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Giving Joseph Hearings Their Due: How to Ensure that Joseph Hearings Pass Due Process Muster

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> *If there is no reasonable basis for treating these confined noncitizens worse than ordinary defendants charged with crimes; worse than convicted criminals appealing their convictions; worse than civilly committed citizens; worse than identical noncitizens found elsewhere within the United States; and worse than noncitizens who have committed crimes, served their sentences, and been definitively ordered removed (but lack a country willing to take them), their detention without bail is arbitrary. Thus, the constitutional language, purposes, and tradition that require bail in instances of criminal confinement also very likely require bail in these instances of civil confinement. That perhaps is why Blackstone wrote that the law provides for the possibility of "bail in any case whatsoever."*[1]

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1. Jennings v. Rodriguez, 138 S. Ct. 830, 865–66 (2018) (Breyer, J., dissenting) (internal citations omitted).

INTRODUCTION

To comport with the Due Process Clause of the Fifth Amendment to the United States Constitution,[2] individuals alleged to have been convicted of crimes included in 8 U.S.C. § 1226(c)[3] must be provided a constitutionally adequate opportunity to challenge their inclusion in that category because without such an opportunity the individuals face prolonged mandatory detention with no right to a bond hearing.[4] As Justice Souter noted, "detaining an alien requires more than the rationality of a general detention statute; any justification must go to the alien himself."[5] Such is the purpose of the *Joseph* hearing.[6] However, the current *Joseph* hearing is inadequate to protect the individual liberty of noncitizens because it incorrectly places a nearly nonexistent burden on the government and a virtually "insurmountable" burden on the noncitizen.[7] Such an imbalance significantly increases the likelihood of individuals being erroneously deprived of their rights when "additional procedural safeguards" have "probable value" in preventing such occurrences.[8]

In 2001, the United States Supreme Court wrote "that the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'"[9] The Court went on to say that plenary power "is subject to important constitutional limitations" and "Congress

2. U.S. CONST. amend. V. "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." *Id*.

3. To be consistent with relevant case law, 8 U.S.C. § 1226(c) is used in lieu of I.N.A. section 236(c).

4. Gayle v. Warden Monmouth Cty. (*Gayle III*), No. 12-2806 (FLW), 2019 WL 4165310, at *10 (D.N.J. Sept. 3, 2019) ("Justice Kennedy noted that since mandatory detention under § 1226(c) is 'premised upon the alien's deportability,' due process requires 'individualized procedures' such as a *Joseph* hearing to ensure that the alien is in fact deportable." (quoting Demore v. Kim, 538 U.S. 510, 531–532 (2003) (Kennedy, J., concurring)).

5. Demore v. Kim, 538 U.S. 510, 552 (2003) (Souter, J., dissenting).

6. *Id.* at 514 n.3.

7. *See Gayle III*, 2019 WL 4165310, at *18; *see also* Tijani v. Willis, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring).

8. Gayle v. Johnson (*Gayle II*), 81 F. Supp. 3d 371, 391 (D.N.J. 2015).

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

must choose 'a constitutionally permissible means of implementing' that power."[10] However, in *Demore v. Kim*, the Court held that § 1226(c) was facially constitutional despite authorizing the Attorney General and his agents to detain an individual without a hearing and without judicial review for an unspecified duration.[11] The subsequent cases of *Jennings v. Rodriguez* and *Nielsen v. Preap* include dicta that *Kim* is still good law as part of the statutory analysis, but instead focus on the ways in which district and circuit courts are interpreting that analysis.[12] Because of the current precedent regarding § 1226(c), the *Joseph* hearing has become essential; indeed, it is nearly the only procedural mechanism a detained person has to challenge his inclusion under the mandatory detention statute.

This Article asserts that the *Joseph* hearing must require the government to show probable cause to include the respondent in the mandatory detention category.[13] If the government meets its burden, the respondent, then, must show a substantial argument as to why he should not be included in the mandatory detention category. Such a standard comports with the Fifth Amendment because it provides more adequate due process protections to noncitizens facing potentially lengthy detention periods, while also "giv[ing] considerable weight to any special governmental interest in detention."[14]

To support the above proposal, this Article will examine and compare the decisions of *Gayle v. Warden Monmouth County*,[15] and its predecessor *Gayle v. Johnson*,[16] with *Tijani v. Willis*[17] to propose a new *Joseph* hearing standard that passes constitutional muster. Part I of this Article outlines the history of § 1226(c), the judicial interpretation of § 1226(c), and the most common concerns about § 1226(c). Part II of this Article explains the *Joseph* hearing and

10. *Id.* at 695 (quoting INS v. Chadha, 462 U. S. 919, 941–42 (1983)).
11. *See Kim*, 538 U.S. at 523.
12. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 830 (2018); Nielsen v. Preap, 139 S. Ct. 954, 962 (2019).
13. *See infra* Part III.
14. *Kim*, 538 U.S. at 578 (Breyer, J., dissenting).
15. *Gayle III*, No. 12-2806 (FLW), 2019 WL 4165310, at *8 (D.N.J. Sept. 3, 2019).
16. *Gayle II*, 81 F. Supp. 3d 371 (D.N.J. 2015).
17. *Tijani*, 430 F.3d 1241 (9th Cir. 2005).

outlines the two aforementioned approaches to the *Joseph* hearing. Finally, Part III proposes a new standard for the *Joseph* hearing.

I. THE WHAT AND WHY OF § 1226(C)

In 1996, Congress overhauled the Immigration and Nationality Act (INA) with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Under IIRIRA, Congress mandated the detention of all immigrants and nonimmigrants placed in removal proceedings because of a criminal conviction or national security concerns.[18] Section 1226(c) of the statute states:

> The Attorney General shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in § 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under § 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under § 1182(a)(3)(B) of this title or deportable under § 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.[19]

Under this statute, the Attorney General is required to detain lawful permanent residents "without a hearing."[20] Additionally, the statute "eliminated the possibility of bail [even] in the case of a

18. *See* M. Isabel Medina, Demore v. Kim—*A Dance of Power and Human Rights*, 18 GEO. IMMIGR. L.J. 697, 700 (2004). For a full discussion about the history of § 1226(c), see *id*. *See also* Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "*Joseph*" Hearings After* Demore v. Kim, 31 N.Y.U. REV. L. & SOC. CHANGE 51 (2006); Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137 (2013).

19. 8 U.S.C. § 1226(c)(1) (2018).

20. Medina, *supra* note 18, at 700.

person who did not pose a flight risk and was not a danger to the community."[21]

Through § 1226(c), Congress sought "(1) to protect the public from potentially dangerous criminal aliens; (2) to prevent aliens from absconding during removal procedures; (3) to correct former bond procedures under which over twenty percent of criminal aliens absconded before their deportation hearings; and (4) to restore public faith in the immigration system."[22] In both *Kim* and *Preap*, the majority opinions averred that Congress "adopted [§ 1226(c)] against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens,"[23] and that "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings."[24] Because of these factors, Congress decided that allowing the person to apply for bond or parole was "too risky."[25] As Justice Kennedy posited, "[i]t seems evident a criminal record accumulated by an admitted alien during his or her time in the United States is likely to be a better indicator of risk than factors relied upon during the [Attorney General]'s initial decision to admit or exclude."[26]

Judges and scholars, however, have questioned both the accuracy and reliability of the statistics Congress and the Court used to justify the enactment of § 1226(c).[27] For example, "[s]cholars question whether there was in fact a significant percentage of removable aliens who actually appeared before an Immigration Judge [(IJ)] for a bond hearing that then failed to return for their remaining proceedings."[28] Additionally, Congress and the Court gave little credence to the resource-related issues

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21. *Id.*

22. *Gayle III*, No. 12-2806 (FLW), 2019 WL 4165310, at *16 (D.N.J. Sept. 3, 2019).

23. Demore v. Kim, 538 U.S. 510, 518 (2003); Nielsen v. Preap, 139 S. Ct. 954, 960 (2019) (explaining that § 1226(c) "sprang from a 'concer[n] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers.'").

24. *Kim*, 538 U.S. at 519.

25. *Preap*, 139 S. Ct. at 959.

26. Zadvydas v. Davis, 533 U.S. 678, 714 (2001) (Kennedy, J., dissenting).

27. *See* Gayle v. Johnson (*Gayle I*), 4 F. Supp. 3d 692, 709–10 n.25 (D.N.J. 2014).

