

GOOD THINGS COME TO THOSE WHO WAIT? RECONSIDERING INDETERMINATE AND INDEFINITE DETENTION AS TOOLS IN U.S. IMMIGRATION POLICY

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Introduction

Detention of deportable immigrants is a major component of the United States' immigration enforcement policy. Our cultural consciousness is rife with examples of detention practice throughout our history and detention is a part of our immigrant tradition. European immigrants passed through Ellis Island quickly unless a reason, usually health-based, was presented to justify detention. This is so pervasive in our national mythology that even the fictional Vito Corleone of *The Godfather* movies was quarantined at Ellis Island for three months for smallpox infection. As a parallel model, in the early twentieth century the majority of Asian immigrants were processed and potentially detained at Angel Island in San Francisco Bay.¹ In the early 1990s, political instability in Haiti led to a mass exodus of refugees who eventually were housed on the U.S. naval

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¹ See generally Angel Island, State Park, San Francisco, www.angelisland.com/immigration_station/index.php. Angel Island is now a California State Park. The website stated:

In 1905, construction of the [Angel Island] U.S. Immigration Station began. It became a detention facility, where Asian (primarily Chinese) immigrants were detained until they could prove they were joining relatives already in the country. The average detention lasted two to three weeks, but many lasted several months. Some people were forced to stay for nearly two years. Detainees found ways to pass the time, attempting to lead as normal a life as possible.

base at Guantánamo, Cuba.² In 1993, Chinese migrants from the ill-fated smuggler's freighter *Golden Venture* were detained after their ship ran aground offshore of Rockaway Beach, New York.³

Historically, arriving "excludable" aliens were not entitled to release on bond, but generally could expect that immigration authorities would generously exercise their parole authority to issue them an identity document and release the immigrants into the United States pending resolution of their immigration applications.⁴ In 1996, Congress amended the Immigration and Nationality Act to increase categories of immigrants who would henceforth be subject to "mandatory detention," including non-citizens who were either inadmissible to the United States as arriving aliens or returning lawful permanent residents or deportable for security or criminal

² Emily Sciolino, *U.S. Tells Haitians Held at Guantánamo They Must Go Home*, N.Y. TIMES, Dec. 29, 1994:

[A]fter the departure of the military junta and the return of the elected President, Jean-Bertrand Aristide, in October, 'Haitians in safe haven can now return home' At the height of the refugee exodus, there were some 20,000 Haitians at Guantánamo. Most fled their country after the Clinton Administration, which had reversed campaign pledges and adopted the Bush Administration's policy of returning refugees to Port-au-Prince, said it would relax that policy. Faced with the new outpouring exodus, the Clinton Administration created the "safe haven" policy to discourage potential refugees by making it clear that they would not have a chance of reaching the United States. After the American-led force restored President Aristide to power, it was only a matter of time before the refugees would be ordered home. Most returned after Haiti's military rulers departed in September.

³ Patrice O'Shaughnessy, *The Golden Venture Tragedy: From hell at sea to the American Dream*, N.Y. DAILY NEWS, June 8, 2008, available at www.newyorkdailynews.com. The author recounts that "[t]he unluckiest were the 10 who drowned or died of hypothermia as they struggled to get to shore. An additional 140 or so were deported to China and about 50 more were sent to other countries. The remaining immigrants were sent to York County jail in Pennsylvania, where many spent three or four years fighting their cases."

⁴ Immigration and Nationality Act (INA) § 212(d)(5), 8 U.S.C. § 1182(d)(5) (2006). "The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States . . ."

grounds.⁵

From 2001 until 2004, the year in which a coup d'état overthrew Haitian president Jean-Bertrand Aristide for the third time, political conditions in Haiti created another crisis of migration by boat. Haitian refugees (labeled "migrants") interdicted at sea by the U.S. Coast Guard were summarily returned to Haiti. United States immigration authorities instituted a policy that Haitian boat persons who reached the U.S. would not be paroled from detention.⁶ Most

⁵ INA § 236, 8 U.S.C. § 236 (2006) states:

(a) On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General-

(1) may continue to detain the arrested alien; and

(2) may release the alien on-

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General;

...

(c) Detention of Criminal Aliens.-

(1) Custody.-The Attorney General shall take into custody any alien who-

(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2),

(B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),

(C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

⁶ *Urge the INS and Congress to Stop Discriminatory Treatment Against Haitian Asylum Seekers in Miami*, Presbyterian Church (USA), available at <http://www.pcusa.org/washington/issuenet/crrl-020423>. The author states:

On December 3, 2001, the Coast Guard rescued 167 Haitians outside of Florida and permitted them to apply for asylum in the United States. In mid-December, Acting Deputy INS

Haitians applied for asylum and were interviewed by asylum officers (civil servants within the Department of Homeland Security's department of Citizenship and Immigration Services) for a determination if they had a "credible fear" of asylum that merited full review by an immigration judge.⁷ The release rate for Haitians who were found to have a "credible fear" of persecution dropped from 96% in November 2001 to 6% between December 14, 2001 and March 18, 2002.⁸ As "arriving aliens" ineligible for bond, the Haitians were forced to fight their asylum cases, including any appeals, from within the confines of a detention center.

The decreased exercise of parole authority was further reinforced by decisions of the U.S. Courts of Appeal finding that parolees were entitled to the right of adjustment of status.⁹ The INA

Commissioner Michael Becraft issued a directive not to release Haitians detained by the INS in Miami. While detained, the vast majority of Haitian asylum seekers have no legal representation and all are facing accelerated legal proceedings. Whereas asylum seekers of other nationalities with similar situation have been routinely released, Haitian asylum seekers are being summarily denied release from detention.

⁷ See 8 C.F.R. § 208.5 (2009). Special duties toward aliens in custody of the Service.

(a) General. When an alien in the custody of the Service requests asylum or withholding of removal or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, the Service shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, except in the case of an alien who is in custody pending a credible fear of persecution determination under section 235(b)(1)(B) of the Act. Where possible, expedited consideration shall be given to applications of detained aliens. Except as provided in paragraph (c) of this section, such alien shall not be excluded, deported, or removed before a decision is rendered on his or her asylum application.

⁸ Susana Barciela, *Haitian Refugees: A People In Search Of Hope*, FLORIDA IMMIGRANT ADVOCACY CENTER, May 1, 2004, <http://www.fiacfla.org/inthenews.php#2>.

⁹ See *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005); see also *Scheerer v. U.S. Att'y Gen.*, 445 F.3d 1311 (11th Cir. 2006); see also *Scheerer v. U.S. Att'y Gen.*, 513 F.3d 1244 (11th Cir. 2008).

provided for this right, but the implementing regulations, later determined to be *ultra vires* by the courts,¹⁰ excluded parolees from eligibility. Although the court victories helped gain permanent status for those who were paroled previously, subsequent requests for parole have been largely denied.

In addition to mandatory detention while cases are pending, successful applicants for relief under the United Nations Convention Against Torture (CAT) may also be detained indefinitely following their immigration court victories, as a result of prior criminal convictions.¹¹ CAT is typically either a tool for applicants who face harm that is not “on account of” a protected fundamental right or an application of last resort for immigrants with severe criminal violations that are thereby ineligible for any other form of relief from deportation. In the latter instance, the alien’s “relief” and detention may last as long as the alien’s tolerance of detention in the United States outweighs his fear of torture in his home country.¹²

Finally, historically the term “indefinite detention” was

¹⁰ See *supra* note 9.

¹¹ See 8 C.F.R. 208.17(b)(1)(ii) (2009).

The immigration judge shall inform the alien that deferral of removal:

- i) Does not confer upon the alien any lawful status in the United States;
- ii) Will not necessarily result in the alien being released from the custody of the Service if the alien is subject to such custody.

¹² See 8 C.F.R. § 208.17(e) (2009). Termination at the request of the alien.

(1) At any time while deferral of removal is in effect, the alien may make a written request to the Immigration Court . . . to terminate the deferral order. If satisfied on the basis of the written submission that the alien's request is knowing and voluntary, the immigration judge shall terminate the order of deferral and the alien may be removed.

(2) If necessary the immigration judge may calendar a hearing for the sole purpose of determining whether the alien's request is knowing and voluntary. If the immigration judge determines that the alien's request is knowing and voluntary, the order of deferral shall be terminated. If the immigration judge determines that the alien's request is not knowing and voluntary, the alien's request shall not serve as the basis for terminating the order of deferral.

reserved for a class of criminal immigrants whose deportation was impossible, typically because of a lack of diplomatic relations with the home country or because of a foreign country's individualized case assessment and denial to accept the deportation of a national of the country. Criminal immigrants ordered deported might languish in a jail or detention center for months or years, since the deportation could not be executed. Litigation and Supreme Court precedent produced a scheme for preventing indefinite detention in most situations, so contemporary cases can use *habeas corpus* lawsuits to prevent or challenge indefinite detention.¹³

This article will primarily focus on illustrating examples of lengthy detention that surely seem unending to the immigrants involved, if not “indefinite” as determined by the U.S. Supreme Court.¹⁴ I will address all other aspects of detention more fully than actual “indefinite” detention.

Detention is one of many tools at the disposal of DHS to assure orderly immigration and provide predictable consequences for violators of the United States immigration system. I hope to illustrate the frequently coercive affects of the detention scheme and argue that in some, if not many, contexts detention actually impedes the orderly administration of justice, despite its assumed use to guarantee such orderliness.

