

# Protecting Immigrants from Prolonged Pre-Removal Detention: When “It Depends” is No Longer Reasonable

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## Introduction

Alejandro Rodriguez came to the United States from Mexico in September 1979 when he was one year old.<sup>1</sup> Having been in the country his entire life, Mr. Rodriguez has since acquired lawful permanent resident status, demonstrated extensive family ties with United States citizen relatives, and documented work as a dental assistant.<sup>2</sup>

*Detention Day 1:* On April 15, 2004, after having completed sentences for a theft and drug offense, Mr. Rodriguez was arrested by the Department of Homeland Security (“DHS”) and charged with deportability.<sup>3</sup>

*Detention Day 98:* On July 21, 2004, an immigration judge ordered him removed to Mexico.<sup>4</sup> Mr. Rodriguez appealed to the Board of Immigration Appeals (“BIA”).<sup>5</sup>

*Detention Day 251:* The BIA affirmed Mr. Rodriguez’s removal order.<sup>6</sup> As a last resort, Mr. Rodriguez filed a petition for review

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1. Petition for Writ of Habeas Corpus at 7, Garcia v. Hayes, No. CV07-3239-VAD (C.D. Cal. May 16, 2007), available at [http://www.aclu.org/files/pdfs/immigrants/garciavhayes\\_habeaspetition.pdf](http://www.aclu.org/files/pdfs/immigrants/garciavhayes_habeaspetition.pdf).

2. *Id.*

3. *Id.*

4. *Id.* at 8.

5. *Id.*

6. *Id.*

before the United States Court of Appeals for the Ninth Circuit and requested a stay of removal.<sup>7</sup> That request was granted.<sup>8</sup> Despite the government's opposition, the Ninth Circuit found that Mr. Rodriguez presented substantial legal claims.<sup>9</sup>

*Detention Day 456:* The Ninth Circuit granted the government's motion to stay the case.<sup>10</sup> In 2005, while Mr. Rodriguez's case was pending, the Ninth Circuit decided *Penuliar v. Ashcroft*.<sup>11</sup> The Ninth Circuit's decision in *Penuliar* was favorable to Mr. Rodriguez's case because it meant that his conviction was not a deportable offense.<sup>12</sup> His removal proceedings probably should have ended at this time. However, the government again moved to stay Mr. Rodriguez's case pending potential rehearing proceedings in *Penuliar*.<sup>13</sup>

*Detention Day 850:* The Ninth Circuit granted another motion to stay the case pending the government's petition for certiorari in *Penuliar*.<sup>14</sup>

*Detention Day 1070:* In March 2007, the Supreme Court decided *Gonzales v. Duenas-Alvarez*.<sup>15</sup> While that decision essentially reversed *Penuliar*, the Supreme Court explicitly left open some theories under which Mr. Rodriguez could continue to defend his case.<sup>16</sup> Thus, when the government moved to dismiss his petition for review, Mr. Rodriguez pursued his appeal under the theories left open in *Gonzales*.<sup>17</sup>

*Detention Day 1166:* In June 2007, shortly after Mr. Rodriguez moved for class certification, the government released Mr. Rodriguez and placed him under house arrest.<sup>18</sup>

As the above chronology shows, Mr. Rodriguez was incarcerated for a total of three years and two months while his removal proceedings pended. Mr. Rodriguez was not a dangerous criminal. His criminal history consists of a 1998 conviction for Unlawful

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7. *Id.* at 8–9.

8. *Id.* at 9.

9. *Id.*

10. *Id.*

11. *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005).

12. Petition for Writ of Habeas Corpus, *supra* note 1, at 9.

13. *Id.*

14. *Id.*

15. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).

16. Petition for Writ of Habeas Corpus, *supra* note 1, at 10.

17. *Id.*

18. Appellant's Opening Brief at 5, Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010) (No. 08-56156).

Driving or Taking of a Vehicle, for which he was sentenced to two years, and a 2003 conviction for Possession of a Controlled Substance for which he only received probation.<sup>19</sup> Nevertheless, Mr. Rodriguez was detained for a long period of time because the law concerning his case was unsettled. The government was relentless in trying to deport him all the while keeping him incarcerated. At no point during this entire time was Mr. Rodriguez given a bond hearing to determine the need for his prolonged detention.<sup>20</sup>

Mr. Rodriguez's story is not much different from thousands of other detainees. A 2009 report by the American Civil Liberties Union stated that Immigration and Customs Enforcement ("ICE") detained at least 4,170 individuals for 180 days or longer, with 1,334 individuals detained for over a year.<sup>21</sup> In fact, a number of these aliens were detained for more than five years.<sup>22</sup>

"The government's policy of prolonged mandatory detention imposes enormous costs on detainees, their families, and the general public."<sup>23</sup> Many aliens are unnecessarily detained even if they pose no danger or flight risk.<sup>24</sup> They can also remain detained even if they have valid grounds to challenge their removal.<sup>25</sup> The families of detainees suffer both financially and emotionally, and most are forced to seek public assistance.<sup>26</sup> Other adverse effects of the policy are the high government costs associated with detaining hundreds or thousands of aliens, and the increasing number of habeas petitions filed in district courts.<sup>27</sup>

This is not to say that the government provides no relief from prolonged detention. Relief from prolonged immigration detention is obtained through the filing of habeas petitions.<sup>28</sup> Through this framework, courts have granted immediate release, or in the alternative, bond hearings, to aliens whose detentions have become

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19. Petition for Writ of Habeas Corpus, *supra* note 1, at 7.

20. Appellant's Opening Brief, *supra* note 18, at 4.

21. *Issue Brief: Prolonged Immigration Detention of Individuals Who Are Challenging Removal*, AMERICAN CIVIL LIBERTIES UNION at 4 (July 2009), available at <https://www.aclu.org/immigrants-rights/issue-brief-prolonged-immigration-detention-individuals-who-are-challenging-removal>.

