2002

In Aid of Removal: Due Process Limits on Immigration Detention

David Cole
Georgetown University Law Center, cole@law.georgetown.edu

51 Emory L.J. 1003-1039 (2002)

January 2010

In Aid of Removal:
Due Process Limits on Immigration Detention

51 Emory L.J. 1003-1039 (2002)

David Cole
Professor of Law
Georgetown University Law Center
cole@law.georgetown.edu

IN AID OF REMOVAL: DUE PROCESS LIMITS ON IMMIGRATION DETENTION

*David Cole**

On October 31, 2001, Ibrahim Turkmen was ready to go. A Muslim Imam and citizen of Turkey, he had come to the United States a year earlier on a six-month tourist visa, but had found work here in a gas station and for a construction company, and had overstayed his visa in order to send money back to his family in Turkey.[1] On October 18, 2001, FBI agents arrested Mr. Turkmen at his home, informally accused him of being associated with Osama bin Laden—a charge he denies and that was never formally advanced—and placed him in immigration proceedings for overstaying his visa. Mr. Turkmen agreed to leave the country, and an immigration judge granted him "voluntary departure," a form of relief that allows aliens to leave the country without incurring the penalties associated with a final deportation order. Two days later, a friend purchased a plane ticket to Turkey for Mr. Turkmen and brought it to the Immigration and Naturalization Service (INS) office in Newark, New Jersey. In ordinary times, he would have been back in Turkey in a matter of days.

But these are not ordinary times, and the INS would not let Mr. Turkmen go. He remained in detention for another three and one-half months, not because the INS faced any problems in effecting his removal, and not because the government had probable cause to believe that Mr. Turkmen had been involved in any criminal activity, but simply because the FBI had not yet "cleared" Mr. Turkmen in its investigation of the terrorist attacks of September 11. On February 25, 2002, when the FBI finally cleared Mr. Turkmen of any ties to terrorism or the events of September 11, the INS allowed him to leave.

---

* Professor of Law, Georgetown University Law Center. J.D., (1984); B.A., (1980), Yale University. Jeffrey Leasure provided excellent research assistance.

[1] The following account of the detention of Mr. Turkmen and Mr. Saffi is drawn from the complaint in their class action suit against the U.S. government. Class Action Complaint and Demand For Jury Trial, Turkmen v. Ashcroft (E.D.N.Y. 2002) (No. CV-02-307), *at* http://news.corporate.findlaw.com/hdocs/docs/terrorism/turkmenash41702cmp.pdf. Through the Center for Constitutional Rights, I am co-counsel for plaintiffs in this lawsuit.

Mr. Turkmen was not alone. Asif-ur-Rehman Saffi, a French citizen and native of Pakistan also detained in connection with the September 11 investigation, was ordered deported on October 17, 2001, but remained in INS custody for four-and-one-half more months, and was actually deported only after the FBI had cleared him as well. On February 18, 2002, the *New York Times* reported that as of that date, 87 noncitizens were in the same situation, having received voluntary departure or final deportation orders, but kept locked up and barred from leaving because the FBI was still investigating them.[2]

Were Mr. Turkmen or Mr. Saffi U.S. citizens, there would have been no basis for their detention. They were never charged with any crimes and were not shown to pose any danger to the community or flight risk. Moreover, once they were ready and willing to leave the country, there was not even any arguable immigration purpose for detaining them, as their custody was not necessary to effectuate their removal. They were held, in essence, "for investigation." Yet beyond the narrow confines of the brief stop-and-frisk authorized in *Terry v. Ohio*,[3] the Constitution knows no place for "investigative detention." As the United States Supreme Court has recently reminded us, preventive detention is a narrowly carved exception to the general due process rule that persons may not be deprived of their liberty absent a criminal conviction.[4]

The detention of aliens for months beyond the time necessary to effectuate their removal is just one component of a wide-ranging preventive detention campaign undertaken by the Department of Justice in the wake of the terrorist attacks of September 11, in which the government has aggressively used immigration authority to implement a broad strategy of preventive detention where other civil or criminal law authority would not permit custody. By a conservative estimate, the government has arrested between 1500 and 2000 persons since September 11 in connection with the investigation of the terrorist

---

[2] Christopher Drew & Judith Miller, *Though Not Linked to Terrorism, Many Detainees Cannot Go Home*, N.Y. TIMES, Feb. 18, 2002, at A1 (reporting that Justice Department has blocked departure of 87 mostly Arab or Muslim noncitizens who have received voluntary deportation or removal orders "[w]hile investigators comb through information pouring in from overseas to ensure that they have no ties to terrorism").

[3] 392 U.S. 1, 24 (1968) (upholding brief investigative detention for purposes of confirming or dispelling suspicion upon reasonable suspicion that crime is afoot).

[4] Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (limiting detention of deportable aliens to six months where there is no significant likelihood of their deportation in the reasonably foreseeable future because the country to which they have been ordered deported will not admit them).

crimes committed that day.[5] Yet as of November 2002, more than one year into the September 11 investigation, not a single person arrested in the preventive detention campaign had been charged with any involvement in the September 11 attacks. (The only person so charged, Zaccarias Moussawi, was arrested before September 11.) Only four detained individuals have been charged with any terrorist-related crime.[6] The vast majority have, like Mr. Turkmen and Mr. Saffi, been "cleared" by the FBI of any involvement in the September 11 attacks or any terrorist activity of any kind. Thus, virtually all of the 1500-2000 persons detained in the government's investigation of September 11 have turned out to be innocent of any involvement in terrorism.

The majority of the detainees have been held on immigration charges, again like Mr. Turkmen and Mr. Saffi. In some cases, the charges are highly technical. One man, Ali Maqtari, a lawful permanent resident alien, was held for a month on the charge that he had been out of lawful status for ten days while adjusting his status from visitor to permanent resident. It is likely that the INS has never deported anyone on such a charge; the purpose of his detention was not to enforce the immigration laws, but to detain him while the FBI interrogated and investigated him. When the FBI cleared him, he was released, and his charges were conditionally dropped pending a showing that his marriage was "genuine."[7]

Those held on immigration charges have been detained and tried entirely in secret. Pursuant to a directive from the Attorney General, their cases are not listed on any public docket, and the immigration judges presiding have been instructed to neither confirm nor deny that the case exists if asked. Every aspect of the proceedings, no matter how routine, is closed to the public, to the press, and even to family members.[8] And pursuant to an immigration

---

[5] An exact number is not available, because on November 5, 2001, when the Justice Department's daily announced running tally was 1147, the Administration responded to criticism about the large number of detainees by abruptly halting its practice of disclosing how many had been detained. It has not released a total figure since that date. But if 1147 were detained in the first seven weeks of the investigation, even if the rate of detainees dropped by 50-75 percent in the subsequent year, the total number would conservatively be in the 1500-2000 range as of November 2002. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960 (2002).

[6] Danny Hakim, *4 Are Charged with Belonging to a Terror Cell*, N.Y. TIMES, Aug. 29, 2002, at A1 (reporting that four men were charged with supporting terrorism in the Detroit area, three of whom had been detained after September 11, and that another detained man, Earnest James Ujaama, had been indicted in Seattle for supporting terrorism).

[7] *All Things Considered* (National Public Radio broadcast, Dec. 4, 2001).

[8] Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (declaring this policy unconstitutional as applied to detained alien whose identity was widely publicized); North Jersey Media Group v. Ashcroft, 2002 U.S. App. LEXIS 21032 (3d Cir. Oct. 8, 2002) (upholding, 2-1, the closure of immigration proceedings). I am

regulation issued in October 2001, the INS officials who prosecute deportation cases can effectively override immigration judges who rule that an alien should be released on bond pending his deportation proceedings.[9] The rule gives INS prosecutors an automatic stay upon filing an appeal from such an order, without any requirement that they show that their appeal is likely to succeed, or that there is a danger of irreparable harm.

When the government is criticized for this use of immigration authority, its defenders often respond that those held on immigration charges are unlawfully here, and as illegal aliens, they are subject to detention.[10] That view is apparently widely held in Congress, as in recent years it has imposed mandatory detention on various categories of aliens. In 1996, for example, Congress mandated detention of all aliens charged with having committed "aggravated felonies," a term of art in immigration law that sweeps far more broadly than it sounds, and encompasses even some misdemeanors.[11] The same year, Congress mandated detention of at least some aliens subject to final orders of deportation.[12] And the INS takes the view that it can detain arriving aliens in order to send a message to others who might be considering coming to the United States; it recently adopted a policy of detaining all Haitian applicants for asylum who arrived in the United States by boat, not because these aliens were considered flight risks or dangerous, but in order to deter other Haitians from risking dangerous boat rides to the United States.[13]

Immigration detention is by definition "preventive" because the INS has no authority to detain for punitive purposes. Punitive detention may be imposed only pursuant to the criminal law.[14] But precisely because preventive detention involves depriving individuals of their physical liberty without an adjudication of criminal guilt, its use is strictly circumscribed by due process constraints. Most fundamentally, preventive detention may not be imposed where there is nothing to prevent. Thus, in the criminal setting, bail may be

---

co-counsel for plaintiffs in the latter case, and co-counsel for Rabih Haddad in a federal action related to the *Detroit Free Press* case. Haddad v. Ashcroft, 2002 WL 31096692 (E.D. Mich. Sept. 17, 2002).

9 8 C.F.R. § 3.19(4)(i)(2) (2002).

10 *See, e.g.*, *Nightline* (ABC News television broadcast, Oct. 1, 2001) (remarks of Beth Wilkinson).

11 8 U.S.C. § 1227(a)(2)(A)(iii) (2000); 8 U.S.C. § 1101(a)(43) (defining "aggravated felony").

12 8 U.S.C. § 1226(c)(1).

13 Jeanty v. Bulger, 204 F. Supp. 2d 1366, 1381-82 (S.D. Fla. 2002).

14 The INS has no authority to detain aliens for any purposes other than prevention. Outside a criminal process, punitive detention violates due process. Zadvydas v. Davis, 533 U.S. 678, 694-95 (2001); Wong Wing v. United States, 163 U.S. 228, 241 (1896) (holding unconstitutional INS imposition of hard labor on deportable aliens, reasoning that immigration authority cannot be exercised for punitive purposes).

denied only if the defendant poses either a risk of flight or a danger to the community.[15]

Similarly, in the immigration setting, preventive detention should be constitutionally permissible only where necessary in aid of removal. The only legitimate purpose of immigration proceedings is to remove those aliens who do not have a legal basis for remaining here. If the alien poses a flight risk, his detention may be necessary to ensure that he will be around if and when a final removal order is effective. If the alien poses a danger to the community, his detention may be necessary to protect the community while his legal status in the United States is resolved. But where an alien poses neither a danger nor a flight risk, his removal may be effectuated without detention, and detention therefore serves no legitimate government purpose. In such circumstances, detention is unconstitutional.

