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NOT YET GONE, AND NOT YET FORGOTTEN: THE REASONABLENESS OF CONTINUED MANDATORY DETENTION OF NONCITIZENS WITHOUT A BOND HEARING

MIRIAM PEGUERO MEDRANO*

Section 1226(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) authorizes the mandatory detention, without the possibility of bond, of noncitizens convicted of certain qualifying offenses for the duration of their removal proceedings. Congress enacted the mandatory detention statute because it was concerned that noncitizens who are convicted of crimes will further engage in criminal activity and fail to appear for their removal hearings. To ensure noncitizens are not deprived of their constitutional right to due process, federal courts have construed § 1226(c) to contain an implicit time limitation against unreasonably prolonged detention. These courts have adopted either a bright-line or case-by-case approach to determine the point at which mandatory detention without bond becomes unconstitutionally impermissible. After six months of detention, the former requires an automatic bond hearing and the latter instructs detainees to file a habeas corpus petition that, if granted, triggers a bond hearing.

This year, the Supreme Court in Jennings v. Rodriguez rejected the lower courts' construction § 1226(c) and held that interpreting § 1226(c) to contain an implicit time limitation is improper because the statute is neither ambiguous or unclear. The Court, however, declined to consider whether its interpretation of § 1226(c) is constitutional and instead remanded the case back to the Ninth Circuit to consider constitutional arguments on the merits.

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* B.A., Monmouth University, 2013; J.D. candidate, Northwestern University Pritzker School of Law, 2018. This Comment is dedicated to all immigrants, like my family and me, who have come to America for the opportunity of a better life—the American Dream. I would like to also thank my family and friends for their endless support and encouragement of my Dream to pursue a law degree, and all the editors of the *Journal of Criminal Law and Criminology* for their hard work and dedication in editing this piece.

This Comment argues that the majority's decision in Jennings v. Rodriguez failed to enforce the Constitution and protect the due process rights of detained noncitizens by interpreting § 1226(c) as not having a time limit on detention without bond. It further contends that while the lower courts correctly interpreted § 1226(c) to include a time limit, the current approaches applied by these courts do not properly protect detainees' constitutional rights because under both approaches, detainees cannot challenge the reasonableness of their continued detention until after six months. Limiting detainees' opportunity to challenge their continued detention for six months raises the same "serious doubts" of constitutionality that Justice Breyer argued, in dissent, are raised when § 1226(c) is interpreted as forbidding an individualized bond hearing. Alternatively, this Comment proposes that detained noncitizens—who pose little risk of flight or danger to the community—should receive prosecutorial discretion in the form of deferred action as to their continued detention at any point during their detention, including during the "presumptively reasonable" six-month period under the current two approaches. If prosecutorial discretion is not granted, detained noncitizens should then be entitled to automatic and periodic bond hearings beginning at six months of detention.

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INTRODUCTION

I like to share the story of Mr. Warren Hilarion Joseph. Mr. Joseph migrated to the United States when he was twenty-one as a legal permanent resident inspired by the American Dream.[1] Today, Mr. Joseph is a U.S. citizen, a U.S. Gulf War veteran, a father to U.S.-born children, and a former legal permanent resident who was detained for *three and a half years* in immigration detention for committing minor, nonviolent offenses.[2]

Shortly after arriving in the United States at the age of twenty-one, Mr. Joseph enlisted in the U.S. Army and served in combat positions in the First Gulf War until he was honorably discharged for injuries suffered in the line

[1] *See* Brief for Americans for Immigrant Justice et al. as Amici Curiae Supporting Respondents at 5–7, Jennings v. Rodriguez, 136 S. Ct. 2489 (2016) [hereinafter Brief for Americans for Immigrant Justice et al.]

[2] Mr. Joseph's story is among the many made available by the Prolonged Detention Stories online platform, a joint project of Community Initiatives for Visiting Immigrants in Confinement (CIVIC) and the Immigrant Rights Clinic at NYU Law. In an effort to underscore the devastating impact of prolonged mandatory detention, CIVIC and NYU Law created this platform for immigrants to share their stories. Some of these stories were included in an amicus brief in support of Respondents in the case *Jennings v. Rodriguez*. *See The Brief*, PROLONGED DETENTION STORIES, https://www.prolongeddetentionstories.org/#the-brief (last visited Dec. 25, 2017). The facts of Mr. Joseph's case are also detailed in his habeas petition, *see* Petition for Writ of Habeas Corpus, Joseph v. Aviles, No. 2:07-cv-02392-JLL (D.N.J. May 11, 2007).

of duty.[3] Like many veterans, Mr. Joseph had a hard time readjusting to society and was arrested in 2001 for illegally purchasing a handgun for people to whom he owed money.[4] While completing his probation sentence, he forgot to inform his probation officer that he had relocated to his mother's house and was subsequently sentenced to six months in prison for violating his probation.[5]

Upon release, Mr. Joseph was civilly detained in immigration detention because he qualified as a noncitizen who committed an offense that triggers the mandatory detention mandate under 8 U.S.C. § 1226(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[6] Section 1226(c) mandates the detention *without bond* of noncitizens who have committed qualifying crimes for the duration of their removal proceedings.[7]

For *three and a half years*, Mr. Joseph was separated from his children and family members, was subjected to horrific jail conditions, and his wartime injuries worsened, requiring surgery and causing permanent difficulty walking.[8] At no point during Mr. Joseph's mandatory detention was his confinement necessary to prevent flight or danger to the community. To the contrary, Mr. Joseph had strong familial and community values and had served in the U.S. military. His two crimes were both minor and non-violent, one of which was a violation of his probation for forgetting to inform his probation officer that he had relocated. Nevertheless, Mr. Joseph was detained during his removal proceedings for a staggering *three and a half years* until he won his case to remain in the United States and was finally released to his family.[9]

Sadly, Mr. Joseph's story is not uncommon.[10] Every year, unnecessary and widespread immigration detention pursuant to § 1226(c) tears thousands of families apart, many of which are comprised of U.S. citizens and legal permanent residents, and imprisons people who have a long history of living

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[3] *See* Brief for Americans for Immigrant Justice et al., *supra* note 1, at 5.

[4] *Id.* at 6.

[5] *Id.*

[6] *Id.* at 6–7; *see also* Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C. (2006)); Immigration and Nationality Act (INA) of 1952 § 236(c).

[7] *See generally* Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C. (2006)).

[8] *See* Brief for Americans for Immigrant Justice et al., *supra* note 1, at 7.

[9] *Id.*

[10] *Id.* at 5–12 (noting that "[p]eople like Mr. Joseph . . . are not unique within our immigration system. For removal cases that are not resolved quickly, it is not uncommon for administrative proceedings to last years, and for individuals to win their cases.").

in the United States, prior legal immigration status, and only minor, nonviolent criminal convictions.[11]

In the landmark case *Demore v. Kim*, the Supreme Court upheld the constitutionality of § 1226(c)'s detention mandate, reasoning that Congress has the authority to detain noncitizens for the *brief period* of their removal proceedings to prevent the risk of flight and dangerousness.[12] Today, because removal proceedings are no longer brief and often prolonged,[13] federal courts have construed § 1226(c) as having a time limit on prolonged detention without bond, relying heavily on Justice Kennedy's concurring opinion in *Demore*, which aptly cautioned that due process rights of noncitizens may preclude mandatory detention without bond if detention becomes unreasonably prolonged or no longer reasonably related "to the purpose for which the individual was committed."[14] Federal courts have applied either a bright-line, six-month rule or a case-by-case approach to determine at what point detention without bond is unconstitutionally prolonged. Of the six circuit courts that have addressed this issue, the Second and Ninth Circuits have adopted a bright-line, six-month rule where noncitizens are automatically entitled to periodic bond hearings upon completing six months of detention.[15] The First, Third, Sixth, and Eleventh Circuits have adopted a case-by-case approach, whereby detained noncitizens may file a petition for a writ of ha-

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[11] *See, e.g.*, Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Record Shows*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html (explaining that while the Obama administration "took steps it portrayed as narrowing the focus of enforcement efforts on criminal aliens . . . the records show that the enforcement net actually grew, picking up more and more immigrants with minor or no criminal records"); Teresa Wiltz, *What Crimes Are Eligible for Deportation?*, PEW CHARITABLE TRUSTS (Dec. 21, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/21/what-crimes-are-eligible-for-deportation (noting that a great number of noncitizens classified as "criminal aliens" under § 1226(c) are being deported for minor, nonviolent offenses, such as misdemeanors, probation violations, petty theft, and shoplifting).

[12] *See generally* 538 U.S. 510 (2003).

[13] Prerna Lal, *Legal and Extra-Legal Challenges to Immigrant Detention*, 24 ASIAN AM. L.J. 131, 138 (2017) (noting that after *Demore* "courts were presented with cases involving noncitizens who had been held in custody for periods far in excess" than the period the Court found reasonable").

[14] *See Demore*, 538 U.S. at 532–33 (2003) (Kennedy, J., concurring); *see also 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)*, 125 HARV. L. REV. 1522, 1522 (2012) [hereinafter *Due Process—Immigration Detention*].

[15] *See, e.g.*, Lora v. Shanahan, 804 F.3d 601, 616 (2d Cir. 2015); Rodriguez v. Robbins, 804 F.3d 1060, 1089 (9th Cir. 2015).

beas corpus, at which point a federal court will examine the individual circumstances of each case to determine whether to grant the petition that then triggers an individualized bond hearing.[16]

Since the Court's decision in *Demore*, § 1226(c) has resulted in the prolonged detention of numerous noncitizens who have committed crimes that fall under § 1226(c)'s list of broad offenses. The latest data demonstrates that there are currently 632,261 pending immigration cases across the United States, and the average length of time a pending case takes to conclude is 681 days or 22 months.[17] The current average wait time for a case to conclude has significantly increased from previous years. For example, in 2016, "open cases in U.S. Immigration Court [had] been waiting for an average of 667 days . . . . This [was] 3.7 [%] longer than the 643 days average wait time at the end of FY 2015 (September 2015) and is 17.6 [%] higher than it was at the end of FY 2014."[18] Furthermore, many of these detained noncitizens have only committed minor, nonviolent offenses, have strong familial ties to family members in the U.S. who are legal permanent residents and citizens that need their support, and are likely to prevail in winning some form of relief because of their strong mitigating equities.[19] As a result, prolonged detention without bond has encouraged many detained noncitizens just like Mr. Joseph to challenge the constitutionality of their prolonged mandatory detention.