22. *Id.*

23. Brief for Amici Curiae American Civil Liberties Union Foundation at 5, Diop v. ICE, 656 F.3d 221 (3d Cir. 2011) (No. 10-1113).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. See generally *In re Indefinite Det.* Cases, 82 F. Supp. 2d 1098 (C.D. Cal. 2000).

unreasonable.<sup>29</sup> However, some courts have declined to extend such relief notwithstanding years of detention.<sup>30</sup>

The Ninth Circuit recently imposed a bright-line rule in *Rodriguez v. Robbins*<sup>31</sup> that triggers the requirement for bond hearings when detention has exceeded six months.<sup>32</sup> The *Rodriguez* decision marks a bold step by the Ninth Circuit—one that other circuits and the United States Supreme Court might have to ultimately accept or reject.

This Note seeks to analyze whether the rule established in *Rodriguez*—that aliens who have been detained for more than six months automatically receive a bond hearing—is necessary to safeguard the due process rights of detained non-citizens, and whether such rule is practicable in light of other considerations. Part I provides a historical background on the laws surrounding immigration detention. Part II examines the Ninth Circuit’s ruling in *Rodriguez*. Part III compares the two approaches that have emerged in defining the limits of “reasonable” detention—the Ninth Circuit’s six-month rule and the Third and Sixth Circuits’ case-by-case approach. Finally, Part IV suggests that a combination of the two approaches best balances the interests of both the government and the detainees in light of due process considerations and other factors.

## I. Historical Background on Immigration Detention

The Fifth Amendment of the United States Constitution declares that “no person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>33</sup> The protections and obligations secured by the Fifth Amendment have long been extended to aliens within the country’s borders.<sup>34</sup> As such, aliens are entitled to due

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29. See, e.g., *Ramirez v. Watkins* No. B:10-126, 2010 WL 6269226 (S.D. Tex. Nov. 3, 2010) (petitioner who had been detained for eighteen months was granted judicial review of his continued detention); *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2009) (petitioner who had been detained for nearly seven years was entitled to a bond hearing).

30. See e.g., *Andrade v. Gonzales*, 459 F.3d 538 (5th Cir. 2006) (alien’s three-year detention pending the outcome of his removal proceedings did not violate his due process rights); *Hussain v. Mukasey*, 510 F.3d 739 (7th Cir. 2007) (petitioner who had been detained for two years was not entitled to relief from detention pending judicial review of removal order).

31. *Rodriguez v. Robbins*, 715 F.3d 1127, 1132–33 (9th Cir. 2013).

32. *Id.* at 1132–33.

33. U.S. CONST. amend. V.

34. *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (“[I]t is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become

process rights in deportation proceedings.<sup>35</sup> This Note is concerned with a specific aspect of due process—the right to a bond hearing in immigration detention.

The United States Supreme Court has abolished civil commitment schemes that it deems to be in violation of the due process clause of the Constitution.<sup>36</sup> Emphasizing the importance of “strict procedural safeguards”<sup>37</sup> in prolonged civil detention, the Court has required individualized assessments and hearings before a judge to justify the continued detention of an individual.<sup>38</sup> As a form of civil detention, immigration detention requires the same procedural safeguards when detention is prolonged.<sup>39</sup>

Data suggests that aliens held in mandatory detention who contest their cases “commonly spend months, and sometimes over a year, in detention because of enormous immigration court backlogs.”<sup>40</sup> As stated earlier, ICE detains over a thousand aliens for one year or longer, and some aliens can remain detained for more than five years.<sup>41</sup> Further, most of these aliens are denied bond hearings where they can ask an immigration judge to determine whether their continued incarceration remains justified.<sup>42</sup>

There are several immigration statutes that govern the detention of aliens. In a series of decisions since 2001, the Supreme Court has

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subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.”); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (“all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.”).

35. See generally *United States v. Salerno*, 505 U.S. 317 (1987).

36. *Foucha v. Louisiana*, 504 U.S. 71 (1992) (finding that a Louisiana statute that allowed continued confinement of insanity acquittee even after the hospital recommended a conditional discharge, violated due process); see also *Addington v. Texas*, 441 U.S. 418 (1979).

37. *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997).

38. *Heller v. Doe*, 509 U.S. 312, 315–16 (1993).

39. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

40. Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 81 (2012).

41. *Issue Brief: Prolonged Immigration Detention of Individuals Who Are Challenging Removal*, AMERICAN CIVIL LIBERTIES UNION (July 2009), available at <https://www.aclu.org/immigrants-rights/issue-brief-prolonged-immigration-detention-individuals-who-are-challenging-removal>.

42. *Id.*

“grappled in piece-meal fashion” with interpreting these statutes in an effort to provide guidance to the lower courts.<sup>43</sup>

“The first broad category of detainable aliens includes those deemed inadmissible at arrival.”<sup>44</sup> 8 U.S.C. section 1225(b) subjects aliens seeking admission at the border to mandatory detention pending removal proceedings unless they are “clearly and beyond a doubt entitled to be admitted.”<sup>45</sup> While most aliens detained under section 1225(b) are asylum seekers and criminal aliens, this subclass also includes certain lawful permanent residents arriving at a United States border.<sup>46</sup>

“The second broad category involves aliens awaiting removal proceedings.”<sup>47</sup> Section 1226(a) generally authorizes the detention of an alien pending a decision on whether he is to be removed.<sup>48</sup> Detention under this statute is discretionary and aliens are entitled to bond hearings.<sup>49</sup> In contrast to section 1226(a), section 1226(c) authorizes mandatory pre-removal detention without bond of aliens convicted of certain crimes.<sup>50</sup>

“The third category involves noncitizens for whom a final removal (i.e., deportation) order has issued but who have not yet been deported.”<sup>51</sup> Section 1231(a)(1) authorizes mandatory detention during a ninety-day removal period.<sup>52</sup> Those noncitizens who are not removed within this timeframe must be released on supervision.<sup>53</sup> However, section 1231(a)(6) authorizes the government to continually detain beyond the ninety-day removal period certain

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43. Rodriguez v. Hayes, 591 F.3d 1105, 1114 (9th Cir. 2010).

44. Adam Klein & Benjamin Wites, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 141 (2011).

45. 8 U.S.C. § 1225(b) (2012) (“[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding.”).

