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REPORT
112–255

KEEP OUR COMMUNITIES SAFE ACT OF 2011

OCTOBER 18, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1932]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1932) to amend the Immigration and Nationality Act to provide for extensions of detention of certain aliens ordered removed, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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19–006

The Amendment

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Keep Our Communities Safe Act of 2011".

SEC. 2. DETENTION OF DANGEROUS ALIENS.

(a) IN GENERAL.—Section 241(a) of the Immigration and Nationality Act (8 U.S.C. 1231(a)) is amended—

(1) by striking out "Attorney General" each place it appears, except for the first reference in subsection (a)(4)(B)(i), and inserting "Secretary of Homeland Security";

(2) in paragraph (1), by amending subparagraph (B) to read as follows:

"(B) BEGINNING OF PERIOD.—The removal period begins on the latest of the following:

"(i) The date the order of removal becomes administratively final.

"(ii) If the alien is not in the custody of the Secretary on the date the order of removal becomes administratively final, the date the alien is taken into such custody.

"(iii) If the alien is detained or confined (except under an immigration process) on the date the order of removal becomes administratively final, the date the alien is taken into the custody of the Secretary, after the alien is released from such detention or confinement.";

(3) in paragraph (1), by amending subparagraph (C) to read as follows:

"(C) SUSPENSION OF PERIOD.—

"(i) EXTENSION.—The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if—

"(I) the alien fails or refuses to make all reasonable efforts to comply with the removal order, or to fully cooperate with the Secretary's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal that is subject to an order of removal;

"(II) a court, the Board of Immigration Appeals, or an immigration judge orders a stay of removal of an alien who is subject to an administratively final order of removal; or

"(III) the Secretary transfers custody of the alien pursuant to law to another Federal agency or a State or local government agency in connection with the official duties of such agency.

"(ii) RENEWAL.—If the removal period has been extended under clause (C)(i), a new removal period shall be deemed to have begun on the date—

"(I) the alien makes all reasonable efforts to comply with the removal order, or to fully cooperate with the Secretary's efforts to establish the alien's identity and carry out the removal order;

"(II) the stay of removal is no longer in effect; or

"(III) the alien is returned to the custody of the Secretary.";

(4) in paragraph (3)—

(A) by adding after "If the alien does not leave or is not removed within the removal period" the following: "or is not detained pursuant to paragraph (6) of this subsection"; and

(B) by striking subparagraph (D) and inserting the following:

"(D) to obey reasonable restrictions on the alien's conduct or activities that the Secretary prescribes for the alien, in order to prevent the alien from absconding, for the protection of the community, or for other purposes related to the enforcement of the immigration laws.";

(5) in paragraph (4)(A), by striking "paragraph (2)" and inserting "subparagraph (B)";

(6) by striking paragraph (6) and inserting the following:

"(6) ADDITIONAL RULES FOR DETENTION OR RELEASE OF CERTAIN ALIENS.—

"(A) DETENTION REVIEW PROCESS FOR COOPERATIVE ALIENS ESTABLISHED.—For an alien who is not otherwise subject to mandatory detention, who has made all reasonable efforts to comply with a removal order and to cooperate fully with the Secretary of Homeland Security's efforts to establish the alien's identity and carry out the removal order, including mak-

ing timely application in good faith for travel or other documents necessary to the alien's departure, and who has not conspired or acted to prevent removal, the Secretary shall establish an administrative review process to determine whether the alien should be detained or released on conditions. The Secretary shall make a determination whether to release an alien after the removal period in accordance with subparagraph (B). The determination shall include consideration of any evidence submitted by the alien, and may include consideration of any other evidence, including any information or assistance provided by the Secretary of State or other Federal official and any other information available to the Secretary of Homeland Security pertaining to the ability to remove the alien.

"(B) AUTHORITY TO DETAIN BEYOND REMOVAL PERIOD.—

"(i) IN GENERAL.—The Secretary of Homeland Security, in the exercise of the Secretary's discretion, may continue to detain an alien for 90 days beyond the removal period (including any extension of the removal period as provided in paragraph (1)(C)).

"(ii) SPECIFIC CIRCUMSTANCES.—The Secretary of Homeland Security, in the exercise of the Secretary's discretion, may continue to detain an alien beyond the 90 days authorized in clause (i)—

"(I) until the alien is removed, if the Secretary determines that there is a significant likelihood that the alien—

"(aa) will be removed in the reasonably foreseeable future; or

"(bb) would be removed in the reasonably foreseeable future, or would have been removed, but for the alien's failure or refusal to make all reasonable efforts to comply with the removal order, or to cooperate fully with the Secretary's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or other documents necessary to the alien's departure, or conspires or acts to prevent removal;

"(II) until the alien is removed, if the Secretary of Homeland Security certifies in writing—

"(aa) in consultation with the Secretary of Health and Human Services, that the alien has a highly contagious disease that poses a threat to public safety;

"(bb) after receipt of a written recommendation from the Secretary of State, that release of the alien is likely to have serious adverse foreign policy consequences for the United States;

"(cc) based on information available to the Secretary of Homeland Security (including classified, sensitive, or national security information, and without regard to the grounds upon which the alien was ordered removed), that there is reason to believe that the release of the alien would threaten the national security of the United States; or

"(dd) that the release of the alien will threaten the safety of the community or any person, conditions of release cannot reasonably be expected to ensure the safety of the community or any person, and either (AA) the alien has been convicted of one or more aggravated felonies (as defined in section 101(a)(43)(A)) or of one or more crimes identified by the Secretary of Homeland Security by regulation, or of one or more attempts or conspiracies to commit any such aggravated felonies or such identified crimes, if the aggregate term of imprisonment for such attempts or conspiracies is at least 5 years; or (BB) the alien has committed one or more crimes of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) and, because of a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; or

"(ee) that the release of the alien will threaten the safety of the community or any person, conditions of release cannot reasonably be expected to ensure the safety of the community or any person, and the alien has been convicted of at least one aggravated felony (as defined in section 101(a)(43)); or

"(III) pending a certification under subclause (II), so long as the Secretary of Homeland Security has initiated the administrative review process not later than 30 days after the expiration of the

removal period (including any extension of the removal period, as provided in paragraph (1)(C)).

