Studying the Hazy Line Between Procedure and Substance in Immigrant Detention Litigation

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Introduction

At age six, Hyung Joon Kim came to the United States with his family. Two years later, he became a lawful permanent resident (LPR).[1] Mr. Kim grew up in California, where he attended public schools. In 1996, at age 18, his life was irreparably changed. After breaking into a tool shed with high school friends, he was convicted of burglary. He earned an early release after serving two months in jail and was able to start his freshman year at the University of California, Santa Barbara. Within the next year, he shoplifted twice, stealing some computer games, batteries, an extension cord, and phone cards, amounting to less than $100. Later, Mr. Kim expressed profound regret for the impact of his actions on his family, saying, "I was young and dumb."[2]

The impacts on Mr. Kim and his family were greater than he ever could have imagined because of the chance timing of his last conviction for "petty theft with priors." He was convicted right after the 1996 Illegal Immigration Reform and Immigrant Responsibility Act expanded the definition of what qualifies as an aggravated felony requiring mandatory, no-bond detention for immigrants.[3] The Immigration and Naturalization Service (INS) initially charged him as deportable, arguing that this last shoplifting charge was an aggravated felony within the newly expanded mandatory detention. It later added his two past crimes involving moral turpitude as justifying both his detention and deportation.[4] Consequently, a day after being released from

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[1] *See* Margaret Taylor, *The Story of* Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* Immigration Stories 343, 358 (David A. Martin & Peter H. Schuck eds., 2005).

[2] *Id.* at 343.

[3] *See* Illegal Immigration Reform and Immigration Responsibility Act, 8 U.S.C. §§ 1101, 1221, 1324, 1363a (1997).

[4] As the case made its way through the court, the charge that Mr. Kim's conviction was an aggravated felony under immigration law fell into question. In an unrelated case, the Ninth Circuit held that a California conviction for petty theft was not an aggravated felony. *See* United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir 2002). After this development, INS amended the charging document to add the allegation that Mr. Kim had been convicted of two

serving his criminal sentence, INS detained him without the possibility of a bond.[5]

While Mr. Kim fought deportation through his immigration case, he also challenged his mandatory detention in the federal courts through a habeas corpus petition, claiming that the no-bail civil detention violated his right to due process as a lawful permanent resident because of the restraint on his liberty. In 1999, a district court agreed, ordering that the government provide him with a bond hearing—which resulted in his release.[6] The Ninth Circuit affirmed the district court's decision, and INS later sought certiorari review from the Supreme Court.

The Supreme Court ultimately ruled against Mr. Kim, distinguishing his case from prior precedent, *Zadvydas v. Davis*.[7] In the 2001 *Zadvydas* opinion, the Court found an immigrant's detention unlawful, as it was "indefinite" and "potentially permanent."[8] The Court held that the statute authorizing no-bond detention of those ordered deported permits detention only for a period reasonably necessary to complete deportation.[9] The Court reasoned that because of the civil, non-punitive nature of immigrant detention, due process requires strong justifications to outweigh the individual liberty interest at stake.[10] In contrast, two years later in *Demore v. Kim*, the Court upheld the mandatory, no-bond detention of Mr. Kim and other lawful permanent residents, finding their detention constitutionally permissible "for the brief period necessary for their removal proceedings."[11]

The key difference in these cases was the Court's understanding of the length of detention, which lead to starkly different outcomes. In the *Kim* opinion, statistics about the prevalence of extended detention played a key role in defining the bounds of no-bond mandatory detention during removal proceedings. The Court relied on statistics provided by the Executive Office of Immigration Review (EOIR) showing that the average case completion time for immigrants held under mandatory detention was less than two months for cases that are not appealed, and approximately four months for the fifteen percent of these cases that are appealed within the agency. Relying on these statistics, the Court had found detention times during removal proceedings to be generally brief—and therefore constitutionally permissible. However, these statistics were both faulty and misinterpreted. Thirteen years later, the Acting Solicitor General wrote a letter to the Supreme Court

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crimes involving moral turpitude, which provided an independent justification for both his deportability and his no-bond detention. *See* Taylor, *supra* note 1, at 357–58 (citing Br. of Pet'r at 4 n.2, Demore v. Kim, 538 U.S. 510 (2003)).

[5] *See id.* at 358.

[6] *See* Kim v. Schiltgen, No. C 99-2257, 1999 WL 33944060, at *9 (N.D. Cal. Aug. 11, 1999).

[7] 533 U.S. 678 (2001).

[8] *Id.* at 691.

[9] *See id.* at 699–700.

[10] *Id.* at 690.

[11] Demore v. Kim, 538 U.S. 510, 513 (2003).

stating that the statistics the Court relied on were erroneous.[12] The most significant revelation from that letter was that cases on appeal within the agency took over a year to be completed on average, rather than approximately four months.[13] Yet with no subsequent action from the Supreme Court, this correction, alongside the Court's earlier decision in *Zadvydas*, was provided too late to shift the implementation of the *Demore* decision in the lower courts.

Despite the incredibly high stakes, we are no closer to clear answers regarding the legal limits of immigrant detention. Since the *Demore* and *Zadvydas* opinions were announced in the early 2000s, the numbers of immigrants[14] detained on an average day and per year have both more than doubled.[15] In 2019, more than half a million immigrants were held in detention at some point,[16] and even following a precipitous drop in 2021 because of border closures, more than a quarter of a million immigrants were detained in 2022.[17] Mass detention has become widespread and normalized, yet little is known about the scope and scale of prolonged detention.

The boundaries of when immigrant detention becomes illegal have continued to be litigated through a series of decisions since *Zadvydas*, with at least one major immigrant detention case appearing on the Supreme Court's docket every term for the last five years.[18] Most of these cases raised questions of statutory interpretation—rather than direct constitutional challenges—and in all of them, the Supreme Court ruled for the government, declining to recognize further legal limits on immigrant detention.[19] For ex-

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[12] *See* Letter from Ian Heath Gershengorn, Acting Solicitor General, to Hon. Scott S. Harris, Supreme Court Clerk, 2 (Aug. 26, 2016), http://online.wsj.com/public/resources/documents/Demore.pdf [https://perma.cc/LJ3S-LV7W].

[13] *See id.* at 3.

[14] Throughout this article, we use the term "immigrant" broadly to mean those in the United States who do not have U.S. citizenship.

[15] *See* Emily Kassie, *Detained: How the US Built the World's Largest Immigrant Detention System*, THE GUARDIAN (Sept. 24, 2019), https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump [https://perma.cc/DS3C-WY8W].

[16] *See id.* For this statistic and all immigration agency issued statistics, the year refers to the fiscal year starting September 1.

[17] *See CBP vs ICE Book-Ins to Detention*, TRAC IMMIGR. (2022) https://trac.syr.edu/immigration/detentionstats/book_in_agen_program_table.html [https://perma.cc/6X59-UP89].

[18] *See, e.g.*, Garland v. Aleman Gonzalez, 142 S. Ct. 2057 (2022); Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022); Johnson v. Guzman Chavez, 141 S. Ct. 2271 (2021); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020) (holding that habeas petitions cannot be used to challenge legal or constitutional errors by an asylum officer in expedited removal proceedings that resulted in continued detention); Nielsen v. Preap, 139 S. Ct. 954 (2019); Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[19] *See, e.g.*, *Arteaga Martinez*, 142 S. Ct. at 1833 (2022) (holding that statute permits detention without bond of immigrants in withholding-only proceedings for more than six months); *Aleman Gonzalez*, 142 S. Ct. at 2064–65 (interpreting statute to bar any district or appellate court from enjoining detention or deportation provisions on a class-wide basis); *Guzman Chavez*, 141 S. Ct. at 2283–84 (2021) (interpreting statute authorizing no-bond detention of those ordered removed applies to immigrants in withholding-only proceedings); *Thuraissigiam*, 140 S. Ct. at 1970–71 (2020) (holding that habeas petitions cannot be used to challenge legal or constitutional errors by an asylum officer in expedited removal proceedings that

ample, in June 2022, the Court decided that previously deported immigrants who re-enter the United States and are seeking protection from persecution are not statutorily entitled to bond hearings after their detention becomes prolonged.[20] Importantly, the Court declined to address the question of whether prolonged detention of those immigrants might be unconstitutional.[21] And despite some speculation that the Court could overrule *Zadvydas*, the opinion reaffirmed that *Zadvydas*' holding recognizing constitutional concerns in prolonged immigrant detention has not been abrogated.[22] A sister case considered in 2022 found a statutory provision to bar class-wide injunctions by district or appellate courts considering challenges to immigrant detention.[23] These decisions, and others over the past five years, set the stage for continued litigation of prolonged detention, shifting from statutory arguments to constitutional ones and from class-wide challenges to individual habeas suits.[24]

This ongoing litigation is one facet of the debate about the role of detention in the immigration system.[25] In this debate, empirically testable propositions—such as the average length of detention of immigrants in different types of removal proceedings—remain at the core of how courts, agencies, and advocates are grappling with this issue. Despite the doctrinal importance of these empirically testable facts, there is scant research on these topics, and

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result in continued detention); *Nielsen*, 139 S. at 964–65 (holding that statute requiring no-bond detention of certain immigrants "when . . . released" from criminal custody permits detention even where the immigration arrest is years later); *Jennings*, 138 S. Ct. at 848 (2018) (finding that statutes that direct that the agency "shall detain" certain immigrants are unambiguous and do not permit periodic bond hearings).

[20] *See Arteaga-Martinez*, 142 S. Ct. at 1833.

[21] *Id.* at 1835.

[22] *Id.* at 1834 ("*Jennings* did not overrule or abrogate *Zadvydas*. But the detailed procedural requirements imposed by the Court of Appeals below reach substantially beyond the limitation on detention authority recognized in *Zadvydas*."); *id.* at 1836 (Thomas, J., concurring).

[23] *See Gonzalez*, 142 S. Ct. at 2062–63.

[24] *See Arteaga-Martinez*, 142 S. Ct. at 1833; *Jennings*, 138 S. Ct. 830. While these legal issues have arisen from habeas petitions in the past, they are increasingly also surfacing in the wave of litigation from conservative states challenging federal government immigration policy. For example, in the lawsuit brought by Texas and Louisiana to challenge DHS Secretary Mayorkas's authority to set priorities for the exercise of agency discretion in immigration enforcement, the States have argued that the statutory provisions—directing that the immigration agencies "shall take into custody" certain immigrants or "shall detain" others—require detention with no discretion to consider release. Brief for Respondents, United States v. Texas, No. 22-58, at 24–28 (Oct. 18, 2022). The statutory interpretation of these detention provisions in that case, arising from a challenge brought under the Administrative Procedures Act, could have far reaching consequences for habeas suits raising individual due process claims.

[25] While this article principally focuses on litigation and the constitutional concerns with immigrant detention, this is only one facet of a rich and ongoing debate over the appropriate role of detention and incarceration in society. Increasingly, scholars, advocates, and organizers are pushing for the abolition of immigrant detention, drawing on decades of groundwork laid by prison abolitionists. *See, e.g.*, CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS (2019); Silky Shah, *The Immigrant Justice Movement Should Embrace Abolition*, THE FORGE (Mar. 4, 2021), https://forgeorganizing.org/article/immigrant-justice-movement-should-embrace-abolition [https://perma.cc/3Z7Y-L5V2].

what little data exists is provided by the Department of Homeland Security (DHS) with no outside review, notwithstanding past errors.[26] Even less is known about how courts are adjudicating immigrants' habeas petitions, which are the only legal avenue for challenging unlawful detention in the federal courts (as opposed to within the immigration agencies). Despite the important role that empirically testable assumptions play in shaping doctrinal decisions in these high-stakes cases, many core legal questions remain unanswered.[27]

While many scholars are researching adjacent immigrant detention areas,[28] there has been little empirical investigation into prolonged detention and habeas challenges to immigrant detention.[29] Most immigration scholars with a focus on detained immigrants have made the normative case for

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[26] *Cf.* Transcript of Oral Argument at 24, Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022) (No. 19-896) (Justice Kagan: "Was *Demore* the one where the Solicitor General provided wrong information to the Court and, basically, the Court was operating on a false understanding of how long some of these detentions lasted?"); *id.* at 45 (Counsel for Arteaga-Martinez: "The government has that data [on length of detention for pending cases]. It hasn't disclosed it.").

[27] *Cf.* Transcript of Oral Argument at 47–48, Garland v. Gonzalez, 142 S. Ct. 2057 (No. 20-322) (2022) (Justice Barrett: "Why just not bring the constitutional challenge? Is it just because, to do that, you would run into the class-action bar and so maybe that's—you know, the government says that it's the class-action bar that's actually—or—or that's actually causing these kind of contorted arguments of the statute. Why isn't a habeas proceeding the better way to handle this?"); *id.* at 48 (Justice Gorsuch: "In the abstract, on first principles, why wouldn't [habeas] be the more natural and maybe the more efficacious route, the—the better route for your clients? . . . I'm not saying it's easy, okay?").

[28] There has been empirical study into detained immigrant populations, detained immigrants' access to counsel and outcomes, bond decisions, and trends of local jails detaining immigrants. *See, e.g.*, Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1 (2018); Emily Ryo & Reed Humphrey, *Children in Custody: A Study of Detained Migrant Children in the United States*, 68 UCLA L. REV. 136 (2021); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117 (2016) [hereinafter Ryo, *Detained*]; Emily Ryo, *Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings*, 52 L. & SOC'Y REV. 503 (2018); Emily Ryo & Ian Peacock, *Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983–2013*, 54 L. & SOC'Y REV. 66 (2020). There is also significant empirical study into broader immigration adjudications, including access to counsel and outcomes in immigration and asylum proceedings. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015); Emily Ryo & Ian Peacock, *Represented but Unequal: The Contingent Effect of Legal Representation in Removal Proceedings*, 55 L. & SOC'Y REV. 634 (2021); Ingrid Eagly & Steven Shafer, *Measuring* in Absentia *Removal in Immigration Court*, 168 U. PA. L. REV. 817 (2020); Jayanth K. Krishnan, *The Immigrant Struggle for Effective Counsel: An Empirical Assessment*, 2022 U. ILL. L. REV. 1021 (2022); Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933 (2015); Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 108 GEO. L.J. 579 (2020); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY (2014); Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785 (2018).

[29] *But see* Freya Jamison, Note, *When Liberty is the Exception: The Scattered Right to Bond Hearings in Prolonged Immigration Detention*, 5 COLUM. HUM. RTS. L. REV. ONLINE 146, 156–62 (2021).

change—offering theoretical frameworks, historical accountings of the crimmigration convergence, and case studies—before offering prescriptions for reform.[30] Legal empiricists have tended to focus on more predictable types of litigation, or only one stage of litigation, rather than grappling with a developing area of law rife with statutory and constitutional claims and unsettled procedure.[31] Scholars writing about immigrant-detention habeas challenges have mostly focused on doctrinal developments and case studies of distinct problems, with the exception of law student Freya Jamison's note examining 264 published appellate habeas decisions in several circuits.[32] Finally, many scholars have analyzed the historical trend of immigrants, attorneys, and courts relying on procedural due process rights as a surrogate for more substantive constitutional constraints in immigration that are limited by the plenary power doctrine.[33] These scholars have focused on the doctrinal contours of procedural due process rights rather than the implications of the procedural rules to vindicate them in litigation.

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[30] *See, e.g.*, César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. Rev. 245 (2017); Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. Rev. 143 (2015); Margaret H. Taylor & Kit Johnson, "*Vast Hordes . . . Crowding in Upon Us": The Executive Branch's Response to Mass Migration and the Legacy of* Chae Chan Ping, 68 Okla. L. Rev. 185 (2015); Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 Ind. L.J. 157 (2016); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. Rev. 1346 (2014).

[31] Employment discrimination and commercial disputes are common focuses, as are motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See, e.g*, Jonah B. Gelbach, *Material Facts in the Debate over* Twombly *and* Iqbal, 68 Stan. L. Rev. 369 (2016).

[32] Jamison, *supra* note 29, at 156–62 (examining habeas appellate decisions from 2010 to 2019 in the First, Second, Third, Sixth, and Eleventh Circuits to illustrate how various constitutional tests operate and the need for reforms to vindicate detained immigrants' liberty rights). Some reports have examined habeas litigation. *See, e.g.*, *The Writ of Habeas Corpus: How a United States District Court Circumvents Oversight of Unlawful Detention*, Immigrant Rts. Clinic at N.Y.U. Sch. of L. & Families for Freedom (2016), https://www.prisonlegalnews.org/media/publications/Writ_of_Habeas_Corpus_-_How_a_United_States_District_Court_Circumvents_Oversight_of_Unlawful_Detention_NYU_Law__FFF_2016.pdf [https://perma.cc/48FW-S9D6]; *No End in Sight*, Tulane Univ. L. Sch. Immigr. Rts. Clinic (May 2021), https://law.tulane.edu/sites/law.tulane.edu/files/TLS%20No%20End%20In%20Sight%20Single%20Pages%20FINAL.pdf [https://perma.cc/Z5WQ-7KYH]; Michael Tan & Michael Kaufman, *Jailing the Immigrant Poor:* Hernandez v. Sessions, 21 CUNY L. Rev. 69 (2018); Bradley Banias, *A "Substantial Argument" Against Prolonged, Pre-Removal Mandatory Detention*, 11 Rutgers Race & L. Rev. 31 (2009); Mary Holper, *The Fourth Amendment Implications of "U.S. Imitation Judges"*, 104 Minn. L. Rev. 1275 (2020); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 Colum. L. Rev. 537 (2010); Darlene C. Goring, *Freedom from Detention: The Constitutionality of Mandatory Detention for Criminal Aliens Seeking to Challenge Grounds for Removal*, 69 Ark. L. Rev. 911 (2017).

[33] *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1630 (1992); Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 Conn. L. Rev. 879 (2015); Rachel E. Rosenbloom, *The Citizenship Line*, 54 B.C. L. Rev. 1965, 1982–85 (2013); *see also* Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 Colum. L. Rev. 1013, 1016 (2008) (describing the trend in terrorism cases as "focus-on-procedure-while-sidestepping-substance").

This Article's contribution is to provide a theoretical framework for understanding immigrant habeas litigation that uncovers how substantive law regarding the limits of immigrant detention is embedded within procedure. Much scholarship has tracked the Supreme Court's characterization in *Erie Railroad Company v. Tompkins* of the "hazy" "line between procedure and substance."[34] A common perception of the difference between "substance" and "procedure" can be understood as the relationship between legal rights versus remedies,[35] or between duties and rights versus the manner of processing said rights in court.[36] Building upon this understanding, we offer a theoretical framework to reveal how substantive law regarding the limits of lawful detention is embedded within the procedure for adjudicating these petitions for writ of habeas corpus. With this framework, we inform efforts to engage in comprehensive empirical study of challenges to prolonged detention.

We propose that habeas litigation challenging unlawful immigrant detention has four key features that complicate the perceived distinction between substantive law of limits on immigrant detention and procedure in adjudications. First, habeas litigation is dictated by multiple overlapping and sometimes contradicting legal authorities for procedural rules that may result in wildly variant judicial practices. Second, these cases must further navigate a labyrinth of proceedings: a myriad of procedural barriers that immigrant habeas petitioners often maneuver without counsel. Third, procedural deadlines and litigation delays are directly implicated in the substantive legal question of continued length of detention. Last, "shadow wins," by which petitioners are liberated through an Immigration and Customs Enforcement (ICE) agency decision, result in a judicial dismissal of the case with no published opinion articulating legal standards regarding the unlawful detention.

We argue that these four distinct yet related facets of habeas litigation challenging unlawful immigrant detention contribute to legal complexity, opaqueness, and ultimately uncertainty regarding the legal contours of prolonged detention. To decode this hidden law of immigrant detention litigation, we propose using a "docketology" approach, a methodology whereby legal empiricists analyze full court dockets, including all court litigation documents, to shine light on the interplay between each judicial order, court

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[34] 304 U.S. 64, 92 (1938) (Reed, J., concurring in part). While that foundational case involves federal court rules in diversity actions, the legal line between procedure and substance is drawn for a variety of reasons, including retroactivity of statutes and conflicts of law, each with their own social, economic, and even political problems. *See, e.g.*, Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 341 (1933).

[35] *See, e.g.*, 3 WITKIN, CALIFORNIA PROCEDURE § 49 (2022).

[36] *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure[ ]—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."). Furthermore, this so-called dichotomy may be more complex, as some rules are neither substantive nor procedural, but can be considered a rule of evidence or a rule of decision. *See* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 665–66 (2019).

procedure, and the underlying legal claim. This analysis will reveal how habeas procedure in practice may hinder or even foreclose challenges to unlawful detention, while extending the time a petitioner is unlawfully detained. More broadly, a docketology approach is critical to better understanding how procedural matters may protract the adjudication of detention litigation, extending the core substantive issue at stake: the length of detention. Little is known about how procedural barriers to filing might stall cases, how long petitioners must wait to receive an answer to their complaint, the timeline to obtain evidence for the continued detention, and the likelihood of obtaining an evidentiary hearing. A docketology approach permits analysis of each procedural step of litigation and, more importantly, of how those procedures impact the length of detention that may already be unlawful. This approach also allows trends to surface that might otherwise be hidden by simply looking at final judgments,[37] or cases in isolation. For example, using this approach, we have uncovered what we have termed "shadow wins," judicial dismissals in habeas cases after the petitioner is released administratively. In these cases, ICE administratively releases detained immigrants challenging their detention through habeas, perhaps to avoid a decision on the merits; since the case lacks a live dispute, it results in dismissal.[38]

This empirical analysis of challenges to prolonged detention is particularly urgent as the Supreme Court continues to look to statistical analysis as part of its ongoing struggle to define the fundamental rights of immigrants including the length at which immigrant detention becomes unlawful.[39] Government analysis of prolonged detention can be fraught and even subject to outright manipulation. Furthermore, trends in challenges to detention can be misunderstood or hidden under predominant methodologies that examine variables such as detention length, case outcomes, and other factors in isolation, instead of following cases through every stage of litigation at the trial level. We join other scholars calling for attention to improving the credibility of empirical legal research [40] and specifically suggest a comprehensive docketology approach for understanding judicial processes in immigrant habeas litigation.

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[37] *See* Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making*, 29 WASH. U. J.L. & POL'Y 83, 85–86 (2009); David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 683 (2007).

[38] *See No End in Sight*, *supra* note 32, at 12.

[39] *See, e.g.*, Transcript of Oral Argument at 25, Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022) (No. 19-896); *id.* at 48.

[40] *See, e.g.*, Jason M. Chin, Alexander DeHaven, Tobias Heycke, Alexander Holcombe & David Mellor, *Improving the Credibility of Empirical Legal Research: Practical Suggestions for Researchers, Journals, and Law Schools*, 3 L. TECH. & HUMS. 1 (2021); Jason Rantanen, *The Future of Empirical Legal Studies: Observations on Holte & Sichelman's* Cycles of Obviousness, 105 IOWA L. REV. ONLINE 15 (2020).

This article will proceed in four parts. Part I describes the rise of mass immigrant detention, the challenges of seeking release through bond and parole, and the current doctrine of habeas corpus as a means for immigrants to seek release from prolonged or punitive detention. Part II follows a case study to illustrate the interaction between habeas procedure and the substantive law regarding the limits of lawful immigrant detention after a detained immigrant petitions a federal court for release. Part III provides a theoretical framework for analyzing this litigation, which untangles some of the ways substantive immigrant detention law is embedded in the procedural process. This framework brings to the fore the complexity of habeas legal authorities regarding procedural rules, the labyrinth of proceedings, outcome-determinative litigation rules, and finally, shadow wins—when cases are dismissed without a merits decision from the court because the detained immigrant was administratively released. In Part IV, the Article revisits the Supreme Court's articulation of habeas as a means for "swift, flexible, and summary determination"[41] and raises two categories of improvements that should be further studied: methods for reducing potentially unconstitutionally prolonged detention during adjudication, and means for decreasing barriers for the often unrepresented immigrants challenging their detention. Lastly, the Article describes the critical need for systemic, not isolated, study of immigrant habeas litigation.

I. The Quest for Habeas Release from Immigrant Detention

The modern immigrant detention complex is a behemothic and sprawling network of federal, state, local, and private prisons. The trappings of prisons—barbed wire, tightly controlled entry and exit, and insubstantial outdoor time—are the same or similar in immigrant detention.[42] As a matter of law, immigration proceedings and detention are civil, and therefore are not considered punishment.[43] Yet as formerly detained immigrant Malik Ndaula states, "prison is prison no matter what label you use, and prison breaks people's souls, hearts, and even minds."[44] This distinction of "civil confinement" under law means detained immigrants do not receive even the procedural protections of constitutional criminal procedure, such as a government-appointed attorney.[45] It also means that immigrant detention is un-

[41] Preiser v. Rodriguez, 411 U.S. 475, 495 (1973).