46. See 8 U.S.C. § 1101(a)(13)(C) (2012).

47. Klein & Wites, *supra* note 44, at 142.

48. 8 U.S.C. § 1226(a) (2012) (“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States”). The Ninth Circuit added to the 1226(a) subclass those aliens who sought judicial review of their removal orders before the Court of Appeals and are awaiting final decisions. *Casas-Castrillon*, 535 F.3d at 942.

49. 8 U.S.C. § 1226(a)(1)–(2) (2012).

50. *Id.* § 1226(c).

51. Klein & Wites, *supra* note 44, at 144.

52. 8 U.S.C. § 1231(a)(1).

53. *Id.* at § 1231(a)(3).

aliens ordered deported (i.e., those who are inadmissible or deportable due to criminal activity).<sup>54</sup>

Two Supreme Court cases have addressed the second and third categories of detainable aliens. In *Zadvydas v. Davis*, the Court was asked to determine whether section 1231(a)(6) authorized indefinite mandatory detention of aliens with final removal orders.<sup>55</sup> Finding that indefinite detention raises serious constitutional concerns, the Court construed the statute to allow detention only for the limited period necessary to effectuate removal.<sup>56</sup> The Court held that detention becomes presumptively prolonged at six months.<sup>57</sup> To be clear, *Zadvydas* does not guarantee an alien's release after six months of detention under section 1231(a)(6). An alien will only be released if he can show there is "no significant likelihood of removal in the reasonably foreseeable future."<sup>58</sup> The Court's six-month rule indicates the point in time an alien becomes entitled to a bond hearing, where he can then demonstrate his eligibility for release.

In *Demore v. Kim*,<sup>59</sup> the Court was then asked to determine whether indefinite mandatory detention was authorized under the pre-removal statute.<sup>60</sup> The Court stated that mandatory detention under section 1226(c) serves the purpose of ensuring an alien's presence during his removal proceedings.<sup>61</sup> As such, the Court affirmed the government's authority to detain aliens without bond while their removal proceedings are pending.<sup>62</sup> Significantly, the *Demore* Court repeatedly emphasized its understanding that pre-removal detention was short and had a definite end point.<sup>63</sup> The Court stated, "the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal."<sup>64</sup> Justice Kennedy's concurring opinion in *Demore*—often cited in any discussion involving the reasonableness of immigration detention—advocates for conducting individualized

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54. *Id.* at § 1231(a)(6).

55. *Zadvydas*, 533 U.S. at 682.

56. *Id.*

57. *Id.* at 701.

58. *Id.*

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

60. *Id.* at 515–16.

61. *Id.* at 521.

62. *Id.* at 531.

63. *Id.* at 528–31.

64. *Id.* at 530.

custody determination hearings in certain circumstances. He notes particularly that:

Since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified . . . Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.<sup>65</sup>

In *Demore*, the Court denied Mr. Kim's request for a bond hearing, finding that his six-month conviction fell within "the brief period" for removal proceedings.<sup>66</sup>

Lower courts have struggled to reconcile *Zadvydas* and *Demore* in the context of pre-removal detention. While *Zadvydas* stated that post-removal detention becomes prolonged at the six-month mark,<sup>67</sup> *Demore* did not specify the exact point in time when an alien's pre-removal detention becomes prolonged. It stated that pre-removal detention lasts anywhere between a month and a half and five months, but upheld a six-month detention without bond.<sup>68</sup> In the absence of a bright-line rule, courts have had to engage in a case-by-case analysis to determine whether a particular alien's pre-removal detention (under section 1225 or section 1226) has become prolonged. Under this approach, courts consider factors such as length of detention, estimated length of future proceedings, likelihood of removability, and conduct of both parties.<sup>69</sup> Not surprisingly, then, this approach has yielded varying results.<sup>70</sup> The "constitutional grey

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65. *Id.* at 532–33 (Kennedy, J., concurring).

66. *Id.* at 530.

67. *Zadvydas*, 533 U.S. at 701.

68. *Demore*, 538 U.S. at 530.

69. Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003); see also Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005); Leslie v. Attorney Gen. of U.S., 678 F.3d 265 (3d Cir. 2012).

70. See, e.g., *Casas-Castrillon*, 535 F.3d at 942 (bond hearing required after seven-year detention); *Andrade*, 459 F.3d at 538 (petition denied despite three-year detention); Tijani, 430 F.3d at 1241 (alien entitled to release on bail following two years and eight months of detention); *Del Toro-Chacon v. Chertoff*, No. C051861RSL, 2008 WL 687445

area”<sup>71</sup> left by *Demore* has clearly resulted in the detention of aliens for years during the pendency of their removal proceedings. Part II of this Note discusses a Ninth Circuit case aimed at remedying this problem.

## **II. *Rodriguez v. Robbins*: The Ninth Circuit Declares an Automatic Right to a Bond Hearing After Six Months of Pre-Removal Mandatory Detention**

*Rodriguez v. Robbins* concerned a class of non-citizens in southern California who have been detained for six months or longer under two immigration statutes, sections 1226(c) and 1225(b) of Title 8 of the United States Code.<sup>72</sup> As discussed in Part I, aliens detained under section 1226(c) are not entitled to release on bond, although they can request a *Joseph* hearing to challenge the applicability of section 1226(c) to their case.<sup>73</sup> In contrast to those detained under section 1226(c), aliens detained under 1225(b), such as asylum seekers, may be released on parole subject to the discretion of ICE officers.<sup>74</sup> The *Rodriguez* detainees argued that subjecting them to prolonged mandatory detention under either of these statutes without affording them bond hearings conducted by a neutral arbiter was constitutionally infirm.<sup>75</sup> The United States District Court for the Central District of California entered a preliminary injunction ordering ICE to grant each detainee an individualized bond hearing before an immigration judge.<sup>76</sup> At a bond hearing, an immigration judge shall grant release on reasonable conditions of supervision unless the government satisfies its burden of showing that the alien’s continued detention is justified based on his danger to society or

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(W.D. Wash. Mar. 10, 2008) (alien not entitled to bond hearing despite two years and five months of detention); Middleton v. Clark, No. C061324RSM, 2007 WL 1031725 (W.D. Wash. Apr. 2, 2007) (two-year detention was not unreasonable).

