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Freedom in the Balance: Procedural Due Process Rights and the Burden of Proof in Detention Hearings in Immigration Removal Proceedings

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FREEDOM IN THE BALANCE: PROCEDURAL DUE PROCESS RIGHTS AND THE BURDEN OF PROOF IN DETENTION HEARINGS IN IMMIGRATION REMOVAL PROCEEDINGS

Colin Brady*

INTRODUCTION

Immigration is inextricably bound to the national character of the United States. The United Nations (U.N.) estimates that the United States is home to approximately 46.6 million foreign-born immigrants, by far the largest immigrant population in the world, representing approximately nineteen percent of the U.S. population.[1] Beyond the size of the immigrant population, immigration plays a defining role in the American experience. Since the nation's founding, immigration has shaped our understanding of what it means to be an American.

Alexis de Tocqueville remarked in 1835, after surveying the United States in hopes of better understanding its democratic revolution, that the original English settlers were "something new in the world" because "it was not necessity that forced them to abandon their country."[2] Instead, these new immigrants "tore themselves away from the sweetness of their native country to obey a purely intellectual need . . . they wanted to make *an idea* triumph."[3] Over a century later, John F. Kennedy remarked on the continued power of this idea: the United States offered immigrants relief from "religious persecution, political oppression, and economic hardship."[4] Immigrants arrived in the United States seeking to fulfill the promise of the pledge of the Declaration of Independence: "life, liberty, and the pursuit of happiness."[5]

What was true then is no less true today. Every year over one million immigrants become new lawful permanent residents (LPR).[6] After an average of eight

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[1] Phillip Connor & Gustavo López, *5 Facts about the U.S. Rank in Worldwide Migration*, PEW RSCH. CTR. (May 18, 2016), https://www.pewresearch.org/fact-tank/2016/05/18/5-facts-about-the-u-s-rank-in-worldwide-migration/ [https://perma.cc/E5HX-7NP8].

[2] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 101, 380 (Harvey C. Mansfield ed., 2000) (1835).

[3] *Id.* at 101.

[4] JOHN F. KENNEDY, A NATION OF IMMIGRANTS 6 (1964).

[5] *See id.* (quoting THE DECLARATION OF INDEPENDENCE (U.S. 1776)).

[6] *Infographics 2017: Lawful Permanent Residents 2017*, U.S. Dep't of Homeland Sec., https://www.dhs.gov/immigration-statistics/visualization/2017 [https://perma.cc/L7WC-ZYSV] (last visited May 8, 2023).

years as a LPR, the naturalization process confers approximately 700,000 people per year with U.S. citizenship.[7]

In addition to individuals who enter the immigration system legally, a vast number of individuals encounter the immigration system when they attempt to circumvent the immigration authorities and enter the United States without documentation.[8] In the past twelve months, a record 1.7 million migrants encountered U.S. Customs and Border Patrol (CBP) as they attempted to illegally cross the U.S. border.[9] Over a million of these migrants were turned away.[10]

Tens of thousands of migrants enter the United States every year, despite their undocumented status.[11] Some stay in detention centers while their immigration cases are adjudicated, and others are released with a notice to appear in court for removal proceedings.[12] For the migrants held in detention, they can encounter desperate conditions at overcrowded and under-resourced CBP stations, which are sometimes used in the absence of longer-term detention facilities.[13]

It is clear that the combined weight of the migrants, legal and undocumented, has stretched the immigration system beyond an ability to efficiently adjudicate all of the cases that come before it. Over the past decade, open and pending cases in the immigration system have climbed from 186,100 in 2008 to 1,328,413 in 2021.[14]

Early in the immigration court process, Immigration and Customs Enforcement (ICE) will determine whether an individual will be detained during the pendency of their removal proceedings because they represent a danger to the community.[15] For migrants detained at the border, the average immigration case is resolved in forty-six days.[16] However, some noncitizens challenging deportation wait much longer.[17] For example, one study found that noncitizens wait an average of 421 days for their

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[7] *Id.*

[8] Michael D. Shear & Zolan Kanno-Youngs, *Surge in Migrants Defies Easy or Quick Solutions for Biden*, N.Y. TIMES (Aug. 20, 2021), https://www.nytimes.com/2021/03/16/us/politics/biden-immigration.html.

[9] Eileen Sullivan & Miriam Jordan, *Illegal Border Crossings, Driven by Pandemic and Natural Disasters, Soar to Record High*, N.Y. TIMES (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/us/politics/border-crossings-immigration-record-high.html.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Simon Romero et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html.

[14] EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., ADJUDICATION STATISTICS: PENDING CASES, NEW CASES AND TOTAL COMPLETIONS (July 8, 2021), https://www.justice.gov/eoir/page/file/1242166/download [https://perma.cc/4DPN-MZFK].

[15] *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management [https://perma.cc/FE43-F7MZ] (last visited May 8, 2023).

[16] AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY (2020).

[17] *Id.*

cases to be adjudicated in California; all the while they remain in ICE detention centers.[18] This demonstrates that not only the outcome, but also the procedures of these detention proceedings can have profound effects on the individual.

These immigration detention proceedings are unusual in their deviation from commonly applied constitutional due process protections extended in other types of detention proceedings.[19] Two circuit courts recently considered the constitutional implications of due process protections in immigration detention proceedings; particularly the courts focused on the question of which party, the individual or the government, must bear the burden of proof in the removal proceeding.[20] The First and Third Circuits arrived at opposite conclusions.[21] In *Hernandez-Lara v. Lyons*, the First Circuit concluded that it was a violation of an individual's due process rights for them to bear the burden of proof in a detention hearing.[22] Conversely, the Third Circuit determined in *Borbot v. Warden Hudson County Correctional Facility* that the government had wide latitude to interpret the statutory basis of the removal authority, and that placing the burden of proof on the individual created no due process concern.[23]

These directly conflicting precedents present an opportunity to consider a narrow question regarding the burden of proof and procedural due process rights in immigration courts within the larger context of U.S. civil detention proceedings. Part I of this Note considers the statutory and regulatory basis for immigration detention.[24] Part II reviews prior cases decided by the Board of Immigration Appeals (BIA) that bear on the question.[25] Part III discusses how the Supreme Court has addressed previous procedural due process concerns within the immigration system and how lower courts have reacted.[26] Part IV lays out how the Supreme Court has conceptualized the constitutional due process rights extended to noncitizens and how that has changed over the years.[27] Part V considers how other categories of individuals are treated with respect to involuntary detention and the burden of proof.[28] Part VI presents the circuit split and contrasts the two Courts' analytical approaches.[29] Finally, Part VII synthesizes these considerations and presents an argument that the government must bear the burden of proof to avoid violating the individual's constitutional due process rights.[30]

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[18] *Id.*

[19] *See, e.g.*, United States v. Salerno, 481 U.S. 738, 751 (1987).

[20] *See* Hernandez-Lara v. Lyons, 10 F.4th 19 (1st Cir. 2021); Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274 (3d Cir. 2018).

[21] *See id.*

[22] 10 F.4th at 19.

[23] 906 F.3d at 274.

[24] *See infra* Part I.

[25] *See infra* Part II.

[26] *See infra* Part III.

[27] *See infra* Part IV.

[28] *See infra* Part V.

[29] *See infra* Part VI.

[30] *See infra* Part VII.

The vast number of foreign-born citizens in the U.S. population today indicates that, for many, the immigration process provides an introduction to their rights and responsibilities as future U.S. citizens. For those who enter the country without documentation, the immigration process is a harrowing and potentially unsuccessful trial they undertake to establish their right to "life, liberty, and the pursuit of happiness" in the United States.[31] In either case, the immigration courts owe these individuals no less duty to respect their inherent constitutional rights than the natural born or naturalized citizens that have come before them. To properly do so, these courts must afford the individuals in immigration proceedings the same basic due process protections that other categories of individuals have in detention proceedings by making the government bear the burden of proof.

I. THE STATUTORY BASIS OF IMMIGRATION DETENTION AUTHORITY

Congress has established and organized the framework for the immigration and naturalization process through two principal statutes.[32] The Immigration and Naturalization Act of 1952 (INA) serves as the foundation for the modern immigration system.[33] The detention and removal proceedings established by the INA were significantly supplemented by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[34] These acts, along with subsequent modifications, vest executive branch agencies with the authority to perform detention and removal proceedings in administrative courts created for the purpose of adjudicating immigration cases.[35]

Broadly speaking, four principal provisions within these statutes provide the basis for immigration detention.[36] Each provision applies to a particular class of noncitizens and provides different protections. The Supreme Court has determined that noncitizen's constitutional rights are not equal under each authority, therefore it is important to differentiate between the circumstances in which a noncitizen can be subject to detention, and the corresponding authority behind that detention.[37]

INA Section 236(a) serves as the "default rule" for the "apprehension and detention of aliens," and therefore establishes the default rule for noncitizen removal

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[31] THE DECLARATION OF INDEPENDENCE (U.S. 1776).

[32] *See generally* Immigration and Nationality Act of 1952, Pub. L No. 82-414, 66 Stat. 163 (1952); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

[33] Immigration and Nationality Act of 1952, Pub. L No. 82-414, 66 Stat. 163 (1952).

[34] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

[35] U.S. CONST. art I, § 8.

[36] 8 U.S.C. §§ 1226(a); 1226(c); 1225(b)(1)(B)(ii), (iii)(IV), (2)(A); 1231(a)(2), (6).

