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Detaining Due Process: The Need for Procedural Reform in "Joseph" Hearings after Demore v. Kim

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INTRODUCTION

In *Demore v. Kim* (hereinafter *Kim II*),[1] the United States Supreme Court seriously undermined immigrants' due process rights and revived "immigration exceptionalism,"[2] the policy of insulating substantive immigration decisions[3] from mainstream constitutional analysis.[4] *Kim II* held that substantive due process does not require an individualized assessment of dangerousness and flight

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1. 538 U.S. 510 (2003) [hereinafter *Kim II*]. I will use the term "Kim I" to refer to *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002), the Court of Appeals case preceding and reversed by *Kim II*. *See infra* Part I.B.

2. Professor Hiroshi Motomura defines "immigration exceptionalism" as "the view that immigration and alienage law should be exempt from the usual limits on government decision-making—for example, judicial review." Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999) [hereinafter Motomura, *Immigration Exceptionalism*]. The plenary power doctrine is a "central feature" of this view. *Id.* at 1364.

3. "Substantive" immigration law generally refers to the criteria of admission and exclusion. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626, 1629 (1992) [hereinafter Motomura, *Curious Evolution*]. Courts have sometimes characterized the substantive due process right against detention alternately as procedural and substantive, a choice of characterization that Motomura has described as outcome-driven. *See id.* at 1628–29, 1665–73, 1700 (arguing that courts have recast arguably substantive rights as procedural rights to avoid the plenary power doctrine in some detention cases, while rejecting this "procedural surrogate" approach in others). Although Kim's claim can be understood to have both procedural and substantive components, the Court addressed only the substantive claim, that is, the government's reasons for detaining him. *Kim II*, 538 U.S. at 530–31.

4. Prior to *Kim II*, the policy of immigration exceptionalism had been in decline. *See, e.g.*, Peter Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 341–45 (2002) (discussing two Supreme Court cases decided in 2001 that may "point the way towards the eventual elimination of immigration law exceptionalism.").

risk prior to detaining a lawful permanent resident (LPR) pending removal[5] under a provision of the Immigration and Nationality Act (INA). In so holding, the Court defied established substantive due process jurisprudence on civil detention, which requires the government to offer a special justification based on specific characteristics of the individual. The Court also eschewed two traditions in immigration law—the privileged status of LPRs over other noncitizens, and the application of the plenary power doctrine exclusively to substantive, rather than procedural, immigration law.[6]

In reaching this result, the majority relied heavily on respondent Hyung Joon Kim's supposed concession of deportability.[7] According to the majority, Kim had neither asked for a hearing to contest his proper inclusion in the mandatory detention statute nor disputed the characterization of his crimes as "aggravated felonies."[8] The majority suggested that concededly deportable aliens are entitled to fewer due process protections because they have waived their legal right to remain in the United States.[9] In the Court's view, when an

5. I use "removal" and "deportation" interchangeably; however, these terms have distinct meanings under immigration law. *See* Thomas Alexander Aleinikoff, David A. Martin & Hiroshi Motomura, IMMIGRATION & CITIZENSHIP: PROCESS AND POLICY 190, 621 (5th ed. 2003). Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), aliens whom the government sought to expel or keep out were either "deportable" or "excludable," respectively. Deportable aliens were those who had effected a physical entry into the country, while excludable aliens were those who had not yet entered. In enacting IIRIRA, Congress replaced the "deportable-excludable" distinction with the "admissible-inadmissible" distinction. "Admissible" aliens are those who had been lawfully admitted, while "inadmissible" aliens are those who had not yet been lawfully admitted. The latter category includes both those outside our borders, and those physically—but unlawfully—present within our borders. "Removal" now refers both to the process of deportation and exclusion. *Id.*

6. *See The Supreme Court, 2002 Term—Leading Cases: Constitutional Law*, 117 HARV. L. REV. 287, 287–88, 291–94, 296–97 (2003) (discussing *Kim II*'s contravention of these two trends in immigration law as it applies the plenary power doctrine to procedural deportation hearings). *But see* M. Isabel Medina, Demore v. Kim—*A Dance of Power and Human Rights*, 18 GEO. IMMIGR. L.J. 697, 704–05 (2004) (arguing that, despite being "faithful to a crabbed view of [noncitizens'] entitlement to constitutional protection," *Kim II* is consistent with the trend away from an extreme deference to the Congressional plenary power).

7. *Kim II*, 538 U.S. at 513–14, 522 n.6, 531. Justice Souter and the dissenters persuasively challenged this characterization of Kim's position. *Id.* at 540–43 (Souter, J., concurring in part and dissenting in part).

8. *See id.* at 513, 514 nn.1–3 (majority opinion) (arguing that Kim conceded his deportability because he neither disputed his inclusion under § 1226(c) based on convictions constituting "aggravated felon[ies]" and two "crimes involving moral turpitude," nor sought a *Joseph* hearing at which such inclusion could be contested).

9. *See id.* at 528 ("But when the Government deals with *deportable* aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.") (emphasis added). *See also id.* at 522 n.6 ("As [Kim] has conceded that he is deportable for purposes of his habeas corpus challenge to § 1226(c) at all previous stages of this proceeding . . . we decide the case on that basis.") (citation omitted). For a pre-*Kim II* decision stating explicitly that concededly deportable aliens have no legal entitlement to remain in the United States, *see* Parra v. Perryman, 172 F.3d 954, 956, 958 (7th Cir. 1999). Given the Court's emphasis on whether or not Kim had conceded deportability and thus forfeited his legal right to remain in the United States, this article focuses exclusively on the class of aliens who have a colorable "legal

alien admits the existence of prior convictions for deportable offenses, the mere procedural formality of a final order of removal or a judgment pursuant to a deportation proceeding should not hinder the government's efforts to remove her.[10] Therefore, Congress may authorize mandatory detention without an individualized assessment of dangerousness or flight risk because detention is a permissible part of the removal process.[11] In so deciding, the Court conflated the argument that detention is permissible with the notion that detention may be predicated on generalized presumptions.

Kim II defined the concession of deportability as an alien's admission of, or failure to contest, the government's charge that she fits the criteria for mandatory detention under INA § 236, 8 U.S.C. § 1226(c) (2000) (that is, alien status and convictions for predicate crimes that constitute "aggravated felonies" or crimes of moral turpitude).[12] Chief Justice Rehnquist distinguished this prima facie deportability from an ultimate finding of deportability: "Lest there be any confusion, we emphasize that by conceding he is '*deportable*' and, hence, subject to mandatory detention under § 1226(c), respondent did not concede he *will ultimately be deported*."[13] Prima facie deportability differs from an ultimate finding of deportability in that the former does not preclude the possibility for relief from removal. In other words, it may be possible for a prima facie deportable noncitizen to exercise some privilege or right that would prevent the government from executing a removal order. The Chief Justice noted that Kim had applied for withholding of removal, but that this potential remedy to removal did not factor into the judgment of "deportability."[14] As a result, a court could

right to remain" prior to removal, namely, lawful permanent residents. This article expresses no views regarding the rights of noncitizens who have entered without inspection or who are deemed not to have effected an "entry."

10. *See Kim II*, 538 U.S. at 518 (noting that the mandatory detention statute was adopted to address the "wholesale failure by the INS to deal with increasing rates of criminal activity by aliens"). *See also id.* at 576–77 (Breyer, J., concurring in part, dissenting in part) (characterizing an alien's concession of deportability as the "rough equivalent" of a final order of removal).

11. *Kim II*, 538 U.S. at 531 (majority opinion).

12. *See id.* at 513 ("Respondent does not dispute the validity of his prior convictions . . . . Respondent also did not dispute the INS's conclusion that he is subject to mandatory detention under § 1226(c)."). This statement, however, overlooks that Kim contested the characterization of his predicate crimes as "aggravated felonies." *See id.* at 522–23 n.6 (noting that, because of Kim's concession of deportability, the Court does not reach the question of whether Kim's convictions constituted either aggravated felonies or crimes of moral turpitude). Some advocates have adopted the majority's characterization in order to narrow *Kim II*'s scope to those cases in which an alien actually concedes deportability. *See, e.g.*, Christina B. LaBrie, *Supreme Court Upholds Mandatory Detention Statute, Reverses Ninth Circuit*, IMMIGRATION DAILY, May 20, 2003, http://www.ilw.com/articles/2003,0520-labrie.shtm ("[O]ne could . . . argue that *Kim* [*II*] simply doesn't apply to any case in which deportability is challenged by the alien.").

13. *Kim II*, 538 U.S. at 523 n.6.

14. *See id.* at 522 & n.6. In this article, the category of prima facie deportable aliens includes those who "concede" that they are subject to mandatory detention (that is, that they are "deportable") and those who contest their inclusion in the mandatory detention statute. Members of each subgroup have not had a deportation hearing, nor have they received a final order of removal.

deem the alien to have "conceded" deportability, even if she advanced arguments that ultimately rendered her non-removable.

The *Kim II* Court's definition of "conceding" deportability heightens the significance of the initial determination made in the so-called *Joseph* hearing of whether the mandatory detention statute properly applies to the alien.[15] At this hearing, an alien may contest her alien status, the existence and finality of prior convictions, and the characterization of those predicate crimes as aggravated felonies or crimes of moral turpitude.[16] Indeed, the permissibility of mandatory detention hinges on this initial inquiry, for if the alien is not properly included in the statute, the government may not detain her under 8 U.S.C. § 1226(c). Some have predicted that *Kim II* will produce a surge in requests for *Joseph* hearings.[17] However, the Court has not yet had an occasion to review the adequacy of the *Joseph* procedures.[18]

In this article, I examine the significance of Kim's alleged concession of deportability and advance two arguments. First, I contend that prima facie deportability itself does not extinguish an LPR's legal right to remain in the country, and that the Court erred in downgrading the liberty interest of LPRs without a final order of removal. Although the Court rhetorically rejected the equation of prima facie deportability with an actual finding of deportability, its holding functionally treats both categories of aliens the same.[19] This treatment is consistent with the view that a concession of deportability is a functional equivalent to entry of a final order of removal.[20] Nonetheless, as argued below, doctrinal coherence requires that LPRs facing mandatory detention retain the right to remain until the government issues a final order of removal.

Second, I argue that the procedures at *Joseph* hearings violate Due Process under the Fifth Amendment as determined by the three-prong test in *Mathews v. Eldridge*.[21] The principal flaw in the *Joseph* hearing's procedures is that the respondent alien has an extremely high burden to show that the government is

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15. *See In re* Joseph, 22 I. & N. Dec. 799, 800, Int. Dec. 3398 (BIA 1999) (en banc) (*citing* 8 C.F.R. § 3.19(h)(2)(ii) (1999), subsequently reclassified as 8 C.F.R. § 1003.19(h)(2)(ii) (2005)). *See also Kim II*, 538 U.S. at 514 & n.3 (referring to this hearing as a "*Joseph* hearing").

16. *See* 8 U.S.C. § 1226(c) (2004); *Kim II*, 538 U.S. at 514 & n.3; *Joseph*, 22 I. & N. Dec. at 805; 8 C.F.R. § 1003.19(h)(2)(ii). Although a respondent may challenge her classification as an alien, I refer to the respondent as an alien throughout this article because I address only the plight of aliens who challenge their detention on the ground that their convictions are not for deportable offenses.

17. *U.S. Supreme Court Permits Mandatory Detention Without Bond Pending Removal Proceedings*, 2003 IMMIGR. BUS. NEWS & COMMENT DAILY 66.

18. *Kim II*, 538 U.S. at 514 n.3.

19. *See id.* at 522 n.6. *See also supra* text accompanying note 14.

20. *Kim II*, 538 U.S. at 576–77 (Breyer, J., concurring in part, dissenting in part). *See also* Parra v. Perryman, 172 F.3d 954, 956–58 (7th Cir. 1999) (suggesting that an alien who had conceded deportability has no legal right to remain in the United States).

21. 424 U.S. 319, 335 (1976). The three factors weighed under *Eldridge* are the private interest at stake, the risk of erroneous deprivation under current procedures, and the government interest. *See infra* Part II.

"substantially unlikely" to prove the charge.[22] Yet numerous ambiguities in the law defining "aggravated felonies" or crimes of moral turpitude for immigration purposes allow the government to detain an alien even if she is later found to have been improperly subjected to mandatory detention.[23] Because of the risk of such an erroneous deprivation of liberty, the government should bear the burden of showing a substantial likelihood that the alien is subject to mandatory detention. Under *Eldridge*, the important private interest at stake in the *Joseph* hearing, the significant risk of erroneous deprivation of liberty, and the weak government interests in detaining non-dangerous aliens unlikely to flee and avoiding the costs of procedural change, all support this conclusion.[24] I also address other procedural flaws that impair immigrants' important liberty interests, but which may not, on their own, violate the Constitution.

Part I explains the deportation process and the mandatory detention regime under 8 U.S.C. § 1226(c), and examines the *Kim II* decision and its emphasis on Kim's alleged concession of deportability. Part I also explores the heightened significance of the *Joseph* hearing after *Kim II*. After establishing the significance of the *Joseph* hearing in a post-*Kim II* context, Part II offers a critique of the procedures at the *Joseph* hearing and suggestions for procedural change.

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22. *See In re* Joseph, 22 I. & N. Dec. 799, 800, Int. Dec. 3398 (BIA 1999) (en banc) (holding that an LPR will not be considered properly included in a mandatory detention category "only when an Immigration Judge is convinced that the [INS] is substantially unlikely to establish . . . the charge or charges that subject the alien to mandatory detention."). The dissent in *Joseph* argues for a standard of proof that would require the government to demonstrate a "likelihood of success on the merits" in showing the alien is properly included in the statute. *See id.* at 809–10 (Schmidt, Chairman, concurring in part, dissenting in part). *See also* LaBrie, *supra* note 12 (arguing that practitioners may challenge the high burden of proof placed on respondents in the *Joseph* hearing).

23. *See infra* Part II.B.1. These ambiguities not only lead to detention of non-dangerous aliens who are unlikely to flee, but also to detention of aliens who are not actually subject to mandatory detention.

24. After this article was written, the Ninth Circuit granted a writ of habeas corpus to an alien who had been detained under mandatory detention for over 32 months. Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005). In order to avoid the constitutional question of Congress's power to authorize prolonged detention of removable LPRs, the Court interpreted the authority to impose mandatory detention under 8 U.S.C. § 1226(c) as applying only to "expedited removal of criminal aliens." *Id.* In a concurring opinion, Judge Tashima questioned the constitutionality of the *Joseph* hearing's procedures and determined that the allocation of the burden of proof therein violated procedural due process, as analyzed under *Mathews v. Eldridge*. *See id.* at 1245–46. (Tashima, J. concurring). In so doing, Judge Tashima adopted arguments advanced by petitioner Tijani's counsel. *See* Substitute Opening Brief of Habeas Petitioner and Appellant Monsuru Olasumbo Tijani at 25–40, Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005) (No. 04-55285) [hereinafter "Tijani Brief"]. This article was researched, written, and completed independently and without knowledge of the Tijani Brief. Although both this article and the Tijani Brief argue that the burden of proof at the *Joseph* hearing violates due process, Tijani argued that mandatory detention is simply inapplicable to LPRs who offer a "substantial argument" that they are not covered by the statute. *Id.* In contrast, this article advocates for shifting the burden of proof to the government in the *Joseph* hearing. These two suggestions may not differ greatly in practice, as the government is unlikely to carry its burden where a petitioner has a "substantial" argument.

