*Rethinking Mandatory Detention For Noncitizens*

by

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INTRODUCTION

Warren Joseph is a lawfully admitted permanent resident with four U.S. citizen children. He immigrated to the United States from Trinidad when he was twenty-one years old. Three months after being admitted into the United States, Warren joined the military. He served in the U.S. Army for eight years, including a tour in Iraq during the first Gulf War, where he received multiple commendations. Upon returning home, Warren began suffering from physical and physiological symptoms similar to those experienced by other Gulf War veterans including Post-Traumatic Stress Disorder ("PTSD") and depression. He turned to drugs and alcohol as a means of coping and eventually found himself in debt. In an attempt to make some quick cash, Warren agreed to drive a truck containing firearms from Oklahoma to New York.[1]

Realizing that he was falling into a self-destructive pattern and needed help, Warren turned himself into the authorities. In 2001, Warren pled guilty to the offense of transporting or receiving firearms without a license. After fully cooperating with authorities, Warren was sentenced to probation. He would later serve six months in prison for violating the terms of his probation. Upon his release in 2004, Immigration officials immediately took Warren into custody.[2]

For the next three years, Warren would be detained at Hudson County Correctional Facility while the government sought to deport him based on his single 2001 conviction. During that time Warren both witnessed and suffered physical and physiological abuse at the hands of his jailors. He was constantly tormented and told to just go back to his home country. The abuse Warren suffered led him to believe that it is not the underlying criminal conviction that results in

[1] Joseph v. Attorney Gen. of U.S., 465 F.3d 123, 124 (3d Cir. 2006).
[2] *Id*.

most detainees being deported; rather, it is the physical and physiological intimidation of detention that cause most people to self deport.[3]

Despite the fact that the U.S. Supreme Court has repeatedly held that civil detention violates due process unless it is reasonably related to a valid government purpose,[4] not once during the entire three years that Warren spent behind bars was the government required to justify his continued detention. Without looking into the facts and circumstances of Warren's individual case, the government categorically labeled him an aggravated felon whose detention was required by law. The government also found detention appropriate without considering the various forms of relief available to Warren due to his strong family ties to the U.S. and status as a war veteran.[5] Based solely on the aggravated felon label, the government denied Warren his right to an individualized bond hearing and refused to consider any alternatives to incarceration. Thus, Warren was forced to fight his entire deportation case from behind bars.[6]

In 2007, the Third Circuit Court of Appeals granted Warren's Petition for Review. The Court found that his criminal conviction did not qualify as an aggravated felony triggering mandatory detention and thereby ordered his release. Although Warren ultimately won his immigration case and was allowed to remain in the United States, the cost was severe. The total length of time Warren spent in immigration detention constituted a period of incarceration lasting six times longer then his six-month sentence for violating his probation. He spent three

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[3] *ACLU Seeks Release of Gulf War Vet Illegally Detained for Three Years*, ACLU, May 22, 2007 [hereinafter *ACLU Article*], http://www.aclu.org/immigrants-rights/aclu-seeks-release-gulf-war-vet-illegally-detained-three-years.

[4] Zadvydas v. Davis, 533 U.S. 678 (2001).

[5] *See generally* Immigration and Nationality Act of1952 §§ 240A, 310, 8 U.S.C. §§ 1229(b), 1421 (2011) (establishing cancellation of removal and naturalization as alternatives to deportation).

[6] Becca Sheff, *Searching for Justice: Mandatory Detention*, Immigration: its our community Blog (Oct. 30, 2009, 8:41 AM), http://itsourcommunity.blogspot.com/2009/10/searching-for-justice-mandatory.html.

years away from his family despite the fact that his crime was non-violent and he posed neither a flight risk nor was a danger to the community.[7]

Unfortunately, Warren Joseph's experience is not unique. His story illustrates the danger of mandating detention based solely upon broad criminal categories that are loosely defined. Warren spent three years in detention based on the government labeling him as an aggravated felon, a label that was ultimately found to be inapplicable. For all practical purposes, Warren lost three years of his life for nothing. Additionally, the failure of immigration officials to consider the various forms of immigration relief available to noncitizens results in the detention of individuals that is unwarranted under the circumstances. Like Warren, thousands of immigrants across the United States are detained by federal agencies on a daily basis. Allowing mandatory detention without an individualized bond hearing "goes against the fundamental notions of due process to which citizens and non-citizens alike are entitled in this country."[8] Congress however, has only continued to expand the grounds requiring detention during the removal process.

Not surprisingly, the number of immigrants being detained has skyrocketed in recent years. In 2004, an estimated one-third of removal proceedings involved immigrant detainees.[9] Today, close to half of all removal proceedings, about 130,000 cases, involve noncitizens pursuing claims from detention facilities.[10] As of July 2011, over 33,000 immigrants are detained on a daily basis and approximately 2.5 million individuals have passed through

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[7] *Joseph*, 465 F.3d 123 (3d Cir. 2006).
[8] *ACLU Article*, supra note 3 (*quoting* Judy Rabinovitz, Senior Staff Attorney at the ACLU's Immigrants' Rights Project).
[9] Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2011 Statistical Year Book, at 01 fig.23 (2009), available at http://www.justice.gov/eoir/statspub/fy08syb.pdf.
[10] Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2011 Statistical Year Book, at 01 fig.24 (2012), available at http://www.justice.gov/eoir/statspub/fy11syb.pdf.

immigration detention facilities since 2003.[11] Federal officers also induce the additional detention of thousands of noncitizens by requesting state and local officials to hold noncitizens until immigration officials can take them into custody.[12] Out of the total number of immigrants being detained, an estimated two-thirds are subject to mandatory detention.[13] Simultaneously, the number of immigrant detainees without any criminal conviction, who are not subject to mandatory custody, doubled between 2005 and 2009.[14]

In order to cope with the continuously increasing number of immigrants being detained, Congress has allocated approximately 24 billion dollars to Immigration and Customs Enforcement ("ICE").[15] This allotment represents a 67 percent increase in spending on immigration enforcement over the last five years.[16] ICE runs the largest detention system in the country, spending about 1.7 billion dollars annually to fund over 500 detention facilities spread throughout the United States.[17] This number does not account for the approximately seventy percent of immigrant detainees who are held in local and state jails under ad hoc agreements with the federal government.[18]

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[11] *Summaries of Recent Reports on Immigration Detention*, National Immigration Reform 12 (2011) [hereinafter *Detention Summaries*], http://www.immigrationforum.org/images/uploads/2010/DetentionReportSummaries.pdf.
[12] Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 173-82 (2008); Fact Sheet, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., Law Enforcement Support Center (Nov. 19, 2008), at http://www.ice.gove/pi/news/factsheets/lesc.htm.
[13] Dora Schriro, U.S. Dep't of Homeland Sec., Immigration Detention Overview and Recommendations (2009).
[14] Transactional Records Access Clearinghouse, *Detention of Criminal Aliens: What Has Congress Bought?* (2010), http://trac.syr.edu/immigration/reports/224.
[15] Transactional Records Access Clearinghouse, *supra* note 14.
[16] Transactional Records Access Clearinghouse, *supra* note 14.
[17] Nat'l Immigration Forum, *The Math of Immigration Detention* 1 (2009), http://www.immigrationforum.org/imiges/uploads/MathofImmigrationDetention.pdf.
[18] Schriro, *supra* note 13, at 6.

As Warren Joseph's case illustrates, the increase in immigration detention stems primarily from enforcing policies that subject ever-larger categories of individuals to removal charges and custody.[19] First, the deportation of noncitizens convicted of criminal offenses, both serious and minor, has become the government's highest interior enforcement objective.[20] Second, many noncitizens arriving in the United States, including returning permanent residents and asylum-seekers, must be detained if charged as inadmissible.[21] Third, noncitizens with final orders of removal may be detained for extended period of time while an appeal is pending or while the government is attempting to effectuate removal.[22] At the same time more individuals are being placed in detention, Congress and the Supreme Court have limited that availability of individualized bond hearings to which noncitizens were normally entitled.[23] The result is that once a noncitizen is placed in immigration detention, that individual will remain in detention for the entirety of the removal proceedings.

