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# Demanding Due Process: Time to Amend 8 U.S.C. § 1226(c) and Limit Indefinite Detention of Criminal Immigrants

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# Demanding Due Process

## TIME TO AMEND 8 U.S.C. § 1226(C) AND LIMIT INDEFINITE DETENTION OF CRIMINAL IMMIGRANTS

### INTRODUCTION

Alejandro Rodriguez came to the United States from Mexico with his family when he was an infant.[1] Rodriguez became a lawful permanent resident (LPR) at age nine and has lived in the United States continuously since he first arrived.[2] His family, including his parents, siblings, and three children, also live in the United States either as citizens or LPRs.[3] Rodriguez established a life in California and worked as a dental assistant.[4] When Rodriguez was nineteen years old, he was convicted for "joyriding," or driving a stolen vehicle, and served two years in prison.[5] Then, in 2003 at age twenty-four, he was convicted of possession of a controlled substance and was sentenced to five years of probation, but no jail time.[6]

In 2004, after remaining in the United States for twenty-five years, Immigration and Customs Enforcement (ICE) detained Rodriguez and commenced removal proceedings for these two prior convictions.[7] An immigration judge determined that his prior conviction for joyriding constituted an aggravated felony and ordered Rodriguez removed.[8] After several appeals in the United States Court of Appeals for the Ninth Circuit and a case abeyance, Rodriguez was finally

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[1] Rodriguez v. Robbins, 804 F.3d 1060, 1073 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[2] *Id.*; Christie Thompson, *The Crucial Immigration Case About to Hit the Supreme Court*, MARSHALL PROJECT (Nov. 29, 2016), https://www.themarshallproject.org/2016/11/29/the-crucial-immigration-case-about-to-hit-the-supreme-court [https://perma.cc/2Y6K-HNSN].

[3] *Rodriguez*, 804 F.3d at 1073.

[4] *Id.*

[5] *Id.*; Thompson, *supra* note 2.

[6] *Rodriguez*, 804 F.3d at 1073; Thompson, *supra* note 2.

[7] *Rodriguez*, 804 F.3d at 1073.

[8] *Id.*

released in 2007.[9] He had spent three years and three months in detention for a crime that the Ninth Circuit does not consider an aggravated felony.[10] Not once during his detention did Rodriguez appear before an immigration judge for a bond hearing to determine whether he was a flight risk or a danger to the community and whether he could be released.[11] As a result of his prolonged detention, his life was disrupted: he lost his job and did not see his children for three years.[12] Not only was Rodriguez deprived of his livelihood and family while he was detained, but he was also deprived of a fundamental constitutional right: due process.

There are dozens of cases like Rodriguez's in which ICE detains a criminal immigrant after release from prison and the criminal immigrant spends months or years in detention without an individualized bond hearing.[13] If an immigrant has not committed a deportable crime, then he or she is eligible to request a bond hearing where an immigration judge determines whether he or she is a flight risk or a danger to the community.[14] Criminal immigrants subject to mandatory detention, however, are not offered a bond hearing at all and must remain in custody for the entire duration of his or her immigration case.[15] Since 1996 when Congress passed the mandatory detention scheme, there has been a surge in litigation surrounding this issue, and detainees subjected to mandatory detention without individualized bond hearings have repeatedly claimed that their due process rights were violated.[16]

The crux of the issue is that the statute that mandates detention of criminal immigrants,[17] 8 U.S.C. § 1226(c), does not

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 1065.

[12] Thompson, *supra* note 2.

[13] *See generally* Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016); Sopo v. U.S. Att'y Gen., 825 F.3d 1199 (11th Cir. 2016); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015).

[14] 8 U.S.C. § 1226(a) (2012); 8 C.F.R. §§ 1236.1(c)(8), (d) (2018).

[15] 8 U.S.C. § 1226(c) (2012).

[16] *See generally Reid*, 819 F.3d 486; *Sopo*, 825 F.3d 1199; *Lora*, 804 F.3d 601.

[17] The statute, as well as court opinions, federal government sources, and many articles, refers to criminal immigrants as "criminal aliens" or "aliens." *See, e.g.*, Demore v. Kim, 538 U.S. 510, 510 (2003); Darlene C. Goring, *Freedom from Detention: The Constitutionality of Mandatory Detention for Criminal Aliens Seeking to Challenge Grounds for Removal*, 69 ARK. L. REV. 911, 911 (2017); *Criminal Alien Statistics—FY2018*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/criminal-alien-statistics [https://perma.cc/X8A3-LDJM]. Other phrases have been used to describe immigrants who have been detained by ICE such as "detainees," "immigrant detainees," "civil detainees," and "civil immigration detainees." *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (stating that government detention of immigrants is civil, not criminal); *see also* César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 256 (2017); Faiza W. Sayed,

have a time limit or individualized bond hearing requirement: "[t]he Attorney General[18] shall take into custody any alien who . . . is inadmissible [or deportable] by reason of having committed [certain] offense[s][19] . . . when the alien is released"[20] from prison.[21] Thus, a criminal immigrant may spend months or years in detention without an individualized bond hearing even if he or she is not a flight risk or danger to the community.[22] This, some circuit courts have ruled, is a violation of due process.[23] Even though criminal immigrants are not U.S.-born citizens, they are still protected under the Fifth Amendment's Due Process Clause.[24]

This issue is more pressing than ever due to the unprecedented backlog in immigration courts.[25] At the end of July 2017, the backlog was at an all-time high of 617,527 cases.[26] By February 2018, the backlog had grown to 667,839 cases.[27] Additionally, the average wait time for a hearing in

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Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1834 (2011). The focus of this note is on the population of immigrants who have been convicted of one or more of the enumerated crimes set forth in 8 U.S.C. § 1226(c). For ease of reference, the note refers to these immigrants as "criminal immigrants."

[18] Although the statute mandates that the Attorney General detain criminal immigrants, the Homeland Security Act of 2002 assigned almost all immigration enforcement functions to the Secretary of Homeland Security. *Reid*, 819 F.3d at 493 n.1.

[19] There are certain crimes for which an immigrant is inadmissible or deportable. These crimes include crimes of moral turpitude (which include crimes such as murder, voluntary manslaughter, kidnapping, robbery, and aggravated assaults), aggravated felonies, violations of state or federal controlled substance laws, firearm offenses, threats to the president, prostitution, human trafficking, money laundering, or a crime where the sentence is longer than one year. 8 U.S.C. § 1182(a)(2) (2012); 8 U.S.C. §§ 1227 (a)(2)(A)(i)–(iii), (B), (C), (D) (2012); *Criminal Resource Manual*, U.S. DEP'T OF JUST., https://www.justice.gov/usam/criminal-resource-manual-1934-appendix-d-grounds-judicial-deportation [https://perma.cc/WM6N-5AYF].