I.
MANDATORY DETENTION UNDER 8 U.S.C. § 1226(C) AND *DEMORE V. KIM*

A. Overview of the Deportation Process

To understand the role of mandatory detention, it is useful to review the deportation process. The process begins when the Department of Homeland Security[25] issues a Notice To Appear (NTA).[26] The NTA must explain to the alien the nature of the proceedings against her, the legal authority pursuant to which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, the charges against her, and the statutory provisions alleged to have been violated.[27] The NTA typically provides the time, place, and date of the initial removal hearing; if not, the Immigration Court schedules the initial hearing.[28]

Deportation proceedings are "civil," not "criminal,"[29] and therefore the Sixth Amendment right to counsel does not attach.[30] The alien may be represented by counsel "at no expense to the government[,]"[31] but if she cannot afford to hire a lawyer, she may be forced to represent herself *pro se*, even if she is not fluent in English.

At the removal hearing, the immigration judge advises the alien of the availability of free legal services and confirms that she has received a list of such services.[32] The immigration judge then asks the alien to plead to the NTA by stating whether she admits or denies the factual allegations and her removability under the charges.[33] The government must prove by clear and convincing evidence that the alien is removable as charged.[34] If the government makes this

25. President Bush signed a 2002 bill transferring the immigration enforcement functions of the Immigration and Naturalization Service (INS) to the Department of Homeland Security (DHS). *See* U.S. Citizenship & Immigr. Servs., *INS into DHS: Where is it now?* (2006), http://uscis.gov/graphics/othergov/roadmap.htm. By March 2003, the INS was abolished and all of its functions transferred to DHS. *Id.* Today, within DHS, Immigration and Customs Enforcement (ICE) enforces federal immigration, customs, and air security laws, while Citizenship and Immigration Services (CIS) administers immigration and naturalization adjudication functions and establishes immigration services policies and priorities. *See id.* Most of the cases discussed in this article concern policies of the former INS.

26. *See* 8 C.F.R. § 239.1 (2005).

27. 8 C.F.R. § 1003.15 (2005).

28. 8 C.F.R. § 1003.18 (2005).

29. *See* Woodby v. INS, 385 U.S. 276, 285 (1966) ("[A] deportation proceeding is not a criminal prosecution.").

30. *See* U.S. CONST. amend. VI (guaranteeing the right to counsel in "all criminal prosecutions").

31. *See* 8 C.F.R. § 1003.16 (2005) ("The alien may be represented . . . by an attorney or other representative of his or her choice in accordance with 8 [C.F.R] part 1292, at no expense to the government").

32. 8 C.F.R. § 1240.10(a)(2)–(a)(3) (2005).

33. § 1240.10(c).

34. 8 C.F.R. § 1240.8(a) (2005).

showing, the burden of proof shifts to the alien to establish her eligibility for relief from removal.[35] If the evidence provides grounds for mandatory denial of the alien's application for relief, she has to show by a preponderance that such grounds for denial do not apply to her case.[36]

After the hearing, the immigration judge renders a written or an oral decision regarding the respondent's deportability.[37] The respondent may appeal within thirty days.[38] A final order of removal extinguishes the alien's legal right to remain in the United States,[39] after which the government will make efforts to deport the alien to a country she designates.[40] If that country will not accept the alien, the government will attempt to send her to a different country.[41]

B. Kim II and the Roots of Mandatory Detention

1. Background

Congress enacted 8 U.S.C. § 1226(c) to authorize the mandatory detention of criminal aliens pending their deportation proceedings without any opportunity for bail.[42] Congress's primary purposes in enacting mandatory detention, as noted by the *Kim II* Court, were protecting the public from criminal aliens and ensuring the attendance of criminal aliens at their removal hearings.[43] Members of Congress demonstrated impatience with the slow process of deportation and the "multiple levels of appeal" available to aliens.[44] In enacting this mandatory

35. § 1240.8(d).

36. *Id.*

37. 8 C.F.R. § 1240.12(a) (2005).

38. 8 C.F.R. § 1240.15 (2005).

39. 8 C.F.R. § 1241.1 (2006).

40. 8 C.F.R. § 1240.10(f) (2005).

41. *See* 8 U.S.C. § 1231(b)(2)(D)–(E).

42. 8 U.S.C. § 1226(c) (2000). This article addresses only the "aggravated felony" ground for mandatory detention under §§ 1226(c)(1)(B), 1227 (a)(2)(A)(iii).

43. *See Kim II*, 538 U.S. 510, 515 (2003).

44. *See* PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, CRIMINAL ALIENS IN THE UNITED STATES, S. REP. No. 104-48, at 3 (1995). In this report, Senator Roth, from the Committee on Governmental Affairs, argued:

> First, the law governing deportation of criminal aliens should be dramatically simplified. After all, criminal aliens have already been afforded all the substantial due process required under our system of criminal justice before being convicted beyond a reasonable doubt of a felony. There is little reason for the multiple levels of appeal and delay in the deportation process which current law permits.

The notion that procedures afforded during a criminal trial or plea bargain eliminates the need for due process pending deportation ignores the long-standing view that deportation is a distinct civil sanction. *See* Woodby v. INS, 385 U.S. 276, 285 (1966) ("To be sure, a deportation proceeding is not a criminal prosecution."); Wong Wing v. United States, 163 U.S. 228, 236 (1896) ("The order of deportation is not a punishment for crime."). To cast deportation as just another inevitable consequence of a criminal conviction without an adversarial hearing requiring the government to prove its case is to fuse immigration and criminal law objectives.

detention statute and authorizing the detention of all alien aggravated felons, Congress created an irrebuttable presumption of dangerousness and flight risk.

The wide range of criminal offenses classified as "aggravated felonies" renders such a presumption dubious. Aside from serious crimes, such as murder and rape,[45] aggravated felonies encompass disparate and often non-violent crimes such as money laundering,[46] theft offenses,[47] receiving a firearm through interstate commerce while being an unlawful user of controlled substances,[48] trafficking in vehicles,[49] offenses relating to perjury where the term of imprisonment is one year or more,[50] and passport mutilation.[51] In a standard bond proceeding, an alien generally should not be detained absent a finding that she is "a threat to national security or is a poor bail risk."[52] Under mandatory detention, however, no bail hearing is provided.

The principal cases for this issue, *Kim v. Ziglar* (hereinafter *Kim I*) and *Demore v. Kim* (hereinafter *Kim II*), involved an alien from Korea named Hyung Joon Kim who entered the United States in 1984 at age six, and became an LPR two years later.[53] Kim was convicted of first-degree burglary at age 18.[54] One year later, he was convicted of "petty theft with priors"[55] and sentenced to three years imprisonment.[56] After serving his sentence, the Immigration and Naturalization Service (INS)[57] detained him pursuant to 8 U.S.C. § 1226(c)(1)(B), which authorizes mandatory detention of "aggravated felons."[58] Section 1226(c)(1)(B) provides that "[t]he Attorney General shall take into custody any alien who . . . is deportable by reason of having committed any offense covered in section 212(a)(2) [8 U.S.C. § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)] . . . ."[59] The government contended that Kim's second offense of "petty

45. INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A) (2000).

46. § 1101(a)(43)(D).

47. § 1101(a)(43)(G).

48. § 1101(a)(43)(E)(ii) (2002) (including offenses defined in 18 U.S.C. § 922(g) (2000)); *see* 18 U.S.C. § 922(g)(3) ("It shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act) . . . to receive any firearm or ammunition which has been shipped or transported in interstate . . . commerce.").

49. *See* 8 U.S.C. § 1101(a)(43)(R) (2000).

50. § 1101(a)(43)(S).

51. *See* § 1101(a)(43)(P).

52. *In re* De La Cruz, 20 I. & N. Dec. 346, 349, Int. Dec. 3155 (BIA 1991) (citing *In re* Patel, 15 I. & N. Dec. 666, Int. Dec. 2491 (BIA 1976)).

53. Kim v. Ziglar, 276 F.3d 523, 526 (9th Cir. 2002) [hereinafter *Kim I*], *rev'd sub nom.* Demore v. Kim [hereinafter *Kim II*], 538 U.S. 510 (2003). For an overview of the facts of this case, *see Kim I*, 276 F.3d at 526; *Kim II*, 538 U.S. at 513.

54. *Id.*

55. *Id. See also* Transcript of Oral Argument at 39–40, *Kim II*, 538 U.S. 510 (No. 01-1491) (clarifying that the first-degree burglary charge was for breaking into a tool shed).

56. *Kim I*, 276 F.3d at 526.

57. *Kim I* and *Kim II* were decided prior to the reorganization of the INS. *See supra* note 25.

58. *Kim I*, 276 F.3d at 526.

59. 8 U.S.C. § 1226(c)(1)(B).

theft with priors" constituted an "aggravated felony," rendering him removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2000).[60]

Kim petitioned for habeas corpus and challenged 8 U.S.C. § 1226(c) as a violation of due process.[61] Specifically, Kim argued that the government failed to individually assess his dangerousness and flight risk, the purported justifications for the detention.[62] The Supreme Court first determined that it had jurisdiction over Kim's claim.[63] It then affirmed the government's categorical presumption of dangerousness,[64] neglected to look beyond Kim's status as an alleged "aggravated felon" to the nature of his crimes, and rejected his substantive due process claim on the merits. On other occasions, the Court has acknowledged the well-established principle that "liberty is the norm, and detention . . . without trial is the carefully limited exception[,]"[65] and that civil detention generally requires a special justification.[66] Here, the Court failed to apply heightened substantive due process scrutiny[67]; instead, it implicitly

60. *See* INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2000) (including a theft offense for which the term of imprisonment is one year or more as an "aggravated felony").

61. *Kim I*, 276 F.3d at 526.

62. *See Kim I*, 276 F.3d at 533 ("The critical difference [between constitutionally-permissible civil detention schemes and pre-adjudication civil detention under § 1226(c)] is that § 1226(c) contains no provision for an individualized determination of dangerousness"); *id.* at 535 ("[T]he government has not provided a "special justification for no-bail civil detention sufficient to overcome a[n] [LPR] alien's liberty interest on an individualized determination of flight risk and dangerousness.").

63. *See Kim II*, 538 U.S. at 516–17 (finding that 8 U.S.C. § 1226(e) did not strip the Court of jurisdiction over Kim's habeas claim because Kim was challenging the constitutionality of the statutory framework, not a discretionary judgment or decision by the Attorney General, and the statute's text does not bar such review).

64. *See id.* at 517–19 (noting that Congress enacted § 1226(c) "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens[,]" including the phenomenon that "deportable criminal aliens who remained in the United States often committed more crimes before being removed."). See also *id.* at 523–25 (comparing Kim's case with *Carlson v. Landon*, 342 U.S. 524 (1952), stating that detention of the aliens in that case according to a legislative scheme was held permissible, even though the aliens were not individually found to be dangerous).

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

66. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("[T]his Court has said that government detention violates [the Fifth Amendment Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . . or, in certain special and 'narrow' nonpunitive 'circumstances' . . . where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'") (internal citations omitted).

67. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 314–15 (1993) (explaining the "two tiered framework" of substantive due process jurisprudence). The *Kim II* court failed to consider whether the detention was "necessary to promote a 'compelling state interest.'" *Id.* at 314. Heightened scrutiny is generally applied where the underlying interest is characterized "fundamental"; in contrast, "infringements of non-fundamental liberty and property interests are scrutinized only to ensure that the infringements are rationally related to legitimate government purposes." *Id.* at 314–15.

deferred to Congress's plenary power to legislate in the immigration context.[68] Although the government had detained Kim for six months pending his removal hearing,[69] the Court cited the "short" 47-day average length of pre-removal detention and the opportunity for aliens to contest their inclusion in the statute as the answer to alleged constitutional defects.[70]

2. Individual assessment

Central to the holding of *Kim II* is the view that the Constitution permits the government to detain individual criminal aliens without finding each *particular* alien dangerous or likely to flee. The majority's insistence on treating all aliens with criminal convictions as dangerous or unlikely to attend their deportation hearings[71] defies precedents requiring the government to show a specific reason for civilly detaining an individual even for a "short" period.[72] The political shift after September 11, 2001, through which the legislative and executive branches have exercised expanded powers with respect to noncitizens, has amplified the pressure on courts to tolerate "immigration exceptionalism."[73]

Accordingly, the dissenters portrayed the *Kim II* majority as unfaithful to settled law. The Court's decision to uphold a legislative scheme that deprives due process rights by "categorical sleight of hand,"[74] Justice Souter argued in dissent, violated a simple, unambiguous rule: "[d]ue process calls for an individual determination before someone is locked away."[75] Even for detention of aliens who have lost their right to remain in the United States, Justice Souter

68. Although the Court did not explicitly invoke plenary power, it noted that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules as to aliens that would be unacceptable if applied to citizens." *Kim II*, 538 U.S. at 521 (citing *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)). *See also id.* at 526 ("[T]he [*Reno v. Flores*] Court emphasized that 'reasonable presumptions and generic rules' . . . are not necessarily impermissible exercises of Congress'[s] traditional power to legislate with respect to aliens.") (citing *Reno v. Flores*, 507 U.S. 292, 313 (1993)).

69. Kim I, 276 F.3d 523, 526 (9th Cir. 2002).

70. *See Kim II*, 538 U.S. at 528–29 (distinguishing the case from *Zadvydas*; there, the post-removal detention "has no obvious termination point", while here, the detention under § 1226(c) is much shorter, completed in an average of 47 days). *See also id.* at 513–14 & n.3 (discussing the possibility of seeking a *Joseph* hearing).

71. *See Kim II*, 538 U.S. at 526 (INS permitted to use "reasonable presumptions and generic rules" in detention policy) (citing *Reno v. Flores*, 507 U.S. 292, 313 (1993)).

72. *See* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1023 (2002) (arguing that "the Court has applied the same general due process analysis to all preventive detention, including preventive detention that is likely to be much more short-lived than that imposed on aliens in removal proceedings[,]" citing, for example, United States v. Salerno, 481 U.S. 739 (1987)).

73. *See, e.g.*, Michael D. Patrick, *Detention Without Bond*, 229 N.Y.L.J., May 28, 2003, at 3, col. 1 (attributing outcome in *Kim II* to the post-9/11 political environment). For an explanation of "immigration exceptionalism," *see also* Motomura, *Immigration Exceptionalism*, *supra* note 2 and accompanying text.

74. *Kim II*, 538 U.S. at 552 (Souter, J., concurring in part, dissenting in part).

75. *Id.* at 551.

noted, the Court has required individualized determinations of dangerousness and flight risk.[76]

In *Carlson v. Landon*, for example, the Supreme Court considered a discretionary detention statute that authorized the Attorney General to detain without bail prima facie deportable Communist aliens pending their removal hearings.[77] The Court found that the power to expel aliens was "subject to judicial intervention under the 'paramount law of the Constitution[,]'"[78] and proceeded to assess the constitutionality of the Internal Security Act of 1950 (ISA).[79] The Act created an exception to the prevailing practice of providing bail hearings to prima facie deportable aliens[80] and granting discretion to detain to the Attorney General, who individually determined whether petitioners were a "menace to the public interest."[81] The Court noted that the government need not show specific acts of sabotage or incitement to deny a deportable alien a bail hearing, but that membership in the Communist party *plus personal activity* in support of that party—not merely membership in a Congressionally-defined category of "Communist aliens"—provided a justification for detention without bail.[82] Despite the belief that detention was a "necessary part" of the deportation procedure, the Court noted that the "purpose to injure could not be imputed generally to all aliens subject to deportation . . . ."[83] Thus, membership in a category of deportable aliens alone was too slender a reed on which to rest the presumption of dangerousness.

