

2005

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Recommended Citation

Jerry E. Norton, *Liberty: A Human Right, or a Citizen Right*, 36 *Loy. U. Chi. L. J.* 565 (2005).

Available at: <http://lawcommons.luc.edu/lucj/vol36/iss2/16>

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Liberty: A Human Right, or a Citizen Right

*Jerry E. Norton**

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*¹

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.²

Aliens do not have a constitutional right to come to this country, or to remain in this country, unless authorized by law.³ Both Congress and the President have constitutional authority to determine the conditions of aliens' ability to come to, and remain in this country.⁴ The subject of this paper is the right of aliens to liberty while their immigration status is being determined. By "liberty," I am referring to the most basic meaning of freedom: physical freedom; freedom from government detention; freedom to avoid being locked up in a government prison cell.

In the months following September 11, 2001, federal officials arrested hundreds, if not thousands, of residents of the United States.⁵ They were detained in connection with terrorism inquiries as well as other immigration violations, often for weeks, without being told of the charges against them. Efforts by their families and attorneys to locate them were often blocked. They were sometimes subjected to brutal

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

3. *See Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (discussing how Congress can exclude aliens based on the premise that every independent nation holds "[j]urisdiction over its own territory").

4. *Id.* at 606–07; *see infra* note 69 and accompanying text (discussing the political branches' plenary power over immigration).

5. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 921 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004). This action under the Freedom of Information Act unsuccessfully requested information on 1,200 detained terrorism suspects, most of them foreign nationals. *Id.* at 937.

treatment and inhumane conditions. These descriptions of the detention of aliens are not from immigrant advocacy groups, but from the Office of the Inspector General of the United States Department of Justice.⁶ The numbers and identities of those detained remain unknown, guarded by secrecy imposed in the name of national security.⁷

LIBERTY

Any inquiry into liberty in America, whether for citizens or for aliens, must begin with the document that brought our nation into existence: the Declaration of Independence. In its most resounding phrase, it is declared to be self-evident that *all* men are created equal and endowed with “unalienable” rights, including liberty.⁸ This categorical recognition of the right to liberty is not limited to citizens.

The theme of the universal liberty for all mankind in the American Declaration of Independence resonated throughout the world in the centuries that followed. On December 10, 1948, 172 years after the Declaration of Independence, the United Nations adopted the Universal Declaration of Human Rights, including words echoing the older document: “All human beings are born free and equal in dignity and rights.”⁹ That same year, similar language was adopted in the American Declaration of the Rights and Duties of Man, and again two years later in the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰

In the United States, the Declaration of Independence defines a theme that could be viewed as a declaration of legislative intent for the Constitution that followed it in 1789, expanded by the Bill of Rights in 1791.¹¹ The drafters of the American Bill of Rights did not include

6. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 162-64 (2003), *available at* <http://www.usdoj.gov/oig/special/0306/full.pdf>. This report covered the treatment of 762 aliens being held in the course of FBI investigations. *Id.* at 2. This would not account for detainees held for other investigations, or by other agencies. *Id.*

7. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 937.

8. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

9. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), art. 1, at 71, U.N. Doc. A/810 at 71, art. 1 (1948), *available at* <http://www.unhcr.ch/udhr/lang/eng.htm>; *see also id.* at art. 3 (stating that “[e]veryone has the right to life, liberty and security of person”).

10. *American Declaration of the Rights and Duties of Man*, Org. of Am. States (Bogotá, Columbia, May 2, 1948), *available at* <http://www.cidh.oas.org/Basicos/basic2.htm>; *Convention for the Protection of Human Rights and Fundamental Freedoms*, *opened for signature* Apr. 11, 1950 (Rome, Italy), Europ. T.S. No. 9, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

11. The rights given in the Constitution are expressly limited to citizens in only four places:

these rights as simply pious platitudes for poetic effect:

Fundamental rights were God-given, and were rights “which no creature can *give*, or hath a right to take away.” They were, in the language of the Declaration of Independence, “inalienable.” Legislators could no more rewrite these laws of nature than they could the laws of physics.¹²

