Due Process and Temporal Limits on Mandatory Immigration Detention

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Since 1996, the Immigration and Nationality Act has required the government to take into custody individuals in removal proceedings who have past convictions for any of a wide range of criminal offenses. This provision has led to more than a five-fold increase in the number of people detained each day, with harsh consequences for these individuals, their families, and communities across the country.

Such a sweeping, categorical detention is not easily reconciled with the Supreme Court's 2001 decision in Zadvydas v. Davis*, which extended to immigration detention the due process limits that the Court has recognized on other forms of civil detention. In* Demore v. Kim*, decided just two years later, the Court rejected an as-applied due process challenge to the mandatory immigration detention statute. Throughout the past decade, lower courts have sought to reconcile* Demore *with* Zadvydas*. As of this writing, three circuit courts have avoided a constitutional problem with the mandatory detention statute by construing its ambiguous language to impose temporal limits on mandatory detention. However, they have not reached consensus on how to define these limits. One circuit has adopted a bright-line rule that detention beyond six months requires a bond hearing, while two others have adopted a reasonableness standard for determining when a hearing is required.*

This Article argues that the mandatory detention statute should be construed to govern detention for no longer than six months, after which time a bond hearing should be required. It reaches this conclusion by analyzing Supreme Court due process doctrine, surveying decisions that have implemented the rule and standard discussed above, and considering key institutional features of the administrative removal system, including the dearth of legal representation for people in detention.

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INTRODUCTION

In 1996, Congress passed a sweeping immigration detention law that categorically requires authorities to take into custody in removal proceedings non-citizens who have any of a wide range of past convictions. More than sixteen years later, courts continue to grapple with the limits of mandatory detention. The U.S. Supreme Court has weighed in twice in recent decades on the due process implications of immigration detention, with starkly different results. In the 2001 decision *Zadvydas v. Davis*,[1] the Court avoided a due process problem by construing the statute governing detention of individuals with final orders of removal to permit detention only so long as removal was reasonably foreseeable, presumptively for no longer than six months.[2] Two years later, in the post-September 11 decision *Demore v. Kim*,[3] the Court found no due process violation where a lawful permanent resident in removal proceedings, who had not been ordered removed, was mandatorily detained for six months without a bond hearing.[4] This Article explores the aftermath of *Demore*, which

1. 533 U.S. 678 (2001).
2. *Id.* at 699.
3. 538 U.S. 510 (2003).
4. *Id.* at 528.

notably failed to address the civil detention jurisprudence that gave rise to *Zadvydas*. I argue that to give effect to both *Demore* and *Zadvydas*, courts are correct to read the ambiguous language of the pre-final-order mandatory detention statute as imposing temporal limits on mandatory detention. I argue further that mandatory detention under this statute should never exceed six months, at which time a bond hearing should be required. This approach, which the Ninth Circuit recently adopted,[5] draws upon the Supreme Court's civil detention jurisprudence, the decisions of lower courts that have begun to consider the limited nature of the *Demore* decision, and institutional features of the detention and removal system. The legacy of *Demore* confirms that this decision was out of step with decades of Supreme Court jurisprudence and that its holding is therefore narrow.

Mandatory detention of people in removal proceedings has led to a massive increase in civil immigration detention in the United States. The number of people detained on a given day has risen from about 6600 in fiscal year 1996[6] to at least 34,000 in 2012.[7] In 2011, the United States detained an unprecedented 429,000 people,[8] and in fiscal year 2013 the federal government spent over $2 billion on immigration detention—about $164 per day per person detained.[9]

Because immigration judges and the Department of Homeland Security ("DHS") view the mandatory detention law as stripping them of discretion to determine whether detention is warranted in an individual case and to set an appropriate bond,[10] mandatory detention bears little relation to the goals of immigration enforcement. People who pose neither flight risks nor danger to the community are nonetheless confined for indeterminate lengths of time, resulting in tremendous hardship to not

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5. Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013).

6. *INS: Deportation, Detention*, 5 MIGRATION NEWS, no. 6, June 1998, *available at* migration.ucdavis.edu/mn/more. php?id=1547_0_2_0.

7. DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS BILL, 2013, H.R. REP. NO. 112-492, at 50 (2012); Press Release, Republican Appropriations Comm., House Approves Fiscal Year 2013 Homeland Security Appropriations Bill (June 7, 2012), http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=298983. *See generally* NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 1–3 (2012), *available at* http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf.

8. JOHN SIMANSKI & LESLEY M. SAPP, DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2011 at 1 (2012).

9. NAT'L IMMIGRATION FORUM, *supra* note 7, at 3.

10. The "custody" required by the mandatory detention statute can and should be construed to encompass alternatives to detention. *See* Memorandum from Am. Immigration Lawyers Ass'n to David Martin and Brandon Prelogar, Dep't of Homeland Sec. (Aug. 6, 2010), *available at* www.nilc.org/document.html?id=94; Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 632 (2010).

only the men and women being detained, but also their families and communities.

This Article revisits *Demore* and analyzes the recent lower court case law exploring limits on prolonged mandatory detention. Part I provides an introduction to immigration detention, the mandatory detention statute, and the Supreme Court's immigration detention case law. Part II explains the reasoning of *Demore* and *Zadvydas* and argues that the *Demore* Court erred, particularly by failing to consider the *Salerno* line of due process jurisprudence. Part III argues that *Zadvydas* continues to limit the scope of mandatory detention and that *Demore* is limited to its facts. Decisions of the U.S. Courts of Appeals for the Third, Sixth, and Ninth Circuits recognize limits on prolonged mandatory detention, confirming this view of *Demore*. These cases hold that the mandatory detention statute should be read to authorize detention without a bond hearing only for a limited period of time. Part IV turns to the question of whether the mandatory detention statute should be interpreted to include a bright-line temporal limitation on the duration of detention. This Article analyzes the results of the Third and Sixth Circuits' loose multi-factored analysis, which contrasts with the clearer six-month limit recently recognized by the Ninth Circuit. This Article then argues that the Ninth Circuit's rule provides the better way to reconcile *Demore* and *Zadvydas*, both as a matter of doctrine and based on the experience of the lower courts and institutional features of the removal system.

I. Mandatory Detention and the Supreme Court's Civil Detention Jurisprudence

A. Mandatory Detention and its Consequences

Courts have interpreted the mandatory detention statute to categorically require the detention of non-citizens in removal proceedings who have past convictions for any of a remarkably wide range of offenses.[11] For example, simple possession of marijuana and, in some states petty theft, can trigger mandatory detention.[12] DHS must take individuals into

11. Immigration and Nationality Act ("INA") § 236(c), 8 U.S.C. § 1226(c) (2012), provides that the "Attorney General shall take into custody any alien who" is inadmissible on any criminal ground or deportable on most criminal grounds "when the alien is released."

12. Simple possession of marijuana falls within the "controlled substance offense" ground of inadmissibility, 8 U.S.C. § 1182(a)(2)(A)(i)(II), and of deportability, *id.* § 1227(a)(2)(B)(i) (excluding "a single offense involving possession for one's own use of 30 grams or less of marijuana"), and both of these grounds trigger mandatory detention. *Id.* § 1226(c). Some state petty theft convictions are treated as "crime[s] involving moral turpitude." A crime involving moral turpitude triggers mandatory detention if the individual is inadmissible (i.e., for someone who was not admitted to the United States before being placed in removal proceedings), *id.* §§ 1182(a)(2)(A)(i)(I), 1226(c)(1)(A), or if the

custody "when released" from criminal custody for the underlying offense, usually when they have completed any sentence and would otherwise have been released.[13] The law strips the immigration judge of her power to conduct a bond hearing and decide whether the individual poses any danger or flight risk, and likewise precludes DHS from making discretionary judgments about whether detention is appropriate.

Since this law was passed, as discussed above, the number of people detained on a given day has increased more than five-fold[14] and the cost of immigration detention has increased accordingly. In fiscal year 2013, Congress allocated $2 billion per year for detention, funding 34,000 detention beds each day.[15] Because it requires large-scale imprisonment without individual assessments of risk, the mandatory detention regime does not effectively serve the goals of immigration detention.[16]

"For many noncitizens, detention now represents a deprivation as severe as removal itself."[17] Although immigration detention is nominally civil, detainees are confined in county jails and other facilities that are designed for corrections purposes.[18] In an Immigration and Customs Enforcement ("ICE") report, Dr. Dora Schriro, a former New York City Corrections Commissioner, found that the agency detained individuals in unduly restrictive, corrections-like conditions, isolated from their families and communities, with inadequate access to law libraries and other services, and often intermingled with criminal inmates.[19]

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individual was sentenced to at least one year of imprisonment or was convicted of more than one crime involving moral turpitude, *id.* §§ 1226(c)(1)(B)–(C), 1227(a)(2)(A)(i)–(ii).

13. *See id.* § 1226(c) ; *see also* INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON IMMIGRATION DETENTION IN THE UNITED STATES: DETENTION AND DUE PROCESS 85–86 (2010) ("It is important to point out that many of the undocumented immigrants with criminal records that ICE detains have already served their sentences; therefore, had their legal status been different, they would have been set free.").

14. DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS BILL, 2013, H.R. REP. NO. 112-492, at 50 (2012); Press Release, Republican Appropriations Comm., *supra* note 7.

15. NAT'L IMMIGRATION FORUM, *supra* note 7, at 2; *see also* DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS BILL, 2013, H.R. REP. NO. 112-492, at 50 (2012); Press Release, Republican Appropriations Comm., *supra* note 7.

16. *See* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 48 (July 2010), http://www.columbialawreview.org/wp-content/uploads/2010/07/42_Anil_Kalhan.pdf (footnote omitted) ("[E]xisting policies and practices almost certainly have caused *overdetention*: detention of individuals who pose no actual flight risk or danger to public safety or are held under overly restrictive circumstances. As custody, bond, and parole decisions increasingly have come to rest on broadly defined categories—for example, an individual's prior conviction . . . rather than individualized determinations of flight risk or dangerousness, the number of detainees presenting no such risks has likely increased, although the precise extent is difficult to ascertain.").

17. *Id.* at 43.

18. DORA SCHRIRO, DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 10 (2009).

19. *See id.* at 4, 21; *see also* INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 13, at 85 ("For those cases in which detention is both strictly necessary and proportional, the Inter-American Commission insists that immigration detention is an eminently civil matter and the conditions of detention ought

Detention separates individuals from their families and deprives detainees' families of income and emotional support.[20] Phone calls are prohibitively expensive, and jails often limit communication with families or attorneys.[21] The cumulative effects of these family separations reverberate throughout communities, removing productive members of the workforce, increasing poverty, and consigning thousands of children to foster care.[22]

The social isolation and uncertain duration of mandatory immigration detention cause well-documented psychological and physical harm. "Without any information about or ability to control the fact or terms of their confinement," even previously healthy individuals "develop feelings of helplessness and hopelessness that lead to debilitating depressive symptoms, chronic anxiety, despair, dread of what may or may not happen in the future, as well as [Post-Traumatic Stress Disorder] and suicidal ideation."[23] Detainees are often at risk of repeated physical and mental abuse,[24] and medical and mental healthcare in detention is often grossly inadequate.[25]

Detention (particularly when mandatory) also discourages individuals from pursuing bona fide challenges to removal because such challenges prolong removal proceedings. Moreover, detainees usually do not have access to counsel due to an inability to pay attorneys' fees while in detention and the remoteness of most detention facilities from cities with pro bono lawyers.[26] Detention diminishes people's chances of prevailing

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not to be punitive or prison-like. However, the IACHR observes with concern that this principle is not observed in immigration detention in the United States.").

20. *See, e.g.*, Bautista v. Sabol, 862 F. Supp. 2d 375, 381 (M.D. Pa. 2012) ("[The detainee's] detention has forced the sale of the family home, caused his lucrative business to go into bankruptcy, and has required that his family—including three young children—seek government assistance to make ends meet.").

21. *Id.* at 110, 115–17.

22. A recent report by the Applied Research Center estimated that over 5100 children currently living in foster care have parents who were either detained or deported and that "in the next five years, at least 15,000 *more* children will face these threats to reunification with their detained and deported mothers and fathers." SETH FREED WESSLER, APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 6 (2011).

23. PHYSICIANS FOR HUMAN RIGHTS, PUNISHMENT BEFORE JUSTICE: INDEFINITE DETENTION IN THE US 11 (2011), *available at* https://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.pdf.

24. *Id.* at 17–18.

25. *See, e.g.*, INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 13, at 97–107 (discussing "chronically inadequate medical care of immigration detainees" and "even worse" mental healthcare, and noting the ratio of one mental health specialist to every 1142 detainees with mental illness, as compared to a 1-in-400 ratio in typical federal prisons and a 1-to-10 ratio in prisons for individuals with mental illness).

26. *Id.* at 130–32 (footnote omitted). "[C]ustody status (i.e. whether or not [individuals] are detained) strongly correlates with their likelihood of obtaining counsel." *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings: New York Immigrant Representation Study Report: Part I*, 33 CARDOZO L. REV. 357, 367–73 (2011) (finding that representation rates were

in their removal proceedings, even when they have a strong challenge to removal.[27]

As immigration courts and federal courts of appeals grapple with crippling backlogs,[28] many people are subject to detention for many months or even years.[29] As of 2009, about 19,000 people annually were detained for over four months, and about 2100 individuals were held for more than a year.[30] Paradoxically, those who are eligible for asylum, cancellation of removal, or other forms of relief—a large proportion of whom are lawful permanent residents—typically face more prolonged detention than those who are not eligible, since proceedings last longer for those who apply for relief from removal.[31] Individuals whose cases

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lower for individuals detained outside of New York City than those detained therein). "[T]he majority of the immigration detention population is housed in facilities in rural locations . . . . Human Rights First reports that 4 of the 6 largest immigration detention facilities are 50 or more miles from a major urban center." INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 13, at 131.

27. *See generally infra* notes 115–116 and accompanying text.

