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A Civil Shame: The Failure to Protect Due Process in Discretionary Immigration Bond Hearings

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A Civil Shame

THE FAILURE TO PROTECT DUE PROCESS IN DISCRETIONARY IMMIGRATION CUSTODY & BOND REDETERMINATION HEARINGS

Stacy L. Brustin[†]

INTRODUCTION

Over the last four years, the US Supreme Court has granted certiorari in four immigration custody and bond review cases.[1] Two of these cases were decided in June 2022.[2] The sheer number of cases the Court has recently considered underscores the significance of this area of immigration law.[3] Each case focuses on whether the Immigration and Nationality Act mandates a review hearing after prolonged detention, yet leaves unresolved the issue of whether initial custody and bond hearings themselves meet the due process threshold required for *civil* detention proceedings. Several federal circuit and district courts have addressed aspects of this question and are split as to whether placing the burden of proof on noncitizens, or failing

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[1] Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018); Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2280–81 (2021); Garland v. Aleman Gonzalez 142 S. Ct. 2057, 2062 (2022); Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1830 (2022).

[2] *Aleman Gonzalez*, 142 S. Ct. at 2062; *Arteaga-Martinez*, 142 S. Ct. at 1830.

[3] *See Guzman Chavez*, 141 S. Ct. at 2280–81; *Rodriguez*, 138 S. Ct. at 836. These cases grapple with statutory and constitutional requirements imposed *after* ICE or an immigration judge determines that a noncitizen should be removed. However, they do not address the question of what due process protection is required at the *front end* of the detention process during initial bond hearings. In *Jennings*, the question the Court addressed is whether federal immigration law requires bond reviews every six months for detained individuals with removal orders awaiting deportation. *Id.* at 836, 838–39.

to take account of a noncitizen's ability to pay when setting bond, violates due process.[4] However, in the majority of jurisdictions, standards placing the burden of proof on noncitizens and other arguably unconstitutional practices continue unchecked.[5]

Until 2017, the Department of Homeland Security (DHS) implemented enforcement guidelines prioritizing certain categories of individuals for arrest and detention.[6] Those with serious criminal convictions were targeted, but DHS enforcement guidelines directed DHS officials not to prioritize legal permanent residents or undocumented individuals with families unless they had serious criminal convictions.[7]

On January 25, 2017, President Trump signed an executive order abolishing these enforcement priorities and instituted sweeping enforcement guidance instructing DHS to arrest and remove noncitizens with any criminal conviction, those with pending charges, and those who committed an act that could be chargeable as a criminal offense, including crossing the border without proper documentation.[8] The numbers of noncitizens arrested and detained increased significantly,[9] and many of those detained from 2017 to 2020 had no criminal record or had arrests or pending charges but no convictions.[10]

At the same time, US Immigration and Customs Enforcement (ICE) began routinely denying bond rather than releasing on recognizance, setting reasonable bonds, or

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[4] *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 39 (1st Cir. 2021) (holding that due process requires placing the burden of proving danger and flight risk on the government); Velasco Lopez v. Decker, 978 F.3d 842, 856–57 (2d Cir. 2020) (holding that the government must prove by clear and convincing evidence that the respondent's prolonged detention is justified based on danger to the community or flight risk); Hernandez v. Sessions, 872 F.3d 976, 1000 (9th Cir. 2017) (requiring ICE and immigration judges to consider alternative conditions of release and ability to pay in setting bond amounts for aliens detained under INA § 236(a)); *infra* Section II.A; *see also infra* note 146 and accompanying text. *But see* Miranda v. Garland, 34 F.4th 338, 361–62 (4th Cir. 2022) (placing the burden of proof on the Respondent is consistent with due process in light of the notice and opportunities to be heard afforded to Respondents), *reh'g denied*, No. 20-01828 (4th Cir.); Rodriguez Diaz v. Garland, No. 20-16245, 2022 WL 17087849 (9th Cir. 2022) (finding that respondent who was denied bond is not entitled, based on a claim of prolonged detention, to a second bond hearing at which the government bears the burden of proof).

[5] *See infra* Section II.D.

[6] *See, e.g.*, AM. IMMIGR. COUNCIL, THE END OF IMMIGRATION ENFORCEMENT PRIORITIES UNDER THE TRUMP ADMINISTRATION (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf [https://perma.cc/8LCM-AMTZ].

[7] *See id.*

[8] *Id.*

[9] *Id.* at 1 ("Between January 25, 2017, and . . . September 30, 2017 . . . ICE made 110,568 arrests" compared to "77,806 arrests made during the same period in 2016," amounting to "a 42% increase" in one year).

[10] *See id.*

conditionally releasing noncitizens when alternatives to detention existed to ensure their return to court.[11] This strategy was designed to deter migration rather than undertake a case by case analysis of what was needed to ensure appearance for removal hearings.[12] During the Trump Administration, the case backlog in immigration courts increased, and despite the hiring of additional immigration judges, the system was unable to meet the demand.[13] All the while, the remaining judges operated under tremendous pressure from the Trump Administration to resolve cases and meet caseload quotas.[14]

These policy changes and practical constraints laid bare an already constitutionally deficient civil bail system and revealed the significant consequences of civil imprisonment of noncitizens who are denied sufficient procedural protection.[15] They also led noncitizens in custody to voluntarily deport due to the discouragement and hopelessness they experienced under prolonged detention pending initial removal proceedings.[16] This discouragement and fear only increased with the spread of contagion in immigration detention facilities during the height of the COVID-19 pandemic.[17]

Immigration advocates and scholars have long sounded alarms about the procedures, or lack of thereof, in initial immigration custody and bond reviews.[18] However, the spike in

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[11] *See, e.g.*, Simon McCormack & Amy Belsher, *The NYC ICE Office Has Pretty Much Stopped Releasing People*, NYCLU (Mar. 30, 2020, 3:00 PM), https://www.nyclu.org/en/news/nyc-ice-office-has-pretty-much-stopped-releasing-people [https://perma.cc/6GWK-KUW5].

[12] *See* EUNICE HYUNHYE CHO ET AL., ACLU, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 23–24 (2020), https://www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf [https://perma.cc/BSJ5-ZMP7]; *see also* AM. IMMIGR. COUNCIL, *supra* note 7; *infra* Section II.G.

[13] The *State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, TRAC IMMIGR. (Jan. 19, 2021), https://trac.syr.edu/immigration/reports/637/ [https://perma.cc/3MYW-MSNG].

[14] *See* Nick Miroff, *Trump Administration, Seeking to Speed Deportations, to Impose Quotas on Immigration Judges*, WASH. POST (Apr. 2, 2018, 7:16 PM), https://www.washingtonpost.com/world/national-security/trump-administration-seeking-to-speed-deportations-to-impose-quotas-on-immigration-judges/2018/04/02/a282d650-36bb-11e8-b57c-9445cc4dfa5e_story.html [https://perma.cc/Q5SA-NMUM].

[15] *See infra* Part III.

[16] *See* Christie Thompson & Andrew R. Calderon, *The Surprising New Effect of Trump's Immigration Crackdown*, POLITICO (May 8, 2019), https://www.politico.com/magazine/story/2019/05/08/self-deportation-trump-immigration-policy-trend-226801/ [https://perma.cc/2R59-2T57].

[17] Hannah Dreier, *To Stay or To Go?*, WASH. POST (Dec. 26, 2020), https://www.washingtonpost.com/nation/2020/12/26/immigration-detention-covid-deportation/ [https://perma.cc/YB6E-SJZ7].

[18] Scholars and advocates have written about the shortcomings of the immigration bond process. *See generally* Raha Jorjani, *Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV.

ICE denials of bond and the resulting increase in the number of review hearings from 2017 to 2020 dramatically highlighted the need for urgent reform of the current statutory and regulatory framework.[19]

This article compares the procedural protections required in initial discretionary custody and bond proceedings with those required in civil mental health commitment and child support contempt proceedings in which judges have limited authority to confine individuals. The comparison reveals that discretionary immigration review hearings do not meet the threshold of due process protection and fundamental fairness required when a court contemplates depriving an individual in a *civil* proceeding of their physical liberty.

Custody and bond redetermination hearings, commonly referred to as "bond hearings,"[20] are civil proceedings in which individuals not subject to mandatory detention may request that an immigration judge (IJ) review ICE's decision to impose bond, deny bond, or release under safeguards.[21] Under the current statutory framework, an IJ has broad discretion to decide whether to overturn ICE's denial of bond, release on recognizance, or change the bond amount set by ICE.[22]

What many do not realize is that immigration "courts" are not courts in the sense of a body of neutral arbiters situated in the judiciary branch, levying a check and balance on the executive

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89 (2010); Anthony R. Enriquez, *Structural Due Process in Immigration Detention*, 21 CUNY L. REV. 35 (2017); Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor:* Hernandez v. Sessions, 21 CUNY L. REV. 69 (2017); Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RSRV. L. REV. 75 (2016); Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157 (2016); Jeremy Pepper, *Pay Up or Else: Immigration Bond and How A Small Procedural Change Could Liberate Immigrant Detainees*, 60 B.C. L. REV. 951 (2019).

[19] Authority for ICE to release newly detained individuals who are not subject to mandatory confinement derives from INA § 236(a). Immigration and Nationality Act, Pub. L. No. 414-477, § 242(a), 66 Stat. 163, 208–09 (1952); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 236(a), 110 Stat. 3009, 3009–585 (1996) (codified at 8 U.S.C. § 1226(a)). This section permits ICE to detain or release noncitizens pending a decision on whether the noncitizen is to be removed from the United States. INA § 236(a). Section 236(a) authorizes release on bond as well as release on recognizance known as conditional parole. *Id.*

[20] *See* Gilman, *supra* note 18, at 195. This article uses the terms "bond hearings" and "custody and bond redetermination hearings" interchangeably. The term "bond hearing" is the term of art courts and attorneys routinely use to refer to § 236(a) proceedings and therefore it is used in this article. However, as scholars have pointed out, the phrasing is misleading and minimizes or ignores completely the custody aspect of the proceeding in which a judge must determine whether to continue detaining a noncitizen and may release a detained individual on their own recognizance or on other conditions in lieu of or in addition to setting a bond. *Id.* at 195–96.

[21] *Id.* § 236(c); 8 C.F.R. § 1003.19(a) (2022); *id.* at § 1003.19.

[22] *See id.* § 236(a).

and legislative branches. They are not even independent tribunals authorized under Article I of the US Constitution. Instead, immigration tribunals fall under the authority of the US Department of Justice (DOJ). IJs are attorneys the DOJ employs to adjudicate removal proceedings.[23] While IJs are authorized by federal statute, wear robes, and remain subject to the judicial code of ethics requiring them to act as neutral arbiters, "the DOJ considers immigration judges to be attorneys acting on behalf of the Attorney General, and has created layers of management judges and personnel who eventually report to the Deputy Attorney General."[24] Attorneys from the Department of Homeland Security, a sister executive agency, litigate the cases that the DOJ employed immigration judges adjudicate.[25] The US Attorney General, the chief law enforcement officer of the federal government, is also the ultimate decisionmaker in the immigration court hierarchy with the ability to overturn the decisions of the Board of Immigration Appeals.[26]

The American Bar Association, Federal Bar Association, IJs, and civil rights advocates have mounted a legislative campaign arguing for the creation of an independent Article I Immigration Court akin to the Bankruptcy or Tax Courts. This effort gained traction with the House Judiciary Committee which voted on May 11, 2022, to bring the "Real Courts, Rule of Law Act of 2022"—a bill creating an Article I Immigration Court—to the House floor.[27] This court would operate independently of the executive branch, and its trial division would have jurisdiction over bond determinations for those detained in DHS custody.[28] However, while shifting immigration

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[23] *For the Rule of Law, An Independent Immigration Court: Hearing Before the Subcomm. On Immigr. & Citizenship of the H. Comm. On the Judiciary*, 117th Cong. 4 (2022) (statement of Hon. Mimi Tsankov, President, National Association of Immigration Judges), https://docs.house.gov/meetings/JU/JU01/20220120/114339/HHRG-117-JU01-Wstate-TsankovM-20220120.pdf [https://perma.cc/SXR9-BE3M].

[24] *Id.*

[25] 8 C.F.R. §§ 1003.0–1003.1, 1003.10 (2022); *About This Office*, U.S. DEP'T OF JUST. (last updated May 18, 2022), http://www.justice.gov/eoir/about-office [https://perma.cc/DK7Q-MUNT].

[26] § 1003.1(h) (2022).

[27] Real Courts, Rule of Law Act of 2022, H.R. 6577, 117th Cong. § 601 (2022); *see also Featured Issue: America Needs an Independent Immigration Court—AILA Urges Passage of the Real Courts, Rule of Law Act of 2022*, AM. IMMIGR. L. ASS'N (May 12, 2022), https://www.aila.org/advo-media/issues/all/aila-urges-passage-real-courts-rule-law-act-2022 [https://perma.cc/EU9V-JYAU].

[28] Real Courts, Rule of Law Act of 2022, H.R. 6577, 117th Cong. § 601(a)(1) (2022) ("The Immigration Courts is [sic] not an agency of, and shall be independent of, the executive branch of the Government."); *see also id.* § 604(b)(1)(E) ("The trial division of the Immigration Courts shall have jurisdiction over . . . determinations relating to bond, custody, or the detention of any alien in the custody of the Department of Homeland Security.").

adjudications to an independent tribunal would be a vast improvement over the current system, the need to protect the procedural due process rights of noncitizens in initial custody and bond redeterminations would remain. Moreover, as the legislative debate continues and differing standards operate around the country as a result of Circuit splits,[29] the pressing need for significant reform to ensure fundamental fairness cannot wait.

Courts and legislatures emphasize that judges must exercise great care and caution before taking the extreme step, in a civil proceeding, of depriving an individual of physical liberty to induce compliance with a court order or to protect the individual or community from imminent harm.[30] The comparison of immigration bond proceedings to involuntary civil mental health commitment and child support contempt hearings illustrates the need for immediate substantive and procedural reforms to ensure that lax procedures do not facilitate erroneous civil immigration detention.[31]

In addition to reducing wrongful detention, statutory and regulatory reforms would save taxpayer dollars. As of November 20, 2022, there were 30,001 noncitizens imprisoned in immigration detention centers throughout the United States at a cost of approximately $4,333,000 per day or $1.582 billion per year.[32] DHS projects that this cost will increase in FY 2023.[33] This level of immigration detention has continued despite empirical evidence that alternatives to detention effectively ensure Respondents return to immigration court for removal proceedings.[34]

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[29] *See id.*; *supra* note 4 and accompanying text.

[30] *See infra* Part III.

[31] This is not to suggest, however, that there are sufficient procedural safeguards in those areas. This author has written on the additional reforms needed to ensure due process protection in the child support contempt process. *See generally* Stacy L. Brustin, *Making* Turner *a Reality—Improving Access to Justice Through Court-Annexed Resource Centers and Same Day Representation*, 20 TEX. J. ON C.L. & C.R. 17 (2014).

[32] *Immigration Detention Quick Facts*, TRAC IMMIGR., https://trac.syr.edu/immigration/quickfacts/ (last visited Dec. 1, 2022); DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT STRATEGIC CONTEXT 4 (2023), https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf [https://perma.cc/WP4H-TW5Q] (revealing that the per bed cost for detaining adults in FY 2021 was $144.43 per individual per day). The FY 2022 have not yet been released.

[33] DHS projects the cost for detaining adults in FY 2023 will increase to $148.62 per individual per day. DEP'T OF HOMELAND SEC., *supra* note 32, at 4.

[34] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 30 (2014) [hereinafter ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION], https://www.gao.gov/assets/gao-15-26.pdf [https://perma.cc/J93V-NNEE]. There is concern that immigration courts are underutilizing release on recognizance for those who do not pose danger or flight risk and are overutilizing invasive surveillance and mobility limiting forms of alternative

Whether or not Congress should create an Article I Court for immigration adjudications is a matter of ongoing debate. However, there is an urgent need for reform of the discretionary bond adjudication process. This article recommends statutory, regulatory, and court rules reforms needed and proposes that these procedural protections apply at the initial review stage as well as at subsequent reviews to be scheduled at regular intervals to ensure due process protection while detention pending removal proceedings continues. These proposed reforms include:

i) Automatic judicial review of ICE bond determinations or denials

ii) Reestablishing a presumption against detention[35]

iii) Adopting a "least restrictive standards" test for custody redeterminations and expanding alternatives to detention available to immigration judges

iv) Ensuring comprehensive language access for the entire bond proceeding

v) Requiring appointment of attorneys for undocumented and documented immigrants detained pending removal proceedings

vi) Placing the burden of proof on the government to demonstrate, by clear and convincing evidence, that denial of bond or imposition of bond is warranted.

vii) Strengthening evidentiary and disclosure standards for proof of danger and disfavoring use of pending charges to make the danger determination

viii) Mandating adequate notice of legal issues to be addressed, , presence of respondent, written judicial findings, and transcription of proceedings

ix) Removing the statutory bond minimum and requiring consideration of ability to pay when setting bond

x) Abolishing the automatic stay provision giving DHS authority to circumvent the adjudicator's release decision pending appeal

This article proceeds in four Parts. Part I describes the current statutory and regulatory framework governing the immigration custody and bond redetermination process. Part II describes the day-to-day realities of immigration bond hearings

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release. *See, e.g.*, Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 SAN DIEGO L. REV. 1 (2022).

[35] This article recommends reforms needed in the immigration custody redetermination process. There is also a dire need to abolish the presumption of confinement standard that ICE must adhere to pursuant to 8 C.F.R. § 236.1(c)(8) (2016). However, analysis of this issue is beyond the scope of this article. For a full discussion *see* Gilman, supra note 18, at 175–86.

and highlights numerous due process deficiencies that permeate these proceedings. Part III contrasts bond review proceedings with two categories of civil proceedings in which judges have authority to confine defendants—mental health commitment and child support contempt hearings. This Part discusses the numerous due process protections defendants retain in these proceedings given the gravity of the liberty interest at stake. Part IV recommends statutory, regulatory, and rules changes necessary to ensure that immigrants detained in civil detention facilities receive full and fair hearings to determine whether they should be confined or released.

I. CONSTITUTIONAL PROTECTIONS FOR DETAINED IMMIGRANTS & THE RIGHT TO SEEK BOND

The Supreme Court has held that the US Constitution protects noncitizens in the United States, regardless of their legal status. Fundamental among the protections noncitizens enjoy is the right to due process.[36]

A. Constitutional Due Process Protection

All individuals residing in the United States are entitled to certain protections under the US Constitution regardless of immigration status.[37] Paramount among them is the right to liberty and the assurance that the government cannot confine or incarcerate individuals "without due process of law."[38] In *Zadvydas v. Davis*, a case involving the right to immigration bond review pending removal, the Supreme Court emphasized that "[f]reedom from imprisonment—from government custody, detention, or other

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[36] *See infra* Section I.A.

[37] Mathews v. Diaz, 426 U.S. 67, 77 (1976). There are limitations to this protection. Certain noncitizens who have entered the U.S. and are subject to exclusion or other statutory limitations are not considered as having "entered" the U.S. and therefore are not subject to due process protection that individuals who are defined as having entered the U.S. including the right to a hearing to review a decision to expel. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S.Ct. 1959, 1982–83 (2020) (holding that an arriving alien who was apprehended twenty five yards into the United States was not entitled to judicial review of a negative credible fear finding and was instead subject to whatever process Congress deemed required by statute); *see also* Landon v. Plasencia, 459 U.S. 21, 32, (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.")

[38] *See* Mathews v. Diaz, 426 U.S. 67, 77 (1976); *see also* Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.")

forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment Due Process] Clause protects."[39]

The Fifth Amendment prohibits the federal government from depriving "persons" of liberty "without due process of law,"[40] which, as the Supreme Court clarified in *Mathews v. Diaz*, includes protection of undocumented persons.[41] However, the right to due process of law does not mean that individuals without legal immigration status are entitled to the same privileges and benefits as citizens. As the Court in *Mathews v. Diaz* clarified, "in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[42] The government's authority to deport, for example, does not extend to citizens.[43] The Court concluded, "[t]he fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'"[44]

The Immigration and Nationality Act of 1952 authorized the executive branch to civilly detain noncitizens.[45] The Supreme Court subsequently held that detention pending removal

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[39] Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)); *see also* Brito v. Garland, 22 F.4th 240, 252–53 (1st Cir. 2021) (noting "[d]etention is the quintessential liberty deprivation") (citing *Foucha*, 504 U.S. at 80 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.")), *aff'd in part, vacated in part, remanded sub nom.*, Brito v. Garland, 22 F.4th 240 (1st Cir. 2021)).