Formal constitutional recognition of physical freedom is found in two places in the Bill of Rights, and each has been further defined by the Supreme Court. The first place is the Fourth Amendment declaration that “[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated.”¹³ The United States Supreme Court has held that this right is not universal, but is limited to “the people” and “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”¹⁴ The Supreme Court has not fully defined when the connection with the community is sufficient to make a defendant part of “the people,” but this category would appear to cover only one who is voluntarily present in the country.¹⁵

The second and more general protection of liberty in the Bill of Rights is in the Due Process Clause of the Fifth Amendment, which prohibits the federal government from depriving “any person” of “liberty” without “due process of law.”¹⁶ As the Supreme Court recently acknowledged: “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.”¹⁷ This right, applying to “any person” cannot be read as extending only to

(1) Article I, Section 2, Clause 2; (2) Article I, Section 3, Clause 3; (3) Article II, Section 1, Clause 5; and (4) Amendment XV, Section 1. DAVID COLE, *ENEMY ALIENS* 212 (2003).

12. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1132 (1987) (quoting SILAS DOWNER, *A DISCOURSE AT THE DEDICATION OF THE TREE OF LIBERTY* (1768)). As Alexander Hamilton expressed it in 1775, “The sacred rights of mankind are not to be rummaged for, among old parchments or musty records. They are written, as with a sunbeam, in the whole *volume* of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.” *Id.* at 1134.

13. U.S. CONST. amend. IV.

14. *United States v. Verdugo-Urguidez*, 494 U.S. 259, 265 (1990).

15. *Id.* In *Verdugo-Urguidez*, the defendant was arrested in Mexico and brought to the United States. *Id.* at 262. The challenged search resulting in questioned evidence occurred in Mexico. *Id.* at 262–63.

16. See U.S. CONST. amend. V (stating that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law”). The Due Process Clause of the Fourteenth Amendment also protects the right to physical liberty. U.S. CONST. amend. XIV, § 1. The discussion here will focus on the Fifth Amendment, however.

17. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

those who are part of a “national community.”¹⁸ All persons are protected by the Due Process Clause of the Fifth Amendment, not just “the people.”

But, of course, no right is absolute. The Due Process Clause protects a right to liberty, but the right protected is not a categorical imperative. As the Supreme Court cautioned in *United States v. Salerno*: “We have repeatedly held that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.”¹⁹ The most obvious instance where liberty can be denied is where the person has been convicted of a crime. Giving other examples of the power to deny liberty, the Court in *Salerno* cited cases approving detention of wartime enemy aliens, mentally unstable individuals believed to be dangerous, juveniles, and those charged with crimes.²⁰ Also included in the list of those whose liberty can be denied are aliens: “[W]e have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings.”²¹

The issue to be addressed is not whether aliens can be detained. All people can be denied liberty. The critical issue deals with the circumstances *when* liberty may be denied. As the Court described it in *Salerno*, “liberty is the norm,” detention is the “carefully limited exception.”²²

As the following pages will show, this Constitutional preference for liberty, so clearly articulated in *United States v. Salerno* was stoutly reaffirmed in the Supreme Court deportation case of *Zadvydas v. Davis* in 2001. But then the chill of September 11, 2001 descended, and the norm of liberty, as evidenced in the 2003 of *Demore v. Kim*, was sacrificed.

SALERNO: LIBERTY IS THE NORM

United States v. Salerno involved a defendant charged in a 29-count indictment with a range of crimes, including crimes of violence.²³ Salerno, it was alleged, was the boss of the Genovese crime family, involved in wide-ranging criminal conspiracies, including at least two in

18. *Id.* See *Verdugo-Urguidez*, 494 U.S. at 64, for an explanation of “national community.”

19. *United States v. Salerno*, 481 U.S. 739, 748 (1987).

20. *Id.* at 748–49.

21. *Id.* at 748 (citing *Carlson v. Landon*, 342 U.S. 524, 537–42 (1952); *Wong Wing v. United States*, 163 U.S. 228 (1896)).

22. *Id.* at 755.