Finally, I subscribe to the usefulness of the scholarly techniques of the Critical Race Theory movement, particularly the use of storytelling to elucidate a legal problem, so narrative vignettes will appear throughout this article. The subjects of the narratives are undocumented immigrants, immigration violators or criminal immigrants, each classification progressively more onerous to many members of society. The narratives are used to provide a concrete illustration of a concept and each narrative is likely representative of hundreds of similar cases. The cases discussed herein are somewhat

¹³ See *Zadvydas v. Davis*, 533 U.S. 678 (2001).

¹⁴ As this article is part of a symposium edition, I will assume that other authors and presenters will focus on subjects of their particular interest, just as my co-panelists from the Department of Homeland Security solely addressed the processing of potential “indefinite” detainees with removal orders, including regulations that provide for periodic case review and likely release.

sanitized versions of actual facts. It is my hope that in depicting actual circumstances I can give voice to a politically weak constituency and show that the function of law unduly prejudices many immigrants, despite detention appearing facially as a reasonable component of U.S. immigration policy.

I. Detention of Asylum Seekers

Aung Case Study: Appealing (f)or Freedom

Aung fled to the United States from his native Burma in order to seek asylum. He was detained at the Miami International Airport after attempting to use a photo-substituted Thai passport. He was ineligible for bond¹⁵ and DHS did not parole him until after his case was pending for over one year. At a non-detained court hearing, months after his parole, DHS re-arrested Aung and took him back into custody.¹⁶ When his case was approaching its ultimate hearing, a hurricane struck Miami, damaging the detention center and causing DHS to relocate Aung to other detention centers, first in Texas, then in Arizona. DHS finally returned Aung to Miami, where he had an individual hearing after being detained for eighteen

¹⁵ 8 C.F.R. 1003.19(h)(2)(i) (2009).

Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub. L. 104208, an immigration judge may not re-determine conditions of custody imposed by the Service with respect to the following classes of aliens: (A) Aliens in exclusion proceedings; (B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act; (C) Aliens described in section 237(a)(4) of the Act; (D) Aliens in removal proceedings subject to section 236(c)(1) of the Act (as in effect after expiration of the Transition Period Custody Rules); and (E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Pub. L. 104132).

¹⁶ See INA § 236(b), 8 U.S.C. § 1226(b) (2006). “Revocation of bond or parole. The Attorney General at any time may revoke a bond or parole authorized under subsection (a), re-arrest the alien under the original warrant, and detain the alien.”

months.

The immigration judge found Aung to be credible.¹⁷ Aung testified to detention and torture in Burma because of his association with members of the democratic movement. He also discussed being

¹⁷ See INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006). Asylum – Burden of proof:

(i) In general The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

randomly conscripted to serve as a porter for the Burmese military in its long-running civil war with the separatist groups in Burma's Karen State. The judge did not find that his past harms were "on account of" a protected ground,¹⁸ but did find that service as a porter - which included carrying armaments and supplies, wearing a military uniform and walking in front of the advancing military as a decoy to draw enemy fire and trigger landmines - constituted torture.¹⁹ Thus, the judge denied asylum, but granted CAT deferral of removal.

Aung's family remained behind in Burma. CAT relief assured him of his personal safety, but unlike asylum, CAT relief did not provide him with a mechanism to become a permanent resident or citizen of the United States. CAT also would not permit him to reunite with his family or petition for them to join him in the United States. DHS threatened to appeal the grant of CAT, so on the last day of the appellate period Aung made a decision to appeal also the denial of asylum. His strategy was that since DHS might appeal the grant of CAT relief, he would likely be detained for the duration of their appeal, so he should exercise his own appellate rights and simultaneously try to prevail on his argument that he was eligible for

¹⁸ See INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

¹⁹ See *In re J-E-*, 23 I. & N. Dec. 291 (BIA 2002).

(1) An alien seeking protection under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must establish that it is more likely than not that he will be tortured in the country of removal.

(2) Torture within the meaning of the Convention Against Torture and 8 C.F.R. § 208.18(a) (2001) is an extreme form of cruel and inhuman treatment and does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment.

(3) For an act to constitute "torture" it must satisfy each of the following five elements in the definition of torture set forth at 8 C.F.R. § 208.18(a): (1) the act must cause severe physical or mental pain or suffering; (2) the act must be intentionally inflicted; (3) the act must be inflicted for a proscribed purpose; (4) the act must be inflicted by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) the act cannot arise from lawful sanctions.

the asylum.

Ultimately, DHS did not appeal the grant of CAT and Aung faced a difficult choice of whether to endure additional detention while his own appeal was considered. His alternative was to withdraw his appeal, accept the CAT relief and gain his freedom. The price of freedom was relinquishing hope of reuniting with his family in the United States. After spending two and one half of the prior four years in jail, Aung was unable to envision intentionally continuing his detention, so he withdrew his appeal.

Aung's scenario presents a typical conundrum for asylum seekers. In order to pursue their claim of asylum, many applicants must endure detention. This detention is not "indefinite" as it has parameters shaped by the trial and appellate court calendars, but it is indeterminate as to the exact length of detention to be expected. Asylum seekers hold the keys to their own cell. If they give up on their case, they will be deported and achieve freedom.

This is particularly so for asylum seekers who are "arriving aliens," meaning they never were admitted to the United States. These applicants are most likely to be detained by DHS when they arrive at a port of entry, either a land border, airport, or seaport. Ironically, if an applicant who arrives at a border with a tourist visa reveals their intent to apply for asylum to the inspections officer, they will likely be detained and be provided a credible fear interview and referred to an immigration judge.²⁰ Those who do not reveal

²⁰ 8 C.F.R. § 208.5(a) (2009). Special duties toward aliens in custody of the Service.

(a) General. When an alien in the custody of the Service requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, the Service shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, except in the case of an alien who is in custody pending a credible fear determination under §208.30 or a reasonable fear determination pursuant to §208.31. Although the Service does not have a duty in the case of an alien who is in custody pending a credible fear or reasonable fear determination under either §208.30 or §208.31, the Service may provide the appropriate

their true intent and achieve a legal entry under pretenses as a tourist may then apply for asylum on their own schedule, prepare for a non-detained asylum interview with an asylum officer with the power to approve the case.²¹ If unsuccessful in their asylum interview, the applicant will be referred to the immigration court, where they have a *de novo* hearing on the application, complete with rights of appeal.

Asylum seekers are arguably inappropriate for any detention, much less indeterminate detention. The restrictive exercise of DHS humanitarian parole authority is very troubling, as this guarantees

forms, upon request. Where possible, expedited consideration shall be given to applications of detained aliens. Except as provided in paragraph (c) of this section, such alien shall not be excluded, deported, or removed before a decision is rendered on his or her asylum application.

²¹ 8 C.F.R. § 208.9(a), (b), (d) (2009). Procedure for interview before an asylum officer.

(a) The Service shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of 208.3(c)(3) and is within the jurisdiction of the Service.

(b) The asylum officer shall conduct the interview in a non-adversarial manner and, except at the request of the applicant, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for asylum. At the time of the interview, the applicant must provide complete information regarding his or her identity, including name, date and place of birth, and nationality, and may be required to register this identity electronically or through any other means designated by the Attorney General. The applicant may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence.

...

(d) Upon completion of the interview, the applicant or the applicant's representative shall have an opportunity to make a statement or comment on the evidence presented Upon completion of the interview, the applicant shall be informed that he or she must appear in person to receive and to acknowledge receipt of the decision of the asylum officer and any other accompanying material at a time and place designated by the asylum officer, except as otherwise provided by the asylum officer.

that *bona fide* asylum seekers remain in detention.²² Asylum applicants must prove that they have a well-founded fear of persecution, either by showing past persecution or showing that their individual circumstances, placed in the context of objectively demonstrable country conditions, justify a subjective fear of persecution.²³ Some asylees' past persecution may have been constituted of indefinite or extra-judicial detention. For those who have fled from a well-founded threat of harm, their detention in the United States may be the first time they have ever spent any time in any jail. Ironically, this detention is occurring in the country in which they are seeking sanctuary.²⁴ Even with improved health and

²² Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 157 (2008). The authors state:

[T]he parole process for asylum seekers is capricious and unpredictable. It varies widely (anywhere from 0.5% to 98%), and seems to depend more upon the personality of the district director and the available detention bed space than it does upon a reasoned policy of release criteria. Third, judicial review of asylum parole decisions is non-existent. Decisions are made by DHS, the detaining authority, and federal courts have often declined to interfere in parole decisions, citing lack of jurisdiction. Finally, although ICE often cites rates of non-appearance for hearings that are as high as 85%, evidence indicates that for asylum seekers, the no-show rates are much lower, and may be as low as 5.7%.

²³ See INA § 208, 8 U.S.C. § 1158 (2006); see also INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

²⁴ See Brané & Lundholm, *supra* note 22, at 164.

The United States has significantly eroded its position as an example and defender of human rights. With the change in administration in 2009, the U.S. may have an opportunity to reposition itself as a strong leader in promoting and protecting the human rights of vulnerable populations. As a founding member of the United Nations, a signatory of the UN Convention Relating to the Status of Refugees, and a primary donor to the UNHCR, the U.S. has committed itself to preserving the fundamental rights of asylum seekers on its soil. However, our country continues to violate the Convention's prohibition against arbitrary detention, despite criticism from UNHCR and the bi-partisan U.S. Commission on International and Religious

psychological services in detention centers, it is a difficult environment for a victim of trauma, post-traumatic stress, or abuse from governmental officials.