[42] *See generally* García Hernández, *supra* note 25, at 88.

[43] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("deportation is not a punishment for crime"); Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("removal proceedings are civil in nature").

[44] García Hernández, *supra* note 25, at 88 (quoting Malik Ndaula & Debbie Satyal, *Rafiu's Story: An American Immigrant Nightmare*, *in* Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today 241, 250 (2008)).

[45] *See* Gideon v. Wainwright, 372 U.S. 335 (1963). The Authors note that even these Sixth Amendment protections have proven inadequate in addressing mass incarceration.

lawful when it becomes punitive, often because it has become too prolonged or indefinite.[46]

Detention can take both a physical and psychological toll, particularly as detention facilities across the board have been criticized for their poor conditions.[47] In some cases, dangerous conditions have led to the deaths of immigrants in detention.[48] Litigation abounds in this area, ranging from challenging prison work programs as labor trafficking to challenging the lack of disability accommodations and constitutionally inadequate medical and mental health care.[49] According to one complaint: "Conditions in detention are so brutal that many people are forced to abandon viable claims for immigration relief and accept deportation out of a desperate desire to escape the torture they are enduring in detention on U.S. soil."[50] One detained person commenting on seemingly indefinite immigrant detention said, "I would rather serve another life sentence than go back to immigrant detention. At least when I was in prison, I knew what to expect."[51]

Furthermore, ICE employs a national detention strategy, acquiring detention beds increasingly in rural areas in the Deep South and transferring immigrants from across the country and at the border to these remote locations. The access-to-justice crisis for immigrants, and particularly detained immigrants, is acute in these regions.[52] As a result, the decisions on whether to continue detention or grant release of immigrants are increasingly made in these remote locations—by ICE officers, by immigration judges, and sometimes by federal courts—where legal representation is less common.[53]

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[46] *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (characterizing immigrant detention as civil and therefore nonpunitive).

[47] *See, e.g.*, Rebecca Merton, Cynthia Galaz & Christina Fialho, *Immigration Detention is Psychological Torture: Strategies for Surviving in Our Fight for Freedom*, FREEDOM FOR IMMIGRANTS, 17 (2019), http://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5db832af48dca06f693b7e87/1572352700752/FFI_MentalHealth.pdf, http://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5db832af48dca06f693b7e87/1572352700752/FFI_MentalHealth.pdf [https://perma.cc/F7WM-FKUN]; Complaint, Dilley Pro Bono Project v. U.S. Immigr. & Customs Enf't, No. 1:17-cv-01055 (D.D.C. June 1, 2017); Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709, 718 (C.D. Cal. 2020).

[48] *See* Darius Tahir, *'Black Hole' of Medical Records Contributes to Deaths, Mistreatment at the Border*, POLITICO (Dec. 1, 2019), https://www.politico.com/news/2019/12/01/medical-records-border-immigration-074507 [https://perma.cc/GR2X-6NMA]; Catherine E. Shoichet, *The Death Toll in ICE Custody is the Highest It's Been in 15 Years*, CNN (Sept. 30, 2020), https://www.cnn.com/2020/09/30/us/ice-deaths-detention-2020/index.html [https://perma.cc/C2KH-HE9N].

[49] *See, e.g.*, *Fraihat*, 445 F. Supp. 3d at 719, 742.

[50] Complaint at 1, Fraihat v. U.S. Immigr. & Customs Enf't, No. 19-cv-01546 (C.D. Cal. Aug. 19, 2019), http://creeclaw.org/wp-content/uploads/2019/08/E-filed-Fraihat_v_ICE_Complaint_to_file_8_19.pdf [https://perma.cc/J7WU-5WTJ].

[51] Merton et al., *supra* note 47, at 17.

[52] *See* Eunice Hyunhye Cho & Paromita Shah, *Shadow Prisons: Immigrant Detention in the South*, S. POVERTY L. CTR. (Nov. 21, 2016), https://www.splcenter.org/20161121/shadow-prisons-immigrant-detention-south [https://perma.cc/JV2N-9FKD].

[53] *See* Eunice Hyunhye Cho, Tara Tidwell Cullen & Clara Long, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, ACLU, HUM. RTS. WATCH & NAT'L

While the immigration legal system has two major mechanisms for immigrants to seek release administratively—bond hearings and parole requests—those avenues are foreclosed completely, or otherwise unhelpful, to tens of thousands of detained immigrants who are forced to remain in detention throughout all of their immigration cases.[54] For those detained immigrants facing prolonged and indefinite detention, the writ of habeas corpus holds promise as a means of release, even if limited. In this section, we describe the growth of the immigrant detention system, the avenues for administrative release through bond and parole, and the doctrine of how habeas petitions have been used to seek release through federal court review when those administrative mechanisms fail.

A. The Rise of Mass and Prolonged Immigrant Detention

The number of people detained on an average day by ICE and its predecessor INS has multiplied twenty-fold in the past forty years,[55] in what some have termed a "deportation state."[56] In 2019, the number of detained immigrants surpassed 50,000 on an average day, with more than 500,000 detained over the year.[57] While the number of detained immigrants dropped to 13,000 in the spring of 2021 after border closures, the detained population has since grown to more than 22,000,[58] a nearly seventy percent increase in less than a year. The U.S. detention budget has grown to $3.2 billion annually,[59] and more than eighty percent of the 215 detention centers are run by for-profit corporations.[60]

By comparison, for much of U.S. history, immigrant detention was miniscule in scale.[61] In early immigration history, Ellis Island in New York and Angel Island in San Francisco Bay served as immigration holding cen-

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IMMIGRANT JUSTICE CTR., 20 (2020), https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration [https://perma.cc/SXW9-8H7T].

[54] *See* Eagly et al., *supra* note 28, at 38 (listing the tens of thousands of detained cases decided over a five-year study period); *ICE Detention Statistics FY 2021*, U.S. IMMIGR. & CUSTOMS ENF'T (2021) (reporting the total ICE Average Daily Population (ADP) of individuals in ICE detention as 16,454 and the ADP for individuals being mandatorily detained as 10,915), https://www.ice.gov/doclib/detention/FY21-detentionstats.xlsx?rev=02242021 [https://perma.cc/MUS9-4VHZ].

[55] *See* Kassie, *supra* note 15.

[56] Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948, 953 (2021).

[57] *See Immigration Detention 101*, DET. WATCH NETWORK (2021), http://www.detentionwatchnetwork.org/issues/detention-101#:~:text=IN%20Fiscal%20Year%20(FY)%202019,an%20appalling%20record%20of%20abuse [https://perma.cc/PKW6-SYAN].

[58] *See ICE Detainees*, TRAC IMMIGR. (2022) (showing 13,258 detained immigrants in February 2021, 22,281 by May 2022, and 55,654 in August 2019), https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html [https://perma.cc/9F4M-ZEG2].

[59] *See* DET. WATCH NETWORK, *supra* note 57. This does not include the 50,000 to 60,000 unaccompanied minors in the custody of the Office of Refugee Resettlement. *See* GARCÍA HERNÁNDEZ, *supra* note 25, at 86.

[60] *See* DET. WATCH NETWORK, *supra* note 57.

[61] *See* GARCÍA HERNÁNDEZ, *supra* note 25, at 26.

ters for inspection.[62] Detention served more of a short-term processing purpose, as opposed to a weeks-, months-, or years-long state.[63] Then, during President Eisenhower's term, INS essentially shut down detention, calling the shift a move towards a "humane administration of immigration laws."[64] Yet the decades following significant civil rights victories in the 1960s and 1970s saw the resurgence and expansion of detention.[65]

The 1980s and 1990s marked the rise of mass incarceration in both the criminal and immigrant legal systems in what has been termed a "severity revolution."[66] Widespread public rhetoric centered on a "tough on crime" narrative, which spurred a massive influx of resources into the prison system. This coincided with a rise in criminalization and worked in conjunction with harsher sentencing laws that removed discretion from the judiciary. These moves set the United States on the trajectory to becoming a carceral state. Soon, the United States developed its notorious reputation as the country with the highest incarceration rate, with staggering impacts on Black and Brown communities which were disproportionately incarcerated in the criminal legal system and disproportionately held for longer periods of time.[67]

Immigration enforcement was likewise swept up in the severity revolution with rhetoric and policy flowing from a general anti-drug hysteria,[68] particularly targeting Cuban and Haitian immigrants.[69] In the early 1980s, 125,000 Cubans arrived on U.S. shores after fleeing Castro's regime as part of the Mariel boat lift, a mass emigration from Cuba to the United States. These migrants were largely poor and dark-skinned, and they were characterized as criminals.[70] The growing community of Haitian migrants was confronted with accusations that they were drug traffickers. In response, the United States remade its immigrant detention system, opening its own federal facilities and contracting with a sprawling network of local jails and private prison corporations.[71] By the end of 1989, the Reagan administration was detaining 6,000 immigrants per year.[72]

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[62] *See id.* at 26–28.

[63] *See id.* at 27–29; *see also* Kassie, *supra* note 15.

[64] García Hernández, *supra* note 25, at 46–47; Paulina Arnold, *How Immigration Detention Became Exceptional*, 75 Stan. L. Rev. (forthcoming 2023).

[65] *See* García Hernández, *supra* note 25, at 57.

[66] Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. Third World L.J. 81, 83 (2005).

[67] *See* Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, The Atlantic (Oct. 2015), http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/ [https://perma.cc/W45D-ND52].

[68] *See* García Hernández, *supra* note 25, at 61.

[69] *See generally* Alina Das, No Justice in the Shadows: How America Criminalizes Immigrants 120 (2020).

[70] *See* García Hernández, *supra* note 25, at 61.

[71] *See* Das, *supra* note 69, at 120.

[72] *See* Kassie, *supra* note 15.

Alongside harsh criminal laws spurred on by what many have identified as racist policies and policing,[73] this period also saw a wave of congressional action that significantly broadened the classes of immigrants which could be deported and created a system of mandatory detention for certain migrants.[74] The 1986 Anti-Drug Abuse Act adopted the framework for immigration detainers—requests from immigration law enforcement for local police to continue detaining and transferring those in their custody who are suspected of immigration violations to federal immigration custody.[75] The 1988 Anti-Drug Abuse Act created a class of "aggravated felons" in immigration law—who neither must have committed a felony, nor an aggravated offense under criminal law—with dire consequences of mandatory detention and deportation with few exceptions.[76] Then in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act worked to vastly expand those subjected to mandatory detention as well as deepen collusion between local police and federal immigration officials.[77]

In the decade following 1996, federal prosecutions of immigration crimes almost quadrupled until immigration violations became the most prosecuted federal crime.[78] These legislative moves were a boon to the private prison industry, which was closely allied with anti-immigrant legislators.[79] For many years, DHS had a bed quota, requiring tens of thousands of detention beds to be paid for and available. This requirement was instigated by West Virginia Democratic Senator Robert C. Bryd, a former member of the Ku Klux Klan. [80] Senator Bryd first wrote the provision into an appropriations bill with little debate.[81]

The current state of immigrant detention is in flux. During the pandemic—owing both to COVID-19-related releases and incredibly restrictive

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[73] *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 13–14 (2017). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

[74] *See* Laila L. Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 708 (2018).

[75] *See* GARCÍA HERNÁNDEZ, *supra* note 25, at 67.

[76] *Id.* For an analysis of what crimes might be an aggravated felony under immigration law, see generally *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL, 1 (Mar. 2021) ("Despite what the ominous-sounding name may suggest, an 'aggravated felony' does not require the crime to be 'aggravated' or a 'felony' to qualify."), https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies_an_overview_0.pdf, [https://perma.cc/T47Z-NFUT].

[77] *See* GARCÍA HERNÁNDEZ, *supra* note 25, at 68.

[78] *See* Hlass, *supra* note 74, at 708–09; Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1350 (2010) (discussing immigration-related crimes and detailing how immigration crime was also the most prosecuted crime in the 1930s and 1950s). Some have argued for decriminalization of the border because of the racialized harm in federal prosecutions. *See, e.g.*, Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967 (2020).

[79] *See* DAS, *supra* note 69, at 121.

[80] *See id.*

[81] *See id.*

border closures—immigrant detention fell to the lowest numbers in decades, with an average population in March 2021 of 14,148.[82] Under the Biden administration, some immigrant detention centers have been closed,[83] and over the past few years, some state and local facilities have ended contracts with federal immigration authorities in response to public pressure.[84] But over the past year, overall detention numbers have rebounded, with between 20,000 and 30,000 immigrants detained on any given day in the first half of 2022.[85] The length of detention for those immigrants is less clear. [86] While the total number of immigrants detained is published by ICE at regular intervals, those statistics do not reliably show how many immigrants were subjected to prolonged detention, what the outermost length of detention is, how many immigrants challenged their detention, or what those outcomes were.[87]

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[82] *See, e.g.*, *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T (2022), http://www.ice.gov/detain/detention-management [https://perma.cc/C2PY-AYFH].

[83] *See* Ted Hesson & Mica Rosenberg, *U.S. to Close, Scale Back Four Immigrant Detention Centers*, REUTERS (Mar. 25, 2022), https://www.reuters.com/world/us/us-plans-close-scale-back-four-immigrant-detention-centers-document-shows-2022-03-25/, *archived at* https://perma.cc/A39N-MFDX.

[84] *See* Annie Correal & Michael Gold, *After Years of Protests, a New York County Ends its ICE Jail Contract*, N.Y. TIMES (May 1, 2021), https://www.nytimes.com/2021/05/01/nyregion/essex-ice.html; Giulia McDonnell Nieto del Rio, *Hudson County Officials Move to End Contract with ICE*, DOCUMENTED (Sept. 13, 2021), https://documentedny.com/2021/09/13/hudson-county-officials-move-to-end-contract-with-ice/, *archived at* https://perma.cc/7DSB-U738.

[85] *See Detention Management*, *supra* note 82.

[86] Of what data is available, it appears that detention length spiked significantly in 2020: according to EOIR data, the median pending time for detained immigrants in removal and related cases was over 100 days from 2014 to 2018, reaching 216 days in fiscal year 2020 and dropping to 58 days in 2021. *See Adjudication Statistics: Median Times for Pending Detained Cases*, EXEC. OFFICE FOR IMMIGR. REV. (data generated July 15, 2022), https://www.justice.gov/eoir/page/file/1163626/Download [https://perma.cc/97WK-GLC4]. This data is of limited use because immigrants can be detained before their removal cases formally begin and after their cases conclude in a final order, and such detentions would not be tracked in the EOIR data. *See Immigration Detention in the United States by Agency*, AM. IMMIGR. COUNCIL, 4 (Jan. 2020) ("In FY 2019, the average detained immigration case took 46 days. This does not count the period that a person was in detention before the start of the case"), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf, [https://perma.cc/M9AE-Z7JM].

[87] *See Detention Management*, *supra* note 82. While one tab of the published spreadsheet includes some data on "average length of stay," there are serious and ongoing concerns about the integrity of ICE data on detention. For example, the reputable Transactional Record Access Clearinghouse at Syracuse University received astoundingly inaccurate data releases from ICE on its Alternatives to Detention Program. *See ICE Posts Wrong Numbers on Alternatives to Detention (ATD) Monitoring*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Dec. 14, 2022), https://trac.syr.edu/whatsnew/email.221214.html [https://perma.cc/T7FN-S2AG]. Advocates have also raised concerns that ICE detention statistics report the length of stay at the current detention facility (the difference between the book-in date and the date of analysis or date of release from that facility), rather than the overall detention length (the difference between the date that detention in the immigration system began and the date of analysis or date of release from the system). *See Detention by the Numbers*, FREEDOM FOR IMMIGRANTS (2018) ("In FY 2017, the average length of stay at any one immigrant prison or jail was 34 days.") (emphasis added), https://www.freedomforimmigrants.org/detention-statistics [https://perma.cc/DTL9-74ZS].

At this point, the future trajectory of immigrant detention is not clear—whether the government will continue detaining at somewhat lower levels, and what the scale and scope of the immigrant population subjected to prolonged detention will be. What has become clear is that the possibilities to seek release from detention through the immigration agencies are limited. Bond and parole are the primary means by which detained immigrants may be released, but these avenues are foreclosed for scores of immigrants. This makes the promise of habeas as a means of release all the more urgent.

B. The Challenges of Seeking Release Through Bond and Parole

Bloated immigration enforcement and restrictive immigration laws work in tandem to feed the sprawling nationwide detention system with immigrants to detain and retain. The two immigration law mechanisms that allow release from detention—parole and bond—have proven ineffective for large numbers of immigrants who remain detained for months or even years. In the immigration law context, parole refers to permission to enter or remain in the United States for a discrete period of time.[88] For detained immigrants, parole is a means for release from detention, based solely on the discretion of ICE. Bond refers to money paid to secure the release of an immigrant, which serves as a guarantee to the government that the bonded person will continue to attend immigration court proceedings.

The government has stated that the purpose of immigrant detention is ensuring that immigrants show up at future immigration proceedings, as well as preventing danger to the community.[89] Immigrants in detention are often actively litigating their cases in immigration court, in a posture analogous to pretrial detention for those with pending criminal cases. After a detained immigrant receives a decision from the immigration judge, they generally remain detained while appealing that decision to the Board of Immigration Appeals (BIA), or, if they are granted relief or termination, they remain detained during any appeals by ICE. Therefore, when a case is appealed, the period of detention becomes longer. While an order of removal is considered administratively final if the BIA upholds it and there is no court-ordered stay of removal in place,[90] immigrants, and at times the government, may also appeal a BIA decision to the relevant court of appeals, and eventually the

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[88] Parole can refer to discretionary permission to enter the country without a legal admission or permission for those who have not yet been legally admitted to temporarily remain, known as "parole in place." *See generally The Use of Parole Under Immigration Law*, AM. IMMIGR. COUNCIL (July 2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_use_of_parole_under_immigration_law_0.pdf [https://perma.cc/7RS7-E23W]; *Seeking Release from Immigration Detention*, AM. IMMIGR. COUNCIL, 2 (Sept. 2019), http://www.americanimmigrationcouncil.org/sites/default/files/research/seeking_release_from_immigration_detention.pdf [https://perma.cc/XGS3-H3XH].

[89] *See Zadvydas*, 533 U.S. at 690 (citing Br. for Resp'ts at 24).

[90] *See* 8 C.F.R. § 1241.1.

Supreme Court if it presents the rare cert-worthy issue.[91] The BIA, as well as the courts of appeals, may remand a case to a lower court, eventually asking an immigration judge to conduct more fact-finding or to apply a different rule when a judge has erred.[92] In this way, some detained immigrants may be detained for years as they actively litigate their removal case.[93] Another class of detained immigrants are those whom, despite having a final order of deportation, ICE cannot seem to physically deport.[94] This may be because the potential receiving country is unwilling to accept the immigrant. This type of immigrant detention is generally called "post-order," since the immigrants have received a final order of removal.[95]

In the 1990s, Congress increased mandatory detention for immigrants, which courts have generally interpreted to mean large categories of immigrants are ineligible for bond.[96] For example, those asylum-seekers classified as "arriving aliens" because they surrendered or encountered immigration enforcement agents at the border are ineligible to seek bond.[97] Large classes of immigrants are also ineligible to seek bond when criminal convictions make an immigrant "inadmissible" or "deportable" as defined under immigration law.[98] For example, any controlled substance conviction—including something as common as possession of unauthorized Xanax—means

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[91] *See* 8 U.S.C. § 1252(a)(5) (discussing scope of jurisdiction for courts of appeal).

[92] *See* 8 C.F.R. § 1003.1(d)(7) (discussing power of BIA to remand).

[93] *See, e.g.*, *Prolonged Detention Fact Sheet*, ACLU (providing description of cases from *Rodriguez* where individual litigants spent years actively litigating their cases while in detention), https://www.aclu.org/sites/default/files/assets/prolonged_detention_fact_sheet.pdf [https://perma.cc/5X47-2BCD].

[94] U.S. government officials call countries that do not agree to accept deported individuals for repatriation "recalcitrant" or "uncooperative." Jill H. Wilson, *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*, CONG. RSCH. SERV. (Jan. 23, 2020), https://sgp.fas.org/crs/homesec/IF11025.pdf [https://perma.cc/AH3G-CLHN].

[95] *The Law of Immigration Detention: A Brief Introduction*, CONG. RSCH. SERV. (Sept. 1, 2022), https://crsreports.congress.gov/product/pdf/IF/IF11343 [https://perma.cc/BC74-TNLP].

[96] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-128, 110 Stat. 3009; Jennings v. Rodriguez, 138 S. Ct. 830, 845–46 (2018).

[97] The bond eligibility of recently arrived asylum seekers encountered inside the United States who were found to have a credible fear through proceedings under 8 U.S.C. § 1225(b) is the subject of pending litigation. *See* Padilla v. U.S. Immigr. & Customs Enf't, No. 2:18-cv-928 (W.D. Wash. Sept. 13, 2021). For several years, a preliminary injunction was in place to guarantee bond hearings for these immigrants. *See* Padilla v. Immigr. & Customs Enf't, 953 F.3d 1134, 1151 (9th Cir. 2020) (upholding injunction that required bond hearings for these immigrants), *vacated by* 141 S. Ct. 1041 (2021). Because that preliminary injunction was entered on a class-wide basis, it was vacated in its entirety after the Supreme Court found class-wide injunctions of immigration enforcement and detention provisions barred by 8 U.S.C. § 1252(f)(1). *See* Padilla v. Immigr. & Customs Enf't, 41 F.4th 1194, 1195 (9th Cir. 2022) (citing Garland v. Gonzalez, 142 S. Ct. 2057 (2022)).

[98] 8 U.S.C. § 1226(c) (listing classes subject to mandatory detention due to criminal removability and security grounds). *But see* In re Joseph, 22 I&N Dec. 799, 808 (B.I.A. 1999); 8 C.F.R. § 1003.19(h)(2)(i); 8 U.S.C. § 1225(b)(1)(B)(ii).

mandatory detention. [99] Immigrants who allegedly implicate security concerns are also subject to mandatory detention.[100] Lastly, those who have an outstanding order of removal or have previously been deported are detained with no access to bond, even if they are pursuing humanitarian protections.[101]

Even those immigrants eligible for bond under statute or regulation face challenges for release. Those who are bond-eligible may navigate three stages of proceedings through various parts of the immigration agencies, with each stage presenting obstacles. The first stage is consideration of bond in the initial custody decision by ICE, the agency prosecuting the deportation case and managing immigrant detention.[102] For immigrants who are not subject to mandatory detention, ICE is supposed to review whether the immigrant is a flight risk or danger to the community.[103] If ICE determines someone is release-eligible, ICE can set a bond[104] or release the immigrant, possibly with restrictions like an electronic monitoring ankle bracelet or regular reporting to ICE.[105] ICE may discretionarily deny an initial bond or impose such a high bond that release is practically impossible.[106] Over the years, ICE has moved toward rarely setting a bond, finding that no conditions can justify release even for those who are eligible under the statute.[107]

The second stage of bond proceedings involves the detained immigrant potentially seeking a custody redetermination through a bond hearing before an immigration judge.[108] An immigrant can make an initial bond redetermination request orally or in writing before an immigration judge.[109] This first bond hearing is critical, as the legal standard is higher for a subsequent hear-

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[99] *See* 8 U.S.C. § 1226(c).

[100] *See id.* § 1226(c)(1)(A) (describing how those immigrants inadmissible under any offense included in 18 U.S.C. § 1182(a)(2), which includes all controlled substance crimes, must be detained).

[101] *See id.* § 1231(a) (discussing reinstatement of removal).

[102] *See id.* § 1357(a); 8 C.F.R. § 287.5(e).

[103] *See* AM. IMMIGR. COUNCIL, *supra* note 86, at 2.

[104] *See* 8 C.F.R. § 103.6; *see also Enforcement and Removal Operations Bond Management Handbook*, U.S. DEP'T OF HOMELAND SEC., 2 (Aug. 19, 2014), https://www.aila.org/File/Related/16051730f.pdf [https://perma.cc/HUV7-MLJE].

[105] *See* AM. IMMIGR. COUNCIL, *supra* note 86, at 2.

[106] Even when an immigrant can pay the bond, there are requirements for a U.S. citizen or lawful permanent resident to post the bond in person at an Immigration and Customs Enforcement office—which may be miles away from where the person paying the bond lives.