[40] U.S. CONST. amend. V. The Supreme Court has determined that the Due Process Clause protects substantive due process rights and procedural due process rights. *See* United States v. Salerno, 481 U.S. 739, 746 (1987).

> So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty." When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as "procedural" due process.

Id. (internal citations omitted).

[41] *Diaz*, 426 U.S. at 77 (citing Wong Yang Sung v. McGrath, 339 U.S. 33, 48–51 (1950)).

[42] *Id.* at 79–80.

[43] The Court refers to the plenary power of the executive and judicial branches to control decisions regarding naturalization and immigration and explains,

> the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.

Id. at 81.

[44] *Id.*

[45] *See* Velasco Lopez v. Decker, 978 F.3d 842, 848 (2d Cir. 2020).

proceedings is constitutionally permissible.[46] The US government has utilized civil confinement liberally, particularly since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996 that expanded the categories of noncitizens subject to mandatory detention.[47] Congress, concerned with the number of noncitizens in removal proceedings who reportedly did not appear for their hearings,[48] amended the INA and mandated detention during removal proceedings for "criminal aliens" with certain triggering convictions.[49] While ICE previously had broad discretion to release detained individuals on bond—and immigration judges had discretion to review ICE's determinations—IIRIRA requires mandatory and unreviewable detention of noncitizens who have committed particular delineated crimes.[50]

The US Constitution grants authority over naturalization to the legislative and executive branches.[51] The Supreme Court has interpreted the branches' discretion to detain immigrants pending removal proceedings as an exercise of this plenary power.[52] However, as the *Zadvydas* Court emphasized, despite Congress' "plenary power to create immigration law . . . Executive and Legislative Branch decisionmaking in that area . . . is subject to important constitutional limitations," including the Due Process Clause of the Fifth Amendment.[53] Due process prohibits the federal government from infringing upon an individual's fundamental rights—the right to liberty paramount among them—without a "full and fair hearing."[54] The *Zadvydas* Court emphasized that detention is

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[46] *See* Demore v. Kim, 538 U.S. 510, 523 (2003) (citing Wong Wing v. United States, 163 U.S. 228, 235 (1896)) ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid.").

[47] *See* INA § 236(c) (requiring mandatory detention pending removal hearings for "criminal aliens" with convictions for statutorily enumerated crimes).

[48] *See* Demore v. Kim, 538 U.S. 510, 513 (2003) ("We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal.").

[49] *See* INA § 236(c).

[50] *See id.* §§ 236(c), 236(e).

[51] U.S. CONST. art. II § 2.

[52] *See* Mathews v. Diaz, 426 U.S. 67, 81 (1976); Zadvydas v. Davis, 533 U.S. 678, 695–96 (2001).

[53] *See Zadvydas*, 533 U.S. at 695. In *Zadvydas*, the Supreme Court interpreted INA § 241(a)(6) and held that an individual cannot be held indefinitely in post-removal detention and the presumptive reasonableness limit for this detention is six months. While *Zadvydas* applies to 28 U.S.C. § 2241 proceedings (federal habeas corpus proceedings) rather than discretionary bond under INA § 236, the due process analysis is nevertheless instructive. *Id.* at 684, 699, 701.

[54] *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 597, 601 (1953) ("While it may be that a resident alien's ultimate right to remain in the United States is subject to

impermissible "unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . . or, in certain special and 'narrow' nonpunitive 'circumstances' . . . where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"[55]

The benchmarks of "full and fair hearing[s]" in civil proceedings include adequate notice, ability of the defendant to meaningfully participate in the hearing, including the right to question and confront witnesses, the right to an attorney, and written judicial determinations.[56] The Supreme Court in *Mathews v. Eldridge* established a three-part test for determining whether due process in civil hearings requires additional procedural safeguards.[57]

In very rare and limited circumstances, a civil court retains the authority to confine an individual to protect that person, protect the community, or induce compliance with a court order.[58] The purpose of such confinement is not to punish or deter future criminal behavior, but to mitigate danger to self or others as well as to ensure parties comply with court orders.[59] In such cases, pursuant to the balancing of interests required under *Mathews*, civil courts must adhere to heightened procedural and evidentiary standards prior to overriding an individual's constitutionally protected right to freedom from physical confinement.[60]

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alteration . . . it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him.").

[55] *Zadvydas*, 533 U.S. at 690 (emphasis added) (citing Kansas v. Hendricks, 521 U.S. 346, 356 (1997)). The heightened due process protections afforded in criminal proceedings include the right to counsel at government expense for indigent defendants, burden of proof on the government, requirement of proof beyond a reasonable doubt for finding of guilt, right to confront and cross examine witnesses. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 31, 86, 694, 1363 (6th ed. 2017).

[56] *See infra* Part III.

[57] Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (explaining that, in determining the adequacy of procedural due process in a civil proceeding the court must assess (1) the nature of "the private interest that will be affected," (2) the "risk of an erroneous deprivation" of that interest with or without additional procedural safeguards and (3) the nature and weight of the government's countervailing interest and administrative burden caused by imposition of additional safeguards.).

[58] *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 368 (1996) (civil commitment proceeding); Addington v. Texas, 441 U.S. 418, 425–46 (1979) (civil commitment proceeding); Turner v. Rogers, 564 U.S. 431, 435 (2011) (child support contempt proceeding).

[59] *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 573 (1975); *Turner*, 564 U.S. at 435.

[60] *See infra* Part III.

B. The Right to Seek Release from Immigration Detention Pending Removal Proceedings—A Discretionary Determination

The Immigration and Nationality Act authorizes ICE to release an individual detained in ICE custody who is not subject to mandatory detention[61] and is not considered an *arriving alien*,[62] pending their removal hearing.[63] DHS may release a detained individual on their own recognizance, require conditions such as electronic monitoring, set a bond at $1,500 or higher, or continue to detain them.[64]

A detained noncitizen may seek IJ review of DHS's decision.[65] An IJ has authority to increase or decrease the bond set by DHS, release on conditional parole, or deny bond and continue detaining the individual pending their removal proceeding.[66] The onus is on the detained individual to request release,[67] and a hearing may be requested orally or in writing.[68]

The bond proceeding is considered entirely separate from the removal hearing,[69] which determines whether the noncitizen may remain in the United States. Although they are two

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[61] *See* INA § 236(a).

[62] *Id.* § 235(b) governs arriving aliens and individuals placed in expedited removal. An IJ does not have authority to set bond for or determine other conditions of release for an "arriving alien" or an individual subject to expedited removal. *See id.* An arriving alien is an individual who is seeking admission to the U.S. and entered through an official port of entry or was interdicted at sea. 8 C.F.R. § 1.2 (2022).

[63] The Immigration and Nationality Act refers to these hearings as "removal proceedings." In this article, I use the terms deportation hearing and removal hearing or proceeding interchangeably as the term "deportation" seems more transparent and accurate than the more ambiguous term "removal."

[64] *See* INA § 236(a) (governing the arrest and detention of noncitizens pending a decision on removal); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018); AMERICAN IMMIGRATION LAWYERS ASSOCIATION, REPRESENTING CLIENTS IN IMMIGRATION COURT 411 (CLINIC ed., 2018) [hereinafter REPRESENTING CLIENTS]; CATH. LEGAL IMMIGR. NETWORK, INC., A GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION 11 (2021) [hereinafter GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION], https://cliniclegal.org/file-download/download/public/7749 [https://perma.cc/PR7S-Y4PE].

[65] INA § 236(a); 8 C.F.R. §§ 1003.19(a), 1236.1(d)(1) (setting forth the procedures for custody redetermination hearings).

[66] INA § 236(a).

[67] REPRESENTING CLIENTS, *supra* note 64, at 412.

[68] 8 CFR § 1003.19(b) (2022); *see also* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL, § 9.3(c) (2021) [hereinafter IMMIGRATION COURT PRACTICE MANUAL], https://www.justice.gov/eoir/eoir-policy-manual/ [https://perma.cc/J2EM-ANV2].

[69] 8 CFR § 1003.19(d) ("Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding."); *see also* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, § 9.3(E)(4) ("The Immigration Judge creates a record, which is kept separate from the Records of Proceedings for other Immigration Court proceedings involving the alien.").

separate proceedings, the same judge often presides over both matters.[70] The IJ may not use evidence introduced during the bond hearing or notes from that hearing to determine removability.[71] However, some IJs permit documents first introduced in the bond hearing to be used in later hearings.[72] Moreover, the parties themselves may request that information elicited during the bond hearing be admitted in the removal proceeding.[73] Thus, although the proceedings are considered separate from one another, what transpires in a bond proceeding can ultimately impact the removal process.[74]

In the bond proceeding, the IJ must first determine whether the individual poses a danger or security risk and, if the IJ finds there is no danger, then they assess whether the individual is a flight risk.[75] IJs may use their discretion to consider a wide array of factors in evaluating danger and flight risk.[76] These factors include criminal history (not limited to consideration of convictions),[77] recency and seriousness of alleged criminal conduct, fixed addresses, community ties, immigration history, and eligibility for relief from removal.[78] Generally, detained individuals only have one opportunity to seek bond in immigration court.[79] They must demonstrate that a material change in circumstances has occurred in order to seek custody redetermination a second time.[80]

If denied bond or unable to pay the bond set, detained individuals remain in detention pending their removal hearing and any appeals.[81] They have a right to appeal the immigration

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[70] REPRESENTING CLIENTS, *supra* note 64, at 412.

[71] *Id.*

[72] GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 32.

[73] *Id.*

[74] *See id.*

[75] *See In re* Siniauskas, 27 I. & N. Dec. 207, 207 (B.I.A. 2018). Almost 69% of ICE immigrant detainees have no criminal record. *Immigration Detention Quick Facts*, TRAC IMMIGR. (last reviewed July 17, 2022), https://trac.syr.edu/immigration/quickfacts/ [https://perma.cc/AR74-KNW6].

[76] *See In re* Guerra, 24 I. & N. Dec. 37, 37, 40 (B.I.A. 2006).

[77] An IJ may also consider pending or dismissed charges. *See* REPRESENTING CLIENTS *supra* note 64, at 413 (citing *In re* Fatahi, 26 I. & N. Dec. 791 (B.I.A. 2016)). In *Fatahi*, the BIA clarified that the IJ should consider both "direct and circumstantial evidence" to determine if an individual poses a danger. *In re Fatahi*, 26 I. & N. Dec. at 795 (citing *In re* D-R-, 25 I. & N. Dec. 445, 454–55 (B.I.A. 2011)).

[78] *See In re Guerra*, 24 I. & N. Dec. at 40.

[79] *See* 8 C.F.R. § 1003.19(e) (2022).

[80] *Id.*

[81] As the Second Circuit has emphasized,

> [d]etention under § 1226(a) is frequently prolonged because it continues until all proceedings and appeals are concluded. Absent release on bond, detention lasts through the initial removal determination proceedings (which themselves

court bond decision to the Board of Immigration Appeals (BIA),[82] but the removal process continues apace while the appeal is pending.[83] Given that it can take years for the BIA to decide an appeal, and considering that the immigration trial courts expedite the scheduling of removal hearings for detained individuals, the removal hearing can take place prior to the resolution of a BIA bond appeal.[84] The BIA decision is final, and there are no additional avenues for judicial review of a bond decision unless there is a constitutional claim.[85]

Whether a detained immigrant is released critically affects their ability to defend against deportation. Detained noncitizens are limited in their ability to master the complexities of removal law and procedure, gather evidence including letters of support and affidavits critical to supporting a defense to removal, draft necessary motions and briefs, and most importantly, hire and communicate with an attorney.[86] Without access to attorneys due to the location of detention centers in isolated, rural areas, and due to the inability to pay an attorney when pro bono counsel is unavailable, many individuals in detention are left with no option but to represent themselves.[87]

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can take months or years) and all inter-agency and federal court appeals, even where an individual has prevailed and the Government appeals.

Velasco Lopez v. Decker, 978 F.3d 842, 852 (2d Cir. 2020).

[82] 8 C.F.R. § 1003.19(f) (2022).

[83] IMMIGRANT LEGAL RES. CTR., REPRESENTING CLIENTS IN BOND HEARINGS, AN INTRODUCTORY GUIDE 6 (2017) [hereinafter REPRESENTING CLIENTS IN BOND HEARINGS], https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf. [https://perma.cc/F64R-N9NQ]. Cases on the detained docket are expedited and the individual hearing may be scheduled within months. *Id.* at 13.

[84] *See* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 74.

[85] "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." INA § 236(E). As the Second Circuit of Appeals explained in *Velasco Lopez*, "[t]he Supreme Court has made clear that [§ 236(e)] does not preclude challenges to 'the extent of the Government's detention authority under the statutory framework as a whole.'" *Velasco Lopez*, 978 F.3d at 850 (citing Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018)). Nor does it "limit habeas jurisdiction over constitutional claims or questions of law." Singh v. Holder, 638 F.3d 1196, 1202 (9th Cir. 2011).

[86] *See* Emma Winger & Eunice Cho, *ICE Makes It Impossible for Immigrants in Detention to Contact Lawyers*, ACLU (Oct. 2021), https://www.aclu.org/news/immigrants-rights/ice-makes-it-impossible-for-immigrants-in-detention-to-contact-lawyers [https://perma.cc/PJR8-HV5L].

[87] *See* ADITI SHAH & EUNICE HYUNHYE CHO, ACLU, NO FIGHTING CHANCE: ICE'S DENIAL OF ACCESS TO LEGAL COUNSEL IN U.S. IMMIGRATION DETENTION CENTERS 5–6 (2022) [hereinafter NO FIGHTING CHANCE], https://www.aclu.org/sites/default/files/field_document/no_fighting_chance_aclu_research_report.pdf [https://perma.cc/2VMT-LUJX]; *see also* Ingrid V. Eagley & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV 1, 2 (2015) ("Drawing on data from over 1.2 million deportation cases decided between 2007 and 2012, we find that only 37% of all

Without counsel, the likelihood of success in a removal proceeding is dramatically reduced.[88]

II. DAY TO DAY REALITIES OF INITIAL IMMIGRATION BOND PROCEEDINGS[89]

> ** Mr. de la Cruz Espinoza's bond hearing lasted approximately five to ten minutes, he did not know it was his burden to prove that he is not a danger to the community nor a flight risk, and he had trouble understanding what was happening due to a language barrier. The IJ set bond at $20,000, which Mr. de la Cruz Espinoza asserts is too high for him or his family to pay.[90]
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> ** [Mr. Thompson Adegoke] appeared pro se via video teleconferencing, did not know he would be having a bond hearing that day, and did not know what was expected of him during the hearing. The IJ did not ask him what his financial situation was, nor did she ask Mr. Thompson to tell the court why he was neither a danger nor a flight risk. The IJ ultimately set bond at $15,000, an amount Mr. Thompson was unable to pay. He later requested a bond reduction to $5,000, to which the court did not respond.[91]
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> ** At the hearing, [Mr. Onosambo-Ohindo] Class Petitioner presented evidence that he was homeless and living in a refugee shelter. He asked the court to consider releasing him with conditions other than a money bond, suggesting either an ankle monitor or regular in-person ICE check-ins, or alternatively with the minimum bond allowed under the statute, $1,500. The government did not file any evidence at his custody hearing and conceded Class Petitioner had

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immigrants, and a mere 14% of detained immigrants, secured representation. Only 2% of immigrants obtained pro bono representation from nonprofit organizations, law school clinics, or large law firm volunteer programs. Barriers to representation were particularly severe in immigration courts located in rural areas and small cities, where almost one-third of detained cases were adjudicated.").

[88] *See* NO FIGHTING CHANCE, *supra* note 87, at 10–11; *see also* Emily Ryo, *Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings*, 52 L. & SOC'Y REV. 503, 504–05 (2018); Eagley & Shafer, *supra* note 87, at 47–51.

[89] The concerns I highlight in this section are based on my own experience observing and participating in bond hearings in Immigration Courts in Arlington, VA, Aurora, CO, and El Paso, TX, as well as based on interviews I conducted with legal directors and staff attorneys of nonprofit legal services agencies around the country. Those I interviewed include: Allegra Love, Founder and Supervising Attorney at the Santa Fe Dreamers Project, in New Mexico (Aug. 11, 2021); Laura Lunn, Director of Advocacy and Litigation at the Rocky Mountain Immigration Advocacy Network, in Colorado (July 14, 2021); Kelly White, Program Director, Detained Adults Program at the Capital Area Immigrant Rights Coalition [CAIR], in Washington, D.C. (July 6, 2021); Katherine Conway (senior attorney), Katharine Gordon (staff attorney), Lorna Julien (senior attorney), Monica Mananzan (managing attorney), and Eleanor Gourley (senior attorney) at CAIR Coalition, (July 15, 2021); and Laura St. John, Legal Director at the Florence Immigrant & Refugee Rights Project, in Arizona (July 29, 2021). These interviews are collectively referred to as "Interviews with Legal Directors and Staff Attorneys." Notes of Interviews on file with the author.

[90] Dubon Miranda v. Barr, 463 F. Supp. 3d 632, 639 (D. Md. 2020), *vacated*, 34 F.4th 338 (2022) (citations omitted).

[91] *Id.* (citations omitted).

> no criminal history. The IJ stated that she could not consider those alternatives to a money bond and set bond at $8,000.[92]
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> ** [DHS Counsel introduced a document known as a "Red Notice" against Ms. Hernandez-Lara as evidence of possible gang affiliation in her home country]. Hernandez denied belonging to the organization. Her counsel explained that her brother had belonged to the gang and pointed out that the Red Notice failed to specify any criminal or dangerous act that Hernandez allegedly committed . . . . [n]onetheless, the IJ found that there was not "sufficient evidence explaining why these allegations are being brought against her." Stating that "it is [Hernandez's] burden of proof to show by clear and convincing evidence she is not a danger," the IJ found, "based on this Red Notice, [that] she has failed to meet that burden." Consequently, he denied her request for bond.[93]

These stories capture the day-to-day realities detained individuals face when seeking judicial review of ICE bond determinations. Federal judges have memorialized these disturbing narratives in court decisions chastising immigration courts for denying litigants full and fair bond hearings. The diminishment of due process manifests itself in myriad ways. Statutes place the burden on the detained individual to affirmatively request bond and prove eligibility for release.[94] Detained individuals do not have the right to appointed counsel and therefore indigent litigants struggle to represent themselves while experienced lawyers represent the government in every bond proceeding.[95] Bond hearings are frequently conducted in English with the outcome delivered to the detained individual in their native language.[96] IJs are not required to consider less restrictive alternatives to detention nor, in many states, are they required to determine the respondent's ability to pay bond.[97] Moreover, government prosecutors retain authority in certain cases to override an IJ's bond determination.[98] This Part relies

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[92] Onosamba-Ohindo v. Barr, 483 F. Supp. 3d 159, 169–70 (W.D.N.Y. 2020) (citations omitted), *appeal docketed* No. 21-1044 (2d Cir. Apr. 27, 2021).

[93] Hernandez-Lara v. Lyons, 10 F.4th 19, 24–25 (1st Cir. 2021) (second and third alterations in original) (citation omitted) (quoting *About INTERPOL Washington: Frequently Asked Questions*, U.S. DEP'T OF JUST. (Apr. 19, 2021), https://www.justice.gov/interpol-washington/frequently-asked-questions [https://perma.cc/BBS5-CJFK]). The First Circuit noted in its decision affirming the lower court that "[i]n the United States, an INTERPOL Red Notice alone is not a sufficient basis to arrest, much less detain or extradite, the "subject" of the notice "because it does not meet the requirements for arrest under the Fourth Amendment to the Constitution." *Hernandez-Lara*, 10 F.4th at 24–25 (internal quotation marks omitted) (citing *About INTERPOL Washington: Frequently Asked Questions*, *supra*).

