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]

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.[1] We hold that Con-

[1]App. to Pet. for Cert. 32a; see 8 U. S. C. §§1101(a)(43)(G),

gress, 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, 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 also did not dispute the INS' conclusion that he is subject to mandatory detention under §1226(c). See Brief in Opposition 1–2; App. 8–9.[2] In conceding that he was deportable, respondent forwent a hearing at which he would have been entitled to raise any nonfrivolous argument available to demonstrate that he was not properly included in a mandatory detention category. See 8 CFR §3.19(h)(2)(ii) (2002); *In re Joseph,* 22 I. & N. Dec. 799 (1999).[3] Respondent instead filed a habeas corpus action

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1227(a)(2)(A)(iii). Section 1226(c) authorizes detention of aliens who have committed certain crimes including, *inter alia*, any "aggravated felony," §§1226(c)(1)(B), 1227(a)(2)(A)(iii), and any two "crimes involving moral turpitude," §§1226(c)(1)(B), 1227(a)(2)(A)(ii). Although the INS initially included only respondent's 1997 conviction in the charging document, it subsequently amended the immigration charges against him to include his 1996 conviction for first-degree burglary as another basis for mandatory detention and deportation. Brief for Petitioners 3, n. 2 (alleging that respondent's convictions reflected two "'crimes involving moral turpitude'").

[2] As respondent explained: "The statute requires the [INS] to take into custody any alien who 'is deportable' from the United States based on having been convicted of any of a wide range of crimes. . . . [Respondent] does not challenge INS's authority to take him into custody after he finished serving his criminal sentence. His challenge is solely to Section 1226(c)'s absolute prohibition on his release from detention, even where, as here, the INS never asserted that he posed a danger or significant flight risk." Brief in Opposition 1–2.

[3] This "*Joseph* hearing" is immediately provided to a detainee who claims that he is not covered by §1226(c). Tr. of Oral Arg. 22. At the

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. App. to Pet. for Cert. 2a. 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. *Id.*, at 31a, 33a.

The District Court agreed with respondent that §1226(c)'s requirement of mandatory detention for certain criminal aliens was unconstitutional. *Kim* v. *Schiltgen*, No. C 99–2257 SI (Aug. 11, 1999), App. to Pet. for Cert. 31a–51a. 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. *Id.*, at 50a. Following that decision, the District Director of the INS released respondent on $5,000 bond.

The Court of Appeals for the Ninth Circuit affirmed. *Kim* v. *Ziglar*, 276 F. 3d 523 (2002). That court held that §1226(c) violates substantive due process as applied to respondent because he is a permanent resident alien. *Id.,* at 528. It noted that permanent resident aliens constitute the most favored category of aliens and that they have the

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hearing, the detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the INS is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention. See 8 CFR §3.19(h)(2)(ii) (2002); *In re Joseph*, 22 I. & N. Dec. 799 (1999). Because respondent conceded that he was deportable because of a conviction that triggers §1226(c) and thus sought no *Joseph* hearing, we have no occasion to review the adequacy of *Joseph* hearings generally in screening out those who are improperly detained pursuant to §1226(c). Such individualized review is available, however, and the dissent is mistaken if it means to suggest otherwise. See *post*, at 17, 20 (opinion of SOUTER, J.).

right to reside permanently in the United States, to work here, and to apply for citizenship. *Ibid.* The court recognized and rejected the Government's two principal justifications for mandatory detention under §1226(c): (1) ensuring the presence of criminal aliens at their removal proceedings; and (2) protecting the public from dangerous criminal aliens. The Court of Appeals discounted the first justification because it found that not all aliens detained pursuant to §1226(c) would ultimately be deported. *Id.,* at 531–532**.** And it discounted the second justification on the grounds that the aggravated felony classification triggering respondent's detention included crimes that the court did not consider "egregious" or otherwise sufficiently dangerous to the public to necessitate mandatory detention. *Id.,* at 532–533. Respondent's crimes of first-degree burglary (burglary of an inhabited dwelling) and petty theft, for instance, the Ninth Circuit dismissed as "rather ordinary crimes." *Id.,* at 538. Relying upon our recent decision in *Zadvydas* v. *Davis,* 533 U. S. 678 (2001), the Court of Appeals concluded that the INS had not provided a justification "for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest." 276 F. 3d, at 535.

