DANGEROUSNESS ON THE LOOSE: CONSTITUTIONAL LIMITS TO IMMIGRATION DETENTION AS DOMESTIC CRIME CONTROL

FRANCES M. KREIMER*

The United States immigration detention regime that was reborn in the 1980s is not only unprecedented in scale, but also in rationale. Whereas immigration detention had historically been justified primarily as a means of ensuring immigration compliance, with a secondary purpose of protecting national security, today’s system increasingly functions in collaboration with criminal law enforcement systems to incapacitate allegedly dangerous individuals for the purpose of preventing potential domestic crime. Regardless of the validity of judicial deference when immigration detention truly serves to aid in the removal process, this Note argues that such deference cannot legitimately be extended to the newly ascendant crime control function of immigration detention. At minimum, Due Process requires immigration detention procedural safeguards that are parallel to those in other preventive detention contexts, in which the government bears the burden of individually demonstrating a need for confinement.

Introduction ................................................. 1486

I. A Genealogy of Immigration Detention .......... 1489
   A. Immigration Detention as a “Necessary Means” of Immigration Law Enforcement ............... 1492
   B. Immigration Detention as Defense of National Security ............................................. 1493
   C. Immigration Detention as Incapacitation to Prevent Domestic Crime ........................... 1494

II. Alien Rights in Crime Control Detention ....... 1499
   A. Plenary Power and “Aliens’ Rights” ................. 1499
      1. Immigration Law and the Plenary Power ...... 1499
      2. Alien Rights: Law Regulating Immigrants ..... 1501
   B. The Constitutional Significance of the Immigration-Detention Nexus ......................... 1503
   C. Disambiguating Demore ............................ 1507

* Copyright © 2012 by Frances Miriam Kreimer. J.D., 2012, New York University School of Law; B.A., 2006, Columbia University. I am deeply grateful to my many teachers, including my clients, supervisors, professors, and family, with special thanks to Adam Cox, Alina Das, Judy Rabinovitz, Mark Noferi, and Karen Shimakawa for their challenging and thoughtful feedback. This Note could not have been published without the commitment and support of the New York University Law Review staff, particularly Jose Irias, Anthony Enriquez, Jerry Gomez, Chris Kochevar, and Thomas Sosnowski.
INTRODUCTION

Ellis Island—the last federal immigration detention facility of its day—closed in 1954. In the years after Ellis Island's closure, only a small number of individuals faced detention during immigration proceedings. Within a decade, the practice appeared to be destined for extinction, along with the racial quotas and exclusions of the previous immigration regime that had ended in 1952. Many welcomed this apparent demise of widespread immigration detention, recognizing the deprivation of physical liberty to be a uniquely intrusive exercise of government power. The trajectory toward a more humanized and...
cost-effective policy—and the limitation of physical confinement to exceptional circumstances—appeared both logically and fiscally sound.\(^6\)

In the 1980s, however, the immigration detention system was resurrected, starting with the opening of new detention facilities originally devoted to confining arriving noncitizens apprehended at the border.\(^7\) The system quickly expanded to include individuals apprehended within the United States, as Congress began to prioritize the immigration detention of individuals with criminal convictions.\(^8\) Over the following decades, the immigration detention system has grown into “the behemoth of American preventive detention,”\(^9\) becoming the nation’s largest detention and supervised release program.\(^10\) On any given day, an average of 32,953 individuals around the United States are in the physical custody of the Department of Homeland Security (DHS), with approximately 363,064 individuals detained per year.\(^11\) As the system has grown, the executive branch has presented this unprecedented scale of immigration detention both to the public and the courts as a necessary and constitutional part of effective immigration enforcement.\(^12\)

---

\(^6\) See, e.g., Ellis Island Ends Alien Processing, N.Y. TIMES, Nov. 13, 1954, at 20 (citing $900,000 in government savings from closing Ellis Island).

\(^7\) See generally Simon, supra note 3 (discussing the “rebirth” of immigration detention in response to the influx of Haitian and Cuban unauthorized migration).

\(^8\) See infra Part III.A.1 (chronicling the tightening nexus between criminal law and immigration enforcement and detention).


\(^12\) The oft-cited quote of John Morton, Director of Immigration and Customs Enforcement (ICE), illustrates this attitude: “[I]t isn’t a question of whether or not we will detain people. We will detain people, and we will detain them on a grand scale. . . . It’s a necessary power.” Jenna Green, ICE Warms Up to Detainees: Immigration Chief Promises Overhaul of ‘Haphazard’ System, Nat’l L.J., Feb. 8, 2010, at 1; see also Mary Bosworth & Emma Kaufman, Foreigners in a Carceral Age: Immigration and Imprisonment in the
This Note challenges contemporary claims that all immigration detention is inherently part of immigration enforcement, and asserts instead that civil detention to control domestic crime—even in the context of immigration proceedings—serves a unique purpose that requires elevated procedural protections. The Supreme Court historically has upheld immigration detention based on the specific purposes it allegedly serves. Initially, it was a constitutionally permissible liberty deprivation only to the extent necessary to enforce compliance with immigration proceedings. Subsequently, it became a means to incapacitate national security threats, which gradually expanded to authorize general civil detention for potential dangerousness. Recent doctrinal developments threaten to obscure the distinctions between compliance enforcement detention, national security detention, and domestic crime control detention—suggesting that confinement during the course of pending immigration proceedings might be per se constitutional. But the distinct rationales offered for immigration detention mandate differentiated constitutional scrutiny. Specifically, the detention of noncitizens as a means of controlling crime within the United States does not merit the judicial deference shown to executive action that serves traditional immigration or national security purposes. Rather, incapacitation to prevent future domestic crime generally requires robust procedural protections, and these protections should be retained even if a detainee is simultaneously in removal proceedings. At a minimum, the government should bear the burden of proving an individualized reason for detention.

This Note proceeds in three parts. In Part I, I provide a brief genealogy of immigration detention, identifying its three historical purposes: (1) to ensure the compliance of potential flight risks, (2) to neutralize potential national security threats, and (3) to control future domestic crime. I then explore the constitutional justifications for each category of executive detention. The first purpose is widely recognized as constitutional by virtue of the executive’s ability to enforce compliance with immigration adjudication and possible removal orders. I argue that the second purpose, which the Court recognized as an independent justification in the 1950s, stems from the execu-
DANGEROUSNESS ON THE LOOSE

November 2012]

tive’s obligation to enforce national security. Today, both the executive and judicial branches rely on national security precedent to justify the expanded role of domestic crime control detention, without any clear constitutional justification, and despite the absence of procedural protections that are essential to domestic crime control detentions outside of immigration proceedings.

In Part II, I argue that these three separate purposes—compliance with immigration proceedings, national security defense, and domestic crime control—do not support an undifferentiated authority to detain individuals during removal proceedings, but rather implicate distinct constitutional concerns. The political branches have broad powers to protect the sovereign independence of the United States by regulating immigration and foreign security threats. However, when those powers are not implicated, the law affords strong constitutional protections to noncitizens while they reside in the United States. I apply this analysis to the Supreme Court’s reasoning in Demore v. Kim, demonstrating that the opinion obscured these distinctions while implicitly relying on them.

In Part III, I present the implications of this analysis. At a time when alternatives to detention diminish the compliance enforcement justification of physical detention, the federal government increasingly deploys immigration enforcement and detention as integrated tools of domestic crime control. I argue that the ascendance of crime control detention means immigration detention’s anemic procedural protections should not receive judicial deference, and that both mandatory and discretionary detentions still must require the government to prove an individualized reason for detention.

I

A GENEALOGY OF IMMIGRATION DETENTION

Today’s immigration facilities house both detainees who are discretionarily detained based on individualized determinations that they are flight risks or dangers to the community, and those who are mandatorily detained pursuant to statute.14 Both discretionary and

14 For a detailed survey of the Immigration and Nationality Act (INA) provisions authorizing immigration detention, see Klein & Wittes, supra note 9. The authors discuss the detention of arriving noncitizens for physical and mental exams pursuant to 8 U.S.C. § 1222 (2006); detention of potentially inadmissible arriving aliens pursuant to 8 U.S.C. § 1225(b)(2)(A) (2006); discretionary detention of noncitizens pending removal proceedings pursuant to 8 U.S.C. § 1226(a) (2006); mandatory detention of noncitizens alleged to be deportable based on specified criminal acts pursuant to 8 U.S.C. § 1226(c)(1) (2006); and detention of noncitizens after a final removal order prior to their deportation pursuant to 8 U.S.C. § 1231(a)(2), (a)(3) (2006). See Klein & Wittes, supra note 9, at 141–44.
mandatory immigration detention are formally civil, rather than criminal. Because the detention purportedly serves a regulatory rather than punitive function, detainees do not enjoy constitutional rights to a speedy trial by an impartial jury, or the right to appointed counsel, and are afforded minimal procedural protections.15