[20] The language "when released" has also been controversial, since detention can occur immediately, months, or even years after a criminal is released from prison. But this controversy is outside the scope of this note's focus. For more information on the topic, see Margaret W. Wong, *Challenged to Mandatory Detention Under U.S. Immigration Law*, FED. LAW., Sept. 2010, at 60, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2010/The-Federal-Lawyer-September-2010/Features/Challenges-to-Mandatory-Detention-Under-US-Immigration-Law.aspx?FT=.pdf [https://perma.cc/4XSV-8QJG].

[21] 8 U.S.C. § 1226(c) (2012).

[22] *Id.* § 1226; Rodriguez v. Robbins, 804 F.3d 1060, 1065 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[23] *See* Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1235 (11th Cir. 2016); *Rodriguez*, 804 F.3d at 1090.

[24] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

[25] *Immigration Court Backlog Sets Record, Detainers Up*, IMMIGRATIONPROF BLOG (Sept. 1, 2017), http://lawprofessors.typepad.com/immigration/2017/09/new-from-trac-immigration-court-backlog-sets-record-detainers-up.html [https://perma.cc/JMK4-M5VQ].

[26] *Id.*

[27] *Compare Backlog of Pending Cases in Immigration Courts as of December 2017*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php [https://perma.cc/9X7Y-4BL8] (667,839 cases in 2018) *with*

immigration courts is now 718 days nationwide.[28] This means that criminal aliens detained upon release from their criminal sentence wait an average of two years before a court hears their removal case.[29] Although there is a strong government interest in preventing criminal immigrants' flight and protecting the community, there is also a constitutional concern that prolonged detention without a hearing deprives an individual of his or her liberty.[30]

Until a recent Supreme Court case, *Jennings v. Rodriguez*, the circuit courts were split as to whether the Constitution mandates an individualized bond hearing after six months of detention, or whether there should be a case-by-case approach to determine when detention becomes unreasonable and thus unconstitutional.[31] The United States Courts of Appeals for the Second and Ninth Circuits employed a bright-line approach and have held that the government should provide a criminal immigrant with an individualized bond hearing after six months in detention.[32] By contrast, the United States Courts of Appeals for the First, Third, Sixth, and Eleventh Circuits rejected the bright-line approach and adopted a case-by-case approach, holding that whether detention becomes unreasonable depends on the specific facts of the case.[33] The Supreme Court granted certiorari to resolve the circuit split and in *Jennings* found that criminal immigrants are not entitled to periodic bond hearings *at any point* during detention.[34]

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*Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts*, TRAC IMMIGRATION (Sept. 21, 2015), http://trac.syr.edu/immigration/reports/405/ [https://perma.cc/7WUG-ZJ8G] (465,644 cases in 2015) *and Backlog in Immigration Cases Continues to Climb: New Tool Offers Caseload Data by States, Courts and Nationality*, TRAC IMMIGRATION (Mar. 11, 2011), http://trac.syr.edu/immigration/reports/225/ [https://perma.cc/R5AS-4WFD] (228,421 cases in 2010).

[28] *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRAC IMMIGRATION (2018), http://trac.syr.edu/phptools/immigration/court_backlog [https://perma.cc/7CDT-UUUS].

[29] *Id.*

[30] Rodriguez v. Robbins, 804 F.3d 1060, 1065, 1067 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[31] Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1223 (11th Cir. 2016).

[32] Lora v. Shanahan, 804 F.3d 601, 614–15 (2d. Cir. 2015); *Rodriguez*, 804 F.3d at 1090.

[33] Reid v. Donelan, 819 F.3d 486, 498 (1st Cir. 2016); *Sopo*, 825 F.3d at 1215; Diop v. Ice/Homeland Sec., 656 F.3d 221, 234 (3d Cir. 2015); Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2004). No other circuits have addressed this issue.

[34] Jennings v. Rodriguez, 138 S. Ct. 830, 833 (2018). The Court's holding also applies to asylees and non-criminal immigrants since it found that Sections 1225(b) and 1226(a) of Title 8 of the United States Code also do not provide for bond hearings. *See id.* at 846; *see also* Kevin Johnson, *Argument Analysis: Justices Seem Primed to Find Constitutional Limits on the Detention of Immigrants*, SCOTUSBLOG (Oct. 4, 2017, 12:44 PM), http://www.scotusblog.com/2017/10/argument-analysis-justices-seem-primed-find-constitution

Due to the Court's decision and the high stakes resulting from the unprecedented immigration court backlog, Congress must take steps to reform the statute. Since the *Jennings* decision announced that Section 1226(c) does not provide periodic bond hearings, the judicial ruling falls short in upholding criminal immigrants' due process rights. Congress must amend the statute to provide specific due process safeguards for criminal immigrants and mandate that they receive a bond hearing after the six-month mark of detention.

Part I of this note provides the statutory framework of mandatory detention for criminal immigrants, including its history, Congress's purpose, and how the framework evolved through three separate bills. Part II discusses the foundational Supreme Court cases that evaluated constitutional limits of mandatory detention, as well as the resulting disagreements among the circuits regarding prolonged mandatory detention and due process. Part III provides insight as to why the Supreme Court's *Jennings* decision is an insufficient solution to the problem of prolonged detention that does not comport with due process requirements for criminal immigrants in light of the immigration court backlog. Finally, Part IV advocates that Congress amend 8 U.S.C. § 1226(c) to include temporal limitations on detention. Congress must adapt the statute to the current state of affairs in the immigration courts, which is vastly different from what it was when the statute was enacted in 1996. If Congress does not amend the statute, the statute will continue to jeopardize the liberty of criminal immigrants as the backlog in immigration courts continues to soar.

## I. THE DEVELOPMENT OF 8 U.S.C. § 1226(C) AND IMMIGRANTS' DUE PROCESS CHALLENGES

### *A. Congressional Action in Response to Criminal Immigrants in the Late Twentieth Century*

After Congress codified immigration laws in the Immigration and Nationality Act in 1952 (INA),[35] criminal immigrants were seldom ordered removed, even if they had

al-limits-detention-immigrants/ [https://perma.cc/BFJ9-4RHC]; Thompson, *supra* note 2. Those statutes and classes of immigrants, however, are not the focus of this note.

