US Supreme Court

Case: *Demore v. Kim*, 538 U.S. 510 (2003)
Date: April 29, 2003 **Votes:** *See Chart* **Opinion:** Rehnquist
Concurrence: Kennedy (in full) **Concur in Part:** O'Connor (with Scalia & Thomas)
Concur/Dissent: Souter (with Stevens & Ginsburg); Breyer

Tags: Immigration, removal, detention, Constitution, procedural due process, aggravated felonies

Question(s) Presented: Whether **§ 1226(c)/INA § 236(c)** is unconstitutional (apprehension and detention of aliens pending removal)?

Procedural History:

- **Removability charged & conceded; Respondent filed habeas petition in Dist. Ct.**
- **1999: N.D. CA:** detention under **§ 1226(c)/INA § 236(c)** violates due process because no determination of danger to society / flight risk with mandatory detention; ordered bond hearing.
- **2002: 9th Circuit:** affirmed because substantive due process was violated for LPR.
  - "It noted that permanent resident aliens constitute the most favored category of aliens . . ." 515
  - Respondent's ag fels were "rather ordinary crimes" and did not amount to "danger to the community." 515
  - Relied on *Zadvydas v. Davis* re. liberty interest of FN

Holdings: "We hold that Congress . . . may require that persons such as respondent be detained for the brief period necessary for their removal proceedings." 513

- "Detention during removal proceedings is a constitutionally permissible part of that process." 531

Rationale: Congress was "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 numbers." 513

Facts: (513) SK citizen entered U.S. in 1984 at age 6 and became LPR 1986. 1996-97 convicted of burglary and petty theft. INS charged him with deportability and detained him pending removal.

Respondent's Arguments:

- Mandatory detention (**§ 1226(c)/INA § 236(c)**) deprives FN of right to challenge custody determination on danger to community and flight risk, and is therefore unconstitutional. 514

Government's Arguments:

- Detention ensures the presence of the alien at removal proceedings (because ~20% don't show up);
- Detention protects the public from dangerous criminal aliens.

Appeals to Statute & Precedent:

- **8 U.S.C. § 1226(c) / INA § 236(c):** mandatory detention because of aggravated felonies
- **8 U.S.C. § 1226(e) / INA § 236(e):** (see Commentary below) – No judicial review of A.G. decisions about detention or release of any alien.
- ***Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999):** respondent entitled to hearing to show why they should not be mandatorily detained
- ***Zadvydas v. Davis*, 533 U.S. 678 (2001):** due process challenge to detained aliens after final order of removal: continued detention beyond the 90-day removal period is permissible only as reasonably necessary to secure the alien's removal. (Here, removal was no longer practically attainable.)
- ***INS v. St. Cyr*, 533 U.S. 289 (2001):** habeas claims
- ***Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976):** "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."
- ***Harisiades v. Shaughnessy*, 342 U.S. 580 (1952):** immigration enforcement is intricately intertwined with foreign relations.
- ***Wong Wing v. U.S.*, 163 U.S. 228 (1896):** Detention for the sake of removal is fine; hard labor is not.
- ***Carlson v. Landon*, 342 U.S. 524 (1952):** detained FNs with Communist ties protested that they'd show up for later court proceedings—but court said nah, detention is a necessary part of removal proceedings.
- ***Reno v. Flores*, 507 U.S. 292 (1993):** Protested INS's policy of releasing juveniles only into the care of their parents, legal guardians, or certain other adult relatives. Court said Congress could delegate to INS to make its own rules when it came to immigration. [This is different from the 1997 Court-stipulated agreement regarding housing conditions for juveniles in immigration detention.]

Relevant U.S. History:

- Legislative history re. **8 U.S.C. § 1226(c) / INA § 236(c)** (on mandatory detention during removal proceedings):
  - "Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." 518
  - "Congress also had before it evidence that one of the major causes of the INS's failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." 519
    - "Once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings." 519
  - **1990: Expanded Ag Fel definition**
  - **1990: Authorized release of LPRs**—bond hearings during deportation proceedings where such aliens were found not to constitute a flight risk or threat to the community.

