

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHARLES DEMORE, DISTRICT :
4 DIRECTOR, SAN FRANCISCO :
5 DISTRICT OF IMMIGRATION AND :
6 NATURALIZATION SERVICE, :
7 ET AL., :

8 Petitioners :

9 v. : No. 01-1491

10 HYUNG JOON KIM. :

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12 Washington, D.C.

13 Wednesday, January 15, 2003

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States at
16 10:13 a.m.

17 APPEARANCES:

18 THEODORE B. OLSON, ESQ., Solicitor General, Department of
19 Justice, Washington, D.C.; on behalf of the
20 Petitioners.

21 JUDY RABINOVITZ, ESQ., New York, New York; on behalf the
22 Respondent.

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23
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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
THEODORE B. OLSON, ESQ.	
On behalf of the Petitioners	3
JUDY RABINOVITZ, ESQ.	
On behalf of the Respondent	27
REBUTTAL ARGUMENT OF	
THEODORE B. OLSON, ESQ.	
On behalf of the Petitioners	54

1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 01-1491, Charles DeMore versus Hyung Joon
5 Kim.

6 General Olson.

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF THE PETITIONERS

9 MR. OLSON: Mr. Chief Justice, and may it please
10 the Court:

11 Based upon years of experience, study, hearings,
12 and overwhelming persuasive evidence, Congress concluded
13 that the prompt removal of aliens convicted of committing
14 serious felonies was essential to the Nation's ability to
15 control its borders. Detention of these aliens during
16 removal proceedings was considered vital by Congress to
17 effectuate that policy, to prevent flight, to evade
18 removal, and to prevent harm done by recidivist criminal
19 aliens.

20 This is a facial substantive due process
21 challenge which cannot succeed unless there are no sets
22 of -- no set of circumstances under which the
23 congressional policy would be constitutional.

24 As this Court has repeatedly --

25 QUESTION: General Olson, do -- do we have

1 authority to entertain this challenge? As you know, an
2 amicus has raised a jurisdictional question, and I think
3 did it maybe in the court of appeals stage as well. It
4 certainly did it early on here.

5 The problem is section 1126(e) which says, no
6 court may set aside any action or decision by the Attorney
7 General under this section regarding the detention or
8 release of any alien or the grant, revocation, or denial
9 of bond or parole. Now, is that provision, number one,
10 inapplicable or, number two, unconstitutional? And if
11 neither of those, why doesn't it mean that we have no
12 authority to entertain this case?

13 MR. OLSON: Justice Scalia, it's the
14 Government's position, as held by three courts of appeals,
15 that that provision does not apply to a habeas corpus
16 challenge to the constitutionality of the statute itself,
17 that the language of that provision relates to challenges
18 to an action by the Attorney General or administrative
19 action and does not preclude a challenge.

20 QUESTION: No. It doesn't -- doesn't say the
21 challenge -- no. It says, no court may set aside any
22 action by the Attorney General. And -- and what is asked
23 for here is that we set aside the Attorney General's
24 action in detailing -- in detaining this alien.

25 MR. OLSON: It's -- it's our submission, after

1 careful examination -- the Government originally took that
2 position that you've suggested in court proceedings. It
3 was rejected by three courts of appeals. We studied it
4 further. The Government studied it further and came to
5 the conclusion that those decisions were correct and it
6 would not preclude -- and we're not contending here
7 today --

8 QUESTION: And -- and you're relying on what
9 language to --

10 MR. OLSON: Well, we're relying on the language
11 that it refers to, and a reasonable construction of the
12 statute refers to actions, administrative actions, by the
13 Attorney General or immigration -- administrative action
14 by administrative officials, and this Court's construction
15 of statutes against precluding constitutional challenges
16 to other statutes.

17 QUESTION: Oh, but all of those other statutes
18 had some wiggle room I think, even St. Cyr, and there just
19 is no wiggle room here. It doesn't refer to judicial
20 review. It simply says, no court may set aside any action
21 by the Attorney General under this section.

22 QUESTION: Even in the Quirin case where the --
23 the presidential order said that the people shall have no
24 access to the courts at all, this Court sat to hear
25 whether that sort of a provision was constitutional or

1 not.

2 MR. OLSON: That's correct, Mr. Chief Justice,
3 and while it would be in the Government's interest to
4 preclude this challenge at all, we think a fair reading of
5 the Court's decisions, including the -- the Court -- the
6 decision that the Chief Justice mentioned, would to --
7 would be to construe that statute as not to preclude this
8 action in this case. Of course, that would lead -- your
9 construction would lead to a -- a victory on behalf of the
10 Government in this case, but we've carefully examined it,
11 and we think that we're not advocating that position here
12 today.

13 QUESTION: Well, I appreciate your carefully
14 examining it, but I'd still like to know what language in
15 it leads your careful examination to conclude that it does
16 not cover this case. I mean, if it's unconstitutional,
17 that's another matter.

18 MR. OLSON: Well, we -- we may be --

19 QUESTION: Maybe we'll strike it down for that
20 reason. But my goodness --

21 MR. OLSON: We -- we may be wrong, Justice
22 Scalia, but we're referring to and relying on the second
23 sentence which says, no court may set aside any action or
24 decision by the Attorney General under this section. It
25 does not state -- and -- and we think the Court would

1 construe it as not precluding a challenge to the
2 constitutionality of the -- of the policy made by the
3 Congress itself in enacting --

4 QUESTION: It doesn't refer to the issue. It
5 doesn't refer to the basis on which the setting aside is
6 done. It doesn't say, may set aside, you know, on grounds
7 other than -- it doesn't even refer to the basis. It
8 says, no court may set aside any action by the --

9 MR. OLSON: I understand, Justice Scalia, and
10 the Government did, indeed, make that assertion, take that
11 position in early proceedings in this case. It was
12 rejected by three courts of appeals. We came to a
13 different conclusion after reexamining it, and that's our
14 position here today.

15 As this Court has repeatedly`stated, Congress
16 has exceedingly broad latitude in dealing with aliens,
17 immigration, and the Nation's borders.

18 QUESTION: Can I have a quick answer just to --
19 you said a facial challenge. I've been assuming that it's
20 a challenge brought by a resident alien who himself has a
21 plausible claim that the statute doesn't apply to him
22 because he's saying two -- you know, petty theft with a --
23 petty theft with a prior is not -- doesn't fall within the
24 category of crimes. I don't know if that's right or
25 wrong, but shouldn't I consider the case of a person who

1 has a -- an arguable claim that he's outside the system?

2 MR. OLSON: Well, Justice Breyer, the -- the
3 case has not been litigated on that basis from its very
4 beginning. I refer the Court to page 9 of the joint
5 appendix which is -- which, at the bottom of that section,
6 articulates the requested relief by the -- by the
7 respondent in this case. Petitioner seeks a declaration
8 that this provision is unconstitutional on its face as
9 violative --

10 QUESTION: It uses those words, I know. I just
11 don't know how to consider it that way. I mean, a person
12 who had no claim whatsoever -- am I supposed to consider
13 it on the basis of a person who has -- well, he would get
14 the removal order entered in 24 hours if he had no claim
15 whatsoever.

16 MR. OLSON: Well --

17 QUESTION: Is that who I'm supposed to consider?

18 MR. OLSON: Well, it --

19 QUESTION: -- or somebody like the plaintiff
20 here?

21 MR. OLSON: If this -- not only is it in the
22 petition for habeas corpus that the individual was
23 challenging on its face, the district court considered it
24 on that basis, and the Ninth Circuit considered it on that
25 basis, and it's been litigated here all the way through by

1 the -- by the respondent on that basis. If there was to
2 be an as-applied challenge, there would be a great deal of
3 other considerations.

4 And -- and this -- as this Court has said, the
5 facial challenge must be rejected unless there are no set
6 of circumstances under which the congressional policy
7 would be upheld.

