

CHARLES DEMORE V. HYUNG JOON KIM:¹ ANOTHER STEP AWAY FROM FULL DUE PROCESS PROTECTIONS

I. INTRODUCTION

Hyung Joon Kim lawfully immigrated to the United States with his family at the age of six, committed two crimes during his late adolescence, and was sentenced to three years in the California prison system.² After he had served his time, the Immigration and Naturalization Service (INS)³ took him into custody to await its decision of whether they would deport him to a country he had not been to since he was a young child.⁴ Kim languished in INS custody while he awaited this decision, not because he posed any risk of flight or danger, but because Congress had created an irrebuttable presumption that it is necessary to detain all aliens in Kim's situation.⁵

Due Process provides substantive protections such that the government must present a compelling governmental interest before it can infringe on our fundamental rights and it must narrowly tailor any such infringements.⁶ When the Supreme Court has addressed detention of citizens, it has required an individualized determination of their risk

1. *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003).

2. *See infra* notes 99-101 and accompanying text (discussing the background of Hyung Joon Kim's case).

3. In 2002, Congress abolished the Immigration and Naturalization Service and transferred its functions to the Bureau of Citizenship and Immigration Services (BICS) within the Homeland Security Department. Homeland Security Act of 2002, Pub. L. No. 107-296 § 451, 116 Stat. 2005 (codified primarily at 6 U.S.C. § 101 *et seq.*). For clarity and consistency, this note will refer to the INS and this new agency as the INS.

4. *See infra* notes 102-104 and accompanying text (discussing the INS's involvement with Kim after his release from prison).

5. *See* Veronica Ascarrunz, *The Due Process Implications of Mandatory Immigration Detention: Mandatory Detention of Criminal and Suspected Terrorists Aliens*, 13 GEO. MASON U. CIV. RTS. L.J. 79 (2003) (noting that the validity of this irrebuttable presumption may rest on whether the groups to which the presumption applies are "sufficiently limited to include only individuals that are flight risks or potential threats to the public such that their detention is directly connected to the relevant government interests"). *See also infra* notes 48-59 and accompanying text (reviewing the statutory history of mandatory detention of criminal aliens).

6. *See infra* notes 17-24 and accompanying text (reviewing due process protections).

of flight and dangerousness.⁷ Rather than following this analysis in *Demore v. Hyung Joon Kim*, the Court held that Congress was not required to narrowly tailor its infringement of Kim's fundamental rights because Kim was not a citizen.⁸

The Supreme Court's decision in *Hyung Joon Kim* will have a direct impact on a large number of aliens.⁹ For example, in 2002, the INS detained approximately 202,000 aliens, 103,000 of whom had criminal records.¹⁰ In this same year, the INS removed 148,619 aliens from the United States, 70,759 of whom the INS classified as criminal.¹¹ The Court's decision also enters the murky area of changing due process protections for non-citizens, which may weaken protections for all. As a whole, the Court explains what certain aliens are not entitled to, but leaves much unexplained.¹²

Part II of this note traces the development of substantive due process protections for aliens, including general due process jurisprudence, the statutory authority for detaining criminal aliens, significant Supreme Court decisions, and approaches taken by the circuit courts.¹³ Part III examines the Supreme Court's decision in *Hyung Joon Kim*.¹⁴ Part IV evaluates the due process analysis used by the Court and addresses the implications of this decision.¹⁵ Part V of this note concludes that the Court's strained departure from strict scrutiny and its

7. See *infra* notes 30-38 and accompanying text (discussing pretrial detentions of criminal suspects).

8. See *infra* notes 189-192 and accompanying text (criticizing the Court's departure from strict scrutiny analysis).

9. See Amy Langenfeld, Comment, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1050-52 (1999) (providing some discussion of the conditions that asylum-seekers and criminal aliens face while in detention). Langenfeld discusses treatment of asylum-seekers and detained criminal aliens in the context of international obligations, due process protections, and separation of powers concerns. *Id.* at 1044. Her analysis of due process protections focuses on procedural due process protections. *Id.* at 1057-60. See also *This American Life: Immigration* (WBEZ Chicago radio broadcast, Oct. 13, 2000) (documenting the consequences of detaining aliens by interviewing aliens, an INS official, a congressman, and prison employees who worked with detainees), available at <http://www.thislife.org/>.

10. U.S. DEPARTMENT OF HOMELAND SECURITY, 2002 YEARBOOK OF IMMIGRATION STATISTICS 175 (2003) (reporting a variety of statistics for the INS, especially for the period between 1997 and 2002).

11. *Id.* at 177. The number of aliens removed for criminal violations has increased from 1,978 in 1986. *Id.* at 176-77. This number has continued to increase over the past several years such that there were 53,214 aliens removed for criminal violations in 1997, 60,965 in 1998, 70,186 in 1999, 71,801 in 2000, and 71,994 in 2001. *Id.* at 190-97.

12. See *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003).

13. See *infra* notes 17-98 and accompanying text.

14. See *infra* notes 99-162 and accompanying text.

15. See *infra* notes 163-262 and accompanying text.

failure to provide an adequate explanation of the departure will have implications for aliens, citizens, and future courts.¹⁶

II. BACKGROUND

A. *Due Process and Detention of Citizens*

The Due Process Clause¹⁷ provides protection in the form of both procedural due process¹⁸ and substantive due process.¹⁹ Substantive due

16. See *infra* notes 263-267 and accompanying text.

17. U.S. CONST. amend. V. “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” *Id.*

[The liberty interest] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that a statute that prohibited the teaching of any foreign language to a child who has not passed the eighth grade was arbitrary).

18. Procedural due process requires a balancing of the individual interest, state interest, and probability that further procedural safeguards will reduce any risk of error. *Mathews v. Eldridge*, 424 U.S. 329, 334-35 (1976) (addressing the termination of social security disability benefits).

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. Though this note will focus on substantive due process issues, there have been cases that have used procedural due process analysis to question detentions. *E.g.*, *Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003) (holding that additional process is not required for pre-deportation detention because it construed such detentions as not being indefinite and the INS had not made a showing of a strong special justification to extend the detention); *Zavala v. Ridge*, 310 F.Supp.2d 1071 (N.D. Cal. 2004) (reasoning that automatic stays, which override an Immigration Judge’s (IJ) decision to release an alien on bond, are unconstitutional because the liberty interest “is of the highest constitutional import,” the Government has not shown “an identified and articulable threat,” and overruling an IJ’s decision “poses a serious risk of error”); *Ashley v. Ridge*, 288 F.Supp.2d 662, 669-71 (D. N.J. 2003) (finding detention of aliens during immigration proceedings without an individualized determination of flight risk or dangerousness violates procedural due process because the alien’s interest in being free from detention is “without question, a weighty one,” the government has proven no interest in keeping each particular alien detained, and the risk of error in unilateral determinations is great).

19. See, *e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (addressing a statute that banned assisted suicide and finding no fundamental interest). “We have long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. The Clause also includes a substantive component that provides heightened protection against government interference with

process²⁰ prohibits the government from infringing on a fundamental interest unless it has a compelling interest and the infringement is narrowly tailored (strict scrutiny).²¹ The Court identifies fundamental interests by identifying whether the interest is “deeply rooted in this Nation’s history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”²² If the interest at stake is not a fundamental interest,²³ the

certain fundamental rights and liberty interests.” *Troxel*, 530 U.S. at 65. (internal quotation omitted.)

20. Justice Souter provided a thorough explanation of his view of the development of substantive due process analysis in *Glucksberg*, 521 U.S. at 752-774 (Souter, J., concurring).

21. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (holding “that the asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.”) *Id.* at 727; *Reno v. Flores*, 507 U.S. 292, 292 (1993) (explaining that the “substantive component . . . forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest”); *United States v. Salerno*, 481 U.S. 739 (1987) (finding liberty from detention a fundamental interest); *Roe v. Wade*, 410 U.S. 113, 155-64 (1973) (holding unconstitutional a statute that prohibited abortions except when necessary to save the life of the mother because the statute was not narrowly tailored when it infringed on a woman’s constitutionally protected right to decide whether to terminate her pregnancy); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (recognizing a constitutionally protected right to privacy and finding unconstitutional a statute that prohibited counseling regarding the use of birth control because it infringed on the right of privacy in the marital relationship); *but see Collins v. Harker Heights*, 503 U.S. 115 (1992) (ruling that municipalities do not have a federal obligation under the Due Process clause to ensure safety and security in the workplace).

22. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). *See also Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (striking down a municipality housing ordinance under the Due Process Clause that denied the right for a non-nuclear family to live in one home); *Rochin v. California*, 342 U.S. 165, 169, 172-73 (1952) (asking whether conduct of the government “shocks the conscience” or “offend[s] a sense of justice”); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (asking whether the interest is “implicit in the concept of ordered liberty”); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (asking whether the interest is “so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

To begin substantive due process analysis, the Supreme Court also requires that those who claim a due process violation describe the interest carefully. *E.g.*, *Glucksberg*, 521 U.S. at 721; *Reno v. Flores*, 507 U.S. 292, 302 (1993) (requiring “a careful description of the asserted right”); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (stating that “[i]t is important . . . to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake”).

23. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (reasoning that decisions about intimate choices about physical relationships is protected by due process, but seeming to apply rational basis review in finding that there was no legitimate state interest in prohibiting homosexual conduct); *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (finding no fundamental right to assisted suicide); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding that there is no fundamental right for homosexuals to participate in sodomy), *overruled by* 539 U.S. 558, 577 (2003); *Schall v. Martin*, 467 U.S. 253 265 (1984) (holding that a juvenile’s interest in freedom from institutional restraints is substantial but not fundamental because juveniles “are always in some form of custody”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (suggesting that a parent’s interest “in the companionship, care, custody, and management of his or her children” is fundamental).

Court will depart from this strict scrutiny and apply rational basis review, which asks whether the government's end is legitimate and whether the means are rationally related to the end.²⁴

The Supreme Court has made clear that a person "may not be punished prior to an adjudication of guilt in accordance with due process of law."²⁵ This does not preclude, however, civil commitments that are not punitive.²⁶ For civil commitments, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."²⁷ The government may commit a person only when there is a finding of future dangerousness and an additional factor such as mental illness "that makes it difficult, if not impossible, for the person to control his dangerous behavior."²⁸ The Court has also required states to meet at least a clear and convincing burden of proof for civil commitments.²⁹

The Supreme Court in *United States v. Salerno* upheld pretrial detention of criminal suspects against a due process challenge.³⁰ The

24. See, e.g., *Vacco v. Quill*, 521 U.S. 793 (1997) (requiring the statute to bear "a rational relation to some legitimate end"); *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (noting that, when there is not a fundamental liberty interest, the infringement on any remaining interest need only be "rationally related to legitimate government interests").

25. *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979) (affirming the *Mendoza-Martinez* tests for punishment and holding that restrictions during pretrial detention that are "reasonably related to a legitimate governmental objective" are not alone punishment). Accord *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963) (reasoning that "punishment cannot be imposed without a prior criminal trial and all its incidents").

26. E.g., *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (observing that "[t]he Court has recognized that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that a state may not hold a person solely due to his incapacity to stand trial unless "there is a substantial probability that he will attain that capacity in the foreseeable future" and "his continued commitment [is] justified by progress toward that goal"); *Greenwood v. United States*, 350 U.S. 366, 369 (1956) (upholding a statute that provided for the commitment of a person who is mentally incompetent to stand trial when the commitment is limited "until sanity is restored," the person is no longer a danger, "or until suitable arrangements are made for the care of the prisoner by his State of residence").

27. E.g., *Jackson*, 406 U.S. at 738. See also *supra* note 26.

28. *Kansas v. Crane*, 534 U.S. 407, 409-10 (2002) (noting that the impairment of volitional control need not be a complete lack of control, but instead "serious difficulty in controlling behavior"). Accord *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (reasoning that the mental illness prong is not rigidly defined and a lack of volitional control due to pedophilia may satisfy this prong). See also, e.g., *Jones v. United States*, 463 U.S. 354, 368 (1983) (holding that insanity acquittees may be detained beyond the time that they may have served if convicted of their underlying crimes); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (suggesting that detaining a person with a mental illness who can survive safely outside of detention would be analogous to "incarcerat[ing] all who are physically unattractive or socially eccentric").

29. *Addington v. Texas*, 441 U.S. 418, 432-33 (1979).

30. *United States v. Salerno*, 481 U.S. 739, 755 (1987). Anthony Salerno and Vincent Cafaro

Court first questioned whether the detention was punishment by using a test that explains “[u]nless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.”³¹ The Court found that this pretrial detention was regulatory rather than penal because Congress did not create it for the purpose of punishment and the limitations on it ensured that it was not “excessive in relation to the regulatory goal Congress sought to achieve.”³² Although the Court found the liberty

brought a facial challenge against the Bail Reform Act of 1984, 18 U.S.C. § 3142, which permitted detention if “after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” *Id.* at 742 (quoting 18 U.S.C. § 3142(a) (2000)). The Court noted that substantive due process protects against government conduct that shocks the conscious or interferes with rights implicit in the concept of ordered liberty. *Id.* at 746 (citing *Rochin v. California*, 342 U.S. 165, 172 (1952) and quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

31. *Salerno*, 481 U.S. at 746-47 (citing *Schall v. Martin*, 467 U.S. 253, 269 (1984); *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) (affirming the *Mendoza-Martinez* tests for punishment and holding that restrictions during pretrial detention that are “reasonably related to a legitimate governmental objective” are not alone punishment); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (reasoning that “punishment cannot be imposed without a prior criminal trial and all its incidents”). *See also* *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (holding that, when the legislature labels the action as civil rather than penal, the Court “will reject the legislature’s manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention to deem it civil”) (internal quotations omitted). In *Bell*, the Court used the following test to determine whether an act is punitive. *Bell*, 441 U.S. at 538.

A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.

Id. The Court has also looked at the following factors.

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Bell, 441 U.S. at 537-38 (quoting *Mendoza-Martinez*, 372 U.S. at 168-169).

32. *United States v. Salerno*, 481 U.S. 739, 746-47 (1987). The Court reasoned that Congress had intended this detention “as a potential solution to a pressing societal problem” and concluded that “[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal. *Id.* at 747. To hold that the detention was not excessive, the Court relied on limitations such as application to only “the most serious crimes,” the detainee’s entitlement “to a prompt detention

interest to be fundamental,³³ it determined that the government had a compelling interest in preventing crime by the detainees.³⁴ Further, the Court concluded that Congress had narrowly tailored this detention³⁵ because the procedures were “specifically designed to further the accuracy” of the determination of likelihood of future dangerousness.³⁶ The importance of procedural safeguards has been applied in civil settings as well.³⁷ In both situations, the Court has placed heavy reliance on the fact that there were individualized determinations before detention.³⁸

B. Statutory Authority for Mandatory Detention of Criminal Aliens

In 1907, Congress passed the first statute that authorized deportation of aliens for conduct that occurred after they came to the United States.³⁹ The Immigration Act of 1917 excluded classes of aliens

hearing,” as well as limited duration of the detention. *Id.*

33. *Id.* at 750 (observing “the importance and fundamental nature of this right”). “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *Id.* at 755.

34. *Id.* at 749-50 (1987) (reasoning that the “interest in preventing crime by arrestees is both legitimate and compelling”).

35. *Salerno*, 481 U.S. at 749-50. (observing that the government was restricted in its implementation of pretrial detention to those who have had an adversarial hearing where the government has proven “by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person”).

We think that Congress’ careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

Id. at 751.

36. *Id.* at 751-52. The Court noted that the procedures included the right to counsel, the ability to testify and cross examine witnesses, enumerated factors for the trier to consider, a clear and convincing standard of proof, and written findings of fact. *Id.* The Fourth Amendment requires “a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.” *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (requiring a timely judicial determination but rejecting the need for an adversary hearing).

37. *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997). “We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards.” *Id.* at 357. The statute in question required commitment proceedings. *Id.*

38. *Id.* at 357-58; *Salerno*, 481 U.S. at 752. “Given the legitimate and compelling regulatory purpose of the act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.” *Salerno*, 481 U.S. at 752.

39. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900, amended by Act of Mar. 26, 1910, ch. 128, § 2, 36 Stat. 263, 265 (repealed 1917). “Any alien woman or girl [found to be a

from admission to the United States, including aliens who had committed crimes of moral turpitude.⁴⁰ The Immigration and Nationality Act of 1952 (INA) excluded aliens convicted of illicit traffic in narcotics as well as aliens who had committed crimes of moral turpitude.⁴¹ Both acts contained provisions granting the Attorney General discretion to admit such aliens if they had been domiciled in the United States for at least seven years and were just returning from a temporary absence.⁴² Although Congress did not explicitly grant this discretion to the Attorney General for deportation proceedings, the courts interpreted it to apply.⁴³

In 1988, Congress provided for the deportation of aliens who were aggravated felons⁴⁴ as well as their mandatory detention.⁴⁵ After many district courts found this mandatory detention unconstitutional,⁴⁶ Congress amended the INA to allow for release of these aliens if they

prostitute] . . . within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported . . .” *Id.* See also Julie Anne Rah, Note, *The Removal of Aliens Who Drink and Drive: Felony DWI as a Crime of Violence Under 18 U.S.C. § 16(B)*, 70 *FORDHAM L. REV.* 2109, 2114 (2002) (reviewing the history of immigration laws in the United States). Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 *HARV. L. REV.* 1889, 1900-14 (2000) (tracing the development of immigration law as it relates to the distinction between civil and penal actions).

40. *INS v. St. Cyr*, 533 U.S. 289, 294 (2001) (citing the Act of Feb. 5, 1917, § 3, 39 Stat. 874, 877 (codified as amended at 8 U.S.C. § 156 (1917) (repealed (1952))).

41. *Id.* (citing the Immigration and Nationality Act of 1952 § 202, 66 Stat. 163, 182-187) (codified as amended at 8 U.S.C. §§ 1101-1537 (2000)).

42. Act of Feb. 5, 1917, 39 Stat. 874; 66 Stat. 212(c).

43. *St. Cyr*, 533 U.S. at 294-95 (citing *In re L*, 1 I. & N. Dec. 1, 2, 1940 WL 7544 (1940) and *In re Silva*, 16 I. & N. Dec. 26, 30, 1976 WL 32326 (1976)).

44. Anti Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, § 7343(c), 102 Stat. 4471 (8 U.S.C. § 1251(a) (transferred to 8 U.S.C. § 1227 as amended (2000))).

45. *Id.* at § 7342 (8 U.S.C. § 1228 as amended (2000)).

46. *E.g.*, *Leader v. Blackman*, 744 F.Supp. 500, 506, 507-09 (S.D. N.Y. 1990) (rejecting an equal protection challenge but holding that mandatory detention without a hearing violates substantive and procedural due process); *Kellman v. INS*, 750 F.Supp. 625, 627-28 (S.D. N.Y. 1990) (holding that the denial to plaintiff of a meaningful bail determination, while in custody, is unconstitutional under the plaintiff's due process rights); *Probert v. INS*, 750 F.Supp. 252, 256 (E.D. Mich. 1990) (holding that “8 U.S.C. § 1252(a)(2) violates substantive and procedural due process” because “[i]t is shocking to the conscience and interferes with the rights implicit in the concept of ordered liberty”); *Paxton v. INS*, 745 F.Supp. 1261, 1265 (E.D. Mich. 1990) (holding that mandatory detention pursuant to § 1252(a)(2) “is precisely the type of governmental conduct that shocks the conscience and interferes with the rights implicit in the concept of ordered liberty”); *Agunobi v. Thornburgh*, 745 F.Supp. 533 (N.D. Ill. 1990) (emphasizing the importance of the government's interest in “ensuring that those aliens who should be deported are deported” but concluding that the lack of procedural safeguards violates due process). *Contra Davis v. Weiss*, 749 F.Supp. 47 (D.Conn. 1990); *Morobel v. Thornburgh*, 744 F.Supp. 725 (E.D. Va. 1990). See *Martinez v. Greene*, 28 F.Supp.2d 1275, 1279-80 (D.Colo.1998) (giving a history of statutory detention for criminal aliens).

were not a risk to the community and were likely to appear for their hearings.⁴⁷ In April 1996, Congress again amended the INA to require mandatory detention of aliens convicted of an “aggravated felony.”⁴⁸ Five months later, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),⁴⁹ which replaced the aggravated felony provision with a broader mandatory detention provision for “criminal aliens.”⁵⁰

The broader criminal alien provision expands the types of crimes that subject aliens to mandatory pre-deportation detention.⁵¹ In addition to aggravated felonies,⁵² the provision requires mandatory pre-deportation detention for aliens convicted of crimes involving moral turpitude with imprisonment of at least one year⁵³ or multiple convictions,⁵⁴ certain crimes involving controlled substances,⁵⁵ certain firearm offenses,⁵⁶ as well as certain other crimes.⁵⁷ Furthermore, IIRIRA requires the Attorney General to take these aliens into custody⁵⁸ and to release them only under certain limited circumstances.⁵⁹

47. Act of Nov. 29, 1990, Pub. L. No. 101-649 § 504(c) § 1252(a)(2)(B) (repealed); Act of Dec. 12, 1991, Pub. L. No. § 310(1) (8 U.S.C. § 1252(a)(2)(B) (repealed). “The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.” *Id.* (repealed by April 24, 1996 Act).

48. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8 U.S.C.).

49. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009.

50. 8 U.S.C. § 1226 (2000).

51. 8 U.S.C. § 1226(c) (2000).

52. 8 U.S.C. § 1227(a)(2)(A)(iii) (2000). “Any alien who is convicted of an aggravated felony at any time after admission is deportable.” *Id.*

53. 8 U.S.C. § 1227(a)(2)(A)(i) (2000).

54. 8 U.S.C. § 1227(a)(2)(A)(ii) (2000). “Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal conduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial. . . .” *Id.*

55. 8 U.S.C. § 1227(a)(2)(B) (2000).

56. 8 U.S.C. § 1227(a)(2)(C) (2000).

57. 8 U.S.C. § 1226(c) (2000).

58. 8 U.S.C. § 1226(c)(1) (2000). “The Attorney General *shall* take into custody” *Id.* (emphasis added).

59. 8 U.S.C. § 1226(c)(2) (2000).

The Attorney General may release . . . only if the Attorney General decides . . . that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety or other persons or of property

Congress also limited judicial review of the discretionary judgment of the Attorney General and of his actions or decisions.⁶⁰

C. Significant Supreme Court Decisions

In 1952, the Supreme Court addressed the detention of aliens without bail during deportation proceedings in the context of the Cold War in the case of *Carlson v. Landon*.⁶¹ Under the authority of the Internal Security Act of 1950,⁶² five individuals were detained due to their connections with communist activities.⁶³ Although the Court held that it was clearly within Congress' plenary power⁶⁴ to expel aliens who had not achieved citizenship,⁶⁵ the Court also clearly held that this power

and is likely to appear for any scheduled proceeding. . . .

Id.

60. 8 U.S.C. § 1226(e) (2000).

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.

Id.

61. *Carlson v. Landon*, 342 U.S. 524, 543 (1952) (holding that "[t]here is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against the Government.").

62. Internal Security Act of 1950, §§ 22-23, 64 Stat. 987 (repealed 1971). The act gave the Attorney General discretion to detain, "[p]ending final determination of the deportability," aliens "who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States." *Id.* at § 22. The Act also provided for detention and deportation of anarchists, aliens who advocated or taught opposition to all organized government, aliens who were members of the Communist Party or Communist Political Association, and certain other aliens. *Id.*

63. *Carlson*, 342 U.S. at 528-31. This was a consolidation of two cases, the first of which involved detention of four individuals for whom it was claimed that "release would be prejudicial to the public interest and would endanger the welfare and safety of the United States." *Id.* at 529. This assertion was predicated on evidence that each person had been a member of the Communist Party of the United States and had participated in the "indoctrination of others to the prejudice of the public interest." *Id.* at 530. The second case involved the detention of *Zydok*, who was also claimed to be member of the Communist Party. *Id.*

64. U.S. CONST. art. I, § 8, cl. 4. "The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . ." *Id.*

65. *Carlson*, 342 U.S. at 534-37. While noting that this plenary power included the power to deport for communist membership alone, the Court endorsed Congress' purpose of the legislation. *Id.* at 535 n.21.

The communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. . . . The Communist organization . . . present[s] a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy

was subject to judicial review “under the ‘paramount law of the constitution.’”⁶⁶ Although the Attorney General’s discretion was subject to judicial review, the Court concluded that it would override that discretion only “where it is clearly shown that it was without a reasonable foundation.”⁶⁷ The Court did not require criminal procedural protections because it found that deportation was “not a criminal proceeding and has never been held to be punishment.”⁶⁸ Due process was satisfied because “evidence of membership plus personal activity in supporting and extending the [Communist] Party’s philosophy concerning violence gives adequate ground for detention.”⁶⁹

The Supreme Court addressed the constitutionality of indefinite

and designed to prevent it from accomplishing its purpose in the United States.

Id. (quoting The Internal Security Act of 1950, § 2(15), 64 Stat. 987 (repealed 1971)).

66. *Carlson*, 342 U.S. at 537. The Court cited for support *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (holding that residents who claim to be citizens are entitled to due process protection during deportation proceedings); *Zakonaite v. Wolf*, 226 U.S. 272 (1912) (applying constitutional guarantees but finding that immigration proceedings are not criminal proceedings); *Kaoru Yamataya v. Fisher* (“The Japanese Immigrant Case”), 189 U.S. 86 (1903) (holding that aliens must be afforded due process protections when administrative officials are executing immigration statutes); *Wong Wing v. United States*, 163 U.S. 228 (1896) (holding that the protections of the Fifth and Sixth Amendments extend to all persons within the territory of the United States); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (noting that, although it was within Congress’ power to expel or exclude aliens, the manner which is taken to execute this power is still subject to review under the Constitution); and *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (holding that determinations of an administrative official regarding the admissibility of aliens who have not been naturalized and have not been domiciled or resided in the United States satisfies due process of law). *Carlson*, 342 U.S. at 537.

67. *Carlson*, 342 U.S. at 540-41. The Government did not argue that the Attorney General’s discretion should not be subject to judicial review. *Id.* at 540.

68. *Id.* at 537. *Accord* *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

While the consequences of deportation may assuredly be grave, they are not imposed as a punishment. . . . Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end an ongoing violation of United States law.

Am.-Arab Anti-Discrimination Comm., 525 U.S. at 491. *But see* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bode Cases*, 113 HARV. L. REV. 1889, 1908, 1929, 1935 (2000) (arguing “that deportation of legal permanent residents for criminal and other post-entry conduct is punishment” because it is analogous to banishment of citizens and noting that long incarcerations only lend further support to this argument).

69. *Carlson*, 342 U.S. at 541. The Court noted that “specific acts of sabotage or incitement to subversive action” were not required, but then immediately noted that there was no evidence that all arrested aliens who had communist membership were denied bail. *Id.* at 541-42. In fact, the Court noted, a majority of aliens with communist membership had been allowed bail. *Id.* at 542.

detention of aliens after removal orders in *Zadvydas v. Davis*.⁷⁰ After examining the due process rights of aliens, the Court held that indefinite detention beyond the point when it is “reasonably necessary to bring [about] removal” was unconstitutional.⁷¹ This holding followed from the Court’s conclusion that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”⁷²

D. Prior Appellate Court Decisions

The Seventh Circuit addressed the constitutionality of § 1226’s mandatory pre-deportation detention provision for criminal aliens⁷³ in *Parra v. Perryman*.⁷⁴ The court held that § 1226(e) barred review of “operational decisions” under § 1226, but it did not bar challenges to the statute itself.⁷⁵ After concluding that Parra had no legal right to remain

70. *Zadvydas v. Davis*, 533 U.S. 678 (2001). In the context of two cases, the Court considered the constitutionality of a statute (8 U.S.C. § 1231(a)(6) (2000)), which authorized the Attorney General to detain aliens indefinitely after an order for removal if the Attorney General determines the alien to be a risk or unlikely to comply with the removal order. *Id.* at 682. The first case involved *Zadvydas*, who was born to Lithuanian parents while they were in Germany in 1948 and immigrated to the U.S. when he was eight. *Id.* at 684. Due to his criminal record, the INS took him into custody and ordered him deported to Germany in 1994. *Id.* Neither Germany nor Lithuania agreed to accept him. *Id.* He filed a petition for writ of habeas corpus in 1995, challenging his continued detention. *Id.* A Federal District Court ordered him released; however, the Fifth Circuit reversed. *Zadvydas*, 533 U.S. at 684.

The second case involved Kim Ho Ma, who had been born in Cambodia. *Id.* at 685. The INS ordered Ma removed but he remained in custody because the U.S. had no repatriation treaty with Cambodia and the INS had concerns that he would be violent or violate his conditions of release. *Id.* at 685-86. The District Court ordered Ma released and the Ninth Circuit Court affirmed. *Id.* at 686 (citing *Kim Ho Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000)).

Before addressing the merits of the claims, the Court concluded that habeas corpus proceedings remained available to challenge post-removal-period detention. *Id.* at 688. Justice Breyer, writing for the Court, held that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by the statute.” *Id.* at 699. The Court allowed a six-month period during which there would be a presumption that removal was reasonably foreseeable. *Zadvydas*, 533 U.S. at 701. If, after this period, an “alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.” *Id.*

71. *Id.* at 689.

72. *Id.* at 694.

73. 8 U.S.C. § 1226(c) (2000).

74. *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999). Manuel Parra was convicted of aggravated sexual assault in 1996 and the INS took him into custody on December 7, 1998 pending his removal proceedings. *Id.* at 955. On March 3, 1999, an immigration judge determined that Parra was deportable. *Id.* at 956. Because Parra wanted to be at home with his three children who are U.S. citizens, he sought a writ of habeas corpus. *Id.* The Department of Justice responded with concerns that Parra would “go into hiding in order to stay in the United States indefinitely.” *Id.*

75. *Id.* at 957. The court reasoned that § 1226(e) precluded judicial review of the Attorney

in the United States,⁷⁶ the court proceeded with procedural due process analysis by weighing the private interest, probability of error, and government's interest in choosing not to provide additional safeguards.⁷⁷ The court narrowly defined Parra's liberty interest as "liberty in the United States by someone no longer entitled to remain in this country."⁷⁸ Further, the court reasoned that, because Parra conceded that he was removable, "the probability of error is zero."⁷⁹ Therefore, the court had little trouble holding that mandatory predetention of criminal aliens is "plainly within the power of Congress" and consistent with due process.⁸⁰

The Third Circuit came to a different conclusion in 2001 in *Patel v. Zemski*.⁸¹ First, the court cited *Parra*⁸² to hold that Congress had not restricted judicial review of the constitutionality of the act.⁸³ It then concluded that the right to be free from physical restraint is a

General's decision to apply § 1226 as well as the Attorney General's decision that Parra was ineligible for release. *Parra*, 172 F.3d at 957. The court went on, however, to state that this did not preclude review of the statute itself. *Id.* (citing *Johnson v. Robison*, 415 U.S. 316, 366-374 (1974)). The court was thus able to avoid the constitutionality of suspending the writ of habeas corpus in these circumstances. *Id.* at 957.

76. *Id.*

Parra's legal right to remain in the United States has come to an end. An alien in Parra's position can withdraw his defense of the removal proceeding and return to his native land, thus ending his detention immediately. He has the keys in his pocket. A criminal alien who insists on postponing the inevitable has no constitutional right to remain at large during the ensuing delay, and the United States has a powerful interest in maintaining the detention in order to ensure that removal actually occurs.

Id.

77. *Id.* at 958.

78. *Parra*, 172 F.3d at 958.

79. *Id.* The court pointed out that Parra did not argue in his petition for writ that he was entitled to remain in the United States. *Id.* at 956.