So understood, due process places significant constraints on the government's power to detain individuals pursuant to immigration authority. Because the immigration power cannot be used punitively, the government may not take a noncitizen's liberty without an individualized showing that the person poses either a danger to the community or a risk of flight. Yet as the examples cited above illustrate, immigration law in recent years has developed as if it were immune from these due process limitations. This is a relatively recent phenomenon, but a widespread one. The Supreme Court has already had one occasion to review it, and a second opportunity is currently pending. In *Zadvydas v. Davis*,[16] the Court in 2001 reaffirmed that at least with respect to aliens living inside the United States, substantive due process applies with full force to immigration detention. The Court strained to read a statute that appeared to authorize indefinite detention of aliens to contain a presumptive six-month limit, precisely to avoid the substantive due process concerns that would be presented were the statute read more broadly. And in *Demore v. Kim*,[17] the Court has agreed to review the constitutionality of the provision imposing mandatory detention on criminal aliens while their removal proceedings are pending. Several lawsuits have challenged the INS's use of immigration detention in connection with the investigation of the September

---

15 *See* United States v. Salerno, 481 U.S. 739, 752-53 (1987).

16 533 U.S. at 678.

17 122 S. Ct. 2696 (2002).

11 attacks.[18] And a district court has declared unconstitutional the "automatic stay" provision promulgated to facilitate the preventive detention campaign that immediately followed the attacks.[19]

In this Article, I seek to demonstrate the radical consequences that taking due process seriously would have for immigration detention as currently practiced. Part I lays out the general principles that apply to civil preventive detention, which establish that substantive due process is violated without an individualized showing after a fair adversarial hearing that there is something to prevent, namely danger to the community or flight. Part II applies this general framework to immigration detention. It first demonstrates, by a review of Supreme Court decisions, that the Court has applied the same due process principles to immigration detention that it has to other forms of civil detention; in other words, this is not a subject on which immigration exceptionalism, or the plenary power doctrine, has played much of a role. Second, I apply these general principles to several immigration law developments since 1996, illustrating that significant aspects of the INS's current detention policy and practice violate due process. Finally, I take up the issue of detention of entering aliens, and argue that cases holding that due process does not limit entering aliens' detention are predicated on an erroneous conflation of the decision to exclude and the decision to detain.

I. DUE PROCESS AND PREVENTIVE DETENTION

With the exception of the power to make war and to impose capital punishment, few state actions are more serious than locking up a human being. The potential for such authority to be abused led the Constitution's Framers to include two critical protections—due process and habeas corpus. Together, the Due Process Clause and the Suspension Clause ensure that the authority to detain must be exercised according to law, and must be subject to judicial review. As the Supreme Court has noted, "[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."[20] The right to liberty is not absolute, but can be restricted only in accordance with both

---

[18] Class Action Complaint and Demand For Jury Trial, Turkmen v. Ashcroft (E.D.N.Y. 2002) (No. CV-02-307), *at* http://news.corporate.findlaw.com/hdocs/docs/terrorism/turkmenash41702cmp.pdf. *See also supra* note 8.

[19] Almonte-Vargas v. Elwood, 2002 U.S. Dist. LEXIS 12387, at *19 (E.D. Pa. June 28, 2002).

[20] *Zadvydas*, 533 U.S. at 690.

procedural and substantive due process.[21] Accordingly, when the government takes an individual into custody, it must do so pursuant to fair procedures that afford adequate notice and a meaningful opportunity to respond, and it must have a legitimate substantive reason for the detention. The writ of habeas corpus in turn ensures that individuals will have recourse to a court to challenge the legality of their detention.[22]

The task of defining what substantive reasons warrant depriving a person of his liberty is not straightforward, and the Due Process Clause by its own terms provides no express guidance on the subject. As in other due process areas, history, tradition, precedent, and principle may guide the development of the jurisprudence. But compared to the disputes that have surrounded the extension of substantive due process to other claimed interests,[23] the Supreme Court's approach to the issue of physical custody has been relatively noncontroversial. While there have been disagreements around the edges,[24] certain principles have garnered nearly unanimous consent. Foremost among them is the neo-Kantian notion that the government cannot lock up people without having a good reason, specific to the individual, for doing so. Outside of wartime, no Justice on the Court has even argued for civil detention in the

---

[21] *Id.*; *see also* Kansas v. Hendricks, 521 U.S. 346, 356 (1997); Foucha v. Louisiana, 504 U.S. 71, 80 (1992); United States v. Salerno, 481 U.S. 739, 746 (1987).

[22] INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); *see also* Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ [of habeas corpus] has been to relieve detention by executive authorities without judicial trial."). The roots of the right not to be detained unlawfully extend back beyond the Constitution. William Blackstone characterizes as an absolute right "the personal liberty of individuals . . . without imprisonment or restraint, unless by due course of law," 1 WILLIAM BLACKSTONE, COMMENTARIES *130, and states that "to refuse or delay to bail any person bailable, is an offence against the liberty of the subject . . . by the common law; as well as by . . . statute . . . and the *habeas corpus* act." 4 BLACKSTONE, COMMENTARIES *294. In England and in the colonies prior to 1789 the writ of habeas corpus was available to non-enemy aliens seeking to challenge their detention. *St. Cyr*, 533 U.S. at 301-02.

[23] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905) (finding substantive due process protects right to contract and invalidates protective labor legislation for bakers); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling *Lochner*); Roe v. Wade, 410 U.S. 113, 164 (1973) (finding substantive due process protects right to terminate pregnancy); Casey v. Planned Parenthood, 505 U.S. 833, 853 (1992) (relying on "reasoned elaboration" of precedent and stare decisis to uphold *Roe* in part, reaffirming that substantive due process protects women's right to terminate her pregnancy); Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986) (relying on tradition and history of condemnation of homosexual conduct to reject substantive due process claim); *id.* at 199 (Blackmun, J., dissenting) (reasoning from precedent to find a right to adult consensual sex); Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (rejecting substantive due process challenge to Washington law banning assisted suicide).

[24] *See, e.g.*, Kansas v. Crane, 534 U.S. 407, 415 (2002) (Scalia, J., dissenting).

absence of an individualized finding that the detention is necessary to protect against a distinct danger posed by the individual sought to be detained.

In a recent decision surveying the landscape, the Supreme Court stated that "government detention violates th[e Due Process] Clause" unless it is imposed as punishment in a criminal proceeding conforming to the rigorous procedures constitutionally required for such proceedings, or "in certain special and 'narrow' non-punitive 'circumstances.'"[25] Non-punitive, or preventive, detention is permissible *only* where an individual (1) is either in criminal or immigration proceedings and has been shown to be a danger to the community or flight risk;[26] (2) is dangerous because of a "harm-threatening mental illness" that impairs his ability to control his dangerousness;[27] or (3) is an enemy alien during a declared war.[28] With the exception of the last category, implicit in all of the Court's decisions regarding detention is the notion that the justification for detention must be particularized to the individual. Just as we cannot impose criminal sanctions on individuals absent a determination of individual culpability,[29] so too we cannot lock up a person absent a showing that there is a demonstrated need to lock up that specific person.

For example, in upholding the Bail Reform Act against a facial due process challenge, the Supreme Court in *United States v. Salerno*[30] emphasized that the statute authorized only a limited period of pretrial detention, and only pursuant

---

[25] *Zadvydas*, 533 U.S. at 690.

[26] *Id.* at 688. *See also Salerno*, 481 U.S. at 752-53; Carlson v. Landon, 342 U.S. 524, 541-42 (1952).

[27] *Zadvydas*, 533 U.S. at 690; *accord Crane*, 534 U.S. at 412-13; Kansas v. Hendricks, 521 U.S. 346, 357 (1997).

[28] Ludecke v. Watkins, 335 U.S. 160, 171-73 (1948) (upholding suspicionless detention of "enemy aliens" during a declared war). The Court also notoriously upheld the internment of citizens and noncitizens of Japanese descent during World War II, Korematsu v. United States, 323 U.S. 214, 217-19 (1944), but that widely criticized decision is of dubious validity today. Eight of the nine sitting Justices have explicitly criticized the decision; Justice Scalia has compared it to the *Dred Scott* case. *See* Cole, *supra* note 5, at 993 n.165 (citing cases).

Another setting in which the government engages in preventive detention is where an individual has testimony material to a criminal proceeding and is likely to abscond if served with a subpoena. 18 U.S.C. § 3144 (2000). The Supreme Court has never opined on the constitutionality of that statute, but lower courts have generally upheld it. One court has interpreted the statute as limited to holding witnesses to testify in criminal trials, and held that it does not extend to testimony for grand jury proceedings, in part based on constitutional concerns. United States v. Awadallah, 202 F. Supp. 2d 55, 76 (S.D.N.Y. 2002). But other courts have disagreed with that conclusion. Bacon v. United States, 449 F.2d 933 (9th Cir. 1971); *In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D.N.Y. 2002). In any event, no court has questioned the validity of detaining material witnesses for testimony in a criminal trial.

[29] Scales v. United States, 367 U.S. 203, 224-25 (1961) (finding that due process requires showing of individual culpability for criminal sanction).

[30] 481 U.S. at 739.

to individualized findings in a fair hearing.[31] The Court first determined that the denial of bail to dangerous arrestees did not constitute punishment, for it served a legitimate nonpunitive interest in protecting the community, and was not excessive in light of that interest.[32] Had the detention been punitive, the Court's analysis implies, it would have been unconstitutional, for punitive detention may be imposed only pursuant to a criminal conviction.[33]

The Court's determination that the denial of bail is not punitive, however, was only the beginning of its due process inquiry. The Court went on to hold that the Bail Reform Act's imposition of civil nonpunitive detention satisfied substantive due process because it served a "legitimate and compelling" interest,[34] applied only to "a specific category of extremely serious offenses,"[35] and required both a showing of probable cause for arrest and clear and convincing evidence, established in a "full-blown adversary hearing," that "no conditions of release can reasonably assure the safety of the community or any person."[36]

Finally, the Court held that the Act's "extensive safeguards" satisfied procedural due process.[37] The Court emphasized that the safeguards included the fact that the defendant has the rights to counsel, to testify, to proffer evidence, and to cross-examine witnesses; that the government must prove its case by clear and convincing evidence; and that an independent judge guided by "statutorily enumerated factors" must issue a written decision subject to "immediate appellate review."[38]

Each of these holdings necessarily implies that civil detention may be imposed only where there has been at a minimum an individualized showing of necessity for detention in a fair adversarial hearing. If detention were imposed without such a showing, it would be excessive in light of the legitimate purposes of detention, and would therefore constitute punishment and violate

---

31 *Id.* at 739. *See also id.* at 750-52.

