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OF IMMIGRANTS
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By Michael Tan

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ABOUT SPECIAL REPORTS ON IMMIGRATION

The Immigration Policy Center's Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

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ABOUT THE IMMIGRATION POLICY CENTER

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Introduction

One of the ugliest myths in the immigration debate is that immigrants are more likely to commit crime or pose a danger to society. Although studies repeatedly have shown that immigrants are less likely to commit crimes than native-born Americans,¹ politicians continue to exploit the public's fear of crime to justify ever more punitive immigration measures, including the mass incarceration of immigrants for reasons that would never be permitted for U.S. citizens. A prime example of this political double standard is the "Keep Our Communities Safe Act of 2011" (H.R. 1932), introduced this past spring by Representative Lamar Smith (R-TX), Chairman of the House Judiciary Committee.² H.R. 1932 proposes a massive expansion of our immigration lock-up system that would waste millions of taxpayer dollars and violate our constitutional commitments to individual liberty and due process of law, while doing little to make America safer.

The vast scope of H.R. 1932 became clear during its committee mark-up, where members of the House Subcommittee on Immigration Policy and Enforcement challenged the language and intent of the legislation and sought to amend its reach. During that meeting, Rep. Smith was forced to acknowledge that the bill's detention mandates extend to immigrants who have no criminal record whatsoever, much less focus narrowly on hard-core offenders.³ Since that time, however, Rep. Smith has continued to misrepresent that "the bill only specifies that a small segment of criminal immigrants may be detained for extended periods."⁴

This paper explores some of the major concerns with expanding our immigration detention system generally, as well as the specific problems that would result from passage of H.R. 1932 or bills like it that seek to use detention as a stand-in for immigration reform. While this paper focuses on some of the particulars of Congressman Smith's bill, the policy choices reflected in H.R. 1932 echo arguments that have been made before. What is troubling from a broader policy perspective is how easily the bill slips away from indefinite detention for convicted individuals who can't be removed from the country and encompasses virtually everyone whom the government seeks to deport—including those with a legal right to remain in the country—as a candidate for possible long-term detention. I argue that people in both of these categories should not be subject to long-term detention. However, even if the bill never passes, its repercussions are significant because it reinforces the myth that immigrants, especially those who enter the country illegally, are dangerous and should be detained.

Although advertised as keeping dangerous "criminal aliens" off our streets, H.R. 1932 in fact sweeps scores of harmless immigrants into our already burgeoning immigration prisons. The bill does this by creating a detention scheme that authorizes not only the indefinite detention of some immigrants, but the detention of asylum seekers and certain lawful permanent residents, with cases in immigration court for months or years, while denying them the basic due process of a bond hearing. Other provisions in the bill could result in the elimination of bond hearings for the countless individuals who enter the country without inspection, regardless of the length of their detention. The bill also requires the detention of individuals who were convicted of crimes years or even decades ago, and who have served their sentences and have been living responsible lives since that time.

This kind of detention scheme seeks to strip away the constitutional protections accorded to immigrants, goes against best practices of incarceration, and represents an investment in detention that is contrary to the national interest and national priorities. The sheer cost of such a proposal is daunting. The administration's Fiscal Year (FY) 2012 budget request for immigration detention already totals *more than \$2 billion*, a record-high request representing a 6.3 percent increase over FY 2011.⁵ At a time of budget crises and a bipartisan commitment to fiscal austerity, H.R. 1932 would saddle taxpayers with massive new costs—at a rate of at least \$122 per detainee per day, or \$44,500 per detainee per year⁶—while doing little to improve public safety.

The Rapid and Costly Expansion of Detention as Immigration Policy

The United States already administers an immigration lock-up system that detains scores of immigrants unnecessarily at the taxpayers' expense. Over the last 15 years, the size of the detention system has more than quintupled, growing from 6,280 beds in 1996⁷ to the current capacity of 33,400 beds.⁸ In 2010, the Department of Homeland Security (DHS) held 363,000 immigrants in detention⁹ in over 250 facilities across the country. Thousands of these immigrants are detained for prolonged periods of time.