[37] Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.").

proceedings.[38] This section broadly authorizes the detention of noncitizens who are subject to removal proceedings.[39] The statute states that the "Attorney General shall take into custody any alien" who has committed crimes specified by the Act.[40] For noncitizens that fall outside those parameters, the courts have found that the Attorney General has "discretionary authority to detain an alien pending a decision on whether the alien is to be removed from the United States."[41] That discretion is exercised by executive branch officers, most commonly agents of the Immigration and Customs Enforcement Agency (ICE), who may release a noncitizen "under the conditions . . . that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear at any future proceeding."[42] Even if a noncitizen is released on conditional parole, that release can be revoked at any time.[43]

The noncitizen can request that the detention determination, first made by the ICE agent, be reviewed by an Immigration Judge (IJ) at a bond hearing within the administrative immigration courts in the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR).[44] These custody or bond proceedings are explicitly separate from, and "form no part of, any deportation or removal hearing or proceeding."[45] Once the initial "bond redetermination" has been issued by the IJ, the question of the noncitizen's custody will only be reconsidered "upon a showing that the alien's circumstances have materially changed since the prior bond redetermination."[46]

Either the noncitizen or the government may appeal the determination of the IJ to the BIA, within the EOIR, which is the highest administrative body in the immigration court system.[47] After the BIA has considered an appeal, judicial review of the immigration process is restricted by statute.[48] This also limits the opportunity for the courts to consider constitutional violations.[49]

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[38] 8 U.S.C. § 1226(a); Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018).

[39] 8 U.S.C. § 1226(a)(3)(A).

[40] *Id.*

[41] Casas-Castrillon v. U.S. Dep't of Homeland Sec., 535, F.3d 942, 947 (9th Cir. 2008); *see* Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1209 (11th Cir. 2016).

[42] 8 C.F.R. § 236.1(c)(8) (2022).

[43] 8 C.F.R. § 236.1(c)(9) (2022).

[44] 8 C.F.R. § 1003.19(a) (2022) (providing immigration judges the authority to review bond determinations); 8 C.F.R. § 1236.1(d)(1) (2022) (providing noncitizens the right to request review of bond decisions).

[45] 8 C.F.R. § 1003.19(d).

[46] *Id.* § 1003.19(e).

[47] *Id.* § 1003.19(b); *see also* § 1003.1(d)(7)(I) (providing that after an appellate review by the BIA, the decision is final "except in those cases reviewed by the Attorney General").

[48] 8 U.S.C. § 1226(e) ("No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial or bond or parole.").

[49] Darko v. Sessions, 342 F. Supp. 3d 429, 433 (S.D.N.Y. 2018) ("The sole forum for an appeal from an IJ's bond determination is the BIA.").

For noncitizens held under this detention authority, DOJ promulgated regulations following IIRIRA that established the burden of proof that a noncitizen must present to CBP or ICE to avoid detention.[50] The noncitizen must "demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding."[51] While this regulation does not explicitly outline which party bears the burden of proof in administrative proceedings, some courts still look to this regulation to inform their reasoning.[52]

The second source of authority that authorizes the detention of noncitizens is INA Section 236(c), which imposes mandatory detention of noncitizens who are subject to removal because of criminal or terrorism offenses.[53] Mandatory detention is required because these noncitizens have committed offenses that prevent their entrance into the United States, such as a "crime involving moral turpitude," or a "violation . . . of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance."[54] Any noncitizen that has engaged in or endorsed terrorist activity also falls within the mandatory detention scheme.[55]

This statute does not outline a clear procedure for establishing the burden of proof prior to releasing the noncitizen. Rather, it provides that noncitizens in this category may be released only "to provide protection to a witness, potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member."[56] Furthermore, release will only be considered if "the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."[57] Therefore, while the statute does not mandate a particular standard for the burden of proof, it strongly suggests that the burden is on the noncitizen to demonstrate his fitness for release.[58]

The third source of detention authority applies to noncitizens who disembark at a port of arrival prior to being lawfully admitted or paroled into the United States.[59] Noncitizens in this category include asylum seekers and stowaways.[60] This authority also includes noncitizens who have entered the United States without a determination that they are admissible in the past two years.[61] The statute again does not refer

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[50] 8 C.F.R. § 236.1(c)(8) (2022).

[51] *Id.*

[52] *In re* Urena, 25 I. & N. Dec 140, 141 (B.I.A. 2009); *see also In re* Fatahi, 26 I. & N. Dec. 791, 793 (B.I.A. 2016).

[53] 8 U.S.C. § 1226(c).

[54] §§ 1182(a), (a)(2)(A)(i).

[55] § 1182(a)(3)(B).

[56] § 1226(c)(2).

[57] *Id.*

[58] *Id.*

[59] 8 U.S.C. § 1225.

[60] § 1225(b)(1)(A)(i).

[61] § 1225(b)(1)(A)(iii)(II).

to a burden of proof. However, it states that "any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."[62] To establish the critical finding of "credible fear" the officer drafts a report that includes "a summary of the material facts as stated by the applicant," as well as "any additional facts (if any) relied upon by the officer."[63] This report's determination creates the necessary findings to authorize the noncitizen to enter the asylum process or authorizes their removal if they do not meet the requirements.[64]

If the noncitizen seeks review of the agency's determination, they can make a "request for prompt review by an immigration judge."[65] This review provides "an opportunity for the alien to be heard and questioned by the immigration judge."[66] With no mention of the government, the statute implicitly places the burden of proof on the noncitizen to demonstrate that they do not merit detention.[67]

The fourth source of detention authority applies to noncitizens who are detained at the conclusion of their removal proceedings.[68] The statute directs that the noncitizens "shall be detained" during the ninety-day period after the conclusion of their proceedings as their removal is prepared, although the detention may last longer if the noncitizen does not promptly complete the application for removal.[69] As detention is mandatory under this authority, the statute does not require either the noncitizen or the Government bear the burden of proof as to whether the detention is justified.[70] However, if the noncitizen seeks to argue that their "life or freedom would be threatened" as a result of removal, "the trier of fact shall determine whether the alien has sustained the alien's burden of proof."[71] While this burden of proof relates to the burden of proof to defeat a removal determination and not a detention determination, it indicates the statute's view of the noncitizen's role in the process.[72]

Overall, the four sources of statutory authority to detain noncitizens are silent on which party explicitly bears the burden of proof in a detention determination. In some cases, the statutes generally suggest that the burden is on the noncitizen to provide sufficient evidence to prevent removal.[73] To resolve this ambiguity, federal regulations have interpreted the statutes to find the noncitizen bears the burden of

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[62] § 1225(b)(1)(B)(iii)(IV).
[63] § 1225(b)(1)(B)(iii)(II).
[64] § 1225(b)(1)(A)(i).
[65] § 1225(b)(1)(B)(iii)(III).
[66] *Id.*
[67] *Id.*
[68] 8 U.S.C. § 1231(a)(2)–(3).
[69] *Id.*
[70] *Id.*
[71] § 1231(b)(3)(C).
[72] *Id.*
[73] *Id.*

proof.[74] Ultimately, while the statutes clearly do not require the individual to bear the burden of proof in detention hearings, they powerfully support that inference.

II. IMMIGRATION COURTS ADDRESS PROCEDURAL DUE PROCESS CONCERNS

To resolve the ambiguity created by the statutory and regulatory framework of immigration detention, IJs and the BIA have repeatedly found it necessary to read requirements into the statutes, including which party bears the burden of proof.[75] The BIA directly addressed that issue in *In re Ellis*, stating, "[s]pecifically, we hold that the alien bears the burden of showing that he was lawfully admitted to the United States, that he is not a threat to the community, and that he is likely to appear before any scheduled hearings."[76]

No single BIA decision explicitly articulates the full scope of the due process rights of noncitizens facing detention. Furthermore, unless the BIA, as the sole appellate authority in the immigration system, addresses the procedural due process question, the immigration system will lack a uniform rule throughout all immigration detention hearings.[77]

When the BIA does address procedural concerns, it is deferential to the government and has generally been reluctant to extend due process protections not provided in the statutes.[78] Several key decisions outline the BIA's approach to noncitizen due process rights. *In re Adeniji* is the often-cited BIA decision that holds that the noncitizen bears the burden of proof in a detention hearing held pursuant to Section 236(c) authority.[79] The BIA decision endorsed an IJ's ruling that when considering a noncitizen's suitability to avoid detention, "the [alien] ha[s] the burden of proof on this issue, but . . . the Service would be required to rebut an otherwise satisfactory showing by the respondent."[80] The analysis continued with the observation that there was "no showing that the respondent is a danger to persons or property which would necessitate holding the respondent in Service custody," which impliedly placed "the burden on the Service to show that the respondent posed such a danger, as the Immigration Judge recounted no evidence that led him to conclude that the respondent had made a satisfactory showing requiring

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[74] *See, e.g.*, 8 C.F.R. § 236.1(c)(8) (2022).

[75] *See In re* Ellis, 10 I. & N. Dec. 641, 643 (B.I.A. 1993) (addressing the burden of proof required for § 242(a)(2)(A)).

[76] *Id.*

[77] 8 C.F.R. § 1003.1 (2022) (describing the appellate jurisdiction of the BIA as including "determinations relating to bond, parole, or detention of an alien").

[78] *See In re* Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *see also In re* Adeniji, 22 I. & N. Dec. 1102, 1131 (B.I.A. 1999) (stating that while the immigration statutes "have imposed burdens on criminal aliens and their families . . . [it] is for Congress, not the Service, and not the Board, to alleviate those burdens").

[79] 22 I. & N. Dec at 1116.

