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DEMORE v. KIM: UPHOLDING THE UNNECESSARY DETAINMENT OF LEGAL PERMANENT RESIDENTS

Demore v. Kim, 123 S. Ct. 1708 (2003)

I. INTRODUCTION

In *Demore v. Kim*,[1] the Supreme Court of the United States held that Congress did not offend due process rights under the Fifth Amendment in requiring that criminal aliens awaiting their removal hearings be detained pursuant to the no-bail provision of the Immigration Nationality Act (INA) (8 U.S.C. § 1226(c)). The Court further held that the provision of the INA limiting judicial review of the Attorney General's discretion for the detention or release of criminal aliens did not preclude the Court of jurisdiction to grant habeas relief.[2] The Court considered the habeas corpus petition filed by a lawful permanent resident (LPR) detained by the Immigration and Naturalization Service (INS).[3] The habeas petition challenged the no-bail provision of the INA.[4]

This Note argues several reasons why the Supreme Court's ruling was erroneous. First, the Court's decision in *Demore* is inconsistent with its recent decision in *Zadvydas v. Davis* that aliens under final orders of removal may not be detained indefinitely, but only for a period reasonably necessary to secure the alien's removal.[5] As in *Zadvydas*, the government has not proffered a sufficiently strong justification for the blanket mandatory detention of criminal aliens under 8 U.S.C. § 1226. Furthermore, the *Demore* decision achieves the absurd result of providing more protection for the liberty of aliens already ordered deported than for those who have not yet been stripped of their right to remain in the United States. Second, *Demore* undermines the high status reserved for LPRs in the United States. Those criminal aliens who would be most appropriate for

[1] 123 S. Ct. 1708, 1721-22 (2003).
[2] *Id.* at 1714.
[3] *Id.* at 1713.
[4] *Id.*
[5] 533 U.S. 678 (2001).

release pending their removal hearing are those with the strongest familial and community ties. Finally, the purpose of § 1226(c) is to ensure that criminal aliens appear for their removal proceedings.[6] The statute was passed in response to the severe inefficiencies and shortage of resources plaguing the INS, which largely contributed to a low percentage of non-detained criminal aliens appearing for their removal proceedings.[7] In finding that the government had a reasonable justification for mandatory detention of criminal aliens, the Court supported the restriction of individual liberties as a solution to government incompetence. Given the current reorganization in the United States immigration departments, it is an opportune time for Congress to restructure this removal process in order to safeguard the rights of lawful permanent aliens.

II. BACKGROUND

A. LAWS GOVERNING CRIMINAL ALIENS

1. History of Immigration Law in the United States

For a large part of this country's history, there has been neither a comprehensive body of immigration law nor laws specifically governing criminal aliens.[8] The first general immigration statute of 1882 barred immigration of "undesirable" aliens including convicts and mentally impaired individuals, but did not include a provision for the removal of aliens who committed crimes *after* entering the United States.[9] Restrictive immigration legislation was passed in 1917 and 1924 providing criminal grounds for deportation.[10]

The Immigration and Nationality Act of 1952 (INA) recodified and revised the immigration laws.[11] The INA augmented federal authority to remove certain criminal aliens and identified "crimes of moral turpitude"[12]

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[6] *Demore*, 123 S. Ct. at 1720.

[7] *Id.* at 1715.

[8] S. REP. NO. 104-48, at 10 (1995).

[9] *Id.*; *see* 22 Stat. 214-215 (1882).

[10] S. REP. NO. 104-48, at 10; *see* S. REP. NO. 64-352 (1916) (allowing for deportation of aliens committing "serious crimes" within the first five years of their entry).

[11] S. REP. NO. 104-48, at 11; *see* Pub. L. No. 82-414, 66 Stat. 163, 8 U.S.C. § 1101 (2000).

[12] S. REP. NO. 104-48, at 11 n.24 (such crimes are defined by state law and include murder, manslaughter, rape and sodomy).

as acts that could give rise to deportation.[13] However, until 1988[14] all persons facing deportation were entitled to a bond hearing.[15]

In recent years, Congress has gradually limited the discretionary relief available to aggravated felons subject to deportation.[16] The culmination of this movement occurred with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[17] The IIRIRA amended and reformed the INA and other immigration laws.[18] In addition to expediting removal of aliens arriving at ports with improper or fraudulent documents, the IIRIRA increased detention requirements for classes of aliens such as those involved in criminal, terrorist, or drug trafficking activities.[19] Congress also eliminated the discretion to release criminal aliens on bond, mandating the detention of virtually all such aliens.[20]

Section 1226(c) of the IIRIRA, entitled "Detention of Criminal Aliens," sets out the guidelines for the detention of criminal aliens pending removal hearings. Section 1226(c) provides in relevant part:

> (1) Custody. The Attorney General shall take into custody any alien who—
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> (B) is deportable by reason of having committed any offense covered in section 1227 (a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227 (a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
>
> (2) Release. The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 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 of other persons or of the property

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[13] *Id.* at 11.

[14] In 1988, Congress amended the INA as part of the Anti-Drug Abuse Act of 1988, establishing a new category of deportable alien, the aggravated felon. *See id.* at 11; 8 U.S.C. § 1227(a)(2)(A)(iii) (2000).

[15] Patel v. Zemski, 275 F.3d 299, 304 (3d Cir. 2001).

[16] *Id.*

[17] *Id.* at 304-05; *see* PUB. L. NO. 104-208, 110 Stat. 3009 (1996).

[18] EVALUATION & INSPECTIONS DIV., U.S. DEP'T. OF JUSTICE, THE IMMIGRATION AND NATURALIZATION SERVICE'S REMOVAL OF ALIENS ISSUED FINAL ORDERS I-2003-004, at 8 (2003).

[19] *Id.*

[20] *See* PUB. L. NO. 104-208, § 303; BUREAU OF CITIZENSHIP AND IMMIGRATION SERV., U.S. DEP'T OF HOMELAND SEC., IMMIGRATION INFORMATION, IMMIGRATION DETENTION FACILITIES, *at* http://uscis.gov/graphics/shared/fieldoffices/detention/index.htm (last modified June 5, 2003).

> and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.[21]

The convictions that trigger § 1226(c) include: (1) any "aggravated felony;"[22] (2) any two crimes involving moral turpitude committed at any time, regardless of the imposed sentence;[23] and (3) any single crime involving moral turpitude if it occurs within five years of the alien's admission into the United States when the term of imprisonment is at least one year.[24] An aggravated felony includes: (1) murder, rape, sexual abuse of a minor; (2) firearms or controlled substance trafficking; (3) a crime of violence with a prison term of at least one year; (4) theft or burglary with a sentence of at least one year; (5) fraud exceeding $10,000; or (6) offenses relating to obstruction of justice, perjury or bribery with a sentence of at least one year.[25]

Further, the Attorney General's "discretionary judgment regarding the application of this section shall not be subject to review."[26] A court may not set aside determinations by the Attorney General pursuant to this section regarding bond or parole or the detention or release of any alien.[27] The statute provides the Attorney General with the discretion to release an alien only when the alien's release is indispensable to the protection of a witness, potential witness, or a person assisting in a criminal investigation, and if the alien does not pose a threat to society or a flight risk.[28] The statute does not impart authority to the Attorney General to release criminal aliens during their removal proceeding solely based upon a determination that a criminal alien does not present a risk of flight or threat to the community.[29]

2. Federal Treatment of Immigration and Terrorism

In recent years, both Congress and the Executive Branch have made specific developments in response to the threat imposed by terrorism. The dissent in *Demore*[30] highlighted the statutory provisions representing the

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[21] 8 U.S.C. § 1226(c) (2000).

[22] *Id.* §§ 1226(c)(1)(B), 1227(a)(2)(A)(iii).

[23] *Id.* §§ 1226(c)(1)(B), 1227(a)(2)(A)(ii).

[24] *Id.* §§ 1226(c)(1)(C), 1227(a)(2)(A)(I).

[25] *Id.* § 1101(a)(43).

[26] *Id.* § 1226(e).

[27] *Id.*

[28] *See id.* § 1226(c)(2).

[29] Patel v. Zamski, 275 F.3d 299, 305 (3d Cir. 2001).