For example, a snapshot look at the Immigration and Customs Enforcement (ICE) detention population on January 25, 2009, indicates that although the average detention length was 81 days, at least 4,170 individuals had been detained for six months or longer, and 1,334 for one year or more. Some had been detained as long as five, nine, and, in one case, 15 years.¹⁰ Among those detained are survivors of torture, asylum seekers, victims of trafficking, families with small children, the elderly, individuals with serious medical and mental health conditions, and lawful permanent residents with longstanding family and community ties who are facing deportation because of previous criminal convictions, many of which are for petty offenses such as shoplifting and low-level drug crimes.

This massive lock-up system is extremely expensive to maintain. According to ICE statistics, it costs \$122 to hold each detainee each day, or \$44,500 per detainee per year.¹¹ When payroll costs are included, the cost of detention jumps to \$166 per detainee per night, or \$60,590.¹² On any given night, ICE spends an average of 5.5 million taxpayer dollars on detention, including operational expenses.¹³ The administration's FY 2012 budget requests *more than \$2 billion*, a record-high request representing a 6.3 percent increase over FY 2011.¹⁴

The rise in detention expenditures corresponds to shifts in the use of detention as a tool of immigration policy objectives. Prior to 1988, the power to detain noncitizens pending deportation proceedings was discretionary and predicated on the individual's risk of flight and danger to national security. Even when noncitizens were detained, federal immigration officials retained the authority to release them on bond.¹⁵ Congress enacted the first mandatory detention statute in 1988, requiring the detention without bond of noncitizens convicted of an "aggravated felony"—at that time defined as a narrow category of deportable offenses.¹⁶ In 1994, Congress expanded the statutory definition of an aggravated felony to include a much

wider range of crimes, which in turn increased the number of noncitizen offenders who could not be released on bond.¹⁷

Two immigration reform measures passed in 1996 resulted in far more drastic changes to the detention laws. The Antiterrorism and Effective Death Penalty Act (AEDPA) required detention without bond for virtually *all* noncitizens with criminal convictions—including non-violent misdemeanor convictions without any jail sentence.¹⁸ The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) worsened matters by vastly expanding the statutory definition of an aggravated felony and making these changes retroactive, while broadening AEDPA's mandatory detention provisions. The result is a statutory regime under which thousands of immigrants are held, often for months or even years, without ever being afforded the basic due process of a bond hearing.

Over the years, much of the justification for the creation of mandatory detention requirements has been the necessity of protecting the public from “dangerous criminal aliens,” but in practice, those who are detained generally do not fit this profile. Although immigration detention centers look like prisons, individuals held in immigration detention are not serving criminal sentences. Indeed, *more than half* of the people in immigration detention have never been convicted of any crime.¹⁹ Rather, immigrants are detained when DHS wishes to deport them from the United States, ensure that they appear for their deportation hearings, and, if they lose their cases, are available for their removal. In most cases, the trigger for immigration detention is not criminal activity at all, but instead some other kind of immigration matter, such as overstaying a visa or applying for asylum.²⁰ In other cases, DHS charges someone as being deportable based on a crime and places the immigrant in immigration detention after he or she serves the sentence. However, the majority of these crimes are non-violent or minor.²¹ As DHS has itself acknowledged, the majority of immigration detainees do not pose a threat to the public.²²

Detention is likewise often unnecessary to prevent an immigrant from fleeing immigration authorities. The criminal justice system has long recognized the value of alternative detention methods, and many immigrants are ideal candidates for alternative methods, such as telephonic and in-person reporting, curfews, and home visits. Indeed, DHS's Alternatives to Detention (ATD) programs—which extend to only a tiny fraction of individuals in removal proceedings²³—have a very high compliance rate among participants. In FY 2010, ATDs far exceeded the target for appearance rates for immigration hearings: the target was 58 percent and the actual FY 2010 rate was 93.8 percent.²⁴ ATDs, moreover, save taxpayer dollars, ranging in cost from as low as 30 cents up to 14 dollars a day per individual.²⁵

