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CHALLENGING DETENTION: WHY IMMIGRANT DETAINEES RECEIVE LESS PROCESS THAN "ENEMY COMBATANTS" AND WHY THEY DESERVE MORE

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As a result of the national attention on the "War on Terror," legal literature has focused on examining executive detention of alleged "enemy combatants" at the United States naval base at Guantànamo Bay. In particular, academics and courts have and are currently actively debating the sufficiency of the process afforded to Guantànamo detainees to challenge their detention. Meanwhile, little attention has been given to a form of executive detention that our country has practiced since virtually the beginning of our nationhood and that affects many more individuals than detention at Guantànamo—the detention of immigrants pending removal proceedings. Although the Immigration and Nationality Act mandates the detention of certain immigrants with criminal histories, little has been written about the process these immigrants receive to challenge their detention. And, despite their similarities, the two forms of detention—executive detention of "enemy combatants" at Guantànamo and of immigrants pending removal proceedings—have not been compared. This Note fills that void by comparing the processes afforded to the two sets of detainees to challenge their detention. It then argues, based on the comparison, that immigrant detainees deserve more process to protect against erroneous detention and proposes ways to reform immigrant challenges to mandatory detention.

INTRODUCTION

Mr. B and Murat Kurnaz were both erroneously detained by the United States for years before finally winning their freedom from detention, but their similarities end there.[1] Mr. B was a lawful permanent resident (LPR) of the United States for forty years when he was placed in mandatory immigrant detention and held for four years because Immigration and Customs Enforcement (ICE) officers incorrectly believed his conviction for two misdemeanors made him removable. Murat Kurnaz, on the other hand, was a twenty-year old Turkish citizen and German legal resident when he was detained at Guantánamo Bay for five years because the government alleged he was an "enemy combatant." Both challenged their detention and were eventually released; however, the bodies reviewing their claims would apply very different standards in determining whether they were properly detained.

In order for Mr. B to challenge his mandatory detention, he would have to ask for a *Joseph* hearing. A *Joseph* hearing is an administrative hear-

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1. Murat Kurnaz, Five Years of My Life: An Innocent Man in Guantanamo 15–18 (Jefferson Chase trans., Palgrave Macmillan 2008); Amnesty Int'l, Jailed Without Justice 22 (2009).

ing before an immigration judge (IJ) in immigration court convened to determine whether the immigrant is "properly included" within the mandatory detention provision. At the hearing, the IJ would determine whether the *noncitizen*[2] had met *his burden* in showing that the Department of Homeland Security (DHS)[3] is *"substantially unlikely* to establish . . . the charge or charges that would otherwise subject the [noncitizen] to mandatory detention."[4] In contrast, Murat Kurnaz would challenge his detention by filing a habeas corpus petition with the D.C. District Court, where the judge would decide if the *government* had met *its burden,* by a *preponderance of evidence,* that Kurnaz was an "enemy combatant."[5] This describes just two of the ways detainees at Guantánamo Bay are surprisingly afforded more procedural protections than are immigrant[6] detainees subject to mandatory detention. This Note examines immigrant detention in light of the similar form of executive detention at Guantánamo Bay; argues that, based on this comparison, immigrants deserve more process to protect against erroneous detention; and proposes ways to reform immigrant challenges to mandatory detention.

Part I provides a brief history of immigrant detention and detention at Guantánamo, describes the current statutory framework supporting both forms of detention, and concludes with a broad overview of detention today in both contexts. Part II compares the processes afforded to immigrant detainees and to Guantánamo detainees, highlights procedural problems with *Joseph* hearings, and offers three explanations for why the two sets of executive detainees receive such disparate procedures when challenging the legality of their detention. In light of the procedures executive detainees at Guantánamo receive, Part III proposes ways in which the government can provide immigrant detainees more process

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2. This Note replaces the term "alien" in statutory text, judicial opinions, and other sources with the term "noncitizen" and intends the terms to have the same meaning. "Alien" is defined as "any person not a citizen or national of the United States." INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). Throughout, this Note provides parallel citations to the Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.), when referencing the U.S. Code, even if the language in question did not originate with the INA.

3. In 2002, Congress passed the Homeland Security Act, which replaced the Immigration and Naturalization Service (INS) with the Department of Homeland Security (DHS). Pub. L. 107-296, 116 Stat. 2135 (2002). DHS contains three bureaus—Customs and Border Patrol (CBP), Immigration and Customs Enforcement (ICE), and the Bureau of Citizenship and Immigration Service (USCIS)—which inherited the INS's functions. The other agency that plays a role in immigration matters within the United States is the Department of Justice (DOJ). The DOJ's Executive Office for Immigration Review (EOIR) houses the immigration judges (IJs) and the Board of Immigration Appeals (BIA). See generally Thomas Alexander Aleinikoff, David A. Martin & Hiroshi Motomura, Immigration and Citizenship: Process and Policy 269–74, 278–84 (6th ed. 2008) (describing responsibilities of DHS and DOJ units).

4. Joseph, 22 I. & N. Dec. 799, 806 (B.I.A. 1999) (emphasis added).

5. Case Management Order, In re Guantanamo Bay Detainee Litig., Misc. No. 08-442 (TFH), at 4 (D.D.C. Nov. 6, 2008).

6. This Note uses the term "immigrant" to refer to lawful permanent residents.

and explains why adding such procedures may actually further the government's own interests.

I. Detention of Immigrants and "Enemy Combatants": Background

The Supreme Court has deemed physical liberty "the most elemental of liberty interests."[7] Given the high importance of physical liberty in our constitutional scheme, executive detention of immigrants and alleged "enemy combatants" has unsurprisingly spawned numerous court challenges and entire fields of academic scholarship. But despite their similarities, the two forms of detention have not been compared—this Note fills that void. This Part provides a foundation for the comparison by first discussing the history, statutory framework, and current reality of immigrant detention and then does the same for detention at Guantánamo Bay.

A. *Immigrant Detention: History and Current Framework*

The detention of immigrants in the United States is not a new phenomenon; rather it "is as old as immigration law itself."[8] What has changed about immigrant detention is the sheer number of immigrants who may be detained, the number of immigrants actually detained,[9] and the length of detention.[10] The first part of this section traces the history of immigrant detention in the United States, which began as a short-term measure for noncitizens whose admissibility was in question, quickly developed into a mechanism for dealing with perceived national security threats, and is now a primary means of enforcing the immigration laws. This section then explains the current statutory framework mandating the expansive role of detention in the enforcement of the immigration laws and discusses Supreme Court decisions concerning limits on immigrant detention. It concludes with statistics and figures that lend a broad overview of the reality of immigrant detention today.

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7. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004); see also Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process Clause] protects.").

8. Lenni B. Benson, As Old as the Hills: Detention and Immigration, 5 Intercultural Hum. Rts. L. Rev. 11, 12 (2010).

9. See Anil Kalhan, Rethinking Immigrant Detention, 110 Colum. L. Rev. Sidebar 42, 44–45 (2010), http://www.columbialawreview.org/assets/sidebar/volume/110/42_Anil_Kalhan.pdf. ("In 1994, officials held approximately 6,000 noncitizens in detention on any given day. That daily average had surpassed 20,000 individuals by 2001 and 33,000 by 2008. . . . This growth has been fueled by enforcement policies that subject ever-larger categories of individuals to removal charges and custody . . . .").

10. See infra notes 57–58 and accompanying text (providing statistics of length of detention); see also Geoffrey Heeren, Pulling Teeth: The State of Mandatory Immigrant Detention, 45 Harv. C.R.-C.L. L. Rev. 601, 602 (2010) ("While it is true that the majority of detainees are removed quickly, a significant minority—about 2100 per year—languish in detention for a year or more while they pursue legal challenges.").

1. *A Brief History of Immigrant Detention in the Modern Era.* — Prior to the 1980s, the government used immigrant detention in three primary circumstances: (1) when a noncitizen's admissibility into the country was in question due to health or support reasons,[11] (2) during a noncitizen's removal proceeding,[12] and (3) during times of national emergency.[13]

In the 1980s a shift in detention policy took place as a result of massive Cuban, Haitian, and Central American immigration to the United States. Detention was used as an immediate response to the massive influx of 125,000 "Marielitos" from Cuba and later to deal with the mass arrival of Haitian asylum seekers.[14] The Immigration and Naturalization Service (INS) soon began using detention as a deterrent to illegal immigration.[15] At the same time, because of the ongoing public attention to

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11. Detention at this time was usually for a brief period—just long enough for the infection to pass, or for the detainee to be declared inadmissible and ordered returned. See Ann Novotny, Strangers at the Door: Ellis Island, Castle Garden, and the Great Migration to America 11–12 (1973) ("If any serious contagious illnesses had been reported, the patients would have been [quarantined] . . . while other passengers would have been held in strict isolation . . . . [T]hose whom the inspectors judged too weak, old or poor to support themselves would be detained, then deported . . . ."); see also T. Pitkin, Keepers of the Gate: A History of Ellis Island 13, 23–24, 73 (1975) (discussing history of immigrant detention at Ellis Island—"the first federal immigration station"—from 1892 and 1955). But see Roger Daniels, No Lamps Were Lit for Them: Angel Island and the Historiography of Asian American Immigration, 17 J. Am. Ethnic Hist. 3, 3–8 (1997) (describing practice of detaining Asian immigrants for prolonged periods of time at Angel Island Immigration Station from 1910 to 1940).

12. A "removal proceeding" is the general term used to refer to the procedure of removing noncitizens from the country. See Aleinikoff et al., supra note 3, at 1027–96 (describing removal proceedings). Early on, the Supreme Court affirmed the government's authority to use detention pending a noncitizen's removal proceeding. See Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("[D]etention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of [noncitizens] would be valid.").

13. The first manifestation of this was the Alien Enemies Act of 1798, which provided that whenever there is a declared war with another country, male nationals of that country age fourteen and up may be detained or removed by proclamation of the President. 1 Stat. 577 (codified at amended at 50 U.S.C. §§ 21–24 (2006)). The provision restricting the law to males was eliminated in 1918. Act of Apr. 16, 1918, 40 Stat. 531. Detaining noncitizens became a recurring phenomenon during periods of national emergency: Noncitizens purportedly dedicated to the violent overthrow of the government were detained during the Red Scare raids of the 1920s, "enemy aliens" were detained during World Wars I and II, noncitizens affiliated with the Communist party were detained during the Cold War, and, most recently, noncitizens of Muslim descent were detained after the September 11 terrorist attacks. See generally John Higham, Strangers in the Land: Patterns of American Nativism, 1860–1925, at 209–12 (2d ed. 1983) (discussing detention of German citizens during World War I); Benson, supra note 8, at 26–38 (describing in detail Red Scare raids and detentions); David Cole, The New McCarthyism: Repeating History in the War on Terrorism, 38 Harv. C.R.-C.L. L. Rev. 1, 1–2 (2003) (discussing similarities and differences between government treatment of noncitizens during Cold War and after September 11).

14. Stephanie J. Silverman, Immigration Detention in America: A History of Its Expansion and a Study of Its Significance 9–10 (Ctr. on Migration, Policy & Soc'y, Working Paper No. 80, 2010).

15. Id. at 10.

increasing crime and drug use rates, the INS began focusing on the detention and removal of noncitizens convicted of drug crimes.[16]

The Anti-Drug Abuse Act of 1988[17] created the concept of an "aggravated felony."[18] The Act further provided for the mandatory detention of aggravated felons by eliminating the Attorney General's (AG) discretion in custody determinations concerning immigrants convicted of aggravated felonies. In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA)[19] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)[20] amended the INA to drastically increase the use of detention. The amendments widened the definition of what constitutes an aggravated felony[21] and broadened the use of mandatory detention by applying it to noncitizens who had committed certain crimes, asylum seekers, and noncitizens with final orders of removal.[22]

In responding to another national emergency, the terrorist attacks of September 11, 2001, the government again turned to the detention of noncitizens.[23] Following the attacks, Attorney General Ashcroft revised

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16. Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens, 115 Harv. L. Rev. 1915, 1919–20 (2002).

17. Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered titles of the U.S.C.).

18. Id. § 7343(a), 102 Stat. at 4470 (codified as amended at 8 U.S.C. § 1226(c)(1) (2006)). An "aggravated felony" is an immigration term of art. The original definition of an "aggravated felony" included murder; any drug-trafficking crime as defined in 18 U.S.C. § 924(c)(2) (2006), as amended; any illicit trafficking in any firearms or destructive devices as defined in 18 U.S.C. § 921; or any attempt or conspiracy to commit any such act, committed within the United States. § 7342, 102 Stat. at 4469–70 (codified as amended in 8 U.S.C. § 1101(a)(43)). The current provision lists twenty categories of offenses that constitute an "aggravated felony" and makes an attempt or conspiracy to commit any of the specified offenses an "aggravated felony" as well. The list includes particularly serious crimes, such as murder, rape, or sexual abuse of a minor, but also much less egregious crimes, such as theft, counterfeiting, or forgery. 8 U.S.C. § 1101(a)(43)(A), (G), (P), (R). The less serious crimes usually require a sentence or term of imprisonment of at least one year to trigger detention in relation to removal proceedings. Id. § 1101(a)(43)(G), (J), (P), (R), (S).

19. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

20. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

21. See supra note 18 for a discussion of the widening definition of an "aggravated felony."

22. INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. 1225(b)(1)(B)(iii)(IV); INA § 236(c), 8 U.S.C. § 1226(c); INA § 241(a), 8 U.S.C. § 1231(a).

23. Under the authority of the immigration laws, male, Muslim foreign nationals, mostly of Arab and South Asian descent, were detained for various immigration violations. The real purpose of these detentions was to interrogate the individuals as part of the FBI's terrorism investigation—the immigration laws were merely a tool to facilitate this. See Office of Inspector Gen., DOJ, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 195 (2003) ("In the aftermath of the September 11 terrorist attacks, the Department of Justice used the federal immigration laws to detain [noncitizens] who were suspected of having ties to the attacks or terrorism in general. . . . In other times,

immigration rules to double the time the government may detain a noncitizen before placing him in removal proceedings, or charging him with a crime.[24] The USA PATRIOT Act,[25] also passed in response to the attacks, added a final category of noncitizens subject to mandatory detention: suspected terrorists.

2. *Current Statutory Framework Governing Immigrant Detention.* — Immigration-related detention is governed by the INA, which prescribes both discretionary[26] and mandatory detention. *All* immigrants in removal proceedings are potentially subject to either form of detention. This section presents a framework for understanding mandatory detention today by providing an outline of the statutory provisions governing mandatory immigrant detention.

The Secretary of Homeland Security and the AG must detain five categories of noncitizens: (1) certain arriving noncitizens, (2) noncitizens subject to "expedited removal,"[27] (3) noncitizens who have certain crimi-

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many of these [noncitizens] might not have been arrested or detained for these violations.").

24. 8 C.F.R. § 287.3(d) (2011). The government may now detain a noncitizen for forty-eight hours before putting him in removal proceedings or charging him with a crime. However, "in the event of an emergency or other extraordinary circumstance" the government may continue detention for "an additional reasonable period of time." Id.

25. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered titles of the U.S.C.).

26. Section 236(a) of the INA allows for the arrest and detention of a noncitizen "pending a decision on whether the [noncitizen] is to be removed from the United States." INA § 236(a), 8 U.S.C. § 1226(a). Section 236(e) of the INA provides that the AG's discretionary judgments regarding detention or release of a noncitizen are not reviewable by any court. INA § 236(e), 8 U.S.C. § 1226(e). In *Demore v. Kim*, the Supreme Court held that section 236(e), because it contains no explicit provision barring habeas review, does not strip courts of jurisdiction to hear habeas petitions bringing constitutional challenges to mandatory detention. 538 U.S. 510, 516–17 (2003).

