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Alienating Our Nation’s Legal Permanent Residents: An Analysis of *Demore v. Kim* and its Impact on America’s Immigration System

By Shaneela Khan*

I. INTRODUCTION

When a legal permanent resident comes to the United States, he comes with permission, with the hope of starting a new life in this country, and with the mentality that he will one day be embraced as a full fledged citizen with all the rights and protections that America has to offer. Imagine coming to the United States as a legal resident, but only imagine that you have come right after kindergarten, when you barely understand the difference between being a citizen and being a legal resident. From childhood to adulthood, you have known no other home than America, and consider yourself nothing else but an American. So when you commit a crime, you expect to be convicted through due process, and then sentenced to jail, like any other American. However, imagine instead that after you have committed a crime, your punishment may entail being kicked out of this country and having to return to the country you were born in, one that you barely remember and have had no connection to since you were a baby. Further, imagine that before your removal hearing, you are imprisoned. As an American, you would have had the right to a hearing before being imprisoned, and perhaps have been able to post bail and get released. However, since you are a legal permanent

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resident, you have no such rights and your freedom can be taken prior to a removal hearing, without judicial review.

_Demore v. Kim_ is a case about a twenty six year-old legal permanent resident named Hyung Joon Kim, who came to the United States from South Korea when he was six years old. At the age of eight, he became a legal permanent resident. At age eighteen, Kim was convicted of first-degree burglary, and, one year later, he was convicted of petty theft with priors. Because of these two convictions, the Immigration and Naturalization Service (INS) charged Kim with being “deportable,” and held him in prison pending his removal hearing. Past cases have held that when an alien has committed crimes that render him deportable under 8 U.S.C. § 1226(c), due process affords him the right to a bail hearing which allows for his release pending deportation proceedings, so long as he is neither dangerous nor a flight risk. This case has changed the law so that now legal permanent residents do not need to get such a bail hearing. If an alien commits certain types of crimes, the INS has the authority to mandatorily detain him prior to his removal hearing, and he is not given an individualized review to determine

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2. Id. at 1712.
3. Id.
4. Id. In Justice Souter’s dissent, he clarifies that being “deportable” is different than being ordered “deported.” Id. at 1728. The Immigration and Nationality Act uses “deportable” in many ways. One way describes “classes of aliens who may be removed if the necessary facts are proven,” and another way the word is used is to “describe aliens who have actually been adjudged as being in the United States unlawfully.” Id. at 1727-28; see also, 8 U.S.C. § 1227(a) (West, WESTLAW through 2001 legislation), 1229(b) (West, WESTLAW, through 1996 legislation). Kim is the first type of deportable alien because no final order for his removal has been made. Id. at 1729.
5. Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001) (holding that detention of a legal permanent resident convicted for harboring an illegal alien, without affording the legal resident a bail hearing, was a violation of his due process rights); Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002) (holding that mandatory detention under 8 U.S.C. § 1226 is unconstitutional as applied to a legal permanent resident who was convicted of illegally carrying a firearm); Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002) (holding that the mandatory detention of a legal permanent resident convicted for two counts of aggravated robbery violated his substantive due process rights).
whether he is dangerous or poses a flight risk.\(^6\)

This paper will discuss the Court's decision to deny a legal permanent resident the opportunity for judicial review prior to his removal hearing. First, I will explore the development of law governing detainment of deportable aliens.\(^7\) Then I will explain the case history of *Kim*.\(^8\) Next, I will discuss the majority and concurring opinions of the Court, using the dissent and other authorities as a critical analysis of the opinions.\(^9\) Last, I will examine the significance of the case and the impact it has had on this body of law.\(^10\)

II. HISTORICAL BACKGROUND

A. Statutory History

Several pieces of legislation passed over the years gave rise to 8 U.S.C. § 1226. In 1917, Congress stated for the first time that if an alien commits a serious offense within the first five years of arriving in the United States, then there are grounds for deportation.\(^11\) Next, the Immigration and Nationality Act of 1952 added "crimes of moral turpitude" as grounds for deportation.\(^12\) The Immigration and Control Act of 1986 required the INS to start deportation proceedings against criminal aliens as fast as possible after they are convicted.\(^13\)

\(^6\) *Kim*, 123 S. Ct. at 1722.
\(^7\) See infra discussion Part II and accompanying notes.
\(^8\) See infra discussion Part III and accompanying notes.
\(^9\) See infra discussion Part IV and accompanying notes.
\(^10\) See infra discussion Part V and accompanying notes.
\(^11\) See S. REP. No. 64-352, at 390 (1916) (citing Immigration Act of 1917, ch. 29, 39 Stat. 874); see also Cabral v. I.N.S., 15 F.3d 193, 194 (1st Cir. 1994) (stating that the Act was the first to permit the deportation of resident aliens who were convicted of crimes of moral turpitude).
\(^12\) See Demore v. Hyung Joon Kim, 123 S. Ct. 1708, 1712 (2003). This Act states that an alien will be deported who is: "(1) convicted of a crime involving moral turpitude committed within five years of entry and sentenced to confinement for a year or more, or (2) convicted of two or more crimes involving moral turpitude, not arising from a single action, at any time after entry regardless of whether confined." Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).
This led to the Anti-Drug Abuse Act of 1988 which set limits on the Attorney General’s discretion so that aliens convicted of aggravated felonies would be mandatorily detained.\textsuperscript{14} In 1990, Congress broadened the definition of an aggravated felony, and thus more aliens became subject to mandatory detention.\textsuperscript{15} At the same time, 8 U.S.C. § 1252(a)(2)(B) was passed, allowing the Attorney General to give preferential treatment to permanent resident aliens, releasing them prior to their removal hearings if they did not pose a flight risk or a danger to the community.\textsuperscript{16} However, in response to several House and Senate Hearing Reports expressing concerns over the INS’s inability to deport criminal aliens, 8 U.S.C. § 1226 was enacted.\textsuperscript{17} This statute \textit{required} the Attorney General to detain aliens who had committed certain crimes pending their removal hearings.\textsuperscript{18} It was this statute that was upheld as constitutional in \textit{Kim}, despite arguments that it deprived legal permanent residents of their due


\textsuperscript{17} \textit{Kim}, 123 S. Ct. at 1715.

\textsuperscript{18} 8 U.S.C. § 1226(c) (West, WESTLAW through 1996 legislation); \textit{see also} Hoang v. Comfort, 282 F.3d 1247, 1260 (10th Cir. 2002). \textit{Hoang} states that crimes to which the mandatory detention provision applies include:

murders, rapes, crimes of terrorist activity, violations of the controlled substances and firearms laws, and crimes committed by repeat offenders... 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.

\textit{Hoang}, 282 F.3d at 1260.
B. Legislative History

Laws dealing with the deportation of criminal aliens arose in the wake of disturbing statistics revealed in a Senate report which discussed criminal aliens. It was estimated that millions of dollars are spent by the government on these aliens on a yearly basis. This report stated that criminal aliens make up 25% of the population in federal prisons, and this number has been steadily growing since the 1980’s. Adding the number of aliens in state prisons, there are about 53,000 criminal aliens currently doing time in the United States. When aliens on parole, probation, or in local jails are included, the number reaches 450,000. These aliens were estimated to cost the government and tax payers approximately $724,000,000 in 1990.

This Senate report called for a simplification of immigration laws dealing with criminal aliens and proposed more limited levels of appeals and delays since criminal aliens had already been afforded due process through the criminal law system before their convictions. In discussing detainment specifically, the report stated that the problems with “undetained criminal aliens who fail to appear . . . would be lessened if the INS detained more criminal aliens.”

