Mandatory Detention during Removal Proceedings: Challenging the Applicability of Denmore v. Kim to Vietnamese and Laotian Detainees

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by Joren Lyons†

INTRODUCTION

On January 20, 2005, sixty-five year-old Huyen Thi Nguyen was released from sixteen months of detention by Immigration and Customs Enforcement (ICE), a division of the Department of Homeland Security. Ms. Nguyen, a lawful permanent resident (LPR) of the United States for more than fifteen years, had been convicted of participating in a cash-for-food-stamps scam. After she finished her brief prison term, ICE detained her thousands of miles from her family in Hawaii while it sought an order for her removal to Vietnam. In January 2005, a federal district court ordered ICE to free her. Her release came more than a year after an immigration judge had ruled that she was neither a flight risk nor a danger to the community.

ICE’s justification for Ms. Nguyen’s lengthy detention came directly from the Supreme Court’s 2003 ruling in Demore v. Kim,1 in which a slim majority of the Court found mandatory civil detention during removal proceedings to be constitutionally acceptable as a means of promoting the efficient deportation of LPRs with criminal convictions. According to the Court, this governmental goal outweighed any due process right to a bond hearing at which an immigration judge could determine whether the individual was suitable for release from custody.

However, the government’s ongoing use of the Kim decision to detain Laotians and Vietnamese like Ms. Nguyen is highly suspect, because the United States lacks repatriation agreements with Laos and Vietnam and cannot actually carry out a removal order, even when it obtains one. In this situation, detainees are entitled to be released under an order of supervision within six months after they are ordered removed.2 However, if they

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2. See Zadvydas v. Davis, 533 U.S. 678 (2001) (setting presumptive detention limit at six

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exercise their right to a hearing on why they should not be issued a removal order, or if they appeal such an order, ICE holds them in custody and the six-month “clock” does not start ticking until all appeals are finished. Presented with the “choice” between (1) accepting an order of removal with the limited possibility of deportation at some unknown future date, or (2) enduring continued detention for as long as they resist the government’s attempts to obtain a removal order, many Laotian and Vietnamese detainees accept a removal order. This essay traces the origin and development of this Catch-22 over the past decade, and then provides an in-depth look at Ms. Nguyen’s own case and the legal strategy that led to her release.

1. THE DETENTION DECADE: CHANGES IN MANDATORY DETENTION LAW SINCE 1996

A. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)

On September 30, 1996, President Bill Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). IIRIRA represented a massive overhaul of United States immigration law, and radically altered the landscape for long-term LPRs with criminal convictions. Prior to the passage of IIRIRA, a LPR of the United States in deportation proceedings was entitled to a hearing regarding rehabilitation, family ties, length of residency, work history, community service, and other equities. However, the new law eliminated consideration of these factors in many cases. Immigration judges now are generally required to enter a removal order against any non-citizen convicted of an “aggravated felony.” In a rather Orwellian twist, the “aggravated felony” designation actually includes a number of misdemeanors, such as theft offenses with a 365-day county jail sentence, even if the sentence is suspended. A removal

months where a removal order has been issued but there is no reasonably foreseeable possibility of executing it).


5. See 8 U.S.C. § 1101(a)(43)(G) (stating that the aggravated felony designation applies to a theft offense where the sentence is one year or more); id. § 1101(a)(48)(B) (stating that in determining the relevant length of a sentence, suspended sentences are to be considered as having been actually imposed). The category also includes misdemeanor consensual sexual intercourse with a person under age eighteen (statutory rape), even where no jail sentence is imposed at all, and regardless of whether the parties are similar in age or in a dating relationship. See id. § 1101(a)(43)(A) (categorizing “sexual abuse of a minor” as an aggravated felony; In re Small, 23 I. & N. Dec. 448 (B.I.A. 2002) (holding that a misdemeanor offense may qualify as an aggravated felony under “sexual abuse of a minor”; Cal. Penal Code § 261.5 (2005) (criminalizing sexual intercourse with any person under the age of eighteen, without regard to consent or relative age of the parties). I am aware of several cases in which
order based on an aggravated felony conviction can only be stayed if an individual demonstrates that he or she faces a likelihood of persecution in the country to which he or she will be removed.  

