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Demore v. Kim: Is the Supreme Court Decreasing the Rights of Lawful Permanent Residents

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DEMORE V. KIM: IS THE SUPREME COURT DECREASING THE RIGHTS OF LAWFUL PERMANENT RESIDENTS?

I. INTRODUCTION

On April 29, 2003, the Supreme Court decided *Demore v. Kim*,[1] holding that the Immigration and Naturalization Service (INS) may detain deportable criminal aliens without bail hearings during their deportation proceedings.[2] The Supreme Court, in a five to four decision, determined that the provision of the Immigration and Nationality Act[3] that allows for the detention of an alien without bail pending deportation proceedings does not violate the alien's due process rights under the Fifth Amendment.[4] In doing so, the Supreme Court overturned the decisions of the lower courts.[5] This decision reverses a long history of recognizing the rights asserted by aliens as deserving of protection under the Due Process Clause of the Constitution.

This Case Comment will begin by discussing the facts and procedural history of *Demore*. It will then analyze the Supreme Court's decision and reasoning. Next, this Comment will briefly describe how courts in the past have upheld the due process rights of aliens and have recognized that due process for these aliens includes many of the rights enjoyed by citizens. Additionally, the courts historically have explained that lawful permanent residents ("LPRs"), as a sub-class of aliens, should enjoy even greater protection than the larger class of aliens in general. Finally, this Comment will conclude that the Supreme Court's flawed reasoning in *Demore* resulted in a violation of the fundamental right of freedom from needless detention that should belong to aliens as well as to

1. 123 S. Ct. 1708 (2003).
2. *Id.* at 1712.
3. 8 U.S.C. § 1226 (2000).
4. *Demore*, 123 S. Ct. at 1708.
5. *Id.* at 1713.

citizens. This Case Comment further expresses concern that, with this case, the Supreme Court may be embarking on a new trend: paying lip service to an alien's right to due process while in practice diminishing the constitutional rights of aliens residing in the United States by defining due process—as applied to them—unjustifiably narrowly.

II. CASE BACKGROUND

In 1984, Hyung Joon Kim, a Korean citizen, entered the United States at the age of six.[6] He became an LPR two years later.[7] In July 1996, when he was eighteen, Kim was convicted of first-degree burglary.[8] A year later, he was convicted of "petty theft with priors" and sentenced to three years in prison.[9] Immediately after his release from prison, the INS[10] detained Kim without bail under the authority of 8 U.S.C. § 1226(c)(1)(B).[11] The INS claimed that under 8 U.S.C. § 1101(a)(43), Kim's second conviction "qualified as an 'aggravated felony,'" and therefore, he could be deported under 8 U.S.C. § 1227(a)(2)(A)(iii).[12]

After being held in INS custody for over three months without the opportunity for a bail hearing, Kim filed a petition for a writ of habeas corpus.[13] Kim argued that the no-bail provision of

6. *See* Kim v. Ziglar, 276 F.3d. 523, 526 (9th Cir. 2002).

7. *Id.* There are many ways for an alien to become an LPR, including sponsorship through a family member who is either a citizen or an LPR, or sponsorship through employment. *See* United States Citizenship and Immigration Services, *Immigration Classification and Visa Categories*, *at* http://uscis.gov/graphics/services/imm_visas.htm (last visited Apr. 15, 2004). The case does not mention how Kim became an LPR.

8. *Id.*

9. *Id.*

10. The INS was restructured under the Department of Homeland Security (DHS) on March 1, 2003, and is now called the United States Citizenship and Immigration Services (USCIS). *See* United States Citizenship and Immigration Services, *This is USCIS*, *at* http://uscis.gov/graphics/aboutus/thisisimm/index.htm (last modified Nov. 19, 2003). This Comment will continue to use "INS" instead of "USCIS" because all of the cases discussed herein refer to the agency as the INS.

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

12. *Id.*

13. *Id.*

§ 1226(c)[14] violated the Due Process Clause of the Fifth Amendment. Specifically, Kim maintained that the Due Process Clause requires that before detaining aliens pending their proceedings, these detainees are constitutionally due at least the process of an individualized determination of risk that they would fail to report or would commit further crime if not detained pending their proceedings.[15] The district court agreed and held that § 1226(c) was "unconstitutional on its face" as applied to the broad class of aliens convicted of certain criminal conduct.[16] The court then ordered the INS to hold a bail hearing "to determine Kim's risk of flight and dangerousness."[17] Following this hearing, the INS released Kim on bond.[18]

The INS appealed, but the Ninth Circuit affirmed the district court's order.[19] The Ninth Circuit, however, did not hold that § 1226(c) was unconstitutional on its face as applied to the broad category of aliens who committed the listed violations, but instead explained that Kim, as an LPR (a subset of the general class of aliens addressed by the district court), was entitled to "the individualized determination and fair procedures guaranteed by the Due Process Clause of the Fifth Amendment."[20] The Ninth Circuit thereby acknowledged, as did the lower court, that aliens are entitled to the protection of the Due Process Clause. It further held that detaining LPRs without a bail hearing pending deportation proceedings violates the due process to which this class of aliens is entitled. Unfortunately, although the Supreme Court agreed that aliens are entitled to some due process, it did not agree with the scope of that due process as defined by the Ninth Circuit.

III. REASONING OF THE SUPREME COURT

The statute at issue in this case is Section 1226(c)(1) of the U.S. Code, which states "[t]he Attorney General shall take into custody

14. 8 U.S.C. 1226(c) (2000) (stating that "the Attorney General shall take into custody any alien" who is removable because he has committed one of the specified list of crimes).