28. In 2002, then-Attorney General John Ashcroft reduced the number of members of the Board of Immigration Appeals and introduced new procedures for "summary affirmance," which involves affirmance without any discussion of the reason for the Board's decision. Board of Immigration Appeals ("BIA"): Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,885, 54,893 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3 (2003)). As a result, the courts of appeals have seen their immigration dockets grow drastically. This has increased the length of time removal appeals remain pending. DORSEY & WHITNEY LLP, SUMMARY OF FINDINGS AND CONCLUSIONS (2006), *available at* http://www.dorsey.com/A-Simmering-Border-Dispute---An-ABA-Commissioned-Dorsey-Study-on-Immigration-Policy-Practice-and-Pro-Bono-is-Cited-in-the-Legal-Times-04-06-2006. Moreover, the Second Circuit recently announced that it will toll all deadlines in newly-filed immigration appeals by ninety days to encourage the DHS to consider whether to exercise prosecutorial discretion and agree to a remand. *In re* Immigration Petitions, 702 F.3d 160, 161–62 (2d Cir. 2012).

29. *See* Declaration of Susan B. Long at Ex. A at 6, B-1, Rodriguez v. Holder, 2013 WL 5229795 (C.D. Cal. Aug. 6, 2013) (No. 07-3239) [hereinafter *Rodriguez* Expert Report] (analyzing 460 cases in which individuals had been detained six months or longer under INA section 236(c), finding that the average detention was 427 days, and documenting detention lasting more than four years); AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 7 (2009), ("US citizens and lawful permanent residents have been incorrectly subject to mandatory detention, and have spent months or years behind bars before being able to prove they are not deportable from the United States."); *see, e.g.*, Ali v. Clark, No. 10-0846, 2010 WL 5559393 at *3 (W.D. Wash. Dec. 16, 2010) (dismissing the habeas petition of a legal permanent resident ("LPR") based on a fifteen-month detention under INA section 236(c)), *report and recommendation adopted*, Ali v. Clark, No. 10-0846, 2011 WL 66024 (W.D. Wash. Jan. 10, 2011); Prince v. Mukasey, 593 F. Supp. 2d 727, 735 (M.D. Pa. 2008) (finding that a legal permanent resident's sixteen-month detention under INA section 236(c) did not violate due process); *see also Rodriguez* Expert Report, *supra*, at B-1 (finding that, among other broader class of non-citizens who had been in mandatory detention under any immigration statute for six months or longer, 78% were detained eight months or longer, 47% for one year or longer, 21% for eighteen months or longer, and more than 9% for two years or longer).

30. *See* Kalhan, *supra* note 16, at 49 (citing DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 16–20 (2009)); *see also* SCHRIRO, *supra* note 18, at 6.

31. Among a group of people who had been detained pursuant to INA section 236(c) for six months or longer, about three quarters had applied for relief from removal. The average duration of detention for this subgroup was sixty days longer than the average for individuals who had not applied

involve either individual or government appeals are also more likely to face prolonged detention.[32] Success in challenging removal also correlates with prolonged detention.[33]

B. Mandatory Detention in Context

Congress enacted the mandatory detention statute in 1996 as part of a package of increasingly punitive and inflexible deportation laws.[34] In an excellent history of *Demore* and the mandatory detention provision, Margaret Taylor points out that even the Immigration and Naturalization Service (the "INS") did not support the mandatory detention law when Congress passed it because Congress preferred to retain discretion over detention decisions.[35] Indeed, the immigration enforcement agency at the time was contracting with the Vera Institute of Justice to develop a pilot supervision program as a more cost-effective alternative to detention.[36]

The 1996 amendments drastically expanded the criminal grounds of removability and stripped immigration judges of their discretion to award discretionary relief from removal based upon equitable factors.[37]

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for relief. *Rodriguez* Expert Report, *supra* note 29, at B-1, B-3. The average duration for individuals who had applied for relief is likely under-reported in this study, since it included some people who remained in detention.

32. Among a class of people held in various forms of mandatory immigration detention for at least six months, the average detention time for those whose cases involved only immigration court proceedings was 330 days, compared with 448 days for administrative appeals and 667 days for Ninth Circuit appeals. *Rodriguez* Expert Report, *supra* note 29, at 8.

33. In January 2013, the average duration of all proceedings in immigration court was 261 days for cases resulting in removal orders and "over two years (839 days)" for cases in which the individuals won relief from removal. Transactional Records Access Clearinghouse, Immigration Court Backlog Continues to Inch Upward in January (2013), *available at* http://trac.syr.edu/immigration/reports/308. Although these averages include both detained and non-detained cases, the disparity in duration between those cases resulting in removal orders and those in which noncitizens prevail applies by the same logic to both detained and non-detained subsets of this population. *See* Heeren, *supra* note 10, at 629 (discussing mandatory detention of those people "who are found to be properly deportable and ineligible for all discretionary relief from removal, but still win CAT relief for withholding of removal," and noting that "[t]hese immigrants, who fear death, imprisonment, or torture in their native countries, have a strong incentive to win their removal case").

34. *See, e.g.*, Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* Immigration Stories 343, 348–49 (David A. Martin & Peter H. Schuck eds., 2005); Alice E. Loughran, *Congress, Categories, and the Constitution—Whether Mandatory Detention of Criminal Aliens Violates Due Process*, 18 Geo. Immigr. L.J. 681, 681–83 (2004).

35. Taylor, *supra* note 34, at 351–52.

36. *Id.* at 351–53.

37. *See, e.g.*, 8 U.S.C. § 1101(a)(43) (2012) (defining "aggravated felony" to include drug trafficking offenses and certain theft and fraud offenses, among many others); *id.* §§ 1158(a)(2)(B), (b)(2)(B) (prohibiting asylum from being granted to individuals with aggravated felony convictions or individuals who apply more than one year after entering United States); *id.* § 1182(a)(2) (listing criminal grounds of inadmissibility); *id.* § 1182(h) (saying discretionary waivers are not available to individuals with most drug-related convictions); *id.* § 1227(a)(2) (listing criminal grounds of deportability); *id.* § 1229b (restricting the cancellation of removal as not available to individuals with aggravated felony

For all of these reasons, as the Supreme Court recently recognized in *Padilla v. Kentucky*, "if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses."[38]

With the introduction of a broad mandatory detention regime, the detention of many non-citizens during removal proceedings became practically inevitable as well. Such detention is often prolonged. Even under the 1996 regime, many individuals have had lengthy removal proceedings and appeals due to the complexity of determining the immigration consequences of criminal convictions, or due to adjudication of applications for the limited forms of relief from removal that may be available to individuals with criminal convictions.

The 1996 amendments also provided for detention after an order of removal had become final—that is, after all administrative appeals had been exhausted or waived. The Immigration and Nationality Act (the "INA") section 241(a)(2) mandates detention for the first ninety days after any type of removal order becomes final.[39] INA section 241(a)(6)—the statute at issue in *Zadvydas v. Davis*—provides that the DHS has discretion to detain individuals after the ninety-day removal period.[40]

C. *ZADVYDAS* AND *DEMORE*

In 2001 and 2003, the Supreme Court took two very different approaches to considering due process problems raised by civil immigration detention. In the 2001 case *Zadvydas v. Davis*, the Court

convictions)); *id.* § 1231(b)(3)(B) (withholding of removal not available to individual with "particularly serious crime"); *see also* Padilla v. Kentucky, 559 U.S. 356, 362–62 (2010). Juliet Stumpf has argued that criminal and immigration law are converging into a new field of "crimmigration." *See generally* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

38. *Padilla*, 559 U.S. at 362–63; *see* Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 79 (2010).

39. 8 U.S.C. § 1231(a)(2).

40. *Id.* § 1231(a)(6) ("An alien ordered removed who is inadmissible under section 1182 of this title [8 U.S.C.], removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)."). Similarly, the 1996 amendment provided for mandatory detention (with the narrow exception that DHS could release an individual on "parole") during "expedited removal" proceedings, a procedure that permits DHS to remove most individuals intercepted at the border without affording them a right to court proceedings. *Id.* § 1225. Individuals with aggravated felonies can also be subject to administrative removal, meaning that the agency prosecuting their removal case could order them removed without an opportunity for a full hearing before an immigration judge. *Id.* § 1228.

recognized that due process limits the executive's power to detain non-citizens in connection with civil removal proceedings.[41] Although the case addressed detention after a removal order had become final, the Court relied upon basic due process principles that have become critical to courts' assessment of whether there is any limit to mandatory detention while a case is still pending.[42]

The *Zadvydas* Court confronted a statutory and due process challenge to the executive's practice of indefinitely detaining individuals who had final orders of removal but who could not actually be deported. This group of people includes individuals who are stateless or who cannot prove their citizenship, and citizens of countries that lack general repatriation agreements with the United States, such as Cuba. Petitioner Kestutis Zadvydas could not be removed because he was stateless, having been born to Lithuanian parents in a displaced persons' camp in Germany.[43] Before being ordered released by a district court, he had been detained for about three years.[44] Kim Ho Ma, the other individual whose case was reviewed in *Zadvydas*, could not be removed because he was a Cambodian citizen and Cambodia and the United States did not have a repatriation treaty.[45]

The *Zadvydas* Court addressed the question of whether INA section 241(a)(6), the discretionary provision of the post-removal period detention statute, authorized detention beyond the removal period for individuals with final removal orders who could not be removed.[46] Immigration enforcement officials argued that this statute, which does not articulate the permissible duration of post-final-order detention, authorized detention for an indefinite time even when the non-citizen could not be removed.[47] Writing for the Court, Justice Breyer rejected this construction, holding that the language of the statute was ambiguous on this point and that a statute permitting such indefinite detention would raise "a serious constitutional problem."[48]

The Court rested its decision on the *United States v. Salerno* line of due process cases, making clear that immigration detention was subject to the same due process limits as other forms of civil detention.[49] *Salerno*

41. 533 U.S. 678, 690 (2001).
42. *See id.*
43. *Id.* at 684.
44. *Id.*
45. *Id.* at 686.
46. *Id.* at 688–89.
47. *Id.* at 689.
48. *Id.* at 690.
49. *See* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 345 (2002) (arguing that in *Zadvydas*, the "Court seems not to have cut the government any more slack than in

and its progeny, discussed in greater detail below, establish that government detention violates due process "unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and 'narrow' nonpunitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"[50] The Court determined that the executive's stated justifications in *Zadvydas*—ensuring appearance at future removal proceedings and avoiding danger to the community—did not justify the deprivation of liberty. "[W]here detention's goal is no longer practically attainable, detention no longer 'bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.'"[51] The Court also held that "preventive detention based on dangerousness" was constitutional "only when limited to specially dangerous individuals and subject to strong procedural protections."[52]

Because the detention at issue was potentially indefinite and the procedural protections weak, and because the statute permitted detention of people who had been admitted to the United States, indefinite post-order detention raised a serious due process problem. The Court therefore held that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."[53]

Two years after *Zadvydas*, however, the Court upheld mandatory detention for individuals in removal proceedings under INA

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other administrative contexts; in other words, it seems to have stepped out of the discourse of immigration exceptionalism, with a result to match").

50. *Zadvydas*, 533 U.S. at 690 (emphasis omitted) (citing Kansas v. Hendricks, 521 U.S. 346, 356 (1997); Foucha v. Louisiana, 504 U.S. 71, 80 (1992); United States v. Salerno, 481 U.S. 739, 746 (1987)).

51. *Zadvydas*, 533 U.S. at 690 (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)).

52. *Id.* at 691.

53. *Id*. at 699. In response to *Zadvydas*, the former INS promulgated regulations that provide for administrative custody reviews at 90 and 180 days after a final order of removal, and for every six months thereafter. *See generally* Continued Detention of Aliens Subject to Final Orders of Removal, 8 C.F.R. § 241.13 (2013). Many individuals in removal proceedings have filed habeas petitions seeking release under *Zadvydas*. This challenging procedure can result in either release or a faster deportation process since the agency can avoid granting the petition by showing a "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. Some individuals nevertheless remain in detention longer than six months after a final removal order. *See, e.g.*, Atanda v. Clark, 646 F. Supp. 2d 1242 (W.D. Wash. 2009) (holding that the individual was properly detained almost three years after the BIA affirmed his removal order because his removal was reasonably foreseeable). Balicudiong-Asican v. Kane, No. 09-0018, 2009 WL 3157223 (D. Ariz. Sept. 25, 2009) (holding that the individual was properly detained sixteen months after the BIA affirmed his removal order because his removal was reasonably foreseeable); Cacatzun-Sop v. Clark, No. 08-1225, 2008 WL 5100209 (W.D. Wash. Nov. 25, 2008) (holding that the individual was properly detained eighteen months after his removal proceeding became administratively final because his removal was reasonably foreseeable). Moreover, some people remain in indefinite detention pursuant to the DHS's position that they are "specially dangerous individuals"—a group that the *Zadvydas* Court noted but did not have occasion to address. *See Zadvydas*, 533 U.S. at 691.

section 236(c). This section of the statute provides that the "Attorney General shall take into custody any alien who" is removable on almost any criminal ground[54] "when the alien is released."[55] The statute does not permit bond hearings or any other individualized determination of flight risk or danger to the community.

Justice Rehnquist authored the majority opinion in *Demore*, and Justice Kennedy provided the swing vote.[56] In the brief majority opinion, the Court dismissed the respondent's due process claims with little constitutional analysis. After a preliminary holding on jurisdiction, the Court turned to an extended discussion of the dangers posed by the government's perceived inability to deport "criminal aliens" without mandatory detention.[57] It emphasized the "wholesale failure by the INS to deal with increasing rates of criminal activity by aliens,"[58] the growth in the number of non-citizens in federal and state prisons,[59] the INS's inability to identify or remove most "criminal aliens,"[60] and the frequency of illegal reentry and recidivism among non-citizens with criminal convictions.[61] The Court found that "Congress also had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings."[62] In reaching this conclusion, the Court made no mention of other facts that were critical to understanding the low rate of immigration enforcement. For example, at that time the INS had not yet instituted a systematic program to encourage appearance and removal through intensive individual supervision.[63]

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54. *See* 8 U.S.C. § 1226(c) (2012).

55. *Id.*

56. Demore v. Kim, 538 U.S. 510, 513, 531 (2003).

57. *Id.* at 518.

58. *Id.* (citing Comm. on Governmental Affairs, Criminal Aliens in the United States: Hearings Before the Permanent Subcommittee on Investigations, 104th Cong. (1995); S. REP. NO. 104-48, pt. 1 (1995)).