Although both the courts and legislatures have consistently classified detention within the immigration context as non-punitive, the reality is that for many immigrants, detention represents a consequence as severe as deportation itself.[24] Detention deprives individuals of the ability to work, attend school, and maintain relationships. For those noncitizens that wish to contest their removability, detention requires that the noncitizen agree to incarceration, for an indefinite period of time, while claims of non-removability are pursued. With limited access to legal

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[19] Transactional Records Access Clearinghouse, *supra* note 14.
[20] Transactional Records Access Clearinghouse, *supra* note 14.
[21] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 45 (2010).
[22] *Zadvydas*, 533 U.S. 678, 699-701 (2001) (defining six months as presumptively reasonable); see also Clark v. Martinez, 543 U.S. 371, 386 (2005) (extending *Zadvydas* to inadmissible noncitizens); 8 C.F.R. § 241.13-241.14 (2009) (detailing procedures governing post-final order custody review).
[23] *See* Demore v. Kim, 538 U.S. 678 (2001).
[24] Padilla v. Kentucky, 130 S.Ct. 1473, 1476 (2010).

counsel, detainees face additionally barriers in presenting effective arguments against removal.[25] The resulting economic, emotional, and psychological harms affect not only the detainees themselves, but also their family members who may be U.S. citizens. Even ignoring the illegal and abusive treatment of detainees that Mr. Joseph's story details, detention forces many noncitizens to acquiesce to removal simply to obtain release from custody even if they have valid claims to remain in the United States.[26]

This article argues that immigration detention, as applied to noncitizen permanent residents convicted of certain crimes,[27] constitutes a deprivation of liberty that raises serious constitutional concerns. Requiring detention without looking at the facts and circumstances of each individual case is inconsistent with Congress's stated primary enforcement goal of removing serious criminals from the United States.[28] The overall result has been the creation of a detention system that is costly, ineffective, and inconsistent with the Congressional policy.[29]

Part I of this article gives a basic overview of immigration law and how its current form and structure came into effect. Part II more closely examines the provisions of the Immigration and Nationality Act ("INA")[30] relating specifically to mandatory detention within the criminal context. Part III discusses why the classification of noncitizens within a one-size-fits-all definition is inconsistent with the purposes of mandatory detention. Part IV argues that mandatory detention, without the availability of a bond hearing, raises serious constitutional concerns and suggests an alternative procedure that would allow the release of certain qualified

[25] Kalhan, *supra* note 21, at 45.
[26] Kalhan, *supra* note 21, at 45.
[27] The mandatory detention provisions related to suspected terrorists, raises a whole host of other constitutional concerns that is beyond the scope of this article.
[28] Transaction Records Clearing House, *Immigration Enforcement Since 9/11: A reality Check* (Sept. 9, 2011), http://trac.syr.edu/immigration/reports/260/.
[29] *Detention Summaries*, *supra* note 11, at 12.
[30] Immigration and Nationality Act, 8 U.S.C. §§ 1101-1531 (2006).

noncitizens prior to a finial order of removal. Part V examines the current limiting doctrines the courts have applied to alleviate the potential constitutional violations. Part VI argues for expanding those limiting doctrines to allow an individualized bail hearing if the noncitizen can put forth a substantial argument asserting relief from removal. Finally, Part VII presents the process by which the proposed amendments could be implemented in the deportation process. Given the serious practical and constitutional concerns inherent in prolonged non-punitive civil detention, mandatory detention should only be imposed on those immigrants who truly represent either a flight risk or are a danger to the community.

## I. BACKGROUND

### *A. Brief History of the Immigration and Nationality Act*

The power to create immigration law and policy rests primarily with Congress. In 1952 Congress passed the McCarran-Walter Act establishing the basic structure of modern day immigration law, including the procedures to be used in deportation proceedings.[31] Since the very first immigration statues were enacted, the Supreme Court has characterized Congress's authority over immigration matters as plenary.[32] The laws and regulations that Congress enacts pursuant to this authority are contained within a statute known as the Immigration and Nationality Act ("INA"). Over time the INA has been frequently amended with major changes occurring in 1965, 1980,1986, 1988, 1990, and 1996.[33]

The rise of immigration detention began in 1996 when Congress amended the INA by enacting the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal

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[31] STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 17 (Robert C. Clark et al. eds., 5th ed. 2009).
[32] *See Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (finding the power to exclude foreigners within the list of sovereign powers specifically delegated to Congress by the Constitution).
[33] LEGOMSKY, *supra* note 31, at 21-22.

Immigration Reform and Immigrant Responsibility Act[34] ("IIRIRA"). These amendments to the INA made the detention and deportation of noncitizens mandatory for a sweeping array of criminal offenses and facilitated harsh consequences for lawful permanent residents. A violation of the INA may result in a noncitizen being: classified as inadmissible, placed in detention for extended periods of time, or forced to leave the country through the deportation or removal process. Over time, Congress has only continued to expand the detention provisions of the INA.[35]

*B. Overview of Federal Agencies Charged with Enforcing the INA*

In the aftermath of September 11, 2001, Congress dramatically restructured those federal agencies whose functions related to national security. Recognizing that immigration enforcement and national security were necessarily entwined, Congress passed the Homeland Security Act of 2002 ("HSA"). The HSA placed enforcement of the INA within the purview of the Department of Homeland Security ("DHS"). Underneath the umbrella of the DHS, the immigration enforcement and service functions were divided into three main immigration agencies: Immigration and Customs Enforcement ("ICE"); Customs and Border Patrol ("CBP'); and U.S. Citizenship and Immigration Services ("USCIS").[36]

The two entities charged with immigration enforcement are CBP and ICE. CBP is dedicated to border inspections while ICE focuses on enforcing the provisions of the INA within the interior of the United States. USCIS is the agency in charge of immigration services. USCIS handles the various applications for immigration benefits such as processing applications for

[34] Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*,113 HARV. L. REV. 1936, 1937 (2000).
[35] *See generally* 8 U.S.C. § 1126(c) (2006).
[36] LEGOMSKY, *supra* note 31, at 2-6.

permanent residence, asylum, and naturalization. It operates through a network of regional and district offices located throughout the United States.[37]

Although the DHS retains control of immigration enforcement and service, the authority to adjudicate immigration claims rests with an agency called the Executive Office for Immigration Review ("EOIR"). The EOIR was created by the Attorney General in 1983 and continues to remain a part of the Department of Justice. The EOIR is comprised of three units, however, for the purposes of this article only two are particularly relevant. The first unit is the Office of the Chief Immigration Judge. This office coordinates the work of various Immigration Judges who are located throughout the United States. An Immigration Judge's main function is to preside over removal hearings. The second branch of EOIR pertinent to this article is the Board of Immigration Appeals ("BIA"). The BIA hears appeals from both Immigration Judges and USCIS decisions.[38]

While the above paragraphs give only the briefest sketch of the organization and scope of United States immigration law, a minimal knowledge of the immigration agencies and their functions is a necessary prerequisite to understanding why mandatory detention of noncitizens is so problematic.

*C. Overview of the Removal Process*

1. Apprehension

Deportable noncitizens can be apprehended at the border or in the interior of the United States. In most cases, employees of ICE or CBP are responsible for taking the removable noncitizen into custody. In many cases, however, federal law enforcement officers or even state or local police will arrest a person for criminal conduct and then later report the arrest to ICE

[37] LEGOMSKY, *supra* note 31, at 3.
[38] LEGOMSKY, *supra* note 31, at 3-4.

when they discover that the individual is not a United States citizen. ICE will then typically take custody of the noncitizen directly from the state or local jail.

2. Before the Removal Hearing

Once a noncitizen is in custody, DHS must decide whether "there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws."[39] If there is prima facie evidence, the case is referred to an immigration judge for a removal hearing.[40] This is accomplished by serving the charging document, known as the Notice to Appear ("NTA"), on the noncitizen and filing it with the immigration court. The NTA informs the noncitizen of the deportability grounds charges and states the time and place of the individuals required appearance before the immigration judge.[41] Prompt service of the NTA is critical because it triggers the start of removal proceedings.

