Symposium:

This Side of the Border: An Analysis of Immigration Detention, Enforcement, and Community Impact

Articles

PROMPTLY PROVING THE NEED TO DETAIN FOR POST-ENTRY SOCIAL CONTROL DEPORTATION

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I. INTRODUCTION

When a person suspected of a crime is arrested without a warrant, the Fourth Amendment guarantees that freedom may not be taken away except upon a neutral magistrate judge's prompt confirmation that probable cause exists that this person in fact committed the crime. In contrast, in the deportation process, a person is often detained for weeks before a judge determines that the noncitizen is actually deportable, thus justifying detention. Even the separate procedures available to review custody do not suffice because the mandatory detention statute renders many detainees ineligible for review by a judge. If they are entitled to a bond hearing, the presumption is detention, and the detainee must bear the burden of proving he is not a danger or a flight risk.

In this Article, I make a modest proposal: for post-entry social control acts of deportation, immigration detainees must be brought promptly

* Associate Clinical Professor, Boston College Law School. I am grateful for the comments of Geoffrey Heeren, Sabi Ardalan, Erin Corcorane, and participants at the Valparaiso Law Review Symposium on Immigration Detention on November 11, 2016. This conference, which occurred three days after the election of President Trump, who promised significant increases in immigration enforcement and detention, came at the perfect moment to discuss these key issues. I also would like to thank Mary Kate Sexton for her excellent research assistance.

before a neutral judge to determine whether probable cause exists to hold them. I limit the reach of this proposal to the post-entry social control acts of deportation (as opposed to extended border control cases) because those are the deportation cases that most resemble punishment for a crime. Also, for strategic reasons, those who have been admitted to the United States are better served by a quick probable cause hearing before an immigration judge, whereas entrants without inspection could benefit from more time to consult with a lawyer before any such hearing. I also foresee that this proposal will lead the government to more carefully justify its decision to detain lawful permanent residents (LPRs), and thus LPRs, who have the strongest claims to procedural protections, will benefit the most from this additional procedure.

This Article contributes to the growing literature about the need to import criminal justice rights into the deportation system. Stephen Legomsky noted, as a general matter, that there are asymmetries between these systems – that immigration removal proceedings have incorporated many of the punishment-like features of a criminal trial, without importing the procedural protections of the criminal trial.[1] Other scholarship has advocated for the application of other rights guaranteed in a criminal trial – court-appointed counsel, freedom from ex post facto laws, freedom from double jeopardy, proportionality principles, the confrontation clause, and the Fourth Amendment exclusionary rule – in removal proceedings.[2] Christopher Lasch has focused on the Fourth

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[1] *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (declaring that enforcement features of the criminal justice model have been enforced in immigration law while adjudication features have been rejected). "A pattern has emerged: those features of the criminal justice model that can roughly be classified as enforcement have indeed been imported. Those that relate to adjudication, in particular, the bundle of procedural rights recognized in criminal cases, which have been consciously rejected." *Id.*

[2] *See* Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675, 675 (2015). *See also* Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 417–18 (2012) (asserting that removal is sufficiently punitive to trigger constitutional proportionality review pursuant to the Fifth Amendment Due Process Clause and the Eighth Amendment's Cruel and Unusual Punishment Clause); Jennifer Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1624–27 (2010) (proposing the application of the Fourth Amendment exclusionary rule in removal proceedings); Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1115 (2008) (urging for an application of the Fourth Amendment exclusionary rule due to widespread constitutional violations by immigration officers and a fundamental change in immigration court practice since *Lopez-Mendoza* was decided); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 339–40 (2000) (proposing the Eight Amendment's requirement that the punishment be proportional to the offense, the ex post facto clause, and the Sixth Amendment's right to

Amendment violations inherent in Immigration and Customs Enforcement (ICE) detainer practices.[3] Shoba Sivaprasad Wadhia has commented on the lack of prompt review of detention as part of a larger set of recommendations to ICE to "inject humanity into its arrest, detention, and removal procedures . . . ."[4] César Cuauhtémoc García Hernández has critiqued the immigration process in which the government can "merely lodge an accusation that a person has violated the law."[5]

Michael Kagan, in a recent Article, critiqued the practice of warrantless arrests without a prompt probable cause hearing by a neutral decisionmaker for immigration detainees.[6] He writes:

> Until now, the means by which federal authorities take immigrants into custody have been insulated from constitutional scrutiny by the plenary power doctrine and by the premise that immigration law is civil, not criminal. These doctrines allowed the American immigration enforcement infrastructure to develop in a parallel universe for more than a century. But rapid developments in case law in the twenty-first century have significantly stripped away this insulation.[7]

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counsel should apply in deportation proceedings); Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 119, 160–63 (1999) (presenting that the current deportation laws violate the double jeopardy clause of the Fifth Amendment); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 97 (1998) (advocating for the principles against retroactivity embodied in the ex post facto clause to apply to deportation proceedings); Stephen H. Legomsky, *Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment*, 13 SAN DIEGO L. REV. 454, 467 (1976) (finding that Eighth Amendment cruel and unusual punishment analysis should apply to deportation for marijuana convictions).

3 *See, e.g.*, Christopher N. Lasch, *Legal Problems With Detainers*, LITIGATING IMMIGRATION DETAINER ISSUES, Ch. 34 (1st ed. 2011) (focusing on Fourth Amendment rights in ICE detainer practices). *See also* Christopher Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 165–66 (2008) (asserting current regulations regarding detainers overstep limited authority granted by Congress).

4 Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 888 (2008).

5 César Cuauhtémoc García Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOW. L.J. 869, 882 (2014).

6 *See* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 166–67 (2015) (questioning warrantless arrests in which detainees are not granted a prompt probable cause hearing by a neutral decisionmaker).

7 *Id.* at 167.

Kagan recommends that courts engage in statutory interpretation of the statute authorizing detention to correct this problem,[8] and proposes the following: (1) immigration judges should start holding probable cause hearings; (2) the Immigration and Nationality Act should be amended to state that the standard for arrests should be probable cause; and (3) if a person is held in immigration custody for more than seventy-two hours, an immigration judge must review his case to ensure the existence of probable cause.[9]

In the present Article, I take Kagan's identification of an important Fourth Amendment violation that is regularly occurring within immigration law and I make the proposal that only in post-entry social control types of deportation should such hearings occur.[10] By "post-entry social control" acts of deportation, named by Daniel Kanstroom,[11] I refer to the deportation of noncitizens who have been admitted to the United

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8 *See id.* (endorsing a focus on the existing provisions of the INA providing that an alien may be detained while it is decided whether or not they can remain in the United States). Specifically, he proposes that courts interpret 8 U.S.C. § 1226(a), which provides: "on a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States," to include a probable cause hearing before a neutral immigration judge. *Id.* at 167–68 (internal quotations omitted).

9 *See id.* at 168 (remarking that immigration judges should distribute immigrant arrest warrants, the INA should be amended to clarify the probable cause standard for immigration arrests, and an immigration judge must review every case in which a person is in immigration custody for seventy-two hours after their arrest to ensure there is probable cause). Kagan borrows the seventy-two hour requirement from state statutes that allow involuntary commitment, which is civil, without a neutral review for up to seventy-two hours. *Id.* at 165–66. He discusses a survey which revealed that only eight outlier states may allow involuntary commitment without a neutral review for up to seven days. *Id.* at 165. The norm in state statues is for involuntary commitment to not surpass seventy-two hours without a neutral judge reviewing detention. *Id.* at 166. He notes that this right is guaranteed by statute rather than by judicial mandate. *Id. See also* Project Release v. Provost, 722 F.2d 960, 975 (2d Cir. 1983) (declining to extend *Gerstein* to civil commitment statutes and finding no due process violation when the state statute provides for a judicial hearing within five days of demand by patient, relative, or friend, as well as habeas corpus relief).

10 *See* Kagan, *supra* note 6, at 166–67 (criticizing warrantless arrest without a prompt probable cause hearing). *See also infra* Part V (proposing that probable cause hearings only take place in post-entry social control types of deportation).

11 DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 5 (2007) [hereinafter KANSTROOM, DEPORTATION NATION]. *See also* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1911 (2000) [hereinafter Kanstroom, *Deportation, Social Control*] (presenting post-entry social control as a theory of deportation).

States but who are deportable for criminal[12] or political conduct[13]—conduct that arose after they entered the United States.[14] More specifically, any non-citizen whom the government charges under the criminal or political grounds of deportability should get a probable cause hearing within seventy-two hours of arrest by the immigration authorities.[15]

The United States deportation system has never seen such a need for review by the judiciary of ICE's detention decisions, particularly in the context of criminal deportations.[16] Within his first week in office, President Trump issued two Executive Orders calling for stricter immigration enforcement and a stronger border.[17] The Department of Homeland Security (DHS) Memos implementing his interior and border enforcement Executive Orders indicate that DHS will use every tool to enforce the immigration law, including increased detention.[18] According

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12 *See, e.g.*, 8 U.S.C. § 1227(a)(2) (2012) (imposing deportation for crimes involving moral turpitude; aggravated felonies; crimes involving high-speed flight; failure to register as a sex offender; controlled substance offenses; drug abuse; espionage and treason crimes; crimes of domestic violence, stalking, or child abuse; violations of restraining order; and human trafficking); 8 U.S.C. § 1227(a)(4) (2012) (ordering deportation for espionage, sabotage, or criminal activity which endangers the public safety or national security).

13 *See, e.g.*, 8 U.S.C. § 1227(a)(4) (2012) (requiring deportation for noncitizen who engages in "any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means"); 8 U.S.C. § 1227(a)(4)(C) (proscribing deportation for an "alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States").

14 *See* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky: *The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1465 (2011) (defining post-entry social control).

15 *See infra* Part V (urging that a noncitizen who faces deportation should be granted a probable cause hearing within seventy-two hours).

16 *See* Donald S. Dobkin, *Court Stripping and Limitations on Judicial Review of Immigration Cases*, 28 JUD. SYS. J. 104, 107 (2007) (identifying Constitutional issues arising from Congress denying jurisdiction of the courts).

17 *See* Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017) [hereinafter Enhancing Public Safety] (ordering that agencies employ all lawful means to enforce the immigration laws of the United States); Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017) (requiring that agencies employ all lawful means to protect the United States's border with Mexico and prevent further illegal immigration into the United States).

18 *See* John Kelly, IMPLEMENTING PRESIDENT'S BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS POLICIES 2 (Feb. 20, 2017), https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies [https://perma.cc/JU27-K2ZP] [hereinafter *Border Security Implementation Memo*] (expressing that detention of undocumented aliens is the most efficient way to enforce immigration law and prevent crime). *See also* John Kelly, ENFORCEMENT OF IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST 3 (Feb. 20, 2017), https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest

to a June 2017 *New Yorker* article, "federal immigration authorities have made forty per cent more arrests than they did at the equivalent point in 2016 . . . ."[19] From the beginning, President Trump has vowed to focus on deporting so-called "criminal aliens"[20] and inflicting federal funding cuts on the so-called "sanctuary cities" that President Trump accused of shielding such "criminal aliens" from removal.[21] His administration has added to the vast number of ICE arrests and deportations already occurring, particularly of noncitizens convicted of crimes.[22]

In Part II, I outline the Supreme Court cases that have established the right to a prompt probable cause hearing in the criminal justice system when a suspect is arrested without a warrant.[23] I compare these rights to

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[https://perma.cc/8QXB-B8AD] [hereinafter *Enforcement Memo*] (supporting the idea that the most efficient way to detain aliens who commit crimes is to replace existing ICE detainer forms with new ones).

19 Jonathan Blitzer, *What Will Trump Do with Half a Million Backlogged Immigration Cases?*, NEW YORKER (June 20, 2017), https://www.newyorker.com/news-desk/what-will-trump-do-with-half-a-million-backlogged-immigration-cases [http://perma.cc/2A5G-GACP].

20 *See* Ben Casselman, *There Aren't 2 To 3 Million Undocumented Immigrants With Criminal Records For Trump To Deport*, FIVETHIRTYEIGHT (Nov. 14, 2016), http://fivethirtyeight.com/features/there-arent-2-to-3-million-undocumented-immigrants-with-criminal-records-for-trump-to-deport/ [http://perma.cc/6AC7-HH2N] (analyzing President Trump's wish to deport two to three million immigrants who have committed crimes). *See also* Michelle Ye Hee Lee, *Trump's Fuzzy Math on Undocumented Immigrants Convicted of Crimes*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/09/02/trumps-fuzzy-math-on-undocumented-immigrants-convicted-of-crimes/?utm_term=7d87bfa2cacb [http://perma.cc/H9X7-LHTW] (clarifying that President Trump has called for the removal of all criminal aliens since 2015).

21 *See* Enhancing Public Safety, *supra* note 17, at 8799 (declaring that all jurisdictions not in compliance with Federal law will not receive federal funds beyond what is required by law).

22 *See* Anna D. Law, *This Is How Trump's Deportations Differ From Obama's*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/03/this-is-how-trumps-deportations-differ-from-obamas/?utm_term=a6457ef2e550 [http://perma.cc/E4Y8-35WQ] (illustrating that Trump's administration continues to apprehend immigrants who have convicted crimes). *See also* Department of Homeland Security, *Table 41. Aliens Removed by Criminal Status and Region and Country of Nationality: Fiscal Year 2015*, HOMELAND SECURITY (Dec. 15, 2016), https://www.dhs.gov/immigrationstatistics/yearbook/2019/table41 [https://perma.cc/23EN-JJN2] (noting the number of deported immigrants who committed crimes in 2015). DHS maintains statistics of "aliens removed by criminal status," which it refers to as the removal of anyone who has a prior criminal conviction. *Id.* In Fiscal Year 2015, of the 333,341 total number of persons removed, 139,950 were previously convicted of a crime. *Id. See also* Department of Homeland Security, *Table 33. Aliens Apprehended: Fiscal Years 1925 to 2015*, HOMELAND SECURITY (Dec. 15, 2016), https://www.dhs.gov/immigration-statistics/yearbook/2015/table33 [http://perma.cc/PUF6-KHRN] (exposing the number of aliens apprehended in 2015). In the same year, ICE arrested 462,388 individuals. *Id.*

23 *See infra* Part II (highlighting cases that have established that in the criminal justice system, when a suspect is arrested without a warrant, she has a right to a prompt probable cause hearing).

the immigration system's statutory and regulatory scheme regarding warrantless arrests, detention, and review of these decisions by an immigration judge.[24] In Part III, I describe court challenges in which noncitizens claimed the right to a prompt probable cause hearing to justify detention pending deportation. Although these challenges have not won such a right, I discuss how the issue remains an open question.[25] In Part IV, I examine why courts would take a fresh look at a right to a prompt probable cause hearing, particularly in light of Supreme Court cases such as *Padilla v. Kentucky*[26] in 2010, *Zadvydas v. Davis*[27] in 2001, and dicta from *Arizona v. United States*[28] in 2012. The success of the ICE detainer litigation is yet another reason for courts to reexamine this issue.[29] In Part V, I discuss my proposal in more detail, and justify why such prompt probable cause hearings should only happen in post-entry social control cases.[30]

II. CRIMINAL JUSTICE RIGHTS COMPARED TO IMMIGRATION RIGHTS

It is first helpful to compare what occurs when a warrantless arrests happens within the criminal justice system, as opposed to the immigration system.[31]

A. Rights After Warrantless Arrest in the Criminal Justice System

In the criminal justice system, a probable cause hearing within forty-eight hours of arrest is necessary to ensure that an arrestee's Fourth

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[24] *See infra* Part II (analogizing the criminal justice system to the immigration system regarding arrests without a warrant, detention, and judicial review of hearings of that nature).

[25] *See infra* Part III (considering the possibility of noncitizens obtaining the right to a prompt probable cause hearing).

[26] *See* 559 U.S. 356, 374 (2010) (deciding that counsel must inform her client if his plea puts him at risk of deportation).

[27] *See* 533 U.S. 678, 669–700 (2001) (explaining that if a removal is not reasonably foreseeable that continued detention should be considered unreasonable and should not be authorized by statute).

[28] *See* 567 U.S. 387, 396 (2012) (highlighting the procedure of a removal of an alien from the United States).

[29] *See* ACLU Immigrants' Rights Project, *Recent Court Decisions Relating to ICE Detainers*, ACLU (July 27, 2015), https://www.aclu.org/other/recent-ice-detainer-cases [http://perma.cc/DD6U-6DYV] (summarizing recent cases concerning ICE detainers).

[30] *See infra* Part V (opining that prompt probable cause hearings only take place in post-entry social control cases).

[31] *See infra* Part II.A–B (comparing warrantless arrest in the criminal justice system with warrantless arrest in the immigration system).

Amendment rights are not violated.[32] This probable cause hearing is different from the later arraignment.[33]

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[34] In 1948, in *Johnson v. United States*, the Supreme Court decided that to implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, whenever possible, the existence of probable cause must be decided by a neutral and detached magistrate.[35] The Court wrote:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[36]

Similarly, in the Court's 1968 decision in *Terry v. Ohio*, which allowed the police to stop and frisk a person in search of weapons when the officer has "reasonable suspicion,"[37] the Court wrote:

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32 *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (rationalizing a 48-hour time period to await a probable cause hearing as complying with the promptness standard set forth in *Gerstein*). *See also* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (rendering a decision that a probable cause hearing must occur before an extended constraint of liberty after arrest to comply with the Fourth Amendment).

33 *See Gerstein*, 420 U.S. at 106 (holding that arraignment, which happens often 30 days after arrest, is insufficient to satisfy an arrestee's Fourth Amendment rights). *But see Riverside*, 500 U.S. at 58 (reasoning that probable cause hearing and arraignment could be combined so long as the proceedings occurred within forty-eight hours).

34 U.S. CONST. amend. IV.

35 *See* Johnson v. United States, 333 U.S. 10, 13–14 (stating that to comply with Fourth Amendment rights a neutral magistrate must draw inferences based on the evidence).

36 *Id. See also* Beck v. Ohio, 379 U.S. 89, 97 (1964) (expressing preference for use of warrants, stating, "'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police.").

37 *See* Terry v. United States, 392 U.S. 1, 20–22 (1968) (agreeing that police officers may stop and frisk someone in search of weapons if they have a reasonable suspicion). *See also* Floyd v. City of New York, 959 F.Supp.2d 540, 627–28 (S.D.N.Y. 2013) (declaring that the practice of stop and frisk is not always constitutional). In 2013, a district court judge in the Southern District of New York ruled that while stop and frisk is constitutional under *Terry*,

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[38]

In 1975, in *Gerstein v. Pugh*, the Supreme Court specifically rejected a Florida procedure whereby a person could remain detained so long as a prosecutor filed an information.[39] In describing the state court's interpretations of its criminal procedure laws, the Court wrote, "[a]s a result, a person charged by information could be detained for a substantial period solely on the decision of a prosecutor."[40] The Court found that such detention violated a suspect's Fourth Amendment rights.[41] Thus, to continue detention after initial arrest, the detached judgment of a magistrate judge is necessary; the prosecutor's finding of probable cause is insufficient to protect Fourth Amendment rights.[42] This Fourth Amendment rule applies to "*any* significant pretrial restraint on liberty."[43]

The *Gerstein* Court allowed few procedural rights in this probable cause hearing, reasoning that the "... sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing."[44] Thus, the probable cause hearing could be held without the

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the New York City police where implementing "stop and frisk" in a manner that was unconstitutional. *Id.*

38 *Terry*, 392 U.S. at 21.

