DUE PROCESS — IMMIGRATION DETENTION — THIRD CIRCUIT HOLDS THAT THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 AUTHORIZES IMMIGRATION DETENTION ONLY FOR A "REASONABLE PERIOD OF TIME." — *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[1] (IIRIRA), designed to ensure the efficient deportation of criminal aliens,[2] amended 8 U.S.C. § 1226(c)[3] to require the Attorney General to detain any removable alien who has committed a crime "of moral turpitude"[4] or a crime "relating to a controlled substance" pending the conclusion of removal proceedings.[5] The statutory language is nondiscretionary: the Attorney General may release an alien covered by § 1226(c) only as part of a witness protection program and, even then, only if he is satisfied that there is no danger of recidivism or flight.[6] In the "vast majority" of cases, the period between a criminal alien's initial detention and the immigration court's final determination of his removability lasts about a month and a half.[7] The Supreme Court has not expressly addressed whether detention that greatly exceeds this period is constitutional; rather, in *Demore v. Kim*,[8] the Court failed to clarify whether courts may engage in less deferential analysis of political branch immigration decisions when it applied the century-old plenary power doctrine — which gives the political branches broad authority over *substantive* immigration decisions[9] — to the more *procedural* world of mandatory detention.[10] Recently, in

---

[1] Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8, 18, and 28 U.S.C.).

[2] *See* S. REP. NO. 104-48, at 4 (1995) ("Problems of undetained criminal aliens who fail to appear or who abscond after they are ordered deported would be lessened if the INS detained more criminal aliens.").

[3] *See* IIRIRA § 303, 110 Stat. at 3009-585 to -586.

[4] 8 U.S.C. § 1227(a)(2)(A) (2006); *see id.* § 1226(c)(1)(C).

[5] *Id.* § 1227(a)(2)(B)(i); *see id.* § 1226(c)(1)(B).

[6] *Id.* § 1226(c)(2).

[7] Demore v. Kim, 538 U.S. 510, 530 (2003).

[8] 538 U.S. 510.

[9] *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547, 554 (1990).

[10] *See Demore*, 538 U.S. at 521–23 ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)) (internal quotation marks omitted)); *see also* Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 389 (2007); *The Supreme Court, 2002 Term — Leading Cases*, 117 HARV. L. REV. 226, 291 (2003) [hereinafter *Leading Cases*]. Commentators have noted that immigration detention policies have both substantive and procedural aspects, and cannot be readily categorized as either. *See, e.g.*, David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 55; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive*

Diop v. ICE/Homeland Security,[11] the Third Circuit relied on Justice Kennedy's narrow *Demore* concurrence to hold that IIRIRA authorizes detention of criminal aliens only for a "reasonable period of time,"[12] beyond which the Due Process Clause requires the government to show that continued detention is necessary.[13] In so doing, the Third Circuit properly acted as a check on the political branches' discretion by evaluating whether immigration detention comports with due process requirements, a standard grounded in both a century of Supreme Court jurisprudence and growing academic calls for courts to limit or abandon the plenary power doctrine as a relic of another era.

The 123-year-old plenary power doctrine, first enunciated in the so-called *Chinese Exclusion Case*,[14] affords Congress "virtually unlimited" power to set immigration policy.[15] While the doctrine has softened somewhat since its inception to exclude procedural immigration policies,[16] courts still accord great deference to the political branches' substantive policy decisions governing admission and exclusion of aliens.[17] Indeed, the plenary power doctrine has enabled the Supreme Court to reject constitutional challenges to policies as varied as "the statutory exclusion of Chinese nationals; the indefinite detention, with-

Constitutional Rights, 92 COLUM. L. REV. 1625, 1627–28 (1992) (arguing that the procedural due process exception often serves as a "surrogate" means of reviewing substantive issues, which would otherwise merit deference). This confluence does little to ameliorate doctrinal confusion.

11 656 F.3d 221 (3d Cir. 2011).

12 *Id.* at 223. By reading a "reasonableness" requirement into § 1226(c), the Third Circuit joined the Sixth and Ninth Circuits. *See* Ly v. Hansen, 351 F.3d 263, 268 (6th Cir. 2003) (finding habeas proceedings appropriate if detention lasts "an unreasonably long time"); Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) ("[I]t is constitutionally doubtful that Congress may authorize [a thirty-two-month detention] for lawfully admitted resident aliens . . . subject to removal.").

