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Charles Demore v. Hyung Joon Kim: Another Step Away from Full Due Process Protections

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CHARLES DEMORE V. HYUNG JOON KIM: 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. After he had served his time, the Immigration and Naturalization Service (INS) 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. 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.

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. When the Supreme Court has addressed detention of citizens, it has required an individualized determination of their risk of flight or danger. For example, in United States v. Salerno, 481 U.S. 739 (1987), the Court found that the government could detain alien pretrial detainees only if it showed that the detainees were dangerous to the public or flight risks.

In contrast, in Charles Demore v. Hyung Joon Kim, 538 U.S. 510 (2003), the Court held that the government could detain aliens for purposes of deportation only if it showed that the aliens were flight risks or potential threats to the public. The Court recognized that the government’s interest in detaining aliens for deportation was not compelling because the government had no reason to believe that Kim posed any risk of flight or danger. The Court noted that the government’s interest in detaining aliens for deportation was limited to the government’s interest in determining whether the aliens were entitled to relief from deportation.

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

The Supreme Court’s decision in Hyung Joon Kim will have a direct impact on a large number of aliens. For example, in 2002, the INS detained approximately 202,000 aliens, 103,000 of whom had criminal records. In this same year, the INS removed 148,619 aliens from the United States, 70,759 of whom the INS classified as criminal. 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.

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. Part III examines the Supreme Court’s decision in Hyung Joon Kim. Part IV evaluates the due process analysis used by the Court and addresses the implications of this decision. Part V of this note concludes that the Court’s strained departure from strict scrutiny and its...
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).
   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
process prohibiting the government from infringing on a fundamental interest unless it has a compelling interest and the infringement is narrowly tailored (strict scrutiny). 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.”

If the interest at stake is not a fundamental interest, 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 . . . for bids 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).


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); 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.\(^{30}\)

\(^{24}\) 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”).


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.” 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.” 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

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

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. 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.

from admission to the United States, including aliens who had committed crimes of moral turpitude.\textsuperscript{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.\textsuperscript{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.\textsuperscript{42} Although Congress did not explicitly grant this discretion to the Attorney General for deportation proceedings, the courts interpreted it to apply.\textsuperscript{43}

In 1988, Congress provided for the deportation of aliens who were aggravated felons\textsuperscript{44} as well as their mandatory detention.\textsuperscript{45} After many district courts found this mandatory detention unconstitutional,\textsuperscript{46} Congress amended the INA to allow for release of these aliens if they


\textsuperscript{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)).


\textsuperscript{45} Id. at § 7342 (8 U.S.C. § 1228 as amended (2000)).

were not a risk to the community and were likely to appear for their hearings. In April 1996, Congress again amended the INA to require mandatory detention of aliens convicted of an “aggravated felony.”

Five months later, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which replaced the aggravated felony provision with a broader mandatory detention provision for “criminal aliens.”

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

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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).


57. 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

60. 8 U.S.C. § 1226(c) (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.  

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

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); Zakonaité 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, 149 U.S. 698 (1893) (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.


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.

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 aliens\(^ {73}\) 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, 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.

The court narrowly defined Parra’s liberty interest as “liberty in the United States by someone no longer entitled to remain in this country.” Further, the court reasoned that, because Parra conceded that he was removable, “the probability of error is zero.” 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.

The Third Circuit came to a different conclusion in 2001 in Patel v. Zemski. First, the court cited Parra to hold that Congress had not restricted judicial review of the constitutionality of the act. 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 right\textsuperscript{84} and applied strict scrutiny, which required “the statute’s infringement on that right [to be] narrowly tailored to serve a compelling state interest.”\textsuperscript{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.\textsuperscript{86}

The Tenth Circuit also held the mandatory detention provision of § 1226 unconstitutional as applied in \textit{Phu Chang Hoang v. Comfort}.\textsuperscript{87} This court rejected the Seventh Circuit’s conclusion that aliens who are subject to § 1226 have forfeited their right to liberty\textsuperscript{88} and held that “[t]he liberty interest of a person who is detained pending deportation proceedings is . . . fundamental.”\textsuperscript{89} Though the court found the

\begin{footnotesize}
\begin{enumerate}
\item 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. \textit{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. \textit{Id.} at 314. \textit{See supra} notes 76-80 and accompanying text (discussing the Seventh Circuit’s opinion in \textit{Parra}). The court also noted that, while holding in \textit{Zadvydas} considered the indefinite length of detention critical, Patel’s eleven-month detention was lengthy. \textit{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). \textit{See also supra} notes 70-72 (discussing \textit{Zadvydas} v. \textit{Davis}).
\item \textit{Patel}, 275 F.3d at 310.
\item \textit{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. \textit{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. \textit{Id.}
\item \textit{Phu Chang Hoang v. Comfort}, 282 F.3d 1247, 1261 (10th Cir. 2002), \textit{vacated}, 123 S. Ct. 1963, (2003). The court reviewed the cases of \textit{Thanh Quoc Nguyen, Phu Chang Hoang}, and \textit{Pham Qua Trung}. \textit{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. \textit{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. \textit{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. \textit{Id.} at 1253.
\item \textit{Id.} at 1255-56. The court relied on the Supreme Court’s decision in \textit{Zadvydas} for the proposition that, even after the INS orders aliens to be removed, they retain a liberty interest sufficient implicate due process protections. \textit{Phu Chang Hoang}, 282 F.3d at 1256 (citing \textit{Zadvydas} v. \textit{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.” \textit{Id.}
\item \textit{Id.} at 1257 (citing for support \textit{Rodriguez-Fernandez} v. \textit{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. \textit{Id.} (comparing these detentions to the detentions in \textit{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.” \textit{Id.} at 1257. The
\end{enumerate}
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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 Unite 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
priors and sentenced to three years imprisonment. Pursuant to 8 U.S.C. § 1226(c), the INS detained Kim on February 2, 1999, the day after he was released, and charged him with being deportable due to his convictions.

