



9-1-2017

Locked Up: *Demore*, Mandatory Detention, and the Fifth Amendment

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Recommended Citation

Alix Sirota, *Locked Up: Demore, Mandatory Detention, and the Fifth Amendment*, 74 Wash. & Lee L. Rev. 2337 (2017).

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Locked Up: *Demore*, Mandatory Detention, and the Fifth Amendment

Alix Sirota*

Table of Contents

I. Introduction.....	2338
II. Examining 8 U.S.C. § 1226(c).....	2346
A. Background and Impact of § 1226(c)	2346
B. Legislative History of § 1226(c).....	2348
III. Chinese Exclusion Cases and the Origin of the Plenary Power Doctrine	2349
A. Historical Backdrop to the Chinese Exclusion Cases.....	2349
B. <i>Chae Chan Ping v. United States</i>	2351
C. <i>Fong Yue Ting v. United States</i>	2354
IV. Evolution of Congress’s Plenary Power in the Detention Context.....	2357
A. <i>Shaughnessy v. United States ex rel. Mezei</i>	2357
B. <i>Zadvydas v. Davis</i>	2361
C. <i>Demore v. Kim</i>	2365
V. Analyzing the Federal Circuit Split.....	2371
A. Individualized Reviews of Reasonableness	2372
B. Bright-line, Six-Month Reasonableness Limitation on Detention.....	2378
VI. Recommendation to Resolve the Circuit Split.....	2381
A. <i>Demore’s</i> Inconsistency with Due Process Jurisprudence.....	2382

* Candidate for J.D., Washington and Lee University School of Law, May 2018. I would like to thank the *Law Review’s* Editorial Board, as well as my student and faculty Note advisors, for their assistance throughout this process. I would also like to thank my family for their constant and endless love, support, and encouragement.

B. <i>United States v. Salerno</i>	2385
C. Comparing § 1226(c) Under <i>Demore</i> to the Bail Reform Act.....	2386
D. Comparing § 1226(c) in the Circuit Courts to the Bail Reform Act	2387
E. The Road to Resolution.....	2390
VII. Conclusion	2391

I. Introduction

In November 2013, Alexander Lora received word that the police were looking for him.¹ On a Friday morning, a week before Thanksgiving, Lora stood outside his girlfriend’s apartment in Brooklyn waiting for the officers to arrive.² Lora assumed it was a simple misunderstanding and was eager to clear things up, as he was starting a new job in the construction industry the following day.³ Instead, Lora stood in awe as five vehicles quickly pulled up the street and a group of Immigration and Customs Enforcement (ICE) officers came storming towards him.⁴ According to Lora, the officers threw him against a car, handcuffed him, and told him “[y]ou’re going to get deported.”⁵

Lora was born in the Dominican Republic, but he entered the United States as a lawful permanent resident (LPR) in 1990 when he was seven years old.⁶ Since arriving to the United States, Lora “lived continuously in Brooklyn, New York where he

1. Batya Ungar-Sargon, *Heavy Burdens and Unfair Fights in Immigration Courts*, CITY LIMITS (Dec. 17, 2015), <http://citylimits.org/2015/12/17/heavy-burdens-and-unfair-fights-in-immigration-courts/> (last visited Sept. 1, 2017) (on file with the Washington and Lee Law Review).

2. Keegan Hamilton, *Here Legally, Detained for Months*, VICE NEWS (Nov. 29, 2016), <https://news.vice.com/story/jennings-rodriguez-supreme-court-immigrant-detention-alexander-lora> (last visited Sept. 1, 2017) (on file with the Washington and Lee Law Review); Ungar-Sargon, *supra* note 1.

3. Ungar-Sargon, *supra* note 1.

4. *Id.*

5. *Id.*

6. See *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015) (“Lora entered the United States as a lawful permanent resident (‘LPR’) from the Dominican Republic in 1990 when he was seven years old.”).

has a large family network, including his . . . chronically ill U.S. citizen mother, LPR father, and U.S. citizen brother and sister.”⁷ At the time of his 2013 detention, Lora “was 31 and staying with his girlfriend in Brooklyn; they took turns caring for Lora’s son with the two-year-old’s mother, Lora’s ex.”⁸

Lora’s 2013 detention stemmed from a 2009 arrest, where Lora and a co-worker were charged with allegedly selling cocaine.⁹ In 2010, Lora pleaded guilty to criminal possession of cocaine and was sentenced to five years’ probation.¹⁰ Lora “was not sentenced to any period of incarceration and he did not violate any of the conditions of his probation.”¹¹

Unbeknownst to Lora, the possession charge rendered him deportable¹² under both 8 U.S.C. § 1227(a)(2)(B)¹³ and 8 U.S.C. § 1227(a)(2)(A)(iii).¹⁴ Further, 8 U.S.C. § 1226(c)¹⁵ requires detention¹⁶ during removal proceedings for non-citizens¹⁷ eligible

7. *Id.*

8. Ungar-Sargon, *supra* note 1.

9. *See* Hamilton, *supra* note 2 (“The deportation was triggered by a 2009 case in which Lora was arrested for allegedly selling cocaine from the Brooklyn bodega where he worked.”).

10. *See id.* (“He pleaded guilty to a possession charge and was sentenced to probation, not realizing, he says, that it would be considered a deportable offense under immigration law.”).

11. *Lora*, 804 F.3d at 606.

12. *See id.* at 607

Lora was charged with removability under INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B), for having been convicted of a crime involving a controlled substance, and INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony, namely, trafficking in a controlled substance as defined in INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

13. 8 U.S.C. § 1227(a)(2)(B) (2012).

14. *Id.* § 1227(a)(2)(A)(iii).

15. *Id.* § 1226(c).

16. Section 1226(c)(2) provides one narrow exception to mandatory detention for the purpose of witness protection. *See infra* note 70 for the complete text of § 1226(c)(2).

17. When possible, this Note will use the term “non-citizen” as opposed to the statutory term “alien” used by 8 U.S.C. § 1226(c). *See, e.g.*, D. McNair Nichols, Jr., Note, *Guns and Alienage: Correcting a Dangerous Contradiction*, 73 WASH. & LEE L. REV. 2089, 2092 n.19 (2016) (“It seems prudent during academic discussion to avoid using the term ‘illegal alien,’ which has potentially

for deportation under § 1227(a)(2)(B) or § 1227(a)(2)(A)(iii).¹⁸ Accordingly, the ICE officers who detained Lora in November of 2013 were acting pursuant to § 1226(c).

At the time of his 2013 detention, Lora was gainfully employed,¹⁹ he had extensive family ties to Brooklyn,²⁰ he shared custody of his two-year-old child,²¹ and he had never been arrested for a violent crime.²² Unfortunately for Lora, none of these facts mattered, as § 1226(c) denied Lora the opportunity for a bond hearing to demonstrate that he was not a flight risk and posed no threat to the community.²³ Instead, Lora was transferred to Hudson County Correctional Center (Hudson) and detained without bond pending removal proceedings.²⁴

Pursuant to § 1226(c), Lora sat in detention at Hudson with no opportunity for bail and no idea how long he would remain there.²⁵ Finally, after five and a half months at Hudson, Lora received a bond hearing²⁶ after successfully contesting a

pejorative and inflammatory implications.”); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 303 (“The very word, ‘alien,’ calls to mind someone strange and out of place, and it has often been used in a distinctly pejorative way.”).

18. See *Lora v. Shanahan*, 804 F.3d 601, 607 (2d Cir. 2015) (“DHS took the position that Lora’s removal charges rendered him subject to mandatory detention under section 1226(c) and that he was not eligible for a bail hearing.”).

19. See Ungar-Sargon, *supra* note 1 (“He was starting a new job the next day that he was excited about, in construction.”).

20. See *supra* note 7 and accompanying text (describing Lora’s family ties to Brooklyn).

21. See Ungar-Sargon, *supra* note 1 (“At the time, Lora . . . took turns caring for Lora’s son with the two-year-old’s mother, Lora’s ex.”).

22. See *Lora*, 804 F.3d at 616 (“[H]e has no arrest record aside from this non-violent drug offense conviction . . .”).

23. See M. Isabel Medina, Demore v. Kim—*A Dance of Power and Human Rights*, 18 GEO. IMMIGR. L.J. 697, 700 (2004) (“Thus, the statute on its face required detention of permanent resident aliens without a hearing and eliminated the possibility of bail in the case of a person who did not pose a flight risk and was not a danger to the community.”).

24. See *Lora*, 804 F.3d at 607 (“After the agents took Lora into custody, he was transferred to Hudson County Correctional Center in Kearny, New Jersey, where he was detained without bond.”).

25. See Ungar-Sargon, *supra* note 1 (“Alex Lora became an immigrant detainee with no trial date and no stated term limit.”).

26. See Scott Martelle, *Judges Should Decide Which Deportation Cases*

procedural flaw in his 2013 detention.²⁷ At the hearing, an immigration judge ordered Lora's release on bond after the parties stipulated that Lora "was not dangerous and posed no risk of flight."²⁸

Despite Lora's ultimate release from custody, the five and a half months in detention drastically impacted the lives of him and his family. Speaking on the aftermath of his detention, Lora told Vice News that "[i]t stresses me out, every day of my life since I was there."²⁹ While detained at Hudson, Lora lost his construction job.³⁰ Even worse, Lora was alerted at Hudson that "the mother of his son attempted suicide, causing the child to be placed temporarily in foster care."³¹

Since his release, Lora has regained custody of his son, but he still faces potential deportation.³² When asked about the prospect of deportation to the Dominican Republic, a place Lora has not lived since he was seven years old, Lora replied "[w]hat am I going to do there? I'm not a stranger here, but I'm a stranger there."³³

Lora's deportation case is scheduled for 2018,³⁴ and if not for a technicality, he would still be in detention while his case is

Require Detention, L.A. TIMES (Nov. 6, 2015, 10:08 AM), <http://www.latimes.com/opinion/opinion-la/la-ol-immigration-court-detentions-20151106-story.html> (last visited Sept. 1, 2017) ("Lora eventually won a bond hearing and was released on \$5,000 bail five and a half months after he was detained.") (on file with the Washington and Lee Law Review).

27. See *Lora v. Shanahan*, 804 F.3d 601, 605 (2d Cir. 2015)

He contended . . . that he was eligible to apply for bail because the mandatory detention provision of section 1226(c) did not apply to him because he had not been taken into custody 'when released' and that indefinite incarceration without an opportunity to apply for bail violated his right to due process.

28. *Id.*

29. Hamilton, *supra* note 2.

30. Martelle, *supra* note 26.

31. Hamilton, *supra* note 2.

32. See *id.* ("Lora has regained custody of his son, but he's still fighting to stop his deportation.").

33. *Id.*

34. Liz Robbins, *Court Sets Limit on Holding Immigrants in Some Deportation Cases*, N.Y. TIMES (Oct. 30, 2015), https://www.nytimes.com/2015/10/31/nyregion/court-sets-limit-on-holding-immigrants-in-criminal-cases.html?_r=0 (last visited Sept. 1, 2017) (on file with

pending.³⁵ Therefore, Lora is fortunate that his detention lasted only five and a half months,³⁶ but the question remains, why lock Lora up at all? His entire life was turned upside down over a crime for which he was already charged and sentenced three years prior.

The United States detained approximately 441,000 non-citizens like Lora in 2013.³⁷ As Lora's story demonstrates, thousands of non-citizens languish in detention awaiting deportation determinations pursuant to § 1226(c).³⁸ Additionally, § 1226(c) provides no limit to the amount of time an arrestee can be held pending removal proceedings.³⁹ Accordingly, § 1226(c) requires indeterminate detention of non-citizens in Lora's predicament, with no individualized determination as to whether detention is actually warranted.⁴⁰

Further, because detention under § 1226(c) continues until the conclusion of deportation proceedings, individuals like Lora "with strong ties to the United States, who have both the legal grounds and every incentive to contest their deportation . . . are

the Washington and Lee Law Review).

35. See *supra* note 27 and accompanying text (discussing Lora's successful challenge of a procedural flaw in his 2003 detention).

36. For instance, in *Ly v. Hansen*, "[t]he INS took Ly into custody on May 11, 1999 and kept him in detention for 500 days before a district court ordered his release." 351 F.3d 263, 265 (6th Cir. 2003) (emphasis added).

37. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 1 (2014), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2013.pdf.

38. See *infra* notes 44–48 and accompanying text (discussing the immigration detention system in the United States).

39. See Medina, *supra* note 23, at 700 ("The statutory provisions concerning removal and mandatory detention do not specify the period of time in which removal must be determined nor do they provide a specific limit to the period of time within which an alien placed in removal proceedings must be detained.").

40. See Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 365 (2013) ("Because immigration judges and the Department of Homeland Security ('DHS') view the mandatory detention law as stripping them of discretion to determine whether detention is warranted in an individual case and to set an appropriate bond, mandatory detention bears little relation to the goals of immigration enforcement.").

detained the longest under the statute.”⁴¹ This quandary causes many detainees “to give up on viable claims” and accept deportation simply to escape continued detention.⁴² Consequently, mandatory, indeterminate detention under § 1226(c) disincentivizes some detainees from challenging their deportation.⁴³

As to how all of this impacts United States citizens, mandatory detention under § 1226(c) is part of an enormously costly immigration detention system.⁴⁴ In 2013, ICE held approximately 34,000 non-citizens like Lora in detention per day.⁴⁵ As of 2013, the daily cost of immigration detention was about \$164 per person.⁴⁶ Therefore, in 2013, the federal government spent upwards of \$5 million taxpayer dollars *per day* on immigration detention.⁴⁷ Accordingly, ICE’s 2013 annual budget for immigration detention alone was approximately \$2 billion.⁴⁸

In *Demore v. Kim*,⁴⁹ the Supreme Court upheld the constitutionality of § 1226(c) against Hyung Joon Kim’s claim

41. Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in *IMMIGRATION STORIES* 343, 361 (David A. Martin & Peter H. Schuck eds., 2005).