This Senate report traced back through past legislation that
influenced our nation’s current laws dealing with criminal aliens.\textsuperscript{26} It stated that past provisions had a “clear intention . . . to prevent the very worst of the criminal aliens from further endangering the public and from being able to flee before deportation.”\textsuperscript{27} However, laws regarding criminal aliens were passed in a “piecemeal fashion,” and there had been no “major immigration legislation” which “focused exclusively on the problem . . . .”\textsuperscript{28}

This report attacked several aspects of the agency’s handling of criminal aliens. First, there was the issue of limited detention space which forces the INS to release aliens.\textsuperscript{29} The released aliens then fail to show up for their deportation hearings, thereby escaping removal entirely. According to the INS reports, 20\% of the aliens who were convicted for aggravated felonies did not report to their hearings, and to make matters worse, the INS made “limited efforts” to find and arrest these aliens.\textsuperscript{30} The Senate report claimed that current immigration laws and the deportation system was in “disarray,” and then made several recommendations to better the system.\textsuperscript{31}

The report recommended “eliminating distinctions among aggravated and non-aggravated felons, at least for non-resident

\textsuperscript{26} Id. at 12. According to the legislation, aggravated felons are ineligible for release under supervision, release under bond, or voluntary departure, unless they are legal aliens who are not a threat to the community and are likely to appear for their hearings. \textit{Id.} (citing the Anti Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988)).

\textsuperscript{27} Id. at 12. The sentiment of these reports is clear, “there is just no place in America for non-U.S. citizens who commit criminal acts here. America has enough criminals without importing more.” \textit{Id.} at 6.

\textsuperscript{28} Id.

\textsuperscript{29} Id. at 23.

\textsuperscript{30} Id. The 20\% of criminal aliens that do not show up for their deportation hearings is roughly 10, 875 aliens. \textit{Id.} (citing \textit{Hearings on Criminal Aliens in the United States, Before the PSI 54} (1993)); \textit{See also} Kim, 123 S. Ct. 1708, 1740 (2003) (citing the Department of Justice, Office of the Inspector General, Case Hearing Process in the Executive Office for Immigration Review, Rep. No. I-93-03, p. 5 (May 1994); Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, pp. ii, 33, 36 (Aug. 1, 2000)) (stating that the Vera Study and the Department of Justice have found similar statistics for the appearance rate of criminal aliens at their deportation hearings).

\textsuperscript{31} Id. at 1.
aliens."\textsuperscript{32} This means that a broader class of alien criminals should be ineligible for protections given to citizen criminals. The report added that the threshold for crimes which render an alien deportable should be lowered so that any felony subjects an alien to deportation.\textsuperscript{33} This would make even less serious crimes punishable by deportation. Finally, it suggested that there should be a requirement that all aggravated felons be detained while their deportation proceedings are pending.\textsuperscript{34} This was probably the recommendation that played an instrumental role in developing the mandatory detention provision in 8 U.S.C. § 1226.

\begin{center}
C. Precedential History
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The majority relied on several cases to support their decision upholding the mandatory detention of aliens pending their removal proceedings. The Due Process Clause of the Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."\textsuperscript{35} In \textit{Dred Scott v. Sandford}, a case in which a slave took his owner to court for his freedom, the Court held that the protections of the Constitution only applied to citizens of the United States, and "negros" were "not citizens."\textsuperscript{36} However, the Fourteenth Amendment overruled this case when it clearly granted due process rights to all people in the United States, not just

\begin{footnotesize}
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\item 32. \textit{Id.} at 31. Even in these reports, a preferential treatment for legal permanent residents can be seen. When Congress discussed toughening up the immigration laws for criminal aliens, they noted that these rules are targeted at illegal aliens, who have no right to be in this country, let alone commit crimes here. However, the attitude about legal aliens is quite different, as evidenced in the report which states, that "immigrants to the United States have been, and continue to be, predominantly hard working and law abiding," but "there appears to be a growing criminal class among immigrants, especially among those here illegally." \textit{Id.} at 7.
\item 33. \textit{Id} at 31.
\item 34. \textit{Id.} at 32.
\item 35. U.S. CONST. amend. V.
\item 36. \textit{Dred Scott v. Sandford}, 60 U.S. 393, 403-04 (1856). \textit{Dred Scott} held that the "negro, whose ancestors were imported into this country, and sold as slaves," cannot "become a member of the political community formed and brought into existence by the Constitution of the United States" because "they . . . are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States." \textit{Id.}
\end{enumerate}
\end{footnotesize}
citizens. In Yick Wo v. Hopkins, this Court held that everyone within the boarders of the United States, citizen or not, was protected by the Fifth Amendment. In Yamataya v. Fisher, this Court held that due process rights extend to aliens in their deportation proceedings.

In 1896, the Court decided Wong Wing v. United States, a case concerning punishment for criminal aliens who were sentenced to hard labor in the United States before they would be deported to China. The Court held that aliens had due process rights to a jury trial before sentencing. At the same time, the Wong Wing Court made some broad statements about the rights of aliens during their deportation proceedings. It held that "detention . . . as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid." Further, it was stated that "detention is a usual feature of every case of arrest on a criminal charge," and it "is not imprisonment in a legal sense."

In Carlson v. Landon, the Court specifically discussed the due process issues implicated in the mandatory detainment of criminal aliens. It was held that the detainment of criminal aliens does not violate due process even when aliens are not afforded a bail hearing to determine their flight risk. The Court stated that the Attorney General has discretion to deny bail, and as long as his decision is justified, it satisfies due process even when the alien does not get an individualized review.

39. Yamata v. Fisher, 189 U.S. 86 (1903) (stating that the "deportation of an alien without provision for such a notice and for an opportunity to be heard was inconsistent with the due process of law required by the Fifth Amendment of the Constitution.") Id. at 99-100.
40. Wong Wing v. United States, 163 U.S. 228 (1896).
41. Id. at 235
42. Id.
44. Id.
45. Id. at 541-42. The Court found justification for the detention of Communist aliens based on their threat to national security. Id. When dealing with alien Communists...because of Congress' understanding of their attitude toward the use of force and violence, the government is not expected to show
In *Reno v. Flores*, the Court specifically addressed detainment of aliens who were “suspected of being deportable.”\(^{46}\) It was held that a regulation which permitted detained juvenile aliens to be released only to their “(i) a parent; (ii) a legal guardian; or (iii) an adult relative,” was not a violation of their due process rights.\(^{47}\)

The Court’s recent decision in *Zadvydas v. Davis* sheds light on the due process issues surrounding detainment.\(^{48}\) In this case the Court held that detaining aliens after they have already been ordered removed is unconstitutional when it lasts longer than 90 days.\(^{49}\) The dissenting opinion in *Zadvydas* pointed out studies which reflected high recidivism rates for released criminal aliens that were out on bail pending their deportation hearings.\(^{50}\) Also, the dissent stated that an alien’s criminal record is a good indicator of his potential to be dangerous in the future.\(^{51}\) Therefore, there is justification for denying certain types of criminal aliens the opportunity to post bail pending their removal hearings.\(^{52}\)

### III. Case History

This case involves a twenty six year-old South Korean man named Kim who came to the United States at the age of six and became a lawful permanent resident two years later, at age eight.\(^{53}\) In 1996, at the age of eighteen, Kim was convicted of first degree specific acts in order to comply with due process standards because there is “reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government.” *Id.*

47. *Id.* at 297 (quoting 8 CFR § 242.24(b)(1) (1992)).
49. *Id.*
50. *Kim*, 123 S. Ct. at 1718 (holding that past criminal convictions are the “personal activity” that this Court found to be a relevant factor in determining an alien’s dangerousness in *Zadvydas*).
51. *Id.* at 1715. In a study from 1986, it was shown that, “after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%--nearly half--were arrested multiple times before their deportation proceedings even began.” *Id.* (citing *Hearing on H.R. 3333 Before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary*, 101st Cong., 1st Sess., 54, 52 (1989)).
52. *Id.*
53. *See id.* at 1711-12.
burglary, and then one year later he was convicted for petty theft with priors. Because Kim's two crimes involved moral turpitude, 8 U.S.C. § 1226(c) authorized the INS to detain him as a deportable alien once he finished serving his sentence.

Kim challenged the constitutionality of 8 U.S.C. § 1226(c) and filed a habeas corpus action in the United States District Court for the Northern District of California. He argued that his due process rights had been violated when he was detained by the INS without a hearing to determine whether or not he "posed a danger to society" or was a "flight risk."

