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 SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, concurring in part and dissenting in part.

Respondent Kim is an alien lawfully admitted to permanent residence in the United States. He claims that the Constitution forbids the Immigration and Naturalization Service (INS) from detaining him under 8 U. S. C. §1226(c) unless his detention serves a government interest, such as preventing flight or danger to the community. He contends that due process affords him a right to a hearing before an impartial official,[1] giving him a chance to show that he poses no risk that would justify confining him between the moment the Government claims he is removable and the adjudication of the Government's claim.

[1] Kim does not claim a hearing before any specific official. The generality of his claim may reflect the fact, noted just below, that the INS released him on bond without any hearing whatsoever after the District Court entered its judgment in this case. App. 11–13. Accordingly, there is no occasion to enquire whether due process requires access to any particular arbiter, such as one unaffiliated with the INS. I therefore use the neutral term "impartial" in describing the hearing Kim claims.

I join Part I of the Court's opinion, which upholds federal jurisdiction in this case, but I dissent from the Court's disposition 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. The INS has never argued that detaining Kim is necessary to guarantee his appearance for removal[2] proceedings or to protect anyone from danger in the meantime. Instead, shortly after the District Court issued its order in this case, the INS, *sua sponte* and without even holding a custody hearing, concluded that Kim "would not be considered a threat" and that any risk of flight could be met by a bond of $5,000. App. 11–13. He was released soon thereafter, and there is no indication that he is not complying with the terms of his release.

The Court's approval of lengthy mandatory detention can therefore claim no justification in national emergency or any risk posed by Kim particularly. The Court's judgment is unjustified by past cases or current facts, and I respectfully dissent.

I

At the outset, there is the Court's mistaken suggestion that Kim "conceded" his removability, *ante*, at 2, 11, and n. 6, 20. The Court cites no statement before any court

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[2] In 1996, Congress combined "deportation" and "exclusion" proceedings into a single "removal" proceeding. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, §304(a), 110 Stat. 3009–587, adding 8 U. S. C. §1229a. Because this case requires consideration of cases decided both before and after 1996, this opinion refers to "removal" generally but, where the context requires, distinguishes between "deportation" of aliens who have entered the United States and "exclusion" of aliens who seek entry.

conceding removability, and I can find none. At the first opportunity, Kim applied to the Immigration Court for withholding of removal, Brief for Respondent 9, n. 12, and he represents that he intends to assert that his criminal convictions are not for removable offenses and that he is independently eligible for statutory relief from removal, *id.*, at 11–12; see also *ante*, at 11–12, n. 6. In his brief before the Ninth Circuit, Kim stated that his removability was "an open question," that he was "still fighting [his] removal administratively," and that the Immigration Court had yet to hold a merits hearing. Brief of Petitioner-Appellee in No. 99–17373 (CA9), pp. 4, 13–14, 24, 33–34, and n. 28, 48–49. At oral argument here, his counsel stated that Kim was challenging his removability. See Tr. of Oral Arg. 36–38, 44.

The suggestion that Kim should have contested his removability in this habeas corpus petition, *ante*, at 11–12, and n. 6, misses the point that all he claims, or could now claim, is that his detention pending removal proceedings violates the Constitution. Challenges to removability itself, and applications for relief from removal, are usually submitted in the first instance to an immigration judge. See 8 U. S. C. §1229a(a)(3). The Immigration Judge had not yet held an initial hearing on the substantive issue of removability when Kim filed his habeas petition in the District Court, even though Kim had been detained for over three months under §1226(c). If Kim's habeas corpus petition had claimed "that he himself was not 'deportable,'" as the Court suggests it should have, *ante*, at 11, the District Court would probably have dismissed the claim as unexhausted. *E. g.*, *Espinal* v. *Filion*, No. 00–CIV–2647–HB–JCF, 2001 WL 395196 (SDNY, Apr. 17, 2001). Kim did not, therefore, "conced[e] that he is deportable," *ante*, at 20, by challenging removability

before the Immigration Judge and challenging detention in a federal court.[3]

Kim may continue to claim the benefit of his current status unless and until it is terminated by a final order of removal. 8 CFR §1.1(p) (2002). He may therefore claim the due process to which a lawful permanent resident is entitled.

II

A

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. Aliens "residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States

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[3]The Court's effort to explain its reference to a nonexistent concession, *ante*, at 11–12, n. 6, seeks to gain an advantage from the fact that the Immigration and Nationality Act uses the word "deportable" in various ways, one being to describe classes of aliens who may be removed if the necessary facts are proven, *e. g.*, §1227(a), and another to describe aliens who have actually been adjudged as being in the United States unlawfully, *e. g.*, §1229b. An alien is not adjudged "deportable" until an order enters "concluding that the alien is deportable or ordering deportation," and such an order is not final until affirmed by the Board of Immigration Appeals or until the time expires for seeking review. §§1101(a)(47)(A)–(B). To suggest, as the Court seems to do, that an alien has conceded removability simply because he does not dispute that he has been charged with facts that will render him removable if those facts are later proven is like saying that a civil defendant has conceded liability by failing to move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) or that a criminal defendant has conceded guilt by failing to dispute the validity of the indictment. But even if the Court's reasoning were sound, it would not cover Kim's situation, for he has stated (and the Court acknowledges) his intent to contest the sufficiency of his criminal convictions as a basis for removal. *Ante*, at 11–12, n. 6. This discussion, which the Court calls a "detour," *ante*, at 12, is necessary only because of the Court's insistence in stating that Kim conceded that he is "deportable." *Ante*, at 2, 11, 20.

to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility." *Fong Yue Ting* v. *United States,* 149 U. S. 698, 724 (1893). *The Japanese Immigrant Case,* 189 U. S. 86, 100–101 (1903), settled any lingering doubt that the Fifth Amendment's Due Process Clause gives aliens a right to challenge mistreatment of their person or property.

The constitutional protection of an alien's person and property is particularly strong in the case of aliens lawfully admitted to permanent residence (LPRs). The immigration laws give LPRs the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen. In fact, the law of the United States goes out of its way to encourage just such attachments by creating immigration preferences for those with a citizen as a close relation, 8 U. S. C. §§1153(a)(1), (3)–(4), and those with valuable professional skills or other assets promising benefits to the United States, §§1153(b)(1)–(5).

Once they are admitted to permanent residence, LPRs share in the economic freedom enjoyed by citizens: they may compete for most jobs in the private and public sectors without obtaining job-specific authorization, and apart from the franchise, jury duty, and certain forms of public assistance, their lives are generally indistinguishable from those of United States citizens. That goes for obligations as well as opportunities. Unlike temporary, nonimmigrant aliens, who are generally taxed only on income from domestic sources or connected with a domestic business, 26 U. S. C. §872, LPRs, like citizens, are taxed on their worldwide income, 26 CFR §§1.1–1(b), 1.871–1(a), 1.871–2(b) (2002). Male LPRs between the

ages of 18 and 26 must register under the Selective Service Act of 1948, ch. 625, Tit. I, §3, 62 Stat. 605.[4] "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths,* 413 U. S. 717, 722 (1973). And if they choose, they may apply for full membership in the national polity through naturalization.

The attachments fostered through these legal mechanisms are all the more intense for LPRs brought to the United States as children. They grow up here as members of the society around them, probably without much touch with their country of citizenship, probably considering the United States as home just as much as a native-born, younger brother or sister entitled to United States citizenship. "[M]any resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens." *Woodby* v. *INS,* 385 U. S. 276, 286 (1966). Kim is an example. He moved to the United States at the age of six and was lawfully admitted to permanent residence when he was eight. His mother is a citizen, and his father and brother are LPRs. LPRs in Kim's situation have little or no reason to feel or to establish firm ties with any place besides the United States.[5]

Our decisions have reflected these realities. As early as 1892, we addressed an issue of statutory construction with the realization that "foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by

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[4] Although an LPR may seek exemption or discharge from registration on the grounds of alienage, such an action permanently bars the LPR from seeking United States citizenship. 8 U. S. C. §1426(a).

