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Darlene C. Goring
Louisiana State University

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Freedom from Detention: The Constitutionality of Mandatory Detention for Criminal Aliens Seeking to Challenge Grounds for Removal

By Darlene C. Goring[*]

I. INTRODUCTION

The systemic dysfunction of our current immigration system has never been more readily apparent than when examining the lack of uniformity in mandatory detention and bond determinations for a limited class of criminal aliens[1] in removal proceedings. What was envisioned by the constitutional framers as a uniform national immigration framework has deteriorated into a jurisprudential quagmire. As a result, it oftentimes infringes upon the due process protections afforded to aliens subject to removal[2] from the United States who do not concede that they are either "deportable" under section 237 of the Immigration and Nationality Act (INA), codified as 8 U.S.C. §

[*] Sam D'Amico Endowed Professor of Law and Nolan J. Edwards Professor of Law, Louisiana State University Paul M. Hebert Law Center. The author wishes to thank John Peacock and Matthew O. Boles for their wonderful research assistance. This article is dedicated to my inspirational guide, Reverend Franklin R. Clark, Pastor at Mt. Olivette Baptist Church.

1. The phrase "criminal alien" is used by the author throughout this research project to refer to a class of aliens convicted of one or more of the enumerated predicate offenses set forth in 8 U.S.C. § 1226(c) (2012).

2. Aliens subject to removal from the United States are governed by the Immigration and Nationality Act § 240, 8 U.S.C. § 1229(a) (2012). *See also* United States v. Lopez-Vasquez, 227 F.3d 476, 479 n.2 (5th Cir. 2000) ("Before IIRIRA's enactment in 1996, individuals such as Lopez-Vasquez who were ineligible for admission into the United States and were never admitted into the United States were referred to as 'excludable' while aliens who had gained admission, but later became subject to expulsion from the United States, were referred to as 'deportable' . . . . In addition, the IIRIRA [Illegal Immigration and Reform and Immigrant Responsibility Act of 1996] has 'done away with the previous legal distinction among deportation, removal, and exclusion proceedings . . . . Now, the term 'removal proceedings' refers to proceedings applicable to both inadmissible and deportable aliens.").

1227,[3] or "inadmissible" under section 212 of the INA, codified as 8 U.S.C. § 1182.[4]

Generally, all aliens who are apprehended by immigration enforcement agencies within the Department of Homeland Security (DHS)[5] are subject to civil detention—due to their inadmissibility or deportability—until such time as removal proceedings pursuant to Section 240 of the INA, codified as 8 U.S.C. § 1229(a)[6] are concluded. Detention facilities are secure, prison-like facilities that are usually located in remote, rural areas.[7] In recognition of the quasi-criminal nature of the detention process, section 1226(a) affords aliens an opportunity to request release from detention upon posting a bond.[8] However, this practice does not apply to aliens subject to certain statutorily enumerated criminal convictions.

Section 236(c) of the INA, codified as 8 U.S.C. § 1226(c),[9] authorizes apprehension and mandatory detention without an

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3. Aliens admitted to the United States are subject to the deportation provisions of the Immigration and Nationality Act, codified at 8 U.S.C. § 1227 (2012).

4. Aliens who seek admission to the United States are subject to the provisions of the Immigration and Nationality Act, codified at 8 U.S.C. § 1182 (2012).

5. *See generally Our History*, U.S. CITIZENSHIP & IMMIGRATION SERV., http://www.uscis.gov/about-us/our-history [https://perma.cc/BBZ6-WC3L] ("On March 1, 2003, U.S. Citizenship and Immigration Services (USCIS) officially assumed responsibility for the immigration service functions of the federal government. The Homeland Security Act of 2002 (Pub. L. No. 107–296, 116 Stat. 2135) dismantled the former Immigration and Naturalization Service (INS) and separated the former agency into three components within the Department of Homeland Security (DHS)."). The Homeland Security Act created USCIS to enhance the security and efficiency of national immigration services by focusing exclusively on the administration of benefit applications. *Id.* The law also formed Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to oversee immigration enforcement and border security. *Id; see also* Hernandez v. Ashcroft, 345 F.3d 824, 828 n.2 (9th Cir. 2003).

6. Aliens subject to removal from the United States. For the removal provisions, see generally Immigration and Nationality Act § 240, 8 U.S.C. § 1229.

7. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS 1, 9-10 (2014), http://www.gao.gov/assets/670/666467.pdf [https://perma.cc/38CJ-78DJ]; Dagmar R. Myslinska, *Living Conditions in Immigration Detention Centers*, NOLO, http://www.nolo.com/legal-encyclopedia/living-conditions-immigration-detention-centers.html [https://perma.cc/XA8V-ZSK7].

8. *See infra* note 27 and accompanying text.

9. Immigration and Nationality Act § 236(c) (codified as amended at 8 U.S.C. § 1226(c) (2014), 66 Stat. 200). This was originally enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div. C of Pub. L. 104–208, 110 Stat. 3009-546. *Illegal Immigration Reform and Immigration Responsibility Act*, CORNELL U. L. SCH.: LEGAL INFO. INST.,

individualized bond hearing of aliens during the pendency of removal hearings initiated pursuant to INA § 240 who are either deportable or inadmissible, upon their release from criminal custody after conviction for a statutorily enumerated list[10] of predicate crimes set forth in § 1226(c)(1), including aggravated felonies,[11] crimes involving moral turpitude,[12] and terrorist activities.[13] As a result, upon release from criminal custody, aliens who were convicted of the statutorily enumerated predicate offenses are subject to mandatory detention by the Department of Homeland Security. Upon release from criminal custody, these criminal aliens must remain in detention and are not eligible to post a bond to gain their release.[14] This results in a prolonged detention[15] of all criminal aliens, including a cohort of criminal aliens who may successfully challenge efforts to remove them from the country.

It is an unassailable principle of both immigration and constitutional law that Congress is authorized to detain aliens who are subject to removal from the United States because they are either inadmissible or deportable. In *Wong Wing v. United States*,[16] the United States Supreme Court held that "[p]roceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for

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https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act [https://perma.cc/PW3B-VTFW].

10. *See* 8 U.S.C. § 1226(a)-(d) (2012).

11. 8 U.S.C. § 1101(a)(43) (Supp. 2014).

12. *See* ALISON SISKIN, CONG. RESEARCH SERV., ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS 4, n.28 (2015) ("Moral turpitude is not defined under immigration law, and has been determined by case law. In general, if a crime manifests an element of baseness, vileness, or depravity under current mores—if it evidences an evil or predatory intent—it involves moral turpitude. For example, crimes such as murder, rape, blackmail, tax evasion, and fraud have been considered to involve moral turpitude, whereas crimes such as simple assault, possessing stolen property, and forgery have not. The flexibility in the term is to allow for changing social norms.").

13. *See* 8 U.S.C. § 1182(a)(3)(B) (2012); 8 U.S.C. § 1227(a)(4)(B) (2012).

14. *See* 8 U.S.C. § 1226(c) (2012).

15. Prolonged detention is defined as lengthy detention of criminal aliens when removal proceedings are pending but no order of removal has been issued. AM. CIVIL LIBERTIES UNION: IMMIGRANTS' RIGHTS PROJECT, PROLONGED IMMIGRATION DETENTION OF INDIVIDUALS WHO ARE CHALLENGING REMOVAL 1 (2009) http://www.aclu.org/files/images/asset_upload_file766_40474.pdf [https://perma.cc/MLU9-8LK5].

16. 163 U.S. 228 (1896).

their deportation."[17] The extent of Congressional authority to detain aliens has expanded since the Court considered this issue in 1896. Under the current immigration framework governing detention, Congress mandates the civil detention of aliens awaiting completion of removal proceedings upon their release from criminal custody. The United States Supreme Court in *Demore v. Kim*[18] held that mandatory "[d]etention during removal proceedings is a constitutionally permissible part of that process."[19]

However, aliens present in the United States are entitled to assert due process protections which include a fundamental liberty interest in being free from unlawful detention that violates their substantive due process protections. The criminal aliens in *Demore*, like many other aliens in similar situations, often concede that they are subject to removal due to their inadmissibility or deportability.[20] However, *Demore* left open the question of whether mandatory detention is constitutionally permissible for criminal aliens who want to assert colorable challenges to their removal.[21] The Seventh Circuit is the only federal circuit that has provided some guidance as to the circumstances under which criminal aliens can seek to avoid mandatory detention without an individualized bond hearing by asserting a colorable claim that they are not subject to removal.

