IMMIGRATION DETENTION IS NEVER "PRESUMPTIVELY REASONABLE": STRENGTHENING PROTECTIONS FOR IMMIGRANTS WITH FINAL REMOVAL ORDERS

Elizabeth Hannah*

*Immigration detention is a central feature of the United States' immigration system. Noncitizens facing removal are detained in staggering numbers throughout the removal process, from the initiation of legal proceedings to the issuance of a final removal order. Moreover, as the U.S. government's reliance upon immigration detention has grown, the Supreme Court has systematically stripped noncitizens of important substantive and procedural protections. This is especially true in the post-removal-order context, where a series of recent decisions have placed more people than ever at risk of prolonged detention without a bond hearing. Three cases in particular—*Johnson v. Guzman Chavez *(2021),* Johnson v. Arteaga-Martinez *(2022), and* Garland v. Aleman Gonzalez *(2022)—have increased the likelihood that noncitizens subject to post-removal-order detention will remain incarcerated for months or years, even if they have pending claims for relief. This Note describes each of these three cases and explains how, together, they severely undermine the rights of noncitizens with final removal orders.*

This Note further argues that people facing post-removal-order detention should be entitled to rigorous due process protections. Even though detention constitutes a clear deprivation of liberty, the Supreme Court has held that six months of post-removal-order detention is "presumptively reasonable." This Note criticizes that premise and asserts that no period of immigration detention is presumptively reasonable. In other words, even if the Court had decided Guzman Chavez*,* Arteaga-Martinez*, and* Aleman Gonzalez *in favor of the noncitizen plaintiffs, the existing framework would still be insufficient to protect immigrants in post-removal-order detention from experiencing protracted and unnecessary trauma. This Note therefore posits that, at minimum, immigrants with final removal orders should*

* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2023. Thank you to Professors Eunice C. Lee and Shefali Milczarek-Desai, who have provided invaluable support, advice, and mentorship throughout my law school career. Thank you also to the entire *Arizona Law Review* team for bringing this Note to publication. Finally, thank you to Mom, Dad, and Will for being the best family ever.

receive a bond hearing before an immigration judge at the close of the 90-day mandatory detention period. While more radical solutions like detention abolition are ultimately in order, a 90-day bond hearing requirement would at least provide noncitizens facing post-removal-order detention a meaningful opportunity to secure release from custody.

TABLE OF CONTENTS

INTRODUCTION

Every day, tens of thousands of people are incarcerated by Immigration and Customs Enforcement ("ICE") in immigration detention centers across the United

States.[1] In 1994, the Immigration and Naturalization Service ("INS") (the predecessor to the Department of Homeland Security, or "DHS") detained fewer than 7,000 people per day on average.[2] By 2017, that number had increased more than fivefold to over 38,000 people per day.[3] Just before the COVID-19 pandemic changed the landscape of immigration policy and enforcement in 2019, the "daily detained population exceeded 52,000" people.[4] Even as the novel coronavirus ravaged incarcerated populations, posing an immediate, grave threat to people in detention, ICE continued to detain approximately 20,000 people per day.[5]

Immigration detention in the United States is technically a form of civil, rather than criminal, confinement, but "[t]his distinction . . . is virtually a legal fiction."[6] The majority of "[i]mmigration detention facilities, even those holding women and children, look and operate like prisons," and in many cases "immigration and criminal detainees are . . . held together, side by side in the same facilities."[7] Although the characterization of immigration detention as civil rather than criminal comes from the notion that deportation and immigration detention are "nonpunitive,"[8] the actual "experience of confinement . . . is no less oppressive than the experience within the criminal justice system."[9] As a practical matter, immigration detention is punishment.

To avoid acknowledging that immigration detention amounts to punishment, courts have long justified its use on the theory that it is "necessary to

---

1. Emily Ryo & Ian Peacock, *The Landscape of Immigration Detention in the United States*, AM. IMMIGR. COUNCIL 6–7 (Dec. 5, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf [https://perma.cc/PE4D-56SF].

2. *Id.* at 6.

3. *Id.* at 6–7.

4. *Fact Sheet: Immigration Detention in the United States*, NAT'L IMMIGR. F. (Jan. 27, 2021), https://immigrationforum.org/article/fact-sheet-immigration-detention-in-the-united-states/ [https://perma.cc/LX5F-MJGS] [hereinafter *Fact Sheet*]; *ICE Detainees*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html [https://perma.cc/EE7V-84JN] (last visited Oct. 24, 2021).

5. *Id. See also Immigration Detention and Covid-19*, BRENNAN CTR. FOR JUST. (Oct. 14, 2021), https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19 [https://perma.cc/58UB-SL8R].

6. Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 84 (2017).

7. *Id.*

8. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (explaining that detention violates the Fifth Amendment's Due Process Clause unless it "is ordered in a *criminal* proceeding with adequate procedural protections" or ordered in certain "nonpunitive" situations like immigration proceedings); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to [a person's] own country . . . .").

9. Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 119 (2018).

give effect to the provisions for the exclusion or expulsion" of noncitizens.[10] In other words, immigration detention is considered necessary to remove people without legal status from the United States.[11] On this basis, Congress has enacted three main statutes that govern immigration detention: 8 U.S.C. §§ 1225, 1226, and 1231.[12] These statutes broadly cover two categories of immigrants: people in ongoing removal proceedings detained pursuant to § 1225 or § 1226 and people who have already been ordered removed from the United States but whose deportations have not yet been effectuated.[13] Detention authority for this latter group—namely, people with outstanding final removal orders—derives from § 1231.[14]

Before engaging further with law and scholarship surrounding immigration detention, it is necessary to articulate an important caveat: because the purpose of immigration detention is, at least ostensibly, to effectuate removal, this Note assumes the premise that sovereign nations have inherent authority to deport noncitizens. While this premise finds support in caselaw,[15] scholars have begun to question "whether deportation continues to deserve the presumption of legitimacy it currently enjoys."[16] Deportation, writes Professor Angélica Cházaro, "is inseparable from violence," and "neither sovereignty nor safety justify" the state's continued infliction of such violence on immigrants and their communities.[17] That is to say,

---

10. Wong Wing v. United States, 163 U.S. 228, 235 (1896). *See also Zadvydas*, 533 U.S. at 699–700 (noting that the "basic purpose" of the statute at issue, which authorized detention, was to "assur[e] the [detained person's] presence at the moment of removal").

11. This assertion is questionable at best. People released under a diverse array of alternatives to detention, including supervised release, electronic monitoring, and community-based programs, generally comply with court orders and appear at their removal hearings. Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2155–70 (2017); Isaí Estévez, Note, *A Case for Community-Based Alternatives to Immigration Detention*, 64 ARIZ. L. REV. 1185, 1204–11 (2022).

12. HILLEL R. SMITH, CONG. RSCH. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 8 & n.55 (2019). This Note refers to all statutory provisions by citing to the U.S. Code. The Immigration and Nationality Act ("INA") provisions corresponding to 8 U.S.C. §§ 1225, 1226, and 1231 are, respectively, INA §§ 235, 236, and 241. *Id.* For a full set of conversions from the U.S. Code to the INA, see *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act [https://perma.cc/M2CG-7GVP] (last visited Nov. 20, 2022).

13. *See* SMITH, *supra* note 12, at 60–61 (comparing major statutory detention provisions).

14. *Id.* at 61.

15. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 587–88 (1952) ("That [noncitizens] remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state."); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

16. Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1046 (2021). *See also* Juliet P. Stumpf, *Crimmigration and the Legitimacy of Immigration Law*, 65 ARIZ. L. REV. 1 (2023) (exploring how procedural defects in crimmigration law undermine the legitimacy of the U.S. immigration system as a whole).

17. Cházaro, *supra* note 16, at 1049–50.

we can and should imagine a world where deportation does not exist at all. Meanwhile, because mass deportation and detention remain central to U.S. immigration policy, this Note focuses on due process concerns associated with post-removal-order detention under § 1231(a).

Through a recent trio of cases—*Johnson v. Guzman Chavez*,[18] *Johnson v. Arteaga-Martinez*,[19] and *Garland v. Aleman Gonzalez*[20]—the Supreme Court has increased the class of people subject to detention under § 1231(a) while limiting the procedural protections available to this same class. In doing so, the Court has severely undermined the rule announced in *Zadvydas v. Davis*, a seminal 2001 case holding that the government may not detain people indefinitely under the authority of § 1231.[21] *Zadvydas* identified six months as a "presumptively reasonable" period of post-removal-order detention without a custody hearing, concluding that detention past six months raises "serious constitutional concerns."[22] *Guzman Chavez*, *Arteaga-Martinez*, and *Aleman Gonzalez*, however, create a risk that thousands of people will be subject to detention *beyond* six months without receiving bond hearings, thus exacerbating the very constitutional concerns *Zadvydas* sought to address.

This Note begins by showing that *Guzman Chavez*, *Arteaga-Martinez*, and *Aleman Gonzalez* will negatively impact both the procedural and substantive rights of people detained under § 1231. First, Part I explains the statutory and regulatory framework governing immigration detention, particularly post-removal-order detention. Part II describes three ways that *Guzman Chavez*, *Arteaga-Martinez*, and *Aleman Gonzalez* undermine *Zadvydas*: (1) by expanding the number of people subject to post-removal-order detention; (2) by limiting the procedural protections available to people in post-removal-order detention; and (3) by preventing courts from issuing class-wide injunctive relief in challenges to post-removal-order detention. Together, these cases inflict trauma upon thousands of people while decreasing the likelihood that they will secure timely release from detention.

Parts III through V of this Note propose solutions to the problem of prolonged post-removal-order detention. Part III shows that individuals can still seek relief through habeas petitions in federal district courts, and it demonstrates that *Zadvydas* continues to play a significant role in these proceedings. In general, district courts still understand detention to become constitutionally suspect after six months—the "presumptively reasonable" detention period announced by *Zadvydas*. Part IV, moreover, emphatically agrees with the scholarship of immigrants' rights advocates who have proposed that district courts can go *further* than the *Zadvydas* Court and consider the possibility that detention becomes unconstitutional *before* six months. Specifically, Part IV builds on this scholarship by arguing that six

---

18. 141 S. Ct. 2271, 2280 (2021) (holding that § 1231 governs detention of people subject to reinstated removal orders).

19. 142 S. Ct. 1827, 1830 (2022) (holding that § 1231 does not require a bond hearing after six months of detention).

20. 142 S. Ct. 2057, 2062–63 (2022) (stripping district courts of the ability to issue class-wide injunctive relief in challenges to post-removal-order detention).

21. 533 U.S. 678, 682 (2001).

22. *Id.* at 682, 701.

months was not a presumptively reasonable period of detention at the time of *Zadvydas*, and it is no more reasonable today.

Finally, Part V proposes class-wide solutions to the problem of prolonged detention under § 1231. To be sure, the availability of individual habeas challenges offers an important avenue for relief, especially if district courts recognize that detention can become unconstitutional prior to six months. However, one can recognize the value of existing safeguards while also demanding heightened protections for immigrants facing prolonged detention. This Note argues that DHS should exercise its discretion to provide bond hearings to all immigrants subject to more than 90 days of post-removal-order detention.

I. STATUTORY AND REGULATORY FRAMEWORK FOR POST-REMOVAL-ORDER DETENTION

The statutes governing immigration detention in the United States cast a wide net. People can be, and regularly are, detained at every stage of their removal proceedings.[23] However, the specific statute authorizing a person's detention can be the deciding factor in determining when a person will be released from custody—and sometimes whether they will be released at all.[24] Importantly, even *after* a person has been ordered removed from the United States, the government can continue to detain them.[25] Post-removal-order detention regularly extends for months, and in some cases, it can last years.[26] To lay the groundwork for this Note, which focuses on post-removal-order detention, the Sections below describe the legal frameworks authorizing detention both during and after removal proceedings.

A. Detention Pending a Final Decision on Removal

In general, DHS has broad discretion over whether to detain noncitizens in ongoing removal proceedings.[27] Section 1226(a) authorizes the government to detain an individual "pending a decision on whether [the person] is to be removed from the United States."[28] Because detention under this statute is discretionary, DHS can simply choose to release a person detained under § 1226(a) at any time.[29] An

---

23. *See* SMITH, *supra* note 12, at 8 ("DHS's detention authority 'shifts as the [noncitizen] moves through different phases of administrative and judicial review.'").

