Providing A Solution For Immigrant Detainees Held Under The Mandatory Detention Statute

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Providing a Solution for Immigrant Detainees Held Under the Mandatory Detention Statute

By Kristine Toma*

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“Remember, remember always, that all of us, and you and I especially, are descended from immigrants and revolutionists.”

-Franklin D. Roosevelt

I. INTRODUCTION

Immigration is an ongoing issue in the United States, a nation of immigrants. There are those in favor of more liberal immigration laws and those opposed to them. Then, there is the issue of immigrants with criminal records that face removal from the United States due to their criminal convictions and lack of citizen status. Under the Mandatory Detention Statute, 8 U.S.C. § 1226 (2012), criminal aliens\(^1\) can be detained by the government without a definitive timeline as to the length of their detention.\(^3\)

Some aliens are held in custody for years before they are even entitled to a bond hearing\(^4\) in front of an immigration judge.\(^5\) This was the case for Astrid Morataya.\(^6\) In 2013, Morataya was placed in

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removal proceedings\textsuperscript{7} and detained pursuant to the Mandatory Detention Statute for two and a half years.\textsuperscript{8} Morataya was placed in removal proceedings as a result of a 1999 conviction for “low-level drug distribution.”\textsuperscript{9} This decade-old conviction was from “a period in her life when she was the victim of ongoing sexual abuse, including a violent kidnapping and rape.”\textsuperscript{10} As a result of her conviction, Morataya missed out on important milestones including her daughter’s first day of kindergarten, her son’s high school graduation, countless holidays, and birthdays.\textsuperscript{11} While Morataya was detained, her youngest daughter was also subjected to a “protracted and traumatic custody battle.”\textsuperscript{12}

Mandatory detention of criminal aliens is the result of the Mandatory Detention Statute, which was passed in 1996 under the Clinton Administration and allows the Attorney General to take into custody and detain any alien that is in removal proceedings.\textsuperscript{13} In order for § 1226, specifically § 1226(c), to be applicable, the alien must have previously committed and been convicted of an offense for which imprisonment was at least one year.\textsuperscript{14} The criminal convictions for which an alien may be detained by the Attorney General are outlined in § 1227.\textsuperscript{15} These include convictions for “a crime involving moral turpitude, multiple convictions where combined sentences are five or more years of imprisonment, a controlled substance offense, a prostitution related offense, terrorist activity, significant human trafficking, and money laundering.”\textsuperscript{16}

However, there is an ambiguity as to how long a detention may last because the statute does not state how long the Attorney General is permitted to hold the alien before the alien is entitled to a bond

\textsuperscript{7} Removal proceedings are when an immigration judge determines whether an alien is deportable or inadmissible. 8 U.S.C. § 1291(a) (2012).
\textsuperscript{8} Brief of Amici Curiae for Americans for Immigrant Justice, et al. in Support of Respondents, \textit{supra} note 6, at *7.
\textsuperscript{9} \textit{Id.}
\textsuperscript{10} \textit{Id.} at *8.
\textsuperscript{11} \textit{Id.}
\textsuperscript{12} \textit{Id.} at *9.
\textsuperscript{13} 8 U.S.C. § 1226 (2012).
\textsuperscript{14} \textit{Id.} § 1226(c).
\textsuperscript{15} \textit{Id.} § 1227.
\textsuperscript{16} \textit{Id.}
hearing in front of an immigration judge.\textsuperscript{17} The purpose of the bond hearing is to determine whether aliens should be released or held in custody during their removal proceedings.\textsuperscript{18} Some aliens are held in custody for years before they are even entitled to a bond hearing before an immigration judge.\textsuperscript{19}

In fact, the only discussion as to when the alien may be released is discussed in the second paragraph of the statute, but even so, no definitive standard is given.\textsuperscript{20} The second paragraph of the statute states that:

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.\textsuperscript{21}

It is not, however, specified how long detainees can be held before they are entitled to a bond hearing. Congress decided that it was “necessary to briefly detain even those aliens who pose absolutely no risk at all in order to avoid the risks posed by other aliens.”\textsuperscript{22}

This Article will explore and discuss this ambiguity in the statute and the current circuit split that exists in regards to this ambiguity.

\textsuperscript{17} Firmacion, supra note 5, at 605.
\textsuperscript{18} Id. at 622.
\textsuperscript{19} Id. at 601–02.
\textsuperscript{20} 8 U.S.C. § 1226(c)(2) (2012).
\textsuperscript{21} Id.
\textsuperscript{22} Sarah Gryll, Comment: Immigration Detention Reform: No Band-Aid Desired, 60 EMORY L.J. 1211, 1251 (2011).
Although all the circuit courts that have addressed this issue have held that a detained alien cannot be held indefinitely, they disagree as to what the standard length of detention should be. A majority of circuit courts have held that an alien can be detained for a reasonable period of time while the minority of circuits have held that, pursuant to § 1226(c), an alien can only be detained for six months.

Section II of this Article will examine the history behind § 1226 and what motivated the passing of this statute. Section III will discuss the Supreme Court cases that have considered this issue as well as other similar alien detention provisions within the United States Code. Section IV will look at the positions that the majority and minority circuit courts have adopted. Lastly, Section V posits what the rule should be regarding the detention of criminal aliens. This proposed rule is a synthesis of the rules posited by the majority and minority circuit courts.

II. BACKGROUND

Mandatory detention statutes were first passed in the Anti-Drug Abuse Act of 1988 under Ronald Reagan’s administration in response to the ongoing drug wars. Mandatory detention statutes were then further expanded in 1996 under Bill Clinton’s administration. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) expanded the definition of an aggravated felony and broadened it to include even more crimes for which criminal aliens could be subject to mandatory detention statutes.

23 Firmacion, supra note 5, at 615–16.
24 Id.
25 See infra Section II and accompanying notes 26–42.
26 See infra Section III and accompanying notes 43–93.
27 See infra Section IV and accompanying notes 94–206.
28 See infra Section V and accompanying notes 207–297.
30 Id. at 896.
31 Id.; see also Deborah F. Buckman, Validity, Construction, and Application of Mandatory Predeportation Detention Provision of Immigration and Nationality Act (8 U.S.C.A. § 1226(c)) As Amended, 187 A.L.R. Fed. 325, (Originally
However, the Immigration and Naturalization Service’s (INS) inability to lower the high levels of crime rates among aliens motivated the passage of § 1226. At the time of the passage of § 1226, twenty-five percent of federal prisoners were aliens. This high level of prisoners was costing the United States upwards of $724 million every year. The Department of Homeland Security’s (DHS, formerly INS) budget was “larger than the budgets of all other federal law enforcement agencies combined.” However, the INS lacked the resources to combat these high levels of crimes and thus, believed enacting a statute would help lower crime levels. In theory, it would have taken twenty-three years for the INS to deport all of the criminal aliens that were residing in the United States at the time. Further, not only were levels of crime high among aliens generally, but recidivist rates among criminal aliens were high as well.