28. *Id.* at 710 n.25.

that drove INS decisions, such as inadequate funding, bed space, lack of notice to those in removal proceedings, and heavy caseloads.[29] In so doing, "[t]he nonappearance statistics—which did not clearly distinguish between noncitizens never detained by INS, noncitizens released by INS on a low bond, or noncitizens released by an [IJ] after a bond hearing—reveal little if anything about the effectiveness of bond hearings."[30] The result of these issues is that Congress required that the Attorney General detain an entire category of people without any individual consideration as to whether they should be included in this category, or whether they are dangerous, or a flight risk.

A. *Judicial Interpretations of § 1226(c)*

Section 1226(c) has been specifically at issue in three United States Supreme Court cases: *Demore v. Kim*,[31] *Jennings v. Rodriguez*,[32] and, most recently, *Nielsen v. Preap*.[33] In *Kim*, the Court upheld § 1226(c) as facially constitutional.[34] In contrast, *Rodriguez* and *Preap* do not reach the constitutional issues and specifically state that the statute's constitutionality may be contested in as-applied challenges.[35]

In 2003, the *Kim* Court held "that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent may be detained for the brief period necessary for their

29. Das, *supra* note 18, at 149–55; *see also Kim*, 538 U.S. at 519.

30. Das, *supra* note 18, at 152.

31. *See* 538 U.S. at 552.

32. *See* 138 S. Ct. 830, 865–66 (2018).

33. *See* 139 S. Ct. 954, 954 (2019).

34. *Kim*, 538 U.S. at 531 (stating that "[d]etention during removal proceedings is a constitutionally permissible part of that process.").

35. *Rodriguez*, 138 S. Ct. at 851 (noting that it did not "reach those [constitutional] arguments" made by respondents, but "remand[ed] the case to the Court of Appeals to consider them in the first instance."); *Preap*, 139 S. Ct. at 972 ("While respondents might have raised a head-on constitutional challenge to § 1226(c), they did not. Our decision today on the meaning of that statutory provision does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it.").

removal proceedings."[36] The Court reasoned that "deportation proceedings 'would be in vain if those accused could not be held in custody pending the inquiry into their true character.'"[37] Further, the detention periods "last[] roughly a month and a half in the vast majority of cases in which it is invoked,"[38] and thus, "in the majority of cases [the detention] lasts for less than the [ninety] days we considered presumptively valid in *Zadvydas*."[39] Under this presumption that detention under § 1226(c) would last only a short period, the *Kim* Court upheld the statute as constitutional.[40]

Nearly fifteen years later, the *Rodriguez* Court determined that the Ninth Circuit Court of Appeals had erred in its application of the doctrine of constitutional avoidance to § 1226(c) because it had read the statute to require a bond hearing when a person is detained for six months or longer.[41] Supreme Court Justice Alito objurgated the appeals court—"a court relying on [the constitutional avoidance] canon . . . must *interpret* the statute, not rewrite it."[42] Therefore, the Court, in reviewing the statutory construction of § 1226(c), determined that the statute "does not give detained aliens the right to periodic bond hearings during the course of their detention."[43] The Court remanded the case back to the Ninth Circuit, which in turn remanded to the district court, to determine whether § 1226(c) comports with due process.[44]

One year later, in *Nielsen v. Preap*, the Court held that the statutory construction of § 1226(c) clearly indicates that *all*

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36. *Kim,* 538 U.S. at 513.

37. *Id.* at 523 (quoting Wong Wing v. United States*,* 163 U.S. 228, 235 (1896)).

38. *Id.* at 530.

39. *Id.* at 529. *Zadvydas* held that under 8 U.S.C. § 1231(a)(6), an immigrant ordered removed, if held for six months or more, may "provide[ ] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." Zadvydas v. Davis, 533 U.S. at 678, 701 (2001). The government must counter with evidence that detention remains reasonable. *See id.* If it cannot do so, the detained person may be released under supervision provided they can demonstrate they are not a danger to the community or a flight risk. *See id.* at 683.

40. *Kim*, 538 U.S. at 516.

41. Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018).

42. *Id.*

43. *Id.*

44. *Id.* at 852.

individuals who have been convicted of crimes outlined in § 1226(c) may be detained, regardless of when they were released from prison or jail for their predicate criminal conviction.[45] In deciding this case, the Court reiterated that:

> [F]rom Congress's perspective . . . it is irrelevant that the [Attorney General] could go on detaining criminal aliens subject to a bond hearing. Congress enacted mandatory detention precisely out of concern that such individualized hearings could not be trusted to reveal which 'deportable criminal aliens who are not detained' might 'continue to engage in crime [or] fail to appear for their removal hearings.'[46]

This decision, again, took aim at the Ninth Circuit's holding that the doctrine of constitutional avoidance should be applied to the words "when released" in the last paragraph of § 1226(c). When it applies those two words, it "limit[s] the class of aliens subject to mandatory detention."[47] In contrast, the Court determined that "when released" simply "specif[ies] the timing of arrest . . . only for the vast majority of cases: those involving criminal aliens who were once in criminal custody," and not the literal reading the Ninth Circuit had conducted.[48] However, the *Preap* majority emphasized that the respondents did not raise a "head-on constitutional challenge to § 1226(c)," thus the Court's decision "on the meaning of that statutory provision does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it."[49]

Each of the aforementioned Supreme Court cases were five-four decisions.[50] Across the three cases, the dissenting voices primarily asked: "Why would Congress have granted the [Attorney General] such broad authority to deny bail hearings, especially when doing so would run contrary to basic American and common-

45. Nielsen v. Preap, 139 S. Ct. 954, 971 (2019).
46. *Id.* at 968 (quoting Demore v. Kim, 538 U.S. 510, 513 (2003)).
47. *Id*. at 971.
48. *Id*.
49. *Id*. at 972.
50. *See generally Preap*, 139 S. Ct. 954; Jennings v. Rodriguez, 138 S. Ct. 830 (2018); *Kim*, 538 U.S. 510.

law traditions?"[51] The critique by the dissenters was that the Court has repeatedly held that Congress did, in fact, issue a mandate requiring the Attorney General to detain individuals within the category covered by § 1226(c), forbidding bail and a bail hearing for those so included.[52] The dissenters argued that these decisions contravened prior decisions when the Court had grappled with identifying a reasonable detention period before a bond hearing is required.[53] In the majority of those cases, the Court determined that detention beyond six months was an unreasonable period without a bond hearing.[54] However, in the cases challenging § 1226(c), "[t]he issue [], of course, [was] not timing but the right to individualized review at all."[55] Because the statute foreclosed any discretion on the part of the government to provide an individualized bond hearing for those properly included under § 1226(c), and the Court continuously interpreted the statute in that manner, the four dissenting Justices argued that "the majority's interpretation of the statute would likely render the statute unconstitutional."[56]

B. *Concerns About § 1226(c)*

Supreme Court Justices, federal appellate judges, federal district court judges, and scholars have expressed deep concern that the Court has read § 1226(c) to be a form of nonpunitive, civil detention,[57] while it actually harshly and severely violates the rights and liberties of immigrants who fall within the categories

51. *Preap*, 139 S. Ct. at 978 (Breyer, J., dissenting).

52. *Rodriguez*, 138 S. Ct. at 859 (Breyer, J., dissenting).

53. *See* Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (holding that § 1231(a)(6) contained a six-month presumption as to the length of time for which it was reasonable to detain a person who had been ordered removed); *see also* United States v. Salerno, 481 U.S. 739, 742, 747 (1987) (requiring that "a judicial officer [] determine whether an arrestee shall be detained," and that "[t]he arrestee is entitled to a prompt detention hearing, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.") (internal citations omitted).

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

55. Demore v. Kim, 538 U.S. 510, 555–56 n.11 (2003) (Souter, J., dissenting).

56. *Rodriguez*, 138 S. Ct. at 859 (Breyer, J., dissenting).

57. *Kim*, 538 U.S. at 532 (Kennedy, J., concurring); *Gayle III*, 2019 WL 4165310, at *10.

outlined with little recourse. Judges and scholars alike criticize three major aspects of § 1226(c): (1) that it does not allow for an individualized bond hearing, (2) that it does not expressly limit the length of detention that may be imposed without an individualized hearing,[58] and (3) that it holds "a concession of deportability [as] a functional equivalent to entry of a final order of removal."[59] Each critique is discussed below.