Groups such as the American Civil Liberties Union (ACLU) have long argued that DHS engages in arbitrary and unnecessary detention—practices that are encouraged by a lack of procedural safeguards in the immigration system. Because immigration detention is civil in nature, described by the Supreme Court as “nonpunitive in purpose and effect,”²⁶ immigrants lack the procedural protections against unlawful imprisonment that are familiar to us from the criminal justice system. Immigration detainees have no right to an appointed attorney—in fact, an estimated 84 percent of detainees do not have lawyers.²⁷ Nor are immigration detainees

uniformly guaranteed a basic form of due process: a prompt bond hearing before an independent judge to determine whether their detention is justified in the first place. Under current law, many immigrants apprehended within the interior of the country are entitled to a hearing where they can request bond or release on recognizance on the grounds that they do not pose a risk of flight or danger.²⁸ However, immigrants convicted of essentially any crimes—including non-violent misdemeanor convictions without any jail sentence—are subject to mandatory detention during the pendency of their immigration cases and are categorically denied bond.²⁹ Individuals arriving at the border without proper documentation—including asylum seekers and certain lawful permanent residents—also may be detained without any bond hearing before an immigration judge.³⁰

The flaws in the current system are most evident when we look at the kinds of people detained. In many cases, they simply don't match the description of the immigrant we've been urged to fear. Many of the people detained are fleeing persecution. For example, Reverend Raymond Soeoth is a Christian minister who fled Indonesia with his wife after suffering persecution for their faith. When his asylum application was denied in 2004, the government put Reverend Soeoth in immigration detention. Even though he posed no danger or flight risk and had never been convicted of any crime, he spent over two-and-a-half years in detention while the courts decided whether to reconsider his asylum claim. During that time, he never received a bond hearing to determine whether his detention was justified. For years, Reverend Soeoth was separated from his wife and congregation. His wife was forced to shutter the corner store they ran together—all because the government would not give him a 15-minute bond hearing. In February 2007, after the ACLU filed suit, a federal court ordered a bond hearing for Reverend Soeoth, where it was determined he was neither a flight risk nor a threat to his community. He was finally ordered released. He will likely be granted asylum.

Other people subject to long-term detention have been able to show that they were never really the risk claimed by the government. For instance, many remain in detention because the U.S. lacks the ability to return them to their home country. Many Uch³¹ left Cambodia as a child refugee with his parents, fleeing persecution by the Khmer Rouge. As a teenager, Mr. Uch was convicted of armed robbery (he drove the getaway car) and, upon serving his criminal sentence, was transferred to immigration detention. Although his conviction rendered him deportable, the United States lacked a repatriation agreement with Cambodia. Consequently, Mr. Uch was lost in legal limbo and spent 28 months in immigration detention waiting to be deported. Mr. Uch eventually filed a habeas corpus petition and was released under supervision. For the past 12 years, he has regularly reported to ICE. He has consistently been employed, married a U.S. citizen, and has a four-year-old American citizen daughter. He is an active contributing member of his community, working with young Cambodian immigrants as a mentor and community mediator, and also helps lead a Buddhist society. Last year, the Governor of the State of Washington pardoned Mr. Uch for his conviction.

Sadly, Reverend Soeoth and Mr. Uch are but the tip of the ICE-berg.³² Under our current detention system, Reverend Soeoth, Mr. Uch, and thousands more like them wasted years of their lives in immigration prison for no reason, unable to work, and separated from their families and communities, at tremendous expense to U.S. taxpayers.

An Even More Draconian Lock-Up System

The relatively “happy endings” for Rev. Soeoth and Many Uch would be unlikely to take place if an indefinite detention scheme became law. Under H.R. 1932, for example, Mr. Uch would face indefinite—or potentially life-long—detention unless he could be removed. In particular, the bill authorizes the indefinite detention of a person convicted of one “aggravated felony”—a sweeping term that includes crimes that are neither aggravated nor a felony, including many minor drug offenses and petty offenses, such as passing a bad check, as well as shoplifting, with a prior conviction³³—and certified as presenting a special danger to public safety. The bill also would allow DHS to detain thousands of harmless individuals, such as asylum-seekers—such as asylum-seekers like Rev. Soeoth and lawful permanent residents returning from abroad—during their removal proceedings, which could take months or years to conclude, while denying them a bond hearing. The bill could also result in the elimination of bond hearings for persons who enter the United States without inspection at a port of entry, regardless of how long they are detained. Finally, the bill would mandate the detention of individuals who were convicted of crimes years or even decades ago, and who have served their sentences and have been living responsible lives since that time.