In tandem with the high levels of crime, there was also a high probability that criminal aliens would not show up to their immigration proceedings. It had been shown that “one out of four criminal aliens released on bond absconded prior to the completion of [their] removal proceedings.” Additionally, not only were criminal aliens unlikely to show up to their immigration proceedings, but “[d]eportable criminal aliens who [were] not detained continue[d] to engage in crime and fail[ed] to appear for their removal hearings in large numbers, [and this] require[d] that persons . . . be detained for the brief period necessary for their removal proceedings.” Congress felt that § 1226 was necessary in order to prevent aliens from continuing to commit crimes, as well as to ensure that they were

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33 Id.
34 Id.
35 Torrey, supra note 29, at 882.
36 Demore, 538 U.S. at 518.
37 Id.
38 Id.
39 Id.
40 Id. at 520.
41 Id. at 513.
attending their removal hearings and not absconding. The INS also felt that its inability to detain criminal aliens during removal proceedings was the reason for its inability to eventually deport them.

III. THE SUPREME COURT’S FAILURE TO PROVIDE AN ANSWER

The Supreme Court has never ruled whether § 1226(c) should stand: (a) for the proposition that a bright-line rule should be adopted whereby criminal aliens can only be held for a maximum of six months before being entitled to a bond hearing; or (b) for the broad discretion proposition that criminal aliens can be detained for a reasonable period of time as determined by the Attorney General before they are entitled to a bond hearing, so long as detention is not indefinite. However, in Zadvydas v. Davis and Demore v. Kim, the Supreme Court discussed § 1226(c) and other alien detention provisions. The Court’s rulings on these issues have influenced the lower courts in their own holdings regarding § 1226(c).

In Zadvydas, the Court held that detaining a criminal alien beyond six months is unreasonable. Although the respondent in this case was not challenging § 1226(c) specifically, he was still challenging the detention of criminal aliens after a final deportation order has been issued by the immigration judge. Once an alien has been ordered removed, “the government ordinarily secures the alien’s removal during a subsequent 90-day statutory ‘removal period,’ during which time the alien normally is held in custody.” However, the alien can be held past this statutorily permitted time under 8 U.S.C. § 1231(a)(6), which applies to criminal aliens among other groups of aliens, and allows the Attorney General to hold aliens

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42 Id.
43 Id. at 519.
47 Zadvydas, 533 U.S. at 701.
48 Id. at 682.
49 Id.
beyond the ninety days if they pose a risk of harm to society.\textsuperscript{50} 
\textit{Zadvydas} challenged the constitutionality of this statute.\textsuperscript{51}

There, Kestutis Zadvydas was born in a displaced persons camp in Germany to Lithuanian parents.\textsuperscript{52} He then came to the United States with his parents and subsequently became a resident alien.\textsuperscript{53} In 1994, Zadvydas was ordered by ICE to be deported back to Germany because of a long criminal record that included “drug crimes, attempted robbery, attempted burglary, and theft.”\textsuperscript{54} However, Germany said that it would not take Zadvydas because he was not a citizen of the country given that he was born in a displaced persons camp to non-German parents.\textsuperscript{55} Accordingly, the United States then sought to have Zadvydas deported to Lithuania because his parents were Lithuanian citizens.\textsuperscript{56} However, Lithuania also refused to accept Zadvydas because, although his parents were born in Lithuania, they had never filed the paperwork for Zadvydas to obtain his Lithuanian citizenship.\textsuperscript{57} The United States government then sought to have Zadvydas deported to the Dominican Republic because his wife was a citizen of the country.\textsuperscript{58} However, the Dominican Republic refused to accept Zadvydas as well.\textsuperscript{59} Given that none of these countries were willing to take Zadvydas, he remained detained by the INS well past the ninety-day removal period.\textsuperscript{60}

Since the government held Zadvydas past the ninety-day removal period, he brought suit against the Attorney General challenging his detention and argued that detention past the ninety-day period was unconstitutional.\textsuperscript{61} On the other hand, the United States government attorney argued that aliens can be detained indefinitely because § 1226(c) does not set any time limits regarding the length of criminal

\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.} at 684.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} at 685.
alien detention. Nevertheless, the Court did not accept the Attorney General’s argument and instead held that the statute implies that the alien can only be held for a reasonable period of time. The Court said that § 1226(c) “limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States.” The Court also held that if the Attorney General is going to hold a criminal alien past the ninety days, the Attorney General needs to make an individual inquiry as to whether the alien should be released back into society, pending his or her deportation, or should be detained for a longer period of time because he or she poses a risk of harm to society. Part of this individual inquiry requires that the INS look at the alien’s “disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, and favorable factors such as family ties.”

If the government decides that the criminal alien is going to be held past the ninety-day removal period, the alien can only be held for a reasonable period of time. The Court stated that, in drafting § 1231(a)(6), Congress doubted that it was constitutional to detain an alien for more than six months after the ninety-day removal period has expired. The Court agreed with Congress that there is a six-month time limit in regards to how long an alien can be legally detained. After the six months have passed, if the alien says that there is good reason to think that he or she is not a risk of harm to society, the burden then shifts to the government to prove that the alien is a risk. If the government fails to meet its burden, the government must release the alien back into society.

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62 Id. at 689.
63 Id. at 682.
64 Id. at 689.
65 Id. at 683.
66 Id.
67 Id. at 682.
68 Id. at 701.
69 Id.
70 Id.
71 Id.
Subsequently, the Supreme Court decided Demore, which dealt with § 1226(c). There, Hyung Joon Kim, a lawful permanent resident originally from South Korea, was convicted of first-degree burglary and was subsequently convicted for petty theft with priors. After these convictions, the INS deemed that Kim was deportable, and he was detained pending his removal proceedings. Kim then brought suit alleging that § 1226(c) violated his Fifth Amendment due process rights because the statute permitted the detainee to be held without requiring the INS to make a “determination that he posed either a danger to society or a flight risk.”