Implicitly responding to this critique, Chief Justice Rehnquist analogized the § 1226(c) mandatory detention statute in *Kim II* to the ISA scheme in *Carlson* and suggested that an alien's conduct underlying her criminal convictions amounts to "personal activity."[84] On this view, mandatory detention is consistent with *Carlson*. However, the *Kim II* majority overlooked a crucial distinction: past criminal behavior serves as a less meaningful proxy for future dangerousness than did "active" participation in Communist activities in the 1950s. An ideology of violent overthrow of the government, combined with affirmative steps to fulfill that goal, differs in significant ways from the commission of criminal acts of unspecified severity. Although mere mem-

76. *See id.* at 553–57 (discussing *Zadvydas v. Davis*, 533 U.S. 678 (2001), noting that the majority and dissenter there found that detention which did not counter a risk of flight and danger violated substantive due process, and that procedural due process required an impartial decisionmaker to assess particularly the need for detention).

77. *See* 342 U.S. 524, 526–28 & nn.2, 4–5 (1952).

78. *Id.* at 537.

79. *Id.* at 537–47.

80. *See In re* Patel, 15 I & N Dec. 666, Int. Dec. 2491 (BIA 1976) ("An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk . . . .") (internal citations omitted).

81. *See Carlson*, 342 U.S. at 541.

82. *Id.*

83. *Id.* at 538.

84. *See* Kim II, 538 U.S. 510, 525 n.9 (2003).

bership in a political group is an inadequate basis for detention, membership "plus personal activity" may very well reveal an active commitment to future dangerousness—not only an ideology of violence, but also the willingness to take steps toward achieving a violent objective that directly threatens the federal government. In contrast, aliens with prior unspecified criminal convictions subscribe to no obvious criminal ideology or school of thought associated with the conduct. There is no widely shared plot for future violence from which it would make sense to infer an on-going threat to the public, especially when one of the "aggravated felonies" is petty theft.[85] Thus, *Carlson* is inapposite to *Kim II*.

On prior occasions, the Court has suggested that removability based on criminal conduct itself only loosely relates to future dangerousness, if at all. For example, in *Zadvydas v. Davis*,[86] the Court considered whether Congress had authorized the INS to indefinitely detain aliens found removable based on past convictions who could not be deported. The Court noted, "the alien's removable status [alone] . . . bears no relation to a detainee's dangerousness."[87] Of course, when the crimes on which removability is predicated are violent or especially heinous, it is reasonable to believe that an alien who commits them is dangerous. But such individuals are also likely to be found dangerous under an individualized assessment. The *Zadvydas* Court's hesitance to automatically equate dangerousness with removability is logical in cases where the predicate crimes are "rather ordinary"[88] or may have no real relationship to an individual's potential for future violence. Without considering the nature and circumstances of the exact crimes for which an alien has been convicted, the government cannot arrive at an accurate conclusion regarding the alien's dangerousness. Moreover, if a presumption of dangerousness flowing from prior criminal convictions in the post-removal context is impermissible, it is illogical to sustain such a presumption in the pre-removal context, where the finality of the predicate convictions and their proper characterization remain in dispute. Ultimately, the existence of past convictions alone cannot justify a presumption of dangerousness without more information about the underlying crimes.[89]

85. Kim I, 276 F.3d 523, 526 (9th Cir. 2002).

86. 533 U.S. 678, 682 (2001).

87. *Zadvydas*, 533 U.S. at 692.

88. *Kim I*, 276 F.3d at 538.

89. A counterfactual example illustrates the problem with this view. Imagine a world without mandatory detention. Congress then passes a statute authorizing mandatory detention of aggravated felons who have at least three traffic tickets, and the legislative history indicates that members of Congress believed such aliens pose a greater flight risk than other aggravated felons. Congress authorized mandatory detention based on membership in that group to ensure their attendance at their removal hearings, without any individualized findings to show that particular aliens with traffic tickets were likely to flee. Under *Kim II*, the only process to which an alien detained pursuant to the statute is entitled is a hearing to contest his or her inclusion in the category of ticketed aggravated felons. The only contestable issues are whether the alien has prior convictions and whether he or she has a bad driving record. Under *Kim II*, Congress would be permitted to presume—across the board, without individualized assessment—that careless driving

In response to the allegation of insufficient individualized assessment, the *Kim II* Court emphasized the *Joseph* hearing's availability as a sufficient opportunity for individualized assessment.[90] This argument, however, begs the question: individualized assessment of what? The *Joseph* hearing, after all, assesses only the alien's susceptibility to mandatory detention, not whether the alien is a flight risk and thus eligible for bail.[91] In his concurrence, Justice Kennedy maintained that due process "requires individualized procedures [such as the *Joseph* hearing] to ensure there is at least some merit" to the INS charge.[92] For the *Kim II* majority, the individualized assessment of an alien's inclusion in the statute—rather than of her dangerousness or flight risk—satisfied due process.

3. Plenary power and substantive due process

Defenders of *Kim II* invoke the special status of immigration law to justify the loose relationship between Congress's presumptions and the facts. On this view, Congress has significant latitude pursuant to the plenary power doctrine to define the categories of admission, exclusion, and deportation.[93] If Congress believes that prior criminal convictions predict future dangerousness or flight risk, the argument goes, Congress may legislate that presumption. However, issues of admission and exclusion are different from those of detention, and Congress's plenary power over the former does not—and should not—presuppose a similar power over the latter.[94]

Since *The Chinese Exclusion Case*[95] in the late nineteenth century, U.S. courts have struggled to define the scope and effect of the plenary power doctrine, which grants the political branches of government virtually unbounded authority to determine the grounds of admission and exclusion.[96] The federal

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is a proxy for high flight risk, no matter how tenuous the link and no matter how remotely the characterization fit a particular alien, as long as *some* evidence supported this claim. The fundamental problem with this approach is that it imposes a severe deprivation of liberty without adequate justification.

90. *See Kim II*, 538 U.S. at 514 & n.3 (explaining the procedures for obtaining a *Joseph* hearing).

91. *See* Medina, *supra* note 6, at 716.

92. Kim II, 538 U.S. 510, 531 (2003) (Kennedy, J., concurring). Importantly, the Court made clear that it had no occasion to assess the adequacy of the *Joseph* hearing. *See id.* at 514 n.3.

93. *See* The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 603–07 (1889) (holding that as an incident to sovereignty, federal government has plenary power to regulate admission and exclusion of aliens even though such a power is not enumerated in Constitution). *See also* Fong Yue Ting v. United States, 149 U.S. 698, 728, 731 (1893) (holding that the power to deport is incident to the power to exclude, and hence, subject to plenary power).

94. *See* Cole, *supra* note 72, at 1038–39 (arguing that issues of excludability and detention should not be conflated, that the Supreme Court has generally subjected immigration detention to the same due process requirements as other civil detention, and that "[i]mmigration exceptionalism should find its limit at the point of detention.").

95. *See The Chinese Exclusion Case*, 130 U.S. at 603–07.

96. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese

government routinely invokes the plenary power to justify expansive authority over immigrants and their substantive rights,[97] but over the last few decades, the Supreme Court has made clear that this power is subject to constitutional limitations.[98] Notably, the Court recognized an "exception" to plenary power for the procedural due process claims of aliens within the United States.[99]

Lower federal courts have disagreed about the applicability of the plenary power doctrine to substantive due process rights and whether the doctrine extends beyond decisions about exclusion and deportation to decisions about pre-removal detention.[100] Those that reject the distinction between deportation and detention powers rely heavily on *Mathews v. Diaz*, the twentieth century's major plenary power decision, and its language suggesting that, pursuant to the immigration power, Congress may make rules that would be impermissible if

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Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 854–63 (1987) (discussing the creation and expansion of Congress's unenumerated power to regulate admission and expulsion of aliens through *The Chinese Exclusion Case* and its progeny, and criticizing the courts' refusal to subject this power to constitutional restraints). *See also* Motomura, *Curious Evolution*, *supra* note 3, at 1626 (characterizing the plenary power doctrine as "judicially created"). A competing view holds that the plenary power doctrine emanates from Congress's power to "establish a uniform Rule of Naturalization," U.S. CONST. art. I, § 8, cl. 4, but many scholars dispute that this power to define the requirements of citizenship applies to immigration law (defining the grounds of entry and removal). Importantly, however, the *Chinese Exclusion* Court did not rely on the Naturalization Clause when articulating the plenary power doctrine for the first time. *See supra* note 95. *See also* Henkin, *supra*, at 856–57 (explaining that the Court based its reasoning on the United States' sovereignty, not on the text of the Constitution).

97. *See, e.g.*, Mathew v. Diaz, 426 U.S. 67, 79–80 (1976) (upholding federal welfare law denying benefits to most aliens, noting that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

98. *See* Zadvydas v. Davis, 533 U.S. 678, 695–99 (2001) (concluding that Congress could not authorize the indefinite detention of irremovable LPRs with final orders of removal because such a law would infringe on the aliens' substantive due process right against detention and present serious constitutional concerns). *See also* INS v. Chadha, 462 U.S. 919, 940–41 (1983) (arguing that Congress must choose "a constitutionally permissible means of implementing" its plenary power in immigration).

99. *See* Motomura, *Curious Evolution*, *supra* note 3, at 1637–38, 1646. The Constitution does not explicitly refer to national or state citizenship except within the Fourteenth Amendment Privileges or Immunities Clause and the Fifteenth Amendment protection of the right to vote. *See* U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1. The Court has limited due process protection to those aliens who have effected an "entry." *E.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213–15 (1953) (holding that a person being held at Ellis Island has not effected an entry into the United States, and thus is not entitled to the due process protection of a hearing); *Zadvydas*, 533 U.S. at 693 (distinguishing between aliens who have effected an entry into the United States, and thus are entitled to due process protection, and those who have not entered and thus cannot claim such protection).

100. *See* Motomura, *Curious Evolution*, *supra* note 3, at 1670–71 (comparing *Morrobel v. Thornburgh*, 744 F. Supp. 725, 727–28 (E.D. Va. 1990), which held that Congress's power to authorize detention pending deportation flowed from Congress's power to create a particular substantive ground of deportation, with *Fernandez-Satander v. Thornburgh*, 751 F. Supp. 1007, 1009 (D. Me. 1990), *vacated without opinion*, 930 F.2d 906 (1st Cir. 1991), which struck down mandatory detention of aggravated felons on the ground that the statute prohibiting bond "is not a statute deciding who was excludable" and therefore not subject to plenary power).

applied to citizens.[101] In *Diaz*, the Supreme Court upheld a federal statute that denied Medicare benefits to all aliens except lawful permanent residents who had resided in the United States for at least five years.[102] The Court reasoned that Congress has no affirmative duty to provide public benefits to all aliens, and can accordingly condition benefits on permanent residency of a certain minimum duration.[103]

However, the *Diaz* Court's reasoning might not apply to the scope of the government's power to detain immigrants, a very different issue than the availability of public benefits. Even if Congress has leeway to define which noncitizens receive public benefits and under what conditions, it does not necessarily follow that Congress has a similar leeway to define the scope of noncitizens' rights against detention. Congress may very well have an affirmative duty *not* to deprive an alien of physical liberty absent sufficient justification. The *Diaz* Court specified the power to deport and the power to exclude as powers Congress could apply only to aliens, but it made no mention of the detention power as similarly expansive in the immigration context.[104]

The argument that the plenary power authorizes Congress to legislate presumptions for detention based on "averages" and categorical judgments fails because it does not distinguish Congress's power to create and define particular grounds of deportation from Congress's power to determine the treatment of an alien pending the determination of removability.[105] While courts have treated the former as plenary, regardless of the soundness of that judgment, they have ruled that the Constitution constrains the latter.[106] Although the staunchest advocates of the plenary power insist that congressional whim trumps standard constitutional principles when analyzing the substantive grounds of admission and exclusion, they cannot claim that congressional whim dictates the *procedures* through which aliens are removed, or *for what reasons* aliens are denied civil liberties to which they still have a legal right pending a determination of their status.[107] Although Congress clearly has the power to detain aliens as part of the removal process, that power has traditionally served the sole purpose of preventing flight and harm to the public pending deportation hearings.[108] As a result, Congress's "greater" power to determine who stays and

101. 426 U.S. at 79–80.

102. *Id.* at 69.

103. *Id.* at 80–81.

104. *See id.* at 80.

105. *See* Cole, *supra* note 72, at 1038 (criticizing defenders of post-1996 immigration detention measures because they have "confused the power to deport with the power to detain.").

106. *See id.* at 1015 ("The Court has long restricted plenary power deference to the *substantive* criteria governing admission and expulsion, and has insisted that the *procedures* Congress employs to carry out removal of persons from the United States must satisfy due process.").

107. *See id.* at 1024 ("[T]he Court has not deferred on questions of the procedures used to effectuate deportation, even while it has deferred with respect to the substantive grounds for exclusion and deportation.").

108. *See* Zadvydas v. Davis, 533 U.S. 678, 690–92 (2001) (arguing that civil detention

who goes does not include the "lesser" power to detain deportable aliens, pending determination of their removability, who pose neither a danger to the community nor a risk of flight.

The power to define the grounds of deportation should be distinguished from the power to detain, in part because the substantive content of the Due Process Clause guards against arbitrary government or government by loose logic when basic liberties are at stake.[109] As previously noted, the Due Process Clause protects all "persons," not only citizens.[110] At its core, it prohibits the government from acting without adequate justification. When laws infringe on freedoms historically rooted in precedent or on freedoms that carry special moral resonance with the public, the government must offer not only any reason for infringement, but a good reason.[111] Constitutional scholars have illuminated the rationale for close scrutiny of laws that infringe on these liberties:

> For the most part, any means "rationally" connected to a legitimate goal will satisfy this requirement [of non-arbitrariness]. But sometimes identifiable intuitions or principles make it morally unreasonable to pursue legitimate ends in particular ways, and sometimes such principles impose specific duties of care. Action in breach of these principles is arbitrary in the constitutional sense.[112]

Although judgments of arbitrariness take on a "moral dimension,"[113] drawing on context and evolving norms, these moral judgments are unavoidable in a democracy committed to "public spirited"[114] governance. Normative inquiry is unavoidable.

The issue latent in *Kim* is whether these moral judgments about the proper justifications for civil detention apply equally to certain aliens as well as citizens.

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requires a "special justification," and that the indefinite detention of deportable aliens does not further the government's regulatory goals of preventing dangerousness and flight risk). *See also* Cole, *supra* note 72, at 1038 (stating that an alien's violation of immigration law does not justify her detention "unless detention is necessary because [she] also poses either a danger to the community or a flight risk").

109. *See* Fallon, *supra* note 67, at 310 ("In its commonest form, substantive due process doctrine reflects the simple but far-reaching principle . . . that government cannot be arbitrary.").

110. U.S. CONST. amend. V. Professor Motomura has pointed out that the mere applicability of the Due Process Clause veils the more contentious question: to how much due process protection is an alien entitled? Hiroshi Motomura, *Widening the Circle*, BOSTON REVIEW, Dec. 2002–Jan. 2003, at 18, *available at* http://www.bostonreview.net/BR27.6/motomura.html. For aliens like Hyung Joon Kim, who have developed significant economic, social, and familial ties in this country, the Due Process Clause normally affords significant protection. *See* Landon v. Plasencia, 459 U.S. 21, 34 (1982) (finding Plasencia's individual interest under the *Mathews v. Eldridge* test "weighty," given her family ties).