42. *Id.* at 362.

43. See Mark Noferi, *Cascading Constitutional Deprivation: The Right To Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 82 (2012) (“As such, the prospect of prolonged mandatory detention coerces some detainees to give up their rights and accept deportation to escape detention.”).

44. See *infra* notes 45–48 and accompanying text (describing the costs associated with immigration detention in the United States).

45. *Immigration Detention: How Can the Government Cut Costs?*, HUMAN RIGHTS FIRST 1 (2013), <http://www.humanrightsfirst.org/uploads/pdfs/immigration-detention-fact-sheet-jan-2013.pdf>.

46. *Id.*

47. *Id.* (emphasis added).

48. *Id.*

49. *Demore v. Kim*, 538 U.S. 510, 530 (2003). In *Demore*, the Court considered the constitutionality of 8 U.S.C. § 1226(c), which authorized the detention of certain criminal non-citizens during removal proceedings. *Id.* at 514. Respondent, a lawful permanent resident of the United States, was convicted of first-degree burglary in 1996. *Id.* at 513. In 1997, respondent was convicted of a second crime, “petty theft with priors.” *Id.* The Immigration and

that “his detention under § 1226(c) violated due process because the INS had made no determination that he posed either a danger to society or a flight risk.”⁵⁰ In the wake of the *Demore* decision, the federal circuit courts continue to wrestle with how § 1226(c) can co-exist with the Fifth Amendment’s Due Process Clause.⁵¹ The result has been the emergence of a circuit split,⁵² with both sides acknowledging that a statute authorizing mandatory, indeterminate detention poses a constitutional problem.⁵³ Each circuit has since interpreted § 1226(c) to contain an implicit “limit on the amount of time that an individual can be detained without a bail hearing.”⁵⁴ However, the circuits remain divided as to what limit to apply.⁵⁵

Naturalization Service (INS) “charged respondent with being deportable from the United States in light of these convictions, and detained him pending his removal hearing.” *Id.* Respondent did not dispute the validity of his prior convictions. *Id.* Further, respondent did not dispute that he was “subject to mandatory detention under 8 U.S.C. § 1226(c).” *Id.* at 513–14. Rather, respondent challenged the constitutionality of § 1226(c) itself. *Id.* at 514. Respondent argued that “his detention under § 1226(c) violated due process because the INS had made no determination that he posed either a danger to society or a flight risk.” *Id.* In evaluating the constitutionality of § 1226(c), the Court explained that § 1226(c) “serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.” *Id.* at 528. The Court stated that “[s]ome studies presented to Congress suggested that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country.” *Id.* at 521. The Court went on to assert that “Congress may make rules as to aliens that would be unacceptable if applied to citizens.” *Id.* at 522. Finally, the Court noted the temporary nature of detentions under § 1226(c). *Id.* at 530. For these reasons, the Court concluded that “[d]etention during removal proceedings is a constitutionally permissible part of the process.” *Id.* at 531. Therefore, the Court upheld the constitutionality of § 1226(c).

50. *Id.* at 514. See *infra* Part IV.C for further analysis of *Demore*.

51. See U.S. CONST. amend. V (providing that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law” (emphasis added)).

52. See *infra* Part V for further discussion of the federal circuit split.

53. See *Reid v. Donelan*, 819 F.3d 486, 494 (1st Cir. 2016) (“And, each circuit has found it necessary to read an implicit reasonableness requirement into the statute itself, generally based on the doctrine of constitutional avoidance.”).

54. *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015).

55. See *id.* at 614 (“[W]hile all circuits agree that section 1226(c) includes

The Second⁵⁶ and Ninth⁵⁷ Circuits read a six-month limitation into the statute, at which point detention becomes presumptively unreasonable.⁵⁸ In contrast, the First,⁵⁹ Third,⁶⁰ and Sixth⁶¹ Circuits opt for individualized reviews to determine whether detention has become unreasonable.⁶²

This Note proceeds as follows: Part II lays out the background and intended purpose of § 1226(c).⁶³ Part III delves into the origin of Congress’s plenary power over immigration regulation.⁶⁴ Part IV discusses the evolution of Congress’s plenary power in the detention context.⁶⁵ Part V discusses the current circuit split regarding interpretation and application of § 1226(c).⁶⁶ Part VI posits that non-citizens within the United States receive the same due process rights as citizens.⁶⁷

some ‘reasonable’ limit on the amount of time that an individual can be detained without a bail hearing, courts remain divided on how to determine reasonableness.”).

56. See *id.* at 616 (“[W]e hold that, in order to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention.”).

57. See *Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013) (“Therefore, subclass members who have been detained under § 1226(c) for six months are entitled to a bond hearing . . .”).

58. See *infra* Part V.B for further analysis of the Second and Ninth Circuits’ interpretations of § 1226(c).

59. See *Reid*, 819 F.3d at 501 (“Our ruling today, *requiring an individualized approach*, removes that predicate.” (emphasis added)).

60. See *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232–33 (3d Cir. 2011) (“At a certain point, continued detention becomes unreasonable . . . This will necessarily be a fact-dependent inquiry that will vary depending on individual circumstances. We decline to establish a universal point at which detention always be considered unreasonable.”).

61. See *Ly v. Hansen*, 351 F.3d 263, 274 (6th Cir. 2003) (“We hold that the INS may detain *prima facie* removable criminal aliens, without bond, for a reasonable period of time . . . The reasonableness of the length of detention is subject to review by federal courts in habeas proceedings . . .”).

62. See *infra* Part V.A for further analysis of the First, Third, and Sixth Circuits’ interpretations of § 1226(c).

63. *Infra* Part II.

64. *Infra* Part III.

65. *Infra* Part IV.

66. *Infra* Part V.

67. *Infra* Part VI.

Accordingly, this Note argues that § 1226(c), as applied by the *Demore* Court and the federal circuit courts, fails to provide non-citizen detainees with adequate due process.

II. Examining 8 U.S.C. § 1226(c)

A. Background and Impact of § 1226(c)

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),⁶⁸ “which substantially altered many provisions of the Immigration and Nationality Act.”⁶⁹ Pursuant to the IIRIRA, Congress enacted 8 U.S.C. § 1226(c),⁷⁰ which requires detention of certain criminal

68. Pub. L. No. 104–208, 110 Stat. 3009–546 (1996).

69. Clay McCaslin, Comment, “*My Jailor is My Judge*”: *Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS*, 75 TUL. L. REV. 193, 196 (2000).

70. 8 U.S.C. § 1226(c) (2012)

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced [1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

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

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the

non-citizens⁷¹ during removal proceedings.⁷² Additionally, § 1226(c) does not provide arrestees with a bond hearing.⁷³ Further, “[t]he statutory provisions concerning removal and mandatory detention do not specify the period of time in which removal must be determined nor do they provide a specific limit to the period of time within which an alien placed in removal proceedings must be detained.”⁷⁴ Accordingly, § 1226(c) requires detention of non-citizens for the duration of removal proceedings, regardless of how long those proceedings take.⁷⁵

Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

71. See Deborah F. Buckman, *Validity, Construction, and Application of Mandatory Predeportation Detention Provision of Immigration and Nationality Act* (8 U.S.C.A. § 1226(c)) as Amended, 187 A.L.R. FED. 325 § 2[a] (2003)

[I]n addition to the “aggravated felon” category of offenses, the AEDPA expanded the application of the mandatory detention provision in 8 U.S.C.A. § 1226(c) to include also less dangerous offenses such as crimes of moral turpitude with a sentence of one year in prison, harboring of aliens, theft offenses with a term of imprisonment of one year or more, fraud, tax evasion, assisting document fraud in some cases, and perjury. The range of crimes, which are covered by 8 U.S.C.A. § 1226(c)’s mandatory detention provisions, is therefore very wide (§ 8).

72. See Anello, *supra* note 40, at 363 (“Since 1996, the Immigration and Nationality Act has required the government to take into custody individuals in removal proceedings who have past convictions for any of a wide range of criminal offenses.”); see also Medina, *supra* note 23, at 699–700 (“One of the most problematic changes was the statute at issue in *Demore v. Kim*, which again mandated detention of all permanent resident aliens placed in removal proceedings because of a criminal conviction or because they have engaged in terrorist activities.”).

73. See Travis Silva, Note, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL’Y REV. 227, 254 (2012) (“Section 1226(c) does not entitle the noncitizen to any process weighing the traditional bail factors, including his risk of flight and ties to the community.”).

74. Medina, *supra* note 23, at 700.

75. See *id.* (“Thus, the statute on its face required detention of permanent resident aliens without a hearing and eliminated the possibility of bail in the case of a person who did not pose a flight risk and was not a danger to the community.”).

B. Legislative History of § 1226(c)

A 1995 Senate Report⁷⁶ from the Committee of Governmental Affairs provides insight into the circumstances surrounding the passage of § 1226(c).⁷⁷ The Committee described the state of immigration law at the time of enactment in dire terms.⁷⁸

To the issue of deportation, the Committee asserted that “[d]espite previous efforts in Congress to require detention of criminal aliens while deportation hearings are pending, many who should be detained are released on bond.”⁷⁹ Consequently, the Committee stated that “[o]ver 20 percent of nondetained criminal aliens fail to appear for deportation proceedings.”⁸⁰ Further, the Committee noted that “[u]ndetained criminal aliens with deportation orders . . . receiv[e] a final notification from the INS that requires them to voluntarily report for removal.”⁸¹ Predictably, some non-citizens fail to voluntarily report for their own deportation.⁸² In an effort to remedy this issue, the Committee suggested that the Immigration and Naturalization

76. See *infra* Part IV.C for further discussion of the *Demore* Court’s use and analysis of the Senate Report.

77. See S. REP. NO. 104-48, at 1 (1995)

America’s immigration system is in disarray and criminal aliens (non-U.S. citizens residing in the U.S. who commit serious crimes for which they may be deportable) constitute a particularly vexing part of the problem Criminal aliens are a serious and growing threat to public safety that costs our criminal justice systems hundreds of millions of dollars annually.

For additional analysis of the legislative history and purpose of § 1226(c), see Gerard Savarisse, Note, *When Is When?: 8 U.S.C. § 1226(C) and the Requirements of Mandatory Detention*, 82 FORDHAM L. REV. 285, 299 (2013).

78. See S. REP. NO. 104-48, at 1 (“[T]he deportation system is in such disarray that no one, including the Commissioner of the Immigration and Naturalization Service, can even say with certainty how many criminal aliens are currently subject to the jurisdiction of our criminal justice system.”).

79. *Id.* at 2.

80. *Id.*

81. *Id.*

82. See *id.* at 24 (“This notice is often referred to by INS officials as the ‘run notice’ since, as one would expect, criminal aliens who have received written notices to report for deportation often fail to appear for their actual deportation.”).

Service (INS) should detain more non-citizens during removal proceedings.⁸³

III. Chinese Exclusion Cases and the Origin of the Plenary Power Doctrine

At the heart of this Note lies the underlying question of whether a statute authorizing mandatory, indeterminate detention without a bond hearing violates the due process rights of non-citizens.⁸⁴ In upholding the constitutionality of § 1226(c), the *Demore* Court partially relied on Congress's plenary power⁸⁵ to regulate immigration.⁸⁶ The Court first articulated the plenary power doctrine in the so-called Chinese Exclusion Cases.⁸⁷

A. Historical Backdrop to the Chinese Exclusion Cases

83. See *id.* at 4 (“Problems of undetained criminal aliens who fail to appear or who abscond after they are ordered deported would be lessened if the INS detained more criminal aliens.”).

84. See U.S. CONST. amend. V (providing that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law” (emphasis added)).

85. See Gabriel J. Chin, Chae Chan Ping and Fong Yue Ting: *The Origins of Plenary Power*, in IMMIGRATION STORIES 7, 7 (David A. Martin & Peter H. Schuck eds., 2005) (“Anxiety over Asian immigration . . . spawned a pair of late nineteenth century Supreme Court cases establishing the principle that Congress possesses plenary power to regulate discrimination The message from these cases . . . is that where the status of immigrants is concerned, almost anything goes.”).

86. See *Demore v. Kim*, 538 U.S. 510, 521 (2003) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.” (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976))). See *infra* Part IV.C for further discussion of the Court’s *Demore* decision.

87. See Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 14 (2003) (“The plenary power doctrine was first articulated in the immigration context in the Chinese exclusion cases.”); see also DAVID A. MARTIN & PETER H. SCHUCK, IMMIGRATION STORIES 2 (2005) (“*Chae Chan Ping v. United States* . . . and *Fong Yue Ting v. United States* . . . are regarded as the foundation stones for the plenary power doctrine.”).

In 1868, the United States and China entered into the Burlingame Treaty,⁸⁸ which recognized “the inherent and inalienable right of a man to change his home and allegiance.”⁸⁹ Under the Treaty, “[t]ravelers from one country to the other were entitled to ‘the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation.’”⁹⁰ Accordingly, the Treaty ushered in an era of Chinese immigration to the United States,⁹¹ particularly to partake in the so-called California gold rush.⁹²

However, there was a backlash on the West Coast to this influx of Chinese immigration,⁹³ for many of the same reasons some Americans denounce immigration today.⁹⁴ In response to the immense backlash, Congress passed the Chinese Exclusion

88. See Chin, *supra* note 85, at 8 (“This immigration was specifically authorized by the Burlingame Treaty, concluded between China and the United States in 1868.”).