Under the Immigration and Nationality Act (INA), the Attorney General has discretion to detain individuals for the duration of removal proceedings,16 during which individuals can contest the alleged grounds for their removal and apply for various forms of relief.17 Generally, DHS Immigration and Customs Enforcement (ICE) officers make custody determinations at the initiation of removal proceedings, which are reviewable by the Attorney General through the Executive Office of Immigration Review (immigration judges in the first instance, and the Board of Immigration Appeals at the appellate level). Since 1996, regulations provide that the detainee bears the burden of proving that he or she “is likely to appear for any future proceeding,”18 and “would not pose a danger to other persons or to property.”19

In addition, approximately two-thirds of immigration detainees are subject to mandatory detention, regardless of any individualized flight risk or dangerousness concerns.20 Furthermore, 8 U.S.C. § 1226(c) requires detention without bond during removal proceedings for noncitizens who are removable on a broad range of statutory grounds, including nonviolent convictions for controlled substance offenses and two or more convictions for “crimes involving moral tur-
DANGEROUSNESS ON THE LOOSE

Those subject to mandatory detention during proceedings are afforded only a Joseph hearing, an administrative hearing in immigration court in which the detainee bears the burden of establishing that she is not “properly included” within the mandatory detention provision. 22

This Part provides a brief genealogy of the current legal regime in order to contextualize the distinct purposes of immigration detention. I build on other scholarship documenting this history 23 by highlighting that today’s massive detention system, with its minimal procedural safeguards, evolved from an initial focus on securing the border toward a contemporary emphasis on preventing domestic crime. 24 Initially constitutionally upheld as a necessary part of the deportation process, immigration detention took on a secondary role of incapacitating noncitizen potential threats to national security during the course of removal proceedings. While the Supreme Court originally affirmed this preventive detention based on a national security rationale, that precedent was subsequently relied on to support dangerousness detention for domestic crime control—first in the expansion of preventive detention pending criminal trials, and then within the immigration system.

---


22 See Sayed, supra note 21, at 1834 (citing In re Joseph, 22 I. & N. Dec. 799, 806 (B.i.A. 1999) (placing the burden on the detainee to prove that the government “is substantially unlikely to establish . . . the charge or charges that would otherwise subject the [individual] to mandatory detention)).


A. Immigration Detention as a “Necessary Means” of Immigration Law Enforcement

In one of the earliest immigration cases, *Wong Wing v. United States*, the Court considered the nature and limits of immigration detention.\(^{25}\) The *Wong Wing* Court held that immigration statutes imposing hard labor as punishment on noncitizens without trial violated the Fifth and Sixth Amendments of the Constitution. The Court simultaneously opined that general immigration detention without trial was permissible:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.\(^{26}\)

For the *Wong Wing* Court, the purpose of immigration detention was to effectuate exclusion or expulsion. In the following decades, the courts rarely reviewed immigration detention as a distinct exercise of executive power, but rather continued to approach it as “a tool ancillary to border control.”\(^{27}\)

Immigration detention withered following the overhaul of U.S. immigration laws in the 1950s and the 1954 closing of what was then the last federal facility for imprisoning immigrants.\(^{28}\) But in 1981, the federal government redeployed detention, again to serve a compliance enforcement function, when it sought to counter the sudden influx of unauthorized Haitian and Cuban migration to southern Florida by opening the Krome Avenue Detention Center outside of Miami.\(^{29}\)

Throughout its expansion over the last three decades, enforcement

---

\(^{25}\) 163 U.S. 228, 235 (1896).

\(^{26}\) *Id.* In *Wong Wing*, the “inquiry into the true character” of the individual appears to refer to whether the person was “lawfully entitled to be or remain in the United States.” *Id.* at 233 (citing the Chinese Exclusion Act of 1892, 27 Stat. 25). There is no indication in the opinion that the Court contemplated any inquiry into potential dangerousness.

\(^{27}\) WILSHER, supra note 23, at 34–35. From the first statutory authorization of immigration detention in 1891 through the Second World War, detention also was functionally deployed as a means of internal control—confining dissidents and “enemy aliens.” *See id.* at 30 (identifying immigration restrictions to limit communism). Despite this operational reality, it continued to be reviewed by the judiciary as a necessary means of effectuating immigration authority. *Id.* at 34–35.

\(^{28}\) Simon, supra note 3, at 579.

\(^{29}\) *Id.*; see also Silverman, supra note 23, at 10–11 (2011) (reviewing the opening of the Krome Avenue Detention Center as a response to unauthorized migration).
compliance has remained a central purpose of the immigration detention system.30

B. Immigration Detention as Defense of National Security

In addition to its initial justification “as part of the means necessary to give effect” to exclusion or deportation,31 the Executive has also deployed immigration detention to confine individuals allegedly dangerous to national security.

The historical roots of detaining noncitizens potentially dangerous to national security are nearly as old as the country itself.32 Throughout U.S. history, the executive branch has periodically exercised this detention power in times of perceived national emergency, although frequently through mechanisms outside of the immigration system.33 However, it was not until the height of the Cold War that the Supreme Court first acknowledged national security as an independent rationale for detaining noncitizens in immigration proceedings, “where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government.”34 In Carlson v. Landon, the Court upheld the discretionary denial of bail to six noncitizens charged with being members of the Communist Party—even absent evidence that the noncitizens presented any flight risk.35 The Court found that because the grounds of deportation were designed to protect the national security, “[d]etention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.”36

30 A 2009 DHS report distinguished the administrative purposes of immigration detention—“to hold, process, and prepare individuals for removal”—from “the punitive purpose of the Criminal Incarceration system.” SCHRIRO, supra note 10, at 2.
31 Wong Wing, 163 U.S. at 235.
33 See, e.g., Sayed, supra note 21, at 1836 n.13 (2011) (describing noncitizen detention as a “recurring phenomenon during periods of national emergency,” and citing the Red Scare raids of the 1920s, the detention of “enemy aliens” during the First and Second World Wars, the detention of alleged Communist noncitizens during the Cold War, and the detention of noncitizen Muslims following the September 11 attacks).
35 Id. at 538. The dissenters indicated that this conflation of immigration enforcement power and public safety was by no means self-evident from prior precedent. See infra notes 37 and 38 and accompanying text. However, the majority reasoned that, at least in this case, both detention and deportation were justified by the same national security concerns: “As all alien Communists are deportable . . . because of Congress’ [sic] understanding of their attitude toward the use of force and violence in such a constitutional democracy as
In its facts and its reasoning, *Carlson* appeared to be a national security case, informed by deference to the legislative concerns about “clear and present” threats to the government of the United States. Indeed, it was cited as such in the general bond standard of immigration custody determination until 1996: “An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, [citing Carlson], or that he is a poor bail risk.”

C. Immigration Detention as Incapacitation to Prevent Domestic Crime

In recent years, *Carlson*’s reasoning has been extended to support dangerousness detention as a tool for control of potential domestic criminal action, first outside of the immigration system and then within it. Borrowing a phrase employed by scholars of the intersection between criminal and immigration law, I term this purpose “domestic crime control,” to differentiate it from the immigration and national security purposes of detention. In the context of civil detention, this term takes on a very specific meaning: Civil confinement to prevent domestic crime is not primarily punitive or deterrent, but rather a physical incapacitation to prevent future criminal action.

Less than twenty years after *Carlson*, President Nixon proposed legislation in the non-immigration, criminal law context “whereby

---

37 The *Carlson* Court pointedly cited the Internal Security Act that provided the basis of the detainees’ deportability and detention. The Act was justified as a defense of national sovereignty and discussed the Communist movement as “a clear and present danger to the security of the United States . . . .” *Id.* at 535 n.21 (quoting Internal Security Act § 2(15), 50 U.S.C. § 781(15) (1952)).


dangerous hard core recidivists could be held in temporary pretrial detention when they have been charged with crimes and when their continued pretrial release presents a clear danger to the community.” Attorney General Mitchell published a constitutional defense of the proposal, citing *Carlson v. Landon* to support his argument. Attorney General Mitchell’s article inspired Professor Laurence Tribe to write an impassioned response. Professor Tribe critiqued the proposal’s “inherent capacity for unrestrained growth,” and its contradiction with “basic concepts of criminal justice” that rely on the moral and deterrent effects of sanction rather than preemptive imprisonment to control domestic criminal threats.