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

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 539.

20. *Id.*

any alien who . . . is deportable under section 1227(a)(2)(A)(i) . . . on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year. . . ."[21] The Supreme Court stated that the statute applied to Kim because he qualified as an alien, he conceded that he was deportable, and he "[did] not dispute the validity of his prior convictions."[22] Kim challenged the constitutionality of § 1226(c), not arguing that he was not subject to § 1226(c), but instead arguing that the statute itself violated due process. Specifically, he alleged that his due process rights were violated when the INS, pursuant to the statute, refused to grant him an *individualized bail hearing* to determine whether or not he posed a flight risk or a danger to society, but instead detained him without considering these factors.[23]

As an overarching principle, the Court explained 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.'"[24] The Court compared Kim's argument to similar arguments in two other cases, *Carlson v. Landon*[25] and *Reno v. Flores*,[26] acknowledging that the Court has repeatedly determined that Congress has substantial authority in immigration matters.[27]

The Court, therefore, began its review of Kim's constitutional challenge to § 1226(c) by looking at the background of the

21. 8 U.S.C. § 1226(c)(1)(C) (2000).
22. Demore v. Kim, 123 S. Ct. 1708, 1712 (2003).
23. *Id.* at 1713.
24. *Id.* at 1716 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).
25. 342 U.S. 524 (1952).
26. 507 U.S. 292 (1993).
27. *Demore*, 123 S. Ct. at 1718–19. In *Carlson*, the detained aliens, members of the Communist Party, challenged their detention on the grounds that they were found not to be a flight risk. *Carlson*, 342 U.S. at 531–32. The *Carlson* Court determined that since Congress had made such aliens deportable based upon its findings regarding the Communist Party, the INS could deny bail to the detainees "by reference to the legislative scheme" even without any finding of flight risk. *Id.* at 543. In *Reno*, a class of alien juveniles brought a due process challenge when the INS arrested them and detained them pending their deportation hearings. 507 U.S. at 294. The Court determined "that 'reasonable presumptions and generic rules,' even when made by the INS rather than Congress, are not necessarily impermissible exercises of Congress' traditional power to legislate with respect to aliens." *Demore*, 123 S. Ct. at 1719 (quoting *Reno*, 507 U.S. at 313).

provision.[28] The Court recognized that "Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens."[29] Congressional investigation additionally revealed that the INS had problems identifying, locating, and removing deportable aliens from the United States.[30] Congress seemed to conclude that the increase in criminal activity by aliens and the supposed difficulty in finding and removing deportable aliens were linked. Against this backdrop, Congress concluded that one of the major reasons for the INS's problems in removing deportable criminals was the "agency's failure to detain those aliens during their deportation proceedings."[31] In support of this conclusion, Congress offered the statistic that more than twenty percent of the deportable aliens who were released failed to appear for their removal hearings.[32] The Court credited these findings and conclusions, relying heavily on them in its own evaluation of the statute's constitutionality.

Nevertheless, even though Congress has broad discretion in immigration matters, that discretion should not confer unlimited power. Even the Supreme Court appears to agree that Congress's plenary power is not limitless. For instance, in reviewing Congress's rationale for passing the statute, the Court assessed whether or not Congress went too far, implicitly acknowledging that, although Congress has broad discretion, it must exercise that discretion within the bounds of due process.

To determine whether Congress exceeded those bounds, the Court balanced the interests of the government against the individualized interests protected by the Due Process Clause. After evaluating the interests at stake and in light of these interests, the Court considered whether the government's actions were sufficiently justified. It held that Congress was, in fact, justified in its concern that if deportable criminal aliens are not detained, many would continue to engage in criminal acts and fail to appear for their removal hearings.[33] Therefore, the Court concluded, detaining such

28. *See Demore*, 123 S. Ct. at 1714.
29. *Id.*
30. *Id.* at 1714–15.
31. *Id.* at 1715.
32. *Id.*
33. *Id.* at 1714-15.

aliens during their removal proceedings without conducting individualized determinations of whether they presented flight risks was not a violation of their due process rights.[34]

The Court then went on to analyze the application of its recent opinion in *Zadvydas v. Davis*,[35] since Kim relied on the reasoning of the *Zadvydas* opinion in his arguments for release.[36] In *Zadvydas*, two aliens asserted, in separate writs of habeas corpus, that their detentions under 8 U.S.C. § 1231 violated the Due Process Clause.[37] This statute permitted detention of aliens following a final order of removal during the statutory removal period (ninety days), or beyond that time if the alien for some reason was not removed as ordered during that ninety day period.[38] Here, the aliens were found to be removable due to having engaged in criminal conduct, and thereafter they were in fact ordered removed from the country. Pursuant to the statute, the INS detained them pending their removal. The problem, though, was that no country would accept them. As a practical matter, the INS was faced with a choice of continuing to detain the aliens, even though they had already served the full sentences for their crimes, or releasing them in the United States. The INS erroneously reasoned that it could detain them indefinitely under this statute since, as no country would accept them, they would indefinitely be "pending removal."[39]

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34. *See id.* at 1721–22.

35. 533 U.S. 678 (2001).

36. *See Demore*, 123 S. Ct. at 1719–21.

37. *See Zadvydas*, 533 U.S. at 684–87 (2001) (consolidating two cases, *Zadvydas v. Davis* and *Ashcroft v. Ma*, for argument).

38. 8 U.S.C. § 1231(a)(1)(C) (2000).