39 *See Gerstein*, 420 U.S. at 118–19 (explaining that a person cannot be detained so long as a prosecutor has filed an information). There was a Florida statute that "seemed to authorize adversary preliminary hearings to test probable cause for detention in all case ... But the Florida courts had held that the filling of an information foreclosed the suspect's right to a preliminary hearing." *Id.* at 105–06. Florida courts also had held that habeas corpus could only be used in exceptional circumstances to test the probable cause for detention under an information. *Id.* at 106. There were two ways to obtain a judicial determination of probable cause: first, by a special statute allowing a preliminary hearing after thirty days; and second, by arraignment, which was often delayed a month or more after arrest. *Id.*

40 *Id.*

41 *See Gerstein*, 420 U.S. at 117 (finding a Florida law that made detainment for a substantial amount of time acceptable if the prosecutor decided so violates the Fourth Amendment).

42 *See id.* (holding that it is unconstitutional for a prosecutor's finding of proximate cause alone to be grounds for continued detention and a neutral magistrate is necessary to consider the evidence).

43 *Id.* at 125 (emphasis added).

44 *Id.*

appointment of counsel and without the Sixth Amendment right to confront one's accuser (thus hearsay is admissible).[45]

In 1991, in *County of Riverside v. McLaughlin*,[46] the Court clarified what would constitute a "timely" judicial determination of probable cause is forty-eight hours.[47] The Court wrote that "the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system.[48] But flexibility has its limits; *Gerstein* is not a blank check."[49] The Court wrote that even if probable cause hearings are provided within forty-eight hours, there may still be "unreasonable delays"—for example, "delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."[50] The Court held that the county could combine probable cause determinations with arraignments, but that was not a reason to delay the probable cause hearing.[51]

The Court's reasoning in *Gerstein* and *Riverside* had its roots in two cases decided years earlier.[52] In *McNabb v. United States*, the Court in 1943 suppressed statements taken from a defendant who was detained for fourteen hours, never taken to a judge (although a federal statute required such judicial intervention), and repeatedly interrogated.[53] Although the Court found a violation of a federal statute, not the Fourth Amendment, that statute provided a similar guarantee that a defendant be taken before the nearest judicial officer.[54] In *Mallory v. United States*, the Court in 1957 interpreted Federal Rule of Criminal Procedure 5(a) to require the

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45 *See id.* at 121–22 (endorsing that a probable cause determination does not require appointment of counsel and that confrontation of the accuser is not useful in a probable cause determination).

46 *See* 500 U.S. 44, 47 (1991) (determining the definition of promptness under *Gerstein*).

47 *See id.* at 56 (conducting a probable cause hearing within forty-eight hours meets the promptness requirement set forth in in *Gerstein*).

48 *Id.* at 55.

49 *Id.*

50 *Id.* at 56.

51 *See id.* at 58–59 (explaining that probable cause determinations and arraignments can be combined, but that the combination does not justify a delay that exceeds the forty-eight hour limit).

52 *See* Wendy L. Brandes, *Post-Arrest Detention and the Fourth Amendment: Refining the Standard of* Gerstein v. Pugh, 22 COLUM. J.L. & SOC. PROBS. 445, 448 (1989) (describing the Court's rulings in *McNabb*, and *Mallory* as the "roots" for the Court's decision in *Gerstein*).

53 *See* 318 U.S. 332, 342–47 (1943) (exposing that McNabb was detained for a period of fourteen hours, was not taken to a judge, and was repeatedly interrogated).

54 *See id.* at 342 (citing 18 U.S.C. § 595 that states it is the responsibility of the officer who arrested the person charged with a crime to take that person to the nearest judicial officer with jurisdiction for a hearing).

suppression of statements that were made while a defendant was detained by the police before being brought before a neutral magistrate as required by the rule.[55] Repeating its rationale from *McNabb*, the Court reasoned that "unwarranted detention led to tempting utilization of intensive interrogation,"[56] which the Court could not sanction.[57] The Court's *McNabb-Mallory* rationale echoed in its later decisions in *Gerstein* and *Riverside*, since the Court reasoned that "[t]he awful instruments of the criminal law cannot be entrusted to a single functionary,"[58] and that "[l]egislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard . . ."[59]

B. Warrantless Arrests and Procedures in the Immigration System

In the immigration system, ICE—the police, not the prosecutor—can arrest someone without a warrant and decide, within forty-eight hours, whether to issue a Notice to Appear (NTA) (the deportation system's equivalent of an information)[60] and whether to detain that person.[61] From there on out, nothing has to happen quickly—in fact, a statutory provision that is meant to ensure ample time for detainees to obtain counsel[62] indicates that an initial master calendar hearing (the deportation system's equivalent of an arraignment) should happen ten days after the NTA is served on the detainee.[63] As a result, a person could be detained for a substantial period on the decision of an ICE officer.[64]

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55 *See* Mallory v. United States, 354 U.S. 449, 451–52, 455–56 (1957) (citing Federal Rule of Criminal Procedure 5(a), which requires a person making an arrest within the United States to take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer).

56 *Id.* at 452–53.

57 *See id.* at 455 (reversing and remanding prolonged interrogation for unnecessary delay in bringing petitioner before commissioner because of recognized evils in such interrogation techniques (citing McNabb v. United States, 318 U.S. 332, 343–44, 363 (1943)).

58 Gerstein v. Pugh, 420 U.S. 103, 118 (1975). *See also* County of Riverside v. McLaughlin, 500 U.S. 44, 47–59 (1991) (finding county's policy holding detainees over the weekend unconstitutional for exceeding forty-eight hour period of detention).

59 *McNabb*, 318 U.S. at 343–44.

60 *See* 8 C.F.R. § 239.1(a) (2016) (showing that the NTA is the document that commences removal proceedings). *See also Riverside*, 500 U.S. at 57–59 (finding detentions without a warrant exceeded the constitutional limit of forty-eight hours).

61 *See* 8 C.F.R. § 287.3(d) (2016) (outlining custody proceedings for noncitizens arrested without a warrant and detention procedures and exceptions).

62 *See* 8 U.S.C. § 1229(b)(1) (2012) (permitting noncitizen time to secure counsel).

63 *See id.* (delaying the hearing provides an opportunity for the detainee to secure counsel).

64 *See Gerstein*, 420 U.S. at 106 ("As a result [of Florida courts' interpretation of the state's criminal procedure laws], a person charged by information could be detained for a substantial period solely on the decision of a prosecutor.").

The statute, 8 U.S.C. § 1357(a), outlines ICE's power without a warrant, which, among other powers,[65] includes the power:

> [T]o arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.[66]

ICE officers thus can make warrantless arrests and refer the case first to an "officer of the Service having authority to examine aliens" and then to an immigration judge.[67]

One immigration regulation, 8 C.F.R. § 287.3(d), requires ICE to make two decisions within forty-eight hours of arrest (except when there are emergency or extraordinary circumstances): (1) whether to issue a NTA; and (2) whether to release the person on bond.[68] The NTA is issued once

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[65] *See* 8 U.S.C. § 1357(a)(1)–(3) (2012) (giving immigration officers the power to make warrantless interrogations of immigrants). For example, ICE may: without a warrant, interrogate a noncitizen "believed to be an alien" about his or her right to remain in the United States; arrest a noncitizen who in the officer's presence or view is entering or attempting to enter the United States in violation of the law; board vessels or vehicles near the border for the purpose of patrolling the border; and make arrests for immigration law-related felonies or other felonies cognizable under the laws of the United States if there's a likelihood of escape before a warrant can be obtained. *Id.*

[66] *Id.*

[67] 8 C.F.R. § 287.3(b) (2016). If "there is prima facie evidence that the arrested [noncitizen] was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge for further inquiry . . . , order the [noncitizen] removed as provided for in section 235(b)(1) of the Act and § 235.3(b) of this chapter, or take whatever other action may be appropriate or required under the laws or regulations applicable to the particular case." *Id.*

[68] *See* 8 C.F.R. § 287.3(d) (2016) (laying out the custody procedures for noncitizens' warrantless arrest). This forty-eight hour rule was created in 1997, following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and originally required these decisions to be made within twenty-four hours. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed Reg. 10312, 10390 (1997) (inserting 8 C.F.R. § 287.3(d) without discussion). Following the September 11, 2011 attacks, the regulation was amended, without

an ICE officer has confirmed the existence of prima facie evidence for removal.[69] The regulation requires that it be a different ICE officer (not the arresting officer) who makes the prima facie evidence determination, although "[i]f no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him or her, may examine the alien."[70] Notice that this regulation makes no provision for review of these important decisions by an independent immigration judge.[71] Rather, the regulation specifically does *not* require that the examining officer be an immigration judge, because the regulation later makes reference to an immigration judge.[72] This regulation allows ICE—the police, not the prosecutor—to make the

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comment, to expand the time frame from twenty-four hours to forty-eight hours, but to include a provision allowing for this timeline to be extended "in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time." 66 Fed. Reg. 48334, 48335 (2001). Shoba Sivaprasad Wadhia has critiqued the DOJ for failing to define "emergency," "extraordinary circumstance," or "additional reasonable period of time." Wadhia, *supra* note 4, at 874. Professor Wadhia describes how Asa Hutchison, then Undersecretary of Border and Transportation Security, in 2004 responded to criticism of this regulation by issuing a policy directing that during non-emergencies, detained noncitizens should be charged within forty-eight hours of their arrest and served with an NTA within seventy-two hours of such arrest. *Id.* 874–76 (citing Memorandum from Asa Hutchison, Undersecretary, Border and Transportation Security, to Michael J. Garcia, Assistant Secretary, U.S. Immigration and Customs Enforcement and Robert Bonner, Commissioner, U.S. Customs and Border Protection (Mar. 30, 2004)). *See also* Immigrant Rights Clinic, New York University, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule* 8 C.F.R. § 287.3, 26 N.Y.U. REV. L. & SOC. CHANGE 397, 398 (2000–01) (critiquing new rule as providing no definition of "emergency" or "extraordinary circumstances," nor any explanation of how long an "additional reasonable period" of detention may be).

[69] *See* 8 C.F.R. § 287.3(a)–(b) (2016) (detailing the examination and determination of proceedings for noncitizens arrested without warrants).

[70] *Id.*

[71] *See* 8 C.F.R. § 287.3(d) (2016) ("Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within forty-eight hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued.").

[72] *See* 8 C.F.R. § 287.3(b) (2016) ("If the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the *examining officer* will refer the case to an *immigration judge* for further inquiry in accordance with 8 CFR parts 235, 239, or 240, order the alien removed as provided for in section 235(b)(1) of the Act and § 235.3(b) of this chapter, or take whatever other action may be appropriate or required under the laws or regulations applicable to the particular case." (emphasis added)).

determination of removability and gives discretion to ICE to make the first detention decision.[73]

The statute requires that ten days lapse between the service of the NTA, which details (in English) why someone is removable from the United States and contains notification of certain rights and responsibilities,[74] and the first master calendar hearing, so that the noncitizen can obtain counsel.[75] The statute also states that "[i]n the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction."[76] However, this section hardly speaks to the speed at which someone should be brought before a judge.[77]

An example is helpful to explain what sorts of delays may occur before ICE must prove that a noncitizen is actually deportable for a

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[73] *See* 8 C.F.R. § 287.3(a)-(b) (allowing an officer to examine and use discretion to order removal). *See also* Hernández, *supra* note 5, at 882 (comparing criminal justice and immigration process, where the government can "merely lodge an accusation that a person has violated the law").

[74] *See* 8 U.S.C. § 1229(a)(1) (2012) (stating the specification for a NTA). An NTA must specify:

> (A) The nature of the proceedings against the [noncitizen][;] (B) The legal authority under which the proceedings are conducted[;] (C) The acts or conduct alleged to be in violation of law[;] (D) The charges against the alien and the statutory provisions alleged to have been violated[;] (E) [That the noncitizen] may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of [legal services;] (F)(i) The requirement that the [noncitizen] must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting [removal] proceedings[;] (ii) The requirement that the [noncitizen] must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number[;] (iii) The consequences under section 1229a(b)(5)...of failure to provide address and telephone information pursuant to this subparagraph; (G) (i) The time and place at which the proceedings will be held[; and] (ii) The consequences under section 8 USCS § 1229a(b)(5) of the failure, except under exceptional circumstances, to appear at such proceedings.

Id.

[75] *See* 8 U.S.C. § 1229(b)(1) ("In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section [240 8 U.S.C.S. §] 1229a . . . the hearing date shall not be scheduled earlier than ten days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.").

[76] 8 U.S.C. § 1229(d)(1) (2012).

[77] *See* 8 U.S.C. § 1229(d)(2) (2012) ("Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.").

criminal conviction.[78] Carlos,[79] a lawful permanent resident from the Dominican Republic, was detained on August 14 and was issued a NTA that charged him as removable for two crimes involving moral turpitude.[80] After being detained for a few weeks (the statute requires at least ten days so he can get a lawyer),[81] he appears before a neutral immigration judge, who gives him a few continuances to find a lawyer.[82] On September 16, he finally has a *pro bono* lawyer to enter an appearance on his behalf.[83] Once Carlos obtains counsel, his counsel writes a motion to terminate removal proceedings, arguing that at least one of his convictions is not a "crime involving moral turpitude" and therefore he is not deportable at all.[84] On October 7, ICE withdraws that charge of removability, and issues another, claiming he is also removable for a crime of domestic violence.[85] His counsel files another motion to terminate based on the new charges, and the judge, after allowing time for both sides to brief the issue, on November 4 finds him removable and begins the process of taking applications for relief from removal.[86] It is almost

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[78] *See generally* 8 U.S.C. § 1227(a) (2012) (enumerating status violations and crimes that place noncitizens in classes qualifying them as deportable).

[79] The case details and timeline are taken from the case of a client represented by the Boston College Immigration Clinic. The client's name and country of origin has been changed, however, to protect his privacy.

[80] *See* Mot. Terminate Proceedings 3:2–5 (reflecting the Author's experience, and a redacted version of this motion is on file with the *Valparaiso University Law Review*). *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(ii) (2012) (showing that a noncitizen with multiple criminal convictions is deportable).

[81] *See* Notice to Appear 2:4–6 (Aug. 1, 2007) (illustrating the Author's experience, and a redacted version of this motion is on file with the *Valparaiso University Law Review*). *See, e.g.*, 8 U.S.C. § 1229(b)(1) (2012) (providing a noncitizen the opportunity to secure counsel).

[82] *See* 8 C.F.R. § 1003.29 (2016) (permitting an immigration judge upon on a good cause showing to grant a continuance).

[83] *See* 8 U.S.C. § 1229(b)(1) (2012) (prolonging the procedural process so a noncitizen can secure counsel).

[84] *See* Mot. Terminate Proceedings 5–6, 8–11 (showing the Author's experience, and a redacted version of this motion is on file with the *Valparaiso University Law Review*). *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2012) (classifying noncitizen "convicted of a crime involving moral turpitude" as deportable).

[85] *See* Additional Charges of Inadmissibility/Deportability 1–3 (Oct. 1, 2015) (detailing the Author's experience, and a redacted version of this motion is on file with the *Valparaiso University Law Review*). *See also* 8 U.S.C. § 1227(a)(2)(E)(i) (2012) (enumerating that noncitizens convicted of domestic violence crimes are deportable). At any time during the removal proceedings, DHS may amend the notice to appear; 8 C.F.R. § 1240.10(e) (2016) (explaining additional charges may be lodged against a noncitizen at any time during the proceeding).

[86] *See* Mot. Terminate Proceedings 17–31; Order to Terminate 1–7 (reflecting the Author's experience, and a redacted version of this motion is on file with the *Valparaiso University Law Review*). *See generally* 8 U.S.C. § 1229 (2012) (beginning procedures to remove deportable noncitizen).

thirteen weeks between when he is detained and when the judge decides that he is actually removable (which is what justifies his detention).[87]

Detention decisions happen in tandem with these removability decisions and begin with ICE.[88] The regulations permit any ICE officer who has arrest authority to conduct an initial custody review.[89] In this review, thanks to a 1997 regulation that I have critiqued elsewhere,[90] the detainee bears the burden of proving to the ICE officer that he is not a danger or a flight risk.[91] There is an opportunity for *de novo* review of ICE's detention decision by a neutral immigration judge.[92] Frequently, the first opportunity that a detainee has for a neutral judge to review ICE's decision to detain is at a bond hearing.[93] But as I have noted elsewhere, that bond hearing is hardly the model vindication of procedural rights, as the detainee bears the burden of proving he is not a danger or a flight risk,[94] and judges routinely rely on unreliable hearsay evidence such as police reports to prove dangerousness.[95] In cases where there are any prior criminal arrests, the central question at the bond hearing becomes

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87 *See* Kagan, *supra* note 6, at 163 (referencing a confidential case where a lawful permanent resident was detained for two and a half months based on a legally baseless arrest).

88 *See generally* 8 C.F.R. § 236.1 (2016) (outlining procedures from the time the officer issues a warrant through detention and the various aspects of a particular case being analyzed simultaneously).

89 *See* 8 C.F.R. § 236.1(c)(8) (2016) ("Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated before April 1, 1997), except as otherwise provided by law.").

90 *See* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 90–91 (2016) (pointing out flaws in the regulation and the explanation provided by INS).

91 *Compare* Holper, *Beast of Burden*, *supra* note 90, at 90–91, *with* 8 C.F.R. § 236.1(c)(8) (2016) (allowing an officer to use discretion to release a noncitizen detainee if the noncitizen satisfies the burden showing that noncitizen is not a danger).

92 *See* 8 C.F.R. § 1003.19 (a), (b), (f) (2016) (permitting review by an immigration judge and appeal of the immigration judge's custody decision to the Board of Immigration Appeals).

93 *See* De La Cruz, 20 I. & N. Dec. 346, 359–60 (Heilman, J., dissenting) ("Unlike the criminal justice system, the initial decision to jail a person is made by the very law enforcement agency which ordered the arrest. There is no impartial magistrate or judge involved at that stage. The [bond] hearing before the immigration judge offers the first opportunity for an alien to appear before an impartial trier of fact.").

94 *See generally* Holper, *supra* note 90, at 76, 105–06, 109, 111, 117–19, 122–30 (detailing the noncitizen's burden to prove that flight is not an issue).

95 *See* Holper, *supra* note 2, at 678 nn.11 & 16, 679 n.23, 682 n.35 (citing multiple personal experiences where an immigration judge deferred to the police report on file).

whether this person is a danger to the community.[96] Flight risk is a secondary concern; only after a detainee has passed the hurdle of proving non-dangerousness may the judge consider whether the detainee will come back to court.[97]

Even if all of this happens quickly—ICE writes the NTA, charging removability; ICE makes an initial detention decision; the immigration judge holds an initial master calendar hearing—the government still never has to justify detention to anyone.[98] Recall that the burden of proof is on the *detainee*, not the government, at that bond hearing where a neutral judge first considers whether to continue detention.[99] That means that there will necessarily be delays before this bond hearing happens. What sorts of delays are typical?[100]

Juan, within two days of arrest, was issued a NTA and a Notice of Custody Determination, which said he will be detained without bond.[101] Because he had no lawyer, he did not want to sign anything, so he did not sign the form asking for a quick hearing.[102] The statutorily-required ten days went by before he saw an immigration judge for the first time.[103] He now sees the judge two weeks after he was arrested.[104] Wishing to present the best possible argument to the judge but not having money to pay a lawyer,[105] Juan asked for a continuance to find a *pro bono* lawyer to

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[96] *See* Urena, 25 I. & N. Dec. 140, 140–42 (BIA 2009) (remanding for an immigration judge to find if detainee with prior criminal record met burden of proof that he was not a danger to the community); Holper, *Beast of Burden*, *supra* note 90, at 128 ("many immigration bond hearings begin and end with a dangerousness finding.").

