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Court Upholds Alien Detention Without Bail

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Two years ago the U.S. Supreme Court addressed the issue of post-final removal order detention in *Zadvydas v. Davis*, 533 U.S. 678 (2001). In that case, a divided court held that detention following a final order of removal was subject to an implied reasonableness standard to ensure the alien's presence at the time of deportation. The Court further held that habeas corpus relief is available to detainees when the duration of detention becomes unreasonable. Finally, the Court held "for the sake of uniform administration in the federal courts" that six months is presumptively reasonable, but beyond that, if the alien makes a showing that there is no reasonable probability of removal within the foreseeable future, the government must rebut that evidence. In *DeMore v. Kim*, 123 S. Ct. 1708 (2003), the Court addressed the related issue of detention pending a final removal order.

The respondent in *DeMore*, Hyung Joon Kim, a citizen of Korea, arrived in the United States in 1984 at the age of six and became a lawful permanent resident of the United States two year later. In 1996 he was convicted of first degree burglary in state court in California. Thirteen months later he was convicted of petty theft with priors and sentenced to three years in prison. The day after his release, he was taken into custody by the Immigration and Naturalization Service (INS) on the grounds that his second conviction qualified as an "aggravated felony" which made him removable, *i.e.*, deportable, from the United States. A little over three months later Kim filed a petition for a writ of habeas corpus in the District Court for the Northern District of California in

which he argued that his detention without bail violated his due process rights under the Fifth Amendment of the United States Constitution.

The district court held the provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 providing for detention of certain deportable aliens, 8 U.S.C. § 1226(c), unconstitutional on its face. *Kim v. Schiltgen*, 1999 U.S. Dist. LEXIS 12511, at *25 (N.D. Cal. August 10, 1999). The court, therefore, granted Kim's writ of habeas corpus, but only to the extent that it ordered the INS to hold a bond hearing. In lieu of that, the INS released Kim on \$5,000 bond, but simultaneously appealed the district court's decision to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals narrowed the district court's ruling holding that while 8 U.S.C. § 1226(c) is constitutional, it is unconstitutional as applied to lawful permanent residents. *Kim v. Ziglar*, 276 F.3d 523, 526 (9th Cir. 2002).

In the appeal that followed, however, the Supreme Court reversed the Ninth Circuit Court of Appeals. Focusing on the Ninth Circuit's narrowing of the unconstitutionality to lawful permanent residents, the Court, in oral argument presented the question regarding the distinction of lawful permanent residents to counsel for the petitioner who responded, "The statute makes no distinction." *DeMore v. Kim*, Oral Argument, 2003 WL 147701, *29 (January 15, 2003). The Court clearly agreed as, despite the dissent's assertion that the Court ignores precedent upholding the rights of lawful permanent residents, the subject is not even addressed in its opinion. The implied result, as noted in the Court's decision is that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." (*Quoting Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)). Thus, if Congress chooses to ignore the differences between lawful permanent residents and other aliens, that is within its power. The Court further held, citing one hundred and six year old precedent, *see Wing v. United States*, 163 U.S. 228 (1896), that detention pending removal proceedings serves the purpose intended by Congress of ensuring availability of the alien for the proceeding and noted that, in contrast to the post-removal order detention addressed in *Zadvydas*, the period of detention has a determinable end, and is generally far shorter than the period that was determined to be presumptively acceptable under *Zadvydas*.
