International Municipal Lawyers Association
2015 Annual Conference
Las Vegas, Nevada

Immigration Detainers: Legal Issues for Local Law Enforcement

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PUBLICATION PENDING: 104 GEO. L. J. ___ (FORTHCOMING 2015)

Immigration Law's Looming Fourth Amendment Problem

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INTRODUCTION

Among the many executive actions to reform immigration enforcement taken by President Obama on November 20, 2014, one measure was not like the others.[1] Homeland Security Secretary Jeh Johnson directed Immigration and Customs Enforcement (ICE) to discontinue the Secure Communities program, under which noncitizens arrested by local law enforcement could be detained and eventually transferred to federal custody to process their deportations.[2] This action differed substantively from the other forms of prosecutorial discretion utilized by the Obama Administration because it benefits immigrants who have a criminal record. This conflicts

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[1] *See generally Fixing Our Broken Immigration System Through Executive Action – Key Facts*, DEP'T OF HOMELAND SEC., http://www.dhs.gov/immigration-action (last updated Jan. 5, 2014).

[2] JEH JOHNSON, DEP'T OF HOMELAND SEC., MEMORANDUM: SECURE COMMUNITIES (Nov. 20, 2014) [hereinafter SECURE COMMUNITIES], *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

with the general Obama strategy on immigration enforcement, which prioritizes noncitizens with criminal records for apprehension and deportation.[3] In the President's words: "Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids."[4]

Given the President's expressed "felons, not families" policy, it is peculiar that ICE would be asked to shut down a program that specifically targets noncitizens who are arrested on suspicion of criminal activity. Although the Obama Administration has used its discretion to grant reprieves from deportation for millions of unauthorized immigrants, it has also deported noncitizens at a record rate.[5] This dual approach depends in large part on ICE's ability to find immigrants with criminal records so that the government may target its apprehension, detention, and deportation resources accordingly. Secure Communities was a critical tool in carrying out this policy because it made it easy for ICE to make sure that immigrants arrested by local authorities would not be released back into the community.[6] But the critical link in Secure Communities was the use of ICE detainers, through which ICE asked local police to detain people longer than they would be permitted to on purely criminal grounds so that ICE agents could easily take them into federal custody.[7]

The end of Secure Communities was a retreat for DHS in the face of mounting resistance from local governments and the judiciary.[8] Most importantly, in 2014 several federal district courts had found that local police would be liable for civil rights violations if they heeded ICE detainer requests by keeping noncitizens in custody when a citizen in the same situation would be released.[9] In December 2014, the Department of Homeland Security (DHS) reported that growing resistance from courts and localities to the detainers had led to a reduction in overall deportations.[10] The constitutional problem in these cases was that ICE does not obtain judicial warrants before it arrests immigrants for deportation.[11] Nor is there any immediate probable cause finding.[12] In immigration enforcement, warrantless arrests are the norm, and there is no automatic, neutral review of probable cause if the arrested person is held in custody as would be

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[3] *See* JEH JOHNSON, DEP'T OF HOMELAND SEC., MEMORANDUM: POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS 4 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[4] President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[5] *See* JOHN F. SIMANSKI, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 6 fig. 2 (Sept. 2014), *available at* https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

[6] *See generally Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure-communities (last visited Apr. 2, 2015).

[7] *See generally ICE Detainers: Frequently Asked Questions*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/factsheets/detainer-faq (last updated Dec. 28, 2011).

[8] SECURE COMMUNITIES, *supra* note 2, at 1 ("Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation. A number of federal courts have rejected the authority of state and local law enforcement agencies to detain immigrants pursuant to federal detainers issued under the current Secure Communities program.").

[9] *See* discussion *infra* Part I.

[10] DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014, at 5 (2014), *available at* http://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf.

[11] SECURE COMMUNITIES, *supra* note 2, at 1.

[12] *Id.*

required in a criminal case under the Fourth Amendment.[13] As a result, federal district courts found no legal basis for local police to detain people, even when an ICE officer believed them to be in the country unlawfully. But this raises an obvious question: if local police cannot detain noncitizens because there is no judicial warrant and no probable cause, why can ICE do exactly the same thing?[14] But if such arrests are vulnerable to constitutional challenge, then is much of how this country enforces immigration law at risk? This is precisely the situation we now face.

Unlike other literature on the issue, I am not directly challenging the massive growth of immigration detention or the policy of mandatory detention that feeds it.[15] This policy deserves and has attracted significant critique.[16] But for the purposes of this Article, I assume for the sake of argument that Congress can—if it so chooses—designate a class of people subject to mandatory detention while they are awaiting resolution of their deportation hearings.[17] But even conceding this point, there are still unanswered questions. What procedures should be used to decide whether an individual belongs in this class? Who should make this decision? What standard of evidence should apply? How long may a person be detained before this decision is made? In short, whatever detention policy Congress chooses to set for immigration enforcement, what procedures are in place to adjudicate whether a person should be subject to it?

The recent cases in which localities have been sued for detaining people on ICE detainers mark a critical turning point in the constitutional regulation of immigration enforcement. Previously, successful challenges to immigration detention had focused on the length of detention and concerned relatively exceptional cases where the government was unable to execute deportation orders promptly.[18] Thus, they attacked immigration enforcement only on the back end. Because most immigration detainees are actually detained for a relatively short period

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[13] *See* discussion *infra* Part IV.

[14] *Cf.* César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. (forthcoming 2015) (manuscript at 103), *available at* http://ssrn.com/abstract=2501704 ("Whether characterized as a matter of law as civil or criminal and no matter if carried out by federal, state, or local officials, every type of immigration law enforcement shares a common central feature: imprisonment.").

[15] *See generally*, Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 137–38 (2013) (describing the dramatic expansion of immigration detention since the mid-1990s).

[16] *See, e.g.*, *id.*; Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363 (2014); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601 (2010); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012); Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447 (2013); Whitney Chelgren, Note, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV 1477 (2011); Faiza W. Sayed, Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833 (2011); Travis Silva, Note, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227 (2012).

[17] *See* discussion *infra* Part IV.

[18] For examples of relatively exceptional cases, see *Zadvydas v. Davis*, 533 U.S. 678 (2001), and its progeny. *See* discussion *infra* Part III.A.

of time, such challenges could only affect a minority of immigration cases.[19] The new wave of federal cases are different because they find constitutional weakness with the way in which immigrants are taken into custody, not just with how long they are detained. They attack immigration enforcement on the front end.

To be clear, the cases so far have questioned the authority of state and local police to detain people based on ICE detainers, not the authority of ICE to arrest. Nor do they necessarily question the authority of Customs and Border Protection Officers to make arrests at the border and ports of entry. But these cases are part of a trend in which successful constitutional challenges have moved incrementally closer and closer to the front end of immigration enforcement. The principal constitutional problem with immigration enforcement is that a person may be deprived of liberty without any prompt review by a neutral magistrate to determine if probable cause exists to justify the arrest and continued custody. This problem is coming into focus at a time when the meaning of the plenary power doctrine, which has long justified expansive federal authority over immigration matters, appears to be narrowed so that long standing statutes and regulations may be becoming more vulnerable to constitutional attack. As Professor Stephen Legomsky has explained, the doctrine was long understood to mean that the federal government had vast authority over immigration, or courts had limited authority to review immigration enforcement.[20] But more recent cases have found that there are in fact constitutional limits on immigration law and have shown federal courts increasingly willing to apply them.[21]

To illustrate why immigration enforcement is growing more vulnerable to constitutional attack, this Article seeks to retell and update an old but rapidly evolving story: how the statutory, regulatory, and institutional mechanisms of immigration enforcement were built in a parallel legal universe in which routine constitutional rights that shaped other areas of law enforcement were effectively inapplicable. From the late nineteenth century through the twentieth century, the Supreme Court generally regarded immigration enforcement as a civil matter and as a matter of national sovereignty. Over time, the result of this approach was that the government gained the power to arrest and detain noncitizens on immigration grounds with little constitutional restraint. But at the dawn of the twenty-first century, the Supreme Court signaled an end to this era with its decision in *Zadvydas v. Davis*, holding that "indefinite detention of aliens . . . would raise serious constitutional concerns" and that the federal government's power to enforce immigration law "is subject to important constitutional limitations."[22]

It should be noted at the outset that *Zadvydas* was a due process case, concerning noncitizens held for lengthy periods of time after the conclusion of their deportation cases, which are known in immigration law as "removal proceedings." It dealt with immigration detention at the back end. The problem that I raise in this Article concerns the beginning of immigration detention, including the arrest by ICE and the initial decision to leave a person in custody while removal proceedings are pending. The deprivation of liberty involved here would support a strong claim

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[19] In 2012, 70% of ICE detainees were released within thirty days. Only 3% spent more than 180 days detained, which is the situation in which *Zadvydas* and its progeny apply. *See Legal Noncitizens Receive Longest ICE Detention*, TRAC IMMIGRATION (June 3, 2013), http://trac.syr.edu/immigration/reports/321.

[20] Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616–17 (2000).

[21] *See* discussion *infra* Part III.

[22] *Zadvydas*, 533 U.S. at 682, 695.

for procedural due process, but the Constitution normally analyzes these issues through the Fourth Amendment because that Amendment speaks specifically to the government action of "seizing" a person.[23] But the Fourth Amendment and due process overlap because the requirement of the Fourth Amendment is, in effect, a requirement for a certain kind of process. Moreover, in *Zadvydas*, the Court opened the door to "constitutional limitations," not only due process claims.[24]

Recent lower court decisions indicate that the next chapter in this story may be a frontal attack on immigration custody. I propose a minimally disruptive means of solving the problem through the doctrine of constitutional avoidance that the Supreme Court used in *Zadvydas*. This solution is important both to preserve the continuity of immigration enforcement, and to allow judges to rule on a constitutional problem without fear of sparking chaos. It is quite plausible that the statutory framework by which ICE currently takes people into custody is unconstitutional, at least as it has been understood and implemented. Thus, federal authorities could be left without any framework by which to effectively enforce immigration law were a court to simply strike down the provisions of the Immigration and Nationality Act (INA) authorizing immigration arrests. Given the stalemate in Congress over immigration reform, one could reasonably wonder how long it would take the legislative process to fill the resulting void. This scenario is not especially desirable from the standpoint of rule of law and maintenance of public order. The specter of immigration chaos is also likely to cause hesitation for judges who might otherwise see merit in the constitutional arguments against the present system. Rather than strike down the INA, I suggest that the statute can be reinterpreted so as to establish a mechanism of regular judicial review of immigration arrests and detention.

I begin in Part I by describing the recent litigation over ICE detainers that highlighted a Fourth Amendment problem with immigration arrests. In Part II, I trace how immigration enforcement was permitted by the Supreme Court to develop in a parallel universe, insulated from constitutional attack by the plenary power doctrine. In Part III, I describe why recent jurisprudence has exposed this parallel universe to newly potent constitutional challenges. Part IV compares the apparatus of immigration arrests and detention to the constitutional safeguards that have developed in other areas of law. I conclude with a proposal for how these constitutional problems may be remedied by reinterpreting the INA in accordance with the doctrine of constitutional avoidance. I propose that the existing statute should be interpreted to require that immigration arrests be automatically reviewed by a neutral immigration judge within a seventy-two hour period, unless the person is released from custody first. I base this proposal on a comparison with criminal procedure, as well as standards used to govern non-criminal custody cases, especially involuntary civil commitment.

I. CANARY IN THE COAL MINE: THE TROUBLE WITH ICE DETAINERS

The early warning signal that there may be a constitutional problem with immigration arrests has come through several district court cases in which the federal government has not even been

[23] *See* Henry v. United States, 361 U.S. 98, 100 (1959) (holding that Fourth Amendment prohibition on unreasonable seizure includes seizure of a person).
[24] *Zadvydas*, 533 U.S. at 695.

a party.[25] The most influential of these was from Clackamas County, Oregon, where police arrested Maria Miranda-Olivares in March 2012 for violating a restraining order.[26] The police notified ICE of her arrest, and the next day ICE issued a detainer requesting that she be detained for an extra forty-eight hours, excluding the weekend, so that ICE could take custody of her.[27] Meanwhile, the local judge set bail of $5,000 for her criminal case, which meant that she needed to pay only $500 to leave jail while her case was pending.[28] But the county jail told Miranda-Olivares and her family that even if she paid the required bail, she would not be released because of the ICE detainer.[29] She thus remained in custody for fifteen days, after which she pled guilty and was sentenced to forty-eight hours in jail, with credit for time served.[30] She then sued for damages for a civil rights violation for having been wrongfully detained for the additional time.[31]

Miranda-Olivares prevailed on her Fourth Amendment claim.[32] The court found that once she reached the moment after which she could have been released on bail but for the ICE detainer, she had been unconstitutionally seized by the county jail, in the terminology of the Fourth Amendment, without a warrant and without any probable cause.[33] The Court said:

> In order for the County to hold a person beyond the period necessary to execute an order of legal authority to continue detention, it must meet the clearly defined reasonable seizure standards of the Fourth Amendment. . . . Prolonged detention after a seizure, such as full custodial confinement without a warrant, must be based on probable cause. Absent probable cause, that detention was unlawful.[34]

The premise that a jail cannot hold someone without probable cause was hardly groundbreaking. But the court's critical finding was that an ICE detainer does not constitute probable cause:

> The County admits that Miranda–Olivares was held past the time she could have posted bail and after her state charges were resolved based exclusively on the ICE detainer. But the ICE detainer alone did not demonstrate probable cause to hold Miranda–Olivares. It

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[25] Prof. Christopher Lasch published an article in 2013 that largely anticipated the Fourth Amendment problems with immigration detainers that led to they rejection by courts in 2014. *See* Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOYOLA L.A. L. REV. 629, 696-698 (2013).