[30] Demore v. Kim, 123 S. Ct. 1708 (2003) (Souter, J., concurring in part and dissenting in part).

procedures for removal of alien terrorists.[31] The statute permits the Attorney General to take into custody and detain any alien thought to be participating in terrorist activity.[32] Significantly, the statute explicitly provides special rules for permanent resident aliens awaiting removal hearings.[33] Such aliens are allowed a release hearing to consider their flight risk and threat to the community.[34]

On November 25, 2002, President George W. Bush abolished the INS and transferred its responsibility to the Department of Homeland Security in the Homeland Security Act.[35] The enforcement functions of the INS were transferred into the Border and Transportation Security Directorate, and the Bureau of Immigration and Customs Enforcement (BICE) was established to carry out the immigration and customs laws of the United States.[36] One of the functions of BICE is to identify, apprehend, and remove criminal aliens.[37] The transition of enforcement functions into BICE has been occurring in phases and is incomplete to date.[38] The ramifications of the reorganization, therefore, are still unknown.

B. SUPREME COURT RULES IN *ZADVYDAS V. DAVIS* TO PROTECT DUE PROCESS RIGHTS OF ALIENS UNDER FINAL ORDER OF REMOVAL

1. Background of Zadvydas v. Davis

Justice Breyer, writing for the majority,[39] considered the writs of habeas corpus brought under 28 U.S.C. § 2241 by two criminal aliens challenging their continued detainment by the INS.[40] The aliens were detained pursuant to 8 U.S.C. § 1231(a)(2), which requires the detention of aliens under final orders of removal during a ninety-day removal period.[41] The INS had detained both aliens for periods longer than the ninety-day requirement.[42] The Court refused to allow the Attorney General to hold

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[31] 8 U.S.C. § 1536 (2000).
[32] *Id.*
[33] *Id.*
[34] *Id.* § 1536(2)(A).
[35] 6 U.S.C.A. § 101 (West Supp. 2003).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Justice Breyer was joined by Justices Stevens, O'Connor, Souter and Ginsburg.
[40] Zadvydas v. Davis, 533 U.S. 678 (2001).
[41] *Id.* at 683.
[42] *Id.* at 684-86.

aliens indefinitely and decided aliens may only be detained for a period reasonably necessary to secure the alien's removal.[43]

The Court reviewed the due process rights of criminal aliens, finding protection of freedom from imprisonment unless detention is ordered in criminal proceedings with adequate procedural safeguards, or in civil proceedings where there is a special justification.[44] The Due Process Clause protects all aliens who have entered the United States, whether their presence is temporary, permanent, lawful or unlawful.[45] When an alien is under a final order of removal, the government seeks to execute the deportation during a ninety-day statutory removal period, during which time the alien must be held in custody.[46] If the alien is detained beyond the ninety-day removal period, an INS panel will review the matter to determine whether custody should be relinquished.[47] In order to release an alien detained beyond the removal period, the panel must find that the alien is unlikely to be violent or pose a threat to the community, to flee, or to violate the conditions of release.[48]

2. Whether Mandatory Detainment of Aliens Under § 2241 Fits with the Purpose of that Act

The detention of aliens under a final order of removal is civil and non-punitive in purpose, therefore requiring a "sufficiently strong special justification."[49] The two regulatory goals cited by 28 U.S.C. § 2241 include "ensuring the appearance of aliens at future immigration proceedings" and "preventing danger to the community."[50] The Court refuted the relevance of these justifications in the case of aliens after a ninety-day removal period.[51]

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[43] *Id.* at 682.

[44] *Id.* at 690 (citing Kansas v. Hendricks, 521 U.S. 346, 356 (1997); United States v. Salerno, 481 U.S. 739, 746 (1987)).

[45] *Id.* at 693 (citing Plyler v. Doe, 457 U.S. 202, 210 (1982); Matthews v. Diaz, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596-98 (1953); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[46] *Id.* at 683 (citing 8 U.S.C. § 1231(a)(2) (Supp. 1994)).

[47] *Id.* (citing 8 C.F.R. § 241.4(i) (2001)).

[48] *Id.* (citing 8 C.F.R. § 241.4(e)&(f) (2001)) (factors contributing to the panel's decision include "the alien's disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, and favorable factors such as family ties").

[49] *Id.* at 690.

[50] *Id.* (quoting Brief for the Respondents at 7, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791)).

[51] *Id.*

The court hearing a habeas claim must ask whether the detention in question serves the basic statutory aim, which is to assure the alien's presence at the time of removal.[52] If the detention is unreasonable[53] and thus not authorized by the statute, then "of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions."[54] If it appears reasonably foreseeable that the alien will be removed, the habeas court should then consider whether the detention is necessary based on a risk of the alien committing further crimes within the reasonable removal period.[55] Thus, if after a six month period, an alien under final orders of removal indicates that there is no significant likelihood of removal in the reasonably foreseeable future, the government must counter with evidence sufficient to deny that demonstration.[56]

3. Zadvydas *Dissent Considers Due Process Rights of Aliens Under a Final Order of Removal*

Justice Kennedy's dissent[57] detailed the rights conferred upon an alien after entering the United States.[58] When threatened with deportation, an admitted alien is entitled to a fair hearing.[59] Until a removal hearing occurs and a deportation order is entered, an alien maintains an interest in remaining in the country by virtue of his continued existence.[60] Such an alien is also entitled to be free from either capricious or arbitrary confinement.[61] If an alien is detained in order to secure his removal, the government can neither justify nor design the confinement as punishment.[62]

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[52] *Id.* at 699.

[53] One example is when an alien's removal is not reasonably foreseeable. *Id.* at 699-700.

[54] *Id.*

[55] *Id.* at 700.

[56] *Id.* at 701.

[57] Justice Kennedy filed a dissenting opinion, in which Chief Justice Rehnquist joined, and in which Justices Scalia and Thomas joined as to Part I. Justice Scalia also filed a dissenting opinion, in which Justice Thomas joined.

[58] *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting).

[59] *Id.* (Kennedy, J., dissenting) (quoting Shaughnessy v. United States ex rel. Mizei, 345 U.S. 206, 212 (1953)) ("Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law . . . .").

[60] *Id.* at 721 (Kennedy, J., dissenting).

[61] *Id.* (Kennedy, J., dissenting).

[62] *Id.* (Kennedy, J., dissenting).

It is "neither arbitrary nor capricious" to detain aliens when necessary to prevent flight or threat to the community.[63] The dissent stated that:

> [w]hether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns, then, not on the substantive right to be free, but on whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large.[64]

The dissent then reviewed the procedures in place for review of the confinement of aliens under a final order of removal, finding them adequate to preserve due process rights.[65] Although the dissent affirmed the established judicial review process in such situations, it cautioned that "[w]ere the INS, in an arbitrary or categorical manner, to deny an alien access to the administrative processes in place to review continued detention, habeas jurisdiction would lie to redress the due process violation caused by the denial of the mandated procedures under 8 C.F.R. § 241.4 (2001)."[66]

C. APPELLATE COURTS APPLY *ZADVYDAS* TO CASES OF ALIEN SPENDING REMOVAL HEARINGS

In a pre-*Zadvydas* decision, the United States Court of Appeals for the Seventh Circuit ruled that an alien[67] could be detained under § 1226(c) as he awaited a removal hearing without violating his constitutional rights.[68] The court appeared to give great weight to the fact that the alien conceded all elements required for his removal, and thus was no longer entitled to remain

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[63] *Id.* (Kennedy, J., dissenting).

[64] *Id.* at 721 (Kennedy, J., dissenting).

[65] *Id.* at 722-23 (Kennedy, J., dissenting). Factors to consider in the recommendation of release or further confinement include:

> "[t]he nature and number of disciplinary infractions"; "the detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and the time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history"; "psychiatric and psychological reports pertaining to the detainee's mental health"; "[e]vidence of rehabilitation"; "[f]avorable factors, including ties to the United States such as the number of close relatives"; "[p]rior immigration violations and history"; "[t]he likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes"; and any other probative information.

Id. (Kennedy, J., dissenting) (quoting 8 C.F.R. § 241.4(f) (2001)).

[66] *Id.* at 724 (Kennedy, J., dissenting).

[67] The alien had been convicted of aggravated criminal sexual assault.