[35] Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163 (codified as amended in scattered sections of 8, 18, 22 U.S.C.); *see also Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/laws/immigration-and-nationality-act [https://perma.cc/A2LA-NYKQ].

committed a deportable offense.[36] And even if a criminal immigrant was ordered removed, he or she was rarely detained during his or her removal proceedings.[37] The Immigration and Naturalization Service (INS)[38] did not have the resources or capacity at the time to have an effective deportation or detention system and Congress had not addressed the issue.[39] Around the 1980s and 1990s, the "problem" of criminal immigrants gained attention nationwide.[40] According to a Senate Report from 1995, "America's immigration system [was] in disarray and criminal aliens . . . constitute[d] a particularly vexing part of the problem."[41] Local politicians were frustrated that criminal immigrants were not deported and that INS did little to address the problem.[42]

After years of neglect, criminal immigrants became a legislative priority and, without considering the implications of its actions, Congress acted swiftly.[43] Immigration reform in the 1980s and 1990s was aimed at tightening border security and reducing immigration amid growing anti-immigration sentiment in the country.[44] According to Congress, the most effective strategy for attaining the country's immigration policy goals included deportation of criminal immigrants following detention during removal proceedings.[45]

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[36] Margaret H. Taylor, Demore v. Kim: *Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 347 (David A. Martin & Peter H. Schuck eds., 2005).

[37] *Id.*

[38] The INS no longer exists today. It was abolished in 2003 and its functions spread among three agencies: United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CPB). *About CPB*, U.S. CUSTOMS & BORDER PROTECTION (last updated Nov. 21, 2016), https://www.cbp.gov/about [https://perma.cc/3XAS-ZBUT]; *Our History*, U.S. CITIZENSHIP & IMMIGR. SERV. (last updated May 25, 2011), https://www.uscis.gov/about-us/our-history [https://perma.cc/F6W3-T5PB]; *Who We Are*, U.S. CITIZENSHIP & CUSTOMS ENF'T (last updated Mar. 1, 2018), https://www.ice.gov/about [https://perma.cc/DR7A-N8AA].

[39] Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J. L. & PUB. POL'Y 367, 373–74, 398, 402 (1999); Taylor, *supra* note 36, at 347.

[40] Taylor, *supra* note 36, at 347–48.

[41] S. Rep. No. 104–48, at 1 (1995).

[42] Peter Kerr, *Moves to Deport Aliens for Drugs Are Not Pressed*, N.Y. TIMES (July 30, 1986), at A1, B5, http://www.nytimes.com/1986/07/30/nyregion/moves-to-deport-aliens-for-drugs-are-not-pressed.html [https://perma.cc/NF94-T2R9].

[43] Taylor, *supra* note 36, at 349.

[44] Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/?utm_term=.59f226a9a619 [https://perma.cc/64FG-9H93].

[45] Taylor, *supra* note 36, at 346.

### 1. Strike One: The Anti-Drug Abuse Act of 1988

The Anti-Drug Abuse Act of 1988 (ADAA) expanded the scope of deportable offenses to include aggravated felonies.[46] Before the ADAA, the only deportable offenses besides national security offenses were crimes of moral turpitude, narcotics offenses, and violations of firearm laws,[47] and even criminal immigrants who committed such crimes could be released on bond at the Attorney General's discretion.[48] Congress added aggravated felonies to this list, including crimes such as murder, drug trafficking, and illicit trafficking of firearms or destructive devices.[49] Additionally, the law mandated that the Attorney General "take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction [of an aggravated felony]."[50]

When challenged in court, some district courts held that due to lack of prompt bail hearings, the ADAA was an unconstitutional violation of due process.[51] In response, Congress amended the statute in 1990 and 1991 to provide LPRs and lawfully permitted immigrants who committed aggravated felonies with a hearing to determine whether the immigrant was a threat to the community or a flight risk.[52] Undocumented aggravated felons, however, could still be detained without a bond hearing.[53]

Despite INS's increasingly limited resources, Congress continued to legislate and expand consequences for criminal immigrants. Even though the amendments to the ADAA

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[46] Anti-Drug Abuse Act of 1988, Pub. L. 100–690, 102 Stat. 4181 (1988) (codified in scattered sections of U.S.C.); Schuck & Williams, *supra* note 39, at 372.

[47] There is no clear legal definition for crimes of moral turpitude since its definition is based on moral rather than legal standards. These crimes are considered acts of vileness or depravity and generally include crimes like murder, arson, robbery, burglary, larceny, and embezzlement. *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. § 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. Fed. 480, § 2[a] (1975).

[48] 8 U.S.C. §§ 1251(a), 1252(a) (1982); Deborah F. Buckman, *Validity, Construction, and Application of Mandatory Predeportation Detention Provisions of Immigration and Nationality Act (8 U.S.C.A. 1226(c)) As Amended*, 187 A.L.R. Fed. 325, § 2[a] n.8 (2003).

[49] Anti-Drug Abuse Act of 1988 § 7342, 102 Stat. at 4469–71 (codified as amended at 8 U.S.C. § 1101(a)(43)); Buckman, *supra* note 48, § 2[a].

[50] Anti-Drug Abuse Act of 1988 § 7343, 102 Stat. at 4470 (codified as amended at 8 U.S.C. § 1226(c)).

[51] Kellman v. District Director, 750 F. Supp. 625, 628 (S.D.N.Y. 1990); Paxton v. INS, 745 F. Supp. 1261, 1265–66 (E.D. Mich. 1990); Agunobi v. Thornburgh, 745 F. Supp. 533, 536–37 (N.D. Ill. 1990); Leader v. Blackman, 744 F. Supp. 500, 508–09 (S.D.N.Y 1990).

[52] Buckman, *supra* note 48, § 2[a].

[53] Taylor, *supra* note 36, at 349–50.

reigned in the scope of the statute, the underlying problem—INS's growing deportation caseload and limited detention capability—remained.[54] The political rhetoric at the time also focused on cracking down on criminal immigrants. As a result, Congress expanded the definition of an aggravated felony in 1994 to include a wider range of crimes, including theft for which the term of imprisonment is at least five years.[55] Even with these changes, Congress continued to focus on immigration reform.[56] There were several omnibus immigration reform bills on Congress's agenda in 1996, and it considered a major overhaul for almost every part of the INA.[57] One such law was the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which targeted terrorism, but nonetheless had deleterious effects on criminal immigrants.[58]

### 2. Strike Two: The Antiterrorism and Effective Death Penalty Act of 1996

Changes to the INA were prompted by the increase in anti-immigration sentiment after the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing, even though the perpetrators of the Oklahoma City bombing were U.S. citizens.[59] After the Oklahoma City bombing, Congress wanted to act quickly and pass a bill that would take a strong stance against national and international terrorism.[60] It drafted the AEDPA, which included significant changes to immigration laws.[61] The bill was delayed over controversial measures such as "secret trials" for deporting immigrant terrorists and was pending in Congress for about a year.[62] Anxious to pass the bill before the first anniversary of the Oklahoma City bombing,

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[54] U.S. GEN. ACCT. OFF., GAO-92-85, IMMIGRATION CONTROL: IMMIGRATION POLICIES AFFECT INS DETENTION EFFORTS 40–43 (1992); Taylor, *supra* note 36, at 349–50.