24. *Compare, e.g.*, 8 U.S.C. § 1226(c) (*mandating* detention for certain classes of immigrants), *with* 8 U.S.C. § 1226(a) (setting forth grounds for *discretionary* detention).

25. § 1231(a)(1)(A), (a)(6) (requiring detention for 90 days following a removal order and, in some cases, allowing detention past the 90-day removal period).

26. *See, e.g.*, Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2294–95 (2021) (Breyer, J., dissenting) (explaining that it regularly takes at least a year to resolve withholding-only removal proceedings, during which time noncitizens are subject to post-removal-order detention). *Guzman Chavez* and withholding-only proceedings are explained in detail in Section II.A below.

27. SMITH, *supra* note 12, at 8–9 (describing INA § 236(a) as the "default" detention rule and noting that DHS "may" detain or release a person subject to detention under this provision). INA § 236(a) is codified at 8 U.S.C. § 1226(a). *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 12.

28. § 1226(a).

29. SMITH, *supra* note 12, at 60.

immigration judge ("IJ") can also order a person to be released on bond if the person is neither a flight risk nor a danger to society.[30]

Some immigrants in ongoing removal proceedings are subject to mandatory detention pursuant to § 1226(c).[31] This statute covers individuals with certain criminal or national security grounds of inadmissibility or deportability.[32] With highly limited exceptions, DHS does not have the authority to release this class of detained immigrants under any circumstances.[33] In addition, people mandatorily detained on criminal or national security grounds do not have the right to a bond hearing before an IJ.[34] Even though removal proceedings can take more than a year to resolve, Supreme Court precedent holds that detention under § 1226(c) without an individualized custody determination hearing does not violate due process.[35]

Finally, § 1225(b) controls detention for three classes of people: (1) immigrants in expedited removal proceedings; (2) "arriving aliens" who pass credible fear screenings and enter into removal proceedings governed by § 1229; and (3) "arriving aliens" placed directly into § 1229 proceedings.[36] People detained under § 1225(b), like those detained under § 1226(c), have no regulatory or statutory right to a bond hearing.[37] However, DHS may release members of this group for "humanitarian reasons or significant public benefit" under § 1182(d)(5).[38]

---

30. *Id. See also, e.g.*, Rajesh v. Barr, 420 F. Supp. 3d 78, 87 (W.D.N.Y. 2019) ("As to the applicable burden of proof, most courts that have decided the issue have concluded that Government must supply clear and convincing evidence that the [person] is a flight risk or danger to society.").

31. Pursuant to § 1226(c), "[t]he Attorney General *shall* take into custody" any person inadmissible or deportable for any offense covered in certain sections of § 1182(a) and § 1227(a). 8 U.S.C. § 1226(c) (emphasis added).

32. SMITH, *supra* note 12, at 60.

33. *Id.*

34. *Id.*

35. Demore v. Kim, 538 U.S. 510, 531 (2003). This decision is subject to criticism, especially because it relied on inaccurate statistics about the average length of removal proceedings. Grace Meng, *Bush Administration Gave U.S. Supreme Court Inaccurate Immigration Data*, HUMAN RTS. WATCH (Aug. 31, 2016, 3:16 PM), https://www.hrw.org/news/2016/08/31/bush-administration-gave-us-supreme-court-inaccurate-immigration-data# [https://perma.cc/R3EC-N37T]. In *Demore*, the Supreme Court gave significant weight to the government's assertion that mandatory detention "generally lasts four months on average." *Id.* However, in 2016, the Department of Justice revealed that "the average detention period was actually over one year" at the time *Demore* was decided. *Id.*

36. § 1225(b). *See also* SMITH, *supra* note 12, at 22–29. The term "arriving alien" refers to someone who attempts to enter the United States through a port of entry but is not admitted, or someone who is picked up by government officials "in international or United States waters and brought into the United States." 8 C.F.R. § 1.2. The word "alien" is dehumanizing and, where possible, will be replaced with "person," "immigrant," "noncitizen," or "individual" throughout this Note.

37. SMITH, *supra* note 12, at 60.

38. *Id.*

B. Post-Removal-Order Detention

Once a person has been ordered removed from the United States—for example, following § 1229 removal proceedings—the authority for their detention shifts from any one of the statutes described above to § 1231(a).[39] Under § 1231(a), DHS has 90 days to carry out a person's removal.[40] Detention during this 90-day removal period is mandatory, and "[u]nder no circumstance" may DHS release a person before the 90-day period has ended if the person has been found removable due to specific criminal or national security concerns.[41] In theory, if a person is not removed from the United States within the 90-day removal period, DHS should release them subject to supervision.[42] DHS regulations require that a person released at the close of the 90-day removal period regularly report to immigration officials, continue to assist DHS in obtaining travel documents, undergo physical and mental examinations as required, request advance permission to travel abroad, and notify DHS of address changes.[43]

Broad subclasses of immigrants, however, are subject to continued detention *beyond* the 90-day removal period. Under § 1231(a)(6), DHS may continue to detain the following categories of individuals: (1) any person who has been found inadmissible for any reason; (2) any person who has been found removable for failing to comply with the conditions of a nonimmigrant visa, committing certain crimes, or triggering terrorism and national security concerns; and (3) any person deemed "a risk to the community or unlikely to comply with [an] order of removal."[44]

DHS regulations set forth the process for 90-day custody reviews carried out pursuant to § 1231(a)(6).[45] At the 90-day custody review stage, a person seeking release has the burden of convincing DHS that they are not a flight risk or a danger to the community.[46] In deciding whether to release a person or continue detaining them, DHS considers (among other factors) the person's in-custody disciplinary record, criminal and immigration history, and ties to the United States.[47] The regulations do not provide for a bond hearing before an IJ.

The number of people detained past the 90-day removal period is significant. A 2019 Office of Inspector General ("OIG") Report took a snapshot of

---

39. *Id.* at 8. INA § 241(a) is codified at 8 U.S.C. § 1231(a).

40. § 1231(a)(1)(A). The removal period can also be extended beyond 90 days if a person refuses to comply in good faith with obtaining travel documents or acts to prevent their own removal. § 1231(a)(1)(C).

41. § 1231(a)(2). *See also* Brief of Amici Curiae the Am. Civ. Liberties Union et al. in Support of Petitioners at 4, United States v. Texas, 143 S. Ct. 442 (No. 22-58), 2022 WL 4383451, at *4.

42. § 1231(a)(3).

43. 8 C.F.R. § 241.5.

44. 8 U.S.C. § 1231(a)(6).

45. 8 C.F.R. § 241.4.

46. § 241.4(d)(1).

47. § 241.4(f).

people detained on a given day in 2017.[48] It found that, of 13,217 noncitizens detained with outstanding removal orders, 3,053 (nearly 25%) had been detained for more than 90 days.[49] The OIG Report identified multiple reasons for DHS's consistent failure to remove people within the 90-day removal period.[50] These reasons included: lengthy legal appeals; complications arranging flights and travel documents; immigrants' noncompliance with the removal process; immigrants' physical and mental health conditions; internal staffing shortages within ICE; and problems coordinating flight schedules.[51] As the OIG report demonstrates, DHS regularly detains people past the 90-day removal period.[52] Therefore, post-removal-order detention is an important subject for legal scholarship.

C. Zadvydas v. Davis *and Six Months of Post-Removal-Order Detention as "Presumptively Reasonable"*

Although § 1231(a)(6) itself does not limit the length of detention past the 90-day removal period, the Supreme Court has read implicit temporal limits into the statute.[53] Thus, the government may not detain people indefinitely following the issuance of a removal order, even if efforts to execute the removal order remain ongoing.[54]

Zadvydas is the leading Supreme Court case on the legality of detention past the 90-day removal period. In *Zadvydas*, the government argued that § 1231(a)(6) set no "limit on the length of time beyond the removal period" that a person could be detained, and therefore the Attorney General had complete discretion to authorize indefinite detention.[55] Under this interpretation of § 1231(a)(6), Mr. Zadvydas, the respondent, would have been subject to *seven years* of detention by the time the Supreme Court heard his case.[56] Because neither Germany (Mr. Zadvydas's last country of residence) nor Lithuania (Mr. Zadvydas's country of birth) would issue travel documents, Mr. Zadvydas was at risk of "permanent confinement" in immigration custody.[57]

The Supreme Court disagreed with the government's extreme interpretation of § 1231(a)(6). "Freedom from imprisonment," it noted, "lies at the

---

48. DEP'T OF HOMELAND SEC. OFF. OF INSPECTOR GEN., ICE FACES BARRIERS IN TIMELY REPATRIATION OF DETAINED ALIENS 3 (Mar. 11, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-28-Mar19.pdf [https://perma.cc/4M2T-5JRH].

49. *Id.*

50. *Id.* at 4–19.

51. *Id.*

52. *Id. See also Policy Brief: Increase in Indefinite ICE Detention Without Foreseeable Removal Dates During COVID-19 Pandemic*, AM. IMMIGR. COUNCIL 1–3 (Jan. 6, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/increase_in_indefinite_ice_detention_without_foreseeable_removal_dates_jan_2021.pdf [https://perma.cc/QT48-P56Y].

53. Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

54. *Id.*

55. *Id.* at 689 (internal quotations omitted).

56. *Id.* at 684. Mr. Zadvydas entered INS custody in 1994, and the Supreme Court heard his case in 2001. *Id.*

57. *Id.* at 684–85.

heart of the liberty that the Fifth Amendment's Due Process Clause Protects."[58] Furthermore, while the due process protections afforded to immigrants "may vary depending on status and circumstance," the Court made clear that people subject to final deportation orders fall within the ambit of the Due Process Clause.[59]

Reasoning that "[a] statute permitting indefinite detention of an [immigrant] would raise a serious constitutional problem," the *Zadvydas* Court held that detention under § 1231(a)(6) is "presumptively reasonable" for a period of up to six months.[60] The Court grounded its decision in the doctrine of constitutional avoidance, which requires courts to "ascertain whether a construction of [a] statute is fairly possible by which [a serious constitutional] question may be avoided."[61] Thus, to avoid analyzing whether § 1231(a)(6) violated the Constitution, the Court interpreted the statute to contain an implicit temporal limit.[62] Specifically, after six months of post-removal-order detention, a person who "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future" must be released unless DHS responds "with evidence sufficient to rebut that showing."[63]

At the time it was announced, *Zadvydas* was "a forceful repudiation by the Supreme Court of the kind of deference to immigration policy that the . . . government urged on the justices."[64] The case reinforced that the Constitution protects undocumented immigrants, and advocates believed that it "would offer significant help" in legal challenges to the constitutionality of immigration detention.[65] Recently, however, the Supreme Court has severely undermined *Zadvydas* in three ways: (1) by expanding the class of people subject to post-removal-order detention;[66] (2) by declining to read § 1231(a)(6) as requiring meaningful procedural protections;[67] and (3) by effectively precluding individuals who face more than six months of detention under § 1231(a)(6) from seeking class-wide injunctive relief in federal courts.[68]

II. THE WEAKENED LEGACY OF *ZADVYDAS* IN CLASS ACTION LITIGATION

Since 2001, the Supreme Court has consistently chipped away at *Zadvydas* by ruling against immigrants in detention-related challenges. Its rulings, particularly in recent years, have left thousands of people at risk of prolonged post-removal-

58. *Id.* at 690.
59. *Id.* at 693–94.
60. *Id.* at 690, 701.
61. *Id.* at 689 (internal quotations omitted).
62. *Id.*
63. *Id.* at 701.
64. Linda Greenhouse, *High Court Rules Immigrants Can't Be Confined Indefinitely*, N.Y. TIMES (June 28, 2001), https://www.nytimes.com/2001/06/28/national/high-court-rules-immigrants-cant-be-confined-indefinitely-2001062893036245541.html [https://perma.cc/YCR5-XQ39].
65. *Id.*
66. *See infra* Section II.A.
67. *See infra* Section II.B.
68. *See infra* Section II.C.

order detention with few procedural protections and limited avenues for class-wide relief. This Part describes three recent cases that, together, leave more people than ever at risk of prolonged detention following an order of removal.