8 QUESTION: General Olson, didn't --

9 MR. OLSON: There -- there's been no --

10 QUESTION: -- didn't the Ninth Circuit narrow
11 the group somewhat? I thought that in the district court,
12 the district court said the whole thing falls. I thought
13 the Ninth Circuit said only as to lawfully admitted --
14 what was it? Lawful permanent residents. And so that was
15 not taking the whole thing at its face, but only a part of
16 the total group.

17 QUESTION: I had the same question. It's at 6a
18 of the petition for the appendix. The court of appeals,
19 in the paragraph at the bottom of 6a, says we stop short
20 of affirming the holding that it's facially
21 unconstitutional.

22 QUESTION: Right.

23 QUESTION: We affirm the grant of habeas corpus
24 on the ground the statute is unconstitutional as applied
25 to him in his status as a lawful permanent resident of the

1 United States.

2 MR. OLSON: Yes, and the Ninth Circuit -- the
3 Ninth Circuit did say that both on page 6 -- 6a and -- and
4 on page 30a. But what -- what the Ninth Circuit did was
5 issue a broad, sweeping declaration of unconstitutionality
6 of the statute with respect to a broad class of
7 individuals, that is to say, all lawful permanent
8 residents. That's the equivalent of a facial decision as
9 to unconstitutionality as to a broad spectrum of the
10 people covered. And -- and --

11 QUESTION: So it's your position, in effect,
12 that although the Ninth Circuit said it was an applied
13 challenge, in fact the Ninth Circuit itself struck it
14 facially.

15 MR. OLSON: Yes, Justice --

16 QUESTION: It just narrowed the description of
17 what it did. Is that right?

18 MR. OLSON: That's -- that is correct, Justice
19 O'Connor. That's --

20 QUESTION: But it -- but it struck it facially
21 only with respect to the permanent resident aliens.

22 MR. OLSON: That's correct.

23 QUESTION: To permanent resident aliens.

24 MR. OLSON: That's correct.

25 QUESTION: Sort of half-facial.

1 (Laughter.)

2 MR. OLSON: Mostly facial.

3 QUESTION: Mostly facial.

4 (Laughter.)

5 MR. OLSON: That's -- that is what the Ninth
6 Circuit did, and it's our position that this -- this case
7 must be considered under those circumstances as a facial
8 challenge.

9 As I was saying, the Court has repeatedly said
10 that in connection with immigration and protecting the
11 Nation's borders, there is no power at which there is more
12 deference to congressional judgment, no authority under
13 the Constitution granted more to the political branches,
14 particularly to Congress. Congress regularly makes rules,
15 this Court has said, applicable to aliens that would be
16 unacceptable if applied to citizens.

17 QUESTION: Is there a regulation or -- or is
18 there a policy with -- in the Department of Justice or the
19 INS which says that there has to be a conviction before
20 you utilize this section? Or if the Attorney General just
21 has information that a felony has been committed, is that
22 sufficient to detain?

23 MR. OLSON: Well, the statute --

24 QUESTION: Here there was a conviction.

25 MR. OLSON: Here there was a conviction, and

1 that is specifically what is said in the statute itself.

2 It's my understanding --

3 QUESTION: Well, the statute itself talks about
4 a conviction.

5 MR. OLSON: Absolutely. And -- and what happens
6 in practice, Justice Kennedy, is that either the removal
7 proceeding is brought, as Congress has suggested, if
8 possible, during the period of incarceration of the
9 individual, or immediately upon release from
10 incarceration.

11 So we were talking, to summarize, a -- this --
12 this provision under 1226(c) applies only to the period of
13 the removal proceeding itself, which was carefully
14 distinguished by this Court in its Zadvydas decision of
15 2 years ago. This is on -- compared to that Zadvydas
16 decision, not an unlimited, potentially permanent
17 detention period, what, as the Court suggested in -- in a
18 distinguishable situation a number of years -- years ago
19 in the Carlson case involving members of the Communist
20 Party, a temporary, limited detention for the purpose of
21 keeping the individual in custody, an individual who's had
22 a full panoply of due process, having been convicted
23 beyond a reasonable doubt with full due process of --

24 QUESTION: Yes, but General, it is true, is it
25 not, that there are people in the class who might have

1 been convicted even before the statute was passed. So
2 you're not just -- just continuing detention. You have to
3 go out and find them and -- and put them under detention.

4 MR. OLSON: It's my understanding, Justice
5 Stevens, that it applies to convictions after the statute
6 was passed. I may be misunderstanding that, and if so,
7 I'll try to correct that during -- during rebuttal. But
8 that to the vast -- that would all -- to the extent that
9 that might be true and I might be mistaken, that would
10 only illustrate why this is a facial challenge. The
11 statute itself should not be declared unconstitutional,
12 particularly in connection with individuals convicted
13 afterwards.

14 QUESTION: What -- what about this particular
15 individual?

16 MR. OLSON: This was after the statute was
17 passed, Mr. Chief Justice.

18 QUESTION: General Olson, you've -- you've put
19 in statistics about the number of -- of aliens who don't
20 show up for the hearings and the -- the rather low
21 percentage of those who are ultimately deported from the
22 class that don't show up and so on.

23 On your view of the Government's authority
24 over -- over aliens and the deference that the Court owes,
25 would our -- in your judgment should our decision be the

1 same regardless of those statistics? If you had told us
2 nothing about the -- the probabilities of catching people,
3 should we, on your view, or would we, on your view, be
4 obligated to defer and simply say it's up to the
5 Government?

6 MR. OLSON: Well, I think Justice Souter, the
7 answer to that is that the test that the Court has
8 consistently applied in this area is there -- is there a
9 rational basis, is the congressional objective rationally
10 likely to advance a legitimate governmental purpose.
11 Those statistics that we set forth in our brief and which
12 were before Congress when Congress enacted this statute,
13 provide the purpose for which Congress acted.

14 QUESTION: Well -- well, is that rational basis
15 review the one we would employ in reviewing legislation
16 passed by Congress concerning immigration policy? And
17 have we applied a more circumscribed review over the means
18 of effectuating those policies? Are -- are there separate
19 questions? I mean, the power of Congress to pass the law
20 and to say what it does versus the implementation of it.

21 MR. OLSON: Well, under certain circumstances,
22 the Court has used that language.

23 QUESTION: Right.

24 MR. OLSON: The -- the means to achieve the
25 objective --

1 QUESTION: Yes.

2 MR. OLSON: -- will be looked at possibly
3 separately.

4 QUESTION: Yes.

5 MR. OLSON: But it seems to me -- and it seems
6 obvious particularly in this case -- that the means are
7 wrapped up in the objective itself.

8 What -- it is clear Congress is dealing with a
9 very difficult problem of a certain category or groups of
10 aliens that were committing serious crimes in this
11 country.

12 QUESTION: Well, does -- is -- does that -- do
13 your statistics define that category as the -- the legal
14 permanent resident aliens or all aliens? I think it's the
15 latter.

16 MR. OLSON: Well, it is -- yes, Justice Souter,
17 it's all.

18 QUESTION: But if it -- if it is the latter,
19 then I don't know that the statistics tell us anything one
20 way or the other about the legitimacy of the ends, i.e.,
21 the -- the automatic detention, with -- with respect to
22 the class that we've got under consideration here.

23 MR. OLSON: What the statistics tell us is that
24 there were large numbers of aliens committing serious
25 crimes and that those -- those individuals committing

1 those crimes were highly likely to be recidivists and that
2 they were -- that class of individuals or those groups of
3 individuals were cultivating a criminal class that was
4 engaging in organized --

5 QUESTION: But, General Olson, those statistics
6 go to the likelihood of entry of the order of deportation,
7 not of the likelihood of flight which this statute is
8 directed at.