27. "Expedited removal" is a process whereby a noncitizen may be ordered removed by the inspecting immigration officer "without further hearing or review unless the [noncitizen] indicates an intention to apply for asylum . . . or a fear of persecution." INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i). If the noncitizen indicates either an intention to apply for asylum or a fear of persecution, the officer must refer him to an interview with an asylum officer. INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii). The noncitizen must be detained pending the interview, which will take place no earlier than 48 hours later. INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); see Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,320 (interim rule Mar. 6, 1997) (codified as amended in scattered parts of the C.F.R.). The noncitizen may consult with anyone of his choosing after the secondary inspection and before the asylum interview, but at no expense of the government and without causing "unreasonabl[e] delay." INA § 235(b)(1)(B)(iv), 8 U.S.C. § 1225(b)(1)(B)(iv). If the asylum officer finds no credible fear, the officer can order the noncitizen removed without further review or hearing. INA § 235(b)(1)(B)(iii)(I), 8 U.S.C. § 1225(b)(1)(B)(iii)(I). If the officer finds that the noncitizen does have a credible fear of persecution, the noncitizen is scheduled for a full merits hearing before an IJ. The noncitizen is mandatorily detained pending a determination of credible fear of persecution and, if no credible fear is found, until removed. INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

nal convictions, (4) suspected terrorists, and (5) noncitizens who have final orders of removal. Each category is discussed in further detail below.

a. *Arriving Noncitizens.* — Under INA section 235(b)(2)(A), if the examining immigration officer determines that an arriving noncitizen[28] is not "clearly and beyond a doubt entitled to be admitted, the [noncitizen] shall be detained."[29] These noncitizens may be released on parole if they fall into a few enumerated categories: (1) those with serious medical conditions, (2) pregnant women, (3) juveniles, (4) witnesses in government proceedings in the United States, and (5) noncitizens "whose continued detention is not in the public interest."[30]

b. *Noncitizens Subject to Expedited Removal.* — Noncitizens subject to "expedited removal" must be detained pending determination of their admissibility and removal.[31] Arriving noncitizens subject to expedited removal are those who are inadmissible under section 212(a)(6)(C) (relating to attempts to obtain admission or other immigration benefits through fraud or misrepresentation) or section 212(a)(7) (lack of a valid passport, visa, or other required document).[32]

c. *Noncitizens with Criminal Convictions.* — Section 236(c) of the INA requires detention of noncitizens who have been convicted of certain crimes "when the [noncitizen] is released, without regard to whether the [noncitizen] is released on parole, supervised release, or probation, and

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28. An "arriving alien," as defined by 8 C.F.R. §§ 1.1(q), 1001.1(q), includes noncitizens seeking admission into the United States, noncitizens seeking transit through the United States, noncitizens interdicted and brought into the United States, and noncitizens paroled into the United States under section 212(d)(5). Section 101(a)(13) of the INA defines admission as "the lawful entry of the [noncitizen] into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A). A returning LPR is now presumed not to be seeking admission, unless he has abandoned or relinquished LPR status, has been absent from the United States for a continuous period of at least 180 days, has engaged in illegal activity after departing the United States, has departed from the United States while under legal process seeking his removal, has committed an offense identified in section 212(a)(2), or is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization. INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).

29. INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A).

30. 8 C.F.R. § 212.5. Parole decisions are made by ICE district directors. IJs lack jurisdiction to review bond decisions involving arriving noncitizens, including LPRs. 8 C.F.R. §§ 236.1(c)(11), 1003.19(h)(2)(i)(B).

31. INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b)(2)(iii).

32. The INA also grants the Secretary of Homeland Security permission to expedite the removal of any noncitizen who entered without inspection (EWI) and who cannot prove that he has been physically present in the United States continuously for the two years preceding. INA § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii). In 2004, pursuant to this grant of authority, DHS announced that it would begin applying expedited removal to EWIs found within 100 miles of the Mexican or Canadian border who cannot show that they have been present in the United States for at least fourteen days. Press Release, Dep't of Homeland Sec., DHS Announces Expanded Border Control Plans (Aug. 10, 2004, 12:00 AM), http://www.dhs.gov/xnews/releases/press_release_0479.shtm (on file with the *Columbia Law Review*).

without regard to whether the [noncitizen] may be arrested or imprisoned again for the same offense."[33] These crimes include conviction of two or more "crimes involving moral turpitude" (CIMT)[34] at any time after the noncitizen's admission to the United States, an aggravated felony,[35] a controlled substance violation, a firearm offense, some cases of single CIMTs, and various other crimes.[36] There is a narrow exception that allows the Secretary of Homeland Security to release a noncitizen subject to mandatory detention for witness protection or for cooperation with a criminal investigation, but only if he is not a danger to the community or a flight risk.[37]

d. *Suspected Terrorists.* — In 2001, the USA PATRIOT Act[38] added section 236A to the INA. This provision requires the AG to detain, pending the noncitizen's removal proceeding, any noncitizen who is engaged in any activity that may endanger national security.[39] The AG may detain the noncitizen for up to seven days prior to placing him in removal proceedings or charging him criminally.[40] Detention under section 236A re-

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33. INA § 236(c), 8 U.S.C. § 1226(c). The ambiguity of the "when released" language has led to much litigation. For instance, the BIA held in *West* that the immigrant must be released from *physical* custody for mandatory detention to apply. 22 I. & N. Dec. 1405, 1406 (B.I.A. 2000). However, an arrest is enough to meet the physical custody requirement even if no sentence was ever served for the crime. Kotliar, 24 I. & N. Dec. 124, 125 (B.I.A. 2007). In *Rojas* the Board clarified that mandatory detention under section 236(c) applies even if the noncitizen is not *immediately* taken into custody by DHS when released from incarceration. 23 I. & N. Dec. 117, 117 (B.I.A. 2001). Many courts have subsequently held that the provision does not apply to an immigrant released from custody long before DHS attempts to take him into immigrant detention. See, e.g., Waffi v. Loiselle, 527 F. Supp. 2d 480, 485–88 (E.D. Va. 2007) (holding mandatory detention provision does not apply to criminal noncitizen taken into immigration custody one month after release from state custody). Most recently, the BIA in *Garcia Arreoloa* held that section 236(c) requires mandatory detention of a criminal noncitizen only if he is released from non-DHS custody after the expiration of the Transition Period Custody Rules and only if the release from physical custody is directly tied to the basis for detention under section 236(c)(1)(A)–(D). 25 I. & N. Dec. 267, 271 (B.I.A. 2010).

34. A conviction for a "crime involving moral turpitude" (CIMT) has been a chief ground of removal for the past one hundred years, but despite this long history the exact meaning of the provision is still "maddeningly vague." Aleinikoff et al., supra note 3, at 737. One popular definition of a CIMT is: "'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general . . . .'" Id. (quoting United States v. Smith, 420 F.2d 428, 431 (5th Cir. 1970)). It is generally accepted that serious crimes against persons or property, as well as crimes with an element of fraud, are CIMTs. Id. at 742.

35. See supra note 18 for discussion of aggravated felonies.

36. INA § 236(c), 8 U.S.C. § 1226(c).

37. INA § 236(c)(2), 8 U.S.C. § 1226(c)(2).

38. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered titles of the U.S.C.).

39. INA § 236A(a)(1), 8 U.S.C. § 1226A(a)(1).

40. INA § 236A(a)(5), 8 U.S.C. § 1226A(a)(5). If the noncitizen is not placed in removal proceedings or charged criminally, the AG "shall release the [noncitizen]." Id. If the noncitizen is placed in such proceedings, the AG is required to continue detaining him "irrespective of any relief from removal for which the [noncitizen] may be eligible, or any

quires certification by the AG or deputy AG, which must be reviewed every six months, that the noncitizen has engaged in terrorist activities or any other activity that may endanger the national security.[41]

e. *Noncitizens with Final Orders of Removal.* — INA section 241(a)(1)(A) states, "when a[ ] [noncitizen] is ordered removed, the [Secretary of Homeland Security] shall remove the [noncitizen] from the United States within a period of 90 days."[42] During this ninety-day removal period the Secretary of Homeland Security "shall detain" the noncitizen.[43] However, section 241(a)(6) declares that a noncitizen

> ordered removed who is inadmissible [because of violations of status requirements entry conditions, criminal convictions, or on national security/foreign policy grounds] or who has been determined by the [Secretary of Homeland Security] to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period . . . .[44]

3. *Recent Supreme Court Decisions on Immigrant Detention.* — The first case concerning immigrant detention under the amended INA to reach the Supreme Court was *Zadvydas v. Davis*, in which the petitioners challenged the constitutionality of INA section 241(a)(6), a provision authorizing further detention of certain removable noncitizens beyond the ninety-day removal period.[45] The two petitioners had final orders of removal; however, the government had been unable to repatriate them because either their countries of origin refused to accept them or no other country would take them.[46] In order to avoid constitutional invalidation, the Court construed section 241(a)(6) to have an implicit "reasonable time" limitation, the application of which is subject to federal court re-

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relief from removal granted the [noncitizen]" until the AG determines that the noncitizen no longer fits into any of the categories of noncitizens who may be certified. INA § 236A(a)(2).

41. INA § 236A(a)(3), 8 U.S.C. § 1226A(a)(3). A noncitizen certified under this provision whose removal is unlikely to occur "in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the [noncitizen] will threaten the national security of the United States or the safety of the community or any person." Id. section 236A(a)(6). The AG has never exercised his power under section 236A. Aleinikoff et al., supra note 3, at 1100.

42. INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A).

43. INA § 241(a)(2), 8 U.S.C. § 1231(a)(2).

44. INA § 241(a)(6), 8 U.S.C. § 1231(a)(6).

45. 533 U.S. 678, 682 (2001).

46. Id. at 684–86.

view.[47] The Court created a six-month presumptive limit on detention.[48] After this period expires, and the noncitizen provides "good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future," he is eligible for conditional release.[49]

In *Demore v. Kim*, an LPR who had been detained for six months during the pendency of his removal hearing pursuant to section 236(c) of the INA challenged the constitutionality of that provision.[50] The Supreme Court held that mandatory detention of criminal noncitizens

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47. Id. at 682. The Ninth Circuit has extended this decision to apply to detention under sections 236(a), 235(b)(1)(B)(ii), and 235(b)(2)(A). Prieto-Romero v. Clark, 534 F.3d 1053, 1063 (9th Cir. 2008) ("Consistent with *Zadvydas*, we construe the Attorney General's detention authority under [236(a)] as limited to the 'period reasonably necessary to bring about [a noncitizen]'s removal from the United States . . . .'" (quoting *Zadvydas*, 533 U.S. at 689)); Nadarajah v. Gonzales, 443 F.3d 1069, 1078 (9th Cir. 2006) ("Rather, consistent with the Supreme Court's approach in *Zadvydas*, we conclude that [sections 235(b)(1)(B)(ii), (b)(2)(A)] permit detention only while removal remains reasonably foreseeable."). The Sixth Circuit has extended it to detention under section 236 in general. See Ly v. Hansen, 351 F.3d 263, 267 (6th Cir. 2003) ("Since permanent detention of Permanent Resident Aliens under § 236 would be unconstitutional, we construe the statute to avoid that result, as did the Court in *Zadvydas*."). The Third Circuit recently extended the decision to section 236(c). See Diop v. ICE/Homeland Sec., No. 10-1113, 2011 WL 3849739, at *9 (3d Cir. Sept. 1, 2011) ("[Section 236(c)] implicitly authorizes detention for a reasonable . . . time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that a[ ] [noncitizen] attends removal proceedings and that his release will not pose a danger to the community.").

48. *Zadvydas*, 533 U.S. at 701. After *Zadvydas*, several courts have had to determine whether removal in an individual case is "reasonably foreseeable." See, e.g., Lema v. INS, 341 F.3d 853, 856 (9th Cir. 2003) ("[W]hen a[ ] [noncitizen] refuses to cooperate fully and honestly with officials to secure travel documents from a foreign government, the [noncitizen] cannot meet his or her burden to show there is no significant likelihood of removal in the reasonably foreseeable future."); Seretse-Khama v. Ashcroft, 215 F. Supp. 2d 37, 50 (D.D.C. 2002) (ordering release of petitioner after more than forty-six months in detention because it was clear that country of origin was not willing to accept the petitioner and INS's efforts had been "belated at best, and for long periods totally non-existent").

49. *Zadvydas*, 533 U.S. at 701. By regulation, the detainee must first prove that there is no significant likelihood of removal in the reasonably foreseeable future and that he has cooperated in the process of obtaining necessary travel documents. 8 C.F.R. § 241.13(d) (2011). If the noncitizen makes this showing, and there are no special circumstances, he will be released under conditions meant "to protect the public safety and to promote the ability of the [DHS] to effect the [noncitizen]'s removal." Id. § 241.13(h). Even if there is no significant likelihood of removal in the reasonably foreseeable future, a noncitizen may still be detained if he falls into the following categories: (1) noncitizens with a highly contagious disease that is a threat to public safety, (2) noncitizens detained on account of serious adverse foreign policy consequences of release, (3) noncitizens detained on account of security or terrorism concerns, or (4) noncitizens determined to be specially dangerous. Id. §§ 241.13(e)(6), 241.14.

Four years later, in *Clark v. Martinez*, the Court extended the *Zadvydas* holding to the other two categories of noncitizens held beyond the ninety-day removal period under section 241(a)(6)—inadmissible noncitizens and those ordered removed whom the Secretary deems to be a danger to the community or pose a flight risk. 543 U.S. 371, 377–78 (2005).

50. 538 U.S. 510, 514 (2003).

pending a determination of their removability under section 236(c) was constitutional, because Congress was "justifiably concerned that deportable criminal [noncitizens] who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers."[51] The Court distinguished *Zadvydas* on two grounds: (1) In *Zadvydas* the noncitizens challenging their detention after final orders of removal were ones for whom removal was "'no longer practically attainable'" and (2) in *Zadvydas* the period of detention was "'indefinite' and 'potentially permanent,'" whereas in this case the detention was "of a much shorter duration."[52]

4. *Immigrant Detention Today.* — Immigration and Customs Enforcement (ICE) is in charge of the detention and removal of noncitizens. ICE "operates the largest detention system in the country,"[53] detaining immigrants in 300 adult and three family detention facilities across the nation.[54] The average daily detained population for FY 2009 was 32,098.[55] The average length of stay in FY 2009 was 25.8 days for

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51. Id. at 513.

