**Demore v. Kim**

538 U.S. 510 (2003)

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

Chief Justice Rehnquist delivered the opinion of the Court.

Section 236(c) of the Immigration and Nationality Act, 66 Stat. 200, as amended, 110 Stat. 3009—585, 8 U.S.C. § 1226(c), provides that “[t]he Attorney General shall take into custody any alien who” is removable from this country because he has been convicted of one of a specified set of crimes. Respondent is a citizen of the Republic of South Korea. He entered the United States in 1984, at the age of six, and became a lawful permanent resident of the United States two years later. In July 1996, he was convicted of first-degree burglary in state court in California and, in April 1997, he was convicted of a second crime, “petty theft with priors.” The Immigration and Naturalization Service (INS) charged respondent with being deportable from the United States in light of these convictions, and detained him pending his removal hearing. We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large num-

bers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.

Respondent does not dispute the validity of his prior convictions, which were obtained following the full procedural protections our criminal justice system offers…Respondent instead filed a habeas corpus action pursuant to 28 U.S.C. § 2241 in the United States District Court for the Northern District of California challenging the constitutionality of §1226(c) itself. He argued that his detention under §1226(c) violated due process because the INS had made no determination that he posed either a danger to society or a flight risk.

The District Court agreed with respondent that §1226(c)’s requirement of mandatory detention for certain criminal aliens was unconstitutional. The District Court therefore granted respondent’s petition subject to the INS’ prompt undertaking of an individualized bond hearing to determine whether respondent posed either a flight risk or a danger to the community. Following that decision, the District Director of the INS released respondent on $5,000 bond.

The Court of Appeals for the Ninth Circuit affirmed. That court held that §1226(c) violates substantive due process as applied to respondent because he is a permanent resident alien. Three other Courts of Appeals have reached the same conclusion. The Seventh Circuit, however, rejected a constitutional challenge to §1226(c) by a permanent resident alien. We granted certiorari to resolve this conflict, see 536 U.S. 956 (2002), and now reverse.

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Having determined that the federal courts have jurisdiction to review a constitutional challenge to §1226(c), we proceed to review respondent’s claim. Section 1226(c) mandates detention during removal proceedings for a limited class of deportable aliens–including those convicted of an aggravated felony. Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens. Criminal aliens were the fastest growing segment of the federal prison population, already constituting roughly 25% of all federal prisoners, and they formed a rapidly rising share of state prison populations as well. Congress’ investigations showed, however, that the INS could not even identify most deportable aliens, much less locate them and remove them from the country…Making matters worse, criminal aliens who were deported swiftly reentered the country illegally in great numbers.

The agency’s near-total inability to remove deportable criminal aliens imposed more than a monetary cost on the Nation. First, as Congress explained, “[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others.” S. Rep. No. 104—249, p. 7 (1996). Second, deportable criminal aliens who remained in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%–nearly half–were arrested multiple times before their deportation proceedings even began. Hearing on H. R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989) (hereinafter 1989 House Hearing); see also Zadvydas, 533 U.S., at 713—714 (Kennedy, J., dissenting) (discussing high rates of recidivism for released criminal aliens).

Congress also had before it evidence that one of the major causes of the INS’ failure to remove deportable criminal aliens was the agency’s failure to detain those aliens during their deportation proceedings. See Department of Justice, Office of the Inspector General, Immigration and Naturalization Service, Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I—96—03 (Mar. 1996), App. 46 (hereinafter Inspection Report) (“Detention is key to effective deportation”); see also H. R. Rep. No. 104—469, p. 123 (1995). The Attorney General at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society. See 8 U.S.C. § 1252(a) (1982 ed.). Despite this discretion to conduct bond hearings, however, in practice the INS faced severe limitations on funding and detention space, which considerations affected its release determinations. S. Rep. 104—48, at 23 (“[R]elease determinations are made by the INS in large part, according to the number of beds available in a particular region”); see also Reply Brief for Petitioners 9.

Once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings. See S. Rep. 104—48, at 2; see also Brief for Petitioners 19.4 The dissent disputes that statistic, post, at 24—25 (opinion of Souter, J.), but goes on to praise a subsequent study conducted by the Vera Institute of Justice that more than confirms it. Post, at 26—27. As the dissent explains, the Vera study found that “77% of those [deportable criminal aliens] released on bond” showed up for their removal proceedings. Post, at 27. This finding–that one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings–is even more striking than the one-in-five flight rate reflected in the evidence before Congress when it adopted §1226(c).5 The Vera Institute study strongly supports Congress’ concern that, even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight.

