THROUGH THE SEVENTH CIRCUIT LENS: CONFLICTING INTERESTS: AN EXAMINATION OF BASIC CIVIL RIGHTS FOR CRIMINAL ALIENS VERSUS CONGRESSIONAL DESIRE FOR SMOOTH REMOVAL PROCEEDINGS

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INTRODUCTION

Maxi Sopo, father and husband, was granted asylum to live in the United States after he was arrested by the Cameroon police because of his positions in the Bali Catholic Youth Association and Southern Cameroons National Council.[1] While in custody, the police took his clothes, starved him, beat him, hung him upside down shocking him through electrical nodes attached to his feet, and forced him to drink his own urine.[2] Sopo came to the United States in 2004 accompanied by his pregnant wife who delivered their daughter soon after their arrival.[3] In 2010, Sopo was arrested for bank fraud.[4] In 2012, Sopo was provided notice that his bank fraud convictions subjected him to removal from the United States.[5] Thereafter, in accordance with 8 U.S.C. § 1226(c), Sopo was detained.[6] He was not given a bond hearing in order to assess whether he was either a flight risk or a danger to society.[7] After sixteen months of civil detention, Sopo filed a *pro se* petition for a writ of *habeas corpus*.[8]

After being denied basic rights in his home country of Cameroon, Sopo sought a better life in the United States for himself and his family.[9] Unfortunately, the civics lesson he learned was that not *all persons* within the United States are treated equally. Nor are they all equally afforded due process of law. Circuits split on the question of *when* a bond hearing was required for these removable criminal aliens.[10] With *Sopo*, the Eleventh Circuit joined three other circuits by adopting a reasonableness standard and rejected the six-month bright-line approach of the Second and Ninth Circuits.[11] Five days after the *Sopo* decision

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1. Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1203 (11th Cir. 2016).
2. *Id.*
3. *Id.*
4. *Id.* at 1204.
5. *Id.*
6. *Id.* at 1203.
7. *Id.* at 1207.
8. *Id.*
9. *Id.* at 1203.
10. *Id.* at 1202.
11. *Id.* at 1215-16.

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was issued, the U.S. Supreme Court accepted certiorari from the Ninth Circuit to address whether criminal aliens are entitled to a bond hearing at all during their removal proceedings—and if so, whether the statute required that bond hearing at six months.[12] No opinion issued during the 2016 term, so the Court reheard oral arguments October 3, 2017.[13] During the arguments, there seemed to be a tacit agreement that this class of aliens is entitled to a bond hearing once the duration of detention becomes unreasonable: Justice Kagan likened arbitrary detention to torture;[14] Justice Breyer expressed unease at the idea that the alien class had no rights not to be confined arbitrarily.[15] Regarding when a bond hearing would be required, Justice Kennedy and Justice Sotomayor agreed that a bright-line rule would be easy to administer—aliens would not have to use the federal courts to file habeas petitions in order to be afforded bond hearings; rather, they would be automatically given a hearing by an immigration judge.[16] Conversely, Justice Alito made the comparison to the Speedy Trial Act which incorporates a totality of the circumstances test and stated that the Constitution makes no mention of a six-month rule—a view shared by Justice Ginsburg.[17]

In a surprise move, the Court issued its opinion on February 27, 2018,[18] even though the opinion was not expected until June.[19] Justice Kagan took no part in the opinion.[20] As it pertains to criminal alien detention under 8 U.S.C. § 1226(c), the Court held that the Ninth Circuit improperly applied the canons of statutory construction to read a six-month bond requirement into the statute, resulting in an interpretation that "falls far short of a 'plausible statutory construction.'"[21] By so reading, according to the Court, the Ninth Circuit ignored Congress's clear command:

> §1226(c) is not 'silent' as to the length of detention. It mandates detention 'pending a decision on whether the alien is to be removed from the United States,' . . . and it expressly prohibits release from detention except for narrow, witness-protection purposes. Even if courts were permitted to fashion 6-month time limits out of statutory silence, they certainly may not transmute existing statutory language into its polar

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12. Jennings v. Rodriguez, 136 S. Ct. 2489 (Mem.) (2016).

13. *See generally* Transcript of Oral Argument, Jennings v. Rodriguez, 136 S. Ct. 2489 (2016) (No. 15-1204).

14. *Id.* at 17-18.

15. *Id.* at 20.

16. *Id.* at 23, 29-30.

17. *Id.* at 41-42.

18. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

19. Associated Press, *US Supreme Court weighs case on detention of immigrants*, IND. LAW. (Oct. 4, 2017), https://www.theindianalawyer.com/articles/45018-us-supreme-court-weighs-case-on-detention-of-immigrants?utm_source=il-daily&utm_medium=newsletter&utm_campaign=2017-10-04 [perma.cc/T5NH-YREX].

20. Rodriguez, 138 S. Ct. at 852.

21. *Id.* at 846.

> opposite. The constitutional-avoidance canon does not countenance such textual alchemy.[22]

The Court ended its statutory analysis by holding that the only exception to Section 1226(c) mandatory detention, ending before removal proceedings conclude, is that specified by the statute: "for witness-protection purposes."[23] In closing, the Court remanded the case to the Ninth Circuit to "consider respondents' constitutional arguments on their merits."[24]

This Note analyzes, through an examination of U.S. Supreme Court and circuit precedent, whether the Seventh Circuit should address the Due Process issue craftily avoided by the Supreme Court. And if so, how? Part I provides background on due process and criminal alien detention laws. Part II provides an overview of the inconsistency of the federal circuits in answering "when" a bond hearing must be provided. Part III analyzes Seventh Circuit precedent on matters such as alien treatment, criminal due process law, and the constitutionality of 8 U.S.C. § 1226(c). Lastly, Part IV argues that the Seventh Circuit should adopt the reasonableness approach.

I. THE DUE PROCESS GUARANTEE OF THE FIFTH AMENDMENT

A. Aliens Are Afforded Some Constitutional Protections

The Due Process Clause of the Fifth Amendment reads: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."[25] The protections of this clause apply to both citizens and aliens.[26] "Alien" is the term chosen by the U.S. Legislature to describe "any person not a citizen or national of the United States."[27] Although this term carries with it a negative connotation, this Note will follow Congress's choice of words for purposes of clarity. According to *Zadvydas v. Davis*, a Supreme Court case in which the alien adjudged removed was subject to indefinite detention, the Court held aliens are afforded constitutional Due Process protections.[28] Thus, "[a] statute permitting

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22. *Id.* at 847.

23. *Id.*

24. *Id.* at 851. The Court also instructed the lower court to not only consider whether a class action was the appropriate mechanism for bringing a constitutional challenge, but also, whether the lower court would have jurisdiction under 8 U.S.C. § 1252(f)(1) which states: "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§ 1221-1232] *other than with respect to the application of such provisions to an individual alien* against whom proceedings under such part have been initiated." *Id.* (internal citations omitted. Emphasis added.)

25. U.S. CONST. amend. V.

26. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001); *see also* Plyer v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

27. 8 U.S.C. § 1101(a)(3) (2012).

28. 533 U.S. at 690.

indefinite detention of an alien would raise a serious constitutional problem."[29]

In *Zadvydas*, the Supreme Court recognized "government detention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . . or, in certain special and 'narrow' non-punitive 'circumstances' . . . where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"[30] Removal proceedings, even if they are inspired by criminal convictions, are civil proceedings—not criminal.[31] As such, these detentions must comport with *Zadvydas*'s command for special and narrow non-punitive circumstances. With *Zadvydas*, in the context of the detention of aliens already adjudged removed, the Court found that after six months, if the alien can "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing."[32] Otherwise, continued detention would run the risk of being punitive in nature and therefore, barred by the Constitution.[33]

Notwithstanding the Court's recognition that aliens have constitutional rights, throughout history, the Court has drawn clear distinctions between citizens and aliens.[34] For example, the United States can exclude aliens from its territory even after giving an alien express permission to enter.[35] Additionally, the Court has recognized that as noncitizens, aliens "remain subject to the power of Congress to expel them."[36] And, this power to expel could be accomplished by any means deemed necessary by the Congress.[37] Thus, there was no constitutional bar to Congress requiring Chinese laborers prove their residency by one credible white witness since it is "within the acknowledged power of every legislature to prescribe the evidence which shall be received . . . in the courts of its own government."[38]

As illustrated by Congress's power to expel aliens even though aliens are afforded due process protections, Congress enjoys broad power in regulating immigration and naturalization.[39] This is known as the Congressional plenary power, which gives the political branches free reign in regulating immigration

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29. *Id.*

30. *Id.* (emphasis in original).