[55] Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103–146, § 222, 108 Stat. 4305, 4320–22 (codified as amended at 8 U.S.C. § 1101(a)(43)).

[56] *Immigration, Other Priorities on Congressional Agenda for 1996*, 73 INTERPRETER RELEASES 133, 133 (Jan. 29, 1996).

[57] *Id.* at 133–35; Taylor, *supra* note 36, at 349, 351.

[58] Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES (July 17, 1996), http://www.nytimes.com/1996/07/17/nyregion/a-law-aimed-at-terrorists-hits-legal-immigrants.html [https://perma.cc/WU36-PXYD].

[59] Austen Ishii, *There and Back, Now and Then: IIRIRA's Retroactivity and the Normalization of Judicial Review in Immigration Law*, 83 FORDHAM L. REV. 949, 953 (2014); Claudia Wilner, *"We Would Not Defer to That Which Did Not Exist": AEDPA Meetings the Silent State Court Opinion*, 77 N.Y.U. L. REV. 1442, 1458 (2002).

[60] *Final Anti-Terrorism Bill Contains Major Immigration Changes*, 73 INTERPRETER RELEASES 521, 521 (Apr. 22, 1996).

[61] *Id.*; *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

[62] Taylor, *supra* note 36, at 349, 352.

Congress had to finalize the bill by April 19, 1996.[63] Thus, the controversial issues still being debated as part of a comprehensive immigration reform bill were inserted in the AEDPA and passed with an overwhelming majority.[64]

The AEDPA made significant, damaging changes to immigration law.[65] In fact, during the bill signing ceremony, President Clinton said, "this bill makes a number of major, ill-advised changes to our immigration laws having nothing to do with fighting terrorism."[66] Specifically, the law expanded the categories of deportable offenses, and included crimes such as theft offenses with a prison term of at least one year, fraud, tax evasion, and perjury.[67] Most significantly, the AEDPA required detention for almost all criminal immigrants without bond hearings.[68] Even the INS and civil rights groups were caught off-guard by the sudden and significant immigration provision passed in this terrorism bill.[69] Five months later, Congress passed yet another major immigration reform bill, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[70]

### 3. Strike Three: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996

The IIRIRA amended some of the controversial parts of the AEDPA, but nonetheless made deportation prospects significantly worse for criminal immigrants.[71] The act expanded

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[63] *Id.*

[64] Antiterrorism and Effective Death Penalty Act of 1996 §§ 435, 440, 110 Stat. at 1274–79 (codified as amended in scattered sections of 28 U.S.C.); Taylor, *supra* note 36, at 349, 352.

[65] Antiterrorism and Effective Death Penalty Act of 1996 §§ 435, 440, 110 Stat. at 1274–79 (codified as amended in scattered sections of 28 U.S.C.) (expanding the description of crimes of moral turpitude which render an immigrant deportable, prohibiting judicial review of a final order of deportation, providing for more expeditious deportation of certain criminal immigrants, and expanding the definition of aggravated felony); *President Signs Terrorism Bill Into Law, Congress Passes Corrections Measures*, 73 INTERPRETER RELEASES 568, 568 (Apr. 29, 1996) [hereinafter *President Signs Terrorism Bill into Law*].

[66] *President Signs Terrorism Bill Into Law*, *supra* note 65, at 568; *see* Antiterrorism and Effective Death Penalty Act of 1996 § 435, 440, 110 Stat. at 1274-79 (codified as amended in scattered sections of 28 U.S.C.); *id.*

[67] Antiterrorism and Effective Death Penalty Act of 1996 §§ 435, 110 Stat. at 1274–75 (codified as amended in scattered sections of 28 U.S.C.); Buckman, *supra* note 48, § 2[a].

[68] Antiterrorism and Effective Death Penalty Act of 1996 § 440(c), 110 Stat. at 1277 (codified in 8 U.S.C.); Taylor, *supra* note 36, at 349, 352.

[69] Eric Schmitt, *Provision in Terrorism Bill Cuts Rights of Illegal Aliens*, N.Y. TIMES (Apr. 19, 1996) http://www.nytimes.com/1996/04/19/us/provision-in-terrorism-bill-cuts-rights-of-illegal-aliens.html [https://perma.cc/N73P-QMGB].

[70] Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (codified in scattered sections of 8, 18, and 28 U.S.C.).

[71] Illegal Immigration Reform & Immigration Responsibility Act of 1996, § 303(a), 110 Stat. at 3009-585 (codified in 8 U.S.C. § 1226(c)); Taylor, *supra* note 36, at 349, 353.

the definition of an aggravated felony and included crimes of theft or violence with a sentence of at least one year, as opposed to the previous threshold of five years.[72] Additionally, permanent residents who were convicted of an aggravated felony and non-permanent residents who were convicted of any crime that rendered them inadmissible could no longer obtain relief from removal and were subject to deportation.[73]

Finally, the IIRIRA expanded the provisions of the AEDPA that mandated detention for criminal immigrants during removal proceedings.[74] These provisions were codified into today's 8 U.S.C. § 1226(c).[75] Because of the IIRIRA, detention of criminal immigrants is mandatory even if he or she does not pose a danger to the community or pose a flight risk.[76] The IIRIRA was the most dramatic and harshest immigration reform passed by Congress in the twentieth century,[77] and its effects are still felt today.[78]

With the passage of the ADAA of 1988, the AEDPA of 1996, and the IIRIRA of 1996, Congress drastically changed immigration laws and imposed indefinite detention on criminal immigrants.[79] Given the current backlog in immigration court,[80] this means that criminal immigrants are facing longer detention periods—and thus, denial of due process.

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[72] Illegal Immigration Reform & Immigration Responsibility Act of 1996, § 321(a)(3), 110 Stat. at 3009-627 (codified in 8 U.S.C. § 1101 (a)(43)(F), (G)); Taylor, *supra* note 36, at 349, 353.

[73] Illegal Immigration Reform & Immigration Responsibility Act of 1996, §§ 240A(a)(3), (b)(1)(C), 110 Stat. at 3009-594 (codified in 8 U.S.C. § 1229b(a)(3), (b)(1)(C)); Taylor, *supra* note 36, at 349, 353.

[74] Illegal Immigration Reform & Immigration Responsibility Act of 1996, § 236(c), 110 Stat. at 3009-585 (codified in 8 U.S.C. § 1226(c)); Taylor, *supra* note 36, at 349, 353.

[75] 8 U.S.C. § 1226(c) (2012); Taylor, *supra* note 36, at 349, 353 n.62.