9 MR. OLSON: Well --

10 QUESTION: As I understand the statistics --
11 correct me if I'm wrong -- that as to the likelihood of
12 showing up at the hearing itself, which this statute
13 protects, 80 percent of the people do show up.

14 MR. OLSON: Well, 80 percent --

15 QUESTION: Is that correct? `

16 MR. OLSON: Well, the -- the statistics have to
17 be looked at very carefully because that 20 percent --
18 20 percent of the --

19 QUESTION: Eight out of 10 of these criminals
20 show up.

21 MR. OLSON: Well, no.

22 QUESTION: That's very comforting.

23 (Laughter.)

24 MR. OLSON: In that -- that -- well, actually
25 the -- it's -- it's worse than that, Justice Scalia,

1 because that figure of 20 percent who absconded were
2 people that had been, during this period of time, been
3 given individualized hearings. They were the ones that,
4 after a hearing, the authorities thought were probably
5 likely not to flee and 20 percent of that group did. When
6 you look at --

7 QUESTION: But -- but they include all aliens
8 and not just the -- the permanent resident aliens.

9 MR. OLSON: Yes, Justice Souter, but there's no
10 question that there were large numbers of lawful permanent
11 resident aliens that were evading the deportation
12 proceeding itself. Once the deportation --

13 QUESTION: Well, I presume there was some,
14 but --

15 QUESTION: Yes, but, General Olson, I wish you
16 would answer this question. It's very important to
17 understand the -- the Government's position on it. We're
18 focusing on the percentage who show up for the hearing.
19 Am I -- and that's correct. That's what this statute is
20 directed at. And am I not correct that 80 percent of the
21 aliens in the class did show up for the hearing without
22 being detained?

23 MR. OLSON: No. The figure jumped to 40 percent
24 for people who were never detained at all, Justice
25 Stevens, and that's explained in the brief. The

1 20 percent to which you're referring are people to which
2 an individualized hearing was -- was given. In 1992
3 alone, we're talking about 11,000 aliens, criminal aliens,
4 who had absconded. And we're not talking just about
5 showing up for the hearing because if that alien isn't in
6 custody, he won't -- and -- and the figure jumps to
7 90 percent of people that will escape the deportation
8 order itself if there --

9 QUESTION: But the statute doesn't -- the
10 statute is not directed at the consequences after the
11 deportation order has been entered. Am I not right on
12 that?

13 MR. OLSON: I -- I respectfully disagree in this
14 sense, that if you have the alien in custody during the --
15 the removal period itself, he will be in custody at the
16 time the order is issued.

17 QUESTION: Oh, I'm sure.

18 MR. OLSON: If he's not, it's very difficult for
19 the Government --

20 QUESTION: But if he's at the hearing, at the
21 conclusion of the hearing, you say, lock this guy up.

22 MR. OLSON: Well, that -- that is not the way
23 the process works, Justice Stevens. There is a potential
24 appeal that the individual can take --

25 QUESTION: No, but this statute is not directed

1 at the time during potential appeal. It's directed at
2 the -- as I understand it -- now, you correct me if I'm
3 wrong.

4 MR. OLSON: No.

5 QUESTION: As I understand the statute, it's
6 directed at the time before the hearing starts.

7 MR. OLSON: Yes, it is, and the Government --
8 and the Congress --

9 QUESTION: So why can't the immigration judge at
10 the end of the hearing say, A, you're going to be removed,
11 and B, you -- you go in the clink until your -- you go
12 away?

13 MR. OLSON: Well, but this -- let me answer it
14 this way. That 20 to 40 percent -- and the statistics are
15 difficult in this area. There are such large numbers of
16 individuals. We're talking about 15,000 criminals
17 convicted of serious crimes per year that are -- go
18 through this process. If -- if we're losing 20 -- even
19 20 percent of those individuals that are absconding from
20 the process and not available for deportation or removal,
21 that is the -- that is what Congress regarded as a very
22 serious problem.

23 QUESTION: I grant that --

24 QUESTION: But, General Olson, you don't
25 necessarily lose them. All you're being asked to do is to

1 have an individualized hearing as to each member of that
2 20 percent.

3 MR. OLSON: But that 20 percent, Justice
4 Stevens -- and it's explained in the brief. That
5 20 percent were the individuals for which there had been
6 an individualized hearing given during that period of time
7 when that process was taking place. If you don't have an
8 individualized hearing, of course, the numbers go up
9 higher.

10 QUESTION: But why can't you deal with that
11 problem with a standard that's tough, that's different
12 from having the hearing? After all, we give bail pending
13 appeal to criminals who have been convicted. We give bail
14 to alien terrorists who are about to be deported. Why
15 couldn't you have a tough standard but, nonetheless --
16 like bail pending appeal, but, nonetheless, give the bail
17 hearing to the person who's willing to come in and he'd
18 have to show, you know, he's not going to run away, he's
19 not a danger, and he has a good issue on the merits?

20 MR. OLSON: One of the -- one of the problems
21 that Congress had is that it had experimented with that
22 process. It was not being successful. The individuals
23 were absconding notwithstanding --

24 QUESTION: I don't think there was a tough
25 standard.

1 MR. OLSON: Well, it -- it appeared -- it
2 appeared to Congress and it appeared to the immigration
3 authorities to be a reasonably tough standard.

4 The problem with criminal aliens is that once --
5 once they enter this process, once they've been convicted
6 after due process of having committed a serious crime and
7 once they're in that process, which is virtually certain
8 to lead to removal -- I mean, this is -- removal is
9 automatic --

10 QUESTION: What I -- what I'm worried -- I see
11 that, and what I'm worried about on the other side of
12 it -- I'm -- I can see also how you could limit it like to
13 bail pending appeal, a tough standard. The other side of
14 it is the alien who's there and who's the wrong person or
15 the -- or the statute doesn't apply to him or there's a
16 crime that they say he committed which he didn't. I mean,
17 there could --

18 QUESTION: Isn't he able to challenge those
19 points?

20 MR. OLSON: Pardon me?

21 QUESTION: I thought those points can be
22 challenged. I thought he can get a hearing as to those
23 points.

24 MR. OLSON: That's -- that's correct, Justice --

25 QUESTION: We're only talking about people as to

1 whom it's acknowledged that they committed the crime, it's
2 acknowledged that they're deportable. And the only reason
3 they may not get deported is the Attorney General might
4 exercise discretion to let them into the country.

5 MR. OLSON: That's -- that's precisely correct.

6 QUESTION: That is correct. So if, in fact, I
7 have a good claim, I'm let out on bail while they're
8 considering it?

9 MR. OLSON: If -- no. If you have a -- if you
10 as --

11 QUESTION: You can take it to court.

12 MR. OLSON: -- and I think it's on page -- pages
13 26 and 27 of the Government's brief sets forth the -- the
14 regulations of the -- of the Immigration and
15 Naturalization Service that provide that you may have an
16 immediate hearing if it is not you, if you are a citizen,
17 if you contend that you didn't -- weren't convicted of a
18 crime --

19 QUESTION: If you have a claim, you're let out
20 on bail while they consider the claim?

21 MR. OLSON: It's my understanding that what
22 happens is that there's an immediate, or a relatively
23 prompt individualized hearing. I'm not positive of the
24 answer to that question, but there is the hearing that the
25 Ninth Circuit talked about --

1 QUESTION: Yes.

2 MR. OLSON: -- an individualized hearing,
3 which -- which would have applied all the way across the
4 board --

5 QUESTION: Well, given --

6 MR. OLSON: -- in those cases under those
7 regulations.

8 QUESTION: Given that, General Olson, that we're
9 only talking about people who have acknowledged -- you
10 know, who have no claim that they didn't commit the crime,
11 who have no claim that they are not deportable, why do we
12 have to rely upon whether 80 percent of them will flee or
13 90 percent, or even -- you know, or none of them will
14 flee? Why is it -- does the Government concede that it's
15 unreasonable to say, look, somebody who has no right to be
16 at large in this country -- he's here illegally, has no
17 right to be at large. And besides that, on top of that,
18 he's already committed a crime in this country. He should
19 leave the country, and we're going to hold him in custody
20 until he leaves. If he wants to fight that -- that
21 departure, that's fine, but he will be in custody until he
22 departs. What is -- what is wrong with that?

