

***DEMORE v. KIM***  
**THE CONSTITUTIONALITY OF MANDATORY  
DETENTION PENDING REMOVAL PROCEEDINGS FOR  
CRIMINAL NONCITIZENS**

*Where Congress eliminates executive discretion, courts remain as  
defenders of personal liberty in individual situations.*<sup>1</sup>

I. INTRODUCTION

Section 236(c) of the Immigration and Nationality Act imposes mandatory detention, pending removal proceedings, on noncitizens convicted of any of a number of crimes specified by the provision, including an aggravated felony.<sup>2</sup> The provision contains no opportunity for any individualized determination of the necessity of detention before its imposition.<sup>3</sup> Even lawful permanent residents who were convicted of relatively minor and nonviolent criminal offenses, who have meritorious challenges to removability and thus may not even be removed, and who are neither flight risks nor dangerous are subject to mandatory detention under section 236(c).<sup>4</sup> The length of detention under the statute is indeterminate and often prolonged, particularly for lawful permanent residents, many of whom have established significant social, familial, and economic connections in the United States.<sup>5</sup>

In *Demore v. Kim*,<sup>6</sup> the Supreme Court of the United States considered a challenge to the constitutionality of section 236(c).<sup>7</sup> Hyung Joon Kim, a citizen of the Republic of South Korea, entered the United States in 1984 at the age of six and became a lawful permanent resident two years later.<sup>8</sup> He was convicted of first degree burglary in 1996, and one year later he was convicted of “petty theft with priors.”<sup>9</sup> On the basis of these convictions, the Immigration and Naturalization Service detained him pursuant to section 236(c) and charged him with being removable.<sup>10</sup> Kim did not dispute that one may be detained pending removal proceedings, but instead asserted that due process “conditions a potentially lengthy

---

Copyright © 2005, Kevin Truitt.

<sup>1</sup> Welch v. Ashcroft, 293 F.3d 213, 227-28 (4th Cir. 2002).

<sup>2</sup> 8 U.S.C. § 1226(c) (2000).

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See, e.g., Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001).

<sup>6</sup> 583 U.S. 510 (2003).

<sup>7</sup> *Id.* at 513, 517-31.

<sup>8</sup> *Id.* at 513.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

detention on a hearing and an impartial decision-maker's finding that detention is necessary to a governmental purpose."<sup>11</sup> The Court rejected his contentions and upheld the statute.<sup>12</sup>

This Note will explore both the deficiencies in the majority's decision and its departure from established precedent. First, this Note will analyze the Court's prior decisions concerning the freedom from physical restraint by the government. Next, it will review two past decisions by the Court on which the majority in *Demore v. Kim* relies, upholding the detention of noncitizens in two separate contexts. After reviewing the Seventh Circuit's decision in upholding section 236(c), this Note will then consider the Court's recent decision in *Zadvydas v. Davis*,<sup>13</sup> in which the Court avoided a "serious constitutional concer[n]" by construing a post-removal-period statute to include a reasonable time limitation so as not to permit indefinite and potentially permanent detention for noncitizens.<sup>14</sup> This Note will then review the decisions of four separate courts of appeals, which subsequently held section 236(c) to be unconstitutional in some form because of the Court's decision in *Zadvydas*. Finally, this Note will review the majority, concurring, and dissenting opinions in *Demore v. Kim* and present an analysis of the Court's decision.

Because of the Court's neglect of years of precedent concerning the limitations on the government's authority to confine citizens and noncitizens alike and its failure to distinguish its decision in *Zadvydas* in any material way, *Demore v. Kim* was wrongly decided. A proper characterization of the liberty interest at stake and a meaningful due process analysis reveal the constitutional infirmities of mandatory detention under section 236(c). Because it categorically infringes upon the rights of a broad class of individuals to be free from physical restraint by the government and provides no individualized determinations as to whether detention is even necessary, section 236(c), in its application to lawful permanent residents, violates the substantive and procedural components of due process.

## II. BACKGROUND

### A. *Supreme Court Precedent Regarding the Right to Be Free from Physical Restraint by the Government*

In *Zadvydas v. Davis*, the Supreme Court recently confirmed, in the context of detention of noncitizens, that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—

---

<sup>11</sup> *Id.* at 548-49 (Souter, J., concurring in part and dissenting in part).

<sup>12</sup> *Id.* at 531.

<sup>13</sup> 533 U.S. 678 (2001).

<sup>14</sup> *Id.* at 682.

lies at the heart of the liberty that [the Due Process] Clause protects.”<sup>15</sup> The Court summarized the decisions concerning this liberty interest in avoiding physical restraint by the government, applicable to citizens and noncitizens alike, stating that “detention violates [due process] unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain . . . ‘narrow’ [or] nonpunitive ‘circumstances,’ where a special justification . . . outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’”<sup>16</sup> According to the Court, these cases demonstrate that due process requires, at the very least, an individualized determination of the necessity of detention in light of the actual purposes of the statute.<sup>17</sup>

The Court’s decision in *United States v. Salerno*,<sup>18</sup> which concerned the pretrial detention of criminal defendants, demonstrates that such an individual’s “strong interest in liberty” may be overcome only in certain limited circumstances and that adequate procedural protections are required.<sup>19</sup> The Court considered the constitutionality of the Bail Reform Act of 1984,<sup>20</sup> which permitted “a federal court to detain an arrestee pending trial if the Government demonstrate[d] by clear and convincing evidence after an adversary hearing that no release conditions ‘will reasonably assure’” the safety of another individual or the community as a whole.<sup>21</sup> The Act required a judicial officer to resolve whether detention was appropriate in each individual case<sup>22</sup> and provided several procedural protections at this hearing.<sup>23</sup> Many considerations specific to the

---

<sup>15</sup> *Id.* at 690.

<sup>16</sup> *Id.* (citations omitted).

<sup>17</sup> *Id.* at 690-92.

<sup>18</sup> 481 U.S. 739 (1987).

<sup>19</sup> *See id.* at 750-51.

<sup>20</sup> 18 U.S.C. §§ 3141-3156 (2000).

<sup>21</sup> *Salerno*, 481 U.S. at 741 (quoting 18 U.S.C. § 3142(e)).

<sup>22</sup> *Id.* at 742.

<sup>23</sup> *Id.* These procedural protections included the right of the arrestee to request counsel to be present at the hearing, the right to testify and present witnesses and evidence, and the right to cross-examine witnesses testifying at the hearing. *Id.* Also, the judicial officer must find that “no conditions of pretrial release can reasonably assure” the safety of the community and must support this conclusion with “clear and convincing” evidence. *Id.* (quoting 18 U.S.C. § 3142(f)).

individual guided the judicial officer in his or her determination,<sup>24</sup> and appellate review was available if detention was ordered.<sup>25</sup>

The respondents in this case challenged the Act as facially unconstitutional.<sup>26</sup> The respondents argued that because detention authorized under the Act was equivalent to punishment before trial, the Act contravened the substantive component of due process.<sup>27</sup> The Court sought to determine whether the “restriction on liberty [under the Act] constitutes impermissible punishment or permissible regulation,”<sup>28</sup> and, if regulatory, whether detention under the statute “appears excessive in relation” to its purposes.<sup>29</sup> Examining legislative intent, the Court concluded that Congress did not explicitly intend detention under the Act to be punitive and that the Act was regulatory in nature since its purpose was to prevent harm to the community.<sup>30</sup> Furthermore, the Court held that detention under the Act was not excessive in relation to this regulatory goal of Congress, primarily because the duration of pretrial detention was limited and the arrestee was afforded a prompt detention hearing.<sup>31</sup> The Court rejected the respondents’ contention of an absolute constitutional prohibition against restriction of the right to liberty, stating that “sufficiently compelling governmental interests can justify detention of dangerous persons.”<sup>32</sup>

Despite “the importance and fundamental nature” of the right to liberty in these circumstances, the Act “narrowly focuses on a particularly acute problem in which the Government interests are overwhelming.”<sup>33</sup> Therefore, the “careful delineation of the circumstances under which detention will be permitted” satisfied the requirements of substantive due process.<sup>34</sup> The procedures under which the arrestee was determined to be dangerous were devised to ensure that this determination was accurate,<sup>35</sup>

---

<sup>24</sup> *Id.* at 742-43. These considerations included “the nature and seriousness of the charges, the substantiality of the Government’s evidence against the arrestee, the arrestee’s background and characteristics, and the nature and seriousness of the danger posed by the suspect’s release.” *Id.* (citing 18 U.S.C. § 3142(g)).

<sup>25</sup> *Id.* at 743 (citing 18 U.S.C. § 3145(b), (c)).

<sup>26</sup> *Id.* at 741.

<sup>27</sup> *Id.* at 746.

<sup>28</sup> *Id.* at 747.

<sup>29</sup> *Id.* (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 748.

<sup>33</sup> *Id.* at 750.

<sup>34</sup> *Id.* at 751.

<sup>35</sup> *Id.*

and “the circumstances under which detention [was] sought [was limited] to the most serious of crimes.”<sup>36</sup>

In the separate context of involuntary civil confinement, the Supreme Court has required an individual determination of its necessity. In *Foucha v. Louisiana*,<sup>37</sup> the Court struck down, on due process grounds, a statute that required commitment of an individual to a psychiatric hospital after having been found not guilty by reason of insanity in a criminal case and that permitted continued confinement until the committed individual proved that he or she was not dangerous.<sup>38</sup> After an individual is found not guilty of committing a criminal act by reason of insanity, the Court stated, it is permissible to assume that “the defendant was still mentally ill and dangerous and hence could be committed.”<sup>39</sup> However, the committed individual should be released when he or she is no longer insane or dangerous.<sup>40</sup> Thus, even if confinement was initially constitutional, it could not continue if the reasons for commitment no longer existed.<sup>41</sup> For this reason and because “[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed,”<sup>42</sup> the individual is “entitled to constitutionally adequate procedures to establish the grounds for his confinement.”<sup>43</sup> Also, in the absence of criminal liability, only “in certain narrow circumstances” could those who pose a danger to the community be subject to confinement.<sup>44</sup>

According to the Court, the statute at issue was materially different from the statute upheld in *Salerno*.<sup>45</sup> Confinement was neither “carefully limited” to the most egregious circumstances<sup>46</sup> nor “strictly limited in duration.”<sup>47</sup> The statute also failed to provide the procedural protections

---

<sup>36</sup> *Id.* at 747.

<sup>37</sup> 504 U.S. 71 (1992).

<sup>38</sup> *Id.* at 83.

<sup>39</sup> *Id.* at 76. A state may commit a person after a verdict of not guilty by reason of insanity in a criminal proceeding when the defendant committed a criminal act because of a mental illness, and the illness was proven by the defendant by a preponderance of the evidence standard. *Id.*

<sup>40</sup> *Id.* at 77. “[T]he acquittee may be held as long as he is both mentally ill and dangerous, but no longer.” *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 79.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 80.

<sup>45</sup> *Id.* at 81-83.

<sup>46</sup> *Id.* at 81.

<sup>47</sup> *Id.* at 82-83.

that the statute at issue in *Salerno* did.<sup>48</sup> Also, under the statute, the detainee had the burden of proving that he or she was not dangerous.<sup>49</sup>

The Court's decision in *Kansas v. Hendricks*<sup>50</sup> reinforced the notion that while it may be necessary for the government to infringe upon one's right to be free from physical restraint, strong procedural protections must exist before one is involuntarily confined.<sup>51</sup> In this case, the constitutionality of the Kansas Sexually Violent Predator Act,<sup>52</sup> more specifically the Act's definition of "mental abnormality,"<sup>53</sup> was challenged on substantive due process grounds.<sup>54</sup> The Court acknowledged that "[s]tates have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety."<sup>55</sup> The Court found such statutes constitutional, provided that "proper procedures and evidentiary standards" exist and that confinement is applicable to "a limited subclass of dangerous persons."<sup>56</sup> Also, because dangerousness alone is not a sufficient justification to survive constitutional scrutiny, a finding of dangerousness in addition to another factor, in this instance a mental abnormality, is sufficient.<sup>57</sup>

---

<sup>48</sup> *See id.* at 82.

<sup>49</sup> *Id.* at 81-82.

<sup>50</sup> 521 U.S. 346 (1997).

<sup>51</sup> *Id.* at 356-57.

<sup>52</sup> KAN. STAT. ANN. §§ 59-29001 to 59-29015 (1994).

<sup>53</sup> *Id.* § 59-29002(b).

