Nos. 01-1491

IN THE
Supreme Court of the United States

CHARLES DEMORE, District Director,
Immigration and Naturalization Service, *et al.*
Petitioners,
v.

HYUNG JOON KIM,
Respondent.

On Writ of Certiorari
to the U.S. Court of Appeals
for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION; ALLIED EDUCATIONAL FOUNDATION; U.S. REPS. BOB BARR, JOE BARTON, JOHN DOOLITTLE, WALTER JONES, AND LAMAR SMITH; AND U.S. SENATOR JESSE HELMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: August 28, 2002

QUESTIONS PRESENTED

Whether Respondent's mandatory detention under 8 U.S.C. § 1226(c) violates the Due Process Clause of the Fifth Amendment, where Respondent was convicted of an aggravated felony after his admission into the United States?

The case also raises the following antecedent question:

Whether a federal district court possesses jurisdiction under 28 U.S.C. § 2241 to set aside the action of the Attorney General in detaining a removable alien who was convicted of an aggravated felony after his admission into the United States, despite 8 U.S.C. § 1226(e)'s admonition that "[n]o court may set aside any action or decision by the Attorney General" to detain an alien under § 1226?

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INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. *See, e.g., Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Al Najjar v. Ashcroft,* 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988). WLF also filed a brief in support of the petition for certiorari in this case.

The Honorable Jesse Helms is a United States Senator from North Carolina. The Honorable Bob Barr, the Honorable Joe Barton, the Honorable John Doolittle, the Honorable Walter Jones, and the Honorable Lamar Smith, are United States Representatives from, respectively,

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Georgia, Texas, California, North Carolina, and Texas. Rep. Smith was Chairman of the Immigration and Claims Subcommittee of the House Judiciary Committee at the time Congress adopted the legislation at issue in this case. All believe strongly that Congress and the Executive Branch ought to be permitted to protect American citizens by imposing finite periods of detention on those removable aliens who have been adjudged guilty of aggravated felonies. All are supporters of the mandatory detention provisions of 8 U.S.C. § 1226(c) and believe that it is fully consistent with the requirements of the U.S. Constitution.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of recent terrorist attacks in this country, *amici* believe that the political branches of government must be afforded broad power to detain aliens who are convicted of aggravated felonies. Where those aliens admit they are here illegally but nonetheless are fighting deportation based on efforts to win discretionary adjustment of status, *amici* believe that the Immigration and Naturalization Service ("INS") ought to detain such aliens during the time it takes to complete deportation proceedings.

Amici are concerned that the decision below, if allowed to stand, will result in an unwarranted abridgement of the power of the political branches of government to control immigration into this county, a power that historically has been subject to only extremely limited judicial review. The

decisions below discuss at great length the alleged rights of aliens who are convicted felons, but do not seem to have taken into account the rights of the federal government to enforce its immigration laws or the rights of those who may be threatened by Mr. Kim's continued presence in American society.

Amici are filing this brief with the consent of all parties. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement contained in the Brief for Petitioners.

In brief, Hyung Joon Kim is 24-year-old citizen of Korea who has been a permanent resident alien living in California since 1986. The Immigration and Naturalization Service (INS) has been seeking his removal from the country because of his repeated criminal offenses.

Mr. Kim's *adult* criminal record dates to July 1996, when he was convicted at age 18 of first degree burglary in California state court. Pet. App. 2a. In August 1997, he was convicted in California state court of "petty theft with priors," and was sentenced to three years imprisonment. *Id.* After serving 18 months of that sentence, he was release to the custody of the INS on February 2, 1999. *Id.* The INS in 1998 had charged him with being a deportable alien under 8 U.S.C. § 1227(a)(2)(A)(iii) because he had been convicted of an "aggravated felony" within the meaning of 8 U.S.C. § 8 U.S.C. § 1101(a)(43)(G). Mr. Kim's removal hearing before an Immigration Judge was scheduled for March 2002 but has been delayed at his request.