[97] *See* Holper, *Beast of Burden*, *supra* note 90, at 128 n.258 (finding dangerousness necessitates a higher standard of proof than flight risk).

[98] *See* Urena, 25 I. & N. Dec. 140, 140–42 (holding the detainee, not the government, has the burden of proof).

[99] *See, e.g.*, Matter of Fatahi, 26 I. & N. Dec. 791, 793 (BIA 2016) (finding a detainee at a custody hearing must show the immigration judge "that he is not 'a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk'" (quoting Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006)).

[100] *See, e.g.*, Holper, *supra* note 2, at 678 nn.11 & 16, 679 n.23. (describing these delays using my own experiences representing detainees in bond hearings before the Boston Immigration Court). As director of the Boston College Immigration Clinic and faculty supervisor for the Boston College Immigration Law Group Bond project, my students and I have represented numerous detainees in their bond hearings.

[101] *See* 8 C.F.R. § 236.1 (2016) (explaining the process of issuing Notice of Custody Determination). *See also* 8 C.F.R. § 239.1 (2016) (outlining the process of NTA).

[102] *Cf.* 8 U.S.C. § 1229a(b)(4)(A) (2012) (allowing time for a noncitizen to appoint counsel).

[103] *See* 8 C.F.R. § 1003.14(a) (2016) (describing when proceedings before an immigration judge can commence). The detainee has a right to request a bond hearing without waiting for a master calendar hearing, but many *pro se* detainees may not realize this. *See* Wadhia, *supra* note 4, at 876 (reporting the procedural timeframe is unclear to many detainees).

[104] *See* Wadhia, *supra* note 4, at 876.

[105] *See generally* Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE &

represent him. Although he indicated his desire to ask for a bond, the judge warned him that he has only one opportunity to do so,[106] so Juan decided to wait. Two weeks went by. Now having the luck of finding a *pro bono* lawyer, Juan needed more time to gather evidence to disprove his own dangerousness and flight risk.[107] Two more weeks went by.[108] Juan's counsel, having scrambled for two weeks to gather evidence, appeared at the hearing with a packet of supporting letters.[109] The government attorney said she needed time to read such a large packet.[110] Another week went by.[111] The government, not being required to provide any evidence to Juan's counsel ahead of time,[112] submitted a large packet to the judge at the hearing, which contained harmful evidence that Juan's counsel had not yet seen.[113] Juan's counsel, wishing to review this information with her client and not wishing for the judge to be reading it during her entire bond argument, requested a continuance.[114] One more week went by. *Ten weeks* after Juan was first detained, a neutral judge finally decided whether he should be released on bond.

Does this long period of time before which detention is reviewed by a neutral judge not violate the Fourth Amendment's right to a prompt

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L. 63, 121 (2012) (arguing for limited right to court-appointed counsel for Joseph hearings, in which it is determined whether the detainee is properly included within a mandatory detention category).

106 *See* 8 C.F.R. § 1003.19(e) (2016) ("After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.").

107 *See, e.g.*, Urena, 25 I. & N. Dec. 140, 141 (BIA 2009) (demonstrating the burden remains on the detainee to overcome presumptions of dangerousness and flight risk).

108 *See* 8 U.S.C. § 1229(b)(1) (2012) (allowing noncitizens time to secure counsel before beginning procedures).

109 This reflects the Author's personal experiences. *See, e.g.*, Castaneda v. Aitken, 2015 WL 3882755, at * 2 (N. D. Ca. June 23, 2015) (describing bond support packet, which included "28 letters of support from family and community members, proof of enrollment in a 90-day inpatient rehabilitation program, and testified that he had been sober in detention for close to nine months").

110 This reflects the Author's personal experiences. *See, e.g.*, Basua, 3 OCAHO no. 547, 1442, 1444–45 (1993) (requesting extension of time to respond to packet of documents submitted as supporting evidence).

111 This reflects the Author's personal experiences. *See, e.g.*, Basua, 3 OCAHO no. 547, 1442, 1445 (1993) (allowing one week before issuing order).

112 *See generally* Geoffrey Heeren, *Shattering the One-Way Mirror Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1571 (2014) (critiquing the vast disparity in information-gathering, because "[i]n contrast to DHS's formidable information-gathering powers, non-citizens in removal cases have few discovery options.").

113 *See, e.g.*, Casteneda, 2015 WL 3882755, at *2 (citing government submitting police reports).

114 *See id.* (requesting a continuance to review documents submitted by a government agency against a defendant in an immigration case).

review of detention by a neutral judge?[115] In this next section, I seek to explain this disparity in rights when one travels between the criminal justice and immigration systems.[116]

III. COURT CHALLENGES TO IMMIGRATION DETAINEE'S LACK OF PROMPT PROBABLE CAUSE HEARING

Why do Fourth Amendment protections not come into play in the immigration context in the same manner as they are applied in the criminal context?[117] The very short, easy answer to that question is that immigration law is civil, not criminal.[118] In the facetious words of Dan Kanstroom, "they are not being punished, they are simply being regulated."[119] Because deportation is not punishment, Fourth Amendment rights and remedies can appear quite watered down.[120] For example, the Supreme Court, in its 1984 decision in *INS v. Lopez-Mendoza*,[121] refused to apply the exclusionary rule to the deportation context, finding that it would only apply for egregious violations.[122] The Court justified this limited availability of Fourth Amendment remedies because deportation was civil.[123]

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115 *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (holding that the Fourth Amendment mandates a judicial determination of probable cause by a neutral judge before a suspect may be detained for an extended period of time).

116 *See* Chacón, *supra* note 2, at 1604–05 (discussing the disparity in rights between criminal and civil proceedings under the Fourth Amendment).

117 *See id.* (identifying how different provisions of the Fourth Amendment provide different protections in the criminal sphere versus the civil sphere).

118 *See* Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (holding that deportation is not punishment).

119 *See* Kanstroom, *supra* note 11, at 1895 (discussing how deportation is not classified as punishment because it is a civil penalty rather than a criminal one). In a presentation I gave to a group of students from my law school's prosecution and defense clinics, they were surprised to hear that immigration, especially immigration detention, was considered "civil," especially after I described to them how immigration detainees are held in local jails, subject to the exact same restraints as the rest of the criminal justice population.

120 *See* Holper, *supra* note 2, at 708 ("[i]mmigration law has seen all procedural protections either guaranteed by statute, or, to the extent they are imposed constitutionally, filtered through the Fifth Amendment Due Process Clause where "fundamental fairness" dictates whether a certain procedure is necessary. The "fundamental fairness" test has led to a watering down of the protections available in a criminal case."); Chacón, *supra* note 2, at 1604–05 (discussing the limited Fourth and Fifth Amendment protections that apply in the immigration, as opposed to the criminal, context).

121 *See* 468 U.S. 1032, 1050 (1984) (discussing the necessity for detention to prevent an individual facing deportation from taking retaliatory action).

122 *Id.* at 1050–51.

123 *See id.* at 1041–50 (applying test from United States v. Janis, 428 U.S. 433 (1976)).

Detention is seen as a necessary part of the deportation process, which itself is civil.[124] As European immigration law scholar Daniel Wilshire has noted, during the early debates of the U.S. government's right to exclude and expel noncitizens, "detention had never been separately considered from the issue of expulsion," which "proved to be a crucial omission" because of the "distinct legal and moral concerns" raised by detention.[125] So, the lack of a prompt probable cause hearing is yet another place where detention—because it is embedded within the "civil" deportation process—takes on the legal character of that process, without truly examining the legal concerns with the detention itself.[126] Appellate court judges and Supreme Court justices, unfortunately writing in dissents, have made this very critique.[127] In the words of Justice Brennan, dissenting in the 1960 case *Abel v. United States*:

> Even assuming that the power of Congress over aliens may be as great as was said in *Galvan v. Press*, . . . and that deportation may be styled "civil," . . . it does not follow

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[124] *See* Carlson v. Landon, 342 U.S. 524, 538 (1952) (explaining how, without detention, aliens could harm the United States during deportation proceedings); Wong Wing v. United States, 163 U.S. 228, 235 (1896) (examining the potential harm aliens could cause during the deportation process if detention was not allowed).

[125] DANIEL WILSHIRE, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS, 6 (Cambridge Univ. Press 2012).

[126] *See* César Cuauhtémoc & García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1358 (2014) (making formalist, rules-based argument that immigration detention is punishment, rooting argument in immigration detention's legislative history); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 49 (2010) (making functionalist critiques that immigration detention has been converted "into a quasi-punitive regime far out of alignment with immigration custody's permissible purposes"). *See generally* Kagan, *supra* note 6, at 130 (discussing the unwarranted power given to immigration authorities).

[127] *See, e.g.*, Flores by Galvez-Maldonado v. Meese, 913 F.2d 1315, 1399 (9th Cir. 1990) (discussing the application of detention to deportable alien minors), *vacated and superseded en banc* 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom.* Reno v. Flores, 507 U.S. 292 (1993), *remanded to* 992 F.2d 243 (9th Cir. 1993). For example, in *Flores*, Judge Fletcher dissented from the panel's decisions that unaccompanied minors in immigration detention had no right to a prompt probable cause hearing and wrote:

> In effect, the majority is moving from the uncontroverted propositions that the political branches of plenary authority over deciding whom to admit into the country and that such political decisions are largely immune from judicial review, to the unsupportable conclusion that how it treats those whom it detains while the deportation is underway is likewise beyond judicial review. This is an unwarranted leap.

Id. at 1339 (Fletcher, J., dissenting).

> that Congress may strip aliens of the protections of the Fourth Amendment . . . .[128]

Scholars such as César Cuauhtémoc, García Hernández, and Anil Kalhan have rightfully critiqued immigration detention as punishment.[129] For those who truly believe that immigration detention is not punishment, as the Supreme Court has held,[130] I wonder whether they have ever spent the day at one of the many other jails where ICE holds people and met with those who are *in* immigration detention.[131] If, after that, they still consider this detention as "civil," then I welcome the conversation.[132] For the moment, however, I leave these important critiques aside; rather, I wish to show how this (misguided) notion that immigration detention and deportation are civil has caused courts to overlook a glaring Fourth Amendment problem, the lack of a prompt probable cause hearing for immigration detainees.[133]

A good place to start is the Supreme Court's 1960 decision in *Abel v. United States*.[134] In *Abel*, the Court considered whether an arrest by immigration authorities pursuant to an administrative warrant should lead to suppression of the evidence under the Fourth Amendment.[135] The Court found that a judicial warrant within the scope of the Fourth Amendment was not necessary to lawfully arrest a noncitizen for

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[128] Abel v. United States, 362 U.S. 217, 250 (Brennan, J., joined by Warren, J., Black, J., and Douglas, J., dissenting) (citing Galvan v. Press, 347 U.S. 522 (1954)).

[129] *See supra* note 126 (exploring different methods of analysis, all of which lead to the conclusion that detention is punishment).

[130] *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896) (reasoning that detention is merely a necessary part of the process of deportation, similar to an innocent person's temporary detention after being arrested).

[131] *See, e.g.*, *Challenging Unconstitutional Conditions in CBP Detention Facilities*, AM. IMMIGR. COUNCIL (Sept. 14, 2017), https://www.americanimmigrationcouncil.org/litigation/challenging-unconstitutional-conditions-cbp-detention-facilities [https://perma.cc/6EQU-NP7R] (explaining typical conditions in immigration detention facilities).

[132] *See* Chi Thon Ngo v. INS, 192 F.3d 390, 398 (3d Cir. 1999) (citing Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385 (10th Cir. 1981) ("[A]n alien whose detention occurs in a maximum security federal prison may be forgiven for wondering when his punishment stopped and detention began."). *See also* Abira Ashfaq, *We Have Given Them this Power: Reflections of an Immigration Attorney*, NEW POLITICS, Summer 2004, at 75 ("[i]t isn't okay that [a detainee] was imprisoned for [two weeks] more than he should because the INS could and did ignore the immigration judge's order [to release him]. I think the government trial attorney should have to spend two weeks in [the jail] for the mistake because incarceration is a big deal.").

[133] *See* Carlson v. Landon, 342 U.S. 524, 537–38 (1952) (discussing how deportation is a civil matter).

[134] *See* 362 U.S. 217, 250 (1960) (illuminating the Supreme Court's decision in this 1960 case).

[135] *See id.* at 230 (emphasizing that the Court's consideration would be different if the evidence had established that the administrative warrant was being employed as an instrument of criminal law rather than deportation).

deportation,[136] reasoning that "[s]tatutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time."[137] The Court's statements about the Fourth Amendment rights in the administrative arrests context was dicta, however, since the Court repeatedly stated that the petitioner had waived the issue by not raising it in prior stages of the litigation.[138] Thus, *Abel*, while problematic in its dicta,[139] is not a case where the issue of a prompt probable cause hearing actually was decided.[140]

Circuit courts considering the issue of whether immigration detainees have a right to a prompt probable cause hearing have decided that the "decision to issue the NTA is the constitutional equivalent of a finding of probable cause by a magistrate."[141] Judge Posner's opinion in the 1982 case *Arias v. Rogers* is of particular interest.[142] Considering a challenge to the arrest without warrant procedures of the Immigration and Naturalization Service (INS) (the precursor to ICE),[143] Judge Posner observed that the statute, 8 U.S.C. § 1357(a)(2), requires "that an alien

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136 *See id.* at 232 (interpreting the language of the statute authorizing administrative arrest).

137 *Id.* at 230.

138 *See Abel*, 362 U.S. at 230 ("The claim that the administrative warrant by which petitioner was arrested was invalid, because it did not satisfy the requirements for 'warrants' under the Fourth Amendment, is not entitled to our consideration in the circumstances before us. It was not made below; indeed, it was expressly disavowed."). The court went to state that the petition "did not challenge the exercise of [the warrant] authority below, but expressly acknowledged its validity. *Id.* at 231. The court further explained that "[a]t no time did petitioner question the legality of the administrative arrest procedure either as unauthorized or unconstitutional. Such challenges were, to repeat, disclaimed." *Id.* As a result, the court concluded that "[a]ffirmative acceptance of what is now sought to be questioned could not be plainer." *Id.* at 232.

139 *See id.* at 246 (Douglas, J., and Black, J., dissenting) ("The tragedy in our approval of these short cuts is that the protection afforded by the Fourth Amendment is removed from an important segment of our life.").

140 *See* Kagan, *supra* note 6, at 127 (discussing the constitutional problems inherent in the ICE's procedure to arrest immigrants without warrants or probable cause hearings).

141 *See* Min-Shey Hung v. United States, 617 F.2d 201, 202 (10th Cir. 1980) (finding examination by authorized INS officer "basically the same as a criminal proceeding before a magistrate on probable cause" and "sufficient to meet the constitutional standards and to commence the deportation proceedings."); Salgado v. Scannel, 561 F.2d 1211, 1212 (5th Cir. 1977) ("Salgado now argues that his May 18 affidavit [which was taken after INS arrested him] should have been suppressed because he was arrested without a warrant and was not taken before a magistrate. We find no merit in this contention. Under the express authority of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(1) and (2), the warrantless arrest was legal."). *Cf.* United States v. Encarnacion, 239 F.3d 395, 400 (1st Cir. 2001) (holding that Federal Rule of Criminal Procedure 5(a), which requires a prompt probable cause hearing, does not protect detainees arrested for deportation under 1357(a)(2)).

142 *See* 676 F.2d 1139, 1141 (7th Cir. 1982) (discussing the applicability of habeas corpus to detention once deportation proceedings have begun).

143 *See infra* note 150 (detailing change from INS to ICE).

arrested without a warrant 'be taken without unnecessary delay before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.'"[144] He wrote that "[t]he reference is to a special inquiry officer, also called an immigration judge. . . [s]pecial inquiry officers have judicial authority . . . and therefore correspond to the committing magistrate in a criminal proceeding."[145] Posner also observed:

> The statute and regulations do not define the authority of the special inquiry officer when an alien who has been arrested without a warrant pursuant to 8 U.S.C. § 1357(a)(2) is brought before him. But we assume (and perhaps 8 C.F.R. § 287.3 implies) that he has the same authority that a committing magistrate would have, and that the special inquiry officer is explicitly given in 8 C.F.R. § 242.2(b) when the arrest is pursuant to a warrant, to order the release of one who is detained illegally.[146]

Posner appears to have been mistaken, as the Ninth Circuit later pointed out.[147] This confusion is understandable, given that he was writing this passage one year before the Executive Office for Immigration Review (EOIR) was created. In 1983, the EOIR finally divorced the former INS from immigration judges, although both agencies remained within the Department of Justice.[148] When Judge Posner referred to "special inquiry officers" in 1982, he was referencing the precursor to what today is an immigration judge (situated in a separate agency). At the time, however, special inquiry officers were part of the INS, but were given

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144 *See Arias*, 676 F.2d at 1142 (quoting 8 U.S.C. § 1357(a)(2) (2012)).

145 *Id.* (citing 8 C.F.R. § 242.8(a) (2017)).

146 *Id.* at 1143.

147 *See* Flores by Galvez-Maldonado v. Meese, 913 F.2d 1315, 1337 (9th Cir. 1990) (discussing the application of detention to deportable alien minors), *vacated and superseded en banc* 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom.* Reno v. Flores, 507 U.S. 292 (1993), *remanded to* 992 F.2d 243 (9th Cir. 1993). In the panel opinion in *Flores*, the Ninth Circuit cited *Arias* as erroneously concluding that the examining officer mentioned in 8 U.S.C. § 1357(a)(2) was an immigration judge rather than an INS official. *Flores*, 913 F.2d at 1337 (citing Arias v. Rogers, 676 F.2d 1139, 1142 (7th Cir.1982). The Panel concluded that Gerstein's "neutral and detached" magistrate requirement was inapplicable to deportation proceedings. *Id.* An en banc panel of the Ninth Circuit reversed this decision, and the Supreme Court reversed the Ninth Circuit. Flores by Galvez-Maldonado v. Meese, 942 F.2d 1352 (9th Cir. 1990), *en banc, rev'd sub nom.* Reno v. Flores, 507 U.S. 292 (1993).

148 *See* Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERP. REL. 453–59 (1988), reprinted in STEPHEN E. LEGOMSKY AND CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY, Sixth Ed. 686, 686 (2015) (chronicling the history of the separation of functions between the INS and what ultimately became IJs under the newly-created EOIR in 1983).

separate files than the INS prosecutors.[149] With the changes that created EOIR in 1983, immigration judges were never given the responsibility of issuing or affirming the charging document. That responsibility stayed with the INS.[150]

The issue of whether noncitizen juveniles who were in INS custody had the right to a prompt probable cause hearing before a neutral judge was an issue in litigation that began in the Ninth Circuit in the 1980s.[151] In *Flores by Galvez-Maldonado v. Meese*,[152] a panel of the Ninth Circuit reversed a district court judge's order granting such hearings.[153] The panel concluded that *Gerstein* did not apply to deportation proceedings, and that the *Gerstein* Court itself stressed that its holding was not readily transferrable to civil proceedings.[154] The panel also followed the dicta in *Abel*, writing that although "professing not to reach the issue of whether an INS arrest warrant was invalid because it failed to comply with the fourth amendment's requirements for warrants, the Court nonetheless devoted five pages to rejecting petitioner's claim."[155] An en banc panel of the Ninth Circuit disagreed, finding that the children's fundamental

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149 *See id.* at 689 (discussing special inquiry officers).