32 *Id.* at 747.

33 Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (invalidating statute permitting civil commitment based on finding of dangerousness alone, reasoning that "[a]s Foucha was not convicted, he may not be punished"); *see also* Wong Wing v. United States, 163 U.S. 228, 237 (1896) (invalidating statute that imposed imprisonment at hard labor on deportable aliens because it imposed punishment without a criminal conviction).

34 *Salerno*, 481 U.S. at 749.

35 *Id.* at 750.

36 *Id.*

37 *Id.* at 752.

38 *Id.* at 751-52.

substantive due process.[39] And without procedural safeguards designed to give the individual a meaningful opportunity to defend himself, civil detention would violate procedural due process. Thus, each prong of the *Salerno* analysis implies that, at a minimum, detention can be imposed only where there is a fair individualized determination that the detained individual needs to be detained, either because he poses a danger to others or a risk of flight.

This conclusion is further supported by the civil commitment cases. The Court has upheld civil commitment where an individual is found, after a fair adversarial proceeding, to be a danger to himself or others *and* to have a mental illness or abnormality that makes it "difficult, if not impossible, for the [dangerous] person to control his dangerous behavior."[40] In its most recent decision, *Kansas v. Crane*, the Court emphasized that the latter showing, namely that the mental abnormality makes it difficult to control the individual's dangerous behavior, is essential "lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment."[41]

The notion that civil commitment cannot serve the ends of "general deterrence" is an important corollary to the principle that civil detention demands an individualized showing of need. General deterrence might well

---

[39] The Court has been less than clear about the relation between the inquiry into whether a detention statute is "punitive" and the subsequent substantive due process inquiry, in which it weighs the government's interest against the individual's interest and asks whether the statute is sufficiently tailored to satisfy due process. It is likely that detention in the absence of any individualized justification for the detention would violate substantive due process because it would serve none of the recognized legitimate purposes of preventive detention, and would also be deemed "punitive" because in that setting detention would be "excessive" in light of the government's legitimate nonpunitive purposes. But it is not necessarily the case that these inquiries will always overlap. A detention statute might be invalid because it was designed to be punitive, even though a similar statute designed to serve nonpunitive purposes might be constitutional. And a detention statute that was concededly nonpunitive in design might nonetheless violate substantive due process under the balancing approach used in *Salerno*.

[40] Kansas v. Crane, 534 U.S. 407, 412 (2002) (quoting Kansas v. Hendricks, 521 U.S. 346, 358 (1997)) (internal quotation marks omitted).

[41] *Id.* To the same effect, the *Crane* Court stated that this requirement was designed "to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Id.* Similarly, in *Kansas v. Hendricks*, 521 U.S. at 358, the Court explained that the requirement of a harm-threatening mental illness "serve[s] to limit involuntary civil commitment to those who suffer from a volitional impairment rendering them dangerous beyond their control." And in *Foucha v. Louisiana*, 504 U.S. 71 (1992), the Court invalidated a Louisiana statute that authorized civil commitment on a finding of dangerousness without any finding of mental illness, stressing that "our present system . . . with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law." 504 U.S. at 83.

justify detention without individualized showings of need, for it might be sufficient for the government to maintain that the detention of a whole category of persons will have a general deterrent effect, without having to show that each individual's detention is in fact necessary for reasons specific to that individual. But if punishment, retribution, and general deterrence are off limits, then the only conceivable legitimate purposes for preventive detention are protection of the community from dangerous persons and avoiding flight where criminal or immigration proceedings are pending. And those purposes are furthered by detention only when individuals actually pose a risk of danger or flight.

The only exception to the due process insistence on individualized showings of need arises in war time. Under the Enemy Aliens Act, enacted in 1798, the President is authorized to detain, deport, or otherwise restrict the liberty of any person over fourteen years of age who is a citizen of the country with which we are at war.[42] The Supreme Court upheld it in 1948, in the immediate aftermath of World War II.[43] In *Ludecke v. Watkins*, a 5-4 majority offered little analysis for its conclusion, other than to note that the law was "almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights."[44] But of course the law invalidated in *Marbury v. Madison*[45] was also "almost as old as the Constitution," but that did not mean that it was constitutionally valid. Four justices vehemently dissented in *Ludecke*, three joining an opinion claiming that deportation of aliens, during peace or wartime, requires a hearing conforming to due process.[46] Interestingly, the Supreme Court's most recent characterization of *Ludecke* describes it as holding that "in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous,"[47] a description that at least arguably implies the need for some individualized finding. However, the point of the Enemy Aliens Act is that the President need make no individualized finding of danger or suspicion whatsoever, and could if he so chose detain all foreign nationals over fourteen from the country we are fighting, without regard to their dangerousness.

---

[42] 50 U.S.C. § 21 (1994).

[43] Ludecke v. Watkins, 335 U.S. 160, 171-73 (1948).

[44] *Id.* at 171.

[45] 5 U.S. (1 Cranch) 137, (1803).

[46] *Id.* at 184 (Douglas, J., dissenting). Justice Black also dissented, but on the ground that the enemy alien power did not survive the cessation of hostilities. *Id.* at 173 (Black, J., dissenting).

[47] United States v. Salerno, 481 U.S. 739, 748 (1987).

There is some reason to doubt whether *Ludecke* remains good law. The government employed strikingly similar reasoning in *Korematsu*, which is now roundly criticized, and not merely because it upheld the internment of *citizens* of Japanese descent. And *Ludecke* precedes the development of the Court's due process jurisprudence regarding preventive detention. Every case since that time has required as an irreducible minimum some individualized showing of need for detention, and perhaps such a showing would now be required in a declared war as well. But as we have not fought a declared war since World War II, the statute has not been invoked in the last half century, and thus its continuing validity has not been confronted. In any event, even if the Court were to reaffirm *Ludecke*, its reasoning would undoubtedly be confined to the unique setting of a declared war. The Court has been careful to note that *Ludecke* should be confined to the situation of "enemy aliens" during wartime, and should not be extended to general immigration matters not involving enemies during wartime.[48]

Thus, with the exception of enemy aliens during wartime, the Supreme Court has upheld civil detention only where it is justified by an individualized showing of need after a full and fair adversarial hearing. This principle is so basic that it brooks virtually no dissent. Yet as will be shown in Part II, recent immigration statutes, regulations, and practices suggest that in the immigration setting we have lost sight of these very basic principles. It is time to return immigration detention to the strictly preventive purposes to which it is constitutionally limited.

II. IMMIGRATION DETENTION AND DUE PROCESS

A. General Principles

The fact that the Constitution limits the imposition of custody in the bail and civil commitment settings does not necessarily mean that it constrains immigration detention to the same extent. The Supreme Court has frequently allowed the federal government to take actions against immigrants that it could not take against citizens, reasoning that the immigration power is an inherent aspect of sovereignty and that, therefore, Congress has "plenary power" over immigration.[49] But while immigration exceptionalism is well-documented, the

[48] Johnson v. Eisentrager, 339 U.S. 763, 772 (1950).

[49] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (finding that power to exclude aliens is "inherent in sovereignty . . . a power to be exercised exclusively by the political branches"); Fong Yue Ting v.

Supreme Court's approach to detention of immigrants residing in the United States has generally been consistent with the basic due process principles articulated in Part I. The Court has treated preventive detention in the immigration context much as it has treated other forms of civil detention. As in the criminal setting, the Court has permitted preventive detention in immigration proceedings only where there is an individualized evidentiary showing of need for the detention.[50] As in other civil settings, the Court has proscribed the punitive use of detention absent a criminal conviction.[51] The only exception concerns aliens seeking to enter the United States, whom the Court has treated as having no constitutional right to object to the procedures utilized to determine their admissibility.[52] And when the Court recently addressed an immigration detention issue, it dismissed the government's "plenary power" arguments.[53] The Court has long restricted plenary power deference to the *substantive* criteria governing admission and expulsion, and has insisted that the *procedures* Congress employs to carry out removal of persons from the United States must satisfy due process.[54]

The notion that ordinary due process principles apply to immigration detention dates back to the late 19th century. *Wong Wing v. United States*[55] involved a challenge to a federal statute designed to exclude and expel Chinese immigrants. In prior decisions involving the same statute, the Court had upheld Congress's power to exclude and expel aliens solely because they were from China, to exclude aliens solely through executive action without judicial review, and to require that Chinese residents prove their bona fides here with the testimony of a "credible white witness."[56] These decisions inaugurated the so-called "plenary power" doctrine, which provides that the immigration

---

United States, 149 U.S. 698, 706-07 (1893); *see generally* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE AND AMERICAN CITIZENSHIP (2002); STEPHEN LEGOMSKY, IMMIGRATION AND THE JUDICIARY 177-222 (1987).

50 Zadvydas v. Davis, 533 U.S. 678, 699 (2001); Carlson v. Landon, 342 U.S. 524, 544 (1952).

51 Wong Wing v. United States, 163 U.S. 228, 237 (1896).

52 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). I address this exception in Part II.B.5, *infra*.

53 *Zadvydas*, 533 U.S. at 695.

54 *See, e.g.*, Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903) (noting that deportation procedures must satisfy due process).

55 163 U.S. at 228.

56 Lem Moon Sing v. United States, 158 U.S. 538 (1895) (upholding Congress's power to exclude aliens without judicial review); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding deportation of Chinese immigrants and "one credible white witness" requirement); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (commonly known as *The Chinese Exclusion Case*) (upholding Congress's power to exclude on the basis of Chinese origin).

power is in large measure immune from constitutional constraint.[57] That doctrine has been limited in recent years, and it is far from clear that a Chinese exclusion law would be upheld today, much less a "one white witness" rule. But the "plenary power" doctrine was at its height in the late 19th century.