80. *Id.*

81. *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001). Vinodbhai Bholidas Patel, a citizen of India, came to the United States in 1984, became a lawful permanent resident in 1990, and had his application for naturalization approved by the INS in 1996. *Id.* at 303. Because he employed an alien and provided the alien with a place to live, Patel was convicted of harboring an undocumented alien on January 10, 2000. *Id.* (noting that the conviction was for a violation of 8 U.S.C. § 1324(a)(1)(A)(iii) (2001)). *Id.* On September 18, 2000, while Patel was serving a sentence of five months in prison and five months of in home probation, the INS charged that this conviction was an aggravated felony, subjecting Patel to removal. *Id.* The INS took Patel into custody when he was released from prison in January 2001. *Id.* Patel made an unsuccessful attempt to challenge the classification of his crime as an aggravated felony for the purposes of 8 U.S.C. § 1101(a)(43)(N), appealed, and filed this petition for a writ of habeas corpus while his appeal was pending. *Patel v. Zemski*, 275 F.3d 299, 303-04 (3d Cir. 2001). He remained in the INS' custody at the time of this decision in December 2001. *Id.* at 303. Patel challenged mandatory detention as applied, claiming that both his substantive and procedural due process rights were violated. *Id.* at 306-07.

82. See *supra* notes 73-75 and accompanying text.

83. *Patel*, 275 F.3d at 302.

fundamental right⁸⁴ and applied strict scrutiny, which required “the statute’s infringement on that right [to be] narrowly tailored to serve a compelling state interest.”⁸⁵ The court held that due process did require an evaluation of the alien’s threat to the community and his risk of flight, which the mandatory detention provision did not afford.⁸⁶

The Tenth Circuit also held the mandatory detention provision of § 1226 unconstitutional as applied in *Phu Chang Hoang v. Comfort*.⁸⁷ This court rejected the Seventh Circuit’s conclusion that aliens who are subject to § 1226 have forfeited their right to liberty⁸⁸ and held that “[t]he liberty interest of a person who is detained pending deportation proceedings is . . . fundamental.”⁸⁹ Though the court found the

84. *Id.* at 314. Pursuant to Congress’ broad power over immigration and naturalization, it may make rules regarding aliens that it could not make regarding citizens; however, these rules remain subject to due process limitations. *Id.* at 307-08. The court reasoned that the Seventh Circuit had confused the merits of the alien’s removal proceedings with the question of whether the alien should be detained pending those proceedings. *Id.* at 314. See *supra* notes 76-80 and accompanying text (discussing the Seventh Circuit’s opinion in *Parra*). The court also noted that, while holding in *Zadvydas* considered the indefinite length of detention critical, Patel’s eleven-month detention was lengthy. *Patel*, 275 F.3d at 309 (pointing out that Patel’s detention by the INS was nearly twice as long as his detention for the substantive crime). See also *supra* notes 70-72 (discussing *Zadvydas v. Davis*).

85. *Patel*, 275 F.3d at 310.

86. *Id.* at 311. The court reasoned that the government’s objectives of preventing aliens from evading hearings and creating a danger justified detaining only those who presented such risks. *Id.* at 312. Because the aliens were already entitled to an initial hearing as to the merits, it would not be a great burden to incorporate into this hearing an individualized determination of risk of flight and danger. *Id.*

87. *Phu Chang Hoang v. Comfort*, 282 F.3d 1247, 1261 (10th Cir. 2002), *vacated*, 123 S. Ct. 1963, (2003). The court reviewed the cases of *Thanh Quoc Nguyen*, *Phu Chang Hoang*, and *Pham Qua Trung*. *Id.* at 1252. Nguyen entered the United States at age 15 in 1991, pled guilty to a misdemeanor offense in 1999, was detained by the INS in about November 2000, and petitioned for his writ of habeas corpus in February 2001. *Id.* Hoang entered the United States at the age of 3 in 1979, pled guilty to two counts of aggravated robbery in 1993, served eight and one-half years, was detained by the INS in November 2000, and petitioned for his writ in January 2001. *Id.* at 1252-53. Trung entered the United States at the age of fifteen in 1987, pled guilty to two counts of forgery in 2000, was detained by the INS in March 2001, and petitioned for his writ on April 27, 2001. *Id.* at 1253.

88. *Id.* at 1255-56. The court relied on the Supreme Court’s decision in *Zadvydas* for the proposition that, even after the INS orders aliens to be removed, they retain a liberty interest sufficient to implicate due process protections. *Phu Chang Hoang*, 282 F.3d at 1256 (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001)). The court reasoned that deportation “[a]liens who are lawful permanent residents of and are physically present in the United States are persons within the protection of the Fifth Amendment.” *Id.*

89. *Id.* at 1257 (citing for support *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981)). The court reasoned that the liberty interest of aliens detained pending deportation proceedings is no less fundamental than the interest of a person detained pending a trial. *Id.* (comparing these detentions to the detentions in *United States v. Salerno*, 481 U.S. 739, 750-51 (1987)). While the court did recognize Congress’ plenary power over immigration, it found that Congress’ “implementation of this authority must comport with the Constitution.” *Id.* at 1257. The

government's interests in ensuring attendance at deportation proceedings and "protecting the public from dangerous aliens" compelling, it found that § 1226 was not narrowly tailored because it created an irrebuttable presumption that all aliens who are subject to this section are flight risks and a danger to the public.⁹⁰

The Fourth Circuit considered a facial and an as-applied challenge⁹¹ to the mandatory detention provision of § 1226 in the case of *Welch v. Ashcroft*.⁹² The court first rejected the facial challenge⁹³ after it concluded that the right to be free from restraint during pre-deportation hearings was not a fundamental right.⁹⁴ It reasoned that § 1226 is not punitive and the government's interests of reducing risk of flight and protecting the community were legitimate interests.⁹⁵ Although the

court found that this statute was a matter of implementation of Congress' power, rather than "the political substantive decision of who is to be admitted or excluded." *Id.* at 1258.

90. *Phu Chang Hoang*, 282 F.3d at 1259. The court reasoned that, even though Congress may have found that many aliens did not appear for their proceedings, this "risk of flight posed by some criminal aliens [was] insufficient to justify the mandatory detention of all aliens who meet the criteria under [§ 1226]." *Id.* at 1259-60. In addition, the crimes that subject aliens to mandatory detention are not limited to dangerous offenses, so it was inappropriate to assume that all of these aliens were dangerous. *Id.* at 1260. Further, the court noted that in the three cases it was reviewing, the district court had ordered bond hearings, and in each case, the alien was released after an individualized determination. *Id.*

91. *Welch v. Ashcroft*, 293 F.3d 213, 228 (4th Cir. 2002), *overruled by* *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745.

92. *Welch v. Ashcroft*, 293 F.3d 213, 228 (4th Cir. 2002), *overruled by* *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003). Ricardo Antonio Welch, Jr. became a legal permanent resident at age ten. *Id.* at 215. In the same year that Welch was honorably discharged from service in the United States Navy and Navy Reserves, he pled guilty to four felony counts. *Id.* After the INS ordered him removed and took him into custody, a state court vacated his felonies. *Id.* at 216. As part of a plea bargain, Welch then pled guilty to six misdemeanor charges of simple assault and one misdemeanor charge of illegally carrying or wearing a handgun. *Id.* The INS continued to detain Welch, though it changed its basis to his misdemeanor firearm conviction. *Id.*

93. *Welch*, 293 F.3d at 224.

94. *Id.* The court explained that the Supreme Court in *Salerno* described the liberty interest involved in being free from physical restraint as being of a "fundamental nature," but it did not explicitly state that pretrial detention is a fundamental right. *Id.* at 221 (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987)). Further, the Welch court found that "the Supreme Court has never added freedom from incarceration to the short list of fundamental rights." *Id.*

95. *Id.* at 222-23. The court reasoned that, because a fundamental liberty interest was not implicated, a two-prong test should apply. *Id.* at 222. "First, such detention must be reasonably related to legitimate government interests. Second, it is axiomatic that due process requires that a pretrial detainee not be punished." *Id.* (internal quotations omitted). To determine whether detention is punitive, the court evaluated whether there was an express intent to punish and, if not, was there "no purpose other than punishment, or is [it] excessive in light of its goals." *Id.* (citing *Schall v. Martin*, 467 U.S. 253, 269 (1984) for this standard). The court reasoned that "[d]eportation itself is not punitive" so § 1226 was not punitive on its face. *Id.* It then concluded

court reasoned that it could not uphold a facial challenge to § 1226,⁹⁶ it did find that § 1226 was unconstitutional as applied to Welch.⁹⁷ It reasoned that there was little support to conclude that Welch posed a flight risk or a danger and it concluded that his fourteen months' incarceration fell "outside any range that comports with due process in these circumstances."⁹⁸

III. STATEMENT OF THE CASE

A. *Statement of Facts*

Hyung Joon Kim ("Kim"), a citizen of Korea, entered the United States on March 10, 1984 at the age of six and became a legal permanent resident of the United States on March 28, 1986.⁹⁹ In 1996, at the age of 18, Kim was convicted of first-degree burglary in state court in California.¹⁰⁰ Two years later, Kim was convicted of petty theft with

that the government's interest in reducing flight of aliens and providing for the safety of the community from dangerous aliens were both legitimate interests. *Id.* at 222-223.

96. *Welch*, 293 F.3d at 224. The court noted that the underlying criminal convictions were subject to due process protections and that aliens should be aware that committing crimes "may subject them to drastic and unwelcome consequences above and beyond mere judicial punishment, up to and including removal." *Id.* at 223-24. The court also discussed challenges that the government faces when "dealing with aliens" and Congress' plenary power regarding immigration. *Id.* at 224. The court concluded that § 1226 would not "violate due process under every possible set of circumstances" and it was thus able to survive a facial challenge. *Id.*

97. *Id.* at 227.

98. *Welch*, 293 F.3d at 227. The court found that the only evidence of dangerousness was Welch's record of misdemeanors, which did not support a finding that he was so dangerous that he should not be released. *Id.* at 225-226. The court reasoned that such misdemeanors were unlike aggravated felonies, which are "particularly serious crime[s]." *Id.* at 226. To determine whether Welch's detention was excessive in relation to the goals of the statute, the court looked at such factors as "the nature of the deprivation, . . . the conditions of confinement, . . . the procedures afforded detainees prior to adjudication, . . . the justification for the continued detention. . . [and] [t]he actual length of the detention." *Id.* (internal citations omitted). Even though the court recognized that detention pending a removal order "features a clearly identifiable event marking completion of the detention period (i.e., issuance of a final order)," there is still "no clearly identifiable deadline by which that event must take place." *Id.* Thus, the same concern with indefinite detention that arose in *Zadvydas* was implicated here. *Id.* at 226. In fact, the court noted that "Welch's 14 months in detention is five months longer than the 90 day § 1231(a)(2) and six-month *Zadvydas* limits combined." *Welch*, 293 F.3d at 226. *See also supra* notes 70-72 for a discussion of *Zadvydas v. Davis*.

99. *Hyung Joon Kim v. Schiltgen*, No. C 99-2257 SI, 1999 U.S. Dist. LEXIS 12511, at *1-2 (N.D. Cal. Aug. 10, 1999) (granting Kim's petition for a writ of habeas corpus and ordering the government to provide a bail hearing), *aff'd sub nom*, *Hyung Joon Kim v. Ziglar*, 276 F.3d 523 (2002), *rev'd sub nom*, *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003).

100. *Hyung Joon Kim v. Schiltgen*, No. C 99-2257 SI, 1999 U.S. Dist. LEXIS 12511, at *2 (N.D. Cal. Aug. 10, 1999).

priors and sentenced to three years imprisonment.¹⁰¹ Pursuant to 8 U.S.C. § 1226(c),¹⁰² the INS detained Kim on February 2, 1999, the day after he was released,¹⁰³ and charged him with being deportable due to his convictions.¹⁰⁴

B. Procedural History

On May 17, 1999, Kim filed a petition for a writ of habeas corpus,¹⁰⁵ arguing that his detention without bail was a violation of the Due Process Clause of the Fifth Amendment.¹⁰⁶ The United States District Court for the Northern District of California held that the mandatory detention provision of 8 U.S.C. § 236 was a violation of the substantive and procedural due process rights of criminal aliens and ordered the INS to provide Kim with an individualized bond hearing.¹⁰⁷ The INS released Kim on a \$5,000 bond and appealed the judgment of the district court.¹⁰⁸

On January 9, 2002,¹⁰⁹ the United States Court of Appeals for the Ninth Circuit held that the no-bail provision of 8 U.S.C. § 236(c)(1) was constitutional on its face, though unconstitutional as applied.¹¹⁰ Therefore, the court affirmed the district court's order requiring the INS to hold a bail hearing for Kim.¹¹¹ The INS then petitioned for writ of certiorari to the United States Supreme Court, which the Court granted on June 28, 2002.¹¹²

101. *Ziglar v. Hyung Joon Kim*, 276 F.3d 523, 526 (9th Cir. 2002).

102. 8 U.S.C. § 1226(c) (2000) provides that “[t]he Attorney General shall take into custody any alien who . . . (B) is deportable by reasons of having committed any offense covered in section . . . 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title.”

103. *Huang Joon Kim*, 538 U.S. at 513.

104. *Id.*

105. See 28 U.S.C. § 2241 (2000) (granting statutory power to grant the writ). Habeas corpus is defined as “[a] writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.” BLACK’S LAW DICTIONARY DELUXE 715 (7th ed. 1999).

106. *Ziglar*, 276 F.3d at 526.

107. *Hyung Joon Kim v. Schiltgen*, No. C 99-2257 SI, 1999 U.S. Dist. LEXIS 12511, at *29 (N.D. Cal. Aug. 10, 1999) (granting Kim’s petition for a writ of habeas corpus and ordering the government to provide a bail hearing), *aff’d sub nom*, *Hyung Joon Kim v. Ziglar*, 276 F.3d 523 (2002), *rev’d sub nom*, *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003).

108. *Ziglar*, 276 F.3d at 526 (holding that “due process requires [the INS] to hold a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community”).

109. *Id.* at 523.

110. *Id.* at 539.

111. *Id.*

112. *Demore v. Hyung Joon Kim*, 536 U.S. 956 (2002) (granting certiorari).

C. *United States Supreme Court Decision*

1. Did Congress Restrict Habeas Corpus Review?

a. Majority Opinion

A splintered¹¹³ United States Supreme Court reversed the judgment of the Court of Appeals for the Ninth Circuit.¹¹⁴ Chief Justice Rehnquist issued a two-part majority opinion, which only Justice Kennedy joined entirely,¹¹⁵ though he also wrote a brief concurring opinion. In part I of the majority's opinion, which Justices Souter, Stevens, Ginsburg, Breyer, and Kennedy joined, the majority raised *sua sponte*¹¹⁶ the issue of whether 8 U.S.C. § 1226(e)¹¹⁷ precluded review of Kim's challenge of his detention.¹¹⁸ The majority explained that, for Congress to preclude habeas review, it must provide "a particularly clear statement" of such intent.¹¹⁹ The majority found no such explicit provision in § 1226(e).¹²⁰

113. *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003). The Justices filed five separate opinions, with only Justice Kennedy joining the majority opinion in its entirety. *Id.* at 531-32. Three justices who joined in judgment filed an opinion written by Justice O'Connor, which disagreed with the majority's holding that the Court had jurisdiction to hear the case. *Id.* at 533-40. In two other opinions, one written by Justice Souter and one written by Justice Breyer, four other justices concurred with the majority's holding that the Court had jurisdiction to hear the case, but dissented from the majority's holding that mandatory detention without bail of criminal aliens pursuant to 8 U.S.C. § 1226(c) (2000) did not violate the Due Process Clause of the Fifth Amendment. *Id.* at 540-79.

114. *Id.* at 531-32.