150 *See* 8 C.F.R. § 239.1 (2017) (describing the power of notice to appear). Nor were judges given authority to affirm probable cause when the Department of Homeland Security was created in 2002; rather, the authority to issue NTAs and confirm that the charges contained therein stayed within DHS. *See also Final Rule, Authority of the Secretary of Homeland Security; Delegations of Authority; Immigration Laws*, 68 Fed. Reg. 44, 10922, 10924 (Mar. 6, 2003) (showing within the Department of Homeland Security Act, Congress finally separated the immigration enforcement functions from the adjudication functions); Department of Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002) (depicting what had been INS now became ICE (responsible for detention and deportation), the Citizenship and Immigration Services (responsible for processing affirmative applications), and the Customs and Border Protection (responsible for border patrol)). The Department of Homeland Security Act also created the Bureau of Citizenship and Immigration Services and the Bureau of Border Security and eliminating the INS. *Id.* The judges and Board of Immigration Appeals, within the Executive Office for Immigration Review, remained in the Department of Justice. *Id.* at 2273-74.

151 *See* Flores by Galvez-Maldonado v. Meese, 913 F.2d 1315, 1337 (9th Cir. 1990) (discussing the necessity of detention versus the protection of alien minors), *vacated and superseded en banc* 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom.* Reno v. Flores, 507 U.S. 292 (1993), *remanded to* 992 F.2d 243 (9th Cir. 1993).

152 *See id.* (reasoning that the necessity of detention warranted the denial of such hearings).

153 *Id.* at 1335-37.

154 *See id.* at 1336 (citing *Gerstein*, 420 U.S. at 125 n.27). The Court remanded to the district court to determine whether such a hearing was appropriate under the *Mathews v. Eldridge* balancing test. *Id. See also id.* at 1337 (citing *Mathews*, 424 U.S. at 334-35).

155 *Id.* at 1337 (citing *Abel*, 362 U.S. at 233). *See also* Spinella v. Esperdy, 188 F. Supp. 535, 540-41 (S.D.N.Y. 1960) ("While the Supreme Court declined to pass upon a similar argument in Abel, . . . some pertinent observations there were nonetheless made . . . the court did refer to its frequent upholding of administrative deportation proceedings shown to have commenced by arrests made pursuant to such warrants.").

liberty interest required that "the decision to detain be made only in conjunction with a neutral and detached determination of necessity."[156]

The Supreme Court reversed the Ninth Circuit in 1993, in the case entitled *Reno v. Flores*.[157] The Court found that there was no fundamental liberty interest at stake because the case dealt with INS custody of children, who are "always in some form of custody."[158] Thus, "shackles, chains, or barred cells" were not at issue, as would be the case in adult immigration detention.[159] The Court dedicated very little of its decision to the procedural due process claim that the children should have their detention promptly reviewed for probable cause by a neutral judge.[160] Rather, the Court found that the juveniles were given ample procedures under the regulations.[161] Nowhere in the majority opinion is *Gerstein* even mentioned.[162] Because the *Flores* Court took great pains to ensure that it was *not* deciding about "shackles, chains, or barred cells," the issue of whether adults in immigration detention can seek a *Gerstein*-style hearing was not resolved.[163] Also, as Michael Kagan has noted, because the Court was ruling on a facial challenge to the regulation, it did not have to consider what would amount to "excessive delay" in holding a hearing.[164]

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156 Flores by Galvez-Maldonado v. Meese, 942 F.2d 1352, 1364 (9th Cir. 1991).

157 *See* 507 U.S. 292, 315 (1993) (reversing the Ninth Circuit's decision in *Flores*).

158 *Id.* at 302 (internal citations and quotations omitted).

159 *Id.*

160 *See id.* at 300 (Stevens, J., dissenting) (discussing the issue of prompt judicial review, which the majority opinion glossed over).

161 *See id.* at 307–09 (outlining the specific procedures available to juveniles under the regulations).

162 *See id.* (avoiding *Gerstein* and the implications stemming therefrom). This is unlike the panel decision and the *en banc* decisions, which, between the majority opinions and the concurring and dissenting opinions, yielded much discussion about the applicability of *Gerstein* or whether a prompt probable cause hearing should be afforded to the juveniles under the *Mathews v. Eldridge* test. *See, e.g.*, *Flores*, 913 F.2d at 1335–37 (panel opinion discussion of applicability of *Gerstein*). In dissent, Justice Fletcher stated, "the [*Gerstein*] Court reasoned that when 'the stakes are this high,' a determination by a neutral magistrate is required. Prosecutorial judgment standing alone is not enough." *Id.* at 1348–49. *See also* *Flores*, 942 F.2d at 1364–65 (en banc opinion addressing *Gerstein* issue); *id.* at 1367–69 (Tang. J., concurring) (discussing that under *Mathews*, not *Gerstein*, plaintiffs should have a probable cause hearing with a neutral judge and stating, "[o]ur Constitution has long recognized that combining the roles of prosecutor and adjudicator in a single entity is a recipe for fundamentally unfair and erroneous decision making."); *id.* at 1374–75 (Rymer, J., concurring in part and dissenting in part) (finding that *Gerstein* does not apply to civil deportation hearings, but that "[t]ime limits and impartiality . . . are basic safeguards against arbitrary action.").

163 *See* Kagan, *supra* note 6, at 151–52 (discussing the *Flores* Court's categorization of juvenile detention as "legal custody" and analogizing it to state orphanages).

164 *See* Kagan, *supra* note 6, at 151–52 (noting that the *Flores* Court sidestepped the excessive delay issue entirely). In *Flores*, the INS regulation challenged had been in effect only one week when the district court issued its judgment; before that, the INS had relied on a 1984

Thus, the Supreme Court has never squarely decided whether immigration detainees have a Fourth Amendment right to a prompt probable cause hearing before a neutral judge. Perhaps the issue might be of renewed interest to judges,[165] especially in light of the cases discussed in the next section.[166]

IV. TAKING ANOTHER LOOK AT PROBABLE CAUSE HEARINGS IN THE IMMIGRATION SYSTEM

What is different now? Why would courts revisit the question of whether noncitizens have the right to a prompt review by a neutral judge of their detention? Besides the political realities of the day—a Trump presidency with its heightened focus on detention and deportation,[167] Jennifer Chacón answered this in a 2010 article, writing that "[s]everal legal and demographic trends are converging that create a renewed need to examine the procedural protections that apply in the context of immigration law enforcement."[168] She notes that immigration enforcement is on the rise, a growing number of noncitizens are potentially subject to ICE jurisdiction, and local, state, and federal law enforcement officers are increasingly using immigration law as a means of achieving criminal law enforcement goals.[169] She notes that "[g]rowing evidence suggests that these gaps between the rights and remedies available to noncitizens in removal proceedings and those available to noncitizens in criminal proceedings have encouraged more aggressive forms of policing in immigrant communities."[170]

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policy that was codified in the regulation. *Flores*, 507 U.S. at 295–97, 300. The Court reasoned that to prevail in such a facial challenge, the children "must establish that no set of circumstances exists under which the [regulation] would be valid." *Id.* at 301 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

165 *Cf.* Gordon v. Johnson, 300 F.R.D. 31, 42 (D. Mass. 2014) (finding concerns with "the procedures used to effectuate the requirements of section 1226(a) [governing detention and bond hearings in immigration court]–specifically the time between detention and a bail hearing as well as the ability of a detainee to ensure his or her request for a hearing makes its way to an Immigration official . . . ").

166 *See infra* Part III (discussing probable cause hearings in the immigration system).

167 *See supra* notes 17–22 and accompanying text (examining President Trump's strong push to detain and deport aliens, particularly ones who have committed crimes); *infra* note 261 and accompanying text (describing Trump's effort to fast-track deportation proceedings).

168 Chacón, *supra* note 2, at 1622.

169 *See* Chacón, *supra* note 2, at 1622 (describing the current trend in immigration enforcement).

170 Chacón, *supra* note 2, at 1622–23.

Developments in Supreme Court case law could cause courts to take a second look at this issue.[171] Also, the successful ICE detainer litigation, such as the cases discussed below, has caused courts to show a renewed interest in the lack of a prompt probable cause hearing when someone is arrested for deportation.[172]

A. Padilla v. Kentucky: *Rethinking Deportation as Civil*

Courts should take another look at this issue now because in 2010, in *Padilla v. Kentucky*, the Supreme Court called into question the categorization of deportation as civil, thus raising new questions about whether the Fourth Amendment should apply to deportation proceedings.[173] On its face, *Padilla* appears to be a simple holding about defense counsel's duty to advise noncitizen defendants about deportation consequences.[174] However, to reach that holding, the Court made significant headway into reclassifying deportation as punishment.[175] For example, the Court stated that: "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[176] The Court explained this after discussing how "[o]ur law has enmeshed criminal convictions and the penalty of deportation for nearly a century,"[177] and it is "'most difficult' to divorce the penalty from the conviction in the deportation context."[178] The Court seemed to waffle between calling deportation civil or criminal. Repeating the time-honored passage that deportation is not punishment for a crime, the Court then

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171 *See id.* at 1568–69 (articulating the Supreme Court decision in *INS v. Lopez-Mendoza* related to a deportation hearing).

172 *See generally* Kagan, *supra* note 6, at 127 (discussing how warrantless arrests are the norm in Immigration law enforcement and there is not immediate probable cause finding either).

173 *See* 559 U.S. 356, 365–66 (2010) (bringing into question deportation and whether it should be considered civil or criminal in nature); Kanstroom, *supra* note 14, at 1472 (analyzing deportation, the *Padilla* case, and the consequences brought about by *Padilla* on Fifth, Sixth, and Fourth Amendment protections). *See also* Peter Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1314–15 (2011) (providing that the Fourth Amendment should apply to cases of deportation).

174 *See* 559 U.S. at 374 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)) ("[i]t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.' . . . To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.").

175 *See id.* at 363–64 (asserting that since deportation could be a criminal punishment, there has never been more importance of accurate legal advice for those facing deportation).

176 *Id.* at 364.

177 *Id.* at 365–66.

178 *Id.* at 366. (quoting United States v. Russell, 686 F.2d 35, 38 (1982)).

stated that "deportation is nevertheless intimately related to the criminal process."[179] The Court ultimately refused to classify deportation as either civil or criminal.[180] Conflating the civil-criminal distinction with the collateral-direct designation, the Court stated that deportation is "uniquely difficult to classify as either a direct or collateral consequence [of a criminal conviction]."[181]

If one thinks of deportation as "quasi-criminal," it is easier to conceptualize a way in which the Fourth Amendment could apply.[182] In a prior article, I proposed an application of the Sixth Amendment's Confrontation Clause,[183] applying *Padilla* to extend certain "hard-floor" rights available in the criminal justice system.[184] Most significantly, these rights can attach categorically, as opposed to relying on a case-by-case analysis (under *Mathews v. Eldridge*)[185] of whether the facts of a given case require the application of a right.[186] I discuss how courts have been willing to extend other criminal justice rights in the deportation context,[187] such

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179 *Padilla*, 559 U.S. at 365.

180 *See id.* at 365–66 (debating, but not concluding, whether or not deportation is a civil or a criminal matter).

181 *Id.* at 357. *See also* Markowitz, *supra* note 173, at 1338–39 (analyzing how courts tend to use the term "collateral consequence" as synonymous with "civil consequence" and that the *Padilla* Court conflates these two discussions).

182 *See generally* Holper, *Confronting Cops*, *supra* note 2, at 721 (presenting the idea of conceptualizing deportation as both a criminal and civil matter).

183 *See id.* at 693 (arguing that Sixth Amendment confrontation clause protections should be applied in removal proceedings).

184 *See id.* (proposing the need for the Sixth Amendment Confrontation Clause protections to be applied to removal proceedings). *See also, e.g.*, *id.* at 1499–1500 (citing Betts v. Brady, 316 U.S. 455 (1942)) (discussing cases leading up to Gideon's recognition of a right to counsel in criminal cases and stating, "[i]t would seem to be clearly wrong now to categorize all forms of deportation as noncriminal, nonpunitive, and collateral, and thus subjected only to the flexible (and frequently ineffective) due process norms à la Betts"); Markowitz, *Deportation Is Different*, *supra* note 173, at 1488–89 (displaying the difference between the criminal and civil realms and how applicable rights in the criminal realm act as a hard floor regardless of specific circumstances).

185 *See* 424 U.S. 319, 334–35 (1976) (articulating that certain "hard-floor" rights can be attached categorically instead of relying on a case-by-case analysis).

186 *See* Holper, *Confronting Cops*, *supra* note 2, at 693 (reviewing whether the Sixth Amendment right of confrontation applies to a civil case rather than a criminal case); Markowitz, *Deportation is Different*, *supra* note 173, at 1338–39 (discussing the difference between "hard floor" rights in the criminal realm and case-by-case rights in the civil realm, and advocating for a test that recognizes some deportations as quasi-criminal and therefore certain hard floor rights should apply).

187 *See* Holper, *Confronting Cops*, *supra* note 2, at 693 (articulating that courts have been extending rights afforded in criminal justice proceedings to the deportation proceedings).

as the rule of lenity,[188] principles against retroactive legislation,[189] a heightened burden to prove deportability,[190] and (a watered-down version of) the exclusionary rule.[191] Thus, it is not a far stretch to extend the Fourth Amendment's guarantee of a neutral, detached magistrate to promptly prove the need to detain.[192]

B. Zadvydas v. Davis: *Questioning the Plenary Power Doctrine*

It is also necessary to discuss why immigration law's plenary power, which causes courts to avoid second-guessing the political branches in immigration law,[193] should not govern a court's consideration of the adequacy of the procedures used to determine whether probable cause exists to hold an immigration detainee.[194] The Supreme Court has found

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188 *See* Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (providing that the rule of lenity provides that if there is ambiguous language in a criminal code then the language will be construed in favor of the accused); Fong Haw Tan v. Phelan, 333 U.S. 6, 9–10 (1948) (describing the rule of lenity and its applicability to deportation statutes and trials).

189 *See* INS v. St. Cyr, 533 U.S. 289, 315–51 (2001) (focusing on principles against retroactive legislation).

190 *See* Woodby v. INS, 385 U.S. 276, 285 (1966) (explaining that the Court has referred to the "clear, convincing, and unequivocal" standard of proof adopted by the *Woodby* Court in deportation cases as an "intermediate standard"); Brandt Distributing Co. Inc. v. Federal Insurance Co., 247 F. 3d 822, 824 (8th Cir. 2001) (emphasizing the type of standard of proof adopted in *Woody* which is generally used "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant."). *See also, e.g.*, Addington v. Texas, 441 U.S. 418, 424, 432 (1979) (discussing the heightened burden to prove deportability and holding that in civil commitment cases, due process requires the intermediate standard of proof and not the criminal "proof beyond reasonable doubt" standard).

191 *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1049–51 (1984) (describing courts extension of criminal justice rights in the deportation context, including the exclusionary rule).

192 *See, e.g.*, Johnson v. United States, 333 U.S. 10, 13–14 (1948) (determining that the Fourth Amendment's requirement for probable cause should be decided by a neutral and detached magistrate).

193 *See* Fong Yue Ting v. United States, 149 U.S. 698, 712–13 (1893) (discussing how allowing or excluding immigrates affects international relations and this process should be overseen by political departments and regulated by executive departments); Ekiu v. United States, 142 U.S. 651, 659 (1892) (stating that is a well-known and accepted adage that sovereign territories, such as the United States, has the power to forbid immigrants to come into their land); Chae Chan Ping v. United States, 130 U.S. 581, 603–04, 606 (1889) (reasoning that if the United States could not exclude noncitizens, "it would be to that extent subject to the control of another power" because it could not defend itself against "vast hordes of . . . people crowding in upon us"); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned").

194 *See Fong Yue Ting*, 149 U.S. at 760 (discussing the probable cause requirement for holding an immigration detainee).

that detention is a necessary part of the removal process;[195] thus, it would follow that if the political branches' decisions in the deportation process are not subject to second-guessing by courts, neither should their detention decisions be scrutinized by the judiciary.[196] However, as David Cole has noted, the Supreme Court has been careful to apply traditional Due Process analysis, even in the face of the plenary power, when considering questions of detention.[197]

In 2001, in *Zadvydas v. Davis*, the Court considered the constitutionality of a statute that the INS interpreted to permit indefinite detention of noncitizens who were ordered removed, but remained indefinitely detained because they were either stateless or their governments refused to repatriate them.[198] The Court resolved the constitutional issue by avoiding it, instead interpreting the post-order custody review statute as not permitting detention beyond six months.[199] However, the Court's rhetoric about the constitutionality of immigration detention suggested that it would require the government to provide special justification for its immigration detention decisions, as it had required of the government in other civil detention contexts.[200] Most importantly, the Court stated that the plenary power is "subject to important constitutional limitations."[201] Michael Kagan acknowledges that *Zadvydas* concerned immigration detention at the "back end" (when the noncitizen had been detained for a while), instead of questioning the

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195 *See* Carlson v. Landon, 342 U.S. 524, 538 (1952) (articulating the necessity for detention to be a part of the deportation process); Wong Wing v. United States, 163 U.S. 228, 235 (1896) (agreeing that there is a necessity for detention within the deportation process).

196 *See Carlson*, 342 U.S. at 534 (reasoning that even lawful permanent residents "remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders"); *id.* at 538 ("[d]etention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.").

197 *See* Zadvydas v. Davis, 533 U.S. 678, 695 ("[t]hat [plenary] power is subject to important constitutional limitations."). *See also* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1038 (2002) (arguing that defenders of unchecked detention as part of the deportation process "have confused the power to deport with the power to detain"); *id.* at 1016 ("at the very height of deference to plenary immigration power, the Court in *Wong Wing* applied to immigration detention the same principle that it has subsequently applied in other civil detention cases: an absolute prohibition of the use of civil detention for punitive ends" (citing *Wong Wing*, 163 U.S. at 228)).

198 *See id.* at 684.

199 *See id.* at 699–701 (interpreting the post-order custody review statute).

200 *See* Cole, *supra* note 197, at 1017–21 (suggesting that the Court would require the government to provide special justification for its immigration detention decisions); Margaret Taylor, Demore v. Kim: *Judicial Deference to Congressional Folly* 364, in IMMIGRATION STORIES (Foundation Press 2005).

201 Taylor, *supra* note 200, at 695.

initial decision to detain.[202] However, the Court's decision in *Zadvydas* marks a turning point in the doctrine, where the Court was willing to recognize that there is something different about immigration detention that causes the plenary power to lose its force where it otherwise might apply to block courts' considerations of immigration questions.[203]

At first glance, the Court's next immigration detention decision after *Zadvydas*, its 2003 decision in *Demore v. Kim*,[204] appears to foreclose a Due Process challenge to the lack of a prompt probable cause hearing.[205] In *Demore*, the Court considered a Due Process challenge to mandatory detention without an individualized hearing on flight risk and dangerousness.[206] Mr. Kim was a LPR who was deportable for two "crimes involving moral turpitude," which under the mandatory detention statute meant that an immigration judge could not consider his bond request.[207] The Court held that these procedures did not violate Due Process because they applied to a narrow group of those Congress deemed most dangerous[208]—those deportable for certain types of crimes, including aggravated felonies[209]—and detention was brief.[210]

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202 *See* Kagan, *supra* note 6, at 129–30.