23. *Id.* at 743.

which murder was planned.²⁴ The government sought to detain Salerno without bail under the terms of the Bail Reform Act of 1984, alleging that nothing other than detention would protect the safety of any other person and the community.²⁵ The Bail Reform Act of 1984 included a long list of procedural protections to be satisfied before the government could detain a suspect without bail.²⁶ The Act required a hearing before a judicial officer at which the accused would be entitled to have counsel, to testify, to present evidence, and to cross examine government witnesses.²⁷ The judicial officer could order the detention only if the statutory elements were supported by clear and convincing evidence.²⁸ Unless the procedural requirements of the Act were met, the accused would be entitled to release until he was brought to trial on the criminal charges.²⁹ The Supreme Court concluded that, given the Congressional determination of the need for preventive detention and the numerous procedural safeguards provided in the statute, Salerno's due process rights were not violated.³⁰

ZADVYDAS: A MAINTAINED NORM OF LIBERTY

Kestutis Zadvydas came to the United States as a child.³¹ He was born to Lithuanian parents in a displaced persons camp in Germany.³² He accrued a long criminal history here and, at the age of 46, was ordered to be deported back to Germany.³³ However, neither Germany nor Lithuania would accept him, asserting that he was not a citizen of either country.³⁴ He faced an indefinite period of detention by the Immigration and Naturalization Service ("INS").³⁵ The Supreme Court

24. *Id.*

25. *Id.* at 743-44.

26. 18 U.S.C. §§ 3141-3156 (2000 & West Supp. 2004).

27. 18 U.S.C. § 3141(f).

28. *See* 18 U.S.C. § 3141(f) (providing the guidelines for a detention hearing).

29. *See* 18 U.S.C. § 3142 (delineating the requirements for the release or detention of a defendant pending trial); *Salerno*, 481 U.S. at 742 (discussing the Bail Reform Act requirements and provisions).

30. *See Salerno*, 481 U.S. at 755 (concluding that the Bail Reform Act also did not violate the Excessive Bail Clause of the Eighth Amendment).

31. *Zadvydas v. Davis*, 533 U.S. 678, 684 (2001). *Zadvydas* came to this country when he was eight years old. *Id.*

32. *Id.*

33. *Id.* *Zadvydas* was previously convicted of drug crimes, attempted robbery, attempted burglary, and theft. *Id.*

34. *Id.*

35. *Id.* In a companion case decided in the same decision, a man born in Cambodia who became a resident alien at age seven was also ordered deported because of his criminal activity. *Id.* at 685.

held that this indefinite detention violated the Due Process Clause of the Fifth Amendment.³⁶

In the *Zadvydas* case, Justice Breyer, speaking for the majority of the Court, acknowledged that Congress has substantial powers in immigration cases.³⁷ The power to exclude immigrants is almost unlimited.³⁸ “But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”³⁹ Applying this due process rule to the question of detention, the Court held that it is permitted, “only when limited to specially dangerous individuals and subject to strong procedural protections.”⁴⁰

And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, see *United States v. Salerno*, . . . or, in certain special and “narrow” non-punitive “circumstances,” . . . where a special justification, such as harm-threatening mental illness, outweighs the “individual’s constitutionally protected interest in avoiding physical restraint.”⁴¹

DEMORE V. KIM: THE DECLINE OF THE NORM

Hyung Joon Kim was born in South Korea.⁴² He came to the United States in 1984 when he was six years old.⁴³ Two years later he became a lawful permanent resident of the United States.⁴⁴ In 1996, Kim was convicted of burglary in a California court.⁴⁵ The following year he was convicted of another California crime: petty theft with priors.⁴⁶ Based on these two crimes, the INS charged Kim as deportable.⁴⁷ They then detained him without bail and without any determination that he posed either a danger to society or was a flight risk, which are the

36. *Id.* at 699.

37. *Id.* at 695.

38. *Id.*

39. *Id.* at 693.

40. *Id.* at 691.

41. *Id.* at 690 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

42. *Demore v. Kim*, 538 U.S. 510, 513 (2003).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* An alien is deportable when he or she commits an offense and has been sentenced to a term of imprisonment of at least one year. 8 U.S.C. § 1227(a)(2) (2000).