[94] *See infra* Section II.D.

[95] *See infra* Section II.C.

[96] *See infra* Section II.B.

[97] *See infra* Section II.A.

[98] *See infra* Section II.G.

on reported federal cases as well as interviews with legal directors in nonprofit immigration legal services programs and catalogues the inequities permeating discretionary immigration bond proceedings.

A. Onus on Detained Individuals to Seek Review of ICE Custody Determination & No Uniform Requirement to Consider Least Restrictive Alternatives to Detention or Ability to Pay

ICE has broad discretion to determine whether to release a noncitizen on their own recognizance, release under safeguards, set bond, or deny bond.[99] However, review of these custody and bond determinations is not automatic, and an IJ cannot redetermine bond on his or her own initiative.[100] Instead, the onus is on the detained individual to seek redetermination. While there is an opportunity to check a box on the I-286 Notice of Custody Determination to seek judicial review, many individuals do not understand the process and, even if they do, they may be reluctant to take action that could be perceived as challenging ICE.[101] Regardless, requesting judicial review of bond does not always result in the scheduling of a bond hearing.[102] Transfers among detention centers in different states make access to bond determination reviews even more uncertain and complicated.[103]

In addition, despite the civil nature of immigration bond proceedings, there is no statutory or regulatory presumption against detention and no requirement that IJs consider the least restrictive alternatives to detention when redetermining

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[99] *See* INA § 236(a). ICE's use of its broad discretionary authority to impose hefty bonds or deny bond altogether directly impacts the constitutional liberty interests of noncitizens articulated in Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) and Zadvydas v. Davis, 533 U.S. 678, 687 (2001). Reform of standards for ICE's determination of whether a noncitizen must be detained or released is beyond the scope of this article, however, the need to enact a statutory or regulatory presumption in favor of release from the outset of ICE custody and require that ICE pursue less restrictive alternatives to detention to effectuate the nonpenal goals of protecting the community and ensuring appearance in immigration court are necessary. *See* Gilman, *supra* note 18, at 175–86.

[100] *In re* P-C-M-, 20 I. & N. Dec. 432, 434 (B.I.A. 1991); *see also* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 34.

[101] Interview with Allegra Love, *supra* note 89.

[102] *See* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 34.

[103] *See id.* at 34–35; *see also* ALISON PARKER, A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES 1–3 (2011), https://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf [https://perma.cc/K2HD-BDRX].

custody and bond.[104] If IJs determine that continued detention is unwarranted, they routinely set monetary bonds rather than utilizing other release options.[105] Release on recognizance is an available option, though underutilized even in cases in which the IJ finds that the Respondent poses no danger or flight risk.[106] Numerous alternatives to detention exist that are effective at ensuring appearance in removal hearings.[107] These alternatives include electronic tracking, community-based supervision, home detention, home visits, and routine "check-ins" with ICE.[108] Yet in most jurisdictions, judicial consideration of these alternatives is not required.[109]

Federal courts have begun to address the constitutionality of the current framework.[110] In *Hernandez v. Sessions*, the Ninth Circuit held that consideration of alternatives to detention in immigration bond hearings is constitutionally required as "[s]etting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at

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[104] *See* INA § 236(a) (authorizing immigration court review of custody and bond determinations but does not contain a presumption against detention nor require the immigration judge to consider least restrictive alternatives to detention.); 8 CFR § 1003.19 (2022) (setting out practices and procedures for immigration court review of DHS bond and custody determinations but does not contain a presumption against detention nor require consideration of least restrictive alternatives; *see also* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 137 (2013) ("Reliance on mandatory detention, evidentiary limitations, and shifting burdens of proof create a presumption of detention.").

[105] Gilman, *supra* note 18, at 189.

[106] *Id.* at 196.

[107] *See* ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION, *supra* note 34, at 34; Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2155–70 (2017).

[108] Marouf, *supra* note 107, at 2155–70; *see also* Brito v. Garland, 22 F.4th 240, 254 (1st Cir. 2021) ("discussing court's earlier order that the IJ consider 'whether non-incarceratory measures, such as home detention, electronic monitoring, and so forth, could mitigate any danger that [the noncitizen] posed to the safety of the community . . . *before* concluding that detention was appropriate.'") (alteration in original) (citing Fernandez Aguirre v. Barr, No. 19-CV-7048 (VEC), 2019 WL 4511933, at *5 (S.D.N.Y. Sept. 18, 2019)), *aff'd in part, vacated in part, remanded sub nom.*, Brito v. Garland, 22 F.4th 240 (1st Cir. 2021)).

[109] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104529, ALTERNATIVES TO DETENTION: ICE NEEDS TO BETTER ASSESS PROGRAM PERFORMANCE AND IMPROVE CONTRACT OVERSIGHT 9–10 (2022), https://www.gao.gov/assets/gao-22-104529.pdf [https://perma.cc/3H27-47WS] ("Other federal, state, and local law enforcement agencies, or an immigration judge as a condition of release, *may* also refer individuals for potential enrollment. The ATD program is then to determine whether the individual is eligible for enrollment and whether participation in ATD would be a reasonable supplemental condition of release." (emphasis added)).

[110] *See, e.g.*, Hernandez v. Sessions, 872 F.3d 976, 982 (9th Cir. 2017) (requiring consideration of alternative conditions of release and ability to pay)); *see also* Miranda v. Garland, 34 F.4th 338, 366 (4th Cir. 2022) (overruling the district court and holding that the current detention procedures are constitutional), *reh'g denied*, No. 20-01828 (4th Cir.).

future hearings."[111] In a First Circuit case addressing the issue, *Brito v. Garland*, the government argued that if a court finds a noncitizen poses a danger to the community, then the court must deny bond, and there is no need to consider less restrictive alternatives.[112] However, the First Circuit, in dicta, suggested that consideration of alternatives to detention would be relevant to and potentially determinative of whether the respondent poses a danger.[113] The court noted, "it is easy to see how conditions of release might shape an IJ's determination as to whether a noncitizen poses a flight risk or danger to the community."[114] The majority of circuits have not addressed this issue, and therefore, without statutory or policy mandates, most immigration courts are not required to consider least restrictive alternatives to detention when redetermining custody and bond.

If an IJ determines that a detained individual poses no danger but presents a potential flight risk, the judge is permitted to set bond based on his or her assessment of the amount needed to deter flight.[115] The minimum bond allowable is $1,500, however, there is no maximum.[116] As of September 16, 2022, the median bond amount awarded across the country was between $5,000 and $6,000.[117] However, individual bond amounts can range from $1,500 to more than $25,000.[118] In Baltimore Immigration Court, for example, bonds "are frequently set between $8,000 and $15,000 and—unlike in the criminal context—must be paid upfront and in full."[119]

The extent to which an IJ must consider ability to pay in determining bond is the subject of a circuit split.[120] In *Hernandez*, the Ninth Circuit determined that analysis of ability to pay is required under the Due Process Clause of the Fifth Amendment.[121] Without such consideration, for an individual of limited means, the setting of a high bond becomes akin to setting

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[111] *Hernandez*, 872 F.3d at 991.

[112] *Brito*, 22 F.4th at 254.

[113] *Id.*

[114] *Id.*

[115] *See* HILLEL R. SMITH, CONG. RSCH. SERV., IF11343, THE LAW OF IMMIGRATION DEENTION: A BRIEF INTRODUCTION 1 (2022), https://crsreports.congress.gov/product/pdf/IF/IF11343.

[116] *See* INA § 236(a).

[117] *See Immigration Court Bond Hearings and Related Case Decisions*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/bond/ (last visited Sept. 16, 2022).

[118] *See id.*

[119] Dubon Miranda v. Barr, 463 F. Supp. 3d 632, 640 (D. Md. 2020), *vacated*, 34 F.4th 338 (2022).

[120] *See id.* at 649–50; Onosamba-Ohindo v. Barr, 483 F. Supp. 3d 159, 184 (W.D.N.Y. 2020), *appeal docketed*, No. 21-1044 (2d Cir. Apr. 27, 2021).

[121] *See* Hernandez v. Sessions, 872 F.3d 976, 1000 (9th Cir. 2017); *see also* Abdi v. Nielsen, 287 F. Supp. 3d 327, 336, 345 (W.D.N.Y. 2018).

no bond at all.[122] The Fourth Circuit, however, reached a different conclusion in holding that detained immigrants are not entitled to the same due process protections as citizens and consideration of ability to pay is not required.[123] This split exacerbates uncertainty and leads to differential treatment of detained citizens in various parts of the country.

B. Limited Language Access—The Failure to Interpret the Entirety of Bond Proceedings

The rules of procedure governing immigration proceedings require availability of interpreters for litigants who do not speak English.[124] The rules state that "the immigration court will arrange for an interpreter both during the individual calendar hearing and, if necessary, the master calendar hearing."[125] They do not, however, specify that interpreters must be available in bond proceedings or, more importantly, that interpreters must interpret bond hearings in their entirety.[126]

Attorneys report that while court interpreting practices around the country differ, certain commonalities exist.[127] Interpreters are generally available to interpret in bond hearings; however, the quality of interpretation varies, and there is a dearth of interpreters capable of interpreting indigenous dialects.[128] Attorneys, or, if unrepresented, pro se litigants, must often affirmatively request that an interpreter translate the entire bond proceeding, including colloquies between the DHS attorney and the judge.[129] Some judges ask the attorney representing the respondent whether interpreting the entire review is necessary,[130] whereas

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[122] *See Hernandez*, 872 F.3d at 991.

[123] *See* Miranda v. Garland, 34 F.4th 338, 366 (4th Cir. 2022), *reh'g denied*, No. 20-01828 (4th Cir).

[124] IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, § 4.11, § 4.15(o); *see also* 8 C.F.R. § 1003.22 (2022).

[125] IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, § 4.11.

[126] *See id.*

[127] Interviews with Legal Directors and Staff Attorneys, *supra* note 89.

[128] *Id.*

[129] Interview with Kelly White, *supra* note 89; Interview with Laura St. John, *supra* note 89; Interview with Allegra Love, *supra* note 89; *see also* Letter from Daniel Werner, SIFI Dir. & Laura Rivera, SIFI Deputy Dir., S. Poverty L. Ctr., to James McHenry, Acting Dir., Exec. Off. For Immigr. Rev. [hereinafter SPLC Letter] 2, 11–12 (Aug. 8, 2017) (https://www.aila.org/File/DownloadEmbeddedFile/72696 [https://perma.cc/5M8X-3LVM]) ("[T]elephonic interpreters appearing in front of all of the Stewart IJs failed to interpret all English language conversations, and often limited interpretation for questions directed to the respondent.").

[130] Personal Observations 2018–2021; Interview with Laura St. John, *supra* note 89.

others simply proceed with intermittent interpreting as needed unless otherwise requested.[131]

Typically, the IJ will ask the respondent to state their name and the language they speak best.[132] An interpreter will interpret this initial exchange; however, judges frequently proceed to inform the respondent, through the interpreter, that they will speak with the attorneys (or attorney if only the government is represented) and get back to the respondent to summarize.[133] The IJ then speaks in English with the attorneys.[134] Sometimes there is simultaneous translation occurring, but often there is not.[135] Instead, the ICE attorney presents documents outlining the respondent's alleged criminal history and makes arguments concerning danger to the community and flight risk while the respondent sits idly by (often via video) unable to understand what is being said or to object to inaccuracies.[136]

C. No Appointment of Counsel

Federal regulations guarantee respondents in custody and bond redeterminations the right to an attorney with the caveat that the representation must be "at no expense to the

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[131] Interview with Laura St. John, *supra* note 89; Interview with Allegra Love, *supra* note 89; *see also* Interview with Laura Lunn, *supra* note 89.

[132] Personal Observations 2018–2021.

[133] Personal Observations 2018–2021; Interviews with Legal Directors, *supra* note 89; *see also* SPLC Letter, *supra* note 129, at 11–12; Maya P. Barak, *Can You Hear Me Now? Attorney Perceptions of Interpretation, Technology, and Power in Immigration Court*, 9 J. ON MIGRATION & HUM. SEC. 207, 210 (2021) (criticizing the use of partial interpretation in Immigration Courts which "leav[es] '[limited English proficiency] individuals [unable] to comprehend the testimony of English-speaking witnesses and exchanges between the Immigration Judge and Trial Attorney and defense counsel.'") (third alteration in original) (quoting LAURA ABEL, BRENNAN CTR. FOR JUST., LANGUAGE ACCESS IN IMMIGRATION COURTS 5 (2011), https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf [https://perma.cc/C6FJ-QFD6]). Abel further notes that *pro se* respondents do not have lawyers to explain the uninterpreted colloquy and therefore "may leave the proceeding with no idea what has just occurred . . . unable to respond to testimony presented by other witnesses." ABEL, *supra* note 133, at 5.

[134] *See* SPLC Letter, *supra* note 129.

[135] Personal observations 2018–2021; Interviews with Legal Directors and Staff Attorneys, *supra* note 89.

[136] *See id.*

government."[137] In other words, with limited exceptions,[138] detained individuals do not have the right to appointed counsel.[139] Over the last decade, approximately 70 to 80 percent of detained individuals in removal proceedings were not represented by attorneys.[140]

Litigants without counsel face significant challenges in bond hearings.[141] Experienced government attorneys represent DHS in *every* proceeding.[142] As the First Circuit Court of Appeals emphasized, "immigration law and procedures and the particular preferences of individual IJs are likely much better known to government representatives than to detainees."[143] Detained individuals with attorneys have a significant advantage.[144] Professor Emily Ryo at the University of Southern

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[137] 8 C.F.R. § 1003.16(b) (2022); IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, § 9.3(e)(2) ("In a bond hearing, the alien may be represented at no expense to the government."); C.J.L.G. v. Sessions, 880 F.3d 1122, 1128 (9th Cir. 2018) ("The right to counsel in immigration proceedings is rooted in the Due Process Clause [of the Fifth Amendment] and codified at 8 U.S.C. § 1362 and 8 U.S.C. § 1229a(b)(4)(A) [of the Immigration and Nationality Act ('INA')].)'" (quoting Blwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005)), *vacated on reh'g en banc sub nom.* C.J.L.G. v. Barr, 923 F.3d 622 (9th Cir. 2019).

[138] The court will appoint attorneys for individuals found to be mentally incompetent and the Office of Refugee Resettlement funds representation for some unaccompanied children in removal proceedings. In addition, there are locally funded programs in some parts of the country subsidizing the costs of counsel in immigration proceedings, but this is not a universal practice. *See* ACLU, THE RIGHT TO COUNSEL, 2–3 [hereinafter THE RIGHT TO COUNSEL], https://www.aclu.org/sites/default/files/field_document/right_to_counsel_final.pdf [https://perma.cc/QTN8-5FWG].

[139] *See C.J.L.G.*, 880 F.3d at 1129 (holding that "neither the Due Process Clause nor the INA creates a categorical right to court-appointed counsel at government expense for alien minors").

[140] Of the 1.6 million detainees between 2001–2022, only 17.3% percent of them were represented. *State and County Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/nta/ (last visited Sept. 16, 2022) (noting that, for the last decade, for those who were are detained, around 70%–80% were unrepresented); *see also* Kica Matos & Helen Gym, *One Big Thing Cities Can Do on Immigration*, BLOOMBERG (Oct. 26, 2020, 11:57 AM), https://www.bloomberg.com/news/articles/2020-10-26/one-big-thing-cities-can-do-to-protect-immigrants [https://perma.cc/KA2L-3YAR]; THE RIGHT TO COUNSEL, *supra* note 137, at 1; Eagley & Shafer, *supra* note 87, at 2 (discussing that an analysis of more than 1.2 million deportation cases adjudicated between 2007 and 2012 found that 37 percent of noncitizens, and only 14 percent of those detained had counsel).

[141] *See* Ryo, *supra* note 88, at 504–05; *see also Importance of Nationality in Immigration Court Bond Decisions*, TRAC IMMIGR. (Feb. 12, 2019), http://www.trac.syr.edu/immigration/reports/545 [https://perma.cc/3PZ7-UUL5] (reflecting that "less than half of detained [noncitizens] with bond hearings" in Fiscal Year 2018 "were granted bond").

[142] *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 31 (1st Cir. 2021) (citing Santosky v. Kramer, 455 U.S. 745, 763 (1982)).

[143] *Id.*

[144] Some attorneys noted that if the burden of proof rested with the government, there would be less need for appointed counsel in bond hearings. However, others had less faith that this transfer of the burden would have this effect. Instead, they worry that IJs would simply accept less proof from the government and then shift the burden back

California conducted studies of the US immigration bond system and found that "the odds of being granted bond are more than 3.5 times higher for detainees represented by attorneys than those who appeared *pro se*."[145] An attorney can analyze standards and burdens of proof, and has the means to gather and present the evidence needed to show that a detained individual is not a danger to the community or a flight risk.[146]

Although bond hearings are technically considered "separate and apart" from removal proceedings,[147] concessions regarding a detained person's manner of entry or alienage, disclosure of negative or inconsistent facts, and arguments regarding eligibility for legal relief adopted in the bond proceeding can significantly impact the removal case.[148] This is a complicated calculation for *attorneys* to undertake, and it is beyond the capacity of pro se litigants to anticipate the negative consequences of their testimonial or evidentiary choices. In addition, standards regarding whether and how evidence or testimony adduced during the bond hearing may be considered in the removal proceeding differs by circuit.[149] Even in those jurisdictions where a judge is prohibited from considering evidence or testimony elicited in the bond hearing, the same judge often hears both proceedings and may not be able to disregard the factual disclosures or credibility determinations made during the bond hearing.[150]

Further, respondents in bond proceedings face significant risk of self-incrimination.[151] This is particularly true in cases where ICE detains a noncitizen who has pending criminal charges

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to the detained individual. Interview with Laura Lunn, *supra* note 89; Interview with Allegra Love, *supra* note 89; Interview with Laura St. John, *supra* note 89.

[145] Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117, 119 (2016). Findings of subsequent studies are ambiguous as to the particular value that attorneys provide in bond proceedings. *See* Ryo, *supra* note 88, at 522–23.

[146] As the First Circuit Court of Appeals noted in *Hernandez-Lara v. Lyons*, "detained individuals will likely experience difficulty in gathering evidence on their own behalf." *See Hernandez-Lara*, 10 F.4th at 30 (citing Moncrieffe v. Holder, 569 U.S. 184, 201 (2013)).

[147] 8 C.F.R. § 1003.19(d) (2022).

[148] GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 31, 57.

[149] *See, e.g.*, Zivkovic v. Holder, 724 F.3d 894, 911 (7th Cir. 2013); *see also* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 32, 37. Courts have differed on whether judges can consider evidence adduced at the bond hearing in the removal proceeding. *Id.* (citing Joseph v. Holder, 600 F.3d 1235, 1240–43 (9th Cir. 2010). In *Joseph*, the court held that the judge erred in considering evidence from the bond hearing as compared to *Zivkovic*, holding that it was permissible to consider such evidence. *Joseph*, 600 F.3d at 1240–43.

[150] *Id.*

[151] *See id.* at 57–58.

in state court.[152] Respondents in removal proceedings do not receive Miranda-like warnings regarding the risk of self-incrimination.[153] Statements made in immigration court can be used against a detained individual in a state or federal criminal proceeding.[154] In most jurisdictions, the burden of proof is on the respondent;[155] however, under federal regulations, an IJ can draw a negative inference in a bond proceeding in which the defendant invokes the Fifth Amendment privilege against self-incrimination.[156] These considerations place tremendous pressure on a respondent to testify in immigration court as to alleged criminal conduct , despite the risk of self-incrimination.[157]

The Supreme Court has held that removal proceedings do not constitute an "adversary adjudication" under the Administrative Procedure Act, meaning that appointment of counsel is not constitutionally mandated.[158] Similarly, lower courts note that detained individuals in removal proceedings are not constitutionally entitled to appointment of counsel because the IJs adjudicating these cases are not simply neutral arbiters comparable to Article III judges, but instead are responsible for developing the record themselves.[159] Courts, such as the Ninth Circuit in *C.J.L.G. v. Sessions*, have found that the IJ's duty to develop the record, and the Respondent's right to appeal if the IJ fails to do so, protects due process and obviates the need to appoint counsel for individuals in removal proceedings, even when they are children.[160]

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[152] *See id.*

[153] *See* United States v. Khan, 324 F. Supp. 2d 1177, 1190 (D. Colo. 2004) (citing United States v. Valdez, 917 F.2d 466 (10th Cir.1990)) (noting that "[g]enerally, aliens are not entitled to a Miranda-type warning of the right to remain silent at deportation hearings"); *see also* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 57–58.