The District Court held for Kim, stating that 8 U.S.C. § 1226(c) was unconstitutional because it allowed the INS to detain aliens without first affording them a bail hearing. The Court of Appeals affirmed the District Court's decision that Kim had a constitutional right to a bond hearing before being detained by the INS prior to his removal hearing. The Court of Appeals said that 8 U.S.C. § 1226(c) is a violation of the "substantive due process" rights of legal permanent residents, who are the "most favored category of aliens." The court held that Kim was not a flight risk because he may not be "ultimately" deported if he prevailed at his removal hearing, and also that the nature of his crimes did not make him a danger to society. Therefore, the court stated that the INS did not have sufficient "justification" for detaining Kim, denying him the opportunity to post bail, and thereby violating his "liberty interests."

The Supreme Court then granted certiorari to hear this case.

54. Id. at 1712.
56. See Kim, 123 S. Ct. at 1712.
57. Id. at 1713.
58. Id. The district court ordered INS to provide Kim a hearing to determine whether or not he posed a danger to society or a flight risk. After a bond hearing which determined Kim was neither a flight risk nor a danger to society, he was released on $5,000 bail. Id.
59. Id.
60. Id.
61. Id.
62. Id. at 1712.
IV. ANALYSIS OF OPINION

A. Jurisdiction of the Supreme Court

1. Concurrence

In the concurring opinion written by Justice O’Connor, in which Justice Scalia and Justice Thomas join, she does not agree with the majority’s view that the Court has jurisdiction to hear this case. 63 8 U.S.C. § 1226(e) states that the “[t]he Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision . . . regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.” 64 Justice O’Connor states that the language of 8 U.S.C. 1226(e) precludes judicial review since it clearly says that the Attorney General’s decision regarding the denial of a bond hearing cannot be set aside by any court. Though she recognized the longstanding requirement that Congress must make a clear statement in order to preclude habeas review, she argues that they have made such a clear statement in the language of the statute. Justice O’Connor also accepts that there is a “strong presumption in favor of judicial review of administrative action,” which serves as a check on the three branches of government. 65 However, she still argues that Congress’s intentions to preclude habeas challenges like Kim’s “could not be clearer” than they were stated in 8 U.S.C. § 1226(e). 66

Justice O’Connor further states that aliens have not routinely relied on habeas actions to challenge their detention without a bail hearing. 67 She relies on Reno v. American-Arab Anti-Discrimination Comm., and states that the Court never said a statute would be limited depending on what grounds are raised by an alien, and that judicial

63. Id.
65. Kim, 123 S. Ct. at 1723.
66. Id.
67. Id. at 1726. Justice O’ Conner explains that the specific issue addressed in Kim concerns the constitutionality of detention pending removal proceedings, and that question has only been brought to this Court twice. Id. In Reno v. Flores and Carlson v. Landon, this Court held that such detention is not a violation of due process.
review should not be allowed just because Kim argues that the statute is unconstitutional. Justice O'Connor construes Congress's language as clearly prohibiting the Supreme Court from reviewing decisions of mandatory detention, despite the fact that they may implicate habeas challenges. She adds that the majority has put "artificial limitations" on the "broad scope" of the statute.

Justice O'Connor also disagrees with the argument that 8 U.S.C. § 1226(e) violates the Suspension Clause which protects the Writ of Habeas Corpus. She claims the Clause protects only those habeas challenges that existed in 1789, and at that time, an alien in Kim's position would "not have been permitted to challenge his temporary detention." Even in the 19th and early 20th centuries, when the Court did consider habeas challenges regarding exclusion or deportation, there were no cases which challenged temporary detention. Though Justice O'Connor brings up many points which imply that that Suspension Clause does not protect the habeas challenge in Kim's case, at the end of her concurrence, she chooses not to "decide the thorny question" of whether 8 U.S.C. § 1226(e)

68. *Id.* at 1724-25. The language of 8 U.S.C. § 1226(e) is similar to the restrictive language of 8 U.S.C. § 1252(g), which effectively precluded judicial review in *Reno v. American-Arab Anti-Discrimination Committee (AADC).* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 473 (1999). In *American-Arab,* members of the Popular Front for the Liberation of Palestine (PFLP) brought an action against the Immigration and Naturalization Services (INS) because they felt they had been targeted for deportation. *Id.* In this case, the Court held that 8 U.S.C. § 1252(g), which restricted "judicial review of the Attorney General's 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act,'" precluded the Court from reviewing their case. *Id.* (citing 8 U.S.C. § 1252(g) (1996)).

69. *Kim,* 123 S. Ct. at 1725.

70. *Id.*

71. *Id.* at 1724. Justice O'Connor states that early in America's history, there was little restriction on immigration. *Id.* Privileges have just recently been given to aliens contesting deportation, and the most comparable case law from the 18th century has "gone far in supporting" the "executive authority of a colony" to exclude or expel aliens who have "no absolute right" to stay in this country." *Id.; See Fong Yue Ting v. United States,* 149 U.S. 698, 713-14 (1893). *Fong Yue Ting* held that the power of congress "to expel . . . [aliens], from the country, may be exercised entirely through executive officers; or congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by congress to depend." *Id.*

72. *Kim,* 123 S. Ct. at 1726.
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violates the Suspension Clause.\textsuperscript{73}

2. Majority

In Justice Rehnquist’s majority opinion, in which Justice Kennedy joins in full, and Justice Souter, Justice Stevens, Justice Ginsburg, and Justice Breyer join in part, he stated that this Court has jurisdiction to hear Kim’s case.\textsuperscript{74} The justices rely on this Court’s statement in Webster v. Doe, and argue that when Congress intends to “preclude judicial review of constitutional claims, its intent to do so must be clear.”\textsuperscript{75} In this case, Justice Rehnquist argues that Congress has not been clear enough to preclude review.

Further, Kim is not challenging a decision by the Attorney General about his detention, but instead he is challenging the statute itself, which allows for his detention without a bond hearing.\textsuperscript{76} Justice Rehnquist relies on past decisions of this Court that have held habeas challenges reviewable despite Congress’s broad statements to preclude judicial review.\textsuperscript{77} The majority of the justices agreed that in this particular case, Congress’s language in 8 U.S.C. § 1226(e) was not clear enough to bar review of Kim’s habeas challenge. There was no “explicit provision barring habeas review,” and so the Justices agreed that the Court has jurisdiction to review Kim’s case.\textsuperscript{78}

A concern in this case is whether Congress has stepped over the

\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 1714; See Webster v. Doe 486 U.S 592, 603 (1988); See also Johnson v. Robison, 415 U.S. 361, 373-74 (1974) (holding that there must be clear and convincing evidence of Congress’ intent in order to preclude judicial review).
\textsuperscript{76} Kim, 123 S. Ct. at 1714.
\textsuperscript{77} Johnson, 415 U.S. at 373-74 (holding that in the Section at issue, “neither the text nor the scant legislative history...provides the 'clear and convincing' evidence of congressional intent required by this Court before a statute will be construed to restrict access to judicial review”); Webster, 486 U.S. at 603 (stating that Congress’s intent to preclude judicial review must be clear and “heightened showing” by Congress is required to “avoid the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”).
\textsuperscript{78} Kim, 123 S. Ct. at 1714. Similarly, in INS v. St. Cyr, this court held that since the provision at issue in that case did not explicitly mention habeas review, it did not have the “sufficient clarity to bar jurisdiction pursuant to the general habeas.” INS v. St. Cyr, 533 U.S. 289, 312-13 (2001).
constitutional limits in implementing its immigration authority. This gives rise to a discussion about the interplay between the powers vested in the Executive and Judicial branches of government. The majority brings forth the point that in 1907 a statutory provision was enacted, which gave Executive officials the “discretion” on “bail decisions.” However, prior to that year, there were many instances of “judicial grants of bail.” In the dissenting opinion, Justice Souter also agrees with the majority’s holding that the Court has authority to hear Kim’s case. He adds that throughout history, the decision to grant bail was placed “in the hands” of the agency, but there was still “general availability of judicial relief from detention pending deportation proceedings.” Despite the opinions of Justice O’Connor, there has indeed been a history of habeas actions which left the ultimate decision of an alien’s detainment in the hands of the judiciary. The majority opinion reflects the current trend of law, which is that without a very clear statement of intent, Congress cannot be interpreted to preclude judicial review of habeas challenges.