essential factors in the usual detention calculus.⁴⁸

In contrast to the procedural rights required in *Salerno*, there was a total lack of procedure to determine the need to deprive Kim of his liberty pending the deportation hearing. A majority of the Supreme Court held in 2003 that Kim's Due Process rights under the Fifth Amendment were not violated.⁴⁹ Writing for the majority in *Demore v. Kim*, Chief Justice Rehnquist first based his conclusion that Kim was not entitled to liberty on Congressional findings in support of its act permitting preventive detention of deportable persons with criminal records.⁵⁰ The Chief Justice read the Congressional findings as a "wholesale failure by the INS to deal with increasing rates of criminal activity by aliens."⁵¹ Criminal aliens were the fastest growing segment of the federal prison population, yet the INS "could not even identify most deportable aliens, much less locate them and remove them from the country."⁵² Further, Congress believed that major causes for the INS' failure to remove aliens were its "failure to detain those aliens during their deportation proceedings," and "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings."⁵³

Thus, while the Congressional findings supported the proposition that the failure of aliens with criminal convictions to show up for their deportation hearings is a serious problem, the same set of findings demonstrated that the vast majorities do appear.⁵⁴ In fact, the number that did not show up did not differ significantly from the number of citizens who fail to show up for hearings on criminal charges.⁵⁵ Thus,

48. *Kim*, 538 U.S. at 513. Under 8 U.S.C. § 1226, the Attorney General shall take into custody any alien who is deportable pursuant to 8 U.S.C. § 1227. 8 U.S.C. § 1226(c) (2000).

49. *Kim*, 538 U.S. at 531.

50. *Id.* at 518–21.

51. *Id.* at 518.

52. *Id.*

53. *Id.* at 519. "One 1986 study showed that, after criminal aliens were identified as deportable, [seventy-seven percent] were arrested at least once more and [forty-five percent] . . . were arrested multiple times before their deportation proceedings even began." *Id.* at 518. These figures on arrests of deportable aliens are drawn from a New York study discussed in the brief for the government. There is no indication of the time period covered. The government also discussed in its brief a Los Angeles study indicating that forty percent of the deportable aliens were arrested within twelve months of release. Brief for the Petitioners at 17, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491).

54. *Kim*, 538 U.S. at 565 (Souter, J., dissenting). In dissent, Justice Souter urged that the evidence showed that an even greater percentage of deportable criminals do appear for their deportation hearings. *Id.* (Souter, J., dissenting). One study put the appearance rate as high as ninety-two percent. *Id.* (Souter, J., dissenting).

55. BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, STATE COURT PROCESSING STATISTICS, 2000, 21 & tbls. 19, 20

the “wholesale failure” of the INS, cited by the court as a justification for the statute, clearly does not demonstrate a particularized need to detain individual deportees any more than inefficiency by the police in catching bail jumpers would justify the pretrial detention of every criminal defendant. Chief Justice Rehnquist could not deny this.⁵⁶ Nor could he deny: “It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”⁵⁷ He could only recite that Congress adopted this provision “against a backdrop of wholesale failure by the INS.”⁵⁸ Unfortunately, this surrender of liberty to administrative generalizations echoes Justice Black’s closing words for the Court in *Korematsu v. United States*, upholding Japanese internment during World War II:

[Korematsu] was excluded . . . because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated . . . and finally, because Congress, reposing its confidence in this time of war in our military leaders . . . determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.⁵⁹

While the Supreme Court never overruled *Korematsu*, the justification offered by Justice Black in denying Due Process was rejected by Congress in 1989, when it found that these internments were “carried out without adequate security reasons” and were “motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.”⁶⁰

The Supreme Court majority was compelled to acknowledge in *Demore v. Kim* both that due process normally requires a particularized

(2003), available at <http://www.ojp.usdoj.gov/bjs>. Of 32,386 state court felony defendants released prior to case disposition, seventy-eight percent made all court appearances. *Id.* Twenty-two percent failed to appear. *Id.* Thirty-two percent committed some misconduct within one year. *Id.*

56. *Kim*, 538 U.S. at 521–22.

57. *Id.* at 523 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)).

58. *Id.* at 518.

59. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

60. 50 U.S.C.S. Appx. § 1989a(a) (2000). In a Statement of the Congress, it recognized that:

[A] grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. . . . [T]hese actions were carried out without adequate security reasons and without any acts of espionage or sabotage . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.