This year, the Supreme Court in *Jennings v. Rodriguez* rejected the lower courts' construction of § 1226(c) and held that interpreting § 1226(c) to contain an implicit temporal limit is improper because the statute is neither ambiguous or unclear.[20] The Court, however, declined to consider whether its strict interpretation of § 1226(c) raises constitutional doubts and instead remanded the case back to the Ninth Circuit to consider those constitutional arguments on the merits.[21] Justice Breyer, on the other hand, delivered a

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[16] *See*, *e.g.*, Reid v. Donelan, 819 F.3d 486, 496 (1st Cir. 2016); Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1217 (11th Cir. 2016); Diop v. ICE/Homeland Sec., 656 F.3d 221, 231–33 (3d Cir. 2011); Ly v. Hansen, 351 F.3d 263, 271–73 (6th Cir. 2003).

[17] *Immigration Court Backlog Tool*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited May 16, 2018); Dana Leigh Marks, *Snapshot of the Crisis Facing Our Immigration Courts Today: Salient Facts and Urgent Needs*, NAT'L ASS'N OF IMMIGR. JUDGES (Oct. 2006), http://naij-usa.org/wp-content/uploads/2015/11/NAIJ-Snapshot-October-2015.pdf.

[18] TRAC, *Average Wait Time in Immigration Court Rises to 667 Days: TRAC*, LEXISNEXIS NEWSROOM: IMMIGR. L. (Feb. 12, 2016), https://www.lexisnexis.com/legalnewsroom/immigration/b/outsidenews/archive/2016/02/12/average-wait-time-in-immigration-court-rises-to-667-days-trac.aspx.

[19] *See* Lal, *supra* note 13, at 133.

[20] *See generally* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[21] *Id.* at 851 (quoting Cutter v. Wilkinson, 544 U.S. 709, 718, n.7 (2005)).

passionate dissent and argued that the majority's interpretation of § 1226(c) renders the statute unconstitutional because the relevant constitutional language, purpose, history, traditions, context, and case law altogether demonstrate that when confinement is prolonged, even immigration civil confinement, bond hearings are constitutionally required.[22]

This Comment argues that the majority's decision in *Jennings v. Rodriguez* failed to enforce the Constitution and protect the due process rights of detained noncitizens by interpreting § 1226(c) as not having a time limit detention without bond. Federal courts that are given the opportunity to decide on the constitutional question should hold, as they have held, that § 1226(c) is unconstitutional unless read to include a time limit on indefinite detention without bond. This Comment also contends that while the lower courts correctly interpreted § 1226(c) to include a time limit, the approaches adopted by these federal courts to determine the time limit do not properly protect detained noncitizens' due process rights. Under both approaches, detention without bond is presumed constitutional for at least six months. This is true even for detained noncitizens who have meritorious defenses and strong mitigating equities, such as community and familial ties, distinguished military service, and prior legal immigration status. Limiting detainees' opportunity to challenge their continued detention for six months raises the same issues of constitutionality that Justice Breyer argued are raised when § 1226(c) is interpreted as forbidding an individualized bond hearing. Alternatively, this Comment proposes that detained noncitizens—who pose little risk of flight or danger to the community—should receive prosecutorial discretion in the form of deferred action as to their continued detention at any point during their detention, including during the current approaches' presumptively reasonable six-month period.

Part I outlines the constitutional principle of due process as well as the relevant statutory framework of § 1226(c)'s detention mandate.[23] Part II discusses the Supreme Court cases that have considered the constitutionality of mandatory detention, and argues that the Court's decision in *Jennings v. Rodriguez* was wrongly decided because § 1226(c) should be read to contain an implicit time limitation on prolonged detention without bond. This part also examines, through case precedent, the approaches applied by the circuit courts in determining the time limit of mandatory detention without bond.[24] Finally, Part III of this Comment argues that neither approach adopted by the

[22] *Id.* at 861 (Breyer J., dissenting).
[23] *See infra* discussion Part I and accompanying notes.
[24] *See infra* discussion Part II and accompanying notes.

circuit courts properly balances detainees' liberty interest against the government's interest in preventing flight and dangerousness.[25] This Part instead proposes that detained noncitizens—who are neither a flight risk nor a danger to the community—should be given prosecutorial discretion in the form of deferred action as to their continued mandatory detention at any point after being detained.[26] If an applicant is denied prosecutorial discretion, he or she should then be entitled to automatic and periodic bond hearings beginning after six months of detention.[27]

I. DUE PROCESS AND THE STATUTORY FRAMEWORK OF 8 U.S.C. § 1226(C) DETENTION MANDATE

Although Congress has plenary power over matters of immigration policy, Congress's power is limited by the Constitution.[28] In resolving issues of mandatory detention of noncitizens, it is thus important to understand what constitutional rights are provided to noncitizens and how they are balanced against the statutory framework currently in place.

A. DUE PROCESS

Not all classes of persons are afforded identical constitutional rights—the Constitution explicitly reserves different rights for "natural born Citizens," "Citizens," and "Persons."[29] For example, the right to vote[30] or to run for federal elective office[31] is explicitly reserved for Citizens, while the right to run for President of the United States is reserved for natural-born Citizens.[32] Moreover, in regulating immigration, "Congress regularly makes

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[25] *See infra* discussion Section III.A and accompanying notes.

[26] *See infra* discussion Section III.B and accompanying notes.

[27] *See infra* discussion Section III.B and accompanying notes.

[28] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 679 (2001) (noting that "Congress has plenary power to create immigration law . . . "); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of congress . . ."); *see also Due Process—Immigration Detention*, *supra* note 14, at 1523 ("The 123-year-old plenary power doctrine, first enunciated in the so-called Chinese Exclusion Case, affords Congress 'virtually unlimited' power to set immigration policy.") (emphasis omitted).

[29] *See* U.S. CONST. art. II, § 1; U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."); *see also* The Honorable Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 806 (2013).

[30] *See* U.S. CONST. amend. XV, XIX, XXIV, XXVI.

[31] U.S. CONST. art. I, § 2.

[32] U.S. CONST. art. II, § 1.

rules that would be unacceptable if applied to Citizens."[33] Aside from a few explicit limitations, however, most rights provided by the Constitution do not acknowledge any distinction between Citizens and noncitizens.[34] Among these rights afforded to all persons are the equal protection of the laws,[35] political freedoms of speech and association,[36] and the due process requirements of fair procedure where lives, liberty, or property are at stake.[37] Furthermore, it is well settled that "Persons" within the meaning of the Constitution includes both Citizens and noncitizens equally.[38]

In the mandatory detention context, the most important constitutional right afforded to noncitizens is the right to due process of the law. The Fifth Amendment of the United States Constitution guarantees that "[n]o person shall . . . be deprived of life, liberty, and property, without due process of the law."[39] While some lower courts have argued that due process rights do not extend to certain classes of noncitizens, the Supreme Court has made clear that due process has long been extended to all aliens within the United States'

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[33] Demore v. Kim, 538 U.S. 510, 521 (2003) (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

[34] *See generally* U.S. CONST; *see also* Moore, *supra* note 29, at 808.

[35] U.S. CONST. amend. XIV.

[36] U.S. CONST. amend. I; *see generally* NAACP v. Alabama, 357 U.S. 449 (holding that freedom of association is an essential part of freedom of speech).

[37] U.S. CONST. amend. V, XIV.

[38] The Court in Kwong Hai Chew v. Colding held:

> It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law. Although it later may be established, as respondents contend, that petitioner can be expelled and deported, yet before his expulsion, he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal. Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard.

344 U.S. 590, 596–598, nn.5–7 (1953); *see also* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367–388 (2003); *see generally* WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 24:8 (3d ed. 2013) (describing protection as it applies to aliens).

[39] U.S. CONST. amend. V.

borders, even those whose presence is "unlawful, involuntary, or transitory."[40] Therefore, a noncitizen "may not be punished prior to an adjudication of guilt in accordance with due process of law,"[41] though "[t]his does not preclude . . . civil commitments that are not punitive."[42] In other words, the government may civilly commit any person "when there is a finding of future dangerousness and an additional factor such as mental illness 'that makes it difficult, if not impossible, for the person to control his dangerous behavior.'"[43] For this reason, "Congress has created specific categories of aliens in immigration" that afford noncitizens dissimilar due process procedures for removal purposes.[44] The following Section discusses the statutory framework that grants the United States Department of Homeland Security (DHS) the power to detain noncitizens without bond during removal proceedings.

B. THE 1996 IIRIRA AND § 1226(C) MANDATORY DETENTION

The IIRIRA, passed by Congress and signed into law by President Bill Clinton, is the current controlling law that authorizes the removal of noncitizens residing in the United States.[45] Congress's restructuring of U.S. immigration laws was in part prompted by the aftermath of three major, historical events: "the 1993 World Trade Center bombing, the initial popularity of anti-immigrant legislation in California in 1994 (Proposition 187), and the 1995 Oklahoma City bombing."[46] In 1996, Congress enacted the IIRIRA to strengthen immigration-enforcement measures at the border and the interior.[47]

The IIRIRA amended the provisions of the Immigration and Nationality

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[40] Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976); Wong Yang Sung v. McGrath, 339 U.S. 33, 49–50 (1950); *see generally* Wong Wing v. United States, 163 U.S. 228 (1896) (holding that aliens may not be incarcerated as punishment for immigration violations without regular criminal process).

[41] Brian Smith, *Charles Demore v. Hyung Joon Kim: Another Step Away From Full Due Process Protections*, 38 AKRON L. REV. 207, 211 n.25 (2005) (citing Bell v. Wolfish, 441 U.S. 520, 535–39 (1979)).

[42] *See id.* at n.26 (citing Kansas v. Hendricks, 521 U.S. 346, 356 (1997)).

[43] *Id.* at n.28 (citing Kansas v. Crane, 534 U.S. 407, 409–10 (2002)).

[44] Moore, *supra* note 29, at 808.

[45] *See generally* Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C. (2006)).

[46] *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, HUM. RTS. WATCH, (July 16, 2007), https://www.hrw.org/reports/2007/us0707/5.htm#_Toc169933513 [hereinafter *Forced Apart*].

[47] *Id.*

Act (INA) that are relevant to removal of noncitizens who have committed crimes "to ensure that the worst noncitizen offenders [are] deported from the United States and to reduce the number of court cases" brought in immigration courts—essentially authorizing fast-track deportation procedures for a greater number of noncitizens.[48] Overall, the 1996 changes to the IIRIRA have resulted in an increased number of detainees and removal of noncitizens, including many noncitizens who have committed relatively minor, nonviolent offenses.[49] A description of these changes is important to an understanding of § 1226(c)'s detention mandate.

1. Inadmissibility vs. Deportability

First, the IIRIRA redefined the distinction between admissible and deportable noncitizens.[50] Under the IIRIRA, foreign nationals who seek admission at the border or are not lawfully admitted into the United States are defined as "inadmissible" and subject to the grounds of inadmissibility.[51] Foreign nationals who are admitted lawfully (i.e., visa holders or legal permanent residents) are "deportable" and subject to grounds of deportability.[52] While both designations can lead to removal, the distinction is important because there are differences between the removal grounds for inadmissibility and the removal grounds for deportability.