23 MR. OLSON: Well, we're -- I'm not quarrelling
24 with your characterization of what --

25 QUESTION: No, but you're -- you're fighting it

1 on the -- on the ground that somehow we have to prove --

2 MR. OLSON: No. No, Justice --

3 QUESTION: -- that a large number of them will
4 flee.

5 MR. OLSON: No. I'm simply --

6 QUESTION: It seems to me that even if none of
7 them would flee, if they have no right to be here, if
8 they've committed a crime, why cannot -- they cannot be
9 held in -- in custody until they leave?

10 MR. OLSON: This -- we may well be here on
11 another occasion defending a broader policy. But let me
12 emphasize the facts that distinguish what you're
13 suggesting and what the Court considered in the Zadvydas
14 case, an immense difference that exists between the
15 circumstances here, and the circumstances under those
16 circumstances.

17 QUESTION: Before you get to -- to Zadvydas and
18 the distinction, you -- you make, I take it, no
19 distinction between lawful permanent residents and people
20 who are excludable. People who are lawful permanent
21 residents have many rights in common with citizens.
22 Indeed, this Court once said that they were a suspect
23 classification. But as far as this case is concerned, it
24 seems to me you're making no distinction at all.

25 MR. OLSON: The statute makes no distinction.

1 The Ninth Circuit, of course, did with respect to
2 excludable aliens, said that with that category of aliens,
3 the statute -- even under the Ninth Circuit's reasoning,
4 the statute was constitutional.

5 What we -- the statute doesn't make that
6 distinction, but what it does do is it provides for a
7 brief, limited detention, which is not unlimited and not
8 potentially permanent, of aliens, an area of Congress'
9 authorities at its zenith, convicted beyond a reasonable
10 doubt with --

11 QUESTION: But it might be of a crime that
12 they -- one of the claims here is that this is not a
13 qualifying plot -- crime. I don't get into that box. Now
14 that may be wrong or right, but suppose -- on your
15 reading, or under this statute, someone would not be able
16 to get bail despite a good claim that they are counting a
17 crime that doesn't qualify as one of these serious
18 offenses.

19 MR. OLSON: That's the question that I believe I
20 addressed earlier that's referred to, the regulations --
21 and I hope I'm correct -- at pages 26 and 27 of the
22 Government's brief. The -- the regulations provide for
23 someone claiming who is claiming that they are a citizen
24 as opposed to an alien, or claiming that the crime for
25 which they've been convicted was not a covered crime,

1 may -- may have an accelerated hearing, which is -- which
2 is --

3 QUESTION: In other words, for the class that
4 we're talking about, it's rather artificial to talk about
5 lawful resident aliens because they can get a hearing on
6 whether their continuing residence is lawful. They --
7 they are determined to be deportable. They are no longer
8 lawful resident aliens.

9 MR. OLSON: That -- that is correct.

10 QUESTION: Well, General Olson, aren't they
11 lawful resident aliens until an order is entered that they
12 be deported?

13 MR. OLSON: What they are is what -- they are --
14 they are lawful resident aliens until there's an order of
15 deportation, but --

16 QUESTION: All right. So at the -- at the point
17 of the -- we'll call it the preliminary hearing, the
18 Joseph hearing, when they can bring these challenges,
19 there is no order that they be deported, and they,
20 therefore, have got to be considered, as I understand it,
21 as lawful resident aliens.

22 MR. OLSON: They -- however, they have -- they
23 have been convicted after due process of a crime that
24 Congress considers serious, and they're being held for a
25 limited period of time --

1 QUESTION: And they can get a hearing on whether
2 they are lawful resident aliens.

3 MR. OLSON: That's correct.

4 QUESTION: Can they? In effect, they can get a
5 hearing on whether they are lawful resident aliens.

6 MR. OLSON: That's correct, Justice Scalia.

7 QUESTION: Well --

8 MR. OLSON: Mr. Chief Justice, if -- if I may
9 reserve the remainder --

10 QUESTION: Very well, General Olson.

11 Ms. Rabinovitz, we'll hear from you.

12 ORAL ARGUMENT OF JUDY RABINOVITZ

13 ON BEHALF OF THE RESPONDENT

14 MS. RABINOVITZ: Mr. Chief Justice, and may it
15 please the Court:

16 The question in this case is whether Congress
17 authorized and, if so, whether the Due Process Clause
18 permits a statute that requires that lawful permanent
19 residents like our client be imprisoned throughout the
20 duration of removal proceedings.

21 QUESTION: Ms. Rabinovitz, do you have a
22 response to the jurisdiction problem? I mean, it's
23 possible that despite the Government's failure to raise
24 it, that we could do so.

25 And why doesn't section 1226 tell the courts to

1 keep hands off?

2 MS. RABINOVITZ: Yes, Your Honor. We agree with
3 the Solicitor General's explanation for why this Court did
4 not --

5 QUESTION: I have to tell you I don't understand
6 it. I thought maybe you'd enlighten me there.

7 (Laughter.)

8 MS. RABINOVITZ: This -- this statute contains
9 no express language that repeals habeas jurisdiction.
10 That's one answer that I could give you, Your Honor, and
11 based on this Court's decision in St. Cyr and Calcano,
12 absent that -- that language, the habeas -- there's still
13 jurisdiction in --

14 QUESTION: How could that language not repeal
15 habeas jurisdiction? No court may set aside any action by
16 the Attorney General under this section. How can -- how
17 can that -- I mean, what can you do in habeas corpus
18 unless you're setting aside action by the Attorney General
19 under this section? How can that possibly not set aside
20 habeas corpus?

21 MS. RABINOVITZ: But this Court has said --

22 QUESTION: I mean, now, maybe you want to argue
23 it's unconstitutional, but gee, to say that it doesn't do
24 this is -- I mean, it's -- it's incredible.

25 QUESTION: Well, the Court in St. Cyr, with

1 which both Justice Scalia and I disagreed, said something
2 very much like that, didn't it, that you had to be very
3 specific if you were going to repeal habeas jurisdiction?

4 MS. RABINOVITZ: Yes.

5 QUESTION: Try Johnson v. Robson too.

6 MS. RABINOVITZ: The point is that this statute
7 requires the Government to detain individuals like our
8 client who are lawful permanent residents not because
9 their detention is necessary to protect the public from
10 danger of flight risk, but merely because they were
11 convicted in the past for one of a broad range of crimes
12 that the Government believes may render them deportable.

13 QUESTION: Can -- you say the Government
14 believes it. The Congress believed it, did it not?

15 MS. RABINOVITZ: Well, Your Honor, the question
16 that remains to be determined in all these cases is
17 whether an individual is, in fact, deportable. Congress
18 did decide that certain kinds of crimes should render an
19 individual deportable and these individuals have been
20 convicted of crimes. But the fact --

21 QUESTION: What more do we need?

22 MS. RABINOVITZ: The fact that they've been
23 convicted of a crime, Mr. Chief Justice, doesn't mean that
24 it's a crime that renders them deportable under the
25 statute. And I think that this addresses, in part,

1 Justice Kennedy's question about have they been -- is this
2 just that they're suspected of committing crimes or have
3 they been convicted of crimes.

4 QUESTION: Well, but in -- in this case, your --
5 your client was convicted, was he not?

6 MS. RABINOVITZ: Yes, Mr. Chief Justice --

7 QUESTION: So --

8 MS. RABINOVITZ: He was convicted, but there
9 still is a question about whether his conviction actually
10 renders him deportable.

