2003 WL 147701 (U.S.) (Oral Argument)
Supreme Court of the United States.

Charles DEMORE, District Director, San Francisco District of Immigration and Naturalization Service, et al., Petitioners,
v.
Hyung Joon KIM.

No. 01-1491.
Wednesday, January 15, 2003

Oral Argument

Appearances:

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

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

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Washington, D.C.

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

***4** PROCEEDINGS

(10:13 a.m.)

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

General Olson.

ORAL ARGUMENT OF THEODORE B. OLSON ON BEHALF OF THE PETITIONERS

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

Based upon years of experience, study, hearings, and overwhelming persuasive evidence, Congress concluded that the prompt removal of aliens convicted of committing serious felonies was essential to the Nation's ability to control its borders. Detention of these aliens during removal proceedings was considered vital by Congress to effectuate that policy, to prevent

flight, to evade removal, and to prevent harm done by recidivist criminal aliens.

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

***5** As this Court has repeatedly--

QUESTION: General Olson, do--do we have authority to entertain this challenge? As you know, an amicus has raised a jurisdictional question, and I think did it maybe in the court of appeals stage as well. It certainly did it early on here.

The problem is section 1126(e) which says, 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. Now, is that provision, number one, inapplicable or, number two, unconstitutional? And if neither of those, why doesn't it mean that we have no authority to entertain this case?

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

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

MR. OLSON: It's--it's our submission, after careful examination--the Government originally took that position that you've suggested in court proceedings. It was rejected by three courts of appeals. We studied it further. The Government studied it further and came to the conclusion that those decisions were correct and it would not preclude--and we're not contending here today--

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

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

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

QUESTION: Even in the Quirin case where the--the presidential order said that the people shall have no access to the courts at all, this Court sat to hear whether that sort of a provision was constitutional or not.

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

QUESTION: Well, I appreciate your carefully ***8** examining it, but I'd still like to know what language in it leads your careful examination to conclude that it does not cover this case. I mean, if it's unconstitutional, that's another matter.

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

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

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

the Court would construe it as not precluding a challenge to the constitutionality of the--of the policy made by the Congress itself in enacting--

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

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

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

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

MR. OLSON: Well, Justice Breyer, the--the case has not been litigated on that basis from its very beginning. I refer the Court to page 9 of the joint appendix which is--which, at the bottom of that section, ***10** articulates the requested relief by the--by the respondent in this case. Petitioner seeks a declaration that this provision is unconstitutional on its face as violative--

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

MR. OLSON: Well--

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

MR. OLSON: Well, it--

QUESTION: --or somebody like the plaintiff here?

MR. OLSON: If this--not only is it in the petition for habeas corpus that the individual was challenging on its face, the district court considered it on that basis, and the Ninth Circuit considered it on that basis, and it's been litigated here all the way through by the--by the respondent on that basis. If there was to be an as-applied challenge, there would be a great deal of other considerations.

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

QUESTION: General Olson, didn't--

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

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

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

QUESTION: Right.

QUESTION: We affirm the grant of habeas corpus on the ground the statute is unconstitutional as applied to him in his status as a lawful permanent resident of the United ***12** States.

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

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

MR. OLSON: Yes, Justice--

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

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

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

MR. OLSON: That's correct.

QUESTION: To permanent resident aliens.

***13** MR. OLSON: That's correct.

QUESTION: Sort of half-facial.

(Laughter.)

MR. OLSON: Mostly facial.

QUESTION: Mostly facial.

(Laughter.)

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

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

QUESTION: Is there a regulation or--or is there a policy with--in the Department of Justice or the INS which says that there has to be a conviction before you ***14** utilize this section? Or if the Attorney General just has information that a felony has been committed, is that sufficient to detain?

MR. OLSON: Well, the statute--

QUESTION: Here there was a conviction.

MR. OLSON: Here there was a conviction, and that is specifically what is said in the statute itself. It's my understanding--

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

MR. OLSON: Absolutely. And--and what happens in practice, Justice Kennedy, is that either the removal proceeding is

brought, as Congress has suggested, if possible, during the period of incarceration of the individual, or immediately upon release from incarceration.

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

QUESTION: Yes, but General, it is true, is it not, that there are people in the class who might have been convicted even before the statute was passed. So you're not just--just continuing detention. You have to go out and find them and--and put them under detention.

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

***16** QUESTION: What--what about this particular individual?

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

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

On your view of the Government's authority over--over aliens and the deference that the Court owes, would our--in your judgment should our decision be the same regardless of those statistics? If you had told us nothing about the--the probabilities of catching people, should we, on your view, or would we, on your view, be obligated to defer and simply say it's up to the Government?