31. *Id.*

32. *Id.* at 701.

33. *Id.*

34. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 603 (1889).

35. *Id.* at 609.

36. Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893).

37. *Id.*

38. *Id.* at 729.

39. *Chae Chan Ping*, 130 U.S. at 604. *See* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 503 (2001) (arguing the plenary power doctrine is a "shameful and racist relic").

matters—so long as the procedures used are constitutional.[40] In doing so, "Congress regularly makes rules that would be unacceptable if applied to citizens."[41] This is because alien policy is "intricately interwoven" with foreign relations, the war power, and maintaining a "republican form of government."[42] Therefore, because the justification for control is so great, the government interest in these cases need not be as strong as with Due Process cases involving U.S. citizens.[43]

B. Mandatory Detention of Criminal Aliens Under 8 U.S.C. § 1226(c)

Notwithstanding the Supreme Court's recognition that aliens are afforded constitutional protections, the Court considered the constitutionality of mandatory detention under 8 U.S.C. § 1226(c) in *Demore v. Hyung Joon Kim*[44] and allowed it to stand. This decision was made even though the detention mandated by Section 1226(c) falls squarely within the realm of what the Due Process Clause seeks to protect.[45] According to the *Rodriguez* Court, the distinction lies with the "definite termination point" found in the statute, i.e. the conclusion of the removal proceedings.[46]

8 U.S.C § 1226(c) provides: "[t]he Attorney General shall take into custody any alien who . . . is deportable by reason of having committed any offense."[47] Congress intended this statute to combat rising rates of alien criminal activity.[48] According to the 1993 Congressional investigation cited by the *Demore* Court, the Immigration and Naturalization Service (INS) "could not even *identify* most deportable aliens, much less locate them and remove them from the country."[49] The investigation also revealed after these criminal aliens were designated deportable, more than three quarters were arrested at least once, and almost half were arrested more than once before their deportation proceedings were started.[50] Thus, the investigation concluded that detaining criminal aliens during their

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40. Samantha M. Brock, *Current Development:* Demore v. Kim*: A Divided Supreme Court Upholds Lesser Due Process*, 10 New Eng. J. Int'l & Comp. L. 137, 145-46 (2004) (citing *Chae Chan Ping*, 130 U.S. at 604).

41. Demore v. Kim, 538 U.S. 510, 522 (2003) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

42. Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952).

43. *See generally Demore*, 538 U.S. 510.

44. *See id.*

45. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

46. Jennings v. Rodriguez, 138 S. Ct. 830, 846 (2018).

47. 8 U.S.C. § 1226(c) (2012).

48. *Demore*, 538 U.S. at 518.

49. *Id.* (emphasis in original) (citing *Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 103d Cong., 1st Sess. (1993); S. Rep. No. 104-48, at 1 (1995)).

50. *Id.* (citing *Hearing on H. R. 3333 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 54, 52 (1989)).

deportation proceedings would not only protect the public from these individuals but, as an added incentive, would increase the rate of successful criminal alien removals.[51]

In *Demore v. Kim*, relying on use of the word "shall" in Section 1226(c), the Supreme Court interpreted the language of this statute to mandate detention of criminal aliens during the pendency of their removal proceedings.[52] The Court relied on two of its previous cases: *Carlson v. Landon* and *Reno v. Flores* in upholding detention during removal.[53] In *Carlson*, the Court held that aliens, who were members of the Communist Party, could be detained during the removal process even though they posed no risk of flight because "detention is necessarily a part of this deportation procedure."[54]

In *Flores*, detained juvenile aliens challenged their detentions resulting from the INS' blanket policy of only releasing juveniles to parents, legal guardians, or other adult relatives.[55] Here, the Court determined this generic rule—even though it was put in place by INS, rather than Congress—was permissible in light of Congress's broad power to legislate with regard to immigration.[56] The *Demore* Court relied heavily on these two cases, which illustrated Congress's broad power to detain, and then distinguished *Zadvydas*, which dealt with detention after a final order of removal had already been issued.[57] Having concluded from these two cases that not only was detention a part of the deportation process but also that Congress enjoyed heightened power to legislate immigration, the Court considered, from the outset of detention, whether the mandatory Section 1226(c) detention was nevertheless appropriate given that no individual findings of risk, flight, or dangerousness were required—or indeed, permitted—by the language of the statute.[58]

Congress's interests under Section 1226(c) include: preventing flight of criminal aliens prior to or during their removal proceedings and protecting the community from these deportable criminal aliens.[59] In upholding the challenged detention, the *Demore* Court found these justifications satisfied *Zadvydas*'s command for "special" justification that outweighs an individual's liberty interest—a necessary finding, given alien detention is a civil rather than criminal proceeding.[60] Therefore, the Court held that individualized bond hearings at the outset of the removal process are not necessary because "when the Government

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51. *Id.* at 519 (citing DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, IMMIGRATION AND NATURALIZATION SERVICE, DEPORTATION OF ALIENS AFTER FINAL ORDERS HAVE BEEN ISSUED, REP. NO. 1-96-03, App. 46 (Mar. 1996)).

52. *See id.* at 513.

53. *Id.* at 523-26.

54. *Id.* at 524 (citing Carlson v. Landon, 342 U.S. 524, 538 (1952)).

55. Reno v. Flores, 507 U.S. 292, 297 (1993).

56. *Id.* at 313-14.

57. *Demore*, 538 U.S. at 523-30.

58. *See generally id.*

59. *Id.* at 513.

60. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

deals with deportable aliens, the *Due Process Clause* does not require it to employ the least burdensome means to accomplish its goal."[61]

Thus, due process protections are different for citizens and aliens.[62] Having interpreted the statute to mandate detention during the pendency of the removal process, the Court held Congress's interest in seamless removal proceedings must be balanced against the due process rights of the criminal aliens being detained.[63] This balance, according to the Court, can ostensibly be found by recognizing an implicit temporal limitation in the statute.[64] Consequently, the Court justified these Section 1226(c) criminal alien detentions by maintaining that such detentions generally last for less than ninety days or up to "five months in the minority of cases in which the alien chooses to appeal."[65] This allowed the Court to hold Section 1226(c) was not facially unconstitutional.[66]

Justice Kennedy concurred giving the Court its crucial fifth vote. However, in his concurrence, Justice Kennedy considered a scenario where the continued detention of someone bearing the status of a lawful permanent resident became unreasonable or unjustified and stated that in such a case, the alien "could be entitled to an individualized determination as to his risk of flight and dangerousness."[67] Thus, the *Demore* Court assumed the liberty interest at stake was only minimally affected because of the short time period of the detention. This left open the question of what would happen when the detention exceeded the length of time recognized by the Court as acceptable.