<sup>54</sup> *Hendricks*, 521 U.S. at 356. The Kansas legislature established procedures for the involuntary civil commitment of any individual determined to be a "sexually violent predator," defined as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." *Id.* at 352 (quoting KAN. STAT. ANN. § 59-29a02(a)). A "mental abnormality" was defined as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *Id.* (quoting KAN. STAT. ANN. § 59-29a02(b)).

<sup>55</sup> *Id.* at 357.

<sup>56</sup> *Id.* Among the procedural protections afforded to each individual were "a trial . . . to determine beyond a reasonable doubt whether the individual was a sexually violent predator"; the requirement that the burden of proof belongs to the State; the guarantee of the assistance of counsel at public cost; and an examination by mental health care professionals for indigent persons. *Id.* at 353. Also, once committed, annual reviews were mandated to ensure that commitment was still appropriate. *Id.* The state could also grant release, and the confined individual could petition for release at any time. *Id.*

<sup>57</sup> *Id.* at 358.

B. *Carlson v. Landon and Reno v. Flores: Detention of Noncitizens Upheld by the Supreme Court*

The Court's decisions in *Carlson v. Landon*<sup>58</sup> and *Reno v. Flores*,<sup>59</sup> upon which the majority in *Demore v. Kim* relied, involved the constitutionality of detaining noncitizens,<sup>60</sup> but under circumstances that in no way resemble mandatory detention under section 236(c). Certainly, neither decision can support a statute that categorically imposes detention upon individuals based solely on an individual's prior criminal conviction and that provides no opportunity for individualized inquiry into the reasons for detention.

In *Carlson*, several noncitizens who were present in the United States and who were members of the Communist Party<sup>61</sup> contended that the Attorney General's decision ordering their detention without bail was "arbitrary and capricious."<sup>62</sup> The power to remove noncitizens, the Court stated, belongs to the political branches of government, subject to judicial scrutiny under constitutional principles.<sup>63</sup> Although detention is an element of deportation, essentially used to protect others during the pendency of removal proceedings, this "purpose to injure could not be imputed to all aliens subject to deportation."<sup>64</sup> For this reason, the Court said that discretion was given to the Attorney General to decide whether to detain noncitizens without bail.<sup>65</sup> The Court held that there was no abuse of discretion in denying bail under the circumstances because in addition to membership in the Communist Party, there was also evidence of participation in its activities.<sup>66</sup> Therefore, "[t]here [wa]s no denial of the due process of the Fifth Amendment under circumstances where there [wa]s a reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government."<sup>67</sup>

---

<sup>58</sup> 342 U.S. 524 (1952).

<sup>59</sup> 507 U.S. 292 (1993).

<sup>60</sup> *Carlson*, 342 U.S. at 526-28; *Flores*, 507 U.S. at 294.

<sup>61</sup> *Carlson*, 342 U.S. at 530.

<sup>62</sup> *Id.* at 533.

<sup>63</sup> *Id.* at 537.

<sup>64</sup> *Id.* at 538.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 541. Because of Congress's understanding of the Communist Party's propensity to advocate the use of force to "accomplish their political aims, evidence of membership plus personal activity in supporting or extending the Party's philosophy concerning violence gives adequate ground for detention." *Id.*

<sup>67</sup> *Id.* at 542. Detention was certainly not mandatory for all noncitizens who were members of the Communist Party. See *id.* at 541-42. "When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation (continued))

At issue in *Flores* was the constitutionality of an Immigration and Naturalization Services (INS) regulation that provided for release of detained noncitizen juveniles only to their parents, close relatives, or legal guardians.<sup>68</sup> A class of noncitizen juveniles contended that due process “require[d] them to be released into the custody of ‘responsible adults.’”<sup>69</sup> The Court stated that in order to determine whether the regulation violated substantive due process, it first had to identify the “asserted right.”<sup>70</sup> Although the juvenile detainees maintained that the right to be free from physical restraint was at issue, the Court stated that this right was not implicated under these circumstances because juveniles are “‘always in some form of custody.’”<sup>71</sup> According to the Court, “the right at issue is the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution.”<sup>72</sup> The Court described the confinement as “‘legal custody’ rather than ‘detention’” because the INS was required to keep juveniles in facilities that met state licensing requirements for “generally accepted child welfare standards.”<sup>73</sup>

Because no fundamental right was implicated in these circumstances, the Court rejected the substantive due process challenge and upheld the regulation under the rational basis standard.<sup>74</sup> The Court also rejected the

---

hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained.” *Id.* at 544. A very small number of removable Communist noncitizens were detained without bail, according to the Court. *Id.* at 542.

<sup>68</sup> *Reno v. Flores*, 507 U.S. 292, 294 (1993).

When neither parent, close relative, or state-appointed guardian is immediately available, the INS will normally keep legal custody of the juvenile, place him in a government-supervised and state-licensed shelter-care facility, and continue searching for a relative or guardian, although release to others is possible in unusual cases.

*Id.* at 310-11. Thus, these regulations did not eliminate all discretion, providing release to another adult under “unusual and compelling circumstances.” *Id.* at 310 (quoting Detention and Release of Juveniles, 53 Fed. Reg. 17,449 (1988)).

<sup>69</sup> *Id.* at 294.

<sup>70</sup> *Id.* at 302.

<sup>71</sup> *Id.* (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1984)).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 298. “[I]ndividual and group counseling, education, recreation and leisure-time activities, family reunification services, and access to religious services, visitors, and legal assistance” were available. *Id.*

<sup>74</sup> *Id.* at 302-03.

respondents' procedural due process claim that the procedures provided were inadequate because they did not require individual determinations for each juvenile to ascertain whether detention or release to a "responsible adult" was more desirable.<sup>75</sup> Rather, it was sufficient for purposes of procedural due process that the juvenile noncitizen, after receiving notice of the initiation of removal proceedings and of the "decision as to custody," was given the right to ask for a redetermination of the custody decision by an immigration judge.<sup>76</sup>

C. *The Seventh Circuit and the Constitutionality of Section 236(c)*

Amidst a multiplicity of district court decisions deciding the constitutionality of section 236(c),<sup>77</sup> *Parra v. Perryman*<sup>78</sup> became the first circuit court decision reaching the merits of section 236(c), although the case was decided before the Supreme Court's decision in *Zadvydas v. Davis*. Parra, a citizen of Mexico who was residing in the United States, was convicted of "aggravated criminal sexual assault" in 1996, subjecting him to mandatory detention under section 236(c).<sup>79</sup> Arguing that mandatory detention under section 236(c) violated due process, Parra sought a writ of habeas corpus under 28 U.S.C. section 2241.<sup>80</sup>

According to the court, individuals subject to the provision "have forfeited any *legal* entitlement to remain in the United States and have little hope of clemency."<sup>81</sup> The court claimed that Parra's removal from the country was almost a certainty, considering that he was not eligible for any relief from removal and that his conviction constituted an aggravated

---

<sup>75</sup> *Id.* at 308.

<sup>76</sup> *Id.* Further review is also available by the Board of Immigration Appeals and the federal courts. *Id.* Therefore, "[procedural] due process is satisfied by giving the detained alien juveniles the *right* to a hearing before an immigration judge." *Id.* at 309.

<sup>77</sup> See, e.g., *Cardoso v. Reno*, 127 F. Supp. 2d 106 (D. Conn. 2001); *Avramenkov v. INS*, 99 F. Supp. 2d 210 (D. Conn. 2000); *Baidas v. Jennings*, 123 F. Supp. 2d 1052 (E.D. Mich. 2000); *Koita v. Reno*, 113 F. Supp. 2d 737 (M.D. Pa. 2000); *Marogi v. Jenifer*, 126 F. Supp. 2d 1056 (E.D. Mich. 2000); *Small v. Reno*, 127 F. Supp. 2d 305 (D. Conn. 2000); *Son Vo v. Greene*, 109 F. Supp. 2d 1281 (D. Colo. 2000); *Alikhani v. Fasano*, 70 F. Supp. 2d 1124 (S.D. Cal. 1999); *Danh v. Demore*, 59 F. Supp. 2d 994 (N.D. Cal. 1999); *Diaz-Zaldierna v. Fasano*, 43 F. Supp. 2d 1114 (S.D. Cal. 1999); *Galvez v. Lewis*, 56 F. Supp. 2d 637 (E.D. Va. 1999); *Reyes v. Underdown*, 73 F. Supp. 2d 653 (W.D. La. 1999); *Van Eeton v. Beebe*, 49 F. Supp. 2d 1186 (D. Or. 1999).

<sup>78</sup> 172 F.3d 954 (7th Cir. 1999).

<sup>79</sup> *Id.* at 955-56.

<sup>80</sup> *Id.* at 956 (citing 28 U.S.C. § 2241 (2000)).

<sup>81</sup> *Id.* at 958.

felony.<sup>82</sup> The court utilized the due process analysis set forth by the Supreme Court in *Mathews v. Eldridge*,<sup>83</sup> requiring an evaluation of the private interest of the individual, the likelihood of a wrongful deprivation of this interest and the efficacy of any additional safeguards, and the government's interest.<sup>84</sup> Parra's interest was minimal since, according to the court, he forfeited his right to live in the country, and the probability of error was essentially nonexistent since his removal was assured.<sup>85</sup> Moreover, the governmental interest was significant.<sup>86</sup> "Given the sweeping powers Congress possesses to prescribe the treatment of aliens," the court upheld the constitutionality of section 236(c).<sup>87</sup>

D. *Zadvydas v. Davis: Indefinite and Potentially Permanent Detention for Noncitizens*

In *Zadvydas v. Davis*, the indefinite and possibly permanent detention of noncitizens was at issue.<sup>88</sup> When a noncitizen is subject to a final order of removal, the individual is detained during a statutory removal period of ninety days to effect his or her removal.<sup>89</sup> If removal is not completed within this 90-day period, a statute authorizes continued detention until removal is accomplished, however long this may take.<sup>90</sup> In light of the "serious constitutional concerns" involved, the Court held that this post-removal-period statute implicitly authorizes detention only for a period of time reasonably necessary to remove the individual from the United States and, therefore, does not permit indefinite detention.<sup>91</sup>

The Court considered two separate occurrences of detention.<sup>92</sup> Kestutis Zadvydas came to the United States with his family when he was eight years old.<sup>93</sup> After a drug conviction and his subsequent imprisonment, he was taken into custody by the INS and ordered to be removed in 1994.<sup>94</sup> Germany, Lithuania, and the Dominican Republic all refused to accept Zadvydas, and the INS kept him in detention after

---

<sup>82</sup> *Id.* at 956. The court suggested that he could easily end his detention by returning to Mexico. *Id.* at 958.

<sup>83</sup> 424 U.S. 319 (1976).

<sup>84</sup> *Parra*, 172 F.3d at 958 (citing *Mathews*, 424 U.S. at 335).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (citing 8 U.S.C. § 1231(a)(6) (2000)).

<sup>91</sup> *Id.* at 682.

<sup>92</sup> *Id.* at 684-86.

<sup>93</sup> *Id.* at 684.

<sup>94</sup> *Id.*

expiration of the 90-day removal period.<sup>95</sup> Kim Ho Ma was born in Cambodia and at the age of seven became a resident alien of the United States.<sup>96</sup> Ma was ordered to be removed after being convicted of an aggravated felony and was taken into INS custody.<sup>97</sup> After expiration of the 90-day removal period, the INS refused to release Ma because it was not convinced that he “would remain nonviolent and not violate the conditions of release.”<sup>98</sup> It was also very doubtful that Cambodia would accept Ma.<sup>99</sup>

The Court concluded that indefinite detention of any noncitizen would create a “serious constitutional problem.”<sup>100</sup> Detention of an individual by the government “violates [due process] unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and ‘narrow’ nonpunitive ‘circumstances,’ where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’”<sup>101</sup> Since the statute at issue was civil and “nonpunitive in purpose and effect,” there must exist a “sufficiently strong special justification” for indefinite detention, according to the Court.<sup>102</sup>

The Court rejected both regulatory objectives of the statute, which, according to the Government, were intended to secure the noncitizen’s appearance at immigration proceedings and to protect the community from danger.<sup>103</sup> The first justification was particularly unconvincing “where removal seem[ed] a remote possibility at best.”<sup>104</sup> The second justification was also insufficient, the Court stated, because “preventive detention based on dangerousness [alone has been upheld] only when limited to specially dangerous individuals and subject to strong procedural protections.”<sup>105</sup>

---

<sup>95</sup> *Id.* Zadvydas in the past failed to appear for both criminal and removal proceedings. *Id.*

<sup>96</sup> *Id.* at 685.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 686.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 690. “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [that the Due Process Clause] protects.” *Id.*

<sup>101</sup> *Id.* at 690 (citations omitted).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 690-92.

