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## Legal and Extra-Legal Challenges to Immigrant Detention

Prerna Lal

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# Legal and Extra-Legal Challenges to Immigrant Detention

Prerna Lal<sup>†</sup>

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## INTRODUCTION

The Baisakhi harvest celebration is a festive occasion of dancing, singing, music, and religious praise for many Sikh men and women and marks the beginning of the Sikh New Year. However, in April 2014, around forty Sikh men in El Paso, Texas, celebrated Baisakhi in a truly unique fashion by launching a hunger strike within an immigrant detention facility.<sup>1</sup> The men, all from India, had been held captive in the detention facility for close to a year after they crossed into the United States from Mexico and requested political asylum.<sup>2</sup> Many, if not all, of them suffered religious persecution in India and tried to seek the protection of the United States by journeying through many countries before finally handing

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1. Caitlin Dickson, *How the U.S. Sold Out Indian Asylum Seekers on the Border*, DAILY BEAST (Aug. 11, 2014, 2:55 AM), <http://www.thedailybeast.com/articles/2014/08/11/how-the-u-s-sold-out-indian-asylum-seekers-on-the-border.html> [https://perma.cc/J8BP-5P6B].

2. *Id.*

themselves over to American authorities at the United States-Mexico border and requesting asylum.<sup>3</sup> Similar hunger strikes began to occur across the United States, coordinated by various advocacy groups and led by detainees engaged to secure their release.<sup>4</sup> These noncitizens seeking asylum were detained in immigration jails for prolonged periods, until weary from the negative public relations of their hunger strike, the U.S. government released them on parole, pending the final adjudication of their asylum claims.<sup>5</sup>

While the immigration story in the limelight is the growing number of apprehensions at the border of unaccompanied minors from Central America, immigration is a central yet understated issue in the Asian American community. A staggering 78 percent of adult Asian Americans are foreign born—more than any other racial or ethnic group in the United States.<sup>6</sup> Asian Americans comprise 1.3 million of the nearly 12 million undocumented immigrants<sup>7</sup> and are increasingly the targets of immigration enforcement efforts. In 2013, 83 percent of Indians facing deportation were detained, a far greater percentage than any other immigrant group.<sup>8</sup> Between 2002 and 2003, almost 14,000 Arabs and Muslims, including many South Asians, were detained and deported under the National Security Entry/Exit Registration System (NSEERS) program.<sup>9</sup> Today, Southeast Asians and Pacific Islanders are deported on the basis of old criminal convictions at a rate three times higher than the rate of other noncitizens.<sup>10</sup> Many are deported to countries in which they have never set foot. Individuals from China, Nepal, Bangladesh, and India frequently comprise the top ten nationalities for whom removal orders are sought in

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3. David Noriega & John Templon, *America's Quiet Crackdown on Indian Immigrants*, BUZZFEED (Jan. 31, 2016, 7:09 AM), <https://www.buzzfeed.com/davidnoriega/americas-quiet-crackdown-on-indian-immigrants/> [https://perma.cc/ZL5A-UQBQ].

4. Samantha Michaels, *Here's Why Hundreds of Immigrants in Detention Have Gone on Hunger Strike*, MOTHER JONES (Dec. 3, 2015, 5:56 PM), <http://www.motherjones.com/politics/2015/11/why-are-hundreds-detained-immigrants-going-hunger-strike/> [https://perma.cc/F4CE-JTZW].

5. *Exclusive: Migrant Mother Says She Was Pushed to End Hunger Strike to Win Release from Detention*, DEMOCRACY NOW! (Sept. 7, 2016), [http://www.democracynow.org/2016/9/7/exclusive\\_migrant\\_mother\\_says\\_she\\_was/](http://www.democracynow.org/2016/9/7/exclusive_migrant_mother_says_she_was/) [https://perma.cc/TVY3-H252].

6. See 2013 American Community Survey 1-Year Estimates, U.S. CENSUS BUREAU, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_13\\_1YR\\_B05003D&prodType=table/](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_B05003D&prodType=table/) [https://perma.cc/98FM-38P3] (last visited Apr. 11, 2017) (depicting table showing number of Asians organized by sex, age, nativity, and citizenship status).

7. BRYAN BAKER & NANCY RYTINA, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, at 3 (2013), [https://www.dhs.gov/sites/default/files/publications/ois\\_ill\\_pe\\_2012\\_2.pdf/](https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf/) [https://perma.cc/5NFJ-8RMM].

8. Noriega and Templon, *supra* note 3.

9. Leslie Berestein Rojas, *NSEERS and 'Special Registration' Are Gone, But Long-Term Effects Continue*, 89.3 KPCC (Jan. 30, 2012), <http://www.scpr.org/blogs/multiamerican/2012/01/30/8161/nseers-and-special-registration-are-gone-but-long-/> [https://perma.cc/CL83-WA36].

10. U.S. DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, 2010 YEARBOOK OF IMMIGRATION STATISTICS (2010).

immigration court.<sup>11</sup> These numbers reflect that immigration enforcement, specifically mass detention and deportation, is an issue of growing concern for our communities.

This Article attempts to trace legal and extra-legal challenges to the mandatory detention statute, enumerated in section 236(c) of the Immigration and Nationality Act (INA), and the growing archipelago of immigrant detention in the United States. The United States runs a massive immigrant detention system, pursuant to several statutory schemes, that gives the Department of Homeland Security (DHS) permission to detain noncitizens, including asylum seekers, during removal proceedings.<sup>12</sup> It is a civil detention system wherein noncitizens are detained across the country in various types of facilities operated by the federal government, private detention contractors, or local jails.