Neither the facts nor good policy merit expanding our immigration detention system. The assumption that detention should be a fundamental tenet of immigration policy has already been tried and failed. As our current immigration detention system demonstrates, detention of immigrants costs money, ignores constitutional safeguards, and isn’t necessary to achieve our policy goals. Proposals like H.R. 1932 essentially add insult to injury, burdening the taxpayer and the immigrant alike in the name of the “immigrants as criminals” myth.

A Bill Taxpayers Cannot Afford

Expanding detention is a massive waste of government resources. Proposals such as Congressman Smith’s would radically expand an immigration detention system that costs taxpayers at least \$122 per detainee per day, or \$44,500 per detainee per year, or \$166 per detainee per day, or \$60,590 per detainee per year, with payroll costs included.³⁴ In contrast, supervised alternatives to detention—such as periodic reporting requirements and travel restrictions—cost from as low as 30 cents up to 14 dollars per person each day.³⁵ DHS has officially stated that it must prioritize which immigrants it detains because of limited resources,³⁶ and the House Report accompanying the 2010 appropriations bill stated that DHS’s highest priority should be the removal of aliens “convicted of serious crimes.”³⁷ These goals are undermined by legislation allowing and often requiring the detention of immigrants who do not fit within those priorities.

In this respect, H.R. 1932—or any proposal calling for more detention—is fundamentally out of step with the times. Budget shortfalls of historic proportions are finally prompting policy-makers to realize that less punitive approaches to criminal justice not only make more fiscal sense, but better protect our communities. States across the country have increasingly abandoned “tough on crime” policies and passed bipartisan reforms to reduce their prison

populations and budgets—and experienced declines in their crime rates while these new policies were in place.³⁸ Conservative leaders like Newt Gingrich have called upon their Republican brethren to get “Right on Crime” and advance policies that would “save on costs without compromising public safety by intelligently reducing their prison populations.”³⁹ It makes no sense to be *expanding* our immigration lock-up system when policy-makers on both the right and the left have come to understand that mass incarceration costs too much and does little to make us safer.

An Unconstitutional Proposal

Long-term detention legislation also runs contrary to our fundamental commitments to individual liberty and due process of law. The Due Process Clause of the Fifth Amendment to the Constitution states: “No person . . . shall . . . be deprived of life, liberty, or property, without due process of law.”⁴⁰ For more than 120 years, the Supreme Court has recognized that this provision “applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”⁴¹ In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court recognized that “[f]reedom from imprisonment—from Government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” For this reason, the Court held that immigration detention violates due process unless it is reasonably related to its purpose of ensuring that immigrants do not abscond. Due process requires a special justification for detention that outweighs its significant deprivation of liberty as well as “strong procedural protections.”⁴² As detention becomes prolonged, the deprivation of liberty becomes greater, requiring an even stronger justification and more rigorous procedural protections.⁴³

H.R. 1932 does not even begin to approach these basic requirements. Rather, the bill would deprive countless individuals like Reverend Soeoth or Mr. Uch of their liberty without sufficient justification or adequate procedural safeguards. In *Zadvydas*, the Court addressed the indefinite—or potentially lifelong—detention of individuals, like Mr. Uch, whom the government cannot deport. This may be because the individual is stateless; the U.S. lacks a repatriation agreement with the destination country; or the destination country refuses to issue travel documents. The Court in *Zadvydas* held that detaining such individuals indefinitely raised serious due process concerns.⁴⁴ The Court therefore interpreted the immigration detention statutes to authorize the detention of individuals awaiting removal for a “presumptively reasonable” six-month period of time. ICE must release most detainees if there is no “significant likelihood of removal in the reasonably foreseeable future.”⁴⁵ By authorizing the indefinite detention of a broad swath of immigrants the government cannot remove, H.R. 1932 is simply the latest effort to overturn *Zadvydas* (one of many over the years), and thus to attempt to deny fundamental due process to immigrants.

H.R. 1932’s authorization of prolonged detention without bond hearings raises serious constitutional concerns as well. In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court upheld the constitutionality of mandatory detention during the pendency of immigration proceedings. However, the Court only did so where detention lasted for the “*brief* period necessary for [completing] removal proceedings”—a period that typically “lasts roughly a

month and a half in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal [to the Board of Immigration Appeals].”⁴⁶ Accordingly, since *Demore*, a growing consensus of federal courts has recognized that the *prolonged* detention of immigrants in the absence of bond hearings raises serious due process concerns because of the greater deprivation of liberty.⁴⁷ By creating a regime that robs immigration judges of the authority to hold bond hearings in cases where DHS has incarcerated an immigrant for a prolonged period of time, H.R. 1932 and bills like it violate the Due Process Clause.