MR. OLSON: Well, Justice Souter, the answer to that is that the test that the Court has consistently applied in this area is there--is there a rational basis, is the congressional objective rationally likely to advance a legitimate governmental purpose. Those statistics that we ***17** set forth in our brief and which were before Congress when Congress enacted this statute, provide the purpose for which Congress acted.

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

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

QUESTION: Right.

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

QUESTION: Yes.

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

QUESTION: Yes.

MR. OLSON: But it seems to me--and it seems obvious particularly in this case--that the means are ***18** wrapped up in the objective itself.

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

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

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

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

MR. OLSON: What the statistics tell us is that there were large numbers of aliens committing serious crimes and that those--those individuals committing those crimes were highly likely to be recidivists and that they were--that class of individuals or those groups of individuals were cultivating a criminal class that was engaging in ***19** organized--

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

MR. OLSON: Well--

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

MR. OLSON: Well, 80 percent--

QUESTION: Is that correct?

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

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

MR. OLSON: Well, no.

QUESTION: That's very comforting.

(Laughter.)

MR. OLSON: In that--that--well, actually ***20** the--it's--it's worse than that, Justice Scalia, because that figure of 20 percent who absconded were people that had been, during this period of time, been given individualized hearings. They were the ones that, after a hearing, the authorities thought were probably likely not to flee and 20 percent of that group did. When you look at--

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

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

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

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

***21** MR. OLSON: No. The figure jumped to 40 percent for people who were never detained at all, Justice Stevens, and that's

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

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

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

QUESTION: Oh, I'm sure.

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

QUESTION: But if he's at the hearing, at the ***22** conclusion of the hearing, you say, lock this guy up.

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

QUESTION: No, but this statute is not directed at the time during potential appeal. It's directed at the--as I understand it--now, you correct me if I'm wrong.

MR. OLSON: No.

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

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

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

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

QUESTION: I grant that--

QUESTION: But, General Olson, you don't necessarily lose them. All you're being asked to do is to have an individualized hearing as to each member of that 20 percent.

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

QUESTION: But why can't you deal with that problem with a standard that's tough, that's different from having the hearing? After all, we give bail pending appeal to criminals who have been convicted. We give bail to alien terrorists who are about to be deported. Why couldn't you have a tough standard but, nonetheless--like bail pending appeal, but, nonetheless, give the bail hearing to the ***24** person who's willing to come in and he'd have to show, you know, he's not going to run away, he's not a danger, and he has a good issue on the merits?

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

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

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

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

QUESTION: What I--what I'm worried--I see that, and what I'm worried about on the other side of it--I'm--I can see also how you could limit it like to bail ***25** pending appeal, a tough standard. The other side of it is the alien who's there and who's the wrong person or the--or the statute doesn't apply to him or there's a crime that they say he committed which he didn't. I mean, there could--

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

MR. OLSON: Pardon me?

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

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

QUESTION: We're only talking about people as to whom it's acknowledged that they committed the crime, it's acknowledged that they're deportable. And the only reason they may not get deported is the Attorney General might exercise discretion to let them into the country.

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

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

***26** MR. OLSON: If--no. If you have a--if you as--

QUESTION: You can take it to court.

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

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

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

QUESTION: Yes.

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

QUESTION: Well, given--

MR. OLSON: --in those cases under those ***27** regulations.

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

that's fine, but he will be in custody until he departs. What is--what is wrong with that?

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

QUESTION: No, but you're--you're fighting it on the--on the ground that somehow we have to prove--

MR. OLSON: No. No, Justice--

***28** QUESTION: --that a large number of them will flee.

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

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

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

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

***29** MR. OLSON: The statute makes no distinction. The Ninth Circuit, of course, did with respect to excludable aliens, said that with that category of aliens, the statute--even under the Ninth Circuit's reasoning, the statute was constitutional.

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

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

MR. OLSON: That's the question that I believe I addressed earlier that's referred to, the regulations--and I hope I'm correct--at pages 26 and 27 of the Government's ***30** brief. The--the regulations provide for someone claiming who is claiming that they are a citizen as opposed to an alien, or claiming that the crime for which they've been convicted was not a covered crime, may-- may have an accelerated hearing, which is-- which is--

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

MR. OLSON: That--that is correct.

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

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

QUESTION: All right. So at the--at the point of the--we'll call it the preliminary hearing, the Joseph hearing, when they can bring these challenges, there is no ***31** order that they be deported, and they, therefore, have got to be considered, as I understand it, as lawful resident aliens.

