# DISCRETIONARY IMMIGRATION DETENTION

MARY HOLPER†

ABSTRACT

*Immigration detainees challenging immigration judges' bond decisions are hitting a jurisdictional wall—federal courts are given license to ignore errors that immigration judges make in determining dangerousness and flight risk, because such decisions can be categorized as "discretionary." This license comes from a 1996 amendment to the Immigration and Nationality Act that removed federal courts' jurisdiction over discretionary decisions to detain for immigration purposes. Detainees' important liberty interests are left to the whims of a single immigration judge, who determines bond under conditions representing an implicit bias minefield.*

*This Article explores the justifications for unreviewable discretion and for stripping federal court jurisdiction over immigration decisions and argues that none of these justifications are applicable when an immigration judge decides whether to detain a person pending their removal proceedings. The Article also suggests manners by which the judiciary can limit the reach of this jurisdiction-stripping statute to ensure that immigration detainees will not face an unclimbable wall when seeking federal court review of their bond decisions.*

TABLE OF CONTENTS

Introduction ..... 962
I. Giving Immigration Judges Carte Blanche Over Liberty Decisions ..... 968
A. Unreviewable Discretion to Detain: A Case Example .... 969
B. The Immigration Bond System: An Implicit Bias Minefield ..... 972



† Associate Clinical Professor and Associate Dean for Experiential Learning, Boston College Law School. I would like to thank Dan Kanstroom, Bijal Shah, Reena Parikh, Diane Ring, Jenna Cobb, David Olson, Heather Arroyo, Beverly Moran, Felipe Cole, Frank Garcia, and the participants in the Cardozo Law School Immigration Enforcement Workshop for their feedback on drafts of this Article. Thanks also to Ben Zimetbaum and Julianna Marandola for their excellent research assistance, and Dean Lienau for her research support.

II. The 1996 Merging of Two Themes: Jurisdiction Stripping and Detention ..... 982
A. 1996: Fervor for Detention Meets Jurisdiction Stripping ..... 983
B. Litigation Challenging 1996 Jurisdiction-Stripping Laws ..... 987
C. Litigation Challenges to 1996 Detention Laws and the Untested Limits of 8 U.S.C. § 1226(e) ..... 992
III. The Justifications Underlying Unreviewable Discretion Do Not Apply To Detention Decisions ..... 996
A. The Origins of Discretion in Immigration Law ..... 997
B. Separation of Functions ..... 1003
C. "No Law to Apply" ..... 1010
D. Immigration Relief as a "Matter of Grace" ..... 1012
E. Judicial Review as "Stealing Time" in the United States, "Wasting" Judicial Resources ..... 1021
IV. Judicial Solutions to Limit the Scope of 8 U.S.C. § 1226(e) ..... 1026
A. Bond Decisions Are Mixed Questions of Law and Fact ..... 1026
B. Suspension Clause ..... 1043
Conclusion ..... 1051

## INTRODUCTION

Immigration detainees challenging immigration judges' bond decisions are hitting a jurisdictional wall—federal courts are given license to ignore errors that immigration judges make in determining dangerousness and flight risk because such decisions are categorized as "discretionary." This license comes from a 1996 amendment to the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(e), which removed federal courts' jurisdiction over discretionary decisions to detain for immigration purposes.[1] Detainees' important liberty interests are left to the whims of a single immigration judge, who determines bond under conditions creating an "implicit bias minefield."[2] But discretion is undefined in the law, so it is "a dustbin of a jurisprudential category: the place where . . . complicated legal

1. *See* 8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment [governing detention pending removal proceedings] . . . shall not be subject to review. No court may set aside any . . . decision . . . by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.").

2. *See infra* Part I.B.

questions go to die."[3] This Article seeks to rescue immigration detention decisions from the jurisprudential dustbin of unreviewability.

This Article is timely because the number of immigration detainees and immigration judges' bond denials is on the rise under the Biden administration.[4] And President Donald Trump intends to expand immigration detention; he set forth a plan for large-scale detentions and deportations at the start of his second presidency, which includes the construction of a mass detention camp.[5] More detainees in the system means more detainees who will seek bond while they fight against deportation.[6] Federal courts will likely see more habeas corpus petitions challenging immigration judges' bond denials because they are the only actors in the immigration system who have sufficient independence from the executive branch to question a detention decision.[7] Detention litigation has answered whether certain detainees have the right to a bond hearing and what procedural protections those bond hearings must contain.[8] Courts must now confront the meaning and scope of 8 U.S.C. § 1226(e). What is more, challenges will arrive more frequently via individual habeas corpus petitions instead of class actions due to a 2022 Supreme Court decision that limits the

3. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 240 (2007) [hereinafter KANSTROOM, DEPORTATION NATION].

4. *See ICE Detainees*, TRAC IMMIGR., https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html [https://perma.cc/KQE8-9NWU] (showing the weekly total number of immigration detainees, which has increased since the COVID-19 pandemic and, as of August 13, 2023, shows 30,184 people in immigration detention); *Detained Immigrants Seeking Release on Bond Have Widely Different Outcomes – Overall Bond Rates Have Dropped*, TRAC IMMIGR. (July 19, 2023), https://trac.syr.edu/reports/722 [https://perma.cc/6FUA-TC4V] (demonstrating that bond was denied in 69 percent of hearings during the Biden administration, which is significantly higher than bond denial rates under prior presidential administrations).

5. *See* Ahilan Arulanantham, *Trump's Immigration Agenda: A Closer Look*, JUST SEC. (June 26, 2024), https://www.justsecurity.org/97146/trumps-immigration-agenda [https://perma.cc/8UUA-5Q2J] (describing the Trump campaign's promises to jail and deport approximately 11 million people living in the United States without status and building mass detention camps while they await deportation).

6. *See Detained Immigrants Seeking Release on Bond Have Widely Different Outcomes*, *supra* note 4 (describing how a reduction in the number of detainees leads to fewer requests for bond in immigration court).

7. *See* Arulanantham, *supra* note 5 (recommending that those who wish to challenge the Trump enforcement agenda must focus on "*which actors* within our system will retain sufficient autonomy to take those assertions [about the illegality of President Trump's enforcement actions] seriously"); *infra* notes 84–91, 266–70 (describing why immigration judges and the Board of Immigration Appeals are not independent adjudicators).

8. *See infra* Part II.C.

availability of class actions as a vehicle for challenging immigration detention.[9] Thus, numerous federal district courts around the country will have to grapple with 8 U.S.C. § 1226(e).

Ask Amaury Reyes-Batista.[10] A long-term permanent resident detained by U.S. Immigration and Customs Enforcement ("ICE") throughout the COVID-19 pandemic, he benefited from prior class action litigation that ensured certain procedural protections in immigration bond hearings.[11] He argued to the federal district court that the immigration judge did not apply the procedural protections guaranteed to him as a class member, leaving him carrying the evidentiary burden at his bond hearing before the immigration judge.[12] The district court met his arguments with a simple citation: 8 U.S.C. § 1226(e).[13] His petition was dismissed, and he remained in detention throughout the pandemic, notwithstanding his significant liberty interests.[14]

---

9. *See infra* Part II.C.

10. The details of Mr. Reyes Batista's habeas litigation efforts are described in an article published by his student attorney, Chelsea Eddy. *See generally* Chelsea Eddy, *Bond, Jinxed Bond: Advocating for the Repeal of the Statutory Ban on Federal Re-view of Discretionary Bond Determinations Under 8 U.S.C. § 1226(e)*, 63 B.C. L. REV. 347 (2022). This Author supervised Mr. Reyes Batista's litigation in federal district court, as he was a client of the Boston College Immigration Clinic.

11. *Id.* at 347–48; Brito v. Barr, 415 F. Supp. 3d 258, 271 (D. Mass. 2019), *aff'd in part, vacated in part*, Brito v. Garland, 22 F.4th 240, 256–57 (1st Cir. 2021) (holding in a class action that in immigration bond hearings the government must bear the burden of proving dangerousness by clear and convincing evidence and flight risk by preponderance of the evidence, the immigration judge must consider alternatives to detention, and the immigration judge must consider the detainee's ability to pay).

12. In bond hearings, immigration judges decide whether a noncitizen is eligible for release during removal hearings. *See* Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 169 (2016). The noncitizen may appeal the immigration judge's bond denial to the Board of Immigration Appeals but has no further appeal to a federal court. *See id.* at 171. The noncitizen can pursue a habeas corpus petition in federal district court to challenge the legality of their continued immigration detention and argue that the immigration judge did not apply constitutionally adequate procedures at the bond hearing. *See id.*; *infra* Part II.C (describing habeas litigation seeking procedural protections in bond hearings). Should detention become unreasonably prolonged, the noncitizen can file a habeas corpus petition in federal district court to challenge their continued detention without bond. *See infra* Part II.C (describing habeas litigation seeking bond hearings for those in mandatory immigration detention). If a noncitizen is in mandatory detention—usually due to a criminal conviction—the immigration judge does not have jurisdiction to decide bond. *See* 8 U.S.C. § 1226(c).

13. *See* Memorandum and Order at 2, Reyes Batista v. Souza, No. 20-12013-PBS, (D. Mass. Nov. 23, 2020).

14. Eddy, *supra* note 10, at 349.

This Article argues that the justifications for giving agencies unreviewable discretion are inapplicable when an immigration judge decides whether to detain a person pending their removal proceedings. This Article addresses four specific justifications. The first justification for refusing court review is separation of powers. This justification arises most commonly in prosecutorial discretion, or forbearance, decisions made by an agency. According to this theory, the agency must apply a complex set of balancing factors, including whether the agency has the resources to undertake such action. Courts have no role in these decisions because there must be a separation of powers between the executive and judicial branches.[15] This rationale only works, however, if immigration judges *are* prosecutors. Immigration judges serve a judicial function, not a prosecutorial function. Although immigration judges work for the attorney general, immigration judges, by regulation, should be independent adjudicators notwithstanding their placement in the executive branch.[16] Thus, immigration judges are not serving a traditional executive branch function of deciding whether the enforcement agency's resources should be utilized against an individual person.[17]

A second justification for unreviewable discretion, which also arises in the prosecutorial discretion decisions made by an agency, is that courts have no role in prosecutorial discretion decisions because there is no set of standards by which an agency's decision can be judged. In the words of the Supreme Court, there is "no law to apply."[18] Yet, when an immigration judge makes a decision in a bond hearing about whether someone should remain in detention for the remainder of the removal proceedings, there are plenty of standards for the immigration judge to apply in the form of precedential case law by the

15. *See infra* Part III.A.

16. *See* 8 C.F.R. § 1003.10(b) ("In deciding the individual cases before them, . . . immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."); *see also* U.S. DEP'T JUST., EXEC. OFF. FOR IMMIGR. REV., MYTHS VS FACTS ABOUT IMMIGRATION PROCEEDINGS 1 (2020) [hereinafter MYTHS VS FACTS], https://immpolicytracking.org/media/documents/2020.12.28_EOIR_factsheet_on_Myths_vs._Facts_About_Immigration_Proceedings.pdf [https://perma.cc/VT87-CN82] (describing as a "myth" that "Immigration Judges and Appellate Immigration Judges are politically pressured or otherwise directed to adjudicate cases to obtain a certain outcome" and citing to the regulatory language that requires immigration adjudicators to exercise their judgment independently).

17. *See infra* Part III.B.

18. *See* Heckler v. Chaney, 470 U.S. 821, 830 (1985).

Board of Immigration Appeals—many of which are borrowed from the criminal law pretrial detention context.

A third justification for removing judicial review of immigration judges' discretionary decisions relates to the exercise of discretion in deciding relief from removal. Because such relief has been seen as a "matter of grace," and not a right, the exercise of discretion is unreviewable.[19] Freedom from imprisonment, however, is not an act of legislative grace. Rather, freedom from imprisonment comports with the common law presumption of liberty. As such, this "matter of grace" justification for unreviewable discretion, though questionable in the relief from removal context, is entirely inapplicable when the question to be resolved is detention, not relief from removal.

A fourth justification for removing judicial review is that noncitizens "steal" time in the United States by exercising what many view as frivolous appeals, which lead to an endless back-and-forth between the federal judiciary and the agency.[20] Here again, however, importing this justification into federal court review of detention decisions is illogical. Review of detention pending removal proceedings buys a detainee no additional time beyond the removal proceedings themselves, as the basis for the detention challenge in federal court becomes moot once a noncitizen has either won the removal case and achieved release or lost the removal case and is released from detention to the home country.

This Article proposes two judicial solutions to limit the reach of 8 U.S.C. § 1226(e). Courts should interpret immigration judges' bond decisions as mixed questions of law and fact, which the Supreme Court has held to be reviewable by federal courts under a separate immigration jurisdiction-stripping statute. In bond hearings, immigration judges take proffers of evidence to find facts and apply established case law to those facts. This is primarily legal work, and as such, can and should be reviewed by courts. Such an interpretation engages federal courts in a dialogue with the agency around bond standards because federal courts will opine on whether judges are correctly applying Board and federal court decisions governing bond hearings. This interpretation also encourages deliberative immigration judge decisions regarding this important liberty interest, because immigration judges must justify their bond decisions to a federal judge. Alternatively, courts should read 8 U.S.C. § 1226(e) to avoid a

19. *See infra* Part III.D.

20. *See infra* Part III.D.

Suspension Clause violation, which would occur if executive branch officers detained a person for removal without any judicial inquiry into the lawfulness of the detention.

Prior scholarship on discretion in immigration law falls into two categories. First, scholars have explored the exercise of prosecutorial discretion in decisions by the immigration enforcement agencies not to enforce the law against certain persons[21]—what the Supreme Court has called "forbearance."[22] Second, scholars have explored the exercise of discretion when immigration judges decide whether to grant or deny a noncitizen's application for relief from removal.[23] The focal point in this second category has been on the 1996 bars to judicial review of removal orders.[24] The question of unreviewable discretion to detain, however, has been understudied.[25]

---

21. *See, e.g.*, Peter Margulies, *Immigration Law's Boundary Problem: Determining the Scope of Executive Discretion*, 74 HASTINGS L.J. 679, 688–708 (2023); Shalini Ray, *Abdication Through Enforcement*, 96 IND. L.J. 1325, 1342–48 (2021); Nicole Hallett, *Rethinking Prosecutorial Discretion in Immigration Enforcement*, 42 CARDOZO L. REV. 1765, 1768 (2021); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 490–513 (2017); SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 7–13 (2015) [hereinafter SIVAPRASAD WADHIA, BEYOND DEPORTATION]; Adam Cox & Cristina Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 107–13 (2015) [hereinafter Cox & Rodriguez, *Redux*]; HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 129 (2014) [hereinafter MOTOMURA, OUTSIDE THE LAW]; Adam Cox & Cristina Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460–65 (2009) [hereinafter Cox & Rodriguez, *President and Immigration Law*]; Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 243–44 (2010) [hereinafter Sivaprasad Wadhia, *Prosecutorial Discretion*].

22. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 18 (2020).

23. *See, e.g.*, Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57, 79–87 (2009); KANSTROOM, DEPORTATION NATION, *supra* note 3, at 240; Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y. L. SCH. L. REV. 161, 180–89, 191–96 (2006) [hereinafter Kanstroom, *The Better Part of Valor*]; Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 621–25 (2006) [hereinafter Neuman, *Discretionary Deportation*]; Daniel Kanstroom, St. Cyr *or Insincere: The Strange Quality of a Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 423–30 (2002) [hereinafter Kanstroom, St. Cyr *or Insincere*]; Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 751–59 (1997) [hereinafter Kanstroom, *Surrounding the Hole in the Doughnut*].

24. *See, e.g.*, Sharpless, *supra* note 23, at 62–65; KANSTROOM, DEPORTATION NATION, *supra* note 3, at 229–41; Kanstroom, *The Better Part of Valor*, *supra* note 23, at 180–96; Neuman, *Discretionary Deportation*, *supra* note 23, at 625–33.

25. The scholarship discussing the bars on judicial review of discretionary relief from removal has mentioned, but has not engaged in any separate discussion of, discretionary detention decisions because its focus has been primarily on discretionary deportation decisions. *See, e.g.*,

This Article proceeds in four parts. Part I discusses the U.S. Court of Appeals for the Ninth Circuit's 2022 decision in *Martinez v. Clark*,[26] a case that demonstrates how 8 U.S.C. § 1226(e) gives immigration judges carte blanche over a key decision—the noncitizen's liberty—that is often outcome determinative for the noncitizen's ability to fight against deportation.[27] Although this decision was vacated by the Supreme Court and is under further review by the Ninth Circuit, it demonstrates how the judiciary can read 8 U.S.C. § 1226(e) as a license to treat immigration judge bond hearings as law-free zones.[28] Part II discusses how two important themes of immigration law—jurisdiction stripping and detention—merged with the passage of 8 U.S.C. § 1226(e) in 1996.[29] Part II also gives an overview of the key Supreme Court decisions regarding the 1996 immigration laws stripping federal courts of jurisdiction when reviewing removal orders and explains why appellate courts have not extensively examined 8 U.S.C. § 1226(e).[30] Part III examines justifications for agencies' unreviewable discretion and argues that these reasons are inapplicable when an immigration judge denies bond.[31] Part IV offers judicial solutions to limit the scope of 8 U.S.C. § 1226(e) to ensure that this jurisdictional wall is not unclimbable for immigration detainees.[32]

## I. GIVING IMMIGRATION JUDGES CARTE BLANCHE OVER LIBERTY DECISIONS

This Part begins with a recent decision by the Ninth Circuit that illustrates how 8 U.S.C. § 1226(e) gives the judiciary license to ignore many errors that arise in an immigration judge's bond decision. The Ninth Circuit's decision has been vacated and is under further review

Kanstroom, *Better Part of Valor*, *supra* note 23, at 180–89, 191–96; Neuman, *Discretionary Deportation*, *supra* note 23, at 621–25. *But see* Eddy, *supra* note 10, at 368–71, 390–406 (arguing that Congress should repeal 8 U.S.C. § 1226(e), which prohibits federal review of custody decisions, to create a fair bond process and reduce the number of detainees languishing in detention).

26. Martinez v. Clark, 36 F.4th 1219 (9th Cir. 2022).
27. *See infra* notes 35–116 and accompanying text.
28. *See infra* notes 63–115 and accompanying text.
29. *See infra* notes 117–201 and accompanying text.
30. *See infra* notes 141–96 and accompanying text.
31. *See infra* notes 202–378 and accompanying text.
32. *See infra* notes 379–528 and accompanying text.

in light of intervening Supreme Court case law.[33] The troubling aspects of this now-vacated opinion are worth exploring, however, given that this is one of the few appellate opinions providing an in-depth analysis of 8 U.S.C. § 1226(e).[34] This Part then describes why such unreviewable discretion in bond hearings leads to a detention system in which a detainee's liberty is often in the hands of a single immigration judge, who decides bond in an implicit bias minefield.

### *A. Unreviewable Discretion to Detain: A Case Example*

In *Martinez v. Clark*, the Ninth Circuit interpreted 8 U.S.C. § 1226(e) broadly, leaving important liberty decisions to the whims of immigration judges.[35] The noncitizen, Mr. Martinez, was convicted of criminal offenses that placed him within the mandatory detention provision of 8 U.S.C. § 1226(c).[36] He filed a habeas corpus petition because his prolonged mandatory detention without a bond hearing had become unreasonably prolonged.[37] After the district court ordered this bond hearing, the immigration judge denied bond, finding that the government had proven by clear and convincing evidence that Mr. Martinez was a danger to the community due to his two convictions for drug trafficking.[38] The court also found no mitigating evidence, despite his successful release from pretrial detention, his efforts at rehabilitation, his family or community ties, and the sentencing court's positive statements.[39] The Board upheld the immigration judge's decision, citing to its longstanding acknowledgment of the dangers of drug trafficking.[40] The district court determined that it had jurisdiction over the questions presented in the petitioner's new claim, but the Ninth Circuit reversed on the jurisdictional question, citing to 8 U.S.C.

33. *See* Martinez v. Clark, 144 S. Ct. 1339, 1339 (2024) (mem.) (granting writ of certiorari, vacating Ninth Circuit's decision, and remanding for further consideration in light of *Wilkinson v. Garland*, 601 U.S. 209 (2024)). For a more detailed discussion, see *infra* Part III.

34. *See infra* Part II.C (describing why 8 U.S.C. § 1226(e) is underlitigated).

35. *See* Martinez v. Clark, 36 F.4th 1219, 1227 (9th Cir. 2022).

36. *Id.* at 1224.

37. *Id.* at 1223–24.

38. *Id.* at 1225.

39. *Id.*

40. *Id.*

§ 1226(e)'s bar to reviewing the agency's discretionary decisions to detain.[41]

The Ninth Circuit opined on the meaning of a "discretionary" determination, reasoning that the "touchstone" is that it is "subjective."[42] Thus, it "depends on the identity and value judgment of the person or entity examining the issue,"[43] and is "value-laden" and "reflect[s] the decision maker's beliefs in and assessment of worth and principle."[44] The court went on to explain that the "prototypical" example of a discretionary decision is "one that is 'fact-intensive' and requires 'equities [to] be weighed.'"[45] The court distinguished discretionary decisions from those that require application of law to fact determinations,[46] and went on to list various matters that have been held to be "discretionary" in immigration law, all of which involved applications for relief from removal.[47] The court added that "matters of governmental grace, such as adjustment of status and cancellation of removal relief are discretionary judgments not subject to review."[48]

The Ninth Circuit applied this rationale to the issue in Mr. Martinez's case: whether he was a danger to the community and thus ineligible for bond.[49] The court reasoned that no court had defined "dangerousness" or what combination of facts is "'conclusive[]' to establish dangerousness."[50] Acknowledging that the Board had

41. *Id.* at 1225–26; *see* 8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section [governing detention pending removal proceedings] shall not be subject to review."). The Ninth Circuit acknowledged that 8 U.S.C. § 1226(e) does not limit habeas jurisdiction over "constitutional claims or questions of law," but determined that the petitioner's claims did not present either a question of law or a constitutional question. *Martinez*, 36 F.4th at 1227.

42. *Martinez*, 36 F.4th at 1227.

43. *Id.* at 1229 (quoting Mendez-Castro v. Mukasey, 552 F.3d 975, 980 (9th Cir. 2009)).

44. *Id.* at 1227, 1229 (alteration in original) (quoting Ramadan v. Gonzales, 479 F.3d 646, 656 (9th Cir. 2007)).

45. *Id.* at 1228 (quoting Torres-Valdivias v. Lynch, 786 F.3d 1147, 1153 (9th Cir. 2015)).

46. *Id.*

47. *Id.* (listing as examples whether a crime is "violent or dangerous" (for the purposes of adjustment of status and waivers of inadmissibility) or "particularly serious" (for the purposes of determining withholding of removal under the Refugee Convention), whether "exceptional and extremely unusual hardship" has been met (for the purposes of determining cancellation of removal), and whether a noncitizen has "good moral character" (also for the purposes of determining cancellation of removal)).

48. *Id.*

49. *Id.*

50. *Id.* at 1228–29 (alteration in original).

established a nine-factor test for determining bond cases,[51] the court held that this multifactored analysis left the court with "no clear, uniform standard for what crosses the line into dangerousness," so the court was "left without 'standards sufficient to permit meaningful judicial review.'"[52] Because "dangerousness" is a "'fact-intensive' inquiry that requires the 'equities [to] be weighed,'"[53] and a "subjective question that depends on the identity and the value judgment of the person or entity examining the issue,"[54] it is discretionary, and thus unreviewable under 8 U.S.C. § 1226(e).[55] The Ninth Circuit went on to write, "What one immigration judge may find indicative of a propensity for danger, another may see as progress towards redemption. That is exactly the type of discretionary judgment that § 1226(e) insulates from judicial review."[56]

Mr. Martinez's petition for rehearing en banc was denied, over a dissenting opinion.[57] The dissenters opined that dangerousness determinations are mixed questions of law and fact and pointed to the "directly analogous" criminal pretrial detention context, where dangerousness determinations are subject to independent appellate review and appellate judges defer only to the district court's findings of fact.[58] The dissenters also critiqued the panel decision for conflating questions of fact and discretion, which stood in contrast to Supreme Court case law.[59] They pointed to the fact that the Board itself had reviewed the immigration judge's decision by using standards governing dangerousness determinations.[60] The dissenters also opined on the significant constitutional concerns that such an expansive view of 8 U.S.C. § 1226(e) presents because the Due Process Clause, at its heart, protects liberty, and if "the government could deem anyone dangerous and detain them for years while their removal case slowly

51. *Id.* at 1228 (citing *In re* Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006), *abrogated by* Hernandez-Lara v. Lyons, 10 F.4th 19 (1st Cir. 2021)).

52. *Id.* at 1229 (quoting Husyev v. Mukasey, 528 F.3d 1172, 1181 (9th Cir. 2008)).

53. *Id.* (quoting Torres-Valdivias v. Lynch, 786 F.3d 1147, 1153 (9th Cir. 2015)).

54. *Id.* (quoting Mendez-Castro v. Mukasey, 552 F.3d 975, 980 (9th Cir. 2009)).

55. *Id.*

56. *Id.*

57. Martinez v. Clark, 68 F.4th 1195, 1196 (9th Cir. 2023) (Berzon, J., dissenting), *denying reh'g en banc of* 36 F.4th 1219 (9th Cir. 2022).

58. *Id.* at 1198–99 (Berzon, J., dissenting).

59. *Id.* at 1201–02 (Berzon, J., dissenting) (citing U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge LLC, 583 U.S. 387, 395–97 (2018) and Guerrero-Lasprilla v. Barr, 589 U.S. 221, 228–29 (2020)).

60. *Id.* at 1201 (Berzon, J., dissenting).

works its way through our system[,] the constitutional protection of liberty would be eviscerated."[61] Moreover, giving "unbridled discretion" to an agency actor and conditioning a person's liberty on "the identity of the decisionmaker or the decisionmaker's personal tastes or feelings offends the central purpose of the Due Process Clause—protecting individuals from 'arbitrary detention.'"[62] They reasoned that the Supreme Court had already determined that requiring a decision-maker to assess the likelihood of future harm to society is governed by standards—otherwise, it would be "so vague as to be meaningless."[63]

Mr. Martinez's petition for certiorari was granted, and the Supreme Court vacated the Ninth Circuit's opinion.[64] The Court remanded to the Ninth Circuit to consider further its decision in light of *Wilkinson v. Garland*,[65] a case in which the Supreme Court rejected jurisdiction stripping in the context of an immigration law relief from removal issue that the government argued was "discretionary."[66] Although this is a positive development, the Ninth Circuit's opinion has judicially validated a view of immigration bond hearings as law-free zones, which make them implicit bias minefields.

### *B. The Immigration Bond System: An Implicit Bias Minefield*

If all courts read 8 U.S.C. § 1226(e) as broadly as the Ninth Circuit in *Martinez* so that "discretion" includes any decision that is "subjective," "value-laden," "fact-intensive," and requires "equities to be weighed,"[67] the impact on most detainees is that the immigration judge's decision during the bond hearing will become the single opportunity to seek release from detention throughout the remainder of the removal proceedings. Leaving this one bond hearing as the only protection of a detainee's liberty is highly problematic because immigration bond hearings occur in an implicit bias minefield.

One design feature of immigration bond hearings is that they typically involve dangerousness findings against persons whom society

---

61. *Id.* at 1198 (Berzon, J., dissenting).

62. *Id.* (Berzon, J., dissenting) (quoting Rodriguez v. Marin, 909 F.3d 252, 255, 257 (9th Cir. 2018)).

63. *Id.* (Berzon, J., dissenting) (quoting Jurek v. Texas, 428 U.S. 262, 272, 274 (1976)).

64. *See* Martinez v. Clark, 144 S. Ct. 1339, 1339 (2024) (mem.).

65. Wilkinson v. Garland, 601 U.S. 209 (2024).

66. *Id.* at 222–26. The application of *Wilkinson*'s holding to 8 U.S.C. § 1226(e) is discussed *infra* Part III.

67. Martinez v. Clark, 36 F.4th 1219, 1227–28 (9th Cir. 2022).

already has deemed to be dangerous. The majority of immigration detainees are not white; most are Latiné men.[68] A common psychological shortcut that immigration judges can take, fostered by images in the media and historical practices in U.S. society, is that nonwhite men are dangerous.[69] For example, empirical findings from immigration bond hearings demonstrate that Central Americans are more likely to be found dangerous; the author of the study suggests that this fear may come from the salience of social stereotypes that depict Central Americans as criminals and gang members.[70] Social science research demonstrates that U.S. residents fear men of color as larger, more threatening, and more prone to violence than a similar-sized white body.[71] Scholars argue that the entire U.S. criminal justice system, which includes widespread surveillance and mass incarceration of huge swaths of the nonwhite population, is built upon the fear of men of color and the need to manage the risks they present.[72] That most

68. Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 24 (2018) (reporting findings that Mexican nationals made up 43 percent of the immigration detainee population, nationals from the Northern Triangle countries (El Salvador, Guatemala, and Honduras) made up 46 percent of the detainee population, and men comprise 79 percent of the detainee population); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 284–85 (2017) ("Combined, Canadian and European immigration law violators could fill half of ICE's detention population every year, but they do not. . . . [A]n analysis of a decade of ICE detention data reached a troubling conclusion regarding Mexicans and Central Americans: immigration officials are more likely to detain Mexicans and Guatemalans.").

69. *See generally* PAUL BUTLER, CHOKEHOLD [POLICING BLACK MEN] 17–80 (2017) (describing social science research that demonstrates U.S. societal fears of Black men and detailing how the entire U.S. criminal justice system is built upon this fear of Black men).

70. *See* Emily Ryo, *Predicting Danger in Immigration Courts*, 44 L. & SOC. INQUIRY 227, 245–46 (2019).