71. Kimere Jane Kimball, Note, *A Right to be Heard: Non-Citizens’ Due Process Right to In-Person Hearings to Justify Their Detentions Pursuant to Removal*, 5 STAN. J. C.R. & C.L. 159, 162 (2009).

72. *Rodriguez*, 715 F.3d at 1131. The class of petitioners is represented by the ACLU.

73. 8 U.S.C. § 1226(c)(2) provides that an alien detained under this statute may only be released if necessary to protect a third-party. A *Joseph* hearing provides an alien the opportunity to challenge the applicability of section 1226(c) to his case. *In re Joseph*, 22 I & N Dec. 799 (BIA 1999).

74. 8 U.S.C. § 1225(b) (2012); 8 U.S.C. § 1182(d)(5)(A).

75. *Rodriguez*, 715 F.3d at 1130.

76. *Id.* at 1130–31.

flight risk.<sup>77</sup> Upon appeal by the government, the Ninth Circuit affirmed the lower court's ruling.<sup>78</sup> The government did not petition for review before the United States Supreme Court.

The Ninth Circuit's opinion begins with an analysis of the section 1226(c) subclass and its likelihood of prevailing on the merits.<sup>79</sup> After referencing numerous precedents, including *Zadvydas* and *Demore*, the court concluded that mandatory detention under section 1226(c) is necessarily limited in duration.<sup>80</sup> A long line of cases evidences the fact that the Ninth Circuit, as well as other jurisdictions, have broadly interpreted *Demore* to require a time limit to mandatory detention notwithstanding its holding that aliens detained under section 1226(c) are not entitled to bond hearings.<sup>81</sup>

The government insisted that aliens detained under section 1226(c) are not entitled to individualized hearings to determine whether their continued detention remains justified.<sup>82</sup> In support of their argument, the government maintained it was the country's immigration policy to detain aliens pending their removal proceedings to prevent flight and danger to society, and that the term "shall" in the statute is to be construed as permitting mandatory detention without bond hearings.<sup>83</sup> Unconvinced by the government's

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77. The injunction also required the government to identify all class members detained under each of the two statutes. *Rodriguez*, 715 F.3d at 1130–31.

78. *Id.*

79. *Id.* at 1136–39.

80. *Rodriguez*, 715 F.3d at 1138 ("[W]e conclude that, to avoid constitutional concerns, § 1226(c)'s mandatory language must be construed 'to contain an implicit "reasonable time" limitation, the application of which is subject to federal-court review.'") (citing *Zadvydas*, 533 U.S. at 682).

81. See, e.g., *Casas-Castrillon*, 535 F.3d at 950 ("References to the brevity of mandatory detention under § 1226(c) run throughout *Demore*."); *Tijani*, 430 F.3d at 1242 (similar); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1081 (9th Cir. 2006) ("In *Demore*, the Court grounded its holding by referencing a 'brief period' . . . of 'temporary confinement' . . . There is no indication anywhere in *Demore* that the Court would countenance an indefinite detention.") (citations omitted); *Diop*, 656 F.3d at 221 ("At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community."); *Ly*, 351 F.3d at 271 ("[T]he Court's discussion in *Kim* is undergirded by reasoning relying on the fact that *Kim*, and persons like him, will normally have their proceedings completed within . . . a short period of time and will actually be deported, or will be released. That is not the case here.").

82. *Rodriguez*, 715 F.3d at 1138.

83. *Id.*

efforts to turn the tide, the *Rodriguez* court simply stated that such a reading of *Demore* is at odds with its post-*Demore* cases.<sup>84</sup>

The government also attempted to distinguish cases that involved post-removal detention from the pre-removal detention.<sup>85</sup> For instance, the ruling in *Casas-Castrillon v. Department of Homeland Security* required the government to give individualized bond hearings to detained aliens seeking judicial review of their removal orders (detention pursuant to section 1226(a)).<sup>86</sup> *Diouf v. Napolitano* (*Diouf II*)<sup>87</sup> extended the requirement for bond hearings to detainees with administrative final removal orders but who have not been removed within the ninety-day removal period (detention pursuant to section 1231(a)(6)).<sup>88</sup> The *Rodriguez* court stated, “this seems to us a distinction without a difference . . . Indeed, if anything, because LPRs [lawful permanent residents] detained prior to the entry of an administratively final removal order have not been adjudicated removable, they would seem to have a greater liberty interest than individuals detained pending judicial review . . . and thus a greater entitlement to a bond hearing.”<sup>89</sup> The *Rodriguez* court’s refusal to distinguish pre-removal detention from post-removal detention is perhaps the most vital aspect of the court’s entire decision because it allowed it to adopt the rationale from prior cases regarding the issue of when detention becomes “prolonged.”

*Zadvydas* holds that six months is the presumptively reasonable limit to post-removal-period detention under section 1231(a)(6).<sup>90</sup> In *Demore*, the Supreme Court had the specific understanding that section 1226(a) authorized mandatory detention only for the limited period of the alien’s removal proceedings, which the Court estimated “lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal.”<sup>91</sup> In *Diouf II*, the Ninth Circuit suggested that detention under section 1226(a) becomes prolonged at the 180-day mark, after which time an alien must be given a bond

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84. *Id.* (“We are not convinced by the government’s reasoning, which relies on a broad reading of *Demore* foreclosed by our post-*Demore* cases.”).

85. *Id.* at 1139.

86. *Casas-Castrillon*, 535 F.3d at 943; *see also* 8 U.S.C. § 1226(a) (2012).

87. *Diouf v. Napolitano*, 634 F.3d 1081, 1084 (9th Cir. 2011).

88. *Id.* at 1084; *see also* 8 U.S.C. § 1231(a)(6).

89. *Rodriguez*, 715 F.3d at 1139.

90. *Zadvydas*, 533 U.S. at 680 (“It is unlikely that Congress believed that all reasonably foreseeable removals could be accomplished in 90 days, but there is reason to believe that it doubted the constitutionality of more than six months’ detention.”).