[154] *See e.g.*, *Khan*, 324 F. Supp. at 1191 (holding that defendant's testimony given during his removal proceeding admitting he entered the United States unlawfully could be used against him in the federal criminal trial charging with scheme to arrange and allow for his fraudulent entry in to the U.S.); *see also* Tania N. Valdez, *Pleading the Fifth in Immigration Court: A Regulatory Proposal*, 98 WASH. U. L. REV. 1343, 1343–44 (2021).

[155] *See infra* Section II.D.

[156] Valdez, *supra* note 154, at 1383.

[157] *Id.*; *see also* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 58.

[158] *See* Ardestani v. I.N.S., 502 U.S. 129, 129–33 (1991).

[159] *See, e.g.*, Quintero v. Garland, 998 F.3d 612, 623 (4th Cir. 2021) ("Based on this statutory requirement, our sister circuits have held that 'unlike an Article III judge,' an immigration judge 'is not merely the fact finder and adjudicator but also has an obligation to establish the record.'") (citations omitted).

[160] C.J.L.G. v. Sessions, 880 F.3d 1122, 1138, 1143 (9th Cir. 2018), *vacated on reh'g en banc sub nom.*, C.J.L.G. v. Barr, 923 F.3d 622 (9th Cir. 2019). In *C.J.L.G. v. Sessions*, the IJ developed the record by providing the mother of the minor child in removal proceedings with a 2014 copy of a State Department report on Honduras in English *Id.* at 1130. In addition, she asked questions of both the minor child and the

D. Detained Individuals Bear the Burden of Proof, Creating an Implicit Presumption of Confinement

The INA and federal regulations are silent as to whether the government or noncitizen bears the burden of proof in bond redetermination proceedings, and what level of proof is needed to meet that burden.[161] The Board of Immigration Appeals had long interpreted this silence as an implicit presumption that an individual should remain free pending removal proceedings.[162] However, in 1996, the BIA held that the burden of proof in a custody and bond redetermination hearing rests with the person seeking release to demonstrate that they do not pose a danger to the community or a flight risk.[163] Detained noncitizens have litigated the constitutionality of this standard and a Circuit split has developed regarding the allocation of burden of proof and quantum of proof required in discretionary § 236(a) bond hearings.

The First and Second Circuits have held that the government must bear the burden of proof in discretionary bond hearings, particularly in cases of prolonged detention. These cases concern habeas corpus petitions filed by noncitizens denied bond in IJ redetermination hearings and detained for substantial periods of time pending completion of removal proceedings.[164]

In *Hernandez-Lara v. Lyons*, applying the *Mathews v. Eldridge* test,[165] the First Circuit held that "the government must

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mother but did not explain the need for nor help gather letters of support or affidavits to bolster the son's claims. She did not ask questions to elicit additional bases for relief. Instead, after a brief hearing, she found, among other things, that "C.J. did not show 'credible, direct and specific evidence . . . that would support an objectionably [sic] reasonable fear of [future] persecution should he return to Honduras.'" *Id.* at 1131.

[161] *See* 8 U.S.C. § 1226(a); *see also* Hernandez-Lara v. Lyons, 10 F.4th 19, 26 (1st Cir. 2021) (explaining that section 1226(a) is silent as to what burden of proof applies in bond hearings and who bears that burden).

[162] *Id.* (citing *In re* Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976) ("For many decades, the BIA interpreted that silence as creating a presumption in favor of liberty pending removal proceedings. . . . 'An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security or that he is a poor bail risk.'")); *see also* Velasco Lopez v. Decker, 978 F.3d 842, 848–49 (2d Cir. 2020).

[163] *See In re* Adeniji, 22 I. & N. Dec. 1102, 1112 (B.I.A. 1999); *see also In re* Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006). Some have argued that *In re* Adeniji is based on a misinterpretation of the federal regulations ICE enacted in 1996 and adopts an inaccurate reading of statistics concerning flight risk thereby making the decision an arbitrary and capricious agency action. *See* Hernandez-Lara v. Lyons, 10 F. 4th 19, 49–51 (1st Cir. 2021) (Lynch, J., dissenting).

[164] *See Hernandez-Lara*, 10 F. 4th at 24–26 (1st Cir. 2021) Ms. Hernandez-Lara was detained for more than ten months at the Strafford County Department of Corrections in Dover, New Hampshire ("Strafford County Jail"). *Id.*; *see also* Velasco Lopez v. Decker, 978 F.3d 842, 849, 855–56. Mr. Velasco Lopez was detained for fifteen months in the Orange County Correctional Facility, a facility detaining defendants facing criminal charges and those serving criminal sentences. *Id.* at 851.

[165] *See supra* note 57 and accompanying text.

bear the burden of proving dangerousness or flight risk in order to continue detaining a noncitizen under [INA § 236(a)]."[166] The Respondent had challenged the constitutionality of her initial bond hearing and sought immediate release or a second bond hearing at which the government would bear the burden of proof.[167] The court upheld the lower court's determination that Ms. Hernandez-Lara, who had been detained for over ten months, was entitled to a second bond hearing in which the government bore the burden of proof.[168] The court found that the initial bond hearing did not provide adequate constitutional protection and due process required shifting the burden of proof to the government.[169] The court noted the government is in a much stronger position to adduce evidence on the question of danger whereas detained individuals experience significant difficulty gathering evidence, understanding complex immigration procedures, and proving a negative with regard to dangerousness.[170]

In *Velasco Lopez v. Decker*, the Second Circuit focused its *Mathews* analysis on prolonged detention at the time of the filing of the habeas petition. The court found that a process in which "the Government need not show anything to justify incarceration for the pendency of removal proceedings, no matter the length of those proceedings" is violative of due

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[166] *Hernandez-Lara*, 10 F.4th at 39. Federal District Courts across the country have held that due process requires the government to bear the burden of proof in discretionary bond hearings. *See, e.g.*, Hulke v. Schmidt, 572 F. Supp. 3d 593, 602 (E.D. Wisc. 2021); Diaz-Ceja v. McAleenan, No. 19-CV-00824-NYW, 2019 WL 277421, at *10 (D. Colo. July 2, 2019); Darko v. Sessions, 342 F. Supp. 3d 429, 435 (S.D.N.Y. 2018). The *Hulke* court found that "it would be in both the Government's and the public's interest for the Government to bear the burden of establishing that Hulke is *actually* a flight risk and a danger to his community" as release from detention would save taxpayer funds. *Hulke*, 572 F. Supp. 3d at 599.

[167] *Hernandez-Lara*, 10 F.4th at 25.

[168] *Id.* at 46.

[169] *Id.* at 39. The Court does not expressly state whether its determination that the government bears the burden of proof "to continue detaining a noncitizen" refers to the entire detention period thereby requiring burden shifting at the initial bond hearing. *Id.* However, the court's reasoning makes this intent clear, particularly when it distinguishes a Third Circuit case in which the Respondent was arguing that "a second bond hearing was required despite alleging no constitutional defect in the one he received." *Id.* at 34 (internal quotation marks omitted) (quoting Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 279 (3d Cir. 2018)). Ms. Hernandez-Lara asserted constitutional defect in her first bond hearing and the court ordered a second hearing acknowledging this defect. *Id.* at 25, 46.

[170] *Id.* at 30–31. It was not Congress but Immigration and Naturalization Services that switched course and adopted regulations creating a presumption in favor of detention for initial bond determinations. *Velasco Lopez*, 978 F.3d at 849; *see* 8 C.F.R. § 236.1(c) (2022). After the INS regulations went into effect, the BIA shifted the burden requiring the respondent to prove lack of danger and flight risk. *See In re Guerra*, 24 I. & N. Dec. at 40 ("The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond."); *Velasco Lopez*, 978 F.3d at 849 (pointing out that "[t]he BIA itself acknowledges that [INA § 236(a)] contains no such requirement").

process.[171] The Court asserted that while the government's interest may initially outweigh depriving a noncitizen of liberty "the longer detention continues, the greater the need for the Government to justify its continuation."[172] The court did not define prolonged detention but held that the respondent, who had spent over fourteen months in detention pending conclusion of removal proceedings, was constitutionally entitled to another 236(a) bond hearing at which the government bears the burden of proof.[173] The court also recognized that "the procedures underpinning Velasco Lopez's lengthy incarceration markedly increased the risk of error [of wrongful detention]."[174]

The Fourth Circuit recently held burden shifting is not constitutionally required in initial bond hearings because the current statutory and regulatory procedures adequately protect the due process rights of detained noncitizens. The court's rationale is grounded on the premise that noncitizens are entitled to less procedural due process than citizens.[175] The court notes that respondents receive notice of their right to seek bond, have an opportunity to be heard, and are offered three opportunities (initial request, IJ review, and appeal to the BIA) to seek redetermination of bond.[176]

The Ninth Circuit, addressing a noncitizen's prolonged fourteen month detention pending completion of removal proceedings, similarly balanced the individual liberty interests at stake against what it viewed as the government's stronger interest in protecting the community and ensuring that noncitizens ineligible for legal status be removed expeditiously.[177] The court held due process does not require a second 236(a) bond hearing in which the government bears the burden of proof.[178] The

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[171] *Velasco Lopez*, 978 F.3d at 849, 855–56 (2d Cir. 2020). The Respondent was detained for fifteen months in the Orange County Correctional Facility, a facility housing criminally charged defendants and those serving criminal sentences. *Id.* at 851.

[172] *Id.* at 855.

[173] *Id.* The *Velasco Lopez* court did not go so far as to hold that all discretionary bond hearings require burden shifting, noting that the government's interest initially on may be stronger than that of the noncitizen's liberty interest. *Id.*

[174] *Id.* at 852.

[175] Miranda v. Garland, 34 F.4th 338, 366 (4th Cir. 2022), *reh'g denied*, No. 20-01828 (4th Cir.).

[176] *Id.* at 345–46. The Court emphasizes that noncitizens are not entitled to the same level of constitutional protection as citizens and therefore comparisons with due process protections owed to citizens are unpersuasive. *Id.* at 366.

[177] Rodriguez Diaz v. Garland, No. 20-16245, 2022 WL 17087849 (9th Cir. Nov. 21, 2022), at *15–16.

[178] *Id.* at 18–20. The court addressed the question whether the Respondent was making an as applied challenge or a facial challenge to 1226(a) and, if facial, whether the challenge was directed toward 1226(a) procedures in all detention circumstances or only in those involving prolonged detention. *Id.* at 11. The court determined that regardless, the challenge would fail on all counts. *Id.* at 15.

court emphasized that the current framework for initial bond reviews and subsequent bond hearings based on changed circumstances protects the liberty interests of the detained noncitizen and is constitutionally sufficient.[179]

IJs in federal circuits which have not addressed the question continue to adhere to the burden of proof standard the BIA articulated in *Matter of Guerra*, that "[a]n alien in a custody determination . . . must establish to the satisfaction of the Immigration Judge and this Board that he or she does not present a danger to persons or property, is not a threat to national security, and does not pose a risk of flight."[180]

In terms of the quantum of proof required to meet one's burden, the Supreme Court has explained that "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause . . . is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[181] Once again, the INA and federal regulations are silent as to the standard of proof required, and courts differ as to whether a preponderance or clear and convincing evidence standard applies. In *Hernandez-Lara v. Lyons*, for example, the First Circuit held that the government must prove danger to the public by clear and convincing evidence, and flight risk by a preponderance of the evidence (finding less risk of error with flight risk determinations due to respondents' access to evidence).[182] By contrast, the Second Circuit in *Velasco Lopez v. Decker* held that in cases of prolonged detention pending removal proceedings, the government must prove both elements—danger and flight risk—by clear and convincing evidence to justify continued confinement.[183]

The statutory silence and Circuit split on the burden of proof and quantum of proof issues allows immigration judges across the country to use varying standards resulting in a lack of predictability and consistency in immigration bail procedures.

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[179] *Id.* at 14–15.

[180] *See In re* Guerra, 24 I. & N. Dec. 37, 38 (B.I.A. 2006); *see also In re* Adeniji, 22 I. & N. Dec. 1102, 1112 (B.I.A. 1999).

[181] Addington v. Texas, 441 U.S. 418, 423 (1979) (citing *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J. concurring)).

[182] Hernandez-Lara v. Lyons, 10 F.4th 19, 40, 44–45 (1st Cir. 2021).

[183] Velasco Lopez v. Decker, 978 F.3d 842, 855–56 (2d Cir. 2020).

E. Permissive Evidentiary Standards for Establishing Danger and a Lack of Disclosure Requirements

Federal regulations and Executive Office for Immigration Review (EOIR) court rules establish a relaxed standard for consideration of evidence in bond redetermination proceedings.[184] An IJ may consider "any information" that is available or presented by the noncitizen or DHS to determine whether the respondent presents a danger to the community or a flight risk.[185]

This broad standard has paved the way for DHS attorneys to routinely use I-213 criminal history reports compiled by DHS that summarize an individual's criminal history, and which courts typically accept as reliable evidence in bond proceedings.[186] DHS also routinely introduces and IJs admit initial arrest warrants, uncorroborated police reports, pending charges, unsubstantiated reports of alleged gang affiliation, or other evidence of activity from the respondent's home country generated through DHS or other international databases such as Interpol.[187] These preliminary reports and uncorroborated allegations constitute hearsay—sometimes double or triple hearsay.[188] Federal courts have reiterated that uncorroborated police reports and arrest warrants have little weight in removal proceedings, yet, in bond proceedings, these

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[184] *See* 8 C.F.R. § 1003.19(d) (2022); IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, § 9.3(e)(7).

[185] 8 C.F.R. § 1003.19(d). While the rules of evidence do not apply in administrative proceedings and hearsay is permitted, the adjudicator has the authority to determine the weight that the evidence should be accorded given its reliability and relevance. *See* James P. Castberg, *Evidence and Findings in Administrative Agencies*, 16 WYO. L.J. 280, 281, 285 (2019); 5 U.S.C. § 556.

[186] Before commencing removal proceedings, DHS completes a Form I-213, Record of Deportable/Inadmissible Alien, that details facts allegedly supporting deportation. *See* Dree K. Collopy et al., *Challenges and Strategies Beyond Relief, in* IMMIGRATION PRACTICE POINTERS 518, 519, 523–24 (2014–15 ed., 2014), https://www.aila.org/File/Related/11120750b.pdf [https://perma.cc/F3F5-J2DP]. The I-213 sets forth the respondent's biographic information; date, place, time, and manner of entry to the United States; immigration record and any history of apprehension and detention by immigration authorities; criminal record, if any; family data; any health or humanitarian aspects; and disposition (whether or not an NTA is to be issued). A Form I-213 can contain damaging information about the respondent that can have far-reaching effects, even when DHS does not have substantial evidence to support its claims. *Id.* at 523–24 (citation omitted).

[187] *See, e.g.*, *Hernandez-Lara*, 10 F.4th at 22–25; *see, e.g.*, Interviews with Monica Mananzan & Katharine Gordon, *supra* note 89 (discussing IJ admission of and reliance on uncorroborated arrest reports and records from Respondents' home countries).

[188] *See* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 60–61.

documents are regularly accepted in evidence and used to determine the threshold issue of danger.[189]

The BIA authorizes IJs to consider pending charges and other preliminary reports of alleged criminal conduct rather than solely permitting consideration of convictions. In *Matter of Guerra*, the BIA held that "Immigration Judges are not limited to considering *only* criminal convictions in assessing whether an alien is a danger to the community. Any evidence in the record that is probative and specific can be considered."[190] The Board's analysis linked the burden of proof with the scope of evidence permitted, finding Mr. Guerra did not meet his burden of proof in disproving danger to the public because the evidence DHS used to rebut his arguments was more detailed and specific.[191] ICE has routinely detained noncitizens with pending charges after a criminal court has released them on bail using due process procedures far more rigorous than those employed in immigration court.[192]

In addition, immigration courts and judges vary greatly in their interpretation of the applicable evidentiary standard. In some jurisdictions, for example, IJs refrain from inquiring about the facts surrounding the underlying immigration relief requested.[193] However, in other jurisdictions, it is standard practice to delve into the details of an underlying claim such as asylum and to base a bond determination on the strength of the asylum claim, despite the lack of evidence generally available at such an early stage of the removal proceedings.[194]

Neither federal regulations nor the immigration court rules authorize discovery for initial bond proceedings other than the general right of immigration court litigants to seek leave from the court to issue a subpoena.[195] A litigant may also file a

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[189] *See, e.g.*, Prudencio v. Holder, 669 F.3d 472, 483–84 (4th Cir. 2012).

[190] *In re* Guerra, 24 I. & N. Dec. 37, 40–41 (B.I.A. 2006) (citation omitted). The BIA cited to the broad discretion INA § 236 affords immigration judges to justify permitting consideration of pending charges. *Id.* at 40.

[191] The BIA noted that the criminal complaint the government introduced provided details about the alleged crime, identified sources for the information, and was signed by the Drug Enforcement Agency agent who prepared the complaint. *See id.* at 39, 41.

[192] *See* Interviews with Legal Directors and Staff Attorneys, *supra* note 89. For example, Laura Lunn raised concerns about IJs asking questions regarding the details of pending criminal charges and drawing negative inferences. These respondents are released pending trial on the criminal charges and then detained in ICE custody.

[193] Interview with Laura Lunn, *supra* note 89.

[194] Interview with Allegra Love, *supra* note 89.

[195] *See* IMMIGRATION COURT PRACTICE MANUAL *supra* note 68, §§ 4.16, 4.20(a); *In re* Khalifah, 21 I. & N. Dec. 107, 112 (B.I.A. 1995) ("As there is no right to discovery in deportation proceedings, no such right exists in the less formal bond hearing procedure."); *see also* REPRESENTING CLIENTS, *supra* note 64, at 27 ("There is no

Freedom of Information Act request to obtain documents in the government's possession.[196] However, this process is lengthy, and by the time a response is received the respondent has likely faced prolonged detention and the deportation proceedings may be underway.[197]

The heightened disclosure requirements for filing of evidence in post-removal bond reviews do not apply in initial custody and bond proceedings.[198] In initial hearings, the immigration court rules permit the filing of supplemental documents in open court on the day of the hearing.[199] There is no requirement that documents be submitted in advance.[200] The rules only specify that "[i]f documents are filed in advance of the hearing, the documents should be filed *together with* the request for a bond hearing."[201]

In cases in which respondents are representing themselves and are physically present in court, they may receive a copy of the documents when they appear, but the documents are typically in English and they will not have a meaningful opportunity to review them or seek guidance on how to object to the evidence.[202] Respondents appearing by video or telephone from detention centers may or may not receive copies of documents DHS intends to introduce against them.[203] In addition to concerns regarding respondents' access to documents, lawyers representing detained individuals are often

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provision in the statute or regulations for discovery as it is generally understood in Article III civil and criminal proceedings. The provisions for requesting that the IJ order depositions and grant subpoenas allow the production of evidence in immigration court rather than production of evidence prior to the hearing date. The most reliable, albeit imperfect, method of discovery in immigration proceedings is through a FOIA request.").

196 *See generally* IMMIGRANT LEGAL RES. CTR., PRACTICE ADVISORY: A STEP-BY-STEP GUIDE TO COMPLETING FOIA REQUESTS WITH DHS (2021) https://www.ilrc.org/sites/default/files/resources/new_foia_dhs_practice_advisory_-_2021.pdf [https://perma.cc/EH88-FE2V] (describing the process for filing a FOIA request).

197 *Id.* at 2–3.

198 Stricter disclosure standards apply to bond hearings conducted post-removal. Once an immigration court has ordered a noncitizen to be removed in subsequent bond hearings the noncitizen must have a "reasonable opportunity to examine evidence against him or her." IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, § 9.4(d)(4).