[107] *See What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, TRAC IMMIGR. (Sept. 14, 2016), http://trac.syr.edu/immigration/reports/438/.http://trac.syr.edu/immigration/reports/438/ [https://perma.cc/4H6Q-3V85]; Jason Tashea, *ICE Risk Assessment Tool Now Only Recommends 'Detain'*, ABA J. (June 28, 2018), https://www.abajournal.com/news/article/ice_risk_assessment_tool_now_only_recommends_detaid [https://perma.cc/RDF8-UVXY]; *see also Immigration and Customs Enforcement's Alternatives to Detention (Revised)*, U.S. DEPT. OF HOMELAND SEC. (Feb. 4, 2015), https://www.oig.dhs.gov/reports/2015-02/us-immigration-and-customs-enforcements-alternatives-detention-revised/oig15 [https://perma.cc/TT6Y-5LZY].

[108] Those who are contesting their status as a mandatory detainee may request a Joseph Hearing. *See* In re *Joseph*, 22 I&N Dec. 799, 807 (B.I.A. 1999).

[109] *See* 8 C.F.R. § 1003.19(b).

ing.[110] The three factors immigration judges evaluate when setting a bond are (1) danger to society, (2) flight risk, and (3) risk to national security.[111] The minimum bond amount an immigration judge can set is $1,500,[112] although judges may also order release without setting a bond.[113]

Even with this opportunity for a hearing before an immigration judge, bond often proves illusory as a means for release. Most seeking bond are denied,[114] with significant variation in outcomes depending on the location of the immigration court.[115] According to one study, the bond set for nearly forty percent of those granted a bond was $10,000 or more, and five percent had a bond set at $25,000 or more.[116]

The third and final stage of bond proceedings in the immigration agencies is a possible interlocutory appeal of the immigration judge's bond to the Board of Immigration Appeals.[117] But while that appeal is made, the immigrant remains detained, and removal proceedings continue before the immigration judge.[118] And as with most appeals, the Board generally defers to factual findings by the immigration judge, making it difficult to succeed on appeal in these highly fact-bound decisions.[119]

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[110] Immigrants or their representatives must make a second bond redetermination request in writing based on a material change since the prior bond redetermination hearing. *See id.* § 1003.19.

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

[112] *See* 8 U.S.C. § 1226(a)(2)(A).

[113] *See id.* § 1226(a)(2)(B) (providing for possibility of conditional parole).

[114] *See Immigration Court Bond Hearings and Related Case Decisions*, TRAC IMMIGR. (last visited June 24, 2021) (noting that, out of 383,211 cases between October 2000 and January 2021, 227,640 were denied bond and 155,571 were granted bond), http://trac.syr.edu/phptools/immigration/bond/ [https://perma.cc/LQ22-ZJDV].

[115] *Importance of Nationality in Immigration Court Bond Decisions*, TRAC IMMIGR. (Feb. 12, 2019), http://trac.syr.edu/immigration/reports/545/http://trac.syr.edu/immigration/reports/545/, *archived at* https://perma.cc/WC27-9THN; *see also* Ryo, *Detained*, *supra* note 28; *Three-Fold Difference in Immigration Bond Amounts by Court Location*, TRAC IMMIGR. (July 2, 2018), http://trac.syr.edu/immigration/reports/519/ [https://perma.cc/2BJA-6MBM].

[116] *See Three-Fold Difference*, *supra* note 115. In a jurisdiction that had held bond hearings every six months for nearly all detained immigrants under federal court order, Professor Ryo found that average grant rates for different immigration judges ranged between twenty-two to seventy-five percent, and average bond amounts ranged from $10,667 to $80,500. Ryo, *Detained*, *supra* note 28, at 119.

[117] *See BIA Practice Manual*, U.S. DEP'T OF JUSTICE, ch. 7, § 3, https://www.justice.gov/eoir/book/file/1528926/download [https://perma.cc/96RF-PPKG].

[118] *See* 8 C.F.R. §§ 1003.6(c), 1003.19(i); *see also Immigration Court Practice Manual*, U.S. DEP'T OF JUSTICE, ch. 9, § 3(f), https://www.justice.gov/eoir/book/file/1528921/download [https://perma.cc/3TD7-FRXE].

[119] *See* 8 C.F.R. § 1003.1(b). The BIA can review a factual determination for clear error. *Id.* § 1003.1(d)(3).

For those who have been denied bond or are ineligible, parole[120] is the only means in the immigration legal system to seek release.[121] Parole generally refers to a process where immigration agencies may permit immigrants seeking admission to enter or remain in the United States.[122] Under the statute, agencies may parole immigrants when doing so serves "urgent humanitarian reasons" or "significant public benefit."[123] Parole is not considered an "admission" for immigration purposes, nor does it by itself confer any immigration benefits.[124] Parole may be for a discrete amount of time, and if

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[120] Under a separate section within the INA, "conditional parole" is used but has a different meaning. *See* Memorandum from Gus P. Coldebella on INA Section 236 Release Versus INA Section 212(d)(5) Parole, U.S. DEPT. OF HOMELAND SEC., AILA Doc. No. 09121790 (Sept. 28, 2007), http://www.aila.org/infonet/dhs-ina-236-release-versus-ina-212d5-parole [https://perma.cc/S2P4-8K8A]. Conditional parole is the avenue for immigration judges to order release of otherwise bond-eligible detainees without a bond amount. *See* 8 U.S.C. § 1226(a). When discussing release through parole in this Article, we exclusively refer to release by ICE under 18 U.S.C. § 1182(d)(5). The United States Citizenship and Immigration Services (USCIS) and the State Department have issued policy guidance relating to parole, which ICE is not bound by, but which can be useful to understand how agencies have interpreted the standards. *See, e.g.*, 9 FAM 202.3 (U). There are also a number of special parole programs, stemming from 18 U.S.C. § 1182(d)(5) authority available to specific communities, including Cuban family reunification, Haitian family reunification, and more. *See Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 4, 2021), http://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states [https://perma.cc/T85H-KYAX]. For details of "parole in place" in practice, see *Discretionary Options for Military Members, Enlistees, and Their Families*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 25, 2022), https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families [https://perma.cc/FLW8-AQ69].

[121] *See* Br. for U.S. Immigr. & Customs Enf't, *In re* DGVLEG (Miami Immigr. Ct. Nov. 2, 2018) ("[T]he exclusive means for the release of inadmissible applicants for an admission is the parole authority under INA § 212(d)(5)(A).").

[122] *See* 8 U.S.C. § 1182(d)(5). USCIS, ICE, and Customs and Border Protection (CBP) have detailed their practice of granting parole into the United States through a Memorandum of Agreement. *See* Memorandum of Agreement (Sept. 2008), https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf [https://perma.cc/48HB-2BCQ]. For more about humanitarian parole, advance parole, and special parole programs—including the Haitian Family Reunification Parole program, the Cuban Family Reunification Parole Program, and more—see *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 9, 2022), http://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states [https://perma.cc/TD8P-WAWB].

[123] 8 U.S.C. § 1182(d)(5). The wave of litigation from conservative states against federal immigration policies is increasingly challenging the discretionary authority of DHS and how it is exercised. For example, Texas and nineteen other states have sued to enjoin the federal government from operating a limited parole program for noncitizens from Cuba, Haiti, Nicaragua, and Venezuela to enter the U.S. from abroad. Compl., Texas v. U.S. Dep't Hom. Sec., No. 23-cv-00007 (S.D. Texas Jan. 24, 2023). The States argue the parole program violates the statute because it is not a case-by-case determination, is not for urgent humanitarian reasons, and advances no significant public benefit. *See id.* at *1. In Texas and Louisiana's suit against Secretary Mayorkas' priorities memorandum on immigration enforcement, the States argue that statutory provisions which direct that the agency "shall" detain certain categories of immigrants do not permit discretionary releases. Brief for Respondents, United States v. Texas, No. 22-58, at 24–28 (U.S. Oct. 18, 2022).

[124] *Id.* § 1182(d)(5)(A) ("shall not be regarded as an admission").

ICE decides the purpose of parole is no longer being served, then it can revoke parole, sending an immigrant back into detention.[125]

While decisions should be made on a case-by case basis, regulations define categories of immigrants who might justify parole. These include those with serious medical conditions, pregnant people, and minors, as long as they present neither a security nor flight risk.[126] There are not formal categories of immigrants excluded from parole, aside from those that implicate security concerns. Parole is discretionary, so ICE may still deny the request even when these criteria are met.[127] Furthermore, there is no avenue for review of denials through the immigration or federal court systems.

Like bond hearings, the parole process is challenging from the outset because the burden to apply for and prove parole eligibility falls solely on the detained person—or, for the minority of represented detained people, on their lawyer. Furthermore, the process seems to be somewhat of a black box, as ICE generally does not provide reasoned decisions regarding the basis for denial or release.[128] In fact, the agency's practices for paroling asylum-seekers have been litigated nationally as violating agency guidance, with some regional ICE field offices denying up to 100 percent of all parole requests.[129]

Ultimately, the immigration law mechanisms of parole and bond have proven futile for large numbers of immigrants. The failures of parole and bond raise the stakes for habeas petitions as another option to seek release. Meanwhile, the use of immigrant habeas has grown, with a seventy-six percent increase in habeas petitions filed by immigrants challenging their detention from 2012 to 2017.[130]

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[125] *See id.*

[126] *See* 8 C.F.R. § 212.5.

[127] In the wave of conservative state-led litigation attacking the use of prosecutorial discretion in the immigration system, this well-established use of parole has come under fire. Anti-immigrant attorneys general argue that mandatory detention statutes bar any exercise of parole on a categorical basis *as well as* bond, regardless of the reality that ICE has never had the bed space or budget for universal mandatory detention with no discretionary releases. *See, e.g.*, Br. for Resp'ts at 28–35, No. 21-954, Biden v. Texas, 2022 WL 1097049 (U.S. Apr. 7, 2022). In the recent Supreme Court decision permitting the Biden Administration to end the Trump-era Migrant Protection Protocols program, the Court sidestepped the question of whether the use of parole to release large numbers of asylum seekers subject to mandatory detention is permissible. Biden v. Texas, 142 S. Ct. 2528, 2544 (2022) (summarizing parole authority and then stating: "we need not and do not resolve the parties' arguments regarding whether . . . the Government is lawfully exercising its parole authorities pursuant to sections 1182(d)(5) and 1226(a)").

[128] *See* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 2049 (2021).

[129] *See* Damus v. Nielsen, 313 F. Supp. 3d 317, 325 (D.D.C. 2018); Heredia Mons v. McAleenan, No. 1:19-cv-01593 (D.D.C. 2020) (citing the New Orleans Field Office 100% denial rate of parole requests in 2017, 2018, and the first seven months of 2019).

[130] *See* Seth Katsuya Endo, *Fee Retrenchment in Immigration Habeas*, 90 FORDHAM L. REV. 1489, 1493 (2022).

C. The Promise of Habeas Corpus to Limit Prolonged and Punitive Immigrant Detention

The writ of habeas corpus is the avenue for immigrants to seek federal court review of constitutional and statutory violations that arise in immigrant detention. It has long been seen as a means of last resort. Yet nearly all of the foundational Supreme Court opinions in constitutional immigration law have arisen in this context.[131] The Supreme Court has long recognized that the writ, included in the Constitution through the Suspension Clause and codified at 28 U.S.C. § 2241, extends equally to noncitizens because it enforces separation-of-powers principles.[132]

The habeas statute permits persons in custody to seek release through the writ if they believe they are "in custody in violation of the Constitution or laws or treaties of the United States."[133] As the Supreme Court noted in 2001, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[134] While multiple statutes and Supreme Court opinions have severely curtailed habeas corpus as a vehicle for judicial review of deportation proceedings or other immigration enforcement decisions, the federal district courts continue to hold jurisdiction over habeas petitions that test whether continued confinement violates a statute or the Constitution—usually the Fifth Amendment's Due Process Clause.[135]

In this Section, we review the case law of the past two decades concerning the statutory and constitutional limits on immigrant detention, which began with the Supreme Court's bold recognition of the constitutional dilemma in no-bond detention in *Zadyvdas* and then continued with repeated

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[131] *See* Fong Yue Ting v. United States, 149 U.S. 698 (1893); Ekiu v. United States, 142 U.S. 651 (1892); Ping v. United States, 130 U.S. 581 (1889). For a discussion of the advocacy of Chinese immigrants challenging harsh and discriminatory immigration restrictions through habeas corpus during this era, see generally LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995). More recently, Professor Litman has analyzed these cases, which limited constitutional review of immigration decisions through the plenary power doctrine, as she problematizes the myth of habeas corpus as the Great Writ, always protective of liberty. *See* Leah M. Litman, *The Myth of the Great Writ*, 100 TEX. L. REV. 219 (2021).

[132] *See* Boumediene v. Bush, 553 U.S. 723, 743 (2008) (discussing history of the writ and noncitizens).

[133] 28 U.S.C. § 2241(c)(3).

[134] Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 301 (2001). We principally discuss doctrinal developments in this area over the past twenty years. For historical analysis of how immigration detention developed as an exception to constitutional limits on civil confinement, *see generally* Arnold, *supra* note 64.

[135] *See Zadvydas*, 533 U.S. at 678. Most recently, the Supreme Court found that federal courts did not have jurisdiction to review removal orders that are entered by executive officials without an administrative hearing. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020). For a comprehensive discussion of the history of habeas jurisdiction in immigration cases, focusing on the 1996 reforms in AEDPA and the litigation that followed, see Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459 (2006).

refusals to recognize further limits. The doctrinal developments in this area inform our discussion of habeas procedure through the lens of an emblematic case, *Ye v. Miller*, and the theoretical framework of the embedded nature of procedural rules and substantive rights.

The Supreme Court recognized the constitutional problem of indefinite immigrant detention in 2001, arising from the intractable case of Mr. Zadvydas, who could not be physically deported because of his complicated immigration history.[136] Mr. Zadvydas was born in a refugee camp in Germany to Lithuanian parents in 1948 and immigrated to the United States as a legal resident at the age of eight.[137] Decades later, in 1994, he was ordered deported to Germany, but Germany refused to accept his deportation because he was not a German citizen.[138] Lithuania and the Dominican Republic, his wife's birth country, both similarly refused him.[139] During the efforts to deport him, Mr. Zadvydas was continuously detained, first at a federal detention center in Oakdale, Louisiana, and then in a facility in New Orleans.[140] After one year of detention, he petitioned for release through habeas in the Eastern District of Louisiana.[141] Over two years later, that court ordered his release under supervision.[142] When he was finally ordered released, he had been detained for nearly four years.[143] On appeal, the Fifth Circuit reversed the release order, permitting his continued detention so long as good-faith efforts to deport him continued and he received periodic administrative review of his detention.[144]

The Supreme Court granted certiorari to Mr. Zadvydas alongside a split decision arising from the Ninth Circuit[145] to consider the question of whether the statute authorizing detention after the entry of a deportation order permit-

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[136] The Court had previously considered prolonged and potentially indefinite detention at the height of the Cold War in the case of stateless legal resident Mezei, who was detained at Ellis Island after returning from a trip to Hungary for 19 months. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 207–09 (1953). Upon return, Mezei was ordered permanently excluded from the United States but could not be deported, as no country would accept him. *Id.* at 209–10. Lower courts had ordered him released from his seemingly indefinite detention at Ellis Island, but the Supreme Court reversed, given the broad power to exclude even without a hearing for national security purposes and even with continued detention. *See id.* at 216.

[137] *See Zadvydas*, 533 U.S. at 684.

[138] *See id.*

[139] *See id.*

[140] *See* Eric Schmitt, *Constitutional Case of a Man Without a Country,* N.Y. TIMES (Mar. 13, 2001), http://www.nytimes.com/2001/03/13/us/constitutional-case-of-a-man-without-a-country.html [https://perma.cc/7DWH-ZMYW].

[141] *See Zadvydas*, 533 U.S. at 685.

[142] *See id.*; *see also* Zadvydas v. Caplinger, 986 F. Supp. 1011, 1027–28 (E.D. La. 1997).

[143] *See* Zadvydas v. Caplinger, 986 F. Supp. 1011, 1027 (E.D. La. 1997).

[144] *See* Zadvydas v. Underdown, 185 F.3d 279, 297 (5th Cir. 1999).

[145] The Ninth Circuit had ordered release of immigrant Cambodian legal resident, Mr. Kim Ho Ma, who could not be deported because the United States had no repatriation treaty with Cambodia. Kim Ho Ma v. Reno, 208 F.3d 815, 821–22 (9th Cir. 2000). The Ninth Circuit employed constitutional avoidance to interpret the relevant statute as authorizing detention for only a reasonable time to effectuate removal. *See id.* at 822–27.

ted indefinite detention.[146] In a landmark decision, the Court answered with a resounding no, holding that the statute permits detention only for a period reasonably necessary to complete deportation.[147] The Court reasoned that the "serious constitutional problem" of indefinite detention required the Court to interpret the detention statute as containing an "implicit limitation" on the detention.[148]

The Court reached this conclusion by applying its due process jurisprudence for civil detention: freedom from detention "lies at the heart of the liberty that [the Due Process] Clause protects"[149] and prohibits detention unless it is ordered in a "*criminal* proceeding with adequate procedural protections"[150] or "in certain special and 'narrow' nonpunitive 'circumstances'"[151] "where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"[152] Because immigrant detention is civil detention and therefore cannot be punitive, strong special justifications must outweigh the individual liberty interest at stake.[153]

In its brief, the government had offered two justifications for immigrant detention: ensuring appearance in immigration proceedings and preventing danger to the community.[154] For those like Mr. Zadvydas, whose removal is a remote possibility, the Court found the first justification to be "weak or nonexistent," and therefore detention to no longer be reasonably related to its purpose. The second justification, danger to the community, could still be relevant for immigrants ordered deported. But in the analogous contexts of civil commitment and pretrial detention, the Court has closely scrutinized dangerousness as a justification for civil detention. For civil commitment, the Court requires "strict procedural safeguards" in a system that detained only "a small segment of particularly dangerous individuals" with the special circumstance of mental illness.[155] In fact, the Court previously struck down Louisiana's commitment system because it placed the burden on the detained person to prove non-dangerousness.[156]

Pretrial detention, on the other hand, has "stringent time limitations" from the Speedy Trial Act,[157] is reserved for the "most serious of crimes,"

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[146] *Zadvydas*, 533 U.S. at 682.
[147] *See id.* at 699–700.
[148] *Id.* at 689–90.
[149] *Id.* at 690 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).
[150] *Id.* (citing United States v. Salerno, 481 U.S. 739, 746 (1987)).
[151] *Id.* (citing *Foucha*, 504 U.S. at 80).
[152] *Id.* (citing Kansas v. Hendricks, 521 U.S. 346, 356 (1997)).
[153] *See id.*
[154] *See* Br. for Resp'ts at 36–38, Zadvydas v. Caplinger, No. 97-31345 (June 3, 1998) ("In particular, Congress has squarely addressed in the last decade the problem of aliens who commit crimes in the United States while awaiting deportation, or who evade deportation by absconding."); *see also Zadvydas*, 533 U.S. at 690.
[155] *Zadvydas*, 533 U.S. at 690 (citing Kansas v. Hendricks, 521 U.S. 346, 348 (1997)).
[156] *See id.* (citing Foucha v. Louisiana, 504 U.S. 71, 81–83 (1992)).
[157] 18 U.S.C. § 3161 *et seq.*

and requires the government to show clear and convincing evidence of dangerousness before a judge.[158] The *Zadvydas* Court found that a general concern for dangerousness, absent a further special circumstance such as dangerous mental illness, could not justify indefinite detention for immigrants ordered removed, where some may have merely overstayed a tourist visa.[159] Therefore, the Court held that the administrative review process for post-removal-order detention, where the immigrant bears the burden of proving non-dangerousness without significant judicial review, raised a constitutional problem of indefinite or even permanent detention.[160] Seemingly employing constitutional avoidance, the Court responded to this constitutional problem by reading the statute as implicitly limited to a period reasonably necessary to complete removal.[161]

As guidance to the lower courts in administering this holding, the Court held that the six-month period after the issue of a final removal order is presumptively reasonable and detention is permitted.[162] Beyond that, the Court established a burden-shifting framework to guide courts in deciding whether to release a detained immigrant. The Court held that if the detained immigrant "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing."[163] Further, "for the detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."[164] If the government fails to rebut that showing, then the detained immigrant should be released.[165] The Court therefore reversed the Fifth Circuit's holding that continued detention was permissible unless the detained immigrant could show that deportation was "impossible."[166] The *Zadvydas* opinion found that interpretation to demand "more than our reading of the statute can bear."[167]

The facts of that case were stark because Mr. Zadvydas was functionally stateless. But this belied a surprisingly common legal problem: at the

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[158] *Zadvydas*, 533 U.S. at 691 (quoting United States v. Salerno, 481 U.S. 739, 750–52 (1987)).

[159] *See id.*

[160] *See id.* at 692.

[161] *See id.* at 699.

[162] *See id.* at 701.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.* at 678, 702. *Zadvydas* concerned detained immigrants who had been encountered in the interior rather than at the border. The *Zadvydas* Court relied on this distinction to distinguish *Mezei*, in which the Court permitted indeterminate detention at Ellis Island, authorized by a different statute, of an immigrant seeking admission who could not be deported. *Id.* at 692–93 (distinguishing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)). But soon after *Zadvydas*, the Court extended its holding to immigrants who are detained at the border while seeking admission to the country. *See* Clark v. Martinez, 543 U.S. 371, 386 (2005).