59. *Demore*, 538 U.S. at 518.

60. *Id.*

61. *Id.*

62. *Id.* at 519 (citing DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., IMMIGRATION & NATURALIZATION SERV., DEPORTATION OF ALIENS AFTER FINAL ORDERS HAVE BEEN ISSUED, REP. NO. I-96-03 (1996); H.R. REP. NO. 104-469, at 123 (1995)); *see id.* at 519 (citing S. REP. NO. 104-48, pt. 1, at 2 (1995)) (finding that "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings," but noting that the dissent disputed this figure).

63. *See id.* at 565 (Souter, J., concurring in part and dissenting in part) (citing VERA INST. OF JUSTICE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM ii, 33, 36 (2000)) (noting that the majority failed to cite a Vera Institute study showing "that 92% of criminal aliens (most of whom were [Legal Permanent Residents]) who were released under supervisory conditions attended all of their hearings"); *see also* Taylor, *supra* note 34, at 352.

While recognizing that it "is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings,"[64] *Demore* also emphasized the political branches' plenary power over deportation. Citing to a one hundred-year-old decision, *Demore* held that the Court had recognized "detention during deportation proceedings as a constitutionally valid aspect of the deportation process."[65] The Court went on to ground its brief due process analysis in two unusual pre-*Zadvydas* cases,[66] and distinguished *Zadvydas* based upon the shorter duration of detention and the fact that removal of the petitioners in *Zadvydas* was "no longer practically attainable."[67] The Court concluded that the respondent's detention was permissible on the basis of a categorical rule rather than individualized determinations of flight risk and dangerousness.[68]

Justice Kennedy concurred and wrote separately to emphasize that his decision hinged on the understanding that an individual in mandatory detention was entitled to a hearing on whether the individual's criminal history corresponded with the categories in the mandatory detention statute, and on his view that the respondent's detention had been sufficiently brief.[69] "Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings," he wrote, "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."[70]

Justices Souter and Breyer authored opinions concurring in the jurisdictional holding and dissenting as to the holding that the respondent's mandatory detention was constitutional. Justice Souter wrote an extensive rebuttal to the majority opinion. He argued:

> [The] Court's holding that the Constitution permits the Government to lock up a lawful permanent resident of this country when there is concededly no reason to do so forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process.[71]

Souter also pointed to other fundamental factual and legal errors. For example, the majority placed great weight on the assertion that Kim had

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64. *Demore*, 538 U.S. at 523 (quoting Reno v. Flores, 507 U.S. 292, 306 (1993)).

65. *Id.* (citing Wong Wing v. United States, 163 U.S. 228, 235 (1896)).

66. *Id.* at 523–26 (citing Carlson v. Landon, 342 U.S. 524 (1952); Reno v. Flores, 507 U.S. 292 (1993)). *Carlson* and *Flores* are discussed in Part II, *infra*.

67. *Demore*, 538 U.S. *at* 527–30.

68. *See id*. at 555–56 (2003) (Souter, J., concurring in part and dissenting in part).

69. *Id.* at 531–32 (Kennedy, J., concurring).

70. *Id.* at 532–33.

71. *Id.* at 541 (Souter, J., concurring in part and dissenting in part).

conceded deportability, ignoring the more complex facts of his case.[72] Indeed, even the dissenters glossed over the basic structure of immigration proceedings, assuming that an individual's concession that he was "deportable" was equivalent to a concession that he had no way to prevail at his removal proceedings, when in fact some people who are deportable ultimately win relief from removal.[73] Additionally, Justice Souter pointed out that the majority overstated the significance of the studies that Congress had cited as showing a need for mandatory detention and failed to mention another study that established that a supervision program could successfully address flight risk concerns.[74] He also discussed the majority's disregard for civil detention jurisprudence more generally, which is addressed below.

II. *DEMORE*'S DIVERGENCE FROM *ZADVYDAS* AND EARLIER CIVIL DETENTION JURISPRUDENCE

The *Demore* majority's approach differed in significant ways from *Zadvydas* and its predecessors. The shift in doctrine reflected the political aftermath of the September 11, 2001 terrorist attacks. Following the attacks, the George W. Bush administration profiled and preventatively detained large numbers of Muslim, Middle Eastern, and South Asian men, often by initiating removal proceedings against them.[75] Although the respondent in *Demore* was not accused of any terrorism-related offenses, the Court's emphasis on Congress's public safety concerns, along with the Bush administration's use of immigration detention for investigatory or preventative purposes indicates a concern for preserving the

72. *Id.* at 514.

73. *See, e.g.*, *id.* at 576 (Breyer, J., concurring in part and dissenting in part) ("If I believed . . . that Kim had conceded that he is deportable, then I would conclude that the Government could detain him without bail for the few weeks ordinarily necessary for formal entry of a removal order.").

74. *Id.* at 564–66 (Souter, J., concurring in part and dissenting in part) (stating that the "Court does not explain how the INS's resource-driven decisions to release individuals who pose serious flight risks, and their predictable failure to attend removal hearings, could justify a systemwide denial of any opportunity for release to individuals like Kim who are neither flight risks nor threats to the public" and discussing a Vera Institute study establishing the effectiveness of alternatives to detention).

75. Taylor, *supra* note 34, at 365; *see* Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 621–22 (2005) (footnotes omitted) ("On orders by the Attorney General to use 'every available law enforcement tool' to arrest persons who 'participate in, or lend support to, terrorist activities,' law enforcement focused on using federal immigration laws to arrest and detain noncitizens suspected of any terrorist ties. More than 1200 citizens and noncitizens were detained for interrogation within the first two months of the attacks. Although many were questioned and released with no charges pressed against them, many were detained for immigration law violations.").

administration's ability to detain people without hearings for national security purposes.[76]

Demore omitted mention of seminal civil detention decisions. Notably, the Court recognized in cases preceding *Demore* that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," and that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[77] Since the late 1800s, and again in *Zadvydas*, the Court has made clear that the Due Process Clause limits immigration detention just as it limits other forms of civil detention.[78]

The Court has examined civil detention in other contexts such as pretrial detention,[79] civil commitment based upon mental illness and findings that an individual is "sexually dangerous,"[80] and detention for failure to pay child support.[81] Prior to *Demore*, the Court had never approved of mandatory, categorical civil detention outside of wartime.[82] As Justice Souter concluded in his opinion in *Demore*, the earlier civil detention cases established that due process "calls for an individual

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76. Charles D. Weisselberg, *The Detention and Treatment of Aliens Three Years After September 11: A New New World?*, 38 U.C. DAVIS L. REV. 815, 834 (2005) ("The real clash in *Kim* was over very different conceptions of the value of liberty, specifically the extent to which the justices would tolerate restrictions for resident aliens that they would not brook for citizens. One cannot read the language of liberty in *Zadvydas* and *Kim* without concluding that there was a shift in the Court in the two years after *Zadvydas*—the two years immediately after September 11."). *See generally* Taylor, *supra* note 34.

77. Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citations omitted) (internal quotation marks omitted).

78. Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by th[e] amendments, and [] even aliens shall not be . . . deprived of life, liberty, or property without due process of law."); *see* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1016 (2002); *id*. at 1023 ("[T]he Court has applied the same general due process analysis to all preventive detention, including preventive detention that is likely to be much more short-lived than that imposed on aliens in removal proceedings."). *See generally* Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001) ("[T]he Due Process Clause protects an alien subject to a final order of deportation.").

79. *E.g.*, United States v. Salerno, 481 U.S. 739 (1987); Schall v. Martin, 467 U.S. 253 (1984) (preventative juvenile pretrial detention); Gerstein v. Pugh, 420 U.S. 103 (1975) (applying the Fourth Amendment to post-arrest detention).

80. *See, e.g.*, Kansas v. Crane, 534 U.S. 407 (2002); Kansas v. Hendricks, 521 U.S. 346 (1997); Heller v. Doe, 509 U.S. 312 (1993); *Foucha*, 504 U.S. 71; Addington v. Texas, 441 U.S. 418 (1979); Jackson v. Indiana, 406 U.S. 715 (1972).

81. Turner v. Rogers, 131 S. Ct. 2507 (2011).

82. *See* Cole, *supra* note 78, at 1009–10 ("Outside of wartime, no Justice on the Court has even argued for civil detention in the absence of an individualized finding that the detention is necessary to protect against a distinct danger posed by the individual sought to be detained."); *see also* Demore v. Kim, 538 U.S. 510, 549 (2003) (Souter, J., concurring in part and dissenting in part) (quoting *Salerno*, 481 U.S. at 755) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

determination before someone is locked away," rather than a categorical determination.[83]

In its due process case law, the Court has emphasized the importance of a high substantive standard. Civil commitment, for example, required a showing of not only danger to society, but also mental illness or a comparable additional factor.[84] Indeed, several of the state civil detention statutes that were upheld required the government attorney to show that detention was the *least restrictive* means to protect the public.[85] A statute that categorically requires detention based upon past acts and affords decisionmakers no authority to consider evidence of rehabilitation or the minor nature of past crimes is out of step with this rigorous approach. Relying upon a categorical proxy for flight risk and dangerousness, rather than a direct, individualized analysis of these factors, does not effectively allocate government resources to ensure removal or protect the community.[86]

The Court's civil detention case law also emphasizes that due process requires that the government bear the burden of proving the need for detention, at least by the intermediate "clear and convincing" evidence standard of proof (which is higher than a preponderance, but lower than "beyond a reasonable doubt").[87] The mandatory detention provisions, as currently implemented, do not meet this requirement. Although the standard for determining whether an individual had a qualifying conviction for purposes of the mandatory detention statute was not addressed in *Demore*, the Board of Immigration Appeals (the "BIA") had previously

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83. *Demore*, 538 U.S. at 551 (Souter, J., concurring in part and dissenting in part).

84. *See Foucha*, 504 U.S. at 75–76 (citation omitted) ("[T]o commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence . . . that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others."); *see also Hendricks*, 521 U.S. at 346–47 (citing *Heller*, 509 U.S. at 314–15) ("Generally, this Court has sustained a commitment statute if it couples proof of dangerousness with proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'").

85. *Heller*, 509 U.S. at 312, 318 (upholding a civil commitment scheme that required government to show by clear and convincing evidence that individuals were "mentally retarded or mentally ill individuals who present a threat of danger to themselves, family, or others, who can reasonably benefit from the available treatment, and *for whom the least restrictive alternative is placement in the relevant facility*" (emphasis added)); *see, e.g.*, United States v. Salerno, 481 U.S. 739, 747 (1987) (citing 18 U.S.C. § 3142(f) (1982)) (explaining that the Bail Reform Act limits the circumstances under which detention may be sought); *see also Demore*, 538 U.S. at 549–50 (Souter, J., concurring in part and dissenting in part).

86. *See* Zadvydas v. Davis, 533 U.S. 678, 699 (2001) ("[In answering] whether the detention is, or is not, pursuant to statutory authority. . . . [T]he habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the alien's presence at the moment of removal.").

87. Foucha v. Louisiana, 504 U.S. 71, 86 (1992); Addington v. Texas, 441 U.S. 418, 431–32 (1979).

addressed this issue. The Board had construed a detention regulation to require detention of anyone alleged to be subject to mandatory detention unless the immigration judge was "convinced that the [INS] is substantially unlikely to prevail on its charge."[88] Indeed, the Board suggested that the INS would not even have to produce a certified conviction record at the initial hearing in order to hold an individual in mandatory detention.[89] This decision effectively put the burden of proof on the individual rather than the government, and did not require a heightened standard of proof.

The Court has also emphasized the importance of "strict procedural safeguards."[90] Virtually all of the civil detention schemes to come before the Court have involved individualized assessments and adversarial hearings before a judge.[91] The non-wartime civil detention schemes that the Court has upheld also involved proceedings in which individuals had a right to appointed counsel or where the individual before the court in an as-applied challenge had counsel.[92] Under current BIA precedent, the very limited "*Joseph* hearing" afforded to people who wish to challenge their classification as mandatory detainees involves no right to appointed counsel and is not transcribed, which makes it difficult to appeal.[93] Because

88. *In re* Joseph, 22 I. & N. Dec. 799, 807 (B.I.A. 1999).

89. *Id.*

90. Kansas v. Hendricks, 521 U.S. 346, 368 (1997).

91. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 315–16 (1993) (upholding scheme that involved three judicial hearings with appointed counsel and examination by two mental health professionals); *Foucha*, 504 U.S. at 86 (overturning decision to extend civil commitment of petitioner who was not found to be mentally ill, but only dangerous, in proceeding in which burden was unconstitutionally placed on individual seeking release); *Addington*, 441 U.S. at 420 (striking down scheme that involved examinations by mental health professionals and six-day hearing based upon insufficiently high standard of proof); Jackson v. Indiana, 406 U.S. 715, 731–39 (1972) (striking down a statute that permitted indefinite detention of an individual who was deemed incompetent to proceed in criminal trial after examination by two psychiatrists and hearing with counsel); Greenwood v. United States, 350 U.S. 366 (1956) (applying the Necessary and Proper Clause to uphold federal civil detention of individual who was deemed incompetent and dangerous after multiple psychiatric evaluations and a competency hearing at which he was represented by counsel); Minnesota *ex rel.* Pearson v. Probate Court of Ramsey Cnty., 309 U.S. 270, 271–272 (1940) (upholding state statute permitting commitment of dangerous person with "psychopathic personality" following court hearing).

92. *See, e.g.*, *Heller*, 509 U.S. at 316 ("Upon filing of the petition, the trial court must appoint counsel to represent the individual in question, unless he retains private counsel."); *Greenwood*, 350 U.S. at 371 (counsel appointed for petitioner); *Minnesota ex rel. Pearson*, 309 U.S. at 272 (upholding a statute acknowledging the right to counsel); *see also* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (holding that civil detention for failure to pay child support violates Due Process because petitioner "received neither counsel nor the benefit of alternative procedures"); *Foucha*, 504 U.S. at 114 (Thomas, J., dissenting) ("Throughout these proceedings, Foucha was represented by state-appointed counsel."); *Addington*, 441 U.S. at 420 ("Appellant retained counsel and a trial was held before a jury."); *Jackson*, 406 U.S. at 718 ("A competency hearing was subsequently held at which petitioner was represented by counsel.").

