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STRUCTURAL DUE PROCESS IN IMMIGRATION DETENTION

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CONTENTS

INTRODUCTION

Certain practices of contemporary immigration detention have been said to "raise a serious constitutional problem."[1] But just what sort of constitutional problem? Typically, courts assume that

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[1] Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem.").

some feature of detention violates a noncitizen's personal right to due process when faced with a deprivation of liberty.[2] Embedded within that assumption is one of immigration law's most vexing questions: to what degree is a noncitizen personally entitled to constitutional rights?[3] Courts struggle to find a coherent answer.[4]

The single-minded focus on a noncitizen's personal right to due process has obscured a serious structural constitutional problem of contemporary immigration detention: the executive's role as both jailor and judge when depriving an individual's liberty.[5] The consolidation of jailer and judge causes a serious structural constitutional concern because it undermines the separation of powers and interbranch checks and balances that the Framers understood to be at the heart of the Due Process Clause.[6] Unrestrained by structural requirements of judicial review found in criminal detention, the Executive Branch instead uses immigration detention to incarcerate more than half a million individuals per year in penal conditions,[7] over ten thousand of them for pro-

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2 *See, e.g.*, Demore v. Kim, 538 U.S. 510, 523 (2003) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." (quoting Reno v. Flores, 597 U.S. 292, 306 (1993))).

3 *See, e.g.*, David D. Cole, *Against Citizenship as a Predicate for Basic Rights*, 75 FORDHAM L. REV. 2541, 2544 (2007) ("Time and again, the Administration has argued that foreign nationals do not deserve the same rights as citizens, and that we can do to them what we could not do to ourselves.").

4 *Compare* Rodriguez v. Robbins, 804 F.3d 1060, 1087 (9th Cir. 2015) (noting that a noncitizen's liberty interest demands that the burden of persuasion at a bond hearing be placed on the government), *cert. granted sub nom.* Jennings v. Rodriguez, 136 S. Ct. 2489 (2016), *with* Sopo v. U.S. Attorney Gen., 825 F.3d 1199, 1219-20 (11th Cir. 2016) (approving placement of burden of persuasion at bond hearing on noncitizen).

5 "Structural due process," developed by Lawrence Tribe in *Structural Due Process*, 10 HARV. C.R.-C.L. L. R. 269 (1976), was later summarized by Burt Neuborne as the principle "that channelling difficult decisions to the most appropriate bodies will minimize the likelihood that a current value judgment will conflict with the ambiguously expressed will of the Founders." *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 365 (1982). In the same article, Neuborne briefly described the French Constitutional Council's decision to strike a statute authorizing seven days of immigration detention without judicial review based on concerns regarding separation of powers and the institutional suitability of the executive to adjudicate the propriety of detention. *Id.* at 398 (citing Judgment of Jan. 9, 1980, Con. const., No. 79-109DC).

6 "Separation of powers differs from checks and balances. One protects individual liberty by allocating particular governmental powers to specific branches. The other protects individual liberty by having each branch restrain the others." Eric M. Freedman, *Habeas Corpus in Three Dimensions Dimension III: Habeas Corpus as an Instrument of Checks and Balances*, 8 NE. U.L.J. 251, 253 (2016) (internal quotations omitted).

7 *See* Office of the Press Sec'y, *DHS Releases End of Year Fiscal Year 2016 Statistics*, U.S. DEP'T OF HOMELAND SECURITY (Dec. 30, 2016), https://perma.cc/5B5P-WDDE (reporting FY 2016 detention figure of 530,250).

longed periods ranging from six months to multiple years.[8] Those who experience the longest average detention time are citizens, others erroneously charged as deportable, and individuals with meritorious claims for immigration status.[9]

More than sixty years ago, the Supreme Court relied on "long-standing practice" and "special considerations applicable to deportation" to approve the Executive's dual role as enforcement agent and adjudicator when the government makes decisions to deport.[10] But it has yet to address the consolidation of jailer and judge in decisions to detain, a distinct governmental power with unique constitutional limits.[11] Because the Framers understood due process to mandate the separation of jailer and judge when the government deprives an individual of liberty, contemporary immigration detention attacks structural norms of government that the Constitution charges the judiciary to defend. As I explain, preoccupation with such structural constitutional concerns can be found throughout majority and dissenting opinions in the Supreme Court's modern immigration detention cases. Courts

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[8] In recent years, as immigration court processing times have reached record highs, immigration detention has de facto separated into two regimes, one relatively short-term and the other indefinitely long. Annual numbers are certain to vary, but a 2012 analysis of individuals leaving detention over a two-month period found that 70% were released after less than a month. Of that group, over three quarters were deported. Of those in detention for longer than a month, 1,792 had been detained for longer than six months. Those numbers gave an estimated annual figure of more than 10,000 prolonged detentions of over six months. Transactional Records Access Clearinghouse, *Legal Noncitizens Receive Longest ICE Detention*, TRACIMMIGRATION (June 3, 2013), https://perma.cc/X5UC-3F7S. A 2009 study estimated the rate of prolonged detention (between 90 days and six months) to be even higher, at 13% of the detained population, or over 2,400 people, on any given day. DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INSTITUTE, IMMIGRATION DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 16 (2009). More recently, a study of the prolonged immigration detention population in the Central District of California uncovered an average detention length of 421 days for those detained longer than six months and still pursuing immigration relief. Individual actions before the federal courts provide anecdotal evidence of detentions that have lasted for years at a time. AM. CIVIL LIBERTIES UNION, PROLONGED DETENTION FACT SHEET 1 (last visited Dec. 2, 2017), https://perma.cc/TKR9-NYML.

[9] *See Legal Noncitizens Receive Longest ICE Detention*, *supra* note 8 (reporting that in a two-month sample of individuals released in 2012, finding the longest average detention time occurred for those whose cases were terminated by an immigration judge or the prosecutor herself, indicating that the government was unable to prove its charges of alienage or deportability or that the noncitizen qualified for and was granted relief from removal).

[10] Marcello v. Bonds, 349 U.S. 302, 311 (1955).

[11] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 695 (stating in a decision addressing immigration detention that Congress' plenary power to create immigration law is subject to "important constitutional limitations").

should therefore explicitly consider these structural concerns when evaluating the constitutionality of immigration detention practices.

I begin by summarizing historical research on the meaning of due process at common law and the Founding to explain how the Fifth Amendment's Due Process Clause provides the structural guarantee of separation of jailer from judge. I then describe the Executive's dual roles of jailer and judge when detaining individuals who are contesting deportation in removal proceedings.[12] After highlighting the unexamined role that structural due process concerns play in the Supreme Court's modern immigration detention cases, I conclude by considering detention practices that might be challenged on structural due process grounds.

By focusing on separation of powers and related structural constitutional concerns, I supplement distinct scholarly critiques of contemporary immigration detention. Others have written, for example, of structural infirmities that might lead to bias in general immigration decision making,[13] institutional design features that result in unjustified detention,[14] and a detention system that lacks minimum standards of due process.[15] Most recently, scholarship has questioned whether some of the detention practices I identify below withstand scrutiny under the Fourth Amendment's prohibition of unreasonable seizures.[16] I agree that such concerns merit consideration by courts and policymakers, but ask here the distinct question whether certain features of contemporary immigration

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12 In removal proceedings, an individual can contest the charges of removability or, if qualified, apply for a waiver of an immigration law violation that permits her to remain in the country with immigration status or other protection from deportation.

13 Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 11-36 (2006) (arguing that immigration courts systematically fail to apply law); Michele Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467 (2008) (considering structural features of immigration court that permit political control and encourage ethical violations); Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 331-42 (2014) (describing structural infirmities with immigration adjudication); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006) (arguing that executive reforms to immigration adjudication have discouraged independent decision making); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 417 (2011) (examining how factors such as immigration judges' lack of independence, limited opportunity for deliberate thinking, low motivation, and the low risk of judicial review all allow implicit bias to drive decision making).

14 *See* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137 (2013) (arguing that institutional design choices underlying the immigration detention system lead to over-detention).

15 *See* Cole, *supra* note 3, at 1008-15.

16 Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 129 (2015).

detention violate the Fifth Amendment's guarantee of due process as understood by its historical meaning: the structural separation of jailer from judge.

I. The Historical Roots of Structural Due Process In Detention Decisions

What does due process demand when the government deprives an individual of liberty? Legal historians have come to understand that the answer to this question is, at least in part, structural in nature. The historical origins of due process, its development at common law in both England and the American colonies, and its subsequent inclusion in the Bill of Rights, support the view that "due process has from the beginning been bound up with the division of the authority to deprive subjects of life, liberty, or property between independent political institutions."[17] As understood from the drafting of the Magna Carta to the ratification of the Bill of Rights, due process prohibited the consolidation of jailer and judge in the same governmental body.

The Fifth Amendment acknowledges that the government will inevitably attempt to deprive persons of liberty. Instead of offering absolute protection from that power, it places an absolute condition on its use: "No person shall be . . . deprived of . . . liberty . . . without due process of law . . . ."[18] The use of the modifier "due" is often understood to imply varying levels of process "as the particular situation demands,"[19] a flexible remedy that can be difficult to define with precision.[20] But historically, "due process of law" has always reflected at least one specific, fundamental principle: the separation of jailer from judge. At its core, due process has been expressed as the "promise[ ] that the Executive must answer to an impartial body with a valid cause for depriving one of his or her liberty."[21] It "ensure[s] that the executive [will] not be able unilat-

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17 Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1681 (2012).

18 U.S. Const. amend. V.

19 Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

20 *See generally* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 309 (1993) ("Due process doctrine subsists in confusion.").