71. *See, e.g.*, IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 71 (2019) (writing that "Americans today see the Black body as larger, more threatening, more potentially harmful, and more likely to require force to control than a similarly sized White body" and opining that "[n]o wonder the Black body had to be lynched by the thousands, deported by the tens of thousands, incarcerated by the millions, segregated by the tens of millions"); BUTLER, *supra* note 69, at 19–46 (describing social science research that demonstrates U.S. societal fear of Black men).

72. *See, e.g.*, BERNARD E. HARCOURT, THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS 141–76 (2018) (describing three strategies of the "counterrevolution": (1) achieve "[t]otal information awareness of the [entire] American people" through mass data collection and surveillance; (2) "eliminate an active minority" at home; and (3) win the "hearts and minds" of "the American people"); BUTLER, *supra* note 69, at 17 ("The most problematic practices of American criminal justice—excessive force by police, harsh sentencing, the erosion of civil liberties, widespread government surveillance, and mass incarceration—are best understood as measures originally intended for African American men."); MICHELLE ALEXANDER, THE NEW JIM CROW 122–23 (10th

immigration detainees are men of color is not an accident; immigration enforcement officers are permitted under Fourth Amendment doctrine to consider "Mexican appearance" as a factor leading to a reasonable suspicion that they are illegally in the United States.[73] That immigration detainees usually appear for their bond hearings in orange jumpsuits and/or shackles certainly does not help counter the dangerousness presumption.[74] Further exacerbating this presumption of dangerousness is Board case law, which presumes a detainee to be dangerous and requires them to prove otherwise.[75]

---

Anniversary ed. 2020) (describing widespread enforcement during the War on Drugs that targeted poor communities of color, even though white people in middle-class communities have higher rates of drug use and sale); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 449–50, 452 (1992) (discussing the "new penology," which focuses on risk-based assessments and managing dangerous populations, instead of the prior goals of the criminal justice system, which included rehabilitation of the individual offender).

73. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (stating that border patrol agents may use Mexican appearance as one of several factors to justify reasonable suspicion of alien status); Ray, *supra* note 21, at 1342 (describing how "Mexican identity quickly became synonymous with illegal presence" and thus "racial profiling . . . has been at the heart of immigration enforcement from the beginning"). *See generally* Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011) (describing a series of Supreme Court Fourth Amendment cases that have sanctioned racial profiling in immigration enforcement, which facilitates the presumption that Latiné people are undocumented).

74. Abira Ashfaq, *"We Have Given Them This Power"; Reflections of an Immigration Attorney*, NEW POL., Summer 2004, at 66, 70 ("Looking like a prisoner is hardly a great starting point to have things tip in your favor [in an immigration relief hearing]. Clothes do make the man and the government knows this."); *see also* de Abadia-Peixoto v. U.S. Dep't of Homeland Sec., 277 F.R.D. 572 (N.D. Cal. 2011) (certifying a class of civil immigration detainees who were shackled during their appearances in the San Francisco immigration court).

75. *See* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RSRV. L. REV. 75, 81–95 (2016) [hereinafter Holper, *The Beast of Burden*] (describing development of Board case law that switched the burden of proof to the detainee in immigration judge bond hearings). Two courts of appeals have concluded that this burden allocation is unconstitutional, while two courts of appeals have determined it to be constitutional. *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 41 (1st Cir. 2021) (holding that the Board's interpretation of the burden allocation in immigration bond hearings under 8 U.S.C. § 1226(a) violates detainees' due process rights); Velasco Lopez v. Decker, 978 F.3d 842, 854–55 (2d Cir. 2020) (finding that requiring a noncitizen to bear the burden of proof in a § 1226(a) bond hearing was unconstitutional in light of "unduly prolonged" immigration detention). *But see* Rodriguez Diaz v. Garland, 53 F.4th 1189, 1193 (9th Cir. 2022) (holding that due process does not require the government to bear the burden of proof in immigration bond hearings), *reh'g denied*, 83 F.4th 1177, 1178 (9th Cir. 2023); Miranda v. Garland, 34 F.4th 338, 366 (4th Cir. 2022) (holding that due process does not require the government to bear the burden of proof in § 1226(a) immigration bond hearings).

A second design feature of immigration bond hearings is the lack of deliberation.[76] Bond hearings are relegated to a less important status than decisions regarding the merits of a noncitizen's case. Bond hearings are quick and informal, whereas removal hearings are intended to be a trial-type hearing in which judges hear from multiple witnesses and arrive at a reasoned decision at the conclusion.[77] Various measures imposed by immigration judges' bosses at the Department of Justice over the years have sent the message that the immigration judges should prioritize efficiency over deliberation in all of their cases.[78] With efficiency prioritized for the trial-type merits hearings, the less formal, quicker bond hearings are given even less time. Bond

76. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 428–41 (2011) (discussing various factors contributing to implicit bias in immigration courtrooms, including the judge's lack of independence, the limited opportunity for deliberate thinking, the judge's low motivation due to stress and burnout, the legal and factual complexity of cases, and the limited opportunity for appellate review).

77. *See* Chirinos, 16 I. & N. Dec. 276, 277 (B.I.A. 1977) (noting that the "primary consideration" in an immigration bond hearing is "that the parties be able to place the facts *as promptly as possible* before an impartial arbiter" and that the Board will encourage "informal procedures so long as they do not result in prejudice," but "[o]bviously" limiting "this informality [from] carry[ing] over to a deportation hearing"); U.S. DEP'T JUST., EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL, § 9.3(e), 126 (2023) [hereinafter IMMIGRATION COURT PRACTICE MANUAL], https://www.justice.gov/media/1239281/dl?inline [https://perma.cc/6TV6-NPFC] ("In general, bond hearings are less formal than hearings in removal proceedings."); Ashfaq, *supra* note 74, at 69 (describing an immigration judge's critique of the author for "not knowing the difference between bond and merits hearings" when the author filed documents in support of bond that the judge deemed excessively long and detailed in facts).

78. *See, e.g.*, Priscilla Alvarez, *Justice Department Eliminates Trump-Era Case Quotas for Immigration Judges*, CNN POL. (Oct. 20, 2021, 1:57 PM), https://www.cnn.com/2021/10/20/politics/immigration-judges-quotas/index.html [https://perma.cc/LA2S-6REX] ("In 2018, [the Department of Justice] released new performance metrics for immigration judges[, which] included completing 700 cases per year to be considered 'satisfactory.' . . . [Although the Biden administration rescinded this policy,] '[t]he Agency is in the process of developing new performance measures . . . .'"). Before the Trump administration's egregious per judge case completion goals, prior Departments of Justice had imposed per court case completion goals as a means of assess the agency's performance. *See* Memorandum from Michael J. Creppy, Chief Immigr. Judge, Exec. Off. for Immigr. Rev., U.S. Dep't Just., to All Immigr. Judges & All Ct. Adm'rs (Apr. 26, 2002), http://www.aila.org/infonet/ocij-describes-case-completion-goals [https://perma.cc/B3JD-TQ3E]. The backlog of over 3 million cases pending in immigration courts nationwide has created a crushing case load of approximately four thousand cases for each immigration judge. *See* Lauren Villagran, *As Migration Surges, Immigration Court Case Backlog Swells to Over 3 Million*, USA TODAY (Dec. 28, 2023, 4:59 PM), https://www.usatoday.com/story/news/nation/2023/12/27/immigration-court-backlog-grows/72030952007 [https://perma.cc/8QG9-AGC3]; *see also* Nicholas R. Bednar, *The Public Administration of Justice*, 44 CARDOZO L. REV. 2139, 2156 (2023) ("When performance is measured in terms of task completion, adjudicators replace quality with quantity because they want to attain satisfactory ratings and advance their careers.").

hearings are usually scheduled with master calendar hearings, which are designed for scheduling and hearing procedural matters.[79] The immigration judge often has multiple detainees' bond and master calendar hearings scheduled for the same morning or afternoon time block, hearing both scheduling matters and bond hearings all at once.[80] Bond evidence is heard by the immigration judge for the first time at the hearing just prior to making a decision—there is simply no time to deliberate.[81] The judge is not required to give reasons for the denial—only if a detainee loses bond and files an appeal does the immigration judge write a decision, giving a post hoc rationalization for the prior denial.[82]

A third design feature is that the immigration judges making bond decisions are not independent adjudicators.[83] They work for the

79. Stacy L Brustin, *A Civil Shame: The Failure to Protect Due Process in Discretionary Immigration Custody & Bond Redetermination Hearings*, 88 BROOK. L. REV. 163, 194 (2022); BETSY CAVENDISH, APPLESEED & STEVEN SCHULMAN, AKIN GUMP STRAUSS HAUER & FELD, REIMAGINING THE IMMIGRATION COURT ASSEMBLY LINE 47 (2012), https://www.chicagoappleseed.org/wp-content/uploads/2017/02/Reimagining-the-Immigration-Court-Assembly-Line2.pdf [https://perma.cc/ZWH5-CAFP] (describing master calendar hearings as a "cattle call" of status hearings).

80. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 77, § 9.3(d), at 126 (indicating that the immigration judge may immediately conduct the bond hearing during the master calendar hearing).

81. *Id.* § 9.3(e)(5), at 127 (indicating that evidence is not always filed in advance of the hearing); FLORENCE IMMIGR. & REFUGEE RTS. PROJECT, HOW TO GET A BOND 21–23 (2022), https://firrp.org/wp-content/uploads/2022/09/Bond-Guide-2013.pdf [https://perma.cc/4DSV-QGJ9] (describing the procedure of a bond hearing); Bednar, *supra* note 78, at 2158–59 (describing the heuristic assumptions at work when judges are rushed, which "increase the likelihood that an adjudicator makes a decision based on extrajudicial considerations rather than the presented evidence," and arguing that "[t]he most hazardous heuristics rely on stereotypes about racial, ethnic, religious, or other groups").

82. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 77, § 9.3(e)(7), at 127 ("Usually, the immigration judge's decision is rendered orally. Because bond hearings are generally not recorded, the decision is not transcribed. If either party appeals, the immigration judge prepares a written decision based on notes from the hearing."); *see also* Singh v. Holder, 638 F.3d 1196, 1208 (9th Cir. 2011) (reasoning that due process requires a contemporaneous recording of a detainee's bond hearing and that the immigration judge's "[p]ost-hoc reconstruction is inadequate").

83. *See* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1803 (2023) ("For separation-of-functions purists, . . . [immigration adjudication] tribunals are a nightmare: courts that make enormously consequential decisions, including whether to incarcerate and deport people, are trapped in the wrong branch."); Marouf, *supra* note 76, at 428–30; *see also* Mary Holper, *Taking Liberty Decisions Away from "Imitation" Judges*, 80 MD. L. REV. 1076, 1081–1100 (2021) [hereinafter Holper, *Taking Liberty Decisions Away*] (arguing that the important question of a noncitizen's liberty should not be entrusted to an immigration judge due to the judge's lack of independence); Mary Holper, *The Fourth Amendment Implications of*

nation's top prosecutor, the attorney general.[84] Although the attorney general does not direct the outcome of every individual bond case, they have the unusual authority to refer any immigration case to themselves and readjudicate it,[85] thus converting the nation's top prosecutor into the nation's top immigration adjudicator. The attorney general, pursuant to this authority, has published precedential decisions interfering with immigration judges' ability to grant bond.[86] Regulations permit a Department of Homeland Security ("DHS") prosecutor to override an immigration judge's bond order with the filing of an appeal notice and to take a detainee released on bond back into custody without providing any change in circumstances to any adjudicator.[87] Additionally, during the President George W. Bush administration, Attorney General John Ashcroft demoted all members of the Board with high grant rates, sending the message to all immigration adjudicators that they rule against the government at the risk of losing their jobs.[88] One former immigration judge noted that because the immigration court system is housed in a law enforcement agency, this structural arrangement "does not project an image which inspires faith in our court's freedom from bias."[89] That former judge's fears were confirmed by empirical research showing that immigration judges were more likely to deny bond and order removal during the Trump administration, regardless of which president's attorney general appointed them.[90]

Multiple scholars conclude that systems of justice should make efforts to counter the impact of judges' implicit biases, which include

---

*"U.S. Imitation Judges"*, 104 MINN. L. REV. 1275, 1283–1306 (2020) [hereinafter Holper, *The Fourth Amendment Implications*] (arguing that the lack of a neutral adjudicator to decide whether a noncitizen's detention should continue violates the Fourth Amendment's prohibition on unlawful seizures).

84. *See* Holper, *Taking Liberty Decisions Away*, *supra* note 83, at 1077.

85. Cox & Kaufman, *supra* note 83, at 1799.

86. *See* Holper, *Taking Liberty Decisions Away*, *supra* note 83, at 1090–95.

87. *See id.* at 1089; *see also* Talia Peleg, *The Dangers of ICE's Unchecked Rearrest Power*, 86 ALB. L. REV. 517, 542 (2022).

88. *See* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 376–77 (2006) [hereinafter Legomsky, *Deportation and the War*].

89. *See* Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, A.B.A. JUDGES' J. (Nov. 1, 2015), https://www.americanbar.org/groups/judicial/publications/judges_journal/2015/fall/who_me_am_i_guilty_of_implicit_bias [https://perma.cc/2GK9-HKWW].

90. Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 DUKE L.J. 1855, 1862 (2020) [hereinafter Kim & Semet, *Presidential Ideology*] (citing Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 621 (2020)).

requiring more deliberation prior to decision.[91] Yet, immigration courts have undergone no systemic changes to minimize the impacts of implicit biases.[92] One immigration judge has reflected on the difficulties of doing her job—acknowledging how many places her own implicit biases could impact her decisions, such as credibility determinations for asylum and discretionary decisions.[93] This judge reflected on an important systemic problem—the lack of time judges are given to deliberate about the important, life-altering decisions they make, given their crushing caseloads and lack of administrative support.[94] The dangerousness determination made under such rushed

91. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2–3, 31–42 (2007). In this study, the authors describe the results of studies of trial court judges, all of whom relied primarily on intuition, and recommend the following to reduce the impact of implicit bias in judges' decisions: increasing time to allow judges to make each decision in a deliberative manner, requiring that judges write opinions, establishing regular training and feedback, using checklists to encourage methodical decision-making, and reallocating decision-making to limit judges' exposure to stimuli that will trigger intuitive thinking. *Id.*; *see also* Marouf, *supra* note 76, at 431–34 (recommending reducing immigration judges' caseloads to give them more time to assess each case as an important way of combating the impacts of implicit bias on their decisions).

92. *See, e.g.*, Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 763 (2018) (proposing changes to immigration proceedings to reduce the pipeline from gang allegations to deportation); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 251–52 (2012) (listing areas for reform to alter the way judges hear immigration cases); Marouf, *supra* note 76, at 428–41 (discussing how the following factors contribute to implicit bias in immigration courtrooms: the judge's lack of independence, the limited opportunity for deliberate thinking, the judge's low motivation due to stress and burnout, the legal and factual complexity of cases, and the limited opportunity for appellate review); Ashfaq, *supra* note 74, at 68 (describing a DHS attorney questioning a Muslim man at a bond hearing about whether he had terrorist connections and writing that the attorney "did this to impress upon the judge that there were certain assumptions he could get away with and that she too should be concerned" because "[n]o sensible judge should want to be the one who puts him on the street"). Although there were efforts in 2009 by the Assistant Chief Immigration Judge to emphasize conscious and unconscious bias in the training of judges, the effectiveness of this training was "diluted by the lack of funding to implement them in full." CAVENDISH & SCHULMAN, *supra* note 79, at 37.

93. *See* Marks, *supra* note 89. One way that prior guidelines around the exercise of immigration prosecutorial discretion attempted to instruct line duty officers was to write not only a list of factors to be considered, but also a list of factors *not* to be considered. *See, e.g.*, Memorandum from Doris Meissner, Comm'r, U.S. Immigr. & Naturalization Serv., U.S. Dep't Just., to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, & Reg'l & Dist. Couns. 7–9 (Nov. 17, 2000), http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf [https://perma.cc/T2NA-NRWU] (listing race, political opinion, religion, and the officer's own personal feelings about the individual as factors that an officer should not consider in the exercise of prosecutorial discretion).

94. *See* Marks, *supra* note 89. Professor Nicholas R. Bednar has described coping mechanisms adjudicators use when making decisions with performance metrics and insufficient

conditions, with all psychological shortcuts leading to a finding of dangerousness, is outcome determinative. Although judges in theory decide two questions at a bond hearing—dangerousness and flight risk—if the judge finds the detainee dangerous, the hearing stops there.[95]

For most detainees, this quick and informal bond hearing is their one and only shot at freedom. Although noncitizens have a right to seek review of the immigration judge's bond denial to the Board,[96] the Board has every incentive to decide the merits case first. Both bond and merits appeals occur within the same time frame, due to the expedited docket for detainee merits cases.[97] Once the Board decides the merits appeal, this can leave one less case to decide, because the Board finds the bond appeal to be moot if the merits are fully resolved.[98] Noncitizens arguing that they have a due process right to a

support staff. *See* Bednar, *supra* note 78, at 2143. He writes, immigration judges "may conduct shorter hearings, arrive at hearings unprepared, or forego statutorily required procedures. Alternatively, they may make assumptions about the individual's case based on their physical appearance, nationality, or presentation in the courtroom." *Id.* These "coping mechanisms," he writes, "tend to bias results in favor of a particular party or policy direction." *Id.* His study focuses on immigration judges, who, on average, "spend[] thirty-six hours per week hearing cases, leaving only four hours to prepare for hearings, review evidence, and draft written decisions." *Id.* at 2145. He highlights the importance of law clerks in ensuring greater judicial deliberation and attention to each case. *Id.* His empirical models "suggest that the presence of a law clerk has a greater effect on outcomes than other sources of bias, such as the appointing administration or whether the IJ previously worked for an immigration-enforcement agency." *Id.* at 2146.

95. *See* Jose Alberto Urena, 25 I. & N. Dec. 140, 141 (B.I.A. 2009) (determining that if an immigration judge decides that a detainee is dangerous in a bond hearing, the judge should deny bond without assessing flight risk). Some courts have reasoned that due process requires the immigration judge to consider whether alternatives to detention will reasonably assure the safety of the community. *See, e.g.*, Doe v. Tompkins, No. 18-12266-PBS, 2019 WL 8437191, at *2 (D. Mass. Feb. 12, 2019) (holding that the immigration court should properly allocate the burden of proof and consider alternatives to detention to ensure the safety of the community and the petitioner's future appearances), *aff'd*, 11 F.4th 1 (1st Cir. 2021). *But see* Miranda v. Garland, 34 F.4th 338, 366 (4th Cir. 2022) (holding that due process does not require the immigration judge to consider alternatives to detention in a § 1226(a) immigration bond hearing).

96. *See* 8 C.F.R. § 1003.1(b)(7) (2022); *id.* § 1236.1(d)(3)(i) (2022).

97. *See* Memorandum from Sirce E. Owen, Acting Deputy Dir., Exec. Off. for Immigr. Rev., U.S. Dep't Just., to EOIR 2 (Jan. 31, 2020), https://www.justice.gov/eoir/reference-materials/OOD2007/dl [https://perma.cc/RSZ5-QYQH] (describing the Executive Office for Immigration Review's "longstanding policy of prioritizing the timely completion of cases involving detained aliens," which requires that "all detained cases should be prioritized for docketing and adjudication").

98. *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T JUST., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, § 7.4, 108 (2022) [hereinafter APPEALS PRACTICE MANUAL], htt

second bond hearing after the passage of some period of time have been unsuccessful.[99] So, absent an immigration judge revisiting their original bond denial upon the detainee showing a material change in circumstances, there is no second bond hearing.[100]

The immigration judge's quick decision at the one bond hearing often sets the trajectory for the noncitizen's entire removal case because detention makes it difficult for a detainee to gather necessary evidence and demonstrate necessary rehabilitation to win discretionary relief from removal.[101] Detention also acts as a deterrent to seeking meritorious appeals.[102] What is more, detention impacts a detainee's ability to obtain a lawyer for the merits case, for there is no right to a court-appointed lawyer in removal proceedings, and

---

ps://www.justice.gov/eoir/book/file/1528926/download [https://perma.cc/GB5N-D83X] (describing situations where bond appeal becomes moot, which include when the Board has either granted or denied relief from removal). Reducing the number of cases pending before the Board was a large motivating factor behind the 2002 "streamlining" regulations that allowed for a single Board member to rubber-stamp an immigration judge's decision. *See* Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 474 (2006) [hereinafter Motomura, *Immigration Law and Federal Court Jurisdiction*].

99. *See, e.g.*, Jennings v. Rodriguez, 583 U.S. 281, 306 (2018) (holding that immigration detention statutes do not contain any provision requiring periodic bond hearings and that it was incorrect for the lower courts to read such requirements into the statutes); Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 277 (3d Cir. 2018) ("Borbot cites no authority, and we can find none, to suggest that duration alone can sustain a due process challenge by a detainee who has been afforded the process contemplated by § 1226(a) and its implementing regulations."); Rodriguez Diaz v. Garland, 53 F.4th 1189 (9th Cir. 2022) (rejecting a due process challenge to a new bond hearing, reasoning that "'duration alone' cannot 'sustain a due process challenge by a detainee who has been afforded the process contemplated by § 1226(a) and its implementing regulations'" (quoting *Borbot*, 906 F.3d at 277)).

100. *See* 8 C.F.R. § 1003.19(e) (stating that a noncitizen's request for a new bond hearing will only be considered upon a showing that there has been a material change in circumstances since the prior bond hearing).

101. *See* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 144–45 (2013); *see also* Marin, 16 I & N Dec. 581, 588 (B.I.A 1978) (acknowledging that noncitizens in detention will have a more difficult time demonstrating rehabilitation in the multifactor test for a discretionary decision under former INA Section 212(c), but that the same test for the exercise of discretion applies regardless of detention as a barrier to rehabilitation); Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1033–34 (2017) [hereinafter Ryo, *Fostering Legal Cynicism*] (explaining detainees' belief that immigration detention is more punitive than criminal custody because guards may purposely discipline detainees to create a negative record that can be used against them during immigration judges' discretionary decision-making).

102. *See* Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. & SOC. SCI. 97, 109 (2019) [hereinafter Ryo, *Understanding Immigration Detention*]; Das, *supra* note 101, at 145.

detainees have proven less likely to secure representation.[103] It is unsurprising, therefore, that an empirical study demonstrates that a person who remains in detention has a significantly higher likelihood of being deported.[104]

Even for detainees who win the lottery of getting a pro bono lawyer[105] and choose to suffer through detention to fight their appeals, detention takes its toll on the detainees themselves, their communities, and society at large.[106] Detainees' ties to family and friends are strained or entirely ruptured, especially when detainees are transferred to detention facilities far from their communities.[107] Detainees experience their detention as arbitrary and punitive,[108] given guards' immense amount of discretion to impose punitive and restrictive conditions of confinement, verbal harassment, strip searches, in some cases physical abuse, and delayed and inadequate medical care.[109] All of this is made worse by the uncertain duration of the detention.[110] Detainees cannot meaningfully contribute to U.S. society because their detention leads to loss of employment.[111] Detention also impacts families who rely on the detainee, whose need for public assistance increases due to the loss

103. *See* Ingrid V. Eagly & Stephen Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 6, 9, 32 (2015) (reporting results of an empirical study that analyzed over 1.2 million immigration removal cases over six years and concluded that detainees were five times less likely to obtain representation than nondetained respondents and, without representation, were more likely to lose their cases and be deported).

104. *See id.* at 75–76 (providing conclusions regarding results of an empirical study, which demonstrated that only 14 percent of detainees had counsel, and that attorney representation was strongly associated with success in immigration court outcomes).

105. *See id.* at 75 ("The bottom line is that the cases of poor immigrants are left to legal services attorneys, law school clinical programs, and pro bono volunteers."). During the six years that the study was conducted, only an estimated "2% of immigrants in removal proceedings obtained counsel from these types of free representation programs. The volume of removal cases is simply too great for existing immigrant aid resources to cover.". *Id.*

106. *See* Das, *supra* note 101, at 143–45; Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIA. INTER-AM. L. REV. 531, 541–42 (1999) (discussing the costs of detention on individuals).

107. *See* Das, *supra* note 101, at 143–44; Mirian G. Martinez-Aranda, *Collective Liminality: The Spillover Effects of Indeterminate Detention on Immigrant Families*, 54 L. & SOC'Y REV. 755, 756 (2020) (describing how family units "become[] suspended in a heightened state of uncertainty over whether the detention will lead to deportation and produce forced family separation").

108. Ryo, *Fostering Legal Cynicism*, *supra* note 101, at 1024–34 (describing conditions of confinement in immigration detention that are indistinguishable from, or even worse than, criminal incarceration from the perspective of detainees).

109. Ryo, *Understanding Immigration Detention*, *supra* note 102, at 104.

110. *See* Ryo, *Fostering Legal Cynicism*, *supra* note 101, at 1031.

111. Das, *supra* note 101, at 143.

of an income-earner or additional caretaker for children.[112] The government squanders the opportunity to benefit from a detainee's contributions to society, spending roughly $165 per day to do so.[113]

Meaningful judicial review of an immigration judge's quick and informal decision to detain can provide an important check on immigration judges' decisions by ensuring that an independent Article III court protects the liberty interest of immigration detainees, who are a politically powerless and unpopular minority.[114] Judicial review also encourages more thorough decisions by immigration judges, who want to avoid reversal, and allows courts to more fully engage with the Board's bond case law, setting up a dialogue between federal courts and the agency.[115] Yet, the Ninth Circuit, and any court that follows its reasoning, have told immigration judges that their dangerousness determinations in a bond hearing are "value-laden," "subjective," "depend[ant] on the identity and the value judgment of the person or entity examining the issue," and "reflect[ing] the decision maker's beliefs in and assessment of worth and principle."[116]

## II. THE 1996 MERGING OF TWO THEMES: JURISDICTION STRIPPING AND DETENTION

This Part describes how 8 U.S.C. § 1226(e), which was part of the 1996 overhaul of immigration law, merges two major themes in immigration law: stripping federal courts of jurisdiction[117] and

112. *See id.* at 143–44 ("[D]etention obstructs the family's access to caregiving and financial support.").

113. *See Featured Issue: Immigration Detention and Alternatives to Detention*, AM. IMMIGR. LAWS. ASS'N (Sept. 9, 2024), https://www.aila.org/library/featured-issue-immigration-detention [https://perma.cc/7AQD-7ALK]. The total number of ICE detainees has varied, reaching a high of 51,000 detained on a given day prior to the COVID-19 pandemic. As of July 2023, there are roughly 30,000 people detained by ICE. *See ICE Detainees*, *supra* note 4 (listing the number of ICE detainees by date).

114. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 747–48 (1995) (describing the U.S. legal system as committed to countermajoritarianism, whereby judges safeguard the interests of unpopular minority groups); *see also* Holper, *Taking Liberty Decisions Away*, *supra* note 83, at 1077–78 (arguing that Article III judges should decide immigration detention cases instead of immigration judges because of the important liberty interests at stake).

115. See *infra* notes 451–56.

116. Martinez v. Clark, 36 F.4th 1219, 1227 (9th Cir. 2022) (internal citations omitted).

117. For a longer history of Congress's efforts to strip jurisdiction over immigration decisions and federal courts' response to such jurisdiction stripping, see generally LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW

detention.[118] Congress enacted statutes stripping federal court jurisdiction over several types of immigration law issues and a detention statute that mandated no-bond immigration detention for many noncitizens convicted of crimes. It also explains Supreme Court decisions concerning the 1996 jurisdiction-stripping statutes and litigation concerning the 1996 detention statutes. Finally, this Part explains why, notwithstanding the plethora of litigation regarding the 1996 jurisdiction-stripping statutes and detention statutes, 8 U.S.C. § 1226(e) has been rarely litigated.

### *A. 1996: Fervor for Detention Meets Jurisdiction Stripping*

In 1996, Congress enacted two statutes—the Antiterrorism and Effective Death Penalty Act ("AEDPA")[119] and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[120] These statutes, passed in the wake of the 1993 World Trade Center bombing and 1995 Oklahoma City Federal Building bombing, marked a key moment in which Congress imported into immigration law elements of the severe and harsh criminal laws of the 1980s.[121] Largely gone were sentiments that the United States should

(1995). Professor Lucey E. Salyer describes how the Chinese litigants utilized the writ of habeas corpus because they were in executive custody as a result of their exclusion or deportation orders. *Id.* at 69–70; *see also* DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 19–21 (2012) (examining the Chinese community's use of writ of habeas corpus because there was no statutory right to appeal an exclusion order). As Salyer writes, "The successful litigation by Chinese provided the main impulse for taking away the jurisdiction of the federal courts in immigration matters and for placing immigration regulation, instead, under the firm control of the administrative agency." SALYER, *supra* note 117, at xvii.

118. Detention also played a key role in shaping emerging immigration law. Detention was introduced into the immigration system to keep persons awaiting a decision in limbo and under the government's control while the executive officers adjudicated their cases. *See* WILSHER, *supra* note 117, at x–xi, 13. Detention facilities at ports of entry sprouted up so that shipping companies, who carried the would-be entrants, did not have to stall their vessels during the inspection procedures. *See* Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 63 (2014) (explaining how Congress passed laws that enabled vessels to temporarily remove noncitizens for inspection); WILSHER, *supra* note 117, at 12 ("The practical problems of inspection of thousands of immigrants per day were overwhelming without detention facilities.").

119. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

120. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

121. *See, e.g.*, César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1471–72 [hereinafter García Hernández, *Creating Crimmigration*]; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 476–77 (2007) [hereinafter Legomsky, *The New Path*];

welcome the helpless refugee and embrace noncitizens for their potential value added to the country; instead, noncitizens were seen as potential criminals who must be watched and managed.[122] But in a post-civil rights movement United States, prior anti-immigrant sentiments rooted solely in racial terms were unacceptable, so hatred toward the "criminal alien" took shape instead.[123]

Among other changes to immigration law, AEDPA and IIRIRA eliminate all judicial review of removal orders against noncitizens convicted of several crimes and of certain forms of relief from removal and discretionary decisions (other than asylum).[124] Congress also created expedited removal, a special removal process for those arriving at the border without proper entry documentation and precluded judicial review for those in this process.[125] Further, Congress precluded judicial review of any decision or action to "commence proceedings, adjudicate cases, or execute removal orders."[126] Congress also channeled any federal court jurisdiction into petitions for review of removal orders instead of habeas petitions in district court,[127] and restricted relief on a class-wide basis.[128]

---

Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 634–35 (2003) [hereinafter Miller, *Citizenship & Severity*]; Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 (2000) [hereinafter Kanstroom, *Social Control*].