52. Id. at 527–28 (quoting *Zadrydas*, 533 U.S. at 690–91). The Court in *Demore* acknowledged that Kim had been detained longer than most under section 236(c), but emphasized the brief nature of most immigrants' detention pending removal. Id. at 530–31. Subsequently, several circuit and district courts have held that section 236(c) does not permit prolonged detention. See, e.g., Casas-Castrillon v. DHS, 535 F.3d 942, 950–52 (9th Cir. 2008) (holding noncitizen detained for seven years while challenging removal has right to bond hearing); *Ly*, 351 F.3d at 271–73 (finding one-and-a-half-year detention of noncitizen when there was no chance of actual, final removal unreasonable and in violation of substantive due process rights); Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455, 464–79 (D. Mass. 2010) (ordering bail hearing for noncitizen detained for twenty-two months in violation of due process); Scarlett v. DHS, 632 F. Supp. 2d 214, 220–23 (W.D.N.Y. 2009) (finding five years of mandatory detention unconstitutional). Not all challenges have been favorable to the noncitizen. See, e.g., Prince v. Mukasey, 593 F. Supp. 2d 727, 735–36 (M.D. Pa. 2008) (concluding sixteen-month pre-final order detention not unreasonable where length was in part due to actions of petitioner and a hearing was scheduled); Ovchinnikov v. Clark, 543 F. Supp. 2d 1265, 1271 (W.D. Wash. 2008) (holding eleven-month detention not unreasonable due to appeal and foreseeable removal); Ali v. Achim, 342 F. Supp. 2d 769, 771–75 (N.D. Ill. 2004) (finding no due process violation as a result of noncitizen's twenty-eight-month detention during removal proceedings). No court has developed a bright-line rule for when detention under section 236(c) becomes unconstitutional; rather, courts examine a number of factors when deciding whether a detainee deserves to be released. The factors examined are not always the same. Compare Andreenko v. Holder, No. 09 Civ. 8535, 2010 WL 2900363, at *4 (S.D.N.Y. June 25, 2010) (examining (1) length of detention, (2) petitioner's concession of deportability, (3) lack of government foot-dragging and petitioner's partial responsibility for delay, (4) likelihood of additional prolonged detention, (5) likelihood of ultimate removal, and (6) likelihood of receiving relief), with Fuller v. Gonzales, No. 3:04CV2039SRU, 2005 WL 818614, at *5 (D. Conn. Apr. 8, 2005) (examining solely (1) length of detention and (2) likelihood of additional prolonged detention).

53. Dora Schriro, DHS, Immigration Detention Overview and Recommendations 6 (2009) [hereinafter Schriro Report].

54. Gov't Accountability Office (GAO), Alien Detention Standards 1, 7–8 (2007).

55. DHS, ICE Removals 1 (2010).

noncriminal detainees and 41 days for criminal detainees.[56] A study focusing only on *immigrants* in detention found that the average length of stay for pre-removal order detainees on January 25, 2009 was 81 days.[57] Of the 18,690 pre-removal order detainees in custody on that day, 13,842 had been detained for less than ninety days, 2486 had been detained for between ninety days and six months, 1792 had been detained for between six months and one year, and 570 had been detained for one year or more.[58]

B. *Detention at Guantánamo Bay: History and Current Reality*

The current law concerning the rights of detainees held at Guantánamo Bay has developed as a result of an active back and forth discussion between the Executive, Congress, and the Courts.[59] Although the Executive's initial decision to detain individuals at Guantánamo and later decisions concerning what process to afford these individuals seemed to be made under the authority of legislation passed by Congress,[60] the Supreme Court has not been wholly deferential.

This section first details the historical framework behind the current Guantánamo litigation by tracing the Executive's and Congress's reactions to the September 11 terrorist attacks and the Supreme Court's assessments of those actions, and concludes by providing a brief picture of detention at Guantánamo today.

1. *Background of Current Guantánamo Litigation.* — After September 11, 2001, Congress passed the Authorization for Use of Military Force (AUMF), authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11 attacks, "or harbored such organizations or persons."[61]

Pursuant to this authority, in November 2001, President George W. Bush issued Military Order No. 1, authorizing military detention of

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56. Id.

57. Donald Kerwin & Serena Yi-Ying Lin, Migration Policy Inst., Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities? 16 (2009). Of the 10,771 immigrants who had received final orders of removal, 8513 had been detained for less than ninety days (79%), 1266 had been detained for between ninety days and six months (12%), 676 had been detained for between six months and one year (6%), and 316 had been detained for one year or more (11%). Id. at 17.

58. Id. at 16.

59. See Benjamin Wittes, Robert M. Chesney & Larkin Reynolds, The Emerging Law of Detention 2.0: The Guantánamo Habeas Cases as Lawmaking 5–7 (2011) [hereinafter Wittes et al., Emerging Law], available at http://www.brookings.edu/papers/2011/05_guantanamo_wittes.aspx (on file with the *Columbia Law Review*) (discussing historical context of current Guantánamo habeas litigation).

60. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (delineating three zones of presidential power and explaining that the President is at his highest power and the judiciary is most wary stepping in when he acts with explicit congressional authorization).

61. Pub. L. No. 107-40, 115 Stat. 224 (2001).

noncitizens whom he believed (i) to be members of al Qaeda or (ii) who have "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor" directed at the United States or its people, or (iii) those who have knowingly harbored those described in (i) or (ii).[62] The order provided that military commissions would have exclusive jurisdiction to try detained noncitizens and that the noncitizens would not have any right to bring a claim in any court of the United States or a foreign nation. In the fall of 2001, when military operations began resulting in captives, the government transferred many of them to a detention facility at the U.S. Naval Base at Guantánamo Bay, Cuba, as authorized by the order.[63]

Just a few years later, a challenge to the executive's authority to detain individuals at Guantánamo Bay reached the Supreme Court. In *Hamdi v. Rumsfeld*, the Supreme Court held that the AUMF gave the executive the authority to detain a citizen classified as an enemy combatant.[64] However, the Court also stated, "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[65] In direct response to *Hamdi*, the Defense Department created "Combatant Status Review Tribunals, (CSRTs)"[66] to determine whether detainees were in fact enemy combatants.

On the same day as the *Hamdi* decision, in the case of *Rasul v. Bush*, the Court held that *noncitizens* detained at Guantánamo could file habeas corpus actions in federal court.[67] As a result of this decision, courts

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62. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001).

63. Stephen Dycus et al., National Security Law 755 (4th ed. 2007).

64. 542 U.S. 507, 517 (2004).

65. Id. at 509.

66. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., Order Establishing Combatant Status Review Tribunal (July 7, 2004) [hereinafter Wolfowitz, Order Establishing CSRT] (on file with the *Columbia Law Review*). In 2004, CSRTs were held for the first time. Of the 532 CSRTs that were held, 503 detainees were determined to be "enemy combatants." Dep't of Def., Combatant Status Review Tribunal Summary, http://www.defense.gov/news/csrtsummary.pdf (on file with the *Columbia Law Review*) (last updated Feb. 10, 2009). In total, 581 CSRTs have been held, resulting in findings confirming "enemy combatant" status in 539 of them. Id. In May 2004, the Administrative Review Board (ARB) was created "to assess annually the need to continue to detain each enemy combatant." Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., Order Establishing Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba 1 (May 11, 2004) [hereinafter Wolfowitz, Order Establishing ARB] (on file with the *Columbia Law Review*). The first ARBs resulted in the release of 14 detainees, the transfer of 119 detainees, and the continued detention of 330 detainees. During the last round of ARBs, ninety-nine hearings were completed, resulting in the transfer of seven detainees and the continued detention of ninety-two detainees. See Dep't of Def., Administrative Review Board Summary, www.defense.gov/news/arb4.pdf (on file with *the Columbia Law Review*) (last updated Feb. 6, 2009).

67. 542 U.S. 466, 488 (2004).

"could suddenly address both the substantive scope of the executive branch's authority to employ military detention and the nature of the process to be employed in determining whether any particular individual falls within the scope of that authority."[68]

Congress responded to *Hamdi* and *Rasul* by passing the Detainee Treatment Act (DTA) of 2005, which stripped the courts of habeas jurisdiction in these cases.[69] However, the Supreme Court, in *Hamdan v. Rumsfeld*, held that the DTA did not apply to habeas petitions that were already pending in the courts when the DTA was passed.[70] Congress then passed the Military Commission Act (MCA), which stripped the courts of jurisdiction even in those cases that had been pending when the DTA was passed.[71]

It was at this point that the Supreme Court decided *Boumediene v. Bush*,[72] definitively establishing the role of the courts in these cases. The Court made two major points. First, noncitizens held at Guantánamo do have access to habeas corpus review to challenge the legality of their de-

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68. Wittes et al., Emerging Law, supra note 59, at 5.

69. Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified as amended in scattered sections of 10, 28, and 42 U.S.C.). The DTA lodged exclusive judicial review of CSRT determinations in the D.C. Circuit. Id. § 1005(e), 119 Stat. at 2742 (codified as amended at 28 U.S.C. 2241(e)(2) (2006)). Judicial review was limited to reviewing whether the CSRT determination was made in accordance with the standards and procedures set by the Secretary of Defense and whether those standards and procedures were constitutional. Id. § 1005(e)(2)(C), 119 Stat. at 2742 (codified as amended at 28 U.S.C. § 2241(e)(2)). Claims challenging CSRTs could only be brought by, or on behalf of, noncitizens held at Guantánamo at the time of the request for review and for whom a CSRT had already been conducted. Id. § 1005(e)(2)(B), 119 Stat. at 2742 (codified as amended at 28 U.S.C. § 2241(e)(2)). The Act also limited both civil and criminal actions that could be brought against government personnel involved in interrogations of detainees by providing a defense if the person did not know the challenged practice was unlawful and if a person of ordinary sense and understanding would not know the practice was unlawful. Id. § 1004(a), 119 Stat. at 2740 (codified as amended at 42 U.S.C. § 2000dd-1(a) (2006)).

70. 548 U.S. 557, 574–84 (2006).

71. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.). The MCA established comprehensive procedures governing the military commissions that would have exclusive jurisdiction to try "enemy combatants." Id. § 948a, 120 Stat. at 2601 (codified as amended at 10 U.S.C. § 948a (2006)). These procedures related to, inter alia, notice; pretrial, trial, and post-trial matters; sentencing; the process of convening a military commission; the requirements to sit on a military commission; and the number of votes required in a military commission. Id. §§ 948–950, 120 Stat. at 2601–37 (codified as amended at 10 U.S.C. §§ 948–950). The Act defined "enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents" or "a person who, before, on, or after the date of the enactment of the [MCA], . . . has been determined to be an unlawful enemy combatant by a [CSRT] or another competent tribunal established under the authority of the President or the Secretary of Defense." Id. § 948a, 120 Stat. at 2601 (codified as amended at 10 U.S.C. § 948a). The courts were also stripped of habeas jurisdiction to hear actions brought by noncitizens challenging their detention, transfer, treatment, trial, or conditions of confinement. Id. § 7, 120 Stat. at 2636 (codified as amended at 28 U.S.C. § 2441).

72. 553 U.S. 723 (2008).

tention.[73] Second, the process afforded by the DTA was not an adequate replacement of habeas.[74] The Court left to the lower federal courts the details of the standard that would govern the habeas proceedings.[75]

Since *Boumediene*, Congress has not legislated with respect to the standards and procedures that would govern challenges to Guantánamo detention,[76] leaving the task of writing the law entirely to the courts.[77] As of February 3, 2010, over two hundred habeas petitions had been filed in the D.C. District Court by or on behalf of detainees held at Guantánamo.[78] Of the fifty-three cases that have been decided, thirty-seven of the petitions have been granted.[79] Those who succeed in their habeas petitions are not immediately released; rather, at that point the government will simply consider releasing them.[80] Thirteen of the detainees who have won their habeas petitions remain in indefinite detention.[81]

2. *Detention at Guantánamo Today.* — According to the New York Times's online Guantánamo database, 779 detainees have been held at

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73. The Court specifically held that it was not deciding "the reach of the writ with respect to claims of unlawful conditions of treatment or confinement." Id. at 792.

74. Id. at 791.

75. Id. at 798.

76. Peter Baker, Obama Says Current Law Will Support Detentions, N.Y. Times, Sept. 24, 2009, at A23.

77. See Benjamin Wittes & Robert Chesney, Piecemeal Detainee Policy, Wash. Post, Feb. 5, 2010, at A17 ("President Obama's decision not to seek additional legislative authority for Guantanamo detentions, along with Congress's lack of interest in taking on the subject, means that, for good or for ill, judges must write the rules governing military detentions of terrorist suspects."). Leaving this task to the judiciary has led to the development of a "contradictory and incoherent body of law"—with judges applying different rules of evidence, different procedures, and even different substantive law. Jack Goldsmith & Benjamin Wittes, A Role Judges Should Not Have to Play, Wash. Post, Dec. 22, 2009, at A19 [hereinafter Wittes & Goldsmith, Detention Policy]. Commentators have "urged the political branches to enact legislation to create a uniform and democratically legitimate detention policy." Id. But see Baher Azmy, Executive Detention, *Boumediene*, and the New Common Law of Habeas, 95 Iowa L. Rev. 445, 537 (2010) (arguing detainees' habeas petitions are "properly within the 'expertise and competence' of the district courts to manage" (quoting *Boumediene*, 553 U.S. at 796)).

78. Jennifer K. Elsea & Michael John Garcia, Cong. Research Serv., RL 33180, Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court 37 (2010).

79. Sixteen detainees, including one whose victory was reversed on appeal, have lost their habeas petitions. See Chisun Lee, Dig into the Gitmo Detainee Lawsuits, ProPublica (July 22, 2009) [hereinafter Lee, Dig into the Gitmo Detainee Lawsuits], http://projects.propublica.org/tables/gitmo-detainee-lawsuits (on file with the *Columbia Law Review*) (last updated Aug. 12, 2010) (providing updates, summaries, and court documents for habeas petitions filed so far).

80. See Chisun Lee, As Gitmo Detainees' Legal Victories Mount, Obama Administration Resists Orders to Release, ProPublica (Apr. 21, 2010, 10:57 AM), http://www.propublica.org/article/as-gitmo-detainees-legal-victories-mount-obama-admin-resists-orders-to-rele (on file with the *Columbia Law Review*) ("[I]n the terrorism detention cases, [a court order of release] promises no more than the 'possibility' of release, U.S. Attorney General Eric Holder said in testimony before the Senate Judiciary Committee . . . .").

81. Lee, Dig into the Gitmo Detainee Lawsuits, supra note 79.

Guantánamo, 600 have been transferred, 8 have died in custody,[82] and 171 remain.[83] In an empirical study of the detainee population in late 2008, Benjamin Wittes and his colleagues stressed that the government has "never identified the interned population in a contemporaneous fashion" and that the New York Times's list of the *current* population may not have been completely accurate because it had "not been the subject of serious empirical analysis."[84] The Wittes study reported that on December 16, 2008, 248 detainees, from thirty different countries, were held at Guantánamo.[85] The study further provided that of "558 detainees who remained at the base long enough to go through the CSRT process, 330 have been transferred or released."[86]

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82. The Guantánamo Docket: Dead, N.Y. Times, http://projects.nytimes.com/guantanamo/detainees/dead (on file with the *Columbia Law Review*) (last visited Oct. 18, 2011).

83. The Guantánamo Docket: A History of the Detainee Population, N.Y. Times [hereinafter the Guantánamo Docket], http://projects.nytimes.com/guantanamo (on file with the *Columbia Law Review*) (last updated Sept. 27, 2011). The New York Times's database contains a list of the names of all past and current detainees, their countries of citizenship, and their current status (transferred or held), as well as the documents the Department of Defense chose to disclose in 2006. Id. The Center for Constitutional Rights's "scorecard" shows that 172 detainees remained as of February 9, 2011. Guantanamo Habeas Scorecard, Ctr. for Constitutional Rights, http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf (on file with the *Columbia Law Review*) (last updated Feb. 9, 2011).

84. Benjamin Wittes & Zaahira Wyne, Brookings Inst., The Current Detainee Population of Guantánamo: An Empirical Study 5 (2008) [hereinafter Wittes et al., Current Detainee Population], available at http://www.brookings.edu/~/media/Files/rc/reports/2008/1216_detainees_wittes/1216_detainees_wittes.pdf (on file with the *Columbia Law Review*).

85. Id. at 6–7. For a complete list of the names and nationalities of the 248 detainees as well as the basis for finding that the detainees were at Guantánamo, see id. at 23–27 (Note on Sources and Methods); id. at 46–65 (Appendix I).