<sup>104</sup> *Id.* at 690. Where the goal of detention is “no longer practically attainable, detention no longer ‘bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.’” *Id.* (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

<sup>105</sup> *Id.* at 691 (citing *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) and *United States v. Salerno*, 481 U.S. 739, 747, 750-52 (1987)).

Furthermore, when the duration of this preventive detention was possibly indefinite, another special circumstance such as mental illness, for instance, must have been present in addition to the justification of dangerousness.<sup>106</sup>

Finally, the statute was not limited in duration, nor was it narrowly confined to a “small segment of particularly dangerous individuals.”<sup>107</sup> The procedural protections available to the noncitizen under the post-removal-period statute were inadequate, as the noncitizen had the burden of establishing that he or she was not dangerous in an administrative proceeding “without . . . significant late[r] judicial review.”<sup>108</sup>

The Court affirmed the principle that the Due Process Clause protects all persons within the United States, “whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>109</sup> Congress has plenary authority to create law in the context of immigration, but that power is limited by constitutional constraints.<sup>110</sup> The Court rejected the argument that the liberty interest of the noncitizen is weakened by the absence of a legal right to live at large in the United States.<sup>111</sup> The liberty interest of a noncitizen under these circumstances, facing indefinite and maybe even permanent detention, was “strong enough to raise a serious question as to whether, irrespective of the procedures used,” the statute was consistent with the Constitution.<sup>112</sup> Therefore, to ensure the statute’s constitutionality, the Court construed the statute so that it did not permit indefinite detention after the 90-day removal period, but rather only for a period reasonably necessary to secure the noncitizen’s removal.<sup>113</sup>

---

<sup>106</sup> *Id.* (citing *Hendricks*, 521 U.S. at 358, 368).

<sup>107</sup> *Id.* (quoting *Hendricks*, 521 U.S. at 368).

<sup>108</sup> *Id.* at 692. “[T]he Constitution may well preclude granting ‘an administrative body the unreviewable authority to make determinations implicating fundamental rights.’” *Id.* (quoting Superintendent, Mass. Correctional Inst. in *Walpole v. Hill*, 472 U.S. 445, 450 (1985)).

<sup>109</sup> *Id.* at 693.

<sup>110</sup> *Id.* at 695; *see also* *INS v. Chadha*, 462 U.S. 919, 941-42 (1983).

<sup>111</sup> *Id.* at 696. “The choice . . . is not between imprisonment and the alien ‘living at large.’ It is between imprisonment and supervision under release conditions that may not be violated.” *Id.* (citation omitted).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 682. The Court held that the duration of post-removal-period detention was presumptively limited to six months. *Id.* at 701. If, after this six-month period, the noncitizen demonstrates 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.*

E. *The Impact of Zadvydas: Section 236(c) and Its Temporary Demise*

In view of the Court's decision in *Zadvydas*, four separate courts of appeals subsequently held section 236(c) to be unconstitutional in some form. In *Patel v. Zemski*,<sup>114</sup> the Third Circuit Court of Appeals, in light of *Zadvydas*, held that section 236(c) was unconstitutional in its application to lawful permanent residents.<sup>115</sup> Vinodbhai Bholidas Patel, a citizen and native of India, arrived in the United States in 1984 and became a lawful permanent resident six years later.<sup>116</sup> While residing in the United States, Patel developed many economic, social, and familial connections.<sup>117</sup> Although Patel's application for naturalization was initially approved by the INS, it was shortly thereafter revoked because he was convicted of "the offense of harboring an undocumented alien."<sup>118</sup> Because this conviction constituted an "aggravated felony," the INS detained Patel after he completed his sentence.<sup>119</sup>

Patel asserted that mandatory detention under section 236(c) without any individualized determination of the necessity of his detention violated his due process rights.<sup>120</sup> The court conceded that Congress may enact laws in the area of immigration that would be intolerable if applied to citizens of the United States, but citing *Zadvydas*, the court stated that this authority is restricted by constitutional protections, including the right to due process.<sup>121</sup> Under substantive due process analysis, the court first sought to determine the right implicated in order to ascertain the appropriate level of scrutiny.<sup>122</sup> There was no contention of an absolute freedom pending removal proceedings, as the government is entitled to detain noncitizens during this time, but the court concluded that "the right

---

<sup>114</sup> 275 F.3d 299 (3d Cir. 2001).

<sup>115</sup> *Id.* at 314.

<sup>116</sup> *Id.* at 303.

<sup>117</sup> *Id.* He had "several business interests, including Dunkin' Donuts franchises, bagel shops, and hotels," and his wife, four children, and other family members also resided in the United States with him. *Id.*

<sup>118</sup> *Id.* This violation of 8 U.S.C. section 1324(a)(1)(A)(iii) was predicated upon Patel's decision to provide the illegal alien employment and a place to live, despite the fact that the individual had entered the country without the help of Patel. *Id.* Patel was still eligible for naturalization, however, despite this conviction. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 306.

<sup>121</sup> *Id.* at 307-08. The court of appeals noted that the Court in *Zadvydas* "distinguished between the deference that must be afforded to immigration policies and the more searching review of the procedures used to implement those policies." *Id.* at 308.

<sup>122</sup> *Id.* at 306-08.

implicated is a fundamental liberty right,<sup>123</sup> relying to a great extent on the Supreme Court's decision in *Zadvydas*.<sup>124</sup> Although those detained under section 236(c) are not confronted with indefinite and potentially permanent detention as in *Zadvydas*, detention under section 236(c) is often protracted, as demonstrated by Patel's eleven-month detention.<sup>125</sup>

Because section 236(c) involves a fundamental liberty interest, heightened scrutiny was applied to determine whether the statute's interference with this right was sufficiently narrowly tailored to serve a compelling state interest.<sup>126</sup> Furthermore, inquiry as to whether detention under section 236(c) constituted "impermissible punishment or permissible regulation" and "whether the statute [was] excessive in relation to Congress's regulatory goals" was necessary.<sup>127</sup> Although concluding that section 236(c) is regulatory, the court of appeals held that mandatory detention without inquiry into its necessity was, in fact, excessive in relation to the stated goals of Congress to prevent danger to the community and to assure one's appearance at removal proceedings.<sup>128</sup> "Due process requires an adequate and proportionate justification for detention—a justification that cannot be established without an individualized inquiry into the reasons for detention."<sup>129</sup>

The court of appeals rejected the Seventh Circuit holding in *Parra v. Perryman*,<sup>130</sup> primarily because it was decided before *Zadvydas*,<sup>131</sup> but also

---

<sup>123</sup> *Id.* at 308.

<sup>124</sup> *Id.* at 309.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 310-13. Detention by the government infringes upon an individual's substantive due process rights except when "ordered in . . . special and 'narrow' nonpunitive 'circumstances' . . . where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Id.* at 310 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

<sup>127</sup> *Id.* at 310 (citing *United States v. Salerno*, 481 U.S. 739, 746-47 (1987)).

<sup>128</sup> *Id.* at 311.

<sup>129</sup> *Id.* "Section 236(c) creates an irrebuttable presumption that all aliens subject to removal under this statute present a flight risk or a danger to the community." *Id.*

To deprive [those individuals who are neither a flight risk nor a danger to the community] of their fundamental right to freedom furthers no government goal, while generating a considerable cost to the government, the alien, and the alien's family. The goals articulated by the government—to prevent aliens from absconding or endangering the community—only justify detention of those individuals who present such a risk.

*Id.* at 312.

<sup>130</sup> 172 F.3d 954 (7th Cir. 1999).

because the court in *Parra* “assumed that all persons subject to [section] 236(c) will ultimately be given a final order of [removal], and concluded from this assumption that those persons have no liberty interest in being free from detention pending that final order.”<sup>132</sup> Although a final order of removal is probable in most cases, the merits of the removal proceedings should not be confused with the decision to detain an individual pending these proceedings.<sup>133</sup>

Before being reversed by the Supreme Court, the Ninth Circuit, in *Kim v. Ziglar*,<sup>134</sup> also held that mandatory detention under section 236(c) was unconstitutional as applied to lawful permanent residents.<sup>135</sup> Hyung Joon Kim, a citizen of Korea, arrived in the United States in 1984 and became a lawful permanent resident two years later at the age of eight.<sup>136</sup> He was convicted of first degree burglary in 1996 and “petty theft with priors” in 1997, and after completing his sentence, was taken into custody by the INS based upon these convictions.<sup>137</sup> Kim filed a petition for a writ of habeas corpus after three months of detention, contending that mandatory detention under section 236(c) violated due process.<sup>138</sup> After six months of detention, the district court held section 236(c) unconstitutional on its face and released Kim on bond after a hearing to determine his risk of flight and dangerousness.<sup>139</sup>

Acknowledging Congress’s authority in matters of immigration, the court stated that it must, nonetheless, inquire into “whether Congress has adopted a constitutionally permissible means of detention and removal of lawful permanent resident aliens.”<sup>140</sup> Since the court assumed that section 236(c) was regulatory and not punitive, it was then necessary to resolve, according to *Zadvydas*, “whether the government has provided a

<sup>131</sup> *Patel*, 275 F.3d at 313.

<sup>132</sup> *Id.* at 314.

<sup>133</sup> *Id.*

<sup>134</sup> 276 F.3d 523 (9th Cir. 2002), *rev’d sub nom.* Demore v. Kim, 538 U.S. 510 (2003).

<sup>135</sup> *Id.* at 526.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 529. The court of appeals cited both *Zadvydas* and *Chadha* for this proposition. *Id.* at 529-30. Because Congress’s authority with respect to noncitizens is “subject to important constitutional limitations,” *id.* at 529 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001)), Congress must select “a constitutionally permissible means of implementing” its plenary authority over noncitizens and cannot exercise that power unless it “does not offend some other constitutional restriction,” *id.* at 530 (quoting *INS v. Chadha*, 462 U.S. 919, 941 (1983)).

sufficiently strong ‘special justification’ to justify civil detention of a lawful permanent resident alien.”<sup>141</sup>

The court analyzed each justification for the statute provided by the government.<sup>142</sup> The government first argued that mandatory detention under section 236(c) was justified to prevent flight before the commencement of removal proceedings.<sup>143</sup> Despite the government’s assertion that individuals subject to the statute have “little hope of avoiding removal and correspondingly little incentive to appear for [the] removal hearing,”<sup>144</sup> the court emphasized that there are still forms of relief available for persons subject to section 236(c).<sup>145</sup> Therefore, not all persons subject to the statute are risks of flight.<sup>146</sup>

The second justification provided by the government was that detention would protect the community from dangerous individuals released during the pendency of removal proceedings.<sup>147</sup> Under these circumstances, the court stated, “civil detention will be upheld only when [the government proves that] it is narrowly tailored to people who pose an unusual and well-defined danger to the public.”<sup>148</sup> The court stated that the paramount difference between the statutes upheld in *Salerno* and *Hendricks* and section 236(c) was that the latter “contains no provision for an individualized determination of dangerousness.”<sup>149</sup> Moreover, “[g]iven the range of crimes qualifying as aggravated felonies, the government simply cannot show that [section 236(c)] covers only aliens who pose an especially serious danger to the public.”<sup>150</sup> Therefore, the court held that the government provided no special justification for the categorical detention of lawful permanent residents that was “sufficient to overcome [the] liberty interest [in] an individualized determination of flight risk and dangerousness.”<sup>151</sup>

In *Hoang v. Comfort*,<sup>152</sup> the Tenth Circuit held section 236(c) unconstitutional in its application to three separate noncitizens who

---

<sup>141</sup> *Kim*, 276 F.3d at 530.

<sup>142</sup> *Id.* at 530-34. Though the government advanced five arguments, the court primarily considered two of the arguments and dismissed the remaining three as merely colorable. *Id.*

<sup>143</sup> *Id.* at 531-34.

<sup>144</sup> *Id.* at 531.

<sup>145</sup> *See id.* at 531-32.

<sup>146</sup> *See id.*

<sup>147</sup> *Id.* at 532.

<sup>148</sup> *Id.* at 532-33.

<sup>149</sup> *Id.* at 533.

<sup>150</sup> *Id.* at 534.

<sup>151</sup> *Id.* at 535.