21 Amanda L. Tyler, *Is Suspension A Political Question?*, 59 Stan. L. Rev. 333, 384 (2006). Others describe due process as a guarantee against both the executive and legislature, ensuring that any "deprivation of life, liberty, or property" be accompanied by "adjudication by a court according to generally applicable laws." *See also* Chapman & McConnell, *supra* note 17, at 1735 (noting that due process is a sufficient basis for judicial invalidation of legislation).

erally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies . . . ."[22] The Due Process Clause is thus "essentially a separation of powers provision,"[23] mandating distinct roles for jailer and judge.[24]

The written origins of due process are traced to a provision in the Magna Carta which states "No freemen shall be taken or imprisoned or disseised [sic] or exiled or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land."[25] The "law of the land" referred to statutes, customs, common law, and orders directing another arm of the government.[26] These legal norms, both substantive and procedural, limited the king's autonomy by conditioning certain of his actions on judicial approval.[27] Thus, due process at its origins was a structural limitation on the government: "a guarantee of judgment by an independent institution according to procedures designed to take the case out of the hands of the King."[28]

The first recorded use of the term "due process" comes from a 1354 English statute which states, "no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."[29] Whatever differences between the two terms that may have originally existed, by the 15th century, "'due process of law' and 'law of the land' were

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22 Chapman & McConnell, *supra* note 17, at 1807.

23 Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1043 (2011).

24 *See id.* ("Individual rights are indeed the beginning and the end of the clause. But separation of powers is the means and the meaning. The clause protects individual rights by assigning and channeling federal power."); *see also* Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1386–87 (2010) ("The Due Process Clause . . . imposed an unequivocal limit on the federal government's power to detain individuals summarily . . . . 'Due process of law,' at its textual, historical, and doctrinal cores, at minimum requires the provision of notice, hearing, and a neutral adjudicator.").

25 Magna Carta ch. 39, *translated in* J.C. Holt, Magna Carta 461 (2d ed. 1992).

26 Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 63 (2012).

27 *See* Chapman & McConnell, *supra* note 17, at 1684; Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 455–56 (2010) ("At the time of the Fifth Amendment's ratification the phrase 'law of the land' was widely understood to refer to duly enacted positive law, with a secondary connotation of appropriate judicial proceedings").

28 Chapman & McConnell, *supra* note 17, at 1684.

29 *Id.* at 1682 (quotation omitted).

interchangeable."[30]

By the time the Framers referred to "due process" in the Constitution's Fifth Amendment, generations of English lawyers had developed the concept at common law, including Edward Coke, whose views were "a chief source of early American constitutionalism."[31] Coke argued that the monarch's autonomy was limited both by positive law enacted by Parliament and common law derived from adjudication by courts.[32] Those principles were codified by Parliament with the passage of the Petition of Right in 1628, which permitted the monarch to deprive a subject of liberty only according to "the Law of the Land," "due processe of Lawe" or "by the lawfull Judgment of his Peeres."[33] This legacy shaped the text of the Due Process Clause itself. The Fifth Amendment's Due Process Clause, like the Petition of Right, uses the same syntactic structure as the Magna Carta.[34] All three texts consistently treat due process as a limit to deprivation rather than a right to liberty.[35]

In at least one important aspect, however, the British and American concepts of due process had diverged before the Constitution's drafting. While Coke viewed due process as a constraint on the executive alone, early Americans understood it to limit the legislature as well.[36] In part, this reflected the colonists' soured relationship with both the King and Parliament. But post-colonial experience also informed the American view of due process as a limitation on both political branches. Early state governments ex-

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30 Duncan v. Louisiana, 391 U.S. 145, 169 (1968) (Black, J., concurring).

31 Chapman & McConnell, *supra* note 17, at 1684; *see also* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 520 (2007) ("Coke taught that [due process and law of the land] meant using the customary and fundamental common law judicial procedures in proceedings where the life, liberty, or property of a subject was at issue . . . . It is commonly thought that the Founding generation understood 'due process of law' as Coke had.").

32 *See* Chapman & McConnell, *supra* note 17, at 1686.

33 *Id.* at 1688 (citing Petition of Right 1628, 3 Car. 1 c. 1, §§ III, IV).

34 *Compare* Magna Carta ch. 39 ("No freemen shall be taken or imprisoned or disseised [sic] or exiled or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land."), *translated in* J.C. Holt, Magna Carta 461 (2d ed. 1992) *with* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

35 *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. at 169 (Black, J., concurring) ("Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed."); Rosenkranz, *supra* note 23, at 1043 ("[F]ar from forbidding executive deprivations of life, liberty, and property, the clause expressly contemplates that the executive will deprive persons of life, liberty, and property. The central function of the clause is to create a check on such deprivations.").

36 *See* Chapman & McConnell, *supra* note 17, at 1699-1703.

perimented with forms of direct democracy that eschewed checks on legislative action.[37] Some legislatures assumed quasi-judicial functions by abolishing the right to a jury trial for certain legal disputes.[38] Such experiences informed the Framers' view that concentrating legislative, executive, and judicial functions "in the same hands is precisely the definition of [despotic] government."[39] When James Madison proposed amending the Constitution with the Due Process Clause, he recommended it be inserted in Article I, among other explicit limitations of congressional power.[40] Thus, in addition to forbidding the executive from imprisoning persons without judicial approval, the Founders understood the Clause to prohibit the legislature from affirmatively granting the Executive that power.[41]

It is common today for courts to discuss a right to due process as coterminous with an individual's "liberty interest," focusing analysis on the individual acted upon rather than the government actor.[42] But due process at its origins in both common law and American government was a structural limit on the government's ability to deprive liberty rather than a personal guarantee of freedom. The minimum understanding of the Due Process Clause therefore implies consideration of how, and not only on whom, the government acts. According to that understanding, when the government acts to deprive liberty, it must separate jailer and judge.

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37 *See id.* at 1703 ("[T]hough they to some extent separated the executive and judicial powers from the legislature, early state constitutions provided few institutional checks on legislative power.").

38 *See id.* 1706-13 (describing cases analyzing the constitutionality of the deprivation of a jury trial for disputes regarding transfer of land, seizure of property, qui tam actions, and stripping of citizenship).

39 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 170 (2d Am. ed. 1794); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 29–30 (1991) ("[T]he words 'due process of law' conveyed 'the same meaning as the words 'by the law of the land,' in *Magna Charta* " (referring to Coke's commentary and early State Constitutions), and "they were 'a restraint on the legislature as well as on the executive and judicial powers of the government.'") (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855)).

40 Chapman & McConnell, *supra* note 17, at 1722 ("[Madison] would have put the Due Process Clause in the section of Article I of the Constitution devoted to enumerating the limits on congressional power, directly following the clause prohibiting Congress from enacting bills of attainder and ex post facto laws.").

41 *Cf. Ex parte* Wilson, 114 U.S. 417, 426 (1885) ("The purpose of the [Fifth] amendment was to limit the powers of the legislature, as well as of the prosecuting officers, of the United States.").

42 *See infra* n. 163-65 and accompanying text.

II. From Jailer to Judge, and Back Again: The Executive's Dual Roles in Immigration Detention

Contemporary immigration detention raises serious structural constitutional concerns when considered alongside the historical meaning of due process as a structural separation of jailer from judge. Courts now openly question whether immigration detention is meaningfully different from criminal incarceration.[43] Both systems confine individuals to cells under penal conditions, in many cases in the same county jails and prisons.[44] Both are publicly justified as systems of deterrence.[45] Yet only in criminal incarceration does the authority to impose ongoing detention "require severance and disengagement from activities of law enforcement."[46]

Immigration detention is, instead, jointly administered by two law enforcement agencies: the U.S. Department of Homeland Security ("DHS") and the U.S. Department of Justice ("DOJ"). From arrest through appeal of an immigration detention custody determination, both DHS and DOJ blend the roles of jailer and judge, at certain points acting as both, at others trading off enforcement and adjudicatory duties. Below, I describe in greater detail the dual roles that each agency plays when detaining individuals who are contesting their deportation in removal proceedings, the administrative hearing at an immigration court that determines whether an individual charged as deportable may nonetheless remain in the United States legally.

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43 *See, e.g.*, Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469, 478 (3d Cir. 2015) ("[W]e cannot ignore the conditions of confinement. Chavez–Alvarez is being held in detention at the York County Prison with those serving terms of imprisonment as a penalty for their crimes. Among our concerns about deprivations to liberties brought about by [immigration detention] is the reality that merely calling a confinement 'civil detention' does not, of itself, meaningfully differentiate it from penal measures." (citations omitted)); Osias v. Decker, No. 17-CV-02786 (VEC), 2017 WL 3242332, at *1 n.2 (S.D.N.Y. July 28, 2017), *vacated as moot*, No. 17-CV-02786 (VEC), 2017 WL 3432685 (S.D.N.Y. Aug. 9, 2017) ("The relevant statute use[s] the term 'detain' rather than 'imprison.' The softer import of detain does not change the hard reality: individuals 'detained' by the immigration authorities are confined in prison settings.").

44 *See* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. Rev. 1346, 1382-88 (2014) (describing conditions of confinement in immigration detention).

45 *Compare id.* at 1401-02 (discussing deterrence as a traditional justification of penal incarceration), *with* R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 175 (D.D.C. 2015) ("[T]he recent surge in detention during a period of mass migration is not mere happenstance, but instead reflects a design to deter such migration.").

46 Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).