Yet at the same time, in *Wong Wing* the Court for the first time in its history declared an immigration statute unconstitutional. The statute imposed imprisonment at hard labor on Chinese aliens found in an administrative proceeding to be unlawfully present in the United States.[58] Without questioning its earlier decisions that Congress has broad plenary power to set conditions on foreign citizens' entry into and continued residence in the country, the Court unanimously held that imprisonment at hard labor was a punitive sanction that required adherence to the constitutional processes that attend criminal convictions, including indictment, trial by jury, and the like. The Court held that the statute violated the Fifth and Sixth Amendments, specifically including the due process clause.[59] In doing so, the Court took care to distinguish civil detention in aid of deportation, which it compared to detention without bail pending a criminal trial and would generally be valid, from detention or confiscation of property imposed as punishment, which it deemed invalid absent a "judicial trial to establish the guilt of the accused."[60] Thus, at the very height of deference to plenary immigration power, the Court in *Wong Wing* applied to immigration detention the same principle that it has subsequently applied in other civil detention cases: an absolute prohibition of the use of civil detention for punitive ends.

The preventive detention presaged by *Wong Wing*'s dicta was expressly upheld in 1952 in *Carlson v. Landon*.[61] In that case, four noncitizens facing deportation for their active membership in the Communist Party claimed that due process forbade their detention pending deportation absent evidence that

---

[57] *See, e.g., Fong Yue Ting*, 149 U.S. at 707 ("The right of a nation to expel or deport foreigners who have not been naturalized . . . rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

[58] Wong Wing v. United States, 163 U.S. 228, 233-34 (1896).

[59] *Id.* at 237-38.

[60] *Id.* at 237. Regarding civil detention, the Court stated:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.

Id. at 235.

[61] 342 U.S. 524 (1952).

they posed a risk of flight. The INS had not found them to be flight risks but to pose a danger to national security. By a 5-4 vote, the Court rejected the aliens' contentions, ruling that preventive detention is also permissible where there is evidence that an alien in pending proceedings may pose a danger to the community if released. As the Court put it, "[t]here is no denial of . . . due process . . . where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government."[62] The dissenters strongly questioned whether the record in fact supported a finding that the aliens posed any real danger, as the government had shown little more than that they were active members of the Communist Party. But while the majority certainly took a very generous view of the government's evidentiary showing, its legal holding is consistent with that of *Salerno* some thirty years later—just as due process permits the detention of persons facing criminal charges where there is evidence that they would pose a danger if released during the pendency of the proceedings, so due process permits preventive detention of aliens on those grounds in immigration proceedings. Thus, while *Carlson*, like *Wong Wing*, pre-dates the modern due process jurisprudence on civil detention, it is consistent with that jurisprudence insofar as it permits preventive detention only upon a showing that there is something—danger to the community or flight—to prevent.[63]

The Court's most recent foray into the question of immigration detention, *Zadvydas v. Davis*,[64] further confirms that due process principles apply with equal force to immigration and other civil detention. *Zadvydas* addressed the government's power to detain aliens who had been finally ordered deported (and had exhausted all appeals), but who could not be deported because no country would accept them. Many of these aliens, known in immigration circles as "lifers," faced indefinite detention, either because their country of origin refused to take them back, or because they were stateless and had no right to return to any country. They argued that their indefinite detention, where they could not be deported, served no legitimate governmental purpose, and therefore violated substantive due process. If immigration detention is designed to hold aliens where necessary in order to assure their removal from

---

[62] *Id.* at 542.

[63] The Supreme Court also upheld preventive detention of alien juveniles in *Reno v. Flores*, 507 U.S. 292 (1993), but in doing so it relied on the fact that juveniles lack a full-fledged liberty interest because they are "always in some form of custody," *id.* at 302, and that they had a "right to a hearing before an immigration judge" on their custody, *id.* at 309.

[64] 533 U.S. 678 (2001).

the country, once they cannot be removed the immigration purpose for the detention drops out.

The government responded by arguing that aliens who have been finally ordered deported are in a fundamentally different posture from other aliens in the United States. The government argued that the deportation order extinguished any legitimate right that they might have had to be at liberty in the United States, and that therefore their indefinite detention posed no due process concerns.[65] The U.S. Court of Appeals for the Fifth Circuit had essentially agreed. It reasoned that aliens finally ordered removed were in an analogous posture, for constitutional purposes, to aliens seeking initial entry. Both had no right to claim that they should be allowed into the United States, and therefore, the Fifth Circuit reasoned, no constitutional rights.[66]

The Supreme Court reversed. Finding that due process protects all aliens in the United States, even those here unlawfully and under final orders of deportation, the Court concluded that serious constitutional questions would be raised were the immigration law interpreted to authorize indefinite detention of aliens in Zadvydas's shoes.[67] To avoid those constitutional concerns, the Court read into the statute a presumptive six-month limit on detention of deportable aliens, ruling that if after six months there is no significant likelihood of removal in the foreseeable future, the alien must be released.[68] While the decision thus technically rests on statutory grounds, its strained statutory interpretation is plainly driven by constitutional concerns.[69]

In its discussion of the constitutional concerns presented, the Court applied to immigration detention the due process principles generated in civil detention cases outside the immigration context, without any suggestion that a different due process analysis should apply. Thus, the Court wrote:

---

[65] Brief for the Respondent at 35-36, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791).

[66] Zadvydas v. Underdown, 185 F.3d 279, 289 (5th Cir. 1999). The Ninth Circuit disagreed, ruling in a case that the Supreme Court considered in conjunction with *Zadvydas* that serious constitutional concerns would be raised by interpreting the immigration law to permit indefinite detention, and therefore read the statute to authorize detention for only a "reasonable time" beyond the initial 90-day period statutorily authorized for removal. Ma v. Reno, 208 F.3d 815, 830-31 (9th Cir. 2000).

[67] *Zadvydas*, 533 U.S. at 693-94.

[68] *Id.* at 701.

[69] The statute itself nowhere contains a six-month limit on detention. As dissenting Justice Kennedy maintained, not without reason, the Court "interpret[ed the] statute in obvious disregard of congressional intent [and] cur[ed] the resulting gap by writing a statutory amendment of its own . . . ." *Id.* at 705 (Kennedy, J., dissenting). That the Court strained so mightily only underscores the depth of its constitutional concerns.

> A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. See *Foucha v. Lousiana*, 504 U.S. 71, 80 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746 (1987), or, in certain special and "narrow" non-punitive "circumstances," *Foucha*, *supra* at 80, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).[70]

As the internal citations in this passage illustrate, immigration detention is not exceptional, but rather a form of civil detention subject to the same due process rules that apply to civil detention elsewhere.

The Court went on to discuss the two regulatory interests asserted by the government for detaining deportable aliens: "'ensuring the appearance of aliens at future immigration proceedings' and 'preventing danger to the community.'"[71] It dismissed the former interest as "weak or nonexistent where removal seems a remote possibility at best." It conceded that the interest in protecting the community continues, but noted that the Court has permitted detention of persons based on dangerousness "only when limited to specially dangerous individuals and subject to strong procedural protections," again citing the civil commitment cases.[72] The immigration detention provision, however, is not so limited, but applies to all deportable aliens, and contains few procedural protections.[73] The Court rejected the government's and the Fifth Circuit's analogy to entering aliens, reasoning that the Court had long drawn a sharp constitutional distinction between aliens outside our borders and those who are present, even unlawfully; the latter are plainly protected by due process, while "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."[74]

---

[70] *Id.* at 690.
[71] *Id.* (quoting government's brief).
[72] *Id.* at 691.
[73] *Id.* at 691-92.
[74] *Id.* at 693.

Significantly, even dissenting Justice Kennedy and Chief Justice Rehnquist intimated that immigration detention would be constitutional only where the alien either poses a risk of flight or a danger to the community. Justice Kennedy wrote that:

> [B]oth removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious. Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish. This accords with international views on detention of refugees and asylum seekers. It is neither arbitrary nor capricious to detain the aliens when necessary to avoid the risk of flight or danger to the community.[75]

Thus, Justice Kennedy suggests that detention of aliens, even inadmissible aliens, where not "necessary to avoid the risk of flight or danger to the community," would violate due process.

Litigation challenging immigration detention has often focused on whether a given immigrant's right to liberty is "fundamental," triggering strict scrutiny under substantive due process, or something less than fundamental, and therefore triggering less demanding review. For example, in reviewing the constitutionality of a 1996 law requiring mandatory detention of all aliens charged as deportable for certain criminal offenses, two courts of appeals have treated the right to liberty as a fundamental right,[76] while two others have not.[77] But significantly, all four courts unanimously concluded that the imposition of mandatory detention violated due process. The "fundamental right" debate is unnecessary, in my view, because the general principles enunciated in the cases above do not turn on levels of scrutiny, but apply across the board as the minimal requirements for any constitutional civil detention scheme. Relying on these principles, the Supreme Court has resolved most of its civil detention cases without specifying whether the right to physical liberty is fundamental.[78] And as Justice Kennedy's dissent in *Zadvydas* illustrates, even under relaxed scrutiny, preventive detention in the absence of evidence of flight risk or

---

[75] *Id.* at 721 (Kennedy, J., dissenting) (citations omitted).

[76] Hoang v. Comfort, 282 F.3d 1247, 1257 (10th Cir. 2002), *petition for cert. filed*, 70 U.S.L.W. 3698 (U.S. May 3, 2002) (No. 01-1616); Patel v. Zemski, 275 F.3d 299, 310 (3d Cir. 2001).

[77] Kim v. Ziglar, 276 F.3d 523, 530 (9th Cir. 2002), *cert. granted*, 122 S. Ct. 2696 (2002); Welch v. Ashcroft, 293 F.3d 213, 221 (4th Cir. 2002) (rejecting view that right to liberty pending a final removal order is a fundamental right); *id.* at 228 (Widener, J., concurring in the judgment).

[78] *See, e.g.*, Kansas v. Crane, 122 S. Ct. 867 (2002); *Zadvydas*, 533 U.S. at 678; Foucha v. Louisiana, 504 U.S. 71 (1992); United States v. Salerno, 481 U.S. 739, 750-51 (1987).

danger is arbitrary, capricious, and unconstitutional.[79] In this area of the law, levels of scrutiny are not particularly illuminating. I have sought to avoid that thicket, and instead have sought to identify the basic due process principles that the Court has applied to civil detention in all settings.

The immigration cases reviewed here illustrate that immigration detention is governed by the same due process principles that regulate other forms of civil preventive detention. Thus, immigration detention may not be used for punitive purposes and must be based on a showing by the government, in a fair adversarial proceeding, that the alien poses either a risk of flight or a danger to the community. These are fairly basic principles, yet as will be shown below, they call into question many recent developments in immigration law.