This article will examine the narrow question left unresolved by the Court's decision in *Demore* regarding "whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable."[22] This article will examine the Seventh Circuit's application of that language to provide heightened due process protections to aliens facing mandatory detention. It will also

17. *Id.* at 235; *see also* Demore v. Kim, 538 U.S. 510, 523 (2003) ("[T]his Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process.").

18. 538 U.S. 510, 531 (2003).

19. *Id.* at 531.

20. News Release, Dep't of Justice: Exec. Office for Immigration Review, Immigration Court Process in the U.S. (2005) (2005 WL 3541986) ("In most removal proceedings, aliens concede that they are removable, but then apply for one or more forms of relief from removal."); *Demore*, 538 U.S. at 531.

21. *Demore*, 538 U.S. at 531 ("The INS detention of respondent, a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings, is governed by these cases.").

22. Gonzalez v. O'Connell, 355 F.3d 1010, 1020 (7th Cir. 2004).

examine the application of section 1226(c) to aliens in removal proceedings and discuss the due process implications arising from mandatory detention of aliens in removal proceedings.

This article will argue that the current statutory and jurisprudential framework governing mandatory detention without bond for criminal aliens who do not concede removability violates the due process protections afforded by the Fifth Amendment.[23] Finally, it will propose a modification to the current mandatory detention framework that will offer heightened protection of the fundamental liberty interests held by criminal aliens.

II. MANDATORY DETENTION OF CRIMINAL ALIENS PENDING REMOVAL UNDER SECTION 1226(C)

Criminalization[24] of the immigration process makes mandatory detention without bond necessary to enable the federal government to effectuate the removal of criminal aliens. Provisions of the INA are designed to work in tandem to achieve this congressional goal. However, the combined lack of uniformity between the federal circuits regarding the interpretation and application of § 1226(c) has created a patchwork of immigration policies that conflict with the due process protections afforded to all persons—including criminal aliens—present in the United States.

It is important to note that there is not a perfect correlation between apprehension, detention, and eventual removal of criminal aliens from the United States. In 1996, Congress recognized, when debating the purposes underlying the adoption

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23. The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

24. In response to the perception that crimes committed by aliens were increasing, Congress enacted several key legislative reforms aimed at expanding the categories of criminal convictions that would subject aliens to determinations of inadmissibility, deportability, and ultimate removal from the United States. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in titles 8 and 18 of the U.S. Code); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in titles 8, 18, 28, 40, and 42 of the U.S. Code). For a discussion about the legislative history of § 1226(c), see Demore v. Kim, 538 U.S. 510, 518 (2003). "Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Id.*

of § 1226(c), that there is a small cohort of criminal aliens who would not be removed despite their eligibility for removal.[25] In his report to the House of Representatives, Congressman Henry Hyde discussed the growing number of incarcerated aliens who were foreign born. Although the number was significant, he estimated that twenty percent of those incarcerated aliens "are not deportable because they are either naturalized citizens or lawful permanent residents with protection from deportation."[26]

Generally, the Attorney General may exercise discretion in deciding whether to detain an alien during removal proceedings. Section 1226(a) provides in pertinent part that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."[27] That exercise of discretion is not available for a limited class of aliens who committed one of the enumerated crimes set forth in Section 1226(c).

Section 1226(c) requires the Department of Homeland Security to detain without bond any alien released from custody for commission of an enumerated list of crimes pending completion of removal proceedings.[28] Predicate offenses or predicate crimes (A)-(D) that trigger mandatory detention include crimes involving moral turpitude, aggravated felonies, controlled substance offenses, terrorist activities, and firearms offenses.[29]

Aliens subject to mandatory detention under § 1226(c) are entitled to review of their custody determination by an immigration judge.[30] In *Joseph*,[31] the procedures required by this hearing, which is commonly referred to as a "Joseph hearing," were examined.[32] A Joseph hearing affords an alien the opportunity to challenge the mandatory detention determination on the basis that the alien was "properly included"[33] within the

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25. *Demore*, 538 U.S. at 520-21.

26. *See* H.R. REP. NO. 104-469, pt. 1, at 118 (1996).

27. 8 U.S.C. § 1226(a) (2012).

28. 8 U.S.C. § 1226(c) (2012).

29. 8 U.S.C. § 1226(c).

30. *See* Gayle v. Johnson, 81 F. Supp. 3d 371, 379-81 (D.N.J. 2015).

31. 22 I. & N. 799 (1999).

32. *Id.* at 800-06.

33. *Id.* at 800-02; 8 C.F.R. § 1003.19(h)(2)(ii) (2016); *see also Gayle*, 81 F. Supp. 3d at 381. The criminal aliens in a putative class action challenged "the adequacy of the *Joseph* hearing." *Id.* at 379. The plaintiffs successfully argued "that *Joseph* hearings do not satisfy due process because the burden of proof on aliens during such hearings is unconstitutionally burdensome." *Id.* at 388-89. The court agreed and imposed "a probable cause standard on

category of criminal aliens subject to mandatory detention under § 1226(c).[34] In a Joseph hearing, the alien has an opportunity to demonstrate that the Bureau of Immigration and Customs Enforcement (BICE) is "substantially unlikely to establish" that the alien is subject to mandatory detention pursuant to § 1226(c).[35] In *Joseph*, the BIA held "that a lawful permanent resident will not be considered 'properly included' in a mandatory detention category when an Immigration Judge or the Board is convinced that the Service is substantially unlikely to establish at the merits hearing, or on appeal, the charge or charges that would otherwise subject the alien to mandatory detention."[36] If

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the [Immigration Judge's] initial determination of whether the Government has a sufficient basis to detain individuals under § 1226(c)." *Id.* at 398. Because of this ruling, the district court rejected "[p]laintiff's proposed standard—a showing that the alien has a substantial challenge to the Government's basis for detention under § 1226(c), as opposed to the alien's current standard of showing the Government is substantially unlikely to prevail—is constitutionally required." *Id.* The court found that under this structure, "the alien will have received constitutionally sustainable due process." *Gayle*, 81 F. Supp. 3d at 398. The court denied Plaintiff's motion to certify class. *Id.* at 404-05. The parties appealed. *See* Garfield Gayle v. Warden Monmouth Cty. Corr. Inst., 838 F.3d 297 (3d Cir. 2016) ("On appeal, Appellants, joined by numerous amici, challenge the merits of the District Court's substantive and procedural due process rulings, as well as its denial of their motion to certify a class, and the Government has responded point by point. Yet, as the parties conceded at oral argument in response to inquiry by the Court, Oral Arg. at 17:56, 38:01 (argued Feb. 10, 2016), the District Court did not have authority to reach the merits. Nor do we. The District Court's judgment therefore must be vacated and the case remanded for consideration of the only issue over which it had jurisdiction: the motion for class certification.").

34. The alien has the burden of proving that the government is "substantially unlikely" to prevail in proving that § 1226(c) is applicable to the alien. *See* Casas v. Devane, No. 15-cv-8112, 2015 WL 7293598, at *2 (N.D. Ill. Sept. 19, 2015) ("[A]ny alien may challenge at an administrative hearing the determination that he is 'properly included' in the categories of aliens subject to mandatory detention under 1226(c). The alien may then appeal the IJ's determination as to the applicability of 1226(c) to the BIA. Unlike a removability determination, the BIA's review of the applicability 1226(c) is not appealable to a federal court of appeals.") (citations omitted).