One year prior to Mr. Kim's aggravated felony conviction, Congress adopted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, which *inter alia* added a new § 236(c) to the Immigration and Nationality Act, 8 U.S.C. § 1226(c). Section 1226(c) *requires* the INS (with one exception not relevant here) to take into custody, pending removal, any alien deportable by reason of having been convicted of an aggravated felony. Section 1226(c) is merely the latest federal mandatory detention statute; a series of federal statutes dating back to 1988 required detention pending deportation of various categories of alien criminals. *See* Pet. App. 35a-36a.

After bringing charges against Mr. Kim, the INS determined that § 1226(c) precluded his release on bond. *Id.* 33a. On May 17, 1999, Mr. Kim filed a habeas corpus petition in U.S. District Court for the Northern District of California, seeking release from detention. On August 11, 1999, the district court granted the petition. *Id.* at 31a-51a. The court held that § 1226(c) was facially invalid as a violation of both substantive and procedural due process because: (1) the Constitution prohibits the detention of aliens in the absence of evidence that they pose a risk of flight or a threat to the community; and (2) aliens are entitled to an "individualized bond hearing" to determine whether they pose a risk of flight or a threat to the community. The INS subsequently released Mr. Kim on $5,000 bond. *Id.* at 2a.

On January 9, 2002, the U.S. Court of Appeals for the Ninth Circuit affirmed. *Id.* at 1a-30a. The appeals court did not concur with the district court's holding that § 1226(c) was facially invalid, but it held that § 1226(c) is unconstitutional as applied to Mr. Kim and similarly situated permanent

resident aliens. *Id.* at 6a. The court held that Mr. Kim had "an obvious and important" due process interest in liberty "during the pendency of removal proceedings." *Id.* at 8a. The court held that that liberty interest outweighed the INS's justifications for seeking to detain him -- including preventing him from fleeing and protecting public safety -- in the absence of "an individualized determination" that he posed a risk of flight or a risk to public safety. *Id.* at 12a-21a, 30a.

SUMMARY OF ARGUMENT

Congress has unambiguously decreed that the federal courts are not to "set aside any action or decision" of the INS taken pursuant to 8 U.S.C. § 1226 "regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e). It is undisputed that the INS acted pursuant to 8 U.S.C. § 1226 in determining that Mr. Kim should be detained pending removal. Accordingly, the Court should reverse the judgment below on the grounds that the lower courts did not possess jurisdiction to overturn the INS's decision to detain Mr. Kim.

Nothing in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001), is to the contrary. The factors that led the Court in *St. Cyr* to conclude that other provisions of IIRIRA did not effect a repeal of habeas jurisdiction are not present in this case. *St. Cyr* held that Congress will not be deemed to have intended to repeal habeas jurisdiction in the absence of a specific and unambiguous statutory directive to that effect; § 1226(e)'s language easily meets that standard. Appeals courts that have reached a contrary interpretation of § 1226(e) have failed to address its plain statutory language.

Nor should § 1226(e) as interpreted herein be deemed a violation of the Suspension Clause of the Constitution, Article I, § 9, cl. 2. The evidence indicates that the courts in this country and England would not in 1789 have entertained a habeas action of the type asserted by Mr. Kim, nor would they have done so until very recently. Under those circumstances, it is well within Congress's power to withdraw jurisdiction over all claims that an alien is being wrongfully detained pending deportation.

ARGUMENT

I. 8 U.S.C. § 1226(e) DEPRIVES FEDERAL COURTS OF JURISDICTION TO GRANT HABEAS CORPUS RELIEF TO ALIENS CHALLENGING THEIR § 1226(c) DETENTION

Congress has acted unequivocally to bar federal courts from overturning Executive Branch decisions to detain alien felons during the time required to effect their deportation. Accordingly, the Court should reverse the judgment below and direct that the habeas corpus petition be dismissed, without reaching the merits of Respondent's due process claims.