B. The Joseph Hearing

1. Majority

The issue of a Joseph hearing is addressed by both the majority and the dissent. When an alien commits either an aggravated felony or any two crimes involving moral turpitude, he falls within the reach

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79. Kim, 123 S. Ct. at 1734.
80. Id. at 1737.
81. Id.
82. Id. In US ex rel Turner, an anarchist alien contested his exclusion from the United States and claimed that it was unconstitutional. United States ex rel. Turner v. Williams, 194 U.S. 279, 283 (1904). Pending his appeal to the Supreme Court, the lower court released the alien on bail. Id. Further, in Fong Yue Ting v. U.S., this Court held that it was constitutional for the agency to require Chinese laborers to carry paperwork and proof of their residency, and though the laborers were aliens, they were able to post bail pending their appeal. Fong Yue Ting v. United States, 149 U.S. 698, 704 (1893). See also, United States v. Moy Yee Tai, 109 F. 1 (2nd Cir. 1901) (allowing Chinese aliens to post bail pending their deportation hearings); and In re Lum Poy, 128 F. 974, 975 (C.C. Mont. 1904) (holding that the practice has been to allow aliens to post bail pending their appeals and deportation proceedings).
of 8 U.S.C. § 1226(c). According to this statute, the alien is then subject to mandatory detention, without the opportunity to get a bail hearing. The Joseph hearing is a form of protection for those aliens who want to argue that their prior convictions do not fall within the category of those punishable by mandatory detention and potential removal from the United States, and therefore they do not fall within the reach of 8 U.S.C. § 1226(c). An alien who argues this immediately gets a Joseph hearing to determine whether or not he was fairly subject to mandatory detention.

Both the majority opinion written by Justice Rehnquist and Justice Kennedy’s concurrence, explain that since Kim conceded he was deportable under 8 U.S.C. § 1226(c) based on his convictions, there is “no occasion” to determine whether or not Joseph hearings provide enough protection for those who may have been improperly detained by the INS under 8 U.S.C. § 1226(c). Justice Rehnquist states that Kim does not dispute his prior convictions, nor does he argue that he is not subject to mandatory detention by the INS. Instead Kim only argues that § 1226(c) itself violates due process because the INS did not determine he posed a danger to society or a flight risk before they detained him. The majority reasons that since Kim conceded that he is deportable under § 1226(c) based on his two prior convictions of moral turpitude, he “forwent” a Joseph hearing. Because Kim only filed a habeas action which claims that 8 U.S.C. § 1226(c) itself is unconstitutional, the Court refused to provide him with an individualized review to determine whether or

84. § 1226(e).
85. In re Joseph, 22 I. & N. Dec. 799 (1999). In this case a Haitian permanent resident was convicted of obstructing and hindering justice when he ran from a police officer. Id. The INS charged him with committing an aggravated felony, and mandatorily detained him pending deportation hearings. Id. The court held that “regulatory history indicates that this rule was intended to provide ‘for an individualized hearing on whether an alien in custody actually falls within a category of aliens subject to mandatory detention.’” Id. (citing 63 Fed. Reg. at 27, 444).
87. Id. at 1712.
88. Id.
89. Id.
not he was properly subject to mandatory detention. Justice Kennedy, in his concurrence, also states that Kim could have had an individualized review in which he would have been “considered...for release under the general bond provisions” had he first utilized, and then prevailed in a Joseph hearing. Justice Rehnquist states that the “real issue” in this case is not whether Kim is deportable, nor whether the Joseph hearing generally provides sufficient protection for aliens facing removal, but that the sole issue in this case is whether or not § 1226(c) violates the Due Process Clause of the Fifth Amendment.

2. Dissent

In Justice Souter’s strong dissent, he states that the majority overlooks the fact that Kim has always contested his removability from the United States, and has argued that he is “eligible for statutory relief from removal.” The majority says that Kim should have raised these arguments, but had he done so in this habeas corpus petition, the “District Court would probably have dismissed the claim as unexhausted” because these issues must be “submitted in the first instance to an immigration judge.” The immigration judge had not yet held a hearing on Kim’s removability when this habeas petition was filed with the District Court, “though Kim had been detained for over three months.” Therefore, Kim has never conceded that he is

90. Id. at 1713.
91. Id. at 1722 (citing In re Joseph, 22 I. & N. Dec. 799, 809 (1999)).
92. Id. at 1717
93. Id. 1727
94. Id.; 8 U.S.C. 1229a(a)(3) (states under “[e]xclusive procedures,” that “[U]nless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.”).
95. Kim, 123 S. Ct. at 1727; 8 U.S.C.1231(a)(1)(A) (2000) (stating that “[E]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days.”). This statute and three month time limit on detention is inapplicable in Kim’s case because it deals with aliens who have already been ordered removed, and are waiting for their native countries to take them back. See Kim, 123 S. Ct. at 1727. However, it does call into question the fact that while aliens who have already been ordered removed are afforded protection through a detention
deportable, and conversely he is challenging his removability before an administrative judge. Kim is simultaneously challenging mandatory detention under Section 1226(c) in the federal court system. As a result, there is no concession that he is accepting deportation.

Even if Kim is held to be deportable under Section 1226(c), meaning that his convictions do fall within the realm of those punishable by deportation, this by no means implies that he will positively be deported. Kim is still contesting the “sufficiency of his criminal convictions as a basis for removal,” and no “final order of removal” has occurred since his case has not yet been reviewed by an immigration judge.

Another point that Justice Souter brings up is that a Joseph review would only let Kim show that he does not fit within the statutory scheme of Section 1226(c), meaning Kim could only argue that his convictions were neither aggravated felonies nor crimes of moral turpitude, and therefore he should not be mandatorily detained. However, Kim’s argument in this case is of a different nature. He is claiming that even if he did commit crimes that fit in either of the two aforementioned categories, the statute as a whole which allows for his mandatory detention without individualized review, is a violation of due process.

3. Concurrence

Justice Breyer addressed this issue as well. He states that if Kim conceded he was deportable, then he can be detained without a judicial review for the short time it takes to conduct a formal hearing. However, Kim does not contend he is deportable, and instead he argues that his past convictions are not the type that would render him subject to mandatory detention and deportability. Despite the fact Kim did not utilize the Joseph hearing, Justice Breyer states limitation, aliens like Kim who are waiting for their final orders and still retain their legal status are not afforded such a time limit for their detention.

96. *Kim*, 123 S. Ct. at 1728. In his brief, Kim states that “he intends to assert that his criminal convictions” of first degree burglary and petty theft with priors are not “removable offenses,” and so he is “eligible for statutory relief from removal.” *Id.* at 1727.


98. *Kim*, 123 S. Ct. at 1746.
that if Kim is not dangerous nor a flight risk, due process still affords him the right to bail. Depriving Kim of this right to a bail hearing is a violation of our Constitution.

Justice Breyer suggests using the bail standards from criminal law which state that a bail hearing should be allowed if it is not requested to "cause delay," if there is a "substantial issue of law or fact," and if the criminal defendant shows "by clear and convincing evidence that he is not likely to flee or pose a danger" to society. The criminal law standards take into account the important governmental interests in detaining aliens, but they do not impede on the due process rights of the alien. So long as the criminal law bail standards are met, the government should allow Kim to get an individualized assessment of flight risk and dangerousness.

C. Due Process Issues

1. Majority

The majority opinion holds that 8 U.S.C. § 1226(c) authorizes mandatory detention of certain types of deportable aliens prior to their removal hearing, and Kim falls within the reach of this statute based on his prior convictions. Further, the short time that Kim would be subject to detainment prior to his removal hearing does not constitute a violation of the Due Process Clause of the Fifth

99. Id. at 1747. Justice Breyer states that "immigration statutes, interpreted in light of the Constitution, permit Kim (if neither dangerous nor a flight risk) to obtain bail." Id. Further, he adds that the language of 8 U.S.C. § 1226(c) allows the Attorney General "to take into custody, any alien who . . . is deportable." Id. He does not interpret this to mean that an alien who may or may not be deported can be taken into custody without a bail hearing. Id.

100. Id. 1747.

101. Id. Justice Breyer suggests using the criminal law standards to determine if bail should be allowed for several reason: 1) they give "considerable weight to any special governmental interest in detention," and address flight risk and "process-related" issues, 2) "[t]he standards are more protective" of the "alien's liberty interests than . . . the [Immigration and Naturalization Service's] Joseph hearings," and 3) the statute does not prohibit using them when an alien's "deportability is in doubt," as it is in Kim's case because no final order for removal as been made. Id.