13 *Diop*, 656 F.3d at 223.

14 Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889).

15 T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 16 (2002).

16 *See* Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86, 100–02 (1903) (standing for the proposition that immigration procedures are subject to due process review); *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (limiting *Yamataya*'s due process protections to deportable aliens, excluding those seeking entry at the border). As noted earlier, *supra* note 10, it may be debatable whether immigration detention is purely procedural; nevertheless, many Court decisions have held that judicial review over detention provisions is both desirable and necessary. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 699 (2001); Carlson v. Landon, 342 U.S. 524, 543 (1952); Bridges v. Wixon, 326 U.S. 135, 154 (1945) (noting that deportation is, at its core, a severe penalty and that "[m]eticulous care must be exercised lest the procedure by which [an alien] is deprived of [his] liberty not meet the essential standards of fairness"); *see also* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 346 (2008) (noting that the plenary power doctrine is now "widely understood to draw a sharp constitutional distinction between rules that select immigrants and rules that otherwise regulate them").

17 *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))); *see also* Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 663 (2008) ("[Judicial] review is typically highly deferential, and may not place meaningful restraints on [agency] decisionmaking.").

out a hearing, of an alien seeking to enter America; and the ideological exclusion of scholars"[18] on the grounds that deference is necessary to ensure sovereignty, national security, and self-preservation.[19]

Over the past eleven years, the Supreme Court has issued two key decisions, *Zadvydas v. Davis*[20] and *Demore v. Kim*,[21] that delved into whether immigration detention policies merit deference under the plenary power doctrine. *Zadvydas*, decided in 2001, concerned two resident aliens who had received final deportation orders under § 1231(a) of the Immigration and Nationality Act of 1952[22] but whose countries of destination refused, or were expected to refuse, to admit them.[23] Typically, deportations under § 1231(a) must be completed within a ninety-day period,[24] but the Attorney General has discretion to hold a removable alien beyond the ninety-day window if certain conditions are met.[25] On these grounds, the government argued it could detain the *Zadvydas* aliens indefinitely under § 1231(a)(6).[26] The Court, in a 5–4 decision with dissents from Justices Kennedy and Scalia, declined to defer to the government's plenary power arguments, instead "construe[ing] the statute to contain an implicit 'reasonable time' limitation" subject to judicial review.[27] Critically, while *Zadvydas* itself was a constitutional avoidance decision,[28] the Court announced for the first time that plenary power is "subject to important constitutional limitations."[29] Just two years later, however, the Court affirmed a stronger version of the plenary power doctrine in *Demore v. Kim* that seemed to indicate that mandatory immigration detention under § 1226(c) is a substantive, not procedural, policy decision.[30] Writing for the majority, Chief Justice Rehnquist implicitly used plenary power deference to recognize the "Court's longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings."[31] In a narrower concurrence, Justice Kennedy provided the crucial fifth vote, arguing that "a lawful

---

18 Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 381 (2004) (footnotes omitted).

19 *See Chae Chan Ping*, 130 U.S. at 604.

20 533 U.S. 678.

21 538 U.S. 510 (2003).

22 Pub. L. No. 82-414, § 241(a), 66 Stat. 163, 204–08 (codified as amended at 8 U.S.C. § 1231(a) (2006)).

23 *Zadvydas*, 533 U.S. at 684–86.

24 8 U.S.C. § 1231(a)(1)(A).

25 *Id.* § 1231(a)(6).

26 *Zadvydas*, 533 U.S. at 689.

27 *Id.* at 682.

28 *Id.* at 699.

29 *Id.* at 695.

30 *See* 538 U.S. 510, 513 (2003).