On the other hand, the government argued that § 1226(c) was a constitutional statute. The government justified the Mandatory Detention Statute on two grounds: “(1) ensuring the presence of criminal aliens at their removal proceedings; and (2) protecting the public from dangerous criminals.”

In response to this challenge, the Court held that § 1226(c) is not in violation of the Fifth Amendment’s Due Process Clause. The Court stated that “detention during such [immigration] proceedings is a constitutionally valid aspect of the process.” The Supreme Court’s decision was premised on the assumption that the detention of criminal aliens is not likely to last a long time. This is because the normal time for removal proceedings is less than ninety days, with the average length of deportation proceedings being forty-seven days, and the median length of deportation proceedings being thirty days. Also, even when the criminal alien appeals the immigration judge’s decision with the Board of Immigration Appeals, the appeal takes an average of four months, with the median length of the appeals

73 Id. at 513.
74 Id.
75 The Fifth Amendment states, “nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .” U.S. CONST. AMEND. V.
76 Demore, 538 U.S. at 515.
77 Id.
78 Id. at 515.
79 Id. at 528.
80 Id. at 523 (citing Wong Wing v. U.S., 163 U.S. 228, 235 (1896)).
81 Id. at 529.
82 Id.
decision being slightly less than four months. In sum, the detention at stake under § 1226(c) lasts roughly a month a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal.84

The Court distinguished Demore from Zadvydas on two grounds.85 The first distinction made was that, whereas Zadvydas already had a final deportation order, Kim did not and was currently in removal proceedings.86 The purpose of § 1226(c) is to detain criminal aliens pending their removal proceedings to ensure they attend their removal hearings.87 As Zadvydas had already been ordered deported, § 1226(c) was no longer serving its purpose since his removal proceedings were already over.88 However, Kim was still in removal proceedings so the statute was serving its purported function of ensuring that criminal aliens do not pose a risk of harm to society and that they actually attend their removal hearings.89 The second distinction made was that, whereas the statute in Zadvydas dealt with an indefinite period of time, § 1226(c) did not because most removal hearings did not last for long periods of time.90 In fact, most hearings lasted less than the ninety-day period that the Court in Zadvydas said was permitted under § 1231(a)(6), so it was presumed that such a detention during removal proceedings was permissible.91

Even though the Court did not establish a definitive rule as to how long a detainee could be held, it did establish some parameters and limits within Section 1226(c).92 It held that within the statute’s language, there is a definite time limit regarding how long an alien can be detained.93 Accordingly, the Attorney General cannot hold the criminal alien for an indefinite period of time.94

83 Id.
84 Id. at 530.
85 Id. at 527.
86 Id.
87 Id.
88 Id.
89 Id. at 528.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
IV. HOW THE CIRCUIT COURTS HAVE RELIED ON ZADVIYDAS AND DEMORE

Although the Court in Demore and Zadvydas did not explicitly hold how long a criminal alien can be detained for, the circuit courts have split in their interpretations of these cases. The majority of circuit courts, the First, Third, Sixth, and most recently the Eleventh Circuit, have followed the Demore line of reasoning that a criminal alien should be detained for a reasonable period of time.95 These circuits did not adopt the bright-line rule of reasoning that the minority of circuit courts have adopted.

In Alli v. Decker,96 the Third Circuit held that the Attorney General can hold the criminal alien for as long as is reasonable.97 At the time the suit was brought, petitioners Alexander Alli and Elliot Grande had been detained for nine months and twenty months respectively.98 They brought a class action suit alleging that their detention under § 1226(c) was a violation of their due process rights guaranteed by the Fifth Amendment.99 The petitioners conceded that being detained for a short period of time pursuant to § 1226(c) was constitutional, but being detained for longer than six months was impermissible.100 Respondents, on the other hand, argued in sync with the Demore line of reasoning that mandatory detention is permissible past six months.101 This is because the end of removal proceedings signal the end of the detention, making it unnecessary to adopt a bright-line rule, as the holding will not be indefinite and will end when the removal proceedings end.102

The court agreed with the respondent’s argument and adopted a reasonableness standard in deciding how long a criminal alien can

97 Id. at 541.
98 Id. at 537.
99 Id.
100 Id. at 539.
101 Id.
102 Id.
constitutionally be detained for prior to being entitled to a bond hearing.\textsuperscript{103} The court thought the reasonableness standard approach was the appropriate test to adopt because it better served Congress’s original intent in passing § 1226(c).\textsuperscript{104} The purpose of the statute was to give the Attorney General broad discretion in detaining criminal aliens to ensure that flight risks attended their immigration hearings and to prevent criminal aliens that posed a risk of harm to society from being released back into society.\textsuperscript{105} By adopting the reasonableness standard, the court ensured that the Attorney General still had such broad discretion to detain aliens for a period of time to ensure attendance at their hearings and the safety of the community.\textsuperscript{106}

In determining whether the length of detention is reasonable or not, the court provided four factors for other courts to look to: (1) whether the detention has continued beyond the average time necessary for completion of removal proceedings; (2) the probable extent of future removal proceedings; (3) the likelihood that removal proceedings actually will result in removal; and (4) the conduct of both parties in removal proceedings.\textsuperscript{107}

Thus, the court adopted the reasonableness standard approach and decided not to adopt the bright-line rule test.\textsuperscript{108} The reason behind the court’s decision not to adopt the bright-line rule test was that it simply was not feasible.\textsuperscript{109} The court held that, because each case is significantly different from the other cases, there will always be many factors at play.\textsuperscript{110} Accordingly, by limiting detention to six months, the Attorney General would be unable to effectively ensure that criminal aliens are actually deported.\textsuperscript{111}

\textsuperscript{103} Id. at 541 (construing § 1226(c) as authorizing mandatory detention for the period of time reasonably necessary to promptly initiate and conclude removal proceeding).
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 541–42.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 542.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
In *Ly v. Hansen*, the Sixth Circuit also held that a criminal alien could only be detained for a reasonable period of time pursuant to § 1226(c). There, the INS detained respondent Hoang Minh Ly for a total of 500 days due to his multiple criminal convictions. Ly originally entered the United States in 1986 as a refugee. Respondent’s first criminal conviction was in 1993 for credit card fraud for which he was convicted and served four months in prison. Subsequently, his second criminal conviction was in 1998 for bank fraud as a result of depositing counterfeit checks into the bank. Ly’s Notice to Appear was issued in May 1999 and he was taken into custody that same month. The basis for his removal was his two convictions of crimes involving moral turpitude, as well as an aggravated felony.