111. *See* Fallon, *supra* note 67, at 320 (noting that in addition to judicial precedent, the Court often looks to its "sense of which of the eligible explanatory rationales best accords with moral intuitions or principles that it takes to be widely shared in the society at large.").

112. *Id.* at 323 (footnotes omitted).

113. *Id.* at 326.

114. *Id.* at 310.

The identifiable "intuitions or principles"[115] that make it "morally unreasonable"[116] to pursue removal by detention without individualized assessment have their roots in civil detention precedent, where the Supreme Court has regarded bodily restraint as a serious deprivation of liberty.[117] These cases carve out a clear area of substantive due process protection against arbitrary government action and require the government in various contexts to offer clear and convincing evidence that a particular individual is dangerous or a flight risk before imprisoning her.[118] Without such evidence, civil detention collapses into "arbitrary" government action providing no justification for imposing such a severe deprivation.[119]

The historically favored status of LPRs such as Kim indicates that such protections should also extend to them. This status follows in part from a functionalist understanding of constitutional rights, which emphasizes the effects of community stakes and ties on an alien's rights to due process.[120] A lawful permanent resident without a final order of removal has a significant liberty interest, one barely distinguishable from the interest of a citizen.[121] LPRs are noncitizens who have adopted the United States as their home, and who are one step away from acquiring an American political identity and a voice in our democracy. Accordingly, the application of an arbitrary detention scheme to the most favored class of aliens conflicts with history and well-settled principles of American constitutional law. By shielding mandatory detention from traditional due process safeguards, *Kim II* expands the substantive reasons for civil

115. *Id.* at 323.

116. *Id.*

117. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (striking down a statute that allowed an insanity acquittee to be committed to a mental institution until he could prove that he was not dangerous to himself or others, even though he did not suffer from any mental illness, and noting that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause"); United States v. Salerno, 481 U.S. 739, 750 (1987) (noting "the individual's strong interest in liberty" and recognizing "the importance and fundamental nature of this right" in upholding a statute which authorized pretrial detention of dangerous felony arrestees, because the government has a sufficiently weighty interest, and the statute offered extensive procedural safeguards); Addington v. Texas, 441 U.S. 418, 433 (1979) (holding that due process requires "clear and convincing" evidence for involuntary civil commitment of the mentally ill). *See also infra* Part II.A.

118. *See infra* Part II.A.

119. *See* Cole, *supra* note 72, at 1007 ("[W]here an alien poses neither a danger nor a flight risk, his removal may be effectuated without detention, and detention therefore serves no legitimate government purpose.").

120. *See* Landon v. Plasencia, 459 U.S. 21, 32–33 (1982) (explaining that, while "an alien seeking initial admission to the United States . . . has no constitutional rights regarding his application . . . once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly. . . . [A] continuously present permanent resident alien has a right to due process [when threatened with deportation.]").

121. Kim II, 538 U.S. 510, 544 (2003) (Souter, J., concurring in part, dissenting in part) ("LPRs share in the economic freedom enjoyed by citizens: they may compete for most jobs in the public and private sectors . . . and apart from the franchise, jury duty, and certain forms of public assistance, their lives are generally indistinguishable from those of United States citizens.").

detention. However, the plenary power doctrine alone cannot justify this expansion because the doctrine applies only to Congress's power to define the grounds of exclusion and deportation.

Pre-*Kim I* precedent supports the application of heightened scrutiny for prolonged detention. In *Zadvydas v. Davis*, the Court suggested that lawful permanent residents with final orders of removal have a substantive due process right against unjustified indefinite detention.[122] *Zadvydas* raised the question of whether Congress had authorized the INS to indefinitely detain resident aliens who had been ordered removed, but whom no country would accept.[123] To avoid the constitutional questions raised by a statute authorizing indefinite detention, the Court read into the statute a six-month "reasonable time" limitation.[124] Justice Breyer, writing for the majority, noted that the proceedings at issue were civil rather than criminal, and that the substantive due process jurisprudence required a "sufficiently strong special justification" which "outweighs the individual's constitutionally protected interest in avoiding physical restraint."[125] Where repatriation efforts had failed and were unlikely to succeed in the foreseeable future, the Court found no such special justification, and limited the detention to a period "reasonably necessary to bring about th[e] alien's removal from the United States."[126] If, after such a period, the government is unable to show a "significant likelihood of removal in the reasonably foreseeable future," detention is no longer reasonably related to its purpose.[127] In so ruling, the Court suggested that the Constitution protects the fundamental freedoms of aliens, even those who no longer have a legal right to be here.[128] By applying traditional civil detention precedent, the Court intimated that heightened scrutiny applies when the government seeks to indefinitely detain an alien.[129]

After *Kim II*, however, the case for heightened scrutiny is uncertain for aliens who face less than indefinite detention and who have conceded deportability, either by failing to contest their inclusion in the mandatory detention statute, or by losing at their *Joseph* hearing (and therefore being deemed "properly included" in the statute).[130] The Court permitted the use of "reasonable

122. *See* 533 U.S. 678, 690–95 (2001).

123. *See id.* at 682–86.

124. *See id.* at 682, 701.

125. *Id.* at 690 (internal citations omitted).

126. *Id.* at 689.

127. *See id.* at 701 (adopting a six-month "presumptively reasonable period of detention," after which the alien detainee is eligible for release if she can demonstrate that "there is no significant likelihood of removal in the reasonably foreseeable future").

128. *See id.* at 682 (noting that the case deals with aliens who have been ordered removed).

129. *See id.* at 690 (emphasizing that civil detention violates due process except in narrow circumstances where there is a "special justification" that outweighs the individual's liberty interest). *See also supra* note 67 for an explanation of heightened (or strict) substantive due process scrutiny.

130. *See* 8 C.F.R. § 1003.19(h)(1)(ii) (2005) ("[N]othing in this paragraph shall be construed

presumptions and generic rules" with respect to deportable criminal aliens.[131] Justice Kennedy argued in his concurrence for a standard of review that would strike down only "arbitrary or capricious" infringement on freedom: "[A] lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."[132] Recent detention cases confirm the availability of judicial review,[133] but also demonstrate the Court's reluctance to apply heightened scrutiny to the prolonged detention of noncitizens.[134]

C. *Conceding Deportability*

The empty-shell view of due process advanced in *Kim II* helps explain the relevance of Kim's "concession" of deportability. At the heart of the *Kim II* decision lies a belief that Kim had conceded his deportability and, therefore, had admitted he had no right to remain in the United States. Kim did not contest Congress's removal power and general authority to detain aliens pending removal, and in the Chief Justice's view, Kim did not "argue that he himself was not 'deportable' within the meaning of § 1226(c)."[135] Because Kim did not challenge his inclusion in the mandatory detention statute at a *Joseph* hearing, he could not challenge the government's authority to detain him specifically.[136] The concession of deportability, therefore, downgraded Kim's liberty interest.[137] In the majority's view, Kim had a less weighty liberty interest than an alien who had not conceded deportability, because he had functionally given himself a final

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as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.").

131. *See* Kim II, 538 U.S. 510, 526 (2003) (citing *Reno v. Flores*, 507 U.S. 292, 313 (1993)).

132. *Id.* at 532. Prior to *Kim II*, some scholars had argued that mandatory detention without bail hearings violated due process, even under rational basis review (which only requires that the detention is rationally related to a legitimate government purpose). *See* Cole, *supra* note 72, at 1023–24 ("Bail hearings routinely assess risk of flight; where aliens pose no such risk, no legitimate purpose is served by their detention.").

133. *See* Medina, *supra* note 6, at 711 (discussing recent executive detention cases and noting that "[i]n all the cases, the power of federal courts to entertain challenges to either statutes or executive acts is at issue. Consistently, thus far, the Court has protected its power to hear constitutional challenges brought by individuals whose rights have been affected.").

134. *See Kim II*, 538 U.S. at 521–22 (highlighting that, despite applicability of Due Process Clause to aliens, "Congress may make rules as to aliens that would be unacceptable if applied to citizens."). *See also* Clark v. Martinez, 543 U.S. 371, 377–80 (2005) (applying the six-month presumptively reasonable detention period defined in *Zadvydas* to "inadmissible" aliens as a matter of statutory interpretation, not constitutional analysis). *See also* Medina, *supra* note 6, at 711 ("*Demore* [*v. Kim*] signals that the Court's view of human rights . . . is not as expansive as its view of its power.").

135. *Kim II*, 538 U.S. at 522.

136. *See id.* at 514.

137. *See id.* at 531 (declaring "[t]he INS detention of respondent, a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings" to be constitutionally permissible).

order of removal.[138] The Court seriously erred by contending that aliens who concede prima facie deportability have somehow lost their right to remain and hence enjoy fewer rights against detention. It contravened the basic rule that a lawful permanent resident retains her status until she receives a final order of removal.[139]

While a straightforward axiom of immigration law, the rule that an LPR who has not abandoned her status has a legal right to remain until she receives a final order of removal[140] has proved controversial. In *Parra v. Perryman*, a case that contributed to the circuit split resolved by *Kim II*, the Seventh Circuit rejected an LPR's due process challenge to mandatory detention based on his supposed concession of deportability.[141] *Parra* involved Manuel Parra, a Mexican citizen who pleaded guilty in 1996 to aggravated criminal sexual assault, an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii).[142] The government detained Parra pending his removal hearing, and Parra sought a writ of habeas corpus challenging the mandatory detention statute as a violation of due process.[143] In a cursory application of *Mathews v. Eldridge*, the court determined that Parra's liberty interest to remain in the United States was nominal, and because of his concession of deportability the risk of error was zero.[144] Finally, the court deemed the public or governmental interest in preventing the flight of criminal aliens significant.[145] As a result, the court found no

138. *See id.* at 523 n.6 (discussing concession of deportability). *See also id.* at 577 (Breyer, J., concurring in part and dissenting in part) (concession of deportability is functional equivalent to final order of removal).

139. *See* 8 C.F.R. § 1.1(p) (2005) ("[LPR] status terminates upon entry of a final administrative order of exclusion, deportation, or removal."). A recent opinion by the D.C. Circuit Court of Appeals indicates that LPRs may abandon their LPR status by means other than a formal adjudication of their right to remain, including by ceasing to reside in the United States. *See* United States v. Yakou, 428 F.3d 241, 248–51 (D.C. Cir. 2005). However, such circumstances are inapposite to the mandatory detention context, where the LPR clearly resides in the United States (in detention) and has not abandoned her right to remain. The commission of various crimes does not constitute involuntary "abandonment" of LPR status because, unlike prolonged physical absence from the United States, it does not demonstrate conduct that is theoretically inconsistent with living in the United States, notwithstanding the undesirability of the underlying crimes. More importantly, aggravated felons may access certain forms of relief from removal, discussed *infra* Part II.B.2(a), which means that even the commission of crimes that clearly fall within the purview of 8 U.S.C. § 1226(c) does not necessarily result in the termination of LPR status. For this reason, "abandonment" cannot be inferred from criminal conduct, and *Yakou* does not apply.

140. *See* 8 C.F.R. § 1.1(p) (2005). *See also Yakou*, 428 F.3d at 249 (citing 1 INS & DOJ Legal Opin. § 91-2 (Jan. 9, 1991) (finding that an LPR "remains a lawful permanent resident until the Government proves otherwise in deportation or exclusion proceedings against him or her, or until the petitioner voluntarily abandons residence and adjusts to nonimmigrant status, or leaves the United States and executes a Form I-407, Abandonment of Lawful Permanent Resident Status") (internal citations omitted)).

141. Parra v. Perryman, 172 F.3d 954, 955 (7th Cir. 1999).

142. *Id.*

143. *Id.* at 955–56.

144. *Id.* at 958.

145. *See id.*

constitutional defects in mandatory detention as applied to aliens who concede deportability.[146]

Contending that Parra "concedes that he is an alien and that he has been convicted . . . of a crime meeting the statutory definition of an aggravated felony[,]" and that an immigration judge had found Parra "deportable" and "ineligible for any relief from removal[,]" the court concluded that Parra had no right to remain in the United States.[147] The court found that "persons subject to § 1226(c) have forfeited any *legal* entitlement to remain in the United States and have little hope of clemency."[148] The notion that a person *subject* to the mandatory detention statute—that is, someone who is prima facie deportable—has "forfeited" her legal entitlement to be here contradicts the spirit of the rule that the status of an LPR "terminates upon entry of a final administrative order of exclusion, deportation, or removal."[149] It completely defies the point of due process, namely, to afford an individual an opportunity to be heard before terminating an important liberty interest. Most strikingly, it lacks coherence. The purpose of a deportation hearing is to determine an alien's removability in a forum where the government bears a heavy burden of proof to minimize the risk of error.[150] If so, how can the central question adjudicated in the hearing—the right of the alien to remain in the United States—be answered and given operative effect before the hearing even occurs?

Despite the logical problem with treating detainees without a final order of removal the same as detainees who have been ordered removed, other courts persist in this view. For example, the Sixth Circuit in *Ly v. Hansen*, reinforced the *Parra-Kim* view that prima facie deportability extinguishes the alien's legal right to remain.[151] *Ly*, decided after *Kim II*, posed the question of whether indefinite pre-removal detention violates due process.[152] Ly was a citizen of Vietnam but, due to the absence of a repatriation agreement between Vietnam and the United States, could not be deported to his home country even if ordered removed.[153] The court applied the reasoning of *Zadvydas v. Davis* and found that Ly's removability had no bearing on his substantive due process liberty interest against detention:

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146. *See id.*

147. *Id.* at 956, 958.

148. *Id.* at 958.

149. 8 C.F.R. § 1.1(p) (2005). While this provision has been held to define only a "subset" of ways in which LPR status can be terminated, the alternative method identified by the *Yakou* court, namely, abandonment, does not apply in the mandatory detention context. *See* United States v. Yakou, 428 F.3d 241, 248–51 (D.C. Cir. 2005).

150. *See* Woodby v. INS, 385 U.S. 276, 286 (1996) (holding that the government must prove the alleged facts underlying the deportation charge by clear and convincing evidence).

151. *See* 351 F.3d 263, 269 (6th Cir. 2003) (noting that "it is true that a [prima facie] removable alien has no right to be in the country").

152. *Id.* at 266.

153. *Id.* at 265 & n.1.