In addition to this reduction in relief from removal, Congress mandated the detention of most individuals who are placed in removal proceedings based on past criminal convictions. Although then-Attorney General Janet Reno delayed the full implementation of the new custody requirements until October 9, 1998, the new rules meant that even individuals eligible for relief from removal faced the prospect of imprisonment for the duration of their removal proceeding. In some cases, these detainees spend more time in civil immigration custody than they serve for their criminal offense, often while housed in remote federal detention facilities such as those in Oakdale, Louisiana and Eloy, Arizona. As a result, many choose deportation over remaining in detention long enough to pursue their case for relief from removal.

While acceptance of a removal order generally results in prompt deportation (and thus release from custody), the situation differs for nationals of countries that lack repatriation agreements with the United States, such as Laos and Vietnam. In such cases, removal is logistically impossible because the government in the person’s country of birth or citizenship simply refuses to accept their return. Nonetheless, following the enactment of IIRIRA, the former Immigration and Naturalization Service took the position that Congress had authorized continued civil detention from the entry of the removal order until its eventual execution, regardless of how remote the removal date might be. Predictably, this position led long-term detainees to pursue relief by filing petitions for writs of habeas corpus, the only available legal mechanism to challenge the constitutionality of their indefinite civil detention.

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long-term permanent residents have been charged with and detained as aggravated felons in removal proceedings based on misdemeanor convictions under section 261.5.


7. See id. § 1226(c). Prior law had allowed for release from custody where an immigration judge was satisfied that the individual was neither a flight risk nor a danger to the community. See 8 U.S.C. § 1252(a)(2)(B) (1995).

8. The so-called "Transition Period Custody Rules" that govern individuals released from criminal custody prior to this date allow for a bond hearing at which the immigration judge may order release upon posting of a bond if the detainee establishes that he or she is neither a flight risk nor a danger to the community. However, those released from criminal custody after October 8, 1998 are subject to the permanent rules' mandatory detention provisions. See In re Rojas, 23 I. & N. Dec. 117 (B.I.A. 2001).


10. See Anastasia Hendrix, Student Paying for Sins of Past: Specter of Deportation Haunts South Korean, San Francisco Chronicle, May 3, 2003, at A17 (quoting attorney Zachary Nightingale, "Almost all of them eventually regret [accepting a removal order to get out of detention], in my experience, but by then it is usually too late.").

11. See Dow, supra NOTE 9, at 265.
B. The Creation of the Six-Month Detention Clock: Zadvydas v. Davis

Various district and circuit courts adopted conflicting positions on the slew of habeas petitions filed by long-term detainees. As a result, the Supreme Court decided to address the issue by granting writs of certiorari in two cases, Zadvydas v. Underdown, and Ma v. Reno.\(^\text{12}\)

Kestutis Zadvydas was born in 1948 to Lithuanian parents in a German refugee camp.\(^\text{13}\) At age eight, he obtained LPR status. He later built up a substantial criminal record and was ordered deported. The government sought to deport him to Germany or to Lithuania. Both countries refused to accept Zadvydas on the grounds that he was not their national and therefore, not their responsibility. After the Dominican Republic, his wife’s country of citizenship, also rejected a request to accept him, Zadvydas remained in immigration custody, and eventually sought a writ of habeas corpus.\(^\text{14}\) The district court ruled in his favor, but the Fifth Circuit overturned the ruling, citing the possibility that Lithuania might accept Zadvydas’ application for derivative citizenship through his parents, and noting the availability of periodic administrative review of his detention.\(^\text{15}\)

Kim Ho Ma was born in 1977 in Cambodia, during the reign of the Khmer Rouge.\(^\text{16}\) He fled with his family at age two, spent the next several years in refugee camps in Thailand and the Philippines. He was admitted to the United States at age seven. At age seventeen, he was allegedly involved in a gang-related shooting in Seattle. Tried as an adult, Ma was convicted of manslaughter, and served twenty-six months in prison before he was released early for good behavior. The conviction, his first, qualified as an aggravated felony, and he was ordered removed after an immigration judge denied his claim that he faced persecution in Cambodia. Ma appealed to the Board of Immigration Appeals, but the immigration judge’s decision was affirmed in 1998. Despite Cambodia’s refusal to accept any deportees, the United States government continued to hold Ma in immigration custody, reasoning that his past gang ties and planned participation in a detainee hunger strike showed an inability to follow the law. The decision to detain him ignored the evidence he had submitted regarding his elderly father’s


\(^{13}\) See Zadvydas v. Davis, 533 U.S. at 684.