[76] Judy Rabinovitz, *Ending the Laws That Fuel Mass Detention and Deportation*, ACLU: SPEAK FREELY (Oct. 20, 2011, 3:00 PM), https://www.aclu.org/blog/immigrants-rights/ending-laws-fuel-mass-detention-and-deportation [https://perma.cc/8Y6L-BHYF]. The IIRIRA provision does not allow the Attorney General to release a criminal immigrant based on his or her discretion. Rather, it mandates detention throughout the duration of the criminal immigrant's removal proceedings, regardless or his or her danger or flight risk. 8 U.S.C. § 1226(c); Debra Lyn Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 460–61 (2001).

[77] Schuck & Williams, *supra* note 39, at 371.

[78] Rabinovitz, *supra* note 76.

[79] Opal Tometi, *Black Lives Matter Co-Founder: The Immigration Challenge No One is Talking About*, TIME (Apr. 29, 2016), http://time.com/4312628/immigration-1996-laws/ [https://perma.cc/4UN6-FGRH].

[80] *Immigration Court Backlog Sets Record, Detainers Up*, *supra* note 25.

### *B. Can Criminal Immigrants Even Challenge 8 U.S.C. § 1226(c) in Court?*

Even though criminal immigrants are not U.S.-born citizens, they are still protected under the Due Process Clause of the Fifth Amendment.[81] What is not clear, however, is at what point during detention criminal immigrants are deprived of due process under 8 U.S.C. § 1226(c).[82] Under section (e) of the statute, "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien . . . ."[83] Therefore, immigrants challenging the constitutionality of Section 1226(c) generally do so through writs of habeas corpus.[84] After IIRIRA and its progeny were codified, habeas corpus litigation exploded.[85] The Supreme Court tackled the constitutionality of indefinite detention in two seminal decisions: *Zadvydas v. Davis* and *Demore v. Kim*.[86]

## II. LITIGATION EFFECT OF MANDATORY DETENTION SCHEMES

Immigrant detainees first challenged the mandatory detention scheme in the Supreme Court with *Zadvydas v. Davis* in 2001.[87] The Supreme Court's subsequent ruling in *Demore v. Kim* in 2003, however, appears to be inconsistent.[88] In *Zadvydas*, the Court read an implicit limit in the detention statute at issue and stated that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[89] Then, just two years later, the Supreme Court in *Demore* refused to read an implicit limit in the detention statute and stated that "[brief]

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[81] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

[82] Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1223 (11th Cir. 2016).

[83] 8 U.S.C. § 1226(e) (2012).

[84] Buckman, *supra* note 48, § 2[a].

[85] Nancy Morawetz, *Back to the Future—Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113, 114 (2006). A writ of habeas corpus is a petition to the court to ensure that a person's imprisonment or detention is legal. *Habeas Corpus*, BLACK'S LAW DICTIONARY (10th ed. 2014). The number of federal cases reviewing orders of the Board of Immigration Appeals, including habeas cases, increased 970 percent from the years 1996 to 2007. Donald S. Dobkin, *Court Stripping and Limitations on Judicial Review of Immigration Cases*, 28 JUST. SYS. J. 104, 106–07 (2007).

[86] *Zadvydas*, 533 U.S. at 679–80; Demore v. Kim, 538 U.S. 510, 511 (2003); Buckman, *supra* note 48, § 2[a].

[87] *Zadvydas*, 533 U.S. at 679–80.

[88] *Demore*, 538 U.S. at 511; *see also* Suzanna Sherry, *The Unmaking of a Precedent*, 55 SUP. CT. REV. 231, 251 (2003); Johnson, *supra* note 34; Taylor, *supra* note 36, at 366.

[89] *Zadvydas*, 533 U.S. at 690.

[d]etention during removal proceedings is a constitutionally permissible part of that process."[90] The Supreme Court upheld brief detention periods without due process, but did not address whether prolonged detentions require temporal limitations to comport with due process.[91] While this latter issue is at the heart of *Jennings v. Rodriguez*, it is imperative to understand what ultimately led to the circuit courts' disagreements and the *Jennings* decision: the Court's legal foundation for mandatory detention.

### *A. The Supreme Court's Seminal Decisions on the Constitutionality of Mandatory Detention*

#### 1. A Victory for Detained Immigrants: *Zadvydas v. Davis*

In *Zadvydas*, the Supreme Court considered the challenge of two immigrants who were held in detention past the ninety-day removal period due to the government's inability to remove them.[92] The Court held that a removable immigrant may be detained for "a period reasonably necessary to bring about that alien's removal from the United States" but that the statute "does not permit indefinite detention."[93] Reading the statute otherwise, the majority held, "would raise a serious constitutional problem."[94]

Rebutting the government's assertion that immigrants' liberty interests are diminished by their lack of legal status in the United States, the Court stated that "an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used . . . the Constitution permits detention that is indefinite and potentially permanent."[95] The government attempted to justify indefinite detention by arguing that the purpose of the statute was to

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[90] *Demore*, 538 U.S. at 531.

[91] Erwin Chemerinsky, *Chemerinsky: Decision in SCOTUS Immigration Case Could Hinge on Government's Admission of Error*, ABA J. (Nov. 29, 2016, 3:00 PM), http://www.abajournal.com/news/article/chemerinsky_due_process_and_detention [https://perma.cc/C2FN-64V2].

[92] *Zadvydas*, 533 U.S. at 678, 684. Once an immigrant is ordered to be removed, the government has ninety days to remove him or her and must hold him or her in custody during this removal period. After the removal period, the government *may* continue to detain an immigrant who is still in the United States or release the immigrant under supervision. 8 U.S.C. § 1231(a) (2012); *Zadvydas*, 533 U.S. at 683. The statute in question in *Zadvydas* was 8 U.S.C. § 1231(a), not 8 U.S.C. § 1226(c), but the Court's analysis and holding is applicable to the discussion of prolonged detention. *Zadvydas*, 533 U.S. at 683.

[93] *Zadvydas*, 533 U.S. at 689.

[94] *Id.* at 690.

[95] *Id.* at 696.

prevent flight and to protect the community.[96] The Court found that these arguments were insufficient. To counter the flight risk argument, the Court said that in both cases, deportation was unlikely and thus "detention's goal was no longer practically attainable."[97] Additionally, the Court dismissed the government's concern about protection of the community by stating, "we have upheld preventive detention based on dangerousness only when limited to especially dangerous individuals and subject to strong procedural protections."[98]

Finally, the Court acknowledged that the judicial branch generally defers to Congress and the executive branch in immigration affairs, but also stated that those branches' power is still "subject to important constitutional limitations."[99] Here, the Constitution required that the government detain immigrants for only a reasonable period of time.[100] The Court imposed a six month limitation, noting that Congress previously doubted the constitutionality of detention for longer than six months based on the 1957 version of 8 U.S.C. § 1252(d).[101]

Therefore, the Court recognized the six-month period as the reasonable period of detention, after which, if the immigrant proves that there is no reasonable possibility of deportation in the foreseeable future, the burden shifts to the government to show evidence that rebuts the immigrant's evidence.[102] Ultimately, it was a win for criminal immigrants since the Court reaffirmed the principle that immigrants were protected under the Due Process Clause, and therefore could not be held indefinitely without the government proving by clear and convincing evidence that the criminal immigrant was dangerous or a flight risk.[103]

### 2. A Setback for Detained Immigrants: *Demore v. Kim*

Despite this step forward for criminal immigrants, the Court took two steps back when it analyzed the constitutionality of 8 U.S.C. § 1226(c) in *Demore v. Kim*.[104] The majority held that Congress has the authority to mandate that

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[96] *Id.* at 690–91.