There appears to be a universal acknowledgement that the present immigrant detention system, though civil in theory, is broken in practice.<sup>13</sup> Yet, the United States continues to lock up noncitizens at an alarming rate. According to the most recent statistics, U.S. Immigration and Customs Enforcement (“ICE”) held 352,882 detainees over the course of fiscal year 2016.<sup>14</sup> The capacity to detain noncitizens has increased from 18,000 in 2004 to 34,000 in 2012, in 250 facilities on any given day.<sup>15</sup> Furthermore, \$5.6 million per day is spent on detaining noncitizens, many of whom have no criminal records, support family members in the United States, and can prevail on winning some form of relief from removal.<sup>16</sup>

Most persons arriving in the United States without proper documentation are returned to their countries of origin through a process known as expedited removal or “Operation Streamline.”<sup>17</sup> For those persons who are not removed through this process, Congress has created an immigration detention scheme premised on the idea that not every individual in removal proceedings should be detained.<sup>18</sup> However, when

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11. *U.S. Deportation Proceedings in Immigration Courts*, TRAC REPORTS, [http://trac.syr.edu/phptools/immigration/charges/deport\\_filing\\_charge.php/](http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php/) [<https://perma.cc/542P-NCQF>] (last visited Apr. 11, 2017) (depicting table showing number of deportation proceedings in U.S. immigration courts organized by nationality, geographic location, year, and type of charge).

12. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §108.02 (2016).

13. See NAT’L IMMIGRANT LAW CTR. ET AL., A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS (2009).

14. *DHS Releases End of Fiscal Year 2016 Statistics*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Dec. 30, 2016), <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2016-statistics> [<https://perma.cc/U7TQ-VTV4>].

15. See NAT’L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 3 (2013), <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf> [<https://perma.cc/WC2X-DPR6>].

16. *Id.*

17. See Immigration and Nationality Act (INA) of 1952 § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2012) (initial screening of applicants for admission into the United States).

18. See *In re Rojas*, 23 I. & N. Dec. 117, 131 (B.I.A. 2001), (Rosenberg, Board Member,

noncitizens are placed in removal proceedings, ICE can detain them until the conclusion of proceedings. Empowered by 8 U.S.C. § 1226(a) (section 236(a) of the INA), the government “may” detain any noncitizen who is removable.<sup>19</sup> For these noncitizens detained by the Government, individualized release determinations are the general rule.<sup>20</sup> In the prehearing stages of a removal proceeding, most noncitizens who are not classified as “arriving aliens” and have not committed any crimes are eligible for release so long as they do not pose a flight risk or danger to the community, and a set of conditions can be established (such as the posting of a bond, reporting requirements, or both) to satisfy the objectives of appearance and community safety.

However, § 1225(b) and § 1226(c) (sections 235(b) and 236(c) of the INA) create an exception to the general availability of parole or individualized consideration of release from detention.<sup>21</sup> The statute sets forth a mandatory detention scheme bounded by fixed rules: an individual who falls within its scope must be detained until the conclusion of removal proceedings.<sup>22</sup> Congress added this mandatory detention provision through the Illegal Immigration and Immigrant Responsibility Reform Act of 1996, in order to expedite the removal of “criminal aliens” from the country.<sup>23</sup> Presently, the law requires the mandatory detention of a broad class of persons such as so-called criminal aliens,<sup>24</sup> national security risks,<sup>25</sup> asylum

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dissenting) (dismissing appeal of criminal alien who was held in mandatory detention even though he was not immediately taken into custody when released from incarceration). The dissent in *In re Rojas* opined that the Congressional language does not expressly mandate the detention of every alien who has ever committed a criminal or terrorist offense. *Id.*

19. 8 U.S.C. § 1226(a) (“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”).

20. *Id.* § 1226(a)(2) (stating that the Attorney General “may release the alien on—(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole”).

21. *See id.* §§ 1225(b), 1226(c).

22. *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 230–31 (3d Cir. 2011) (describing detention statutes); *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 946–48 (9th Cir. 2008) (same).

23. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of the U.S.C.) [hereinafter “IIRIRA”].

24. Mandatory detention under § 1226(c) applies to noncitizens who are inadmissible because they committed a crime involving moral turpitude or a controlled substance offense; have multiple criminal convictions with an aggregate sentence of five years or more of confinement; are connected to drug trafficking, prostitution, money laundering, or human trafficking; carried out severe violations of religious freedom while serving as a foreign government official; or have been involved in serious criminal activity and asserting immunity from prosecution. Mandatory detention under § 1226(c) also applies to noncitizens who are deportable on account of having been convicted of two or more crimes involving moral turpitude, an aggravated felony, a controlled substance offense, certain firearm-related offenses, or certain other miscellaneous crimes; aliens who are deportable on account of having committed a crime of moral turpitude within a certain amount of time since their date of admission for which a sentence of one year or longer has been imposed; and aliens who are inadmissible or deportable because of connections to terrorism.