35. Joseph, 22 I. & N. 799, 806 (1999).

36. *Id.* In *Tijani v. Willis*, the concurring opinion clearly set forth criticism of the *Joseph* decision by stating:

> The BIA's Joseph decision was, plainly put, wrong. There can be no doubt that individual liberty is one of the most fundamental rights protected by the Constitution . . . . Joseph, which was decided prior to Zadvydas, gives that right little or no weight. Instead, it establishes a system of "detention by default" by placing the burden fully on the alien to prove that he should not be detained. When such a fundamental right is at stake, however, the Supreme Court has insisted on heightened procedural protections to guard against the erroneous deprivation of that right. In particular, the Supreme Court has time and again rejected laws that place on the individual the burden of protecting his or her fundamental rights.

successful, the alien's detention is deemed discretionary and the alien is thereafter entitled to an individualized bond hearing within the scope of INA § 1226(a).[37] At the individualized bond hearing, the government has an opportunity to demonstrate that continued detention is necessary.[38]

Federal courts have jurisdiction to hear challenges raised in the form of habeas petitions[39] against mandatory detention and bond requests.[40] Section 236(e) bars federal courts from reviewing challenges to an Immigration Judge's discretionary decision regarding bond and detention. However, in federal court,[41] aliens may assert challenges to "the statutory framework that permits his detention without bail."[42]

Section 1226(e) bars review of the Attorney General's "discretionary judgment," and an "action or decision by the Attorney General" regarding detention and/or bond determinations.[43] However, the Supreme Court in *Demore* held that notwithstanding this language, aliens may assert "challenges

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430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring). Judge Tashima expressed concern that the standard articulated in *Joseph* did not afford aliens facing mandatory detention under § 1226(c) a sufficient opportunity to challenge the detention before being subject to the deprivation of their fundamental liberty interests. *Id.* at 1244-45. Justice Breyer's dissenting opinion in *Demore* was cited to argue that the *Joseph* analysis should be narrowly interpreted. *Id.* at 1246-47. Justice Breyer argued that "[Section 1226(c)] tells the Attorney General to 'take into custody any alien who . . . *is* deportable,' not one who may, or may not, fall into that category." Demore v. Kim, 538 U.S. 510, 578 (2003) (Breyer, J., dissenting) (emphasis added). However, Judge Tashima argued that "[o]nly those immigrants who could not raise a 'substantial' argument against their removability should be subject to mandatory detention . . . . This interpretation is not only more respectful of the Constitution, it is also more consistent with Congress' chosen language." *Tijani*, 430 F.3d at 1247 (Tashima, J., concurring).

37. Pujalt-Leon v. Holder, 934 F. Supp. 2d 759, 766 n.3 (M.D. Pa. 2013).

38. Baidas v. Jennings, 123 F. Supp. 2d 1052, 1061 (E.D. Mich. 1999).

39. *See* 28 U.S.C. § 2241 (2012). District courts have the power to grant habeas corpus relief to aliens where their custody is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (2012).

40. *See* 8 U.S.C. § 1226(e) (2012). "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." *Id.*

41. Demore v. Kim, 538 U.S. 510, 517 (2003) ("Section 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the legislation authorizing his detention without bail.").

42. *See* 8 U.S.C. § 1226(e); *see also* Bugianishvili v. McConnell, No. 1:15-cv-3360, 2015 WL 3903460, at *3 (S.D.N.Y. 2015).

43. 8 U.S.C. § 1226(e) (2012).

to the statutory framework that permits detention without bail."[44] In *Demore*, the Court concluded, "Section 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the legislation authorizing his detention without bail."[45]

The imprecise language of § 1226(c) has resulted in a growing and conflicting body of jurisprudence regarding the nature of the mandatory detention obligation that Congress imposed on immigration officials.[46] A split has emerged in the federal circuits regarding the interpretation and application of § 1226(c) for mandatory detention without bond for criminal aliens released from criminal custody.

For example, the First Circuit interprets the language of § 1226(c) as temporal in nature, and holds that § 1226(c) only requires immigration officials to detain criminal aliens convicted of a predicate crime, immediately after the criminal alien is released from custody.[47] Other federal circuits have adopted a conflicting interpretation. In the Second, Third, Fourth and Tenth Federal Circuits, § 1226(c) is interpreted as "duty triggering" language that permits immigration officials to apprehend and detain a criminal alien "at any time" after the alien was released from criminal custody.[48] In addition, federal circuits are also in conflict regarding whether prolonged detention of criminal aliens subject to mandatory detention without bond may run afoul of the

44. *Demore*, 538 U.S. at 517; Gonzalez v. O'Connell, 355 F.3d 1010, 1014 (7th Cir. 2004).

45. *Demore*, 538 U.S. at 517; *Gonzalez*, 355 F.3d at 1014.

46. Tijani v. Willis, 430 F.3d 1241, 1243 (9th Cir. 2005) (Tashima, J., concurring) ("As with most statutes, the relatively simple mandate of § 236(c) leaves many questions unanswered, the most important of which is who, exactly, falls under the statute's provisions. The statute states only that mandatory detention applies to an alien who 'is deportable by reason of having committed' a number of specified criminal offenses, but does not define those offenses with precision, nor does it define what 'is deportable' means.").

47. *See* Castaneda v. Souza, 810 F.3d 15, 22 (1st Cir. 2015) ("[W]e conclude that the 'when . . . released' clause imposes a deadline for picking up an alien coming out of criminal custody that limits the application of (c)(2)'s bar to bonded release."); *Id*. at 39.

48. *See* Lora v. Shanahan, 804 F.3d 601, 611 (2d Cir. 2015); Sylvain v. Att'y Gen., 714 F.3d 150, 156-57 (3d Cir. 2013); Hosh v. Lucero, 680 F.3d 375, 384 (4th Cir. 2012); Olmos v. Holder, 780 F.3d 1313, 1327 (10th Cir. 2015). These federal circuits deferred to the Board of Immigration Appeals' (BIA) ruling that "'when. . . released' does not impose a temporal restriction on the agency's authority and duty to detain an alien." *Lora*, 804 F.3d at 610 (citing Rojas, 23 I. & N. 117, 120-21, 127 (2001).

Due Process Clause.[49] The Supreme Court has not weighed in to resolve these issues.[50]

III. *DEMORE V. KIM*

Non-punitive civil detentions[51] are generally not constitutionally permissible except during times of "global war or domestic insurrection"[52] as illustrated by the internment of Japanese Americans during World War II.[53] However, within the field of immigration, civil detention of aliens is permissible, and does not infringe upon the protection afforded to aliens under the Due Process Clause.[54] Congress's power to detain aliens is a longstanding principle of immigration law. In *Wong Wing v. United States*,[55] the Supreme Court acknowledged that detention is an integral component of the admission and removal process within the immigration field:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for

49. A number of federal circuits (including the Third, Sixth, and Ninth Circuits) adopted the analysis introduced by Justice Kennedy in his concurring opinion in *Demore*. Justice Kennedy argued that mandatory detention without bond subject to § 1226(c) could infringe upon an alien's liberty interest where such "continued detention became unreasonable or unjustified." Demore v. Kim, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring). In such circumstances, continued detention would be appropriate only upon a showing by the government that the alien was a "risk of flight or dangerous[]." *Id.* at 532-33. In the absence of either circumstance, an alien who had been unreasonably or unjustifiably detained for a prolonged time period would thereafter fall within the parameters of § 1226(a) and be entitled to an individualized bond determination. The Second Circuit rejected the "fact-dependent inquiry" in favor of a bright-line rule that a "six-month period" of detention is presumptively reasonable. *See Lora*, 804 F.3d at 614-15.

50. For an excellent and comprehensive analysis of the conflicting interpretation and application of § 1226(c), see Gerard Savaresse, Note, *When is When?: 8 U.S.C. § 1226(c) and the Requirements of Mandatory Detention*, 82 FORDHAM L. REV. 285 (2013).

51. Rodriguez v. Robbins, 804 F.3d 1060, 1065 (9th Cir. 2015) (defining non-punitive civil detentions as detentions that are "merely preventative").

52. *Id.* at 1074.

53. *See* Korematsu v. United States, 323 U.S. 214, 215-17, 223 (1944).

54. Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

55. 163 U.S. 228 (1896).

> their deportation. Detention is a usual feature in every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.[56]

The question remaining after *Wong Wing* was the extent of Congress's power to detain. In *Demore v. Kim*, the Supreme Court addressed the constitutionality of civil detentions by immigration officials and held that "[d]etention during removal proceedings is a constitutionally permissible part of that process."[57] Chief Justice Rehnquist writing for the Court held that, "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings."[58]

The criminal alien in *Demore*, a South Korean citizen, was a lawful permanent resident of the United States.[59] Mr. Kim was convicted of burglary and petty theft, and charged with being deportable for those crimes.[60] The INS and the Court adopted the position that Mr. Kim conceded that he was deportable and consequently, proceeded with their analyses on that basis.[61]

There appeared to be a disputed question regarding whether Mr. Kim conceded deportability, and in doing so "forwent a hearing at which he would have been entitled to raise any nonfrivolous argument available to demonstrate that he was not

56. *Id.* at 235.

57. Demore v. Kim, 583 U.S. 510, 531 (2003). "At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Id.* at 523.

58. *Id.* at 513.