First, in *Guzman Chavez*, the Supreme Court expanded the categories of immigrants subject to post-removal-order detention by holding that § 1231(a) authorizes detention for certain individuals in ongoing withholding-of-removal[69] proceedings.[70] Second, just a year later, *Arteaga-Martinez* held that § 1231(a) cannot be read to require that the government provide a bond hearing before an IJ once detention hits six months, even though *Zadvydas* identified six months as the point at which the government must justify continued detention.[71] This decision means that DHS's constitutionally dubious 180-day custody regulations are the only agency mechanism by which a person can seek custody review of § 1231(a) detention, even when that detention exceeds six months.[72]

Finally, *Aleman Gonzalez* all but eliminated the possibility of securing injunctive relief from post-removal-order detention on a class-wide basis.[73] Indeed, despite the promise of *Zadvydas* as a tool for challenging prolonged detention, the Supreme Court has rendered it effectively toothless in class action cases.[74] To the extent that *Zadvydas* still provides due process protections to immigrants facing six months or more of post-removal-order detention, it does so largely in the context of individual habeas proceedings.[75]

The following Sections discuss each of these recent Supreme Court decisions, highlighting their negative impacts on the rights of people detained pursuant to § 1231(a).

---

69. "Withholding of removal" is defined and explained in Section II.A below.

70. Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2280 (2021) ("We conclude that § 1231, not § 1226, governs the detention of [people] subject to reinstated orders of removal, meaning those [people] are not entitled to a bond hearing while they pursue withholding of removal.").

71. Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1830 (2022) ("The issue in this case is whether the text of § 1231(a)(6) requires the Government to offer detained noncitizens bond hearings after six months of detention in which the Government bears the burden of proving by clear and convincing evidence that a noncitizen poses a flight risk or a danger to the community. It does not.").

72. *See id.* at 1834 (describing the DHS's argument that bond hearings were not necessary because administrative custody reviews provided "adequate process"); *see also* Diouf v. Napolitano, 634 F.3d 1081, 1091 (9th Cir. 2011) (expressing skepticism as to whether DHS's 180-day custody review procedures satisfied constitutional due process requirements).

73. Garland v. Aleman Gonzalez, 142 S. Ct. 2057, 2062–63 (2022) ("We granted certiorari and instructed the parties to address whether [8 U.S.C. § 1252(f)(1)] deprived the District Courts of jurisdiction to entertain respondents' requests for class-wide injunctive relief. We hold that the statute has that effect."). Fortunately, *Aleman Gonzalez* did not strip district courts of jurisdiction to issue class-wide declaratory relief. Such a ruling "would . . . leave many noncitizens with no practical remedy whatsoever against clear violations by the Executive Branch." *Id.* at 2077–78 (Sotomayor, J., concurring in part and dissenting in part).

74. *See id.* at 2076–77.

75. *See infra* Part III.

A. The Expanded Scope of 8 U.S.C. § 1231(a)

At first glance, § 1231(a) appears to apply *only* to people who are no longer seeking immigration relief. Indeed, the provisions of § 1231(a) are triggered when a person is "ordered removed" from the United States, suggesting that they have no remaining avenues for obtaining legal status.[76] As it turns out, however, the Supreme Court's interpretation of § 1231(a) in *Guzman Chavez* means that some people in *ongoing*, fear-based immigration proceedings fall within the statute's detention provisions.[77] By holding that immigrants in "withholding-only proceedings," described below, are subject to detention pursuant to § 1231(a), the Supreme Court's decision in *Guzman Chavez* increased the number of people at risk of prolonged post-removal-order detention.

1. Withholding-Only Removal Proceedings

If DHS apprehends a person who was ordered removed from the United States and subsequently reentered the country without proper documentation, the person's "prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed."[78] People subject to reinstatement of removal are initially placed into an expedited deportation process that lacks a hearing and judicial review, and they are ineligible for nearly all forms of relief from removal.[79] Thus, individuals with reinstated removal orders cannot apply for asylum—a form of protection that provides a pathway to citizenship for individuals who have a "well-founded fear of persecution [in their home countries] on account of race, religion, nationality, membership in a particular social group, or political opinion."[80]

Although individuals with reinstated removal orders cannot apply for most types of immigration relief, there is an important exception to this broad rule: if a person "expresses a fear of returning to the country of removal," they are entitled to a "reasonable fear" interview conducted by an asylum officer.[81] If the officer determines that the person might qualify for relief in the form of either "withholding of removal" or protection under the Convention Against Torture ("CAT"), the person is referred to an IJ for full consideration of their claims.[82] Neither withholding of removal nor relief under the CAT offers a pathway to citizenship, but both withholding and CAT relief do protect individuals from removal to countries where they face persecution or torture.[83] Fear-based proceedings before an IJ involving people with reinstated removal orders are called "withholding-only proceedings."[84]

---

76. 8 U.S.C. § 1231(a)(1)(A).

77. Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2280 (2021).

78. § 1231(a)(5).

79. HILLEL R. SMITH, CONGR. RSCH. SERV., IF11736, REINSTATEMENT OF REMOVAL: AN INTRODUCTION 1–2 (2021), https://sgp.fas.org/crs/homesec/IF11736.pdf [https://perma.cc/8TR9-KAMV].

80. §§ 1101(a)(42)(A), 1158(b)(1)(A).

81. SMITH, *supra* note 79, at 1.

82. *Id.* at 1–2.

83. *Id.*

84. *Id.* Withholding-only proceedings are characterized by the presence of respondents for whom withholding of removal and protection under the CAT are the *only*

2. People in Withholding-Only Proceedings Are Detained Under § 1231(a)

In general, being "ordered removed" from the United States triggers the provisions of § 1231(a).[85] More specifically, detention becomes mandatory under § 1231(a) and the 90-day removal period begins when a person's removal order "becomes administratively final."[86] In many cases, the administrative finality of a removal order is a straightforward inquiry: if a person loses their case before an IJ and declines to appeal, the removal period begins immediately.[87] However, the "administrative finality" of reinstated removal orders for individuals in withholding-only proceedings remained an open question until *Guzman Chavez*, in large part because such individuals have pending fear-based claims for immigration relief.[88]

In *Guzman Chavez*, the Supreme Court addressed this issue and held that reinstated removal orders are "administratively final," even for people seeking relief in withholding-only proceedings.[89] As a result, people in withholding-only proceedings are subject to post-removal-order detention under § 1231(a).[90] The Court explained that individuals in withholding-only proceedings have, without exception, been "previously removed pursuant to a valid order of removal."[91] It then reasoned that a removal order becomes "administratively final" for purposes of § 1231(a) once agency proceedings have concluded.[92] Because reinstated removal orders cannot be reviewed or reopened by the Board of Immigration Appeals

---

available forms of relief. *The Difference Between Asylum and Withholding of Removal*, AM. IMMIGR. COUNCIL (Oct. 6, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf [https://perma.cc/WU24-PGUU]. People applying for asylum (the most protective form of fear-based relief from removal) can, and usually do, simultaneously apply for withholding of removal and relief under the CAT to maximize their chances of success. *See Asylum Manual, 5-11 Immigration Basics, 6 Withholding of Removal*, IMMIGR. EQUAL., https://immigrationequality.org/asylum/asylum-manual/immigration-basics-withholding-of-removal/ [https://perma.cc/2VVV-65J9] (last visited Jan. 18, 2023). Thus, a person can seek withholding of removal without being in withholding-only proceedings. Withholding-only proceedings are often the next-best option for a person who is statutorily ineligible for asylum.

85. § 1231(a)(1)(A).

86. § 1231(a)(1)(B)(i). It can also be triggered by certain other qualifying events set forth in § 1231(a)(1)(B)(ii) and (iii), none of which are relevant here.

87. *When Is an Order of Removal Final*, NOLO, https://www.nolo.com/legal-encyclopedia/when-is-order-removal-final.html [https://perma.cc/X8PM-VMTY] (last visited Sept. 25, 2022) ("If you do not reserve the right to appeal, then the Order of Removal is final on the date that the IJ enters it. In that case, ICE may take you into custody immediately after your removal hearing.").

88. *See* Mohamed T. Hegazi, Note, *To Be or Not to Be Detained: Why Reinstated Removal Orders During Withholding-Only Proceedings Are Not Administratively Final*, 15 SETON HALL CIR. REV. 57, 58–61 (2019) (describing the circuit split as to whether reinstated removal orders should be considered "administratively final").

89. 141 S. Ct. 2271, 2284 (2021).

90. *Id.* at 2280.

91. *Id.* at 2284.

92. *Id.* at 2284–85.

("BIA"), the majority deemed them "administratively final" and sufficient to trigger § 1231(a) detention.[93]

Approximately 3,000 individuals are placed in withholding-only proceedings each year.[94] DHS has authority under § 1231(a)(6)[95] to detain them past the 90-day removal period, subject only to the constraints articulated in *Zadvydas*. Because withholding-of-removal proceedings regularly take more than a year to resolve,[96] *Guzman Chavez* has created an entirely new class of people likely to be detained for six months or more. Furthermore, *Guzman Chavez* represents just the first in a series of Supreme Court cases that make individuals increasingly vulnerable to prolonged detention under § 1231(a)(6).[97]

B. Section 1231(a)(6) Lacks Important Procedural Protections

Just one year after increasing the number of people subject to detention under § 1231(a), the Supreme Court in *Arteaga-Martinez* held that this same class does *not* have a statutory right to a bond hearing before an IJ after six months of post-removal-order detention.[98] Thus, while § 1231(a)(6) does not permit indefinite detention under *Zadvydas*, neither does it require (as a matter of statutory interpretation) that the government provide a bond hearing before a neutral arbiter at the six-month mark.[99] DHS's 180-day custody review procedures, therefore, offer the sole remaining administrative protection for people facing prolonged detention

---

93. *Id.* The Supreme Court had an alternative option in *Guzman Chavez*. *Id.* at 2293 (Breyer, J., dissenting). It could have found, as the dissent did, that § 1226(a) governs the detention of people in withholding-only proceedings. *Id.* Section 1226(a) authorizes detention "pending a decision on whether a [person] is to be removed from the United States," which, for all practical purposes, describes the procedural posture of withholding-only cases. *Id.* at 2293, 2295 (noting that individuals in withholding-only proceedings "reasonably fear persecution or torture" and have pending claims for relief). As the dissent explained, if a person is granted withholding of removal, the probability that they will be removed from the U.S. in the future is less than 2%. *Id.* at 2295. Withholding-only proceedings, then, are effectively proceedings to decide "whether a [person] is to be removed." *See id.* Had the Supreme Court reached this alternative conclusion, people in withholding-only proceedings would be entitled to a bond hearing. *Id.* at 2293.

94. AM. IMMIGR. COUNCIL, *supra* note 84 ("From FY 2014 to FY 2019, a little more than 3,000 withholding-only proceedings were begun each year."). While this number constitutes a very small percentage of overall removal proceedings, *see id.*, it means that approximately 3,000 more people per year will be subject to post-removal-order detention under *Guzman Chavez*.

95. Section 1231(a)(6) authorizes detention beyond 90 days for the following individuals: (1) individuals who are found inadmissible; (2) individuals who are found removable under specific statutory provisions; or (3) individuals who are determined by DHS to pose a flight risk or danger to the community. Individuals in withholding-only proceedings could potentially fall within any of these categories. In particular, most have a prior removal order based on inadmissibility.

96. *Guzman Chavez*, 141 S. Ct. at 2294.

97. *See infra* Sections II.B, C.

98. Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1830 (2022).

99. *Id.* at 1830, 1832.

under § 1231(a)(6).[100] These regulations, however, "raise serious constitutional concerns."[101]

1. DHS's 180-Day Custody Reviews Do Not Provide Adequate Process

Following *Zadvydas*, DHS adopted regulations to implement the six-month custody review requirement imposed by the Supreme Court.[102] These regulations provide that a person whose detention under § 1231(a)(6) has reached 180 days (six months) "may submit a written request for release" asserting "that there is no significant likelihood [of removal] in the reasonably foreseeable future."[103] If DHS determines that the request has merit, it will refer the request to the State Department for further review.[104] The State Department then provides a report to DHS regarding the likelihood of removal to the country in question.[105] Based on this report and other available information, DHS makes the final determination as to whether removal is likely to occur in the "reasonably foreseeable future."[106] Only a decision that removal is not likely to occur in the reasonably foreseeable future will allow a person's release.