<sup>152</sup> 282 F.3d 1247 (10th Cir. 2002).

challenged the provision.<sup>153</sup> Thanh Quoc Nguyen, Phu Chang Hoang, and Pham Qua Trung each came to the United States as a refugee from Vietnam, and each was admitted as a lawful permanent resident at this time.<sup>154</sup> After convictions for various offenses, and upon completion of their respective sentences, the INS took each into custody pursuant to section 236(c).<sup>155</sup> Each noncitizen petitioned for writ of habeas corpus, challenging the constitutionality of section 236(c) in his application.<sup>156</sup> In addition, each individual was seeking some form of relief that would preclude him from being subject to removal.<sup>157</sup>

The court explicitly rejected the Seventh Circuit's holding in *Parra* that a noncitizen subject to section 236(c) "has somehow forfeited his or her right to liberty during [removal] proceedings," as this argument was explicitly rejected by the Court in *Zadvydas*.<sup>158</sup> The petitioners in this case were lawful permanent residents and would remain as such until final orders of removal were entered.<sup>159</sup> Therefore, because of this status and their physical presence in the United States, they were entitled to due process.<sup>160</sup> Although Congress has plenary authority over legislation in the context of immigration, "statutes which implement this plenary authority are subject to the limits of the Constitution."<sup>161</sup> The court accordingly rejected the argument that judicial review of any law enacted by Congress in this context is so limited that the constitutionality of section 236(c) should be upheld.<sup>162</sup> For this reason, the provision must not be inconsistent with constitutional prohibitions.<sup>163</sup>

---

<sup>153</sup> *Id.* at 1251.

<sup>154</sup> *Id.* at 1252-53.

<sup>155</sup> *Id.* Nguyen, in early 1999, was convicted of "the misdemeanor offense of threat/use of a dangerous weapon in a fight." *Id.* at 1252. Hoang was convicted of "two counts of aggravated robbery in connection with the stealing of a purse and wallet by use of force, threats, and intimidation with the aid of a firearm" in 1993. *Id.* at 1253. In 1987, Trung was convicted of "two counts of forgery in Utah state court." *Id.*

<sup>156</sup> *Id.* at 1252-53.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1255.

<sup>159</sup> *Id.* at 1256.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1257. "Thus, while aliens are subject to the plenary power of Congress to expel them, Congress' implementation of this authority must comport with the Constitution." *Id.*

<sup>162</sup> *Id.* at 1257-58. "[Section] 236(c) concerns the method by which the immigration statutes are implemented and not the political substantive decision of who is to be admitted or excluded." *Id.* at 1258.

<sup>163</sup> *Id.*

Rather than arguing that they may not be detained at all pending removal proceedings, petitioners instead asserted that “they have a fundamental liberty interest that may not be arbitrarily infringed upon by the [g]overnment absent . . . an individualized hearing to address risk of flight and danger to the public.”<sup>164</sup> The court stated that, according to *Salerno*, “a person who is detained pending trial has a fundamental liberty interest in freedom from restraint,” and that it is no different for one who is detained pending removal proceedings.<sup>165</sup> Therefore, the court held that petitioners had a fundamental right to be free from detention pending removal proceedings that cannot be infringed except “in certain limited circumstances.”<sup>166</sup>

Under a substantive due process analysis, since the right asserted was deemed to be fundamental, the government may not abridge this right unless narrowly tailored to a compelling governmental interest, regardless of the procedures employed.<sup>167</sup> Detention, other than in the criminal context, violates due process “except in certain non-punitive circumstances where a special justification outweighs the individual’s constitutionally protected interest in avoiding physical restraint.”<sup>168</sup> The court then examined whether the government’s proffered justifications for the statute, to ensure presence at removal proceedings and to protect the community from dangerous individuals, were “special justifications” outweighing the individual’s fundamental liberty interest.<sup>169</sup> According to the court, the governments’ interest must be compelling and the statute must be narrowly tailored to this interest.<sup>170</sup>

Although securing an individual’s presence at removal proceedings is a compelling interest, section 236(c) is not in any sense narrowly tailored, as it establishes an irrebuttable presumption that all individuals subject to the statute are flight risks and it provides no procedures by which one can

---

<sup>164</sup> *Id.* at 1256.

<sup>165</sup> *Id.* at 1257 (citing *United States v. Salerno*, 481 U.S. 739, 750-51 (1987)).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1258.

<sup>168</sup> *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)). In resolving whether section 236(c) was nonpunitive, the court, following *Salerno*, sought to determine whether Congress “intended the restriction on liberty to be punishment” or “whether another purpose may rationally be assigned to the restriction on liberty.” *Id.* (citing *Salerno*, 481 U.S. at 747). The restriction on liberty may nevertheless be equivalent to punishment “if it imposes conditions so excessive in relation to the assigned purpose as to be considered punitive rather than regulatory.” *Id.* (citing *Salerno*, 481 U.S. at 747). Under this analysis, the court held that section 236(c) was nonpunitive. *Id.* at 1258-59.

<sup>169</sup> *Id.* at 1259 (citing *Zadvydas*, 533 U.S. at 690).

<sup>170</sup> *Id.* (citing *Salerno*, 481 U.S. at 749-51).

challenge this presumption.<sup>171</sup> The court stated that this case was illustrative of why the risk of flight cannot be imputed to each person subject to the statute, as each noncitizen was seeking some form of relief to avoid removal and thus “have a significant incentive to attend deportation proceedings.”<sup>172</sup>

The government’s second justification, preventing danger to the community, was also a compelling interest, but likewise was not narrowly tailored.<sup>173</sup> The array of offenses encompassed by section 236(c) cannot justify an irrebuttable presumption of dangerousness.<sup>174</sup> Furthermore, the fact that all three petitioners in this case were released on bond after a hearing granted by the district court rebuts the assertion that dangerousness can be imputed to all who are subject to the statute.<sup>175</sup> Because the court found that petitioners’ right to substantive due process was violated, it was unnecessary to analyze the procedural due process claim.<sup>176</sup>

In *Welch v. Ashcroft*,<sup>177</sup> the Fourth Circuit also held that section 236(c) was unconstitutional as applied.<sup>178</sup> In this case, Ricardo Antonio Welch, Jr., a citizen of Panama, became a lawful permanent resident of the United States at the age of ten.<sup>179</sup> His parents, siblings, and son were all citizens of the United States.<sup>180</sup> Soon after he was honorably discharged from the military, Welch pled guilty to four felony counts in 1994.<sup>181</sup> After completing his sentence, the Department of Justice (DOJ) detained Welch

---

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1259-60.

<sup>173</sup> *Id.* at 1260.

<sup>174</sup> *Id.*

Offenses to which the mandatory detention provision in section 236(c) applies include not only dangerous offense such as murders, rapes, crimes of terrorist activity, violations of the controlled substances and firearms laws, and crimes committed by repeat offenders, but also less dangerous offenses such as crimes of moral turpitude with a sentence of one year in prison, theft offenses with a term of imprisonment of one year or more, fraud, tax evasion, assisting document fraud in some cases, and perjury.

*Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> 293 F.3d 213 (4th Cir. 2002), *overruled in part by* Demore v. Kim, 538 U.S. 510 (2003).

<sup>178</sup> *Id.* at 224.

<sup>179</sup> *Id.* at 215.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

pending his removal proceedings.<sup>182</sup> Welch's felony convictions, however, were vacated soon thereafter because of ineffective assistance of counsel, and Welch eventually pled guilty to seven misdemeanor counts.<sup>183</sup> The DOJ abandoned its efforts to remove Welch based on the vacated felony convictions but attempted to remove Welch based on the new misdemeanor convictions.<sup>184</sup> Because section 236(c) mandated detention during the period pending his removal proceedings, Welch filed a petition for a writ of habeas corpus challenging its constitutionality.<sup>185</sup>

The court of appeals stated that it must first determine whether one has a fundamental right to be free from physical restraint pending removal proceedings in the absence of any individualized finding that he or she is found to be a risk of flight or a danger to the community.<sup>186</sup> Conceding that "[t]he liberty interest implicated by incarceration pending a final removal order is unquestionably significant," the court nonetheless stated that the Supreme Court had never before "added freedom from incarceration to the short list of fundamental rights,"<sup>187</sup> and therefore heightened scrutiny was not to be applied to determine whether section 236(c) was consistent with substantive due process.<sup>188</sup> Categorical detention pending removal proceedings, however, "must be reasonably related to legitimate government interests" and must not constitute punishment.<sup>189</sup>

According to the court, section 236(c) is not explicitly punitive, but "[d]espite the lack of express punitive intent, however, the statute may still be punitive if it has no purpose other than punishment, or is excessive in light of its goals."<sup>190</sup> The court sought to determine whether mandatory detention pending removal proceedings "based on a record of prior criminal conduct is a reasonable and not excessive way to prevent flight risk and to protect the community," both facially and as applied to Welch.<sup>191</sup> After concluding that section 236(c) "does not violate due process under every possible set of circumstances" and thus is facially valid, the court subsequently held that the statute violated substantive due

---

<sup>182</sup> *Id.* at 216.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* Welch simultaneously applied for naturalization as a citizen of the United States. *Id.*

<sup>186</sup> *Id.* at 218.

<sup>187</sup> *Id.* at 221.

<sup>188</sup> *Id.* at 222.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 223.

process as applied to Welch.<sup>192</sup> The interests of the government in detaining Welch were “relatively slight.”<sup>193</sup> The length of Welch’s detention also demonstrated that his detention was excessive in light of the statute’s objectives, according to the court.<sup>194</sup> In Welch’s situation, incarceration for fourteen months pending final adjudication of his removal was incompatible with the requirements of due process.<sup>195</sup> Therefore, “Welch’s detention constitutes punishment without the benefit of a trial.”<sup>196</sup>

### III. DEMORE v. KIM: DISCUSSION AND ANALYSIS

#### A. Facts and Procedural Events

Hyung Joon Kim is a citizen of the Republic of South Korea, but he arrived in the United States in 1984 and became a lawful permanent resident two years later at the age of eight.<sup>197</sup> His mother is a citizen of the United States, and his father and brother are both lawful permanent residents.<sup>198</sup> He was convicted of burglary in 1996, and one year later, he was convicted of “petty theft with priors.”<sup>199</sup> Because of these convictions,

---

<sup>192</sup> *Id.* at 224. “Fourteen months of incarceration pendente lite of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights as in criminal proceedings, together lead us to conclude that the circumstances of Welch’s detention constitute punishment without trial.” *Id.*

<sup>193</sup> *Id.* at 225. Welch had been free on bond and had not once attempted to flee during his attempts to appeal. *Id.* Moreover, the immigration judge determined that Welch’s case “present[ed] ‘exceptionally appealing humanitarian factors’ and that his naturalization application was likely to succeed.” *Id.* Also, there was little to support the assertion that detention for Welch was necessary to protect the community as his criminal record did not suggest that he was in any way dangerous. *Id.*

<sup>194</sup> *Id.* at 226-27.

The point at which extended detention pendente lite will violate due process depends upon such factors as the nature of the deprivation, the conditions of confinement, the procedures afforded detainees prior to adjudication, and the justification for the continued detention. The actual length of the detention is a cornerstone of the inquiry.

*Id.* (citation omitted).

<sup>195</sup> *Id.* at 227.

<sup>196</sup> *Id.* at 228.

<sup>197</sup> Demore v. Kim, 538 U.S. 510, 513 (2003).

<sup>198</sup> Respondent’s Brief at 8, Demore v. Kim, 538 U.S. 510 (2003) (No. 01-1491).