Unnecessary Detention

Efforts to expand immigration detention do not promote public safety. For instance, H.R. 1932 authorizes the detention of thousands of harmless immigrants—including asylum-seekers like Reverend Soeoth and longtime lawful permanent residents—for as long as it takes for their immigration cases to be decided, while denying them bond hearings to determine whether they need to be locked up in the first place. The bill could also result in the elimination of bond hearings, regardless of length of detention, for the numerous individuals who enter the country without inspection in order to seek work or reunite with their families. Lengthy delays in immigration courts, the Board of Immigration Appeals, and the federal courts, and the complex nature of immigration cases, ensure that many individuals will languish in detention for months or years, even though they do not pose a flight risk or danger to the community.⁴⁸

Notably, Representative Smith himself conceded at his bill’s markup that the expanded detention of asylum-seekers does not primarily advance public safety, but rather seeks to deter fraudulent asylum applications—a rationale at odds with his prior touting of the bill as narrowly targeted to detain criminals.⁴⁹ However, a range of administrative mechanisms—such as corroboration requirements and credibility determinations—are already in place to address fraud. More important, to the extent that improvement is needed in immigration adjudications, detention is one of the least effective means to address larger concerns about our broken immigration system.

Yet another “innovation” in expanding detention under H.R. 1932 is its treatment of persons who have been at liberty for years, leading productive lives. So long as the noncitizen could be charged with removability based on one of the grounds set forth in the mandatory detention statute, it would make no difference when the triggering offense was committed—it might have taken place decades before the statute was enacted—or that the individual never even served any time in jail for that offense. Rather, if an individual were the subject of any form of criminal custody after the statute’s effective date, he or she would be mandatorily detained.

This proposal would lead to the detention of many individuals who present no flight risk or danger to the community. As courts have recognized, mandatory detention is unwarranted where noncitizens who committed an offense and were released from custody for that offense a considerable time ago generally do not present a great risk of danger or flight.⁵⁰ Moreover, the new provision needlessly compromises the ability of immigrants who have some of the strongest claims against removal, based on their family ties and productive lives in the

community, to meaningfully defend their right to remain in the United States. There is no good reason why such individuals should not be able to present their case for release to an immigration judge.

Nor does public safety require the indefinite detention of individuals the government cannot deport. The government already has substantial authority available to deal with cases of truly “dangerous aliens.” First, immigrants are subject to the same criminal laws that apply to all persons in the United States. Indeed, any immigrant convicted of a crime has already been sentenced by a judge with access to all available information concerning the offense and the perpetrator. That judge determined the appropriate sentence, taking into account considerations of public safety. Immigrants who violate the terms of probation or parole arising from a criminal sentence can have their release revoked, resulting in their return to prison.

Second, immigrants who suffer from a mental illness that renders them a danger to themselves or others, including sex offenders, can be civilly committed under existing state law after serving their criminal sentences. Public health measures such as quarantine laws also apply to non-citizens and citizens alike.⁵¹ Finally, the immigration laws provide for the prolonged detention of immigrants who cannot be removed, but whose release would pose a threat to national security. The USA PATRIOT Act of 2001 addressed the “mandatory detention of suspected terrorists,” and through that provision authorizes the detention of non-citizens who cannot be removed, provided that they actually present a danger to national security.⁵² There is no need to distort the purpose of the immigration detention system in order to ensure public safety.

Conclusion

In a time of fiscal crisis, it is incumbent on policy-makers to take a hard look at what the government’s growing expenditures on immigration detention have actually bought. Prolonged and indefinite immigration detention is costly, wasteful, and contrary to our constitutional values. Rather than expand our detention system based on the myth of the ubiquitous “criminal alien,” Congress and the Obama administration should be limiting detention mandates and making more effective use of the government’s limited law enforcement resources. As in the criminal justice context, we should look first to community-based forms of supervision to address concerns about flight risk and danger, treating physical custody as a measure of last resort. Moreover, where individuals are detained, they should be uniformly provided with bond hearings before an immigration judge regarding whether their incarceration is justified. In America, liberty—not imprisonment—should be the norm for everyone, and meaningful review of detention should be available to all. Proposals that institutionalize expanded detention for immigrants are an affront to these values and to common sense.