102. Id. at 1717.
Amendment. Though Justice Rehnquist acknowledges that aliens are entitled to due process protection during their deportation hearings, he states that detention during these proceedings is "constitutionally valid." Also, he relies on the decisions in *Carlson* and *Flores* to determine that individual findings which support the detention of an alien prior to his removal hearings are not required.

Justice Rehnquist relies on *Mathews v. Diaz*, and states that the Court has accepted "Congress may make rules as to aliens that would be unacceptable if applied to citizens." This means that such mandatory detention without the opportunity for a bail hearing would be unacceptable if it was applied to a citizen, but since Kim is a legal permanent resident, he is not afforded similar protections. Justice Rehnquist relies on the *Carlson* case in which aliens, like Kim, challenged the constitutionality of their detainment. The Court held that these aliens, who had communist ties, could be detained "even without any finding of flight risk.

Justice Rehnquist also relies on this Court's decision in *Flores*, where a class of juvenile aliens contested their detainment during their deportation hearings. The INS only wanted to release these juvenile aliens to responsible adults. The juvenile respondents claimed that their detainment was a due process violation, but the Court rejected their challenge. The Court stated that "reasonable presumptions and generic rules . . . are not necessarily impermissible exercises of . . . power," and the amount of individualized review

103. *Id.* at 1722.
104. *Id.* at 1717.
106. *Kim*, 123 S. Ct. at 1716. Justice Rehnquist refers to *Mathews v. Diaz*, a case in which this Court held that there was no due process violation where Congress required aliens to be citizens for at least five years before they became eligible for a federal medical program. *Mathews v. Diaz*, 426 US 67, 79-80 (1976).
107. *Kim*, 123 S. Ct. at 1718; *Carlson v. Landon*, 342 U.S. 524 (1952) (holding that the Communist aliens could be detained without an individualized review of their flight risk); *see also* text accompanying note 45.
109. *Flores*, 507 U.S. at 299 (holding that there was no due process violation in detaining juvenile aliens suspected of being deportable until a "parent," "adult relative," or "legal guardian" was located to take custody of them).
given to the juveniles was sufficient.\textsuperscript{110}

Next, the majority differentiates Kim's case from the Court's prior holding in Zadvydas, a case that the dissent and other courts have relied on when holding that 8 U.S.C. § 1226(c) is unconstitutional.\textsuperscript{111} Justice Rehnquist states that in Zadvydas, the aliens had already been through their removal proceedings, so further detainment served no immigration purpose, and therefore it violated due process.\textsuperscript{112} The purpose to detain is to prevent aliens from "fleeing prior to their removal."\textsuperscript{113} The goal of deportation in Zadvydas was "no longer practically attainable" since the aliens had already gone through removal proceeding, been ordered removed, but their native country was refusing to allow them re-entry.\textsuperscript{114} Continued detention in Zadvydas, past the ninety day statutory removal period, was held to be a violation of due process.\textsuperscript{115} Zadvydas is materially different than Kim's case because it deals with the detention of aliens who have already been given a final order of removal at their hearings. In stark contrast, Kim's detention is still serving a purpose because holding him prior to his removal hearing ensures he will not flee before that hearing.\textsuperscript{116}

The majority opinion differentiates Zadvyas from Kim's case in another way as well. It states that while Kim's detention is a lot shorter, the detention at issue in Zadvyas was "indefinite" and "potentially permanent."\textsuperscript{117} While detention prior to a removal hearing usually lasts no more than 90 days, detention post removal

\begin{itemize}
\item \textsuperscript{110} Kim, 123 S. Ct. at 1719.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id. at 1719-20.
\item \textsuperscript{113} Id. at 1720
\item \textsuperscript{114} Id. at 1720; See Zadvydas v. Davis, 533 U.S. 678 (2001) (holding that there was a violation of due process when an alien native of Germany and an alien native of Cambodia were held for over 90 days after they had already been ordered removed).
\item \textsuperscript{115} Zadvydas, 533 U.S. at 702.
\item \textsuperscript{116} Kim, 123 S. Ct. at 1720. The majority makes a point to focus on the importance of an alien appearing for his removal hearing. Id. Justice Rehnquist justifies detention pending removal hearings by relying on studies which indicate that a significant percent of aliens released on bail skip their removal hearings.
\item \textsuperscript{117} Id.; Zadvydas, 533 U.S. at 690-91; See Alicia Brown, Striking a Balance: The Conflict between Safety and Due Process Rights-The Practical Implications of Zadvydas v. Davis, 22 J. NAT'L ASS’N ADMIN. L. JUDGES 429 (2002).
\end{itemize}
hearings has "no obvious termination point." For the reasons stated above, the majority held that Kim's mandatory detention did not violate due process, and they reversed the decision of the Court of Appeals to allow Kim to be released on bail after his individualized bond hearing.

2. Dissent

In Justice Souter's powerful dissent, in which Justice Ginsburg and Justice Stevens join, he argues that it has been long established that "all aliens within our territory are ... entitled to the protection of the Due Process Clause." He states that there is a "century of precedent acknowledging the rights of permanent residents" and these rights include "the basic liberty from physical confinement" which lay "at the heart of due process." Since there has been no final order for Kim's removal, he is entitled to the full protections of due process that a legal permanent resident holds. Justice Souter discusses the various immigration preferences, economic freedoms, and attachments to the United States that legal permanent residents possess. He explains that, for the most part, their lives are "indistinguishable" from those of regular citizens; they pay taxes, males are required to register for the military, they support the economy, and contribute to society in enumerable ways. Further, attachments to this country are much more intense for legal permanent residents like Kim, who come to America as children and have little or no connection to their country of citizenship. The dissent relies on case law which has repeatedly extended greater due process protections to legal permanent residents than any other class

118. Kim, 123 S. Ct. at 1720; Zadvydas, 533 U.S. at 697.
119. Kim, 123 S. Ct. at 1722.
120. Id. at 1728.
121. Id. at 1727; See Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that all people within the United States are protected by the Fourteenth Amendment, a decision handed down over a century ago).
122. Kim, 123 S. Ct. at 1727.
123. Id. at 1728.
124. Id. at 1729.
125. Id.
of aliens.\textsuperscript{126}

The majority quotes \textit{Mathews} in its assertion that rules applicable to aliens would not be acceptable if applied to citizens. However, the dissent clarifies that \textit{Mathews} was a case involving a federal statute which "limited eligibility for a federal medical insurance program" to citizens and legal permanent residents that have been residing in the United states for five years.\textsuperscript{127} Justice Souter argues that deportation and detainment of legal permanent residents is unrelated to the federal government's authority to regulate its own programs. The \textit{Mathews} case never says anything about limiting the due process rights of legal permanent residents, and therefore it is incomparable to the issue in Kim's case. In fact, the issue in the \textit{Mathews} case was about giving more rights to certain classes of citizens and aliens when it came to federal medical funding, and in contrast with the interpretation of the majority, it never supported any limitations on the liberty interests of any class of aliens.\textsuperscript{128}