59. *Id.*

60. *Id.*

61. *Demore*, 538 U.S. at 514 ("Respondent also did not dispute that INS' conclusion that he is subject to mandatory detention under § 1226(c) . . . . In conceding that he was deportable, respondent forwent a hearing at which he would have been entitled to raise any nonfrivolous argument available to demonstrate that he was not properly included in a mandatory detention category."). However, the varying opinion of the Court stated, "At the outset, there is the Court's mistaken suggestion that Kim 'conceded' his removability . . . . The Court cites no statement before any court about conceding removability, and I can find none." *Id.* at 541 (Souter, J., concurring in part and dissenting in part). *See id.* at 577 (Breyer, J., concurring in part and dissenting in part) ("This case, however, is not one in which an alien concedes deportability. As Justice Souter pointed out, Kim argues to the contrary . . . . Kim claims that his earlier convictions were neither for an 'aggravated felony' nor for two crimes of 'moral turpitude.'").

properly included in a mandatory detention category."[62] However, a Joseph hearing would not have assisted Mr. Kim. The Joseph hearing would have permitted him to address the question of whether "his criminal convictions are not for removable offenses."[63] However, Mr. Kim also challenged the government's ultimate ability to remove him from the country.[64] Mr. Kim asserted that, notwithstanding his criminal convictions, he was "independently eligible for statutory relief from removal."[65] Kim argued on appeal that his prior crimes did not constitute aggravated felonies or crimes involving moral turpitude.[66] Had Mr. Kim been successful, he would not have been subject to mandatory detention under § 1226(c), and would have been eligible for an individualized bond hearing under § 1226(a) to determine if he was entitled to post bond.

The Supreme Court held that its decision was based on the fact that he "conced[ed] that he is deportable" in his habeas petition.[67] The Court did note, however, that Mr. Kim "did not concede that he *will ultimately be deported*. As the dissent notes, respondent has applied for withholding of removal."[68] The parameters of a Joseph hearing are not broad enough to include an evaluation of removability.[69] In the event that Mr. Kim's arrests fell within the categories of predicate crimes enumerated in § 1226(c), he still would have been subject to mandatory detention. The fact that Mr. Kim may have been eligible for withholding of removal was irrelevant to the Immigration Judge evaluating his case, and would not have prevented immigration officials from subjecting him to mandatory detention without an individualized bond hearing.[70]

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62. *Id.* at 514. "Nor did he argue that he himself was not 'deportable' within the meaning of § 1226(c)." *Id.* at 522.

63. *Demore*, 538 U.S. at 542 (Souter, J., concurring in part and dissenting in part). The Supreme Court did not address these arguments because Kim asserted them for the first time on appeal. *See id.* at 522 n.6.

64. *Id.* at 541-42 (Souter, J., concurring in part and dissenting in part).

65. *Id.* at 542 (Souter, J., concurring in part and dissenting in part).

66. *Id.* at 522 n.6.

67. *Demore*, 538 U.S. at 522 n.6.

68. *Id.* at 522-23 n.6.

69. *Id.* at 514 n.3 ("At the hearing, the detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the INS is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention.").

70. *Id.* at 542 (Souter, J., concurring in part and dissenting in part) ("The suggestion that Kim should have contested his removability in this habeas corpus petition . . . misses the

In *Demore*, the Court examined the legislative history of § 1226(c) to determine whether mandatory detention was constitutionally permissible.[71] The legislative history revealed that the purpose of such detentions was two-fold: first, to reduce the risk of flight; second, to minimize the danger to the public from criminal aliens.[72] In *Demore*, the Supreme Court determined that a limited period of detention was constitutionally permissible because it was reasonably related to the limited 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."[73] Although the Court did not impose a specific time

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point that all he claims, or could now claim, is that his detention pending removal proceedings violates the Constitution. Challenges to removability itself, and applications for relief from removal, are usually submitted in the first instance to an immigration judge . . . . The Immigration Judge had not yet held an initial hearing on the substantive issue of removability when Kim filed his habeas petition in the District Court, even though Kim had been detained for over three months under § 1226(c). If Kim's habeas corpus petition had claimed 'that he himself was not "deportable,"' as the Court suggests it should have . . . the District Court would probably have dismissed the claim as unexhausted.").

71. *Id.* at 514-16.

72. *Demore*, 538 U.S. at 515. However, in *Gayle v. Johnson*, the court noted the following:

> While it appears that the primary basis for mandatory detention was congressional concern over the possibility that potentially deportable aliens who were not detained would fail to appear for their removal proceedings, frustrating the Government's removal efforts, . . . nevertheless, the reports and data relied on by Congress in enacting § 1226(c), and by the Supreme Court in upholding the constitutionality of the law, have been heavily criticized by several scholarly commentators as inaccurate and misleading. Scholars question whether there was in fact a significant percentage of removable aliens who actually appeared before an Immigration Judge for a bond hearing that then failed to return for their remaining proceedings.

4 F. Supp. 3d 692, 709-10 n.25 (D.N.J. 2014).

73. *Id.* at 528. Similarly, the Supreme Court in *Zadvydas v. Davis*, held that detention is permissible for post-removal under 8 U.S.C. § 1231, which allows immigration officials to detain without bond following an order of removal. 533 U.S. 678, 682 (2001). The Court did, however, impose a temporal limit on the length of post-removal detention without bond:

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

period for the detention, the Court did instruct that the detention should be for a brief period of time.[74]

It is important to note that the duration of pre-removal immigration detention for extended periods of time can trigger due process concerns. Justice Kennedy authored a concurring opinion in *Demore* in which he addressed the length of pre-removal detentions. He argued that "since the Due Process Clause prohibits arbitrary deprivations of liberty, 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."[75] Such extended periods of detention may run afoul of the Due Process Clause unless immigration officials can demonstrate that the continued detention is necessary because the alien is either a flight risk or a danger to the community.[76] The constitutionality of prolonged detention is of little significance to a criminal alien who immigration officials cannot ultimately remove from the country. Prolonged detention for criminal aliens who do not concede removability are not permitted to assert a challenge to their ultimate removability before they are detained without the opportunity for an individualized bond hearing. This type of detention serves only one purpose; to further penalize criminal aliens after their release from criminal custody. This is not a constitutionally permissible reason for subjecting aliens to civil detention. For this cohort of criminal aliens, mandatory detention without bond infringes upon the substantive due process protections afforded by the Constitution to be free from unreasonable restraint.

IV. SEVENTH CIRCUIT DECISIONS APPLYING *DEMORE*

> confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.

Id. at 701.

74. Demore v. Kim, 538 U.S. 598, 513 (2003) ("We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.").

75. *Id.* at 532 (Kennedy, J., concurring).

76. *Id.*

For nearly twenty years, courts within the Seventh Circuit have consistently held that the mandatory detention statute "is unconstitutional as applied to prisoners who have a good-faith claim that they will ultimately be permitted to remain in the country."[77] In addition to Seventh Circuit precedent,[78] in Justice

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77. *See* Forbes v. Perryman, 244 F. Supp. 2d 947, 949 (N.D. Ill. 2003). In *Forbes*, a lawful permanent resident from Jamaica lived in the United States since 1967. *Id.* at 948. Forbes was detained since June 10, 2002, to at least when the order was issued February 14, 2003. *Id.* at 947-48. He was detained in 2002 for a 1995 conviction for "unlawful delivery of cannabis," which was found subject to mandatory detention under § 236(c). *Id.* Forbes presented "a good-faith defense to removal." *Id.* at 949.

> Mr. Forbes was erroneously denied the opportunity to file for relief under § 212(c) of the [INA] as allowed by *INS v. St. Cyr*, 533 U.S. 289, 329 [] (2001) (holding that provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 repealing discretionary relief form removal do not apply retroactively to aliens who pleaded guilty to possession of controlled substances prior to the enactment of the statute).

Forbes, 244 F. Supp. 2d at 949. The court held that "Mr. Forbes is entitled to an individualized bond hearing, and [] order[ed] the [INS] to provide him with such a hearing within two weeks." *Id.* at 950. In *Patel v. Ridge*, the court stated that "[s]everal judges of this court have held that [S]ection 1226(c) is unconstitutional as applied to detainees who have a 'good-faith claim' that they will ultimately be permitted to remain in the country." No. 04 C 2109, 2004 WL 1595362, at *1 (N.D. Ill. July 14, 2004). In *Patel*, a lawful permanent resident, convicted of "the offense of False Declarations before a Grand Jury," was charged with removability "as an alien convicted of an aggravated felony." *Id.* The alien asserted that "he [had] a 'good-faith claim' that he [was] not deportable, and, therefore, that detention pursuant to section 1226(c) [was] unconstitutional as applied to him." *Id.* at *2. The District Court rejected Patel's argument as "conclusory," and determined that he "neither cited, quoted, nor developed any argument regarding this precedent and statutory law." *Id.* In *Bonsol v. Perryman*, the court found that the criminal alien did not concede removability and "raise[d] a good-faith challenge to his removal based on his assertion that he was not 'convicted' under Illinois law." 240 F. Supp. 2d 823, 826 (N.D. Ill. 2003). The district court found a Fifth Amendment violation because as applied, § 1226(c) "is not narrowly tailored because it adopts a categorical approach to detention based only on the criterion of lack of United States citizenship." *Id.* at 827.