After extensive hearings, President Nixon’s nationwide preventive-detention bills died in committee. However, President Nixon succeeded in incorporating a preventive detention provision into the District of Columbia Court Reform and Criminal Procedure Act of 1970. The D.C. bill became a model for the subsequent federal Bail Reform Act of 1984, which incorporated dangerousness into the standard criteria for pre-trial detention in federal courts across the

---

42 See id. at 1234 (“Moreover, detention has been authorized in noncriminal areas prior to any judicial determination. Thus, in *Carlson v. Landon* the Supreme Court upheld the denial of bail to alien Communists pending deportation proceedings . . . .”).
43 Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 375–76 (1970). Professor Tribe noted that civil detention as a form of crime prevention has a seductive appeal: “Since no detained defendant will commit a public offense [or fail to appear for their hearing], each decision to detain fulfills the prophecy that is thought to warrant it, while any decision to release may be refuted by its results.” Id. at 374–75. Professor Tribe provides an illustration with Lewis Carroll’s classic fictional example: “The Queen observes that the King’s Messenger is ‘in prison now, being punished; and the trial doesn’t even begin till next Wednesday; and of course the crime comes last of all.’ Perplexed, Alice asks, ‘Suppose he never commits the crime?’ ‘That would be all the better, wouldn’t it?’ the Queen replies.” Id. (quoting LEWIS CARROLL, THROUGH THE LOOKING GLASS 88 (Harper & Bros. ed. 1902)).
country. The Court of Appeals for the Second Circuit held that pre-trial detention on the ground of danger to the community (as opposed to flight risk) was “repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes.” However, the Supreme Court reversed, citing Carlson v. Landon in support of the proposition that, even outside the exigencies of war, “the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh the individual’s liberty interest.” Chief Justice Rehnquist, writing for the majority, emphasized the procedural protections afforded to pretrial detainees as important factors in analyzing both substantive and procedural due process challenges.

Shortly after receiving the Supreme Court’s blessing in United States v. Salerno, the “danger to the community” reasoning and language of the Bail Reform Act migrated into an immigration detention system.

47 See Shima Baradaran, Restoring the Presumption of Innocence, 72 OHIO ST. L.J. 723, 746–50 (2011) (chronicling the rise of “community safety” pre-trial detention, and noting the innovations of the 1984 Act).


49 Salerno, 481 U.S. at 741 (upholding a statute requiring the pre-trial detention of arrestees charged with certain serious felonies if the government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions “will reasonably assure . . . the safety of any other person and the community” (citing 18 U.S.C. § 3142(e) (Supp. III 1982))); see also Baradaran, supra note 47, at 731–32 (arguing that the introduction of “dangerousness” as a barrier to bail for pre-trial arrestees is a relatively recent innovation that conflicts deeply with the presumption of innocence).


51 The majority opinion noted repeatedly that the Bail Reform Act required the government to bear the burden of convincing a neutral decision maker by clear and convincing evidence “that no conditions of release can reasonably assure the safety of the community or any person.” Salerno, 481 U.S. at 750 (citing 18 U.S.C. § 3142(f)). In assessing the procedural sufficiency of the Act, the majority discussed the “extensive safeguards” afforded to detainees, including “procedures by which a judicial officer evaluates the likelihood of future dangerousness [that] are specifically designed to further the accuracy of that determination.” Id. at 751. These safeguards are: a right to counsel, clear statutory guidelines, the government’s burden of clear and convincing proof, the requirement that the judicial officer include written findings of facts and reasons for a decision to detain, and the opportunity for immediate appellate review of detention. Id. at 751–52.
system in the infant stages of its most recent incarnation—but largely stripped of the procedural protections that had been guaranteed to citizen pretrial detainees.\footnote{See infra Part III.B (discussing the absence of procedural protections in immigration detention).}

Federal detention centers reopened in the 1980s to detain Cuban, Haitian, and Central American migrants apprehended at the border and depicted as threats to public safety.\footnote{See, e.g., Simon, supra note 3, at 582–83. Simon highlights the contrast between the earlier waves of refugees fleeing Communist regimes in Hungary, Poland, and Southeast Asia in the 1950s (who were treated as heroes), and the 1980s influx of refugees from Cuba, El Salvador, Guatemala, and Haiti (depicted as “criminals and deviants”). Because of the Refugee Act of 1980, the United States could not deport individuals who met the international definition of a refugee. The United States thus developed the immigration imprisonment strategy as a deterrent, and allegedly as a public safety system. Id.}


Congress amended this provision in 1990 to require the release of any individual who the Attorney General determines “is not a threat to the community and . . . is likely to appear before any scheduled hearings.”\footnote{Immigration Act of 1990 § 504, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049, 5050 (codified as amended at 8 U.S.C. § 1252(a)(2)(B) (2006)).} This statute introduced into the context of immigration detention the broader “threat to the community” language, which “seem[ed] to have been modeled upon the same language . . . in the Bail Reform Act of 1984.”\footnote{De La Cruz, 20 I. & N. Dec. at 355 (Heilman, Board Member, dissenting).}

tively, which expanded the criminal grounds for deportability and narrowed the forms of relief available to immigrants.\textsuperscript{60} The 1996 laws also significantly broadened the scope of criminal convictions that mandate immigration detention. However, the transitional rules allowed release for some individuals who would otherwise be subject to mandatory detention. Those individuals instead were subject to a new crime control restriction that they “not pose a danger to the safety of other persons or of property . . . .”\textsuperscript{61}

Additionally, although neither of the statutes authorized a change in discretionary bail standards, the accompanying regulations shifted the presumption of release, “add[ing] as a requirement for ordinary bond determinations under section 236(a) of the Act that the alien must demonstrate that ‘release would not pose a danger to property or persons,’ even though section 236(a) does not explicitly contain such a requirement.”\textsuperscript{62} Soon after this new language was introduced, the Board of Immigration Appeals clarified that “danger to property or persons” was not limited to threats of direct violence, but also more broadly served to control the danger of potential domestic crime.\textsuperscript{63} Today, in the discretionary detention context, an accusation of dangerousness is an absolute bar to release on bond unless disproved by the detainee.\textsuperscript{64}

The constitutional limitations of this emerging domestic crime control preventive detention have not been clearly addressed by the Court. As I will explore in Part II, incapacitation to prevent future domestic crime—unlike detention to ensure compliance with immigration proceedings or to serve a national security function—has not historically been afforded deference as an exercise of the immigration power. Yet, as Part III explains, domestic crime control immigration detention also lacks the procedural protections that are essential for preventive detentions in other domestic crime control contexts.

\textsuperscript{60} For a brief summary, see Heeren, supra note 21, at 610–11.
\textsuperscript{63} \textit{See In re} Melo-Pena, 21 I. & N. Dec. 883, 886 (B.I.A. 1997). The Board noted “that the transition rules do not limit ‘danger to the safety of other persons or of property’ to the threat of violence. Distribution of drugs is also a danger to the safety of persons.” \textit{Id.} (quoting IIRIRA § 303(b)(3), 110 Stat. 3009 (1996)).
\textsuperscript{64} \textit{See In re} Urena, 25 I. & N. Dec. 140, 141 (B.I.A. 2009).
II

ALIEN RIGHTS IN CRIME CONTROL DETENTION

Both discretionary and mandatory immigration detention are constrained by the limits of the Constitution, even to the extent that they are analyzed as exercises of Congress’s immigration power.65 In addition, however, Congress’s plenary power over immigration does not extend to all actions regulating noncitizen lives. Although the Court has recognized both enforcing compliance with immigration proceedings and protecting national security as exercises of Congress’s immigration power, that deference cannot extend to detention that only serves the purpose of domestic crime control.

A. Plenary Power and “Aliens’ Rights”

The difference between regulation of “flight risks” and “national security threats” on the one hand, and civil detention for potential dangerousness on the other, mirrors a fundamental distinction in American immigration law between laws that protect the national character and safety of the United States from foreign invasion and laws that regulate noncitizens’ lives within the United States.66 One recent immigration casebook articulates this underlying difference as between laws “relating to immigration” and laws “relating to noncitizen immigrants.”67 This distinction has constitutional dimensions: Judicial deference to Congress’s plenary power over immigration law “is widely understood to draw a sharp constitutional distinction between rules that select immigrants and rules that otherwise regulate them.”68

1. Immigration Law and the Plenary Power

Congressional power to regulate immigration initially emerged in the context of controlling which noncitizens could enter the United

---

65 See Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (noting that Congress’s “‘plenary power’ to create immigration law . . . is subject to important constitutional limitations”); see also Monestime v. Reilly, 704 F. Supp. 2d 453, 459 (S.D.N.Y. 2010) (“[I]t is of no import that Monestime is detained under a ‘mandatory’ detention statute—what a statute requires of a federal official and what the Constitution demands are not always in harmony.”).


68 Cox, supra note 66, at 346.
States. In *Chae Chan Ping v. United States*, the first case to articulate the federal immigration power, the Supreme Court upheld the federal government’s right to exclude a Chinese laborer from entering the United States. The Court envisioned this power as a necessary part of protecting the national borders, affirming the federal right to exclude “vast hordes of [foreign] people crowding in upon us.” It was in this context that the Supreme Court found the federal power to exclude noncitizens to be implied as “an incident of every independent nation,” notwithstanding the Constitution’s silence on the matter.

The Court expanded the same reasoning to include the federal right to deport noncitizens from the country in *Fong Yue Ting v. United States*. Just four years after *Chae Chan Ping*, the Court found that “[t]he right of a nation to expel or deport foreigners . . . rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.” In *Fong Yue Ting*, three Chinese laborers were arrested because they could not meet the statutory requirement of providing at least one credible White witness to testify that they were residents of the United States at the time of the passage of the Chinese Exclusion Act of 1882. As in *Chae Chan Ping*, the immigration enforcement in question was not directly related to undesirable individual social conduct within the United States, but rather was affirmed as a means of controlling the procedural conditions for noncitizens to enter and remain within the United States.

