

## **U.S. Can Hold Immigrants Set To Be Deported**

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### **Body**

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The government can imprison immigrants it is seeking to deport without first giving them a chance to show that they present neither a flight risk nor a danger to the community, a divided Supreme Court ruled today.

The 5-to-4 decision upheld the mandatory-detention provisions of a 1996 immigration law as applied to a substantial category of aliens who are lawful permanent residents of the United States and who have been convicted of any of a number of drug crimes and other "aggravated" offenses. Excerpts, Page A20.

The provision does not deal with terrorism, and the decision today has no direct application to the legal issues involving the detention and treatment of suspects under the USA Patriot Act that Congress passed after the terrorist attacks on Sept. 11, 2001. But the decision was nonetheless notable for the degree of deference the majority showed to the judgments Congress made in 1996 about the desirability of detaining immigrants before deporting them.

Tens of thousands of these so-called "criminal aliens" have been imprisoned before deportation under the statute, which replaced a law giving the attorney general the discretion to release individuals on bond while their deportation cases went forward as long as they presented neither flight nor security risk.

Four federal appeals courts, including the San Francisco-based United States Court of Appeals for the Ninth Circuit in this case, have declared the mandatory-detention provision unconstitutional at least as applied to lawful permanent residents, who have more rights than aliens who have not been lawfully admitted into the country.

In addition to overturning the Ninth Circuit today, the court next week will almost certainly vacate the other decisions, from the 3rd Circuit in Philadelphia, the 4th Circuit in Richmond, Va., and the 10th Circuit in Denver.

The appeals courts had relied in part on a Supreme Court decision of two years ago, *Zadvydas v. Davis*, in which the court interpreted another provision of the immigration law and ruled that the government could not indefinitely detain a deportable alien whose country of origin refused to take him back.

In his opinion for the court today, Chief Justice William H. Rehnquist -- who had dissented from the earlier decision -- said the two cases were substantially different, the first dealing with an open-ended, perhaps lifetime detention, while the case today concerned detentions that last only weeks or months, until the conclusion of deportation proceedings.

The result was to turn the *Zadvydas* decision into a narrower ruling in retrospect than it appeared to be to immigrants' rights advocates when it was issued in June 2001; it had appeared then to establish a significant floor of constitutional protection even for aliens who had been adjudged deportable.

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The immigrant in the case today, a Korean-born Californian named Hyung Joon Kim, is still contesting his deportability and is not yet subject to a final order of removal.

Justice Sandra Day O'Connor had joined the majority in the Zadvydas decision, which was also decided by a 5-to-4 vote. Her vote with Chief Justice Rehnquist today determined the different outcome.

The only federal appeals court to have upheld the mandatory-detention provision at issue today was the United States Court of Appeals for the Seventh Circuit, in Chicago, which, unlike the other appeals courts, issued its ruling before the Supreme Court decided the Zadvydas case.

Mr. Kim came to the United States from Korea with his family at the age of 6 and became a permanent resident two years later. After two criminal convictions in California as a teenager, one for burglary and one for theft, he was placed in deportation proceedings and imprisoned under the new law. After three months in detention, he filed a petition for a writ of habeas corpus arguing that he was constitutionally eligible for release while challenging his deportation.

His case raised two questions: whether habeas corpus review was available despite language in the law suggesting that it was not, and whether the mandatory-detention provision violated the constitutional guarantee of due process.

Six justices agreed today that habeas corpus was available, thus giving the court jurisdiction over the case and reiterating the need for Congress to be extremely clear if it intended to strip the courts of jurisdiction over a category of cases. Reaching the merits of the case, five then found no constitutional requirement for a hearing at which a detained immigrant could demonstrate eligibility for release on bond.

The two questions were answered by separate coalitions of justices. Those who agreed that the court had jurisdiction were, in addition to Chief Justice Rehnquist, Justice Anthony M. Kennedy and the four who dissented on the detention issue: Justices David H. Souter, John Paul Stevens, Ruth Bader Ginsburg and Stephen G. Breyer.

Those who agreed with the chief justice on the constitutionality of mandatory detention were Justices Kennedy, O'Connor, Antonin Scalia, and Clarence Thomas.

Chief Justice Rehnquist said that "against a backdrop of wholesale failure" by immigration authorities under the old law to deal with rising rates of crime by aliens, Congress had adequately demonstrated a need to imprison aliens awaiting deportation for past crimes to keep them from committing new crimes.

While Congress might have permitted "individualized bail determinations," he said, "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."

After the federal district court in San Francisco ruled in favor of Mr. Kim in 1999, the Immigration and Naturalization Service granted him a hearing, found him eligible for release and released him on \$5,000 bond. He has been free since then, working and attending college. His lawyer, Judy Rabinovitz of the American Civil Liberties Union, said Mr. Kim would now challenge his eligibility for deportation on the ground that the property crimes for which he was convicted were not the "aggravated" crimes of "moral turpitude" to which the law refers.

In a dissenting opinion, Justice Souter said the decision was "at odds with the settled standard of liberty," under which the government has to justify the detention of individuals on a case-by-case basis, not of entire classes of people. "Due process calls for an individual determination before someone is locked away," Justice Souter said. He read his dissent from the bench this morning, a step he has taken only rarely to emphasize a particularly deep disagreement. Justices Stevens and Ginsburg signed his opinion.

Justice Breyer, who wrote the majority opinion in the Zadvydas case, dissented separately on narrower grounds. He said the 1996 law, properly interpreted, made bail available to an alien who raised a substantial legal challenge to deportability.

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