In its certiorari petition, the INS did not raise this jurisdictional issue, and *amici* do not know whether it plans to do so in its merits brief. That omission nonetheless should not deter the Court from addressing the issue. It is always appropriate, of course, for a court *sua sponte* to raise the issue of its own jurisdiction, and the jurisdictional issue is a "subsidiary question fairly included" within the question presented by Petitioner. SUP. CT. R. 14.1(a).

The case is, perhaps, more easily resolved by overlooking the jurisdictional issue and addressing the merits of Respondent's due process claims. In *amici*'s view, the INS is likely to prevail on its argument that it has afforded Respondent all the process he is due, while the jurisdictional issue presents a much closer question. The Court nonetheless should not address the merits without first determining whether it possesses jurisdiction to do so. "The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998) (citations omitted). Accordingly, a federal court may not exercise "hypothetical jurisdiction" over a case as a means of disposing of a case without the need to address a difficult jurisdictional issue; "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment -- which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Id.* 101.

The district court and Ninth Circuit asserted jurisdiction over this case under the federal habeas statute, 28 U.S.C. § 2241. However, 8 U.S.C. § 1226(e) clearly suggests that no such jurisdiction exists in the lower federal courts:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside *any action or decision* by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole. (Emphasis added.)

There is no question that following Mr. Kim's release from state prison in February 1999, the INS detained him

"under this section," *i.e.,* under 8 U.S.C. § 1226. Moreover, the action of which Mr. Kim complains is one "regarding the detention or release of an[] alien or the grant, revocation, or denial of bond or parole." Accordingly, the only plausible reading of § 1226(e) is that Congress intended to prohibit federal courts from "set[ting] aside" the INS's detention of Mr. Kim and other similarly situated criminal aliens.

Amici recognize that there is "a strong presumption in favor of judicial review of administrative action," and that the Court has a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr,* 121 S. Ct. 2271, 2278 (2001). Nonetheless, there is no plausible interpretation of § 1226(e) other than that Congress intended to preclude *all* lower-court review of an INS decision to detain an alien felon pursuant to § 1226, including habeas review.[2] The Court should reverse the appeals court's judgment and remand with directions that the petition be denied for want of jurisdiction.

A. Interpreting § 1226(e) as Repealing Habeas Jurisdiction in This Case Is Consistent with *St. Cyr*

The Court's decision last year in *St. Cyr* required it to address other provisions of IIRIRA that arguably barred federal court review of habeas corpus petitions filed by alien

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[2] Section 1226(e) could plausibly be read as not barring claims that the detainee is not actually an alien or has not actually been convicted of an aggravated felony. Detention in such circumstances arguably is not detention "under this section," thereby rendering the statutory bar inapplicable. However, Mr. Kim does not contest that he is an alien or that the crimes of which he stands convicted are "aggravated felonies" within the meaning of 8 U.S.C. § 1101(a)(43).

felons complaining that the INS improperly failed to consider their requests for waiver of deportation.[3] The Court declined to interpret those provisions as a bar to the habeas claims, finding that the IIRIRA provisions relied on by the INS failed to overcome the "strong presumption" in favor of the availability of habeas jurisdiction. *St. Cyr,* 121 S. Ct. at 2278. The Court held that if Congress wishes to repeal habeas jurisdiction, it "must articulate specific and unambiguous statutory directives to effect a repeal." *Id.* at 2278-79.

The factors that led the Court in *St. Cyr* to conclude that Congress had there not intended to limit habeas jurisdiction are not present in this case. Crucial to the Court's conclusion was use of the term "judicial review" in each of the three jurisdiction-limiting IIRIRA provisions at issue in that case.[4] The Court explained:

> The term "judicial review" or "jurisdiction to review" is the focus of each of these three provisions. In the immigration context, "judicial review" and "habeas corpus" have historically distinct meanings. See *Heikkila v. Barber,* 345 U.S. 229 (1953). In *Heikkila,* the Court concluded that the finality provisions at issue "preclud[ed] judicial review" to the maximum extent possible under the Constitution, and thus concluded that the APA was inapplicable. *Id.* at 235. Nevertheless,

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[3] 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), and (b)(9).