89. Burlingame Treaty, U.S.-P.R.C., July 28, 1868, 16 Stat. 739; Chin, *supra* note 85, at 8.

90. Chin, *supra* note 85, at 8 (quoting 16 Stat. 739, 740 (July 28, 1868)).

91. See *id.* (“Between 1870 and 1880, 138,941 Chinese migrated to the United States . . .”).

92. See *id.* at 7–8 (“Chinese came to the country they called ‘Gold Mountain’ to participate in the California gold rush, and their numbers grew slowly.”).

93. See *id.* at 8 (“By the mid-1870s, however, California and other western states demanded restriction of Chinese immigration . . .”); see also *Chae Chan Ping v. United States*, 130 U.S. 581, 595–96 (1889) (discussing the factors that led to a demand for restriction of Chinese immigration).

94. Justice Field’s summary of the backlash to Chinese immigration in 1889 echoes many of the same assertions made in modern times. Justice Field spoke of contention regarding employment opportunities, a lack of assimilation, and a fear of the minority one day becoming the majority. See *Chae Chan Ping*, 130 U.S. at 594–95

[T]hey began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field . . . It seemed impossible for them to assimilate with our people . . . As they grew in numbers each year the people of the coast saw, or believed they saw . . . great danger that at no distant day that portion of our country would be overrun by them . . .

Act⁹⁵ in 1882, which “suspended immigration of Chinese laborers for ten years.”⁹⁶ In 1884, a subsequent Act mandated that any Chinese immigrants wishing to temporarily leave the United States must obtain certificates for re-entry.⁹⁷ However, as seen in *Chae Chan Ping v. United States*,⁹⁸ Congress later declared such certificates null and void.⁹⁹

B. *Chae Chan Ping v. United States*

Chae Chan Ping immigrated to the United States in 1875.¹⁰⁰ In 1887, Ping obtained a re-entry certificate and departed for a return visit to China.¹⁰¹ While Ping was abroad, Congress passed the Scott Act¹⁰² in response to continued backlash against Chinese immigration.¹⁰³ The Scott Act prohibited the entry or re-entry of *all* Chinese laborers, including those holding re-entry certificates.¹⁰⁴ In 1888, Ping returned to the United States,

95. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

96. Chin, *supra* note 85, at 8.

97. See Saito, *supra* note 87, at 15 (“In 1884 Congress required all Chinese residents who wanted to leave the United States temporarily to obtain certificates of re-entry.”).

98. 130 U.S. 581 (1889). See *infra* Part III.B for a discussion of the *Chae Chan Ping* decision.

99. See Chin, *supra* note 85, at 11 (“As for the return certificates, the statute provided that no more could be issued, and that ‘every certificate heretofore issued . . . is hereby declared void and of no effect, and the chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.’ (quoting Act of Oct. 1, 1888, ch. 1064 § 2, 25 Stat. 504)).

100. See *id.* (“Chae Chan Ping had come to the United States in 1875 . . .”).

101. See *id.* (stating that Ping lived in the United States “until June 2, 1887, when he returned for a visit to China after first having obtained a re-entry certificate”).

102. Scott Act, ch. 1064, § 1, 25 Stat. 504 (1888).

103. See Chin, *supra* note 85, at 11 (describing the factors that influenced Congress’s decision to pass the Scott Act).

104. See Saito, *supra* note 87, at 15 (“In 1888, a few days before his return, a new law went into effect precluding the entry of all Chinese workers, regardless of whether they held certificates.”); Chin, *supra* note 85, at 11 (“Perhaps 30,000 Chinese, residents of the United States but temporarily overseas, held re-entry certificates that were now void.”).

arriving via the steamship *Belgic* to a port in San Francisco.¹⁰⁵ At the port, Ping presented his certificate for re-entry into the United States.¹⁰⁶ The collector at the port, acting pursuant to the Scott Act, refused to accept Ping's certificate.¹⁰⁷ Subsequently, the captain of the *Belgic* detained Ping on board the ship because Ping's re-entry certificate "had been declared void while he was at sea."¹⁰⁸

On a writ of habeas corpus, the Circuit Court, Northern District of California heard Ping's petition for release from unlawful custody.¹⁰⁹ The Circuit Court ruled that Ping was not entitled to enter the United States and ordered that Ping remain in custody on board the ship.¹¹⁰ On appeal to the Supreme Court, Ping argued that the Scott Act violated his right to re-enter and work in the United States.¹¹¹ Ping asserted that the Burlingame Treaty and the statutes passed to execute it vested such rights to Chinese laborers.¹¹²

In evaluating Ping's claim, the Court recognized that the Scott Act violated the spirit of the Burlingame Treaty and the statutes passed to execute it.¹¹³ However, the Court stated that when a treaty and statute both fall within the purview of Congress, the last in time rule applies.¹¹⁴

105. See *Chae Chan Ping*, 130 U.S. at 582 ("On the 7th of September, 1888, the appellant, on his return to California, sailed from Hong Kong in the steam-ship *Belgic*, which arrived within the port of San Francisco on the 8th of October following.").

106. *Id.*

107. *Id.*

108. Chin, *supra* note 85, at 11.

109. *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889).

110. *Id.*

111. See *id.* at 589 ("The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of congress.").

112. *Id.*

113. See *id.* at 600 ("It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868, and of the supplemental treaty of 1880 . . .").

114. See *id.*

If the treaty operates by its own force, and relates to a subject within the power of congress, it can be deemed in that particular only the

More consequential for this discussion, the Court “characterized Ping’s certificate as a license . . . [which] may typically be revoked at any time.”¹¹⁵ Therefore, the Court classified those rights vested to immigrants under treaties and statutes as contractual in nature and subject to the will of Congress.¹¹⁶ In essence, the Court’s ruling granted Congress the ability to limit or revoke such rights at will.¹¹⁷

The Court’s *Chae Chan Ping* opinion laid the foundation for Congress’s plenary power over immigration regulation.¹¹⁸ Writing for the Court, Justice Field did not cite to any provisions in the Constitution granting Congress with such authority over immigration.¹¹⁹ Rather, Justice Field viewed Congress’s power over immigration as inherent to protect the sovereignty and security of the country.¹²⁰ Justice Field asserted that a foreign sovereign could invade the United States through a state-sanctioned invasion or through “vast hordes of its people crowding in upon us.”¹²¹ Consequently, Justice Field stated that

equivalent of a legislative act, to be repealed or modified at the pleasure of congress. In either case the last expression of the sovereign will must control.

115. Rose Cuison Villazor, *Chae Chan Ping v. United States: Immigration as Property*, 68 OKLA. L. REV. 137, 150 (2015).

116. *See Chae Chan Ping*, 130 U.S. at 600 (“A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment.”).

117. *See, e.g., id.* at 609 (“Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its [p]leasure.”); Silva, *supra* note 73, at 232 (“In other words, though the country may have entered into a binding commitment under international law, Congress’s decision to subsequently exclude the entry of Chinese immigrants was absolute and judicially unreviewable.”).

118. *See Chin, supra* note 85, at 13 (“The innovative ground of the Supreme Court’s decision, which had not been focused on in the circuit court, was the breadth of federal power over immigration.”).

119. *See id.* at 13–14 (“The Court recognized this authority not from any particular provision of the Constitution, but as inherent in sovereignty . . .”).

120. *See id.* at 14 (“The Court’s understanding of the scope of the power may have been influenced by the circumstances under which it was exercised. It regarded the exclusion of the Chinese as almost a war measure . . .”).

121. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

Congress possessed “sovereign powers delegated by the constitution”¹²² to counter either type of foreign encroachment.¹²³ Further, Justice Field concluded that Congressional actions that deter either type of encroachment would be “conclusive upon the judiciary.”¹²⁴ Accordingly, the Court affirmed the Circuit Court’s ruling against Ping.¹²⁵ Over one hundred years later, “*Chae Chan Ping* remains good law today and continues to support the federal government’s . . . power to regulate and enforce immigration law.”¹²⁶

C. Fong Yue Ting v. United States

On May 5, 1892, one day before the Chinese Exclusion Act was set to expire, President Harrison signed into law the Geary Act,¹²⁷ which was “[a]n act to prohibit the coming of Chinese persons into the United States.”¹²⁸ Among other provisions, the

122. *See id.* at 609 (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, cannot be granted away or restrained on behalf of any one.”).

123. *See id.* at 606

The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

124. *See id.* (“The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity . . . may arise when war does not exist In both cases its determination is conclusive upon the judiciary.”).

125. *Id.* at 611.

126. Villazor, *supra* note 115, at 138.

127. Geary Act, ch. 60, 27 Stat. 25 (1892).

128. *See Chin*, *supra* note 85, at 16 (“On May 5, 1892, one day before the original act would have lapsed, President Harrison signed into law the Geary Act, a new and yet sterner measure. The Act was entitled ‘An Act to prohibit the

Act provided that all Chinese laborers in the United States must obtain a certificate of residence within one year of the Act's passage.¹²⁹ Under the Act, any Chinese laborer "found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States."¹³⁰ Pursuant to the Act, Chinese laborers found without a certificate of residence were "brought to a U.S. judge, who would order deportation."¹³¹

In *Fong Yue Ting v. United States*,¹³² the Court granted three writs of habeas corpus "upon petitions of Chinese laborers arrested and held by the marshal of the district for not having certificates of residence."¹³³ The issue before the Court was whether Congress's "sovereign powers delegated by the constitution"¹³⁴ extended beyond "the exclusion of those first arriving to the deportation of permanent residents."¹³⁵ The Court ruled in the affirmative,¹³⁶ further solidifying Congress's plenary power to regulate immigration.¹³⁷

coming of Chinese persons into the United States' . . .").

129. See Geary Act § 6 ("And it shall be the duty of all Chinese laborers within the limits of the United States . . . to apply to the collector of internal revenue of their respective districts, within no year after the passage of this act, for a certificate of residence . . .").

130. Chin, *supra* note 85, at 17 (quoting Geary Act § 6).

131. *Id.*

132. 149 U.S. 698 (1893).

133. *Id.* at 699.

134. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

135. Saito, *supra* note 87, at 16.

136. See *Fong Yue Ting*, 149 U.S. at 707 ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

137. See *id.* at 731

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject.

However, unlike the unanimous *Chae Chan Ping* decision,¹³⁸ the *Fong Yue Ting* majority faced substantial opposition.¹³⁹ Most notable was Justice Field's dissent, considering he wrote the majority opinion in *Chae Chan Ping*.¹⁴⁰ In his dissenting opinion, Justice Field observed a fundamental distinction between the rights of non-citizens first arriving to the United States and non-citizens already in the country.¹⁴¹ Justice Field believed that non-citizens within the United States should receive the same constitutional rights and protections as citizens.¹⁴² Accordingly, Justice Field objected to the Majority extending his *Chae Chan Ping* decision to limit the rights of non-citizens residing in the United States.¹⁴³

138. See *supra* Part III.B (discussing the Supreme Court's decision in *Chae Chan Ping*).

139. See Chin, *supra* note 85, at 19 ("Unlike *Chae Chan Ping*, there was substantial opposition to the majority's view.>").

140. See *supra* notes 118–126 and accompanying text (discussing Justice Field's majority opinion in *Chae Chan Ping*).

141. See *Fong Yue Ting v. United States*, 149 U.S. 698, 746 (1893) (Field, J., dissenting) ("[B]etween legislation for the exclusion of Chinese persons, that is, to prevent them from entering the country, and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, there is a wide and essential difference.>").

142. See *id.* at 754

Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens. The moment any human being from a country at peace with us comes within the jurisdiction of the United States . . . he becomes subject to all their laws, is amenable to their punishment, and entitled to their protection To hold that they are subject to any different law, or are less protected in any particular, than other persons, is, in my judgment, to ignore the teachings of our history, the practice of our government, and the language of our constitution.

143. See *id.* 149 U.S. at 760

The decision of the court, and the sanction it would give to legislation depriving resident aliens of the guaranties of the constitution, fill me with apprehensions. Those guaranties are of priceless value to every one resident in the country, whether citizen or alien. I cannot but regard the decision as a blow against constitutional liberty, when it declares that congress has the right to disregard the guaranties of the constitution intended for the protection of all men domiciled in the country with the consent of the government, in their rights of person and property.

*IV. Evolution of Congress's Plenary Power in the
Detention Context*

The Supreme Court continued to uphold Congress's plenary power throughout the twentieth century. However, the Court began to draw a distinction between the due process rights of non-citizens first arriving to the United States and those already in the country.¹⁴⁴ The following cases track the evolution of Congress's plenary power as applied to the detention of non-citizens.

A. *Shaughnessy v. United States ex rel. Mezei*

Ignatz Mezei lived in the United States from 1923 to 1948.¹⁴⁵ In May of 1948, Mezei "sailed to Europe, apparently to visit his dying mother in Rumania."¹⁴⁶ Mezei attempted to return to the United States in February of 1950.¹⁴⁷ However, upon arrival in New York, Mezei found himself temporarily excluded from the United States pursuant to the Passport Act.¹⁴⁸ Immigration authorities directed Mezei to Ellis Island to await further disposition of his case.¹⁴⁹ The Attorney General, acting pursuant to the Passport Act, ordered Mezei's "temporary exclusion to be

144. See *infra* note 329 and accompanying text (providing extensive Supreme Court precedent delineating the due process rights of non-citizens).

145. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208 (1953).