In addition to challenges of mental and physical health, detained asylum seekers are subjected to a problematic culture within the detention institution. However unintentional, the asylum adjudication system is not currently able or willing to confront this culture. A detention center, like any other community, can establish a collective norm. Detainees are all subjected to a regular daily schedule of events and indignities including meals (i.e. “feedings”), visitation, chapel, recreation, head counts, and court appearances. Much of the process seeks to institutionalize responses to authority, and to depersonalize the detainee experience. This environment tends to be discouraging for the applicant.²⁵

Freedom. As a country with a strong tradition of providing refuge to the oppressed, the U.S. should serve as an example of how a nation can respect human rights and international law and preserve human dignity, while considering security measures and ensuring enforcement of our immigration laws.

²⁵ *Id.* at 159-160.

Researchers have found that asylum seeking mothers are more likely to give up their case if they are detained and separated from their children. A recent study by the Government Accountability Office (GAO) found persistent and systemic problems with detention center phone systems. The standards require that detainees be able to make free calls to pro bono legal service providers, their consulates, and the Office of the Inspector General's complaint hotline. However, the study found that in the last five years, 41% of calls were not successful. This has serious implications for a detainee's ability to maintain contact with their family and attorney. Although deportation proceedings are civil rather than criminal, they can have consequences that are just as serious. Deportation can result in the loss of a job, separation from loved ones, and for those facing persecution, a return to situations of great danger and distress. It is all the more important, therefore, that detainees have fair access to the procedures that will determine if they are eligible to remain in this country. Detention presents various additional concerns. Interpretation services in detention are frequently unavailable or insufficient. The hardships of detention often force asylum seekers to abandon meritorious claims, simply in

The one aspect of their reality where their humanity should matter is in their removal proceedings before the immigration judge. The institution's cultural outlook of their legal process is largely dependent on the population's collective optimism about their judge. If enough cases prevail, the outlook may be upbeat. If more cases are denied, the outlook is gloomy. Detainees may wonder if fairness and consistency are part of the justice offered in the United States, particularly within the detained setting.

Researchers have made empirical analysis of immigration judges' rates of denying asylum applications.²⁶ The wide disparity of grant rates cannot be explained by any finding other than blatant inconsistencies in adjudicators' application of the asylum standard. In past studies, the New York court's approval rate of asylum cases ranged between the judge with the highest denial rate of 88 percent and the judge with lowest of 7 percent.²⁷ A more recent study showed that over time the disparity has decreased in New York and the new highest denial rate had come down to 67 percent while the lowest rate was 5 percent — a difference of 62 percentage points, or

order to gain release. Detainees have added difficulty in finding witnesses, or even documentary evidence, that will support their claim for relief. If detainees in a particular facility are denied access to legal orientation presentations, they may lose one of their few opportunities to obtain advice about their case. In detention centers that are located far from immigration courts, appearance via video-teleconferencing is becoming common, making it difficult for detainees to confront evidence against them and leading to concerns about the credibility findings in asylum cases.

²⁶ Transactional Records Access Clearinghouse Immigration, *Latest Data from Immigration Courts Show Decline in Asylum Disparity*, available at <http://trac.syr.edu/immigration/reports/209/>. A series of reports by the Transactional Access Records Clearinghouse (TRAC) and others — all based on case-by-case data from the Executive Office for Immigration Review (EOIR) — have found extensive disparities in how the nation's Immigration Judges decide the thousands of individual requests for asylum that they process each year. The consistency of these findings, as well as the fact that the disparities are found in most parts of the country and for individuals coming from many different nations, established that the background and experiences of individual Immigration Judges often are more important in how they decide a matter than the underlying facts.

²⁷ *Id.*

about a quarter less than in the earlier report.²⁸

The disparity in denials makes clear that many cases are denied for reasons other than the quality of the case. Since cases are randomly assigned to judges it is inconceivable that one judge was issued a pool of cases significantly stronger than another judge's docket. For example, one of the New York judges was found to be nineteen times more likely to grant asylum to an Albanian applicant than another judge on the same court.²⁹ As the late Senator Edward "Ted" Kennedy wrote, "refugee roulette" is unacceptable in a system that makes life-or-death decisions for some of the world's most vulnerable persons."³⁰

To illustrate the issue further, prior to 2002, all Miami detained cases were heard by the two judges sitting at the immigration court at the Krome Detention Center.³¹ In 2004 and 2005, Judge Hurewitz denied cases at a 91 percent rate.³² Judge Foster denied cases at a 96.7 percent rate.³³ Detainees were acutely

²⁸ See *supra* note 26.

²⁹ Senator Edward M. Kennedy, *Foreword* to J. RAMJI-NOGALES, A SCHOENHOLTZ & P. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM*, XV (New York University Press 2009).

³⁰ *Id.*

³¹ TRAC IMMIGRATION JUDGE REPORTS – ASYLUM; Judge Hurewitz Report Series – Past Report 2007; City – Miami/Krome, <http://trac.syr.edu/immigration/reports/judgereports/> (for "City" select "Miami-Krome"; then for "Report Series" select "Past Report 2007").

³² TRAC IMMIGRATION, JUDGE KENNETH HUREWITZ (2007), <http://trac.syr.edu/immigration/reports/judge2007/077/index.html>.

³³ TRAC IMMIGRATION, JUDGE NEALE FOSTER (Krome) (2008), <http://trac.syr.edu/immigration/reports/judgereports/00251KRO/index.html>.

Detailed data on Judge Foster decisions were examined for the period covering fiscal years 2004 through 2009. During this period, Judge Foster is recorded as deciding 121 asylum claims on their merits. Of these, he granted 4, gave no conditional grants, and denied 117. Converted to percentage terms, Foster denied 96.7 percent and granted (including conditional grants) 3.3 percent Judge Foster can also be ranked compared to each of the 261 individual immigration judges serving during this period who rendered at least one hundred decisions in a city's immigration court. If judges were ranked from 1 to 261

aware that they faced many challenges in prevailing, but if they were assigned Judge Hurewitz, they were two to three times more likely to win their case. Judge Denise Slavin replaced Judge Foster and for her first two years granted over 35 percent of her detained cases, although in 2008 her grant rate declined to about 9 percent.³⁴

Since 2002, non-criminal detainees in Miami have been housed at a separate facility under jurisdiction of the Krome Immigration Court.³⁵ Judge Ford adjudicated this docket starting in 2007.³⁶ His first two years showed a grant rate of about 4 percent,

where 1 represented the highest denial percent and 261 represented the lowest - Judge Foster here receives a rank of 3. That is 2 judges denied asylum at higher rates, and 258 denied asylum at the same rate or less often.

³⁴ TRAC IMMIGRATION, JUDGE DENISE N. SLAVIN (Krome) (2008), <http://trac.syr.edu/immigration/reports/judgereports/00128KRO/index.html>.

Detailed data on Judge Slavin's decisions were examined for the period covering fiscal years 2004 through 2009. During this period, Judge Slavin is recorded as deciding 168 asylum claims on their merits. Of these, she granted 46, gave no conditional grants, and denied 122. Converted to percentage terms, Slavin denied 72.6 percent and granted (including conditional grants) 27.4 percent.

³⁵ The GEO Group, Inc., Broward Transition Center, <http://www.thegeogroupinc.com/facility.asp?fid=4>

³⁶ TRAC IMMIGRATION, JUDGE REX J. FORD (Krome) (2008), <http://trac.syr.edu/immigration/reports/judgereports/00115KRO/index.html>.

Detailed data on Judge Ford decisions were examined for the period covering fiscal years 2004 through 2009. During this period, Judge Ford is recorded as deciding 398 asylum claims on their merits. Of these, he granted 22, gave no conditional grants, and denied 376. Converted to percentage terms, Ford denied 94.5 percent and granted (including conditional grants) 5.5 percent. Compared to Judge Ford's denial rate of 94.5 percent, nationally during this same period, immigration court judges denied 57.3 percent of asylum claims. In the Miami-Krome Immigration Court where Judge Ford was based, judges there denied asylum 89.4 percent of the time. Judge Ford can also be ranked compared to each of the 261 individual immigration judges serving during this period who rendered at least one hundred decisions in a city's immigration court. If judges were ranked from 1 to 261 where 1 represented the highest denial percent and 261 represented the lowest - Judge Ford here receives a rank

rising to 14 percent in 2009.³⁷ Significantly, the downtown Miami (non-detained) court, arguably serving a similar pool of respondents, had an average grant rate of about 21 percent.³⁸ Of further note is that Judge Ford formerly presided over the Miami (non-detained) court, where for years 2004-2007, he granted only 8 percent of asylum cases, translating to a grant rate of nearly three times more restrictive than that of his peers on the Miami court.³⁹

Grant rates are attributable to many factors (including quality of cases and countries represented on a judge's docket), but success is increased markedly by representation of counsel. Nationwide, 86 percent of unrepresented cases lose, while the overall denial rate is 54 percent.⁴⁰ Judge Ford's non-detained docket had an average rate of attorney representation, about 89 percent.⁴¹ Interestingly, his detained docket has had less attorney representation, about 81 percent,⁴² but his grant rate has actually increased since presiding over a detained docket. Attorneys enthusiastically appear before judges with higher grant rates, resulting in over 95 percent representation in Judge Slavin's hearings and about 97 percent

of 7. That is 6 judges denied asylum at higher rates, and 254 denied asylum at the same rate or less often.