199 IMMIGRATION COURT PRACTICE MANUAL *supra* note 68, § 9.3(e)(5) ("Documents for the immigration judge to consider are filed in open court or, if the request for a bond hearing was made in writing, together with the request.").

200 *Id.*

201 *Id.*

202 *See id.* §§ 3.1, 3.3, 9.1(e)(2) ("In some detention facilities, detainees are provided with orientations or 'rights presentations' by non-profit organizations. The Executive Office for Immigration Review also funds orientation programs at a number of detention facilities, which are administered by the EOIR Legal Orientation Program.").

203 IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, § 9.1; Personal Observations 2018–2021 and Interviews with CAIR attorneys, *supra* note 89. Comments of Eleanor Gourley.

forced to rebut government allegations and evidence they had limited or no opportunity to review.[204] The IJ may agree to give a continuance to allow counsel to review the documents; however, this means that the noncitizen will remain in detention for a longer period of time.[205]

F. Insufficient Time Allotment for Proceedings, Lack of Attorney Access to Clients, Lack of Uniformity in Judicial Findings, and Unavailability of Transcripts

Bond hearings are often conducted immediately prior to or after a respondent's master calendar hearing (MCH).[206] However, the MCH is part of the removal case and thus separate from the bond case, which can prove confusing to litigants.[207] In a MCH, judges typically address logistical and scheduling issues and also consider respondents' admissions or denials of the removal charges levied against them.[208] The expectation is that each matter on a MCH calendar will be brief.[209] When bond hearings are scheduled on this calendar, the expectation is that the bond proceeding will also be quick, akin to a preliminary, pretrial matter, rather than a substantive proceeding.[210] This emphasis on speed encourages waiver of language interpretation

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[204] *Id.*; *see also* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 46, 50, 59.

[205] Personal Observations 2018–2021; Interviews with Legal Directors and Staff Attorneys, *supra* note 89. This lack of disclosure shifted somewhat with the onset of the COVID-19 pandemic and the increased use of telephone and video bond hearings. With DHS attorneys and counsel for Respondent appearing remotely, EOIR standing orders (or individual court orders) required submission of documents in advance. *See, e.g.*, U.S. DEP'T OF JUST., NEW YORK BROADWAY IMMIGRATION COURT STANDING ORDER REGARDING TELEPHONIC APPEARANCES (2020), https://www.justice.gov/eoir/page/file/1287811/download [https://perma.cc/2LG2-E64A]. In one of our clinic's cases, this advance disclosure allowed us to investigate the allegations and gather evidence demonstrating that DHS had miscategorized the charges or failed to note that the charges had been dismissed.

[206] *See* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 47; IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, § 9.3(d); SPLC Letter, *supra* note 129.

[207] GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 31.

[208] IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, § 4.15(e).

[209] ROCKY MOUNTAIN IMMIGR. ADVOC. NETWORK, TYPES OF HEARINGS IN IMMIGRATION COURT (2020), https://static1.squarespace.com/static/57f6bd842e69cf55d8158641/t/5efe5abe396e36705dacb283/1593727678906/RMIAN+Handout+-+Types+of+Immigration+Court+Hearings++-+-+Updated+7.2.2020+ENG.pdf [https://perma.cc/77SF-MMQS].

[210] Personal observations and Interviews with Legal Directors and Staff Attorneys, *supra* note 89.

of the entire proceeding and curtails questioning.[211] Because of crowded calendars, litigants and attorneys are often under pressure to complete the bond hearing as quickly as possible.[212]

In many hearings, the respondent is physically located in the detention center and attending the proceeding via video display.[213] This is a practice that predates the COVID-19 pandemic, and courts have found that appearance of the respondent via video, rather than in person, is constitutionally permissible.[214] However, because detained noncitizens are often unable to review or object to evidence presented against them in court while appearing via video, and because the government is not required to provide documents in advance, the respondent may be denied the opportunity to object or counter such evidence as a result of their appearing via video.[215]

Even for respondents represented by attorneys, the attorney is often left with the difficult choice of participating in the hearing via video from the detention center, which allows them to communicate with the client but deprives them of easy access to documents introduced in court, or participating in the courtroom without the ability to consult with the client.[216]

IJs do not issue written findings of fact or conclusions of law in bond redeterminations unless one of the parties files an appeal with the Board of Immigration Appeals.[217] Instead, the IJ renders an oral decision and completes a form order granting or denying bond or conditional release and stating the grounds justifying the decision—danger, flight risk, or both.[218]

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[211] *See, e.g.*, SPLC Letter, *supra* note 129 (observing that telephonic interpreters "failed to interpret all English language conversations, and often limited interpretation for questions directed to the respondent").

[212] Interviews with Legal Directors and Staff Attorneys, *supra* note 89; *see also* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 47–48. Some judges discourage witness testimony in favor of proffers from attorneys or a written declaration to expedite the bond hearing. *Id.* at 50.

[213] *See* REPRESENTING CLIENTS IN BOND HEARINGS, *supra* note 83, at 14.

[214] *See* Vilchez v. Holder, 682 F.3d 1195, 1199 (9th Cir. 2012) (stating that "a hearing by video conference does not necessarily deny due process").

[215] *See* REPRESENTING CLIENTS IN BOND HEARINGS, *supra* note 83, at 14; IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, at § 9.3(e)(v).

[216] *See* REPRESENTING CLIENTS IN BOND HEARINGS, *supra* note 83, at 14. If the attorney is appearing in person and must consult with the client, they must determine whether to break confidentiality in front of the judge, DHS, and spectators in the gallery, or ask the judge to clear the courtroom, which could cause prejudice, delays and significant disruption. *See id.*

[217] *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, at § 9.3(e)(vii) ("The Immigration Judge's decision is based on any information that is available to the Immigration Judge or that is presented by the parties. *See* 8 C.F.R. § 1003.19(d). Usually, the Immigration Judge's decision is rendered orally. Because bond hearings are generally not recorded, the decision is not transcribed. If either party appeals, the Immigration Judge prepares a written decision based on notes from the hearing.").

[218] *See id.*; 8 C.F.R. § 1003.19(f) (2022).

Immigration courts differ as to whether they record bond hearings, and individuals generally cannot obtain a transcript of the proceeding even if they are appealing to the BIA.[219]

G. Prosecutorial Authority to Override Bond Determinations through Invocation of Automatic Stay

Although the IJ has authority to redetermine the terms of custody and release, federal regulations authorize the Department of Homeland Security to automatically stay an IJ's decision to release a detained individual in cases where ICE denied bond or imposed a bond of "$10,000 or more."[220] Under this provision, the IJ bond order "shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination . . . with the immigration court within one business day of the order."[221] This provision gives the DHS attorney representing the government in the bond hearing the discretion to file for a stay once approved by a DHS supervisor.[222]

If DHS invokes the stay, the IJ's decision authorizing conditional release or release on bond is held "in abeyance pending decision of the appeal by the Board."[223] Although the stay will lapse under certain circumstances, including if DHS does not actually file a notice of appeal within ten business days of the IJ order, this provision is a powerful tool DHS may wield to prolong detention of immigrants.[224] DHS may initiate the stay against permanent residents as well as undocumented immigrants.[225]

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[219] *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 68, § 9.3(e)(7); *see also* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 34 (citing *In re* Chirinos, 16 I. & N. Dec. 276, 277 (BIA 1977) ("[T]here is no right to a transcript of a bond redetermination hearing."). *But see* Singh v. Holder, 638 F.3d 1196, 1208–09 (9th Cir. 2011) (arguing due process obligates an immigration court to contemporaneously record the bond proceeding and make an audio version available to respondent in cases involving prolonged detention).

[220] 8 C.F.R. § 1003.19(i)(2) (2022).

[221] *Id.*

[222] *See id.*

[223] *Id.* Under certain circumstances, the stay will lapse including if DHS does not "file a notice of appeal . . . within ten business days of the issuance" of the IJ custody order. 8 C.F.R. § 1003.6(c)(1) (2022).

[224] According to EOIR data, 1,923 appeals of bond determinations to the BIA were filed between the years 2015 and 2021. Of the 1,923 appeals, DHS filed motions for automatic stay in 183 of them or 9.5 percent. These were bond determinations in which the IJ had decreased bond or relaxed conditions of release. EXEC. OFF. FOR IMMIGR. REV., PLANNING, ANALYSIS, AND STATISTICS DIVISION, BOND APPEALS FILED BY DHS FROM JANUARY 21, 2013 TO NOVEMBER 30, 3031 WITH PREVIOUS COURT BOND DATA AND BIA MOTION FOR STAY INFORMATION (2021) (on file with author); *see also* Interviews with Legal Directors and Staff Attorneys, *supra* note 89.

[225] *See* 8 C.F.R. §§ 1003.6(c), 1003.19(i) (2022).

The automatic stay provision was enacted in 1998 as the Executive Branch sought to limit the power and independence of IJs.[226] The stay provision was initially applicable to detained individuals who had committed particular crimes.[227] However, after the September 11 terrorist attacks, the Attorney General expanded the provision to its current form to ensure that those who qualified for bond but whom the government believed posed a national security threat could be held pending appeal.[228] However, the use of this power has expanded significantly and is no longer limited to cases involving national security or particularly serious crimes.[229] Instead, as seen during the Trump Administration, ICE routinely denied bond or set bond in excess of $10,000 regardless of the security threats involved, making many cases subject to the automatic stay.[230] From 2017 to 2020, DHS exercised its authority to invoke the automatic stay in far greater numbers than in previous years.[231] For cases in which

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[226] Mary Holper, *Taking Liberty Decisions Away from "Imitation" Judges*, 80 MD. L. REV. 1076, 1089 (2021).

[227] Holper, *supra* note 226, at 1089–90; Raha Jorjani, *Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 97–99 (2010).

[228] *See* Jorjani, *supra* note 227, at 97–99; *see also* 2022-ICFO-16345 (DHS RESPONSES TO A FOIA REQUEST) (2022) (on file with author). The responses indicate that from 2006–2015 DHS Counsel approved filing of 215 automatic stay notices in 422 cases. DHS provided no information regarding the number of automatic stays approved from 2016 to the present. The breakdown by year is as follows:

2006: 52
2007: 69
2008: 44
2009: 28
2010: 7
2011: 7
2012: 7
2013: 1
2014: 0
2015: 0

[229] *See* Maureen A. Sweeney et al., *Detention as Deterrent: Denying Justice to Immigrants and Asylum Seekers*, 36 GEO. IMMIGR. L.J. 291, 312–14 (2021) (discussing bonds of $10,000–$15,000 or more for relatively minor offenses such as driving while intoxicated).

[230] *See* GABRIELA KAHRL ET AL., UNIV. OF MD. FRANCIS KING CAREY SCH. OF L. & CATH. LEGAL IMMIGR. CTR., PRESUMED DANGEROUS: BOND, REPRESENTATION, AND DETENTION IN THE BALTIMORE IMMIGRATION COURT 1–2 (2019), https://cliniclegal.org/file-download/download/public/382 [https://perma.cc/C6FX-49Q9] (finding that the average bond amount across the sample size of 359 unique cases was $11,408); *see also* Daniel Bush, *Under Trump, Higher Immigration Bonds Mean Longer Family Separations*, PBS NEWSHOUR (June 28, 2018, 2:38 PM), https://www.pbs.org/newshour/politics/under-trump-higher-immigration-bonds-mean-longer-family-separations [https://perma.cc/U4B9-XZ2W] (discussing findings that bonds have increased across the board, often exceeding $10,000).

[231] According to EOIR data, DHS filed for automatic stay in 183 cases between 2015 and 2021. There is a significant uptick in filings in 2017–2020. Approximately 171 of the 183 filings or 93.4 percent occurred from 2017–2020. The breakdown of filings by year is as follows:

2015: 2

DHS denies bond or sets bond above $10,000, attorneys must caution their clients that even if they prevail in their bond hearing and the judge orders release, if DHS decides to invoke the automatic stay, they will remain detained pending appeal.

III. CIVIL CASES—DUE PROCESS AND FUNDAMENTAL FAIRNESS PROTECTIONS

The stringent procedural standards that state courts apply in civil proceedings in which a defendant's physical liberty is at stake stand in stark contrast to the lax procedures utilized in immigration bond hearings and serve as guides for reforming the immigration bond determination process. While deprivation of physical liberty in civil proceedings is rare, there are two circumstances that may result in temporary confinement: involuntary civil commitment and child support contempt.[232] In both circumstances, substantive and procedural protections exist to ensure that the purpose of confinement is not to punish the defendant, which is the province of criminal law, but to ensure compliance with a court order or to protect the community or defendant from imminent physical harm.[233] The higher standards provided in these civil cases illustrate the ways in which immigration bond proceedings fail to comport with due process and fundamental fairness.[234]

2016: 7
2017: 33
2018: 58
2019: 53
2020: 28
2021: 2

DHS RESPONSES TO A FOIA REQUEST 1/2006–12/2015, *supra* note 228.

[232] *See* Addington v. Texas, 441 U.S. 418, 427 (1979); *see also* Turner v. Rogers, 564 U.S. 431, 441–44 (2011).

[233] *See* Jarpa v. Mumford, 211 F. Supp. 3d 706, 721 (D. Md. 2016) ("As a general matter, when restriction of individual liberty has triggered due process concerns, 'a heightened burden of proof [is placed] on the State,' to justify continued detention.") (alteration in original) (quoting Cooper v. Oklahoma, 517 U.S. 348, 363 (1996)).

[234] LISA DAILEY ET AL., TREATMENT ADVOC. CTR., GRADING THE STATES, AN ANALYSIS OF U.S. PSYCHIATRIC TREATMENT LAWS 9 (Sept. 2020) ("Such action is subject to a balancing of interests in which it must be determined, after all due process rights are afforded, that the state's interest in protecting either the individual or the public outweighs that individual's general right to make their own health care decisions."). https://www.treatmentadvocacycenter.org/storage/documents/grading-the-states.pdf [https://perma.cc/7FYL-DASX]. To be sure, many, including this author, have critiqued the mental health commitment or child support contempt processes as lacking sufficient constitutional due process protection. However, limiting principles and basic protections exist in these proceedings that do not exist in immigration bond hearings. *See, e.g.*, Donald Stone, *There Are Cracks in the Civil Commitment Process: A Practitioner's Recommendations to Patch the System*, 43 FORDHAM URB. L.J. 789, 791–93 (2016). *See generally* Brustin, *supra* note 31, at 20 ("propos[ing] recommendations for implementing meaningful 'alternative procedural safeguards'").

A. Involuntary Civil Commitment

An individual suffering from severe mental illness whom a relative or the state believes poses a threat to themselves or others may be subject to involuntary civil commitment.[235] The *parens patriae* authority of courts to protect vulnerable individuals from harm, combined with the police power of the state to protect the community from individuals deemed dangerous, authorizes judges to impede an individual's right to liberty and physically confine them.[236] Individuals subject to civil commitment are entitled to a hearing.[237] State law governs the substantive and procedural standards used in these proceedings.[238] On numerous occasions, however, the Supreme Court has struck down state mental health commitment statutes as unconstitutional on the ground that the statutes failed to provide adequate procedural due process.[239]

In *Addington v. Texas*, the Supreme Court held that involuntary commitment "constitutes a significant deprivation of liberty," and that an individual subject to a petition for commitment is entitled to heightened procedural due process to ensure that such infringement is warranted and appropriate.[240] If an individual can live safely with family members or on their own, then involuntary confinement is constitutionally impermissible.[241]

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[235] *See* SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE 11–12 (2019) [hereinafter CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM], https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf [https://perma.cc/G8ZZ-SN8T]. There are other types of commitment proceedings that are directly related to ongoing criminal cases in which the reasonable doubt standard of proof applies. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 352–53, 371 (1997) (holding that procedures required under state statute that authorize civil commitment of convicted sex offenders released from prison, including a requirement of proof beyond a reasonable doubt, comport with due process).

[236] *See Addington*, 441 U.S. at 426; *see also* Stone, *supra* note 234, at 792.

[237] *See* CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM, *supra* note 235, at 12 (explaining that in some states, individuals can be confined for short periods of time pending a hearing). In addition, in other states such as New York, a hearing is not automatically set but an individual can request a hearing at any time. *Id.*

[238] *Id.* at 1.

[239] *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 369 (1996) (rejecting a presumption that a defendant was competent unless he could prove incompetence by clear and convincing evidence); Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (holding that a statute placing the burden of proving lack of danger on the civilly committed individual was unconstitutional); *Addington*, 441 U.S. at 427 (holding that an individual could not be civilly committed based upon a finding of mental illness by a preponderance of the evidence).

[240] *See Addington*, 441 U.S. at 425 (citing Jackson v. Indiana, 406 U.S. 715 (1972)).

[241] O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

All state civil commitment statutes require a finding of mental illness,[242] as well as a determination that the subject of the petition is dangerous,[243] suffering from a "grave[] disab[ility],"[244] or in a state of "deteriorat[ion],"[245] before permitting involuntary commitment. Some state statutes also require proof of an individual's impaired understanding of the need for treatment or a higher threshold of incompetency.[246]

The implicit—and often explicit—presumption is for release.[247] In Maryland, for example, the commitment statute requires release unless the judicial officer finds, by clear and convincing evidence, that the moving party proves each element for involuntary commitment is proven.[248]

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[242] CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM, *supra* note 235, at 4. The statutory origins of these standards trace back to 1964 when Congress enacted the Ervin Act, which established standards for civil commitment in the District of Columbia. *See* District of Columbia Hospitalization of the Mentally Ill Act, Pub. L. No. 88-597, 78 Stat. 944, 944–54 (1964) (codified at D.C. CODE ANN. §§ 21-501–21-592). The Act required a finding of dangerousness and mandated consideration of less restrictive alternatives to hospitalization. CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM, *supra* note 235, at 4; *see also* CAL. WELF. & INST. CODE §§ 5000–5556 (West, Westlaw current with amendments received through Oct. 15, 2022) (known as the Lanterman-Petris-Short Act). This statute required the government to prove the defendant posed "imminent dangerousness" or had a "grave disability" impairing their ability to meet their basic needs to justify a civil commitment. CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM, *supra* note 235, at 4

[243] *See O'Connor*, 422 U.S. at 575 (holding that an individual whom the lower court found to not be a danger could not be involuntarily committed).

[244] In Alaska, for example, the term "gravely disabled" is defined, in part, as "a condition in which a person as a result of mental illness . . . is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken." ALASKA STAT. § 47.30.915(7) (West, Westlaw current with amendments received through Aug. 27, 2022 of the 2022 2d Reg. Sess. of the 32nd Leg.).

[245] This is generally defined as leaving one unable to care for one's own basic needs, thereby placing oneself at risk of harm. *See, e.g.*, OR. REV. STAT. § 426.005(1)(f)(C)(iv) (West, Westlaw current through laws enacted in the 2022 Reg. Sess. of the 81st Legis. Assemb.).

[246] *See* CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM, *supra* note 235, at 11 (citing state statutes in Alabama, New York, and Idaho).

[247] *See, e.g.*, MD. CODE ANN., HEALTH–GEN. § 10-632(e)(2) (West, Westlaw current through all legislation from the 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 123, § 8(a) (West, Westlaw current through Chapter 125, 134, 136, 144–47, 149, 158, 174 of the 2022 2d Ann. Sess.).

[248] *Id.* These elements include:

> (i) The individual has a mental disorder;
>
> (ii) The individual needs in-patient care or treatment;
>
> (iii) The individual presents a danger to the life or safety of the individual or of others;
>
> (iv) The individual is unable or unwilling to be voluntarily admitted to the facility;

Most states also require that the adjudicator consider the least restrictive means available to ensure the safety of the individual and the public.[249] If means other than inpatient commitment can achieve these goals, then involuntary inpatient confinement is impermissible.[250] Other alternatives to consider include individual care plans and outpatient treatment.[251] In Minnesota, for example, the commitment statute authorizes involuntary confinement only if,

> [a]fter careful consideration of reasonable alternative dispositions including but not limited to dismissal of petition; voluntary outpatient care; voluntary admission to a treatment facility; . . . appointment of a guardian or conservator; or release before commitment . . . it finds that there is no suitable alternative to judicial commitment.[252]

The government or private petitioner bears the burden of proof and must demonstrate by clear and convincing evidence that involuntary commitment is justified.[253] In *Addington v.*

> (v) There is no available less restrictive form of intervention that is consistent with the welfare and safety of the individual.