39. *Zadvydas*, 533 U.S. at 684–86. Zadvydas was born of Lithuanian parents in Germany. *Id.* at 684. He had an extensive criminal record, including "drug crimes, attempted robbery, attempted burglary, and theft." *Id.* Zadvydas also had a "history of flight, from both criminal and deportation proceedings." *Id.* He was ordered deported to Germany in 1994, but Germany refused to accept him, claiming that he was not a German citizen. *Id.* Lithuania also refused to accept Zadvydas, claiming that he was "neither a Lithuanian citizen nor a permanent resident." *Id.* The INS also asked the Dominican Republic to take Zadvydas because it was Zadvydas's wife's country, but this was unsuccessful as well. *Id.* Ma was born in Cambodia, and came to the United States as a child. *Id.* at 685. When he was seventeen, he was involved in a gang-related shooting and was convicted of manslaughter. *Id.* Ma was ordered for deportation because of his conviction for an

The Court concluded that, regardless of the statute's arguable grant of power, the Constitution limits § 1231's post-removal-period detention statute to a period "reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention."[40] The Court thereby found that indefinite detention without adequate procedural protections violates due process.[41]

The Court further recognized that, because deportation hearings are civil rather than criminal in nature, there are not only inadequate, but in fact no such procedural safeguards to protect these detainees. Therefore, their indefinite detention necessarily results in a violation of due process under this reasoning.[42] The Court further inferred that—even where detentions are not indefinite—the government must have a *reasonable purpose* for the detention, and that the detention period can only be as long as *to reasonably fulfill that purpose.*[43]

The Court was given the opportunity in *Demore* to extend its holding in *Zadvydas*, thereby requiring that all alien detentions serve a meaningful, rather than merely nominal or purported, immigration purpose and further limiting the detention's duration to the time period absolutely necessary to fulfill this purpose as in *Zadvydas*. Under this reasoning, the Court in *Demore* would have had to declare that the Constitution limits the Attorney General's authority to detain Kim without a bail hearing. The Court, however, declined to extend such a broad reading of *Zadvydas* to cover the facts of *Demore*.[44]

Instead, the Court distinguished *Zadvydas* on two bases. First, the Court focused on the status of the two aliens in *Zadvydas*, as compared to Kim's status, finding their differing statuses legally relevant as a threshold matter since they affected whether the detentions served their purported immigration purpose as required under its vision of due process. In *Zadvydas*, the Immigration Judge had entered final orders of deportation against the aliens but their

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aggravated felony. *Id.* However, the INS could not deport Ma because the United States did not have a repatriation agreement with Cambodia. *Id.* at 686.

40. *Id.* at 689.

41. *Id.* at 690.

42. *Id.*

43. *See id.* at 690–96.

44. *See* Demore v. Kim, 123 S. Ct. 1708, 1719 (2003) ("*Zadvydas* is materially different from the present case. . . .").

removal was "'no longer practically attainable'" since no country would accept them.[45] Therefore, their deportation proceedings were concluded rather than pending. The Court maintained that, since the proceedings were concluded, the detention in *Zadvydas* could not and, in fact, "did not serve its purported immigration purpose."[46]

On the other hand, the Court asserted that Kim's case differed because the statute at issue dealt with deportable aliens "*pending their removal proceedings*." Kim's removal proceedings were pending. With proceedings still pending, the Court reasoned, the detention serves the necessary (and ongoing) immigration purpose of preventing such aliens from fleeing during the removal proceedings. Thus, it was not controlled by the *Zadvydas* result, and therefore was justifiable.[47]

The Court also distinguished *Zadvydas* from Kim's case on a second ground by pointing out that the period of detention at issue in *Zadvydas* was "'indefinite,'" while the detention under § 1226 is of a "shorter duration."[48] The Court asserted that under § 1226(c), the detention period has a "definite termination point," and it is often shorter than the ninety-day period the *Zadvydas* Court held presumptively valid.[49] The Court concluded that, unlike indefinite detentions, "[d]etention during removal proceedings is a constitutionally permissible part of that process."[50] Therefore, the Court reasoned that the finding in *Zadvydas* that indefinite detentions violated due process did not control Kim's case or demand the same result. As a result, Kim's constitutional challenge failed.[51]

In reaching this conclusion, however, the Supreme Court ignored the long history of the protection of aliens' constitutional

45. *Id.* (quoting *Zadvydas*, 533 U.S. at 690).
46. *Id.*
47. *Id.* at 1720.
48. *Id.* (quoting *Zadvydas*, 533 U.S. at 690).
49. *Id.* The Executive Office for Immigration Review calculated that in eighty-five percent of the cases where aliens were detained under § 1226(c), the removal proceedings took an average of forty-seven days. *See id.* at 1720–21. However, Kim was detained for six months in INS custody before the District Court granted habeas relief. *Id.* In a footnote, the Supreme Court explained that the longer-than-average term was due to the fact that Kim himself requested a continuance. *Id.* at 1721 n.15. Even without the continuance, however, Kim would have been detained for five months.
50. *Id.* at 1721–22.
51. *Id.*

rights and liberties. The Court also failed to fully analyze the language of § 1226(c), and it misapplied the factors and rationale of *Zadvydas*.