93. *See generally* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65 (2011).

the judge cannot make any individualized assessments of danger or flight risk, and the BIA's governing standard is deferential to the immigration prosecutor, a *Joseph* hearing typically involves very minimal process.

The Court has recognized the need for procedural and substantive standards that accord with the serious and often irreparable harm that a longer period of detention may cause an individual and her family. As the Court has recognized in other contexts, prolonged detention "may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[94] A recent civil detention decision, *Turner v. Rogers*,[95] confirms that the *Salerno* line of cases still governs civil detention. *Turner* held that detention for civil contempt of court based on failure to pay child support must be accompanied by counsel or other strong procedural protections.[96]

The *Demore* majority did not cite *Salerno* or other seminal civil detention cases.[97] Instead, the Court supported its holding with two outlying due process cases. First, it cited *Carlson v. Landon*,[98] which involved a statute under which the Attorney General had discretion to detain members of the Communist Party during their removal proceedings.[99] *Carlson* is a troubling decision, but unlike *Demore*, it did not involve a mandatory detention statute.[100] More importantly, it is an outlier in the civil detention jurisprudence. It is a product of the McCarthy era, with its parallels to the racial, ethnic, and religious profiling of the post-September 11 period.[101] Its approach to due process is not consistent with the intervening due process cases discussed above.

Second, the Court cited *Reno v. Flores*,[102] which similarly did not support the constitutionality of a mandatory detention scheme. *Flores* involved the choice of placement for juveniles who did not contest the

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Demore did not have occasion to address the sufficiency of the *Joseph* standard since the Court found that Kim had waived his right to a *Joseph* hearing. Demore v. Kim, 538 U.S. 510, 513–14 (2003).

94. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (citation omitted); *see* WESSLER, *supra* note 22, at 22–27.

95. 131 S. Ct. 2507 (2011).

96. *Id.* at 2520.

97. Taylor, *supra* note 34, at 364.

98. 342 U.S. 524 (1952).

99. *Id.* at 526–28.

100. *See id.* at 528 n.5 (1952) (citing Internal Security Act of 1950, § 23, 8 U.S.C. § 156) ("Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole."); *id.* at 541–42 (citation omitted) ("There is no evidence or contention that all persons arrested as deportable under § 22 of the Internal Security Act . . . for Communist membership are denied bail. In fact, a report filed with this Court by the Department of Justice in this case at our request shows allowance of bail in the large majority of cases.").

101. *See* Demore v. Kim, 538 U.S. 510, 573–74 (2003) (Souter, J., concurring in part and dissenting in part).

102. 507 U.S. 292 (1993).

INS's power to maintain custody over them.[103] The juveniles also received immigration court hearings regarding their placements. The case does not speak to the question of whether an individual may constitutionally be detained without a bond hearing.[104]

Notably, although the *Demore* majority distinguished *Zadvydas* based upon the duration of detention and the fact that detaining someone whose removal is "no longer practically attainable" does not serve the goals of immigration detention,[105] it did not mention a distinction that cut the other way; that whereas the *Zadvydas* petitioners had final orders of removal, the respondent in *Demore* did not have a final order (although he had conceded deportability[106]), and indeed still had lawful permanent resident status.[107] As Justice Souter emphasized, the Court has long held that lawful permanent residents are entitled to a very high level of due process, approaching that afforded citizens.[108] A significant percentage of individuals in removal proceedings are lawful permanent residents.[109]

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103. *Id.* at 299–300.

104. *See Demore*, 538 U.S. at 575–76 (Souter, J., concurring in part and dissenting in part).

105. *Id.* at 511 (majority opinion).

106. *Demore* rested on the assumption that the petitioner had conceded "deportability," *id.* at 514, and did not reach the question of whether someone who had not conceded deportability could be mandatorily detained consistent with due process. The term "deportable," as used in section 236(c) and throughout the INA, refers to the preliminary determination that DHS has grounds for deporting an individual (for example, that the individual has been convicted of a qualifying criminal offense), as distinct from the question of whether the individual qualifies for relief such as asylum or withholding, deferral, or cancellation of removal. *Compare* 8 U.S.C. § 1227 (2012) (grounds of deportability) *with id.* § 1229a(c)(4) ("Applications for relief from removal"). Thus, the fact that Petitioner Kim had conceded deportability did not mean that he would necessarily be removed at the conclusion of proceedings. *See* Taylor, *supra* note 34, at 356–57.

107. *See, e.g.*, Samantha M. Brock, Demore v. Kim*: A Divided Supreme Court Upholds Lesser Due Process*, 10 NEW ENG. J. INT'L & COMP. L. 137, 174 (2004) (citing Brief for Law Faculty as Amicus Curiae Supporting Respondent at 9, Demore v. Kim, 538 U.S. 510 (2003) (No. 01-1491) ("On its face this seems an astonishing assertion: those who are merely accused should have fewer protections than this against whom a final determination has been rendered.")).

108. *See generally* Taylor, *supra* note 34 (noting mandatory detention's disproportionate impact on lawful permanent residents); *Demore*, 538 U.S. at 541 (Souter, J., concurring in part and dissenting in part) ("The Court's holding . . . forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process.").

109. DHS does not publish annual numbers of lawful permanent residents whom it has deported or placed in removal proceedings. However, a 2010 study based on Freedom of Information Act data estimated that ICE arrested 7200 green card holders in New York City between 2005 and 2010. This figure is more than one-fifth of total ICE arrests in New York during that period. N.Y. UNIV. SCH. OF LAW IMMIGRANT RIGHTS CLINIC ET AL., INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRANT DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 7 (2012), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf. Human Rights Watch has reported that 9.8 percent of people actually deported between April 1997 and August 2007 were lawful permanent residents. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS) 6 tbl. 4 (2010), *available at* http://www.hrw.org/reports/2009/04/15/forced-apart-numbers. Lawful permanent residency is a threshold requirement for certain forms of relief from removal, so

Under the Immigration and Nationality Act, a lawful permanent resident does not lose the benefit of that status until he is actually ordered removed and the order becomes administratively final following affirmation by the BIA or a waiver of appeal rights.[110] As Justice Souter observed in his dissent, the *Demore* majority passed over decades of due process case law recognizing the heightened due process rights of lawful permanent residents as comparable to those of citizens.[111]

Likewise, in emphasizing that mandatory detention during proceedings ensured future appearances while detention of someone whose removal was not attainable did not serve an immigration-related purpose, the majority overlooked the subset of mandatory detainees who will ultimately win relief from removal[112] and gain or retain permission to remain in the United States. Indeed, even individuals whose removals will not be "practically attainable"—such as most Cuban citizens and stateless individuals—are routinely subjected to mandatory detention during proceedings. Detention of individuals who will win relief from removal (for example, asylum), or whose removal is otherwise not likely to be legally or practically attainable does not serve the purpose of enforcing the immigration laws[113]

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lawful permanent residents likely win deportation challenges (and face prolonged proceedings) more often than other individuals. *See, e.g.*, 8 U.S.C. §§ 1182(h), 1229b(a) (2012).

110. *Demore*, 538 U.S. at 543 (Souter, J., concurring in part and dissenting in part) (citing 8 C.F.R. § 1.1(p) (2002)) ("He may therefore claim the due process to which a lawful permanent resident is entitled."). Justice Souter also points out that even the dissenting Justices in *Zadvydas*, who would have approved indefinite post-final-order detention, supported their argument by emphasizing that the population at issue in *Zadvydas* had no right to remain in the United States. *Id.* at 554–55.

111. *See id.* at 561 (Souter, J., concurring in part and dissenting in part) (citation omitted) ("Some individual aliens covered by § 1226(c) have meritorious challenges to removability or claims for relief from removal. As to such aliens, as with Zadvydas and Ma, the Government has only a weak reason under the immigration laws for detaining them."); *see also id.* at 560–61 ("While there are differences between detention pending removal proceedings (this case) and detention after entry of a removal order (*Zadvydas*), the differences merely point up that Kim's is the stronger claim."); *see, e.g.*, Taylor, *supra* note 34; Weisselberg, *supra* note 76.

112. Notably, *Demore* addressed an individual who (according to the Court) had conceded removability and was seeking withholding of removal. The Court did not address the BIA's standard for determining whether an individual is subject to mandatory detention under *In re* Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999). *Demore*, 538 U.S. at 514 n.3; *see* Gonzalez v. O'Connell, 355 F.3d 1010, 1020–21 (7th Cir. 2004).

113. *See Demore*, 538 U.S. at 527–28 ("[D]etention of deportable criminal aliens *pending their removal proceedings* . . . necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed."); Zadvydas v. Davis, 533 U.S. 678, 699–700 (2001) (The basic purpose of post-removal detention is "assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized."); Kalhan, *supra* note 16, at 44 ("[D]etention and other forms of custody are constitutionally permissible to prevent individuals from fleeing or endangering public safety.").

The majority also did not address the fact that as a practical matter, detention can constitute an even more serious deprivation for individuals still fighting their removal cases than for those with final orders. Being detained during removal proceedings greatly diminishes the likelihood of success.[114] Immigration law is extremely complicated, particularly in cases that involve questions of the immigration consequences of criminal convictions. Most people in detention must represent themselves due to a lack of money to hire an attorney and a dearth of access to pro bono counsel, whereas those not in detention are more likely to have access to counsel.[115] Efforts to fight a complicated legal case without an attorney are further complicated by detention in remote facilities that are far from family members and evidence, and by the exorbitant costs of phone calls to family members.[116] A detainee's knowledge that he or she will not receive an individualized bond hearing even weighs against pursuing meritorious claims.

III. *DEMORE* IN THE CIRCUIT COURTS: RECOGNIZING TEMPORAL LIMITS

In the brief period between *Zadvydas* and *Demore*, every appellate court to address the constitutionality of mandatory detention held that it violated due process.[117] Since *Demore*, lower courts have endeavored to

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114. *See Accessing Justice*, *supra* note 26, at 363–64. Represented individuals with LPR-related cases were thirty-two percent more successful than their underrepresented counterparts; those represented individuals with non-LPR-related cases were thirty-eight percent more successful than their underrepresented counterparts. *Id.* at 385. Moreover, the "likelihood of filing an application for relief [for example, for asylum or Convention Against Torture relief] is highly correlated with having legal counsel and with custody status. . . . Ninety-five percent to 98% of nondetained individuals before New York Immigration Courts who filed applications for relief were represented." *Id.* at 379.

115. "More than half of respondents in removal proceedings, and 84% of detained respondents, do not have representation. The lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation by 'immigration consultants' and 'notarios.'" AM. BAR ASS'N COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES ES-7 (2010); *see* JOAN FRIEDLAND, IMMIGRATION POLICY CENTER, FALLING THROUGH THE CRACKS: HOW GAPS IN ICE'S PROSECUTORIAL DISCRETION POLICIES AFFECT IMMIGRANTS WITHOUT LEGAL REPRESENTATION 5 (2012) (finding that of the individuals detained, roughly eighty-four percent are unrepresented).

116. INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 13, at 110 (footnote omitted) (concluding that "ICE's history when it comes to providing free, low-cost telephone service to immigrant detainees has been deplorable" and observing that ICE's contract with telephone service provider "does not contain any penalties for inadequate connectivity, excessive charges or other problems, despite the fact that with this system the company has no incentive to provide quality service"); *see* Demore v. Kim, 538 U.S. 510, 554 (2003) (Souter, J., concurring in part and dissenting in part) ("[D]etention prior to entry of a removal order may well impede the alien's ability to develop and present his case on the very issue of removability.").

117. *E.g.*, Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002); Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002); Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002); Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001);

implement the Supreme Court's holding in a way that is most consistent with the due process principles recognized in *Zadvydas* and its predecessors. Some courts and the BIA have recognized limitations related to the likelihood that an individual will be found removable[118] and to the amount of time that has passed since release from criminal custody for a removable offense.[119] In addition, all three appellate courts that have decided challenges to prolonged mandatory immigration detention have held that the mandatory detention statute does not authorize either "prolonged" detention without a bond hearing or durations of detention without a bond hearing that are not "reasonable."[120]

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see also Taylor, *supra* note 34, at 365. The Seventh Circuit had upheld the mandatory detention statute, but it issued this decision before *Zadvydas*. *See generally* Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999).

118. *E.g.*, *In re* Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999) (finding that an individual is subject to mandatory detention unless he or she can prove he or she is "substantially unlikely to prevail"). The *Joseph* standard has been criticized, particularly because it places the burden of proof on the individual being detained. *See* Dona, *supra* note 93, at 66–67.

119. *See, e.g.*, *In re* Garcia Arreola, 25 I. & N. Dec. 267, 271 (B.I.A. 2010) (holding that individuals released from criminal custody for removable offense prior to 1998 effective date of INA section 236(c) are not subject to mandatory detention). The idea of subjecting individuals to mandatory detention based upon convictions for which they were released prior to the effective date of the mandatory detention statute also raises serious due process concerns. Relatedly, many courts have held that because the statute instructs DHS to take an individual into custody "when released" from criminal custody, it governs detention only if the individual was taken into ICE custody right after being released from criminal custody for an enumerated offense. *See, e.g.*, Bogarin-Flores v. Napolitano, No. 12-0399, 2012 WL 3283287, at *3 (S.D. Cal. Aug. 10, 2012); Rianto v. Holder, No. 11-0137, 2011 WL 3489613, at *3 (D. Ariz. Aug. 9, 2011); Sylvain v. Holder, No. 11-3006, 2011 WL 2580506, at *6 (D.N.J. June 28, 2011) ("Most District Courts considering the issue have rejected the BIA's interpretation of § 1226(c)(1) in *Matter of Rojas*."); Oscar v. Gillen, 595 F. Supp. 2d 166, 169 (D. Mass. 2009); Bromfield v. Clark, No. 06-0757, 2007 WL 527511, at *4–5 (W.D. Wash. Feb. 14, 2007); Boonkue v. Ridge, No. 04-0566, 2004 WL 1146525, at *2 (D. Or. May 7, 2004) (finding that the individual was not subject to mandatory detention because he was not taken into custody until five years after being released from state custody); Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1231 (W.D. Wash. 2004) ("[M]andatory detention statute, INA § 236(c), does not apply to aliens who have been taken into immigration custody several months or several years after they have been released from state custody."); Pastor-Camarena v. Smith, 977 F. Supp. 1415, 1417 (W.D. Wash. 1997) ("The plain meaning of [§ 236(c)] is that it applies immediately after release from incarceration, not to aliens released many year earlier."); *see also* Zabadi v. Chertoff, No. 05-03335, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005) ("Department of Homeland Security need not act immediately but has a reasonable period of time after release from incarceration in which to detain."). The BIA and two circuit courts, however, have interpreted this language to permit commencement of mandatory detention after time has passed since release from criminal custody. *See* Sylvain v. Att'y Gen., 714 F.3d 150, 161 (3d Cir. 2013); Hosh v. Lucero, 680 F.3d 375, 378 (4th Cir. 2012); *In re* Rojas, 23 I. & N. Dec. 117, 122 (B.I.A. 2001).

120. Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013) (holding that "when detention becomes prolonged, § 1226(c) becomes inapplicable"); Diop v. ICE/Homeland Sec., 656 F.3d 221, 235 (3d Cir. 2011) (holding that INA section 236(c) "authorizes only mandatory detention that is reasonable in length"); Ly v. Hansen, 351 F.3d 263, 270 (6th Cir. 2003) (construing "the pre-removal detention statute to include an implicit requirement that removal proceedings be concluded within a reasonable time").

Both Justice Rehnquist's majority opinion and Justice Kennedy's concurrence in *Demore* rest on the idea that mandatory detention under INA section 236(c) is typically brief. The majority stated that mandatory detention is authorized for "the brief period necessary for [Kim's] removal proceedings," which had lasted six months at the time of the decision,[121] and distinguished *Zadvydas* in part on the basis that "the detention here is of a much shorter duration."[122] The Court held that "the detention at stake under [8 U.S.C.] § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal."[123] Justice Kennedy made clear in his concurrence that the Court was not finding that section 236(c) would authorize a longer period of detention, stating that because "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."[124] This emphasis on the temporally limited nature of mandatory detention has become an important tool for limiting *Demore* in the lower courts.

A. The Ninth Circuit

The Ninth Circuit has "addressed the question of how broadly *Demore* sweeps in several decisions over the past decade" and has "consistently held that *Demore*'s holding is limited to detentions of brief duration."[125] The Ninth Circuit's initial post-*Demore* decisions arose in the context of as-applied challenges involving extremely long periods of detention, whereas more recent cases provided an opportunity for the Circuit to truly limit *Demore* to its facts. The Circuit recently adopted a rule that, as this Article argues, strikes respects disparate strains of Supreme Court doctrine while also reflecting institutional realities: any immigration detention lasting six months or longer requires a bond hearing.[126]

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121. *Demore*, 538 U.S. at 523.

122. *Id.* at 528.

123. *Id*. at 530. This statistic was criticized at the time *Demore* was decided and is even less accurate today, as the durations of immigration proceedings have increased. *See generally* Taylor, *supra* note 34; *see also* Transactional Records Access Clearinghouse, *supra* note 33 (explaining in the first quarter of fiscal year 2013, the average duration of proceedings was 261 days for cases resulting in removal orders and more than two years, or 839 days for cases in which respondents won relief).

124. *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (citing Zadvydas v. Davis, 533 U.S. 678, 684–86 (2001) (Kennedy, J., dissenting) ("[A]liens are entitled to be free from detention that is arbitrary or capricious.")).

125. *Rodriguez*, 715 F.3d at 1137.

126. *Id*. at 1143.

First, in a fact-specific 2005 decision,[127] the court held that two years and eight months of mandatory detention was prolonged and thus required a bond hearing.[128] Several years later, in *Casas-Castrillon v. Department of Homeland Security*,[129] the court held that once a removal order is appealed to the Court of Appeals and remanded, mandatory detention is no longer authorized.[130] The court avoided the due process problem, which would be caused by such prolonged detention, by construing INA section 236(c) to provide no authority for detention after the case reached the Court of Appeals on a petition for review of the agency order, holding that authority for detention had shifted to INA section 236(a), which requires a bond hearing.[131] It did not address the question of whether detention might also become prolonged before a removal case reached the Court of Appeals.

Courts in the Ninth Circuit began analyzing the procedures required for a bond hearing in this circumstance, finding that in light of the already prolonged detention, due process requires more robust procedures than are typical in an immigration court bond hearing. For example, whereas in traditional immigration bond hearings the burden falls on the non-citizen to show entitlement to release, in "*Casas* hearings" (and now "*Rodriguez* hearings") the government bears the burden of proving by clear and convincing evidence that the individual is a flight risk or a danger to community.[132] Unlike traditional immigration bond hearings, *Casas* and *Rodriguez* hearings also must be recorded to allow for meaningful review.[133]

Several years after *Demore*, the Ninth Circuit reaffirmed *Zadvydas*'s continued vitality by recognizing a presumptive six-month limit on detention of some "arriving aliens"—individuals arrested at the border, including returning lawful permanent residents—who are subject to a

127. Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005).

128. *Id.* at 1242.

129. 535 F.3d 942 (9th Cir. 2008).

130. *Id.* at 948. *See generally* Rodriguez v. Hayes, 591 F.3d 1105, 1114–16 (9th Cir. 2010) (reviewing Ninth Circuit caselaw on prolonged immigration detention).

131. *Casas-Castrillon*, 535 F.3d at 942 ("An alien whose case is being adjudicated before the agency for a second time—*after* having fought his case in this court and won . . . has not received expeditious process. We therefore conclude that the mandatory [] detention of aliens under § 1226(c) was intended to apply for only a limited time and ended in this case when the BIA affirmed Casas' order of removal . . . . Thereafter, the Attorney General's detention authority rests with § 1226(a)."); *see Hayes*, 591 F.3d at 1116 (citing *Casas-Castrillon*, 535 F.3d at 951; *Tijani*, 430 F.3d at 1242) ("We have subsequently clarified that, in order to avoid the serious constitutional questions raised by indefinite mandatory detention, detention of an alien beyond an expedited period ceases to be mandatory under Section 1226(c) and instead becomes discretionary under Section 1226(a).").

132. Singh v. Holder, 638 F.3d 1196, 1203 (9th Cir. 2011).

133. *Id.* at 1208–09; *see, e.g.*, Benavides-Duran v. Asher, No. 12-0913, 2012 WL 5471090, at *4 (W.D. Wash. Nov. 9, 2012) (applying this rule).

different form of mandatory detention.[134] *Nadarajah v. Gonzales*, like *Zadvydas*, involved a petitioner who had argued that his removal could not be effectuated even if he were to be ordered removed.[135] The court focused on whether his removal was reasonably foreseeable and reinforced the idea that a six-month period was significant for purposes of a due process analysis.[136]

The Ninth Circuit subsequently extended the reasoning of *Tijani* and *Casas-Castrillon* to require bond hearings in cases of prolonged post-final-order detention—that is, in cases involving the same detention statute at issue in *Zadvydas*, INA section 241(a)(6). In *Diouf v. Napolitano*,[137] the court held that detention of an individual who has a judicial stay of removal and petition for review of a motion to reopen pending before the circuit court is governed by INA section 241(a)(6).[138] The *Diouf* panel then relied upon the reasoning and time periods at issue in *Demore* and *Casas-Castrillon*—along with the procedural due process analysis laid out in *Mathews v. Eldridge*—to hold that this discretionary detention of individuals with a final order becomes prolonged, and thus requires a bond hearing, after six months.[139] The court ordered a bond hearing even though Diouf, unlike Zadvydas, had no practical barrier to his deportation, and even though INA section 241(a)(6) makes no express reference to bond hearings.[140]

Most recently, in the 2013 *Rodriguez v. Robbins* class action decision, the Ninth Circuit extended the analysis used in *Diouf* to "construe the government's statutory mandatory detention authority under Section 1226(c) and Section 1225(b) [categorical detention for 'arriving aliens'] as limited to a six-month period, subject to a finding of

134. *See* Nadarajah v. Gonzales, 443 F.3d 1069, 1078–79 (9th Cir. 2006). There is some debate over the level of due process protections that should be afforded individuals deemed "inadmissible" as opposed to "deportable." *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 380 (2005) ("The Government, joined by the dissent, argues that the statutory purpose and the constitutional concerns that influenced our statutory construction in *Zadvydas* are not present for aliens . . . who have not been admitted to the United States. Be that as it may, it cannot justify giving the *same* detention provision a different meaning when such aliens are involved."); Bertrand v. Holder, No. 10-0604, 2011 WL 4356375 (D. Ariz. Aug. 16, 2011) (holding that inadmissible individuals have no procedural due process rights), *adopted by* 2011 WL 4356369 (D. Ariz. Sept. 19, 2011).

135. *Nadarajah*, 443 F.3d at 1071.

136. *Id.* at 1078.

137. 634 F.3d 1081 (9th Cir. 2011).

138. *Id.* at 1085.

139. *Id.* at 1092 n.13 ("As a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months.")

140. *Id.*; *see* Franco-Gonzales v. Holder, No. 10-02211, 2011 WL 5966657, at *3 (C.D. Cal. Aug. 2, 2011) (citing Rodriguez v. Hayes, 591 F.3d 1105, 1115 (9th Cir. 2010) ("While *Casas-Castrillon* did not define what constitutes a 'prolonged' period, the Ninth Circuit later extended the Supreme Court's definition of what is presumptively reasonable in the 8 U.S.C. § 1231(a)(6) removal context—i.e., a six-month detention period—to pre-removal discretionary detentions under 8 U.S.C. § 1226(a).")).

flight risk or dangerousness."[141] The district court subsequently entered a permanent injunction requiring DHS to provide each individual in mandatory immigration detention in the Central District of California, "by the class member's 181 st day of detention, with a . . . bond hearing before an Immigration Judge consistent with the substantive and procedural requirements" set forth in prior Ninth Circuit detention cases and in the court's order.[142] The injunction also requires DHS to identify class members periodically over the course of two years.[143]

B. The Third and Sixth Circuits

The Third and Sixth Circuits have likewise recognized that INA section 236(c) does not require open-ended detention without a bond hearing. The Sixth Circuit held in *Ly v. Hansen* "that the INS may detain *prima facie* removable aliens for a time reasonably required to complete removal proceedings in a timely manner. If the process takes an unreasonably long time, the detainee may seek relief in habeas proceedings."[144] Focusing on the idea of unreasonableness, the Sixth Circuit eschewed a clear rule in favor of a flexible list of factors. It held:

> [A] bright-line time limitation, as imposed in *Zadvydas*, would not be appropriate for the pre-removal period; hearing schedules and other proceedings must have leeway for expansion or contraction as the necessities of the case and the immigration judge's caseload warrant. In the absence of a set period of time, courts must examine the facts of each case, to determine whether there has been unreasonable delay in concluding removal proceedings.[145]

Citing language from *Zadvydas*, the Sixth Circuit held that once detention became prolonged, the government would have to show a "strong and special justification"[146] for continued detention and would have to hold a hearing on the justification. In petitioner Ly's case, pre-final-order detention had been prolonged and removal was not practical

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141. 715 F.3d 1127, 1133 (9th Cir. 2013).

142. Rodriguez v. Holder, No. 07-3239, 2013 WL 5229795, at *3 (C.D. Cal. Aug. 6, 2013).

143. *Id.* at *4. Shortly before this Article went to press, Judge Michael A. Ponsor of the District of Massachusetts accepted the Ninth Circuit's reasoning and adopted a six-month rule. Reid v. Donelan, No. 13-30125, 2014 WL 105026, at *4–5 (D. Mass. Jan. 9, 2014); *see* Bautista v. Sabol, 862 F. Supp. 2d 375, 381 (M.D. Pa. 2012) ("While courts have declined to establish concrete rules for appropriate detention periods, there exists a point—somewhere around the seven month mark—where pre-removal detention becomes universally questionable.") (addressing detention during expedited removal proceedings). Judge Ponsor held that this rule was supported by Supreme Court precedent, the due process concerns raised by prolonged detention, and concerns regarding access to courts, which this Article explores further below.

144. 351 F.3d 263, 268 (6th Cir. 2003); *see also id.* at 275 (Haynes, J., concurring) ("[A]ny time periods that exceed the time limits cited in [*Demore v.*] *Kim* would be presumptively unconstitutional.").

145. *Id.* at 271 (majority opinion).

146. *Id*.

because the United States was not deporting people to their country of citizenship.[147]

The Third Circuit has adopted a similar approach. Even before the Third Circuit took up this issue, many district courts within the Third Circuit had recognized temporal limits on mandatory detention. In determining reasonableness of past detention, most of the district courts considered some combination of the factors that Judge John E. Jones identified in the published Middle District of Pennsylvania decision *Alli v. Decker*: whether the detention has continued beyond the average time necessary for completion of removal proceedings; the probable extent of future removal proceedings; the likelihood that removal proceedings actually will result in removal; and the conduct of both parties in the removal proceedings.[148]

In *Diop v. ICE/Homeland Security*, the Third Circuit held that once mandatory detention pursuant to INA section 236(c) becomes unreasonably prolonged, mandatory detention no longer serves the legitimate purposes of the statute and section 236(c) ceases to govern the individual's detention.[149] Like the Sixth[150] and the Ninth[151] Circuits, the court adopted this construction of the statute to avoid having to strike it down on due process grounds.[152] The Third Circuit construed INA section 236(c) to permit mandatory detention only so long as it was not unreasonably prolonged.[153] While recognizing that Justice Kennedy "did not frame the issue this way," it "read Justice Kennedy's [concurring opinion in *Demore*] to uphold the statute on its face, while leaving open the possibility that it might be unconstitutional as applied."[154]

The Third Circuit held that the petitioner's thirty-five month detention had become unreasonably prolonged but "decline[d] to establish a universal point at which detention will always be considered unreasonable."[155] Indeed, as discussed in greater detail below, the Third Circuit did not define reasonableness. It explained the analysis only in

147. *Id.* at 266 n.1.

148. Alli v. Decker, 644 F. Supp. 2d 535, 543–44 (M.D. Pa. 2009), *rev'd in part, vacated in part*, 650 F.3d 1007 (3d Cir. 2011).

149. 656 F.3d 221, 233–34 (3d Cir. 2011).

