IGNORING THE COURT'S ORDER: THE AUTOMATIC STAY IN IMMIGRATION DETENTION CASES

RAHA JORJANI*

"If you don't have enough evidence to charge someone criminally but you think he's illegal, we can make him disappear."
James Pendergraph
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Introduction

The changes to immigration laws in 1996,[1] and later the

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* Clinical Professor, UC Davis School of Law, Immigration Law Clinic. J.D. (2005), B.A (2000). I am grateful to Professor Bill Ong Hing, Nadia Yakoob, Doug Keller, Shaffy Moeel, Aaron Dailey, and Professor Holly Cooper who all reviewed and commented on previous drafts of this article. My continued respect and appreciation to the courageous advocates at the Florence Immigrant and Refugee Rights Project, Florence, Arizona.

[±] This article contains information obtained from primary objects in the course of confidential interviews, and from facts generally known or discovered during the daily/regular representation collected through direct representation of the author's clients. The information is protected by the broader ethical rules of confidentiality and the attorney-client privilege.

[†] Stevens, Jacqueline, *America's Secret ICE Castles*, THE NATION, Dec. 16, 2009"), *available at* http//www.thenation.com/doc/20100104/stevens/single ("If you don't have enough evidence to charge someone criminally but you think he's illegal, we can make him disappear." Those chilling words were spoken by James Pendergraph, then executive director of Immigration and Customs Enforcement's (ICE) Office of State and Local Coordination, at a conference of police and sheriffs in August 2008).

[1] The Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 440(a), 110 Stat. 1214 (1996), amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, § 306(d), 110 Stat. 3009 (1996); James Smith, *United States Immigration Law as We Know It: El Clandestino, the American Gulag, and Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 771 (2005) ("The combined effect of casting a broader net and eliminating relief has precluded any proportionality, or, indeed,

effects of September 11, 2001, dramatically altered the landscape for immigration law and enforcement. While 1996 brought with it the systematic stripping of judicial discretion in immigration proceedings, 2001 gave us the Automatic Stay Regulation.[2] Enacted just one month after the events of 9/11, this regulation speaks volumes about prosecutorial advantage in removal proceedings and the far reaches of the executive power to detain. Contrary to the principles of due process and fairness, the regulation allows the Department of Homeland Security (DHS), in certain cases, to unilaterally stay an immigration judge's order to release an individual from immigration detention.[3] While the 2001 regulations were later revised in response to public concern, these changes failed to cure the previous defects. As such, the current automatic stay regulation remains in violation of well-established principles of domestic and international law.

The last fifteen years have witnessed a remarkably fast-paced trend towards increasing criminalization of immigration laws.[4] The expansion of immigration detention through application of the

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rationality, in the law. Long-term permanent residents with lengthy and exceptional ties to the United States who have committed misdemeanor property or drug possession offenses decades ago are lumped with noncitizens who have recently entered without inspection and whose offenses may be violent felonies or major drug trafficking offenses . . . Until 1996, a basic principle of immigration law was that noncitizens deportable on criminal grounds would have the opportunity to demonstrate the mitigating circumstances of their offense and rehabilitation.").

[2] 8 C.F.R. § 1003.19(i)(2) (2006). The first automatic stay regulation was established as a result of a proposed rule after the passing of AEDPA and IIRIRA. *See* 63 Fed. Reg. 27441-01 (May 19, 1998). This article focuses on the due process concerns arising from the expansion of the stay in 2001 and maintained even after the changes to the stay in 2006.

[3] The Automatic Stay Provision can be invoked in any case where DHS has initially "determined that an alien should not be released or has set a bond of $10,000 or more." 8 C.F.R. § 1003.19(i)(2) (2006).

[4] Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law,* 74 No. 33 INTERPRETER RELEASES 1317 (1997) ("This trend has been consistent, and has transcended Republican and Democratic Congresses and administrations. Immigration law violations are being prosecuted at a higher rate and noncitizens with criminal histories are being apprehended and deported at record rates."); *see also* Smith, *supra* note 1, at 781 (stating that criminalization of immigration violations has now become commonplace).

automatic stay and other provisions has caused detention numbers to triple in just over a decade's time. In 1996, immigration authorities had a daily detention capacity of less than 10,000.[5] Today more than 30,000 immigrants are detained each day.[6]

To an individual who is behind bars, the difference between "prison" and "detention" is purely academic. Both subject the individual to loss of freedom, separation from family, and a complete interruption of livelihood through government control. In both, an individual will undergo strip searches, visit family members from behind a glass wall, and suffer various extents of psychological, emotional, and sensory deprivation. Yet, despite their unmistakably punitive nature and striking similarity to the criminal justice system,[7] detention and deportation are governed by civil or administrative laws, and not considered to be criminal in nature.[8] The Supreme Court recently struggled with this designation given that "deportation is intimately related to the criminal process."[9] Still, the ongoing designation of this increasingly criminalized process as a civil one permits the government to incarcerate individuals or cause them to "disappear"[10] without extending to them protections that would otherwise apply in criminal proceedings.[11]

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[5] Amnesty International, *Jailed Without Justice: Immigration Detention in the USA* 3 (2009), *available at* http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf [hereinafter Amnesty International].

[6] *Id.*

[7] Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 107 (2005) (referring to immigration detention as "quasi-criminal confinement").

[8] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that deportation order is not a punishment for crime); *see also* Carlson v. Landon, 342 U.S. 524, 537 (1952) (finding that deportation is not a criminal proceeding and was never held to be punishment); *see also* United States v. Hernandez-Guerrero, 147 F.3d 1075 (9th Cir. 1998) (finding that deportation proceedings are civil in nature, and not tantamount to criminal prosecutions); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action . . . ").

[9] Padilla v. Kentucky, No. 08-651, 2010 WL 1222274, at *6 (U.S. Mar. 31, 2010).

[10] Stevens, *supra* note †.

[11] KEVIN R. JOHNSON, RAQUEL ALDANA, BILL ONG HING, LETICIA SAUCEDO & ENID F. TRUCIOS-HAYNES, UNDERSTANDING IMMIGRATION LAW 339 (LexisNexis 2009) (stating that there is no constitutional right to appointed counsel

This article examines a regulation from which DHS derives a legal advantage in removal proceedings that significantly impacts the outcome of any deportation case. While several articles have provided a limited discussion on automatic stays in the greater context of mandatory and prolonged detention, the complexity and substantial impact of the automatic stay regulation merits a discussion devoted to it in its entirety. Part I of the article provides a general background to removal proceedings and bond hearings. Part II tells the story of Manuel who, as a result of invocation of the automatic stay, continued to be detained even after an immigration judge found him suitable for release. Part III discusses the relevance of 9/11 to the current version of the automatic stay regulations. Part IV compares the old regulations or interim rule (2001) with the new regulations or final rule (2006), as well as briefly surveys how several courts have treated them. Part V then discusses the way the Supreme Court has treated preventive detention and the question of when an individual can be held without bond. This section compares bail procedures in the federal criminal context to bond procedures in the immigration context. Lastly, Part VI provides a review of the Court's most recent decision regarding stays in the immigration context and concludes that the automatic stay regulations are in violation of the long-standing principle that a stay should not exist as a matter of right. In a time when the immigration detention system continues to expand, due process safeguards are critical to ensuring meaningful review of detention status for those in custody.

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in removal proceedings under the Sixth Amendment because deportation from the U.S. is not viewed as punishment akin to a criminal conviction, citing *Fong Yue Ting*, 149 U.S. at 698; *INS v. Lopez-Mendoza,* 468 U.S. 1032, 1038 (1984), noting that "[c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."

I. Getting Out Of Jail: How Immigration Bond Hearings Typically Work

To understand the changes that the automatic stay regulations made to the regular procedures for bond appeals, a brief background on such procedures is useful. Individuals who are not United States (U.S.) citizens, and who are deemed to have violated immigration laws, can be placed into removal proceedings[12] at which time an immigration judge must determine whether they should be removed from the U.S. Both individuals in and out of legal status can be placed into removal proceedings. In any removal proceeding, there are two primary questions that an immigration judge must answer. The first is whether an individual is subject to removal. The second is whether, if subject to removal, the individual is eligible for any relief or remedy to prevent removal from the U.S.[13]

Individuals, against whom DHS initiates removal proceedings, may be subject to either discretionary detention pursuant to Section 236(a) of Immigration and Nationality Act (INA) or to mandatory detention under Section 236(c).