115. *Id.* (Kennedy, J. concurring)

116. *Sua sponte* is defined as "[w]ithout prompting or suggestion; on its own motion." BLACK'S LAW DICTIONARY DELUXE 1437 (7th ed. 1999).

117. 8 U.S.C. § 1226(e) (2000).

(e) Judicial Review. 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.

Id.

118. *Hyung Joon Kim*, 538 U.S. at 516. Justice Kennedy's "query . . . opened the morning's colloquy between bench and bar with a clear curveball—neither the government's filings nor those of the respondent were concerned with this aspect of judicial review." *Supreme Court Refuses Detention Secrecy Case; Accepts Mariel Cuban's Indefinite Detention Challenge; Upholds detention During Removal Proceedings*, Interpreter Releases, Report and Analysis of Immigration and Nationality Law, 81 NO. 3 INTERPRETER RELEASES 73, 78 (2004). Even though Justice Kennedy raised this issue during oral argument, he joined the majority's opinion, which held that judicial review was not precluded. *Hyung Joon Kim*, 538 U.S. at 538.

119. *Hyung Joon Kim*, 538 U.S. at 516 (citing *INS v. St. Cyr*, 533 U.S. 289, 308-309 (2001)). In March 1996, Enrico St. Cyr was convicted of a crime that made him deportable. *St. Cyr*, 533 U.S. 293, 293 (2001). Although this conviction occurred before enactment of the Effective Death

b. Justice O'Connor Concurring in Part and Concurring in Judgment

Justice O'Connor filed an opinion, which Justices Scalia and Thomas joined, that concurred in part and in judgment.¹²¹ This opinion expressed disagreement with the majority's holding that the Court had jurisdiction to hear this case.¹²² Although she agreed with the majority's standard of requiring a clear statement by Congress to repeal habeas jurisdiction,¹²³ she read 8 U.S.C. § 1226(e) to contain the requisite clear statement.¹²⁴

Penalty Act and the Illegal Immigration Reform and Immigration Responsibility Act, the Attorney General claimed these acts precluded him from using any discretion with regard to St. Cyr's request for a waiver of deportation. *Id.* St. Cyr filed a habeas corpus petition, claiming that the 1996 acts did not apply to convictions that occurred before their enactment. *Id.* The District Court accepted his petition and found for him and the Court of Appeals for the Second Circuit affirmed. *Id.*

In an opinion written by Justice Stevens, the Supreme Court held there is a "strong presumption in favor of judicial review of administrative action" and required "a clear statement of congressional intent to repeal habeas jurisdiction." *St. Cyr*, 533 U.S. at 298 (citing *Ex parte Yerger*, 8 U.S. 85, 102 (Wall. 1869)). The Court clarified that "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect repeal." *Id.* at 299 (citing *Yerger*, 8 U.S. at 105). Applying this standard, the Court found that it was able to hold that the statute was not sufficiently clear, and thus able to avoid "a construction that would raise serious constitutional questions." *Id.* at 314. The Court went on to hold that elimination of the Attorney General's discretion did not apply retroactively. *Id.* at 326.

120. *Hyung Joon Kim*, 538 U.S. at 517. The Court explained that "[s]ection 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the legislation authorizing his detention without bail." *Id.* To come to this conclusion, the Court reasoned that the limitation on judicial review applied only to discretionary judgments, but Kim was challenging the statutory framework that permitted his detention without bail rather than any discretionary judgment. *Id.* See *supra* note 60 (giving the text of § 1226(e)).

121. *Hyung Joon Kim*, 538 U.S. at 533-40 (O'Connor, J., concurring in part).

122. *Id.* at 533 (O'Connor, J., concurring in part).

123. *Id.* at 533.

124. *Id.* (O'Connor, J., concurring in part). "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." *Id.* at 535. See *supra* note 60 for the text of 8 U.S.C. § 1226(e) (2000).

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

Justice O'Connor then evaluated whether this limitation on habeas corpus violated the Suspension Clause.¹²⁵ ¹²⁶ Even though she provided an analysis of the Suspension Clause,¹²⁷ she concluded that she “need not conclusively decide the thorny question whether 8 U.S.C. § 1226(e) violates the Suspension Clause” because the majority determined there was jurisdiction.¹²⁸

jurisdiction. That’s one answer that I could give you, Your Honor, and based on 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?

United States Supreme Court Official Transcript at 32-33, *Demore v. Hyung Joon Kim*, 123 S. Ct. 1708 (2003) (No. 01-1491).

125. U.S. CONST. art. I, § 9, cl. 2. “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.” *Id.*

126. *Hyung Joon Kim*, 538 U.S. 537-40 (O’Connor, J., concurring in part). Justice O’Connor noted that “[t]he 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.” *Id.* at 537-38 (O’Connor, J., concurring in part) (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) and *Felker v. Turpin*, 518 U.S. 651, 663-664 (1996)). She also noted that “until very recently, the writ was not generally available to aliens to challenge their detention while removal proceedings were ongoing.” *Id.* at 539 (O’Connor, J., concurring in part).

127. *Id.* at 537-40 (O’Connor, J., concurring in part) (reasoning that “[t]he 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”).

128. *Hyung Joon Kim*, 538 U.S. at 540 (O’Connor, J., concurring in part). The parties did not brief this issue. United States Supreme Court Official Transcript at 62-63, *Demore v. Hyung Joon Kim*, 123 S. Ct. 1708 (2003) (No. 01-1491) (containing oral argument before the Supreme Court by Theodore B. Olson on behalf of the United States and Judy Rabinovitz on behalf of Hyung Joon Kim).

QUESTION: General Olson, I don’t want to intrude 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.)

Id.

2. Does Mandatory Detention Violate the Due Process Clause of the Fifth Amendment?

a. Majority Opinion

Part II of the majority opinion, which Justices O'Connor, Scalia, Thomas, and Kennedy joined, held that detention of “a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings” does not violate the Due Process Clause of the Fifth Amendment.¹²⁹ The majority began its analysis by evaluating the policy behind mandatory detention pending removal hearings¹³⁰ and held that “[s]uch detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.”¹³¹

The majority noted that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”¹³² The majority also

129. *Hyung Joon Kim*, 538 U.S. at 530-33.

130. *Id.* at 516-22. The majority found a “wholesale failure by the INS to deal with increasing rates of criminal activity by aliens.” *Id.* at 518 (citing, for example, *Criminal Aliens in the United States: Hearings Before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs*, 103d Cong., 1st Sess. (1993); S. REP. NO. 104-48, at 1 (1995)). The majority also cited S. REP. NO. 104-249, at 7 (1996) (noting that “aliens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others.”), DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, IMMIGRATION AND NATURALIZATION SERVICE, DEPORTATION OF ALIENS AFTER FINAL ORDERS HAVE BEEN ISSUED, REP. NO. I-96-03 (Mar. 1996) (noting that the INS’ failure to detain aliens during deportation proceedings was a major cause of its failure to remove deportable criminal aliens), S. REP. NO. 104-48, at 23 (noting that limitations on funding and detention space affected release determinations when the Attorney General had broad discretion to conduct individualized bond hearings), and S. REP. NO. 104-48 at 2 (noting that more than twenty percent of deportable criminal aliens who the INS released failed to appear for their removal hearings). *Id.* at 518-19.

131. *Hyung Joon Kim*, 538 U.S. at 527-28. The Court also noted that Kim did not challenge the general authority of Congress to remove criminal aliens and had conceded that he was deportable. *Id.* at 522-23. The majority found the concession important because Kim did not receive the procedural protection provided under 8 U.S.C. § 1226(c) and the Court did not need to reach Kim’s argument that his petty theft crime did not qualify as an aggravated felony, which he brought up for the first time in his brief to the Supreme Court. *Id.* at 523 n.6.

132. *Id.* at 521 (citing *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)). For guidance on the constitutional rights of aliens, the majority looked to *Zadvydas v. Davis*, 533 U.S. 678 (2001) (Kennedy, J., dissenting); *Reno v. Flores*, 507 U.S. 292 (1993) (reviewing the constitutional rights of juveniles during the deportation process); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (noting that aliens are entitled to constitutional protections when they are within the United States and have developed substantial connections with the United States); *Fiallo v. Bell*, 430 U.S. 787 (1977) (noting that the power to expel and exclude aliens is a power of the political branch and

looked to *Carlson v. Landon*¹³³ and *Reno v. Flores*,¹³⁴ which both upheld detention of aliens who were deportable.¹³⁵ The majority distinguished the Court's previous holding in *Zadvydas v. Davis*¹³⁶ by noting that *Zadvydas* involved removal that was "no longer practically attainable" and the detention had no foreseeable termination.¹³⁷ This case, however, involved pre-deportation detention, which the majority observed "lasts roughly a month and a half in the vast majority of cases in which [8 U.S.C. § 1226] is invoked, and about five months in the minority of cases in which the alien chooses to appeal."¹³⁸ The majority reasoned that, while aliens are entitled to due process of law in deportation proceedings,¹³⁹ Congress need not use the "least burdensome means to accomplish its goal" when dealing with deportable aliens.¹⁴⁰ The majority upheld detention during such proceedings¹⁴¹ and rejected Kim's claim.¹⁴²

b. Justice Kennedy Concurrs

Justice Kennedy filed a brief concurring opinion in which he reasoned that "due process requires individualized procedures to ensure there is at least some merit to the [INS] charge and, therefore, sufficient justification to detain a lawful permanent resident alien¹⁴³ pending a

thus largely immune from judicial review); and *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (noting that although aliens are entitled to certain constitutional protections, policy toward aliens is exclusively entrusted to the political branch and largely immune from judicial review). *Id.* at 521-23.

133. *Carlson v. Landon*, 342 U.S. 524 (1952). Active members of the Communist Party may be detained without bail pending deportation. *Id.* at 538. The Court reasoned that, where Congress has granted the Attorney General the discretion of whether to grant bail during deportation hearings, the Attorney General's decision "can only be overridden where it is clearly shown that it was without a reasonable foundation." *Id.* at 540-41 (internal quotations omitted). *See supra* notes 61-69 and accompanying text (reviewing *Carlson*).

134. *Reno*, 507 U.S. 292 (upholding the INS' policy of releasing alien juveniles while deportation proceedings are pending only when there is a parent, legal guardian, or certain other adult relatives available to take the juveniles into their care).

135. *Hyung Joon Kim*, 538 U.S. at 523-26.

136. *See supra* notes 70-72 and accompanying text (reviewing the *Zadvydas* opinion)

137. *Hyung Joon Kim*, 538 U.S. at 527-31.

138. *Id.* at 530-31 (citing Brief for Petitioners at 39-40, *Demore v. Hyung Joon Kim*, 123 S. Ct. 1708 (2003) (No. 01-1491)).

139. *Id.* at 522 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)).

140. *Id.* at 528.

141. *Id.* at 522-23.

142. *Id.* at 532.

143. Permanent resident alien is defined as:

[a]n alien admitted to the United States as a lawful permanent resident. . . . Lawful permanent residents are legally accorded the privilege of residing permanently in the

more formal hearing.”¹⁴⁴ He also concluded that the Due Process Clause might preclude detention if it becomes “unreasonable or unjustified.”¹⁴⁵ Kim, however, did have an opportunity to demonstrate that he was not properly included as a criminal alien, which satisfied the Due Process Clause.¹⁴⁶

c. Justice Souter Concurrs with Jurisdiction and Dissents with Merits

Justice Souter filed an opinion, which Justices Stevens and Ginsburg joined, that concurred with the majority’s holding that the Court did have jurisdiction to hear this case, but dissented from the majority’s disposition on the merits.¹⁴⁷ Justice Souter began by disagreeing with the majority’s conclusion¹⁴⁸ that Kim had conceded his deportability.¹⁴⁹ He reasoned that Kim was not able to raise the issue yet because Immigration Court had not yet held a hearing on Kim’s removability.¹⁵⁰

Justice Souter concluded that evaluation of mandatory detention under 8 U.S.C. § 1226(c) must begin with “the traditional doctrine concerning the Government’s physical confinement of individuals.”¹⁵¹

United States. They may be issued immigrant visas by the Department of State overseas or adjusted to permanent resident status by the Immigration and Naturalization Service in the United States.

U.S. DEPARTMENT OF HOMELAND SECURITY, 2002 YEARBOOK OF IMMIGRATION STATISTICS 226 (2003).

144. *Hyung Joon Kim*, 538 U.S. at 538-40 (Kennedy, J., concurring) (citing his dissenting opinion in *Zadvydas v. Davis*, 533 U.S. 678, 721 (Kennedy, J., dissenting) for support).

145. *Id.* (Kennedy, J., concurring).

146. *Id.* (Kennedy, J., concurring). See *infra* note 206 (describing the *Joseph* hearing).

147. *Hyung Joon Kim*, 538 U.S. at 540-76 (Souter, J., dissenting in part).

148. *Id.* at 523 n.6 (discussing the conclusion that Kim conceded he was deportable).

149. *Id.* at 540-43 (Souter, J., dissenting in part).

150. *Id.* (Souter, J., dissenting in part).

151. *Id.* at 542-47 (Souter, J., dissenting in part) (providing an extensive evaluation of precedent regarding the rights of lawful permanent residents). See, e.g., *Landon v. Placencia*, 459 U.S. 21 (1982) (discussing and distinguishing the rights of aliens residing in the United States during deportation proceedings with the rights of aliens who are denied admission to the United States in exclusion proceedings); *Mathews v. Diaz*, 426 U.S. 67 (1976) (noting that the Due Process Clauses of the Fifth and Fourteenth Amendments provide protections to aliens from deprivation of life, liberty or property without due process of law); *In re Griffiths*, 413 U.S. 717 (1973) (holding that a state’s exclusion of aliens from the practice of law violated the Equal Protection Clause); *Woodby v. INS*, 385 U.S. 276 (1966) (discussing that resident aliens may have stronger ties to the United States than some who have become naturalized citizens); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (holding that due process entitles an alien returning from a trip outside the United States to a hearing on the charges underlying an attempt to exclude him); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (holding that aliens who lawfully enter and are residing in the United States are

Justice Souter relied on precedent¹⁵² to conclude that due process requires an individual determination before detention¹⁵³ and therefore Kim's detention "violate[d] both components of due process."¹⁵⁴

d. Justice Breyer also Concurring with Jurisdiction and
Dissenting with Merits

Justice Breyer filed an opinion that concurred in part and dissented

entitled to rights guaranteed by the Constitution, including rights protected by the First Amendment, Fifth Amendment, and the Due Process Clause of the Fourteenth Amendment); *Bridges v. Wixon*, 326 U.S. 135 (1945) (holding that aliens residing in the United States are accorded freedom of speech and of press); *Kaoru Yamataya v. Fisher* ("The Japanese Immigrant Case"), 189 U.S. 86 (1903) (holding that the Fifth Amendment's Due Process Clause gives aliens a right to challenge mistreatment of their person or property); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (holding that aliens residing in the United States are entitled to all of the protections of the Constitution even though they remain subject to Congress's power to order expulsion or deportation); *Lau Ow Bew v. United States*, 144 U.S. 47 (1892) (discussing the jurisdiction of the federal courts to decide questions raised by aliens subject to the Chinese Exclusion Act of 1882, § 6, as amended, 8 U.S.C. § 265); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1839) (interpreting "the people" as used in the Fourth Amendment and noting that aliens are entitled to constitutional protections when they are within the United States and have developed substantial connections with the United States).

152. *Hyung Joon Kim*, 538 U.S. at 548-53 (Souter, J., dissenting in part). Cases on which Justice Souter relied included *Reno v. Flores*, 507 U.S. 292 (1993) (reviewing the constitutional rights of juveniles during the deportation process); *Foucha v. Louisiana*, 504 U.S. 71 (1992) (holding that a state may confine a mentally ill person only if it shows by clear and convincing evidence that the person is both mentally ill and dangerous); *United States v. Salerno*, 481 U.S. 739 (1987) (noting that "in our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); *Addington v. Texas*, 441 U.S. 418 (1979) (holding that the Due Process Clause of the Fourteenth Amendment requires a clear and convincing standard of proof in civil commitment hearings for the purpose of involuntarily committing individuals to state mental hospitals); *Jackson v. Indiana*, 406 U.S. 715 (1972) (holding that a criminal defendant who is found to be incompetent to stand trial cannot be held more than a reasonable time to determine whether there is a substantial probability that he will attain capacity in the foreseeable future and he must then either be released subject to civil commitment proceedings or held as long as justified by progress toward capacity).