25. *See* INA §§ 212(a)(3)(B), 237(a)(4)(B), 236(c)(1)(D) (taking these sections together, any alien who is inadmissible or deportable for terrorist activity must be detained).

seekers without proper documentation,<sup>26</sup> arriving aliens<sup>27</sup> who appear inadmissible for reasons other than document-related ones, and persons under final orders of removal who have committed aggravated felonies.<sup>28</sup>

Advocates and detainees have challenged the expansive mandatory detention provisions of § 1225(b) and § 1226(c). As a result of the ever-increasing backlogs in immigration court, detention under these two sections can last for months, sometimes even a few years, as noncitizens await the conclusion of removal proceedings. Since immigrant detention is considered a civil matter, procedural protections afforded to criminal defendants facing incarceration do not apply to immigrants and arriving aliens who are similarly incarcerated. Although the DHS has the discretion to not enforce § 1225(b) and § 1226(c), once a noncitizen has been detained, usually no recourse is available to the detainee. Detainees are permitted to ask an immigration judge to reconsider the applicability of mandatory detention but such review is limited in scope and addresses only whether the individual's criminal history falls within the purview of § 1226(c).<sup>29</sup>

Over the past few years, advocates have had varying levels of success in challenging immigration detention. First, we look at these challenges to determine where we are in terms of litigation, specifically on matters concerning mandatory detention. Then, we turn back to the extra-legal challenges to immigration detention, such as the infiltration of detention centers by immigrant activists.

## I. LEGAL CHALLENGES

### A. *The Scope of Mandatory Detention*

Advocates challenged the constitutionality of mandatory detention under § 1226(c) with varied success until the Supreme Court decision in *Demore v. Kim*.<sup>30</sup> In this case, Hyung Joon Kim came to the United States from South Korea when he was six years old and became a lawful permanent resident two years later, at the age of eight.<sup>31</sup> In 1996, at the age of eighteen, Kim was convicted of first-degree burglary. One year later he

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26. See INA § 235(b)(1)(B)(v) (providing that all aliens subject to inspection under this clause are subject to detention pending a final determination of credible fear of persecution).

27. See 8 C.F.R. § 1.2 (2011) (defining an arriving alien as “an applicant for admission . . . into the United States” or “an alien seeking transit through the United States”).

28. See IIRIRA § 303.

29. See generally *In re Joseph*, 22 I. & N. Dec. 799, 800 (B.I.A. 1999) (granting mandatorily detained aliens the right to request an individualized bond determination hearing before an immigration judge to establish that mandatory detention does not apply or a habeas corpus petition in U.S. District Court).

30. See *Demore v. Kim*, 538 U.S. 510 (2003).

31. *Id.* at 513.

was convicted for petty theft with priors.<sup>32</sup> Because Kim's two crimes involved moral turpitude, § 1226(c) authorized the Immigration and Naturalization Service or INS (now known as the Department of Homeland Security) to detain him as a deportable alien once he finished serving his three-year prison sentence in 1999.<sup>33</sup>

Kim challenged the constitutionality of § 1226(c), contending that his due process rights had been violated when the INS detained him without a bond hearing to determine whether or not he “posed a danger to society” or was a “flight risk.”<sup>34</sup> The District Court ruled in favor of Kim.<sup>35</sup> The Court of Appeals for the Ninth Circuit then affirmed the District Court's decision that Kim had a constitutional right to a bond hearing before the INS detained him prior to his removal hearing, holding that 8 U.S.C. § 1226(c) violated the “substantive due process” rights of lawful permanent residents, the “most favored category of aliens.”<sup>36</sup> According to the Ninth Circuit panel, Kim was not a flight risk because he could prevail at his removal hearing and therefore keep his lawful resident status, and the nature of his crimes did not make him a danger to society.<sup>37</sup> Therefore, the court stated that the INS did not have sufficient justification for detaining Kim.<sup>38</sup>

The INS appealed the decision to the Supreme Court of the United States. Dozens of civil rights organizations, immigrant advocacy groups, and individuals, such as former INS Commissioners, filed amicus briefs in support of Kim.<sup>39</sup> Despite unparalleled support for Kim, in a 5–4 decision, the Supreme Court reversed the Ninth Circuit and held that § 1226(c) authorized mandatory detention of certain types of allegedly deportable noncitizens prior to their removal hearing, and Kim fell within the reach of this statute based on his prior convictions.<sup>40</sup> Further, the Court found that the short time that Kim would be subject to detainment prior to his removal hearing did not constitute a violation of the Due Process Clause of the Fifth Amendment.<sup>41</sup>

In upholding the mandatory detention regime, the Court differentiated Kim's case from the Court's prior holding in *Zadvydas v. Davis*, a case that the dissent and four other Courts of Appeal had relied on when holding

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32. *Id.*

33. *Id.*

34. *Id.* at 514.

35. *Id.* The district court ordered INS to provide Kim a hearing to determine whether or not he posed a danger to society or a flight risk. After a bond hearing which determined Kim was neither a flight risk nor a danger to society, he was released on \$5,000 bail. *Id.* at 515.

36. *Id.* at 515

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 531.

41. *Id.*

that § 1226(c) was unconstitutional.<sup>42</sup> Kestutis Zadvydas, a lawful permanent resident with a long criminal history, was ordered deported in 1994.<sup>43</sup> Because Zadvydas was born to Lithuanian parents in a German displaced persons camp, neither Germany nor Lithuania accepted him as a citizen of their respective countries.<sup>44</sup> Since he could not be removed to any country, the INS kept Zadvydas in custody after expiration of the ninety-day removal period.<sup>45</sup> Zadvydas challenged his detention past the ninety-day period by filing a petition for a writ of habeas corpus under 28 U.S.C. § 2241, which was granted by the District Court, but reversed by the Fifth Circuit.<sup>46</sup> The Supreme Court ruled in favor of Zadvydas, stating “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”<sup>47</sup> In distinguishing Kim from Zadvydas, Justice Rehnquist stated that Zadvydas had already been through his removal proceedings, so further detainment served no immigration purpose.<sup>48</sup>