11 QUESTION: And what question is that? Does
12 Congress in the statute set forth the crimes?

13 MS. RABINOVITZ: No, Your Honor. Congress sets
14 forth a -- a broad category of crimes that can render
15 somebody deportable, and one of those is -- is a broad
16 category that are labeled aggravated felonies.

17 The question, though -- and this is a question
18 that has been very hotly litigated in the courts -- is
19 whether a conviction is an aggravated felony. And in this
20 case, that question is especially relevant because in our
21 client's case, the conviction that he was --

22 QUESTION: Well, did -- did you -- but the Ninth
23 Circuit didn't go off on that basis, did it?

24 MS. RABINOVITZ: No, Your Honor. The Ninth
25 Circuit --

1 QUESTION: So are you going to -- are you going
2 to defend the Ninth Circuit's basis here?

3 MS. RABINOVITZ: We're defending the Ninth
4 Circuit's ruling, Your Honor.

5 I'm -- I'm just explaining that this issue about
6 whether somebody is deportable is an open issue, and
7 that's precisely what the -- that's precisely what a
8 deportation proceeding is to determine.

9 QUESTION: Now, Ms. Rabinovitz, I had -- I had
10 understood from General Olson -- and please, you know, if
11 it's wrong, I -- I want to know it -- that -- that your
12 client could get a hearing on that particular issue,
13 whether the crime he's being -- he has been convicted of
14 is one of the crimes that entails deportation. Is -- is
15 not true that he can -- that he gets a hearing on that?

16 MS. RABINOVITZ: He gets a hearing --

17 QUESTION: Individualized hearing.

18 MS. RABINOVITZ: He gets a hearing, Your Honor,
19 but it's a very limited hearing to the extent that that
20 hearing does not determine that he has, in fact, been
21 convicted of a crime that renders him deportable. All
22 that it --

23 QUESTION: In other words, it's a hearing that
24 says you were convicted of X or you weren't convicted
25 of X. It's not a hearing that says that X renders you

1 deportable. Is that the point?

2 MS. RABINOVITZ: Yes, although, Your Honor, it
3 does say that the Government is not substantially unlikely
4 to prevail on its charge, so -- that you are deportable.
5 So -- and essentially it --

6 QUESTION: So it --

7 MS. RABINOVITZ: -- it says that there is
8 reason -- there's a possibility. It's not impossible that
9 you will be found deportable. You -- that it's not --
10 since the Government is not substantially unlikely to
11 prevail on the charge.

12 I think it's important to recognize that there
13 are many individuals who are subjected to mandatory
14 detention under this statute who cannot satisfy that
15 standard. In fact, that that -- they've had that hearing
16 and the court has held the Government substantially -- you
17 know, we can't show that the Government is substantially
18 unlikely to prevail.

19 QUESTION: I mean, I have a reason. I mean, now
20 I am -- I'm confused on this and I'd appreciate it. I --
21 I assume there is someone in prison. He's detained like
22 your client. There's a class of people. There are two
23 subgroups. Group 1 is a group that has no non-frivolous
24 argument that they shouldn't be deported. It's virtually
25 conceded they're -- they should be deported. Their only

1 arguments against it are frivolous. Group 2 are people
2 who have a real non-frivolous argument -- a real non-
3 frivolous argument -- that they aren't -- it's the wrong
4 person, this crime doesn't fall within the statutory
5 definition, I probably will get asylum, something like
6 that. They have a real non-frivolous argument.

7 Now, I thought that what we were talking about,
8 at least in part, was that people in this group 2 were
9 being held without bail. Now, am I right? Because I
10 think what I heard the Solicitor General say is I'm wrong.
11 We're only talking about people in group 1.

12 MS. RABINOVITZ: No --

13 QUESTION: That was just, I think, what Justice
14 Scalia was concerned about. That's just what I'm
15 concerned about, and I'd appreciate some elaboration on
16 it.

17 MS. RABINOVITZ: No, Your Honor. You're
18 absolutely right. We are talking about the second
19 category of cases.

20 QUESTION: But aren't there one-and-a-half or --
21 there's this Joseph hearing. It's not just that either
22 you have a hearing or you don't have a hearing. You have
23 the hearing that Justice Souter was referring to where
24 your burden is enormous because you will not succeed at
25 that hearing if you show it's more likely than not that

1 this crime is -- doesn't qualify as serious. You have to
2 show overwhelmingly that the Government will win on that
3 issue in it. So -- but there is something other than --
4 There's this Joseph hearing, which you say is not
5 adequate, is it?

6 MS. RABINOVITZ: Yes, Your Honor.
7 It's exactly --

8 QUESTION: You're -- you're not asking just for
9 individualized hearings on those items, are you?
10 You're -- you're not just asking for individualized
11 hearings on whether you are the person that did the --
12 that -- that was convicted and whether the -- the crime of
13 conviction causes you to be deportable. You want a
14 hearing on whether, if you are let go, you will show up
15 for -- for a later hearing.

16 And I don't see why -- why that is necessary --

17 MS. RABINOVITZ: Yes --

18 QUESTION: -- so long -- so long as you get a
19 hearing on those other substantive points, it seems to me
20 the Government ought to be able to hold you, an alien who
21 has no right to be at large in this country, until you
22 leave.

23 MS. RABINOVITZ: Let me try -- let me try to
24 explain how the statute works and why we believe that it's
25 a problem. The -- the proceeding that you're asking for,

1 a determination about whether, in fact, an individual is
2 deportable, is precisely what a deportation hearing is
3 for, and that kind of decision is not made the first time
4 you come before an immigration judge. It's often a very
5 protracted process, and we have individuals who have --
6 who have been in jail for 17 months pending an immigration
7 judge hearing to determine that exact question, Justice
8 Scalia, about whether they are, in fact, deportable, which
9 is why we say that the relevant question is whether
10 pending those proceedings, there's a regulatory purpose in
11 detaining that individual. And we're not --

12 QUESTION: Well, and the -- the Government
13 answers that there's a substantial number of people who
14 don't show up for these hearings, and that's the purpose
15 of holding them. So that certainly is a regulatory
16 purpose.

17 MS. RABINOVITZ: Yes, Mr. Chief Justice, that is
18 a regulatory purpose. But this Court looks to the
19 regulatory purpose in an individual's case when you're
20 talking about depriving somebody of a significant liberty
21 interest, which is what's here. We don't allow people to
22 be locked up based on averages.

23 QUESTION: Well, but you -- look -- look at the
24 immigration cases. Look at Carlson against Landon.
25 I mean, that certainly was a class, not an individual.

1 MS. RABINOVITZ: No, Your Honor, Mr. Chief
2 Justice. I respectfully -- I read Carlson differently.
3 In Carlson, what this Court did is it upheld the Attorney
4 General's discretionary decision that five individuals
5 could be detained because there was -- that -- the
6 decision to detain them was with not -- was not without
7 reasonable foundation. It was a discretionary decision.
8 It's wholly different from this case.

9 What makes this statute so unique and so
10 unprecedented is that the Government is prohibited.
11 There's no discretion here. The Attorney General is
12 prohibited from releasing individuals like our client, a
13 lawful permanent resident who has a legal right to be
14 here, even when --

15 QUESTION: Well, who has the legal right to be
16 here, although he's been convicted of a crime which makes
17 him deportable.

18 MS. RABINOVITZ: No, Mr. Chief Justice. It's
19 not clear that this conviction makes him deportable. In
20 fact --

21 QUESTION: Well, it's clear he's been convicted.

22 MS. RABINOVITZ: He's been convicted of a crime,
23 but it's not clear that this conviction renders him
24 deportable. That's precisely what a deportation
25 proceeding is for.