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

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

MR. OLSON: That's correct.

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

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

QUESTION: Well--

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

QUESTION: Very well, General Olson.

Ms. Rabinovitz, we'll hear from you.

ORAL ARGUMENT OF JUDY RABINOVITZ ON BEHALF OF THE RESPONDENT

MS. RABINOVITZ: Mr. Chief Justice, and may it ***32** please the Court:

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

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

And why doesn't section 1226 tell the courts to keep hands off?

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

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

(Laughter.)

MS. RABINOVITZ: This--this statute contains no express language that repeals habeas jurisdiction. That's one answer that I could give you, Your Honor, and based on ***33** this Court's decision in St. Cyr and Calcano, absent that--that language, the habeas--there's still jurisdiction in--

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

MS. RABINOVITZ: But this Court has said--

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

QUESTION: Well, the Court in St. Cyr, with which both Justice Scalia and I disagreed, said something very much like that, didn't it, that you had to be very specific if you were going to repeal habeas jurisdiction?

MS. RABINOVITZ: Yes.

QUESTION: Try Johnson v. Robson too.

MS. RABINOVITZ: The point is that this statute ***34** requires the Government to detain individuals like our client who are lawful permanent residents not because their detention is necessary to protect the public from danger of flight risk, but merely because they were convicted in the past for one of a broad range of crimes that the Government believes may render them deportable.

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

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

QUESTION: What more do we need?

MS. RABINOVITZ: The fact that they've been convicted of a crime, Mr. Chief Justice, doesn't mean that it's a crime that renders them deportable under the statute. And I think that this addresses, in part, Justice Kennedy's question about have they been--is this just that they're suspected of committing crimes or have they been convicted ***35** of crimes.

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

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

QUESTION: So--

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

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

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

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

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

***36** MS. RABINOVITZ: No, Your Honor. The Ninth Circuit--

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

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

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

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

MS. RABINOVITZ: He gets a hearing--

QUESTION: Individualized hearing.

MS. RABINOVITZ: He gets a hearing, Your Honor, but it's a very limited hearing to the extent that that ***37** hearing does not determine that he has, in fact, been convicted of a crime that renders him deportable. All that it--

QUESTION: In other words, it's a hearing that says you were convicted of X or you weren't convicted of X. It's not a hearing that says that X renders you deportable. Is that the point?

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

QUESTION: So it--

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

I think it's important to recognize that there are many individuals who are subjected to mandatory detention under this statute who cannot satisfy that standard. In fact, that that--they've had that hearing and the court ***38** has held the Government substantially--you know, we can't show that the Government is substantially unlikely to prevail.

QUESTION: I mean, I have a reason. I mean, now I am--I'm confused on this and I'd appreciate it. I--I assume there is someone in prison. He's detained like your client. There's a class of people. There are two subgroups. Group 1 is a group that has no nonfrivolous argument that they shouldn't be deported. It's virtually conceded they're--they should be deported. Their only arguments against it are frivolous. Group 2 are people who have a real nonfrivolous argument--a real nonfrivolous argument--that they aren't--it's the wrong person, this crime doesn't fall within the statutory definition, I probably will get asylum, something like that. They have a real nonfrivolous argument.

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

***39** MS. RABINOVITZ: No--

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

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

QUESTION: But aren't there one-and-a-half or--there's this Joseph hearing. It's not just that either you have a hearing or you don't have a hearing. You have the hearing that Justice Souter was referring to where your burden is enormous because you will not succeed at that hearing if you show it's more likely than not that this crime is--doesn't qualify as serious. You have to show overwhelmingly that the Government will win on that issue in it. So--but there is something other than--There's this Joseph hearing, which you say is not adequate, is it?

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

QUESTION: You're--you're not asking just for individualized hearings on those items, are you? You're--you're not just asking for individualized hearings on ***40** whether you are the person that did the--that--that was convicted and whether the--the crime of conviction causes you to be deportable. You want a hearing on whether, if you are let go, you will show up for--for a later hearing.

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

MS. RABINOVITZ: Yes--

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

MS. RABINOVITZ: Let me try--let me try to explain how the statute works and why we believe that it's a problem. The--the proceeding that you're asking for, a determination about whether, in fact, an individual is deportable, is precisely what a deportation hearing is for, and that kind of decision is not made the first time you come before an immigration judge. It's often a very protracted process, and we have individuals who have--who have been in jail for 17 months pending an immigration judge hearing to determine that exact question, Justice Scalia, ***41** about whether they are, in fact, deportable, which is why we say that the relevant question is whether pending those proceedings, there's a regulatory purpose in detaining that individual. And we're not--

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

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

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

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

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

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

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

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

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

QUESTION: You mean the first degree burglary conviction--

***43** MS. RABINOVITZ: Both--

QUESTION: --is not an aggravated felony?