203 *See id.* at 142–44 (articulating that the decision in *Zadvydas* was a turning point in immigration decisions, ruling that there is something different about immigration detention making the plenary authority lose its power when it might otherwise apply). *See also* Immigrants Rights Clinic, New York University, *supra* note 68, at 418–19, 419 n. 104 (noting Congress's plenary power over aliens, but addressing "whether Congress has chosen a constitutionally permissible means of implementing that power" by engaging in due process review (citing INS v. Chadha, 462 U.S. 919, 940–41 (1983))).

204 *See* 538 U.S. 510, 531 (2003) (reviewing issues regarding immigration detention for the first time after *Zadvydas*).

205 *See id.* at 526–27, 531 (illustrating that instead the Due Process challenge to prompt bond hearing is quashed).

206 *See id.* at 514 (questioning the constitutionality of 28 U.S.C. § 2241 under the Due Process Clause).

207 *See id.* at 513, 513 n.1 (defining crimes that involve "moral turpitude").

208 *See id.* at 518–21 (relying on Congressional reports that allowed for legislative presumption of dangerousness and flight risk). *See also id.* at 524–25 (holding that the Due Process clause was not violated because the statute applied to a select group of dangerous individuals).

209 Mandatory detention applies to noncitizens deportable for firearms, aggravated felonies, crimes involving moral turpitude, terrorism or security reasons, and noncitizens who are inadmissible for any criminal reasons. *See* 8 U.S.C. § 1226(c). Although the term "aggravated felony" sounds sinister, in reality the term is quite all-encompassing, having been described as "colossus" after "a series of amendments have added crime after crime to the list." *Id. See also* Legomsky, *Asymmetric Norms*, *supra* note 1, at 484; Peter Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Removal Proceedings*, 43 HARV. C.R-C.L. REV. 289, 340 (2008) ("[t]he definition of aggravated felony has been expanded to sweep so broadly that now a crime does not need to be either aggravated or a felony to fall within the statutory definition of 'aggravated felony.'").

210 Writing to uphold mandatory detention in *Demore*, Justice Rehnquist cited statistics that led the Court to believe that a typical removal hearing where the person is in detention "lasts

However, the mandatory detention statute in *Demore* narrowly withstood a Due Process challenge,[211] and that was only because the fifth vote, Justice Kennedy, believed that there *was* in fact an individualized review by an immigration judge of the legality of the detention.[212] Mr. Kim could have asked an immigration judge to review whether he was properly included in the mandatory detention statute.[213] An immigration judge, in what is referred to as a *Joseph* hearing (named after the Board's decision authorizing such hearing),[214] can review whether a detainee has

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roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *See Demore*, 538 U.S. at 530. The Department of Justice recently wrote a letter to the Court explaining that these statistics were incorrect; mandatory detention for detainees who appeal their cases actually lasted twelve months in the average case at the time the government presented these statistics. *Id. See also* Letter from Ian Heath Gershengorn, Acting Solicitor General, U.S. Dep't of Justice, to the Honorable Scott Harris, Clerk, Supreme Court of the United States (Aug. 26, 2016) http://online.wsj.com/public/resources/documents/Demore.pdf [https://perma.cc/S98W-45AH].

211 Scholars have been critical of the Court's decision in *Demore*. *See, e.g.*, David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 717 (2009) ("[t]he Court's reasoning in [*Demore v. Kim*] is flawed, as it proffers no good reason for discarding the requirement of individualized need before subjecting a human being to preventive detention."). *See also* Taylor, *supra* note 200, at 345 (describing the case in terms of legal realism, since it was decided in a post-September 11th world, which provides a striking contrast to *Zadvydas*, which was decided before September 11, 2001).

212 *See Demore*, 538 U.S. at 531–33 (Kennedy, J., concurring) (citing Matter of Joseph, 22 I. & N. Dec. 799 (BIA 1999)) (describing procedures, laid out in the Board's decision in *Matter of Joseph*, whereby a mandatory detainee can seek review by an immigration judge about whether he is properly included in a mandatory detention category, and stating that "due process requires individualized procedures to ensure there is at least some merit to the [INS]'s charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing"). *See also Demore*, 538 U.S. at 515 n.3 ("[b]ecause respondent conceded that he was deportable because of a conviction that triggers § 1226(c) and thus sought no *Joseph* hearing, we have no occasion to review the adequacy of *Joseph* hearings generally in screening out those who are improperly detained pursuant to § 1226(c)."). Justice Kennedy also focused on the short length of detention, noting that "a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (citing Zadyvdas, 533 U.S. at 684–86); Cole, *Preventive Detention*, *supra* note 224, at 717 (describing *Demore* as an outlier for upholding preventive detention without the usual showing necessary, but that "even there the crucial fifth vote stressed the importance of some kind of individualized determination").

213 *See Demore*, 538 U.S. at 531 (articulating that Mr. Kim had the option to ask the immigration judge to review that appropriateness of being included in the mandatory detention statute).

214 *See* Matter of Joseph, 22 I. & N. Dec. 799, 809 (BIA 1999) (ruling in a "Joseph" hearing, which is named after the Board's decision authorizing the decision to be made).

been properly charged as an aggravated felon, and thus subject to mandatory detention.[215]

Because the *Demore* Court assumed that Mr. Kim had foregone the right to ask for a *Joseph* hearing, the Court did not consider any constitutional challenges to such a hearing.[216] Following *Demore*, courts and scholars have criticized these hearings.[217] Namely, the detainee must request it (as opposed to it being automatically provided, unlike a probable cause hearing);[218] there is no timeline by which it must happen (again, unlike the probable cause hearing, which must occur within forty-eight hours for criminal detention and seventy-two hours for civil detention);[219] and there is an incredibly high standard of proof, requiring the detainee to bear the burden of proving that DHS is "substantially unlikely to prevail" on their ground of deportability.[220]

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[215] *See id.* at 800 (interpreting that the immigration judge has the discretion to review whether or not the detainee has been appropriately charged as an aggravated felon, subjecting that detainee to mandatory detention).

[216] *See Demore*, 538 U.S. at 514 (ruling that Mr. Kim did not request a "*Joseph* hearing", and therefore the Court did not consider any constitutional challenges to that type of hearing).

[217] *See, e.g.*, Kagan, *supra* note 6, at 160 (discussing three limits on the impact of such Joseph hearings); Tijani v. Willis, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring) (articulating that the *Joseph* standard places minimal risk on the governments broad shoulders).

[218] *See* Kagan, *supra* note 6, at 160 (articulating that a detained respondent for a *Joseph* hearing must request the hearing); *Flores*, 942 F.2d at 1368 n.3 (Tang, J., concurring) ("[f]reedom from governmental restraint is not a right reserved exclusively for those schooled in the intricacies of INS regulations").

[219] *See* Kagan, *supra* note 6, at 165–66 (describing how many states limit emergency civil commitment without a hearing or neutral review to seventy-two hours or less).

[220] *See Tijani*, 430 F.3d at 1246 (Tashima, J., concurring) ("*Joseph* standard is not just unconstitutional, it is egregiously so. The standard not only places the burden on the defendant to prove that he should not be physically detained, it makes that burden all but insurmountable."). *See also* Kagan, *supra* note 6, at 160 (discussing the three significant limitations on the impact of a *Joseph* hearing); Noferi, *supra* note 111, at 68 (critiquing procedures available in *Joseph* hearings); Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1872 (2011) (comparing procedures for immigration detainees, which are less protective than those used for Guantanamo detainees' cases, and arguing that the government should bear the burden of proof at a *Joseph* hearing); Shalini Bargava, *Detaining Due Process: The Need for Procedural Reform in "*Joseph*" Hearings After* Demore v. Kim, 31 N.Y.U. REV. L. & SOC. 51, 54–55 (2006) (arguing that the burden of proof in *Joseph* hearings violates Due Process).

C. *The ICE Detainer Litigation and* Arizona v. United States: *Renewed Interest in the Lack of a Prompt Probable Cause Hearing*

The successful ICE detainer litigation, fueled by the scholarship of my co-panelist Christopher Lasch,[221] has caused courts across the United States to find Fourth Amendment violations when counties continued to hold a noncitizen pursuant to an ICE detainer.[222] The ICE detainer is a request to state or local authorities to "[m]aintain custody" of a person for an additional forty-eight hours, plus weekends and holidays, "beyond the time when the person would have otherwise been released" from the state or local custody.[223] When local jails honored ICE's request and refused to release a noncitizen until ICE came to detain them, the noncitizens sued the jails, arguing that this continued custody was a new arrest for Fourth Amendment purposes, yet that it lacked probable cause.[224] Because noncitizens enjoy the same rights as citizens when charged or held for a crime,[225] courts have responded to the unlawful seizure of a noncitizen by the criminal justice system's actors by analyzing their cases under

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221 *See* Lasch, *supra* note 3, at 174 (writing about the limits that should be upheld on the executive branch's power to issue immigration detainers).

222 *See ICE Detainers and the Fourth Amendment: What Do Recent Federal Court Decisions Mean?* AMERICAN CIVIL LIBERTIES UNION, (Nov. 13, 2014), https://www.aclu.org/other/backgrounder-ice-detainers-and-fourth-amendment-what-do-recent-federal-court-decisions-mean (providing Fourth Amendment detention cases).

223 Miranda-Olivares v. Clackamas County, 2014 WL 1414305, at *2 (2014). *See also* 8 C.F.R. § 287.7(d) (discussing temporary detention at the request of the Homeland Security Department and that it shall not exceed forty-eight hours, not including the weekend and holidays).

224 *See, e.g.*, Orellana v. Nobles Cty., 230 F.Supp.3d 934, 940 (2017) (holding that the immigration detainee's continued confinement after he would have been released on state charges of driving under the influence, pursuant to ICE detainer, violated his rights under the Fourth Amendment); Moreno v. Napolitano, 213 F. Supp. 3d 999, 1004, 1007 (2016) (granting summary judgment to class of individuals targeted by ICE detainers on their claim that ICE's practice of issuing detainers without obtaining an arrest warrant was prohibited by the INA and finding that that the warrantless arrest power of § 1357(a)(2) did not defeat their claim because "immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained . . . "); Miranda-Olivares v. Clackamas Cty., No. 3:12-cv-02317, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) (arguing this was a new arrest for Fourth Amendment purposes); ACLU, *ICE Detainers, supra* note 222, at 3–4 (collecting cases where holding a noncitizen under ICE detainer was found to be a new arrest for Fourth Amendment purposes).

225 *See* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Protections as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003) (explaining how the rights attaching to criminal trials, including the right to a public trial, a trial by jury, the assistance of a lawyer, and the right to confront adverse witnesses, all apply to "the accused" without reference to a person's citizenship). *See also* D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 89–90 (2011) (discussing cases and briefs in which courts and litigants assumed Fourth Amendment's application to noncitizens).

traditional Fourth Amendment principles.[226] As Michael Kagan has noted, the ICE detainer cases revealed "immigration law's looming Fourth Amendment problem"—the lack of a *Gerstein-Riverside* probable cause hearing when immigration authorities arrest noncitizens for deportation.[227]

Similarly, in 2012, in *Arizona v. United States*,[228] the Supreme Court reaffirmed the idea that civil immigration arrests, just like criminal arrests, must comply with the Fourth Amendment.[229] This case considered whether Arizona's controversial immigration law was preempted by federal law.[230] The Court discussed section 2(B) of the law, which required Arizona officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."[231] The law also provided that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released."[232] While the Court found that other provisions of Arizona's law were preempted by federal law,[233] section 2(B) was not, because nothing in federal law

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226 *See* ACLU, *ICE Detainers*, *supra* note 222 (analyzing unlawful seizure of a noncitizen under a traditional Fourth Amendment principle).

227 *See generally* Kagan, *supra* note 6, at 158 (discussing immigration law's lack of a *Gerstein-Riverside* probable cause hearing).

228 *See* Arizona v. United States, 567 U.S. 387, 446 (2012) (affirming that civil immigration arrests must comply with the Fourth Amendment).

229 *See id.* at 413 (noting that "detaining individuals solely to verify their immigration status would raise constitutional concerns" and citing Fourth Amendment cases).

230 *See id.* at 399 (quoting Ariz. Rev. Stat. Ann. § 13-1509(A)) ("Section 3 of the Arizona Law (S.B. 1070) creat[ed] a new state misdemeanor [that] forbids the 'willful failure to complete or carry an alien registration document in violation of 8 United States Code § 1304(e) or 1306(a).'"); *id.* at 400–02 (presenting that the Court held that § 3 added a state-law penalty for conduct proscribed by federal law and thus was preempted by federal law). *See also id.* at 402 (quoting Ariz. Rev. Stat. Ann. § 13-2928(C)) (displaying that the Court also considered § 5(C), which made it a state misdemeanor for "[a]n unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona.); *id.* at 406 (explaining how the Court held that § 5(C) was preempted because the Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens.); *id.* at 406 (quoting ARIZ. REV. STAT. ANN. § 13-3883(A)(5)) (demonstrating that the third provision the Court considered was Section 6 of S.B. 1070, which provided that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States."); *id.* at 407–10 (conveying that the Court held that § 6 was preempted by federal law, since the removal process is entrusted to the federal government and this statute would create an obstacle to federal enforcement efforts).

231 *Id.* at 409–10.

232 *Id.* at 413–14.

233 *See id.* at 399–410 (outlining the Arizona laws that were preempted by federal law).

prohibited states from sharing information with ICE.[234] When challengers suggested that Arizona officials would delay the release of individuals pending information from ICE, the Court stated, citing Fourth Amendment cases, that such holds would be illegal.[235] The Court also stated, "it is not a crime for a removable alien to remain present in the United States . . . [so] the police [cannot] stop someone based on nothing more than possible removability [and] the usual predicate for an arrest is absent."[236] *Arizona* thus provides helpful, relatively recent, dicta from the Supreme Court that civil immigration arrests must comply with the Fourth Amendment.[237]

The detainer cases look more like a classic Fourth Amendment case, because it was criminal justice system actors detaining persons (or in the case of *Arizona*, a hypothetical situation where a state officer holds a detainee too long).[238] However, the lesson is the same—it is not permissible, under the Fourth Amendment, to take away a person's liberty without a prompt probable cause hearing by a neutral decisionmaker.[239] It should not matter *who* is taking away the liberty—a county that has just finished detaining him pursuant to a criminal charge, or ICE.[240] In both cases, the deprivation of liberty happens while ICE takes its own sweet time building a case against the detainee without having to justify this to a neutral judge.[241] In *County of Riverside v. McLaughlin*, the Supreme Court wrote that "delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake" are all unreasonable delays—and those were "unreasonable delays" even if the probable cause hearing happened within forty-eight hours.[242]

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234 *See id.* at 411–13 (reasoning that federal law actually encouraged information-sharing between state and federal officials).

235 *See Arizona*, 567 U.S. at 413–14 (citing Arizona v. Johnson, 555 U.S. 323, 333 (2009) (quoting Arizona law dealing with the determination of a person's immigration status)).

236 *Id.* at 407.

237 *See id.* at 446 (outlining a reasonable attempt to investigate immigration status with Fourth Amendment compliance).

238 *See id.* at 333 (demonstrating hypothetical situation of detainee being held too long).

239 *See* U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures).

240 *Compare* U.S. CONST. amend. IV (banning unreasonable searches and seizures) *with* 8 C.F.R. § 287.7 (2017) (outlining who has the authority to issue detainers).

241 *See* Morales v. Chadbourne, 793 F.3d 208, 218 (1st Cir. 2015) (showing *Bivens* action against ICE officials for issuing a detainer against a U.S. citizen, reasoning that ICE officials are welcome to go about their work determining whether there is reasonable suspicion that someone has violated the immigration laws, but they just must let the person out of jail while they undertake such investigation).

242 500 U.S. 44, 56 (1991).

It appears that an opening is available in the doctrine for immigration detainees to request prompt probable cause hearings by a neutral judge.[243] In the next section, I discuss why such probable cause hearings should only happen in post-entry social control deportations.[244]

V. A PROMPT PROBABLE CAUSE HEARING FOR POST-ENTRY SOCIAL CONTROL DEPORTATIONS

Before explaining why prompt probable cause hearings should only occur in post-entry social control cases, it is first helpful to define that term.[245] We are indebted to Daniel Kanstroom for the concept of "post-entry social control" deportation, which encompasses deportation of noncitizens who have been admitted to the United States and who are deportable due to criminal or political conduct.[246] For them, Kanstroom argues, deportation essentially functions as punishment because it regulates their behavior and thus exercises continual control over them, as does the criminal law.[247] Thus, the constitutional protections of a criminal trial should apply in these proceedings.[248] Kanstroom distinguishes "post-entry social control" deportations from "extended border control" deportations,[249] where the noncitizen has not been admitted to the United States or has been admitted, yet violates the rules that govern his temporary residence.[250] These proceedings are essentially contractual and thus it is more appropriate to think of them as civil and non-punitive.[251]

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243 *Compare* Fed. R. Crim. P. 5.1(e) (explaining the procedure of a probable cause hearing in a criminal case) *with* Part V.A (providing a collection of cases that have held that this rule does not apply to deportation).

244 *See infra* Part V (discussing prompt probable cause hearings for post-entry social control deportations).

245 *See* KANSTROOM, DEPORTATION NATION, *supra* note 11, at 4–6 (describing post-entry social control as laws that proscribe criminal and political conduct as grounds for deportation).

246 *See* Kanstroom, *Fifth-and-a-Half Amendment*, *supra* note 14, at 1465 and accompanying text (presenting more information defining post-entry social control).

247 *See* Kanstroom, *Deportation, Social Control*, *supra* note 11, at 1898 (expounding upon the similarities between immigration removal and criminal law).

248 *See* Kanstroom, *Fifth-and-a-Half Amendment*, supra note 14, at 1465, 1499–1500 (discussing how due process should extend to aliens).

249 *See* KANSTROOM, DEPORTATION NATION, *supra* note 11, at 6 (distinguishing between post-entry social control and extended border control).

250 *See* KANSTROOM, DEPORTATION NATION, *supra* note 11, at 6 (describing the differences between post-entry social control and extended border control).

251 *See* Kanstroom, *Deportation, Social Control*, *supra* note 11, at 1907 (presenting the proceedings as more civil and contractual in nature).

A. Limiting the Remedy to Post-Entry Social Control Deportations

Why should probable cause hearings only happen in post-entry social control cases? First, the rationale that keeps deportation proceedings squarely in the "civil," as opposed to "criminal," box, and thus failing to incorporate procedural protections such as the Fourth Amendment's right to a prompt probable cause hearing by a neutral judge, does not hold up as well in the context of post-entry social control deportations.[252] Following the rationale in *Padilla*, it is easier to conceptualize deportation for a crime as punishment and thus deserving of at least the "quasi-right" to a Fourth Amendment probable cause hearing.[253]

In contrast, a proposal that encompasses extended border control deportations carries much more legal baggage.[254] Although the Court's statements in *Abel* were dicta, they nonetheless proved persuasive to some courts afterwards.[255] Also, the Supreme Court in its 1993 *Reno v. Flores*[256] decision rejected an argument that, under a Due Process analysis, a class of unaccompanied minor noncitizens should be entitled to prompt review of their custody by a neutral immigration judge.[257] While Michael Kagan offered reasons for why *Flores* would not foreclose a future argument (especially on behalf of an adult immigration detainee),[258] I query whether

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252 *See supra* Part IV.A (discussing *Padilla v. Kentucky*).

