

May 6, 2003

COURT UPHOLDS DETENTION OF ALIENS CONVICTED OF FELONIES

(Demore v. Kim, No. 01-1491)
(Riley v. Radoncic, No. 01-1459)

The U.S. Supreme Court this week upheld the authority of the federal government to detain, pending deportation, those aliens ordered deported because they have been convicted of aggravated felonies. The decisions (in two separate cases) were victories for the Washington Legal Foundation (WLF). WLF filed briefs in each case, *Demore v. Kim* and *Riley v. Radoncic*, urging the Court to hold that alien felons have no constitutional right to be free from detention during the time it takes to complete their deportation. In each case, a federal appeals court held that mandatory detention violates an alien felon's rights to due process of law; the Supreme Court overturned both decisions.

"Congress has adopted numerous laws in recent years to ensure that the American public is protected from dangerous alien criminals. There are thousands of criminal aliens who are awaiting deportation at any given time; the Court's decisions upholding those laws will have a significant impact on public safety," said WLF Chief Counsel Richard Samp after reviewing the High Court's decisions. "Once the government has determined that an alien's criminal past disqualifies him from continued residence in this country, there can be no justification for a court -- particularly in the post-9/11 era -- ordering that the alien nonetheless be set free," Samp said.

Each of the two cases involves an alien with an extensive criminal background. One involves Hyong Joon Kim, a 25-year-old Korean citizen who moved to California as a child. His most recent conviction qualified as an "aggravated felony" under immigration law; the law mandates deportation of any alien convicted of an aggravated felony, and detention of the alien until deportation can be effected. Thus, when Kim was released from prison, the INS took Kim into custody and instituted deportation proceedings. But the lower courts ruled that it is unconstitutional to detain Kim pending deportation unless the INS presents specific evidence demonstrating that Kim is a danger to society if set free. Accordingly, Kim has been free on bond since 1999 while he fights what ostensibly is an "automatic" deportation.

The other case involves Sabrija Radoncic, a citizen of Serbia. Unlike Kim, Radoncic has never been in the U.S. legally; he entered the country illegally by sneaking across the border in

1991. His chief source of income since then appears to have been alien smuggling, a crime for which he has been arrested three times. After serving a prison term, Radoncic was detained by the INS pending deportation. However, the lower courts ruled that it is unconstitutional to detain Radoncic pending deportation.

In its decision in *Demore v. Kim*, the Supreme Court agreed with WLF that the statute requiring detention -- 8 U.S.C. § 1226(c) -- is constitutional. The Court held that Congress (which adopted the statute) and immigration authorities have good reason to believe that *any* alien felon who is released pending deportation poses a threat to public safety and is likely to flee rather than appear for deportation. The Court noted studies indicating that a significant percentage of aliens in the position of Kim flee before they can be deported. The Court agreed with WLF that in light of those figures, immigration authorities have strong reason to detain *all* alien felons during the relatively short period of time necessary to effect deportation, regardless whether the INS has information that any particular alien poses an especially large flight risk or danger to public safety.

WLF also argued that Congress explicitly stripped the federal courts of jurisdiction to review decisions to detain alien felons facing deportation. But six members of the *Demore v. Kim* Court disagreed. In a concurring opinion, Justice O'Connor (joined by Justices Scalia and Thomas) adopted WLF's jurisdictional argument almost verbatim. Those three went on to agree with Chief Justice Rehnquist's majority opinion that the mandatory detention statute does not violate the Due Process Clause.

The Court did not actually grant full review in *Riley v. Radoncic*. Rather, the Court this week granted certiorari, vacated the appeals court decision favoring Radoncic, and remanded the case to the appeals court for reconsideration in light of *Demore v. Kim*. That decision undoubtedly will require the appeals court to find against Radoncic on remand. Because due process permits (the Supreme Court held) the government to detain even permanent resident aliens pending deportation, it follows *a fortiori* that detention is permissible for those aliens, such as Radoncic, who sneaked into the country illegally and never acquired "legal" status.

WLF is a public-interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to combating illegal immigration and ensuring that aliens who engage in criminal activities are excluded from American society. WLF filed its briefs on behalf of itself, nine Members of Congress (U.S. Representatives Bob Barr (Ga.), Joe Barton (Tex.), John Doolittle (Calif.), George Gekas (Penn.), Walter Jones (N.C.), Lamar Smith (Tex.), John Sweeney (N.Y.), and Dave Weldon (Fla.), and U.S. Senator Jesse Helms (N.C.)), and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. WLF's briefs in *Demore v. Kim* and *Radoncic* are posted on its web site, www.wlf.org.