B. The Principles Applied

1. Mandatory Detention

Until relatively recently, immigration detention was generally consistent with the above principles. Prior to its amendment in 1996, the INA delegated what appeared to be open-ended discretion to the Attorney General to deny bail to aliens in deportation proceedings and for six months after their proceedings concluded with a final order of deportation.[80] However, the Board of Immigration Appeals (BIA) had long interpreted that statutory grant of discretion to conform to due process requirements, holding that aliens should not be detained unless they posed either a risk of flight or a danger to the national security.[81] The BIA did not explain its interpretation as driven by constitutional concerns, but absent those constitutional concerns, it is difficult to see what justification the BIA had for reading into an open-ended grant of discretion the specific requirements that the government establish flight risk or danger. Prior to 1996, virtually identical statutory language governed

---

[79] *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting).

[80] Before its amendment in 1996, 8 U.S.C. § 1252(a) (1994) provided that any alien taken into custody "pending a determination of deportability . . . may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . ; or (C) be released on conditional parole." 8 U.S.C. § 1252(a)(2) (1994). A companion provision governing detention once a deportation order became final and executable used virtually identical language. *Id.* § 1252(c).

[81] The Board interpreted 8 U.S.C. § 1252(a) (1994) to require release of the alien unless "he is a threat to the national security or . . . a poor bail risk." *In re* Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976) (citation omitted); *see also* O'Rourke v. Warden, 539 F. Supp. 1131, 1135 (S.D.N.Y. 1982) ("[A]n alien should be detained or required to post a bond, only if he is a threat to national security or is a poor bail risk.") (internal quotation marks omitted); *In re* Drysdale, 20 I. & N. Dec. 815, 817 (B.I.A. 1994) ("Once it is determined that an alien does not present a danger to the community or any bail risk, then no bond should be required.").

detention after a deportation order became executable, and therefore this provision also appeared to limit detention to situations where the alien proved a flight risk or a danger. Under that statute, it had long been the rule that—before or after a final order of deportation—aliens living here could be detained only where there was a "reasonable foundation" that they were either a flight risk or a danger to the community.[82]

In 1996, however, Congress amended the INA's detention provisions. It imposed mandatory detention on certain criminal aliens while they were in pending deportation proceedings,[83] and appeared to require mandatory detention of *all* aliens subject to executable removal orders, at least for ninety days.[84] Both of these provisions raise serious constitutional problems because they require detention even where there is no need for preventive detention, that is, where the alien is neither a risk of flight nor a danger to the community.

Four courts of appeals have struck down the provision imposing mandatory detention on criminal aliens, at least in some respect, and the Supreme Court has agreed to review the issue.[85] The appellate court decisions follow directly from *Zadvydas* and the Court's general jurisprudence on civil detention. If aliens finally ordered deported have a liberty interest in being free of physical custody, *a fortiori* aliens who have only been *charged* as deportable have at least as strong a liberty interest.[86] There is no doubt that Congress may authorize the detention of aliens pending removal proceedings who pose a risk of flight or a danger to the community. But mandatory detention provisions by

---

[82] *See* Bartholomeu v. District Director, 487 F. Supp. 315, 321 (D. Md. 1980) (holding that decision to detain alien after final order of deportation is entered is subject to habeas review for abuse of discretion, and that discretion is abused if the detention is "without reasonable foundation"); United States *ex rel.* Daniman v. Shaughnessy, 117 F. Supp. 388, 390 (S.D.N.Y. 1953) (ordering release of alien subject to final order of deportation where there was no reasonable foundation for the claim that he was a risk of flight); *see also* United States *ex rel.* Barbour v. District Director, 491 F.2d 573, 578 (5th Cir. 1974) (habeas should be granted where INS detains aliens "without reasonable foundation"); Danh v. Demore, 59 F. Supp. 2d 994, 1002 (N.D. Cal. 1999) ("Under an abuse of discretion standard, the Attorney General's decision to deny bond can always be reversed if it is arbitrary or erroneous."). *But cf.* Al Najjar v. Ashcroft, 186 F. Supp. 2d 1235, 1242 (S.D. Fla. 2002) (holding that 8 U.S.C. § 1252(c) (1995) gives Attorney General unfettered discretion to detain aliens under final deportation orders for six months, without regard to whether the alien poses a danger to the community or a flight risk).

[83] 8 U.S.C. § 1226(c) (2000).

[84] *Id.* § 1231(a)(1)(A).

[85] Kim v. Ziglar, 276 F.3d 523, 538-39 (9th Cir. 2002), *cert. granted sub nom.* Demore v. Kim, 122 S. Ct. 2696 (2002); Welch v. Ashcroft, 293 F.3d 213, 227 (4th Cir. 2002); Hoang v. Comfort, 282 F.3d 1247, 1260 (10th Cir. 2002); Patel v. Zemski, 275 F.3d 299, 314 (3d Cir. 2001); Radoncic v. Zemski, 28 Fed. Appx. 113, 116 (3d Cir. 2001).

[86] *See Kim*, 276 F.3d at 535.

definition impose preventive detention even where there is nothing to prevent. The fundamental flaw in the mandatory detention scheme is that it eliminates any individualized determination of whether a given alien poses a danger or flight risk.[87]

The government makes three arguments in defending mandatory detention. It first contends that *Zadvydas*'s due process analysis does not apply here, because in *Zadvydas*, the Court confronted the possibility of "indefinite" detention, whereas the provision imposing detention pending removal proceedings terminates when the removal order becomes final.[88] But the Court has applied the same general due process analysis to all preventive detention, including preventive detention that is likely to be much more short-lived than that imposed on aliens in removal proceedings. In *Salerno*, for example, the Bail Reform Act provided for civil detention only until the criminal trial, which under speedy trial requirements is generally a brief period. Detention while removal proceedings and appeals therefrom are pending can and often does last for years.[89]

Second, the government argues that it is more efficient to detain all criminal aliens, as many criminal aliens flee to avoid deportation. It cites a study finding that the INS failed to deport eighty-nine percent of non-detained aliens ordered deported, while the INS was able to remove almost ninety-four percent of detained aliens who were ordered deported.[90] But as one court put it, a ninety percent failure to appear rate does not justify imprisoning the ten percent of aliens "who would dutifully report to proceedings," because detaining the ten percent "furthers no government goal."[91] Bail hearings

---

[87] *Id.* at 533-34; *Hoang*, 282 F.3d at 1259-60.

[88] Pet. for Cert. at 13-14, Demore v. Kim, 122 S. Ct. 2696 (2002) (No. 01-1491). The detention itself does not terminate in most cases, because under a separate provision of 8 U.S.C. § 1231, aliens subject to final removal orders are subject to an automatic 90-day detention, and criminal aliens may be subject to further detention thereafter. 8 U.S.C. § 1231(a)(1)(A), (a)(6). The government's argument is that technically detention *pursuant to 8 U.S.C. § 1226(c)* is not indefinite.

[89] For example, Mazen Al Najjar spent three and one-half years detained pending final resolution of his deportation hearings. Al Najjar v. Ashcroft, 273 F.3d 1330, 1335 (11th Cir. 2001). Nasser Ahmed similarly spent three and one-half years in detention pending resolution of his deportation hearings. David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267, 273 (2000/2001). I represented both Mr. Al Najjar and Mr. Ahmed.

[90] Pet. for Cert. at 16, *DeMore* (No. 01-1491) (citing OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, INSPECTION REPORT, IMMIGRATION AND NATURALIZATION SERVICE, DEPORTATION OF ALIENS AFTER FINAL ORDERS HAVE BEEN ISSUED (1996), *available at* http://www.usdoj.gov/oig/i9603/ i9603.htm).

[91] Patel v. Zemski, 275 F.3d 299, 312 (3d Cir. 2001).

routinely assess risk of flight; where aliens pose no such risk, no legitimate purpose is served by their detention.

Finally, the government maintains that the Court should defer to Congress's plenary power over deportation.[92] But as illustrated above, the Court has not deferred on questions of the procedures used to effectuate deportation, even while it has deferred with respect to the substantive grounds for exclusion and deportation. Moreover, even granting the government plenary power over who may remain and who shall be removed, individualized hearings focused on danger and flight risk would fully permit the government to detain wherever necessary in aid of removal. The mandatory detention provision, by contrast, imposes detention even where detention is wholly *unnecessary* to removal. There is no reason to defer to such legislation, just as there was no reason to defer to Congress's imposition of imprisonment at hard labor in *Wong Wing*.

The 1996 provision imposing mandatory detention once an alien is ordered removed also offends due process for many of the same reasons. Title 8 of the U.S. Code § 1231(a)(2) somewhat contradictorily requires that *all* aliens ordered removed be detained during the ninety-day removal period, but further provides that "under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible . . . or deportable [on specified grounds]." The latter proviso seems to suggest, at least by negative implication, that detention during the removal period is not in fact mandatory for any but those aliens falling into the category who may not be released under any circumstance. But to the extent that this statute imposes mandatory detention on any aliens who pose neither a flight risk nor a danger, it furthers no legitimate immigration purpose, and is unconstitutional. While it may well be true that many aliens ordered removed would be likely to flee to avoid deportation, where an alien does not in fact pose that risk and does not present any danger to the community, his detention is not even rationally related to removal, for it is wholly unnecessary to effectuate the alien's departure.

One court has recently interpreted *Zadvydas* to authorize as a constitutional matter six months of post-removal order detention "regardless of whether the alien presents a danger to the community or a risk of flight."[93] But that

---

[92] Pet. for Cert. at 14-18, *DeMore* (No. 01-1491).

[93] Al Najjar v. Ashcroft, 186 F. Supp. 2d 1235, 1242 (S.D. Fla. 2002). Judge Williams, concurring in a mandatory detention case, similarly reasoned that *Zadvydas* adopted a presumption that six months of pre-

conclusion misreads *Zadvydas*'s imposition of a six-month *limit* on detention as a six-month *automatic authorization* of detention even where there is no need for detention. The Supreme Court in *Zadvydas* held that post-removal order detention is limited to six months, even where an alien poses a danger to the community. As the Court stated its holding, "[i]n our view, the statute, read in light of the Constitution's demands, *limits* an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States."[94]

Both of the aliens before the Court in *Zadvydas*—Kestutis Zadvydas and Kim Ho Ma—had been determined by the INS to require detention because they were dangerous.[95] Neither Zadvydas nor Ma challenged those determinations in the Supreme Court. Rather, they argued that, *even assuming they were dangerous*, they could not be detained indefinitely if they could not be removed. The Supreme Court agreed. But that conclusion in no way suggests that if Zadvydas and Ma were *not* dangerous or a flight risk, they could nonetheless be detained for six months.