146. *Id.*

147. *Id.*

148. See *id.* ("Upon arrival on February 9, 1950, he was temporarily excluded from the United States by an immigration inspector acting pursuant to the Passport Act as amended and regulations thereunder."); see also *id.* at 210–11

Under [the Passport Act], the Attorney General, acting for the President, may shut out aliens whose 'entry would be prejudicial to the interest of the United States'. And he may exclude without a hearing when the exclusion is based on confidential information the disclosure of which may be prejudicial to the public interest. (quoting Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, s 1, 55 Stat. 252, 22 U.S.C. s 223, 22 U.S.C.A. s 223).

149. See *id.* at 208 ("Pending disposition of his case he was received at Ellis Island.").

made *permanent without a hearing* before a board of special inquiry, on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.”¹⁵⁰

In 1951, the United States District Court for the Southern District of New York sustained Mezei’s writ of habeas corpus and reviewed the Attorney General’s order.¹⁵¹ At this time, Mezei had been detained without a hearing for twenty-one months.¹⁵² The District Judge requested that the Government provide evidence of the threat to public safety justifying Mezei’s continued detention.¹⁵³ When the Government refused to provide such information, the District Judge ruled for Mezei’s “conditional parole on bond.”¹⁵⁴ The Court of Appeals for the Second Circuit affirmed the District Judge’s ruling.¹⁵⁵ In 1953, the Supreme Court granted certiorari and considered whether “the Attorney General’s continued exclusion of respondent without a hearing amounts to an unlawful detention.”¹⁵⁶

In examining Mezei’s predicament, the Supreme Court saw the issue as one of exclusion rather than detention.¹⁵⁷ In its opinion, the Court referenced *Chae Chan Ping*¹⁵⁸ and Congress’s non-justiciable plenary power to *exclude* non-citizens from entering the United States.¹⁵⁹ Accordingly, the Court upheld the

150. *Id.* (emphasis added).

151. *Id.* at 209.

152. *Id.*

153. *See id.* (“The District Judge, vexed by the problem of ‘an alien who has no place to go’, did not question the validity of the exclusion order but deemed further ‘detention’ after 21 months excessive and justifiable only by affirmative proof of respondent’s danger to the public safety.”).

154. *Id.*

155. *Id.*

156. *Id.* at 207.

157. *See, e.g., id.* (“This case concerns an alien immigrant permanently *excluded* from the United States . . .”); *id.* at 213 (“Neither respondent’s harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding.”); Christopher R. Yukins, *The Measure of a Nation: Granting Excludable Aliens Fundamental Protections of Due Process*, 73 VA. L. REV. 1501, 1528 (1987) (“The Supreme Court, unlike the lower courts, focused its inquiry in *Mezei* on exclusion, rather than detention.”).

158. *See supra* Part III.B for a discussion of *Chae Chan Ping v. United States*.

159. *See* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210

Passport Act as valid Congressional action in furtherance of its plenary power over immigration.¹⁶⁰

However, in a stark departure from the Chinese Exclusion Cases,¹⁶¹ the Court stated that “a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process.”¹⁶² Therefore, according to the Court, continued exclusion of a “lawful resident alien” without a hearing would violate that individual’s due process rights. Accordingly, the Court sought to determine whether Mezei’s two-year harborage at Ellis Island or his residency in the United States prior to departing rendered him a “lawful resident alien.”¹⁶³

First, the Court determined that, despite Mezei’s prior residency in the United States, he would not be treated differently than any other non-citizen attempting to enter the United States.¹⁶⁴ Regarding Mezei’s continued exclusion at Ellis Island, the Court asserted that “such temporary harborage, an act of legislative grace, bestows no additional rights.”¹⁶⁵

(1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); *see also id.* at 212 (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950))).

160. *See id.* at 210 (“In the exercise of these powers, Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife. That authorization, originally enacted in the Passport Act of 1918, continues in effect during the present emergency.”).

161. *See supra* Part III for a discussion of the Chinese Exclusion Cases.

162. *Mezei*, 345 U.S. at 213.

163. *Id.* at 213–15.

164. *See id.* at 213 (“For purposes of the immigration laws, moreover, the legal incidents of an alien’s entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws.”); *see also id.* at 214

[R]espondent, apparently without authorization or reentry papers, simply left the United States and remained behind the Iron Curtain for 19 months. Moreover . . . [§] 307 of the 1940 Nationality Act . . . deems protracted absence such as respondent’s a clear break in an alien’s continuous residence here. In such circumstances, we have no difficulty in holding respondent an entrant alien . . .

165. *Id.* at 215; *see also id.* (“Congress meticulously specified that such shelter ashore ‘shall not be considered a landing’ And this Court has long

Therefore, the Court concluded that neither Mezei's two-year "harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding."¹⁶⁶

After determining Mezei's non-resident status, the Court reversed the Second Circuit and denied Mezei's release from Ellis Island on bond.¹⁶⁷ Additionally, as a non-resident, the Court found that Mezei's continued exclusion at Ellis Island did not deprive him of any statutory or constitutional right.¹⁶⁸

Despite *Shaughnessy v. United States ex rel. Mezei*'s¹⁶⁹ continued observance of Congress's plenary power over immigration,¹⁷⁰ the opinion denotes a shift in the Court's attitude toward the rights of non-citizens in the United States. Straying from the *Fong Yue Ting* majority opinion,¹⁷¹ the *Mezei* Court instead applied Justice Field's distinction between the rights of non-citizens arriving to the United States and those already in the country.¹⁷² The *Mezei* Court recognized Congress's plenary power toward "alien[s] on the threshold of initial entry" into the United States.¹⁷³ However, the Court also stated that non-citizens residing in the United States should receive due process

considered such temporary arrangements as not affecting an alien's status; he is treated as if stopped at the border.").

166. *Id.* at 213.

167. *Id.* at 216.

168. *See id.* at 215 ("Thus we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right.").

169. 345 U.S. 206 (1953).

170. *See id.* at 210 ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

171. *See Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

172. *See supra* notes 140–143 and accompanying text for further discussion of Justice Field's *Fong Yue Ting* dissent.

173. *See Mezei*, 345 U.S. at 212 ("But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" (quoting *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950))).

protections.¹⁷⁴ Therefore, under *Mezei*, Congress's plenary power no longer trumps the due process rights of "lawful resident aliens" in the United States.

B. *Zadvydas v. Davis*

In *Zadvydas v. Davis*,¹⁷⁵ the Court considered two separate instances of continued detention¹⁷⁶ pursuant to 8 U.S.C. § 1231.¹⁷⁷ The Court consolidated the two cases and decided them together.¹⁷⁸

First, the Court discussed the case of Kestutis Zadvydas, a German citizen who had lived in the United States since immigrating with his parents when he was eight years old.¹⁷⁹ After a series of arrests, the INS took Zadvydas into custody and ordered him deported to Germany.¹⁸⁰ However, Germany refused to accept Zadvydas, which left him in custody indefinitely while the INS considered alternative options.¹⁸¹

The second case the Court examined was that of Kim Ho Ma.¹⁸² Similar to Zadvydas, Ma was born overseas but lived in

174. *See id.* ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *id.* at 213 ("To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process.").

175. 533 U.S. 678 (2001).

176. *See id.* at 686 ("Zadvydas asked us to review the decision of the Fifth Circuit authorizing his continued detention. The Government asked us to review the decision of the Ninth Circuit forbidding Ma's continued detention. We granted writs in both cases, agreeing to consider both statutory and related constitutional questions.").

177. 8 U.S.C. § 1231 (2012).

178. *See Zadvydas*, 533 U.S. at 686 ("We consolidated the two cases for argument; and we now decide them together.").

179. *Id.* at 684.

180. *See id.* ("Most recently, he was convicted of possessing, with intent to distribute, cocaine; sentenced to 16 years' imprisonment; released on parole after two years; taken into INS custody; and, in 1994, ordered deported to Germany.").

181. *Id.*

182. *Id.* at 685.

the United States since he was seven years old.¹⁸³ After serving two years for a manslaughter conviction, the INS took Ma into custody and ordered him deported.¹⁸⁴ Ma's detention also continued indefinitely while the INS worked to finalize his deportation.¹⁸⁵

Section 1231(a)(1)(A) states that "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days . . ." ¹⁸⁶ Additionally, § 1231(a)(2) requires that the Government detain non-citizens ordered deported during this ninety-day period.¹⁸⁷ Further, § 1231(a)(6) allows the Government to detain non-citizens ordered deported beyond the ninety-day removal period¹⁸⁸ in certain circumstances.¹⁸⁹ At issue in *Zadvydas* was whether § 1231(a)(6) authorized indefinite detention of non-citizens following a deportation order.¹⁹⁰ The Government asserted that

183. *Id.*

184. *See id.* ("In 1995, at age 17, Ma was involved in a gang-related shooting, convicted of manslaughter, and sentenced to 38 months' imprisonment. He served two years, after which he was released into INS custody. In light of his conviction of an 'aggravated felony,' Ma was ordered removed.")

185. *Id.* at 685–86.

186. 8 U.S.C. § 1231(a)(1)(A) (2012).

187. *See id.* § 1231(a)(2) ("During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.")

188. *See id.* § 1231(a)(6) ("An alien ordered removed . . . may be detained beyond the removal period . . .").

189. *See id.*

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period . . .

190. *See Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) ("In these cases, we must decide whether this post-removal-period statute authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal.")

the statute's plain language provided the Attorney General with such authority.¹⁹¹

Two key developments arose in *Zadvydas*. First, in response to the Government's claim that under *Mezei*, "alien status itself can justify indefinite detention,"¹⁹² the Court distinguished *Zadvydas* from *Mezei*¹⁹³ on the ground that *Mezei*, unlike *Zadvydas*, involved a non-resident "'treated,' for constitutional purposes, 'as if stopped at the border.'"¹⁹⁴ Importantly, the Court then stated that "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."¹⁹⁵ Accordingly, the Court further bolstered the distinction between non-citizens arriving to the United States and non-citizens already residing in the country.¹⁹⁶

191. *See id.* at 689

The Government argues that the statute means what it literally says. It sets no "limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained." Hence, "whether to continue to detain such an alien and, if so, in what circumstances and for how long" is up to the Attorney General, not up to the courts. (quoting Brief for Petitioners in No. 00-38, p. 22).

192. *Id.* at 692.

193. *See supra* Part IV.A (discussing the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei*).

194. *Zadvydas*, 533 U.S. at 693 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953)). *See also* Medina, *supra* note 23, at 708 ("Instead of overruling the case, the *Zadvydas* Court distinguished *Mezei* on the grounds that it involved an alien who had not entered the United States."); Susan Marx, Comment, *Throwing Away the Key: The Constitutionality of the Indefinite Detention of Inadmissible Aliens*, 35 TEX. TECH L. REV. 1259, 1273 (2004)

While *Mezei* was an alien who had not yet entered the United States and was therefore not sheltered by Constitutional protections, *Zadvydas* and *Ma* were within the confines of the country and were therefore entitled to Due Process. The Court determined that these facts were too different to be treated equally and thus that the *Mezei* decision did not control *Zadvydas*.

195. *Zadvydas*, 533 U.S. at 693.

196. *See id.* ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law It is well established that certain constitutional

The second major development in *Zadvydas* was the Court's position on Congress's plenary power to regulate immigration.¹⁹⁷ The Government argued that the statute at issue regulated immigration-related matters, and because of Congress's plenary power in this field, the judiciary should "defer to Executive and Legislative Branch decisionmaking in that area."¹⁹⁸ In response, the Court stressed that Congress's plenary power "is subject to important constitutional limitations."¹⁹⁹

Ultimately, the Court asserted that a statute permitting indefinite detention of resident non-citizens would raise a constitutional problem.²⁰⁰ Accordingly, it appeared that the Court, in contrast to the prior cases discussed,²⁰¹ was poised to strike down the relevant statute as unconstitutional. However, the Court instead applied the constitutional avoidance doctrine to sidestep addressing the statute's constitutionality.²⁰²

Under the constitutional avoidance doctrine, "when an Act of Congress raises 'a serious doubt' as to its constitutionality, [the]

protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

197. See Whitney Chelgren, *Preventive Detention Distorted: Why it is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1515 (2011) ("The *Zadvydas* decision is significant because it places parameters on the government's plenary power.").

198. See *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) ("The Government also looks for support to cases holding that Congress has 'plenary power' to create immigration law, and that the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area.").

199. *Id.*

200. See *id.* at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem . . . 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."); see also *id.* at 692 ("The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.").

201. See generally *supra* Parts III.B–C, IV.A.

202. See *Zadvydas*, 533 U.S. at 699 ("Consequently, interpreting the statute to avoid a serious constitutional threat . . ."). For a discussion on the constitutional avoidance doctrine generally and its application in *Zadvydas*, see generally Sanford G. Hooper, Note, *Judicial Minimalism and the National Dialogue on Immigration: The Constitutional Avoidance Doctrine in Zadvydas v. Davis*, 59 WASH. & LEE L. REV. 975 (2002).

‘Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’²⁰³ Accordingly, the *Zadvydas* Court interpreted the relevant statute to limit detention “to a period reasonably necessary” to secure deportation.²⁰⁴ As to what constitutes a reasonable amount of time, the Court determined that the statute limits detention to six months.²⁰⁵ Therefore, after six months in detention, “once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.”²⁰⁶

C. Demore v. Kim

Hyung Joon Kim, a South Korean citizen, moved to California with his parents in 1984 when he was six years old.²⁰⁷

203. *Zadvydas*, 533 U.S. at 689 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

204. *See id.* (“[W]e read an implicit limitation into the statute before us. In our view, the statute, read in light of the Constitution’s demands, limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.”).

205. *See id.* at 701

We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. . . . Consequently, for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior postremoval confinement grows, what counts as the “reasonably foreseeable future” conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.