"(C) RENEWAL AND DELEGATION OF CERTIFICATION.—

"(i) RENEWAL.—The Secretary of Homeland Security may renew a certification under subparagraph (B)(ii)(II) every 6 months, after providing an opportunity for the alien to request reconsideration of the certification and to submit documents or other evidence in support of that request. If the Secretary does not renew a certification, the Secretary may not continue to detain the alien under subparagraph (B)(ii)(II).

"(ii) DELEGATION.—Notwithstanding section 103, the Secretary of Homeland Security may not delegate the authority to make or renew a certification described in item (bb), (cc), or (ee) of subparagraph (B)(ii)(II) below the level of the Assistant Secretary for Immigration and Customs Enforcement.

"(iii) HEARING.—The Secretary of Homeland Security may request that the Attorney General or the Attorney General's designee provide for a hearing to make the determination described in item (dd)(BB) of subparagraph (B)(ii)(II).

"(D) RELEASE ON CONDITIONS.—If it is determined that an alien should be released from detention by a Federal court, the Board of Immigration Appeals, or if an immigration judge orders a stay of removal, the Secretary of Homeland Security, in the exercise of the Secretary's discretion, may impose conditions on release as provided in paragraph (3).

"(E) REDETENTION.—The Secretary of Homeland Security, in the exercise of the Secretary's discretion, without any limitations other than those specified in this section, may again detain any alien subject to a final removal order who is released from custody, if removal becomes likely in the reasonably foreseeable future, the alien fails to comply with the conditions of release, or to continue to satisfy the conditions described in subparagraph (A), or if, upon reconsideration, the Secretary determines that the alien can be detained under subparagraph (B). This section shall apply to any alien returned to custody pursuant to this subparagraph, as if the removal period terminated on the day of the redetention."; and

(7) by inserting after paragraph (7) the following:

"(8) JUDICIAL REVIEW.—Without regard to the place of confinement, judicial review of any action or decision pursuant to this section shall be available exclusively in habeas corpus proceedings instituted in the United States District Court for the District of Columbia, and only if the alien has exhausted all administrative remedies (statutory and regulatory) available to the alien as of right.".

(b) DETENTION OF ALIENS DURING REMOVAL PROCEEDINGS.—

(1) CLERICAL AMENDMENT.—(A) Sections 235 and 236 of the Immigration and Nationality Act (8 U.S.C. 1225 and 1226) are amended by striking "Attorney General" each place it appears (except in the second place that term appears in section 236(a)) and inserting "Secretary of Homeland Security".

(B) Section 236(a) of the Immigration and Nationality Act (8 U.S.C. 1226(a)) is amended by inserting "the Secretary of Homeland Security or" before "the Attorney General—".

(C) Section 236(e) of the Immigration and Nationality Act (8 U.S.C. 1226(e)) is amended by striking "Attorney General's" and inserting "Secretary of Homeland Security's".

(2) LENGTH OF DETENTION OF CERTAIN ALIENS; VENUE FOR CERTAIN ACTIONS.—Section 235 of the Immigration and Nationality Act (8 U.S.C. 1225) is amended by adding at the end the following:

"(e) LENGTH OF DETENTION.—

"(1) Notwithstanding any other provision of this section, an alien may be detained under this section, without limitation, until the alien is subject to an final order of removal.

"(2) The length of detention under this section shall not affect any detention under section 241.

"(f) JUDICIAL REVIEW.—Without regard to the place of confinement, judicial review of any action or decision made pursuant to subsection (e) shall be available exclusively in a habeas corpus proceeding instituted in the United States District Court for the District of Columbia and only if the alien has exhausted all administrative remedies (statutory and nonstatutory) available to the alien as of right.".

(3) VENUE FOR CERTAIN ACTIONS SEEKING JUDICIAL REVIEW OF LENGTH OF DETENTION.—Section 236(e) of the Immigration and Nationality Act (8 U.S.C. 1226(e)) is amended by adding the following at the end: "Without regard to the

place of confinement, judicial review of any action or decision made pursuant to subsection (f) shall be available exclusively in a habeas corpus proceeding instituted in the United States District Court for the District of Columbia and only if the alien has exhausted all administrative remedies (statutory and nonstatutory) available to the alien as of right.".

(4) LENGTH OF DETENTION.—Section 236 of the Immigration and Nationality Act (8 U.S.C. 1226) is amended by adding at the end the following subsection:

"(f) LENGTH OF DETENTION.—

"(1) Notwithstanding any other provision of this section, an alien may be detained under this section for any period, without limitation, until the alien is subject to a final order of removal.

"(2) The length of detention under this section shall not affect detention under section 241 of this Act.".

(5) DETENTION OF CRIMINAL ALIENS.—Section 236(c)(1) of the Immigration and Nationality Act (8 U.S.C. 1226(c)(1)) is amended, in the matter following subparagraph (D) to read as follows:

"any time after the alien is released, without regard to whether an alien is released related to any activity, offense, or conviction described in this paragraph; to whether the alien is released on parole, supervised release, or probation; or to whether the alien may be arrested or imprisoned again for the same offense. If the activity described in this paragraph does not result in the alien being taken into custody by any person other than the Secretary, then when the alien is brought to the attention of the Secretary or when the Secretary determines it is practical to take such alien into custody, the Secretary shall take such alien into custody.".

(6) ADMINISTRATIVE REVIEW.—Section 236 of the Immigration and Nationality Act (8 U.S.C. 1226) is amended by adding at the end the following subsection:

"(g) ADMINISTRATIVE REVIEW.—

"(1) The Attorney General's review of the Secretary's custody determinations under section 236(a) shall be limited to whether the alien may be detained, released on bond (of at least $1,500 with security approved by the Secretary), or released with no bond.

"(2) The Attorney General's review of the Secretary's custody determinations for the following classes of aliens:

"(A) Aliens in exclusion proceedings.

"(B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5).