\(^{15}\) See Zadvydas v. Underdown, 185 F.3d at 294, 297.

\(^{16}\) See Ma, 208 F.3d at 819-20. The factual and procedural summary given here comes from the Ninth Circuit opinion and from Zadvydas v. Davis, 533 U.S. at 685-86.
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disability, an offer of steady employment, and his frequent discussions with his younger brother about the negative consequences of gang life.

Faced with the prospect of lifelong civil detention, Ma filed a habeas petition which was eventually consolidated with dozens of other Cambodian, Laotian, and Vietnamese cases. These cases were heard before an unusual five-judge panel of the District Court for the Western District of Washington. The panel stated:

[A]s the probability that the government can actually deport an alien decreases, the government’s interest in detaining that alien becomes less compelling and the invasion into the alien’s liberty more severe. Dangerousness and flight risk are thus permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Detention by the INS can be lawful only in aid of deportation. Thus, it is ‘excessive’ to detain an alien indefinitely if deportation will never occur.

Because Cambodia categorically refused to accept any deportees, the court subsequently held that there was no sufficient, compelling justification for Ma’s continued detention, and ordered INS to release him. The government appealed, and the Ninth Circuit ruled that where there is no reasonable likelihood that the country of origin will permit a person’s return in the reasonably foreseeable future, Congress has not authorized detention for more than ninety days beyond the entry of a final order of removal.

The Supreme Court consolidated the government’s petition for certiorari in Ma’s case with Zadvydas’ petition, and held in a 5-4 decision that where there is no reasonably foreseeable likelihood of removal, Congress has generally not authorized post-removal order detention for more than six months. The majority opinion noted that release could be made subject to conditions of supervision, and that further detention could be authorized if the conditions of release were violated.

The Zadvydas decision had two notable effects. First, the Justice Department responded by modifying its post-order custody rules to provide for a supervised release procedure, contingent upon a determination that there is no significant likelihood of the individual’s removal in the reasonably foreseeable future. Implementation of these rules has been highly problematic. Second, the government redoubled its extensive

18. Id. at 1156. The court further ruled that the government had not established a constitutionally acceptable procedure for making detention decisions where there was no possibility of removal; it added that at a minimum the detainees were entitled to a hearing before an immigration judge at which they could present evidence in favor of release, as well as the right to appeal an adverse decision. See id. at 1157.
19. See Ma, 208 F.3d at 827.
21. Id. at 695.
efforts to establish repatriation agreements with holdout countries, such as Laos, Vietnam, and Cambodia, especially after the events of September 11, 2001. This effort met with success in March 2002, when Cambodia agreed to accept the return of its nationals on a case-by-case basis. Three months later, in June 2002, the first group of six deportees from the United States arrived in Cambodia. Kim Ho Ma was deported to Cambodia in October 2002. However, Vietnam and Laos, have not yet established repatriation agreements with the United States, and their citizens remain within the scope of the Zadvydas ruling.

C. Expanding the Scope of Zadvydas: Clark v. Martinez and Thai v. Ashcroft

While the Court in Zadvydas ruled that admitted aliens could not be indefinitely detained, the Justices left open the question of whether a person stopped at the border, an "inadmissible arriving alien," was entitled to release from custody if a removal was issued against him but proved to be impossible to execute. Again the circuit courts split on the issue: the Ninth and Sixth Circuits held that the Zadvydas ban on indefinite detention applied to inadmissible aliens as well as those who are deportable. At the same time, the Eighth and Eleventh Circuits ruled that the protections of Zadvydas do not extend to inadmissible arriving aliens. The Supreme Court resolved the issue in January 2005 in Clark v. Martinez, ruling 7-2
that the same principle enunciated in Zadvydas applies equally to inadmissible arriving aliens who cannot be removed. 29

A second issue left open in Zadvydas was under what circumstances an unremovable individual could be detained beyond the six-month removal period that the Court authorized. While the Court postulated that some "specially dangerous" individuals might be permissibly detained more than six months after issuance of a removal order, it did not definitively state who might fall into this category. 30