Id.

determination of the need to deprive a citizen of his liberty and that the Due Process Clause applies to all humans, citizens and aliens alike.⁶¹ Still the Court concluded that due process does not give aliens a right to liberty.⁶² The Chief Justice defended this evident anomaly in the only way he could, by introducing a logical non sequitur: “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”⁶³ This quoted language, from *Mathews v. Diaz*, is not even part of the holding in that case, but rather dictum.⁶⁴ In *Diaz*, the question before the Court was not fundamental liberty interests, but whether denying welfare benefits to aliens who had resided in the country for less than five years violated the Fifth Amendment.⁶⁵

The due process interest in *Diaz* was one of entitlement to benefits. The interest at issue in *Kim* was liberty. For the latter, where a substantial liberty interest is involved, the Supreme Court held in *Reno v. Flores* that due process includes “a substantive component, which forbids the government to infringe certain ‘fundamental’ liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest.”⁶⁶ Where, as in *Mathews v. Diaz*, the interest is not fundamental, *Flores* requires that the government only “meet the (unexacting) standard of rationally advancing some legitimate governmental purpose.”⁶⁷ The principle of heightened scrutiny in such cases where liberty is denied is most concisely stated by Justice Souter in his dissent in *Kim*: “the Fifth Amendment permits detention only where ‘heightened, substantive due process scrutiny’ finds a ‘sufficiently compelling’ governmental need.”⁶⁸

In recognizing that Congress has broad powers over naturalization and immigration, Chief Justice Rehnquist drew on a line of cases going

61. *Kim*, 538 U.S. at 523–24. The Fifth Amendment prohibits the federal government from depriving “any person” of “liberty . . . without “due process of law.” U.S. CONST. amend. V.

62. *Kim*, 538 U.S. at 531.

63. *Id.* at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)). Justice Souter, in dissent, considered the quoted language from *Mathews v. Diaz* to be dictum. *Id.* at 547 n.9 (Souter, J., dissenting).

64. *Id.* at 547 n.9 (Souter, J., dissenting).

65. “The real question presented by this case is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible.” *Diaz*, 426 U.S. at 80.

66. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

67. *Id.* at 306. See Ellis M. Johnston, Note, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593, 2615–26 (2001), for a discussion of the due process issues surrounding the statutes that formed the basis for the *Demore v. Kim* proceedings.

68. *Kim*, 538 U.S. at 549 (Souter, J., dissenting) (quoting *Flores*, 507 U.S. at 316).

back to the *Chinese Exclusion Case* in 1889, in which the political branches were recognized as having plenary power over immigration.⁶⁹ However, this plenary power was subjected to due process review beginning with *Yamataya v. Fisher* in 1903.⁷⁰ In *Yamataya*, the Court specifically distinguished the plenary power of Congress to *exclude* aliens from entering the United States from the constitutionally limited power to *deport* aliens already present.⁷¹

Taking another tack to justify the conclusion of the majority in *Kim*, the Chief Justice borrowed, from the Communist Party deportation case, *Carlson v. Landon*, the equally questionable assertion that “detention is necessarily a part of this deportation procedure,” thus exempting Congress from the due process demand that individualized findings be made for detaining lawful aliens pending deportation hearing.⁷² However, as Justice Souter points out in his dissent, Rehnquist was again using dictum to instruct his holding.⁷³ In fact, the *Carlson* Court held that there was “reasonable apprehension of hurt from aliens charged with a philosophy of violence against [the] Government.”⁷⁴

The *Kim* case was decided by a bare majority of the Supreme Court. Justices Kennedy, O’Connor, Scalia and Thomas joined in Chief Justice Rehnquist’s opinion for the Court.⁷⁵ The decision is in sharp contrast with the decision of an equally divided Supreme Court less than two

69. *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889). For a history of the Supreme Court’s early treatment of due process and immigration see Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632–56 (1992).

70. *Yamataya v. Fisher*, 189 U.S. 86 (1903); see Motomura, *supra* note 69, at 1637–38 (discussing *Yamataya* and the plenary power of Congress to establish admission and deportation categories).

71. *Yamataya*, 189 U.S. at 97–100.

72. *Kim*, 538 U.S. at 524 (quoting *Carlson v. Landon*, 342 U.S. 524, 538 (1952)).

73. *Id.* at 573 (Souter, J., dissenting). According to Justice Souter, the Court in *Carlson* nowhere said that detention was part of every deportation proceeding. *Id.* (Souter, J., dissenting).