A. Decisions to Detain Made Prior to Initiation of Removal Proceedings

DHS acts as both jailer and judge, absent even review by another executive agency, in the period before it initiates removal proceedings against an individual. When arresting a suspected noncitizen, a DHS agent can obtain a pre-arrest warrant not from a neutral arbiter, but from another DHS agent.[47] However, prior arrest authorization is not required if the agent has "reason to believe that the alien . . . is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest."[48]

Subsequent to arrest, the U.S. Immigration and Customs Enforcement ("ICE"), a sub-agency of DHS, alone decides whether it will refer an arrested individual to removal proceedings and whether to keep her in detention pending the initiation and completion of those proceedings.[49] A decision to refer does not itself initiate proceedings, which begin only when ICE files a charging document with an immigration court.[50] Because no law governs the time by which ICE must file a charging document, an individual may be detained "for weeks or months awaiting . . . the scheduling of a court date because DHS has not served the [charging document] on the Immigration Court."[51]

In recent years, ICE has substantially increased its use of detention pending removal proceedings. In 94% of cases where an individual requested a bond hearing from an immigration judge, ICE has elected to continue detention pending completion of removal proceedings rather than set an initial bond.[52] About one-fourth of those detention decisions are discretionary,[53] meaning ICE decided to continue detention because it believed the individ-

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47 8 C.F.R. § 287.5(e) (2017).

48 8 U.S.C. § 1357(a)(2) (2017). Regulations require post-arrest examination by any agency officer other than the arresting officer. *See* 8 C.F.R. § 287.3(a) (2017). But, if a second officer is not "readily available" or her input "would entail unnecessary delay," the arresting officer may conduct her own examination. *Id.* DHS therefore arrests individuals without any independent oversight, ex-ante or ex-post.

49 *See* 8 C.F.R. § 287.3(d) (2017).

50 *See* 8 U.S.C. § 1229 (2017).

51 Bridget Kessler, Comment, *In Jail, No Notice, No Hearing . . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights*, 24 AM. U. INT'L L. REV. 571, 604 (2009).

52 Transactional Records Access Clearinghouse, *What Happens When Individuals are Released on Bond in Immigration Court Proceedings?*, TRACIMMIGRATION (Sept. 14, 2016), https://perma.cc/44ZY-8UAA (noting that twenty years prior to 2016, three out of four bond hearings before an IJ requested lowering a bond amount originally set by ICE).

53 *See* U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GEN., ICE's RE-

ual was a flight risk or a danger to the community.[54] The remaining three-quarters of individuals that ICE declines to release are incarcerated in mandatory detention. In these cases, ICE continues detention based on the charge of removability alone. In other words, the agency does not assess dangerousness or flight risk—the actual need for detention during removal proceedings—and will not release an individual even if she can prove she is neither. ICE's decision to detain is presumed controlling for the indefinite period that removal proceedings last—many last years.[55]

The charges that ICE believes require mandatory detention are so expansive in scope that is it difficult to consider them a rational proxy for flight risk or danger unless one imputes those qualities to all individuals in removal proceedings (an assumption that does not bear out empirically).[56] Mandatory detention charges include lacking evidence of a right to enter the country;[57] overstaying the ninety-day period prescribed by the Visa Waiver Program;[58] possessing one or more of an indeterminate class of criminal convictions;[59] and re-entering the country after receiving a removal order, even if doing so to escape persecution or torture in a foreign country.[60] Individuals charged with these violations

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LEASE OF IMMIGRATION DETAINEES 34 (2014), https://perma.cc/F55V-JCBP (76% of detained individuals were held in mandatory detention in 2013).

54 *See* 8 C.F.R. § 236.1(c)(8) (2017).

55 *See* AM. CIVIL LIBERTIES UNION, *supra* note 8, at 4-5 (highlighting individual cases where detention during removal proceedings lasted years); Transactional Records Access Clearinghouse, *Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts*, TRACIMMIGRATION (Sept. 21, 2015), https://perma.cc/6NMC-8EBM (reporting average wait time of 635 calendar days for a hearing in immigration court).

56 *See What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, *supra* note 52 (reporting that 86% of individuals released on bond subsequently report to their proceedings).

57 In Saleem v. Shanahan, No. 16-CV-808 (RA), 2016 WL 4435246, at *2 (S.D.N.Y. Aug. 22, 2016), the court noted that an asylum seeker was properly classified as an "arriving alien" pursuant to 8 C.F.R. § 1001.1(q) (2017), and was thus subject to mandatory detention under 8 U.S.C. § 1225(b) (2017), which states, "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding . . . ."

58 *See, e.g.*, Neziri v. Johnson, 187 F. Supp. 3d 211, 213 (D. Mass. 2016) (noting the government's argument that a noncitizen is detainable without bond under authority in the Visa Waiver Program statute (citing Matter of A–W–, 25 I. & N. Dec. 45 (B.I.A. 2009)).

59 8 U.S.C. § 1126(e) (2017) (forbidding custody redetermination by immigration judge for individuals described at 8 U.S.C. § 1226(c), which includes individuals charged as removable for range of indeterminate offenses classified under statutory terms of art, including, for example, crimes involving moral turpitude, aggravated felonies, and crimes of violence).

60 *See, e.g.*, Padilla-Ramirez v. Bible, 180 F. Supp. 3d. 697 (D. Idaho 2016), *aff'd*, 862

can possess widely varied incentives to abscond or indicators of dangerousness. Many have been referred to an immigration judge for assessment of humanitarian-based claims for asylum or other protection from deportation after a DHS officer found they had a credible fear of persecution in their countries of origin. Some lack substantial ties to the United States while others are longtime residents with family, homes, and jobs within the country. Some have criminal records and others do not. Of those records, some contain only one decades-old conviction that did not result in criminal incarceration.[61]

Depending on the grounds for mandatory detention, ICE claims unreviewable authority to release an individual for purposes of witness protection, urgent humanitarian reasons, or significant public benefit.[62] To secure such release, the detained individual must prove to an ICE officer's satisfaction that she will not pose a danger to property or persons, or abscond.[63] When evaluating humanitarian release requests, officers check a box on a form that contains neither factual findings nor discussion of a rationale for their decision.[64] There is no appeal of an ICE decision to deny a humanitarian release request, even to correct blatant errors, as when an ICE officer confuses two individuals' files.[65]

In sum, for the overwhelming majority of individuals detained prior to the commencement of removal proceedings, DHS both executes detention and adjudicates its propriety. In all cases, DHS alone authorizes its arrests. In close to all cases, DHS alone decides to commit the individual to long-term incarceration during removal proceedings. As many as three-quarters of those detained long-term cannot appeal DHS's decision to detain to anyone other than DHS. No other agency or court may review that appeal.

F.3d 881 (9th Cir. 2017) (finding that an individual previously deported who reentered the country and sought protection from persecution was detainable without bond).

61 *See* Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 774-76 (2012) (providing examples of individuals charged as removable due to convictions for shoplifting, turnstile jumping, and a twenty-year-old conviction for firing a gun into an empty pool).

62 8 U.S.C. §§ 1226(c)(2), 1182(d)(5) (2017).

63 8 C.F.R. § 236.1(c)(3) (2017).

64 Respondents' Supplemental Brief at 25, Jennings v. Rodriguez, 136 S. Ct. 2489 (2016) (No. 15-1204).

65 *See, e.g.*, Rodriguez v. Robbins, 804 F.3d 1060, 1081 (9th Cir. 2015), *cert. granted sub nom.* Jennings v. Rodriguez, 136 S. Ct. 2489 (2016) (identifying two blatant errors when denying requests for release, or "parole": officers had confused Ethiopia with Somalia and had mixed up two detainees' files).

B. Decisions to Detain Made Pending Removal Proceedings

While removal proceedings are ongoing, DHS and DOJ alternate blended roles of jailer and judge. Only one in four detained individuals may seek review from DOJ of DHS's decision to detain. But the impartiality of that review is compromised due to DOJ's shared immigration enforcement objectives. As currently practiced, federal court review by habeas corpus fails to address the serious constitutional concerns caused by this structure of detention decision making.

1. Executive Review of Detention During Removal Proceedings

Where the DOJ is permitted to review DHS's decision to detain pending removal proceedings, substantial barriers to impartiality exist. DOJ's detention review functions are carried out by officers from a sub-agency, the Executive Office for Immigration Review ("EOIR"), at adversarial hearings in which DHS attorneys advocate for continued detention. Initial review occurs before an officer called an immigration judge.[66] Appeal from an immigration judge is heard by another EOIR officer or panel of officers at the Board of Immigration Appeals.[67]

Though EOIR officers are referred to as "judges," they lack common structural protections that promote decisional independence from DOJ's immigration enforcement objectives. EOIR officers are not employees of an independent judicial branch, for example, but adjudicatory officers of administrative law housed in DOJ, the executive agency responsible for prosecution of immigration-related crime. Unlike other administrative law judges in the Executive Branch, EOIR officers are not bound by statutory prohibitions on ex parte communication with government counsel related to the merits of a proceeding.[68]

EOIR officers are also vulnerable to political pressure from the

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66 8 C.F.R. § 1236.1(d)(1) (2017).

67 8 C.F.R. § 1236.1(d)(3).