[80] *Id.* at 1114.

rebuttal."[81] Despite this ambiguity, the decision is regularly cited to place the burden of proof on the noncitizen.[82] The decision interpreted the regulation regarding the noncitizen bearing burden of proof prior to detention proceedings, and extended it into the proceeding itself.[83]

In re Guerra involved a noncitizen who had entered the country as a non-immigrant visitor and was charged with "removability for remaining in th[e] country longer than his period of authorized stay."[84] The noncitizen argued that his pending drug trafficking charges could not be interpreted to find that he posed a threat to the community and thus he was warranted release on bond.[85] Nevertheless, the court held that the "burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond."[86] The court concluded that "[i]nasmuch the respondent has failed to establish that he does not present a danger to his community, we find that he should not be released from custody during the pendency of his removal proceedings."[87]

The decision in *Adeniji* was followed by other decisions which touched on matters related to the burden of proof that further clarified how the court should consider the burden. *Guerra* reaffirmed that the noncitizen bears the burden of proof in a detention hearing and held that the IJ has broad discretion to interpret the noncitizen's evidence.[88] Significantly, the detention authority applied in *Guerra* was pursuant to Section 236(a), the default detention category.[89]

Guerra reinforced the understanding that the noncitizen had the burden of proof and that the IJ had broad discretion when considering the evidence.[90] *Guerra* was followed by *In re D-R-*, which expanded an IJ's discretion further.[91] The court adjudicated the status of a noncitizen who allegedly participated in extrajudicial killings of Bosnian Muslims, but there was a lack of clear factual findings.[92] The BIA found that the "Immigration Judge's findings were based on reasonable inferences from direct and circumstantial evidence of the record as a whole, not on

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[81] *Id.*

[82] *See, e.g.*, *In re* Urena, 25 I. & N. Dec 140, 141 (B.I.A. 2009).

[83] 8 C.F.R. § 1236.1(c)(8) (2022) (providing that an officer may release a noncitizen at their discretion, if "the alien [] demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons").

[84] 24 I. & N. Dec. 37, 37 (B.I.A. 2006).

[85] *Id.* at 39.

[86] *Id.* at 40; *see, e.g.*, *In re* Fatahi, 26 I. & N. Dec. 791, 795 (B.I.A. 2016) (citing Guerra's proposition that "an alien has the burden to demonstrate that he is not a danger to the community at large").

[87] *In re Guerra*, 24 I. & N. Dec. at 41.

[88] *Id.* at 40.

[89] *Id.* at 37.

[90] *See, e.g.*, *In re Fatahi*, 26 I. & N. Dec. at 795.

[91] *See In re* D-R-, 25 I. & N. Dec. 445, 445 (B.I.A. 2011).

[92] *Id.* at 453.

speculation."[93] The BIA again upheld the burden of proof rested on the noncitizen and held that the IJ could "make reasonable inferences from direct and circumstantial evidence in the record and are not required to interpret the evidence in a manner advocated by the respondent."[94]

These decisions reflect some of the difficulty that the court will face when the noncitizen bears the burden of proof. *In re D-R-* is particularly instructive in this matter.[95] The noncitizen was accused of participating in the extrajudicial killing of Bosnian Muslims as a special police officer during the Bosnian War.[96] The government presented evidence of State Department records, International Criminal Tribunal for the Former Yugoslavia at The Hague reports, documentary video and photographs from independent filmmakers, and records showing the respondent's service with the Special Police Brigade.[97] The noncitizen denied any knowledge of the killings or having participated in them himself.[98]

The government presented evidence of the noncitizen's proximity to extrajudicial killings and high probability of his awareness, but no direct evidence of the noncitizen's participation.[99] This evidence would be unlikely to satisfy a standard of clear and convincing proof that the noncitizen was a threat to the community or a flight risk. Regardless, the court placed the noncitizen in the difficult position of establishing his non-participation in the alleged crimes that the Government, with its overwhelming ability to collect and analyze evidence, could not precisely allege.[100] The noncitizen, by his account of events, was in the unenviable position of trying to prove a negative. Instead of addressing the flaws in the allocation of the burden of proof, the BIA sidestepped the issue by strengthening the ability of the IJ's to reject a noncitizen's framing of the evidence, and to extract inferences from the Government's rebuttal evidence.[101]

In summary, the BIA has directly addressed immigration regulations which put the burden of proof on the noncitizen, and repeatedly upheld them.[102] Additionally, the BIA has also repeatedly cited ambiguous statutory authority to justify placing the burden of proof on the noncitizen, despite the provisions offering no definitive answer to the issue.[103] The BIA has also addressed issues created by the burden of

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[93] *Id.* at 454.

[94] *In re Fatahi*, 26 I. & N. Dec. at 795.

[95] *See generally In re* D-R-, 25 I. & N. Dec. 445 (B.I.A. 2011).

[96] *Id.* at 450.

[97] *Id.* at 447.

[98] *Id.* at 449.

[99] *Id.* at 454–55.

[100] *See id.* at 452–53.

[101] *See, e.g.*, *id.* at 457–61.

[102] *See, e.g.*, *In re* R-A-V-P-, 27 I. & N. 803, 804 (B.I.A. 2020) ("[T]he Board has 'consistently held that aliens have the burden to establish eligibility for bond while proceedings are pending.'").

[103] *See In re* Ellis, 10 I. & N. Dec. 641, 643 (B.I.A. 1993) (concerning § 242(a) detention

proof and repeatedly expanded the IJ's discretion when weighing the evidence.[104] These decisions demonstrate a clear understanding within the immigration court system that the noncitizen should bear the burden of proof in disproving the necessity of their own detention, and a willingness by the court to accept highly circumstantial evidence from the Government to rebut a noncitizen's argument and bypass concerns about a noncitizen's constitutional due process rights.

III. THE SUPREME COURT'S CURRENT IMMIGRATION PROCEDURAL DUE PROCESS FRAMEWORK AND LOWER COURT RESPONSE

The Supreme Court has addressed the constitutional implications of immigration and resulting due process concerns repeatedly, establishing a framework of constitutional due process rights that must be afforded to noncitizens in the immigration process.[105] Much of the Court's recent focus has concentrated on the constitutionality of mandatory detention and indefinite detention without a sentence of incarceration.[106] However, over time, the Court has considered a broad scope of how state powers may be applied to individuals going through the immigration process.[107] The Court's opinions are narrowly written, somewhat in tension, and do not create a clear understanding of what due process protections are constitutionally appropriate, including who bears the burden of proof in detention hearings.[108] By not addressing the topic definitively, the Court's opinions have left the lower courts wide latitude for interpretation.[109]

Two threshold issues must be addressed. First, in the Court's opinion: How much authority does Congress have to define the scope of immigration detention and removal procedures? Additionally, how much authority does Congress have to empower the administrative court system, which has further developed procedural requirements? Second, what constitutional protections do noncitizens have?

Beginning with the first issue, the Court has held that Congress has broad authority to establish an immigration process.[110] The Court has held that "[t]he power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly

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authority); *In re* Adeniji, 22 I. & N. Dec. 1102, 1131 (B.I.A. 1999) (concerning § 236(c) detention authority); *In re* Fatahi, 26 I. & N. Dec. 791, 793 (B.I.A. 2016) (concerning § 236(a) detention authority).

[104] *See, e.g.*, *In re* D-R-, 25 I. & N. Dec. 445, 457–61.

[105] *See generally* Plyler v. Doe, 457 U.S. 202, 210 (1982); Shaughnessy v. United States *ex. rel* Mezei, 345 U.S. 206, 212 (1953).

[106] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

[107] *See, e.g.*, *Plyler*, 457 U.S. at 210.

[108] *See Zadvydas*, 533 U.S. at 692.

[109] *See, e.g.*, *id.*

[110] *See generally* Galvan v. Press, 347 U.S. 522, 530 (1954); INS v. Delgado, 466 U.S. 210, 235 (1984).

our foreign relations and the national security."[111] There is no question of the constitutionality of the larger immigration scheme. This is relevant because the courts regularly justify decisions offering less due process protections to individuals in immigration detention proceedings on the justification that they are adhering to the intent of Congress, which the previous section demonstrated is not necessarily apparent from the statutes.[112]

To answer the second question, the Court, in *Plyler v. Doe*, addressed whether or not constitutional protections extended to "undocumented aliens."[113] The Court unequivocally held that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."[114] Further stating that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[115]

While the *Plyler* decision appeared definitive, later cases suggested that there were certain categories of noncitizens who could not claim full constitutional protections.[116] In *Landon v. Plasencia*, a lawful permanent resident (LPR) left the United States and traveled to Mexico for the purpose of organizing the illegal entry of other noncitizens into the United States.[117] The LPR was detained under Section 235(b) of the Immigration and Nationality Act of 1952 (INA), as a noncitizen who had violated U.S. criminal laws.[118] When the LPR argued that her constitutional due process protections were violated through the denial of a deportation proceeding, the Court distinguished the case from *Plyler*, holding that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."[119]

The *Landon* holding differs markedly from *Plyler* and clearly authorizes lower courts, as well as administrative courts, to withdraw some of the constitutional protections that the Court had guaranteed in *Plyler*.[120] The Court emphasized the position of the noncitizen within the immigration process, finding that noncitizens, even LPRs returning from abroad, could have their due process rights restricted by statute.[121]

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[111] *Galvan*, 347 U.S. at 530.

[112] *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 28 (1982) ("The language and history of the Act thus clearly reflect a congressional intent . . . .").

[113] *See Plyler*, 457 U.S. at 202.

[114] *Id.*

[115] *Id.* at 210; *see also* Shaughnessy v. United States *ex. rel* Mezei, 345 U.S. 206, 212 (1953) (stating that "[i]t is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law").

[116] *See generally* Landon v. Plascencia, 459 U.S. 21 (1982).

[117] *Id.* at 23.

[118] *Id.*

[119] *Id.* at 32.