Ly filed a petition for habeas corpus on August 5, 1999, but his hearings were continued in order to give his counsel additional time to prepare. The various immigration proceedings that Ly was subject to continued until October 19, 2000, when the immigration judge issued a final order of removal. Ly had his bond hearing on November 21, 2000 and even though the immigration judge said that he did not have the authority to release Ly from detention, “[the] INS released Ly on his own recognizance and subject to specified conditions.”

Faced with the question of the constitutionality of indefinite detention, the Third Circuit followed the line of reasoning in *Zadvydas* and held that aliens can only be detained for a reasonable period of time. The court held that the “INS may detain prima facie removable aliens for a time reasonably required to complete

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112 351 F.3d 263 (6th Cir. 2003).
113 *Id.* at 265.
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.* at 266.
122 *Id.*
123 *Id.* at 268.
removal proceedings in a timely manner. If the process takes an unreasonably long time, the detainee may seek relief in habeas proceedings.”

It further decided that even though criminal aliens can only be held for a reasonable period of time, the government still has the power to indefinitely hold them so long as it shows a “strong[,] special justification” for holding them. The court stated that “[w]hile it is true that a removable alien has no right to be in the country, it does not mean that he has no right to be at liberty” pursuant to the Fifth Amendment.

In its conclusion, the court held that Ly’s 500-day detention was not a reasonable period of time. Not only did the government fail to show a special, strong justification for detaining Ly beyond a reasonable time period, but his detention was for a longer time that his jail sentences for both of his convictions combined. Ly should have not been detained for that long period of time because the judge had already made a prima facie determination showing that he was in fact a removable alien. There was no need to keep him detained longer than that. Ly did not have to be physically in custody in order for the government to enter his final removal order, as this could have been done without his presence.

In Reid v. Donelan, the First Circuit adopted the reasonableness standard. There, Mark Anthony Reid was a lawful permanent resident of the United States and had been since 1978. In 1986, Reid was convicted for possession of narcotics. He subsequently added to his criminal record with multiple criminal convictions. On November 13, 2012, Reid was detained by

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124 Id.
125 Id.
126 Id. at 269.
127 Id. at 271.
128 Id.
129 Id.
130 Id.
131 Id.
132 819 F.3d 486 (1st Cir. 2016).
133 Id.
134 Id. at 491.
135 Id.
136 Id.
Immigration and Customs Enforcement (ICE) and held in detention pending his removal proceedings.\textsuperscript{137} Reid brought suit alleging that his detention was in violation of his due process rights.\textsuperscript{138} At that point, he had been in detention for 400 days.\textsuperscript{139}

Reid argued that detention under \$ 1226(c) could only be for six months, at which point a detainee was entitled to a bond hearing.\textsuperscript{140} He further argued that anything longer than six months was presumptively invalid.\textsuperscript{141} However, the court did not agree with his argument and instead, adopted the reasonableness approach.\textsuperscript{142} The court said that in determining what reasonable is, certain factors should be taken into consideration.\textsuperscript{143} Although not exhaustive, the court, like the court in \textit{Alli},\textsuperscript{144} said that various factors should be looked at in determining reasonableness.\textsuperscript{145} The court held that in making a determination of the reasonableness of the length of the detention, these factors should serve as “guideposts” in this determination.\textsuperscript{146}

On the other hand, the minority of circuit courts have followed the \textit{Zadvydas} line of reasoning and have held that criminal aliens can only be detained for six months before they are entitled to a bond hearing.

In \textit{Rodriguez v. Robbins},\textsuperscript{147} the Ninth Circuit held that bond hearings are required at six months for aliens that have been detained

\textsuperscript{137} Id.

\textsuperscript{138} Id. at 492.

\textsuperscript{139} Id.

\textsuperscript{140} Id.

\textsuperscript{141} Id.

\textsuperscript{142} Id. at 500.

\textsuperscript{143} Id.


\textsuperscript{145} \textit{Reid}, 819 F.3d at 500. Factors that should be considered are “the total length of the detention; the foreseeability of proceedings concluding in the near future (or the likely duration of future detention); the period of the detention compared to the criminal sentence; the promptness (or delay) of the immigration authorities or the detainee; and the likelihood that the proceedings will culminate in a final removal order.” \textit{Id}.

\textsuperscript{146} Id. at 501.

\textsuperscript{147} 804 F.3d 1060 (9th Cir. 2015); \textit{cert granted} sub nom Jennings v. Rodriguez (decision would not resolve the circuit split).
for prolonged periods of time pursuant to § 1226(c). In that case, Alejandro Rodriguez was brought to the United States as an infant, where he grew up and went to school. All of Rodriguez’s family lived in the United States and he had no ties with his native country of Mexico. In 2003, Rodriguez was arrested and convicted for possession of a controlled substance. ICE initiated removal proceedings against Rodriguez at which time the immigration judge determined that Rodriguez’s prior conviction for “joyriding” constituted an aggravated felony, which subjected him to detention during his removal proceedings in compliance with §1226(c). By the time Rodriguez brought suit against the Attorney General, he had already been detained for 1189 days and had not yet had a bond hearing.

Rodriguez brought this suit along with other non-citizens who were subject to §1226(c) and who had also been detained for prolonged periods of time. The court relied on Zadvydas and Demore in making its decision. It thought that even though Demore was correct in saying that criminal aliens should be detained for a reasonable period of time while their removal proceedings take place, the short removal times on which the Demore court relied were no longer true for many of the detained criminal aliens. The criminal aliens who were part of the class that brought suit in Rodriguez had already been detained for 404 days. In fact, “[n]early half [of criminal aliens] are detained for more than one year, one in five for more than eighteen months, and one in ten for

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148 Id. at 1068.
149 Id. at 1073.
150 Id.
151 Id.
152 Id.
153 Id.
154 Id. at 1066.
155 Id.
156 Id. at 1072.
157 Id.
more than two years."\textsuperscript{158} One criminal alien bringing suit alongside Rodriguez had even already been in detention for 1585 days.\textsuperscript{159}

Due to the change in average times most criminal aliens are held, the court adopted the bright-line rule of six months before a criminal alien is entitled to a bond hearing.\textsuperscript{160} This was because “[p]rolonged detention imposes severe hardship on class members and their families.”\textsuperscript{161} Given that most detainees are the breadwinners of their families, prolonged detention means that such families lose their main source of income and are forced to depend on the government for their basic necessities.\textsuperscript{162} Also, the court believed that “there is a difference between detention being authorized and being necessary as to any particular person.”\textsuperscript{163} Accordingly, if the criminal alien does not pose a threat to society or does not pose a flight risk, there is no reason to continue detaining the individual.\textsuperscript{164}