[5] See also *Welch* v. *Ashcroft*, 293 F. 3d 213, 215 (CA4 2002) (detainee obtained LPR status at age 10); *Hoang* v. *Comfort*, 282 F. 3d 1247, 1252–1253 (CA10 2002) (ages 3 and 15), cert. pending, No. 01–1616.

and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicil of choice . . . is to be presumed." *Lau Ow Bew* v. *United States,* 144 U. S. 47, 61–62.[6] Fifty years later in dealing with a question of evidentiary competence in *Bridges* v. *Wixon,* 326 U. S. 135 (1945), we said that "the notions of fairness on which our legal system is founded" applied with full force to "aliens whose roots may have become, as they are in the present case, deeply fixed in this land," *id.*, at 154. And in *Kwong Hai Chew* v. *Colding,* 344 U. S. 590 (1953), we read the word "excludable" in a regulation as having no application to LPRs, since such a reading would have been questionable given "a resident alien's constitutional right to due process." *Id.*, at 598–599.[7] *Kwong Hai Chew* adopted the statement of Justice Murphy, concurring in *Bridges*, that "'once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the

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[6] In *The Venus,* 8 Cranch 253 (1814), we held that property belonging to American citizens who were resident in England during the War of 1812 was to be treated as belonging to English proprietors for purposes of prize law. We stated that, as permanent residents of England, the American citizens were "bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance thereto; they are obliged to defend it, (with an exception in favor of such a subject, in relation to his native country) in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects," *id.*, at 282.

[7] "Although the holding [in *Kwong Hai Chew*] was one of regulatory interpretation, the rationale was one of constitutional law. Any doubts that *Chew* recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by *Rosenberg* v. *Fleuti*, [374 U. S. 449 (1963),] where we described *Chew* as holding 'that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him.' 374 U. S., at 460." *Landon* v. *Plasencia,* 459 U. S. 21, 33 (1982).

First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.'" 344 U. S., at 596–597, n. 5 (quoting *Bridges*, *supra*, at 161). See also *United States* v. *Verdugo-Urquidez,* 494 U. S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); *Woodby*, *supra*, at 285 (holding that deportation orders must be supported by clear, unequivocal, and convincing evidence owing to the "drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification"); *Johnson* v. *Eisentrager,* 339 U. S. 763, 770–771 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. . . . [A]t least since 1886, we have extended to the person and property of resident aliens important constitutional guarantees—such as the due process of law of the Fourteenth Amendment").

The law therefore considers an LPR to be at home in the United States, and even when the Government seeks removal, we have accorded LPRs greater protections than other aliens under the Due Process Clause. In *Landon* v. *Plasencia,* 459 U. S. 21 (1982), we held that a long-term resident who left the country for a brief period and was placed in exclusion proceedings upon return was entitled to claim greater procedural protections under that Clause than aliens seeking initial entry. The LPR's interest in remaining in the United States is, we said, "without question, a weighty one." *Id.*, at 34. See also *Rosenberg* v. *Fleuti,* 374 U. S. 449 (1963); *Kwong Hai Chew*, *supra.*

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.[8] In evaluating Kim's challenge to his mandatory detention under 8 U. S. C. §1226(c), the only reasonable starting point is the traditional doctrine concerning the Government's physical confinement of individuals.[9]

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[8]This case provides no occasion to determine the constitutionality of mandatory detention of aliens other than LPRs.

[9]The statement 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," *Mathews* v. *Diaz,* 426 U. S. 67, 79–80 (1976), cannot be read to leave limitations on the liberty of aliens unreviewable. *Ante*, at 10–11. *Diaz* involved a federal statute that limited eligibility for a federal medical insurance program to United States citizens and LPRs who had been continuously resident in the United States for five years. 426 U. S., at 69–70. Reversing a lower court judgment that this statute violated equal protection, we said this:

"In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.' " *Id.*, at 79–80 (footnotes omitted).

Taken in full, the meaning of this paragraph is plain: through the exercise of the deportation and exclusion power, Congress exposes aliens to a treatment (expulsion) that cannot be imposed on citizens. The cases cited in the footnotes to this paragraph accordingly all concern Congress's power to enact grounds of exclusion or deportation. *Id.*, at 80, nn. 14–15 (citing *Kleindienst* v. *Mandel,* 408 U. S. 753 (1972); *Galvan* v. *Press,* 347 U. S. 522 (1954); and *Harisiades* v. *Shaughnessy,* 342 U. S. 580 (1952)); cf. *ante*, at 10–11 (quoting *Diaz*, *supra*, at 81, n. 17 (quoting *Harisiades*)). Nothing in *Diaz* addresses due process protection of liberty or purports to sanction any particular limitation on the liberty of

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Kim's claim is a limited one: not that the Government may not detain LPRs to ensure their appearance at removal hearings, but that due process under the Fifth Amendment conditions a potentially lengthy detention on a hearing and an impartial decisionmaker's finding that detention is necessary to a governmental purpose. He thus invokes our repeated decisions that the claim of liberty protected by the Fifth Amendment is at its strongest when government seeks to detain an individual. THE CHIEF JUSTICE wrote in 1987 that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno,* 481 U. S. 739, 755. See also *Reno* v. *Flores,* 507 U. S. 292, 316 (1993) (O'CONNOR, J., concurring) ("The institutionali-

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LPRs under circumstances comparable to those here.

Even on its terms, the *Diaz* statement is dictum. We acknowledged immediately that "[t]he real question presented by *[Diaz]* is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible." 426 U. S., at 80. Our holding that Congress could consider length of residence and immigration status in allocating medical insurance in no way suggests the existence of a federal power to imprison a long-term resident alien when the Government concedes that there is no need to do so.

The Court does not explain why it believes the *Diaz* dictum to be relevant to this case, other than to repeat it and identify prior instances of its quotation. *Ante*, at 10–11. The Court resists calling the statement "'dictum,'" *ante*, at 10, but it does not deny that *Diaz* involved "discrimination *within* the class of aliens" rather than "discrimination between citizens and aliens," 426 U. S., at 80, thus making any suggestion about Congress's power to treat citizens and aliens differently unnecessary to the holding. Nor does the Court deny that *Diaz* dealt with an equal protection challenge to the allocation of medical insurance and had nothing to say on the subject of the right of LPRs to protection of their liberty under the Due Process Clause. See *supra*, at 4–9.

zation of an adult by the government triggers heightened, substantive due process scrutiny"); *Foucha* v. *Louisiana,* 504 U. S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); *id.*, at 90 (KENNEDY, J., dissenting) ("As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution").

Accordingly, the Fifth Amendment permits detention only where "heightened, substantive due process scrutiny" finds a "'sufficiently compelling'" governmental need. *Flores*, *supra*, at 316 (O'CONNOR, J., concurring) (quoting *Salerno*, 481 U. S., at 748). In deciding in *Salerno* that this principle did not categorically bar pretrial detention of criminal defendants without bail under the Bail Reform Act of 1984, it was crucial that the statute provided that, "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.*, at 750 (citing 18 U. S. C. §3142(f)). We stressed that the Act was not a "scattershot attempt to incapacitate those who are merely suspected of" serious offenses, 481 U. S., at 750, and held that due process allowed some pretrial detention because the Act confined it to a sphere of real need: "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community." *Id.*, at 751; see also *Foucha*, *supra*, at 81 (calling the pretrial detention statute in *Salerno* a "sharply focused scheme").