91. *Demore*, 538 U.S. at 530.

hearing unless removal is imminent.<sup>92</sup> Consistent with the reasoning of these cases, the Ninth Circuit in *Rodriguez* arrived at the conclusion that aliens detained under sections 1226(c) and 1225(b) are entitled to bond hearings when their detention becomes prolonged at six months.<sup>93</sup>

The government presented two arguments against a six-month rule.<sup>94</sup> First, the government urged that a categorical time limit is contrary to the decisions of other circuits, particularly the Sixth and Third Circuits.<sup>95</sup> In *Ly v. Hansen* and *Diop v. ICE*, the Sixth and Third Circuits rejected a bright-line time limit on pre-removal detention without a bond hearing.<sup>96</sup> The *Rodriguez* court, however, explained why the reasoning in *Ly* and *Diop* could not apply to *Rodriguez*.<sup>97</sup> The Ninth Circuit noted that *Rodriguez* was a class action suit, and therefore relief would have had to apply to all aliens detained under sections 1226(c) and 1225(b) in the district.<sup>98</sup> Also, the court of appeals indicated there was no reason to depart from the holding in *Diouf II* that continued detention is presumed prolonged when it exceeds six months.<sup>99</sup>

The government's second argument against what it termed a "six-month blanket rule" was that such a rule "embrace[s] an inflexible blanket approach to due process analysis."<sup>100</sup> The Court stated that this was not the case because the six-month rule merely identified the point in time during an alien's detention that he becomes entitled to a bond hearing.<sup>101</sup> It is during these bond hearings that individualized determinations will be made as to whether a particular alien's continued detention is justified.<sup>102</sup>

The opinion then proceeded with its analysis of the section 1225(b) subclass.<sup>103</sup> The government asserted that the "entry fiction"

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92. *Diouf II*, 634 F.3d at 1091–92.

93. *Rodriguez*, 715 F.3d at 1139 ("Even if *Diouf II* does not squarely hold that detention always becomes prolonged at six months, that conclusion is consistent with the reasoning of *Zadvydas, Demore, Casas*[-Castrillon] and *Diouf II*, and we so hold.").

94. *Id.*

95. *Id.*

96. *Ly*, 351 F.3d at 271; *Diop*, 656 F.3d at 234.

97. *Rodriguez*, 715 F.3d at 1139.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1139–44.

doctrine<sup>104</sup> precluded the court of appeals from granting the same due process rights to the section 1225(b) subclass as would apply to section 1226(c) detainees.<sup>105</sup> The court of appeals acknowledged that the “entry fiction” doctrine does apply to majority of the aliens detained under section 1225(b).<sup>106</sup> The court of appeals, however, recognized that section 1225(b) also applies to some lawful permanent residents returning from abroad after a brief period of time, who for some reason, have been rendered inadmissible.<sup>107</sup> The court of appeals stated that these aliens are entitled to the same due process rights as other detainees.<sup>108</sup> Because *some* aliens in the 1225(b) subclass were entitled to the same due process rights as other classes of immigrants, the Ninth Circuit declined to exclude 1225(b) detainees from its holding in order to protect the constitutional rights of those aliens to whom the “entry fiction” doctrine does not apply.<sup>109</sup> Thus, under the *Rodriguez* opinion, all aliens detained under section 1225(b) are entitled to an opportunity to argue for their release after six months of detention.

Following the ruling from the Ninth Circuit, the class of detainees filed a motion for summary judgment in district court requesting four additional procedural safeguards.<sup>110</sup> First, the petitioners requested that their likelihood of removal be considered at their bond hearing.<sup>111</sup> The district court denied this request, explaining that considering the likelihood of removal as a factor at a bond hearing expands the scope and purpose of a bond hearing.<sup>112</sup> Second, the petitioners requested that an immigration judge “be required to consider conditions short of incarceration.” The district court stated that immigration judges should already be considering

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104. *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1448 (9th Cir. 1995) (The entry fiction doctrine refers to the view that arriving aliens enjoy less constitutional protections than other detained aliens because they have not been granted admission to the United States).

105. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Barrera-Echavarria*, 44 F.3d at 1441.

106. *Rodriguez*, 715 F.3d at 1140.

107. Lawful permanent residents who engaged in illegal activity after having left the United States for a brief period of time are treated as aliens seeking admission and are included in the 1225(b) subclass. 8 U.S.C. § 1101(a)(13)(C)(iii) (2012).

108. See *Landon v. Plasencia*, 459 U.S. 21, 103 (1982) (holding that a lawful permanent resident arrested for alien smuggling upon return to the United States is entitled to due process).

109. *Rodriguez*, 715 F.3d at 1142–43.

110. *Rodriguez v. Holder*, No. CV-3239 TJH (RNBx), 2013 WL 5229795 (C.D. Cal. Aug. 6, 2013).

111. *Id.* at 2.

112. *Id.*

alternatives to incarceration such as, house arrest with electronic monitoring.<sup>113</sup> Third, the petitioners requested that they automatically receive bond hearings, rather than being required to request a hearing.<sup>114</sup> The district court granted this request stating, “[t]he bond hearing process would be fraught with peril if the court of appeals were to place the burden on detainees to request a bond hearing when the government is constitutionally obligated to provide those hearings.”<sup>115</sup> Finally, the petitioners requested that their hearing notices be written in plain language.<sup>116</sup> The district court also granted this request stating, “comprehensible notice must be provided to detainees for that notice to pass constitutional review.”<sup>117</sup>

The *Rodriguez* decision is expected to make waves across the Ninth Circuit.<sup>118</sup> Following the decision, courts have either automatically granted habeas petitions or asked that the parties provide further briefing in light of the *Rodriguez* decision.<sup>119</sup> As of March 2014, the six-month rule has been adopted by only one court from another jurisdiction.<sup>120</sup>

### III. Contrasting Approaches and How Due Process Favors the Six-Month Rule

*Zadvydas*, *Demore*, and myriad cases that have applied them in different jurisdictions clearly mandate that a “reasonable time limitation” must be read into the pre-removal mandatory immigration detention statutes.<sup>121</sup> Indeed, even without the Supreme Court’s direction in *Zadvydas*, the Fifth Amendment certainly requires the

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Rodriguez*, et al. v. Robbins, et al., AMERICAN CIVIL LIBERTIES UNION (December 8, 2014), available at <https://www.aclu.org/immigrants-rights/rodriguez-et-al-v-robbins-et-al> (“The ruling stands to benefit thousands of immigration detainees across the Ninth Circuit, where an estimated 25% of immigrant detainees are held every year.”).