[68] Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999).

in the United States.[69] The court further indicated that the alien could choose to withdraw his defense of the removal proceeding and return to his native land immediately.[70] However, a criminal alien choosing to "postpone the inevitable" had no constitutional right to remain unconfined during the resulting delay, and the United States had a substantial interest in detaining the alien so as to ensure his removal.[71]

After the *Zadvydas* ruling, however, three appellate courts applied the decision to require individualized bond hearings for criminal aliens being detained prior to a removal determination.[72] The Court of Appeals for the Third Circuit compared the detention of aliens under a final order of removal, as considered in *Zadvydas*, with aliens detained prior to a removal hearing.[73] The Third Circuit stated that although the pre-removal hearing detention may not be indefinite, it is often lengthy.[74] The appellate court observed that the appellant,[75] while awaiting a removal hearing, had been confined for eleven months, six months more than his prison term for the original offense and five months longer than the six-month period the Supreme Court accepted as reasonable for detainees ordered removed.[76] Although the *Zadvydas* Court did not address the constitutionality of confinement prior to a removal determination, the Third Circuit believed that the Court's reasoning could be applied to such a situation.[77]

The appellate courts determined that because § 1226(c) implicated the aliens' fundamental right to be free from physical limitation, a court must "apply heightened due process scrutiny to determine if the statute's infringement on that right is narrowly tailored to serve a compelling state interest."[78] Governmental detainment in a non-criminal proceeding violates the Due Process Clause unless a special justification in a non-criminal proceeding outweighs the individual's constitutional right to be free from

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[69] *Id.* at 958.

[70] *Id.*

[71] *Id.*

[72] Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002); Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002); Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001).

[73] *Patel*, 275 F.3d at 309.

[74] *Id.*

[75] The appellant was "convicted of a non-violent offense, retains the possibility of relief from deportation, and contests the classification of his offense as an aggravated felony, a challenge that could render removal improper." *Id.* at 314.

[76] *Id.* at 309.

[77] *Id.*

[78] *Id.* at 310 (citing Reno v. Flores, 507 U.S. 292, 306 (1993)); *see also* Hoang v. Comfort, 282 F.3d 1247, 1258 (10th Cir. 2002).

physical restraint.[79] Congress did not anticipate § 1226(c) detainment to be penalizing, but cited two non-punitive purposes of protecting the community from danger, and preventing flight risk.[80]

Section 1226(c) establishes an "irrebutable presumption" that every alien subject to deportation under the statute represents a flight risk or threat to the community.[81] Even if many of the aliens under § 1226 would fall within these two categories, those aliens who would not present a danger and would obediently report to the proceedings would be deprived of their fundamental right to freedom.[82] Therefore, depriving individuals of such a fundamental right does not promote any governmental goal.[83]

Moreover, the Third Circuit commented that shortly after the INS takes custody of an alien, the alien is permitted a hearing before an immigration judge to ascertain whether he or she is an aggravated felon pursuant to § 1226(c).[84] The court discovered no reason that such a hearing could not incorporate an evaluation of flight risk and danger, thereby affording the alien a less restrictive means to the attainment of the government's goals.[85]

III. FACTS AND PROCEDURAL HISTORY

A. FACTS

Respondent Hyung Joon Kim is a lawful permanent resident (LPR) of the United States.[86] Kim entered the United States legally in 1984 at the age of six, and became a LPR in 1986.[87] Kim is a native and citizen of the Republic of Korea (South Korea).[88] Kim's mother is a United States citizen and his father and brother are LPRs.[89]

A California state court convicted Kim of first degree burglary of a toolshed in 1996.[90] He was sentenced to five years' probation and 180 days

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[79] *Hoang*, 282 F.3d at 1258.
[80] *Id.*
[81] *Id.* at 1259; *Patel*, 275 F.3d at 311.
[82] *Patel*, 275 F. 3d at 312.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] Brief for the Respondent at 8, Demore v. Kim, 123 S. Ct. 1708 (2003) (No. 01-1491).
[87] Brief for the Petitioners at 3, Demore v. Kim, 123 S. Ct. 1708 (2003) (No. 01-1491).
[88] *Id.*
[89] Brief for the Respondent at 8, *Demore*, (No. 01-1491).
[90] *Id.*

in jail (of which 117 were suspended).[91] In 1997, Kim was convicted of "petty theft with priors" and received a sentence of three years' imprisonment.[92] Kim was released after serving less than two years of his sentence.[93] The INS did not initiate the removal proceedings against Kim while he was serving his criminal sentence, but waited until the day after he was released from prison.[94]

The INS arrested and detained Kim at the county jail.[95] As provided by § 1226(c), the INS declined to consider Kim's release on bond.[96] The INS charged Kim as deportable, characterizing his 1997 petty theft conviction as an aggravated felony.[97] However, the INS did not formally begin removal proceedings against Kim until March 10, 1999, five weeks after his arrest and detention.[98]

In May 1999, after more than three months in INS detention, and while awaiting his first substantive hearing before an immigration judge, Kim filed a habeas corpus petition.[99] In the petition, Kim challenged the constitutionality of his mandatory detention pursuant to § 1226(c).[100]

B. PROCEDURAL HISTORY

In August 1999, the district court declared § 1226(c) unconstitutional and ordered the government to conduct an individualized bond hearing.[101] The Attorney General did not request a stay of the district court's order, nor contested Kim's release on bond.[102] In fact, the INS released Kim on $5000 bond after determining that he was not a threat or significant flight risk.[103] This determination came five days after the district court's mandate, and more than six months after Kim was taken into INS custody.[104]

The INS appealed the decision of the district court to the United States Court of Appeals of the Ninth Circuit in *Kim v. Ziglar*.[105] The Ninth Circuit

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[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* at 9.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*; *see* Kim v. Schiltgen, 1999 U.S. Dist. LEXIS 12511 (N.D. Cal. 1999).
[102] Brief for the Respondent at 9, *Demore*, (No. 01-1491).
[103] *Id.* at 10.
[104] *Id.* at 9.
[105] 276 F.3d 523 (9th Cir. 2001).

overturned the district court's finding that § 1226 was unconstitutional on its face.[106] The appeals court found that the statute could be constitutionally applied in certain situations, for example to those who have not yet "entered" the United States.[107] The Ninth Circuit nonetheless concluded that the statute was unconstitutional as applied to LPRs.[108] The appeals court affirmed the lower court's grant of habeas corpus relief to Kim as a LPR alien.[109] The court recognized the rights of LPRs to work, reside permanently, and apply for citizenship.[110] Significantly, the Ninth Circuit viewed these rights as guaranteed until a final administrative order of removal was entered against a LPR.[111]

The Ninth Circuit observed that the statute in question is "civil and regulatory, not criminal or punitive."[112] In accordance with *Zadvydas*, the court analyzed whether the government provided a sufficiently strong justification for the civil detention of a LPR alien.[113] The court rejected two of the government's rationales for detaining Kim without an individual bail hearing.[114]

First, the Ninth Circuit challenged that Kim and other LPRs must be detained in order to assure their proper removal from the United States.[115] Second, given the variety of crimes falling under the classification of aggravated felonies, the government could not demonstrate that § 1226(c) covers only aliens that are dangerous to the public.[116] The appeals court followed the reasoning of the majority in *Zadvydas* to conclude that the government did not propose a special justification for the detainment of Kim.[117] The statute could not pass constitutional muster in the case of Kim or other similarly situated LPRs.[118] Pursuant to the Due Process Clause of the Fifth Amendment, Kim, as a LPR, was entitled to "a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community."[119]

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[106] *Id.* at 527.
[107] *Id.*
[108] *Id.* at 539.
[109] *Id.* at 528.
[110] *Id.*
[111] *Id.* (citing 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p)).
[112] *Id.* at 530.
[113] *Id.*
[114] *Id.* at 531-34.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 535-37.
[118] *Id.* at 538.
[119] *Id.* at 539.

C. SUPREME COURT CASE

The INS filed a petition for certiorari with the United States Supreme Court. The Court granted a writ for certiorari.[120] Upon certiorari, the Court considered two issues: (1) whether 8 U.S.C. § 1226(e) deprives the Court from jurisdiction to hear the case; and (2) the constitutionality of mandatory detention during removal proceedings for the class of deportable aliens pursuant to 8 U.S.C. § 1226(c).