"(C) Aliens described in sections 212(a)(3) and 237(a)(4).

"(D) Aliens described in section 236(c).

"(E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Public Law 104–132); is limited to a determination of whether the alien is properly included in such category.".

(7) CLERICAL AMENDMENTS.—(A) Section 236(a)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1226(a)(2)(B)) is amended by striking out "conditional parole" and inserting in lieu thereof "recognizance".

(B) Section 236(b) of the Immigration and Nationality Act (8 U.S.C. 1226(b)) is amended by striking "parole" and inserting "recognizance".

(c) SEVERABILITY.—If any of the provisions of this Act or any amendment by this Act, or the application of any such provision to any person or circumstance, is held to be invalid for any reason, the remainder of this Act and of amendments made by this Act, and the application of the provisions and of the amendments made by this Act to any other person or circumstance shall not be affected by such holding.

(d) EFFECTIVE DATES.—

(1) The amendments made by subsection (a) shall take effect upon the date of enactment of this Act, and section 241 of the Immigration and Nationality Act, as so amended, shall in addition apply to—

(A) all aliens subject to a final administrative removal, deportation, or exclusion order that was issued before, on, or after the date of enactment of this Act; and

(B) acts and conditions occurring or existing before, on, or after the date of enactment of this Act.

(2) The amendments made by subsection (b) shall take effect upon the date of enactment of this Act, and sections 235 and 236 of the Immigration and Nationality Act, as so amended, shall in addition apply to any alien in detention under provisions of such sections on or after the date of enactment of this Act.

SEC. 3. SENSE OF THE CONGRESS.

It is the sense of the Congress that—

(1) this Act should ensure that Constitutional rights are upheld and protected; and

(2) it is the intention of the Congress to uphold the Constitutional principles of due process and that due process of the law is a right afforded to everyone in the United States.

Purpose and Summary

H.R. 1932 allows for the continued detention of dangerous aliens who cannot be removed and strengthens the Department of Homeland Security's ability to detain criminal aliens in removal proceedings.

Background and Need for the Legislation

I. CONTINUED DETENTION OF DANGEROUS ALIENS WHO CANNOT BE REMOVED

The Supreme Court's decisions in *Zadvydas v. Davis*[1] and *Clark v. Martinez*[2] have interpreted current immigration law to limit the length of detention of aliens who have received orders of removal but who cannot be removed. As a result of these decisions, each year the Department of Homeland Security ("DHS") must release thousands of criminal aliens into communities in the United States. The Keep Our Communities Safe Act amends the Immigration and Nationality Act ("INA") to provide DHS with a statutory basis to continue to detain dangerous aliens who cannot be removed.

Zadvydas *and* Clark

In the 2001 decision in *Zadvydas v. Davis,* the Supreme Court ruled that under current immigration law, aliens who were admitted to the U.S. and then ordered removed cannot be detained for more than six months if there is no reasonable likelihood of their being removed (in the case of *Zadvydas,* because countries could not be found that would accept the aliens ordered removed). *Zadvydas* interpreted section 241(a)(6) of the INA, that provides that "[a]n alien ordered removed who is inadmissible . . . , removable [for violating a condition or entry, being convicted of certain crimes or on security grounds] or who has been determined . . . to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period [generally, a period lasting 90 days after the order of removal becomes administratively final]."

The Court read section 241(a)(6) to "contain an implicit 'reasonable time' limitation" that was "[b]ased on our conclusion that indefinite detention of aliens [beyond the removal period] would raise serious constitutional concerns. . . ."[3] The Court stated that "when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[4] The Court decided to read section 241(a)(6) to "limit[] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United

[1] *See* 533 U.S. 678 (2001).
[2] *See* 543 U.S. 371 (2005).
[3] *Zadvydas,* 533 U.S. at 682.
[4] *Id.* at 689, *quoting Crowell v. Benson,* 285 U.S. 22, 62 (1932).

States."[5] After six months of post-removal detention, an alien cannot be detained if there is not a significant likelihood of removal in the reasonably foreseeable future.[6]

The Court stated that, "[t]he Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]' any 'person . . . of . . . liberty . . . without due process of law.' Freedom from imprisonment . . . lies at the heart of the liberty that Clause protects."[7] The Court found that "[t]here is no sufficiently strong special justification here for indefinite civil detention. . . ."[8] However, the Court's very next words—"*at least as administered under this statute*"[9]—point to the fact that it was especially concerned with the breadth of the grounds of inadmissibility encompassed by section 241(a)(6). The Court later pointed out that "[t]he provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' . . . say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations" and that "the statute before us applies not only to terrorists and criminals, but also to ordinary visa violators. . . ."[10]

In *Clark,* the Court expanded its decision in *Zadvydas* to apply to non-admitted aliens.

Principal Reasons Why Aliens Ordered Removed Cannot Be Removed

There are two principal reasons why aliens ordered removed from the U.S. cannot in fact be removed. First, DHS's Office of Inspector General reported that "as of June 2004, more than 133,662 illegal aliens with or pending final orders [of removal] had been apprehended and released into the U.S . . . are unlikely to ever be repatriated if ordered removed because of the unwillingness of their country of origin to provide the documents necessary for repatriation."[11] The report went on to describe a variety of means that nations used to frustrate the removal process.[12]

The second involves the Convention Against Torture ("CAT"). Legislation enacting CAT was enacted in 1998.[13] Its primary aim is ensuring that human rights violators and others engaged in torture are brought to justice and details the process for extradition, detention, criminal prosecution, and victim compensation. CAT also prohibits the return of an alien to a country where there are substantial grounds for believing that he or she would be in danger of being tortured.