119. *Khoury v. Asher*, No. C13-1367RAJ, 2014 WL 954920 (W.D. Wash. Mar. 11, 2014); *Shahzad v. Gurule*, No. CV13-1176-PHX-DGC (MEA), 2014 WL 690924 (D. Ariz. Feb. 24, 2014); *Manzanarez v. Holder*, Civ. No. 13-00354-SOM/BMK, 2013 WL 5607167 (D. Haw. Oct. 11, 2013); *Jumapili v. Ice Field Office Dir.*, No. C13-1026-RSL, 2013 WL 5719805 (W.D. Wash. Oct. 21, 2013).

120. *Reid v. Donelan*, C.A. No. 13-cv-30125-MAP, 2014 WL 105026 (D. Mass. Jan. 9, 2014).

121. See Gerald Siepp & Sophie Feal, *The Mandatory Detention Dilemma: The Role of the Federal Courts in Tempering the Scope of INA § 236(c)*, 10-07 IMMIGRATION BRIEFINGS 1 (2010).

same prohibition on indefinite civil detention.<sup>122</sup> However, as seen in *Rodriguez*, the government still tries to persuade courts that the pre-removal detention statute authorizes indefinite detention without bond hearings. Courts have moved beyond this threshold question and into the inquiry of what constitutes a “prolonged” detention period.<sup>123</sup> A recent district court opinion describes the two approaches that have emerged:

The thornier aspect . . . lies in the definition of “reasonableness.” Two approaches have emerged. One view, adopted by the Third and Sixth Circuits, requires a “*fact-dependent inquiry* requiring an assessment of all of the circumstances of any given case,” to determine whether detention without an individualized hearing is unreasonable . . . The other approach, one employed by the Ninth Circuit, applies a *bright-line rule*. Under that view, the government’s “statutory mandatory detention authority under Section 1226(c) . . . [is] limited to a six-month period, subject to a finding of flight risk or dangerousness.”<sup>124</sup>

As discussed below, the Ninth Circuit’s six-month approach, and not the Third and Sixth Circuit’s case-by-case approach, should be the rule across all jurisdictions. Due process considerations and administrative efficiency influence this conclusion.

#### A. The Third and Sixth Circuit’s Case-By-Case Approach

Challenges to pre-removal mandatory detention without bond hearings are traditionally made through habeas petitions where district court judges engage in a case-by-case analysis to determine whether an alien’s detention has become “prolonged.” The Third and Sixth Circuits recognize the possibility of changing the traditional approach, but have expressly decided against a bright-line rule.

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122. The Due Process Clause forbids the government from depriving a person of his or her “liberty . . . without due process of law.” U.S. CONST. amend. V.

123. See generally *Sengkeo v. Horgan*, 670 F. Supp. 2d 116 (D. Mass. 2009) (whether twenty months of pre-removal detention is reasonable); *Johnson v. Orsino*, 942 F. Supp. 2d 396 (S.D.N.Y. 2013) (whether fifteen-month pre-removal detention without a bond hearing was unreasonably long); *Hernandez v. Sabol*, 823 F. Supp. 2d 266 (M.D. Pa. 2011) (whether seven-month pre-removal detention without a bond hearing was reasonable).

124. *Reid*, C.A. No. 13-cv-30125-MAP, 2014 WL 105026, at \*3 (emphasis added).

In *Diop v. ICE*, the Third Circuit refused to adopt the presumption in *Zadvydas* that detention beyond six months was unreasonable.<sup>125</sup> The court stated:

Reasonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case. That being said, we note that the reasonableness of any given detention pursuant to § 1226(c) is a function of whether it is necessary to fulfill the purpose of the statute.<sup>126</sup>

The Sixth Circuit in *Ly v. Hansen* expressed a similar position:

A bright-line time limitation, as imposed in *Zadvydas*, would not be appropriate for the pre-removal period; hearing schedules and other proceedings must have leeway for expansion or contraction as the necessities of the case and the immigration judge's caseload warrant. In the absence of a set period of time, courts must examine the facts of each case, to determine whether there has been unreasonable delay in concluding removal proceedings.<sup>127</sup>

As explained by *Diop* and *Ly*, the "fact-dependent inquiry" is the preferable approach for the pre-removal context because it takes into account individual circumstances as well as the court's caseload. Further, given that cases of pre-removal detention exceeding six months are rare,<sup>128</sup> any special circumstances of these cases should determine whether a bond hearing is warranted.<sup>129</sup> In making such a determination, the district courts hearing habeas petitions consider the same factors immigration judges consider at bond hearings. These include: (a) the length of detention; (b) the foreseeability of

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125. *Diop*, 656 F.3d at 234.

126. *Id.*

127. *Ly*, 351 F.3d at 271–73.

128. *Demore*, 538 U.S. at 529 ("The Executive Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days. Brief for Petitioners 39–40. In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter.").

129. *Ramirez*, No. B:10-126, 2010 WL 6269226, at \*52.

actual removal; and (c) the conduct of both the immigration authorities and the detainee.<sup>130</sup>

The government has additional reasons for advocating for the case-by-case approach and against the Ninth Circuit's six-month rule. The government in *Rodriguez* raised some of the key reasons. First, the six-month rule supposedly places a great burden on the government since it would be required to defend against multiple bond hearings potentially around the same time.<sup>131</sup> The government might also be unable to prepare for bond hearings in time.<sup>132</sup> This difficulty on the part of the government could potentially result in the release of a large number of non-citizens. Finally, the government argues that the six-month rule would place a burden on the administrative resources because courts will be required to provide hundreds of bond hearings.<sup>133</sup>

Indeed, even after *Rodriguez*, the traditional case-by-case approach continues to be the framework for challenges to immigration detention in other jurisdictions.<sup>134</sup>

## B. The Ninth Circuit's Six-Month Rule

As discussed in Part II, the Ninth Circuit believes that the six-month approach is consistent with prior Supreme Court cases. Under this approach, aliens who have been detained for more than six months pending removal proceedings will automatically be entitled to bond hearings. The six-month rule provides a more efficient framework for avoiding due process violations in the immigration detention context. Additionally, the rule favors administrative concerns.