[120] *Id.* at 33.

[121] *Id.*

Noncitizens who are detained at or reasonably near the border cannot claim some constitutional protections.[122] To emphasize the variance in constitutional protections, the Court approvingly stated that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[123]

A recent opinion, which approved restricted constitutional protections, considered a noncitizen who had attempted to cross the U.S. border and was detained by a Border Patrol agent within twenty-five yards of the border.[124] CBP processed him for expedited removal pursuant to Sections 1182(a)(7)(A)(i)(L), 1125(b)(1)(A)(ii), and 1225(b)(1)(B)(iii)(IV) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[125] He was denied certain due process rights, such as the ability to file a writ of habeas corpus, pursuant to Sections 1252(a) and (e)(2) of the IIRIA.[126] Faced with a noncitizen who had no claim to asylum or authorized entry into the country, the Court restated the *Landon* holding that the "power to admit or exclude aliens is a sovereign prerogative."[127] The Court added that "a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted."[128] Accordingly, the Court found it appropriate to restrict the noncitizen's ability to file writs of habeas corpus seeking additional review of their removal proceedings.[129]

The Court addressed detention procedures to determine whether they amounted to a violation of constitutional due process in *Zadvydas v. Davis*.[130] In this case, Kestutis Zadvydas, born to Lithuanian parents, lived in the United States since he was eight years old.[131] Convicted of possession of cocaine with an intent to distribute, he was sentenced to sixteen years' imprisonment.[132] Released after two years, he was detained by the INS for removal pursuant to Section 241(a) of the INA, having met the statutory requirements for removal of noncitizens with certain types of criminal offenses under Section 1251(a)(2) of the IIRIA.[133] The Court focused on the due process dilemma created when the United States could not effectively remove a noncitizen that was declared removable because other countries would not accept them.[134] In *Zadvydas*, Germany, Lithuania, and the Dominican Republic, all countries that

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122 *See* U.S. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1968–69 (2020).
123 Demore v. Kim, 538 U.S. 510, 521 (2003).
124 *Thuraissigiam*, 140 S. Ct. at 1967.
125 *Id.*
126 *Id.*
127 *Id.* at 1982.
128 *Id.*
129 *Id.* at 1983.
130 *Zadvydas*, 533 U.S. at 678–79.
131 *Id.* at 684.
132 *Id.*
133 *Id.*
134 *Id.* at 684–85.

had legal ties to the noncitizen, refused to accept the transfer, which left the noncitizen in a position of indefinite detention.[135]

Against the issue of indefinite detention, the Court held that due process concerns were clearly presented as "[f]reedom 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."[136] The Court expressed a concern that the scope of the individuals potentially facing this detention was not narrow because it applied "broadly to aliens ordered removed for many and various reasons, including tourist visa violations."[137] The Court also found the noncitizen's due process protections were limited by the administrative court process where "the alien bears the burden of proving he is not dangerous" and where there is limited availability of judicial review.[138]

The Court held that "an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent."[139] Seeking to uphold Congress's intent behind the statute without creating unconstitutional detention schemes, the Court held that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."[140]

In order to determine whether detention was still appropriate, the Court held that there was a "6-month period" at which point the noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," and at which point the "Government must furnish with evidence sufficient to rebut that showing."[141] In the six-month petition, the Court allowed the noncitizen to raise the issue and then required the Government to bear the burden of showing that detention was still necessary.[142]

This burden shifting signals that the Court is comfortable placing the burden of proof on the noncitizen in an immigration detention hearing, even when noncitizens are in the extraordinary position of facing potentially indefinite detention prior to removal.[143] By acknowledging the burden of proof element of the process, *Zadvydas*

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[135] *Id.*

[136] *Id.* at 690.

[137] *Id.* at 691.

[138] *Id.* at 692; *see also* Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) ("[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process."); Berenyi v. Dist. Dir., INS, 385 U.S. 630, 636 (1967) (stating the burden for the overall removal process as, "[w]hen the Government seeks to strip a person of citizenship already acquired, or deport a resident alien and send him from our shores, it carries the heavy burden of proving its case by 'clear, unequivocal, and convincing evidence'").

[139] *Zadvydas*, 533 U.S. at 696.

[140] *Id.* at 699.

[141] *Id.* at 680.

[142] *Id.*

[143] *Id.*

implicitly approves the burden of proof being placed on the noncitizen as constitutionally permissible, but provides no additional commentary or guidance on how to evaluate the burden placement outside of the six-month petition for indefinite detention.[144]

Within this constitutionally undefined space, lower courts naturally have expanded on the Court's framework.[145] In *Singh v. Holder*, the Ninth Circuit cited *Demore v. Kim* for the proposition that lower federal courts had the jurisdiction to address a "habeas petition challenging the statutory framework that permits the petitioner's detention without bail."[146] Citing earlier precedent within the Circuit, *Casas-Castrillon v. Department of Homeland Security*, the court held that because the immigration detention statutes under which the noncitizen was detained authorized the noncitizen's expedited removal and did not authorize prolonged mandatory detention, "an alien is entitled to release on bond unless the 'government establishes that he is a flight risk or will be a danger to the community.'"[147] The court determined that the noncitizen's thirty-five month detention was unreasonably prolonged and violated his due process rights.[148] Notably, the court did not qualify the shift of the burden of proof to the government.[149] It simply stated that following prior precedent, "the burden of establishing whether detention is justified falls on the government."[150] The court went further and held that "the clear and convincing evidence standard of proof applies in *Casas* bond hearings," finding that the liberty interest of the noncitizen was weighty enough to merit more substantial proof than a preponderance of the evidence.[151]

In *Diop v. ICE/Homeland Security*, the Third Circuit considered the same question of the appropriateness of a shifting burden of proof.[152] The court announced a similar general rule that "when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute."[153] Addressing the ambiguity, the court "decline[d] to establish a universal point at which detention will always be considered unreasonable."[154] Nevertheless, the court held that the noncitizen's thirty-five months of detention was unreasonable and therefore a violation of his due process rights.[155]

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[144] *Id.*

[145] *See generally* Singh v. Holder, 638 F.3d 1196 (9th Cir. 2011).

[146] *Id.* at 1202.

[147] *Id.* at 1203 (quoting Casas-Castrillon v. U.S. Dep't of Homeland Sec., 535 F.3d 942, 951 (9th Cir. 2008)).

[148] *Casas-Castrillon*, 535 F.3d at 951.

[149] *Singh*, 638 F.3d at 1203.

[150] *Id.*

[151] *Id.* at 1205.

[152] *See generally* 656 F.3d 221 (3d Cir. 2011).

[153] *Id.* at 233.

[154] *Id.*

[155] *Id.* at 234–35.

Ultimately, the Supreme Court decisions have broadly endorsed the Congressional statutory framework for the immigration detention and removal process.[156] The Court has addressed due process concerns created by unreasonably lengthy detention that merit the government bearing the burden of proof.[157] However, the Court is comfortable with the lower courts enforcing regulations that place the burden of proof on the noncitizen.[158] The Court has not explicitly established a procedure for determining who bears the burden of proof.[159] Accordingly, the lower courts have begun to deviate on which parties bear the burden of proof during the detention process and what qualifies as a violation of a noncitizen's constitutional due process rights.[160]

IV. UNDERSTANDING HOW THE SUPREME COURT CONCEPTUALIZES NONCITIZENS' CONSTITUTIONAL DUE PROCESS RIGHTS

While the Supreme Court has largely endorsed the statutory framework for immigration detention, its decisions have established vague outer limits on the government's authority to detain individuals in the immigration process.[161] The Court has not clearly enumerated explicit due process rights that must be afforded to individuals, but the Court has considered and expressed clear concern about the prospect of unlimited detention as a violation of due process rights.[162] A wider review of Supreme Court precedent that addresses constitutional protections extended to noncitizens, outside the immediate context of the immigration court system, offers a broader understanding of what constitutional protections noncitizens should reasonably expect under the Court's view.[163]

Plyler v. Doe offers a starting point to examine the Court's view of noncitizens, both legal and undocumented, and their constitutional rights.[164] The Court considered a Texas effort to exclude undocumented school-age children from attending public school, on the basis that they did not merit the equal protection of the law as a result of their illegal entry into the United States.[165]

The Court stated that the equal protection and due process rights found in the Fourteenth Amendment were "universal in their application, to all persons within the territorial jurisdiction."[166] Extending this principle, the Court held that regardless

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[156] *See* Demore v. Kim, 538 U.S. 510, 510 (2003).
[157] Zadvydas v. Davis, 533 U.S. 678, 701 (2000).
[158] *Id.* at 692.
[159] *Id.*
[160] *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 24 n.4 (1st Cir. 2021); Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 275, 277 (3d Cir. 2018).
[161] *See Zadvydas*, 533 U.S. at 678–79.
[162] *Id.*
[163] *See* Plyler v. Doe, 457 U.S. 202, 210–11 (1982).
[164] *Id.* at 205.
[165] *Id.*
[166] *Id.* at 212 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

of whether or not "a person's initial entry into a State . . . was unlawful . . . [it] cannot negate the simple fact of his presence within the State's territorial perimeter."[167] Simple presence in the United States entitles the individual, even undocumented noncitizens, to equal protection of the law.[168]

Plyler addressed and dismissed the possibility of two separate standards existing for equal protection and due process rights within the immigration court system between legal and undocumented noncitizens.[169] *Plyler* is clear that whatever due process rights are found must be applied to all noncitizens.[170]