The implementing legislation for CAT stated that "[t]o the maximum extent consistent with the obligations of the United States under the Convention . . . the regulations . . . shall exclude from

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[5] *Zadvydas,* 533 U.S. at 689.
[6] *See id.* at 701.
[7] *Id.* at 690.
[8] *Id.*
[9] *Id.* (emphasis added).
[10] *Id.* at 691, 697 (citation omitted).
[11] Department of Homeland Security Office of the Inspector General, *Detention and Removal of Illegal Aliens* (April 2006) at 18.
[12] *See id.* at 17. Section 243(d) of the INA requires the Secretary of State to stop issuing visas to nationals of countries the Secretary of Homeland Security determines to have refused or delayed the return of their nationals who have been ordered deported. However, it is used sparingly because of diplomatic ramifications.
[13] *See* the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, div. G., sec. 2242 (1998).

the protection of such regulations aliens described in section 241(b)(3)(B)" of the [INA].[14] The aliens described in section 241(b)(3)(B) consist of aliens who 1) have participated in persecution, 2) have engaged in terrorist activity, 3) have been convicted of particularly serious crimes and are thus a danger to the community of the United States, 4) have committed serious crimes outside the U.S., or 5) there are reasonable grounds to believe are a danger to the security of the U.S. This group of aliens who are eligible for CAT relief consists of aliens who are *barred* under the Immigration and Nationality Act from receiving asylum and others forms of immigration relief.[15]

Unfortunately, the Department of Justice disregarded Congress's wishes to exclude such aliens from CAT's relief from removal. The regulations provide relief from removal to all aliens, no matter how dangerous.[16] In fact, the more heinous an alien's actions, the more likely that they might be subject to torture in their home country. As the 9th Circuit has stated, "even those who assisted in Nazi persecutions, or engaged in genocide, or pose a danger to our own security are not excluded from the protections of CAT."[17] Among the criminal aliens who have received CAT relief was an alien implicated in a mob-related quintuple homicide in Uzbekistan and an alien who killed a spectator at a Gambian soccer match.[18] Terrorists have received relief from removal under CAT, including an alien involved in the assassination of Anwar Sadat.[19] And, yes, even a Nazi war criminal has sought to avoid deportation through CAT.[20]

The Impact of Zadvydas *and* Clark *on Public Safety*

DHS has provided the Committee with data that shows that thousands of criminal aliens have been released into American communities as a result of the Supreme Court's interpretation of section 241(a)(6). In fiscal year 2009, criminal aliens who have yet to be removed were released 3,847 times on the basis of the decisions; in fiscal year 2010, criminal aliens were released 3,882 times.[21] As far back as 2005, almost 900 criminal aliens ordered removed had received CAT relief and had then been released from detention as a result of *Zadvydas* and *Clark.*[22]

Administration officials have long believed that as a result of the decisions, "there are instances where the government is forced to release aliens who have final orders of removal, though they may pose grave threats to the public."[23] Jonathan Cohn, then-Deputy

[14] *Id.* at sec. 2242(c).
[15] *See* INA sec. 208(b)(2).
[16] *See* 8 C.F.R. sec. 208.16–18.
[17] *Edu v. Holder,* 624 F.3d 1137, 1145 (9th Cir. 2010).
[18] *See Immigration Relief Under the Convention Against Torture for Serious Criminals and Human Rights Violators: Hearing Before the Subcomm. on Immigration, Border Security and Claims of the House Comm. on the Judiciary* at 1–2 (statement of John Hostettler, Chairman, Subcommittee on Immigration, Border Security and Claims).
[19] *See Soliman v. U.S.,* 296 F.3d 1237 (11th Cir. 2002). *See also, e.g., Haile v. Holder,* No. 06–74309/09–70779 (9th Cir. Sept. 26, 2011).
[20] *See Immigration Relief Under the Convention Against Torture for Serious Criminals and Human Rights Violators* at 15 (statement of Eli Rosenbaum, Director, Office of Special Investigations, U.S. Department of Justice).
[21] Information provided by DHS.
[22] *See* H.R. Rep. No. 109–345, pt. 1, at 69 (2005).
[23] *Immigration Relief Under the Convention Against Torture for Serious Criminals and Human Rights Violators* at 14 (statement of C. Stewart Verdery, Assistant Secretary for Border and Transportation Security Policy and Planning, Department of Homeland Security) .

Assistant Attorney General, testified that because of the decisions, "the government is [now] required to release numerous rapists, child molesters, murderers, and other dangerous illegal aliens into our streets. . . . [V]icious criminal aliens are now being set free within the U.S." [24] Among the criminal aliens who have been released was a man who murdered his wife in the presence of their seven-year-old daughter, despite the fact that the government alleged that he had a harm threatening mental illness.[25] Jonathan Cohn testified that:

> Another example is Tuan Thai, who has raped, tortured, and terrorized women and vowed to repeat his grisly acts. Among other crimes, Mr. Thai repeatedly raped his friend's girlfriend over the course of several months, beginning while she was 6 months' pregnant. He then monitored her phone calls and threatened to poison her with cocaine and harm her other children if she tried to kick him out of the house. He also threatened to beat up his own girlfriend slowly until she died. And he later threatened to kill his immigration judge and prosecutor after his release.[26]

Aliens released on the basis of the decisions have gone on to commit further crimes. For instance, one was subsequently arrested for shooting a New York State trooper in the head.[27] Tragically, in at least two instances, aliens released on the basis of the decisions subsequently went on to commit murder.

Huang Chen entered the U.S. in 1997 on a temporary visa and then overstayed. He assaulted Qian Wu in 2006 and was put in deportation proceedings. After an immigration judge ordered him removed, DHS tried to obtain travel documents from the People's Republic of China. China refused to grant Chen the necessary documents. After six months of detention, DHS released Chen pursuant to the decisions. In August 2008, Chen was convicted of assault and DHS tried to deport him. Again, China refused to issue travel documents. He was again released pursuant to the decisions. Chen then murdered Ms. Wu. According to news reports, the victim's heart and lungs were ripped from the body.[28]

Abel Arango came from Cuba and entered through Miami in the early 1990s, and then began a life of crime in Florida. He served time in prison for armed robbery. He was released from prison in 2004, and was supposed to be deported; however, Cuba wouldn't take him back. Arango was released from immigration custody pursuant to the decisions. Thereafter, he shot Ft. Myers, Florida police officer Andrew Widman at close range in the face. The officer never had the opportunity to draw his weapon. The husband and father

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[24] *Strengthening Interior Enforcement: Deportation and Related Issues: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship and the Subcomm. on Terrorism, Technology and Homeland Security of the Senate Comm. on the Judiciary,* 109th Cong. at 74 (2005) (statement of Jonathan Cohn, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice).