B. Procedural History

On May 17, 1999, Kim filed a petition for a writ of habeas corpus, arguing that his detention without bail was a violation of the Due Process Clause of the Fifth Amendment. 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.

The INS released Kim on a $5,000 bond and appealed the judgment of the district court.

On January 9, 2002, 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. Therefore, the court affirmed the district court’s order requiring the INS to hold a bail hearing for Kim.

The INS then petitioned for writ of certiorari to the United States Supreme Court, which the Court granted on June 28, 2002.

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 reason of having committed any offense covered in section . . . 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title.”
103. Hyung 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.
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.
C. United States Supreme Court Decision

1. Did Congress Restrict Habeas Corpus Review?

a. Majority Opinion

A splintered United States Supreme Court reversed the judgment of the Court of Appeals for the Ninth Circuit. Chief Justice Rehnquist issued a two-part majority opinion, which only Justice Kennedy joined entirely, 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 the issue of whether 8 U.S.C. § 1226(e) precluded review of Kim’s challenge of his detention. The majority explained that, for Congress to preclude habeas review, it must provide “a particularly clear statement” of such intent. The majority found no such explicit provision in § 1226(e).

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).


(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.

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. Even though she provided an analysis of the Suspension Clause, 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.

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?


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”).


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.
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. The majority began its analysis by evaluating the policy behind mandatory detention pending removal hearings 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.”

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.” 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*\textsuperscript{133} and *Reno v. Flores*,\textsuperscript{134} which both upheld detention of aliens who were deportable.\textsuperscript{135} The majority distinguished the Court’s previous holding in *Zadvydas v. Davis*,\textsuperscript{136} by noting that *Zadvydas* involved removal that was “no longer practically attainable” and the detention had no foreseeable termination.\textsuperscript{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.”\textsuperscript{138} The majority reasoned that, while aliens are entitled to due process of law in deportation proceedings,\textsuperscript{139} Congress need not use the “least burdensome means to accomplish its goal” when dealing with deportable aliens.\textsuperscript{140} The majority upheld detention during such proceedings\textsuperscript{141} and rejected Kim’s claim.\textsuperscript{142}

b. Justice Kennedy Concurs

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 alien\textsuperscript{143} pending a

\textsuperscript{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*).

\textsuperscript{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).

\textsuperscript{135}. *Hyung Joon Kim*, 538 U.S. at 523-26.

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

\textsuperscript{137}. *Hyung Joon Kim*, 538 U.S. at 527-31.

\textsuperscript{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)).

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

\textsuperscript{140}. *Id.* at 528.

\textsuperscript{141}. *Id.* at 522-23.

\textsuperscript{142}. *Id.* at 532.

\textsuperscript{143}. Permanent resident alien is defined as:

[an] 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." He also concluded that the Due Process Clause might preclude detention if it becomes “unreasonable or unjustified.”

Kim, however, did have an opportunity to demonstrate that he was not properly included as a criminal alien, which satisfied the Due Process Clause.

c. Justice Souter Concurs 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. Justice Souter began by disagreeing with the majority’s conclusion that Kim had conceded his deportability. 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.

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.”
Justice Souter relied on precedent\(^{152}\) to conclude that due process requires an individual determination before detention\(^{153}\) 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

\(152\) 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 Zadvydas 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.  Although Justice Souter found that the INS could hold aliens who concede that they are deportable for a limited time without bail, he agreed with Justice Souter’s opinion that Kim had not conceded his deportability.

Justice Breyer analyzed the text of the statute to conclude that mandatory detention did not apply until an alien “is deportable.” 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. 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.” 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.

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. This departure will impact aliens generally as well as the large population of aliens who face detention.

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.\textsuperscript{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,\textsuperscript{165} the INS’ automatic stay rule,\textsuperscript{166} and the alien detention provisions of the USA PATRIOT Act.\textsuperscript{167}

A. Due Process Analysis

Although the Supreme Court did acknowledge and affirm that aliens are entitled to due process protections,\textsuperscript{168} its evasion of established due process standards and analysis\textsuperscript{169} weakens due process protections for aliens and may well serve as a foundation for a future erosion of protections for citizens.\textsuperscript{170} Not only did the Court confuse the suspect

\begin{itemize}
  \item 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).
  \item 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).
  \item 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)).
  \item 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.
\end{itemize}

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, 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. Furthermore, the Court’s modification of substantive due process analysis creates questions about what the standard is, and to whom this modification applies.