78. To a very limited extent, other jurisdictions are considering whether mandatory detention without bond under § 1226(c) infringes upon the fundamental liberty interests of criminal aliens who do not concede removability. *See* Ramirez-Garcia v. Holder, 550 F. App'x 501, 502 (9th Cir. 2013). The Ninth Circuit vacated a Removal Order for an alien who asserted derivative United States citizenship through his mother pursuant to § 201(g) of the INA. *See In re* Ramirez-Garcia, A12 519 653, 2007 WL 2463883, at *1 (BIA July 24, 2007). Ramirez-Garcia was convicted and sentenced to sixty-months imprisonment in 1988 for trafficking in controlled substances. *Id.* at *3. An Order of Removal was entered on the basis of that conviction. *Id.* at *1. Upon release for criminal custody, Ramirez-Garcia was placed in mandatory detention under § 1226(c). *Id.*; *see also* 8 U.S.C. § 1226(c) (2012). In *Gayle v. Johnson*, an alien convicted of the predicate crimes that made him subject to mandatory detention, was held without bond under § 1226(c), but was ultimately not found removable. 81 F. Supp. 3d 371, 374-75 (D.N.J. 2015). Thus, his detention served no purpose and did not further the government's underlying purpose of § 1226(c). *See* 8 U.S.C. § 1226(c). One of the named plaintiffs in the putative class action, Sukh, a Guyanese national,

Souter's concurrence in *Demore*, he observed that "[s]ome individual aliens covered by § 1226(c) have meritorious challenges to removability or claims for relief from removal. As to such aliens . . . the Government has only a weak reason under the immigration laws for detaining them."[79]

For example, prior to the Supreme Court's decision in *Demore*, the Seventh Circuit in *Parra v. Perryman*[80] hypothesized the possible scenario where "it is easy to imagine"[81] that an alien could raise a constitutional challenge to mandatory detention if the alien had a good faith basis for challenging his removal.[82] In *Parra*, the alien was not successful in this regard, but the Court acknowledged the possibility that such a challenge could be asserted.[83] Mr. Parra, a citizen of Mexico, was convicted of "aggravated criminal sexual assault" in 1996 and was found to be removable for conviction of an aggravated felony.[84] He was apprehended and detained without the possibility of posting a bond.[85]

The alien did not present any good faith reasons—such as that he was a United States citizen—that could be used to challenge removal, and in fact, the court noted that the case did not fall within any of the examples noted because "Parra concedes that he is an alien removable because of his criminal conviction, and Mexico accepts return of its citizens."[86] The Seventh Circuit

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and lawful permanent resident for twenty years, was detained for "nearly 21 months" in a correctional facility. *Gayle*, 81 F. Supp. 3d at 377. He was deemed deportable due to convictions for assault and theft of services, which are crimes of moral turpitude. *Id.* After almost two years, the "[Immigration Judge] granted Sukhu's application for the adjustment of status based on a relative petition filed by his U.S. citizen daughter, and thus, terminated his removal proceedings" and released him from immigration custody. *Id.* at 378.

79. Demore v. Kim, 538 U.S. 510, 561 (2003) (Souter, J., concurring in part and dissenting in part) (citation omitted).

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

81. *Id.* at 957.

82. *Id.* The court in *Parra* stated the following:

> Section 1226(c) authorizes detention by the Executive Branch without trial, and it is easy to imagine cases—for example, claims to persons detained under § 1226(c) who say that they are citizens rather than aliens, who contend that they have not been convicted of one of the felonies that authorizes removal, or who are detained indefinitely because the nations of which they are citizens will not take them back—in which resort to the Great Writ may be appropriate.

Id. at 957.

83. *Id.*

84. *Parra*, 172 F.3d at 955.

85. *Id.* at 956.

86. *Id.* at 957.

adopted the narrow position that Parra did not have any due process interests worthy of constitutional protection.[87] The Court noted that "[t]he private interest here is not liberty in the abstract, but liberty in the United States by someone no longer entitled to remain in this country . . . the probability of error is zero when the alien concedes all elements that require removal (as Parra has done)."[88] As a result, possible violations of fundamental liberty interests were not considered because criminal aliens "subject to § 1226(c) have forfeited any legal entitlement to remain in the United States."[89]

In *Vang v. Ashcroft*,[90] a case also decided prior to the Supreme Court's decision in *Demore*, a District Court in the Seventh Circuit found that mandatory detention under § 1226(c) "as applied to petitioners who have not conceded removability" infringed upon the alien's substantive liberty interests.[91] In *Vang*, the District Court distinguished the *Parra* decision for criminal aliens, who unlike Parra, "all demonstrated at least some hope that they will not be removed."[92] The *Vang* decision examined conflicting federal district decisions that considered "the constitutionality of § 1226(c) as applied to petitioners who have not conceded removability,"[93] and concluded that "§ 1226(c) implicates a fundamental liberty interest as applied."[94]

The District Court applied the heightened scrutiny analysis test set forth in *United States v. Salerno*[95] to evaluate the alien's substantive due process claims.[96] *Salerno* held that "the government may not infringe a person's fundamental liberty interests, regardless of the process provided, unless it narrowly tailors the infringement to serve a compelling state interest."[97] *Vang* held that the government's stated regulatory goals for mandatory detention, which included providing for public safety

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87. *Id.* at 958.
88. *Id.* (italics omitted).
89. *Parra*, 172 F.3d at 958 (italics omitted).
90. Vang v. Ashcroft, 149 F. Supp. 2d 1027 (N.D. Ill. 2001).
91. *Id.* at 1035.
92. *Id.* at 1038. The court stated, "Where, as here, there is a good faith basis to contest removability, however, the Court does not believe *Parra* precludes a bond hearing." *Id.* at 1036.
93. *Id.* at 1035.
94. *Id.* at 1037.
95. United States v. Salerno, 481 U.S. 739 (1987).
96. *Id.* at 739.
97. *Vang*, 149 F. Supp. 2d at 1035 (citing *Salerno*, 481 U.S. at 748).

and insuring the criminal alien's participation in removal proceedings, were legitimate.[98] However, the court held that "while legitimate, the goals outlined by Congress do not justify the infringement of [criminal aliens'] fundamental rights."[99] Section 1226(c), as applied to criminal aliens who have good faith challenges to their removal, was not narrowly tailored because it "sweeps too broadly" by denying bond hearings to all aliens, including those who "demonstrated at least some hope that they will not be removed."[100]

The Seventh Circuit also considered this issue after the Supreme Court's decision in *Demore*. In *Gonzalez v. O'Connell*,[101] a lawful permanent resident was "found guilty" of possession of cocaine and sentenced to two years probation.[102] The government found him removable "as an alien convicted of an aggravated felony," and detained him subject to § 1226(c).[103] He received a Joseph hearing where "[t]he [immigration judge] determined that [he] was subject to mandatory detention pending removal proceedings under § 1226(c) because he was removable as an alien convicted of an aggravated felony and of a state drug offense. Therefore bond was not available to [him]."[104]

Mr. Gonzalez filed a petition for a writ of habeas corpus.[105] He asserted that "his right to due process under the Fifth and Fourteenth Amendments" was violated "because he raised the good-faith argument that he would not in fact be deported."[106] He asserted that under Illinois law, his "probationary dispositions" were not convictions, and thus he was not deportable "because he was not 'convicted' of either an aggravated felony, or a state law relating to a controlled substance."[107] At the Joseph hearing, Mr. Gonzalez was given an opportunity to present evidence that he was not subject to mandatory detention under § 1226(c).[108]

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98. *Vang,* 149 F. Supp. 2d at 1037.
99. *Id.*
100. *Id.* at 1038.
101. Gonzalez v. O'Connell, 355 F.3d 1010 (7th Cir. 2004).
102. *Id.* at 1012.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Gonzalez*, 355 F.3d at 1012.
107. *Id.*
108. *Id.* at 1013 (citing Demore v. Kim, 538 U.S. 510, 514 n.3 (2003)) ("At the hearing, the detainee may avoid mandatory detention by demonstrating that he is not an alien,

The most important aspect of this decision was that Mr. Gonzalez "did not concede his deportability."[109] Although Mr. Gonzalez attempted to distinguish the holding in *Demore*, the Seventh Circuit found that the Supreme Court's analysis in *Demore* was equally applicable to his challenge.[110] Although Mr. Gonzalez challenged his deportability, the Seventh Circuit had previously ruled that his argument was without merit.[111] The court noted that "[prior decisions], in effect, stripped Mr. Gonzalez of the predicate argument underlying his constitutional claim – that he has raised a 'good-faith challenge' to his deportability."[112] The Seventh Circuit reconciled *Demore* with *Gonzalez* by noting that "[a] distinction between petitioners who raise facially meritless claims and those who concede their deportability is one of form and not substance. Both are without a legal right to remain in the United States."[113]

The analysis is quite different, however, if an alien has a good faith challenge to the DHS's initial determination of removability. Drawing guidance from *Demore*, the Seventh Circuit identified an important gap in the current due process paradigm governing mandatory detention proceedings.[114] The Seventh Circuit, drawing from Justice Souter's dissenting opinion in *Demore*, acknowledged that the outcome of Gonzalez's challenge would be different if he had asserted a good faith

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was not convicted of the predicate crime, or that the INS is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention.").

