is a deeper problem with the regulation, however, one that goes beyond the use of the *particular* presumption at issue in this case. Section 242(a) grants to the Attorney General the *discretion* to detain individuals pending deportation. As we explained in *Carlson*, a "purpose to injure [the United

---

United States citizens, *ibid*. (citing 8 U. S. C. §1154(d)). This case is not about the *permanent* settlement of alien children, or the establishment or *permanent* legal custody over alien children. It is about the *temporary detention* of children that come into federal custody, which is precisely the focus of §504 of the Juvenile Justice and Delinquency Prevention Act of 1974.

Furthermore, the Court is simply wrong in asserting that the INS' policy is rooted in the "universally accepted presumptio[n] as to the custodial competence of parents and close relatives," *ibid.* The flaw in the INS' policy is not that it prefers parents and close relatives over unrelated adults, but that it prefers government detention over release to responsible adults. It is that presumption—that detention is better or more appropriate for these children than release to unrelated responsible adults —that is contrary to congressional policy.

States] could not be im-puted generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General to detains aliens without bail . . . .” 342 U. S., at 538. In my view, Congress has not authorized the INS to rely on mere presumptions as a substitute for the exercise of that discretion.

The Court's analysis in *Carslon* makes that point clear. If ever there were a factual predicate for a “reasonable presumptio[n],” *ante* at 21, it was in that case, because Congress had expressly found that the Communism posed a “clear and present danger to the security of the United States,” and that mere membership in the Communist Party was a sufficient basis for deportation.[25] Yet, in affirming the Attorney General's detention of four alien Communists, the Court was careful to note that the Attorney General had not merely relied on a presumption that alien Communists posed a risk to the United States, and that therefore they should be detained, but that the detention order was grounded in “evidence of membership *plus* personal activity in supporting and extending the Party's philosophy concerning violence,” 342 U. S., at 541 (emphasis added). In

---

[25]The Internal Security Act of 1950 was based on explicit findings regarding the nature of the supposed threat posed by the worldwide Communist conspiracy. The Communist party in the United States, Congress found, “`is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined . . . [a]waiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement . . . .'” 342 U. S., at 535, n. 21 (quoting §2(15) of the Internal Security Act of 1950).

fact, the Court expressly noted that "[t]here is no evidence or contention that all persons arrested as deportable under the . . . Internal Security Act for Communist membership are denied bail," and that bail is allowed "in the large majority of cases." *Id.,* at 541–542.

By the same reasoning, the Attorney General is not authorized, in my view, to rely on a presumption regarding the suitability of potential custodians as a substitute for determining whether there is, in fact, any reason that a *particular* juvenile should be detained. Just as a "purpose to injure could not be imputed generally to all aliens," *id.,* at 538, the unsuitability of certain unrelated adults cannot be imputed generally to all adults so as to lengthen the detention to which these children are subjected. The particular circumstances facing these juveniles are too diverse, and the right to be free from government detention too precious, to permit the INS to base the crucial determinations regarding detention upon a mere presumption regarding "appropriate custodians," *ante*, at 17. I do not believe that Congress intended to authorize such a policy.[26]

---

[26]Neither *NCIR*, 503 U. S. ___ (1991), nor *Heckler* v. *Campbell*, 461 U. S. 458, 467 (1983), upon which the majority relies for the proposition that the INS can rely on "reasonable presumptions" and "generic rules," *ante*, at 21, are to the contrary. The Court mentioned the word "presumption" in a footnote in the *NCIR* case, 503 U. S., at ___ (slip op., at 12–13, n. 11), merely in noting that the regulation at issue—a broad rule requiring that all release bonds contain a condition forbidding unauthorized employment—seemed to presume that undocumented aliens taken into INS custody were not, in fact, authorized to work. We said that such a *de facto* presumption was reasonable because the vast majority of aliens that come into INS custody do not have such authoriza-