On June 6, 2002, after Kim filed his Brief in Opposition with the Supreme Court, the Ninth Circuit held that a conviction for "petty theft with priors" pursuant to the same California statute under which Kim was convicted in 1997 did not qualify as an aggravated felony pursuant to the INA.[121] Ten weeks after the ruling, the INS modified the immigration charges against Kim to include his 1996 conviction and add a new ground for deportation.[122] The amended claim alleged that Kim's 1996 and 1997 convictions together constituted "convict[ions] of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct."[123] Thus, Kim remained subject to deportation on the basis of committing crimes of moral turpitude, which is also a basis for mandatory detention under § 1226(c).[124]

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

1. The Court Found it had Jurisdiction to Review the Respondent's Claim

Writing for the majority, Chief Justice Rehnquist[125] reversed the Ninth Circuit's decision and held that Kim's claim must fail.[126] The Court first

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[120] Demore v. Kim, 536 U.S. 956 (2002).

[121] Brief for the Respondent at 11, *Demore* (No. 01-1491) (citing United States v. Corona-Sanchez, 291 F.3d 1201, 1213 (9th Cir. 2002)).

[122] Brief for the Petitioners at 3 n.2, *Demore* (No. 01-1491).

[123] *Id.* (citing 8 U.S.C. § 1227(a)(2)(A)(ii)).

[124] Brief for the Respondent at 11, *Demore* (No. 01-1491).

[125] Chief Justice Rehnquist was joined by Justice Kennedy. Justices Stevens, Souter, Ginsburg, and Breyer joined as to Part I, and Justices O'Connor, Scalia, and Thomas joined in all but Part I. Justice Kennedy concurred in the opinion, asserting that if INS removal procedures were found to have unreasonable delay, then constitutionality would potentially be in question. Justice O'Connor, joined by Justices Scalia and Thomas, concurred in part and concurred, agreeing with decision on the merits, but disagreeing that the Court has jurisdiction to hear constitutional challenge.

[126] Demore v. Kim, 123 S. Ct. 1708, 1722 (2003).

determined that it had the jurisdiction to grant habeas relief to Kim's constitutional challenge of detention under § 1226(c).[127] The Court relied on its precedent requiring Congress to clearly convey when it intends to preclude judicial review of constitutional claims.[128] Because § 1226(e) does not contain a provision clearly barring habeas review, the plain text did not prohibit Kim's constitutional challenge to the legislation sanctioning his detention without bail.[129]

2. The Court Considered the State of Immigration in the United States at the Time of the Passage of § 1226(c)

The Court considered the substantive claim presented by Kim contesting the § 1226(c) mandatory detention of certain deportable aliens throughout their removal proceedings.[130] The Court initially examined the backdrop against which Congress adopted § 1226, referencing the 1995 congressional hearings regarding criminal aliens in the United States.[131] For example, at the time that Congress passed the legislation, criminal aliens were the fastest growing group of prisoners in federal prison populations, as well as a rapidly rising proportion of state prison populations.[132] A Congressional investigation uncovered that the INS could not even *identify* most removable aliens, much less locate them and deport them from the country.[133] Additionally, the inquiry revealed that criminal aliens who had been deported "swiftly" returned to the United States illegally in large numbers.[134]

The Court also reviewed statistics that Congress considered prior to the enactment of § 1226(c), indicating that over twenty percent of the released deportable criminal aliens failed to appear for their removal hearings, and often committed more crimes before being deported.[135] During this period reflected in the data, the Attorney General had broad discretion to conduct individualized bond hearings and could release criminal aliens from custody if determined that they were neither flight

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[127] *Id.* at 1713-14.

[128] *Id.* at 1714 (citing Webster v. Doe, 486 U.S. 592, 603 (1988)).

[129] *Id.*

[130] *Id.*

[131] *Id.* at 1714-15 (citing *Criminal Aliens in the United States: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs*, 103rd Cong. (1993); S. REP. NO. 104-48, at 1 (1995)).

[132] *Id.* (citing S. REP. NO. 104-48, at 6-9).

[133] *Id.* at 1715 (citing S. REP. NO. 104-48, at 1).

[134] *Id.* (citing S. REP. NO. 104-48, at 2).

[135] *Id.* (citing S. REP. NO. 104-48, at 2-3).

risks nor dangers to society.[136] In practice, the decisions of the INS to release criminal aliens were impacted by the severe deficiencies facing the INS in its funding and detention space.[137] Moreover, the Attorney General did not consistently provide individualized bond hearings for each criminal.[138]

3. The Court Assessed Recent Changes in the Immigration Law

The Court appraised the changes in immigration law since the end of the 1980s.[139] In 1988, Congress restricted the Attorney General's discretion in detention decisions regarding removable aliens who had been convicted of aggravated felonies.[140] In 1990, Congress broadened the definition of "aggravated felony," resulting in the detention of more criminal aliens.[141] At the same time, however, Congress passed a provision[142] granting the Attorney General leave to release LPRs during the deportation proceedings if he or she found that the LPRs were not a likely flight risk or danger to the community.[143] Then, following the reports showing that detention during deportation proceedings might best ensure that criminal aliens be successfully removed from the country, Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain deportable criminal aliens while they awaited the determination of their removability.[144] The Court voiced its support of the proposition that "Congress may make rules as to aliens that would be unacceptable if applied to citizens."[145]

4. The Court's Evaluation of Relevant Precedent

i. Opinions Rejecting Due Process Violation Claims

In its discussion of Fifth Amendment due process rights, the Court first set out that Kim did not dispute whether he was "deportable" within the

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[136] *Id.* (citing 8 U.S.C. § 1252(a) (1982)).

[137] *Id.* (citing S. REP. NO. 104-48, at 23) ("[R]elease determinations are made by the INS in large part, according to the number of beds available in a particular region.").

[138] *Id.* (citing Brief for the Petitioners at 19, Demore v. Kim, 123 S. Ct. 1708 (2003) (No. 01-1491)). "[M]ore than 20% of criminal aliens who were released on bond *or otherwise not kept in custody* throughout their deportation proceedings failed to appear for those proceedings." *Id.* (citing S. REP. NO. 104-48, at 2) (emphasis added).

[139] *Id.* at 1716.

[140] *Id.* (citing Pub. L. No. 100-690, 102 Stat. 4181 (1988)).

[141] *Id.* (citing Pub. L. No. 101-649, 104 Stat. 4978 (1990)).

[142] 8 U.S.C. § 1252(a)(2)(B) (2000).

[143] *Demore*, 123 S. Ct. at 1716 (citing Pub. L. No. 101-649, 104 Stat. 4978 (1990)).

[144] *Id.*

[145] *Id.* (citing Matthews v. Diaz, 426 U.S. 67, 79-80 (1976)).

meaning of § 1226(c).[146] The Court acknowledged that aliens are entitled to due process rights in deportation proceedings.[147] Yet the Court affirmed its century-old ruling that deportation hearings "would be in vain if those accused could not be held in custody pending the inquiry into their true character."[148]

The Court evaluated its opinions in *Carlson v. Landon*[149] and *Reno v. Flores*.[150] *Carlson* supported the Court's position in *Demore* because the Communist aliens were detained as they awaited their deportation proceedings without any sort of individual bond hearing.[151] The *Flores* Court also rejected due process challenges of juvenile aliens held in custody by the INS pending their deportation proceedings.[152] The Court upheld the constitutionality of this detention and the agency's policy of only releasing detained juveniles to the care of certain adults, including parents and legal guardians.[153]

ii. The Court Distinguished *Zadvydas v. Davis*

The Court distinguished the recent *Zadvydas v. Davis* decision which prohibited indefinite detention of removable aliens, and allowed detainment only for a period reasonably necessary to secure the alien's removal.[154] First, the aliens in *Zadvydas* were ones for whom deportation was "no longer practically attainable," and so detention could not serve its asserted immigration purpose.[155] In contrast, the aliens in *Demore* were deportable criminal aliens *pending their removal proceedings*.[156] The Court found that based on this difference in removal status, the government's detention of the aliens under § 1226 could increase the likelihood of meeting the immigration goal of successful deportation.[157]

Second, while the detention period facing the aliens in *Zadvydas* was indefinite, the detention for Kim and similarly situated LPRs was of a shorter duration.[158] The Court referenced statistics suggesting that in

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[146] *Id.* at 1717.

[147] *Id.* (quoting Reno v. Flores, 507 U.S. 292, 306 (1993)).

[148] *Id.* (quoting Wong Wing v. United States, 163 U.S. 228, 235 (1896)).

[149] 342 U.S. 524 (1952).

[150] 507 U.S. 292 (1993).

[151] *Demore*, 123 S. Ct. at 1718 (citing *Carlson*, 342 U.S. at 524).

[152] *Id.* at 1719 (citing *Flores*, 507 U.S. 292 (1993)).