C. Criminal Alien Defined

8 U.S.C. § 1226(c) distinguishes between detention of aliens, generally, and detention of criminal aliens.[68] For the former, the U.S. Attorney General has discretion to release the alien on bond.[69] With the latter, the Attorney General has no such discretion.[70] Congress made detention of criminal aliens mandatory.[71]

8 U.S.C. § 1226(c) codifies what crimes subject an alien to removal (deportation)—thereby allowing them to be classified as criminal aliens.[72] According to the statute, a criminal alien is one who is deportable because of

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61. *Demore*, 538 U.S. at 528 (emphasis in original).
62. *See generally* Chae Chan Ping v. United States, 130 U.S. 581 (1889).
63. *Demore*, 538 U.S. at 523.
64. *Id.* at 529.
65. *Id.* at 530.
66. *Id.* at 531.
67. *Id.* at 532 (Kennedy, J., concurring).
68. *See* 8 U.S.C. § 1226 (2012).
69. *See id.* § 1226(a).
70. *See id.* § 1226(c).
71. *Demore*, 538 U.S. at 518 (Congress mandated detention of criminal aliens in response to increasing rates of criminal activity by aliens). The Court makes no distinction between violent and non-violent crimes. *Id.*
72. *See* 8 U.S.C. § 1226(c).

committing a specified offense (conviction of at least two crimes of moral turpitude, use of drugs or conviction for violating any law related to controlled substances, firearm offenses, conspiracy or espionage, or most commonly: aggravated felony which includes murder, rape, and drug trafficking, as well as fraud and failure to appear);[73] is deportable because of having been sentenced to imprisonment for at least one year;[74] or is deportable for having taken part in terrorist activities.[75]

D. Convenience Under Fire

The Court's decision in *Demore* has been attacked.[76] *Demore* raised both substantive and procedural due process concerns.[77] Substantive due process protects individuals from government action that "shocks the conscience."[78] Procedural due process guarantees that any deprivation by the government is done in a manner that is fair.[79] Although the former is out of the reach of the Court—through its own doing—the Court has retained the power over the latter to consider the constitutionality of immigration procedures.[80]

With *Demore*, the alien detained had not had the final removal order present in *Zadvydas*.[81] Rather, the alien was simply detained so the removal procedure would be more convenient for the government.[82] This desire for convenience fails to recognize there is a huge individual liberty at stake, particularly today where the average amount of time a criminal alien is detained during removal proceedings is 455 days.[83] The *Demore* Court backed away from its *Zadvydas* holding—indicating that aliens who have received a final order of deportation have more protection than aliens not yet found deportable.[84] This inconsistent decision undermines the status enjoyed by lawful permanent residents in the

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73. *See* INA § 101(a)(43)(A-U) (2011); *see also* 8 U.S.C. § 1226(c)(1)(B). These specified offenses can be found in 8 U.S.C. § 1227(a)(2)(A)(ii) (2008) (conviction of at least two crimes of moral turpitude), (A)(iii) (aggravated felony), (B) (use of drugs or conviction for violating any law related to controlled substances), (C) (firearm offenses), or (D) (conspiracy and espionage).

74. 8 U.S.C. § 1226(c)(1)(C). The requirements here can be found in 8 U.S.C. § 1227(a)(2)(A)(i) (conviction for crime of moral turpitude within a specified time period of admission where the possible sentence is one year or longer).

75. *See* 8 U.S.C. § 1227(a)(4)(B) (terrorist activities).

76. Brock, *supra* note 33, at 143-44.

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

78. United States v. Salerno, 481 U.S. 739, 746 (1987).

79. *Id.*

80. *See* Fiallo v. Bell, 430 U.S. 787, 792 n.4 (1977).

81. *See generally Demore*, 538 U.S. at 510-79.

82. *Id.*

83. Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1213 (11th Cir. 2016).

84. *See* Jennifer Korte Doucleff, *Supreme Court Review:* Demore v. Kim*: Upholding the Unnecessary Detainment of Legal Permanent Residents*, 94 J. Crim L. & Criminology 625, 644 (2004).

United States.[85] Additionally, the Court accepted at face value Congress's assertion that detention was necessary to effectuate removals, and failed to consider whether less restrictive means of ensuring appearance at removals could be used.[86]

Legal scholars also call attention to Congress's requirement that the Department of Homeland Security (DHS) maintain a certain number of detention beds.[87] This requirement was put in place to guarantee there be an adequate number of beds to accommodate the increase in detainees. Corresponding with the expansion of crimes resulting in mandatory detention pending removal, the daily detainee population "quadrupled between fiscal years 1995 and 2011, from 7,475 to 33,330."[88] Commensurate with this increase in the number of detainees, the length of time an alien is detained has increased.[89] With these numbers as support, scholars question the practicability of mandatory detention given the "high fiscal costs of detention."[90] Other criticism is centered on the condition of detention, given these immigration detentions are plagued with inadequate health care, instances of rape, and treatment generally reserved for criminal corrections rather than civil detention; for instance: solitary confinement.[91]

Other scholars take this disapproval one step further by asserting the policy behind Congress's plenary power (which formed the basis for upholding the constitutionality of Section 1226(c)) is less relevant now than when it was created and have called for limitations to the doctrine.[92] Some scholars argue for outright rejection of the Congress's plenary power.[93] Their arguments are based on the belief that adherence to the plenary power doctrine reduces predictability in judicial decisions and undermines equal protection rights afforded to aliens.[94]

Notwithstanding those concerns, *Demore* is the law. Thus, this Note will now proceed to examine how the lower courts have applied the case.

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85. *Id.*

86. *Id.*; *see also Demore*, 538 U.S. at 528 ("[W]hen the Government deals with deportable aliens, the *Due Process Clause* does not require it to employ the least burdensome means to accomplish its goal.").

87. Stephen H. Legomsky & Cristina M. Rodriguez, Immigration and Refugee Law and Policy 842 (6th ed. 2015).

88. *Id.*

89. *Id.*

90. *Id.* at 834.

91. *Id.* at 843.

92. *See generally Due Process- Immigration Detention- Third Circuit Holds that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Authorizes Immigration Detention Only for a "Reasonable Period of Time."*, 125 Harv. L. Rev. 1522 (2012).

93. *See* Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 Sup. Ct. Rev. 1, 4.

94. *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 Geo. Immigr. L.J. 365, 386-87 (2002); *see also* Wishnie, *supra* note 32, at 503 (arguing the plenary power doctrine is a "shameful and racist relic").

II. INCONSISTENCY IN THE FEDERAL COURTS

A. The Reasonableness Approach

As of June 2016 when *Sopo* was handed down by the Eleventh Circuit, six of the thirteen circuit courts had considered as-applied challenges to Section 1226(c).[95] In each case, the alien detained was held for significantly longer than the five months recognized by the *Demore* Court as the outside limit to detention.[96] Recognizing the length of time for removal proceedings has increased since *Demore*, each circuit considering the issue relied on Justice Kennedy's *Demore* concurrence and the Supreme Court's *Zadvydas* decision to hold there is an implicit temporal limitation to detention under Section 1226(c). Finding otherwise would require the courts to declare the statute unconstitutional.[97] This, courts are loath to do.[98] They therefore bolster their decisions recognizing an implicit temporal limitation to the statute by professing to adhere to the doctrine of constitutional avoidance.[99]

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress . . . . 'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.[100]

The Sixth Circuit was the first to consider the issue of when a bond hearing was required.[101] The court considered the alien's challenge that Section 1226(c) violated substantive and procedural Due Process since aliens detained under the statute were held without any individualized bond hearings to determine their risk of flight or dangerousness to the community.[102] The court held removable aliens may only be detained "for a time reasonably required to complete removal proceedings in a timely manner."[103] The Sixth Circuit was quickly joined by the Third and First Circuits, which adopted the reasonableness approach and forewent

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95. Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1212 (11th Cir. 2016).

96. *Id.* at 1211.

97. Reid v. Donelan, 819 F.3d 486, 494 (1st Cir. 2016).

98. *Id.*

99. *Id.*

100. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988) (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

101. *See* Ly v. Hansen, 351 F.3d 263, 268 (6th Cir. 2003).

102. *See id*.

103. *Id*.

adoption of a bright-line rule. These circuits recognized that determining whether detention was unreasonable, and therefore unconstitutional, was necessarily a "fact-dependent inquiry that will vary depending on individual circumstances."[104]

With *Sopo*, the Eleventh Circuit was the last to consider the issue, and likewise, adopted the reasonableness approach since "[a] bright-line approach strips away the essence of a reasonableness standard."[105]

The benefit of the reasonableness, or case-by-case approach, is that it takes into account the specific facts of an individual case.[106] Further, a case-by-case approach prevents aliens from deliberately prolonging their removal proceedings to meet the statutory limit.[107] Lower courts are capable of applying reasonableness standards—within and outside of the scope of Section 1226(c).[108] "[C]ourts are familiar with and regularly assess reasonableness as a legal standard."[109]

B. Six Months: The Unacceptable Bright-Line Rule

On the other hand, the courts that adopted the six-month bright-line rule, recently struck down by the *Rodriguez* Court, recognized the inconsistency that can result from a reasonableness standard.[110] They feared that employing the reasonableness standard would increase detention time "for those least likely to actually be removed at the conclusion of their proceedings" and, additionally, doubted the federal court system's competence to adjudicate complicated immigration issues.[111]

The Ninth Circuit was the first to take this approach, holding the "government's statutory mandatory detention authority . . . [is] limited to a six-month period, subject to a finding of flight risk or dangerousness."[112] Although

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104. Diop v. ICE/Homeland Sec., 656 F.3d 221, 233 (3rd Cir. 2011).

105. Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1215 (11th Cir. 2016).

106. *Id.*

107. *Id.* at 1216.

108. *Id.* at 1217.

109. Ly v. Hansen, 351 F.3d 263, 273 (6th Cir. 2003).

110. Reid v. Donelan, 819 F.3d 486, 497 (1st Cir. 2016).

111. *Id.* at 497-98.

112. Rodriguez v. Robbins (*Rodriguez II*), 715 F.3d 1127, 1133 (9th Cir. 2013). This was the second time this case came before the Ninth Circuit. *See generally id*. In *Rodriguez I*, the court held that the trial court impermissibly denied class certification of the plaintiffs, all of whom were non-citizens detained longer than six months without a bond hearing. *See generally* Rodriguez v. Hayes (*Rodriguez I*), 591 F.3d 1105 (9th Cir. 2010). Here, in *Rodriguez II*, the Ninth Circuit upheld the trial court's grant of a preliminary injunction requiring the government to provide each class member with an individualized bond hearing, and only continue to detain the individual class member if the government shows by clear and convincing evidence continued detention is necessary to protect the community or prevent flight. *Rodriguez*, 715 F.3d at 1133. In *Rodriguez III*, the Ninth Circuit upheld the trial court's grant of a permanent injunction requiring automatic bond hearings after six months. *See generally* Rodriguez v. Robbins (*Rodriguez III*), 804 F.3d 1060 (9th Cir. 2015), *cert. granted*, *sub nom*. Jennings v. Rodriguez, 136 S. Ct. 2489 (2016). On June

this is categorized as a bright-line rule, this holding does not mean that every criminal alien detained under Section 1226(c) will be instantly released after the six-month mark since this would increase the likelihood that aliens detained would intentionally prolong their proceedings in order to reach this point.[113] Rather, the six-month rule simply requires the alien be provided an individualized bond hearing—with the presumption that detention is prolonged once it reaches the six-month mark.[114]

The Second Circuit quickly agreed with the Ninth Circuit's bright-line approach, holding "mandatory detention for longer than six months without a bond hearing affronts due process."[115] The Second Circuit reached this decision after considering "the pervasive confusion over what constitutes a 'reasonable' length of time that an immigrant can be detained without a bail hearing, the current immigration backlog and the disastrous impact of mandatory detention on the lives of immigrants who are neither a flight risk nor dangerous."[116]

The Ninth and Second Circuits recognized the benefits of the bright-line rule: that it is an easy standard to apply,[117] that it ensures "similarly situated detainees receive similar treatment,"[118] and that it does not require each alien detained under Section 1226(c) to file a habeas petition to receive a bond hearing.[119]

Although the Supreme Court struck down the six-month rule as an impermissible interpretation of the statute, the constitutional issue remains. How long is too long for a criminal alien to be detained—living in conditions substantially similar to criminal imprisonment—after having already served a sentence for the underlying qualifying crime? At what point does the length of the civil detention offend the Due Process Clause?

C. Not All Removable Aliens Are in Fact Removed

The bright-line rule seemed more inclined to take into account that detention time increases for those least likely to be actually removed.[120] As the Sixth Circuit noted, the goal of detention while removal proceedings are pending is to ensure the government's ability to deport the alien once the proceedings have

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20, 2016, the U.S. Supreme Court granted the government's petition for writ of certiorari and held oral arguments on November 30, 2016. *Jennings*, 136 S. Ct. 2489. No opinion issued, but the Supreme Court reheard oral arguments on the issue on October 3, 2017. Transcript of Oral Argument, *Jennings*, 136 S. Ct. 2489 (No. 15-1204). The opinion issued February 27, 2018. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

113. *See generally* Rodriguez v. Robbins (*Rodriguez II*), 715 F.3d 1127 (9th Cir. 2013).

114. *Id*. at 1139.

115. Lora v. Shanahan, 804 F.3d 601, 606 (2nd Cir. 2015), *cert. denied*, 136 S. Ct. 2494 (2016).

116. *Id.* at 614.

117. Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1214 (11th Cir. 2016).

118. *Lora*, 804 F.3d at 615.

119. *Id.* at 614.

120. Rodriguez v. Robbins (*Rodriguez II*), 715 F.3d 1127, 1139 (9th Cir. 2013).

concluded.[121] With that as the goal, the actual removability of the alien has bearing on the reasonableness of the detention.[122] However, without discouraging aliens from seeking relief from deportability, the courts can consider whether applications for relief are likely to succeed and made in good faith or whether the aliens pursued the applications for the mere purpose of delaying the proceedings.[123] In this regard, the reasonableness standard is more appropriate:

> [A]ppeals and petitions for relief are to be expected as a natural part of the process. An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him. Further, although an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take. The mere fact that an alien has sought relief from deportation does not authorize the INS to drag its heels indefinitely in making a decision. The entire process, not merely the original deportation hearing, is subject to the constitutional requirement of reasonability.[124]

Having noted that good faith applications for relief should not increase the length of time an alien is detained, it is important to note the availability of relief for aliens detained under Section 1226(c).[125] Relief from deportation is an affirmative defense whereby the alien bears the burden of proof.[126] The availability for relief depends on several factors.[127] Relevant to this Note is the factor based on the grounds for deportability—namely, conviction of a crime.[128] Especially relevant is the aggravated felon's limited forms of relief as the aggravated felon is precluded from obtaining discretionary relief.[129] However, not all criminal aliens detained under Section 1226(c) are aggravated felons, so it is important to still consider these discretionary forms of relief.[130]

The available relief from deportability for aliens includes cancellation of removal part A (for lawful permanent residents);[131] cancellation of removal part B for non-lawful permanent residents);[132] registry;[133] legalization;[134] and

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121. Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003).
122. *Id.*
123. *Id.* at 272.
124. *Id.*
125. *See generally* LEGOMSKY & RODRIGUEZ, *supra* note 79, at 626-47.
126. *Id.* at 625.
127. *Id.*
128. *Id.*
129. *Id.* at 626.
130. *See* 8 U.S.C. § 1226(c) (2012).
131. LEGOMSKY & RODRIGUEZ , *supra* note 79, at 626-27.
132. *Id.* at 633.
133. *Id.* at 646.
134. *Id.* at 647.

adjustment of status.[135] These five forms of relief are the preferred forms of relief since success on the merits allows the alien to achieve lawful permanent resident status.[136] Other forms of relief include deferred action;[137] voluntary departure;[138] objections to destination;[139] stays of removal;[140] the Convention against Torture;[141] and in some cases, asylum.[142] Because the focus of this Note is criminal aliens, this relief portion will focus on cancellation of removal and asylum.