In *Zadvydas v. Davis*, the Court considered whether extended and indefinite detention during immigration proceedings eventually created the possibility of due process violation. Specifically, the Court examined detention after an administrative court determined that the noncitizen should be removed, finding detention necessary to mitigate the risk the noncitizen might pose to national security, the community, and the risk that they may not comply with the removal order.[171] The statute established a ninety-day removal period, but permitted the government to detain a noncitizen beyond that point if it was unable to execute the noncitizen's removal.[172] Regulations created a certain degree of procedural protection, mandating review by an administrative panel to evaluate the suitability of noncitizens for release once detention became indeterminate.[173] However, in order for the board to authorize release, the noncitizens must prove "'to the satisfaction of the Attorney General' that he will pose no danger or risk of flight."[174]

Before addressing the potential due process violations that the government's detention policy created, the Court reiterated its cardinal principle of statutory interpretation, which is to avoid reading constitutional issues into a statute that could be fairly interpreted another way.[175]

The Court also noted that aside from the constitutional problem created by indefinite detention, the structure of review created another problem. Observing that "the sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous without (in the Government's view) significant later judicial review," the Court noted that this structure of review was already struck down as impermissible when applied to insanity related detention.[176] Accordingly, the Court found that the "Constitution

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[167] *Plyler*, 457 U.S. at 215.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] Zadvydas v. Davis, 533 U.S. 678, 688 (2000).
[172] *Id.* at 683.
[173] *Id.*
[174] *Id.* (citing 8 C.F.R. § 241.4 (2022)).
[175] *Id.* at 689.
[176] *Zadvydas*, 533 U.S. at 692.

may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'"[177]

Nevertheless, the Court concluded that if the statute could be saved through statutory construction and the intent of Congress was clear, then the Court "must give effect to that intent."[178] Ultimately, the Court held that post-removal detention would only be constitutionally permissible if an implicit reasonableness limitation was read into the statute.[179] The Court felt that such a limitation could cure the prospect of indefinite detention through the application of iterative administrative reviews after six months.[180]

Despite its stated concern about the potential lack of due process inherent in an unreviewable administrative board, the Court neglected to clarify what could rectify this situation. The Court's failure to do so implied that it found the process acceptable. This apparent comfort with due process protections that are explicitly less stringent than those afforded to other categories of individuals offers some insight into how the Court would evaluate additional due process protections, such as placing the burden of proof on the Government.

In *Demore v. Kim*, the Court again considered due process protections as applied to detention, specifically addressing whether *Zadvydas* prevented the government from applying Section 1226(c) of the IIRIRA in such a manner to permit no-bail civil detention, even for lawful permanent residents.[181] Citing extensive data collected by Congress that detailed the presence of removable criminal noncitizens committing crimes and evading government authority, the Court found that congressional intent to detain individuals going through the removal process was clear.[182] Mandatory detention during removal proceedings pending a determination of their removability is a powerful application of government authority, but Congress found that high rates of recidivism and flight from authority by removable noncitizens justified its use.[183] Considering the blanket mandatory detention policy, the Court made it clear that "in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[184]

Addressing a similar due process concern in *Reno v. Flores*, the Court held that while it was "well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings," it was also clear that detention during those proceedings was constitutionally valid.[185] In *Reno*, the Court considered a due

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[177] *Id.* (quoting Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445, 450 (1985)).
[178] *Id.* at 696 (quoting Miller v. French, 530 U.S. 327, 336 (2000)).
[179] *Id.* at 699.
[180] *Id.* at 701.
[181] Demore v. Kim, 538 U.S. 510, 515 (2003).
[182] *Id.* at 521.
[183] *Id.*
[184] *Id.* (quoting Mathews v. Dias, 426 U.S. 67, 79–80 (1976)).
[185] *Demore*, 538 U.S. at 522–23 (quoting Reno v. Flores, 507 U.S. 292, 306 (1993)).

process challenge to the policy that restricted the release of noncitizen juveniles to their parents, legal guardians, or other adult relatives, and the blanket presumption of unsuitability of other custodians that applied.[186] Citing their earlier decision, the Court reiterated that "'reasonable presumptions and generic rules,' even when made by the INS rather than Congress, are not necessarily impermissible exercises of Congress' traditional power to legislate with respect to aliens."[187] These reasonable presumptions and generic rules were permissible because "in the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation . . . [t]he particularization and individuation need go no further than this."[188]

In *Demore*, the Court once again evaluated due process concerns in the detention process and found that Congressional authority to regulate immigration translated to the ability to develop powerful and restrictive policies that diminished the due process rights of noncitizens in a manner which would be unacceptable if applied to citizens generally.[189] Furthermore, the Court distinguished no-bail detention from the detention discussed in *Zadvydas* and sharply limited the application of the "implicit statutory limitation" that it had articulated previously.[190] The Court clarified its earlier restriction on the government's detention authority applied only when "removal was 'no longer practically attainable.'"[191]

The Court revisited its *Zadvydas* decision again in *Jennings v. Rodriguez*, in which the Court once more confronted an attempt by a lower court to broaden the holding in *Zadvydas* to endorse an interpretation of immigration statutes that would impose six-month limits on detention or require periodic bond hearings.[192] The Court found that when the lower court interpreted the statutory text, it relied heavily on its understanding of how the *Zadvydas* Court had interpreted the statute, rather than the actual text of the statute.[193] In *Jennings*, Alejandro Rodriguez, a LPR, was detained and processed for removal as a result of criminal offenses.[194] He claimed that enforcement of Sections 1225(b), 1226(a), and 1226(c) of the IIRIRA were all subject to the due process protection identified in *Zadvydas*, which essentially "grant[ed] a license to graft a time limit onto the text of § 1225(b)," despite it "provid[ing] no such authority."[195]

After close textual analysis and consideration of how to interpret the statutes to best achieve the Congressional intent animating them, the Court found that the

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[186] *Id.* at 526.
[187] *Id.* (quoting *Reno*, 507 U.S. at 313).
[188] *Id.* (quoting *Reno*, 507 U.S. at 313–14).
[189] *Id.*
[190] Zadvydas v. Davis, 533 U.S. 678, 699 (2000).
[191] *Demore*, 538 U.S. at 527 (quoting *Zadvydas*, 533 U.S. at 690).
[192] Jennings v. Rodriguez, 138 S. Ct. 830, 834 (2018).
[193] *Id.*
[194] *Id.* at 838.
[195] *Id.* at 843.

interpretation of a mandatory six-month limitation on detention was "draw[n]. . . out of thin air" and "utterly implausible."[196] The Court concluded its decision in *Jennings* by noting that "'[d]ue process is flexible[]' . . . and it 'calls for such procedural protections as the particular situation demands.'"[197] It is clear from reviewing the Court's decisions that detention in the course of immigration proceedings does not create such a situation that demands a vigorous defense of due process rights.[198]

While *Plyler* ostensibly established that the due process rights of noncitizens are no different than other citizens, later decisions significantly walk back this declared constitutional protection.[199] The decision in *Zadvydas* to protect the due process rights of noncitizens processed for removal could be identified in this tradition of enforcing noncitizens' due process rights.[200] However, later decisions go to extraordinary lengths to distinguish and limit the scope and power of the restriction applied in *Zadvydas*.[201]

Demore clearly distinguished between two categories of noncitizens.[202] The noncitizens in *Zadvydas* were "challenging their detention following final orders of deportation" when their removal was "no longer practically attainable" and therefore faced the prospect of indefinite detention.[203] Conversely, the noncitizens in *Demore* were detained "pending their removal proceedings."[204] Read together, it is clear that the Court felt that short of indefinite detention with no reasonable prospect of removal, the government's justifications for detention and the procedure applied were sufficiently reasonable to overcome due process concerns.[205]

During its close textual analysis in *Jennings*, the Court took great pains to note that the *Zadvydas* decision "represent[ed] a notably generous application of the constitutional-avoidance canon" that lower courts later sought to carry much further;[206] the implication of which is that the powerful modification to the immigration statutes in *Zadvydas* was outside the ordinary review the Court found appropriate in other decisions.[207]

Ultimately, the *Demore* decision explicitly walked back the protection announced in *Plyler* of equal protection and due process rights for noncitizens by pointing out that within the field of immigration, Congress could reasonably pass laws that would infringe on due process rights that would be completely unacceptable if applied to

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196 *Id.* at 851.
197 *Id.* at 852.
198 *Id.*
199 Plyler v. Doe, 457 U.S. 202, 210 (1981).
200 Zadvydas v. Davis, 533 U.S. 678, 690 (2000).
201 *See* Demore v. Kim, 538 U.S. 510, 510 (2003).
202 *Id.*
203 *Id.* at 527 (quoting *Zadvydas*, 533 U.S. at 690).
204 *Id.* at 527–28.
205 *Id.*
206 Jennings v. Rodriguez, 138 S. Ct. 830, 843 (2018).
207 *Id.*

the population at large.[208] Short of indefinite detention, it is unclear that the Court will intervene to protect noncitizens' due process rights, except perhaps in the most extraordinary of situations.[209]

V. CONSIDERING DETENTION SCHEMES APPLIED TO DIFFERENT CATEGORIES OF INDIVIDUALS

The Supreme Court's silence on the constitutional implications of noncitizens bearing the burden of proof in detention procedures makes it hard to extract clear guidance, so it is useful to review how the Court has outlined the scope of due process rights for other categories of individuals. Four categories of individuals are subject to additional detention considerations: (1) people with mental illness; (2) sexual offenders; (3) enemy combatants; and (4) highly dangerous criminals.[210] Considering each in turn, it is apparent that the Court does not afford the same protection to noncitizens that it has provided to these other categories of individuals.[211] Taken together, it is unclear why certain due process rights, protected in different detention contexts, merit less concern from the Court in the immigration context.