DHS must also decide at this point whether to detain the individual pending a final removal decision.[42] Under the INA, detention is mandatory for certain categories of noncitizens.[43] In all other cases the DHS officer has discretion whether to detain the person without bond, release on a cash bond of at least $1500, or release on conditional parole.[44] However, release is only permitted if a DHS officer or immigration judge determines the noncitizen does not pose a danger to the community and is likely to appear for any future proceeding.[45] Should DHS determine that pre-removal detention is warranted, the NTA provides

[39] 8 C.F.R. § 287.3(b) (2008).
[40] *Id*.
[41] 8 U.S.C. § 1229(a) (2006).
[42] Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 UNIV. MIAMI INTER-AMERICAN L. REV. 531 (1991).
[43] *See* 8 U.S.C. §§ 1125(b)(1)(B)(iii)(IV), 1125(b)(2)(A), 1126(c)(1)(A, B, C, D), 1231(a)(1, 2, 3) (2006).
[44] 8 U.S.C. § 1226(a).
[45] 8 C.F.R § 236.1(c)(8) (2008).

detainees the opportunity to seek release by requesting a de novo bond redetermination hearing before an immigration judge.[46] DHS must make both the decision to issue a NTA and a detention determination within 48 hours of taking the noncitizen into custody.[47]

3. The Removal Hearing

The opposing parties at a removal hearing are the noncitizen and ICE. The hearing is usually held at an EOIR immigration court over which an immigration judge presides. ICE then has the burden of proving by clear and convincing evidence that the individual in custody is a noncitizen.[48] The burden then shifts to the noncitizen to prove by clear and convincing evidence that he or she is lawfully present within the United States.[49] If the noncitizen does so, the burden shifts back to ICE to prove the alleged deportability grounds by the same evidentiary standard.[50]

If the noncitizen concedes removability or the immigration judge finds the individual deportable, the hearing enters a second phase during which the noncitizen applies for one or more forms of affirmative relief.[51] In this phase, the noncitizen has the burden of establishing all the elements required for the affirmative relief sought.[52] ICE then has the opportunity to put forth any evidence relevant to the immigration judge's relief determination. After all the evidence has been submitted, the immigration judge renders a decision. If the judge orders the noncitizen deported, his opinion must contain a formal order terminating the proceedings and directing removal to a specified country.[53]

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[46] 8 C.F.R. § 1003.19 (2008).
[47] 8 C.F.R. § 287.3(d) (2008) (allowing an additional reasonable period of time will when there is an emergency situation or other extraordinary circumstances).
[48] *See* Murphy v. INS, 54 F.3d 605 (9th Cir. 1995).
[49] 8 U.S.C. § 1229(a) (2006).
[50] *Id*.
[51] *See supra* note 2.
[52] 8 U.S.C. § 1229(a) (2006).
[53] *Id*.

4. Appealing a Final Order of Removal

Both ICE and the noncitizen have the right to appeal the decision of the immigration judge to the BIA. Judicial review of a BIA decision is normally accomplished by filing a petition for review in the United States Court of Appeals for the circuit in which the removal hearing was held.[54] However, Congress's adoption of the IIRIRA severely limited the availability of judicial review. While courts of appeals can still review questions of law,[55] they no longer have the authority to review either removal orders based on criminal convictions or challenges to the denial of discretionary relief.[56] Also as a result of IIRIRA, the government is free to remove the noncitizen before a judicial court has decided the petition for review unless a request for stay of removal is granted.[57]

II. DETENTION OF NONCITIZENS: DISCRETIONARY V. MANDAORY

The adoption by Congress of the AEDPA and IIRIRA in 1996 broadened the applicable provisions within the INA that could impose detention on noncitizens. Since then, various amendments to the INA and regulations promulgated by the DHS have only increased the number of situations where noncitizens may be detained.[58] The provisions within the INA concerning the detention of noncitizens pending removal can be found in INA § 236. Section 236 of the INA outlines when detention is either mandatory or discretionary for noncitizens properly subject to removal due to a criminal conviction.[59]

[54] 8 U.S.C. § 1252(b)(2) (2006).
[55] *Id*. § 1252(a)(2)(D).
[56] *Id*. § 1252(a)(2)(B, C).
[57] *Id*. § 1252(b)(3)(B).
[58] *See infra* Part II.A-B.
[59] *See* 8 U.S.C. § 1226 (2006).

*A. INA § 236(a): Discretionary Detention*

All noncitizens found to be removable because of criminal conduct are subject to either discretionary or mandatory detention.[60] INA § 236(a) states that, "an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States."[61] The class of noncitizens who fall under the umbrella of § 236(a) is limited to: (1) those convicted of a *single* crime involving moral turpitude ("CIMT") and sentenced to less than one year of imprisonment; (2) those deportable for domestic violence and related offenses; and (3) those deportable for a federal conviction for high speed flight from an immigration checkpoint.[62] Noncitizens detained pursuant § 236(a) have a right to a bond hearing and are eligible for release pending a favorable determination on the bond.[63]

Assuming § 236(a) applies, a bond hearing is scheduled and takes place before an immigration judge during the initial stages of the removal process.[64] The relevant determination in a bond hearing under INA § 236 is whether the noncitizen presents either a danger to the community or is a flight risk.[65] At a bond hearing before an immigration judge, the presumption is in favor of issuing the bond and the burden of establishing that the noncitizen represents a flight risk or is a danger rests with the ICE prosecutor seeking to impose detention.[66]

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[60] *Id*.
[61] *Id*. § 1226(a).
[62] Gerald Seipp & Sophie Feal, *The Mandatory Detention Dilemma: The Role Of The Federal Courts in Tempering The Scope Of INA § 236(c)*, Immigr. Briefings 1, 5 (2010).
[63] 8 U.S.C. § 1226(a)(1)(2) (2006), *see also* 8 C.F.R. § 1003.19 (2008).
[64] *See id*. § 1003.19(c)(3)(d).
[65] 8 C.F.R. § 236.1(c)(8) (2008).
[66] Bradley B. Banias, *A "Substantial Argument" Against Prolonged, Pre-Removal Mandatory Detention*, 11 RUTGERS RACE & L. REV. 31, 33 (2009).

Before the attacks on September 11, if a noncitizen was successful at his or her bond hearing, that person was immediately released from ICE custody.[67] In the political atmosphere following September 11, government officials were concerned that the bond process, as applied in the immigration context, would allow potential terrorists to avoid apprehension.[68] Therefore, on October 29, 2001, the Attorney General issued a new regulation authorizing ICE prosecutors to effectively overrule an immigration judge who orders the release of a noncitizen on bond.[69] The prosecutor can automatically prevent the noncitizens release by filing an appeal of the judge's release order to the BIA. An appeal can be made regardless of how frivolous the claim and without meeting the usual standards for a stay pending appeal, such as a likelihood of success on the merits and irreparable harm.[70] Thus, the noncitizen is forced to remain in detention until the appeal is adjudicated; a process that routinely takes months and often more than a year to decide.[71]

While the regulation authorizing the automatic stay provision may have been issued with the intent to combat terrorism, the practical effects are far more wide reaching. ICE prosecutors can now effectively detain any noncitizen regardless of the nature of the immigration violation.

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[67] Assuming that the noncitizen can make the 10% down payment on the amount of the bond.
[68] *See* 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 (2005) (arguing that most of the people detained after 9/11 as suspected terrorists were arrested pursuant to immigration violations). These individuals were then held in custody for extended periods of time so that they could be interrogated for matters that had nothing to do with the reasons for their initial arrest.
[69] The regulation provides: "In any case in which the district director has determined that an alien should not be released or has set a bond of $10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon the Services filing of a [Notice of Appeal] with the immigration court within one business day of the issuance of the order, and shall remain in abeyance pending decision of the appeal by the Board of Immigration Appeals." 8 C.F.R. § 1003.19(i)(2) (2003).
[70] David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1030 (2002). *See also* 8 C.F.R. § 3.19(4)(i)(2) (2002).
[71] Cole, *supra* note 70, at 1030.