[26] Miranda-Olivares v. Clackamas Cty., No. 3:12–cv–02317–ST, 2014 WL 1414305, at *1 (D. Or. Apr. 11, 2014). In the Secretary of Homeland Security's memorandum ending Secure Communities, the Clackamas County case was the first one cited in acknowledging "the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment." SECURE COMMUNITIES, *supra* note 2, at 2.

[27] *Miranda-Olivares*, 2014 WL 1414305, at *2.

[28] *Id*.

[29] *Id*.

[30] *Id*. at *3.

[31] *Id*.; *see* 42 U.S.C. § 1983 (2012) (permitting damages for violation of constitutional rights of any person in the United States).

[32] *Miranda-Olivares*, 2014 WL 1414305, at *1.

[33] In Fourth Amendment law, a person is "seized" when a government official makes him or her reasonably believe that s/he is not at liberty to leave or go about his or her business. *See* Florida v. Bostick, 501 U.S. 429, 437 (1991).

[34] *Miranda-Olivares*, 2014 WL 1414305, at *11 (internal citations omitted).

> stated only that an investigation "has been initiated" to determine whether she was subject to removal from the United States.[35]

The logic and the facts are difficult to assail. There is no mechanism by which any judge or neutral adjudicator assesses at the outset of an immigration case that ICE has solid grounds for concluding that a person is in the United States unlawfully.[36] In fact, in most removal cases there is no neutral determination about deportability until the conclusion of removal proceedings in immigration court.[37]

Miranda-Olivares's lawsuit was resolved at a critical moment in April 2014, accelerating a trend in which counties around the country began announcing that they would no longer detain people on the basis of ICE requests.[38] In fact, 2014 saw a wave of cases successfully challenging ICE detainers on constitutional grounds. The Third Circuit had reached a similar holding in March 2014.[39] In February 2014, a federal court in Rhode Island held: "One needs to look no further than the detainer itself to determine that there was no probable cause to support its issuance."[40] Several other federal courts reached similar holdings in unpublished decisions in 2014.[41]

The DHS noted at the end of 2014 that the growing resistance to honoring ICE detainers had become a significant operational challenge:

> ICE's efforts in the interior, however, were impacted by an increasing number of state and local jurisdictions that are declining to honor ICE detainers. As a result, instead of state and local jails transferring criminal aliens in their custody to ICE for removal, such aliens were released by state and local authorities. Since January 2014, state and local law enforcement authorities declined to honor 10,182 detainers. This required ICE to expend additional resources attempting to locate, apprehend, and remove criminal aliens who were released into the community, rather than transferred directly into custody. These changes further contributed to decreased ICE removals.[42]

In November 2014, the Obama Administration replaced Secure Communities with a new program in which ICE will ask local communities for notification about an individual's pending

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[35] *Id.*
[36] *See* discussion *infra* Part IV.A.
[37] *See, e.g.*, People v. Xirum, 993 N.Y.S.2d 627, 630 (N.Y. Sup. Ct. 2014) (holding that probable cause exists to detain on the basis of an immigration detainer when an immigration court had previously issued an order of removal).
[38] *See* Amanda Peterson Beadle, *Why 250 Counties Have Stopped Honoring Local ICE Detainers*, AM. IMMIGR. COUNCIL (Sept. 22, 2014), http://immigrationimpact.com/2014/09/22/why-250-counties-have-stopped-honoring-local-ice-detainers; John Couwels, *Lawsuit Fears Cause Cops to Turn Down Feds' Immigration Checks*, CNN (Aug. 3, 2014, 3:15 PM), http://www.cnn.com/2014/08/01/politics/customs-immigration-detainers; Julia Preston, *Sheriffs Limit Detention of Immigrants*, N.Y. TIMES (Apr. 18, 2014), http://www.nytimes.com/2014/04/19/us/politics/sheriffs-limit-detention-of-immigrants.html?_r=F.
[39] Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014).
[40] Morales v. Chadbourne, 996 F. Supp. 2d 19, 29 (D.R.I. 2014).
[41] *See* SECURE COMMUNITIES, *supra* note 2, at 2 n.1 (summarizing court decisions against Secure Communities); *cf.* Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 777 (9th Cir. 2014) (en banc) (holding state law provision precluding bail for immigrants unlawfully present violates substantive due process).
[42] DEP'T OF HOMELAND SEC., *supra* note **Error! Bookmark not defined.**, at 4–5 (footnotes omitted).

release, but will not ask that the person be detained for extra time.[43] If ICE wishes to request actual detention of the person, it must specify a basis for probable cause, such as a previously issued final removal order.[44] The intention, however, seems to be to facilitate ICE officers taking people into custody at the moment when they are released from local custody. This new system may prevent local governments from being responsible for immigration-based detention without probable cause. But it leaves open the question of why ICE agents are permitted to detain the same people without a finding of probable cause.

This issue had been lurking in immigration cases for some time before the cascade of local and judicial decisions forced the end of ICE detainers and the Secure Communities program in 2014. In 2008, a federal judge in Connecticut found that immigration arrest warrants are deficient for Fourth Amendment purposes because they are "issued exclusively by executive officials" with no neutral review.[45] And yet, the normal means of immigration enforcement in the United States, especially in the interior of the country, is for ICE to make warrantless arrests, with no automatic or timely review by a neutral adjudicator.[46] To get any review of whether she is correctly subject to mandatory immigration detention, a person must know to ask for a hearing; at that hearing the detainee, rather than DHS, bears the burden of proving that she is "substantially unlikely" to be subject to lawful detention.[47]

As these 2014 cases show, this system was vulnerable to a strikingly simple, two-step constitutional attack. First, in the United States, the government may not deprive a person of liberty without probable cause or due process of law. Second, immigration arrests deprive people of liberty without any clear standard of evidence, and without any automatic or timely review by a neutral decision maker, and thus fail to provide necessary due process. This line of attack has now been shown to be valid when targeted against local jails that detain people at the request of the federal government.[48] The next question is whether this attack will be equally potent when targeted at the federal government itself. If it succeeds, the primary mechanism by which DHS arrests suspected unauthorized immigrants will be unconstitutional.

However, immigration enforcement has rarely been a simple matter constitutionally. In order to understand how such a system could have survived into the twenty-first century, and to understand why it may suddenly be vulnerable to constitutional attack, we need to retrace the way immigration enforcement was long allowed to exist in a parallel universe in which it was insulated from constitutional scrutiny. In particular, in 1960 the Supreme Court refused to declare that immigration arrests must meet Fourth Amendment requirements in *Abel v. United States*, denying in particular that warrants must be issued by a neutral decision maker.[49] Even on its own terms, *Abel* is a weak precedent because Abel had conceded the validity of the warrant before the trial court, so the Court did not actually affirm the validity of the warrant on the

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[43] SECURE COMMUNITIES, *supra* note 2, at 2. For an argument that Congress never authorized a detainer system beyond a request that local authorities notify DHS of a detainee's pending release, *see* Lasch, supra n. 25, at 693.
[44] *Id*.; *see also* People v. Xirum, 993 N.Y.S.2d 627, 630 (N.Y. Sup. Ct. 2014) (finding that previous removal orders can be the basis for probable cause).
[45] El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 275 (D. Conn. 2008).
[46] *See* discussion *infra* Part IV.
[47] *See* Sayed, *supra* note 16, at 1834, 1850–51.
[48] *See, e.g.*, Miranda-Olivares v. Clackamas Cty., No. 3:12–cv–02317–ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014).
[49] 362 U.S. 217, 230 (1960).

merits.[50] Even if it had so held, it would be unclear today whether it remains good law, though some lower courts continue to rely on it.[51] *Abel* was decided seven years before *Camara v. Municipal Court*, where the Court decided that the Fourth Amendment applies to civil and administrative searches, not only to criminal investigations.[52]

The treatment of immigration arrest warrants in *Abel* illustrates the peculiar ways in which immigration enforcement has long been insulated from constitutional standards applicable in other fields of law enforcement. In dicta, the Court said that immigration arrest warrants enjoyed "the sanction of time" because they had never been directly challenged and appeared consistent with the Court's early immigration law jurisprudence, dating back to The Japanese Immigrant Case in 1903.[53] But, as detailed in Part III, the Court has grown more willing to apply constitutional limits to immigration enforcement—certainly more willing than it was in 1903 or 1960.[54] By retracing the Court's evolving willingness to apply constitutional protections to immigrants, we can see why immigration law's longstanding constitutional insulation is now wearing perilously thin. We can also see why attacking immigration enforcement on constitutional grounds remains a difficult battle. But the attack is coming.

II. FOUNDATIONS OF A PARALLEL UNIVERSE

A. PLENARY POWER, NOT ENUMERATED POWER

Until the dawn of the twenty-first century, there were few constitutional restraints on the federal government's power to detain people on suspicion of being unlawfully present in the country. Congress and the Executive Branch were thus left relatively free to set up an administrative system for adjudicating deportation cases and detention of potential deportees without needing to worry much about the system surviving constitutional attack. The Supreme Court's longstanding unwillingness to apply meaningful constitutional scrutiny to immigration enforcement shaped the enforcement mechanisms that developed. These mechanisms are built on a particular jurisprudential foundation, a foundation that is now far less stable.

In the Chinese Exclusion Case in 1889, the Supreme Court was forced to identify the source of federal authority to regulate immigration.[55] This was not a simple problem because immigration control is not explicitly one of Congress's enumerated powers. A strict textual reading of Article I could thus lead to the conclusion that the power to regulate entry of foreigners actually belongs to each of the fifty states. Recently, Justice Scalia appeared to endorse a version of this view in *Arizona v. United States*, where the Court struck down several provisions of Arizona's anti-immigrant SB1070 statute on federalism grounds:

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[50] *Id*. at 230–32.
[51] *See, e.g.*, United States v. Lucas, 499 F.3d 769, 776 (8th Cir. 2007) (citing *Abel* in upholding the arrest and ensuing search on an administrative warrant of an escaped convict).
[52] 387 U.S. 523, 532 (1967).
[53] *Abel*, 362 U.S. at 230, 233–34 (citing Yamataya v. Fisher, 189 U.S. 86 (1903)).
[54] *Camara* itself provides an interesting parallel illustrating how the sanction of time may erode. *Camara* overruled a precedent that was only eight years old. *See* Frank v. Maryland, 359 U.S. 360 (1959). In dissent, Justice Clark (joined by Justices Harlan and Stewart) protested that the Court was discarding not just its own case law, but also "municipal experience, which dates back to Colonial days." *Camara*, 387 U.S. at 547 (Clark, J., dissenting).
[55] Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).

> Today's opinion . . . deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there.
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> . . . .
>
> There is no doubt that "before the adoption of the constitution of the United States" each State had the authority to "prevent [itself] from being burdened by an influx of persons." And the Constitution did not strip the States of that authority.
>
> . . . .
>
> One would conclude from the foregoing that after the adoption of the Constitution there was some doubt about the power of the Federal Government to control immigration, but no doubt about the power of the States to do so.[56]

Although the Constitution makes no explicit reference to a federal power to regulate the entry of foreigners, Article I does give Congress the authority "[t]o regulate commerce with foreign nations" and "[t]o establish a uniform rule of naturalization."[57] Assuming that the federal government is one of enumerated powers, the most straightforward theory of federal authority over immigration would be to say that international migration is a form of international commerce. One of the difficulties with this may have been that the Chinese Exclusion Case arose at a time when the Court's doctrine on interstate commerce was extremely formalistic. In 1888, the Court had held that manufacturing alcohol within a state, even with the intent to sell it across state lines, did not implicate interstate commerce.[58] The goods did not become part of interstate commerce "until they are committed to the common carrier for transportation" across state lines.[59] Nevertheless, there would have been a good argument that international migration satisfies even this restrictive approach because it necessarily involves transportation, moving across borders, and is closely connected with labor, employment and other economic interests. Moreover, entering the country and remaining here are steps toward becoming a United States citizen, and thus may be considered within the federal government's naturalization power.[60]

Basing federal immigration power on the foreign commerce and naturalization clauses would have given immigration law a foundation in the text of the Constitution. It would be consistent with the rule that the federal government "possesses only certain enumerated powers."[61] But this is not the approach that the Supreme Court chose. Instead, the Court reasoned that the authority to regulate immigration is inherent in national sovereignty and the national "right of self-preservation," rather than stemming from any specific constitutional provision.[62] In subsequent cases, the Court expanded on this inherent sovereign power, developing the plenary power doctrine.[63]

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[56] Arizona v. United States, 132 S.Ct. 2492, 2511–13 (2012) (Scalia, J., dissenting) (internal citations omitted).
[57] U.S. CONST. art. I, § 8.
[58] Kidd v. Pearson, 128 U.S. 1 (1888). *But see* Gonzales v. Raich, 545 U.S. 1, 2 (2005) (the Commerce power extends to regulation of home-grown cannabis).
[59] *Kidd*, 128 U.S. at 25.
[60] The central statutory requirements to naturalize as a United States citizen in most cases are to enter the United States and legally reside here for a specified number of years. 8 U.S.C. § 1427 (2012). As a result, it is difficult to separate the law regulating naturalization from the law regulating entry and residency of noncitizens.
[61] Gibbons v. Ogden, 22 U.S. 1, 205 (1824).
[62] Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604–06, 608 (1889).
[63] *See generally* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984).