153. *Hyung Joon Kim*, 538 U.S. at 540-76 (Souter, J., dissenting in part).

154. *Id.* at 558 (Souter, J., dissenting in part). Justice Souter addressed the majority's effort to distinguish *Zadydas* by arguing that, even though that case involved detention after a removal order, the same principles that limited post removal order detention also limit the power to detain pending deportation proceedings. *Id.* at 560-62 (Souter, J., dissenting in part). In addition, he questioned the majority's interpretation of statistics supporting the need for detention, as well as the majority's reliance on *Carlson v. Landon* and *Reno v. Flores* because those cases involved discretionary detention rather than mandatory detention. *Id.* at 568-76 (Souter, J., dissenting in part). Though he did not question the power to detain aliens to avoid flight or prevent danger to the community, he phrased the issue as "whether that power may be exercised by detaining a still lawful permanent resident alien when there is no reason for it and no way to challenge it." *Id.* at 576 (Souter, J., dissenting in part). So phrased, he found "[t]he Court's holding that the Due Process Clause allows this under a blanket rule is devoid of even ostensible justification in fact and at odds with the settled standard of liberty." *Id.*

in part.¹⁵⁵ He joined Part I of the majority's opinion, which held that the court did have jurisdiction to decide this case.¹⁵⁶ Although Justice Souter found that the INS could hold aliens who concede that they are deportable for a limited time without bail,¹⁵⁷ he agreed with Justice Souter's opinion that Kim had not conceded his deportability.¹⁵⁸

Justice Breyer analyzed the text of the statute to conclude that mandatory detention did not apply until an alien "is deportable."¹⁵⁹ Until that is determined, and in the absence of other bail standards for aliens who are not yet deportable, he reasoned that the INS should apply the criminal justice system bail standards.¹⁶⁰ He thus interpreted the statute to apply these bail standards to an alien whose claim that he is "not deportable is (1) not interposed solely for purposes of delay and (2) raises a question of 'law or fact' that is not insubstantial."¹⁶¹ Because he found that Kim's arguments were "neither insubstantial nor interposed solely for purposes of delay," mandatory detention did not apply, and the Court should have remanded the case to apply the criminal justice bail standards.¹⁶²

IV. ANALYSIS

This note will focus on the Supreme Court's departure in *Demore v. Hyung Joon Kim* from typical substantive due process analysis. I will argue that the Court confused equal protection analysis with due process analysis and erred when it relied on statistics to dispense with individualized determinations of whether detention is necessary.¹⁶³ This departure will impact aliens generally as well as the large population of

155. *Hyung Joon Kim*, 538 U.S. at 576-79 (Breyer, J., concurring in part and dissenting in part).

156. *Id.* at 576.

157. *Id.* Justice Breyer reasoned that "an alien's concession that he is deportable seems to me the rough equivalent of the entry of an order of removal." *Id.* at 576-77. Time limits of the kind in *Zadvydas v. Davis*, 533 U.S. 678, would then apply. *Id.* at 577-78 (Breyer, J., dissenting in part). See also *supra* notes 70-72 and accompanying text (reviewing the decision in *Zadvydas*).

158. *Hyung Joon Kim*, 538 U.S. at 576 (Breyer, J., dissenting in part) (citing *id.* at 540-43 (Souter, J., dissenting in part)).

159. *Id.* at 577-79 (Breyer, J., dissenting in part). Justice Breyer looked at the text of the statute and concluded that, because it states that the Attorney General shall "take into custody any alien . . . is deportable" it does not apply to "one who may, or may not, fall into that category." *Id.* at 578-79 (quoting in part 8 U.S.C. § 1226(c)(2000)).

160. *Id.* (referring to the standards in 18 U.S.C. § 3143(b) (2000)).

161. *Id.* (Breyer, J., dissenting in part).

162. *Hyung Joon Kim*, 538 U.S. at 577-78 (Breyer, J., dissenting in part).

163. See *infra* notes 174-184 and accompanying text (arguing that the Court merged equal protection and due process analysis).

criminal aliens.¹⁶⁴ Further, this note will evaluate the interaction of this holding with post-September 11 attempts to increase our detention power over aliens such as the detentions conducted by the INS during the FBI investigation immediately after the September 11 terrorist attacks,¹⁶⁵ the INS' automatic stay rule,¹⁶⁶ and the alien detention provisions of the USA PATRIOT Act.¹⁶⁷

A. Due Process Analysis

Although the Supreme Court did acknowledge and affirm that aliens are entitled to due process protections,¹⁶⁸ its evasion of established due process standards and analysis¹⁶⁹ weakens due process protections for aliens and may well serve as a foundation for a future erosion of protections for citizens.¹⁷⁰ Not only did the Court confuse the suspect

164. See Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Mandatory Predeportation Detention Provision of Immigration and Nationality Act (8 U.S.C.A. § 1226(c)) as Amended*, 187 A.L.R. Fed. 325 (2003) (describing current case law regarding mandatory predeportation detention). See also *supra* notes 10-12 and accompanying text (suggesting the impact of this decision).

165. See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 69-71 (2003) [hereinafter SEPTEMBER 11 DETAINEES] (describing the process by which aliens were detained immediately after the September 11 terrorist attacks and the failures associated with this process). See also *infra* notes 227-240 and accompanying text (reviewing the post-September 11 responses that affected aliens).

166. Immigration Court Rules of Procedure, 8 CFR § 1003.19(i)(2) (2003) (staying the decision of an Immigration Judge to release an alien during the time that the INS seeks appeal of that decision). See also *infra* notes 241-247 and accompanying text (discussing the automatic stay rule and its implementation).

167. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), 107 Pub. L. No. 56, 115 Stat. 272 (2001) (8 U.S.C. § 1226a) [hereinafter USA PATRIOT Act]. See also *infra* notes 248-262 and accompanying text (reviewing the USA PATRIOT Act's provisions affecting terrorist aliens).

168. *Hyung Joon Kim*, 538 U.S. at 523. "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Id.* (quoting *Reno v. Flores*, 507 U.S. 292 (1993)).

169. *Id.* at 528 (reasoning that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal). See also *supra* notes 139-40 and accompanying text (discussing the *Hyung Joon Kim* holding). Typical due process jurisprudence requires any infringement on a fundamental right to be "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 301-02.

170. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 989 (2002).

While security measures have often been initially targeted at immigrants, they have just as often laid the groundwork for future deprivations of citizens' rights as well. What we do to immigrants creates a precedent that then makes it more thinkable to do the same to citizens. Thus, from the long view, all citizens have a stake in how we treat aliens in times of crisis. Unfortunately, not many citizens take the long view.

classification analysis of equal protection with the fundamental interest analysis of substantive due process,¹⁷¹ but it also allowed the categorization of a group of people that would otherwise be entitled to individualized determinations of the necessity of their detention.¹⁷² Furthermore, the Court's modification of substantive due process analysis creates questions about what the standard is, and to whom this modification applies.¹⁷³

1. Blurring Suspect Classification Analysis with Fundamental Interest Analysis

In *Zadvydas v. Davis*, the Court decided that detention of aliens during immigration proceedings does implicate a protected liberty interest.¹⁷⁴ Rather than addressing this question as such, the Court in *Demore v. Hyung Joon Kim* placed much of its emphasis on the ability of Congress to treat aliens differently than citizens.¹⁷⁵ Precedent does support this assertion; however, this precedent has been in the context of equal protection analysis,¹⁷⁶ Fourth Amendment protections to aliens

Id. at 989.

171. See *infra* notes 174-184 and accompanying text (arguing that the Court blurred suspect class and fundamental interest analysis).

172. See *infra* notes 185-196 and accompanying text (arguing that the Court inappropriately evaded the narrowly tailored requirement). David Cole argues that this lack of an individualized determination transforms the detention of aliens from a civil detention into punishment. David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1011-12 (2002). Cole avoids the fundamental right analysis, relying instead on precedent such as *Salerno*. *Id.* at 1020. He does go on to suggest, however, that mandatory detention of criminal aliens fails rational basis review because "where an alien poses neither a danger nor a flight risk, his removal may be effectuated without detention, and detention therefore serves no legitimate government purpose." *Id.* at 1007, 1021, 1026.

173. See *infra* notes 193-194 and accompanying text (arguing that the Court's decision creates more questions than it answers).

174. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001). The Court responded to an argument that the aliens in *Zadvydas* had a diminished liberty interest because they had been ordered removed by noting that "an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent." *Id.*

175. *Hyung Joon Kim*, 538 U.S. at 521-22 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) for the proposition that Congress can make "rules that would be unacceptable if applied to citizens" when exercising its power over immigration).

176. *E.g.*, *Mathews v. Diaz*, 426 U.S. 67 (1976). Aliens challenged the constitutionality of denial of Medicare Part B supplemental medical insurance for aliens who had not been admitted for permanent residence and resided in the United States for at least five years. *Id.* at 70. The emphasis in this case was one the question of whether Congress could treat aliens differently for the purpose of statutory benefits, which is an equal protection question. *Id.* at 67, 69, 73. Thus, the focus was on whether there was a rational basis for the distinction between aliens and citizens, and whether this distinction was invidious. *Id.* at 73-74.

outside the country, and aliens detained at the borders, rather than substantive due process analysis.¹⁷⁷

Suspect classification analysis and fundamental right analysis are two distinct tests for two distinct protections.¹⁷⁸ Rather than focusing on the characteristics of the right that is infringed to determine what standard of review should apply, equal protection focuses on the characteristics of the group that is discriminated against.¹⁷⁹ That is, the Court will apply strict scrutiny to distinction based on suspect classes, intermediate scrutiny to distinctions based on quasi-suspect classes, and rational basis review to all other distinctions.¹⁸⁰ However, equal

The United States District Court for the Southern District of Florida tested the statute's distinction according to the equal protection component of the Due Process Clause of the Fifth Amendment and held that it was "invalid because it was not both rationally based and free from invidious discrimination." *Id.* at 73. The Supreme Court reversed, in part because it held that the statute survived equal protection analysis because "[t]he fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is invidious." *Id.* at 80. Although the Court reasoned that there should be a "narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization" and noted that "in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," this was in the context of a claim that denial of a statutory medical insurance program violated equal protection. *Matthews*, 426 U.S. at 69-70, 79-82. For example, the Court concluded that "the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for [a]ll aliens" and reasoned that "[t]he decision to share that bounty [which 'a conscientious sovereign makes available to its own citizens'] with our guests may take into account the nature of the relationship between the alien and this country." *Id.* at 80.

177. See, e.g., *Reno v. Flores*, 507 U.S. 292 (1993) (concentrating on the rights of juveniles rather than aliens and holding that, absent an available parent, close relative, or legal guardian, juveniles have no fundamental right to be released from government custody into the care of a private custodian); *United States v. Verdugo-Urquidez*, 494 U.S. 258 (1990) (holding that a search by Drug Enforcement Administration agents in a foreign country conducted to provide evidence in a trial regarding an alien who was apprehended in a foreign country and brought to the United States for trial does not violate either the Fourth Amendment or equal protection portion of the Fifth Amendment); *Fiallo v. Bell*, 430 U.S. 787 (1977) (holding that Congress could give a preference for immigration decisions to the relationship between an illegitimate child and mother without giving it to the relationship between an illegitimate child and father).

178. See *Cole*, *supra* note 170, at 982 (noting that, while aliens may be treated differently than citizens when there is a rational basis, "distinctions between citizens and aliens do not generally justify differential application of First Amendment speech and association rights or Fifth Amendment due process protections").

179. E.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82-84 (2000) (holding that discrimination based on ages does not affect a suspect class). Factors that determine whether the class is suspect include whether the classification is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," whether the class has "been subjected to a history of purposeful unequal treatment," and whether the class is "a discrete and insular minority." *Id.* at 83 (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) and *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976)).

180. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

protection is just one path toward strict scrutiny.¹⁸¹ Fundamental interest analysis is another, but in this case, it was the path not taken.¹⁸² Even if

In considering whether state legislation violates the Equal Protection Clause . . . we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

Id.

The Court applies rational basis review when the distinction is based on neither a suspect class nor quasi-suspect class. *E.g.*, *Kimel v. Florida Bd. of Regents*, 428 U.S. 62, 84 (2000) (explaining that, under rational basis review, the Court “will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the [government’s] actions were irrational”) (*alteration in original*); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458-59, 60 (1988) (holding that a state may allow local school boards to charge for bus service because the poor are not a suspect class, education is not a fundamental right, and therefore the state only needed a rational justification for this action); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (holding a state may not place people in “different classes on the basis of criteria wholly unrelated to the objective of that statute”).

Intermediate scrutiny applies when the distinction is based on a quasi-suspect class such as classifications based on sex or illegitimacy. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (explaining that, when there is a classification based on gender, the state has a burden to show that the “classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives”); *Mills v. Habluetzel*, 456 U.S. 91, 101 (1982) (reasoning that discrimination based on illegitimacy “will survive equal protection scrutiny to the extent [it is] substantially related to a legitimate state interest”); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”).

181. *See Vacco v. Quill*, 521 U.S. 793, (1997) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996) for the proposition that “if a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class, [it will be upheld] so long as it bears a rational relation to some legitimate end”); *Kadrmas*, 487 U.S. at 457-58; *Romer*, 517 U.S. at 620, 631, 635 (concluding that a state constitutional amendment that prohibited any state or local action designed to protect homosexual people served no legitimate government purpose). “Unless a statute provokes strict judicial scrutiny because it interferes with a fundamental right or discriminates against a suspect class, it will ordinarily survive equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.” *Kadrmas*, 487 U.S. at 457-58.

Under the due process guarantee, the Court often employs strict scrutiny (the compelling interest test) in reviewing legislation which limits fundamental constitutional rights. However the Court will also use this standard of review under the equal protection guarantee in two categories of civil liberties cases: first, when the governmental act classifies people in terms of their ability to exercise a fundamental right; second, when the governmental classification distinguishes between persons, in terms of any right, upon some “suspect” basis.

RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.3 (6th ed. 2000).

182. *Hyung Joon Kim*, 538 U.S. at 521, 527-28 (relying on Congress’ plenary power over

Congress may treat aliens differently than citizens based on their lack of citizenship for purposes such as statutory benefits, once the Court determines that Congress has infringed on their fundamental interests, it should apply strict scrutiny.¹⁸³ Here, however, the Court determined that even though a fundamental interest was implicated, strict scrutiny was not the appropriate standard of review.¹⁸⁴

2. Eliminating Hearings and Modifying Due Process

The Court in *Demore v. Hyung Joon Kim* accepted statistical studies to justify a blanket rule of detention rather than requiring individualized determinations of risk of flight and dangerousness.¹⁸⁵ The Court reasoned that these studies were sufficient to support this approach even though other studies suggested another course of action.¹⁸⁶ It pointed to *Los Angeles v. Alameda* to support its reliance on

immigration to justify departing from the strict scrutiny test, such that Congress need not use the least burdensome means).

183. See Richard A. Brisbin, Jr. & Edward V. Heck, *The Battle Over Strict Scrutiny: Coalitional Conflict in the Rehnquist Court*, 32 SANTA CLARA L. REV. 1049 (1992) (tracing the Rehnquist Court's use of heightened scrutiny in cases involving freedom of expression, freedom of association, free exercise of religion, establishment of religion, equal protection, and substantive due process). Brisbin and Heck argue that "the trend during the Rehnquist Court has been toward the use of divergent standards of review in different settings." *Id.* at 1050. With respect to substantive due process cases, they conclude that the Court has struggled internally with defining what are substantive rights more than what level of scrutiny applies when substantive due process rights are implicated. *Id.* at 1097. They also predicted that Justice Brennan's replacement by Justice Souter could lead to "increased resort to deferential standards" in areas other than racial equal protection and political speech where heightened scrutiny had been previously been applied. *Id.* at 1105.