253 *See supra* Part IV.A.

254 *See supra* Part III (looking at court challenges to immigration detainee's lack of a prompt probable cause hearing).

255 *See, e.g.*, Flores by Galvez-Maldonado v. Meese, 913 F.2d 1315, 1337 (9th Cir. 1990), *superseded by* Flores v. Reno, 942 F.2d 1352 (9th Cir. 1990) (en banc) (reversed by Reno v. Flores, 507 U.S. 292 (1993) ("[o]ur holding is in keeping with the Supreme Court's forceful dicta in *Abel* . . . though professing not to reach the issue of whether an INS arrest warrant was invalid because it failed to comply with the fourth amendment's requirements for warrants, the Court nonetheless devoted five pages to rejecting petitioner's claim."); Spinella v. Esperdy, 188 F. Supp. 535, 540–41 (S.D.N.Y. 1960) ("[w]hile the Supreme Court declined to pass upon a similar argument in *Abel*, . . . some pertinent observations there were nonetheless made . . . the court did refer to its frequent upholding of administrative deportation proceedings shown to have commenced by arrests made pursuant to such warrants.").

256 507 U.S. 292 (1993).

257 *See id.* at 308–09 (displaying that lower courts had rejected similar arguments). *See, e.g.*, Salgado v. Scannel, 561 F.2d 1211, 1212 (5th Cir. 1977) (explaining why the motion for suppression was not granted). *See also* United States v. Noel, 231 F.3d 833, 837 (11th Cir. 2000) (per curiam) (conveying that Criminal Procedure Rule 5(a) does not apply to deportation); United States v. Cepeda-Luna, 989 F.2d 353, 358 (9th Cir. 1993) (demonstrating that Criminal Procedure Rule 5(a) does not apply to deportation); United States v. Valente, 155 F. Supp. 577, 579 (D. Mass. 1957) (Aldrich, J.) (stating Criminal Procedure Rule 5(a) does not apply to deportation).

258 *See* Kagan, *supra* note 6, at 151–52 (discussing how Kagan writes that because the Court was ruling on a facial challenge, it did not have to consider what would amount to "excessive delay" in holding a hearing). *See also* Kagan, *Immigration Law's Looming Fourth Amendment*

trying to make the case for probable cause hearings for the extended border control cases is dragging down the vindication of rights by those whose cases more closely resemble punishment for a crime, and thus have a stronger claim to more procedural protections in their deportation hearings.[259]

A second reason for not granting probable cause hearings to extended border control detainees is strategic.[260] Many of the extended border control deportations involve entrants without inspection.[261] In their cases, ICE first carries the burden of proof, which requires them to prove by clear and convincing evidence that the person in these proceedings is an "alien."[262] The person in removal proceedings has a right to remain silent when questioned about alienage.[263] Let us say that, when ICE officers arrested this person, they committed an egregious violation of his Fourth Amendment rights (by, for example, coercing him to sign a statement that he was from Mexico). According to the Supreme Court's *Lopez-Mendoza* decision, the earlier statements can be suppressed in immigration court because of the egregious nature of the Fourth Amendment violation.[264]

Problem, *supra* note 6, at 151–52 (quoting Flores, 507 U.S. at 302–03) (exemplifying that because *Flores* dealt with a child, who is always in some form of custody, and specifically did *not* deal with "shackles, chains, or barred cells," its holding would not extend to adults in immigration detention).

259 *See supra* Part IV.A (analyzing *Padilla v. Kentucky*).

260 *See Noel*, 231 F.3d at 836 (expanding upon the list of reasons that detainees are not granted prompt probable cause hearings).

261 *See* KANSTROOM, DEPORTATION NATION, *supra* note 11, at 5 (describing reasons for extended border control deportations); Jose Magaña-Salgado, *Fair Treatment Denied: The Trump Administration's Troubling Attempt to Expand "Fast-Track" Deportations*, 5 (2017), https://www.ilrc.org/report-expedited-removal-expansion [https://perma.cc/T3EC-EXMD] (reporting the Center for Migration Studies Data that projects that the undocumented population in 2017 is 11,100,000, and of these, 1,025,289 entered in the past two years, with 355,167 entering without inspection).

262 *See* 8 C.F.R. § 1240.8(c) (2012) (outlining the establishment of the alienage of the respondent); Matter of Guevara, 20 I. & N. Dec. 238, 239–40 (BIA 1990) (showing the Board of Immigration Appeals has held that although judges can draw an adverse inference from silence, this does not meet the government's burden of proving alienage by clear and convincing evidence).

263 *See* Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599, 602 (1990) (arguing that respondents in deportation proceedings cannot be compelled to testify and that this silence cannot support an order of deportation). *See also id.* at 603 ("[t]here is no doubt that the privilege [against self-incrimination] may be asserted in this context, where the testimony sought might result in criminal prosecution in addition to deportation."); *id.* at 626–29 (chronicling the legislative history behind the requirement that the government first prove alienage in a deportation case).

264 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (holding that, while the exclusionary rule is available in such proceedings, it is only available where there has been an egregious violation of the Fourth Amendment); Navia-Duran v. INS, 568 F.2d 803, 807

However, if he later admits at a removal hearing that he is a citizen of Mexico, ICE can easily meet its burden of proof.[265] Should entrants without inspection have prompt probable cause hearings, especially before they have an opportunity to obtain counsel who could raise these Fourth Amendment arguments to suppress the prior statements and counsel them on their right to remain silent, they might promptly admit to alienage during the probable cause hearing.[266] These admissions would foreclose any opportunity to raise suppression arguments and terminate proceedings, since the noncitizen's statements during the probable cause hearing would be independent evidence of alienage.[267]

Unlike the evidentiary issues in an extended border control case, post-entry social control deportations, such as Carlos' deportation, normally turn on evidence of a criminal conviction.[268] The statute only permits

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(1st Cir. 1977) (suppressing noncitizen's confession of alienage when confession was coerced by INS agent). *See also* Yanez-Marquez v. Lynch, 789 F.3d 434, 459–60 (4th Cir. 2015) (surveying case law applying *Lopez-Mendoza* exceptions).

265 *See In re* Guevara, 20 I. & N. Dec. 238, 241–42 (BIA 1990) (collecting case law to show silence and citizenship does not avert removal).

266 *See* Chacón, *supra* note 2, at 1629–30 ("[w]hen a Fourth Amendment violation occurs during a search or seizure, or when a due process violation occurs during the government's interrogation of a noncitizen, unrepresented immigrants are unlikely to be able to adequately address the complex legal issues that a suppression motion requires.").

267 *See* Chacón, *supra* note 2, at 1568 (showing that it is possible to advocate for regulation that separates probable cause hearing records from the removal record, which would mirror the regulation governing the record in bond hearings); 8 C.F.R. § 1003.19(d) (2013) ("[c]onsideration by the Immigration Judge of an application or request of a respondent regarding custody shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceedings"). *See also* Immigration Court Practice Manual § 9.3(a) ("[b]ond proceedings are separate from removal proceedings"); 8 C.F.R. § 1240.7(a) (2013) (allowing the receipt into evidence of an "oral or written statement" made by the respondent or another person during "any investigation, examination, hearing, or trial"). The Immigration Judge Benchbook reconciles these regulations by advising immigration judges that it is permissible to use such prior statements made in a bond proceeding so long as "the evidence is reintroduced and received in the deportation or removal hearing." *Id. See also* Immigration Judge Benchbook, Evidence, p. 3, para 3a-3b; Joseph v. Holder, 600 F.3d 1235, 1240–41 (9th Cir. 2010) (demonstrating that the Ninth Circuit Court of Appeals, however, did not permit an immigration judge to use her notes from a bond hearing in the removal hearing because of 8 C.F.R. § 1003.19(d) precluded any evidence from a bond hearing to be used in a removal hearing); *id.* at 1241 (discussing how the court did not need to resolve the meaning of 8 C.F.R. § 1240.7(a) because the judge did not rely on prior written statements and, because no transcript existed of the bond hearing, she did not rely on prior oral statements); *In re* Adeniji, 22 I. & N. Dec. 1102, 1126 (BIA 1999) (Rosenberg, Board Member, dissenting) ("[t]he underlying purpose of [8 C.F.R. § 1003.19(d)] is not to limit the information an immigration judge may consider in redetermining bond, but to ensure that evidence presented in far more informal bond hearing does not taint the ultimate adjudication of the charges of removability.").

268 For the moment, I leave out a more fulsome discussion of the type of evidence that would cause DHS to charge a noncitizen with deportability for political activity, which

certain documents to prove the existence of a conviction—namely, certified conviction records.[269] Thus, requiring the government to act quickly to get these records might prove overly difficult if DHS continued to pursue as many criminal deportations as it plans to do under the Trump administration (or as it was doing previously).[270] The right to a prompt probable cause hearing would trigger each time DHS charged a criminal or political ground of deportability.[271] To limit the number of probable cause hearings in which DHS must quickly justify its detention decisions by providing criminal records, DHS would likely respond by charging a criminal or political ground of deportability only when necessary—i.e., in LPRs' cases.[272] Typically, the deportation of LPRs is purely for post-entry conduct.[273] In contrast, others such as noncitizens who have overstayed

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Kanstroom also has classified as part of the category of post-entry social control deportations. *See, e.g.*, 8 U.S.C. § 1227(a)(4)(A) (2012) (proscribing deportation for "any activity a purpose of which is the opposition to, or control or overthrow of, the government by force, violence, or other means"). *See also* KANSTROOM, DEPORTATION NATION, *supra* note 11, at 6 (describing post-entry social control deportations as including deportation for crime and political activity). I am limiting my discussion to deportation for a crime, since my own observations from fourteen years of representing immigration detainees and conducting intake interviews with immigration detainees has led me to believe that the criminal grounds of deportation are more frequently charged; *supra* Part II (comparing criminal justice rights to immigration rights).

269 *See* 8 U.S.C. § 1229a(c)(3)(B) (2012) (outlining requirements for proof of convictions); 8 C.F.R. § 1003.41 (2013) (presenting which documents are admissible evidence, such as records of judgments and criminal convictions, pleas, verdicts, and docket entries).

270 *See* Ye Hee Lee, *supra* note 20 (stating that President Trump expressed a desire to target "criminal aliens" for deportation); *id.* (taking advantage of fuzzy math, President Trump claimed that there were 2 million undocumented noncitizens with criminal convictions, when in fact there are 1.9 million noncitizens deportable for crime—many are LPRs or otherwise legally here—and only 820,000 (about 43% of that 1.9 million "criminal aliens") are undocumented). *See also* Casselman, *supra* note 20 (showing this puts President Trump right on par with President Obama's initial policies, which were to target the "criminal aliens" first, and under these policies, Obama deported over 400,000 in 2012).

271 *Contra*, cases cited *supra* note 141 (noting that courts have held that Criminal Procedure Rule 5(a), or the right to a prompt probable cause hearing, does not apply to deportations).

272 *Cf.* James Q. Wilson, Bureaucracy, 180, 222, 225, 232, 289 (1989) (explaining that bureaucracies resist changes to core tasks, will seek changes to core tasks only if it increases agency autonomy, and will meet new problems when a policy is implemented unless new resources are provided).

273 *See* 8 U.S.C. § 1227(a)(1)(A) (2012) (illustrating that there is always the possibility that lawful permanent residents are deportable because they are inadmissible at the time of entry, e.g., the noncitizen could have committed fraud in the application for their admission to the United States); KANSTROOM, DEPORTATION NATION, *supra* note 11, at 5 (classifying as extended border control deportation of those who have evaded border control by fraud or misrepresentation). *See also, e.g.*, *In re* Sosa, 20 I. & N. Dec. 758 (BIA 1993) (presenting in this instance, their deportations would more easily be classified as extended border control deportations.). In my fourteen years of experience representing lawful permanent residents in removal proceedings and consulting with immigration detainees, many of whom are

their visas and then are convicted of a crime can be charged either for violating the terms of their visas or for the conviction.[274] Their deportations are a hybrid—part post-entry social control; part extended border control.[275]

This may lead to fewer deportations, particularly of lawful permanent residents, who have the most to lose because they have been admitted to the United States, some of them a long time ago, and often have other ties to the community that go with long residence in the United States.[276] While our immigration system still clings to the notion that they are "simply being regulated,"[277] not punished, and fails to provide them with other protections like court-appointed counsel, at the very least requiring the government to promptly prove the deportation of a lawful permanent resident to a neutral judge provides some criminal procedure-type protections in the immigration system.[278] The prompt probable cause hearing is one step in the direction of providing stronger procedural protections to LPRs, who, according to several scholars, are more deserving of procedural protections that are available to defendants in the criminal justice system.[279]

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lawful permanent residents facing deportation, I have typically seen NTAs that charge the criminal grounds of deportability.

[274] *See* 8 U.S.C. § 1227(a)(1)(C) (2012) (authorizing removal of noncitizen for violating terms of visa).

[275] *See* KANSTROOM, DEPORTATION NATION, *supra* note 11, at 5 (classifying deportation statutes for visa violations as contractual in nature because of the "contractual aspect of the deal that permitted entry"). *See also* KANSTROOM, DEPORTATION NATION, *supra* note 11, at 6 and accompanying text ("[t]he purest post-entry social control laws . . . proscribe criminal or political conduct within the United States, often without limit.").

[276] *See* Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2404 (2013) (analyzing the importance of removal hearings for permanent residents that are within the country legally); Markowitz, *Straddling the Criminal-Civil Divide*, *supra* note 209, at 292 and accompanying text ("[p]ermanent residents, as a class, have the greatest economic and familial connections and political allegiance to the United States").

[277] *See* Kanstroom, *Deportation, Social Control*, *supra* note 11, at 1895 and accompanying text (suggesting that immigrants are not being punished but "simply being regulated").

[278] *See generally* U.S. CONST. amend. VI (displaying how the right to a fair, speedy trial is so crucial that is has been added as an amendment to the U.S. Constitution).

[279] *See, e.g.*, Johnson, *supra* note 276, at 2405 (arguing for court-appointed counsel for LPRs in deportation proceedings); Markowitz, *Straddling the Criminal-Civil Divide*, *supra* note 209, at 292 ("[t]he well-founded recognition of permanent residents, and their precursor, denizens, as 'citizens' of a lesser status holding rights superior to other noncitizens justifies greater protection for this class of noncitizens"); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 214–15 (1983) (showing that a noncitizen's level of membership in the United States should govern how much process is due to the noncitizen and therefore LPRs should receive the most procedural protections). *See also* T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 244–45 (1983) (stating that Due Process should turn not on the person's membership in the United States community—the United States'

What would truly make the probable cause hearing meaningful is if the government had to explain its charging decision.[280] For example, there are numerous Supreme Court and circuit court cases detailing why several different types of offenses are not "crimes of violence,"[281] a federal criminal law term of art that is incorporated in the aggravated felony definition[282] and the crime of domestic violence ground of deportability.[283] There are also numerous instances of the Supreme Court reversing the Board of Immigration Appeals on the meaning of terms like "aggravated felony" in deportation cases, calling upon the agency to use common sense in interpreting this term of art.[284] What if the immigration judge required

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relationship to her – but rather on her community ties – what the United States is taking from her); Gerstein v. Pugh, 420 U.S. 103, 119 (defining probable cause hearing).

280 *See Gerstein*, 420 U.S. at 119–20 (conveying the meaning of probable cause hearing and its justifications).

281 *See, e.g.*, Johnson v. United States., 559 U.S. 133, 138 (2010) (demonstrating Florida common law battery, which punished actual and intentional touching, was not a violent felony, which is defined as an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another, under a sentencing enhancement statute that is virtually the same as the first prong of 18 U.S.C. § 16); Leocal v. Ashcroft, 543 U.S. 1, 11–12 (2004) (displaying that in Florida, aggravated DUI is not a crime of violence under 18 U.S.C. § 16).

282 *See* 8 U.S.C. § 1101(a)(43)(F) (2012) (showing that an aggravated felony can be a crime of violence).

283 *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2012) (categorizing the crimes of domestic violence, stalking, and child abuse as violent crimes).

284 For example, the Supreme Court, in a unanimous decision in 2004, decided, evoking common sense, that a DUI statute punishing negligently causing serious bodily injury was not a crime of violence aggravated felony, overruling the Board and some circuit courts. *See Leocal*, 543 U.S. at 10 ("[w]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."). Similarly, in a series of decisions determining the meaning of "drug trafficking aggravated felony," the Court found that the Board failed to use common sense. *Id. See, e.g.*, Moncrieffe v. Holder, 133 S. Ct. 1678, 1686–89 (2013) (reasoning that a misdemeanor conviction under a statute that was broad enough to encompass social sharing of small amounts of marijuana was not a drug trafficking aggravated felony). *See also id.* at 1689 (quoting Lopez v. Gonzales, 549 U.S. 47, 54) ("[t]here is a more fundamental flaw in the Government's approach: It would render even an undisputed misdemeanor an aggravated felony. This is 'just what the English language tells us not to expect,' and that leaves us 'very wary of the Government's position.'"); Carachuri-Rosendo v. Holder, 560 U.S. 563, 581–82 (2010) (holding that a second simple possession offense was not an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(B) because it was not punished as a recidivist offense in the state); *id.* at 575 (citing Lopez, 549 U.S. at 54) ("[b]ecause the English language tells us that most aggravated felonies are punishable by sentences far longer than ten days, and that mere possession of one tablet of Xanax does not constitute 'trafficking,' *Lopez* instructs us to be doubly wary of the Government's position in this case"); Lopez v. Gonzales, 549 U.S. 47, 54 (2006) ("[r]eading [the statute] the Government's way, then, would often turn simple possession into trafficking, just what the

the government to explain why existing Supreme Court and circuit court cases could be distinguished from the statute at issue in the government's deportation case against the individual? This would lead to fewer wrongful deportations for criminal conduct, as judges would more closely monitor overzealous DHS attorneys.[285] DHS would be forced to do their research before detaining a lawful permanent resident, because they would need to supply a prompt answer to a judge why the conviction fit within the ground of deportability.[286] DHS thus could exercise its discretion to only "prove up" the cases they are prioritizing.[287]

Returning to Carlos' case example,[288] let us examine more closely why he spent thirteen weeks in jail before the immigration judge confirmed that he actually was deportable for the reasons charged by the government (and thus his detention pursuant to such deportation was justified). Did the lack of a lawyer cause this delay? Somewhat (perhaps a few weeks of searching for a lawyer caused non-action on his case). Did the actual hiring of a lawyer cause this delay? Perhaps; without a lawyer, the judge and DHS would have reached the same result, that he was deportable, without considering the large body of case law on why his crime was not a "crime of violence" that would render him deportable.[289] After thirteen weeks of detention, the judge decided that the government had proved removability by clear and convincing evidence. What if the judge only

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English language tells us not to expect, and that result makes us very wary of the Government's position").