[167] *Zadvydas*, 533 U.S. at 702.

time that the Supreme Court was considering the case, federal immigration authorities held 2,800 people who could not be deported.[168] That is a large number of affected people in itself, but is especially significant as a proportion of the average detained population, which was 19,000 in 2001.[169]

Mr. Zadvydas's case established that prolonged detention of immigrants raises constitutional concerns, made especially stark in that case because he could not be deported and thus might be detained forever. But that left open the question of the legality of prolonged detention for those who had not yet been ordered deported. The Court next considered the limits of prolonged, no-bond detention for those still in removal proceedings two years later in *Demore v. Kim*. Mr. Kim was a lawful permanent resident who was deportable because he had been convicted of burglary and petty theft.[170] These convictions also subjected him to mandatory, no-bond detention under 8 U.S.C. § 1226(c) during his removal proceedings.[171] Mr. Kim had been detained for approximately six months before he was ordered released by the district court granting his habeas petition.[172] In a 5-4 decision, the Court found no constitutional problem in the statute authorizing no-bond detention of immigrants with certain criminal convictions "for the *brief* period necessary for their removal proceedings."[173] The Court held that concerns about flight for these immigrants justified the no-bond detention statute, finding no constitutional problem because the detention was perceived as time-limited with a definitive end at the conclusion of proceedings.[174]

As previously noted, the Court relied on faulty data from the Executive Office for Immigration Review and misinterpreted it to erroneously conclude those in mandatory detention during their removal proceedings—a subset of immigrants with certain criminal convictions or who raise terrorism or serious foreign policy concerns—were nearly always detained for fewer than five months. The *Demore* opinion recounted that eighty-five percent of these immigrants' removal proceedings lasted "an average time of 47 days and a median of 30 days."[175] For the remaining fifteen percent of these cases appealed to the administrative appeals body, "appeal takes an average of four months, with a median time that is slightly shorter."[176] The Court concluded that detention for this group of immigrants lasts "roughly a month

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[168] *See* Schmitt, *supra* note 140.
[169] *See* Det. Watch Network, *supra* note 57.
[170] *See* Demore v. Kim, 538 U.S. 510, 513 (2003).
[171] *See id.* at 513–14. Mr. Kim's burglary conviction was initially alleged to be an aggravated felony, and both the burglary and petty theft convictions were crimes involving moral turpitude. *See id.* at 513 n.1. This established two independent bases for no-bond detention under Section 1226(c). Mr. Kim did not dispute that he was subject to detention under Section 1226(c), even though the burglary conviction was not clearly an aggravated felony. *See id.* at 513–14.
[172] *See id.* at 530–31.
[173] *Id.* at 513 (emphasis added).
[174] *See id.* at 527–28.
[175] *Id.* at 510, 529.
[176] *Id.*

and a half in the vast majority of cases" and "about five months" in the appealed cases.[177] Over a decade later, the Solicitor General's office informed the Court that the agency had "made several significant errors" in calculating the average length of detention in these immigration cases in 2001, leaving out more than 15,000 cases that should have been included in those statistics.[178] The agency had also used a definition of case completion that counted the transfer of venue as completion.[179] The correction of these two errors modified the case length estimates by a few days, in some instances revising the case length down and in others increasing the case length.[180]

Most significantly, the Solicitor General pointed out that the *Demore* Court had erroneously added together the two statistics for no-appeal immigration judge proceedings and administrative appeal proceedings to reach the conclusion that detention lasts about five months in appealed cases.[181] That addition assumed that immigration judge proceedings where there was a later administrative appeal took the same amount of time as no-appeal immigration judge proceedings.[182] The Solicitor General relayed that this assumption, though "understandable" from the information that was provided, was "incorrect."[183] In fact, immigration judge proceedings took significantly longer—an average of 113 days and median of 89 days—in cases where an appeal was taken.[184] This meant that the correct average and median times from the filing of charges in immigration court to resolution of the administrative appeal for this subset of immigration cases were 382 and 272 days respectively—both well in excess of the five months the Court had assumed.[185]

But even when the *Demore* opinion was released in 2003, long before the statistics on detention length were revealed to be inaccurate, there were indications that the holding of this case was limited because of the constitutional questions presented by protracted detention. Justice Kennedy, the crucial fifth vote for the majority, filed a concurrence expressing concern regarding the constitutionality of prolonged no-bond detention of those like Mr. Kim. He wrote that legal permanent residents "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."[186] He further noted that "unreasonable delay" in deportation proceedings could make it

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[177] *Id.*
[178] Letter from Ian Heath Gershengorn, *supra* note 12, at 2.
[179] *See id.*
[180] *See id.*
[181] *See id.*
[182] *See id.* at 2–3.
[183] *Id.* at 3.
[184] *See id.*
[185] *See id.* at 2–3.
[186] *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (citing *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting)).

necessary to "inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons."[187]

Seizing upon this apparent concern for prolonged detention from the Justice considered to be the key swing vote on the Court at the time, litigators continued to bring cases challenging no-bond detention, arguing that detention during removal proceedings could become unreasonable because of pervasive delays in adjudications. In the first such case, litigated before *Demore* and decided months after in 2003, Mr. Ly, a Vietnamese refugee with white-collar criminal convictions, sought release through habeas during his removal proceedings on the grounds that, even at their conclusion, he could not be deported.[188] Because there was no repatriation treaty between Vietnam and the United States, Mr. Ly argued that his detention was functionally indefinite, and that he should be released even during his removal proceedings.[189] He was held in no-bond detention for 500 days—over one year and seven months—with ongoing removal proceedings until a district court granted his release.[190] The Sixth Circuit agreed, finding that *Demore* relied on the assumption that proceedings would be "completed within a short period of time and [the detainee] will actually be deported, or will be released."[191] Since Mr. Ly "had been imprisoned for a year and a half with no final decision as to removability in the case," his detention was no longer reasonable, and he was entitled to a bond hearing to seek release.[192]

In the decades following *Ly*, cases continued to arise in most circuits regarding immigrants held in prolonged, no-bond detention during removal proceedings.[193] These cases again raised the question of whether detention even during removal proceedings becomes unlawful at some point, interpreting *Demore* as limited to authorizing brief detention. Like in *Ly*, each case presented detention well beyond the five months erroneously stated as the average length for appealed cases by the *Demore* Court—including nearly seven years of detention in one case.[194] Every circuit court to consider the question during that period found that prolonged detention raised constitutional concerns at some point, and therefore the immigrant was entitled to a

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[187] *Id.* at 532–33 (Kennedy, J., concurring).
[188] *See* Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003).
[189] *See id.* at 266.
[190] *See id.* at 274.
[191] *Id.* at 271.
[192] *Id.*
[193] *See, e.g.*, Sopo v. Att'y Gen., 825 F.3d 1199, 1202 (11th Cir. 2016) (held for four years); Diop v. U.S. Immigr. & Customs Enf't, 656 F.3d 221, 223 (3d Cir. 2011) (held for 1,072 days); Reid v. Donelan, 819 F.3d 486, 495 (1st Cir. 2016) (held for 400 days); Lora v. Shanahan, 804 F.3d 601, 614 (2d Cir. 2015) (held for 158 days); Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 944 (9th Cir. 2008) (seven years).
[194] *See Casas-Castrillon*, 535 F.3d at 944–48.

bond hearing to argue for release.[195] But a split emerged on the appropriate legal remedy for the constitutional concerns with such prolonged detention. Relying on constitutional avoidance as the Court did in *Zadvydas*, the Second and Ninth Circuits interpreted the mandatory detention statute to contain an implicit bright-line limit of six months, holding that immigrants in proceedings are at that point entitled to a bond hearing in immigration court.[196] In contrast, the First, Third, Sixth, and Eleventh Circuits held that district courts should individually review the reasonableness of prolonged detention through habeas petitions without any bright-line rule, pointing to *Demore*'s failure to adopt such a presumption as well as the statute's plain language, which contains no time limit.[197]

Against this backdrop, in 2016 the Supreme Court granted certiorari to *Jennings v. Rodriguez* to review the Ninth Circuit's broad ruling that all detained immigrants were entitled to periodic bond hearings every six months because of constitutional concerns with prolonged detention.[198] Somewhat uniquely, the Ninth Circuit's ruling had considered immigrants detained according to three separate statutory provisions that authorize detention during proceedings: immigrants in full removal proceedings[199] detained discretionarily under Section 1226(a), immigrants in full proceedings subject to mandatory detention under Section 1226(c), and immigrants in expedited removal proceedings under Section 1225(b).[200] Using constitutional avoidance, the Ninth Circuit imposed a six-month limit on each, after which the immigrant received periodic bond hearings.[201] This resulted in bond hearings with procedural protections for those who were held in mandatory detention and ordinarily not entitled to bond, for both immigrants in full proceedings after crimes or terror offenses under Section 1226(c) and immigrants in expedited removal proceedings under Section 1226(b), many of whom had presented at the border to request asylum.[202] The Ninth Circuit further held that immigrants in full proceedings who are bond-eligible under Section 1226(a) should, upon denial of bond or otherwise continued detention, re-

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[195] *See Lora*, 804 F.3d at 614; Rodriguez v. Robbins, 804 F.3d 1060, 1066 (9th Cir. 2015), *reversed by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018); *Reid*, 819 F.3d at 495; *Diop*, 656 F.3d at 223; *Ly*, 351 F.3d at 271; *Sopo*, 825 F.3d at 1202.

[196] *See Lora*, 804 F.3d at 614; *Rodriguez*, 715 F.3d at 1133, *reversed by Jennings*, 138 S. Ct. 830.

[197] *See Reid*, 819 F.3d at 495; *Diop*, 656 F.3d at 231; *Ly*, 351 F.3d at 271; *Sopo*, 825 F.3d 1215.

[198] *See Jennings*, 138 S. Ct. at 839.

[199] This refers to those in Section 240 proceedings, rather than those subject to withholding-only proceedings under Section 1241 or expedited removal under Section 1225(b).

[200] *See Rodriguez*, 715 F.3d at 1134–44.

[201] *See id.* at 1133.

[202] *See id.* at 1135. The periodic bond hearings resulting from the *Rodriguez* ruling were the subject of novel empirical analysis of immigration judges' decision-making. *See* Ryo, *Detained*, *supra* note 28, at 121–22.

ceive periodic bond hearings every six months with procedural protections.[203]

The Court reversed on review, holding that the canon of constitutional avoidance was not appropriate for these statutes because the Ninth Circuit's interpretation of the statutes was not plausible.[204] The Court found that the text of each statute plainly authorized prolonged detention, including detention without bond for those with certain criminal convictions and immigrants seeking admission.[205] The Court held that the Ninth Circuit "all but ignored the statutory text," relying on *Zadyvdas* as "essentially granting a license to graft a time limit onto the text" of Section 1225(b), which mandated detention of applicants for admission until the conclusion of their proceedings.[206] The Court found the text of Section 1226(c), the provision at issue in *Demore*, to be "even clearer," with no time limit; the statute permits release "only if" certain conditions are met, making clear that those detained under its authority "are not entitled to be released under any circumstances other than those expressly recognized by the statute."[207] Finally, the Court also found that the text of Section 1226(a), the general provision for those in full removal proceedings, did not "even remotely support[ ]" the imposition of periodic bond hearings every six months at which the government must prove by clear and convincing evidence that continued detention is necessary.[208]

Because the Ninth Circuit's opinion was based on the statutory interpretation and had not ruled on a direct constitutional challenge, the Court declined to reach the constitutional arguments and instead remanded for the Ninth Circuit to consider them in the first instance.[209] The case remains in litigation before the district and appellate courts because of both COVID-19-related stays and stays for a further appeal.[210] There are ongoing settlement negotiations between the parties, and an injunction remains in place for now.[211]

In addition to reversing the Ninth Circuit, *Jennings* abrogated the holdings in the First, Second, Sixth, and Eleventh Circuits by limiting prolonged detention during proceedings for immigrants who had committed certain criminal or terrorism-related offenses.[212] All five circuits based their hold-

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[203] *See Rodriguez*, 715 F.3d at 1138–39.
[204] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018).
[205] *See id.*
[206] *Id.* at 843.
[207] *Id.* at 846.
[208] *Id.* at 847–48.
[209] *Id.* at 851.
[210] *See* Rodriguez v. Barr, 2021 WL 4871067 (9th Cir. 2021); Rodriguez v. Marin, 909 F.3d 252 (9th Cir. 2018); Rodriguez v. Hayes, No. 2:07-cv-3239 (C.D. Cal. 2022).
[211] Joint Status Report, Rodriguez v. Hayes, No. 2:07-cv-3239, ECF No. 598 (C.D. Cal. Mar. 4, 2022).
[212] *See* Hamama v. Adduci, 946 F.3d 875 (6th Cir. 2020) (recognizing that *Jennings* abrogated *Ly*); Shanahan v. Lora, 138 S. Ct. 1260 (2018) (granting writ of certiorari, vacating, and remanding for reconsideration in light of *Jennings*); Reid v. Donelan, No. 14-1270, 2018 WL

ings on statutory analysis upended by the *Jennings* Court. For example, in a Sixth Circuit case concerning the prolonged detention of a class of Iraqi immigrants, the Court held that *Ly*, its relevant pre-*Jennings* precedent, "turned on a constitutional avoidance reading of § 1226(c), one that *Jennings* expressly foreclosed."[213] Given the drastically different approaches in *Jennings* and *Ly*, the Court concluded "only one can survive. It is not *Ly*."[214]

In contrast, the Third Circuit's holding rested on both statutory interpretation and constitutional due process analysis, and the constitutional holding appears to survive *Jennings*.[215] The Third Circuit had held that, "[a]t a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and danger to the community."[216] Because *Jennings* interpreted Section 1226(c) but expressly reserved the constitutional question, remanding that issue back to the Ninth Circuit, the Third Circuit held that "*Jennings* did not call into question our constitutional holding . . . that detention under § 1226(c) may violate due process if unreasonably long."[217]

With most prior precedent abrogated by *Jennings*, courts throughout the country are now grappling with whether and when prolonged, no-bond detention authorized by statute is unreasonable and unconstitutional under the Due Process Clause. One of the first decisions to do so, *Reid v. Donelan*, [218] discusses at length the statistical data on the duration of detention during removal proceedings, distinguishing *Demore* as not addressing years-long detention.[219] In *Reid*, the Massachusetts district court concluded that mandatory, no-bond detention "violates due process when it becomes unreasonably prolonged," eschewing any bright-line period but indicating that more than one year of detention is likely unreasonable.[220] Some courts considering claims by long-detained immigrants have followed suit after weighing various fact-specific factors.[221] Others have found prolonged detention

4000993 (1st Cir. 2018) (withdrawing and vacating prior opinion in light of *Jennings* and remanding to district court).

[213] *Hamama*, 946 F.3d at 880.

[214] *Id.*

[215] *See* Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 278 (3rd Cir. 2018) (interpreting Diop v. U.S. Immigr. & Customs Enf't., 656 F.3d 221, 223 (3d Cir. 2011)).

[216] *Diop*, 656 F.3d at 232.

[217] *Borbot*, 906 F.3d at 278 (interpreting Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018)).

[218] 390 F. Supp. 3d 201 (D. Mass. 2019).

[219] *See id.* at 215.

[220] *Id.*

[221] *See* Kabba v. Barr, 403 F. Supp. 3d 180 (W.D.N.Y. 2019) (holding immigrant in no-bond detention for 18 months because of criminal convictions was unreasonable and unconstitutional); Banda v. McAleenan, 385 F. Supp. 3d 1099 (W.D. Wash. 2019) (holding asylum seeker seeking admission in no-bond detention for eighteen months was unreasonable).

reasonable.[222] Several cases have encountered mootness obstacles because the immigrant-petitioner was released or deported before the court could issue a final opinion on the reasonableness of the detention length.[223]

But the legal limits of immigrant detention remain a perennial topic for the Supreme Court. A series of opinions have followed the *Jennings* model of using plain-language statutory interpretation to hold that various statutory provisions authorize immigrant detention without bond or other procedural protections. In each case, the Court declines to consider the constitutionality of prolonged detention as not properly presented and also declines to use constitutional avoidance to find legal limits to detention, as it did in *Zadvydas*.[224] The Court has thus rejected two different possible statutory bases for bond hearings for formerly deported immigrants seeking protection from persecution.[225] The Court also found that those subject to no-bond detention because of criminal convictions need not be immediately taken into immigration custody after serving their sentences.[226] As in past cases, empirically testable facts such as length of detention, length of immigration proceedings, and adequacy of habeas corpus as review of detention featured prominently in the oral arguments in these cases.[227] And as in the past, these empirical questions were largely unanswered by advocates for both sides.[228]

Finally, two recent decisions limit the relief available through habeas corpus petitions. Most recently, the Court found that a statutory provision strips the district and appellate courts of jurisdiction to award class-wide injunctions of other immigration enforcement and detention provisions.[229] A few years ago, the Court also upheld a statutory provision that strictly limited judicial review of an expedited removal order, finding it did not violate the Suspension or Due Process Clauses because administrative and judicial

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[222] *See, e.g.*, Minaya-Rodriguez v. Barr, 459 F. Supp. 3d 488 (W.D.N.Y. 2020) (holding detention of immigrant held for over twelve months was not unreasonable where underlying criminal sentence was for 7.5 months).

[223] *See, e.g.*, Sopo v. U.S. Att'y Gen., 890 F.3d 952 (11th Cir. 2018), *vacating* 825 F.3d 1199 (11th Cir. 2016); *cf.* Hassan v. Barr, No. 19-1175, 2020 WL 1444975 (D. Minn. Mar. 25, 2020) (declining to adopt magistrate's recommendation to release and finding the case prudentially moot because petitioner was released and the likelihood of redetention was unclear); Lukaj v. McAleenan, No. 3:19-cv-241, 2020 WL 248724 (M.D. Fla. 2020) (vacating prior order of release for immigrant detained for almost fourteen months because of factual error).

[224] *See Arteaga-Martinez*, 142 S. Ct. at 1834–35; *Guzman Chavez*, 141 S. Ct. at 2291 n.9; *cf. Nielsen*, 139 S. Ct at 972 (2019).

[225] *See Arteaga-Martinez*, 142 S. Ct. at 1833 (holding that Section 1231(a)(6) does not require six-month bond hearings); *Guzman Chavez*, 141 S. Ct. at 2280 (holding that withholding-only cases are not detained under Section 1226(a)).

[226] *See Preap*, 139 S. Ct. at 964–68.

[227] *See supra* notes 26–27; *see also* Transcript of Oral Argument at 46, Pham v. Guzman Chavez, (No. 19-897) (Jan. 11, 2021).

[228] *See id.*

[229] *See Garland*, 142 S. Ct. at 2062–63. The Court did not address whether class-wide declaratory relief remains available. *See id.* at 2065 n.2.

review is beyond what it described as the "traditional function" of habeas corpus in providing release from unlawful confinement.[230]

These recent decisions collectively mean that the legality of immigrant detention will, for the most part, be litigated through individual petitions by detained immigrants and will be litigated through the frame of what is constitutionally permissible, where length of detention is most relevant because of *Zadvydas*. Despite repeated recent losses, this litigation is likely to continue, with these constitutional claims destined to return to the Supreme Court for a few reasons. First, these habeas petitions are often the only avenue for possible release after administrative mechanisms have failed for detained immigrants held for months or years who are desperate for a way out of confinement.[231] Second, the federal government consistently petitions for certiorari to challenge any favorable appellate precedent, so immigrant advocates wary of a conservative Court cannot easily avoid review.[232] And third, both Democratic and Republican administrations for the past decade have continued systems of mass immigrant detention, to varying degrees, as well as zealous defense of broad executive authority for no-bond detention in the courts.[233] Because of these bipartisan policies, there is every reason to expect these challenges to endure, meaning the constitutional questions about civil detention they present will continue to be recurring issues on the Supreme Court's docket.

Furthermore, while challenges to prolonged detention are the most common claims raised in immigrant habeas petitions, other statutory or constitutional claims regarding the legality of immigrant detention have been advanced over the past several years through this vehicle.[234] Most recently, the COVID-19 pandemic led to a resurgence of habeas litigation from de-

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[230] *See Thuraissigiam*, 140 S. Ct. at 1968–83.

[231] *See supra* sections I.B, I.C.

[232] *See, e.g.*, Petition for Writ of Certiorari, Albence v. Arteaga Martinez, 2020 WL 290966 (No. 19-896); Petition for Writ of Certiorari, Garland v. Aleman Gonzalez, 2020 WL 5498427 (No. 20-322); Petition for Writ of Certiorari, Johnson v. Guzman Chavez, 2020 WL 360451 (No. 19-897); Petition for Writ of Certiorari, Dep't Hom. Sec. v. Thuraissigiam, 2019 WL 3545866 (No. 19-161); Petition for Writ of Certiorari, Nielsen v. Preap, 2017 WL 1967444 (No. 16-1363); Petition for Writ of Certiorari, Jennings v. Rodriguez, 2016 WL 1239224 (No. 15-1204).

[233] *See "I'm a Prisoner Here": Biden Administration Policies Lock Up Asylum Seekers*, Hum. Rts. First (Apr. 21, 2022), https://humanrightsfirst.org/wp-content/uploads/2022/09/ImaPrisonerHere.pdf [https://perma.cc/J5ED-5Y87]; Br. for Pet'rs at 46, Garland v. Gonzalez, No. 20-322, 2021 WL 4864812 (Oct. 14, 2021) ("In short, existing regulations provide—at least as a general matter—all the process that the Constitution requires.").

[234] For some years, petitioners had argued that, as a matter of statutory interpretation, immigrants with criminal convictions can be held in no-bond detention only if they are detained immediately after release from incarceration. *See, e.g.*, *Nielsen*, 139 S. Ct. at 954. The Court foreclosed that argument in 2019. *Id.* Others had argued that those who have been previously ordered deported and request asylum-like protection from effectuating that deportation should receive bond hearings under the detention statutes. *See Guzman Chavez*, 141 S. Ct. at 2271. And some have sought greater procedural protections for bond hearings in immigration court, such as requiring the court to consider the immigrant's ability to pay in setting the bond amount. *See, e.g.*, Hernandez v. Sessions, 872 F.3d 976 (9th Cir. 2017).

tained immigrants, who are held in congregate facilities in which space for social distancing is scarce. Across the country, scores of immigrants have filed these petitions asking federal courts to intervene to protect those held in crowded facilities in conditions likely to expose them to COVID-19.[235] Many sought release by arguing that detention which exposed them to serious illness or death was unreasonable and unconstitutional.[236] One judge in Massachusetts considered a series of individual bail applications and ordered fifty immigrants released, while permitting others to remain detained.[237] Some cases challenged the conditions of confinement and sought court intervention requiring facilities to do more to protect detainees from the virus, including testing, quarantining, and depopulating to permit social distancing.[238]

As courts weighed these cases one at a time, sporadically ordering releases, COVID-19 spread rapidly through the facilities. As of January 9, 2023, a reported total of 50,554 detained immigrants had tested positive for COVID-19. As of May 23, 2022, a reported total of 43,338 detained immigrants had tested positive for COVID-19.[239] An epidemiological model by public health researchers estimates that the actual positive cases over a two-month period in the spring of 2020 may have been up to fifteen times higher than the numbers reported by immigration authorities.[240] Eleven detained immigrants have died from COVID-19.[241]

Through this latest wave of habeas litigation alleging punitive confinement, as well as the ongoing challenges to prolonged detentions in other contexts, federal courts at every level are continuing to grapple with the claims of detained immigrants asserting the need for cognizable legal limits. Even after significant litigation and use of discovery, both the existence and contours of those legal limits depend on factual questions that have not yet been conclusively answered.

II. Case Study: Adjudicating an Immigrant Habeas Petition

To demonstrate how procedure is intertwined with the substantive question of the legality of detention in the practice of habeas adjudication, we walk through an illustrative district court case that shows the procedural

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[235] *See COVID Behind Bars Data Project*, UCLA Law, http://uclacovidbehindbars.org/ [https://perma.cc/4BPY-522Q].

[236] *See, e.g.*, Dada v. Witte, No. 1:20-CV-00458, 2020 WL 2614616 (W.D. La. May 22, 2020).

[237] *See* Savino v. Souza, 459 F. Supp. 3d 317 (D. Mass. 2020).

[238] *See, e.g.*, Gayle v. Meade, No. 20-21553-CIV, 2020 WL 3041326 (S.D. Fla. June 6, 2020).

[239] *See* ICE Guidance on COVID-19 (Jan. 9, 2023), https://www.ice.gov/coronavirus#detStat [https://perma.cc/C22X-C4QX].

[240] *See id.*

[241] *See COVID-19 ICE Detainee Statistics by Facility*, U.S. Immigr. & Customs Enf't (Oct. 2, 2022), http://www.ice.gov/coronavirus#detStat [https://perma.cc/P2G4-JAJ2].

paths of these cases.[242] The quest for release by Mr. Zhi Qiang Ye six years ago shows common procedural barriers and delays that persist in these cases. He began, like most detained immigrants, representing himself without the help of a lawyer in filing his case. Unlike others, he was able to navigate court rules to advance to later stages of adjudication, which permit examination of the full adjudicative process as a grounding for later analysis. His case shows that even with significant litigation, there is a dearth of judicial analysis of the evidence because of procedural barriers—and what judicial analysis exists is buried in a memorandum order scheduling a hearing, available on the Public Access to Court Electronic Records (PACER) but never published or available in commercial databases. And though he was released from detention, this victory was a "shadow win" because it is recorded as dismissal for mootness and was not made pursuant to court order.

Mr. Ye's journey through the immigration legal system and his later challenge of detention in the federal courts is emblematic of the experience of many detained immigrants seeking release through habeas.[243] First, he navigated the administrative immigration court system, in which he was ordered deported but not physically removed.[244] Then, when he was arrested by ICE years later, he was detained mandatorily with no opportunity to argue for release on bond while ICE purportedly pursued the effectuation of his deportation order.[245] He was also detained far from his community and far from legal help: although Mr. Ye was arrested in California, where he had grown up, he was later shipped to Louisiana for further immigrant detention.[246] After more than seven months in detention since his re-arrest and with a failed administrative request for release, he filed a habeas petition.[247] Though the legal framework for this case was based upon well-settled law from *Zadvydas* fifteen years prior, Mr. Ye still had to navigate numerous procedural barriers for his claim to be considered.[248] Since the procedural rules for habeas corpus are drawn from a complicated array of legal sources, they are complex even for a trained lawyer to parse.[249] Furthermore, for Mr. Ye and other immigrants, procedural barriers often prolong detention that may already be unconstitutional. While these setbacks cumulatively foreclose relief for many immigrants, Mr. Ye was ultimately successful in

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[242] The Authors have obtained the full dockets of all immigrant habeas cases filed in the Western District of Louisiana over a ten-year period and selected this case after reviewing the trends across cases. All filings are on file with authors and available upon request.

[243] *See* Ye v. Miller, No. 16-cv-1742 (W.D. La. filed Dec. 20, 2016).

[244] *See* Order of Removal, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 (W.D. La. Feb. 28, 2017).

[245] *See* Pet. for Habeas Corpus, Ye v. Miller, No. 16-cv-1742, ECF No. 1 (W.D. La. Dec. 20, 2016).

[246] *See* Brooks Decl., Ye v. Miller, No. 16-cv-1742, ECF No. 12-2 (W.D. La. Feb. 28, 2017).

[247] *See* Pet. for Habeas Corpus, Ye v. Miller, No. 16-cv-1742, ECF No. 1 (W.D. La. Dec. 20, 2016).