This ambiguity was squarely addressed in Thai v. Ashcroft, in which the Ninth Circuit considered whether Anh Tuan Thai, the son of an American soldier and a Vietnamese woman, could be detained indefinitely based on the government's assertion that his release would pose a "special danger" to the public. 31 Thai, like all Vietnamese citizens, could not be removed to Vietnam, and had filed suit when the government attempted to use the revised, post-Zadvydas regulations to justify his indefinite detention on the grounds that he was unable to control his violent behavior. 32 The Ninth Circuit, after a detailed reading of Zadvydas, held that the Supreme Court had not authorized indefinite detention except for reasons of national security, and ruled that even "[a]n alien's ill mental health coupled with dangerousness cannot justify indefinite detention under Zadvydas." 33 The Thai panel's decision essentially struck down large portions of the post-Zadvydas regulations that the Justice Department had issued in 2001, which explicitly provided for extended detention following entry of a removal order against mentally ill individuals prone to uncontrollable violence. 34 However, the decision is effective only for people detained within the Ninth Circuit, and the Department of Homeland Security has not publicly announced any modification of its regulations or procedures elsewhere in the country.

D. A Major Setback for Detainees: Demore v. Kim

Although detainees in cases like Martinez and Thai successfully fought to expand the scope of Zadvydas, the government ultimately prevailed on the key point of whether the Court’s decision prohibited mandatory detention of people who were not yet under a final order of

31. 366 F.3d 790 (9th Cir. 2004).
32. The specific regulation at issue was 8 C.F.R. § 241.14(f) (2004), regarding detention of people with serious mental health problems.
33. Thai, 366 F.3d at 798.
34. See id. at 798-99, 8 C.F.R. § 241.14(f). At the same time that the Ninth Circuit has restricted the government's attempts to extend detention beyond the period authorized in Zadvydas, it has safeguarded the government's absolute right to hold individuals ordered removed for the six month time period authorized in that decision. See Khotesouvan v. Morones, 386 F.3d 1298 (9th Cir. 2004) (rejecting a due process challenge to detention, despite the impossibility of actual removal, because less than ninety days had passed since entry of final removal order).
removal, but were currently in removal proceedings. Prior to Zadvydas, the Seventh Circuit had found no constitutional infirmity in the requirement of 8 U.S.C. § 1226(c) for detention without bond during removal proceedings. However, post-Zadvydas challenges to § 1226(c) met with success in many other cases. In Kim v. Ziglar, for example, the Ninth Circuit found that regardless of whether an LPR was ultimately removable, he had a cognizable due process right to a bond hearing before an immigration judge, at which he could establish that he was neither a flight risk nor a danger to the community. Provided that these criteria were satisfied, the immigration judge could then set the bond in an amount appropriate to ensure the person’s return to court for his next hearing. If the individual posted the bond, he was then released pending a final decision on whether or not he was to be deported.

Under the various circuit court decisions, immigration judges conducted numerous bond hearings, allowing the release of many detainees with less serious criminal records while their removal proceedings continued. These releases ground to an abrupt halt on April 29, 2003, when the government’s petition for certiorari resulted in the Supreme Court’s overruling of Kim v. Ziglar. In a 5-4 decision, the Court held in Demore v. Kim that the government’s interest in promptly executing removal orders is sufficient to overcome an individual detainee’s liberty interest, since the detention at issue is not indefinite. In upholding the government’s power to detain deportable LPRs “for the brief period necessary for their removal proceedings,” the Court explicitly relied on statistics showing that the average detention time for § 1226(c) detainees from the initiation of removal proceedings to entry of a final order of removal is a mere forty-seven days, or five and a half months in the fifteen percent of cases in which an appeal is filed. In an important caveat,

35. See Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999).
36. See Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002), rev’d sub nom. Demore v. Kim, 538 U.S. 510 (2003); See also Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002); Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002); Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001).
37. Kim v. Ziglar, 276 F.3d at 539.
38. Id. at 538.
39. Id. at 539.
40. For example, Hyung Joon Kim (the plaintiff in Kim v. Ziglar) was released on bond after a determination that his convictions for shoplifting and breaking into a toolshed with friends did not indicate that he was a danger to the community. See Bob Egelko, Jail with No Bail OK’d for Legal Immigrants, SAN FRANCISCO CHRONICLE, May 30, 2003, at A3.
42. Id. (expressly finding that Congress in drafting 8 U.S.C. § 1226(c) authorized detention without bond in order to “increas[e] the chance that, if ordered removed, the aliens will be successfully removed”).
43. Id. at 513.
44. Id. at 529. In discussing the additional time required for an appeal, the majority assumed that it was the non-citizen who would be appealing the immigration judge’s removal order. Revealingly, the Court never considered the possibility that an individual might actually win his or her case before an immigration judge, thereby prompting a government appeal. See id. at 531 n.14.
however, the Court limited the scope of the Kim decision to individuals who had conceded that they are removable due to their criminal record, and reaffirmed the right to a bond hearing before an immigration judge for those who wish to contest whether their conviction(s) meet the criteria for mandatory detention under 8 U.S.C. § 1226(c). 45