First, the lack of individual hearings is alarming because the statute clearly states that the discretion of the Attorney General "shall not be subject to review"; therefore, "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."[60] As a result, a person who allegedly falls within a category outlined in § 1226(c) may only contest his detention by requesting a hearing to challenge his inclusion in the category[61] or by being detained for a significant

58. *See Gayle III*, No. 12-2806 (FLW), 2019 WL 4165310, at *10 (D.N.J. Sept. 3, 2019); *see also Kim*, 538 U.S. at 555–56 n.11 (Souter, J., dissenting); Nielsen v. Preap, 139 S. Ct. 954, 978 (2019) (Breyer, J., dissenting); Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 949 (9th Cir. 2008) ("Even though [the individual's] detention is permitted by statute . . . [w]e hold that the government may not detain a legal permanent resident . . . for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention."); Hechavarria v. Sessions, No. 15-CV-1058, 2018 WL 5776421, at *8 (W.D.N.Y. Nov. 2, 2018) ("Moreover, given that the statute precludes any pre- or post-deprivation procedure to challenge the government's assumption that an immigrant is a danger to the community or a flight risk, it presents a significant risk of erroneously depriving [the individual] of life and liberty interests."); Darlene C. Goring, *Freedom from Detention: The Constitutionality of Mandatory Detention for Criminal Aliens Seeking to Challenge Grounds for Removal*, 69 ARK. L. REV. 911, 925 (2017) ("For this cohort of criminal aliens, mandatory detention without bond infringes upon the substantive due process protections afforded by the Constitution to be free from unreasonable restraint.").

59. Bhargava, *supra* note 18, at 54.

60. 8 U.S.C. § 1226(e) (2018); *see, e.g.*, Quinteros v. Warden Pike Cty, 784 F. App'x 75, 76 (3d Cir. 2019) (holding that that the court "lacks jurisdiction to otherwise review the IJ's 'discretionary judgment regarding' the denial of a bond under § 1226(c).").

61. *In re* Joseph, 22 I. & N. Dec. 799, 800 (B.I.A. 1999) ("[T]he [IJ]may make a determination on whether a lawful permanent resident 'is not properly included' in a mandatory detention category . . . when an [IJ] is convinced that the Service is substantially unlikely to establish . . . the charge or charges that subject the alien to mandatory detention.").

period of time to the extent that he may initiate a successful habeas corpus petition.[62]

Further, as outlined above, the Court in *Kim* found that Congress enacted § 1226(c) because it perceived "criminal aliens" as highly likely to reoffend while awaiting the conclusion of their removal hearings and because it was persuaded by data suggesting that "criminal aliens" are a high flight risk.[63] While the majority in *Kim* held that this rationale was enough to justify a brief detention in order to best effectuate removal and prevent crime in the community,[64] Justice Kennedy remarked that, "the Due Process Clause prohibits arbitrary deprivations of liberty;" thus, "a lawful permanent resident alien . . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."[65] However, "[t]here is a difference between detention being authorized and being necessary as to any particular person."[66] An entire cohort of individuals is being detained under the guise of "public safety" based on potentially inaccurate and misleading data,[67] and without any individual consideration. As Justice Rehnquist articulated: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[68] Section 1226(c) is not a "carefully limited exception," but a categorical suspension of "the [g]overnment's duty not to deprive any 'person' of 'liberty' without 'due process of law.'"[69]

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62. *See* Zadvydas v. Davis, 533 U.S. 678, 701 (2001). Currently, federal district courts have been flooded with habeas petitions predicated on due process challenges to detention. *See, e.g.*, Ernst v. Green, No. 19-10189, 2019 WL 5304072 (KM), at *3 (D.N.J. Oct. 18, 2019); Kabba v. Barr, 403 F. Supp. 3d 180, 184, 191 (W.D.N.Y. 2019); Reid v. Donelan, 390 F. Supp. 3d 201, 210 (D. Mass. 2019).

63. *See supra* Section I.A.

64. *See* Demore v. Kim, 538 U.S. 510, 513 (2003).

65. *See id.* at 532 (Kennedy, J., concurring).

66. Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 949 (9th Cir. 2008).

67. *See supra* Section I.A.

68. United States v. Salerno, 481 U.S. 739, 755 (1987).

69. Nielsen v. Preap, 139 S. Ct. 954, 985 (2019) (Breyer, J., dissenting). Darlene C. Goring argued that criminal aliens, subject to prolonged detention:

> [W]ho do not concede removability are not permitted to assert a challenge to their ultimate removability before they are detained

Second, the statute does not expressly limit the length of detention, but sets forth that a person "may" be detained "pending a decision on whether the alien is to be removed from the United States."[70] Many judges and scholars argue that the constitutionality of § 1226(c), as decided in *Kim*, was largely predicated on the alleged brief period of detention that immigrant detainees would experience, as so carefully discussed in *Zadvydas*.[71] Fifteen years after *Kim*, Justice Breyer pointed out that:

> Detention normally lasts twice as long as the government then said it did. . . . [T]housands of people here are held for considerably longer than six months without an opportunity to seek bail. We deal here with prolonged detention, not the short-term detention at issue in [*Kim*]. Hence, [*Kim*], itself a deviation from the history and tradition of bail and alien detention, cannot help the Government.[72]

Consequently, the decision in *Kim* opened the door to potential long-term detention without the opportunity for judicial review unless and until the noncitizen can be heard on a habeas petition. Moreover, some courts read § 1226(c) and the relevant precedent to mean that an individual must first exhaust his administrative remedies before he is eligible for habeas consideration, further extending detention without recourse.[73]

> without the opportunity for an individualized bond hearing. This type of detention serves only one purpose; to further penalize criminal aliens after their release from criminal custody. This is not a constitutionally permissible reason for subjecting aliens to civil detention. For this cohort of criminal aliens, mandatory detention without bond infringes upon the substantive due process protections afforded by the Constitution to be free from unreasonable restraint.

Goring, *supra* note 58, at 925.

70. 8 U.S.C. § 1226(a) (1994).

71. *See* Demore v. Kim, 538 U.S. 510, 529 (2003); *see also* Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

72. Jennings v. Rodriguez, 138 S. Ct. 830, 869 (2018) (Breyer, J., dissenting) (internal citation omitted).

73. *See, e.g.*, Francisco Cortez v. Nielsen, No. 19-CV-00754-PJH, 2019 WL 1508458, at *4 (N.D. Cal. Apr. 5, 2019) ("[T]he court finds [ ] the prudential exhaustion of administrative remedies is required, and that the petitioner has failed to establish any valid exception to the exhaustion requirement.");

In addition, Judge Wolfson, in *Gayle v. Warden Monmouth County*, recalled that Justice Kennedy's concurrence in *Kim* suggests that Justice Kennedy understood the *Kim* majority as implicitly holding that "detention under § 1226(c) is nonpunitive civil detention, which may be justified . . . at least as long as the detention is relatively brief."[74] But, when "a particular case result[s] in unnecessarily long detention, that might suggest that the detention was meant to be punitive, which could not be so justified" without due process.[75] Therefore, "were there to be an unreasonable delay by [the Attorney General] 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."[76]

Finally, scholars and judges offer the critique that if a person concedes that he does fall within one of the categories outlined in § 1226(c), he forfeits any possible judicial review until his removal hearing, or until he can be heard on a habeas petition. "In the majority's view, [the detained person] ha[s] a less weighty liberty interest than an alien who had not conceded deportability," thus it was permissible for him to be held with little, if any recourse.[77] Essentially, by conceding deportability, a noncitizen detained under § 1226(c) "had functionally given himself a final order of removal" before he received an actual removal order,[78] which contravenes the requirement of due process—the opportunity for an

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Jefferally v. Barr, No. H-19-1244, 2019 WL 3935977, at *2–3 (S.D. Tex. Aug. 20, 2019) ("Jefferally's challenges have not been administratively exhausted.").