This article focuses specifically on the class of individuals facing removal who have been found to be bond eligible under INA § 236(a) and are not subject to mandatory detention. When an individual is apprehended and placed in DHS custody, an initial custody determination is made, either setting bond or holding them at no bond.[14] Individuals detained pursuant to INA 236(a) have the right to seek review of initial custody determinations before an immigration judge at any time after being placed into custody.[15] The immigration judge has the authority to modify the initial custody

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[12] *See* INA § 237(a)(2) (for example, an individual who is a lawful permanent resident in the United States but who has been convicted of one or more crimes can be placed into removal proceedings and will have to argue that s/he should not lose his/her lawful permanent status as a result of his/her convictions); *see also* INA § 212(a)(6) (stating that an individual who has not yet obtained any legal status can also be placed in removal proceedings as a result of being present in the United States without being admitted or paroled).

[13] INA § 240(a)(1); INA § 240(c)(1); INA § 240(c)(4).

[14] 8 C.F.R. § 236.1(d)(1) (2007).

[15] 8 C.F.R. § 236.1(d)(1) (2007); 8 C.F.R. § 1003.19(a) (2006); 8 C.F.R. § 1003.14(a) (2003).

determination, by either lowering or raising the bond amount, or denying bond altogether.

Both DHS and the detained foreign national have the right to appeal the decision of an immigration judge following a Custody Redetermination Hearing or bond hearing.[16] The filing of a regular appeal from an immigration judge's bond decision "shall not operate to delay compliance with the order (except as provided in § 1003.19(i)), nor stay the administrative proceedings or removal."[17] Therefore, if the detainee is denied bond, s/he has the right to appeal but must remain detained during the pendency of that appeal. However, if the detainee is successful at the bond hearing, a regular appeal by DHS would still permit the detainee to pay the bond amount and secure his/her release from detention during the pendency of any appeal. If the Board of Immigration Appeals (BIA) sustains DHS' appeal, the bond will be revoked and the individual can be remanded back to custody.

Custody hearings are separate from the underlying removal proceedings.[18] The inquiry at a custody hearing is simply whether an individual is eligible for release on bond, and if so, whether his/her continued detention is justified. An individual in custody must litigate his/her custody status while moving forward with the merits of his/her underlying case. A detained immigrant seeking release on bond must show that s/he is neither a danger to the community nor a flight risk.[19] Thus, when a court orders an individual's release on bond, it is only after that individual has demonstrated that release on bond is warranted.

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[16] 8 C.F.R. § 236.1(d)(3)(i) (2007).

[17] 8 C.F.R. § 236.1(d)(4) (2007).

[18] 8 C.F.R. § 1003.19(d) (2006).

[19] *In re* Adeniji, 22 I&N Dec. 1102, 1116 (BIA 1999).

II. The Going Gets Tough But The Stay Keeps Going: Impact of the Automatic Stay in Real Time

Manuel's Story[20]

I met Manuel in the Florence detention center in the middle of the Arizona desert, when he was 29 years old. Manuel has been in the United States since he was brought here by his family at the age of 3. Since then he married a US citizen and had four healthy children. Manuel and his wife lived in a low-income, working-class neighborhood and struggled financially.

Manuel had 3 misdemeanor convictions, none resulting in jail terms of more than five weeks. But based on his tattoos, the government argued that Manual was an active and dangerous gang member.

Manuel's minor convictions did not subject him to mandatory detention as none of them were considered to be crimes of moral turpitude or aggravated felonies.[21] After being given an opportunity to call a 14-year veteran of the Department of Corrections as a witness, the government failed to convince the judge that Manuel was an active and dangerous gang member. After listening to the facts and making an individualized determination based on the evidence before him, the judge found that Manuel – who had a

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[20] I represented this individual in removal proceedings from March 2007 until December 2008. Names have been changed to protect the identity of the individual involved. Also, there are no transcripts generally kept of bond proceedings as there is no right to such transcripts. *See also In re* Chirinos, 16 I&N Dec. 276, 276 (BIA 1977) (stating federal regulation 8 C.F.R. § 1003.19 (2006) does not provide for a transcript of bond redetermination proceedings).

[21] Morris, *supra* note 4, at 1324 (stating that an aggravated felony is a legal term used in immigration law and defined by INA § 101(a)(43). Even convictions designated as misdemeanors in state criminal court can be deemed "aggravated felonies" for immigration purposes. "The term 'aggravated felony' is not a concept of criminal law, but rather an invention of immigration law." Many criminal offenses are now classified as aggravated felonies and many are not what would be typically thought of as particularly serious offenses. The term "crime involving moral turpitude" is not statutorily defined, rather is interpreted by courts. It "refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general . . . . "); *Matter of Franklin,* 20 I&N Dec. 867, 868 (BIA 1994); *see also* Jordan v. De George, 341 U.S. 223 (1951).

steady job, took his kids to school every morning after he made them breakfast, picked them up every afternoon, waited patiently in line for a green card for ten years, renewed his work permits annually in compliance with U.S. immigration laws, had no felony convictions, and whom friends, family, neighbors, and other community members testified was the kind of man who constantly helped others- was not a danger to the community, regardless of how he chose to tattoo his body.

After giving both sides an opportunity to present their cases, the judge granted a new bond of $5,000, finding that for Manuel's economically challenged family, that amount was more than enough to guarantee his appearance in court once released. For a moment, Manuel and his family believed that after a long year of detention he would finally be able to return to his family and be with his children who depended on him. As soon as the judge's order was signed, however, DHS invoked the automatic stay.[22] That afternoon, the result of a several hours long hearing was rendered ineffective when DHS filed a simple one-page form with the Executive Office for Immigration Review; a form that takes minutes to complete. We were left having to explain to Manuel, his wife, and his four kids, that the government could keep Manuel in detention for several more months, despite the judge's order of release on bond.

We immediately filed a writ of habeas corpus on Manuel's behalf, challenging the constitutionality of the stay, but the petition was rendered moot when the BIA issued its decision in the case.[23] Despite all of the evidence to the contrary – including a letter from a detention officer stating that after months of close observation he

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[22] Since DHS had initially set Manuel at no bond, it was later able to invoke the automatic stay, which is applied to cases where DHS initially sets the detained individual's custody status at either no bond or a specific bond amount. *See* 8 C.F.R. § 1003.19(i)(2) (2006).

[23] Immigration detention can be challenged by way of a writ of habeas corpus in district court. Habeas corpus review is available to persons who are in federal custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(1), (c)(3) (2008). The writ filed on Manuel's behalf argued that the automatic stay violated due process and was therefore unconstitutional, and that it was also *ultra vires* to the INA which gave the immigration judge discretion to redetermine custody status unless mandatory detention applied.

believed that Manuel did not present a danger to others – the BIA vacated the judge's bond decision and found, despite having never met him, that Manuel was a danger to the community; a finding that not only changed Manuel's life, but also permanently changed the lives of his five family members, all U.S. citizens.

Manuel continued to languish in detention for a total of twenty months[24] (nearly two years) before he informed me that he could no longer cope with his confinement. He expressed that if detention operated like a criminal sentence, he would at least know when he was getting released. Instead, the lack of fixed time limits on detention made "doing the time" that much greater of a physical and psychological deprivation. Manuel gave up his appeal and accepted removal. He was removed to Mexico on Christmas Day.

III. History of the Automatic Stay Provision: What's 9/11 Got To Do With It?

The events of September 11, 2001 had a substantial effect on the way that the United States government dealt with foreign nationals. Immediately, the U.S. government expressed a heightened interest in national security and the need to protect its "homeland."[25] As a response to the perceived need for increased security, the United States undertook a variety of measures to increase its detention powers.[26] Some of these measures were promptly visible.

Shortly after 9/11, the Attorney General directed the Federal Bureau of Investigation (FBI) and other federal law enforcement personnel to use "every available law enforcement tool" to arrest

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[24] Manuel had already been detained for nearly one year at the time of his custody redetermination hearing. There are numerous reasons why an individual may have already been subject to prolonged detention at the time of his/her first bond hearing. In some cases, an individual may not be eligible for a bond hearing based on the law at the time of his/her detention, however, if the law changes, the individual may request bond.

[25] On March 1, 2003, the Immigration and Naturalization Service ceased to exist and the Department of Homeland Security was formed in its place. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2003).

[26] Brian Smith, *Charles Demore v. Hung Joon Kim: Another Step Away From Full Due Process Protections*, 38 AKRON L. REV. 207, 244 (2005).

those suspected of participating in or lending support to terrorist activities.[27] One of these available tools was immigration law, which has been recognized as providing law enforcement with greater latitude and requiring of them reduced accountability.[28] Immediately after the attacks, the INS (predecessor to DHS), in cooperation with the FBI, arrested and questioned more than 1,000 non-citizens[29] during its investigation, ultimately detaining many on immigration violations.[30] Other measures were far less visible, despite their greater long-term impact. The Attorney General gave permission to INS District Directors to file appeals after immigration judges ordered the release of aliens, thereby automatically staying the orders.[31]

The 2001 automatic stay regulations expanded the application of automatic stays to individuals subject to discretionary detention. Before 2001, the automatic stay could only be applied to individuals whom the government believed were subject to mandatory detention.[32] After the 2001 regulations, the automatic stay could be applied in any case where the District Director had made an initial custody determination of no bond or set bond at $10,000 or more.[33] The application of the regulation is not limited to cases where an individual has been convicted of any particular offenses, and therefore may be applied to individuals who have been convicted of minor offenses, as well as individuals who have not been convicted

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[27] *See* Office of Inspector General, U.S. Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Apr. 2003), *available at* http://www.justice.gov/oig/special/0306/index.htm.