---


71 *Chae Chan Ping*, 130 U.S. at 606.

72 Id. at 603.

73 149 U.S. 698 (1893).

74 Id. at 707.

75 Id. at 725–32.

76 Id. at 728 (emphasizing that federal immigration enforcement power was not rooted in proving individual wrongdoing, but rather that “congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed . . . without judicial trial . . . just as it might have authorized such officers absolutely to prevent his entrance into the country”).
November 2012] DANGEROUSNESS ON THE LOOSE 1501

Chae Chan Ping and Fong Yue Ting set the tone for future cases evaluating detention as an exercise of immigration enforcement power. Their reasoning laid the foundation for the continuing categorization of immigration enforcement as civil, rather than criminal, proceedings. They have thus been afforded exceptional judicial deference as exercises of Congress’s plenary power over immigration, itself justified as a defense against a perceived external threat grounded in the “‘foreign relations [power], the war power, and the maintenance of a republican form of government.’”78

Judicial deference to immigration detention—at least as part of the means necessary to effectuate removal—also arose in this sphere.79 Although cases over the last decade demonstrate that an invocation of plenary power will not necessarily place an issue beyond the purview of judicial review,80 the continued judicial deference to executive immigration detention practices is justified by explicit and implicit references to this power.81

2. Alien Rights: Law Regulating Immigrants

Since its inception, Congress’s plenary power over regulating who can enter or remain in the country has existed in tension with laws that regulate noncitizens’ lives within the United States outside of the immigration selection. While differentiating between these two spheres may prove difficult,82 the Court’s recognition of constitutional-

---


79 See supra Part I.A (discussing Wong Wing v. United States, 163 U.S. 228, 235 (1896), as emblematic of the longstanding assumption that detention is a necessary part of the removal process).


81 See supra Parts I.A, B (surveying the rise of judicial deference to immigration detention because of the presumed link to immigration proceedings).

82 See Cox, supra note 66, at 357–65 (asserting that the selection-regulation dichotomy is unstable, inconsistently applied, and irrational).
ally protected “aliens’ rights” preceded the plenary power doctrine, and has continued to stand in stark contrast to it. 83

Three years before Chae Chan Ping, in Yick Wo v. Hopkins, the Supreme Court emphasized that the Equal Protection Clause covers “all persons” within the jurisdiction, regardless of citizenship. 84 Thus, the Court found that a San Francisco ordinance discriminatorily applied to prevent Chinese residents from getting permits to operate laundries violated the Equal Protection Clause. 85 Several years after Chae Chan Ping, in Wong Wing v. United States, the Supreme Court held that full criminal constitutional protections must be afforded to Chinese immigrants who had been sentenced to hard labor for violating immigration laws. 86 In addition, the Court held that the First and Fifth Amendments, and the Due Process Clause of the Fourteenth Amendment “extend their inalienable privileges to all ‘persons’ and guard against any encroachment on those rights by federal or state authority.” 87

Although the boundaries of this “alien rights” doctrine have been fiercely contested, 88 in subsequent cases the Court generally reviewed state policies that discriminated on the basis of citizenship with strict scrutiny. 89 Additionally, federal laws which receive deference when Congress or the President acts “in the area of immigration and natu-

84 118 U.S. 356, 369 (1886).
85 Id. at 362–63.
86 163 U.S. 228, 237 (1896).
87 Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (“None of these provisions acknowledges any distinction between citizens and resident aliens.” (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring))).
88 See, e.g., Kanstroom, supra note 24, at 1927 (summarizing scholarly attempts to reconcile the deference that plenary power affords to immigration law with the rights-oriented “alienage jurisprudence”); Peter L. Markowitz, Deportation Is Different, 13 U. P A. J. C O N S T. L. 1299, 1304 & n.25 (2011) (noting scholarly works that criticize the plenary power theory); Brian G. Slocum, Canons, the Plenary Power Doctrine, and Immigration Law, 34 F L A. ST. U. L. R E V. 363, 386 (2007) (commenting that while “rational basis scrutiny can be applied to immigration statutes, it is no longer clear that the plenary power doctrine always precludes the application of a more stringent standard of review when a statute infringes fundamental rights or raises equal protection concerns”).
89 See, e.g., Graham v. Richardson, 403 U.S. 365, 372 (1971) (“[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.” (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938))). However, strict scrutiny is not generally applied when the State deals “with matters firmly within a State’s constitutional prerogatives” in order “to preserve the basic conception of a political community.” Foley v.
ralization” coexist with an understanding that “[j]ust because the object of government power is an alien does not mean that the government is exercising its immigration power.” While the magnitude of this deference has not always been clear, “a consistent thread is that courts often frame their reasoning in terms of the dichotomy between immigrant selection and regulation . . . .” Whereas the Court will give the federal government wide latitude in the area of controlling who enters or remains in the country, less deference is afforded to government action that infringes on noncitizen rights within the country. This is particularly descriptive of the application of criminal law to noncitizens, where—at least in theory—“the treatment of noncitizens caught up in the criminal system is separate and apart from their treatment under the plenary power doctrine and decisions regarding admission or removal.”

B. The Constitutional Significance of the Immigration-Detention Nexus

The traditional distinction between criminal and immigration law illuminates an important limit on the justifications for immigration detention: While the political branches claim extensive discretion in the exercise of the immigration power, that deference does not extend to all executive and legislative action governing noncitizens’ lives within the United States. Specifically, while Congress may alter the rules governing noncitizens’ rights to remain in the country, their rights to be free of physical confinement, at least when apprehended within the United States, are not absolutely compromised by their lack of citizenship.


92 Cox, supra note 66, at 393 (citing cases).

93 See Motomura, supra note 69, at 1626, 1647–48 (contrasting “[t]he stunted growth of constitutional immigration law . . . with the flowering of constitutional protections for aliens in areas other than immigration law” that extended constitutional protections to noncitizens including Due Process guarantees, the Fifth Amendment Takings Clause, and other substantive and procedural criminal protections).


95 This Note focuses on the treatment of individuals who have entered the country, who are most likely to be at the junction of U.S. criminal enforcement and immigration enforcement, and who have been held to enjoy the protection of the Fifth Amendment. See Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United...
Recent precedent may “confuse[ ] the power to deport with the power to detain,” leading to a common assumption that civil detentions during the course of immigration proceedings are exercises of the plenary power over immigration based solely on the presumed immigration purpose of the detention. However, as Justice Souter summarized in his dissenting opinion in Demore v. Kim, the Court has not held that the “‘constitutionally protected liberty interest’ in avoiding physical confinement, even for aliens already ordered removed, is conceptually different from the liberty interest of citizens considered in [other civil confinement contexts].” Indeed, the Supreme Court had recognized the “clear applicability of general due process standards: physical detention requires both a ‘special justification’ that ‘outweighs the individual’s constitutionally protected interest in avoiding physical restraint’ and ‘adequate procedural protections,’” at least for individuals who have entered the country and whose detention cannot thus fall within the legal fiction of “exclusion.” The majority in Demore did not overrule the precedent cited


97 See, e.g., Motomura, supra note 69, at 1665 (discussing largely unsuccessful arguments that “physical incarceration removes the case from the immunity that the plenary power doctrine typically confers on an exclusion or deportation decision”).

98 Demore, 538 U.S. at 553 (quoting Zadvydas, 533 U.S. at 690).

99 For noncitizens deemed to be apprehended at the border, the question of detention has proved considerably more complex, as certain constitutional protections have not been held to extend to those seeking entry. See supra note 95 and accompanying text (discussing constitutional distinctions). The detention of those detained at entry (particularly asylum seekers) also raises significant concerns. See, e.g., Eleanor Acer, Lack of Immigration Court Review of Detention Violates U.S. Commitments Under International Law, Human Rights First (Apr. 6, 2012), http://www.humanrightsfir.st.org/2012/04/06/lack-of-immigration-court-review-of-detention-violates-u-s-commitments-under-international-law/.
by Justice Souter’s dissent, nor did it expressly disclaim the liberty interest of noncitizens within the country. Rather, the Demore majority emphasized that the liberty rights of noncitizens may be subject to unique limitations and conditions by virtue of Congress’s power over immigration.

Thus there is no indication that noncitizens within the United States are subject to unreviewable executive detention outside of immigration proceedings. Rather, since Wong Wing, the judiciary historically has deferred to immigration detention because it directly served the purpose of enforcing compliance with the immigration selection function of the proceedings. The Carlson Court expanded that latitude to executive detention as a means of protecting the national government from foreign threats, invoking national security concerns that parallel the foreign affairs justifications underlying the plenary power.