Cancellation of removal is granted at the U.S. Attorney General's discretion.[143] It is available for criminal aliens but excludes aggravated felons.[144] In order to qualify for cancellation part A, the alien must be deportable, must be a lawful permanent resident, must have resided continuously post-admission for seven years, and cannot be an aggravated felon.[145] In making a decision to award relief, the Attorney General will consider the alien's ties to the United States, the alien's positive qualities, the seriousness of the crimes, and whether the alien has since been rehabilitated.[146] Cancellation part B, on the other hand, applies to non-permanent residents.[147] As with part A, under part B, the Attorney General has discretion to award relief from removal.[148] However, under part B, cancellation will result in an award of status.[149] Thus, the requirements are stricter: the alien must have resided in the United States for ten years, must have good moral character, cannot have committed a crime of inadmissibility or falsified documents, and removal must result in extreme and exceptionally unusual hardship to the alien's U.S. citizen or lawful permanent resident spouse, parent, or child.[150]

For illustrative purposes, Sopo applied for two forms of relief: withholding of removal ("an asylum application is automatically treated as an application for withholding of removal in the event asylum is denied")[151] and relief under the Convention against Torture.[152] Success under either of these forms of relief would

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135. *Id.*
136. *See generally id.* at 626.
137. *Id.* at 649.
138. *Id.* at 662.
139. *Id.* at 666.
140. *Id.* at 672.
141. *Id.* at 1120.
142. *Id.* at 1055.
143. INA § 240A(a) (2011).
144. Legomsky & RODRIGUEZ , *supra* note 79, at 631.
145. INA § 240A(a).
146. Legomsky & RODRIGUEZ , *supra* note 79, 627-33.
147. *Id.* at 633.
148. INA § 240A(b)(1).
149. Legomsky & RODRIGUEZ , *supra* note 79, at 639.
150. INA § 240A(b).
151. Legomsky & RODRIGUEZ , *supra* note 79, at 1060.
152. Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1204 (11th Cir. 2016).

have allowed Sopo to remain in the United States.[153] Under Withholding of Removal (Asylum), a non-discretionary form of relief, Sopo would have to show that conditions in his native country are so bad that he would be persecuted.[154] In order to make this showing, Sopo must have a legitimate fear against returning.[155] Additionally, in order to qualify for asylum, Sopo would have to show that he filed his application within one year of arriving in the United States.[156]

In order to succeed under the Convention against Torture, Sopo must show that he would be tortured: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[157] Given Sopo's abhorrent treatment in Cameroon, it seems likely that the Convention against Torture relief will be granted—even though his request for relief under withholding of removal will likely fail since his crime qualifies as an aggravated felony.[158] This likelihood of success casts doubt on the reasonableness of Sopo's four-year detention, especially when factoring in his individualized risk of flight and danger to the community.

The *Rodriguez* Court held reading a requirement of a bond hearing within six months into Section 1226(c) was an impermissible use of statutory interpretation.[159] Curiously, the Court made no mention of the split amongst the circuits, so it is unclear whether reading "detainees must be given a bond hearing to assess their flight risk and dangerousness when the length of their detention becomes unreasonable" would likewise be an impermissible use of statutory interpretation.[160] Nevertheless, the Court invited the Ninth Circuit to consider the constitutional implications of prolonged detention.[161] Thus, bearing this in mind, this Note next turns to Seventh Circuit jurisprudence in order to make an informed decision regarding which approach would provide the best fit.

III. THE SEVENTH CIRCUIT APPROACH

Although "[s]tare decisis is not an inexorable command," it is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[162] Thus,

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153. Legomsky & RODRIGUEZ , *supra* note 79, at 1055, 1120.

154. *Id.* at 927.

155. *Id.* at 1083.

156. 8 U.S.C. § 1158(a)(2)(B) (2008).

157. Legomsky & RODRIGUEZ, *supra* note 79, at 1120-21 (quoting Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3.1, Dec. 10, 1984, 1465 U.N.T.S. 85).

158. 8 C.F.R. 208.16(d) (2017).

159. Jennings v. Rodriguez, 138 S. Ct. 830, 847 (2018).

160. *See generally Id.*

161. *Id.* at 851.

162. Payne v. Tennessee, 501 U.S. 808, 827-28 (1991) (emphasis removed).

Seventh Circuit precedent concerning the constitutionality of Section 1226(c), alien rights, and criminal due process provides the necessary groundwork for determining when a bond hearing is required for criminal aliens detained in the Seventh Circuit.

*A. Alien Detention: Pre-*Demore

Before the Supreme Court decided *Demore*, the Seventh Circuit considered the constitutionality of 8 U.S.C. § 1226(c) in *Parra v. Perryman*. The court held that since persons detained under the statute have "little hope" to remain in the United States and "[a] criminal alien who insists on postponing the inevitable has no constitutional right to remain at large during the ensuing delay," detention was proper.[163] Moreover, according to the court, "the United States has a powerful interest in maintaining the detention in order to ensure that removal actually occurs."[164]

The court balanced the due process interests involved, finding the private interest at stake was negligible since it involved the liberty of a person "no longer entitled to remain in this country."[165] When the alien admits all the elements required for removal, "the probability of error is zero."[166] And, the public interest in detention is substantial in order to carry out the removal order.[167]

The Seventh Circuit was guided by the Supreme Court's decision in *United States v. Salerno*, which upheld pretrial detentions in criminal prosecutions.[168] In *Salerno*, the Supreme Court considered the constitutionality of the Bail Reform Act of 1984 which allowed judicial officers to detain persons charged with crimes pending trial if there is clear and convincing evidence that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[169] According to the Seventh Circuit, because the private interest in criminal cases is higher (citizens may be involved), and fewer persons skip out on their criminal trials than aliens skip out on removal proceedings, Section 1226(c), like the Bail Reform Act, was constitutional—especially given Congress's plenary power to regulate immigration.[170]

Thus, pre-*Demore*, the Seventh Circuit recognized no temporal limitation for detaining criminal aliens under Section 1226(c).[171]

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163. Parra v. Perryman, 172 F.3d 954, 958 (7th Cir. 1999).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* (citing United States v. Salerno, 481 U.S. 739 (1987)).
169. 18 U.S.C. § 3142(e)(1) (2012).
170. *Parra*, 172 F.3d at 958.
171. *See id.* at 955.

B. Alien Detention: Post-Demore

Post-*Demore*, the Seventh Circuit's consideration of Section 1226(c) did not involve the issue of whether the statute had an implicit temporal limitation.[172] Rather, the Seventh Circuit considered a challenge by a detained alien in *Gonzalez v. O'Connell* that his detention under Section 1226(c) was improper since his probationary disposition did not amount to the conviction required by the statute.[173] Thus, the alien argued his mandatory detention violated Due Process since "he raised a good-faith argument that he would not in fact be deported."[174]

The court noted that its earlier *Parra* decision was on par with the Supreme Court's holding in *Demore*.[175] But, regarding disciplinary dispositions, the Seventh Circuit drew a distinction between *Parra* and *Demore* and found that where the detainees conceded they were deportable, they could not find relief under the statute.[176]

The case was ultimately decided on the merit-based claim—a probationary disposition is a conviction for Section 1226(c) purposes.[177] Therefore, the alien was properly detained under the statute.[178] Here, the court was not confronted with a temporal challenge to Section 1226(c) and, therefore, did not address it.[179] By this point, only the Sixth Circuit had considered such a challenge.[180]

The Seventh Circuit next considered whether immigration status had any bearing on who could be mandatorily detained when a lawful permanent resident was convicted of a drug-related offense and was therefore, removable.[181] In *Velez-Lotero v. Achim*, the alien challenged his detention under Section 1226(c) because the statute did not distinguish between lawful permanent residents and other aliens.[182] The court found the only relief from this mandatory detention was found in the witness protection exception included in the statute.[183] Thus, the alien was not entitled to a bond hearing.[184] Here again, the Seventh Circuit was not presented with, nor did it consider the implicit temporal limitation recognized in *Demore*.[185] Still, by the date of this decision, only the Sixth Circuit had

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172. *See generally* United States v. Zamudio, 718 F.3d 989 (7th Cir. 2013); Velez-Lotero v. Achim, 414 F.3d 776 (7th Cir. 2005); Gonzalez v. O'Connell, 355 F.3d 1010 (7th Cir. 2004).

173. *See generally Gonzalez*, 355 F.3d 1010.

174. *Id*. at 1012.

175. *Id.* at 1019.

176. *Id.*

177. *Id.* at 1020.

178. *Id.* at 1021.

179. *See generally id.*

180. Ly v. Hansen, 351 F.3d 263, 268 (6th Cir. 2003).

181. Velez-Lotero v. Achim, 414 F.3d 776, 777 (7th Cir. 2005).

182. *Id.* at 782.