68 *Compare* Travis Silva, Note, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227, 264 (2012) (noting ex parte communication between government counsel and EOIR supervisory adjudicators), *with* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1022 (2006) (describing "structural rules designed to ensure impartiality" of an administrative law judge imposed by the Administrative Procedures Act, including removal after notice and hearing before a Merit Systems Protection Board and a prohibition on ex parte communications related to the merits of the proceedings). *But see* EXEC. OFFICE FOR IMMIGRATION REVIEW & NAT'L ASS'N OF IMMIGRATION JUDGES, ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES 15 (2011), https://perma.cc/V4V8-HK3T (stat-

U.S. Attorney General, who as head of DOJ shapes both the corps of EOIR officers who review detention decisions and the substance of the law they adjudicate. One Supreme Court Justice recognized this capacity to influence EOIR decision making when he described the Board of Immigration Appeals as "only advisory" to the Attorney General, noting that the agency is "neither a judicial body nor an independent agency. It is created by the Attorney General as part of his office, he names its members, and they are responsible only to him. It operates under his supervision and direction, and its every decision is subject to his unlimited review and revision."[69]

The Attorney General exercises indirect influence over EOIR detention adjudication through personnel decisions. Because EOIR officers serve at the pleasure of the Attorney General, they may be summarily fired if she disagrees with the content of their decisions.[70] Short of termination, the Attorney General can reassign EOIR officers to geographically isolated courts, or engage in partisan hiring practices.[71] Past internal DOJ investigations uncovered evidence of the "systematic use of political or ideological affiliations in screening candidates" for immigration judgeships.[72] Of the eighty-four immigration judges hired between June 2016 and June 2017, approximately three-quarters worked previously as immigration enforcement attorneys within ICE or as prosecutors within DOJ.[73] Some view this "systemic lack of institutional independence" as the root of EOIR's "inability to apply the law in an even fashion."[74] Immigration judges themselves argue that DOJ policies rob them of institutional independence to adjudicate

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ing limited circumstances in which ex parte communication between an immigration judge and a party should be permitted).

69 United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 269–70 (1954) (Jackson, J., dissenting); *see also Evolution of the U.S. Immigration Court System: Pre-1983*, U.S. DEP'T OF JUSTICE (last updated Apr. 30, 2015), https://perma.cc/QXM5-GF9G ("The BIA was and remains . . . responsible solely to the Attorney General in reviewing and deciding immigration case appeals."). The BIA was originally created by the Attorney General in 1940, 5 Fed. Reg. 3, 502 (Sept. 4, 1940). In 1983, it was subsequently placed within EOIR. 48 Fed. Reg. 8,038 (Feb. 25, 1983). However, the reorganization did not affect its independence.

70 *See* Silva, *supra* note 68, at 264.

71 *Id.*

72 U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 137 (2008), https://oig.justice.gov/special/s0807/final.pdf.

73 CATHOLIC LEGAL IMMIGRATION NETWORK, INC., IMMIGRATION COURT PRACTITIONER'S GUIDE: RESPONDING TO INAPPROPRIATE IMMIGRATION JUDGE CONDUCT 8 (2017), https://perma.cc/7WNF-KMJN.

74 Silva, *supra* note 68, at 264.

whether an individual may safely be released on bond.[75] Federal courts sitting in review of EOIR have called it "the least competent federal agency,"[76] noting "excessive judicial passivity,"[77] a "disturbing pattern of . . . misconduct,"[78] and findings "grounded solely on speculation and conjecture."[79] Judges at the U.S. Courts of Appeals have concluded "that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice,"[80] and that federal courts provide "the first meaningful review that the petitioner has . . . ."[81]

The Attorney General's influence over EOIR detention decisions can also take a more direct form in response to political pressure from the executive. She may refer for her own consideration any EOIR custody decision and summarily reverse it without notice to the detained individual.[82] Upon referral, she may receive additional evidence and make de novo factual and legal determinations that a detained individual may not have an opportunity to contest.[83] The Attorney General may also control the substantive crite-

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75 *See* Legomsky, *supra* note 13, at 373.

76 Chavarria–Reyes v. Lynch, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting).

77 Bouras v. Holder, 779 F.3d 665, 682 (7th Cir. 2015) (Posner, J., dissenting), *reh'g en banc granted, opinion vacated sub. nom.* Bouras v. Lynch, No. 14-2179, 2015 BL 224445 (7th Cir. July 14, 2015).

78 Qun Wang v. Attorney Gen. of the U.S., 423 F.3d 260, 268 (3d Cir. 2005).

79 Jin Chen v. U.S. Dep't of Justice, 426 F.3d 104, 115 (2d Cir. 2005).

80 Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005).

81 Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. Times (Dec. 26, 2005), https://perma.cc/322Y-A2PL (quoting John M. Walker Jr., chief judge of the U.S. Court of Appeals for the Second Circuit, at a conference in September of 2005).

82 *See* 8 C.F.R. § 1003.1(h) (2017); *see also* Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 Iowa L. Rev. Online 129, 133 (2017) ("[T]he referral and review mechanism lacks 'notice to the parties and publication of intent to refer a case, notice upon actual referral for review, and the identification of issues to be resolved by the Attorney General and an opportunity to submit briefing.'" (quotation omitted)); Justin Chasco, Comment, *Judge Alberto Gonzales? The Attorney General's Power to Overturn Board of Immigration Appeals' Decisions*, 31 S. Ill. U.L.J. 363, 381 (2007) ("The power to overturn a Board decision decreases the independence of the Board by giving the chief policy maker direct oversight of decisions of the Board.").

83 *See* Matter of D-J-, 23 I. & N. Dec. 572, 575 (A.G. 2003) (when hearing a case on referral, the Attorney General retains full authority to receive additional evidence and to make de novo factual determinations); Matter of Joseph Patrick Thomas Doherty, 12 Op. O.L.C. 1, 4 (1988) ("[R]espondent was notified that the Attorney General would consider [evidence not previously considered by BIA or immigration judge] and was given an opportunity to respond on the merits to the facts and reasoning contained in it, an opportunity which respondent has exercised."). *But see* Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. 1766, 1778-79 (2010) (discussing Matter of Silva-Trevino, I. & N. Dec. 687 (A.G. 2008), where counsel only

ria by which EOIR adjudicators make future custody decisions by designating a case as binding precedent.[84] In *Matter of D-J-*, the Attorney General reversed decisions by an immigration judge and the Board of Immigration Appeals to release an individual seeking asylum. His decision was reasoned from explicitly political grounds, or what he termed "sound immigration policy:"[85] general deterrence of future asylum seekers,[86] and a desire for increased security after the attacks of September 11, 2001.[87] He designated the decision precedential, effectively ordering all EOIR officers to rely on non-individualized criteria to deny release to persons seeking asylum.[88]

Procedural barriers raised by DOJ rulemaking further stymie impartial detention review. A custody review by DOJ comes only if the detained individual knows to request one. A universal right to government-appointed counsel in removal proceedings has not been recognized, and only 18% of pro se individuals in detention receive a custody review before DOJ, compared with 44% of those with representation.[89] Uniquely in U.S. detention law, at an immigration custody hearing the detained individual bears the burden of persuading the adjudicator that she should be released.[90] Finally, where DOJ grants release, DHS may once again assume the role of detention adjudicator by automatically staying release through a ministerial filing.[91] Separately, the Board of Immigration Appeals may preliminarily stay a release order on its own discretion while it considers a DHS appeal.[92] Neither a showing of likelihood of success on the merits of an appeal nor irreparable harm if release is granted is required for a stay to take effect.

Individuals in mandatory detention lack even the limited avenues of detention review described above. If a mandatorily de-

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received notice of referral to Attorney General, but provided no indication of the reasons for the referral, the issues to be considered on review, or any briefing schedule or procedures to be followed).

84 *See* Matter of D-J-, 23 I. & N. Dec. 572, 581 (A.G. 2003) ("[T]his opinion constitutes binding precedent, requiring the BIA and IJs to apply the standards set forth herein.").

85 *Id.* at 579.

86 *Id.* 577-81.

87 *Id.*

88 *Id.* at 581-83 (designating decision precedential and questioning the constitutional need for individualized custody hearing, stating that non-individualized criteria can justify detention).

89 *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 70-71 (2015).

90 8 U.S.C. § 1229a(c)(2) (2017); *see also* Matter of Guerra, 24 I. & N. Dec. 37, 38 (BIA 2006).

91 8 C.F.R. § 1003.19(i)(2).

92 *Id.* § 1003.19(i)(1).

tained individual requests a custody review before DOJ, the agency denies jurisdiction to make a determination of dangerousness or flight risk.[93] Those detained due to a prior criminal conviction may seek a narrower form of review from an immigration judge that does not concern dangerousness or flight risk, but instead asks the detained individual to prove that she was erroneously incarcerated because DHS is "substantially unlikely to establish the charge of deportability."[94] The burden of persuasion in this posture has been criticized by one Court of Appeals judge as "all-but-insurmountable."[95]

DOJ review of DHS detention decisions therefore fails to meaningfully separate the jailer from the judge. Only a quarter of DHS's detention decisions are reviewable by DOJ at all. That review takes place before an adjudicator appointed by the executive's chief law enforcement officer, under procedural and substantive rules enacted in response to the executive's immigration enforcement priorities. If a DOJ adjudicator orders release from detention, her decision is summarily reversible by an immigration enforcement officer from DHS or the Attorney General.

2. Habeas Corpus During Removal Proceedings

If an individual challenges immigration detention pending removal proceedings by habeas corpus in federal court, DOJ and DHS collaborate to advocate for continued confinement. Prior to the filing of a habeas petition, DHS may transfer a detained individual to a jurisdiction where her claims for release or review are restricted by unfavorable law.[96] In federal court, DOJ represents DHS in opposition to the detained individual's release, advancing arguments in defense of detention that DHS did not make in immigration court. In cases of mandatory detention, for example, DHS is not required to justify to an immigration judge the constitu-

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93 Matter of Joseph, 22 I. & N. Dec. 799, 802 (BIA 1999) ("The regulations generally do not confer jurisdiction on Immigration Judges over custody or bond determinations respecting those aliens subject to mandatory detention.").

94 The standard was created by the BIA in Matter of Joseph, 22 I. & N. Dec. 799, 806. (BIA 1999). More than 90% of *Joseph* hearing appeals result in continued detention. *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65, 74 tbl.2 (2011).