The Chinese Exclusion Case simply held that Congress has authority to set immigration policy. But it immediately ushered in an era of nearly unlimited authority.[64] To some extent, this was unsurprising. In the case, a Chinese man was denied reentry to the United States even though he possessed a written guarantee of reentry.[65] The Court could have held that the federal government has the authority to set immigration policy but nevertheless found that the facts of this case raised due process problems. By excluding the man despite his reliance on a government promise, the Court appeared to conceive of immigrants at the border as having no enforceable rights. Having established federal authority over immigration, the Court moved quickly to nearly completely remove the judiciary from playing a role in reviewing how the government controlled immigration. In *Ekiu v. United States*, three years after the Chinese Exclusion Case, the Court refused to intervene in favor of a Japanese woman detained at the port of San Francisco, holding:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government.[66]

As Professor Legomsky wrote, plenary power rendered immigration law "a constitutional oddity."[67] In 1909, the Court said of immigration that "over no conceivable subject is the legislative power of Congress more complete."[68] Yet the Court saw no need to find a specific source for the power in the Constitution. The Court permitted Congress to enact statutes free from the substantive constitutional restraints that attach to nearly any other subject matter.[69]

B. THE CIVIL-CRIMINAL DISTINCTION

Whereas *Ekiu* concerned detention at the border, the next year the Court dealt with a noncitizen who was a long-term resident of the United States. In *Fong Yue Ting v. United States*, a federal marshal arrested a Chinese man who had been living in New York City for more than a decade "without any writ or warrant," because he had failed to produce a certificate granting him the right to reside in the country.[70] He and others in the same situation were granted no trial or hearing before a judge ordered them deported.[71] Again the Court swore off any judicial role in reviewing the manner in which Congress and the Executive regulated immigration.[72] But in *Fong*

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[64] *See Plenary Power, DOMA, and Executive Deference*, 126 HARV. L. REV. 1583, 1585 (2013) (summarizing the Court's early immigration cases, which "suggested that immigration decisions made by Congress and the executive branch were immune from judicial review").
[65] *Chae Chan Ping*, 130 U.S. at 582.
[66] Ekiu v. United States, 142 U.S. 651, 660 (1892).
[67] Legomsky, *supra* note 63, at 255.
[68] Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320, 339 (1909).
[69] Legomsky, *supra* note 63, at 255, 258–59.
[70] 149 U.S. 698, 702 (1893).
[71] *Id.* at 703, 730.
[72] *Id.* at 731 ("The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department

Yue Ting, the Court offered an additional rationale for why the constitutional protections that might also otherwise apply to deprivations of liberty did not apply to immigration enforcement:

> The order of deportation is not a punishment for crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.[73]

This distinction between criminal law and the civil/administrative nature of immigration enforcement has long been a primary shield against arguments that immigration adjudication deserves more procedural due process. But it also led to the earliest indications that some judges were bothered by the implications of unfettered government power to arrest, detain, and deport. In *Fong Yue Ting*, Justice Brewer offered a lone dissent arguing that detaining and deporting a person lawfully residing inside the country called for constitutional protections that might not apply to a newcomer stopped at the border.[74] Despite having joined the Court's opinions in the Chinese Exclusion Case and *Ekiu*, Justice Brewer now warned: "This doctrine of powers inherent in sovereignty is one both indefinite and dangerous."[75] And he argued that the proposition that deportation is not punishment defies common sense about the human impact of such state action.[76]

Nevertheless, at the outset of the twentieth century, the Supreme Court had established the essential pillars of the parallel universe. The Chinese Exclusion Case established broad federal authority over immigration. *Ekiu* established that a foreigner stopped at the border and refused entry had essentially no rights to procedural due process. *Fong Yue Ting* established that even foreigners who had been longtime residents of the United States could be detained and deported with little due process, owing to the civil-criminal distinction.

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cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject.").

[73] *Id*. at 730.

[74] *Id*. at 733–34, 738 (Brewer, J., dissenting) (contrasting the Chinese Exclusion Case and *Ekiu* with, "[w]hatever may be true as to exclusion . . . I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens").

[75] *Id.* at 737. Justice Brewer worried that the federal government's new immigration authority had no constitutional limits. He also noted the anti-Asian racial prejudice that gave rise to these cases:

> The expulsion of a race may be within the inherent powers of a despotism. . . . [A]mong the powers reserved to the people, and not delegated to the government, is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory.

Id. at 737–38.

[76] *Id*. at 740 ("[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.").

C. THE NORMALIZATION OF UNRESTRAINED IMMIGRATION AUTHORITY

For most of the twentieth century, plenary power came to mean that noncitizens could not typically vindicate constitutional claims in immigration cases.[77] The apex of such unlimited plenary power was the Court's statement in 1950 in that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[78] In *Shaughnessy v. United States ex rel. Mezei*, the Court cited this broad proposition to affirm indefinite detention, without a hearing, of a noncitizen at Ellis Island in a case in which the would-be immigrant was inadmissible to the United States but where no other country would agree to take him.[79]

Nevertheless, the Court never completely removed itself from immigration field, even if it consistently upheld whatever the political branches chose to do. Although the Court saw no apparent substantive constitutional restraints on the government's immigration authority, it was at least somewhat more sympathetic to noncitizens' procedural due process rights.[80] Even in *Ekiu*, the Court recognized that immigrants detained at the border had the right to file a habeas corpus petition.[81]

In some ways, *Mezei* provided early hints of a shift on the Court. The majority embraced Justice Brewer's argument in *Fong Yue Ting* that noncitizens are entitled to more constitutional protections when they are residents than when they are at the border. The majority in *Mezei* conceded that noncitizens who have entered the United States have a claim to due process before they are detained and deported, even if they had entered illegally.[82] Mezei was detained at the border, but his detention nevertheless attracted four dissenters. In dissent, Justice Jackson wrote:

> Fortunately it is still startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial.
>
> . . . .
>
> Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused.[83]

Despite the Court's approval of indefinite detention, *Mezei* provides objective evidence that support on the Court for unrestrained federal immigration authority had eroded since the 1890s.

In the second half of the twentieth century, the political branches did more than the Court to advance immigrant rights.[84] In 1965 Congress overhauled the immigration statute, removing the most egregiously racist restrictions and quotas.[85] The Executive Branch established the

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[77] *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).
[78] United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).
[79] 345 U.S. 206, 212 (1953).
[80] Legomsky, *supra* note 63, at 259–60.
[81] Ekiu v. United States, 142 U.S. 651, 660 (1892).
[82] *Mezei*, 345 U.S. at 212.
[83] *Id*. at 218, 225 (Jackson, J., dissenting).
[84] *See generally* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996).
[85] *Id*. at 275.

immigration courts and the Board of Immigration Appeals (BIA).[86] Congress and the Executive Branch have periodically enacted provisions providing new procedures governing how immigrants are apprehended and processed for possible deportation.[87] These measures led to the system described in Part IV. In brief, for noncitizens caught in the interior of the country, ICE agents may make arrests with or without a warrant, after which they initiate removal proceedings in immigration court. During these proceedings, the respondent is often kept detained, and there are limited opportunities for this detention to be reviewed.

In Part III I will explain how immigration law's parallel universe has been in decline, though this decline was barely detectable until the twenty-first century. But there were early signals that the Court had shifted. Although there were few dramatic changes in doctrine, beginning in the later part of the twentieth century there were subtle changes in the way the Court talked about plenary power.[88] The clearest early indication of this transition came in 1983, in the case of *INS v. Chadha*.[89] The statute at issue in *Chadha* permitted the vote of one house of Congress to veto the suspension of deportation by the Executive Branch.[90] The Court struck down the legislative veto in a decision concerned more with separation of powers than immigration.[91] This is significant because for nearly a century the Court had treated "plenary power" as if it meant exceptional power.[92] In *Chadha*, the Court diluted the meaning of the word "plenary" to simply mean any subject matter over which Congress may legislate.[93] The kicker in *Chadha* was the Court's statement that even when Congress has plenary power, a Court must assess "whether Congress has chosen a constitutionally permissible means of implementing that power."[94]

In a sense, what the Court did in *Chadha* was to begin to normalize immigration law within the broader context of administrative law. One interpretation of traditional plenary power is that it did not create alternative constitutional standards for immigration so much as it restrained courts from reviewing immigration laws against established constitutional norms.[95] *Abel*, where the Court declined to strike down the immigration arrest statutes, illustrates this pattern. Although the Court in *Abel* discussed the history of immigration arrest warrants at some length, it decided that the defendant's objection to their validity "is not entitled to our consideration"

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[86] *See generally* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010) (describing the roles of immigration courts and the BIA in immigration adjudication).

[87] *See generally* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 649–59 (5th ed. 2009).

[88] Professor Gabriel Chin has suggested that the Court's early, expansive descriptions of federal immigration authority were always somewhat exaggerated because they came in cases affirming racially discriminatory laws during a time when the Court also upheld racist laws directed at citizens. *See* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000).

[89] 462 U.S. 919 (1983).

[90] *Id.* at 923.

[91] *Id.* at 952–56 ("Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.").

[92] *See* Legomsky, *supra* note 63, at 299 (arguing that the *Chadha* decision adopted a strategy "to acknowledge the plenary nature of the Congressional power, but to proceed as if the word 'plenary' were meaningless").

[93] *Chadha*, 462 U.S. at 941 ("Congress has plenary authority in all cases in which it has substantive legislative jurisdiction . . . ." (quoting Buckley v. Valeo, 424 U.S. 1, 132 (1976)) (citing McCulloch v. Maryland, 17 U.S. 316 (1819))).

[94] *Id.*

[95] *See* Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 33.

because the defendant failed to raise the constitutional objection in the lower courts.[96] The decision fits a pattern in which immigration measures were permitted to remain in force with light judicial scrutiny. As we will see in Part III, *Chadha* was a critical step by which the Court gradually reintroduced the possibility of meaningful constitutional scrutiny, setting the stage for more dramatic changes in the twenty-first century.

In sum, the Court has acted through subtle, nuanced shifts. Consider that in *Arizona v. United States*, it was essential to the Court's holding that immigration policy was a matter for the federal government. But the *Arizona* majority did not mention plenary power by name and did not cite the Chinese Exclusion Case, nor any of the nineteenth century anti-Asian cases that came immediately after it.[97] In reiterating that the federal government has "broad" and "well settled" authority over immigration, the *Arizona* court did not fall back on powers inherent in national sovereignty.[98] Instead, the Court cited enumerated powers, specifically naturalization, foreign affairs, and the impact on commerce.[99] Thus, without ever announcing a reversal of its early immigration cases, the Court is taking a different approach to defining the federal government's immigration powers in the twenty-first century.[100]

This long, slow doctrinal evolution has had an important practical impact. The immigration enforcement structures that we have in the United States were mostly built before this evolution in judicial doctrine had taken hold. The statutes authorizing immigration arrests today are little changed from those that the Court refused to review in the *Abel* decision in 1960. They were not designed to withstand the kind of judicial scrutiny that now seems increasingly likely.

III. THE DECLINE OF THE PARALLEL UNIVERSE

A. *ZADVYDAS* AND "IMPORTANT CONSTITUTIONAL LIMITATIONS"

With *Zadvydas v. Davis*, the Supreme Court confronted the question of whether American immigration law permitted indefinite detention of noncitizens who were found deportable after long periods of residence in the United States. It was decided in 2001, almost as if at the dawn of the new century the Court decided to signal a new approach. *Zadvydas* emerged from two lower court cases concerning "lifers": people the Immigration and Naturalization Service (INS)

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[96] Abel v. United States, 362 U.S. 217, 230 (1960).
[97] *See* Arizona v. United States, 132 S. Ct. 2492 (2012).
[98] *Id.* at 2498.
[99] *Id.* ("Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad." (citations omitted)).
[100] This shift in how the Court justifies the government's immigration authority is illustrated by Justice Scalia's dissent in *Arizona*, where he disputed whether immigration is an enumerated power, insisting instead that it is "inherent in sovereignty" and thus "there was no need to set forth control of immigration as one of the enumerated powers of Congress." *Id.* at 2514 (Scalia, J., dissenting) (citing Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893)). Oddly, although Justice Scalia denied any connection between immigration and naturalization, he did suggest that immigration authority may be implicitly acknowledged in the Constitution through Article I, Section Nine, which provided until 1808 that Congress may not ban the importation of slaves ("[i]mportation of such Persons as any of the States now existing shall think proper"). *Id*. It is curious that Justice Scalia sees an evident connection between immigration and the slave trade, but not with foreign commerce or foreign affairs.

believed that it could detain indefinitely—if necessary, for the rest of their lives.[101] One of them was Kestutis Zadvydas, who filed a writ of habeas corpus in the Eastern District of Louisiana.[102] The other case involved a group of lifers with habeas petitions in the Western District of Washington, for which Kim Ho Ma became the named plaintiff.[103] When the District Court of the Western District of Washington held an *en banc* oral argument in June 1999, the Chief Judge John Coughenour asked the Department of Justice attorney why, if the government could indefinitely detain immigrants, it could not also indefinitely detain citizens that it considered dangerous.[104] "Does your Constitution permit that?" he demanded.[105]

The government attorney said, "No."[106]

"I don't think mine does either," Judge Coughenour replied.[107]

But despite Judge Coughenour's indignation (which the Supreme Court ultimately vindicated), at the time the government's argument for indefinite detention of immigrants was a close question. In fact, the INS lifer cases produced a circuit split, with the Ninth Circuit granting the habeas petitions and the Fifth Circuit denying them.[108] The Supreme Court itself divided five to four, with Justices Scalia, Thomas, Kennedy, and Chief Justice Rehnquist all dissenting.[109]

There was plenty of authority for the government's position. The INA did appear to permit indefinite detention. The reason INS lifers were detained was that they were deportable from the United States because of their criminal records, but no other country would take them back.[110] The statute authorized ninety days of detention during a "removal period."[111] But it went on to specify that if the person was deemed to be a danger to the community or unlikely to comply with eventual deportation, he or she "may be detained beyond the removal period."[112] Congress provided no outer time limit on this additional detention, and the INS interpreted this to be authorization for indefinite detention. This was not surprising given that Supreme Court had allowed indefinite detention in the *Mezei* case.[113]