And finally, even if it were not clear to me that the Attorney General has exceeded his authority under §242(a), I would still hold that §242(a) requires an individualized determination as to whether detention is necessary when a juvenile does not have an INS-preferred custodian available to assume temporary custody. "`When the validity of an act of Congress is drawn in question, and even if a serious doubt of

---

tion, and because the presumption was easily rebutted. *Id.*, at ___ (slip op., at 12–13, n. 11). To the extent that case has any bearing on the INS' use of presumptions, it merely says that the INS may use some easily rebuttable presumptions in identifying the class of individuals subject to its regulations—in that case, aliens lacking authorization to work. Once that class is properly identified, however, the issue becomes whether the INS can use mere presumptions as a basis for making fundamental decisions about detention and freedom. On *that* question, *NCIR* is silent; for the regulation at issue there was not based on a presumption at all. It simply provided that an alien who violates American law by engaging in unauthorized employment also violates the terms of his release from INS custody. *Id.*, at ___ (slip. op., at 3).

Heckler v. *Campbell*, 461 U. S. 458 (1983), presents a closer analog to what the INS has done in this case, but only as a matter of logic, for the factual differences between the governmental action approved in *Heckler* and the INS' policy in this case renders the former a woefully inadequate precedent to support the latter. In *Heckler*, the Court approved the use of pre-established medical-vocational guidelines for determining Social Security disability benefits, stating:

"The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking

constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Witkovich*, 353 U. S., at 201–202 (quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932)). The detention of juveniles on the basis of a general presumption as to the suitability of particular custodians without an individualized determination as to whether that presumption bears any relationship at all to the facts of a particular case, implicates an interest at the very core of the Due Process Clause, the constitutionally protected interest in freedom from bodily restraint. As such, it raises even more

---

authority to determine issues that do not require case-by-case consideration. A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking." *Id.*, at 467 (citations omitted).

Suffice it to say that the determination as to the suitability of a temporary guardian for a juvenile, unlike the determination as to the nature and type of jobs available for an injured worker, *is* an inquiry that requires case-by-case consideration, and *is not* one that may be established fairly and efficiently in a single rulemaking. More importantly, the determination as to whether a child should be released to the custody of a friend, godparent or cousin, as opposed to being detained in a government institution, implicates far more fundamental concerns than whether an individual will receive a particular government benefit. In my view, the Court's reliance on *Heckler* v. *Campbell* cuts that case from its administrative law moorings. I simply do not believe that Congress authorized the INS to determine, by rulemaking, that children are better off in government detention facilities than in the care of responsible friends, cousins, godparents, or other responsible parties.

serious constitutional concerns than the INS policy invalidated in *Witkovich*. Legislative grants of discretionary authority should be construed to avoid constitutional issues and harsh consequences that were almost certainly not contemplated or intended by Congress. Unlike my colleagues, I would hold that the Attorney General's actions in this case are not authorized by §242(a).

I agree with JUSTICE O'CONNOR that respondents "have a constitutionally protected interest in freedom from institutional confinement . . . [that] lies within the core of the Due Process Clause." *Ante*, at 1 (concurring opinion). Indeed, we said as much just last Term. See *Foucha* v. *Louisiana*, 504 U. S. ___, ___ (1992) (slip op., at 8) ("Freedom from bodily restraint has always been at the core of liberty protected by the Due Process Clause from arbitrary governmental action"). *Ibid.* ("We have always been careful not to `minimize the importance and fundamental nature' of the individual's right to liberty") (quoting *United States* v. *Salerno*, 481 U. S. 739, 750 (1987)).

I am not as convinced as she, however, that "the Court today does not hold otherwise." *Ante*, at 1 (concurring opinion). For the children at issue in this case *are* being confined in government-operated or government-selected institutions, their liberty *has been* curtailed, and yet the Court defines the right at issue as merely the "alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Ante*, at 9. Finding such a claimed constitutional right to be "nove[l]," *ante*, at 10, and certainly not "fundamental," *ante*, at 12, 19, the Court concludes that these juveniles' alleged "right" to be released to "other

responsible adults" is easily trumped by the government's interest in protecting the welfare of these children and, most significantly, by the INS' interest in avoiding the administrative inconvenience and expense of releasing them to a broader class of custodians. *Ante*, at 12, 18–20.