[25] *See Tran v. Mukasey,* 515 F.3d 478 (5th Cir. 2008).

[26] *Strengthening Interior Enforcement* at 9.

[27] *See* H.R. Rep. No. 109–345, pt. 1, at 69.

[28] Information provided by DHS; *see also* Michael Schmidt, *Neighbor Charged with Stalking and Killing Woman,* N.Y. Times, Jan. 27, 2010.

of three died at the scene, and Arango died in a shoot out with police.[29]

*Post-*Zadvydas *Regulations*

In 2002, the Department of Justice ("DOJ") issued regulations that provide a procedure under the authority of section 241(a)(6) for the detention of aliens ordered removed whose removal is not reasonably foreseeable but who are deemed to pose a special danger to the public:[30]

> [DHS] shall continue to detain an alien if the release of the alien would pose a special danger to the public, because: i) [t]he alien has previously committed one or more crimes of violence as defined in 18 U.S.C. 16; ii) [d]ue to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and iii) [n]o conditions of release can reasonably be expected to ensure the safety of the public.[31]

Proceedings are divided into two phases: a reasonable cause hearing and continued detention review merit hearings. In the initial phase, an alien who is detained and has been ordered removed may request that DHS determine whether there is a significant likelihood of removal in the reasonably foreseeable future. If there is not, the alien must be released unless based on a medical and physical evaluation DHS determines that the alien should not be released because they would pose a special danger to the public.[32]

If DHS finds the alien poses a special danger, the case is referred to an Immigration Judge for a reasonable cause hearing. This hearing is to determine whether DHS's evidence is sufficient to establish reasonable cause to proceed with a continued detention review merits hearing or whether the alien should be released. If the Immigration Judge finds that DHS has shown reasonable cause, the alien is notified and a merits hearing is scheduled. However, if the Immigration Judge finds that DHS has not met its burden, the proceedings are dismissed and the alien is released.[33]

In the continued detention review merits hearing, which must be held promptly, DHS has the burden of proving "by clear and convincing evidence, that the alien should remain in custody because the alien's release would pose a special danger to the public. . . ."[34] If the Immigration Judge finds that DHS has met its burden, the judge shall order the continued detention of the alien. Otherwise, the proceedings are dismissed.[35]

The regulations provide for periodic review of continued detention.[36] A detained alien may request that DHS review the continued detention order, but not earlier than six months after the most

[29] Information provided by DHS; *see also H.R. 1932, the "Keep Our Communities Safe Act of 2011": Hearing Before the Subcomm. on Immigration Policy and Enforcement of the House Comm. on the Judiciary,* 112th Congress (2011) (statement of Douglas Baker, Chief of Police, Fort Myers, Florida, Police Department).

[30] *See* 8 C.F.R. sec. 241.14(f).

[31] 8 C.F.R. sec. 241.14(f)(1).

[32] *See* 8 C.F.R. sec. 241.14(f)(1)-(3).

[33] *See* 8 C.F.R. sec. 241.14(h).

[34] 8 C.F.R. sec. 241.14(i)(1).

[35] *See* 8 C.F.R. sec. 241.14(i)(3)-(4).

[36] *See* 8 C.F.R. sec. 241.14(k)(1).

recent decision.[37] In order to win release from detention, the alien must show that due to a "material change in circumstances," their release "would no longer pose a special danger to the public. . . ."[38] If DHS does not release the alien, the alien may file a motion with the immigration judge to set aside the prior determination, and the alien's burden is the same—that, due to a material change in circumstances, his release would no longer pose a special danger to the public.[39] If the Immigration Judge grants the motion, a new merits hearing is held.[40]

The Federal circuits have split as to whether the regulations have a valid basis under section 241(a)(6).[41]

The Keep Our Community Safe Act

H.R. 1932 provides new statutory authorization for DHS to detain for extended periods dangerous aliens ordered removed who cannot be removed. As Thomas Dupree, Jr., former Principal Deputy Assistant Attorney General, told the Committee:

> The need for [the Keep Our Communities Safe Act] is acute. . . . [U]nder current law, the government is compelled to set dangerous criminals loose on the streets of the United States. . . . There is absolutely no reason to leave uncorrected a law that compels the release of some of the most dangerous and deranged individuals in Federal custody. Often their home countries do not want them back precisely *because* their crimes were so heinous. . . . The [bill] will protect the American people by giving the Department of Homeland Security and the Department of Justice the legal tools they need to keep these dangerous predators off our streets.[42]

Under the bill, if DHS wants to continue detention of an alien beyond 90 days following the removal period, a DHS official not below the level of the Assistant Secretary for Immigration and Customs Enforcement may continue detention until removal after certifying (or pending a certification) that 1) the alien has a highly contagious disease that poses a threat to public safety, 2) release of the alien is likely to have serious adverse foreign policy consequences, 3) there is reason to believe that release would threaten national security, or 4) release of the alien will threaten the safety of the community or any person, conditions of release cannot reasonably be expected to ensure their safety, and either the alien has been convicted of an aggravated felony or certain other crimes (or attempts or conspiracies to commit these crimes) or the alien has committed a crime of violence and because of a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future.

[37] *See* 8 C.F.R. sec. 241.14(k)(2)-(3).
[38] 8 C.F.R. sec. 241.14(k)(4).
[39] *See* 8 C.F.R. sec. 241.14(k)(6).
[40] *See id.*
[41] *Compare Hernandez-Carrera v. Carlson,* 547 F.3d 1237 (10th Cir. 2008) (regulations have a valid basis), *with Tran,* 515 F.3d at 478 (no valid basis); *Thai v. Ashcroft,* 366 F.3d 790 (9th Cir. 2004) (no valid basis).
[42] *H.R. 1932, the "Keep Our Communities Safe Act of 2011".*

DHS must renew such a certification every six months for as long as it wants to continue detention of the alien. In the absence of a certification, the alien is to be released, although conditions may be imposed and re-detention is possible.