³⁷ *Id.*

³⁸ TRAC IMMIGRATION, JUDGE REX. J. FORD (Miami) (2008), <http://trac.syr.edu/immigration/reports/judgereports/00115MIA/index.html>.

Judge Ford is recorded as deciding 950 asylum claims on their merits. Of these, he granted 77, gave no conditional grants, and denied 873. Converted to percentage terms, Ford denied 91.9 percent and granted (including conditional grants) 8.1 percent . . . Compared to Judge Ford's denial rate of 91.9 percent, nationally during this same period, immigration court judges denied 57.3 percent of asylum claims. In the Miami Immigration Court where Judge Ford was based, judges there denied asylum 79.4 percent of the time.

³⁹ *Id.*

⁴⁰ TRAC IMMIGRATION, LATEST DATA FROM IMMIGRATION COURTS SHOW DECLINE IN ASYLUM DISPARITY (2009), <http://trac.syr.edu/immigration/reports/209/>.

⁴¹ TRAC IMMIGRATION, JUDGE REX J. FORD (Miami) (2008), <http://trac.syr.edu/immigration/reports/judgereports/00115MIA/index.html>.

⁴² TRAC IMMIGRATION, JUDGE REX J. FORD (Krome) (2008), <http://trac.syr.edu/immigration/reports/judgereports/00115KRO/index.html>.

representation in Judge Coleman's courtroom.⁴³ Judge Foster, of the 4 percent grant rate, attracted attorney representation in only 73 percent of his cases.⁴⁴

Finally, the outcome-determinative aspect of judge selection was fully illustrated by the South Florida landings of boatloads of Haitian "migrants" in 2001⁴⁵ and 2002.⁴⁶ With a few exceptions, the Haitians were caught on U.S. soil and were charged as removable for entering the country without inspection or documents. Most applied for bond and asylum. In order to handle the influx of such a large number of cases, judges from the downtown Miami court were detailed to Krome to handle cases along with the regular Krome judges. Most of the cases were heard by Judge Ford, (90 percent denial rate in 2002),⁴⁷ Judge Hurewitz (91 percent denial rate in

⁴³ TRAC IMMIGRATION, JUDGE DENISE N. SLAVIN, *supra* note 34; TRAC IMMIGRATION, JUDGE SANDRA S. COLEMAN (Miami) (2008), <http://trac.syr.edu/immigration/reports/judgereports/00245MIA/index.html>.

⁴⁴ TRAC IMMIGRATION, JUDGE NEALE S. FOSTER, *supra* note 33.

⁴⁵ Trenton Daniel, *Hellish voyage ended in despair, deportation for Haitians*, MIAMI HERALD, Mar. 27, 2008, available at <http://www.miamiherald.com/news/broward/story/473056.html>. A year after 102 Haitian migrants jumped from a flimsy wooden sailboat and splashed ashore on a condo-spiked beach in Broward, almost all of them have been deported to their homeland.

⁴⁶ *Boatload of Haitians swarms ashore in Florida*, CNN NEWS, Oct. 30, 2002, <http://archives.cnn.com/2002/US/South/10/29/haitians.ashore/>. The article reports:

More than 200 Haitians – including many children – jumped from a 50-foot wooden boat near Key Biscayne Tuesday afternoon, swimming to shore and swarming the highway leading into Miami. Video from local news outlets showed people jumping into the water and swimming or wading to the beach. The Coast Guard said the boat ran aground. . . . 'People started running up over the bridge, jumping on cars. They were jumping on rocks on the shore, hurting themselves and bleeding.' If the estimate of 206 people on board the boat is accurate, it would be the largest single crossing of Haitian migrants to the United States in nearly three years. 'The passion of so many people from so many countries to come to this country . . . the aspirations of a better life, keeps so many trying,' Coffey said. Some of the Haitians interviewed by a local television station said they couldn't take another day in Haiti.

⁴⁷ TRAC IMMIGRATION, JUDGE REX J. FORD (2006), <http://trac.syr.edu/immigration/reports/judge2006/115/index.html>.

2002),⁴⁸ Judge Slavin (28 percent denial rate in 2002) and Judge Sandra Coleman (16 percent denial rate in 2002).⁴⁹ Those applicants assigned to Judge Ford forlornly expected to lose their case and be denied bond. Those assigned to Judges Coleman and Slavin were – quite appropriately – optimistic about a reasonably good chance of both attracting a willing attorney (paid or unpaid) to represent the case and of a successful outcome in their case.

II. *Needing Relief from Relief*

Mansoor Case Study: Relinquishing Deferral of Removal under CAT in Order to Gain Freedom

Mansoor was a refugee from Iraq who formerly held lawful permanent resident status in the United States. I met him in a visitation room at the Krome Detention Center in the outskirts of Miami, Florida. At the time we met he had been detained for almost two years. What made his case interesting was that he was not waiting to be deported. He had represented himself before an immigration judge. He was deemed deportable and was stripped of his resident status.

Despite being deportable, he won his case in Removal Proceedings. He was granted Deferral of Removal pursuant to the United Nations Convention Against Torture (CAT). He was not going to be deported so long as the threat of torture remained viable, but he also was not assured of release from the custody of the Department of Homeland Security.⁵⁰ When we spoke he told me that he was waiting for a new decision from the immigration judge.

⁴⁸ TRAC IMMIGRATION, JUDGE KENNETH S. HUREWITZ (2006), <http://trac.syr.edu/immigration/reports/judge2006/077/index.html>.

⁴⁹ TRAC IMMIGRATION, JUDGE SANDRA COLEMAN (2006), <http://trac.syr.edu/immigration/reports/judge2006/128/index.html>; TRAC IMMIGRATION, JUDGE SANDRA S. COLEMAN (2006), <http://trac.syr.edu/immigration/reports/judge2006/245/index.html>.

⁵⁰ See *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005); see also *Scheerer v. U.S. Att’y Gen.*, 445 F.3d 1311 (11th Cir. 2006); see also *Scheerer v. U.S. Att’y Gen.*, 513 F.3d 1244 (11th Cir. 2008).

Mansoor was trying to reopen his case, so he could abandon his CAT victory and he could have no restrictions on being deported. This was not a crazed idea. He made a calculated decision that abandoning his CAT grant would give him the best chance possible to escape from what appeared to be an indefinite period of detention.

Mansoor's plan worked. The judge reopened his case and permitted him to withdraw from the CAT relief. Mansoor relinquished his appellate rights so that the decision immediately became final. Ninety days later DHS performed a mandatory review of the likelihood of his removal from the United States. No deportations were possible to Iraq as a result of the Gulf War. He was released with an "order of supervision" from DHS, was given work authorization and returned to a normal civilian life.

III. Mandatory Detention

The INA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), requires mandatory detention of many individuals – those who are deportable for certain criminal offenses, those considered “arriving” from abroad, including lawful permanent residents who have traveled out of the United States, and those suspected of drug trafficking and terrorism offenses.⁵¹ Prior to IIRIRA, an alien ordinarily would not be detained without an opportunity for posting a bond unless he or she presented a threat to national security or a risk of flight.⁵² At first glance, the new scheme is sensible from the perspective of public safety and perhaps reduces absconding and assures timely resolution of the immigration cases of many deportable aliens, but similar to the arriving asylee context discussed above, is drastically over-inclusive and serves as a deterrent to some immigrants making defenses to their deportation.

While mandatory detention prevents additional criminal activity by the non-citizen this is an unnecessarily broad safeguard for society. In the criminal context, prisoners are released upon the completion of their jail sentences without such assurances. Thus the

⁵¹ See INA § 236(c), 8 U.S.C. § 1226(c) (2006).

⁵² See *In re Patel*, 15 I. & N. Dec. 666 (BIA 1976).

“benefit” of detaining immigrants is largely symbolic, as if to demonstrate to a public intolerant of immigrant transgressors that ours is an orderly immigration system with significant quasi-punitive consequences for any non-citizen with a criminal conviction. The immigration courts then serve a gate-keeping function and an alien must suffer in detention and prove their merits if they are to be reintegrated into society. This system is built on a double-standard where immigrants are held to a standard of criminal purity not expected of the rest of U.S. society.⁵³

The United States Supreme Court held in *Demore v. Kim*⁵⁴ that mandatory detention under INA § 236(c) during removal proceedings does not violate the protections guaranteed under the Constitution. Kim, a lawful permanent resident filed a habeas petition challenging the no-bond provision of INA § 236(c), pursuant to which he had been held for six months during the pendency of removal proceedings against him.⁵⁵ The Supreme Court held that detention of lawful permanent residents during removal proceedings is constitutionally permissible, even when there has been no finding that they are unlikely to appear for their deportation proceedings.⁵⁶ In doing so, the Court noted that detention pending removal “serves the purpose of preventing deportable criminal aliens from fleeing prior to, or during, their removal proceedings, thus increasing their chance that, if ordered removed, the aliens will be successfully removed.”⁵⁷

As in the asylee context, many criminal aliens have never spent any time in a jail or detained setting prior to entering ICE custody. For example, many minor drug offenders and those with theft convictions with no violent history are likely to have been

⁵³ This phenomenon is addressed at length in Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163 (2008). Professor Morawetz makes use of widely known examples of drug use to make her point. For example, she argues that there should be a consistency in attitudes and legal treatment of past drug use, which is neither a bar to serving in the FBI nor in the office of the President. “84% of voters (polled) said that they did not think that proof of cocaine use in his 20’s should disqualify Bush from the Presidency.”