95 Tijani v. Willis, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring).

96 *See, e.g.*, Calla-Collado v. Att'y Gen. of the U.S., 663 F.3d 680, 685 (3d Cir. 2011) (stating that a transfer to another state did not violate constitutional rights because the detainee had the same rights and privileges, such as the right to present evidence and witnesses, whether the deportation proceeding was in Louisiana or New Jersey).

tionality of its opposition to a bond hearing.[97] But before a federal judge at habeas, DOJ supplies the missing constitutional argument that, if accepted, permits continued detention of the habeas petitioner without review of the individual need for detention.

Some lower courts have used the mere availability of habeas corpus to dismiss due process challenges to detention adjudication by the executive.[98] But due process in detention decisions and the availability of habeas are distinct questions.[99] Moreover, habeas as currently administered fails to enforce the separation of judge and jailer that due process demands. Congress has legislated the Executive's role as judge in immigration detention by denying federal courts jurisdiction to review dangerousness or flight risk, the actual need for an individual's detention.[100] Habeas challenges are therefore limited to constitutional or statutory interpretation questions concerning the detention framework.[101] A common habeas challenge to mandatory immigration detention, for example, argues that the Due Process Clause prohibits detention for a prolonged period without an individualized finding of dangerousness or flight risk.[102] The Courts of Appeals that have reached the issue universally agree that, at some point, detention becomes illegal if such an individualized finding is not made.[103] But federal courts that find a detention illegally prolonged commonly order a bond hearing rather than release.[104] In most cases, they decline to adjudicate the bond hearing, instead ordering an immigration judge to do so.[105]

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97 *See, e.g.*, United States v. Gonzalez-Roque, 301 F.3d 39, 47 (2d Cir. 2002) ("[C]onstitutional claims lie outside the BIA's jurisdiction . . . .").

98 *See, e.g.*, Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1255 (10th Cir. 2008) ("[A]liens who believe that their continued detention is unlawful may challenge ICE's determination by seeking a writ of habeas corpus in federal court. This is sufficient to satisfy the requirements of the Due Process Clause."); Levario-Garcia v. Prim, No. 16 C 11364, 2017 WL 1181592, at *3 (N.D. Ill. Mar. 29, 2017) ("Simply asserting that a third party should be the decision maker in a post custody review is not sufficient to show a due process violation, and as such, the court finds Levario-Garcia's due process claim to be without merit.").

99 *See infra* note 129 (discussing Court's refusal to decide whether extraterritorial detainees were entitled to due process in addition to habeas corpus review).

100 8 U.S.C. § 1226(e) (2017).

101 *See* Demore v. Kim, 538 U.S. 510, 516-17 (2003).

102 *See* Sopo v. U.S. Attorney Gen., 825 F.3d 1199 (11th Cir. 2016); Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015); Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011); Hoang Minh Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003).

103 *See* Sopo, 825 F.3d at 1199; *Reid*, 819 F.3d at 486; Lora, 804 F.3d at 601; Rodriguez, 804 F.3d at 1060; Diop, 656 F.3d at 221; Hoang Minh Ly, 351 F.3d at 263.

104 *See* Sopo, 825 F.3d at 1199; Reid, 819 F.3d at 486; Lora, 804 F.3d at 601; Rodriguez, 804 F.3d at 1060; Diop, 656 F.3d at 221; Hoang Minh Ly, 351 F.3d at 263.

105 *See, e.g.*, Chiao Fang Ku v. Bowen, No. 17-CV-00760, 2017 WL 2888584, *2 (M.D.

Thus, courts find ongoing confinement to be unconstitutional, but nonetheless remand to the law enforcement agency opposing release for the ultimate decision as to whether an individual should be detained.[106]

Effective habeas review is also hampered by more practical matters. Ex-post habeas review of the executive's ex-ante detention adjudication often arrives too late to check the Executive's role as ultimate arbiter of immigration detention.[107] Federal courts already face a historical surge in their immigration dockets.[108] As the number of detained individuals has increased, so too have the number of habeas petitions challenging detention.[109] Depending on the circuit, review of an immigration detention habeas petition takes, on average, from five-and-a-half to nineteen months.[110] By the time a habeas petition is adjudicated, the detained individual may have been released because she renounced a meritorious claim for immigration status and accepted deportation, unable to withstand indefinite incarceration.[111] Where the deportation case ended in a grant or maintenance of immigration status while a habeas petition was pending, released individuals were forced to endure a detention in which they should never have been held.[112]

Under the current system of post-hoc, limited judicial review,

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Pa. June 7, 2017) ("Federal courts frequently defer to immigration judges under these circumstances, as opposed to conducting their own bond hearings." (citations omitted)).

106 *Cf.* Leamer v. Fauver, 288 F.3d 532, 540 (3d Cir. 2002) ("The underlying purpose of proceedings under the Great Writ of habeas corpus has traditionally been to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful." (quoting Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review,* 114 HARV. L. REV. 1551, 1553-54 (2001)) (internal quotations omitted)).

107 *Cf.* United States v. U.S. Dist. Court for E. Dist. of Mich., 407 U.S. 297, 317–18 (1972) ("The independent check upon executive discretion is not satisfied, as the Government argues, by 'extremely limited' post-surveillance judicial review." (footnote omitted)).

108 *See, e.g.*, Lora, 804 F.3d at 615-16 (noting the surge of the immigration dockets' size in the Second and Ninth Circuits) (citing John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis,* 51 N.Y. L. SCH. L. REV. 13, 14 (2006-2007)).

109 Transactional Records Access Clearinghouse, *Suits Challenging Confinement of Noncitizens Jump*, TRACREPORTS (Feb. 21, 2017), https://perma.cc/TWN4-QDXG (showing a 76% increase in habeas suits challenging immigration detention in five-year period from 2012 to 2017).

110 *See* Brief of Amici Curiae Americans for Immigrant Justice, et al. in Support of Respondents at 31, Jennings v. Rodriguez (2016) (No. 15-1204), 2017 WL 564164.

111 *See, e.g.*, *id.* at *13-17.

112 *See, e.g.*, *id.* at *19-21 (describing individual cases where the noncitizen placed in removal proceedings had legal status to remain in the United States).

contemporary immigration detention has surged in scope and diminished in precision. Immigration detention is now "the largest detention and supervised release program in the country."[113] Today, the executive branch holds over 40,000 people a day in immigration detention,[114] a more than five-fold increase in the daily detention population since reforms to detention law in 1996.[115] The current president has pledged to "deport or incarcerate" two to three million noncitizens.[116] Meanwhile, as much as 11.7% of removal cases are terminated because the government cannot prove alienage or deportability.[117] Even more sobering, about 1.5% of immigration detention and removal decisions are carried out against citizens.[118] By these percentages, a hypothetical target of three million enforcement actions means erroneous detention or deportation of as many as 351,000 noncitizens and 45,000 citizens. Limited, post-hoc habeas review from a detention cell or foreign country is an insufficient protection for deprivations of liberty of such magnitude.

III. Uncovering Structural Due Process in Immigration Detention Case Law

If the Due Process Clause demands a separation of jailer and judge in immigration detention, why have courts not so explained in previous decisions? While the Supreme Court has yet to explicitly acknowledge the historical roots of structural limitations on government detention, evidence of its views on the matter can be discerned from the modern immigration detention cases *Zadvydas v. Davis* and *Demore v. Kim*.[119] In each case, the rationales of the majority and dissenting opinions hinged on a central assumption

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113 Dora Schriro, Immigration and Customs Enf't, U.S. Dep't of Homeland Security, Immigration Detention Overview and Recommendations 2 (2009), https://perma.cc/AZJ4-N2EQ.

114 Devlin Barret, *Record Immigrant Numbers Force Homeland Security to Search for New Jail Space*, Wall Street J. (Oct. 21, 2016, 5:30 AM), https://perma.cc/7WD3-WM4A.

115 Schriro, *supra* note 113, at 2 (reporting an average daily population of 7,500 in 1995); *see also* Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 Ind. L.J. 157, 176-78 (2016) (describing how law reforms in the 1990s increased the use of immigration detention).

116 *60 Minutes: The 45th President* (CBS News broadcast Nov. 13, 2016), https://perma.cc/2EKF-GVGN.

117 Transactional Records Access Clearinghouse, *Share of Immigration Cases Ending in Deportation Order Hits Record Low*, TRACImmigration (Feb. 7, 2012), https://perma.cc/T3N5-PVTC.

118 Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. 606, 629 (2011).

119 Demore v. Kim, 538 U.S. 510 (2003); Zadvydas v. Davis, 533 U.S. 678 (2001).

of due process as either a structural limit on the government's ability to detain or an individual right to liberty. Where due process was interpreted as a structural limit, the Court expressed greater skepticism of the constitutionality of the government's detention practices. Below, I examine discussions of these issues in *Zadvydas* and *Demore*. I then conclude with proposals on how courts might separate the jailer from the judge in immigration detention.

Before turning to the cases, I consider a challenge to the argument that consideration of structural implications of due process leads to a meaningfully different constitutional analysis of immigration detention. Perhaps a structural *limit* on government actually derives from a personal *right* to due process. If that were the case, then a noncitizen's right to invoke structural limits would arguably be limited by the same restrictions that deny her the right to procedural protections. It would thus make no difference whether a noncitizen's due process challenge to immigration detention was analyzed through the lens of limits or rights.[120]

In many areas of law, in fact, the "line dividing structural limitations from individual rights 'is elusive at best, if not downright illusory.'"[121] Substantive rights—to assemble and petition, to criminal trial by jury, to freedom from unreasonable searches and seizures—protect individuals by limiting government action based on structural principles of representation or separation of powers.[122] In this sense, "there is no hermetic separation between individual rights and structural or systemic processes of governance."[123] Instead, constitutional "rights" can be understood as "linguistic or rhetorical tools the law deploys for pragmatic reasons and aims," which exist in order "to maintain appropriate structural relationships of authority."[124]

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120 *See* Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2054 (2005) ("[A] person seeking to resist governmental action must usually invoke a right sufficient to overcome the exercise of government power. And indeed, modern due process jurisprudence is typically concerned with what rights are contained in the Due Process Clause, rather than the limits of governmental power." (footnotes omitted)).