By its very definition, the automatic stay provision will only apply to those individuals who an immigration judge has specifically determined pose neither a flight risk nor are a danger to the community. Therefore, it will result in the continued detention only of individuals found not to warrant preventive detention.[72]

Section 236 was never intended by Congress to operate as a mandatory detention provision of the INA. Traditionally under INA § 236(a), a noncitizen in removal proceedings is "either released on his or her own recognizance or authorized a bond or other supervision arrangements, which are imposed by the DHS prior to any involvement by the Immigration Court."[73] The Attorney General's unilateral addition of the automatic stay provision effectively transforms INA § 236(a) into requiring mandatory detention. Many noncitizens faced with the prospect of prolonged detention will opt for voluntary departure or expedited removal instead of waging a long and costly court battle from behind bars.[74] While it is certainly true that there are some circumstances where a stay of release is warranted, ICE prosecutors should be required to show that they are likely to succeed on appeal and that the release of the noncitizen would result in irreparable harm.[75]

*B. INA § 236(c): Mandatory Detention*

In contrast to INA § 236(a), which gives ICE prosecutors discretion over whether to seek detention of the noncitizen, INA § 236(c) *requires* detention for certain categories of criminal immigrants.[76] Section 236(c) states that the Attorney General *shall* take into custody any

[72] Cole, *supra* note 70, at 1030.
[73] Seipp, *supra* note 62.
[74] *See generally* Jennifer Lee Koh, Jayashri Srikantiah, Karen C. Tumlin, National Immigration Law Center, Deportation without Due Process (2011) *available at* nilc.org/2011sept6dwn.html.
[75] 8 C.F.R. § 3.19(4)(i)(2) (2002).
[76] 8 U.S.C. § 1226(c).

noncitizen who is: (1) inadmissible or deportable on criminal grounds;[77] (2) deportable for a crime of moral turpitude for which they were sentenced to at least one year of imprisonment;[78] or (3) inadmissible or deportable on terrorism grounds.[79] Pursuant to § 236(c), a noncitizen convicted of any one of a wide range of crimes, including simple drug possession, is subject to mandatory detention.[80] Mandatory detention applies to all noncitizens falling within one of the applicable categories, including permanent residents who remain eligible for relief from deportation.[81] If a noncitizen properly falls within the scope of INA § 236(c), an immigration judge lacks jurisdiction to hold a bond hearing.[82] As a result, the noncitizen has no right to a bond and must remain in detention until removal proceedings have been completed.

The only way a noncitizen can avoid mandatory detention under INA § 236(c) is to make the argument that INA § 236(c) is inapplicable because he or she is not properly included in one of the mandatory detention classifications.[83] For example, a noncitizen challenging the application of INA 236(c) might argue that he or she cannot properly be classified as an aggravated felon because the criminal conduct at issue only constituted a misdemeanor. A noncitizen is not properly included under INA § 236(c) if the government is *substantially unlikely* to establish the removal ground that would otherwise subject that individual to

[77] *See generally* 8 U.S.C. §§ 1182(a)(2), 1227(a)(2).
[78] 8 U.S.C. § 1227(a)(2)(A)(i).
[79] 8 U.S.C. §§ 1182(a)(3)(B), 1227(a)(4)(B).
[80] 8 U.S.C. § 1226(c)(I).
[81] For example, a person who is deportable for a single simple drug possession is subject to mandatory detention, *see* 8 U.S.C. § 1226(c)(I)(B), but generally is not barred from relief.
[82] *See* In re Adeniji, 22 I. & N. Dec. 1102, 1107-13, 1999 WL 1100900 (B.I.A. 1999). The only exception to mandatory detention under 236(c) is if release is necessary to protect an actual or potential government witness. *See* 8 U.S.C. § 1226(c)(2).
[83] *See* In re Joseph, 22 I. & N. Dec. 799, 802, 1999 WL 339053 (B.I.A. 1999) (*Joseph II*), 8 C.F.R. § 1003.19(h)(2)(ii) (2009).

mandatory detention.[84] Under this standard, as established in *Matter of Joseph*,[85] a noncitizen in removal proceedings may challenge the mandatory detention provisions of INA § 236(c) in a special hearing before an immigration judge.[86] Known as *Joseph* hearings, these hearings essentially bifurcate the bond determination process.[87] If the noncitizen is able to establish that 236(c) is inapplicable, the immigration judge may then grant a bond hearing where the burden will once again be on the government to show that the noncitizen is neither a flight risk nor a danger to the community.[88] However, even if the noncitizen is successful in both the *Joseph* hearing and bond hearing, detention may still be required if the ICE prosecutor implements the automatic stay provision by choosing to appeal the immigration judge's bond determination.[89]

## III. THE MANDATORY DETENTION CATEGORIES UNDER INA § 236(c) ARE OVERLY BROAD AND INEFFECTIVE AT TARGETING DANGEROUS CRIMINAL IMMIGRANTS

In enacting INA § 236(c), Congress's stated purpose was to detain and deport what it viewed as a growing class of criminal immigrants.[90] To help achieve that goal, INA § 236(c) lists a number of activities that can make a noncitizen subject to mandatory detention.[91] The primary categories are: (1) immigration violations; (2) criminal violations; and (3) terrorism activities.[92] Fearing that a specific list of crimes would limit the number of noncitizens eventually deported, Congress set out broad categories of criminal offenses that could make one subject to mandatory detention. These categories include crimes of moral turpitude, controlled

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[84] Seipp, *supra* note 62.
[85] *Joseph*, 22 I. & N. Dec. 799 (BIA 1999) (interpreting 8 C.F.R. §§ 103.19(i)(2) and 1003.19(i)(2)).
[86] *Id*.
[87] Seipp, *supra* note 62.
[88] Seipp, *supra* note 62.
[89] *Supra*, Part II.A-B.
[90] Transactional Records Access Clearinghouse, *supra* note 10.
[91] 8 U.S.C. § 1226(c).
[92] *Id*.

substance violations, and so-called aggravated felonies.[93] However, just as Warren Joseph's case demonstrates, Congress' lack of specificity in establishing these categories has resulted in the detention of individuals who are neither a flight risk nor a danger to society.

One problem with INA § 236(c)'s use of criminal categories to determine when mandatory detention is appropriate is that the statute uses terms of art unique to immigration law. For example, a noncitizen is subject to mandatory detention if he or she is convicted of a single crime of moral turpitude the sentence for which exceeds one year.[94] Although the phrase "crime of moral turpitude" generally refers to crimes involving dishonesty, immorality or violence, application of the standard is often unclear as an exact definition is nowhere to be found in the criminal law context. Because of this ambiguity, the question of what crimes involve an act of moral turpitude has led to inconsistencies among the various jurisdictions[95] only adding to the luck of the draw element present in immigration law.

Even defining a noncitizen as an aggravated felon under the INA has proven difficult. INA § 101(a) includes in its definition of an aggravated felony any crime of violence for which the term of imprisonment was at least one year.[96] While there is no ambiguity that someone convicted of murder is guilty of a crime of violence, courts have disagreed as to whether those guilty of a drunk driving charge are guilty of a crime of violence.[97] Additionally, the grounds for being classified as an aggravated felon under the INA are much greater then in criminal law. Under the INA, an individual can be categorized as an aggravated felon while only having been

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[93] *Id*.
[94] *Id*.
[95] *See generally* Norton Tooby & J.J. Rollin, Crimes of Moral Turpitude – The Complete Guide (2008 ed.).
[96] 8 U.S.C. § 1101(a)(43)(F)
[97] LEGOMSKY, *supra* note 31, at 569-70.

convicted for a misdemeanor under the applicable state law.[98] For example, in *Erewele v. Reno*, the court held that the crime of shoplifting, traditionally a misdemeanor offense, fell within the INA's definition of an "aggravated felony."[99] Although the noncitizen in that case was only sentenced to probation rather then incarceration, the court ruled that the pre-removal mandatory detention provisions of INA § 236(c) applied.[100] Recognizing the inequities that result from these malleable standards, many judges have openly criticized the provisions of § 236(c) and have expressed reservations that the INA should be applied blindly.[101]

Broad application of the term aggravated felon is especially troublesome because the consequences of being labeled in this category tend to be more severe then being found removable on alternative grounds.[102] Noncitizens who are not characterized as aggravated felons remain eligible to apply for asylum, lawful permanent residence, and other various forms of immigration relief. Aggravated felons however are disqualified from almost every provision of the INA that would allow them to legalize their status.

By imposing mandatory deportation for broad categories of criminal convictions, noncitizens no longer have the opportunity to show rehabilitation or to present evidence that the crime committed was not as serious as the statutory label suggests. Crime labels are often an inaccurate reflection of the range of conduct covered by the label. Furthermore, given the many different ways criminal law is applied across the state criminal justice systems, qualifying for

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[98] Transactional Records Access Clearinghouse, *Aggravated Felonies and Deportation* (2006), http://trac.syr.edu/immigration/reports/155/. Carlos Pacheco entered the US as a permanent resident when he was six years old. In 2000, a federal appeals court found that he was an aggravated felon based on his misdemeanor conviction in Rhode Island for stealing some Tylenol and cigarettes.