[97] *Id.* at 690.

[98] *Id.* at 690–91.

[99] *Id.* at 695.

[100] *See id.*

[101] *Id.* at 701 (citing United States v. Witkovich, 353 U.S. 194, 195 (1957)).

[102] *Id.*

[103] Buckman, *supra* note 48, § 2[a]; *Power to Admit to Bail in Deportation Case*, 36 A.L.R. 887 (1925).

[104] Buckman, *supra* note 48, § 2[a].

criminal immigrants be detained "for the limited period of [their] removal proceedings" and that 8 U.S.C. § 1226(c) is therefore constitutional.[105] Analyzing Congress's intent in passing the statute, the Court highlighted INS's failure to "deal with increasing rates of criminal activity by aliens" and that INS "could not even identify most deportable aliens, much less locate them and remove them from the country."[106] The Court also noted that some studies presented to Congress suggested that detention was the best way to ensure criminal immigrants are successfully removed from the United States.[107] It was against this backdrop that Congress passed 8 U.S.C. § 1226(c) and the Court evaluated it.[108]

Defendant Mr. Kim relied on the Court's decision in *Zadvydas* when presenting his constitutional challenge, requiring the Court to distinguish these seemingly similar cases.[109] First, the Court highlighted that the immigrants in *Zadvydas* challenged their detention because removal was not attainable,[110] whereas in Kim's challenge, the statute pertained to criminal immigrants who were detained pending their removal proceedings.[111] The Court asserted that detention was necessary to prevent deportable immigrants from fleeing during their removal proceedings.[112] Even though Congress did not fully consider individualized bond hearings when it enacted 8 U.S.C. § 1226(c), the Court stated, "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."[113]

The second distinction the Court made between *Zadvydas* and *Demore* was that "[w]hile the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,' . . . the detention [in *Demore*] is of a much shorter duration."[114] In *Zadvydas*, detention after the post-removal period expired was indefinite because Germany would not accept Mr. Zadvydas, whereas for Mr. Kim, "detention [has] a definite termination point, in the majority of cases it lasts for less than the 90 days [the majority] considered presumptively

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

106 *Id.* at 518 (emphasis omitted).

107 *Id.* at 521.

108 *Id.*

109 *Id.* at 526–29.

110 Mr. Zadvydas argued that removal was not obtainable because neither Germany nor Lithuania would accept him, and he argued that there was no reasonable possibility of removal in the foreseeable future. Zadvydas v. Davis, 533 U.S. 678, 684, 702 (2001).

111 *Demore*, 538 U.S. at 527–28.

112 *Id.* at 528.

113 *Id.*; *see also* Taylor, *supra* note 36, at 349, 354.

114 *Demore*, 538 U.S. at 528 (citing *Zadvydas*, 533 U.S. at 690–91).

valid in *Zadvydas*."[115] The Court pointed to statistics showing that 85 percent of deportation proceedings were completed in an average of forty-seven days and a median of thirty days.[116] Therefore, the Court ruled that detention "for the limited period of [Mr. Kim's] removal proceedings" is constitutional.[117]

One cannot ignore the different tones the Supreme Court took in *Zadvydas* and *Demore*.[118] In *Zadvydas*, the Court took an immigrant-friendly approach and reaffirmed the principle that immigrants are protected by the Due Process Clause,[119] whereas the Court in *Demore* reaffirmed a principle from *Mathews v. Diaz*[120] that "Congress may make rules as to aliens that would be unacceptable if applied to citizens."[121] In the several years following these two decisions, the circuit courts struggled to agree on what the Supreme Court failed to address in *Zadvydas* and *Demore*: do prolonged detentions require due process?[122] And if they do, at what point in the detention does due process require a bond hearing?[123]

### *B. Circuits Split on "Trigger Point"[124] At Which Due Process Requires a Bond Hearing*

In the years after *Zadvydas* and *Demore*, one thing the circuit courts could agree on was that 8 U.S.C. § 1226(c) "does not permit the government to detain a criminal alien for an unreasonable amount of time without providing a bond hearing" for constitutional reasons.[125] The circuit courts were split as to the point at which detention of a criminal immigrant becomes unreasonable and thus unconstitutional.[126] The circuit courts adopted two different approaches: the first was the case-by-case approach, making the point at which detention becomes unreasonable dependent on the specific facts of the case, and the second was the bright-line approach, which drew the unreasonable detention line at the six-month mark.[127] The Supreme Court, however, took neither approach in its *Jennings* decision, holding

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115 *Id.* at 529.
116 *Id.*
117 *Id.* at 531.
118 Sherry, *supra* note 88, at 251; Taylor, *supra* note 36, at 349, 353.
119 *Zadvydas*, 533 U.S. at 689, 693–94.
120 Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).
121 *Demore*, 538 U.S. at 522.
122 Chemerinsky, *supra* note 91.
123 Johnson, *supra* note 34.
124 Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1214 (11th Cir. 2016).
125 *Id.* at 1223.
126 *Id.*
127 *Id.*

that criminal immigrants are not entitled to bond hearings at any point while in detention awaiting removal.[128]

## III. THE *JENNINGS* DECISION FALLS SHORT

The Supreme Court's decision in *Jennings v. Rodriguez* is yet another setback for criminal immigrants. Due process demands more for criminal immigrants and to achieve due process for criminal immigrants facing detention, Congress must amend 8 U.S.C. § 1226(c).

### *A. The* Jennings *Outcome*

The Supreme Court, in a five to three vote,[129] reversed and remanded the Ninth Circuit's six-month limit on detention and decided that no temporal limitation should be read into 8 U.S.C. § 1226(c).[130] The Court stated that "[Section] 1226(c) does not on its face limit the length of detention it authorizes" and that the language of the statute "reinforces the conclusion that aliens detained under [the Attorney General's] authority are not entitled to be released under any circumstances other than those expressly recognized by the statute."[131] In sum, criminal immigrants must be detained for the entire duration of their removal proceedings and are not entitled to a bond hearing.[132] The Court remanded the case back to the Ninth Circuit to determine whether indefinite detention without a bail hearing is unconstitutional.[133]

The Supreme Court's ruling makes clear that the Justices did not want to rewrite a statute in order to comport with due process. The Court ignored, however, the practical advantages of ruling otherwise. As the United States Court of Appeals for the First Circuit reasoned in *Reid v. Donelan*, "the practical advantages of . . . [a] bright-line rule . . . are persuasive justifications for legislative or administrative intervention, not judicial decree."[134] Given the Court's decision, it is imperative that Congress address the issue and amend the statute.