The court held that § 1226(c) is no longer applicable after six months of detention have passed.\textsuperscript{165} At the six-month mark, detention shifts from § 1226(c) to § 1226(a) where extended discretionary holdings require a bond hearing.\textsuperscript{166} At this bond hearing, it is the government’s burden to prove that a discretionary holding past the six months is necessary to ensure that the criminal alien does not fail to show up to removal hearings and does not pose a harm to society.\textsuperscript{167}

In \textit{Tijani v. Willis},\textsuperscript{168} the Ninth Circuit also held that detention for longer than six months was unreasonable.\textsuperscript{169} Monsuru Tijani had been in detention for two years and eight months while the court determined whether his crime was in fact a crime involving moral

\textsuperscript{158} \textit{Id. But see} Demore v. Kim, 538 U.S. 510, 529 (2003) (holding that most removal proceedings only last about ninety days).
\textsuperscript{159} \textit{Rodriguez}, 804 F.3d at 1072.
\textsuperscript{160} \textit{Id}.
\textsuperscript{161} \textit{Id}.
\textsuperscript{162} \textit{Id}.
\textsuperscript{163} \textit{Id. at} 1068.
\textsuperscript{164} \textit{Id}.
\textsuperscript{165} \textit{Id. at} 1069.
\textsuperscript{166} \textit{Id}.
\textsuperscript{167} \textit{Id}.
\textsuperscript{168} 430 F.3d 1241 (9th Cir. 2005).
\textsuperscript{169} \textit{Id. at} 1242.
turpitude. In the court’s short opinion, Circuit Judge Noonan stated that he doubted the constitutionality of Tijani’s detention. The case was remanded with instructions that either: (1) the district court grant Tijani’s writ of habeas corpus; or (2) Tijani be entitled to a bond hearing within sixty days and released if it is shown that he is not a flight risk and does not pose a risk of harm to society.

In the Tijani court’s concurring opinion, the circuit judge gave more of an explanation as to why he thought the detention was unreasonable. His line of reasoning was that thirty months is an unreasonable length of time to be detained because it is five times the six-month period that the court in Zadvydas suggested was reasonable. Even though the court in Zadvydas did not provide a bright-line rule for what is reasonable, but instead provided a frame of reference in regard to what is reasonable rather than a bright-line, the Ninth Circuit in Tijani did adopt a bright-line rule by saying that detention beyond six months is in fact unreasonable and blurs the lines of constitutionality.

The Second Circuit in Lora v. Shanahan also adopted a bright-line approach. Alexander Lora was convicted of possession of cocaine and sentenced to five years of probation. During the third year of his probation, Lora was detained by ICE officials who had been conducting a raid in his neighborhood. Pursuant to § 1226(c), he was detained and kept in detention for four months before he was entitled to a bond hearing. The lower court granted Lora’s bond but the government appealed, contending that it could still detain him.

Respondent argued that his detention for four months was sufficient and that his potentially indefinite detention, if he were to be

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170 Id.
171 Id.
172 Id.
173 Id. at 1246 (Tashima, J., concurring).
174 Id.
176 Id.
177 Id. at 605.
178 Id.
179 Id. at 605-06.
180 Id. at 608.
detained again, was a violation of his Fifth Amendment due process
due by process.\textsuperscript{181} The Second Circuit agreed with Lora and adopted a bright-
line rule of six months, stating that “mandatory detention for longer
than six months without a bond hearing affronts due process.”\textsuperscript{182} 
Also, this bright-line rule would ensure uniform results because it
would dictate how similar cases should be handled and would
prevent inequities in the judicial court system.\textsuperscript{183}

The circuit court also justified the lower court's decision to grant
Lora’s bond based on his behavior. The court observed that, after
Lora was granted bond, he “remain[ed] gainfully employed, tied to
his community, and poised to contest his removability once DHS
clear[ed] its backlog sufficiently to afford him a hearing.”\textsuperscript{184} These
behaviors indicated that he was neither a threat to society nor a flight
risk since he was patiently awaiting his trial hearing.\textsuperscript{185}

The New York District Court found that detention of a criminal
alien for longer than six months was a violation of an alien’s Fifth
Amendment due process rights.\textsuperscript{186} Here, Jorge Araujo-Cortes was
born in Colombia, but came to the United States when he was one-
year-old.\textsuperscript{187} In 2004, he was arrested for attempted robbery, but was
not convicted of this charge.\textsuperscript{188} As a result of this arrest, he was
placed in immigration proceedings.\textsuperscript{189} Araujo-Cortes was granted
cancellation of removal from the United States based on the hardship
that his removal would have on his father who was suffering from
cancer.\textsuperscript{190}

In 2009, Araujo-Cortes was arrested and convicted of “Criminal
Possession of a Weapon in the Fourth Degree.”\textsuperscript{191} He successfully
completed his probation for this charge.\textsuperscript{192} Five years after this

\textsuperscript{181} Id. at 607–08.
\textsuperscript{182} Id. at 605–06.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 608.
\textsuperscript{185} Id.
\textsuperscript{187} Id. at 536.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
conviction, Araujo-Cortes was arrested by ICE and placed in
immigration detention pending his removal proceeding.193 At the
time this complaint was brought, Araujo-Cortes had been detained
for over six months.194

The court reasoned that not only was detention for more than six
months unreasonable, but § 1226(c) did not apply to Araujo-
Cortes.195 The reasoning for this conclusion was based on what the
court interpreted as Congress’ intent in passing § 1226(c), the
Mandatory Detention Statute.196 It said that the statute was intended
to detain those individuals who had just been released from prison,
not those who were high functioning members of society after their
prison sentences.197 At the time that Araujo-Cortes was arrested by
ICE, five years had transpired and he was already situated back with
his family.198 According to the court, “he [was] differently situated
from the criminal aliens who are taken into custody ‘when . . .
released.’”199 To deny granting Araujo-Cortes an individualized bond
hearing would be to violate his due process rights.200 Accordingly,
he should have had to come before an immigration judge to
determine whether his detention should continue or whether he
should be released on bond.201

Additionally, a district court in Connecticut also held that
detention without a bond hearing beyond six months is
unconstitutional.202 Nadeisha Fuller had been detained by the Bureau
of Immigration and Customs Enforcement (BICE) for two years.203
Fuller was convicted of second-degree assault, for which she was
sentenced to one year in prison.204 During her detention, Fuller twice