109. *Id.* at 1014.

110. *Id.* at 1014-15.

111. *Gonzalez*, 355 F.3d at 1020. The Seventh Circuit explained:

> It is not necessary, however, for this court to reach this important issue in this case. After the district court's decision in this case, this court decided *Gill v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003). *Gill* squarely rejected the argument that Mr. Gonzalez advanced before the district court that he was not in fact "deportable": that "convict[ion]" for immigration purposes is defined by state law, and that he was not "convicted" according to Illinois law because he only received a disposition of probation.

Id.

112. *Id.* at 1020. The Seventh Circuit jurisprudence determined that a "'conviction' for immigration purposes is governed by 8 U.S.C. § 1101(a)(48)(A), and that a probationary disposition under 720 ILCS 570/410 following a plea of guilty qualifies as a 'conviction' under that definition." *Id.*

113. *Id.*

114. *Id.* at 1012.

challenge to his removability.[115] The court clearly recognized that "[a] wholly different case arises when a detainee who has a good-faith challenge to his deportability is mandatorily detained under § 1226(c)."[116] Although dicta, this analysis paved the way for aliens detained subject to § 1226(c) to assert constitutional challenges to the DHS's mandatory detention paradigm.

Two more recent District Court decisions arising from the Seventh Circuit have affirmatively carved out an exception for aliens who do not concede removability. In *Papazoglou v. Napolitano*,[117] the alien, a long-term lawful permanent resident, filed a writ of habeas corpus seeking release from mandatory detention.[118] The DHS determined that he was subject to removal because he pled guilty and was convicted of third degree sexual assault and physical abuse of a child, not as an aggravated felon.[119] The immigration judge (IJ) found him eligible for full relief from removal due to a petition filed for adjustment of status, an application for waiver of grounds of inadmissibility, and an I-130 visa petition[120] filed by his wife, a United States citizen.[121] Mr. Papazoglou was taken into custody and held without bond pursuant to § 1226(c) for thirteen months.[122] Mr. Papazoglou argued that his mandatory detention without bond subject to § 1226(c) was unconstitutional.[123] The District Court looked to the Seventh Circuit's decision in *Parra* for guidance.[124] The court concluded that "[t]he *Parra* decision left the door open to claims made by detainees who had not yet conceded deportability, but instead had colorable claims that they were not in fact deportable."[125]

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115. *Id.* at 1020-21. The court cited Justice Souter's opinion in *Demore v. Kim* stating, "Some individual aliens covered by § 1226(c) have meritorious challenges to removability or claims for relief from removal . . . . As to such aliens . . . the Government has only a weak reason under the immigration laws for detaining them." 538 U.S. 510, 561 (Souter, J., concurring in part and dissenting in part).

116. *Gonzalez,* 355 F.3d at 1020.

117. Papazoglou v. Napolitano, No. 1:12-cv-00892, 2012 WL 1570778 (N.D. Ill. May 3, 2012).

118. *Id.* at *1.

119. *Id.*; *see also* 8 U.S.C. § 1227(a)(2)(E)(I) (2012).

120. *Papazoglou*, No. 1:12-cv-00892, 2012 WL 1570778, at *1.

121. *Id.*

122. *Id.* at *2.

123. *Id.* at *4.

124. *Id.* at *2.

125. *Papazoglou*, No. 1:12-cv-00892, 2012 WL 1570778, at *4.

Citing *Parra*, the court found that "questions of due process violations" are raised when "aliens who claim they are citizens"; "aliens who claim they have not been convicted of the offenses that trigger removal"; and "aliens who have no country to which they can be removed" are subject to mandatory detention without bond.[126] Mr. Papazoglou argued "that his mandatory detention without bail [was] unconstitutional because he [had] a colorable, good faith claim that he [was] not deportable—namely that an IJ ha[d] already determined that he [was] eligible to remain in the United States."[127] The Seventh Circuit in *Parra* noted that habeas corpus petitions may be appropriate for aliens subject to mandatory detention without bond in circumstances where the alien has not conceded removability.[128]

The court found that the Government "infringed upon the detainee's fundamental liberty interests" because the alien "demonstrated a legitimate and good faith reason to contest his

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126. *Id.*

127. *Id.*; Parra v. Perryman, 172 F.3d 954, 957 (7th Cir. 1999) ("Today's case presents none of these possibilities, however, for Parra concedes that he is an alien removable because of his criminal conviction, and Mexico accepts returns of its citizens."); *see also* Vang v. Ashcroft, 149 F. Supp. 2d 1027, 1033 (N.D. Ill. 2001).

128. *Parra*, 172 F.3d at 957 ("[R]esort[ing] to the Great Writ may be appropriate."). However, in *Young v. Aviles*, a lawful permanent resident from Jamaica was subject to mandatory detention without a bond hearing after immigration officials determined that he was subject to removal. 99 F. Supp. 3d 443, 445, 454 (S.D.N.Y. 2015). Young pled guilty to "possession of approximately twenty pounds of marijuana" with "intent to distribute a controlled substance." *Id.* at 445. Young "was sentenced to ninety days in jail, with credit for time served." *Id.* At the time the District Court issued its opinion, Young had been detained without bond for "almost seven months," which was four months longer than the length of incarceration for the underlying conviction. *Id.* at 454.

Young filed a petition for writ of habeas corpus, asserting several arguments to distinguish his action from the controlling force of the *Demore* decision by arguing that "he [had] a 'substantial challenge' to removability . . . ." *Id.* at 452. Young had contemporaneously "filed applications for Cancellation of Removal and asylum." *Young*, 99 F. Supp. 3d at 446. The Court found the argument that "his detention violates the Due Process Clause" to be "meritless." *Id.* at 453. The Court concluded "that Young's continued detention without a bond hearing [did] not yet violate due process." *Id.* at 456. The Court explained further:

> With respect to the former, an application for cancellation of removal is not a challenge to removability, but rather a request for discretionary relief . . . . Unfortunately for Young, "the Supreme Court's decision in *Demore* all but forecloses the argument that 'the term "is deportable," as used in § 1226(c), means anything other than an alien who *prima facie* qualifies for removal,' regardless of whatever forms of discretionary relief may be available, as well as the argument that applying the mandatory detention statute to an alien who may qualify for discretionary relief is unconstitutional."

Id. at 454 (citations omitted).

removability, namely that an IJ ha[d] already determined that Papazoglou merits full relief from removal."[129] As a result, the Court ordered an individualized bond hearing for the alien.[130]

The most recent case to consider this issue is *Casas v. Devane*.[131] In this case, the criminal alien was convicted of an aggravated felony and charged by the DHS with being removable.[132] The criminal alien was apprehended and detained for four months as an alien subject to mandatory detention without bond under § 1226(c).[133] He challenged the constitutional permissibility of his mandatory detention.[134] He argued that the Seventh Circuit permits aliens to challenge mandatory detention where there is a good faith challenge to their removability.[135]

The court acknowledged that the Supreme Court's decision in *Demore* concluded that mandatory detention of deportable aliens pending removal is constitutionally permissible, but it distinguished the holding in *Demore* from the applicability in *Casas*, noting that *Demore* applies "to aliens who proffer 'facially meritless' bases for contesting their removal . . . ."[136] Instead, the Court relied on the Seventh Circuit's decision in *Gonzalez*, noting that "a wholly different case arises when a detainee who has a good faith challenge to his deportability is mandatorily detained under § 1226(c)."[137] As to Casas, the court concluded that "Casas' good-faith basis for challenging his removal distinguishes him from aliens who by conceding their deportability have 'forfeited any legal entitlement to remain in the United States.'"[138]

Casas sought to challenge his deportability on the basis that "his criminal defense attorney affirmatively misinformed him that pleading guilty to the charged offense would not subject him to

129. *Papazoglou*, No. 1:12-cv-00892, 2012 WL 1570778, at *4-5.