[4] Also at issue in *St. Cyr* was a provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, that, the INS argued, similarly demonstrated Congress's intent to repeal federal habeas jurisdiction over the alien felons' claims. *Id.* at 2284-85.

> the Court reaffirmed the right of habeas corpus. *Ibid.* Noting that the limited role played by the courts in habeas corpus proceedings was far narrower than the judicial review authorized by the APA, the Court concluded that "it is the scope of inquiry on habeas corpus that differentiates" habeas review from "judicial review." *Id.* at 236.

St. Cyr, 121 S. Ct. at 2285.

St. Cyr is inapposite in this respect because the crucial language of § 1226(e) makes no mention of limitations on "judicial review." Although the first sentence of § 1226(e) bars "review" of the Attorney General's "discretionary judgments" to detain aliens pursuant to § 1226,[5] the second sentence is not so limited. The second sentence states unequivocally that "[n]o court may set aside any action or decision" to detain an alien under § 1226. There can be no argument that the second sentence employs a term of art such that "[n]o court" does not really mean "no court," or that INS decisions may not be "set aside" in actions filed under the Immigration and Naturalization Act but may be set aside in habeas actions.

Another factor in *St. Cyr*'s determination that Congress had not intended to bar habeas review was the absence of any language in the relevant IIRIRA and AEDPA provisions making explicit reference to habeas review under 28 U.S.C.

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[5] The first sentence of § 1226(e) presumably applies primarily to actions taken by the Attorney General pursuant to §§ 1226(a) and (b). Those subsections grant the Attorney General discretionary authority to arrest, detain, release, and/or rearrest aliens who are subject to removal proceedings but who are not subject to mandatory detention under § 1226(c).

§ 2241. The Court concluded, "Given the historic use of § 2241 jurisdiction as a means of reviewing deportation and exclusion orders, Congress' failure to refer to § 2241 is particularly significant." *Id.* at 2286 n.36.

That factor is of limited relevance in this case because there is no similar history of routine reliance on habeas jurisdiction to challenge detention of aliens pending completion of deportation/removal proceedings. *Amici* are aware of only two cases in which the Court has heard such a challenge, and neither was successful. *Reno v. Flores,* 507 U.S. 292 (1993); *Carlson v. Landon,* 342 U.S. 524 (1952). Moreover, *Reno v. Flores* was a class action suit (filed on behalf of a class of juvenile aliens) in which § 2241 was merely one of several statutes invoked as the basis for federal court jurisdiction.[6] In the absence of a pre-1996 history of routine reliance on § 2241 to challenge detention of aliens pending completion of deportation proceedings, no significance can be attached to Congress's failure to cite § 2241 when (in § 1226(e)) it mandated that "no court" may set aside any actions taken by the Attorney General under § 1226. *St. Cyr* held that Congress will not be deemed to have intended to repeal habeas jurisdiction in the absence of a "specific and unambiguous statutory directive" to that effect; § 1226(e)'s "no court" language easily meets that standard.

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[6] The plaintiffs in that suit did not limit themselves to the narrow claims that are the hallmark of habeas review, *St. Cyr,* 121 S. Ct. at 2285, but rather brought a wide-ranging facial challenge to the procedures employed by the INS in determining whether to detain juvenile aliens, as well as to the conditions of their detention. *Reno v. Flores,* 507 U.S. at 296.

In sum, nothing in *St. Cyr* suggests that § 1226(e) should be interpreted to mean anything other than what its unambiguous language states: "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention . . . of any alien."

B. Appeals Court Decisions to the Contrary Either Ignore § 1226(e) or Misinterpret Its Language

Each of the appeals courts to consider the issue has held that § 1226(e) is *not* a bar to habeas corpus claims such as Mr. Kim's. *See, e.g., Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999); *Patel v. Zemski*, 275 F.3d 299, 302 (3d Cir. 2001). However, the courts' analyses of the issue all have been cursory and have failed to address § 1226(e)'s plain statutory language.