150. Ly v. Hansen, 351 F.3d 263, 270 (6th Cir. 2003) ("[B]y construing the pre-removal detention statute to include an implicit requirement that removal proceedings be concluded within a reasonable time, we avoid the need to mandate the procedural protections that would be required to detain deportable aliens indefinitely."); *see id.* at 269 ("[W]hile Congress did express a desire to have certain criminal aliens incarcerated during removal proceedings, it also made clear that such proceedings were to proceed quickly.").

151. Rodriguez v. Robbins, 715 F.3d 1127, 1137–38 (9th Cir. 2013).

152. *Diop*, 656 F.3d at 235.

153. *Id.* at 233.

154. *Id.* at 232 n.10.

155. *Id.* at 233–34.

general terms: "[T]he reasonableness determination must take into account a given individual detainee's need for more or less time, as well as the exigencies of a particular case," and "must take into account errors in the proceedings that cause unnecessary delay."[156] The *Diop* court faulted the immigration judge and government attorneys for unnecessary delays in Diop's case.[157] But it did not consider whether a three-year detention might have been reasonable if the government actors had not erred, nor recognize any general rules for how these factors should affect the reasonableness analysis.

In *Leslie v. Attorney General*,[158] the Third Circuit addressed the final factor in *Alli*, which focuses on the conduct of the individual and the government in removal proceedings.[159] Among all of the factors in *Alli*, the district courts in the Third Circuit have discussed this one the most extensively, interpreting it in divergent ways.[160] The *Leslie* court held that the fact that an individual had pursued bona fide challenges to his removal, including a successful appeal, did not make the corresponding extension in his mandatory detention reasonable, since a contrary holding would "effectively punish [Leslie] for pursuing applicable legal remedies."[161]

Thus, all three of the circuit courts to have squarely addressed the issue have held that mandatory detention has some type of temporal limits. This conclusion is compelled by *Demore*'s emphasis on the brevity of detention, by Justice Kennedy's concurring opinion, and by *Zadvydas* and the *Salerno* line of cases. The more challenging question is how to define these limits.

IV. The Case for a Six-Month Limit on Mandatory Detention

This Part argues that courts can consistently give effect to both *Demore* and *Zadvydas* by providing a bond hearing after six months to any individual who was initially subject to mandatory detention under INA section 236(c), regardless of the course that her removal proceedings have taken. In raising this subject, I do not intend to suggest that *Demore* was rightly decided or that due process permits mandatory detention without a bond hearing in the first instance. Rather, this Article focuses on how lower courts should respond to *Demore* because this is a question with great practical import. The choice of rule or standard gives content to an

156. *Id.* at 234.
157. *Id.*
158. 678 F.3d 265 (3d Cir. 2012).
159. *Id.* at 270–71.
160. *See infra* Part IV.B.1.
161. Leslie v. Att'y Gen., 678 F.3d 265, 271 (3rd Cir, 2012) (alteration in original) (quoting Oyedeji v. Ashcroft, 332 F. Supp. 2d 747, 753 (M.D. Pa. 2004)).

otherwise abstract constitutional principle,[162] and shapes the experience of individuals subject to mandatory detention.

This Part first argues that six months has been recognized as a constitutionally significant benchmark in due process jurisprudence. It then proposes that prudential considerations, based upon district courts' application of the "unreasonably prolonged" standard and institutional considerations, likewise support a six-month bright-line limit on mandatory detention. The reasonableness standard adopted by the Sixth and Third Circuits allows for significant flexibility but has led to inconsistent approaches to similar facts and does not sufficiently account for the largely unrepresented nature of the detained population or other pragmatic concerns that arise in an administrative court system.

A. Doctrinal Basis for a Six-Month Limit

By predicating its decision on a "brief" period of detention,[163] *Demore* left intact *Zadvydas*'s holding that long periods of immigration detention raise serious due process concerns and that six months represents a significant deprivation of due process. Respondent Hyung Joon Kim had been held in mandatory detention for six months before a district court granted his habeas petition and an immigration judge released him on bond based upon his low flight risk and lack of danger to the community.[164] *Demore* emphasized that "the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in

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162. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 939 (1999) (arguing for a reexamination of "the illusion that constitutional rights are defined by courts through a process of identifying pure constitutional values without regard to functional, fact-specific policy concerns"). A number of authors have proposed taxonomies for the judicially-created rules or standards used to implement abstract articulations of constitutional rights. *See, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, 15 (2004) (distinguishing between "constitutional operative propositions (judicial statements of *what the Constitution means*)" and "constitutional decision rules (judicial statements of *how courts should decide* whether the operative propositions have been complied with)"); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 106 (1997) (arguing that "[c]onstitutional doctrine and the tests by which it is partly constituted matter enormously" and cataloging different types of constitutional balancing tests and other implementation methods); *see also* Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 80 (2000) ("Judicial doctrines, working alongside rules laid down and practices built up by other branches, properly fill in the document's outline, making broad principles workably specific in a court and in the world.").

163. Demore v. Kim, 538 U.S. 510, 513 (2003) ("We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings."); *see id.* at 528 (citation omitted) ("While the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,' the detention here is of a much shorter duration.").

164. *Id.* at 515, 530–31.

which the alien chooses to appeal."[165] Particularly in light of the focus of both the majority opinion and Justice Kennedy on the brevity of the detention at issue, *Demore* is consistent with *Zadvydas*'s presumption that detention for longer than six months raises serious due process concerns.[166]

This conclusion is bolstered by the fact that individuals like Kim, who still have lawful permanent residency status and have not been ordered removed, are sometimes considered to have greater due process rights than individuals who, like Zadvydas, have no immigration status in the United States.[167] Moreover, the remedy proposed here and recently adopted by the Ninth Circuit—a bond hearing after six months—is far more limited than the release required by *Zadvydas*.

Moreover, reading the mandatory detention statute to require detention beyond the period approved in *Demore* is problematic because even the six-month period of mandatory detention was unprecedented in general civil detention jurisprudence. As discussed above, no other peacetime decision has authorized such prolonged civil detention without an individualized finding of dangerousness.[168] Given the serious due process concerns underlying the analysis of INA section 236(c), courts should err on the side of limiting mandatory detention to the period addressed in *Demore*.

The *Salerno* line of cases supports the conclusion that lower courts should not extend *Demore* to uphold mandatory detention for longer periods of time. The Supreme Court has required stringent substantive standards and strong procedural protections for civil detention, particularly when prolonged.[169] For example, pretrial detention under the Bail Reform Act was deemed constitutional because it required "a full-blown adversary hearing" and "clear and convincing" proof that "no conditions of release" could "reasonably assure the safety of the community or any person,"[170] even though the length of detention was limited by the Speedy Trial Act to about one-hundred days.[171] The sex

165. *Id.* at 530.

166. *See* Zadvydas v. Davis, 533 U.S. 678, 701 (2001) ("We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months."); Rodriguez v. Robbins, 715 F.3d 1127, 1137–44 (9th Cir. 2013) (discussing the application of *Demore*); Diouf v. Napolitano, 634 F.3d 1081, 1091 (9th Cir. 2011); Reid v. Donelan, No. 13-30125, 2014 WL 105026, at *4 (D. Mass. Jan. 9, 2014).

167. *See* Landon v. Plasencia, 459 U.S. 21, 25–27 (1982); *see also* Clark v. Martinez, 543 U.S. 371, 378 (2005) (holding that post-final-order detention statute must be interpreted in the same way for LPRs and non-LPR individuals subject to the statute).

168. Cole, *supra* note 78, at 1009–10; *see supra* Part II.

169. *See supra* Part II.

170. United States v. Salerno, 481 U.S. 739, 749–50 (1987).

171. 18 U.S.C. § 3161 (2006). With very limited exceptions, the Speedy Trial Act requires that an information or indictment be issued within thirty days and that the trial commence within seventy days from the information or indictment.

offender commitment scheme in *Kansas v. Hendricks* permitted detention for up to one year at a time, but the Court justified its decision to uphold this scheme by reference to Kansas' "strict procedural safeguards," including a right to trial by jury and a requirement that the government prove the need for commitment beyond a reasonable doubt.[172] In *Foucha v. Louisiana*, the Court struck down civil commitment schemes providing for indefinite detention, overturning a civil contempt order that carried a one-year sentence because the individual was provided with neither a lawyer nor adequate alternative procedural safeguards.[173]

The *Mathews v. Eldridge* style analysis employed in *Nadarajah* references these core due process concerns, balancing them against the minimal process of an immigration court bond hearing. The Ninth Circuit has also applied a *Mathews v. Eldridge* style analysis in *Diouf v. Napolitano*, finding the private interests at stake to be "profound," and the risk of erroneous deprivation of liberty absent a hearing to be "substantial."[174]

Additionally, the Ninth Circuit has emphasized the procedural safeguards that Congress has created for the few types of immigration detention that it expressly authorized to continue beyond six months.[175] The choice of six-month increments in these statutes bolsters the conclusion that the mandatory detention statute should not be construed to permit prolonged detention without procedural protections and that six months is a significant period for due process purposes.[176] Similarly, in

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172. Kansas v. Hendricks, 521 U.S. 346, 364 (1997) ("The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards.").

173. *See* Foucha v. Louisiana, 504 U.S. 71, 82 (1992) (citations omitted) ("It was emphasized in *Salerno* that the detention we [the Court] found constitutionally permissible was strictly limited in duration. Here, in contrast, the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely."); Addington v. Texas, 441 U.S. 418, 431–33 (1979) (striking down civil commitment scheme providing for indefinite detention because standard of proof by government was too low); *see also* Bartley v. Kremens, 402 F. Supp. 1039, 1053 (E.D. Pa. 1975) (holding that final commitment hearing was required within two weeks from initial detention).

174. Diouf v. Napolitano, 634 F.3d 1081, 1091–92 (9th Cir. 2011); 8 U.S.C. §§ 1225(b)(1)(B)(ii), 1225(b)(2)(A) (2012) (discussing the detention of individuals in expedited removal proceedings); *see* Reid v. Donelan, No. 13-30125, 2014 WL 105026, at *5 (D. Mass. Jan. 9, 2014).

175. Nadarajah v. Gonzales, 443 F.3d 1069, 1079 (9th Cir. 2006).

176. *See id.* ("Further, the structure of the immigration statutes, with specific attention given to potential detentions of over six months in carefully defined categories, indicates that the period of detention allowed under the general detention statutes must be construed as being brief and reasonable, as the Supreme Court has determined in construing similar provisions."); *see also id.* at 1076–77 (holding that 8 U.S.C. §§ 1225(b)(1)(B)(ii), (b)(2)(A)—which provide for detention without a bond hearing for individuals intercepted at the border—are presumptively limited to six months).

First, the USA PATRIOT Act authorizes detention without a bond hearing for individuals whom the government suspects to be terrorists or to pose threats to national security. 8 U.S.C. § 1226a; *id.* §§ 1531–1537; *see Nadarajah*, 443 F.3d at 1078. Section 1226a provides for mandatory detention, until

an article setting forth an autonomy-based justification for preventative detention, legal philosopher Alec Walen surveyed jurisprudence extending beyond immigration detention and observed that "six months seems to reflect a reasonable outer limit on what can count as 'short-term' detention."[177] For all of these reasons, the Ninth Circuit rule comports with due process.[178]

B. A Pragmatic Approach

This Subpart contrasts the practical consequences of the rule and standard discussed above. First, it reviews district court decisions implementing the flexible reasonableness standard and compares these results to Ninth Circuit judicial doctrine. Second, it proposes institutional features of the removal system that courts should consider in choosing a rule or standard.

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the time of removal, of any non-citizen whom the Attorney General has certified as meeting one of the terrorism-related or other national security-related criteria set forth in the statute. *Id.* § 1226a(a)(6). These grounds are extremely broad. Presumably in response to *Zadvydas*, however, Congress included a section titled "Limitation on indefinite detention," which provides that an individual detained under this section of the USA PATRIOT Act "whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." *Id.* While this detention statute itself raises serious constitutional concerns, the choice of six-month increments for administrative review and for triggering a heightened substantive standard suggests that Congress saw this period as constitutionally significant. *Id.* § 1226a(a)(7).

Second, 8 U.S.C. §§ 1531, 1537, which were enacted years before *Zadvydas* as part of the 1996 amendments, created the Alien Terrorist Removal Court. Congress empowered this court, which operates separately from the immigration court system, to hold removal hearings for any non-citizen about whom "the Attorney General has classified information that an alien is an alien terrorist." *Id.* § 1533(a)(1). Such proceedings may be instituted based upon the Attorney General's certification that (among other things) the noncitizen is a terrorist and that his or her removal proceedings "would pose a risk to the national security of the United States." *Id.* §§ 1533(a)(1)(B), 1533(a)(1)(D). The statute gives the Attorney General discretion over whether to detain people in such proceedings and provides for release hearings only for lawful permanent residents. *Id.* § 1536(a). At the same time, it provides that the Attorney General must review his decision to certify an individual every six months. *See id.* § 1226a(a)(7); *see also Nadarajah*, 443 F.3d at 1078–79. Thus, while this statute too raises serious constitutional problems, it suggests that Congress viewed six months of detention as a significant period even before *Zadvydas*.

177. Alec Walen, *A Unified Theory of Detention, with Application to Preventative Detention for Suspected Terrorist*s, 70 Md. L. Rev. 871, 916 (2011). In addition to the Supreme Court's holding in *Zadvydas*, Walen points to several other examples suggesting that six months is a key outer limit for short-term detention, including a provision of the Fourth Geneva Convention relating to internment of civilians and the maximum punishment for a petty criminal offense without the right to a jury trial. *Id.* at 915 (citing Baldwin v. New York, 399 U.S. 66, 69 (1970)).

178. *See* Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013) *(*citing Diouf v. Napolitano, 634 F.3d 1081, 1092 n.13 (9th Cir. 2011)) ("As a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months."); Heeren, *supra* note 10, at 632 (noting that DHS could interpret INA section 236(c) to impose a six-month limit on mandatory detention).