For example, for the government to deport Legal Permanent Residents (LPRs), an immigration judge must "conduct a hearing and sign[] an order of removal . . . ," but DHS is permitted to "administratively" remove, without an order from an immigration judge, noncitizens who do not have legal status and have committed a criminal offense, such as an aggravated felony.[53] Like LPRs, many noncitizens without legal status are detained for a protracted amount of time pending removal proceedings. While this Comment primarily focuses on the prolonged detention without bond of LPRs, the prolonged

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[48] *Id.*; *see also* M. Gavan Montague, *Should Aliens Be Indefinitely Detained under 8 U.S.C. § 1231? Suspect Doctrines and Legal Fictions Come under Renewed Scrutiny*, 69 FORDHAM L. REV. 1439, 1443 (2001); *Due Process—Immigration Detention*, *supra* note 14, at 1522.

[49] Montague, *supra* note 48, at 1443–44; 1443; *see also, generally Immigration Court Backlog Tool*, *supra* note 17.

[50] Montague, *supra* note 49, at 1443; *see also* 8 U.S.C. § 301 (1996).

[51] *Id.*; *see also* 8 U.S.C. §§ 212(a)(6), 245(i) (changing the term "entry" to "admission," which requires that an immigration officer inspect and admit an alien, rather than just simply accomplishing the act of crossing the border).

[52] Montague, *supra* note 48, at 1443.

[53] *Aggravated Felonies and Deportations*, TRAC IMMIGR. (June 9, 2006), http://trac.syr.edu/immigration/reports/155/.

detention of noncitizens without legal status is equally constitutionally questionable.

2. Sections 1226(a) and 1226(c)'s Detention Mandate

Second, the IIRIRA adopted the mandatory detention provision, § 1226(c), which requires the mandatory detention of noncitizens who are undergoing removal proceedings for committing a qualifying offense.[54] The provision states:

> (c) Detention of criminal aliens
>
> (1) Custody The Attorney General shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C) or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.[55]

Section 1226(c)'s mandatory detention provision only applies to noncitizens who are designated "criminal aliens." This designation is important because it triggers the Attorney General's (AG) obligation to detain a noncitizen. As the statute above reads, the AG "shall take into custody," upon release from prison, parole, or probation, any alien deemed deportable on the basis of committing an offense covered under the statute.[56] The Attorney General, therefore, has little discretion in detaining noncitizens who have committed qualifying offenses, and on its face, § 1226(c) provides no statutory possibility for release on bond.[57]

Conversely, noncitizens designated as noncriminal aliens are subject to

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[54] Montague, *supra* note 48, at 1444; *Due Process—Immigration Detention*, *supra* note 14, at 1522.

[55] 8 U.S.C. § 1226(c) (2012).

[56] 8 U.S.C. § 1226(c). These offenses include crimes involving "moral turpitude," violation of any state, federal, or foreign law "involving a substance," aggravated felonies, certain firearm offenses, or any crime related to espionage, sabotage, treason, and sedition, or a violation of the Military Selective Service Act. 8 U.S.C. § 1182(a)(2)(A)(i); 8 U.C.S. §§ 1227(a)(2)(A)(i), 1227(a)(2)(A)(ii), (A)(iii), (B)-(D).

[57] *Due Process—Immigration Detention*, *supra* note 14, at 1522.

discretionary detention during removal proceedings.[58] Section 1226(a) provides that the AG *may* arrest a noncriminal alien "pending a decision on whether the alien is to be removed from the Unites States," and the AG has discretion to "continue to detain the alien; and . . . release the alien on . . . bond . . . or conditional parole."[59] Thus, under this provision, the AG is authorized to detain a noncriminal alien but is not required to by law, and there is a statutory possibility for release on bond.

3. Qualifying Offenses Under § 1226(c)

Third, the IIRIRA broadened the grounds that qualify for mandatory detention under § 1226(c) by expanding the definition of an "aggravated felony" to encompass crimes involving more than a one-year prison sentence, crime of moral turpitude, and crimes involving controlled substances or firearms.[60] These new broad categories of crimes are not easily determined, are often confusing and vague, and are not all defined under federal law.[61] For example, regularly described as a nebulous concept, a crime involving moral turpitude is not defined by federal law; instead, courts have defined the crime as "generally a crime that (1) is vile, base, or depraved and (2) violates accepted moral standards."[62] Furthermore, under this new scheme, the term "aggravated felony" not only covers severe crimes commonly characterized as felonies, such as rape, drug trafficking, and murder, but also incorporates less serious crimes, such as petty theft or shoplifting, that are considered misdemeanors in some states but are re-characterized as felonies for immigration purposes because they carry a potential one-year sentence.[63]

These new broad categories of crimes that trigger mandatory detention

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[58] *Id*.

[59] 8 U.S.C. § 1226(a) (2012).

[60] *Id.*; *Due Process—Immigration Detention*, *supra* note 14, at 1522.

[61] *See* Ceron v. Holder, 747 F.3d 773, 779 (9th Cir. 2014); Keungne v. U.S. Att'y Gen., 561 F.3d 1281, 1284 (11th Cir. 2009) (noting that a crime of moral turpitude "involves 'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man'") (quoting Vuksanovic v. U.S. Att'y Gen., 439 F.3d 1308, 1311 (11th Cir. 2006)); *see also* Knapik v. Ashcroft, 384 F.3d 84, 89 (3d Cir. 2004) (defining moral turpitude as "conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general").

[62] *See Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL (Dec. 16, 2016), https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview (noting that "judges have noted numerous "non-violent, fairly trivial misdemeanors are considered aggravated felonies under our immigration laws."); *see also* Dawn Marie Johnson, *AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes, The Legislative Reform*, 27 J. LEGIS. 477, 477–78 (2001).

[63] *Aggravated Felonies: An Overview*, *supra* note 63.

have had a significant impact. In one particular case, Mario, a nineteen-year old legal permanent resident, "was convicted for possession of 2.5 grams of marijuana with intent to distribute, which is a misdemeanor offense under Illinois law."[64] Even though Mario was only sentenced to a "year of supervision—a sentence that is less severe than probation," the court re-characterized his crime as a felony under immigration law, and he was subsequently subject to mandatory detention.[65]

4. The Impact of the 1996 IIRIRA

Congress's purpose in making these sweeping changes to immigration policy was "based upon the [g]overnment's concerns over the risks of flight and danger to the community."[66] According to a Senate Report, § 1226(c) was enacted "to curtail the 'serious and growing threat to public safety' posed by criminal noncitizens."[67] At the time the statute was enacted, more than 20% of all undetained noncitizens who had been convicted of a crime failed to report to their removal proceedings.[68] Therefore, Congress enacted § 1226(c) to require that all noncitizens that have committed a deportable offense be detained during removal proceedings on the basis of safety concerns as well as accountability.[69]

Congress, however, did not envision § 1226(c) as an indefinite prison sentence for noncitizens that have already served their prison sentence: in 1996, removal proceedings took at most 90 days to be completed.[70] Over the years, however, the broadened offenses that fell within the grounds of deportability and immigration priorities have created an influx in the number of removal cases, which has contributed to the immigration court backlog and increase in wait time for the start and completion of removal proceedings.[71]

Today, however, immigration judges (IJs) are unlikely to complete removal proceedings in the 90 days.[72] Data show that as of July 2017, the average number of days a case is pending on the immigration court docket

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[64] *Forced Apart*, *supra* note 46.

[65] *Id.*

[66] Demore v. Kim, 538 U.S. 510, 531 (2003).

[67] *See* Gerard Savaresse, *When Is When?: 8 U.S.C. § 1226(C) and the Requirements of Mandatory Detention*, 82 FORDHAM L. REV. 285, 299 (2013).

[68] *Id.*

[69] *Id.* at 300.

[70] *Id.* at 299.

[71] *Despite Hiring, Immigration Court Backlog and Wait Times Climb*, TRAC IMMIGR. (May 15, 2017), http://trac.syr.edu/immigration/reports/468/.

[72] *See* TRAC, *supra* note 18.

until decision is 682 days, and in some states—specifically Colorado, Michigan, Illinois, Nebraska, Ohio, California, New Jersey, Arizona, Nevada, and Georgia—the wait time substantially exceeds that average.[73] For example, in Colorado, the average is a staggering 1,037 days; in Illinois, the average is 1,007 days; in Texas, the average is 818 days; and in New Jersey, the average is 814 days.[74] For noncitizens charged with criminal offenses, including noncitizens detained pursuant to § 1226(c), the national average number of days a case is pending before a decision is entered is even higher, at 897 days, with Texas's average being the highest at 1,132 days.[75] Section 1226(c) has thus had a significant effect on the number of detained noncitizens, "with harsh consequences for these individuals, their families, and communities across the country."[76]

In short, the 1996 IIRIRA made sweeping changes that broadened the types of crimes that could result in mandatory detention and possible removal. These changes have resulted in the prolonged mandatory detention of many immigrants, including those who have legal residency, for committing minor, nonviolent offenses that are not even classified as egregious crimes on the state level.

II. SUPREME COURT PRECEDENT AND THE TWO APPROACHES ADOPTED BY THE CIRCUIT COURTS

Key Supreme Court and circuit court cases have addressed mandatory detention pursuant to § 1226(c). As the following Sections explain, while the Supreme Court has upheld the constitutionality of mandatory detention without bond of "criminal" noncitizens undergoing removal proceedings, circuit courts have interpreted the statute to contain an implicit time limitation. These lower courts have applied differing approaches to determine at what point detention without bond becomes unreasonably prolonged or unjustified. The following Sections examine these key cases.

A. SUPREME COURT PRECEDENT PRE-*JENNINGS*

Two landmark Supreme Court cases addressed the constitutionality of prolonged detention of noncitizens: *Zadvydas v. Davis*[77] and *Demore v. Kim*.[78] In *Zadvydas*, the Court held that indefinite detention of noncitizens

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[73] *Immigration Court Backlog Tool*, *supra* note 17.

[74] *See* TRAC, *supra* note 18.

[75] *Id.*

[76] Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 363 (2014).

[77] *See generally* 533 U.S. 678 (2001).