183. *Id.*

184. *Id.*

185. *See generally id.*

considered a temporal challenge to Section 1226(c).[186]

The Seventh Circuit's next foray into Section 1226(c) was in *United States v. Zamudio* when the alien detained under the statute was an aggravated felon under 8 U.S.C § 1227(a)(2)(A)(iii) based on a robbery conviction.[187] Here, the district judge, during the criminal sentencing, ordered the alien to report to the Department of Homeland Security (DHS) to determine the alien's removability.[188] The alien challenged this on grounds that it was an additional imprisonment term.[189] The court agreed there was no need for this added measure because under Section 1226(c)(1)(B), the alien was removable anyway and already required to report to the immigration authorities.[190]

Thus, if the removal proceedings are not complete before the end of his sentence, the alien must be detained anyway until the removal process is completed.[191] This "must be detained" language indicates the Seventh Circuit's recognition that Section 1226(c) mandates detention.[192] Again, the court was neither presented with, nor considered the temporal limitation of this mandatory detention.[193] By the date of this decision, the Sixth, Third, and Ninth Circuits have all considered temporal challenges to Section 1226(c).[194]

C. Due Process Requirements in Criminal Law

New crimes are constantly being added to the list of aggravated felonies,[195] likely in response to "[n]ational security fears and economic instability [which] have increased demands for more aggressive enforcement of immigration laws."[196] Additionally, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) enlarged the definition of aggravated felony to include crimes *punishable* by one year or more; actual punishment, therefore, is rendered irrelevant.[197] Previously, placement within the aggravated felon category required crimes with sentences of five years or more.[198]

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186. Ly v. Hansen, 351 F.3d 263, 268 (6th Cir. 2003).

187. U.S. v. Zamudio, 718 F.3d 989, 991 (7th Cir. 2013).

188. *Id.* at 989.

189. *Id.*

190. *Id.* at 991.

191. *Id.*

192. *Id.*

193. *Id.*

194. *See* Rodriguez v. Robbins, 715 F.3d 1127, 1133 (9th Cir. 2013); Diop v. ICE/Homeland Sec., 656 F.3d 221, 223 (3rd Cir. 2011); Ly v. Hansen, 351 F.3d 263, 268 (6th Cir. 2003).

195. INA § 101 (2011); 8 U.S.C. § 1101(a)(43) (2012).

196. Barbara A. Frey & X. Kevin Zhao, *The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law*, 299 Law & Ineq. 279, 280 (2011).

197. Brock, *supra* note 33, at 143 (citing DAVID WEISSBRODT ET AL., IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 44-47, § 1-8 (4th ed. 1998)).

198. *Id.*

Even absent the enlargement of criminal offenses rendering an alien deportable, deportation itself is a punishment—and, a rather harsh one.[199] It is the equivalent of exile, which is almost never permitted for U.S. citizens, and not as punishment for a crime.[200] Rather, when it applies to a U.S. citizen, loss of U.S. citizenship is limited to two circumstances: revocation of naturalization and expatriation.[201] Revocation of naturalization is a unilateral decision by the U.S. government, which necessarily, cannot apply to someone born a citizen.[202] It takes effect when there are defects in the naturalization.[203] Expatriation can apply to both born and naturalized citizens, but unlike revocation of naturalization, requires consent on the part of the citizen being expatriated.[204]

Unlike revocation of citizenship, which is severely limited and never allowed as punishment for a crime, the detention mandated by Section 1226(c) is punitive in nature, since the majority of detained aliens are housed in either state prisons or local jails.[205] This enlargement of criminal offenses rendering an alien deportable illustrates the blending of criminal and immigration law, making an examination of Seventh Circuit criminal law crucial to understanding how the court will decide the question of when a bond hearing becomes necessary for criminal aliens detained under Section 1226(c).[206]

1. The Seventh Circuit Finds a Similarity Between Immigration Detention and Criminal Custody.—In *United States v. Estrada-Mederos*, an alien appealed his federal criminal sentence, asserting the government delayed in charging him, thereby preventing him from having his federal sentence run concurrently with his state sentence and "failed to give him credit for time spent in immigration detention[.]"[207] By the time the alien had been taken into federal criminal detention, he had been in immigration detention for more than six months.[208] Although *the court found a similarity between state criminal custody and immigration detention*, the court ultimately distinguished between the two; finding that although neither immigration detention nor state incarceration could be credited toward his federal sentence, the lower court should have considered whether the delay deprived the alien "of the opportunity to serve a partially concurrent sentence."[209]

The Seventh Circuit explicitly recognized the similarities between state

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199. Frey & Zhao, *supra* note 184, at 285.

200. Legomsky & RODRIGUEZ, *supra* note 79, at 1311.

201. *Id.* at 1311-29.

202. *Id*. at 1311.

203. *Id.*

204. *Id.* at 1329.

205. *See* Frey & Zhao, *supra* note 184, at 306.

206. *See generally id.* (arguing that the blending of immigration and criminal law leads to selective incorporation of protection afforded criminal defendants in the civil immigration proceedings).

207. 784 F.3d 1086, 1088 (7th Cir. 2015).

208. *Id.* at 1089.

209. *Id.* at 1093.

incarceration and civil immigration detention were "too strong to ignore" even though immigration custody is classified as civil detention.[210] This seems to indicate the loss of liberty is the same and, moreover, immigration detention closely parallels a criminal sentence. Based on this similarity, it is reasonable to think that certain procedural safeguards must be present for an immigration detention.

2. Due Process Limits to Pre-Trial Detentions.—The federal bail system, upheld by *Salerno*, is guided by 18 U.S.C. § 3142, which allows federal judicial officers to order that the person charged with a crime either be: released on his own recognizance; released on a condition; detained temporarily "to permit revocation of conditional release, deportation, or exclusion[;]" or detained pending trial.[211] Although the burden of proof for a criminal conviction is beyond a reasonable doubt, the prosecution need only prove by clear and convincing evidence that an indicted person is a flight risk or danger to have them ordered detained.[212] Justice Marshall's *Salerno* dissent questioned the majority's rationale, finding that denial of bail cuts against the presumption of innocence—particularly given the lesser burden.[213]

Recognizing the importance of the presumption of innocence, pre-*Salerno*, the Seventh Circuit held in *Duran v. Elrod*: "as a matter of due process, pre-trial detainees may suffer no more restrictions than are reasonably necessary to ensure their presence at trial."[214] The rationale for this is persons detained before trial have not yet been convicted of a crime.[215] Thus, detention must be narrowly tailored to ensure presence at trial.[216] Even though aliens are afforded lesser due process rights, that same rationale can be applied to Section 1226(c) detentions. The pre-trial detainees not yet convicted of a crime in *Duran* can be likened to criminal aliens not yet ordered removed—yet detained under Section 1226(c).

When the Seventh Circuit entertained a challenge by criminal detainees in *Jordan v. Wolke* regarding the conditions of their detention where the jail was overcrowded and contact visitation was denied, the court found no Due Process violation.[217] In this particular jail, only five percent of the inmates remained in the jail for over thirty days.[218] In analyzing what the Due Process Clause requires, the court relied on *Bell v. Wolfish*.[219] In *Bell*, the Seventh Circuit found that in balancing the individual's liberty interest against the government interest, the appropriate question is whether the infringement is in place to punish or whether the effects on the individual are merely incidental to a legitimate government

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210. *Id.* at 1091.
211. 18 U.S.C. § 3142(a)(3) (2012).
212. *Id.* § 3142(f)(2)(B).
213. United States v. Salerno, 481 U.S. 739, 766 (1987) (Marshall, J., dissenting).
214. 542 F.2d 998, 999 (7th Cir. 1976).
215. *Id.* at 1000.
216. *See generally id*.
217. *See generally* 615 F.2d 749 (7th Cir. 1980).
218. *Id.* at 751.
219. *Id.* at 752.

interest.[220]

In applying *Bell v. Wolfish* to the facts of the case, the Seventh Circuit relied on the fact that the detention period was brief and found that no violation had occurred because the balance weighed in favor of security.[221] Applying that rationale to detention of criminal aliens, who are detained pending a *civil* proceeding, these same interests must be balanced. Examining pre-trial criminal detention is important because it involves not only a loss of liberty but, also, an acknowledgement that certain conditions of confinement are allowed so long as the government has a legitimate interest and the period of detention is brief.[222]