In *Zadvydas*, the Court introduced two critical constitutional tools that continue to provide fodder for constitutional challenges to immigration law. First, in response to the government's argument that plenary power permitted indefinite detention, the Court said "that power is subject to important constitutional limitations."[114] For this proposition, the Court cited the *Chadha*

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[101] *See* Kevin Costello, Comment, *Without a Country: Indefinite Detention as Constitutional Purgatory*, 3 U. PA. J. CONST. L. 503, 504 (2001).
[102] Zadvydas v. Caplinger, 986 F. Supp. 1011 (E.D. La. 1997).
[103] Kim Ho Ma v. INS, 56 F. Supp. 2d 1165 (W.D. Wash. 1999).
[104] Reporter's Transcript of Proceedings, Kim Ho Ma v. INS, 56 F. Supp. 2d 1165 (W.D. Wash. 1999) (on file with author). The author was in the audience for this hearing and witnessed the exchange.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] Zadvydas v. Davis, 533 U.S. 678, 685–86 (2001) (describing the lower court decisions).
[109] *Id*. at 681.
[110] *Id.* at 695 ("[T]he issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.").
[111] *Id*. at 682.
[112] *Id*.
[113] *See* discussion *supra* Part II.C; *see also Zadvydas*, 533 U.S. at 693 (noting that "*Mezei*, like the present cases, involves indefinite detention").
[114] *Zadvydas*, 533 U.S. at 695.

decision.[115] Second, the Court recognized that even deportable immigrants with serious criminal records have a "liberty interest [that] is, at the least, strong enough to raise a serious question as to whether . . . the Constitution permits detention that is indefinite and potentially permanent."[116] For this proposition, the Court gave no citation, because the Court had not previously recognized that detaining deportable or excludable noncitizens infringed a constitutional right.[117]

These two premises have immense potential reach. On the one hand, the Court effectively returned the plenary power doctrine to its original purpose. As we have seen, the central question in the Chinese Exclusion Case was whether Congress has the constitutional authority to set immigration policy at all.[118] But, having answered in the affirmative, the Court slipped quickly toward finding that Congress has nearly *unlimited* power to set immigration policy, which is a different proposition.[119] After a century of plenary power meaning unlimited or nearly unreviewable power, *Chadha* and *Zadvydas* returned immigration law to a more normal constitutional path, wherein Congress has authority, but must still respect fundamental rights. To paraphrase the Court: federal power, subject to constitutional limitations.[120]

B. THE POWER OF AVOIDANCE

In addition to articulating new analytical tools by which to apply constitutional scrutiny to immigration enforcement, *Zadvydas* also highlighted a path by which to craft a remedy for the resulting constitutional problems. Reading the majority's decision, it is difficult to avoid the conclusion that the Justices believed that indefinite detention is unconstitutional.[121] But that is not actually what they held. The decision says only that indefinite detention raises "a serious question."[122] Such a serious question triggers the doctrine of constitutional avoidance, by which the Court tries to interpret the statute "to avoid a serious constitutional threat."[123] Using this method, the Court held that the statute permits detention only for six months, after which there must be a hearing to review whether there is a sufficient reason to think that deportation can be executed in the foreseeable future.[124]

Zadvydas did not invent the doctrine of constitutional avoidance. As the Court has explained it, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is

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[115] *Id.*
[116] *Id*. at 696.
[117] *Cf*. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 207 (1953) (describing indefinite detention as "stranded in [a] temporary haven on Ellis Island").
[118] *See* discussion *supra* Part II.A.
[119] *See id*.
[120] *See Zadvydas*, 533 U.S. at 695 ("[Immigration] power is subject to important constitutional limitations.").
[121] *See id*. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]' any 'person . . . of . . . liberty . . . without due process of law.' Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. . . . The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention—at least as administered under this statute.").
[122] *Id*. at 696.
[123] *Id*. at 699.
[124] *Id*. at 701.

plainly contrary to the intent of Congress."[125] In theory, the doctrine is intended to promote judicial restraint because it provides an alternative for judges who might otherwise simply strike down a statute.[126]

As a canon of interpretation, constitutional avoidance has its critics.[127] Among those critiques is the view that constitutional avoidance does not really avoid anything. In order to trigger the doctrine, the court must analyze constitutional concerns, and highlight a clash between the Constitution and a statute.[128] Another problem is that the results actually encroach on the role of the legislature by writing new judge-made rules of law.[129] By reinterpreting statutes to avoid constitutional problems, a court may arrive at a meaning that the legislature would not have endorsed.[130] At their core, these critiques suggest that constitutional avoidance is not in fact a tool of judicial modesty or restraint at all. An empirical study indicated that judges are more prone to use the avoidance doctrine to reach policy outcomes with which they agree ideologically.[131]

But the doctrine nevertheless enjoys the full and recent endorsement of the Court. It can be an immensely powerful tool in the field of immigration, especially at a time when Congress appears unable to enact new legislation. The aftermath of *Zadvydas* illustrates this. In *Zadvydas*, the Court avoided directly overruling *Mezei* by distinguishing it.[132] *Mezei* applied to noncitizens stopped at the border, whereas *Zadvydas* concerned people who had entered the country.[133] This was a predictable distinction, one that the Court made in *Mezei*.[134] But it fell away quickly. In 2005, the Court found that *Zadvydas*'s construction of the statute regarding people found to be deportable also applies to noncitizens stopped at the border because they are inadmissible.[135] Thus, although *Mezei* was perhaps not directly overruled, it was rendered effectively a dead letter through the technique of constitutional avoidance.[136]

The utility of constitutional avoidance to remedy Fourth Amendment problems with immigration law was illustrated as early as 1971 by the Court of Appeals for the D.C. Circuit in the case of *Au Yi Lau v. INS.*[137] That case concerned the validity of an immigration arrest and the ambiguous statutory language governing the standards for such arrests. I discuss the standards themselves below in Part IV. But for present purposes, the relevance of *Au Yi Lau* is that the government conceded that the arrest provisions of the INA should be interpreted so as to be

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[125] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *see also* Pub. Citizen v. U.S. Dep't of Justice*,* 491 U.S. 440, 466 (1989).
[126] *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1206–07 (2006) (describing the "judicial restraint theory" of constitutional avoidance).
[127] For a useful summary of major critiques, see *id.* at 1208–10.
[128] *See* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 87 (1995).
[129] *See* Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299, 321 (2000).
[130] *See* Schauer, *supra* note 128, at 74.
[131] James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 6 (2005).
[132] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
[133] *Id.*
[134] *See* discussion *supra* Part II.C.
[135] Clark v. Martinez, 543 U.S. 371, 378 (2005).
[136] A decade before *Zadvydas*, Professor Hiroshi Motomura described the tendency in immigration law for statutory interpretation to displace direct application of constitutional principles. *See* Motomura, *supra* note 77, at 549–50.
[137] 445 F.2d 217 (D.C. Cir. 1971).

consistent with the Constitution.[138] This led the court to apply the probable cause standard to immigration arrests, even though that phrase does not appear in the statute.[139]

There are two reasons why constitutional avoidance can be especially potent in the immigration context. First, at least technically, a person challenging an enforcement policy need not show that it is definitely unconstitutional.[140] Instead, one need only convince a court that the policy raises a serious constitutional question, which the statute should be interpreted to avoid.[141] Second, because there is an elaborate but not necessarily clearly written statutory and regulatory structure in place to control immigration in the United States, it is often possible to link a due process interest to a statute or regulation that is open to more than one interpretation.[142]

C. THE ERODING CIVIL-CRIMINAL DISTINCTION

Traditionally, respondents in immigration proceedings are afforded fewer procedural protections than criminal defendants because immigration is considered to be a form of civil adjudication. This civil-criminal distinction has been a central part of the Court's constitutional understanding of immigration law since *Fong Yue Ting* in 1893.[143] It remains a primary doctrinal concept insulating immigration policy from constitutional scrutiny. But there is good reason to think that this insulation is thinning.[144] In order to illustrate this, I will first examine the way the Court has dealt with Fourth Amendment claims in removal cases, especially the application of the exclusionary rule. I will then highlight indications in recent case law that the civil-criminal distinction is no longer as decisive as it once was in immigration cases.

In the abstract, it has been clear since 1967 that the Fourth Amendment's requirement of probable cause and warrants applies in the civil context as well criminal.[145] But with regard to administrative searches, the Court has indicated that probable cause need not always mean the same thing in every context.[146] In the 1984 case of *INS v. Lopez-Mendoza*, the Court decided that the exclusionary rule did not apply in deportation proceedings to evidence obtained from an illegal arrest.[147] In the case, INS agents arrested Mexican immigrants in workplace raids.[148] After their arrests, they effectively confessed to being in the country unlawfully, but they later argued that the arrests were illegal, and thus their post-arrest statements should be suppressed and their

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[138] *Id.* at 222.
[139] *See* discussion *infra* Part IV.B.
[140] *See* Morrison, *supra* note 126, at 1202–03 (contrasting the "classical avoidance" canon and the "modern avoidance" canon, with the latter requiring a lower level of constitutional concern).
[141] One could reasonably debate whether in practice this is different in terms of how convinced a judge must be to rule against the government on constitutional grounds. But as a technical matter, the doctrinal requirements for constitutional avoidance are looser and less defined than for direct challenges to statutes.
[142] *See, e.g.*, Dent v. Holder, 627 F.3d 365, 374–75 (9th Cir. 2010) (using the doctrine of constitutional avoidance to construe a vague procedural rule to compel the government to provide an immigration respondent with a copy of his "A-file").
[143] *See* discussion *supra* Part II.B.
[144] *See* Hernández, *supra* note 16, at 1353–57 (illustrating the Court's failure to articulate a clear rationale for the civil-criminal distinction, and the tendency to blur the line in recent cases); Kalhan, *supra* note 16 (arguing that the convergence of criminal and immigration law has reduced the relevance of the distinction between them).
[145] *See* Camara v. Mun. Court, 387 U.S. 523, 538–39 (1967).
[146] *See id.*; Marshall v. Barlow's, Inc., 436 U.S. 307, 320–21 (1978).
[147] 468 U.S. 1032, 1034 (1984).
[148] *Id.* at 1035.

deportation proceedings terminated.[149] The question was whether, if the arrests were illegal, the exclusionary rule should apply.[150]

The Court noted that even if immigration proceedings were entirely equivalent to criminal cases, the fact of an illegal arrest would not prevent the proceeding from going forward.[151] But on the exclusionary rule, the Court's starting point was that "[a] deportation proceeding is a purely civil action."[152] The Court had never applied the exclusionary rule in a civil proceeding.[153] Nevertheless, the Court acknowledged that immigration proceedings shared some characteristics with criminal prosecutions, especially in that the arresting officer will be motivated to use evidence in the subsequent deportation.[154]

The Court identified several reasons why the exclusionary rule should not apply in immigration court, despite seeing some close parallels to the criminal context. First, immigration authorities typically must prove only limited facts to obtain a deportation order, and these facts can generally be proven under relaxed rules of evidence.[155] Second, the Court noted that more than 97% of immigration respondents decided not to fight their deportations, so that there would be less deterrent value in the theoretical possibility of being able to exclude some evidence.[156]

Importantly, the Court did not rule on whether the arrests were illegal[157] and suggested that other remedies existed.[158] Although *Lopez-Mendoza* is the Court's leading case about the application of the Fourth Amendment to immigration enforcement, it only addressed the remedy for illegal arrests.[159] The case depends implicitly on the premise that immigration arrests can theoretically violate the Fourth Amendment because otherwise the question of applying the exclusionary rule would have been moot. *Lopez-Mendoza* thus left open the question of what constituted a valid arrest for immigration purposes.

The Court has never repudiated the civil-criminal distinction that is at the heart of *Lopez-Mendoza* or *Fong Yue Ting*. But there are at least two indications that the distinction is losing some of its importance. First, the Supreme Court in has acknowledged that deportation could be worse than imprisonment for some people.[160] Second, the Court has recently insisted on a strict interpretation of deportation grounds, analogous to the interpretation of criminal statutes.

The first sign came in 2001, the same year as *Zadvydas*. In *INS v. St. Cyr*, the Court refused to allow immigration courts to apply a retroactive rule to a criminal plea bargain because of the

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[149] *Id.* at 1035–38.
[150] *Id*. at 1034.
[151] *Id*. at 1039 ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible." (citing Gerstein v. Pugh, 420 U.S. 103, 119 (1975))).
[152] *Id*. at 1038.
[153] *Id*. at 1042.
[154] *Id*. at 1042–43.
[155] *Id*. at 1041–42.
[156] *Id.* at 1044.
[157] *Id*. at 1045 (suggesting declaratory relief).
[158] *Id*. at 1050 (O'Connor, J., concurring) ("We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of respondents . . . .").
[159] *Lopez-Mendoza* did not apply the exclusionary rule to most Fourth Amendment violations in immigration enforcement but left open the possibility of using the exclusionary rule in cases of "egregious violations . . . that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id.* at 1050–51*; see also* Oliva-Ramos v. Attorney Gen., 694 F.3d 259, 271 (3d Cir. 2012) (holding that the exclusionary rule applies to egregious or widespread violations of the Fourth Amendment).
[160] INS v. St. Cyr, 533 U.S. 289, 323 (2001).

strong presumption against such legislation.[161] The Court found that staying in the United States could be more important to many people than staying out of jail.[162] The Government relied on *Lopez-Mendoza* to argue that the civil nature of immigration proceedings should permit retroactive rules, but the Court rejected this application of the civil-criminal distinction: "[T]he presumption against retroactivity applies far beyond the confines of the criminal law."[163] Thus, the Court minimized the importance of characterizing deportation as nonpunitive.[164]

St. Cyr laid the groundwork for the Supreme Court's 2010 landmark decision in *Padilla v. Kentucky*, where the Court found that failure to correctly advise a criminal defendant of the immigration consequences of a plea bargain violated the Sixth Amendment.[165] In *Padilla*, the Court again refused to extend the civil-criminal distinction of *Lopez-Mendoza*.[166] The State argued that criminal defense lawyers need not advise defendants of non-criminal consequences.[167] But, echoing Justice Brewer's dissent in *Fong Yue Ting*, the Court in *Padilla* concluded that deportation is often a more severe consequence than prison.[168] *Padilla* suggests that the determinative issue is the functional consequences of adjudication—imprisonment and deportation—not whether these consequences had been labeled as civil or criminal.