122. *See generally* García Hernández, *Creating Crimmigration*, *supra* note 121 (explaining that attitudes towards welcoming immigrants have shifted over time, but that "[b]eginning in the 1980s," immigration law enforcement "increasingly adopted the securitized approach of criminal law enforcement"); *see also* Miller, *Citizenship & Severity*, *supra* note 121, at 625–29; Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 582–83 (1998) [hereinafter Simon, *Refugees in a Carceral Age*].

123. García Hernández, *Creating Crimmigration*, *supra* note 121, at 1485–1507.

124. *See* 8 U.S.C. § 1252(a)(2)(B); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2487 (1998) [hereinafter Cole, *Jurisdiction and Liberty*] (describing jurisdiction-stripping provisions of AEDPA and IIRIRA).

125. *See* 8 U.S.C. §§ 1225(b)(1)(A)(iii)(I), 1252(a)(2)(A), 1252(g); Cole, *Jurisdiction and Liberty*, *supra* note 124, at 2488.

126. *See* Cole, *Jurisdiction and Liberty*, *supra* note 124, at 2488 (describing IIRIRA's judicial review provision) (citation and internal quotation marks omitted).

127. *See* 8 U.S.C. § 1252(b)(9); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1975–76 (2000) [hereinafter Neuman, *Jurisdiction and the Rule of Law*].

128. 8 U.S.C. § 1252(f); Jill E. Family, *Another Limit on Federal Court Jurisdiction? Immigrant Access to Class-Wide Injunctive Relief*, 53 CLEV. ST. L. REV. 11, 13 (2005).

Another major theme of the 1996 laws was the use of detention to facilitate deportation.[129] For example, AEDPA creates mandatory detention for noncitizens who were deportable for several categories of criminal convictions under immigration law.[130] Although this was not Congress's first attempt at creating mandatory detention, it was the most expansive to date.[131] IIRIRA includes the permanent "mandatory detention" statute[132] under which many noncitizens convicted of crimes would be ineligible for bond.[133] The expedited removal provisions also mandate detention for those who were caught at or near the border who sought admission to the United States.[134] Although it carves out these categories of mandatory detention, Congress also kept in place

129. *See* PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON GOVERNMENTAL AFFS., CRIMINAL ALIENS IN THE UNITED STATES, S. REP. NO. 104-48, at 1–3, 31–32 (1995); Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 352 (David A. Martin & Peter H. Schuck eds., 2005). Outside of the scope of this Article is a more detailed history about how the war on crime manifested itself in policies that sought to deport and detain immigrants of color, which saw its most anti-immigrant legislation in AEDPA and IIRIRA. *See generally* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014) [hereinafter García Hernández, *Immigration Detention as Punishment*]; García Hernández, *Creating Crimmigration*, *supra* note 121, at 1469; Miller, *Citizenship & Severity*, *supra* note 121, at 665; Simon, *Refugees in a Carceral Age*, *supra* note 122, at 581.

130. Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277 (1996).

131. In 1988, with the Anti-Drug Abuse Act, Congress created mandatory detention for those whom it newly defined as having been convicted of an "aggravated felony." Pub. L. No. 100-690, § 7343, 102 Stat. 4181, 4470 (1988) (amending the INA to include 8 U.S.C. § 1252(a)(2), which provided that the attorney general must take into custody aliens convicted of an aggravated felony upon completion of the sentence and "shall not release such felon from custody"). At the time, "aggravated felony" included only murder, drug trafficking, and firearms trafficking. *Id.* Congress, two years later, scaled back its mandatory detention statute, permitting lawful permanent residents who were convicted of aggravated felonies to seek release from immigration detention. Immigration Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 4978, 5049 (amending former INA § 242(a)(2)). A 1991 amendment provided eligibility for release on bond for those who were convicted of aggravated felonies but had been lawfully admitted to the United States. Miscellaneous and Technical Immigration and Naturalization Amendments Act, Pub. L. No. 102-232, § 306, 105 Stat. 1733, 1751 (1991).

132. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 303(a), 110 Stat. 3009-546, 3009-585 (providing for mandatory detention). IIRIRA also provides for transitional rules due to a lack of detention bedspace to accommodate all of those who are now ineligible for bond hearings. *See id.* § 303(b)(3) (providing guidelines for when the attorney general could release noncitizens); *see also* Taylor, *supra* note 129, at 353 (noting that Congress had not realized "that the INS simply did not have sufficient bed space to carry out the new detention mandate").

133. 8 U.S.C. § 1226(c)(1) (requiring the attorney general to take into custody noncitizens who are removable for being convicted of an aggravated felony, crimes of moral turpitude, a firearms offense, a drug crime, or any of the criminal grounds of inadmissibility), *invalidated by* Perera v. Jennings, 598 F. Supp. 3d 736, 748 (N.D. Cal. 2022).

134. *See* 8 U.S.C. § 1225(a).

the statute authorizing bond hearings for all other noncitizens in removal proceedings.[135]

At the same time, Congress passed 8 U.S.C. § 1226(e), stripping judicial review of discretionary decisions to detain.[136] It appears that 8 U.S.C. § 1226(e) was passed without analysis of why judicial review of a decision to detain should give some pause and why it should be considered separately from judicial review of a decision to grant relief from removal.[137] Rather, the limitation on judicial review of detention decisions was simply the compilation of two sentiments motivating the 1996 legislation. The first concern was that the U.S. deportation system was complex and allowed noncitizens to "buy" too much time living at large in the United States through a complicated hearings and appeals process.[138] The second concern was that detention allowed the immigration enforcement authorities to ensure that deportation orders are actually effectuated once someone loses all of these appeals.[139] Cutting off the judiciary's access to detention decisions ensured more finality to denials of bond by the agency, which would keep the detainee in detention and prevent them from fleeing a removal order.[140]

Justice Antonin Scalia, in a 1999 decision, observed that "*many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the

---

135. *See id.* § 1226(a). The only change that Congress made to its prior version was to increase the minimum bond amount from $500 to $1,500. *Compare id.* § 1226(a) (2018), *with id.* § 1252 (1995) (current version at 8 U.S.C. § 1226(a)).

136. *See* Cole, *Jurisdiction and Liberty*, *supra* note 124, at 2487 (explaining how IIRIRA denies criminal aliens judicial review of their order of removal and the decision to detain them pending removal).

137. *See generally* PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON GOVERNMENTAL AFFS., CRIMINAL ALIENS IN THE UNITED STATES, S. REP. NO. 104-48 (1995) (reflecting the absence of any discussion of jurisdiction stripping of detention decisions); *see also* H.R. REP. NO. 104-469(I) (1996) (same).

138. *See* S. REP. NO. 104-48, at 2–3 (describing the complexities of current immigration procedures, which cause deportation delays and allow noncitizens to accrue time toward certain relief provisions and earn entitlement to work authorization).

139. *Id.* at 2–4. As Professor Margaret Taylor describes, the INS's inability to ensure that persons with deportation orders were actually deported from the United States "was something of an insider's secret," which gained attention and caused overreaction by Congress. Taylor, *supra* note 129, at 347–51.

140. *See* S. REP. NO. 104-48, at 1–3 (describing how current immigration procedures permit noncitizens to accrue significant time in the United States); *id.* at 32 (recommending that Congress "consider requiring that all aggravated felons be detained pending deportation," a step that "may be necessary because of the high rate of no-shows for those criminal aliens released on bond").

theme of the legislation."[141] The legislative history of the 1996 laws stripping jurisdiction over discretionary decisions evince congressional concern that sympathetic federal judges had failed to accord appropriate deference to the agency's discretionary denials. All the while, the noncitizen illegally gained extra time in the United States during this back and forth between the federal court and the immigration agency.[142] Scholars also critique the 1996 jurisdiction-stripping statutes, arguing that Congress's ability to remove federal courts' jurisdiction goes against the purpose of life tenure for Article III judges—ensuring that the judiciary could check the majoritarian pressures of the politically elected branches.[143] Yet, at a time when anti-immigrant and anticriminal sentiment was high, Congress was able to pass legislation that "broke this taboo" for two historically unpopular groups—noncitizens (especially those with criminal convictions) and prisoners.[144] Classifying judicial review as an essential component of the rule of law, one scholar has identified 1996 as "the year in which the rule of immigration law died."[145]

### *B. Litigation Challenging 1996 Jurisdiction-Stripping Laws*

Litigation followed the passage of AEDPA and IIRIRA. Most of it focused on the jurisdiction-stripping provisions related to removal

141. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 486 (1999). In *Reno v. American-Arab Anti-Discrimination Committee*, the Court interpreted 8 U.S.C. § 1252(g), which precludes jurisdiction over any claim "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." *Id.* at 477–78. The Court held that the noncitizens were barred from raising a selective prosecution claim because of 8 U.S.C. § 1252(g). *Id.* at 492.

142. David A. Martin, *Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of* St. Cyr *and* Nguyen, 16 GEO. IMMIGR. L.J. 313, 329 (2002).

143. Cole, *Jurisdiction and Liberty*, *supra* note 124, at 2482. This was not the first time that Congress engaged in efforts to remove federal courts' jurisdiction because of manifest hostility to the judiciary. *See, e.g.*, Lawrence Gene Seger, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 18 (1981) ("The source of this wave of proposed legislation is no mystery. These bills are the product of deep hostility — in some quarters of Congress and the nation — to federal judicial precedent in the areas of abortion rights, school prayers, and public school desegregation through mandatory busing.").

144. Cole, *Jurisdiction and Liberty*, *supra* note 124, at 2482; *see also* Brown v. Davenport, 596 U.S. 118, 134 (2022) (describing AEDPA as a "sea change in federal habeas law" because "Congress instructed that, if a state court has adjudicated the petitioner's claim on the merits, a federal court 'shall not' grant habeas relief 'unless' certain conditions are satisfied" and that those conditions are "demanding").

145. Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 704.

orders, including denials of relief from removal.[146] In 2001, the Supreme Court decided *INS v. St. Cyr*,[147] where the Court found jurisdiction to review whether a statute that rendered a noncitizen ineligible for relief from removal could be retroactively applied in Enrico St. Cyr's case. The government invoked the 1996 jurisdiction-stripping statutes, which purported to remove judicial review over Mr. St. Cyr's case due to his criminal conviction.[148] The Court relied on the presumption in favor of judicial review of administrative action and the constitutional avoidance doctrine, which requires a clear statement before Congress repeals habeas jurisdiction.[149] In analyzing whether Congress repealed habeas jurisdiction in 1996, the Court examined the Suspension Clause of the U.S. Constitution, which requires that "the Privilege of the Writ of Habeas Corpus" not be suspended "unless . . . in Cases of Rebellion or Invasion the public Safety may require it."[150] The Suspension Clause both protects individual liberty against arbitrary executive detention and ensures the separation of powers.[151] The Court analyzed whether the writ of habeas corpus, as it existed when the Constitution was ratified in 1789, could have been invoked by a noncitizen in federal custody who raised a question of law in his

146. *See* Neuman, *Jurisdiction and the Rule of Law*, *supra* note 127, at 1976 (stating that "[t]he major focus of the litigation has been" AEDPA and IIRIRA's preclusion of judicial review of removal orders for certain so-called "criminal alien[s]").

147. INS v. St. Cyr, 533 U.S. 289 (2001), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

148. *Id.* at 298–314. The government argued that three IIRIRA provisions, 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), and (b)(9); and AEDPA § 401(e) stripped federal courts of habeas corpus jurisdiction. *Id.* at 310–13.

149. *Id.* at 299.

150. *See* U.S. CONST. art. I, § 9, cl. 2. Scholars have noted only four times when Congress has suspended the writ, two of which occurred in U.S. territories. *See, e.g.*, Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 986–98 (2012) (describing suspensions occurring during the Civil War and Reconstruction); Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 597–98 (2010) (discussing Civil War–era suspension, Reconstruction-era suspension, and two suspensions occurring in U.S. territories, rather than states). In only one case, *Boumediene v. Bush*, 553 U.S. 723 (2008), has the Supreme Court found that Congress violated the Suspension Clause. *See, e.g.*, Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 538 (2010) [hereinafter Neuman, *The Habeas Corpus Suspension Clause*] ("The Supreme Court had never before found a violation of the Suspension Clause, and the holding of *Boumediene* gives its reasoning a precedential significance that earlier discussions lack.").

151. Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 757 (2013).

petition.[152] It concluded that the writ of habeas corpus had always been used as a means for a noncitizen subject to a deportation order to test the legality of that order.[153] For this reason, the Court interpreted the immigration statute not to preclude jurisdiction over Mr. St. Cyr's petition, which presented a question of law.[154]

*St. Cyr* provided some clarity about which questions could be reviewed in habeas, but it did not provide all of the answers. Namely, the Court was asked, as a constitutional question, must federal courts review questions of law, questions of fact, and questions of discretion?[155] The Court answered "yes" to questions of law.[156] And it answered "no" to questions of fact because its examination of the historical record demonstrated that the Suspension Clause, as interpreted in 1789, left questions of fact unreviewable.[157] However, the *St. Cyr* Court also suggested that the exercise of discretion would be unreviewable in a habeas corpus challenge, but did not define what it meant to "exercise discretion."[158]

---

152. *St. Cyr*, 533 U.S. at 299–301; *see also* Neuman, *The Habeas Corpus Suspension Clause*, *supra* note 150, at 543 (describing "the eighteenth-century writ as a floor (but not necessarily a ceiling) for the content of the Suspension Clause").

153. *St. Cyr*, 533 U.S. at 306.

154. *Id.* at 314.

155. *See* Kanstroom, St. Cyr *or Insincere*, *supra* note 23, at 425.

156. *St. Cyr*, 533 U.S. at 314.

157. *Id.* at 306 ("[O]ther than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive. However, they did review the Executive's legal determinations." (citations omitted)). Factual questions that presented a constitutional issue, however, would remain reviewable, because the Due Process Clause requires that factual determinations be supported by "some evidence." Neuman, *Jurisdiction and the Rule of Law*, *supra* note 127, at 1968. *See generally* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631 (1988) (examining the "some evidence" requirement applied in evaluating whether a governmental decision resulting in the loss of liberty interests violates due process).

158. *St. Cyr*, 533 U.S. at 306–07. The Supreme Court, relying on Professor Gerald L. Neuman's historical findings about the judiciary's use of habeas jurisdiction, reasoned that questions of fact were unreviewable. *Id.* The Court also reasoned that questions of discretion were also unreviewable. *See id.* (discussing the "strong tradition in habeas corpus law . . . that subjects the legally erroneous failure to exercise discretion, unlike a substantively unwise exercise of discretion, to inquiry on the writ" (quoting Neuman, *Jurisdiction and the Rule of Law*, *supra* note 127, at 1991)); *see* Kanstroom, St. Cyr *or Insincere*, *supra* note 23, at 426 ("The question of habeas review in such a case [when an immigration judge decides that a noncitizen does not merit discretion] was not directly presented in St. Cyr, but the structure of the opinion is not especially promising for those who might seek review of such a Board denial.").

Congress later codified the *St. Cyr* decision in the REAL ID Act of 2005,[159] creating a "savings clause" to restore judicial review of questions of law and constitutional questions, notwithstanding the 1996 bars.[160] Questions of fact as they arose in certain relief from removal proceedings remained unreviewable.[161] Questions of discretion also remained unreviewable.[162] This legislation led to more litigation, requiring courts to distinguish between questions of law, questions of fact, and elusive questions of discretion.[163]

Beginning in 2020, the Supreme Court began to answer some questions left open after *St. Cyr* and the REAL ID Act. In the Supreme Court's 2020 case *Guerrero-Lasprilla v. Barr*,[164] the Court held that so-called "mixed questions" of law and fact were reviewable notwithstanding the immigration statute's judicial review preclusions.[165] The Court stated that "questions of law" in the immigration judicial review statute includes the application of a legal standard to undisputed or established facts.[166] Two years later, in *Patel v. Garland*,[167] the Supreme Court determined that a question of fact made while deciding a petition for relief from removal was not reviewable.[168] The Court held that because the noncitizen presented no

159. *See* Motomura, *Immigration Law and Federal Court Jurisdiction*, *supra* note 98, at 488 (citing H.R. REP. NO. 109-72, at 173–74 (2005) (Conf. Rep.)) (describing how Congress provided judicial review of questions of law and constitutional claims in order to prevent the so-called "criminal aliens" from getting an added layer of review in the habeas courts, prior to review in the courts of appeals, and to avoid the confusion of bifurcating issues relating to the same removal order in the habeas courts and courts of appeals).

160. *See* 8 U.S.C. § 1252(a)(2)(D) (proving that statutory provisions that limit or eliminate judicial review "shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section"); *see also* Sharpless, *supra* note 23, at 61 (referring to 8 U.S.C. § 1252(a)(2)(D) as a "savings clause").

161. *See infra* notes 167–69 (discussing *Patel v. Garland*, 596 U.S. 328 (2022)).

162. *See* 8 U.S.C. § 1252(a)(2)(B)(ii).

163. *See generally* Sharpless, *supra* note 23, at 83–87 (discussing the differences between discretionary versus nondiscretionary decisions and questions of law versus fact).

164. Guerrero-Lasprilla v. Barr, 589 U.S. 221 (2020). The Supreme Court interpreted the statute barring judicial review of discretionary decisions in circuit courts' review of removal decisions, which makes reviewable "constitutional claims or questions of law." *See* 8 U.S.C. § 1252(a)(2)(C)–(D).

165. *Guerrero-Lasprilla*, 589 U.S. at 228.

166. *Id.* at 224–25.

167. Patel v. Garland, 596 U.S. 328 (2022).

168. *Id.* at 337–45.

question of law or constitutional question, the relevant statutes cut off all judicial review of his application for relief.[169]

The Court came closer to deciding the question of judicial review of the elusive "discretionary" decisions in 2024. In *Wilkinson v. Garland*,[170] the Court decided that the application of undisputed facts to the statutory standard of "exceptional and extremely unusual hardship" for the purposes of cancellation of removal was not a discretionary question.[171] The government argued that the question was a discretionary decision and thus jurisdiction was barred.[172] The Court saw the issue as no different than the mixed question of law and fact at issue in *Guerrero-Lasprilla*, although *Guerrero-Lasprilla* involved a judicially created standard (equitable tolling), whereas *Wilkinson* involved a statutory standard (exceptional and extremely unusual hardship).[173] The Court elaborated that a mixed question can "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence"[174] or it can "require courts to expound on the law . . . by amplifying or elaborating on a broad legal standard."[175]

There now appears to be some clarity around which immigration decisions are reviewable in the relief from removal context, with questions of fact clearly unreviewable and questions of law (including mixed questions of law and fact) reviewable.[176] None of the Supreme Court decisions specifically addressed 8 U.S.C. § 1226(e), however.[177]

---

169. *Id.* at 341–42.

170. Wilkinson v. Garland, 601 U.S. 209 (2024).

171. *Id.* at 216–18.

172. *Id.* at 222–25.

173. *Id.* at 221.

174. *Id.* at 222 (quoting U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 583 U.S. 387, 395–96 (2018)).

175. *Id.*

176. The next line of open questions involves the standard of review for mixed questions of law and fact. *See, e.g.*, Alzaben v. Garland, 66 F.4th 1, 7–8 (1st Cir. 2023) (holding that a good-faith-marriage determination is a mixed question of law and fact under 8 U.S.C. § 1252(a)(2)(D), reviewing case-specific factual issues under the substantial evidence standard, and finding that the court lacked jurisdiction to review the agency's weighing of the evidence); Williams v. Garland, 59 F.4th 620, 632–39 (4th Cir. 2023) (setting forth a different legal analysis to answer the jurisdictional question about the reviewability of a mixed question of law and fact and the standard of review applicable to a mixed question).

177. The Supreme Court in *Patel* left open the meaning of the language of 8 U.S.C. § 1226(e) and merely distinguished its jurisdiction-stripping language as different from that which governs jurisdiction over relief from removal decisions. *See* Patel v. Garland, 596 U.S. 328, 341 (2022) ("Had Congress intended instead to limit the jurisdictional bar to 'discretionary judgments,' it could easily have used that language—as it did elsewhere in the immigration code."); *see also* 8

And none has answered the elusive question: What *is* a question of discretion? The Supreme Court in *Wilkinson* did not review an exercise of discretion, but stated in a footnote that exercises of discretion would come *after* the immigration judge determined eligibility for relief.[178] The Court appears to be tracking a "residual thesis" of discretion, leaving discretion as the thing that happens after an agency decisionmaker finds the facts and applies the law.[179] Though the Supreme Court has opined on what is *not* "discretion," they have yet to say what it *is*.[180] This question will become increasingly important as courts give meaning to 8 U.S.C. § 1226(e).

### *C. Litigation Challenges to 1996 Detention Laws and the Untested Limits of 8 U.S.C. § 1226(e)*

The prior Section described the extensive litigation challenging the 1996 jurisdiction-stripping statutes, all of which arose when noncitizens challenged their removal orders. The 1996 laws, the reader will recall, had an additional theme: detention. This Section focuses on challenges that noncitizens have raised to their detention since 1996.[181] This Section divides these legal challenges into three phases and discusses why 8 U.S.C. § 1226(e) remains rarely litigated.

The first phase of litigation following the 1996 detention statutes was simply seeking an individualized determination of one's detention by an executive officer. In the 2001 case of *Zadvydas v. Davis*,[182] the Court recognized a due process right to be free from indefinite detention and read the statute to avoid such detention. Thus, the statute that supposedly authorized "mandatory" detention of

---

U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review.").

178. *Wilkinson*, 601 U.S. at 225 n.4.

179. *See* Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 717–30 (dividing the analysis into the residual thesis—discretion is what is left after law is applied—and the contingency thesis—discretion is everything because even purported legal reasoning is a mask for substantive policy decisions); *id.* at 730 ("[T]he residual thesis is a necessary framework, even if ultimately illusory, for analysis of practice in the field. As long as discretion appears specifically in our law and practice, we will have to try to understand its meaning.").

180. *Wilkinson*, 601 U.S. at 15 n.4; Guerrero-Lasprilla v. Barr, 589 U.S. 221, 224–29 (2020); *see also* Kanstroom, *The Better Part of Valor*, *supra* note 23, at 165 ("[T]he law/discretion line—as a normative and a structural or procedural concept, is theoretically impossible to define with sufficient precision to base a jurisdictional preclusion upon it . . . .").

181. *See* Laila L. Hlass & Mary Yanik, *Studying the Hazy Line Between Substance and Procedure in Immigration Detention Litigation*, 58 HARV. C.R.-C.L. L. REV. 203, 223–34 (2023) (describing challenges to mandatory detention following the 1996 legislation).

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

noncitizens convicted of certain crimes and ordered removal could not permit indefinite detention without any individualized determination.[183] In the 2003 case of *Demore v. Kim*,[184] the Supreme Court upheld mandatory detention for those who conceded deportability for crimes against a due process challenge, assuming that all such detentions were brief.[185] Yet Justice Anthony M. Kennedy's concurring opinion gave rise to much litigation around when due process would ensure a bond hearing as detention became unreasonably prolonged.[186] This litigation achieved bond hearings for whole classes of mandatory detainees who otherwise would not have had any bond hearing due to their criminal convictions and left many litigants continuing to fight simply for the right to a bond hearing.[187]

The second phase of the detention litigation involved the procedural protections in immigration bond hearings. A trifecta of

183. The individualized determination that the Court ordered was an examination into whether the noncitizen's deportation was reasonably foreseeable. Because the purpose of the executive detention was to prevent noncitizens living under removal orders from fleeing prior to their physical removal from the United States, that purpose had no place when a noncitizen's country would not accept him or when the noncitizen was stateless. *Id.* at 691–92, 699.

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

185. *Id.* at 526–30. The Government presented the Court with what turned out to be faulty statistics to indicate that most detentions under 8 U.S.C. § 1226(c) were shorter than they actually were. *See* Jennings v. Rodriguez, 583 U.S. 281, 343 (2018) (Breyer, J., dissenting) ("The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the Government then said it did.").

186. *Demore*, 538 U.S. at 531–32 (Kennedy, J., concurring) (reasoning that once detention becomes prolonged, mandatory detention pursuant to 8 U.S.C. § 1226(c) would no longer be reasonably related to the government's interest of protecting the community and ensuring that detainees appear for their hearings).

187. For example, in *Reid v. Donelan*, the district court certified a class of detainees who were subject to 8 U.S.C. § 1226(c) and whose removal proceedings had exceeded six months. *See* 991 F. Supp. 2d 275, 276–78 (D. Mass. 2014); Reid v. Donelan, 297 F.R.D. 185, 187 (D. Mass. 2014). On review, the United States Court of Appeals for the First Circuit rejected the district court's bright-line rule for providing bond hearings automatically at six months of detention. Upon further litigation, and in light of the Supreme Court's decision in *Jennings*, the district court created a test whereby each class member would have to file an individual habeas petition and show that detention had become unreasonably prolonged under a multifactor test. But upon such showing, certain procedural protections would automatically apply at the bond hearing ordered by the district court. *See* Reid v. Donelan, 390 F. Supp. 3d 201, 209 (D. Mass. 2019), *aff'd in part and vacated in part*, 17 F.4th 1 (1st Cir. 2021). On appeal, the First Circuit rejected the district court's use of a class as a vehicle to provide for relief to class members and vacated the portion of the district court's order that required procedural protections to be guaranteed on a class-wide basis. *See Reid*, 17 F.4th at 12; *see also* Rodriguez v. Robbins, 804 F.3d 1060, 1079–80 (9th Cir. 2015), *rev'd sub nom. Jennings*, 583 U.S. 281 (interpreting mandatory detention statutes, 8 U.S.C.§ 1226(c) and 8 U.S.C. § 1225(b), to provide bond hearings after six months, and interpreting 8 U.S.C. § 1226(a) to provide periodic bond hearings).

procedural protections were often demanded by litigants: the requirements that the government bear the burden of proof by clear and convincing evidence, the immigration judge consider alternatives to detention, and the immigration judge consider a detainee's ability to pay.[188] Some of these procedural arguments were raised within the context of the challenges to prolonged mandatory detention; others were raised within the context of noncitizens whose detention was governed by the general detention statute, 8 U.S.C. § 1226(a).[189]

Once battles were fought and won (or lost) over the detainee's right to a bond hearing and right to certain procedural protections at that bond hearing, detainees moved to the third phase of detention litigation—challenges to an immigration judge's bond denial. Now that the bond hearing and procedures have been afforded, it comes down to what immigration judges *do* with the standards. This is when courts must interpret 8 U.S.C. § 1226(e) and will find a lack of case law because it is rarely litigated.

Despite these multiple rounds of detention litigation, the Supreme Court has not done any deep dive into the boundaries of 8 U.S.C. § 1226(e). In *Zadvydas*, the Court held that the statute was inapplicable because the noncitizens were challenging their indefinite detention after an order of removal already had entered.[190] Moreover, the noncitizens were challenging "the extent of the Attorney General's authority under the . . . statute," and not seeking "review of the Attorney General's exercise of discretion."[191] In *Demore*, the Court held 8 U.S.C. § 1226(e) to be inapplicable because the detainee challenged "the statutory framework that permits his detention

188. *See, e.g.*, Hernandez-Lara v. Lyons, 10 F.4th 19, 41 (1st Cir. 2021) (holding that the Board's interpretation of the burden allocation in immigration bond hearings under 8 U.S.C. § 1226(a) violates detainees' due process rights); Velasco Lopez v. Decker, 978 F.3d 842, 855 (2d Cir. 2020) (finding that requiring noncitizen to bear the burden of proof in § 1226(a) bond hearing was unconstitutional in light of "unduly prolonged" immigration detention). *But see* Rodriguez Diaz v. Garland, 53 F.4th 1189, 1193 (9th Cir. 2022) (holding that due process does not require the government to bear the burden of proof in immigration bond hearings); Miranda v. Garland, 34 F.4th 338, 366 (4th Cir. 2022) (holding that due process does not require the government to bear the burden of proof in § 1226(a) immigration bond hearings). *See generally* Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 SAN DIEGO L. REV. 1, 16–17 (2022) [hereinafter Holper, *Immigration E-Carceration*] (describing litigation involving procedural protections in immigration bond hearings).

189. *See supra* notes 187–88 (describing the *Reid* litigation, which involved procedural protections for 8 U.S.C. § 1226(c) and litigation involving procedural protections for 8 U.S.C. § 1226(a) detainees).

190. Zadvydas v. Davis, 533 U.S. 678, 688 (2001).

191. *Id.*

without bail" and not a "discretionary judgment" by the attorney general regarding detention or release.[192] A similar rationale was repeated by the Supreme Court in its 2018 *Jennings v. Rodriguez*[193] decision, where the Court found jurisdiction to review the detainees' statutory claims challenging their mandatory detention under various immigration statutes,[194] and again in its 2019 decision in *Nielsen v. Preap*,[195] where the Court decided whether one mandatory detention immigration statute applied in one set of circumstances.[196]

There are also few appellate cases interpreting the meaning of 8 U.S.C. § 1226(e). One can see how courts could easily skirt 8 U.S.C. § 1226(e) in the first and second phases of detention litigation challenges—clearly questions such as whether there is a due process right to a bond hearing and what procedural protections should apply at that hearing are not challenges to a judge's discretionary decision to detain. Now that detainees are asking federal court judges to review whether the immigration judge actually applied the correct procedures—that is, did the immigration judge apply a clear and convincing evidence standard to the government's dangerousness evidence—courts cannot so easily bypass the question of whether they were being asked to review a discretionary decision.