74. Portillo v. Hott, 322 F. Supp 3d 698, 706 n.6 (E.D. Va. 2018).

75. *Id.*; *see also Kim*, 538 U.S. at 549 (Souter, J., concurring in part, dissenting in part) ("[D]ue process under the Fifth Amendment conditions a potentially lengthy detention on a hearing and an impartial decisionmaker's finding that detention is necessary to a governmental purpose. . . . [T]he claim of liberty protected by the Fifth Amendment is at its strongest when government seeks to detain an individual.").

76. *Gayle III*, No. 12-2806 (FLW), 2019 WL 4165310, at *10 (D.N.J. Sept. 3, 2019) (quoting *Kim*, 538 U.S. at 532–33 (Kennedy, J., concurring)); *see also* Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 949 (9th Cir. 2008) ("[The detainee] may nonetheless have the right to contest before a neutral decision maker whether the government's purported interest is *actually* served by detention in his case.").

77. Bhargava, *supra* note 18, at 69.

78. *Id.* at 69–70.

individual to be heard before having their liberty interests violated.[79]

Removal proceedings provide a clear procedure to remove a person from the United States, and in those proceedings the government bears the primary burden. It is in these removal proceedings that a person's removability is ultimately determined. Nevertheless, even if removability is established, lawful permanent residents may demonstrate that they are entitled to relief from removal.[80] All of these factors are considered in removal proceedings. Therefore, at the initial detention phase, "[t]he only reason that [the immigrant] is being detained is because the government *may* be able to prove he is subject to removal."[81] Scholar Shalini Bhargava asked: "how can the central question adjudicated in the [removal] hearing—the right of the alien to remain in the United States—be answered and given operative effect before the hearing even occurs?"[82] Such is the function of § 1226(c) as it was drafted and as it has been interpreted.

II. THE *JOSEPH* HEARING AND THE TWO COMPETING STANDARDS

In 1999, the Board of Immigration Appeals (BIA) stated that "[t]he regulations generally do not confer jurisdiction on [IJs] over custody or bond determinations respecting those aliens subject to mandatory detention," such as those detained under § 1226(c).[83] As an exception, 8 C.F.R. section 3.19(h)(2)(ii) provides that "the [IJ] may make a determination on whether a lawful permanent resident 'is not properly included' in a [§ 1226(c)] mandatory detention category . . . either before or after the conclusion of the underlying removal case."[84] Consequently, the *Joseph* hearing was adopted.

A. *The Current Joseph Hearing*

Under the *Joseph* precedent, the Attorney General's "'reason to believe' that the alien 'falls within a category barred from release'

79. *Gayle II*, 81 F. Supp. 3d 371, 389 (D.N.J. 2015).
80. *Id.* at 380.
81. Tijani v. Willis, 430 F.3d 1241, 1243 (9th Cir. 2005) (Tashima, J., concurring).
82. Bhargava, *supra* note 18, at 71.
83. *In re* Joseph, 22 I. & N. Dec. 799, 802 (B.I.A. 1999).
84. *Id*. at 800.

. . . can often be expected to suffice until the [IJ] resolves the merits of the removal case, a resolution that frequently occurs speedily in cases involving detained criminal aliens."[85] If the IJ finds the person removable under § 1226(c), "the [IJ] lacks any bond jurisdiction;" however, if the IJ finds that the individual should not be included in a § 1226(c) category, the IJ "would have [the] authority to redetermine custody conditions" under § 1226(a).[86]

While in a *Joseph* hearing, "the detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [Attorney General] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention."[87] A *Joseph* hearing provides the detained person "with the opportunity to offer evidence and legal authority on the question [of] whether the Service has properly included him . . . ."[88] In particular, the IJ must be "convinced that the [Attorney General] is *substantially unlikely* to establish at the merits hearing . . . the charge or charges that would otherwise subject the alien to mandatory detention."[89] The burden of proof is placed on the detainee, not the Attorney General, and "[a]s a result of the inherently high burden placed on the alien . . . some detainees are detained for months or even years without ever having a bond hearing."[90]

On the other hand, "the standard of proof on the government is less exacting than the one imposed for the merits hearing," maintaining the separation between the standards of proof for the actual removal hearing and the preliminary *Joseph* hearing.[91] The government need only show a "reason to believe" that the person

85. *Id.* at 807 (quoting Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27,441, 27,444–45 (May 19, 1998)).

86. *Id*. at 803, 806.

87. *See* Demore v. Kim, 538 U.S. 510, 514 n.3 (2003).

88. *In re Joseph*, 22 I. & N. Dec. at 805.

89. *Id.* at 806 (emphasis added).

90. Gayle v. Warden Monmouth Cty. Corr. Inst., No. 12–cv–02806(FLW), 2017 WL 5479701, at *4 (D.N.J. Nov. 15, 2017).

91. *Gayle III*, No. 12-2806 (FLW), 2019 WL 4165310, at *8 (D.N.J. Sept. 3, 2019).

falls within an included category,[92] a standard the government argues is akin to the probable cause standard used in a criminal context.[93] This standard only adheres to the person's inclusion under § 1226(c) categories and "[f]rom this fact [of inclusion], the statute presumes that the alien poses a threat to the community."[94] This type of hearing is the *only* mechanism a respondent has in combatting mandatory detention,[95] *unless* he is later successful in a habeas petition where a federal court requires an IJ to conduct a bond hearing and the IJ grants bond.

B. *Two Approaches to the* Joseph *Hearing*

In most cases assessing the adequacy of *Joseph* hearings, the courts arrive at the same conclusion—the *Joseph* hearing does not pass procedural due process muster and must be changed.[96] Given that the *Joseph* hearing is the *only* hearing to which a detainee under § 1226(c) is entitled, it is essential that the procedures of the hearing meet due process standards. In addressing these very issues, two approaches have been proposed to reform the *Joseph* hearing to comply with procedural due process requirements: First, in *Gayle III*, Judge Wolfson proposed that the government bear the greater burden and that "it is prudent to impose the probable cause standard to protect [the alien's liberty] interests."[97] Second, in *Tijani*, Judge Tashima, in alignment with Justice Breyer's dissent in *Kim*, proposed that "only those immigrants who could not raise a 'substantial' argument against their removability should be

92. *In re Joseph*, 22 I. & N. Dec. at 802 (citing *In re* Joseph, 22 I. & N. Dec. 660, 668 (B.I.A. 1999)).

93. *Gayle III*, 2019 WL 4165310, at *8.

94. Medina, *supra* note 18, at 725 (emphasis added).

95. Bhargava, *supra* note 18, at 75 ("This rule places a heavy burden on the respondent and permits the government to detain individuals who are unable to meet this burden. . . . Without bond hearings or any other opportunity to contest detention, an alien who seeks pre-removal release must win at her Joseph hearing.").

96. *See*, *e.g.*, *Gayle III*, 2019 WL 4165310, at *19; Tijani v. Willis, 430 F.3d 1241, 1246–47 (9th Cir. 2005) (Tashima, J., concurring).

97. *Gayle III*, 2019 WL 4165310, at *19.

subject to mandatory detention."[98] Both proposals are described below.

1. The Gayle *Approach*

In *Gayle III*, Judge Wolfson determined that "the probable cause standard is sufficient to ameliorate any potential wrongful deprivation of liberty an alien may suffer in light of his or her 'substantially unlikely to prevail' burden at *Joseph* hearings."[99] Under the probable cause standard, "an IJ would examine whether the facts and circumstances, based upon reasonably trustworthy information, are sufficient to warrant a [reasonably] prudent man to believe that the alien is subject to mandatory detention under § 1226(c)."[100] The burden then shifts to the respondent to show that the government is "'substantially unlikely' to prevail" at the removal hearing.[101]

To arrive at the above conclusion, Judge Wolfson applied the *Mathews v. Eldridge*[102] standard by conducting a balancing test between the competing interests of the government and the person detained.[103] *Mathews* provides for the balancing of interests of two entities or individuals. The *Mathews* standard looks at three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and

98. *Tijani*, 430 F.3d at 1246–47 (9th Cir. 2005) (Tashima, J., concurring) (quoting Demore v. Kim, 538 U.S. 510, 578–79) (2003)).

99. *Gayle III*, 2019 WL 4165310, at *19.

100. *Id.*

101. *Id.* at 20.

102. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (establishing a procedural due process balancing test).