<sup>199</sup> *Kim*, 538 U.S. at 513. Kim’s sentence for his burglary conviction was five years’ probation and 180 days in jail, 117 of which were suspended. Respondent’s Brief at 8, *Kim* (No. 01-1491). He was sentenced to three years’ imprisonment for his second conviction, and was released after less than two years. *Id.*

the INS took Kim into custody and charged him with being removable from the country.<sup>200</sup>

Awaiting his first hearing before an immigration judge, and after more than three months in detention, Kim filed a petition for writ of habeas corpus under 28 U.S.C. section 2241, contending that section 236(c) was unconstitutional because the absence of any individualized determinations of his risk of flight or his dangerousness did not comport with due process.<sup>201</sup> The district court accepted Kim's argument, and the INS, at the direction of the district court, promptly held an individualized bond hearing to determine whether Kim was a flight risk or a danger to the community.<sup>202</sup> The District Director of the INS subsequently released Kim on \$5,000 bond.<sup>203</sup> The court of appeals affirmed the decision of the district court, holding that the statute was unconstitutional as applied to Kim because of his status as a lawful permanent resident.<sup>204</sup>

### B. *Majority Opinion*

According to the Court, because of Congress' expansive power over immigration and naturalization, it may enact legislation in this context that "would be unacceptable if applied to citizens."<sup>205</sup> Therefore, the Court held that the statute was constitutionally valid since Congress enacted section 236(c) based upon evidence that some criminal noncitizens, who were not detained, tended to commit crimes pending their removal proceedings and upon evidence that approximately one-fifth of criminal noncitizens, deemed to be removable and who were not detained, neglected to attend their removal hearings.<sup>206</sup> According to the Court, Kim did not contend that he was not removable under section 236(c), nor did he challenge the authority of Congress to remove criminal noncitizens from the country.<sup>207</sup> Rather, Kim only argued that his detention "for [a] brief period necessary for [his] removal proceedings"<sup>208</sup> was inconsistent with the Due Process Clause of the Fifth Amendment.<sup>209</sup>

---

<sup>200</sup> *Kim*, 538 U.S. at 513. The INS waited five weeks after Kim's arrest and detention to formally commence removal proceedings. Respondent's Brief at 9, *Kim* (No. 01-1491).

<sup>201</sup> *Kim*, 538 U.S. at 514.

<sup>202</sup> *Id.* at 514-15.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

<sup>206</sup> *Id.* at 513, 520.

<sup>207</sup> *Id.* at 513-14.

<sup>208</sup> *Id.* at 513.

<sup>209</sup> *Id.* at 514.

Although acknowledging that noncitizens are entitled to due process in removal proceedings, the Court stated that “detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process.”<sup>210</sup> The Court stated that the decision in *Carlson* supported its holding that section 236(c) was constitutional.<sup>211</sup> In *Carlson*, from the majority’s perspective, the noncitizens argued that their detention was not preceded by any individualized determinations as to their risk of flight.<sup>212</sup> Although the Attorney General had discretion to release on bond or detain Communist noncitizens, the Court stated that “the INS had adopted a policy of refusing to grant bail to those aliens.”<sup>213</sup> Thus, under the majority opinion, the Court in *Carlson* concluded that “the INS could deny bail to the detainees ‘by reference to the legislative scheme’ even without any finding of flight risk.”<sup>214</sup> The majority also claimed that in *Carlson*, there was no individualized determinations as to dangerousness.<sup>215</sup> The majority opinion also stated that *Flores* supported its holding because the Court in that case rejected the due process challenge to detention during removal proceedings.<sup>216</sup> The Court in *Flores* upheld the constitutionality of the INS policy of “releasing detained alien juveniles only into the care of their parents, legal guardians, or certain other adult relatives.”<sup>217</sup>

The majority in *Kim* also attempted to distinguish *Zadvydas*, stating that it was “materially different . . . in two respects.”<sup>218</sup> In *Zadvydas*, the noncitizens challenging their detention after final orders of removal had been entered “were ones for whom removal was ‘no longer practically attainable.’”<sup>219</sup> Thus, the Court in *Zadvydas* “held that the detention there did not serve its purported immigration purpose.”<sup>220</sup> Because the justification for detention was “no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed.”<sup>221</sup> Mandatory detention pending removal proceedings, on the other hand, “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,

---

<sup>210</sup> *Id.* at 523.

<sup>211</sup> *Id.* at 524-25.

<sup>212</sup> *Id.* at 524.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* (quoting *Carlson v. Landon*, 342 U.S. 524, 543 (1952)).

<sup>215</sup> *Id.* at 525.

<sup>216</sup> *Id.* at 526.

<sup>217</sup> *Id.* (citing *Reno v. Flores*, 507 U.S. 292, 297 (1993)).

<sup>218</sup> *Id.* at 527.

<sup>219</sup> *Id.* (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* (quoting *Zadvydas*, 533 U.S. at 690).

the aliens will be successfully removed.”<sup>222</sup> Congress had evidence that “permitting discretionary release of aliens pending their removal hearings” would result in many not appearing for their removal proceedings and unlawfully remaining in the United States.<sup>223</sup>

*Zadvydas* was also materially different from this case because in *Zadvydas* the detention was “‘indefinite’ and ‘potentially permanent.’”<sup>224</sup> Under section 236(c), the Court stated, “not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*.”<sup>225</sup>

Because detention pending removal proceedings is a “constitutionally permissible part of that process,” Kim, a criminal noncitizen who, according to the majority, conceded that he was removable, may be detained “for the limited period of his removal proceedings.”<sup>226</sup>

### C. Justice Kennedy’s Opinion

In Justice Kennedy’s concurring opinion, he stated that because detention under section 236(c) is premised upon the removability of the noncitizen, individualized determinations as to whether the noncitizen is even subject to the statute are required by due process.<sup>227</sup> Kim, according to Justice Kennedy, did not avail himself of these procedures.<sup>228</sup> Justice Kennedy stated that since “arbitrary deprivations of liberty” infringe upon an individual’s due process rights, a lawful permanent resident should be provided individual determinations “as to his or her risk of flight and dangerousness if the continued detention be[comes] unreasonable or

---

<sup>222</sup> *Id.* at 528.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* (quoting *Zadvydas*, 533 U.S. at 690-91).

<sup>225</sup> *Id.* at 529. The majority cited a study by the Executive Office for Immigration Review, which stated,

[I]n 85% of the cases in which aliens are detained pursuant to [section 236(c)], removal proceedings are completed in an average time of 47 days and a median of 30 days. In the remaining 15% of cases, in which the alien appeals the decision of the immigration judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter.

*Id.* (citation omitted).

<sup>226</sup> *Id.* at 531.

<sup>227</sup> *Id.* (Kennedy, J., concurring). “[Kim] was entitled to a hearing in which he could have ‘raised any nonfrivolous argument available to demonstrate that he was not properly included in a mandatory detention category.’” *Id.* at 532 (quoting majority opinion at 514).

<sup>228</sup> *Id.*

unjustified.”<sup>229</sup> This situation, according to Justice Kennedy, did not present itself in this case.<sup>230</sup>

D. *Justice Souter’s Opinion*

In his opinion, Justice Souter stated that the majority, in upholding the constitutionality of a statute that allows the detention of a lawful permanent resident “when there is concededly no reason to do so,” ignored “over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process.”<sup>231</sup> Although Congress certainly may remove lawful permanent residents, this power must not be implemented without due process.<sup>232</sup>

The Court’s decision in *Zadvydas* acknowledged the “clear applicability of general due process standards” and never intimated that the liberty interest in avoiding physical confinement was different for citizens and noncitizens.<sup>233</sup> Therefore, because “any decision about the requirements of due process for [a lawful permanent resident] must account for the difficulty of distinguishing in practical as well as doctrinal terms between the liberty interest of [a lawful permanent resident] and that of a citizen,” an examination of Supreme Court precedent concerning the liberty interest in avoiding physical confinement by the government is essential.<sup>234</sup>

A “special justification” for detention is required that “outweighs the individual’s constitutionally protected interest in avoiding physical restraint” in addition to the necessity of “adequate procedural protections.”<sup>235</sup> Furthermore, there must be a “sufficiently compelling” interest of the government to validate such detention, the class of individuals subject to the statute must be narrow, and the duration of detention should be strictly limited.<sup>236</sup> Because of the broad class of persons subject to detention under section 236(c) and its uncertain

---

<sup>229</sup> *Id.* These circumstances could exist “[w]ere there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings.” *Id.*

<sup>230</sup> *Id.* at 533.

<sup>231</sup> *Id.* at 541 (Souter, J., concurring in part and dissenting in part).

<sup>232</sup> *Id.* at 547.

<sup>233</sup> *Id.* at 553. In fact, the majority in *Zadvydas* explicitly adopted prior cases dealing with the detention and confinement of citizens and applied those cases to the detention of noncitizens already ordered removed. *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

<sup>234</sup> *Id.* at 547.

<sup>235</sup> *Id.* at 557 (quoting *Zadvydas*, 533 U.S. at 690-91).

<sup>236</sup> *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 316 (1993)).

duration, Justice Souter stated that there is no sufficient justification for mandatory detention under section 236(c).<sup>237</sup>

“[P]rocedural due process requires, at a minimum, that a detainee have the benefit of an impartial decisionmaker able to consider particular circumstances on the issue of necessity.”<sup>238</sup> Under these standards, Justice Souter concluded that section 236(c) was clearly unconstitutional.<sup>239</sup> Under *Salerno*, it was significant that the statute provided for a “full-blown adversary hearing [in which] the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”<sup>240</sup> In *Foucha*, the statute at issue violated due process because it did not provide the individual with an “adversary hearing at which the State [was to] prove by clear and convincing evidence that he [was] demonstrably dangerous to the community.”<sup>241</sup> Therefore, procedural due process requires, at the very least, “an opportunity for a detainee to challenge the reason claimed for committing him.”<sup>242</sup>

Contrary to the majority’s assertions, Justice Souter believed that the circumstances in *Zadvydas* were materially different from mandatory detention under section 236(c).<sup>243</sup> The Court’s decision in *Zadvydas* stands for the principle that “detaining an alien requires more than the rationality of a general detention statute; any justification must go to the alien himself.”<sup>244</sup> Even though, as the majority asserts, section 236(c) prevents

---

<sup>237</sup> *Id.* at 558.

<sup>238</sup> *Id.* at 557.

<sup>239</sup> *See id.* at 558.

<sup>240</sup> *Id.* at 549 (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987)).

<sup>241</sup> *Id.* at 550 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992)).

<sup>242</sup> *Id.* at 551. Therefore, “[to select] a class of people for confinement on a categorical basis and [to deny] members of that class any chance to dispute the necessity of putting them away” violates due process. *Id.* at 551-52.

<sup>243</sup> *Id.* at 560-61.

<sup>244</sup> *Id.* at 552. In addition, according to Justice Souter, the Senate Report relied upon by the majority to justify categorical detention, which stated that 20% of noncitizens not detained failed to appear at removal proceedings, did not distinguish between lawful permanent residents and nonimmigrants or noncitizens illegally present in the country. *Id.* at 562-63. Also, these statistics were misleading, “not as a result of chronic discretionary judgment failures by [the] INS in assessing which aliens might pose a flight risk. Rather, the rates were alarmingly high because decisions to release aliens in proceedings were driven overwhelmingly by a lack of detention facilities.” *Id.* at 563-64 (quoting Brief for T. Alexander Aleinikoff et al. at 19, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491)). The majority did not “explain how the INS’s resource-driven decisions to release individuals who pose serious flight risks, and their predictable failure to attend removal hearings, could justify a systemwide denial of any opportunity for release to individuals like  
(continued))

noncitizens pending removal proceedings from fleeing during this time, the statute in *Zadvydas* did the same, evaluated outside the context of the detention of any particular individual.<sup>245</sup> “[T]he fact that a statute serves its purpose in general fails to justify the detention of an individual in particular.”<sup>246</sup> The contention that detaining a noncitizen under section 236(c) “based on a general conclusion that detention is needed for effective removal of criminal aliens on a class-wide basis” is directly refuted by the holding in *Zadvydas*.<sup>247</sup>

Furthermore, although detention under section 236(c) is not necessarily indefinite or potentially permanent, removal proceedings “are not formally limited to any period” and, frequently, extend beyond the average duration indicated by the majority.<sup>248</sup> The statistics provided by the majority are reflective of the reality that many noncitizens concede removability.<sup>249</sup> However, lawful permanent residents, Kim included, have very strong incentives to challenge their removability and are more likely than other noncitizens to pursue challenges to removability, which often necessitate months of proceedings.<sup>250</sup> Therefore, the possibility of several months of detention demands individualized inquiry into the necessity of detention under *Zadvydas*.<sup>251</sup>

---

Kim who are neither flight risks nor threats to the public.” *Id.* at 564. The majority also ignored a study conducted on behalf of the INS that concluded that 92% of criminal noncitizens, mostly lawful permanent residents, appeared for their removal hearings when released under supervisory conditions. *Id.* at 565. Therefore, the detention of all lawful permanent residents subject to section 236(c), “even on a general level,” was not demonstrated to be essential to ensure appearance at removal proceedings. *Id.* at 566.