The Seventh Circuit evaded the jurisdictional bar in *Parra* by claiming that § 1226(e) prohibits only "[t]wo particular avenues of attack" on detention decisions: (1) an argument that the Attorney General erred in applying § 1226 to an alien; and (2) an argument that he erred in deeming the alien statutorily ineligible for bail. *Parra*, 172 F.3d at 957. The court held that "[a] person who has different legal arguments may present them," including an argument that detention is improper because § 1226(c) is unconstitutional. *Id.* That interpretation of § 1226(e) is not plausible. The second sentence of § 1226(e) does not state that certain types of detention decisions or certain types of legal challenges to detention are barred; rather, it states categorically that "[n]o court may set aside" INS detention of an alien felon pursuant to § 1226.

The Seventh Circuit attempted to draw support from this Court's interpretation of another jurisdiction-limiting immigration statute in *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999). The comparison was not well-taken. The statute at issue in *American-Arab,* 8 U.S.C. § 1252(g), sharply limits judicial review of claims by an alien "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against an alien under this Act." The Court concluded that § 1252(g) imposed limits on judicial review *only* when the plaintiffs' claims addressed one of the three types of "decision[s] or action[s]" enumerated in § 1252(g); but the Court made clear that § 1252(g) applied *regardless* of the grounds raised by the alien to challenge the Attorney General's decisions or actions in these three areas. *American-Arab*, 525 U.S. at 482-83. Similarly, 8 U.S.C. § 1226(e) prohibits a court from "set[ting] aside" a decision by the Attorney General to detain an alien felon pursuant to § 1226, *regardless* of the basis for challenging detention. Accordingly, contrary to the Seventh Circuit's contention, the Court's analysis in *American-Arab* fully supports *amici*'s contention that § 1226(e) bars Mr. Kim's habeas claim.

The Third Circuit in *Patel* likewise held that § 1226(e) does not bar judicial review of a habeas corpus challenge to INS detention of an alien felon under § 1226. But it did so without any real analysis; it simply cited to *Parra* and stated in conclusory fashion: "[§ 1226(e)], which restricts judicial review of INS decisions made under this section [1226], does not restrict judicial review of its constitutionality." *Patel,* 275 F.3d at 302. To the contrary, § 1226(e) plainly *does* restrict judicial review of a challenge to § 1226(c) detention based on a claim that § 1226(c) is unconstitutional; § 1226(e)

states that "no court" may set aside a § 1226 detention actions, without limitation based on the grounds for challenge.

Other courts, including the court below, have upheld jurisdiction without any reference whatsoever to § 1226(e). *See* Pet. App. 2a-3a ("The district court had jurisdiction pursuant to 28 U.S.C. § 2241. *See INS v. St. Cyr*, 533 U.S. 289 (2001)."). As explained above, *St. Cyr* does not require a conclusion that the Court ignore § 1226(e)'s clear prohibition against federal court interference with an action by the Attorney General to detain an alien felon temporarily while removal proceedings are ongoing.

II. CONGRESS'S DECISION TO BAR REVIEW OF § 1226(c) DETENTIONS DOES NOT VIOLATE THE SUSPENSION CLAUSE

St. Cyr stated that the IIRIRA and AEDPA provisions at issue in that case, if interpreted as barring habeas jurisdiction in any federal court:

> [W]ould give rise to substantial constitutional questions. Article I, § 9, cl. 2 of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Pubic Safety may require it." Because of that Clause, some "judicial intervention in deportation cases" is unquestionably "required by the Constitution." *Heikkila v. Barber,* 345 U.S. 229, 235 (1953).

St. Cyr, 121 S. Ct. at 2279. The Court avoided those "substantial constitutional questions" by invoking the doctrine of constitutional doubt and interpreting the relevant IIRIRA

and AEDPA provisions as not repealing the federal court's § 2241 habeas jurisdiction. *Id.* at 2287.

St. Cyr undoubtedly raises questions regarding the constitutionality of § 1226(e). Because § 1226(e) repeals federal habeas jurisdiction over Mr. Kim's claims that his mandatory detention pending removal is unconstitutional, one conceivably could argue that it violates the Suspension Clause.[7] *Amici* respectfully submit, however, that any such argument ultimately is unavailing.