Discussion:

- Per *Harisiades v. Shaughnessy* (at 588-89), "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."
- "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." 522
- "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.'" 523 (quoting *Wong Wing* at 235)
- *Zadvydas*: "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." (527; Z at 690.)
    - "While the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,' the detention here is of a much shorter duration." 528

Concurrence in Full: Kennedy

- "due process requires individualized procedures to ensure there is at least some merit to the INS's charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing." 531
    - "As the Court notes, these procedures were apparently available to respondent in this case." 532
    - "Respondent, however, did not seek relief under these procedures, and the Court had no occasion here to determine their adequacy." 532

Concurrence in Part: O'Connor, with Scalia & Thomas

- Believes that **§ 1226(e)** doesn't give federal courts jurisdiction to review ANYTHING related to an A.G.'s decision about detention or release, including the question of whether the statute itself is constitutional.
    - "There is simply no reasonable way to read this language other than as precluding all review, including habeas review, of the A.G.'s actions or decisions to detain criminal aliens pursuant to **§ 1226(c).**" 534
    - "Because **§ 1226(e)** plainly deprives courts of federal habeas jurisdiction over claims that mandatory detention under **§ 1226(c)** is unconstitutional, one could conceivably argue that such a repeal violates the Suspension Clause…" 537

Concur/Dissent: Souter with Ginsburg and Stevens

- Jurisdiction part was fine—okay to examine constitutional question regarding the detention statute.
- "I dissent from the Court's disposition [541] on the merits. 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." 540-41
- "The Court's approval of lengthy mandatory detention can therefore claim no justification in national emergency or any risk posed by Kim particularly." 541
- "Kim may continue to claim the benefit of his current status unless and until it is terminated by a final order of removal. 8 C.F.R. Sec. 1.1(p) (2002). He may therefore claim the due process to which a lawful permanent resident is entitled." 543
- "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." 543 (Citing ***Fong Yue Ting* (1893)** & ***The Japanese Immigrant Case (Yamataya)* (1903)**.)
- Especially strong protections to LPRs. 543-46
    - Several precedents
    - ***Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953):** "excludable" does not have any application to LPRs.
    - ***Landon v. Plasencia*, 459 U.S. 21 (1982):** LPR's interest in remaining in the U.S.

- "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." 547

- Due process claims are strongest when government seeks to detain an individual. 549
  - "Accordingly, the Fifth Amendment permits detention only where 'heightened, substantive due process scrutiny' finds a 'sufficiently compelling' governmental need." 549 (quoting *Flores*, O'Connor, J., concurring; internal quotation marks omitted.)
- "The substantive demands of due process necessarily go hand in hand with the procedural, and the cases insist at the least on an opportunity for a detainee to challenge the reason claimed for committing him." 551
- "These cases yield a simple distillate that should govern the result here. Due process calls for an individual determination before someone is locked away." 551
- "In fact, aliens in removal proceedings have an additional interest in avoiding confinement, beyond anything considered in *Zadvydas*: detention prior to entry of a removal order may well impede the alien's ability to develop and present his case on the very issue of removability." 554
- "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." 576

Concur/Dissent: Breyer

- Kim ought to get bail, because he can make a non-frivolous argument for why he is not deportable.

Commentary:

PART 1: Argument for Judicial Review

- **8 U.S.C. § 1226(e) / INA § 236(e):** "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the A.G. under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."
- "respondent does not challenge a 'discretionary judgment' by the A.G. or a 'decision' that the A.G. has made regarding his detention or release. [517] Rather, respondent challenges the statutory framework that permits his detention without bail." 516-17
- Court's precedent requires *express preclusion of judicial review of constitutional claims.*
  - "And, where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress's intent." 517
  - "Section 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the legislation authorizing his detention without bail." 517

	Rehnquist	**Kennedy**	**O'Connor**	**Scalia**	**Thomas**	**Souter**	**Stevens**	**Ginsburg**	**Breyer**
	Opinion	***Concurrence in full***	***Concur in part & J***	***Joined O'Connor***	***Joined O'Connor***	***Concur / dissent in part***	***Joined Souter***	***Joined Souter***	***Concur / dissent in part***
Jdgmnt	✔	✔	✔	✔	✔				
PART 1 Jx to review	✔	✔				✔	✔	✔	✔
PART 2 Detention permissible	✔	✔	✔	✔	✔				