In fact, the *Zadvydas* Court specifically directed that habeas courts reviewing the legality of any post-removal-order detention "should consider the risk of the alien's committing further crimes" and "the statute's basic purpose, namely, assuring the alien's presence at the moment of removal."[96] Similarly, as noted above, dissenting Justice Kennedy, writing for himself and Chief Justice Rehnquist, suggested that detention of aliens who posed neither a flight risk nor a danger would be arbitrary, capricious, and unconstitutional.[97]

---

removal detention is reasonable even without a showing that the alien poses a danger or flight risk. Welch v. Ashcroft, 293 F.3d 213, 234 (4th Cir. 2002) (Williams, J., concurring).

[94] Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (emphasis added). *See also* United States v. Oliveros, 275 F.3d 1299, 1308 n.6 (11th Cir. 2001) (noting that *Zadvydas* imposed a "presumptive limit" of six months on post-removal order detention).

[95] *See* Zadvydas v. Underdown, 185 F.3d 279, 284 n.2 (5th Cir. 1999) (noting that INS determined that Zadvydas was "a threat to security as well as a flight risk"); Ma v. Reno, 208 F.3d 815, 820 (9th Cir. 2000) (noting that the INS detained Ma because it could not conclude that Ma would "remain nonviolent" if released).

[96] *Zadvydas*, 533 U.S. 699.

[97] *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). The majority in *Zadvydas* did set a six month maximum as a presumptively reasonable period of detention, but it did so only with respect to aliens deemed dangerous or a risk of flight, in order to mitigate the "difficult judgments" involved in assessing "the Government's foreign policy judgments, including, for example the status of repatriation negotiations . . . ." *Id.* at 700. The "difficult judgments" to which the Supreme Court referred concerned the complexity of foreign negotiations over repatriation, not the entirely familiar judicial assessment of whether an individual poses a flight risk or a danger to the community, inquiries that the Court expressly directed habeas courts to

Under the Court's due process jurisprudence, any mandatory detention provision is likely to be invalid, because preventive detention at a minimum requires an individualized finding, after a fair hearing, that the individual poses a risk that warrants prevention. By definition, mandatory detention statutes deny individualized treatment and deny any hearing, much less a fair one. Because the government's legitimate interests in detention can be served by a process of individualized hearings, mandatory detention statutes should be invalid. As the decision in *Salerno* illustrates, mandatory preventive detention in the criminal setting would plainly violate due process; as the liberty interests and the government's interests are identical in the immigration setting, it should also violate due process there.

2. *The USA PATRIOT Act: Detention by Certification*

Section 412 of the USA PATRIOT Act also raises serious due process concerns. It gives the Attorney General new power to detain aliens without a hearing and without a showing that they pose a danger or a flight risk. He need only certify that he has "reasonable grounds to believe" that the alien is "described in" various anti-terrorism provisions of the INA, and the alien is then subject to potentially indefinite detention.[98] The INA's anti-terrorism provisions in turn include persons who are mere members of designated "terrorist organizations,"[99] persons who have supported only the lawful activities of such organizations,[100] and persons who have used, or threatened to use, any weapon with intent to endanger person or property.[101] Thus, the law defines as a terrorist subject to unilateral executive detention a permanent resident alien who the INS has reasonable grounds to believe threatened her husband with a kitchen knife in a domestic dispute. Surely all such persons do not pose a danger or flight risk necessitating preventive detention, but the USA PATRIOT Act empowers the Attorney General to detain them without any showing that they in fact pose a danger or flight risk.

The detention provision authorizes the INS to detain aliens without *any* charges whatsoever for seven days. This is a curious provision in several

undertake. *Zadvydas* merely sets a presumptive outside limit on how long the INS may detain aliens subject to final deportation orders *who pose a danger* but cannot be deported.

[98] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 § 412(a)(3) (2001) (amending 8 U.S.C. § 1226A(a) (Supp. 2002)).

[99] 8 U.S.C. § 1182(a)(3)(B)(i)(V) (2001).

[100] *See id.* §§ 1182(a)(3)(B)(vi), 1227(a)(4)(B).

[101] 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) (2002).

respects. First, since the Attorney General must have reasonable grounds to believe that an alien is inadmissible or deportable before he can invoke this authority, it is not clear what purpose is served by permitting the alien to be held without charges for seven days. The Attorney General ought to be able to charge the alien with the provision he has reasonable grounds to believe that the alien has violated. The only possible purpose of delaying such a charging document for seven days would be to keep him from an immigration judge who could review the legality of the detention and entertain a request for release on bond. But it is difficult to imagine any *legitimate* purpose that such a delay could further.

Moreover, the authority to detain for seven days appears to be directly contrary to the Supreme Court's holding that the Fourth Amendment requires that persons arrested be brought before a judge promptly, and presumptively within forty-eight hours, for a probable cause hearing.[102] The Fourth Amendment applies to persons living in the United States, including aliens,[103] and an arrest for immigration purposes is just as much a seizure as an arrest for criminal law purposes. While *County of Riverside* permits the government to show that a delay of more than forty-eight hours in getting a detainee before a judge was reasonable under extraordinary circumstances, the PATRIOT Act grants blanket authority to detain for seven days without charges anytime the Attorney General decides to certify. This aspect of the provision is almost certainly unconstitutional.

The PATRIOT Act does provide for habeas corpus review of the Attorney General's certification decision.[104] But the scope of that review will undoubtedly be the subject of considerable dispute. The government is almost certain to argue that the habeas court is restricted to asking whether the Attorney General had any basis for his belief, based solely on the evidence available to him at the time of certification, and that the court has no authority to ascertain whether in fact the alien falls within the specified grounds of inadmissibility or removability.[105] If courts accept that view, the alien would have no opportunity to present contradictory evidence, but would be limited to

---

[102] County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[103] INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); Rhoden v. United States, 55 F.3d 428 (9th Cir. 1995).

[104] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 § 412(a)(3) (2001) (amending 8 U.S.C. § 1226A(a) (Supp. 2002)).

[105] The government has successfully argued for such a deferential standard in connection with denials of admission. *See* Adams v. Baker, 909 F.2d 643 (1st Cir. 1990).

challenging the sufficiency of the government's record. Such a process would afford the alien no meaningful opportunity to be heard.

Even if the habeas corpus review is more searching, and the courts conclude that their task is to ascertain whether there are in fact "reasonable grounds to believe" that the alien is deportable or inadmissible on terrorism-related grounds, the statute does not require that the alien pose either a danger to the community or a risk of flight, the only grounds upon which preventive detention has ever been sustained.[106] The government might argue that any alien certified as deportable or inadmissible on terrorist grounds would by definition pose a danger to the community, but given the breadth of the INA's terrorism grounds, that view is not sustainable. A woman who once brandished a knife in a domestic dispute is not necessarily a danger to the community, nor is a person who has done nothing more than provide humanitarian aid to an organization that our government considers "terrorist."

The PATRIOT Act provision applies both during removal proceedings, which can last years, and after removal proceedings have concluded. Indeed, it appears to authorize indefinite detention of some aliens even where they have *prevailed* in their removal proceedings. It provides that detention shall be maintained "irrespective of . . . any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified . . . ."[107] But an alien who has been granted relief from removal may not be removed. An alien granted asylum, for example, has a legal right to live in the United States. At that point, the INS has no legitimate basis for detaining the individual, as detention certainly is not in aid of removal where removal itself is unauthorized.[108]

---

[106] The statute does require the Attorney General to make such a showing each time he seeks to extend the detention by six-month increments, but requires no such showing for the initial six-month period. *See* 8 U.S.C. § 1226A(a)(7) (Supp. 2002).

[107] 8 U.S.C. § 1226A(a)(2) (2001), *amended by* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 § 412 (2001).

[108] Zadvydas v. Davis, 533 U.S. 678, 702 (2001) (holding that the INS could not detain indefinitely even aliens finally determined to be deportable where there was no reasonable likelihood that they could by deported). The Court in *Zadvydas* reserved for another day the legality of indefinite detention of a deportable alien where applied "narrowly to 'a small segment of particularly dangerous individuals,' say suspected terrorists." *Id.* at 691 (citation omitted). But the PATRIOT Act's definition of who may be detained is not limited to a narrow, "small segment of dangerous individuals," as the *Zadvydas* Court contemplated, but applies to garden-variety criminals, barroom brawlers, and those who have supported no violent activity whatsoever, but have merely provided humanitarian support to a disfavored group.

The standard for the Attorney General's certification raises additional constitutional concerns. The Act authorizes potentially *indefinite* detention whenever the Attorney General has "reasonable grounds to believe" that an alien falls within one of the specified grounds of deportation or inadmissibility. 8 U.S.C.

3. Detention After Deportation or Voluntary Departure is Possible

As the stories that opened this article illustrate, since September 11 the INS has adopted a policy and practice of holding deportable aliens well beyond the time necessary to effectuate their departure simply because the FBI has not yet completed its investigation of them. Aliens who have agreed to leave and have been granted voluntary departure or a final order of removal, and who are fully ready to leave, have been detained for months longer, until the FBI has "cleared" them. This practice plainly violates due process, for once removal can be effected, any further custody cannot be said to be in aid of removal. The INS has no freestanding authority to detain persons, but may do so only in aid of removal. Custody maintained long after removal could be effected is not incident to the INS's removal of the alien, but incident to the FBI's investigation of the individual. But neither the FBI nor the INS has any authority to detain people simply for investigation.

The Constitution does not permit investigative detention. If the FBI suspects that an individual may be guilty of a crime, it cannot arrest her, investigate, and then release her only after it has convinced itself that she is innocent. Rather, the law presumes that she is innocent, and permits her arrest only if the FBI obtains objective information establishing probable cause to believe that she has in fact committed a crime.[109] Moreover, it must justify any arrest within forty-eight hours by making a probable cause showing before an independent judge.[110] Yet in the Justice Department's post-September 11 detention campaign, the government held many immigrants for months after they could have been deported, solely for investigative purposes, without establishing to anyone that there was probable cause to believe that they had committed a crime.

Such detention violates substantive due process because it furthers no legitimate government interest. It also violates procedural due process, be-

---

§ 1226A(a)(3). If that standard is interpreted as requiring anything less than probable cause, the constitutional minimum required for an arrest, it would likely be unconstitutional. Gerstein v. Pugh, 420 U.S. 103, 111 (1975). Moreover, even probable cause is not constitutionally sufficient to justify preventive pretrial detention absent a separate and additional finding that the individual poses either a risk of flight or a threat to the community. United States v. Salerno, 481 U.S. 739, 752-53 (1987).