Id.

[249] *See, e.g.*, STATE STANDARDS FOR CIVIL COMMITMENT, TREATMENT ADVOC. CTR. 3, 7, 10, 13, 18, 24 (2020), https://www.treatmentadvocacycenter.org/storage/documents/state-standards/state-standards-for-civil-commitment.pdf [https://perma.cc/X4VF-NWFP] (citing DEL CODE ANN. tit. 16, § 5011(a)(3) (2020) ("An individual shall be involuntarily committed for inpatient treatment only if . . . [a]ll less restrictive alternatives have been considered and determined to be clinically inappropriate at the time of the hearing."); (citing FLA. STAT. § 394.467(1)(b)) (2020). ("A person may be ordered for involuntary inpatient placement for treatment upon a finding of the court by clear and convincing evidence that . . . [a]ll available less restrictive treatment alternatives that would offer an opportunity for improvement of his or her condition have been judged to be inappropriate."); (citing WASH. REV. CODE § 71.05.240(4) (2020) ("[A]fter considering less restrictive alternatives to involuntary detention and treatment, finds that no such alternatives are in the best interests of such person or others, the court shall order that such person be detained for involuntary treatment not to exceed 14 days.").

[250] *See id.*

[251] *Id.*

[252] MINN. STAT. § 253B.09(1) (West, Westlaw current with all legislation from the 2022 Reg. Sess.); s*ee also* MISS. CODE ANN. § 41-21-73(4) (West, Westlaw current with laws from the 2022 Reg. Sess. effective through July 1, 2022); NEB. REV. STAT. § 71-925(1) (West, Westlaw current through the end of the 2d Reg. Sess. of the 107th Leg. 2022); N.M. STAT. ANN. § 43-1-11(E) (West, Westlaw current through the 2022 2d Reg. Sess. and the 3d Special Sess. of the 55th Leg. (2022)).

[253] *See* O'Connor v. Donaldson, 422 U.S. 563, 571 n.6 (1975); Addington v. Texas, 441 U.S. 418, 431 (1979) (changing standard of proof required in civil commitment hearings from preponderance of the evidence to clear and convincing evidence). The *Addington* court emphasized that "[t]his Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.* at 425. The court further noted that "[i]ncreasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered." *Id.* at 427. Alexander Tsesis, *Due Process in Civil Commitment*, 68 WASH. & LEE L. REV. 253, 306 (2011). *But see* WASH. REV. CODE § 71.05.240(4)(a) (employing a preponderance of the evidence standard in civil commitment proceedings).

Texas, the Supreme Court emphasized that the liberty interest at stake in a civil commitment hearing requires a more stringent standard than a preponderance of the evidence, and held that the "clear, unequivocal, and convincing" evidence standard should be used in such cases.[254] The Court distinguishes between the use of each standard, noting that the lowest preponderance of the evidence standard is used in a "typical civil case involving a monetary dispute between private parties."[255] Society, according to the Court, "has [] minimal concern with the outcome of such private suits" and therefore it is appropriate that the parties "share the risk of error" more or less equally.[256] The clear and convincing evidence standard, on the other hand, is adopted in civil cases "to protect particularly important individual interests" including in "cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant."[257] In these cases the interests at stake are more significant than financial loss or gain and it is appropriate to "reduce the risk to the defendant" and place a heavier burden on the plaintiff to increase the likelihood that a decision against the plaintiff is justified.[258]

The Court determined that the interest of society and the risks at issue in civil commitment are as substantial, if not more, than those in these quasi-criminal cases and necessitate the higher standard of proof.[259] While the Supreme Court did not go so far as to impose the reasonable doubt standard of proof,[260] a few states employ this higher standard.[261]

Some state statutes specify the type of proof needed to meet the clear and convincing evidence standard. West Virginia, for example, lays out in detail that, in determining whether someone is at risk of causing serious harm,

> [j]udicial, medical, psychological and other evaluators and decisionmakers should utilize all available information, including psychosocial, medical, hospitalization and psychiatric information and including the circumstances of any previous commitments or

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[254] *Addington*, 441 U.S. at 431–33.

[255] *Id.* at 423.

[256] *Id.*

[257] *Id.* at 424.

[258] *Id.*

[259] *Id.* at 427.

[260] The Court found the criminal standard of beyond a reasonable doubt unnecessary in the commitment context because the state's aim is not punitive and because some or all of the consequences of an erroneous decision not to commit may fall upon the individual. *Id.* at 428.

[261] *See* Stone, *supra* note 234, at 795–96 (citing to MONT. CODE ANN. § 53-21-126 (1975) ("beyond a reasonable doubt")).

> convalescent or conditional releases that are relevant to a current situation, in addition to the individual's current overt behavior.[262]

State courts provide numerous additional protections for individuals at risk of involuntary commitment. They require that qualified interpreters provide interpretation for those parties who are not proficient in English,[263] and several state statutes expressly require interpretation of entire proceedings, delineating narrow and clear circumstances under which an interpreter may be waived.[264] Statutes also provide that the subject of a commitment petition is entitled to appointment of counsel.[265] Federal courts have held that due process requires such an appointment.[266]

Individuals subject to involuntary commitment have the right to be physically present at their hearing, to review evidence, to call and confront witnesses, and to have a judge or jury adjudicate the civil claim.[267] The rules of evidence apply in commitment proceedings and, therefore, the use of hearsay and other unreliable

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[262] W. VA. CODE R. § 27-1-12 (West, Westlaw current with legislation of the 2022 1st Special Sess., Reg. Sess., 2d Special Sess., Reg. Sess., 3d Special Sess., and 4th Special Sess.).

[263] *See* NAT'L CTR. FOR STATE COURTS, CALLED TO ACTION: FIVE YEARS OF IMPROVING LANGUAGE ACCESS IN STATE COURTS 7 (2017), https://www.ncsc.org/__data/assets/pdf_file/0027/15858/language-access-called-to-action.pdf [https://perma.cc/DD8A-U638]; *see, e.g.*, ALASKA STAT. §§ 47.30.735(b)(5), 47.30.745(a) (West, Westlaw current with amendments received through Aug. 27, 2022 of the 2022 2d Reg. Sess. of the 32nd Leg.) (Patients have the right to an interpreter during 30-day and 90-day involuntary commitment hearings.); GLENN A. GRANT, N.J. JUDICIARY LANGUAGE ACCESS PLAN 4 (2017), https://www.njcourts.gov/attorneys/assets/directives/dir_01_17.pdf [https://perma.cc/SR8R-DUU3].

[264] *See, e.g.*, WASH. ADMIN. CODE § 388-02-0145 (West, Westlaw current with amendments adopted through the 22-19 Wash. State Reg., dated Oct. 5, 2022) (for DSHS hearings, "(1) Interpreters must: (a) Use the interpretive mode that the parties, the hearing impaired person the interpreter and the ALJ judge consider the most accurate and effective; (b) Interpret statements made by the parties and the ALJ; (c) Not disclose information about the hearing without the written consent of the parties; and (d) Not comment on the hearing or give legal advice. (2) The ALJ must allow enough time for all interpretations to be made and understood."); WASH. ADMIN. CODE § 388-02-0140 (West, Westlaw current with amendments adopted through the 22-19 Wash. State Reg., dated Oct. 5, 2022) (establishing procedures for waiver of interpreter services).

[265] *See, e.g.*, FLA. STAT. § 394.467(4) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 2d Reg. Sess.); United States v. Comstock, 560 U.S. 126, 130 (2010) (quoting 18 U.S.C. § 4247(d) (2006)) ("The statute provides that the prisoner 'shall be represented by counsel' and shall have 'an opportunity' at the hearing 'to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine' the Government's witnesses.").

[266] *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078, 1097–98 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974); *Comstock*, 560 U.S. at 130.

[267] *Vitek*, 445 U.S. at 494 (citing Miller v. Vitek, 437 F. Supp. 569, 575 (D. Neb. 1977)) (holding that the lower court's finding that due process required "[a] hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given").

evidence is limited.[268] Courts have considered the potential for self-incrimination and held that respondents in civil commitment proceedings have the right to invoke the Fifth Amendment if their testimony could lead to future criminal prosecution.[269] This is the standard applicable to all civil proceedings.[270] However, in the involuntary commitment context, judges may not draw a negative inference from the fact that the respondent has invoked his right to refrain from self-incrimination.[271]

In *Jackson v. Indiana*, the Supreme Court reiterated the general principle that involuntary mental health commitment must be limited in duration and "reasonab[ly] relat[ed] to the purpose for which the individual is committed."[272] Thus, in many states, an individual is entitled to a preliminary hearing within hours or days of involuntary commitment.[273] As a government review of civil commitment in the United States reported, in almost every state the duration of inpatient commitment is usually no more than "a week to [ten] days."[274]

Federal courts have grappled with the question of whether an individual who cannot afford private outpatient

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[268] *See, e.g.*, W. VA. CODE § 27-1-12(b) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 2d Reg. Sess.) ("The rules of evidence shall be followed in making the 'likely to cause serious harm' determination except that hearsay evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.").

[269] *See, e.g.*, *Lessard*, 349 F. Supp. at 1103; *In re* Matthews, 613 P.2d 88, 90 (Or. Ct. App. 1980); *In re* Field, 412 A.2d 1032, 1035 (N.H. 1980); *see also* Stone, *supra* note 234, at 796 ("*Lessard*'s conclusion was to extend the privilege against self-incrimination whenever a person is committed on the basis of his or her statements to a psychiatrist in the absence of a showing that the statements were made with 'knowledge' that the individual was not obligated to speak." (citing *Lessard*, 349 F. Supp. at 1101)).

[270] *See* Stone, *supra* note 216, at 803 n.81 ("[S]uch is the case in all civil contexts. The privilege applies wherever there is future prosecution or a threat or risk of future prosecution, and the statement reveals inculpatory information.").

[271] *Id.* at 803; GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 58 (citing Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)).

[272] Jackson v. Indiana, 406 U.S. 715, 738 (1972). This case involved involuntary pre-trial commitment of a criminal defendant, but the Court noted that the standards imposed in traditional civil commitment cases are even higher than those for pre-trial detainment in criminal cases and require limited duration and "reasonable relation to the purpose" of confinement. *Id.* at 717, 730, 738.

[273] *See, e.g.*, *Lessard*, 349 F. Supp. at 1092, 1098, 1103 (holding that an individual who is involuntarily committed must have a preliminary hearing within forty-eight hours and a hearing within ten to fourteen days, and emphasizing the need to provide timely notice of the petition, notice of right to a jury trial, and right to an attorney as well as raising concerns regarding hearsay evidence and privilege against self-incrimination), *vacated on other grounds*, 414 U.S. 473 (1974). *Lessard* is discussed in Stone, *supra* note 234, at 794–97. *But see* N.Y. MENTAL HYG. LAW § 9.33 (McKinney, Westlaw current through L.2022, chapters 1 to 579). Under New York law, hearings are not mandatory and must be requested. *Id.*

[274] CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM, *supra* note 235, at 28.

treatment may be involuntarily committed on an inpatient basis and have generally held that continued inpatient confinement based on indigence is impermissible.[275] In *Lake v. Cameron*, for example, the DC Circuit noted that a court cannot continue to confine an individual simply because the respondent is unable to afford outpatient care to prevent her from wandering and getting lost.[276] The court has a duty to explore and exhaust community alternatives, as does the government.[277]

Government attorneys do not have the right to stay a lawful decision of a civil trial judge.[278] A judge who issues an order denying commitment or releasing an individual from commitment and in some cases the appellate court, has the sole authority to stay the trial court decision pending appeal.[279]

B. Child Support Contempt

An individual who fails to pay a child support order may be subject to a finding of civil contempt of court and temporary incarceration.[280] The purpose of this remedy is to facilitate compliance with court orders rather than to punish individual obligors.[281] The petitioner in civil enforcement actions is often the state child support agency whose role is to pursue the state's interest in ensuring financial support of children in the state and

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[275] *See, e.g.*, Lake v. Cameron, 364 F.2d 657, 660–61 (D.C. Cir. 1966).

[276] *Id.*

[277] *See id.*

[278] *See, e.g.*, VA. SUP. CT. R. 1:1 (explaining that under State and federal rules of civil procedure, final judgments and orders remain under the control of the trial court that issued the judgment); *see also id.* (explaining that "[a]ll final judgments, orders, and decrees, irrespective of terms of court, remain under the control of the trial court"); FED. R. APP. P. 8 (explaining that while trial courts generally retain authority to stay proceedings, in certain circumstances the appellate court may assume such authority).

[279] *See, e.g.*, VA. SUP. CT. R. 1:1; FED. R. APP. P. 8.

[280] *See* Turner v. Rogers, 564 U.S. 431, 442 (2011) (citations omitted) ("A court may not impose punishment 'in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.' And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free.") (quoting Hicks v. Feiock, 485 U.S. 624, 638 n.9 (1988)); *see also* U.S. DEP'T OF JUST., CRIM. RES. MANUAL § 754 (2020), https://www.justice.gov/archives/jm/criminal-resource-manual-754-criminal-versus-civil-contempt [https://perma.cc/SMN3-64LZ].

[281] *Turner*, 564 U.S. 431 at 441–42, 411–34; CRIM. RES. MANUAL § 754. Criminal statutes for willfully failing to pay child support are designed to punish individuals who knowingly and intentionally avoid paying child support. In prosecutions under these statutes, indigent defendants have the right to appointment of counsel, the government bears the burden of proof, and the evidentiary standard is beyond a reasonable doubt. *See* U.S. DEP'T OF JUST., *supra* note 280; *see also, e.g.*, D.C. CODE § 46–225.02(b)(1) (2022)) (requiring "a finding by the Court that an obligor has willfully failed to obey a lawful support order").

prevent dependence on public benefits.[282] A private petitioner, however, may also initiate a case for civil contempt.[283]

The initial burden of proof is on the government or petitioner.[284] They must prove by clear and convincing evidence that the respondent had an obligation to pay support and did not pay.[285] The judge must also explicitly find that the defendant had the ability to pay the support judgment but failed to do so.[286] If the court finds that the obligor is unable to pay due to involuntary unemployment, disability, or some other circumstance, then the judge cannot utilize the remedy of civil contempt.[287]

In *Turner v. Rogers*, the Supreme Court addressed the due process protection required in child support contempt proceedings. Rogers had sought a finding of contempt against the father of her child, Michael Turner, for failure to pay child support.[288] Neither Rogers nor Turner were represented by attorneys at the hearing.[289] The trial judge made no findings regarding whether Turner had the ability to pay, yet found Turner in contempt and incarcerated him for failure to pay.[290] The Supreme Court emphasized the need to accurately assess "the key 'ability to pay' question" to determine whether confinement for civil contempt is appropriate.[291] To incarcerate an individual who does not have the ability to pay transforms the remedy from one

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[282] *See* 45 C.F.R. § 303.6(c)(4) (2022); Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,532 (Dec. 20, 2016); *see also Turner*, 564 U.S. at 443–44.

[283] *See Turner*, 564 U.S. at 443–44.

[284] *See* 45 C.F.R. § 303.6(c)(4) (2022); Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,532 (Dec. 20, 2016); *Civil Contempt—Ensuring Noncustodial Parents Have the Ability to Pay*, OFF. CHILD SUPPORT ENF'T (2016), https://www.acf.hhs.gov/sites/default/files/documents/ocse/fem_final_rule_civil_contempt.pdf [https://perma.cc/FEM2-RLAQ].

[285] *See* Dep't of Revenue Child Support Enf't v. Grullon, 147 N.E.3d 1066, 1070–71 (2020). "A Probate and Family Court judge has the power and authority to find a person in contempt . . . [and a] civil contempt finding [must] be supported by clear and convincing evidence of disobedience of a clear and unequivocal command." *Id.* (second alteration in original) (internal quotation marks omitted) (citing *In re* Birchall, 839 N.E.2d 799, 803–04 (2009)).

[286] *See* 45 C.F.R. § 303.6(c)(4); *Turner*, 564 U.S. at 435; *see* OFF. OF CHILD SUPPORT ENF'T, ESSENTIALS FOR ATT'YS IN CHILD SUPPORT ENF'T 256 (3d ed. 2002), https://www.acf.hhs.gov/archive/css/training-technical-assistance/essentials-attorneys-child-support-enforcement-3rd [https://perma.cc/3D9V-49BZ] (explaining that, in some states, the burden is additionally on the custodial parent to prove that the respondent had an ability to pay whereas in other states inability to pay is an affirmative defense that the noncustodial parent is required to raise and substantiate).

[287] *Turner*, 564 U.S. at 442, 446 ("[T]he critical question likely at issue in these cases concerns . . . , the defendant's ability to pay.").

[288] Turner v. Rogers, 564 U.S. 431, 436 (2011).

[289] *Id.* at 437.

[290] *Id.* at 437–38.

[291] *Id.* at 445.

designed to induce compliance to a punishment.[292] The *Turner* Court reiterated that such confinement is impermissible under civil law and violates due process.[293]

Courts recognize the severity of a child support contempt confinement order and only use this option when all other measures have failed. For example, civil courts often set a minimum amount short of the entire arrearage owed that, once paid, prevents the obligor's confinement.[294] Courts routinely stay orders of execution of the confinement order to give defendants an opportunity to pay and ensure that incarceration is used as a last resort.[295] State statutes also limit the amount of time an obligor can spend in jail for civil failure to pay support.[296] In *Turner*, for example, the statute at issue limited the period of incarceration for civil contempt to one year, after which time the obligor must be released.[297]

For litigants who are not proficient in English, court interpreters are available to interpret the entirety of contempt proceedings. In accordance with Department of Justice guidance on the need to provide language access in state court proceedings,[298] courts have developed comprehensive language access plans ensuring provision of language services in child support hearings.[299]

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[292] Scholars and practitioners have criticized the use of civil contempt to induce child support payment and argued that defendants in these proceedings should have the same due process rights afforded to criminal defendants. *See, e.g.*, Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 127 (2008).

[293] *See Turner*, 564 U.S. at 441–22.

[294] *See Grullon*, 147 N.E.3d at 1076.

[295] Personal observations in D.C. Superior Court 2009–2017.

[296] *See* D.C. CODE § 46-225.02 (West, Westlaw current through June 30, 2022) (setting a maximum of 180 days of incarceration); W. VA. CODE § 61-5-29(1) (West, Westlaw current with legislation of the 2022 1st–4th Special Session) (setting a maximum of one year).

[297] *See Turner*, 564 U.S. at 436.

[298] *See* FED. C.R. DIV., U.S. DEP'T OF JUST., LANGUAGE ACCESS IN STATE COURTS 1, 3 (2016) [hereinafter LANGUAGE ACCESS IN STATE COURTS], https://www.justice.gov/crt/file/892036/download [https://perma.cc/3F99-VRZB] (noting that LEP individuals also are protected by Title VI of the Civil Rights Act, which prohibits discrimination).

[299] *See, e.g.*, Letter from Brooke A. Bogue, Manager, Off. of Language Access Servs., to N.C. Admin. Off. of the Cts. (Sept. 25, 2013), https://www.lep.gov/sites/lep/files/resources/NC_int_memo_0913.pdf [https://perma.cc/QV5H-YJ3D]; JEFFERSON PAR. JUV. CT., LA., LANGUAGE ACCESS PLAN 2–3 (2020), https://www.jpjc.org/Downloads/LanguageAccessPlan2020.pdf [https://perma.cc/BTJ7-RMB5]; VT. JUDICIARY, LANGUAGE ACCESS PLAN 2 (2021), https://www.vermontjudiciary.org/sites/default/files/documents/Language%20Access%20Plan%20Final.pdf [https://perma.cc/LS36-RCVJ]; *Limited English Proficiency Plan (LEP)*, SUPER. CT. OF CAL., CNTY. OF GLENN, https://www.glenncourt.ca.gov/general-info/limited-english.shtml [https://perma.cc/SSZ7-S9QR].