<sup>245</sup> *Id.* at 561.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* “[N]either the Court nor Justice Kennedy in dissent suggested that scrutiny under the Due Process Clause could be satisfied at such a general level. Rather, we remanded the individual cases of *Zadvydas* and *Ma* for determinations of the strength of the Government’s reasons for detaining them in particular.” *Id.* at 561-62. Furthermore, the government’s interest in *Zadvydas* in detaining noncitizens with no lawful right to remain in the country and even considered to be dangerous and a risk to flee is clearly weaker than the government’s interest in subjecting to detention a lawful permanent resident who is neither dangerous nor likely to flee. *Id.* at 562.

<sup>248</sup> *Id.* at 567. “[T]he average time from receipt of charging documents to decision obscures the fact that the alien may receive charging documents only after being detained for a substantial period.” *Id.* Kim himself had been detained five weeks before he was even charged. *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 567-68.

<sup>251</sup> *Id.* at 568.

According to Justice Souter, in its attempts to distinguish *Zadvydas*, the majority ignored the ways in which a noncitizen in Kim's situation awaiting removal proceedings has a stronger claim than the individuals in *Zadvydas* who were subject to final orders of removal.<sup>252</sup> First, Kim has an additional interest in averting detention because of the strong probability that detention would inhibit the "ability to develop and present his case on the very issue of removability."<sup>253</sup> Furthermore, Kim still has a legal right to remain in the country until a final order of removal issued, whereas the individuals in *Zadvydas* were already ordered to be removed and, therefore, had no lawful right to so remain.<sup>254</sup>

Justice Souter asserted that the majority also failed in its proposition that the Court's decisions in *Carlson* and *Flores* should be read to uphold mandatory detention under section 236(c).<sup>255</sup> The statutory scheme in *Carlson* did not mandate detention for all noncitizens subject to it, but rather, it involved the discretion of the Attorney General.<sup>256</sup> Thus, with "evidence of membership [in the Communist Party] plus personal activity in supporting and extending the Party's philosophy concerning violence," the conclusion by the District Director of the INS that the individuals represented "a menace to the public interest" did not constitute an abuse of discretion.<sup>257</sup> The Court in *Carlson* expressly recognized that not all individuals who were arrested for membership in the Communist Party were denied bail, and it further recognized that the decision of whether to grant release on bail or to detain was completely within the discretion of the Attorney General.<sup>258</sup> Therefore, the circumstances in *Carlson* and section 236(c) at issue here are different matters.<sup>259</sup> In this case, no individualized determinations had been made by an impartial decisionmaker concerning whether Kim was either a flight risk or a danger to society.<sup>260</sup> Moreover, the majority cited *Carlson* as stating that detention was part of the deportation proceedings, but as Justice Souter stated, "[the *Carlson* court] nowhere said that detention was part of every deportation proceeding."<sup>261</sup> The majority in *Carlson* even explicitly stated

---

<sup>252</sup> See *id.* at 554.

<sup>253</sup> *Id.* "[The] recognition that the serious penalty of removal must be justified on a heightened standard of proof will not mean all that much when the INS can detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence." *Id.* (citation omitted).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 568.

<sup>256</sup> *Id.* at 569.

<sup>257</sup> *Id.* at 569 (quoting *Carlson v. Landon*, 342 U.S. 524, 541 (1952)).

<sup>258</sup> *Id.* at 568-69.

<sup>259</sup> *Id.* at 570.

<sup>260</sup> *Id.* at 570-71.

<sup>261</sup> *Id.* at 573.

that discretion to release an individual or to detain him was “necessary, since ‘[o]f course [a] purpose to injure [the United States] could not be imputed generally to all aliens subject to deportation.’”<sup>262</sup>

The Court’s decision in *Flores* is equally unavailing, as it also did not involve mandatory detention.<sup>263</sup> In fact, Justice Souter stated that the INS regulation in *Flores* required the release of noncitizen juveniles pending removal proceedings unless there was an individualized determination that he or she constituted a threat to society or was unlikely to attend the proceedings.<sup>264</sup> “*Flores* turned not on the necessity of detention, but on the regulation’s restriction that alien juveniles could only be released to the custody of the juvenile’s parent, legal guardian, or another specified adult relative.”<sup>265</sup> Because the juveniles in *Flores* were in custody of some manner, the constitutional issue was “not whether the alien’s detention was necessary to a governmental purpose.”<sup>266</sup> The liberty interest in avoiding physical restraint therefore was never at issue.<sup>267</sup>

#### E. Justice Breyer’s Opinion

For Justice Breyer, the dispositive factor in this case was whether Kim, in fact, conceded that he was removable.<sup>268</sup> According to Justice Breyer, if removability is conceded, the time limitations set forth in *Zadvydas* should be applicable because of the similarity between a noncitizen’s concession of removability and a final order of removal.<sup>269</sup> However, Justice Breyer did not agree with the majority’s conclusion that Kim, in fact, conceded his removability.<sup>270</sup> Since Kim’s arguments that he was not subject to removability are “neither insubstantial nor interposed solely for purposes of delay,” Breyer’s interpretation of section 236(c), necessary to be consistent with constitutional requirements, would have included bail

---

<sup>262</sup> *Id.* at 574 (quoting *Carlson*, 342 U.S. at 538). “The Court nowhere addressed, much less approved, the notion that the INS could justify, or that Congress could compel, an individual’s detention without any determination at all that his detention was necessary to some Government purpose.” *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 574-75. This limitation was nevertheless also subject to the exception that in “unusual and compelling circumstances and in the discretion of the [INS] district director or chief patrol agent,” the juvenile could be released to another person not designated. *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 297 (1993)).

<sup>266</sup> *Id.* at 575.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 576 (Breyer, J., concurring in part and dissenting in part).

<sup>269</sup> *Id.* at 576-77.

<sup>270</sup> *Id.* at 577.

standards applicable in the criminal justice context.<sup>271</sup> Thus, the government would be required to allow individuals in Kim's situation "to seek an individualized assessment of flight risk and dangerousness as long as the alien's claim that he is not deportable is (1) not interposed solely for the purposes of delay and (2) raises a question of 'law or fact' that is not insubstantial."<sup>272</sup>

#### F. *Analysis*

Never had the Supreme Court, even in the context of immigration, upheld a statute concerning detention that "sweeps so broadly without allowing some kind of opportunity for an immigrant to demonstrate why his detention is not necessary."<sup>273</sup> *Demore v. Kim* was an unfortunate decision that disregarded years of precedent concerning the constitutional limitations on the government's authority to confine citizens and noncitizens alike and that failed to distinguish its decision in *Zadvydas* in any material way. Detention pending removal proceedings is not per se unconstitutional, but a proper identification of the liberty interest at stake and a meaningful due process analysis demonstrate that section 236(c) contravenes constitutional protections. Because it categorically infringes upon the rights of a broad class of individuals to be free from physical restraint by the government without sufficient justification and because it provides no opportunity to determine whether detention is even necessary, section 236(c) violates the substantive and procedural components of due process in its application to lawful permanent residents.

The notion 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,"<sup>274</sup> upon which the majority relies, "cannot be read to leave limitations of liberty unreviewable."<sup>275</sup> Although Congress has plenary authority over matters of immigration, it must nonetheless choose a "constitutionally permissible means of implementing that power."<sup>276</sup> The Supreme Court has held on numerous occasions, most recently in *Zadvydas*, that all persons present in the United States, whether lawfully or unlawfully and whether citizens or noncitizens, are protected

---

<sup>271</sup> *Id.* at 577-79.

<sup>272</sup> *Id.* at 578-79.

<sup>273</sup> *Another Chance to "Fix '96": Supreme Court to Review Mandatory Detention of Immigrants* (Jan. 14, 2003) (quoting Judy Rabinovitz, Senior Staff Attorney with the ACLU's Immigrants' Rights Project), available at <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=11574&c=95>.

<sup>274</sup> *Kim*, 538 U.S. at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

<sup>275</sup> *Id.* at 547 n.9 (Souter, J., concurring in part and dissenting in part).

<sup>276</sup> *INS v. Chadha*, 462 U.S. 919, 940-41 (1983).

from deprivation by the government of protected liberty interests without due process of law.<sup>277</sup>

Traditionally, the substantive component of due process forbids any governmental action that infringes upon certain fundamental rights, irrespective of the procedures provided, unless narrowly tailored to further a compelling governmental interest.<sup>278</sup> Analysis of any statute under substantive due process first requires identification of the liberty interest implicated in order to determine the appropriate level of scrutiny.<sup>279</sup> The Court in *Salerno* emphasized the “importance and fundamental nature” of the right to be free from involuntary, physical confinement pending trial and recognized the “individual’s strong interest in liberty” under these circumstances.<sup>280</sup> Also, according to the Court, “[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>281</sup> The Court in *Foucha* stated that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.”<sup>282</sup> More recently, in the context of immigration, the Court in *Zadvydas* affirmed that this right “lies at the heart of the liberty that [the Due Process] Clause protects.”<sup>283</sup>

Since the rights of an individual detained pending removal proceedings are no less fundamental, heightened scrutiny must be applied to determine the validity of section 236(c).<sup>284</sup> The interest at stake is not one of absolute freedom pending removal proceedings but, rather, the right to be free pending removal proceedings in the absence of an individualized determination that detention is necessary.<sup>285</sup> Because there are several means by which an individual subject to section 236(c) can avoid removal,<sup>286</sup> this right should not be confused with the rights of an

---

<sup>277</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

<sup>278</sup> *See Hoang v. Comfort*, 282 F.3d 1247, 1258 (10th Cir. 2002), *vacated by* 538 U.S. 1010 (2003). Rights that are not considered fundamental are subjected to less exacting scrutiny. *See id.*

<sup>279</sup> *Reno v. Flores*, 507 U.S. 292, 302 (1993).

<sup>280</sup> *United States v. Salerno*, 481 U.S. 739, 750 (1987).

<sup>281</sup> *Id.* at 755.

<sup>282</sup> *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

<sup>283</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

<sup>284</sup> *See Flores*, 507 U.S. at 315-16 (O’Connor, J., concurring). “The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny.” *Id.* at 316.

<sup>285</sup> *See Demore v. Kim*, 538 U.S. 510, 548-49 (2003) (Souter, J., concurring in part and dissenting in part).

<sup>286</sup> Respondent’s Brief at 4 n.5, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491). The Court has recognized that “[t]here is a clear difference” between the possibility of removal and the certainty of removal. *INS v. St. Cyr*, 533 U.S. 289, 325 (2001). Although  
(continued)

individual subject to an ultimate finding of removability. “As long as Congress or the INS provide for trial and appeal procedures that must be completed before an alien is finally removable, there is a separate liberty interest at stake.”<sup>287</sup>

Assuming the government’s interests in ensuring one’s appearance at removal proceedings and protecting the community from harm are deemed compelling, section 236(c) cannot withstand strict scrutiny, as the means chosen to further these interests are patently overinclusive. Even by statistics relied upon by the majority, most individuals subject to section

---

most individuals subject to section 236(c) are ultimately removed, removal is not certain, as there are many individuals who have meritorious claims for relief. For example, some individuals detained under section 236(c) are later determined to be citizens, and others eventually may demonstrate that their conviction in fact did not constitute a removable offense or that there has been in fact no conviction. See Respondent’s Brief at 3-4, *Kim* (No. 01-1491). An individual may also avoid removal if he or she has been pardoned for the underlying criminal offense. 8 U.S.C. § 1227(a)(2)(A)(v) (2000). Also, although individuals convicted of aggravated felonies are denied discretionary relief, the Court in *St. Cyr* held that discretionary relief is available for noncitizens “whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for [section] 212(c) relief at the time of their plea under the law then in effect.” *St. Cyr*, 533 U.S. at 326. The Court in this case described the number of individuals relying on section 212(c) prior to the enactment of IIRIRA as “extremely large.” *Id.* at 295-96. Relief from removal is also available through other avenues, such as through private federal legislation, see *Vargas v. Reno*, 966 F.Supp. 1537, 1549 (S.D. Cal. 1997), or through international treaties, including the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, see *Kamalthas v. INS*, 251 F.3d 1279, 1280 (9th Cir. 2001). Furthermore, the Attorney General may withhold removal upon deciding that removal to a specific country would threaten the noncitizen’s life or freedom “in that country because of the [noncitizen’s] race, religion, nationality, membership in a particular social group, or political opinion,” provided that the noncitizen has not participated in persecution nor committed a “particularly serious crime,” nor poses a danger to the United States. 8 U.S.C. § 1231(b)(3) (2000). A conviction of an aggravated felony for which the noncitizen has been sentenced to at least 5 years’ imprisonment is considered a “particularly serious crime.” *Id.* § 1231(b)(3)(B). Therefore, because one is subject to 236(c) certainly does not indicate that removal is the inevitable consequence. Although a final order of removal is probable in most cases, “the merits of the removal proceedings should not be confused with the decision to detain pending these proceedings.” *Patel v. Zemski*, 275 F.3d 299, 314 (2001).