121 Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1654 (2013) (quoting Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 276 (2008)).

122 *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1205 (1991) ("Like the original Constitution, the original Bill of Rights was webbed with structural ideas.").

123 Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 3 (2010).

124 Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD 725, 730, 734 (1998).

How rights function in law generally, however, does not accurately describe how they function in immigration doctrine, where the individual entitlement to constitutional rights is not assumed.[125] Instead, the degree to which a person possesses a particular right depends on immigration status, with some rights possessed only by citizens or, in some cases, individuals with a specific type of immigration status.[126] It is this very argument that the government has used to justify indefinite detention of noncitizens without judicial review.[127] When courts accept this argument, the "right" to due process affords limited or no protection of a noncitizen's liberty.

In contrast, reasoning from structural limits on the government's ability to detain has resulted in protection of noncitizens' liberty. In *Boumediene v. Bush*, for example, the Court found within the Suspension Clause a constitutional limit to the executive's authority to detain noncitizens without judicial review.[128] Even assuming without deciding that Guantanamo detainees had no personal right to due process, the Court evoked "troubling separation-of-powers concerns" to hold that the detainees could challenge their detention at habeas.[129] In its opinion, the Court viewed the Constitution's separation-of-powers structure to be like the substantive guarantees of the Fifth and Fourteenth Amendments in that they both protect persons as well as citizens.[130] That common protec-

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125 *See, e.g.*, Demore v. Kim, 538 U.S. 510, 522 (2003) ("[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.") (citing Zadvydas v. Davis, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens . . . .")).

126 *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application. . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.") (citations omitted).

127 *See* Zadvydas, 533 U.S. at 692 ("The Government argues that, from a constitutional perspective, alien status itself can justify indefinite detention . . . .").

128 Boumediene v. Bush, 553 U.S. 723 (2008) (holding that noncitizens detained as enemy combatants in Guantanamo Bay may seek judicial review of their detention by habeas corpus).

129 *See id.* at 764. The Court in *Boumediene* left unanswered the question of whether the substitutes for habeas review provided by the government satisfied the Due Process Clause. *See id.* at 785.

130 *Id.* at 743 (citing Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886)). Both separation of powers and the amendments presumably protect individual liberty. *Boumediene* permitted noncitizens to challenge their detention through habeas corpus. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), cited in *Boumediene* as support for a substantive guarantee of the Fourteenth Amendment, the Court discontinued the detention of Chinese petitioners who were imprisoned under a state law for operating laundry

tion can be explained by a shared structural principle that government must separate jailer from judge when depriving an individual of liberty. Thus, "foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principle[s],"[131] expressed not only in the Suspension Clause, but in the Due Process Clause as well.

As *Boumediene* affirms, where invocation of personal rights has failed to constrain the government from depriving a noncitizen of liberty without meaningful procedural protections, reliance on structural limits may succeed.[132] Thus, even if individual rights and structural limits are generally indistinguishable, in the law of noncitizen detention there exists a material distinction between constitutional protection that is structural—"the government may not detain without judicial review"—and personal—"the government may not detain *me* without judicial review."[133] *Boumediene* was decided after the Court's most recent reviews of the constitutionality of immigration detention practices in *Zadvydas* and *Demore*.[134] But as explained below, its distinction between personal and structural rights was already present in immigration detention doctrine.

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businesses in wooden buildings without a permit. The *Yick Wo* Court considered the permit-granting system to give state officers "authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will." *Id.* at 356-57. Though holding the permit system a violation of the Equal Protection Clause, the Court's focus on preventing "purely arbitrary" enforcement that "acknowledges neither guidance nor restraint" recalls the rationale for structural separation of jailer and judge contained in the Due Process Clause.

131 Boumediene v. Bush, 553 U.S. at 743 (citing INS v. Chadha, 462 U.S. 919, 958–59 (1983)); *cf.* Bond v. United States, 564 U.S. 211, 223–24 (2011) (Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism.").

132 *See also* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 914 (1991) ("In particular situations, someone who lacks a constitutional right may nonetheless be sufficiently protected by an enforceable nonconstitutional norm . . . .").

133 *Boumediene* is not typically thought of as an immigration case, as the executive relied on military rather than immigration detention authority at Guantanamo. *See also* Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1835 (2011) ("[E]xecutive detention of immigrants and alleged 'enemy combatants' has unsurprisingly spawned numerous court challenges and entire fields of academic scholarship. But despite their similarities, the two forms of detention have not been compared . . . ."). But if a constitutional limit on the executive's ability to alone adjudicate detention exists for noncitizen enemy combatants, it is difficult to deny the same for noncitizen noncombatants.

134 Demore v. Kim, 538 U.S. 510 (2003); Zadvydas v. Davis, 533 U.S. 678 (2001).

A. Zadvydas v. Davis

Zadvydas v. Davis concerned a statute that permitted "indefinite, perhaps permanent" detention following a final order of removal.[135] Both petitioners in the consolidated case had been ordered removed, but one was stateless and the other hailed from a country that lacked a repatriation agreement with the United States.[136] The U.S. government was therefore unable to execute their removal orders. Relying on a statute that stated "the Government 'may' continue to detain an alien who still remains here" ninety days after a removal order has been issued, the government opted to detain them indefinitely.[137] In order to make the decision for indefinite detention, a panel staffed by the jailer (at that time, Immigration and Naturalization Services, or "INS") reviewed the individual detainee's file and optionally conducted an interview.[138] In order to secure release, the detainee bore the burden of proving she was neither dangerous nor likely to flee.[139] If release were denied, the panel would review the continued need for detention either within a year, or, at the panel's discretion, within a shorter time,.[140]

Writing for the majority, Justice Breyer noted that the Due Process Clause mandates that a deprivation of liberty "bear[ ] [a] reasonable relation to the purpose for which the individual [was] committed."[141] The detention at issue in *Zadvydas* appeared to lack that reasonable relation because while the government claimed it was for the purposes of carrying out removal, the individuals detained might never be removed.[142] The majority therefore found that serious constitutional concerns compelled a reading of the statute that did not authorize indefinite detention.[143] Instead, the statute permitted detention for a presumptively reasonable period of six months.[144] After that period, a detained person could seek review of her confinement by habeas, and "if removal is not reasonably foreseeable, the court should hold continued detention un-

135 Zadvydas, 533 U.S. at 692.
136 *Id.* at 684-87.
137 *See id.* at 683 (citing 8 U.S.C. § 1231(a)(6) (2017)).
138 *Id.* (citing 8 C.F.R. § 241.4(i) (2017)).
139 *Id.* at 678, 683 (citing 8 C.F.R. § 241.4(d)(1)).
140 *Id.* at 684 (citing 8 C.F.R. § 241.4(k)(2)(iii), (v)).
141 Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972)) (alterations in original).
142 *Id.* at 690 ("[B]y definition the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best.")
143 *Id.* at 699.
144 *Id.* at 701.

reasonable and no longer authorized by statute."[145] Both petitioners' cases were remanded to district courts to analyze whether removal was reasonably foreseeable. In the case of the petitioner whose country of origin refused to accept deportees, the district court was to give "due weight to the likelihood of successful future negotiations" for repatriation.[146]

Zadvydas was a holding of statutory interpretation, but seven Justices, including two dissenters, agreed that, at a minimum, "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious."[147] The reasons for that agreement indicate how the Court might decide questions of structural due process in immigration detention. The majority framed its opinion in terms of proper institutional roles, summarizing the government's rejected position as "'whether to continue to detain such an alien and, if so, in what circumstances and for how long' is up to the Attorney General, not up to the courts."[148] In contrast, the dissents focused squarely on the limited access that noncitizens had to due process rights. The opinions thus hinged on whether freedom from arbitrary detention was a matter of structural limits or individual rights.

The majority's constitutional analysis began by noting that the Due Process Clause forbids the government to act in certain manners.[149] The serious constitutional problem caused by the statute at issue was obvious, in part, because the sole procedural protections available were administrative proceedings without significant later judicial review.[150] The Due Process Clause placed important constitutional limitations on Congress's plenary power to create immigration law, limitations that went beyond "freedom from detention that is arbitrary or capricious."[151] In fact, the majority opined, "[t]he Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights."[152] Because of such constitutional concerns, the majority rejected the government's argument that the

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145 *Id.* at 699-700.

146 *See id.* at 702.

147 Zadvydas v. Davis, 533 U.S. 678, 695, 721 (2001) (Kennedy, J., dissenting).

148 *Id.* at 689.

149 *Id.* at 690.

150 *Id.* at 691; *see also* Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) ("[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process.").

151 Zadvydas v. Davis, 533 U.S. 678, 694-95 (2001).

152 *Id.* at 692 (quoting Superintendent, Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445, 450 (1985)) (internal quotations omitted).

judicial branch must defer to executive and legislative decision making in immigration detention matters.[153]

Numerous structural due process concerns were voiced in the majority opinion. The Due Process Clause was interpreted as a limiting principle that forbade the government from acting, rather than a declaration of a right to liberty variable according to immigration status.[154] The serious constitutional problem at issue was "obvious" because a determination of a fundamental right—freedom from detention—was left to the executive alone, without "significant" judicial review. The Due Process Clause therefore provided a structural right to a separation of jailer and judge, such that the judiciary need not defer to the political branches' determinations of an individual's liberty. The habeas remedy envisioned by the majority reinforced this structural due process guarantee. The Court rejected the government's proposed compromise solution to the constitutional problem: a habeas action where the reviewing court would largely defer to "the Government's view about whether the implicit statutory limitation is satisfied in a particular case, conducting little or no independent review of the matter."[155] Ultimately, independence in detention decision making was the remedy for the Court's serious constitutional concerns.