⁵⁴ *Demore v. Kim*, 538 U.S. 510 (2003).

⁵⁵ *Id.*

⁵⁶ *Id.* at 523-24.

⁵⁷ *Id.* at 528.

sentenced to probation or received suspended sentences for their crimes. Many defendants, both guilty and innocent, enter pleas of convenience in order to truncate the criminal court experience, because of overwhelming pro-prosecutorial schemes and to limit both the uncertainty of trial and the expense of retaining counsel.⁵⁸

The current immigration scheme inexplicably treats permanent residents very differently depending on whether they have traveled abroad or not.⁵⁹ This inconsistency undermines the

⁵⁸ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001). Stuntz describes the transfer of adjudications:

This transfer of adjudication from courts to prosecutors also flows from criminal law's depth, from its tendency to cover the same conduct many times over. Suppose a given criminal episode can be charged as assault, robbery, kidnapping, auto theft, or any combination of the four. By threatening all four charges, prosecutors can, even in discretionary sentencing systems, significantly raise the defendant's maximum sentence, and often raise the minimum sentence as well. The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty. The odds of conviction are therefore higher if the four charges can be brought together than if prosecutors must choose a single charge and stick with it even though the odds that the defendant did any or all of the four crimes may be the same. This gain (from the government's point of view) exists whenever overlapping criminal prohibitions cover a single chain of events.

⁵⁹ See INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2006).

An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

- (i) has abandoned or relinquished that status,
- (ii) has been absent from the United States for a continuous period in excess of 180 days,
- (iii) has engaged in illegal activity after having departed the United States,
- (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
- (v) has committed an offense identified in section 1182(a)(2) of

immigrant's sense of fairness in the administrative process, as many are not deportable at all prior to travel – such as those with a single marijuana conviction or some with a single theft offense⁶⁰ – yet upon their return from a trip abroad they are not only deportable, but are subjected to mandatory detention while they fight for a waiver from deportation.⁶¹

The federal government could not provide enough bed space for the potential detainees at the time of IIRIRA, so a deadline for implementation of the policy was delayed twice, finally going into effect on October 8, 1998.⁶² This means that immigrants who were formerly not detained at all, are now subject to mandatory detention, yet during the transitional period of 1996 to 1998 they were not of such a high enforcement priority to cause space to be constructed on schedule.

The detention scheme is further imbalanced against the immigrant by the non-finality of a judge's bond determination. An Immigration Judge's order granting bond may be automatically stayed in any case where DHS has originally: 1) determined that the

this title, unless since such offense the alien has been granted relief under section 1182 (h) or 1229b (a) of this title.

⁶⁰ See INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2006). Criminal and related grounds.

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime), or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

⁶¹ See INA § 236, 8 U.S.C. § 1226 (2006).

⁶² See *In re Adeniji*, 22 I. & N. Dec. 1102 (BIA Nov. 3, 1999) (stating that "Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c) (Supp. II 1996), does not apply to aliens whose most recent release from custody by an authority other than the Immigration and Naturalization Service occurred prior to the expiration of the Transition Period Custody Rules").

person should not be released; or 2) set a bond of \$10,000 or more.⁶³ DHS must file an EOIR-43 Notice of Service Intent to Appeal Custody Determination within one business day of the Immigration Judge's order.⁶⁴ The automatic stay ends only if the INS fails to file a notice of appeal within ten business days of the order.⁶⁴ Thus, DHS truly controls the availability of bond.

Immigration consequences are life-altering but not considered punitive. It is a troubling point that DHS has the ability to win an automatic stay of a bond decision simply by not offering a bond in first instance. DHS similarly may stay, via an appeal, the release of an immigrant, even if the immigrant wins on merits of the discretionary case. This does not make sense when compared to a criminal trial, where a successful defendant would never be forced to serve a sentence after winning at trial.

III. A Reason to Believe

Cameran Case Study: Wrongly Detained on Terrorism Charges

Cameran was from a family active in the Kurdish resistance politics. His family escaped the infamous Anfal⁶⁵ terrorism

⁶³ 8 C.F.R. § 1003.19(i)(2) (2006).

⁶⁴ 8 C.F.R. § 1003.6(c)(1) (2006).

⁶⁵ *U.S.: Anfal Campaign Included Poison Gas, 'Savage Attacks'*, CNN NEWS, Aug. 21, 2006, <http://www.cnn.com/2006/WORLD/meast/08/21/hussein.anfal/index.html>. The author stated:

The Anfal campaign is regarded by the United States as 'one of the great atrocities against the Iraqi people' by former Iraqi dictator Saddam Hussein. It is believed that some 100,000 Kurds were killed and about 3,000 villages destroyed in a series of eight separate military operations staged in the Kurdish region of Iraq from February to August 1988. Officials from the U.S. Embassy in Baghdad, the Kurdish regional government in northern Iraq, and Human Rights Watch provided detail about the campaign in recent statements. 'Anfal' -- which means 'spoils' in Arabic -- is a term from the eighth chapter, or sura, of the Quran, the sacred Muslim book.

campaign and Al-Anfal⁶⁶ chemical weapon attacks on Kurdish regions by Saddam Hussein's regime. His older brothers endured egregious torture, including being hung from meat hooks until their arms separated from their shoulders, as part of the Hussein campaign to break the Kurdish will. As a young man, Cameran's family sent him from home for his own safety, and he lived in refugee camps throughout the Middle East until the United Nations High Commissioner on Refugees sent him for permanent resettlement in the United States.

Two years later, soon after September 11, 2001, he was arrested near the port of Miami, where he had driven with a friend so that the friend could have a romantic rendezvous with his girlfriend who worked on a cruise ship and was disembarking in Miami between cruises. Port security noticed the men as they circled the port lost, unsuccessfully looking for the location to meet crew members leaving the ship.⁶⁷

⁶⁶ 'Chemical Ali' Executed, Iraqi Government Spokesman Says, CNN NEWS, Jan. 25, 2010, <http://www.cnn.com/2010/WORD/meast/01/25/chemical.ali.executed/index.html>. The article announced:

Saddam Hussein's cousin Ali Hassan al-Majeed -- also known as Chemical Ali -- was executed Monday, an Iraqi government spokesman said. He was hanged after having been convicted on 13 counts of killings and genocide, Ali al-Dabagh said. Al-Majeed had been sentenced to death in four separate trials, including one that focused on his involvement in a poison gas attack against Iraqi Kurds that killed about 5,000 people. His execution had been delayed for political rather than legal reasons. It is not clear what change, if any, led to the reported execution The 1988 poison gas attack on the village of Halabja, which earned al-Majeed his nickname, was part of the Anfal campaign, in which the Hussein regime killed at least 100,000 Iraqi Kurds. The campaign is believed to be worst poison gas attack on civilians ever.

⁶⁷ Mark Sappenfield, *Focus of U.S. Fear: A legal refugee is recast as enemy*, CHRIST. SCI. MONITOR, Sept. 5, 2002, available at <http://www.csmonitor.com/2002/0905/p01s01-usju.html>. The announcement stated:

Sadeq was caught in the post-Sept. 11 net that snared up to 1,200 noncitizens with faces and names like his. Taken from their workplaces, vacations, or beds for activities or physical appearances that seemed suspicious, they were held without charge, interrogated by the FBI and immigration authorities

*Cameran was arrested by the INS and taken to the Krome Detention Center. Technically, he was accurately charged as deportable as a refugee who had not applied for permanent residency after being in the U.S. for over a year. He was also charged with being a terrorist. This allegation subjected him to indefinite detention and barred him from acquiring residency. He was detained on the terrorism charge and subjected to repeated interrogations by the FBI. For months, his only option for release seemed to be if he conceded deportability and hoped for removal. Finally, once certain of his innocence from terrorism, DHS cut a deal. If he conceded to a lesser charge of removability, DHS would acquiesce to a grant of permanent residency. Cameran accepted the deal, the immigration judge granted residency and Cameran was released from custody. Within a week he moved permanently to Canada.*⁶⁸

without legal counsel, and put through secret court proceedings. Many remain in prison; their names still withheld. Of those freed, many have been deported. Most others refuse to speak to the press - embarrassed and worried that any attention will bring trouble from agitated neighbors and federal authorities . . . But Sadeq is eager to talk, straining in passionate, halting English to present his case as if for the first time. He recalls dates and phone numbers with astonishing clarity. And he answers all questions, not just out of a Kurdish-villager's courtesy, but with a keen understanding of how things work. This, after all, is a man who told his wife to call the Arabic channel Al Jazeera or the British Broadcasting Corporation if he were mistreated . . . Sadeq's story is a window on the most contentious front in America's war on terrorism - the national reckoning over the balance between national security and civil liberties. In answering legal challenges to the secrecy and apparent Muslim-oriented discrimination of the detentions, US Attorney General John Ashcroft has countered: 'The Department of Justice is waging a deliberate campaign of arrest and detention to protect American lives . . . We believe we have Al Qaeda membership in custody, and we will use every constitutional tool to keep suspected terrorists locked up'. Federal officials refuse to comment on Sadeq's case. But Michael Vastine, Sadeq's Miami lawyer, says: 'They were pulled over because they looked like Middle Eastern men. It was clearly on the basis of racial profiling... The public mind-set was to act now and think later'.

