SUPREME COURT OF THE UNITED STATES

No. 01–1491

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS *v.* HYUNG JOON KIM

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

[April 29, 2003]

JUSTICE KENNEDY, concurring.

While the justification for 8 U. S. C. §1226(c) is based upon the Government's concerns over the risks of flight and danger to the community, *ante*, at 7–10, the ultimate purpose behind the detention is premised upon the alien's deportability. As a consequence, due process requires individualized procedures to ensure there is at least some merit to the Immigration and Naturalization Service's (INS) charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing. See *Zadvydas* v. *Davis*, 533 U. S. 678, 690 (2001) ("[W]here detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed" (internal quotation marks and brackets omitted)); *id.*, at 718 (KENNEDY, J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention"). If the Government cannot satisfy this minimal, threshold burden, then the permissibility of continued detention pending deportation proceedings turns solely upon the alien's ability to satisfy the ordinary bond procedures—namely, whether if released the alien would pose a risk of flight or

a danger to the community. *Id.*, at 721 (KENNEDY, J., dissenting).

As the Court notes, these procedures were apparently available to respondent in this case. Respondent was entitled to a hearing in which he could have "raise[d] any nonfrivolous argument available to demonstrate that he was not properly included in a mandatory detention category." *Ante*, at 2, and n. 3 (citing 8 CFR §3.19(h)(2)(ii) (2002); *In re Joseph*, 22 I. & N. Dec. 799 (1999)). Had he prevailed in such a proceeding, the Immigration Judge then would have had to determine if respondent "could be considered . . . for release under the general bond provisions" of §1226(a). *Id.*, at 809. Respondent, however, did not seek relief under these procedures, and the Court had no occasion here to determine their adequacy. *Ante*, at 2, n. 3.

For similar reasons, since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified. *Zadvydas*, 533 U. S., at 684–686; *id.*, at 721 (KENNEDY, J., dissenting) ("[A]liens are entitled to be free from detention that is arbitrary or capricious"). Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons. That is not a proper inference, however, either from the statutory scheme itself or from the circumstances of this case. The Court's careful opinion is consistent with these premises, and I join it in full.