[248] *See Zadvydas*, 533 U.S. at 701.

[249] *See infra* section III.A.

achieving his release.[250] However, like most of those who win release, Mr. Ye was released through the discretion of ICE rather than pursuant to a court order.[251] That means that he was not provided a final written decision with a reasoned explanation from the court regarding the legality of his detention.[252] This is part of a phenomenon that we term "shadow wins." These discretionary releases foreclose the development of legal standards and obscure meritorious cases for release, which are recorded in the formal court record as dismissed because the case is moot.

Mr. Ye immigrated from China with his parents in 1989 as a lawful permanent resident when he was only eleven years old.[253] He contracted meningitis as a small child, which resulted in cognitive impairments.[254] As an adult, he worked as a cashier.[255] He also had a few run-ins with law enforcement. In his mid-twenties, he was convicted of false impersonation and, on two separate occasions, second-degree burglary in California.[256] Returning from a short trip abroad two years after his last conviction, Mr. Ye was stopped by Customs and Border Patrol and placed in removal proceedings because he had been convicted of a "crime involving moral turpitude," a poorly defined category of crimes including some non-violent, misdemeanor offenses.[257] Mr. Ye was assisted by a lawyer to fight his deportation, arguing that the Chinese government would subject him to forced sterilization because of his cognitive impairment.[258] The immigration judge found that Mr. Ye was not competent to participate in the deportation proceedings against him based on a psychologist's evaluation that he intellectually functions at a third-grade level.[259] After weighing the evidence submitted by his counsel, the immigration judge ordered him deported anyway on August 24,

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[250] *See* R. & R., Ye v. Miller, No. 16-cv-1742, ECF No. 21 (W.D. La. May 25, 2017); *see also No End in Sight*, *supra* note 32, at 19–22.

[251] *See No End in Sight*, *supra* note 32, at 12–14.

[252] *See* R. & R. at 2, Ye v. Miller, No. 16-cv-1742, ECF No. 21 (W.D. La. May 25, 2017) ("Since Ye has been released and has thereby achieved the sole relief requested in his habeas petition, his habeas petition has been rendered moot. . . . IT IS RECOMMENDED that . . . Ye's habeas petition be DISMISSED WITH PREJUDICE as moot."); Judgment, Ye v. Miller, No. 16-cv-1742, ECF No. 23 (W.D. La. June 19, 2017) ("Ye's habeas petition is DISMISSED WITH PREJUDICE as moot.").

[253] *See* Order of Removal at 5, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 (W.D. La. Feb. 28, 2017).

[254] *See id.*

[255] *See id.*

[256] *See id.*

[257] *Id.* at 2 (charging Mr. Ye with inadmissibility under Section 1182(a)(2)(A)(i)(I)). *See generally* Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEB. L. REV. 647 (2012).

[258] *See* Order of Removal at 6, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 (W.D. La. Feb. 28, 2017).

[259] *See id.*

2009.[260] That deportation order became final on November 23, 2010, when the Board of Immigration Appeals dismissed his appeal.[261]

Mr. Ye was arrested by ICE years later, on May 4, 2016, at his home, and he was held in detention at a county jail in California.[262] After about four months in county jail, he was then transferred to LaSalle Detention Center in Jena, Louisiana, a former juvenile prison that had been converted into an immigration facility in 2006.[263] This facility was the largest immigrant detention megacomplex in the Gulf South at the time.[264] Then, as now, the facility was owned and operated by the private prison corporation Geo Group, which had also operated the former juvenile prison rife with violence and abuse.[265] In the wake of the national expansion of both incarceration and immigrant detention as part of the War on Drugs and criminalization legislation, Louisiana became a nationwide destination for immigrant detention, with for-profit megacomplexes in rural areas desperate for jobs and tax dollars.[266] Like Mr. Ye, many detained at LaSalle had been transferred hundreds or thousands of miles away from family, friends, and legal resources.[267] Jena, Louisiana is extraordinarily remote, with a total population of 3,410 residents and located hours away from major populations centers like Baton Rouge and New Orleans.[268]

When Mr. Ye was held a further three months in LaSalle—after seven and a half months of detention in total—he filed a pro se habeas petition in

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[260] *See id.* at 1, 8.

[261] *See* Board of Immigration Appeals Dismissal at 11–12, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 (W.D. La. Feb. 28, 2017); *see also* 8 C.F.R. § 1241.1 (providing that a removal order is final upon dismissal by the Board of Immigration Appeals).

[262] *See* Post Order Custody Review Sheet at 28, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 (W.D. La. Feb. 28, 2017); Brooks Decl., Ye v. Miller, No. 16-cv-1742, ECF No. 12-2 (W.D. La. Feb. 28, 2017).

[263] *See* Brooks Decl., Ye v. Miller, No. 16-cv-1742, ECF No. 12-2 (W.D. La. Feb. 28, 2017); *see also* Maria Clark, *In Tiny Jena, Immigration Debate Plays Out at Largest Detention Center in the Gulf South*, TIMES-PICAYUNE (Oct. 24, 2018), https://www.nola.com/archive/article_4bc64444-cdc1-5b79-baa1-5d6c95400477.html [https://perma.cc/FC7D-NVE9].

[264] *See* Clark, *supra* note 263; *see also Defunct Louisiana Juvenile Private Prison Reactivated by GEO for Immigrants*, PRISON LEGAL NEWS (June 15, 2008), https://www.prisonlegalnews.org/news/2008/jun/15/defunct-louisiana-juvenile-private-prison-reactivated-by-geo-for-immigrants/ [https://perma.cc/CAM3-CYMD].

[265] *See id.* According to documents for fiscal year 2015, ICE paid Geo Group $70.19 per day per immigrant for detaining up to 1,170 people at LaSalle, and then $28.38 for additional immigrants held, up to a maximum capacity of 1,560 people. *See New Data on 637 Detention Facilities Used by ICE in FY 2015*, TRAC IMMIGR. (Apr. 12, 2016), https://trac.syr.edu/immigration/reports/422/ [https://perma.cc/73MJ-CL3J].

[266] In 1986, Louisiana opened the largest immigrant detention center in the country, housing up to 1,000 immigrants in one section and with capacity for a tent city for 5,000 more detained immigrants if needed. Frances Frank Marcus, *Prison for Aliens Opens in Louisiana*, N.Y. TIMES (Apr. 9, 1986), http://www.nytimes.com/1986/04/09/us/prison-for-aliens-opens-in-louisiana.html [https://perma.cc/9XD3-SKR5].

[267] *See New Data on 637 Detention Facilities Used by ICE in FY 2015*, *supra* note 265.

[268] *See ACS Demographic and Housing Estimates (2016)*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=Jena,%20louisiana&tid=ACSDP5Y2016.DP05 [https://perma.cc/PU2U-DLYC].

federal court.[269] He argued that his detention had become indefinite because ICE could not obtain a travel document for him and therefore could not deport him.[270] Though he had been ordered deported six years ago and then been in detention awaiting deportation for over seven months, ICE had not obtained a travel document from China verifying his identity and permitting his international travel so that ICE could deport him to China.[271] Mr. Ye explained to the court that China could not verify his identity or residency because he had emigrated from China over thirty years ago.[272] Mr. Ye also argued that China would not accept his return because of his criminal record.[273] With these seemingly intractable barriers to his deportation, Mr. Ye argued that he was being held in indefinite detention in violation of his constitutional rights.[274]

He pleaded with the federal court for release from detention because he had no other mechanism to seek his release. Because he had been ordered deported previously, Mr. Ye was subject to mandatory detention and ineligible to seek release through a bond hearing in immigration court.[275] Further, he recounted that the office had denied his parole request and permitted his continued detention even though he could not be deported.[276] That administrative denial of release through parole could not be appealed to an immigration court or any other neutral arbiter.[277] Mr. Ye, like so many others who are ineligible for bond and unable to convince the agency in charge of their

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[269] Pet. for Habeas Corpus, Ye v. Miller, No. 16-cv-1742, ECF No. 1 (W.D. La. Dec. 20, 2016).

[270] *See id.* at 7–9.

[271] *See id.* at 8.

[272] *See id.*

[273] *See id.*

[274] *See id.*

[275] *See* 8 U.S.C. § 1241(a). Even before Mr. Ye was ordered deported, he was not eligible for bond under the statute because one of his criminal convictions is considered an "aggravated felony." *See* Order of Removal at 3, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 (W.D. La. Feb. 28, 2017). In immigration court, those with certain criminal convictions, including a single conviction for an aggravated felony, are not bond-eligible and will not receive any individualized hearing considering flight risk and dangerousness, absent court intervention based on constitutional concerns. *See* 8 U.S.C. § 1226(c)(1) (providing that federal officials "shall take into custody" any immigrant who has committed an aggravated felony); *Jennings*, 138 S. Ct. at 847 ("We hold that § 1226(c) mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings 'only if' the alien is released for witness-protection purposes."); Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 278 (3d Cir. 2018) ("*Jennings* did not, however, address the constitutionality of § 1226(c) . . . . Accordingly, *Jennings* did not call into question our constitutional holding in *Diop* that detention under § 1226(c) may violate due process if unreasonably long.").

[276] *See* Pet. for Habeas Corpus at 9, Ye v. Miller, No. 16-cv-1742, ECF No. 1 (W.D. La. Dec. 20, 2016) ("I've attempted to submit stay request, motion to reopen, and access to bond, but all been denied by ICE officer due to my final order of removal status."); *see also* 8 C.F.R. § 241.1 *et seq.* (post-custody order review process after *Zadvydas*); 8 U.S.C. § 1231(a)(3) (providing that post-removal-period supervision is governed by regulations).

[277] *See* 8 C.F.R. § 241.1 *et seq.* (post-custody order review process after *Zadvydas*); *see also* 8 U.S.C. § 1231(a).

detention to permit release, was left to the last-resort remedy of seeking release from unconstitutional detention in federal court.

But even this last-resort remedy is limited by a number of strict procedural rules that have emerged from a combination of the statute, the traditions of common law, and modern court interpretations. The first of these important rules is that Mr. Ye was required to file his petition in the Western District of Louisiana against the warden. The habeas statute states that the habeas petition should name as respondent "the person who has custody" over the petitioner and says that district courts may grant the writ within their respective jurisdictions.[278] The Supreme Court most recently interpreted the statute in *Rumsfeld v. Padilla*[279] to require that the habeas petition be directed at the immediate custodian with the power to produce the body of such party before the court or judge.[280] The Court further recognized that the "default rule" is that the warden of the facility is the proper respondent rather than "the Attorney General or some other remote supervisory official" with legal control, but expressly reserved the question of the proper respondent for immigrant habeas petitions—a question which had divided the lower courts.[281] Notwithstanding that express reservation, many courts subsequently interpreted the *Padilla* immediate custodian rule to apply to the petitions of detained immigrants because they challenge present physical confinement.[282] Therefore, for immigrants in detention, they usually must direct their habeas petition at the warden of the facility where they are being held, whose name the detained immigrant might not know because they are a private prison executive or county or state employee who is contracting with ICE.[283] The *Padilla* Court also interpreted the habeas statute to require that the district court issuing the writ "have jurisdiction over the custodian," meaning that the only district court with jurisdiction over a habeas petition is the "district of confinement."[284] Together, these rules generally require the habeas petitioner to sue the warden as immediate custodian and file the writ in the district court with territorial jurisdiction over the detention facility.

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[278] 28 U.S.C. § 2242; *see also id.* § 2243 (providing the writ "shall be directed to the person having custody of the person detained").

[279] 542 U.S. 426 (2004) (quoting *In re* Jackson, 15 Mich. 417, 439–40 (1867).

[280] *See also* Wales v. Whitney, 114 U.S. 564 (1885)).

[281] *Padilla*, 542 U.S. at 435 n.8.

[282] *See* Nken v. Napolitano, 607 F. Supp. 2d 149, 161 & n.7 (D.C. Cir. 2009); Kholyavskiy v. Achim, 443 F.3d 946 (7th Cir. 2006). Some district courts have disagreed, finding that the federal official with the most immediate control over the facility is the proper respondent, rather than the local warden. *See, e.g.*, Masingene v. Martin, No. 19-CV-24693, 2020 WL 465587, at *2 (S.D. Fla. Jan. 27, 2020); Rodriguez Sanchez v. Decker, No. 18-CV-8798, 2019 WL 3840977, at *2–3 (S.D.N.Y. Aug. 15, 2019); Saravia v. Sessions, 280 F. Supp. 3d 1168, 1186 (N.D. Cal. 2017).

[283] Scholars have argued that this rule should not apply to detained immigrants. *See* Michael Beland & Amanda Lesher Olear, *Hiding the Ball: The Need for Abandoning the Immediate Custodian Rule for Writs of Habeas Corpus Filed by Immigrant Detainees*, 4 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 99 (2004).

[284] *Padilla*, 542 U.S. at 442 (citing Braden v. 30th Judicial Circuit Ct. of Ky., 410 U.S. 484, 495 (1973), and Carbo v. United States, 364 U.S. 611, 617–18 (1961)).

Because Mr. Ye was detained in the northern part of the state, he filed his petition for habeas corpus by mail to the federal court for the Western District of Louisiana, which docketed his case on December 20, 2016.[285] In his petition, he sued the warden of LaSalle Detention Center and officials from the New Orleans ICE Field Office.

In addition to naming the jailer and filing in the district court of confinement, the habeas petition must comply with an array of requirements from the statute and local rules. Petitions must relay the essential facts of the detention, as well as why the detention is unlawful.[286] They also must be filed in writing, be signed, and be verified by the person seeking relief or someone acting on their behalf.[287] Under local court rule in the Western District of Louisiana, all unrepresented petitioners must file their petition on AO 242, a federal form created by the courts for habeas matters.[288] And finally, every petition must be accompanied by the five-dollar filing fee or an application for waiver of fees accompanied by an affidavit describing their assets and legal claim, as well as a certified copy of their commissary account in detention.[289] Petitions that fail to comply with these requirements are delayed or dismissed.[290]

Like most detained immigrants held for long periods of time,[291] Mr. Ye represented himself and so had to navigate these procedural obstacles without the help of a lawyer.[292] Mr. Ye avoided some common early mistakes that often delay and frustrate self-represented litigants in these cases. As the Court later observed, he was likely assisted by a "writ-writer" or jailhouse "lawyer" who read and wrote English and understood the basic court procedure in habeas cases.[293] With this help, Mr. Ye correctly filed his petition on AO 242, the required habeas petition form for the unrepresented.[294] He paid the $5.00 filing fee, rather than seeking to file *in forma pauperis*, which is a temporary waiver of fees technically available for the indigent but difficult

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[285] Since all of the current long-term Louisiana detention centers are located in the central and northern parts of the state, all immigrant habeas petitions are adjudicated in the Western District of Louisiana. Petitions filed elsewhere have been dismissed as improper. *See, e.g.*, Dada v. Witte, No. 20-1093, 2020 WL 1674129 (E.D. La. Apr. 6, 2020).

[286] *See* 28 U.S.C. §§ 2242, 2243.

[287] *See id.* § 2242.

[288] *See* Local Rule 3.2, U.S. Dist. Ct. for W. Dist. of La. (updated Oct. 15, 2020), https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/localrules.WDLA.2021Feb11.pdf [https://perma.cc/KW27-7GDL]; *see also* Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241 (AO 242), Admin. Office of U.S. Cts. (Sept. 1, 2017), https://www.uscourts.gov/sites/default/files/AO_242_0.pdf [https://perma.cc/N88D-MKTM].

[289] *See* 28 U.S.C. §§ 1914, 1915.

[290] *See No End in Sight*, *supra* note 32, at 17–19.

[291] *See id.* at 31–33; *see also* Eagly et al., *supra* note 28, at 32 (finding that only fourteen percent of detained immigrants were represented in immigration court).

[292] *See* Pet. for Habeas Corpus, Ye v. Miller, No. 16-cv-1742, ECF No. 1 (W.D. La. Dec. 20, 2016).

[293] Mem. Order at 5, Ye v. Miller, No. 16-cv-1742, ECF No. 16 (W.D. La. Dec. 20, 2016).

[294] *See* Pet. for Habeas Corpus, Ye v. Miller, No. 16-cv-1742, ECF No. 1 (W.D. La. Dec. 20, 2016).

to obtain because of procedural requirements.[295] His petition relayed the essential facts of his prolonged detention and the delays and obstacles to deporting him.[296] He also plainly stated a legal claim, saying that he was seeking "release from indefinite detention."[297] He properly sued his immediate custodian—the warden of LaSalle Detention Center in Jena, Louisiana, where he was held—as well as ICE officials with legal authority over his detention.[298] Further, he recounted how all other efforts to seek release had failed, including his requests for bond and release.[299] His filing was typed and mailed from a San Francisco address, presumably by a relative or friend who assisted him.[300] This initial filing did not include the immigration court opinion that explains his cognitive impairment and full immigration history.[301]

Along with his petition, Mr. Ye filed a motion to appoint counsel for "fair representation."[302] This step was unusual and again showed likely assistance from a writ-writer, as few unrepresented detained immigrants know to explicitly ask the court to appoint an attorney to assist them.[303] In his motion, Mr. Ye explained that he had contacted a non-profit organization in California that provided advice to immigrants but that they could not represent him in his case and were not licensed to practice in Louisiana.[304] Given the low numbers of immigration lawyers in Louisiana and extreme scarcity of lawyers with substantive knowledge of immigration law who are familiar with federal practice generally and habeas in particular, it is not surprising he could not find counsel.[305] He asked for the support of counsel

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[295] *See* Docket, Ye v. Miller, No. 16-cv-1742, (W.D. La. filed Dec. 20, 2016) (showing filing fee of $5 paid when petition filed); *see No End in Sight*, *supra* note 32, at 31–33 (describing delay and dismissal for failure to pay fee).

[296] *See* Pet. for Habeas Corpus, Ye v. Miller, No. 16-cv-1742, ECF No. 1 (W.D. La. Dec. 20, 2016).

[297] *Id.* at 9.

[298] *See id.* at 2.

[299] *See id.* at 3–4, 9.

[300] *See* Pet. for Habeas Corpus, Ye v. Miller, No. 16-cv-1742, ECF No. 1 (W.D. La. Dec. 20, 2016).

[301] *See id.* at 1–2; *see also* Order of Removal at 5, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 at 5 (W.D. La. Feb. 28, 2017).

[302] Mot. for Appointment of Counsel at 2, Ye v. Miller, No. 16-cv-1742, ECF No. 2 (W.D. La. Dec. 20, 2016).

[303] *See No End in Sight*, *supra* note 32, at 30 (noting that only 5% of detained immigrants asked the court to appoint counsel in habeas cases, and "only a handful" had their requests granted).

[304] *See* Mot. for Appointment of Counsel at 1–2, Ye v. Miller, No. 16-cv-1742, ECF No. 2 (W.D. La. Dec. 20, 2016).

[305] *See* Eleanor Acer, Jennifer Rizzo & Hiroko Kusuda, *Louisiana and the Growing Crisis in Immigrant Representation*, HUM. RTS. FIRST, 8 (Mar. 28, 2014) ("The representation challenges presented in immigrant detention are particularly acute in Louisiana"), https://web.archive.org/web/20210621140105/https://www.humanrightsfirst.org/sites/default/files/left-out-conference-paper.pdf [https://perma.cc/LP75-AGCP]; *No End in Sight*, *supra* note 32, at 29 ("In the ten-year study period, there were only six attorneys who represented petitioners in three or more cases at the time of filing.").

because of his limited English.[306] He further stated that he had $150 total in a savings account and no income due to his detention.[307]

Mr. Ye's case moved quickly at first. The clerk assigned a district and magistrate judge the same day that the petition and motion to appoint counsel were filed, and the pleadings were referred to the magistrate judge.[308] In unusually short order, eight days after filing and three days after Christmas, the court responded by directing the clerk to serve the summons on government officials: the warden of LaSalle, the ICE District Director, and local and national U.S. attorneys' offices.[309] The magistrate further ordered the government to respond with summary judgment evidence on the likelihood of removal and to file an answer and memorandum of law in response to the service of the summons.[310] Mr. Ye was then invited to produce "contradictory summary judgment evidence" on the lawfulness of his detention.[311] This order followed the burden-shifting framework from *Zadvydas*, which requires the government to produce evidence sufficient to rebut the petitioner's showing that removal is not reasonably foreseeable in order to justify continued detention.[312] Under *Zadvydas*, the petitioner should be released from detention if the government cannot prove that they are likely to be deported soon.[313]

Even with *Zadvydas*' clear legal framework grounded in a presumption of detention for less than six months for deportation, many significant legal and factual questions remained, as is usually true for Supreme Court opinions. The Court left the lower courts to consider what evidence would show "good reason to believe" that deportation is not sufficient to trigger a need for government response.[314] The Court also did not specify what government evidence would be sufficient in rebuttal to justify the detention.[315] And finally, the Court did not opine on how the district or appellate courts should weigh the evidence and adjudicate these time-sensitive, high-stakes petitions.[316] The appellate and district courts where Mr. Ye was litigating—the Fifth Circuit and Western District of Louisiana—had also left those questions largely unanswered almost two decades later.

Because prolonged detention is the core legal claim in these cases, the case timeline is particularly significant. In the magistrate's order directing the service of summons, the judge permitted the government sixty days to

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[306] *See* Mot. for Appointment of Counsel at 2, Ye v. Miller, No. 16-cv-1742, ECF No. 2 (W.D. La. Dec. 20, 2016).

[307] *See id.* at 3.

[308] *See* Docket, Ye v. Miller, No. 16-cv-1742 (W.D. La. filed Dec. 20, 2016) (showing case assignment on December 20, 2016).

[309] *See* Mem. Order, Ye v. Miller, No. 16-cv-1742, ECF No. 3 (W.D. La. Dec. 28, 2016).

[310] *See id.* at 2.

[311] *Id.*

[312] *See id.*

[313] *See id.*

[314] *See Zadvydas*, 533 U.S. at 701.

[315] *See id.*

[316] *See id.* at 701–02.

respond.[317] Then Mr. Ye was given thirty days for his reply.[318] The day after the magistrate's scheduling order, the clerk issued and mailed the summonses.[319] The various government defendants were served over the next two weeks, as early as January 3, 2017, and as late as January 17.[320] By the time all defendants had been served, Mr. Ye had been detained for eight and a half months.[321] The magistrate's briefing schedule of sixty days for response and a further thirty days for reply implicitly permitted an additional three months of detention—nearly a year of detention for Mr. Ye in total—before the case could be taken under advisement, assuming no further delays. Some petitions may sit for months without action from the court to require a response from federal officials.[322]

Over a week after the order requiring service of the summons, the magistrate judge denied the request for appointed counsel.[323] The judge held that Mr. Ye had "not shown that the interests of justice require that counsel be appointed" because the legal principles governing the case were well-established and the "circumstances surrounding Ye's claims are not particularly complex or unusual."[324] The court further noted that supplemental briefing from Mr. Ye "would not assist the Court" and that appointed counsel is generally only required if an evidentiary hearing is needed.[325]

Detained for nearly nine months at this point, Mr. Ye again requested relief from the court, stating that "ICE has repeatedly claim[ed] that they [were] waiting for [the] traveling document."[326] He asked for judgment and evidentiary proof from the government—specifically, evidence that China will accept his deportation, valid travel documents from China, and a sworn

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[317] *See* Mem. Order at 2, Ye v. Miller, No. 16-cv-1742, ECF No. 3 (W.D. La. Dec. 28, 2016).

[318] *See id.*

[319] *See* Summons Issued, Ye v. Miller, No. 16-cv-1742, ECF No. 4 (W.D. La. Dec. 29, 2016). The summonses auto-generate with a deadline for government response of twenty-one days, but the clerk crossed out that earlier deadline, replacing it with the sixty-day deadline ordered by the court. *Id.*

[320] *See* Acknowledgment of Service as to District Director ICE, Ye v. Miller, No. 16-cv-1742, ECF No. 5 (W.D. La. Jan. 5, 2017); Acknowledgment of Service as to Warden LaSalle Detention Facility, Ye v. Miller, No. 16-cv-1742, ECF No. 6 (W.D. La. Jan. 5, 2017); Acknowledgment of Service as to U.S. Attorney, Ye v. Miller, No. 16-cv-1742, ECF No. 7 (W.D. La. Jan. 6, 2017); Acknowledgment of Service as to U.S. Attorney General, Ye v. Miller, No. 16-cv-1742, ECF No. 8 (W.D. La. Jan. 17, 2017).