### 1. The Six-Month Rule Best Protects Aliens' Due Process Rights

First, there is a substantial risk of deprivation of due process rights when detention exceeds six months.<sup>135</sup> "Indeed, no persuasive argument justifies discarding this pragmatic approach when dealing with individuals detained under section 1226(c)."<sup>136</sup> Thus, it is

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130. *Ly*, 351 F.3d at 271–72.

131. *Rodriguez*, 715 F.3d at 1145.

132. *Id.*

133. *Id.*

134. *Stephens v. Aviles*, No. 13-4295 (FSH), 2013 WL 4537985 (D.N.J. Aug. 27, 2013); *Ricketts v. Holder*, No. 13-0308, 2013 WL 3087236 (D.N.J. Jun. 12, 2013); *Barcelona v. Napolitano*, No. 12-7494 (SRC), 2013 WL 6188478 (D.N.J. Nov. 26, 2013).

135. *Demore*, 538 U.S. at 530.

136. *Reid*, No. 13-cv-30125-MAP, 2014 WL 105026, at \*4.

reasonable to entitle detainees to bond hearings before an immigration judge at this stage of the proceedings.

Second, the simplicity of the six-month approach provides more certainty and avoids the incongruence that could flow from a case-by-case approach. District court judges applying the case-by-case approach may interpret similar facts in different ways, leading to disparate results. For instance, some judges have taken the position that good faith applications for relief or appeals do not justify denying a request for a bond hearing, while others have held that requests to continue removal proceedings due to pending applications or appeals can make a prolonged detention period reasonable.<sup>137</sup> As a result, courts have held that a twenty-month detention was unreasonably prolonged even though the delay was attributable to the alien's two appeals,<sup>138</sup> while also having held that a fifteen-month detention of an alien whose appeal had been pending for four months was not unreasonably prolonged.<sup>139</sup>

Not only have courts taken varying approaches with respect to appeals by the alien, but they have also taken different positions with regard to appeals by the DHS.<sup>140</sup> Some judges have taken the position that delays due to government appeals weigh heavily against the respondents in determining whether detention has become unreasonably prolonged.<sup>141</sup> On the other hand, some judges have held that continued detention beyond six months for the purpose of allowing the government to pursue an appeal does not render an alien's detention unreasonably prolonged when the government's decision to appeal is found to be reasonable or the appeal is conducted at a permissible pace.<sup>142</sup>

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137. Farrin Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 397–98 (2014) (citations omitted).

138. Gupta v. Sabol, No. 1:11-1081, 2011 WL 3897964 (M.D. Pa. Sept. 6, 2011) (finding a twenty-month detention unreasonably long even though the detention was caused by the detainee's two appeals).

139. Johnson v. Orsino, 942 F. Supp. 2d 396 (S.D.N.Y. 2013) (applying Third and Sixth Circuit approaches and deeming a fifteen-month detention not unreasonably prolonged because individual's appeal had been pending for four months).

140. Anello, *supra* note 137, at 398 (citations omitted).

141. Tkachenko v. Sabol, 792 F. Supp. 2d 733, 741 (M.D. Pa. 2011); Akinola v. Weber, No. 09-3415, 2010 WL 376603, at \*5 (D.N.J. 2010); Victor v. Mukasey, No. 3:CV-08-1914, 2008 WL 5061810 (M.D. Pa. 2008).

142. Jayasekara v. Warden, No. 1:10-1649, 2011 WL 31346, at \*5 (M.D. Pa. 2011) (finding similarly that petitioner's request for continuance was not unreasonable, and denying a bond hearing on the theory that future detention was unlikely to be prolonged); Segura v. Holder, No. 4:CV-10-2045, 2010 WL 5356499, at \*2 (M.D. Pa. 2010).

Disparities also arise from the fact that some courts hearing habeas petitions consider factors that others have deemed irrelevant.<sup>143</sup> These factors include the expected duration of future detention and the likelihood of success in removal proceedings.<sup>144</sup> Under the rule, aliens who have been detained beyond six months will automatically be entitled to bond hearings. This ensures that a detainee who is eligible for release, would not have to remain detained any longer than is necessary. In response to criticisms that the bright-line rule fails to account for individual circumstances that should affect the outcome of each case, the six-month rule does not foreclose an opportunity for individualized assessment because such an assessment will be made at the detainee's bond hearing before an immigration judge.

Third, proponents of the six-month approach assert that the rule ensures due process would be afforded to *all* detainees whose confinement goes beyond six months.<sup>145</sup> Prior to the Ninth Circuit's six-month rule, detainees wanting to challenge their prolonged detention would have to file habeas petitions with the district court. The district court will then determine whether the detainee is entitled to either release or a bond hearing. The individualized approach, however, "presumes that detainees have knowledge about the American court system and have finances to obtain an attorney (or are fortunate enough to receive pro bono assistance) and that they have the language skills required to navigate the legal thicket."<sup>146</sup>

The six-month approach eliminates the need for filing habeas petitions, and simply requires the court to schedule a bond hearing for someone who has been detained for over six months. Aliens would be given an opportunity to speak directly to an immigration judge regarding their request for release on reasonable bond.<sup>147</sup> Thus, under the six-month approach, unrepresented detainees who lack knowledge of the legal process will not be unjustly deprived of due process.

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143. Anello, *supra* note 137, at 400.

144. *Id.* at 399–400 (citations omitted).

145. *Reid*, No. 13-cv-30125, 2014 WL 105026, at \*5.

146. *Id.*

147. Anello, *supra* note 137, at 399.

## 2. *Administrative Concerns Favor a Six-Month Rule*

By eliminating the need for two hearings, the six-month rule eases the burden on both the government and the detainee.<sup>148</sup> The benefit of the rule to detainees has been discussed above.

Adjudicating challenges to pre-removal mandatory detention solely before the immigration courts is more efficient for the government.<sup>149</sup> Habeas petitions are lengthy and require extensive written and oral argument. In contrast, immigration judges can quickly adjudicate detention-related issues, sometimes even during the same day as a preliminary removal hearing.