We have reviewed involuntary civil commitment statutes the same way. In *Addington* v. *Texas,* 441 U. S. 418

(1979), we held that a State could not civilly commit the mentally ill without showing by "clear and convincing evidence" that the person was dangerous to others, *id.*, at 433. The elevated burden of proof was demanded because "[l]oss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior." *Id.*, at 427. The statutory deficiency was the same in *Foucha*, where we held that Louisiana's civil commitment statute failed due process because the individual was denied an "adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community." 504 U. S., at 81. See also *id.*, at 88 (opinion of O'CONNOR, J.) (civil commitment depends on a "necessary connection between the nature and purposes of confinement").

In addition to requiring a compelling reason for detention, we held that the class of persons affected must be narrow and, in pretrial-type lockup, the time must be no more than what is reasonably necessary before the merits can be resolved. In the case of the Bail Reform Act, we placed weight on the fact that the statute applied only to defendants suspected of "the most serious of crimes," *Salerno*, *supra*, at 747; see also *Foucha*, *supra*, at 81, while the statute in *Kansas* v. *Hendricks,* 521 U. S. 346 (1997), likewise provided only for confinement of "a limited subclass of dangerous persons" who had committed "'a sexually violent offense'" and who suffered from "'a mental abnormality or personality disorder" portending "predatory acts of sexual violence,'" *id.*, at 357 (quoting Kan. Stat. Ann. §59–29a02(a) (1994)). *Salerno* relied on the restriction of detention "by the stringent time limitations of the Speedy Trial Act," 481 U. S., at 747, whereas in *Foucha*, it was a fault that the statute did not impose any comparable limitation, 504 U. S., at 82 (citing *Salerno*). See also *Jackson* v. *Indiana,* 406 U. S. 715, 738 (1972) ("At

the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed").

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. *E. g.*, *Hendricks, supra*, at 357 (stating that civil commitment was permitted where "the confinement takes place pursuant to proper procedures and evidentiary standards"); *Foucha*, *supra*, at 81–82 (invalidating a statute under which "the State need prove nothing to justify continued detention"); *Salerno*, *supra*, at 751 ("[T]he procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination"); *Addington*, *supra*, at 427 (requiring a heightened burden of proof "to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered").

These cases yield a simple distillate that should govern the result here. Due process calls for an individual determination before someone is locked away. In none of the cases cited did we ever suggest that the government could avoid the Due Process Clause by doing what §1226(c) does, by selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away. The cases, of course, would mean nothing if citizens and comparable residents could be shorn of due process by this sort of categorical sleight of hand. Without any "full-blown adversary hearing" before detention, *Salerno*, *supra*, at 750, or heightened burden of proof, *Addington*, *supra*, or other procedures to show the government's interest in committing an individual, *Foucha*, *supra; Jackson*, *supra*, procedural rights would amount to nothing but mechanisms for testing group membership. Cf.

Foucha, *supra*, at 88 (opinion of O'CONNOR, J.) ("Nor would it be permissible to treat all acquittees alike, without regard for their particular crimes"). And if procedure could be dispensed with so expediently, so presumably could the substantive requirements that the class of detainees be narrow and the detention period strictly limited. *Salerno*, *supra; Hendricks*, *supra.*

C

We held as much just two Terms ago in *Zadvydas* v. *Davis,* 533 U. S. 678 (2001), which stands for the proposition that detaining an alien requires more than the rationality of a general detention statute; any justification must go to the alien himself. *Zadvydas* considered detention of two aliens, Zadvydas and Ma, who had already been ordered removed and therefore enjoyed no lawful immigration status. Their cases arose because actual removal appeared unlikely owing to the refusal of their native countries to accept them, with the result that they had been detained not only for the standard 90-day removal period, during which time most removal orders are executed, but beyond that period because the INS considered them to be a "'risk to the community'" and "'unlikely to comply with the order of removal.'" *Id.*, at 682 (quoting 8 U. S. C. §1231(a)(6) (1994 ed., Supp. V)). Zadvydas and Ma challenged their continued and potentially indefinite detention under the Due Process Clause of the Fifth Amendment.

The *Zadvydas* opinion opened by noting the clear applicability of general due process standards: physical detention requires both a "special justification" that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint'" and "adequate procedural protections." 533 U. S., at 690 (quoting *Hendricks*, *supra*, at 356). Nowhere did we suggest that the "constitutionally protected liberty interest" in avoiding physical confine-

ment, even for aliens already ordered removed, was conceptually different from the liberty interest of citizens considered in *Jackson*, *Salerno*, *Foucha*, and *Hendricks*. On the contrary, we cited those cases and expressly adopted their reasoning, even as applied to aliens whose right to remain in the United States had already been declared forfeited. *Zadvydas*, 533 U. S., at 690.

Thus, we began by positing commonly accepted substantive standards and proceeded to enquire into any "special justification" that might outweigh the aliens' powerful interest in avoiding physical confinement "under [individually ordered] release conditions that may not be violated." *Id.*, at 696. We found nothing to justify the Government's position. The statute was not narrowed to a particularly dangerous class of aliens, but rather affected "aliens ordered removed for many and various reasons, including tourist visa violations." *Id.*, at 691. The detention itself was not subject to "stringent time limitations," *Salerno*, 481 U. S., at 747, but was potentially indefinite or even permanent, *Zadvydas*, 533 U. S., at 691. Finally, although both Zadvydas and Ma appeared to be dangerous, this conclusion was undermined by defects in the procedures resulting in the finding of dangerousness. *Id.*, at 692. The upshot was such serious doubt about the constitutionality of the detention statute that we construed it as authorizing continuing detention only when an alien's removal was "reasonably foreseeable." *Id.*, at 699. In the cases of Zadvydas and Ma, the fact that their countries of citizenship were not willing to accept their return weighed against the Government's interest in keeping them at hand for instant removal, even though both were serious flight risks, *id.*, at 684–686, 690, and we remanded the cases to the Courts of Appeals for a determination of the sufficiency of the Government's interests in Zadvydas's and Ma's individual detention, *id.*, at 702.

Our individualized analysis and disposition in *Zadvydas*

support Kim's claim for an individualized review of his challenge to the reasons that are supposed to justify confining him prior to any determination of removability. 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. See Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 20–23. After all, our recognition that the serious penalty of removal must be justified on a heightened standard of proof, *Woodby* v. *INS,* 385 U. S. 276 (1966), will not mean all that much when the INS can detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence. Cf. *Stack* v. *Boyle,* 342 U. S. 1, 4 (1951). Kim's right to defend against removal gives him an even stronger claim than the aliens in *Zadvydas* could raise.

In fact, the principal dissenters in *Zadvydas*, as well as the majority, accepted a theory that would compel success for Kim in this case. The dissent relied on the fact that Zadvydas and Ma were subject to a "final order of removal" and had "no right under the basic immigration laws to remain in this country," 533 U. S., at 720 (opinion of KENNEDY, J.), in distinguishing them "from aliens with a lawful right to remain here," *ibid.*, which is Kim's position. The dissent recognized the right of all aliens, even "removable and inadmissible" ones, to be "free from detention that is arbitrary or capricious," *id.*, at 721, and the opinion explained that detention would pass the "arbitrary or capricious" test "when necessary to avoid the risk of flight or danger to the community," *ibid.*[10]

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[10] In support of its standard, the dissent relied on a report by the United Nations High Commissioner for Refugees, which likewise

Hence the *Zadvydas* dissent's focus on "whether there are adequate procedures" allowing "persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." *Ibid.*; see also *id.*, at 722–723. Indeed, there is further support for Kim's claim in the dissent's view that the process afforded to removable aliens like Zadvydas and Ma "[went] far toward th[e] objective" of satisfying procedural due process, *id.*, at 722;[11] that process stands in stark contrast to the total absence of custody review avail-

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countenanced detention only "in cases of necessity" and stated, under a heading entitled "Guideline 3: Exceptional Grounds for Detention":

"There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements . . .), these should be applied *first* unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose." United Nations High Commissioner for Refugees, Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (Feb. 1999) (hereinafter Detention Guidelines) (emphasis in original), cited in *Zadvydas*, 533 U. S., at 721 (opinion of KENNEDY, J.).