Three other Courts of Appeals have reached the same conclusion. See *Patel* v. *Zemski*, 275 F. 3d 299 (CA3 2001); *Welch* v. *Ashcroft*, 293 F. 3d 213 (CA4 2002); *Hoang* v. *Comfort*, 282 F. 3d 1247 (CA10 2002). The Seventh Circuit, however, rejected a constitutional challenge to §1226(c) by a permanent resident alien. *Parra* v. *Perryman*, 172 F. 3d 954 (1999). We granted certiorari to resolve this conflict, see 536 U. S. 956 (2002), and now reverse.

I

We address first the argument that 8 U. S. C. §1226(e) deprives us of jurisdiction to hear this case. See *Florida* v. *Thomas,* 532 U. S. 774, 777 (2001) ("Although the parties

did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case"). An *amicus* argues, and the concurring opinion agrees, that §1226(e) deprives the federal courts of jurisdiction to grant habeas relief to aliens challenging their detention under §1226(c). See Brief for Washington Legal Foundation et al. as *Amici Curiae*. Section 1226(e) states:

> "(e) Judicial review
> "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 Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."

The *amicus* argues that respondent is contesting a "decision by the Attorney General" to detain him under §1226(c), and that, accordingly, no court may set aside that action. Brief for Washington Legal Foundation et al. as *Amici Curiae* 7–8.

But respondent does not challenge a "discretionary judgment" by the Attorney General or a "decision" that the Attorney General has made regarding his detention or release. Rather, respondent challenges the statutory framework that permits his detention without bail. *Parra* v. *Perryman*, *supra,* at 957 ("Section 1226(e) likewise deals with challenges to operational decisions, rather than to the legislation establishing the framework for those decisions").

This Court has held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster* v. *Doe,* 486 U. S. 592, 603 (1988); see also *Johnson* v. *Robison,* 415 U. S. 361, 367 (1974) (holding that provision barring review of "'decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration

providing benefits for veterans'" did not bar constitutional challenge (emphasis deleted)). And, where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress' intent. See *INS* v. *St. Cyr,* 533 U. S. 289, 308–309 (2001) (holding that title of provision, "Elimination of Custody Review by Habeas Corpus" along with broad statement of intent to preclude review was not sufficient to bar review of habeas corpus petitions); see also *id.,* at 298 (citing cases refusing to find bar to habeas review where there was no specific mention of the Court's authority to hear habeas petitions); *id.,* at 327 (SCALIA, J., dissenting) (arguing that opinion established "a superclear statement, 'magic words' requirement for the congressional expression of" an intent to preclude habeas review).

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.

II

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. See, *e.g.,* Criminal Aliens in the United States: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 103d Cong., 1st Sess. (1993); S. Rep. No. 104–48, p. 1 (1995) (hereinafter S. Rep. 104–48) (confinement of criminal aliens alone cost $724 million in 1990). 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. *Id.,* at 6–9**.** Congress' investigations showed, however, that the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country. *Id.,* at 1. One study showed that, at the then-current rate of deportation, it would take 23 years to remove every criminal alien already subject to deportation. *Id.,* at 5. Making matters worse, criminal aliens who were deported swiftly reentered the country illegally in great numbers. *Id.,* at 3.