In *Padilla*, the Court noted that plea bargains account for "nearly 95% of all criminal convictions."[169] This fact calls into question one of the central rationales for not applying the exclusionary rule in *Lopez-Mendoza*. In that earlier case, the Court reasoned that the high rate of voluntary deportations in immigration court lessened the deterrent potential of the exclusionary rule.[170] But voluntary deportations are the immigration equivalent of a guilty plea in criminal court. Now that the Court has recognized the generally high rate of criminal plea bargaining, it appears to have undermined one of the rationales for distinguishing immigration and criminal proceedings in *Lopez-Mendoza*.[171]

The second sign that the civil-criminal distinction has eroded can be seen in recent litigation about criminal grounds for deportation, in which the Supreme Court has required a far more strict application of the immigration statute than one might have expected a few decades earlier. In 1952 in *Harisiades v. Shaughnessy*, the Court cited the civil-criminal distinction to explain

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[161] *Id*. at 315–16.
[162] *See id.* at 323.
[163] *Id.* at 324.
[164] *Id*. ("[O]ur mere statement that deportation is not punishment for past crimes does not mean that we cannot consider an alien's reasonable reliance on the continued availability of discretionary relief from deportation when deciding whether the elimination of such relief has a retroactive effect.").
[165] 559 U.S. 356, 356 (2010).
[166] *Id*. at 365 ("Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process." (internal citation omitted)).
[167] Brief of Respondent at 7, *Padilla*, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 2473880, at *7 ("Neither this Court nor the federal circuits have held that the trial court or defense counsel must inform defendants of all possible consequences flowing from a guilty plea. The only duty of the trial court is to ensure that the defendant understands the 'direct' consequences of the plea.").
[168] *Padilla*, 559 U.S. at 366.
[169] *Id*. at 372.
[170] INS v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984).
[171] It might also be noted that the government does not provide legal counsel in immigration proceedings. Thus, it is conceivable that more immigration respondents would raise constitutional objections if they had representation.

why the rule against ex post facto laws did not apply to grounds of deportation.[172] The question in *Harisiades* was about how broadly the government could apply a statute calling for noncitizen Communists to be deported.[173] The statute made members of the Communist Party deportable, but Harisiades ceased to formally be a member before it was enacted.[174] More than merely about an ex post facto law, *Harisiades* concerned the question of whether the government could broadly apply deportation laws that were based on Congressional concern about public safety.[175] In *Harisiades*, the Court said yes.

An analogous question has arisen recently about the application of criminal grounds of deportation, where immigration judges are called on to decide whether convictions under state criminal laws constitute aggravated felonies, crimes involving moral turpitude, or other deportable offenses as defined in federal law. The central problem in these cases is that state criminal statutes are often different than their federal analogues. For instance, the federal definition of "burglary" is not always the same as some state law definitions of the crime.[176] As recently as 2008, the Attorney General issued a decision in *In re Silva-Trevino* calling for immigration judges confronting such cases to review not just the record of conviction, but any other probative evidence from a criminal case—including police reports and witness statements that had never been subject to cross examination—to decide if a deportable crime had been committed.[177] This approach seems in sync with *Harisiades*, where the Court permitted a generally flexible approach to applying removal grounds against people who might pose a threat to American communities. But it has not fared well in the federal courts of the twenty-first century.[178] In its 2013 term, the Supreme Court held that in most cases immigration courts must restrict their analysis to a strict comparison of the state and federal statutes at issue.[179] In April 2015, Attorney General Eric Holder rescinded the *Silva-Trevino* decision, noting that the Court's categorical approach to interpreting grounds of removal "cast doubt" on the looser approach in that seven-year-old decision.[180]

The civil-criminal distinction, as the Court articulated it in 1893, created an overly simplistic analytical approach. The recent rise of mass-scale detention of immigrants with criminal records has given immigration enforcement a strongly punitive cast, making it more difficult to plausibly consider immigration enforcement entirely distinct from criminal punishment.[181] At the same time, the Court seems to be shifting focus away from formalistic differences in process, and

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[172] 342 U.S. 580, 594 (1952) ("[E]ven if the Act were found to be retroactive, to strike it down would require us to overrule the construction of the ex post facto provision . . . . It always has been considered that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." (footnotes omitted)).

[173] *Id.* at 581.

[174] *Id.* at 582.

[175] *See id.* at 591 ("We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation.").

[176] *See* Taylor v. United States, 495 U.S. 575, 592 (1990).

[177] *In re* Silva-Trevino, 24 I. & N. Dec. 687, 687 (A.G. 2008).

[178] *See, e.g.*, Prudencio v. Holder, 669 F.3d 472 (4th Cir. 2012); *see also* Olivas-Motta v. Holder, 746 F.3d 907 (9th Cir. 2013).

[179] *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013).

[180] *In re* Silva-Trevino in Removal Proceedings, Op. Att'y Gen. (Apr. 10, 2015).

[181] *See generally* Hernández, *supra* note 16, at 1353–57.

instead focusing on the weight of the interest at stake.[182] Understanding deportation as a severe measure—regardless of whether it is intended as a punishment—becomes a powerful argument for more procedural protections under a due process analysis.[183] But for present purposes, deportation is not the main concern because that would come only after the conclusion of removal proceedings. The concern with immigration arrests is the immediate and continuing deprivation of liberty while the case is pending. This is a concern in criminal cases just as it is in immigration. The Fourth Amendment speaks directly to this concern in both the civil and criminal context.

D. REASONS FOR CAUTION

Zadvydas and *Padilla* seem to herald a new approach, and they certainly open up constitutional questions about immigration enforcement that not long ago seemed foreclosed. I will highlight some of these looming questions below in Part IV. But it is important to first raise a note of caution. There have been false starts in the past where observers thought they saw signs of a new approach from the Court in an immigration case only to be disappointed.[184] Although the Court now acknowledges that detention of immigrants and deportation raise weighty constitutional concerns, we do not yet know how far the Court will be willing to go with this analysis. There are cases indicating that the Court may be cautious.

One of these cases came a decade before *Zadvydas*. In *Reno v. Flores*, the Court approved the government's policy of keeping noncitizens in "custody" pending their deportation hearings.[185] I put the word custody in quotes because its meaning in the context of that case is somewhat ambiguous. In *Flores*, the habeas petitioners were children who arrived in the United States unaccompanied.[186] They were held in custody by the INS because there was no one immediately available to assume responsibility for their care.[187] Justice Scalia's opinion for the Court stated: "[T]he INS cannot simply send them off into the night."[188] Instead, the INS placed them in a youth shelter.[189]

In this unique context, the Court found that the means by which the INS took the children into custody met procedural due process requirements. The petitioners argued, and the lower courts held, that the procedures violated due process because the INS used a system of warrantless arrests, without any automatic or timely review by an immigration judge.[190] Instead, each minor would have to affirmatively request a hearing.[191] That the Court rejected this objection is significant because warrantless arrests without automatic, timely hearings in front of

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[182] *See generally* Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491 (2011) (arguing that due process analysis calls for more procedural protections in immigration proceedings because of the severity of deportation).
[183] *Id*. at 498.
[184] *See, e.g.*, Motomura, *supra* note 77, at 547–48 (describing disappointment after the plenary power doctrine was critiqued in the 1980s).
[185] 507 U.S. 292, 315 (1993).
[186] *Id*. at 294.
[187] *Id*. at 295.
[188] *Id*.
[189] *Id*. at 297.
[190] *Id*. at 308.
[191] *Id*. at 309.

immigration judges remain the standard today for noncitizens arrested and taken into custody by DHS on immigration grounds.[192] Thus, if one adopts a broad reading of *Flores*, it could be that the Court approved warrantless arrests without automatic judicial review in the context of immigration enforcement.

But there are two good reasons not to read *Flores* so broadly. First, the Court noted that it was ruling only on a facial challenge to the custody policy, and that it was leaving unresolved whether "excessive delay" in holding a hearing in a specific case might raise a different constitutional question.[193] Second, the Court took pains to emphasize that it did not understand the children at issue in *Flores* to be detained, even though the applicable regulations categorized them that way for administrative purposes.[194] The Court instead said that the proper terminology was "legal custody," noting that the applicable regulations allowed the children to be placed in a detention facility for no more than seventy-two hours, and even then only in separate juvenile facilities.[195] Analogizing the INS custody arrangements to state orphanages, the Court rejected the petitioner's claims that their liberty interests were infringed:

> The "freedom from physical restraint" invoked by respondents is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells . . . .
>
> . . . We are unaware, however, that any court—aside from the courts below—has ever held that a child has a constitutional right not to be placed in a decent and humane custodial institution if there is available a responsible person unwilling to become the child's legal guardian but willing to undertake temporary legal custody.[196]

Flores thus appears to be quite distinguishable from *Zadvydas*, where detention with barred cells was the central question. It seems reasonable to presume that with a greater deprivation of liberty at issue, there might be a stronger due process argument for more stringent procedural safeguards. Nevertheless, *Flores* represents the Court's most direct engagement with the procedural means by which noncitizens are taken into custody and initially held, and the system survived scrutiny.

A second case suggesting a cautious approach came after *Zadvydas*. A central feature of modern immigration enforcement is the congressionally-mandated policy of mandatory enforcement by which noncitizens who have committed certain crimes "shall" be taken into custody while their cases are pending in immigration court.[197] This policy makes immigration detention far more harsh than state pretrial criminal detention often is, because in state criminal courts defendants often have a right to a bail setting even when facing charges for a violent offense. The Supreme Court affirmed the mandatory detention policy in *Demore v. Kim*, two years after *Zadvydas*.[198] The Court distinguished *Zadvydas* because this case concerned pre-removal order detention, and because, in theory, pre-order detention would be short in

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[192] *See* discussion *infra* Part IV.A.
[193] *Flores*, 507 U.S. at 309.
[194] *Id*. at 298 ("Juveniles placed in these facilities are deemed to be in INS detention 'because of issues of payment and authorization of medical care.'").
[195] *Id*.
[196] *Id.* at 302–03.
[197] 8 U.S.C. § 1226(c) (2012).
[198] 538 U.S. 510 (2003).

duration.[199] *Zadvydas*, by contrast, concerned indefinite detention after a removal order had been issued. The Court relied on statistics showing that nearly all immigration court cases are resolved within a month, and within five months in the case of appeals.[200] In this context the Court found that Congress could make a generally applicable decision that certain deportable persons pose a risk of absconding without requiring an individual hearing.[201] However, the reach of this holding has been limited, at least in the Ninth Circuit, because immigration cases often take longer to resolve than the Court assumed in *Demore*.[202]

In *Demore*, the Court reiterated that in immigration, "Congress regularly makes rules that would be unacceptable if applied to citizens."[203] But this begs the question: When may immigration policy depart from the constitutional limitations that apply elsewhere? *Demore* focused on the narrow question of whether Congress could deny bond to class of deportable noncitizens with criminal records.[204] But the case did not ask the Court to address how—or, more importantly, who—should determine that a person belongs in this disfavored class. In *Demore*, "[r]espondent [did] not dispute the validity of his prior convictions, ... Respondent also did not dispute the INS' conclusion that he is subject to mandatory detention under [the statute]."[205] The respondent did not even dispute the conclusion that he was ultimately deportable.[206] This scenario made the government's concern that the respondent might abscond especially sympathetic. But a more difficult situation would be raised by a respondent subjected to mandatory detention who insists either that she is not deportable or is not in the category of convicted criminals who are subject to such detention.[207] Such a scenario could arise if DHS were to errantly charge a U.S. citizen with being a noncitizen, or if a noncitizen had grounds to contest whether a particular criminal conviction constituted an aggravated felony.[208]In such a situation, a respondent in immigration custody may ask for something known as a *Joseph* hearing, which I will discuss in Part IV.A.[209] But the Court made clear that because the respondent in *Demore* did not claim any defenses, "we have no occasion to review the adequacy of *Joseph* hearings generally."[210] This remains an open question today.

Rather than suggesting a unique standard for immigration cases, *Demore* is consistent with *United States v. Salerno*, a case about criminal pretrial detention.[211] In *Salerno*, much as in *Demore*, the Court affirmed Congress's authority to insist on pretrial detention for a certain class

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[199] *Id.* at 527–31.
[200] *Id.* at 530.
[201] *Id.* at 518–21, 528.
[202] *See* Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir 2013) (holding that *Zadvydas* requires a bond hearing once pre-order detention lasts beyond six months); Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 950 (9th Cir. 2008) (prolonged detention while a respondent petitions in federal court for review of a removal order requires a bond hearing). *See generally* Anello, *supra* note 16.
[203] *Demore*, 538 U.S. at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).
[204] *See id.* at 513.
[205] *Id.* at 513–14.
[206] *Id.* at 514.
[207] *See id.* at 578 (Souter, J., dissenting) ("[T]he relevant statutes literally say nothing about an individual who, armed with a strong argument against deportability, might, or might not, fall within their terms.").
[208] For relevant examples, *see infra* note 281.
[209] *Demore*, 538 U.S. at 514 & n.3.
[210] *Id.* at 514 n.3.
[211] 481 U.S. 739 (1987).

of defendants.[212] Thus, a challenge focusing on the right to bond faces a difficult road. If anything, *Salerno* supports the claim that the civil-criminal distinction is fading in importance. The starting point for the Court's analysis in *Salerno* was that pretrial detention in a criminal case is "regulatory" in nature.[213] In support of its holding, it cited two immigration cases, along with cases on involuntary confinement based on mental illness.[214] The Court's view thus seems to be that although imprisonment post-conviction as a criminal punishment may be a unique category, other types of detention are governed by a common set of principles.[215]

From this premise, it would seem logical to scrutinize immigration detention according to the same constitutional rules that govern other regulatory forms of detention. *Demore* and *Salerno* stand for the rule that Congress may designate a particular class of people for mandatory detention while their cases are pending based on a presumption of flight risk or dangerousness.[216] But this does not address the procedural safeguards required to determine whether a person actually belongs in this disfavored class. In *Salerno*, the Court stressed that the pretrial detention applied only if the government could demonstrate probable cause and "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[217] Immigration detention procedures fall far short of these safeguards, as we shall see in Part IV.