> The INS argues that because Ly is *prima facie* removable, he has no liberty interest at all, and cannot therefore complain that he is not at liberty within the United States. *While it is true that a removable alien has no right to be in the country*, it does not mean that he has no right to be at liberty. *Zadvydas* established that deportable aliens, even those who had already been ordered removed, possess a substantive Fifth Amendment liberty interest[.][154]

Thus, the court essentially equated the legal status of prima facie deportable aliens with that of aliens already found removable. The *Ly* court interpreted *Kim II* to authorize mandatory pre-removal detention only for "a short period of time," although it did not specify the exact length of time beyond which detention would be unconstitutional or unreasonable.[155] Ultimately, the court held that the indefinite detention of aliens without a final order of removal would raise a constitutional question.[156] Following *Zadvydas* and the canon of constitutional avoidance, the court read a "reasonable time limitation" into the statute and deferred judgment on its constitutionality.[157] While the court upheld the detention without bond of prima facie removable criminal aliens for a "reasonable" period of time required to initiate and conclude proceedings, it noted that indefinite detention of nonremovable deportable aliens required the government to show a "strong special justification" beyond mere dangerousness.[158]

Other courts have rejected the *Parra-Kim* reasoning. In *Hoang v. Comfort*, decided before *Kim II*, the Tenth Circuit addressed and rejected *Parra* and the notion that the government may extinguish an alien's legal right to remain in the United States before the removal hearing.[159] The three aliens in *Hoang* had criminal convictions that rendered them prima facie removable, but they also had applied for relief under the Convention Against Torture.[160] The court maintained that LPRs may be "deportable" because of criminal convictions, but "they remain lawful permanent residents until such time as they are finally ordered deported."[161] As a result, they have a "fundamental liberty interest that may not be arbitrarily infringed upon" absent an individualized hearing to address flight

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154. *Id.* at 269 (emphasis added). This view resonates with Justice Scalia's dissent in *Zadvydas*, where he characterizes LPRs with final removal orders as the equivalent of inadmissible aliens—neither has a legal entitlement to remain in the United States. *See* Zadvydas v. Davis, 533 U.S. 678, 703 (2001) (Scalia, J., dissenting).

155. *See Ly*, 351 F.3d at 270 (stating that mandatory detentions under 8 U.S.C. § 1226(c) "were usually relatively brief . . . but did not specifically hold that any particular length of time in a specific case would be unreasonable or unconstitutional.").

156. *See id.* at 265, 270.

157. *See id.* at 270–73.

158. *Id.* at 273.

159. *See* Hoang v. Comfort, 282 F.3d 1247, 1255–56 (10th Cir. 2002).

160. *See id.* at 1252–53, 1256.

161. *Id.* at 1256 (citing 8 C.F.R. § 1.1(p)).

risk and dangerousness.[162] Indeed, "[t]he liberty interest of a person who is detained pending deportation proceedings is no less fundamental."[163] Applying heightened scrutiny, the court found that mandatory detention violated substantive due process.[164] Justice Souter endorsed this view in his partial dissent in *Kim II*, contending that because Kim had applied to the Immigration Court for withholding of removal, his removability remained in dispute.[165] As such, "Kim may continue to claim the benefit of his current status [as an LPR] unless and until it is terminated by a final order of removal."[166]

Hoang and the *Kim II* dissenters recognized that until the entry of a final order of removal, an LPR remains in the United States, even while detained, as a matter of right, not a matter of "grace."[167] Despite the *Kim* majority's contrary intimation, this is the only sensible conclusion. If an LPR's legal right to remain were involuntarily extinguished prior to that time, a final order of removal would be redundant or even superfluous. If an LPR were to lose her legal status without the elaborate procedural safeguards afforded in a deportation hearing,[168] what purpose would the deportation hearing serve? Would the hearing merely reaffirm the general belief that the LPR in question has no right to be here? What if the immigration judge found that the LPR's offenses are not deportable crimes? Would the LPR first lose her legal right to remain upon her classification as prima facie deportable, and then regain that right at the conclusion of the deportation hearing? The only way to avoid this arbitrary result is to preserve the notion that an LPR remains an LPR, entitled to all the rights conferred by that status, until a final order of removal has issued.

*D. Relevance of the "*Joseph*" Hearing*

The courts' confusion about an alien's pre-removal legal status threatens the liberty of concededly prima facie deportable aliens because the *Parra-Kim* view provides the government with a justification for what would otherwise be considered unconstitutional detention. That is, it allows the government to downgrade an LPR's liberty interest before the entry of a final order of removal.

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162. *Id.*

163. *Id.* at 1257.

164. *See Hoang*, 282 F.3d at 1256–57 (finding petitioners' liberty interest as a fundamental right, thus triggering heightened scrutiny). *See also id.* at 1258–60 (finding mandatory detention under INA § 236(c) violates substantive due process, given the fundamental nature of the right implicated, and the government's failure to show special justifications to outweigh the individual's liberty interest).

165. *See* 538 U.S. 510, 541 (2003) (Souter, J., concurring in part, dissenting in part) (rejecting the majority's suggestion that Kim "conceded" his removability).

166. *Id.* at 543 (*citing* 8 C.F.R. § 1.1(p)) (arguing that Kim may continue to claim the due process to which an LPR is entitled until his status is terminated by a final removal order).

167. *See* Kim I, 276 F.3d 523, 528 (9th Cir. 2002).

168. *See* Woodby v. INS, 385 U.S. 276, 286 (1966) (imposing a heightened burden of proof on the government at a deportation hearing because of the severe hardship posed by deportation of a permanent resident alien).

The debate over when the government may extinguish an LPR's legal right to remain renders the *Joseph* hearing highly significant for any alien facing mandatory detention, because at this hearing the immigration judge determines whether the government is unlikely to prove that the alien has been properly charged with the elements listed under 8 U.S.C. § 1226(c).[169] For example, the respondent may raise questions as to whether the government will ultimately be able to produce documents showing the respondent is an alien, or that she has convictions for deportable offenses.[170] The respondent may offer factual evidence and legal authority in support of her position.[171] If the respondent fails to make this showing, she will have effectively "conceded" deportability.[172]

Under the applicable regulation, the *Joseph* hearing permits an alien to contest her inclusion under the mandatory detention statute.[173] The regulation states that "nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs."[174] At the hearing, the detainee may challenge her status as an alien and the existence of a conviction for a predicate crime, or show that "the INS is otherwise substantially unlikely to establish that [s]he is in fact subject to mandatory detention."[175] In *In re Joseph*, the respondent, an LPR of Haitian origin, had fled from Maryland police officers during a chase.[176] Once apprehended, Joseph was charged with "obstructing and hindering," a common-law crime in Maryland.[177] Joseph pleaded guilty to intentionally obstructing a police officer and received a one-year sentence.[178] The INS initiated removal proceedings against him pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who has been convicted of an "aggravated felony" defined under federal immigration law—in this case, obstruction of justice.[179] The immigration judge decided that Joseph's conviction did not constitute an

169. *See In re* Joseph, 22 I. & N. Dec. 799, 800, Int. Dec. 3398 (BIA 1999) (en banc).

170. *See id.* at 805 ("the very purpose of the regulation, 8 C.F.R. § 3.19(h)(2)(ii) [subsequently reclassified as 8 C.F.R. § 1003.19(h)(2)(ii)], is to provide an alien . . . with the opportunity to offer evidence and legal authority on the question whether [INS] has properly included him within a category that is subject to mandatory detention").

171. *Id.*

172. If an alien loses at her *Joseph* hearing, she will be deemed properly included in the mandatory detention statute. Proper inclusion means she is properly charged as an aggravated felon. Accordingly, she will be treated as if she is deportable (having failed to rebut the very strong presumption in favor of the government under current *Joseph* hearing procedures). This is—in effect—the same as if she had foregone the *Joseph* hearing.

173. *See Joseph*, 22 I. & N. Dec. at 805. *See also* 8 C.F.R. § 1003.19(h)(2)(ii) (2005).

174. 8 C.F.R. § 1003.19(h)(2)(ii) (2005). This provision is the reclassified version of 8 C.F.R. § 3.19(h)(2)(ii) (1999), which initially spawned the *Joseph* hearing.

175. Kim II, 538 U.S. 510, 514 n.3 (2003).

176. *See Joseph,* 22 I. & N. Dec. at 800–01.

177. *Id.*

178. *Id.* at 801.

179. *See id.* (discussing § 1101(a)(43)(S)).

aggravated felony and terminated the removal proceedings.[180] The INS appealed the immigration judge's decision and subsequent order releasing Joseph, and obtained an automatic stay of the release order pending the bond appeal.[181] Although Joseph's conviction record gave the INS "reason to believe" he was an aggravated felon, the Board of Immigration Appeals (BIA) held that this presumption was insufficient to dictate the outcome of his bond hearing if the record as a whole did not support the charge.[182] The BIA determined that "obstructing and hindering" was unlikely to constitute an aggravated felony and, as a result, the INS was substantially unlikely to find Joseph subject to the mandatory detention statute.[183] The BIA found that an LPR "will not be considered 'properly included' in a mandatory detention category" when an Immigration Judge or the BIA finds, on the basis of the bond record as a whole, that the INS is "substantially unlikely to establish [on] the merits . . . the charge or charges that would otherwise subject the alien to mandatory detention."[184] This rule places a heavy burden on the respondent and permits the government to detain individuals who are unable to meet this burden.[185] Indeed, the *Joseph* dissent criticized this excessive burden in light of an LPR's important liberty interest.[186] Without bond hearings or any other opportunity to contest detention, an alien who seeks pre-removal release must win at her *Joseph* hearing.

The severity of this burden creates the possibility that an alien who raises a reasonable claim could still lose at the *Joseph* hearing. Under current regulations, an immigration judge has no authority to conduct a bond hearing for an alien who loses at the *Joseph* hearing.[187] Therefore, an alien with a non-frivolous challenge to deportability has no opportunity for release whatsoever if she cannot meet the high burden of proof placed on her at the *Joseph* hearing.[188] Because this hearing is an LPR's only pre-removal opportunity to contest the court's classification of her record into one of the mandatory detention categories, due process requires better procedural safeguards and an opportunity for an immigration judge to consider possible relief from removal.

Immigrants' rights advocates will likely emphasize that *Kim II* applies only to aliens who "concede deportability" and argue that due process requires bond

180. *Id.*

181. *Id.*

182. *Id.* at 804–05.

183. *Id.* at 808.

184. *Id.* at 806.

185. *See* LaBrie, *supra* note 12 (arguing that the "substantially unlikely" standard is not supported by the applicable regulation, 8 C.F.R. § 1003.19(h)(2)(ii)).

186. *See Joseph*, 22 I & N. Dec. at 809–10 (Schmidt, Chairman, concurring and dissenting) (characterizing burden as "inappropriately deferential to the [INS]," and failing to give appropriate weight to the LPR's liberty interests).

187. *See id.* at 803 ("[I]f the respondent is removable as an aggravated felon, the Immigration Judge lacks any bond jurisdiction.").

188. *See* 8 C.F.R. § 1003.19(h)(1)(i)(E) (2005).

hearings for aliens who advance good-faith defenses to their deportability.[189] While this strategy may secure due process for a significant number of aliens, it may falter in the face of an expansive notion of "conceding deportability," as demonstrated by *Kim II*. Specifically, Kim challenged the characterization of his predicate convictions as "aggravated felonies" and applied for relief from removal, but the court still found that he "conceded" his deportability.[190] If such actions do not demonstrate that Kim contested his deportability, and if seeking relief from removal counts as conceding deportability, then this "limiting" construction of *Kim II* will not achieve a just outcome. In addition, the status of aliens who do raise substantive challenges in the *Joseph* hearing, but who lose as a result of their high evidentiary burden, remains unclear after *Kim*. Accordingly, immigrants' rights advocates must push for procedural reform within the *Joseph* hearing to safeguard the pre-removal rights of LPRs.

II.
PROCEDURAL DUE PROCESS AND THE *JOSEPH* HEARING

Part I explored the reasoning behind *Kim II*, focusing on the concept of "conceding deportability" and the heightened significance of the *Joseph* hearing after the case was decided. This section applies the basic test for procedural due process in administrative proceedings articulated in *Mathews v. Eldridge* to examine the adequacy of the *Joseph* hearing's procedures.[191] The three factors of the test are (1) the private interest affected by official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, or the marginal value of additional or alternative procedures; and (3) the government's interest, including the administrability of additional or substitute procedures.[192] The Supreme Court has held that the *Eldridge* test applies to the due process claims of aliens who have entered the country.[193] The following sections examine each of the *Eldridge* factors in turn, and conclude that elements of the *Joseph* hearing currently violate the procedural due process rights of LPRs.

A. Private Interest

To evaluate the significance of an LPR's liberty interest in the *Joseph* hearing, it is helpful to review precedent in the civil detention and immigration contexts. The next two subsections discuss key precedents in both realms and

189. *See, e.g.*, LaBrie, *supra* note 12.

190. *See* Kim II, 538 U.S. 510, 513–14 & n.3, 522–23 n.6 (2003) (deciding the case on the basis of Kim's concession of deportability for habeas corpus purposes, because he failed to seek a *Joseph* hearing, at which he could have challenged his deportability).

191. *See* 424 U.S. 319, 334–35 (1976).

192. *Id.*

193. *See* Landon v. Plasencia, 459 U.S. 21, 32–34 (1982) (finding that an alien who has gained admission to the United States and is continuously present here has a right to due process, and applying the *Eldridge* procedural due process analysis).

support the conclusion that an LPR has a weighty liberty interest at stake in the *Joseph* hearing.

1. Civil detention

The Court has generally regarded freedom from bodily restraint as a fundamental right,[194] the deprivation of which requires both a compelling governmental interest as well as heightened procedural safeguards.[195] In the context of mandatory detention, the private interest at stake is the detainee's liberty. Because immigration proceedings are civil, not criminal,[196] immigration detention is a form of civil detention. A civil detainee's right to be free of bodily restraint has generally been regarded as fundamental, and laws that infringe on this right must meet a higher level of scrutiny.[197] In *Foucha v. Louisiana*, for example, the Court considered a Louisiana law which permitted the civil commitment of a criminal defendant found not guilty by reason of insanity.[198] Under that scheme, a hospital review committee at the psychiatric facility detaining the acquitted may recommend relief, but a trial court must first hold a hearing where the acquitted must prove that she does not pose a danger to herself or others.[199] If the acquitted is deemed dangerous, the state may compel her to return to the mental institution, whether or not she is mentally ill.[200] In Foucha's case, the state sought his continued confinement solely on the basis of his antisocial personality (not a mental illness) and evidence of dangerousness.[201] The civil detention scheme raised a number of constitutional problems, in part because, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[202] Because the statute lacked sufficient procedures, such as an adversary hearing requiring the government to demonstrate the detainee's mental

194. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

195. *See, e.g.*, *Salerno*, 481 U.S. at 748 ("[S]ufficiently compelling governmental interests can justify detention of dangerous persons."); Reno v. Flores, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny."); Addington v. Texas, 441 U.S. 418, 427 (1979) (requiring a higher burden of proof where individual liberty is at stake).

196. *See* Woodby v. INS, 385 U.S. 276, 285 (1966) ("a deportation proceeding is not a criminal prosecution").

197. *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 369–70 (2002) (describing the general rule of civil commitment precedent as requiring the government to show dangerousness plus some additional factor).

198. 504 U.S. 71, 73 (1992).

199. *Id.*

200. *Id.*

201. *See id.* at 74–75.

202. *Id.* at 80 (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)).

illness and dangerousness, the Court struck down the scheme as a violation of due process.[203]

Similarly, in *Kansas v. Hendricks*, the Court considered a Kansas civil commitment regime under the state's Sexually Violent Predator Act of 1994.[204] Leroy Hendricks had served a prison sentence for "taking indecent liberties" with two 13-year old boys, and upon his release, the state civilly committed him under the Act on the grounds that Hendricks suffered from pedophilia and was unable to control his behavior.[205] Hendricks challenged the statute as a violation of substantive due process.[206] While acknowledging the fundamental nature of the liberty interest at stake, the Court upheld the scheme on the ground that it required not only a showing of mere dangerousness, but also of mental abnormality or some other characteristic rendering an individual with a history of sexual molestation unable to control his behavior.[207] Only individuals with past violent behavior and "a present mental condition that creates a likelihood of such conduct in the future" may be committed.[208] Thus, under *Hendricks*, substantive due process requires the government to identify some special justification beyond mere past dangerousness for potentially indefinite non-punitive civil detention.[209]

Contrary to the Court's intimation in *Kim II*, standard civil detention analysis has been applied even to laws which produce only a "short" deprivation of liberty.[210] In *United States v. Salerno*, the Court considered the constitutionality of the Bail Reform Act of 1984 (BRA).[211] The statute empowered federal courts to detain an arrestee pending trial upon a showing that "no release conditions will reasonably assure the safety of any other person and the community."[212] The BRA required the government to demonstrate the need for detention by clear and convincing evidence at an adversarial hearing.[213] Suspects enjoyed elaborate procedural protections under the statute, including not only an adversarial hearing, but also the right to counsel at the detention

203. *See id.* at 80, 83, 86.