206. *Id.*

207. *Demore v. Kim*, 538 U.S. 510, 513 (2003); Taylor, *supra* note 41, at 343.

Two years later, Kim became a lawful permanent resident of the United States.²⁰⁸

In 1996, when Kim was eighteen years old, he was arrested and convicted of first-degree burglary.²⁰⁹ In 1997, Kim was caught and subsequently convicted for shoplifting.²¹⁰ Kim pleaded guilty to petty theft with priors, a felony in California.²¹¹ Subsequently, the INS charged Kim with “being deportable from the United States in light of these convictions, and detained him pending his removal hearing.”²¹² Kim did not dispute the validity of his prior convictions.²¹³ Nor did Kim dispute that he was subject to mandatory detention under § 1226(c).²¹⁴ Rather, Kim filed a habeas corpus petition challenging the statute’s constitutionality.²¹⁵ Kim argued that “a system of mandatory detention without any individualized ‘determination that he posed either a danger to society or a flight risk’ violated the Due Process Clause.”²¹⁶

The *Demore* Court ultimately upheld the constitutionality of § 1226(c). The *Demore* outcome surprised many observers because of the Court’s decision just two years prior in *Zadvydas*.²¹⁷ To

208. *Demore*, 538 U.S. at 513.

209. *Id.*

210. Taylor, *supra* note 41, at 359.

211. *See id.* (“The prosecutor charged the offense as a ‘petty theft with priors,’ punishable under state law as a felony, and Kim pleaded guilty to this charge.”).

212. *Demore*, 538 U.S. at 513; *see also* Taylor, *supra* note 41, at 344 (“He was charged with being deportable under a vastly expanded definition of ‘aggravated felony’ in the newly amended immigration statute.”).

213. *Demore*, 538 U.S. at 513.

214. *Id.* at 513–14.

215. *Id.* at 514.

216. Silva, *supra* note 73, at 241–42 (quoting *Demore v. Kim*, 538 U.S. 510, 514 (2003)).

217. *See, e.g.*, Taylor, *supra* note 41, at 364 (“By explicitly applying *Salerno* and its progeny to lawful permanent residents detained by the INS, *Zadvydas* seemed to neutralize plenary power arguments and bolster the claim that a blanket mandate to detain non-citizen offenders without bond was unconstitutional.”); Silva, *supra* note 73, at 241 (“Any concern that the Court was drastically pruning the plenary power doctrine was extinguished, however, two years later in *Demore v. Kim*.”); *see also supra* Part IV.B (discussing the Supreme Court’s decision in *Zadvydas*).

remedy this apparent contradiction, the Court sought to distinguish § 1226(c) from § 1231, the statute at issue in *Zadvydas*.²¹⁸

The Court distinguished § 1226(c) from § 1231 in two respects. First, the Court compared the purposes of the two statutes.²¹⁹ The Court noted that in *Zadvydas*, the statute governed “detention following a final order of removal.”²²⁰ The Court then explained that because deportation of the petitioners in *Zadvydas* was “no longer practicably attainable,”²²¹ continued detention no longer served the intended statutory purpose.²²² In contrast, the Court asserted that in *Demore*, “the statutory provision at issue governs detention of deportable criminal aliens *pending their removal proceedings*.”²²³ Accordingly, the Court found that as long as removal proceedings were ongoing, such detention continued to serve the intended statutory purpose.²²⁴

Next, the Court compared the length of detention under the two statutes.²²⁵ The Court found that under § 1231, detention “was ‘indefinite’ and ‘potentially permanent.’”²²⁶ In contrast, the Court stated that § 1226(c) posed no such problem because it

218. See Taylor, *supra* note 41, at 365 (“[T]he *Demore* Court simply distinguished *Zadvydas* on its facts, focusing on purported differences in the purpose and length of detention in the pre-hearing and post-order contexts.”).

219. See *Demore v. Kim*, 538 U.S. 510, 527–28 (2003) (comparing the purposes of §§ 1226(c) and 1231).

220. *Id.* at 527.

221. *Id.* (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

222. See *id.* (“First, in *Zadvydas*, the aliens challenging their detention following final orders of deportation were ones for whom removal was ‘no longer practicably attainable.’ The Court thus held that the detention there did not serve its purported immigration purpose.” (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001))).

223. *Id.* at 527–28.

224. See *id.* at 528 (“Such detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.”).

225. See *id.* (“While the period of detention at issue in *Zadvydas* was ‘indefinite’ and ‘potentially permanent,’ the detention here is of a much shorter duration.” (citing *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001))).

226. See *id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001)).

contained “a definite termination point”²²⁷ and “in the majority of cases it lasts for less than the 90 days . . . considered presumptively valid in *Zadvydas*.”²²⁸ Therefore, the Court partially relied on the temporal, finite nature of detention under § 1226(c) to distinguish it from the statute at issue in *Zadvydas*.²²⁹

Regarding the length of detention under § 1226(c), it has recently come to light that the *Demore* Court relied on erroneous data from the Department of Justice.²³⁰ Newly discovered information obtained through Freedom of Information Act requests show that the Department of Justice “greatly understated the time certain aliens with criminal records spend in no-bail detention.”²³¹ The *Demore* Court found that “in the majority of cases [detention] lasts for less than the 90 days . . . considered presumptively valid in *Zadvydas*.”²³² However, the recently released data shows that “the average detention period was 382 days, [with a] median of 272 days.”²³³ Regarding the *Demore* Court’s use of erroneous data, Solicitor General Ian Gershengorn stated that “[t]he conclusion the court drew is understandable, but it is incorrect.”²³⁴

In addition to the controversy surrounding the faulty data relied on in *Demore*, an unspoken, external factor may have influenced the Court’s surprising effort to distance itself from

227. *Id.* at 529.

228. *Id.*

229. *See id.* at 528 (“*Zadvydas* is materially different from the present case in a second respect as well. While the period of detention at issue in *Zadvydas* was ‘indefinite’ and ‘potentially permanent,’ the detention here is of a much shorter duration.” (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001))).

230. *See* Jess Bravin, *Justice Department Gave Supreme Court Incorrect Data in Immigration Case*, WALL ST. J., <http://www.wsj.com/articles/justice-department-gave-supreme-court-incorrect-data-in-immigration-case-1472569756> (last updated Aug. 30, 2016, 3:48 PM) (last visited Sept. 2, 2017) (“The Justice Department said it provided the Supreme Court with erroneous information that helped it win a 2003 case upholding a blanket policy of denying bail to thousands of immigrants imprisoned while appealing deportation orders.”) (on file with the Washington and Lee Law Review).

231. *Id.*

232. *Demore v. Kim*, 538 U.S. 510, 529 (2003).

233. Bravin, *supra* note 230.

234. *Id.*

Zadvydas.²³⁵ Scholars posit that the terrorist attacks on September 11, 2001 likely played a role in the Court's decision.²³⁶ In the aftermath of the attacks, "the George W. Bush administration profiled and preventatively detained large numbers of Muslim, Middle Eastern, and South Asian men, often by initiating removal proceedings against them."²³⁷ Although Kim was not charged with any terrorism-related offenses, the Court likely recognized that its ruling could interfere with the "[Bush] administration's ability to detain people without hearings for national security purposes."²³⁸ Therefore, the Court may have strayed from *Zadvydas* in a deliberate attempt to avoid disrupting the Government's response to the 9/11 attacks.²³⁹

Regardless of the Court's motive, in a 5–4 decision the *Demore* Court upheld the constitutionality of § 1226(c) and its mandatory detention regime.²⁴⁰ In doing so, the Court carved

235. See Taylor, *supra* note 41, at 365 ("But this result was not completely unexpected, for a reason never mentioned within the four corners of the *Demore* decision.").

236. See Anello, *supra* note 40, at 376 ("The *Demore* majority's approach differed in significant ways from *Zadvydas* and its predecessors. The shift in doctrine reflected the political aftermath of the September 11, 2001 terrorist attacks."); Taylor, *supra* note 41, at 345 ("It is the historical context of *Demore v. Kim*, rather than Court's analysis of precedent, that explains the outcome.").

237. Anello, *supra* note 40, at 376; see also *id.* ("[T]he Court's emphasis on Congress's public safety concerns, along with the Bush administration's use of immigration detention for investigatory or preventative purposes indicates a concern for preserving the administration's ability to detain people without hearings for national security purposes."); Taylor, *supra* note 41, at 365 ("It was decided against the backdrop of the detention of hundreds of Arab and Muslim non-citizens in connection with the 9/11 terrorism investigation, who were taken into INS custody and held without bond until they were cleared by the FBI.").

238. Anello, *supra* note 40, at 376; see also Taylor, *supra* note 41, at 365 ("[B]oth sides knew that the case could affect the government's claimed authority to detain without bond any non-citizens deemed 'of interest' to the terrorism investigation.").

239. See Taylor, *supra* note 41, at 365 ("[W]hile the Court studiously avoided commenting on the social and political context of the case, surely the justices saw the connection as well.").

240. See *Demore v. Kim*, 538 U.S. 510, 513 (2003) ("We hold that Congress . . . may require that persons such as respondent be detained for the brief period necessary for their removal proceedings."); *id.* at 531 ("For the reasons set forth above, respondent's claim must fail. Detention during removal proceedings is a constitutionally permissible part of that process.").

back at the limitations the *Zadvydas* Court placed on Congress's plenary power over immigration.²⁴¹

Additionally, the *Demore* Court declined to follow the discussed precedent²⁴² bifurcating the due process rights of non-citizens first arriving to the United States from those already in the United States.²⁴³ Rather, the Court stated that "Congress may make rules as to *aliens* that would be unacceptable if applied to citizens."²⁴⁴ The Court failed to distinguish between "aliens" arriving to the United States and "aliens" already residing in the country.²⁴⁵ Accordingly, the Court implied that non-citizens, even lawful permanent residents such as Kim, do not possess the same due process rights as citizens.²⁴⁶

241. See Taylor, *supra* note 41, at 363 ("But *Demore v. Kim* might nevertheless be called a surprising decision, because just two years earlier it had seemed that the Supreme Court was backing away from a strong version of plenary power deference identified with the Cold War era."); see also *id.* at 362–63 ("Rather than apply careful due process scrutiny to the statute, the Court instead invoked a 'fundamental premise of immigration law'—deference to the political branches' plenary power to control immigration.").

242. See Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L.J. 243, 290–91 (2013) ("It is difficult to see the basis for the *Demore* decision in specific constitutional precedent. In fact, the decision diverges significantly from the Supreme Court's decision just two years earlier in *Zadvydas*.").

243. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *id.* at 213 ("To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process."). For further discussion of *Mezei* and *Zadvydas*, see *supra* Parts IV.A–B.

244. *Demore*, 538 U.S. at 522 (emphasis added).

245. See Medina, *supra* note 23, at 698 ("*Demore* treats permanent resident aliens as if they are indistinguishable from unauthorized resident aliens or aliens who are inadmissible to the United States.").

246. See *id.* at 697 ("The Court holds that aliens are entitled to a less heightened standard of scrutiny under the Due Process Clause than citizens, even when the governmental action being challenged involves a fundamental human right—the right to physical liberty.").

As previously mentioned, the Court's decision was stunning to many, particularly in light of the *Zadvydas* decision only two years prior.²⁴⁷ The decision spawned the current circuit split and is critically important because it declared the constitutionality of mandatory, indeterminate detention without bail for non-citizen residents of the United States.²⁴⁸

V. Analyzing the Federal Circuit Split

Over the past decade, lower courts have struggled to reconcile *Demore* and *Zadvydas* in the context of § 1226(c) detention.²⁴⁹ However, each circuit to weigh in on § 1226(c) has ultimately followed *Zadvydas* in two respects.²⁵⁰ First, the circuits unanimously declined to endorse indeterminate mandatory detention.²⁵¹ Second, attempting to avoid addressing

247. See Taylor, *supra* note 41, at 363 (“But *Demore v. Kim* might nevertheless be called a surprising decision, because just two years earlier it had seemed that the Supreme Court was backing away from a strong version of plenary power deference identified with the Cold War era.”); Anello, *supra* note 40, at 363 (“Such a sweeping, categorical detention is not easily reconciled with the Supreme Court’s 2001 decision in *Zadvydas v. Davis*, which extended to immigration detention the due process limits that the Court has recognized on other forms of civil detention.”).

248. See *Demore v. Kim*, 538 U.S. 510, 531 (2003) (“Detention during removal proceedings is a constitutionally permissible part of that process.”).

249. See, e.g., Michelle Firmacion, Note, *Protecting Immigrants From Prolonged Pre-Removal Detention: When “It Depends” is no Longer Reasonable*, 42 HASTINGS CONST. L.Q. 601, 608 (2015) (“Lower courts have struggled to reconcile *Zadvydas* and *Demore* in the context of pre-removal detention.”); Anello, *supra* note 40, at 363 (“Throughout the past decade, lower courts have sought to reconcile *Demore* with *Zadvydas*.”).

250. See, e.g., Anello, *supra* note 40, at 383 (“Since *Demore*, lower courts have endeavored to implement the Supreme Court’s holding in a way that is most consistent with the due process principles recognized in *Zadvydas* and its predecessors.”); Taylor, *supra* note 41, at 366 (“Already the lower courts, when asked to reconcile *Demore* with the rest of due process jurisprudence, have read *Demore* narrowly while more readily embracing the *Zadvydas* approach.”).