<sup>287</sup> Ellis M. Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593, 2607 (2001). Although a final order of removal is likely in a majority of cases for persons subject to section 236(c), the merits of the removal proceedings should not be confused with the decision to detain an individual pending removal proceedings. See *Patel*, 275 F.3d at 314.

236(c) are not flight risks.<sup>288</sup> Furthermore, the statute is not limited to individuals convicted of serious and violent crimes, but rather, it subjects individuals like Kim, who were convicted of relatively minor and nonviolent crimes, to mandatory detention.<sup>289</sup>

In a more specific context, the Court in *Zadvydas* stated that government detention violates substantive due process except “in certain special and ‘narrow’ nonpunitive ‘circumstances,’<sup>290</sup> where a special justification . . . outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’”<sup>291</sup> Nowhere in *Zadvydas* did the Court state that the principles established in past Supreme Court cases concerning the involuntary, physical confinement of individuals by the government were applicable only to citizens.<sup>292</sup> Rather, the Court in *Zadvydas* expressly adopted the holdings of these cases in reaching its own holding.<sup>293</sup> The requirement of this “special justification” necessarily demands that such justification be tailored to the specific individual.<sup>294</sup> The fundamental premises implicit in the Court’s holding in *Zadvydas*—that detention of a noncitizen requires more than reference to a general detention statute and that the basis for detention must involve consideration of its necessity under the individual circumstances—compel this conclusion.<sup>295</sup>

Neither of the proffered reasons for mandatory detention under section 236(c) constitutes a special justification sufficient to outweigh a lawful permanent resident’s constitutionally protected liberty interest. The government contended that mandatory detention for lawful permanent residents such as Kim, who are subject to section 236(c), was necessary to ensure that these individuals appear at their removal proceedings.<sup>296</sup> It is important to realize, however, that removal for those subject to section

---

<sup>288</sup> See *Kim*, 538 U.S. at 519-21.

<sup>289</sup> Defined in 8 U.S.C. section 1101(a)(43), the term “aggravated felony” encompasses such crimes as shoplifting, petit larceny, and perjury, even if the jurisdiction designates such crimes as misdemeanors. Respondent’s Brief at 2-3, *Kim* (No. 01-1491).

<sup>290</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

<sup>291</sup> *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

<sup>292</sup> See *Kim*, 538 U.S. at 553 (Souter, J., concurring in part and dissenting in part). *Zadvydas* “was an application of principles developed in over a century of cases on the rights of [noncitizens] and the limits on the government’s power to confine individuals.” *Id.* at 560.

<sup>293</sup> See *id.* at 553.

<sup>294</sup> See Brief of the American Bar Association as Amicus Curiae Supporting Respondent at 16, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491).

<sup>295</sup> See *Zadvydas*, 533 U.S. at 690, 702.

<sup>296</sup> *Kim*, 538 U.S. at 519-21.

236(c) is not absolutely certain. For lawful permanent residents in particular, many of whom have developed significant social, economic, and familial connections in this country and many of whom have meritorious challenges to removal, the incentive to appear is considerably stronger.<sup>297</sup> In recognition of evidence that a substantial majority of noncitizens who are conditionally released rather than detained actually attend their removal proceedings,<sup>298</sup> there is no special justification for mandatory detention of lawful permanent residents who pose no risk of evading their removal proceedings.

The government also contended that mandatory detention under section 236(c) is necessary to protect the public from dangerous individuals who are not detained pending their removal proceedings.<sup>299</sup> There are, however, a wide array of crimes qualifying as an aggravated felony under the statute, and many of these crimes are relatively minor and nonviolent, refuting any presumption that all individuals subject to section 236(c) are dangerous to the public.<sup>300</sup> Therefore, section 236(c) certainly does not encompass only noncitizens convicted of particularly dangerous crimes, and the existence of a past conviction alone, “without any individualized consideration of the dangerousness of the underlying crime or of the individual’s present condition, can be unreliable evidence of dangerousness.”<sup>301</sup> There is likewise no special justification for mandatory detention of lawful permanent residents who are not a danger to the community.

The Court’s holding in *Salerno*, under the analogous situation of pretrial detention in the criminal context, provides another avenue by which section 236(c) may be examined under substantive due process. Under *Salerno*, the statute authorizing detention must be legitimately regulatory rather than impermissibly punitive, and it may not be excessive in relation to the objectives that the statute seeks to achieve.<sup>302</sup> The Court rejected an “absolute constitutional barrier” against restriction of the right

---

<sup>297</sup> *Id.* at 520 n.5.

<sup>298</sup> *Id.* at 565 (Souter, J., concurring in part and dissenting in part).

<sup>299</sup> *Id.* at 517-19.

<sup>300</sup> *See supra* notes 174, 289.

<sup>301</sup> *Kim v. Ziglar*, 276 F.3d 523, 534 (9th Cir. 2002).

<sup>302</sup> *See United States v. Salerno*, 481 U.S. 739, 746-49 (1987); *see also Johnston*, *supra* note 287, at 2620-21. “*Salerno* requires courts to perform a two-part test under the traditional strict scrutiny analysis.” *Johnston*, *supra* note 287, at 2621. The existence of a compelling governmental interest is determined by whether the purpose of the detention statute is punitive or regulatory and whether the statute is excessive in relation to its purpose. *Id.* If regulatory and not excessive, then the governmental interest is compelling, but this interest must be narrowly tailored to justify the infringement of an individual’s liberty interest. *Id.*

to liberty, stating that “sufficiently compelling governmental interests can justify detention of dangerous persons.”<sup>303</sup> The Court in *Salerno* upheld the statute at issue, which required individualized determinations at a “full-blown” adversarial hearing and provided for other procedural protections, such as appellate review, “to further the accuracy of [the] determination” in each individual case.<sup>304</sup> Also, the Act “carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes,”<sup>305</sup> and the duration of pretrial detention was also limited.<sup>306</sup>

Section 236(c) provides none of the attributes found to be sufficient in *Salerno*. The circumstances under which detention is required under section 236(c) are not carefully delineated but, rather, apply to a broad class of individuals, many of whom are neither a flight risk nor dangerous. Section 236(c) provides virtually no procedural protections to assure that detention is necessary to ensure one’s appearance at removal proceedings or to protect the community from danger. Furthermore, the duration of detention under section 236(c) is often protracted, particularly for lawful permanent residents who do not concede removability. For these reasons, the means chosen to effectuate the statute’s purposes are excessive, and mandatory detention under section 236(c) without individualized inquiry is unconstitutional under *Salerno*.

Even if a government action survives substantive due process analysis, procedural due process nonetheless requires that any infringement of an individual’s protected liberty interests be implemented in a fair manner and that adequate procedural protections be afforded against erroneous deprivations of these interests.<sup>307</sup> To determine whether section 236(c) comports with procedural due process, the following three factors must be balanced: (1) the individual’s liberty interest and the gravity of its deprivation; (2) “the risk of an erroneous deprivation of [this] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>308</sup>

---

<sup>303</sup> *Salerno*, 481 U.S. at 748.

<sup>304</sup> *Id.* at 750-51.

<sup>305</sup> *Id.* at 747.

<sup>306</sup> *Id.* at 748.

<sup>307</sup> See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>308</sup> *Id.* at 335. Under this procedural due process analysis, the Court in *Mathews* presumed that actual procedures existed, stating that the procedures in question were adequate if tailored “to ‘the capacities and circumstances of those who are to be heard,’ to insure that they are given a meaningful opportunity to present their case.” *Id.* at 349 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)). Section 236(c), of course, contains no procedures to determine the necessity of detention and, therefore, no  
(continued)

As already discussed, a lawful permanent resident's liberty interest in avoiding physical restraint pending removal proceedings in the absence of any individualized inquiry is indisputably significant.<sup>309</sup> In the absence of any individualized determinations, the risk of an erroneous deprivation of this right is overwhelming. Without individualized inquiry to determine the necessity of detention, there will certainly be many who are needlessly detained. The statistics cited by the majority reveal that 20% of individuals subject to section 236(c) who are not detained fail to appear for their removal proceedings.<sup>310</sup> Section 236(c) creates an irrebuttable presumption that an individual subject to the statute is a flight risk, despite the fact that a substantial majority attend their removal proceedings in the absence of detention.

Furthermore, section 236(c) creates the same presumption that an individual convicted of an aggravated felony is a threat to the community. Despite its name, the classification of "aggravated felony" is certainly not limited to crimes that are particularly dangerous, as it includes many criminal acts that are nonviolent and relatively minor.<sup>311</sup> Some convictions in which imprisonment does not follow nonetheless trigger mandatory detention.<sup>312</sup> Moreover, in many situations, individuals have been released into the community after having completed the sentence of imprisonment for the underlying conviction, "which indicates that an individualized judgment has already been made, pursuant to the applicable processes of the criminal law, that they pose no serious or continuing danger to the public."<sup>313</sup> Therefore, mandatory detention under section 236(c) creates an unreasonable risk that individuals who are neither likely to flee their removal proceedings nor dangerous will be detained.

The value of individual determinations is obvious. The purposes of detention under section 236(c) will be equally achieved by determining the necessity of detention for each individual subject to the statute, and this

---

opportunity to be heard. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21 (1982) (employing the *Mathews* test for evaluating whether deportation procedures comply with due process for returning lawful permanent residents).

<sup>309</sup> *See supra* notes 279-87 and accompanying text; *see also* *Caballero v. Caplinger*, 914 F. Supp. 1374, 1378 (E.D. La. 1996) (stating that the question of whether one has a protected liberty interest in remaining free pending removal proceedings is dispositive of any procedural due process claim because section 236(c) contains no procedures for protecting this interest).

<sup>310</sup> *See* *Demore v. Kim*, 538 U.S. 510, 519 (2003).

<sup>311</sup> *See supra* notes 174, 289.

<sup>312</sup> Brief of the American Bar Association as Amicus Curiae Supporting Respondent at 3-4, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491).

<sup>313</sup> Brief of Amici Curiae the National Asian Pacific American Legal Consortium et al. at 13, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491).

can be achieved with few additional burdens. Once an individual is detained pursuant to section 236(c), he or she has the right to a “*Joseph* hearing” before an immigration judge, at which point it is determined whether the individual is subject to the statute.<sup>314</sup> An individualized determination by this immigration judge as to the individual’s flight risk and dangerousness could be performed at this hearing with little difficulty.<sup>315</sup> For those not subject to section 236(c), the INS routinely makes individualized bond determinations, which immigration judges then review in “brief, informal bond hearings.”<sup>316</sup> The government indisputably has an interest in ensuring that individuals appear for removal proceedings and do not cause harm to the community, but the additional costs, if any, of providing adequate procedures to determine the necessity of detention in each individual case would be offset by the benefits of not detaining every individual subject to 236(c).<sup>317</sup>

Therefore, in consideration of the competing interests implicated by mandatory detention under section 236(c), procedural due process requires an opportunity to contest the need for detention in each individual case. The strong liberty interest of the individual to be free pending removal proceedings, the unacceptable probability that an erroneous deprivation of this right will occur, and the limited burden on the government to provide adequate protections compels this result.

The majority insisted that the Court’s prior decisions in *Carlson* and *Flores* supported its holding,<sup>318</sup> but it virtually ignored the Court’s recent decision in *Zadvydas*, except in its attempts to distinguish it.<sup>319</sup> In *Zadvydas*, the noncitizens who challenged the constitutionality of their

---

<sup>314</sup> Respondent’s Brief at 31, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491). This hearing does not address whether the individual constitutes a risk of flight or danger nor whether the individual is eligible for discretionary relief, but only whether the individual is subject to the statute. *Id.* The burden on the individual, which requires proof that the INS is “substantially unlikely” to succeed on its assertion that the individual is removable under a classification in section 236(c), is difficult to satisfy. *See generally* In re *Joseph*, 22 I. & N. Dec. 799 (Board of Immigration Appeals, May 28, 1999) (dismissing the appeal and releasing the respondent pursuant to the bond order). If the individual is successful at this *Joseph* hearing, he or she is entitled to a bond hearing. Respondent’s Brief at 31, *Kim* (No. 01-1491).