The High Commissioner also referred to the "minimum procedural guarante[e]" for a detainee "either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made." Detention Guidelines, Guideline 5: Procedural Safeguards.

[11]The scheme considered in *Zadvydas* did not provide review immediately after the removability determination; the dissent noted that custody review hearings usually occurred within three months of a transfer to a postorder detention unit, with further reviews annually or more frequently if the alien requested them. 533 U. S., at 722–723. But the lag was fitted to the circumstances. In the usual case, removal in fact would come promptly; it is only when it did not that interim custody raised a substantial issue. The issue here, of course, is not timing but the right to individualized review at all.

able in response to Kim's claim that he is neither dangerous nor a flight risk.[12] The removable aliens in *Zadvydas* had the right to a hearing, to representation, and to consideration of facts bearing on risk of flight, including criminal history, evidence of rehabilitation, and ties to the United States. *Ibid.* The references to the "necessity" of an individual's detention and the discussion of the procedural requirements show that the principal *Zadvydas* dissenters envisioned due process as individualized review, and the Court of Appeals in this case correctly held that Kim's mandatory detention without benefit of individualized enquiry violated due process as understood by both the *Zadvydas* majority and JUSTICE KENNEDY in dissent. *Kim* v. *Ziglar*, 276 F. 3d 523, 535–537 (CA9 2002). Every Court of Appeals to consider the detention of an LPR under §1226(c) after *Zadvydas* reached the same

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[12]The hearing recognized in *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999), is no response to this deficiency. As the Court notes, the "'*Joseph* hearing'" only permits an alien to show that he does not meet the statutory criteria for mandatory detention under §1226(c). *Ante*, at 2–3, and n. 3. Kim argues that, even assuming that he fits under the statute, the statute's application to LPRs like him does not fit under the Due Process Clause.

JUSTICE KENNEDY recognizes that the Due Process Clause requires "an individualized determination as to [an LPR's] risk of flight and dangerousness if the continued detention [becomes] unreasonable or unjustified." *Ante*, at 2 (concurring opinion). It is difficult to see how Kim's detention in this case is anything but unreasonable and unjustified, since the Government concedes that detention is not necessary to completion of his removal proceedings or to the community's protection. Certainly the fact that "there is at least some merit to the [INS's] charge" that Kim should be held to be removable, *ante*, at 1, does not establish a compelling reason for detention. The INS releases many noncriminal aliens on bond or on conditional parole under §1226(a)(2) pending removal proceedings, and the fact that Kim has been convicted of criminal offenses does not on its own justify his detention, see *supra*, at 12–14.

conclusion.[13]

D

In sum, due process requires a "special justification" for physical detention that "outweighs the individual's constitutionally protected interest in avoiding physical restraint" as well as "adequate procedural protections." *Zadvydas*, 533 U. S., at 690–691 (internal quotation marks omitted). "There must be a 'sufficiently compelling' governmental interest to justify such an action, usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the community." *Flores,* 507 U. S., at 316 (O'CONNOR, J., concurring) (quoting *Salerno*, 481 U. S., at 748). The class of persons subject to confinement must be commensurately narrow and the duration of confinement limited accordingly. *Zadvydas*, *supra*, at 691; *Hendricks*, 521 U. S., at 368; *Foucha*, 504 U. S., at 81–82; *Salerno*, *supra*, at 747, 750. JUSTICE KENNEDY's dissenting view in *Zadvydas*, like that of the majority, disapproved detention that is not "necessary" to counter a risk of flight or danger; it is "arbitrary or capricious" and violates the substantive component of the Due Process Clause. 533 U. S., at 721. Finally, procedural due process requires, at a minimum, that a detainee have the benefit of an impartial decisionmaker able to consider particular circumstances on the issue of necessity. *Id.*, at 691–692; *id.*, at 722 (KENNEDY, J., dissenting); *Foucha*, *supra*, at 81; *Salerno*, *supra*, at 750. See also *Kenyeres* v. *Ashcroft*, *ante*, at ___ (slip op., at 4) (KENNEDY, J., in chambers) ("An opportunity to present one's meritorious grievances to a court supports the legitimacy and

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[13] *Welch* v. *Ashcroft*, 293 F. 3d 213 (CA4 2002); *Hoang* v. *Comfort*, 282 F. 3d 1247 (CA10 2002), cert. pending, No. 01–1616; *Patel* v. *Zemski*, 275 F. 3d 299 (CA3 2001). The Seventh Circuit's decision in *Parra* v. *Perryman*, 172 F. 3d 954 (1999), preceded our decision in *Zadvydas*.

public acceptance of a statutory regime").

By these standards, Kim's case is an easy one. "[H]eightened, substantive due process scrutiny," *Flores, supra*, at 316 (O'CONNOR, J., concurring), uncovers serious infirmities in §1226(c). Detention is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where the underlying offenses are minor. *E. g.*, *Michel* v. *INS*, 206 F. 3d 253, 256 (CA2 2000) (possession of stolen bus transfers); *Matter of Bart*, 20 I. & N. Dec. 436 (BIA 1992) (issuance of a bad check). Detention under §1226(c) is not limited by the kind of time limit imposed by the Speedy Trial Act, and while it lasts only as long as the removal proceedings, those proceedings have no deadline and may last over a year. See Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 23–26; see also *id.*, at 10–20 (citing examples). Section 1226(c) neither requires nor permits an official to determine whether Kim's detention was necessary to prevent flight or danger.

Kim's detention without particular justification in these respects, or the opportunity to enquire into it, violates both components of due process, and I would accordingly affirm the judgment of the Court of Appeals requiring the INS to hold a bail hearing to see whether detention is needed to avoid a risk of flight or a danger to the community.[14] This is surely little enough, given the fact that 8 U. S. C. §1536 gives an LPR charged with being a foreign terrorist the right to a release hearing pending a determination that he be removed.

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[14] Although Kim is a convicted criminal, we are not concerned here with a State's interest in punishing those who violate its criminal laws. Kim completed the criminal sentence imposed by the California courts on February 1, 1999, and California no longer has any interest in incarcerating him.

III

The Court proceeds to the contrary conclusion on the premise that "the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." *Ante*, at 16. Sometimes, maybe often, it may, but that is not the point in contention. Kim has never challenged the INS's general power to detain aliens in removal proceedings or even its power to detain him in particular, if it affords him a chance to participate in an enquiry whether he poses a flight risk or a danger to society.

The question, rather, is whether Congress has chosen "'a constitutionally permissible means of implementing' [its immigration] power." *Zadvydas*, *supra*, at 695 (quoting *INS* v. *Chadha,* 462 U. S. 919, 941–942 (1983)); see also *Carlson* v. *Landon,* 342 U. S. 524, 537 (1952) (stating that the deportation power "is, of course, subject to judicial intervention under the 'paramount law of the Constitution'"). As in *Zadvydas*, we are here concerned not with the power to remove aliens but with the "important constitutional limitations" on that power's exercise. *Zadvydas*, *supra*, at 695.[15]

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[15] The Court's citations to *Wong Wing* v. *United States,* 163 U. S. 228 (1896), are therefore inapposite. *Ante*, at 12, 20. In *Wong Wing*, we hypothesized that detention "necessary to give effect" to the removal of an alien "would be valid"; the use of the subjunctive mood makes plain that the issue was not before the Court. 163 U. S., at 235. *Wong Wing* certainly did not hold that detention in aid of removal was exempt from the Due Process Clause.