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“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.” Mathews v. Diaz, 426 U.S. 67, 79—80 (1976). The dissent seeks to avoid this fundamental premise of immigration law by repeatedly referring to it as “dictum.” Post, at 9—10, n. 9 (opinion of Souter, J.). The Court in Mathews, however, made the statement the dissent now seeks to avoid in reliance on clear precedent establishing that “ ‘any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.’ ” 426 U.S., at 81, n. 17 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588—589 (1952)). And, since Mathews, this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens…

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“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” [Reno v. Flores, 507 U.S. 292 (1993).] At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process. As we said more than a century ago, deportation proceedings “would be vain if those accused could not be held in custody pending the inquiry into their true character.” Wong Wing v. United States, 163 U.S. 228, 235 (1896); see also Flores, supra, at 305—306; Zadvydas, 533 U.S., at 697 (distinguishing constitutionally questioned detention there at issue from “detention pending a determination of removability”); id., at 711 (Kennedy, J., dissenting) (“Congress’ power to detain aliens in connection with removal or exclusion … is part of the Legislature’s considerable authority over immigration matters”).

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Despite this Court’s longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings, respondent argues that the narrow detention policy reflected in 28 U.S.C. § 1226(c) violates due process. Respondent, like the four Courts of Appeals that have held §1226(c) to be unconstitutional, relies heavily upon our recent opinion in Zadvydas v. Davis, 533 U.S. 678 (2001).

In Zadvydas, the Court considered a due process challenge to detention of aliens under 8 U.S.C. § 1231 (1994 ed., Supp. V), which governs detention following a final order of removal. Section 1231(a)(b) provides, among other things, that when an alien who has been ordered removed is not in fact removed during the 90-day statutory “removal period,” that alien “may be detained beyond the removal period” in the discretion of the Attorney General. The Court in Zadvydas read §1231 to authorize continued detention of an alien following the 90-day removal period for only such time as is reasonably necessary to secure the alien’s removal. 533 U.S., at 699.

But Zadvydas is materially different from the present case in two respects.

First, in Zadvydas, the aliens challenging their detention following final orders of deportation were ones for whom removal was “no longer practically attainable.” Id., at 690. The Court thus held that the detention there did not serve its purported immigration purpose. Ibid. In so holding, the Court rejected the Government’s claim that, by detaining the aliens involved, it could prevent them from fleeing prior to their removal. The Court observed that where, as there, “detention’s goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed.” Ibid. (internal quotation marks and citation omitted).

In the present case, the statutory provision at issue governs detention of deportable criminal aliens pending their removal proceedings. Such detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed. Respondent disagrees, arguing that there is no evidence that mandatory detention is necessary because the Government has never shown that individualized bond hearings would be ineffective. See Brief for Respondent 14. But as discussed above, see supra, at 6—7, in adopting §1226(c), Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully.

Respondent argues that these statistics are irrelevant and do not demonstrate that individualized bond hearings “are ineffective or burdensome.” Brief for Respondent 33—40. It is of course true that when Congress enacted §1226, individualized bail determinations had not been tested under optimal conditions, or tested in all their possible permutations. But when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal. The evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action.

 Zadvydas is materially different from the present case in a second respect as well. While the period of detention at issue in Zadvydas was “indefinite” and “potentially permanent,” 533 U.S., at 690—691, the detention here is of a much shorter duration.

Zadvydas distinguished the statutory provision it was there considering from §1226 on these very grounds, noting that “post-removal-period detention, unlike detention pending a determination of removability … , has no obvious termination point.” Id., at 697 (emphasis added). Under 1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in Zadvydas. The Executive Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to §1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days. In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter.

For the reasons set forth above, respondent’s claim must fail. Detention during removal proceedings is a constitutionally permissible part of that process. See, e.g., Wong Wing, 163 U.S., at 235 (“We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid”); Carlson, 342 U.S. 524; Flores, 507 U.S. 292. The INS detention of respondent, a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings, is governed by these cases. The judgment of the Court of Appeals is

Reversed.

Justice Souter, with whom Justice Stevens and Justice Ginsburg join, concurring in part and dissenting in part.