[78] *See generally* 538 U.S. 510 (2003).

post-removal order is constitutionally impermissible past six months unless the government can demonstrate removal in the foreseeable future or a special circumstance.[79] While *Zadvydas* does not concern § 1226(c) pre-removal-order detention, lower courts have cited the decision for support in interpreting § 1226(c).[80]

In *Demore*, the Supreme Court upheld the constitutionality of § 1226(c) on the basis of Congress's concerns of flight risk and dangerousness, and importantly on the finding that in a majority of cases, detention had a definite termination date of less than 90 days.[81] The *Demore* decision was a significant setback for the due process rights of detained noncitizens: despite the Court's view of promptness in removal proceedings, many detainees have been detained far longer than the 90-day period the court envisioned.[82]

1. Zadvydas v. Davis

Zadvydas involved two cases from separate jurisdictions that were consolidated by the Court, where both noncitizens were detained indefinitely post-removal order.[83] Kestutis Zadvydas, an LPR born in a displaced persons camp in Germany to Lithuanian parents who immigrated with his family to the U.S. when he was eight-years-old, filed the first case.[84] Zadvydas had an extensive criminal record of attempted robbery in the third degree,[85] and a history of flight.[86] Zadvydas completed sixteen years in prison for his crimes and was released on parole.[87] He was then taken into custody by immigration officials, and subsequently ordered to be deported to Germany in 1994.[88] However, Germany and Lithuania refused to accept Zadvydas, claiming that he was not a citizen of either country.[89] The second case involved Kim Ho

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[79] 533 U.S. at 679.

[80] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 843 (2018).

[81] 538 U.S. at 512.

[82] Joren Lyons, *Mandatory Detention During Removal Proceedings: Challenging the Applicability of* Demore v. Kim *to Vietnamese and Laotian Detainees*, 12 ASIAN AM. L.J. 231, 239 (2005).

[83] *See* 533 U.S. at 686.

[84] *Id*. at 684.

[85] Zadvydas v. Caplinger, 986 F. Supp. 1011, 1014 (E.D. La. 1997), *rev'd sub nom*. Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999), *vacated sub nom*. Zadvydas v. Davis, 533 U.S. 678 (2001), *opinion withdrawn and superseded sub nom*. Zadvydas v. Davis, 285 F.3d 398 (5th Cir. 2002), *aff'd as modified sub nom*. Zadvydas v. Davis, 285 F.3d 398 (5th Cir. 2002).

[86] *Zadvydas*, 986 F. Supp. At 1014.

[87] *Id.*

[88] *Id.* at 1015.

[89] *See Zadvydas*, 533 U.S. at 684; *see generally* Ma v. Reno, 208 F.3d 815 (9th Cir. 2000),

Ma, a resident alien born in Cambodia who fled with his family to Thailand and the Philippines before arriving in the United States at the age of seven.[90] Ma was convicted of manslaughter, and after completing his prison sentence, he was released, detained by immigration officials, and ordered to be removed from the United States.[91] Similar to Zadvydas, Ma could not return to his home country.

Because Zadvydas and Ma could not return back to their home countries, they remained civilly detain indefinitely in immigration detention centers.[92] After being detained for years, both filed habeas petitions in their respective jurisdictions arguing that permanent confinement pursuant to 8 U.S.C. § 1231(a)(1)(A) was unconstitutional, and the federal district courts ordered them released on those grounds.[93] On appeal, the Fifth Circuit reversed the district court's holding in Mr. Zadvydas's case, reasoning that "detention did not violate the Constitution because eventual deportation was not 'impossible,' good-faith efforts to remove Zadvydas from the United States continued, and Zadvydas's detention was subject to periodic administrative review."[94] On appeal in Ma's case, the Ninth Circuit affirmed his release and "concluded, based in part on constitutional concerns, that the statute did not authorize detention for more than a 'reasonable time' beyond the 90-day period authorized for removal."[95] The Supreme Court subsequently granted writs in both cases, joined them for oral argument, and decided them together.[96]

Section 1231(a)(1)(A) states that "when [a noncitizen] is ordered to be removed, the [AG] shall remove the alien from the [U.S.] within a period of 90 days."[97] If the alien is not removed after the 90-day period expires, an noncitizen "may be detained beyond the removal period and, if released, shall be subject to the terms of supervision."[98] While some courts have interpreted

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vacated sub nom. Zadvydas v. Davis, 533 U.S. 678 (2001), *opinion modified and reinstated sub nom*. Ma v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001).

[90] *Zadvydas*, 533 U.S. at 685; *Reno*, 208 F.3d at 819.

[91] *Id.*

[92] *Zadvydas*, 533 U.S. at 699; *Reno*, 208 F.3d at 819.

[93] *Zadvydas*, 533 U.S. at 684–85; *Reno*, 208 F.3d at 820.

[94] *Zadvydas*, 533 U.S. at 685; s*ee generally* Zadvydas v. Caplinger, 986 F. Supp. 1011 (E.D. La. 1997), *rev'd sub nom*. Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999), *vacated sub nom*. Zadvydas v. Davis, 533 U.S. 678 (2001), *opinion withdrawn and superseded sub nom*. Zadvydas v. Davis, 285 F.3d 398 (5th Cir. 2002), *aff'd as modified sub nom*. Zadvydas v. Davis, 285 F.3d 398 (5th Cir. 2002).

[95] *Zadvydas*, 533 U.S. at 686; *see Reno*, 208 F.3d at 827.

[96] *Zadvydas*, 533 U.S. at 686.

[97] 8 U.S.C. § 1231(a)(1)(A) (2012).

[98] 8 U.S.C. §§ 1231(a)(1), (6) (2012).

the plain language of § 1231(a)(1)(A) as allowing for the indefinite detention of noncitizens unable to leave the U.S., the Supreme Court in *Zadvydas* found "nothing in the history of these statutes that clearly demonstrate[d] a congressional intent to authorize indefinite, and perhaps permanent, detention."[99]

The Court held that the INA's post-removal-period detention provision contains an implicit reasonableness limitation of six months.[100] The Court reasoned that while the plain language of § 1231(a)(1)(A) does not impose an explicit limitation on detention after the 90-day removal period, "interpreting the statute to avoid a serious constitutional threat . . . once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."[101] Further, the Court explained that "for the sake of uniform administration in the federal courts,". . . six months is the appropriate "reasonable time" after which the "alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the [g]overnment must respond with evidence sufficient to rebut that showing."[102]

The Court's decision in *Zadvydas* was a major step in the right direction for protecting the due process rights of detained noncitizens. The Court recognized that noncitizens, even noncitizens who are ordered deported, are protected by the Constitution, and detaining noncitizens indefinitely without bond violates their constitutional rights to liberty and due process under the law.

2. Demore v. Kim

Two years after *Zadvydas* was decided, the Supreme Court granted certiorari to the case *Demore v. Kim*, which challenged the constitutionality of mandatory detention under 8 U.S.C. § 1226(c).[103] Hyung Joon Kim came to the United States from South Korea when he was six years old as an LPR.[104] As an adult, Kim was convicted of "petty theft with priors," and after he completed his sentence, he was detained pending his removal proceeding pursuant to § 1226(c).[105] Kim filed a habeas petition arguing that he was entitled to a bond hearing to determine whether he "posed either a danger to the community or a flight risk."[106] The district court agreed and held that

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[99] Zadvydas, 533 U.S. at 699.
[100] *Id.* at 680–81.
[101] *Id*. at 699.
[102] *Id*. at 701.
[103] *See generally* Demore v. Kim, 538 U.S. 510 (2003).
[104] *Id.* at 513.
[105] *Id.*
[106] *Id.*

unless § 1226(c) is interpreted to contain an implicit time limitation to detention without bond, the statute unconstitutionally deprives noncitizens of their right to due process.[107] Kim was subsequently granted a bond hearing and released on a $5,000 bond.[108] On appeal, the Ninth Circuit affirmed the lower court's decision and concluded that "[the Immigration and Naturalization Service (INS), since subsumed into DHS] had not provided a 'special justification' for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest."[109] The government appealed.[110]

In a 5–4 decision, the Supreme Court reversed the lower courts' decisions and held that § 1226(c) was constitutional.[111] The Court opined that "[a]lthough the Fifth Amendment entitles aliens to due process in deportation proceedings, detention during such proceedings is a constitutionally valid aspect of the process, even where . . . there has been no finding that they are unlikely to appear for their deportation proceedings."[112] The Court emphasized Congress's concern that deportable noncitizens who have committed prior crimes are likely to continue to engage in crime and fail to show up for deportation hearings in large numbers.[113] Furthermore, the Court distinguished *Zadvydas* and explained that while there was a real concern of possible indefinite detention under § 1231(a)(1)(A), such a concern does not exist under § 1226(c) because detainees are only detained for the duration of their removal proceedings, which at the time was mostly a period of "less than . . . 90 days."[114] Thus, in deciding that § 1226(c) is constitutional, the court focused centrally on the brief duration of mandatory detention at the time *Demore* was decided.

While Justice Kennedy joined the opinion of the Court by providing the vital fifth vote in the majority's 5–4 opinion, he wrote a noteworthy concurring opinion that left open the possibility of constitutional concerns that may arise when detention becomes unreasonably prolonged:

> [S]ince 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. Were there to be an unreasonable delay by the INS in

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[107] *See* Kim v. Schiltgen, No. C 99-2257SI, 1999 WL 33944060, at *1 (N.D. Cal. Aug. 10, 1999).

[108] *Id.*

[109] Kim v. Ziglar, 276 F.3d 523, 535 (9th Cir. 2002).

[110] *Id.*

[111] *Id.*

[112] Demore v. Kim, 538 U.S. 510, 511 (2003) (citations omitted).

[113] *Id.* at 513.

[114] *Id.* at 511–12.

> pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.[115]

Justice Kennedy's concurring opinion makes clear that while the *Demore* decision upheld the constitutionality of mandatory detention, detention without a bond hearing must be limited in duration so as not to deprive noncitizens of their right to due process.

Since *Demore*, "courts have struggled to reconcile *Zadvydas* and *Demore* in the context of pre-removal detention."[116] While the Supreme Court in *Zadvydas* held that post-removal detention becomes unreasonably prolonged at the six-month mark, *Demore* upheld the constitutionality of mandatory detention pre-removal-order without determining at what point such detention becomes unreasonably prolonged.[117] Prior to the recent Supreme Court decision in *Jennings v. Rodriguez*, federal courts have reconciled these two decisions by interpreting § 1226(c) to include an implied time limit against prolonged detention without bond.[118] To determine at which point detention without bond is unconstitutional, federal courts have adopted a bright-line and case-by-case approach.

B. CASE-BY-CASE APPROACH PRE-*JENNINGS*

The First, Third, Sixth, and Eleventh Circuits have held that a case-by-case approach is a better-suited approach for determining when mandatory detention without bond is unjustified.[119] The case-by-case approach permits a detained noncitizen to file a habeas petition that if granted, triggers a bond hearing.

1. Diop v. ICE/Homeland Security

In *Diop v. ICE/Homeland Security*, the petitioner, Cheikh Diop, was a Senegalese citizen who unlawfully migrated to the United States and was

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[115] *Id.* at 532–33 (Kennedy, J., concurring) (citation omitted); *see also* Savaresse, *supra* note 67, at 301.

[116] Michelle Firemacion, *Protecting Immigrants from Prolonged Pre-Removal Detention: When it "Depends" is No Longer Reasonable*, 42 HASTINGS CONST. L.Q. 601, 608 (2015).