Viewed in this light, *Zadvydas* concerned not only the minimal due process rights of a noncitizen in indefinite detention, but the judiciary's constitutionally structured role as an independent reviewer of a deprivation of liberty carried out by the political branches.[156] This structural focus distinguished the Court's due process analysis from the typical rights-based paradigm used in immigration cases and aligned it instead with *Boumediene*, an executive detention case concerned with structural limits and separation of powers. The structural point was bolstered by the majority's directive that habeas courts "take appropriate account of [the executive branch's immigration-related expertise] without abdicating their legal responsibility to review the lawfulness of an alien's continued detention."[157] The legal responsibility of detention review

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153 *See id.* at 695.

154 The majority's phrasing moves beyond the syntax of the Clause itself, which does not specify to whom it is addressed. *See* Rosenkranz, *supra* note 23, at 1041 ("[The Due Process Clause] is written in the passive voice. It invites the question *deprived by whom*?" (emphasis in original)).

155 Zadvydas, 533 U.S. at 699.

156 The Court's defense of individual rights in the case is tepidly expressed as "an alien's liberty interest is, at the least, strong enough to raise a serious question" regarding the constitutionality of indefinite detention. *Id.* at 696.

157 *Id.* at 700.

fell to the judiciary alone, even in matters touching immigration.

In contrast, the dissenters assumed that *Zadvydas* was, at heart, an individual rights case. Justice Scalia began with a "careful description" of the substantive right claimed:[158] a "right of release into this country by an individual who concededly has no legal right to be here."[159] Assuming that a noncitizen had a diminished personal right to due process, he then concluded that the political branches could authorize and execute her indefinite detention.[160]

Justice Kennedy's dissent also relied on an assumption of a diminished personal right. He found fault with the majority for its misunderstanding of the petitioners' liberty interests.[161] He considered those interests, and thus the rights that protected them, "subject to limitations and conditions not applicable to citizens . . . ."[162] That preliminary conclusion decided the question before him. Reasoning from the diminished personal right, Justice Kennedy overlooked the executive's role in adjudicating the propriety of detention without significant judicial review. He thus found that removable persons held pending deportation have "a due process liberty right to have the INS conduct the review procedures in place"—the right to detention review by the jailer.[163] For individuals without any prospects of relief from deportation, ex-post, limited habeas review was a suitable check on an erroneous deprivation of liberty. If, for example, the jailer were "to deny an alien access to the administrative processes in place to review continued detention, habeas jurisdiction would lie to redress the due process violation caused by the denial . . . ."[164]

Nonetheless, Justice Kennedy showed concern for structural constitutional considerations when he accused the majority of "committing its own grave constitutional error" by ordering lower courts to review the likelihood of successful repatriation negotia-

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158 *Id.* at 702 (Scalia, J., dissenting) (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

159 *Id.* at 703 (Scalia, J., dissenting).

160 *Id.* at 703 (Scalia, J., dissenting).

161 Zadvydas v. Davis, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting) ("As persons within our jurisdiction, the aliens are entitled to the protection of the Due Process Clause.").

162 *Id.* (Kennedy, J., dissenting) (citing Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.")).

163 *Id.* at 721 (Kennedy, J., dissenting).

164 *Id.* at 724 (Kennedy, J., dissenting). Presumably, Justice Kennedy's habeas court would remand to the executive for administration of the denied procedures. See discussion *infra* Section II, for a discussion of the problems with the remedy.

tions.[165] His concern was the perceived "systemic dislocation in the balance of powers" caused by requiring the executive to give the judiciary an account of negotiations related to international relations.[166] But the majority's habeas remedy did not assume the executive's role to negotiate a repatriation agreement. It simply asked for an evidence-based representation of the progress made toward that agreement.

The executive's role in adjudicating immigration detention is an even more direct example of the "systemic dislocation" that preoccupied Justice Kennedy in *Zadvydas*. Toward the conclusion of his dissent, he expressed interest in addressing that matter when he asked rhetorically "whether, and to what extent, a habeas court could review the Attorney General's determination that a detained alien continues to be dangerous or a flight risk,"[167] and alluded to the possible existence of "substantial questions concerning the severity necessary for there to be a community risk; the adequacy of judicial review in specific cases where it is alleged there is no justification for concluding an alien is dangerous or a flight risk; and other issues."[168] His proposed constitutional safeguard in *Zadvydas* even acknowledged a role for the judiciary, suggesting that courts "review a single, discrete case deciding whether there were fair procedures and adequate *judicial* safeguards to determine whether an alien is dangerous to the community so that long-term detention is justified."[169]

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165 *Id.* at 705 (2001) (Kennedy, J., dissenting).

166 Zadvydas v. Davis, 533 U.S. 678, 705 (Kennedy, J., dissenting). According to Justice Kennedy, this was a serious misconception of the proper judicial function because it carried the possibility of questioning the executive "respecting its ongoing negotiations in the international sphere." *Id.* at 725.

167 *Id.* at 724 (Kennedy, J., dissenting).

168 *Id.* at 724-25 (Kennedy, J., dissenting).

169 *Id.* at 725 (Kennedy, J., dissenting) (emphasis added). The specification of a judicial safeguard contradicted Justice Kennedy's earlier suggestion that "the review process need not include a judicial officer or formal court proceeding, but could be conducted by a neutral administrative official." 533 U.S. 678 at 723 (Kennedy, J., dissenting) (citing Morrissey v. Brewer, 408 U.S. 471, 486 (1972)). Justice Kennedy borrowed that suggestion from *Morrissey v. Brewer*, a challenge to the review process for parole eligibility and revocation. *Morrissey*, 408 U.S. 471. The analogy appears closer if reasoned from the individual rights paradigm, in which an individual with a criminal conviction, like an individual with an order of removal, has a lesser liberty interest and thus a lesser right to due process. However, the use of a nonjudicial officer in the parole context could also be consistent with the division of jailer and judge because of extensive judicial participation in the underlying criminal matter. The decision to impose a criminal sentence, after all, is typically made by the judiciary, at the resolution of a proceeding a judicial officer oversaw and administered for fairness.

B. Demore v. Kim

Two years after deciding *Zadvydas*, the Court considered the constitutionality of mandatory detention, or incarceration without a bond hearing, of a lawful permanent resident ("LPR") during removal proceedings. In *Demore v. Kim*, the Court held that Congress may require that noncitizens be detained without bond for the brief period necessary for their removal proceedings.[170] At its most expansive, that holding would permit detention without bond for the indefinite period that removal proceedings last. The Courts of Appeals have unanimously disagreed with that reading of *Demore*, however, limiting mandatory detention to a reasonable period, after which a bond hearing is constitutionally compelled.[171] As of this writing, the scope of *Demore*'s holding remains pending before the Supreme Court, one of several issues in *Jennings v. Rodriguez*.[172]

Concern with systemic infirmities, rather than individual liberties, animated the *Demore* majority's opinion. The majority focused on the "wholesale failure by the INS to deal with increasing rates of criminal activity by aliens."[173] It argued that the executive's "near-total inability to remove deportable criminal aliens" was a systemic flaw of immigration enforcement, supporting its conclusion with statistics on noncitizen criminal incarceration and criminal and immigration recidivism that Congress had considered when authorizing mandatory detention.[174] Writing in dissent, Justice Souter critiqued the majority's systemic focus, arguing that "the only reasonable starting point is the traditional doctrine concerning the Government's physical confinement of individuals."[175]

Still, both the majority opinion and Justice Souter's dissent adopted the individual rights-focused analyses of the dissents in *Zadvydas*. Systemic considerations were only relevant to the majority because it had already decided that noncitizens possessed diminished or no individual due process rights. It therefore "endorsed the proposition that Congress may make rules as to

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170 Demore v. Kim, 538 U.S. 510, 513 (2003).

171 *See* Sopo v. U.S. Attorney Gen., 825 F.3d 1199 (11th Cir. 2016); Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015); Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011); Hoang Minh Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003).

172 Jennings v. Rodriguez, 136 S. Ct. 2489 (2016) (granting cert.).

173 Demore, 538 U.S. at 518 (citations omitted).

174 *Id.* at 518-19.

175 *Id.* at 547 (Souter, J., concurring in part and dissenting in part) (footnote omitted).

aliens that would be unacceptable if applied to citizens," including statute-based categorical presumptions of dangerousness and flight risk that might not be speedily judicially reviewed.[176] Under this rights-focused analysis, when the government deals with deportable persons, the Due Process Clause does not require compliance with traditional constitutional restrictions on the deprivation of liberty.[177]

Justice Souter's dissent disagreed with the majority's conclusion, but not its analytical framework.[178] Grounding his constitutional analysis in discussion of rights rather than limits, he viewed noncitizens residing in the United States as "entitled" to the safeguards of the Constitution.[179] In his view, the majority simply weighed the rights at issue incorrectly, "forget[ting] over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process."[180]

As a result, Justice Souter felt obligated to address the extent to which a noncitizen possessed a personal right to due process. He argued that a lawful permanent resident deserved due process because of "practical" similarities with a citizen: domestic domicile, payment of taxes, military service,[181] "stronger family, social, and economic ties here than some who have become naturalized citizens[,]" and the ability to apply for citizenship.[182] He then insisted that his analysis would only determine the constitutionality of mandatory detention of LPRs.[183] But why? Like an LPR, an un-

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176 *See id.* at 522 (citing Zadvydas v. Davis, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens.")).

177 *See id.* at 528.