As a preliminary matter, understanding the effects of different rules and standards and the institutional features of the system in which they will operate is particularly important where the constitution and relevant statutes do not expressly dictate a method of implementation. Thus, in *Zadvydas*, the Supreme Court recognized an implicit presumption of release after six months "for the sake of uniform administration in the federal courts."[179] Although this type of statutory construction is often the province of the Supreme Court, the due process concerns at issue in civil detention are sufficiently acute that at least a few lower courts have likewise construed ambiguously-worded detention statutes to require a hearing within a set period of time even where the statutes did not explicitly include a deadline. For example, district courts have ruled that to avoid a due process problem, a hearing is required within seventy-two hours of a civil commitment based on mental illness or commitment of a juvenile.[180]

Where the text of a constitutional right can encompass different methods of implementation, the courts should choose among these methods based in part on an understanding of their practical effects, within the relevant institutional structure.[181] As Richard Fallon has written, for example, the Supreme Court must "assess the competence of courts to conduct particular kinds of inquiries; the costs that particular tests are likely to engender—including judicial errors of both over- and under-protection and the burdens of litigation under narrower and broader, or more and less determinate, doctrinal formulations."[182]

This Subpart compares the effects of the circuit courts' differing approaches to defining prolonged detention. This analysis of district court

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179. Zadvydas v. Davis, 533 U.S. 678, 701 (2001) ("Consequently, for the sake of uniform administration in the federal courts, we recognize that [six-month] period.").

180. *See, e.g.*, Luna v. Van Zandt, 554 F. Supp. 68, 75 (S.D. Tex. 1982) (applying the *Mathews* balancing test and holding that the state was required to conduct a hearing on the patient's continued detention, with burden on the government, within seventy-two hours of beginning protective custody); Doe v. Gallinot, 486 F. Supp. 983, 994 (C.D. Cal. 1979) (setting a seventy-two hour hearing requirement with limited exceptions and absolute requirement of hearing after seven days), *aff'd*, 657 F.2d 1017 (9th Cir. 1981); Bartley v. Kremens, 402 F. Supp. 1039, 1053 (E.D. Pa. 1975) (holding that due process required probable cause hearing within seventy-two hours, and full commitment hearing within two weeks of detention, in juvenile commitment context), *dismissed as moot*, 431 U.S. 119 (1977); *see also* United States v. Shields, 522 F. Supp. 2d 317, 332 (D. Mass. 2007) (requiring probable cause hearing within forty-eight hours of scheduled release of federal prisoners deemed "sexually dangerous").

181. *See, e.g.*, David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 207–08 (1988) ("[I]n deciding constitutional cases, the courts constantly consider institutional capacities and propensities. That is, to a large extent, what constitutional law consists of: courts create constitutional doctrine by taking into account *both* the principles and values reflected in the relevant constitutional provisions *and* institutional realities. . . . [I]t makes much more sense to read into the Constitution a general requirement that its various provisions be interpreted in light of institutional realities than to insist that those realities be ignored."); Fallon, *supra* note 162, at 65–66.

182. Fallon, *supra* note 162, at 66.

decisions shows that the Third and Sixth Circuit approach, in practice, leads to disparate results and often accords insufficient attention to the magnitude of the deprivation of liberty at issue. In contrast, a clear six-month limit provides a framework for more consistently avoiding the most egregious deprivations of liberty.[183] Next, the analysis of institutional features of the removal system shows that the clear six-month rule allows for far more meaningful real-world administration of temporal limits than does the flexible reasonableness standard, particularly for the large portion of unrepresented people in detention.

1. Disparate District Court Approaches

The proliferation of district court habeas decisions addressing prolonged mandatory detention, particularly in the Third Circuit, provides a useful illustration of how a flexible reasonableness standard is applied in practice.[184] The Ninth Circuit's 2013 decision in *Rodriguez v. Robbins* makes clear that anyone who has been in mandatory immigration detention for more than six months is entitled to a bond hearing.[185] In contrast, the Third and Sixth Circuits' flexible standard, which provides that bond hearings are required only when mandatory detention becomes "unreasonably prolonged," leaves greater uncertainty and has led to disparate results that do not always focus on the magnitude of the deprivation of liberty at issue. As discussed above, the Third Circuit held in *Diop* that "the reasonableness determination must take into account a given individual detainee's need for more or less time, as well as the exigencies of a particular case," and "must take into account errors in the proceedings that cause unnecessary delay."[186] It did not mandate a particular test or set a definite temporal limit on mandatory detention.

District court judges in the Third Circuit have applied the reasonableness standard to interpret similar facts in different ways,

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183. *See generally* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 384 (1985); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976) ("It has been common ground . . . that the two great social virtues of . . . rules . . . are the restraint of official arbitrariness and certainty."). Moreover, "rules will be relatively cheaper (and thus more desirable) in areas of law where identical disputes arise frequently." Russell B. Korobkin, *Behavioral Analysis and Legal Forms: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 33 (2000). From an economic perspective, "added cost from having resolved the issue . . . at the promulgation stage will be outweighed by the benefit of having avoided additional costs repeatedly incurred in giving content to a standard on a retail basis." Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 563 (1992).

184. This Part focuses primarily on the Third Circuit because this circuit has a large number of relevant district court habeas decisions. This Article discusses cases from the past few years, not only after *Diop*, because many courts in the Third Circuit had previously applied a similar reasonableness standard based on *Ly*.

185. Rodriguez v. Robbins, No. 07-3239, 2012 WL 7653016, at *1 (C.D. Cal. Sept. 13, 2012).

186. Diop v. ICE/Homeland Sec., 656 F.3d 221, 234 (3d Cir. 2011).

particularly where detention has lasted more than six months but not yet two or more years.[187] Although a number of judges have simply stated that cases involving removal proceedings that have lasted significantly longer than average—typically a matter of years—involve unreasonably prolonged detention,[188] others have applied some combination of the factors that Judge John E. Jones enumerated in his published decision *Alli v. Decker*: (1) the length of past detention, (2) the reason proceedings have been extended (including an allocation of responsibility for delays between the parties), (3) the expected duration of future removal proceedings, and (4) the likelihood that proceedings will result in removal.[189]

The second and fourth factors, in particular, are not directly related to the due process principles that undergird the constitutional avoidance analysis. As a matter of both doctrine and the experience of the detainees, the duration of detention more meaningfully reflects the seriousness of the deprivation of liberty than the question of which party "caused" delays.[190] Focusing on the latter shifts the courts' focus from the magnitude of the deprivation of liberty to a contest over the parties' conduct in removal proceedings. Immigration detention, which is at least formally civil in nature, should not be converted to a sanction for an individual's conduct

187. Cases with the most egregious durations of past detention are sometimes found to involve "unreasonably prolonged" detention primarily on this basis. *See, e.g.*, Leslie v. Att'y Gen., 678 F.3d 265, 270–71 (3d Cir. 2012) (holding that mandatory detention was unreasonable because it lasted four years); Nwozuzu v. Napolitano, No. 12-3963, 2012 WL 3561972, at *4, *6 (D.N.J. Aug. 16, 2012) (finding that the typical removal proceeding should take between one-and-[a-]half and five months, and finding that a twenty-eight month detention was "unreasonably long").

188. *See, e.g.*, *Leslie*, 678 F.3d at 270–71 (3d Cir. 2012) (finding that the expected time for the case was five months, and that the individual's detention was unreasonable because it lasted four years); *Nwozuzu*, 2012 WL 3561972, at *4, *6 (finding that the typical removal proceeding should take between one-and-a-half and five months, and finding that a twenty-eight month detention was "unreasonably long"); *see also* Bete v. Holder, No. 11-6405, 2012 WL 1067747, at *8 (D.N.J. Mar. 29, 2012) (finding a twelve-month detention not unreasonably long in part because periods of detention that the Court of Appeals deemed unreasonably prolonged in *Diop* and *Leslie* were significantly longer).

189. 644 F. Supp. 2d 535, 542–43 (M.D. Pa. 2009) (citing Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003)), *rev'd in part, vacated in part*, 650 F.3d 1007 (3d Cir. 2011). *Alli* was frequently cited because Judge Jones discussed the district courts' emerging consensus that INA section 236(c) did not authorize unreasonably prolonged detention, and he catalogued factors that courts should consider in determining whether to award a bond hearing, while adopting the Sixth Circuit's reasonableness standard. The Court adopts the Sixth Circuit's instruction to "examine the facts of each case, to determine whether there has been unreasonable delay in concluding removal proceedings." *Id.* at 540.

190. *See* Demore v. Kim, 538 U.S. 510, 528 (2003) (citation omitted) (upholding mandatory detention because, "[w]hile the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,' the detention here is of a much shorter duration."); Foucha v. Louisiana, 504 U.S. 71, 82 (1992) (citation omitted) ("It was emphasized in Salerno that the detention [the Court] found constitutionally permissible was strictly limited in duration. Here, in contrast, the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely.").

in removal proceedings. The reasonableness standard also implies that routine government backlogs (particularly in the absence of bad faith by the government) can justify severe deprivations of liberty, even though this proposition finds no support in the Supreme Court's due process jurisprudence. Both overloaded immigration court dockets and long processing times for applications filed with U.S. Citizenship and Immigration Services, which often must be approved before an immigration judge can grant applications for relief, routinely delay removal proceedings.[191]

Determining which party is "responsible" for delays in immigration court proceedings can be daunting and subjective. First, with regard to individuals' appeals and applications for relief, the Third Circuit has adopted the Sixth Circuit's holding that, "[a]lthough an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take."[192] However, this guidance has proven susceptible to different interpretations, and district courts have adopted inconsistent approaches to facts such as individual respondents' appeals or applications and government appeals. Many judges have held that applications or appeals filed in good faith do not justify prolonged detention without a bond hearing[193] but other judges have held that

191. "[A]s of July 2009, EOIR could not adjudicate approximately 17,000 removal cases due to pending USCIS decisions." Margaret Scotti, *Development in the Executive Branch: ICE Prioritizes Certain Aliens for Detention and Removal; Explores Options for Improving Detainment Conditions*, 25 GEO. IMMIGR. L.J. 227, 230 (2010) (citing Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, at 1 (Aug. 20, 2010)). A 2011 USCIS Policy Memorandum observed that "EOIR has identified a significant number of removal proceedings involving individuals with applications or petitions pending before USCIS. While awaiting the full and proper adjudication of the applications and petitions, EOIR's immigration judges have repeatedly continued many of the removal proceedings." Policy Memorandum, U.S. Citizenship & Immigration Servs., Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11–16 (Feb. 4, 2011).

192. *Leslie*, 678 F.3d at 271 (citing *Ly*, 351 F.3d at 272) (holding that a four-year period of mandatory detention was unreasonably prolonged where the individual had pursued bona fide challenges to removal and sought only a five-week continuance).

193. *E.g.*, Nwozuzu v. Napolitano, No. 12-3963, 2012 WL 3561972, at *4–5 (D.N.J. Aug. 16, 2012) (holding that courts "should also deduct delays attributable to the petitioner, but not those caused by the pursuit of bona fide legal challenges to removal" and granting bond hearing because detention had lasted twenty-eight months, the petitioner's continuances were a small fraction of delays before the immigration court, and petitioner's appeal had been successful); Gupta v. Sabol, 1:11-1081, 2011 WL 3897964 (M.D. Pa. Sept. 6, 2011) (finding a twenty-month detention unreasonably long even though the detention was caused by the detainee's two appeals); Madrane v. Hogan, 520 F. Supp. 2d 654 (M.D. Pa. 2007) (holding that individual's requests for continuances were reasonable and granting bond hearing). "To consider the time related to a petitioner's bona fide legal challenges would unduly punish a petitioner for seeking to enforce his rights." *See Nwozuzu*, 2012 WL 3561972, at *4 (citing *Leslie*, 678 F.3d at 271); *but cf.* Diaz v. Muller, No. 11-4029, 2011 WL 3422856, at *4 (D.N.J. Aug. 4, 2011) (finding that the individual's detention was reasonable because he "conceded at the hearing that

routine extensions of removal proceedings due to respondents' applications or appeals can render prolonged periods of detention reasonable.[194] As discussed above, removal proceedings for individuals who are eligible for relief from removal (for example, those eligible for asylum or Convention Against Torture relief) or who have a colorable argument that they are not even "removable" in the first instance—often a complex issue—typically last longer than those for individuals who lack grounds to fight their deportations.[195] Moreover, when an individual is counseled, continuances requested by the party's attorney can result from attorney failures rather than an effort by the individual to delay proceedings.

Third Circuit district courts have taken similarly varied approaches to considering the impact of administrative appeals by DHS. Some judges have held that government appeals weigh in favor of a finding that detention has become unreasonably prolonged such that a bond hearing is required. For example, in *Tkochenko v. Sabol*,[196] Judge Christopher Connor of the Middle District of Pennsylvania held that a two-year detention was unreasonably prolonged where it was likely to continue due to a government appeal, reasoning that "delays attributable to the government weigh heavily against the respondents in conducting this analysis."[197] Similarly, in *Akinola v. Weber*,[198] Judge William Martini of the District of New Jersey emphasized that the government, not the

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he actually does not want the Immigration Court to speed up his removal proceedings" because he wanted time to pursue post-conviction relief).

194. *E.g.*, Johnson v. Orsino, No. 12-6913, 2013 WL 1767740, at *11–12 (S.D.N.Y. Apr. 24, 2013) (applying Third and Sixth Circuit approach and deeming fifteen-month detention not unreasonably prolonged because individual's appeal had been pending for four months); Espinoza-Loor v. Holder, No. 11-6993, 2012 WL 2951642, at *1, *7 (D.N.J. July 2, 2012) (finding a thirteen-month detention not unreasonably prolonged because detainee requested adjournments to have his I-130 petition adjudicated by another agency); Maynard v. Hendrix, No. 11-0605, 2011 WL 6176202, at *4 (D.N.J. Dec. 12, 2011) (finding an eighteen month detention not unreasonably long because "the delays here are attributable almost exclusively to Petitioner's repeated requests for adjournments"); Bestman v. Decker, No. 1:11-CV-984, 2011 WL 3206685, at *7 (M.D. Pa. June 28, 2011), *report and recommendation adopted*, No. 1:11-0984 (M.D. Pa. July 28, 2011) (holding that nineteen-month mandatory detention was permissible because petitioner "applied for asylum, sought withholding of removal or cancellation of removal, and requested withholding of removal under Article III of the Convention Against Torture," and pursued an appeal); Nivar v. Weber, No. 10-0825, 2010 WL 4024771, at *7 (D.N.J. Oct. 13, 2010) (holding that the fact that detainee had requested a single continuance in removal proceedings meant that he was not entitled to a bond hearing) (six-month detention); *see also* Bete v. Holder, No. 11- 6405, 2012 WL 1067747, at *8 (D.N.J. Mar. 29, 2012) (finding a twelve-month detention not unreasonably prolonged in part because detainee was responsible for twenty-one days of his detention, without explaining reason for continuance).