86. Id at 6. The study concurred with the New York Times that overall 779 detainees had been held at Guantánamo since its opening in 2002. Id. The Wittes study also provided a categorization of the detainees, based on government claims and detainees' publically available self-description. See id. at 9–22 (describing five categories of detainees ranging from small group of "worst of the worst" to those "held erroneously . . . as a result of mistakes, confusion, and wrongful identifications"). An earlier study, from 2006, analyzing Department of Defense data on 517 detainees found that 55% of the detainees were not determined to have committed any hostile acts against the United States or its allies, 8% of the detainees were characterized as al Qaeda fighters, and, of the remaining detainees, 40% had no definitive connection with al Qaeda at all and 18% had no definitive affiliation with either al Qaeda or the Taliban. Mark Denbeaux & Josh Denbeaux, The Guantanamo Detainees: The Government's Story 2 (2006), available at http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf (on file with the *Columbia Law Review*).

II. CHALLENGING DETENTION: THE PROCEDURES AND STANDARDS COMPARED

Although immigrant detainees in the United States and detainees at Guantánamo both face possibly prolonged executive detention,[87] the procedures and standards governing challenges to their detention are surprisingly different. Section A of this Part describes the *Joseph* hearing through which an immigrant detainee may challenge his inclusion within the mandatory detention provision and concludes with an examination of three specific problems with the hearings. Section B discusses the greater administrative procedures Guantánamo detainees receive and the less stringent standard they face when challenging their classification as "enemy combatants" in court. Section C offers three possible explanations for the disparate procedures and standards.

A. *Procedures and Standards Governing Immigration Proceedings*

An immigrant in mandatory detention must overcome two hurdles before he is free to return to his predetention life. The first is his *Joseph* hearing at which he will challenge his detention. The second hurdle is his removal hearing at which he will contest his removability. A full discussion of removal proceedings is beyond the scope of this Note; however, because being detained has a profound affect on an immigrant's ability to build his case against removal, this section briefly discusses procedures in removal hearings. It then discusses the standards and procedures governing *Joseph* hearings and concludes by highlighting three core problems with the *Joseph* hearing that increase the likelihood of erroneous detention.

1. *Procedures in Removal Hearings.* — A unique set of evidentiary rules apply in an immigrant's removal proceedings. First, the Federal Rules of Evidence do not apply in immigration proceedings. Instead, IJs "have broad discretion to admit and consider relevant and probative evi-

87. Indefinite detention of immigrants under section 241(a)(6) was declared unconstitutional in *Zadvydas v. Davis*, and, while the Supreme Court declared mandatory detention under section 236(c) constitutional, it did so under the impression that detention under that provision is generally short-term. Courts facing challenges to prolonged mandatory detention have declared that section 236(c) does not permit such detention. See supra note 52 for a discussion of these cases. In contrast, the White House has insisted that the AUMF allows for indefinite detention of individuals at Guantánamo Bay. Dafna Linzer, White House Drafts Executive Order for Indefinite Detention, ProPublica (Dec. 21, 2010, 7:11 PM), http://www.propublica.org/article/white-house-drafts-executive-order-for-indefinite-detention (on file with the *Columbia Law Review*) (last updated Dec. 22, 2010). The Obama Administration has asserted that forty-eight detainees fall into the indefinite detention category. Id. The White House is in the process of drafting an order that "will offer detainees in this category a minimal review every six months and then a more lengthy annual review." Id. The detainees will also have an opportunity to challenge their detention and access to an attorney and to some of the evidence against them. Id.

dence."[88] Similarly, despite the seemingly punitive nature of removal, the safeguards of criminal procedure do not apply in removal proceedings.[89] On the threshold issue of alienage, the government has the burden of proof.[90] If the individual is indeed a noncitizen he must prove either "by clear and convincing evidence" that he is "lawfully present . . . pursuant to a prior admission" or that he "is clearly and beyond doubt entitled to be admitted and is not inadmissible."[91] If the individual has been admitted the government has the burden to establish deportability by "clear and convincing evidence."[92] However, "putting the burden of proof on the government on alienage and deportability does not matter in the majority of contested cases, which turn instead on relief from removal, where the noncitizen has the burden."[93]

2. *Procedures Under Mandatory Detention.* — The initial determination that an immigrant is mandatorily detainable pursuant to section 236(c) is made by the ICE district director.[94] The immigrant may challenge this decision by arguing that he is not "properly included" within the mandatory detention provision.[95] To do this the immigrant would request a *Joseph* hearing in immigration court. The hearing was named after the BIA's decision in *Joseph*, which created the standard governing such claims.[96]

At the *Joseph* hearing the detainee may contest his inclusion within the mandatory detention provision in three ways: (1) by demonstrating that he is not in fact a noncitizen, (2) by showing that he was not convicted of the predicate crime,[97] or (3) by proving that DHS is "substantially unlikely to prevail" on a charge of removability against him specified in section 236(c)(1).[98] The IJ's decision in the *Joseph* hearing may be ap-

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88. D-R-, 25 I. & N. Dec. 445, 458 (B.I.A. 2011); see also INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (2006) (describing IJ's authority).

89. Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 Wash. & Lee L. Rev. 469, 472 (2007) ("For more than a century, however, the courts have uniformly insisted that deportation is not punishment and that, therefore, the criminal procedural safeguards do not apply in deportation proceedings.").

90. 8 C.F.R. § 1240.8(c) (2011).

91. INA § 240(c)(2), 8 U.S.C. § 1229a(c)(2).

92. INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A).

93. Aleinikoff et al., supra note 3, at 1047.

94. 8 C.F.R. § 236.1(d)(1).

95. 8 C.F.R. § 1003.19(h)(2)(ii).

96. 22 I. & N. Dec. 799 (B.I.A. 1999).

97. If an immigrant is placed in mandatory detention, but the government has not charged him with a crime that would result in mandatory detention in the Notice to Appear (NTA), the charging document that DHS uses to initiate removal proceedings, it must give the immigrant notice of the basis for mandatory detention and provide an opportunity to challenge the detention before an IJ in a *Joseph* hearing. Kotliar, 24 I. & N. Dec. 124, 127 (B.I.A. 2007).

98. *Joseph*, 22 I. & N. Dec. at 807; see also Demore v. Kim, 538 U.S. 510, 514 n.3 (2003) (holding detainee may avoid mandatory detention by demonstrating DHS is "substantially unlikely to establish that he is in fact subject to mandatory detention"). In *Joseph*, the

pealed to the BIA; however, the BIA is highly deferential to DHS on appeal.[99]

If the immigrant meets his burden at the hearing, the IJ will conduct a bond hearing using the custody standards of section 236(a) to determine whether he is a flight risk or a danger to the community.[100] If the IJ denies bond, the immigrant may appeal the decision to the BIA.[101] If the IJ sets bond and orders the immigrant's release, DHS may obtain an automatic stay of the order by filing a notice of intent to appeal.[102] If the immigrant is unable to meet his burden, he will remain in detention as the IJ has no authority to conduct a bond hearing for a noncitizen who does not receive a favorable decision at the *Joseph* hearing.[103] The *Joseph* hearing is thus the only pre-removal opportunity for the immigrant to win release from detention before his detention becomes prolonged.[104] Habeas review is available to all noncitizens in immigration detention;

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respondent, an LPR from Haiti, received a one-year sentence after pleading guilty to the common law crime of "obstructing and hindering," when he was arrested at the end of a police chase. Id. at 801–02. He was later placed in mandatory detention under section 236(c) and charged with deportability under section 237(a)(2)(A)(iii) for having committed an aggravated felony as defined by section 101(a)(43)(S) (obstruction of justice). Id. at 801. The IJ determined that his crime did not constitute an aggravated felony and terminated removal proceedings. Id. The IJ issued an order in a bond proceeding releasing the respondent from custody. Id. The government appealed both decisions and obtained an automatic stay of the custody determination pending the appeal of the bond hearing. Id. However, the BIA in *Joseph* concluded that it was substantially unlikely that the crime of "obstructing and hindering" would be viewed as an aggravated felony for removal purposes because there was significant evidence that the respondent was seeking to evade his own arrest, rather than obstructing the arrest of another. Id. at 808. (In the precedent decision of *Batista-Hernandez* the Board emphasized that the obstruction of justice aggravated felony encompasses hindering or preventing *another's* apprehension. 21 I. & N. Dec. 955, 962 (B.I.A. 1997)). Consequently, the IJ was correct in holding that the respondent was not "properly included" in the mandatory detention provision. *Joseph*, 22 I. & N. Dec. at 808.

99. 8 C.F.R. § 236.1(d)(3). An empirical study of *Joseph* hearings found that "BIA shifts the risk of error almost entirely onto the detained noncitizen by construing the 'substantially unlikely' standard to require that nearly all legal and evidentiary uncertainties be resolved in favor of the DHS." Julie Dona, Making Sense of "Substantially Unlikely": An Empirical Analysis of the *Joseph* Standard in Mandatory Detention Custody Hearings 5 (June 1, 2011) (unpublished manuscript), available at http://ssrn.com/abstract=1856758 (on file with the *Columbia Law Review*).

100. *Joseph*, 22 I. & N. Dec. at 806. Factors considered by the IJ in bond hearings include the immigrant's employment history, length of residence in the community, family ties, record of appearance or nonappearance at court proceedings, and previous criminal or immigration law violations. Sugay, 17 I. & N. Dec. 637, 638–39 (B.I.A. 1981).

101. 8 C.F.R. §§ 236.1(d)(3), 1236.1(d)(3).

102. *Joseph*, 22 I. & N. Dec. at 800.

103. 8 C.F.R. § 1003.19(h)(1)(i)(E).

104. See Shalini Bhargava, Detaining Due Process: The Need for Procedural Reforms in "*Joseph*" Hearings After *Demore v. Kim*, 31 N.Y.U. Rev. L. & Soc. Change 51, 75 (2006) ("Without bond hearings or any other opportunity to contest detention, a[ ] [noncitizen] who seeks pre-removal release must win at her *Joseph* hearing.").

however, courts generally order release only when detention has been unconstitutionally prolonged.[105]

3. *Procedural Problems with* Joseph *Hearings.* — There are three core problems with *Joseph* hearings: (1) the burden on the immigrant detainee,[106] (2) the lack of any other pre-removal opportunity to contest detention, and (3) the automatic stay provision.[107] This section discusses each problem in turn; Part III presents solutions.

a. *The Burden on the Immigrant Detainee.* — The *Joseph* hearing places the burden on the immigrant detainee to show that the government is "substantially unlikely" to prove that he is in fact subject to mandatory detention. This burden is too great,[108] particularly in light of two factors: (1) the lack of a right to counsel provided by the government[109] and (2) the complexity of immigration law.

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105. The REAL ID Act of 2005 eliminated habeas, mandamus, and all writs jurisdiction in the district courts with regards to "judicial review of an order of removal entered or issued under any provision of this Act." REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (codified as amended at 8 U.S.C. § 1252 (2006)). The legislative history makes clear that habeas remains available for "challenges to detention that are independent of challenges to removal orders." Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep.); see also Hernandez v. Gonzales, 424 F.3d 42, 42–43 (1st Cir. 2005) (holding REAL ID does not strip courts of jurisdiction to hear challenges to detention independent of challenges to removal orders); Ali v. Gonzales, 421 F.3d 795, 797 n.1 (9th Cir. 2005) ("[T]he Real ID Act of 2005 . . . does not apply to this case because petitioners do not challenge or seek review of any removal order."); Bonhometre v. Gonzales, 414 F.3d 442, 446 n.4 (3d Cir. 2005) ("A[ ] [noncitizen] challenging the legality of his detention still may petition for habeas corpus."). Thus a detainee who loses at a *Joseph* hearing could bring a habeas petition in a district court; however, courts generally order release only when detention has been prolonged. See supra note 52 for circumstances where courts have ordered release.

106. See Tijani v. Willis, 430 F.3d 1241, 1246–47 (9th Cir. 2005) (Tashima, J., concurring) (declaring *Joseph* standard's allocation of burden of proof unconstitutional and advocating that "[o]nly those immigrants who could not raise a 'substantial' argument against their removability should be subject to mandatory detention").

107. Shalini Bhargava also points out that *Joseph* hearings present issues of prejudice and impartiality. For one, the hearing will alert DHS to issues it must address and evidence it needs to present at the final removal proceeding. Second, if the same IJ presides over the *Joseph* hearing and the final removal hearing, the immigrant may be prejudiced because the two hearings discuss essentially the same issues and the IJ has already decided at the *Joseph* hearing that the government is substantially likely to prevail. See Bhargava, supra note 104, at 91–92 for a more thorough discussion of this issue and other problems with *Joseph* hearings.

108. An empirical study of *Joseph* hearings found that the IJ ruled in favor of DHS in 120 out of 165 appeals of custody determinations that were reported to Westlaw between November 1, 2006 and November 1, 2010. Dona, supra note 99, at 10.

109. For a comprehensive discussion of why the government should provide immigrants in removal proceedings with counsel and why the cost is manageable, see generally Donald Kerwin, Migration Policy Inst., Revisiting the Need for Appointed Counsel (2005); Margaret H. Taylor, Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform, 29 Conn. L. Rev. 1647 (1997); Michael Kaufman, Note, Detention, Due Process, and the Right to Counsel in Removal Proceedings, 4 Stan. J. C.R. & C.L. 113 (2008).

Immigrants in removal proceedings have the "the privilege of being represented" by counsel but "at no expense to the government."[110] An immigrant detainee thus has three options for representation: (1) representing himself, (2) finding pro bono representation, or (3) securing private counsel. Given most detainees' limited financial background and the lack of incentives for private attorneys to take on a detainee's case securing private counsel is unlikely.[111] As a result, most detained immigrants appear in immigration court without counsel.[112]

i. *Problems with Pro Se Representation in Immigration Court.* — The lack of counsel is particularly detrimental in immigration proceedings because of their incredible complexity.[113] Challenges to mandatory immigrant detention involve some of the most difficult immigration law questions, such as whether an immigrant has committed a predicate offense, has been "convicted" for immigration purposes, or is actually a citizen, and may even involve questions concerning the meaning of the mandatory detention statute itself. Available empirical evidence shows that immigrant detainees challenge their detentions at *Joseph* hearings on complicated grounds.[114]

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110. INA §§ 240(b)(4)(A), 292, 8 U.S.C. §§ 1229(b)(4)(B), 1362.

111. Most detained immigrants "come from working class communities and have limited financial resources." Peter L. Markowitz, Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study, 78 Fordham L. Rev. 541, 548 (2009). Private attorneys have little incentive to take on immigration defense cases because they are much more "labor intensive, unpredictable, and time-consuming endeavor" than transactional immigration services and such clients are "most likely to default on their financial obligations." Id. at 548–49. Thus, the only viable option for a detained immigrant seeking counsel is to rely on pro bono representation; demand for representation, however, far outstrips the funding legal aid organizations have for immigration defense. Id. at 549–50.

112. See Am. Bar Ass'n, Immigration Detainee Pro Bono Opportunities Guide 1 (2004) (noting only 10% of detained individuals secure counsel); Vera Inst., Improving Efficiency and Promoting Justice in the Immigration System 1 (2008) (finding that between October 1, 2006 and September 30, 2007, approximately 84% of detained immigrants lacked representation). In removal cases in general, 39% of immigrants whose cases were completed in FY 2009 were represented. Exec. Office for Immigration Review, DOJ, FY 2009 Statistical Yearbook A1 (2010) [hereinafter EOIR Statistical Yearbook 2009]. Fifty percent of the completed cases involved detained immigrants. Id. at A2.