[117] *Id.* (citing *Zadvydas*, 533 U.S. 678, 701 (2001)); *see also Demore*, 538 U.S. at 510.

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

[119] *See*, *e.g.*, Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016); Sopo v. U.S. Att'y Gen., 825 F.3d 1199 (11th Cir. 2016); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003).

convicted and taken into custody for committing the crime of "recklessly endangering another person."[120] At his second hearing, where Diop was representing himself, the government charged him with the additional crime of having possessed a controlled substance with the intent to manufacture or distribute.[121] Following the second conviction, Diop filed multiple motions and appeals to the court, all while detained pending his removal proceeding pursuant to § 1226(c)'s detention mandate. By the time the case reached the appellate court, Diop was detained for a total of "1,072 days—two years, eleven months, and five days."[122]

The facts in *Diop* perfectly demonstrate that interpreting § 1226(c) without a time limit can result in serious constitutional issues.[123] As the Third Circuit pointed out, this was exactly the concern of Justice Kennedy in *Demore*: § 1226(c) detention mandate "might still violate the Due Process Clause if 'the continued detention became unreasonable or unjustified.'"[124] Diop's situation was exactly the prolonged detention that becomes unreasonable and constitutionally impermissible.[125] The Third Circuit construed § 1226(c) as containing an implicit time limitation against prolonged detention without bond.[126] The court adopted a case-by-case approach to determine the time limit where courts "make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that a noncitizen attends removal proceedings and that his or her release will not pose a danger to the community."[127]

2. Ly v. Hansen

In *Ly v. Hansen*, Hoang Minh Ly was a Vietnam refugee who entered the United States in 1986.[128] Ly was convicted of credit card and bank fraud, and he fully served his sentence on both convictions.[129] Shortly after being released, the INS took Ly into custody and the IJ entered a written order stating that Ly was removable to Vietnam. The Board of Immigration appealed, and the government filed a motion with the Sixth Circuit to remand the case

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

[121] *Id.* at 224.

[122] *Id.* at 223.

[123] *Id.*

[124] *Id.* at 232 (citing Demore v. Kim, 538 U.S. 510, 532 (2003)).

[125] *Id.* at 233.

[126] *Id.* at 234 (reasoning that "[r]easonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case").

[127] *Id.* at 231.

[128] Ly v. Hansen, 351 F.3d 263, 265 (6th Cir. 2003).

[129] *Id.*

back to the district court. Ly was detained for 500 days while these proceedings were taking place and was only released afterward by the INS, subject to specific conditions and supervision.[130]

The Third Circuit held that due process requires that § 1226(c) be interpreted as having a time limit against unreasonably prolonged and unjustified detention. The court rejected the bright-line approach and adopted a case-by-case approach reasoning that the "bright-line limitation . . . would not be appropriate," because "courts must examine the facts of each case, to determine whether there has been unreasonable delay in concluding removal proceedings."[131]

3. Reid v. Donelan

In *Reid v. Donelan*, Mark Anthony Reid came to the United States as an LPR, served in the U.S. Army, pursued higher education, and owned his own business.[132] However, "Reid amassed an extensive criminal record, including larceny, assault, drug and weapon possession, failure to appear, interfering with an officer, driving on a suspended license, selling drugs, violation of probation, and burglary."[133] After completing his prison sentence, Reid was released and subsequently detained pursuant to § 1226(c) without a bond hearing[134] for over a year pending removal proceedings.[135] Reid filed a habeas petition along with a class-action suit and argued that "§ 1226(c) contains an implicit 'reasonableness' requirement and should be read to authorize mandatory detention only up to six months, at which time the government must provide a bond hearing."[136]

On appeal, the First Circuit held that, based on the doctrine of constitutional avoidance, § 1226(c) should be read to include an implicit time limit.[137] The court, however, disagreed with the bright-line, six-month rule, and instead adopted a case-by-case approach, listing factors to "provide guideposts for other courts."[138] The court's factors included length of the detention,

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[130] *Id.*

[131] *Id.* at 271.

[132] Reid v. Donelan, 819 F.3d 486, 491 (1st Cir. 2016).

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 492.

[137] *Id.* at 496 (reasoning that "the secondary six-month rule was predicated on there being no foreseeable hope of removal" and that under § 1226(c), removability, as well as release in some circumstances, is foreseeable).

[138] *Id.* at 501.

foreseeability of proceedings concluding in the near future, period of detention compared to the completed criminal sentence, the promptness (or delay) of the immigration authorities or the detainee, and the likelihood that the proceedings will culminate in a final removal order.[139]

4. Sopo v. U.S. Attorney General

The latest case to advocate the case-by-case approach is *Sopo v. United States Attorney General*.[140] In this case, the petitioner, Maxi Dingo Sopo, came to the U.S. on asylum from Cameroon, and after being in the country for six years, he pled guilty to an aggravated felony.[141] Sopo was taken into custody after completing his criminal sentence, and he subsequently filed a habeas petition requesting a bond hearing.[142]

On appeal, the Eleventh Circuit held that as a matter of constitutional avoidance, § 1226(c) must be construed to contain an implicit time limit.[143] The court adopted a case-by-case approach, reasoning that such an approach "adheres more closely to legal precedent and the practical advantages."[144] Like the First Circuit in *Reid*, the Eleventh Circuit enumerated non-exhaustive reasonableness factors: the amount of time that the noncitizen has been in detention without a bond hearing; reasons for the protracted proceedings; the possibility of removal after a final order of removal; whether the detainee's civil immigration detention exceeds the time the detainee spent in prison for the crime that rendered him removable; and whether the facility for the civil immigration detention is meaningfully different from a penal institution for criminal detention.[145]

C. BRIGHT-LINE APPROACH PRE-*JENNINGS*

The Second and Ninth Circuits adopted a bright-line rule of six months for presumptive reasonableness pre-removal orders, after which a noncitizen is entitled to periodic bond hearings to determine whether continued detention is reasonable or justified.

1. Lora v. Shanahan

In *Lora v. Shanahan*, Alexander Lora was convicted of a felony drug

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139 *Id.* at 500.
140 Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1217 (11th Cir. 2016).
141 *Id.* at 1201.
142 *Id.*
143 *Id.*
144 *Sopo*, 825 F.3d at 1201.
145 *Id.* at 1218.

offense in the United States, and after completing his prison sentence, he was taken into custody pursuant to § 1226(c).[146] Lora subsequently filed a habeas petition challenging his continued detention and argued that imprisonment without a bond hearing raised constitutional due process concerns.[147] The district court agreed and ordered Lora's release, and the government appealed.[148]

On appeal, the Second Circuit noted that while a constitutional argument was not presented in this case, § 1226(c) must be read to include a time limit on prolonged detention without bond,[149] and adopted the bright-line approach.[150] First, it reasoned that "*Zadvydas* and *Demore*, taken together, suggest that the preferred approach for avoiding due process concerns in this area is to establish a presumptively reasonable six-month period of detention."[151] Second, "the pervasive inconsistency and confusion exhibited by district courts in this Circuit when asked to apply a reasonableness test on a case-by-case basis weighs . . . in favor of adopting an approach that affords more certainty and predictability."[152]

The court explained that this is especially true for the Ninth and Second Circuits that "have been disproportionately burdened by a surge in immigration appeals and a corresponding surge in the sizes of their immigration dockets."[153] The court noted that the number of noncitizens detained pursuant to § 1226(c) has substantially increased with the passage of the IIRIRA that "expanded the definition of criminal aliens . . . who violate state criminal laws, which, combined with a simultaneous rise in immigration to the United States, has resulted in an enormous increase in the number of aliens taken into custody pending removal."[154] Third, the court reasoned that without a six-month rule, endless months of detention—often caused by nothing more than bureaucratic backlog—will have real-life consequences for immigrants and their families.[155]

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[146] Lora v. Shanahan, 804 F.3d 601, 605 (2d Cir. 2015).

[147] *Id.*

[148] *See generally* Lora v. Shanahan, 15 F. Supp. 3d 478 (S.D.N.Y. 2014), *aff'd*, 804 F.3d 601 (2d Cir. 2015).

[149] *Lora*, 804 F.3d at 614–15.

[150] *Id.* at 616.

[151] *Id.* at 615.

[152] *Id.*

[153] *Id.* at 615–16.

[154] *Id.* at 604.

[155] *Id.* at 616.

2. Rodriguez v. Robbins I and II

In *Rodriguez I*, Alejandro Rodriguez, an LPR, was detained during the course of his removal proceedings.[156] After three years of incarceration, Alejandro and a class of detained LPRs he represented filed a habeas corpus petition that argued that §§ 1225(b), 1226(a), and 1226(c) do not authorize prolonged detention without bond.[157] The district court granted the class a preliminary injunction and ordered the government to provide individual hearings before an IJ to determine whether continued detention was justified, and the government appealed.[158] On appeal, the Ninth Circuit affirmed, relying on the canon of constitutional avoidance to construe the relevant provisions as imposing a time limit on prolonged detention without bond.[159] The court adopted a bright-line rule, concluding that "detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months."[160]

After the Ninth Circuit decided *Rodriguez v. Robbins I*, the district court granted summary judgment and a permanent injunction on behalf of the entire class, and the government again appealed the decision of the lower court to the Ninth Circuit.[161] In *Rodriguez v. Robbins II*, the Ninth Circuit again affirmed the lower court's decision and held that § 1226(c) detainees are entitled to automatic and periodic bond hearings after six months of detention.[162] The Ninth Circuit described the devastating nature of civil immigration for detained noncitizens:

> Class members spend, on average, 404 days in immigration detention . . . . In some cases, detention has lasted much longer: As of April 28, 2012, when the government generated data to produce to the petitioners, one class member had been detained for 1,585 days, approaching four and a half years of civil confinement. Non-citizens who vigorously pursue claims for relief from removal face substantially longer detention periods than those who concede removability . . . . Class members frequently have

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[156] *See* Rodriguez v. Robbins (*Rodriguez I*), 715 F.3d 1127, 1131–32 (9th Cir. 2013).

[157] *Id.*

[158] *Id.*; *see also* Rodriguez v. Robbins, Nos. CV 07–03239–TJH (RNBx), SA CV 11–01287–TJH (RNBx), 2012 WL 7653016, *1 (C.D. Cal. Sept. 13, 2012).

[159] *Rodriguez I*, 715 F.3d at 1137, 1146.

[160] *Id.* at 1138 (quoting Diouf v. Napolitano, 634 F.3d 1081, 1092 n.13 (9th Cir. 2011)) ("[D]etention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months.").

[161] *See* Rodriguez v. Holder, No. CV 07-3239 TJH (RNBX), 2013 WL 5229795, *1 (Cal. Ct. App. Oct. 28, 2015).