[109] United States v. Watson, 423 U.S. 411, 424-25 (1976) (upholding arrest in public place on probable cause); *Gerstein*, 420 U.S. at 112 (requiring prompt probable cause hearing before independent judge for any arrest).

[110] County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (requiring government to bring detainee before independent judge for probable cause hearing within 48 hours of arrest, absent extraordinary circumstances).

cause the aliens were afforded no hearing on detention and were not determined to be dangerous in any proceeding.

4. Automatic Stays

It appears that in the wake of September 11, most immigration judges hearing cases of aliens detained in connection with the investigation of those attacks denied bond to the aliens before them. But apparently some immigration judges ruled that aliens should be released, finding insufficient evidence that the aliens posed a risk of flight or a threat to the community. On October 29, 2001, therefore, the Attorney General issued a new regulation authorizing INS District Directors—the "prosecutors" in removal proceedings —to effectively overrule, at least temporarily, an immigration judge who orders the release of an alien in proceedings before her.[111] The District Director can block the alien's release simply by filing an appeal to the BIA of the judge's release order. The appeal has the effect of automatically staying the release order while the matter is on appeal. It does so no matter how frivolous the appeal is, and without any requirement that the District Director meet the usual standards for a stay pending appeal, such as likelihood of success and irreparable harm.[112] Appeals of immigration custody decisions routinely take months and often more than a year to decide. Yet the automatic stay provision imposes no time limit on the BIA decision process.

Like the mandatory detention statute, the automatic stay provision authorizes the detention of aliens who pose no flight risk or danger to the community. Indeed, by definition it applies only where an immigration judge, having considered all the evidence, specifically finds that the alien can be released on bond because he poses no flight risk or danger warranting detention. Thus, it will result in the detention *only* of individuals found not to need preventive detention.

As with mandatory detention, the government has a legitimate interest here—immigration judges sometimes err, and the government has an interest in not letting an alien go free who in fact poses a threat or a flight risk, despite an immigration judge's finding to the contrary. But the INS was always able to seek stays pending appeal of release orders. In doing so, however, the INS had to show that it was likely to succeed on its appeal and would suffer

[111] 8 C.F.R. § 3.19(4)(i)(2) (2002). *See* Review of Custody Determinations, 66 Fed. Reg. 54909 (Oct. 31, 2001) (to be codified at 8 C.F.R. pt.3).

[112] *Id.*

irreparable harm in the meantime. Where it can make such a showing, a stay is warranted. But the automatic stay provision authorizes stays without any such showing, and even when it is undisputed that no such showing could be made. That power is clearly excessive in relation to the government's legitimate purposes, and therefore violates due process.

The government's notice regarding the regulatory amendment explained that the change was designed in part to avoid the necessity for last-minute expedited briefing where an alien has been ordered released and the government seeks to stay her release.[113] But that interest could plainly be met by authorizing a seven-day temporary stay of release orders merely for purposes of allowing the BIA to decide whether to grant a full stay pending appeal. Instead, the regulation takes the stay decision out of the hands of the judges altogether and gives it to the prosecutor who has by definition failed to persuade a judge in an adversary hearing that detention is justified.[114]

5. The Entering Aliens Exception

The above analysis addresses the rights of aliens who have entered the country, whether legally or not, and who as a result are indisputably protected by the Fifth Amendment's Due Process Clause. For at least a century, the Supreme Court has held that aliens who have entered the country are entitled to due process.[115] But the status of aliens outside our borders and seeking to enter has been seen as starkly different. The Supreme Court's discussion in *Zadvydas v. Davis* captures the prevailing view:

> The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States,

---

[113] Review of Custody Determinations, 66 Fed. Reg. 54909, 54911 (Oct. 31, 2001).

[114] One court has held the automatic stay provision unconstitutional, concluding that without a reasonable time frame on resolution of appeals, "the automatic stay suffers from the same constitutional infirmities as mandatory detention . . . ." Almonte-Vargas v. Elwood, 2002 U.S. Dist. LEXIS 12387, at *19 (E.D. Pa. June 28, 2002). In that case, the INS invoked the automatic stay to block release of a criminal alien who had been ordered released after an individualized bond hearing required by the Third Circuit's decision declaring mandatory detention of criminal aliens unconstitutional.

[115] *See, e.g.*, Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903).

> including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.[116]

The *Zadvydas* Court advanced this distinction between aliens inside and outside our borders as its rationale for rejecting the government's reliance on *Shaughnessy v. United States ex rel. Mezei*.[117] As noted above, in *Zadvydas* the Fifth Circuit had adopted the government's argument that an alien subject to a final order of deportation has essentially the same legal status as an alien seeking initial entry, and therefore is not constitutionally entitled to due process.[118] The Supreme Court invoked the "well established" distinction between aliens seeking to enter and aliens already here to dismiss that argument, finding that even aliens finally ordered deported retain a liberty interest in being free of physical custody that triggers due process protection.

But while the distinction between excludable and deportable aliens is certainly well established, there is good reason to question it, at least as regards detention. The argument rests on a right-privilege distinction that, whether or not it is justified with respect to entry, ought not fairly extend to involuntary custody. The rationale for the distinction is probably best illustrated by *United States ex rel. Knauff v. Shaughnessy*.[119] In that case, the Court upheld the exclusion of a German war bride on the basis of secret evidence. Relying on the right-privilege distinction, the Court reasoned that Knauff had no legal right to enter, and therefore was requesting a privilege. As a result, the Court reasoned, she could not challenge the procedures used to exclude her, for "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[120]

This decision is often loosely cited for the proposition that aliens outside our borders have no constitutional rights.[121] But upon closer reading, it stands for a much narrower proposition, one by no means unique to immigration law. The Court has often held that where a person has no right to a given benefit, he has no protected property or liberty interest in that benefit, and therefore due process does not restrict the procedures the government uses to allocate it. For

---

[116] 533 U.S. 678, 693 (2001) (internal citations omitted). *See generally* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v Davis*, 2001 SUP. CT. REV. 47.

[117] 345 U.S. 206 (1953).

[118] Zadvydas v. Underdown, 185 F.3d 279, 294-95 (5th Cir. 1999).

[119] 338 U.S. 537 (1950).

[120] *Id.* at 544.

[121] *See, e.g.*, Guzman v. Tippy, 130 F.3d 64, 66 (2d Cir. 1997).

this reason, inmates cannot object on due process grounds to denials of discretionary pardon or parole.[122] On this view, *Knauff* does not stand for the sweeping proposition that aliens beyond our borders have no rights, or even no due process rights, but establishes only the narrower claim that because non-citizens have no liberty or property interest in entry they have no right to object to the procedures used to exclude them. Indeed, the Court has subsequently described *Knauff* in precisely those terms, describing it as holding that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights *regarding his application* . . . ."[123]

The Court in *Mezei* relied almost exclusively on *Knauff*, but in so doing it appears to have extended that decision beyond its rationale. At issue in *Knauff* was simply the procedure used to determine her admissibility. But *Mezei* challenged both the denial of entry and his potentially indefinite detention. Virtually without analysis, the *Mezei* Court extended the right-privilege distinction that governed in *Knauff* to the distinct issue of indefinite detention. No country would take Mezei back, and he had been detained on Ellis Island for nearly two years before he obtained his release on a petition for habeas corpus.[124] The Court first found that, like Knauff, Mezei had no due process right to object to the procedures used to deny him entry. It then turned to what it euphemistically called the issue of Mezei's "continued exclusion on Ellis Island."[125] It characterized his indefinite detention as itself a gratuitous benefit, because the government could "keep entrants by sea aboard the vessel pending determination of their admissibility . . . ."[126] As such, it concluded that Mezei's "temporary harborage, an act of legislative grace, bestows no additional rights" upon him.[127] In effect, the Court used the "entry fiction" to

---

[122] *See, e.g.*, Hewitt v. Helms, 459 U.S. 460, 466 (1983); *see also* Olim v. Wakinekona, 461 U.S. 238, 248-49 (1983) (holding that state prison regulations did not create a liberty interest implicated by a transfer to another state); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 466-67 (1981) (ruling that neither a state statute empowering the Board of Pardons to commute sentences nor the Board's practice of commuting three-fourths of life sentences created a liberty interest requiring due process in review of applications for commutation); Meachum v. Fano, 427 U.S. 215, 229 (1976) (finding that prison inmates had no liberty interest implicated in being transferred to another prison); Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972) (holding that an untenured professor had no property interest in being rehired and therefore no due process objection to the procedures used to reach that decision); Tefel v. Reno, 180 F.3d 1286, 1300 (11th Cir. 1999) (finding that various actions taken by the INS to encourage aliens to apply for suspension of deportation did not create a liberty interest protected by due process).

[123] Landon v. Plasencia, 459 U.S. 21, 32 (1982) (emphasis added).

[124] United States *ex rel.* Shaughnessy v. Mezei, 195 F.2d 964, 965 (2d Cir. 1952).

[125] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953).

[126] *Id.*

[127] *Id.*

transform Mezei from an indefinitely detained alien with no place to go into an alien continuously knocking at the gate, challenging his denial of entry.[128]

It is one thing to say that due process does not apply to the denial of a gratuitous benefit; it is another matter entirely to say that due process does not apply when the government has deprived a human being of her physical liberty. As Justice Jackson stated in dissent in *Mezei*,

> Realistically, this man is incarcerated by a combination of forces which keep him as effectually as a prison, the dominant and proximate of these forces being the United States immigration authority. It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound.[129]

Mezei was confined because our government refused to parole him while his admissibility was being determined, and because no other country would accept him back. In the most literal sense, the government was depriving him of his liberty. In that setting, one need not ask whether the extension of a benefit gives rise to a statutorily created liberty or property interest, because

---

[128] Most courts have subsequently read *Mezei* to establish the broad proposition that excludable aliens have no due process rights vis-à-vis the decision to detain or parole them. *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441, 1449-50 (9th Cir. 1995) (rejecting argument that *Mezei* involved only exclusion, and finding that it upheld the legality of his detention); Jean v. Nelson, 727 F.2d 957, 969-70 (11th Cir. 1984) (concluding that under *Mezei*, aliens cannot claim equal protection rights under the Fifth Amendment); Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982) (holding that *Mezei* stands for the proposition that "indefinite detention of a permanently excluded alien deemed to be a security risk, who is refused entry to other countries, is not unlawful"). Many courts have, like the Court in *Mezei*, treated the question of detention versus release as involving only a privilege, not a right. *See, e.g.*, Gisbert v. U.S. Attorney General, 988 F.2d 1437, 1443 (5th Cir. 1993); Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir. 1986); Jeanty v. Bulger, 204 F. Supp. 2d 1366, 1375 (S.D. Fla. 2002) (finding that because "neither detention nor parole affects their legal status as excludable aliens," aliens requesting parole "have no constitutional rights with regard to their [parole] applications").