Another reason explaining the lack of appellate cases interpreting 8 U.S.C. § 1226(e) is that habeas cases often become moot prior to the resolution of a case by the district court. A detainee's immigration removal case is fast tracked due to the detention. Thus, the removal case often resolves, obviating the need for a court to rule on the legality of detention, because the detainee has now been released into the United States pursuant to a win in the removal case or has been released in the detainee's home country pursuant to a loss in the removal case.[197] The likelihood of mootness becomes higher with the

192. Demore v. Kim, 538 U.S. 510, 516–17 (2003).

193. Jennings v. Rodriguez, 583 U.S. 281 (2018).

194. *Id.* at 295.

195. Nielsen v. Preap, 586 U.S. 392 (2019).

196. *Id.* at 419–20.

197. *See* Mary Holper, *The Great Writ's Elusive Promise*, CRIMMIGRATION BLOG (Jan. 21, 2020) [hereinafter Holper, *Elusive Promise*], http://crimmigration.com/2020/01/21/the-great-writs-elusive-promise [https://perma.cc/MU5R-RNKE]; Hlass & Yanik, *supra* note 181, at 209 (describing "shadow wins," when a detainee who is challenging detention via a habeas corpus petition is released, but there is no published opinion by the federal district court that articulates any useful guidance to future habeas courts).

additional time that appellate review would take.[198] Given the high likelihood of the detention challenge becoming moot, many detainees and their lawyers may forego these challenges, choosing to preserve limited resources and focus all efforts on fighting against removal.[199] The pooling of resources via class actions[200] has become less viable since the Supreme Court, in 2022, limited the relief that federal courts can provide to classes of litigants.[201] Because of this decision, major challenges to immigration detention will likely come via individual habeas corpus petitions. Courts will have to grapple with the meaning of 8 U.S.C. § 1226(e). More importantly, courts will have to grapple with the elusive question left open after all this litigation about the 1996 jurisdiction-stripping and detention statutes: What *is* a discretionary decision?

## III. THE JUSTIFICATIONS UNDERLYING UNREVIEWABLE DISCRETION DO NOT APPLY TO DETENTION DECISIONS

This Part explores how discretion has come to play such a large role in immigration law. In this discussion, this Part also assesses why discretion, and particularly unreviewable discretion, is given to agencies in general. It also discusses four primary justifications for unreviewable discretion in immigration law. First, courts do not want to second-guess enforcement agents' exercise of forbearance so as not

198. An amicus brief filed in the United States Court of Appeals for the First Circuit presented statistics from the District Court of Massachusetts that showed the average time to resolve a habeas petition was 130 days, with some averaging 408 days. This length of time to decide the petition resulted in many cases becoming moot prior to resolution. Brief for Am. Immigr. Laws. Ass'n as Amicus Curiae supporting Appellant, at 11, Maldonado-Velasquez v. Moniz, No. 17-1918, 2018 WL 11444979 (1st Cir. 2018).

199. *See* Holper, *Elusive Promise*, *supra* note 197.

200. Class actions can more easily surmount the 8 U.S.C. § 1226(e) jurisdictional bar, because the commonality requirement for class certification means that the federal court will not be examining any one person's discretionary detention decision. *See, e.g.*, Martinez v. Clark, 36 F.4th 1219, 1229 (9th Cir. 2022) (reasoning that a class action that challenged the process of determining bonds was cognizable notwithstanding 8 U.S.C. § 1226(e) because the class action did not attack any one detention decision, but the process used to decide whether to detain class members).

201. In *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022), the Court interpreted 8 U.S.C. § 1252(f) to mean that courts are stripped of their authority to grant injunctive relief for classes of immigration detainees, and did not reach the question of whether federal courts may provide declaratory relief to classes. *Id.* at 555. Declaratory judgments ultimately do not have the same teeth as injunctive relief, and thus, the *Aleman Gonzalez* decision is likely to reduce the number of class actions because class litigators find them not worth the effort. *See id.* at 572 n.9 (Sotomayor, J., concurring in part and dissenting in part) ("[A] declaratory judgment (unlike an injunction) 'is not ultimately coercive.'" (quoting Steffel v. Thompson, 415 U.S. 452, 471 (1974) (internal citations omitted))).

to encroach on executive branch enforcement. Second, there is no law to apply to forbearance decisions. Third, relief from removal is a matter of grace, not right. And fourth, judicial review of discretion allows noncitizens to steal time in the United States through endless litigation. Each justification for unchecked discretion, however, proves to be inapplicable when the question involves an immigration judge's discretion to detain.

### *A. The Origins of Discretion in Immigration Law*

Immigration law developed as a strict set of rigid rules requiring exclusion or deportation of an increasing number of categories of noncitizens.[202] Such "uncompromising rules" broke up families and created numerous other injustices for noncitizens, causing the agency to cure such rigidity through informal agency exercises of discretion and Congress to do so through private bills.[203] As administrative law scholar Kenneth Culp Davis has explained, discretion is often preferable to rigid rules,[204] because agencies constantly face problems that Congress could not have foreseen when writing a statute. Rigid rules in these situations would be useless, as it is impossible to write meaningful standards that address all aspects of a problem when its full scope is unknown.[205] Even in situations when rules can be written, discretion is often better because it may be necessary to tailor results to unique facts and circumstances, such that an agency can accomplish individualized justice.[206] There must be the perfect balance between rules and discretion. Discretion that is too broad causes justice to suffer from arbitrariness or inequality, and discretion that is too narrow causes justice to suffer from insufficient individualizing.[207]

---

202. *See* Neuman, *Discretionary Deportation*, *supra* note 23, at 622–24; Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 753–54.

203. Neuman, *Discretionary Deportation*, *supra* note 23, at 622–23; Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 752–54.

204. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 16 (1969). *But see* Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 710 (noting that this dichotomy within administrative law between "rules" and "discretion" is problematic because there is no one singular meaning of "rule").

205. DAVIS, *supra* note 204, at 16.

206. *Id.* at 15; *see also id.* at 25 ("Rules alone, untempered by discretion, cannot cope with the complexities of modern government . . . .").

207. *Id.* at 52; *see also id.* at 3–4 (arguing that unnecessary discretionary power should be eliminated, and "necessary" discretionary power should be confined, structured, and checked).

The concept of discretion plays an enormous role in immigration law.[208] This summary focuses on discretion as it exists in two areas key to immigration: the creation of the "relief provisions" to avoid mandatory deportation and of parole and other alternatives to detention to avoid mandatory detention.

Today, relief from removal takes multiple forms—adjustment of status, cancellation of removal, waivers of inadmissibility, voluntary departure, and relief that implements U.S. obligations under the Refugee Convention and the Convention Against Torture.[209] One of the oldest forms of relief from removal, adjustment of status, took shape in the 1930s.[210] Immigration law in existence at the time provided a singular mechanism for a noncitizen living in the United States to become a permanent resident—exit the United States and seek to reenter by requesting an immigrant visa at a consulate.[211] This inflicted a hardship on the many noncitizens living illegally in the United States, who had established a life and family ties, because a consular officer could easily deny the application,[212] and no judicial review was available of such denial.[213] In 1935, the Immigration and Naturalization Service ("INS") established "preexamination," a system whereby a noncitizen's inadmissibility could be determined prior to leaving the United States so that the noncitizen was guaranteed readmission after

208. *See* Kanstroom, *The Better Part of Valor*, *supra* note 23, at 165 ("Discretion has been so deeply intertwined with statutory immigration law for more than fifty years that much of the whole enterprise could fairly be described as a fabric of discretion.").

209. *See* Sharpless, *supra* note 23, at 58; Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 751–52.

210. *See* Abraham D. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. LEGAL STUD. 349, 350–51 (1972).

211. *Id.*

212. *Id.* at 351.

213. *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (holding that the judiciary may not review the constitutionality of a visa denial made by the executive branch, provided the denial is "facially legitimate and bona fide"). The Court cited to cases dating back to the early 1900s to support its decision that "as an unadmitted and nonresident alien, [Mandel] had no constitutional right of entry to this country as a nonimmigrant or otherwise." *Id.* at 762–66 (first citing United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904); then citing United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302; then citing Galvan v. Press, 347 U.S. 522, 530–32 (1954); and then citing Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952)). It is only when the denial of a visa is alleged to burden the constitutional rights of a U.S. citizen that a court considers whether the consulate gave a facially legitimate and bona fide reason to deny the visa. *See* Dep't of State v. Muñoz, 144 S. Ct. 1812, 1820–21 (2024).

a brief and inexpensive trip to a United States consulate in Canada.[214] Congress regularized this practice, creating what is today "adjustment of status," which allows a noncitizen to apply to become a permanent resident without leaving the United States.[215] Congress delegated the adjudication of such applications to the attorney general, and different delegates of the attorney general played a role in deciding these applications. INS officers initially decided the applications in relatively informal adjudications, but those denied could seek motions to reopen before the INS.[216] A denied applicant could also renew the application for adjustment of status in deportation proceedings, where the predecessor to an immigration judge (who, like INS officers, worked for the attorney general) would decide the case, and an appeal could be taken to the Board (who also worked for the attorney general), and thereafter federal court.[217] Each time a delegate of the attorney general made a decision on an application for adjustment of status, the administrative official exercised discretion.[218]

The INS also engaged in an unregulated system of administrative discretion to suspend deportation in order to alleviate hardships of harsh and uncompromising deportation laws.[219] Noncitizens in deportation proceedings initially sought the intervention of Congress in the form of private bills.[220] To decrease the pressure on Congress to consider such private bills, Congress in 1940 delegated its discretion to the attorney general in 1940, allowing the attorney general's delegates to suspend a noncitizen's deportation in the exercise of discretion.[221] The attorney general delegated such exercises of discretion to the immigration judges' predecessors, with precedential guidance and

214. Sofaer, *supra* note 210, at 351. Professor Abraham D. Sofaer noted that between 1935 and 1950, the INS adjudicated over forty-five thousand preexamination cases, demonstrating that the practice was very popular. *Id.*

215. *Id.* Sofaer notes that the original version of adjustment of status under Section 245 of the INA was so restrictive that the INS restored the practice of preexamination in 1955, but Congress has since liberalized the requirements for adjustment of status, making them largely mirror the requirements to obtain an immigrant visa abroad. *Id.* Congress again restricted adjustment of status, such that today there is a requirement that a noncitizen have been lawfully admitted or paroled into the United States to be eligible. *See* 8 U.S.C. § 1255(a) (2018).

216. Sofaer, *supra* note 210, at 353–54.

217. *Id.*

218. *Id.*

219. Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 734–35 (citing Charles Gordon, *Discretionary Relief From Deportation*, 11 DECALOGUE J. 6, 6 (1960)).

220. Neuman, *Discretionary Deportation*, *supra* note 23, at 622–23; Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 753–54.

221. Neuman, *Discretionary Deportation*, *supra* note 23, at 623.

appellate review of their decisions by the Board and judicial review in the federal courts.[222] Congress, however, also had to approve all of these applications for suspension of deportation, so the attorney general prepared a list to present to a congressional committee, with a detailed statement of facts and an overview of eligibility for each candidate.[223] Congress later inserted other relief provisions in the INA, providing more discretionary escape valves for noncitizens to avoid an otherwise rigid application of the deportation or exclusion laws.[224]

Looking back at the history of relief from removal provisions, one can see how overly harsh immigration laws led to requests for the exercise of discretion to avoid the truly harsh impacts of those laws in cases where there were humanitarian concerns.[225] To fit this into administrative law professor Martin Shapiro's typology of discretionary decisions,[226] this is a situation where the uniform application of rigid rules generated "a small number of random, unforeseeable inequities," so the agency had discretion to grant waivers to the otherwise harsh law.[227] In 1979, the INS began rulemaking to provide standards for the exercise of discretion in adjustment of status applications after realizing how uneven the

222. Neuman, *Discretionary Deportation*, *supra* note 23, at 631–33.

223. Sofaer, *supra* note 210, at 401–02.

224. *See* Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 751–52.

225. *See* Sivaprasad Wadhia, *Prosecutorial Discretion*, *supra* note 21, at 252–53 (describing how Congressman Barney Frank, following the harsh 1996 immigration laws, wrote to the attorney general, asking the attorney general to issue guidance on the exercise of prosecutorial discretion to avoid the extreme hardship of the new laws).

226. Shapiro created a typology of agency exercises of discretion, dividing it into seven categories. Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1489–1522 (1983) [hereinafter Shapiro, *Administrative Discretion*]. These are (1) "distributive decisions," which involve the agency allocating scarce resources when no legal rights or entitlements have been vested in any particular individuals; (2) "high-volume, low-level decisions," where discretion is not desirable, but the costs of controlling it outweigh the meager benefits yielded by such controls; (3) decisions that involve such subtle and complex human factors that the agency needs unbounded discretion because its vast expertise based on reviewing thousands of cases cannot be reduced to rules or precedents; (4) "waivers," which are "[w]here the uniform application of a rule generates a small number of random, unforeseeable inequities" that agency actors must correct; (5) "thematic" statutes, where goals are assigned by the legislature but there are no weights or priorities written into the statute; (6) decisions under conditions of high uncertainty; and (7) the classic prosecutorial discretion decisions, which are decisions to initiate enforcement actions, where there is "no law to apply" because the legislature has mandated enforcement but has not told the agency how it should single out individuals against whom to employ its scarce prosecutorial resources. *Id.*

227. *See id.* at 1504; *see also* Jay v. Boyd, 351 U.S. 345, 356 (1956) (describing how Congress intended to limit grants of suspension of deportation to the minimum number).

exercise of discretion was by its various officials.[228] At this point, it appeared that the "small number of random, unforeseeable inequities" in the harsh deportation laws was no longer small nor unforeseeable by the agency.[229] The Reagan administration, however, thwarted these efforts in 1981 to avoid providing standards against which agency decisions could be evaluated by the federal courts.[230]

Perhaps no form of relief from removal epitomizes a humanitarian exception to harsh immigration laws more than asylum. Here, too, the law developed through ad hoc grants of discretionary exceptions to otherwise harsh immigration laws, which provided no manner of entry. For those seeking refuge in the United States, parole was the mechanism to grant refuge to those fleeing persecution.[231] The statutory right to apply for asylum was not available until 1980 and was an implementation of U.S. treaty obligations under the 1951 United Nations Convention Relating to the Status of Refugees.[232] When the United States acceded to the 1967 Refugee Protocol, it was bound by Articles 2 through 34 of the Refugee Convention.[233] The United States developed asylum, a discretionary form of relief, in order to implement Article 34 of the Refugee Convention, which requires states "as far as possible [to] facilitate the assimilation and naturalization of refugees."[234]After the United States was bound by its treaty

228. *See* Neuman, *Discretionary Deportation*, *supra* note 23, at 623–24; Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 767–70 (discussing a study that Sofaer conducted for the Administrative Law Conference of the United States, which demonstrated the vast discrepancies in INS's exercises of discretion in adjustment of status application decisions).

229. *See* Shapiro, *Administrative Discretion*, *supra* note 226, at 1504.

230. Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 770–71.

231. Cox & Rodriguez, *President and Immigration Law*, *supra* note 21, at 501–05; ANDORRA BRUNO, CONG. RSCH. SERV., R46570, IMMIGRATION PAROLE 2 (2020), https://crsreports.congress.gov/product/pdf/R/R46570 [https://perma.cc/EN2H-5JNH]. President Dwight Eisenhower directed the Attorney General in 1956 to grant parole to fifteen thousand Hungarian refugees who fled after the 1956 Hungarian Revolution. *Id.* at 2 n.6.

232. *See* Mary Holper, *Redefining "Particularly Serious Crimes" in Refugee Law*, 69 FLA. L. REV. 1093, 1100 (2017) [hereinafter Holper, *Particularly Serious Crimes*].

233. *Id.* at 1099.

234. *Id.* at 1101 (quoting the Convention Relating to the Status of Refugees, art. 34, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150); *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 441 (1987). The relief of nonrefoulement (nonreturn), which today takes the form or withholding of removal, was added to U.S. law by statute in 1950 to protect persons who faced persecution. *See* Holper, *Particularly Serious Crimes*, *supra* note 232, at 1099. It was at first discretionary, and then made mandatory due to U.S. treaty obligations; Article 33.1 of the Refugee Convention mandates that states cannot return persons who are likely to face persecution. *Id.* at 1100 n.22; *see also id.* at 1099 (describing how the United States acceded to the 1967 Refugee Protocol, which bound

obligations, but before the 1980 Refugee Act, the INS handled the small number of asylum claims through informal and ad hoc procedures, because there was no statute or regulation providing for asylum.[235]

Within the realm of immigration detention, there are places where discretion came to be incredibly important to provide a case-by-case exception to overly harsh laws. For example, Congress over the years wrote various statutes that mandated detention for those who were arriving in the United States.[236] Notwithstanding this "mandatory" language, immigration officials, as early as the late 1800s, exercised their discretion to grant parole, often releasing noncitizens to the care of community groups.[237] Congress eventually wrote the parole authority into the immigration statute, again delegating such exercises of discretion to the attorney general. Congress left the standards undefined—the only guidance it provided is that the agency can grant either humanitarian parole or significant public benefit parole.[238]

Both the parole exception to mandatory detention of those arriving in the United States and the relief provisions to mandatory deportation created humanitarian escape valves, where uniform application of the rule to all cases would result in "a small number of random, unforeseeable inequities" that it would be desirable to allow the agency to correct.[239] Eventually, exercises of discretion gave way to rules that created standards. Also, exercises of discretion were often conducted by delegates of the attorney general, many of whom acted as adjudicators, not prosecutors.

---

states to Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees, and how withholding removal implements U.S. obligations not to return refugees where they face persecution).

235. Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 39 (1984). At that time, under five hundred claims to asylum were made each year, and most requests came from prominent defectors from Soviet-bloc countries. *Id.* The INS established procedures and standards to resolve asylum claims in 1975, and Congress passed the Refugee Act in 1980. *Id.*

236. *See* WILSHER, *supra* note 117, at 13–15.

237. *See* Holper, *Immigration E-Carceration*, *supra* note 188, at 9–10; WILSHER, *supra* note 117, at 14.

238. *See Fact Sheet: The Use of Parole Under Immigration Law*, AM. IMMIGR. COUNCIL (Apr. 8, 2024), https://www.americanimmigrationcouncil.org/research/use-parole-under-immigration-law [https://perma.cc/48EE-PGMU] (describing two types of parole from ICE custody, humanitarian parole and significant public benefit parole, and stating that neither type of parole is defined in the statute or regulations, so decisions are made on a case-by-case analysis).

239. *See* Shapiro, *Administrative Discretion*, *supra* note 226, at 1504 (listing as one category "waivers," which are needed when the uniform application of a rule generates "a small number of random, unforeseeable equities").

Having explained how immigration law came to be infused with discretion, the following sections examine the four primary justifications that courts give for refusing to review agencies' discretionary decisions.

### *B. Separation of Functions*

Courts frequently refuse to review discretionary decisions because these decisions are made by prosecutors, and there is a need to separate the judicial and executive branches of government. Many immigration law exercises of discretion fit within the mold of true "prosecutorial discretion" decisions, akin to those made by a criminal court prosecutor who is deciding whether to deploy the resources of the government against an individual person.[240] These types of exercises of prosecutorial discretion can involve "micro" decisions about whether to pursue enforcement against one person or "macro" decisions such as laying out enforcement priorities or establishing programmatic exercise of prosecutorial discretion. A typical immigration law example of a "macro" decision is the creation of the Deferred Action for Childhood Arrivals ("DACA") program.[241] The Supreme Court, in its 2020 decision *Department of Homeland Security v. Regents of the University of California*, which evaluated the Trump administration's termination of the DACA program, referred to this type of prosecutorial discretion as "forbearance."[242]

Prosecutorial discretion of this sort is "both a welcome and a necessary component of immigration law."[243] The theories behind this type of prosecutorial discretion are economic, because the government never has enough resources to enforce the law fully against everyone so there must be some discretion not to enforce the law against some, and humanitarian, because those who have violated the law may have equities that render full enforcement of the law unjust.[244] When making a forbearance decision, the agency must apply a complex set of balancing factors, including whether the agency has the resources to

240. *See, e.g.*, Sivaprasad Wadhia, *Prosecutorial Discretion*, *supra* note 21, at 244–45.

241. *See* MOTOMURA, OUTSIDE THE LAW, *supra* note 21, at 129; SIVAPRASAD WADHIA, BEYOND DEPORTATION, *supra* note 21, at 56–57.

242. *See generally* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020) (referring to the DACA program as a forbearance policy).

243. Sivaprasad Wadhia, *Prosecutorial Discretion*, *supra* note 21, at 244.

244. *Id.* at 244–45.

undertake such action.[245] Courts have no role in these decisions because there is a need to separate the executive and judicial functions.[246] As scholars have noted, the Roberts Court has prioritized the separation of functions in administrative law.[247] The role of federal judges thus is to ensure that each branch completes its own functions without stepping into the realm of other branches.[248]

The justification for unreviewable discretion due to separating executive and judicial functions is inapplicable in the context of immigration judges' detention decisions. To put it simply, *who* is making the discretionary decision matters. Exercises of prosecutorial discretion that involve "forbearance" are made by ICE or the Customs and Border Patrol ("CBP") and involve decisions not to enforce the law against certain persons.[249] The other set of discretionary decisions are made by the actors within the immigration agencies who are the supposed neutral adjudicators—immigration judges and the Board—whose roles are not enforcement.[250] When discretion is given to those

245. *See, e.g.*, United States v. Texas, 599 U.S. 670, 679–80 (2023); Heckler v. Chaney, 470 U.S. 821, 831–32 (1985), Margulies, *supra* note 21, at 727.

246. *See, e.g.*, United States v. Texas, 599 U.S. at 680–81; Margulies, *supra* note 21, at 727; Markowitz, *supra* note 21, at 496 ("Prosecutors, whether they be administrative or criminal, the theory goes, are in a better position than Congress and the judiciary to assess how to most efficiently utilize the available enforcement resources."); *see also* United States v. Nixon, 418 U.S. 683, 693 (1973) (noting the executive branch's "absolute discretion to decide whether to prosecute a case").

247. *See* Cox & Kaufman, *supra* note 83, at 1773–78. On the topic of agency adjudication, Professors Adam Cox and Emma Kaufman have noted that two theories of administrative law advanced by the Roberts Court—separation of powers and unitary executive—are in tension. *Id.* at 1773–81, 1796–97. The unitary executive theory dictates that courts ensure that agency bureaucrats are strongly controlled by the President. *Id.* at 1778–81. The political control over immigration courts provides an example of this tension—separation-of-powers purists abhor their lack of independence from political actors, and unitary executive purists celebrate such control over immigration courts. *Id.* at 1788–89, 1797–1809. Cox and Kaufman have predicted that immigration adjudication is unlikely to be shifted to Article III courts, and there will be other such "presidential adjudication" systems, modeled after immigration courts, in other agencies. *Id.* at 1807–09.

248. *Id.* at 1781 (describing judges as "janitors" who "tidy up government—to separate powers horizontally, and to integrate executive powers vertically").

249. *See* SIVAPRASAD WADHIA, BEYOND DEPORTATION, *supra* note 21, at 7–13.

250. Officials from the Citizenship and Immigration Services ("CIS") also exercise their discretion in deciding certain applications, such as adjustment of status and asylum. Although CIS officers work for the DHS, they are acting in an adjudicative function, because they are finding facts and applying law to an application. Although their role is supposed to be service oriented and not enforcement, they carry out several enforcement functions. *See* Beth Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 WIS. L. REV. 707, 710 ("In creating the current immigration agency structure under DHS, Congress's intent and statutory mandate

who are not supposed to carry the label or role of a prosecutor, the separation of powers justification for unreviewable discretion disappears. Most of the scholarship discussing prosecutorial discretion in immigration law specifically leaves aside the question of adjudicatory discretion[251]; thus, few scholars have grappled with this distinction.

When one examines the history of the various roles within the federal agencies that administer immigration law, it is easy to see how massive amounts of discretion have been vested in these executive officers. The prosecutorial and adjudicatory functions of the immigration agencies were historically comingled.[252] Although there was a forced split of functions by the Supreme Court in 1950 in order to comply with the 1946 Administrative Procedure Act ("APA"),[253] Congress then removed immigration hearings from the APA's

---

were clearly to insulate USCIS's adjudication service-oriented mission from immigration enforcement functions performed by Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP)."). *But see id.* at 752–55 (describing how CIS officers have both enforcement-focused investigatory tasks and prosecution tasks, such as issuing immigration charging documents and filing them with immigration courts, even though they are not supposed to be an enforcement agency); *id.* at 710–11 ("USCIS has dramatically increased its enforcement functions within its adjudication mission, thereby fortifying a pipeline from application to apprehension, detention, and deportation."); Hallett, *supra* note 21, at 1797 ("[I]n the Trump era, even USCIS has been reoriented into an enforcement agency.").

251. *See, e.g.*, Margulies, *supra* note 21, at 690; Sivaprasad Wadhia, *Prosecutorial Discretion*, *supra* note 21, at 245.

252. *See generally* ALISON PECK, THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION 49–113 (2021) (describing the history of how the supposedly neutral immigration courts were placed within the Department of Justice, an enforcement agency, in the lead-up to World War II); Holper, *supra* note 83, at 1306–13 (describing the history of comingled functions between the immigration prosecutors and the supposedly neutral adjudicators, who now are known as immigration judges); Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L.J. 261, 267–70 (2019) (describing the historical tension of government officials' conflicting roles as impartial adjudicator and enforcement agent); Daniel Kanstroom, *The Long, Complex, and Futile Deportation Saga of Carlos Marcello*, *in* IMMIGRATION STORIES 113–39 (David A. Martin & Peter H. Schuck, eds., 2005) (describing the story of Carlos Marcello, whose case was a key Supreme Court case in the history of comingled functions between the immigration prosecutors and the supposedly neutral adjudicators); Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 456 (1988) (describing how the Supreme Court's decision in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36–38 (1950), *modified*, 339 U.S. 908 (1950), *superseded by statute*, Supplemental Appropriation Act of 1951, Pub. L. No. 81-843, 64 Stat. 1044, 1048, forced the former INS to split its prosecutorial and adjudicatory functions, and the aftermath of this separation of functions within the agency).

253. *See McGrath*, 339 U.S. at 50.

procedural requirements with the INA of 1952.[254] The agencies themselves made incremental changes to split the roles of prosecutor from adjudicator. The attorney general created a separate adjudicatory agency in 1983 to house the judges and Board, whereas the prosecutorial functions remained in the INS (although both were within the Department of Justice).[255] In 2002, with the Homeland Security Act, the immigration courts and Board remained in the Department of Justice, while some of the enforcement functions resided with the newly created DHS.[256] Namely, two enforcement agencies—CBP and ICE—were housed within DHS.[257] DHS continued to host Citizenship and Immigration Services officers, even though their role is primarily immigration status adjudication and not enforcement.[258] Throughout history, and to this day, many seek to remove immigration judges and the Board entirely from the Department of Justice, so that the nation's top prosecutor is not the boss of the supposedly independent adjudicators.[259] Defenders of the current structure note that immigration judges and Board members are independent adjudicators, in that they make decisions for each individual case without regard for any political influences.[260] Yet, many

254. Supplemental Appropriation Act of 1951, ch. 1052, 64 Stat. 1044, 1048 (1950); Marcello v. Bonds, 349 U.S. 302, 306 (1955). In *Marcello v. Bonds*, the Supreme Court recognized that the INA exempted Mr. Marcello's deportation proceedings from the APA's requirements that prosecutors and adjudicators be separate. 349 U.S. at 308–10. The Court further decided that his deportation hearing did not violate his due process rights even though the presiding officer—who was the adjudicator—was supervised by the prosecuting agency. *Id.* at 311.

255. *See* Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8056, 8057 (Feb. 25, 1983); Holper, *"U.S. Imitation Judges"*, *supra* note 252, at 1310–12.

256. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, §§ 441–446 (transferring immigration enforcement functions to DHS); Holper, *"U.S. Imitation Judges"*, *supra* note 252, at 1313.

257. *See* Zilberman, *supra* note 250, at 731.

258. *See id.* at 752–55 (describing how CIS officers have both enforcement-focused investigatory tasks and prosecution tasks, such as issuing immigration charging documents and filing them with immigration courts, even though they are not supposed to be an enforcement agency).

259. *See, e.g.*, Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1644–51 (2010); Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 3–4, 10–11 (2008); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 644–45 (1981).

260. *See* 8 C.F.R. § 1003.1(d)(1)(ii) (2022) ("Subject to the governing standards . . . Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board . . . ."); *id.* § 1003.10(b) ("[I]mmigration judges

have noted how politics have impacted multiple decisions by these supposedly "independent" judges, including bond determinations.[261]

The question of who is making the discretionary decision is important because immigration judges are supposed to act as neutral judges, independent of the DHS prosecutors who appear before them.[262] Thus, questions that factor into "prosecutorial discretion" decisions should be irrelevant to them. So, for example, judges should not concern themselves with "the complicated balancing of . . . factors," including "whether the agency has enough resources to undertake the action."[263] They do not decide whom to arrest and against whom to bring immigration charges—these prosecutorial functions are housed squarely within the DHS.[264] The judges are simply tasked with deciding an individual noncitizen's case, which includes finding facts, applying relevant law, and often includes exercising adjudicatory discretion.

---

shall exercise their independent judgment and discretion . . . ."); MYTHS VS FACTS, *supra* note 16, at 1 (characterizing the fact that "Immigration Judges and Appellate Immigration Judges are politically pressured or otherwise directed to adjudicate cases to obtain a certain outcome" as a myth and pointing to the regulatory language that requires immigration adjudicators to exercise their judgment independently); Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 850 (2016) (advocating that the attorney general utilize power to set policy through referral authority rather than by influencing the Board, which acts as a delegate of the attorney general).