195. *See supra* note 31.

196. 792 F. Supp. 2d 733 (M.D. Pa. 2011).

197. *Id.* at 741.

198. No. 09-3415, 2010 WL 376603, at *5 (D.N.J. 2010).

individual petitioner, was responsible for delay because the government had appealed the immigration court's decision.[199]

In contrast, Judge John E. Jones of the Middle District of Pennsylvania held that detention was not unreasonably prolonged even though it had already lasted sixteen months and ICE had appealed a grant of Convention Against Torture relief. He reasoned that "there is nothing on the record before this Court to suggest that the government's decision to appeal the Immigration Judge's decision to grant deferral of removal is an unreasonable course of action."[200] Similarly, Judge Malcolm Muir held that a detention of thirteen-and-a-half months was not unreasonably prolonged even though the government's BIA appeal had been pending for almost the entire period. He found that "there is no indication of delay or stalling on the part of ICE" and concluded without further discussion that "the matter is moving forward at a permissible pace."[201] The Third Circuit district court decisions ultimately demonstrate a lack of clarity or agreement as to whether the concept of "reasonableness" refers to the magnitude of the deprivation of liberty or the government's actions.

The Third Circuit district court judges have also adopted disparate approaches to analyzing the expected duration of future detention. Some judges emphasized the procedural posture of the underlying removal cases where this posture suggests future proceedings are likely to be prolonged.[202] Others have found this factor irrelevant or omitted any mention of it.[203]

Finally, disparities also emerge with respect to a related factor, the likelihood of success in removal proceedings. Evidence that removal is

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199. *Id.* at *5; *see* Victor v. Mukasey, No. 3:CV-08-1914, 2008 WL 5061810 (M.D. Pa. Nov. 25, 2008).

200. Jayasekara v. Warden, No. 1:10-1649, 2011 WL 31346, at *5 (M.D. Pa. Jan. 5, 2011) (finding similarly that petitioner's request for continuance was not unreasonable, and denying bond hearing on theory that future detention was unlikely to be prolonged).

201. Segura v. Holder, No. 4:CV-10-2045, 2010 WL 5356499, at *2 (M.D. Pa. Dec. 21, 2010). The court stated in a footnote that the court "may not take such a deferential view of this delay if this case comes before this court a third time and the matter is still pending before the Board of Immigration Appeals." *Id.* at *2 n.1. But given the delays inherent in the process of filing a federal habeas action and the fact that the BIA was not a party to the habeas action, this observation would not appear to affect the outcome.

202. *E.g.*, Tkochenk v. Sabol, 792 F. Supp. 2d 733, 742–43 (M.D. Pa. 2011) (expressing "no confidence that this is a case in which the period of continued detention pending removal has any fixed, finite or identifiable duration," where past detention had lasted two years and future proceedings expected to last "many months" due to BIA backlog and potential remand); Donaldson v. Donate, No. 3:CV-09-0208, 2009 WL 5179539, at *5 (M.D. Pa. Dec. 31, 2009) (granting habeas writ where petitioner had been detained three years and proceedings likely to last "many months"); Occelin v. Dist. Dir. for Immigration Custom Enforcement, No. 1:09-CV-164, 2009 WL 1743742, at *3–4 (M.D. Pa. June 17, 2009) (ordering a bond hearing where government had appealed and BIA had not yet issued briefing schedule, meaning proceedings were likely to continue for months).

203. *E.g.*, Pierre v. Sabol, No. 1:10-2634, 2011 WL 4498822, at *1 (M.D. Pa. Sept. 27, 2011) (finding future detention irrelevant based on a technicality).

unlikely has sometimes weighed in favor of habeas relief,[204] and some judges have cited the lack of such evidence as an adverse factor, in some cases implying that a bond hearing is not required absent the prospect of truly indefinite detention.[205] Other decisions do not even address this factor.[206] Moreover, this factor is already frequently considered by the immigration court as part of the bond hearing itself, as relevant to flight risk.[207] These disparities bolster the importance of a clear upper temporal limit for mandatory detention.

2. *Institutional Features of the Removal System*

As *Zadvydas* suggests, administrability concerns should inform the choice of rule or standard in the context of mandatory detention pending removal proceedings.[208] Such analysis requires an understanding of the institutional structure in which prolonged detention challenges arise. In the mandatory detention context, unlike in the context of post-final-order detention, individuals' detention challenges often arise while they are in active immigration court proceedings. Other prolonged detention challenges arise after immigration court proceedings have concluded, during administrative or in some cases judicial appeals.

While habeas proceedings provide a critical constitutional safeguard against unlawful detention, immigration courts can provide a more accessible and efficient forum for addressing challenges to pre-final-order detention. Although time in immigration court is limited, individuals in immigration court speak directly to the judge rather than being required to file a written pleading as they would in a habeas case.[209] Detained individuals in removal proceedings typically have at least one opportunity to speak with an immigration judge before being deported. Although many individuals who have spent more than six months in mandatory detention will have already completed their immigration court proceedings and reached the appeal process, the immigration judge would

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204. *E.g.*, *Tkochenko*, 792 F. Supp. 2d at 743 ("[G]ranting this relief is particularly appropriate here, where it is evident that Tkochenko has made a substantial showing that she may prevail on the merits; where an immigration judge has found her fears of harm to be credible."); *see also* Ly v. Hansen, 351 F.3d 263, 271–72 (6th Cir. 2003) (finding removal not practically attainable due to lack of repatriation treaty); Alli v. Decker, 644 F. Supp. 2d 535, 544 (M.D. Pa. 2009) (citing *Madrane*, 520 F. Supp. 2d at 658, 660) (discussing how the immigration judge had granted relief), *rev'd in part, vacated in part*, 650 F.3d 1007 (3d Cir. 2011).

205. *E.g.*, Johnson v. Orsino, No. 12-6913, 2013 WL 1767740, at *13 (S.D.N.Y. Apr. 24, 2013) (applying Third and Sixth Circuit approach).

206. *E.g.*, Tsvetkov v. Decker, No. 3:10-1042, 2010 WL 2160320 (M.D. Pa. May 26, 2010).

207. *E.g.*, *In re* Andrade, 19 I. & N. Dec. 488, 490 (B.I.A. 1987).

208. *See supra* Part IV.B.

209. Of course, in the prolonged detention context many individuals will no longer be appearing before an immigration judge at the time they seek a hearing on danger and flight risk. Habeas petitions should be available as an option for those without access to immigration court proceedings.

have jurisdiction to hold a custody redetermination hearing upon being made aware that the individual is no longer in mandatory detention.[210]

As a practical matter, habeas proceedings are often less accessible to people in detention than administrative court proceedings. Most detained individuals are unrepresented,[211] and those who do have immigration counsel rarely can afford to retain attorneys to file habeas petitions. Few immigration practitioners have a background in federal habeas practice. Habeas proceedings, which often involve exclusively written submissions, are difficult to navigate without counsel. Many detainees lack the language or research skills necessary to successfully pursue this procedure.[212]

Viewed from a systemic perspective, adjudicating detention claims before the immigration court would also be more efficient than litigating them exclusively in habeas proceedings. Immigration judges routinely and quickly adjudicate detention-related questions in cases pending before them. Individuals who are bond-eligible typically receive brief bond hearings on the same day as a preliminary removal hearing. Habeas proceedings often provide a critical check for agency errors in detention determinations.[213] At the same time, each case can take many months to resolve. Habeas proceedings also require both parties to submit extensive written arguments and, in some cases, to appear for a hearing in district court. To trigger a government response and a decision on a pending habeas petition, a detainee will sometimes have to file an additional request for an order to show cause why relief should not be granted. The adjudication of detention claims in an administrative setting often, although not always, eliminates the need for separate habeas proceedings.

Thus, the best rule in this context would be one that is suitable for administration in immigration court as well as in habeas proceedings.[214] A

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210. 8 C.F.R. § 236.1 (2013) (stating that an individual may seek custody redetermination before an immigration judge at any time "before an order under 8 CFR part 240 becomes final"); *see* Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 947–48 (finding that detention of an individual who has a stay of removal from the court of appeals is governed by the INA section 236(a)).

211. *See* Dona, *supra* note 93, at 86; *see also supra* note 115.

212. Reid v. Donelan, No. 13-30125, 2014 WL 105026, at *5 (D. Mass. Jan. 9, 2014) (citing Heeren, *supra* note 10, at 603.

213. For example, as the experience of the Ninth Circuit has shown, habeas proceedings can play an important role in ensuring that proper procedures are followed in immigration court bond hearings when such hearings are granted. *See, e.g.*, Singh v. Holder, 638 F.3d 1196, 1205 (9th Cir. 2011) (granting the habeas writ unless a new bond hearing is held because the immigration judge violated the individual's due process rights by failing to use the "clear and convincing" evidence standard, and failing to record proceedings); *accord* Dela Cruz v. Napolitano, 764 F. Supp. 2d 1197, 1201 (S.D. Cal. 2011) ("Petitioner's due process rights were violated by the IJ's failure to articulate the standard of proof to which he was holding Respondents at the . . . bond hearing."); Singh v. Napolitano, No. 08-0464, 2011 WL 4041000 (S.D. Cal. Sept. 9, 2011). But clearer rules about when individuals are entitled to bond hearings and what procedures are required should diminish the need for habeas review.

214. In *Diouf*, the Ninth Circuit held that "Diouf's own case illustrates why a hearing before an immigration judge is a basic safeguard for aliens facing prolonged detention under § 1231(a)(6). The

clear temporal limit, such as the six-month rule proposed here and adopted by the Ninth Circuit, allows immigration judges to routinely and easily apply the due process limits that federal courts have recognized on mandatory detention. As compared with a reasonableness analysis, such a rule would more clearly communicate the immigration courts' authority to issue bond in a particular case, and thereby trigger hearings without necessarily requiring action by the individuals in detention. This issue is particularly critical for those who would not otherwise be appearing before the immigration court because they are detained while their removal decisions are on appeal, and for those who are unrepresented and thus may not know that they can request a bond hearing. In the Central District of California, pursuant to the injunction in the class action *Rodriguez v. Holder*, the DHS now routinely identifies individuals who have been in mandatory detention for six months and who are entitled to immigration court bond hearings.[215] This task is feasible due to the simplicity of the temporal rule.

Regardless of the forum, a six-month limit would also avoid disparities. It would permit fairer resolutions for individuals who are unrepresented and therefore less well-equipped to request a hearing or present evidence on the more complex factors described in *Alli*.

One might argue that a clear six-month rule could encourage immigration judges to deny reasonable requests for continuances, encourage delay by individual immigration court respondents, or otherwise interfere with case management.[216] This objection is of limited force, however, because the proposed rule would not require an immigration judge to order release after six months, but merely to hold a bond hearing. Individuals could not predict with any certainty that they would be released after six months, since release would occur only where the judge determined at a hearing that the individual was not a danger to the community or a flight risk. Moreover, detaining a person for a

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government detained Diouf in March 2005. DHS conducted custody reviews under § 241.4 in July 2005 and July 2006. In both instances, DHS determined that Diouf should remain in custody pending removal because his 'criminal history and lack of family support' suggested he might flee if released. In February 2007, however, an immigration judge determined that Diouf was *not* a flight risk and released him on bond. If the district court had not ordered the bond hearing on due process grounds, Diouf might have remained in detention until this day. To address these concerns, aliens who are denied release in their 180-day reviews must be afforded the opportunity to challenge their continued detention in a hearing before an immigration judge." Diouf v. Napolitano, 634 F.3d 1081, 1092 (9th Cir. 2011).

215. Rodriguez v. Holder, No. CV 07-3239, 2013 WL 5229795, at *3–4 (C.D. Cal. Aug. 6, 2013).

216. Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003) ("A bright-line time limitation, as imposed in *Zadvydas*, would not be appropriate for the pre-removal period; hearing schedules and other proceedings must have leeway for expansion or contraction as the necessities of the case and the immigration judge's caseload warrant.").

prolonged period of time without a bond hearing offends fundamental notions of due process, regardless of the surrounding circumstances.

CONCLUSION

The idea that an individual may be jailed for even a matter of days without a bond hearing is troubling and out of step with prior due process case law. Yet so long as *Demore* remains good law, courts must reconcile this decision with the larger body of civil detention jurisprudence. The most straightforward approach to this challenge is to limit *Demore* to its facts. In light of the majority's and Justice Kennedy's emphasis on the "brief" nature of mandatory detention, temporal limitations are particularly critical to this analysis. The Ninth, Third, and Sixth Circuits have all recognized the limited nature of *Demore* and have taken important steps to recognize temporal limits on mandatory detention.

The choice of rule or standard for implementing these due process limits has great practical effect on those fighting their removals, on their families, and on the system as a whole. The mechanism for implementing temporal limitations on *Demore* should focus on the duration of the underlying deprivation of liberty, account for the fact that most affected individuals are unrepresented, and be appropriate for administration by administrative immigration judges and federal district courts. A six-month outer limit on mandatory detention is consistent with the Supreme Court's jurisprudence and would provide the best option for interpreting *Demore* in a manner consistent with *Zadvydas* and other civil detention jurisprudence.

This proposal provides a limited procedural and substantive safeguard against unconstitutionally prolonged detention. A clear temporal limit on mandatory detention does not mandate release, but does require a hearing at which the government must prove individualized flight risk or dangerousness.

In future cases, courts will continue to grapple with prolonged detention as well as exploring the other limitations on *Demore*, such as the limits on detaining people who contest whether they are in fact removable on a ground that triggers mandatory detention, and questions about whether someone can be mandatorily detained if ICE failed to take them into custody immediately "when released" from custody for an enumerated offense. The six-month rule represents an important step toward giving practical effect to due process limits on immigration detention.

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