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[128] Jennings v. Rodriguez, 138 S. Ct. 830, 833 (2018).

[129] Justice Kagan recused herself because, while solicitor general, she authorized a filing during an earlier phase of the case. Allissa Wickham, *Justice Kagan Steps Back from Immigrant Detention Case*, LAW360 (Nov. 13, 2017, 10:03 PM), https://www.law360.com/articles/984302 [https://perma.cc/DX95-ZQWC].

[130] *Jennings*, 138 S. Ct. at 835. There are two other statutes at issue in *Jennings*, neither are the focus of this note. *Id.* at 834.

[131] *Id.* at 846.

[132] *Id.*

[133] *Id.* at 835.

[134] Reid v. Donelan, 819 F.3d 486, 498 (1st Cir. 2016).

### *B. A Dire Situation: The Immigration Court Backlog Is the Highest It Has Ever Been*

The Supreme Court in *Jennings* failed to address how current detention conditions and overall immigration climate are starkly different from those of 1996, when Congress passed 8 U.S.C. § 1226(c). As a result, the Supreme Court's decision will have significant consequences for immigrants in limbo and could lead to even more due process violations if Congress does not properly address the issue.

The backlog of immigration court is the worst it has ever been.[135] On June 1, 2017, the Government Accountability Office issued a report by the Executive Office for Immigration Review on the management of the immigration court system.[136] Covering the years 2006 to 2015, the report found that cases pending more than doubled between those years.[137] Currently, a criminal immigrant must wait almost two years for a hearing and remains detained during this time under the current statute.[138]

Current statistics paint a much different picture than the ones the Supreme Court provided in *Demore*,[139] which were later revealed to be inaccurate. The statistics in *Demore*, based on the government's brief from the Executive Office for Immigration Review, stated that "85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days."[140] For the remaining 15 percent of cases, where the immigrant appeals the decision to the Board of Immigration Appeals, "take[] an average of four months, with a median time that is slightly shorter."[141] This is important since the

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[135] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 21 (2017) [hereinafter GAO-17-438]; Akilah Johnson, *At Immigration Courts, A Growing Backlog*, BOSTON GLOBE (June 23, 2017), https://www.bostonglobe.com/metro/2017/06/22/immigration-courts-growing-backlog/eP1PUmY7Yez55JCVMKERAJ/story.html [https://perma.cc/XF6A-L2Q2]; Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, N.Y. TIMES (Dec. 1, 2016), https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html [https://perma.cc/TR9C-4LBM]; Maria Sacchetti, *DOJ Details Plan to Slash Immigration Court Backlog*, WASH. POST (Nov. 3, 2017), https://www.washingtonpost.com/local/immigration/doj-details-plan-to-slash-immigration-court-backlog/2017/11/03/03fcef34-c0a0-11e7-959c-fe2b598d8c00_story.html?utm_term=.b0e78e6fb533 [https://perma.cc/3DV3-XYCA].

[136] GAO-17-438, *supra* note 135.

[137] *Id.*; *Immigration Court Backlog Tool*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/[https://perma.cc/M5NS-N545].

[138] *Id.*

[139] Demore v. Kim, 538 U.S. 510, 529 (2003).

[140] *Id.*

[141] *Id.*

Supreme Court's decision in *Demore* was premised on the fact that there was a definite, shorter detention period than in *Zadvydas*.[142] In fact, the Acting Solicitor General during the time of *Demore* admitted that the statistics the government provided to the Court were "seriously inaccurate."[143] The latest statistics show an average detention period of more than a year, which is three times the estimate on which the Supreme Court based its *Demore* decision.[144]

Given the backlog of immigration court today, detention periods are, in fact, indefinite. What was once an outlier case—an immigrant detained for the longer-than-average six months—is now the case immigrants hope for, as many today face years before their cases are adjudicated.[145] With longer detention periods comes the dire need for a due process mechanism to protect immigrants' liberty. Additionally, with the current administration's push to detain and deport more immigrants, more people could end up in the system, creating longer waiting periods, and more due process violations for these detainees.[146]

### *C. The Effects of Detention on Immigrants and Society*

Not only is prolonged detention without a bond hearing a violation of due process, but it is also ripping families apart and ruining lives, further justifying why immigrants need congressional action.[147] Most of the criminal immigrants who find themselves in this situation have strong community ties, are hard workers, go to school, and have lived in the United States since they were young.[148] By being subjected to prolonged detention, they lose their jobs, custody of their children, contact with their families, and their livelihoods.[149]

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[142] *Id.* at 513, 529–30.

[143] Letter from Ian Heath Gershengorn, Acting Solicitor Gen., U.S. Dep't of Justice, to Hon. Scott S. Harris, Clerk, Supreme Court of the U.S. (Aug. 26, 2016), http://online.wsj.com/public/resources/documents/Demore.pdf [https://perma.cc/Z3NF-88RE] [hereinafter Gershengorn Letter]; Chemerinsky, *supra* note 91.

[144] Chemerinsky, *supra* note 91; Gershengorn Letter, *supra* note 143.

[145] Preston, *supra* note 135.

[146] Editorial Board, *Trump's Aggressive Immigration Enforcement is Overwhelming an Already Taxed Court System*, L.A. TIMES (June 30, 2017, 4:00 AM), http://www.latimes.com/opinion/editorials/la-ed-trump-immigration-courts-deportations-20170630-story.html [https://perma.cc/GQ8B-W7N8].

[147] Rodriguez v. Robbins, 804 F.3d 1060, 1072–73 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[148] *Id.*

[149] *Id.*; *see generally* Kalina M. Brabeck, M. Brinton Lykes & Cristina Hunter, *The Psychological Impact of Detention and Deportation on U.S. Migrant Children and*

That the class of people at issue is criminals does not justify prolonged detention periods without a bond hearing. . Often the crimes for which an immigrant is found removable are minor offenses or non-violent crimes, such as shoplifting and minor drug offenses.[150] Moreover, detention during removal proceedings for a criminal immigrant happens *after* they have served time for their crime, and sometimes the deportation period is longer than the sentence for the underlying crime.[151] In the interest of justice and human rights, Congress should amend the statute so that criminal immigrants are subjected only to reasonable detention times, as required by the Constitution.