The 180-day custody review process does not provide a bond hearing before an IJ or an avenue for administratively appealing a denial of relief.[107] Furthermore, if DHS denies a person's request to be released after 180 days of post-removal-order detention, the person must wait another six months before they are eligible to submit another release request.[108] Because of these procedural defects, immigrants' rights advocates launched legal challenges asserting that § 1231(a)(6) required procedural protections beyond those implemented by DHS.[109] Specifically, advocates argued that § 1231(a)(6) required DHS to provide bond hearings before IJs, where the government bore the burden of proof, once post-removal-order detention reached six months.[110]

---

100. *See id.* at 1834–35 (outlining the government's argument that the administrative 180-day custody review process provides "adequate process").

101. Diouf v. Napolitano, 634 F.3d 1081, 1091 (9th Cir. 2011).

102. 8 C.F.R. § 241.13. *See also* Developments in the Law, *V. Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915, 1925–26 (2002).

103. § 241.13(d)(1). Technically a person can submit a release request prior to 180 days of post-removal-order detention, but DHS has no obligation to consider the request until after the 90-day removal period has expired. § 241.13(d)(3). In addition, it has no obligation to release a person whose request has merit until the six-month mark. § 241.13(b)(2)(ii). Furthermore, DHS is not required to consider a person's release request unless the person shows that they have fully cooperated in carrying out their removal (e.g., by complying with the process for obtaining travel documents). § 241.13(e)(2).

104. § 241.13(e)(3).

105. *Id.*

106. § 241.13(e)(1).

107. Guerrero-Sanchez v. Warden York Cnty. Prison, 905 F.3d 208, 227 (3d Cir. 2018).

108. § 241.13(j).

109. *See* Martinez v. Larose, 968 F.3d 555, 557 (6th Cir. 2020); *Guerrero-Sanchez*, 905 F.3d at 210–11; Diouf v. Napolitano, 634 F.3d 1081, 1082 (9th Cir. 2011).

110. *Id.*

Prior to *Arteaga-Martinez*, the issue of whether § 1231(a)(6) required a six-month bond hearing had split circuit courts.[111] The Third Circuit and the Ninth Circuit both held that people "who are denied release in their 180-day reviews must be afforded the opportunity to challenge their detention before an IJ."[112] Noting that courts need not afford *Chevron* deference[113] to DHS regulations that "raise grave constitutional doubts," both circuits criticized the 180-day custody review procedures for failing to provide adequate procedural safeguards.[114] The Third Circuit, for example, found DHS's interpretation of the post-removal-order-detention statute to be unreasonable for three reasons: (1) "DHS employees [instead of] ostensibly neutral decisionmakers like IJs" oversaw the review process; (2) the procedures "place[d] the burden on *the* [*noncitizen*], rather than the government, to prove that he or she [was] *not* a flight risk or a danger to the society"; and (3) the regulations offered no avenue for appealing DHS's decision.[115] Both circuits read a bond hearing requirement into the text of § 1231(a)(6) to avoid constitutional concerns, building on the constitutional avoidance analysis in *Zadvydas*.[116]

The Sixth Circuit, meanwhile, reached the opposite conclusion, declining to hold that people subject to detention under § 1231(a)(6) are entitled to a bond hearing after six months.[117] In *Martinez v. Larose*, the Sixth Circuit was "reluctant to graft a bond-hearing requirement onto a statute absent language supporting such a requirement."[118] A discrete temporal limit on statutorily authorized detention, the court reasoned, "would be out of place in a post-*Jennings* [*v. Rodriguez*] world."[119] Furthermore, the Sixth Circuit found that *Zadvydas* supplied sufficient guidance for reviewing indefinite detention claims.[120]

Eventually, the Supreme Court granted certiorari to decide whether § 1231(a)(6) required the government to provide a bond hearing before an IJ, at

---

111. *Compare Guerrero-Sanchez*, 905 F.3d at 210–11, *with Diouf*, 634 F.3d at 1082 *with Martinez*, 968 F.3d at 557.

112. *Guerrero-Sanchez*, 905 F.3d at 226; *Diouf*, 634 F.3d at 1092.

113. *Chevron* deference describes the framework articulated in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* deference requires courts to defer to "reasonable" agency interpretations of statutes where Congress has "left a gap for the agency to fill." *Id.* at 844–45. However, courts may substitute their own statutory interpretation for that of an agency if the agency's interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Id.*

114. *Guerrero-Sanchez*, 905 F.3d at 226–27; *Diouf*, 634 F.3d at 1090–92 (citing, among others, Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001) (recognizing that federal courts should generally defer to the Attorney General's interpretation of immigration laws, but not where the Attorney General's interpretation raises serious constitutional questions)).

115. *Guerrero-Sanchez*, 905 F.3d at 227.

116. *Id.* at 226; *Diouf*, 634 F.3d at 1086.

117. Martinez v. Larose, 968 F.3d 555, 565–66 (6th Cir. 2020).

118. *Id.* at 566.

119. *Id.* (citing Jennings v. Rodriguez, 138 S. Ct. 830, 843, 851 (2018) (holding that 8 U.S.C. §§ 1225(b) and 1226(a), (c) cannot "reasonably be read to limit detention to six months")).

120. *Id.*

which the government bore the burden of proof, to individuals facing six months or more of post-removal-order detention.[121]

2. Section 1231(a)(6) Does Not Entitle Individuals to a Bond Hearing

The Supreme Court resolved the above-described circuit split in 2022, announcing in *Arteaga-Martinez* that individuals facing prolonged detention pursuant to § 1231(a)(6) do not have the right to a six-month bond hearing.[122] As a result, the DHS 180-day custody review procedures—despite their defects—remain the only agency mechanism available to seek relief from prolonged post-removal-order detention at the six-month mark.[123]

In *Arteaga-Martinez*, Mr. Arteaga-Martinez applied for withholding of removal and CAT protection (the only forms of relief for which he was eligible due to a reinstated removal order).[124] After having "been detained for four months without a [bond] hearing," Mr. Arteaga-Martinez filed a habeas petition challenging his continued detention.[125] Because the Third Circuit had previously held that people subject to prolonged detention under § 1231(a)(6) had an automatic, statutory right to a bond hearing after six months, a district court granted Mr. Arteaga-Martinez a bond hearing once his detention reached 180 days.[126]

The government appealed the district court's decision to give Mr. Arteaga-Martinez a bond hearing.[127] At the same time, in the bond hearing itself, the government failed to show that Mr. Arteaga-Martinez presented a flight risk or a danger to the community.[128] He was released on bond while his withholding-only proceedings continued.[129]

Even though Mr. Arteaga-Martinez himself posed no risk of danger or flight, the Supreme Court disagreed with the Third Circuit's (and, by extension, the Ninth Circuit's) conclusion that he was statutorily entitled to a six-month bond hearing.[130] The Court found "no plausible construction" of § 1231(a)(6) that would impose such a requirement, noting that "[o]n its face, the statute says nothing about bond hearings before [IJs] or burdens of proof."[131] Over the dissenting opinion of Justice Breyer, who argued that the "lower courts' bail hearing requirements [were] reasonable implementations of the *Zadvydas* standard," the majority criticized the courts below for "reach[ing] substantially beyond the limitation on detention authority recognized in *Zadvydas*."[132] *Zadvydas*, the Court reasoned, *permits* the

121. Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1833 (2022).
122. *Id.*
123. *See id.* at 1834–35.
124. *Id.* at 1830–31.
125. *Id.* at 1831.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 1833.
131. *Id.*
132. *Id.* at 1834, 1838.

government to provide bond hearings after six months, but it does not *require* such action.[133]

If the Supreme Court had read § 1231(a)(6) to require bond hearings after six months of post-removal-order detention, individuals facing prolonged detention would have been guaranteed a hearing before a neutral arbiter. Instead, they are afforded only the procedural protections implemented by DHS in the wake of *Zadvydas*—protections that arguably do not afford people a meaningful opportunity to be heard.[134] Moreover, while *Arteaga-Martinez* left open the question of whether constitutional due process (as opposed to § 1231(a)(6) itself) prohibits indefinite detention without a bond hearing,[135] a companion case decided alongside *Arteaga-Martinez* eliminated the possibility of class-wide injunctive relief for constitutional violations related to prolonged post-removal-order detention.[136] The effects of this companion case, *Aleman Gonzalez*, are discussed in the next Section.

C. People Detained Under § 1231(a)(6) Cannot Obtain Class-Wide Injunctive Relief

On the same day it issued *Arteaga-Martinez*, the Supreme Court decided *Aleman Gonzalez* and stripped lower courts of the authority to issue class-wide injunctive relief in challenges to prolonged detention under § 1231(a)(6).[137] Thus, district courts are now limited to issuing injunctive relief from prolonged post-removal-order detention (either in the form of bond hearings or outright release) on a case-by-case basis.[138]

Aleman Gonzalez interpreted § 1252(f)(1), a statute that deprives district courts of the authority to "enjoin or restrain the operation of" various INA provisions, as a severe restriction on district courts' authority to craft meaningful remedies.[139] After engaging in an "ordinary meaning" analysis that hinged on a series of dictionary definitions, the Court concluded: "§ 1252(f)(1) generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions."[140] Because § 1231(a)(6) is one of the "specified

---

133. *Id.* at 1834.

134. *See supra* Subsection II.B.1.

135. *Arteaga-Martinez*, 142 S. Ct. at 1834–35.

136. Shalini Bhargava Ray, *The Demise of Rights-Protective Statutory Interpretation for Detained Immigrants and the Rise of "Piecemeal" Textualism*, SCOTUSBLOG (June 14, 2022, 9:58 PM), https://www.scotusblog.com/2022/06/the-demise-of-rights-protective-statutory-interpretation-for-detained-immigrants-and-the-rise-of-piecemeal-textualism/ [https://perma.cc/Q2VX-CABW].

137. Garland v. Aleman Gonzalez, 142 S. Ct. 2057, 2062–63 (2022).

138. *Id.* at 2065.

139. *Id.* at 2064–65.

140. *Id.* Scholars have criticized Supreme Court justices for being "selective and inconsistent in when and how they use dictionary definitions." Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 281 (1998); *see also* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 566 (2013) ("The Justices typically rely on one, or at most two, dictionaries to define a contested word;

statutory provisions" covered by § 1252(f), district courts cannot enjoin its operation on a class-wide basis.[141] Post-*Aleman Gonzalez*, they may only "enjoin or restrain the operation of" § 1231(a)(6) "with respect to . . . an individual [person] against whom proceedings . . . have been initiated."[142]

In short, even if lower courts find that detention under § 1231(a)(6) violates the Constitution in a given case, they can only order injunctive relief in individual proceedings. This restriction means that "very few noncitizens will be able to . . . win relief against unconstitutional detention because they must retain counsel individually or engage in complex federal litigation pro se."[143] Because "[d]etained immigrants face many hurdles in finding and consulting with counsel as it is," eliminating opportunities for class-wide injunctive relief "denies them, in [Justice] Sotomayor's words, 'a meaningful opportunity to protect their rights.'"[144] Put simply, the Court's decision in *Aleman Gonzalez* severely undermines the due process rights of immigrants detained under § 1231(a)(6).

III. THE CONTINUED IMPACT OF *ZADVYDAS* IN INDIVIDUAL PETITIONS FOR RELIEF

The preceding Sections make clear that in recent years, the Supreme Court has expanded the pool of people subject to detention under § 1231(a)(6) while systematically increasing the likelihood that post-removal-order detention will exceed six months.[145] Together, *Guzman Chavez*, *Arteaga-Martinez*, and *Aleman Gonzalez* effect a crippling blow to the rights of people facing prolonged detention while awaiting removal from the United States. This trio of cases has dramatically weakened *Zadvydas* as a tool for securing class-wide relief.