[28] Miller, *supra* note 7, at 90.

[29] I have replaced any reference to individuals classified as "aliens" by the Immigration and Nationality Act with "non-citizens" and "foreign nationals." I use the term "non-citizen" here only in-so-far as it accurately describes the legal class of individuals that are subject to the laws of detention and deportation at issue in this article. The term non-citizen refers to anyone who is not a U.S. citizen, therefore it includes those who are lawful permanent residents, undocumented, refugees, visa-holders, and many others.

[30] Smith, *supra* note 26, at 245 (citing *supra* note 27).

[31] *Id.*

[32] *Id.*; 66 Fed. Reg. 54909-02 (Oct. 31, 2001) (codified at 8 C.F.R. § 1003.19(i)(2) (2006)).

[33] 8 C.F.R. § 1003.19(i)(2) (2006).

of a single criminal offense.

This drastic change was passed without public comment. In fact, the notes accompanying the published rule state that swift action without public comment was needed to "prevent the release of aliens who may pose a threat to national security."[34] In authorizing publication of the rule, then Attorney General John Ashcroft called the notice and comment process "impracticable, unnecessary, and contrary to the public interest."[35]

Professor David Cole describes this attack on liberty as part of a "wide-ranging preventive detention campaign undertaken by the Department of Justice in the wake of the terrorist attacks of September 11th, in which the government has aggressively used immigration authority to implement a broad strategy of preventive detention where other civil or criminal law authority would not permit custody."[36]

The notes accompanying the final rule issued in 2006 discussed the public comments that were received in response to the 2001 regulations, during the sixty-day comment period. The Executive Office for Immigration Review received six comments, five of which were opposed to the interim rule, and one that supported it.[37] The five commenters opposing the interim rule were "raising issues regarding its constitutionality, the breadth of its provisions, and the present meaningfulness of custody review, and challenging the need to change the preexisting stay provision."[38] Commenters argued that the interim regulation was unconstitutional as it violated the Due Process Clause of the Fifth Amendment. The single commenter in support of the interim rule "stated this constitutionally protected liberty interest is weak in the case of illegal

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[34] 66 Fed. Reg. 54909-02 (Oct. 31, 2001) (codified at 8 C.F.R. § 1003.19(i)(2) (2006)).

[35] 66 Fed. Reg. 54909-02 (Oct. 31, 2001) (codified at 8 C.F.R. § 1003.19(i)(2) (2006)).

[36] David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention,* 51 EMORY L.J. 1003, 1004 (2002).

[37] 71 Fed. Reg. 57873-01 (Oct. 2, 2006) (codified as 8 C.F.R. § 1003.6(c)(2) (2006) and 8 C.F.R. § 1003.19(i)(2) (2006)).

[38] *Id.*

aliens who have no well-founded expectations of being permitted to remain in the United States." The most obvious flaw with this argument however is, that the automatic stay provision applies not only to the case of "illegal aliens," but applies equally to lawful permanent residents who have entered and remained in the U.S. legally, as well as to those who have entered legally as refugees or have been granted asylum and other protections.

IV. The Automatic Stay: The Old Regs, The New Regs, And What The Courts Have Said

Through invocation of the automatic stay, a release order cannot be executed until the BIA has made a final decision on the custody appeal, despite an individualized determination by the immigration judge that continued detention without bond is not legally justified. In effect, the law allows for the detention of immigrants as a default position, even where a finding has been made that an individual is neither a flight risk nor a danger to the community.

While the automatic stay is not invoked in every bond appeal by DHS, it remains one of the principal tools at DHS' disposal to keep individuals confined, even after a court orders their release. The government already relies on broadly written mandatory detention grounds to ensure confinement in the absence of due process protections for immigrants with certain criminal convictions. But even where a person is *not* subject to mandatory detention, the automatic stay provides the government with the means to continue detention without bond despite a finding of suitability for release. Smith describes this as sending a "clear" message to the non-citizen that "even if you are successful in your defense, you will pay the price of lengthy decision."[39]

Detainees and their representatives must strategize difficult cases with an (at times paralyzing) awareness that DHS can simply ignore a judge's order of release. Contending with such unilateral

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[39] Smith, *supra* note 1, at 777.

and sweeping powers, an advocate's ability to convey the likelihood of success to his or her client is also substantially hindered. This curious legal arrangement, where after a full and fair adversarial hearing, the decision of the immigration court can be ignored by the non-prevailing party, is applied in none other than custody determinations, where due process protections should instead be at their highest, in light of the liberty interests at stake.

A. The 2001 Regulations and Judicial Findings of Unconstitutionality

In October 2001, the agency revised its regulations to expand Immigration and Custom Enforcement's authority to automatically stay orders by an immigration judge. The agency openly stated that by enabling the government to obtain automatic stays of orders releasing aliens, the agency could "avoid the necessity for a case-by-case determination of whether a stay should be granted in particular cases. . ."[40]

Here is how the stay works: Once a judge has ordered that a detainee be released pursuant to the payment of a set bond amount, DHS files a simple form[41] that institutes the functional equivalent of mandatory detention[42] against an individual who does not fall within the mandatory detention grounds of INA § 236(c), until the BIA

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[40] 66 Fed. Reg. 54909-02 (Oct. 31, 2001) (codified at 8 C.F.R. § 1003.19(i)(2) (2006)).

[41] Notice of INS Intent to Appeal Custody Redetermination, Form EOIR-32 (2001), *available at* http://www.immigrationlinks.com/news/news1154.htm (last visited Mar. 10, 2010) (requiring only the government attorney who is opposing counsel on a particular case, provide the Executive Office for Immigration Review with 1) the Alien Number of the detained individual, 3) the initial custody determination made by DHS, 4) the date of the Immigration Judge's bond decision, 5) the bond amount set by the Judge, and 6) the date that the EOIR 43 form is being filed. Upon signing such a form and serving it upon a detained individual's counsel, the automatic stay is triggered. Nowhere does the form require an articulation for the basis of the stay. Nowhere does it ask counsel to cite to or attach evidence in support of its decision to invoke such this extreme appeal).

[42] Zavala v. Ridge, 310 F. Supp. 2d 1071, 1079 (N.D. Cal. 2004) (stating that "the regulation[] has the effect of mandatory detention for a new class of aliens, although Congress has specified that such individuals are not subject to mandatory detention.").

issues a decision on the custody appeal. The old regulations did not require that DHS provide any evidence or state any basis for invoking the stay.[43] There was also no time requirement within which the BIA had to act.[44]

Several district courts held, prior to the issuance of the new regulations in 2006, that the automatic stay regulations violated due process and were therefore unconstitutional.[45] The court in *Zavala v. Ridge* stated that the automatic stay provision "effectively eliminates the discretionary nature of the immigration judge's determination and results in mandatory detention for the class of aliens who have been held without bail or on over $10,000 bond."[46] Another district court recognized the automatic stay as essentially "accomplishing Petitioner's mandatory detention" despite a clear order of release and determination by the immigration court that such an individual is not subject to mandatory detention."[47] In *Ashley v. Ridge,* the court stated that "one cannot characterize continued confinement under the automatic stay regulation as anything but arbitrary."[48] The court in *Ashley* further maintained that "a fair hearing is only meaningful if the results of that hearing are respected, otherwise it is merely a formality with no legal significance."[49] A regulation that renders legally insignificant a process put in place to determine the necessity of continued confinement of a human being for administrative purposes, should not be upheld in a democratic society that respects the rule of law.

In *Bezmen v. Ashcroft,* the court, quoting the Supreme Court in *Zadvydas*, found that "[g]overnmental detention in civil

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[43] 66 Fed. Reg. 54909-02 (Oct. 31, 2001) (codified at 8 C.F.R. § 1003.19(i)(2) (2006)).

[44] *Id.*

[45] *But see* Pisciotta v. Ashcroft, 311 F. Supp. 2d 445 (D.N.J. 2004) (holding that ongoing detention pending completion of removal proceedings, pursuant to automatic stay of the immigration judge's release order did not deprive alien of due process).

[46] *Zavala*, 310 F. Supp. 2d at 1079.