184. *Hyung Joon Kim*, 538 U.S. at 527-28 (avoiding the narrowly tailored requirement of strict scrutiny and instead stating that Congress need not use the least burdensome means).

185. *Id.* at 523, n.6, 527-28. The Court found support in S. REP. 104-48, p. 2 (1995) for the contention that twenty percent of released deportable criminal aliens did not appear for their removal hearings. *Id.* at 518. The Court also pointed to a 1986 study that showed that after criminal aliens were identified as deportable, seventy-seven percent were arrested again before their deportation proceedings began. *Id.* (citing *Hearing on H.R. 3333 Before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary*, 101st Cong. 54, 52 (1989)). But see *Hyung Joon Kim*, 538 U.S. at 562-68 (Souter, J., dissenting in part) (disputing the relevance of the studies and the majority's reliance on them).

186. *Id.* at 527-28. See also OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, INSPECTION REPORT: IMMIGRATION AND NATURALIZATION SERVICE DEPORTATION OF ALIENS AFTER FINAL ORDERS HAVE BEEN ISSUED, 15 (Mar. 1996) [hereinafter DEPORTATION OF ALIENS], available at <http://www.usdoj.gov/oig/inspection/INS/9603/index.htm>.

Limits imposed by personnel, funding, detention space, and related resources affected how soon, and how many, aliens were removed. District managers and [Detention and Deportation] officers in several locations expressed frustration over their inability to remove aliens with final orders. They attributed this inability in part to the workload and the resources for handling it and to humanitarian and political conditions and pressures

these studies.¹⁸⁷ Although *Alameda* allowed the use of studies to support the government's contention that its end was substantial, it did not suggest that the Court should use studies to satisfy the means of strict scrutiny such that the government could group people to deny them individualized process.¹⁸⁸

Determining whether the government has a compelling interest is a step of strict scrutiny that evaluates the ends of the government, and it is for this step that *Alameda* allowed the use of statistics.¹⁸⁹ The Court in *Hyung Joon Kim* evaded the next step, which requires it to determine whether the infringement on a fundamental interest is narrowly tailored and thus evaluate the means chosen to reach the end, and instead used the statistics to conclude that the means were appropriate.¹⁹⁰ It explained that the statistics suggested that the INS was failing to remove sufficient aliens when there had been discretionary release.¹⁹¹ When Kim raised the argument that Congress should have instead addressed the lack of funding and detention space, the real problem behind the INS' failure, the Court departed from strict scrutiny by answering that Congress was not required "to employ the least burdensome means to accomplish its goal" when it "deals with deportable aliens."¹⁹²

interfering with carrying out immigration laws. District officials noted that in making choices about whom to detain, they tended to detain the aliens who can be removed most easily.

Id.

187. *Id.* (citing *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 436-37 (2002)).

188. *Alameda*, 535 U.S. at 434-36 (permitting the use of a study to support a substantial interest in the context of regulating secondary effects of protected speech). The Court did not address the validity of the judgment because the case had come to the Court on summary judgment. *Id.* at 439. However, the Court did reason that shoddy data or reasoning would not be sufficient and one may shift the burden back to the government by showing that study does not support the government's interest or bringing evidence that disputes the government's findings. *Id.* at 438-39.

189. *Id.* at 434-36 (addressing the argument over whether there was a substantial interest (end), not whether the means were appropriate).

190. *Hyung Joon Kim*, 538 U.S. at 528 (observing that "[t]he evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action"). See *supra* note 21 and accompanying text (noting that any infringement on a fundamental interest must be narrowly tailored).

191. *Hyung Joon Kim*, 538 U.S. at 528. The majority argued that the statistics suggested "that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." *Id.* However, the majority itself earlier pointed out that when there was discretionary release, the failure was in large part due to "severe limitations on funding and detention space, which considerations affected its release determinations." *Id.* at 519. The Court essentially concluded that when Congress found that it is not detaining enough individuals due to a lack of funding and detention space, Congress could remedy this problem by requiring mandatory detention, without necessarily remedying the lack of funding or detention space. *Id.*

192. *Id.* at 528. See also *Tineo v. Ashcroft*, 350 F.3d 382, 399 n.12 (3d Cir. 2003) (citing

Although the Court departed from the narrowly tailored requirement of strict scrutiny, it failed to provide an explanation of why it made this departure or what standard of review it was applying, and instead dropped it into the opinion as if it were an inevitable conclusion from established law.¹⁹³ The Court might have explained its departure by explaining that Congress' plenary power over substantive immigration decisions should also allow Congress greater deference regarding decisions about how to implement these substantive decisions.¹⁹⁴ It might also have drawn an analogy to its prison cases, another area where it has created an exception.¹⁹⁵ Failing to explain what standard of review it applied, the Court left it to lower courts to struggle with *Hyung Joon Kim* to determine when and how to apply this exception.¹⁹⁶

Hyung Joon Kim for the proposition that Congress need not use the least burdensome means when dealing with deportable aliens); DEPORTATION OF ALIENS, *supra* note 186.

193. *Hyung Joon Kim*, 538 U.S. at 528 (explaining that the least burdensome means need not be used, but providing neither a citation nor an explanation of this conclusion).

194. See generally Natsu Taylor Saito, *Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-going Abuses of Human Rights*, 10 ASIAN L.J. 13 (2003) (tracing the development of the plenary power, arguing that it has allowed for abuse of disfavored groups, and suggesting constitutional and legislative remedies to this problem).

195. E.g., *Washington v. Harper*, 494 U.S. 210, 224, 227 (1990) (holding that a prison inmate with a serious mental illness may be forced to take psychiatric medications when the inmate is dangerous and the treatment is in the inmate's medical interest because a state's interests in safety and security are of such importance that any infringements on constitutional rights need only be "reasonably related to legitimate penological interests"); *Turner v. Safley*, 482 U.S. 78, 99-100 (1987) (upholding restrictions on prisoners' correspondence with prisoners at other different institutions but rejecting a prohibition on allowing a prisoner to marry without the prison superintendent's permission because this marriage restriction was "not reasonably related to legitimate penological objectives"); *Bell v. Wolfish*, 441 U.S. 520, 545-46, 554 (1979) (noting that, while prisoners due retain constitutional protections during confinement, these protections are limited such that "they are subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution").

196. E.g., *Ly v. Hansen*, 351 F.3d 263, 268-70 (6th Cir. 2003) (struggling with whether to apply strict scrutiny, rational basis, an extensive to its purpose test that balances several factors, or a strong special justification test); *Zavala v. Ridge*, 310 F.Supp.2d 1071 (N.D. Cal. 2004) 1076-1078 (applying strict scrutiny to review whether an automatic stay of an Immigration Judge's decision to release an alien on bond). In addition to reviewing strict scrutiny and rational basis review, the court in *Ly* suggested that another test for non-punitive regulatory legislation asks whether the detention is "excessive to its purpose." *Ly*, 351 F.3d at 268. The court actually avoided these tests and instead asked whether there is a "strong special justification" for the detention, whether the detention has a "reasonable relation" to the reason for the detention, and requiring for indefinite civil detention something more than dangerousness alone or a "general goal of preventing danger to the community." *Id.* (citing *Zadvydvas v. Davis*, 533 U.S. 678, 690-91 (2001)).

B. Implications for Aliens

1. Deportable Aliens

Although *Demore v. Hyung Joon Kim* will serve as precedent for the proposition that Congress must be extremely clear to habeas corpus jurisdiction,¹⁹⁷ the Court's view of the liberty rights of aliens is less than clear.¹⁹⁸ The Court limited its declaration that Congress need not "employ the least burdensome means to accomplish its goal" to deportable aliens.¹⁹⁹ Its failure to describe what it meant by "deportable" is troubling because, at the time of Kim's habeas corpus petition, Kim had not yet had his removal hearing to determine whether he would in fact be deported.²⁰⁰ Because the INS had not yet made a final determination of Kim's deportability, the only thing that distinguished him from other aliens was the INS' allegation he was subject to mandatory deportation.²⁰¹ This leaves open the question whether the Court really means *all* aliens when it proclaims that Congress need not use least burdensome means.²⁰² The Court's emphasis on Kim's concession that he was deportable may have been an

197. *E.g.*, *Ali v. INS*, 346 F.3d 873, 878-80 (9th Cir. 2003) (using *Hyung Joon Kim* for support that a clear statement is needed to repeal habeas jurisdiction and finding that 8 U.S.C. § 1252(g), which states that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien" does not contain a sufficiently clear statement); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 216 (3d Cir. 2003) (citing *Hyung Joon Kim* for the proposition that the statutes must "state explicitly that a district court may not exercise jurisdiction over habeas corpus claims").

198. *See, e.g.*, Joshua W. Gardner, Note, *Halfway There: Zadvydas v. Davis Reins in Indefinite Detentions, But leaves Much Unanswered*, 36 CORNELL INT'L L.J. 177, 196, 206 (2002) (noting that the Court may have lessened the plenary deference accorded in immigration matters but arguing that the lower courts may have difficulty with the *Zadvydas* opinion).

199. *Hyung Joon Kim*, 538 U.S. at 527-28. The Court found Kim's concession to be important because the Court believed that it was because of the concession that Kim did not take advantage of a procedural protection and the Court did not need to reach a conclusion on the merits of his case. *Id.* at 523 n.6. It made a distinction between one conceding that he is deportable and conceding that he will ultimately be deported, but did not explain this distinction. *Id.* The Court explained that they believed Kim's concession was not the "real issue in this case." *Id.* However, the Court did limit its holding to those who concede the deportability. *Id.* at 532.

200. *Id.* at 542 (Souter, J., dissenting in part) (noting that "the District Court would probably have dismissed [Kim's] claim as unexhausted" if Kim had included in it a challenge to removal because there had not yet been a hearing on the issue of removability). *Id.*

201. *Hyung Joon Kim*, 538 U.S. at 513.

202. *Id.* at 523 n.6, 529-30. "Lest there be any confusion, we emphasize that by conceding he is 'deportable' and, hence, subject to mandatory detention under § 1226(c), respondent did not concede that he *will ultimately be* deported." *Id.* at 523 n.6.

attempt to avoid this implication.²⁰³

Although Kim did not dispute that he was convicted of the crimes that led to the allegation that he was deportable,²⁰⁴ there has been much litigation regarding which crimes suffice for § 1226.²⁰⁵ In addition, even though the Court noted that Kim did not take advantage of a *Joseph* hearing²⁰⁶ in which he could have challenged the INS' allegations,²⁰⁷ this does not lead to the conclusion that he was deportable.²⁰⁸ This hearing requires an alien to prove that it is substantially unlikely that the government will prevail during the removal proceeding.²⁰⁹ Kim may have decided that he would not prevail at this hearing, but still hoped that he would prevail in the actual removal proceeding.²¹⁰ The Court's

203. *Id.* at 532. "The INS detention of respondent, a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings, is governed by these cases." *Id.* The Seventh Circuit subsequently concluded that an alien's good-faith challenge to his deportability will get him beyond the *Hyung Joon Kim* holding, such that he may be entitled to an individualized determination of whether detention is appropriate. *Gonzalez v. O'Connell*, 355 F.3d 1010, 1020-21 (7th Cir. 2004) (citing *Hyung Joon Kim*, 123 S. Ct. at 1722, 1738). In this case, Carlos Gonzalez claimed that he had raised a good-faith claim as to his deportability because he had been sentenced to only probation and the state law provided that "probationary dispositions . . . are not convictions." *Id.* at 1013. The court reasoned that Gonzalez had not raised a claim sufficient for their good-faith exception to *Hyung Joon Kim* because the court had previously determined that "a probationary disposition [under this state's law] following a plea of guilty qualifies as a conviction" for the purpose of § 1101(a)(48)(A). *Id.* at 1020. It was concerned that if "any claim, no matter how ridiculous" would be sufficient to get beyond mandatory detention, the holding in *Hyung Joon Kim* and Congress' intent behind § 1226(c) would become "practically void." *Id.*

204. *Hyung Joon Kim*, 538 U.S. at 513.

205. *See, e.g.*, Christina LaBrie, *Lack of Uniformity in the Deportation of Criminal Aliens*, 25 N.Y.U. REV. L. & SOC. CHANGE 357 (1999) (discussing the difficulties of applying the aggravated felony and crimes of moral turpitude standards to states that have various definitions and punishments for crimes).

206. *In re Joseph*, 221 I. & N. Dec. 799 (BIA 1999) (interpreting 8 CFR § 1003.19 (2003) to require a preliminary hearing in which an alien must convince the immigration judge that the government will be substantially unlikely to prevail). *See also* 8 CFR § 1003.19(h)(2)(ii) (2003) (stating "nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs"). A lawful permanent resident may challenge his mandatory detention only by claiming that he is not properly included in the mandatory detention category. HELEN A. SKLAR ET AL., *THE IMMIGRATION ACT OF 1990 TODAY* § 12:25 (2003). The alien must prove that "it is substantially unlikely that the INS will prevail on the charge of removability" to obtain relief from detention. *Id.*

207. *Hyung Joon Kim*, 538 U.S. at 513, 514 n.3.

208. *See id.* at 578 (Breyer, J., dissenting in part) (explaining that § 1226(c) "tells the Attorney General to take into custody any alien who . . . is deportable, not one who may, or may not, fall into that category").

209. *See supra* note 206 (describing the source of the *Joseph* hearing).

210. *See Hyung Joon Kim*, 538 U.S. at 542 n.3 (Souter, J., dissenting in part) (comparing a finding that an alien concedes that he is removable when he does not take advantage of his *Joseph* hearing is analogous to finding "that a civil defendant has conceded liability by failing to move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) or that a criminal defendant

decision will increase the administrative burden on the INS because aliens will now take advantage of this hearing, even if they do not think they will prevail, simply so they may reserve the right to challenge their detentions.²¹¹ Further, this hearing would have addressed the merits of the deportation, not Kim's real contention, which was the necessity of his detention.²¹²

2. During Removal Detentions

The following rules may summarize the Court's current position with regard to due process protections for aliens detained during immigration proceedings. Aliens who have entered the United States have more protections than those detained at the border²¹³ or people not within the United States.²¹⁴ Aliens are entitled to due process protections during deportation proceedings;²¹⁵ however, Congress need not use the "least burdensome means to accomplish its goal" when dealing with deportable aliens.²¹⁶ Detention of aliens or citizens must not extend beyond the point when the goal of the detention "is no longer practically attainable" or "no longer bears a reasonable relation to the purpose for which the individual was committed."²¹⁷ The INS may

has conceded guilt by failing to dispute the validity of the indictment").

211. *E.g.*, *Gonzalez v. O'Connell*, 355 F.3d 1010, 1019-20 (7th Cir. 2004) (noting that *Hyung Joon Kim* "left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable" but concluding that a good faith challenge would be sufficient to raise a due process challenge to detention).

212. SKLAR, *supra* note 208, at § 12:25 (noting that the purpose of the hearing is to review whether the alien is properly included in the mandatory detention category).

213. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Leng May Ma v. Barber*, 357 U.S. 185 (1958) and *Kaplan v. Tod*, 267 U.S. 228 (1925)).

214. *Id.* (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) and *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) for support).

215. *See, e.g.*, *Hyung Joon Kim*, 538 U.S. at 522; *Zadvydas*, 533 U.S. at 690; *Reno v. Flores*, 507 U.S. 292, 306 (1993).

216. *Hyung Joon Kim*, 538 U.S. at 527-28. *See also* *Pequeno-Martinez v. Trominski*, 281 F.Supp.2d 902, 922 (S.D. Texas 2003) (relying on *Hyung Joon Kim* for the proposition that Congress' plenary power over immigration decisions does limit review of substantive immigration decisions such that substantive due process rights of aliens "are subject to limitations and conditions that would be unacceptable if applied to citizens," but reasoning that the procedures Congress uses to implement its policy are still "subject to more exacting judicial review.")