[321] *Compare* Acknowledgment of Service as to U.S. Attorney General, Ye v. Miller, No. 16-cv-1742, ECF No. 8 (W.D. La. Jan. 17, 2017), *with* Pet. for Habeas Corpus, Ye v. Miller, No. 16-cv-1742, ECF No. 1 (W.D. La. Dec. 20, 2016).

[322] *See No End in Sight*, *supra* note 32, at 20.

[323] *See* Mem. Order, Ye v. Miller, No. 16-cv-1742, ECF No. 9 (W.D. La. Jan. 27, 2017).

[324] *See id.* at 1–2.

[325] *See id.* at 2.

[326] *See* Mot. Requesting Relief, Ye v. Miller, No. 16-cv-1742, ECF No. 10 (W.D. La. Jan. 30, 2017).

statement by an ICE official.[327] The magistrate judge denied this motion for miscellaneous relief as duplicative of the habeas petition and premature.[328]

Five days before the sixty-day deadline in the summons,[329] an Assistant U.S. Attorney (AUSA) from the U.S. Attorney's Office in the Western District of Louisiana, representing all government respondents, entered the case on February 28 with a motion to dismiss.[330] Often, AUSAs run out the deadline, filing on the very last day,[331] or request extensions, sometimes repeatedly.[332] These extensions of already-generous deadlines are nearly always granted by the court, and further prolong the petitioner's detention.[333] And until the case is fully briefed and the judge is prepared to rule on the question of release, it is of little use that the Supreme Court directed that the government's burden to show that deportation will occur soon increases as the length of detention grows.[334]

Accompanying her brief, the AUSA offered rebuttal evidence that is typical in immigrant habeas cases: a sworn statement from an ICE official in the local field office that was based on review of a file rather than personal knowledge and filled with conclusory assertions and predictions with no clear factual basis.[335] Based on a file review and conversations with other officers, the Assistant Field Office Director stated that the agency had requested travel documents from China soon after detaining Mr. Ye in May 2016.[336] The agency's history of the case showed intermittent requests for travel documents over several months.[337] Importantly, the declaration contained two predictions for the possible timeline for issuance of the travel document.[338] First, on January 5, 2017, after the habeas petition was filed, local ICE officials were told by headquarters that "it is possible that a [travel document] will be issued within the next couple of weeks."[339] Then, in late February, local officials asked again and were told "there is currently

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[327] *See id.*

[328] *See* Electronic Order Denying Mot. for Miscellaneous Relief, Ye v. Miller, No. 16-cv-1742, ECF No. 11 (W.D. La. Jan. 31, 2017).

[329] *Compare* Acknowledgment of Service as to U.S. Attorney General, Ye v. Miller, No. 16-cv-1742, ECF No. 8 (W.D. La. Jan. 17, 2017), *with* Mot. to Dismiss Pet. for Writ of Habeas Corpus, Ye v. Miller, No. 16-cv-1742, ECF No. 12 (W.D. La. Feb. 28, 2017).

[330] *See* Mot. to Dismiss Pet. for Writ of Habeas Corpus, Ye v. Miller, No. 16-cv-1742, ECF No. 12 (W.D. La. Feb. 28, 2017).

[331] *See, e.g.*, Docket, Gomez Barco v. Witte, No. 20-cv-497 (W.D. La. filed Apr. 17, 2020).

[332] *See No End in Sight*, *supra* note 32, at 23 (describing extension requests from the Assistant U.S. Attorney in 57 cases out of 499 cases, and second extension requests in 10 of those cases).

[333] *See id.* (noting that 65 out of 67 requests for extension by government were granted and remaining two requests were not ruled on).

[334] *See Zadvydas*, 533 U.S. at 701.

[335] *See* Brooks Decl. ¶ 2, Ye v. Miller, No. 16-cv-1742, ECF No. 12-2 (W.D. La. Feb. 28, 2017).

[336] *See id.* ¶ 17.

[337] *See id.*

[338] *See id.*

[339] *Id.* ¶ 26

a potential for a [travel document] to be issued within the next 30 to 45 days."[340] In other words, the statement was largely composed of conclusory assertions, and the predictions on timeframe for future deportations were devoid of any detail or supporting evidence. Even the statement offered in this case contained a prediction that had already been proven false by the time it was filed as evidence in the case. The statement then offered another predicted timeline, similarly devoid of detail or support, with no explanation for why it might be more accurate than the last. The AUSA also attached various records from the underlying immigration proceedings and agency decisions to continue detention.[341] This, too, is typical in immigrant habeas cases—AUSAs often include generic agency decisions to continue detention as rebuttal evidence.[342]

Mr. Ye responded with a short brief pointing out that he had then been detained for over ten months and that ICE "still hasn't provided any actual factual evidence" that China will issue travel documents.[343] He argued that "[a]ll statements only point to the unknown possibility of obtaining the traveling document at an unforeseen future."[344] After again summarizing the relevant holdings of *Zadvydas*, Mr. Ye pointed to public reports and news articles detailing that "China has long been uncooperative in accepting its citizens for removal from the United States."[345] He further asserted that even according to ICE's own evidence, "more than nine months have passed" without obtaining any travel document, and there had been no agreement from China to accept his deportation.[346] Mr. Ye further shared that his prolonged detention had caused both his physical and mental health "to sharply deteriorate," and he repeated his request for release.[347]

A month later, after Mr. Ye had been detained for nearly a year, the magistrate judge responded by setting an evidentiary hearing.[348] The court also appointed counsel for the hearing, based on the documents from the immigration case that showed that the immigration judge had determined Mr. Ye was unable to meaningfully participate in his removal proceedings. The court had concluded that Mr. Ye could not be reasonably expected to

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[340] *Id.* ¶ 27.

[341] *See* Order of Removal, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 (W.D. La. Feb. 28, 2017); Board of Immigration Appeals Dismissal, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 (W.D. La. Feb. 28, 2017); Ninth Circuit Denial of Pet. for Review, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 (W.D. La. Feb. 28, 2017); EADM Detention History & Post Order Custody Review Worksheet & Decisions, Ye v. Miller, No. 16-cv-1742, ECF No. 12-3 (W.D. La. Feb. 28, 2017).

[342] *See No End in Sight*, *supra* note 32, at 24–26 (showing typical evidence submitted by the government, including unsworn ICE documents).

[343] Resp. to Notice of Mot. Pet. at 1, Ye v. Miller, No. 16-cv-1742, ECF No. 14 (W.D. La. Mar. 20, 2017).

[344] *Id.*

[345] *Id.* at 2–6.

[346] *Id.* at 6.

[347] *Id.* at 6–7.

[348] *See* Mem. Order, Ye v. Miller, No. 16-cv-1742, ECF No. 15 (W.D. La. Apr. 25 2017); Mem. Order, Ye v. Miller, No. 16-cv-1742, ECF No. 16 (W.D. La. Apr. 25 2017).

represent himself in the evidentiary hearing, even with the apparent assistance of a jailhouse "writ-writer."[349] In the order setting the hearing, the judge also evaluated the evidence before the court on the likelihood of deportation and found the ICE evidence to be lacking.[350] The court held that the government had "presented no evidence to support their contention that travel documents will be issued soon" and had "not shown that their detention of Ye [was] reasonable, given the gravity of the errors made in his detention reviews," which did not acknowledge his cognitive impairment from childhood meningitis.[351] The court noted that his condition could delay or even preclude the issuance of travel documents.[352] But the setting of a further deadline in the case, after both sides had the opportunity to present "summary judgment" evidence, again implicitly authorized continued detention at least until that evidentiary hearing, scheduled for more than a month later on June 5, 2017.[353] Even though the court criticized the adequacy of ICE's evidence, ICE faced no consequences and instead was offered another bite at the apple. This additional step of permitting an evidentiary hearing for the government to cure an inadequate rebuttal can delay cases for months, especially because fully briefed petitions may sit for additional months awaiting a ruling.

Appointed counsel from the federal defender moved to enroll as counsel a week later, on May 4, 2017.[354] Mr. Ye was released from detention the very next day, after being detained for exactly one year and one day.[355] That time was double the "presumptively reasonable" period mentioned in *Zadvydas*.[356] Five months of that detention was during his habeas litigation as his case was being adjudicated. Both of the predictions in ICE's sworn statements during the litigation about the date that travel documents would be issued proved incorrect—he was ultimately released, as no travel documents were ever issued for him.[357] While it is difficult to know for sure, it seems likely that the court's order expressing doubt about the respondents' evidence, appointing counsel for Mr. Ye, and setting an evidentiary hearing precipitated his release from detention.

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[349] Mem. Order, Ye v. Miller, No. 16-cv-1742, ECF No. 15 (W.D. La. Apr. 25 2017).

[350] *See* Mem. Order, Ye v. Miller, No. 16-cv-1742, ECF No. 16 (W.D. La. Apr. 25 2017).

[351] *Id.* at 4.

[352] *See id.*

[353] *Id.* at 5.

[354] *See* Mot. for Wayne J. Blanchard to Enroll as Counsel, Ye v. Miller, No. 16-cv-1742, ECF No. 17 (W.D. La. May 4, 2017).

[355] *See* Second Brooks Decl., Ye v. Miller, No. 16-cv-1742, ECF No. 19-2 (W.D. La. May 16, 2017) ("On May 5, 2017, Petitioner was released from ICE custody pending his removal from the United States.").

[356] *See Zadvydas*, 533 U.S. at 701.

[357] *Compare* Brooks Decl. ¶ 27, Ye v. Miller, No. 16-cv-1742, ECF No. 12-2 (W.D. La. Feb. 28, 2017) (claiming from a January 5, 2017 communication that a travel document could issue "within the next couple of weeks" and from a February 23, 2017 communication that "there is currently a potential for a [travel document] to be issued within the next 30 to 45 days"), *with* Release Notification, Ye v. Miller, No. 16-cv-1742, ECF No. 19-3 (W.D. La. May 16, 2017) (stating "ICE will continue to make efforts to obtain your travel document").

On May 16, the government filed a motion to dismiss the suit for mootness because of his release. The government provided another declaration from the Assistant Field Office Director stating that Mr. Ye had been released and filed the notification that Mr. Ye was subject to an order of supervision as a condition of that release.[358] That order required him to report periodically to an ICE field office, generally stay within the State of California, and not commit any crimes.[359]

Shortly after, the magistrate judge issued his report and recommendation suggesting that the suit be dismissed for mootness because the court could grant no further relief to Mr. Ye after his release.[360] On June 20, the district court concurred and ordered dismissal.[361] From filing to dismissal, the case had lasted exactly six months.[362]

As with shadow wins broadly, there was no written opinion analyzing the facts of the case, and there was no judgment on the merits.[363] The magistrate judge's short memorandum order to schedule the evidentiary hearing contained the only judicial analysis of evidence in the case, which happens frequently in these matters.[364] Furthermore, that order was not published in any of the federal reporters, nor is it available as an unpublished opinion in any commercial database. This analysis could only be located by reviewing the order in the PACER docket of this specific case, and few would know to parse the docket given that the case was ultimately dismissed for mootness. Many of these cases contain no judicial assessment of the evidence, even after multiple rounds of briefing and declarations from both sides, because of dismissals for mootness.[365] This also means that there are few enunciated standards for what evidence is sufficient or insufficient to legally justify continued prolonged detention. In some jurisdictions, the Supreme Court's *Zadvydas* opinion remains the lone guiding precedent on important interpretive questions.[366]

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[358] *See* Second Brooks Decl., Ye v. Miller, No. 16-cv-1742, ECF No. 19-2 (W.D. La. May 16, 2017); Release Notification, Ye v. Miller, No. 16-cv-1742, ECF No. 19-3 (W.D. La. May 16, 2017).

[359] *See* Release Notification, Ye v. Miller, No. 16-cv-1742, ECF No. 19-3 (W.D. La. May 16, 2017).

[360] *See* R. & R., Ye v. Miller, No. 16-cv-1742, ECF No. 21 (W.D. La. May 25, 2017).

[361] *See* Judgment, Ye v. Miller, No. 16-cv-1742, ECF No. 23 (W.D. La. June 20, 2017).

[362] *See* Docket, Ye v. Miller, No. 16-cv-1742, ECF No. 21 (W.D. La. filed June 20, 2017).

[363] *See id.* The magistrate judge did make preliminary findings in his scheduling order that the government's evidence was inadequate, but this was not a final analysis.

[364] *See No End in Sight*, *supra* note 32, at 15 (noting frequent dismissals without judicial evaluation of evidence in cases).

[365] *See id.* (noting that forty percent of cases are dismissed because the detained immigrant was no longer in custody).

[366] For example, the Fifth Circuit—which includes the top two states housing the most detained immigrants in the country—has not provided more specific legal guidance on what evidence the government must provide to demonstrate reasonably foreseeable deportation when the petitioner provides evidence that their country of origin will not issue travel documents or will not accept deportations. As a result, district courts primarily discuss *Zadvydas* itself and occasionally also cite to other district courts as persuasive authority. *See, e.g.*, Castro Balza v. Barr, 2020 WL 6143643, at *4–5 (W.D. La. Sept. 17, 2020).

III. A Theoretical Framework for Decoding the Hidden Law of Habeas

While the Court has already decided that indefinite civil detention without procedural safeguards presents an "obvious" and serious constitutional problem,[367] the constitutional and statutory limits on immigrant detention continue to be a perplexing problem for federal courts. We offer a theoretical framework grounded in observations of unique features of habeas litigation illustrated by Mr. Ye's case to improve further study of how district courts are adjudicating challenges to prolonged detention.

We identify four novel attributes of immigrant habeas litigation. First, immigrant habeas litigation involves a complex patchwork of legal rules that govern the filing and adjudication of petitions. We suspect the contradictions and ambiguity in these legal rules have significant impact on immigrant detention habeas procedure and ultimately the vindication of detained immigrants' rights. Second, immigrant habeas litigation is marked by circuitous proceedings, often navigated by pro se litigants. We posit that parsing through the journeys of individual cases is critical to understand *how* cases are being adjudicated, which in turn implicates how substantive rights are being undermined or addressed. Third, we argue that rules specifying key deadlines for habeas procedure should be understood as delineating substantive rights, as the core legal question centers on length of detention, which litigation deadlines can extend or contract. Lastly, we suggest the existence of "shadow wins" in immigrant habeas litigation, where the ultimate decision appears as a dismissal although the detained litigant achieved administrative release.

A. Complexity of Legal Authorities for Immigrant Detention Habeas Petitions

Complexity is the defining feature of the legal rules for habeas petitions that challenge executive detention, which are all filed pursuant to Section 2241.[368] The rules that govern these habeas petitions are drawn from a conglomeration of statutes and court-promulgated rules, resulting in a patchwork of legal authorities that are difficult to parse even for trained lawyers. The sources for these rules include the Judiciary Act of 1867, the Rules Enabling Act of 1934, the Federal Rules of Civil Procedure, and the Rules Governing Section 2254 Cases, along with case law interpreting these authorities, and the residual authority of the courts through the All Writs Act in the Judiciary Act of 1789.[369] Some of these sources were originally written

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[367] *See Zadvydas*, 533 U.S. at 692.

[368] Some habeas claims by federal prisoners may rely on Section 2241 and therefore also be governed by these rules.

[369] For a synopsis of these four authorities through the lens of the enemy combatant Guantanamo line of cases, see generally Marc D. Falkoff, *Back to Basics: Habeas Corpus Proce-*

as rules for other types of habeas petitions, such as Section 2254 petitions challenging state criminal convictions or sentences in federal court or Section 2255 motions challenging federal convictions or sentences.[370] This complexity makes habeas corpus practice particularly esoteric. The complexity causes both delay in adjudication in these high-stakes cases and procedures that are arbitrary because judges generally have wide discretion to choose among varying sources of procedural rules.

The first source for rules in these cases is drawn from the legislation that codified the broad power of the federal courts to issue the writ of habeas corpus for state prisoners held in violation of federal law: the Judiciary Act of 1867 and subsequent amendments.[371] That Act codified the right to petition for habeas corpus from the federal courts "in all cases where any person may be restrained of his or her liberty in violation of the [C]onstitution, or of any treaty or law of the United States."[372] The Act also provided the decision-making rules for courts considering such petitions, the core of which have undergone only cosmetic amendments. Judges are directed to "forthwith award a writ" unless the petition failed to state a claim and then require the custodian to respond with the legal basis for the detention within three to twenty days, after which the judge should set the case for hearing within five days, or longer if requested.[373] The habeas petitioner may also reply, contesting any material facts.[374] The statute also directs the judge to "proceed in a summary way to determine the facts of the case" and provides, if the detention is unlawful, the petitioner "shall forthwith be discharged and set at liberty."[375]

In 1948, Congress enacted additional rules, including permitting evidence "taken orally or by deposition, or, in the discretion of the judge, by

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dures and Long-Term Executive Detention, 86 DENV. U. L. REV. 961, 1001–05 (2009). Some of these rules apply slightly differently to the more common state prisoner habeas petitions, which have also been referred to as a "confusing amalgam, to be found in a variety of different sources." Charles Alan Wright, *Procedure for Habeas Corpus*, 77 F.R.D. 227, 227 (1978).

[370] *See* 28 U.S.C. §§ 2254, 2255.

[371] Codified at 28 U.S.C. §§ 2243–48. The Judiciary Act of 1867 was enacted to protect Black Americans from unfair imprisonment by local courts and so granted federal courts "stunning" authority, including "supervisory power over the state courts" for the first time. *See* Falkoff, *supra* note 369, at 985; *see also Ex parte* McCardle, 6 Wall. 318, 326 (1868) (describing the 1867 Act as creating jurisdiction that was "impossible to widen"); Fay v. Noia, 372 U.S. 391, 415 (1963) (acknowledging the 1867 Act's "expansive language" and "imperative tone"). The general authority for federal courts to inquire into the legality of federal detention preceded this legislation: the Judiciary Act of 1789 passed by the first Congress after ratification of the Constitution. ch. 20, § 14, 1 Stat. 73 (1789) (permitting "inquiry into the cause of commitment" but limiting the inquiry in criminal cases to pretrial detention or incarceration connected to a federal proceeding).

[372] Habeas Corpus Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867).

[373] 14 Stat. 385, 386–86; *see* 15 Stat. 44 (1868); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). After later amendments, the hearing may be scheduled more than five days after the return "for good cause." 28 U.S.C. § 2243.

[374] 14 Stat. 386 (1867); *see also* 28 U.S.C. § 2243; Falkoff, *supra* note 369; 15 Stat. 44 (1868); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

[375] 14 Stat. 386 (1867).

affidavit," as well as "written interrogatories to the affiants" and "answering affidavits."[376] The same Act further emphasized speed, providing that the "court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."[377]

Those statutory rules emphasized quick and flexible consideration of habeas petitions but also left many questions unanswered at a time when federal court rules were undergoing transformation—transitioning from highly technical pleading and separate rules for law and equity to notice pleading and common federal rules. Congress passed the Rules Enabling Act in 1934, permitting the Supreme Court to set rules of "practice and procedure" and evidence for the federal courts so long as those rules "shall not abridge, enlarge or modify any substantive right."[378] Uniquely, rules promulgated under the Act nullify any statutes "in conflict with such rules."[379] Soon thereafter, the first Federal Rules of Civil Procedure were promulgated and went into effect in 1938. Then as now, the Rules provided a comprehensive framework for the adjudication of civil matters, from filing and service of process, to motions and discovery, to trials, orders, and judgments.[380] At the time, the Rules applied to habeas corpus only to the extent rules were "not set forth in statutes of the United States" and where the Rules "conformed to the practice in actions at law or suits in equity" in these cases.[381]

Almost three decades later, a state prisoner who had petitioned for habeas corpus sought discovery as of right—specifically, written interrogatories—under Rule 33 of the Federal Rules of Civil Procedure to uncover evidence to show his detention was unlawful.[382] Mr. Alfred Walker had served the respondent warden with interrogatories to prove the unreliability of an informant whose statements formed the basis for his arrest.[383] After the district court permitted the written interrogatories, the appellate court vacated that order on mandamus review, after which the case landed in the Supreme Court, presenting the question of whether habeas petitioners could use the broad discovery instruments from the Rules.[384] Eschewing the appellate court's holding that discovery under the Rules was not permitted because it did not "conform" with pre-Rules habeas practice, the Supreme Court focused on the intent of the Rules, explaining that drafters intended the Rules to "have very limited application to habeas corpus proceedings."[385] The Court also held that district courts have discretionary authority

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[376] Act of June 25, 1948, ch. 646, 62 Stat. 961, 966.
[377] 62 Stat. 961, 965; 28 U.S.C. § 2243.
[378] Act of June 19, 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1064; 28 U.S.C. § 2072.
[379] 28 U.S.C. § 2072.
[380] *See* FEDERAL RULES OF CIVIL PROCEDURE (effective Dec. 1, 2020).
[381] Holiday v. Johnston, 313 U.S. 342, 353 (1941) (quoting earlier version of Rule 81(a)(2)).
[382] Harris v. Nelson, 394 U.S. 286 (1969).
[383] *Id.* at 289.
[384] *Id.* at 289–90.
[385] *Id.* at 293–95.

under the All Writs Act, 28 U.S.C. § 1651, to issue appropriate orders to inquire into facts, which could include discovery, to facilitate a fair and meaningful evidentiary hearing on specific allegations of unlawful confinement.[386]

Much of the reasoning in Mr. Walker's case—*Harris v. Nelson*[387]—is specific to habeas petitions challenging constitutional defects in state criminal proceedings, even though this holding has been interpreted to apply to habeas petitions more broadly.[388] *Harris* noted that the "expansion" of federal habeas corpus to require federal courts to independently determine the factual basis of constitutional challenges to state convictions post-dated the Rules, meaning that the Rules' drafters could not have contemplated their discovery rules applying to that context.[389] The *Harris* Court also considered that discovery mechanisms against an "adverse party" in habeas under the Rules would be "circuitous, burdensome, and time consuming" because the warden-respondent generally could not supply facts regarding an underlying conviction based on personal knowledge and would need to solicit "appropriate officials" for their sworn statements.[390] Permitting broad discovery in habeas proceedings would also vastly increase the "burden upon courts, prison officials, prosecutors, and police," especially because most "prisoners" file habeas petitions "without the guidance or restraint" of attorneys.[391]

These arguments in the *Harris* opinion betray the Justices' preoccupation with managing habeas filings from *state* prisoners, one aspect of the conservative counterrevolution during the Burger Court after years of expanded federal protections from the Warren Court.[392] But the Court's reasoning, which rested on the drafters' intent and the impracticability of discovery

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[386] *See id.* at 299–300.

[387] 394 U.S. 286 (1969).

[388] *See, e.g.*, Al Odah ex. rel. Al Odah v. United States, 329 F. Supp. 2d 106, 107 (D.D.C. 2004) (concluding that foreign national enemy combatants must seek leave of court to serve document and deposition requests on respondents); Gaitan-Campanioni v. Thornburgh, 777 F. Supp. 1355 (E.D. Tex. 1991) (concluding that Rule 6 of habeas rules and *Harris* require court approval for discovery in habeas petition by those challenging indefinite detention); Castañeda Juarez v. Asher, No. C20-700, 2020 WL 8473407, at *3 (W.D. Wash. 2020) (concluding that habeas petitioners detained immigrants "are not entitled to discovery as a matter of course").

[389] *Harris*, 394 U.S. at 295–96.

[390] *Id.*

[391] *Id.* at 297. The Court also noted that it was "of some relevance" that 28 U.S.C. § 2246, enacted in 1948, specifically permitted written interrogatories only for those who had submitted sworn affidavits in the habeas case. This reasoning would apply equally to habeas petitioners challenging executive detention and federal custody, but this argument did not seem to drive the decision. *See id.* at 296.

[392] *See* Falkoff, *supra* note 369, at 1005. Writing in 1966, noted jurist Skelly Wright and his co-author remarked "the very existence of habeas corpus, a constant reminder to the states of the supremacy of federal law, and its increasing scope, have [sic] created tension and have evoked a number of suggested alternatives." J. Skelly Wright & Abrahma D. Dofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895 (1966). They then discussed a number of "rules and doctrines" that "enable federal courts to deny or to defer jurisdiction, often allowing states the first opportunity to pass on their prisoners' federal claims," *id*. at 903, as well as possible limits on federal authority to engage in fact-finding following Townsend v. Sain, *id.* at 919–946.

in state prisoner habeas cases, does not align with the issues in habeas challenges to federal executive detention.[393] First, the use of habeas to challenge unlawful federal executive detention was well-established when the Federal Rules of Civil Procedure were drafted,[394] and so it is difficult to draw clear conclusions from the lack of clear evidence of their intent for whether various Rules would apply to habeas.[395] Second, discovery of the relevant facts in habeas proceedings challenging federal executive detention rarely raise the same practical considerations as with state prisoners, where the habeas respondent knows little of the facts relevant to the underlying conviction. In fact, immigrants held in federal executive detention almost always file their habeas petition against a warden who is an agent or even employee of ICE—the agency which is both the custodian and which possesses most relevant facts regarding the detention and many facts of the underlying removal proceedings.[396] This single agency also has the authority to order release.[397] So discovery requests directed at the warden-respondent as an agent of ICE could be relatively straightforward, seeking relevant agency records—far from what the Court imagined as a "circuitous, burdensome, and time-consuming" procedure directed at various, dispersed state and local officials for state prisoners.