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

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

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

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

(Laughter.)

MS. RABINOVITZ: But--but--yes. But let me point out--I refer you to the-- the amicus brief for--by Citizens and--and Immigrants for Equal Justice. It's one of these green briefs. And it's on page 12 of their brief. They referred to a case, the Solorzano-Patlan case, where an individual was convicted of entering an automobile with intent to commit theft, and the Board of Immigration of Appeals said--or the--the--excuse me. The immigration judge said exactly what-- what you have

said, which is that how could this crime not be an aggravated felony? It's a burglary, entering an automobile with intent to commit ***44** theft.

One-and-a-half years after our client--after this person--excuse me--he wasn't our client--was detained, the Seventh Circuit disagreed. Despite what the Board of Immigration Appeals said that how could this crime not be a burglary--

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

MS. RABINOVITZ: Mr. Chief Justice--

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

(Laughter.)

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

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

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

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

***45** QUESTION: Because you're relying on a conviction of someone else for a different kind of a crime.

MS. RABINOVITZ: No.

QUESTION: Are we talking about this person as an as-applied challenge, or do we have a facial challenge?

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

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

MS. RABINOVITZ: Yes, we are.

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

MS. RABINOVITZ: Right, right.

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

QUESTION: And isn't it the--

QUESTION: Well, but not in this case.

QUESTION: Not in this case. First degree burglary.

MS. RABINOVITZ: Oh, it--it certainly is. It ***46** remains a question about whether this is an aggravated felony--

QUESTION: Well, but--

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

QUESTION: Justice Breyer's classification of people who have really serious claims and people who have frivolous

claims--surely a claim that first degree burglary is not deportable under the statute would verge on the frivolous.

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

And all that I can tell you is that if you refer to our brief at page 5, note 6--oh, no. Excuse me. That's not the place. To our brief at--our brief at page ***47** 30, note 27, we note numerous examples where the question of whether something is an aggravated felony has been contested and decided--

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

MS. RABINOVITZ: Right. Right. Right.

QUESTION: In your opinion, would--would--and this goes back to my initial question which I'm still--haven't heard you really answer. Look, on appeal, somebody who has been convicted of a crime, in order to get out on--on appeal-- have bail on appeal, he has to show not only he wouldn't run away, not only he isn't a danger, but also that he raises a substantial question.

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

MS. RABINOVITZ: In this case, if we're talking about somebody who raises a nonfrivolous challenge like our ***48** client, that would satisfy this case because this is--

QUESTION: Well, I'm saying if it'd satisfy the case, though I take it from what you say it would satisfy you and your position.

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

QUESTION: So to keep someone in prison without bail, after they've been convicted of something, pending a deportation order is not constitutional without an individualized hearing at least if--or don't say at least--if, among other things, he shows there is a substantial question not for purposes of delay. Imagine an opinion that said that. Would you argue for or against that opinion?

MS. RABINOVITZ: I would argue for that opinion in this case because it would resolve this case. I believe ***49** that there also might be--there would be a constitutional issue that even somebody else--due process requires that they have an opportunity to show that they're not a danger and a flight risk because that is the purpose of regulatory detention. And as the--

QUESTION: I--I note that you have redefined substantial question as nonfrivolous. Anything that's not sanctionable raises a substantial question for purposes of--of this new rule?

MS. RABINOVITZ: Yes, Your Honor--

QUESTION: Wow.

MS. RABINOVITZ: --and--and it has to be that way because there are so many examples of circuit courts finding that the board's decision about what constitutes a deportable offense is wrong and yet, that those were cases where the individual could--where their--their claim might have been considered bordering on the frivolous, even though it wasn't.

And let give you a very--

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

MS. RABINOVITZ: Let me give you an example.

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

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

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

MS. RABINOVITZ: Two points.

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

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

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

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

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

MS. RABINOVITZ: You're right, Your Honor, ***52** Mr. Chief Justice. But the-- the point is that if somebody is locked up for a year-and-a-half, and they can't get the evidence for their case, because being locked up in jails also makes it much harder for people to present their cases, there's no right to appointed counsel. It means they can't work.

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

And let me just point out one other--

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

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

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

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

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

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

QUESTION: Well--

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

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

MS. RABINOVITZ: But let me return to the point about whether it's-- whether due process is satisfied by requiring that somebody be mandatorily detained throughout the process of their deportation proceeding, a process ***54** which, as I said, can be months, often years, without any individualized determination of danger and flight risk.