<sup>315</sup> *See* *Patel v. Zemski*, 275 F.3d 299, 312 (3d Cir. 2001).

<sup>316</sup> 8 C.F.R. § 3.19 (2004).

<sup>317</sup> *See* Brief of Amici Curiae the National Asian Pacific American Legal Consortium et al. at 17-18, *Kim* (No. 01-1491).

<sup>318</sup> *See Kim*, 538 U.S. at 523-26 (2003); *see also id.* at 569-76 (Souter, J., concurring in part and dissenting in part) (contending that the Court’s decisions in *Carlson* and *Flores* did not support mandatory detention under section 236(c)).

<sup>319</sup> *See id.* at 527-29.

detention were subject to final orders of removal, but actual removal had proven to be unattainable.<sup>320</sup> Therefore, the majority contended that because the reason for detention was no longer realistic, detention did not bear “a reasonable relation to the purpose for which the individual was committed.”<sup>321</sup> Conversely, mandatory detention pending removal proceedings, the majority stated, is consistent with the objective of ensuring the noncitizen’s appearance at removal proceedings and, ultimately, improves the likelihood that the noncitizen, if ordered to be removed, will in fact be removed.<sup>322</sup>

Contrary to the majority’s assertions, *Zadvydas* implicitly requires more than reference to a general detention statute to justify detention of a noncitizen, and, therefore, any justification for detention must involve consideration of its necessity for each individual. Therefore, “the fact that a statute serves its purpose in general fails to justify the detention of an individual in particular,” a statement supported by the Court’s holding in *Zadvydas*.<sup>323</sup> If this were otherwise, the outcome in *Zadvydas* would have been different because detention of all noncitizens subject to final orders of removal “will in general ‘serv[e] the purpose’ of their effective removal.”<sup>324</sup> The Court in *Zadvydas*, however, remanded each case to determine the government’s purpose in detaining each individual.<sup>325</sup>

*Zadvydas* is also distinguishable, the majority asserted, because the detention in that case was “‘indefinite’ and ‘potentially permanent.’”<sup>326</sup> The majority in *Demore v. Kim* repeatedly referred to the duration of detention pending removal proceedings as brief, stating that “in 85% of the cases in which aliens are detained pursuant to [section 236(c)], removal proceedings are completed in an average time of 47 days and a median of 30 days.”<sup>327</sup> The majority also emphasized that, contrary to the statute at issue in *Zadvydas*, section 236(c) has a “definite termination point.”<sup>328</sup>

Although detention under section 236(c) contains a “definite termination point,” there is no limitation on its duration.<sup>329</sup> This fact

---

<sup>320</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 684-86 (2001).

<sup>321</sup> *Kim*, 538 U.S. at 527 (quoting *Zadvydas*, 533 U.S. at 690).

<sup>322</sup> *Id.* at 528.

<sup>323</sup> *Id.* at 561 (Souter, J., concurring in part and dissenting in part).

<sup>324</sup> *Id.*

<sup>325</sup> *Zadvydas*, 533 U.S. at 702.

<sup>326</sup> *Kim*, 538 U.S. at 528 (quoting *Zadvydas*, 533 U.S. at 690-91).

<sup>327</sup> *Id.* at 529.

<sup>328</sup> *Id.*

<sup>329</sup> Appeals to the BIA seldom take fewer than four months, and frequently take more than a year. Respondent’s Brief at 4, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491). “Given the time required for hearings and appeals, individuals . . . can expect to be incarcerated between six months and well over a year.” *Id.*

proves to be especially consequential for lawful permanent residents who do not concede removability.<sup>330</sup> Many lawful permanent residents have established familial, social, and economic ties to their community while residing in the United States and thus are less likely to concede removability. Removal proceedings involving lawful permanent residents will most likely be “the most protracted because they have the most substantial legal claims and the most at stake.”<sup>331</sup> The fact that lawful permanent residents have the “strongest claims to relief for removal,” besides providing a clear motivation to attend removal proceedings, also results in lengthy removal proceedings.<sup>332</sup> Therefore, “[s]ection 236(c) often compels lawful permanent residents to choose between prolonged mandatory detention and abandoning bona fide claims to legal status.”<sup>333</sup>

In its efforts to distinguish the circumstances in *Zadvydas* from those in *Kim*, the majority failed to acknowledge the many ways in which Kim’s claim is much stronger. Kim, as a lawful permanent resident not subject to a final order of removal nor proven to be a flight risk or dangerous, certainly has a more powerful interest in liberty than the noncitizens in *Zadvydas*, who had been subject to a final order of removal and were considered risks of flight and dangerous to the community.<sup>334</sup> Kim’s status as a lawful permanent resident will remain until a final order of removal has been entered.<sup>335</sup> Such an order is not final until the decision of an immigration judge, finding him subject to removal, is affirmed by the BIA or until the period permitting review by the BIA has expired, whichever is earlier.<sup>336</sup>

---

<sup>330</sup> The majority mistakenly assumed that Kim conceded his removability because he did not claim a hearing before he filed a writ of habeas corpus challenging the constitutionality of section 236(c). *Kim*, 538 U.S. at 541 (Souter, J., concurring in part and dissenting in part). Although an immigration judge reviews challenges to removability and requests for relief from removal, in this case Kim had not yet had the opportunity to this hearing before an immigration judge on his removability before he filed his habeas petition. *Id.* at 542. As Justice Souter points out, had Kim included in his habeas corpus petition that he was not removable, his claim would have been dismissed for failing to exhaust administrative remedies. *Id.* Thus, Kim did not concede that he was removable “by challenging removability before the Immigration judge and challenging detention in a federal court.” *Id.*

<sup>331</sup> Respondent’s Brief at 5, *Kim* (No. 01-1491); see *supra* text accompanying note 313.

<sup>332</sup> Respondent’s Brief at 5, *Kim* (No. 01-1491).

<sup>333</sup> *Id.*

<sup>334</sup> See *Zadvydas*, 533 U.S. at 684-86.

<sup>335</sup> See 8 C.F.R. § 1.1(p) (2004).

<sup>336</sup> 8 U.S.C. § 1101(a)(47)(B) (2000).

In addition, contrary to detention after a final order of removal, detention pending removal proceedings hinders the noncitizen's "ability to develop and present his case on the very issue of removability"<sup>337</sup> and infringes upon a noncitizen's ability to obtain counsel.<sup>338</sup> Even noncitizens who concede removability "are prevented from tying up their affairs and making preparations with their families for their departure, to the detriment of the wider community."<sup>339</sup>

There are several foreseeable consequences of the Court's decision in *Kim*. "[M]any lawful permanent residents who were released on bond as a result of the court of appeals' decisions will be subject to reincarceration," despite the fact that it had already been determined that they were neither a risk of flight nor a danger to society.<sup>340</sup> As already stated, mandatory detention under section 236(c) clearly affects the ability of individuals to obtain counsel and to defend against removability, and it coerces persons with legitimate and meritorious claims to relief from removal to choose between protracted detention and foregoing these claims. Also, because the INS undoubtedly has limited resources and because "absolute rules hinder fair and efficient enforcement efforts,"<sup>341</sup> mandatory detention under section 236(c) is unwise as a matter of policy. If the number of individuals detained under section 236(c) ever exceeds the amount of detention spaces available, the inevitable consequence is that many individuals who are, in fact, dangerous or a flight risk will be released.

#### IV. SIGNIFICANCE

The decision in *Zadydas* represented a departure from the plenary power doctrine, under which matters of immigration "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference,"<sup>342</sup> and, at the same time, signified progress in the protection of the rights of noncitizens in the context of

---

<sup>337</sup> *Demore v. Kim*, 538 U.S. 510, 554 (2003) (Souter, J., concurring in part and dissenting in part). "Recognition that the serious penalty of removal must be justified on a heightened standard of proof will not mean all that much when the INS can detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence." *Id.* (citation omitted).

<sup>338</sup> Brief of Amici Curiae Citizens and Immigrants for Equal Justice et al. at 20, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491). "Approximately ninety percent of INS detainees go through proceedings without representation." *Id.*

<sup>339</sup> *Id.* at 5.

<sup>340</sup> *ACLU Criticizes High Court Detention Ruling, Calls on Congress to Repeal Irrational and Unjust Law* (April 29, 2003), available at <http://www.aclu.org/Immigrants-Rights/ImmigrantsRights.cfm?ID=12505&c=95> (last visited Feb. 28, 2005).

<sup>341</sup> Brief for T. Alexander Aleinikoff et al. at 18, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491).

<sup>342</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

detention. *Demore v. Kim*, however, abruptly reversed this progress. Although acknowledging that due process principles were applicable, the Court's opinion in *Demore v. Kim* contained very little constitutional analysis.

The decision in *Demore v. Kim* is unfortunate, not only for lawful permanent residents, but for all noncitizens.<sup>343</sup> Since "the Court has traditionally afforded robust constitutional protection to permanent resident aliens, even while withholding such protection from other categories of noncitizens," the Court's denial of constitutional protection to lawful permanent residents pending removal proceedings "casts an ominous shadow on the constitutional rights of all other [noncitizens]."<sup>344</sup>

Regrettably, *Demore v. Kim* is likely to have a significant impact on the future development of this area of law and will have major implications for any constitutional challenge to any form of detention of noncitizens. Nevertheless, the holding of *Demore v. Kim* could be interpreted narrowly to diminish its adverse effect on the rights of lawful permanent residents. One could legitimately present various arguments to challenge the legality of mandatory detention under section 236(c) in its application to a specific individual.<sup>345</sup> Excessively prolonged detention pending adjudication of one's removal case could potentially reach a point where it is no longer justified and thus unconstitutional.<sup>346</sup> Also, "[i]ndividuals who later may fall under *Zadvydas* because the government is unable to remove them from the U.S. may argue that [section] 236(c) is unconstitutional as applied to them."<sup>347</sup> *Zadvydas* emphatically stands for the principle that "there is no purpose in detaining individuals who have no likelihood of being removed."<sup>348</sup> Therefore, detention under these circumstances would no longer serve its purpose. Finally, the Court's decision in *Demore v. Kim* relied, to a great extent, on its finding that Kim conceded removability and was properly included in a category of persons subject to mandatory detention under section 236(c).<sup>349</sup> Therefore, the Court's decision does not necessarily prohibit an interpretation of the statute that would involve "an

---

<sup>343</sup> See *The Supreme Court, 2002 Term, Leading Cases*, 117 HARV. L. REV. 226, 287-339 (2003).

<sup>344</sup> *Id.* at 288.

<sup>345</sup> Beth Werlin, The American Immigration Law Foundation, *Mandatory Detention After Demore v. Kim* (Sept. 2003), available at [http://www.aifl.org/lac/lac\\_pa\\_0-90203.asp](http://www.aifl.org/lac/lac_pa_0-90203.asp) (last visited Feb. 28, 2005).

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

actual concession of inadmissibility or [removability] before a person is subject to mandatory detention.”<sup>350</sup>

## V. CONCLUSION

Imposition of mandatory detention under section 236(c) of the INA for certain criminal noncitizens pending removal proceedings is unconstitutional in its application to lawful permanent residents. The statute violates substantive due process because it categorically infringes upon the rights of lawful permanent residents who pose neither a risk of flight nor a danger to the community, and, likewise, it violates procedural due process because of the absence of any process by which the necessity of detention may be challenged. In *Demore v. Kim*, however, the Court ignored years of precedent regarding the limitations on the government’s power to detain both citizens and noncitizens, distinguished its previous decision in *Zadvydas v. Davis* on mostly trivial grounds, and failed to perform any meaningful due process analysis. As a result, many lawful permanent residents who were convicted of relatively minor and nonviolent crimes, who have legitimate claims to relief from removal and thus may not even be removed, and who are neither risks of flight nor dangerous, are needlessly detained under section 236(c).

*Kim* is a regrettable decision that will adversely affect the lives of a countless number of individuals and their families and friends. Due to the harshness and potentially lengthy duration of detention pending removal proceedings, many lawful permanent residents will feel compelled to abandon meritorious challenges to removal. One who contests removability while in detention will be at a critical disadvantage because of the difficulty of obtaining counsel and developing and presenting his or her case. While the Court has upheld the constitutionality of mandatory detention under section 236(c), at least for those who have conceded removability, Congress is, of course, capable of modifying the law and requiring individualized inquiry into the necessity of detention.

KEVIN TRUITT

---

<sup>350</sup> *Id.*