261. *See, e.g.*, Kim & Semet, *Presidential Ideology*, *supra* note 90, 1876–91 (reporting the results of an empirical study that demonstrated that noncitizens were more likely to lose a bond hearing during the Trump administration than they did during the prior two presidential administrations, regardless of who was president when they were appointed as an immigration judge, and reasoning that results call into question political independence of immigration judges when making bond decisions); Holper, *Taking Liberty Decisions Away*, *supra* note 83, at 1088–95 (describing specific examples of immigration judges' lack of independence in bond decisions); Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 707 (2019) (describing political interference with immigration adjudication); Legomsky, *Deportation and the War*, *supra* note 88, at 372–79 (describing how liberal Board members were demoted during the presidency of George W. Bush, and various other aspects of the immigration system that demonstrate judges and Board members are not truly neutral adjudicators).

262. 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b). Professor Bijal Shah discusses these distinct roles of the attorney general, who has authority to refer immigration cases to themself to set forth precedential decisions for immigration judges and the BIA while deciding an individual's immigration case. *See* Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 132–33 (2017), https://ilr.law.uiowa.edu/volume-102-response-pieces/5 [https://perma.cc/WX2A-94LK] (distinguishing between the attorney general's political powers as a political appointee and their adjudicative powers through the referral and review mechanism and arguing that the discretion exercised in these differing roles should not be conflated).

263. *See* Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

264. *See* Zilberman, *supra* note 250, at 731–34.

It is important here to overlay immigration law's history as a system with massive amounts of discretion onto the history of the attempts to separate the prosecutorial and adjudicatory functions in immigration law.[265] As this history demonstrates, Congress delegated various types of discretionary authority to the attorney general, who in turn delegated it to agency actors. The attorney general delegated such exercises of discretion to both the INS (the prosecutors) and those who would eventually earn the title of "immigration judge"[266] (the adjudicators) with precedential guidance and appellate review of their decisions by the Board.[267] So immigration law has developed into one large body of discretionary authority that could arguably come within the realm of "prosecutorial discretion" and be justified by the motivations behind giving an enforcement agency full, unreviewable discretion. After all, Congress gave the authority to the nation's top *prosecutor*, the attorney general. Yet, it matters how the discretionary decisions were later subdelegated.[268] The adjudicators who work under the attorney general should not be "prosecutors," or else the entire immigration adjudication should unravel due to its lack of separated functions.[269] It is for this reason that immigration judges simply do not

265. *See supra* Part III.A.

266. It was not until 1973 that the judges earned this title (and began the practice of wearing robes); prior to that, their title was "special inquiry officer." *See* Holper, *"U.S. Imitation Judges"*, *supra* note 252, at 1311–12; Rawitz, *supra* note 252, at 458.

267. *See* Jay v. Boyd, 351 U.S. 345, 351 (1956) (describing that the attorney general delegated the authority to decide suspension of deportation cases to special inquiry officers, with review by the BIA); *id.* at 365–66 (Black, J., dissenting) ("Of course the Court refers to the Attorney General's 'unfettered discretion,' but participation of the Attorney General in this case is a fiction.").

268. *See* Cox & Rodriguez, *Redux*, *supra* note 21, at 109 (discussing an important aspect of "presidential immigration law," which is the allocation of power *within* the executive branch). Professors Cox and Christina M. Rodriguez describe how Congress's elimination of relief from removal, which "have often been conceptualized as limiting the role discretion plays in immigration enforcement," actually "shift[s] the exercise of discretion from immigration judges to prosecutors and immigration police." *Id.* at 132.

269. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2363 (2001) (reasoning that presidential participation in executive branch adjudications would "contravene procedural [due process] norms and inject an inappropriate influence into the resolution of controversies"); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 456–57, 475 (1986) (reasoning that the participation of an independent adjudicator is an "essential safeguard, and may be the only one," to ensure a fair hearing, and describing an independent adjudicator as "one element" of the "due process 'floor'"); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975) ("[T]here is wisdom in recognizing that the further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards."). *But*

exercise "prosecutorial discretion," and therefore the reasons to give a prosecuting agency unreviewable discretion do not apply.

The argument thus far—that immigration judges' exercises of discretion should be reviewable because they do not fit the prosecutorial discretion mold—provides yet another reason why immigration judges' discretionary decisions regarding relief from removal should be reviewable. Other scholars argue that removal decisions should be reviewable, regardless of the jurisdiction-stripping bar over discretionary decisions.[270] Their arguments center on the availability of federal court review in habeas corpus,[271] the presumption of judicial review of agency decisions,[272] and the idea that most discretionary decisions can be recharacterized as mixed questions of law and fact.[273] None question the separation of powers justification for

---

*see* Cox & Kaufman, *supra* note 83, at 1781–97, 1803–09 (describing different theories to justify adjudication by an Article II court and applying them to immigration courts). The Supreme Court, in *Marcello v. Bonds*, held that a deportation hearing in which the adjudicator "was subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions," did not violate due process. 349 U.S. 302, 311 (1955). The Court gave this argument no analysis, simply stating that the due process argument was "without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters." *Id.* It is worth noting that the *Marcello* decision was decided well before the "due process" revolution took hold in immigration law. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1652–53 (1992) [hereinafter Motomura, *The Curious Evolution of Immigration Law*] (describing the "arrival of the due process revolution in immigration law").

270. *See supra* note 10; Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1465–94 (1997) [hereinafter Benson, *Back to the Future*] (arguing that habeas review remains available for the types of immigration decisions over which Congress sought to restrict judicial review in 1996). *See generally* Motomura, *Immigration Law and Federal Court Jurisdiction*, *supra* note 98 (discussing two different models of habeas review—direct and collateral—that federal courts can use to review immigration decisions); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000) (describing costs of judicial review but arguing that judicial review of deportation orders is critical in immigration cases).

271. *See, e.g.*, Benson, *Back to the Future*, *supra* note 270, at 1465–94; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1044–59 (1998) [hereinafter Neuman, *Executive Detention and the Removal of Aliens*] (arguing that the Suspension Clause extends to noncitizens).

272. *See generally, e.g.*, David K. Hausman, *When Jurisdiction Stripping Raises Factual Questions*, 101 WASH. U. L. REV. 1677 (2024) (advocating that courts apply the presumption of judicial review to immigration decisions).

273. *See, e.g.*, Sharpless, *supra* note 23, at 57–60 (discussing the difficulty of distinguishing between questions of law and fact); Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 731 ("The dichotomy between questions of 'fact' and those of 'law' appears often in

the lack of judicial review over prosecutorial discretion decisions when the discretion comes from a prosecutor masquerading as a judge. Thus, this Article contributes to others' arguments that immigration judges' decisions outside of the detention context should not be unreviewable by federal courts.

### *C. "No Law to Apply"*

Another common justification for the lack of judicial review over forbearance decisions is that there is no set of standards by which the agency's decision can be judged. To put it in the words of the Supreme Court, there is "no law to apply."[274] If the agency decision need not follow any set precedent or rely on any factor or combination of factors, reviewing courts are at a loss for whether the agency's decision was sound.

In the context of immigration law forbearance decisions, there is some debate as to whether there is law to apply. As scholars have documented, the exercise of prosecutorial discretion consists of a long history of memoranda guiding officers' exercise of discretion.[275] The agency actors who believe they are writing guidelines for the exercise of discretion certainly appear to believe that they are creating "law to apply" that provides some guidance for "generalizable policy."[276] The need to create standards to guide against arbitrary enforcement decisions, many of which will be animated by racial discrimination or xenophobia, justifies the creation of enforcement priorities.[277] Specifically, there is a concern that the absence of standards simply "devolves discretion to the rank and file," does nothing to guard against racial discrimination, and "produc[es] a shadow, unsupervised shield from enforcement for those whose race or appearance does not reveal their deportability."[278] Indeed, this was the justification for executive policies such as the DACA program.[279] Yet, others have

discussions of discretion. Despite its venerability and durability, however, this distinction is much more slippery than it might first appear.").

274. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985).

275. *See* SIVAPRASAD WADHIA, BEYOND DEPORTATION, *supra* note 21, at 111.

276. *Id.*; *see also* Neuman, *Discretionary Deportation*, *supra* note 23, at 624 (reasoning that "case-by-case adjudication of discretionary relief does not actually produce much in the way of generalizable policy").

277. Ray, *supra* note 21, at 1327–28.

278. *Id.* at 1354; *see also* Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 451 (2018) (describing this regime as "rogue by design").

279. *See* Ray, *supra* note 21, at 1347.

argued that general statements of priorities such as these are not creating "law to apply" that binds any one agency prosecutor.[280]

Whether one agrees that there is "law to apply" in the context of forbearance decisions, there is certainly law to apply when immigration judges decide bond cases. For these decisions, immigration judges have numerous interpretive guidelines, such as balancing tests set forth in published decisions, to utilize as they exercise their delegated discretion.[281] The Board has a nine-factor test for judges to apply when deciding bond[282] and has set forth guidance on certain underlying facts that point to a dangerousness or flight risk finding.[283] Thus, although "case-by-case adjudication of discretionary relief does not actually produce much in the way of generalizable policy,"[284] suggesting that there is "no law to apply" for this type of discretion either is false. The Board has created that law—in the form of precedential case law—to guide immigration judges. After immigration judges decide the facts based on the record before them, they apply Board case law to those facts.[285] These standards guide immigration judges and provide a structure for judicial review of the decision, even if they do not mandate a certain outcome in any one case.[286]

---

280. *See, e.g.*, Margulies, *supra* note 21, at 728.

281. *See* SIVAPRASAD WADHIA, BEYOND DEPORTATION, *supra* note 21, at 111; *see, e.g.*, *In re* C-V-T-, 22 I. & N. Dec. 7, 11 (B.I.A. 1998); Monreal-Aguinaga, 23 I. & N. Dec. 56, 58 (B.I.A. 2001); *In re* Andazola-Rivas, 23 I. & N. Dec. 319, 332 (B.I.A. 2002).

282. *See, e.g.*, *In re* Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006).

283. *See, e.g.*, *In re* Siniauskas, 27 I. & N. Dec. 207, 208–09 (B.I.A. 2018) (instructing judges that a DUI conviction should lead to a dangerousness finding); *In re* R-A-V-P-, 27 I. & N. Dec. 803, 805 (B.I.A. 2020) (instructing judges that they should consider the likelihood that the detainee will win relief from removal in flight risk assessment).

284. Neuman, *Discretionary Deportation*, *supra* note 23, at 624. Neuman cites as a reason for curtailing judicial review of discretionary relief from removal that some standards are just so open-ended that they are unreviewable. *See id.* at 628 (listing "extreme hardship" as a standard that is so open-ended that it is unreviewable). As discussed *supra* Part II.B, however, the Supreme Court held in its 2024 *Wilkinson* decision that "exceptional and extremely unusual hardship" in the cancellation of removal statute is a mixed question of law and fact, and therefore subject to judicial review.

285. *See infra* Part IV.A.

286. As Judge Marsha S. Berzon emphasized in *Martinez*, "[l]egal inquiries involving the weighing of multiple factors, without a standard that *mandates* a particular result, are legion." Martinez v. Clark, 68 F.4th 1195, 1202 (9th Cir. 2023) (Berzon, J., dissenting), *reh'g & reh'g en banc denied*, 36 F.4th 1219 (9th Cir. 2022). Judge Berzon cites as an example whether a police officer's use of force was excessive under the Fourth Amendment, writing that . . . "[t]here is no legal standard in excessive force cases that mandates a particular outcome in all instances. But the Supreme Court has held that once the facts have been established, whether the totality of the circumstances 'warrant[s] deadly force . . . is a [] question of law.'" *Id.* (alterations in original) (quoting Scott v. Harris, 550 U.S. 372, 381 n.8 (2007)).

To put it differently, the Board creates standards to guide judges in their bond decisions. With each new standard, the Board increasingly deprives judges of the need to exercise their own discretion to decide which factors were important to the questions of dangerousness and flight risk. Thus, the justification for the judiciary declining review of prosecutorial discretion decisions—that there is "no law to apply"—is simply inapplicable when a federal court reviews an immigration judge's bond decision.

### *D. Immigration Relief as a "Matter of Grace"*

Another justification for the lack of judicial review of a discretionary decision has come from an unnecessary intertwining of relief from removal and detention decisions. When immigration judges determine relief from removal, these decisions are "matter[s] of grace."[287] There is no entitlement to such relief—the law makes the person deportable, and relief from removal is simply a gift.[288] Nobody can claim entitlement to a gift. The noncitizen is entitled to only one form of discretionary relief—asylum—due to the United States' obligations under the Refugee Convention.[289] Thus, asylum is the only discretionary relief from removal that must be available to noncitizens. Tellingly, discretionary decisions in asylum are the only discretionary relief decisions that are subject to judicial review.[290] Perhaps this is in recognition that asylum, as a right, is not a "matter of grace," which Congress could take away at will.[291]

Judicial review of discretionary decisions to deny relief from removal and judicial review of a discretionary decision to detain have become inextricably intertwined. They were wrapped up together in the 1996 legislation cutting off access to judicial review for various

287. *See* Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 756 (quoting Jay v. Boyd, 351 U.S. 345, 354 (1956)).

288. *See* Neuman, *Discretionary Deportation*, *supra* note 23, at 635–36. There is overlap between the "prosecutorial discretion" and "matter of grace" justifications. A good example is Justice Scalia's opinion on *Reno v. AADC*, where he discusses the history of 8 U.S.C. § 1252(g) and describes how the INS, as a prosecuting agency, set forth memos providing guidance for the exercise of prosecutorial discretion. 525 U.S. 471, 483–85 (1999). Such exercises of prosecutorial discretion came with them the "gift" of a work permit, through statuses such as deferred action. *Id.* Justice Scalia writes how litigation ensued, because "no generous act goes unpunished." *Id.* at 484.

289. *See supra* Part III.A.

290. *See* 8 U.S.C. § 1252(a)(2)(B)(ii).

291. *See* Martin, *supra* note 142, at 332.

types of discretionary decisions.[292] The Ninth Circuit, in its extensive examination of 8 U.S.C. § 1226(e),[293] utilized the robust case law interpreting what a discretionary decision is and why it is unreviewable. All of this case law arose in context of relief from removal.[294] But despite jurists' urge to lump them together, these two types of discretion given to immigration judges should be separated.

There is good reason to separate the justifications for unreviewable discretion in relief decisions from unreviewable discretion in the detention context. Congress created discretionary relief from removal as a gift, not a right. Relief from removal was not available until Congress wrote it into statute.[295] Prior to its insertion into immigration law, exercises of discretion took the form of private bills presented to Congress or exercises of discretion by the agency who was charged with enforcing immigration law.[296] Similarly, no person has a right to be admitted to the United States.[297] This is the animating force behind the doctrine of consular nonreviewability—courts will not second-guess the consular officer's decision to deny a visa, so long as the denial is "facially legitimate and bona fide."[298] In fact, one of the

---

292. *See supra* Part II.A.

293. *See supra* Part I.A (discussing Martinez v. Clark, 68 F.4th 1195, 1197 (9th Cir. 2023) (Berzon, J., dissenting), *reh'g & reh'g en banc denied*, 36 F.4th 1219 (9th Cir. 2022)).

294. *See supra* Part I.A (discussing Martinez v. Clark, 68 F.4th 1195, 1197 (9th Cir. 2023) (Berzon, J., dissenting), *reh'g & reh'g en banc denied*, 36 F.4th 1219 (9th Cir. 2022)).

295. *See* Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 754 (discussing the secret exercises of discretion that Congress eventually codified in 1940, creating the discretion relief which was then called "suspension of deportation").

296. *See id.* at 753–54 (describing the "virtually secret and unregulated system of administrative discretion" exercised at this time).

297. *See* SALYER, *supra* note 117, at 31 ("The Supreme Court, in fact, had exercised a much more zealous review of the Interstate Commerce Commission because of the potential danger it posed to the private property rights of citizens. Immigrants applying for admission, however, sought a privilege, not a right, in the Court's opinion . . . .").

298. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972); *see* Trump v. Hawaii, 585 U.S. 667, 697–707 (2018) (holding that President Trump's executive order that excluded persons from Muslim-majority countries passed this rational basis). Professor Peter H. Schuck discusses the foundational cases for "the extraconstitutional status of exclusion"—United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, and Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953), *superseded by statute*, Real ID Act of 2005—which affirmed that "the Constitution . . . stop[s] at the water's edge." Schuck, *supra* note 235, at 18–20. He writes that the teaching of these cases "remains enshrined in the current immigration statute," by, for example, the consular officer's ability to deny entry, a decision which is final and subject only to administrative review. *Id.* at 20–21. As recently as 2020, the Supreme Court relied on the extraconstitutional status of exclusion to reject any right to procedural due process for a noncitizen who was stopped close to the border. Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 136–41 (2020).

oldest relief from removal provisions, adjustment of status, came about as a circumvention to the consular processing of an immigrant visa.[299] Like one immigration scholar has written, "The arbitrariness of consuls is proverbial. Immigration lawyers generally prefer the Scylla of the adjustment of status process, despite its discretionary character, to the Charybdis of the consul."[300]

This "matter of grace" theory, while questionable in the relief context,[301] entirely falls apart in the detention context.[302] It is not bestowed as a gift upon the individual by the government but is rooted in the common law presumption of liberty.[303] The distinction here tracks the "rights–privileges" theories behind due process protections.[304] "Rights" are rooted in the Constitution or common law tradition, whereas "privileges" are benefits that the government gratuitously confers upon the person.[305] Congress gave relief from removal as a gift, to alleviate the burdens of harsh deportation laws, similar to the way that states have provided "new property" such as welfare.[306] Relief from removal is not constitutionally required, so the "total abolition" of such statutory relief would be well within

299. *See supra* Part III.A.

300. Neuman, *Discretionary Deportation*, *supra* note 23, at 617–18.

301. Professor Daniel Kanstroom examines this "matter of grace" theory behind unreviewable discretion in relief from removal in order to demonstrate how weak this justification is, given developments in the law in which courts more closely examined other "matters of grace" such as parole and probation revocations and clemency cases. Kanstroom, St. Cyr *or Insincere*, *supra* note 23, at 445–54.

302. *See* Neuman, *Discretionary Deportation*, *supra* note 23, at 638–39.

303. *See generally* Daniel Wilsher, *Whither Presumption of Liberty? Constitutional Law and Immigration Detention*, *in* CHALLENGING IMMIGRATION DETENTION: ACADEMICS, ACTIVISTS AND POLICY-MAKERS 66, 66–81 (Michael J. Flynn & Matthew B. Flynn eds., 2017) (discussing freedom from immigration detention tracks with the common law presumption of liberty).

304. *See* Kanstroom, St. Cyr *or Insincere*, *supra* note 23, at 447–48; Schuck, *supra* note 235, at 48 (describing how "immigration doctrine found the power of this principle [the right-privilege distinction] to be irresistible" and that entry into the United States was conceived of as a privilege under this doctrine). One can see also Professor Peter Schuck's emphasis that when the "'demise' of the right-privilege distinction in the law generally was announced during the 1960s—quite prematurely, as it turned out—immigration law took little notice." *Id.* at 48–49.

305. Motomura, *The Curious Evolution of Immigration Law*, *supra* note 269, at 1651.

306. *See* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482, 483 (1984); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733–39 (1964); *see also* Cox & Kaufman, *supra* note 83, at 1804 (describing "new" liberty rights as "any due-process-protected interest recognized after the birth of the modern administrative state").

Congress's power.[307] In contrast, liberty, as an innate right, cannot be framed as a legislative gift or "new property."[308] Physical liberty is a "natural" liberty independently recognized by the Constitution, not merely a "positivist liberty" defined by statutes or regulations.[309] Like Justice Stephen G. Breyer wrote, "Freedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries."[310] Justice Breyer wrote this to justify a constitutional right to an immigration bond hearing pending removal proceedings.[311] Moreover, granting release from detention is not a "scarce resource" that an agency official is allocating where no legal entitlement exists, as in a welfare benefit.[312] The exercise of

307. Martin, *supra* note 142, at 332. Cox and Kaufman dispute whether the right to remain in the U.S. can truly be classified as a "new" liberty right. Cox & Kaufman, *supra* note 83, at 1803–07. They describe how Thomas Jefferson and James Madison believed the Alien Friends Act to be unconstitutional because "'alien friends' had a liberty right in their continued residence in the country." *Id.* at 1806. Their discussion centers on the right to remain generally, as opposed to a right to any statutory relief that allows a noncitizen to remain in the United States. *Id.* at 1803–07. However, they note that while there is conflicting history about whether the right to remain is a "new" liberty, they clearly frame the right to be free from detention as an "old" liberty right, regardless of whether the right to be free from deportation or exclusion can be framed as such. *Id.* at 1805.

308. *See* Cox & Kaufman, *supra* note 83, at 1805; *see also* Herman, *supra* note 306, at 526 (describing separate constitutional analyses for liberty and property); Friendly, *supra* note 269, at 1295 (opining that a key determinant when a court decides whether a party has a constitutionally protected private interest is whether the "government is seeking to take action against the citizen" or "is simply denying a citizen's request").

309. *See* Neuman, *Discretionary Deportation*, *supra* note 23, at 638; *see also* Herman, *supra* note 306, at 494–503 (discussing the Supreme Court's development of a positivist notion of state-created liberty entitlements).

310. Jennings v. Rodriguez, 583 U.S. 281, 332 (2018) (Breyer, J., dissenting).

311. Justice Breyer wrote a dissenting opinion in *Jennings* because he would have read the mandatory immigration detention statutes to provide for a bail hearing after six months of confinement. *Id.* at 341–46 (Breyer, J., dissenting). His source of the constitutional right to a bail hearing was the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment. *Id.* at 329–44 (Breyer, J., dissenting). The majority opinion did not rule on the constitutional right to a bond hearing, because the Court did not find that the statutes were ambiguous, and thus the Court could not avoid a constitutional question through statutory interpretation. *Id.* at 312. The Court remanded to the lower court to address whether the relevant statutes were unconstitutional as applied to the detainees. *Id.* at 312–14.

312. Shapiro, creating a typology of discretionary decisions, lists as one category "distributive decisions," which involve the allocation of scarce resources when there are no legal rights or entitlements that have been vested in any particular individual. Shapiro, *Administrative Discretion*, *supra* note 226, at 1500–01. In the relief from removal context, one place where the law sees an allocation of scarce resources is Congress's allocation of a set number of grants for cancellation of removal for nonpermanent residents each year. *See* 8 U.S.C. § 1229b(e) (2008) (describing the limited number of applications for cancellation or suspension that may be granted

adjudicatory discretion in relief from removal has been described as "recast[ing] an applicant as a supplicant."[313] Yet, with respect to a noncitizen's request for release from detention, "freedom [is] his to take, not to beg for."[314]

This Author has made a similar argument in the examination of burdens of proof in immigration law.[315] When a noncitizen seeks relief from removal, they have been found removable, and the burden of proof is unquestionably theirs to prove that they are both eligible for such relief and deserving of relief in the exercise of discretion.[316] They have been recast as the supplicant, begging for something that Congress determined was not presumptively theirs.[317] Yet when Congress provided for bond hearings before the immigration judge through the most recent amendments, Congress legislated against the backdrop of a presumption of freedom, and Board case law that presumed liberty.[318] Thus, it is simply incorrect to describe a discretionary bond determination as a "matter of grace" in the same way that one defends unreviewable discretion in applications for relief from removal.

There are certainly critics of this idea that noncitizens have any innate right to be free in the United States while their immigration

---

in any one fiscal year). Another way in which relief from removal is framed as a scarce resource is Congress's granting of a set number of visas that provide pathways to permanent residents. *See Fact Sheet: Family-Based Immigration*, NAT'L IMMIGR. F. (Feb. 14, 2018), https://immigrationforum.org/article/fact-sheet-family-based-immigration [https://perma.cc/THB4-ESUF]. No law governing bond sets forth a numeric limit on bond grants. *Cf.* Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 104–12 (2017) (arguing that "bed quota," through which DHS interprets Congress's funding for a set number of immigration detention beds each to mandate that ICE fill those beds, violates detainees' due process rights by foregoing an individualized determination of dangerousness and flight risk and not applying a presumption of liberty).

313. *See* Neuman, *Discretionary Deportation*, *supra* note 23, at 621.

314. *See* Ashfaq, *supra* note 74, at 67. Courts of appeals, utilizing the property–liberty dichotomy, have reasoned that "the failure to be granted discretionary relief . . . does not amount to a deprivation of a liberty interest." Patel v. Gonzales, 470 F.3d 216, 220 (6th Cir. 2006) (alterations and internal quotations omitted); *see also* Jupiter v. Ashcroft, 396 F.3d 487, 492 (1st Cir. 2005) ("There is no property interest involved and, because the relief of voluntary departure (like the relief of adjustment of status) is essentially discretionary, there is no cognizable liberty interest in that remedy." (citing Ali v. Ashcroft, 366 F.3d 407, 412 (6th Cir. 2004))).

315. *See generally* Holper, *The Beast of Burden*, *supra* note 75.

316. *See id.* at 114 (citing 8 U.S.C. § 1229a(c)(2) (2006)).

317. *See* Holper, *The Beast of Burden*, *supra* note 75, at 117–22.

318. *See id.* at 81–82 (discussing *In re* Patel, 15 I. & N. Dec. 666 (B.I.A. 1976), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in In re* Valdez-Valdez, 21 I. & N. Dec. 703, 716–17 (B.I.A. 1997)).

cases are pending. Some courts of appeals, for example, have refused to import pretrial detention procedures into immigration bond hearings, reasoning that the presumption against detention that exists in all other forms of civil detention is inapplicable to immigration detention.[319] These courts have repeated the Supreme Court's rationale when it upheld mandatory immigration detention without bond against a due process challenge in *Demore v. Kim*. The Court wrote, "Congress regularly makes rules that would be unacceptable if applied to citizens."[320] The rationale here is that when it comes to the government's detention of noncitizens for the purposes of removal proceedings, due process protections are simply not as strong because noncitizens' liberty interests are diminished.[321] As Professor Margaret Taylor has noted, the *Demore* majority simply bypassed the presumption of freedom from civil detention in a convenient way—by ignoring this case law.[322] She offers a legal realist critique of the Court's decision, noting that the Court backed away from its application of civil detention case law from two years earlier[323] because it was the first immigration detention case to reach the Supreme Court following the September 11, 2001 terrorist attacks.[324]

It is also noteworthy that even diminished rights to be free are still grounded in a right to liberty. As this Author has described elsewhere, immigration judges can accommodate that diminished liberty right by releasing noncitizens under some form of supervision, either through

---

319. *See, e.g.*, Rodriguez Diaz v. Garland, 53 F.4th 1189, 1206 (9th Cir. 2022) ("The recognized liberty interests of U.S. citizens and aliens are not coextensive: the Supreme Court has 'firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.'" (quoting Demore v. Kim, 538 U.S. 510, 522 (2003))); Miranda v. Garland, 34 F.4th 338, 359–61 (4th Cir. 2022) (distinguishing Supreme Court case law in which heightened procedural protections applied to civil detention because, in those cases, it involved detention of citizens, and reciting the Supreme Court's statement that "Congress regularly makes rules that would be unacceptable if applied to citizens." (quoting *Demore*, 538 U.S. at 521)).

320. *Demore*, 538 U.S. at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

321. *See Miranda*, 34 F.4th at 359–61; *see also* Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1086 (1988) ("Liberty is not undifferentiated. Under the plenary power doctrine, the liberty retained by aliens against the exercise of federal immigration authority has been marked as of lesser scope or status, or as deserving less judicial protection, than other kinds of liberty." (first citing JOHN RAWLS, POLITICAL LIBERALISM 219–92 & n.7 (1993); and then citing United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302)).

322. *See* Taylor, *supra* note 129, at 363–64.

323. *See* Zadvydas v. Davis, 533 U.S. 678, 690–92 (2001).

324. *See* Taylor, *supra* note 129, at 365.

the payment of a bond (so they must appear to all future court dates in order to get the bond money returned),[325] or release on some alternative to detention where they are continually monitored by ICE.[326] Release under supervision was Justice Breyer's way of responding to the age-old tension the judiciary faced: That releasing a noncitizen gives him freedom to live in the United States—exactly what the deportation order is trying to prevent.[327]

An even stronger critique that noncitizens have the innate right to be free from detention during removal proceedings is that *detention itself* is an act of legislative grace. This was the Supreme Court's rationale in the 1953 case of *Shaughnessy v. United States* ex. rel. *Mezei*,[328] where the Court held that a returning resident who had been away and behind the Iron Curtain long enough to strip him of his status was entitled to no due process right to be free from indefinite detention when the government could not deport him anywhere.[329] His detention, or "temporary harborage," on Ellis Island was "an act of legislative grace," and "bestows no additional rights."[330] To put it another way, detention was a gift granted by the immigration authorities, who exercised their benevolence in not leaving him floating on a ship or drowning in the ocean when his exclusion order could not be effectuated.

*Mezei* has suffered no shortage of critique by academics,[331] and courts have sought to limit its detention holding to the circumstances

325. When noncitizens seek the assistance of a bail bondsman, the bail bondsman keeps tabs on the noncitizen and can chase them down if they fail to appear. *See Immigration Bail Bonds: What Happens If Someone Doesn't Show*, ACTION IMMIGR. BONDS (Apr. 4, 2023), https://www.actionbail.com/news/immigration-bail-bonds-what-happens-if-someone-doesnt-show [https://perma.cc/QUW3-BQBZ].

326. *See* Holper, *Immigration E-Carceration*, *supra* note 188, at 17–18. Professor Daniel Wilsher notes that modern politics and legislation have rejected this "in favour of a binary choice between full authorization and expulsion." WILSHER, *supra* note 117, at xxi.

327. *See* Holper, *Immigration E-Carceration*, *supra* note 188, at 48–51 (describing Justice Breyer's opinions on this topic in immigration detention cases).

328. Shaughnessy v. United States *ex. rel.* Mezei, 345 U.S. 206 (1953), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

329. *See id.* at 214 (explaining the Court had "no difficulty in holding respondent an entrant alien" or of similar status under these circumstances).