31 *Id.* at 526.

permanent resident alien . . . *could* be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."[32]

Diop confronts the critical doctrinal issues raised by *Zadvydas* and *Demore*. Cheikh Diop, a Senegalese national, received a Notice to Appear from the U.S. Department of Homeland Security (DHS) on March 19, 2008.[33] The Notice stated that Diop had illegally entered the United States and that he was removable as an alien convicted of a crime of moral turpitude.[34] That day, Diop was taken into custody by the Bureau of Immigration and Customs Enforcement (ICE), where he remained for 1072 days as his case wound its way through the immigration system.[35] Before Diop was released on February 24, 2011, his case had been the subject of "four rulings by an immigration judge, three rulings by the [Board of Immigration Appeals], a state court ruling . . . and a subsequent pending appeal to the intermediate state court, a ruling by a federal district court judge on his habeas petition, and an appeal [to the Third Circuit]."[36]

Diop's initial foray into the federal courts came on August 4, 2009, when he filed a pro se habeas petition in district court.[37] He argued that the government could not constitutionally detain him under § 1226(c) for an extended period of time without providing a hearing to determine whether his detention was justified by IIRIRA.[38] Judge Muir of the Middle District of Pennsylvania denied the writ on two grounds. First, he noted that, because Diop's removal proceedings were ongoing, a final order of removal had not yet been entered and the ninety-day period of removal under § 1231[39] — a separate provision that governs detention and deportation procedures for aliens ordered finally removed — had not yet begun.[40] Thus, Diop's petition was not yet ripe. Second, Judge Muir argued that under *Demore*, the executive branch could detain Diop throughout the course of his removal proceedings, no matter how long they took.[41]

The Third Circuit vacated. Writing for a unanimous court, Judge Fuentes[42] held that the Due Process Clause permits detention without

---

[32] *Id.* at 532 (Kennedy, J., concurring) (emphasis added).

[33] *Diop*, 656 F.3d at 223.

[34] *Id.* Diop had been convicted of reckless endangerment in state court in 2005. *Id.*

[35] *Id.* at 223, 226.

[36] *Id.* at 226.

[37] *Id.* at 225.

[38] *Id.*

[39] 8 U.S.C. § 1231(a)(1)(A) (2006) ("[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days . . . .").

[40] *Diop*, 656 F.3d at 225.

[41] *Id.*

[42] Judge Fuentes was joined by Judge Chagares of the Third Circuit and Judge Pollak of the Eastern District of Pennsylvania, sitting by designation.

a bond hearing under § 1226(c) only for a "reasonable period of time," after which the government must show that continued detention is necessary to achieve the purposes of IIRIRA.[43] The court first needed to determine the threshold question of jurisdiction, as Diop had already been released and there was arguably no "case or controversy" over which to exercise review.[44] Judge Fuentes concluded that Diop's case fell into an exception to the general doctrine of mootness for conflicts that are "'capable of repetition' while 'evading review.'"[45]

Turning to the merits, Judge Fuentes invoked the canon of constitutional avoidance.[46] Because the Due Process Clause bars the government from depriving "any person" — including aliens[47] — of "life, liberty, or property[,] without due process of law,"[48] § 1226(c) "raises a serious risk of running afoul of this command unless it is premised on a 'sufficiently strong special justification.'"[49] Thus, although *Demore* held that § 1226(c) was facially justified by its dual goals of "ensuring that aliens convicted of certain crimes would be present at their removal proceedings"[50] and would not be "on the loose in their communities, where they might pose a danger,"[51] Judge Fuentes argued that Justice Kennedy's concurrence provided an "important limitation"[52] under which a lawful permanent resident would be entitled to an individualized bond hearing should the continued detention become "unreasonable or unjustified."[53] As such, while Congress could constitutionally require the detention of a criminal alien at the start of removal proceedings without a bond hearing, "the constitutionality of this practice is a function of the length of the detention."[54] While Judge Fuentes did not "establish a universal point at which detention will always be considered unreasonable,"[55] he held that Diop's detention of almost three years without a bond hearing violated due process.[56]

---

[43] *Id.*

[44] *Id.* at 226–27.

[45] *Id.* at 227 (quoting Turner v. Rogers, 131 S. Ct. 2507, 2515 (2011)).

[46] *Id.* at 231 (quoting Zadvydas v. Davis, 533 U.S. 678, 689 (2001)).

[47] *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of [the aliens within the United States] from deprivation of life, liberty, or property without due process of law.").

[48] *Diop*, 656 F.3d at 231 (quoting U.S. CONST. amend. V) (internal quotation marks omitted).

[49] *Id.* (quoting *Zadvydas*, 533 U.S. at 690).

[50] *Id.* at 231 (citing Demore v. Kim, 538 U.S. 510, 519 (2003)).

[51] *Id.* at 231–32.

[52] *Id.* at 232.

[53] *Id.* (quoting *Demore*, 538 U.S. at 532 (Kennedy, J., concurring)) (internal quotation mark omitted).