A. Neither in 1789 Nor Thereafter Would Common Law Courts Have Recognized Mr. Kim's Right to Contest Detention Pending Deportation, by Seeking a Writ of Habeas Corpus

St. Cyr held that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *Id.* at 2279 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996). Accordingly, the constitutionality of § 1226(e)'s repeal of habeas jurisdiction over the claims of Mr. Kim and other similarly situated alien felons turns on whether the writ of habeas corpus was generally available to those in Mr. Kim's position in 1789 (or, possibly, thereafter). Because the historical evidence suggests that Mr. Kim would not have been permitted to contest his detention pending removal/deportation, there is no constitutional violation.

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[7] Because § 1226(e) is not susceptible of any plausible interpretation that would avoid raising questions regarding its constitutionality, the doctrine of constitutional doubt has no application in this case.

It is no doubt true that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *St. Cyr.*, 121 S. Ct. at 2280. But the INS's efforts to take Mr. Kim into custody do not constitute "detention" of the sort that historically has been subject to immediate habeas review. The INS has no desire to retain custody of removable aliens; its sole purpose in taking custody is to ensure a means of effecting removal. A removable alien remains in INS custody only so long as he continues to fight the INS's removal efforts. In that very real sense, a removable alien in INS custody possesses at all times the keys to his cell; he can unlock the door at any time by agreeing to return to his native land.[8]

Because Colonial America and the United States imposed few controls on immigration before 1875,[9] there is little early case law regarding the availability of habeas corpus review as a means of challenging detention pending deportation. The English experience, however, suggests that habeas review was not available:

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[8] Numerous federal appeals courts have recognized this fundamental aspect of INS detention. *See. e.g., Parra,* 172 F.3d at 957 (detained alien "has the keys in his pocket"); *Doherty v. Thornburgh,* 943 F.2d 204, 212 (2d Cir. 1991) (detained alien "possessed, in effect, the key that unlocks his prison cell"); *Richardson v. Reno,* 180 F.3d 1311, 1317 (11th Cir. 1999) ("Richardson's detention is not entirely beyond his control; he is detained only because of the removal proceedings, and he may obtain his release any time he chooses by withdrawing his application for admission and leaving the United States"), *cert. denied,* 529 U.S. 1036 (2000).

[9] *St. Cyr,* 121 S. Ct. at 2282.

> In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the King without the consent of Parliament. It was formerly exercised by the King, but in later times by Parliament, which passed several acts on the subject between 1793 and 1848. 2 Inst. 57; 1 Chalmers Opinions, 26; 1 Bl. Com. 260; Chitty on the Prerogative, 49; 1 Phillimore, c. 10, § 220 and note; 30 Prl. Hist. 157, 167, 188, 217, 229; 34 Hansard Parl. Deb. (1st series) 441, 445, 471, 1065-1071; 6 Law Quart. Rev. 27.
>
> Eminent English judges, sitting in the Judicial Committee of the Privy Council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein.

Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893).

As laws limiting immigration became increasingly restrictive in the late 19th century, the number of lawsuits challenging decisions to deport or exclude aliens also increased. Because federal immigration laws from 1891 to 1952 made no express provision for judicial review of such decisions, what limited review that existed generally took the form of petitions for writs of habeas corpus. Early cases made clear that the Court, while recognizing federal court jurisdiction over such petitions, was unwilling to second-guess Executive Branch deportation and exclusion decisions. In rejecting a habeas petition filed by Chinese citizens who had lived in this country many years but who had been ordered deported because they could not obtain certificates demonstrating their residency, the Court explained that, to a

large extent, the courts had a role to play in exclusion and deportation cases only to the extent that they were assigned a role by Congress:

> In Nichimura Ekiu's case, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency. 142 U.S. 660.
>
> The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.
>
> The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an aliens' right to be in the country has been made by Congress to depend.

Fong Yue Ting, 149 U.S. at 713-14.