130. *Id.* at *6.

131. Casas v. Devane, No. 15-cv-8112, 2015 WL 7293598 (N.D. Ill. Nov. 19, 2015).

132. *Id.* at *1.

133. *Id.*

134. *Id.* "Casas' [sic] argues that his detention without an individualized bond hearing is unconstitutional because he has a good-faith basis for contesting his removal." *Id.* at *2.

135. *Casas*, No. 15-cv-8112, 2015 WL 7293595, at *2. The government "concede[d] that the Seventh Circuit has 'left open the possibility that an alien [with a] legitimate challenge to removability might not be subject to mandatory detention.'" *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at *3.

deportation."[139] Upon concluding that Casas presented a good faith challenge to his deportability, the Court ordered his release from mandatory detention "unless he receives an order from an Immigration Judge who has determined after an individualized bond hearing that Casas' continued detention is necessary to prevent a risk of flight or a threat to public safety."[140] The Court concluded that offering Casas an opportunity to challenge his detention in an individualized bond hearing would not "thwart" the Congressional purpose underlying the mandatory detention statute for aliens "who have a good-faith basis for believing they may ultimately be permitted to remain in the country."[141]

V. DUE PROCESS CONSIDERATIONS

The field of Immigration law differs significantly from other areas of law regulated by the federal government.[142] "Congress traditionally exercises authority over matters of immigration and exclusion through passage of immigration legislation."[143] Article I, Section 8, Clause 4 of the Constitution authorizes Congress to "establish a uniform Rule of Naturalization."[144] In *Fiallo v. Bell*,[145] the Supreme Court reasserted the principle that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[146] Although the Supreme Court recognizes Congress's plenary power to regulate the field of immigration, that power is not without constitutional safeguards. In *INS v. Chadha*,[147] the Court limited

139. Casas v. Devane, No. 15-cv-8112, 2015 WL 7293598, at *3. "[T]he Seventh Circuit has affirmed that modification of a criminal conviction . . . can save an alien from deportation." *Id.*

140. *Id*.

141. *Id.*

142. *See generally* Jean v. Nelson, 711 F.2d 1455, 1465 (11th Cir. 1983) ("Although the Constitution fails to delegate specifically the power over immigration, the Supreme Court recognized almost a century ago that the political branches have plenary authority over immigration matters as an inherent concomitant of national sovereignty.").

143. *Id.* at 1466; *see also* United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898) ("The power, granted to Congress by the Constitution, 'to establish an uniform rule of naturalization,' was long ago adjudged by this court to be vested exclusively in Congress.").

144. U.S. CONST. art. I, § 8, cl. 4.

145. 430 U.S. 787 (1977).

146. *Id*. at 792.

147. 462 U.S. 919 (1983).

the scope of Congressional authority to "constitutionally permissible means of implementing its power."[148]

The Fifth Amendment to the United States Constitution guarantee of due process protection "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[149] Supreme Court jurisprudence acknowledged, in decisions dating back to the 1886 decision in *Yick Wo v. Hopkins*,[150] that all aliens present in the United States are persons entitled to assert both substantive[151] and procedural[152] due process protections against governmental action.[153] However, Congress is not required to provide aliens with the full bundle of constitutional rights afforded to United States citizens. The Supreme Court, in *Mathews v. Diaz*,[154] acknowledged and approved of the constitutional dichotomy that distinguishes aliens from citizens by noting that "[i]n the exercise of its broad power over

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148. *Id.* at 941.

149. Zadvydas v. Davis, 533 U.S. 678, 693 (2001). In *Demore v. Kim*, Justice Souter asserted the following:

> It has been settled for over a century that all aliens within our territory are "persons" entitled to the protection of the Due Process Clause. Aliens "residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility." The Japanese Immigrant Case, 189 U.S. 86 (1893), settled any lingering doubt that the Fifth Amendment's Due Process Clause gives aliens a right to challenge mistreatment of their person or property.

538 U.S. 510, 543 (2003) (Souter, J., concurring in part and dissenting in part) (citations omitted).

150. Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886).

151. United States v. Salerno, 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'") (citation omitted).

152. *Id.* "When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process." *Id.* (citation omitted). "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment . . . . The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

153. *Salerno*, 481 U.S. at 746; *see also* Wong Wing v. United States, 163 U.S. 228, 238 (1896).

154. Mathews v. Diaz, 426 U.S. 67 (1976).

naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[155]

The Supreme Court, in *Reno v. Flores*,[156] examined the scope to the substantive due process rights afforded by the Constitution.[157] Citing its decision in *Foucha v. Louisiana*,[158] Justice O'Connor noted that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[159] The "liberty" interest protected by the Fifth Amendment "denotes . . . freedom from bodily restraint . . . ."[160] These longstanding due process protections are equally afforded to aliens during pending of removal proceedings. In *Shaughnessy v. United States ex rel Mezei*,[161] the Court held that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[162]

In *Demore*, the Supreme Court held that the detention of a criminal alien pursuant to § 1226(c) does not infringe upon the alien's due process rights granted by the Fifth Amendment.[163] The Court expressed the "longstanding view that the Government

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155. *Id.* at 79-80. "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Id.* at 77.

156. Reno v. Flores, 507 U.S. 292 (1993).

157. *Id.* at 301-03.

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

159. *Reno*, 507 U.S. at 315 (O' Connor, J., concurring); s*ee also* Forbes v. Perryman, 244 F. Supp. 2d 947, 949 (N.D. Ill. 2003) ("The government may not interfere with the fundamental liberty interests of an individual, such as his interest in physical freedom, unless its actions are narrowly tailored to meet a compelling state interest.") (citing *Reno*, 507 U.S. at 301-03); Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997) ("[T]he Due Process Clause . . . provides heightened protection against governmental interference with certain fundamental rights and liberty interests.").

160. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see also Reno*, 507 U.S. at 316 (O'Connor, J., concurring) ("In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protection of the Due Process Clause . . .") (quoting DeShaney v. Winnebago Cty. Dep't of Social Servs., 489 U.S. 189, 200 (1989)).

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

162. *Id.* at 212; *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.").

163. Demore v. Kim, 538 U.S. 510, 531 (2003); *see also* Dia v. Ashcroft, 353 F.3d 228, 239 (3d Cir. 2003) ("The due process afforded aliens stems from those statutory rights granted by Congress and the principle that 'minimum due process rights attach to statutory rights.'").

may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings."[164] However, while there are no legitimate procedural due process concerns for criminal aliens who concede removability, the same is not true for criminal aliens who assert good faith challenges to the government's ability to remove them from the country.[165] As to this cohort of criminal aliens, the Due Process Clause affords protection against infringement of their substantive liberty interests.[166]

This proposition is consistent with the Court's longstanding jurisprudential framework. First, unlike criminal aliens who concede that they are subject to removal, criminal aliens who assert good faith challenges to their ultimate removal, retain their right to remain in the country, and equally important, also retain their substantive liberty interest to be free from unreasonable civil detention.[167]

Second, no "sufficiently compelling governmental interest[]"[168] can be furthered from enforcing mandatory detention without bond pursuant to § 1226(c) for criminal aliens who can assert good faith challenges to their removal. The Supreme Court's decision in *United States v. Salerno*[169] offers guidance in this area. In *Salerno*, the Court balanced the "individual's strong interest in liberty" against "the Government's regulatory interest in community safety . . . ."[170]

164. *Demore*, 538 U.S. at 526; *see also* Carlson v. Landon, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.").

165. *Demore*, 538 U.S. at 561. (Souter, J., concurring in part and dissenting in part) ("[T]he fact that a statute serves its purpose in general fails to justify the detention of an individual in particular. Some individual aliens covered by § 1226(c) have meritorious challenges to removability or claims for relief from removal . . . . As to such aliens . . . the Government has only a weak reason under the immigration laws for detaining them.").

166. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

167. Parra v. Perryman, 172 F.3d 954, 958 (7th Cir. 1999) ("The private interest here is not liberty in the abstract, but liberty in the United States by someone no longer entitled to remain in this country . . . . [T]he probability of error is zero when the alien concedes all elements that require removal.").

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

169. *Id.* at 747.

170. *Id.* at 748-50. "On the other side of the scale, of course is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right.