[153] *Id.* (citing *Flores*, 507 U.S. at 297).

[154] *Id.* (citing Zadvydas v. Davis, 533 U.S. 678, 699 (2001)).

[155] *Id.* (quoting *Zadvydas*, 533 U.S. at 690).

[156] *Id.* at 1720.

[157] *Id.*

[158] *Id.* (citing *Zadvydas*, 533 U.S. at 690-91).

eighty-five percent of the cases in which an alien is held pursuant to § 1226(c), removal proceedings are generally concluded within forty-seven days, with the remaining fifteen percent of the cases, in which the alien appeals the decision of the Immigration Judge, averaging four months.[159] The Court acknowledged the longer than average duration of Kim's detention, which had lasted six months.[160]

5. The Majority Concluded Kim was Lawfully Detained

The Court held that detention during removal proceedings is constitutionally permissible, relying on *Carlson* and *Flores*.[161] The Court reversed the Ninth Circuit, emphasizing that Kim was a criminal alien who had conceded his deportability, and who would only be detained for a *limited* period before his removal proceedings.[162]

B. DISSENTING OPINION

The dissent[163] joined in the majority opinion to uphold federal jurisdiction in the case, but disagreed with the majority on the merits of the case.[164] The dissent observed that the basic liberty from physical confinement is central to due process rights and must be afforded to LPRs.[165] The INS never contended that the detention of Kim was necessary to ensure that he would appear for his removal hearing or to protect the community from danger.[166] In fact, the INS released Kim finding that he was not a threat, and that any risk of flight could be eliminated by a bond of $5000.[167]

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[159] *Id.* at 1720-21 (citing Brief for the Petitioners at 39-40, Demore v. Kim, 123 S. Ct. 1708 (2003) (No. 01-1491)).

[160] *Id.* at 1721.

[161] *Id.* at 1721-22.

[162] *Id.* at 1722.

[163] For the purposes of this discussion, Justice Souter's opinion will be referred to as the dissent. Although Justices Souter, Stevens and Ginsburg, concur with the majority opinion on the jurisdiction issue, the analysis in this Note focuses only on the dissenting portion of their opinion.

[164] *Demore*, 123 S. Ct. at 1727 (Souter, J., concurring in part and dissenting in part). Justices Stevens and Ginsburg joined in the opinion. Justice Breyer authored a separate dissent on the merits arguing that if Kim's legal arguments were not insubstantial nor brought for purpose of delay, he was entitled to a bond hearing. *Id.* at 1746-47 (Breyer, J., concurring in part and dissenting in part).

[165] *Id.* at 1727 (Souter, J., concurring in part and dissenting in part).

[166] *Id.* (Souter, J., concurring in part and dissenting in part).

[167] *Id.* (Souter, J., concurring in part and dissenting in part).

1. Kim's Rights to Remain in the United States are in Force Until He is Under a Final Order of Removal

The dissent first argued that the majority opinion mistakenly suggested that Kim conceded his removability.[168] Kim could not request relief from removal until he came before an immigration judge.[169] At the time that Kim filed his habeas corpus petition, he had not yet been provided with an initial hearing on the substantive issue of removability before an immigration court.[170] Furthermore, had Kim claimed that he was not deportable, the district court would likely have dismissed Kim's claim, finding that it was unexhausted.[171] Finally, Kim could continue to claim the benefit of his status as a LPR until a final order of removal was entered.[172]

The dissent next reviewed the legal protections granted to LPRs, including the heightened due process protection they receive over other aliens.[173] LPRs have the opportunity to create a permanent life in the United States by developing economic, familial, and social ties equal to those of a citizen.[174]

2. Mandatory Detention Under § 1226(c) Does Not Fulfill a Necessary Governmental Purpose

Pursuant to the Fifth Amendment, a potentially lengthy detention must fulfill a necessary governmental purpose.[175] Kim invoked the Court's consistent decisions that "the claim of liberty protected by the Fifth Amendment is at its strongest when government seeks to detain an individual."[176] Due process requires that a detainee be given an individual determination for the detainment as well as an opportunity to challenge the reason for his commitment.[177] The government could not avoid the Due Process Clause by categorically selecting a group of people for confinement, as done by § 1226(c), and denying members of the class any opportunity to contest their detainment.[178]

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[168] *Id.* (Souter, J., concurring in part and dissenting in part).
[169] *Id.* (Souter, J., concurring in part and dissenting in part).
[170] *Id.* (Souter, J., concurring in part and dissenting in part).
[171] *Id.* at 1727-28 (Souter, J., concurring in part and dissenting in part).
[172] *Id.* at 1728, 1730 (Souter, J., concurring in part and dissenting in part).
[173] *Id.* at 1728 (Souter, J., concurring in part and dissenting in part).
[174] *Id.* (Souter, J., concurring in part and dissenting in part).
[175] *Id.* at 1731 (Souter, J., concurring in part and dissenting in part).
[176] *Id.* (Souter, J., concurring in part and dissenting in part).
[177] *Id.* at 1732-33 (Souter, J., concurring in part and dissenting in part).
[178] *Id.* at 1733 (Souter, J., concurring in part and dissenting in part).

The *Zadvydas* decision supports an individualized review of Kim's confinement.[179] Kim had an even stronger claim than the alien in *Zadvydas*, who had already been issued a final removal order.[180] The constitutional limitations of Congress's power to remove aliens should apply more strictly to aliens such as Kim in that:

> Government's justification for detaining individuals like Zadvydas and Ma, who had no right to remain in this country and were proven flight risks and dangers to society . . . is certainly stronger (and at least no weaker) than its interest in detaining a lawful permanent resident who has not been shown (or even claimed) to be either a flight risk or a threat to the community.[181]

Aliens in removal proceedings have an additional interest in avoiding detainment in order to develop and present their case against removability.[182]

The dissent compared the "stark contrast to the total absence of custody review" in Kim's case to the rights provided to removable aliens under *Zadvydas*, including "the right to a hearing, to representation, and to consideration of facts bearing on risk of flight, including criminal history, evidence of rehabilitation, and ties to the United States."[183] Such protections are not extended solely to aliens under a final order of removal, but under 8 U.S.C. § 1536, Congress has made similar provisions granting release hearings for those aliens charged with being foreign terrorists.[184]

The majority's reliance on the Senate Report[185] as basis for justification of a class-wide confinement without exception was problematic for several reasons.[186] For example, the Senate Report failed to distinguish between alien groups, and the INS statistics regarding flight risk reflected that decisions to release aliens were based solely on availability of beds within the particular regions.[187] The dissent cited to a study[188] conducted at the request of the INS, finding that supervised release of criminal aliens significantly decreased the potential for flight risk.[189]

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[179] *Id.* at 1733-34 (Souter, J., concurring in part and dissenting in part).

[180] *Id.* at 1734 (Souter, J., concurring in part and dissenting in part).

[181] *Id.* at 1738-39 (Souter, J., concurring in part and dissenting in part).

[182] *Id.* at 1734 (Souter, J., concurring in part and dissenting in part).

[183] *Id.* at 1735 (Souter, J., concurring in part and dissenting in part).

[184] *Id.* at 1736-37 (Souter, J., concurring in part and dissenting in part).

[185] S. REP. NO. 104-48 (1995).

[186] *Demore*, 123 S. Ct. at 1739 (Souter, J., concurring in part and dissenting in part).

[187] *Id.* (Souter, J.,concurring in part and dissenting in part).

[188] VERA INST. OF JUST., TESTING CMTY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM, at ii, 33, 36 (2000).

[189] *Demore*, 123 S. Ct. at 1740 (Souter, J., concurring in part and dissenting in part).