[47] *See* Almonte-Vargas v. Elwood, No. CIV.A. 02-CV-2666, 2002 WL 1471555 (E.D. Pa. June 28, 2002).

[48] Ashley v. Ridge, 288 F. Supp. 2d 662, 669 (D.N.J. 2003).

[49] *Id.* at 671.

proceedings is only permissible 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."[50] The court also found that detention under the automatic stay "clearly exceeds the rationale for promulgating" the revised regulation.[51] In *Bezmen*, the regulations were found to be unlawful primarily based on the lack of time limitations for adjudicating the stay, the ability of DHS to override the decision of the immigration judge (and the BIA if it opts for review by the Attorney General), and the regulation's applicability to "non-criminal aliens who are neither connected to activities of terrorism nor otherwise pose a threat to national security or the public."[52]

In *Zabadi v. Chertoff,* the district court points out that the prosecutor who argued before the immigration judge that Mr. Zabadi should not be released on bond is the same individual who determined that the immigration judge's release order should be automatically stayed.[53] The court then concluded that such a procedure "impermissibly merges the functions of adjudicator and prosecutor."[54] The regulation is found to be *ultra vires* as it "eliminates the discretionary authority of immigration judges to determine whether an individual may be released, thereby exceeding the authority bestowed" upon the agency by Congress. Furthermore, when addressing the lack of time limits on the BIA's adjudication of automatic stays in the 2001 regulations, the court in *Zabadi* contemplates a period of time "short enough" to be constitutional, and concludes that an example of such a period would be one week.[55]

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[50] Bezmen v. Ashcroft, 245 F. Supp. 2d 446, 449 (D. Conn. 2003) (quoting Zadvydas v. Davis, 533 U.S. 678, 693 (2001)).

[51] *Bezmen*, 245 F. Supp. 2d at 450.

[52] *Id.*

[53] Zabadi v. Chertoff, No. C 05-01796 WHA, 2005 WL 1514122, at * 2 (N.D. Cal. June 17, 2005).

[54] *Id.*

[55] *Id.*

B. The 2006 Regulations and the Failure to Cure the Problem.

The new regulations or final rule went into effect in November 2006, adopting the automatic stay provisions found in the interim rule but placing a limitation on the duration of the stay and purporting to clarify the basis upon which a stay may be invoked.[56] The question became, then, whether the 2006 changes cured the constitutional defects present in the old regulations. A close look at the new regulations reveals that they did not.

The new regulations require that a "senior legal official of DHS" certify that s/he has approved the filing of the stay and that there is factual and legal support justifying continued detention of the detained individual.[57] In effect, the regulations require only that DHS approve its own legal strategy. By requiring that DHS determine the validity of its own legal position, the regulations are tantamount to permitting DHS to adjudicate the identical legal issue that it is prosecuting before an independent authority. One federal district court has explicitly recognized this by stating that the automatic stay scheme conflates the functions of the adjudicator and the prosecutor.[58]

Furthermore, the new regulations require that DHS certify only that there is factual and legal support, without having to articulate what that support is or what evidence is being relied upon for such a conclusion. In the context of bail determinations in federal criminal court, reliance on a conclusory statement of reasons has been deemed perfunctory, and therefore inadequate. For example, where a district court stated that listed conditions of release "will reasonably assure the safety of the community," the First Circuit remanded because this "conclusory language accomplished very little in the way of finding subsidiary facts or furnishing needed

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[56] 71 Fed. Reg. 57873-01 (Oct. 2, 2006) (codified as 8 C.F.R. § 1003.6(c)(2) (2006) and 8 C.F.R. § 1003.19(i)(2) (2006)).

[57] 8 C.F.R. § 1003.6(c)(1)(ii) (2006) (the official must certify that he/she "is satisfied that the contentions justifying the continued detention of the alien have evidentiary support, and the legal arguments are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing precedent or the establishment of new precedent").

[58] Zavala v. Ridge, 310 F. Supp. 2d 1071, 1078 (N.D. Cal. 2004).

enlightenment to an appellate tribunal . . ."[59] In the immigration context, where a detained immigrant is appealing a decision by an immigration judge, the BIA may summarily dismiss an appeal that relies on bare and conclusory assertions.[60] DHS should be held to the same standard and made to provide substantial legal and factual support for its position immediately upon invoking the automatic stay, and not weeks later, as is currently the case. In discussing the 2001 regulations, one district court found that "the ability of the government to overturn or nullify an [immigration judge's] bail determination pending appeal without having to make a showing creates a risk of erroneous deprivation of the liberty interest."[61] A close look at the new certification requirements for DHS reveal that they do not cure the deprivation identified by the court in *Zabadi*, as the change is purely in form, and not in substance.

The requirement that a senior legal official of DHS certify that there is factual and legal support for DHS' position requires no more of DHS, than their minimum ethical obligation to any court. As an officer of the court, government counsel has several duties to a tribunal or court. Under the Model Rules of Professional Conduct, *all* lawyers have a duty "not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[62] Notably, the Model Rules, recognizing the special interest at stake where liberty is at issue, go on to state that "[a] lawyer for the defendant in a criminal proceeding, *or the respondent in a proceeding that could result in incarceration,* may nevertheless so defend the proceeding as to require that every element of the case be established."[63] DHS litigators therefore already have a basic duty to

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[59] United States v. Tortora, 922 F.2d 880, 883 (1st Cir. 1990).

[60] Toquero v. INS, 956 F.2d 193, 194 (9th Cir. 1992) (holding that the Notice of Appeal must inform the BIA of what aspects of the immigration judge's decision were allegedly incorrect, explaining why, and affirming the dismissal of petitioner's appeal by the BIA for lack of specificity).

[61] Zabadi v. Chertoff, No. C 05-01796 WHA, 2005 WL 1514122, at *2 (N.D. Cal. June 17, 2005).

[62] MODEL RULES OF PROF'L CONDUCT R. 3.1 (2004).

[63] *Id.* (emphasis added).

present meritorious claims. As such, requiring that DHS adjudicate on its own behalf the question of whether or not it has complied with this pre-existing duty, in no way serves to protect individuals from abuses of power by DHS, where it is the non-prevailing party in a custody hearing and invokes the automatic stay.

In requiring that there be factual and legal support for DHS' position, the regulation also permits DHS to rely on legal arguments that are contrary to binding precedent. The regulations explicitly provide that DHS' legal arguments may be warranted if they are non-frivolous arguments for the *reversal of existing precedent or the establishment of new precedent.*[64] This requirement permits DHS to detain immigrants without bond by relying on principles that have been previously rejected by the courts. In contrast, if release orders were permitted to take effect during DHS' appeal of custody decisions, the risk that an individual will be unnecessarily and unjustifiably detained would be avoided, while DHS' right to appeal would be wholly preserved.

The new regulations were briefly considered by a Wisconsin district court in *Hussein v. Gonzales* in 2007.[65] While the court found that the question of the constitutionality of the new regulations had become moot through the issuance of a final custody decision by the BIA, the court nonetheless commented on the validity of the automatic stay regulations. The court stated that the new regulations were "not unreasonable" and did not violate due process as "the current regulation provides that the automatic stay will lapse 90 days after the filing of the notice of appeal."[66] Unfortunately, however, the so-called "90 day limitation" of the new regulations can be dangerously deceptive.

The automatic stay regulations allow for continued detention well beyond 90 days. DHS has 1 day to file the original form expressing its intent to automatically stay the judge's release order.[67] DHS then has 10 days to file the notice of appeal with the BIA.[68]

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[64] 8 C.F.R. § 1003.6(c)(1)(ii) (2006).

[65] Hussain v. Gonzales, 492 F. Supp. 2d 1024, 1032 (E.D. Wis. 2007).

[66] *Id.*

[67] 8 C.F.R. § 1003.19(i)(2) (2006).

[68] 8 C.F.R. § 1003.6(c)(1) (2006).

The stay will lapse after 90 days if the BIA has not acted on the appeal,[69] however if it does, DHS can then seek a discretionary stay[70] thereby continuing the detention for up to 30 days.[71] At this point, the detention without bond has continued for up to 130 days. If DHS is unhappy with the BIA's decision, the stay will then remain in effect for 5 additional business days (potentially 7 calendar days) during which time DHS can refer the case to the Attorney General. The Attorney General may then certify the case to himself and take an additional 15 business days (potentially 19 calendar days) to make a final decision. That adds another 20 to 26 days of potential confinement, bringing the total to 150 to 156 days. That does not include a 21-day extension, that may be granted to the detainee to submit its brief in support of release, which tolls the original 90 days period. Therefore there is a total potential detention of between 150 to 177 days *after* an immigration judge has determined that an individual is neither a flight risk nor a danger to the society. This potential detention of between 5 and 6 months turns any reference to a "90 day limitation," such as that in *Hussein v. Gonzales,* into a misleading one. It also fails to take into account the very real consequences of unnecessarily prolonged detention on human lives. The value of even one day of unnecessary confinement to an incarcerated individual cannot be disregarded.[72] Also, it is important to remember that these calculations begin from the date of the custody decision that DHS is appealing. Any time spent in detention prior to the custody hearing is virtually unaccounted for. For example, Manuel was detained for almost one year before he

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[69] 8 C.F.R. § 1003.6(c)(4) (2006).