In *Addington v. Texas*, the Court considered the due process rights of an individual that was placed into involuntary detention in the form of hospitalization to determine whether the standard of proof offered by the state was appropriate.[212] The Court noted that it "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[213]

The Court "conclude[d] that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."[214] However, the Court also found that the strict "beyond a reasonable doubt" standard, typically applied in a criminal case, was not appropriate when detention was "not exercised in the punitive sense" and when detention lacked "the moral force of the criminal law."[215] Consequently, the Court found that a middle standard of "clear and convincing" evidence was constitutionally appropriate in civil commitment proceedings to mitigate the risk to the individual's due process rights.[216]

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[208] *Demore*, 538 U.S. at 522.
[209] *See* Zadvydas v. Davis, 533 U.S. 678, 701 (2001).
[210] *See* Addington v. Texas, 441 U.S. 418, 423 (1979); Kansas v. Hendricks, 521 U.S. 346, 346 (1997); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004); United States v. Salerno, 481 U.S. 739, 751 (1987).
[211] *See Zadvydas*, 533 U.S. at 701.
[212] *Addington*, 441 U.S. at 418.
[213] *Id.* at 425.
[214] *Id.* at 427.
[215] *Id.* at 428.
[216] *Id.* at 433.

In *Foucha v. Louisiana*, the Court reviewed an action by the Louisiana Supreme Court to authorize the detention of an individual who was no longer considered mentally ill, solely because he was still deemed dangerous and doctors were unwilling to support the claim that the individual would not be dangerous to others.[217] The Court observed that the Louisiana Supreme Court enforced Louisiana law in such a manner as to apparently circumvent the due process protection the Court identified in *Addington*.[218] The Court reiterated that "freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[219] As a result, the Clause protects against "arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"[220]

Drawing a comparison between involuntary detention of mentally ill individuals and involuntary detention authorized by the Bail Reform Act of 1984, the Court noted that the detention authorized by the Bail Reform Act was sharply focused on the "government's interest in preventing crime by arrestees" and required the government to prove to a neutral decisionmaker in a "full-blown adversary hearing" the danger posed to the community.[221] The Court found it highly problematic that in Louisiana's hearing, the "[s]tate need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous."[222] By failing to meet the minimum burden established in *Addington*, the Court held that Louisiana's detention policy irretrievably violated the individual's due process rights.[223]

Addington and *Foucha* make it clear that the Court has considered and explicitly rejected a detention procedure in which the government fails to prove, by clear and convincing evidence, the necessity of the individual's detention.[224] This policy predates the Court's treatment of current immigration detention policy and stands in sharp contrast to it.[225]

The Court confronted a new detention scheme when it considered Kansas's Sexual Violent Predator Act, which permitted civil commitment of individuals who demonstrated both "mental abnormality" and were likely to commit "predatory acts of sexual violence."[226] Following the evidentiary standards established in *Foucha*, the Act unambiguously required "a precommitment finding of dangerousness to one's self or to others, and [the] link[ing of] that finding to a determination that the person suffered from a 'mental abnormality' or 'personality disorder.'"[227]

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[217] 504 U.S. 71, 75, 83 (1992).
[218] *Id.*
[219] *Id.* at 80 (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).
[220] *Id.* (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)).
[221] *Id.* at 81 (quoting United States v. Salerno, 481 U.S. 739, 751 (1987)).
[222] *Id.* at 81–82.
[223] *Id.* at 86.
[224] *See* Addington v. Texas, 441 U.S. 418, 418 (1978); *Foucha*, 504 U.S. at 83.
[225] *See* Zadvydas v. Davis, 533 U.S. 678, 701 (2001).
[226] Kansas v. Hendricks, 521 U.S. 346, 346 (1997).
[227] *Id.*

While directly linked to "dangerousness," the Court found that the additional statutory element of "mental abnormality" served as a sufficient limitation of the Act's applicability to only those individuals whose dangerous behavior was apparently beyond their ability to control.[228] Furthermore, the State had to "prove by clear and convincing evidence that the person" satisfied these requirements prior to their involuntary detention.[229]

The Court revisited its detention framework for violent sexual offenders in *Kansas v. Crane* and clarified an additional requirement of "lack of control."[230] The Court noted that the "Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules."[231] Accordingly, the government has a degree of leeway to articulate the legal definition of "mental disorder" that satisfies the required second element to justify detention.[232] Nevertheless, the Court underlined the necessity of the Government proving the second element, to avoid the chance that "'civil commitment' become[s] a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment."[233]

Regarding violent sexual offenders, the Court's policy guidance attempts to offer the lower courts the flexibility they need to detain individuals that fall short of a total loss of self-control, recognizing that "insistence upon [an] absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities."[234] But this flexibility extended to the government is bound by an outright rejection of "an approach to civil commitment that would permit the indefinite confinement 'of any convicted criminal' after the completion of a prison term[,]" underlining the need to distinguish these individuals from "typical recidivists convicted in an ordinary criminal case."[235]

The *Crane* decision, issued in the year between *Zadvydas* and *Demore*, demonstrates that the Court's thinking about the involuntary detention of mentally ill and violent sexual offenders remained consistent and contained a common feature with immigration detention proceedings, as well as fundamental due process protections absent from immigration detention proceedings.[236]

The common feature between both types of proceedings was a demonstration of a specific feature of the individual that necessitated their nonpunitive detention.[237] For the violent sexual offenders, the state was required to show "dangerousness" and

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[228] *Id.* at 358.
[229] *Id.* at 356.
[230] 534 U.S. 407, 413 (2002).
[231] *Id.*
[232] *Id.*
[233] *Id.* at 412 (quoting *Hendricks*, 521 U.S. at 372–73).
[234] *Id.*
[235] *Id.* at 413 (quoting *Foucha*, 504 U.S. at 82–83).
[236] *Id.*
[237] *See* Addington v. Texas, 441 U.S. 418, 418 (1979); *Foucha*, 504 U.S. at 83.

"mental abnormality."[238] Similarly, in the immigration context, the state is required to show a range of evidence, such as a violation of "a crime involving moral turpitude" or "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance," among many others.[239] These elements ensure the individual a degree of process, but as the Court identified in *Foucha*, this minimal process is useless if it is not also a fair process.[240]

Additional procedural protections are guaranteed in violent sexual offender proceedings by the requirement for the State to satisfy a "clear . . . and convincing" evidentiary standard and the requirement for the government to bear the burden of proof.[241] Conversely, the burden is placed on the individual in the immigration detention proceeding, jeopardizing the fair process the Court identified in *Foucha*.[242]

Around the same time as the *Zadvydas*, *Crane*, and *Demore* decisions, the Court was also working through the issue of how to handle the detention of enemy combatants who were suspected of actively fighting against the U.S. military in Afghanistan and Iraq.[243] It was unclear what legal status these detainees fell into, and what sort of legal protection would be provided.[244] From the outset, the Court held that these detainees must receive the due process protections that were constitutionally afforded by being held on U.S. territory.[245]

In *Hamdi*, the Government argued that to determine if detention was appropriate, it would be sufficient to apply a "some evidence" standard in which there was not a "weighing of the evidence," instead, the Court would assess "whether there is any evidence in the record that could support the conclusion."[246] In the Government's view, the Court's review should "assume the accuracy of the Government's articulated basis for [the individual's] detention . . . and assess only whether that articulated basis was a legitimate one."[247]

After weighing the competing interests, the Court concluded that "neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the appropriate constitutional balance" because the "risk of erroneous deprivation' of a detainee's liberty interest is unacceptably high."[248] A constitutionally appropriate detention regime for enemy combatants would require "factual notice of his classification, and a fair opportunity to rebut the Government's

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238 *Hendricks*, 521 U.S. at 346.
239 8 U.S.C. § 1182(a)(2)(A)(i).
240 *Foucha*, 504 U.S. at 80.
241 *Addington*, 441 U.S. at 433.
242 *In re* Fatahi, 26 I. & N. Dec. 791, 795 (B.I.A. 2016).
243 Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2003).
244 *Id.*
245 *Id.*
246 *Id.* at 527.
247 *Id.* at 527–28.
248 *Id.* at 532–33.

factual assertions before a neutral decisionmaker."[249] Acknowledging the exigencies created by ongoing combat operations, the Court allowed that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as the presumption remained a rebuttable one and . . . once the Government puts forth credible evidence . . . the onus could shift to the petitioner to rebut the evidence."[250]

Congress and President Bush resisted the detention regime articulated in *Hamdi*, and tried repeatedly over the next several years to strip the courts of the jurisdiction to review enemy combatant cases.[251] After the Court held their attempt to be without merit, Congress attempted to fashion military courts that could adjudicate the status of enemy combatants outside the judiciary created by Article III; again, in *Hamdan v. Rumsfeld*, the Court stepped in to block Congress's attempt to ignore the Court's prior ruling and ensure that the Court's vision of the appropriate process for enemy combatants was applied.[252]

In *Boumediene v. Bush*, the Court answered another attempt by Congress and the President to circumvent the rulings of the Court, and fashion their own procedure for enemy combatants.[253] With this final major opinion in this line of cases, the Court reminded Congress and the President that "[s]ecurity subsists, too, in fidelity to freedom's first principles. Chief among those are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[254]

The Court's vigorous efforts to defeat attempts to undermine the procedural due process protections that it held were appropriate for enemy combatants suggests that the Court considers those due process protections to be fundamental to constitutional governance.[255] These procedural protections extended to enemy combatants stand in stark contrast to the wide latitude the government has been afforded in immigration detention hearings.[256]