217. *Zadvydas*, 533 U.S. at 690 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972)). *But see* *Agyeman v. Coachman*, 74 Fed. Appx. 691, 692-94 (9th Cir. 2003) (unpublished memorandum decision) (citing *Hyung Joon Kim* for support to find that the INS' six-year detention of Emmanuel Senyo Agyeman was constitutional because, in addition to the fact that he had an individualized bond determination, the length of detention was attributable to continuances to allow time for Agyeman to hire a lawyer, continuances to allow Agyeman to present certain evidence, time for an

detain criminal aliens for the brief period necessary²¹⁸ for their removal proceedings without an individualized determination of their risk of flight or dangerousness if they concede that they are deportable.²¹⁹ However, some individualized procedures may be required to ensure some merit to the charge and there may need to be an individualized determination of risk of flight and dangerousness “if the continued detention [becomes] unreasonable or unjustified.”²²⁰

appeal of the IJ’s decision, time for an appeal of a final removal order, and time for reversal and remand).

218. *Hyung Joon Kim*, 538 U.S. at 513 (indicating that the detention may be “for the brief period necessary for [the alien’s] removal proceedings”). See *Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003) (holding that the limitation for pre-removal detention must be reasonable, as determined by the facts of each case); *Ashley v. Ridge*, 288 F.Supp.2d 662, 673 (D. N.J. 2003) (rejecting automatic stays of Immigration Judges’ decisions to release on bond because this procedure would not ensure that the detentions would be limited to the month and a half to five months that the Court seemed to find acceptable in *Hyung Joon Kim*).

219. *Hyung Joon Kim*, 538 U.S. at 532. See, e.g., *Gonzalez v. O’Connell*, 355 F.3d 1010, 1919 (7th Cir. 2004) (noting that *Hyung Joon Kim* “was expressly premised” on the fact that Kim had conceded that he was deportable); *Likens v. Reno*, 330 F.3d 547 (2d Cir. 2003) (ruling that, even though Maurice Truman Aikens was challenging the validity of his removal order and the court could not review these challenges because they had not been administratively exhausted, Aikens had conceded that he was deportable, and thus *Hyung Joon Kim* permitted his detention during the removal proceedings); *Ashley v. Ridge*, 288 F.Supp.2d 662, 672 (D. N.J. 2003) (noting that *Hyung Joon Kim* was distinguishable because the alien in *Ashley* had “demanded the hearing to which he was entitled”). *Contra Fraser v. Ashcroft*, No. 02CV4417SJ, 2003 WL 21143031, *1-4 (E.D. N.Y. 2003) (concluding that *Hyung Joon Kim* stands simply for the proposition that detention during removal proceedings is constitutional and allowing the detention of John Fraser, an alien who was actively challenging his deportability).

220. *Hyung Joon Kim*, 538 U.S. at 538 (Kennedy, J., concurring). E.g., *Zgombic v. Farquilarson*, 69 Fed.Appx. 2 (2d Cir. 2003) (unpublished summary order) (remanding the case because the district court had the “occasion to consider whether the facts of this case fall into the potential exceptions noted in” Justice Kennedy’s concurring opinion in *Hyung Joon Kim*); *Uritski v. Ridge*, 286 F.Supp.2d 842 (E.D. Mich. 2003). See also *supra* notes 143-146 and accompanying text (reviewing Justice Kennedy’s concurring opinion). Alexander Grigorievich Uritski is a citizen of Israel who entered the United States in 1996, became a lawful permanent resident in 2002, and pled guilty to Third Degree Criminal Sexual Conduct on September 24, 2002 at the age of 17. *Id.* at 843 (citing Mich. Comp. Laws Ann. §§ 762.11-762.15). After the INS detained Uritski in October 2002 pursuant to 8 U.S.C. § 1226, Uritski challenged his removability because the state court had assigned him to probation instead of entering a judgment of conviction. *Id.* (claiming that this did not serve as an aggravated felony for the purpose of 8 U.S.C. §§ 1101(a)(43)(A) & 1227(a)(2)(A)(iii)). Although the Immigration Court agreed with Uritski and granted him bond, the government immediately appealed, which automatically stayed the bond determination. *Id.* (citing the automatic stay provision of 8 C.F.R. § 1003.10(i)(2)). Distinguishing *Hyung Joon Kim*, the court observed that Uritski’s eleven-month detention was longer the average of four months which the *Hyung Joon Kim* Court used to determine that detention is permissible “for the brief period necessary for . . . removal proceedings.” *Id.* at 843, 846 (quoting *Hyung Joon Kim*, 123 S. Ct. 1708, 1712). Relying in part on Justice Kennedy’s concurring opinion in *Hyung Joon Kim*, the court held that Uritski was “entitled to an individualized determination that his detention is necessary to further a sufficiently compelling governmental need.” *Id.* at 846 (citing *Hyung Joon Kim*, 123 S. Ct. at 1722 (Kennedy, J., concurring)).

Taken together, *Demore v. Hyung Joon Kim* and *Zadvydas v. Davis* may ironically provide that criminal aliens must be removed from homes and detained while they wait for their removal hearing, but they must be released back to their homes after they are ordered removed if removal cannot be effectuated.²²¹ Criminal aliens might even receive less protection than terrorist aliens.²²² Although the Court explained the distinction between *Zadvydas* and *Hyung Joon Kim* was that *Zadvydas* involved potentially indefinite detention while *Hyung Joon Kim* involved detentions with an end point, perhaps the real distinction was that *Zadvydas* was decided before the September 11 terrorist attacks while *Hyung Joon Kim* was decided after.²²³ Although the Court did not recognize the “white elephant” in the room, probably because the cases involved criminal rather than terrorist aliens, it might have recognized that the attacks may have increased the level of the government’s compelling interest in detaining aliens.²²⁴ However, modification of due process analysis and disparate treatment of aliens during a time of perceived need for increased security may not only have a lasting impact on aliens, but may also serve as a stepping stone toward decreased protections of citizens.²²⁵ In any event, it is unlikely that the Court had

221. *Hyung Joon Kim*, 538 U.S. at 532 (allowing detention while a removal hearing is pending); *Zadvydas v. Davis*, 533 U.S. 678, 701-02 (2001) (establishing time limits for detention after the INS orders removal).

222. See *infra* notes 248-255 and accompanying text (reviewing the USA PATRIOT Act provisions for terrorist aliens).

223. *Hyung Joon Kim*, 538 U.S. 510 (decided on April 29, 2003); *Zadvydas*, 533 U.S. 678 (decided on June 28, 2001).

224. Cole, *supra* note 170, at 955 (noting that “[i]n the wake of September 11, we plainly need to rethink the balance between liberty and security”). Cole observes that, in times of crisis, the need for security will be weighted too heavily over the value of liberty because “[l]iberty is almost by definition abstract” while “[f]ear . . . is immediate and palpable.” *Id.* at 955-56.

225. See Cole, *supra* note 170, at 957, 959, 989-1003 (arguing that the Enemy Alien Act served as a foundation for the detention of Japanese ancestry during World War II and that the Palmer Raids of 1919-1920, which targeted “alien radicals” in response to bombs that were exploded in eight cities and led to the arrest of 4,000 to 10,000 individuals, served as a foundation for the McCarthy red scare); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (analogizing questionable responses to emergencies in the past to current responses during the war on terrorism such that “[t]oday’s war on terrorism has already demonstrated our government’s remarkable ability to evolve its tactics in ways that allow it simultaneously to repeat history and to insist that it is not repeating history”). Cole noted that “what we do to aliens today may well pave the way for what will be done to citizens tomorrow.” Cole, *supra* note 170, at 989.

[W]hen one looks not at the quantity but at the quality of our response, it is clear that we have resurrected the very techniques that got us into trouble in the past—namely, expanding the substantive definitions of wrongdoing to encompass otherwise innocent political activity, relying on group identity rather than individual conduct for suspicion, and adopting administrative measures to avoid the safeguards associated with the

forgotten about the attacks and subsequent detentions during their deliberations.²²⁶

C. *Post September 11 World*

Responding to the perceived need for increased security measures after the September 11 terrorist attacks, the United States undertook a variety of measures²²⁷ to increase its detention powers,²²⁸ especially with

criminal process.

Cole, *The New McCarthyism supra* at 29.

226. See *infra* notes 227-262 and accompanying text (discussing actions taken to increase detention power over aliens subsequent to the September 11 attacks).

227. E.g., Memorandum from Michael J. Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators 1 (Sep. 21, 2001) (setting forth secrecy requirements during immigration proceedings), available at http://archive.aclu.org/court/creppy_memo.pdf (last visited Mar. 27, 2004).

As some of you already know, the Attorney General has implemented additional security procedures for certain cases in the Immigration Court. Those procedures require us to hold the hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court.

Id. See Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 8 (2002) (pointing out that a result of this policy is that “[w]e do not know who . . . is being held, where they are, . . . how they are being treated . . . who has been charged, or what violations of law, if any, are being alleged”).

228. See, e.g., *Al-Marri v. Rumsfeld*, No. 03-3674, 2004 WL 415279 (7th Cir. 2004) (affirming a dismissal of a habeas petition by an alien who was detained in the United States as a material witness because the petition was filed in Illinois, where he had been detained, instead of South Carolina, where he was transferred after being declared an enemy combatant); *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (holding that a declaration that describes the circumstances under which Hamdi was captured “in a zone of active combat in a foreign theater of conflict” is sufficient to conclude that the President “had constitutionally detained Hamdi pursuant to the war powers entrusted to him by the . . . Constitution”), *cert. granted*, 124 S. Ct. 981 (2003); *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003) (holding that “the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat” unless Congress authorizes such detentions), *cert. granted*, 124 S. Ct. 1353 (2003); *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003) (holding that the court had jurisdiction over Guantanamo because, rather than requiring sovereignty for jurisdiction, the court reasoned that territorial jurisdiction was sufficient); *Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003) (reasoning that “aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens,” are not entitled to constitutional protections so the court did not have jurisdiction to grant habeas relief to detainees being held by the United States at its Camp X-Ray base in Guantanamo Bay), *cert. granted*, 124 S. Ct. 534 (2003). Because these detentions, which involve aliens and citizens, involve legal questions regarding the “enemy combatant” designation, the scope of the President’s war powers, Congress’ war powers, standing, and the jurisdictional reach of the Constitution, this note will not address these cases. See Chris K. Iijima, *Shooting Justice Jackson’s “Loaded Weapon” at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and McCarthy*, 54 SYRACUSE L. REV. 109, 113 (2004) (suggesting that post-September 11 detentions involve a “‘hidden’ racial message of anti-Muslim sentiment”); Daniel Kanstroom, *Unlawful Combatants in the United States*, 30-WTR HUM. RTS. 18 (2003)

regard to aliens.²²⁹ Immediately after the attacks, the INS, in cooperation with the Federal Bureau of Investigation (FBI), detained more than one thousand aliens during its investigation into the attacks.²³⁰ As part of this process, the Department of Justice developed a hold-until-cleared policy, which instructed the INS to detain aliens until the FBI gave clearance for release, even after their removal was possible.²³¹ The Attorney General also gave permission to INS District Directors to file appeals after immigration judges order the release of aliens, thereby automatically staying the release orders.²³² Finally, Congress passed the USA PATRIOT Act, which expanded the power to detain terrorist aliens.²³³ Each step toward expansion of the detention power raises questions about how much protection the Due Process Clause has left to give.

1. Hold-Until-Cleared Policy

Pursuant to the hold-until-cleared policy, the INS must detain aliens until the FBI has cleared them, even after a final order of removal or a voluntary decision by the alien to depart.²³⁴ The Department of Justice

(reviewing the cases of Padilla and Hamdi and suggesting that the Judiciary should not decline habeas cases brought by enemy combatants); Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004) (arguing that, although the Constitution allows for a detention power, it belongs to Congress rather than the President so the detentions of Hamdi and Padilla are susceptible to attack); *This American Life: Secret Government* (WBEZ Chicago radio broadcast, Jan. 10, 2003) (reviewing the facts and process of Padilla's case, including interviews with his attorney Donna R. Newman), available at <http://www.thislife.org/>.

229. See *infra* notes 230-33 and accompanying text (reviewing briefly actions taken after September 11).

230. SEPTEMBER 11 DETAINEES, *supra* note 165, at 1. After the number of detainees reached 1,200, the Department of Justice stopped keeping count "because the statistics became confusing." *Id.* at 1 n.1.

231. *Id.* at 37. "This hold until cleared policy was not memorialized in writing, and our review could not determine the exact origins of the policy. However, this policy was clearly communicated to INS and FBI officials in the field, who understood and applied the policy." *Id.*

232. Immigration Court Rules of Procedure, 8 CFR § 1003.19(i)(2) (2003). The change made by the Attorney General increased the scope of the automatic stay provision beyond only aliens subject to mandatory detention. Review of Custody Determinations, 66 Fed. Reg. 54909 (Oct. 31, 2001) (codified at 8 C.F.R. § 1003.19(i)(2)).

233. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412, 115, Stat. 272, 350-52 (amending the Immigration and Nationality Act (codified as amended at 8 U.S.C. §§ 1101 et seq. (2000)), by inserting § 236A, 8 U.S.C.A. § 1226a (West Supp. 2002)).

234. See Cole, *supra* note 172, at 1029. Cole argues that these detentions violate due process because investigative detentions are unconstitutional for either the INS or FBI. *Id.* at 1011-12. He explains that these detentions serve no legitimate government interest because the INS may detain only for the purpose of effectuating removal. *Id.*

conducted this policy in a haphazard manner, which led to extended detentions in harsh conditions.²³⁵ For example, although the INS and FBI were to apply this policy only to aliens “of interest,” this limitation had nothing to do with any evidence of a connection to terrorism or the September 11 attacks.²³⁶ The INS took a variety of measures to maintain detention of these aliens to comply with this policy.²³⁷ The INS made an automatic no-bond determination for all detainees, prohibited release of detainees without written permission from the INS Executive Associate Commissioner for Field Operations Michael Pearson, and established a Bond Unit to obtain evidence for bond hearings before the immigration judges.²³⁸ When the FBI failed to provide evidence to support a no-bond determination, the FBI provided INS counsel with boilerplate documents describing the FBI’s September 11 investigation in general.²³⁹ The INS also developed a method of automatically requesting continuances to

235. SEPTEMBER 11 DETAINEES, *supra* note 165, at 69-71. The classification of aliens as “of interest” as well as the lack of resources and priority given to the clearance process led to substantial delays in release of the detainees. *Id.*

The FBI cleared less than 3 percent of the 762 September 11 detainees within three weeks of their arrest. The average length of time from arrest of a September 11 detainee to clearance by FBI Headquarters was 80 days, and the median was 69 days. Further, we found that more than a quarter of the 762 detainees’ clearance investigations took longer than 3 months.

Id. at 51. There is evidence that the detainees were physically and verbally abused during their detention. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES’ ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 47 (2003).

[S]ome [Metropolitan Detention Center (MDC)] staff members slammed and bounced detainees into the walls at the MDC and inappropriately pressed detainees’ heads against walls. We also found that some officers inappropriately twisted and bent detainees’ arms, hands, wrists, and fingers, and caused them unnecessary physical pain; inappropriately carried or lifted detainees; and raised or pulled detainees’ arms in painful ways. In addition, we believe some officers improperly used handcuffs, occasionally stepped on compliant detainees’ leg restraint chains, and were needlessly forceful and rough with the detainees – all conduct that violates [Federal Bureau of Prisons’] policy.

Id. at 28.

236. SEPTEMBER 11 DETAINEES, *supra* note 165, at 41. “Some appear to have been arrested more by virtue of chance encounters or tenuous connections to a[n FBI September 11 investigative] lead rather than by any genuine indications of a possible connection with or possession of information about terrorist activity.” *Id.* at 41-42.

237. *Id.* at 76.