74. *Carlson*, 342 U.S. at 542.

Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings. Of course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General to detain aliens without bail. . . .

Id. at 538. “There is no denial of . . . due process . . . where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government.” *Id.* at 542. For a discussion of *Carlson v. Landon*, see David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1016–17 (2002).

75. Justices O’Connor, Scalia and Thomas did not join the Chief Justice in full. *Kim*, 538 U.S. at 533 (O’Connor, J., concurring). They disagreed with the majority that the Court had jurisdiction, arguing that 8 U.S.C. § 1226(e) deprived the Court of jurisdiction. *Id.* (O’Connor, J., concurring).

years earlier in *Zadvydas*: an essentially irreconcilable decision.⁷⁶

Thus, in order to make his holding in *Kim* tenable, Chief Justice Rehnquist attempted to distinguish *Zadvydas*: “First, in *Zadvydas*, the aliens challenging their detention following final orders of deportation were ones for whom removal was ‘no longer practically attainable.’”⁷⁷ He continued: “[w]hile the period of detention at issue in *Zadvydas* was ‘indefinite’ and ‘potentially permanent,’ . . . the detention here is of a much shorter duration.”⁷⁸ The Court noted that “the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked.”⁷⁹ Yet, *Kim* had already been detained six months before he was released under habeas corpus relief.⁸⁰ Additionally, in spite of this effort to distinguish the cases, the basic rule applied by the Court in *Zadvydas* was that detention of resident aliens is permitted “only when limited to specially dangerous individuals and subject to strong procedural protections.”⁸¹ *Kim* had no procedural protections preceding his detention, and there was no particularized showing that he was either dangerous or likely to fail to appear.⁸² In fact, no particularized showing of any kind was made in the *Kim* case.⁸³ As one commentator noted: “The decision marks the first time outside of a war setting that the Court has upheld preventive detention of *anyone* without an individualized assessment of the necessity of such detention.”⁸⁴

Both *Zadvydas* and *Kim* were guilty of committing crimes in this country. Congress determined that the crimes they committed should result in their deportation.⁸⁵ The punishment, although legal, does not eliminate the need for procedural fairness. A foundational aspect of our legal system is that even those guilty of the most heinous crimes are entitled to due process of the law.⁸⁶ *Kim*, who came to the United States when he was six, and whose second crime was “petty theft with priors,” is entitled to no less. Indeed, one of the implicit reasons for treating the due process issues differently between instances where the

76. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

77. *Kim*, 538 U.S. at 527 (quoting *Zadvydas*, 533 U.S. at 690).

78. *Id.* at 528 (quoting *Zadvydas*, 533 U.S. at 690–91).

79. *Id.* at 530.

80. *Id.* at 530–31.

81. *Zadvydas*, 533 U.S. at 691.

82. *See Kim*, 538 U.S. at 513 (discussing the circumstances surrounding *Zadvydas*' detention).

83. *Id.* at 513–14.

84. COLE, *supra* note 11, at 224.

85. *See* 8 U.S.C. § 1226 (2000) (presenting the procedure for apprehending and detaining aliens).

86. *See* U.S. CONST. amend. V (providing that “any person” is entitled to due process).

alien is excluded from entry on the one hand and deported after entry on the other, as recognized by the Court in *Zadvydas*, is because the latter may have family and attachments to this country.⁸⁷ Detaining aliens and depriving them of their rights to contact attorneys or their families may be as unfair as similar detentions of citizens.⁸⁸ These concerns have led the European Court on Human Rights to interpret Article 8 of the European Convention on Human Rights to require an individualized analysis of a person's threat to the community balanced against his or her family ties to that community before authorizing deportations of individuals.⁸⁹

CONCLUSIONS

So, the threshold question is: how does the Due Process Clause of the Fifth Amendment apply to aliens? In spite of uncertainties caused by *Demore v. Kim*, the best summary of those rights is still the language from *Kwong Hai Chew v. Colding* in 1953:

[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.⁹⁰

If the Due Process clause of the Fifth Amendment applies to aliens who are in the United States, as the Court in *Kwong Hai Chew* and