251. See, e.g., *Rodriguez v. Robbins*, 715 F.3d 1127, 1137 (9th Cir. 2013) (“[W]hile mandatory detention under § 1226(c) is not constitutionally impermissible *per se*, the statute cannot be read to authorize mandatory detention of criminal aliens with no limit on the duration of imprisonment.”); *Ly v. Hansen*, 351 F.3d 263, 269 (6th Cir. 2003) (“*Zadvydas* established that deportable aliens, even those who had already been ordered removed, possess a

the statute's constitutionality, each circuit chose to read an implicit time limitation into § 1226(c).²⁵²

However, despite the circuits' unanimous agreement that "section 1226(c) includes some 'reasonable' limit on the amount of time that an individual can be detained without a bail hearing, courts remain divided on how to determine reasonableness."²⁵³ This division among the circuits over "how to determine reasonableness"²⁵⁴ marks the essence of the current split.

A. Individualized Reviews of Reasonableness

In evaluating "the amount of time that an individual can be detained without a bail hearing,"²⁵⁵ the First, Third and Sixth Circuits call for individualized reviews to determine whether detention under § 1226(c) has become unreasonable.²⁵⁶ Under this

substantive Fifth Amendment liberty interest, and that interest was violated by indefinite detention.").

252. See *Reid v. Donelan*, 819 F.3d 486, 494 (1st Cir. 2016) ("And, each circuit has found it necessary to read an implicit reasonableness requirement into the statute itself, generally based on the doctrine of constitutional avoidance."); see also *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015) ("[W]e hold that, in order to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention."); *Rodriguez*, 715 F.3d at 1138 ("Consistent with our previous decisions, we conclude that, to avoid constitutional concerns, § 1226(c)'s mandatory language must be construed 'to contain an implicit "reasonable time" limitation, the application of which is subject to federal-court review.'" (quoting *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001))); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011)

"[I]t is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality . . . [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Applying this principle to 1226(c) we conclude that the statute implicitly authorizes detention for a reasonable amount of time . . . (quoting *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)).

253. *Lora*, 804 F.3d at 614.

254. *Id.*

255. *Id.*

256. See, e.g., *Reid*, 819 F.3d at 501 ("Our ruling today, requiring an individualized approach, removes that predicate."); *Diop*, 656 F.3d at 232–33 ("At a certain point, continued detention becomes unreasonable . . . This will

rule, “every detainee must file a habeas petition challenging detention, and the district courts must then adjudicate the petition to determine whether the individual’s detention has crossed the ‘reasonableness’ threshold, thus entitling him to a bail hearing.”²⁵⁷

In *Ly v. Hansen*,²⁵⁸ the district director of the INS appealed a district court ruling granting habeas corpus to Hoang Minh Ly,²⁵⁹ a lawful permanent resident as of 1987.²⁶⁰ The INS took Ly into custody on May 11, 1999, and kept him in detention for 500 days before a district court ordered his release.²⁶¹

Upon analyzing the legal landscape relating to § 1226(c), the Sixth Circuit declined to follow the *Demore* Court’s ruling that § 1226(c) “was not unconstitutional in requiring the detention of deportable aliens pending their deportation.”²⁶² The Sixth Circuit distinguished *Ly* from *Demore* on the ground that, in *Demore*, “Kim was a deportable alien for whom deportation, to South Korea, was a real possibility.”²⁶³ In contrast, the Sixth Circuit found that Ly’s deportation was never a real possibility.²⁶⁴

necessarily be a fact-dependent inquiry that will vary depending on individual circumstances. We decline to establish a universal point at which detention always be considered unreasonable.”); *Ly*, 351 F.3d at 273 (“We hold that the INS may detain prima facie removable criminal aliens, without bond, for a reasonable period of time The reasonableness of the length of detention is subject to review by federal courts in habeas proceedings . . .”).

257. *Reid*, 819 F.3d at 495 (quoting *Lora*, 804 F.3d at 614).

258. 351 F.3d 263 (6th Cir. 2003).

259. *Id.* at 265.

260. *See id.* at 274 (Haynes, J., dissenting) (“The United States Attorney General granted Ly refugee status when he entered the United States. Ly became a permanent United States resident on December 21, 1987, and has lived in the United States with other family members who are also permanent residents.”).

261. *Id.* at 265.

262. *Id.* at 270.

263. *Id.*

264. *See id.* at 265 n.1 (“Actual removal of Ly from the United States was never a possibility during this process. Vietnam has not and does not accept deportees because there is no repatriation agreement between the United States and Vietnam.”). *But see* Julia Preston, *Vietnam Agrees to the Return of Deportees From the U.S.*, N.Y. TIMES (Jan. 23, 2008), <http://www.nytimes.com/2008/01/23/us/23immig.html> (last visited Sept. 19, 2017) (noting that in 2008, “American immigration authorities reached an

Instead of following *Demore*, the Sixth Circuit looked to *Zadvydas* for guidance.²⁶⁵ On the issue of mandatory detention, the Sixth Circuit observed that *Zadvydas* did sanction mandatory detention of non-citizens without a bond hearing.²⁶⁶ However, the Sixth Circuit also agreed with the *Zadvydas* Court that a statute authorizing indeterminate mandatory detention posed a constitutional problem.²⁶⁷ Therefore, in accordance with *Zadvydas*, the Sixth Circuit sought to read a reasonable time limitation on mandatory detention into § 1226(c) to avoid addressing the statute's constitutionality.²⁶⁸

In determining what type of limitation to read into § 1226(c), the Sixth Circuit declined to adopt the bright-line, six-month limitation imposed in *Zadvydas*.²⁶⁹ Rather, the Sixth Circuit found that the unpredictable nature of removal proceedings demanded more flexibility than the post-removal detention at

agreement . . . with Vietnam that clears the way for Vietnamese immigrants under deportation orders to be sent back to their country") (on file with the Washington and Lee Law Review).

265. *Ly*, 351 F.3d at 267 ("The question remaining before us is whether the holding of *Zadvydas* extends to the mandatory *pre-removal* detention statute . . .").

266. *See id.* at 267–68 ("*Zadvydas* also made clear that *limited* civil detention, without bond, is constitutional as applied to deportable aliens.").

267. *See id.* at 269 ("[A]lthough criminal aliens may be incarcerated pending removal, the time of incarceration is limited by constitutional considerations, and must bear a reasonable relation to removal."); *see also id.* at 267

Congress has ordered that aliens who have been convicted of an aggravated felony or two crimes involving moral turpitude (including fraud) *must* be detained pending removal proceedings, based on a *prima facie* determination of removability by the government. If an order of removal is not entered (or not entered promptly), the result is mandatory indefinite detention for criminal aliens, which is prohibited by *Zadvydas*.

268. *See id.* at 267 ("Since permanent detention of Permanent Resident Aliens under § 236 would be unconstitutional, we construe the statute to avoid that result, as did the Court in *Zadvydas*."); *id.* at 270 ("[B]y construing the pre-removal detention statute to include an implicit requirement that removal proceedings be concluded within a reasonable time, we avoid the need to mandate the procedural protections that would be required to detain deportable aliens indefinitely.").

269. *See id.* at 271 ("A bright-line time limitation, as imposed in *Zadvydas*, would not be appropriate for the pre-removal period . . .").

issue in *Zadvydas*.²⁷⁰ Therefore, the Sixth Circuit determined that courts must conduct individualized inquiries into the reasonableness of ongoing detention under § 1226(c).²⁷¹ The Sixth Circuit concluded that “[w]hen actual removal is not reasonably foreseeable, deportable aliens may not be indefinitely detained without a government showing of a ‘strong special justification,’ constituting more than a threat to the community, that overbalances the alien’s liberty interest.”²⁷²

As in *Ly*, the Third Circuit in *Diop v. ICE/Homeland Security*²⁷³ acknowledged the constitutional problem with a statute authorizing mandatory, indeterminate detention without a bond hearing.²⁷⁴ To avoid a constitutional problem, the Third Circuit also cited *Zadvydas* and sought to read a limitation on mandatory detention into § 1226(c).²⁷⁵ Additionally, as in *Ly*, the Third Circuit declined to “establish a universal point at which detention will always be considered unreasonable.”²⁷⁶ Rather, the Third Circuit stated that reasonableness depends on “whether continued detention is necessary to carry out the statute’s purpose”²⁷⁷ and that “[r]easonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all of the

270. *See id.* (“A bright-line time limitation, as imposed in *Zadvydas*, would not be appropriate for the pre-removal period; hearing schedules and other proceedings must have leeway for expansion or contraction as the necessities of the case and the immigration judge’s caseload warrant.”).

271. *See id.* (“In the absence of a set period of time, courts must examine the facts of each case, to determine whether there has been unreasonable delay in concluding removal proceedings.”).

272. *Id.* at 273.

273. 656 F.3d 221 (3d Cir. 2011).

274. *See id.* at 231 (discussing § 1226(c)’s due process implications).

275. *See id.*

[I]t is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality . . . [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” Applying this principle to 1226(c) we conclude that the statute implicitly authorizes detention for a reasonable amount of time

(quoting *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)).

276. *Id.* at 233.

277. *Id.* at 235.

circumstances of any given case.”²⁷⁸ Therefore, “when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute.”²⁷⁹

The First Circuit is the latest circuit to weigh in on the current split. In *Reid v. Donelan*,²⁸⁰ the Government appealed a district court decision that Mark Anthony Reid’s continued detention under § 1226(c) was unreasonable absent a bond hearing.²⁸¹ Reid, a lawful permanent resident since 1978 and a U.S. Army veteran, challenged his continued detention after spending eight months in INS custody.²⁸²

On appeal, the First Circuit noted that “[t]he concept of a categorical, mandatory, and indeterminate detention raises severe constitutional concerns.”²⁸³ The First Circuit then determined that, as in *Zadvydas*, it would “read an implicit reasonableness limitation into the statute to avoid constitutional conflict.”²⁸⁴

As to what limitation to apply, the First Circuit surveyed the current circuit split and discussed whether to apply individualized reviews as in the Third and Sixth Circuits, or whether to apply a bright-line rule as in the Second and Ninth Circuits.²⁸⁵

The First Circuit stated that, on a practical level, it preferred the Second and Ninth Circuits’ bright-line approach.²⁸⁶ However, the First Circuit provided several reasons why it felt restrained

278. *Id.* at 234.

279. *Id.* at 233.

280. 819 F.3d 486 (1st Cir. 2016).

281. *Id.* at 492.

282. *Id.* at 491.

283. *Id.* at 494.

284. *Id.* at 496.

285. *See id.* at 494–95 (“And, each circuit has found it necessary to read an implicit reasonableness requirement into the statute itself, generally based on the doctrine of constitutional avoidance Yet, the courts of appeals have split on the method for enforcing this statutory reasonableness requirement.”).

286. *See id.* at 498 (“Despite the practical advantages of the Second and Ninth Circuits’ approach . . .”).

from adopting such a rule.²⁸⁷ First, as in *Ly*, the First Circuit stated that *Zadvydas*' six-month rule simply does not make sense in the context of § 1226(c) detention.²⁸⁸ Next, the First Circuit viewed *Demore* as effectively barring its "ability to adopt a firm six-month rule."²⁸⁹ Finally, the First Circuit asserted that "the inherent nature of the 'reasonableness' inquiry weigh[s] heavily against adopting a six-month presumption of unreasonableness."²⁹⁰

Regarding individualized reviews, the First Circuit stated that "[f]rom a more practical standpoint . . . the approach employed by the Third and Sixth Circuits has little to recommend it."²⁹¹ The First Circuit went on to describe several potential pitfalls associated with individualized reviews.²⁹² However, despite the First Circuit's preference for a bright-line rule on a practical level, the court felt compelled to adopt the Third and Sixth Circuits' individualized approach.²⁹³ As a result, the First

287. *See id.* at 495 ("From a strictly legal perspective, we think that the Third and Sixth Circuits have the better of the argument.")

288. *See id.* at 496 ("Although it is tempting to transplant this [six-month] presumption into § 1226(c) based on the superficial similarities of the problems posed, such a presumption has no place here.")

289. *Id.* at 497; *see also id.* ("In *Demore*, the Supreme Court declined to state any specific time limit in a case involving a detainee who had already been held for approximately six months The *Demore* Court also briefly discussed facts specific to the detainee")

290. *Id.*

291. *Id.*

292. *See id.* at 497–98

First, the approach has resulted in wildly inconsistent determinations Second, the failure to adopt a bright-line rule may have the perverse effect of increasing detention times for those least likely to actually be removed at the conclusion of their proceedings Third, even courts that have adopted the individualized habeas approach have questioned the federal courts' "institutional competence" to adjudicate these issues and the consequences of such an interpretation.

293. *See id.* at 498 ("[W]e have surveyed the legal landscape and consider ourselves duty-bound to follow the trail set out by the Third and Sixth Circuits In the end, we think the Third and Sixth Circuits' individualized approach adheres more closely to legal precedent than the extraordinary intervention requested by Petitioner.")

Circuit joined the Third and Sixth Circuits' side of the current split.

B. Bright-line, Six-Month Reasonableness Limitation on Detention

In order to avoid addressing the constitutionality of § 1226(c), the Second and Ninth Circuits read a bright-line, six-month reasonableness limit into the statute.²⁹⁴ Under the bright-line rule, a non-citizen detained under § 1226(c) “must be provided a bond hearing once his or her detention reaches the six-month mark, because any categorical and mandatory detention beyond that timeframe is presumptively unreasonable.”²⁹⁵

In *Rodriguez v. Robbins*,²⁹⁶ the Ninth Circuit heard an appeal regarding a class of non-citizens who challenged “their prolonged detention . . . without individualized bond hearings and determinations to justify their continued detention.”²⁹⁷ The class members had each been detained for over six months pursuant to either 8 U.S.C. §§ 1225(b)²⁹⁸ or 1226(c).²⁹⁹

As to § 1226(c), the Ninth Circuit sought to determine whether mandatory detention of non-citizens “for prolonged periods raises the constitutional concerns identified by the Supreme Court in *Zadvydas*, or whether such detention is consistent with *Demore* and, thereby, permissible.”³⁰⁰

294. See *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015) (“[W]e hold that, in order to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention.”); *Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013) (“Therefore, subclass members who have been detained under § 1226(c) for six months are entitled to a bond hearing . . .”).