330. *Id.* at 215.

331. *See, e.g.*, Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 574–76 (2021) (summarizing critiques of *Mezei*); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1031–37 (2002); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143

of the case, which involved exclusion for national security reasons.[332] Importantly, the Supreme Court in *Zadvydas* later limited *Mezei* to those treated as "seek[ing] entry" to the United States, which allowed the Court to conclude that a serious constitutional problem would result if permanent residents suffered indefinite detention after their orders of deportation.[333] The Court later extended *Mezei*'s holding to those who were stopped close to the border after making an entry.[334] Thus, *Mezei*'s rationale that detention is a "matter of grace" does not apply to the context of immigration bond hearings, which are available only to those who have made an entry into the United States and travelled further into the interior.[335]

Even if one considers immigration detention as nothing more than a "helpmate to deportation" and not a separate issue,[336] an immigration judge's bond determination still cannot be described as a "matter of grace." When the Supreme Court, in the 2010 decision *Kucana v. Holder*,[337] determined that discretionary motions to reopen were subject to judicial review, the Court distinguished these motions from the "matter of grace" justification for unreviewable discretion in the relief from removal context.[338] The Court described motions to reopen as "adjunct rulings" and "procedural device[s] serving to ensure 'that

U. PA. L. REV. 933, 982–84 (1995); Schuck, *supra* note 235, at 28–30; Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392–96 (1953).

332. *See* Holper, *Taking Liberty Decisions Away*, *supra* note 83, at 1108–09 (discussing federal district courts' limitation of the *Mezei* holding to the unique political situation at the time). The Supreme Court, in the 2020 case of *Department of Homeland Security. v. Thuraissigiam*, relied on the portion of *Mezei*'s holding that noncitizens who are seeking admission have no due process rights, although, unlike in *Mezei*, the Court was not asked to consider whether the noncitizen's detention was lawful. 591 U.S. 103, 138 (2020).

333. *See* Zadvydas v. Davis, 533 U.S. 678, 692–95 (2001).

334. *Thuraissigiam*, 591 U.S. at 103, 138–41 (affirming *Mezei*'s holding that noncitizens who were seeking admission have no due process rights and extending the rationale to apply to noncitizens who were in expedited removal due to having spent a short duration of time in the United States and being in close proximity to the U.S. border at the time of arrest).

335. Executive Office for Immigration Review, 8 C.F.R. § 1003.19(h)(2)(i) (2022) (precluding immigration judge jurisdiction over bond hearings for "arriving aliens," as defined by 8 C.F.R. § 1001.1(q), in removal proceedings); M-S-, 27 I. & N. Dec. 509, 509 (Att'y Gen. Apr. 16, 2019) (holding that those in expedited removal, due to their presence of less than fourteen days in the U.S. and arrest within one hundred miles of a land border, are not eligible for a bond hearing before an immigration judge).

336. *See* Stumpf, *supra* note 118, at 61 (describing "the constitutionalization of detention as a non-punitive helpmate to deportation" rather than its "original justification as a minion of deportation").

337. Kucana v. Holder, 558 U.S. 233 (2010).

338. *Id.* at 247–48.

aliens [a]re getting a fair chance to have their claims heard.'"[339] Because the motion to reopen provides no substantive immigration relief, the Court reasoned, it could be theoretically distinguished from the relief from removal provisions for the purposes of judicial review of an agency's exercise of discretion.[340] In a similar vein, if detention is only a "helpmate to deportation,"[341] then the bond hearing is merely an "adjunct ruling[]" to the removal decision.[342] Under this rationale, the bond determination is merely serving as a device to "ensure 'that [noncitizens] are getting a fair chance to have their claims heard,'" because being released on bond facilitates the noncitizen presenting the best case possible against removal.[343]

To better illustrate this discussion, let us return to the case of Amaury Reyes-Batista.[344] As a long-term lawful permanent resident, he sought a discretionary waiver of deportation.[345] If a judge had exercised discretion to deny him that waiver, this would have been a classic "matter of grace" justification for unreviewable discretion.[346] He could claim no right to win the waiver case; he was the supplicant.[347] While his removal case was pending, however, he sought bond, and the judge denied him in the exercise of discretion.[348] In this decision, freedom should have been his to take, not beg for.[349] He clearly had a

339. *Id.* at 248.

340. *Id.* The Court also determined that Congress did not clearly intend to make motions to reopen discretionary decisions, but that the Attorney General, by regulation, made them discretionary. *Id.* at 243–47. The Court reasoned that the agency cannot shelter its own decisions from judicial review by rendering them discretionary by regulation. *Id.* at 252–53.

341. *See* Stumpf, *supra* note 118, at 61.

342. *See Kucana*, 558 U.S. at 248. Certainly, the Board considers bond hearings to be adjunct to the removal proceedings, given that they are decided separately, appealed separately, and contain separate records than the removal proceedings. *See* Executive Office for Immigration Review, 8 C.F.R. § 1003.19(d) (2022).

343. *See Kucana*, 558 U.S. at 248; *see also* Eagly & Shafer, *supra* note 103, at 75–76 (reporting empirical findings that detainees are less likely to obtain legal counsel and are less likely to win their removal cases).

344. *See generally* Eddy, *supra* note 10 (describing detainee's habeas litigation that was dismissed because the federal district court determined that he was seeking review of a discretionary decision to detain, which is precluded under 8 U.S.C. § 1226(e)).

345. Mr. Reyes-Batista was applying for a 212(c) waiver, although in his removal case, he never made it to the exercise of discretion because the judge found that he was not eligible to apply for the waiver. Both the Board and First Circuit upheld this decision. *See* Reyes-Batista v. Garland, 50 F.4th 288, 291–92 (1st Cir. 2022).

346. *See* Kanstroom, St. Cyr *or Insincere*, *supra* note 23, at 422.

347. *See* Neuman, *Discretionary Deportation*, *supra* note 23, at 621.

348. *See* Eddy, *supra* note 10, at 348.

349. *See* Ashfaq, *supra* note 74, at 68.

due process right to be free from detention.[350] Even if he had a diminished right to "live at large" as a noncitizen found removable,[351] his request to be released on an ankle monitor could have accommodated that diminished right.[352] Even if his detention is simply considered a "helpmate to deportation,"[353] it provides no substantive immigration relief in the same way that the discretionary waiver protects him from deportation. Accordingly, the decision to detain is an "adjunct ruling," serving the purpose of giving him a fair chance to present his case for a waiver of deportation.[354] As an adjunct ruling, unreviewable discretion under the "matter of grace" justification is inappropriate.[355]

### *E. Judicial Review as "Stealing Time" in the United States, "Wasting" Judicial Resources*

A final justification for cutting off judicial review is to prevent noncitizens from "buying" (or "stealing") additional time in the United States through frivolous appeals and to avoid the nitpicky decisions that federal judges make by sending a case back to the agency. This was a large motivating factor behind the 1996 laws that attempted to preclude judicial review over certain types of removal cases.[356] An overarching sentiment behind such legislation has been that appeals allow noncitizens to "steal" exactly what the deportation or exclusion

350. *Cf.* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 208–14 (reasoning that a noncitizen had no due process right to be free from indefinite detention because he was an applicant for admission).

351. *See* Demore v. Kim, 538 U.S. 510, 511 (2003) (reasoning that "Congress regularly makes rules that would be unacceptable if applied to citizens") (citing Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)); *cf.* Zadvydas v. Davis, 533 U.S. 678, 703 (2001) (Scalia, J., dissenting); *see also* Holper, *Immigration E-Carceration*, *supra* note 188, at 48–51 (describing Justice Breyer's opinions offering alternatives to detention as a "middle ground" between the right to live at large and physical confinement).

352. *See* Holper, *Immigration E-Carceration*, *supra* note 188, at 48–51.

353. *See* Stumpf, *supra* note 118, at 61.

354. *See* Kucana v. Holder, 558 U.S. 233, 248 (2010) (reasoning that motions to reopen are "adjunct rulings" that provide no substantive relief, but rather "ensure 'that [noncitizens] are getting a fair chance to have their claims heard,'" and thus unreviewable agency discretion was inappropriate).

355. *See id.* at 247–49.

356. *See* Lenni Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 68 (2007) [hereinafter Benson, *Making Paper Dolls*].

order seeks to prevent—more time in the United States.[357] This line of argument assumes a few things. One assumption is that noncitizens' appeals are not meritorious; because they will never win, the appeals are merely dilatory. Another assumption is that noncitizens are aided by unscrupulous immigration lawyers—or, to quote former Attorney General Jeff Sessions, "dirty immigration lawyers"[358]—who will raise any number of frivolous legal objections that judges will have to hear and consider. A final assumption is that the judiciary is not to be trusted, because they act too kindly to the noncitizen[359] and nitpick over minute errors, causing endless litigation by repeatedly sending the case back to the agency for do-overs.[360] It is also important to note that these challenges are only brought on behalf of noncitizens; the government has no procedural vehicle through which to bring an immigration case to a federal court if the noncitizen wins before the

357. *See, e.g.*, Neuman, *Discretionary Deportation*, *supra* note 23, at 627 (discussing negative views on federal court appeals of deportation decisions because of the belief that "aliens file baseless petitions in order to drag out the proceedings, imposing additional costs on the government, obtaining the benefits of remaining in the United States in the interim, and increasing their opportunities to disappear and avoid removal altogether"); *see also* Stone v. INS, 514 U.S. 386, 399 (noting that "Congress'[s] 'fundamental purpose' in enacting § 106 of the INA was 'to abbreviate the process of judicial review . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.'" (quoting Foti v. INS, 375 U.S. 217, 224 (1963))), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1196, Pub. L. No. 104-132, § 440(b)(47)(A), 110 Stat. 1214, 1277 (codified as amended at 8 U.S.C. § 1101(a)(47)(A)), and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(d)(2), 110 Stat. 3009-546, 3009-627, *as recognized in* Nasrallah v. Barr, 590 U.S. 573, 583–84 (2020)); *id.* at 399–400 ("Congress'[s] concern reflected the reality that 'in a deportation proceeding . . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.'" (quoting INS v. Doherty, 502 U.S. 314, 321–25 (1992))).

358. Jeff Sessions, U.S. Att'y Gen., Remarks to the Exec. Off. for Immigr. Rev. (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review [https://perma.cc/59N2-KAPP]; *see also* SALYER, *supra* note 117, at 69 (citing statement of one legislator in 1893 that Chinese people "are always litigating"); *id.* at 70 (describing how several "experienced white attorneys were willing to represent Chinese in the habeas corpus cases before the federal courts," and that this "small group of six to eight attorneys" were well-paid by the Chinese American community).

359. *See* García Hernández, *Creating Crimmigration*, *supra* note 121, at 1498.

360. *See* Neuman, *Discretionary Deportation*, *supra* note 23, at 627. Not all members of the judicial branch have lived up to this stereotype. In fact, there are numerous examples of the Supreme Court cutting off whole lines of procedural arguments by, for example, holding that due process simply does not apply. *See* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 188–89 (1983) (reasoning that procedural due process has become "the kudzu vine of constitutional law: allow it to take root and it soon takes over the whole hillside," so the Supreme Court "has been working to find ways to contain the spreading plant," and the strongest version of the plenary power "plainly eliminates high-court pruning").

agency.[361] So, judicial review, in the mind of the immigration restrictionist, only provides opportunities for orders of deportation or exclusion to be undone but never undoes an agency decision in which the noncitizen has won.

Yet, when a noncitizen seeks review of an immigration judge's decision to detain in federal court, many of these concerns are inapplicable. Review of a removal order can extend a person's time in the United States while the noncitizen appeals to the federal court following the Board's decision.[362] In contrast, detention challenges occur via habeas corpus petitions, which are litigated separately from the removal order.[363] The detention challenge can only last for as long as the detainee remains in custody,[364] and the detainee remains in custody only as long as the removal proceedings last.[365] Beyond that, if noncitizens win, they are released from detention, and their habeas case becomes moot.[366] Likewise, if they lose their removal case and are

361. For noncitizens challenging their deportation or exclusion orders via habeas corpus, the noncitizen is the one who is claiming unlawful executive detention, so only he may bring the petition to a federal court. *See* 28 U.S.C. § 2241(c)(4). For noncitizens challenging a deportation (or today, "removal") order via a petition for review filed with a federal court of appeals, such petitions may only be filed by the person against whom there is a removal order. *See* 8 U.S.C. § 1252(b).

362. See Neuman, *Discretionary Deportation*, *supra* note 23, at 627.

363. *See* Hernandez v. Gonzales, 424 F.3d 42, 42 (1st Cir. 2005) (holding that detention claims are independent of removal claims and therefore detention challenges must be reviewed by distinct courts via habeas corpus petitions whereas removal orders are appealed to courts of appeals via petitions for review).

364. 28 U.S.C. § 2241(c).

365. 8 U.S.C. § 1226(e).

366. *See* Hlass & Yanik, *supra* note 181, at 262.

deported from the United States, the habeas case also becomes moot,[367] as they are no longer in custody.[368]

There are also the efficiency and cost-saving justifications for cutting off judicial review.[369] Unreviewable exercises of discretion are granted to agencies because the issue is simply not important enough to merit the careful consideration and examination by a "real" judge.[370] Giving federal courts the authority to review decisions drains the resources of the judiciary; it is simply more efficient to have only an immigration judge make the decision, with an appeal to the Board (if the Board addresses it prior to mooting the appeal through a negative resolution of the merits).[371] As Shapiro explains, it is not that discretion is desirable in these situations—it is simply that the decisions are made at such a high volume that the cost of controlling it is simply not worth it.[372]

The efficiency and cost-saving justifications simply cannot apply to a decision about a person's liberty. Liberty from months or years of detention while a noncitizen fights an immigration case should be important enough to merit careful consideration by a judge, and review

367. Once a detainee has a final order of removal, detention often continues up until deportation, but the detention authority shifts from 8 U.S.C. § 226 to 8 U.S.C. § 1231. Courts have applied different tests to determine whether detention is unreasonably prolonged under the different statutes. *Compare* German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 210–13 (3d Cir. 2021) (applying a multifactor test to determine that mandatory detention under 8 U.S.C. § 1226(c) had become unreasonably prolonged, therefore meriting a bond hearing), *with* Guerrero-Sanchez v. Warden York Cnty. Prison, 905 F.3d 208, 225 (3d Cir. 2018) (applying the three-part *Mathews v. Eldridge* balancing test for when detention becomes unreasonably prolonged under 8 U.S.C. § 1231(a)), *abrogated in part by* Johnson v. Arteaga-Martinez, 596 U.S. 573 (2022). *But see* Doe v. Becerra, 697 F. Supp. 3d 937, 943 (N.D. Cal. 2023) ("In sum, the Court finds that the shift in the statutory basis governing Doe's detention does not negate his constitutional rights nor substantively change the applicable due process analysis.").

368. Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2572–73 (1998) (describing the "in custody" requirement for habeas as "somewhat elastic" but that for a person deported and outside of the United States, "it is doubtful . . . that the [noncitizen] would fall within even expanded concepts of custody, and hence could not invoke the habeas corpus jurisdiction").

369. Congress's attempts at jurisdiction stripping in 1996, while intended to streamline the removal of noncitizens without federal court involvement, actually created more litigation, which Professor Lenni Benson has documented, pointing to the sheer number of immigration cases in federal courts since 1996. *See* Benson, *Making Paper Dolls*, *supra* note 356, at 38–39.

370. *See* Shapiro, *Administrative Discretion*, *supra* note 226, at 1501–02.

371. *See supra* note 95 and accompanying text.

372. Shapiro, *Administrative Discretion*, *supra* note 226, at 1502.

of such a decision by a federal court.[373] The right to be free from executive detention is a common law concept that is foundational to the Constitution.[374] The common law presumption of liberty has been a strong counterweight to the political branches' plenary power over immigration decisions.[375] As some courts of appeals have recognized, the liberty interests of immigration detainees are strong enough to require additional procedures at bond hearings, such as a government-borne burden of proof and the requirement that immigration judges consider alternatives to detention and the detainee's ability to pay.[376] These courts have followed Supreme Court case law recognizing liberty as the norm, with civil detention as the exception, in the due process calculus.[377] The Supreme Court has stated that "the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights'" such as the right to be free pending deportation.[378] Thus, although efficiency and cost-saving often counsels against judicial review in other administrative contexts, the authority to

373. *See* Holper, *Taking Liberty Decisions Away*, *supra* note 83, at 1118–21 (arguing that liberty is too important to assign to immigration judges, who work for the nation's top prosecutor, and for that reason pretrial immigration detention decisions should be assigned to magistrate or district court judges); *see also* Mary Holper, *JRAD Redux: Judicial Recommendation Against Immigration Detention*, 91 GEO. WASH. L. REV. 561, 563 (2023) (arguing that immigration pretrial detention decisions are so important that a criminal court judge should be allowed to issue a recommendation against immigration detention).

374. *See, e.g.*, Tyler, *supra* note 150, at 907, 921 (describing the common law evolution of the privilege of the writ of habeas corpus, which was a "principal safeguard" against executive detention, and how the Founders adopted this common law privilege into the U.S. Constitution with the knowledge that the political branches could abuse their power by invoking national security); Neuman, *The Habeas Corpus Suspension Clause*, *supra* note 150, at 567 (" [The Suspension Clause] was one of the limited number of individual rights guaranteed in the original 1787 Constitution.").

375. *See, e.g.*, WILSHER, *supra* note 117, at 13, 20–22, 33–34 (describing how federal courts often applied the common law presumption of freedom when deciding noncitizens' cases, notwithstanding the political branches' plenary power over immigration matters, which would instruct the judiciary to defer to the political branches' decisions).

376. *See supra* notes 187–88 (describing cases in which courts of appeals have decided whether immigration detainees are constitutionally entitled to certain procedural protections in bond hearings).

377. *See, e.g.*, Hernandez-Lara v. Lyons, 10 F.4th 19, 28 (1st Cir. 2021) ("The Supreme Court has repeatedly affirmed that '[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'" (alteration in original) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987))); Holper, *The Beast of Burden*, *supra* note 75, at 95–107 (describing Supreme Court civil detention case law in which the burden of proof lies with the government and arguing that immigration detention should not be an exception to these cases).

378. Zadvydas v. Davis, 533 U.S. 678, 692 (2001) (quoting Superintendent, Mass. Corr. Inst., Wapole v. Hill, 472 U.S. 445, 450 (1985)).

deprive a person of his bodily liberty for an extended period of time is such an important decision that concerns about efficiency and cost-savings cannot dominate.

## IV. JUDICIAL SOLUTIONS TO LIMIT THE SCOPE OF 8 U.S.C. § 1226(E)

This Part lays out two mechanisms courts should use to limit the reach of 8 U.S.C. § 1226(e) so that detainees are not stuck in the implicit bias minefields of bond hearings without any judicial oversight.[379] First, courts should interpret all immigration judge bond decisions as mixed questions of law and fact, which is consistent with what occurs in a bond decision and aligns with the Board's own understanding of the exercise of discretion. This solution protects 8 U.S.C. § 1226(e) against a void-for-vagueness challenge and ensures that biases of one immigration judge do not impact a detainee's liberty. Alternatively, courts should interpret the statute as allowing for judicial review to avoid violating the Suspension Clause of the Constitution. These solutions are ways to ensure that the important liberty interests at issue in a bond hearing are protected through federal court review.

### *A. Bond Decisions Are Mixed Questions of Law and Fact*

Federal courts should consider immigration judges' bond decisions for what they are—mixed questions of law and fact. Because mixed questions of law and fact are questions of law, they are reviewable in habeas proceedings.[380] At moments during the bond hearing, the immigration judge will decide questions of fact—that is, did the detainee commit a certain crime for which he has not been convicted. Yet, the immigration judge next filters them through precedential cases interpreting the bond standards.[381] As discussed, the Board has created law to apply, setting forth a nine-factor test for

379. There is also the possibility that Congress can simply repeal 8 U.S.C. § 1226(e), a question that has been explored elsewhere. *See* Eddy, *supra* note 10, at 395–406.

380. Federal courts have opined that constitutional questions or questions of law are reviewable notwithstanding 8 U.S.C. § 1226(e). *See, e.g.*, Diaz Ortiz v. Smith, 384 F. Supp. 3d 140, 144–45 (D. Mass. 2019); Hechavarria v. Whitaker, 358 F. Supp. 3d 227, 235–36 (W.D.N.Y. 2019); Enoh v. Sessions, No. 16-CV-85, 2017 WL 2080278, at *5 (W.D.N.Y. May 15, 2017); *see also infra* Part II.B (describing the *St. Cyr* decision, in which the Supreme Court reasoned that questions of law always have been reviewable in habeas corpus).

381. *See* Sharpless, *supra* note 23, at 69–87 (describing that many federal courts view immigration judges' decisions regarding relief from removal as mixed questions of law and fact in order to provide judicial review of these decisions).

deciding bond cases.[382] It also has provided guidance that immigration judges must consider dangerousness prior to flight risk.[383] In deciding the question of flight risk, the Board has established that the immigration judge must consider the likelihood that a noncitizen will win the underlying immigration case.[384] In deciding questions like dangerousness, the Board has instructed that immigration judges should consider national security concerns,[385] and has specified certain facts, such as a driving under the influence conviction, that should cause an immigration judge to find dangerousness.[386] The Board itself has undone its own unreviewable exercises of discretion by creating standards.[387] Even if the Board did not have its own set of standards, it could easily borrow them from an analogous situation—criminal pretrial detention.[388] Once the Board has created law for its adjudicators to apply, that converts an unreviewable exercise of discretion into an application of standards to a fixed set of facts: exactly

382. *See infra* Part III.C; *In re* Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006), *abrogated by* Hernandez-Lara v. Lyons, 10 F.4th 19 (1st Cir. 2021).

383. *In re* Urena, 25 I. & N. Dec. 140, 141 (B.I.A. 2009).

384. *See In re* R-A-V-P-, 27 I. & N. Dec. 803, 805 (B.I.A. 2020), *abrogated by* Hernandez-Lara v. Lyons, 10 F.4th 19 (1st Cir. 2021); *In re* Andrade, 19 I. & N. Dec. 488, 489–90 (B.I.A. 1987); *In re* Patel, 15 I. & N. Dec. 666, 667 (B.I.A. 1976) (finding no flight risk when the noncitizen had relief from removal available), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), *as recognized in In re* Valdez-Valdez, 21 I. & N. Dec. 703, 716–17 (B.I.A. 1997).

385. *See In re* Hussam Fatahi, 26 I. & N. Dec. 791, 793 (B.I.A. 2016); *see also In re* D-J-, 23 I. & N. Dec. 572, 572 (Att'y Gen. 2003).

386. *In re* Egidijus Siniauskas, 27 I. & N. Dec. 207, 207 (B.I.A. 2018).

387. *See* Martin, *supra* note 142, at 331 n.66 (describing "important differences between ad hoc discretion—genuinely unfettered—and a kind of discretion, far more common in our administrative system, that gives rise to a 'fabric of doctrine'" (quoting Wong Wing Hang v. INS, 360 F.2d 715, 718 (2d Cir. 1966))).

388. Federal district courts have looked to guidance from the Bail Reform Act, which governs criminal pretrial detention, to determine whether certain procedural protections should apply in immigration bond hearings. *See, e.g.*, Martinez v. Clark, 68 F.4th 1195, 1198–1200 (9th Cir. 2023) (Berzon, J., dissenting), *reh'g denied* 36 F.4th 1219 (9th Cir. 2022); Reid v. Donelan, 390 F. Supp. 3d 201, 224–25 (D. Mass. 2019), *aff'd in part and vacated in part*, 17 F.4th 1 (1st Cir. 2021). The purpose of pulling standards from the Bail Reform Act is because immigration judges are determining the same issue—whether a detainee is likely to be a danger or a flight risk during the pendency of proceedings. *See Martinez*, 68 F.4th at 1197–1200 (Berzon, J., dissenting); *Reid*, 390 F. Supp. 3d at 224–27; *see also In re* De La Cruz, 20 I. & N. Dec. 346, 352–61 (B.I.A. 1991) (Heilman, Bd. Member, dissenting) (interpreting the former immigration detention statute governing bond hearings for those convicted of certain crimes and advocating for the Board to interpret the provision in accordance with the Bail Reform Act because of the parallels in the statutory language); Gilman, *supra* note 12, at 190–95 (comparing pretrial detention and immigration bond custody determination factors).

what the Supreme Court held is a "questio[n] of law."[389] Nor does it matter that such balancing or multifactor tests will not yield one particular result, for multiple questions of law require case-by-case approaches.[390]

Like the Supreme Court clarified in *Wilkinson*, mixed questions of law and fact are still reviewable, even though they require a reviewing court to "expound on the law . . . by amplifying or elaborating on a broad legal standard"[391] and "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence."[392] In the bond hearing context, a court is required to determine "dangerousness" (the "broad legal standard") and decide whether a past criminal history is indicative of a likelihood to reoffend when weighed against rehabilitation and successful release in the criminal justice system (the "case-specific factual issues").[393] Indeed, the Ninth Circuit's list of unreviewable discretionary determinations in immigration law, spelled out in its *Martinez v. Clark* decision interpreting 8 U.S.C. § 1226(e),[394] are all up for reconsideration after *Wilkinson*.[395] This is likely why the Supreme Court vacated the Ninth

389. *See* Guerrero-Lasprilla v. Barr, 589 U.S. 221, at 228–30 (2020); *Martinez*, 68 F.4th at 1198–1203 (Berzon, J., dissenting) (reasoning that dangerousness determinations in immigration bond hearings are mixed questions of law and fact that are "directly analogous" to another mixed question of law and fact—dangerousness determinations in criminal bail hearings—and also like other mixed questions of law and fact recognized by the Supreme Court as questions of law); *see also* Katie Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 663 (2008) (reasoning that the "agency is perfectly free to adopt . . . binding standards for the exercise of its discretion" but that "[t]hese standards . . . would be enforceable against the agency in court, creating meaningful limitations on the agency's discretion"); Kanstroom, St. Cyr *or Insincere*, *supra* note 23, at 434 (reasoning that the more "the BIA seeks to structure its exercise of discretion, to render it transparent, and to proceed in a rule-like fashion, the more it seems to invite judicial oversight of its choice and application of factors").

390. *See Martinez*, 68 F.4th at 1202 (Berzon, J., dissenting).

391. Wilkinson v. Garland, 601 U.S. 209, 222 (2024) (quoting U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge LLC, 583 U.S. 387, 396 (2018)).

392. *Id.*

393. *See Martinez*, 36 F.4th at 1225; *see also id.* at 1229 ("Dangerousness is a 'fact-intensive' inquiry that requires the 'equities [to] be weighed.'" (quoting Torres-Valdivias v. Lynch, 786 F.3d 1147, 1153 (9th Cir. 2015))).

394. *See infra* Part I.A.

395. The Ninth Circuit listed as unreviewable exercises of discretion whether a crime is "violent or dangerous" or "particularly serious," and whether an applicant has proven "exceptional and extremely unusual hardship," "extreme hardship," and "good moral character." *Martinez*, 36 F.4th at 1228. The *Wilkinson* decision, which came after, clarified that "exceptional and extremely unusual hardship" is not discretionary. 601 U.S. at 217–18.

Circuit's *Martinez* decision, sending it back to be reconsidered in light of *Wilkinson*.[396]

What rarely occurs in a bond hearing is the immigration judge "leap[ing] over" the eligibility questions (dangerousness and flight risk) to get to the ultimate exercise of discretion.[397] The Supreme Court, in *INS v. Abudu*,[398] reasoned that the Board may bypass legal issues of eligibility in the context of a motion to reopen and decide whether the noncitizen is eligible for a favorable exercise of discretion in the underlying relief from removal.[399] In that instance, the *Abudu* Court held that an abuse of discretion standard of review would apply.[400] Similarly, there may be an immigration judge who "leaps over" the dangerousness and flight risk questions and states that she is denying bond in the exercise of discretion. In that instance, 8 U.S.C. § 1226(e) suggests that federal courts have no jurisdiction to review the decision.[401] Yet, if the judge has not done this leap, and instead has applied bond law to facts, this is a question of law. In sum, a federal court reviews what the judge did, not what the judge arguably *could have done*.[402]

What is more, an immigration judge's process for deciding bond indicates that a bond hearing is more like the agency's review of whether an applicant has proven equitable tolling of a statutory deadline—the issue found to be a legal question in *Guerrero-*

396. *See* Martinez v. Clark, 144 S. Ct. 1339, 1339 (2024) (mem.) (granting writ of certiorari, vacating Ninth Circuit's decision, and remanding for further consideration in light of *Wilkinson v. Garland*, 601 U.S. 209 (2024)).

397. *See* Williams v. Garland, 59 F.4th 620, 634 (4th Cir. 2023) (quoting INS v. Abudu, 485 U.S. 94, 105 (1988)) (preferring the "common-sense" approach of using specific factual issues where boards did not previously deny relief as a matter of discretion).

398. INS v. Abudu, 485 U.S. 94 (1988).

399. *Id.* at 105.

400. *Id.*

401. Outside of the scope of this Article is whether the immigration judge has the authority to leap over these key questions in a bond hearing. The Supreme Court's *Abudu* reasoning that the Board may "leap" over the legal questions in a motion to reopen to deny relief as a matter of discretion arose in the context of motions to reopen for the purposes of seeking underlying relief, which is a different context with different statutory authority. *See id.* at 104. Nor did the *Abudu* Court have the opportunity to fully analyze an agency's decision that had made such a leap. *See id.* at 105; *see also* SEC v. Chenery Corp., 332 U.S. 194, 207–09 (1947) (holding that an appellate court should not substitute its judgment for that of the agency and should only judge an agency's decision based on the reasons invoked by the agency).

402. *See Williams*, 59 F.4th at 635 (rejecting abuse of discretion standard of review to the Board's denial of a motion to reopen because "the proper standard depends on the discrete question we must review, not some broader conclusions the BIA could have but did not, in fact, draw").