Moreover, the rules of evidence apply in child support contempt proceedings,[300] and the rules of civil procedure permit discovery—interrogatories, production of documents, subpoenas, depositions—so that each side may access documents and information concerning evidence that the opposing party intends to use at the hearing.[301] Contempt proceedings, like all civil court proceedings, are recorded or transcribed, and transcripts are available upon request.[302]

The *Turner* Court determined that appointing counsel for Mr. Turner was not constitutionally required, however the Court left open the possibility that under different circumstances, appointment would be necessary.[303] The Supreme Court applied the *Mathews v. Eldridge* test and found that, while the private liberty interest at stake was substantial, the risk of erroneous deprivation of that interest without appointed counsel could be mitigated using alternate procedural safeguards such as enhanced notice, form pleadings, judicial inquiries, and written findings.[304] The Court held that such safeguards were not available in Turner's case and remanded.[305]

In determining that appointment of counsel was not constitutionally required, the Court explained that the central legal question of ability to pay child support is "a question that in many—but not all—cases is sufficiently straightforward to warrant determination *prior* to providing a defendant with counsel."[306] The Court also emphasized that the *Turner* case involved two pro se parties, and raised concerns that appointing counsel for the respondent when the petitioner did not have an

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[300] *See, e.g.*, Cal. R. of Ct. 5.113(a) (2013) ("[A]t a hearing on any request for order brought under the Family Code, absent a stipulation of the parties or a finding of good cause under (b), the court must receive any live, competent, and admissible testimony that is relevant and within the scope of the hearing."); DEL. FAM. CT. R. CIV. P. 43(a) ("All evidence shall be admitted which is admissible under statute or under the rules of evidence applied in the courts of the State of Delaware.").

[301] *See, e.g.*, D.C. SUPER. CT. P. & S R. 6 (requiring disclosure of earnings and other financial information and authorizing discovery, including interrogatories, requests for production of documents, admissions, subpoenas, and depositions, in accordance with D.C. SUPER. CT. DOM. REL. R. 26–37).

[302] *See, e.g.*, DEL. FAM. CT. R. OF CIV. P. 42.2.(d)–(e) ("All hearings or trials shall be recorded by stenographic notes, stenotype machine or by electronic, mechanical or other appropriate means . . . . All sidebar conferences and chambers conferences during trial shall be recorded unless the trial judge or master determines, in advance, that neither evidentiary nor substantive issues are involved.").

[303] Turner v. Rogers, 564 U.S. 431, 448–49 (2011).

[304] *Id.* at 447–48.

[305] *Id.* at 449.

[306] *Id.* at 446. The Court suggested that a trial judge can ascertain ability to pay through production of basic financial information.

attorney "could create an asymmetry of representation that would alter significantly the nature of the proceeding."[307]

The *Turner* decision was narrow in scope and the Court left open the question whether appointment of counsel *is* necessary in cases in which (1) the government is a party represented by counsel, (2) the legal questions at issue are unusually complex, or (3) alternative procedural safeguards are unavailable or inadequate.[308] The Court noted the imbalance of power created when the government, represented by experienced attorneys, seeks to infringe the liberty interest of an unrepresented individual.[309] Thus, the *Turner* reasoning suggests that in cases in which the government, represented by counsel, is seeking civil confinement, respondents may be entitled to appointed counsel.

The last feature of note in civil child support contempt proceedings involves judicial autonomy and control over court orders. As in civil commitment cases, government attorneys representing the state do not have the right to stay a lawful decision of the trial judge.[310] Instead the trial judge who issued the civil contempt order, or in some circumstances the appellate court, retains authority to stay the order pending appeal.[311]

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[307] *Id.* at 447 (internal quotation marks omitted) (citing Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973)).

[308] *Id.* at 449.

> We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody . . . Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative . . . Neither do we address what due process requires in an unusually complex case where a defendant "can fairly be represented only by a trained advocate."

Id. (citing *Gagnon*, 411 U.S. at 788).

[309] The Court cited to the reasoning in *Johnson v. Zerbst* that "[t]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel*." *Id.* at 449 (internal quotation marks omitted) (quoting Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938)).

[310] *See supra* note 278 and accompanying text (discussing finality of judgments).

[311] *See, e.g.*, NORTH CAROLINA INDIGENT DEFENSE SERVICE, SAMPLE MOTION TO STAY EXECUTION OF JUDGMENT FOR CIVIL CONTEMPT, https://www.ncids.org/wp-content/uploads/2021/05/MotionToStay.doc; *Appealing an Order*, FAMILY L. SELF HELP CTR., https://www.familylawselfhelpcenter.org/self-help/divorce/how-do-i-change-the-order/166-appealing-an-order#step5 (explaining that plaintiff can file a motion in the district court requesting the district court judge stay the order or, in certain circumstances the request for a stay can be filed with the supreme court (NRAP 8(a)(2)).

IV. REFORMS NEEDED TO BRING DISCRETIONARY IMMIGRATION CUSTODY AND BOND PROCEEDINGS IN LINE WITH CIVIL CONFINEMENT DUE PROCESS STANDARDS

In the immigration, mental health commitment, and child support contexts, judges retain authority to curtail individual liberty and confine individuals for the nonpunitive purposes of protecting that person or the community from harm or inducing compliance with a court order.[312] The use of the extraordinary remedy of civil detention is justified under the plenary power in the immigration context, the *parens patriae* and police power in the mental health context, and the power of the judiciary to effectuate its own orders in the contempt context.[313] However, the ways in which this authority is exercised in the immigration bond context varies dramatically from the other civil proceedings detailed above.

The comparison illustrates the need for urgent statutory, regulatory, and rules reform, in addition to continued litigation, to ensure that the extreme remedy of immigration detention is used sparingly and imposed only after a fundamentally fair process that protects the due process rights of detained noncitizens and reduces the risk of erroneous detention. The proven effectiveness of alternatives to confinement and the heavy cost to taxpayers of immigration detention further bolster the need for reform.[314]

A. Detention As a Last Resort—Automatic Judicial Review, Presumption in Favor of Release, Consideration of Least Restrictive Alternatives, and Ability to Pay

Bond determinations are civil in nature. In theory, denial or imposition of bond is not to be used for punitive purposes, rather it is meant to protect the community and ensure appearance in court.[315] Yet, advocates express grave concern that ICE places noncitizens, including those seeking protection from persecution in their home countries, in jail-like conditions to deter them from crossing the border and to wear down detained noncitizens to the point they request their own deportation.[316] As one legal director explained, "Confinement cannot be punitive

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312 *See supra* Sections III.A., III.B.

313 *Id.*

314 *See supra* notes 32–33 and accompanying text.

315 *See In re* Guerra, 24 I. & N. Dec. 37, 38 (B.I.A. 2006).

316 *See* Sweeney et al., *supra* note 229, at 292.

for a civil reason [and the] idea that [immigration detention] is not punitive is fiction."[317] Procedures such as automatic judicial review, presumptions in favor of release, and consideration of least restrictive alternatives and ability to pay would reduce the likelihood that the government is detaining individuals for punitive purposes.

Most state statutes and court rules governing involuntary mental health commitment proceedings require automatic judicial review of administrative commitment decisions to ensure that civil remedial purposes are being served.[318] The onus to request judicial reconsideration is not on the confined individual.[319] Yet, in the immigration bond context, the onus is on the detained noncitizen to request redetermination.[320] Statutory changes and implementation of regulations clarifying that detained individuals eligible for bond are automatically entitled to custody and bond redetermination hearings unless the individual affirmatively waives this right are urgently needed.

In addition, in both the involuntary commitment and child support contempt contexts there is either an explicit or implicit presumption against confinement created through burden shifting and consideration of least restrictive alternatives.[321] However, this presumption against detention does not uniformly apply in discretionary immigration bond hearings.[322] Which party bears the burden of proof varies by circuit.[323] Two circuits have held that placing the burden of proof on the noncitizen in discretionary bond proceedings, particularly after prolonged detention, violates the Due Process Clause of the Fifth Amendment.[324] By contrast, the Fourth and Ninth Circuits have held that requiring a noncitizen to prove lack of danger and

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[317] Interview with Laura Lunn, *supra* note 89; *see also* Sweeney et al., *supra* note 229, at 292–93.

[318] *See supra* note 100–101 and accompanying text; Section II.A; *see also* CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM, *supra* note 235, at 12.

[319] *See* CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM, *supra* note 235, at 12. In the child support contempt context, there is no administrative decision to review. Administrative law judges have no authority to use the contempt power to civilly confine. *See, e.g.*, 14 C.F.R. § 406.109(c) (2022) ("*Limitations on the power of the administrative law judge.* The administrative law judge may not issue an order of contempt.").

[320] *See supra* note 176 and accompanying text; *supra* Sections III.A, III.B.

[321] *See supra* note 248 and accompanying text; *supra* Sections III.A, III.B.

[322] *Supra* Section II.D.

[323] *Id.*

[324] *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 38–39, 41 (1st Cir. 2021); Velasco-Lopez v. Decker, 978 F.3d 842, 855 (2d Cir. 2020). *But see* Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 279 (3d Cir. 2018) (stating that, in analyzing the detainee's claims, the court "perceive[d] no problem" with requiring that INA § 236(a) detainees bear the burden of proof at bond hearings).

flight risk is constitutionally permissible.[325] Statutory and regulatory reform incorporating a presumption against civil detention would create uniformity across the country and reduce the risk of erroneous detention.

Requirements that judges consider the least restrictive alternatives to incarceration in civil involuntary commitment or child support contempt proceedings also reflect an implicit presumption against confinement and ensure adjudicators use the extraordinary civil remedy of incarceration sparingly. In the immigration context, the Ninth Circuit has held that as a matter of due process IJs must consider the least restrictive alternatives to detention that would protect the community and ensure return to court.[326] However, in the majority of jurisdictions such consideration is not required. This vacuum creates an implicit presumption *in favor of detention* even though numerous alternatives to detention exist that studies have demonstrated facilitate safety and return to court.[327] As a result, unacceptably high and costly rates of civil immigration detention continue apace,[328] and the risk that the executive branch confines noncitizens who are neither a danger nor a flight risk remains ever present.[329]

Similarly, imposition of a minimum bond amount and the failure of IJs to consider a respondent's ability to pay leads to punitive rather than remedial confinement. In child support cases, judges must consider ability to pay to ensure that the obligor had the capacity to pay support yet failed to do so.[330] Further, child support courts establish purge amounts calibrated to reflect an amount the obligor is able to pay.[331] If the purge amount is so high that an obligor cannot pay it, then the incarceration simply punishes the obligor for indigency—converting the remedy from civil to criminal without providing

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[325] Miranda v. Garland, 34 F.4th 338, 366 (4th Cir. 2022), *reh'g denied*, No. 20-01828 (4th Cir.). Rodriguez Diaz v. Garland, No. 20-16245, 2022 WL 17087849, at *2–3 (9th Cir. Nov. 21, 2022).

[326] *See* Hernandez v. Sessions, 872 F.3d 872, 991 (9th Cir. 2017); *see also* Brito v. Garland, 22 F.4th 240, 254 (1st Cir. 2021).

[327] *See* AUDREY SINGER, CONG. RSCH. SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 9 (2019). Alternatives to Detention (ATD) includes "supervised release and enhanced monitoring for a subset of foreign nationals subject to removal whom ICE has released into the United States." *Id.* The average daily cost of Alternatives to Detention (ATD) is less than 7% of that of detention: $10.55 in ATD as compared to $158 in detention. *See id.* at 15; ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION, *supra* note 34, at 18; Marouf, *supra* note 107, at 2155–70.

[328] *See supra* notes 32–33 and accompanying text.

[329] *See supra* notes 9–10 and accompanying text.

[330] *See supra* notes 306–308 and accompanying text.

[331] *See supra* notes 306–308 and accompanying text.

the required criminal procedural safeguards. The Ninth Circuit has found that failure to consider ability to pay in immigration bond hearings violates the Fifth Amendment and due process requires such consideration to ensure that the purpose of detention remains nonpunitive.[332] However, this is not a uniform requirement across the country.[333]

Imposition of excessive bond and failure to consider ability to pay also implicate Eighth Amendment concerns. The Eighth Amendment to the Constitution forbids courts from imposing excessive bail, and courts recognize that setting bail at an impossibly high level undermines the purpose of bail.[334] The Supreme Court continually affirms the idea that the prohibition of excessive bail functions "to prevent bail being set so high that the level itself (rather than the reasons that might properly forbid release on bail) prevents provisional release."[335] Statutory and regulatory changes are necessary to ensure that consideration of the ability to pay bond is required across the country as a matter of due process.

B. Ensuring Meaningful Participation in Bond Proceedings—Comprehensive Language Access

In addition to considering ability to pay, regulations and court rules are necessary to ensure that immigration courts adhere to federal guidelines regarding language interpretation.[336] As in any other civil proceeding where an individual's physical liberty is at stake, the entirety of discretionary bond proceedings should be simultaneously or consecutively interpreted in the noncitizen's first language. State court rules and Department of Justice Guidelines provide helpful guidance as to the extent of interpretation services required in immigration bond proceedings.[337]

The Division of Civil Rights of the US Department Justice exhorts state courts to provide comprehensive language access in

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[332] *See supra* note 116 and accompanying text; Hernandez v. Sessions, 872 F.3d 976, 976 (9th Cir. 2017).

[333] *See supra* note 120 and accompanying text; Section II.A.

[334] U.S. CONST. amend. VIII.

[335] *See, e.g.*, Jennings v. Rodriguez, 138 S. Ct. 830, 862 (2018) (citing Carlson v. Landon, 342 U.S. 524, 545 (1952)).

[336] *See* 28 U.S.C. § 1827; ADMIN. OFF. OF THE U.S. CTS., GUIDE TO JUDICIARY POLICY VOL. 5 § 110 (2021), https://www.uscourts.gov/file/22692/download [https://perma.cc/ARY7-799L]; A.B.A., STANDARDS FOR LANGUAGE ACCESS IN COURTS 2, 15 (2012),–https://www.americanbar.org/groups/legal_aid_indigent_defense/language_access/ [https://perma.cc/Y6XT-27VY].

[337] *See supra* Section II.B.

court proceedings.[338] As the DOJ emphasized in its report, *Language Access in State Courts*, "[w]ithout careful attention to providing effective language services, many people will face a judicial process that places unfair and unconstitutional burdens on their ability to fully participate in proceedings."[339]

Additionally, Standard 1 of the American Bar Association Guidelines for Language Access in Courts is directed to all courts and administrative tribunals and explains that fundamental fairness requires individuals with limited English proficiency (LEP) "be able to be fully present during a legal proceeding: an interpreter is provided in order for him to understand what is discussed and decided (including questions asked of him, the statements of the judge, and testimony of others)."[340] This concept of an LEP litigant being "present" in a legal proceeding strikes at the core problem with the intermittent interpretation occurring all too frequently in bond proceedings.[341] Without interpretation, the detained individual is essentially absent from the proceeding because they do not understand what is being presented or discussed during their bond hearing.[342]

It is critical that unrepresented respondents understand everything that transpires during the hearing—from direct questioning to discussion between the judge and the DHS attorney—so that they can correct or object as needed. While lack of consistent interpretation is particularly prejudicial to unrepresented pro se litigants, the due process concerns remain when the noncitizen has an attorney. If the client does not understand what is transpiring, they cannot alert their attorney to inaccuracies or misunderstandings. In bond redeterminations involving represented litigants, the onus should not be on the attorney to affirmatively request interpretation of the entire proceeding, nor should judges ask attorneys whether they are willing to waive interpretation. If an attorney affirmatively seeks waiver because they believe it is in their client's best interest, then the court should accept the request. However, court rules should make clear that full interpretation is the standard.

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338 *See supra* note 298 and accompanying text.
339 LANGUAGE ACCESS IN STATE COURTS, *supra* note 298, at 1.
340 A.B.A., *supra* note 336, at 19–20.
341 *See* Barak, *supra* note 133, at 217.
342 *See id.* at 211.

C. *Remedying the Imbalance of Power—Appointment of Counsel*

Due process requires that noncitizens detained pending removal proceedings be appointed counsel for bond redetermination hearings in accordance with the reasoning in *Addington v. Texas* and *Turner v. Rogers*.[343] The imbalance of power inherent in bond hearings where the government is represented by an attorney in every proceeding and unrepresented respondents are left to maneuver complex legal terrain on their own—and face lengthy incarceration if they fail—is fundamentally unfair. The Supreme Court made it clear in *Turner* that such an imbalance of power in representation could tip the scales in favor of mandated appointment of counsel.[344]

The other two circumstances the *Turner* Court identified as weighing in favor of appointed counsel also exist in the immigration bond context: lack of alternative procedural safeguards to mitigate erroneous decision-making and complex legal questions at issue. There are no alternative procedural safeguards in lieu of appointed counsel that would protect pro se litigants given the complexity and stakes involved in bond proceedings.[345] This is particularly true so long as the burden of proof remains on the noncitizen to prove a negative, e.g. that they are not a danger to the community or a flight risk. In addition, unlike in *Turner*, where the Court found that determining indigency was a straightforward issue that could be assessed through form pleadings and follow up questioning,[346] the issues in bond redetermination hearings are far from simple. Respondents are expected to access court records, police reports, rehabilitation records, and letters of support to demonstrate they do not pose a danger to the community—all while they are detained in ICE custody.[347] This task is nearly impossible to

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[343] *See* Lenni B. Benson, *Immigration Adjudication: The Missing "Rule of Law,"* 5 J. ON MIGRATION & HUM. SEC. 331, 349–51 (2017).

[344] *See supra* note 309 and accompanying text.

[345] There is a need for appointment of counsel at all stages of removal proceedings. However, because custody and bond redetermination is the threshold stage at which the issue of a detained immigrant's release is determined and also when the ability to adequately prepare a case and hire a lawyer for the removal case is at issue, this article focuses on appointment of counsel at the redetermination stage. For more comprehensive recommendations regarding appointment of counsel in all removal proceedings, see NAT'L ASS'N OF IMMIGR. JUDGES, THE IMMIGRATION COURT—IN CRISIS AND IN NEED OF REFORM 1–2 (2019), https://www.naij-usa.org/images/uploads/publications/Immigration_Court_in_Crisis_and_in_Need_of_Reform.pdf [https://perma.cc/CJ7S-2AY2].

[346] *See supra* note 306 and accompanying text.

[347] *See supra* note 86 and accompanying text.

accomplish from the confines of a detention center and without assistance of counsel.

When the government alleges danger based on pending criminal charges, respondents face a complex legal dilemma regarding self-incrimination—though they may be unaware of the dilemma.[348] Deciding whether to testify and risk self-incrimination or plead the Fifth Amendment knowing that the IJ is permitted to make a negative inference from such action is a complicated task requiring expert legal advice and guidance.[349] As Judge Pillard pointed out in her concurrence in *United States v. Gewin*, determining whether to testify in a civil confinement proceeding when one risks potential self-incrimination is far from simple, and therefore, distinguishable from the scenario presented in *Turner*.[350]

In proving flight risk, respondents may have slightly better access to certain forms of proof such as letters of support *if*, from detention, they are able to communicate with and obtain documents from relatives and friends. However, complex threshold issues of proof remain that require sophisticated legal analysis, and such evidence is often inaccessible to individuals confined in detention centers.[351] Determining whether the respondent is eligible for underlying relief that would incentivize return to court is one such issue. Assessing eligibility and demonstrating likelihood of success for asylum, withholding of removal, Convention Against Torture, cancellation of removal, immediate relative petitions, Temporary Protected Status, DACA, U Visas, or other removal defense claims is complicated and requires sophisticated legal analysis and amassing of

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[348] *See* Valdez, *supra* note 154, at 1383; *see also* GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION, *supra* note 64, at 63, 64.