As we have seen in Part II, federal courts have already found immigration procedures to be constitutionally deficient when local police rely on them to detain people on immigration grounds. If it is a constitutional problem for state and local police to detain a person on immigration grounds without an independent finding of probable cause, what about when federal immigration officers do the same thing? Before answering this question, it is important to add one further note of caution.

Because the national government has plenary power to set immigration policy, the Court has shown some inclination to apply certain constitutional protections more stringently to state measures than to federal policies. This phenomenon can be seen most clearly in equal protection cases. As early as 1886, in *Yick Wo v. Hopkins*, the Supreme Court made clear that the Fourteenth Amendment could protect noncitizens.[218] In 1973, with *In re Griffiths*, the Court found that alienage was a "suspect classification" and thus "[bore] a heavy burden of justification."[219] Most importantly, in *Plyler v. Doe*, a divided Court struck down, five to four, a Texas law restricting unauthorized immigrant children from attending public school, and rejected the opportunity to conclude that they constituted a suspect class.[220] The Court called for

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[212] *Id.* at 755 ("The Act authorizes the detention prior to trial of arrestees charged with serious felonies . . . . We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.").
[213] *Id.* at 748.
[214] *Id.* at 748–49 (citing*, inter alia*, Carlson v. Landon, 342 U.S. 524 (1952) (immigration); Wong Wing v. United States, 163 U.S. 228 (1896) (immigration); Addington v. Texas, 441 U.S. 418 (1979) (involuntary commitment)).
[215] *See Demore*, 538 U.S. at 553 (Souter, J., dissenting) (noting that the majority in *Zadvydas* did not reject noncitizen's "constitutionally protected liberty interest"); Frances M. Kreimer, Note, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485, 1504 (2012).
[216] *Demore*, 538 U.S. at 531; *Salerno*, 481 U.S. at 751.
[217] *Salerno*, 481 U.S. at 750.
[218] 118 U.S. 356, 369 (1886).
[219] 413 U.S. 717, 721 (1973) (internal quotations omitted).
[220] 457 U.S. 202, 223 (1982).

heightened scrutiny because of the fundamental role of primary education in modern society and the reality that large, unauthorized immigrant populations "raise[] the specter of a permanent caste of undocumented resident aliens."[221] Yet the Court limited the reach of this holding by conceding that in general a state "may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct."[222]

As Professor Hiroshi Motomura points out, it is impossible to understand how the Court has used the Equal Protection Clause with regard to immigrants without considering the lens of federalism, which is why the Court regards differentiation by states as suspect.[223] There is reason to think that federalism should have more impact in an equal protection context than it would in a case about the government's power to detain a person without judicial review. The foundation of immigration law is to differentiate citizens from all others.[224] The federal authority to set immigration policy can thus be understood as a limited exception to equal protection, permitting discrimination based on alienage for a particular purpose. But although such an exception from the guarantee of equal protection is necessary to establish immigration policy, it is not as clear that a similar exception needs to be made to constitutional protections against arbitrary deprivation of liberty. Establishing a uniform national immigration policy does not inherently require unreasonable searches and seizures or confinement without due process. Nevertheless, it is probably not an accident that the constitutional difficulties with immigration arrests were recognized first in suits against localities. Courts are likely to proceed with more caution when the argument is applied to federal authorities, though there appears to be no sound reason why the same analysis cannot apply to the federal government as well.

IV. IMMIGRATION ARRESTS COMPARED TO OTHER AREAS OF LAW

A. WARRANTS WITHOUT JUDGES

The manner by which the government should seek to deport a noncitizen found in the interior of the country is set out in the INA. The statute provides that removal proceedings shall be initiated by ICE issuing a "Notice to Appear" (NTA), which is the immigration court equivalent of an indictment.[225] The NTA sets out the grounds for which DHS believes the person should be removed from the country, for instance being unlawfully present in the country, or, for a legal resident, committing a removable criminal offense.[226] These NTAs can be served on respondents out of custody. However, the constitutional problems that this Article focuses on relate to cases where the respondent is taken into ICE custody and detained.

An important clarification is relevant here. There already exists a significant body of law and scholarship regarding the suppression of evidence obtained through immigration arrests that

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[221] *Id*. at 218–19.
[222] *Id*. at 219.
[223] *See* Motomura, *supra* note 76, at 566.
[224] *See* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 343 (2008) ("For over a century, every effort by courts and scholars to draw a conceptual distinction between immigrant-selecting rules and rules that affect immigrants' behavior outside the selection context (immigrant-regulating rules) has been an utter failure.").
[225] 8 U.S.C. § 1229(a) (2012).
[226] *Id.* § 1229(a)(1) (setting out the content of the NTA).

violate the Fourth Amendment.[227] This area of law is governed by *Lopez-Mendoza*, which focused only on the use of evidence obtained through illegal arrests in immigration cases.[228] But *Lopez-Mendoza* was about the exclusionary rule.[229] It leaves open the question as to whether immigration arrests may generally constitute an unreasonable seizure in violation of the Fourth Amendment.

A critical issue here concerns the nature of immigration arrest warrants, which are a routine part of the initiation of the immigration detention and removal process. The statute provides: "On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."[230] Such a warrant is required unless there is inadequate time to obtain a one.[231] The statute then provides that detention will be mandatory, with no release on bond, if the person has committed an aggravated felony or certain other crimes.[232] In other cases, ICE may release the respondent on bond.[233]

In *Camara v. Municipal Court*, the Supreme Court said that "the warrant machinery contemplated by the Fourth Amendment" would normally call for an administrative search or seizure to "be reviewed by a neutral magistrate."[234] In the criminal context the term "warrants" implies the involvement of a judicial officer, providing a neutral check on the powers of police. Typically a police officer would sign a statement requesting a warrant and attesting to the grounds justifying it. The judge would then review the officer's request. Immigration arrest warrants do not include review and authorization by a judicial officer, nor by any other neutral adjudicator such as an immigration judge. In immigration enforcement, the "warrant" issues with the officer's signature alone.

For a warrantless arrest, the immigration statute requires only that the person arrested "shall be taken without unnecessary delay for examination before an officer of the Service."[235] The

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[227] *See generally* AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW (2015); Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010).

[228] *See supra* text accompanying note 147.

[229] *See* discussion *supra* Part III.C.

[230] 8 U.S.C. § 1226(a).

[231] *See id.* § 1357(a)(2).

[232] *Id.* § 1226(c).

[233] *See id.* § 1226(a). The statutory references to "Attorney General" can create a certain degree of confusion in delineating the roles played today by DHS and the Department of Justice. At the time Congress enacted these provisions, both the immigration courts (housed in the Executive Office for Immigration Review) and the INS fell under the mandate of the Attorney General. As a result, both the adjudicatory and the enforcement arms of the federal government were within the same federal department. This ceased to be the case in 2002, when the enforcement functions were shifted to DHS through the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). However, Congress did not comb through the INA and replace every reference to the Attorney General with DHS as needed. Instead, Congress enacted a single provision to govern the new division of labor, codified at Section 103 of the INA. 8 U.S.C. § 1103. Section 1103 provides that the Attorney General's authority now shall be limited to those that were exercised by EOIR before the establishment of the DHS. *Id.* § 1103(g). Most other functions previously carried out by INS have been transferred to DHS. *Id.* § 1103(a)(1). However, there is an additional provision that the Attorney General retains authority to make rulings on questions of law. *Id.* § 1103(a)(1).

[234] 387 U.S. 523, 532 (1967).

[235] 8 U.S.C. 1357(a)(2).

applicable regulations provide that this review must be "by an officer other than the arresting officer."[236] This is the closest existing rules come to providing an immediate neutral review of the arrest. There is no other specific requirement for a neutral review of the arrest. The mere requirement that another ICE officer review an arrest would be analogous to allowing police detectives to have their warrantless arrests reviewed by fellow detectives in the same department.

In the context of criminal arrests, the Court has found review by a prosecutor inadequately neutral to satisfy the Fourth Amendment.[237] There is an analogous procedural requirement in the immigration regulations that when ICE issues an immigration arrest warrant it must also issue an NTA to initiate removal proceedings.[238] These proceedings ultimately should provide a hearing and adjudication with clearer standards and a neutral decision maker. In order to issue a removal order, an immigration judge ultimately must find that DHS has proven its case by clear and convincing evidence.[239] But at the time of arrest, this adjudication may be weeks away and may not be completed for months.

There is already case law from at least one court of appeals finding that when a person is detained at the border for more than forty-eight hours, there must be a review by a neutral judicial officer.[240] ICE's practice of routinely arresting and detaining people in the interior of the country without any prompt review by a neutral adjudicator certainly seems to raise a serious constitutional question. The lack of immigration judge involvement in the warrant process contrasts with the role of these judges in setting bond for the detainees not subject to mandatory detention, which is a routine immigration court function.

B. PROBABLE CAUSE?

Current law contains ambiguity about the standard that must be met to justify an immigration arrest. There is no explicit requirement for probable cause when ICE issues immigration arrest warrants. The applicable statute authorizes an ICE officer "to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest."[241]

The statute thus only provides a standard for warrantless arrests: "reason to believe."[242] In the case of warrantless arrests, the applicable regulations also provide that there must be "prima facie evidence" that the person is unlawfully present.[243] The regulations thus potentially add to confusion by introducing an alternative formulation of the standard for an immigration arrest. They go into considerable detail about which types of officers may issue a warrant or execute an arrest but do not explicitly resolve the fundamental ambiguity about the standard that should be required to issue and arrest. [244]

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[236] 8 C.F.R. § 287.3 (2012).
[237] *See* discussion *infra* Part IV.C.
[238] 8 C.F.R. § 236.1(b). An NTA relates to civil violations and simply charges an immigrant with being removable; it does not establish probable cause of removability.
[239] 8 U.S.C. § 1229(c)(3)(A).
[240] United States v. Adekunle, 2 F.3d 559, 562 (5th Cir. 1993).
[241] 8 U.S.C. § 1357(a)(2).
[242] *See id.* § 1357(a)(2) (authorizing arrests without warrants).
[243] 8 C.F.R. § 287.3.
[244] *See id.* § 287.5(e).

The difficulty is one of clarity and implementation. In *Au Yi Lau*, the D.C. Circuit held that the reason to believe standard should be understood as equivalent to probable cause.[245] Several other circuits have adopted the same interpretation.[246] Thus, whereas the doctrinal question may appear resolved at the level of the circuit courts, probable cause is still not the explicit standard used in regulations. Moreover, some cases indicate that probable cause may not mean the same thing in administrative searches as it does in criminal investigations.[247]

Nor is probable cause referred to on the forms that immigration officers must complete to issue a warrant to validate an arrest. Immigration arrest warrants are issued on an I-200 form,[248] in which the officer warrants: "from evidence submitted to me, it appears that _____ . . . is within the country in violation of the immigration laws and is therefore liable to be taken into custody . . . ."[249] The operative standard here is "appears," but it is not clear how this standard compares to more established ones like probable cause or reasonable suspicion. On the basis of plain language, appears does not seem to be a high standard.

Even assuming that the standard is probable cause, there is another layer of potential confusion. What should the probable cause be for? The most obvious answer would appear to be probable cause that the person is removable from the United States. But the I-200 form also refers to its subject as "liable to being taken into custody."[250] In practice, this is a circular standard: the ICE officer signing the form is also likely making the custody determination at the same time. But the form masks an important issue. Not every person subject to potential removal is subject to mandatory detention. Unless the person has committed certain crimes, she may be eligible for release while her removal case is pending. [251]

A second form typically issued with the I-200 is the I-286, or "Notice of Custody Determination."[252] Thus, the determination that someone is "liable to be taken into custody" requires an officer to do no more than anticipate her own decision which is made at exactly the same time. The Notice of Custody Determination illustrates other peculiarities of immigration enforcement. This form is served on the arrested respondent, who has the opportunity on the same form to request a custody or bond redetermination by an immigration judge.[253] But the ICE officer has the option of simply checking a box that states, "You may not request a review of this determination by an Immigration Judge because the Immigration and Nationality Act prohibits your release from custody."[254] An ICE officer would check this box if she believes that the respondent is subject to mandatory detention. Thus, in immigration enforcement, the police agency making the arrest has the power to also make an initial determination that judicial review should not be available.

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[245] Au Yi Lau v. INS, 445 F.2d 217, 222 (D.C. Cir. 1971).
[246] *See* United States v. Sanchez, 635 F.2d 47, 62 n.13 (2d Cir. 1980) (citing *Au Yi Lau*); Lee v. INS, 590 F.2d 497, 500 (3d Cir. 1979) (same); United States v. Cantu, 519 F.2d 494, 496 (7th Cir. 1975) (same).
[247] *See* Chacón, *supra* note 227, at 1608.
[248] 8 C.F.R. § 236.1(b)(1).
[249] U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FORM I-200, WARRANT FOR ARREST OF ALIEN (2007).
[250] *Id*.
[251] 8 U.S.C. §1226(c) (2012).
[252] U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FORM I-286, NOTICE OF CUSTODY DETERMINATION (2007).
[253] *Id*.
[254] *Id*.