By contrast, civil detention to prevent potential domestic criminal activity by itself has never been deemed a purpose that deserves judicial deference. Criminal incarceration, the traditional context for determinations of dangerousness, is a sphere of full doctrinal equality between citizens and noncitizens. Even in detention serving a preventive function (such as pre-trial criminal detention or civil commitments), both citizens and noncitizens receive relatively robust procedural protections under the Due Process Clause.

The fact that a liberty deprivation takes place in the context of removal proceedings does not transform it into detention with an immigration purpose. The prevention of domestic crime may be a

101 The continued validity of Zadvydas, even following Demore, was reaffirmed in Clark v. Martinez, 543 U.S. 371 (2005) (expanding the application of Zadvydas’s statutory interpretation).

102 See infra note 116 and accompanying text (analyzing the Demore Court’s reliance on congressional immigration power).

103 See supra Part I.A (elaborating on the original enforcement compliance purpose of immigration detention).


105 See supra note 94 and accompanying text.

106 See United States v. Salerno, 481 U.S. 739, 746–47 (1987) (pre-trial criminal detention); Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (civil commitments). Indeed, the robust protections guaranteed to noncitizens in the domestic crime control context provided at least one of the reasons that the government increasingly turned to pretextual immigration detentions in the wake of the September 11, 2001 attacks. See infra note 130 and accompanying text (reviewing the use of pretextual detentions).

legitimate and even compelling government interest\(^\text{108}\) as well as an expressed priority of exclusion and deportation enforcement.\(^\text{109}\) But that shared goal does not mean that civil detention for potential dangerousness serves the *immigration enforcement* purpose of controlling the admission or expulsion of noncitizens, just as pre-trial detention, civil commitment, or criminal incarceration do not serve immigration enforcement purposes when they incapacitate potential criminals who happen to be noncitizens. Nor should *Carlson*’s national security reasoning authorize procedurally infirm crime control detention. Alienage alone does not transform a danger to the community into a national security threat.

In *Zadvydas v. Davis*, the Supreme Court apparently recognized these distinctions, noting that “preventive detention based on dangerousness” (as opposed to detention designed to prevent flight or protect the national security) was analogous to other civil confinements outside of the immigration context.\(^\text{110}\) To avoid serious constitutional concerns, the *Zadvydas* Court held that the statute authorizing immigration detention after a final order of removal must be interpreted as limited to the “period reasonably necessary to secure removal.”\(^\text{111}\) The Court was clear that detention based on dangerousness had been upheld “only when limited to specially dangerous individuals and subject to strong procedural protections.”\(^\text{112}\)

---

\(^{108}\) *Salerno*, 481 U.S. at 749.

\(^{109}\) See infra Part III.A.1 (elaborating on the integration of criminal and immigration enforcement).

\(^{110}\) 533 U.S. 678, 690–91 (2001). The Court distinguished detention reasonably necessary to bring about removal and the special deference afforded in national security contexts from detention justified only by allegations of potential domestic criminal activity. See id. at 696 (making explicit that the Court did not “consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security”). National security detentions are explicitly provided for in a distinct section of the INA (which as of this writing has not been used). See 8 U.S.C. § 1226A(a) (2006) (providing for the “[d]etention of terrorist aliens”); Stephanie Cooper Blum, *‘Use It and Lose It’: An Exploration of Unused Counterterrorism Laws and Implications for Future Counterterrorism Policies*, 16 LEWIS & CLARK L. REV. 677, 679, 717–21 (2012) (hypothesizing explanations for this provision’s non-use). Although immigration enforcement operates in the name of homeland security, “current removal policies have almost nothing to do with national security.” Chacón, *supra* note 59, at 1856. Even following September 11, 2001, when an estimated 1200 persons were taken into immigration custody, none were ultimately charged with engaging in or aiding terrorism. See id. at 1875 n.261 (citing Adam Liptak, *The Pursuit of Immigrants in America After Sept. 11*, N.Y. TIMES, June 8, 2003, at 414).

\(^{111}\) *Zadvydas*, 533 U.S. at 699.

\(^{112}\) Id. at 691.
C. Disambiguating Demore

Despite Zadvydas’s statement that detention as domestic crime control demands rigorous constitutional scrutiny, the Supreme Court’s next immigration detention case, Demore v. Kim, contained broad language that could be read as condoning, by virtue of the plenary power, all detention during the course of immigration proceedings.

On closer examination, however, Demore’s constitutional deference should be understood as rooted in the immigration enforcement purpose of the detention and premised on limitations to that detention which made it reasonable in relation to that purpose. Its holding can be extended no further.

Without explicitly differentiating between the flight risk and domestic crime control rationales for detention, the Demore Court upheld brief mandatory detention “during removal proceedings for a limited class of deportable aliens,” as a legitimate response to “[t]he INS’s near-total inability to remove deportable criminal aliens.” In rejecting the Due Process claims of the detainee challenging his no-bond detention, the majority cited broad language that “this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens,” and concluded with the seemingly expansive phrase that

113 Id. at 695.
114 Demore v. Kim, 538 U.S. 510, 531 (2003) (“Detention during removal proceedings is a constitutionally permissible part of that process.”).
115 Id. at 518. The Court elaborated “that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.” Id. at 513.
116 Id. at 522. Elsewhere, the Court quotes the full precedent, which cabins its applicability to congressional acts executed “'[i]n the exercise of its broad power over naturalization and immigration . . . .'” Id. at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)). As the Demore dissent maintained, that quoted language had previously stood for the proposition that “through the exercise of the deportation and exclusion power, Congress exposes aliens to a treatment (expulsion) that cannot be imposed on citizens.” Demore, 538 U.S. at 548 n.9 (Souter, J., concurring in part and dissenting in part). The majority’s citations for this firm and repeated endorsement were Mathews v. Diaz, 426 U.S. 67, 80 (1976), a federal welfare benefits case in which the Court held that not all noncitizens could advance a “constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests”; Reno v. Flores, 507 U.S. 292, 302 (1993), a juvenile immigration custody case which had explicitly found that the “‘freedom from physical restraint’ . . . is not at issue in this case” since the children were not put in “shackles, chains, or barred cells”; Fiallo v. Bell, 430 U.S. 787 (1977), a challenge to congressional definitions of a special preference immigration status; United States v. Verdugo-Urgüidez, 494 U.S. 259 (1990), which specifically distinguished the Fourth Amendment’s applicability to the search of a Mexican citizen’s Mexican residence
“[d]etention during removal proceedings is a constitutionally permissible part of that process.”

However, the Court’s reasoning implicitly qualified this sweeping conclusion in two ways. First, Chief Justice Rehnquist devoted much of the majority decision to reviewing Congress’s rationale for the statute, and the extensive statistical evidence and legislative history that provided support for this rationale—paralleling his opinion for the Court in *Salerno*, where the Court found a compelling government interest in public safety that justified the Bail Reform Act. For example, much of the majority’s analysis focused on the flight risk purpose of mandatory detention, emphasizing that “Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully.” The opinion also noted congressional concerns about the dangerousness of “criminal aliens,” as reflected in recidivism studies relied upon by Congress. In doing so, the Court seemingly credited “danger to the community” as another valid justification of mandatory detention. The opinion’s extensive discussion of the justifications for mandatory detention suggests that not all detentions during removal proceedings would necessarily be found constitutional.

Secondly, although the decision itself did not clearly distinguish between the flight risk and crime control rationales, the *Demore* Court implicitly assumed that by targeting individuals who were evading removal and subjecting them to detention for only a brief period of time, the statute was reasonably related to an immigration enforcement purpose. This assumption that detention functioned as part of the removal process was evidenced in the decision’s core holding that “[d]etention during removal proceedings is a constitutionally permissible part of that process.” The Court made this explicit by distinguishing *Zadvydas’s* post-final order detention not only based on the indefinite duration of that detention, but also on the fact that once removal was “no longer practically attainable” and detention was only serving a domestic crime control function, that

---

117 *Demore*, 538 U.S. at 531.
119 *Demore*, 538 U.S. at 528.
120 *Id.* at 518–19.
121 *Id.* at 531.
122 *Id.* at 527 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).
determination “did not serve its purported immigration purpose.” 123 By contrast, the Court explained that detaining “deportable criminal aliens pending their removal proceedings . . . necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.” 124 In other words, the Court assumed that immigration detention necessarily served the immigration purpose of enforcing compliance with removal proceedings, the heart of the plenary power.

The Court seemed to thoroughly credit Congress’s assessment that detention of individuals with criminal convictions was necessary to prevent such individuals from evading immigration enforcement. The decision made multiple references to a 1995 Senate Report entitled “Criminal Aliens in the United States” as an important piece of legislative history. Among other findings, this report noted:

While INS has responsibility for deporting all criminal aliens, the agency is unable to even identify most of the criminal aliens eligible for deportation. . . . [C]riminal aliens who come in contact with state and local law enforcement officials are often not identified as aliens because it is difficult for untrained personnel to accurately determine citizenship. Consulting INS is often fruitless since the INS file system, which is name based, cannot reliably be used to identify criminal aliens because of the widespread use of aliases by such aliens.125

The assumption of an immigration enforcement purpose for detention also helps explain the majority’s repeated invocation of the statement that “Congress may make rules as to aliens that would be unacceptable if applied to citizens.”126 The majority did not assert that noncitizens could be detained by congressional mandate for any purpose and by any means throughout their stay in the United States, but only that the immigration detention statute was entitled to deference because there was strong evidence of important justifications for the policy, and because it “necessarily” served an immigration enforcement purpose by preventing flight risk. Thus, the Demore Court assumed that detention necessarily serves an immigration function.