The *Demore* decision rested on a tenuous majority. Recent revelations that the Office of the Solicitor General lied to the Supreme Court about the length of time that it took to conclude proceedings cast doubt on the Supreme Court’s decision in the aforementioned case.<sup>49</sup> Only Justice Kennedy joined in the entirety of the opinion while two of the concurrences suggest that the Court might rule a different way in a case with different, or rather, accurate facts.<sup>50</sup> Justice Kennedy noted that, in a case of “unreasonable delay,” a court should “inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.”<sup>51</sup> Justice Breyer indicated in his concurrence that he could have voted differently if Kim had not conceded his deportability.<sup>52</sup> Taken together, these concurrences establish that *Demore* was a narrow decision of little precedential value, except to cases with similar facts. A narrow reading of *Demore* suggests

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42. *Id.* at 527; see *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding that the post-removal-period detention statute, read in light of the Constitution’s demands, implicitly limits a noncitizen’s detention to a period reasonably necessary to bring about that her or his removal from the United States and does not permit indefinite detention).

43. *Zadvydas*, 533 U.S. at 684.

44. *Id.*

45. *Id.* at 685.

46. *Id.*

47. *Id.* at 699.

48. *Demore v. Kim*, 538 U.S. 510, 526 (2003).

49. See Letter from Ian Heath Gershengorn, Acting Solicitor General, to the Honorable Scott S. Harris, Clerk of the Supreme Court of the United States (Aug. 26, 2016), <http://lawprofessors.typepad.com/files/demore.pdf> [<https://perma.cc/T693-7X98>].

50. Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 621 (2010).

51. *Id.*

52. See *Demore*, 538 U.S. at 576 (Breyer, J., concurring in part and dissenting in part).

that a noncitizen with a strong argument against removability or a noncitizen detained for over six months might have good cause to establish that § 1226(c) does not govern her or his detention.<sup>53</sup> Unsurprisingly then, *Demore* did not end challenges to mandatory detention, and given the recent revelations, it is likely that the Supreme Court of the United States, when faced with this question in the near future in a similar case, may rule the other way.<sup>54</sup>

*B. Mandatory Does Not Mean Prolonged or Indefinite Detention*

With the constitutional challenge to mandatory detention out of the picture, almost immediately, courts were presented with cases involving noncitizens who had been held in custody for periods far in excess of the five-month average that the Supreme Court found reasonable in *Demore*. For example, in *Ly v. Hansen*, the Sixth Circuit concluded that a Vietnamese immigrant who had been detained for 500 days during his removal proceedings was entitled to an individualized bond hearing to determine whether he was a flight risk or danger to the community.<sup>55</sup> The Court distinguished *Ly* from *Kim* by stating that the period of time required to conclude the proceedings was unreasonably long, and that deportation to Vietnam was not foreseeable as the country was not accepting repatriating Vietnamese.<sup>56</sup>

The Sixth Circuit is not alone in constructing limitations to mandatory detention. More circuits, including the Ninth Circuit and the Third Circuit, have recently held that, in light of the serious constitutional problems posed by prolonged detention, section 236(c) of the INA must be construed as authorizing detention for only a brief and “reasonable period of time.”<sup>57</sup> In *Casas-Castrillon v. Department of Homeland Security*, the Ninth Circuit found that individuals initially subject to detention under § 1226(c) are entitled to bond hearings if their removal is stayed pending direct judicial review of their removal orders, or if their removal cases have been remanded for further administrative proceedings.<sup>58</sup> The Third Circuit went

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53. *See id.* at 577 (Breyer, J., concurring in part and dissenting in part).

54. *See Heeren, supra* note 50, at 621.

55. *Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003) (finding that incarceration of a criminal alien for one and one-half years as part of a civil, nonpunitive removal proceeding when there was no chance of actual, final removal, was unreasonable, and therefore violated the alien’s substantive due process rights).

56. *Id.* at 274.

57. *See Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 223 (3d Cir. 2011) (“*Demore* emphasized that mandatory detention pursuant to § 1226(c) lasts only for a ‘very limited time’ in the vast majority of cases.”); *Tijani v. Willis*, 430 F.3d 1241, 1249 (9th Cir. 2005) (holding that the mandatory detention statute only authorizes detention for “expeditious” removal proceedings, not for those that exceed the brief period of time set forth in *Demore*).

58. *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008) (“[T]he government may not detain a legal permanent resident such as Casas for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention.”).

a step further in 2011, holding that the Due Process Clause of the Fifth Amendment prohibits mandatory detention beyond a “reasonable period of time” and that the mandatory detention statute, § 1226(c), authorizes detention for only that reasonable period.<sup>59</sup>

These decisions hinge on the idea that when mandatory detention exceeds that reasonable period, the DHS must bear the burden of showing that continued detention of a noncitizen is necessary to prevent flight or avoid danger to the community.<sup>60</sup> The rationale behind these holdings is that although the Supreme Court in *Demore* upheld the constitutionality of mandatory detention, it did not uphold mandatory detention for as long as removal proceedings take to conclude. Rather, as Justice Kennedy explained in his concurrence, mandatory detention may come to violate due process “if the continued detention became unreasonable or unjustified.”<sup>61</sup>

Advocates have latched onto Justice Kennedy’s stipulation that the “constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [the one-and-a-half to five-month] thresholds”<sup>62</sup> to challenge detention under § 1226(c) past the five-month period. When detention exceeds that reasonable period, the noncitizen is entitled to an individualized hearing where the government must show that continued detention is necessary to prevent flight or danger to the community.<sup>63</sup> Failure to establish that a detainee is a flight risk or danger to the community should compel the release of the detainee on bond or parole until the conclusion of removal proceedings.