[99] Erewele v. Reno, 2000 WL 1141430 (N.D. Ill. 2000).

[100] *Id*.

[101] *Id*. The court expressed its own misgivings that Congress, in its attempts to deter illegal immigration, equated misdemeanors with felonies

[102] Transactional Records Access Clearinghouse, *supra* note 98.

INA § 236(c) will often turn on the jurisdiction in which the crime took place rather then the underlying facts and circumstances. A mandatory detention rule that depends on the length of a sentence relies too much on the sentencing and parole policies of different states.[103] Therefore, any reform of INA § 236(c) should begin by clarifying the applicable legal standards and narrowing the classes of criminal noncitizens subject to mandatory detention.

## IV. THE CONSTITUTIONALITY OF CIVIL DETENTION: *ZADVYDAS, CLARK* AND *DEMORE*

Detention pending the outcome of removal proceedings often last months or years.[104] Until recently, non-punitive or preventive detention was permissible only where an individual: (1) has been shown to be a danger to the community or flights risk;[105] (2) is dangerous because of a harm threatening mental illness;[106] or (3) is an enemy alien during a declared war.[107] However, contrary to traditional notions of due process, INA § 236(c) requires the detention of noncitizens without showing any of the factors listed above. While the Supreme Court has upheld the constitutionality of INA § 236(c) when the period of pre-removal detention is brief, in order to avoid serious constitutional questions, courts should interpret INA § 236(c) to authorize mandatory detention only for those immigrants who cannot raise a substantial argument against their removability or a substantial argument that they are eligible for some form of immigration relief.

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[103] Marawetz, *supra* note 34, at 1960. (One state may sentence a person to a 364 day definite term, whereas another may sentence the person to a one year term with the understanding that the person would be released after before the year is up. In practice, the sentences are the same, but because the states use different sentencing formulations, only the person in the first state could seek relief from deportation.).
[104] Banias, *supra* note 66, at 32.
[105] Cole, *supra* note 70, at 1010.
[106] *Id*.
[107] *Id.*

*A. The Constitutional Requirements of Post-Removal Detention: Zadvydas and Clark*

The Supreme Court had the opportunity to examine the constitutionality of mandatory detention within the post-removal context in *Zadvydas v. Davis.*[108] The Court in *Zadvydas* dealt with permanent resident detainees who were being held in post removal detention.[109] These noncitizens were faced with the possibility of life behind bars because no country would take them and ICE refused to release them on parole.[110] Recognizing that their detention was potentially indefinite, the immigrant detainees in *Zadvydas* challenged the constitutionality of the INA provisions that authorized their prolonged detention.[111]

The Court in that case found that immigrants could not be held indefinitely in the post-removal setting for two reasons.[112] First, the civil nature of immigration detention required the government show a "special circumstance" in order to constitutionally validate indefinite civil detention,[113] and protecting the community and effectuating removal did not satisfy the "special circumstance" requirement.[114] Second, the Court distinguished the immigrant detainees in *Zadvydas* from earlier cases that dealt with un-removable immigrant detainees.[115] Focusing on the distinction between immigrants who have already been admitted into the United States and those immigrants still seeking admission, the Court held that admitted immigrants have significant due process rights.[116] In *Zadvydas*, all of the detainees had entered the United States

[108] Zadvydas v. Davis, 533 U.S. 678 (2001).
[109] *Id*. at 684.
[110] *Id*. at 689.
[111] *Id*.
[112] *Id.* at 690-91.
[113] *Id.* at 679.
[114] *Id*. at 679-80.
[115] *Id*.
[116] *Id*.

as lawfully admitted lawful permanent residents. Therefore, their liberty interest was equivalent to that of a U.S. citizen.[117]

To avoid what the court called "serious constitutional questions," the Court interpreted mandatory detention in the post-removal setting to include a temporal limitation.[118] The Court authorized post-removal detention only until "removal is no longer reasonably foreseeable."[119] In order to give lower courts guidance in applying this standard, the Court opined that six months was a presumptively valid time period during which removal could be effectuated.[120] Thus, the Court's holding in *Zadvydas* created a temporal limitation for the length of time noncitizens, who have been ordered removed, can be held without a hearing to reevaluate their circumstances.[121]

The Court's opinion in *Zadvydas* avoided "the serious constitutional question" of life detention by focusing on the language of INA § 241(a)(6).[122] The Court treated the issue raised in *Zadvydas* as one of statutory interpretation rather then a Constitutional challenge to indefinite post-removal detention. The extension of the *Zadvydas* holding to *Clark v. Martinez* highlights that the decision was statutory in nature.[123] In *Clark*, the Court was once again asked to consider the proper application of INA § 241(a)(6).[124] This time however, INA § 241(a)(6) was being applied to noncitizens never having been admitted to the United States.[125] Reversing his position in *Zadvydas* and writing for the majority, Justice Scalia found that INA § 241(a)(6) could not be

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[117] The court needed to make this distinction to avoid overruling prior cases that allowed the government to detain indefinitely immigrants who had not entered the country. *Id*. at 693 (distinguishing case from Shaughnessy v. Mezei, 345 U.S. 206 (1953)).
[118] *Id*. at 699.
[119] *Id*. at 689.
[120] *Id*. at 701.
[121] *Id*. at 699.
[122] *Id*. at 700.
[123] Clark v. Martinez, 543 U.S. 371 (2005).
[124] *Id*. at 376.
[125] *Id*.

construed to apply a time limit for post-removal detention as to one class of noncitizens but not to another.[126] Despite the fact that noncitizens who have not been admitted to the United States do not raise the same constitutional concerns that influenced the Court's statutory construction in *Zadvydas*, "it is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation."[127] The Court's reasoning in both *Zadvydas* and *Clark* indicates that when faced with a constitutional challenge to immigration detention, the Court is more likely to avoid any constitutional concerns by engaging in statutory construction of the INA, rather then addressing the constitutional issue directly. While neither opinion dealt with the constitutionality of pre-removal detention of admitted immigrants, this issue would come before the court two years later in *Demore v. Kim*.[128]

*B. The Constitutional Requirements of Pre-Removal Detention:* Demore v. Kim

In *Demore*, the Court was asked to decide whether INA § 236(c) violated the Due Process Clause of the Fifth Amendment. The noncitizen in *Demore* argued that § 236(c) was unconstitutional because it mandated detention even though "the INS had made no determination that he posed either a danger to society or a flight risk."[129] Rather than challenging his inclusion in one of § 236(c) mandatory detention categories at a Joseph hearing,[130] Mr. Kim choose to directly challenge the constitutionality of § 236(c) in a habeas petition.[131]

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[126] *Id*. at 379-80.
[127] *Id*. at 380.
[128] Demore v. Kim, 538 U.S. 510 (2003).
[129] *Id*. at 514.
[130] *Supra* Part II.B.
[131] *Demore*, 538 U.S. 510 at 513-14.

In finding INA § 236(c)'s mandatory detention proceedings constitutionally permissible, the court relied on the idea that Congress has plenary power over immigration.[132] The Court stated that it is a "fundamental premise of immigration law" that "Congress regularly makes rules that would be unacceptable if applied to citizens."[133] Recognizing that courts should typically defer to the legislature over immigration matters, the Court then cited to INA § 236(c)'s legislative history. Chief Justice Rehnquist turned to Congressional documents to support the propositions that: "(1) criminal aliens were the fastest growing population in federal prisons; (2) removable, criminal aliens continued to commit crimes after removal proceedings were underway; and (3) removable, criminal aliens often fail to appear for their removal hearings."[134] Thus, Congress enacted INA § 236(c) to effectuate and ensure the removal of classes of immigrants who are inherently a danger to the community or represent a flight risk.