*Constitutionality of the Post-*Zadvydas *Regulations and the Keep Our Communities Safe Act*

The Supreme Court clearly indicated in *Clark* that Congress has the power to amend the INA to provide for the continued detention beyond the removal period of aliens where the national interest in detention is great. In fact, the Court seemingly encouraged Congress to act, stating that "[t]he Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it."[43] In the corresponding footnote, the Court stated that "[t]hat Congress has the capacity to do so is demonstrated by its reaction to our decision in *Zadvydas.* Less than four months after the release of our opinion, Congress enacted [section 412(a) of the USA PATRIOT Act, found at section 236A(a)(6) of the INA] which expressly authorized continued detention, for a period of six months beyond the removal period (and renewable indefinitely) [of terrorist aliens]."[44] Section 236A(a)(6) allows for continued detention after the removal period of terrorist aliens not only if their release will threaten the national security, but also if release will threaten "the safety of the community or any person." This rationale—to protect the safety of the community or any person—that the Court looked favorably upon is precisely the reason why the Keep Our Communities Safe Act provides for the continued detention of dangerous aliens.

Additionally, the 10th Circuit in the 2008 decision of *Hernandez-Carrera v. Carlson* clearly indicates that the bill will be upheld as constitutional.[45] In that case, the 10th Circuit upheld the post-*Zadvydas* regulations that closely mirror the Keep Our Communities Safe Act. The 10th Circuit stated that:

> In *Zadvydas,* the government argued that by the clear terms of [section 241(a)(6) of the Immigration and Naturalization Act], Congress did not place a "limit on the length of time beyond the removal period that an alien who falls within one of the [provision's] categories may be detained.". . . Far from limiting the Attorney General's detention authority to "a small segment of particularly dangerous individuals," . . . this reading would have authorized the detention of *any* removable alien under [section 241(a)(6)] without regard to an alien's dangerousness or special characteristics. . . . As the Supreme Court pointed out, this construction suggested, at its limits, that Congress had authorized the Attorney General to permanently detain an alien guilty only of a tourist visa violation. . . .
>
> . . . .

[43] *Clark,* 543 U.S. at 385.
[44] *Id.* at n.8.
[45] *See Hernandez-Carrera,* 547 F.3d at 1237.

> [Under the regulations, d]etention beyond the removal period is authorized only in situations where the government's interest in an alien's continued detention is particularly strong: in the cases of 1) aliens with a highly contagious disease that is a threat to public safety; 2) aliens detained on account of serious adverse foreign policy consequences of release; 3) aliens detained on account of security or terrorism concerns; and 4) aliens determined to pose a special danger to the public. . . . Therefore, in contrast to the expansive scope of ICE's detention authority advanced by the government in *Zadvydas,* the Attorney General has now interpreted [section 241(a)(6)] only to authorize continued detention for a "small segment . . . of individuals" whose release would particularly endanger the public's health or safety . . . or the nation's foreign relations.
>
> . . . .
>
> We are confident . . . that due process is satisfied here. . . . [W]e note that it is not at all clear that removable aliens benefit from precisely the same advantages of due process as do citizens or lawful permanent resident aliens. To be sure, "the *Due Process Clause* applies to all 'persons' within the United States, including aliens. . . . However, the nature of the protection an alien is due "may vary depending upon status and circumstance." . . . "The fact that all persons, aliens and citizens alike, are protected by the *Due Process Clause* does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship. . . .
>
> . . . .
>
> [T]he Attorney General's statutory interpretation raises no serious constitutional question. . . .[46]

The Committee believes that the decisions in the 5th and 9th Circuits finding the regulations invalid were wrongly decided.[47] Since the regulations are not constitutionally infirm, this bill, which conforms closely to the regulations, is also not constitutionally infirm. As Thomas Dupree, Jr., told the Committee:

> [T]he bill appropriately addresses the constitutional concerns identified by the *Zadvydas* Court. . . . It narrows the potential sweep of the post-removal-detention statute by limiting it to a small segment of particularly dangerous individuals. It provides for regular and individualized as-

[46] *Id.* at 1252–54, 1256 (citations omitted). The Supreme Court in *Zadvydas* similarly stated that "the Due Process Clause protects an alien subject to a final order of deportation . . . *though the nature of that protection may vary depending upon status and circumstances*. . . ." 533 U.S. at 693–94 (citations omitted and emphasis added). And in the later case of *Demore v. Kim,* the Court found that "this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." 538 U.S. 510, 522 (2003) (citation omitted).

[47] Judge Kozinski, in dissenting to a 9th Circuit order denying a petition for rehearing, explained why *Thai* was wrongly decided. "The Supreme Court, confronted with a very broad statute, narrowed its scope to avoid unconstitutionality, but the Court's method of narrowing is not the only permissible one. The Attorney General, pursuant to his statutory delegation of regulatory authority, has selected a different method of conforming the statute to the requirements of the Constitution: He has accepted the six month limitation as to most aliens and has provided stringent procedural protections for narrow classes of aliens who are believed to be a danger to the community." *Thai v. Ashcroft,* 389 F.3d 967, 971 (9th Cir. 2004) (Kozinski, dissenting).