In my view, the only "novelty" in this case is the Court's analysis. The right at stake in this case is not the right of detained juveniles to be *released* to one particular custodian rather than another, but the right not to be *detained* in the first place. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U. S., at 755 (1987). It is the government's burden to prove that detention is necessary, not the individual's burden to prove that release is justified. And, as JUSTICE O'CONNOR explains, that burden is not easily met, for when government action infringes on this most fundamental of rights, we have scrutinized such conduct to ensure that the detention serves both "legitimate and compelling" interests, *id.*, at 749, and, in addition, is implemented in a manner that is "carefully limited" and "narrowly focused." *Foucha*, 504 U. S., at ___ (slip op., at 9).[27]

---

[27]A comparison of the detention regimes upheld in *Salerno* and struck down in *Foucha* is illustrative. In *Salerno*, we upheld against due process attack provisions of the Bail Reform Act of 1984 which allow a federal court to detain an arrestee before trial if the government can demonstrate that no release conditions will "`reasonably assure . . . the safety of any other person or the community.'" *Salerno*, 481 U. S., at 741. As we explained in *Foucha:*

"The statute carefully limited the circumstances under which detention could be sought to those involving the most serious of crimes . . . , and was narrowly focused on a particularly acute problem in which the government interests are overwhelming. In

On its face, the INS' regulation at issue in this case cannot withstand such scrutiny.[28] The United States no doubt has a substantial and legitimate interest in protecting the welfare of juveniles that come into its custody. *Schall* v. *Martin*, 467 U. S. 253, 266 (1984). However, a blanket rule that simply *presumes* that detention is more appropriate than release to responsible adults is not narrowly focused on serving

---

addition to first demonstrating probable cause, the government was required, in a full-blown adversary hearing, to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person . . . . Furthermore, the duration of confinement under the Act was strictly limited. The arrestee was entitled to a prompt detention hearing and the maximum length of pretrial detention was limited by the stringent limitations of the Speedy Trial Act." 504 U. S., at ___ (slip op., at 9) (citations and internal quotation marks omitted).

By contrast, the detention statute we struck down in *Foucha* was anything but narrowly focused or carefully limited. Under Louisiana law, criminal defendants acquitted by reason of insanity were automatically committed to state psychiatric institutions, regardless of whether they were then insane, and held until they could prove that they were no longer dangerous. *Foucha*, *supra*, at ___ (slip op., at 1). We struck down the law as a violation of the substantive component of the Due Process Clause of the Fourteenth Amendment:

"Unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited. Under the statute, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify

that interest. Categorical distinctions between cousins and uncles, or between relatives and godparents or other responsible persons, are much too blunt instruments to justify wholesale deprivations of liberty. Due process demands more, far more.[29] If the government is going to detain juveniles in order to protect their welfare, due process requires that it demonstrate, *on an individual basis*, that

---

continued detention, for the statute places the burden on the detainee to prove that he is not dangerous.

. . . . .

"It was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration. Here, in contrast, the State asserts that . . . [Foucha] may be held indefinitely." *Id.*, at ___, (slip op., at 10–11).

As explained in the text, the INS' regulation at issue in this case falls well on the *Foucha* side of the *Salerno*/*Foucha* divide.

[28]Because this is a facial challenge, the Court asserts that respondents cannot prevail unless there is "no set of circumstances . . . under which the [regulation] would be valid." *Ante*, at 8. This is a rather puzzling pronouncement. Would a facial challenge to a statute providing for imprisonment of all alien children without a hearing fail simply because there is a set of circumstances in which at least one such alien should be detained? Is the Court saying that this challenge fails because the categorical deprivation of liberty to the members of the respondent class may turn out to be beneficial to some? Whatever the Court's rhetoric may signify, it seems clear to me, as I explain in the text, that detention for an insufficient reason without adequate procedural safeguards is a deprivation of liberty without due process of law.