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

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[4] Although the Attorney General had authority to release these aliens on bond, it is not clear that *all* of the aliens released were in fact given individualized bond hearings. See Brief for Petitioners 19 ("[M]ore than 20% of criminal aliens who were released on bond *or otherwise not kept in custody* throughout their deportation proceedings failed to appear for those proceedings"), citing S. Rep. 104–48, at 2 (emphasis added). The evidence does suggest, however, that *many* deportable criminal aliens in this "released criminal aliens" sample received such determinations. See Brief for Petitioners 19 (noting that, for aliens not evaluated for flight risk at a bond hearing, the prehearing skip rate doubled to 40%).

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.

Congress amended the immigration laws several times toward the end of the 1980's. In 1988, Congress limited the Attorney General's discretion over custody determinations with respect to deportable aliens who had been convicted of aggravated felonies. See Pub. L. 100–690, Tit. VII, §7343(a), 102 Stat. 4470. Then, in 1990, Congress broadened the definition of "aggravated felony," subjecting

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[5]The dissent also claims that the study demonstrated that "92% of criminal aliens . . . who were released under supervisory conditions attended all of their hearings." *Post*, at 27 (opinion of SOUTER, J.). The study did manage to raise the appearance rate for criminal aliens through a supervision program known as the Appearance Assistance Program (AAP). But the AAP study is of limited value. First, the study included only 16 aliens who, like respondent, were released from prison and charged with being deportable on the basis of an aggravated felony. 1 Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, pp. 33–34, 36 (Aug. 1, 2000). In addition, all 127 aliens in the AAP study were admitted into the study group only after being screened for "strength of family and community ties, appearance rates in prior legal proceedings, and eligibility to apply for a legal remedy." *Id*., at 13; see also *id*., at 37. Following this selection process, "supervision staff were in frequent, ongoing communication with participants," *id*., at 14, through, among other things, required reporting sessions, periodic home visits, and assistance in retaining legal representation. *Id.,* at 41–42. And, in any event, respondent seeks an individualized bond hearing, not "community supervision." The dissent's claim that criminal aliens released under supervisory conditions are likely to attend their hearings, *post*, at 27, therefore, is totally beside the point.

more criminal aliens to mandatory detention. See Pub. L. 101–649, Tit. V, §501(a), 104 Stat. 5048. At the same time, however, Congress added a new provision, 8 U. S. C. §1252(a)(2)(B) (1988 ed., Supp. II), authorizing the Attorney General to release permanent resident aliens during their deportation proceedings where such aliens were found not to constitute a flight risk or threat to the community. See Pub. L. 101–649, Tit. V, §504(a)(5), 104 Stat. 5049.

During the same period in which Congress was making incremental changes to the immigration laws, it was also considering wholesale reform of those laws. Some studies presented to Congress suggested that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country. See, *e.g.,* 1989 House Hearing 75; Inspection Report, App. 46; S. Rep. 104–48, at 32 ("Congress should consider requiring that all aggravated felons be detained pending deportation. Such a step may be necessary because of the high rate of no-shows for those criminal aliens released on bond"). It was following those Reports that Congress enacted 8 U. S. C. §1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability.

"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 republi-

can 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. See, *e.g.*, *Zadvydas,* 533 U. S., at 718 (KENNEDY, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens"); *Reno* v. *Flores,* 507 U. S. 292, 305–306 (1993) ("Thus, 'in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens'" (quoting *Fiallo* v. *Bell,* 430 U. S. 787, 792 (1977) (quoting *Mathews*, *supra,* at 79–80)); *United States* v. *Verdugo-Urquidez,* 494 U. S. 259, 273 (1990).