204. *See* 521 U.S. 346, 350 (1997).

205. *See id.* at 353–56 (explaining that as a pedophile who has not been cured of his condition, Hendricks was a sexually violent predator within the meaning of the Act).

206. *Id.* at 350.

207. *See id.* at 356–58.

208. *See id.* at 357–58.

209. *Id.* at 358.

210. *See* Kim II, 538 U.S. 510, 528–531 (2003) (distinguishing mandatory detention under § 1226(c) from the post-removal period detention in *Zadvydas v. Davis*, which was indefinite and potentially permanent). *See also* Cole, *supra* note 72, at 1023 ("[T]he Court has applied the same general due process analysis [in *Zadvydas*] to all preventive detention, including preventive detention that is likely to be much more short-lived than that imposed on aliens in removal proceedings.").

211. *See* 481 U.S. 739, 741 (1987).

212. *Id.* (internal quotation omitted).

213. *Id.*

hearing and the opportunity to present evidence and cross-examine witnesses.[214] Congress specified the factors a judicial officer should consider, such as "the nature and seriousness of the charges, the substantiality of the . . . evidence against the [suspect, the suspect's] background and characteristics, and the nature and seriousness of the danger posed by the suspect's release."[215] The Court rejected the defendants' substantive due process challenge, emphasizing that the concern for the individual's dangerousness justified the detention,[216] and that the adversarial hearing provided a strong procedural safeguard against erroneous detention. Ultimately, the Court subjected the statute to traditional substantive due process analysis, noting that the BRA "carefully limits the circumstances under which detention may be sought to the most serious of crimes."[217] Even though the detention had a "natural" termination point, that is, the date the jury delivers the verdict in the suspect's trial, the Court nonetheless applied traditional substantive due process precedent.[218] Thus, short duration alone has not traditionally justified an alternative or diluted constitutional analysis. The Court's application of heightened substantive due process scrutiny to civil detention and civil commitment statutes reflects the significant weight of the private interest at stake.

2. Immigration context

Although the Court has recognized freedom from bodily restraint as a fundamental right[219]—the infringement of which requires a special justification[220]—until *Kim II* the law was unsettled regarding whether an adult LPR had a fundamental right against potentially lengthy pre-removal detention.[221] In *Reno v. Flores*, the Court invoked both the plenary power doctrine and the special status of children to reject a substantive due process claim by juvenile aliens detained at an INS facility pending determinations of deportability.[222] Justice Scalia, writing for the majority, expressly rejected the notion that the

214. *Id.* at 741, 751.

215. *Id.* at 742–43.

216. *Id.* at 751 ("When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community . . . a court may disable the arrestee from executing that threat.").

217. *Id.* at 747.

218. *See* Cole, *supra* note 72, at 1023.

219. Foucha v. Louisiana, 504 U.S. 71, 86 (1992).

220. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (stating that government detention violates the Due Process Clause unless it is ordered through an adequate criminal proceeding, or, in limited nonpunitive circumstances, there is a *special justification* that outweighs the individual detainee's liberty interest).

221. *Compare id.* (construing a statute against the indefinite detention of LPRs with final removal orders because of constitutional doubts that such a statute would otherwise raise), *with* Reno v. Flores, 507 U.S. 292 (1993) (holding that inadmissible alien children have no "fundamental right" against government detention pending their removal hearings).

222. *See* 507 U.S. at 294, 301–06. For a brief discussion of the plenary power doctrine, *see supra* Part I.3.B. and *infra* Part II.C.2.

juvenile aliens had any "fundamental right" to be free from detention, emphasizing both the role of youth and alien status in the constitutional analysis.[223] The issue in *Flores*, however, was not a general right to be free from detention. Instead, the Court recast the juveniles' right to "freedom from physical restraint" as a right "to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child care institution."[224] Accordingly, the Court found the juveniles' liberty interest not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[225] Justice Scalia counseled against expanding the class of fundamental rights recognized by the Court, noting that "the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."[226] Although the juveniles in *Flores* sought an individualized determination of whether a private placement would be in the best interests of the child rather than a categorical right to private placement, the Court found that the child's best interests have never served as the sole criterion in making custody decisions.[227] Finally, the Court invoked the plenary power doctrine to defend the government's failure to create a narrowly tailored program that would minimize denial of release into private custody: "If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles . . . who are aliens."[228] *Flores* may stand for the proposition that alien children have no substantive due process right to be free from detention without a hearing, but its implications for alien adults is unclear. Immigration cases immediately preceding *Kim II* suggested that the liberty interest of aliens may rise to the status of a fundamental, or at least weighty, right.[229]

The plenary power rationale of *Flores* is especially dubious after the Court's decision in *Zadvydas v. Davis*, where the Court found that indefinite detention of removable LPRs after the 90-day removal period raised serious constitutional questions.[230] In *Patel v. Zemski*, the Third Circuit applied *Zadvydas* to strike down mandatory detention during the pre-removal period under § 1226(c),

223. *See id.* at 302–03, 305–06 (characterizing the interest involved as less than fundamental, given that children are "always in some form of custody," and the juvenile detainees were aliens subject to Congress's "broad power over immigration and naturalization").

224. *Id.* at 302.

225. *Id.* at 303 (quoting United States v. Salerno, 481 U.S. 739, 751 (1987)).

226. *Id.* at 302 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

227. *Id.* at 304.

228. *Id.* at 305.

229. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (characterizing civil detention precedent as establishing that the freedom from bodily constraint "lies at the heart of the liberty" protected by the Due Process Clause, requiring the government to offer a special justification for infringing on this core liberty, and requiring that infringement be narrowly tailored to achieve this special government purpose).

230. *See id.* at 689 (construing an implicit time limitation on post-removal period detention to avoid "a serious doubt" as to the statute's constitutionality).

without an individualized assessment of flight risk or dangerousness, as violating the alien's substantive due process right.[231] *Patel* involved the mandatory detention of Vinodbhai Bholidas Patel, a fifty-five-year-old LPR convicted of harboring an undocumented alien in violation of INA § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii) (2001).[232] Patel served five months in prison and five months of probation, during which time the INS initiated removal proceedings against him.[233] After completing his sentence, Patel was placed in detention.[234] Although Patel contested the characterization of his offense as an aggravated felony requiring detention under § 1226(c), the immigration judge rejected his argument and found him subject to mandatory detention.[235] On appeal, the Third Circuit determined that mandatory detention implicated a "fundamental right to be free from physical restraint" and required heightened due process scrutiny.[236] Following *Zadvydas*, the court held that mandatory detention violated substantive due process because it failed to provide individualized inquiry into the reasons for detention.[237] On this view, substantive due process required "a close nexus between the government's goals and the deprivation of the interest in question."[238]

However, *Kim II* complicates the meaning of these cases. The *Kim II* Court characterized a concededly deportable alien's liberty interest as far less weighty than a citizen's liberty interest, and the Court's failure to apply heightened substantive due process scrutiny signaled the less than "fundamental" stature of the liberty at stake.[239] As argued in Part I, the Court downgraded Kim's liberty interest by erroneously suggesting he had no legal entitlement to remain.[240] The argument for treating prima facie deportable aliens (without a final order of removal) any differently from other LPRs defies *Zadvydas* and is logically problematic.[241] Moreover, the Court failed to acknowledge that detaining a nondangerous alien who is unlikely to flee *does not* advance the government's purpose.[242]

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231. *See* 275 F.3d 299, 309–10, 314 (3d Cir. 2001).

232. *Id.* at 302–03.

233. *See id.*

234. *Id.*

235. 275 F.3d at 303–04.

236. *Id.* at 310.

237. *See id.* at 310–11 (finding that nonpunitive government detention violates substantive due process unless there is a special justification which "outweighs the individual's constitutionally protected interest in avoiding physical restraint" and that cannot be established without an individualized inquiry into the reasons for detention").

238. *Id.* at 311.

239. *See* Kim II, 538 U.S. 510, 521–23 (2003).

240. *See id.*

241. If LPRs with a final removal order are entitled to heightened due process protection, then LPRs who are in an earlier stage in this process—and who are still authorized to be in the U.S.—should enjoy no less due process protection.

242. *See Kim II*, 538 U.S. at 515. The Court suggests that mandatory detention is designed to protect the public and ensure aliens' attendance at removal hearings, but it never admits that this

The *Kim II* Court offered two grounds for distinguishing the case from *Zadvydas*: the relatively "short" duration of mandatory detention under § 1226(c), and the closer relationship between detention pending removal proceedings and the government's purpose of preventing flight.[243] However, neither justification is persuasive. First, many pre-removal detentions last for longer than the average of forty-seven days[244]; some deportation proceedings take months, or even years to occur.[245] Immigrants' rights advocates may interpret the holding of *Kim II* as dependent entirely on the "short" length of the detention, although the definition of "short" presents interpretive problems.[246] On one version of this view, any pre-removal detention longer than the cited forty-seven-day average could be considered to violate a fundamental right.[247] Recognizing a right against detention on day 48 and no sooner, while administrable, is extremely arbitrary. Moreover, defining a core liberty's scope with reference to the *average* length of detention would subject an important constitutional right to the vicissitudes of government policies that determine the "average" detention. Second, because some aliens in mandatory detention may be found ultimately *not* removable, their detention does not effectuate their removal, because they are not ultimately removable at all.[248] Without a better initial screen to identify these aliens and filter out those who have been wrongly charged by the government or those who have a high likelihood of obtaining relief from removal, mandatory detention fails on the *Kim II* Court's rationale.[249] In any case, a long pre-removal detention without an opportunity for a bail

program will sweep up aliens who are not dangerous or likely to flee (because there is no individualized determination of these issues).

243. *See id.* at 527–29 (distinguishing *Zadvydas v. Davis* in that the post-removal-order detention of aliens who could not be removed did not serve the government's purported purpose, and that the detention in that case was indefinite and potentially permanent).

244. *Id.* at 529 (citing statistics from the Executive Office for Immigration Review that "in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days").

245. *See, e.g.*, Ellis M. Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens.* 89 GEO. L.J. 2593, 2593–94 (2001) (discussing the case of Joao Herbert, a Brazilian national deported for selling marijuana after being detained pending his removal hearing for twenty months).

246. *Cf.* Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003) (opining that while the court must define a reasonable time limitation for pre-removal detention, there should also be a case-by-case inquiry on the reasonableness of the length of detention).

247. *See id.* at 275 (Haynes, J., concurring in part, dissenting in part) (interpreting *Kim II* to establish a forty-seven-day time limit beyond which detention is presumptively unconstitutional, absent an individualized assessment of flight risk and dangerousness).

248. *See Kim II*, 538 U.S. at 527–28 ("In the present case, the statutory provision at issue governs detention of deportable criminal aliens *pending their removal proceedings*. 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.").

249. That is, the rationale that mandatory detention effectuates the removal of criminal aliens. *See id.*

hearing may still implicate the fundamental rights of LPRs because it is not limited to a short period of time nor does it serve the government's purpose.

Regardless of whether courts determine that LPRs have fundamental rights against lengthy mandatory detentions, *Kim II* is likely inapplicable to aliens in the *Joseph* hearing.[250] The immigration judge at that stage in the proceedings has not yet determined that the alien has been properly classified and is truly subject to mandatory detention.[251] An alien contesting her inclusion in the mandatory detention statute has not "conceded deportability" or functionally given herself a final order of removal.[252] Absent a concession of deportability, *Kim II*'s rationale—that concededly deportable aliens have lesser liberty interests than those who have not conceded deportability—does not apply. This ensures that, even in the current legal landscape, the private interest at stake in the *Joseph* hearing is considered significant.

B. Risk of Erroneous Deprivation

The preceding section assessed the weight of an alien's liberty interest in the *Joseph* hearing under the first prong of *Mathews v. Eldridge*. Under that analysis, an alien has a weighty liberty interest in avoiding detention because in the *Joseph* hearing she has not yet conceded deportability or taken any action that would justify treating her as having only a limited or downgraded liberty interest. This section argues that under the second prong of the *Eldridge* test, due process demands procedural changes to minimize the risk of erroneous deprivation of this important private interest. After addressing a significant constitutional defect in the procedures at the *Joseph* hearing, this section also proposes a number of minor changes that would enhance the fairness and accuracy of the *Joseph* proceedings.

1. Burden of proof

The cases discussed in Part II.A. establish that the Constitution protects core physical liberties.[253] They also allude to the ways in which the Supreme Court has required Congress and state legislatures to justify infringing on such liberties, and to narrowly tailor laws to achieve their special purposes.[254] These requirements sound in both procedural and substantive due process—laws

250. *Id.* at 531 (holding that "INS detention of respondent, *a criminal alien who has conceded that he is deportable*" is constitutionally permissible during removal proceedings).

251. *See In re* Joseph, 22 I. & N. Dec. 799, 800, Int. Dec. 3398 (BIA 1999) (en banc).

252. *See id.* Because the alien actively contests her inclusion in the statute at the *Joseph* hearing, she does not, by definition, concede her proper inclusion.

253. *See supra* notes 117–23 and accompanying text.

254. *See* Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (state must have a "particularly convincing reason" for infringing on freedom from bodily restraint). *See also* United States v. Salerno, 481 U.S. 739, 749 (1987) (detention scheme upheld where government interest was "legitimate and compelling").

infringing physical liberty require the government to articulate a compelling substantive reason for infringement,[255] and the deprivation of that liberty must be accompanied by extensive procedural safeguards.[256] In light of the importance of her liberty interest, the current *Joseph* hearing procedures impose an excessive evidentiary burden on the alien.

Central to the procedural due process analysis is the concept of the burden of proof. The Supreme Court has held that "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[257] Where physical liberty is at stake, due process requires heightened procedural safeguards, including a heightened burden of proof on the government, to minimize the risk of erroneous deprivation.[258] Accordingly, the Supreme Court has required that the government prove by "clear and convincing" evidence a special justification for detaining an individual.[259] In *Addington v. Texas*, the Court considered the constitutionality of the standard of proof required for the civil commitment of the mentally ill and dangerous under Texas law,[260] and imposed a heightened standard of proof on the government.[261] The Court based its decisions on the nature of the private interest at stake, as well as the risk of erroneous deprivation of liberty.[262] Characterizing the freedom from bodily restraint as a substantial interest but not as serious as the potential for criminal incarceration, the Court held that the government must prove by at least clear and convincing evidence that an individual is both mentally ill and requires hospitalization to protect himself and others before civilly committing him to a mental institution.[263]

The Court subsequently affirmed the tradition of heightened standards of proof where significant private interests are at stake in *Santosky v. Kramer*.[264] The *Santosky* Court considered the sufficiency of New York family law provisions permitting the state to terminate parental rights upon showing by a preponderance of the evidence that the natural parents neglected their

255. *See Foucha*, 504 U.S. at 86; *Salerno*, 481 U.S. at 749.