The six-month temporal limit identified in *Zadvydas*, however, remains highly influential in the context of individual petitions for writs of habeas corpus adjudicated by district courts.[146] While the Supreme Court has rejected the bright-

---

they use general and legal dictionaries interchangeably and without any apparent rationale; they lack a predominant practice regarding whether dictionaries chosen were published close to enactment date, to filing date, or neither; and they have adopted individualized yet uneven approaches to their preferred dictionary brands.").

141. *Aleman Gonzalez*, 142 S. Ct. at 2063–65.

142. *Id.* at 2065.

143. Ray, *supra* note 136.

144. *Id.*

145. *See supra* Part II.

146. *See* Freya Jamison, Note, *When Liberty is the Exception: The Scattered Right to Bond Hearings in Prolonged Immigration Detention*, 5 COLUM. HUM. RTS. L. REV. 146, 159, 164 (2021) (describing that courts evaluate whether detention has become prolonged with reference to benchmarks set forth by precedent, and illustrating that plaintiffs wait to file habeas petitions until detention reaches "the outer limits of constitutionality," as defined by courts). Jamison's Note technically references the benchmarks articulated in *Demore v. Kim*, 538 U.S. 510 (2003), not the six-month marker in *Zadyvdas*. *See id.* at 159. *Demore*'s due process analysis, however, was explicitly tied to the six-month limit first identified in *Zadvydas*. 538 U.S. at 527–31. Indeed, *Demore*'s holding was predicated in part on the notion that removal proceedings take *less than six months*. *Id.* Thus, where caselaw and secondary sources cite *Demore* for the proposition that detention becomes prolonged at six months, they are invoking the reasoning of *Zadvydas*.

line rule that § 1231(a)(6) requires a bond hearing after six months, respondents can continue to rely upon *Zadvydas* to show that their detention past six months violates due process.[147] Moreover, this Note argues that *Aleman Gonzalez* opens the door for district courts to go beyond *Zadvydas* and consider the possibility that detention may violate due process before the six-month mark, as some scholars argued even before *Aleman Gonzalez* was decided.[148] Undoubtedly, due process would have been more effectively preserved if the Court had adopted a six-month bond hearing requirement in *Arteaga-Martinez*. Nevertheless, post-*Aleman Gonzalez*, district courts can assess the harms caused by detention on an individualized, case-by-case basis, and they can question the assumptions that drove the *Zadvydas* Court to adopt a "presumptively reasonable" six-month period for post-removal-order detention. Although the six-month limit identified in *Zadvydas* offers an analytical starting point for evaluating prolonged detention under § 1231(a)(6), the reasoning relied upon in *Zadvydas* itself suggests that district courts would have grounds to find detention unconstitutional prior to six months.[149]

A. Habeas Challenges to Detention Under § 1231(a)(6)

Even though immigrants subject to post-removal-order detention are not automatically entitled to a six-month bond hearing, they can challenge the constitutionality of their detention by filing individual habeas petitions in federal district courts.[150] Of course, class-wide protections would more effectively protect due process, especially for people who (for example) cannot afford attorneys or do not speak English.[151] The availability of habeas relief, however, means that people facing prolonged detention are not entirely without options.

Habeas corpus is a "fundamental instrument for safeguarding individual freedom against arbitrary and lawless government action," and it has historically been used to challenge the lawfulness of one's detention by the federal government.[152] The Suspension Clause of the U.S. Constitution guarantees the right to habeas relief, stating: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may

147. *June 13, 2022: Supreme Court Confirms Noncitizens in Withholding-Only Proceedings Have No Statutory Right to Bond Hearings*, CLINIC (June 16, 2022), https://cliniclegal.org/resources/june-13-2022-supreme-court-confirms-noncitizens-withholding-only-proceedings-have-no [https://perma.cc/XH85-P6QR] ("Therefore, those who have been detained for long periods of time pending their withholding proceedings can still challenge their prolonged detention on due process grounds in accordance with Zadvydas.").

148. *See infra* Part IV.

149. *See infra* Part IV.

150. *Introduction to Habeas Corpus*, AM. IMMIGR. COUNCIL 2 (June 2008), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_0406.pdf [https://perma.cc/47UC-RPFA].

151. *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 395 (2014) ("[T]he clear six-month rule allows for far more meaningful real-world administration of temporal limits than does the flexible reasonableness standard, particularly for the large portion of unrepresented people in detention.").

152. AM. IMMIGR. COUNCIL, *supra* note 150, at 1.

require it."[153] In addition, 28 U.S.C. § 2241 gives federal district courts the authority to review habeas petitions that challenge detention on constitutional grounds.[154]

In *Zadvydas*, the Supreme Court held that § 2241 is "available as a forum for statutory and constitutional challenges to [post-removal-order] detention."[155] Although several INA provisions strip federal courts of jurisdiction to hear claims related to deportation, *Zadvydas* found that these provisions do not apply to claims that the government has exceeded its constitutional authority to detain individuals pursuant to 8 U.S.C. § 1231(a).[156] *Zadvydas* is best known for the proposition that six months is a "presumptively reasonable" period of post-removal-order detention, but it also stands for the principle that 28 U.S.C. § 2241 encompasses habeas challenges to detention under 8 U.S.C. § 1231(a).

Furthermore, while *Aleman Gonzalez* held that federal courts do not have the authority to issue class-wide injunctive relief in post-removal-order detention challenges, it also held that district courts "retain the authority to 'enjoin or restrain the operation of' the relevant statutory provisions 'with respect to the application of such provisions to an individual [person].'"[157] In other words, it preserved individual habeas relief as a vehicle for challenging prolonged post-removal-order detention. Consequently, although *Aleman Gonzalez* devastated the ability of immigrants to seek post-removal-order detention relief on a class-wide basis, it did not go so far as to preclude them from challenging their detention in federal court altogether. Given the flaws in DHS's 180-day custody review procedures,[158] the ability to challenge one's detention in federal court can mean the difference between immediate release (or, at minimum, access to a bond hearing) and indefinite incarceration.

B. **Zadvydas** *Shapes How District Courts Analyze Whether Continued Detention is Constitutional*

Although *Arteaga-Martinez* declined to interpret *Zadvydas* as requiring a bond hearing after six months of post-removal-order detention, the six-month limit on detention in *Zadvydas* continues to have enormous influence over how district courts analyze individual requests for bond hearings brought through habeas petitions.[159]

First, in at least three circuits, district courts have held that noncitizens cannot even bring habeas challenges *until* their post-removal-order detention reaches six months. Indeed, in the Third, Fourth, and Eleventh Circuits, district courts have expressly declined to consider habeas claims challenging § 1231(a)(6)

153. U.S. Const. art. I, § 9, cl. 2.

154. 28 U.S.C. § 2241(a) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.").

155. 533 U.S. 678, 688 (2001).

156. *Id.* at 687–88.

157. 142 S. Ct. 2057, 2065 (2022).

158. *See supra* Subsection II.B.1.

159. *See supra* note 146 and accompanying text.

detention until it hits the six-month mark.[160] In unpublished cases, district courts in the Fifth Circuit and the Second Circuit have also held that habeas challenges to post-removal-order detention are "premature" prior to six months.[161] While at least one district court in the Ninth Circuit has held that a due process challenge to detention under § 1231(a)(6) could move forward before six months,[162] the more common approach requires noncitizens to wait 180 days before permitting them to request a bond hearing via habeas. In some circuits, then, the six-month "presumptively reasonable" period effectively suspends habeas corpus for six months following the issuance of a final removal order.[163]

Second, absent a bright-line rule requiring a six-month bond hearing, at least four circuits employ a "reasonableness" analysis to determine when prolonged detention violates due process.[164] The way courts approach the first factor in this analysis—the length of detention—is often explicitly tied to *Zadvydas*. In the Third Circuit, for example, "when detention becomes unreasonable, the Due Process Clause demands a hearing."[165] The Third Circuit's reasonableness analysis is fact-

160. *See* Grant v. Warden of Clinton Cnty. Corr. Facility, No. 1:22-cv-0331, 2022 WL 3045842, at *3 (M.D. Pa. 2022) ("[N]oncitizens detained under Section 1231(a)(6) past the six-month presumptively constitutional period may bring an as-applied Due Process Clause challenge . . . ."); Barenboy v. Att'y Gen. of U.S., 160 Fed. App'x. 258, 261 (3d Cir. 2005) ("[T]he removal period did not begin until Barenboy began to cooperate with ICE officials; *i.e.*, in April 2005. Thus, the second habeas petition, filed about six weeks thereafter, was still premature."); Ali v. Barlow, 446 F. Supp. 2d 604, 609 (E.D. Va. 2006) ("Accordingly, petitioner's ninety-day removal period expired on July 31, 2006, and the six month presumptively reasonable post-removal period will expire on October 29, 2006. Thus, petitioner's habeas petition is premature."); Farah v. U.S. Att'y Gen., 12 F.4th 1312, 1333 (11th Cir. 2021) ("If after six months he is still in custody and has not been removed from the United States, then he can challenge his detention under section 1231(a). But until then, his detention is presumptively reasonable under *Zadvydas*. We vacate and remand with instructions to dismiss Farah's habeas petition as moot in part and not ripe for review in part."); H.N. v. Warden, Stewart Det. Ctr., No. 7:21-CV-59, 2021 WL 4203232, at *3 (M.D. Ga. 2021) ("Any challenge to Petitioner's detention under § 1231(a) is premature."). *See also* Ian Bratlie & Adriana Lafaille, *A 180-Day Free Pass?* Zadvydas *and Post-Order Detention Challenges Brought Before the Six-Month Mark*, 30 GEO. IMMIGR. L.J. 213, 232–40 (2016) (explaining that habeas claims filed before a person has been detained for six months are "subject to routine dismissal").

161. Agyei-Kodie v. Holder, 418 Fed. App'x. 317, 318 (5th Cir. 2011) ("Although that period has expired, Agyei–Kodie has not been in post-removal-order detention longer than the presumptively reasonable six-month period set forth in *Zadvydas*. Consequently, any challenge to his continued post removal order detention is premature."); Adams v. Holder, No. 11–CV–84, 2012 WL 1999488, at *3 (W.D.N.Y. 2012) ("Petitioner seeks release before the expiration of the presumptive six-month removal period and, therefore, his constitutional challenges to his detention under *Zadvydas* are premature.").

162. Hoang Trinh v. Homan, 333 F. Supp. 3d 984, 994 (C.D. Cal. 2018).

163. Bratlie & Lafaille, *supra* note 160, at 240.

164. Jamison, *supra* note 146, at 157 ("The First, Third, Sixth, and Eleventh Circuits all . . . adopted fact-specific reasonableness tests to determine when detention without a bond hearing violates due process.").

165. German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 210 (3d Cir. 2020) (internal quotations omitted).

specific, but the "most important factor is the duration of detention."[166] Detention becomes increasingly suspect in the Third Circuit "after five months," likely becoming "unreasonable sometime between six months and one year."[167] Although the Third Circuit's reasonableness test does not cite to *Zadvydas* itself, the six-month limit it invokes flows directly from *Zadvydas*'s reasoning.[168]

Other circuits use a similar approach. The Eleventh Circuit, applying an almost identical reasonableness test, has stated that "there is little chance that [a person's] detention is unreasonable until at least the six-month mark."[169] And even absent precedential circuit court opinions on this issue, district courts all over the country have centered their reasonableness analysis around six months. The Eastern District of Michigan has held that "reasonableness is a 'function of the length of the detention,' and detentions longer than six months are presumptively unreasonable";[170] the Southern District of New York has held that "detention that has lasted longer than six months is more likely to be 'unreasonable' . . . than detention of less than six months";[171] and the District of Minnesota determined that detention was unreasonable where it "lasted over twice as long" as the "presumptively reasonable" six-month period.[172] While district courts often apply "the reasonableness standard to interpret similar facts in different ways,"[173] the preceding examples suggest that courts almost uniformly incorporate the six-month standard into their review.

These decisions illustrate that the six-month temporal marker identified in *Zadvydas* continues to have an enormous impact on the viability of habeas petitions challenging prolonged detention under § 1231(a)(6). *Zadvydas* has shaped and constrained the way that courts determine whether prolonged post-removal-order detention satisfies constitutional due process.