The Court also cited the cases of *Carlson v. Landon*[135] and *Reno v. Flores*[136] to support the position that mandatory detention during removal proceedings without an individual bond hearing is consistent with Supreme Court's precedent.[137] Therefore, mandatory detention under INA § 236(c) is not only in line with constitutional requirements, but has always been considered

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[132] *Supra* Part I.
[133] *Demore*, 538 U.S. 510 at 515-17.
[134] Banias, *supra* note 66, at 41-42 (citing *Demore*, 538 U.S. 510).
[135] Carlson v. Landon, 342 U.S. 524 (1952). In *Carlson*, the INS denied bail without individual hearings to all aliens deportable as communists. Because Congress had determined by statute that all communist immigrants were a danger to the community, those individuals were not eligible for a bond even if they did not pose a flight risk.
[136] Reno v. Flores, 507 U.S. 292 (1993). In *Reno*, alien juveniles contested INS's policy to release juveniles only to certain legal guardians. The Court held that the INS, like Congress, could make reasonable assumptions and adopt rules applicable to a defined class of immigrants. This authority is merely an extension of Congress's plenary power to legislate with respect to aliens.
[137] *Demore*, 538 U.S. at 526.

a traditional part of the removal process.[138] The seemingly contrary holding in *Zadvydas* was distinguished in two ways.[139] First, because the purpose of detention under the INA is to effectuate removal and the immigrants in *Zadvydas* could not be removed, such indefinite detention did not serve an immigration purpose.[140] Second, while *Zadvydas* dealt with the potentially permanent detention of admitted immigrants, detention under INA § 236(c) is necessarily limited in duration.[141] Relying heavily on statistics showing that detention under INA § 236(c) typically did not last more then six months, the Court was able to distinguish *Zadvydas*.[142]

Although the Court in *Demore* ultimately found INA § 236(c) to be constitutionally permissible, it was careful to narrow this holding in significant ways. Under INA § 236(c), immigrants can be detained for the brief period necessary for their removal proceedings if: (1) the immigrant concedes removability;[143] and (2) the immigrant is only held for a brief period.[144] In the Courts opinion, the restriction of liberty resulting from mandatory detention in these circumstances was justified because of the rapid pace of most removal proceedings.

In applying the standard announced in *Demore*, the district courts have struggled to determine exactly when the length of pre-removal detention, without a bond hearing, has become

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[138] *Id*.
[139] *Zadvydas*, 533 U.S. 678 (holding that prolonged immigration detention raised serious constitutional concerns).
[140] *Id*. at 527.
[141] Banias, *supra* note 66, at 41-42 (citing *Demore*, 538 U.S. 510). The Executive Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to INA § 236(c) removal proceedings are completed in an average time of 47 days and a median of 30 days.
[142] *Demore*, 538 U.S. at 526.
[143] The Court in *Demore* concluded that Mr. Kim conceded removability but that is not necessarily correct. He simply chose to challenge his detention through a habeas petition rather then first contesting removability.
[144] *Demore*, 538 U.S. at 531.

constitutionally impermissible. Some courts have applied a "shocks the conscience" standard while others have created a balancing test considering: (1) the overall length of detention; (2) whether the civil detention is for a longer period than the criminal sentence for crimes resulting in the deportable status, (3) whether actual removal was reasonably foreseeable; (4) whether the immigration authority acted promptly to advance its interests; and (5) whether the petitioner engaged in dilatory tactics in the immigration court.[145] The overall result has been an inconsistent application of the law with the noncitizen's likelihood of success depending as much upon the particular jurisdiction as the strength of his or her claims.[146]

## V. PRE-REMOVAL MANDATORY DETENTION: THE NEED FOR GREATER FLEXIBILITY

### *A. Limiting the Application of 236(c): Temporal Limitation and Substantial Argument Approach*

Given the limited nature of the Court's holding in *Demore*, Justice Kennedy and Justice Breyer wrote concurring opinions analyzing how they would resolve the issue of prolonged detention for an immigrant who is actively fighting removal.[147] Justice Kennedy believed that if an immigrant is subject to prolonged pre-removal mandatory detention, the principles announced in *Zadvydas* should apply.[148] Because an admitted immigrant has rights under the Due Process Clause, "a lawful permanent resident alien... could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or

[145] Sengkeo v. Horgan, 670 F.Supp. 2d 116 (D. Mass. 2009); Flores-Powell v. Chadbourne, 677 F.Supp.2d 455 (D. Mass. 2010).
[146] Seipp, *supra* note 62 (discussing challenges based on prolonged detention).
[147] *Id*. at 531-33 (Kennedy, J., concurring); *Id*. at 576-79 (Breyer, J. concurring in part and dissenting in part).
[148] *Demore*, 538 U.S. at 532 (*citing Zadvydas v. Davis*, 533 U.S. 678 (2001) (Kennedy, J., concurring)).

unjustified."[149] Thus, Justice Kennedy would allow an individualized hearing on pre-removal detention for immigrants detained longer then six months.[150]

Justice Breyer, in his concurring opinion, agreed with Justice Kennedy temporal limitation, but also recognized a second way to interpret and limit INA § 236(c). Analyzing the text of § 236(c) directly, Justice Breyer noted that the provision only allows detention of criminal immigrants who are deportable, "not one who may, or may not" be deportable.[151] Thus, Justice Breyer reasoned that if a substantial legal argument exists as to an immigrant's removability, that individual should be entitled to a bond hearing.[152]

Immigration courts could look to criminal bail standards to determine what is or what is not a "substantial legal argument."[153] These standards would recognize the government's interest in detention while at the same time protecting a detained immigrants liberty interest.[154] Therefore, Justice Breyer would interpret INA § 236(c) to allow a detained immigrant to seek an individualized assessment of flight risk and dangerousness as long as the claim contesting removability is: "(1) not interposed solely for purposes of delay and (2) raises a question of "law or fact" that is not insubstantial."[155]

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[149] *Id*.
[150] Justice Kennedy stated, "were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Id*. at 532-33.
[151] *Id*. at 578 (Breyer, J., concurring in part and dissenting in part).
[152] *Id*. at 577
[153] "Federal law makes bail available to a criminal defendant after conviction and pending appeal provided: (1) the appeal is not for the purpose of delay; (2) the appeal raises a substantial question of law or fact; and (3) the defendant shows by clear and convincing evidence that, if released, he is not likely to flee or pose a danger to the safety of the community." Banias, *supra* note 60, at 44.
[154] Bianas, *supra* note 66, at 44.
[155] *Demore*, 538 U.S. at 578-79 (Breyer, J., concurring in part and dissenting in part).

The 9th Circuit subsequently applied Justice Breyer's substantial argument approach to the *Joseph* hearing context in the case of *Tijani v. Willis*.[156] As mentioned above,[157] a noncitizen in a *Joseph* hearing has the opportunity to challenge the underlying grounds for removal. However, the individual making this challenge bares the burden of showing that ICE is "substantially unlikely" to establish the charges that rendered the noncitizen subject to mandatory detention.[158] The *Joseph* standard "not only places the burden on the defendant to prove that he should not be physically detained, it makes that burden all but insurmountable."[159] In contrast to this standard, Judge Tashima in his concurring opinion found that the Supreme Court has consistently adhered to the principle that the risk of erroneous deprivation of a fundamental right should not be placed on the individual.[160] When an individual's liberty interest is at stake, the government must bare the higher burden.[161] Therefore, detention should only be imposed on those immigrants who could not raise a substantial argument against their removability.

*B. Advantages and Disadvantages of the Temporal Approach*

The temporal approach is most effective in the post-removal rather then pre-removal context. By definition, immigrants subject to mandatory detention under INA § 236(c) have yet to be ordered removed.[162] Litigation in the pre-removal context is ongoing and the time necessary to conclude such litigation will vary on a case-by-case basis. Thus, while the Supreme Court established that a six-month period of detention in the post-removal context was

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[156] Tijani v. Willis, 430 F.3d 1241, 1246 (9th Cir. 2005).
[157] *Supra* Part II.A-B.
[158] In re Joseph, 22 I. & N. Dec. 799, 802, 1999 WL 339053 (B.I.A. 1999) (*Joseph II*).
[159] *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring).
[160] Banias, *supra* note 66, at 62-63.
[161] *Tijani*, 430 F.3d at 1245 (Tashima, J., concurring).
[162] 8 U.S.C. § 1226(c).

presumptively valid,[163] it is unlikely a similar bright line rule could be created for pre-removal detention. Joseph Warren for example was held for over three years and yet the length of his detention was not considered to be unreasonable. A brief review of cases applying Kennedy's temporal approach illustrates this lack of uniformity.[164] In addition to the lack of uniformity, the temporal test is limited in that it cannot prevent a constitutional violation.[165] By its very nature, the temporal approach can only be applied after an immigrant has been detained for too long. The temporal test does nothing to help those immigrants who wish to challenge their detention at the outset of removal hearings. At the very best, this approach can only stop constitutional violations from continuing.