103. *See*, *e.g.*, *Gayle III*, 2019 WL 4165310, at *15, *18 ("I find that the Constitution demands a more exacting or easily definable standard under the *Mathews* test . . . ."); *Gayle II*, 81 F. Supp. 3d 371, 390 (D.N.J. 2015).

> administrative burdens that the additional or substitute procedural requirement would entail.[104]

Judge Wolfson urged that this "flexible" balancing test would yield the appropriate result to adequately protect the competing interests.[105]

In conducting this analysis, Judge Wolfson discussed the first and third prong of the *Mathews* test together. First, the interest at stake for the individual was liberty and not being physically restrained by the government.[106] Second, Congress sought to protect public safety, ensure attendance at removal hearings, and correct an allegedly broken bond system.[107] Further, Judge Wolfson noted the Court "has recognized 'detention during deportation proceedings as a constitutionally valid aspect of the deportation process'"[108] because the aforementioned interests of the government are "compelling," and thus, do "not . . . run afoul of the Constitution."[109]

When Judge Wolfson assessed the third prong, she found that the IJs and BIA were inconsistently applying the *Joseph* standards of "reason to believe" and "substantially unlikely."[110] *Joseph* did not clearly outline the government's "initial burden," neither did it explicate the types of evidence the government must produce to meet that amorphous burden.[111] Moreover, no case since *Joseph* has specified that the government "bears any sort of formal burden at a *Joseph* hearing."[112] Judge Wolfson observed:

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104. *Gayle III*, 2019 WL 4165310, at *15.

105. *Id.*

106. *Id.*

107. *Id.* at *16. Through § 1226(c), Congress sought "(1) to protect the public from potentially dangerous criminal aliens; (2) to prevent aliens from absconding during removal procedures; (3) to correct former bond procedures under which over twenty percent of criminal aliens absconded before their deportation hearings; and (4) to restore public faith in the immigration system." *Gayle III*, 2019 WL 4165310, at *16.

108. *Id.* at *11 (quoting Demore v. Kim, 538 U.S. 510, 522 (2003)).

109. *See id.* at *15 (citing *Kim*, 538 U.S. at 518–22)); *see also Gayle II*, 81 F. Supp. 3d at 391.

110. *Gayle III*, 2019 WL 4165310, at *18.

111. *See id.* at *18–19.

112. *Gayle II*, 81 F. Supp. 3d at 394.

> Exacerbating the ill-defined process, the Government tacitly concedes that "[t]he burden on the Government during a *Joseph* hearing may change over time and in relation to the allegations and evidence presented by the alien"; this concession raises the vexing question of how an alien is able to prepare his or her argument against mandatory detention while navigating a seemingly constantly shifting procedural landscape.[113]

For all of the listed reasons, Judge Wolfson held that "an individual may be deemed subject to mandatory detention even if [the Attorney General] merely presented a scintilla of unrefuted evidence," and as a result, there is a serious risk of an erroneous deprivation of individual rights that is not "justified" by the government's asserted interests.[114] Therefore, Judge Wolfson determined that the "Constitution demands a more exacting standard under the *Mathews* test, particularly since the Supreme Court has recognized the importance of the protections the *Joseph* hearing is intended to afford."[115]

To support her supposition that requiring the respondent to bear the "substantially unlikely" burden meets due process, Judge Wolfson stated that the "'substantially unlikely' standard . . . passes the 'at-least-some-merit' review" outlined in Justice Kennedy's concurrence in *Kim*.[116] In combination with the probable cause requirement now imposed on the government, Judge Wolfson held that the "substantially unlikely" standard has been appropriately recalibrated such that a greater balancing between the competing interests has been achieved.[117]

2. The Tijani *Approach*

In his *Tijani* concurrence, Judge Tashima stated that the *Joseph* standard is "egregiously" unconstitutional because "[t]he

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113. *Id.* at 395.

114. *Id.*

115. *Id.* at 394.

116. *Gayle III*, 2019 WL 4165310, at *20. Justice Kennedy stated that "due process requires individualized procedures to ensure that there is at least some merit to [ICE's] charge, and therefore, sufficient justification to detain a lawful permanent alien pending a more formal hearing." Demore v. Kim, 538 U.S. 510, 531 (2003) (Kennedy, J., concurring).

117. *Gayle III*, 2019 WL 4165310, at *21.

standard not only places the burden on the defendant to prove that he should not be physically detained, it makes that burden all but insurmountable."[118] To address this imbalance, Judge Tashima held that the government needs to show that the respondent should be included in the mandatory detention category by clear and convincing evidence.[119] If the government meets the clear and convincing burden, the burden then shifts to the respondent who must "raise a 'substantial' argument against [his] removability" and is not subject to mandatory detention.[120] As Justice Breyer stated in *Kim,* the statute only mandates "the Attorney General to 'take into custody any alien who [ ] *is* deportable,' not one who may, or may not, fall into that category."[121] Thus, the person purporting not to be deportable under § 1226(c) only needs to show that his claim is "(1) not interposed solely for purposes of delay and (2) raises a question of 'law or fact' that is not insubstantial. And that interpretation . . . is consistent with what the Constitution demands."[122]

As with Judge Wolfson, Judge Tashima reiterated that "individual liberty is one of the most fundamental rights protected by the Constitution."[123] Additionally, Judge Tashima argued that "[t]here can also be no doubt that the Due Process Clause protects immigrants as well as citizens."[124] Further, when lengthy civil detention is at issue, as it is under § 1226(c), "a system of 'detention by default'" is not permissible and "heightened procedural protections to guard against the erroneous deprivation of that right" are required.[125]

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118. Tijani v. Willis, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring).

119. *See id.* at 1245.

120. *Id.* at 1246–47.

121. *Kim*, 538 U.S. at 578 (Breyer, J., dissenting).

122. *Id.* at 578–79 (Breyer, J., dissenting).

123. *Tijani*, 430 F.3d at 1244 (Tashima, J., concurring) (citing Zadvydas v. Davis, 533 U.S. 678, 690 (2001)).

124. *Id.* at n.2 (citing Mathews v. Diaz, 426 U.S. 67, 77 (1976)). "The Fifth Amendment, as well as the Fourteenth Amendment, protects every [alien] from deprivation of life, liberty or property without due process of law." *Mathews*, 426 U.S. at 77.

125. *Tijani*, 430 F.3d at 1244 (Tashima, J., concurring).

To counter the government's clear and convincing argument, the respondent must show that he has a "substantial argument" against his removability, and consequently, should not be included in the category of individuals who must be detained.[126] The respondent can "point to inconsistent case law, raise novel but plausible legal claims, or demonstrate that [the Attorney General] lacks sufficient evidence [to demonstrate that] there is genuine uncertainty as to whether the noncitizen 'is' removable."[127] For example, in *Tijani*, the respondent claimed that his conviction was not an aggravated felony or a crime involving moral turpitude when the categorical approach was applied to analyze the state statute under which he was convicted against the corresponding federal statute.[128] Should the state statute be broader than the federal statute and divisible, the records of conviction do not support the supposition that respondent's convictions met the standard for aggravated felony or crime involving moral turpitude.[129] Employing the "substantial argument" standard, Judge Tashima held that the respondent's arguments "easily rise[ ] to the level of 'substantial.'"[130]

Judge Tashima argues that the above-outlined standard gives effect to "Congress' chosen language" and the purpose of the statute.[131] In the *Joseph* hearing the IJ does not conclude that the respondent is definitively not removable; instead, the IJ determines whether the respondent *may not* be removable, and therefore is not properly included under a statute that requires certainty.[132] Further, the new standard "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."[133] Therefore, Judge Tashima determined that the clear and convincing standard, in combination with the "'substantial

126. *Id.* at 1247.

127. Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65, 94 (2011).

128. *See Tijani*, 430 F.3d at 1247–48 (Tashima, J., concurring).

129. *Id.* at 1248.

130. *Id.*

131. *Id.* at 1247.