238. *Id.* at 76-77 (explaining that the requirement for written permission from Pearson (Pearson Letter) was issued as an order at INS Commissioner James Ziglar’s request). The INS General Counsel opposed the Pearson Letter because he was concerned that “refusal to accept bond on an unappealed bond order, based solely on the need for a Pearson letter, was not legally defensible. . . . As a result, INS employees routinely faced the dilemma of choosing between following Pearson’s directive or the INS General Counsel’s advice.” *Id.* at 86.

239. *Id.* at 78-79 (noting that the INS used these affidavits for at least two months).

maintain detention when it lacked adequate information from the FBI to support a no-bond determination.²⁴⁰

2. Automatic Stays of Release Determinations

When the INS pursues an appeal of an Immigration Judge's (IJ) decision to release an alien on bond, the appeal automatically stays the IJ's decision.²⁴¹ There is no language in the automatic stay regulation that requires the INS to make any showing that the stay is warranted.²⁴² As a result, the INS continues to detain aliens whom the IJ determined are not a risk of flight or a danger.²⁴³

Although *Demore v. Hyung Joon Kim* dispensed with any requirement for an individualized determination of risk of flight or danger, the Court relied on Kim's decision not to take advantage of a *Joseph* hearing²⁴⁴ and Justice Kennedy's opinion explicitly stated that there should be some determination on the merits.²⁴⁵ This automatic

240. SEPTEMBER 11 DETAINEES, *supra* note 165, at 78, 81-84 (noting that the formalized version of this policy allowed the INS to stop seeking continuances when the FBI affirmatively notified the INS that they had no interest in the detainee, but confusion continued and "no interest" notifications were not timely).

241. Immigration Court Rules of Procedure, 8 CFR § 1003.19(i)(2) (2003). A release is stayed "no matter how frivolous the appeal by the Government." *Ashley v. Ridge*, 288 F.Supp.2d 662, 670-71 (D. N.J. 2003).

242. *Ashley*, 288 F.Supp.2d at 670-71.

Automatic stay in certain cases. In any case in which the district director has determined that an alien should not be released or has set a bond of \$10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon the Service's filing of a Notice of Service Intent to Appeal Custody Redetermination . . . with the immigration court within one business day of the issuance of the order, and shall remain in abeyance pending decision of the appeal by the Board of Immigration Appeals. . . .

Id. at 665.

243. *Cole*, *supra* note 172, at 1030-31. *Cole* argues that a stay would be permissible when the INS does make a showing that it is warranted, but becomes "clearly excessive in relation to the government's legitimate purposes, and therefore violated due process" without the showing. *Id.* at 1031. He notes that this regulation takes the decision to detain away from the judge and places it with "the prosecutor who has by definition failed to persuade a judge in an adversary hearing that detention is justified." *Id.*

244. *Hyung Joon Kim*, 538 U.S. at 532. *See also supra* note 206 (describing the *Joseph* hearing). "In conceding that he was deportable, respondent forfeit a hearing at which he would have been entitled to raise any nonfrivolous argument available to demonstrate that he was not properly included in a mandatory detention category." *Hyung Joon Kim*, 538 U.S. at 514. The Court also explicitly limited holding to the fact he "conceded that he is deportable." *Id.* at 532.

245. *Id.* at 532 (Kennedy, J., concurring). "[D]ue process requires individualized procedures to ensure there is at least some merit to the Immigration and Naturalization Service's (INS) charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing." *Id.* at 540 (Kennedy, J., concurring).

stay regulation, however, allows the INS to extinguish the result of any hearing that would have been available to Kim as well as any other decision to release an alien.²⁴⁶ Therefore, *Hyung Joon Kim* leaves this automatic stay rule highly susceptible to attack.²⁴⁷

3. Terrorist Alien Provisions of the USA PATRIOT Act

In response to the terrorist attacks of September 11, 2001, Congress passed the USA PATRIOT Act, which included further provisions for the detention of aliens.²⁴⁸ In particular, 8 U.S.C.A. § 1226a provides that the Attorney General “may certify an alien . . . if the Attorney General has reasonable grounds to believe” that the alien meets specified

246. *E.g.*, *Bezmen v. Ashcroft*, 245 F.Supp.2d 446, 449, 451 (D. Conn., 2003) (dissolving an automatic stay because “it allows the INS to unilaterally override a decision of an IJ” results in indefinite detention).

247. *E.g.*, *Zavala v. Ridge*, 310 F.Supp.2d 1071 (N.D. Cal. 2004) (vacating an automatic stay because they can be indefinite and there is no special justification for them in light of the fact that an immigration judge has already determined that the alien is not a danger to the public or a significant flight risk); *Bezmen*, 245 F.Supp.2d at 451 (dissolving an automatic stay because the goals of the interim detention are not served because *Bezmen* was not deemed a threat by the INS.); *Ashley v. Ridge*, 288 F.Supp.2d 662, 675 (D. N.J. 2003) (holding that “detention of Petitioner without judicial review of the automatic stay of the bail determination, despite the Immigration Judge’s decision that he be released on bond, violates Petitioner’s procedural and substantive due process constitutional rights”). After the INS (Bureau of Immigration and Customs Enforcement) detained Milton Ashley on August 6, 2003, an Immigration Judge (IJ) determined that he should be released on bond. *Ashley*, 288 F.Supp.2d at 664. The INS immediately filed a notice of intent to appeal this determination, which automatically stayed the IJ’s decision. *Id.* Ashley filed a writ of habeas corpus. *Id.* The court noted that, while the Executive may have plenary power over substantive immigration issues, no deference is required for “the means the government has chosen to exercise that plenary power. *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983)). Because the court found that Ashley had a fundamental liberty interest implicated, it reasoned that strict scrutiny should apply. *Id.* at 668. It also concluded that “government detention violates the Due Process Clause unless it is ordered in a criminal proceeding with adequate procedural protections, or in non-punitive circumstances where a special justification outweighs the individual’s constitutionally protected interest in avoiding physical restraint. *Ashley*, 288 F.Supp.2d at 668 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)). Because the IJ had already determined that Ashley should be released on bond, the court concluded “one cannot characterize [Ashley’s] continued confinement as anything but arbitrary.” *Id.* at 669. The court distinguished *Hyung Joon Kim* by pointing out that Ashley had taken advantage of the hearing that Kim had not and that the automatic stay provision gave no assurance that detention would last for only a brief period. *Id.* at 672-73. Further, the court reasoned that the automatic stay rule was contrary to congressional intent because it “effectively converts any alien detained pursuant to the discretionary detention provision of § 1226(a) into one held pursuant to the mandatory detention provision of § 1226(c).” *Id.* at 673.

248. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412, 115, Stat. 272, 350-52 (amending the Immigration and Nationality Act (codified as amended at 8 U.S.C.A. §§ 1101 *et seq.* (West. Supp. 2002)) by inserting § 236A, 8 U.S.C.A. § 1226a (West Supp. 2002)).

criteria²⁴⁹ and he “shall” take the alien into custody once he makes this certification.²⁵⁰ Unlike § 1226, however, § 1226a provides certain protections after certification.²⁵¹

The Attorney General must bring charges or otherwise begin deportation proceedings within seven days of detention or release the alien.²⁵² Although § 1226a allows detention even when removal is unlikely in the reasonably foreseeable future, this detention is limited to “additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.”²⁵³ The Attorney General must review certification every six months and when the Attorney General decides that “certification should be revoked, the alien may be released.”²⁵⁴ There is some conflicting language that requires the Attorney General, “irrespective of any relief from removal for which the alien may be eligible” to maintain custody as long as the above exceptions do not apply; however, the section also states that “if the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.”²⁵⁵

Current case law suggests that detentions pursuant to § 1226a may easily become unconstitutional.²⁵⁶ The seven-day limit on beginning

249. 8 U.S.C.A. § 1226a (a)(3) (West Supp. 2002). Aliens subject to certification include those who are engaged in, have been engaged in, or are seeking to enter the United States to engage in (a) a violation of laws regarding espionage, sabotage, exporting goods, technology, or sensitive information; (b) the use of force, violence, or unlawful means to oppose, control, or overthrow the government; (c) terrorist activities; or (d) “any other activity that endangers the national security of the United States.” 8 U.S.C. § 1226a(a)(3) (West Supp. 2002). *See Cole, supra* note 170, at 966-69 (arguing that the USA PATRIOT Act “makes aliens deportable for wholly innocent association activity with a ‘terrorist organization,’ which interferes with their right of association).

250. 8 U.S.C.A. § 1226a (a)(1) (West Supp. 2002). *See Cole, supra* note 170, at 970-72 (suggesting that this provision will result in the detention of aliens who are neither a danger nor risk of flight and arguing that the INS has no legitimate basis to detain aliens for preventative detention before and after their removal determinations).

251. *See Ascarrunz, supra* note 5, at 79 (comparing USA PATRIOT Act detentions under 8 U.S.C.A. § 1226a with criminal alien detentions under 8 U.S.C. § 1226).

252. 8 U.S.C.A. § 1226a (a)(3) (West Supp. 2002).

253. *Id. See Ascarrunz, supra* note 5, at 108-09 (suggesting that, unlike the lack of individual determination of risk of flight or dangerousness in § 1226(a), the certification process of § 1226a is “necessarily individual”).

254. 8 U.S.C.A. § 1226a (a)(7) (West Supp. 2002). This release may be subject to “such conditions as the Attorney General deems appropriate.” *Id. See Ascarrunz, supra* note 5, at 109-11 (arguing that there are significantly more procedural safeguards in § 1226a such that they are not even mandatory and are “sufficiently narrowly tailored”). *But see Cole, supra* note 170, at 972 (reasoning that, even with these provisions, it appears that the INS may detain “aliens indefinitely, even where they have prevailed in their removal proceedings”).

255. 8 U.S.C.A. § 1226a (a)(2) (West Supp. 2002).

256. *See Shirin Sinnar, Note, Patriotic or Unconstitutional? The Mandatory Detention of*

removal proceedings may eliminate the same concern regarding the length of pre-removal detention; however, the time between commencement of proceedings and disposition of the proceedings is not limited and therefore is still a concern.²⁵⁷ Further, because it seems that the Attorney General may renew detentions in six-month increments with no maximum limit, the same post-removal concerns the Court addressed in *Zadvydas v. Davis* remain an issue.²⁵⁸ The Court in *Zadvydas* found detention after removal hearings unconstitutional when removal is no longer reasonably foreseeable, although it allowed for a presumption of constitutionality for up to six months.²⁵⁹

The general rule which *Zadvydas* reaffirmed was that detention is unconstitutional when the “detention longer bears a reasonable relation to the purpose for which the individual was committed.”²⁶⁰ If the government argues that the purpose of the detention is both to be able to execute removal orders and to protect against terrorism, it may transform the detention from a civil proceeding to punishment.²⁶¹ However, the Court in *Zadvydas* explicitly left open the question of preventative detention in the context of terrorism.²⁶²

V. CONCLUSION

Although mandatory detention is a poor policy decision, wasting resources on individuals who do not need detained and weakening our

Aliens Under the USA Patriot Act, 55 STAN. L. REV. 1419 (2003) (arguing that § 1226a is unconstitutional but suspecting that courts will take a different approach due to terrorism).

257. *Hyung Joon Kim*, 538 U.S. at 540 (Kennedy, J., concurring). See also Kathleen O'Rourke, *Deportability, Detention and Due Process: An Analysis of Recent Tenth Circuit Decisions in Immigration Law*, 79 DENV. U.L. REV. 353, 376-77 (2002) (questioning “[w]hether the seven-day limit . . . will place any actual restraints on the government’s treatment of immigrants”).

258. 8 U.S.C.A. § 1226a (a)(6) (West Supp. 2002). The alien “may be detained for additional periods of up to six months.” *Id.* This would seem to limit detention to a total of six months were it not for a subsequent portion of § 1226a, which states that “[t]he alien may request each 6 months in writing that the Attorney General reconsider the certification.” 8 U.S.C.A. § 1226a (a)(7) (West Supp. 2002). This would seem to indicate that Congress intended for the additional periods to be up to six months each rather than for the periods to be limited to six months total.

259. *Zadvydas v. Davis*, 533 U.S. 678, 699, 701 (2001). See *supra* notes 70-72 and accompanying text (discussing the *Zadvydas* decision).

260. *Zadvydas*, 533 U.S. at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738, (1972)).

261. See, e.g., *Kansas v. Hendricks*, 521 U.S. 344, 361-62 (1997) (discussing distinctions between criminal and civil proceedings); *supra* note 31 (discussing the distinction between regulatory and penal actions).

262. *Zadvydas*, 533 U.S. at 696. “Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security.” *Id.*

arguments when other countries detain our citizens, it does not appear to be a priority for any of the political parties and they are not likely to address the problem through legislation.²⁶³ The judiciary could have served as a protectorate for non-citizens, but the Court's analysis in *Demore v. Hyung Joon Kim* serves as an indicator that this minority may be left without recourse to protect their fundamental rights.²⁶⁴ To reach this end, the Supreme Court had to use a strained due process analysis to find such detentions constitutional rather than pointing out that the text of the Fifth Amendment is not limited to citizens and the Framers expressed their concerns with detaining innocent people with the Suspension Clause.²⁶⁵ Instead, the Court blurred the distinction between equal protection analysis and due process analysis and gave little consideration to the means chosen by Congress when it infringed on this minority's fundamental right of liberty.²⁶⁶ Leaving us without an explanation of how they rationalized away strict scrutiny or an identification of what standard they applied, the Court has left it to future courts to struggle with these questions as they address ever-

263. See O'Rourke, *supra* note 257, at 376-77 (arguing that mandatory detention without an individualized determination is of suspect constitutionality, but is also a drain on INS resources). See also Press Release, Office of the Press Secretary for George W. Bush, Fact Sheet: Fair and Secure Immigration Reform (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/print/20040107-1.html> (last visited Mar. 28, 2004) (on file with author) (offering temporary worker status to illegal aliens as long as they pay a fee and return home after the work is completed, but not addressing mandatory detention); Natural Law Party, Additional Platform Issues, at <http://natural-law.org/platform/addissues.html> (last visited Mar. 28, 2004) (copy on file with author) (arguing that we should "disincentivize illegal immigration by enforcing our immigration laws and by working to improve economic conditions in neighboring countries"); Michael Tanner, Libertarian Party, The Benefits of Open Immigration, at <http://www.lp.org/issues/immigration.html> (last visited Mar. 28, 2004) (on file with author) (arguing for increased immigration as long as aliens don't use government benefits, but raising a concern with threats to their civil liberties); Reform Party USA, RPUSA Issues Committee Final Report (Oct. 10, 2003), at http://issues.reformparty.org/documents/2003platform_amendments.html (last visited Mar. 28, 2004) (copy on file with author) (arguing for dramatically decreased immigration and for "[t]he United States Government [to] automatically expel any immigrant found to be illegal). *But cf.* Democratic National Committee, The 2000 Democratic National Platform: Prosperity, Progress, and Peace (Aug. 8, 2000), at <http://www.democrats.org/about/2000platform.html> (last visited Mar. 28, 2004) (copy on file with author) (addressing primarily illegal immigration, but promising to enhance due process protections for legal immigrants).

264. See *supra* notes 132-142 and accompanying text (reviewing the Court's reasoning that led it away from strict scrutiny).

265. See, e.g., U.S. CONST. art. I, § 9, cl. 2. (establishing the Suspension Clause); U.S. CONST. amend. V. (stating explicitly that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"); see *supra* notes 168-196 and accompanying text (analyzing the Court's due process analysis in *Demore v. Hyung Joon Kim*).

266. See *supra* notes 185-196 and accompanying text (focusing on the Court's decision to bypass the narrowly tailored requirement of strict scrutiny in *Hyung Joon Kim*).

expanding attempts to target aliens in our post-September 11 world.²⁶⁷

Brian Smith

267. *See supra* notes 227-262 and accompanying text (discussing post September 11 attempts to increase detentions power over aliens).