[54] *Id.*

[55] *Id.* at 233.

[56] *Id.* at 234–35. The court found that neither *Carlson v. Landon*, 342 U.S. 524 (1952), which held it constitutional to detain Communist aliens without individualized hearings, *id.* at 541–42, nor *Reno v. Flores*, 507 U.S. 292 (1993), which held it constitutional to detain alien juveniles until

By relying on Justice Kennedy's narrow concurrence in *Demore*, the *Diop* court synthesized the seemingly contradictory holdings in *Zadvydas*, which recognized constitutional limits to the detention power, and *Demore*, which rejected a due process challenge to § 1226(c)'s mandatory detention provision. In so doing, the Third Circuit crafted a principle by which it will consider immigration detention under § 1226(c) to be a substantive policy meriting some degree of plenary power deference until the detention becomes "unreasonable or unjustified," at which point the court will engage in a more rigorous constitutional analysis. This compromise holding highlights the confused state of the plenary power doctrine, particularly as it relates to immigration detention, throughout the federal courts today.[57]

One need only examine *Demore* to understand just how muddled the doctrine is. First, Justice Kennedy's concurrence was based *solely* on his own *Zadvydas* dissent.[58] Thus, when lower courts rely on his opinion to find constitutional limits on immigration detention, they must simultaneously draw on principles from the dissent of a standing opinion arguably more favorable to their holding. Second, while Chief Justice Rehnquist distinguished *Zadvydas* from *Demore* on the grounds that the detention in the former case was "potentially permanent"[59] and removal was no longer possible,[60] Justice Kennedy's concurrence would have allowed lawful permanent residents in *both* cases to raise constitutional claims regarding their right to liberty should detention cross an undefined reasonableness threshold.[61] Most critically, *Demore* has further confused the question of whether immigration detention is a substantive policy meriting plenary power deference or a procedural decision requiring more exacting review.[62] *Demore* thus

---

they could be released to a responsible adult, *id.* at 312, 315, applied to *Diop*, noting that "a reading of [these cases] that purported to uphold detention for an unreasonable length of time without further individualized inquiry" would contravene Justice Kennedy's *Demore* concurrence. *Diop*, 656 F.3d at 233.

[57] Other lower courts have had difficulty reconciling the two decisions. *See* Kimere Jane Kimball, Note, *A Right to Be Heard: Non-Citizens' Due Process Right to In-Person Hearings to Justify Their Detentions Pursuant to Removal*, 5 STAN. J. C.R. & C.L. 159, 172–74 (2009).

[58] *See Demore*, 538 U.S. at 531–33 (Kennedy, J., concurring). In his *Zadvydas* dissent, Justice Kennedy argued that the Court read a meaning into § 1231(a) that the text could not bear, though he suggested that the issue might be resolved in the future on constitutional grounds. *See* Zadvydas v. Davis, 533 U.S. 678, 705–06 (2001) (Kennedy, J., dissenting).

[59] *Demore*, 538 U.S. at 528 (quoting *Zadvydas*, 533 U.S. at 691) (internal quotation marks omitted).

[60] *Id.* at 527–28.

[61] While Justice Kennedy did not reach the constitutional issue in *Zadvydas*, he noted that aliens within U.S. jurisdiction are "entitled to the protection of the Due Process Clause," including "protection against unlawful or arbitrary personal restraint or detention," though those rights are "subject to . . . conditions not applicable to citizens." 533 U.S. at 718 (Kennedy, J., concurring).

[62] *Compare Leading Cases*, *supra* note 10, at 292 (arguing that *Demore* treated detention as a substantive policy), *with* Slocum, *supra* note 10, at 389 (arguing that *Demore* expanded the plenary power doctrine to encompass procedural policies).

cut against ten years of judicial developments that had "narrowed the scope of the plenary power doctrine by treating detention as a procedural matter subject to ordinary due process principles."[63]

Although many courts continue to affirm the vitality of some weakened variant of the plenary power doctrine,[64] the academic community has called for the judiciary to limit its use of the doctrine or to reject it completely.[65] One prominent line of argument notes that strong judicial deference to the political branches' immigration decisions may prevent the courts from developing clear constitutional norms, particularly in the realm of detention and due process.[66] A second strand argues that the plenary power doctrine is best viewed as a "shameful and racist relic" given its origins in upholding the Chinese Exclusion Act and should be significantly curtailed.[67] According to these critiques, the plenary power doctrine undermines both predictability and the fundamental national value of equal protection. Thus, while *Zadvydas* was welcomed as a watershed in the history of the plenary power doctrine,[68] *Demore* was criticized as a significant "step back" in the protections afforded immigrants.[69]

Because the *Diop* court was presented with no clear guidance from the Supreme Court as to whether, or when, immigration detention under § 1226(c) becomes unconstitutional in fact, it should have actively

---

[63] *Leading Cases*, *supra* note 10, at 292.