Moreover, the *Wong Wing* dictum must be understood in light of the common contemporary practice in the federal courts of releasing aliens on bail pending deportation proceedings. While the Court is correct that the first statutory provision permitting Executive officials to release aliens on bond was enacted in 1907, *ante*, at 12, n. 7, the Court ignores the numerous judicial grants of bail prior to that year. See, *e. g.*, *United States ex rel. Turner* v. *Williams,* 194 U. S. 279, 283 (1904) (stating that the lower court admitted the appellant to bail pending appeal to this Court); *Fong Yue Ting* v. *United States,* 149 U. S. 698,

A

The Court spends much effort trying to distinguish *Zadvydas*, but even if the Court succeeded, success would not avail it much. *Zadvydas* was an application of princi-

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704 (1893) (same); *United States* v. *Moy Yee Tai*, 109 F. 1 (CA2 1901); *In re Lum Poy*, 128 F. 974, 975 (CC Mont. 1904) (noting that "the practice in California, Idaho, and Oregon has been and is to admit Chinese persons to bail pending an investigation into the lawfulness of their residence within the United States, and before any order for deportation has been made"); *In re Ah Tai*, 125 F. 795, 796–797 (Mass. 1903) (identifying a practice in several federal districts admitting aliens to bail, both before an initial finding of deportability and during the appeal therefrom); *In re Chow Goo Pooi*, 25 F. 77, 78 (CC Cal. 1884). The breadth of this practice is evident from one court's statement that "[t]o hold bail altogether inadmissible . . . would invalidate hundreds of existing recognizances." *Ah Tai*, *supra*, at 797.

As Judge Augustus Hand later noted, the only change in 1907 was that bail decisions were committed to the discretion of Executive officials, rather than judges:

"Prior to the passage by Congress in 1907 of the act empowering the administrative official to fix bail, various courts made it a practice to grant bail to aliens during deportation hearings. . . . In our opinion that act was intended to place the general determination of granting bail in the hands of the authorities charged with the enforcement of the deportation laws as persons ordinarily best qualified to perform such a function . . . ." *United States ex rel. Potash* v. *District Director of Immigration and Naturalization*, 169 F. 2d 747, 751 (CA2 1948) (citations omitted).

Thus, while *Wong Wing* stated in passing that detention may be used where it was "part of the means necessary" to the removal of aliens, 163 U. S., at 235, that statement was written against the background of the general availability of judicial relief from detention pending deportation proceedings.

The judicial grants of bail prior to 1907 arose in federal habeas proceedings. Contrary to JUSTICE O'CONNOR's objection to federal jurisdiction in this matter, there is indeed a "history of routine reliance on habeas jurisdiction to challenge the detention of aliens without bail pending the conclusion of removal proceedings." *Ante*, at 4 (opinion concurring in part and concurring in judgment).

ples developed in over a century of cases on the rights of aliens and the limits on the government's power to confine individuals. While there are differences between detention pending removal proceedings (this case) and detention after entry of a removal order *(Zadvydas)*, the differences merely point up that Kim's is the stronger claim, see *supra*, at 15–17. In any case, the analytical framework set forth in *Salerno*, *Foucha*, *Hendricks*, *Jackson*, and other physical confinement cases applies to both, and the two differences the Court relies upon fail to remove Kim's challenge from the ambit of either the earlier cases or *Zadvydas* itself.[16]

First, the Court says that §1226(c) "serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings." *Ante*, at 17. Yes it does, and the statute in *Zadvydas*, viewed outside the context of any individual alien's detention, served the purpose of preventing aliens ordered to be deported from fleeing prior to actual deportation. In each case, the fact that a statute serves its purpose in general fails to justify the detention of an individual in particular. Some individual aliens covered by §1226(c) have meritorious challenges to removability or claims for relief from removal. See Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 10–20. As to such aliens, as with Zadvydas and Ma, the Government has only a weak reason under the immigration laws for detaining them.

The Court appears to respond that Congress may require detention of removable aliens based on a general conclusion that detention is needed for effective removal of criminal aliens on a class-wide basis. But on that logic *Zadvydas* should have come out the other way, for deten-

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[16]The Court tellingly does not even mention *Salerno*, *Foucha*, *Hendricks*, or *Jackson*.

tion of the entire class of aliens who have actually been ordered removed will in general "serv[e] the purpose" of their effective removal, *ante*, at 17. Yet neither the Court nor JUSTICE KENNEDY in dissent suggested that scrutiny under the Due Process Clause could be satisfied at such a general level. Rather, we remanded the individual cases of Zadvydas and Ma for determinations of the strength of the Government's reasons for detaining them in particular. 533 U. S., at 702.[17] We can insist on nothing less here, since the Government's justification for detaining individuals like Zadvydas and Ma, who had no right to remain in this country and were proven flight risks and dangers to society, *id.*, at 684–686, is certainly stronger (and at least no weaker) than its interest in detaining a lawful permanent resident who has not been shown (or even claimed) to be either a flight risk or a threat to the community.[18]

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[17] The Court is therefore mistaken in suggesting that I view the detention of the individual aliens in *Zadvydas* as serving a governmental purpose. *Ante*, at 17, n. 10. The Court confuses the "statute in *Zadvydas*, viewed outside the context of any individual alien's detention," *supra*, at 23, with the "detention at issue in *Zadvydas*," *ante*, at 17, n. 10, namely the detention of Zadvydas and Ma as individuals. The due process analysis in *Zadvydas* concentrated on the latter, holding that the detention of Zadvydas and Ma would not serve a legitimate immigration purpose if there were no "significant likelihood of removal in the reasonably foreseeable future." 533 U. S., at 701. Thus, the Court's suggestion in this case that "the statutory provision" authorizes "detention" that prevents deportable aliens from fleeing as a general matter, *ante*, at 17, is no sufficient basis for claiming *Zadvydas* as support for the Court's methodology or result. Rather, the Court should consider whether the detention of Kim as an individual is necessary to a compelling Government interest, just as it did for the detention of Zadvydas and Ma as individuals. As the Government concedes, Kim's individual detention serves no Government purpose at all.

[18] Nor can the general risk of recidivism, *ante*, at 7, justify this measure. The interest in preventing recidivism may be vindicated "by the ordinary criminal processes involving charge and conviction, the use of

The Court's closest approach to a reason justifying class-wide detention without exception here is a Senate Report stating that over 20% of nondetained criminal aliens failed to appear for removal hearings. *Ante*, at 8 (citing S. Rep. No. 104–48 (1995) (hereinafter Senate Report)). To begin with, the Senate Report's statistic treats all criminal aliens alike and does not distinguish between LPRs like Kim, who are likely to have developed strong ties within the United States, see *supra*, at 5–9, and temporary visitors or illegal entrants. Even more importantly, the statistic tells us nothing about flight risk at all because, as both the Court and the Senate Report recognize, the INS was making its custody determinations not on the ground of likelihood of flight or dangerousness, but "in large part, according to the number of beds available in a particular region." Senate Report, at 23, cited *ante*, at 8; see also H. R. Rep. No. 104–469, p. 124 (1995) (hereinafter House Report) ("[I]n deciding to release a deportable alien, the INS is making a decision that the alien cannot be detained given its limited resources"); App. 26–27. This meant that the INS often could not detain even the aliens who posed serious flight risks. Senate Report, at 23 (noting that the INS had only 3,500 detention beds for criminal aliens in the entire country and the INS district comprising Pennsylvania, Delaware, and West Virginia had only 15). The desperate lack of detention space likewise had led the INS to set bonds too low, because "if the alien is not able to pay, the alien cannot be released, and a needed bed space

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enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct." *Foucha* v. *Louisiana,* 504 U. S. 71, 82 (1992). The ability to detain aliens in removal proceedings who pose threats to the community also satisfies this interest. Cf. *United States* v. *Salerno,* 481 U. S. 739 (1987). The alternative to detention, of course, is not unrestricted liberty, but supervised release, which also addresses the risk of recidivism. *Zadvydas*, 533 U. S., at 696.

is lost." House Report, at 124. The Senate Report also recognized that, even when the INS identifies a criminal alien, the INS "often refuses to take action because of insufficient agents to transport prisoners, or because of limited detention space." Senate Report, at 2. Four former high-ranking INS officials explained the Court's statistics as follows: "Flight rates were so high in the early 1990s not as a result of chronic discretionary judgment failures by [the] INS in assessing which aliens might pose a flight risk. Rather, the rates were alarmingly high because decisions to release aliens in proceedings were driven overwhelmingly by a lack of detention facilities." Brief for T. Alexander Aleinikoff et al. as *Amici Curiae* 19.