Some courts, however, have held that excludable aliens retain certain due process rights regarding their physical liberty. Thus, in *Ngo v. INS*, 192 F.3d 390, 399 (3d Cir. 1999), the Third Circuit held that excludable aliens who could not be removed were entitled, as a matter of due process, to periodic review of the necessity for their continued detention. The Tenth Circuit in *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981), held that as detention of excludable aliens becomes indefinite, it would be viewed as "impermissible punishment rather than detention pending deportation." On this view, excludable aliens at a minimum enjoy the *Wong Wing* due process right not to be punished without a criminal trial. And the Fifth Circuit has held that excludable aliens have a due process right to object to intentionally abusive detention conditions. Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987). The latter decisions in particular seem intuitively correct—surely if the government began shooting those who arrived at our shores without proper papers the courts would not find that the aliens had no due process right to object to such treatment. Thus, *Mezei* cannot literally mean that aliens outside our borders seeking entry have no constitutional right to assert regarding how they are treated in the admission process.

[129] *Mezei*, 345 U.S. at 220 (Jackson, J., dissenting).

the liberty interest in being free of physical custody derives directly from the Constitution itself. As the Supreme Court has stated, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . . ."[130] Whenever the government takes an individual into custody, it should have to comply with due process.

Moreover, the conclusion that due process extends to detention should not be limited by geographical concerns. When our government takes an individual into custody, it is imposing its will and authority on that person. It demands that the detained person remain in custody pursuant to its legal authority. But its legal authority is in turn constrained by the Constitution.[131] Thus, if the United States seeks to try a U.S. citizen abroad, it must extend constitutional protections to that person.[132] By the same token, outside of wartime, when separate rules may apply to citizens and aliens alike,[133] where the federal government imposes its authority on a noncitizen by depriving her of liberty, it must afford her due process, since the protections of the due process clause extend to all persons.

The Supreme Court's conclusion that Mezei's "temporary harborage" at Ellis Island did not give him any "additional rights" therefore missed the point. It is reasonable to decline to allow such harborage to act as a bootstrap, giving the alien rights with respect to *entry* that he would not otherwise enjoy if stopped at the border and turned away. But it does not follow that he has no

---

[130] Foucha v. Louisiana, 504 U.S. 71, 80 (1992). *See also* Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (quoting *Foucha*). As a result, "*commitment for any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Foucha*, 504 U.S. at 80 (emphasis added); *see also* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("Without doubt, [liberty] denotes . . . freedom from bodily restraint . . . .").

[131] GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 108-17 (1996) (arguing for "mutuality of obligation" theory of constitutional rights, extending rights where we choose to impose federal legal obligations).

[132] Reid v. Covert, 354 U.S. 1, 5 (1957) (holding that civilians cannot be tried in military courts that lack constitutional protections associated with criminal trial).

[133] Johnson v. Eisentrager, 339 U.S. 763, 772 (1950) (holding that enemy aliens captured on the battlefield abroad cannot seek habeas corpus claiming violations of constitutional rights, but limiting its holding to "enemy aliens" during wartime, noting that power to detain enemy aliens is "an incident of war and not . . . an incident of alienage"); *Ex parte* Quirin, 317 U.S. 1 (1942) (upholding use of military tribunal to try foreign nationals and U.S. citizen accused of fighting for Germany and violating the laws of war during World War II).

right to object to the process *by which he was deprived of his liberty once stopped.*[134]

In its brief to the Supreme Court in *Mezei*, the government argued that the issue of whether due process limited Mezei's detention was indistinguishable from whether due process limited his exclusion, because an order releasing him would for all practical purposes constitute an entry.[135] But under the "entry fiction" doctrine, an alien granted temporary "parole" into the United States at large is treated as if he were still at the border for purposes of assessing his ultimate admissibility.[136] Thus, whether an alien is literally outside the country, detained in the country, or at large in the country has no legal effect on his admission if he has not "entered." Given the existence of that fiction, ordering an alien released on parole is not equivalent to affording him entry. Although temporarily free of custody, he has no legal right to remain in the United States, and as soon as he can be excluded he will be. In addition, an alien released on parole may be subjected to reasonable release conditions to meet the government's concerns, while an admitted alien is subject only to the general conditions applicable to all aliens here. Thus, the government's and the Court's use of the entry fiction is unpersuasive as a rationale for denying due process protection to an alien whom the government decides to hold in its custody, because releasing the alien is no more a legal "entry" than is holding him in custody on U.S. soil.

This is not to say that there are no constitutional differences between the detention of an alien stopped at the border and the detention of an alien residing in the United States. First, where an entering alien is free to return to the country from which she came, it might be more justifiable to conclude that the government has not deprived her of her liberty when it holds her pending a

---

[134] Justice Holmes made exactly this point in a case involving detention of a person who claimed that he was a U.S. citizen but whom the government claimed was subject to exclusion:

> It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case. But on the question whether he is wrongly imprisoned we must look to the actual facts. *De facto* he is locked up until carried out of the country against his will.

Chin Yow v. United States, 208 U.S. 8, 12-13 (1908).

[135] *See* Brief for Petitioner at 3 n.2, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 208 (1953) (No. 139) ("Although this proceeding arises on a petition for habeas corpus, it actually involves the right of an alien to temporary entry into the United States in the face of a determination by the Attorney General that his entry would impair the public interest. The order of the district court does not merely grant the respondent his freedom; it gives him a privilege he never possessed.").

[136] *Mezei*, 345 U.S. at 215.

determination on her admission. In that setting, the alien arguably has the "keys to her cell," and may effect her release at any time by agreeing to return to her country of origin. Accordingly, one might well conclude that the *government* is not responsible for her detention.[137] But where, as in Mezei's case, an entering alien has no other country to return to, or where a refugee is seeking asylum from her country of origin, she cannot return, and therefore has no "keys to her cell." Second, in the balancing approach called for by modern due process jurisprudence,[138] an initial entrant's lack of ties to the community here, and the government's difficulty in obtaining substantial information about initial entrants from abroad, might combine to warrant less substantial procedural safeguards than would be required for detention of aliens residing here. But when the government imposes detention, it should not be able to sidestep the question of due process altogether by asserting that the alien has no liberty interests at stake.

Thus, the exception for entering aliens announced in dicta in *Zadvydas* is founded on a false conflation of the issues of entry and detention. Where the government seeks not merely to deny the benefit of entry but to hold an alien against her will in custody, the alien's liberty has been deprived, and due process requires that the detention be justified by a showing, developed in a fair proceeding, that the alien's detention is necessary to effectuate the government's interest in expelling her.

CONCLUSION

The due process constraints on civil detention are relatively straightforward. Civil detention cannot be punitive. It must be accompanied by a hearing in which the person subject to detention is afforded a meaningful opportunity to be heard. And it must be justified by a showing that the detained individual is in a pending criminal or immigration proceeding and poses a risk of flight or danger to the community, or is a danger in part because of a mental disability that impairs her ability to control her dangerous conduct.

---

[137] The same cannot be said of an alien in deportation proceedings, as he has a legal right to remain here while he pursues all of his appeals, and generally may not be deported until those appeals are fully exhausted or waived.

[138] *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (ruling that procedural due process analysis must weigh the individual's interest, the government's interest, and the cost and efficacy of further procedural safeguards); Landon v. Plasencia, 459 U.S. 21, 34 (1982) (finding that courts must apply *Mathews* balancing test to procedural due process claims regarding expulsion of aliens living here).

These are such basic principles—applicable to all nonenemy alien civil detention settings, no matter what level of scrutiny is applied—that it is surprising how often they have been transgressed since the 1996 amendments to the immigration law. It is as if in the anti-immigrant fervor that produced the 1996 immigration laws we collectively lost our moorings and forgot that immigration detention is preventive detention, and as such is warranted only when there is actually something to prevent. As this Article has demonstrated, a wide range of immigration initiatives since 1996, including many post-September 11 measures, suggest that the government has lost sight of that basic proposition.

Defenders of these measures have typically made three errors. First, and most importantly, they have confused the power to deport with the power to detain. The mere fact that someone has allegedly (or even concededly) violated the immigration law's conditions for continued residence may warrant placing her in deportation proceedings and deporting her if she is not eligible for any of the many forms of relief from removal. But it does not authorize *detention* unless detention is necessary because the alien also poses either a danger to the community or a flight risk.

Second, defenders have relied on the right-privilege distinction and plenary power doctrine to argue that immigration detention is subject at most to very deferential review. But as illustrated above, the Supreme Court has applied the same constitutional analysis to immigration detention and to other forms of civil detention. With the exception of *Mezei*, where the Court conflated exclusion and detention and found no due process right at all, the Court has imposed the same basic due process requirements on immigration detention that it imposes on other civil detention.

Third, defenders have argued that detention of entering aliens raises no constitutional concerns, relying on the Court's decision in *Mezei*. But that decision wrongly conflated the issues of excludability and detention. Aliens at the border are no less "persons" than aliens who have managed to enter the country, and when federal officials impose our legal obligations on them by locking them up, they should be bound by due process. While the due process calculus might differ somewhat with respect to a first-time entrant and a long-time resident, one cannot avoid due process inquiry altogether by adopting a fiction that no liberty has been infringed.

The notion that due process protects persons incarcerated by the government is hardly radical. Nor are the corollary propositions that absent a

criminal trial, the government cannot lock people up without a legitimate, nonpunitive reason, established in an individualized hearing. The fact that these propositions have such radical consequences for immigration detention as it is practiced today only underscores how radically disrespectful of due process the government's exercise of immigration authority has become. There are obvious reasons for these developments—the 1996 immigration reforms illustrated that the politics of immigration and crime is a dangerous mix, and the fear of another terrorist attack has led the government to exploit immigration law to the fullest. But precisely because our fears and our fervor are so intense, it is critical that we hue to the basic due process principles that have guided civil detention in the past. Immigration exceptionalism should find its limit at the point of detention.