⁶⁸ Mark Sappenfield, *Moving Forward, Thinking Back*, CHRIST. SCI.

Like other aspects of immigration, Cameran's story resonates with symbolic value. It became clear early in Cameran's detention that he was not a terrorist, and authorities eventually agreed that his two friends were not terrorists either. Cameran was pro-American, pro-Kurd, and fervently opposed to Saddam Hussein. It was clear that after September 11, 2001, the United States was scared and Cameran superficially manifested traits we associated with our fears, which gave rise to DHS alleging they had a "reason to believe" that he was a terrorist.

At least in the criminal immigrant context, it is clear from a record of conviction that the person punished and now detained has been convicted of some wrongdoing. This is distinct from the immigration provisions that mandate detention of immigrants whom the attorney general has "a reason to believe" are involved in terrorism or controlled substances trafficking.⁶⁹

The "reason to believe" standard was so flexible and DHS was not transparent about the nature of their reasons that Cameran and counsel could not prepare for hearings. DHS invoked privileges to not reveal "classified" information in order to delay hearings on Cameran's adjustment of status application. Like many asylees, Cameran was detained and interrogated for the first time and only in the United States. His experience was so destructive to his confidence in the fairness of U.S. society that he felt compelled to abandon the country, despite spending years fighting to be granted

MONITOR, Sept. 10, 2003, *available at* <http://www.csmonitor.com/2003/0910/p15s01-lihc.html>. [He] seems to revel in his industry. His 60-hour work weeks are a means to a life that he has so desperately wanted for more than a decade now since the Iraqi refugee first fled the terror campaigns that Saddam Hussein waged against his people. Now, for the first time, Sadeq can see that life within his grasp - with his job, a car, and a baby on the way. It is an almost complete reversal from his life of one year ago, when his words rasped with frustration and anger toward the United States. He [Cameran] had come to America seeking safety from Mr. Hussein, gaining refugee status. Instead, he said last year, the 4-1/2 months he spent in a federal detention center after being caught up in the post-Sept. 11 antiterror roundup 'destroyed my life'. As he sat behind bars for weeks after he was cleared by the FBI, a trucking job vanished. So, too, did his car, and his clothes and furniture - tossed out by the landlord of his Detroit apartment.

⁶⁹ See INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C) (2006); *see also* INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (2006).

refuge here.

V. The Slow Wheels of Justice

Silva Trevino Case Study: Removal Proceedings Determined to Be Literally Indefinite

In 2004, Cristoval Silva Trevino was convicted by plea of no contest of indecent liberties with a minor and was sentenced to probation.⁷⁰ He was taken into immigration custody in 2005. Silva-Trevino contested his deportability and sought to adjust his status to permanent residency, a defense to deportation. Silva-Trevino's case remained pending as recently as December 10, 2009, when the United States District Court for the Southern District of Texas granted Silva-Trevino's Petition for Writ of Habeas Corpus, ordering relief from detention.⁷¹

Silva-Trevino's case remained pending for over four years because of its complex arguments,⁷² since Attorney General Mukasey

⁷⁰ See *In re Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008)

⁷¹ *Silva-Trevino v. Watkins*, No. B-09-001 (S.D. Tex. 2009). More than four years ago, DHS took the then sixty-six-year-old Silva-Trevino into custody pending the resolution of his removal case. Now, the seventy-year-old Petitioner is still without an administratively final order of removal and he is still in detention. This Court is sworn to uphold the Constitution and so it must grant this petition, but it does so only after giving the Government many months to rectify the situation. This Court's holding is the direct result of the unconscionable action or, more accurately, the unconscionable inaction, of the Government. To take more than four years to deport an alien who voluntarily pleaded guilty to a serious offense-indecency with a minor-not only offends any notion of prompt justice, it breaches any semblance of constitutional propriety. This is especially true given that this Court made it clear to the Government's counsel months ago that immediate action was imperative.

⁷² See generally *Silva-Trevino*, No. B-09-001 (S.D. Tex. Feb. 5, 2009). The Attorney General expanded the analysis of "crimes involving moral turpitude" to include a new "reasonable possibility" test, whereas previously courts applied the "categorical" and "modified categorical" approaches. The categorical approach looks only to the structure of the statute of conviction and establishes whether a respondent convicted under that statute must be subject to an immigration consequence. If the statute of conviction criminalizes conduct that both is and is not considered an enumerated offense, the court employs a modified categorical approach by conducting "a limited examination of documents in the record of

certified the case to himself for his own review and rewriting of the framework for analyzing deportability⁷³ and hearings on remand took considerable time to execute.

The holding in Silva-Trevino's hearing is significant because it is representative of a trend in U.S. District Courts to expect some measure of expediency of the adjudication of immigration matters. It further shows courts' acceptance of arguments that "indefinite" or at least "unlawful" detention may occur while administrative proceedings are pending, as opposed to solely after a removal order is entered, a context where the same arguments have been accepted since 2001.⁷⁴

These arguments do not yet seem to be gaining traction within the Department of Homeland Security. The prevailing view within DHS seems to be that the law requires detention of criminal immigrants without exception, regardless of how long the removal proceedings take to conclude. Even at the November 2009 symposium at St. Thomas University, DHS attorneys sought to clearly distinguish post-order (and post-appeal) "indefinite" detention as the only situation where *habeas corpus* rights might attach. They further argued that detention during proceedings was simply an unfortunate collateral consequence of the crime and that the detainee had no recourse if they wanted or needed to appeal their case. In fairness, Silva-Trevino's well-publicized *habeas corpus*

conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially overinclusive." Immigration Courts are constrained by the principle of "not looking behind a record of conviction." By limiting examination to the record of conviction, the courts prevent the parties from presenting any and all possible evidence bearing on the conduct leading to the conviction. This preserves judicial economy and assists in a streamlined adjudication consistent with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence. Under the new analysis, the party bearing the burden of proof must further establish a realistic, not "theoretical" possibility that the averred non-deportable conduct could lead to a prosecution and conviction under the relevant criminal statute.

⁷³ See 8 C.F.R. § 1003.1(h)(1)(i) (2007).

⁷⁴ See generally *Zadvydas v. Davis*, 533 U.S. 678 (2001) (reversing the lower court's decision to allow prolonged detention by merely proving a good faith effort of pending administrative procedures).

victory was not pronounced until the following month, with its clear message that (at least in the Southern District of Texas) “DHS cannot apprehend someone, imprison him, and then throw away the key.”⁷⁵

Silva-Trevino’s example shows that the major reasons invoked for the necessity of detention – public safety and prompt adjudication without risking alien flight – are not limitless considerations that outweigh an individual’s liberty interest, particularly where “the government has offered not a shred of evidence to show that a final decision is likely to be reached soon or will ever be reached.”⁷⁶ Silva-Trevino’s release was predicated upon strict orders of non-detained supervision, including weekly reporting requirements, wearing an ankle monitor, residing at a fixed and permanent address, posting a \$25,000 bond, complying with a state sexual offender registry, curfew, psychological treatments, limitation on his freedom of association, limitation on his access to electronic media and consent to random warrantless searches of his home.⁷⁷ Arguably, Silva-Trevino’s new arrangements were not so much as a release from detention as they were an alternative form of detention.

Although perhaps the best publicized (since his case carries significant consequences as revolutionary precedent), Silva-Trevino is not alone in prevailing in challenging lengthy detention while proceedings remain pending. In a case of applications for asylum, withholding of removal under the INA and CAT, the Northern District of California has found that where CAT is granted, but the record is remanded for further hearings on the asylum and withholding applications, the immigrant may be eligible for *habeas corpus* relief, despite the non-finality of the removal proceedings. In *Cheema v. Chertoff*, the court held that the immigrant’s eight year period of detention, including at least three years after his agency proceedings became final, were unlawful, despite a pending order of remand from the Court of Appeals.⁷⁸ The Court of Appeals itself

⁷⁵ *Silva-Trevino*, No. B-09-001 at 1.

⁷⁶ *Id.* at 10.

⁷⁷ *Id.* at 10-14.

⁷⁸ *Cheema v. Chertoff*, No. C 04-03869 SI at 1, 7 (N.D. Cal. Nov. 16, 2005) (order granting petition for writ of habeas corpus). Cheema was a “central figure” in the movement to establish an independent Sikh state, Khalistan, and was subjected to persecution in India as a result. He fled to Canada in August 1990, and

had apparently recognized that its order remanding the case would not itself result in petitioner's release, noting "respite from torture is limited if the consequence is that a petitioner is deliberately detained in custody in this country. To be offered *indefinite imprisonment* as an alternative to likely torture is to be offered a harsh choice."⁷⁹ Finally, to not grant *habeas*, the court would be providing a perverse disincentive for asserting appellate rights. In advancing arguments he *might* prevail on a higher form of relief than the grant of CAT, the immigrant was preventing his own release. This detention was despite the present deferral of his order of removal, a deferral that would not change, unless he was granted a permanent status (asylum) better than the relief he currently held.⁸⁰

In another example, the Middle District of Pennsylvania has

came to the United States two months later, where he joined the Sikh Youth of America and participated in lobbying efforts for the cause of Sikh independence. He returned to India in February 1992, upon learning that his wife was ill, and was arrested and tortured upon his arrival The IJ denied petitioner asylum because she did not find him credible on the subject of his fundraising activities in the United States between 1990 and 1992. Petitioner raised money in the United States for families in the Punjab and for individuals injured while trying to cross between Pakistan and India, and he put potential donors in contact with Daljit Singh Bittu, a leader of the militant wing of the Sikh Student Federation in India, whom petitioner knew as a student in India. He also took phone calls from individuals in India and connected them with Bittu in Pakistan. In addition, in 1995, while in the U.S., petitioner had contact with the head of the militant Khalistan Commando Force.