The Court held that an individual's liberty interests can be outweighed in circumstances where "sufficiently compelling governmental interests can justify detention of dangerous persons."[171] Under those circumstances, the Court determined that "we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings."[172] However, when examining mandatory detention without bond under § 1226(c) for criminal aliens who do not concede removal, the scale does not balance in favor of subordinating their fundamental liberty interest.

Demore was clear that the government's articulated rationales underlying § 1226(c) to reduce the risk of flight and to minimize the danger to the public safety were sufficiently compelling interests that warrant restrictions to the personal liberty of criminal aliens. However, mandatory detention without bond for this limited class of aliens does not further the stated governmental interest of preventing flight risks and protecting public safety. Criminal aliens who can assert good faith challenges to removal are not flight risks. On the contrary, these aliens have every incentive to participate vigorously in their removal proceedings in order to successfully defend and resolve against governmental efforts to remove them from the country.

Additionally, there is no reasonable basis upon which to categorically conclude that this limited class of aliens poses a significant threat to public safety. Criminal aliens subject to § 1226(c) are detained after release from criminal custody. This means that those criminal aliens have been tried and punished for commission of the predicate crimes enumerated in sections (A)-(D) of § 1226(c)(1). Subjecting them to additional detention because of the same predicate crimes for which they were previously incarcerated can only be classified as punishment. Historically, "[d]eportation is not a criminal proceeding and has never been held to be punishment."[173] No regulatory goals or purposes can be articulated, addressed, or solved by further detention of aliens who can assert good faith challenges to their

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But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *Id.* at 750-51.

171. *Id.* at 748.

172. *Salerno*, 481 U.S. at 748. "Under these circumstances, we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 751.

173. Carlson v. Landon, 342 U.S. 524, 537 (1952).

removal. In this context, mandatory detention without bond becomes penal in nature and violative of the Fifth Amendment Due Process protections afforded to all persons in the United States.[174] As such, these aliens are entitled to have an opportunity to establish that they are not subject to removal before being subjected to mandatory detention without bond under § 1226(c).

VI. CONCLUSION

The infringement of due process interests of criminal aliens subject to mandatory detention pursuant to § 1226(c) can be minimized if criminal aliens are permitted to assert their good faith challenges to removability during the Joseph hearing. Currently, the scope of Joseph hearings only permits criminal aliens to argue that they are not "properly included" within the category of criminal aliens subject to mandatory detention under § 1226(c).[175]

The practical benefits associated with adopting a uniform federal immigration policy regarding prolonged mandatory detention of criminal aliens in limited situations where the alien does not concede removal would be significant.[176] In addition to being cost effective to release aliens who ultimately will not be removed from the United States, it would address the lack of available beds for thousands of aliens currently in detention, and

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174. Demore v. Kim, 538 U.S. 510, 557-58 (2003) (Souter, J., concurring in part and dissenting in part) ("Heightened, substantive due process scrutiny . . . uncovers serious infirmities in § 1226(c). Detention is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where their underlying offenses are minor . . . .").

175. For other proposals for modification to the mandatory detention framework, see id. at 578-79 (Breyer, J., dissenting in part) ("The [bail] standards are more protective of a detained alien's liberty interests than those currently administered in the Immigration and Nationalization Service's *Joseph* hearings. And they have proved workable in practice in the criminal justice system. Nothing in the statute forbids their use when § 1226(c) deportability is in doubt . . . . So interpreted, the statute would require the Government to permit a detained alien to seek an individualized assessment of flight risk and dangerousness as long as the alien's claim that he is not deportable is (1) not interposed solely for purposes of delay and (2) raises a question of 'law or fact' that is not insubstantial. And that interpretation, in my view, is consistent with what the Constitution demands.").

176. *See* Gayle v. Johnson, 4 F. Supp. 3d 692, 709 n.25 (D.N.J. 2014) ("Lastly, I note that Plaintiffs argue that mandatory detention is problematic because it may make it more difficult for mandatorily detained aliens to secure legal representation in their removal proceedings. In that connection, Plaintiffs cite a recent study showing both (i) the lack of representation for mandatorily detained aliens, and (ii) a positive correlation between representation and a favorable outcome for the alien in the removal proceedings.").

decrease the cost and manpower currently utilized to apprehend criminal aliens.

The individualized benefits derived from modifications to the mandatory detention policy would be especially important to criminal aliens who are lawful permanent residents. If afforded an individualized bond hearing, this group of criminal aliens could avoid the consequences of prolonged periods of detention and unnecessary disruption to their personal lives resulting from futile periods of mandatory detention.

Additionally, modifications to the mandatory detention policy will lead to the enforcement of § 1226(c) in a uniform manner across all of the federal circuits. Currently, only criminal aliens who are inside of the jurisdiction of the Seventh Circuit are able to challenge the harsh consequences of §1226(c)'s mandatory detention without bond. Inconsistent rulings for similarly situated criminal aliens facing mandatory detention without bond, where the only variable is the "accident of geography"[177] between criminal aliens apprehended in and outside of the Seventh Circuit, are contrary to the longstanding principle that immigration laws must be enforced in a uniform manner. The constitutional framers envisioned that immigration laws would be enacted and enforced in a "uniform manner."[178] As immigration is solely within the purview of the federal government,[179] inherent in the application and interpretation of federal legislation is the premise that "federal statutes are generally intended to have uniform nationwide application."[180]

177. Nemetz v. INS, 647 F.2d 432, 435 (4th Cir. 1981) (internal quotations omitted).

178. *See generally* The Federalist No. 32, at 199 (Alexander Hamilton) (referencing the Congressional authority to establish "an Uniform Rule of Naturalization" was intended to "necessarily be exclusive; because if each State had power to prescribe a distinct rule, there could be no Uniform Rule." Hamilton's analysis applies with equal force to the necessity for uniformity within federal common law jurisprudence within the field of immigration law.); *see also* Gonzales-Gomez v. Achim, 372 F. Supp. 2d 1062, 1073 (N.D. Ill. 2005) ("The uniformity requirement in immigration law is rooted textually in the Constitution's Naturalization Clause . . . .").

179. *See* DeCanas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power.").

180. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989); *see also* Rosario v. INS, 962 F.2d 220, 223 (2d Cir. 1992) (In citing *Holyfield*, the Second Circuit noted that "[t]he [*Holyfield*] Court first observed that because the Indian Child Welfare Act was designed to implement a uniform federal policy—the same is true with the Immigration and Nationality Act—domicile was not to be determined according to the law of the forum, but rather required a uniform federal definition."); Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 914 (9th Cir. 2004) ("We have identified nothing in the legislative history to rebut the

The commitment to uniform administration of a federal immigration policy is recognized across federal jurisprudence. The Third Circuit in *Gerbier v. Holmes*[181] noted that "[i]ndeed, the policy favoring uniformity in the immigration context is rooted in the Constitution."[182] Judicial efforts to foster uniformity within the field of immigration are founded upon notions of fundamental fairness and a desire to avoid the consequences of disparate treatment arising from jurisdictional variances.[183] For example, the Third Circuit in *Gerbier* compared conflicting classifications of the exact criminal activity by two different states. Concerned about possible disparate treatment, the court noted that "[t]his cannot be what Congress intended in establishing a 'uniform' immigration law."[184] Furthermore, the Third Circuit, citing *Francis v. INS*,[185] added that "[f]undamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner."[186] Modification of Joseph hearings for criminal aliens who do not concede that they are subject to removal would address these concerns, and prevent the continuing infringement of their substantive due process interests.

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presumption that Congress intended uniform application of the immigration laws, and there is evidence that Congress intended the interpretation that we adopt.").

181. Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002).

182. *Id.* at 311.

183. *See* Gonzales-Gomez v. Achim, 372 F. Supp. 2d 1062, 1074 (N.D. Ill. 2005). The court considered the role that "the uniformity principle has played a central role in immigration, including in construing and evaluating the validity of immigration statutes." *Id.* The *Gerbier* court recognized the nexus between uniformity and equity noting that "[f]undamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner." *Gerbier*, 280 F.3d at 312.

184. *Gerbier*, 280 F.3d at 312.

185. Francis v. INS, 532 F.2d 268 (2d Cir. 1976).

186. Gerbier v. Holmes, 280 F.3d 297, 312 (3d Cir. 2002). In addition to questions of fundamental fairness, there are equal protection questions raised when federal statutes are not uniformly enforced. *See* Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975). Using the analysis from *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the *Francis* court applied the rational basis test and using the minimal scrutiny, the court noted that the application of a federal statute "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Francis*, 532 F.2d at 272. "We do not dispute the power of Congress to create different standards of admission and deportation for different groups of aliens. However, once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest." *Id.* at 273.