Respondent Kim is an alien lawfully admitted to permanent residence in the United States. He claims that the Constitution forbids the Immigration and Naturalization Service (INS) from detaining him under 8 U.S.C. § 1226(c) unless his detention serves a government interest, such as preventing flight or danger to the community. He contends that due process affords him a right to a hearing before an impartial official, giving him a chance to show that he poses no risk that would justify confining him between the moment the Government claims he is removable and the adjudication of the Government’s claim.

…The Court’s holding that the Constitution permits the Government to lock up a lawful permanent resident of this country when there is concededly no reason to do so forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process. The INS has never argued that detaining Kim is necessary to guarantee his appearance for removal proceedings or to protect anyone from danger in the meantime. Instead, shortly after the District Court issued its order in this case, the INS, sua sponte and without even holding a custody hearing, concluded that Kim “would not be considered a threat” and that any risk of flight could be met by a bond of $5,000. He was released soon thereafter, and there is no indication that he is not complying with the terms of his release…

At the outset, there is the Court’s mistaken suggestion that Kim “conceded” his removability. The Court cites no statement before any court conceding removability, and I can find none. At the first opportunity, Kim applied to the Immigration Court for withholding of removal, and he represents that he intends to assert that his criminal convictions are not for removable offenses and that he is independently eligible for statutory relief from removal…At oral argument here, his counsel stated that Kim was challenging his removability.

It has been settled for over a century that all aliens within our territory are “persons” entitled to the protection of the Due Process Clause. Aliens “residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility.” Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893)…

The constitutional protection of an alien’s person and property is particularly strong in the case of aliens lawfully admitted to permanent residence (LPRs). The immigration laws give LPRs the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen. In fact, the law of the United States goes out of its way to encourage just such attachments by creating immigration preferences for those with a citizen as a close relation, and those with valuable professional skills or other assets promising benefits to the United States.

Once they are admitted to permanent residence, LPRs share in the economic freedom enjoyed by citizens: they may compete for most jobs in the private and public sectors without obtaining job-specific authorization, and apart from the franchise, jury duty, and certain forms of public assistance, their lives are generally indistinguishable from those of United States citizens. That goes for obligations as well as opportunities. Unlike temporary, nonimmigrant aliens, who are generally taxed only on income from domestic sources or connected with a domestic business, LPRs, like citizens, are taxed on their worldwide income. Male LPRs between the ages of 18 and 26 must register under the Selective Service Act of 1948, “Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society.” In re Griffiths, 413 U.S. 717, 722 (1973). And if they choose, they may apply for full membership in the national polity through naturalization.

The attachments fostered through these legal mechanisms are all the more intense for LPRs brought to the United States as children. They grow up here as members of the society around them, probably without much touch with their country of citizenship, probably considering the United States as home just as much as a native-born, younger brother or sister entitled to United States citizenship. “[M]any resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens.” Woodby v. INS, 385 U.S. 276, 286 (1966). Kim is an example. He moved to the United States at the age of six and was lawfully admitted to permanent residence when he was eight. His mother is a citizen, and his father and brother are LPRs. LPRs in Kim’s situation have little or no reason to feel or to establish firm ties with any place besides the United States.

Our decisions have reflected these realities. As early as 1892, we addressed an issue of statutory construction with the realization that “foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicil of choice … is to be presumed.” Lau Ow Bew v. United States, 144 U.S. 47, 61—62.6 Fifty years later in dealing with a question of evidentiary competence in Bridges v. Wixon, 326 U.S. 135 (1945), we said that “the notions of fairness on which our legal system is founded” applied with full force to “aliens whose roots may have become, as they are in the present case, deeply fixed in this land,” id., at 154. Kwong Hai Chew adopted the statement of Justice Murphy, concurring in Bridges, that “ ‘once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all “persons” and guard against any encroachment on those rights by federal or state authority.’ ” 344 U.S., at 596—597, n. 5 (quoting Bridges, supra, at 161)…

Although LPRs remain subject to the federal removal power, that power may not be exercised without due process, and any decision about the requirements of due process for an LPR must account for the difficulty of distinguishing in practical as well as doctrinal terms between the liberty interest of an LPR and that of a citizen. In evaluating Kim’s challenge to his mandatory detention under 8 U.S.C. § 1226(c), the only reasonable starting point is the traditional doctrine concerning the Government’s physical confinement of individuals.