The dissent disagreed with the majority's claim that mandatory detention under § 1226(c) is generally much shorter in duration than that in *Zadvydas*.[190] The statistics cited by the majority regarding length of detention demonstrate that the vast majority of cases involve aliens who do not raise any challenge to deportation.[191] However, LPRs represent the alien group most likely to present substantial challenges to deportation, which then result in lengthy proceedings.[192] Even if the average length of detention is shorter for aliens such as Kim than those aliens in *Zadydas*, this does not provide a "legitimate answer to the due process claim to individualized treatment and hearing."[193]

Finally, *Demore* does not implicate the government's unquestionable power to detain aliens in order to prevent flight or threat to the community.[194] Rather, the issue presented was whether such a power could be used to detain a still lawfully permanent resident alien *without reason*, and without opportunity to oppose it.[195] Due process forbids such a "blanket rule" allowing this confinement.[196]

V. ANALYSIS

The Supreme Court reached an erroneous conclusion in *Demore*. First, the Court's holding was inconsistent with its recent decision in *Zadvydas*. Curiously, the Court protected the due process rights of aliens under final orders of removal in *Zadvydas*, but neglected to do so for aliens who have not yet been found deportable. The government's rationale for mandatory detention is less reasonable for criminal aliens such as Kim than it is for aliens already under a final order of removal. Furthermore, the Court's opinion serves to undermine the high status reserved for LPRs in the United States. Finally, by adopting § 1226 in response to INS disorganization, Congress chose to strip individuals of their due process rights, as opposed to holding the INS accountable for its incompetence. The Court's decision to ignore evidence suggesting that the government could achieve its goal of ensuring the appearance of criminal aliens through less restrictive means furthers this violation of personal liberty. Congress should act to reverse this unnecessary infringement on the rights of LPRs

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[190] *Id.* at 1741 (Souter, J., concurring in part and dissenting in part).
[191] *Id.* (Souter, J., concurring in part and dissenting in part).
[192] *Id.* (Souter, J., concurring in part and dissenting in part).
[193] *Id.* (Souter, J., concurring in part and dissenting in part).
[194] *Id.* at 1746 (Souter, J., concurring in part and dissenting in part).
[195] *Id.* (Souter, J., concurring in part and dissenting in part).
[196] *Id.* (Souter, J., concurring in part and dissenting in part).

through legislation requiring individual bond hearings and a supervised release program for appropriate aliens.

A. IN *DEMORE*, THE SUPREME COURT REACHED A RULING INCONSISTENT WITH ITS RECENT DECISION IN *ZADVYDAS*

1. The Protections Afforded to the Aliens in Zadvydas *Should Also Safeguard the Aliens in* Demore

Similar to the aliens in *Zadvydas*, Kim is a LPR in the United States, and is therefore protected by the Due Process Clause of the Fifth Amendment from infringements upon his right to liberty from unwanted restraint. These LPRs are entitled to be free from arbitrary or capricious detainment.[197] However, an important distinction exists between the aliens in *Zadvydas* and *Demore* that supports the argument that those aliens in the latter group deserve even greater protection than those in the former. As noted by the dissent in *Zadvydas*, prior to the determination to remove an alien, the alien, by virtue of his presence in the United States, has an interest in remaining.[198] In the same way, aliens like Kim who have *not even appeared* for their removal hearing, have an interest in remaining in the United States. Unlike those aliens who have had an opportunity to appear in a removal hearing, have argued their case to remain, and have been ordered removed, aliens like Kim have not yet lost their right to remain in the country.

Similar to the aliens in *Zadvydas*, Kim and other aliens awaiting their removal hearings could potentially be detained for indefinite periods. The statutory language did not impose a fixed time limit for the detainment of aliens either prior to or after a removal determination. For aliens such as Kim who choose to exercise their right to appeal the restriction of their liberties, the detention will most certainly be lengthy. In *Zadvydas*, the Court required the government to release an alien under a final removal order after having been detained for six months, asserting that Congress previously doubted the constitutionality of detention for longer than six months.[199] In comparison, Kim was finally provided an individualized bond determination after being detained for six months, which was still prior to his deportation hearing. As in *Zadvydas* where the Court found that the aliens should not be unduly penalized because the government could not remove them in a timely manner, the aliens awaiting their removal

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[197] Zadvydas v. Davis, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting).

[198] *Id.* (Kennedy, J., dissenting).

[199] *Id.* at 701.

proceedings should not be punished for exercising their constitutional right to appeal the government's actions.

The *Zadvydas* Court rejected the government's detention of criminal aliens for the purpose of protecting the community without strong procedural protection for the aliens. In *Zadvydas*, the Court noted that the aliens themselves bore the burden of demonstrating that they did not impose a threat to the community or constitute significant flight risks, and were not protected with adequate judicial review.[200] Correspondingly, aliens like Kim are not afforded a *single opportunity* to prove the unreasonableness of their detention. Section 1226(c)(2) provides a pre-removal hearing release only for those aliens in a witness protection program. Notwithstanding the aliens in witness protection programs, the government offers no procedural protections for the due process rights of criminal aliens.

The dissent in *Zadvydas* considered the procedural safeguards for aliens under deportation orders to demonstrate that they are not flight risks or threats to their communities.[201] Although it found adequate safeguards for the liberty rights of these aliens, the dissent cautioned against the continued detainment of aliens without access to such protections.[202] Certainly, the dissent's warning applies to the situation of aliens who have not yet surrendered their right to remain in the country and who are being detained without consideration for release.

2. The Government Did Not Have a Sufficiently Strong Justification to Detain the Aliens in Demore

Both *Zadvydas* and *Demore* involved aliens subject to detention without individualized consideration of the necessity of their detainment. The *Zadvydas* Court addressed this procedural failure and asserted that with detention in the context of a civil proceeding, the government must proffer a sufficiently strong special justification to support its decision.[203] The reasonableness of the detention should be considered chiefly in terms of the statute's basic aim. While in *Zadvydas* the Court found that the statutory purpose was to ensure the presence of the alien at the time of the removal, in *Demore* the Court viewed a principle goal of § 1226(c) as to make certain

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[200] *Id.* at 692 (citing 8 C.F.R. § 241.4(d)(1) (2001) (providing that aliens, including criminal aliens, ordered removed may appeal their detention and be ordered released if shown that their release will not pose a danger to the community or that they do not constitute a significant flight risk)).

[201] *Id.* at 722-23 (Kennedy, J., dissenting).

[202] *Id.* at 724 (Kennedy, J., dissenting).

[203] *Id.* at 690.

that the alien would be present for the removal proceedings.[204] Thus, reasonable justification for detainment would be predicated upon the likelihood that an alien would appear for his removal hearing.

Without an individualized determination of flight risk, however, the government cannot assume that detention is required for aliens prior to their deportation hearing. Certain criminal aliens would appear for their hearings without being subjected to a severe restraint on their freedom. For example, many LPRs have established strong ties to their communities.[205] Many have families living in the United States.[206] These aliens have considerable interests in cooperating with the government and fighting for the right to remain in the country. It would be unreasonable, in consideration of the statutory aim, to detain an immigrant who would appear for his hearing without confinement. It becomes less reasonable still for the government to require detention of such aliens when it releases aliens like those in *Zadvydas* who have already been ordered deported. These aliens under orders of removal have little incentive to cooperate with the government. They have lost their right to stay in the United States and have exhausted their right to due process on this issue. In contrast, the *Demore* decision allows detention for LPRs with their right to remain in the United States intact and with an interest in cooperating with the government, but at the same time upholds the release of criminal aliens with no right to stay in the country and with much less interest in complying with the government.

B. IN DECIDING TO UPHOLD § 1226(C), THE COURT UNDERMINES THE HIGH STATUS RESERVED FOR LEGAL PERMANENT RESIDENTS

The decision upholding mandatory detention for criminal LPRs pending their removal hearing undermines the high status reserved for LPRs such as Kim in the United States. The United States has always been a nation open to immigrants, and to this day the new immigrant population continues to grow in proportion to the country's overall populace. During the 1990s, more than thirteen million people moved to the United States, averaging more than one million immigrants per year, including between 700,000 and 900,000 LPRs per year.[207] By 2000, the Census measured the

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[204] Demore v. Kim, 123 S. Ct. 1708, 1713 (2003) (indicating that the other main purpose of § 1226(c) is to protect the public from danger); S. REP. NO. 104-48, at 32 (1995).

[205] RANDY CAPPS ET AL., THE URBAN INST., THE NEW NEIGHBORS: A USER'S GUIDE TO DATA ON IMMIGRANTS IN U.S. COMMUNITIES 7 (2003), *available at* http://www.urban.org/url.cfm?ID=310844.

[206] *Id.* at 9, fig.4.