IV. ANALYSIS

A. Historical Background: The Supreme Court's Well-Established Precedent of Upholding the Constitutional Rights of Aliens

Aliens who legally reside in the United States, no matter what their length of stay in this country, are entitled to constitutional protection.[52] In fact, the Court even stated that aliens in general are a "prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate."[53] As recently as 2001, the Court again affirmed that aliens have a right to protection under the Due Process Clause in *Zadvydas v. Davis*.[54] These rights at least arguably include "the basic liberty from physical confinement lying at the heart of due process."[55] Additionally, the majority conceded that "'[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'"[56] Evidently, no one disputes that aliens have a right to due process. This case instead denies that an alien's loss of liberty in the face of pending deportation proceedings is a violation of that due process.

Even if this were true with respect to the general class of aliens (which this Comment argues it is not), compared to other aliens within the United States, LPRs have an especially strong history of constitutional protection. Therefore, their due process rights should include freedom from confinement without an individualized determination that detention is necessary in their specific cases.[57] The rationale behind granting additional protection to LPRs is grounded, in part, in the fact that "[t]he immigration laws give LPRs

52. *Id.*. at 1728 (Souter, J., concurring in part and dissenting in part) (asserting that "[i]t has been settled for over a century that all aliens within our territory are 'persons' entitled to the protection of the Due Process Clause.").

53. Graham v. Richardson, 403 U.S. 365, 372 (1971) (citations omitted); *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

54. 533 U.S. 678, 690 (2001).

55. *Demore*, 123 S. Ct. at 1727 (Souter, J., concurring in part and dissenting in part).

56. *Id.* at 1717 (quoting Reno v. Flores, 507 U.S. 292, 306 (1993)).

57. *See id.* at 1728 (Souter, J., concurring in part and dissenting in part).

the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen."[58] For example, LPRs enjoy the same economic freedom as United States citizens.[59] Additionally, LPRs have many of the same responsibilities as citizens: their worldwide income is taxable,[60] and male LPRs between the ages of eighteen and twenty-six must register under the Selective Service Act of 1948.[61] Thus, the Court consistently infers that when aliens enter the United States, they are subject to American rules, just as are ordinary citizens. Correspondingly, it is only fair that the same rights and liberties safeguard them as well.

No doubt based on these similarities to United States citizens, the Supreme Court has in fact historically protected the rights of LPRs.[62] For instance, as long ago as 1892, the Court held that an alien domiciled in the United States cannot be prohibited from leaving the United States and then returning.[63] Subsequently, in 1945, the Court in *Bridges v. Wixon*[64] concluded that "the notions of fairness" that underlie our legal system apply in their entirety to "aliens [who] may have become . . . deeply fixed in this land."[65] Finally, in 1953, the Court held that the word "excludable" in a statute did not apply to LPRs because such a reading would have

58. *Id.*

59. *Id.* (Souter, J., concurring in part and dissenting in part) (recognizing that LPRs, like full citizens, "may compete for most jobs in the private and public sectors without obtaining job-specific authorization").

60. *Id.* at 1728–29 (Souter, J., concurring in part and dissenting in part) (construing 26 CFR §§ 1.1-1(b), 1.871-1(a), 1.871-2(b) (2002)). Nonimmigrant aliens, on the other hand, are generally taxed only on income from domestic sources. *Id.* (Souter, J., concurring in part and dissenting in part)

61. *Id.* at 1729 (Souter, J., concurring in part and dissenting in part) (construing Selective Service Act of 1948, ch. 625, tit. I, § 3, 62 Stat. 604, 605).

62. *See id.* at 1729–30 (Souter, J., concurring in part and dissenting in part).

63. *See* Lau Ou Bew v. United States, 144 U.S. 47, 63 (1892) (noting that a domicile within the United States cannot be forfeited simply by a temporary absence).

64. 326 U.S. 135 (1945).

65. *Id.* at 154; *see also id.* at 161 (Murphy, J., concurring) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment.").

been questionable given "a resident alien's constitutional right to due process."[66] Consequently, the Court's refusal to consider Kim's status as an LPR in its review of the case contradicts a long history of acknowledging the rights of LPRs.

The above cases, among others, show a well-established precedent and trend of the Supreme Court upholding the due process rights of aliens, particularly LPRs.[67] The about-face of the Supreme Court in *Demore* gives rise to a troubling question: Does the Court's decision to cut back on the rights of LPRs signal a new and disturbing trend? If the Supreme Court is curtailing the rights of aliens, it is important to determine the reasons underlying the Court's actions.

B. The Court's Sacrifice of Constitutional Protections in the Wake of September 11th

Although never mentioned in the Court's opinion, one reason for the Court's shift could be a response to new national security policies instigated by the September 11, 2001 terrorist attacks on the United States, in which nineteen foreign terrorists crashed commercial airliners into the World Trade Center in New York, the Pentagon in Washington D.C., and a Pennsylvania field, killing about three thousand Americans.[68] Notably, *Zadvydas*, which extended due

66. Kwong Hai Chew v. Colding, 344 U.S. 590, 598–99 (1953).

67. Although historically the Supreme Court has often upheld the constitutional rights of aliens, it has not done so in every case. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976) (upholding the constitutionality of a federal medical insurance program that required resident aliens to fulfill a five-year continuous residency requirement when citizens did not have to meet the same requirement); Kleindienst v. Mandel, 408 U.S. 753 (1972) (supporting Congress's right to exclude aliens from entering the United States); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (stating that the deportation of resident aliens because of their past membership in the Communist Party was not a violation of due process).