Kim’s claim is a limited one: not that the Government may not detain LPRs to ensure their appearance at removal hearings, but that due process under the Fifth Amendment conditions a potentially lengthy detention on a hearing and an impartial decisionmaker’s finding that detention is necessary to a governmental purpose. He thus invokes our repeated decisions that the claim of liberty protected by the Fifth Amendment is at its strongest when government seeks to detain an individual. The Chief Justice wrote in 1987 that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” United States v. Salerno, 481 U.S. 739, 755…

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These cases yield a simple distillate that should govern the result here. Due process calls for an individual determination before someone is locked away. In none of the cases cited did we ever suggest that the government could avoid the Due Process Clause by doing what §1226(c) does, by selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away…

We held as much just two Terms ago in Zadvydas v. Davis, 533 U.S. 678 (2001), which stands for the proposition that detaining an alien requires more than the rationality of a general detention statute; any justification must go to the alien himself. Zadvydas considered detention of two aliens, Zadvydas and Ma, who had already been ordered removed and therefore enjoyed no lawful immigration status. Their cases arose because actual removal appeared unlikely owing to the refusal of their native countries to accept them, with the result that they had been detained not only for the standard 90-day removal period, during which time most removal orders are executed, but beyond that period because the INS considered them to be a “ ‘risk to the community’ ” and “ ‘unlikely to comply with the order of removal.’ ” Id., at 682 (quoting 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V)). Zadvydas and Ma challenged their continued and potentially indefinite detention under the Due Process Clause of the Fifth Amendment.

The Zadvydas opinion opened by noting the clear applicability of general due process standards: physical detention requires both a “special justification” that “outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint’ ” and “adequate procedural protections.” 533 U.S., at 690 (quoting Hendricks, supra, at 356). Nowhere did we suggest that the “constitutionally protected liberty interest” in avoiding physical confinement, even for aliens already ordered removed, was conceptually different from the liberty interest of citizens…

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In sum, due process requires a “special justification” for physical detention that “outweighs the individual’s constitutionally protected interest in avoiding physical restraint ” as well as “adequate procedural protections.” Zadvydas, 533 U.S., at 690—691 (internal quotation marks omitted). “There must be a ‘sufficiently compelling’ governmental interest to justify such an action, usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the community.” Flores, 507 U.S., at 316 (O’Connor, J., concurring) (quoting Salerno, 481 U.S., at 748)…Finally, procedural due process requires, at a minimum, that a detainee have the benefit of an impartial decisionmaker able to consider particular circumstances on the issue of necessity. Id., at 691—692; id., at 722 (Kennedy, J., dissenting); Foucha, supra, at 81; Salerno, supra, at 750.

By these standards, Kim’s case is an easy one. “[H]eightened, substantive due process scrutiny,” Flores, supra, at 316 (O’Connor, J., concurring), uncovers serious infirmities in §1226(c). Detention is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where the underlying offenses are minor. E. g., Michel v. INS, 206 F.3d 253, 256 (CA2 2000) (possession of stolen bus transfers); Matter of Bart, 20 I. & N. Dec. 436 (BIA 1992) (issuance of a bad check). Detention under §1226(c) is not limited by the kind of time limit imposed by the Speedy Trial Act, and while it lasts only as long as the removal proceedings, those proceedings have no deadline and may last over a year. See Brief for Citizens and Immigrants for Equal Justice et al. as Amici Curiae 23—26; see also id., at 10—20 (citing examples). Section 1226(c) neither requires nor permits an official to determine whether Kim’s detention was necessary to prevent flight or danger.

Kim’s detention without particular justification in these respects, or the opportunity to enquire into it, violates both components of due process, and I would accordingly affirm the judgment of the Court of Appeals requiring the INS to hold a bail hearing to see whether detention is needed to avoid a risk of flight or a danger to the community. This is surely little enough, given the fact that 8 U.S.C. § 1536 gives an LPR charged with being a foreign terrorist the right to a release hearing pending a determination that he be removed.

The Court proceeds to the contrary conclusion on the premise that “the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings.” Ante, at 16. Sometimes, maybe often, it may, but that is not the point in contention. Kim has never challenged the INS’s general power to detain aliens in removal proceedings or even its power to detain him in particular, if it affords him a chance to participate in an enquiry whether he poses a flight risk or a danger to society.

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This case is not about the National Government’s undisputed power to detain aliens in order to avoid flight or prevent danger to the community. The issue is whether that power may be exercised by detaining a still lawful permanent resident alien when there is no reason for it and no way to challenge it. The Court’s holding that the Due Process Clause allows this under a blanket rule is devoid of even ostensible justification in fact and at odds with the settled standard of liberty. I respectfully dissent.