193 Id. at 536–37.
194 Id. at 537.
195 Id. at 549.
196 Id.
197 Id.
198 Id. at 549–50.
199 Id. at 550.
200 Id.
201 Id.
(D. Conn. Apr. 8, 2005).
203 Id. at 2.
204 Id.
attempted to get a bond hearing but was unsuccessful in both attempts.\textsuperscript{205}

Based on the length of time Fuller had been detained, the court did not think she would be released anytime in the foreseeable future, which meant that she would be detained well past her already lengthy two-year detention.\textsuperscript{206} As Fuller’s detention was four times the length determined as reasonable in both Demore and Zadvydas, the court held that her detention was unconstitutional.\textsuperscript{207}

V. ADOPTING A BRIGHT-LINE RULE TO ENSURE FAIRNESS

In considering what rule the Supreme Court should adopt, one must examine the case law and the tension between the circuit courts and make a decision based on what the fair thing is to do with criminal aliens that are being detained for long periods of time and not getting a bond hearing. They should not be held for an indefinite period of time because this would be a violation of their due process rights.\textsuperscript{208} The rule should be one that follows the line of reasoning of the minority of circuit courts.\textsuperscript{209} It should mirror a bright-line rule, but still give the government discretion to handle the cases of criminal aliens that have committed egregious crimes and do in fact pose a significant threat of harm to society as well as a flight risk.\textsuperscript{210}

It is important for there to be a bright-line rule because it would ensure that detained aliens’ constitutional rights are not violated, and it ensures that there is a uniform application of the law among alien detainees around the country.\textsuperscript{211} As stated in Zadvydas, aliens are entitled to the protection afforded under the Fifth Amendment’s Due Process Clause which “forbid[s] the Government [from] ‘depriv[ing]’ any ‘person . . . of . . . liberty without due process of law.’”\textsuperscript{212} Accordingly, the Zadvydas court further provided that, “[f]reedom from imprisonment—from government custody, detention, or other

\textsuperscript{205} Id.
\textsuperscript{206} Id. at 5.
\textsuperscript{207} Id. at 6.
\textsuperscript{208} Firmacion, supra note 5, at 618.
\textsuperscript{209} Id.
\textsuperscript{210} Id. at 622.
\textsuperscript{211} Id. at 617–18.
\textsuperscript{212} Zadvydas v. Davis, 533 U.S. 678, 690 (2001).
forms of physical restraint—lies at the heart of the liberty that Clause protects.\textsuperscript{213} To allow the government to have unfettered discretion as to how long aliens can be detained effectively deprives them of this right and provides them with no constitutional protection against prolonged detention.\textsuperscript{214} By adopting a rule that mandates how long criminal aliens detention can be before a bond hearing is required, such aliens will no longer be in a state of limbo of not knowing how long they will continue to be detained for.\textsuperscript{215} Their day in court will be sooner rather than later, and they will be able to present their case that they pose neither a risk of harm to society nor a flight risk during their removal proceedings.\textsuperscript{216}

It should be noted that this bright-line rule would only guarantee that the detained alien receives a bond hearing within the six-month timeframe.\textsuperscript{217} It does not mean that the detainee would be released at six months.\textsuperscript{218} Such a decision would still be at the discretion of the immigration judge to determine whether the detainee is in fact a flight risk or a risk of harm to society, and can be released into society pending his immigration proceedings.\textsuperscript{219}

This rule is feasible because a majority of alien detainees have not been convicted of a serious offense.\textsuperscript{220} A 2009 study provided that:

DHS admitted that the 30,000 detainees held on that day had ‘a low propensity for violence’ and only eleven percent had previously been convicted of a violent offense. Furthermore, ‘[b]etween 2009 and 2011, over half of all immigrant detainees had no

\textsuperscript{213} Id.
\textsuperscript{214} Firmacion, supra note 5, at 621.
\textsuperscript{215} Id. at 621–22; see also Farrin R. Anello, Due Process and Temporal Limits on Mandatory Immigration Detention, 65 Hastings L.J. 363, 394 (2014). The court has found temporal limitations in statutes that do not specifically state how long detention is to last. “For example, district courts have ruled that to avoid a due process problem, a hearing is required within seventy-two hours of a civil commitment based on mental illness or commitment of a juvenile.” Id.
\textsuperscript{216} Firmacion, supra note 5, at 621–22.
\textsuperscript{217} Id. at 622.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Torrey, supra note 29, at 882–83.
criminal records. Of those with any criminal history, nearly 20 percent were merely for traffic offenses.221

If a majority of detainees do not in fact have convictions for serious crimes, they should be entitled to a prompt bond hearing, not be detained for unreasonable periods of time.222 Since the government is supposed to consider the detainees’ “disciplinary record, criminal record[,] and] . . . mental health reports . . .” as part of their inquiry in determining whether a detainee should be held for a longer period of time, it should follow that those detainees who do not have convictions for significant offenses be entitled to a prompt bond hearing, since they do not pose a risk of harm to society.223

To adopt a rule that arbitrarily allows ICE officials to detain criminal aliens for longer than six months would be a deviation from the norm of civil detention jurisprudence.224 This is because detention for longer than six months would be unprecedented, given that “no other peacetime decision has authorized such prolonged civil detention without an individualized finding of dangerousness.”225 Even though immigration proceedings take place in a different realm than standard civil proceedings, the rules regarding detention should not deviate far from the norm in civil proceedings.226 In situations where detention is permitted for longer periods of time, there have been procedural safeguards put in place to ensure that individuals’ rights are not violated.227 For example:

The sex offender commitment scheme in Kansas v. Hendricks [that] permitted detention for up to one year at a time, but the Court justified its decision to uphold this scheme by reference to Kansas’ ‘strict procedural safeguards,’ including a right to trial by jury and a

221 Id.
222 Id.
224 Anello, supra note 215, at 391.
225 Id.
226 Id.
227 Id. at 392.
requirement that the government prove the need for commitment beyond a reasonable doubt.\textsuperscript{228}

Given that the text of § 1226(c) does not provide all of these safeguards including a high level of proof to justify continued detention, a six-month rule would provide procedural safeguards for criminal aliens otherwise not afforded by the plain text of the statute.\textsuperscript{229} Ensuring that there is a time limit as to when a bond hearing has to take place would provide some procedural safeguards for detainees\textsuperscript{230}