More recently, courts are beginning to define when mandatory detention becomes prolonged such that due process requires an individualized bond hearing before an immigration judge. In *Diouf v. Napolitano* (“*Diouf II*”), the Ninth Circuit applied the holding of the *Casas-Castrillon* decision from 2008 to aliens discretionarily detained under § 1231(a)(6) and indicated that detention becomes prolonged after 180 days or six months.<sup>64</sup> Furthermore, under the reasoning of another Ninth Circuit decision, *Singh v. Holder*, the DHS trial attorney is now required to show by clear and convincing evidence that detention of the noncitizen past the

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59. *Diop*, 656 F.3d at 222.

60. *See id.*; *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) (“[T]he government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a *Casas* hearing.”).

61. *Demore v. Kim*, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring).

62. *Diop*, 656 F.3d at 234.

63. *Id.* at 223.

64. *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (“When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decision-maker is substantial. The burden imposed on the government by requiring hearings before an immigration judge at this stage of the proceedings is therefore a reasonable one.”).

six-month period is necessary to prevent flight or danger.<sup>65</sup>

Soon thereafter, in *Rodriguez v. Robbins*, the Ninth Circuit affirmed a grant of a preliminary injunction in favor of a certified class of noncitizens who challenged their prolonged detentions under § 1226(c) and § 1225(b).<sup>66</sup> The Ninth Circuit held that noncitizens were likely to succeed on the merits that § 1225(b) and § 1226(c) must be construed to authorize only six months of mandatory detention, after which detention is authorized by § 1226(a) and an individual bond hearing.<sup>67</sup> The Ninth Circuit also held that the preliminary injunction was necessary to ensure that individuals who did not constitute a flight risk or danger to public safety were not needlessly detained.<sup>68</sup> The Second Circuit has ruled similarly.<sup>69</sup>

Thus, it is clear that while mandatory detention under § 1226(c) is not constitutionally impermissible *per se*, litigants can challenge mandatory detention on the basis that it violates due process after a certain period, especially if there is little chance of eventual removal. In a similar vein, litigants can also contest mandatory detention by challenging when the U.S. government can take a “criminal alien” into custody.

*C. Mandatory Detention May Not Apply If There Is a Delay Between Release from Criminal Custody and Subsequent Apprehension by ICE*

Congress requires that the Attorney General “shall take into custody any alien . . . when the alien is released.”<sup>70</sup> The text reflects Congress’s view that immigrants completing prison sentences or otherwise being released from custody in connection with a removable offense are sufficiently likely to pose a danger to the community or a risk of flight upon such release that individualized considerations are not necessary. By requiring that the government take certain individuals into custody directly from criminal custody, Congress sought to remedy the problem of the government’s inability to locate removable individuals.<sup>71</sup> The statutory scheme and language arguably reflect that the fixed rules of mandatory detention are inapplicable to any individual who is not immediately transferred from criminal custody because of a removable offense to immigration custody. Consequently, mandatory detention should not extend to individuals who were long ago convicted of crimes, have since rehabilitated, and now reside in the community at large.

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65. *Singh*, 638 F.3d at 1203.

66. *Rodriguez v. Robbins*, 715 F.3d 1127, 1130–31 (9th Cir. 2013).

67. *Id.* at 1142–43 (“[W]e must construe § 1225(b) to avoid potential constitutional concerns raised by its application to LPRs who enjoy due process protection.”).

68. *Id.* at 1145.

69. *See Lora v. Shanahan*, 804 F.3d 301 (S.D.N.Y. 2015).

70. 8 U.S.C. § 1226(e) (2012).

71. *Demore v. Kim*, 538 U.S. 510, 518 (2003) (“Congress’ investigations showed, however, that the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country.”).

Contrary to the statutory scheme, the United States government has asserted that the statute authorizes ICE to mandatorily detain *any* non-citizen—even persons who have served their criminal sentence, are rehabilitated, and pose no danger to the community.<sup>72</sup> In *Matter of Rojas*, the Board of Immigration Appeals (“BIA”) determined that mandatory detention applies only to individuals released from non-DHS custody after October 8, 1998 and only if that custody was for an offense listed in § 236(c).<sup>73</sup> The U.S. Court of Appeals for the First Circuit rejected the Government’s efforts to find ambiguity in the term “when released.”<sup>74</sup> In *Saysana*, the court found the “when released” language to be clear and held that the government’s alternative formulations were “strained” and not consistent with the legislative scheme.<sup>75</sup> In *Preap v. Johnson*, the Ninth Circuit held that under the plain language of § 1226(c), the government may detain without a bond hearing only those noncitizens it takes into immigration custody promptly upon their release from the triggering criminal custody.<sup>76</sup> However, the U.S. Court of Appeals for the Second and Fourth Circuits have held that that the term “when released” is ambiguous and, therefore, DHS retains its authority to detain noncitizens subject to mandatory detention even if they are not taken into custody immediately upon the noncitizen’s release from custody.<sup>77</sup>

In contrast to the Second and Fourth Circuit rulings, district courts across the country have overwhelmingly found that the “when released” language in § 1226(c) is triggered only when the Attorney General assumes custody immediately after the noncitizen is released from criminal custody and not at any future date.<sup>78</sup> With similar litigation pending in circuit courts

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72. See *In re Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001) (published agency interpretation of § 1226(c)).