Since this Court has held that due process protections do extend to legal permanent residents, Kim has a right to be free from arbitrary

\begin{itemize}
  \item \textsuperscript{126} \textit{Id.} at 1730 (stating that although LPR's are "subject to federal removal power, that power may not be exercised without due process."); \textit{See} Landon v. Plasencia, 459 U.S. 21, 34 (1982) (holding that a legal resident alien who left the United States for a short time and then returned to find herself facing exclusion was entitled to more rights than aliens who seek initial entry); \textit{See} Bridges v. Wixon, 326 U.S. 135, 154 (1945) (holding that "care must be exercised lest the procedure" through which the resident alien "is deprived of that liberty not meet the essential standards of fairness").
  \item \textsuperscript{127} \textit{Kim}, 123 S. Ct. at 1730 n.9.
  \item \textsuperscript{128} \textit{Mathews} v. Diaz, 426 U.S. 67, 79-80 (1976) (stating that "Congress regularly makes rules that would be unacceptable if applied to citizens."). However, there was no mention about limiting the constitutional rights of legal permanent residents. By creating a provision that makes aliens who have lived in the United States for five years eligible for federal benefits, the government was trying to make more federal services available for this class of aliens who have become part of the American society. Contrary to the majority's view of \textit{Mathews}, the government was not trying to deprive aliens of certain rights in this country. \textit{See also} Welch v. Ashcroft, 293 F.3d 213, 225 (4th Cir. 2002) (stating that "once an alien gains admission to this country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.") (citing Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., 820 F.3d 1359, 1363 (4th Cir.1987)).
\end{itemize}
or capricious detention that serves no governmental interest.\textsuperscript{129} The dissent explains that Kim is entitled to a "hearing and an impartial decision-maker's finding that detention is necessary to a governmental purpose."\textsuperscript{130} The majority cites \textit{Flores}, claiming that detention of an alien based on generic rules is justifiable, however, the \textit{Flores} case concerned juveniles who are always in someone's custody.\textsuperscript{131} The Court refused to release them without being sure that they would report to court for their immigration proceedings, and without ensuring they had a parent, guardian, or adult to care for them.\textsuperscript{132} In stark contrast, Kim is an adult, and the detention of "an adult by the government triggers heightened substantive due process scrutiny."\textsuperscript{133} The custody and detention of minor children, who are the responsibility of the court when there is no appropriate guardian for them, has nothing to do with the detention of an adult legal resident. The dissent calls the detention of the children in \textit{Flores} an issue about "legal custody," while Kim's case presents the issue of "detention."\textsuperscript{134} \textit{Flores} does not say that the detention of an adult is justified in all cases; there is no go ahead in \textit{Flores} to deprive a class of adult aliens their liberty while they wait for their removal.

\textsuperscript{129} \textit{Kim}, 123 S. Ct. at 1736; \textit{Zadvydas}, 533 U.S. at 721 (Kennedy, J., dissenting) (stating that detention that is not "necessary" to avoid flight risk or danger to the community is "arbitrary or capricious," and therefore constitutes a violation of due process).

\textsuperscript{130} \textit{Kim}, 123 S. Ct. at 1731.

\textsuperscript{131} \textit{Id.} at 1745. Justice Souter differentiates Kim's case from \textit{Flores} because "freedom from physical restraint" was never an issue in that case since "juveniles" are "always in some form of custody." \textit{Id.} (quoting Reno v. Flores, 507 U.S. at 302 (1993)).

\textsuperscript{132} \textit{Id.} The Court made a blanket presumption that juveniles could only be released to certain people, without reviewing each juvenile alien's case. \textit{Id.} However, such a presumption was made in the best interests of juveniles whose safety is the Court's responsibility. \textit{Id.} This is not the case for adults, so adults must be afforded due process before they are detained. \textit{Flores}, 507 U.S. at 302.

\textsuperscript{133} \textit{Id.} at 1731; \textit{See Foucha v. Louisiana}, 504 U.S. 71 (1992) (holding that the State cannot "continue to confine an adult who is not now considered mentally ill," for the sole reason that he is deemed dangerous because "the State has not proven this ground for confinement by clear and convincing evidence"); \textit{See also Jackson v. Indiana}, 406 U.S. 715 (1972) (holding that due process was violated when a mentally handicapped man was facing indefinite confinement because of a pending indictment against him).

\textsuperscript{134} \textit{Kim}, 123 S. Ct. at 1745.
Neither the dissent nor Kim is arguing for a blanket prohibition against the detention of aliens prior to their removal hearings. They do, however, believe that a weighty governmental interest must be met in order to justify the detention. Determining that an alien poses a flight risk or is dangerous would meet that governmental interest in detention. However, mandatory detention without such a determination is an unconstitutional deprivation of liberty. Justice Souter argues that if the procedural due process requirements could be "dispensed" as easily as they are in Section 1226(e), then so could the substantive due process requirements of ensuring a narrow class of detainees and a limited detention period. In Kim's case, the statute applies broadly to all aliens "claimed to be deportable for criminal offenses," and it is not limited to those who are "likely to flee" or are "dangerous." The detention itself is not limited in time because, although there is a removal proceeding within ninety days, the alien remains detained through the course of the proceeding which has "no deadline" and could take over one year. This

135. In *Flores*, it is stated that the provision which only allows juveniles to be released to specific individuals does not implicate any liberty interests. 507 U.S. at 302 (stating that "the freedom from physical restraint . . . is not at issue in this case").

136. *Kim*, 123 S. Ct. at 1733. See also *Hoang v. Comfort*, 282 F.3d 1247, 1260 (2002) (holding that "[a]lthough the government has a compelling interest in ensuring that deportable aliens appear for their proceedings, this interest is not sufficient to justify detention of a lawful permanent resident alien absent an individualized determination that the alien is in fact a flight risk.").

137. *Kim*, 123 S. Ct. at 1733. Justice Souter also states that the "claim of liberty protected by the Fifth Amendment is at its strongest when government seeks to detain an individual." *Id.* at 1731; see *Patel v. Zemski*, 275 F.3d 299, 310 (3d Cir. 2001) (stating that after establishing that mandatory detention implicates Patel's fundamental right to be free from physical restraint, we must apply heightened due process scrutiny to determine if the statute's infringement on that right is narrowly tailored to serve a compelling state interest.); see also *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (holding that Congress needs to employ "a constitutionally permissible means of implementing" its plenary power.); see also *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting).

138. *Id.*; *Welch v. Ashcroft*, 293 F.3d 213, 218 (4th Cir. 2002) (holding that mandatory detention in Welch's case leaves no process to implement, and so the "procedural due process inquiry collapses into the substantive one").

139. *Kim*, 123 S. Ct. at 1736.

140. *Id.* at 1734.
statute, therefore, invalidates the constitutional protections we have guaranteed to all those who live within our boarders.

The dissent addresses the Zadvydas case in which this Court held that a statute which was not limited in the class of aliens it affected, nor in the length of detention it prescribed, violated due process. Therefore, the case was remanded and the lower court was ordered to make individualized determinations of the "sufficiency of the Government's interests" in detention.\(^{141}\) In Zadvydas, this Court stated that due process principals applied to aliens who have already been ordered to leave the United States.\(^{142}\) Therefore, there is no reason that equal, or perhaps more protection should not be afforded to those legal permanent residents who have not yet been ordered removed.\(^{143}\) Kim has more of an interest in avoiding detention and getting an individualized review because mandatory confinement impedes his ability to prepare a defense for his upcoming removal proceeding.\(^{144}\) This Court has gone to great lengths to ensure due process in Zadvydas, so there is no justification for failing to apply the same principles in Kim's case.

The majority relies on studies that concluded that aliens who were released pending their removal hearings were likely not to show up for their court dates and also commit more crimes in the meantime.\(^{145}\) The dissent responds by saying that recidivism is already addressed in the normal criminal law scheme through charges, convictions, and enhanced sentencing for repeat

\(^{141}\) Id.

\(^{142}\) Zadvydas, 533 U.S. at 678.

\(^{143}\) Welch v. Ashcroft, 293 F.3d 213, 231 (4th Cir. 2002) (holding that lawful permanent residents . . . are entitled to equal, if not greater, constitutional protections” than other types of aliens).

\(^{144}\) Demore v. Hyung Joon Kim, 123 S. Ct. 1708, 1734 (2003) (stating that 8 U.S.C. § 1226(e) “isolates” detained aliens from “their lawyers, witnesses, and evidence.”); see also Zadvydas, 533 U.S. at 720 (Kennedy, J., dissenting ) (stating that the Court should have upheld the detention of the removed aliens, as they had "no right under the basic immigration laws to remain in this country," and distinguishing them from “from aliens with a lawful right to remain here.”).

\(^{145}\) See supra text accompanying note 116. See Patel v. Zemski, 275 F.3d 299, 312 (3d Cir. 2001) (explaining that “[W]e do not downplay the risk that some criminal aliens might pose to the community or the risk that they might flee before a final order is issued. But an immigration judge would retain the discretion to detain any alien who poses such a risk.”).
criminals. There is no need to make a blanket presumption against a broad class of aliens, subjecting them to mandatory detention and infringing upon their due process rights, only to reduce the chances of recidivist crime. Even the "Government concedes, Kim's individual detention serves no Government purpose at all." Further, Justice Souter explains that the study that reached the conclusion that released aliens flee or commit more crimes did not use only legal permanent residents. Therefore, the data from this study that the majority relies on is inapplicable to Kim. Further, legal permanent residents like Kim, especially those who came to the

146. Kim, 123 S. Ct. at 1739 (citing Foucha v. Louisiana, 504 U.S. 71, 82 (1992)).

147. Since there is such a long and varied list of crimes for which an alien can be mandatorily detained, "it cannot simply be assumed that persons who have at one time been convicted of the crimes encompassed by §236(c) 'pose a danger to the public.'" Hoang v. Comfort, 282 F.3d 1247, 1260 (10th Cir. 2002).