ENDNOTES

¹ See, e.g., Stuart Anderson, *Immigrants and Crime: Perception vs. Reality*, Immigration Reform Bulletin, Cato Institute (June 2010), available at http://www.cato.org/pubs/irb/irb_june2010.pdf (discussing recent studies showing that immigrants are less likely to commit crimes than the native-born).

² See H.R. 1932, Bill Summary & Status, <http://hdl.loc.gov/loc.uscongress/legislation.112hr1932>.

³ See Unofficial Tr. of Markup of H.R. 1932, the Keep Our Communities Safe Act of 2011, by the H. Comm. on Judiciary, 112th Cong. 28-32; 39-47 (2011) [hereinafter Markup Transcript], *available at* <http://judiciary.house.gov/hearings/pdf/7%2014%2011%20HR%201932%20HR%202480%20HR%201002.pdf>.

⁴ Rep. Lamar Smith, Letter to the Editor (“Criminal Immigrants Should Be Detained”), Miami Herald, June 23, 2011, *available at* <http://www.miamiherald.com/2011/06/23/2281984/criminal-immigrants-should-be.html>.

⁵ U.S. Department of Homeland Security, Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2012 Congressional Budget Justification [hereinafter FY 2012 Budget Justification], at 57, *available at* <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>.

⁶ *Id.*

⁷ Office of the Inspector General, U.S. Department of Justice, Audit Report 97-05 (1/97), Immigration and Naturalization Service Contracting for Detention Space, Jan. 1997, at 2, *available at* <http://www.justice.gov/oig/reports/INS/a9705/index.htm>.

⁸ National Immigration Forum, *Math of Immigration Detention* (Aug. 2011), at 2, *available at* <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

⁹ Office of Immigration Statistics, Annual Report, Immigration Enforcement Actions: 2010, p. 1, *available at* <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

¹⁰ See Roberts, Michelle, *AP Impact: Immigrants face detention, few rights*, Wash. Post. (Mar. 13, 2009); ACLU, *Issue Brief: Prolonged Detention of Individuals Who Are Challenging Removal* (July 2009), *available at* http://www.aclu.org/files/images/asset_upload_file766_40474.pdf.

¹¹ FY 2012 Budget Justification, at 57.

¹² *Math of Immigration Detention*, at 2.

¹³ FY 2012 Budget Justification, at 57.

¹⁴ *Id.* at 938. By adding 600 beds, the House Homeland Security appropriations bill would lead to an additional expenditure of \$27 to \$36 million.

¹⁵ See, e.g., *Matter of Patel*, 15 I&N Dec. 666, 666 (BIA 1976) (“An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, . . . or that he is a poor bail risk.” (citations omitted)).

¹⁶ Aggravated felonies originally encompassed only murder, drug-trafficking, or trafficking in firearms. See Anti-Drug Abuse Act, § 7343(a)(4), Pub. L. No. 100-690, 102 Stat. 4181 (1988). In 1990, in response to legal challenges, Congress soon amended the mandatory detention provision to provide lawful permanent residents with a bond hearing to establish their eligibility for release. In 1991, this exemption was extended to any “lawfully admitted” noncitizen. Immigration Act of 1990, § 504, Pub. L. No. 101-649, 104 Stat. 4978, 5049 (1990); Miscellaneous and Technical Immigration and Naturalization Amendments Act § 306, Pub. L. No. 102-232, 105 Stat. 1733, 1751 (1991).

¹⁷ Immigration and Nationality Technical Corrections Act of 1994, § 222, Pub. L. no. 103-416, 108 Stat. 4305, 4320-22 (1994).

¹⁸ Antiterrorism and Effective Death Penalty Act, § 440(c), Pub. L. No. 104-132, 110 Stat. 1214, 1277 (1996).

¹⁹ According to DHS data, the majority of immigration detainees from 2005 through 2009 had no criminal convictions whatsoever. TRAC Immigration, *Detention of Criminal Aliens: What Has Congress Bought?* (Feb. 11, 2010), *available at* <http://trac.syr.edu/immigration/reports/224/index.html>.