The primary advantage of the temporal approach is its "safety net" quality.[166] An immigrant will always have the opportunity to apply for this relief even if he or she does not challenge the application of INA 236(c) at the outset of litigation. Furthermore, if litigation continues to drag on year after year, an immigrant can challenge the length of detention even if previous challenges were rejected. The temporal approach provides a remedy for immigrants who fall through the cracks and get lost within the immigration civil detention system indefinitely.[167]

*C. Advantages and Disadvantages of the Substantial Argument Approach*

The primary difficulty with the substantial argument approach is determining what exactly constitutes a substantial argument against removal. In his concurring opinion Justice

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[163] *See Zadvydas*, 533 U.S. 678.
[164] For example in *Prince v. Mukasey*, the court found that a sixteen-month detention period was valid. 593 F. Supp. 2d 727, 735 (M.D. Pa. 2008). However, in *Parlak v. Baker*, the court determined that a pre-removal detention period of seven months resulted in a constitutional violation. 374 F. Supp. 2d 551, 561 (E.D. Mich. 2005).
[165] Bianas, *supra* note 66, at 56.
[166] *Id*. at 56-57.
[167] *Id*. at 57.

Breyer outlines three factors: (1) the appeal is not dilatory; (2) the appeal raises a substantial question of law or fact; and (3) the defendant is not a flight risk or danger to the community.[168] At the outset of litigation, an immigrant is likely to raise every argument possible against removability. When viewed in total, this might make some of the arguments look frivolous or dilatory, thereby failing the first factor of Justice Breyer's test. Additionally, district courts regularly disagree with the B.I.A. and Immigration Judges on detention related issues.[169] Because district courts are less familiar with the arc of a typical removal case, they may not be in the best position to determine what constitutes a substantial argument within the immigration context.

The main advantage of the substantial argument approach is that it would prevent constitutional violations from occurring at the outset of the removal process.[170] A noncitizen falling under INA 236(c) would be entitled to a bond hearing if he or she can: (1) raise a substantial question of law or fact contesting the application of the INA § 236(c) categories and (2) the challenge is not interposed solely for the purposes of delay. Unlike the temporal test, which only provides a remedy for constitutional violations, immigrants would not have to wait the six months established in *Zadvydas* before challenging their detention. The substantial argument approach would also relieve pressure on the detention system because immigrants whose arguments are rebuked at the outset of litigation might be persuaded to accept voluntary departure or an order of removal quickly.[171] Additionally, those immigrants who do have a legitimate challenge to their removal would not be subject to detention preventing both a drain on ICE resources and the interruption of the immigrant's life.

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[168] *Demore*, 538 U.S. at 578-79 (Breyer, J., concurring in part and dissenting in part).
[169] Bianas, *supra* note 66, at 57.
[170] *Id*. at 66.
[171] *Id*. at 66-67.

Finally, the substantial argument approach aligns with congressional policy because it would not apply to those immigrants most likely to flee; namely, those immigrants with no real argument against removal. The Supreme Court in *Demore* recognized that Congress enacted INA § 236(c)'s requirement of mandatory detention to fix the problem of immigrants failing to show up for their removal proceedings.[172] However, if an immigrant has a substantial argument contesting removability, he or she is more likely to appear at the removal hearing. If mandatory detention applied mainly to those immigrants who could not contest their removability, "then removal would likely be quick, complying with the 'brief' removal process Chief Justice Rehnquist approved in *Demore*."[173] The substantial argument approach recognizes that immigrants without a valid legal argument are flight risks and ensures that those immigrants remain subject to mandatory detention.[174]

## VI. EXPANDING THE SCOPE OF THE SUBSTANTIAL ARGUMENT EXCEPTION

The temporal limitation and substantial argument approach do not go far enough in limiting the INA's application of mandatory detention. Mandatory pre-removal detention, without a bond hearing, continues to raise serious constitutional questions and the Court's limited holding in *Demore* reflects this concern.[175] Additionally, both approaches fail to take into account the complexity of immigration law and the various avenues of relief available to noncitizens subject to removal. Given the Supreme Court's willingness to construe the statutory language of the INA in order to avoid constitutional challenges,[176] ICE and the courts should

[172] *Demore*, 538 U.S. at 578-79
[173] Bianas, *supra* note 66, at 66.
[174] *Id*. at 66-67.
[175] *See supra* Part IV.B.
[176] *See supra* Part IV.A.

interpret INA § 236(c) to permit bond hearings for noncitizens that have a substantial claim for affirmative relief.

Noncitizens who fall into any of the categories set out in INA § 236(c) are considered removable.[177] However, the INA does not require that every removable noncitizen be deported. Several forms of relief from deportation are available to qualified individuals who might otherwise be removed.[178] Warren Joseph's case also illustrates this point. Even if Mr. Joseph was ultimately found to be removable, the ACLU opined that his strong ties to the U.S. would qualify him for various forms of relief.[179] The relief provisions contained within the INA address the reality that removal can have severe consequences for immigrants and citizens alike. The INA recognizes that while many of the removability grounds entail extreme wrongdoing, others do not.[180] The relief provisions "reflect the philosophy that even serious misconduct must be weighed against other factors, such as long-term residence, or an unusual degree of hardship, or the likelihood of persecution in a foreign country."[181] Within the removal process, relief from deportation can be analogized to an affirmative offense. Rather then contesting the particular grounds for a noncitizen's removal, immigrants in removal proceedings will often concede their removability but assert they are non-the-less eligible to remain in the United States.

Justice Breyer's substantial argument exception to INA § 236(c) recognizes the individual's right to be free while at the same time providing the "government leeway to detain those noncitizenss who lack any incentive to press their legal claims, and are therefore the most

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[177] 8 U.S.C. § 1226(c).
[178] Voluntary departure, cancellation of removal, adjustment of status, and asylum are just some of the examples of the various relief provisions.
[179] *Joseph*, 465 F.3d 123 (3d Cir. 2006).
[180] LEGOMSKY, *supra* note 31, at 593.
[181] *Id*.

likely to abandon those claims."[182] While the concurring opinion in *Demore* only addressed avoiding pre-removal detention by raising substantial arguments *contesting the underlying grounds* for removability,[183] the same line of reasoning can be applied to arguments concerning relief from removal. Immigration law is somewhat unique in that a noncitizen may be more concerned with qualifying for a particular form of relief rather then contesting removability. However, the ultimate outcome for the individual immigrant under either argument is the same, he or she will be allowed to remain within the United States.

INA § 236(c) only requires detention of those individuals who are removable. Once a noncitizen qualifies for relief, he or she is no longer subject to deportation. Therefore, regardless of whether noncitizens in a pre-removal hearing contest the grounds of their deportation or claim eligibility for some form of relief, either assertion constitutes a substantial argument against removability.

Many of the same difficulties in applying the substantial argument approach, as understood by Justice Breyer, would also be present if relief from removal was included within this exception.[184] Courts and immigration judges might disagree on which individuals are likely to qualify for immigration relief. The discretionary nature of most forms of relief might also make it difficult for an adjudicating body to determine at the outset of a removal hearing the probability that relief might be granted. However, putting the burden on the noncitizen to show that in the past, similarly situated individuals have been granted relief mitigates this concern.

The biggest obstacle to including relief from removal within the substantial argument exception is that such an inclusion would be stretching the statutory language of INA § 236(c).

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[182] *Tijani*, 430 F.3d 1241, 1247 (9th Cir. 2005) (Tashima, J. concurring).
[183] *Demore*, 538 U.S. at 578-79 (Breyer, J., concurring in part and dissenting in part).
[184] *See supra* Part V.C.

INA § 236(c) mandates that the Attorney General take into custody a noncitizen who is deportable.[185] A noncitizen cannot be eligible for relief until a determination is made that he or she is properly subject to removal. Thus, ICE has interpreted INA § 236(c) to require that a deportable noncitizen be placed in mandatory detention, irrespective of the fact that the noncitizen may qualify for relief from removal. However, as Justice Breyer recognized in his concurring opinion in *Demore*, INA § 236(c) applies only to those individuals who *are* removable, not individuals who *may* be removable.[186] Based upon the Supreme Court's policy of engaging in statutory construction to avoid constitutional questions, the Court should find that noncitizens that have a substantial argument for affirmative relief *may* be deportable, thus falling outside the bounds of INA § 236(c).