1 QUESTION: You mean the first degree burglary
2 conviction --

3 MS. RABINOVITZ: Both --

4 QUESTION: -- is not an aggravated felony?

5 MS. RABINOVITZ: Not necessarily, Your Honor.
6 That remains to be determined, but --

7 QUESTION: Well, how could a first degree
8 burglary not be an aggravated felony?

9 MS. RABINOVITZ: That's a good question,
10 Mr. Chief Justice.

11 QUESTION: Well, it's a very good question.

12 (Laughter.)

13 MS. RABINOVITZ: But -- but -- yes. But let me
14 point out -- I refer you to the -- the amicus brief for --
15 by Citizens and -- and Immigrants for Equal Justice. It's
16 one of these green briefs. And it's on page 12 of their
17 brief. They referred to a case, the Solorzano-Patlan
18 case, where an individual was convicted of entering an
19 automobile with intent to commit theft, and the Board of
20 Immigration of Appeals said -- or the -- the -- excuse me.
21 The immigration judge said exactly what -- what you have
22 said, which is that how could this crime not be an
23 aggravated felony? It's a burglary, entering an
24 automobile with intent to commit theft.

25 One-and-a-half years after our client -- after

1 this person -- excuse me -- he wasn't our client -- was
2 detained, the Seventh Circuit disagreed. Despite what the
3 Board of Immigration Appeals said that how could this
4 crime not be a burglary --

5 QUESTION: Well, but -- it's not just a question
6 of being a burglary. First degree burglary usually means
7 with -- with people present and on the premises.

8 MS. RABINOVITZ: Mr. Chief Justice --

9 QUESTION: Of course, the Seventh -- Seventh
10 Circuit might have been wrong.

11 (Laughter.)

12 MS. RABINOVITZ: That's a good point, Your
13 Honor, but the Government did not petition for cert in
14 that case.

15 And -- and the point that I want to make --

16 QUESTION: Well, it sounds like you're -- you're
17 still seeking some kind of facial invalidation of the
18 statute rather than as applied to your client.

19 MS. RABINOVITZ: No, Your Honor, we're not
20 seeking --

21 QUESTION: Because you're relying on a
22 conviction of someone else for a different kind of a
23 crime.

24 MS. RABINOVITZ: No.

25 QUESTION: Are we talking about this person as

1 an as-applied challenge, or do we have a facial challenge?

2 MS. RABINOVITZ: Your Honor, this is definitely
3 an as-applied challenge, and I refer you to page --

4 QUESTION: So we are talking about the first
5 degree burglary --

6 MS. RABINOVITZ: Yes, we are.

7 QUESTION: -- not entering a car with intent to
8 commit theft.

9 MS. RABINOVITZ: Right, right.

10 My point with raising that example was just to
11 point out that the question of what constitutes an
12 aggravated felony is very contested.

13 QUESTION: And isn't it the --

14 QUESTION: Well, but not in this case.

15 QUESTION: Not in this case. First degree
16 burglary.

17 MS. RABINOVITZ: Oh, it -- it certainly is. It
18 remains a question about whether this is an aggravated
19 felony --

20 QUESTION: Well, but --

21 MS. RABINOVITZ: -- because you need to look at
22 the precise --

23 QUESTION: Justice Breyer's classification of
24 people who have really serious claims and people who have
25 frivolous claims -- surely a claim that first degree

1 burglary is not deportable under the statute would verge
2 on the frivolous.

3 MS. RABINOVITZ: Mr. Chief Justice, I need to --
4 to disagree with you. It's unclear. To decide whether
5 this is -- is an aggravated felony, the Court is going to
6 need to look at the specific language of the statute.
7 The -- the specific crime that our client committed was he
8 broke and entered into a tool shed and he was convicted
9 under California State law. This is a very complicated,
10 technical area of the law.

11 And all that I can tell you is that if you refer
12 to our brief at page 5, note 6 -- oh, no. Excuse me.
13 That's not the place. To our brief at -- our brief at
14 page 30, note 27, we note numerous examples where the
15 question of whether something is an aggravated felony has
16 been contested and decided --

17 QUESTION: Do you -- you consider whether he
18 broke into an inhabited tool shed, I guess, to be not
19 within the statute, and the other side thinks it is.

20 MS. RABINOVITZ: Right. Right. Right.

21 QUESTION: In your opinion, would -- would --
22 and this goes back to my initial question which I'm
23 still -- haven't heard you really answer. Look, on
24 appeal, somebody who has been convicted of a crime, in
25 order to get out on -- on appeal -- have bail on appeal,

1 he has to show not only he wouldn't run away, not only he
2 isn't a danger, but also that he raises a substantial
3 question.

4 Now, suppose that we were to say at least those
5 people who show that they raise a substantial question --
6 a substantial question -- and it says not for purposes of
7 delay -- that as to those people, you have to have an
8 individualized hearing.

9 MS. RABINOVITZ: In this case, if we're talking
10 about somebody who raises a non-frivolous challenge like
11 our client, that would satisfy this case because this
12 is --

13 QUESTION: Well, I'm not saying if it'd satisfy
14 the case, though I take it from what you say it would
15 satisfy you and your position.

16 MS. RABINOVITZ: Your Honor, I misspoke. What I
17 meant is that in this case, this is an as-applied
18 challenge. It's a -- it's a challenge about whether this
19 statute as applied to our client who's a lawful permanent
20 resident, who has bona fide challenges that he is not
21 deportable and is eligible for relief from deportation,
22 that in this case, applying the statute to him is
23 unconstitutional.

24 QUESTION: So to keep someone in prison without
25 bail, after they've been convicted of something, pending a

1 deportation order is not constitutional without an
2 individualized hearing at least if -- or don't say at
3 least -- if, among other things, he shows there is a
4 substantial question not for purposes of delay. Imagine
5 an opinion that said that. Would you argue for or against
6 that opinion?

7 MS. RABINOVITZ: I would argue for that opinion
8 in this case because it would resolve this case. I
9 believe that there also might be -- there would be a
10 constitutional issue that even somebody else -- due
11 process requires that they have an opportunity to show
12 that they're not a danger and a flight risk because that
13 is the purpose of regulatory detention. And as the --

14 QUESTION: I -- I note that you have redefined
15 substantial question as non-frivolous. Anything that's
16 not sanctionable raises a substantial question for
17 purposes of -- of this new rule?

18 MS. RABINOVITZ: Yes, Your Honor --

19 QUESTION: Wow.

20 MS. RABINOVITZ: -- and -- and it has to be that
21 way because there are so many examples of circuit courts
22 finding that the board's decision about what constitutes a
23 deportable offense is wrong and yet, that those were cases
24 where the individual could -- where their -- their claim
25 might have been considered bordering on the frivolous,

1 even though it wasn't.

2 And let give you a very --

3 QUESTION: That -- that is true but all --

4 MS. RABINOVITZ: Let me give you an example.

5 QUESTION: -- all of -- at least for people who
6 have committed their crimes after this statute was
7 enacted, it seems to me that they are on notice. If you
8 get convicted of a felony, your -- your welcome in this
9 country is at an end if it's an aggravated felony, and you
10 will be held until it is -- it is finally determined
11 whether that is, indeed, an aggravated felony or not.
12 I don't know that that's terribly unfair.

13 MS. RABINOVITZ: But your question presupposes
14 the answer. You're saying --

15 QUESTION: No, it doesn't. It -- it's just one
16 of the risks you take when you commit a felony. Your --
17 it's -- it's part of -- of the condition of your
18 admittance to this country. Once this statute is passed,
19 any lawful resident alien knows that if he commits a
20 felony and it's an aggravated felony, he will be deported.

21 MS. RABINOVITZ: Two points.

22 QUESTION: And -- and until the question of
23 whether it is an aggravated felony, assuming it's at least
24 arguable, is decided, he will be held in custody and not
25 permitted to be at large in this country.