> sessments of the need for continued detention by high-level officials within the Department of Homeland Security, as well as the opportunity to have those assessments reviewed by a Federal court.[48]

However, even were the decisions invalidating the regulations decided correctly, that would only go to show that the regulations were invalid interpretations of section 241(a)(6) of the INA.[49] It would not lead to the conclusion that Congress could not enact legislation mirroring the text of the regulations. As the 5th Circuit stated:

> While this Court is sympathetic to the Government's concern for public safety, we are without power to authorize . . . continued detention. . . . We note however that in a similar circumstance where public safety was also of great concern, Congress took prompt action to address the issue. In particular, in the field of national security, Congress enacted the Patriot Act which authorizes detention beyond the removal period of any alien whose removal is not foreseeable for additional periods of up to six months if the alien presents a national security threat. . . . Thus, not only are the Government's concerns properly directed to Congress, but importantly Congress has shown that it has the authority and willingness to address these concerns.[50]

Adequacy of Civil Commitment Laws

It is sometimes argued that the continued detention provisions of the Keep Our Communities Safe Act are unnecessary because dangerous aliens can be kept off our streets through Federal or state civil commitment laws. Unfortunately, such laws are inadequate. The Supreme Court has ruled that civil commitment laws can only be used against persons who "suffer from a volitional impairment rendering them dangerous beyond their control" because of a mental illness or abnormality.[51]

Aliens who are sane but highly dangerous cannot be subject to civil confinement.[52] This is true even if they have antisocial personalities that sometimes lead to aggressive conduct and for which there is no effective treatment.[53] It means that aliens who are mentally ill and highly dangerous but found to be able to control their dangerousness cannot be subject to civil containment. Most dangerous aliens are beyond the reach of civil commitment laws.

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[48] *H.R. 1932, the "Keep Our Communities Safe Act of 2011".*

[49] As the 9th Circuit found, "[b]ecause the Government may not detain [the appellee] under [section 241(a)(6)], the . . . regulations, which were enacted under the authority of that statute, cannot authorize [the appellee's] continued and potentially indefinite detention." *Thai,* 366 F.3d at 799.

[50] *See Tran,* 515 F.3d at 485. And the 9th Circuit stated that "[w]e also do not speak to the possibility that Congress could enact a statute that explicitly allows for Federal civil commitment of aliens who pose a danger to the community due to their mental conditions." *Thai,* 366 F.3d at 799.

[51] *Kansas v. Hendricks,* 521 U.S. 346, 358 (1997).

[52] *See id.*

[53] *See Foucha v. Louisiana,* 504 U.S. 71, 82 (1992). *Also see* Sravanthi Pajerla & Alan Felthous, *The Paradox of Psychopathy,* Psychiatric Times, Nov. 1, 2007 ("High scores on the Psychopathy Checklist Revised . . . have been shown to be strong predicators of criminal and especially violent recidivism among prisoners.").

II. EXTENSION OF *ZADVYDAS* AND *CLARK* TO NON POST-REMOVAL PERIOD CASES

Section 236(c) of the INA provides that the government "shall take into custody" individuals who are inadmissible or deportable under various criminal and terrorist grounds. Why did Congress provide for mandatory detention of such aliens? First, because Congress did not want Americans to be unnecessarily put at risk. As Justice Kennedy has stated, "[a]ny suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist. . . ."[54]

The recidivism rate of criminal immigrants after release from detention is extremely high. In 1999, the Judiciary Committee subpoenaed the Justice Department for information on inadmissible or deportable aliens who were released from INS custody and then subsequently convicted of additional crimes. The resulting information revealed that of the 35,318 criminal aliens whom INS released between 1994 and 1999, 37% had been convicted of another crime in the United States by 2000.[55] The Supreme Court has stated that "Congress [was] justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime. . . ."[56] The Court noted that "deportable criminal aliens who remained in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable,77% were arrested at least one more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began."[57]

Second, when illegal and criminal aliens in removal proceedings are not detained, many simply abscond and become fugitives—as do most of those ordered removed. Department of Justice records reveal that since 1996, nearly 770,000 non-detained aliens in removal proceedings failed to appear in court, 40% of all those not detained.[58] Of all removal orders against aliens who were not detained, 78% represented aliens who failed to show up in court.[59]

What happens when non-detained aliens abscond and are then ordered removed? They are almost never deported. The Department of Justice's Office of the Inspector General found that the INS was only able to remove 13% of nondetained aliens with final orders of removal.[60] This is why U.S. Immigration and Customs Enforcement ("ICE") has told the Committee that almost 500,000 immigrant fugitives now roam our streets.[61]

The Supreme Court well understands these concerns. It has held in *Demore v. Kim* that "Congress [was] justifiably concerned that deportable criminal aliens who are not detained . . . fail to appear

[54] *Zadvydas,* 533 U.S. at 714 (Kennedy, J., dissenting).
[55] *See* H.R. Rept. 106–1048 at 256–57 (2001) .
[56] *Demore,* 538 U.S. at 510.
[57] *Id.* at 518.
[58] *See* Mark Metcalf, *Built to Fail: Deception and Disorder in America's Immigration Courts,* 2011 Center for Immigration Studies at 17 nn.40, 47.
[59] *See id.* at 17 n.47.
[60] *See* U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders* i, ii (2003).
[61] Information provided by ICE.

for their removal hearings in large numbers. . . ."[62] It noted that "Congress also had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings"[63] and that a study "strongly support[ed] Congress' concern that, even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight."[64]

Because of these considerations, the Court ruled that the mandatory detention in section 236(c) did not violate the Due Process Clause of the Fifth Amendment—"Congress . . . may require that persons such as [the criminal alien] respondent be detained for the brief period necessary for their removal proceedings."[65]

The Court took pains to make clear that while the respondent relied heavily on the Court's ruling in *Zadvydas* in arguing that section 236(c) was unconstitutional, *Zadvydas* was "materially different."[66] First, in *Zadvydas,* the goal of detention—ultimate removal—was no longer practically attainable while in the present case, "detention of deportable criminal aliens *pending their removal proceedings* . . . necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed."[67]

Second, "[w]hile the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent' . . . the detention here is of a much shorter duration."[68] Importantly, "post-removal period detention, *unlike detention pending a determination of removability* . . . , has no obvious termination point."[69]

The *Demore* Court also noted that the respondent himself had worked to extend the length of his detention by requesting a continuance of his removal hearing.[70] This brings up the specter of aliens and their attorneys intentionally using dilatory tactics in removal proceedings in order to force their release.

There is another reason why *Zadvydas*-type post-removal period detention is fundamentally different from detention during the removal process—and therefore why the same constitutional considerations don't arise. Aliens in the removal process generally hold the keys to their own cells—they can accept removal and quickly win release from detention. Aliens in post-removal period detention generally do not have this ability.