113. The Ninth Circuit has stated, "'[T]he immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.'" Baltazar-Alcazar v. INS, 386 F.3d 940, 948 (9th Cir. 2004) (quoting Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988)).

114. An empirical study examining 165 appeals of custody determinations in *Joseph* hearings found that:

> [C]lassification of a respondent's conviction into an enumerated category was by far the most common challenge; challenges specifically to the classification for "crimes involving moral turpitude" were presented in 39 percent of appeals. Several respondents challenged the allegation that they had a conviction at all, or argued that the conviction was invalid. At least thirteen respondents argued that the evidence provided by the DHS was insufficient, and four individuals claimed that they were U.S. citizens.

Dona, supra note 99, at 13.

The government has tried to ameliorate some of the problems detainees face in representing themselves pro se through the National Detention Standards.[115] The standards require, among other things, that every detention facility have a law library with up-to-date legal materials, that ICE officials help facilitate group presentations on legal rights, that detainees be allowed to meet privately with current or prospective legal representatives, and that detainees have telephone access to make private calls to legal representatives. Because the standards have no formal enforcement mechanism, studies have found systemic violations.[116]

Since 2003, the government has also attempted to help detainees learn about their legal rights through the Legal Orientation Program (LOP), run by the Executive Office of Immigration Review (EOIR). Through the program volunteers from legal aid organizations "provide comprehensive explanations about immigration court procedures along with other basic legal information to large groups of detained individuals."[117] The presentations have three components: (1) an interactive group orientation, (2) a brief individual session with a counselor, and (3) a self-help/referral component.[118]

ii. *Difficulties with Securing Pro Bono Representation.* — Because of the complexity of immigration proceedings, a detainee's best option is to secure pro bono representation, but he may face significant difficulty in finding an effective pro bono attorney willing to take his case. A study of 150 of the approximately 300 detention facilities and 148 legal aid organi-

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115. In November 2000, the INS adopted National Detention Standards that apply to all facilities where adult detainees are housed. ICE, Detention Operation Manual (2000), available at http://www.ice.gov/detention-standards/2000/ (on file with the *Columbia Law Review*). The standards were updated in 2008, based on performance. The standards cover seven topics: safety, security, order, care, activities, justice, and administration and management. ICE, Operations Manual ICE Performance Based National Detention Standards (2008), available at http://www.ice.gov/detention-standards/2008/ (on file with the *Columbia Law Review*).

116. A report of the government's compliance with the detention standards "reveale[d] . . . pervasive violations." The key findings relating to an immigrant's ability to represent himself include: (1) visitation—"over 60 facilities failed to post the required list of pro bono legal services organizations serving the local area," (2) telephone access—"32 facilities failed to allow detainees to make special access calls to courts, consulates, or free legal service providers and . . . 30 facilities failed to provide a reasonable degree of privacy for legal phone calls," (3) legal materials—"at least 29 detention facilities had no law library" and "59 facilities did not make available some or all of the legal material that the standard requires they have," (4) group legal rights presentations—"133 facilities hosted no legal rights presentations in the twelve months preceding their annual reviews." Karen Tumlin, Linton Joaquin & Ranjana Natarajan, A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers, at vi, viii–x (2009), available at http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf (on file with the *Columbia Law Review*).

117. LOPs currently take place in fourteen detention facilities. To view a list of the facilities, see DOJ, EOIR Legal Orientation and Pro Bono Program [hereinafter EOIR Legal Orientation and Pro Bono Program], http://www.justice.gov/eoir/probono/probono.htm#LOP (on file with the *Columbia Law Review*) (last updated Dec. 2010).

118. Id.

zations revealed that detention facilities' isolated locations and legal aid organizations' limited funding and staff mean that many detainees are unable to secure counsel.[119] If a detainee does manage to find an attorney willing to represent him, his problems may not end there as the effectiveness of that representation[120] may still be undermined by his inability to make private phone calls[121] and the constant possibility of a transfer.[122] A detainee constantly faces the risk of transfer to another deten-

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119. The study found that:

> 80 percent of detainees were held in facilities which were severely underserved by legal aid organizations, with more than 100 detainees for every full-time NGO attorney . . . . More than a quarter of detainees were in facilities . . . where the ratio was 500 or more detainees per NGO attorney . . . . 10 percent of detainees were held in facilities in which they had no access to NGO attorneys whatsoever.

Nat'l Immigrant Justice Ctr., Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court 4 (2010).

120. Securing counsel is not enough; rather, it is essential that the detainee secure *competent* counsel. Unfortunately, the immigration context has been plagued by *in*competent counsel. See LaJuana Davis, Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings, 58 Drake L. Rev. 123, 140–50 (2009) (noting "[o]verburdened [l]awyers," "[r]isk of [f]raud from [u]naccredited [r]epresentatives," "[d]istance [b]etween available legal representation and location of detention centers," and "language barriers" as main obstacles to finding competent counsel in immigration proceedings); Andrew I. Schoenholtz & Hamutal Bernstein, Improving Immigration Adjudications Through Competent Counsel, 21 Geo. J. Legal Ethics 55, 58–59 (2008) ("Low-quality representation is too often the case at the Immigration Court level . . . . [T]heir representative (1) may not have the appropriate legal expertise, (2) may be overloaded with too many cases, (3) may not give due attention and care to individuals, or (4) may even be fraudulent.").

121. Of the sixty-seven detention facilities surveyed regarding detainee phone access, lawyers were unable to make private phone calls to their detained clients in 78% of the facilities. Nat'l Immigrant Justice Ctr., supra note 119, at 5.

122. See Taylor, supra note 109, at 1651 ("[D]etainees are often confined at remote facilities with restrictive phone and visitation policies. Those who have ties to a particular community, or at least some hope of obtaining representation in the place where they are initially apprehended, may nevertheless be transferred across the country to an isolated location."). Transfers can obstruct established attorney-client relationships or sever the relationships entirely, and they also interfere with a detainee's right to choose counsel. Human Rights Watch, Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States 41–57 (2009). For detainees seeking bond hearings, transfers can affect their ability to present evidence of close family relationships, a stable place to live, and employment possibilities, all of which can be shown to prove the unlikelihood of absconding. Note, INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel, 100 Harv. L. Rev. 2001, 2005 (1987); Human Rights Watch, supra, at 58–61. Transfers can affect not only a detainee's access to legal counsel, but also the law that applies in the detainee's case. Detention facilities within the Fifth Circuit were most likely to receive transfers. Human Rights Watch, supra, at 36–37. The Fifth Circuit "is widely known for decisions that are hostile to the rights of noncitizens . . . ." Id. at 6, 36–37, 41–57.

tion facility,[123] which may happen at any time to meet ICE's "operational needs" or "to meet the specialized needs of that detainee."[124]

In sum, "[d]etention makes it difficult (and costly) for attorneys to offer representation, for detainees to secure legal counsel, for attorneys (who represent detainees) to provide effective representation, and for detainees to prepare their own cases."[125]

b. *Lack of Other Opportunities to Contest Detention.* — Despite the difficulties a detained immigrant faces in presenting his case pro se and the difficulties an attorney may face in effectively representing a detained immigrant, if the IJ decides that the immigrant is "properly included" within the mandatory detention provision, he is without jurisdiction to conduct an individualized bond hearing.[126] Thus, the *Joseph* hearing is the sole opportunity for an immigrant to seek pre-removal release from detention. However, the heavy "substantially unlikely" burden combined with the difficulties of pro se representation creates the possibility that an immigrant with a credible claim that he has been incorrectly subjected to mandatory detention could still lose at his *Joseph* hearing. The strong likelihood that a detainee will fail to meet his burden of proof combined with

123. Transfers are not a rare occurrence. In 2008, an estimated 317,482 detainees were transferred. Human Rights Watch, supra note 122, at 29. During the first six months of 2008, 52.4% of detainees were transferred at least once while roughly one in four detainees was subject to multiple transfers. Transactional Records Access Clearinghouse (TRAC), Huge Increase in Transfers of ICE Detainees (Dec. 2, 2009), http://trac.syr.edu/immigration/reports/220/ (on file with the *Columbia Law Review*).

124. ICE, ICE/DRO Detention Standard: Transfer of Detainees 1, 2 (2008), available at http://www.ice.gov/doclib/dro/detention-standards/pdf/transfer_of_detainees.pdf (on file with the *Columbia Law Review*). The only operational need cited is to alleviate overcrowding. Id. When a detainee is transferred, he "shall not be informed of the transfer until immediately prior to leaving the facility" and "[f]ollowing notification, the detainee shall normally not be permitted to make or receive any telephone calls." Id. at 3. His legal counsel "shall be notified of the transfer once the detainee has arrived at the new detention location," however, the Deportation Officer may delay notice "[w]hen there are special security concerns." Id. Studies have found ICE has not complied with transfer standards. See Office of Inspector Gen., DHS, OIG-09-41, Immigration and Customs Enforcement's Tracking and Transfers of Detainees 8 (2009), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf (on file with the *Columbia Law Review*) ("ICE staff interviewed at the sites visited said they did not notify the detainee's legal representative because they considered the notifications to be the detainee's responsibility."). ICE launched an "Online Detainee Locator System," which may partly ameliorate this problem. The system allows anyone to search for a detainee's current location by providing the detainee's alien registration number or biographical information. The system will provide the detention facility's name and contact/visitation information. ICE, Online Detainee Locator System (2010), available at http://www.ice.gov/doclib/news/library/factsheets/pdf/odls-brochure.pdf (on file with the *Columbia Law Review*).

125. Kerwin, supra note 109, at 7.

126. 8 C.F.R. § 1003.19(h)(1)(i)(E), (ii) (2011).

the lack of any other opportunity to contest detention tramples upon the due process rights of detainees.[127]

c. *The Automatic Stay Provision.* — If, in the *Joseph* hearing, the IJ finds that a detainee was not properly included within the mandatory detention provision and, in the subsequent bond hearing, holds that the detainee meets the release requirements, the IJ will order his release. However, an automatic stay provision allows DHS to stay the IJ's release order until the BIA rules on their appeal. DHS does this by filing a notice of intent to appeal within one business day of the IJ's order.[128] After the 2006 revisions to the automatic stay provision, a senior DHS legal official must also certify that he has approved the filing of the appeal and that there is evidentiary and legal support for continued detention.[129] The revisions further provide that the automatic stay lapses ninety days after the notice of appeal is filed if the BIA has not acted within that time.[130]

The revisions were meant to resolve the constitutional concerns presented by the original automatic stay provision; however, the revised provision is still problematic.[131] First, DHS only has to state that there are evidentiary and legal arguments supporting continued detention, the revised provision does not require DHS to explain those arguments. Second, DHS's legal arguments do not need to be warranted by current law; rather, DHS can make any "non-frivolous argument for the extension, modification, or reversal of existing precedent or the establishment of new precedent."[132] And although the first court to address the new regulations found them reasonable because of the ninety-day lapse provi-

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127. See Tijani v. Willis, 430 F.3d 1241, 1246–47 (9th Cir. 2005) (Tashima, J., concurring) (declaring *Joseph* standard's allocation of burden of proof unconstitutional and advocating that "[o]nly those immigrants who could not raise a 'substantial' argument against their removability should be subject to mandatory detention"); Wilks v. DHS, Civ. No. 1:CV-07-2171, 2008 WL 4820654, at *3 (M.D. Pa. Nov. 3, 2008) ("We also believe that the so-called *Joseph* hearing to be conducted during the November 28 proceedings . . . would not satisfy due process."); Gaspar v. Sepulveda, No. C-07-2905 RMW, 2007 WL 1695090, at *2–*3 (N.D. Cal. June 11, 2007) (holding "[i]f the Joseph hearing standard is applied and petitioner is denied bond based upon that standard, petitioner may reapply to the court to issue an order to show cause" explaining "why respondents should not be ordered to grant petitioner a 'Joseph-type hearing that comports with procedural due process by placing the burden on DHS to establish by clear, convincing, and unequivocal evidence that its detention is . . . authorized'" (quoting Petition for Writ of Habeas Corpus at 10, 24, *Gaspar*, No. C-07-2905 RMW, 2007 WL 1695090)); see also Bhargava, supra note 104, at 76–88 (arguing *Joseph* hearing procedures violate due process).

128. 8 C.F.R. § 1003.19(i)(2).

129. 8 C.F.R. § 1003.6(c)(1)(i), (ii).

130. 8 C.F.R. § 1003.6(c)(4). See generally Raha Jorjani, Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases, 5 Intercultural Hum. Rts. L. Rev. 89, 97–100 (2010) (providing history of automatic stay provision).

131. See Jorjani, supra note 130, at 100–03 (describing constitutional problems of pre-2006 automatic stay provision).

132. 8 C.F.R. § 1003.6(c)(1)(ii).

sion,[133] given the various extensions DHS can obtain, the "90 day" limitation can potentially turn into 150 to 177 days, not including the time spent in detention prior to DHS's appeal of the custody decision.[134] Thus an immigrant could face months of erroneous detention because of DHS's unilateral decision to stay his release.

When contesting mandatory detention the burden is on the immigrant detainee and the burden is severe. If he does not meet this burden he has no further pre-removal opportunity to win release. However, if the government loses and the IJ orders the immigrant's release, it can keep the immigrant in detention simply by requesting an automatic stay and claiming that it has evidentiary and legal arguments supporting continued detention. The next section reveals how detainees at Guantánamo receive more process than mandatorily detained immigrants.

B. *Procedures and Standards Governing Challenges of Detention at Guantánamo*

This section discusses the procedures for sending a captured individual to Guantánamo, the administrative processes for challenging detention once an individual is being held at Guantánamo, and the final judicial review of the validity of detention in the D.C. District Court via a habeas petition.

1. *How a Captured Individual Is Sent to Guantánamo.* — When an individual is captured by U.S. military forces abroad, military officers in the field assess whether the "captured individual[ ] [was] part of or supporting forces hostile to the United States or coalition partners, or otherwise engaged in an armed conflict against the United States."[135] If the officers believe that the individual meets this criteria, he is designated an "enemy combatant" and sent to a holding facility where a military screening team reviews the designation and decides whether continued detention is necessary and also whether transfer to Guantánamo is appropriate.[136]

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133. Hussain v. Gonzales, 492 F. Supp. 2d 1024, 1032 (E.D. Wis. 2007) ("[P]roviding for an automatic stay . . . is not unreasonable. The cases upon which Hussain relies to support his argument that the regulation violates due process addressed the previous regulation under which the duration of the automatic stay was indefinite.").

134. Jorjani, supra note 130, at 106–08. DHS has one day to file its intent to automatically stay the IJ's order. 8 C.F.R. § 1003.19(i)(2). It then has ten days to file the appeal with the BIA. Id. § 1003.6(c)(1). The ninety-day lapse period is tolled for twenty-one days if the detainee asks for an enlargement of the period to file a brief in favor of release. Id. § 1003.6(c)(4). The appeal lapses in ninety days if the BIA has not acted on it, but if it does DHS can seek a discretionary stay, which continues detention for up to an additional thirty days. Id. §§ 1003.6(c)(5), 1003.19(i)(1). If the BIA orders release of the immigrant, DHS can refer the case to the AG, which stays release for another five days. Id. § 1003.6(d). If the AG certifies the case to himself the automatic stay stays in place for fifteen additional days. Id.