The Court's recognition that, at the time of the enactment of §1226(c), "individualized bail determinations had not been tested under optimal conditions" is thus rather an understatement. *Ante*, at 17. The Court does not explain how the INS's resource-driven decisions to release individuals who pose serious flight risks, and their predictable failure to attend removal hearings, could justify a systemwide denial of any opportunity for release to individuals like Kim who are neither flight risks nor threats to the public.

The Court also cites a report by the Department of Justice relied upon by the Government. 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) (hereinafter Post-Order Report), App. 14, cited *ante*, at 7–8, 10. But that report does not even address the issue of detention before a determination has been made that an alien is removable. As its title indicates, the Post-Order Report analyzed removal rates only for aliens who had

already received final orders of removability.[19] See also *id.*, at 25 ("This current review was limited to actions taken by INS to remove aliens after [immigration judges or the Board of Immigration Appeals] had issued final orders").[20]

More relevant to this case, and largely ignored by the Court, is a recent study conducted at the INS's request concluding that 92% of criminal aliens (most of whom were LPRs) who were released under supervisory conditions attended all of their hearings. 1 Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, pp. ii, 33, 36 (Aug. 1, 2000) (hereinafter Vera Institute Study). Even without supervision, 82% of criminal aliens released on recognizance showed up, as did 77% of those released on bond, leading the reporters to conclude that "supervision was especially effective for criminal aliens" and that "mandatory detention of virtually all criminal aliens is not necessary." *Id.*, at ii, 36, 42.[21]

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[19] Detention of such aliens is governed by the statute at issue in *Zadvydas*, §1231(a), not by §1226(c).

[20] A prior study by the same body noted that nonappearance rates by aliens in deportation proceedings before issuance of orders to deport (aliens, that is, like Kim) were approximately 23% for the first half of 1993 and 21% for all of 1992. Department of Justice, Office of the Inspector General, Case Hearing Process in the Executive Office for Immigration Review, Rep. No. I–93–03, p. 5 (May 1994) (hereinafter Case Hearing Report). Congress appears to have considered these relevant figures, Senate Report, at 2 ("Over 20 percent of nondetained criminal aliens fail to appear for deportation proceedings"), without referring to irrelevant post-order numbers. The Government relied on the Post-Order Report in its brief and at oral argument. Brief for Petitioners 7, 19–20, and n. 7; Tr. of Oral Arg. 23. The Government did not cite the Case Hearing Report.

[21] The Court throws in minor criticisms of the Vera Institute Study that have no bearing on its relevance here. The Institute's supervised release program included 127 criminal aliens who would be subject to

The Court nowhere addresses the Vera Institute's conclusion that criminal aliens released under supervisory conditions are overwhelmingly likely to attend their hearings. Instead, the Court fixes on the fact that 23% of the comparison group of aliens released on bond failed to attend all of their hearings. *Ante*, at 8–9. Since the bond determinations were made by the INS, the fact remains that resource-driven concerns may well have led the INS to release individuals who were evident flight risks on bonds too low to ensure their attendance. See *supra*, at 24–25. The Court's assumption that the INS's bond determinations involved "individualized screening" for flight risk, *ante*, at 9, finds no support in the Vera Institute Study. Thus the Court's reliance on the failure rate of aliens released by the INS on bond, whether it comes from the Senate Report or the Vera Institute Study, *ante*, at 8–

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mandatory detention under §1226(c) because of their criminal histories. Vera Institute Study 33. Since the INS seeks Kim's removal on the grounds of either crimes of moral turpitude or an aggravated felony, see *ante*, at 1–2, n. 1, the fact that most of the Vera Institute Study's subjects were convicted of crimes of moral turpitude but not an aggravated felony, *ante*, at 9, n. 5, is of no moment. Nor were all of the aliens studied subject to intensive supervision, *ibid.*; most were subject to "regular supervision," which involved no mandatory reporting sessions beyond an initial orientation session with supervision staff and required only that the alien keep the staff apprised of a current mailing address, appear in court, and comply with the orders of the immigration judge. Vera Institute Study 17–18. That the Institute considered various screening criteria before authorizing supervised release, *ante*, at 9, n. 5, does not undermine the value of the study, since any program adopted by the INS in lieu of mandatory detention could do the same. Cf. *Zadvydas*, 533 U. S., at 696. Finally, the fact that Kim sought and was granted release on bond rather than supervised release, *ante*, at 9, n. 5, does not detract from the relevance of the Vera Institute Study. Regardless of what methods the INS decides to employ to prevent flight, the study supports the conclusion that mandatory detention under §1226(c) is "not necessary" to prevent flight, Vera Institute Study 42, and therefore violates the Due Process Clause.

9, does not support its conclusion.

In sum, the Court's inapposite statistics do not show that detention of criminal LPRs pending removal proceedings, even on a general level, is necessary to ensure attendance at removal hearings, and the Vera Institute Study reinforces the point by establishing the effectiveness of release under supervisory conditions, just as we did in *Zadvydas*. 533 U. S., at 696 (noting that imprisonment was constitutionally suspect given the possibility of "supervision under release conditions that may not be violated").[22] The Court's first attempt to distinguish *Zadvydas* accordingly fails.

The Court's second effort is its claim that mandatory detention under §1226(c) is generally of a "much shorter duration" than the incarceration at issue in *Zadvydas*. *Ante*, at 18. While it is true that removal proceedings are unlikely to prove "indefinite and potentially permanent," 533 U. S., at 696, they are not formally limited to any period, and often extend beyond the time suggested by the Court, that is, "an average time of 47 days" or, for aliens who exercise their right of appeal, "an average of four months." *Ante*, at 19; see also Case Hearing Report 12 (finding that the average time from receipt of charging

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[22] This case accordingly presents no issue of "'court ordered release,'" *ante*, at 20, n. 14 (quoting *Zadvydas*, *supra*, at 713 (KENNEDY, J., dissenting)); in this case, for example, the INS reached its own determination to release Kim on bond. This case concerns only the uncontroversial requirement that detention serve a compelling governmental interest and that detainees be afforded adequate procedures ensuring against erroneous confinement. *E. g.*, *United States* v. *Salerno,* 481 U. S. 739, 751 (1987) ("[T]he procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination"); see also *Zadvydas*, *supra*, at 721 (KENNEDY, J., dissenting) (stating that due process requires "adequate procedures" permitting detained aliens to show that "they no longer present special risks or danger" warranting confinement).

documents by a detained alien to a final decision by the immigration judge was 54 days). Even taking these averages on their face, however, they are no legitimate answer to the due process claim to individualized treatment and hearing.

In the first place, the average time from receipt of charging documents to decision obscures the fact that the alien may receive charging documents only after being detained for a substantial period. Kim, for example, was not charged until five weeks after the INS detained him. Brief for Respondent 9.