When a pre-*Salerno* criminal detainee challenged the constitutionality of the Bail Reform Act of 1984 in *United States v. Portes*, the Seventh Circuit focused on the purpose of the detention and whether it was necessary.[223] In *Portes*, a magistrate judge ordered pre-trial detention, finding the government met its burden of proving both the detainee was a danger to the community and a flight risk.[224] The court held that although the right to bail is not a "basic human right," the "eighth amendment necessarily implies that unreasonable denial of bail is prohibited."[225] Thus, under certain circumstances, a court has the power to deny bail.[226]

In determining whether detention is permissible and, therefore, not a punishment, the court looks to the purpose of the detention.[227] Protection of the community and prevention of flight are legitimate legislative goals.[228] The court recognized that "at some point, the length of delay may raise due process objections."[229] However, the detention in this case had not reached that tipping point.[230] This case is important because it illustrates that citizens are afforded added protections.[231] In this case, the individual was afforded a detention hearing and *still*, the court recognized that too long a detention would raise due process concerns.[232] Notably, the court did not impose a bright-line rule here.[233]

3. Status Can Impact Due Process Protections.—In *Faheem-El v. Klincar*, the detainee challenged his detention, which resulted from an Illinois statute

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220. *Id.* (citing Bell v. Wolfish, 441 U.S. 520, 537 (1979)).

221. *Id.* at 753.

222. *Id.*

223. 786 F.2d 758, 760 (7th Cir. 1985).

224. *Id.* at 764-65.

225. *Id.* at 766 (citing Hunt v. Roth, 648 F.2d 1148, 1157 (8th Cir. 1981)) (emphasis removed).

226. 18 U.S.C. § 3142 (2012).

227. *Portes*, 786 F.2d at 767.

228. *Id.*

229. *Id.* at 768.

230. *Id.* at 760, 768 (Defendant was ordered detained in July 1985, and the case was decided in December 1985. The Seventh Circuit therefore found the length of detention challenge premature).

231. *See generally id.*

232. *See id.*

233. *Id.*

prohibiting bail for parolees who were arrested on new criminal charges.[234] Parolees are entitled to due process before their parole is revoked.[235] However, that process need not be a bail hearing.[236] Rather, a parole revocation hearing would suffice.[237] In this case, the Seventh Circuit found the right to a bail hearing (normally required by due process) was "outweighed by the state's interest in regulating parole."[238]

The Seventh Circuit's focus in *Klincar* was on the plaintiff's status as a parolee.[239] This parolee status is similar to the status of a criminal alien. In both situations, the individual had already been convicted of a crime, causing their detention.[240] Here, however, the defendant was still serving his sentence on conditional release, whereas criminal aliens can be detained even when they have already completed their criminal sentences.

4. Lengthy Detentions Affront Due Process.—In *Armstrong v. Squadrito*, the plaintiff filed a 42 U.S.C. § 1983 action after he was erroneously detained for fifty-seven days after being arrested pursuant to a warrant.[241] The court found that this detention shocked the conscience (the standard for a substantive due process challenge).[242]

In *United States v. Warneke*, the defendants were detained in excess of seventeen months pending trial.[243] Rather than challenge on due process grounds, they raised a Double Jeopardy claim, asserting their lengthy detention was punishment.[244] Here, the court recognized that the Due Process Clause protects individuals from excessively long pre-trial detentions.[245] However, as these defendants did not assert Due Process claims, the court did not address them other than to express concern at the length of time the defendants were in custody pending trial.[246] Again, the court declined to define a *per se* time limit at which point detention becomes unreasonable.[247]

5. Seventh Circuit Criminal Due Process Cases Can Guide the Court's Examination of Alien Detention under 8 U.S.C. § 1226(c).—As explained above, an examination of due process rights afforded in criminal proceedings is necessary because of the apparent convergence of immigration and criminal

234. 841 F.2d 712, 714 (7th Cir. 1988).
235. *Id.* at 722.
236. *Id.*
237. *Id.* at 722-23.
238. *Id.* at 724.
239. *See generally id*.
240. *See generally* 8 U.S.C § 1226(c) (2012).
241. 152 F.3d 564, 567 (7th Cir. 1998).
242. *Id.*
243. 199 F.3d 906, 907 (7th Cir. 1999).
244. *Id.*
245. *Id.* at 908.
246. *Id.*
247. *Id.*

law.[248] With *Estrada-Mederos*, the Seventh Circuit expressly recognized the similarities between immigration detention and criminal incarceration, indicating both are punishment.[249] This recognition provides the foundation for requiring procedural safeguards for aliens detained under Section 1226(c). At the very least, this would require balancing the purpose of the detention with the loss of liberty resulting from the detention.

Moreover, based on the above Seventh Circuit criminal due process cases, there are clear trends toward recognizing due process is offended by prolonged pre-trial detentions and imposing no more restrictions than reasonably necessary to ensure presence at trial.[250]

IV. THE SEVENTH CIRCUIT SHOULD ANSWER THE SUPREME COURT'S INVITATION TO CONSIDER THE CONSTITUTIONALITY OF PROLONGED MANDATORY DETENTION UNDER 8 U.S.C. § 1226(C)

Fairness is the essence of Due Process.[251] Although the purpose of 8 U.S.C. § 1226(c) mandating the detention of criminal aliens[252] is to prevent flight and protect the community, no finding of individual propensities needs to be made at the outset of the detention.[253] Reviewing courts have deferred to Congress's desire for smooth removal proceedings, and the Supreme Court guidance merely recognizes the detention may not be indefinite;[254] the Court backed off from addressing the constitutional issue.[255] Lower courts split on exactly what that means—although they all recognize detention under Section 1226(c) is mandatory—at least initially.[256] Moreover, each circuit court hearing challenges to detention without a bond hearing under Section 1226(c) relied on Justice Kennedy's concurrence in *Demore* when finding an individualized bond hearing was required—at some point.[257]

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248. Frey & Zhao, *supra* note 184, at 280.

249. *See generally* United States v. Estrada-Mederos, 784 F.3d 1086 (7th Cir. 2015).

250. *See Warneke*, 199 F.3d at 908; *see also* United States v. Portes, 786 F.2d 758, 768 (7th Cir. 1985); Jordan v. Wolke, 615 F.2d 749, 751 (7th Cir. 1980) (some detentions are allowed if the period is brief); Duran v. Elrod, 542 F.2d 998, 999 (7th Cir. 1976) (least restrictive means to ensure presence at trial).

251. *See* United States v. Salerno, 481 U.S. 739, 746 (1987).

252. 8 U.S.C. § 1226(c) (2012).

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

254. *Id.*

255. *See* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

256. *See* Reid v. Donelan, 819 F.3d 486, 497-98 (1st Cir. 2016); Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1215 (11th Cir. 2016); Lora v. Shanahan, 804 F.3d 601, 606 (2nd Cir. 2015), *cert. denied*, 136 S. Ct. 2494 (2016); Rodriguez v Robbins, 715 F.3d 1127, 1133 (9th Cir. 2013); Diop v. ICE/Homeland Sec., 656 F.3d 221, 223 (3rd Cir. 2011); Ly v. Hansen, 351 F.3d 263, 268 (6th Cir. 2003).

257. *See Reid*, 819 F.3d at 497-98; *Sopo*, 825 F.3d at 1215; *Lora*, 804 F.3d at 606; *Rodriguez*, 715 F.3d at 1133; *Diop*, 656 F.3d at 223; *Ly*, 351 F.3d at 268.