Later cases slightly expanded the scope of habeas review of deportation orders. Thus, while Congress was free to establish virtually any rules for the expulsion of aliens and to specify that those rules were to be administered solely by

executive officers without an opportunity for judicial review, habeas relief was available if the proceedings were conducted in so unfair a manner as to constitute a deprivation of liberty without due process of law. *See, e.g., The Japanese Immigrant Case,* 189 U.S. 86, 100-01 (1904) (proceedings are constitutionally deficient if alien is not afforded opportunity to present her case); *Zakonaite v. Wolf,* 226 U.S. 272, 275 (1912). In all such cases, the availability of habeas relief was predicated on the petitioner being subject to government detention. *See, e.g., Ekiu v. United States,* 142 U.S. 651, 660 (1891) ("An alien immigrant, prevented from landing by any such officer claiming to do so by an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.").

But while the Court was willing to entertain habeas challenges to a government exclusion/deportation decision, in no case did the Court question the right of immigration officials to detain the alien while exclusion/deportation proceedings were on-going. Indeed, it was apparent from the structure of the Court's analysis that the Court would have rejected any such claims. By allowing deportation issues to be decided solely by administrative proceedings without possibility of judicial review, the Court implicitly endorsed continued detention while those proceedings continued. Only after those administrative proceedings had been completed (and the alien could thus conceivable have a basis for challenging the proceedings as fundamentally unfair) would the Court permit aliens to file habeas corpus petitions.

The Court, in essence, imposed an exhaustion of administrative remedies requirement on the filing of habeas corpus challenges to temporary government detention

imposed in aid of deportation proceedings. Although such detention was a sufficient deprivation of liberty to trigger habeas jurisdiction, the right to bring a habeas action did not ripen until the alien had a basis for demonstrating that the attempted deportation was wrongful. The Court addressed the point explicitly in *Wing Wong v. United States,* 163 U.S. 228 (1896). The Court carefully distinguished between detention imposed on aliens for the purpose of punishment and temporary detention imposed to aid deportation. The Court strongly criticized government efforts to impose punishment on Chinese laborers (in the form of imprisonment for one year at hard labor) without affording them the procedural protections of a criminal trial before a judge. *Id.* at 236-38. At the same time, the Court endorsed Executive Branch detention as a necessary means of ensuring that deportation could be effected:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.

Id. at 235.

Indeed, *Wing Wong*'s endorsement of detention as a necessary component of the deportation process has carried forward to the present. *See Carlson v. Landon*, 342 U.S. at 538 ("[d]etention is necessarily a part of the deportation procedure."); *Reno v. Flores,* 507 U.S. at 306 ("Congress has the authority to detain aliens suspected of entering the

country illegally pending their deportation hearings."). *See also St. Cyr*, 121 S. Ct. at 2281 ("In this case, the INS points out, there is no dispute that the INS had authority in law to hold St. Cyr, as he is eligible for removal.").

By the middle of the 20th century, the percentage of aliens in deportation proceedings being released on parole pending deportation increased considerably. *See, e.g., Carlson v. Landon,* 342 U.S. at 538 n.31. Nonetheless, until 1952 habeas corpus petitions remained the only means by which deportation orders could be challenged. *Heikkila,* 345 U.S. at 236-37. Thus, an alien who had been paroled but who wished to challenge a final order of deportation had to surrender himself to the custody of the INS before filing a habeas petition challenging the order. *See, e.g., Bridges v. Wixon,* 326 U.S. 135, 140 (1945). Because being in INS custody was a pre-condition for filing a habeas petition challenging deportation, it is hardly surprising that the Court was not faced with numerous claims from aliens seeking release from detention pending deportation.

Moreover, it was generally understood by Congress in that era that such relief was unavailable. In a 1950 report, a report that ultimately led to adoption of the INA in 1952, the Senate Judiciary Committee made clear its belief that the only form of relief available to an alien in deportation proceedings was a habeas corpus petition, and that such petitions could be filed only after the final order of deportation had been issued:

> Once the order and warrant of deportation are issued, the administrative process is complete. Under the fifth amendment to the Constitution, the "due process" provision, the alien may, however, petition for a writ of habeas corpus. . . . Habeas

> corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.