There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention...these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.

Id. n. 10.

149. Kim, 123 S. Ct. at 1739. The aliens reported in the study were not only legal residents, but included in the findings were the recidivism and no-show data for illegals and those aliens who were just visiting the Unites States. Id.

150. Id. Justice Rehnquist states that the studies which concluded that aliens released pending their deportation hearings where likely to commit more crimes and fail to report to court where not conducted under the best of conditions. Id. at 1720. He also states that bond hearings were never determined to be "ineffective or burdensome." Id. Therefore, Justice Souter argues that "supervised release" will "address recidivism" and at the same time will not deprive aliens of due process in the way that mandatory detention does. Id. at 1738. He also suggests looking to the Vera Institute Study, which concluded that 92% of the criminal aliens who were mostly legal permanent residents and were released under supervision attended all of their hearings. Id. at 1740 (referring to the Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, pp. ii, 33, 36 (Aug. 1, 2000)).
United States at a very young age, have many attachments to the United States and are unlikely to flee anywhere.\footnote{151} Also, the aliens in the study that the majority discusses were not released on bail after an individual review about their flight risk or dangerousness, but where released based on whether or not there was room available to detain them.\footnote{152} Therefore, such a study provides no basis for a decision denying legal permanent residents the right to individualized review.

The majority cites \textit{Carlson} and explains that the aliens in that case had a similar claim to Kim's, but that this Court allowed their detention despite the fact that they posed no flight risk.\footnote{153} However, unlike in Kim, the Court's decision in Carlson was based on the aliens' Communist ties.\footnote{154} Those aliens posed a danger to society and that is why their mandatory detainment was justified.\footnote{155} Further, even the respondents in Carlson were given judicial review which determined they were dangerous.\footnote{156} The case itself states that the Court made its decision to allow detention of the respondents based on their "understanding [that] . . . Communists use[d] force and violence to accomplish their political aims."\footnote{157} Here, no decision maker has held Kim is dangerous or a flight risk, so there is no justifiable reason to hold Kim. The majority states that in Carlson, the Court did not go into individual evaluations of the aliens, however, this is a misinterpretation of the decision. Justice Souter points out that the dissent of Carlson found the evidence of the individual findings of dangerousness unsupported.\footnote{158} This does not
mean that there were no individual findings at all. Instead, it says that there were individual findings, but just that the dissent felt evidence of these findings did not support the majority’s conclusion about them. The fact that findings were made is evident, and so they should be made in Kim’s case as well. Further, Justice Souter states that the Carlson Court believed they were deciding the case based on individual findings about the aliens, so this Court should not be using that case to support the idea that a court does not need to make such individual findings.

The majority states that an alien in Kim’s case is subject to a limited amount of time in detention. They state that while Zadvydas presented a case where detention was “indefinite” and “potentially permanent,” Kim’s case was different because detention lasted for a much “shorter duration.” However, Justice Souter’s dissent states that detention like Kim’s is not limited by the time limit found in the Speedy Trial Act. Removal hearings have no deadline, they can go for over a year. But, even if detention prior to a removal hearing is relatively short, like the majority states, there is still no reason to allow for it without affording aliens the right to due process. Further, it is not a rule that due process applies only to lengthy deprivations of liberty; it applies to all deprivations of liberty. Any physical confinement by the government, without giving the defendant an opportunity for a hearing, raises due process issues.

3. Concurrence

In the concurring opinion, Justice Kennedy states that if the INS had detained without “at least some merit to the . . . charge,” then

159. Carlson, 342 U.S. at 541.
160. Kim, 123 S. Ct. at 1744.
161. Id. at 1720 (citing Zadvydas, 533 U.S. at 690-91).
163. Id. at 231 (stating that there are “extensive procedural safeguards attendant to post-removal-period detention,” but “these safeguards . . . are absent in § 1226(c)”)
164. Kim, 123 S. Ct. at 1741. The majority states that the average time of Kim-type detention is under 90 days, however, there is no standard that detention must be less than this amount of time. Id.
165. U.S. CONST. amend. V.
there would be a Due Process issue and perhaps Kim could argue that his rights had been violated.\textsuperscript{166} If the delayed detention was "unreasonable or unjustified," then it would be an "arbitrary deprivation of liberty."\textsuperscript{167} Had the INS failed to "satisfy this minimal, threshold burden," then Kim should have been entitled to an individualized review in which it would be determined whether his detention was really required to either "facilitate deportation, or protect against risk of flight or dangerousness."\textsuperscript{168} However, Justice Kennedy states that in this case, the INS has met their burden and so temporary detention was permissible under due process.\textsuperscript{169} He states that the INS was reasonable and had sufficient justification to temporarily detain Kim without first giving him an individualized review. Justice Kennedy agreed with the overall outcome of this case, but states that there are no due process issues that needed to be addressed.\textsuperscript{170}

V. IMPACT

A. Societal

In this case, the Court has decided that legal permanent residents will not be afforded the same constitutional protections as citizens. The Court has narrowed the rights of a class of people who are legally living in the United States, paying taxes, contributing to our economy, and enriching our society. The decision in \textit{Kim} makes it clear that we as a nation are not willing to extend all our

\begin{itemize}
\item \textsuperscript{166} \textit{Kim}, 123 S. Ct. at 1722.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Id. at 1734 n. 12. Justice Souter responds to Justice Kennedy's concurrence and states that:
\item Justice Kennedy recognizes that the Due Process Clause requires an individualized determination as to [an LPR's] risk of flight and dangerousness if the continued detention [becomes] unreasonable or unjustified...It is difficult to see how Kim's detention in this case is anything but unreasonable and unjustified, since the Government concedes that detention is not necessary to completion of his removal proceedings or to the community's protection.
\item \textit{Id}.
\item \textsuperscript{170} Id. at 1722.
\end{itemize}
constitutional safeguards to aliens who live among us. In making this decision, the Court has reneged on prior case law that had established principles in favor of permanent resident aliens.\textsuperscript{171} The impact of this decision is that legal permanent residents can be imprisoned without a hearing, then be removed from this country.\textsuperscript{172} Since we as a nation have invited legal permanent residents to our country, it is a shame that we will fail to offer them the constitutional protections of this land. Though it has been long established that legal permanent residents are a special class of aliens, the holding in this case says otherwise.\textsuperscript{173}

As our nation becomes more diverse, and our immigrant population grows, the definition of the ‘average American’ has and will continue to change. Most likely, the average person living in America will be directly affected by this law either because they are a legal permanent resident, or have family members and friends who are in this class of aliens. Today, there are approximately 12 to 15 million legal residents currently residing in the United States.\textsuperscript{174} Add to this number all of their family members and friends, and the math reveals that a significant portion of our society will feel the blow of \textit{Demore v. Kim}. Over the last few years, particularly after September 11, 2001, society’s view of the immigrant population have changed, and this hesitant attitude about immigrants is reflected in our laws.\textsuperscript{175}

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  \item \textsuperscript{171} Welch v. Ashcroft, 293 F.3d 213, 224 (4th Cir. 2002) (holding that “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”).
  \item \textsuperscript{172} \textit{Kim}, 123 S. Ct. at 1708.
  \item \textsuperscript{173} \textit{Welch}, 293 F.3d at 231 (stating that "[l]awful permanent residents are the most favored category of aliens admitted to the United States.").
  \item \textsuperscript{175} See Alicia Brown, \textit{Striking a Balance: The Conflict between Safety and Due Process Rights-The Practical Implication of Zadvydas v. Davis}, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 429, 457 (2002) (stating that after the “events of September 11th, 2001, the ramifications of the decision would appear to be even more far reaching than previously thought . . . the Court’s ruling that special circumstances, such as terrorism, can justify holding an immigrant beyond the ninety day period has become more important.”); \textit{See also} Mary Jacoby, \textit{Al-Najjar to Appeal Deportation Order to Supreme Court}, ST. PETERSBURG TIMES, Nov. 16th, 2001, at 4A (discussing that the 11th Circuit held that an alien who was
Despite our feelings about immigration policies in the future, we owe the immigrants who we have welcomed into our country the protections that our Constitution provides. The holding in this case represents a different view, and today even society's most esteemed class of aliens will find that they will be denied the same due process rights as native born citizens.