Also, the six-month rule reduces the instances of habeas petitions, thereby allowing the government to redirect its attention to the goal of quickly resolving pending removal cases. Currently, about fifteen percent of pre-removal detention cases go beyond six months.<sup>150</sup> If the government can resolve removal proceedings prior to the end of six months, the government will further reduce the need for *Rodriguez* bond hearings.

Finally, the government should weigh the cost of providing bond hearings against the cost of unnecessarily housing hundreds or thousands of aliens. In fiscal year 2013, \$2 billion were allocated for detention, funding as many as 34,000 detention beds each day.<sup>151</sup>

For the reasons stated above, due process and administrative considerations favor the six-month rule. However, as the next section illustrates, a combination of the two approaches might be best.

## **IV. Proposed Solution: Combined Case-by-Case Approach and Six-Month Approach**

Whether the courts adopt the Ninth Circuit's six-month rule or the Third and Sixth Circuit's case-by-case approach, an alien would have to be detained for at least six months in order to determine whether his detention is reasonable. Either approach presumes that an alien's detention for the first six months is reasonable and justified. However, there may be situations where an alien's detention for *any* period of time might not be reasonable. For instance, an alien who is neither a flight risk or danger to society should not be detained at all

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148. *Reid*, No. 13-cv-30125, 2014 WL 105026, at \*15.

149. *Anello*, *supra* note 137, at 401.

150. *Demore*, 538 U.S. at 529.

151. Department of Homeland Security Appropriations Bill, 2013, H.R. Rep. No. 112-492, at 50 (2012).

even if he is to receive a bond hearing at a later date. Indeed, neither approach can prevent a constitutional violation, it can only remedy it.<sup>152</sup> “To assume that DHS will only detain those immigrants whom it reasonably thinks it can remove within a reasonable amount of time is to grant DHS an undeserved omniscience.”<sup>153</sup>

In order to balance the interests of both the detainees and the government, the two approaches described above should be combined. The proposal involves giving aliens a hearing at the outset of litigation to determine whether the detainee may be entitled to a bond hearing at that time, rather than waiting for six months. This approach is based on Judge Tashima’s concurring opinion in the Ninth Circuit case, *Tijani v. Willis*:

[The government] should interpret § 236(c) to apply mandatory detention in a more narrow fashion. Only those immigrants who could not raise a “substantial” argument against their removability should be subject to mandatory detention . . .

The ‘substantial argument’ standard strikes the best balance between an alien’s liberty interest and the government’s interest in regulating immigration . . . It gives the alien’s liberty rights adequate respect and ensures that the alien’s detention will be relatively brief. At the same time, it provides the government leeway to detain those aliens who lack any incentive to press their legal claims, and are therefore the most likely to abandon those claims and flee.<sup>154</sup>

Similar to a *Rodriguez* hearing, an alien who prevails at this initial hearing only receives a bond hearing, not release.<sup>155</sup> An alien will only be released upon a showing that he is not a danger to society or a flight risk.<sup>156</sup> Unlike a *Rodriguez* hearing, however, an alien will have the opportunity to demonstrate he is entitled to a bond hearing without waiting for six months.

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152. Bradley Banias, *A “Substantial Argument” Against Prolonged, Pre-Removal Mandatory Detention*, 11 RUTGERS RACE & L. REV. 31, 56 (2009).

153. *Id.*

154. *Tijani*, 430 F.3d at 1247.

155. Banias, *supra* note 152, at 69.

156. *Id.*

If the alien does not prevail at this initial hearing, or if the government chooses to appeal, he may have to wait six months before receiving a bond hearing. This possibility of further detention is where the safety-net feature of this approach comes into play.<sup>157</sup> The six-month rule serves to ensure that all aliens detained pending their removal proceedings receive a bond hearing after they have been detained for six months.

Finally, this two-step approach, which combines a case-by-case inquiry at the outset of litigation with a six-month rule as a safety net feature, is best for both detainees and the government for two primary reasons. First, this approach is administratively efficient because it eliminates the need for habeas petitions.<sup>158</sup> Second, and more importantly, the approach helps avoid due process violations instead of trying to remedy violations after they have occurred. The approach meets the government's interest in detaining only those who are true flight risks or those who have no legitimate grounds for challenging removability.<sup>159</sup>

### Conclusion

Prolonged mandatory detention has long been an issue in the pre-removal context. The absence of a bright-line rule for what constitutes a reasonable length of detention has resulted in the detention of thousands of aliens for years. Many aliens fall through the cracks due to the backlog of cases at immigration courts; many face severe hardship in filing habeas petitions; and many find themselves on the losing end of a system that has created disparate results. The rule introduced by the Ninth Circuit in *Rodriguez*, where aliens automatically receive bond hearings after six-months of detention, seeks to remedy these problems.<sup>160</sup> However, not only is the Ninth Circuit's approach rejected by other jurisdictions,<sup>161</sup> it might still be inadequate to protect the due process rights of aliens. Under either the Ninth Circuit's six-month rule or the traditional case-by-case approach, an alien is guaranteed to be detained for at least six-months. In cases where an alien poses no flight risk or danger to the

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157. *Id.*

158. *Id.* at 68.

159. *Id.*

160. See Michael Tan, *Victory: Federal Courts Immigration Detainees Deserve Fair Hearings*, AMERICAN CIVIL LIBERTIES UNION (Aug. 7, 2013), available at <https://www.aclu.org/blog/immigrants-rights/victory-federal-court-rules-immigration-detainees-deserve-fair-hearings>.

161. See *Diop*, 656 F.3d at 234; *Ly*, 351 F.3d at 271–73.

community, such detention, even for a period of six months, may be unreasonable. A better approach is to conduct a case-by-case inquiry at the outset of removal proceedings to determine whether an alien may be entitled to a bond hearing, and, upon the decision to detain him, to automatically give him a second bond hearing after six months of detention. This approach, while ensuring that aliens will not be unreasonably detained, may be burdensome on immigration courts and may be costly. A cost-benefit analysis is necessary to weigh the burden and costs of such an approach against the burden and costs of the current system. At this time, however, should the Supreme Court have to rule on a jurisdictional split, the Ninth Circuit's six-month rule better protects the due process rights of aliens and should be adopted.

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