132. *Id.*

133. *Id.*

argument' standard" better protects the individual's liberty interest and avoids erroneous deprivation of that liberty, while also giving adequate weight to governmental interests.[134]

III. WHY THE ADOPTION OF THE "PROBABLE CAUSE" AND "SUBSTANTIAL ARGUMENT" STANDARD FOR THE *JOSEPH* HEARING IS ESSENTIAL FOR DUE PROCESS

Rodriguez and *Preap*, along with the myriad of cases that grapple with defining aggravated felonies[135] and crimes involving moral turpitude,[136] have changed the mandatory detention landscape in which the *Joseph* hearing is situated. *Rodriguez* held that the statutory construction of § 1226(c) does not support "some arbitrary time limit devised by courts . . . ."[137] The statute specifies a "definite termination point" of detention in the statutory language—"pending a decision on whether the alien is to be removed"[138]—and accordingly, the statute "does not give detained aliens the right to periodic bond hearings during the course of their detention."[139] Further, the statute forecloses judicial review of the Attorney General's decision to include a person within the § 1226(c) mandatory detention provision.[140] Though the Court left open the possibility of as-applied due process challenges to the statute, the Court, in dicta, upheld *Kim*'s holding that § 1226(c) is facially constitutional.[141]

In close succession to *Rodriguez*, *Preap* determined that § 1226(c)'s clause—"when the alien is released"—includes *all* aliens who have been held in custody for criminal convictions alleged to

134. *Id.*

135. *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204 (2018); Moncrieffe v. Holder, 569 U.S. 184 (2013); Leocal v. Ashcroft, 543 U.S. 1 (2004).

136. *See, e.g.*, Vilchiz-Bello v. U.S. Attorney General, 709 Fed. App'x. 596 (11th Cir. 2017); Miranda-Romero v. Lynch, 797 F.3d 524 (8th Cir. 2015); Ceron v. Holder, 747 F.3d 773 (9th Cir. 2014); Prudencio v. Holder, 669 F.3d 472 (4th Cir. 2012); Matter of Silva-Trevino, 26 I. & N. Dec. 826 (B.I.A. 2016).

137. Jennings v. Rodriguez, 138 S. Ct. 830, 846 (2018).

138. *Id.*

139. *Id.* at 836.

140. *Id.* at 841. Though, the Court clarifies that "§ 1226(e) does not preclude 'challenges [to] the statutory framework that permits [the alien's] detention without bail.'" *Id.* (quoting Demore v. Kim, 538 U.S. 510, 517 (2003)).

141. *Id.* at 846–47; *see also Kim*, 538 U.S. at 530–31.

fall within § 1226(c)(1)(A) through (D), regardless of when the crime was committed or when the release occurred.[142] The *Preap* Court reiterated Congress' belief that "individualized hearings could not be trusted to reveal which deportable aliens who are not detained might continue to engage in crime or fail to appear for their removal hearings."[143] Therefore, *all* who *could* fall under § 1226(c) *must* be detained *regardless* of when they were released from prison or jail, without exception.[144]

Finally, § 1226(c) requires the Attorney General to take into custody any noncitizen who has been convicted of any number of crimes, including, but not limited to: crimes involving moral turpitude, controlled substance trafficking, human trafficking, prostitution, and aggravated felonies.[145] The difficult question of what constitutes an aggravated felony or a crime involving moral turpitude has only caused greater problems because of the rapidly growing and changing bodies of law.[146] As highlighted by Judge Tashima in *Tijani*, the respondent in that case had been detained for over two years while the IJ, the BIA, and the Ninth Circuit grappled with whether Mr. Tijani's convictions amounted to an aggravated felony and/or a crime involving moral turpitude *because* it was such a complex and ever-changing analysis to undertake.[147]

In combination, *Rodriguez*, *Preap*, and the emerging case law that is more clearly defining the crimes encompassed within § 1226(c)(1)(A) through (D) have made the mandatory detention statute incredibly broad. Individuals who "have long since paid their debt to society,"[148] have a substantial argument against removability, and are not dangerous or a flight risk, are highly

142. Nielsen v. Preap, 138 S. Ct. 954, 970 (2019).

143. *Id.* at 968 (internal citations omitted).

144. *Id.*

145. 8 U.S.C. § 1226(c) (2018); *see also* 8 U.S.C. § 1182(a)(2) (2018).

146. *See generally* Tania P. Linares Garcia, *Inhale, Exile: Limiting Review of Aggravated Felonies and Crimes Involving Moral Turpitude After* Moncrieffe v. Holder*, 133 S. Ct. 1673 (2013),* 39 S. ILL. U. L.J. 573, 573–83 (2015) (overview of relevant statutes and case law regarding removability of noncitizens on the grounds of aggravated felonies or crimes involving moral turpitude).

147. Tijani v. Willis, 430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring) ("Today, nearly [thirty] months later, Tijani remains in mandatory detention while courts continue to sort out whether his offenses *actually* fall within the reach of the mandatory detention statute." (emphasis added)).

148. Nielsen v. Preap, 138 S. Ct. 954, 985 (2019) (Breyer, J., dissenting).

likely to be detained, potentially for long periods of time.[149] Further, those who are detained have no statutory right to a bond hearing, even if detained longer than six months.[150] Further still, the discretion of the Attorney General as to who is included in § 1226(c) is not reviewable by the courts.[151] All of this is compounded by the reality that in many jurisdictions, for any habeas petitioner contesting detention to be successful, the petitioner must have administratively exhausted their claims, unless the petitioner can sustain a sufficient due process challenge extending beyond the jurisdiction of the agency.[152]

Not only is the *Joseph* hearing the first opportunity for a noncitizen to contest his inclusion in the mandatory detention category, it may, in fact, be the *sole opportunity* a noncitizen has to contest his detention for a year's time or more. Indeed, the statute itself states those who *are* removable must be detained, and therefore, "*[o]nly* those immigrants who could not raise a 'substantial' argument against their removability should be subject to mandatory detention."[153] Because of the "blanket application" and the "breadth of its reach,"[154] it is clear that the Constitution, and, more specifically, due process, requires greater protections for noncitizens during the *Joseph* hearing than is currently provided.

In *Tijani*, Judge Tashima averred that, "[t]he B.I.A.'s *Joseph* decision was, plainly put, wrong"[155] and constitutes "a decision that is both contrary to the Constitution and shortsighted as a matter of policy."[156] Furthermore, "the Supreme Court has time and again rejected laws that place on the individual the burden of protecting

149. *See id.* at 978 (Breyer, J., dissenting); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018).

150. *See Rodriguez*, 138 S. Ct. at 836.

151. 8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.").

152. *See supra* note 73.

153. Tijani v. Willis, 430 F.3d 1241, 1247 (9th Cir. 2005) (Tashima, J., concurring) (emphasis added); *see* 8 U.S.C. § 1226(c) (2018).

154. *Tijani*, 430 F.3d at 1246.

155. *Id.* at 1244.

156. *Id.* at 1243.

his or her fundamental rights."[157] In essence, the *Joseph* hearing "establishes a system of 'detention by default'" because the respondent bears a very high burden of proof in demonstrating that he should not be included in the mandatory detention category.[158] Such a burden significantly increases the likelihood that a person will be arbitrarily and/or erroneously detained because his colorable claim does not persuade the IJ that the Attorney General is "substantially unlikely" to win in the subsequent removal hearing.[159]

As discussed in the prior Part, Judge Tashima in *Tijani* and Judge Wolfson in *Gayle III* have provided two options as to how to change the *Joseph* hearing. Ultimately, Judge Tashima and Judge Wolfson concluded that the current *Joseph* hearing does not pass due process muster and requires a recalibration of the burdens of proof in order to satisfy due process.[160] Both judges agreed with Justice Souter's proposition in *Kim* about the "clear applicability of general due process standards: physical detention requires both a special justification that outweighs the individual's constitutionally protected interest in avoiding physical restraint and adequate procedural protections."[161] Each judge clearly states that individual liberty and avoiding physical restraint are foundational to the panoply of rights afforded all persons in the United States.[162] Moreover, the judges concur that Congress has "broad power over naturalization and immigration that allows it to make rules that

157. *Id.* at 1244.

158. *Id.*

159. *See* Hechavarria v. Whitaker, 358 F. Supp 3d 227, 233–34 (W.D.N.Y. 2019).

160. *Tijani*, 430 F.3d at 1245 (Tashima, J., concurring) ("[D]ue process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake are both particularly important and more substantial than mere loss of money.") (internal citations omitted); *Gayle II*, 81 F. Supp. 3d 371, 382 (D.N.J. 2015) ("[E]ven in circumstances where mandatory detention is constitutionally permissible, due process still requires 'adequate procedural protections' to ensure that the Government's stated justification for detaining an alien without a bond hearing 'outweighs the individually constitutionally protected interest in avoiding physical restraint.'").

