SUPREME COURT OF THE UNITED STATES

No 01–1491

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS *v.* HYUNG JOON KIM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 29, 2003]

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

I join all but Part I of the Court's opinion because, a majority having determined there is jurisdiction, I agree with the Court's resolution of respondent's challenge on the merits. I cannot join Part I because I believe that 8 U. S. C. §1226(e) unequivocally deprives federal courts of jurisdiction to set aside "any action or decision" by the Attorney General in detaining criminal aliens under §1226(c) while removal proceedings are ongoing. That is precisely the nature of the action before us.

I

I begin with the text of the statute:

> "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." §1226(e) (emphasis added).

There is no dispute that after respondent's release from prison in 1999, the Attorney General detained him "under this section," *i.e.*, under §1226. And, the action of which respondent complains is one "regarding the detention or release of a[n] alien or the grant, revocation, or denial of bond or parole." §1226(e). In my view, the only plausible reading of §1226(e) is that Congress intended to prohibit federal courts from "set[ting] aside" the Attorney General's decision to deem a criminal alien such as respondent ineligible for release during the limited duration of his or her removal proceedings.

I recognize both the "strong presumption in favor of judicial review of administrative action" and our "long-standing rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS* v. *St. Cyr,* 533 U. S. 289, 298 (2001). I also acknowledge that Congress will not be deemed to have repealed habeas jurisdiction in the absence of a specific and unambiguous statutory directive to that effect. See *id.*, at 312–313; *Ex parte Yerger,* 8 Wall. 85, 105 (1869). Here, however, the signal sent by Congress in enacting §1226(e) could not be clearer: "*No court* may set aside *any action or decision* . . . regarding the detention or release of any alien." (Emphasis added.) There is simply no reasonable way to read this language other than as precluding all review, including habeas review, of the Attorney General's actions or decisions to detain criminal aliens pursuant to §1226(c).

In *St. Cyr*, the Court held that certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) do not strip federal courts of their jurisdiction to review an alien's habeas claim that he or she is eligible for a waiver of deportation. 533 U. S., at 312. I dissented in that case, and continue to believe it was wrongly decided. Nothing in *St. Cyr*, however, requires that we ignore the plain

language and clear meaning of §1226(e).

In *St. Cyr*, the Court stressed the significance of Congress' use of the term "judicial review" in each of the jurisdictional-limiting provisions at issue. In concluding that Congress had not intended to limit habeas jurisdiction by limiting "judicial review," the Court reasoned as follows:

> "The term 'judicial review' or 'jurisdiction to review' is the focus of each of these three provisions. In the immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings. See *Heikkila* v. *Barber,* 345 U. S. 229 (1953). In *Heikkila*, the Court concluded that the finality provisions at issue 'preclud[ed] judicial review' to the maximum extent possible under the Constitution, and thus concluded that the [Administrative Procedure Act] was inapplicable. *Id.*, at 235. Nevertheless, the Court reaffirmed the right of habeas corpus. *Ibid.* Noting that the limited role played by the courts in habeas corpus proceedings was far narrower than the judicial review authorized by the APA, the Court concluded that 'it is the scope of inquiry on habeas corpus that differentiates' habeas review from judicial review." *Id.,* at 311–312.

In this case, however, §1226(e) does not mention any limitations on "judicial review." To be sure, the first sentence of §1226(e) precludes "review" of the Attorney General's "discretionary judgment[s]" to detain aliens under §1226(c). But the second sentence is not so limited, and states unequivocally that "[n]o court may set aside any action or decision" to detain an alien under §1226(c). It cannot seriously be maintained that the second sentence employs a term of art such that "no court" does not really mean "no court," or that a decision of the Attorney General may not be "set aside" in actions filed under the Immigration and Naturalization Act but may be set aside on habeas review.

Congress' use of the term "Judicial review" as the title of §1226(e) does not compel a different conclusion. As the Court stated in *St. Cyr*, "a title alone is not controlling," *id.,* at 308, because the title of a statute has no power to give what the text of the statute takes away. Where as here the statutory text is clear, "'the title of a statute . . . cannot limit the plain meaning of the text.'" *Pennsylvania Dept. of Corrections* v. *Yeskey,* 524 U. S. 206, 212 (1998) (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947)).

The Court also focused in *St. Cyr* on the absence of any language in the relevant statutory provisions making explicit reference to habeas review under 28 U. S. C. §2241. See 533 U. S., at 313, n. 36. This statutory silence spoke volumes, the Court reasoned, in light of the "historic use of §2241 jurisdiction as a means of reviewing deportation and exclusion orders," *ibid*. In contrast, there is no analogous history of routine reliance on habeas jurisdiction to challenge the detention of aliens without bail pending the conclusion of removal proceedings. We have entertained such challenges only twice, and neither was successful on the merits. See *Reno* v. *Flores*, 507 U. S. 292 (1993); *Carlson* v. *Landon*, 342 U. S. 524 (1952). See also Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 1067, n. 120 (1998) (distinguishing detention pursuant to a final order of removal from the interlocutory detention at issue here). Congress' failure to mention §2241 in this context therefore lacks the significance that the Court accorded Congress' silence on the issue in *St. Cyr*. In sum, nothing in *St. Cyr* requires us to interpret 8 U. S. C. §1226(e) to mean anything other than what its plain language says.

I recognize that the two Courts of Appeals that have considered the issue have held that §1226(e) does not preclude habeas claims such as respondent's. See *Patel* v. *Zemski*, 275 F. 3d 299 (CA3 2001); *Parra* v. *Perryman*, 172

F. 3d 954 (CA7 1999). In *Parra*, the Seventh Circuit held that §1226(e) does not bar "challenges to §1226(c) itself, as opposed to decisions implementing that subsection." *Id.,* at 957. Though the Court's opinion today relies heavily on this distinction, I see no basis for importing it into the plain language of the statute.