An ICE determination that mandatory detention applies will delay but not entirely preclude neutral review. In the 1999 case of *In re Joseph*, the Board of Immigration Appeals (BIA) clarified that immigration judges have jurisdiction to determine whether a respondent is actually subject to mandatory detention.[255] But there are three significant limitations on the impact of such *Joseph* hearings.[256] First, the detained respondent must request the hearing, even after having received an official form that misleadingly says that "you may not" request review by an immigration judge.[257]

Second, there is no required timeline or deadline by which a *Joseph* hearing must take place if requested. The BIA recognized this implicitly in *Joseph* by noting that, in some cases, the immigration judge will have made a final ruling on the merits of the removal case before even reaching the custody question.[258] This is what happened in *Joseph*: the respondent was taken into custody in November 1998, and the immigration judge terminated the removal proceedings and ordered his release on January 20, 1999.[259] Mr. Joseph thus spent approximately two months detained without legal basis and without any opportunity for earlier judicial review.

The third problem is that the BIA sets a strikingly high standard for respondents to meet in order to prevail in a *Joseph* hearing when immigration judges address custody before the removal case is fully adjudicated.[260] Note that in a *Joseph* hearing, the detainee is simply seeking the opportunity to *request* release on bond. DHS would still be able to argue that bond should be denied or set at a high level either to ensure the respondent's appearance or to protect public safety.[261] Nevertheless, in order to prevail in a *Joseph* hearing,

> [T]he Immigration Judge must have very substantial grounds to override the custodial effect of the Service's charge . . . .
>
> . . . In requiring that the Immigration Judge be convinced that the Service is substantially unlikely to prevail on its charge, when making this determination before the resolution of the underlying case, we provide both significant weight to the Service's "reason to believe" that led to the charge and genuine life to the regulation that allows for an Immigration Judge's reexamination of this issue.[262]

As Professor Geoffrey Heeren cogently describes,"[t]he burden of proof in the proceeding is placed on the party with the least resources . . . ."[263] Thus, whereas the BIA authorized immigration judges to "make an independent determination" about the legality of mandatory detention in a particular case, it also asked them to effectively defer to the police agency that first put the person in detention by giving "significant weight" to the DHS's view.[264]

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[255] *In re* Joseph, 22 I. & N. Dec. 799 (BIA 1999).
[256] *See also* Sayed, *supra* note 16, at 1852 (describing the deficiencies of *Joseph* Hearings).
[257] U.S. DEP'T OF HOMELAND SEC., *supra* note 252.
[258] *In re Joseph*, 22 I. & N. Dec. at 800.
[259] *Id*. at 801.
[260] *Id*.
[261] *See id.* at 806 ("A determination in favor of an alien on this issue does not lead to automatic release. It simply allows an Immigration Judge to consider the question of bond under the custody standards of section 236(a) of the Act.").
[262] *Id*. at 806–07.
[263] Heeren, *supra* note 16, at 604.
[264] *In re Joseph*, 22 I. & N. Dec. at 807.

In addition to the inherent tension between independence on the one hand and deference on the other, *In re Joseph* eschews explicit invocation of the established standards that are well known in criminal procedure.[265] Much as the reason to believe standard has been interpreted as equivalent to probable cause, it is possible that the BIA's "substantial grounds to override" standard is, for practical purposes, similar to the probable cause standard, which is itself quite favorable to the prosecution. As the Supreme Court noted "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[266] Moreover, there is some overlap in terminology used by the Supreme Court to define the standard for probable cause reviews.[267] Although the *Joseph* standard and probable cause may be synonymous, the BIA and the Attorney General have left the question open to ambiguity.

C. IMMIGRATION ENFORCEMENT COMPARED TO CRIMINAL ENFORCEMENT

The system used today to arrest and detain people for immigration enforcement purposes simply could not exist in its current form if it were not for the way the Supreme Court shielded immigration law from constitutional scrutiny during the nineteenth and twentieth centuries. To illustrate this, I will start with criminal procedure. As we have seen, immigration arrests are made without warrants issued by neutral magistrates.[268] In immigration, "warrants" are signed only by the law enforcement agency, so that in criminal law terms immigration enforcement makes warrantless arrests the norm.[269] On the surface, this is different from criminal procedure because the Supreme Court has expressed a preference for warrants to be issued before arrests in the criminal context.[270] But this difference may be of little practical consequence, because in criminal law enforcement warrantless arrests are permissible and commonplace for minor crimes, so long as a "policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime."[271]

The important divergence between criminal law and immigration law is about what happens after the initial arrest. In *Gerstein v. Pugh*, the Court recognized that once a person is in custody, "the suspect's need for a neutral determination of probable cause increases significantly."[272] In *Gerstein*, the State of Florida argued that the charges filed by the prosecutor should be sufficient to justify pretrial detention.[273] The Court rejected this because it did "not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment."[274] Since the 1940s, the Court has been emphatic about the need for a neutral magistrate's review of probable cause

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[265] *See* Gerstein v. Pugh, 420 U.S. 103, 111 (1975) ("The standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense." (internal quotation marks omitted)); *see also* Beck v. Ohio, 379 U.S. 89, 91 (1964).
[266] Illinois v. Gates, 462 U.S. 213, 232 (1983).
[267] *See id.* at 238 (reviewing court should ensure that a magistrate had a "substantial basis" for concluding that probable cause existed).
[268] *See* discussion *supra* Part IV.A.
[269] *See id*.
[270] *See Gerstein*, 420 U.S. at 113.
[271] *Id*. at 113–14; *see also* Atwater v. Lago Vista, 532 U.S. 318, 354 (2001).
[272] *Gerstein*, 420 U.S. at 114.
[273] *Id*. at 116–17.
[274] *Id*. at 117.

because, in Justice Frankurter's words, "[z]eal in tracking down crime is not in itself an assurance of soberness of judgment. . . . The awful instruments of the criminal law cannot be entrusted to a single functionary."[275]

Deprivation of liberty can violate the Fourth Amendment's bar against unreasonable seizures—in this case, of a person.[276] The Court long ago recognized that pretrial detention has serious human consequences because it "may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[277] For these reasons, the Court held that "[w]hen the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty."[278] The Court later clarified that a neutral probable cause review must take place within forty-eight hours of arrest.[279]

The central issues here are neutrality, time, and automaticity. The Court's reasoning in *Gerstein* should be pertinent to immigration enforcement because *Gerstein* focuses on the narrow issue of pretrial custody, which raises concerns under the Fourth Amendment. As we have seen in *Salerno*, the Court appears to consider immigration detention to be similar to pretrial criminal detention, labeling them both "regulatory."[280] *Gerstein* does not deal with other procedural protections that are specific to criminal trials, such as the Sixth Amendment's rights to a jury trial, confrontation of witnesses, and appointed counsel.[281] The neutral probable cause review that is required under the Fourth Amendment is not even necessarily an adversarial proceeding and does not necessarily implicate the defendant's right to counsel.[282] The Court insisted on a neutral probable cause review but stressed that states have considerable flexibility to design their own criminal procedures.[283]

The lack of prompt, neutral review for probable cause in immigration enforcement can have real consequences if DHS officers prove fallible. For example, in a case handled by the author through the Immigration Clinic at the University of Nevada, Las Vegas, a lawful permanent resident was initially detained and issued an NTA in 2013 based on a criminal conviction. The immigration court did not hold a hearing until forty-three days after the initial arrest. At that hearing, the immigration judge found there was no legal basis for removal or for detention. But since DHS reserved appeal, the respondent was left in custody. Because DHS had thirty days to decide whether to appeal, a legally baseless arrest nevertheless produced roughly two-and-a-half months of detention.[284] In *Gerstein*, the Florida procedure, which the Court found insufficient, would have provided for a preliminary hearing after just thirty days.[285]

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[275] McNabb v. United States, 318 U.S. 332, 343 (1943); *see also* Johnson v. United States, 333 U.S. 10, 13–14 (1948).
[276] *See Gerstein*, 420 U.S. at 112; *Johnson*, 333 U.S. at 13–14
[277] *Gerstein*, 420 U.S. at 114.
[278] *Id*.
[279] Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).
[280] *See* discussion *supra* Part III.D.
[281] U.S. CONST. amend. VI; *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (finding a right to appointed counsel for indigent defendants).
[282] *Gerstein*, 420 U.S. at 123–24.
[283] *Id*.
[284] Based on personal knowledge of the case and on the oral decision of the immigration judge (confidential, on file with author).
[285] *Gerstein*, 420 U.S. at 106; *see also* Cnty. Of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (requiring probable cause review within forty-eight hours).

In *McNabb v. United States*, Justice Frankfurter expressed concern about "the misuse of the law enforcement process" and "the dangers of the overzealous as well as the despotic."[286] Given that guarding against abuse of power is always a central concern of the Constitution, it is worth taking note of the degree to which immigration enforcement today is a gap in our constitutional armor. If a despotic federal official were to baselessly accuse a person of murder in order put him behind bars, a neutral magistrate would be reviewing the case within forty-eight hours.[287] But if that despotic federal official were to instead simply accuse the person of being in the country unlawfully, much more time—possibly weeks or months—might go by before the case was reviewed by a neutral immigration judge, especially if the person did not know to ask for a *Joseph* hearing.

To see the need for a neutral review of immigration custody, one need not accuse DHS of willfully seeking to wrongfully arrest people on immigration grounds. One need only imagine that immigration officers are human and that they sometimes make mistakes. There have been confirmed reports of United States citizens being errantly detained and deported because of mistakes in the process.[288] Guarding against unintentional errors with grave human consequences is alone a good reason to add a neutral review early in the process.

The procedural safeguards involved in immigration arrests fall far short of those required in criminal arrests, especially in terms of how much time may pass before the decision to keep someone detained is reviewed by a neutral magistrate. There is considerable persuasive appeal in this comparison. Unlike prison after sentencing, pretrial detention cannot be justified as a form of punishment, which makes it more analogous to immigration detention. More to the point, one can reasonably ask why someone detained on murder charges should get more procedural protection than someone detained merely on administrative charges of being unlawfully present in the country. Unlike other amendments, the Fourth Amendment's text does not limit the protection against unreasonable seizures to criminal cases.[289]

D. IMMIGRATION ENFORCEMENT COMPARED TO INVOLUNTARY MENTAL HEALTH COMMITMENT

Immigration arrest procedures fall short not only in comparison with criminal procedures, but also in comparison with civil confinement law. If criminal procedure were the only comparison, there would be an immediate objection that it is simply inappropriate to compare immigration and criminal detention. As explained in Part IV.C, there is reason to think that the civil-criminal distinction is declining in influence, though it has not disappeared. If the Court continues to move toward an approach rooted in due process analysis, the critical procedural question would

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[286] 318 U.S. 332, 343 (1943).
[287] *See McLaughlin*, 500 U.S. at 56.
[288] *See* Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 932 (2014); *see also* William Finnegan, *The Deportation Machine: A Citizen Trapped in the System*, THE NEW YORKER (April 29, 2013), http://www.newyorker.com/magazine/2013/04/29/the-deportation-machine; Mark Reaman, *Immigration Officers Detain Citizen for Days Without Formal Charges*, CRESTED BUTTE NEWS (March 4, 2015), http://crestedbuttenews.com/?option=com_content&task=view&id=6272.
[289] *Compare* U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."), *with* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

be the weight of the interest at stake.[290] In this framework, it matters much less whether a process is formally labeled criminal or civil. Detention inherently burdens fundamental liberty rights and has a drastic impact on people's lives, and thus should trigger heightened procedural protections.

Nevertheless, because of the continued relevance of the civil-criminal distinction, a useful comparison may also be made between immigration and involuntary commitment on the basis of mental illness. Like immigration, involuntary commitment involves deprivation of liberty but is not premised on a desire for punishment and has historically been subject to more relaxed methods of adjudication than criminal cases.[291] Much as in immigration detention, states sometimes allow emergency commitment based on an authorization from a police officer or clinician.[292] But in this comparison, we can see again immigration enforcement offering much less procedural protection.