²⁰ According to Department of Justice statistics, a mere 8.3 percent of the pending immigration court caseload for FY 2011 is made up of “criminal” cases—that is cases involving individuals charged with criminal activities or actions adverse to national security. In contrast, 90 percent of pending cases involved immigration law violations such as overstaying a visa or failing to meet certain procedural requirements. TRAC Immigration, *Rising Immigration Backlog at All-time High, Yet Criminal, National Security, and Terrorism Cases Fall* (Sept. 14, 2011), <http://trac.syr.edu/immigration/reports/261/> (reporting data through July 2011).

²¹ For example, the Office of Immigration Statistics reported that in 2005, 56% of criminal convictions forming the basis for deportations were non-violent drug or illegal reentry crimes; an additional 14.6% were non-specified but non-violent crimes. See, e.g., Mary Dougherty, Denise Wilson, and Amy Wu, U.S. Dep’t of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2005*, Table 4, November 2006, at 5; see also Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy* (July 16, 2007). In a report analyzing enforcement data from 1997 to 2007, Human Rights Watch found that some of the most common crimes for which people were deported were relatively minor offenses, such as

marijuana and cocaine possession or traffic offenses. Among legal immigrants who were deported, 77 % had been convicted for such nonviolent crimes. Human Rights Watch, *Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses* (Apr. 15, 2009).

²² See Dora Schiro, U.S. Immigration and Customs Enforcement, Immigration Detention Overview and Recommendations (Oct. 2009), at 2, available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

²³ As of January 22, 2011, there were 13,583 participants in the ICE's Full Service program, in which contractors provide the equipment and monitoring services along with case management, and category, and 3,871 participants in the Technology-Assisted TA program, in which the contractor provides the equipment but ICE continues to supervise the participants. FY 2012 Budget Justification, at 43.

²⁴ *Id.* at 44.

²⁵ Anil Kalhan, Rethinking Immigration Detention, 110 Colum. L. Rev. Sidebar 40, 55 n.93 (2010), available at http://www.columbialawreview.org/assets/sidebar/volume/110/42_Anil_Kalhan.pdf.

²⁶ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

²⁷ ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-8 (2010), available at <http://new.abanet.org/immigration/pages/default.aspx>.

²⁸ See 8 U.S.C. § 1226(a).

²⁹ See 8 U.S.C. § 1226(c).

³⁰ See 8 U.S.C. § 1225(b). Instead of a proper hearing before a neutral-decision maker, these individuals have recourse only to discretionary parole for "urgent humanitarian reasons" or for "significant public benefit" where the individual presents neither a security risk nor a risk of absconding. 8 U.S.C. § 1182(d)(5)(A).

³¹ Mr. Uch's story was featured in the PBS documentary *Sentenced Home*, <http://www.pbs.org/independentlens/sentencedhome/>.

³² For the stories of other individuals subject to prolonged and indefinite immigration detention, see *Keep Our Communities Safe Act of 2011: Hearing on H.R. 1932 Before the H. Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. (2011), statement of Ahilan Arulanantham, Deputy Legal Director, American Civil Liberties Union of Southern California and statement of the American Immigration Lawyers Association.

³³ 8 U.S.C. § 1101(a)(43).

³⁴ *Math of Immigration Detention* (Aug. 2011), at 2. The Congressional Budget Office recently reported that "implementing H.R. 1932 would have no significant costs to the federal government." Congressional Budget Office, Cost Estimate for H.R. 1932 (Aug. 8, 2011). The estimate is conclusory and does not acknowledge the numerous expanded detention mandates H.R. 1932 creates. Strikingly, the cost estimate entirely ignores the new provisions of H.R. 1932 authorizing prolonged detention without bond hearings during the pendency of removal proceedings and expanding the mandatory detention of noncitizens charged with removal based on crimes.

³⁵ Kalhan, 110 Colum. L. Rev. Sidebar at 55 n.93 (2010).

³⁶ See Memorandum from John Morton, Assistant Secretary, U.S. Immigration and Customs Enforcement, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, at 1 (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (stating that "ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest enforcement priorities, namely national security, public safety, and border security").

³⁷ H.R. Report 111-157, at 8 (2009).