---

166. *Id.* at 211.

167. *Id.*

168. *See supra* note 146. The Third Circuit cites *Demore* instead of *Zadvydas* in *German Santos*, but *Demore*'s own prolonged detention analysis depends on the reasoning of *Zadvydas*. *Supra* note 146.

169. Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1217 (11th Cir. 2016) (vacated as moot). While *Sopo* was vacated as moot in May 2018 after the respondent was removed from the United States, its multi-factor reasonableness analysis continues to be applied in the Eleventh Circuit. *See, e.g.*, Stephens v. Ripa, No. 22-20110, 2022 WL 621596, at *2 (S.D. Fla. 2022); Moore v. Nielsen, No. 4:18-cv-01722, 2019 WL 2152582, at *10 (N.D. Ala. 2019).

170. Al -Sadoon v. Lynch, No. 1:21-cv-11438, 2022 WL 492971, at *8 (E.D. Mich. 2022).

171. Sajous v. Decker, No. 18-CV-2447, 2018 WL 2357266, at *10 (S.D.N.Y. 2018).

172. Muse v. Sessions, 409 F. Supp. 3d 707, 716 (D. Minn. 2018). *See also supra* note 146 (explaining that a comparison to the temporal benchmarks in *Demore* is effectively a comparison to the six-month benchmark adopted in *Zadvydas*).

173. Anello, *supra* note 151, at 396.

IV. DISTRICT COURTS CAN CONCLUDE THAT DUE PROCESS VIOLATIONS OCCUR *BEFORE* SIX MONTHS

This Note affirms the work of immigrants' rights advocates who have persuasively argued that district courts have an affirmative obligation to consider post-removal-order detention challenges brought via habeas petitions no matter when they are filed.[174] Insofar as judges have interpreted the "presumptively reasonable" period from *Zadvydas* to *prohibit* courts from considering constitutional challenges within six months of the date of a removal order, this interpretation misconstrues *Zadvydas*'s reasoning.[175] "The six-month *Zadvydas* presumption is 'just that—a presumption.'"[176] *Zadvydas* provides a "guide for approaching [§ 1231(a)(6)] detention challenges," but nothing in *Zadvydas* imposes "a prohibition on claims challenging detention less than six months."[177]

Furthermore, this Note builds on prior scholarship and questions the premise articulated in *Zadvydas* that it is presumptively reasonable for the government to continue detaining a person six months after they have been ordered removed from the United States. Importantly, this Note does *not* take issue with the *Zadvydas* Court's decision to adopt a reading of § 1231(a)(6) that allowed it to avoid invalidating the statute on constitutional grounds. Instead, the analysis presented here assumes that the Court's application of the constitutional avoidance doctrine was proper. This Note's sole point of contention is the Court's decision to set six months as the presumptively reasonable period instead of, for example, identifying a shorter period or imposing a mandatory bond hearing requirement as soon as post-removal-order detention begins.

A critique of *Zadvydas* should not be conflated with an argument that *Zadvydas* does not provide important protections to immigrants at immediate risk of harm from prolonged detention. The six-month limit identified by *Zadvydas* gave rise to a custody review process that, while flawed, at least offers a chance at relief. In addition, it has been adopted into federal court tests for unconstitutional detention that, again, offer substantive protections to individuals at risk of indefinite detention. Indeed, *Zadvydas* remains a critical tool with which people subject to post-removal-order detention can seek release through habeas petitions. Nevertheless, by critically examining the reasoning set forth in *Zadvydas*, this Note argues that the protections for immigrants facing post-removal-order detention should be significantly stronger

---

174. Bratlie & Lafaille, *supra* note 160, at 232–44 (arguing that district courts regularly misunderstand the *Zadvydas* presumption). Bratlie and Lafaille invoke the Suspension Clause and the constitutional doctrine of "ripeness" to show that district courts should decide all habeas challenges to post-removal-order detention on their merits. *Id.*

175. *Id.*

176. Hoang Trinh v. Homan, 333 F. Supp. 3d 984, 994 (C.D. Cal. 2018) (quoting Clark v. Martinez, 543 U.S. 371, 387 (2005) (O'Connor, J., concurring)); *see also* Bratlie & Lafaille, *supra* note 160, at 232–40 (arguing that district courts regularly misunderstand the *Zadvydas* presumption and should seriously consider habeas claims filed before six months of post-removal-order detention).

177. *Hoang Trinh*, 333 F. Supp. 3d at 994 (internal quotations omitted); Bratlie & Lafaille, *supra* note 160, at 232–44.

than those crafted by the Supreme Court in 2001 and applied by lower courts in the following decades.

Zadvydas's holding is reexamined here on two grounds. First, in identifying the six-month temporal marker, *Zadvydas* relied on factually distinguishable precedent and did not give enough weight to Congress's 1996 decision to *shorten* the removal period from six months to 90 days.[178] Second, research shows that detention causes serious, immediate harm.[179] Given the physical and emotional trauma imposed by immigration detention, there does not exist any time frame for which detention would be presumptively reasonable.[180] Because *Zadvydas* did not establish sufficient procedural or substantive protections even at the time it was decided, the arguments flowing from it (including those put forth by the plaintiffs in *Arteaga-Martinez*, arguing for bond hearings at six months) do not go far enough to protect the rights of people facing post-removal-order detention.

A. **Zadvydas** *Relied on Factually Distinguishable Precedent*

The majority in *Zadvydas* devoted just two paragraphs to justifying its decision "to recognize some presumptively reasonable period of detention."[181] Although the Court noted that it has "adopted similar presumptions in other contexts to guide lower court determinations," it failed to acknowledge the readily apparent differences between a presumptive six-month period of immigration detention and the presumptions involved in the "other contexts" it invoked.[182] To justify adopting a presumptively reasonable period of post-removal-order detention, the Supreme Court cited two cases in which it purportedly adopted similar presumptions: *Cheff v. Schnackenberg* and *County of Riverside v. McLaughlin*.[183] Neither case, however, supports allowing post-removal-order detention to extend for six months without a bond hearing before an IJ.[184]

In *Cheff*, the Court held that the federal courts do not need to conduct jury trials where the maximum sentence for the offense at issue is six months or less.[185]

---

178. *See infra* Sections IV.A, B.

179. *See infra* Section IV.C.

180. *See infra* Section IV.C.

181. 533 U.S. 678, 700–02 (2001). The two paragraphs to which this sentence refers begin with, "We realize that recognizing this necessary Executive leeway will often call for difficult judgments." *Id.* at 700. They end with, "To the contrary, [a person] may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

182. *Id.* at 701.

183. *Id.*

184. On this point, this Note agrees with the *Zadvydas* dissent. *See id.* at 712 (Kennedy, J., dissenting) ("The cases which the Court relies upon to support the imposition of presumptions are inapposite."). In his dissenting opinion, however, Justice Kennedy argued that the Court should not have read any temporal limits into § 1231(a)(6) at all. *Id.* at 706–07. This Note, in contrast, argues that district courts should validate and expand upon the *Zadvydas* Court's constitutional concerns. Specifically, district courts should rely on the cases cited by *Zadvydas* to strengthen protections for people detained under § 1231(a)(6).

185. Cheff v. Schnackenberg, 384 U.S. 373, 379–80 (1966) ("Since Cheff received a sentence of six months' imprisonment . . . , Cheff's offense can be treated only as 'petty' in

Instead, defendants charged with "petty" offenses—those involving sentences of six months or less—can be convicted by a judge (or panel of judges).[186] The Court therefore upheld Mr. Cheff's conviction for criminal contempt of court, handed down by a three-judge panel of the Seventh Circuit Court of Appeals.[187] It noted, however, that "sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof."[188] In other words, trial by jury is required where a charge carries a maximum sentence of more than six months.[189]

The six-month temporal marker imposed by the Court in *Cheff* differs from that invoked in *Zadvydas* for two reasons. First, and perhaps most importantly, the Court never found the actual period of incarceration in *Cheff* to be "presumptively" reasonable.[190] Unlike immigrants detained under the *Zadvydas* framework, for whom six months of post-removal-order detention is considered presumptively reasonable,[191] the defendant in *Cheff* received a full hearing *prior* to being taken into custody.[192] The Court in *Cheff* deemed six months a reasonable sentence for a person convicted of a petty offense, but it did not allow the defendant to be jailed for six months before receiving any hearing at all.[193] Second, although the defendant in *Cheff* did not receive a full trial by jury, he was still guaranteed all the procedural protections that the U.S. legal system affords to criminal defendants.[194] For example,

---

the eyes of the statute and our prior decisions. We conclude therefore that Cheff was properly convicted without a jury.").

186. *Id.* ("Over 75 years ago in *Callan v. Wilson*, 127 U.S. 540, 557 . . . (1888), this Court stated that 'in that class or grade of offences called 'petty offences,' which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose,' a jury trial is not required.").

187. *Id.*

188. *Id.* at 380.

189. *Id.*

190. *Id. Cheff* held that due process does not demand a *jury* trial for persons accused of crimes involving a maximum sentence of six months, but it never held that an individualized custody hearing is not required at all. *See id.* at 375 (explaining that the defendant in *Cheff* was "tried before a panel of three judges of the Court of Appeals"). Because the defendant in *Cheff* received an individualized custody hearing, the issue of incarceration without an individualized custody hearing was never before the Court. *See id.*

191. *See supra* Section I.C.

192. Mr. Cheff's criminal conviction was for contempt of court, which arose in the context of a complaint filed by the Federal Trade Commission, and there is no evidence in the facts of the case to indicate that he was detained pre-trial. *Cheff*, 384 U.S. at 376–77. *See also* Jim Harger, $*18.9 Million Real Estate Listing Closes a Chapter on Holland Furnace Co., Once the City's Largest Employer*, MICH. LIVE (Apr. 27, 2013, 3:24 PM), https://www.mlive.com/business/west-michigan/2013/04/189_million_real_estate_listin.html [https://perma.cc/47VM-8NMP] ("*After* several appeals failed, Cheff entered federal custody in 1966 and served two months and nine days before he was released early to tend to his wife, who died later that year.") (emphasis added).

193. *Cheff*, 384 U.S. at 377 ("Cheff demanded a jury trial, which was denied, and *following a full hearing extending over a 10-day period* the court found him guilty.") (emphasis added).

194. *See id.*

even in the absence of a jury, the government still had to prove its case against Mr. Cheff beyond a reasonable doubt, and it had to do so in a hearing before a neutral judge.[195] In contrast, under the post-*Zadvydas* six-month custody review regulations, immigrants seeking release bear the burden of proof and do not have the opportunity to appear before an IJ.[196] Thus, despite the Supreme Court's reliance on *Cheff* in deciding *Zadvydas*, it has no bearing on the question of how long the government should be allowed to detain a person pending execution of a removal order.

After citing *Cheff*, the Supreme Court in *Zadvydas* turned to *County of Riverside* to justify its finding that six months of post-removal-order detention is presumptively reasonable.[197] *Riverside*, however, applies even less to the facts of *Zadvydas* than *Cheff*. In *Riverside*, the Court held that people arrested and taken into custody must receive a probable cause hearing *within 48 hours*.[198] Stated another way: 48 hours is a presumptively reasonable period of detention for people awaiting probable cause hearings. After 48 hours, however, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance" that would justify detaining a person absent a probable cause finding.[199]

The difference between presuming 48 hours of detention to be reasonable and presuming six months of detention to be reasonable should be strikingly obvious, even to the casual observer. Yet in *Zadvydas*, the Court did not even attempt to deal with the problem of relying upon a 2-day presumptively reasonable custody period to justify a 180-day presumptively reasonable custody period.[200] Instead, it cited *Riverside* with no explanation aside from a single parenthetical.[201] Furthermore, like the procedural protections in *Cheff*, the custody procedures in *Riverside* involved a burden shift to the government once the presumptively reasonable period of custody ended.[202] Again, this burden shift stands in stark contrast to the post-*Zadvydas* regulations adopted by DHS, which put the burden on the person seeking release to show that their detention has become unreasonable.[203]

Despite the Supreme Court's assertion in *Zadvydas* that it has "adopted similar presumptions in other contexts," neither *Cheff* nor *Riverside*—the two cases it cited in support of that assertion—involved presumptively reasonable periods of

---

195. *See id.* The opportunity to appear before a judge is precisely what the plaintiffs advocated for in *Arteaga-Martinez*. *See supra* Section II.B.