This rule would also provide an administrative scheme that is easier for immigration officials to follow and also requires less work on the part of detained individuals.\textsuperscript{231} The six-month rule would serve as a trigger for judges so that they know by when they have to afford a bond hearing to a detainee.\textsuperscript{232} Having this automatic-trigger mechanism in place would make it so that detained individuals would have their hearings without having to necessarily fill out any additional paperwork.\textsuperscript{233} Even though their hearings could be prior to the six-month mark, the rule would ensure that their initial bond hearing would not take place past the six-month mark of being detained.\textsuperscript{234}

A bright-line rule of six months, with the possibility of a bond hearing prior to such based on the conviction the detainee has on record, would also ensure that many detainees are not in detention for a period of time longer that the sentence for the crime they committed that led to their detention.\textsuperscript{235} It is illogical for individuals to be detained and separated from their families for longer periods of time than the detention period for which they actually committed the

\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Fisman, supra note 5, at 618.
\textsuperscript{232} Anello, supra note 215, at 402.
\textsuperscript{233} Id. Not requiring the individual to file any paperwork to get their bond hearing would be especially critical for those detainees who are not represented by an attorney and otherwise do not have the resources to carry out this process on their own. Id.
\textsuperscript{234} Id.
\textsuperscript{235} Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003).
crime. This paradox was highlighted by Chief Circuit Judge Boggs in *Ly*. Judge Boggs pointed out the fact that Ly was detained by immigration officials for a period of time longer than that which he served for his combined two convictions.

This was also the case for Alejandro Rodriguez, who was held in detention for two years and three months as a result of his two criminal convictions, which made him removable from the United States. The time he was held in detention as he awaited his removal proceedings exceeded the time he was sentenced to jail for his criminal convictions. His two criminal convictions were for theft and possession of a controlled substance. For the first, Alejandro was sentenced to two years in prison, and for the second, he was only given probation. Given that he was only sentenced to two years for his criminal activity, it seems absurd that he would be detained for a longer period of time as he awaited removal proceedings.

In addition, the bright-line rule needs a caveat that would allow the government to detain criminal aliens for a longer period of time. This would allow the government to make an individualized determination as to whether or not the detainee poses a risk to society or is a flight risk. Giving the government this discretion to detain individuals for a longer period of time to make this determination without violating a detainees’ due process rights would be in line with Congress’ intent in passing § 1226(c). The government’s purposes would be achieved if it were able to detain individuals for a

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236 Id.
237 Id.
238 Id.
239 Id.
240 Id.
241 Id.
242 Id.
243 Id.


245 Id.

246 Id. In passing this statute, Congress wanted to protect the community from criminal aliens and simultaneously ensure that they do not flee during their removal proceedings. Id.
longer period of questioning based on their criminal history and the
danger they pose to society if they were to be released.247

The government would have some leeway in these cases where
the specific alien in question has an especially egregious criminal
history.248 In these instances, it would be appropriate for the
government to detain individuals for prolonged periods of time as it
makes a particularized inquiry regarding the level of threat such
individuals pose to the community at large.249 The court followed this
line of reasoning in Mwangi v. Terry.250 There, the government held
Simon Mwangi for longer than six months in order to determine
whether he was in fact a risk to society if he were to be released.251
Mwangi argued that his detention was in violation of the court’s
holding in Zadydas because it was past the six-month period that
was considered reasonable.252 According to Mwangi, his detention
was going to be for an indefinite period of time.253

The court disagreed with this argument and said that his detention
was not in fact indefinite given that he already had a bond hearing
where he was denied bond.254 The immigration judge denied his bond
because of his domestic violence charge in the United States and
during his bond hearing, he testified that he had been a part of a
Kenyan sect, the Mungiki sect, where he “participated in robberies,
beatings, and forcing women to submit to female genital
mutilation.”255 Based on these two convictions, he was denied bond
because the immigration judge believed that he posed a threat of
harm to society due to his criminal history.256

Even though he was denied bond during his initial bond hearing,
he was granted a second bond hearing at a later time.257 During this

247 Id.
248 See Bradley B. Banias, A “Substantial Argument” Against Prolonged, Pre-
249 Id.
250 465 Fed. Appx. 784, 784 (10th Cir. 2012).
251 Id. at 785.
252 Id. at 786.
253 Id.
254 Id. at 785.
255 Id.
256 Id.
257 Id. at 786.
bond hearing, the immigration judge decided to grant his bond and he was released on a $6,000 bond.\textsuperscript{258} It is appropriate for the government to be able to detain individuals for longer than six months in those cases where there is uncertainty as to the level of threat the detainee poses.\textsuperscript{259} This uncertainty can be due to a question of whether detainees have been rehabilitated or whether they still in fact pose a risk of harm to society.\textsuperscript{260} It could be that because the crime was a long time ago, they have repented and are no longer a risk to society, but the immigration judge has to make this judgment call.\textsuperscript{261} It was appropriate for the government to prolong Mwangi’s detention because a particularized inquiry was made into the danger he posed.\textsuperscript{262} However, in situations where the detainee’s criminal record is not as egregious as Mwangi’s, the bright-line, six-month rule should be applicable and the detainee should be entitled to a bond hearing prior to the expiration of this six-month limit.\textsuperscript{263}

Detaining individuals with egregious crime records for a longer period of time would also reduce the number of no-shows at removal proceedings following their release.\textsuperscript{264} This is because those criminal aliens who have less of a substantive argument to challenge their removal from the United States are less likely to show up for their hearings.\textsuperscript{265} Those with less egregious crimes who do have a substantive argument to challenge their removal proceedings, are not likely to abandon their hearings because they stand to lose more by not showing up to their hearings than they do by complying with the law.\textsuperscript{266} Thus, these individuals should not be held over six months before being entitled to a bond hearing because they are not likely to be flight risks, while those with more severe criminal histories should be detained as individualized inquiries are made to see the risk of harm to society and flight risk they pose.\textsuperscript{267}

\textsuperscript{258} Id.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Id.
\textsuperscript{262} Banias, supra note 248, at 64.
\textsuperscript{263} Id. at 66–67.
\textsuperscript{264} Id. at 67.
\textsuperscript{265} Id.
\textsuperscript{266} Id.
\textsuperscript{267} Id.
Some might argue that this proposal is not feasible due to the increasing numbers of aliens detained and the limited number of judges available to provide bond hearings.\textsuperscript{268} This concern is evidenced by the fact that average detention times of aliens before they receive a bond hearing has been increasing each years and an increasing number of aliens are being detained.\textsuperscript{269} In 2001, the average detention time for aliens awaiting a bond hearing was thirty-nine days.\textsuperscript{270} In 2003, this time increased to forty-seven days.\textsuperscript{271} Currently, there have been more detentions by ICE, but the agency has not provided statistics regarding the average detention time.\textsuperscript{272} Despite the unavailability of number of those detained by ICE, the agency are detaining aliens for longer periods of time, often for several years.\textsuperscript{273}