*Lasprilla*.[403] In deciding whether to equitably toll a deadline—that is, in the motion to reopen context—an immigration judge or Board member reviews settled facts, normally in the form of proffers of fact such as declarations.[404] This decision is akin to summary judgment—the facts are assumed true, and the Board or immigration judge determines whether these facts support the legal standard.[405] Similarly, in a bond hearing, there is rarely oral testimony and the immigration judge usually decides the case based on the declarations and other evidence such as criminal records and police reports.[406] Although the immigration judge may determine that a detainee is not credible (that is, the judge believes the police report over the detainee's version of events), in many bond hearings, the facts as presented are taken as true.[407] The judge weighs the evidence to reach an outcome. Specifically, the immigration judge must determine whether a detainee proved rehabilitation with evidence of rehabilitation and plans for rehabilitation, despite a past criminal record.[408] In both of these contexts, a reviewing court is equally well positioned to review those

403. *See* Guerrero-Lasprilla v. Barr, 589 U.S. 221, 226 (2020) (agreeing to decide whether "claims that the Board incorrectly applied the equitable tolling due diligence standard" to established facts is a question of law).

404. *Williams*, 59 F.4th at 638.

405. *See* Trujillo Diaz v. Sessions, 880 F.3d 244, 252 (6th Cir. 2018) (reasoning that the BIA "must accept as true reasonably specific facts proffered by an alien in support of a motion to reopen unless it finds those facts to be inherently unbelievable" (internal citations omitted)).

406. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 77, § 9.3(e)(6) (describing bond hearings, which generally rely on proffers of fact by the noncitizen and government, and stating that "[a]t the immigration judge's discretion, witnesses may be placed under oath and testimony taken" but that "parties should be mindful that bond hearings are generally briefer and less formal than hearings in removal proceedings"); Sarah Lakhani & Erin Quinn, *A Beginner's Guide to Bond Hearings*, IMMIGRANT LEGAL RES. CTR. (June 29, 2018), https://www.ilrc.org/resources/beginner%E2%80%99s-guide-bond-hearings [https://perma.cc/KNG6-RDAY].

407. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 77, § 9.3(e)(6) (stating that in bond hearings, which are "generally briefer and less formal than hearings in removal proceedings," immigration judges generally rely on proffers of fact instead of oral testimony); Lakhani & Quinn, *supra* note 406 (describing how some immigration courts take testimony during bond hearings and others do not and advising attorneys to seek to stipulate certain facts from the government in advance of the bond hearing).

408. *See* Martinez v. Clark, 36 F.4th 1219, 1225 (9th Cir. 2022) ("In making the dangerousness determination, the immigration judge evaluated . . . mitigating evidence, such as . . . successful release on bond pre-incarceration, the district court's statements during sentencing, . . . efforts at rehabilitation, . . . family ties, and . . . strong community support.").

declarations, reports, and filter those facts through a written legal standard.[409]

Finally, the Board itself equates exercises of discretion with mixed questions of law and fact. In its regulations governing appellate standards of review, the Board reviews questions of law de novo and questions of fact under a clear error standard.[410] When an immigration judge exercises their discretion, the Board reviews that decision under a de novo standard.[411] This change came about in 2002, when the Board shifted its review from de novo review of all questions to the current standards of review.[412] In clarifying the different standards of review, the Board wrote,

> Where the Board reviews what was previously called a mixed question of law and fact in the proposed rule, and is now referred to as a discretionary decision, the Board will defer to the factual findings of the immigration judge unless clearly erroneous, but the Board members will retain their "independent judgment and discretion," subject to the applicable governing standards, regarding the review of pure questions of law and the application of the standard of law to those facts.[413]

Thus, the Board sees discretionary decisions as the equivalent of "mixed questions of fact and law," which the Supreme Court later clarified are legal questions.[414] Given the Board's role as an appellate

409. In *Williams*, the Fourth Circuit decided that equitable tolling the motion to reopen deadline is a legal question that a court should assess using the review de novo standard, not the abuse of discretion standard. *See* 59 F.4th at 639. The court reasoned that "[t]he BIA held no hearing, took no evidence, made no credibility determinations below. It merely read Williams's motion and the written declarations attached. We can conduct this analysis just as well." *Id.* at 638.

410. 8 C.F.R. §§ 1003.1(d)(3)(i)–(iii) (2022).

411. *Id.* § 1003.1(d)(3).

412. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,888 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003). Prior to 2002, the Board reviewed all aspects of immigration judge decisions de novo. AM. IMMIGR. COUNCIL, STANDARDS OF REVIEW APPLIED BY THE BOARD OF IMMIGRATION APPEALS PRACTICE ADVISORY 2 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/standards_of_review_applied_by_the_board_of_immigration_appeals.pdf [https://perma.cc/42CE-KQVG] (citing *In re* S-H-, 23 I. & N. Dec. 462, 463–64 (B.I.A. 2002)).

413. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54, 888–89 (codified at 8 C.F.R. § 1003).

414. *See* Guerrero-Lasprilla v. Barr, 589 U.S. 221, 228 (2020); Wilkinson v. Garland, 601 U.S. 209, 219 (2024).

body, not a fact finder,[415] its de novo standard of review for discretionary decisions signals that matters of discretion are really another way of saying questions of law.

When analyzing the question of dangerousness and flight risk in a bond hearing, there should be no unreviewable "value judgment," or residual exercise of discretion.[416] Rather, the immigration judge finds facts and applies the many applicable standards to those facts and should do nothing more.[417] There are good reasons not to allow for such value judgments to determine a person's liberty. First, anything that asks an immigration judge to perform a "value judgment" about a detainee is a terrible idea, given the identities of who is in detention, the conditions under which immigration judges work, and the research on implicit bias.[418] In this type of situation, administrative law scholar Louis Jaffe warned in 1965 that "[d]iscretion . . . can be a facade for inadequate thinking, failure to face issues, hidden experiences, or downright dishonesty."[419] Like Jaffe observed, "These vices multiply in large, overworked agencies where power of decision may be fractionated and diffused."[420] In a study of INS adjustment of status adjudications in the late 1960s, the author wrote that "adjudicators seem to have utilized discretionary grounds to give effect to their biases."[421]

---

415. *See* 8 C.F.R. § 1003.1(d)(3)(iv) ("Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding cases.").

416. See *infra* notes 429–35 and accompanying text (arguing that if federal courts permit immigration judges to exercise unreviewable value judgments, this interpretation would render 8 U.S.C. § 1226(e) vulnerable to a void-for-vagueness challenge).

417. Professor Louis Jaffe described the process whereby decisions were made, stating that "[t]he mind focuses . . . on a group of authoritative decisional factors[,] [b]ut ultimately it reaches a decision by an intuitive leap"—that "intuitive leap" is the "exercise of 'discretion.'" LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 555–56 (1965) (internal citations omitted).

418. *See infra* Part I.B.

419. JAFFE, *supra* note 417, at 588; *see also* Heckler v. Chaney, 470 U.S. 821, 848 (1985) (Marshall, J., concurring) (justifying judicial review of discretionary decisions because "discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives").

420. JAFFE, *supra* note 417, at 588. The exercise of unreviewable discretion also causes immigration detainees to experience immigration detention as harsher than criminal incarceration—guards have more power because they can write up any disciplinary infraction, which can negatively impact the detainee's discretionary case in immigration court. Ryo, *Fostering Legal Cynicism*, *supra* note 101, at 1033–34.

421. Sofaer, *supra* note 210, at 420. Sofaer notes, however, that "[t]he biases of one administrator were frequently offset by the biases (or lack of bias) of other administrators," so

This observation recognizes that one purpose for injecting discretion into the immigration system—to allow line-duty officers (or in this case, judges) to relieve the impact of harsh laws for humanitarian reasons—is now gone.[422] If the president and/or Congress does not trust those who exercise the discretion to exercise it in a way that meets its humanitarian purpose, and without bias, then they should simply rid the immigration system of discretion.[423] A version of this occurred during the Obama administration, where there were various exercises of prosecutorial discretion, either through guidance memoranda or in the granting of deferred action to categories of persons.[424] All of these took discretion away from rank-and-file ICE officers, because the administration believed that ICE officers were disinclined to exercise it in favor of noncitizens.[425] Immigration judges' exercises of discretion are no doubt seen as immune from the hostility of ICE officers.[426] However, one wonders whether that should be the case, given that empirical data demonstrate that immigration judges' decisions are

---

that the ultimate denial rate was low, given the opportunities for additional review in existence at the time and other forms of relief available. *See id.*

422. Professor Nicole Hallett describes how the Obama administration took a categorical approach to prosecutorial discretion, setting a "default position of non-removability for a large category of removable individuals . . . largely because of institutional pushback from immigration officials who resented the directives not to enforce the law to the fullest extent possible." *See* Hallett, *supra* note 21, at 1784–85 (discussing ICE officers' litigation against the Obama administration in the wake of DACA's creation, in which the officers argued that DACA violated their duty to enforce immigration laws). She further describes how the Obama administration, with the creation of the DACA program, "addressed institutional resistance by moving adjudication of discretion requests from frontline ICE enforcement officials to USCIS." *Id.* at 1808.

423. *Cf. id.* at 1789 ("When individual prosecutors make decisions about who and how to charge, the biases of those individuals are unavoidably imported into the decision-making process. Two of the most pernicious biases are race and class.").

424. *See id.* at 1783–85 (describing how the Obama administration, through its creation of the DACA and Deferred Action for Parents of Americans programs and its listing of priorities in the Johnson Memo, attempted to take discretion away from rank-and-file ICE officers who were disinclined to exercise it).

425. *See id.*

426. *See id.* at 1784. ICE officers sued the Obama administration for forcing them not to fully enforce all immigration laws, *id.* at 1783 n.110, thus publicly demonstrating their bias in favor of harsh enforcement. Immigration judges, however, have made no such public statements and thus have preserved for themselves the veneer of the neutral, detached judge. In fact, the judges' union has filed a grievance in order to preserve their independence in the face of attempts by the attorney general to curtail their decisional independence. *See id.* at 1799 (describing the grievance from the National Association of Immigration Judges).

swayed by the presidential administration in place.[427] Also, even without any political influence on immigration judges, studies repeatedly demonstrate that implicit biases do not align with one's stated preferences.[428] The harmful effects of implicit biases against those who are in detention—mostly men of color—must be checked, given that what is often the one and only decision regarding a detainee's freedom results from a quick, informal hearing.[429] If immigration judges, like ICE officers, are not to be trusted to exercise discretion fairly and humanely, then they either should not exercise discretion, or at the very least, an independent, Article III judge should review these exercises of discretion to protect important liberty interests.

Second, if the exercise of discretion in 8 U.S.C. § 1226(e) is read in a way that allows for "value judgments," then the statute becomes vulnerable to a void-for-vagueness challenge. The void-for-vagueness doctrine has been referred to as the "fraternal twin" of discretion.[430] The doctrine exists to ensure that persons regulated by a statute are on notice of what conduct to avoid.[431] It also ensures that enforcement actors do not engage in discriminatory conduct.[432] The doctrine has

427. *See, e.g.*, Kim & Semet, *Presidential Ideology*, *supra* note 90, at 1865–67 (reporting the results of an empirical study that demonstrates noncitizens were more likely to lose a bond hearing during the Trump administration than they did during the prior two presidential administrations, regardless of who was president when their immigration judge was appointed, calling into question political independence of immigration judges when making bond decisions).

428. Professor Elizabeth Keyes describes the "availability heuristic," in which "people estimate the probability of an outcome based upon how many examples of that outcome they can identify" and applies that heuristic to sample narratives that immigration judges hear from noncitizens. *See* Keyes, *supra* note 92, at 244; *see also id.* at 243–46 (discussing how an immigration judge may consciously reject a certain available narrative—that a noncitizen who has committed crimes is a "bad immigrant" who is undeserving of a favorable exercise of discretion—yet the availability heuristic occurs at a subconscious level and causes the immigration judge to deny the noncitizen's discretionary waiver).

429. *See supra* Part I.B.

430. *See, e.g.*, Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 492 (1994). Professor Robert C. Post writes, "the doctrine of undue discretion is most often used when laws are addressed to official decisionmakers, whereas vagueness doctrine is typically used when legal rules directly constrain the conduct of ordinary citizens." *Id.*

431. Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1127 (2016).

432. *Id.* Because 8 U.S.C. § 1226(e) is a jurisdictional statute, only a federal judge would interpret the statute. As such, it is possible that the vagueness concerns differ from those presented by a statute that governs detention or deportation, which is interpreted by enforcement agents such as ICE. However, the Supreme Court, in holding that a deportation statute is void for

been held applicable in the civil context and, specifically, in the immigration context.[433] In the context of immigration detention, allowing unfettered value judgments to control who gets bond is akin to allowing "the norms of middle-class virtue . . . [to] order[] the relationship" between the jailer and the jailed.[434] The void-for-vagueness doctrine here could provide what has been called an "antidote" to structures that permit "excessive state power and structural imbalances of that power."[435]

One defense against a void-for-vagueness challenge is that a statute is given meaning through case law. Thus, if what would otherwise be an unconstitutionally vague law is given standards through the development of case law, it no longer operates to allow discriminatory enforcement; it also no longer fails to put regulated persons on notice.[436] So, if one were to raise a void-for-vagueness challenge to 8 U.S.C. § 1226(e), no doubt the government would defend the statute through citation to the various legal standards in place that judges must use to give meaning to the statute. Yet, requiring judges to use those standards as a guide means that their unregulated "value judgments" are removed.

The void-for-vagueness doctrine has not commonly been used to challenge a statutory delegation of the exercise of discretion to an agency. This is likely because there are so many instances in which agencies exercise discretion; to invalidate every statutory authorization of an agency's exercise of discretion would cause the entire administrative state to collapse.[437] However, though scholars have

---

vagueness, wrote that a statute must "provide standards to govern the actions of police officers, prosecutors, juries, *and judges*." Sessions v. Dimaya, 584 U.S. 148, 156 (2018) (emphasis added) (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

433. *See* Jordan v. De George, 341 U.S. 223, 231 (1951); *see also Sessions*, 584 U.S. at 156 ("[W]e long ago held that the most exacting vagueness standard should apply in removal cases." (citing *Jordan*, 341 U.S. at 229)).

434. *See* Post, *supra* note 430, at 498 (interpreting the Supreme Court's decision in Papachristou v. City of Jacksonville, 405 U.S 156 (1972), which struck down an anti-vagrancy ordinance under the void-for-vagueness doctrine, as "holding that the norms of middle-class virtue are not a constitutionally acceptable basis for ordering the relationship between police and citizen").

435. *See* Koh, *supra* note 431, at 1140 (describing a conceptualization of vagueness as "a doctrine in which courts can address the immigration powers of the government").

436. *See Jordan*, 341 U.S. at 232 (stating that "doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional for vagueness").

437. *See* Davis, *supra* note 204, at 16 (reasoning that discretion is often preferable to rigid rules because agencies constantly face problems that Congress could not have foreseen when

attempted to create taxonomies of types of discretion,[438] none can agree on a settled definition of what *is* an exercise of discretion.[439] As Shapiro has noted, courts have treated administrative discretion as a "cowboy's attempt to cut as many as possible out of the unmarked herd and brand them as non-discretionary."[440] These efforts by courts have gone only so far as to define that which *is not* an exercise of discretion, while failing to come up with a unitary decision of what *is* an exercise of discretion.[441] This becomes highly problematic in immigration law because the preclusion of judicial review turns on this very question—what is discretion—that is so undefined.[442] Therefore, to restore the rule of law, Congress must clearly define, in the immigration statutes that preclude jurisdiction over exercises of discretion, what *is* an exercise of discretion.[443] Without such a definition, noncitizens are left guessing at which questions will be heard by federal courts, and courts have no guidance on when to exercise their jurisdiction. The void-for-vagueness doctrine is the antidote, because it provides a mechanism for courts to instruct Congress to write clear laws to guide courts and regulated parties on which questions are subject to federal courts' jurisdiction.[444]

---

writing a statute); *supra* note 226 (describing Shapiro's taxonomy of seven different types of discretion that agencies exercise).

438. *See, e.g.*, Shapiro, *Administrative Discretion*, *supra* note 226, at 1500–11 (creating a taxonomy of seven different types of discretion that agencies exercise); Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 761–66 (categorizing different types of exercises of discretion in immigration law).

439. *See* Kanstroom, *The Better Part of Valor*, *supra* note 23, at 163 ("[W]e still lack fundamental agreement on what discretion actually means. Discretion is an extremely amorphous concept—a kind of shadow standard, a contentless gap-filler, a euphemism for allocation of authority."). Kanstroom describes how the exercise of discretion can be defined as what happens *after* judges decide issues of law and fact; he recognizes that this means the "exercise of discretion" is not part of the "Rule of Law." *See* Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 725–26. He also cites to a more pragmatic definition of discretion, which is the "power to make a choice between two alternative courses of action." *Id.* at 711 (quotations omitted).

440. Shapiro, *Administrative Discretion*, *supra* note 226, at 1490.

441. *See id.* (describing the development of today's review for abuse of discretion only in terms of factors weighing in favor of abuse rather than a valid exercise of discretion).

442. *See* Kanstroom, *The Better Part of Valor*, *supra* note 23, at 165 (arguing that the line between law and discretion is impossible to define, which will pose issues related to the REAL ID Act).

443. *See id.* (concluding that "either a more sophisticated jurisdictional statute or a more refined theory of discretion is needed" to create a more sensible judicial review system to address issues with the REAL ID Act).

444. *See* Sessions v. Dimaya, 584 U.S. 148, 156 (2018) (reasoning that a statute must "provide standards to govern the actions of police officers, prosecutors, juries, and judges" (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

Treating all bond decisions as an immigration judge's application of law to facts raises a concern: To what set of cases does 8 U.S.C. § 1226(e) apply if all immigration judge decisions are rendered nondiscretionary by the Board's creation of standards to guide the judges in making bond decisions? Courts will not simply read out a portion of the statute that Congress has written.

There are two possible answers. First, DHS regularly makes custody determinations, in which the ICE officer decides to detain or release the noncitizen on a bond or other alternatives to detention.[445] In these situations, DHS decides how to utilize the finite detention or monitoring resources of the government. The only guidance derives from prosecutorial discretion memoranda put forth by DHS.[446] Bond determinations made by immigration judges, however, have an established set of standards, developed through Board case law.[447] Bond determinations by immigration judges are another determination of the same issues determined by DHS (dangerousness or flight risk), and as such are referred to as "custody redeterminations."[448] These decisions, however, are made by the

445. Gilman, *supra* note 12, at 165–68 (describing DHS initial custody determinations); Holper, *Immigration E-Carceration*, *supra* note 188, at 13–14 (describing ICE's alternatives to detention program that they utilize in their initial custody determinations).

446. *See, e.g.*, SIVAPRASAD WADHIA, BEYOND DEPORTATION, *supra* note 21, at 94–98 (providing examples of memorandum in 2010 related to prosecutorial discretion).

447. *See, e.g.*, *In re* Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in In re* Valdez-Valdez, 21 I. & N. Dec. 703, 716–17 (B.I.A. 1997) (citing cases to source a rule that an alien should not be required to post bond unless that person poses a threat to national security or is a poor bail risk); *In re* Andrade, 19 I. & N. Dec. 488, 489 (B.I.A. 1987) (listing factors determining the necessity for and amount of bond by relying on case law). The need for more Board case law articulating bond standards increased when detention rates, and thus the number of bond determinations, increased following the increase in immigration detention beds. *See* PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON GOVERNMENTAL AFFS., CRIM. ALIENS IN THE U.S., S. REP. NO. 104-48, at 1–2 (1995). Taylor describes how the INS's capacity to detain noncitizens in the early 1980s allowed for approximately 2,200 persons to be detained for immigration purposes on any given day, and that roughly 90 percent of these detainees were detained for a brief period before they were returned to Mexico after voluntary departure grants. Taylor, *supra* note 129, at 347–48. Thus, "during proceedings few individuals were actually detained based on flight risk and dangerousness," so there was not much need for the BIA to set forth standards for bond determinations. *See id.* at 348. They did not do so until the 1990s, when detention beds increased drastically; this caused INS to have a larger capacity to hold noncitizens pending their removal proceedings. *See id.* at 349. It was in the late 1980s and 1990s that Congress started passing various versions of what is today mandatory detention for those who have been convicted of certain crimes. *See id.* at 350–51.

448. *See* Gilman, *supra* note 12, at 169–70 (discussing the procedure and structure that allows for a custody redetermination).

supposedly neutral decisionmakers, unlike when ICE officers determine bond. So, the ICE officer's bond determination would still be unreviewable under 8 U.S.C. § 1226(e), and thus the statute would not be rendered meaningless.

Second, one can interpret 8 U.S.C. § 1226(e) as applying only to the bond amount set by an immigration judge.[449] Following this reasoning, a federal court is barred from reviewing whether a bond is excessively high.[450] A legal question within that context, however, is whether the amount of bond is so high that it has the effect of preventing release.[451]

Treating bond decisions as an immigration judge's application of law to facts, and thus reviewable, raises another concern beyond giving meaning to 8 U.S.C. § 1226(e)—it runs counter to central principles of administrative law, which require generalist federal judges not to substitute judgment for that of an "expert" agency.[452] The arguments set forth in this Article are therefore another way of creating an immigration exception to administrative law.[453] Yet, the Roberts Court

449. A possible third situation is where an immigration judge "leaps over" the issues of eligibility for bond and decides based purely on an exercise of discretion. *See supra* notes 398–402 and accompanying text (discussing application of Supreme Court's decision in *Abudu* to immigration judge bond decisions). Whether such a leap is permissible in the context of bond decisions is not fully explored in this Article. *See id.*

450. *See* Prieto-Romero v. Clark, 534 F.3d 1053, 1067 (9th Cir. 2008) ("Prieto-Romero would have us second-guess the IJ's discretionary assessment of the bond amount required to secure his presence at removal in the event that his petition for review is denied. We have no authority to entertain this challenge.").

451. *See id.* (citing other case law for the assertion that bond amounts raise concerns when they have the effect of preventing release). For example, courts have rejected noncitizen detainees' arguments that bond cannot be imposed as a matter of law to avoid indefinite detention post removal order. *See, e.g.*, Shokeh v. Thompson, 369 F.3d 865, 871–72 (5th Cir. 2004), *vacated as moot*, Shokeh v. Thompson, 375 F.3d 351 (5th Cir. 2004); Doan v. INS, 311 F.3d 1160, 1162 (9th Cir. 2002). These courts have recognized, however, "that serious questions may arise concerning the reasonableness of the amount of the bond if it has the effect of preventing an alien's release." Doan, 311 F.3d at 1162; *see also* Shokeh, 369 F.3d at 872 n.10, 872–73 (remanding to the district court for further fact finding to determine reasonableness of the bond). In *Shokeh*, the Fifth Circuit reasoned that a noncitizen's choice not to pay a bond presents no constitutional problem, because "his confinement would then be based on his choice not to pay rather than a condition that he is simply unable to satisfy." *Id.*

452. *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 836 (2001) (describing how *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) set forth a mandatory deference doctrine despite the fact that *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) already has set forth a multifactor approach to deference).

453. *See generally* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (discussing the exceptional treatment the Supreme Court tends to give immigration law).

has already rejected this central tenet of administrative law in overruling the foundational case, *Chevron v. NRDC*,[454] which required courts to defer to expert administrative agencies when the statute was unclear.[455] Even while *Chevron* deference was in place, one immigration scholar argued that the Court's refusal to apply administrative law principles of deference to immigration detention and deportation decisions is not an example of immigration exceptionalism.[456] Rather, this trend is "an application of deeply rooted constitutional principles" because "immigration is the rare field of administrative law in which an executive branch agency can arrest, detain and force an individual to go someplace against their will."[457] Immigration law has always presented a problematic system, because it is ostensibly civil, yet agency actors conduct so many deprivations of liberty without the substantive or procedural protections of the criminal justice system.[458] This problem became significantly more acute in 1996 when Congress cut off judicial review to discretionary decisions. To ask a question posed by Shapiro: "[W]ho guards the guardians?" (assuming that agency actors are "guardians" of the "public interest," which includes detainees' liberty interests).[459] After 1996, the answer became "nobody."

To be sure, there are ways in which the federal courts can oversee what happens at a bond hearing without substantively reviewing the merits of the immigration judge's decision. One of these ways is to ensure that immigration judges follow certain procedures, such as shifting the burden of proof to the government or requiring the immigration judge to consider alternatives to detention or a detainee's ability to pay.[460] Another is to ensure that immigration judges actually exercise their discretion. For example, an immigration judge may rely on a "gang verification report," in which a gang unit of the police

454. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

455. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

456. *See, e.g.*, Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 495 (2019) (arguing that the Supreme Court has created a liberty exception to *Chevron* in cases involving immigration detention and deportation).

457. *Id.*

458. *See* Legomsky, *The New Path*, *supra* note 121, at 469 (arguing that modern immigration law rejects the "procedural ingredients of criminal adjudication" despite its parallels to criminal enforcement).

459. MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 28, 71 (1988) [hereinafter SHAPIRO, JUDICIAL CONTROL OF ADMINISTRATION].

460. *See supra* Part II.C. (describing procedural due process litigation in bond hearings).

department justifies why they believe a certain noncitizen to be a member of a street gang.[461] This is directly analogous to the situation in the 1954 case of *United States* ex rel. *Accardi v. Shaughnessy*,[462] where the Board simply relied on the attorney general's list of "unsavory characters" without independent analysis and thus failed to exercise discretion.[463] If the immigration judge denies bond because a detainee is on the gang list, the judge has basically delegated the discretionary decision to the gang unit of the local police department to determine who is a dangerous person. This type of decision does not involve the immigration judge exercising their discretion "according to [their] own understanding and conscience."[464]

These procedural fixes have their limitations, however. Not all courts agree that immigration detainees are entitled to the same procedural protections that are guaranteed in the civil pretrial detention context.[465] Even for courts that have sent the case back to an immigration judge to fix the procedures, the judge may recite the magic words that fix the procedural flaw, with no change in outcome or real engagement with the substantive standards.[466] What happened to Mr. Accardi is illustrative—on remand, the Board justified its opinion to the district court, and the district court found that the same negative outcome was justified because the Board exercised its own

461. *See* Mary Holper, *Gang Accusations: The Beast that Burdens*, 89 BROOK. L. REV. 119, 119 (2023).

462. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

463. *See id.* at 264, 268 (holding a claim sufficient where the Attorney General provided a deportation list that was allegedly never reviewed by the Board).

464. *See id.* at 267 (emphasizing that discretion refers to the exercise of authority by the discretion recipient's personal understanding). *But see* Diaz Ortiz v. Smith, 384 F. Supp. 3d 140, 143–45 (D. Mass. 2019) (refusing to second-guess the immigration judge's bond denial based on the government's evidence of gang membership because the district court may not review the judge's weighing of the evidence, so the petitioner must show that "'the evidence itself could not—as a matter of law—have supported' the immigration judge's decision to deny bond" (quoting Hechavarria v. Whitaker, 358 F. Supp. 3d 227, 240 (W.D.N.Y. 2019))).

465. *See supra* Part II.C. (describing procedural due process litigation in bond hearings).

466. *See, e.g.*, Eddy, *supra* note 10, at 347–50 (describing a case where the immigration judge provided procedural formalities in response to federal court litigation but then came to the same decision, and the federal district court judge refused to second-guess the immigration judge due to 8 U.S.C. § 1226(e)); *see also Diaz Ortiz*, 384 F. Supp. 3d at 143 (finding on motion to enforce that the immigration judge followed his burden allocation because the immigration judge, after remand from the district court to reallocate the burden of proof, "stated his conclusion that the Government had met its burden").

discretion.[467] The Supreme Court later upheld this result as in compliance with the governing regulation.[468] With the number of bond denials on the rise, something more is needed than tinkering with procedures.[469]

An advantage of treating all bond determinations as questions of law is that courts will engage more fully with the Board's substantive standards for bond, which include its nine-part test and other precedential case law. This treatment sets up a dialogue between the agency and the courts, which encourages the Board to expand upon its existing case law governing bond.[470] More substantive guidance to detainees and their advocates about which factors are important lead to all participants finding the process to be less arbitrary.[471] This federal

---

467. *See* Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280, 282–83 (1955) (describing Board members' testimony in a hearing before the district court).

468. *See id.* at 284 (ruling that Accardi was not entitled to an additional hearing unless he could prove the Board was influenced by the Attorney General's deportation list, which the plaintiff failed to prove).

469. *See Detained Immigrants Seeking Release on Bond Have Widely Different Outcomes – Overall Bond Rates Have Dropped*, *supra* note 4 (demonstrating that bond was denied in 69 percent of hearings during the Biden administration, which is significantly higher than bond denial rates under prior presidential administrations).

470. *See* Christopher J. Walker & James R. Saywell, *Remand and Dialogue in Administrative Law*, 89 GEO. WASH L. REV. 1198, 1203–04, 1243 (2021) (discussing a study of Board decisions after remand from federal courts of appeals and finding that "the agency on remand usually seems to be listening, and often consciously responds and reacts, to the judicial reasoning" and that a "deeper dive into the [Board] decisions on remand, however, reveals an often-rich dialogue between the agency and the court"); *see also* Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1122–30 (2021) (discussing a trend of federal judges becoming "deciders" of agencies' decisions on policy, in lieu of "overseers" of such decisions); KANSTROOM, DEPORTATION NATION, *supra* note 3, at 229 (describing AEDPA and IIRIRA as "designed in large part to stifle the dialogue between the judiciary and the executive branch enforcers of deportation laws"); Benson, *Making Paper Dolls*, *supra* note 356, at 63–64 ("Through judicial review, we find the areas where statutory reform is needed, where the system is being resisted by large groups of people and where justice may not be served by archaic rules or overly restrictive statutory provisions.").