1 Now, that doesn't strike me as terribly
2 unreasonable. Just don't do the felony.

3 MS. RABINOVITZ: Well, two points, Your Honor.
4 First, in this case, the conviction that is now being
5 considered as possibly an aggravated felony was committed
6 before the statute took effect. So even under Your
7 Honor's proposal, the statute could not apply to him.

8 In terms of what you're suggesting, though, if
9 Congress was to say that anybody who -- there still is an
10 issue of whether somebody is, in fact, deportable, and to
11 condition -- and -- and this Court has recognized that
12 individuals who are facing deportation, particularly
13 lawful permanent residents, have a right to a fair
14 hearing. To say that those individuals must give up their
15 right to physical liberty --

16 QUESTION: Well, but there's no question that
17 these people are going to get a fair hearing eventually.
18 The question you're challenging is whether they should
19 be -- be incarcerated pending that hearing. So we're not
20 talking about a fair hearing.

21 MS. RABINOVITZ: You're right, Your Honor,
22 Mr. Chief Justice. But the -- the point is that if
23 somebody is locked up for a year-and-a-half, and they
24 can't get the evidence for their case, because being
25 locked up in jails also makes it much harder for people to

1 present their cases, there's no right to appointed
2 counsel. It means they can't work.

3 There are -- and this is, again, where I would
4 like to refer you, just in general, to the amicus brief by
5 the Citizens and Immigrants for Equal Justice which points
6 out other cases where individuals gave up their claims
7 because otherwise they were going to be in detention for
8 so long.

9 And let me just point out one other --

10 QUESTION: Well, you -- you've got someone who
11 is an alien here. The alien has committed a felony.
12 I mean, it's difficult to -- for me to say that they
13 should have all these additional benefits so that somehow
14 they can avoid deportation.

15 MS. RABINOVITZ: Well -- well, first of all,
16 Mr. Chief Justice, this -- it's not only for people who
17 are convicted of felonies. Even the definition --

18 QUESTION: Well, but that's with the case we're
19 dealing of here.

20 MS. RABINOVITZ: Okay, but the -- the question
21 is what -- what constitutes an aggravated felony.
22 Misdemeanors constitute an aggravated felony as well.
23 You're right. In this case, the initial conviction --

24 QUESTION: What -- what do you -- what do you
25 mean, misdemeanors constitute an aggravated felony?

1 MS. RABINOVITZ: I know it's somewhat shocking,
2 Mr. Chief Justice, but, in fact, the way that aggravated
3 felony has been defined so broadly --

4 QUESTION: Well --

5 MS. RABINOVITZ: -- the courts have held that
6 even misdemeanors can be aggravated felonies.

7 QUESTION: But there's no question that first
8 degree burglary is not a misdemeanor. So, in our case,
9 that's not -- we don't have to worry about that, do we?

10 MS. RABINOVITZ: But let me return to the point
11 about whether it's -- whether due process is satisfied by
12 requiring that somebody be mandatorily detained throughout
13 the process of their deportation proceeding, a process
14 which, as I said, can be months, often years, without any
15 individualized determination of danger and flight risk.

16 And the example that I wanted to give ties back
17 with this Court's decision in *St. Cyr*, which said that
18 212(c) relief was available to individuals whose
19 convictions -- who had pled guilty prior to -- to the
20 statute having taken effect. All of those individuals
21 were subject to mandatory detention under the statute.
22 Their claim would have been considered close to frivolous
23 until the Supreme Court ruled differently.

24 QUESTION: Well, that's -- that's -- I mean,
25 your argument to me rings true for people who have real

1 claims, but if you're trying to apply it to a person who
2 has an insubstantial claim or a claim that is interposed
3 for purposes of delay, I'm tempted to say, well, there's a
4 very good reason to keep him locked up, namely, he doesn't
5 have any argument and he's about to be deported and -- and
6 if he wants to be deported quickly, he can be.

7 MS. RABINOVITZ: Your Honor, that's --

8 QUESTION: But if he has a substantial claim,
9 it's different.

10 MS. RABINOVITZ: Your Honor, I think it's
11 important to recognize that that's precisely the kind of
12 factors that the Immigration Service and the immigration
13 judge looks at when they make a determination whether
14 somebody should be released on bond. They -- when they're
15 determining flight risk, that's precisely what they look
16 at. They say, oh, this is a frivolous -- this is a
17 frivolous claim. We're not going to release this person
18 on bond because they're not going to show up. And we're
19 not saying that individuals in that situation should be
20 released from detention.

21 All that we're saying is that an individual
22 needs to be given some opportunity to demonstrate, look,
23 I was convicted of this crime, but I have claims for
24 relief. I'm not a flight risk. I'm not a danger.

25 QUESTION: Would you say that --

1 MS. RABINOVITZ: And I think it's important to
2 look at --

3 QUESTION: Would you agree that the alien has
4 the burden of showing that?

5 MS. RABINOVITZ: Your Honor, we have no --

6 QUESTION: In your -- in your regime, you
7 would -- would there be any problem putting the burden on
8 the alien to show that?

9 MS. RABINOVITZ: We have no problem with
10 Congress creating a presumption that individuals who are
11 charged with these kinds of -- with being deportable for
12 these kinds of crimes are a danger and are a flight risk,
13 and that they need to come forward to show that they're
14 not. And in fact --

15 QUESTION: Well, but I -- I'll get to that in a
16 minute. But insofar as the substantiality or -- or the
17 likelihood of prevailing -- forget about flight risk for a
18 moment. Insofar as the likelihood of prevailing and the
19 substantiality of the -- of the issue, that's almost what
20 the statute already provides for in a bail determination
21 hearing, as set forth on page 26 of the Government's
22 brief. A person in INS custody is -- is entitled to a
23 bond determination hearing. And the standard is whether
24 or not the Government is -- he has to show the Government
25 is substantially unlikely to prevail. That's very --

1 forget flight risk for a moment. That is very close to
2 the regime that you propose. So I don't see what we're
3 arguing about here as to that.

4 Now, if you want to say that you're entitled to
5 release if you're not a flight risk, that's something
6 quite different. And I would -- and I would doubt the
7 latter, but --

8 MS. RABINOVITZ: Let me try to clarify what I
9 believe is some confusion about what that hearing does.
10 The hearing essentially just shows you need to show that
11 the Government has no frivolous claim. That's essentially
12 what you need to show. I mean, you have to show that the
13 Government had -- that the Government's charge is
14 frivolous. And I would assume that the Government is not
15 putting people into proceedings if they have no possible
16 argument. But to require that an individual be locked up
17 throughout the whole deportation process just because they
18 cannot show that the Government has a -- has a frivolous
19 claim, that doesn't satisfy due process.

20 In terms of burden, Your Honor, what I was
21 referring to -- what I thought you were referring to is
22 whether an individual is going to have an obligation to
23 show that they're not a danger of flight risk. But
24 even --

25 QUESTION: Well, perhaps that's why I asked you

1 that question first. It -- it does seem to me that if you
2 concede that he has the burden, that that is really very,
3 very close to what the -- the statute already provides,
4 forgetting about flight risk for the moment, or -- or --

5 MS. RABINOVITZ: Yes, Your Honor. I don't --
6 I don't see it that way. I see that the question about if
7 you need -- if an individual has to prove that the
8 Government's argument is frivolous, that's not the same
9 thing as showing that you have a non-frivolous claim. And
10 that's all that we're saying. I think that they're
11 completely different. One is showing that the
12 Government's argument is frivolous.

13 I don't -- most of the cases where individuals
14 were found not deportable, it wasn't that the Government's
15 claim was frivolous, but those individuals prevailed in
16 their proceedings. And that's the issue here, whether --
17 whether an individual can be detained for a substantial
18 period of time without any opportunity to show that --
19 that there's no purpose that's served by their detention.