⁷⁹ *Id.* at 5.

⁸⁰ *Id.* at 7. Moreover, the Court concludes that the fairly unusual posture of this case weighs in favor of concluding that Cheema is subject to a final order of removal. On remand, Cheema is only eligible for more relief, not less, under his petitions for withholding of deportation and asylum. Indeed, at oral argument, the government conceded that, had petitioner lost his appeal at the Ninth Circuit, the May 8, 2002 decision would have been a final order of removal; but it took the position that because petitioner partially prevailed and the Ninth Circuit remanded the case to the BIA, petitioner no longer has a final order, and therefore 8 U.S.C. § 1231 does not apply. As petitioner points out, this logic would produce the absurd result that an alien who loses his appeal would be released, while an alien who seeks and obtains the relief provided by law is subject to indefinite detention. Cheema has been detained for approximately eight years, and regardless of how the BIA handles Cheema's petitions for withholding of deportation and asylum on remand, Cheema is now and will always be subject to the deferral of removal order.

held that *Demore v. Kim*⁸¹ did not authorize detention of great length without compromising the immigrants' due process rights. In *Occelin v. District Director*,⁸² the immigrant was detained for over two years while his case was in the administrative appellate process in his application for CAT relief. The delays in this case were partially attributable to errors in the tape recordings of proceedings, errors that made it impossible to transcribe the proceedings for appellate briefing.⁸³ The court found that "continued detention pending the conclusion of a maze of removal proceedings is in violation of his right to due process and is therefore unconstitutional."⁸⁴

VI. The Alternative to Release

Case study of a typical Mariel Cuban: When Detention was Truly Indefinite

*It was a beautiful day in July 2000 in Lompoc, California, "The City of Arts and Flowers"*⁸⁵ and former "Flower Seed Capital of the

⁸¹ See *Demore v. Kim*, 538 U.S. 510 (2003).

⁸² *Occelin v. District Director*, No. CV-09-00164 (M.D. Pa. June 17, 2009). A careful reading of the Supreme Court's decision in *Demore* reveals it to be not the sweeping pronouncement suggested by Respondents, but rather a narrower holding grounded in repeated reference to the anticipated brevity that pre-final order removal proceedings are expected to take in the ordinary course. The emphasis in *Demore* on the anticipated limited duration of the detention period is unmistakable, and the Court explicitly anchored its holding by noting a "brief period," of "temporary confinement." Indeed, the references to the brevity and limited nature of confinement can be found throughout *Demore* (internal citations omitted).

⁸³ *Id.* at 4. The BIA found that Occelin's continued detention, regardless of length, was not indefinite because that detention under section 236(c) of the INA would terminate upon completion of Occelin's removal proceedings. Further, the BIA found no showing that the completion of Occelin's removal proceedings had been delayed by the government's conduct. It stated, "[a] constitutional detention cannot be transformed into an unconstitutional detention solely because an alien makes tactical decisions, which are within his or her rights, which necessarily serve to lengthen the time required to complete the alien's removal proceedings."

⁸⁴ *Id.* at 13.

⁸⁵ The City of Lompoc, www.cityoflompoc.com (last visited Apr. 15, 2010).

World”⁸⁶ located northwest of Santa Barbara. Inside the Federal Correctional Institution, the staff had converted part of an indoor recreation area into a makeshift courtroom. The immigration judge and his clerks had driven out from the Lancaster, California immigration court for a day of hearings. So had the attorney, the Assistant Chief Counsel, for the Immigration and Naturalization Service. About fifteen cases were on the docket. Each prisoner had a final order of removal and the sole issue in each case was whether the immigration judge should order release. All of the cases involved citizens of countries that would not accept deportations, since the United States had irregular or no diplomatic relations. Most of the cases involved Cubans.

A few of the prisoners refused to appear for their hearings. None of those who appeared did so with the assistance of an attorney. Most made diligent appeals for their release, like any prisoner appearing before a parole board. Some came prepared with speeches, letters and supporting documentation. One prisoner cursed at the judge. Another was completely silent. None were granted release.

Of particular note was a Cuban national who had never acquired resident status in the United States. He was a big, strong, tough-looking guy. He had arrived in the U.S. on the 1980 Freedom Flotilla,⁸⁷ but quickly was convicted of a serious felony battery

⁸⁶ The city was long known as the flower seed capital of the world. Flower fields have diminished in recent years, so it's debatable whether that title still stands. http://en.wikipedia.org/wiki/Lompoc,_California.

⁸⁷ Sarah Town, *Seventeen Years and Counting A History of the Indefinite Detention of Cuban Immigrants*, IN MOTION MAGAZINE (1997), <http://www.inmotionmagazine.com/mariel.html>.

In November 1997 more than 1,000 of the original passengers of the 1980 Freedom Flotilla remain in federal, state, county, and private detention facilities contracted by addition to the Mariel detainees, a growing number of other Cuban immigrants of varying status, are being re-detained by the INS after serving sentences for excludable/ deportable criminal offenses. They are likewise warehoused in INS detention centers and contracted public and private prisons indefinitely awaiting deportation.

[Some] ran afoul of the law once they had been paroled into the United States, with infractions such as traffic violations or

offense and later was convicted multiple times for drug possession. Several years later, in the early 1990s, he was convicted in Trenton, New Jersey for possession of heroin. He served a few weeks in jail and then was transferred to federal custody. About eight years later he was still there. The federal Department of Prisons had transferred him from facility to facility for a few months at a time, before he reached the Lompoc prison. He had lived in a state of transition for much of his detention. He had been jailed at Lompoc for a couple of years and had been reviewed by the immigration court at least twice previously.

The Mariel presented a compelling case for his release. He made a prepared statement. He presented an organized set of materials showing that he had enrolled in a series of prison classes, including G.E.D., vocational training, parenting skills, and substance abuse awareness. He presented his disciplinary record and letters from the prison chaplain and two relatives who lived on the East Coast that vouched for him and would take him into their homes if he was released.

The judge and the INS attorney asked him questions about his criminal and detention history. He had numerous disciplinary problems in his past, including time spent in "special housing" or solitary confinement for fighting and conflict with guards. The last two years of history were clean.

The Mariel took responsibility and explained his actions. He explained that in the first few years, he had no idea how long he was going to be detained, but it could be forever. It was not possible to mentally grasp being in jail forever. He also did not know where he was going to spend his time. He figured that in his environment he could either be tough or be a victim and he decided he was not going to be messed with, even if he was going to have disciplinary

possession of small amounts of cocaine, as well as more serious crimes. The Marielitos of this final group were often advised by public defenders to enter pleas of guilty or no contest to charges for which the prosecution may have had little evidence, or of which they claimed innocence, in order to gain lighter sentences. After completing these sentences, generally short terms of probation or jail time, these Cubans, were re-detained by the INS to serve a second, and sometimes a third, indefinite sentence.

problems. Every time he was transferred he felt like he was being tested by the new facility and the new population. He got in more trouble.

Finally, at Lompoc he felt like he was in a more stable prison environment and had gotten in fewer conflicts. He also was getting older. He understood if he did not establish a period with a clean record he was never going to be released, so he focused on his goal.

The INS attorney argued that the Mariel was just manipulating the system so he could gain release and then he would return to being a menace to society. As part of his argument, the attorney argued that anyone who thought otherwise would reconsider if the Mariel was released to live in their neighborhood.

The judge was conflicted over whether showing consistent good behavior was the product of actual rehabilitation or just an act. He also was somewhat sympathetic to the fact that the crime that triggered the indefinite detention was not violent and resulted in a minimal punishment. The judge had seen this case before and had notes in his file that previously he had been concerned that the Mariel was a risk for violence.

Ultimately, the judge decided that the case merited further maturation and required at least an additional year of time before release should be granted. Thus he denied the case.

For years, the courts struggled with the issue of indefinite detention, but generally deferred⁸⁸ to the Congress and the Executive

⁸⁸ Barrera-Echevarria v. Rison, 44 F.3d 1441, 1448 (9th Cir. 1995):

More recently, the long-term detention of many of the Mariel Cubans has been a matter of great public and congressional concern. Prison disturbances by Cuban detainees in 1984, 1987, and 1991 have focused public spotlights on the continued detention of hundreds of Mariel refugees. And we must assume that Congress is aware of the numerous cases addressing the statutory and constitutional authority of the government to detain the Mariel Cubans. During the past 15 years, in fact, Congress has held many hearings relating in whole or in part to the detention of the Mariel Cubans and has amended the immigration laws, including those dealing with excludable aliens and parole, on several occasions. This legislative history

Branch decision for proper procedures to deal with indefinite detainees. The Department of Justice promulgated regulations that provided for review of Mariel Cuban cases in the manner described above, where the detainee received an annual individualized assessment of their dangerousness by a two or three member panel, with favorable cases being granted parole.⁸⁹ In rejecting the concept

confirms our interpretation that long-term detention is authorized under the current statutes.