Senate Jud. Comm., "The Immigration and Naturalization Systems of the United States," S.Rep. No. 1515, 81st Cong., 2d Sess. 28, 629 (1950) (quoted in *Shaughnessy v. Pedreiro,* 349 U.S. 591, 596 (1955)).

Actions challenging detention pending deportation have become somewhat more common in the past 40 years. Congress sought to reverse that trend with respect to alien criminals when it adopted §§ 1226(c) and (e). Any claim that § 1226(e) is unconstitutional under the Suspension Clause is unavailing in the face of evidence that in 1789 and at all times until very recently, the law did not recognize the right of aliens being detained by immigration authorities to file a habeas corpus petition challenging detention pending deportation.

B. § 1226(e) Can and Should Be Interpreted as Permitting Court Challenges by Those Claiming Not to Be Aliens or Not to Have Committed Aggravated Felonies

The Court on several occasions has upheld the right to a judicial forum for those challenging deportation on the ground that they are United States citizens. *Ng Fung Ho v. White,* 259 U.S. 276 (1922); *Kwock Jan Fat v. White,* 253 U.S. 454, 465 (1920); *Chin Yow v. United States,* 208 U.S. 8, 12-13 (1908). Accordingly, someone in Mr. Kim's position cannot -- consistently with due process -- be denied an opportunity to file a habeas corpus petition challenging deportation on the grounds that he is a citizen. Although the

issue is less clear, due process also likely demands that such an individual be provided an opportunity to challenge in federal court the INS's contention that he has been convicted of an aggravated felony.

While requiring judicial review of the facts underlying a citizenship claim, the three cases all strongly support the position that habeas jurisdiction historically has not been available to challenge detention pending deportation. In each case, the Court made clear that while the petitioner had wrongly been denied a judicial hearing on his citizenship claim, immediate release from custody could not be ordered. Rather, detention could continue until such time as the petitioner's citizenship claim was proven. As the Court explained in *Chin Yow,* the alien "is imprisoned only to prevent his entry and an unconditional release would make the entry complete without the requisite proof." *Chin Yow*, 208 U.S. at 13. The other two cases explicitly adopted the procedures employed by *Chin Yow*. *Ng Fung Ho,* 259 U.S. at 285; *Kwock Jan Fat,* 253 U.S. at 465.

Amici nonetheless believe that it would be appropriate to interpret § 1226(e) as not barring claims that the detainee is not actually an alien or has not actually been convicted of an aggravated felony. Detention in such circumstances arguably is not detention "under this section," thereby rendering the statutory bar inapplicable. Moreover, the INS in other litigation has interpreted § 1226(e) in that manner, and its interpretation of the statute is entitled to deference.

But Mr. Kim is unaffected by any such interpretation. He does not deny that he is an alien. He does not deny that he has been convicted of an aggravated felony. Moreover, he lacks an even colorable claim that he is eligible for any

sort of relief from deportation. Because he has committed an aggravated felony, he is ineligible for cancellation of removal under 8 U.S.C. § 1229b. *See* 8 U.S.C. § 1229b(a)(3). Nor is he eligible for withholding of removal under 8 U.S.C. § 1231(b)(3) in the absence of any evidence that his "life or freedom" would be threatened because of his "race, religion, nationality, membership in a particular social group, or political opinion" if he were returned to Korea.

Finally, *amici* note that any constitutional concern regarding limitations on the duration of Mr. Kim's detention is misplaced. In light of *Zadvydas v. Davis,* 533 U.S. 678 (2001), Mr. Kim cannot be subjected to indefinite detention. But while this case has been pending far longer than the typical § 1226(c) matter, most of the delay is attributable to Mr. Kim himself, who has asked for repeated continuances of his pending hearing before an Immigration Judge.

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment below.

Respectfully submitted,

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Date: August 28, 2002