The *Harris* opinion is also notable because it spurred the promulgation of additional rules specific to habeas proceedings.[398] The *Harris* majority and two dissenting Justices remarked on the need for special rules promulgated

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[393] *See Harris*, 394 U.S. at 295–97.

[394] *See* Falkoff, *supra* note 369, at 964, 978–88 (describing habeas challenges to executive detention as "core" and tracing the history of executive habeas in American law).

[395] The *Harris* opinion acknowledges as much, noting "there is little direct evidence, relevant to the present problem, of the purpose of the 'conformity' provision of Rule 81(a)(2)." *Harris*, 394 U.S. at 294; see also *id.* ("Such specific evidence as there is with respect to the intent of the draftsmen of the rules indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings.").

[396] *See supra* section II (discussing the immediate custodian rule). ICE maintains a public list of immigrant detention facilities on its website. The vast majority of detention beds are in privately-run facilities under contract with ICE. *See* Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, ACLU (Oct. 5, 2021), https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration [https://perma.cc/DW25-8TYY]. But even in those facilities, ICE employees known as deportation officers provide individualized case management and maintain agency records on detention, including adjudicating any requests for release. *See supra* section I.B. ICE sometimes runs its own offices inside private detention facilities and these facilities also sometimes house immigration court.

[397] *See supra* section I.B. (discussing parole and bond). In creating the Department of Homeland Security through legislation passed in 2002, the "detention and removal program" was transferred to the newly-created DHS (specifically, its Bureau of Border Security) from the Commissioner of Immigration and Naturalization, previously located within the Department of Justice. 6 U.S.C. § 251. The Bureau of Immigration and Customs Enforcement, now known as ICE, is a component agency of DHS that assumed these functions upon the reorganization in 2003. *See Honoring the History of ICE*, https://www.ice.gov/features/history#:~:text=Opening%20its%20doors%20in%20March,and%20Customs%20Enforcement%20or%20ICE [https://perma.cc/63DA-US5U].

[398] *See* Falkoff, *supra* note 369, at 1005.

under the Rules Enabling Act for habeas proceedings.[399] Soon after *Harris*, the Court did just that, promulgating the Rules Governing Section 2254 Cases, which went into effect after Congress approved them in 1977.[400] Those rules concerned motions under the titular section, which permits those in custody because of state criminal convictions to challenge their continued detention in federal court under certain circumstances.[401] These rules included the *Harris* holding that the district court has discretion to permit discovery and that traditional discovery is only permitted with leave of the court.[402]

The principal challenge at this time, as the *Harris* Court discussed, was the perception that federal courts were overwhelmed by Section 2254 habeas applications from state prisoners challenging constitutional defects in state criminal proceedings.[403] Even before the adoption of the Rules Governing Section 2254 Cases, the Supreme Court's rulemaking process had sought to ease the perceived burden on the federal courts from the perceived flood of these petitions. The 1971 version of the Federal Rules had doubled the outer limit of time for a custodian to respond to a Section 2254 habeas petition where they can show good cause for exceeding the three-day deadline from the previous deadline of twenty days to forty.[404] The notes of the Advisory Committee explained this change as based on the "substantial increase in the number of such proceedings in recent years" and the "considerable burden on state authorities."[405] Even then, the Committee noted that the "additional time should, of course, be granted only for good cause."[406]

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[399] "[I]t is our view that the rule-making machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and § 2255 proceedings, on a comprehensive basis and not merely one confined to discovery." *Harris*, 294 U.S. at 300 n.7; *see also id.* at 303, 305 (Harlan, J., dissenting) (commenting that "the problem of habeas discovery should be dealt with not case by case but through exercise of our rule-making power") (citing the Rules Enabling Act, 28 U.S.C. § 2072). Interestingly, Justice Black also dissented, expressing his view that the Court had no "valid delegation of legislative power by the Congress" and therefore could not "write new laws providing for discovery in habeas corpus cases" through decisions or rulemaking. *Id.* at 301–02 (Black, J., dissenting).

[400] *See* Rules Governing Section 2254 Cases in the United States District Courts; *see also* Falkoff, *supra* note 369, at 1005.

[401] *See* 28 U.S.C. § 2254. At the same time, the Court promulgated the Rules Governing Section 2255 Proceedings for motions under 28 U.S.C. § 2255, which authorizes motions to challenge federal criminal convictions under certain circumstances. Those rules differ from the Section 2254 rules in that they do not permit district courts to apply the rules to general habeas petitions under Section 2241, and so they are not relevant here.

[402] *See* Rule 6, Rules Governing Section 2254 Cases in the United States District Courts; *see also* Bracy v. Gramley, 520 U.S. 899, 904 (1997) (recognizing that those Rules accordingly included the holding from *Harris*).

[403] *See, e.g.*, J. Skelly Wright & Abrahma D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895 (1966) ("The broad scope of federal habeas corpus as a remedy for state prisoners . . . radically increase[s] the tasks, if not the power, of federal courts.").

[404] *See* FED. R. CIV. P. 81 1971 amendment.

[405] FED. R. CIV. P. 81 advisory committee's note to 1971 amendment.

[406] FED. R. CIV. P. 81 1971 amendment.

Though Congress promulgated the Rules Governing Section 2254 Cases specifically to respond to the perceived flood of cases and unique challenges of federal proceedings reviewing state convictions, a peculiar provision permits the rules to be applied in other habeas cases. At first, the Section 2254 Rules seem to define their scope as affecting only those cases involving a petition under Section 2254. The very next subsection, however, permits the district court to "apply any or all of these rules to a habeas corpus petition not covered by" Section 2254. This allows a district court to apply the Section 2254 Rules or not, in whole or in part, at their discretion to other habeas petitions.

Reflecting the focus of the drafters, many of the Section 2254 Rules incorporate legal requirements for constitutional challenges to state criminal convictions that do not apply to habeas petitions challenging executive detention.[407] As Professor Falkoff has pointed out, Rule 5 requires that the respondent's answer to the petition "state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.'" But none of those bars—neither failure to exhaust, procedural bars, non-retroactivity, nor statutes of limitations—apply to habeas petitions challenging federal executive detention. Along the same lines, Rule 9 requires authorization from a court of appeals before filing a successive habeas petition, which is needed for challenges to criminal convictions under statute but not for challenges to federal executive detention.[408] So although the Section 2254 Rules themselves permit all Rules to apply to other habeas petitions in each judge's discretion, the application of these specific Rules would impose these additional legal requirements on executive detention habeas petitions not contained in the habeas statute. If a judge exercised their discretion to apply such a Rule with additional legal requirements that impeded a habeas petition challenging executive detention, that would arguably modify a substantive right—the right to seek release from unlawful detention under Section 2241—which is prohibited by the Rules Enabling Act.[409]

Other rules grant extraordinarily broad discretion to district courts. For instance, the "respondent is not required to answer unless a judge so orders."[410] The judge conducts a preliminary review of any petition and is directed to dismiss any petition if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief."[411] If the petition

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[407] *See* Falkoff, *supra* note 369, at 1005; Rule 5, Rules Governing Section 2254 Cases in the United States District Courts.

[408] Rule 9, Rules Governing Section 2254 Cases in the United States District Courts; 28 U.S.C. § 2254.

[409] *See* 28 U.S.C. § 2072(b). Courts may hesitate to embrace this argument even though the absence of meaningful deadlines can significantly prolong the case and detention that may be unlawful.

[410] Rule 5(a), Rules Governing Section 2254 Cases in the United States District Courts.

[411] Rule 4, Rules Governing Section 2254 Cases in the United States District Courts.

might be entitled to relief, the judge must "order the respondent to file" a response "within a fixed time."[412]

Both the Section 2254 Rules and the current Federal Rules of Civil Procedure also permit the use of the Federal Rules of Civil Procedure in habeas proceedings, though under slightly different limitations. Under the Section 2254 Rules, the Federal Rules of Civil Procedure "may be applied" by the district court "to the extent they are not inconsistent with any statutory provisions or these rules."[413] The Federal Rules of Civil Procedure themselves provide that they "apply to proceedings for habeas corpus" to the extent that the procedure in question "is not specified in a federal statute, the Rules Governing Section 2254 Cases, or [Section 2255 Rules]" and to the extent that habeas practice regarding that procedure in question "has previously conformed to the practice in civil actions."[414]

The result of these multiple overlapping and sometimes contradicting authorities is that procedural rules in executive detention habeas corpus petitions present a grab bag for federal judges. The plain language of the statute governs these cases, unless the statute presents a procedural (rather than substantive) rule, and then courts may interpret rules promulgated under the Rules Enabling Act to supersede the statutory procedural rule. These authorities fail to provide any clear or unified procedure for habeas petitions challenging executive detention. The district court may choose to apply the Section 2254 Rules, which generally provide broad discretion and few case deadlines. On any procedural questions not answered in the Section 2254 Rules and not specified in statute, the district court may also apply the Federal Rules of Civil Procedure.

This assortment of procedural rules that potentially apply has enormous stakes for habeas petitioners in executive detention. For example, detained immigrants want their jailer-custodians to respond to their habeas petitions as soon as possible so their cases can proceed and potentially result in their release from detention. The habeas statute itself specifies that this response must be "returned within three days unless for good cause additional time, not exceeding twenty days, is allowed."[415] But if a judge elects to apply the Section 2254 Rules, as many do, those Rules require that the jailer-custodian files a response only after the judge so orders and within an unspecified "fixed time"—with no limit on the response time at all.[416] Or the judge

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[412] *Id.*

[413] Rule 1, Rules Governing Section 2254 Cases in the United States District Courts.

[414] FED. R. CIV. P. 81.

[415] 28 U.S.C. § 2243.

[416] *Id.* § 2254; Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. District courts in many jurisdictions have done so, and have denied motions by Section 2241 habeas petitioners to enforce the shorter statutory deadlines. *See* Tompkins v. Pullen, No. 3:22-cv-00339, 2022 WL 871938, at *2 (D. Conn. March 23, 2022) (holding that the three-day deadline "has been impliedly repealed through the passage of the Rules Governing Section 2254 Cases," which can be applied to Section 2241 habeas cases); Castillo v. Pratt, 162 F. Supp. 2d 575, 577 (N.D. Tex. 2001) (holding that, even in Section 2241 cases, "the 2254 Rules

might elect to apply the Federal Rules of Civil Procedure, generally giving federal agencies, officers, or employees sixty days after service to file an answer.[417] While more empirical research is needed, one study documented that the sixty day response deadline became the norm in one district.[418] This shows the stakes of the grab bag of rules: district courts may increase the response deadline twenty-fold or more, based on which procedural rules they choose. During the extended response period, the habeas petitioner continues to be detained, potentially unlawfully. Without further empirical study, the extent to which different rules are relied upon in courts across the country is not clear.

In sum, the upshot of the multimple sources of legal rules is that district courts may increase the response deadline twenty-fold or more, while the habeas petitioner continues to be detained, potentially unlawfully.

B. Labyrinth of Proceedings

Overlaid on this convoluted patchwork of procedural rules is a labyrinth of circuitous proceedings. Habeas petitions are logistically difficult to initiate,[419] and that complexity is compounded for the vast majority of detained immigrants, who are filing their habeas petitions without the assistance of an attorney.[420]

There are a number of initial steps an immigrant must take to initiate review of their detention through a habeas petition. An immigrant filing an immigrant habeas petition must use a specific court-mandated form in particular jurisdictions,[421] pay a $5 filing fee[422] or file a motion to proceed *in forma pauperis*,[423] and serve the U.S. Attorney with a copy. The form with instructions is nine pages, and the petition must be either typed or "neatly

take precedence over 28 U.S.C. § 2243 and FED. R. CIV. P. 81(a)(2)"); Wyant v. Edwards, 952 F. Supp. 348, 350 (S.D.W.V. 1997). While most of those decisions concern Section 2241 habeas petitioners challenging criminal custody, some judges have applied the reasoning in cases challenging executive detention. *See, e.g.*, Y.V.S. v. Wolf, No. 20-CV-228, 2020 WL 4926545, at *1 (W.D. Tex. Aug. 21, 2020) (finding "the strict time limits prescribed by § 2243 . . . are subordinate to the district court's discretionary authority to set deadlines" under the Section 2254 Rules); Romero v. Cole, No. 1:16-CV-148, 2016 WL 2893709, at *2 (W.D. La. Apr. 13, 2016) (denying a motion for preliminary injunction from a detained immigrant, holding "it is well settled that the strict time limit prescribed by § 2243 is subordinate to the Court's discretionary authority to set deadlines under Rule 4 of the Rules Governing § 2254 Cases"), *report and recommendation adopted*, 2016 WL 2844103 (W.D. La. May 12, 2016).

[417] *See* FED. R. CIV. P. 12(a)(2).

[418] *See No End in Sight*, *supra* note 32, at 22–23.

[419] *See* Geoffrey Heeran, *Pulling Teeth: State of Mandatory Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 603 (2010).

[420] *See No End in Sight*, *supra* note 32, at 3.

[421] For example, immigrants detained in Louisiana are bound by Western District of Louisiana Local Rules, which mandate a court form. Local Rule 3.2, U.S. DIST. CT. FOR W. DIST. OF LA. (updated Oct. 15, 2020), https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/localrules.WDLA.2021Feb11.pdf [https://perma.cc/KW27-7GDL].

[422] *See* 28 U.S.C. § 1914(a).

[423] *See id.* § 1915.

written."[424] Although citing law is not required, the form asks for a detailed legal and procedural history, including administrative exhaustion and appellate history.[425] All litigation forms, motions, and instructions are exclusively available in English, and pro se immigrants must navigate this maze of requirements generally without guideposts. Furthermore, detained immigrants risk dismissal unless they keep their address updated with the court throughout their case, even if their address only changes due to ICE-initiated transfer to a new detention center.[426]

The labyrinthine habeas process may lead to both delays that further prolong detention and dismissals for minor procedural errors, such as failing to pay the five-dollar filing fee or to fill out the mandatory pro se habeas form to initiate the petition. In one case, a pro se immigrant who had been a lawful permanent resident requested a fee waiver when challenging his immigrant detention. His only source of income was disability benefits, which he received after an AIDS diagnosis, but he lost the disability income when he was detained and lost his lawful permanent resident status. In this case, the federal court denied his request to proceed *in forma pauperis* without explanation and ordered him to pay $5 within thirty days. Because the court did not receive his payment within that time frame, his case was dismissed.[427] These are the procedural barriers that immigrants who start the process for seeking habeas review face.

Moreover, many detained immigrants may have viable claims for release that are never even brought to court because of the everyday challenges detained immigrants face, including language access, lack of adequate legal materials and basic office supplies, and isolation from family, advocates, and legal educators. As detention centers become concentrated in rural areas in the South, access to lawyers with habeas expertise and immigration law dwindles.[428] Many Southern states suffer from a shortage in immigration attorneys, particularly those serving clients on a pro bono or low-cost basis.[429] Further, generally, most immigration attorneys primarily learn to practice before the immigration agencies and in immigration court. Sub-

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[424] Petition for Writ of Habeas Corpus Under 28 U.S.C.A. § 2241 (AO 242), ADMIN. OFFICE OF U.S. CTS. (Sept. 1, 2017), https://www.uscourts.gov/sites/default/files/AO_242_0.pdf [https://perma.cc/N88D-MKTM].

[425] *See id.*

[426] For example, Local Rules in the Western District of Louisiana require pro se litigants to file change of address or face dismissal of the case. Local Rule 40.3.1, U.S. DIST. CT. FOR W. DIST. OF LA. (updated Oct. 15, 2020), https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/localrules.WDLA.2021Feb11.pdf [https://perma.cc/KW27-7GDL].

[427] *See No End in Sight*, *supra* note 32, at 18.

[428] *See generally* Cho & Shah, *supra* note 52 (describing the concentration of detention centers in the South); *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers*, PROJECT S. (May 2017), https://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf [https://perma.cc/C4ZV-AE3T].

[429] *See* Robert A. Katzman, *Study Group on Immigrant Representation: The First Decade,* 87 FORDHAM L. REV. 485 (2018).

stantially fewer immigration attorneys have experience in federal practice to represent a habeas petitioner.

Petitioners are predominantly pro se, navigating this maze of federal forms, rules, and procedures without legal assistance and often in a foreign language. As scholar Jessica Steinberg writes in the state court context, "the system, in effect, depends upon the skill of an attorney to transform a party's grievance into a highly stylized set of allegations, evidence, and arguments, upon which a judge . . . can base a ruling," such that unrepresented people are confronted with barriers at every step, from filing and serving their petition to arguing relevant legal authorities and presenting required evidence.[430] Lack of language access adds an additional layer of complication for non- and limited English-speaking litigants.

Pro se litigants in many cases do not initially clear procedural hurdles, which may require amending, refiling, and potentially transferring venue, if litigants are even able to keep their cases alive. Court process can add another level of indeterminacy in the life of the case; as discussed above, there is no set timeframe for when a court must issue a summons to notify the U.S. Attorney's office that a lawsuit has been filed against ICE, or for when the U.S. Attorney must enter an appearance.

The gauntlet of procedural requirements and murkiness of some pro se pleadings can result in dockets that may appear non-linear, with conflicting information. Some scholars have theorized that federal appellate courts have responded to the substantial pro se litigation with perfunctory unpublished opinions that suffer from "pervasive decisional atrophy," without sufficient review and reasoning.[431] Unrepresented parties often suffer worse outcomes than represented parties, and this is likely the case for pro se immigrant litigants facing the complex legal rules and procedures of seeking habeas review of their detention.[432]

C. Deadlines as Substantive Issues

Rules delineating deadlines for the process of the habeas claim have been widely considered procedural, rather than implicating substantive rights, without much interrogation.[433] However, for immigrants held in pro-

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[430] Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 744 (2015).

[431] Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 536–37 (2020).

[432] *See, e.g.*, Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469, 470 (2016) ("Using difference-in-proportions tests, this Article examines the interaction of party power and representation and finds that represented parties have better case outcomes than unrepresented parties.").

[433] Some district courts have set aside the strict deadlines within the habeas statute under the theory that these are procedural deadlines that are not modifying a substantive right. Instead, courts follow the Supreme Court's rules, which simply require a response within a discrete time. *See Y.V.S. v. Wolf*, No. EP-20-CV-00228-DCG, 2020 WL 4926545, at *1–2 (W.D. Tex. Aug. 21, 2020) (denying the petitioner's motion to require the response within three days

longed or indefinite detention seeking habeas relief, the length of time in detention is the key substantive inquiry. This means that, in meritorious cases, a variety of so-called procedural deadlines can serve either to extend unlawful detention or facilitate liberty.

Legal scholars have called the substance/procedure distinction "ethereal"[434] and "elusive,"[435] as what is held "procedural" in one context might be considered "substantive" in another.[436] As the Court has said: "Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn."[437] The Court has also eschewed the jurisprudential meaning of "substantive" and "procedural" by stating the terms "do not have a precise content, even (indeed especially) as their usage has evolved."[438] But just because their meaning is not monolithic does not signify they are devoid of meaning.[439]

Furthermore, civil procedure scholar Thomas Main has argued that substantive law is constructed upon a foundation of assumptions about procedural law and how the substantive right is being enforced, such that substantive law is inherently procedural.[440] In this way, substantive law may become so intertwined and embedded within procedure that it is difficult to untangle.[441] Moreover, procedural assumptions buried within substantive law may lead to over- or under-enforcement of substantive law.[442]

Although the relationship between substance and procedure is underdeveloped in jurisprudence regarding challenges to immigrant detention,[443]

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and not to exceed twenty days, and relying upon jurisprudence that has held "the strict time limits prescribed by § 2243 . . . are subordinate to the district court's discretionary authority to set deadlines under Rule 4" of Supreme Court rules); *Romero v. Cole*, No. 1:16-CV-00148, 2016 WL 2893709, at *2 (W.D. La. Apr. 13, 2016), report and recommendation adopted, No. 1:16-CV-00148, 2016 WL 2844013 (W.D. La. May 12, 2016) ("[I]t is well settled that the strict time limit prescribed by § 2243 is subordinate to the Court's discretionary authority to set deadlines under Rule 4 of the Rules Governing § 2254 Cases.")

[434] Allan Erbsen, *A Unified Approach to* Erie *Analysis for Federal Statutes, Rules, and Common Law*, 10 UC IRVINE L. REV. 1101, 1117 (2020).

[435] Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1188 (1982).

[436] Cook, *supra* note 34, at 345.

[437] Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988).

[438] *Id.*

[439] *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 724 (1974).

[440] Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010); *see also* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1630 (1992) (explaining that distinction between substance and procedure "remains a Holy Grail of legal analysis" in many areas of law, with special relevance in the context of immigration because of trends to vindicate substantive rights procedurally due to doctrinal limitations on immigrants' substantive rights).

[441] *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting). ("[P]rocedure and substance are so interwoven that rational separation becomes well-nigh impossible.").

[442] *See id.*

[443] *See supra* note 431; *see also* Marin v. Hebert, No. 21-CV-208, 2021 WL 299198, at *1 (W.D. La. Jan. 28, 2021) (denying petitioner's motion to show cause asking for a response in

procedural rules in application are very much implicated in generating and undermining substantive rights.[444] The central legal question in immigrant detention litigation is the legality of the length of detention without a hearing before a neutral arbiter on the reasonableness of continued detention. Therefore, the substantive question of law is directly impacted by—or, as Professor Main might say, "embedded" in—procedural areas such as litigation deadlines. Assumptions or ignorance about systemic lengths of detention, ICE's removal practices, and adjudication timeframes might enable or encourage judges to allow extensive litigation calendars despite facts pointing to the existence of detention that is already indefinite or prolonged.

In habeas cases challenging immigrant detention, this question of whether procedural rules work to modify substantive rights becomes especially murky. The Rules Enabling Act allows the Supreme Court to create rules of "practice and procedure," but admonishes the Supreme Court to ensure that these procedural and practice rules do not "abridge, enlarge or modify any substantive right."[445] However, as described above, judges have interpreted the Rules Enabling Act to allow them broad discretion in fashioning the procedural rules in habeas cases, superseding statutory deadlines. After an immigrant files a habeas action to seek release, judges might apply Section 2254 Rules, with no specified response time, or the Federal Rules of Civil Procedure, with a sixty-day response window, instead of the habeas statute deadline of a government response within three to twenty days, with good cause.[446] This discretion to extend the deadline twenty-fold or more implicitly authorizes continuing the very detention that the detained immigrant is challenging as unlawful.

This same problem of procedural deadlines potentially multiplying the substantive issue of unlawful detention is replicated in other ways as well. Deadlines relating to any exchange of evidence or to the date of an evidentiary hearing can extend detention, which may already be unlawfully prolonged. Judges must determine whether an evidentiary hearing is warranted, and if so, they should conduct the hearing "as soon as practicable after giving the attorneys adequate time to investigate and prepare" under Rule 8 in Section 2254 proceedings.[447] Each stage of the process implicitly permits extended detention before a decision is issued.[448]

Some legal scholars have criticized the Court for perhaps implicitly or explicitly suggesting that all Federal Rules are "presumptively valid," as it has never prohibited a procedural rule on the basis that it has abridged a

three days, under the theory that strict deadlines under 28 U.S.C. § 2243 can be set aside under Rule 4 of the Rules Governing Section 2254).

[444] *See generally* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010).

[445] 28 U.S.C. § 2072.

[446] *See supra* section III.A.

[447] *See* Rule 8, Rules Governing Section 2254 Cases in the United States District Courts.

[448] *See id.*

substantive right.[449] However, it is difficult to understand how deeply intertwined procedural rules and their application are in our understanding of substantive rights without future comprehensive study of habeas case dockets.