Even though the increased number of detainees might make it impossible for bond hearings to occur before the six-month mark, it is possible that if the Supreme Court were to issue a decision adopting the six-month rule, the proceedings would occur in a timely and efficient manner.\textsuperscript{274} After Demore, “statistics showed that removal proceedings were completed within forty-seven days in eighty-five percent of cases in which aliens were mandatorily detained.”\textsuperscript{275} This same phenomenon might occur if the Supreme Court were to adopt this rule and provide for faster bond hearings with more detainees being released promptly as they await their removal proceedings. Also, having to hear an overwhelming number of cases as detainees approach the six-month limit is the cost of doing business for immigration judges, and this does not justify refusing to adopt a bright-line categorical approach.\textsuperscript{276}

Not only would adopting the minority circuits’ bright-line rule with the added caveat regarding mandatory detention provide a more equitable solution for those detained, but it would also alleviate the

\textsuperscript{268} Lora v. Shanahan, 804 F.3d 601, 604 (2d Cir. 2015).
\textsuperscript{269} Id.
\textsuperscript{270} Id. at 605.
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 604.
\textsuperscript{275} Id.
\textsuperscript{276} Id.
government’s burden in terms of the financial resources it is expending in order to keep them detained. This is evidenced by a 2009 report which found that ICE “detained at least 4,170 individuals for 180 days or longer, with 1,334 individuals detained for over a year. In fact, a number of these aliens were detained for more than five years.” The increasingly large number of detainees being held by ICE is only leading to more and more money being spent by the government in order to keep them detained. In making a decision regarding what rule should be followed, “the government should weigh the cost of providing bond hearings against the cost of unnecessarily housing hundreds or thousands of aliens.”

The government is not the only one who would benefit from detainees being entitled to prompt bond hearings and being released sooner, since the families of detainees also face the consequences of prolonged detention.

The government’s policy of prolonged mandatory detention imposes enormous costs on detainees, their families, and the general public. Many aliens are unnecessarily detained even if they pose no danger or flight risk. They can also remain detained even if they have valid grounds to challenge their removal. The families of detainees suffer both financially and emotionally, and most are forced to seek public assistance. Other adverse effects of the policy are the high government costs associated with detaining hundreds or thousands of aliens, and the increasing number of habeas petitions filed in district courts.

277 Firmacon, supra note 5, at 621.
278 Id. at 603. The burden on the government is also evidenced by the fact that DHS’s budget is larger than the budget of any agency. If criminal aliens were to not be detained for these long periods of time, it would lead to less money having to be spent on maintaining facilities for them. Id.
279 Id.
280 Id. at 621. In weighing these interests, it should be taken into consideration that “[i]n fiscal year 2013, $2 billion were allocated for detention, funding as many as 34,000 detention beds each day.” Id. If more aliens continue to be detained, this would lead to even more costs for the government. Id.
281 Id. at 603.
282 Id.
Families suffer a lot as a result of prolonged detention because a lot of the time, the person detained is the one who financially supports the family. The number of families that are impacted by this law is a substantial portion of people because § 1226(c) also applies to legal permanent residents who have committed such crimes. This number is especially relevant given that “there are approximately 12 to 15 million legal residents in the United States.”

Detaining individuals for a reduced period of time would also be beneficial to the nation’s economy. This is because many of the detained aliens are tax-paying individuals who are contributing to the economy and detaining them for long periods of time, sometimes years, has a detrimental effect on the United States economy as a whole. The longer taxpayers are detained, the less they contribute to the economy. By reducing the number of detainees in custody, not only would the government no longer be expending as many resources on detention, but it would also be receiving the profits of the detainees, while families would enjoy family reunification and assurance that they are able to maintain the standard of living they had prior to their loved one’s detention.

Less time in detention cells would also be beneficial to detainees given that they are subjected to subpar conditions while in detention centers. As relayed in a detainee’s story of detention:

The cell, which has concrete walls, contains only a metal bed, a thin mattress covered by two sheets and a blanket; a toilet; and a sink. It is sealed off from the rest of the facility by a thick metal door with a small

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283 Id.
285 Id.
286 Id. at 141.
287 Id.
288 Id.
289 Firmacion, supra note 5, at 603.
plexiglass window. There is no curtain for use when he relieves himself. The door has a slit for passing food trays and documents. [The detainee] has no contact with the prisons population. He remains in his cell day and night, except to show and for legal visits. He is allowed to shower just 3 times per week.291

These conditions are not unique to one individual detainee.292 Not only are detainees subject to these conditions, but they are also punished just like any other inmate, even though they already served time for their conviction.293 During Morataya’s detention, discussed above, security guards treated her and punished her as they would any other inmate.294 Morataya’s treatment was depicted:

She was twice placed in solitary confinement, once for having a sugar packet in her uniform that she forgot to dispose of at mealtime, and once for not being ready to leave her cell because she had begun menstruating and lagged behind her cellmates while trying to secure menstrual pads.295

Reform is not only necessary to ensure that detainees are not being held for long periods of time and in effect having their due process rights potentially violated, but to also ensure that detainees do not continue to be subjected to these inhumane conditions as they await their removal proceedings.296

A bright-line rule should be adopted, but the government should still have the discretion to hold a criminal alien for what it considers a reasonable period of time as it makes an individualized inquiry as to whether the alien should be released or remain in custody. The latter part of this rule would only be applicable to those aliens who have committed especially egregious crimes.

291 Id.
292 Id.
293 Brief of Amici Curiae for Americans for Immigrant Justice, et al. in Support of Respondents, supra note 6, at *7.
294 Id.
295 Id.
296 Gee, supra note 290, at 1.
Adopting a bright-line rule with the caveat that the government can detain certain individuals for a longer period of time because of specific individual criminal convictions, would lead to a more efficient and fair system.297 Those subjected to detention for longer periods of time would still be entitled to bond hearings although the government would have the discretion to detain them for a reasonable period of time as it makes a determination regarding their potential as a flight risk and their potential risk of harm to society.298

297 Firmacion, supra note 4, at 623.
298 Id.