471. *See* SHAPIRO, JUDICIAL CONTROL OF ADMINISTRATION, *supra* note 459, at 45 (describing two "fundamental notions" of the APA's rulemaking provisions, which are that the "government must make all of its rules public so that people cannot be punished for violating rules that they could not have known existed[,]" and that "people should have a chance to say what kind of law they want before it is made"); *see also* Rachel Barkow, *The Ascent of Administrative State and Demise of Mercy*, 121 HARV. L. REV. 1332, 1335 (2008) ("[O]ur legal culture has come to view unreviewable discretion to decide individual cases as the very definition of lawlessness."); *id.* at 1339 ("In a legal culture that is firmly committed to judicial review, wedded to reasoned decisionmaking, and devoted to a fair and regular process, there is little space for the exercise of unreviewable legal power that is dispensed without reason and without the need to be consistent."). Professor Emily Ryo reported that immigration detainees perceived

court oversight also sends the message to immigration judges that their bond decisions must stand up to judicial review, which encourages more careful deliberation prior to a bond decision.[472] The oversight of substantive standards compliments the already-existing oversight of procedural due process at bond hearings,[473] and encourages federal courts to analyze substance and procedure separately.[474] This judicial oversight is also significantly more meaningful than some courts' rationale that if an immigration judge's decision is "so arbitrary that it would offend . . . due process," then it is reviewable, notwithstanding 8

immigration detention as punishment for several reasons, one of which was "the belief that legal rules are made inscrutable to them—inaccessible and incomprehensible—by design." Ryo, *Fostering Legal Cynicism*, *supra* note 101, at 1034.

472. *See* Walker & Saywell, *supra* note 470, at 1243–44 (reporting the results of an empirical study that demonstrated Board discussion of federal court's reasoning in 78.9 percent of remanded cases and extensive discussion in 23 percent of remanded cases); *id.* at 1254 (reporting that in some cases federal courts remanded to the Board with an order to assign the case to a different immigration judge).

473. *See supra* Part II.C. (describing procedural due process litigation in bond hearings). Although not all courts have agreed upon which procedural protections are due, it should not be controversial that the Due Process Clause requires that there be "some evidence" to support an agency conclusion, even if that fact-finding is unreviewable. *See* Neuman, *Jurisdiction and the Rule of Law*, *supra* note 127, at 1968; *see also* Diaz Ortiz v. Smith, 384 F. Supp. 3d 140, 142–43 (D. Mass. 2019) (refusing to second-guess an immigration judge's bond denial based on the government's evidence of gang membership because the district court may not review a judge's weighing of the evidence due to 8 U.S.C. § 1226(e), but leaving open the option that a future petitioner could show that "'the evidence itself could not—as a matter of law—have supported' the immigration judge's decision to deny bond" (quoting Hechavarria v. Whitaker, 358 F. Supp. 3d 227, 240 (W.D.N.Y. 2019))). The Due Process Clause is also one vehicle through which courts have examined objections to hearsay evidence, such as police reports and gang packets, because an immigration judge's reliance upon them is fundamentally unfair. *See* Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675, 696–700 (2015) (describing how courts have analyzed the use of police reports in immigration cases to determine whether the reliance on such reports violates the noncitizen's due process rights).

474. Professor Hiroshi Motomura describes how the distinction between substantive and procedural questions can seem obvious but that this distinction is "deceptive." *See* Motomura, *The Curious Evolution of Immigration Law*, *supra* note 269, at 1629. He writes, "Because of the anomalous structure that the plenary power doctrine imposes on constitutional immigration law, procedural decisions are often the only vehicle for taking substantive constitutional rights seriously, and procedural surrogates for substantive constitutional rights have evolved as a result." *Id.* at 1631. He concludes that courts' overreliance on procedural surrogates for substantive review "impedes the sound development of immigration law." *Id.* at 1632. He opines that "procedural surrogates force procedural solutions to assume too heavy a burden of assuring constitutional protections in immigration law. To compensate for the absence of substantive constitutional scrutiny, judges may require more extensive—and possibly excessive—procedures than they would by addressing substantive claims openly." *Id.* at 1700–01.

U.S.C. § 1226(e).[475] Like Shapiro has noted, "arbitrary and capricious" is a "sort of lunacy test."[476] Taking this "embarrassing"[477] standard further by requiring an immigration judge's decision to be "so arbitrary that it would offend . . . due process"[478] ensures that almost no bond decision will meet this standard.

With judicial oversight, judges' biases can be checked, and immigration bond hearings become less of an implicit bias minefield that an immigration detainee must navigate.

### *B. Suspension Clause*

Courts should also read 8 U.S.C. § 1226(e) to avoid any violations of the Suspension Clause of the Constitution.[479] Like the Supreme Court held in *St. Cyr*, courts must read into a congressional statute the clear intent to repeal habeas jurisdiction over the federal courts.[480] There is also a "strong presumption in favor of judicial review of administrative action."[481] Like the Court held in the 2020 case of *DHS*

475. *See, e.g.*, *Diaz Ortiz*, 384 F. Supp. 3d at 144 (quoting Pratt v. Doll, No. 17-cv-1020, 2019 WL 722578, at *4 (M.D. Pa. Feb. 20, 2019)); Massingue v. Streeter, No. 19-cv-30159, 2020 WL 1866255, at *5 (D. Mass. Apr. 14, 2020).

476. SHAPIRO, JUDICIAL CONTROL OF ADMINISTRATION, *supra* note 459, at 56.

477. *Id.* at 58 (describing "arbitrary and capricious" as "embarrassing words" that courts were forced to use because they were adopted from the APA).

478. *See Diaz Ortiz*, 384 F. Supp. 3d at 144 (quoting *Pratt*, 2019 WL 722578, at *4).

479. *See* U.S. CONST., art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); Hechavarria v. Whitaker, 358 F. Supp. 227, 236 n. 2 (W.D.N.Y. 2019) (noting that 8 U.S.C. § 1226(e) raises a serious constitutional issue in that it may violate the Suspension Clause); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Norms and Statutory Interpretation*, 100 YALE L.J. 545, 580–600 (1990) (describing courts' reliance on statutory interpretation to avoid deciding constitutional issues). In recent years, the Court has had less of an appetite for statutory interpretation to avoid constitutional questions when these arguments were presented on behalf of noncitizen detainees. *See, e.g.*, Nielsen v. Preap, 586 U.S. 392, 418–19 (2019) (refusing to utilize the doctrine of constitutional avoidance because the statute clearly does not support noncitizens' interpretation); Jennings v. Rodriguez, 583 U.S. 281, 286 (2018) (refusing to utilize the doctrine of constitutional avoidance because the detention statutes cannot be read to provide periodic bond hearings or the procedural protections that petitioners request). However, this Article's proposal would require a court to find that Congress clearly erased the constitutional right to habeas corpus, which the Court has rarely done. *See* Boumediene v. Bush, 553 U.S. 723, 732–39 (2008) (describing a back and forth between Congress and the Court, where Congress needed to more clearly erase the right to habeas corpus for Guantanamo detainees in response to the Court's earlier ruling in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

480. *See* INS v. St. Cyr, 533 U.S. 289, 298–99 (2001), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

481. *St. Cyr*, 533 U.S. at 298.

*v. Thuraissigiam*,[482] seeking release from executive custody is at the core of what the writ of habeas corpus always has protected.[483] Justice Clarence Thomas, concurring in *Thuraissigiam*, examined the historical record and determined that the privilege of habeas corpus guaranteed freedom from discretionary detention. A "suspension" of the privilege, he wrote, meant a statute granting executive power to detain without bail or a trial based on mere suspicion of a crime or danger.[484] That is exactly what 8 U.S.C. § 1226(e) permits—a full grant of executive power to an immigration judge to detain without bail based on a mere suspicion of crime or danger.[485] Nor is there any "adequate substitute" for habeas,[486] for the only judicial review that is available to immigration detainees comes in the form of review of a removal order,[487] which is separate and apart from the decision to detain pending the removal order,[488] and comes only *after* the detainee has suffered all of the detention pending removal.[489]

---

482. Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020).

483. *Id.* at 1969–70.

484. *Id.* at 1983 (Thomas, J., concurring) (alteration in original).

485. In Justice Thomas's dissenting opinion in *Hamdi v. Rumsfeld*, he opined that the writ of habeas corpus does not apply outside of the criminal process. *See* 542 U.S. 507, 593 (2004) (discussing how the punishment-nonpunishment distinction harmonizes precedent). Professor Amanda Tyler has critiqued his reasoning, stating that "there is absolutely nothing originalist about Justice Thomas's opinion in *Hamdi*." Amanda Tyler, *Habeas Corpus in Wartime and Larger Lessons for Constitutional Law*, HARV. L. REV. BLOG (Apr. 15, 2019), https://harvardlawreview.org/blog/2019/04/_habeas-corpus-in-wartime_-and-larger-lessons-for-constitutional-law [https://perma.cc/7FRW-STCS]. Justice Thomas's concurring opinion in *Thuraissigiam*, Tyler writes, "suggests that he now recognizes the error of his earlier ways." Amanda L. Tyler, Thuraissigiam *and the Future of the Suspension Clause*, LAWFARE (July 2, 2020, 12:31 PM), https://www.lawfareblog.com/thuraissigiam-and-future-suspension-clause [https://perma.cc/6EBZ-SK7U].

486. *See* Boumediene v. Bush, 553 U.S. 723, 789 (2008).

487. *See* 8 U.S.C. § 1252(a)(5) (setting petition for review as the "sole and exclusive means for judicial review of an order of removal").

488. Aguilar v. USICE, 510 F.3d 1, 11 (1st Cir. 2007); Hernandez v. Gonzales, 424 F.3d 42, 42 (1st Cir. 2005); 8 C.F.R. § 1003.19(d) (2022) (stating that requests for release from custody "shall be separate and apart from . . . any deportation or removal hearing or proceeding").

489. *Cf.* Jennings v. Rodriguez, 583 U.S. 281, 292–95 (2018) (reasoning that 8 U.S.C. § 1252(b)(9), which channels all judicial review of questions of law and fact arising from an action taken to remove a noncitizen, cannot be read so broadly to preclude challenges to mandatory detention because this would render such challenges "effectively unreviewable"). In *Alphonse v. Moniz*, the district court held that the jurisdiction-stripping statute, 8 U.S.C. § 1252(b)(9), precluded a habeas court from deciding whether a detainee was properly detained without a bond hearing pursuant to 8 U.S.C. § 1226(c) because the same question would be answered in his removal case. No. CV 21-11844-FDS, 2022 WL 279638, at *3–6 (D. Mass. Jan. 31, 2022). The court held that the petition for review of this question in the removal proceedings was an adequate

The Supreme Court has opined on 8 U.S.C. § 1226(e) multiple times since its passage, although in no case did the Court interpret it to preclude jurisdiction.[490] Thus, the Court has not had occasion to reach a key Suspension Clause issue, which is whether the writ historically applied to challenges such as those presented by the immigration detainee.[491] Professor Gerald L. Neuman has published a detailed account of the types of questions brought by noncitizens that courts have historically considered in habeas corpus.[492] The only questions that habeas courts did not historically review were questions of fact (except to the extent that the petitioner raised the due process claim that the factual findings were unsupported by any evidence).[493] The Supreme Court relied on Neuman's historical findings in *St. Cyr* and concluded that only factual determinations were outside of the scope of habeas review.[494] Also relying on Neuman's work, the Court reasoned that "traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other."[495] This reasoning certainly suggests that discretionary decisions have historically been outside of

substitute for habeas. *Id.* at *7. On appeal to the First Circuit, petitioner argued that such petition for review of the removal order comes too late, because such relief would only be determined once the petitioner suffered all of the detention. Opening Brief for Petitioner-Appellant, at 30, Alphonse v. Moniz, Case No. 22-1151 (June 27, 2022). The case was remanded back to the district court without any resolution of this Suspension Clause issue, and the district court granted him a bond hearing because his detention under 8 U.S.C. § 1226(c) had become unreasonably prolonged. *See* Alphonse v. Moniz, 635 F. Supp. 3d 28, 34, 35–39 (D. Mass. 2022).

490. *See supra* Part II.C.

491. *See* INS v. St. Cyr, 533 U.S. 289, 301–08 (2001) (deciding that none of the 1996 immigration jurisdiction-stripping statutes expressed a clear congressional intent to repeal habeas jurisdiction), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302. Neuman, acknowledging that "a strict originalist might be attracted to an interpretation of the Suspension Clause that uses practice in 1787 as the definition of the constitutional minimum," would not limit the Suspension Clause inquiry by reconstructing habeas corpus law at that particular moment. Neuman, *Executive Detention and the Removal of Aliens*, *supra* note 271, at 980. He writes that such a task is too difficult, "given fragmentary documentation, state-by-state disuniformity, and uncertainty about how state practices should be transferred to new national institutions." *Id.* He also does not advocate for reference to English practices, given the difficulty of translating "doctrines employed in a unitary system founded on parliamentary supremacy" into the U.S. federal system, which is founded on a written constitution. *Id.*

492. *See* Neuman, *Executive Detention and the Removal of Aliens*, *supra* note 271, at 1004–20 (analyzing habeas corpus inquiries throughout three distinct time periods in history).

493. *Id.* at 986.

494. *See St. Cyr*, 533 U.S. at 306–07.

495. *St. Cyr*, 533 U.S. at 307; Neuman, *Jurisdiction and the Rule of Law*, *supra* note 127, at 1991 (discussing the "strong tradition in habeas corpus law . . . that subjects the legally erroneous failure to exercise discretion, unlike a substantively unwise exercise of discretion, to inquiry on the writ").

the scope of habeas corpus review,[496] and thus 8 U.S.C. § 1226(e) would present no Suspension Clause violation. Yet Justice Breyer, in his concurring opinion in *Thuraissigiam*, opined that the only decisions that were historically unreviewable in habeas review were factual questions.[497] In addition, given that Neuman does not advocate that the historical record be confined to habeas practices in existence in 1789,[498] his work supports an argument that courts did in fact review exercises of discretion in habeas.[499]

Justice Sandra Day O'Connor, joined by Justices Scalia and Thomas, opined in her 2003 *Demore* concurrence on whether 8 U.S.C. § 1226(e) violates the Suspension Clause. She concluded that

---

496. *See* Kanstroom, St. Cyr *or Insincere*, *supra* note 23, at 425–26.

497. Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 152–55 (2020) (Breyer, J., concurring) (discussing the historical record, which made factual questions unreviewable on habeas, and reasoning that the respondent's "quarrel, at bottom, is not with whether settled historical facts satisfy a legal standard, . . . but with what the historical facts are," so it is unreviewable in a habeas corpus petition (emphasis omitted) (citing Guerrero-Lasprilla v. Barr, 589 U.S. 221, 226–28 (2020)); Daniel Kanstroom, *Deportation in the Shadows of Due Process: The Dangerous Implications of* DHS v. Thuraissigiam, 50 SW. L. REV. 342, 357 (2021) ("Breyer's model raises the question of who determines whether a claim is one of fact or law and at what stage in proceedings does that take place?" (emphasis omitted)).

498. Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in* DHS v. Thuraissigiam, JUST SEC. (Aug. 25, 2020), https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam [https://perma.cc/4GVM-2224] [hereinafter Neuman, *The Supreme Court's Attack*] (arguing that courts' Suspension Clause analysis must incorporate post-1789 developments because "[n]either immigration law in the modern sense nor refugee law in the post-War sense existed in England or the United States before 1789," and "[i]f we must look for precedents on all fours, then we will not find them – neither precedents saying that habeas corpus applies in immigration law nor that it does not"); Cole, *Jurisdiction and Liberty*, *supra* note 124, at 2500. Tyler has noted that although the *Thuraissigiam* Court rendered post-1789 irrelevant to the habeas analysis in the case, his lawyer's concession on this point means that the case has no precedential value when petitioners make Suspension Clause arguments based on post-1789 developments in habeas law. *See* Tyler, Thuraissigiam *and the Future of the Suspension Clause*, *supra* note 485. She cites the majority opinion in *Boumediene*, which states that "[t]he Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments." *Id.* (quoting Boumediene v. Bush, 553 U.S. 723, 746 (2008)); Jonathan Hafetz, *The Suspension Clause After* Department of Homeland Security v. Thuraissigiam, 95 ST. JOHN'S L. REV. 379, 385 (2021) (arguing for a more flexible approach to the Suspension Clause, which evolves over time and does not limit itself to case law available at the country's founding).

499. *See* Neuman, *Executive Detention and the Removal of Aliens*, *supra* note 271, at 1004–20 (citing Carlson v. Landon, 342 U.S. 524, 540 (1952)) (describing various questions that courts consider in habeas jurisdiction, which include review of the exercise of discretion for abuse). Professor Jonathan Hafetz, examining the common law, describes that "the concept of 'discretion' was not well developed at common law," but he analogizes modern-day abuse of discretion review to common law review of whether an agency or individual acted within its delegated authority. Jonathan Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2534–35 (1998).

"historical evidence suggests that respondent would not have been permitted to challenge his temporary detention pending removal until very recently."[500] She discussed that the lack of any provision in federal immigration law for judicial review left habeas review as the sole mechanism whereby noncitizens could challenge exclusion or deportation decisions.[501] She wrote, "[I]n no case did the Court question the right of immigration officials to temporarily detain aliens while exclusion or deportation proceedings were ongoing."[502] The Justices recognized, however, that "discerning the relevant habeas corpus law for purposes of Suspension Clause analysis is a complex task"[503] and that they would "not conclusively decide the thorny question whether 8 U.S.C. § 1226(e) violates the Suspension Clause," because the majority of the Court determined that the statute did not preclude jurisdiction.[504] The full historical briefing necessary to ascertain this question was not before the Supreme Court in *Demore*, as the government did not argue that 8 U.S.C. § 1226(e) presented a jurisdictional bar.[505]

A closer look at the historical record, however, indicates bail pending removal was a regular part of the process. In his dissenting opinion in *Jennings v. Rodriguez*, Justice Breyer cited some cases in which federal courts took it upon themselves to decide whether to release a noncitizen on bail pending review of the agency's deportation

---

500. Demore v. Kim, 538 U.S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in the judgment). It is important to note that in the cases of *Jennings v. Rodriguez*, 583 U.S. 281 (2018), and *Nielsen v. Preap*, 586 U.S. 392 (2019), Justices Thomas and Neil M. Gorsuch, concurring in both cases, would have found that there was no jurisdiction to review the issue of the applicability of the mandatory detention statutes because of the jurisdiction-stripping statute in 8 U.S.C. § 1226(e). *Nielsen*, 586 U.S. at 423–27 (Thomas, J., concurring in part); *Jennings*, 583 U.S. at 314–26 (Thomas, J., concurring in part). In both cases, Justice Thomas cited back to the concurring opinion of O'Connor, Scalia, and Thomas in *Demore v. Kim*. *Nielsen*, 586 U.S. at 424 (Thomas, J., concurring in part); *Jennings*, 583 U.S. at 323 n.6 (Thomas, J., concurring in part).

501. *Demore*, 538 U.S. at 538–39.

502. *Id.* at 539.

503. *Id.* at 538.

504. *Id.* at 540.

505. The Washington Legal Foundation and other amici argued that notwithstanding the government's decision not to raise the jurisdictional bar under 8 U.S.C. § 1226(e), the Court should address the issue and argued that § 1226(e) precluded jurisdiction and that such preclusion did not violate the Suspension Clause. Brief of Washington Legal Foundation et al. as Amici Curiae in Support of Petitioners, *Demore*, 538 U.S. 510 (No. 01-1491), 2002 WL 2008201, at *6, *14–22. Amici looked only at the historical record in existence in 1789, stated that there "is little early case law regarding the availability of habeas corpus review as a means of challenging detention pending deportation," and looked to English law to suggest that habeas review was unavailable in this context. *Id.* at *15–18.

or exclusion decision, in order to support his assertion that a right to bail always existed.[506] He discussed the *In re Ah Moy*[507] decision, in which the circuit court judges considered whether to release a Chinese national on bail pending a determination of whether to allow her to enter the United States, but the bail issue was left unresolved by her physical departure on a ship bound for China.[508] He also cited to the 1924 case of *Tod v. Waldman*,[509] in which the Court reversed the Second Circuit's decision to free a woman and her three children after a finding that the Department of Labor had unfairly denied her the right to administrative appeal.[510] Yet on a motion to reconsider, the *Waldman* Court then held that "[n]othing in the order of this Court shall prejudice an application for release on bail of the respondents pending compliance with the mandate of this Court."[511] Justice Breyer cited this 1925 passage from the modified *Waldman* opinion to support his argument that a right to bail always existed, and in so doing, also cited to the *In re Ah Moy* decision, in which Justice Stephen Johnson Field wrote that the court lacked the authority to order bail because doing so would allow Ah Moy to enter the United States—just what the statute forbade.[512]

Additionally, there is a little-known doctrine, made more visible during the COVID-19 pandemic, by which Article III courts can release a detainee on bail if there are extraordinary circumstances that make the grant of bail necessary to make habeas relief effective.[513] In

506. *See* Jennings v. Rodriguez, 583 U.S. 281, 337–44 (2018) (Breyer, J., dissenting).

507. *In re* Ah Moy, 21 F. 808 (C.C.D. Cal. 1884).

508. *Jennings*, 583 U.S. at 338 (Breyer, J., dissenting).

509. Tod v. Waldman, 266 U.S. 113 (1924), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

510. *Jennings*, 583 U.S. at 339–40 (first citing *Waldman*, 266 U.S. at 120; and then citing *Waldman*, 266 U.S. at 548, *modifying Waldman*, 266 U.S. 113); *see also Waldman*, 266 U.S. at 118 ("This denial of [fair] appeal [to the Secretary of Labor] did not give to them a right to admission to the country . . . . To discharge them was to take them out of the proper custody of the government authorities pending their admission or exclusion . . . .").

511. *Waldman*, 266 U.S. at 548.

512. *Jennings*, 583 U.S. at 339–40 (Breyer, J., dissenting) (quoting *Waldman*, 266 U.S. at 548) ("This statement [from the Court in *Waldman*] is inconsistent with the earlier opinion of Justice Field, sitting as Circuit Judge, because it shows that even an alien challenging her exclusion could be released on bail." (citing *In re* Ah Moy, 21 F. 808 (C.C.D. Cal. 1884))). The *Jennings* majority, however, reasoned that Justice Breyer's dissent "reads far too much into *Waldman*." 583 U.S. at 310.

513. *See* Mapp v. Reno, 241 F.3d 221, 226 (2d Cir. 2001); *see also* Holper, *Taking Liberty Decisions Away*, *supra* note 83, at 1111–12 (describing the use of this doctrine during the COVID-19 pandemic).

*Mapp v. Reno*,[514] the Second Circuit considered cases both for and against the contention that the power to admit bail is incident to the power to hear and determine the case.[515] The court cited cases where federal courts granted bail that dated back to 1880, thus demonstrating a historical practice of bail in removal proceedings—further historical proof that bail existed for noncitizens whom the government was seeking to remove.[516]

To resolve the Suspension Clause question, therefore, courts will have to face open questions. A question posed by scholars such as Neuman following the Court's 2020 *Thuraissigiam* opinion is how historical precedent impacts the analysis of the writ's availability.[517] Assuming the continued relevance of historical analysis, the next question is if exercises of discretion are really "mixed questions of law and fact," then they are legal questions, and cutting off judicial review of these questions violates the Suspension Clause.[518] If exercises of discretion are something else—neither law nor fact—then courts may have to parse the historical record to see whether these questions were traditionally answered in habeas. This task will prove difficult; scholars have noted that federal deportation law did not exist in 1789, so courts

514. Mapp v. Reno, 241 F.3d 221 (2d Cir. 2001).

515. *See id.* at 225 (citing Principe v. Ault, 62 F. Supp. 279, 281 (D. Ohio 1945)).

516. *Id.*

517. Neuman writes that Justice Samuel A. Alito's opinion in *Thuraissigiam*:

> pursues a manipulative version of originalism that eviscerates the Suspension Clause by ignoring the *meaning* of the writ of habeas corpus, and by treating the relatively few early examples of published habeas corpus decisions as isolated data that he can distinguish, rather than as sources of the underlying principles, which *Boumediene* had already stated.

*See* Neuman, *The Supreme Court's Attack*, *supra* note 498. He worries, alongside Justice Sonia Sotomayor, that the majority opinion's refusal to say what the Suspension Clause *does* require with regard to immigration detention means that the constitution may guarantee no content to the writ for future immigration detainees. *Id.*; Tyler, Thuraissigiam *and the Future of the Suspension Clause*, *supra* note 485 ("That the *Thuraissigiam* majority apparently reopens this issue [of whether the Suspension Clause creates an affirmative right to review] begs the question of just what, if any, of the *Boumediene* majority opinion remains good law."); *see also* Lee Kovarsky, *Habeas Privilege Origination and* DHS v. Thuraissigiam, 121 COLUM. L. REV. F. 23, 24–25 (2021) ("The Court held that the Constitution does not require an Article III forum to test the detention at issue and, in the process, returned the existential question to a state of doctrinal uncertainty."); *The Supreme Court, 2019 Term—Leading Cases: Article I—Suspension Clause—Expedited Removal Challenges*—Department of Homeland Security v. Thuraissigiam, 134 HARV. L. REV. 410, 415 (2020) ("*Thuraissigiam* surfaces lingering confusion around the proper role and understanding of historical precedent in applying the Suspension Clause.").

518. *See supra* Part II.B.; *see also* Brief of Legal Historians as Amici Curiae in Support of Respondent at 19, Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020) (No. 19-161), 2020 WL 416674 (describing courts' habeas review of the application of law to facts).

must glean meaning from analogous circumstances.[519] It will be difficult to find a Founding–era analogous circumstance to an "exercise of discretion," because there is no one definition of discretion.[520]

It is unlikely that courts will need to go that far into the historical record. As discussed, immigration judges should not, in their bond hearings, do a residual analysis—judges should not engage in value judgments after taking proffers and filtering those through applicable Board precedent.[521] Nor is this what occurs in the typical bond hearing.[522] Courts should be careful to review what the agency actually did, not what the agency could have done.[523] When agencies apply law to settled fact, which is what happens in most bond hearings, they do not engage in a residual exercise of discretion.[524] Thus, the elusive question of an *actual* discretionary decision—what happens *after* the judge applies law to fact[525]—can simply remain elusive.

It is fitting that this Article concludes by bringing the query back to where the Article started: What *is* a question of discretion?[526] Is it just a dustbin of questions that courts would rather avoid?[527] Or, will courts simply refuse to label much of what happens in an immigration

519. *See, e.g.*, Hafetz, *supra* note 498, at 428; Neuman, *The Supreme Court's Attack*, *supra* note 498; Neuman, *Executive Detention and the Removal of Aliens*, *supra* note 271, at 981–82.

520. *See, e.g.*, Kanstroom, *The Better Part of Valor*, *supra* note 23, at 163; s*ee also* Neuman, *The Habeas Corpus Suspension Clause*, *supra* note 150, at 593 ("[T]he pre-constitutional record sheds too little light to illuminate the constitutional analysis of illegal detention in the context of discretionary power in the modern administrative state.").

521. *See supra* Part IV.A.

522. *Id.*

523. *See* SEC v. Chenery Corp., 332 U.S. 194, 207–09 (1947) (holding that an appellate court should not substitute its judgment for that of the agency, and should only judge an agency's decision based on the reasons invoked by the agency); Williams v. Garland, 59 F.4th 620, 634 (2022) (reasoning that "abuse of discretion" review is only appropriate where the Board "'leap[s] over' substantive and procedural questions 'and simply determine[s]' it will deny relief as a matter of 'discretion' even if a noncitizen proves his legal claim," but that is not what the Board did in the underlying case (quoting INS v. Abudu, 485 U.S. 94, 105 (1988))).

524. *See supra* Part IV.A.

525. *See* Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 725–26; DAVIS, *supra* note 204, at 4.

526. *See, e.g.*, Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 23, at 724–25.

527. *See* KANSTROOM, DEPORTATION NATION, *supra* note 3, at 240 (describing the congressional delegation of discretionary authority in deportation law as "exceedingly broad, and . . . standardless," but that the judiciary should not "cede the field completely to administrative actors" or else "[d]iscretion will be a dustbin of a jurisprudential category: the place where . . . complicated legal questions go to die").

judge's bond decision as "discretionary" in order to find jurisdiction?[528] One can hope that judges will not sidestep deciding the important question of immigration detainees' liberty by reading 8 U.S.C. § 1226(e) broadly.

## CONCLUSION

Seventy years ago, Justice Hugo L. Black wrote, "No society is free where government makes one person's liberty depend upon the arbitrary will of another."[529] This is the risk with 8 U.S.C. § 1226(e)—one immigration judge's decision, which happens in a nondeliberative setting with a quick and informal hearing, determines the liberty of a noncitizen for the duration of removal proceedings. A bond denial in this context can cause immigration detainees to give up meritorious relief from removal or fail to get counsel in order to adequately present their relief from removal, both of which lead to unnecessary deportations. Detainees and their communities suffer, society suffers, and the government unnecessarily detains human beings at a significant cost. For these reasons, this Article has argued that 8 U.S.C. § 1226(e)'s unreviewable discretion to detain has no place in detention decisions. The common justifications for unreviewable discretion by an agency are simply inapplicable—immigration judges do not exercise "prosecutorial discretion," there is law to apply, their bond determinations cannot be described as a "matter of grace," and detainees are not unjustly enriched with extra time in the United States while they fight a detention challenge. Thus, federal judges should take liberty decisions seriously and find every way to interpret 8 U.S.C. § 1226(e) to ensure that immigration detainees challenging their bond denials do not face an insurmountable jurisdictional wall.

528. *See* Shapiro, *Administrative Discretion*, *supra* note 226, at 1490 (describing courts' treatment of administrative discretion as "a cowboy's attempt to cut as many as possible out of the unmarked herd and brand them as non-discretionary").

529. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 217 (1953) (Black, J., dissenting), *superseded by statute*, Real ID Act of 2005.