## IV. CONGRESS: TIME TO AMEND 8 U.S.C. § 1226(C)

It is imperative that Congress take action to ensure that criminal immigrants in detention receive the due process to which the Constitution affords them as they await the outcome of their deportation proceedings. Because a Supreme Court ruling will not be enough to ensure this,[152] nor is it judicially proper for the Court to re-write the statute, Congress should amend 8 U.S.C. § 1226(c). The amendment should change the statute to include a bright-line six-month rule that is easily administrable by the courts and uniform across all cases involving detention of criminal immigrants.[153]

Specifically, Congress should add a Section (2) to 8 U.S.C. § 1226(c) that reads:

> (2) Prolonged Detention
>
> If detention under § 1226(c)(1) lasts six months, then the alien must be afforded bond hearings, with the possibility of release into the United States, unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community.

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*Families*, 84 AM. J. OF ORTHOPSYCHIATRY 496 (2014), https://pdfs.semanticscholar.org/df59/818dc1a9103681ddab2cf2894353ef8cc76c.pdf [https://perma.cc/JU2A-6JYS].

[150] *Rodriguez*, 804 F.3d at 1072–73; Taylor, *supra* note 36, at 343; Tina Vasquez, *Supreme Court Hears Case on Stripping Migrants of Due Process Rights*, REWIRE (Nov. 30, 2016, 5:06 PM), https://rewire.news/article/2016/11/30/supreme-court-hears-case-stripping-migrants-due-process-rights/ [https://perma.cc/URU8-FVQK] (discussing the story of Astrid Morataya who came to the United States when she was eight years old, was convicted for a low-level drug crime when she was older during a rough period in her life, subjected to two years in mandatory detention, and forced to obtain a U-Visa and testify against her attacker in order to stay in the United States to be with her children).

[151] Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2004).

[152] *See supra*, Part III.

[153] Lora v. Shanahan, 804 F.3d 601, 616 (2d Cir. 2015).

This language will ensure consistency and provide clarity. Moreover, it will insulate the detainee from discrimination that can result from variables such as whether the immigrant is represented by counsel or what judge is presiding over the hearing. Most importantly, it will guarantee due process in a time when backlogs and mass deportation are clogging up the system. As Justice Kennedy said in his *Demore* concurrence, "since the Due Process Clause prohibits arbitrary deprivations of liberty . . . [an] alien . . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."[154] There is strong evidence to suggest that the Supreme Court and Congress consider that anything longer than six months is unreasonable.[155] Thus, Congress should codify a six-month limitation into the statute.

In reality, this amendment would inevitably receive backlash, especially given the current administration's staunch stance on immigration issues.[156] One major critique could be that the Department of Homeland Security's mission is to protect the United States from terrorism and other security threats, and by allowing hearings at the six-month mark, this amendment would do the opposite, since it may allow criminal immigrants to be released and commit more crimes.[157] This amendment, however, does not automatically release criminal immigrants after six months. It entitles a criminal immigrant to a bond hearing at six months, where the government can show that he or she is a danger to the community or a flight risk if there is concern that the immigrant may commit more crimes. As stated in an oral argument in *Jennings*, the court "gives triple ax murderers . . . bail hearings."[158] Criminal immigrants convicted of mostly non-violent offenses should be afforded the same constitutionally-required bail hearings.

Individual bond hearings are the norm. In fact, "[i]n all contexts apart from immigration and military detention, the Court has found that the Constitution requires some individualized process and a judicial or administrative finding

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[154] Demore v. Kim, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring) (citations omitted).

[155] *Lora*, 804 F.3d at 615.

[156] Matt Ford, *President Trump's Immigration Policy Takes Shape*, ATLANTIC (Feb. 21, 2017), https://www.theatlantic.com/politics/archive/2017/02/trump-immigration-deportation-memo/517395/ [https://perma.cc/5CTH-26VC].

[157] *Our Mission*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/our-mission [https://perma.cc/R6CT-HP54].

[158] Transcript of Oral Argument at 11, Jennings v. Rodriguez, 138 S. Ct. 830, 833 (2018) (No. 15–1204).

that a legitimate governmental interest justifies detention of the person in question."[159] This note's proposed amendment would not release droves of criminals into American streets; rather, it would afford immigrants a procedural safeguard to ensure that the government has a legitimate interest in depriving the immigrant's liberty.[160]

Despite critics' concerns, there are good reasons why the statute should be rewritten to include a six-month limit. There is a strong history of both the Supreme Court and Congress determining detention periods of longer than six months without a hearing as unreasonable. The Supreme Court in *Zadvydas* found that detention periods over six months raised constitutionality concerns.[161] The Court emphasized that the six-month mark does not mean every criminal immigrant should be released at six months, it just means that the immigrant should be afforded a bond hearing after this time.[162] The same procedure should be applied with the amended 8 U.S.C. § 1226(c). Additionally, before 8 U.S.C. § 1226(c) was amended in 1996, a criminal immigrant could not be detained for more than six months and when the six-month period expired, the statute required the immigrant's release under the Attorney General's supervision.[163] Because the Supreme Court has found that detention over six months is presumptively unreasonable, and thus raises issues of constitutionality, the six-month mark is the best duration for an amended statute.

## CONCLUSION

As the Supreme Court has said, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."[164] While the Court has

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[159] Rodriguez v. Robbins, 804 F.3d 1060, 1075 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[160] *Id.* at 1090.

[161] Zadvydas v. Davis, 533 U.S. 678, 701 (2001); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 391 (2014).

[162] *Zadvydas*, 533 U.S. at 701.

[163] 8 U.S.C. § 1252(c) (1994) ("When a final order of deportation . . . is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States."). Bassett, *supra* note 76, at 460. Note that for immigrants who committed an aggravated felony, the statute required the Attorney General to take him or her into custody, but permitted release upon a determination that the criminal immigrant did not pose a flight risk or danger to the community. 8 U.S.C. § 1252(a)(2)(B) (1994); Bassett, *supra* note 76, at 460.

[164] *Zadvydas*, 533 U.S. at 690.

found that government detention violates the Due Process Clause in criminal proceedings unless procedural mechanisms are in place, it has neglected to do so for criminal immigrants in detention under 8 U.S.C. § 1226(c).

After years of litigation surrounding Congress's mandatory detention scheme, only one thing seems to be clear: the jurisprudence has come out on the wrong side of justice. Since the Supreme Court has tackled the issue of mandatory detention statutes in *Zadvydas* and *Demore*, the circuit courts have been divided on this issue of whether a limitation should be read into 8 U.S.C. § 1226(c) in order to ensure immigrants' due process rights are not violated. Even though the Supreme Court took up this issue in *Jennings*, the decision leaves detained criminal immigrants without recourse. Because of the dire situation imposed by the immigration court backlog and the unreasonably negative effects that the *Jennings* decision imposes on the immigrant, it is paramount that Congress rewrite the statute. Immigrants' due process rights demand action.

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