285 *See Johnson*, 333 U.S. at 13–14 (discussing the Fourth Amendment's requirement that probable cause be decided by a neutral and detached magistrate, so that the inferences of "zealous officers" may be checked by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime"). *See also* Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L & SOC. JUST. 195, 199 (2014) (outlining ICE's agency culture, which perceives any noncitizen with a criminal conviction as a threat, regardless of the circumstances of that conviction, and arguing that the Obama-era agenda of prosecutorial discretion largely failed because it inadequately accounted for ICE agency's culture); Kagan, *supra* note 6, at 163 (showing how Michael Kagan has noted that "[t]o see the need for neutral review of immigration custody, one need not accuse DHS of willfully seeking to wrongfully arrest people on immigration grounds. One need only imagine that immigration officers are human and that they sometimes make mistakes.").

286 *Contra* Kelly, *Enforcement Memo*, *supra* note 18, at 4 (outlining that the DHS officials should act consistently with President Trump's Executive Order and grants full authority to initiate removal proceedings for aliens as described by any provision of the INA).

287 *See* Rabin, *supra* note 285, at 199 (demonstrating ICE's agency culture, which perceives any noncitizen with a criminal conviction as a threat, regardless of the circumstances of that conviction, and arguing that the Obama-era agenda of prosecutorial discretion largely failed because it inadequately accounted for ICE agency's culture).

288 *See supra* Part II.B (analyzing warrantless arrests and procedures in the immigration system).

289 *See* Flores v. Meese, 942 F.2d 1352, 1359 (1991) (describing crime of violence cases).

had to decide whether there was probable cause to hold Carlos?[290] What if the judge was forced to make this decision earlier in the process – let us say within seventy-two hours of his arrest? In the criminal justice process, probable cause hearings must be completed within forty-eight hours of arrest to justify continued pretrial detention.[291] This timeline is not as strict in other forms of civil detention, such as civil commitment;[292] yet a timeline *exists*, and it is certainly significantly shorter than the average amount of time before which Carlos had his case reviewed by a judge.

What would these hearings look like? First and foremost, the government would need to present certified conviction records to show probable cause that the noncitizen is deportable under 8 U.S.C. § 1227(a)(2);[293] for political deportations, the government would likely present affidavits or prior statements by the detainee.[294] Ideally, if a body of case law exists where courts have found similar statutes to not fit within the ground of deportability,[295] the judge would force DHS to explain why the result would be different in this case.[296] The probable cause hearing, at which DHS would have to prove its decision, would happen every time DHS listed a criminal or political ground of deportability on an NTA – not only when the detainee requested such a hearing, or when the detainee had the knowledge and ability to argue why his conviction might not fit

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290 "Probable cause" is a lower standard of proof than "clear and convincing evidence." *See* California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 n.6 (1981) (defining "clear, unequivocal, and convincing" as "a higher probability than is required by the preponderance-of-the-evidence standard"). *See also*, Gerstein v. Pugh, 420 U.S. 103, 111 (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)) (defining "probable cause" as "facts and circumstances 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense'"); *id.* at 121 (reasoning that probable cause "does not require the file resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands").

291 *See Gerstein*, 420 U.S. at 113–14 (discussing the justification for arresting a person for a brief period of detention).

292 *See* Kagan, *supra* note 6, at 166 (expressing that to deprive someone of liberty, it must come within a set period of days).

293 *See* Removal Proceedings, 8 U.S.C. § 1229a(c)(3)(B) (2006) (stating the official documents needed for a conviction, such as the official judgement, verdict, and plea). *See also* Evidence of Criminal Conviction, 8 C.F.R. § 1003.41 (2017) (specifying and naming the documents needed for a criminal conviction).

294 To mirror probable cause hearings in the criminal justice system, such affidavits would be admissible even though the witness is not available for cross-examination. *See* Gerstein v. Pugh, 420 U.S. 103, 121–22 (1975) (expressing that the Court authorized fewer procedural rights in a probable cause hearing, e.g., one trial right that would not be available is the confrontation right to cross-examine witnesses).

295 *See* Lasch, *supra* note 3, at 187 (discussing statutory language giving broad discretion to officials).

296 *See id.* at 186 (addressing the authorization of immigration detainers and the steps necessary for the issuance of detainers).

within the ground of deportability.[297] Such a probable cause hearing can be combined with what is now the deportability decision at a master calendar hearing, so long as it happens within seventy-two hours.[298] Should DHS need more time to meet the higher "clear and convincing evidence" standard for deportability, however, these hearings can be separate.[299]

In the criminal context, probable cause hearings happen without the constitutional right to court-appointed counsel, as the probable cause hearing is not deemed to be a "critical stage" of the proceedings that is sufficiently important to the adversarial process to have the right to counsel attach.[300] I am not advocating that noncitizens obtain more process at the probable cause hearing than they would obtain if they were arrested for a crime.[301] However, because the detainee is without counsel, it is even more critical that the immigration judge require that the government actually prove that the noncitizen is deportable, and thus pretrial detention is justified.[302] It is important that this probable cause not merely be a rubber stamp on DHS's decision.[303]

If DHS cannot prove its case at the prompt probable cause hearing, then the detainee goes free. Nothing prevents DHS from bringing a deportation case against the noncitizen; the difference is that the noncitizen need not wait in detention while the government takes its sweet time building a case against him or her.[304] Free from detention, that

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297 *See supra* notes 178–81 (critiquing Joseph hearings). *See also* Kagan, *supra* note 6, at 162 ("[t]he central issues [in a *Gerstein* probable cause hearing] are neutrality, time, and automacity.").

298 *See* Cty. of Riverside v. McLaughlin, 500 U.S. 44, 59 (1991) (permitting the county to combine probable cause hearings with arraignments, so long as the probable cause hearing occurred within forty-eight hours).

299 *See* California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90, 93 (1981) (providing that the "clear and convincing" standard is meant to protect important interests in very few civil cases). This Article is not advocating for a right to counsel at this stage.

300 *See* Maine v. Moulton, 474 U.S. 159, 160 (1985) (expressing that to leave a person without counsel before trial might be more detrimental than during the actual trial itself and this deprivation should not be allowed). *See also* Gerstein v. Pugh, 420 U.S. 103, 112 (1974) (stating that to allow fewer compromises would mean to leave citizens at the mercy of the officers).

301 *See generally Gerstein*, 420 U.S. at 111 (describing the circumstances to warrant a probable cause arrest).

302 *See generally* Kagan, *supra* note 6, 142–43 (questioning whether indefinite detention of noncitizens that were found deportable was permitted by American immigration law).

303 *See Gerstein*, 420 U.S. at 112–13 (quoting *Johnson*, 333 U.S. at 13–14) ("[the Fourth Amendment's] protection consists in requiring that those inferences [which reasonable men can draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

304 *See* Morales v. Chadbourne, 793 F.3d 208, 218 (reasoning that ICE officials are welcome to go about their work in determining whether there is reasonable suspicion that someone

noncitizen has easier access to counsel, which in turn may help him or her avoid wrongful deportation.[305] Why does the right to a bond hearing before an immigration judge not satisfy the same concerns?[306] After all, a noncitizen may request that the immigration judge review DHS's initial decision to detain;[307] this bond hearing can happen at or before the first master calendar hearing.[308] There are several reasons why the right to a bond hearing does parallel a *Gerstein-Riverside* probable cause hearing.[309] First, in reality, the bond hearing does not necessarily happen quickly, since the detainee has only one opportunity to ask for such a bond hearing[310] and, because the detainee bears the burden of proof,[311] it is in the detainee's interest to get more time to adequately prepare the case.[312] Juan's case example demonstrates the delays that often occur before

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has violated the immigration laws; they just must let the person out of jail while they undertake such investigation).

[305] *See* Ingrid V. Eagly & Steven Shafer, Article: *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 3–4 (2015) (explaining that right to counsel on immigration matters has always been a right, but not one that the government pays for). Ingrid V. Eagly and Steven Shafer conducted a national study between 2007 and 2012 researching the scope and impact of attorney representation in immigration courts. *Id.* at 6. They analyzed over 1.2 million immigration removal cases over six years for the study, and concluded that detainees were five times less likely to obtain representation than nondetained respondents, and without representation, were more likely to lose their cases and be deported. *Id.* at 6. Thus, detention led to a greater likelihood of wrongful deportations. *Id.* at 31.

[306] *See id.* at 31 (providing that detainees who are eligible for release on bond remain in jail because they are too poor to pay for the actual bond amount).

[307] *See* Apprehension, Custody, and Detention, 8 C.F.R. § 236.1(c)(8) (2016) (addressing that the alien must demonstrate to the officer that a release after being detained would not pose a danger to society and the alien will appear for future proceedings). *See also* Custody/Bond, 8 C.F.R. § 1003.19 (2006) (providing that the bond amount is determined by review of an immigration judge pursuant to 8 C.F.R part 1236).

[308] The detainee has a right to request a bond hearing without waiting for a master calendar hearing, but many *pro se* detainees may not realize this. *See* Jurisdiction and Commencement of Proceedings, 8 C.F.R. § 1003.14(a) (explaining that proceedings before an immigration judge begins when the charging document is filed, but a charging document is not required to be filed for a bond proceeding). *See also* Wadhia, *supra* note 4, at 876 (describing that a detained noncitizen can file a request for bond even though the NTA has not been filed in immigration court).

[309] *See* Custody/Bond, 8 C.F.R. § 1003.19(e) (expressing the order of a bond determination).

[310] *See id.* (stating that in order for a bond redetermination to happen, there must be a showing that the alien's circumstances have changed materially).

[311] *See, e.g.*, *In re* Fatahi, 26 I. & N. Dec. 791, 795 (BIA 2016) (providing that the alien has the burden to show and prove that he is not a danger to society and persons). *See also In re* Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006) (detailing that the alien has the burden to show that he/she should be released on bond). *In re* Adenigi, 22 I. & N. Dec. at 1102, 1125 (1999) (stating that the respondent bears the burden of proof).

[312] *See* Deportable Aliens, 8 U.S.C. § 1227 (2008) (describing the timeline for typical bond hearing).

review of detention by an immigration judge.[313] Second, in the bond hearing, the *detainee* bears the burden of proving he is not a danger or a flight risk;[314] this is the opposite presumption of what exists at a probable cause hearing—a presumption of freedom, with the government justifying its decision to detain.[315] Finally, if DHS argues that the detainee fits within one of the many criminal grounds of deportability that trigger mandatory detention,[316] he does not even have the right to a bond hearing, unless he can prove that DHS is substantially unlikely to prevail on the mandatory detention charge.[317] So all ICE has to do is write a NTA, and the burden shifts to the detainee for all custody-related matters.[318]

Why does the *Joseph* hearing, which allows an immigration court to review whether a detainee is properly included in a mandatory detention category, not remedy the lack of a prompt probable cause hearing?[319] For one, there are significant critiques of the standard in a *Joseph* hearing, as detailed above.[320] Also, hearings only occur when the ground of removability is a mandatory detention ground.[321] For those like Carlos, who are removable on a non-mandatory detention ground, his only method of making the government prove its case is by filing a motion to terminate and litigating the issue of whether his crime actually makes him deportable. But, as demonstrated above, this could take weeks.[322]

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313 *See generally* Apprehension, Custody, and Detention, 8 C.F.R § 236.1 (defining the issuance of the notice to appear and when the respondent may be arrested and taken into custody).

314 *See* Holper, *supra* note 90, at 81-94 (discussing the burden of the detainee).

315 *See* McNabb v. United States, 318 U.S. 332, 343–44 (citing to a congressional statute requiring prompt probable cause hearings and stating: "[l]egislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard.").

316 *See* Apprehension and Detention of Aliens, 8 U.S.C. § 1226(c) (indicating that the Board has held that it is not necessary for DHS to charge the mandatory detention ground on the NTA to raise it as a bar to a bond hearing). *See also In re* Kotliar, 24 I. & N. Dec. 124, 126–27 (BIA 2007) (determining if this offense would give rise to a charge of removability).

317 *See In re* Joseph, 22 I. & N. Dec. 799, 800 (describing the judge's bond ruling if the alien is "properly included" in a mandatory is subject to the automatic stay).

318 *See id.* (describing that a permanent resident might not be properly included in a mandatory detention if before or after the prior removal case).

319 *See id.* (explaining that this determination is made by 8 C.F.R. § 3.19).

320 *See* Chacón, *supra* note 2 (expressing the gaps of rights and remedies of noncitizens in removal proceedings and how this encourages strict forms of policing in immigrant areas).

321 *See In re* Joseph, 22 I. & N. Dec. 799, 804 (BIA 1999) (showing that the only authority is confined to whether the Service had a good cause for charging respondent with removability under one of the sections of the Act).

322 *See id.* at 807 (stating that the immigration judge has discretion on the custody status bond and the judge can use any information that is available to make this determination).

B. Addressing Concerns with the Bifurcation of Rights

In proposing different rights for different types of removal proceedings, I am following the lead of other scholars who have paved this road.[323] In 2008, Peter Markowitz proposed that there should be a bifurcation of these different removal proceedings.[324] Markowitz proposed that expulsion of LPRs for crime should be a criminal proceeding, where all of the protections of a criminal trial attach.[325] For all other types of removal proceedings, they should be deemed civil, with the corresponding lack of procedural protections.[326] He draws the line at admission as a lawful permanent resident and writes that "[t]he well-founded recognition of permanent residents, and their precursor, denizens, as 'citizens' of a lesser status holding rights superior to other noncitizens justifies greater protection for this class of noncitizens."[327] Drawing on similar protections for lawful permanent residents, Kevin Johnson has made the case for the right to court-appointed counsel in removal proceedings only for lawful permanent residents.[328]

Through this proposal, I am in no way suggesting that those who entered illegally, who are deportable for being present in the United States, or others whose cases are more clearly in the extended border control realm, do not have Fourth Amendment rights.[329] Indeed, this

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323 *See* Markowitz, *supra* note 209, at 290 (establishing that noncitizens who are the subject of removal and traditional proceedings have a lack of procedural protections).

324 *See id.* (illustrating that this contribution explains a distinction between "exclusion proceedings" and "expulsion proceedings").

325 *See id.* at 290–91 (reasoning that the bifurcated approach excludes noncitizens from entering into civil proceedings).

326 *See id.* (reviewing that the Supreme Court test that determines civil or criminal nature of how proceedings should go provides clear guidance on dividing the line).

327 *See id.* at 292. Markowitz justifies this distinction by reasoning that the issues in an exclusion case—defense from outside aggression and self-determination—justify the greater power of the government in the exclusion realm. *Id.* at 293. Expulsion is a tool used to protect against danger within our society, and the central purpose of such protection is to incapacitate residents who pose a threat or danger. *Id.*

328 *See* Johnson, *supra* note 276, at 2402 (expressing that a person does have a privilege of being represented by counsel to removal proceedings, but a noncitizen does not have this guaranteed by the government during removal proceedings). *See also* Mark Noferi, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. DOV. RTS. & ECON. DEV. 533, 536–37 (arguing that only lawful permanent residents should have the right to court-appointed counsel in *Joseph* hearings).

329 *See* Au Yi Lau v. USINS, 445 F.2d 217, 223 (D.C. Cir. 1971) ("[s]ince aliens in this country are sheltered by the Fourth Amendment in common with citizens, such a reading of the Congressional mandate [the immigration statute authorizing warrantless arrests] must be controlled by the constitutional standards governing similar detentions made by other law enforcement officials.").

would be counter to Supreme Court case law.[330] In the 1970s, the Supreme Court in *Almeida-Sanchez v. United States*[331] and *United States v. Brignoni-Ponce*[332] applied the Fourth Amendment to border agents' interactions with noncitizens.[333] More recently in 2012, the Supreme Court in *Arizona v. United States* reiterated that the Fourth Amendment applies to immigration arrests.[334] That the Fourth Amendment applies when an ICE officer arrests a noncitizen for deportation is one of the few positive outcomes of the 1984 *Lopez-Mendoza* decision, where the Court refused to apply the exclusionary rule, except when immigration officers committed egregious violations of the noncitizen's Fourth Amendment rights.[335] Because the *Lopez-Mendoza* decision, which has been heavily critiqued by scholars,[336] dealt only with the remedy of evidentiary exclusion, it implicitly recognized that the Fourth Amendment applies to such an arrest,[337] as subsequent courts have clarified.[338] Similarly, the Court's

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330 *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (establishing that the search of petitioner's car is deemed warrantless and made without probable cause, violating the Fourth Amendment).

331 *See id.* (explaining that the search of the automobile could not be justified as probable cause due to officers lacking warrant or reason).

332 *See* 422 U.S. 873 (1975) (describing how the Fourth Amendment does not allow a stop and question of a vehicle's occupants regarding immigration status).

333 *See id.* at 878 (explaining that the Fourth Amendment applies to all seizures of the person, including short arrests); *Almeida*, 413 U.S. at 272–73 (providing that searches may take place at other places other than the border itself).

334 *See* 567 U.S. 387, 414 (2012) (determining that the person's immigration status is to be determined before he/she is released).

335 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (holding that immigration officers can exclude evidence of peaceful arrests of noncitizens).

336 *See* Chacón, *supra* note 2, at 1624 (proposing the application of the Fourth Amendment exclusionary rule in removal proceedings). *See also* Burch Elias, *supra* note 2, at 1115 (arguing for an application of the Fourth Amendment exclusionary rule due to widespread constitutional violations by immigration officers and a fundamental change in immigration court practice since *Lopez-Mendoza* was decided); David Gray et al., *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 25 (2012) (criticizing *Lopez-Mendoza* Court's reasoning that law enforcement officers are primarily interested in criminal law enforcement, not immigration enforcement, and that imposing the exclusionary rule in immigration proceedings therefore offers little or no additional deterrence benefit beyond that provided by the threat of suppression in criminal trials as "of course. . ., another iteration of the spectacular non sequitur").

337 *See* M. Isabel Medina, *Ruminations on the Fourth Amendment: Case Law, Commentary, and the Word "Citizen,"* 11 HARV. LATINO L. REV. 189, 196 (2008) (finding that this exclusionary rule does not apply in deportation proceedings, but evidence could be admitted in a deportation proceeding to prove the deportability of an undocumented noncitizen). *See also id.* ("[t]he *Lopez-Mendoza* opinion accepted without question the principle that the Fourth Amendment applied to undocumented persons in a criminal proceeding").

338 *See, e.g.*, Yanez-Marquez v. Lynch, 789 F.3d 434, 450 (4th Cir. 2015) (describing that the exclusionary rule applies where the evidence has been obtained by violation of the Fourth Amendment); Oliva-Ramos v. USAG, 694 F.3d 259, 271–72 (3d Cir. 2012) (discussing that the

opinion in *INS v. Delgado*[339] also started with the assumption that the Fourth Amendment applied when immigration agents engaged in a factory raid, where they interrogated noncitizens about their right to be in the United States.[340]

Nor does the Court's 1990 decision in *United States v. Verdugo-Urquidez* foreclose the argument that noncitizens who entered illegally have no claims to Fourth Amendment rights.[341] In *Verdugo-Urquidez*, the Court held that a Mexican citizen could not claim suppression as a remedy for a Fourth Amendment violation when U.S. federal agents searched his home in Mexico after they had arrested him in Mexico and extradited him to the United States for prosecution.[342] The Court examined the history of the Fourth Amendment's reference to "the people" and found that unlike other amendments (such as the Fifth Amendment that applies to "persons" and the Sixth Amendment that applies to the "accused"), the Fourth Amendment only applies to citizens of the United States or those with voluntary substantial connections to the political community of the United States[343] Because he had not established "voluntary substantial connections" to the United States, Mr. Verdugo-Urquidez could not claim Fourth Amendment rights.[344] While the Court stated that the *Lopez-Mendoza* Court had not expressly decided that the Fourth Amendment applied to "illegal aliens in this country,"[345] the Court did suggest that the Fourth Amendment should apply to noncitizens who are illegally in the United States because "the illegal aliens in *Lopez-Mendoza* were in the United States voluntarily and presumably had accepted some societal obligations," which distinguished their cases from that of Mr. Verdugo-

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exclusionary rule should apply in deportation proceedings involving Fourth Amendment violations); Kandamar v. Gonzales, 464 F.3d 65, 70–71 (1st Cir. 2006) (explaining that the exclusionary rule should not apply because this is a case in violation of the Fourth Amendment); Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006) (holding that stopping aliens without reasonable suspicion infringed on Fourth Amendment rights).

