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 BREYER, concurring in part and dissenting in part.

I agree with the majority that the courts have jurisdiction, and I join Part I of its opinion. If I believed (as the majority apparently believes, see *ante*, at 2–3, and n. 3) that Kim had conceded that he is deportable, then I would conclude that the Government could detain him without bail for the few weeks ordinarily necessary for formal entry of a removal order. Brief for Petitioners 39–40; see *ante,* at 18–20. Time limits of the kind set forth in *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), should govern these and longer periods of detention, for an alien's concession that he is deportable seems to me the rough equivalent of the entry of an order of removal. See *id.*, at 699–701 (reading the statute, under constitutional compulsion, as commonly imposing a presumption of a six month "reasonable" time limit for post-removal-order detention).

This case, however, is not one in which an alien concedes deportability. As JUSTICE SOUTER points out, Kim argues to the contrary. See *ante*, at 2–4 (opinion concurring in part and dissenting in part). Kim claims that his earlier convictions were neither for an "'aggravated felony,'" nor for two crimes of "'moral turpitude.'" Brief for

Respondent 3, 11–12, 31–32, and n. 29. And given shifting lower court views on such matters, I cannot say that his arguments are insubstantial or interposed solely for purposes of delay. See, *e.g.*, *United States* v. *Corona-Sanchez*, 291 F. 3d 1201, 1213 (CA9 2002) (petty theft with a prior not an "aggravated felony"). Compare *Omagah* v. *Ashcroft,* 288 F. 3d 254, 259 *(*CA5 2002) ("'Moral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved'"), with *Guarneri* v. *Kessler,* 98 F. 2d 580, 580–581 (CA5 1938) ("Moral turpitude" involves "'[a]nything done contrary to justice, honesty, principle or good morals'"), and *Quilodran-Brau* v. *Holland,* 232 F. 2d 183, 184 (CA3 1956) ("The borderline of 'moral turpitude' is not an easy one to locate").

That being so — as long as Kim's legal arguments are neither insubstantial nor interposed solely for purposes of delay — then the immigration statutes, interpreted in light of the Constitution, permit Kim (if neither dangerous nor a flight risk) to obtain bail. For one thing, Kim's constitutional claims to bail in these circumstances are strong. See *ante,* at 10–14, 19–20 (SOUTER, J., concurring in part and dissenting in part). Indeed, they are strong enough to require us to "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); accord, *Zadvydas*, *supra*, at 689.

For another, the relevant statutes literally say nothing about an individual who, armed with a strong argument against deportability, might, or might not, fall within their terms. Title 8 U. S. C. §1226(c) tells the Attorney General to "take into custody any alien who . . . *is* deportable" (emphasis added), not one who may, or may not, fall into that category. Indeed, the Government now permits such an alien to obtain bail if his argument against deportability is significantly *stronger* than substantial, *i.e.*, strong

enough to make it "substantially unlikely" that the Government will win. *In re Joseph*, 22 I. & N. Dec. 799 (1999). Cf. 8 CFR §3.19(h)(2)(ii) (2002).

Finally, bail standards drawn from the criminal justice system are available to fill this statutory gap. Federal law makes bail available to a criminal defendant after conviction and pending appeal provided (1) the appeal is "not for the purpose of delay," (2) the appeal "raises a substantial question of law or fact," and (3) the defendant shows by "clear and convincing evidence" that, if released, he "is not likely to flee or pose a danger to the safety" of the community. 18 U. S. C. §3143(b). These standards give considerable weight to any special governmental interest in detention (*e.g.*, process-related concerns or class-related flight risks, see *ante*, at 17). The standards are more protective of a detained alien's liberty interest than those currently administered in the INS' *Joseph* hearings. And they have proved workable in practice in the criminal justice system. Nothing in the statute forbids their use when §1226(c) deportability is in doubt.

I would interpret the (silent) statute as imposing these bail standards. Cf. *Zadvydas*, *supra,* at 698; *United States* v. *Witkovich*, 353 U. S. 194, 201–202 (1957); *Kent* v. *Dulles*, 357 U. S. 116, 129 (1958). So interpreted, the statute would require the Government to permit a detained alien to seek an individualized assessment of flight risk and dangerousness as long as the alien's claim that he is not deportable is (1) not interposed solely for purposes of delay and (2) raises a question of "law or fact" that is not insubstantial. And that interpretation, in my view, is consistent with what the Constitution demands. I would remand this case to the Ninth Circuit to determine whether Kim has raised such a claim.

With respect, I dissent from the Court's contrary disposition.