256. *See* Addington v. Texas, 441 U.S. 418, 427 (1979).

257. *Id.* at 423 (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

258. *Id.* at 427.

259. *Id.*

260. *See id.* at 420–22.

261. *See id.* at 427 ("[T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.").

262. *See id.* at 425 ("In considering what standard should govern in a civil commitment proceeding, we must assess . . . the extent of the individual's interest in not being involuntarily confined indefinitely . . . [and] we must be mindful that the function of legal process is to minimize the risk of erroneous decisions.").

263. *See id.* at 421, 424–33.

264. *See* Santosky v. Kramer, 455 U.S. 745, 756, 769 (1982).

children.[265] Given the fundamental nature of parents' right to raise their children, the "slight" governmental interest in terminating parental rights of negligent parents, and the risk of error inherent in a fact-intensive inquiry, the Court held that the preponderance standard violated due process.[266] Following *Addington*, the Court held that the state must prove parental negligence by clear and convincing evidence in order to terminate parental rights.[267] The Court declined to assess the procedures used by New York state as a "package," finding that other procedural provisions, such as the right to counsel and the availability of multiple hearings, did not cure the constitutional defect in the standard of proof: "Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard."[268] Indeed, the *Santosky* Court emphasized that the burden of proof plays a crucial role in regulating risk.[269]

The *Joseph* hearing's current burden of proof creates an impermissibly high risk of erroneously depriving an alien of her liberty before a removal hearing. If the government charges an alien with a crime that has not yet been firmly classified as an aggravated felony (or other deportable crime), then the alien is likely to lose at the *Joseph* hearing because she must show the government is substantially unlikely to prove the charge.[270] Where the law is unsettled, she may be unable to meet this burden.[271] If she loses at the *Joseph* hearing, the alien will be detained, even though she could ultimately be found to have been improperly classified and thus remain in the United States as a lawful permanent resident.[272] For example, the Courts of Appeals were divided on the issue of whether driving while under the influence (DUI) constituted a "crime of violence," making the offense an aggravated felony for immigration purposes.[273] The Supreme Court resolved the circuit split and found that DUI offenses

265. *See id.* at 748–50.

266. *See id.* at 758.

267. *See id.* at 768–69.

268. *Id.* at 757–58 & n.9. The Court also reasoned that the standard of proof is "shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases . . . [and thus] must be calibrated in advance"). *Id.*

269. *See id.* (emphasizing the importance of the standard of proof as a procedural safeguard, because it alone "instructs the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions he draws from that information.") (emphasis and internal citation omitted).

270. *See In re* Joseph, 22 I. & N. Dec. 799, 800, Int. Dec. 3398 (BIA 1999) (en banc) (establishing "substantially unlikely" standard). *See also supra* Part I.D.

271. *See infra* notes 273–78 and accompanying text.

272. *See Joseph*, 22 I. & N. Dec. at 802.

273. By definition, a crime of violence, as defined by 18 U.S.C. § 16 (2000), is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(F) (2000). *Compare* United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001) (DUI with injury to another under CAL. VEH. CODE § 23153 does not constitute a "crime of violence" under 18 U.S.C. § 16), *with* Le v. U.S. Atty. Gen., 196 F.3d. 1352, 1353–54 (11th Cir. 1999) (DUI with serious bodily injury under FLA. STAT. ANN. § 316.193(3) constitutes a "crime of violence" under 18 U.S.C. § 16).

requiring a mens rea of negligence or less did not rise to the level of a crime of violence.[274] Until this resolution, however, an alien detained on a DUI offense in a circuit that had not ruled on the question would have been unable to show at her *Joseph* hearing that the government was "substantially unlikely" to prove that she is properly classified as an aggravated felon.[275] Indeed, such ambiguity in the law suggests that neither party is more likely to win. Although a detainee in this position may be able to show that she and the government have a roughly equal chance of prevailing, such showing would fall short of her high burden of proof at the *Joseph* hearing.

Aliens convicted for the first time of possession of a controlled substance also face the risk of losing at the *Joseph* hearing, even if they advance a meritorious argument that their crime is not a deportable offense. Federal law generally punishes first-time possession as a misdemeanor,[276] which does not constitute a per se "aggravated felony" for immigration purposes.[277] However, the circuit courts are divided on whether a state law conviction for this same offense amounts to an aggravated felony.[278] Not all the federal appellate courts have decided the question, leaving the immigration consequences of a first-time

274. *See generally* Leocal v. Ashcroft, 543 U.S. 1 (2004) (DUI offense under FLA. STAT. ANN. § 316.193(3)(c)(2) does not constitute a "crime of violence" under 18 U.S.C. § 16). However, not even *Leocal* has eliminated doubts about the categorization of DUI offenses. The House of Representatives recently passed a bill expanding the definition of "crime of violence" to include negligent acts and omissions that create a risk of injury, even if no injury results. *See* Gang Deterrence and Community Protection Act of 2005, H.R. 1279, 109th Cong. § 112 (1st Sess. 2005) (amending 18 U.S.C. § 16(b) to include "an offense punishable by imprisonment for more than one year and that, by its nature, involves a substantial risk that physical injury may result to the person or property of another" as a "crime of violence").

275. *See Joseph*, 22 I. & N. Dec. at 800.

276. *See* 21 U.S.C. § 844(a) (2000) (providing that a person who knowingly or intentionally possesses a controlled substance "may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both," except if he commits the offense after one or more prior convictions).

277. *See* 18 U.S.C. § 3559(a) (2000) (classifying offenses carrying more than one year of imprisonment as felonies and one year or less of imprisonment as misdemeanors).

278. The Second, Third, and Ninth Circuits have held that a conviction under state law for possession of a controlled substance does not constitute an "aggravated felony" unless it would also be punishable as a felony under federal law, or is a crime involving a "trafficking element." *See* Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. 2004); Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002); Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996). These courts emphasized the uniquely federal character of the government's immigration power, as established in the Naturalization Clause of Art. I, § 8, and found that the interest in national uniformity counseled against attaching the meaning of aggravated felony to the "vagaries of state drug laws." *Cazarez*, 382 F.3d at 910, 912–14 (citing *Aguirre*, 79 F.3d at 317 and *Gerber*, 280 F.3d at 311–12). The Fifth Circuit, however, ruled that a state law felony conviction for drug possession counts as an aggravated felony for immigration purposes, even though the very same offense would be a misdemeanor if it had been prosecuted under federal law. United States v. Hernandez-Avalos, 251 F.3d 505 (5th Cir. 2001). In rejecting the "national uniformity" argument advanced in *Aguirre*, the Fifth Circuit reasoned that Congress had made a deliberate policy not to create a uniform test for aggravated felonies, and to include offenses that are felonies under state law but not federal law. *Hernandez-Avalos*, 251 F.3d at 510.

conviction for drug possession difficult to predict in those circuits.[279] If the offense is not considered an aggravated felony for immigration purposes, an alien charged with removability solely on that ground is not subject to mandatory detention at all.[280] Therefore, an alien's pre-removal liberty depends largely on the classification of her prior criminal offenses, and inconsistency across jurisdictions can substantially impede an alien's ability to challenge the grounds of her detention.

The *Joseph* hearing currently requires the alien to show that the government is "substantially unlikely" to prove that she is subject to mandatory detention.[281] Arguably, the burden of proof, while critical in factual determinations such as whether a person is "dangerous," is less relevant where the court renders a legal conclusion as to whether a respondent is an "aggravated felon" as a matter of immigration law.[282] The legal question of whether a crime is an aggravated felony, however, may ultimately hinge on the interpretation of facts. For example, to determine whether an offense constitutes a "crime of violence" under federal law,[283] a court must examine the facts to decide whether the offense (a) involved "the use, attempted use, or threatened use of physical force against the person or property of another," or (b) "is a felony and . . . by its nature, involves a substantial risk that physical force against the person or property of another *may be used* in the course of committing the offense."[284] Although the immigration judge in a *Joseph* hearing renders a legal conclusion about whether the respondent meets the criteria of the mandatory detention statute, the immigration judge may have to resolve a number of factual issues. According to immigration practitioner and former BIA member Lory Rosenberg, the government could misconstrue a respondent's conviction file and mistakenly believe that the respondent was incarcerated for a year or more when she was not, or that the respondent was "convicted" for immigration purposes when she was not.[285] These questions can be verified by documentary evidence, such as the sentencing report specifying the respondent's criminal sentence, or records indicating when the respondent began her prison term and when she was released.[286] As a result, what seems like a purely legal determination in the *Joseph* hearing may require the immigration judge to consider the underlying facts to determine whether the

279. *See supra* note 278.

280. *See* 8 U.S.C. § 1226(c).

281. *In re* Joseph, 22 I. & N. Dec. 799, 800, Int. Dec. 3398 (BIA 1999) (en banc).

282. *See, e.g.*, Nickolas J. Kyser, *Substance, Form, and Strong Proof*, 11 AM. J. TAX POL'Y 125, 144–45 (1994) ("A heightened burden of proof is a plausible response to a factual claim, but makes little sense as a way of dealing with an argument about the legal conclusion to be drawn from undisputed facts.").

283. A "crime of violence," as defined by 18 U.S.C. § 16 (2000), is an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) (2000).

284. 18 U.S.C. § 16 (2000) (emphasis added).

285. *See* Lory Diana Rosenberg, *Gonna Need Somebody on Your Bond—Pre-Removal Detention under the INA*, 8 BENDER'S IMMIGR. BULL. 1409 (2003).

286. *See id.*

individual has been properly classified as an aggravated felon. In such a situation, the burden of proof could very well dictate the outcome.

To the extent that the standard of proof reveals society's preference for allocating the risk of error,[287] an LPR threatened with mandatory detention should not bear a greater burden of justifying the detention than the government.[288] A heightened burden of proof has traditionally applied even in the immigration context. In *Woodby v. INS*, for instance, the Court held that the government must prove the alien's removability by clear and convincing evidence before issuing a deportation order, given the "immediate hardship" of deportation and the significant family, social, and economic ties LPRs often enjoy.[289] A similar burden of proof applies to the government in denaturalization proceedings.[290] In addition, there is a "longstanding principle of construing any. . .ambiguities in deportation statutes in favor of the alien [facing removal]."[291] All of this suggests that an alien who raises a non-frivolous argument to contest her inclusion in the mandatory detention statute should not bear a higher burden of proof than the government. Given the important liberty interest at stake, and the fact that the alien detainee has not yet conceded deportability, due process—even post-*Kim II*—requires the government at least to share the risk of error equally with the alien, and prove by a preponderance of the evidence that the underlying conviction triggers mandatory detention.

2. *Other options for procedural change*

Besides changing the burden of proof, other potential changes in the *Joseph* hearing may improve the fairness and accuracy of determining whether a respondent alien is likely to be subject to mandatory detention. These include permitting the immigration judge to consider the respondent's potential relief from removal and requiring different immigration judges to preside over the *Joseph* hearing and the ultimate removal hearing.

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287. *See* Addington v. Texas, 441 U.S. 418, 423 (1979) ("The standard [of proof] serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.").

288. *See id.* at 427 (holding that the state must justify civil commitment of an individual by "proof more substantial than a mere preponderance of the evidence[,]" because an individual facing civil commitment, given her substantial interest in avoiding bodily restraint, "should not be asked to share equally with society the risk of error when the possible injury to [her] is significantly greater than any possible harm to the state.").

289. *See* 385 U.S. 276, 286 (1966). *See also* INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2000) ("In the [removal] proceeding the [government] has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable.").

290. *See* Schneiderman v. United States, 320 U.S. 118, 123 (1943) (holding that, in a denaturalization proceeding, the government bears the burden to prove, by clear and convincing evidence, that citizenship was not properly conferred upon the alien).

291. INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

a. Relief from removal

The *Joseph* hearing permits a respondent to argue that she is improperly charged under the mandatory detention statute, but the applicable regulations technically do not authorize an immigration judge to consider the alien's potential relief from removal.[292]

An alien found to have committed predicate crimes qualifying as aggravated felonies is not eligible for many forms of relief from removal, such as cancellation of removal,[293] asylum,[294] or voluntary departure.[295] Some aliens, however, may qualify for relief under the Convention Against Torture (CAT)[296] or under INA § 212(c), even though that section was repealed in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[297] The failure of the immigration judge in a *Joseph* hearing to consider relief from removal seriously risks the erroneous deprivation of an alien's pre-removal liberty in some cases.[298]

Aliens who have committed certain aggravated felonies may qualify for withholding or deferral of removal under the CAT and avoid deportation.[299] Article 3(1) of CAT provides: "No State Party shall expel, return ("*refouler*") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."[300] This form

292. *See* 8 C.F.R. § 1003.19(h)(2)(ii) (alien may contest inclusion in statute).

293. *See* INA § 240A(a)(3), (b)(1)(C), 8 U.S.C. § 1229b(a)(3), (b)(1)(C) (2000).

294. *See* INA § 208(b)(2)(A)(ii), (b)(2)(B)(i), (c)(2)(B), (c)(3), 8 U.S.C. § 1158(b)(2)(A)(ii), (b)(2)(B)(i), (c)(2)(B), (c)(3) (2000) (providing that aggravated felonies are automatically "particularly serious crimes," the conviction of which terminates the alien's asylum status and subjects her to deportation).

295. *See* INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (2000).

296. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (1987) (entered into force for the United States Nov. 20, 1994) [hereinafter CAT]. *See also* Foreign Relations Authorization Act, Pub. L. No. 103-236, § 506 (1994) (codified at 18 U.S.C. §§ 2340, 2340A, 2340B (2000) (implementing statute)); 8 C.F.R. §§ 208.16–208.18 (2005) (implementing regulations).

297. *See generally* INS v. St. Cyr, 533 U.S. 289 (2001) (holding that waiver of deportation under repealed INA § 212(c) remains available for aliens who were convicted of predicate crimes through plea agreements, and would have been eligible for § 212(c) relief at the time of their plea). *See also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 304(b), Pub. L. No, 104-208, 110 Stat. 3009 (repealing INA § 212(c)).

298. *See* Beth Werlin, *Mandatory Detention after* Demore v. Kim, AM. IMMIGR. L. FOUND. PRACTICE ADVISORY at 4, Aug. 29, 2003, *available at* http://www.ailf.org/lac/lac_pa_083003.pdf (advising practitioners to present the alien's eligibility for relief from removal at the *Joseph* hearing, a factual issue that would render the government substantially unlikely to succeed on its charge of the alien's removability). Considering such relief allows the immigration judge to gauge more accurately the government's ultimate likelihood of prevailing at the merits hearing.

299. *See* 8 C.F.R. §§ 208.16–208.17 (2005).