Immediately after the Kim decision, the newly-created bureau of Immigration and Customs Enforcement46 began re-detaining those LPRs subject to § 1226(c) who had been released on bond under the various circuit courts’ previous rulings. 47 Despite the Court’s sunny view of the promptness with which removal hearings are conducted, many of these re-detained permanent residents are subjected to far more than the five or six months of detention the Court envisioned. 48

II. CHALLENGING THE APPLICABILITY OF KIM TO VIETNAMESE AND LAOTIAN DETAINNEES

A. The Dilemma of Kim

For the majority of individuals subject to mandatory detention under 8 U.S.C. § 1226(c), Kim established a clear choice: remain in custody and continue to fight the case, or be deported. But Laotians, Vietnamese, and nationals of a few other countries cannot be deported, regardless of whether they win or lose their removal cases. Hence the government must release them from detention eventually, either when the immigration judge or the Board of Immigration Appeals (BIA) grants relief from removal, or if the case is lost, under a Zadvydas release no more than six months after a final removal order is issued. These individuals must choose between lengthy detention while their application for relief is under consideration, or freedom in exchange for accepting a removal order that at present is merely a piece of paper with no practical effect.

The government currently uses its detention authority to pressure Laotians and Vietnamese into accepting removal orders without pursuing their statutory right to apply for relief from removal. This strategy is

45. See id. at 514 n.3 (citing with approval In re Joseph, 22 I & N Dec. 799 (B.I.A. 1999), noting the availability of individualized administrative review of any claim of improper application of § 1226(c), and declining to extend the scope of its decision to aliens who have been screened out of the scope of § 1226(c) via a Joseph hearing).


47. See Follow Up Implementation of United States Supreme Court Decision in Demore v. Kim, Memorandum from Anthony S. Tangeman, Director of the Office of Detention and Removal, United States Immigration and Customs Enforcement, to Regional Directors Assistant Regional Directors, Detention & Interim Directors, Enforcement (May 15, 2003).

48. For example, the author has a client who reported for further detention shortly after the Kim decision. He spent an additional eleven months in custody before the removal proceeding was terminated in his favor and he was released.
effective for two reasons: (1) fighting to retain their permanent resident status prolongs their detention; and (2) since they can't be deported, accepting a removal order has few practical consequences. But the long-term folly of this logic becomes clear upon examination of Cambodia's 2002 agreement to accept deportees. The agreement abruptly altered the equation for 1,500 Cambodian Americans under final orders of removal, giving previously dormant removal orders dire real-world consequences years after any chance to challenge the orders had expired.\(^4^9\) Because of this painful example, advocates continually struggle to convince Vietnamese and Laotian detainees to stay in jail and fight their cases. The lure of prompt release from custody is too often stronger than the possible future consequences of accepting a removal order.

**B. A Ray of Hope: Ly v. Hansen**

Recent litigation has focused on regaining the right to a bond hearing in Laotian and Vietnamese removal cases, so that people can demonstrate that they are neither a flight risk nor a danger to the community. Because Laotians and Vietnamese cannot be deported regardless of the outcome of their removal proceedings, their cases do not implicate Kim's overriding governmental interest in efficiently executing orders of removal, and can be distinguished on that basis. This argument was successful in the Sixth Circuit case of *Ly v. Hansen,* in which the court found an inherent reasonableness requirement in limiting the amount of time a Vietnamese citizen could be held in detention during removal proceedings, since he could not be removed from the United States regardless of the outcome of the proceedings.\(^5^0\)