339 *See* 466 U.S. 210, 232 (1984) (discussing that workers were questioned on if they were deportable aliens and were subject to questioning by INS agents).

340 *See id.* at 218–19 (explaining that the workers' freedom of movement was restricted due to the workers obligations to their employer). In this case, the Court found that the workers were free to leave, despite the INS agents standing at each doorway; therefore, no unlawful seizure had occurred that would require the INS to prove probable cause. *Id.*

341 *See* 494 U.S. 259, 274–75 (1990) (explaining that the facts in Verduga-Urquidez's case do not call for a comprehensive Fourth Amendment analysis).

342 *See id.* at 262–62, 274–75 (outlining the facts from *Verduga-Urquidez*).

343 *See id.* at 264–66 (highlighting the court's reasoning in *Verduga-Urquidez*).

344 *Id.* at 271.

345 *Id.* at 272.

Urquidez, who "had no voluntary connections with this country that might place him among 'the people' of the United States."[346]

While I presume that Fourth Amendment rights exist for all noncitizens in the United States,[347] in this Article, my proposal deals more narrowly with the *remedy* for violations of the Fourth Amendment right to have one's detention promptly reviewed by a neutral judge.[348] Other remedies would still be available for violations of noncitizens' Fourth Amendment rights.[349] For example, when the Fourth Amendment violation is egregious, the exclusionary rule will apply in removal proceedings.[350] Also, noncitizens may complain about officer conduct during an arrest through DHS's own regulations.[351] These regulations deal exclusively with the conduct of an officer when arresting a noncitizen, instead of the length of time before which a noncitizen should be brought before a neutral judge.[352] I do not suggest that these remedies are adequate; rather, I leave the critique of these remedies to others,

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346 *Id.* at 272–73 (stating the plurality view that the Fourth Amendment generally does not apply to illegal aliens). Courts have disagreed about whether the plurality opinion's discussion with respect to whether the Fourth Amendment applies to illegal aliens is dicta or binding precedent. *See, e.g.*, Martinez-Aguero v. Gonzalez, No. EP-03-CA-411(KC), 2005 WL 388589, at *5 (W.D. Tex. Feb. 2, 2005), *aff'd and remanded*, 459 F.3d 618 (5th Cir. 2006) (finding that a border cross-card holder had Fourth Amendment rights and stating that "[t]he definition of 'the people' advanced in *Verdugo-Urquidez* is therefore considered as persuasive authority to the extent it applies to resolution of the present motion for summary judgment."). *See also* United States v. Guitterez, 983 F.Supp. 905, 915 (N.D. Cal. 1998) ("[i]t is also noteworthy that a majority of the justices did *not* subscribe to Chief Justice Rehnquist's [*Verdugo-Urquidez*] opinion, particularly with respect to his discussion and analysis regarding the scope of the Fourth Amendment as it applies to illegal aliens" (emphasis in original)); United States v. Esparza-Mendoza, 265 F.Supp.2d 1254, 1261 (D.Utah 2003) ("[t]his court is not at liberty to second-guess Justice Kennedy's direct statement that he was joining the Court's opinion.").

347 *See* ADMINISTRATIVE AND EXPEDITED REMOVAL: IMMIGRATION LAW'S NEXT FOURTH AMENDMENT PROBLEM (work in progress) (on file with author) (making this argument in much more detail in another Article which is on file with the author).

348 *See supra* notes 52–65 and accompanying text (discussing the need for remedies against violations of Fourth Amendment protections).

349 *See Lopez-Mendoza*, 468 U.S. at 1050–51 (exemplifying an available remedy).

350 *See id.* (explaining the Court's interpretation of "egregious"). *See also* Elizabeth A. Rossi, *Revisiting* INS v. Lopez-Mendoza: *Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477, 480–81 (2013) (articulating an application *Lopez-Mendoza* exceptions based on egregiousness); *Yanez-Marquez*, 789 F.3d at 459–60 (surveying the application of *Lopez-Mendoza* exceptions based on egregiousness).

351 *See* 8 C.F.R. § 287.10(a) (stating procedures for reviewing violations by immigration officers). *See also* 8 C.F.R. § 287.8 (outlining standards for immigration officers pertaining to enforcement activities).

352 *See* 8 C.F.R. § 287.10 (giving the process for noncitizen complaints). *See generally* 8 C.F.R. § 287.8(c)(2)(vi) (noting that the regulations only discuss prompt review by a magistrate judge when a person is arrested and charged with a criminal violation).

particularly those who have called upon the Supreme Court to revisit its decision in *Lopez-Mendoza*.[353]

1. Proposed Solution: Use of Immigration Judges for Post-Entry Social Control Probable Cause Hearings

My proposal is that immigration judges should preside over probable cause hearings for any admitted noncitizen who is charged as deportable for a criminal conviction under 8 U.S.C. § 1227(a)(2); these hearings must occur within seventy-two hours of arrest.[354] One critique of this proposal is the use of immigration judges to perform the "neutral magistrate" function.[355] Even an immigration judge, Judge Dana Marks, has stated that to an outsider, it might appear that an institutional bias is embedded within immigration judges' decisions when they work within an enforcement agency, the Department of Justice.[356] This is made worse when there are allegations of politics playing into the hiring of immigration judges, as happened during the George W. Bush administration.[357]

The history of why immigration judges exist within their current subagency, the Executive Office for Immigration Review, contributes to this conversation.[358] Before the Supreme Court's 1950 decision in *Wong Yang Sung v. McGrath*,[359] there were "presiding inspectors," who presided over deportation hearings, in the way an immigration judge would

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353 *See, e.g.*, Burch Elias, *supra* note 2, at 1112–14 (critiquing the remedies for the problems in the current adjudication process). *See also* Rossi, *supra* note 350, at 530 (exploring possible remedies for the problems in the current adjudication process); *The Role of the Exclusionary Rule in Removal Hearings*, 126 HARV. L. REV. 1633, 1635 (2013) (explaining the role of the exclusionary rule in deportation proceedings).

354 *See supra* notes 41–51 and accompanying text (discussing the current process of immigration hearings).

355 *See supra* notes 41–51 and accompanying text (referencing the author's proposal).

356 *See* Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 AM. BAR ASS'N JJ. J. 20, 21–22 (2015) ("[t]he immigration court system is housed in a law enforcement agency, the United States Department of Justice, which is closely aligned with those who are the prosecutors in our courts (Department of Homeland Security (DHS) trial counsel). This structural arrangement has caused many members of the public we serve, and the attorneys who represent them, to doubt our decisional independence.").

357 *See An Investigation of Allegations of Politicized Hiring by Monica Goodling and other Staff in the Office of the Attorney General*, U.S. DEPT. OF JUSTICE, (July 28, 2008), 69, http://www.justice.gov/oig/special/s0807/final.pdf [https://perma.cc/5E9A-72YS] (finding that members of the Bush administration violated civil service laws and departmental policy in selecting candidates for immigration judge positions based on political ties and recommendations rather than professional qualifications).

358 *See* Yang Sung v. United States, 339 U.S. 33, 35 (1950) (presenting the question addressed by the Court).

359 *See id.* (noting the historical role of presiding inspectors).

today.[360] Except that these presiding inspectors worked for the INS; the only separation was that the presiding inspector was not permitted to hear a case in which he had been the investigating officer unless the noncitizen consented.[361] The Supreme Court decided in *Wong Yang Sung* that the Administrative Procedures Act (APA)'s requirement of separating judges from prosecutors applied to deportation proceedings; this decision was a watershed moment that completely upended the INS.[362] When Congress, in 1950, decided that deportation proceedings would not be subject to the APA because that would be too costly and too cumbersome, the culture within the INS had shifted.[363] Even though the Supreme Court later confirmed that the APA's hearing requirements did not apply to deportation proceedings,[364] it was too late; the functions already had separated.[365] The INS created special inquiry officers to conduct hearings and make decisions, and in 1956, there came about radical changes to the INS's hearing structure.[366] Finally, in 1983, the EOIR was created, thus finally divorcing the former INS from the immigration judges.[367]

If immigration judges are once-upon-a-time enforcement agents, then why should the probable cause hearing be assigned to an immigration judge instead of keeping the decision with a separate ICE officer?[368] For one, a regulation binds immigration judges to make unbiased decisions;[369]

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360 *See generally* Rawitz, *supra* note 148, at 686–87 (chronicling the history of the separation of functions between the INS and what ultimately became IJs under the newly-created EOIR in 1983).

361 *See generally id.* at 687 (discussing the role of presiding inspector).

362 *See generally id.* at 688–89 (noting implications of the Court's holding that the APA required separating judges from prosecutorial roles).

363 *See generally id.* (explaining the evolution of INS procedures).

364 *See* Marcello v. Bonds, 349 U.S. 302, 310 (1955) (clarifying that the APA does not apply to deportation hearings).

365 *See id.* at 306–11 (elaborating on the changes of law, including the changes made in 1952).

366 *See* Rawitz, *supra* note 148, at 690 (showing that these radical changes included: (1) special inquiry officers were removed from the operational supervision by INS District Directors, and placed under a Chief Special Inquiry Officer; (2) the Order to Show Cause replaced the warrant for arrest and pleadings were introduced; (3) the examining and prosecuting officer functions were mandatory in every case in which deportability was contested; and (4) there was a creation of a "record file" for the special inquiry officers to use, which insulated him from prejudicial material that might be contained in the noncitizen's general file).

367 *See* Rawitz, *supra* note 148, at 691.

368 *See generally id.* (noting the separation of functions between the INS and what ultimately became IJs under the EOIR after 1983).

369 *See* 8 C.F.R. §§ 1003.1(d)(2), 1003.10(b).

but ICE has no such regulation.[370] Also, Janet Gilboy's discussion of the "values dissensus . . . at the heart of the current interinstitutional differences" in her empirical study of immigration judge bond hearings in Chicago in the 1980s also helps to answer this question.[371] In this study, she saw that immigration judges reduced bonds set by an INS officer in two-thirds of the cases.[372] Gilboy writes how INS focuses on immigration enforcement, with bail as an important tool; immigration judges can strike a different balance between effective immigration law enforcement and protection of liberty interests.[373] Other scholars have continued this conversation, commenting on the institutional biases that cause ICE to seek detention in more cases.[374]

In the current administration, former DHS Secretary John Kelly (now White House Chief of Staff) has written memos interpreting President Trump's Executive Orders that prioritize detaining and deporting as many eligible noncitizens as possible.[375] Former press secretary Sean Spicer has stated that such memos have taken the "shackles off" of ICE officers, allowing them to deport and detain as many people as possible and increasing their numbers.[376] ICE Acting Director Thomas Homan

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370 *Cf.* Gerstein v. Pugh, 420 U.S. 103, 117 (quoting Coolidge v. New Hampshire, 402 U.S. 443, 449 (1971) ("[a] prosecutor's responsibility to law enforcement is inconsistent with the constitutional rule of a neutral and detached magistrate").

371 Janet Gilboy, *Administrative Review in a System of Conflicting Values*, 13 L. & SOC. INQUIRY 515, 523–25 (1988).

372 *See id.* (discussing the role played by various levels of adjudicatory officers).

373 *See id.* at 523–25 (noting the differing values of adjudicatory officers, and how those values impact the adjudication process).

374 *See, e.g.*, Michele Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. L.J. 197, 239 (1999) (discussing "bureaucratic biases" favoring detention over release of asylum seekers); Rabin, *supra* note 285, at 199 (explaining ICE's agency culture, which perceives any noncitizen with a criminal conviction as a threat, regardless of the circumstances of that conviction, and arguing that the Obama-era agenda of prosecutorial discretion largely failed because it inadequately accounted for ICE agency's culture).

375 *See* EXECUTIVE ORDER: ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES (Jan. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united [https://perma.cc/X2FN-UP42] (showing Trump's stance on immigration enforcement). *See also* EXECUTIVE ORDER: BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS (Jan. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements [https://perma.cc/V44P-9XEJ] (highlighting Trump administration's policy approach); Kelly, *Border Security Implementation Memo*, *supra* note 18 (describing Trump's executive approach to this area of immigration law on President Trump's administration); Kelly, *Enforcement Memo*, *supra* note 18 (noting the current executive branch approach to this area of immigration law on President Trump's administration).

376 *See Press Briefing by Press Secretary Sean Spicer*, THE WHITE HOUSE OFFICE OF PRESS SECRETARY 13 (Feb. 21, 2017), https://www.whitehouse.gov/the-press-office/2017/02/21/

stated to the House Appropriation Committee's Homeland Security Subcommittee, "[i]f you're in this country illegally and committed a crime by entering this country, you should be uncomfortable. . . [y]ou should look over your shoulder, and you need to be worried." [377] Given ICE's preexisting culture that favors detention and deportation, an institutional ethos that has only grown during the Trump administration, one can see the value of having an immigration judge, not an ICE officer, decide probable cause.[378]

There are also practical considerations with immigration judges taking on this new role. Immigration judges already have crushing caseloads,[379] especially for detention cases, which by directive by the Chief Immigration Judge must be completed within sixty days.[380] To add these cases into the mix would clearly burden the judges.[381] This conclusion, however, assumes that EOIR cannot hire more judges, or that the money to do so is not available.[382] In recent years, when Congress funded the Department of Homeland Security each year, there has been a "bed mandate" that required funding to detain 34,000 immigration detainees each year.[383] Many assume this money is necessary for the country's safety without questioning this expense. If we authorize funding for 34,000 immigration detainees, then we should also authorize funding for immigration judges to rule on the legality of detaining 34,000 people (although my proposal only speaks to the post-entry social control

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press-briefing-press-secretary-sean-spicer-2212017-13 [https://perma.cc/SR44-KP2Z] (explaining the Trump administration's stance on immigration laws).

377 Elise Foley, *ICE Director to All Undocumented Immigrants: "You Need to Be Worried"*, HUFFINGTON POST (June 13, 2017), http://www.huffingtonpost.com/entry/ice-arrests-undocumented_us_594027c0e4b0e84514eebfbe?utm_source=AILA+Mailing&utm_campaign=62b03d74b3-AILA8_6_15_17&utm_medium=email&utm_term=0_3c0e619096-62b03d74b3-290828949 [https://perma.cc/3XSA-D3W4].

378 *See* Rabin, *supra* note 285, at 199 and accompanying text (2014) (discussing ICE's agency culture).

379 *See* Madison Park, *By the Numbers: Why Immigration Cases Take So Long*, CNN (Apr. 12, 2017), http://www.cnn.com/2017/04/12/politics/immigration-case-backlog-by-the-numbers/index.html. [https://perma.cc/C59L-HPQN] ("542,411, this is the number of pending cases in immigration court as of February. The country's 58 immigration courts are already dealing with a crush of more than a half a million backlogged cases . . . ").

380 *See generally id.* (commenting on immigration judges' caseloads).

381 *See id.* (showing a large backlog of cases).

382 *See id.* (inferring that judges are not available for this task).

383 *See, e.g.*, Department of Homeland Security Appropriations Act of 2015, Pub. L. No. 114–4, March 4, 2015, 129 Stat. 39 (2015) (providing a bed mandate for funding. *See also* César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1453, 1505 (2015) (commenting of the statutory bed mandate for funding). Only this year did Congress take the mandate out, mandating instead that the Government Accountability Office review ICE's current methods for determining detention resource requirements. *Id.*

detainees, so other immigration detainees would not need additional judges for probable cause hearings).

There is also the critique that immigration judges should not be "policing the police."[384] Jennifer Chacón has argued that immigration courts were not designed to police the police in the same manner as state court judges, who traditionally monitor the enforcement conduct of police officers.[385] Also, she writes that immigration judges are not only overburdened, but their decisions on Fourth Amendment rights violations are heavily constrained by a body of law that formed at a time when immigration enforcement looked very different than it does today.[386] Requiring judges to hold prompt probable cause hearings in post-entry social control cases, however, does not require judges to rule on Fourth Amendment issues that would arise when a noncitizen seeks the remedy of suppression.[387] Rather, the judge looks at whether the law and conviction records support a finding of probable cause for the detainee to be held pursuant to the violation of the Immigration and Nationality Act—i.e., whether that crime is a "crime involving moral turpitude," "crime of domestic violence," or other category of crime that makes him deportable.[388] This is not the type of "policing the police" that examines the actions of ICE officers when they arrest a detainee.[389] Indeed, it is the sort of decisions immigration judges make on a regular basis, whenever a noncitizen who is deportable for a crime asks the immigration judge to hold DHS to its burden of proof.[390] The proposal in this Article merely requires that they make these decisions more quickly, and in every single case where DHS charges deportability for a crime.[391]

VI. CONCLUSION

The time has come for courts to take noncitizens' Fourth Amendment rights seriously. It is not enough that ICE—the police and prosecutor—

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384 *See* Chacón, *supra* note 2, at 1568–69 (arguing that police acts are not generally meant to be policed by immigration courts).

385 *See id.* at 1568 ("[u]nfortunately, unlike state and federal courts, which have long overseen police activity, immigration courts were not designed to police the police.").

386 *See id.* at 1569 (displaying the evolving deficiency in this area of immigration law).

387 *See id.* (discussing the way courts are administratively designed).

388 *See generally* 8 U.S.C. § 1227(a)(2) (defining various deportable offenses).

389 *See* Chacón, *supra* note 2, 1566–67 (criticizing the immigration system for lacking a system that puts a check on deportation detention).

390 *See generally* 8 U.S.C. § 1229a(c)(3) (explaining that in the case of a noncitizen who has been admitted, the government must prove deportability by clear and convincing evidence).

391 *See, e.g.*, Amanda Frost, *Learning from Our Mistakes: Using Immigration Enforcement Errors to Guide Reform*, 92 DENV. U. L. REV. 769, 774–75 (2015) (describing cases of Pedro Guzman and Wilfredo Garza, both of whom were U.S. citizens that ICE erroneously believed to be illegally in the United States and deported).

decide as quickly as they can whether a noncitizen is deportable for post-entry conduct such as a criminal conviction. The promise of the Fourth Amendment, as interpreted by the Supreme Court in *Gerstein* and *Riverside*, tells us that review of a warrantless arrest must happen promptly by a neutral judge. The injustices of immigration law's lack of such a prompt review of detention is highlighted when one sees that many LPRs suffer time away from their families, employment, and property ties, all because an ICE officer believed him or her to be deportable for a post-entry act. ICE officers can and have been proven to be wrong in their determinations of who was deportable and thus subject to immigration detention.[392] The numerous detentions for deportation that already have occurred—with many more likely to occur—highlight the need for automatic, prompt review by a judge of ICE's detention decisions, at least in the context of post-entry social control deportations.

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[392] *See id.* (providing the consequences of poor law enforcement and adjudication procedures).