[64] *See, e.g.*, T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 383 (2002) (arguing that *Zadvydas*'s emphasis on constitutional limits to the political branches' power over immigration law is "unlikely" to "signal an end to the plenary power doctrine as we know it").

[65] *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 858 (1987) (arguing that "accretions" to the plenary power doctrine "cry out for the sharpest criticism"); Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 4 ("[A]fter *Miller*, the courts lack adequate justifications for the plenary power doctrine . . . in immigration and nationality cases generally.").

[66] *See* Aleinikoff, *supra* note 64, at 386–87; *see also* Motomura, *supra* note 9, at 549 (arguing that the plenary power doctrine forces courts to use "phantom constitutional norms" in decisionmaking, which "confuse[] and contort[] the law" if used for an extended period of time).

[67] Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 503 (2001); *see also* Henkin, *supra* note 65, at 862. For a discussion of the divergent immigration and citizenship policies levied at Europeans and Mexicans historically, see MAE M. NGAI, IMPOSSIBLE SUBJECTS 89 (2004).

[68] *See, e.g.*, David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1007 (2002) ("[Under *Zadvydas*,] substantive due process applies with full force to immigration detention."); Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?*, 116 HARV. L. REV. 1868, 1875–76 (2003). *But see* Aleinikoff, *supra* note 64, at 384 (arguing that there are strong indications the Supreme Court did not "jettison[] the plenary power doctrine with its decision in *Zadvydas*").

[69] Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345, 1409 (2007).

engaged with the rationales and policies underlying the plenary power doctrine to bolster its holding that there is some limit to the deference owed the political branches. First, it might have noted that the traditional foreign policy justification for granting the political branches deference in immigration policy has become significantly less relevant in recent years and is particularly inapplicable in the context of predeportation detention.[70] Second, it could have argued that adopting an overly deferential judicial approach to gray areas in immigration law might well interfere with the development of a predictable and coherent legal doctrine,[71] as well as legislative and executive policy that would arise in response to judicial involvement at the margins. Finally, it could have acknowledged that prolonged immigration detention of the sort found in *Diop* is a "difficult legal problem that neither politicians nor the administrative agency has an incentive or desire to fix."[72] Thus, any plenary power deference to immigration detention decisions that are justified by the political branches' relative expertise in immigration *must* face some outer limits imposed by the courts — limits that should be a function not only of the potential length of detention, but also of the institutional capacity and political will to respond independently to problems that arise.

Diop fell squarely into a doctrinal mess created by *Zadvydas* and *Demore*. Given the current lack of clear Supreme Court guidance as to which aspects of immigration law the plenary power doctrine covers, the Third Circuit reached a decision that deftly balanced deference to the political branches' immigration choices with the courts' long tradition of providing due process protection for lawful permanent residents held in immigration detention. However, the court could have bolstered its holding that Diop's three-year detention was in fact unreasonable by supplementing Justice Kennedy's concurrence, which was based on *theoretical* limits to the political branches' power to detain under § 1226(c), with the compelling policy arguments readily at hand in the vast literature on plenary power. Such additions would have allowed the court to engage with the true substance of today's plenary power debate: whether the doctrine still captures how we wish to engage legally with aliens on our shores.

---

[70] *See* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340–41 (2002) (arguing that the international order is relatively stable); *cf.* Henkin, *supra* note 65, at 859–60 (criticizing plenary power doctrine as allowing political branches to enact xenophobic policies domestically in times of international tension without facing judicial scrutiny).

[71] *See* Motomura, *supra* note 9, at 574 ("[T]he plenary power doctrine smothers the entire field of immigration law so completely that it is difficult to find the benchmarks of 'full enforcement' of real norms.").

[72] Aleinikoff, *supra* note 64, at 386.