20 And I think that -- that this case is a perfect
21 example because in this case, once the district court --
22 our client was detained for 6 months without any
23 individualized determination. The district court then
24 said due process requires an individualized determination,
25 and the INS, the Immigration Service, on its own decided

1 he poses no danger and he can be released on 5,000-dollar
2 bond. And he's been out for the past 3-and-a-half years.
3 He's now getting his college degree. He's working.

4 If the Government prevails in this appeal, it
5 will have no choice but to re-incarcerate him throughout
6 his proceedings. It's not a question of discretion like
7 Carlson, where they can make that determination.

8 And going back to your question about burden, I
9 think it's important to recognize that the regime that was
10 in place prior to this statute, and that is now in place
11 in those circuits where they've said that the statute
12 needs to be interpreted to -- or that the statute -- due
13 process requires an individualized determination, still
14 requires that an individual show that they are not a
15 danger of flight risk. They bear that burden. And so
16 under this system, no individual who's a danger of flight
17 risk is going to be released except for those cases where
18 there's, you know, obviously going to be error. But in
19 general, individuals who are a danger of flight risk
20 aren't going to be released.

21 I think it -- there's one last point that I
22 would like to make because I realize my time is short,
23 which is that this case poses a serious constitutional
24 problem, and we believe that there is a way that this
25 Court can avoid that problem by construing the statute to

1 not apply to individuals like our client who are, in fact,
2 not deportable.

3 The statute says that individuals shall be
4 mandatorily detained. An individual who is deportable on
5 one of these grounds is subject to mandatory detention.
6 As we've been talking about here, in fact, the question of
7 whether he is deportable remains very much to be decided.
8 He doesn't have any order of deportation.

9 QUESTION: Ms. Rabinovitz, why wasn't Judge
10 Fletcher absolutely right in rejecting that claim?
11 Because the language is when the alien is released from
12 criminal custody.

13 MS. RABINOVITZ: Because --

14 QUESTION: The statute directs custody when the
15 alien is released from criminal custody, and not at some
16 later time, not at the time of the issuance of a removal
17 order.

18 MS. RABINOVITZ: Because I think that what Judge
19 Fletcher was not aware of is that the whole regime right
20 now that the Immigration Service has is to conduct
21 deportation proceedings while individuals are still
22 serving their criminal sentence, which makes complete
23 sense, because then you do not have this problem. People
24 are already ordered deported, determined deportable while
25 they are still in jail. And so the --

1 QUESTION: But still, if the statute says when
2 released from criminal custody, even before release, but
3 it doesn't say at the later time of the final removal
4 order.

5 MS. RABINOVITZ: There's two different issues,
6 Justice Ginsburg. One is when -- is deportable. It says,
7 when released. Our point is only that there are
8 individuals who have deportation proceedings while they're
9 in prison, and there will be an immigration judge decision
10 or a BIA decision that says they are deportable.

11 Now, they may still be seeking review of that
12 decision in the Federal courts, in which case, that
13 decision is not final and they would not fit under the
14 next statute, the statute that you -- that this Court
15 construed in -- in Zadvydas, which was '1241, but they
16 would -- or excuse me -- 1231. But they would still have
17 an order of deportation, and then, that would be a way to
18 say that individual is deportable.

19 Whereas, here you have a situation where anybody
20 who the Government charges with being deportable -- in
21 this case, our client, even though he may not actually be
22 deportable -- is subject to mandatory detention for
23 possibly a year, 2 years, however long.

24 I see my time is up.

25 QUESTION: Thank you, Ms. Rabinovitz.

1 Mr. Olson, General Olson, you have 4 minutes
2 remaining.

3 REBUTTAL ARGUMENT OF THEODORE B. OLSON

4 ON BEHALF OF THE PETITIONERS

5 QUESTION: General Olson, I don't want to
6 intrude upon your rebuttal time, but I have one question
7 that's very important for me and you can answer it yes or
8 no. Assuming I disagree with you as to the reading of the
9 statute as to whether there is jurisdiction in this case,
10 if there is no jurisdiction, is that provision of the
11 statute in the view of the Government unconstitutional?

12 MR. OLSON: No. Now, we haven't briefed and
13 studied that and -- and I have to rely on the answer that
14 I gave before. But I think that that would be a correct
15 with -- it would be within the power of Congress to do
16 that under certain circumstances.

17 QUESTION: Well, you can rely on the presumption
18 of constitutionality if you haven't briefed it.

19 (Laughter.)

20 MR. OLSON: Well, then I would've have to answer
21 the question differently.

22 Well, if -- I guess no, I guess I would --
23 that -- that's a good answer.

24 Let me -- let me --

25 (Laughter.)

1 MR. OLSON: Let me just deal with a few things
2 that were raised during my colleague's argument.

3 First of all, the date of the offense that's
4 involved in this case was after the enactment of this
5 statute. On page 8 of the respondent's brief, it is
6 asserted that he was convicted of petty theft with priors
7 and sentenced to 3 years' imprisonment in 1997. That was
8 when that conviction took place.

9 Secondly -- and I think a lot of time has been
10 expended with respect to the question that focused in
11 large part by Justice Breyer. What happens if it's not
12 the individual? What happens if he's really a citizen?
13 What happens if he wants to challenge whether this crime
14 was one that should be covered?

15 As we said on page 26 -- and we cite the
16 relevant provision of the INS regulations -- those types
17 of things can be challenged in an individualized bond
18 hearing at which the -- which is what the Ninth Circuit
19 was talking about and which is what our opponents are
20 talking about here, and that those issues may be raised at
21 that point, which is precisely what the respondents are
22 talking about. So that's already built into the statute.

23 Now, one might quarrel with whether -- what the
24 burden of proof is, and where it should be and how it
25 should be written, but that's a -- this is a determination

1 by the executive branch with respect to the statute. If
2 the alien can show that the INS is substantially unlikely
3 to prevail on its underlying charge of removability, then
4 the individual may be released on bond. If the decision
5 goes against the individual, that can be taken to the
6 Board of Immigration Appeals. So there's a process that
7 takes care of precisely those -- that category 2, as you
8 put it.

9 Now, that does not deal with the question of
10 dangerousness or risk of flight, but that's what Congress
11 was concerned about when it -- when it enacted the
12 statute. Congress was concerned about a situation in
13 which large numbers of individuals who commit serious
14 crimes -- and Congress went to the effort of define what
15 it thought -- defining what it thought was serious crimes.

16 Now, if there is some question about that in an
17 individual case, or if there's some question about an
18 aberrational lengthy detention, that should be brought to
19 this Court or the courts below in an as-applied challenge.
20 The respondent is saying here today that this is an
21 as-applied challenge, but that has never been the way this
22 case has been litigated from the petition, which I cited
23 as a facial challenge, through the district court's
24 decision to the -- to the as -- the -- the facial
25 challenge in part of the decision of the Ninth Circuit.

1 This has been a challenge to the congressional
2 determination that people who commit serious crimes are
3 to -- to be deportable as rapidly as possible.

4 They -- and -- and to the -- in order for that
5 policy to be effectuated, for our borders to be protected,
6 to avoid the acculturation of a criminal alien class in
7 the United States that's operating freely, for a limited
8 period of time, that individual will be detained during
9 that process until the final order of deportation is
10 entered.

11 85 percent of the aliens that are brought into
12 these procedures don't even challenge the immigration
13 decision -- immigration judge decision, and more than half
14 of those cases are resolved within 30 days. The
15 statistics are in the brief.

16 QUESTION: Thank you, General Olson.

17 MR. OLSON: Thank you.

18 CHIEF JUSTICE REHNQUIST: The case is submitted.

19 (Whereupon, at 11:14 a.m., the case in the
20 above-entitled matter was submitted.)

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