73. *Id.* at 125–27; see also *In re Garcia Arreola*, 25 I. & N. Dec. 267, 269 (B.I.A. 2010) (“Section 236(c) of the Act requires mandatory detention of a criminal alien only if he or she is released from non-DHS custody after the expiration of the TPCR and only where there has been a post-TPCR release that is directly tied to the basis for detention under sections 236(c)(1)(A)-(D) of the Act.”). “TPCR” refers to the Transition Period Custody Rules that expired on October 8, 1998. TPCR essentially gave the federal government two years to implement § 236(c). *In re Garcia Arreola*, 25 I. & N. at 268 n.2.

74. *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009) (holding that the BIA’s decision in *Saysana* violated the plain language of the statute).

75. *Id.* at 14.

76. *Preap v. Johnson*, 831 F.3d 1193, 1197 (9th Cir. 2016) (“The statute unambiguously imposes mandatory detention without bond only on those aliens taken by the [Attorney General] into immigration custody ‘when [they are] released’ from criminal custody. And because Congress’s use of the word ‘when’ conveys immediacy, we conclude that the immigration detention must occur promptly upon the aliens’ release from criminal custody.”).

77. *Lora v. Shanahan*, 804 F.3d 601, 612 (2d Cir. 2015) (holding that DHS retains its authority and duty to detain a noncitizen subject to mandatory detention even if not taken into custody immediately upon the noncitizen’s release); *Hosh v. Lucero*, 680 F.3d 375, 381 n.8 (4th Cir. 2012).

78. Brief of Amicus Curiae American Immigration Lawyers Association in Support of Petitioner-Appellee at 12–13, *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013) (No. 11-3357) (“Since the decision in *Hosh* on May 25, 2012, 21 district courts have considered the ‘when released’

across the country, the “when released” question is likely to be resolved by the Supreme Court in the near future. Meanwhile, given the limits of litigation in reforming mandatory detention, immigrant rights activists have lately taken matters into their own hands to expose the inhumanity of mandatory detention.

## II. EXTRA-LEGAL CHALLENGES

### *A. Challenging Detention Through Civil Disobedience*

On July 11, 2012, Marco Saavedra went to Customs and Border Protection (“CBP”) in Port Everglades, Florida and told the CBP officer that he was looking for his cousin who did not have a license and may have been arrested at a Border Protection checkpoint in the area.<sup>79</sup> He admitted to the CBP officer that he did not have papers to reside in the country and showed the officer his Matricular Consular identity document from Mexico, stating that it was the only identification he could produce.<sup>80</sup> Upon further questioning, Marco described to the CBP officer that he had unlawfully entered the country with his cousin when he was fifteen through Arizona and went to Fort Lauderdale in Florida, looking for work.<sup>81</sup> The CBP officer told Marco that since he was here illegally, he was under an obligation to arrest him.<sup>82</sup> Marco was arrested and detained at the Broward Transitional Center, a private immigration facility in Florida.<sup>83</sup>

Little did the CBP officer know that Marco Saavedra, a twenty-three-year-old graduate of Kenyon College who grew up in Ohio, was an undocumented youth organizer with the National Immigrant Youth Alliance (“NIYA”), a national immigrant advocacy group of undocumented youth. Along with several members of the NIYA, Marco had traveled to Florida and presented himself to the CBP in the hopes that he would be detained and sent to the Broward Transitional Detention Center.<sup>84</sup> While the detention center in Broward has received the label of a “model facility” in the past, members of NIYA had been receiving emails and letters from family members of detainees at Broward who had been locked up for

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question. Of these district courts, 15 of these courts have rejected the holding of the Fourth Circuit. In contrast, only 6 district courts have followed the Fourth Circuit. Put simply, only four district courts out of nineteen outside the Fourth Circuit have found *Hosh* persuasive.”)

79. The Nation, *Infiltrating ICE: How Undocumented Activists Are Organizing on the Inside*, YOUTUBE (Feb. 7, 2013), [http://www.youtube.com/watch?v=7uy6S\\_0-I\\_M/](http://www.youtube.com/watch?v=7uy6S_0-I_M/) [https://perma.cc/HUD9-GFNE].

80. DreamActivist, *DREAMers Infiltrate Immigration Detention Center*, YOUTUBE (Aug. 2, 2012), <http://www.youtube.com/watch?v=QPqEuTop41g/> [https://perma.cc/5NLT-6JHG].

81. *Id.*

82. *Id.*

83. *Id.*

84. The Nation, *supra* note 79.

months despite not committing any crimes.<sup>85</sup> In particular, NIYA received news about Claudio Rojas, a forty-seven-year-old citizen and national of Argentina, who had been detained inside Broward since March 2010 after violating a prior order of removal.<sup>86</sup>

CBP initially arrested and detained Claudio and his son, Emiliano Rojas, in 2010 when Emiliano was caught driving without a license at a CBP checkpoint in Florida.<sup>87</sup> They were detained at Broward, where both Claudio and Emiliano were pressured into waiving their rights and agreed to depart the United States within 120 days if granted bond.<sup>88</sup> Prior to his 2010 detention, Claudio had spent twelve years building his life in the United States.<sup>89</sup> He worked in construction and landscaping to provide for his two sons, who had spent most of their lives here, and his wife, Liliana Caminos-Rojas, who had almost lost her eyesight following a surgery.<sup>90</sup> As Claudio had every reason to stay in the United States, he violated his agreement to depart the country within 120 days, which automatically turned into a final order of removal.<sup>91</sup> ICE agents arrived on his doorsteps in February 2012 and took him into detention once again.<sup>92</sup> Emiliano was spared as a matter of prosecutorial discretion, and he immediately contacted several NIYA organizers who decided to launch an investigation into the detention facility.<sup>93</sup>