The Supreme Court has decided a number of cases about civil commitment, most of them focusing on the substantive standards required by the Constitution. In *Addington v. Texas*, the Court acknowledged that civil commitments do not require the same procedures as criminal cases.[293] But the Court nevertheless found that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[294] The holding in *Addington* was that civil commitment requires a clear and convincing standard of proof and that preponderance of the evidence is too low a standard given the weight of the due process interests.[295] The Court considered this conclusion to be a kind of balance because it also found that the Constitution did not necessarily require a criminal law burden of proof for civil commitment.[296] *Addington* offers an interesting basis for comparison with immigration detention, which involves a similar deprivation of liberty. It is instructive that Congress has set an identical standard of proof—clear and convincing evidence—for immigration hearings.[297]

In 1982, the Second Circuit rebuffed an appeal seeking to require a probable cause hearing within forty-eight hours for involuntary civil commitment, relying on the premise that non-criminal deprivations of liberty do not require the same procedural protection.[298] But under most state procedural systems, a neutral decision maker must review the case after seventy-two hours at most.[299] According to one survey, there are eight states that may allow involuntary

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[290] *See* Traum, *supra* note 182 (arguing for a due process-based approach to immigrants' constitutional rights).
[291] *See* Addington v. Texas, 441 U.S. 418, 428 (1979) ("There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions.").
[292] *See* CHRISTOPHER SLOBOGIN, ARTI RAI & RALPH REISER, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 736 (5th ed. 2009).
[293] *Addington*, 441 U.S. at 428.
[294] *Id.* at 425.
[295] *Id.* at 430–31.
[296] *Id.*
[297] 8 U.S.C. § 1229a(c)(2)(B) (2012).
[298] Project Release v. Prevost, 722 F.2d 960, 963 n.4 (2d Cir. 1983). *But see* Howell v. Hodge, 710 F.3d 381, 385 (6th Cir. 2013) ("[T]he bar for involuntarily removing someone from society against her will is high—quite understandably and quite legitimately so."); Lessard v. Schmidt, 349 F. Supp. 1078, 1090 (E.D. Wis. 1972) (finding that the "loss of basic civil rights" inherent in civil commitment impacts constitutional interests "at least as high as those of persons accused of criminal offenses").
[299] *See* 44 AM. JUR. 3D *Proof of Facts* 217 § 4.5 (1997); *see, e.g.*, CAL. WELF. & INST. CODE § 5250 (West 2014) (seventy-two hours); ARK. CODE. ANN. § 20-47-207 (2009) (setting a seventy-two hour window for a hearing); ALA. CODE § 22-52-2 (1991) (requiring immediate review by a probate judge of an involuntary commitment petition); *In re* Young, 857 P.2d 989, 1011–12 (Wash. 1993) (en banc) (holding that, based on *Mathews v. Eldridge* analysis, "a

commitment without a neutral review for more time – up to 7 days in some cases.[300] But these states appear to be outliers. According to the same survey, 42 states limit emergency commitment without a hearing or neutral review to 72 hours or less.[301] Of these, 19 states require a review within 24 hours.[302]

In an effort to take a modest approach to reforming immigration enforcement, the prevailing seventy-two hour norm is striking because it is tailored to a civil context.[303] Much like immigration detention, civil commitment is not intended to be punitive. Although civil commitment law departs from criminal procedure in certain details—for instance allowing seventy-two hours plus a weekend in some cases, instead of forty-eight hours, as the admissible window before a hearing—it also keeps to the basic framework established in *Gerstein*. In order to constitutionally deprive someone of liberty for a prolonged period, there must be a neutral review, it must be automatic, and it must come promptly within a set period of days, not weeks.

CONCLUSION AND A SUGGESTION FOR A REMEDY

The means by which ICE takes people into custody on immigration grounds is constitutionally problematic and increasingly under threat of judicial challenge. In 2014, federal courts across the country found that local and state authorities violate the Fourth Amendment if they detain people on the basis of requests from the existing DHS system. The looming question now is whether it is similarly a Fourth Amendment problem for federal authorities to detain people using this system.

Although DHS cancelled the Secure Communities program in November 2014, it has otherwise made only cosmetic changes to address the significant constitutional concerns that have arisen in court. In 2015, DHS issued a revised immigration detainer form, the I-247D.[304] Much like the old system, the new form requests law enforcement "maintain custody of [a person] for a period not to exceed 48 hours beyond the time when he/she would otherwise have been released."[305] Unlike the old version, the new form uses the phrase "probable cause."[306] It

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72–hour hearing is required by the constitutional guaranty to due process," although the state statute at the time provided for a hearing after only forty-five days); State v. Post, 541 N.W.2d 115, 120–21 (Wis. 1995) (describing the seventy-two hour hearing requirement in Wisconsin); 13B WASH. PRAC., CRIMINAL LAW § 2419 (2014–2015 ed.).

[300] *See generally* J.S. Vernick, M. Gakh, and J. Rutkow, *Emergency Detention of Persons with Certain Mental Disorders During Public Health Disasters: Legal and Policy Issues*, 7 AM. J. DISASTER MED. 295, 297-300 (2012) (listing the permitted length of emergency mental health detention in all US states and the District of Columbia.).

[301] *Id.*

[302] *Id.*

[303] A similar norm appears in standards applicable to involuntary health quarantines. *See* Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. (forthcoming 2015) (describing the five day hearing requirement in the Model State Emergency Health Powers Act).

[304] Dep't Homeland Sec., Form I-247D (2015). Sample on file with author. In early summer 2015, DHS circulated the revised form. In August 2015, I saw one of the revised detainer forms used in reference to a criminal defendant in Las Vegas, NV, through my legal practice in the Thomas & Mack Legal Clinic at UNLV. *See generally* César Cuauhtémoc García Hernández, *PEP v. Secure Communities*, CRIMMIGRATION (blog), http://crimmigration.com/2015/07/07/pep-vs-secure-communities/ (July 7, 2015) (posting an electronic version of the new form, and describing its constitutional deficiencies).

[305] Form I-247D, *supra* n. 304.

[306] Id.

states that "DHS has determined that … probable cause exists that the subject is a removable alien."[307] It then four multiple choice options that can be checked to explain the basis for the purported probable cause.[308] But there is no place on the form in which DHS would set out the individualized details supporting its assertion.[309] So, for instance, if DHS asserts there is probable cause because of voluntary statements made by the subject to an immigration officer, DHS need not specify what the actual statements were, much less when, where or how they were elicited. Moreover, the new detainer form, just like the old version, is to be signed only by an Immigration Officer, not by any neutral magistrate or judge.[310] Thus, DHS appears intent on persisting with a system lacking neutral review and without the requirement for a particularized, non-generic attestation of the basis for probable cause. As a result of this reluctance to make anything other than cosmetic reforms, the judiciary is likely to be asked to step in to scrutinize whether this system meets the demands of the constitution.

Until now, the means by which federal authorities take immigrants into custody have been insulated from constitutional scrutiny by the plenary power doctrine and by the premise that immigration law is civil, not criminal. These doctrines allowed the American immigration enforcement infrastructure to develop in a parallel universe for more than a century. But rapid developments in case law in the twenty-first century have significantly stripped away this insulation. Plenary power no longer means that constitutional rights can be ignored in the context of immigration. The civil-criminal distinction no longer appears to determine the results of immigration cases with the Court increasingly finding close connections between immigration and criminal law. Finally, the procedures used to take immigrants into custody fall short of the safeguards used in other civil contexts, such as involuntary commitment proceedings.

The challenge with this analysis is that it does not simply address relatively exceptional cases, as the Court did in the *Zadvydas* decision on indefinite detention. The Fourth Amendment problem with immigration arrests goes to the heart of how immigration law is enforced routinely. This makes the fashioning of a narrow remedy especially important. Following the *Zadvydas* path, the remedy for this constitutional problem should be to interpret the statute so as to avoid the problem. The means to do this would focus on the existing provisions of the INA that provide that "on a warrant issued by the Attorney General, an alien may be arrested and detained pending

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[307] Id.

[308] The four options are:

- a final order of removal against the subject;
- the pendency of ongoing removal proceedings against the subject;
- biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

Id.

[309] Even when courts allow for a relaxed standard of probable cause in immigration searches, they have insisted on specificity and reliability in order to safeguard against unrestrained action by immigration officials. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ,CRIMMIGRATION LAW 96 (2015) (describing varying approaches to defining probable cause in immigration searches).

[310] *Id.*

a decision on whether the alien is to be removed from the United States."[311] Since the DHS reorganization, this has been understood as a role assigned to ICE.[312] But, as we have seen, the result of this division of labor is that immigration arrest warrants are issued without the involvement of any neutral adjudicator, with ambiguous standards, and without an automatic timeline for the involvement of a neutral adjudicator. But the existing statutes and regulations contain two other provisions relevant to this process. First, ICE must issue a Notice to Appear charging an individual with removability before issuing an arrest warrant.[313] Second, the Attorney General, or in practical terms, immigration judges and the BIA, retain jurisdiction over removal adjudication and questions of law.[314]

In order to avoid serious constitutional problems, these provisions should be reinterpreted with three important changes.

First, immigration judges should issue immigration arrest warrants. This would mean stripping this function from ICE, which is part of DHS, and shifting it to the Department of Justice, which includes the immigration courts. The immigration statute assigns to the Attorney General authority to make rulings on questions of law.[315] Because warrants require a kind of adjudication, as well as a question of law regarding the meaning of probable cause, these tasks should be understood as remaining with the Attorney General. If issuing warrants remains an ICE function, then the necessary ingredient of neutrality will be missing and a serious constitutional problem would result.

Second, the INA, or at least the applicable regulations, should be amended so as to state clearly that the standard for valid immigration arrests is probable cause.[316] The applicable arrest warrant forms should be amended as well. As we have seen, the probable cause standard has been clear in appellate case law since the D.C. Circuit's decision in *Au Yi Lau* in 1971.[317] But alternative standards persist in the statute and the regulations, leading to ambiguity in implementation.[318] Although an initial arrest may be justified by probable cause that the person is in the United States unlawfully, continued custody should require an additional showing of probable cause that she is subject to detention under the immigration statute.

Third, if a person is to be held in immigration custody for seventy-two hours after arrest, an immigration judge must review the case to ensure the existence of probable cause. This timeline is consistent with the existing requirement that an NTA initiating removal proceedings in immigration court must issue before the arrest warrant.[319] What would be new is that an immigration judge would need to review the evidence on which ICE wishes to justify an arrest. With warrantless arrests, an automatic, early review by an immigration judge is necessary if the person is to remain detained pending resolution of the removal case. The Supreme Court has held that, for warrantless arrests, the mere filing of charges is not sufficient to meet the Fourth

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[311] 8 U.S.C. § 1226(a).
[312] *See* discussion *supra* Part IV.A.
[313] *See* discussion *supra* Part IV.B.
[314] *See* discussion *supra* Part IV.A.
[315] 8 U.S.C. § 1103(a)(1).
[316] For a more demanding proposal, see Chelgren, *supra* note 16, at 1523 (arguing that under *Salerno* there should be an adversarial hearing in which the government must prove dangerousness by clear and convincing evidence before mandatory detention may be imposed).
[317] *See* Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971).
[318] *Id.*
[319] *See* discussion *supra* Part IV.A.

Amendment's requirement for a neutral determination of probable cause "as a prerequisite to extended restraint of liberty following arrest."[320] Alternatively, ICE could opt to release the person pending resolution of the removal proceedings in the normal course.

Two aspects of this proposal stop somewhat short of the requirements of criminal procedure. First, the seventy-two hour requirement is borrowed from the established standard used by states in other areas of civil confinement, such as involuntary commitment on mental health grounds. It is longer than the forty-eight hour clock used in criminal arrests. Second, the reliance on immigration judges would not create a mechanism for a "judicial determination of probable cause," as called for in *Gerstein*.[321] Immigration judges are administrative adjudicators and part of the Executive Branch. However, the essential logic in *Gerstein* is that the probable cause review needs to be conducted by an adjudicator who is "neutral and detached," and immigration judges could provide a significant measure of detachment from the ICE officers who arrest people for immigration violations.[322] My argument would be that the deprivation of liberty inherent in immigration arrests and detention requires safeguards that are closely analogous to those used in criminal investigations, but the Supreme Court has also been clear that applications of the probable cause standard may be tailored to specific administrative contexts.[323]

These interpretive reforms could be imposed by a federal court in the manner used by the Supreme Court in *Zadvydas*. Alternatively, the Attorney General could revise the regulations governing immigration arrests.[324] Whether by decision of the Attorney General or a court, this approach would have the virtue of repairing a constitutional vulnerability using features of the existing statute and regulations. It would not require a court to strike down the immigration arrest and custody system as unconstitutional, which would create an enforcement vacuum until Congress managed to draft a new statute. In practice, this interpretive approach would force changes in how ICE operates, in that ICE officers would have to justify their arrests to immigration judges before their execution or immediately thereafter. It would undoubtedly impose a new burden on immigration judges, who are already backlogged and underresourced.[325] Concerns already exist that immigration judges are not adequately equipped to supervise arrest procedures.[326] There would be an urgent need for Congress to add resources to immigration courts through the appropriations process. But despite these drawbacks, this proposal would resolve the looming constitutional problem within the current statutory framework. Congress would not need to attempt to reform the INA itself. And in the present stalemate over immigration, the ability to repair a looming problem without major statutory changes is no small accomplishment.

The fundamental starting point to addressing immigration arrests is the recognition that taking someone into custody on immigration grounds entails a substantial infringement of

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[320] Gerstein v. Pugh, 420 U.S. 103, 114 (1975).
[321] *Id*.
[322] *See id*. at 112–13 (citing Johnson v. United States, 333 U.S. 10, 13–14 (1948)).
[323] *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 314–19 (1978); Camara v. Mun. Court, 387 U.S. 523, 538–39 (1967).
[324] *See* 8 U.S.C. § 1103(g)(2) (2012) (permitting the Attorney General to establish regulations and administrative mechanisms as necessary to carry out the function of the Executive Office of Immigration Review).
[325] There were more than 85,000 pending cases in immigration courts nationally as of December 2014. *Immigration Court Backlog Tool*, TRACIMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog (last visited Feb. 10, 2015). Nationally, these cases take 583 days to adjudicate on average. *Id*.
[326] *See* Chacón, *supra* note 227, at 1565.

liberty, much like a criminal arrest. There is a compelling argument under procedural due process that there must be substantial procedural protections in place.[327] The Fourth Amendment offers the most applicable guidepost to the types of safeguards required while balancing the exigent needs of law enforcement. In this light, it is helpful to recall Justice Stewart's concurrence in *Gerstein*, joined by three other Justices, where he lamented that the neutral probable cause review required after criminal arrests was arguably less process than would be required in civil procedure for far lesser infringements on individual rights.[328] The Fourth Amendment standard here is actually quite modest given what is at stake. But it could nevertheless be a radical shift for immigration enforcement.

[327] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (holding that due process depends in part on the private interests at stake in official action).

[328] Gerstein v. Pugh, 420 U.S. 103, 127 (1975) (Stewart, J., concurring) ("I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, the custody of a refrigerator, the temporary suspension of a public school student, or the suspension of a driver's license." (internal citations omitted)).