[207] *Id.* at 4, 8.

immigrant population to be thirty-one million, or eleven percent of the total United States population.[208] LPRs make up the largest group of immigrants in the United States, about one-third of all immigrants.[209]

As explained above, LPRs enjoy the rights to work, attend school, reside permanently, and apply for citizenship.[210] These rights extend to LPRs until a final order of removal is entered.[211] LPRs, as opposed to temporary, nonimmigrant aliens, are taxed on their worldwide income.[212] Male LPRs between the ages of eighteen and twenty-six must register for selective service.[213] LPRs are eligible for naturalization after three to five years following receipt of their legal residence documentation in the United States.[214]

Many LPRs have lived in the United States for years and have relatives who are also LPRs and citizens of the country. Almost all LPRs are "sponsored" by close family members or employers upon entrance into the country.[215] For example, in fiscal year 2000, of the 850,000 immigrants who attained legal permanent residence, 100,000 were sponsored by an employer, and the majority of the remainder achieved the LPR status based on family reunification.[216]

LPRs with strong familial ties in the United States have compelling reasons to appear for their removal proceedings. Eighty-five percent of immigrant families with children are mixed citizen-status families (families in which at least one parent is a noncitizen and one child is a citizen).[217] For children eighteen and younger, one out of five was the child of an immigrant parent in 2000.[218] Given that LPRs form the largest group of immigrants, many of the children born to immigrants are born to LPRs. It can be expected, therefore, that such aliens appreciate the opportunity to present their case to remain in the country.

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[208] *Id.* at 8 (citing Census 2000) (noting that this number includes both legal and undocumented immigrants).

[209] *Id.* at 9-10.

[210] Kim v. Ziglar, 276 F.3d 523, 528 (9th Cir. 2001).

[211] *Id.*

[212] Demore v. Kim, 123 S. Ct. 1708, 1728-29 (2003) (Souter, J., concurring in part and dissenting in part).

[213] *Id.* at 1729.

[214] CAPPS ET AL., *supra* note 205, at 9, fig.4.

[215] *Id.*

[216] *Id.* at 10.

[217] MICHAEL FIX ET AL., THE URBAN INST., THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES (2001), *available at* http://www.urban.org/url.cfm?ID=410227.

[218] THE URBAN INST., CHECK POINTS: DATA RELEASES ON ECONOMIC AND SOCIAL ISSUES (2000), *available at* http://www.urban.org/UploadedPDF/CP_000911.pdf.

LPRs contribute in many positive ways to the country. As the length of their stay in the country increases, immigrant residents achieve greater social and economic status.[219] For instance, homeownership by LPRs increases with time spent in the United States.[220] Immigrants also start up eighteen percent of all small businesses.[221] Immigrants as a group earn $240 billion a year and contribute $90 billion in taxes.[222] In comparison to the native-born population, immigrants are more likely to be employed, start new businesses, and save more of their income.[223]

LPRs who are not flight risks or dangerous to their community are severely impacted by mandatory detention, whether or not they would be later ordered to deport. One study found that those LPRs with significant ties to the community are more likely to appear for their removal hearings.[224] The study also revealed that many of the LPRs who would be eligible for a release program are ultimately permitted to remain in the country.[225] Thus, the LPRs who are most likely to comply with the removal proceedings are the same ones who make the greatest contributions to their communities and who are most likely to remain in the country. By indiscriminately forcing detention upon these LPRs, the government unnecessarily deprives them from associating within their communities among their families and friends. The LPRs that the court determines to deport are deprived of the opportunity to prepare themselves for their potential removal; these LPRs are prematurely disconnected from their loved ones and communities.

While in detention, LPRs are restricted from participating in the workforce and economy. Many aliens have had jobs or businesses in the United States, but while detained cannot continue their work or make final arrangements if they are deported. The ramifications of detention extend to the aliens' communities and potentially the United States workforce and economy. In upholding the blanket mandatory detention provision of § 1226(c), the Court demoralized those LPRs who most likely have made significant contributions to the United States and have family who will continue to reside in the United States.

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[219] CAPPS ET AL., *supra* note 205, at 7.

[220] *Id.* at 6.

[221] AMERICAN IMMIGRATION LAWYERS ASS'N (AILA), FIVE IMMIGRATION MYTHS EXPLAINED (2003), *at* http://www.aila.org/contentViewer.aspx?bc=17,142.

[222] *Id.*

[223] *Id.*

[224] VERA INST. OF JUST., *supra* note 188, at 7.

[225] *Id.* at 37 (finding that forty percent of the released aliens in their study were later permitted to stay in the United States).

C. IN FINDING THAT THE GOVERNMENT HAD A REASONABLE PURPOSE TO DETAIN CRIMINAL ALIENS, THE COURT PERMITTED THE RESTRICTION OF INDIVIDUAL LIBERTIES AS A SOLUTION TO GOVERNMENT INEFFICIENCY

The Court accepted the government's rationale for mandatory detention as a means to compensate for its own inefficiency and lack of resources.[226] It rejected information suggesting that detention is unnecessary in all cases of criminal aliens.[227] The *Demore* Court upheld mandatory detention under § 1226(c) for the purposes of assuring that criminal aliens appear for their removal hearings as well as to protect the public from potential criminal activity by the aliens.[228] It found support for detention pursuant to these rationales in Senate Report 104-48 (Senate Report) which led to the enactment of § 1226(c) in 1996.[229] The Senate Report highlighted that prior to the enactment of § 1226, a low percentage of non-detained criminal aliens appeared for their removal hearings and criminal aliens often committed more crimes before being deported.[230] The Senate Report documented numerous INS incompetencies contributing to the low appearance rate.[231] The Court acknowledged that when Congress enacted § 1226, the INS had never tested individualized bond determinations under optimal conditions.[232]

The Court improperly discounted the INS-commissioned study conducted by the Vera Institute of Justice, which found that with supervised release, a greater percentage of criminals appear for their removal hearings.[233] In neglecting to apply the findings of the Vera Study, the Court incorrectly found that the government proffered reasonable justification for the mandatory detention of criminal aliens such as Kim.

1. The Court Approved the Congressional Enactment of § 1226 in Response to the INS' Severely Inefficient Operations and Inadequate Resources

The *Demore* Court agreed that the government had reasonable justification to detain criminal aliens without an individual assessment based upon the information presented in the Senate Report. The Senate Report revealed that prior to the time that Congress enacted § 1226 in 1996,

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[226] Demore v. Kim, 123 S. Ct. 1708, 1714-16 (2003).

[227] *Id.* at 1719.

[228] *Id.* at 1711.

[229] *Id.* at 1715 (citing S. REP. NO. 104-48 (1995)).

[230] S. REP. NO. 104-48, at 31-32.

[231] *Id.* at 2-4.

[232] *Demore*, 123 S. Ct. at 1720.

[233] *Id.* at 1715-16 (citing VERA INST. OF JUST., *supra* note 188).

the INS was operating with inadequate resources and severe inefficiency.[234] The Senate Report stated that the INS was unable to "even identify most of the criminal aliens eligible for deportation."[235] While the Court acknowledged that § 1226(c) compensated for the disorganization of the INS, it nevertheless agreed that the restriction of individual liberties was an appropriate solution to the problem.

Prior to the passage of § 1226(c), the INS decisions to release criminal aliens on bond were influenced principally by the agency's lack of resources, specifically the "chronic lack of detention space" available to the INS.[236] At the time of the report, the INS had approximately 3500 detention beds available in the entire country.[237] The lack of detention resources put tremendous pressure on the INS to release, rather than confine, criminal aliens.[238] The Senate Report suggested that over twenty percent of non-detained criminal aliens failed to appear for their removal hearings.[239]

Moreover, once released on bond, the INS was again encumbered by inadequate resources in terms of its capability to monitor the criminal aliens. The INS made limited efforts to locate and apprehend criminal aliens failing to appear.[240] The Senate Report described the INS record-keeping system as "outdated and seriously flawed."[241] The agency did not maintain accurate records of the criminal aliens' basic information and often had difficulty locating aliens to issue their final orders of removal.[242]

Instead of requiring the INS to streamline its operations when confronted with the severe disorganization, Congress restricted the rights of criminal aliens. In upholding the mandatory detention imposed upon all criminal aliens, the Court further promoted the violation of individual liberties to counter the failings of the government.