68. While the events of September 11th, 2001 are well-established and known to the average American, in the context of this Comment, it seems important to point out that the terrorists were aliens; the fact that the terrorist network is comprised of foreigners, many of whom may be aliens within the United States, is directly related to the resulting change in national security policies. *See, e.g., Bush State of the Union Address at* http://www.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt/index.html (Jan. 29, 2002) (discussing the effect of the attacks of September 11th, the

process protections afforded aliens, was decided in June 2001, nearly three months prior to the September 11th attacks. *Demore*, on the other hand, was decided after September 11th and, unlike *Zadvydas*, restricted the definition of due process as applied to aliens.

In the months following the attacks, the United States launched its War on Terrorism and began reshaping national security policies and "challenging the value that Americans have always placed on civil liberties."[69] One such change in policy, passed in response to the Bush Administration's "request for 'the tools' to fight terrorism,"[70] is the USA Patriot Act.[71] Certain provisions of the Patriot Act deal with aliens, with a "seemingly intentional disregard for the constitutional status of resident and temporary aliens."[72] For example, under § 412 of the Patriot Act, if the Attorney General has "'reasonable grounds to believe'" that an alien is engaged in activities that threaten the national security of the United States, he is authorized to take such alien into custody.[73] It further provides, "If an immigrant is detained for purposes related to immigration under this provision, there is no statutory or constitutional authority to control the length of the detention."[74] Since the passage of the Patriot Act, this particular section has caused many aliens to be detained *indefinitely* in United States detention facilities and prisons "with no remedy."[75]

Thus, even though the September 11th attacks were not mentioned in *Demore*, and no one has alleged that Kim has any ties to terrorism, its post-September 11th timing, combined with the realities of the new political climate, suggest that the decision reached by the majority signals a *judicial* mirroring of the post-

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reactions of the American people and the government, and the actions taken by the government in response to the terrorist attacks).

69. John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1083 (2002).

70. *Id.* at 1087.

71. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

72. Whitehead & Aden, *supra* note 69, at 1095.

73. *Id.* at 1126 (quoting USA Patriot Act § 412).

74. *Id.* at 1127.

75. *Id.*

September 11th political and legislative climate of willingness to sacrifice personal liberties in exchange for a more certain national security.[76]

C. *The* Demore *Court's Flawed Reasoning*

1. The majority's failure to consider Kim's LPR status

Without explanation, the majority simply discounted Kim's status as an LPR, choosing to avoid confronting the historical protection afforded to this subset of aliens.[77] Yet, until a final order of removal is entered against him, Kim is entitled to all of the benefits and rights of an LPR.[78] By disregarding Kim's LPR status, the majority ignored the Supreme Court's history of protecting the constitutional rights of LPRs to a higher degree than those of other immigrant classifications.

2. The majority's focus on congressional concern regarding deportable criminal aliens

The majority focused on Congress's concern that, without detention, deportable criminal aliens would "continue to engage in crime and fail to appear for their removal hearings in large numbers."[79] Although the cases make clear that some deference to congressional findings when shaping immigration policy is appropriate, the inordinate focus on these findings seemed to lull the majority into failing to adequately address what should have been the key concern: analyzing the extent of Kim's constitutional rights under the Due Process Clause.

Another issue that the Court inadequately addressed was the issue of an alien's rights if he or she is *not* found to be deportable. Early in the opinion, Chief Justice Rehnquist stated that Kim conceded that he was deportable.[80] Justice Souter, however, asserted that the Court was mistaken—Kim never conceded that he was

76. *See id.* at 1084 (stating that since the September 11th attacks, many Americans are willing to give up some of their civil liberties in exchange for greater security).

77. *See* Demore v. Kim, 123 S. Ct. 1708, 1708–22 (2003).

78. *Id.* at 1728 (Souter, J., concurring in part and dissenting in part).

79. *Id.* at 1712.

80. *Id.*

removable.[81] In fact, Souter stated that Kim had "applied to the Immigration Court for withholding of removal" and that his counsel confirmed that Kim "was challenging his removability."[82] Thus, Kim never conceded that he is deportable, and if he is not deportable, the majority's rationale can arguably be considered moot—he is not a part of the class of "deportable" criminal aliens that concerns Congress. If Kim is not within this class of aliens, then it follows—under *Zadvydas*—that Kim has a right to a bail hearing because the validation for detention without bail, namely that the alien is actually *pending deportation*, is no longer necessarily present. Therefore, the fit required between detention and the immigration purpose thereof required by the Court's reasoning in *Zadvydas* could not possibly be met.[83]

3. The findings on which Congress, and therefore the Court, relied were clearly faulty

The majority accepts the Congressional argument that detention under 1226(c) "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings . . . ."[84] As part of its rationale, the majority mentioned congressional investigations conducted while the INS operated under an older rule which allowed the Attorney General to exercise discretion to release deportable aliens.[85] These statistics showed that the INS had a poor track record in successfully deporting criminal aliens.[86]

Relying on these statistics, however, which were gleaned while the INS was operating under the old rule, is misleading if applied to the problem currently at hand. It seems clear that the reason behind the INS's poor track record while operating under the old rule was not that the agency could not make a good determination of flight risk or dangerousness; rather, the INS could not detain more aliens because of a lack of detention resources.[87] At that time, the INS

81. *Id.* at 1727 (Souter, J., concurring in part and dissenting in part).
82. *Id.* (Souter, J., concurring in part and dissenting in part).
83. *See supra* text accompanying notes 37–43.
84. *Demore*, 123 S. Ct. at 1720.
85. *Id.* at 1714–15.
86. *Id.* at 1715.
87. *Id.*

often decided not to detain aliens, even if they were significant flight risks, because there were not enough spaces in the detention facilities of the particular area.[88]

Another factor the majority considered was the finding that when deportable aliens were released, more than twenty percent did not appear at their removal hearings.[89] However, as Justice Souter accurately pointed out, this finding, too, is faulty in that it failed to distinguish between the different immigrant statuses of the criminal aliens.[90] The statistic includes all criminal aliens—LPRs such as Kim, who have "strong ties within the United States," as well as temporary visitors and illegal aliens.[91] Misplaced reliance on such a statistic which, due to essentially lumping together apples and oranges, exaggerates the likelihood that LPRs will fail to report, resulting in LPRs losing their rights based upon the actions taken by illegal aliens and others who are not constitutionally protected to the same degree as LPRs.