The panel in *Ly* affirmed the District Court's order requiring a bond hearing where detention had gone on for a year and a half without a final decision on whether Ly would be ordered removed.\(^5^1\) The appeals panel cogently noted that in such a situation an individual "cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him."\(^5^2\) Given the lack of a repatriation agreement with Vietnam, the Sixth Circuit held that *Zadvydas,* not *Kim,* governs cases where removal is not achievable.\(^5^3\) Where a person cannot be removed from the United States regardless of the outcome of the removal proceeding, the government's interest in detaining him without bond during the proceeding is greatly diminished and cannot overcome the person's

51. Id. at 265.
52. Id. at 272.
53. Id. at 270 (finding Kim inapplicable because as a Korean citizen, Kim's removal was a real possibility).
liberty interest in receiving an individualized bond hearing via a habeas petition if the removal proceeding takes an unreasonably long time. Of course, detention without bond in such a situation is still authorized where the government demonstrates at a bond hearing that the individual is a flight risk or a danger to the community. Ly simply restores access to a forum in which these issues can be presented.

C. Nguyen v. Alcantar

The Sixth Circuit remains the only circuit that explicitly requires a bond hearing for long-term Vietnamese and Laotian detainees in removal proceedings. Others, such as the Ninth Circuit, have yet to speak on the issue, and the field remains open for litigation at the District Court level. In a recent example, a judge for the Northern District of California adopted the Sixth Circuit’s rationale in Nguyen v. Alcantar, another Vietnamese detention case. This case provides a valuable case study, because it presents legal arguments and strategies that can potentially aid in future litigation of this issue.

An examination of the case’s timeline is instructive, particularly given the Supreme Court’s insistence that “the detention at stake under §1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal.” In Nguyen, the removal proceedings began in September 2003. Ms. Nguyen promptly filed a motion to terminate, arguing that her criminal conviction did not qualify as an aggravated felony, and that she was not otherwise deportable. The immigration judge granted the motion and terminated the removal proceeding in October 2003, and the government appealed in November 2003.

Nguyen requested and received a bond hearing before the immigration judge in December 2003. After reviewing the facts of the case, the immigration judge determined that Nguyen was neither a flight risk nor a danger to the community, and ordered her released on a bond of $5,000. That same day, the government filed a notice of intent to appeal the custody determination, which under the applicable regulations automatically stayed Ms. Nguyen’s release from custody until the BIA ruled on the government’s appeal.

In April 2004, the BIA reversed the immigration judge’s decision to terminate the removal proceeding, and remanded the matter for a hearing on the danger that Ms. Nguyen would face if she was removed to Vietnam. In June 2004, the immigration judge granted her application for

54. See id. at 268.
55. Id.
withholding of removal under 8 U.S.C. § 1231(b)(3), finding that she faced a probability of persecution in Vietnam. In July 2004, the government again filed an appeal with the BIA, and Ms. Nguyen cross-appealed, arguing again that her conviction did not qualify as an aggravated felony or otherwise render her subject to removal. In October 2004, the government requested an extension of time to file its brief, which was granted. By January 2005, when the District Court heard oral arguments on the habeas petition, Ms. Nguyen had been in removal proceedings for sixteen months, during which time the government had filed two appeals in the case in chief and one bond appeal; the BIA had not yet issued a final decision in the case.

In her habeas petition, Ms. Nguyen argued that the government’s appeals had prolonged her removal proceeding far beyond what the Supreme Court envisioned in *Kim*. She called the District Court’s attention to Justice Kennedy’s concurring opinion in *Kim*, where he noted:

> [S]ince the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified. . . . Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.  

Kennedy’s concurrence carried special weight, since his joinder in the majority’s opinion in *Kim* provided the decisive fifth vote.

Ms. Nguyen reminded the District Court that *Kim* expressly found that when drafting 8 U.S.C. §1226(c), Congress authorized detention without bond in order to “increase[e] the chance that, if ordered removed, the aliens will be successfully removed.”60 The government’s interest in prompt removal, already questionable for a Vietnamese national, was particularly attenuated here, since the immigration judge had already determined that U.S. law prohibited Ms. Nguyen’s removal to Vietnam due to her demonstration that she faced a likelihood of harm there. Given the inapplicability of *Kim*’s central rationale of efficient execution of removal orders, the lack of a final decision as to whether Ms. Nguyen’s conviction subjected her to removal at all, and the protracted nature of the removal proceeding, Ms. Nguyen argued that her continued detention was outside the scope of that authorized by *Kim*.