[162] Rodriguez v. Robbins (*Rodriguez II*), 804 F.3d 1060, 1065, 1090 (9th Cir. 2015) (concluding that "class members are entitled to automatic bond hearings after six months of detention").

> strong ties to this country . . . . Prolonged detention imposes severe hardship on class members and their families.[163]

The Ninth Circuit stated that prolonged detention of this nature raises serious constitutional issues of "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint," all of which lie "at the heart of the liberty that [the Due Process] Clause protects."[164] Relying on *Rodriguez I*, the court adopted a "six-month mark" for when detention without bond becomes prolonged.[165]

On March 25, 2016, petitioner David Jennings, in his capacity as the field office director of the Los Angeles, California Office of Immigration and Customs Enforcement (ICE) filed a petition for writ of certiorari to the Supreme Court challenging the Ninth Circuit's decision.[166] The Supreme Court granted writ to *Jennings v. Rodriguez* and recently issued its opinion on the case.

D. *JENNINGS V. RODRIGUEZ*

The Supreme Court in *Jennings v. Rodriguez* reversed the Ninth Circuit's opinion in *Rodriguez II* and held that § 1226(c) cannot be interpreted to contain an implicit time limitation because the statute, according to the Court, was clear and unambiguous.[167] The majority's opinion, however, left much unanswered as the Court declined to consider whether its interpretation of § 1226(c) rendered the statute unconstitutional.[168] Rather, the Court remanded the case back to the Ninth Circuit to consider whether its interpretation is unconstitutional.[169] The dissenting opinion, on the other hand, written by Justice Breyer, fervently disagreed with the majority's opinion and addressed the constitutional concerns of interpreting § 1226(c) as not containing an implicit time limit on detention without bond.[170]

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[163] *Rodriguez II*, 804 F.3d at 1072–73.

[164] *Id.* at 1066 (citing Zadvydas v. Davis, 533 U.S. 678, 679 (2001)).

[165] *Id. at 1079.*

[166] *See generally* Jennings v. Rodriguez, 136 S. Ct. 2489 (2016).

[167] *See generally* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[168] *Id.* at 851.

[169] *Id.*

[170] *Id.* at 861 (Breyer J., dissenting).

1. The Opinion[171]

In *Jennings*, the Supreme Court held that the Ninth Circuit in *Rodriguez II* misapplied the canon of constitutional avoidance to construe §§ 1225(b), 1226(a), and 1226(c) as including a time limit on prolonged detention without bond.[172] The court explained that "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."[173] After an examination of the text of each provision, the Court concluded that, because "the relevant statutory provisions is clear," the canon does not apply and the lower court's construction is implausible.[174]

In regard to § 1226(c) specifically, the Court reasoned that first "§ 1226(c) is not 'silent' as to the length of detention" because the statute's language mandates detention pending a decision on removal.[175] Second, § 1226(c)'s specification that certain circumstances may lead to a detainee's release, such as witness protection purposes, demonstrates that other forms of release, such as release on bond, are prohibited.[176] Third, the Court reasoned that § 1226(c) "together with § 1226(a) . . . makes clear that detention of aliens within its scope must continue 'pending a decision' on removal."[177] For these reasons, the Court concluded that an analysis of § 1226(c)'s statutory language "falls far short of a 'plausible statutory construction'" sufficient to invoke the canon of constitutional avoidance.[178]

The Court, however, declined to address the constitutional argument—whether its strict interpretation of § 1226(c) renders the statute unconstitutional. Instead, the court stated that:

> [b]ecause the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents' constitutional arguments on their merits. Consistent with our role as 'a court of review, not of first view,' we do not reach those arguments. Instead, we remand the case to the Court of Appeals to consider them in the first instance.[179]

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[171] This section does not discuss the facts and procedural history involved in *Jennings* as they are identical to the facts described above in *Rodriguez I and II.*

[172] *Jennings*, 138 S. Ct. at 842.

[173] *Id.* (citing Clark v. Martinez*,* 543 U.S. 371, 385 (2005)) (internal quotation marks omitted).

[174] *Id.* at 849.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.* at 851 (quoting Cutter v. Wilkinson, 544 U.S. 709, 718, n.7 (2005)).

2. The Dissent

Writing with passionate opposition, Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented to all parts of the majority's decision.[180] First, the dissent described the key characteristics of the group of noncitizens that were a part of the class action before the Court.[181] The dissent described that all the asylum seekers were fleeing persecution from their home countries, all the detainees who have committed crimes were detained after serving their criminal sentences, and all members of the third group who arrived at the borders seeking entry for reasons other than asylum might have a meritorious claim to admissibility.[182] The dissent further explained that these classes of detained noncitizens "number in thousands," the length of detention is often prolonged, many of the detainees eventually do actually obtain relief, immigration detention centers where these detainees are confined are similar in many respects to prisons and jails, and in some cases, the conditions of detention are significantly worse.[183]

The dissent then addressed the constitutional question that the majority declined to consider—whether § 1226(c) entitled detainees to bond hearings to determine whether he or she poses a risk of flight or a danger to the community. Breyer concluded: "In my view, the relevant constitutional language, purposes, history, tradition, and case law all make clear that the majority's interpretation *at the very least* would raise 'grave doubts' about the statute's constitutionality."[184]

First, the dissent considered the relevant constitutional language and the values that it protects. It argued that the Fifth Amendment's Due Process Clause extends to all persons within the territory of the U.S., irrespective of a person's immigration status.[185] This is because "[f]reedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries."[186] Second, the dissent argued that American history also demonstrates that bail is a practice that is entrenched in our legal system.187 The dissent explained that Blackstone and the Judiciary Act of 1798

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[180] *Id.* at 860 (Breyer J., dissenting).

[181] *Id.*

[182] *Id.*

[183] *Id.* at 860–61.

[184] *Id.* at 861.

[185] *Id.* at 862 ("No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection.")

[186] *Id.*

[187] *Id.* at 863.

both provided rights to bail.[188] Today, similar practices have remained part of our legal tradition, for example all criminal cases have been provided the possibility of release on bail under federal laws.189 Furthermore, the dissent noted that while immigration detention cases are not criminal cases, there is a strong "basis for reading the Constitution's bail requirements as extending to" civil immigration cases as "the law treats like cases alike. And reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical."[190]

Third, the dissent examined case law and argued that the Court, while sometimes denying bail to some individuals, had never held that bail is unnecessary.[191] The court cited several decisions from different time periods in American history, ending with the Court's decision in *Demore*, which only found detention without bond constitutional for a limited period of time to arrange removal.[192] Fourth, the dissent argued that the statutory language "shall be detained" under § 1226(c) does not mean that the detained noncitizens must be detained without bail[193] because the word "detain" is ambiguous and has readily coexisted with the word bail.[194] Lastly, the dissent argued that there is also nothing in the statute or the legislative history that demonstrates Congress intended prolonged detention without bail.

In regard to § 1226(c), specifically, the dissent argued that the statute's use of the term "take into custody" has long been interpreted as not requiring that a prisoner be confined, and at any rate should not be interpreted differently from "detain."[195] In addition, § 1226(c)'s phrase that prohibits the statute from applying to persons in witness protection also does not demonstrate that detention without bail is authorized by the statute "because the phrase has nothing to do with bail. It has to do with a special program, the Witness Protection Program, set forth in . . . § 3521" which "allows the Attorney General to relocate the witness, to give him an entirely new identity, to help his family similarly, and to pay him a stipend, among other things."[196]

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[188] *Id.*

[189] *Id.* at 864.

[190] *Id.* at 865.

[191] *Id.*

[192] *Id.* at 866–69.

[193] *Id.* at 870.

[194] *Id.* at 872.

[195] *Id.*

[196] *Id.* at 873.

3. Argument in Favor of the Dissent

The majority's decision in *Jennings* failed to enforce the Constitution and protect the due process rights of detained noncitizens. As Justice Breyer argued, the majority's interpretation of § 1226(c) at the very least raises serious doubts about the statute's constitutionality as applied to detained noncitizens. However, the majority declined to even consider the constitutional question, and in doing so, it also declined to protect the constitutional rights of detained noncitizens.

Section 1226(c) is not clear or unambiguous. First, § 1226(c)'s mention of bail is irrelevant. While there is nothing in the language of § 1226(c) that states that bail is required, there is also nothing in the language of the statute that authorizes detention without bail. As Justice Breyer argued, what is clear is that bail has been historically provided to detained individuals throughout our country's history and even today. Second, the majority's focus on the length of detention misses the point. The majority noted that the statute is not silent as to the length of detention because it states detention is only required until removal proceedings conclude. The issue, however, is not about the length of detention; the issue is about prolonged detention *without bond*. When prolonged detention is coupled with the impossibility of bond, then issues of constitutionality arise. So, while § 1226(c) specifies the length of detention, it is ambiguous as to the length of detention without bond. Finally, all federal courts before *Jennings* interpreted § 1226(c) as requiring a time limit to avoid an unconstitutional interpretation, yet the Court declined to consider whether its interpretation raises constitutional concerns. For these reasons, the majority's decision in *Jennings* was incorrectly decided, and § 1226(c) should be interpreted as containing a time limit to detention without bond to avoid violating the due process rights of detained noncitizens.

III. PROPOSAL FOR PROSECUTORIAL DISCRETION FOR NONCITIZENS WITH STRONG EQUITIES

Unlike the Supreme Court's decision in *Jennings*, the bright-line and case-by-case approaches adopted by the circuit courts pre-*Jennings* are a step in the right direction for protecting the rights of 1226(c)'s detained noncitizens. However, these approaches still fall short in striking the right balance between the due process rights and liberty interests of detained noncitizens against the security interests of the government.

A. STRIKING THE RIGHT BALANCE

The case-by-case and bright-line approaches do not properly protect de-

tainees' liberty and due process interests because both approaches categorically presume "that an alien's detention for the first six months is reasonable and justified."[197] For example, the bright-line approach only requires periodic bond hearings *after* six months of detention. The case-by-case approach permits detainees to file a habeas petition at any time during their detention, but detention for less than six months is a strong mitigating factor *against* granting the petition.[198]

The weight these approaches place on this presumption is misplaced. Due process requires mandatory detention to be reasonably related to the government's purported immigration purpose of preventing flight and protecting public safety.[199] Without a compelling governmental interest in continued detention, mandatory detention without bond does not overcome a noncitizen's constitutional liberty interests.[200]

For many detained noncitizens, there is no compelling governmental interest in detention. The stories highlighted by the Community Initiative for Visiting Aliens in Confinement (CIVIC) demonstrate that many noncitizens detained pursuant to § 1226(c) pose little threat to the community and are not a flight risk at any point during their mandatory detention sentence.[201] These individuals are likely to be granted release on bond and are likely to win their cases to remain in the United States.[202] Yet, under the current approaches, these noncitizens are detained and precluded from a bond determination for at least six months. The presumptively reasonable six-month period under the bright-line and case-by-case approaches thus improperly balances the detainee's due process interests against the government's interest in protecting the public and preventing flight.