178 Justice Souter briefly hinted at the separation of powers guarantees that the Due Process Clause carries. In a footnote, he questioned "whether due process requires access to any particular arbiter, such as one unaffiliated with the INS." *Id.* at 540 n.1 (Souter, J., concurring in part and dissenting in part).

179 Demore v. Kim, 538 U.S. 510, 543 (2003) (Souter, J., concurring in part and dissenting in part) (emphasis added) ("Aliens 'residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility.'" (quoting Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893)).

180 *Id.* at 541 (Souter, J., concurring in part and dissenting in part).

181 *See id.* at 544-45 (Souter, J., concurring in part and dissenting in part) (citations omitted).

182 *Id.* at 545 (Souter, J., concurring in part and dissenting in part) (citing Woodby v. INS, 385 U.S. 276, 286 (1966)).

183 *Id.* at 547 n.8 (Souter, J., concurring in part and dissenting in part).

documented or out-of-status noncitizen might live here, pay taxes, and develop strong family, social, and economic ties. Is military service, which LPRs alone among noncitizens may undertake, to be understood as the source of an individual right to constitutional due process? Or is Congress's decision to "establish a uniform rule of naturalization" for LPRs through a citizenship application subject to discretionary approval the necessary condition for due process?[184] If so, it would seem that Congress, rather than the Constitution, grants due process rights, a conclusion that Justice Souter's dissent rejected.

Justice Souter's analysis displays the internal inconsistency at the heart of the individual rights-focused analysis of due process in immigration detention law. To support the existence of an individual entitlement, Justice Souter emphasized an actual connection to the national community. By grounding legal protection in actual facts as opposed to the legal category of immigration status alone, his approach seems to promise fair government treatment based on meaningful criteria. But as *Demore*'s majority opinion shows, an exclusive focus on personal rights can also work to the noncitizen's detriment by establishing artificial tiers of rights-bearers, some more entitled than others to protections from the same deprivation of liberty.[185] Had Justice Souter's dissent followed the *Zadvydas* majority and considered the structural implications of due process, it would have avoided the debate over which noncitizens deserve protection from arbitrary deprivation of liberty. Instead, both the majority and dissent in *Demore* overlooked the serious separation of powers concerns presented when the political branches authorize and execute detention free of judicial review. Though both opinions reached different results, their shared methodology diminished the Judiciary's structural role as an independent power that checks political branch overreach.

C. Achieving Separation of Jailer and Judge in Immigration Detention

What solutions exist for structural due process concerns in immigration detention? The most direct way to separate jailer and judge in immigration detention would be to constitutionally mandate judicial review of the executive's detention decisions. The

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184 U.S. CONST. art. I, § 8, cl. 4.

185 *See, e.g.*, Alghazali v. Tsoukaris, No. 16–9055 (JLL), 2017 WL 3191514, at *5 (D.N.J. July 27, 2017) (finding that a noncitizen detained as an applicant for admission was owed a "lesser level of Due Process rights" than one detained due to prior criminal convictions and thus upholding as legal detention of fifteen months without a bond hearing).

large volume of immigration cases already present on federal court dockets calls for thoughtful consideration of such a solution. On the one hand, mandating judicial review of detention would likely reduce the number of habeas petitions seeking a similar remedy, but more than replace them with custody hearings. On the other, habeas proceedings and custody hearings are not comparable in terms of the complexity of legal questions presented. A greater number of custody hearings might be held in the same time it takes for federal courts to adjudicate a lesser number of habeas petitions. Federal courts are well trained in expeditiously adjudicating pre-trial criminal detention bail hearings. They might manage immigration detention bail hearings with equal aplomb. Moreover, the removal of custody cases from immigration court dockets would reduce the record backlog of cases before EOIR, which have, in turn, contributed to delayed removal proceedings and increased rates of prolonged detention pending those proceedings.

Short of true judicial review, procedural alterations to detention decision-making could at least reapportion some adjudicatory duties from DHS to another body.[186] Two Courts of Appeals have taken this approach, requiring an automatic bond hearing before an immigration judge within six months of DHS's decision to place an individual in mandatory detention.[187] Four other circuit courts require a bond hearing when detention becomes unreasonable under the facts and circumstances of the case, a determination made upon petition to a habeas court.[188] Delay associated with ex-post habeas review makes an automatic time limit a constitutionally preferable remedy,[189] though some of that delay would be eliminated if the habeas court itself conducted a bond hearing rather than remanding to DOJ. Barring adoption of such a practice, however, both of these solutions still leave the ultimate decision on custody to the Executive.[190]

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186 Immigration law frequently employs "procedural surrogates" for analogous constitutional guarantees made to citizens. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1665-73 (1992) (describing how courts have given near-conclusive weight to a noncitizen's liberty interest in procedural due process analyses to rule against the government in immigration detention cases).

187 *See* Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015); Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015).

188 *See* Sopo v. U.S. Attorney Gen., 825 F.3d 1199 (11th Cir. 2016); Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011); Hoang Minh Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003).

189 *See supra* text accompanying notes 107-112.

190 For discussion of remedies for structural infirmities in immigration adjudication generally, see generally Lawrence Baum, *Judicial Specialization and the Adjudication of*

Moving beyond mandatory detention, other attributes of immigration detention merit scrutiny for separation of powers concerns. Some procedural barriers may be so insurmountable that they practically ensure continued confinement, functionally vesting detention adjudication in the executive branch. The *Zadvydas* majority noted constitutional doubts regarding the placement of the burden of persuasion on the detained individual.[191] The dissent raised questions concerning the quantum of proof necessary to establish dangerousness at an immigration custody hearing.[192] Lower courts have questioned the fairness of forcing an individual in mandatory detention to prove that DHS is substantially unlikely to establish the charge of deportability in order to receive a bond hearing.[193] Other practices that blur the line between judge and jailer include DHS's unchecked authority to control the judicial forum by transferring the location of immigration detention;[194]

Immigration Cases, 59 DUKE L.J. 1501, 1553-60 (2010) (discussing proposals to vest jurisdiction of appeals of DOJ adjudications to a specialized tribunal); Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 21 (2013) (arguing for the establishment of an Article I court to adjudicate immigration matters); David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177 (2016) (offering strategies to increase uniformity in immigration adjudication); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1636 (2010) (proposing that trial level immigration adjudication occur at a new executive branch tribunal and appellate adjudication at an Article III immigration court).

191 Shortly after Congress's last major reforms of detention laws in 1996, the BIA reversed a longstanding presumption against detention established by case law. *See* Matter of Patel, 15 I. & N. Dec. 666 (BIA 1976). In *Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999), the BIA newly held that the detainee bears the burden of persuasion at a bond hearing, a shift justified in part by citing to a new regulation that applied only to INS enforcement officers when reviewing requests for release. Despite its textual limitation to the INS, the BIA also considered the regulation "binding" on EOIR. Matter of Adeniji, 22 I. & N. Dec. at 1113. In *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 92 (2016), Mary Holper considers the reversal troubling because the BIA, as part of the EOIR, would be governed by the enforcement agency's own agenda. Holper's concern is structural in nature. In *Matter of Adenji*, the "judge" (or in this case, administrative officer) adopted the jailer's standard for detention review.

192 *See* Zadvydas v. Davis, 533 U.S. 678, 724-25 (2001) (Kennedy, J., dissenting).

193 *See* Tijani v. Willis, 430 F.3d 1241, 1244-46 (9th Cir. 2005) (Tashima, J., concurring).

194 Nancy Morawetz writes of "how great the danger is of distorting the rule of law through mindless application" of venue rules in habeas petitions that permit the government to transfer pending petitions to the district court of its choice by transferring detention to a geographically isolated center. Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L.J. 13, 32 (2005). In an empirical study of transferred immigration habeas petitions, Morawetz documents how the Western District of Louisiana systematically denies requests for stays of removal and vacates those previously granted by transferring courts, resulting in the deportation of individuals with claims for immigration relief pending

DOJ's use of unreasonably high bonds to ensure continued detention even while finding release to be theoretically appropriate;[195] and DHS's substitution of its own judgment on custody for an immigration judge's by use of automatic stays of detention pending appeal to the Board of Immigration Appeals, without any showing of likelihood of success on the merits of the appeal or irreparable harm absent the stay of release. Whether such practices are consistent with a true division between the authority to jail and to judge the lawfulness of incarceration is not a foregone conclusion. But courts reviewing immigration detention should ask the question explicitly, exploring systemic attacks on the separation of powers in addition to the individual burdens on liberty that are their customary focus.

Conclusion

Over the last twenty years, the executive branch has vigorously guarded its control over immigration detention decisions, supported by legislative reforms that expelled the judiciary from detention review. "In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security."[196] Commitment to the historical meaning of due process also gives courts a particular responsibility: to maintain the separation of powers between jailer and judge in immigration detention.

Article III judicial review. She concludes that venue "rules, which allow the government to choose the court that will review the legality of controversial government policies, lend themselves to abuse." *Id.* at 33. Peter L. Markowitz and Lindsay C. Nash also address due process concerns with venue transfers. Markowitz and Nash observe that "change of venue motions are routinely denied even if the location of proceedings is distant from the immigrant's place of residence; deprives the immigrant of access to counsel or evidence; is far from the location of witnesses; and changes the governing circuit law in ways prejudicial to the immigrant." Peter L Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 Fla. L. Rev. 1153, 1202-03 (2014). They advocate for a due process inquiry in a fair location. *Id.* at 1213.

195 *See* Hernandez v. Lynch, No. EDCV 16-00620-JGB (KKx) (C.D. Cal. Nov. 10, 2016), *aff'd sub nom.* Hernandez v. Sessions, 872 F.3d 976 (9th Cir. 2017) (granting preliminary injunction requiring immigration judges to consider a respondent's ability to pay a bond when setting bond amount).

196 Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring in, dissenting in part, and concurrent in the judgment).