Considering the wide range of classes of individuals that the Court has protected in regard to involuntary detention or civil commitment, it is clear that the Court has consistently found liberty to be a fundamental right that merits a correspondingly rigorous degree of procedure to ensure minimal undue or erroneous restriction of a citizen's liberty interest.[257] Broadly speaking, the detention procedures described

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[249] *Id.* at 533.
[250] *Id.* at 534.
[251] *See* Rasul v. Bush, 542 U.S. 466, 474–75 (2004).
[252] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006).
[253] *See* Boumediene v. Bush, 553 U.S. 723, 733–34 (2008).
[254] *Id.* at 797.
[255] *Id.*
[256] *See* Demore v. Kim, 538 U.S. 510, 518 (2003).
[257] Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

above contain strikingly similar elements, such as the Government bearing the burden of proving the necessity of detention under a declared standard of proof.[258]

This interpretation of due process is also consistent with the requirements that the Court laid out for individuals who are detained in advance of trial under the Bail Reform Act of 1984.[259] Unlike involuntary detention, which could impact the classes of individuals previously discussed, this detention could be applied against anyone accused in the criminal justice system of a "serious crime" or "present[ing] a demonstrable danger to the community."[260] Faced with such a broad detention mandate, the Court gave its approval only after listing the extensive due process protections that ensured the targeted application of the detention.[261] The Court was satisfied with: (a) the protection created by the detainee's right to counsel; (b) their ability to present information and cross-examine witnesses; (c) the presence of a judicial officer who determined whether the individual met the statutory requirements for detention; and finally (d) the fact that "[t]he Government must prove its case by clear and convincing evidence."[262] Crucially, the basic procedural protection of requiring the government to bear the burden of proof to justify an individual's detention, universally applied in other detention contexts, is not present in immigration detention proceedings.[263]

VI. EVALUATING THE COMPETING ANALYTICAL APPROACHES OF THE CIRCUIT COURTS

The First Circuit, in *Hernandez-Lara v. Lyons*, and the Third Circuit, in *Borbot v. Warden Hudson County Correctional Facility*, both evaluated the constitutionality of whether it was appropriate for the Government or the individual to bear the burden of proof in immigration detention hearings; the circuits have arrived at conflicting conclusions.[264]

The First Circuit applied a more extensive review.[265] The court first acknowledged that under the governing regulations, "a noncitizen seeking release bears the burden of 'demonstrat[ing] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any

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[258] *See* Addington v. Texas, 441 U.S. 418, 433 (1979); Kansas v. Hendricks, 521 U.S. 346, 356 (1997); *Hamdi*, 542 U.S. at 534.

[259] United States v. Salerno, 481 U.S. 739, 751 (1987).

[260] *Id.* at 750.

[261] *Id.* at 750–52.

[262] *Id.*; *see also* Zadvydas v. Davis, 533 U.S. 678, 701 (2000).

[263] *In re* Fatahi, 26 I. & N. Dec. 791, 795 (B.I.A. 2016).

[264] *See* Hernandez-Lara v. Lyons, 10 F.4th 19 (1st Cir. 2021); Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274 (3d Cir. 2018).

[265] *Hernandez-Lara*, 10 F.4th at 33.

future proceeding.'"[266] Furthermore, the court acknowledged that the BIA precedent supported the application of this requirement, citing a Second Circuit opinion which concluded that "the [G]overnment 'need not show anything to justify incarceration for the pendency of removal proceedings, no matter the length of those proceedings.'"[267] Finding this conclusion constitutionally suspect, the First Circuit applied the *Mathews v. Eldridge* balancing test.[268]

The court determined that the first factor in the *Mathews* analysis, the "private interest that will be affected by official action," clearly fell in the individual's favor as "[f]reedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects."[269] The second factor, "the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," also fell in favor of the individual and additional procedural protection.[270] The First Circuit found that immigration detention hearings lacked procedural protections commonly found in other contexts—the individuals had no right to counsel and were unlikely to be able to access counsel on their own; they would have difficulty obtaining evidence while detained; they often lacked English proficiency, which increased their difficulty in navigating the proceedings; they lacked any knowledge of the immigration law standards that would be applied to them; and finally, the requirement that they prove the negative of their lack of dangerousness is inherently difficult.[271] The final factor, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail," was indeterminate, but likely resolved in favor of the individual as well.[272] The court found that the Government already had an interest in investigating the criminal backgrounds and safety issues presented by individuals in the immigration system, and it would not be overly burdensome for them to share their findings with the court.[273] Conversely, the individual, being without resources, detained, and likely without counsel, was relatively in a much worse position to present the court with adequate evidence either way.[274]

The First Circuit concluded that the *Mathews* balancing test clearly resolved in favor of the individual, and the Government should bear the burden of proof in immigration detention proceedings.[275]

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[266] *Id.* (citing 8 C.F.R. § 236.1(c)(2)–(8) (2022)).

[267] *Id.* at 27 (quoting Velasco Lopez v. Decker, 978 F.3d 842, 849 (2d Cir. 2020)).

[268] *Id.* at 28–29.

[269] *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Zadvydas v. Davis, 533 U.S. 678, 695 (2001)).

[270] *Hernandez-Lara*, 10 F.4th at 28–29 (quoting *Mathews*, 424 U.S. at 335).

[271] *Id.* at 30–31.

[272] *Id.* at 32 (quoting *Mathews*, 424 U.S. at 335).

[273] *Id.* at 33.

[274] *Id.*

[275] *Hernandez-Lara*, 10 F.4th at 45–46.

On the other hand, the Third Circuit applied a more circumscribed analysis of the detention policy.[276] The court cited *Demore* for the principle that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[277] As a result, although the burden of proof at all times rested on the individual under Section 1226(a) of the IIRIRA, unlike under Section 1226(c) of the IIRIA in which the burden of proof eventually shifted to the Government, the court "perceive[d] no problem with the distinction."[278] The court noted that unlike individuals detained under Section 1226(c) of the IIRIA, who were without any detention hearing, individuals detained under Section 1226(a) of the IIRIRA had at least one detention hearing and therefore the court could not say that their due process rights were clearly violated.[279] Ultimately, the court hedged, suggesting that its opinion did not consider all applications of Section 1226(a) of the IIRIRA, and did not conclusively hold that the Due Process Clause might never entitle an individual to more process than Section 1226(a) of the IIRIA currently affords.[280]

Between the two circuit rulings, only the First Circuit directly considered the constitutional question of whether or not placing the burden of proof on the individual in the detention proceeding was a violation of the Due Process Clause.[281] The Third Circuit analysis found that Congress's intent was clear from the statutory framework, and sought to implement it. Moreover, the analysis found that *Demore* made it clear that Congress had leeway to draft laws that implicated noncitizen rights in a way that would be impermissible for citizens, while *Jennings* further supported the conclusion that additional process could not be read into the immigration statutes.[282] Consequently, the Third Circuit found no due process problem to directly address.[283]

The First Circuit's comprehensive review and application of the *Mathews* balancing test provided a more thorough analysis of the due process issues at stake in the immigration detention proceedings.[284] Its broader perspective on other categories of individuals that have had specific detention procedures authorized against them offers essential context to understand how the immigration procedures fit within the larger constitutional framework.[285]

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[276] Borbot v. Warden Hudson Ctny. Corr. Facility, 906 F.3d 274, 276 (3d Cir. 2018).
[277] *Id.* (quoting Demore v. Kim, 538 U.S. 510, 521 (2003)).
[278] *Id.* at 279.
[279] *Id.* at 279.
[280] *Id.* at 280.
[281] Hernandez-Lara v. Lyons, 10 F.4th 19, 27 (1st Cir. 2021).
[282] *Borbot*, 906 F.3d at 278–79.
[283] *Id.* at 280.
[284] *Hernandez-Lara*, 10 F.4th at 27–28.
[285] *Id.* at 28–29.

VII. SYNTHESIZING PROCEDURAL DUE PROCESS PROTECTIONS IN DIFFERENT DETENTION SCHEMES TO ARRIVE AT THE CONCLUSION THAT THE GOVERNMENT SHOULD BEAR THE BURDEN OF PROOF IN IMMIGRATION DETENTION PROCEEDINGS

The Immigration and Nationality Act of 1952 (INA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created the statutory framework of the immigration detention system.[286] The broad mandate for detention established by the statutes, and specific burdens established by regulations created pursuant to those statutes, clearly demonstrate the intention of Congress and the desire of the immigration agencies to place the burden of proof in detention proceedings on the individual.[287]

The view of the immigration courts align with Congress, as the BIA noted in *In re R-A-V-P-* that the claim that "the [Department of Homeland Security] should bear the burden of proof to demonstrate [the undocumented immigrant] is a flight risk by clear and convincing evidence lacks merit because we have clearly held that 236(a) places the burden of proof on the alien to show that he merits release on bond."[288]

Furthermore, the Supreme Court's conflicting opinions create the opportunity to draw competing inferences from their holdings.[289] *Plyler v. Doe* offered an understanding of the rights of noncitizens, including undocumented immigrants, as already incorporated in our understanding of the Fourth and Fourteenth Amendments.[290] However, later Court decisions focused more narrowly on the due process concerns created by indefinite detention specifically, rather than detention generally, as well as made clear that they were comfortable with the application of less procedural due process protections for undocumented noncitizens generally.[291]

Within the context of indefinite detention, the Court noted that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the Clause protects."[292] Nevertheless, the Court declared in *Demore* that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[293] Accordingly, the Court struck down attempts by lower

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[286] *See* Immigration and Nationality Act of 1952, Pub. L No. 82-414, 66 Stat. 163 (1952); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

[287] *See* 8 U.S.C. § 1226(a)–(c); 8 C.F.R. 236.1(c)(8) (2022) (requiring the noncitizen to "demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding").