Reading a time limit on detention into Sec. 1227 would risk frustrating the government's ability to control immigration policy and relations with foreign nations. A judicial decision requiring that excludable aliens be released into American society when neither their countries of origin nor any third country will admit them might encourage the sort of intransigence Cuba has exhibited in the negotiations over the Mariel refugees. See, e.g., *Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir.1984) (en banc) ("[T]his approach would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back."), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). In an area with sensitive foreign policy implications, we must hesitate to interpret an ambiguous statutory scheme as requiring such a result. We therefore hold that the Attorney General's detention of Barrera has been authorized by statute.

⁸⁹ 8 C.F.R. § 212.12 (2009)- Parole determinations and revocations respecting Mariel Cubans.

(a) Scope. This section applies to any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980 (hereinafter referred to as Mariel Cuban) and who is being detained by the Immigration and Naturalization Service (hereinafter referred to as the Service) pending his or her exclusion hearing, or pending his or her return to Cuba or to another country. It covers Mariel Cubans who have never been paroled as well as those Mariel Cubans whose previous parole has been revoked by the Service. It also applies to any Mariel Cuban, detained under the authority of the Immigration and Nationality Act in any facility, who has not been approved for release or who is currently awaiting movement to a Service or Bureau Of Prisons (BOP) facility. In addition, it covers the revocation of parole for those Mariel Cubans who have been released on parole at any time.

on unlawful “indefinite detention,” the majority of courts characterized the confinement as a series of one-year periods of detention followed by an opportunity to plead his case anew. However, the reality is that the authorities could successively deny parole without the detainee having meaningful recourse in the judiciary, so practically speaking, their detention was indefinite.

Minority views began to emerge within the courts arguing that “nowhere do these statutes give the Attorney General any license to extend the period of detention into perpetuity.”⁹⁰ Courts and advocates noticed the risks of deferring to weak foreign policy arguments as a basis for denying indefinite detainees their rights to due process to challenge the legality and necessity of their detention, in one case noting that “foreign leaders such as Fidel Castro simply could care less whether we imprison or set free their former imprisoned citizens. The prolonged detention of Mariel Cubans has had no deterrent effect on Castro’s mission to frustrate our foreign policy. In the meantime, individuals . . . have languished in our prisons after having completed their sentence for any previously committed offenses.”⁹¹

(b) Parole authority and decision. The authority to grant parole under section 212(d)(5) of the Act to a detained Mariel Cuban shall be exercised by the Commissioner, acting through the Associate Commissioner for Enforcement, as follows: (1) Parole decisions. The Associate Commissioner for Enforcement may, in the exercise of discretion, grant parole to a detained Mariel Cuban for emergent reasons or for reasons deemed strictly in the public interest.

A decision to retain in custody shall briefly set forth the reasons for the continued detention. A decision to release on parole may contain such special conditions as are considered appropriate. A copy of any decision to parole or to detain, with an attached copy translated into Spanish, shall be provided to the detainee. Parole documentation for Mariel Cubans shall be issued by the district director having jurisdiction over the alien, in accordance with the parole determination made by the Associate Commissioner for Enforcement.

⁹⁰ *Barrera-Echavarria*, 44 F.3d at 1451 (H. Pregerson, dissenting).

⁹¹ *Id.* at 1452. Because there is no explicit statutory authority that allows Barrera's indefinite detention, the majority argues that limiting the time period of the detention of an excludable alien would invite foreign leaders to “compel us to

Eventually the Supreme Court agreed. In *Zadvydas v. Davis* the court held that indefinite detention must be a practice limited to cases with no significant likelihood of removal and subject to stringent procedural safeguards, and that six months will be a presumptively reasonable period of time for DHS to execute a removal order, after which due process rights attach.⁹² Even this decision did not solve all problems as it was construed as only providing rights to aliens who had been admitted to the United States. In 2005, in *Clark v. Martinez*,⁹³ the Supreme Court reiterated

grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back.”

⁹² *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001).

A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to 'deprive' any 'person . . . of . . . liberty . . . without due process of law.' Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that 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, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint The proceedings at issue here are civil, not criminal, and we assume that they are non-punitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention -- at least as administered under this statute. The statute, says the Government, has two regulatory goals: 'ensuring the appearance of aliens at future immigration proceedings' and 'preventing danger to the community.' But by definition the first justification -- preventing flight -- is weak or nonexistent where removal seems a remote possibility at best. As this Court [has] said, where detention's goal is no longer practically attainable, detention no longer 'bears [a] reasonable relation to the purpose for which the individual [was] committed.' The second justification -- protecting the community -- does not necessarily diminish in force over time. But we have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections.

⁹³ See *Clark v. Martinez*, 543 U.S. 371 (2005).

the logic of *Zadvydas* of only detaining immigrants as long as it is reasonably necessary to achieve removal and further held that the prohibition against detaining immigrants beyond the six-month removal period applies equally to all aliens that are its subject, whether or not those aliens have been legally admitted to the country. All immigrants not deportable after 90 days are subject to review and consideration for release pursuant to statute.⁹⁴

⁹⁴ See INA § 241, 8 U.S.C. § 241 (2006). Detention, Release and Removal of aliens ordered removed

(1) Removal period.-

(A) In general.-Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period.-The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

....

(2) Detention.-During the removal period, the Attorney General shall detain the alien. Under no circumstances during the removal period shall the Attorney General release an alien who has been found inadmissible under section 212(a)(2) or 212(a)(3)(B) or deportable under section 237(a)(2) or 237(a)(4)(B).

(3) Supervision after 90-day period.-If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be *subject to supervision* under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien-

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality,

VII. Recommendations and Conclusions

As the courts have recognized that detention necessarily compromises liberty interests, I would hope that further studies be performed on the effect of current policies in certain key areas.

Initially, consideration must be given to the impact of detention on asylum seekers. Many cases do not present a flight risk, and most applicants neither present a risk to security nor community. The exercise of parole could alleviate humanitarian concerns inherent in the detention of these most vulnerable of persons. Since parole confers legal benefits, including ability to work and adjust status to residency, perhaps the rights of parolees must be redefined by Congress or another quasi-parole status must be devised, if necessary to enable release of *bona fide* applicants. In a related issue, the “credible fear” interview, as presently implemented, frequently provides an insufficiently high threshold to distinguish which asylum applicants are worthy of parole.

Immigration judges must be more consistent in applying the asylum standard. Consistency is crucial in the detained setting. Inconsistent denial rates serve as a deterrent to attorney representation and client applications. If this proves to be an intractable problem at the agency level, the appellate courts may be forced to take a more active role in curbing the asylum disparity, since the present deference to fact-finding by immigration judges makes it impossible for appellate courts to serve a corrective role where injustice – or at least inconsistency – is obvious.

In addition to the role of meting out fair justice within the detained setting, consistency would provide a disincentive to fraudulent use of documents and irregular entry to the U.S. In the current scheme, those who acquire visas or successfully make a clandestine entry gain two opportunities for presenting their application, including the non-adversarial interview at the asylum officer.

circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

Detention also necessarily stifles the incentive for appeals within the agency and to the federal courts. A detained asylum case can last for years, including appeals, remanded proceedings and institutional delays, so an asylum seeker must have access to release at some point in his proceedings. The obvious counterpoint is to try to make a disincentive for fraud, but this must be counterbalanced with the risks of causing trauma to *bona fide* asylum applicants.

Next, the present mandatory detention provisions are drastically over inclusive for those with minor or old criminal convictions, causing unnecessary national expense and angst for the detainees. The disparate treatment of deportable and inadmissible residents is not good policy. Detention of all inadmissible arriving aliens only deters travel and creates obstacles for hiring attorneys and building cases. It makes no sense to subject individuals to mandatory detention after a trip abroad if they were not similarly detainable prior to their trip. The public is not made safer by detaining all arriving immigrants with minor criminal infractions, particularly since these same individuals lived among society prior to traveling.

Agencies should consider alternatives to detention. As in the case of Silva-Trevino, it is possible to create safeguards for safety and prevent absconding that are less socially destructive than detention for detention's sake. Monitoring a released individual is expensive, but must be less so than ongoing detention. Additionally, safeguards must be in place to limit the length of detention. An immigrant who wins their case should not be detained upon appeal. DHS should not be able to override a judge's bond decision unilaterally. The consequence is that the detainee is at a disadvantage litigating their case while detained, which limits investing in a defense and causes irreparable damage to the case-in-chief – which typically concludes before the detainee can complete the appeal of the bond case.

Finally, as a society we must consider the larger social cost of detention. What is it about us that feeds our national need to imprison and detain? And further, what is it in the national psyche that makes us feel that jailing such broad classes of immigrants makes us safer? Why do we condone severe sanctions such as

subjecting an immigrant with a marijuana conviction to mandatory detention upon return from a trip abroad? Does a feeling of mistrust of outsiders or insecurity undermine our common sense? Detention has always been a tool for immigrant processing within the U.S. In some contexts it has become the only tool, and its effects on detainees' lives and cases should trigger its thoughtful reconsideration.