[70] 8 C.F.R. § 1003.19(i)(1) (2006) (stating that a discretionary stay provides the BIA with the authority to stay the order of an immigration judge redetermining the conditions of custody when DHS appeals the custody decision and seeks a stay on its own motion); *see also* 8 C.F.R. § 1003.19(i)(2) (2006) (stating that a discretionary stay allows the BIA to determine whether or not a stay should be put in place during the pendency of the underlying custody appeal where as an automatic stay *automatically* stays the release order until the underlying custody appeal has been resolved).

[71] 8 C.F.R. § 1003.6(c)(5) (2006).

[72] "[T]he unjust deprivation, for a single hour of one man's liberty, creates a debt that can never be repaid." Johnson v. United States, 218 F.2d 578, 580 (9th Cir. 1954) (Stephens, J., concurring).

qualified for a custody hearing.[73]

Whether one is in or out of custody can determine the strength of the claim asserted and access to critical elements in the preparation of any defense. The Supreme Court has recognized that the "traditional right to freedom before conviction permits the unhampered preparation of a defense . . ."[74] Out of custody respondents have better access to legal services, time, support, and the evidence needed to support their defense – all crucial factors in any case.[75] This is particularly important when individuals face increasingly complex legal issues in removal proceedings[76] under what has been called the "labyrinthine character of modern immigration law."[77] It is of great consequence, then, that an individual's merits hearing moves forward during any custody appeal. As such, a conclusion in the underlying proceeding may be reached while the automatic stay appeal is pending, in which case the detained individual will likely have already been irreparably harmed by his continued detention. In fact, it is common for detained immigrants to altogether abandon meritorious claims[78] as a result of

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[73] There are several reasons why an individual would not immediately ask for a custody hearing. For example, the legal determination of who is eligible for bond may change based on evolving case law. Secondly, an individual must gather proper evidence to demonstrate that s/he is not a flight risk or a danger to the community, evidence that may not be available immediately. A third example is that an individual could qualify for post-conviction relief in criminal court and any subsequent vacatur of a prior conviction could cause that individual to no longer be subject to mandatory detention.

[74] Stack v. Boyle, 342 U.S. 1, 4 (1951).

[75] Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 542 (2009) (explaining that the majority of individuals in removal proceedings are not likely to secure legal representation, but detained respondents are even less likely to secure the same, with 84% of detained individuals not represented by counsel). The author further points out that detention may hamper an attorney's ability to prepare his client to testify. *Id.* at 557, 568.

[76] Michael L. Culotta & Aimee J. Frederickson, *Holes in the Fence: Immigration Reform and Border Security in the United States,* 59 ADMIN. L. REV. 521, 528 (2007) ("Immigration cases can be long and complex, involving several levels of appeal.").

[77] Markowitz, *supra* note 75, at 544.

[78] Am. Civil Liberties Union Found., *Immigrants Rights Project Issue Brief: Prolonged Immigration Detention of Individuals Who Are Challenging Removal* 1,

an inability to cope with the physical, psychological, emotional, economic, and health effects of prolonged detention.

More fundamentally, however, the limitation, be it 90 days, 150 days, or 177 days, does not cure the fundamental due process problem that occurs when a non-prevailing party can unilaterally stay a decision as critical as one having to do with the liberty of another human being. The right of the non-prevailing party to appeal should be protected without subjecting an individual to continued confinement despite a clear finding by a neutral magistrate that the individual is neither a flight risk nor a danger. The right to appeal any decision of the immigration judge and the discretionary stay option that DHS has available to it more than sufficiently protect DHS' interest in detaining an individual subject to removal proceedings.[79] "The emergency stay provision found in 8 C.F.R. 1003.19(i)(1) presents an appropriate and less restrictive means whereby the government's interest in seeking a stay of the custody redetermination may be protected without unduly infringing upon Petitioner's liberty interest."[80] This sentiment has repeatedly been expressed by advocates who represent individuals in removal proceedings, but also additionally has been echoed by a former INS General Counsel.[81]

Further, the automatic stay presents an affront to the adversarial system. For centuries, "American courts have relied upon neutral and passive factfinders to resolve lawsuits on the basis of evidence presented by contending litigants during formal adjudicatory proceedings."[82] Neubauer and Meinhold carefully describe this system in the Fourth Edition of their book *Judicial Process*:

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4 & 6 (July 2009), http://www.aclu.org/files/images/asset_upload_ file766 _40474.pdf.

[79] 8 C.F.R. § 1003.19(f) (2006); 8 C.F.R. § 1003.38 (2006); 8 C.F.R. § 1003.19(i)(1) (2006).

[80] Zavala v. Ridge, 310 F. Supp. 2d 1071, 1077 (N.D. Cal. 2004) (citing Bezmen v. Ashcroft, 245 F. Supp. 2d 446, 451 (D. Conn. 2003)).

[81] David Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate,* 18 GEO. IMMIGR. L.J. 305, 313 (2004).

[82] STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1 (1988).

> The adversary system relies on a neutral and passive decision maker to decide disputes between the opposing parties. The judge serves as a neutral arbitrator, ensuring that each side battles within the established rules . . . The underlying theory of the adversary system is that neutral, passive decision makers are essential to ensure evenhanded consideration of each case and to convince society that the judicial system is trustworthy and legitimate . . .[83]

While the Supreme Court has held that a removal proceeding does not constitute an "adversary adjudication," such a view is nearly two decades old and openly challenged by the American Bar Association.[84] This is consistent with the Supreme Court's characterizations of deportation as "banishment"[85] and "the loss of all that makes life worth living."[86] In an adversarial proceeding, if parties can agree to nothing else, they can agree to present their evidence and arguments before a neutral decision-maker who must in turn determine which party shall prevail. Procedural laws are put in

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[83] DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 37 (4th ed. 2007).

[84] Ardestani v. INS, 502 U.S. 129, 133-34 (1991) (the United States Supreme Court has held that removal proceedings do not constitute an "adversary adjudication" under the Administrative Procedure Act). It is worth noting that particularly after the 1996 immigration reforms and the events of September 11, 2001, removals have more than tripled and collaboration between criminal and immigration agencies has vastly expanded. As such, it may be worth revisiting the Supreme Court's assessment of immigration removal policy that is nearly two decades old. The American Bar Association has repeatedly recognized the adversarial nature of removal proceedings. Most recently, a resolution and report to the House of Delegates was issued by the ABA's Commission on Immigration. The report resolved that removal proceedings are adversarial in nature and largely mirror criminal trials. *See* American Bar Association, Report to the House of Delegates 3 (2006), *available at* http://www.abanet.org/ Publicserv/immigration/ 107a_right_to_counsel.pdf; Donald Kerwin, *Revisiting the Need for Appointed Counsel*, Migration Policy Institute 4 (Apr. 2005), *available at* http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf (referring to removal proceedings as "adversarial," and noting that "removal proceedings, although 'civil,' bear striking similarities to criminal trials.").

[85] Knauer v. United States, 328 U.S. 654, 676 (1946) (Rutledge, J., dissenting).

[86] Cox v. United States, 332 U.S. 442, 454 (1947) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

place to prevent people from taking the rule of law into their own hands.[87]

Where one party can unilaterally ignore a court's order at the end of a proceeding, the entire validity of such a proceeding is undermined. As such, the automatic stay regulation fails to provide DHS with any incentive to timely obtain and present actual evidence in support of its assertions that an individual is either a danger or a flight risk. This weakens any proceeding over which a neutral decision-maker presides. The adversary process relies on "the sharp clash of proofs presented by adversaries in a highly structured forensic setting. . .upon which a neutral and passive decision-maker can base the resolution of a litigated dispute acceptable to both parties and society."[88] Thus allowing the use of automatic stays "produces a patently unfair situation by 'tak[ing] the stay decision out of the hands of the judges altogether and giv[ing] it to the prosecutor who has by definition failed to persuade a judge in an adversary hearing that detention is justified.'"[89] In a time of scarce resources and severe economic challenges, we ought to question a system that devotes substantial government resources to a process that one court described as rendering the judge's decision "an empty gesture."[90]

For a detained immigrant, a bond hearing may be the culmination of hours of careful preparation. Life is interrupted for numerous family members who must travel to often remote locations to attend hearings. The attorneys' fees associated with this litigation can also be quite substantial. Meanwhile, DHS can come to the same bond hearing knowing that even if the evidence leads the Court to order the detainee's release on bond, it retains the power to invoke the automatic stay and impede a justly gained verdict.