123 Id. at 527.
124 Id. at 527–28.
126 Id. Cf. Margaret H. Taylor, Demore v. Kim: Judicial Deference to Congressional Folly, in Immigration Stories 365, 365 (2005) (noting that “the Court repeated three times . . . the familiar incantation” that different rules apply to citizens and aliens).
But just because detention prevents flight does not mean that it serves an immigration enforcement purpose, absent a showing that the individual presents a flight risk if not detained.

The Court’s assumption, unstable when it was decided, has become even less tenable since. First, as set forth below, in the intervening years since Congress enacted mandatory detention, new data and reporting systems have been put in place that ameliorate the concern that noncitizens with criminal convictions will escape identification and removal. At the same time, however, the Board of Immigration Appeals has determined that dangerousness is a threshold question in discretionary custody determinations, such that an alien “who presents a danger to persons or property should not be released during the pendency of removal proceedings,” without ever reaching the question of whether the individual presents a flight risk.127 As detention increasingly serves as a system of civil confinement for potential dangerousness, Demore’s assumption that mandatory detention is entitled to the deferential review typically afforded to immigration legislation grows ever more suspect.

III
SAFEGUARDING LIBERTY IN THE AGE OF “IMMACERATION”

This Note has chronicled how the “danger to the community” rationale became a central justification for a detention system that historically merited judicial deference as a necessary part of immigration enforcement or a means to protect national security. Although this conflation has gone largely unchallenged,128 it raises serious constitutional and policy concerns of inequitable and needless liberty deprivations. These concerns are exacerbated by the discriminatory dynamics of immigration enforcement, which indicate that this form of executive detention will disproportionally impact racial minorities.129

128 The lack of a bright line between national security and crime control, see generally Chacón, supra note 59, combined with the Attorney General’s broad and statutorily unreviewable discretionary authority to detain have made potential challenges particularly difficult. See 8 U.S.C. § 1226 (2006) (granting the Attorney General discretionary authority and barring review). Moreover, the government has always been able to resort to the flight-risk rationale of immigration detention. Cf. Michelle Roberts, The Associated Press, AP Impact: Immigrants Face Detentions, Few Rights, SEATTLE TIMES (Mar. 13, 2009), http://www.seattletimes.com/html/nationworld/2008863779_apdetainedimmigrants.html?syndication=rss (citing ICE spokeswoman Cori Bassett’s assertion that “[detention] is ensuring compliance, and if you look at the stats, for folks who are in detention, the stats are pretty darn high”).
129 The racial undertones of immigration detention merit a substantive analysis that is outside the scope of this Note. For research that highlights the racialized impact of immi-
addition, the growing reliance on pretextual uses of immigration detention suggests that immigration detention's minimal procedural safeguards could make it an increasingly alluring alternative system of domestic crime control—but only for a “particular, racially lopsided fraction of the United States population.”

Two current trends in immigration detention—the criminalization of immigration enforcement and the development of meaningful alternatives to physical confinement—further destabilize the fiction that immigration detention necessarily serves a compliance purpose, either in motivation or in effect. As a result, due process protections should not be triggered only by indefinite or even prolonged detention; rather, the due process inquiry must parallel the balancing test of dangerousness-based liberty deprivations in other civil contexts. This recalibration would necessitate significantly more robust procedural protections for both mandatory and discretionary immigration detainees, minimizing costly and needless deprivations of liberty.

**November 2012**

**DANGEROUSNESS ON THE LOOSE**

---

A. The Ascendance of Crime-Control Detentions

Two trends indicate the continuing rise of crime control as an immigration detention rationale. First, the recent convergence of criminal and immigration law (termed “crimmigration law”) has given rise to what Anil Kalhan has termed “immcarceration,” immigration detention produced by the fusion of criminal and immigration enforcement.131 At the same time, a combination of technological advances and innovative community supervision models has dramatically increased the feasibility of meaningful alternatives to detention (ATDs) for “flight risks” alone.132 ICE has already implemented a range of ATDs, including electronic monitoring,133 telephonic and in-person reporting, curfews, and home visits, reserving physical detention for those deemed dangerous.134 President Obama’s proposed 2013 budget reflects the importance of both of these trends in the foreseeable future.135 Together, these developments indicate a trend

131 Anil Kalhan, Rethinking Immigration Detention, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010). Although Kalhan uses the term to refer more broadly to the excessive and quasi-punitivne nature of the current detention regime, the term is particularly fitting in the context of detention for the purpose of controlling domestic crime.


133 Some reject the characterization of electronic monitoring as an alternative to detention because it is so highly restrictive. See, e.g., DETENTION WATCH NETWORK & MILLS LEGAL CLINIC, POLICY BRIEF: COMMUNITY-BASED ALTERNATIVES TO IMMIGRATION DETENTION 3 (2010), available at http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/DWN%20ATD%20Report%20FINAL_08-25-2010.pdf. Without minimizing the significant liberty restraint that electronic monitoring represents, I include electronic monitoring as a technical alternative to physical incarceration because of its implications regarding who will still remain physically detained.

134 See, e.g., ICE, ALTERNATIVES TO DETENTION FOR ICE DETAINES FACT SHEET (2009), available at http://www.aia.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286%7C31038%7C30487 [hereinafter ICE, ATD FACT SHEET] (defining ATDs as mechanisms “to ensure compliance with a removal order for aliens . . . who present a low risk of flight, and who pose no danger to the community”); Kalhan, supra note 131, at 55 (reviewing the literature on alternatives to detention).

135 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013, at 118, available at http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/homeland.pdf [hereinafter 2013 BUDGET]. The DHS budget boasts among its “funding highlights” that it “[a]ligns resources with risk in immigration detention by focusing on criminal aliens [and other priorities] . . . and expand[s] resources for electronic monitoring and intensive supervision.” Id. The document elaborates that: “Consistent with its stated enforcement priorities and recent policy guidance, ICE will continue to focus resources on those individuals who have criminal convictions or fall under other priority categories. For low risk individuals, ICE will work to enhance the effectiveness of Alternatives to Detention, which costs significantly less than detention.” Id. at 120.
toward reserving physical incarceration as a tool of incapacitating criminal risk.

1. Increased Interoperability Between Criminal and Immigration Systems

Since the federal government introduced mandatory and discretionary immigration detention for potential dangerousness in its current form in 1996, civil immigration enforcement has become increasingly integrated into the criminal justice system. This raises concerns about the “asymmetric incorporation” of criminal justice goals and methodologies into a civil system that lacks the basic procedural protections of the criminal law. This convergence continues, as ICE focuses its attentions on “dangerous and repetitive criminal aliens” using the mechanisms of the criminal justice system and as capacities for technological data sharing between executive agencies improve. This is particularly troubling because ICE, which has no authority to detain individuals incarcerated in federal, state, or local facilities, instead detains supposedly dangerous individuals at the moment of their release from criminal incarceration—after the criminal system has determined that the time has come to release the individual into society.

In the last several years, ICE has consolidated fourteen programs for apprehending noncitizens through local law enforcement into an omnibus program called “Agreements of Cooperation in Communities to Enhance Safety and Security” (ICE ACCESS).


137 SCHRIRO, supra note 10, at 11.

138 A majority of those detained are apprehended either through the Criminal Alien Program (48%) or through the Office of State and Local Coordination (12%). Id. at 12.

139 SISKIN, supra note 11, at 1.

The most recent integration project is currently underway. Invoking the language of crime prevention, ICE is in the process of implementing “Secure Communities,” an integration program that introduces information sharing capability between various criminal and immigration databases. Through Secure Communities, the fingerprints of everyone arrested and booked by local law enforcement are not only checked against FBI criminal history records, but they are also checked against DHS immigration records; ICE then determines if immigration enforcement action is required, considering the immigration status of the individual, the severity of the crime, and the individual’s criminal history. ICE has stressed both the novelty of this innovation, and the role of the program in ensuring public safety.