Empirical evidence also demonstrates that many noncitizens are neither a danger to the community or a flight risk. For example, in a study that contrasted criminal pretrial detention with civil pre-removal order immigration detention, findings showed that detained noncitizens are less of a flight and

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[197] Firemacion, *supra* note 116, at 621.

[198] *Id.*; *see also* Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1217 (11th Cir. 2016) (noting that under the case-by-case approach, "there is little chance that a criminal alien's detention is unreasonable until at least the six-month mark").

[199] *See* Demore v. Kim, 538 U.S. 510, 531–32 (2003) (Kennedy, J., dissenting) (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

[200] *See id.* (noting that "[l]iberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention" (citing Zadvydas v. Davis, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting)).

[201] *See The Brief*, *supra* note 1.

[202] *Id.*

public safety risk than detained criminals.[203] Detained noncitizens are less likely to commit crimes than native-born citizens,[204] and there are lower recidivism rates found for noncitizens than criminal detainees.[205] Furthermore, "criminal empirical researchers . . . found no evidence that lack of U.S. citizenship increases flight risk."[206] Releasing noncitizens with strong equities, therefore, does not frustrate the government's interest in preventing dangerousness and flight because many of these detainees have no interest in further engaging in criminal activity or failing to appear to their removal proceedings.

Detained noncitizens, on the other hand, pay a significant price. Noncitizens are treated worse than citizens accused of a serious crime. In our criminal justice system, criminal defendants are presumed innocent until proven guilty and are constitutionally entitled to receive bail at a reasonable time after being detained.[207] "Most studies show that criminal judges release a majority of defendants pretrial . . . even including defendants with more serious charges."[208] Noncitizens detained under § 1226(c), however, are not entitled to bond for at least six months because of the presumption that detention for six months is reasonable, irrespective of whether they are a flight risk or a danger to the community.[209]

Mandatory detention also significantly harms detainees and their families.[210] Detained noncitizens are separated from their families, subjected to limited visitation and communication with them,[211] and placed in detention

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[203] NAZGOL GHANDNOOSH & JOSH ROVNER, SENT'G PROJECT, IMMIGRATION AND PUBLIC SAFETY 70–71 (Mar. 16, 2017), *available at* https://www.sentencingproject.org/publications/immigration-public-safety/.

[204] *Id.* at 71.

[205] *Id.*

[206] *Id.* at 72.

[207] *Id.*

[208] *Id.*

[209] Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 70 (2014).

[210] *See The Brief*, *supra* note 1 ("Immigration detention is, in theory, a civil procedure and not punitive incarceration. In reality, it inflicts profound suffering on detained people and their families, as they recount below.").

[211] Caitlin Patler & Tonya Maria Golash-Boza, *The fiscal and human costs of immigrant detention and deportation in the United States*, 11 SOCIOLOGY COMPASS 1, 3 (2017), *available at* https://doi.org/10.1111/soc4.12536 ("A recent study of 462 detained parents found that access to child visitation was not equally distributed: Individuals detained in private facilities were less likely to receive visits from their children, and individuals with undocumented children received relatively fewer visits from their children than those without undocumented children.").

centers that are often located outside of their home state.[212] In some cases, detained noncitizens' children are forced into foster care because no other person is available to take care of them while their parent is detained.[213] Others lose their jobs, businesses, and homes, or their education is disrupted.[214]

Furthermore, immigration detention facilities are essentially indistinguishable from prison and sometimes considered worse.[215] Detained noncitizens are detained behind bars in a prison jumpsuit under the same conditions as people currently serving prison sentences for violent criminal offenses.[216] Many of these facilities are owned and run by private prison companies that have a reputation for having poor track records on prison conditions.[217] According to a federal report, detained noncitizens are subject to inhumane treatment, given insufficient hygiene supplies and medical care, and provided potentially unsafe food.[218] This report also found that detainees "were housed incorrectly based on their criminal history" and that staff prevented detainees from filing grievances and took part in mistreating detainees.[219] Other sources demonstrate that detainees are also subjected to arbitrary solitary

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[212] *Id*; *see also The Brief*, *supra* note 1.

[213] *See The Brief*, *supra* note 1 (detailing how Alexander Lora, the appellee in *Lora v. Shanahan*, had to place his son in foster care after he was detained).

[214] *Id.* (discussing how Sayid Omargharib lost his business while detained because he could not keep up with business expenses and his clientele left permanently to other business and he was unable to replace them); *see also* Patler & Golash-Boza, *supra* note 211, at 3 (noting that a studied "revealed that detention contributed to extreme financial insecurity for the family members of detained individuals. Respondents had, on average, lived in the United States for 20 years, and 69% have a U.S. Citizen or Lawful Permanent Resident spouse or child. A full 94% reported being a source of financial or emotional support for their families prior to detention").

[215] Patler & Golash-Boza, *supra* note 211, at 3.

[216] *Id*.

[217] *The Brief*, *supra* note 1.

[218] *See generally* OFF. INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES (Dec. 11, 2017), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf; *see also* Patler & Golash-Boza, *supra* note 211, at 3 (noting that "[s]erious allegations have emerged about life inside detention centers, including improper management and operation, particularly regarding the provision of preventative and emergency health care services and access to attorney visits").

[219] OFF. INSPECTOR GEN., *supra* note 218.

confinement[220] and sexual abuse by staff and other detainees.[221]

In short, the current approaches adopted by the circuit courts do not properly protect detainees' constitutional rights because both approaches limiting detainees' opportunity to challenge their continued detention, which raises the same "serious doubts" of constitutionality that Justice Breyer argued are raised when § 1226(c) is interpreted as forbidding an individualized bond hearing.

B. PROSECUTORIAL DISCRETION FOR NONCITIZENS WITH STRONG EQUITIES

Noncitizens that are detained pursuant to § 1226(c) should be given the opportunity to apply for prosecutorial discretion to defer action on their mandatory detention.[222] If granted, these noncitizens should be released, under supervision, if necessary, during the course of their removal proceedings. If not granted, noncitizens should then be entitled to automatic and periodic bond hearing after six months of detention.

1. Prosecutorial Discretion

Prosecutorial discretion in immigration law "refers to the decision the Department of Homeland Security (DHS) makes," as an agency of the executive branch, "about whether to enforce the immigration laws against a person or a group of persons."[223] The concept of prosecutorial discretion applies in many contexts, including administrative, civil, and criminal contexts, and

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[220] *See generally* NIJC & PHR, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRANT DETENTION (2012), http://static.prisonpolicy.org/scans/Invisible.pdf.

[221] Safia Samee Ali, *Sexual Assaults in Immigration Detention Centers Rarely Get Investigated, Group Charges*, U.S. NEWS (Apr. 12, 2017), https://www.nbcnews.com/news/us-news/sexual-assaults-immigration-detention-centers-don-t-get-investigated-says-n745616.

[222] The current administration's enforcement priorities state that every deportable noncitizen is a priority. *See* Exec. Order No. 13767, *Border Security and Immigration Enforcement Improvements*, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017); Exec. Order No. 13768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017). The administration's enforcement priorities, however, cannot feasibly identify, arrest, and deport all groups of noncitizens, especially since data shows that the U.S. is already over-capacity in detention, and immigration courts are overwhelmingly backlogged. The current administration's immigration policy will inevitably tip towards some form of enforcement priority, and this Comment argues that noncitizens that are not a flight risk or a danger to the community should exist outside the ambit of that priority.

[223] Shoba S. Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285, 1285 (2014).

may be used at any stage of an immigration case.[224]

The legal authority for prosecutorial discretion can be found in the Take Care Clause of Article II, Section 3 of the United States Constitution.[225] The Take Care Clause imposes a duty on the President to faithfully execute the laws that are established by the legislative branch.[226] In *Heckler v. Chaney*, the Supreme Court made it clear that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[227]

A review of U.S. immigration laws implemented by Congress confirms that Congress has authorized DHS to exercise prosecutorial discretion in regards to the implementation of immigration policy.[228] This is most evident in the Department of Homeland Security Act, which states that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens."[229] A memorandum by former INS Commissioner Doris Meisnner, dated November 17, 2000, explains the broad application of prosecutorial discretion:

> In the immigration context, the term [prosecutorial discretion] applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.[230]

The purpose of prosecutorial discretion is both monetary and humanitarian.[231] The government has limited resources to spend and therefore cannot assert the full scope of its enforcement authority and instead needs to

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[224] *Id.*

[225] U.S. CONST. art. II, § 3.

[226] *Id.*

[227] 470 U.S. 821, 831 (1985).

[228] Wadhia, *supra* note 223, at 1296.

[229] 8 U.S.C. § 1103 (1996).

[230] Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. L.J. 243, 244–245 (2010); *see also* Marisa Bono, *When a Rose is Not a Rose: DACA, the DREAM Act, and the Need for More Comprehensive Immigration Reform*, 40 T. MARSHALL L. REV. 193, 203 ("Executive administrators have exercised their discretion to grant deferred action for two main purposes: first, to more efficiently allocate resources as a matter of 'administrative convenience;' and second, to recognize humanitarian considerations when removable would be unconscionable.").

[231] Wadhia, *supra* note 230, at 244–245.

prioritize its focus.[232] Furthermore, some individuals, because of their upstanding reputation in society, are not pursued as a "reward for their good deeds and in part a judgment by society that some people are morally desirable and more likely to succeed in the future."[233] Another factor that has prompted the use of prosecutorial discretion is the adoption of the IIRIRA in 1996. The 1996 IIRIRA changes to immigration policy, which, as described above, expanded the list of offenses that could qualify as aggravated felonies and adopted the mandatory detention of certain classes of noncitizens, "rendered the exercise of prosecutorial discretion by the INS the only means for averting the extreme hardship associated with certain deportation and/or removal cases."[234] Instead, Immigration and Customs Enforcement (ICE), a component of DHS that is primarily responsible for enforcing "federal laws governing border control, customs, trade and immigration," looks to the executive's priorities regarding immigration policy to determine which groups of noncitizens are an enforcement priority under the current administration.

The most widely recognized form of prosecutorial discretion is deferred action, also called priority status.[235] Put simply, "[d]eferred action is a more formal way of exercising prosecutorial discretion."[236] While there is no statutory basis for deferred action,[237] this type of prosecutorial discretion "enables the government to make a formal determination not to pursue removal of an unqualified or unlawfully present individual for a specific period of time, usually for extraordinary humanitarian or law enforcement purposes."[238]

An example of deferred action is President Obama's adoption of the Deferred Action for Childhood Arrivals (DACA) program in 2012.[239] DACA

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[232] *Id.*

[233] *Id.* at 245.