[29]In objecting to this statement, see *ante*, at 18, n. 6, the majority once again mischaracterizes the issue

detention in fact serves that interest. That is the clear command of our cases. See, *e.g.*, *Foucha*, 504 U. S., at ___ (slip op., at 10) (finding due process violation when individual who is detained on grounds of "dangerousness" is denied right to adversary hearing in "which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community"); *Salerno*, 481 U. S., at 742 (finding no due process violation when detention follows hearing to determine whether detention is necessary to prevent flight or danger to community); *Schall* v. *Martin*, 467 U. S., at 263 (same; hearing to determine whether there is "serious risk" that if released juvenile will commit a crime); *Gerstein* v. *Pugh*, 420 U. S. 103, 126 (1975) (holding that Fourth Amendment requires judicial determination of probable cause as prerequisite to detention); *Greenwood* v. *United States*, 350 U. S. 366, 367 (1956) (upholding statute in which individuals charged with or convicted of federal crimes may be committed to the custody of the Attorney General after judicial determination of incompetency); *Carlson* v. *Landon*, 342 U. S., at 541 (approving Attorney General's discretionary decision to detain four alien Communists based on their membership and activity in Communist party); *Ludecke* v. *Watkins*, 335 U. S. 160, 163, n. 5 (1948) (upholding Attorney General's detention and deportation of alien under the Alien Enemy Act; finding of "dangerousness" based on evidence adduced at administrative hearings). See also *Stanley* v. *Illinois*, 405 U. S. 645, 657–658 (1972)

---

presented in this case. As explained above, see n. 24, *supra*, the INS can of course favor release of a juvenile to a parent or close relative over release to an unrelated adult. What the INS cannot do, in my view, is prefer *detention* over *release* to a responsible adult, a proposition that hardly ``revolutionize[s]'' our family law.

(State cannot rely on presumption of unsuitability of unwed fathers; State must make individualized determinations of parental fitness); *Carrington* v. *Rash*, 380 U. S. 89, 95–96 (1965) (striking down blanket exclusion depriving all servicemen stationed in State of right to vote when interest in limiting franchise to *bona fide* residents could have been achieved by assessing a serviceman's claim to residency on an individual basis).[30]

If, in fact, the Due Process Clause establishes a

---

[30]There is, of course, one notable exception to this long line of cases: *Korematsu* v. *United States*, 323 U. S. 214 (1944), in which the Court upheld the exclusion from particular "military areas" of all persons of Japanese ancestry without a determination as to whether any particular individual actually posed a threat of sabotage or espionage. *Id.*, at 215–216. The Court today does not cite that case, but the Court's holding in *Korematsu* obviously supports the majority's analysis, for the Court approved a serious infringement of individual liberty without requiring a case-by-case determination as to whether such an infringement was in fact necessary to effect the Government's compelling interest in national security. I understand the majority's reluctance to rely on *Korematsu*. The exigencies of war that were thought to justify that categorical deprivation of liberty are not, of course, implicated in this case. More importantly, the recent congressional decision to pay reparations to the Japanese-Americans who were detained during that period, see Restitution for World War II Internment of Japanese Americans and Aleuts, 102 Stat. 903, suggests that the Court should proceed with extreme caution when asked to permit the detention of juveniles when the government has failed to inquire whether, in any given case, detention actually serves the government's interest in protecting the interests of the children in its custody.

powerful presumption against unnecessary official detention that is not based on an individualized evaluation of its justification, why has the INS refused to make such determinations? As emphasized above, the argument that detention is more appropriate for these children than release to responsible adults is utterly lacking in support, in either the history of this litigation, or expert opinion. Presumably because of the improbability of the INS' asserted justification for its policy, the Court does not rely on it as the basis for upholding the regulation. Instead, the Court holds that even if detention is not really *better* for these juveniles than release to responsible adults, so long as it is "good enough," *ante*, at 12, the INS need not spend the time and money that would be necessary to actually serve the "best interests" of these children. *Id.*, at 11–12. In other words, so long as its cages are gilded, the INS need not expend its administrative resources on a program that would better serve its asserted interests and that would not need to employ cages at all.