161. Demore v. Kim, 538 U.S. 510, 553 (2003) (Souter, J., dissenting) (internal quotations omitted).

162. *Tijani*, 430 F.3d at 1244 (Tashima, J., concurring); *Gayle II*, 81 F. Supp. 3d at 382.

would be unacceptable if applied to citizens."[163] However, Judge Tashima and Judge Wolfson held that the government must bear a higher burden of proof when individual liberty and erroneous deprivation of that liberty are at risk—and both determined this higher burden of proof to be necessary for the *Joseph* hearing to fall within constitutional bounds.[164]

A. *Probable Cause*

The burden of proof the government should be required to meet in a *Joseph* hearing is that of probable cause.[165] Judge Wolfson provided that the "reason to believe" standard as applied in *Joseph* hearings was inconsistently applied across immigration courts.[166] Under *Matter of Joseph*, it was unclear as to whether the government bore any burden in *Joseph* hearings, and if so, what that burden might be.[167] Because of these factors, "it is likely that an individual may be deemed subject to mandatory detention even if ICE merely presented a scintilla of unrefuted evidence."[168]

In practice, the "reason to believe" standard allows the government to submit uncertified or unofficial evidence to meet its

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163. *Kim*, 538 U.S. at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)); *see also Tijani*, 430 F.3d at 1247, n.5 (Tashima, J., concurring); *Gayle II*, 81 F. Supp. 3d at 390–91. However, many of the cases cited to by Justice Rehnquist in *Kim* to support this proposition were cases about access to social security or insurance, see *Mathews*, 426 U.S. at 69–70, the First Amendment and the Smith Act, see generally Harisiades v. Shaughnessy, 342 U.S. 580 (1952), or the McCarran Act, see generally Carlson v. Landon, 342 U.S. 524 (1952), not directly about detention of an alien who has not yet been adjudicated for removability.

164. *See Tijani*, 430 F.3d at 1244–45 (Tashima, J., concurring); *see also Gayle III*, No. 12-2806 (FLW), 2019 WL 4165310, at *17–19 (D.N.J. Sept. 3, 2019).

165. *See* discussion *supra* Section II.B. Though this author strongly believes that "clear and convincing" should be the appropriate standard, current Supreme Court precedent suggests that the Court would more likely uphold a probable cause standard because of its view that noncitizens may be subject to lesser due process rights than citizens. Therefore, this author argues a pragmatic approach to bringing *Joseph* hearings into alignment with due process.

166. *Gayle III*, 2019 WL 4165310, at *18.

167. *Id.*

168. *Id.*

threshold,[169] which "leaves the noncitizen with the burden of establishing positive equities in light of a baseline record that may already be skewed against her."[170] Such a system has three major impacts on evidence collection. First, this standard improperly accounts for the noncitizen's fundamental right to individual liberty, as discussed more fully in prior sections of this Article. Second, the "reason to believe" standard disincentivizes the government from conducting any kind of an investigation before arresting or detaining the person it has "reason to believe" falls into the mandatory detention category.[171] Third, as Justice Souter asserted:

> [D]etention prior to entry of a removal order may ill impede the alien's ability to develop and present his case on the very issue of removability. After all, our recognition that the serious penalty of removal must be justified on a heightened standard of proof, will not mean all that much when the [Attorney General] can detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence.[172]

Because the respondent is detained *before* any kind of *Joseph* hearing is held, the respondent holds a significantly higher burden of proof while being physically restrained, as well as restricted from attaining counsel and gathering any evidence to meet that burden.[173] Therefore, "as a matter of constitutional jurisprudence, [the current standard] is a serious deprivation of an alien's liberty interest that is not justified by the Government's interests under § 1226(c)."[174]

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169. Dona, *supra* note 127, at 76.

170. Das, *supra* note 18, at 157.

171. *Id.*; *see also Dona*, *supra* note 127, at 75–77.

172. Demore v. Kim, 538 U.S. 510, 554 (2003) (Souter, J., dissenting).

173. *See id.*; *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 862 (2018) (Breyer, J., dissenting) ("[Bail] not only 'permits the unhampered preparation of a defense,' but also 'prevent[s] the infliction of punishment prior to conviction."); Das, *supra* note 18, at 157–58 ("Detention makes [acquiring evidence of positive equities] relatively difficult for the noncitizen. Detained noncitizens have no right to government-appointed counsel. Detained noncitizens may be held in any facility across the United States, and many are transferred far from their families and communities.").

174. *Gayle II*, 81 F. Supp. 3d 371, 395 (D.N.J. 2015).

To rectify this issue, Judge Wolfson proffered the probable cause standard as the right level of burden to ascertain whether the government's evidence supported the inclusion of this particular person in the category of mandatory detention.[175] In particular, the judge urged that:

> Probable cause requires the kind of fair probability on which reasonable and prudent people, not legal technicians, act. While the test is fluid, importantly, and contrary to the current reason to believe standard, it contains an objective component—the "reasonably prudent man" standard—which can adequately be reviewed by judges. By contrast, the "reason to believe" standard, to the extent it exists as [the Attorney General]'s burden of proof in a *Joseph* hearing, has no clear objective component.[176]

The protection of an objective standard, supported by an abundance of precedent, will assist the IJs in applying the probable cause standard consistently and fairly.[177]

IJs should undertake a review of the "facts and circumstances" known to the Attorney General to ascertain "whether a reasonably prudent person would believe that the alien had committed the offenses triggering mandatory detention."[178] This standard still recognizes the differences between the burdens of proof required in bond hearings, *Joseph* hearings, and removal hearings. To require a higher burden of proof than that of probable cause "could obviate the purpose of, and the need for, a final removal hearing."[179] However, to continue allowing a lower burden of proof would enable the government to erroneously deprive individuals of their rights.[180] The probable cause standard is the best compromise to protect an alien's liberty interests while accommodating the government's interests in efficient administration of justice.[181]

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175. *Id*. at 395–96 (internal citations omitted).
176. *Id*. at 396.
177. *See id*.
178. *Id*.
179. *Gayle III*, No. 12-2806 (FLW), 2019 WL 4165310, at *21 (D.N.J. Sept. 3, 2019).
180. *See id.*
181. *Id.* at 19.

Such a standard supports the purposes of the statute.[182] Moreover, probable cause is "the minimum justification necessary" to comply with due process while balancing the interests of the government and the noncitizen.[183]

B. *Substantial Argument that Respondent is Not Removable*

In *Kim*, Justice Breyer's dissent proposed that "only those immigrants who could not raise a 'substantial' argument against their removability should be subject to mandatory detention."[184] Lowering the burden of proof required for the noncitizen is important for two key reasons. First, as Judge Tashima determined:

> [T]he Supreme Court has consistently adhered to the principle that the risk of erroneous deprivation of a fundamental right may not be placed on the individual. Rather, when a fundamental right, such as individual liberty, is at stake, the government must bear the lion's share of the burden.[185]

Second, there is a great deal of fluidity regarding what constitutes an "aggravated felony" or a "crime involving moral turpitude," as well as the other crimes included in § 1226(c).[186]

Following this in-depth review, Judge Tashima found that the "blanket" and "broad" application of the *Joseph* hearing exacerbates an already broad, non-time constrained statute.[187] In addition, in

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182. *See Gayle II*, 81 F. Supp. 3d 371, 397–98 (D.N.J. 2015).

183. *Id.* at 398.

184. Tijani v. Willis, 430 F.3d 1241, 1247 (9th Cir. 2005) (Tashima, J., concurring) (quoting Demore v. Kim, 538 U.S. 510, 578-79 (2003) (Breyer, J. dissenting)).

185. *Id.* at 1245 (discussing rights such as the right to liberty and the right to parent).

186. *See* Dona, *supra* 127, at 77 ("The most frequent legal question addressed in [*Joseph* hearing] appeals is whether the respondent's state or federal conviction can be classified as an offense enumerated in § [1226](c): a crime involving moral turpitude (CIMT), an aggravated felony, a controlled substances offense, or a firearms offense."); *see also* Medina, *supra* note 18, at 743; Bhargava, *supra* note 18, at 54–55; Jorge A. Solis, *Detained Without Relief*, 10 ALA. C.R. & C.L. L. REV. 357, 383 (2019).