Immigration authorities’ reliance on criminal law enforcement mechanisms, coupled with the immigration system’s capability to detain based on criminal records, indicate that incapacitation to prevent future criminality has assumed unprecedented prominence as a justification for immigration detention. In addition to the 1996 statutory mandate to detain individuals based on certain criminal grounds of deportability, ICE has made clear that detention will increasingly

---


143 Letter from John Morton, Assistant Sec’y, Dep’t of Homeland Security, to Rep. Zoe Lofgren (April 28, 2011), available at http://uncovertheruth.org/wp-content/uploads/20110429mortonresponse.pdf (“Secure Communities provides ICE with unprecedented capability to focus its enforcement efforts on criminal aliens booked into our nation’s jails. By removing those aliens whose criminal history demonstrates a willingness to violate our laws, ICE is better able to fulfill its responsibility to keep our communities safe. As such, enhancement of public safety through the expansion of Secure Communities is one of our top priorities.”). The public safety rationale is not entirely explicit, but it appears to be a combination of both deterrence and incapacitation. See, e.g., Sunathi Reddy, Immigration Backers Cheer Cuomo Action, WALL ST. J., June 2, 2011, available at http://online.wsj.com/article/SB100014240527023036573404576359962487244504.html (“Supporters of Secure Communities say it is a deterrent to crime and boosts public safety.”).
be reserved for allegedly dangerous detainees with criminal convictions.144

2. Alternatives to Detention

Simultaneously, new alternatives to detention (ATDs) exist which can ensure compliance with immigration proceedings for those individuals not deemed dangerous. These alternatives include previously technologically unimaginable methods, including ankle bracelet electronic monitoring devices.145 While cautioning against unnecessarily imposing electronic monitoring on individuals who would otherwise be fully released from custody, immigrant advocates may support dependable and increasing reliance on ATDs as a substitute for physical detention, averting unnecessary liberty deprivations and resulting in significant taxpayer savings.146 As discussed above, the administra-

144 See 2013 Budget, supra note 135; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel (June 17, 2011), available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [hereinafter Morton Prosecutorial Discretion Memo] (prioritizing national security and public safety apprehensions and detentions); Holiday on ICE: The U.S. Department of Homeland Security’s New Immigration Detention Standards: Hearing Before the Subcomm. on Immigration Policy & Enforcement of the H. Comm. on the Judiciary, 112th Cong. 26–27 (2012) (statement of Kevin Landy, Assistant Director, Office of Detention Policy and Planning, U.S. Immigration and Customs Enforcement) (describing the new Risk Classification Assessment’s focus on ensuring that criminal aliens are prioritized for detention); id. at 44 (statement of Chris Crane, President, National Immigration and Customs Enforcement Council 118 of the American Federation of Government Employees) (testifying about ICE’s announced goal of prioritizing detention of convicted criminals, focusing on the “worst of the worst,” and expressing concern that “increased targeting of the most violent criminals will result in a more violent, aggressive and overall dangerous detainee population in ICE facilities nationwide”).


tion continues to signal its commitment to exploring these cost-saving alternatives. 147

Although increased reliance on ATDs could mean a net decrease in physical detention, it appears that alternatives to detention will also serve to emphasize detention’s crime control purpose. ICE justifies ATDs by virtue of their positive correlation with compliance enforcement, 148 but refuses to consider alternatives to detention for those who are characterized as dangers to the community. 149 Even immigrant rights advocates have generally accepted this distinction, 150 focusing on ATDs as means to “ensure that [immigrants] show up for their immigration court dates” 151 rather than as methods to control dangerousness. While those deemed to be high flight risks may still be detained, many low-level flight risks could be released—unless they are also deemed to be dangers to the community. As a result, the functional impact of ATDs will likely be a relative decrease in reliance on physical confinement as a means of removal proceedings compliance and a renewed focus of detention as a means to confine potential dangers to the community.

B. Fifth Amendment Limits on Crime Control Detention

As the Court has emphasized, “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment’s Due Process] Clause protects,” 152 and this Clause extends to noncitizens, at least after entry into the United States. 153 In light of the

147 See 2013 BUDGET, supra note 135, at 120.


149 See supra note 134 and accompanying text (describing eligibility for ATDs).

150 See MATH OF IMMIGRATION DETENTION, supra note 148, at 1 (“Physical detention . . . should only be used in limited circumstances, such as for holding immigrants whose release would pose a serious danger to the community.”).

151 DETENTION WATCH NETWORK & MILLS LEGAL CLINIC, supra note 133, at 1.


153 See supra note 95 (discussing the distinction between noncitizens who have entered the United States and those apprehended at the border). See also César Cuauhtémoc García Hernández, Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel, 21 BERKELEY LA RAZA L.J. 17, 23–31 (2011) (reviewing the role of modern Due Process jurisprudence in immigration law); Daniel Kanstroom, The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-A-Half Amendment, 58 UCLA L. REV. 1461,
ascendance of the potential dangerousness justification discussed above, as well as the proliferation of ATDs which can ensure compliance enforcement, detentions during the course of immigration proceedings can no longer be assumed to necessarily serve an immigration compliance or national security purpose. Absent these traditional justifications, immigration detention for potential dangerousness should be reviewed with the more robust Fifth Amendment scrutiny generally applied to other preventive detentions.

Outside of the immigration context, at a minimum, Due Process protections require “that laws not authorize more [preventive detention] than they need to.”154 Zadvydas articulated this standard in assessing dangerousness detention absent flight risk, noting that preventive detention is “limited to specially dangerous individuals and subject to strong procedural protections.”155 This limitation suggests, as I argue in the following subsections, that both current mandatory and discretionary detention procedures are constitutionally infirm.

I. Mandatory Detention: Individualized Determinations as a Minimum Requirement of Due Process

The mandatory detention scheme is a particularly severe infringement on standard Due Process principles, which have always assumed that some individual determination was a procedural prerequisite of preventive detention.156 Since Demore upheld mandated detentions in 2003, the system faced mounting attacks, emphasizing the procedural insufficiency of the Joseph hearing (particularly given the high burden of proof on the detainee and the lack of appointed counsel),157 ICE’s

1465–66 (2011) (analyzing the applicability of Due Process analysis in the deportation context).

154 Klein & Wittes, supra note 9, at 89. Critics suggest the standard for preventive detention may be much stricter, characterizing preventive detention as a constitutional aberration. See id. (discussing claims that preventive detention “runs counter to American values and law”). Cf. Abhi Raghunathan, “Nothing Else but Mad”: The Hidden Costs of Preventive Detention, 100 GEO. L.J. 967, 969 (2012) (discussing the ambiguity regarding the standard for preventive detention).

155 Zadvydas, 533 U.S. at 691. In support, the Court in Zadvydas compared two previous cases. In Kansas v. Hendricks, 521 U.S. 346 (1997), the Court upheld a program that “limited confinement to a small segment of particularly dangerous individuals” and “provided strict procedural safeguards.” Id. at 368. However, in Foucha v. Louisiana, 504 U.S. 71 (1992), the Court struck down a “detection [program] of insanity acquittees who are no longer mentally ill” which placed “the burden on the detainee to prove that he is not dangerous.” Id. at 81–83.

156 See Demore v. Kim, 538 U.S. 510, 551 (2003) (Souter, J., dissenting) (“[O]ur cases yield a simple distillate[;] Due process calls for an individual determination before someone is locked away.”).

157 See supra notes 21 and 22 and accompanying text (discussing applicability and critiques of mandatory detention); Mark Noferi, Cascading Constitutional Deprivation: The
refusal to include electronic monitoring and ATDs in its interpretation of mandatory custody,\textsuperscript{158} and the prolonged nature of detentions beyond the length that Demore contemplated.\textsuperscript{159} Since Demore, changes both in the integration of criminal and immigration enforcement and in the rise of ATDs intensify these Due Process critiques by challenging Demore’s assumption that detention is a necessary component of immigration enforcement, as opposed to a civil detention for domestic crime control purposes.

First, the Demore Court deferred to Congress’s concern that the INS was unable to effectuate the removal of “criminal aliens,” both because the INS could not identify removable individuals due to the gap between the criminal and immigration systems, and because the INS had proved unable to ensure compliance with removal proceedings.\textsuperscript{160} These realities have now changed considerably with the merging of the criminal justice and immigration enforcement systems, as well as the introduction of more efficient and comprehensive technologies and systems allowing ICE to identify and track noncitizens (both within the criminal justice system and through ATDs).\textsuperscript{161} Together, the cooperation and technological fusion of the immigration and criminal systems and the development of ATDs mean that com-

\begin{flushright}
\end{flushright}

\textsuperscript{158} See Heeren, supra note 21, at 632–33 (noting that courts have defined “custody” to include conditions of parole for habeas corpus purposes, but that DHS currently refuses to consider monitoring ATDs for individuals subject to mandatory detention).

\textsuperscript{159} Both the Ninth and Third Circuits have found that, under certain circumstances, prolonged mandatory detention during removal proceedings would raise constitutional concerns. See Diop v. ICE/Homeland Sec., 656 F.3d 221, 233 (3d Cir. 2011) (citing Justice Kennedy’s Demore concurrence and finding that due process demands a hearing even for mandatory detainees once the duration of detention becomes unreasonable); Casas-Castrillon v. Dep’t of Homeland Sec., 535 F.3d 942 (9th Cir. 2008) (requiring a bond hearing for detainees initially subject to detention under 8 U.S.C. § 1226(c) if their removal is stayed pending direct judicial review or if their cases have been remanded); Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) (holding that § 1226(c) only authorizes mandatory detention where removal hearings are “expeditious”). For recent critiques of mandatory detention, see Whitney Chelgren, Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections, 44 LOY. L.A. L. REV. 1477, 1503 (2011) (critiquing mandatory detention procedures as unconstitutional); Heeren, supra note 21 (contending that mandatory detention is both unfair and inefficient, as it does not correlate well to flight risk or dangerousness, improperly allocates burdens of proof, and subjects detainees to prolonged conditions of confinement designed for short-term detention); Sayed, supra note 21 (arguing that immigrant detainees deserve more procedural protections than “enemy combatants” but currently receive less).