135. Wolfowitz, Order Establishing ARB, supra note 66, at 1.

136. Id. The screening team's assessment is reviewed by an officer designated by the combatant commander. When deciding whether a detainee should be transferred to Guantánamo Bay, the combatant commander considers "the threat posed by the detainee,

Prior to any detainee's transfer to Guantánamo, a panel comprised of Department of Defense officials reviews the decision and advises the Secretary of Defense on proposed transfers.[137] If the Secretary decides to transfer the detainee, he undergoes further interviews and assessments immediately upon his arrival.[138] The Secretary of Defense makes the ultimate decision as to whether a detainee should be transferred to the custody of a foreign government, released, or should remain detained.[139]

2. *Combatant Status Review Tribunals and Administrative Review Boards.* — Once a detainee has been transferred and held at Guantánamo he has an opportunity to challenge his designation as an "enemy combatant" through an administrative proceeding known as a CSRT.[140] The detainee does not have a right to legal counsel, but he is assigned a "personal representative" who will assist him throughout the process.[141] The personal representative must be afforded an opportunity to review "any reasonably available information . . . that may be relevant to a determination of the detainee's designation as an enemy combatant."[142] The representative may share this information, except that which is classified, with the detainee.[143]

Thirty days after the personal representative has been allowed to review the information, the CSRT is convened.[144] At the hearing the detainee is allowed to call witnesses "if reasonably available" and to question witnesses called by the Tribunal.[145] The detainee has a right to submit documentary evidence, and to testify, but cannot be compelled to do

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his seniority within hostile forces, possible intelligence that may be gained from the detainee, possible law of war violations committed by the detainee, and any other relevant factors." Id. at 2.

137. Id. The review panel considers "all available information" including "information submitted by other governments or obtained from the detainees themselves." Id.

138. Id. In addition to this review, each Guantánamo detainee undergoes a "threat assessment," which helps "determine whether, notwithstanding his status as an enemy combatant, he can be transferred to the custody of another government, can be released, or should remain detained." Id. Assessments are provided to the Commander of the U.S. Southern Command for recommendation. Id. The Commander forwards his recommendation to an interagency committee in Washington, which in turn makes its own recommendation. Id.

139. Id.

140. Wolfowitz, Order Establishing CSRT, supra note 66, at 1.

141. Memorandum of Gordon England, Sec'y of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Naval Base, Cuba 17 (July 29, 2004), available at http://www.defense.gov/news/jul2004/d20040730comb.pdf (on file with the *Columbia Law Review*). The Personal Representative must tell the detainee the following: "I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obliged to divulge it at the hearing." Id. at enclosure (3), 3.

142. Wolfowitz, Order Establishing CSRT, supra note 66, at 1.

143. Id.

144. Id.

145. Id. at 2.

so.[146] In making its determination, the Tribunal is free to consider "any information it deems relevant and helpful to a resolution of the issue."[147] The CSRT decides by the preponderance of evidence whether the detainee is in fact an "enemy combatant," and there is a rebuttable presumption in favor of the government's evidence.[148] If the Tribunal decides that the detainee should no longer be designated an "enemy combatant," a report of the decision is forwarded to the Secretary of Defense and arrangements are made for the detainee's release.[149]

However, if the Tribunal rules against the detainee, he still has one more avenue of administrative review through the nonadversarial Administrative Review Boards.[150] The ARBs, conducted at least once a year, provide the detainee with an opportunity to demonstrate that "he is no longer a threat to the United States and its allies[,] . . . why it is otherwise appropriate that he be released, or any other relevant information."[151] A Designated Military Officer, who is "not an advocate for or against . . . continued detention," provides the Review Board with information in the Department of Defense's possession along with any other information that indicates whether the detainee should be released, transferred, or remain in detention.[152] The Designated Military Officer must provide the Review Board with a summary of the main facts favoring continued detention as well those favoring release.[153]

Before the hearing, the detainee is provided notice of the hearing and is given the summary prepared by the Designated Military Officer.[154] The detainee is assisted by a military officer who is permitted to see all information provided by the Designated Military Officer to the Review Board.[155] The Review Board makes a written assessment of whether there is any reason to believe that the enemy combatant remains a threat, and a recommendation of whether continued detention is necessary, to the Designated Civilian Official (DCO), the Department of Defense official who oversees the ARB process.[156] The DCO makes the final determination of whether the detainee should be released, transferred, or remain in detention.[157]

Although the ARB process is the final administrative review of a detainee's designation as an "enemy combatant," all detainees may also seek judicial review of the designation via a habeas corpus petition in the D.C.

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146. Id. at 3.
147. Id.
148. Memorandum of Gordon England, supra note 141, at enclosure 1, 9.
149. Wolfowtiz, Order Establishing CSRT, supra note 66, at 3–4.
150. Wolfowitz, Order Establishing ARB, supra note 66, at 3–4.
151. Id. at 5–6.
152. Id. at 5.
153. Id.
154. Id.
155. Id. at 6.
156. Id. at 3, 7–8.
157. Id. at 8.

District Court.[158] The next section details the standards that D.C. district judges have developed to govern such cases.

3. *Standards for Habeas Petitions as Stated by the D.C. District Court.* — The law surrounding Guantánamo detainees habeas petitions is in a state of flux, with many questions still unsettled.[159] However, for the purposes of this Note, examining the areas where the judges have formed some sort of consensus is sufficient. Following the Supreme Court's *Boumediene* decision, Judge Hogan of the D.C. District Court issued a case management order which set standards intended to govern the Guantánamo detainees' habeas petitions.[160] Rather than giving the government's evidence a rebuttable presumption as in the CSRTs, the order placed the burden on the government to prove that a detainee had been correctly classified as an "enemy combatant" by a "preponderance of evidence."[161]

While most judges have adhered to the allocation of the burden of proof and the preponderance standard set out in Judge Hogan's case management order, the question of what standard the Constitution requires at a minimum remains. In *Al-Bihani v. Obama*, the D.C. Circuit rejected a detainee's argument that the court should apply a "beyond a reasonable doubt," or at least a "clear and convincing" standard, holding instead that the preponderance standard was constitutionally permissible.[162] The court explicitly refrained from declaring what minimum stan-

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158. Boumediene v. Bush, 553 U.S. 723, 770–71 (2008) (establishing that noncitizens held at Guantánamo have a right to bring habeas petitions); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) ("[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.").

159. See Wittes et al., Emerging Law, supra note 59, at 2–3 ("Some of the parameters of the law of detention that were altogether unsettled . . . have come into sharper focus . . . . And lower court judges have, to some degree, fallen into line. On other issues, by contrast, the law remains more or less as it was then, uncertain and subject to greatly divergent approaches by district judges with profoundly differing instincts."). Issues that continue to lack clarity in the D.C. District Court include the scope of the government's detention authority, whether detainability once established is permanent, whether the government should receive evidentiary presumptions, the treatment of hearsay evidence, the role of the "mosaic theory" of evidence, and the admissibility and weight of involuntary statements. See id. at 32–114 (discussing these issues). The purpose of this Note is to compare the procedures and standards that immigrant detainees and Guantánamo detainees receive, thus these areas are not relevant.

160. Case Management Order, In re Guantanamo Bay Detainee Litig., Misc. No. 08–0442 (TFH), at 1 (D.D.C. Nov. 6, 2008).

161. Id. at 4. Benjamin Wittes and his colleagues argue that the consensus among the district courts on the allocation and calibration of proof "weakens on closer inspection." Wittes et al., Emerging Law, supra note 59, at 12. The consensus is illusory because "both appeals court judges and the detainees themselves are attacking the preponderance of the evidence standard from opposite sides, creating a kind of pincer action against its continued use." Id. Detainees are pushing for a higher burden of proof, while the D.C. Circuit has aggressively hinted that a lower burden of proof is likely constitutionally permissible. Id. at 12–21.

162. 590 F.3d 866, 876–78 (D.C. Cir. 2010).

dard the Constitution requires.[163] The D.C. Circuit revisited the issue in *Al-Adahi v. Obama*, despite the fact that neither party contested that the preponderance standard applies.[164] While the Court emphasized that in habeas cases the preponderance standard has not been the norm, it concluded that "[a]lthough we doubt . . . that the Suspension Clause requires the use of the preponderance standard, we will not decide the question in this case."[165]

Judge Hogan's case management order also established procedures concerning (1) factual returns, (2) legal justification, (3) exculpatory evidence, (4) discovery, and (5) classified information, among others.[166] The order required the government to reveal the factual basis upon which it is detaining the individual, explain its legal justification for detention, disclose to the detainee all reasonably available exculpatory evidence, and, if requested by the detainee, disclose documents referenced in factual returns, all statements made by the detainee that relate to information in factual returns, and information about the circumstances under which such statements were made.[167] The government must provide the detainee's counsel with classified information and the detainee

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163. Id. at 878.

164. 613 F.3d 1102, 1103–05 (D.C. Cir. 2010).

165. Id. at 1104–05. Cases after *Al-Adahi* have continued to require the government to meet the preponderance standard. See, e.g., Alsabri v. Obama, 764 F. Supp. 2d. 60, 69 (D.D.C. 2011) ("To justify its detention of an individual, the government must prove by a preponderance of the evidence that the individual falls within one of these categories of detainable persons."); Ali v. Obama, 741 F. Supp. 2d 19, 24 (D.D.C. 2011) ("Under this Court's CMO, the Government bears the burden of proving the lawfulness of the petitioner's detention by a preponderance of the evidence."); Kandari v. United States, 744 F. Supp. 2d 11, 14 (D.D.C. 2010) (finding "Government has met its burden to show by a preponderance of the evidence"); Khan v. Obama, 741 F. Supp. 2d 1, 4 (D.D.C. 2010) (applying preponderance standard "[p]ursuant to the Case Management Order"); see also Wittes et al., Emerging Law, supra note 59, at 12 ("In all of the Guantánamo habeas cases that have proceeded to disposition, the judges have required that the government carry the burden of showing, by a preponderance of the evidence, that the detainee falls within the definition of the detainable class.").

166. Case Management Order, Misc. No. 08–0442 (TFH), at 2–4. These standards have not been as widely accepted as the allocation of the burden of proof or the preponderance standard. Judge Hogan has lamented the varying rules and standards applied to the habeas petitions by different D.C. district judges and has urged Congress to develop uniform procedures for these cases. See Wittes & Goldsmith, Detention Policy, supra note 77 ("'It is unfortunate,' [Judge Hogan] said in an oral opinion from the bench, 'that the Legislative Branch of our government and the Executive Branch have not moved more strongly to provide uniform, clear rules and laws for handling these cases.'"). But see Azmy, supra note 77, at 537 (arguing detainees' habeas petitions present "challenging normative, political, and practical considerations" that are "properly within the 'expertise and competence' of the district courts to manage"). Similarly, in the immigrant detention context, district courts deciding whether detention was unreasonably prolonged under section 236(c) examine different factors. See supra note 52 (discussing two courts, within the same circuit, that examined different factors in habeas petitions brought by detainees alleging unconstitutionally prolonged detention under INA section 236(c)).

167. Case Management Order, Misc. No. 08–0442 (TFH), at 2–4.

with an adequate substitute.[168] Lastly, although Guantánamo detainees have no right to counsel paid for by the government, given the novel constitutional issues their cases present, they have easily obtained pro bono representation.[169]

C. *Explaining the Different Procedures and Standards*

A detainee held at Guantánamo receives several levels of review.[170] The detainee's classification as an "enemy combatant" is reviewed first by various government and military officials (when he is captured, when he is transferred to Guantánamo, and again once he arrives there), then through administrative procedures in the CSRTs and ARBs, and lastly judicial review in the D.C. federal courts through a habeas petition.[171] A personal representative or military officer assists the detainee through the CSRT and ARB processes. In contrast, an immigrant detainee receives initial review by the ICE district director, administrative review in immigration court, and an appeal to the BIA, which is highly deferential to DHS.[172] The government cannot prevent the immigrant detainee from obtaining counsel, but if he is indigent the government has no obligation to provide counsel.

Furthermore, when the D.C. District Court reviews a Guantánamo detainee's habeas petition, the burden is on the government to justify detention by a preponderance of evidence, while at the *Joseph* hearing the burden is on the detained immigrant to show the government is "substantially unlikely" to prevail on its charge of removability against him.

Given the fact that Guantánamo detainees are suspected "enemy combatants" and immigrant detainees have resided and contributed to this country for lengthy periods of time, it seems perverse that Guantánamo detainees should receive more process and face a less burdensome standard. This Note proposes three explanations for the disparate process Guantánamo and immigrant detainees receive: (1) the fact that the two sets of detainees are not entirely similarly situated, (2) the cost of providing additional procedures to immigrant detainees, and (3) deference to agency decisionmaking.

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168. Id. § I.F.

169. See Farah Stockman, Detainee Fight Gets Bigger, Costlier for Long-Battling Boston Law Firm, Boston Globe, June 25, 2008, at A1 ("[B]y 2005, the Center for Constitutional Rights, a New York-based group coordinating the defense of hundreds of Guantanamo Bay detainees, had convinced dozens of firms, solo practitioners, and federal defense counsel that constitutionally protected liberties must be defended.").

170. This Note does not claim the procedures Guantánamo detainees receive are adequate; it only suggests that Guantánamo detainees receive more process than immigrant detainees when challenging detention. See, e.g., Azmy, supra note 77, at 475–79 (discussing deficiencies in CSRT process).

171. See supra Part II.B for a detailed discussion of the procedures and standards for challenging detention at Guantánamo Bay.

172. See supra Part II.A for a full discussion of the procedures and standards for challenging immigrant detention.

1. *The Two Sets of Detainees Are Not Similarly Situated.* — Perhaps the most obvious reason why Guantánamo detainees receive more process is that, given their situation, they simply need more protection. Guantánamo detainees are less able to defend themselves because they have never been charged with a crime by the U.S. government and so may have no idea why they are being detained. Moreover, Guantánamo detainees are captured in foreign countries and held at Guantánamo, with no access to the outside world and thus the information, witnesses, and resources needed to prove their innocence.[173]

In contrast, immigrant detainees have usually been convicted of some crime (whether or not it actually subjects them to mandatory detention) and so they, arguably, are not wholly "innocent" like individuals erroneously detained at Guantánamo. Immigrant detainees also receive a Notice to Appear (NTA), which initiates removal proceedings and generally informs the immigrant of why he is being detained.[174] Additionally, detention facilities are intended to have legal rights presentations, law libraries, and lists of pro bono counsel to aid the detainee should he think he has been incorrectly detained.[175] Thus immigrant detainees—because they have been convicted of some crime, know why they are in detention, and have resources to represent themselves or seek counsel—are not similarly situated to Guantánamo detainees and therefore need less process.

2. *Cost of Providing Additional Procedures.* — Another obvious explanation for the fact that Guantánamo detainees receive more process than immigrant detainees is that, given the relatively small number of Guantánamo detainees, the government can afford to provide them additional process. A total of 779 individuals have been held at Guantánamo Bay.[176] In contrast, on September 1, 2009, 31,075 immigrants were in detention, 66%—approximately 20,510 individuals—of whom were subject to mandatory detention.[177] Providing additional procedures to mandatorily detained immigrants may thus seem prohibitively expensive and burdensome for the government.

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173. See Azmy, supra note 77, at 447 ("Kurnaz was deemed an 'enemy combatant' . . . part[ly] because his . . . friend . . . Bilgin, had 'engaged in a suicide bombing.' . . . Yet, not having seen Bilgin for years and without access to any information [or] counsel, all Kurnaz could say . . . was that he had no idea Bilgin had ever done anything violent . . . ." (quoting Declaration of James R. Crisfield Jr. at 11, Karnaz v. Bush, Civil Action No. 04-CV-1135 (ESH) (D.D.C. Oct. 18, 2004))).