187. *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring) (noting that *Zadvydas* "express[ed] scepticism about detention where the 'sole procedural protections available to the alien are found in administrative proceedings

the *Joseph* context, the respondent's "detention is not the result of a criminal conviction; nor is it because he faces imminent removal . . . [he] is being detained because the government *may* be able to prove he is subject to removal."[188] Yet, "[u]nlike [the civil detention cases], the *Joseph* standard places little to no risk on the broad shoulders of the government."[189] The "great deal of deference" afforded to the Attorney General's determination,[190] in combination with the respondent's burden that is "all but insurmountable," in a hearing where an individual's liberty is at stake makes the *Joseph* standard "egregiously" unconstitutional.[191] Therefore, an alternative standard must be created and applied.

To address the first of these issues, Judge Tashima sought guidance from Supreme Court jurisprudence on state civil detention statutes and federal bail statutes.[192] In particular, Judge Tashima recalled the Court's assertion that the "primary function of a standard of proof was to allocate the risk of an erroneous decision among litigants based upon the competing rights and interests involved."[193] When only money is at stake, a lower standard may be applied and the parties may bear the risk equally.[194] In contrast, even when a statute is "narrowly crafted" and includes "stringent time limitation[s]," when individual liberty is at stake, the government must bear the higher burden.[195] Hence, Judge Tashima proposed that the noncitizen should only be required to assert a substantial argument that he is not properly included in the mandatory detention category.[196]

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where the alien bears the burden.'" (quoting Zadvydas v. Davis, 533 U.S. 678, 692 (2001))).

188. *Id.* at 1243.

189. *Id.* at 1246.

190. *Id.* at 1243.

191. *Id.* at 1246.

192. *See Tijani*, 430 F.3d at 1245–46 (Tashima J., concurring). In his review of civil detention jurisprudence, Judge Tashima cited the following: *Addington v. Texas*, 441 U.S. 418 (1979) and *Foucha v. Louisiana*, 504 U.S. 71 (1992). In his review of bail procedures, Judge Tashima cited to *United States v. Salerno*, 481 U.S. 739 (1987).

193. *Id.* at 1244.

194. *Id.*

195. *Id.* at 1245–46.

196. *Id.* at 1244. Judge Tashima also argued that in addition to the substantial argument standard for the respondent, the government must first

Furthermore, the rapidly shifting body of law that determines whether a noncitizen was convicted of crimes that constitute an aggravated felony, a crime involving moral turpitude, or an illicit trafficking offense is critical to the *Joseph* hearing. Should a crime no longer be classified as one of those outlined in § 1226(c), the noncitizen would not be included in mandatory detention, and potentially, would not be removable at all.[197] Though "[t]he fluidity of the law" in this area "suggests that permanent resident aliens facing mandatory detention should pursue aggressive litigation in the *Joseph* hearing,"[198] such highly sophisticated and nuanced arguments on "unsettled law [are] generally resolved in favor of the DHS under the *Joseph* standard."[199] As noted by Law Professor Medina, "[t]he Board rejects novel legal arguments even when it explicitly recognizes that they are plausible."[200] As a result, a person may suffer detention for a significant period of time as he awaits the appellate process regarding his colorable claim of non-removability because his conviction is not one categorized under § 1226(c).[201]

Moreover, "the relevant statutes literally say nothing about an individual who, armed with a strong argument against deportability, might, or might not, fall within their terms."[202] Therefore, Judge Tashima, in his *Tijani* concurrence, agreed with the four dissenting voices in *Kim*, and argued that the substantial argument standard "is not only more respectful of the Constitution, it is also more consistent with Congress' chosen language[,]"

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prove by a clear and convincing standard that the noncitizen should be included in the mandatory detention category. *Id.* He argued that clear and convincing is the most consistently applied standard in the civil detention context, and the most appropriate for the *Joseph* hearing. *Id.*

197. *See* Dona, *supra* note 127, at 77 ("The most frequent legal question addressed in [*Joseph* hearing] appeals is whether the respondent's state or federal conviction can be classified as an offense enumerated in § [1226](c): a crime involving moral turpitude (CIMT), an aggravated felony, a controlled substances offense, or a firearms offense."); *see also* Medina, *supra* note 18, at 743; *see generally* Solis, *supra* note 186.

198. Medina, *supra* note 18, at 743.

199. Dona, *supra* note 127, at 73.

200. *Id.* at 78.

201. *Id.* at 77 ("The ambiguous nature of these legal categories is underscored by the frequent occurrence of circuit splits; what is a deportable crime in one circuit may not be one in a neighboring circuit.").

202. Demore v. Kim, 538 U.S. 510, 578 (Breyer, J., dissenting).

requiring the Attorney General to detain "any alien who *is* deportable, not one who may, or may not, fall into that category."[203] The substantial argument standard "give[s] considerable weight to any special governmental interest," while also providing more protection for a detained alien's liberty interest.[204] Should there be any doubt as to the substantial argument standard, Justice Breyer and Judge Tashima offer the reminder—"[this standard] has proved workable in practice in the criminal justice system" for decades and must be applied when mandatory detention is at stake.[205]

C. *Considering a Substantial Argument for Relief in the* Joseph *Hearing*

The *Joseph* hearing only considers where a person is correctly included in the category requiring mandatory detention; the current scope of the *Joseph* hearing does not allow a person to raise his potential claim for relief from removal.[206] A noncitizen who conceded that he falls under an included category "did not concede that he *will ultimately be deported*."[207] The person may still have a viable claim for relief from removal. "The failure of the [IJ] in a *Joseph* hearing to consider relief from removal seriously risks the erroneous deprivation of an alien's pre-removal liberty in some

203. *See* Tijani v. Willis, 430 F.3d 1241, 1247 (9th Cir. 2005) (Tashima, J., concurring).

204. *Kim*, 538 U.S. at 578 (Breyer, J., dissenting).

205. *Id.*; *Tijani*, 430 F.3d at 1247 (Tashima, J., concurring).

206. *Kim*, 538 U.S. at 556 n.12 (Souter, J., dissenting) ("[T]he '*Joseph* hearing' only permits an alien to show that he does not meet the statutory criteria for mandatory detention under § 1226(c). Kim argues that, even assuming that he fits under the statute, the statute's application to [legal permanent residents] like him does not fit under the DPC."); *see also* Bhargava, *supra* note 18, at 75 ("Because this hearing is an [legal permanent resident's] only pre-removal opportunity to contest the court's classification of her record into one of the mandatory detention categories, due process requires better procedural safeguards and an opportunity for an [IJ] to consider possible relief from removal."); Goring, *supra* note 58, at 923 ("The parameters of a *Joseph* hearing are not broad enough to include an evaluation of removability." Even if they were, they "would not have prevented immigration officials from subjecting him to mandatory detention without an individualized bond hearing.").

207. Goring, *supra* note 58, at 923.

cases."[208] With such a narrow scope and high burden of proof placed on the respondent, *Joseph* hearings "do little to ensure that the agency is making optimal decisions regarding the proper application of the mandatory detention statute."[209] Considering relief may optimize decision-making and alleviate over-inclusion in mandatory detention.

CONCLUSION

As Judge Wolfson declared, "whenever an individual's liberty is at stake, any protections to avoid errors should be considered and encouraged."[210] Therefore, "[b]ecause mandatory detention in the immigration context deprives aliens of their liberty interests, it is prudent to impose the probable cause standard to protect those interests."[211] Provided the government has met its burden, and to ensure that the burden is appropriate given the "magnitude" of the liberty interest at stake, the burden on the respondent should be that he presents a substantial argument against his inclusion in the mandatory detention category or for his claim for relief from removal. As long as § 1226(c) is in place and mandatory detention is allowed, due process requires that the government bear the greater burden in demonstrating the inclusion of the noncitizen in a § 1226(c) category, while the noncitizen bears the lighter burden. Anything less erodes the foundation of the very freedoms on which this country was built.

208. Bhargava, *supra* note 18, at 89.
209. Das, *supra* note 18, at 155 n.82.
210. *Gayle II*, 81 F. Supp. 3d 371, 402 (D.N.J. 2015).
211. *Id.* at 395–96.