300. CAT, S. TREATY DOC. NO. 100-20 at 20, 1465 U.N.T.S. at 114. Art. 3(2) of the CAT requires that "competent authorities shall take into account all relevant considerations," including the human rights condition in the destination state when determining whether there are "substantial grounds" to believe that the deportee would be subjected to torture there. *Id.* In giving its advice

of relief remains available even to aliens who have committed "particularly serious crimes" and who, therefore, are not eligible for asylum or withholding of removal.[301] CAT relief is often sought, but rarely granted.[302]

Other forms of relief, however, are more readily available. For example, INA § 212(c) has been interpreted to allow an LPR who has resided lawfully in the United States for seven consecutive years to apply for a discretionary waiver from deportation.[303] Although § 212(c) originally granted the Attorney General broad discretion to admit excludable aliens, the BIA has interpreted the provision to apply in the deportation context to provide discretionary relief from removal as well.[304] In *INS v. St. Cyr*, the Supreme Court held that the 1996 repeal of § 212(c) did not apply retroactively, and thus, aliens who entered into plea agreements prior to the repeal of § 212(c) (and presumably in reliance on the continued availability of relief under § 212(c)) may still access such relief if they meet the other statutory requirements.[305] That these sources of relief are available to aliens convicted of aggravated felonies, at least two crimes of moral turpitude, or other deportable offenses suggests that an alien who fails to meet her burden at a *Joseph* hearing may still be found not removable.[306] Requiring the immigration judge to consider relief from removal, and thereby assessing the government's likelihood of proving the alien's deportability on the merits, rather than merely proving the charge that she is properly included under 8 U.S.C. § 1226(c), would significantly reduce the risk of erroneous deprivation of liberty for at least a small set of aliens.

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and consent to the ratification of the CAT, the Senate recommended declaring that "the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to . . . the Attorney General in deportation cases." S. TREATY DOC. NO. 100-20 at 7. In addition, because the CAT is not self-executing, "the determinations of [the Attorney General] *will not be subject to judicial review in domestic courts*." *Id.* (emphasis added).

301. *See, e.g.*, Bi Zhu Lin v. Ashcroft, 183 F. Supp. 2d 551, 553 (D. Conn. 2002). The alien convicted of extortion and smuggling aliens, which are aggravated felonies, was ineligible for asylum and withholding. But she was eligible for relief from deportation under the CAT because she was more likely than not to be forcibly sterilized if removed to China, and forced sterilization constituted torture under the Convention. *Id.*

302. *Cf.* Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127, 135 (2000) (noting difficulty of obtaining objective evidence of torture in home country necessary to establish "substantial grounds for believing the person would be in danger of being subjected to torture") (quoting Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998), § 2242(a)).

303. *See* INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996). *See also In re* Silva, 161 I. & N. Dec. 26, 30 Int. Dec. 2532 (BIA 1976) (holding that "an [LPR] who had not departed the United States following his [deportable] conviction . . . was entitled to apply to the Attorney General for discretionary relief under section 212(c) of the [INA].").

304. *See In re* Silva, 161 I. & N. Dec. at 30. *See also* INS v. St. Cyr, 533 U.S. 289, 294–96 (2001) (summarizing the BIA's interpretation of INA § 212(c)).

305. *St. Cyr*, 533 U.S. at 326.

306. *See, e.g.*, *Bi Zhu Lin v. Ashcroft*, 183 F. Supp. 2d 551 (D. Conn. 2002) (relief from removal available to aggravated felon under Convention Against Torture); *INS v. St. Cyr*, 533 U.S. 289, 297–98 (2001) (§ 212(c) relief available to narrow class of aggravated felons).

The *Joseph* hearing should occur within days of the start of mandatory detention, which could provide insufficient time for both sides to fully prepare the argument for or against relief from removal.[307] Thus, a thorough discussion of relief from removal during the *Joseph* hearing may be infeasible. There may be cases, however, where there is obvious evidence that an alien will qualify for relief from removal. For example, consider the case of an alien who has old convictions for minor crimes which may or may not constitute "aggravated felonies," such as a DUI offense. If these convictions resulted from plea bargains entered into in reliance on the availability of § 212(c) relief, the alien may have a straightforward case for relief. The government impermissibly risks erroneous deprivation of liberty[308] by ignoring such relief.

b. Prejudice and impartiality

Other features of the *Joseph* hearing also undermine the fairness of the hearing. First, although the regulations provide that no information from the *Joseph* hearing may be used in the removal proceeding,[309] practitioners have questioned to what extent the government will or would be able to honor this rule.[310] According to former BIA member Lory Rosenberg, "[a] '*Joseph* hearing,' whether or not successful, may alert the DHS to evidence it requires to satisfy its burden of proof in the hearing on the merits."[311]

Second, if the same judge presides over the *Joseph* hearing and the ultimate removal hearing, it may be difficult for the decision maker to disregard evidence offered in the earlier proceeding, because the *Joseph* hearing and the deportation hearing address the very same issues surrounding deportability.[312] Once an immigration judge has deemed the government likely, or at least not substantially unlikely, to prevail, permitting the same immigration judge to hear the removal case could prejudice the alien, even if the she offers new evidence and more detailed arguments. This is not to say that immigration judges are unable to remain impartial, but instead, that few people could completely ignore highly relevant facts that were revealed in related proceedings, especially where the two proceedings tread on nearly identical ground. Even if criminal defendants routinely appear before the same judge for their bail hearing and their plea

307. *See* Kim Il, 538 U.S. 510, 514 n.3 (2003) (noting that a Joseph hearing is provided "immediately").

308. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

309. *See* 8 C.F.R. § 1003.19(d) (2005).

310. *See* Rosenberg, *supra* note 285, at 1414 ("Although the regulations provide that a custody or bond hearing shall be separate and apart and form no part of the removal proceeding, the nature of the [*Joseph*] hearing is such that a respondent is bound to expose his arguments to be tested against the sufficiency of the government's evidence.").

311. *Id.*

312. *See* 8 C.F.R. § 1003.19(d) (2005) (providing that the immigration judge's consideration in a *Joseph* hearing "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding."). *See also* Rosenberg, *supra* note 285, at 1414 (noting that alien's arguments relating to removability will be exposed in the *Joseph* hearing).

agreement or trial, the criminal and immigration contexts differ in at least two important respects. First, while criminal cases are tried before a jury, deportation hearings are conducted without a jury.[313] This may heighten the risk of prejudice. Second, while a criminal bail hearing focuses on the defendant's dangerousness and flight risk, a trial ideally functions to determine guilt or innocence. In contrast, the *Joseph* hearing and the ultimate removal hearing address many of the same issues, as the issues determined at the *Joseph* hearing go directly toward establishing elements of removability.[314] When the same immigration judge presides over the same case twice, an adverse finding at a *Joseph* hearing in its current form could unduly prejudice the detainee. As a result, assigning different immigration judges to the *Joseph* hearing and to the removal hearing may be sensible.

C. Government Interest

1. Plenary power (reprise)

Arguably, in a regime of mandatory detention where Congress has manifested a near zero-tolerance policy toward criminal aliens, it would frustrate Congressional intent if the courts required immigration judges to consider relief from removal, shifted the burden to the government in a preliminary hearing, and required separate decisionmakers at *Joseph* and removal hearings.[315] This argument relies on the extra deference ostensibly due to Congress on matters of substantive immigration law, in which Congress is said to have plenary power.[316] As discussed above, however, the modern plenary power doctrine typically has not been held to apply to the procedural due process claims of LPRs, or even of those who enter without inspection.[317]

313. I thank Mary Holper at the Catholic Legal Immigration Network, Inc. for raising this point.

314. However, a traditional focus on dangerousness and flight risk at the *Joseph* hearing would have avoided this result. *See In re* Joseph, 22 I. & N. Dec. 799, 803, Int. Dec. 3398 (BIA 1999) (en banc) ("In a case such as this . . . the Immigration Judge's jurisdiction over custody issues is dependent on the answer to the very same question that underlies the charge of removability in the case in chief."). *See also* Rosenberg, *supra* note 285, at 1413 ("The '*Joseph* hearing' would not have involved consideration of factors relating to dangerousness or the likelihood that Kim would flee. It would merely have determined the propriety of treating Kim as a noncitizen subject to mandatory detention pending his removal proceedings.").

315. *Kim II*, 538 U.S. at 515, 528.

316. *See generally supra* Part I.B.3.

317. *See supra* Part I.B.3. *See also* Landon v. Plasencia, 459 U.S. 21, 32–33 (1982) (holding that a continuously present LPR has a right to due process when faced with deportation); Kwong Hai Chew v. Colding, 344 U.S. 590, 597–98 (1953) (same); Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 87–89 (1903) (recognizing the due process rights of an alien who entered the United States illegally without inspection).

Despite the inapplicability of plenary power to procedural due process claims,[318] the *Joseph* hearing, as it currently exists, reflects some effects of the plenary power doctrine. The hearing considers only the extent to which an alien meets the criteria Congress has established for removability,[319] and it fails to consider the traditional, constitutionally permissible reasons for civil detention, namely dangerousness and flight risk.[320] The *Joseph* hearing may satisfy a step-child brand of due process afforded to aliens under current law. However, the Court cannot now credibly invoke plenary power to impose a double downward ratchet and legitimate the constitutional defects of the *Joseph* hearing.

CONCLUSION

The Supreme Court's ruling and reasoning in *Kim II* substantially threatens immigrants' procedural and substantive due process rights. By privileging presumptions over proven claims and attributing generalized "dangerousness" to all conceded aggravated felons, the Court defied a long tradition of due process jurisprudence and undermined the evolving norm of alien-citizen parity in the realm of procedure and fundamental rights.[321]

As argued in Part I, *Kim II* errs fundamentally because it equates the status of pre-removal aliens with the status of aliens who do not have a legal right to be here. This belief in a "rough" equivalent to a final order of removal that would extinguish an LPR's legal status undermines due process when it is the most valuable, that is, when it seeks to provide procedural safeguards to people widely believed deportable because of prior convictions. Although few in the legal community would accept the idea of "rough" equivalents to a guilty verdict or guilty plea without sufficient procedures, weak procedural safeguards have flourished in the immigration context, despite the severity of the potential deprivation. In its extreme form, the functionalist view retreats from the core promise of the Due Process Clause, a promise to protect all persons, citizen or alien, from arbitrary deprivations of life, liberty, and property.

The danger of arbitrary government is greatest against "insular" minorities

318. *See* Motomura, *Curious Evolution*, *supra* note 3, at 1631 ("The plenary power doctrine has eroded significantly in the past few decades, and the evolution of procedural due process as an exception to plenary power has been a critical part of this trend.")

319. *See In re* Joseph, 22 I. & N. Dec. 799, 803, Int. Dec. 3398 (BIA 1999) (en banc).

320. *See In re* Patel, 15 I. & N. Dec. 666, 666, Int. Dec. 2491 (BIA 1976) ("An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk.") (internal citations omitted).

321. *See* Motomura, *Curious Evolution*, *supra* note 3, at 1631 (noting the evolution of procedural due process as part of the erosion of the plenary power). The decline of the plenary power doctrine, which is the justification for citizen-alien disparity, should create enhanced citizen-alien parity. I believe this applies to fundamental rights indirectly—one of Motomura's arguments is that judges try to evaluate substantive rights of immigrants via procedural due process if they want to issue a ruling that protects those rights. *Id.* at 1661 (discussing case in which the fundamental right to marry was cast as a procedural due process claim in the immigration context).

denied access to the political process, such as noncitizens.[322] Aliens have no voice in the conversation over how best to curb government excesses and hold the government "to a tolerable level of compliance with legal norms."[323] Although the Supreme Court has announced that Congress's plenary power over naturalization and immigration authorizes it to make rules applying to aliens that would be impermissible if applied to citizens,[324] there are limits to such power inherent in the idea of non-arbitrary government.[325] The government may not summarily kill aliens[326] nor torture them.[327] And until *Kim II*, it could not legislate loose presumptions when basic liberties are at stake, especially when the individual is a lawful permanent resident.[328] By assuming that pre-removal detentions are generally "short,"[329] the Court glossed over the real deprivations produced by mandatory detention and ignored precedent in which standard civil detention analysis has been applied to supposedly "short" detentions[330] and to immigrants.[331] Although the government generally need comply only with the basic requirement of rationality, it must abide by a higher standard, that is, act in good faith and with good reasons, when infringing on basic rights recognized by our legal tradition.[332] This rationale for heightened scrutiny should apply to all people who live and work side by side with American citizens, and who have demonstrated their commitment to participating in national life as lawful perma-

322. United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938) (implying that statutes directed at discrete and insular minorities may require a stricter judicial inquiry). *But see* Plyler v. Doe, 457 U.S. 202, 219 n.19, 230 (1982) (holding that undocumented immigrant children were not a "suspect class," although the state could not deny them a public education without violating the Equal Protection Clause because the differential treatment fails even a rational basis scrutiny).

323. Fallon, *supra* note 67, at 373.

324. Mathews v. Diaz, 426 U.S. 67, 69–80 (1976).

325. At the core of the Due Process Clause is the concept of non-arbitrary government. *See* Motomura, *Curious Evolution*, *supra* note 3, at 1681–82 ("[P]rocedural due process incorporates the principles of consistency and commensurability."). The requirement of consistency and commensurability requires the government to offer reasons that justify differences in treatment, instead of invoking executive or legislative whim. *Id.*

326. *See, e.g.*, Transcript of Oral Argument at 25, *Clark v. Martinez*, 543 U.S. 371 (2005) (No. 03-878) (J. Stevens implying that "minimum" constitutional protection ensures that the government may not kill aliens).

327. *Cf.* Zadvydas v. Davis, 533 U.S. 678, 704 (2001) (Scalia, J., dissenting) (aliens under final order of removal may not be subjected to hard labor without a judicial trial and may not be tortured).

328. *See Zadvydas*, 533 U.S. at 693 (privileged status of LPRs). *See also* Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (applying heightened scrutiny to law infringing on basic liberty).

329. *See* Kim II, 538 U.S. 510, 529 (2003) (citing average removal time of forty-seven days). *See also id.* at 531 (characterizing detention period as "brief").

330. *See* Cole, *supra* note 72, at 1023.

331. *See Zadvydas*, 533 U.S. at 690 (requiring a "sufficiently strong special justification" for indefinite detention of aliens with final orders of removal).

332. *See* Fallon, *supra* note 67, at 314–15 (describing the oft-used "two-tiered framework," whereby government intrusions on "fundamental" interests are subject to "strict" scrutiny, while other types of intrusion must be only "rationally related" to government purposes.).

nent residents.[333] Where an alien has not yet conceded deportability, and contests her deportability affirmatively, the government should be required to show that it has a substantial reason to detain her before her removal hearing.

After *Kim II*, the sole forum for an alleged aggravated felon to contest mandatory detention is the *Joseph* hearing.[334] The current procedures of the *Joseph* hearing, however, violate due process, as analyzed under the three-part *Mathews v. Eldridge* test,[335] by imposing an excessive burden of proof on the alien.[336] The suggestions for procedural change in Part II may not secure pre-removal freedom for all lawful permanent residents who would ultimately be found non-removable,[337] nor are they likely to promote the open adjudication of aliens' substantive rights.[338] However, such changes may be the most pragmatic steps toward a just, constitutional scheme of pre-removal detention.

333. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (recognizing that community ties enhance alien's constitutional status).

334. *See supra* Part I.D.

335. 424 U.S. 319, 335 (1976).

336. *See In re* Joseph, 22 I. & N. Dec. 799, 800, Int. Dec. 3398 (BIA 1999) (en banc) ("substantially likely" standard). *See also* Mathews v. Eldridge, 424 U.S. 319 (1976).

337. Because *Eldridge* prescribes a balancing test, its required procedures may not eliminate the risk of error altogether. Instead, the test may only minimize the risk subject to the relative importance of the private interest and government interest at stake.

338. *See* Motomura, *Curious Evolution*, *supra* note 3, at 1700 (arguing that the use of "procedural surrogates" for substantive constitutional claims prevents the important development of judicial review over the substantive constitutional claims of noncitizens, and noting that "[u]nder current immigration doctrine, the use of procedural surrogates casts serious doubt on the predictability and candor of the decisionmaking process").