[288] *In re* R-A-V-P-, 27 I. & N. 803, 804 (B.I.A. 2020).

[289] *See* Plyler v. Doe, 457 U.S. 202, 210 (1982); Demore v. Kim, 538 U.S. 510, 510 (2003).

[290] *Plyler*, 457 U.S. at 210.

[291] *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[292] *Id.*

[293] *Demore*, 538 U.S. at 521.

courts to read additional due process protections into immigration detention, except in the most extreme case of indefinite detention pending removal with no detention hearing.[294] Nevertheless, despite the precedent set in *Zadvydas*, in *Jennings v. Rodriguez*, the Court made it clear that it would not be appropriate or constitutionally required to place the six-month limits on detention without bond hearings for individuals facing detention without the prospect of indefinite detention.[295] In the face of the lower courts trying to drag the due process protections provided in immigration proceedings into alignment with other detention proceedings, the Court dismissed the concern, noting "'[d]ue process is flexible,' we have stressed repeatedly, and it 'calls for such procedural protections as the particular situation demands.'"[296]

It is not hard to understand how the Third Circuit, referencing *Demore* and *Zadvydas*, came to the conclusion that it was unnecessary to extend additional due process protections in the immigration detention context, highlighting the Supreme Court's comfort with a different standard of due process protection for individuals in the immigration court system.[297] *Department of Homeland Security v. Thuraissigiam*, while not bearing directly on the due process rights, implicated the immigration detention process and speaks to the Supreme Court's willingness to overturn lower court decisions to make it clear that noncitizens can be denied procedural due process protections that are otherwise fundamental to our understanding of the concept.[298] The Supreme Court in *Thuraissigiam* took issue with the undocumented noncitizen's presence in the United States and determined that after being denied asylum, he had no right to review of the outcome or challenge the constitutionality of his procedure. The Court was guided by the principles that an individual had "only those rights regarding admission that Congress ha[d] provided by statute" and "[b]ecause the Due Process Clause provides nothing more, [the procedure] does not . . . violate due process."[299] The recent and continuing trend toward restricting the scope of due process rights as applied to undocumented immigrants certainly could lead the Third Circuit to conclude that as long as the immigration detention procedure adhered to the statutory guidelines, then the procedure was both within the intent of Congress and constitutional.[300]

Despite the Supreme Court's lack of concern about potential due process issues in the immigration detention process, the *Mathews* balancing test, as applied by the First Circuit in *Hernandez-Lara*, offered a compelling analysis of the risk posed by the current detention proceedings to undocumented immigrants' due process rights.[301]

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[294] *Zadvydas*, 533 U.S. at 701–02.
[295] Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018).
[296] *Id.* at 852 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
[297] *See Demore*, 538 U.S. at 510; *Zadvydas*, 533 U.S. at 678.
[298] U.S. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020).
[299] *Id.*
[300] Borbot v. Warden Hudson Ctny. Corr. Facility, 906 F.3d 274, 278–79 (3d Cir. 2018).
[301] Hernandez-Lara v. Lyons, 10 F.4th 19, 27–33 (1st Cir. 2021).

The fundamental constitutional right of liberty, the weighty risk of erroneous detention, and the obvious interest the Government already has in collecting the type of information that would inform a court as to the degree of danger individuals pose to the community, clearly demonstrates that the Government should bear the burden of proving with clear and convincing evidence that an individual ought to lose their liberty.[302]

In the end, however, the First Circuit's *Mathews* balancing test, though constitutionally appropriate, was too narrow in scope. The First Circuit's well-reasoned conclusion that the balance fell in favor of adding essential, additional due process protections into the existing immigration detention procedure was correct.[303] However, in pursuing the constitutionally mandated test, it bypassed a more holistic review of how the Supreme Court has resolved the question of due process in other categories of detention proceedings.[304] The First Circuit noted that "the Supreme Court has consistently decided procedural due process challenges in the detention context on a categorical basis (e.g., all criminal defendants or insanity acquittees)."[305] For criminal defendants who pose a sufficient danger to the community as to merit pretrial detention, the "Government must prove its case by clear and convincing evidence."[306] For mentally ill individuals who the court is seeking to place under involuntary detention, the Court held that holding the Government to a "clear and convincing" standard of proof, or higher, was constitutionally appropriate.[307] For violent sexual predators, the Court determined that due process required the Government to prove by "clear and convincing evidence that the person is both (1) mentally ill, and (2) a danger to himself or to others."[308] Only in the extraordinary case of enemy combatant detainees did the Court adjust the standard of proof, allowing that "the Constitution would not be offended by a presumption in favor of the Government's evidence"; however, the Court still found it necessary for the detainee to receive "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions," establishing that the Government still bore the burden of first showing the necessity of the individual's detention.[309]

The Supreme Court has provided a perfectly consistent determination that in all of the detention categories listed, the Government bears the burden of proving the necessity of the individual's detention.[310] In every detention category except for enemy combatants, the Court has determined that a "clear and convincing" standard of proof is a constitutionally required minimum standard. For enemy combatants,

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[302] *Id.*
[303] *Id.* at 45–46.
[304] *Id.* at 44–45.
[305] *Id.* at 44.
[306] United States v. Salerno, 481 U.S. 739, 752 (1987).
[307] Addington v. Texas, 441 U.S. 418, 425 (1979).
[308] Kansas v. Hendricks, 521 U.S. 346, 356, 371 (1997).
[309] Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004).
[310] *Id.*

the Court acknowledged that imposing a higher standard of proof could "intrude into sensitive secrets of national defense [or] result in a futile search for evidence buried under the rubble of war," which justified a more pragmatic, but rebuttable, "presumption in favor of the Government's evidence."[311]

In the face of this consistent interpretation of the procedural due process protections that must be extended in detention proceedings, except for the most extreme detention scenarios posed by detaining enemy combatants on the battlefield, the Supreme Court has held that the Government must prove the necessity of an individual's detention by clear and convincing evidence.[312] Why then would it be constitutionally acceptable to apply a lesser standard to individuals whose status is adjudicated in the immigration court system?[313] No reasonable explanation, other than diverging category-based precedent supports the notion that in all cases, except immigration, the Government must factually prove the necessity of an individual's detention.[314] The enemy combatant line of precedent suggests that if there are compelling reasons why evidence would be hard to procure, it could justify a lesser standard of proof.[315] However, some individuals in immigration detention proceedings are lawful permanent residents (LPR), who have certainly been investigated by U.S. law enforcement agencies before.[316] Perhaps in the case of noncitizens or asylum seekers who illegally entered the country it would be appropriate to require the Government to satisfy a lower standard of proof.[317] However, even in these cases, for the removal proceeding to be executed, the U.S. law enforcement agencies must have a certain level of dialogue with the individuals' country of origin.[318] It stands to reason that during these discussions, the U.S. law enforcement agencies could also collect information relevant to their detention proceedings from their foreign counterparts.[319]

Furthermore, the enemy combatant line of precedent demonstrates that, in the face of Congressional legislation and executive action which the Supreme Court determined violated fundamental principles of due process, the Court is capable of acting again and again to address the constitutionally faulty procedure and strike it down.[320]

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311 *Id.* at 532, 534.

312 *Addington*, 441 U.S. at 433; *Hendricks*, 521 U.S. at 356; *Hamdi*, 542 U.S. at 509; *Salerno*, 481 U.S. at 751.

313 Demore v. Kim, 538 U.S. 510, 522 (2003).

314 *Addington*, 441 U.S. at 433; *Hendricks*, 521 U.S. at 353; *Hamdi*, 542 U.S. at 533; *Salerno*, 481 U.S. at 751.

315 *Hamdi*, 542 U.S. at 533.

316 *See, e.g.*, Landon v. Plascencia, 459 U.S. 21, 22 (1982).

317 *See, e.g.*, U.S. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963–66 (2020).

318 *See* Zadvydas v. Davis, 533 U.S. 678, 684 (2001) (discussing U.S. immigration authorities contacting foreign governments to coordinate noncitizen removal).

319 *Id.*

320 *See Hamdi*, 542 U.S. at 529.

Recent Court opinions that profess to defend the constitutional division of power and therefore endorse Congress's vision of immigration detention are undercut by the Court's willingness to intervene in the area of national defense, which is also within the constitutional ambit of Congress and the President.[321] As the Court repeatedly stood up against Congress and the President to enforce an application of constitutionally acceptable procedural due process protections to enemy combatants, so should the Court act again and reject Congress's statutory framework for detention as inconsistent with the procedural due process protections guaranteed by the Constitution.

CONCLUSION

The Supreme Court's vigorous defense of the procedural due process rights of enemy combatants marked just adherence to constitutional principles in the face of security concerns that pressured the Court to compromise those principles in the pursuit of a more pragmatic approach.[322] The Court's refusal to compromise those due process protections underscored their fundamental importance to the Court's understanding of an individual's due process rights in the face of detention.[323] Those protections are no less important and no less valid for noncitizens whose lives are touched by the immigration courts. As Justice Marshall noted in his dissent in *Salerno*, when faced with the prospect of unjust and indefinite detention, we should turn to the Constitution to "shelter us forever from the evils of such unchecked power," because "[o]ver 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves."[324] The Supreme Court should have the courage to extend the procedural due process protections afforded to other categories of individuals facing detention to undocumented noncitizens and immigrants facing detention in the immigration court system, and shift the burden of proof to the Government.

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[321] *See* Boumediene v. Bush, 553 U.S. 723, 733–34 (2008).
[322] *Id.* at 797.
[323] *Id.*
[324] United States v. Salerno, 481 U.S. 739, 767 (1987).