174. INA § 239(a)(1)(A)–(D), 8 U.S.C. § 1229(a)(1)(A)–(D) (2006). If the NTA does not provide the basis for detention, the government must notify the detainee of the basis and provide him with an opportunity to contest detention. Kotliar, 24 I. & N. Dec. 124, 127 (B.I.A. 2007).

175. See supra notes 116, 119, and accompanying text for a discussion of government noncompliance with these detention standards.

176. The Guantánamo Docket, supra note 83.

177. Schriro Report, supra note 53, at 6. The report did not indicate how many of the 20,510 were LPRs.

3. *Deference.* — The *Joseph* hearing and the standards that govern it were established by the BIA. As an agency, the BIA receives a great amount of freedom when interpreting statutes and regulations, and when developing standards related to its area of expertise.[178] In contrast, the procedures and standards governing Guantánamo detention were developed by the Executive and Congress, whose actions the judiciary is meant to check.

However, when the Executive and Congress act in concert, as they seemed to in the post-September 11 context, their decisions generally deserve great deference from the courts.[179] Moreover, during times of national emergency, which the time immediately after September 11 certainly was, the courts are usually highly deferential to the political branches of the government because courts lack institutional competence to make decisions during a crisis.[180] Thus deference cannot fully explain the different procedures and standards that have developed.

Instead of deferring to the Executive, in *Hamdi v. Rumsfeld* Justice O'Connor applied the *Mathews v. Eldridge* test to demonstrate why Guantánamo detainees need more procedures to protect against erroneous detention.[181] Using Justice O'Connor's reasoning in *Hamdi*, and applying the *Mathews* test, the next part of this Note first shows that in the immigrant detention context more protections are also appropriate and then proposes such protections.

III. Proposals for Change: Reforming Immigrant Challenges to Detention in Light of Guantánamo Procedures

The key procedural difference between a Guantánamo detainee's challenge to his detention and that of an immigrant detainee is that the Guantánamo detainee receives several levels of review. Each stage of review is meant to make up for procedural deficiencies in the earlier stage. This Note suggests using the structure of process Guantánamo detainees receive and the standard that governs their challenges to detention as guides for reforming challenges to immigrant detention. To that end,

178. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–45 (1984) (ordering judicial deference to reasonable agency interpretations of ambiguous statutes within their authority to administer because of agencies' greater expertise). No high court has ruled on the sufficiency of the *Joseph* hearing. See Demore v. Kim, 538 U.S. 510, 514 n.3 (2003) ("[W]e have no occasion to review the adequacy of *Joseph* hearings generally in screening out those who are improperly detained pursuant to § 1226(c).").

179. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (arguing "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum" and deserves "the widest latitude of judicial interpretation").

180. See Benjamin Wittes, Law and the Long War: The Future of Justice in the Age of Terror 117 (2008) (arguing judiciary is not competent to evaluate military actions because of "the limits of judges as people untrained in military matters and the limits of evidence collected in a fashion so far removed from the one to which judges are accustomed").

181. Hamdi v. Rumsfeld, 542 U.S. 507, 529–35 (2004).

section A uses the *Mathews* test and LPRs' status as members of American society to establish why *Joseph* hearings violate LPRs' due process rights. Section B suggests a new framework for reviewing immigrant detention, by implementing protections before detention, by altering the *Joseph* hearing standard so that it is less burdensome, and by adding a review process after an immigrant has been detained. Because changing the entire framework for review may take time to implement and perfect, section C suggests three changes—providing counsel, expanding the Legal Orientation Program, and making the National Detention Standards legally enforceable—that can be implemented within the current *Joseph* hearing framework to provide detainees with greater safeguards to protect against erroneous detention.

A. *Why LPRs Deserve More Process*

Currently, immigrant detainees must meet a high standard when challenging the legality of their detention through administrative procedures. In contrast, detainees at Guantánamo Bay receive more review and have to meet a less onerous burden. Detention at Guantánamo Bay is the latest form of executive detention the Supreme Court has reviewed for adequacy of process and for which the lower courts have begun to establish minimum procedural safeguards. Guantánamo is thus the best guide to what the courts believe the Constitution requires when the Executive detains an LPR. Justice O'Connor's opinion in *Hamdi*, as explained in greater detail below, suggests that the government must provide more than barebones procedures to protect against erroneous detention when exercising its detention authority. This section shows how the government has failed to do so in the immigration context.

1. *Current Procedures Fail the* Mathews *Test.* — In *Hamdi*, Justice O'Connor employed the *Mathews* test to decide what process was due to alleged "enemy combatants" challenging their detention.[182] The *Mathews* test determines if procedures provided before the government deprives an individual of a right satisfy due process by weighing the affected private interest, the risk of erroneous deprivation, and the value of additional procedures, against the government interest, including the burden of providing additional procedures.[183] The Supreme Court has stated that the due process clause of the Fifth Amendment applies to immigrants[184] and has itself applied the *Mathews* test in the immigration context.[185]

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182. Id. at 529.

183. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

184. Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of [noncitizens] within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.").

185. See Landon v. Plasencia, 459 U.S. 21, 34 (1982) (applying *Mathews* test to determine if LPR had been afforded due process in immigration proceeding).

In applying the test, Justice O'Connor heavily weighed Hamdi's interest in physical liberty. She referred to physical liberty as "the most elemental of liberty interests" and stated that its importance was not offset by the war context or the "enemy combatant" accusation.[186] Justice O'Connor then stressed the "very real" risk of erroneous deprivation of that liberty in the absence of sufficient process in this context.[187] Lastly, while O'Connor recognized the "weighty and sensitive" government interests in detaining those who pose a threat to national security and in reducing the procedures available given the practical difficulties of the war context, she did not accept the incredibly deferential standard the government had advanced.[188]

The Supreme Court in *Boumediene v. Bush* again assessed the adequacy of the process afforded to Guantánamo detainees and again found it lacking, despite the administration's addition of CSRTs allowing detainees to contest enemy combatant allegations and exclusive review of determinations in the D.C. Circuit.[189] The Court emphasized that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings" and that this "accords with our test for procedural adequacy in the due process context."[190] Thus "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing."[191] The Court assessed the CSRT and found that there was considerable risk of error in the tribunal's findings.[192] The review of the CSRT's findings allowed by the DTA was an inadequate process to make up for the CSRT's deficiencies, and thus an inadequate replacement for habeas, as it did not allow detainees at Guantánamo "to challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release."[193]

Many of the same concerns Justice O'Connor highlighted in *Hamdi* as reasons for providing Guantánamo detainees more process are relevant to the immigration context. Justice O'Connor's fear of an unchecked system of detention as one reason to require more than minimal protections is especially relevant because immigrants are particularly vul-

186. *Hamdi*, 542 U.S. at 529–30.

187. Id. at 530.

188. Id. at 527–28, 531. The government put forth the "some evidence" standard, under which "a court would assume the accuracy of the Government's articulated basis for . . . detention . . . and assess only whether that articulated basis was a legitimate one." Id. at 527–28.

189. 553 U.S. 723 (2008). See supra Part I.B for a discussion of the background of the Guantánamo litigation and note 69 for a discussion of the very limited judicial review the DTA allowed.

190. *Boumediene*, 553 U.S. at 781.

191. Id. at 783.

192. Id. at 785.

193. Id. at 792.

nerable to abuse.[194] Since the Court was unwilling to find the "enemy combatant" accusation or the war context enough to justify providing only minimal protections against erroneous detention, the assertion that the immigrant falls under mandatory detention or the immigration context[195]—less grave situations—similarly should not be enough justification. Moreover the Court in *Boumediene* made clear that in the case of executive detention, because no court order has led to the detention, collateral review of the detention decision must adequately safeguard against earlier deficiencies.[196]

a. *Private Interest.* — Alleged "enemy combatants" and immigrant detainees have equal interests in not being erroneously detained. As noted previously, the Supreme Court has found those interests in physical liberty to be great.[197] However, unlike Guantánamo detainees, immigrant detainees must overcome two hurdles before they can return to their former lives: (1) the *Joseph* hearing and (2) the final removal hearing. Losing at the *Joseph* hearing has grave implications for success at the final removal hearing because detention undermines immigrants' ability to build their removal case by separating them from evidence, witnesses, and counsel.[198] As discussed in Part II.A.3.a, even if a detainee does manage to retain counsel, detention facilities' remote locations, restrictive visitation policies, and lack of privacy impede the effectiveness of that counsel. Many detention facilities' lack of legal material, or outdated materials, also prevents pro se detainees from mounting successful challenges in removal hearings. Lastly, the conditions of confinement encourage detainees to forego procedural rights, such as appeals, or pursue claims that may prolong detention.[199]

The Supreme Court has acknowledged that an immigrant's interest in remaining in the United States is "a weighty one" as the immigrant "stands to lose the right 'to stay and live and work in this land of free-

194. See John Hart Ely, Democracy and Distrust 161 (1980) (noting "[noncitizens] cannot vote in any state" and that "[h]ostility toward 'foreigners' is a time-honored American tradition").

195. The government has traditionally received significant deference in the immigration context under the "plenary power" doctrine; however, it is unlikely that this deference is more than the deference the government receives in the war context. See generally Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 Yale L.J. 545, 550–60 (1990) (describing plenary power doctrine).

196. See supra notes 190–191 and accompanying text.

197. See supra note 7 and accompanying text (discussing importance of physical liberty under Supreme Court precedent).

198. See Michele R. Pistone, Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers, 12 Harv. Hum. Rts. J. 197, 216–24 (1999) (discussing how detention of asylum seekers impedes ability to satisfy burdens of proof and persuasion, prepare cases, testify credibly, and meet legal standards, but encourages abandonment of valid claims); Kaufman, supra note 109, at 126–30 (discussing barriers to representation and case preparation facing immigrant detainees).

199. Kaufman, supra note 109, at 129–30.

dom,'" and "may lose the right to rejoin . . . immediate family, a right that ranks high among the interests of the individual."[200] Thus an immigrant's liberty interest combined with the interest in remaining in the United States, both weighty on their own, should require a truly compelling government interest to outweigh them.

b. *Government Interest.* — The government's interests in detaining immigrants who allegedly fall under mandatory detention and providing them minimal process are three: (1) protecting society from criminal immigrants, (2) ensuring that these immigrants appear at removal proceedings, and (3) not further burdening the immigration system. The first two concerns are not issues because, even if an immigrant receives additional process, he will still have to prove that he is not a flight risk or a danger to society at a bond hearing before he can win release.[201]

The government may argue that minimal procedures are appropriate in this context because, unlike Guantánamo, there is little risk of indefinite detention. However, this is not true as there are a growing number of immigrants remaining in mandatory detention for prolonged periods.[202] Moreover, the reason the government sought minimal protections for Guantánamo detainees was because of the practical difficulties of a trial-like process in a military context—an issue not implicated here.[203] Lastly, additional procedures, as the next section demonstrates, can be tailored to limit the burden on the government and may actually further the government's own interests in fair trials and correct outcomes.

c. *Risk of Erroneous Detention.* — Perhaps most importantly, the risk of erroneous detention under the current procedures is just as real in the immigration context as it is in Guantánamo. Three judicial opinions considering the issue have suggested that the *Joseph* hearing standard violates due process.[204] Several factors combine to create a strong likelihood that an erroneously detained immigrant will remain in detention: (1) the difficulty of representing oneself pro se given the complexity of immigration law, (2) the lack of legal resources available to prepare one's case, (3) the constant possibility of a transfer to another detention facility, and (4) the incredibly high standard one must meet to successfully challenge detention.[205]

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200. Landon v. Plasencia, 459 U.S. 21, 34 (1982) (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945)).

201. Additionally, a 2009 study by DHS itself stated that the immigrant detainee population was of low custody and had a low propensity for violence. Schriro Report, supra note 53, at 2.

202. Kerwin & Lin, supra note 57, at 16–17.

203. See Hamdi v. Rumsfeld, 542 U.S. 507, 531–32 (2004) ("In [the government's] view, military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would . . . intrude on the sensitive secrets of national defense . . . .").

204. See supra note 127 for a discussion of these opinions.

205. See supra Part II.A.3 (discussing procedural problems with *Joseph* hearings).

The immigrant detainee's interest in physical liberty and remaining in the United States combined with the real risk of erroneous detention under the current procedures, clearly outweigh the government's three interests. Not only do the current procedures fail the *Mathews* test, but they also make little sense given LPRs' status as members of the American community.

d. *LPRs, as Members of the American Community, Deserve Greater Protections.* — LPRs' status as members of the American community indicates that they deserve more procedural protections than Guantánamo detainees. Currently, however, LPRs receive minimal protections to safeguard against erroneous detention. This seems impossible to reconcile with the historical conception of LPRs' status in American society:

> Historically and psychologically, admission in [the LPR] category amounts to an invitation to full membership in the society and eventually the polity. Immigrants—that is, [noncitizens] selected for lawful permanent resident status—pass through the most rigorous screening our immigration system imposes. But having done so, they are then invited to become part of our community, to sink roots—permanent roots—and to chart out life plans in reliance on enduring rights to remain.[206]

LPRs have lived permanently in the United States—they work, pay taxes, and raise their families here—often contributing to American society in ways indistinguishable from those of U.S. citizens. LPRs thus have a great stake in not being detained and hence are likely to contest detention. Given their strong connections to the United States and contributions to our society, LPRs should receive greater, not lesser, procedural protections than those given to alleged "enemy combatants," most of whom have no connection whatsoever to the United States—the fact that the opposite is true thus seems perverse.

To ameliorate this confused state of affairs, the next section presents ways in which the government can provide immigrant detainees more process and make the standard for challenging detention less burdensome by reexamining current procedures in light of protections executive detainees at Guantánamo Bay receive.

B. *A New Framework for Review*

The current framework for an immigrant detainee to challenge his detention—through a *Joseph* hearing in immigration court—is equivalent to Guantánamo detainees' CSRT process. Both administrative proceedings are highly deferential to the government's position and require the

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206. David A. Martin, Graduated Application of Constitutional Protections for Aliens: The Real Meaning of *Zadvydas v. Davis*, 2001 Sup. Ct. Rev. 47, 102; see also Demore v. Kim, 538 U.S. 510, 543–44 (2003) (Souter, J., dissenting) ("The constitutional protection of a[ ] [noncitizen's] person . . . is particularly strong in the case of [LPRs]. The immigration laws give LPRs the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen.").

detainee to prove he is not an enemy combatant, or subject to mandatory detention, thus creating the potential for erroneous detention.[207] However, unlike in the Guantánamo context, which offers procedural protections before and after the CSRT determination, the framework for challenging mandatory immigrant detention begins and ends here. This section proposes a new framework for reviewing immigrant detention by adding procedural protections before detention, altering the *Joseph* hearing standard so it is less burdensome, and providing additional review during detention, using the current Guantánamo structure as a model.

1. *Protections Before Detention.* — Before a captured individual is sent to Guantánamo a number of military and Department of Defense officials must review his classification as an "enemy combatant" and approve detention.[208] A similar review mechanism prior to subjecting an immigrant to mandatory detention should be put in place. Such a mechanism is already in place when an ICE official seeks to detain an immigrant not subject to mandatory detention—he must first obtain approval from the field office director.[209] Review by the field office director is appropriate for those not subject to mandatory detention because the determination there does not require a legal judgment—the director simply needs to decide whether the immigrant poses a flight risk or a danger to the community.