³⁸ See generally, American Civil Liberties, *Smart Reform Is Possible* (Aug. 2011), available at www.aclu.org/files/assets/smartreformispossible.pdf.

³⁹ Newt Gingrich & Pat Nolan, *Prison reform: A smart way for states to save money and lives*, Wash. Post (Jan. 7, 2011), available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html>.

⁴⁰ U.S. Const. amend. V.

⁴¹ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

⁴² *Id.* at 690-91.

⁴³ See *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997).

⁴⁴ *Zadvydas*, 533 U.S. at 690.

⁴⁵ *Id.* at 701. The Court extended the holding in *Zadvydas* to persons ordered removed on grounds of inadmissibility in *Clark v. Martinez*, 543 U.S. 371 (2005).

⁴⁶ *Demore*, 538 U.S. at 513, 530 (emphasis added).

⁴⁷ See e.g., *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011) (construing 8 U.S.C. § 1231(a)(6) to require a bond hearing at six months of detention); *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (both construing 8 U.S.C. § 1226(c) as only authorizing detention for “expeditious” removal proceedings in order to avoid the serious constitutional problem of prolonged mandatory detention); *Diop v. ICE/Homeland Security*, No. 10-1113, slip op. at 16, 20 (3d Cir. Sept. 1, 2011) (holding that three-year long detention without a bond hearing violated due process and construing INA § 236(c) as only authorizing detention “for a reasonable amount of time” before the government bears the burden of proving the necessity of continued detention at an individualized bond hearing); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003) (construing § 1226(c) as only authorizing mandatory detention for the period of time reasonably needed to conclude proceedings promptly); *Welch v. Ashcroft*, 293 F.3d 213, 224 (4th Cir. 2002) (holding, prior to *Demore*, that “[f]ourteen months of incarceration . . . of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights” to be impermissible); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 468-71 (D. Mass. 2010) (construing § 1226(c) to implicitly require that removal proceedings be completed within a reasonable period of time; if not, detention can only continue after an individualized determination of flight risk and dangerousness); *Alli v. Decker*, 644 F. Supp. 2d 535, 539 (M.D. Pa. 2009) (noting “the growing consensus . . . throughout the federal courts” that prolonged mandatory detention raises serious constitutional problems).

⁴⁸ TRAC Immigration, *Immigration Court Decision Times Lengthen* (July 28, 2011), available at <http://trac.syr.edu/immigration/reports/257/> (reporting that during the first six months of FY 2011, the immigration court proceeding took average on average 302 days—up 7.5 percent in the last six months, and almost 30 percent higher than the average disposition time during FY 2009); TRAC Immigration, *Immigration Case Backlog Still Growing in FY 2011* (Feb. 7, 2011), available at <http://trac.syr.edu/immigration/reports/246/> (reporting that the backlog of immigration cases in the immigration court system is more than a third higher (44 percent) than levels at the end of FY 2008); Judicial Business of the U.S. Courts, Annual Report of the Director 9, Table B-4C (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/judicialbusinesspdfversion.pdf> (reporting median time of 16.7 months from filing to final disposition of administrative agency appeals).

⁴⁹ Markup Transcript at 30.

⁵⁰ See *Saysana v. Gillen*, 590 F.3d 7, 18 (1st Cir. 2009) (reasoning that “the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be”) (citing cases).

⁵¹ See Kathleen S. Swendiman and Jennifer K. Elsea, *Federal and State Quarantine and Isolation Authority*. Congressional Research Service 5-6 (Jan. 23, 2007), available at <http://www.fas.org/sgp/crs/misc/RL33201.pdf>.

⁵² See 8 U.S.C. § 1226a. In addition, existing federal regulations permit DHS to indefinitely detain certain non-citizens who cannot be removed in certain circumstances—where releasing the individual would pose a danger to the public on account of the person’s highly contagious disease, would have adverse foreign policy consequences, would pose significant national security or terrorism risks, and would pose a special danger to the public because the person has been convicted of a crime of violence, possesses a mental condition or personality disorder and is likely to engage in future violence because of behavior associated with that condition or disorder, and no conditions of release can reasonably be expected to ensure public safety. 8 C.F.R. § 241.14. The federal courts are divided on the validity of these regulations in light of *Zadvydas* and *Clark v. Martinez*, 543 U.S. 371 (2005). Compare *Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008), with *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008), and *Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004).