295. *Reid v. Donelan*, 819 F.3d 486, 495 (1st Cir. 2016).

296. 715 F.3d 1127 (9th Cir. 2013).

297. *Id.* at 1130.

298. 8 U.S.C. § 1225(b) (2012).

299. See *Rodriguez*, 715 F.3d at 1131 (“This appeal concerns individuals detained in southern California for six months or longer under one of two federal immigration statutes.”).

300. *Id.* at 1134.

Ultimately, the Ninth Circuit found that *Demore* is limited to detentions of brief duration.³⁰¹ Accordingly, the Ninth Circuit stated that “while mandatory detention under section 1226(c) is not constitutionally impermissible *per se*, the statute cannot be read to authorize mandatory detention of criminal aliens with no limit on the duration of imprisonment.”³⁰² Accordingly, the Ninth Circuit, citing *Zadvydas*, set out to read a “reasonable time limitation” into § 1226(c).³⁰³

As to what “reasonable time limitation” to read into the statute, the court looked to a prior Ninth Circuit decision for guidance.³⁰⁴ In *Diouf v. Napolitano*,³⁰⁵ the Ninth Circuit addressed the issue of “prolonged” detention under a separate immigration-related statute.³⁰⁶ In that case, the court ruled that detention exceeding six months constituted “prolonged” detention and required a bond hearing before an immigration judge.³⁰⁷

The *Rodriguez* court acknowledged that detention under § 1226(c) was not at issue in *Diouf*.³⁰⁸ Nevertheless, the *Rodriguez* court decided to read the same six-month limitation

301. *See id.* at 1137 (“We have addressed the question of how broadly *Demore* sweeps in several decisions over the past decade. On each of these occasions, we have consistently held that *Demore*’s holding is limited to detentions of brief duration.”).

302. *Id.*

303. *See id.* at 1138 (“Consistent with our previous decisions, we conclude that, to avoid constitutional concerns, § 1226(c)’s mandatory language must be construed ‘to contain an implicit “reasonable time” limitation, the application of which is subject to federal-court review.’” (quoting *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001))).

304. *See id.* at 1139 (“The government is likewise correct that *Diouf II* by its terms addressed detention under § 1231(a)(6), not § 1226(c) or § 1225(b). But *Diouf II* strongly suggested that immigration detention becomes prolonged at the six-month mark regardless of the authorizing statute.”).

305. 634 F.3d 1081 (9th Cir. 2011).

306. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1136 (9th Cir. 2013) (“Second, in *Diouf* . . . we addressed the definition of ‘prolonged’ detention for purposes of the *Casas* bond hearing requirement. *Diouf II* first extended the holding of *Casas* to aliens discretionarily detained under 8 U.S.C. § 1231(a)(6).”).

307. *See id.* (“Importantly, we indicated that an ‘alien’s continuing detention becomes prolonged’ at the 180–day mark” (quoting *Diouf*, 634 F.3d at 1091)).

308. *See id.* at 1139 (“The government is likewise correct that *Diouf II* by its terms addressed detention under § 1231(a)(6), not § 1226(c) . . .”).

into § 1226(c).³⁰⁹ Therefore, the Ninth Circuit determined that non-citizens “detained under § 1226(c) for six months are entitled to a bond hearing.”³¹⁰

In *Lora v. Shanahan*,³¹¹ the Second Circuit heard the government’s appeal following an order releasing Alexander Lora³¹² on bond pending his removal proceedings.³¹³ On appeal, the Second Circuit sought to determine, among other issues, whether mandatory, indeterminate detention without a bond hearing violated Lora’s due process rights.³¹⁴ The Second Circuit stated that it would read an implicit limitation into § 1226(c) “in order to avoid significant constitutional concerns.”³¹⁵ The Second Circuit then provided several reasons justifying applying a bright-line, six-month reasonableness limit to mandatory detention under § 1226(c).³¹⁶

First, the Second Circuit noted that the *Zadvydas* Court implemented a six-month reasonableness limitation on detention in a related context.³¹⁷ Next, the Second Circuit found that a

309. *See id.* (“But *Diouf II* strongly suggested that immigration detention becomes prolonged at the six-month mark regardless of the authorizing statute.”).

310. *Id.* at 1138.

311. 804 F.3d 601 (2d Cir. 2015).

312. *See infra* Part I for more on Alexander Lora and his story.

313. *See Lora*, 804 F.3d at 605 (“[T]he immigration judge (IJ) ordered Lora’s release conditioned on posting a \$5000 bond. This appeal followed.”).

314. *See id.* at 613 (“Lora also argued below and argues to this Court that his indefinite detention without being afforded a bond hearing would violate his right to due process.”).

315. *Id.* at 606.

316. *See id.* at 614–15

We believe that, considering the relevant Supreme Court precedent, the pervasive confusion over what constitutes a “reasonable” length of time that an immigrant can be detained without a bail hearing, the current immigration backlog and the disastrous impact of mandatory detention on the lives of immigrants who are neither a flight risk nor dangerous, the interests at stake in this Circuit are best served by the bright-line approach.

317. *See id.* at 615 (“In *Zadvydas*, the Court held that six months was a ‘presumptively reasonable period of detention’ in a related context, namely post-removal-determination detention.” (quoting *Zadvydas v. Davis*, 533 U.S. 678, 700–01 (2001))).

bright-line rule would “ensure[] that similarly situated detainees receive similar treatment”³¹⁸ and would result in “more certainty and predictability” in its application.³¹⁹ Finally, the Second Circuit expressed concern about the effect that individualized determinations of reasonableness, and the uncertainty that comes with it, would have on non-citizens and their families.³²⁰

Therefore, the Second Circuit upheld mandatory detention under § 1226(c), but stated that “to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention.”³²¹ The Second Circuit concluded that at the bail hearing, “the detainee must be admitted to bail unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community.”³²²

VI. Recommendation to Resolve the Circuit Split

At the time of this writing, the circuits remain split three-to-two, with both sides refusing to endorse the *Demore* Court’s decision, sanctioning mandatory, indeterminate detention of non-citizens under § 1226(c).³²³ Instead, to avoid prolonged detention under § 1226(c), the circuits on both sides of the split interpret the statute to include an “implicit reasonable time limitation”³²⁴ on mandatory detention.³²⁵ The First, Third, and

318. *Id.*

319. *Id.*

320. *See id.* at 616 (“Finally, without a six-month rule, endless months of detention, often caused by nothing more than bureaucratic backlog, has real-life consequences for immigrants and their families.”).

321. *Id.*

322. *Id.* (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013)).

323. *See, e.g., Rodriguez v. Robbins*, 715 F.3d 1127, 1137 (9th Cir. 2013) (“[W]hile mandatory detention under § 1226(c) is not constitutionally impermissible *per se*, the statute cannot be read to authorize mandatory detention of criminal aliens with no limit on the duration of imprisonment.”).

324. Buckman, *supra* note 71, § 6.5.

325. *See Reid v. Donelan*, 819 F.3d 486, 494 (1st Cir. 2016) (“And, each

Sixth Circuits call for individualized reviews to determine whether mandatory detention has become unreasonable,³²⁶ while the Second and Ninth Circuits maintain that mandatory detention becomes presumptively unreasonable after six months.³²⁷ However, both circuits' approaches, as argued below, fail to provide non-citizen arrestees with adequate due process.³²⁸ Therefore, neither side's approach constitutes an acceptable resolution to the current circuit split. To resolve the split, the Court should revisit its anomalous *Demore* decision to protect the due process rights of non-citizens in the United States.

A. *Demore's Inconsistency with Due Process Jurisprudence*

Beginning in 1893, the Court has routinely provided that the Fifth Amendment's due process rights apply to all individuals within the United States, including non-citizens.³²⁹ Accordingly,

circuit has found it necessary to read an implicit reasonableness requirement into the statute itself, generally based on the doctrine of constitutional avoidance.”).

326. See *supra* Part V.A (discussing the First, Third, and Sixth Circuits' interpretations of § 1226(c)).

327. See *supra* Part V.B (discussing the Second and Ninth Circuits' interpretations of § 1226(c)).

328. See *infra* Part VI.C (describing the Fifth Amendment problem with both sides of the circuit split's approaches).

329. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“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.”); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (“Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“[T]o the fifth and sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the

in 2001, the *Zadvydas* Court recognized that Congress's plenary power "is subject to important constitutional limitations"³³⁰ and that "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."³³¹ Yet, just two years later, the *Demore* Court flatly stated that "th[e] Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."³³² The *Demore* Court's assertion of a ubiquitous dividing line between the rights of citizens and non-citizens represents an archaic view of Congress's plenary power³³³ and fractures the otherwise harmonious due process jurisprudence previously mentioned.³³⁴

As discussed above, the Court has repeatedly stated that the Due Process Clause applies to non-citizens in the United States.³³⁵ Therefore, if the Court were to revisit *Demore*, the question should become whether § 1226(c) survives a Fifth Amendment challenge absent judicial deference to a robust concept of plenary power. To answer this question, the Court should look to Fifth Amendment jurisprudence in a context similar to § 1226(c)'s pre-removal detention.

protection guarantied [sic] by those amendments, and that even aliens shall not . . . be deprived of life, liberty, or property without due process of law."); *Fong Yue Ting v. United States*, 149 U.S. 698, 754 (1893) (Field, J., dissenting) ("Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens.").

330. *Zadvydas*, 533 U.S. at 695.

331. *Id.* at 693.

332. *Demore v. Kim*, 538 U.S. 510, 522 (2003).

333. See Taylor, *supra* note 41, at 363 ("But *Demore v. Kim* might nevertheless be called a surprising decision, because just two years earlier it had seemed that the Supreme Court was backing away from a strong version of plenary power deference identified with the Cold War Era.").

334. See *id.* at 366 ("The [*Demore*] decision is inconsistent with *Zadvydas* and the *Salerno* line of cases, and thus may be unstable as precedent.").

335. See McCaslin, *supra* note 69, at 202 ("As far back as the late nineteenth century, the Supreme Court recognized that aliens within the borders of the United States are 'persons' entitled to the protection of the United States Constitution and thereby to the Fifth Amendment's guarantee of due process."). For a list of Supreme Court precedent delineating the due process rights of non-citizens in the United States, see *supra* note 329 and accompanying text.

As to relevant Fifth Amendment jurisprudence, past scholarship³³⁶ and the *Demore* dissent³³⁷ have referred to the *United States v. Salerno*³³⁸ line of preventive detention cases when discussing § 1226(c). Of those cases, mandatory detention under § 1226(c) most closely resembles the Bail Reform Act of 1984's (Bail Reform Act) pretrial preventive detention regime at issue in *Salerno*.³³⁹ Both § 1226(c) and the Bail Reform Act call for detention prior to a proceeding—whether it be a trial or deportation hearing—to prevent a risk of flight or danger to others.³⁴⁰ In *Salerno*, the Court upheld the Bail Reform Act against a Fifth Amendment challenge on the ground that the statute's "extensive safeguards suffice to repel a facial challenge."³⁴¹ In sum, if resident non-citizens receive the same due process rights as citizens, as argued here, and the Bail Reform Act's comparable pretrial detention regime withstood a Fifth Amendment challenge in *Salerno*—a Court revisiting *Demore* should look to *Salerno* and the Bail Reform Act to

336. Taylor, *supra* note 41, at 363–64; Chelgren, *supra* note 197, at 1489–91; Medina, *supra* note 23, at 731–39; Anello, *supra* note 40, at 373–83.

337. *Demore*, 538 U.S. at 561 (Souter, J., concurring in part and dissenting in part) ("In any case, the analytical framework set forth in *Salerno*, *Foucha*, *Hendricks*, *Jackson*, and other physical confinement cases applies to both, and the two differences the Court relies upon fail to remove Kim's challenge from the ambit of either the earlier cases or *Zadvydas* itself.").

338. 481 U.S. 739 (1987).

339. See Chelgren, *supra* note 197, at 1489–90 ("Immigration detention, therefore, is essentially preventive detention—it is not meant to exact a punitive sentence but is an administrative measure designed to help the government keep track of immigrants who might ultimately be ordered removed and to prevent removable immigrants from committing crimes in the interim.").

340. Compare *Demore v. Kim*, 538 U.S. 510, 528 (2003) ("Such detention necessarily serves the purpose of *preventing* deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." (emphasis added)), with *Salerno*, 481 U.S. at 749 ("The government's interest in *preventing* crime by arrestees is both legitimate and compelling." (emphasis added)).

341. *Salerno*, 481 U.S. at 752; see also Chelgren, *supra* note 197, at 1491 ("In upholding pretrial detention, the Court also pointed to the procedural rights afforded to the arrestee; namely, the Bail Reform Act required an adversarial hearing regarding the arrestee's dangerousness and placed strict time limits on pretrial detention.").

determine whether § 1226(c) provides non-citizens with sufficient due process.³⁴²

B. United States v. Salerno

In *Salerno*, the leading case on pretrial preventative detention, the Court considered the constitutionality of the Bail Reform Act.³⁴³ The Bail Reform Act authorized pretrial detention of individuals charged with committing crimes in certain categories.³⁴⁴ Congress passed the Bail Reform Act to address “the alarming problem of crimes committed by persons on release.”³⁴⁵ Accordingly, the Bail Reform Act sought to prevent “individuals charged with certain crimes”³⁴⁶ from fleeing or posing a danger to others while released on bail.³⁴⁷

342. See Chelgren, *supra* note 197, at 1492 (“Given the ubiquitous nature of *Salerno*-type protections in other preventive detention schemes, it is striking that virtually no protections attach to immigration detention.”); *id.* at 1516 (“Given that due process rights do apply to immigrants, and given that the government does not have unlimited plenary power, the procedural protections identified in *Salerno* and its progeny should apply in the context of immigration detention.”).