Before an ICE official can subject any immigrant to mandatory detention, he should be required to first seek review by ICE legal counsel. In fact, the previous detention priority memo specifically stated that questions of whether an immigrant falls under one of the mandatory detention provisions must be directed to legal counsel.[210] This Note suggests

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207. Joseph, 22 I. & N. Dec. 799, 800 (B.I.A. 1999) ("[T]he Immigration Judge must have very substantial grounds to override the Service's decision to charge the [noncitizen] with a ground that subjects the [noncitizen] to detention."). The CSRT hearing accords a rebuttable presumption in favor of the government's position. Wolfowitz, Order Establishing CSRT, supra note 66, at 3; see also supra Part II.A.2 (explaining *Joseph* hearings); supra at Part II.B.2 (discussing CSRT process).

208. Wolfowitz, Order Establishing ARB, supra note 66, at 2; see also supra Part II.B.1 (explaining process whereby captured individuals are sent to Guantánamo).

209. Memorandum from John Morton, Assistant Sec'y, ICE, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens 4 (June 30, 2010) (on file with the *Columbia Law Review*).

210. Memorandum from Asa Hutchinson, Undersec'y for Border and Transp. Sec., to Robert C. Bonner, Comm'r, CBP, and Michael J. Garcia, Assistant Sec'y, ICE, Detention Prioritization and Notice to Appear Documentary Requirements 2 (Oct. 18, 2004) (on file with the *Columbia Law Review*). On September 1, 2009, 31,075 immigrants were in ICE custody, 66% of whom—approximately 20,510 individuals—were subject to mandatory detention, leaving 10,565 individuals detained who did not fall under mandatory detention. See supra note 177 and accompanying text. If only twenty-four field office directors can review 10,565 individuals' detention, it is not unreasonable to think ICE's much larger base of legal counsel can review the detention of the 20,510 remaining individuals who are LPRs. For a list of the twenty-four field offices, see ICE, Enforcement and Removal Operations, http://www.ice.gov/contact/ero/ (on file with the *Columbia Law Review*) (last visited Sept. 8, 2011).

that such review should be required in every case. If ICE legal counsel catches an error at this point it will benefit everyone—the immigrant will be saved from prolonged loss of physical liberty, ICE will save the cost of having to detain that individual, and it will take one case off of already overcrowded immigration court dockets.[211]

2. *Shifting the Burden of Proof in* Joseph *Hearings.* — When a Guantánamo detainee brings a habeas petition, the government must justify detention by the preponderance of the evidence standard. The fact that the courts have been willing to put the burden on the government despite the national security context lends strong support to the argument that in all contexts where the government seeks to detain an individual the government should justify the detention. Furthermore, in civil commitment cases the Supreme Court has required the government to justify confinement and has required a higher burden of proof than preponderance of the evidence.[212] The ultimate end of immigrant detention is removal, which the Supreme Court has deemed a civil, rather than a criminal, procedure.[213] Thus, following the Supreme Court's civil commitment precedents, the burden in *Joseph* hearings should be shifted to the government and the burden of proof should be high. This Note proposes that when a detainee challenges detention, the government should have to prove that it is substantially likely to prevail on a charge of removability against the immigrant specified in section 236(c)(1).[214]

3. *Protections During Detention.* — Once a detainee has been transferred to Guantánamo he has an opportunity to challenge his classification as an "enemy combatant" through a CSRT. If he fails to convince the tribunal, his status is reviewed again, at least once a year, by the ARB. As explained above, in the immigration context the *Joseph* hearing is similar to the CSRT. However, immigrants who lose at their *Joseph* hearings have no further way to challenge their detention—a major procedural defect, especially given the high burden immigrants must meet to succeed at the hearing.

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211. See infra text accompanying notes 226–227 (discussing costs of detention).

212. See, e.g., Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (plurality opinion) (emphasizing "[f]reedom from physical restraint being a fundamental right, the State must have a particularly convincing reason" justifying detention and striking down statute allowing criminal defendant acquitted due to insanity to be committed to psychiatric institution until *he* could prove he was not a danger to himself or others); Addington v. Texas, 441 U.S. 418, 431–33 (1979) (requiring state to justify civil commitment of individual by clear and convincing proof).

213. See Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.").

214. Shalini Bhargava similarly suggests that the burden of proof should be on the government in *Joseph* hearings; however, instead of keeping the substantially unlikely/likely standard she suggests a preponderance standard, at the least. Bhargava, supra note 104, at 87–88.

Detention in the immigration context would benefit from a review process similar to the ARB. An appropriate review time is six months into detention, the presumptive limit the Supreme Court set for detention of immigrants under section 241(a)(6).[215] All immigrant detainees detained under the authority of section 236(c), whether or not they initially requested a *Joseph* hearing, should have their detention reviewed at the six-month point to ensure an appropriate determination was made initially. The number of immigrant detainees remaining in detention for six months or more is small, but significant enough for this to be a manageable and worthwhile endeavor.[216] If the process is nonadversarial, as the ARB is, the government will expend fewer resources as it will not need to send trial attorneys to defend continued detention. Such a review process may also help reduce the costs related to protracted litigation, which the current framework facilitates,[217] and if an immigrant is cleared at this stage the government will also save significant detention costs.

This Note does not recommend the review process take place within DHS as ICE officials make the initial decision to detain the immigrant, and review within the same department may cast doubt on the neutrality of the process. The DOJ currently houses both immigration-related administrative review bodies and is thus the most appropriate place to review mandatory immigrant detention decisions. After the Supreme Court's *Zadvydas* decision, a new type of hearing—continued detention review—was established to assess whether noncitizens with final orders of removal whose removal ICE had been unable to effectuate should remain in custody.[218] This hearing takes place before an IJ in immigration court. Assessing mandatory detention would also constitute a form of "continued detention review." However, instead of further burdening already overcrowded immigration court dockets, this Note suggests all continued detention review take place before a separate, independent body within the DOJ.

C. *Protecting Immigrant Detainees Under the Existing Framework*

While altering the entire framework for reviewing mandatory detention decisions may take some time, there are many practical changes that the government can implement within the current review system to ensure that immigrants are not erroneously detained. This section proposes three such changes: (1) providing some form of legal counsel, (2) ex-

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215. Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

216. On January 25, 2009, there were 2362 immigrants in detention who had been detained for six months or more. Kerwin & Lin, supra note 57, at 1, 16.

217. See Tijani v. Willis, 430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring) ("[N]early 30 months later, Tijani remains in mandatory detention while courts continue to sort out whether his offenses actually fall within the reach of the mandatory detention statute.").

218. EOIR Statistical Yearbook 2009, supra note 112, at C2. Only one continued detention hearing was requested and completed in 2009. Id. at C3.

panding LOPs, and (3) making the National Detention Standards legally enforceable.

1. *Providing Counsel.* — At the CSRT and ARB stage Guantánamo detainees are assisted by personal representatives and, while they have no right to counsel paid for by the government, they have easily obtained pro bono representation in their habeas petitions.[219] In contrast, most immigrant detainees appear in court without any assistance,[220] even though studies have shown that competent legal representation can greatly aid a noncitizen's immigration case.[221] This Note suggests that the government should provide an immigrant who requests a *Joseph* hearing with some form of legal counsel.[222] Providing an immigrant with legal counsel during the *Joseph* hearing promotes three important goals: (1) fairness and the legitimacy of the system, (2) correct outcomes, and (3) immigration court efficiency.

When pro se immigrants, often lacking fluency in the English language, appear in immigration court to contest their case against skilled government trial attorneys, the hearing can seem like a farce.[223] Such a trial undermines the legitimacy of immigration court proceedings and seems incredibly unfair to indigent LPRs—who have often developed strong ties in this country over a lengthy period of residence and so have a strong interest in not being erroneously detained. Moreover, the IJ is more likely to reach a correct outcome if both sides of the issue are advocated forcefully, but given the complexity of immigration law, a pro se immigrant may have a hard time understanding the law, let alone applying it correctly to his case.

Ideally, the government should provide all detainees who wish a *Joseph* hearing an attorney;[224] however, a more cost-effective option would be to provide a BIA accredited representative. Federal regulation currently allows non-attorneys who work for BIA recognized nonprofit religious, charitable, or social service agencies to represent immigrants in

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219. See Stockman, supra note 169 (describing pro bono efforts of several large firms on Guantánamo cases).

220. See supra note 112 (listing statistics on legal representation of immigrant detainees).

221. See Kerwin, supra note 109, at 6 ("Represented detainees received relief in 24% of their cases, compared to 15% for unrepresented detainees.").

222. The right to appointed counsel in cases where an individual's physical liberty is at stake has been recognized by the Supreme Court: "The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981).

223. See Jacinto v. INS, 208 F.3d 725, 728–32 (9th Cir. 2000) (discussing how immigration court proceedings involving pro se immigrant had violated requirement of full and fair hearing).

224. See generally Kerwin, supra note 109, at 13–16 (presenting three models for legal representation of immigrant detainees).

immigration court.[225] These accredited representatives would serve the function of the Guantánamo detainees' non-attorney personal representatives; however, the immigration context should improve upon that model by allowing the accredited representative to advocate on behalf of the immigrant.

The major argument against providing all mandatorily detained immigrants with counsel is the cost of such a measure. However, detention itself is incredibly costly. For fiscal year 2010, ICE's Enforcement and Removal Operations was allocated a budget of $1.77 billion for custody operations.[226] Estimates of the cost of detention per night range from $95 to $141.[227] Other costs to the government include the cost of transportation, the cost of adding another case to already overcrowded immigration court dockets,[228] and the cost of government trial attorneys working on the case. Detention also has a broader cost to the government and to American society in general: Detention deprives us of productive members of society. Additional procedures may help catch errors earlier in the process and thus save the government and society these detention costs.

Part of the cost of providing counsel can be managed by providing accredited representatives instead of attorneys. Providing counsel may also have benefits that will help overcome the cost. For one, providing counsel will increase court efficiency. Because most detainees appear pro se, IJs have to spend significant time explaining court procedures[229]—counsel would eliminate that need. Evidence has also shown that legal representation "financially benefits the government by leading to improved appearance rates in courts, fewer requests for continuances and shorter periods of detention" and by deterring frivolous claims.[230]

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225. 8 C.F.R. § 292.1(a)(4), 292.2 (2011). There are five individuals who may represent immigrants in immigration court: (1) attorneys, (2) recent law graduates under the supervision of an attorney or accredited representative, or law students in a legal aid program or clinic, (3) reputable individuals who have a pre-existing relationship with the immigrant, (4) accredited representatives, and (5) an accredited official of the government to which the immigrant owes allegiance. Id. § 292.1(a).

226. Office of Immigration Affairs, DHS, Factsheet: ICE Fiscal Year 2010 Enacted Budget 2 (2009), available at http://www.ice.gov/doclib/news/library/factsheets/doc/2010budgetfactsheet.doc (on file with the *Columbia Law Review*).

227. Kerwin & Lin, supra note 57, at 4–5.

228. See TRAC, Immigration Courts Taking Longer to Reach Decisions (Nov. 11, 2010), http://trac.syr.edu/immigration/reports/244 (on file with the *Columbia Law Review*) ("The average number of days it took to dispose of cases decided during FY 2010 was 280 days, 47 days longer on average than completion times for FY 2009."); TRAC, As FY 2010 Ends, Immigration Case Backlog Still Growing (Oct. 21, 2010), http://trac.syr.edu/immigration/reports/242 (on file with the *Columbia Law Review*) ("The number of cases awaiting resolution before the Immigration Courts reached a new all-time high of 261,083 by the end of September 2010 . . . .").

229. See EOIR Statistical Yearbook 2009, supra note 112, at G1 ("[IJs], in order to ensure that [pro se] individuals understand the nature of the proceedings, as well as their rights and responsibilities, must take extra care and spend additional time explaining this information.").

230. Kerwin, supra note 109, at 16–17.

Because Congress would have to make the ultimate decision to provide all immigrant detainees with attorneys, or accredited representatives, this suggestion would take time to put in place. The next section proposes a change that may be easier to achieve.

2. *Expanding Legal Orientation Programs.* — Because the LOP is already established, increasing funding to expand LOP is a goal that can be achieved much more quickly. Like providing counsel, the benefits of LOP may offset the costs. These benefits include: (1) effectively preparing detainees to proceed pro se, (2) moving participants through immigration court faster, (3) increasing immigration court efficiency, and (4) improving detention conditions.[231] Currently only fourteen detention facilities receive LOP services.[232]

Funding for LOP should be expanded to reach all detention facilities and an LOP designed specifically for *Joseph* hearings should be developed. This Note suggests a two-part LOP: (1) an initial screening process and (2) targeted services for immigrants referred from the screening process. At the first session, the LOP attorneys would briefly meet with each detainee held pursuant to the mandatory detention provision to determine which detainees have credible claims that they have been incorrectly detained. These immigrants would then be referred to receive intensive LOP services to prepare them to proceed pro se in their *Joseph* hearings.

3. *Making the National Detention Standards Legally Enforceable.* — Guantánamo detainees, or their personal representatives, are provided with the legal justification for detention and exculpatory information to help challenge their classification as "enemy combatants." The NTA provides immigrant detainees with the legal basis for detention, but detainees also need access to legal materials to determine whether their detention is lawful. The National Detention Standards require that all detention facilities have law libraries with up to date legal materials, but because the standards are not legally enforceable there have been many

231. The Vera Institute of Justice evaluated the impact of the program from 2005 through September 2007. The report found that detainees who participated in the LOP had immigration court cases that were on average thirteen days shorter than cases for detainees who did not participate in LOP and that some detainees who received intensive LOP services and went on to represent themselves pro se achieved case outcomes that were close to those represented individuals achieve. Vera Inst. of Justice, Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II, at iv (2008). Detention facility employees at LOP sites commented that when detainees have access to legal information they have observed reduced behavior problems and that LOP overall makes detention "more humane." Id at v. Perhaps most important for Congress, IJs reported that LOP participants appeared in court better prepared, had a better understanding of immigration court proceedings, were better able to identify relief available to them and relief that was not available to them, and fewer LOP participants failed to appear for their hearings upon release from detention—all contributing to improving court efficiencies. Id.

232. EOIR Legal Orientation and Pro Bono Program, supra note 117.

documented violations.[233] To ensure that all immigrant detainees have access to the legal resources they need to challenge detention, the detention standards should be legally enforceable by detainees and members of the public. If relief is limited to requiring the detention facility to comply with the violated standard, this change should not be overly burdensome as it would simply require detention facilities to provide resources they already should have been providing.

CONCLUSION

Mr. B spent four years in mandatory immigrant detention despite the fact that the underlying crimes for which ICE alleged he was detainable were not aggravated felonies and an IJ had even ruled so. Mr. B's case thus reveals that the current framework for reviewing immigrant challenges to detention provides inadequate protections to prevent against erroneous detention. When compared to the greater process alleged "enemy combatants" held at Guantánamo receive, the inadequacy of the procedures immigrant detainees receive becomes apparent. It makes little sense that LPRs should receive less protection than Guantánamo detainees, given the national security implications of the Guantánamo context and the strong ties LPRs have to the United States. Such a state of affairs threatens the legitimacy of executive detention.

Justice O'Connor's opinion in *Hamdi v. Rumsfeld* suggests that, no matter what the context, the government must provide adequate procedures to protect against erroneous detention when it chooses to exercise its detention power. The Guantánamo context reveals that several levels of review and a standard that requires the government justify detention may ensure that procedural deficiencies in earlier stages of detention review are caught. Altering the framework of review so that it is more consistent with this approach and ensuring that immigrant detainees have tools to fight detention in the manner suggested by this Note would serve several important objectives. Such changes would align procedures to challenge detention with the historically favored status of LPRs, increase the legitimacy of executive detention, and, most importantly, ensure immigrant detainees have a fair opportunity to contest detention and that those erroneously detained are quickly screened out and allowed to return to their lives as productive members of the American community.

233. See supra notes 116, 119, and accompanying text for reported violations of the standards.