The government took the position that while its appeal of the immigration judge’s decision was pending, Ms. Nguyen remained subject to mandatory detention under *Kim*. It argued that the Supreme Court had authorized detention of any and all individuals potentially subject to 8

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60. Id. at 528.
U.S.C. § 1226(c), for as long as they continued to contest the government’s attempts to obtain an order of removal. In this view, the only avenue of release from custody would be to accept an order of removal and waive all appeal rights.

The government’s actions in this case underscore the fundamental flaw in its reading of Kim and Zadvydas. If Ms. Nguyen had simply requested an order of removal at her first hearing in September 2003 and waived her right to appeal, she would have been released from custody long ago. Instead, she challenged the government’s claims that her offense subjected her to removal and that she faced no risk of harm in Vietnam. Although Ms. Nguyen won her case twice before the immigration judge, she still remained jailed and isolated from her family.

The District Court granted Ms. Nguyen’s habeas petition in January 2005, after she had been detained for sixteen months. The court adopted the Sixth Circuit’s rationale from Ly v. Hansen, noting in particular, that the government’s appeals were unreasonably prolonging the removal proceeding. The court further distinguished Ms. Nguyen’s case from Kim by noting that Ms. Nguyen had never conceded that she was removable, and that the immigration judge actually had determined that Ms. Nguyen was not removable and ordered her released on bond while the government appealed that finding. The District Court’s order observed that the automatic stay regulations invoked by the government to freeze the immigration judge’s bond order in December 2003 had since been found unconstitutional in Zavala v. Ridge.

Because the immigration judge had already determined after an individualized hearing that Ms. Nguyen did not pose a flight risk or a danger to the community, and that release on bond was therefore appropriate while the parties litigated whether she was actually subject to removal at all, the District Court ordered her released pursuant to the terms of the immigration judge’s original bond decision. ICE’s Detention and Removal Office released Ms. Nguyen on January 20, 2005, after she posted her bond. She flew back to Honolulu the next day, rejoining her seventy-four year-old husband, a naturalized United States citizen.

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61. See 8 C.F.R. § 241.4(b)(4) (stating that normal post-removal order detention procedures do not apply to an alien when there is no significant likelihood of removal in the reasonably foreseeable future); 8 C.F.R. § 241.13 (setting a general presumption that such aliens are eligible for release ninety days after a removal order becomes final).


63. Zavala v. Ridge, 310 F. Supp. 2d 1071 (N.D. Cal. 2004) (holding that granting ICE attorneys the authority to stay an immigration judge’s order for an individual’s release on bond by filing a one-page preprinted check-off form violated substantive due process by barring case-by-case consideration of the need for a stay of the bond order).
CONCLUSION

The purpose of this detailed recounting of Ms. Nguyen's habeas petition is twofold: first, to provide a blueprint for other petitioners to challenge the applicability of *Kim* to Vietnamese and Laotian detainees, and second, to underscore the extraordinary burdens that the current law places on an individual who wishes to contest a removal proceeding. Ms. Nguyen, an ailing sixty-five year-old woman who served four years in a Vietnamese political prison prior to escaping Vietnam, had to endure sixteen months of detention in this country in order to pursue relief from removal that was ostensibly available to her under the law. She did this despite the knowledge that she could have accepted a removal order to Vietnam with no immediate consequences, and that this act of submission would have freed her from detention. Until *Kim* is overturned or sufficiently distinguished, each and every Vietnamese and Laotian detainee under 8 U.S.C. § 1226(c) will face the same agonizing choice.

The past decade of obsessive detention and deportation of LPRs with criminal convictions has devastated thousands of families via civil removal proceedings that would grossly violate due process if applied to United States citizens. Yet no outcry has reached the ears of the general public. Sadly, the events of September 11, 2001 have furthered these assaults on immigrant communities and cemented the now-reflexive link between "alien" and "national security threat." In this context, restoring some measure of proportionality to deciding whether an individual is to be expelled forever from this country is a most daunting task. Nonetheless, it is a necessary one.

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64. For example, despite the possibility of lifelong banishment from the country, no legal counsel is provided for low-income people facing deportation; an attorney is available only to those who can afford one. See 8 U.S.C. § 1362.