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[87] NEUBAUER & MEINHOLD, *supra* note 83, at 44.

[88] SAUNDRA D. WESTERVELT ET AL., WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 255-56 (2001).

[89] Ashley v. Ridge, 288 F. Supp. 2d 662, 671 (quoting Cole, *supra* note 37, at 1031).

[90] *Id.* at 668.

V. The Supreme Court, Preventive Detention and Detention Without Bond

The U.S. Supreme Court has held that "freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects."[91] Although individuals who are not U.S. citizens suffer substantial limitations on procedural protections otherwise at play in government custody cases, the U.S. Supreme Court has held that "[t]he Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[92] This recognition of Due Process as a protection that transcends one's citizenship status is critical in assessing the constitutionality of the automatic stay regulations, as "[t]he fundamental requirement of due process is the opportunity to be heard *at a meaningful time* and *in a meaningful manner*."[93]

DHS has no legal authority to detain for punitive purposes, so its detention of non-citizens is labeled "preventive."[94] The idea is that detention will prevent individuals who have been marked for removal from escaping this fate, even when they are only suspected as being removable. Numerous U.S. citizens have been detained until they have been able to prove to DHS or to the courts that they are in fact citizens and that their detention has been unlawful.[95] Preventive detention, when permitted in the United States, has

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[91] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[92] *Id.* at 693.

[93] Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (internal citations omitted) (emphasis added) (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[94] INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation hearing is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . . "); *see also* Cole, *supra* note 36, at 1006.

[95] Flores-Torres v. Mukasey, 548 F.3d 708, 710 (9th Cir. 2008) ("There is no dispute that if Torres is a citizen the government has no authority under the INA to detain him, as well as no interest in doing so, and that his detention would be unlawful under the Constitution and under the Non-Detention Act, 18 U.S.C. § 4001"). On remand, the U.S. District Court for the Northern District of California held that Torres was in fact a U.S. citizen. *See* Flores-Torres v. Holder, No. C 08-01037 WHA, 2009 WL 5511156, at *8 (N.D. Cal. Dec. 23, 2009) (Torres's detention for three years had therefore been unlawful).

always been accompanied by an individualized determination of the need for confinement. Outside of wartime, no Justice on the Supreme Court has asserted the legality of civil detention in the absence of an individualized finding that the detention is necessary to protect against a distinct danger posed by the individual sought to be detained.[96]

Yet DHS, relying on administrative regulations rather than a Congressional act, can ignore such an individualized determination in detention cases for up to five or six months, until a final decision on the underlying custody appeal is issued by the BIA.

In *United States v. Salerno,* the U.S. Supreme Court upheld the constitutionality of a statute authorizing a limited period of pretrial detention without bail pursuant to an individualized finding in a fair hearing.[97] The Court in *Salerno,* however, made clear that the Bail Reform Act applied only to a "specific category of extremely serious offenses" and could only be applied once demonstrated by way of a "full-blown adversary hearing. . .that no conditions of release can reasonably assure the safety of the community or any person."[98] A close look at the Bail Reform Act and the right of review of federal orders relating to the detention of criminal defendants is instructive to our inquiry into the review of release orders issued by the federal immigration court.

Well-established domestic legal principles require that where a government seeks to deprive an individual of their liberty, prompt determinations by an independent decision-maker must be made as to whether the deprivation is justified. Federal law statutorily requires that a bail hearing be held "immediately" upon the detained individual's first appearance, with at most three and five day continuances afforded to the parties.[99] In the criminal context, the government may move a district court to review a magistrate judge's release order, however, the law requires that "the motion . . . be determined promptly."[100] Similarly, an appeal of a release order may

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[96] Cole, *supra* note 36, at 1009-10.

[97] United States v. Salerno, 481 U.S. 739, 747 (1987).

[98] *Id.* at 750.

[99] 18 U.S.C. § 3142(f) (2006).

[100] 18 U.S.C. § 3145(a) (2006).

be taken by the Government to the Court of Appeals within thirty days of the release order but must be "diligently prosecuted."[101] Notably, the government does not generally appeal the decision of a district court to grant bail in a criminal case.[102]

Also in the criminal context, the Supreme Court held that while probable cause may be sufficient for an arrest and brief detention by a police officer, once in custody, the need for a neutral determination by a magistrate increased significantly.[103] The Court has recognized that "the consequences of prolonged detention may be more serious than the interference occasioned by an arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[104] It is for these very reasons that the findings of fact by a trial court or lower court are to be presumed to be correct unless they have been proven clearly erroneous.[105]

The need for an independent determination of danger and flight risk before an individual is subject to confinement without the possibility of bail or bond is similarly supported by international law.[106] Amnesty International, an internationally recognized human

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[101] 18 U.S.C. § 3145(c) (2006); 18 U.S.C. § 3731 (2009).

[102] Based on conversations with federal public defenders in November and December 2009. Numerous state public defenders also reported that the government generally did not appealed a grant of bail and that only a judge could decide whether or not a bail decision would be stayed.

[103] Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

[104] *Id.*

[105] Doug Keller, *Resolving a "Substantial Question:" Just Who is Entitled to Bail Pending Appeal Under the Bail Reform Act of 1984?,* 60 FLA. L. REV. 825, 845 (stating that in the federal criminal context, there is already a built-in presumption that the defendant's conviction is correct); Anderson v. Bock, 56 U.S. 323, 325 (1853) (recognizing a presumption that the judgment of the lower correct was supported by the written proofs); *The Quickstep*, 76 U.S. 665, 666 (1869) (recognizing a "presumption in favor of the correctness of the decision appealed from"); *In re Estate of Lee Chuck*, 33 Haw. 445, 3 (Hawai'i Terr. 1935) (recognizing the general presumption in all legal proceedings that judicial tribunals act according to law). In the immigration context, the BIA recognizes deference to an Immigration Judge's findings of fact and is to review such findings under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2009); *see also In re S-H-*, 23 I & N Dec. 462, 464-65 (BIA 2002).

[106] Article 9 of the International Covenant on Civil and Political Rights,

rights organization, recommends that all decisions to detain be subject to formal and regular review by a judicial body and that no one be subject to mandatory detention.[107] It has recognized that any detained person must be provided with a "prompt and effective" remedy before an independent judicial body with which to challenge the decision to detain him or her.[108]

While the U.S. Supreme Court has upheld the constitutionality of preventive detention in the criminal context,[109] it has recognized that "[p]retrial detention is still an exceptional

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ratified by the United States with reservations, states that "[I]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial . . . . " The International Covenant on Civil and Political Rights was adopted by the U.N. General Assembly in 1966 and went into force in 1976. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), *available at* http://www2.ohchr.org/english/law/ccpr.htm. As of November 2009, 165 countries have ratified the Covenant. Office of the U.N. High Comm'r for Human Rights, *Status of Ratifications of the International Covenant on Civil and Political Rights*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. The U.S. ratified this treaty in June 1992. *Id.* The U.S. Constitution provides the President with the power to sign a treaty into law, with consent of two-thirds of the U.S. Senate. U.S. CONST. art. II, § 2, cl. 2. The U.S. Constitution explicitly provides that treaties that are signed by the President and ratified by the Senate are "the supreme law of the land." U.S. CONST. art. VI, cl. 2. Similarly, Principle 37 of the Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment states that a person who is detained shall be brought to a judicial or other authority provided by law *promptly* after his arrest and such authority "shall decide without delay upon the lawfulness and *necessity* of detention." (italics added) Adopted by General Assembly resolution 43/173 of 9 December 1988. Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988). "To protect against arbitrary decisions and the abuse of discretionary power, all decisions regarding the use of detention must be subject to review by a judicial or other competent and independent authority." Amnesty International, *supra* note 6, at 15 (certainly no prompt re-determination can be said to have been provided where the result of that prompt custody hearing cannot be given effect for up to 5 or 6 months. The automatic stay regulation insulates original custody determinations made by DHS from timely and independent review).

[107] Amnesty International, *supra* note 5, at 9.

[108] Amnesty International, *supra* note 5, at 12.