196. *See supra* Section II.B.

197. 533 U.S. 678, 701–02 (2001) (citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56–58 (1991)).

198. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56–58 (1991).

199. *Id.* at 57.

200. *See* 533 U.S. at 700–02.

201. *Id.* at 701 ("See . . . *County of Riverside v. McLaughlin* . . . (adopting presumption, based on lower court estimate of time needed to process arrestee, that 48–hour delay in probable-cause hearing after arrest is reasonable, hence constitutionally permissible).").

202. *Cnty. of Riverside*, 500 U.S. at 57; Developments in the Law, *supra* note 102, at 1927–28.

203. Developments in the Law, *supra* note 102, at 1927–28. *See also supra* Section II.B.

detention greater than 48 hours without a hearing.[204] In addition, because both cases involved criminal arrestees or defendants, the custody determinations to which the Court referred came attached with significantly stronger procedural protections than those created by DHS in the wake of *Zadvydas*.[205] As such, both *Cheff* and *Riverside* support the contention that the *Zadvydas* Court should have gone beyond identifying six months as a presumptively reasonable period of post-removal-order detention.

Just as the Supreme Court in *Zadvydas* should have gone further to protect the rights of people facing post-removal-order detention, so too should district courts. When reviewing habeas petitions, for example, district courts applying a "reasonableness" analysis should consider the proposition that detention might become unconstitutional after just 48 hours, as in *Riverside*. They should also impose heightened procedural protections akin to those in both *Cheff* and *Riverside*, like requiring the government to bear the burden of proof in any bond hearings. Such rigorous protections would help alleviate the constitutional concerns that *Zadvydas* sought to address.

B. The Supreme Court Failed to Give Weight to Congress's Decision to Shorten the Removal Period to 90 Days

In addition to relying on inapposite case law,[206] the Supreme Court in *Zadvydas* barely acknowledged the fact that Congress itself, in 1996, *shortened* the removal period from 180 days to 90 days.[207] This change came with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), a law that limited due process protections and imposed mandatory detention for expansive categories of immigrants facing removal.[208] Without citing a single piece of legislative history or supporting caselaw, the Court asserted, "we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time."[209] In doing so, the Court declined to define 90 days as the presumptively reasonable limit on post-removal-order detention.

While the Court's explanation of Congress's 1996 decision to shorten the removal period to 90 days is plausible, there is an alternative explanation: that Congress, in fact, shortened the removal period *precisely because* all reasonably foreseeable removals could be accomplished in 90 days.[210] Another explanation is that even if Congress did not believe that all reasonably foreseeable removals could

---

204. *See Cnty. of Riverside*, 500 U.S. at 56–58; Cheff v. Schnackenberg, 384 U.S. 373, 379–80 (1966).

205. *Id.*; *see also* Developments in the Law, *supra* note 102, at 1927–28.

206. *See supra* Section IV.A.

207. *See* 533 U.S. 678, 698, 701 (2001).

208. Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. MIGRATION & HUM. SEC. 192, 192 (2018).

209. *Zadvydas*, 533 U.S. at 701. The Court did discuss the legislative history of post-removal-order detention generally, *see id.* at 696–99, but it did not do so in the context of its assertion that Congress doubted whether "all reasonably foreseeable removals could be accomplished" within 90 days. *Id.* at 701.

210. *See* Bratlie & Lafaille, *supra* note 160, at 241 ("By the time the six-month mark passes, a noncitizen has already been detained for *twice* the time in which Congress expected removal to occur, and in which the vast majority of removals in fact occur.").

be accomplished in 90 days, it believed they *should be* accomplished within the shortened time frame. However, instead of acknowledging the ambiguity inherent in Congress's decision and engaging with relevant legislative history, the Supreme Court in *Zadvydas* effectively spoke for Congress on the matter by casting doubt on the reasonability of carrying out 90-day removals.

After declining to recognize 90 days as the presumptively reasonable period of post-removal-order detention, the Court went on to say, "We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months."[211] It cited a single case, *United States v. Witkovich*, in support of this proposition, and it offered no other examples of presumptively reasonable detention periods in the immigration context.[212] The Court then pointed to "uniform administration in the federal courts" as a reason to recognize six months as a presumptively reasonable period of post-removal-order detention.[213]

The Court's cursory treatment of *Witkovich* obscures the degree to which the law at issue in that case—and the precedent interpreting it—differed from the law at issue in *Zadvydas*.[214] In 1957, when *Witkovich* was decided, post-removal-order detention was governed by 8 U.S.C § 1252(c).[215] At that time, the removal period was six months, and detention within the removal period was discretionary—not mandatory.[216] That is, the Attorney General had "a period of six months from the date of [a final removal order] . . . within which to effect the [noncitizen's] departure from the United States," and during that time the Attorney General had discretionary authority to detain the noncitizen facing removal.[217] To reiterate, Congress expressly shortened this six-month removal period to 90 days in 1996.[218] But beyond that, the *Zadvydas* analysis ignores important limits on detention under § 1252(c) that existed in the *Witkovich* era.

It is true that § 1252(c) allowed post-removal-order detention to extend for up to six months.[219] On its face, this fact supports the Court's assertion in *Zadvydas* that Congress "previously doubted the constitutionality of detention for more than six months."[220] However, as the district court decision in *Witkovich* makes clear, six

---

211. *Zadvydas*, 533 U.S. at 701.
212. *Id.*
213. *Id.*
214. *See* Developments in the Law, *supra* note 102, at 1928.
215. 8 U.S.C. § 1252(c) (effective to Apr. 23, 1996). *See also* United States v. Witkovich, 353 U.S. 194, 202–03 (1957) (Clark, J., dissenting) ("The Congress has also authorized the Attorney General to retain an [individual] in custody for six months subsequent to a final order of deportation within which to 'effect the [person's] departure.' 66 Stat. 210, 8 U.S.C. § 1252(c).").
216. United States v. Witkovich, 140 F. Supp. 815, 818–19 (N.D. Ill. 1956) ("After the entry of a final deportation order, the Attorney General is given six months within which to 'effect the [noncitizen's] departure', during which the noncitizen *may be detained or released on bond*.") (emphasis added).
217. 8 U.S.C. § 1252(c) (effective to Apr. 23, 1996).
218. *Zadvydas*, 533 U.S. at 698, 701.
219. *Witkovich*, 140 F. Supp. at 818–19.
220. *Zadvydas*, 533 U.S. at 701.

months was not a presumptively reasonable period of detention under § 1252(c) in the way the *Zadvydas* court suggests.[221] Instead, six months represented a *limit* for post-removal-order detention.[222] Precedent had already held that "the period of [post-removal-order] detention [pursuant to § 1252(c)] *must terminate* after six months, and the [noncitizen] thereafter be subject to only such detention as may result from a violation of the supervision provisions" of the same statute.[223] In other words, a person could only continue to be detained after the six-month mark if they violated the conditions of their release from post-removal-order detention (e.g., failed to appear at regular check-ins with INS and provide information about their whereabouts). Furthermore, under the *Witkovich* statute, a person was required to "be released from detention *sooner* than six months if . . . there [was] no reasonable possibility of [their] being deported in the foreseeable future."[224] Six months, then, was not a presumptively reasonable period of post-removal-order detention; it was an upper limit on detention that could only be exceeded if a person violated certain conditions, and that had to be cut short if removal became unforeseeable at any time.

In contrast, the *Zadvydas* framework does not mandate that detention under § 1231(a)(6) terminate after six months.[225] The *Zadvydas* Court explicitly did not intend "that every [noncitizen] not removed must be released after six months."[226] Instead, it held that a person "may be held in confinement [after six months] *until* it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."[227] This interpretation ignores the statutory framework described by the district court decision in *Witkovich*, where release at the six-month mark was indeed mandatory.[228] Moreover, the statute at issue in *Witkovich* allowed a person to be released *as soon as* their removal became unforeseeable; the *Zadvydas* interpretation of § 1231(a)(6), meanwhile, *assumes* that removal remains reasonably foreseeable within six months of a removal order being issued.[229]

By ignoring important limits on the post-removal-order-detention statute analyzed in *Witkovich*, the Court in *Zadvydas* subjected a large class of people to

---

221. *See Witkovich*, 140 F. Supp. at 818–19 (omitting any reference to a presumptively lawful detention period).

222. *Id. See also* Developments in the Law, *supra* note 102, at 1928 ("Federal courts interpreted the [six-month] time limitation as a strict one and found detention beyond six months unlawful.").

223. *Witkovich*, 140 F. Supp. at 818–19. *See also, e.g.*, Shrode v. Rowoldt, 213 F.2d 810, 813 (8th Cir. 1954) (concluding that post-removal-order detention is not allowed after the six-month mandatory period has ended); United States *ex rel.* Lee Ah Youw v. Shaughnessy, 102 F. Supp. 799, 801–02 (S.D.N.Y. 1952) (same); SMITH, *supra* note 12, at 6 n.40 ("If the order of deportation remained outstanding after six months, the [noncitizen] was subject to supervised release under regulations promulgated by the Attorney General.").

224. *Witkovich*, 140 F. Supp. at 819.

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

226. *Id.*

227. *Id.* (emphasis added).

228. *Witkovich*, 140 F. Supp. at 818–19. *See also* Developments in the Law, *supra* note 102, at 1928 (asserting that the *Zadvydas* majority "should have adopted a similar approach" to the one described in *Witkovich*).

229. *Zadvydas*, 533 U.S. at 701; *Witkovich*, 140 F. Supp. at 818–19.

prolonged, unnecessary detention. The Court could instead have viewed Congress's decision to shorten the removal period to 90 days as evidence that Congress viewed detention longer than 90 days as presumptively *unreasonable*. That is, Congress's decision to shorten the removal period to 90 days provides grounds for requiring either outright release or a bond hearing before an IJ after just three months of post-removal-order detention. Although the Court did not go this far in *Zadvydas*, nothing precludes district courts from doing so now.

C. No Period of Detention is "Presumptively Reasonable"

In addition to the legal arguments discussed above, research reveals that spending six months in immigration detention inflicts enormous trauma on noncitizens and their families. A person detained for six months is likely to experience immense physical and psychological trauma, and the only way to avoid such trauma is through release from custody. Research on the effects of detention existed at the time *Zadvydas* was decided,[230] but the consensus among experts today is clearer than ever: detention itself causes irreparable harm. As such, no period of post-removal-order detention can be presumptively reasonable.

The harms inflicted upon detained immigrants by detention itself are well documented.[231] As a group, refugees and asylum seekers "are [already] more vulnerable to mental illness . . . as compared to the general population."[232] This vulnerability reflects the "severe and often repeated exposure to adversity" that refugees and asylum seekers face in their home countries and throughout their migration journeys.[233] Although many host countries detain refugees and asylum seekers on arrival, this practice compounds their pre-existing risk of mental illness:

> Time spent in immigration detention in the host country is a particular post-migration stressor that entails loss of liberty and the threat of forced return to the country of origin. For many asylum seekers with a history of major trauma, it is reminiscent of contexts in their country of origin where they had been deprived of their liberty and human rights. Immigration detention also exposes asylum seekers to possible

---

230. At no time does the majority in *Zadvydas* consider the experience of being in immigration detention and the accompanying harms. *See Zadvydas*, 533 U.S. at 678–702.

231. *See, e.g.*, Katy Robjant, Rita Hassan & Cornelius Katona, *Mental Health Implications of Detaining Asylum Seekers: Systemic Review*, 194 BRIT. J. PSYCHIATRY 306, 310–11 (2009), https://www.cambridge.org/core/journals/the-british-journal-of-psychiatry/article/mental-health-implications-of-detaining-asylum-seekers-systematic-review/D5BE178EDE1219503F263C15BF5B57CE [https://perma.cc/36YX-CN9C]; M. von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC PSYCHIATRY 1, 1–3, 14–19 (Dec. 6, 2018), https://bmcpsychiatry.biomedcentral.com/track/pdf/10.1186/s12888-018-1945-y.pdf [https://perma.cc/X6JS-8ZBG]; *Policy Brief | 5 Reasons to End Immigrant Detention*, NAT'L IMMIGR. JUST. CTR. (Sept. 14, 2020), https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrant-detention [https://perma.cc/29U8-8GYR]; Isra Chaker, *Why We're Joining the Call to Shut Down ICE Detention Centers*, AM. CIV. LIBERTIES UNION (Sept. 23, 2021), https://www.aclu.org/news/immigrants-rights/why-were-joining-the-call-to-shut-down-ice-detention-centers/ [https://perma.cc/UJ87-7VX5].