343. 18 U.S.C. § 3142 (2012).

344. See John B. Howard, Jr., Note, *The Trial of Pretrial Dangerousness: Preventive Detention After United States v. Salerno*, 75 VA. L. REV. 639, 649 (1989)

The Act sets out four categories of offenses in which the government may move for detention on the grounds of a defendant’s flight risk or dangerousness: crimes of violence; offenses for which the maximum sentence is life imprisonment or death; certain major drug offenses carrying a maximum term of imprisonment of ten years or more; and felonies committed after the accused has been convicted of two or more prior federal or state offenses of the above types.

345. *Salerno*, 481 U.S. at 742 (quoting S. REP. NO. 98-225, at 3 (1983)).

346. Gilman, *supra* note 242, at 285.

347. See *United States v. Salerno*, 481 U.S. 739, 742 (1987) (“By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to ‘give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.’” (quoting S. REP. NO. 98-225, at 3 (1983))); see also *id.* (stating that the Act sanctions pretrial preventative detention where “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person

In reviewing a Fifth Amendment challenge to the Bail Reform Act, the *Salerno* Court emphasized the statute's "extensive procedural safeguards."³⁴⁸ First, and most importantly for our discussion, the Bail Reform Act *did not require* pretrial preventative detention. Rather, the Court noted that "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."³⁴⁹ Additionally, while the Bail Reform Act itself contained no time limit on pretrial detention, the Court found that "pretrial detention [under the Act] is limited by the stringent time limitations of the Speedy Trial Act."³⁵⁰ Ultimately, the *Salerno* Court upheld the Bail Reform Act, providing a useful canvas for the types of procedural safeguards that a statute authorizing preventive detention should possess to survive a Fifth Amendment challenge.³⁵¹

C. Comparing § 1226(c) Under *Demore* to the Bail Reform Act

A comparison of the Bail Reform Act and § 1226(c) under *Demore* reveals several notable distinctions. First, as mentioned above, the Bail Reform Act requires individualized determinations as to the necessity of pretrial preventative

prior to trial" (quoting 18 U.S.C. § 3142(e)).

348. *See id.* at 752 ("We think these extensive safeguards suffice to repel a facial challenge."); *id.* at 742 ("Section 3142(f) provides the arrestee with a number of procedural safeguards.").

349. *Id.*

350. *Id.* at 747. *But see id.* at 747 n.4 ("We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal.").

351. *See Taylor, supra* note 41, at 363

Acknowledging that the statute presented serious constitutional issues, the Court nonetheless found that due process was satisfied because of several protections embedded in the "no bail" statute. Pretrial detention without bond was subject to stringent time limitations. In addition, the statute provided substantive criteria to limit its application to "the most serious of crimes," and careful procedures, built around a bond hearing before a judicial officer, to protect criminal defendants against erroneous decisions.

detention.³⁵² In contrast, § 1226(c) mandates detention pending removal proceedings with no individualized inquiry into the necessity of such detention.³⁵³ Additionally, unlike the Bail Reform Act, which is buttressed by the Speedy Trial Act, § 1226(c) under *Demore* provides no limitation as to the amount of time a non-citizen can remain in custody.³⁵⁴

In upholding the Bail Reform Act, the *Salerno* Court stated that the Act's "extensive safeguards suffice to repel a facial challenge."³⁵⁵ As evidenced above, § 1226(c) under *Demore* lacks the safeguards found in the Bail Reform Act.³⁵⁶ Accordingly, a Court revisiting *Demore* should find that § 1226(c) under *Demore* fails to provide sufficient due process compared to the Bail Reform Act. The question then turns to whether the circuit courts' added safeguards provide non-citizens with sufficient due process compared to the Bail Reform Act.

D. Comparing § 1226(c) in the Circuit Courts to the Bail Reform Act

352. See *Salerno*, 481 U.S. at 750 ("In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.").

353. See *Silva*, *supra* note 73, at 254 ("Section 1226(c) does not entitle the noncitizen to any process weighing the traditional bail factors, including his risk of flight and ties to the community.").

354. See *Medina*, *supra* note 23, at 700 ("The statutory provisions concerning removal and mandatory detention do not specify the period of time in which removal must be determined nor do they provide a specific limit to the period of time within which an alien placed in removal proceedings must be detained.").

355. *United States v. Salerno*, 481 U.S. 739, 752 (1987).

356. See, e.g., *Taylor*, *supra* note 41, at 364 ("The detention scheme [at issue in *Demore*], which mandates pre-hearing detention for virtually all non-citizen offenders without *any* hearing to assess flight risk or dangerousness, indisputably does not meet the criteria of the *Salerno* line of cases."); *Chelgren*, *supra* note 197, at 1491 ("In nonimmigration contexts, the Supreme Court continues to uphold the use of preventive detention when *Salerno*-type protections are present; however, when these protections are absent, the Court holds that preventive detention is unconstitutional."); *Medina*, *supra* note 23, at 737 (stating that *Demore* "is *Salerno* without the *Salerno* process, and it is the distinction between citizens and non-citizens that appears to allow the government to dispense with process").

The federal circuit courts, acknowledging that a straightforward application of § 1226(c) would pose a Fifth Amendment problem, unanimously reject *Demore* as precedent.³⁵⁷ Instead, the circuits on both sides of the split opt to “read *Demore* narrowly while more readily embracing the *Zadvydas* approach [of constitutional avoidance].”³⁵⁸

To address § 1226(c)’s failure to provide a time limit on mandatory detention, the circuits on both sides of the split applied the constitutional avoidance doctrine, reading § 1226(c) to include an implicit limit “on the amount of time that an individual can be detained without a bail hearing.”³⁵⁹ However, unlike the Bail Reform Act, the circuits on both sides of the split still interpret § 1226(c) to authorize mandatory detention for *all covered individuals*, albeit with an implicit time limit on such detention read into the statute.³⁶⁰ In enacting both § 1226(c) and the Bail Reform Act, Congress expressed a belief that, in certain circumstances, detaining individuals not yet deemed guilty or deportable was nevertheless necessary to achieve a desired objective. However, the Bail Reform Act requires that the Government prove, in an adversary hearing, that detaining an individual prior to trial would actually achieve the desired governmental interest.³⁶¹ In denying arrestees that initial hearing to challenge the necessity of their pre-removal detention,

357. See *supra* note 251 and accompanying text (providing examples of circuit courts’ explanations for declining to follow *Demore*).

358. Taylor, *supra* note 41, at 366.

359. *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015); see also Anello, *supra* note 40, at 363 (stating that “circuit courts have avoided a constitutional problem with the mandatory detention statute by construing its ambiguous language to impose temporal limits on mandatory detention”).

360. See, e.g., *Lora*, 804 F.3d at 616 (“[W]e hold that, in order to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention.”); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011) (“Applying this principle to 1226(c) we conclude that the statute implicitly authorizes detention for a reasonable amount of time . . .”). See *supra* Part V for a discussion of each circuit’s interpretation of § 1226(c).

361. *Supra* notes 348–349 and accompanying text.

the circuits' approaches lack a critical procedural safeguard contained in the Bail Reform Act.³⁶²

Additionally, while reading an implicit time limit on detention addressed the issue of indeterminate mandatory detention, § 1226(c) under both sides of the split still authorizes potentially lengthy mandatory detention. Under the individualized review of reasonableness approach, a non-citizen's only chance for release is to file a habeas petition challenging detention as unreasonable and hope that a district court agrees.³⁶³ Further, provided a non-citizen detained under § 1226(c) has the means to file such a petition, as the First Circuit observed in *Reid*, individualized determinations tend to produce "wildly inconsistent" results.³⁶⁴ Therefore, regardless of how unreasonable detention may appear, timely release in the First, Third, and Sixth Circuits is no sure thing.

To the bright-line, six-month approach, as Lora's story demonstrates, six months of detention can turn someone's life upside down. Lora's 2013 detention lasted only five and a half months, but during that time he lost his job, his son, and his emotional wellbeing.³⁶⁵ Lora and his loved ones suffered greatly as a result of his 2013 detention, despite the fact that the Government agreed at his bond hearing that he "was not dangerous and posed no risk of flight."³⁶⁶ Critically, Lora and his loved ones would find themselves in the exact same predicament under the Second and Ninth Circuits' six-month approach.

362. See Gilman, *supra* note 242, at 286 ("[I]n *Salerno*, the Supreme Court emphasized that pretrial detention decisions must be made on an individualized basis and that the government bears the burden of proving the need for detention 'by clear and convincing evidence.'" (quoting *Salerno*, 481 U.S. at 750–51)).

363. See, e.g., *Reid v. Donelan*, 819 F.3d 486, 495 (1st Cir. 2016) ("Under this approach, every detainee must file a habeas petition challenging detention, and the district courts must then adjudicate the petition to determine whether the individual's detention has crossed the 'reasonableness' threshold, thus entitling him to a bail hearing." (quoting *Lora*, 804 F.3d at 614)); *Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003) ("The reasonableness of the length of detention is subject to review by federal courts in habeas proceedings, as stated by *Zadvydas*.").

364. *Reid*, 819 F.3d at 497.

365. See *supra* Part I for more of Alexander Lora's story.

366. *Lora*, 804 F.3d at 605.

Applying the constitutional avoidance doctrine to § 1226(c), the circuits on both sides of the split read an implicit protection against indeterminate mandatory detention into the statute.³⁶⁷ However, both of the circuits' approaches continue to sanction mandatory detention of resident non-citizens with no individualized inquiry into the necessity of such detention.³⁶⁸ Consequently, the circuits' approaches reflect the notion that some due process for non-citizens is better than none. However, Supreme Court precedent provides that non-citizens within the United States are entitled *to all, not some*, of the due process rights set forth in the Fifth Amendment.³⁶⁹ For the foregoing reasons, choosing a side in the current circuit split is not an appropriate resolution. Rather, for the sake of consistency with due process jurisprudence, and for the sake of non-citizens like Lora, the Supreme Court should step in and revisit *Demore*.

E. The Road to Resolution

On June 20, 2016, the Supreme Court granted certiorari in *Rodriguez v. Robbins*, the Ninth Circuit case involved in the current split.³⁷⁰ This case provides the Court with a prime opportunity to revisit *Demore* and the constitutionality of § 1226(c). As argued above, the Court should conclude that § 1226(c) under *Demore* fails to provide sufficient due process compared to the Bail Reform Act. Additionally, the Court should find that the circuits' implicit time limits on detention fail to fully resolve the disconnect between § 1226(c) and the safeguards contained in the Bail Reform Act. Because neither *Demore's* nor the circuits' interpretations of § 1226(c) provide sufficient due process when compared to the Bail Reform Act, the Court should find that § 1226(c) has a Fifth Amendment problem. If the Court

367. *Supra* note 359 and accompanying text.

368. *Supra* note 360 and accompanying text.

369. *See supra* note 329 and accompanying text (listing Supreme Court precedent delineating the due process rights of non-citizens).

370. *Jennings v. Rodriguez*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/jennings-v-rodriguez/> (last visited Sept. 2, 2017) (on file with the Washington and Lee Law Review).

deems § 1226(c) unconstitutional, then Congress should amend the statute to include the sort of procedural safeguards found in the Bail Reform Act.³⁷¹ Such a scenario would resolve the current split, as the amended § 1226(c) would presumably contain sufficient due process for non-citizen arrestees. Therefore, the statute's Fifth Amendment problem that created the present circuit split would no longer exist.

Regarding the practice of overturning precedent, the Supreme Court generally adheres to the doctrine of *stare decisis*.³⁷² However, the Court regularly acknowledges that the doctrine "is not an inexorable command."³⁷³ Rather, whether the doctrine "shall be followed or departed from is a question entirely with the discretion of the court."³⁷⁴ Accordingly, the doctrine of *stare decisis* is not determinative if the Court wishes to overrule *Demore*.

VII. Conclusion

Lora's story serves as a sobering reminder that § 1226(c) does not apply only to non-citizens who illegally entered the country weeks or months before detention. The statute applies to all non-citizens, including Lora, who entered the United States legally at the age of seven and lived in Brooklyn ever since.³⁷⁵ The Court, and the country, should not be satisfied with the circuits' interpretations of § 1226(c), as both approaches continue to deny

371. See *supra* Part VI.B for a description of the procedural safeguards identified in *Salerno*.

372. See *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478–79 (1987) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*.").

373. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); see also *Smith v. Allwright*, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent.").

374. See *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) ("The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.").

375. *Id.* at 606.

non-citizens, like Lora, the same due process as citizens receive under the Bail Reform Act.

This Note proposes that the Supreme Court revisit its anomalous *Demore* decision. In doing so, the Court should overturn *Demore* and strike down § 1226(c) as unconstitutional. Such an outcome would resolve the current circuit split and remove the inconsistent application of § 1226(c) in the circuits. Additionally, such a result would provide a benefit to United States citizens because the costs of detaining non-citizens pending removal proceedings would decrease if mandatory detention were not required for all. Finally, and most importantly, such a ruling would ensure that non-citizens, like Alexander Lora, may never have to suffer unreasonably and unnecessarily.