[109] *See* United States v. Salerno, 481 U.S. 739, 739 (1987).

step."[110] The Court has stated that "[f]ederal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail."[111] Cole explains that "because preventive detention involves depriving individuals of their physical liberty without an adjudication of criminal guilt, its use is strictly circumscribed by due process constraints."[112] According to the U.S. Supreme Court, bail is "basic to our system of law,"[113] and doubts regarding the propriety of release "should always be resolved in favor of the defendant."[114] Only in rare cases should release be denied.[115] In fact, under the Bail Reform Act of 1984, which sought to make it *more* difficult to obtain bail pending appeal,[116] defendants have a right to bail even *after* they have been found guilty of an offense and sentenced to imprisonment, if they can prove that they are not a flight risk or danger, and that their appeal raises a meritorious question of law or fact.[117]

It is irreconcilable then that detention based on *civil* laws – which by legal definition is precluded from serving the purposes of retribution, punishment, or general deterrence[118] – would lend safe haven to unequivocal disregard toward the protections that should attach at the taking of any human being into government custody.

In 2003, the U.S. Supreme Court upheld in *Demore v. Kim* preventive detention without bail in the immigration context "for the brief period necessary for . . . removal proceedings."[119] While

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[110] United States v. Torres, 929 F.2d 291, 292 (7th Cir. 1991) (citing *Salerno*, 481 U.S. at 749).

[111] Stack v. Boyle, 342 U.S. 1, 4 (1951).

[112] Cole, *supra* note 36, at 1006.

[113] Herzog v. United States, 75 S. Ct. 349, 351 (1955).

[114] *Id.*

[115] United States v. Motamedi, 767 F.2d 1402, 1405 (9th Cir. 1985) (citing Stellers v. United States, 89 S. Ct. 36, 38 (1968)).

[116] Keller, *supra* note 105, at 827 (stating that the circuits courts unanimously agree that Congress intended to make it more difficult to obtain bail pending appeal when it passed the 1984 Bail Act).

[117] 18 U.S.C. § 3143(b)(1) (2004).

[118] Carlson v. Landon, 342 U.S. 524, 537 (1952) (finding that deportation is not a criminal proceeding and has never held to be punishment); *see also* Cole, *supra* note 36, at 1012.

[119] Demore v. Kim, 538 U.S. 510, 513 (2003).

Demore is often cited by DHS for the proposition that immigrant detainees can simply be held without bond, the Court makes no mistake about its understanding that the mandatory detention it is authorizing is of a brief nature.[120] In fact, the Court specifically notes that the average duration of removal proceedings in 85% of removal proceedings is forty-seven days. The Ninth Circuit recently affirmed this reading of *Demore* where it held that since the Supreme Court in *Demore* only authorized mandatory detention for a brief period, prolonged detention was unconstitutional where the detainee had not been provided with a bond hearing where he could challenge his continued detention.[121] Despite Congress's plenary powers to create immigration laws, the Court has made clear that such a "power is subject to important constitutional limitations."[122] Further, courts have distinguished between this plenary power over immigration issues and the means by which the government exercises that power, finding that the judicial branch need not defer to the executive branch in the area of the latter.[123]

Furthermore, the detention on review in *Demore* had been authorized by way of Congressional action based on legislative findings. While arguably the Court in *Demore* erred in "accept[ing] statistical studies to justify a blanket rule of detention rather than requiring individualized determinations of risk of flight and

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[120] *Demore,* 538 U.S. at 523 (brief period), 526, 531 (limited period), 528 (shorter duration), 529 (very limited time) and (in 85% of cases, average period for removal proceedings is forty-seven days). *See also* Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 950 (9th Cir. 2008) (stating that the Court in *Demore* upheld mandatory detention "with the specific understanding that § 1226(c) authorized mandatory detention only for the 'limited period of [the alien's] removal proceedings'").

[121] Casas-Castrillon v. Mukasey, 535 F.3d 942, 948 (9th Cir. 2008) (affirming that under *Demore* mandatory detention authorizes brief detentions and stating that because neither § 1231(a) nor § 1226(c) govern the prolonged detention of aliens awaiting judicial review of their removal orders, Casas' detention was authorized during this period under the Attorney General's general, discretionary detention authority under § 1226(a), and that therefore Casas was entitled to a bond hearing).

[122] Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

[123] Ashley v. Ridge, 288 F. Supp. 2d 662, 667 (D.N.J. 2003) (citing *Zadvydas*, 533 U.S. at 695; INS v. Chadha, 462 U.S. 919, 940-41 (1983)); *see also* Smith, *supra* note 27, at 248 n.247.

dangerousness,"[124] here, the regulations that are relied upon for prolonging an individual's detention do not arise from an act of Congress, nor are they based on evidentiary studies or legislative findings.[125] In contrast, the 2001 automatic stay regulations were passed one month after a national emergency and without public comment.

DHS' decision as to whether or not to invoke an automatic stay is largely discretionary, therefore there is a heightened danger that such discretion will be abused. Whether a stay is invoked against a particular detained individual arises not from a categorical rule established by Congress – as is the case with mandatory detention- rather it is a discretionary decision made by individual DHS officers. Furthermore, it is unclear what, if any, oversight is provided over these discretionary determinations or whether the incidence, frequency, and bases for invocation of the stay are monitored by the Executive Office of Immigration Review. While a memorandum issued by the Office of the Chief Immigration Judge on October 31, 2006 states that certain notations are made in automatic stay cases,[126] initial inquiries have revealed that very little, if anything, is tracked with respect to automatic stay cases.[127]

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[124] Smith, *supra* note 26, at 236.

[125] Demore v. Kim, 538 U.S. 510, 518 (2003).

[126] Memo from the Office of the Chief Immigration Judge to all Immigration Judges, Court Administration, Judicial Law Clerks, and Immigration Court Staff, *Interim Operating Policies and Procedures Memorandum 06-03: Procedures for Automatic Stay Cases* (October 31, 2006) (on file with the U.S. Department of Justice) (stating that "the Court Administrator or designee shall enter a notation in the Remarks section of ANSIR or the Comment section of CASE that Form EOIR-43 has been filed in the case and the date that it was filed" and that once DHS files a timely Notice of Appeal with the Board, the Clerk's office of the Board will notify the immigration court via an e-mail to the Court Administrator when a Notice of Appeal is filed in an automatic stay case).

[127] The UC Davis Immigration Law Clinic filed a Freedom of Information Act Request (FOIA) related to the invocation of the automatic stay regulations in the immigration custody context on December 8, 2009. On December 15, 2009, a notice of receipt was issued by the Office of the General Counsel of the Executive Office for Immigration Review. On December 17, 2009, I received an email communication from a FOIA officer at the BIA stating that automatic stays are not tracked in a separate field and that therefore it was unlikely that the FOIA office would be able to provide us with the information we were looking for. I received

Amnesty International reported in 2009 that it "was told by advocates that in some jurisdictions, ICE routinely denies bond so that it may later invoke this 'automatic stay' authority."[128] This was confirmed years earlier by David Martin, former INS General Counsel, when he testified that "there are indications that the automatic stay mechanism is now being used routinely and without careful calculation by the enforcement agencies of the individual merits that led the IJ to reduce the bond in the first place."[129] In the absence of a Congressional Act that complies with the mandates of the U.S. Constitution, detention without bond produces too grave of a consequence to be left to one party's discretionary determination, where that determination is insulated from prompt review by an independent decision-maker.

Furthermore, in upholding mandatory detention, the Court in *Demore* relied on the availability of a *Joseph* bond hearing as a safeguard against unlawful detention.[130] A *Joseph* hearing is one where an individual can challenge whether he is properly included in the class of individuals subject to mandatory detention. This provides a necessary safeguard for individuals against whom removal proceedings are initiated on erroneous grounds. For example, U.S. citizens who are erroneously detained by DHS rely on *Joseph* hearings to challenge their detention while their status is being determined.[131] If an individual can demonstrate in a *Joseph* hearing that DHS is substantially unlikely to prevail on a charge of removability then the judge can order release from detention pending

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the same response from the court administrator of the San Francisco Immigration Court also in December 2009 (e-mails on file with the author).

[128] Amnesty International, *supra* note 5, at 17.

[129] Martin, *supra* note 81, at 313.

[130] *Demore,* 538 U.S. at 532 (Kennedy, J., concurring).