Additionally, Justice Souter pointed to a study conducted by the Vera Institute of Justice that "conclu[ded] that criminal aliens released under supervisory conditions are overwhelmingly likely to attend their hearings."[92] The majority disregards this second study despite the implication that a supervisory system may equally achieve Congress's goal of ensuring that deportable aliens attend their removal hearings. A supervisory system may, in fact, achieve the congressional objective in a manner that is more constitutional than § 1226(c). The constitutional problem of § 1226(c)—as discussed in this Comment—is that aliens are detained without an inquiry into whether they are either dangerous or a flight risk, thereby triggering a due process issue. However, with a supervisory system like the one tested by the Vera Institute, aliens would be evaluated based on several factors, including whether they posed a danger to society and whether they have strong ties to families and their communities.[93] Therefore, under such a plan, only the criminal

88. *Id.*
89. *Id.* at 1715 n.4.
90. *Id.* at 1739 (Souter, J., concurring in part and dissenting in part).
91. *Id.* (Souter, J., concurring in part and dissenting in part).
92. *Id.* at 1740 (Souter, J., concurring in part and dissenting in part).
93. *See id.* at 1716 n.5; *id.* at 1740 n.15.

aliens who are deemed to be either dangerous to society or flight risks would be detained.

In addition to being more constitutional, the supervisory plan may be more effective in making sure criminal aliens appear for their deportation hearings. Section 1226(c) does not provide the solution to the problem of lack of detention space. For example, the INS may wish to detain a criminal alien under § 1226(c) but find that there is no space at the detention facility. The Vera Institute, however, found that its system "significantly reduced no-shows while decreasing the use of detention space."[94] Because the supervisory system will detain only those aliens that are dangerous or flight risks, there is a higher likelihood that the INS will have the detention facilities to accommodate them. This will, in turn, lead to a higher success rate for the INS in ensuring that criminal aliens appear for their deportation hearings. The fact that the majority disregarded this study, which provided a plan that can potentially fulfill the congressional objective effectively and in a manner that will not implicate the due process rights of aliens, is very disturbing.

4. Unlike the Ninth Circuit, the Supreme Court failed to thoroughly analyze the language of § 1226(c)

In its opinion, the Supreme Court never thoroughly analyzes the language of § 1226(c). The relevant portion of the statute states:

> The Attorney General shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

94. David A. Martin, *Too Many Behind Bars*, LEGAL TIMES, Jan. 27, 2003, at 51, 53.

> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.[95]

Instead of analyzing the language of this statute, the Supreme Court merely defers to Congress. In contrast, when the Ninth Circuit reviewed Kim's case, it carefully examined the language of § 1226(c).[96] After doing so, the court noted that bail is not allowed while the removal proceedings are pending, even if the aliens are neither flight risks nor a danger to society.[97] Second, the court realized that a "wide range of past conduct triggers removal proceedings and detention without bail" and that a lot of that conduct is "non-violent and poses little threat to the physical safety of the public."[98] Finally, the court contrasted the no-bail provision of § 1226(c), whose constitutionality was questionable, with the provision that allows bail under § 1231(a)(6), which was questioned by the *Zadvydas* case.[99] Under § 1231(a)(6), aliens who have actual orders of final removal entered against them can obtain bail ninety days after entry of the order.[100]

The Ninth Circuit decided to "take guidance" from the *Zadvydas* case's analysis of § 1231(a)(6) and apply the same reasoning to the question of the constitutionality of § 1226(c).[101] The court stated that "*Zadvydas* reaffirmed the principle that aliens are entitled to protection under the Due Process Clause."[102] The Ninth Circuit did not deny that Congress has plenary powers over immigration matters.[103] However, the court explained that this power is subject to limits placed by the Constitution, and that the limits were implicated in Kim's case.[104] In order for the government to exercise this plenary power within constitutional limits over aliens, and to detain

95. 8 U.S.C. § 1226(c)(1) (2000).
96. Kim v. Ziglar, 276 F.3d 523, 527 (9th Cir. 2002).
97. *Id.*
98. *Id.*
99. *Id.*
100. 8 U.S.C. § 1231(a)(6).
101. *Ziglar*, 276 F.3d at 529.
102. *Id.* at 530.
103. *Id.* at 529.
104. *Id.*

an LPR, the court reasoned that it must provide a "sufficiently strong" justification for its act.[105]

Therefore, the appellate court considered the government's justifications for the no-bail civil detention under § 1226(c).[106] It dismissed three of the five justifications and focused on the two primary arguments: the risk of flight of the criminal aliens during removal proceedings and the need to protect the public from aliens who may be dangerous.[107] After careful review, the court concluded that these remaining justifications were also insufficient—the fact that *some* aliens may pose a flight risk or be dangerous to the public was not enough to justify the overbroad "civil detention, without bail, of all lawful permanent resident aliens who have been charged with removability."[108]