87. See Robert Pauw, *Plenary Power: An Outmoded Doctrine that Should not Limit IIRIRA Reform*, 51 EMORY L.J. 1095 (2002) (discussing the mandatory deportation of those convicted of crime under the 1996 Congressional act). Robert Pauw cites a number of instances where the deportation has an impact on the deported alien and his family far beyond the harm caused by the crime. *Id.* at 1107–10. For example, in one case an alien was born in Thailand and adopted by an American family when he was two. *Id.* at 1107. As a teenager he stole a car and wrote several bad checks. *Id.* Several years later, the Immigration Service arrested him pursuant to the 1996 Congressional act, and detained and deported him without any opportunity to show he had rehabilitated himself. *Id.* at 1107–08. He was deported to Thailand, where he had not been since he was a child and did not speak the language. *Id.* at 1107–08. For an argument that the alien's social and family ties to the community should expressly be given weight in assessing her due process claims, see also David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 82–92 (2001).

88. See Pauw, *supra* note 87, at 1111–12 (analyzing the difference in family rights between aliens and citizens).

89. *Id.* at 1128 n.138.

90. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring), *quoted in Demore v. Kim*, 538 U.S. 510, 546 (2003) (Souter, J., dissenting)).

Zadvydas v. Davis recognized, the legitimacy of the post-September 11 detentions is highly questionable. Some members of the public seem to draw comfort from the fact that those being detained are mostly foreigners. As Professor David Cole observed, “discrimination against noncitizens remains one of the few group-based categories that many people still feel comfortable employing.”⁹¹ But this comfort may be transitory. “Virtually every significant government security initiative implicating civil liberties . . . has originated in a measure targeted at noncitizens.”⁹²

The detentions of aliens after September 11, 2001 cannot be justified under our constitution merely by the alien status of the detainees, or by the fact that they may be deportable. The power of federal officers to hold aliens incommunicado can only be justified by war powers,⁹³ insurrection⁹⁴ or another danger or emergency.⁹⁵ This power over foreigners in this country is virtually indistinguishable from the power these officers have over American citizens. Our respect for universal rights to liberty of aliens may be an indication of the respect we will show the rights of our citizens tomorrow.

91. COLE, *supra* note 11, at 100.

92. *Id.* at 85. David Cole points out, that in 1798, the Alien and Sedition Acts were initially enacted to target enemy aliens. *Id.* at 91. However, the Sedition Act was enforced exclusively against Republican critics of the Federalist administration. *Id.* Similarly, the Enemy Alien Act, enacted at the same time as the Alien and Sedition Acts, permits the president to detain any citizen fourteen years or older of a nation in which we are at war. *Id.* at 92. But during World War II, the Roosevelt Administration not only rounded up Japanese aliens under the Enemy Alien Act, but citizens of Japanese ancestry were detained as well. *Id.* Moreover, during the Red Scare of 1919-1920, the government conducted dragnet raids directed at radical aliens. *Id.* at 118. But during the McCarthy era of the 1940s and 1950s, citizens became the target of the Red Scare as well. *Id.* at 132.

93. See *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (discussing the Court’s refusal to question internment of enemy aliens in time of war).

94. See *Moyer v. Peabody*, 212 U.S. 78, 85-86 (1909) (stating the constitutionality of detention in times of insurrection).

95. For a discussion of other instances in which Due Process will allow the detention of persons, see *United States v. Salerno*, 481 U.S. 739, 748 (1987). The most recent case before the United States Supreme Court dealing with the liberty rights of aliens was *Rasul v. Bush*, 124 S. Ct. 2686 (2004). In this case the government argued that alien detainees held since early 2002 at Guantanamo Bay, Cuba, were not entitled to habeas corpus review of their detention, in part because the rights of aliens should be less extensive than the rights of citizens. *Id.* at 2693. The Court rejected this argument. *Id.* at 2693-96. Justice Stevens observed in his opinion for the Court: “At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, . . . and all other dominions under the sovereign’s control.” *Id.* at 2696-97. The question in *Rasul* was one of statutory construction, not constitutional law, yet the decision of the Court demonstrates a strong rejection of the position urged in Justice Scalia’s dissenting opinion for himself, Chief Justice Rehnquist and Justice Thomas. *Id.* at 2701. The dissenters would have read the habeas corpus statute as “holding that aliens abroad *did not have* habeas corpus rights.” *Id.* at 2708.