The linchpin in the Court's analysis, of course, is its narrow reading of the right at stake in this case. By characterizing it as some insubstantial and nonfundamental right to be released to an unrelated adult, the Court is able to escape the clear holding of our cases that "administrative convenience" is a thoroughly inadequate basis for the deprivation of core constitutional rights. *Ante*, at 19 (citing, for comparison, *Stanley* v. *Illinois*, 405 U. S. 645 (1972)). As explained above, however, the right at issue in this case is not the right to be released to an unrelated adult; it is the right to be free from government confinement that is the very essence of the liberty protected by the Due Process Clause. It is a right that cannot be defeated by a claim of a lack of expertise or a lack of resources. In my view, then, *Stanley* v. *Illinois* is not a case to look to for comparison, but one from which to derive controlling

law. For in *Stanley*, we flatly rejected the premise underlying the Court's holding today.

In that case, we entertained a due process challenge to a statute under which children of unwed parents, upon the death of the mother, were declared wards of the State without any hearing as to the father's fitness for custody. In striking down the statute, we rejected the argument that a State's interest in conserving administrative resources was a sufficient basis for refusing to hold a hearing as to a father's fitness to care for his children:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.
>
> "*Bell* v. *Burson*, 402 U. S. 535 (1971), held that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault. Absent fault, the State's declared interest was so attenuated that administrative convenience was insufficient to excuse a hearing where evidence of fault could be considered. That drivers involved in accidents, as a statistical matter, might be very likely to have been wholly or partially at fault did not foreclose hearing and proof on specific cases before licenses were suspended.
>
> "We think the Due Process Clause mandates a similar result here. The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that

> advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." 405 U. S., at 656–658.

Just as the State of Illinois could not rely on the administrative convenience derived from denying fathers a hearing, the INS may not rely on the fact that "other concerns . . . compete for public funds and administrative attention," *ante*, at 12, as an excuse to keep from doing what due process commands: determining, on an individual basis, whether the detention of a child in a government-operated or government-sponsored institution actually serves the INS' asserted interest in protecting the welfare of that child.[31]

Ultimately, the Court is simply wrong when it asserts that "freedom from physical restraint" is not at issue in this case. That is precisely what is at issue. The Court's assumption that the detention facilities used by the INS conform to the standards set forth in the partial settlement in this case has nothing to do with the fact that the juveniles who are not released to relatives or responsible adults are

---

[31]Of course, even as a factual matter the INS' reliance on its asserted inability to conduct home studies because of a lack of resources or expertise as a justification for its wholesale detention policy is unpersuasive. It is perfectly clear that the costs of detention far exceed the cost of the kinds of inquiry that are necessary or appropriate for temporary release determinations. See n. 18, *supra*. Moreover, it is nothing less than perverse that the Attorney General releases juvenile *citizens* to the custody of "other responsible adults" without the elaborate "home studies" allegedly necessary to safeguard the juvenile's interests but deems such studies necessary before releasing *noncitizens* to the custody of "other responsible adults."

held in detention facilities. They do not have the "freedom from physical restraint" that those who are released do have. That is what this case is all about. That is why the respondent class continues to litigate. These juveniles do not want to be committed to institutions that the INS and the Court believe are "good enough" for aliens simply because they conform to standards that are adequate for the incarceration of juvenile delinquents. They want the same kind of liberty that the Constitution guarantees similarly situated citizens. And as I read our precedents, the omission of any provision for individualized consideration of the best interests of the juvenile in a rule authorizing an indefinite period of detention of presumptively innocent and harmless children denies them precisely that liberty.

I respectfully dissent.