Infiltrating a detention center created the risk of prolonged detention and deportation from the country, which NIYA organizers aimed to prevent through storytelling and advocacy.<sup>94</sup> Those who agreed to infiltrate weighed their options and trusted that organizers from NIYA would help to get them out, as the organization had successfully defended hundreds of undocumented youth from deportation in the past.<sup>95</sup> Once inside the detention center, NIYA organizers planned to work with Claudio to organize with other detainees, collect their stories and reveal how the

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85. *DREAM Activist Speaks Out on Infiltrating Florida Detention Center to Find Wrongly Held Immigrants*, DEMOCRACY NOW! (Aug. 1, 2012), [http://www.democracynow.org/2012/8/1/dream\\_activist\\_speaks\\_out\\_on\\_infiltrating/](http://www.democracynow.org/2012/8/1/dream_activist_speaks_out_on_infiltrating/) [https://perma.cc/PH83-J289] (hereinafter DEMOCRACY NOW).

86. Viet Medic, *Two Immigrant-Rights Activists Arrested at Demonstration in Sen. Bill Nelson's Office*, MIAMI HERALD (Aug. 8, 2012), <http://www.miamiherald.com/2012/08/08/2940584/activists-press-sen-bill-nelson.html/> [https://perma.cc/NAT6-TS49].

87. *Id.*

88. *Id.*

89. *Immigrant Group Protests Detention of Undocumented*, FOX NEWS (Aug. 9, 2012), <http://www.foxnews.com/world/2012/08/09/immigrant-group-protests-detention-undocumented.html/> [https://perma.cc/MP93-455U].

90. Aura Bogado, *Dreamers Fight Deportations*, NATION (Jan. 30, 2013), <https://www.thenation.com/article/dreamers-fight-deportations/> [https://perma.cc/FC5G-E66B].

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

Obama Administration was detaining noncitizens who had committed no crimes or had convictions for minor crimes and subjecting them to deportation from the United States.<sup>96</sup> NIYA organizers believed that through the power of storytelling, they could deploy a public relations effort from inside the detention facility to eventually gain the release of these detainees, many of whom had U.S. citizen family members.<sup>97</sup>

Marco was joined inside the detention facility by Viridiana Martinez, a 26-year-old woman who is a founder of the North Carolina DREAM Team, an immigrant youth group that advocates for the rights of undocumented youth in North Carolina.<sup>98</sup> For the next few weeks, with the help of Claudio, Marco and Viridiana spoke to detainees inside Broward and gathered information from hundreds of detainees. NIYA set up a detention center hotline for detainees and their families to call with details on each case.<sup>99</sup> These details included the alien number, basic biographical information, contact information for the detainees' families, and how they had ended up in detention.<sup>100</sup>

By August 3, 2012, Marco and Viridiana had collected and transmitted information on 110 individuals who should have received prosecutorial discretion under the new guidelines issued by the Obama Administration.<sup>101</sup> Included in the list were individuals who had pending applications for nonimmigrant U-visas, more than a dozen DREAM Act eligible youth who were not supposed to be a removal priority, over sixty individuals with no criminal record or prior removal orders, some detained merely for being passengers in vehicles, and several cases of noncitizens who were in need of immediate medical care.<sup>102</sup> This list included one individual with a blood clot in his leg and a bullet in the spine, one woman taken for ovarian surgery and returned the same day, still bleeding, to her cell, and a man who urinated blood for days but wasn't taken to see a doctor.<sup>103</sup> Using the power of direct email marketing, community outreach

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96. *BREAKING: Viridiana Martinez to be Released From Broward Detention Center*, NAT'L IMMIGRANT YOUTH ALLIANCE (Aug. 3, 2012), <http://theniya.org/breaking-viridiana-martinez-to-be-released-from-broward-detention-center/> [https://perma.cc/8FQY-YLYS].

97. Marco Saavedra, *Letter from BTC*, UNDOCUMENTED OHIO (Feb. 13, 2013), <http://daohio.org/2013/02/13/letter-from-btc/> [https://perma.cc/8LKZ-43YS].

98. DEMOCRACY NOW, *supra* note 85.

99. Saavedra, *supra* note 97.

100. *Id.*

101. STEVE PAVEY, U.S. IMMIGRANT DETENTION AS THE NEXT PHASE OF THE EXPANDING PRISON INDUSTRIAL COMPLEX—A CASE STUDY OF BROWARD TRANSITIONAL CENTER 2 (2012), <https://www.sfaa.net/files/5813/9570/4725/HRSJIssueBriefing3.pdf> [https://perma.cc/EXE5-NHVG].

102. *Broward Transitional Center*, DREAM ACTIVIST, <http://action.dreamactivist.org/broward/> [https://perma.cc/N86W-4RC9] (last visited Apr. 12, 2017); see Megan O' Matz, *Immigrants with No Criminal History Get Lengthy Stays At Little-Known Jail*, SUN-SENTINEL (Jan. 6, 2013), [http://articles.sun-sentinel.com/2013-01-05/news/fl-private-immigration-jail-20130105\\_1\\_illegal-immigrants-deutch-human-rights-abuses/](http://articles.sun-sentinel.com/2013-01-05/news/fl-private-immigration-jail-20130105_1_illegal-immigrants-deutch-human-rights-abuses/) [https://perma.cc/M53W-B2Y5].