[349] *See id.*

[350] United States v. Gewin, 759 F.3d 72, 88 (D.C. Cir. 2014) (citing United States v. Bobart Travel Agency, Inc., 699 F.2d 618, 619–20 (2d Cir.1983) ("To guide a client between the Scylla of contempt and the Charybdis of waiving his Fifth Amendment privilege requires not only a lawyer but an astute one."). Judge Pillard explained that:

> Unlike in *Turner*, the question at issue in Gewin's contempt proceeding was not "straightforward" . . . Gewin very well may have spent the funds identified in the court's sentencing order. If so, he could have come forward with that evidence to defend against civil contempt, but in doing so he would have exposed himself to criminal contempt or prosecution on another ground for dissipating funds in violation of the court's order. Alternatively, if he avoided criminal jeopardy by declining to present that evidence to the court, he would remain in contempt, with no apparent end to his incarceration. The hazards surrounding those choices underscore that Gewin's circumstances presented legal issues far more complex than those characterized in *Turner* as simple enough that an indigent could navigate them effectively on his own, aided only by a system of simple forms and follow-up questioning.

Id. (citations omitted).

[351] *See supra* notes 86–87 and accompanying text.

evidence that detained respondents are not capable of undertaking without counsel.

The rationale adopted by the Ninth Circuit in *C.J.L.G. v. Sessions* does not hold water in the immigration bond context. There, the court held that IJs are tasked with developing the record and it is this unique responsibility, along with the detained individual's right to appeal if the IJ fails to fully develop the record, which ensures fundamental fairness.[352] However, an IJ's duty to develop the record does not include providing complex, privileged advice to the respondent concerning the potential benefits and risks of pleading the Fifth Amendment. IJs do not have the capacity or resources to secure criminal court records demonstrating that the charges DHS alleges are mischaracterized, have been reduced, or were dismissed altogether.[353] In master calendar hearings, which are separate from bond proceedings, IJs make inquiries to determine whether respondents have potential defenses to deportation, however these inquiries do not generate the evidence required in bond proceedings to demonstrate that a potential removal defense is strong enough to incentivize return to court.[354] Without counsel, detained noncitizens are at unacceptable risk of continued confinement based on erroneous determinations that they pose a danger to the community or constitute a flight risk.

D. Preventing Erroneous Deprivation of Liberty—Reestablishing the Burden of Proof on the Government

As in the involuntary commitment context, the risk of "significant deprivation of liberty" inherent in continued immigration detention requires burden shifting and a higher quantum of proof to reduce the margin of error that individuals who are not a danger nor a flight risk are being civilly detained.[355] This standard must be applied at the initial custody and bond redetermination and the court should be required to set additional reviews at regular intervals in cases involving prolonged detention.

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[352] *See* C.J.L.G. v. Sessions, 880 F. 3d 1122, 1138 (9th Cir. 2018), *vacated on reh'g en banc sub nom.*, C.J.L.G. v. Barr, 923 F.3d 622 (9th Cir. 2019).

[353] *See supra* note 14 and accompanying text.

[354] *See supra* notes 208–212 and accompanying text.

[355] Addington v. Texas, 441 U.S. 418, 425 (1979) (citing Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); *In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967)).

The First and Second Circuits' decisions underscore that IJs must have substantial evidence to justify denying bond and continuing to civilly detain a noncitizen.[356] It is the government that has access to evidence of criminal convictions relevant to assessments of danger and it is the government that can acquire information regarding immigration history and underlying immigration relief relevant to determinations of flight risk.[357]

In addition, the standard of proof must be commensurate with the level of confidence the adjudicator is expected to have in his or her factual and legal conclusions. The *Velasco Lopez* and *Hernandez-Lara* courts compare civil immigration detention to involuntary civil commitment and find that the same need to reduce the likelihood of erroneous civil confinement using a higher standard of proof applies in both contexts, particularly on the question of danger and in circumstances where a noncitizen is detained for a lengthy period pending removal proceedings.[358]

It is notable, however, that in the involuntary civil commitment context, the burden of proof and quantum of proof analyses do not depend upon the length of the civil confinement or the ease of access to evidence. Instead, statutes governing these proceedings recognize that the gravity of the liberty interest at stake exists at the outset of the adjudicatory process and continues so long as confinement continues.[359] Although the police and parens patrie powers of the state are weighty, they do not overshadow the fundamental rights of individuals subject to involuntary commitment.[360] The stakes do not merely involve resolution of money disputes but determination of weighty, often quasi-criminal, questions of great importance to society. Therefore, the right to physical liberty necessitates that the party seeking commitment provide substantial evidence to demonstrate that the conditions justifying the extreme measure of nonpunitive, civil confinement exist *at the outset of the adjudication and then at regular intervals*, regardless of

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[356] *See* Velasco Lopez v. Decker, 978 F.3d 842, 855–56 (2d Cir. 2020); Hernandez-Lara v. Lyons, 10 F.4th 19, 30–31 (1st Cir. 2021).

[357] *See Velasco Lopez*, 978 F.3d at 853 ("In making the relevant inquiry, the Government had substantial resources to deploy. Those resources include computerized access to numerous databases and to information collected by DHS, DOJ, and the FBI, as well as information in the hands of state and local authorities.").

[358] *Id.* at 856 (footnote omitted) ("The Supreme Court has consistently held the Government to a standard of proof higher than a preponderance of the evidence where various liberty is at stake, and has reaffirmed the clear and convincing standard for types of civil detention."); *see also* Hernandez-Lara v. Lyons, 10 F.4th at 40 ("[I]n several contexts, the government must justify detention by clear and convincing evidence.").

[359] *See supra* Section III.A; *see also Addington*, 441 U.S. at 423.

[360] *Id.* at 426.

whether the person the government seeks to commit has access to evidence.[361]

Similarly, the plenary power in the immigration context should not overshadow the individual right to liberty. Nor should it weaken the obligation of the government to provide significant evidence, at the initial redetermination hearing and at intervals during prolonged detention, on quasi-criminal issues as important as whether an individual poses a danger or flight risk. As in *Addington* where the Court found that "the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others,"[362] the federal government has no interest in *civilly* detaining noncitizens if they are not a danger to society or a flight risk. Given the stakes at issue, and the need to significantly reduce the likelihood of erroneous, punitive decisions, the appropriate standard to use in initial and subsequent reviews, as in the civil commitment context, is clear and convincing evidence.[363]

In *Miranda v. Garland*, the Fourth Circuit adopted a different and deeply troubling interpretation, reasoning that comparisons between the procedural protections required in civil commitment hearings and those required in discretionary bond proceedings are inapposite because *Addington* applied to citizens, and Congress's plenary power authorizes differential treatment of noncitizens.[364] This reasoning contorts the plenary power to justify a weakening of the procedural due process

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[361] *See supra* notes 272–274 and accompanying text. *See, e.g.*, ALASKA STAT. § 47.30.735(b)(5) ("Procedure for 30-day commitment" providing for a hearing and requiring numerous procedural protections to determine if commitment warranted); § 47.30.740 ("Procedure for 90-day commitment" following 30-day commitment); § 47.30.745(a) ("90-day commitment hearing rights; continued commitment" providing for heightened protections including a judicial hearing within five days of the filing of the petition and right to a jury trial if requested); § 47.30.770 ("Additional 180-day commitment" requiring release after 90 days unless the person seeking extension proves by clear and convincing evidence that continued confinement is required and requiring successive petitions and hearings at 180-day intervals for continued confinement) (West, Westlaw current with amendments received through Aug. 27, 2022 of the 2022 2d Reg. Sess. of the 32nd Leg.).

[362] *Addington*, 441 U.S. at 426.

[363] *Id.* at 423.

[364] Miranda v. Garland, 34 F.4th 338, 359 (4th Cir. 2022), *reh'g denied*, No. 20-01828 (4th Cir.); *see also* Rodriguez Diaz v. Garland, No. 20-16245, 2022 WL 17087849, at *20 (9th Cir. Nov. 21, 2022) (finding that "while Rodriguez Diaz's private interest and the government's interests are both substantial here, the private interest of a detained alien under § 1226(a) is lower than that of a detained U.S. citizen, and the governmental interests are significantly higher in the immigration detention context. . . . These interests can be compared to those at stake in prior cases in which the Supreme Court has upheld immigration detention schemes."). It is important to note that the detention scheme referred to in *Demore* is that of mandatory detention under INA § 236(c), not discretionary detention under § 236(a).

guaranteed to "all persons" under the Fifth Amendment as recognized in *Zadvydas* and *Mathews v. Diaz*.[365] In *Mathews*, the Supreme Court distinguished the right to receive public benefits as an entitlement from which noncitizens may constitutionally be deprived, however, the opinion does not state that noncitizens may receive less procedural due process protection.[366] Taken to its logical conclusion, the *Miranda* court's reasoning suggests that noncitizens at risk of civil commitment or contempt for failure to pay child support could be subject to less procedural due process protection than citizens in the same position, which neither state nor federal courts have recognized to be true and which raises significant equal protection concerns.[367]

The Ninth Circuit majority opinion finds that detained noncitizens already enjoy sufficient procedural due process protection because they may request initial IJ redetermination of ICE bond decisions, appeal unfavorable decisions to the BIA, and seek subsequent bond review hearings based on changed circumstances.[368] However, when the burden of proof remains on the Respondent at each stage of review and the quantum of proof required at each stage is insufficient to assure that an accurate decision regarding danger and flight is likely then the presumption for detention remains intact and the substantial risk of error at each stage remains the same. As the majority in *Hernandez-Lara* explained it, "[l]oaded dice rolled three times are still loaded dice."[369]

It is possible that other appellate courts will join the First and Second Circuits in their analyses of the burden and standard of proof issues. However, given the fundamental difference in standards now applied in immigration courts in different circuits, it is time for statutory and regulatory change expressly stating, as was the norm in discretionary custody and bond hearings prior to the BIA's decision in *Adeniji*,[370] and as is

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[365] Zadvydas v. Davis, 533 U.S. 678, 694–95 (2001); Mathews v. Diaz, 426 U.S. 67, 78 (1976). This argument is the same plenary power rationale used to justify executive branch mistreatment of Native Americans (as citizens of an independent nation) including removing Native American children from their families. *See* DOROTHY ROBERTS, TORN APART 104–05 (2022).

[366] *See* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 380–82 (2003).

[367] *See Miranda*, 34 F.4th at 359–61; Cole, *supra* note 366, at 379–80, 385 (citing Yick Wo v. Hopkins, 118 U.S. 356, 269 (1886) and Pyler v. Doe, 457 U.S. 202 (1982)) (noting that noncitizens, including undocumented individuals, are entitled to equal protection of the law).). Cole also points out that noncitizens tried for crimes are entitled to the same procedural protections as citizens. Cole, *supra* note 366, at 370–71.

[368] *Rodriguez Diaz*, 2022 WL 17087849, at *25.

[369] Hernandez-Lara v. Lyons, 10 F.4th 19, 32 (1st Cir. 2021).

[370] *See supra* notes 161–163 and accompanying text.

the norm in other civil confinement contexts, that there is a presumption of release and that the burden of proof must be placed on the government to prove by clear and convincing evidence that civil detention is warranted. These standards should be applied at the initial custody and bond redetermination as well as at subsequent reviews. The immigration courts should be required to set additional reviews at regular intervals in cases involving prolonged detention.

E. Safeguarding Fundamental Fairness—Adequate Notice, Evidentiary Limits, Required Disclosure, Presence of Respondent, Availability of Transcripts, and Court Findings

The current discretionary bond scheme suffers from a deficiency endemic to immigration court proceedings more generally, which is the characterization of these proceedings as "administrative" and subject to the Administrative Procedure Act (APA).[371] IJs are lawyers working for an executive branch agency—the Department of Justice—yet they are given the extraordinary power to detain—a power which administrative law judges subject to the APA do not have at their disposal.[372] Immigration courts are not subject to federal rules of procedure or evidence.[373] The administrative nature of the discretionary bond hearing contributes to the lack of adequate safeguards pertaining to notice, advance disclosure of evidence, introduction of evidence, judicial findings, and availability of transcripts.[374] These deficiencies call for immediate reform.

One of the hallmarks of due process is adequate notice. In *Turner*, the Supreme Court held that all respondents must receive notice that the key issue to be addressed in a child support contempt proceeding is ability to pay, and the Court remanded to ensure that respondents received notice explaining this critical issue.[375] The threshold issue in a discretionary

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[371] Ardestani v. INS, 502 U.S. 129, 133, 138–39 (1991) (holding that removal proceedings do not constitute an "adversary adjudication" under the Administrative Procedure Act).

[372] *See* Administrative Procedure Act, 5 U.S.C. §§ 551(10), 556(c).

[373] KIND, CHAPTER 3: THE IMMIGRATION COURT SYSTEM 7 (2015), https://supportkind.org/wp-content/uploads/2015/04/Chapter-3-The-Immigration-Court-System.pdf [https://perma.cc/JQ8Z-288Y].

[374] The Second Circuit, in *Velasco Lopez* explained that "[t]he Supreme Court has been unambiguous that executive detention orders, which occur without the procedural protections required in courts of law, call for the most searching review." Velasco Lopez v. Decker, 978 F.3d 842, 850 (2020) (citing Boumediene v. Bush, 553 U.S. 723, 781–83 (2008); I.N.S. v. St. Cyr, 533 U.S. 289, 301–02, (2001)).

[375] Turner v. Rogers, 564 U.S. 431, 447–48 (2011).

custody and bond proceeding is whether the detained noncitizen poses a danger to the community or a flight risk, yet the notice provided to respondents does not inform them of this critical standard.[376] Therefore, immigration courts must alert respondents in advance of a discretionary bond proceeding of the threshold issues to be addressed in the hearing.

In addition, evidentiary limits are necessary to ensure fairness of immigration bond proceedings. The rules of evidence apply in civil involuntary commitment proceedings, and in those cases, the judge is not permitted to make a negative inference if the respondent invokes the Fifth Amendment.[377] In immigration bond hearings, by contrast, judges are permitted to draw a negative inference from the respondent's decision not to testify. They can also consider *any* information that is available or presented by the noncitizen or DHS, which routinely includes unreliable or unduly prejudicial documents related to pending, unproven, criminal charges.[378] This practice is particularly egregious in circumstances in which criminal courts, under the strictest due process procedural safeguards, have already determined that the noncitizen may be released on bail pending trial.[379] Evidence supporting continued detention should generally be limited to proof of *convictions*, or evidence that criminal courts have imposed high bail amounts to protect against flight risk.

Moreover, the absence of disclosure requirements paves the way for an unfair element of surprise to permeate the entire bond process. In civil commitment cases, disclosure is required to give respondents the ability to review evidence the government intends to introduce in advance of trial.[380] In immigration bond hearings, by contrast, attorneys for the government routinely introduce I-213 criminal history reports, police reports, and other critical evidence without disclosure in advance to counsel or pro se respondents.[381]

With the advent of COVID-19 and increased use of remote phone or video bond hearings, advance disclosure has increased.[382] Immigration courts began requiring each party to serve any documents it intended to introduce in evidence on the

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[376] *Id.*

[377] *See supra* notes 268–271 and accompanying text.

[378] *See supra* Section II.E.

[379] *See supra* notes 191**Error! Bookmark not defined.**–192 and accompanying text.

[380] *See supra* Section III.B.

[381] *See supra* note 186 and accompanying text.

[382] *See supra* note 203 and accompanying text.

opposing party prior to the hearing.[383] As a result, DHS disclosed criminal history evidence in advance, which diminished the unfair element of surprise and allowed attorneys to investigate allegations and object to or counter the government's evidence.[384] This procedural shift demonstrates that fuller disclosure is feasible. Regulations and court rules should require the government to provide copies of I-213 reports and any other documents it intends to introduce to prove danger in advance of bond proceedings.

Several additional procedural safeguards are needed to ensure that discretionary bond hearings are fundamentally fair. This includes basic protections provided in civil involuntary commitment and child support contempt cases, such as allocating sufficient time to permit full presentation of issues,[385] requiring IJs to provide detailed findings,[386] and mandating that all proceedings be tape recorded and transcripts made available upon request to facilitate review and appeal. Moreover, ensuring that detained individuals are physically present during bond hearings is critical to facilitating respondents' access to exhibits. It also allows attorneys to consult privately with their clients while remaining present in the courtroom to fully defend their clients' interests.

F. Preventing Prosecutorial Overreach—Abolishing the Automatic Stay Provision

No other area of day-to-day practice in bond hearings illustrates the lack of independence and authority IJs retain in the current executive branch controlled adjudicatory process than the issue of automatic stays of bond determinations. Authorizing DHS to countermand an IJ's decision to release a detained noncitizen on bond undermines the authority of IJs and dispels any illusion that the administrative adjudicators working under the auspices of the Department of Justice have

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[383] *See supra* note 205 and accompanying text.

[384] *See supra* note 204 and accompanying text. EOIR has now fully implemented electronic filing in immigration courts which would facilitate advance disclosure in bond proceedings, if required. *See EOIR Courts and Appeals System (ECAS)—Online Filing*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/ECAS [https://perma.cc/YH8E-GFTW]; U.S. DEP'T OF JUST. ECAS USER MANUAL 3–4 (2022) https://www.justice.gov/eoir/page/file/1300086/download [https://perma.cc/XD3C-28S3].

[385] Vitek v. Jones, 445 U.S. 480, 494 (1980) (due process required "[a] hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given").

[386] *See id.*; *see also supra* Section II.F.

independence or autonomy from the prosecuting agency, the Department of Homeland Security.

It is debatable whether the automatic stay provision was ever justified by national security concerns following the September 11 attacks. However, the potential of the provision to delegitimize the entire bond process became evident during the Trump Administration as DHS abolished enforcement priorities and began indiscriminately arresting undocumented immigrants, detaining them, and routinely denying bond.[387] This exponentially increased the number of IJ bond orders eligible for automatic stays pending appeal and led to significant increases in DHS' invocation of the stay.[388] The Department of Justice should amend the regulations governing immigration court proceedings and eliminate the automatic stay provision.

CONCLUSION

The liberty interests at stake in 236(a) custody and bond redetermination hearings are profound and the consequences of erroneous or capricious decisions that extend detention are grave. While the government has an interest in protecting the community and ensuring that individuals subject to possible removal appear at their proceedings, these interests do not outweigh the fundamental right to physical liberty guaranteed to *all* persons in the United States. The Supreme Court has consistently held that under the Fifth Amendment Due Process Clause, physical "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[389] Procedures that dramatically reduce the risk of erroneous confinement must be implemented to ensure that civil immigration detention is the exception not the norm.

Currently, the likelihood, due to lax procedures,[390] that immigration courts are continuing to detain individuals who are not a danger to the community, nor a flight risk is unacceptably high. The standards imposed in civil mental health commitment and civil child support contempt proceedings should serve as guideposts for the procedural due process protections needed in discretionary bond proceedings.[391] Statutory, regulatory, and rules reforms (and continued litigation in the interim) are

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[387] *See supra* note 11 and accompanying text.

[388] *See* CHO ET AL., *supra* note 12, at 23–24.

[389] Foucha v. Louisiana, 504 U.S. 71, 83 (1992) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).

[390] *Supra* Section I.B.

[391] *Supra* Part III.

urgently needed to ensure that the government only takes the extreme measure of civilly depriving noncitizens of their physical liberty when detention is reasonably related to purpose of that detention and cannot be achieved in less restrictive ways.

Additionally, given the demonstrated effectiveness of alternatives to confinement and the extraordinary cost to taxpayers of immigration detention,[392] the government has no legitimate interest in incarcerating individuals who pose no risk or whose risk can be mitigated in other ways.

While the debate on whether to remove authority for immigration adjudication from the Department of Justice and create an Article I independent immigration court continues, there is need for immediate change in adjudication of discretionary custody and bond. This change requires returning to a system which presumes individuals should be released pending removal proceedings. The detained individual should not merely have the right to an initial automatic review hearing, but the immigration court should be required to set review hearings at regular intervals during prolonged civil detention at which the presumption for release applies. In order to overcome this presumption, the government must be required to bear the burden of proving danger or flight risk, by clear and convincing evidence, and demonstrating that less restrictive alternatives will not suffice. Additional procedural protections proposed in this article are critical to fundamentally fair process. Reforms must ensure that the proceedings are not tainted by implicit presumptions or prosecutorial advantage but instead comport with the due process standards required in other civil confinement proceedings.

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[392] *See supra* notes 32–33 and accompanying text; *see also supra* note 166 and accompanying text.