\textsuperscript{160} See supra Part II.C (summarizing the Demore Court’s analysis of the government interest in mandatory detention).

\textsuperscript{161} See supra Part III.A (reviewing the two causes of crime control detention’s ascendance).
pliance concerns are increasingly addressed in ways that do not require detention. Accordingly, mandatory detention can no longer be deferred to as a response to the government’s “near-total inability to remove deportable criminal aliens.”

Moreover, the Demore majority’s assumption that immigration detention necessarily serves an immigration purpose has been called into question. Even mandatory detention, which on paper applies to anyone with qualifying convictions (allegedly as part of the removal process), is applied selectively in practice. As a result of immigration enforcement officers’ immense prosecutorial discretion in deciding whom to detain, and based on announced enforcement priorities, it appears that individuals will increasingly be taken into custody based on ICE’s untried perception of dangerousness, and subsequently subject to mandatory detention based on specific grounds of removability.

Because the compliance enforcement justification of mandatory detention has weakened even as detention increasingly confines individuals based on potential dangerousness, the minimal procedural protections afforded mandatory detainees raise Due Process concerns that can no longer be justified by the immigration enforcement purpose upheld in Demore.

2. “Danger to the Community”: Putting the Government to Its Burden

Even outside of the mandatory detention context, discretionary bond determinations for immigration detainees receive significantly less procedural protection than nearly any other preventive deten-
tion,\textsuperscript{167} casting doubt on the procedure’s legitimacy when deployed in the service of ordinary crime control.

In discretionary determinations, the respondent—frequently a noncitizen with limited English proficiency and rarely represented by counsel\textsuperscript{168}—must affirmatively request a neutral adjudication, and bears the burden of proving that he or she “would not pose a danger to property or persons.”\textsuperscript{169} Statutory provisions also purport to bar any judicial review of the Attorney General’s discretionary decision in the matter.\textsuperscript{170} These procedures stand in stark contrast to pre-trial criminal detention, despite the facial similarities of the flight risk and danger to the community criteria.\textsuperscript{171} For pre-trial detentions, individuals must be brought before an independent judge for a probable cause hearing within forty-eight hours of arrest, and detention for dangerousness is constitutionally protected by a series of judicial safeguards, including a requirement that “[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”\textsuperscript{172}

As reviewed above, the minimal procedural protections in immigration proceedings were originally upheld with the understanding that detention served either an immigration enforcement or national security purpose.\textsuperscript{173} With the first introduction of a broader “danger to the community” standard for immigration detention in 1990, at least one dissenting member of the BIA advanced the position that the parallels between the immigration detention statutory language and the wording of the Bail Reform Act should be interpreted similarly.\textsuperscript{174} Specifically, the dissent suggested that the statute at issue should not create a rebuttable presumption against release, that the

\textsuperscript{167} Cf. Noferi, supra note 157, at 6 (comparing procedural protections in immigration detention to criminal pre-trial detention, civil commitment, and national security detention).

\textsuperscript{168} See Accessing Justice, supra note 5, at 359–60 (discussing the low representation rates in removal proceedings in New York City and nationwide, particularly for detainees, and enumerating the distinctive characteristics of individuals facing removal, including “relative lack of familiarity with the legal system” and “language barriers”).

\textsuperscript{169} 8 C.F.R. § 1236.1(c)(8) (2009); In re Adeniji, 22 I. & N. Dec. 1102 (B.I.A. 1999).

\textsuperscript{170} See supra Part I.A (discussing discretionary detention procedures). Cf. Simon, supra note 3, at 600–01 (discussing the lack of democratic accountability in executive detentions of noncitizens).

\textsuperscript{171} See supra notes 56 and 57 and accompanying text (discussing parallels between immigration detention and criminal pre-trial detention).


\textsuperscript{173} See supra Parts I.A–B (analyzing the evolution of immigration detention rationales).

\textsuperscript{174} See In re De La Cruz, 20 I. & N. Dec. 346 (B.I.A. 1991) (Heilman, Board Member, dissenting) (asserting that “[i]mmigration bond hearings before an immigration judge gen-
burden of persuasion should remain with the government, and that the standard of proof should be “clear and convincing” for the threat to the community prong, and “clear preponderance” for the flight risk prong.175

However, the majority of the Board rejected this approach as a pure matter of statutory construction, neglecting the constitutional questions at issue, and finding that the statute at issue created a rebuttable presumption against release for legal permanent residents convicted of aggravated felonies, placing the burden on the respondent to disprove both dangerousness and flight risk.176 This decision and others paved the way for the construction of the 1996 regulations which—without any statutory support—shifted the burden to all detained noncitizens first to disprove dangerousness as a preliminary matter, and then to disprove flight risk.177

The increased trend toward detention for potential dangerousness demands an inversion of the current order of operations and burdens of proof. Currently, Matter of Guerra requires the detainee to first establish that she is not a danger to the community, before getting the opportunity to prove that she is not a flight risk.178 As a matter of constitutional logic, by contrast, in order to invoke the immigration authority to detain, the government should first be required to establish an immigration enforcement purpose for the detention, namely compelling the appearance of an immigrant who is likely to abscond if released. Only after that point should danger to the community be considered as a distinct supplemental factor. As a distinguishable prong of the analysis, detentions justified by potential dangerousness should be “limited to specially dangerous individuals and subject to strong procedural protections.”179 At minimum, these protections should include placing the burden of proving “special dangerousness” on the government, as is required in the discretionary hearings pro-

---

175 Id. These standards mirror the federal bail standards. The Bail Reform Act explicitly requires clear and convincing evidence for detention based on dangerousness. 18 U.S.C. 3142(f) (2006). The eight circuits that have provided guidance require only a preponderance of the evidence to establish flight risk. See John L. Weinberg, Practicing Law Inst., Federal Bail and Detention Handbook § 6.7 (2012).


177 See supra Part I.C (discussing the evolution of current bond standards).


vided for by Zadvydas and the Third and Ninth Circuits, and the vast majority of other preventive detentions.\textsuperscript{180}

**CONCLUSION**

The U.S. immigration detention regime that was reborn in the 1980s is not only unprecedented in scale, but also in rationale. Whereas the Court historically justified immigration detention as a means of ensuring immigration compliance, followed by a secondary purpose of protecting national security, today’s system increasingly functions in collaboration with criminal law enforcement to incapacitate for the purposes of confining individuals based on accusations of potential dangerousness levied without the traditional procedural protections attached to civil confinement.

Whatever the validity of judicial deference when immigration detention truly serves to aid in the removal process, this Note has argued that such deference cannot legitimately be extended to immigration detention’s newly ascendant crime-control function. Courts analyzing immigration detention challenges should preserve the conceptual and constitutional distinctions between the rationales for detention. Immigration detention’s increasing use of potential domestic dangerousness as a rationale to confine individuals demands due process procedural safeguards that parallel protections in other preventive contexts. At a minimum, Due Process requires the government to bear the burden of individually demonstrating a need for confinement.

\textsuperscript{180} See Singh v. Holder, 638 F.3d 1196 (9th Cir. 2011) (quoting Casas-Castrillon v. Dep’t of Homeland Sec., 535 F.3d 942, 951 (9th Cir. 2008)); Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005)) (requiring the government to prove flight risk or danger to the community by clear and convincing evidence in cases where bond hearings were judicially imposed); Diop v. ICE/Homeland Sec., 656 F.3d 221, 233 (3d Cir. 2011) (holding that after detention duration becomes unreasonable, “the Due Process clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purpose of the detention statute”). See also Demore v. Kim, 538 U.S. 510, 550 (2008) (Souter, J., dissenting) (“We stressed [in Salerno] that the act was not a ‘scattershot attempt to incapacitate those who are merely suspected of’ serious offenses.” (quoting United States v. Salerno, 481 U.S. 739, 750 (1987))); Klein & Wittes, supra note 9, at 186 (articulating the minimum standard for preventive detention as a test of necessity, inquiring into the direness and certainty of potential consequences for failing to detain, and whether the detention is structured in a fashion that minimizes the possibility of erroneous or excessive incarceration). Cf. Chelgren, supra note 159, at 1518 (surveying lower courts’ applications of Zadvydas); Raghunathan, supra note 154, at 971–85 (detailing the allocations of burdens of proof in civil commitment hearings); Sayed, supra note 21, at 1834 (contrasting the allocation of the burden of proof in immigration detention with procedures for Guantánamo detainees).