2. The Court Incorrectly Rejected the Important Findings of the Vera Report Demonstrating that Under Efficient Programs, Released Criminal Aliens Will Consistently Report for Their Removal Hearings

In *Demore*, the government argued that mandatory detention under § 1226(c) was necessary to the appearance of criminal aliens at their

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[234] S. REP. NO. 104-48.
[235] *Id.* at 2.
[236] *Id.* at 23.
[237] *Id.*
[238] *Id.*
[239] *Id.* at 2.
[240] *Id.* at 18.
[241] *Id.* at 14.
[242] *Id.* at 2, 15.

removal hearings.[243] While the government supported this rationale with data indicating that the INS could not manage the released criminal aliens, the Court completely rejected findings that eligible criminal aliens would appear for removal hearings under a less costly release program.[244] A study conducted at the request of the INS by the Vera Institute for Justice found that a supervised release program for eligible criminal aliens pending their removal hearings served as a less costly and equally effective alternative to detainment.[245] Unfortunately, the INS cannot implement a supervised release program due to the statutory restraint on the discretion of the agency to release criminal aliens into such a program.[246]

In ignoring the significance of the Vera Institute's findings, the Court averred that the Due Process Clause did not require the least burdensome means to achieve a statutory goal of detention.[247] However, as in *Zadvydas* where the Court could not find a reasonable justification for detention when removal seems a remote possibility, the government's need to detain criminal aliens to assure their appearance at a removal hearing can not be reasonably justified for those aliens who would appear without detainment. The Court therefore ignored evidence that certain criminal aliens would be unjustifiably detained by mandatory detention under § 1226(c).

i. The Vera Report Demonstrated that a Supervised Release Program for Eligible Criminal Aliens Facilitated a High Appearance Rate at Removal Hearings

The report issued by the Vera Institute of Justice (Vera Report) reviewed the findings of the Appearance Assistance Program (AAP) as designed and implemented by the Vera Institute.[248] The criminal aliens participating in the AAP were placed under intensive supervision, signifying that as a condition of release the aliens were expected to report regularly to supervision officers in person and by phone.[249] The AAP staff monitored the criminal aliens' whereabouts and risk of flight and provided them with information about their obligations to comply with the law and

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[243] Demore v. Kim, 123 S. Ct. 1708, 1713 (2003).

[244] *Id.* at 1720.

[245] VERA INST. OF JUST., *supra* note 188, at i-iii.

[246] S. REP. NO. 104-48, at 12.

[247] *Demore*, 123 S. Ct. at 1720.

[248] VERA INST. OF JUST., *supra* note 188. The AAP began in February 1997 in New York City. *Id.* at 1. The program participants included aliens from three groups: asylum seekers, criminal aliens, and undocumented workers apprehended at work sites. *Id.* The AAP employed two levels of supervision, both intensive and regular. *Id.* at 2.

[249] *Id.*

the consequences for noncompliance.[250] The researchers established certain criteria to determine the suitability of the criminal aliens for release including: the strength of their family and community ties, their appearance rate in prior legal proceedings, their eligibility to apply for legal relief, and the potential impact on public safety as determined by their rap sheets.[251] If an alien was not qualified for legal relief, the program considered the strength of the alien's ties to the community and other equities both in the United States and in home country.[252] Prior to an alien's release, the researchers verified the alien's address and contact information and required a designated guarantor who agreed to take moral, not legal or financial, responsibility for the alien.[253]

After conducting a three year assessment of the program, the Vera Institute discovered that ninety-four percent of the supervised criminal aliens appeared for their removal hearings.[254] The researchers compared the results of the criminal aliens participating in the AAP to the results of a comparison group of criminal aliens released on bond or parole without supervision, finding that the comparison group appeared for their removal hearings seventy-one percent of the time.[255] The Vera Report contrasted these statistics with the seventy-eight percent appearance rate of felony defendants released from detention before criminal trials on bail and recognizance.[256] Finally, the Vera Report found that forty percent of the criminal aliens released under the AAP were ultimately allowed to remain in the United States.[257]

The Vera Report discerned three factors positively affecting the aliens' compliance within the removal proceedings: community and family ties in the United States, the aliens' representation by counsel, and participation in AAP.[258] When surveyed for their motivation to comply, the aliens cited that the AAP assisted them in making more informed decisions by explaining the removal process, ways to seek attorneys, legal options, and consequences for failing to appear.[259] The aliens further explained that they

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[250] *Id.*
[251] *Id.* at 13.
[252] *Id.*
[253] *Id.*
[254] *Id.* at 3.
[255] *Id.*
[256] *Id.* at 4, n.5.
[257] *Id.* at 37.
[258] *Id.* at 7.
[259] *Id.*

were reluctant to disappoint the program staff who had treated them with respect.[260]

The Vera Report highlighted that for criminal aliens supervised release was more cost-effective than detention.[261] The cost of releasing a criminal alien on bond was not only the least expensive alternative, but also resulted in the lowest continuous rate of appearance at removal proceedings.[262] The Vera Institute suggested that the best choice for the management of criminal aliens awaiting their removal proceedings would be an intensive supervision program until the final order of removal is or is not entered, and then detainment upon an order of removal.[263]

The Vera Report confirmed that the statutory aim of ensuring the appearance of criminal aliens at their removal hearings may be met without mandatory detention. Under a program of supervised release, eligible criminal aliens will maintain their right to remain in the country without excessive limitation upon this right up until the point that they are afforded a hearing on their removal. If at that time, after having an opportunity to present their case to remain in the United States, an immigration judge determines that the criminal alien be removed, the alien no longer has an unrestricted right to be in the country.

ii. Congress Should Enact Legislation Demanding an Alternative to Mandatory Detention in Order to Reduce Costs Both in Terms of Government Resources and Individual Liberties

In 1998, the INS publicly asserted through its commissioner, Doris Meissner, that it would like an amendment to the requirement under § 1226 of mandatory detention for criminal aliens to allow for more agency discretion in its handling of the aliens.[264] Commissioner Meissner stated that even though the INS had received more funding and had considerably increased its detention capacity, the agency nevertheless could not accommodate the detainment of all criminal aliens as required under § 1226(c).[265] Significantly, Commissioner Meissner argued that for some

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[260] *Id.*

[261] *Id.* at 8, tbl.1 (finding based on cost through the final hearing that the cost per criminal alien detained was $4575 and the cost per criminal alien detained and then supervised was $3871).

[262] *Id.* (finding the cost was $238 through the final hearing, but only with a seventy-seven percent appearance rate).

[263] *Id.*

[264] *Concerning INS Reform: Detention Issues: Before the Immigration Subcomm., Senate Judiciary Comm.*, 105th Cong. (1998) (statement of Doris Meissner, Comm'r., Immigration and Naturalization Serv.).

[265] *Id.*

of the aliens, detention served no purpose under the statute.[266] In fact, both the Department of Justice and INS admitted that § 1226 goes too far.[267] Ironically, by enacting § 1226(c), the legislature chose to limit the liberty rights of aliens in response to the inefficiencies of the INS, while the INS contracted with the Vera Institute for Justice to develop a supervised release program so as to prevent unnecessary detention.

Since 1998, the immigration policies and procedures of the United States have undergone vast transformation. In response to the terrorism of September 11, 2001, the government has allocated more resources to the management of immigration.[268] The government has acted to better organize and restructure immigration services resulting in the abolishment of the INS and creation of the new Homeland Security Department. It is an opportune time for Congress to reverse its history of shielding government inefficiency in immigration at the cost of the rights of aliens who lawfully reside in the United States. Congress should rescind the mandatory detention provision of § 1226 and return the discretion to the immigration agency for individual release determinations. As recommended by the INS and the Vera Report, Congress should endorse individual bond hearings and supervised release programs to protect aliens from unnecessary restraint at a relatively low cost to the government.

VI. CONCLUSION

In *Demore v. Kim*, the Supreme Court held that: (1) the provision of the INA limiting judicial review of the Attorney General's discretion for the detention or release of any alien did not preclude the Supreme Court of jurisdiction to grant habeas relief; and (2) Congress did not offend due process rights under the Fifth Amendment in requiring that aliens pending removal hearings be detained pursuant to the no-bail provision under § 1226(c) of the INA.

The *Demore* Court, however, ruled inconsistently with its recent opinion in *Zadvydas v. Davis*. The Court succeeded in damaging the high status reserved for legal permanent aliens in the United States. The Court improperly agreed that the government could reasonably restrict the rights of individual aliens as a solution for government incompetence. During this era of reform in the country's immigration services and policies, Congress should revoke the mandatory detention provision of § 1226 and instead

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[266] *Id.*

[267] Brief for the Respondents at 27, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791).

[268] *See, e.g.*, The Homeland Security Act, 6 U.S.C.A. § 101 (West Supp. 2003).

enact legislation that requires both government efficiency and protection for individual liberties.

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