The Ninth Circuit, in applying *Zadvydas*, carefully analyzed the language of § 1226(c) to determine whether the statute was a permissible act of Congress.[109] However, the Supreme Court, faced with the same issue, simply concluded that *Zadvydas* does not apply in Kim's case and justified upholding § 1226(c) on the basis of deference to Congress.[110]

5. The Supreme Court's decision not to follow *Zadvydas* in this case

The Supreme Court's reasons for declining to apply *Zadvydas* to this case are not persuasive. The fact pattern, of course, is different. The most obvious difference, as the Court points out, is that *Zadvydas* dealt with aliens who had final orders of deportation against them, but had no country to where they might go, while Kim's removal proceedings were still pending.[111] However, Zadvydas and Ma, the two aliens in the *Zadvydas* case, were found to

105. *Id.* at 530.
106. *Id.*
107. *Id.* at 531. The other three justifications were "making the removal of criminal aliens a top priority of immigration enforcement, . . . correcting the failure of the prior laws which permitted release on bond, and . . . repairing damage to America's immigration system." *Id.* at 530. The Ninth Circuit dismissed these three arguments as being too general. *Id.* at 531.
108. *Id.* at 534.
109. *See id.* at 526–34.
110. *See* Demore v. Kim, 123 S. Ct. 1708, 1719–22 (2003).
111. *Id.* at 1720–21.

be a flight risk[112] and potentially dangerous to the public, respectively.[113] In contrast, when the District Court ordered the INS to hold an individualized bail hearing to establish whether Kim was a flight risk or a danger to society, the INS released Kim on a modest bond.[114] Since his release, Kim has kept a clean record, working and attending college while his deportation hearing is pending.[115]

Allowing bail for removable aliens such as Zadvydas and Ma just because no country was willing to receive them, while detaining Kim, who actually has the right to fight his removal proceedings, without bail seems counterintuitive. As Justice Souter pointed out, Kim's claim was stronger than any argument discussed in *Zadvydas*: "detention prior to entry of a removal order may well impede the alien's ability to develop and present his case on the very issue of removability."[116] Moreover, as an LPR, Kim has a chance to win against his deportation order. Justice Souter explained that "[u]nlike many illegal entrants and temporary nonimmigrants, LPRs are the aliens most likely to press substantial challenges to removability requiring lengthy proceedings."[117] Yet, the majority concluded that Kim's deportation was inevitable and decided that taking away his liberty without bail in the interim was, therefore, not a violation of his due process rights.

V. IMPLICATIONS OF THE SUPREME COURT'S DECISION

The Supreme Court's holding in *Demore* encourages a dangerous new movement toward taking away important rights and liberties of immigrants. The Supreme Court declared that aliens, even LPRs like Kim, could be detained without bail hearings during their deportation proceedings.[118] The holding seems simple enough, but there is a possibility that this holding may be extended. The

112. Zadvydas v. Davis, 533 U.S. 678, 684 (2001).
113. *Id.* at 685–86.
114. *See Ziglar*, 276 F.3d at 526.
115. Martin, *supra* note 94, at 53.
116. *Demore*, 123 S. Ct. at 1734 (Souter, J., concurring in part and dissenting in part); *see also* Brief of Amici Curiae Citizens and Immigrants for Equal Justice et al. at 24, *Demore* (No.01-1491).
117. *Demore*, 123 S. Ct. at 1741 (Souter, J., concurring in part and dissenting in part).
118. *Id.* at 1721–22.

Supreme Court may have embarked on a slippery slope on which the rights of aliens will be further compromised.

It is unclear whether the *Demore* holding will be extended into non-immigration areas, or whether it could implicate the rights of aliens in a criminal trial. In general, defendants in criminal proceedings, after being "taken into custody and formally charged with a crime," attend a bail hearing where a magistrate or a trial judge decides whether they can be released from custody while they wait for their trials.[119] Bail hearings are conducted to determine a defendant's flight risk and potential danger to society.[120]

In *Demore*, the Supreme Court appears to believe that criminal defendants who are also aliens are very likely to be a flight risk, as shown in its reliance on the statistics of criminal aliens failing to appear at their deportation hearings. It is not much of a leap, then, for a state to conclude that aliens as a class are a flight risk.

For example, the State of California, following the decision in *Demore*, might decide that when criminal defendants are found to also be aliens, they are automatically to be denied bail hearings and held in custody until trial. After all, if a concern exists that a criminal alien will not appear at a deportation hearing, it seems logical to also be concerned that the same criminal alien will fail to appear for his trial. In deference to the type of congressional findings cited in *Demore*, the Supreme Court might conclude that denial of bail hearings in criminal proceedings against defendants who are also aliens is not a violation of the Due Process Clause.

One can argue that the above scenario is implausible for several reasons. The first reason is that the states do not have the plenary power of Congress. It is well established that when states make "classifications based on alienage, like those based on nationality or race, [the classifications] are inherently suspect and subject to close judicial scrutiny."[121] Therefore, such a law in California, as in the above example, would be subject to a higher standard of judicial review than the one received by § 1226(c), and the courts would probably strike it down. However, if the criminal alien was charged with a federal crime, a different result may very well occur. The

119. RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 983 (2001).

120. *Id.*

121. Graham v. Richardson, 403 U.S. 365, 372 (1971).

rationale in *Demore* could be used by Congress to support a federal statute denying bail to aliens charged with a federal crime.