A. Acceptance of an Implicit Temporal Limitation to 8 U.S.C. 1226(c)

With that as a background, the Seventh Circuit will likely adhere to its *Parra* precedent and hold detention under Section 1226(c) is mandatory.[258] This result is, further, clearly required by the Rodriguez opinion.[259] To date, the Seventh Circuit has not been presented with the question of how long is too long. However, *if* presented with the issue, the Seventh Circuit will likely agree there is an implicit temporal limitation. Not only because sister circuits have decided this way, but also, the Supreme Court in *Zadvydas* held indefinite detention unconstitutional absent exigent circumstances.[260] Moreover, Justice Kennedy's *Demore* concurrence is compelling in creating the possibility of individualized bond hearings for aliens detained for an unreasonable length of time under Section 1226(c).[261] The *Rodriguez* dissent is similarly compelling in its support of individualized bond hearings: "[i]t is immaterial that detention here is not literally indefinite, because while the respondents' removal proceeding must end eventually, they last an indeterminate period of at least six months and a year on average, thereby implicating the same constitutional right against prolonged arbitrary detention that we recognized."[262]

Additionally, Seventh Circuit precedent requires this finding.[263] Not only did the Seventh Circuit recognize the similarities between immigration detention and criminal incarceration, the court has held criminal pre-trial detentions can raise due process concerns depending on the length of the detention.[264]

B. Reasonableness: The Proper Approach

Having read an implicit temporal limitation into the statute, or failing that, having recognized prolonged detention under the statute offends due process, the Seventh Circuit has options for deciding the question of *when* a bond hearing is required. The court can require immediate bond hearings at the outset of detention—an approach not required by the Supreme Court in *Demore*, and therefore unlikely given *Parra*.[265] Alternatively, can adopt a case-by-case approach as the Sixth, Third, First, and Eleventh Circuits did;[266] or can adopt a

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258. Parra v. Perryman, 172 F.3d 954, 958 (7th Cir. 1999).

259. *See* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

260. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

261. *Demore*, 538 U.S. at 532 (Kennedy, J. concurring).

262. Jennings v. Rodriguez, 138 S. Ct. 830, 868 (2018) (Breyer, J. dissenting).

263. *See* United States v. Warneke, 199 F.3d 906, 908 (7th Cir. 1999); United States v. Portes, 786 F.2d 758, 768 (7th Cir. 1985); Jordan v. Wolke, 615 F.2d 749, 751 (7th Cir. 1980); Duran v. Elrod, 542 F.2d 998, 999 (7th Cir. 1976).

264. *See Warneke*, 199 F.3d at 908; *Portes*, 786 F.2d at 768; *Jordan*, 615 F.2d at 751; *Duran*, 542 F.2d at 999.

265. *Demore*, 538 U.S. at 528 ("when the Government deals with deportable aliens, the *Due Process Clause* does not require it to employ the least burdensome means to accomplish its goal.").

266. *See* Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1215 (11th Cir. 2016); Reid v. Donelan, 819

hybrid (for instance, case-by-case, but not to exceed a certain amount of time).

The Seventh Circuit should adopt the case-by-case approach following the Sixth, Third, First, and Eleventh Circuits, as there are compelling reasons for doing so. Although all individuals detained under Section 1226(c) are similarly situated, there are facts distinguishing them significantly in light of Congress's purpose in passing the statute: effectuating removals, preventing flight, and protecting the community.[267] The reasonableness of the detention can be determined by analyzing the alien's risk of flight, whether the alien poses a danger to society, the cause of delay in the proceedings, and the likelihood of removal.

1. Threat of Flight.—For instance, regarding threat of flight, courts can ask: how tied is the alien to the community? How long has the alien been in the United States? Does the alien have a family? Are any of the alien's family members U.S. citizens? Is the alien employed or enrolled in school? Does the alien own a home? All these factors will vary case-to-case. And all are relevant to determine whether the individual criminal alien is a flight risk.[268]

2. Danger to the Community.—Regarding the government's interest in protecting the community, it is important to consider the nature of the alien's offense. Was it a violent crime? Were multiple victims involved? Is this a repeat offender? These are questions judges ask every day when imposing sentences. Thus, it is likely they would be able to do so in the context of a bond hearing for criminal aliens subject to civil detention under Section 1226(c).

3. Cause of Delay.—As the standard for mandatory detention under Section 1226(c) is reasonableness, in addition to these questions regarding flight risk and danger to the community, the Seventh Circuit should consider the cause for delay in the proceedings. Which party is causing the protracted proceedings? Where the government is to blame, fairness weighs in favor of granting bond. On the other hand, where the alien is rightfully appealing any adverse decisions, the alien should not be punished by continued detention—absent other reasons for maintaining detention. One year of detention without an individualized bond hearing determining risk of flight and danger to the community should be presumptively unreasonable, absent other mitigating factors.

4. Likelihood of Relief.—Moreover, as the primary purpose of mandatory detention is to aid the government in actually removing aliens after a final order of removal is made, the Seventh Circuit should consider whether relief from deportation is a legitimate possibility. Where relief is likely to be granted, continued detention becomes unreasonable. As such, by adopting the reasonableness standard, the Seventh Circuit would allow its lower courts to make determinations based on these factors—and any others the court deems wise.

F.3d 486, 497-98 (1st Cir. 2016); Diop v. ICE/Homeland Sec., 656 F.3d 221, 223 (3rd Cir. 2011); Ly v. Hansen, 351 F.3d 263, 268 (6th Cir. 2003).

267. *See generally Demore*, 538 U.S. 510.

268. *See generally Sopo*, 825 F.3d 1199; *Reid*, 819 F.3d 486; *Lora*, 804 F.3d 601; *Rodriguez*, 715 F.3d 1127; *Diop*, 656 F.3d 221; *Ly*, 351 F.3d 263.

CONCLUSION

Although aliens are afforded lesser Due Process protections than citizens, they are afforded some.[269] Because the Supreme Court upheld the constitutionality of mandatory detention for criminal aliens under 8 U.S.C. Section 1226(c),[270] the only question left to be answered by the Seventh Circuit is *when* a bond hearing is required. The Seventh Circuit can find guidance for answering this question by following the lead of its sister circuits in understanding Justice Kennedy's *Demore* concurrence to mean there is an implicit temporal limitation in the statute.[271] Given the federal courts adherence to the doctrine of constitutional avoidance and that indefinite detention under Section 1226(c) would raise serious constitutional issues, the Seventh Circuit should not hesitate to likewise find an implicit temporal limitation in the statute.[272] This reading, not considered by the Rodriguez Court, seems a viable option. Otherwise, the court should tackle the constitutional issue. In doing so, the court would, perhaps, invite Congress to draft a more palatable statute—one that recognizes aliens are afforded constitutional protection, but that also protects their interests in seamless removal proceedings.

Seventh Circuit cases have recognized a similarity between immigration detention and criminal incarceration.[273] This recognition should require heightened scrutiny for challenges to prolonged detention under the statute. Moreover, the Seventh Circuit has recognized in its criminal due process cases that due process is offended by too long a detention.[274] Thus, the court should not hesitate to join its sister circuits in recognizing an implicit temporal limitation to Section 1226(c) detentions.[275]

Presupposing the Seventh Circuit will recognize a temporal limit to detention under Section 1226(c), regarding when a bond hearing is required is another matter. The court likely will—and should—trust its judges to judge and adopt the reasonableness standard, and in doing so, recognize that each case is different. By adopting this flexible reasonableness standard, the lower courts can weigh the

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269. Plyler v. Doe, 457 U.S. 202, 210 (1982).

270. *See generally Demore*, 538 U.S. 510.

271. *Id.* at 532 (Kennedy, J. concurring).

272. *See Sopo*, 825 F.3d 1199; *Reid*, 819 F.3d 486; *Lora*, 804 F.3d 601; *Rodriguez*, 715 F.3d 1127; *Diop*, 656 F.3d; *Ly*, 351 F.3d 263.

273. United States v. Estrada-Mederos, 784 F.3d 1086, 1088 (7th Cir. 2015).

274. *See* United States v. Warneke, 199 F.3d 906 (7th Cir. 1999); *see also* Armstrong v. Squadrito, 152 F.3d 564, 567 (7th Cir. 1998).

275. *See Warneke*, 199 F.3d at 908; United States v. Portes, 786 F.2d 758, 768 (7th Cir. 1985); Jordan v. Wolke, 615 F.2d 749, 751 (7th Cir. 1980); Duran v. Elrod, 542 F.2d 998, 999 (7th Cir. 1976).

relevant factors to determine whether the detained alien is a flight risk or a danger to society. This standard is in line with Supreme Court and Seventh Circuit jurisprudence and, absent clearer guidance from the Supreme Court to the contrary, should be adopted by the Seventh Circuit.