In his habeas corpus challenge, respondent did not contest Congress' general authority to remove criminal aliens from the United States. Nor did he argue that he himself was not "deportable" within the meaning of §1226(c).[6]

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[6]Respondent's concession on this score is relevant for two reasons: First, because of the concession, respondent by his own choice did not receive one of the procedural protections otherwise provided to aliens detained under §1226(c). And, second, because of the concession we do not reach a contrary argument raised by respondent for the first time in his brief on the merits in this Court. Specifically, in his brief on the merits, respondent suggests that he might not be subject to detention under §1226(c) after all because his 1997 conviction for petty theft with priors might not qualify as an aggravated felony under recent Ninth Circuit precedent. Respondent now states that he intends to argue at his next removal hearing that "his 1997 conviction does not constitute an aggravated felony . . . and his 1996 conviction [for first-degree burglary] does not constitute either an aggravated felony or a crime involving moral turpitude." Brief for Respondent 11–12. As respondent has conceded that he is deportable for purposes of his habeas corpus challenge to §1226(c) at all previous stages of this proceeding, see n. 3, *supra,* we decide the case on that basis. Lest there be any confusion, we emphasize that by conceding he is "*deportable*" and,

Rather, respondent argued that the Government may not, consistent with the Due Process Clause of the Fifth Amendment, detain him for the brief period necessary for his removal proceedings. The dissent, after an initial detour on the issue of respondent's concession, see *post*, at 2–4 (opinion of SOUTER, J.), ultimately acknowledges the real issue in this case. *Post,* at 17, n. 11; see also Brief in Opposition 1–2 (explaining that respondent's "challenge is solely to Section 1226(c)'s absolute prohibition on his release from detention").

"It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Flores, supra,* at 306. 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").[7]

In *Carlson* v. *Landon,* 342 U. S. 524 (1952), the Court

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hence, subject to mandatory detention under §1226(c), respondent did not concede that he *will ultimately be deported*. As the dissent notes, respondent has applied for withholding of removal. *Post,* at 3 (opinion of SOUTER, J.).

[7] In fact, prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings. See 34 Stat. 905, §20.

considered a challenge to the detention of aliens who were deportable because of their participation in Communist activities. The detained aliens did not deny that they were members of the Communist Party or that they were therefore deportable. *Id.*, at 530. Instead, like respondent in the present case, they challenged their detention on the grounds that there had been no finding that they were unlikely to appear for their deportation proceedings when ordered to do so. *Id.*, at 531–532; see also Brief for Petitioner in *Carlson* v. *Landon,* O. T. 1951, No. 35, p. 12 (arguing that legislative determinations could not justify "depriving [an alien] of his liberty without facts personal to the individual"). Although the Attorney General ostensibly had discretion to release detained Communist aliens on bond, the INS had adopted a policy of refusing to grant bail to those aliens in light of what Justice Frankfurter viewed as the mistaken "conception that Congress had made [alien Communists] in effect unbailable." 342 U. S., at 559, 568 (dissenting opinion).

The Court rejected the aliens' claims that they were entitled to be released from detention if they did not pose a flight risk, explaining "[d]etention is necessarily a part of this deportation procedure." *Id.,* at 538; see also *id.*, at 535. The Court noted that Congress had chosen to make such aliens deportable based on its "understanding of [Communists'] attitude toward the use of force and violence . . . to accomplish their political aims." *Id.*, at 541. And it concluded that the INS could deny bail to the detainees "by reference to the legislative scheme" even without any finding of flight risk. *Id.*, at 543; see also *id.*, at 550 (Black, J., dissenting) ("Denial [of bail] was not on the ground that if released [the aliens] might try to evade obedience to possible deportation orders"); *id.,* at 551, and n. 6.

The dissent argues that, even though the aliens in *Carlson* were not flight risks, "individualized findings of

dangerousness were made" as to each of the aliens. *Post*, at 35 (opinion of SOUTER, J.). The dissent, again, is mistaken. The aliens in *Carlson* had *not* been found individually dangerous. The only evidence against them was their membership in the Communist Party and "a degree . . . of participation in Communist activities." 342 U. S., at 541. There was no "individualized findin[g]" of likely future dangerousness as to any of the aliens and, in at least one case, there was a specific finding of nondangerousness.[8] The Court nonetheless concluded that the denial of bail was permissible "by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.,* at 543.[9]