[131] Problems with ICE Interrogation, Detention and Removal Procedures: Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law (Feb. 13, 2008) (testimony of Kara Hartzler, att'y, Florence Immigration and Refugee Rights Project) (explaining that ICE detains individuals who are U.S. citizens by virtue of birth or derivative status and stating that "the Florence Project encounters between 40-50 cases a month of people in immigration detention who have potentially valid claims to U.S. citizenship)." *See also* Jacqueline Stevens, *Thin ICE*, THE NATION, June 23, 2008, *available at* http://www.thenation.com/doc/20080623/stevens.

further resolution of the case.[132] However, the automatic stay allows DHS to nullify any such order, even after a *Joseph* hearing.[133] It is unclear whether the Court in *Demore* would have upheld mandatory detention, had it contemplated that even *Joseph* hearings cannot guarantee release on bond since invocation of the automatic stay would interfere with any such result. The *Demore* Court did not directly resolve this issue as they found that Mr. Kim chose not to challenge his detention through a *Joseph* hearing.[134] *Demore* therefore raises serious questions regarding the constitutionality of the automatic stay regulations.[135]

VI. Nken v. Holder *and Adjudicating Stays in the Immigration Context*

The U.S. Supreme Court recently issued an opinion in *Nken v. Holder*, clarifying standards for stays of court orders in the immigration context.[136] The Supreme Court has described a stay as "an intrusion into the ordinary processes of administration and judicial review."[137] In *Nken,* the Court reaffirmed the long-standing principle that "a stay is not a matter of right, even if irreparable injury might otherwise result to the appellant," rather it is a discretionary manner.[138] Courts have traditionally held that the party requesting a stay bears the burden of showing that the circumstances

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[132] *In re Joseph,* 22 I&N Dec. 799, 807 (BIA 1999).

[133] Ashley v. Ridge, 288 F. Supp. 2d 662, 672 (D.N.J. 2003) (stating that the results of the bail hearing were "nullified by the automatic stay provision").

[134] *Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

[135] Smith, *supra* note 27, at 248 (stating that *Demore* leaves the automatic stay rule highly susceptible to attack); *see also Ashley,* 288 F. Supp. 2d at 672 ("[i]t is not clear that the *Kim* decision would have been resolved the same way if it had been brought pursuant to the § 3.19(i)(2) automatic stay provision, under which even if an Immigration Judge were to find that a detainee was 'not convicted of the predicate crime' or in any way not subject to § 1226(a), his decision would still be stayed upon the unilateral discretion of the BICE pending appeal").

[136] Nken v. Holder, 129 S. Ct. 1749, 1757 (2009).

[137] *Id.*

[138] *Id.*

justify an exercise of that discretion.[139] In considering stays in the immigration context, the Court upheld the traditional test for whether, in the exercise of discretion, a stay should be granted, in which the following four factors are weighed: likelihood of success on the merits, irreparable harm, harm to the opposing party, and the public interest.

The Court in *Nken,* was dealing with a different type of stay than that which is at issue here. There, an immigrant petitioner had filed for a stay of a removal order to be able to remain in the United States while seeking federal appellate court review. So if an immigrant subject to removal has the right to seek an automatic stay from a removal order, why shouldn't the government be permitted to seek an automatic stay from a detention release order? Simple; it's the fundamental difference in power between the government and a foreign national.

The Supreme Court has recognized that "an alien seeking a stay of removal pending adjudication of a petition for review does not ask for a coercive order against the Government, but rather for the temporary setting aside of the source of the Government's authority to remove."[140] A government stay of a detention release order certainly operates as a coercive order against a detained individual whose liberty is directly affected by such an action, and who has been found suitable for release.

Furthermore, a stay from a removal order is automatic only until the court decides whether *the stay* should be granted, unlike the automatic stays of bond decisions, which remain in effect until *the underlying custody issue* is resolved. Also, the Supreme Court requires that a petitioner requesting a stay of his/her removal order file a motion for stay in addition to his or her Petition for Review,[141] explaining the irreparable harm that will come to the petitioner, beyond that which is caused by the burden of removal alone.[142] As such, the Supreme Court has put into place a procedure that ensures

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[139] *Id.* at 1760.

[140] *Nken,* 129 S. Ct. at 1752.

[141] *See* 8 U.S.C. § 1252(b)(3)(B) (2005) (stating that the filing of the Petition for Review does not stay the order of removal).

[142] Nken v. Holder, 129 S. Ct. 1749, 1761 (2009).

that only warranted stays are granted. The same assurance should be available in stays of release orders, however the automatic stay regulation makes it so that a release is stayed "no matter how frivolous the appeal by the Government."[143] Even with the 2006 changes to the regulations, the automatic stay regulation's only protection against unwarranted or frivolous requests is self-certification by DHS.[144] As such, the concern raised by the court in *Ashley* regarding frivolous appeals, has not been cured.

By creating an automatic stay as a matter of right for DHS, the regulation runs contrary to the Court's reasoning in *Nken*. The automatic stay remains in effect not until the BIA decides whether or not to grant the stay, but rather until the BIA decides whether or not to sustain or overrule the lower court's underlying custody decision.

Lastly, while the Supreme Court places the burden of *showing* a likelihood of success on the merits on the party seeking the stay, the automatic stay regulation allows DHS to invoke a categorical stay not only without demonstrating irreparable harm or a likelihood of success on the merits, but also by relying on arguments that have previously been rejected.

Whether a court's decision should be stayed pending a subsequent decision by a higher court should remain a discretionary decision. Otherwise, it becomes a stay as a matter of right and runs afoul of the Supreme Court's reasoning in *Nken.*

VII. Recommendations and Conclusion

The automatic stay is unconstitutional because it deprives a person of liberty without heed to the process of law. When it comes to determinations as critical as custody determinations in the civil immigration context, a judge's release order should be given effect as long as the rights of the non-prevailing party to appeal the decision are protected. Allowing a release order to take effect despite an appeal of that order by DHS averts the serious due process concerns triggered by automatically staying such orders, while

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[143] Ashley v. Ridge, 288 F. Supp. 2d 662, 670-71 (D.N.J. 2003).

[144] 8 C.F.R. § 1003.6(c)(1) (2006).

preserving DHS' right to appeal and to a subsequent remand should their appeal be successful.

As such, the regulation found at 8 C.F.R. 1003.19(i)(2) should be repealed. In fact, former INS General Counsel David Martin stated in his testimony before the National Commission on Terrorist Attacks Upon the United States in 2003, that "[r]epealing the automatic stay provisions while still assuring the BIA's power to issue a discretionary stay upon an adequate showing provides sufficient safeguards, both of public safety and of the core interest in liberty."[145] He went on to state that while many respondents who have committed violent crimes should be detained throughout their removal proceedings, "a case-by-case stay procedure can identify those instances."[146] DHS' interest in staying a decision is already satisfied by the discretionary stay provision found at 8 C.F.R. 1003.19(i)(1), which was described by one court as a "narrowly tailored, less restrictive means" of protecting the government's interest in seeking stays of custody decisions "without unduly infringing upon [petitioner's] liberty interest."[147]

Furthermore, treating current U.S. detention law and practice in the U.S. as anything other than punishment perpetuates a "legal fiction" that is increasingly indefensible and in need of reexamination.[148]

David Cole has written that "[w]ith the exception of the power to make war and to impose capital punishment, few state actions are more serious than locking up a human being."[149] DHS' power to categorically confine individuals should be considered within the greater context of incarceration trends in the United States. The U.S. leads the world in producing prisoners.[150] It has also been recognized that "immigrant detainees represent the fastest

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[145] Martin, *supra* note 81, at 313.

[146] *Id.*

[147] Bezmen v. Ashcroft, 245 F. Supp. 2d 446, 451 (D. Conn. 2003).

[148] Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Deportation for Crimes*, 27 YALE J. ON REG. 47, 49 (2010).

[149] Cole, *supra* note 36, at 1008.

[150] Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations,* N.Y. TIMES, Apr. 23, 2008.

growing segment of the U.S. incarcerated population."[151] Rapid rates of incarceration have created the potential danger that we are becoming all too accepting of incarceration as a means to further governmental objectives. Stripped of legal jargon, this article raises the age-old question of how we as a society justify depriving another human being of liberty.

The International Committee for the Red Cross provides a sobering account of this loss:

> The change from being a free individual to being a prisoner means the loss of all points of reference, a sudden plunge into an unknown world where all the rules are different and values are unfamiliar. Once he or she has been withdrawn from the world, an individual suddenly deprived of freedom, becomes extremely vulnerable. Imprisonment constitutes a fundamental change for all individuals, even if they are prepared and resilient.[152]

There simply is no justification for continued detention beyond a determination made in any court of law that an individual should be released. We do not tolerate such injustice in criminal law and there is no reason why we should tolerate it in the immigration context.

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[151] American Bar Association Resolution (Aug. 2002), *available at* http://www.abanet.org/intlaw/policy/ humanrights/detainees115B.pdf (last visited Mar. 10, 2010).

[152] INTERNATIONAL RESPONSES TO TRAUMATIC STRESS: HUMANITARIAN, HUMAN RIGHTS, JUSTICE, PEACE AND DEVELOPMENT CONTRIBUTIONS, COLLABORATIVE ACTIONS AND FUTURE INITIATIVES 226 (Yael Danieli, Nigel S. Rodley & Lars Weisaeth eds., Baywood Pub. Co., Inc. 1996), *available at* http://www.cicr.org/web/eng/siteeng0.nsf/htmlall/57JMTS.