The Seventh Circuit sought support from our decision in *Reno* v. *American-Arab Anti-Discrimination Comm.,* 525 U. S. 471 (1999) *(AADC)*, but our holding there supports my reading of §1226(e). In *AADC*, the Court construed a statute that sharply limits review of claims "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." 8 U. S. C. §1252(g) (1994 ed., Supp. III). The Court concluded that this provision imposes jurisdictional limits only on claims addressing one of the three "'decision[s] or action[s]'" specifically enumerated in the statute. *AADC*, *supra*, at 482. Nowhere in *AADC* did the Court suggest, however, that the statute's jurisdictional limits might not apply depending on the particular grounds raised by an alien for challenging the Attorney General's decisions or actions in these three areas. *AADC* therefore provides no support for imposing artificial limitations on the broad scope of 8 U. S. C. §1226(e).

II

Because §1226(e) plainly deprives courts of federal habeas jurisdiction over claims that mandatory detention under §1226(c) is unconstitutional, one could conceivably argue that such a repeal violates the Suspension Clause, which provides as follows: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, §9, cl. 2. The clarity of §1226(e)'s text makes such a question unavoidable, unlike in *St. Cyr*, where the Court invoked the doctrine of consti-

tutional doubt and interpreted the relevant provisions of AEDPA and IIRIRA not to repeal habeas jurisdiction. *St. Cyr*, *supra*, at 314; see also *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 57, n. 9 (1996) (where the text of a statute is clear, the "preference for avoiding a constitutional question" cannot be invoked to defeat the plainly expressed intent of Congress).

In my view, any argument that §1226(e) violates the Suspension Clause is likely unavailing. *St. Cyr* held that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" 533 U. S., at 301 (quoting *Felker* v. *Turpin*, 518 U. S. 651, 663–664 (1996)). The constitutionality of §1226(e)'s limitation on habeas review therefore turns on whether the writ was generally available to those in respondent's position in 1789 (or, possibly, thereafter) to challenge detention during removal proceedings.

Admittedly, discerning the relevant habeas corpus law for purposes of Suspension Clause analysis is a complex task. Nonetheless, historical evidence suggests that respondent would not have been permitted to challenge his temporary detention pending removal until very recently. Because colonial America imposed few restrictions on immigration, there is little case law prior to that time about the availability of habeas review to challenge temporary detention pending exclusion or deportation. See *St. Cyr*, *supra*, at 305. The English experience, however, suggests that such review was not available:

> "In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the King without the consent of Parliament. It was formerly exercised by the King, but in later times by Parliament, which passed several acts on the subject between 1793 and 1848. Eminent English judges, sitting in the Judicial

> Committee of the Privy Council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein." *Fong Yue Ting* v. *United States,* 149 U. S. 698, 709 (1893) (citations omitted).

In this country, Congress did not pass the first law regulating immigration until 1875. See 18 Stat 477. In the late 19th century, as statutory controls on immigration tightened, the number of challenges brought by aliens to Government deportation or exclusion decisions also increased. See *St. Cyr, supra,* at 305–306. Because federal immigration laws from 1891 until 1952 made no express provision for judicial review, what limited review existed took the form of petitions for writs of habeas corpus. See, *e.g.*, *Ekiu* v. *United States,* 142 U. S. 651 (1892); *Fong Yue Ting* v. *United States, supra; The Japanese Immigrant Case,* 189 U. S. 86 (1903); *Chin Yow* v. *United States,* 208 U. S. 8 (1908); *Kwock Jan Fat* v. *White,* 253 U. S. 454 (1920); *Ng Fung Ho* v. *White,* 259 U. S. 276 (1922). Though the Court was willing to entertain these habeas challenges to Government exclusion and deportation decisions, in no case did the Court question the right of immigration officials to temporarily detain aliens while exclusion or deportation proceedings were ongoing.

By the mid-20th century, the number of aliens in deportation proceedings being released on parole rose considerably. See, *e.g.*, *Carlson* v. *Landon*, 342 U. S., at 538, n. 31. Nonetheless, until 1952 habeas corpus petitions remained the only means by which deportation orders could be challenged. *Heikkila* v. *Barber,* 345 U. S. 229, 236–237 (1953). Under this regime, an alien who had been paroled but wished to challenge a final deportation order had to place himself in government custody before filing a habeas petition challenging the order. *Bridges* v. *Wixon,* 326 U. S.

135, 140 (1945). Given this, it is not surprising that the Court was not faced with numerous habeas claims brought by aliens seeking release from detention pending deportation.

So far as I am aware, not until 1952 did we entertain such a challenge. See *Carlson* v. *Landon*, *supra*. And there, we reaffirmed the power of Congress to order the temporary detention of aliens during removal proceedings. *Id.*, at 538. In *Reno* v. *Flores*, we likewise rejected a similar challenge to such detention. And, *Flores* was a wide-ranging class action in which 28 U. S. C §2241 was but one of several statutes invoked as the basis for federal jurisdiction. 507 U. S., at 296. All in all, it appears that in 1789, and thereafter until very recently, the writ was not generally available to aliens to challenge their detention while removal proceedings were ongoing.

Because a majority of the Court has determined that jurisdiction exists over respondent's claims, I need not conclusively decide the thorny question whether 8 U. S. C. §1226(e) violates the Suspension Clause. For present purposes, it is enough to say that in my view, §1226(e) unambiguously bars habeas challenges to the Attorney General's decisions regarding the temporary detention of criminal aliens under §1226(c) pending removal. That said, because a majority of the Court has determined that there is jurisdiction, and because I agree with the majority's resolution of the merits of respondent's challenge, I join in all but Part I of the Court's opinion.