Another reason that this scenario may be implausible, as of right now, is that criminal defendants are entitled to greater procedural protections under the Constitution than they would have in a civil or administrative proceeding.[122] At this time, those procedural protections apply to anyone who comes into criminal courts, including aliens. Thus, the hypothetical given above is an extreme case and, arguably, it is a scenario that is highly unlikely. Then again, in the past, the United States government has taken extreme action that seemed highly unlikely, such as the internment of Japanese-Americans during World War II.[123]

The concern that the *Demore* holding is the start of a further erosion of rights and liberties of aliens is not groundless. This case was decided against the backdrop of the September 11th attacks and the fear of future terrorist attacks. Although September 11th was not mentioned in *Demore*, it is highly likely that the attacks were in the back of the minds (or even in the front of the minds) of the justices holding the majority opinion. In fact, even before this case was accepted by the Supreme Court for review, some people wondered if the post-September 11th climate would influence the Court.[124] The *Demore* decision shows that this concern may have been justified.

In *Demore*, the unmentioned fear is that aliens like Kim will turn out to be terrorists who escape the deportation proceeding to wreak further havoc against the American people. Perhaps this is not such an unreasonable fear. While the holding in this case may, on the surface, seem to empower the INS to promote national security, in light of the fact that the INS itself is often responsible for releasing aliens who are considered flight risks when there is a lack of space in the detention facilities,[125] the holding may instead only act to open the door toward the further loss of liberties of aliens in the United States.

In the wake of the September 11th attacks and the anti-immigration feeling that they triggered, aliens in the United States

122. *See* ALLEN ET AL., *supra* note 119, at 71–74.

123. *See infra* text accompanying notes 129–33.

124. *See, e.g.*, Martin, *supra* note 94, at 51.

125. Demore v. Kim, 123 S. Ct. 1708, 1739 (2003) (Souter, J., concurring in part and dissenting in part).

need the protection of the courts more than ever before. "Historically, judicial review has served as an invaluable safeguard against arbitrary decision-making by federal administrative agencies, including the INS."[126] In the current "post-9/11 environment of zero tolerance," judicial review is crucial to "prevent and correct abuses of discretion by immigration officials."[127] In fact, the only remedy aliens have is judicial review. After all, aliens in the United States do not have voting rights, barring them access to the protection a citizen can get through the democratic process.[128] Thus, without the protection of the courts, aliens have no other recourse when faced with the threat of losing their rights and liberties.

Admittedly, national security is an important and necessary concern. Perhaps infringements on constitutional rights are necessary for the safety of the American people. It is necessary to bear in mind, however, that "even small infringements, over time, may become major compromises that alter this country's way of life."[129] The government must be careful when it develops immigration laws in particular. "[T]here is a problem in developing immigration policies on the basis of fear. History has shown that we, Americans, get into trouble when we legislate out of fear."[130] One such historical example of the United States "legislating out of fear" is the internment of Japanese-Americans during World War II.[131] This disturbing moment in American history surfaced when wartime fear caused the government to take away the liberty and rights of numerous Japanese-Americans. Since then, the United States has acknowledged the injustice of this action and has awarded reparations to those affected.[132] The Japanese-American internment is just one example of how fear can cause due process to be

126. David B. Pakula & Lawrence P. Lataif, *Judicial Review of BCIS Decisions: Will There Be Any?*, 80 INTERPRETER RELEASES 677, 677 (2003).

127. *Id.*

128. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Soskin v. Reinertson, 353 F.3d 1242, 1266 (10th Cir. 2004) (Henry, J., dissenting).

129. Whitehead & Aden, *supra* note 69, at 1084.

130. John S. Richbourg, *Liberty and Security: The Yin and Yang of Immigration Law*, 33 U. MEM. L. REV. 475, 478 (2003).

131. *See id.* at 483.

132. *See id.*

sacrificed in the name of national security.[133] The compromise of the rights and liberties of different groups is collateral damage in our efforts to heighten national security.

One can hopefully trust that the injustice that occurred during the Japanese-American internment will never happen again in this country. However, there may be signs of such an impending threat to the civil liberties of aliens within the United States. For example, after September 11, 2001, the Bush Administration instituted a special registration of aliens who legally enter the United States from twenty-five specified countries.[134] All of these countries, with the exception of North Korea, are Arab or Muslim.[135] This special registration is eerily familiar—it is reminiscent of the order given to Japanese-Americans to "report to assembly centers during World War II."[136] One can only hope that the decision in *Demore*, along with other actions taken in the name of security, is not the start of a slippery slope in which aliens will lose other fundamental rights.

VI. CONCLUSION

The Supreme Court's decision in *Demore v. Kim* is a departure from the Court's long established precedent of upholding the constitutional rights of aliens. By quickly deferring to Congress instead of scrutinizing the statute and following the tradition of upholding the constitutional rights of aliens, the Supreme Court established ominous precedent for dealing with the rights of aliens.

Although Congress does have plenary power over immigration matters, this power is not an unlimited one. It must be held in check by the Constitution. As Judge William Fletcher, who wrote the opinion in *Kim v. Ziglar*, stated, "[w]e must remember that our 'Nation's armor' includes our Constitution, the central text of our civic faith. It is the foundation of everything that makes our country's system of laws and freedoms worth defending."[137] Accordingly, the right to due process is a fundamental individual right that should not be easily obstructed by the government. With

133. *See id.* at 483–84.
134. *Id.* at 503.
135. *Id.*
136. *Id.*
137. Kim v. Ziglar, 276 F.3d 523, 538–39 (9th Cir. 2002).

Demore, however, the Supreme Court illustrates that this right can, in fact, be taken away—even when the justifications for its infringement are questionable.

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