Including affirmative relief within Justice Breyer's substantial argument exception has significant advantages. Allowing noncitizens to avoid mandatory detention when they are able to put forth a substantial argument that they qualify for such relief is consistent with the Congressional policy behind INA § 236(c)'s enactment. The majority opinion in *Demore* upheld the mandatory detention provisions of INA § 236(c) in part because it recognized that Congress was properly concerned with: (1) the risk that immigrants released on their own recognizance would not show up to their removal hearings; and (2) that noncitizens convicted of crimes, if released, are likely to commit additional crimes in the future.[187] However, a noncitizen that qualifies for relief from removal is in a position distinct from those immigrants with whom Congress was primarily concerned. Just as the noncitizen who has a substantial argument

[185] 8 U.S.C. § 1226(c).
[186] *Demore*, 538 U.S. at 578.
[187] *Id*. at 578-79.

contesting his or her grounds of deportation is likely to show up to the removal hearing, so too is the noncitizen who is likely to qualify for relief from removal.

Furthermore, immigrants who qualify for some form of relief are also unlikely to commit additional crimes. Because most forms of relief from removal are discretionary,[188] a noncitizen released on parole is unlikely to commit any act that would jeopardize a favorable exercise of that discretion. Aggravated felons and noncitizens deportable on terrorist grounds are expressly disqualified from most of the major relief provision within the INA;[189] thus, this exception will be inapplicable to the categories of immigrants Congress was most concerned with.

Recognizing this exception would allow noncitizens to protect their liberty interest by contesting detention at the outset of removal hearings rather then waiting until the end of the process. In addition to preventing constitutional violations from occurring, allowing a noncitizen to avoid detention through this avenue would relieve the length of custody concerns addressed by the Supreme Court in both *Zadvydas* and *Demore*.[190] INA § 236(c) requires that individuals remain in detention throughout the removal and appeals process. Once again, Joseph Warran's case illustrates how the blind application of mandatory detention forces permanent residents to endure substantial periods of incarceration even if their claim is ultimately successful. When a noncitizen raises all possible arguments against deportation, including challenging the underlying grounds for removal and applying for relief, the length of detention is increased. Incorporating relief from removal into the substantial argument exception would help avoid the constitutional implications of prolonged civil detention.

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[188] Relief from removal is generally in the form, "If A, B, and C, then the Attorney General (or the Secretary of Homeland Security, as the case may be) *may* do X." Legomsky, *supra* note 25, at 646.

[189] *See, e.g.*, 8 U.S.C. §§ 1229(b)A(a)(3), 1229(b)A(b)(1)(c), 1229(b)(c)(4), 1229(c)(a)(1), 240(c)(b)(1)(C).

[190] *See Zadvydas*, 533 U.S. 678; *Demore*, 538 U.S. 510.

Including this exception would not only benefit immigrants subject to detention, but would also benefit permanent residents and citizens that rely on the incarcerated individual. Generally under the INA, the noncitizens who are most likely to qualify for relief from removal are those individuals that have significant ties to the United States. For example, a noncitizen may qualify for relief from removal if he or she can show "exceptional and extremely unusual hardship" to a qualifying family member.[191] An immigration judge is most likely to find exceptional and extremely unusual hardship when the qualifying family member suffers from a physical or mental illness and relies on the noncitizen for support.[192] Currently, a noncitizen falling into one of the categories described in INA § 236(c), who admits removability, is automatically denied a bond hearing and subject to the presumptively valid six-month detention period outlined in *Zadvydas*.[193] The result of this procedure is that any application to USCIS applying for relief from removal must be pursued while the noncitizen is behind bars. If no exception to mandatory detention the qualifying family member suffers as a result.

## VII. IMPLEMENTING CHANGE

Limiting the scope of mandatory detention under INA § 236 will require various administrative and legislative changes. Some of these changes can be done unilaterally by the Attorney General or ICE. Others will require an act by Congress amending the statutory language of INA § 236. Regardless of the mode of change, if Congress truly wants to focus immigration enforcement on removing those noncitizens who pose a danger to the community,[194] INA § 236 should be amended and applied to accomplish that goal rather then being used as a blanket rule to incarcerate all those who fall within its scope.

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[191] 8 U.S.C. § 1229(b)(b)(1)(D).
[192] *See generally* INA v. Jong Ha Wang, 450 U.S. 139 (1981).
[193] *Zadvydas*, 533 U.S. at 693.
[194] Transactional Records Access Clearinghouse, *supra* note 98.

*A. Changes That can be Made Pursuant to Regulations Issued by the Department of Justice*

The Department of Justice should abolish regulation 8 C.F.R. § 1003.19(i)(2), which allows ICE to automatically stay an immigration judge's order of release pending appeal.[195] This regulation has allowed ICE to broaden the scope of mandatory detention beyond INA § 236's original intent and has reduced bond hearings before an immigration judge to a mere formality.[196] The Department of Justice should reinstate the requirement that stays of release pending appeal will only be granted upon a showing by the government of a likelihood of success on the merits and irreparable harm. This standard strikes the proper balance between an individual's liberty interest and the government's need to detain those individuals who are truly dangerous.

*B. Incorporating the Expanded Substantial Argument Approach*

The substantial argument approach could be incorporated into the removal process without requiring new procedures or incurring significant delays. Currently, a noncitizen can immediately challenge a DHS officer's custody determination under INA § 236(a) by appealing that decision to an immigration judge. If the noncitizen is detained pursuant to INA § 236(c), the application of that provision can be challenged at the outset of detention in a *Joseph* hearing.[197] Using the existing framework of a *Joseph* hearing, immigration judges could simply ask whether the noncitizen has a substantial argument: (1) challenging the grounds for removal; (2) alleging the applicability of relief from removal; or (3) both. If the noncitizen receives a favorable determination in the initial proceeding, a traditional bond hearing would subsequently be held.

[195] *See supra* Part II.A.
[196] *See supra* Part II.A.
[197] *See supra* Part II.B.

The creation of this expanded *Joseph* hearing could be done by the B.I.A. on appeal, federal courts could do it circuit by circuit, or the Attorney Generally can simply issue an opinion enforcing the change.[198] However, to avoid confusion and ensure uniformity, the most effective mode of change would be to have either the Attorney General issue an opinion recognizing the substantial argument exception or have the Department of Justice issue a regulation requiring ICE officers to interpret INA § 236(c) with this exception in mind.[199]

*C. Narrowing and Clarifying the Criminal Categories Under INA § 236*

Any reform of INA § 236(c) should begin by clarifying the applicable legal standards and narrowing the classes of criminal noncitizens subject to mandatory detention. The INA's use of ill defined terms and broad criminal labels as the criteria for determining when detention is appropriate has proven ineffective and has led to unnecessary confusion.[200] Additionally, the list of offenses qualifying as an aggravated felony under INA § 101(a)(43) should be shortened to include serious offenses.[201] However, amending the provisions of the INA can only be accomplished by an act of Congress. Therefore, Congress's Commission on Immigration Reform should propose bills that tie detention and deportation to relevant criminal standards rather then relying on principles that are unique to immigration law.

## VIII. CONCLUSION

Congress's immigration policy has steadily moved toward greater executive branch authority to decree that noncitizens that share certain characteristics are uniformly dangerous. Immigration detention in the aftermath of the September 11th attacks has seen a dramatic

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[198] Bianas, *supra* note 66, at 67.
[199] The attorney general has jurisdiction to take on a B.I.A. case and render an opinion at any time. 8 C.F.R. § 1003.1(h)(1)(i).
[200] *Supra* Part III.
[201] *See* 8 U.S.C. 1101(a)(43).

increase in the use of no-bond directives based on categorical presumptions, without individualized assessments of flight risk or danger to the community. This tendency has resulted in the overuse of mandatory detention. Joseph Warren, who spent three years in prison based on a criminal label that the 3rd Circuit Court of Appeals eventually found to be inapplicable, is just one example of ICE's overuse of mandatory detention.[202] Given the serious constitutional concerns associated with prolonged civil detention, ICE and the courts should interpret the relevant provisions of the INA to allow an individualized bond hearing whenever possible. Incorporating the expanded substantial argument approach into making bond determinations avoids any potential constitutional concerns and is consistent with the Congressional policy of requiring detention for those noncitizens that are either a flight risk or a danger to the community.

[202] Joseph v. Attorney Gen. of U.S., 465 F.3d 123, 124 (3d Cir. 2006).