[234] *Id.* at 253 (citing a letter written by Attorney General Robert Raben to Massachusetts Congressmen Barney Frank).

[235] *Id.* at 246.

[236] Jessica Vaughan, *What is Deferred Action?*, CTR. FOR IMMIGR. STUD. (June 15, 2012), https://cis.org/Vaughan/What-Deferred-Action.

[237] The Code of Federal Regulations describes deferred action as "an act of administrative convenience to the government which gives some cases lower priority." *See* 8 C.F.R. §274a.12(c)(14).

[238] *Id.*

[239] *See Remarks by the President on Immigration*, WHITE HOUSE (June 15, 2012, 2:30 PM), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration. It is important to note that on September 5, 2017, the Acting Secretary of Homeland Security rescinded the June 12, 2012 memorandum establishing the DACA program. *See* Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) from Elaine C. Duke, Acting Sec'y, to James W. McCament, Acting Dir., U.S. Citizen and Immigration Services, Et Al. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memo

put forth a deferred action initiative by which unauthorized youth who grew up in the United States and had other strong equities were eligible for a stay of deportation."[240] President Obama's focus "on humanitarian factors like family relationships resembles how prosecutorial discretion, and deferred action in particular, has been applied historically."[241] Thus, in adopting DACA, the Obama administration took major strides in broadening the protection of noncitizens when they announced their decision to defer the deportation of millions of noncitizens.[242]

It is important to note that prosecutorial discretion, including deferred action, is not a new idea in the United States' immigration policy.[243] In fact, prosecutorial discretion has played a major role in immigration enforcement throughout our country's history. For example,

> [o]ne of the earliest documents used by the immigration agency . . . was an Operations Instruction that allowed for 'deferred action' . . . for noncitizens who could show one or more of the following factors: advanced or tender age; presence in the United States for many years; need for treatment in the United States for a physical or mental condition; and adverse effect on family members in the United States as a result of deportation." Furthermore, "by the time DACA came around, federal immigration agencies had been using deferred action with the Supreme Court's blessing for over 60 years.[244]

2. Prosecutorial Discretion for Detained Noncitizens

Detained noncitizens should be given the opportunity to apply for prosecutorial discretion immediately after being detained pursuant to § 1226(c). Prosecutorial discretion in the form of deferred action for detained noncitizens with strong equities is the type of enforcement priority that is consistent with humanitarian and monetary theories of prosecutorial discretion and is consistent with the use of prosecutorial discretion since the enactment of IIRIRA.

First, there are many detained noncitizens who have compelling humanitarian factors. The Second Circuit in *Lora* explained that there are two types

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randum-rescission-daca.

[240] *See generally* Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children from Janet Napolitano, Sec'y of Homeland Security on DACA to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., Et Al. (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[241] *See* Wadhia, *supra* note 223, at 1301–02.

[242] *See Remarks by the President in Address to the Nation on Immigration*, WHITE HOUSE (Nov. 20, 2014, 8:01 PM), http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[243] *See* Wadhia, *supra* note 223, at 1293.

[244] Bono, *supra* note 230, at 204.

of noncitizens that § 1226(c) subjects to mandatory detention: (1) noncitizens that "have criminal records. . . are dangerous[,] or have no ties to a community, and (2) "non-citizens who, for a variety of individualized reasons, are not dangerous, have strong family and community ties, are not flight risks[,] and may have meritorious defenses to deportation at such time as they are able to present them."[245] Detainees in the latter category are not a danger to society or a flight risk.[246] Most of these detainees have not even committed serious or violent offenses. Rather, most were detained for committing minor, nonviolent offenses but were subject to mandatory detention because of the series of immigration enforcement policy changes made by the enactment of the IIRIRA.[247] Further, these detainees are generally upstanding members of their communities who contribute to the economy and pay taxes.[248] Detainees in this latter category are also likely to have meritorious defenses against their continued detention if given the opportunity to present them, which in turn makes it more that they will to return to defend their case.[249]

Second, there are compelling monetary reasons to provide prosecutorial discretion to detained noncitizens with strong equities. The cost of detaining noncitizens is very high,[250] and reducing the number of detainees will allow the government to spend more money on improving detention centers that are in need of resources.[251] This, in turn, will save taxpayers money and allow the government to focus on more serious crimes.[252] Furthermore, the costs of detention go far beyond what the government spends in detention centers. A recent study that surveyed over 500 detained noncitizens who had been detained for six months or more "found that long-term detention removed millions of dollars from local communities."[253] Approximately 90% of the surveyed detainees were employed before being detained and had

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[245] Lora v. Shanahan, 804 F.3d 601, 605 (2d Cir. 2015).

[246] *See supra* Section III.A.

[247] *See supra* Section I.B.

[248] *See supra* Section I.B.

[249] *See supra* Section I.B.

[250] *Immigration Detention: How Can the Government Cut Costs?*, HUM. RTS. FIRST (Mar. 31, 2013), https://www.humanrightsfirst.org/uploads/pdfs/immigration-detention-fact-sheet-jan-2013.pdf (describing that immigrant detention is costing taxpayers millions—in 2013 alone "the federal government spen[t] more than $5 million daily to detain immigrants).

[251] *See generally* OFF. INSPECTOR GEN., *supra* note 218.

[252] Wadhia, *supra* note 230, at 268 ("Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations . . . the Service must make decisions about how best to expend its resources. Managers should plan and design operations to maximize the likelihood that serious offenders will be identified.").

[253] Patler & Golash-Boza, *supra* note 211, at 3–4.

steady pre-detention earnings.[254] Based on these earnings, the study found that "the estimated lost wages for the sample due to detention was $43,357 per day."[255]

3. Application and Risk Assessment Tools

Similar to other warrants for prosecutorial discretion, the application would be sent to a local ICE office and reviewed by ICE officers to determine if the positive factors in a noncitizen's background make him or her a nonpriority for detention. If a noncitizen is granted prosecutorial discretion, the detainee is released for the duration of their removal proceedings.

Officers that review applications for deferred action can use current risk assessment tools to objectively determine whether an applicant should be granted deferred action on their continued detention. For example, "the Office of Probation and Pretrial Services of the Administrative Office of the U.S. Courts has developed a risk assessment tool designed specifically for federal pretrial defendants."[256] By using the Risk Prediction Index (RPI), officers will be exposed to "valuable information for determining whether or not an individual should be incarcerated until the trial or released, and if the latter, whether the [noncitizen] should be required to post bond or be subject to an alternative to detention."[257] This risk tool is particularly useful because while it "incorporates information such as criminal history, demographics, drug use, and residency, it intentionally does not give significant consideration to immigration status."[258]

Furthermore, current Alternatives to Detention (ATD) programs can be used to ensure that detention is a last resort.[259] ICE has in place several ATD programs, such as release on parole, check-in at ICE offices, home visits and check-ins, telephonic monitoring, and in rare cases, GPS monitoring through an electronic ankle bracelet.[260] Prosecutorial discretion in conjunction with the use of ATD programs protects both the detainee's liberty interest and the

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[254] *Id.*

[255] *Id.* at 4.

[256] *See generally* Allyson Theophile, *Pretrial Risk Assessment and Immigration Status: A Precarious Intersection*, 73 FED. PROBATION (Apr. 2007), *available at* https://mow.fd.org/sites/mow.fd.org/files/training/2015_CLE_Detention_and_Release/Pretrial%20Risk%20Assessment%20and%20Immigration%20article.pdf.

[257] *Id.*

[258] *Id.*

[259] *Alternatives to Detention*, DETENTION WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/alternatives (last visited May 17, 2018).

[260] *Id.*

government's interest in preventing flight and dangerousness.

There are many things that assuredly could go wrong with this proposal. For instance, there is no way of ensuring that applicants are given the needed assistance and resources to apply for release while detained, especially when detention centers are presently having a difficult time providing detainees with proper basic needs. To address this problem and other similar problems, ICE should ensure that the application is available online, in hard copy at all detention centers, and in multiple languages. Furthermore, ICE should be required to provide detained noncitizens with information on how to apply online as well as telephonic assistance and detailed instructions on paper hard copies. All immigration detention centers should be informed that no detained noncitizen can be denied the liberty to apply. Finally, applicants should also be afforded the opportunity to appeal a determination by ICE to an independent board consisting of ICE officers located in another office.

Another problem that might arise from this proposal is the reality that the current culture at ICE under today's administration is one that is aggressive and unapologetic to noncitizens that violate immigration laws.[261] ICE officers might therefore abuse their discretion and deny prosecutorial discretion even to detained noncitizen that clearly qualify. To address this problem, ICE officials should be required to attend training on how to use the risk assessment tool in an objective manner. The training should be developed in collaboration with nongovernmental organizations that are knowledgeable about the effect mandatory detention has had on detainees and their families. All officers should be required to make a decision within seventy-two hours so as not to delay release. Also, adopting prosecutorial discretion for detained noncitizens can potentially shift the aggressive ICE culture that exists under the current administration by exposing ICE officials to the positive characteristics of detained noncitizens.

4. Six-Month Bond Hearing if Discretion is Denied

In the case that a detained noncitizen is denied prosecutorial discretion, automatic periodic bond hearings beginning at six months should be required. Six-month detention without bond at this point will no longer be unreasonable because detained noncitizens would have had the opportunity to apply for prosecutorial discretion. Furthermore, requiring automatic bond hearings will ensure that *every* detained noncitizen is given their day in court in the event that their application for prosecutorial discretion is not granted.

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[261] John Burnett, *Riding With ICE: 'We Are Trying To Do The Right Thing*,' NPR (June 20, 2017), https://www.npr.org/2017/07/20/537894936/ice-not-apologizing-for-aggressive-tactics.

CONCLUSION

Due to the current political climate regarding immigration law, the due process rights of noncitizens have never been in such great jeopardy. This risk is even more concerning for noncitizens who have committed a § 1226(c) qualifying offense and are mandatorily detained. Due process is a right afforded to everyone, regardless of a person's immigration status or previous criminal record. Detained noncitizens are no exception to these rights, and mandatory detention under § 1226(c), without any opportunity for bond during detention, is a violation of detained noncitizens' constitutional rights to liberty and due process. The circuit courts aptly read § 1226(c) to include a time limitation against unreasonably prolonged detention. The approaches adopted by these courts, however, incorrectly presumed that detention for at least six months is reasonable and justified. As this Comment has shown, detention for even six months is not reasonable or justified for many detained noncitizens who have strong equities and can prove they are not dangerous or a flight risk. As an alternative, this Comment proposed that detained noncitizens should be afforded the opportunity to apply for prosecutorial discretion as to their continued detention at any point after being detained. If granted, detained noncitizens are released for the duration of their removal proceedings, and if denied, detained noncitizens are entitled to automatic and periodic bond hearings after six months.