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[8]See *Carlson* v. *Landon,* 342 U. S. 524, 549 (1952) (Black, J., dissenting) (noting that, in at least one case, the alien involved had been found "'*not* likely to engage in any subversive activities'" (emphasis added)); see also *id.,* at 550, n. 5 (quoting the District Judge's finding in case No. 35 that "'I don't know whether it is true . . . that their release is dangerous to the security of the United States'"); *id.,* at 552 ("[T]he bureau agent is *not* required to prove that a person he throws in jail is . . . 'dangerous'" (emphasis added)); see also *id.,* at 567 (Frankfurter, J., dissenting) ("[T]he Attorney General . . . did *not* deny bail from an individualized estimate of 'the danger to the public safety of [each person's] presence within the community'" (emphasis added)).

[9]Apart from its error with respect to the dangerousness determination, the dissent attempts to distinguish *Carlson* from the present case by arguing that the aliens in *Carlson* had engaged in "'personal activity'" in support of a political party Congress considered "'a menace to the public.'" *Post*, at 31 (opinion of SOUTER, J.). In suggesting that this is a distinction, the dissent ignores the "personal activity" that aliens like respondent have undertaken in committing the crimes that subject them to detention in the first instance—personal activity that has been determined with far greater procedural protections than any finding of "active membership" in the Communist Party involved in *Carlson*. See 342 U. S., at 530 ("[T]he Director made allegation[s], supported by affidavits, that the Service's dossier of each petitioner contained evidence indicating to him that each was at the time of arrest a member of the Communist Party of the United States and had since 1930 participated . . . in the Party's indoctrination of others"). In the present case, respondent became "deportable" under §1226(c) only following criminal

In *Reno* v. *Flores,* 507 U. S. 292 (1993) the Court considered another due process challenge to detention during deportation proceedings. The due process challenge there was brought by a class of alien juveniles. The INS had arrested them and was holding them in custody pending their deportation hearings. The aliens challenged the agency's policy of releasing detained alien juveniles only into the care of their parents, legal guardians, or certain other adult relatives. See, *e.g.*, *id.,* at 297 (citing Detention and Release of Juveniles, 53 Fed. Reg. 17449 (1988) (codified as to deportation at 8 CFR §242.24 (1992))). The aliens argued that the policy improperly relied "upon a 'blanket' presumption of the unsuitability of custodians other than parents, close relatives, and guardians" to care for the detained juvenile aliens. 507 U. S., at 313. In rejecting this argument, the Court emphasized that "reasonable presumptions and generic rules," even when made by the INS rather than Congress, are not necessarily impermissible exercises of Congress' traditional power to legislate with respect to aliens. *Ibid.;* see also *id*., at 313–314 ("In the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation . . . . The particularization and individuation need go no further than this"). Thus, as with the prior challenges to detention during deportation proceedings, the Court in *Flores* rejected the due process challenge and upheld the

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convictions that were secured following full procedural protections. These convictions, moreover, reflect "personal activity" that Congress considered relevant to future dangerousness. Cf. *Zadvydas* v. *Davis*, 533 U. S. 678, 714 (2001) (KENNEDY, J., dissenting) (noting that "a criminal record accumulated by an admitted alien" is a good indicator of future danger, and that "[a]ny suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist").

constitutionality of the detention.

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).[10]

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.

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[10] The dissent denies this point, insisting that the detention at issue in *Zadvydas* actually did bear a reasonable relation to its immigration purpose. *Post,* at 23 (opinion of SOUTER, J.) ("[T]he statute in *Zadvydas* . . . served the purpose of preventing aliens . . . from fleeing prior to actual deportation").

Cf., *e.g.*, *Los Angeles* v. *Alameda Books*, *Inc.,* 535 U. S. 425, 436–437 (2002); *Flores*, 507 U. S., at 315 ("It may well be that other policies would be even better, but 'we are [not] a legislature charged with formulating public policy'" (quoting *Schall* v. *Martin,* 467 U. S. 253, 281 (1984))).