Even more revealing is an explanation of the raw numbers that are averaged out. As the Solicitor General conceded, the length of the average detention period in great part reflects the fact that the vast majority of cases involve aliens who raise no challenge to removability at all. Tr. of Oral Arg. 57. LPRs like Kim, however, will hardly fit that pattern. Unlike many illegal entrants and temporary nonimmigrants, LPRs are the aliens most likely to press substantial challenges to removability requiring lengthy proceedings.[23] See Vera Institute Study 33, 37 (stating that many of the criminal aliens studied were "lawful permanent residents who have spent much or all of their adult lives in the United States" and that 40% of those released on supervision "were allowed to remain in the United States"). Successful challenges often require several months of proceedings, see Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 10–20; detention for an open-ended period like this falls far short of the "stringent time limitations" held to be significant in *Salerno*, 481 U. S., at 747. The potential for sev-

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[23] Criminal aliens whose "removal proceedings are completed while [they are] still serving time for the underlying conviction," *ante*, at 19, are irrelevant to this case, since they are never detained pending removal proceedings under §1226(c).

eral months of confinement requires an individualized finding of necessity under *Zadvydas*.[24]

B

The Court has failed to distinguish *Zadvydas* in any way that matters. It does no better in its effort to portray its result in this case as controlled by *Carlson* v. *Landon,* 342 U. S. 524 (1952), and *Reno* v. *Flores,* 507 U. S. 292 (1993).

1

Carlson did not involve mandatory detention. It involved a system similar to the one Kim contends for here. The aliens' detention pending deportation proceedings in *Carlson* followed a decision on behalf of the Attorney General that custody was preferable to release on bond or on conditional parole. *Carlson*, *supra*, at 528, n. 5 (citing Internal Security Act of 1950, §23, 64 Stat. 1011). We sustained that decision because we found that the District Director of the INS, to whom the Attorney General had delegated the authority, did not abuse his discretion in concluding that "evidence of membership [in the Communist Party] plus personal activity in supporting and ex-

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[24] The Court calls several months of unnecessary imprisonment a "very limited time," *ante*, at 19, n. 12. But the due process requirement of an individualized finding of necessity applies to detention periods shorter than Kim's. *Schall* v. *Martin,* 467 U. S. 253 (1984), involved a maximum detention period of 17 days, *id.*, at 270, yet our due process analysis noted that the detainee was entitled to a hearing in which he could challenge the necessity of his confinement before an impartial decisionmaker required to state the facts and reasons underlying any decision to detain, *id.*, at 276–277. The 90-day removal period in §1231(a)(1) not only has a fixed endpoint, but also applies only after the alien has been adjudged removable, §1231(a)(1)(B). The discussion of that provision in *Zadvydas* cannot be read to indicate any standard of permissible treatment of an LPR who has not yet been found removable.

tending the Party's philosophy concerning violence" made the aliens "a menace to the public interest." 342 U. S., at 541. The significance of looking to "personal activity" in our analysis was complemented by our express recognition that there was "no evidence or contention that all persons arrested as deportable . . . for Communist membership are denied bail," *id.*, at 541–542, and by a Government report showing that in fact "the large majority" of aliens arrested on charges comparable to the *Carlson* petitioners' were allowed bail. *Id.*, at 542; see also *id.*, at 538, n. 31 (noting that it was "quite clear" that "detention without bond has been the exception").

Indeed, the *Carlson* Court's constitutional analysis relying on the opportunity for individualized bond determinations simply followed the argument in the brief for the United States in that case. In response to the aliens' argument that the statute made it "mandatory on the Attorney General to deny bail to alien communists," the Government stated, "[w]e need not consider the constitutionality of such a law for that is not what the present law provides." Brief for Respondent in *Carlson* v. *Landon*, O. T. 1951, No. 35, p. 19; see also *id.*, at 20 ("[T]he act itself, by its terms, leaves no doubt that the power to detain is discretionary, not mandatory"). The Government also presented the following excerpt of a statement of the chairman of the House Judiciary Committee:

> "'No particular hardship is going to be worked on anyone because, bear this fact in mind, *it is not mandatory on the Attorney General to hold people in detention. He is given discretionary power.* If in his judgment one of the class of people I have just mentioned ought to be held for paramount national reasons, he may detain him, but he is not obliged to hold anybody, *although I trust that in every case of a subversive or a hardened criminal he will.*'" *Id.*, at 19

(quoting 96 Cong. Rec. 10449–10450 (1950) (statement of Rep. Walter) (emphasis added in Brief for Respondent in *Carlson* v. *Landon*, *supra*)).

In short, *Carlson* addressed a very different scheme from the one here.

It is also beside the point for the Court to suggest that "like respondent in the present case," the *Carlson* petitioners challenged their detention because "there had been no finding that they were unlikely to appear for their deportation proceedings." *Ante*, at 13. Each of them was detained after being found to be "a menace to the public interest," 342 U. S., at 541, and their challenge, unlike Kim's, was that the INS had locked them up for an impermissible reason (danger to society) whereas only a finding of risk of flight would have justified detention. *Id.*, at 533–534 ("It is urged . . . that where there is no evidence to justify a fear of unavailability for the hearings or for the carrying out of a possible judgment of deportation, denial of bail under the circumstances of these cases is an abuse of discretion"); see also *id.*, at 551 (Black, J., dissenting) ("A power to put in jail because dangerous cannot be derived from a power to deport").[25] We rejected that contention, leaving the petitioners in detention because they were dangerous to the public interest, and on that issue, an official had determined that the *Carlson* petitioners ought to be detained. Here, however, no impartial decisionmaker has determined that detaining Kim is

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[25] Similarly, the question presented in *Butterfield* v. *Zydok*, argued and decided together with *Carlson*, was "[w]hether, in exercising his discretion to grant or withhold bail pending final determination of the deportability of an alien, the Attorney General is justified in denying bail on the ground that the alien is an active participant in Communist Party affairs, or whether he is bound also to consider other circumstances, particularly the likelihood that the alien will report as ordered." Pet. for Cert. in *Butterfield* v. *Zydok*, O. T. 1951, No. 136, p. 2.

required for any purpose at all, and neither the Government nor the Court even claims such a need.

For the same reason it is beside the point to note that the unsuccessful *Carlson* petitioners' brief raised a claim that detention without reference to facts personal to their individual cases would violate the Due Process Clause. *Ante*, at 13. As the United States pointed out in its own *Carlson* brief, that issue was never presented, since the District Director's exercise of discretion was based on individualized determinations that the petitioners were dangerous to society. See *supra*, at 31–32.[26] Nor is the Court entitled to invoke *Carlson* by saying that the INS "had adopted a policy of refusing to grant bail" to alien Communists, which made the Attorney General's discretion to release aliens on bond merely "ostensibl[e]." *Ante*, at 13. The *Carlson* Court found that "[t]here is no evidence or contention that all persons arrested as deportable . . . for Communist membership are denied bail." 342 U. S., at 541–542.