103. O'Matz, *supra* note 102.

through social networks and blogs, and partner and affiliate outreach, NIYA organizers broadcasted the stories that Marco and Viridiana had collected, demanding that ICE release the 110 detainees.<sup>104</sup>

The organizing did not end there. Inside the detention facility, with the support of Marco and Viridiana, Claudio Rojas started a hunger strike, which continued until he was released back to his family in Florida.<sup>105</sup> Seeing the power of organizing, 428 detainees signed a letter addressed to ICE Director John Morton and several congressional members, demanding an investigation into the detention practices at the facility.<sup>106</sup> Word of the conditions at Broward drew the ire and attention of 26 congressional representatives, who wrote a letter to ICE, demanding an investigation into detention practices at the facility.<sup>107</sup> The NIYA organizers also occupied the political offices of Florida Senator Bill Nelson to pressure him to support an investigation into the detention facility and call for the release of detainees.<sup>108</sup>

Several detainees were released over the next few weeks.<sup>109</sup> Through organizing inside detention centers, immigrant rights organizers with the NIYA exposed that prolonged detention was not limited to alleged criminal aliens, but also extended to noncitizens with no criminal histories. Through the power of community organizing and storytelling, these advocates were able to secure the release of dozens of detainees where legal advocates had failed. They also reminded ICE that while they had the power to take noncitizens into custody, they also had the power of discretion.

### *B. Mandatory Detention Is Not Mandatory*

The Homeland Security Act replaced the former INS with a new bureaucracy structured to prioritize immigration enforcement.<sup>110</sup> While ramping up on the enforcement of immigration laws, ICE developed several “alternative to detention” (“ATD”) programs through ankle bracelets, global positioning systems, telephonic monitoring, and active case specialists to assure that non-detained immigrants in proceedings do not abscond.<sup>111</sup> Instead of relying on imprisoning noncitizens, the DHS

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104. *Release All Low-Priority Detainees at the Broward Detention Center*, DREAM ACTIVIST, <http://action.dreamactivist.org/btc/> [<https://perma.cc/FT4B-2FSX>] (last visited April 3, 2013) (hereinafter DREAM ACTIVIST).

105. Mike Clary, *Detained Immigrant on Day 18 of Hunger Strike*, SUN-SENTINEL (Aug. 9, 2012), [http://articles.sun-sentinel.com/2012-08-09/news/fl-detention-center-hunger-strike-20120808\\_1\\_deportation-cases-immigration-and-customs-enforcement-hunger-strike/](http://articles.sun-sentinel.com/2012-08-09/news/fl-detention-center-hunger-strike-20120808_1_deportation-cases-immigration-and-customs-enforcement-hunger-strike/) [<https://perma.cc/V2DM-JKHL>].

106. *BREAKING: 428 Detainees Sign Letter from Detention Demanding Review of Broward*, IYJL (Nov. 2, 2012), <http://iyjl-blog.tumblr.com/page/2/> [<https://perma.cc/232P-SH5Y>].

107. O’ Matz, *supra* note 102..

108. Medic, *supra* note 86.

109. DREAM ACTIVIST, *supra* note 104.

110. Homeland Security Act of 2002, Pub. L. No. 107-296, § 476, 116 Stat. 2135, 2205 (2002).

111. *Alternatives to Detention for ICE Detainees*, AILA (Oct. 23, 2009), <http://www.aila.org/>

could choose to expand the use of ATD programs to persons who are subject to mandatory detention. It is a matter of discretion, rather than a matter of law.

In March 2013, ICE was forced to release over two thousand detainees as a result of the controversial budget sequester.<sup>112</sup> A considerable number of detainees released under supervision had criminal records such as aggravated felony convictions.<sup>113</sup> The widespread release of detainees is a reminder that the DHS has discretion to release even aliens subject to mandatory detention. In addition to expanding the use of ATD programs, the DHS could considerably improve the efficiency and fairness of immigration detention through more sensible interpretations of the current mandatory detention statute, such as a bond determination hearing for noncitizens detained past six months. From the vantage point of the government, these changes would allow the DHS to reallocate money to tracking down actual fugitives and improve the detention system for those who must be detained.

#### CONCLUSION

These litigation and bold civil disobedience tactics suggest that the time may be right to try a more carefully tailored immigration detention policy. The broad classes of noncitizens subject to mandatory detention are imprecise and arbitrary. It is hard to conceive of mandatory detention as anything other than a crude measure, which is unfair, inefficient, and expensive. There is a broad spectrum of ways to tailor detention policy, ranging from legislative amendments to new legal interpretations. The best way to simplify and rationalize the detention provisions would be to simply eliminate § 1226(c) and to revise other regulations to explicitly confer jurisdiction on immigration judges to make custody decisions at all phases of removal proceedings. Granting immigration judges the discretion to make individualized determinations as to custody restores procedural due process for noncitizens while also protecting the community from dangerous criminals. It is something we can and must do if we are indeed, a nation of immigrants, and a nation of laws.

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infonet/ice-fact-sheet-alternatives-detention-for-detainee/ [https://perma.cc/A7XD-N5EG].

112. Alfonso Chardy, *Criminals Among the 225 Immigrants Freed by ICE in Florida After Sequester*, BRADENTON HERALD (Mar. 24, 2013), <http://www.bradenton.com/news/local/crime/article34575996.html> [https://perma.cc/5PPR-CB5F].

113. *Id.*