B. Judicial

The Court's age-old plenary power doctrine has "entrusted to the political branches of government," those matters which deal with immigration. Immigration has been a concept that is "largely immune from judicial inquiry or interference." Before this case, the trend has been that substantive immigration issues, like whether or not to admit or deport an alien, have been left to agency discretion. However, for procedural matters relating to immigration, like hearings, the Court has applied the usual constitutional principles. This case has broken that trend since the Court decided to leave the procedural issue of a bail hearing in the hands of the agency. Kim presented an issue that was procedural in nature, since Kim was arguing that he should have been afforded a hearing prior to detainment. The Court upheld a statute that allows an agency to hold an alien without justifying detainment on an individual level. In doing so, the Court demonstrated that due process protections will not extend to legal permanent residents.

The impact of this case is that it strengthens the plenary power doctrine, thus taking away from the principals that established judicial oversight of certain agency actions. While prior cases had set up a system in which the agency would be held accountable to due process standards for its procedural actions, the ruling in Kim says otherwise. Prior decisions of this Court have narrowed the

suspected of having ties to a terrorist organization cannot be held while waiting to be deported, despite the special circumstances exception in Zadvydas).

177. Id. at 287-88.
178. Id.
179. Id. at 292; see Patel v. Zemski, 275 F.3d 299, 307-08 (2001) (stating that "[i]t is undisputed that Congress has plenary power to create substantive immigration law to which the judicial branch generally must defer . . . . However,
absolute powers of the agency, but this decision broadens these powers by giving the agency almost total control over immigration. Due process protects individuals against deprivation of liberty, and detention is exactly the type of procedural matter that should be overseen by the judiciary. Even after this decision, three courts, Ashley v. Ridge, Ly v. Hansen, and Zavala v. Ridge have run into difficulty applying the principles discussed in Kim. However, the force of this decision has overall limited the ability of the judiciary to interfere with agency decisions regarding detention. This case has constricted the reach of the judicial branch to oversee agency action, even when the agency presses against constitutional limits.

Congress' power is subject to constitutional limitations, including due process constraints . . . .

180. Ashley v. Ridge, 288 F.Supp.2d 662 (D.N.J. 2003) (holding that an automatic stay provision, which allowed the Attorney General to invoke a hold on a legal permanent resident's release, even after an individualized review determined he should be released, was a violation of the alien's due process rights.); Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003) (holding that a refugee whose detention pending his removal proceedings was not estimated to be “short...like Kim['s],” was held to be a violation of due process.); Zavala v. Ridge, 310 F.Supp.2d 1071 (2004) (explaining that a sex offender, who had been given the opportunity to post bail prior to the date that Section 1226 (c) had become effective, could not now be detained pursuant to the automatic stay provisions because it would violate due process.).

181. See Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). A landmark Supreme Court case has recently established that even when Congress authorizes the detention of certain people, like enemy combatants, due process demands that they be given a “meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.” Id. at 2635. This is a very significant holding for the American citizens being held indefinitely in Guantanamo Bay without access to counsel or the opportunity for judicial review. In this case, it is stated that “history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others....” Id. at 2647. It clarifies that the “Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.” Id. at 2650. Currently this Court is grappling with Rumsfeld v. Padilla, a case that concerns an American citizen being detained by the President for terrorist ties, “without Congressional authorization and judicial oversight.” Brief of Amici Curiae Janet Reno, et al. at 27, Rumsfeld v. Padilla, 124 S. Ct. 1904 (2004) (No. 03-1027). This decision will further determine the direction in which our separation of powers doctrine is going.
C. Administrative

Although the Court held that there was no due process issue in *Kim*, it did not prohibit judicial review of habeas challenges altogether, like Justice O'Conner interpreted Congress's intention to be in 8 U.S.C. § 1226 (e).\textsuperscript{182} The Court has stated that judicial review will not be precluded without a clear intent from Congress.\textsuperscript{183} The *Kim* decision held that even the words “no court” in the statute were not strong enough to overcome the presumption of judicial review.\textsuperscript{184} In *Kim*, the Court has upheld the agency’s authority over aliens, but it has reinforced an alien’s ability to utilize the protections embedded in the *Joseph* hearing, the removal hearing, and the habeas challenge when applicable.

Despite the availability of judicial review, this case has given the administrative agency more power than it had been afforded in the past. In spite of the strong dissent which makes many powerful points about how the agency has deprived Kim of his due process rights, and the prior case law which has held procedural agency decisions to due process standards, this Court upheld the discretion of the agency regarding detention pending a removal hearing.\textsuperscript{185} The decision in *Kim* has supported the authority of agency discretion in the face of a constitutional challenge, thereby strengthening the force of the agency to carry out its functions.

\textsuperscript{182} *Kim*, 123 S. Ct. at 1723; see also Yamata v. Fisher, 189 U.S. 86, 98-99 (1903) (stating that “Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention”).

\textsuperscript{183} Id. at 1714 (holding that “where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress' intent”).

\textsuperscript{184} Id. at 1723.

\textsuperscript{185} See The Supreme Court, 2002 Term Leading Cases, 117 HARV. L. REV. 287, 292 (2003); see also Yamata v. Fisher, 189 U.S. 86 (1903). *Yamata* held that it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. See *Yamata*, 189 U.S. 86.
VI. CONCLUSION

Imagine yourself in the position of Yoon Kim, a man who has spent the majority of his life believing he is a regular American, and that the United States is his home. If you were in Kim's position and had just committed his crimes, you would be deprived of your liberty and detained in an INS prison without the right to a bail hearing. As you are being held in jail awaiting the removal proceedings, your opportunities to meet with your attorney and present a case are diminishing. The fact remains that if you cannot present a strong enough case, you will be removed from this country that you believe to be your home, and forced to return to a country that you probably have no connection to.

In Kim's case, his entire family was living in the United States, and he had not been back to Korea since he was six years old. It is hard to imagine what would become of someone who is deported and who knows nothing and no one in the country of his origin. Worse though, is the fact that Kim was not given a fair chance to develop his case. Had he been better able to discuss his case with his attorney and witnesses, perhaps he could have made a better argument to stay. Also, if Kim is eventually removed from the United States and has to leave behind all his friends and family, he will not have had the opportunity to spend his last days with them.186 Despite the fact that he has served the time for the crimes he committed, and even if he poses no danger to the community or any flight risk, Kim will be held in a prison until the day he is deported from the United States.

The protections of the Constitution which offer every American the opportunity to be heard before they are deprived of their liberty, were not offered to Kim. We as a nation are welcoming legal permanent residents into our country, benefiting as a nation from their work and existence in the United States, then failing to treat them as our equals court. There is no reason to deny Kim the basic Constitutional safeguards of getting a hearing before his freedom is

No such arbitrary power can exist where the principles involved in due process of law are recognized. Id. at 101.

186. See Parra v. Perryman, 172 F.3d 954, 956 (7th Cir. 1999) (stating that in the case of an alien convicted of aggravated criminal sexual assault, the “question at hand...is where he passes the time while waiting for the [removal] order to become final. He says that he wants to spend it at home, with his...three children who are U.S. citizens.”).
taken. Since he posed no flight risk or danger to society, the government held Kim in violation of his rights against arbitrary and capricious detention. Kim has been denied the freedoms of a country that at one time had welcomed him. Our Constitution has been interpreted to provide due process protection to all those that stand on American soil, but this case has made it clear that due process applies differently in the case of legal permanent residents. It seems to be a shame that America, "a nation of immigrants," has such a poorly structured immigration system.187

187. Salameda v. Immigration and Naturalization Service, 70 F.3d 447, 452 (7th Cir. 1995).