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. 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. Precedent does support this assertion; however, this precedent has been in the context of equal protection analysis. 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.” 1d. 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)).

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


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. Here, however, the Court determined that even though a fundamental interest was implicated, strict scrutiny was not the appropriate standard of review.

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. The Court reasoned that these studies were sufficient to support this approach even though other studies suggested another course of action. 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 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).


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.\textsuperscript{187} Although \textit{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.\textsuperscript{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 \textit{Alameda} allowed the use of statistics.\textsuperscript{189} The Court in \textit{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.\textsuperscript{190} It explained that the statistics suggested that the INS was failing to remove sufficient aliens when there had been discretionary release.\textsuperscript{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.”\textsuperscript{192}
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. 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. It might also have drawn an analogy to its prison cases, another area where it has created an exception. 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.

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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-punititive 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 Zadvydas 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); Ogbughikpa 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.

Although Kim did not dispute that he was convicted of the crimes that led to the allegation that he was deportable, there has been much litigation regarding which crimes suffice for § 1226. In addition, even though the Court noted that Kim did not take advantage of a Joseph hearing in which he could have challenged the INS' allegations, this does not lead to the conclusion that he was deportable. This hearing requires an alien to prove that it is substantially unlikely that the government will prevail during the removal proceeding. Kim may have decided that he would not prevail at this hearing, but still hoped that he would prevail in the actual removal proceeding.

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 good-faith dispositive exception under this state’s law would be sufficient 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(b)(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. Further, this hearing would have addressed the merits of the deportation, not Kim’s real contention, which was the necessity of his detention.

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 border or people not within the United States. Aliens are entitled to due process protections during deportation proceedings, however, Congress need not use the “least burdensome means to accomplish its goal” when dealing with deportable aliens. 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.”

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).


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 necessary\textsuperscript{218} for their removal proceedings without an individualized determination of their risk of flight or dangerousness if they concede that they are deportable.\textsuperscript{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.”\textsuperscript{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); Uritsky 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.\(^\text{221}\) Criminal aliens might even receive less protection than terrorist aliens.\(^\text{222}\) 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.\(^\text{223}\) 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.\(^\text{224}\) 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.\(^\text{225}\) 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).


\(^{224}\) 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.
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
regard to aliens. 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. 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. 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. Finally, Congress passed the USA PATRIOT Act, which expanded the power to detain terrorist aliens. 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. 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 DETAINNEES, 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.


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.\textsuperscript{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.\textsuperscript{236} The INS took a variety of measures to maintain detention of these aliens to comply with this policy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{239} The INS also developed a method of automatically requesting continuances to

\textsuperscript{235} \textit{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. \textit{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. \textit{Id.} at 51. There is evidence that the detainees were physically and verbally abused during their detention. \textsc{Office of the Inspector General, U.S. Dep’t of Justice, Supplemental Report on September 11 Detai nees’ 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. \textit{Id.} at 28.

\textsuperscript{236} \textit{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.” \textit{Id.} at 41-42.

\textsuperscript{237} \textit{Id.} at 76.

\textsuperscript{238} \textit{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.” \textit{Id.} at 86.

\textsuperscript{239} \textit{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
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. Therefore, Hyung Joon Kim leaves this automatic stay rule highly susceptible to attack.

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. 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


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.

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

The Attorney General must bring charges or otherwise begin deportation proceedings within seven days of detention or release the alien. 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.” 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.”

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.”

Current case law suggests that detentions pursuant to § 1226a may easily become unconstitutional. The seven-day limit on beginning detention pursuant to § 1226a allows the Attorney General greater discretion to keep an alien in custody, but it also allows for periodic reviews and releases if certain conditions are met.

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).


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”).


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. 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. 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.

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.” 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. However, the Court in Zadvydas explicitly left open the question of preventative detention in the context of terrorism.

V. CONCLUSION

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

Allegis 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).


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.


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.\textsuperscript{263} The judiciary could have served as a protectorate for non-citizens, but the Court’s analysis in \textit{Demore v. Hyung Joon Kim} serves as an indicator that this minority may be left without recourse to protect their fundamental rights.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\begin{footnotesize}
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\item \textsuperscript{264} See \textit{supra} notes 132-142 and accompanying text (reviewing the Court’s reasoning that led it away from strict scrutiny).
\item \textsuperscript{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 \textit{supra} notes 168-196 and accompanying text (analyzing the Court’s due process analysis in \textit{Demore v. Hyung Joon Kim}).
\item \textsuperscript{266} See \textit{supra} notes 185-196 and accompanying text (focusing on the Court’s decision to bypass the narrowly tailored requirement of strict scrutiny in \textit{Hyung Joon Kim}).
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expanding attempts to target aliens in our post-September 11 world.\textsuperscript{267} 

\textit{Brian Smith}