D. Shadow Wins

Adjudication of habeas petitions filed by immigrants is also obscured from study and analysis because of the phenomenon of shadow wins, where immigrants like Mr. Ye are released while their petitions are pending through the discretionary decisions of ICE officials rather than through court order. These releases appear in the court record as dismissals because the courts find the suit to be moot once the detained immigrant has received the only relief sought: release from detention. These shadow wins inhibit the development of a body of decisional law and shield the facts from further scrutiny.

Habeas petitions by detained immigrants present a unique example of the national trend toward pretrial dispute resolution and away from full trials—a phenomenon that Professor Marc Galanter named the "vanishing trial" in a 2004 comprehensive empirical study.[450] In this study, Professor Galanter documented the precipitous decline in prison and jail filings and trials after the passage of the Prison Litigation Reform Act of 1995 (PLRA), which heightened procedural requirements in prison litigation.[451] By the end of the study, only one percent of prisoner cases terminated in a trial. More broadly, across case types, civil dispositions in federal court increased by a factor of five while trials precipitously declined to 1.8% of federal civil cases in 2002 from 11.5% in 1962, continuing a "long historic decline."[452] While immigrants challenging executive detention are not included in his analysis nor governed by PLRA, these cases follow the same trend of anemic resolution of litigation.[453] Only an exceedingly small percentage of immigrant petitions receive an evidentiary hearing, and only a portion of those result in a court decision on the merits of the case.[454] Judges dismiss the overwhelming majority of immigrant habeas cases before any judicial fact-finding.[455]

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[449] *See* Spencer, *supra* note 36, at 658.

[450] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004).

[451] *Id.* at 469–70.

[452] *Id.* at 459, 461.

[453] *See, e.g.*, 18 U.S.C. § 1915A (prescreening of "prisoner" civil actions); 42 U.S.C. § 1997(e) (requiring exhaustion and limiting attorneys' fees for actions brought by "prisoners" "incarcerated or detained" "who [are] accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law").

[454] *See No End in Sight*, *supra* note 32, at 26–27.

[455] *See id.* at 15.

Merits decisions in immigrant habeas cases are rare for several reasons. First, like in prisoner cases subject to the PLRA, the vast majority of federal judges perform some type of screening of immigrant habeas petitions, especially for those filed by unrepresented litigants.[456] Given the labyrinthine procedural rules that apply to these cases, cases do not survive the screening despite the opportunity to amend the petition to remedy any defects in the initial filing. The rules are simply too complex for detained and unrepresented immigrants, with many unable to fix a defect in their filing because of language or literacy barriers, or lack of legal knowledge.

But even cases that survive screening are unlikely to receive an evidentiary hearing or court order on the merits that decides the core legal and factual question: whether continued detention of the immigrant is legal. With long deadlines, litigation becomes protracted over months or even years in habeas proceedings, and so most cases resolve once the petitioner is no longer detained, with ICE already having deported or voluntarily released the petitioner. If release is the only relief sought by the formerly detained immigrant, the court must dismiss the habeas lawsuit as moot for lack of jurisdiction.

In cases where the immigrant is released from detention into the community during the case, the detained immigrant wins the relief they sought without a formal court ruling in their favor, and the court record will show dismissal of the habeas petition. These discretionary releases might initially seem positive: they conserve court resources and provide immediate relief to the immigrant, akin to settlement. But in reality, discretionary release is a unilateral agency action that ends the case, not a settlement negotiated by both parties.[457]

These shadow wins, wins though they are, can be deleterious to the individual petitioners and to the interests of similarly situated detained immigrants. First, shadow wins stunt the development of case law: in many jurisdictions, there are practically no published opinions weighing evidence and providing concrete examples of interpreting the legal standards in these cases to guide future litigants. This contributes to legal uncertainty for both the government and detained immigrants, even though fact patterns often repeat in these cases. This legal uncertainty extends potentially unlawful detention and causes both the government and detained immigrants or their

[456] This screening may be under the habeas statute, which provides that a judge presented with a habeas petition "shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243. Judges who elect to apply the Rules for Section 2254 cases may conduct preliminary review under Rule 4.

[457] Criminal law scholars have criticized the plea bargaining process, which appears to be a negotiation between two parties, as similarly one-sided, because it offers "no substantive right against overwhelming force" of the prosecution. Josh Bowers, *Plea Bargaining's Baselines*, 57 Wm. & Mary L. Rev. 1083, 1101 (2015).

advocates to relitigate similar issues.[458] Second, the dismissals often prevent a detained immigrant from seeking attorneys' fees and costs, if they were represented in the suit.[459] This contributes to the extreme scarcity of qualified attorneys to bring these cases. Third, dismissals because of a discretionary release leave the formerly detained immigrant vulnerable to the vagaries of that discretion: ICE could subsequently re-arrest the person and subject them to detention again, and the detainee would have to restart habeas litigation from the beginning to legally challenge the renewed detention.[460] Finally, even these discretionary dismissals often come very late in the case, after months of litigation during which the court has given the government multiple bites at the apple to justify continued detention. The months of potentially unlawful detention that the detained immigrant suffers while the case is processed could be prevented with swifter action early in the case.

Those who study the vanishing trial have observed that the lack of trials deprives legal actors of determinative outcomes, leading bargaining in the shadow of the law to become "adjudication in the shadow of bargaining."[461] For detained immigrants seeking release through habeas, this goes one step further and becomes shadow adjudication, with only a very remote possibility of a court hearing and rarely any direct negotiation between the government and the detained immigrant and their counsel.[462]

IV. The Future of Habeas Adjudications

This theoretical framework grounded in the reality of habeas adjudication reveals fundamental contradictions between the purpose of habeas as

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[458] The implications of these hidden decisions are analogous to other court decisions that are not available in commercial legal databases. As others have argued, these missing decisions prevent the public and litigants from understanding basic information about the federal administration of justice. *See* Merritt McAlister, *Missing Decisions*, 169 U. Penn. L. Rev. 1101 (2011) (analyzing the implications of federal appellate merits terminations that are on navigable databases).

[459] *See* Equal Access to Justice Act, 28 U.S.C. § 2412(a) (permitting courts to award costs to a prevailing party in civil actions against the United States in some circumstances); *id.* § 2412(b) (permitting courts to award "reasonable fees and expenses of attorneys" to a prevailing party in civil actions against the United States in some circumstances); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 604–05 (2001) (interpreting "prevailing party" to require a "material alternation of the legal relationship of the parties" through the "judicial imprimatur" of a judgment on the merits or other court order).

[460] *See The Writ of Habeas Corpus: How a United States District Court Circumvents Oversight of Unlawful Detention*, Immigr. Rts. Clinic at N.Y.U. Sch. of L. & Families for Freedom (2016), https://www.prisonlegalnews.org/media/publications/Writ_of_Habeas_Corpus_-_How_a_United_States_District_Court_Circumvents_Oversight_of_Unlawful_Detention_NYU_Law__FFF_2016.pdf [https://perma.cc/48FW-S9D6].

[461] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004); Marigold S. Melli, Howard S. Erlanger & Elizabeth Chambliss, *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 Rutgers L. Rev. 1133, 1147 (1988).

[462] *See* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 Colum. L. Rev. 2049 (2021).

providing relief from unlawful confinement and the current process to vindicate that right. We therefore offer reforms to habeas adjudication to resolve these contradictions and recommend further empirical study of these cases to reveal systemic challenges that may not be visible to detained immigrants, attorneys, and judges from traditional legal research. These approaches must be driven by a commitment to the purpose of habeas corpus as providing a flexible remedy to reach any form of unlawful confinement.

A. Seeking a "Swift, Flexible and Summary Determination"

As early as 1948, the Court commanded that the processing of habeas petitions must not flounder into a "procedural morass."[463] Shortly thereafter, the Court again emphasized that habeas corpus affords "a swift and imperative remedy in all cases of illegal restraint or confinement."[464] The *Harris* opinion also discussed the need for streamlined and effective procedure in habeas cases because of the high stakes:

> The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with initiative and flexibility essential to insure [sic] that miscarriages of justice within its reach are surfaced and corrected.[465]

The Court has also contrasted habeas, "a swift, flexible, and summary determination," with a civil action "governed by the full panoply of the Federal Rules of Civil Procedure," which "can take a significant amount of time, very frequently longer than a federal habeas corpus proceeding."[466] Despite these clear commands from the Court, the law of habeas procedure as it stands now is indeed a morass, with multiple sources of procedural rules and wide discretion for district courts who may choose how quickly or slowly to proceed in these high-stakes cases.

Given the importance of liberty rights and the Court's command that the law of habeas corpus provide a "swift, flexible, and summary determination,"[467] we suggest prescriptions in two core areas. First, we offer recommendations to ensure expeditious substantive decisions. Second, we discuss prescriptions that may reduce procedural barriers to claims concerning unlawful immigrant detention.[468] Many of these prescriptions would equally improve adjudication for those in other types of executive detention or fed-

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[463] Price v. Johnston, 334 U.S. 266, 269 (1948).
[464] Fay v. Noia, 372 U.S. 391, 400 (1963).
[465] *Harris*, 394 U.S. at 291.
[466] *Preiser*, 411 U.S. at 495.
[467] *Preiser*, 411 U.S. at 495.
[468] *See id.*

eral or state criminal custody, though some are specifically tailored to the context of detained immigrants. And because judges have wide discretion in adjudication of these petitions, these changes could be implemented immediately by district courts without the need for legislative action.

First, habeas adjudications should be modified to more quickly reach resolution because—as we have discussed in this Article—the core substantive legal issue is often length of detention. Quick resolution of these cases will not only better serve the purpose of providing review of unlawful confinement, but may also provide more guidance through reasoned judicial opinions that decide cases before they are dismissed for mootness as shadow wins or losses. This judicial guidance can in turn influence the decisions of the immigration agencies to release detained immigrants in alignment with constitutional due process. That judicial guidance can also inform when detained immigrants and their advocates challenge continued detention. Recommendations to reduce procedural barriers also relate to other key characteristics of habeas litigation—namely the legal complexity overlaid on a labyrinth of proceedings, which is often navigated by pro se litigants.

District courts should not rely on the Section 2254 Rules to further expand their discretion in fashioning habeas procedure. The Section 2254 Rules were drafted to address the specific challenges of the perceived flood of habeas petitions challenging state convictions, and they obfuscate rather than clarify the procedural rules in immigrant habeas petitions. The Section 2254 Rules give broad discretion to district courts with few or no clear deadlines for the government, which extends detention and also permits procedural variation among courts and judges.[469] District courts need not resort to the Section 2254 Rules given that the Court has already interpreted the All Writs Act as a source of authority for managing discovery and other procedural matters in habeas petitions.[470]

Relatedly, district courts should enforce the statutory deadline for responding to habeas petitions in no more than twenty days.[471] This deadline is swift but reasonable where the respondents are employees or agents of the custodial agency, Immigration and Customs Enforcement, who are responsible for maintaining records on their authority for continued detention. Longer deadlines both prolong potentially unlawful detention and provide time during which the government may produce a post hoc justification for the detention, which should be a basis for release. Extensions should be strongly disfavored unless the detained immigrant joins the request.

Furthermore, district courts should expeditiously issue reasoned opinions in each case after the matter is fully briefed. These reasoned opinions will create a necessary body of law that guides parties in future litigation. Where ICE and their counsel fail to present specific, detailed evidence that

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[469] *See* Rules Governing Section 2254 Cases in the United States District Courts.
[470] *See Harris*, 394 U.S. at 299–300.
[471] *See* 28 U.S.C. § 2243.

provides a legal justification for continued detention, district courts should order release. For example, in claims based on *Zadvydas* where the petitioner argues they are being held indefinitely because they cannot be deported, district courts should order release if ICE fails to show that deportation is likely imminent. ICE would need to provide such evidence through testimony based on personal knowledge of cooperation by the receiving country, proof of issuance of travel documents, and firm flight dates with no other obstacles. If the evidence offered by ICE and their counsel is merely conclusory, and therefore inadequate to justify continued detention, then the appropriate remedy is release rather than further opportunities to provide more convincing evidence.[472] Setting a matter for an evidentiary hearing when the offered evidence—if accepted as true—does not legally justify the detention, encourages sandbagging by government respondents, who face no immediate consequence for deliberately filing legally deficient pleadings.[473]

And for cases where there are genuine issues of material fact, district courts should act quickly to use all available tools for fact-finding under the habeas statute and the All Writs Act.[474] This could include ordering evidentiary hearings where the petitioner is brought to court and ICE testimony is tested through cross-examination.[475] District courts should grant reasonable requests for discovery from the petitioner—including, for example, the production of all documents on which ICE and their counsel rely to show that deportation will likely occur soon in *Zadvydas* cases.

Second, in tandem with efforts to improve the speed of case adjudications, reducing procedural barriers is important to ensuring accurate adjudication of immigrant detention habeas claims. The complexity of law and procedure may result in dismissal or delay of meritorious cases, rendering habeas corpus ineffective. To simplify this convoluted process, district courts can allow for flexibility with petitioners, reducing unnecessary procedural barriers. Furthermore, district courts can facilitate access to justice through appointing counsel so petitioners are not left alone to navigate this high-stakes and complex system.

As an initial matter, courts should reduce procedural barriers so that detained people, who are largely unrepresented, can negotiate the process. For example, the $5 filing fee is prohibitive for many. When deliberating over motions for waiver of fees (*in forma pauperis*), courts should take into consideration the many barriers that unrepresented detained immigrants face, including prolonged detention with almost no opportunity to earn income. Jurisdictions that require habeas forms should use forms tailored to immigrant detention, as having totally irrelevant sections can easily confuse peti-

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[472] The habeas statute directs judges to "summarily hear and determine the facts, and dispose of the matter as law and justice require." *Id.*

[473] *See* Blackledge v. Allison, 431 U.S. 63, 80 (1977) (suggesting use of summary judgment to test facially adequate allegations in state prisoner's habeas petition).

[474] *See* 28 U.S.C. § 2243; *Harris*, 394 U.S. at 299–300.

[475] *See Harris*, 394 U.S. at 299–300.

tioners.[476] The Administrative Office of the U.S. Courts could issue a separate form for habeas petitions filed by immigrants not represented by attorneys that is simpler and has instructions on seeking appointment of counsel, as well as seeking a waiver of the filing fee. Another avenue the court could pursue to reduce procedural barriers would be to order each U.S. Attorney's Office to notify the court of any transfer of unrepresented petitioners while the habeas petition is under consideration, and ensure unrepresented petitioners' cases are not dismissed for failure to change their address in court filings related to the transfers.[477] Since the transfers of detained people are involuntary changes of address where the custodian has greater access to information on their location, it is appropriate for the custodian's counsel to provide the court with the new address as quickly as possible.

Additionally, district courts should encourage access to counsel for immigrants in prolonged detention by appointing counsel for unrepresented petitioners with regularity.[478] Along these lines, when pro se litigants file motions to have counsel appointed, district courts should fully consider the context of the many barriers that unrepresented detained immigrants face, including language, limited legal resources, and limited contact with family and advocates. Finally, courts should also consider other methods to encourage access to counsel for unrepresented detained habeas litigants, such as more regularly awarding attorneys' fees and costs to immigrants who win release under the Equal Access to Justice Act.[479]

Immigrant habeas has the promise to provide "swift, flexible, and summary determination"[480] of the legality of immigrant detention. To meet this promise, courts should work to reduce delays and procedural barriers that foreclose habeas claims from immigrants in unlawful detention.

B. Systemic, Not Isolated, Study of Immigrant Habeas

In addition to these procedural reforms that could be implemented immediately in district courts, further study on habeas adjudication could illuminate systemic failures to check unlawful detention. Habeas litigation challenging immigrant detention is ripe for scholarly investigation because fundamental empirical questions driving the development of legal doc-

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[476] *See* Administrative Office of the U.S. Courts, *Instructions, Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241* (effective Sept. 1, 2017), https://www.uscourts.gov/sites/default/files/AO_242_0.pdf [https://perma.cc/5CP9-33A3] (for example, Question 10 on pages 4–5 is irrelevant to immigrant detention).

[477] *See No End in Sight*, *supra* note 32, at 17 (detailing that 28 cases in the study were dismissed because immigrants did not update their addresses).

[478] The Criminal Justice Act permits the court to appoint counsel in habeas cases where "the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B).

[479] *See* 28 U.S.C. § 2412; *see also* Seth Katsuya Endo, *Fee Retrenchment in Immigration Habeas*, 90 FORDHAM L. REV. 1489 (2022) (arguing that awarding attorneys' fees in immigrant habeas benefits detainees' strong liberty interests and government's interest in enforcing the law).

[480] *Preiser*, 411 U.S. at 495.

trine—procedural and substantive—are significantly understudied and underdetermined. The most high-profile example of this dilemma is the inaccurate estimation of the average length of detention for immigrants ineligible for bond during their removal proceedings, which drove the *Demore* decision that found no significant constitutional problem with this "brief" period of detention.[481] Even after the Solicitor General confessed the error in the data provided by the government to defend its system of mass, no-bond detention, there has been no independent empirical study of the length of detention.[482] This problem repeats in less conspicuous ways as well, such as when judges make consequential decisions setting deadlines or evaluating evidence in individual habeas cases based on assumptions that warrant empirical study.[483]

We suggest further study of immigrant habeas litigation at a systemic level, rather than looking at cases in isolation. This means examining habeas litigation at the district court level rather than focusing on appellate courts. It also means studying full dockets to understand the interplay of procedure and the substantive law of limits to immigrant detention throughout the arc of the case, not just final decisions. This form of study is particularly important because there are few final decisions based on examination of evidence in some jurisdictions. Legal scholars can play a key role in studying these cases because of the complexity of the law and procedure, their ability to navigate accessing source documents, and the difficulty of examining trends across cases.

First, we call for increased study of immigrant habeas decision-making within the district courts.[484] Even though the overwhelming majority (seventy-nine percent) of cases are resolved at the district court level, there is a disproportionate focus on the appellate courts throughout the legal profession.[485] In immigrant habeas, district court dockets are particularly important to understand barriers to claims and how fact-finding occurs. District court decisions reveal the fluid nature of trial court litigation, where judges make decisions on the scope of litigation, deadlines, discovery, and fact-finding throughout, all of which may or may not be dispositive of individual claims

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[481] *Demore*, 538 U.S. at 513.

[482] *See* Letter from Ian Heath Gershengorn, *supra* note 12.

[483] In fact, in a study of immigrant habeas cases, the court granted nearly all of the requests for extensions by the U.S. Attorney. Generally, evidence in support of these requests were sworn statements by ICE repeating information contained in ICE databases, even though there has been evidence of significant errors in these databases. *See No End in Sight*, *supra* note 32, at 23–24.

[484] For a discussion of the importance of studying district courts, see Kim, Schlanger, Boyd & Martin, *supra* note 37, at 85–86; and Hoffman, Izenman & Lidicker, *supra* note 37, at 683.

[485] *See* Daniel J. Knudsen, *Institutional Stress and the Federal District Courts: Judicial Emergencies, Vertical Norms, and Pretrial Dismissals*, 2014 UTAH L. REV. 187, 188 (2014) (citing Pauline T. Kim et al., *How Should We Study District Judge Decision-Making*, 29 WASH. U. J.L. & POL'Y 83, 84 (2009).

and may or may not be analyzed in a published opinion.[486] Appellate decisions in immigration habeas cases give a less complete picture than district court decisions. Most appeals in these cases are tracked into a "second-tier appellate process" with no oral argument, resulting in an unpublished decision,[487] with the exception of the rare well-lawyered and legally novel individual or class suit. Because of this, even habeas cases that are appealed will likely receive scant analysis, and unpublished opinions may omit so many essential facts, such as the procedural history of the immigration case, that they are not useful for scholarly analysis unless studied in tandem with more complete records.[488]

Secondly, we argue that the study of these district court cases should employ a docketology approach, examining all the litigation documents, not just a final decision. Without comprehensive empirical research, the legal community can only rely on instinct or anecdote, which are especially susceptible to confirmation bias and so will do little to bridge the divide on controversial issues in predicting the impact of the next immigrant detention legal issue that comes to the fore. This docketology approach will more precisely illustrate the interplay between each judicial order, the evidence and facts of each case, and the underlying legal claim.

Further, we argue that legal scholars are particularly well-suited to engage in this type of docketology research. It is hard to access large numbers of immigrant habeas cases because of how they are quasi-private on PACER,[489] and it is also often difficult to unravel key procedural points and facts due to the nature of pro se litigation and complexity of legal authorities. This means that a substantial body of reasoned opinions therefore exists as "submerged precedent" in the dockets of cases but not available through searchable legal databases.[490] Further, because the underlying evidence and legal arguments by the parties can only be accessed through public terminals, immigrant habeas decisions are even more hidden—buried rather than submerged. This opacity of case information and legal complexity are well-suited for legal scholarly investigation.

This type of approach has revealed important insights about the consequences of judicial decision-making in procedural, interim rulings in the past. After the *Padilla* decision seemed to limit habeas petitions to the district court with jurisdiction over the detention facility, Professor Nancy Morawetz studied the district court adjudications of requests for stays of deportation in the district of confinement as well as other districts where

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[486] *See* Kim, Schlanger, Boyd & Martin, *supra* note 37, at 85–86.

[487] McAlister, *supra* note 431, at 536.

[488] *See id.* at 573 ("The only way to decipher 'under-reasoned' decisions is by way of reference to another decisionmaker's (the district court's or administrative law judge's) decision. . . . The avoidance decision issues in appeals in which . . . the court ultimately hides its work—and perhaps intentionally so.").

[489] While court orders can be viewed through PACER, many are not published in the federal reporters, or even in Westlaw or LexisNexis.

[490] Elizabeth Y. McCuskey, *Submerged Precedent*, 16 Nev. L.J. 515 (2016).

petitions were filed over a six-month period.[491] Through analysis of dozens of cases, her research revealed that district courts were systemically transferring these petitions to a single district court in Louisiana where many immigrants are detained.[492] The Louisiana district court held in every case studied that it had no jurisdiction to issue a stay.[493] She therefore revealed that the transferring court provides the only opportunity to seek a stay of deportation, and that opportunity to seek a stay after transfer is illusory.[494] While the law has subsequently developed to generally bar these types of stays, her methodology demonstrates important insights from systemic study of district court decision-making at every procedural stage and therefore serves as a model for what is needed to uncover hidden trends in these cases.[495]

In short, legal scholars are well-positioned to unearth the full case histories, analyze interim court decisions and final outcomes, and reach well-founded conclusions that can inform the development of doctrine regarding the procedure and substantive law in these cases. This comprehensive empirical study of full case dockets at the trial level is important in order to more precisely capture the impact of complex legal authorities, the labyrinthine process, the inherently substantive nature of procedure challenging immigrant detention, and shadow wins. Simply studying Supreme Court and appellate jurisprudence or published decisions cannot fully depict the hidden law of immigrant detention habeas litigation.

Conclusion

Federal courts at every level continue to consider the legal limits on immigrant detention as those detained in the new era of mass detention seek release through habeas corpus petitions. As the substantive law of immigrant habeas continues to develop, several empirically testable questions remain: How long are immigrants in different proceedings being detained? How effective are habeas corpus petitions in providing a constitutional backstop for detained immigrants? Are habeas corpus proceedings offering a swift and flexible determination of the legality of continued detention? Despite years (and, in some instances, decades) of litigation over these legal limits, the

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[491] *See generally* Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. Third World L.J. 13 (2005).

[492] *See id.*

[493] *See id.*

[494] *See id.*

[495] *See id.*; *see also* Salyer, *supra* note 131. Professor Salyer's historical analysis of habeas petitions brought by Chinese immigrants at the turn of the century is similarly insightful. She found that over one thousand Chinese immigrants were permitted to enter the United States through habeas proceedings over a fifteen-year period, and with a high rate of reversal of the administrative officer's decision to exclude. *See* Salyer, *supra* note 131, at 80–82. That success is remarkable especially considering the "novel and strange" procedures, including referral to a commissioner for an informal hearing where exhaustive interrogation of witnesses was permitted. *Id.* at 75–79.

empirical questions that dominate these legal debates have not been answered with rigorous empirical analysis.

We offer a theoretical framework for answering these questions, drawing out the core adjudication challenges in immigrant habeas cases that demonstrate the larger tension between substantive rights and procedural rules, including the incredible power of procedure to vindicate—or not—legal rights. We posit that immigrant habeas adjudications illustrate the convergence of procedure and substantive issues and inform doctrinal development in both areas. We call for reforms of procedural rules as necessary to facilitate the development of substantive law and vindicate rights. Finally, we invite further comprehensive study of federal court dockets and filings, informed by this theoretical framework, which can offer a unique contribution to the consideration of the legal limits on immigrant detention.