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

QUESTION: Well, that's--that's--I mean, your argument to me rings true for people who have real claims, but if you're trying to apply it to a person who has an insubstantial claim or a claim that is interposed for purposes of delay, I'm tempted to say, well, there's a very good reason to keep him locked up, namely, he doesn't have any argument and he's about to be deported and--and if he wants to be deported quickly, he can be.

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

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

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

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

QUESTION: Would you say that--

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

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

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

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

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

QUESTION: Well, but I--I'll get to that in a minute. But insofar as the substantiality or--or the likelihood of

prevailing--forget about flight risk for a moment. Insofar as the likelihood of prevailing and the substantiality of the--of the issue, that's almost what the statute already provides for in a bail determination hearing, as set forth on page 26 of the Government's brief. A person in INS custody is--is entitled to a bond determination hearing. And the standard is whether or not the Government is--he has to show the Government is substantially unlikely to prevail. That's very--forget flight risk for a moment. That is very close to the regime ***57** that you propose. So I don't see what we're arguing about here as to that.

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

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

In terms of burden, Your Honor, what I was referring to--what I thought you were referring to is whether an individual is going to have an obligation to show ***58** that they're not a danger of flight risk. But even--

QUESTION: Well, perhaps that's why I asked you that question first. It-- it does seem to me that if you concede that he has the burden, that that is really very, very close to what the--the statute already provides, forgetting about flight risk for the moment, or--or--

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

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

***59** And I think that--that this case is a perfect example because in this case, once the district court--our client was detained for 6 months without any individualized determination. The district court then said due process requires an individualized determination, and the INS, the Immigration Service, on its own decided he poses no danger and he can be released on 5,000-dollar bond. And he's been out for the past 3-and-a-half years. He's now getting his college degree. He's working.

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

And going back to your question about burden, I think it's important to recognize that the regime that was in place prior to this statute, and that is now in place in those circuits where they've said that the statute needs to be interpreted to--or that the statute--due process requires an individualized determination, still requires that an individual show that they are not a danger of flight risk. They bear that burden. And so under this system, no ***60** individual who's a danger of flight risk is going to be released except for those cases where there's, you know, obviously going to be error. But in general, individuals who are a danger of flight risk aren't going to be released.

I think it--there's one last point that I would like to make because I realize my time is short, which is that this case poses a serious constitutional problem, and we believe that there is a way that this Court can avoid that problem by construing the statute to not apply to individuals like our client who are, in fact, not deportable.

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

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

***61** MS. RABINOVITZ: Because--

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

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

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

MS. RABINOVITZ: There's two different issues, Justice Ginsburg. One is when-- is deportable. It says, when released. Our point is only that there are individuals who have deportation proceedings while they're in prison, and there will be an immigration judge decision or a BIA ***62** decision that says they are deportable.

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

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

I see my time is up.

QUESTION: Thank you, Ms. Rabinovitz.

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

REBUTTAL ARGUMENT OF THEODORE B. OLSON ON BEHALF OF THE PETITIONERS

QUESTION: General Olson, I don't want to intrude ***63** upon your rebuttal time, but I have one question that's very important for me and you can answer it yes or no. Assuming I disagree with you as to the reading of the statute as to whether there is jurisdiction in this case, if there is no jurisdiction, is that provision of the statute in the view of the Government unconstitutional?

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

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

(Laughter.)

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

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

Let me--let me--

(Laughter.)

MR. OLSON: Let me just deal with a few things ***64** that were raised during my colleague's argument.

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

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

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

***65** Now, one might quarrel with whether--what the burden of proof is, and where it should be and how it should be written, but that's a--this is a determination by the executive branch with respect to the statute. If the alien can show that the INS is substantially unlikely to prevail on its underlying charge of removability, then the individual may be released on bond. If the decision goes against the individual, that can be taken to the Board of Immigration Appeals. So there's a process that takes care of precisely those-- that category 2, as you put it.

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

Now, if there is some question about that in an individual case, or if there's some question about an aberrational lengthy detention, that should be brought to this Court or the courts below in an as-applied challenge. ***66** The respondent is saying here today that this is an as-applied challenge, but that has never been the way this case has been litigated from the petition, which I cited as a facial challenge, through the district court's decision to the--to the as-- the--the facial challenge in part of the decision of the Ninth Circuit. This has been a challenge to the congressional determination that people who commit serious crimes are to--to be deportable as rapidly as possible.

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

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

QUESTION: Thank you, General Olson.

***67** MR. OLSON: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

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