232. Von Werthern et al., *supra* note 231, at 1–2.

233. *Id.* at 2.

> abuse from staff and violence from fellow detainees, social isolation, and forceful removal.[234]

The longer the detention period, the more severe the mental health symptoms an immigrant is likely to experience.[235] In one study comparing people who had been detained for more than six months to those who had been detained for less than six months, a higher proportion of people in the former group experienced post-traumatic stress disorder, depression, or other "severe mental health-related disability" than those in the latter group.[236]

When people do experience mental or physical illness in detention, they often cannot receive the care they need.[237] Access to medical care in immigration detention centers is limited and plagued with problems like under-staffing and "lack of responsiveness to people with chronic-care issues."[238] The government's own inspections of ICE facilities have revealed that people with serious conditions can go for months without receiving proper care, face significant barriers to accessing specialty care, and regularly do not know what is going on due to poor translation and interpretation.[239]

Furthermore, detention separates families, placing prison walls and often thousands of miles between detained immigrants and their loved ones.[240] Because detention facilities are often located in the rural United States, hours from the nearest cities, physical visits can be a practical impossibility.[241] High phone costs and limited appointment hours compound the effects of physical separation.[242] Detention causes people to lose their jobs, sends families into poverty, and drives children into the foster care system.[243] It further precludes the vast majority of people from accessing legal counsel—a barrier that makes people less likely to be released from detention or win ultimate relief in their cases.[244]

In *Zadvydas*, the Supreme Court discusses none of this. It makes no mention of the human costs of immigration detention, focusing instead on legal frameworks that have little basis in reality. Because detention imposes severe trauma on immigrants and their families, no period of immigration detention should be considered presumptively reasonable. While *Zadvydas* did not consider the very real, immediate harms of detention that extends *less than* six months, district courts

---

234. *Id*.
235. *Id*.
236. Robjant et al., *supra* note 231, at 308.
237. Isaac Chotiner, *The Troubling State of Medical Care in ICE Detention*, NEW YORKER (Sept. 25, 2020), https://www.newyorker.com/news/q-and-a/the-troubling-state-of-medical-care-in-ice-detention [https://perma.cc/6T5P-RXML] ("[M]edical care within ICE facilities raises concern across the board . . . .").
238. *Id.*
239. *Id.*
240. Anello, *supra* note 151, at 367–69.
241. *Id.* at 368 & n.26.
242. *Id.* at 368.
243. *Id.*
244. *Id.* at 368–69 & n.26.

should make this the starting point of their analysis in habeas petitions challenging the constitutionality of post-removal-order detention.

V. DHS SHOULD IMPOSE BOND HEARING REQUIREMENTS ON A CLASS-WIDE BASIS

DHS should enact regulations requiring people facing post-removal-order detention to receive bond hearings after 90 days of detention. In the alternative, DHS should enact regulations requiring bond hearings once post-removal-order detention reaches six months.

Undoubtedly, the continued availability of the writ of habeas corpus as a mechanism for challenging unconstitutional detention offers an important avenue for individuals to seek relief. And, as discussed in Part IV, district courts should go beyond *Zadvydas* and begin to question the constitutionality of detention as soon as a removal order becomes administratively final. Nevertheless, no remedy to the problem of prolonged post-removal-order detention is sufficient if it requires noncitizens to file lawsuits on an individual basis to obtain relief: class-wide solutions are in order.

DHS is the government actor best positioned to require that immigrants facing post-removal-order detention receive a bond hearing after a set time has passed.[245] Even in *Arteaga-Martinez*, where the Supreme Court declined to impose a six-month bond hearing requirement, both parties *conceded* "that the [g]overnment possesses discretion to provide bond hearings under § 1231(a)(6) or otherwise."[246] The Court acknowledged this point, noting that federal agencies "are free to grant additional procedural rights in the exercise of their discretion."[247] DHS, then, could address the problem of prolonged post-removal-order detention at any time by enacting regulations providing for a bond hearing after a discrete period of time.

DHS should enact regulations requiring a bond hearing immediately after the close of the 90-day statutory removal period. It cannot be said enough: in 1996, Congress shortened the post-order removal period from 180 days to 90 days,

---

245. Congress could also solve this problem, and it could go as far as abolishing post-removal-order detention altogether. Although examining the full range of alternatives to immigration detention is beyond the scope of this Note, one of many alternatives to detention would offer a significantly more humane, practical approach to the current treatment of immigrants with outstanding removal orders. Congress could easily pass a law requiring DHS to prioritize alternatives to detention over incarceration; indeed, such a law has been proposed as recently as 2021. Alternatives to Detention Act of 2021, S. 2795, 117th Cong. (2021). Reform-minded advocates should therefore support congressional candidates whose platforms include reducing reliance on immigration detention in favor of alternative options—including detention abolition. Unfortunately, the current Congress is unlikely to pass such a bill in the near future. *See, e.g.*, Jonathan Rauch, *Plan Z for Immigration*, THE ATLANTIC (Sept. 2, 2021), https://www.theatlantic.com/magazine/archive/2021/10/let-states-sponsor-immigration/619813/ [https://perma.cc/VAL5-JCC7] (describing how Congress's efforts to enact immigration reforms have largely stalled since 2007). Thus, this Note focuses on agency solutions.

246. 142 S. Ct. 1827, 1834 (2022).

247. *Id.* (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)) (internal quotations omitted).

providing reason to believe that it considered detention after 90 days to impose an unreasonable burden on immigrants and their families.[248] Furthermore, the precedent relied upon in *Zadvydas* supports the conclusion that detention can be unconstitutional before six months.[249] Regulations providing for a bond hearing before an IJ after 90 days of post-removal-order detention would comport with the statutory text—which requires mandatory detention during the removal period[250]—while imposing heightened procedural protections at the earliest feasible opportunity.

In the alternative, DHS should enact regulations requiring a bond hearing before an IJ, at which the government bears the burden of proof, after six months of post-removal-order detention. Proposing a six-month framework does not undermine the criticisms of *Zadvydas* set forth throughout this Note. The six-month mark is too long.[251] Its development does not comport with precedent, nor does it account for the human costs of immigration detention. [252] However, while imperfect, requiring the government to provide a bond hearing after six months has the benefit of providing mandatory class-wide protections. As scholar Farrin R. Anello argues, "a clear six-month limit provides a framework for more consistently avoiding the

---

248. *See supra* Part IV. Even the dissent in *Zadvydas* questioned why the majority did not identify 90 days as the "presumptively reasonable" detention period. 533 U.S. 678, 717 (2001) (Kennedy, J., dissenting) ("It is curious that the majority would approve of continued detention beyond the 90-day period, or, for that matter, during the 90-day period, where deportation is not reasonably foreseeable.").

249. *See supra* Part IV. The notion that detention can become unconstitutional after just 90 days, at the close of the mandatory post-removal-order detention period, is also consistent with the Ninth Circuit's pre-*Zadvydas* position on the issue. Ma v. Reno, 208 F.3d 815, 822 (9th Cir. 2000) ("In cases in which [a person] has already entered the United States and there is no reasonable likelihood that a foreign government will accept the [person's] return in the reasonably foreseeable future, we conclude that the statute does not permit the Attorney General to hold the [person] beyond the statutory removal period. Rather, the [person] must be released subject to the supervisory authority provided in the statute."), *vacated by Zadvydas*, 533 U.S. at 700–01.

250. Congress should also enact legislation to prohibit mandatory detention entirely in the absence of a bond hearing before an IJ. This "policy solution [would breathe] air into an otherwise suffocated system" that "places immigrant due process rights in a chokehold." Vincent Becraft, *"Yearning to Breathe Free:" Immigrant Due Process Rights Constrained by the Supreme Court's Recent Upholding of 8 U.S.C. § 1226*, 30 KAN. J.L. & PUB. POL'Y 281, 283 (2021) (arguing for this reform in the context of detention under 8 U.S.C. § 1226(c)). In *Yearning to Breathe Free*, Vincent Becraft argues that "noncitizens held in mandatory detention are guaranteed a bond hearing under the Due Process Clause" regardless of whether other avenues for relief remain available. *Id.* at 284. He asserts that mandatory detention "is prima facie unconstitutional" because it absolves the government of its responsibility to show that "detention bears some reasonable relationship to a legitimate governmental interest"—the standard for civil commitment. *Id.* at 298. Under Becraft's framework, as soon as a final removal order is issued and detention becomes mandatory, people facing detention under § 1231 should receive a bond hearing before a neutral IJ. Again, while this Note focuses on regulatory solutions, Congress is not without power to provide relief to people facing prolonged post-removal-order detention without a bond hearing.

251. *See supra* Part IV.

252. *See supra* Part IV.

most egregious deprivations of liberty."[253] Without a clear limit on post-removal-order detention, many people will be subject to detention with no access to a bond hearing before an IJ.[254]

At the end of the day, "[t]he idea that an individual may be jailed for even a matter of days without a bond hearing is troubling and out of step with prior due process case law."[255] No period of post-removal-order detention is "presumptively reasonable," and even a mandatory 90-day detention requirement raises serious constitutional concerns.[256] As a practical matter, however, Congress is unlikely to abolish the 90-day mandatory detention period at any point in the near future.[257] Thus, as advocates continue to push for a statutory solution that comports with constitutional due process, DHS should impose rigorous procedural due process requirements on § 1231(a) detention as soon as possible. It can do this by requiring a bond hearing before an IJ as soon as the 90-day removal period ends, or in the alternative, by requiring a bond hearing after six months. Though this latter requirement does not go far enough, it would at least instantiate the promise of *Zadvydas* and provide clear, class-wide procedural protections.

CONCLUSION

As long as immigration detention exists, immigrants' rights advocates, adjudicators, and government officials should push for maximum due process protections. In many cases, such advocacy requires acknowledging the merits of existing safeguards while continuing to build on the protections they provide.

In *Zadvydas*, the 2001 Supreme Court broke new ground by imposing a clear temporal limit on post-removal-order detention. During the 2021 and 2022 terms, however, the Supreme Court issued *Guzman Chavez*, *Arteaga-Martinez*, and *Aleman Gonzalez*, effectively walking back the rights of immigrants with final removal orders. This trio of cases undermined the due process protections created by *Zadvydas* by increasing the number of people subject to post-removal-order detention and making it more difficult for individuals to challenge their detention.

Furthermore, while the six-month limit articulated in *Zadvydas* established important standards that continue to offer some protections, the *Zadvydas* Court could have—and should have—gone further. A critical reading of the precedent relied upon in *Zadvydas* would limit any presumptively reasonable period of detention to far less than six months. Congress's decision to shorten the removal period to 90 days suggests that a presumptively reasonable detention window should be no longer than three months. Outside these legal frameworks, a significant body of research suggests that *no* period of immigration detention can be called presumptively reasonable.

District courts, by taking seriously the prolonged detention claims brought through habeas petitions, can validate the constitutional concerns identified in *Zadvydas* and strengthen the legal protections born from that case. They can do so

253. Anello, *supra* note 151, at 395.
254. *See* Ray, *supra* note 136.
255. Anello, *supra* note 151, at 403.
256. *See generally* Becraft, *supra* note 250.
257. *See supra* note 245.

by finding that post-removal-order detention becomes constitutionally suspect *before* six months. At the same time, DHS should act immediately to impose a regulatory bond hearing requirement at the close of the 90-day removal period, or, at minimum, after post-removal-order detention reaches six months. In the long term, Congress should abolish immigration detention entirely. These changes would bring the United States one step closer to being a country that operationalizes the values it broadcasts to the rest of the world—a country that welcomes immigrants in practice, not just in rhetoric.