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*.[11] 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. Brief for Petitioners 39–40. In the remaining 15% of cases, in which the alien appeals the decision of the

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[11] The dissent concedes that "[t]he scheme considered in *Zadvydas* did not provide review immediately . . . . [C]ustody review hearings usually occurred within three months of a transfer to a postorder detention unit." *Post*, at 17, n. 11 (opinion of SOUTER, J.). Yet, in discussing the present case, the dissent insists that "the due process requirement of an individualized finding of necessity applies to detention periods shorter than" respondent's. *Post*, at 30, n. 24 (citing *Schall* v. *Martin,* 467 U. S. 253 (1984), in which "the detainee was entitled to a hearing" when threatened with "a maximum detention period of 17 days"). The dissent makes no attempt to reconcile its suggestion that aliens are entitled to an immediate hearing with the holding in *Zadvydas* permitting aliens to be detained for several months prior to such a hearing.

Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter. *Id.*, at 40.[12]

These statistics do not include the many cases in which removal proceedings are completed while the alien is still serving time for the underlying conviction. *Id.*, at 40, n. 17.[13] In those cases, the aliens involved are never subjected to mandatory detention at all. In sum, the detention at stake under §1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal.[14] Respondent was detained

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[12] The very limited time of the detention at stake under §1226(c) is not missed by the dissent. See *post*, at 30 (opinion of SOUTER, J.) ("Successful challenges often require several months"); *post,* at 30, (considering "[t]he potential for several months [worth] of confinement"); but see *post,* at 10 ("potentially lengthy detention").

[13] Congress has directed the INS to identify and track deportable criminal aliens while they are still in the criminal justice system, and to complete removal proceedings against them as promptly as possible. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–32, §§432, 438(a), 110 Stat. 1273–1276; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, §§326, 329, 110 Stat. 3009–630 to 3009–631 (codified at 8 U. S. C. §1228). The INS therefore established the Institutional Hearing Program (IHP) (subsequently subsumed under the "Institutional Removal Program"). By 1997, the General Accounting Office found that nearly half of all deportable criminal aliens' cases were completed through the IHP prior to the aliens' release from prison. See General Accounting Office, Report to the Chairman, Subcommittee on Immigration and Claims of the House Committee on the Judiciary, INS' Efforts to Remove Imprisoned Aliens Continue to Need to Improve 10, Fig. 1 (Oct. 1998). The report urged, however, that the INS needed to improve its operations in order to complete removal proceedings against all deportable criminal aliens before their release. *Id.*, at 13. Should this come to pass, of course, §1226(c) and the temporary detention it mandates would be rendered obsolete.

[14] Prior to the enactment of §1226(c), when the vast majority of deportable criminal aliens were not detained during their deportation

for somewhat longer than the average—spending six months in INS custody prior to the District Court's order granting habeas relief, but respondent himself had requested a continuance of his removal hearing.[15]

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.

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proceedings, many filed frivolous appeals in order to delay their deportation. See S. Rep. 104–48, at 2 ("Delays can earn criminal aliens more than work permits and wages—if they delay long enough they may even obtain U. S. citizenship"). Cf. *Zadvydas*, 533 U. S., at 713 (KENNEDY, J., dissenting) ("[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens"). Respondent contends that the length of detention required to appeal may deter aliens from exercising their right to do so. Brief for Respondent 32. As we have explained before, however, "the legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow," and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices. *McGautha* v. *California,* 402 U. S. 183, 213 (1971) (internal quotation marks omitted); accord, *Chaffin* v. *Stynchcombe,* 412 U. S. 17, 30–31 (1973).

[15] Respondent was held in custody for three months before filing his habeas petition. His removal hearing was scheduled to occur two months later, but respondent requested and received a continuance to obtain documents relevant to his withholding application. See Brief for Respondent 9, n. 12.