The Court refuses to accept the opinion of the *Carlson* Court and the representations made in the successful brief for the Government in that case. The Court not only fails to acknowledge the actual holding of *Carlson*; it improperly adopts as authority statements made in dissent. The Court's emphatic assertion that "[t]here was no 'individu-

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[26] While a prior conviction may sometimes evidence a risk of future danger, it is not conclusive in all cases, and Kim is a good example, given that the Government found that he "would not be considered a threat." App. 13. Indeed, the Court acknowledges that convictions are only "relevant to" dangerousness, *ante*, at 15, n. 9; it does not state that they compel a finding of danger in all cases. As even the *Zadvydas* dissent recognized, due process requires that detained criminal aliens be given an opportunity to rebut the necessity of detention by showing "that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." 533 U. S., at 721 (opinion of KENNEDY, J.).

alized findin[g]' of likely future dangerousness as to any of the aliens," *ante*, at 14, rests entirely on opinions voiced in dissent, although the Court only mentions this fact in a footnote, *ante*, at 14, n. 8 (citing 342 U. S., at 549, 551, n. 5, 552 (Black, J., dissenting), and *id.*, at 567 (Frankfurter, J., dissenting)). Statements made in dissent do not override the *Carlson* Court's express finding that the petitioners in that case were found to be not only members of the Communist Party, but "active in Communist work" and to "a degree, minor perhaps in [one] case, [participants] in Communist activities." *Id.*, at 541.[27]

Moreover, the *Carlson* dissenters did not suggest that no individualized determinations had occurred; rather, they contended that the District Director's individual findings of dangerousness were unsupported by sufficient reliable evidence. See *id.*, at 549–550 (Black, J., dissenting) (arguing that the aliens were not in fact "'dangerous'" at all); *id.*, at 552 (arguing that danger findings were based on "the rankest hearsay evidence" instead of the INS being "required to prove" that the detainee was dangerous); *id.*, at 555–556 (arguing that activity within the Communist movement did not make the aliens "dangerous"); *id.*, at 566–567 (Frankfurter, J., dissenting) (arguing that evidence of Communist party membership was "insufficient to show danger"; that evidence of some aliens' activities was stale; and that the history of treatment of the aliens involved forced him to conclude that the Attorney General was not actually exercising discretion on an

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[27] In the footnote immediately following its citation of dissenting opinions, the Court cites a passage from the *Carlson* majority opinion confirming that the *Carlson* petitioners' detention rested on the "allegation, supported by affidavits, that the [INS's] dossier of each petitioner contained evidence" of Communist Party membership and activities "to the prejudice of the public interest." 342 U. S., at 530 (quoted *ante*, at 14, n. 9).

individual basis).[28] And even if the *Carlson* dissenters were factually correct, all that would show is that the *Carlson* Court was misled (by the Government, no less) into deciding the case on the basis that individualized findings of dangerousness were made. Given that the *Carlson* Court clearly believed that it was deciding a case in which individualized determinations occurred, it is serious error for this Court to treat *Carlson* as deciding a case in which they did not.

Finally, the Court gets no help from the isolated passages of the *Carlson* opinion that it quotes. Although the *Carlson* Court stated that detention was "'a part'" of deportation procedure, *ante*, at 13 (quoting *Carlson*, 342 U. S., at 538), it nowhere said that detention was part of every deportation proceeding. Instead, it acknowledged that "the far larger part" of aliens deportable on "subversive charges" were released on "modest bonds or personal recognizances" pending their deportation proceedings. *Id.*, at 538, n. 31. Contrary to the Court's holding today, the

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[28] Justice Black's dissenting statement that one of the aliens was "'not likely to engage in any subversive activities,'" 342 U. S., at 549, does not amount to a "specific finding of non-dangerousness," *ante*, at 14. On the contrary, the Court expressly stated that the Government could prove dangerousness based on "personal activity" in the Communist Party; it simply was not required to go so far as to show "specific acts of sabotage or incitement to subversive action." *Carlson*, *supra*, at 541. Thus while there was no finding of "subversive action," there certainly was a finding of "danger," albeit one that Justice Black found unconvincing.

Likewise, Justice Frankfurter's statement in dissent that the Solicitor General of the United States had "advised" that "it has been the Government's policy . . . to terminate bail" for aliens awaiting deportation who were "present active Communists," 342 U. S., at 568, is difficult to reconcile with the contrary statements in both the majority opinion and the United States' brief in *Carlson*, see *supra*, at 31–33. Whatever its basis, Justice Frankfurter's reference to a "policy" of bail denials does not bear the weight that the Court places upon it today.

Carlson Court understood that discretion to admit to bail was necessary, since "[o]f course [a] purpose to injure [the United States] could not be imputed generally to all aliens subject to deportation." *Id.*, at 538. It was only in this light that the Court said that the INS could "justify [its] refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity"; the Court was referring to the INS's power to detain on a finding that a given alien was engaged in Communist activity that threatened society. *Id.*, at 543. The Court nowhere addressed, much less approved, the notion that the INS could justify, or that Congress could compel, an individual's detention without any determination at all that his detention was necessary to some Government purpose. And if there was ever any doubt on this point, it failed to survive our subsequent, unanimous recognition that the detention scheme in *Carlson* required "some level of individualized determination" as a precondition to detention. *INS* v. *National Center for Immigrants' Rights, Inc.,* 502 U. S. 183, 194–195 (1991); see also *Flores,* 507 U. S., at 313. *Carlson* stands at odds with the Court's outcome in this case.

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The Court's paragraph on *Flores, supra*, is no more help to it. Like *Carlson*, *Flores* did not involve mandatory detention, and the INS regulation at issue in *Flores* actually required that alien juveniles be released pending removal proceedings unless the INS determined that detention was required "'to secure [the juvenile's] timely appearance before the [INS] or the immigration court or to ensure the juvenile's safety or that of others.'" 507 U. S., at 297 (quoting 8 CFR §242.24(b)(1) (1992)). Again, Kim agrees that such a system is constitutional and contends for it here. *Flores* turned not on the necessity of detention, but on the regulation's restriction that alien juveniles

could only be released to the custody of the juvenile's parent, legal guardian, or another specified adult relative. Even this limitation, however, was subject to exception for releasing a juvenile to another person in "'unusual and compelling circumstances and in the discretion of the [INS] district director or chief patrol agent.'" 507 U. S., at 297 (quoting 8 CFR §242.24(b)(4) (1992)).

Thus, the substantive due process issue in *Flores* was not whether the aliens' detention was necessary to a governmental purpose: "'freedom from physical restraint'" was "not at issue" at all because, as juveniles, the aliens were "'always in some form of custody.'" 507 U. S., at 302 (quoting *Schall* v. *Martin,* 467 U. S. 253, 265 (1984)). Since "'[l]egal custody' rather than 'detention' more accurately describes the reality of the arrangement" in *Flores*, 507 U. S., at 298, that case has no bearing on this one, which concerns the detention of an adult.[29]

Flores is equally distinguishable at the procedural level. We held that the procedures for the custody decision sufficed constitutionally because any determination to keep the alien "in the custody of the [INS], released on recognizance, or released under bond" was open to review by the immigration court, the Board of Immigration Appeals, and the federal courts. *Id.*, at 308. Like the aliens in *Carlson*, the juveniles in *Flores* were subject to a different system and raised a different complaint from Kim's.

While *Flores* holds that the INS may use "reasonable presumptions and generic rules" in carrying out its statu-

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[29] Nor is it to the point for the Court to quote *Flores* as rejecting the aliens' challenge to a "'"blanket" presumption of the unsuitability of custodians other than parents, close relatives, and guardians.'" *Ante*, at 15 (quoting 507 U. S., at 313). *Flores* expressly stated that the regulation did not implicate the core liberty interest in avoiding physical confinement. *Id.*, at 302 ("The 'freedom from physical restraint' . . . is not at issue in this case").

tory discretion, *id.*, at 313, it gave no *carte blanche* to general legislation depriving an entire class of aliens of liberty during removal proceedings. *Flores* did not disturb established standards that detention of an adult must be justified in each individual instance.[30]

IV

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. I respectfully dissent.

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[30] Indeed, the passages the Court quotes from *Flores* did not concern the regulation's constitutionality at all, but rather its validity as an implementation of the authorizing statute. *Id.*, at 313 ("Respondents also contend that the INS regulation violates the statute because it relies upon a 'blanket' presumption"). *Flores* clearly separated its analysis of the regulation under the Due Process Clause from its analysis of the regulation under the statute. See *id.*, at 300; see also *id.*, at 318–319 (O'CONNOR, J., concurring) (pointing out the substantive due process analysis at *id.*, at 301–306, and the procedural due process analysis at *id.*, at 306–309).