Unfortunately, in the years following *Demore,* some Federal courts have tried to turn the decision on its head. They have ruled that mandatory detention under section 236(c) for more than a few months is likely unconstitutional and therefore, under the doctrine of constitutional avoidance, the provision should be read to *not* require continued detention of criminal aliens. In *Tijani v. Willis,* the 9th Circuit ruled that:

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[62] *Demore,* 538 U.S. at 513.
[63] *Id.* at 519.
[64] *Id.* at 520.
[65] *Id.* at 513.
[66] *Id.* at 527.
[67] *Id.* at 527–28 (emphasis in original).
[68] *Id.* at 528 (citation omitted).
[69] *Id.* at 529 (quoting *Zadvydas* at 697, emphasis added in *Demore*).
[70] *See id.* at 531.

> [It is] constitutionally doubtful that Congress may authorize imprisonment [under section 236(c)] of [over two years and eight months] for lawfully admitted resident [criminal] aliens who are subject to removal. . . . To avoid deciding the constitutional issue, we interpret the authority conferred by [section 236(c)] as applying to expedited removal of criminal aliens. Two years and eight months of process is not expeditious; and the foreseeable process in this court . . . is a year or more.[71]

Therefore, the case was remanded so that an Immigration Judge could grant the alien bail unless the government could establish that the alien was a flight risk or a danger to the community.[72]

The decision in *Tijani* has no foundation in *Zadvydas.* As the dissenting judge in *Tijani* stated, at the very most, "[t]he constitutional limit, if any, to the duration of an alien's detention under [section 236(c)] was left open by the Supreme Court in *Demore."*[73] Alternately, he stated, the Court was "holding that because the removal proceedings are by definition finite, there is no constitutional limit to the duration of detention under [section 236(c)]."[74] After all, "[t]he reasons for detaining criminal aliens pending removal do not diminish over the duration of their detention."[75]

Then, in *Casas-Castrillon v. Department of Homeland Security,* the 9th Circuit ruled that a criminal alien being detained pursuant to section 236(c) who receives a final removal order (upheld by the Board of Immigration Appeals) and then challenges that order in Federal circuit court is not subject to mandatory detention under section 236(c) after the court issues a stay of removal, but only to discretionary detention under section 236(a) of the INA.[76] Section 236(a) does provide for release of an alien on bond, and the 9th Circuit ruled that did it not, the statute would likely be unconstitutional.[77] The 2nd Circuit came to the better-reasoned conclusion that "when a court issues a stay pending its review of an administrative removal order, the alien continues to be detained under section 236[c] until the court renders its decision."[78]

The 9th Circuit has extended this type of rationale beyond the realm of criminal aliens. Aliens are subject to mandatory detention during the removal period (which begins when an order of removal becomes administratively final).[79] However, the 9th Circuit found in *Prieto-Romero v. Clark* that an alien "whose removal order is administratively final, but whose removal has been stayed by a court of appeals pending its disposition of his petition for review" is no longer within the removal period, but subject only to discretionary detention under section 236(a).[80] And in *Nadarajah v. Gonzales,* the court read the mandatory detention provisions for aliens applying for admission (found at section 235(b) of the INA) to be limited

[71] 430 F.3d 1241, 1242 (2005).
[72] *Id.*
[73] *Id.* at 1252 (Callahan, J., dissenting).
[74] *Id. (footnote omitted).*
[75] *Id.* at 1252 n.5.
[76] *See* 535 F.3d 942, 948 (9th Cir. 2008). Section 236(a) provides that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." The court ruled that section 236(c) only applies "during removal proceedings."
[77] *See id.* at 951.
[78] *Wang v. Ashcroft,* 320 F.3d 130, 147 (2nd Cir. 2003).
[79] *See* sec. 241(a)(1)-(2) of the INA.
[80] 534 F.3d 1053, 1059 (9th Cir. 2008).

to a "reasonable" length and only "while removal remains reasonably foreseeable." [81]

However, non-criminal aliens ordered removed who are not detained abscond just as do criminal aliens. So too do arriving aliens who are not entitled to be admitted. In fact, by the mid-1990s, thousands of aliens were arriving at U.S. airports each year without valid documents, often making meritless asylum claims, knowing that they would be released into the community pending asylum hearings before Immigration Judges because of a lack of detention space.[82] Congress responded by creating the expedited removal process.

The Keep Our Communities Safe Act

The Keep Our Communities Safe Act rejects the expansion of the supposed rationale of *Zadvydas and Clark* to non post-removal order cases. The bill provides that detention under sections 235 and 236 of the INA is "without limitation, until the alien is subject to a final order of removal"—without any statutory limitation on duration. Duration will, of course, be limited in practice because immigration judges, the Board of Immigration Appeals, and Federal circuit courts will eventually reach decisions on matters before them. Aliens might also be less tempted to engage in dilatory tactics if they realize that such tactics won't get them released from detention. Finally, aliens will usually continue to hold the keys to their own detention—if they accept their removal they will be expeditiously freed from detention.

Additionally, the bill provides, contra *Casas-Castrillon v. Department of Homeland Security,* that the removal period continues during the period after a Federal court orders a stay of an alien's removal. However, detention during this period is at the discretion of DHS.

It should be noted that in cases of detention pursuant to sections 235 and 236 where detention is discretionary (such as with section 236(a)) and not mandatory, aliens will continue to have access to bond hearings by immigration judges.

III. APPLICABILITY OF SECTION 236(C) WHEN DHS DETENTION DOES NOT IMMEDIATELY FOLLOW UPON RELEASE FROM CUSTODY

Section 236(c) provides that the government "shall take into custody" individuals who are inadmissible or deportable under various

[81] 443 F.3d 1069, 1078, 1084 (9th Cir. 2006).

[82] *See* H.R. Rep. No. 104–469, pt. 1, at 157–58 (1995). Even arriving aliens who show a "credible fear of persecution" may abscond if later denied asylum. The grant rate for credible fear determinations has become so high—87% percent in fiscal year 2011 (through March 2011)—that the credible fear requirement is no longer deterring arriving aliens from making fraudulent asylum claims at ports of entry. Information provided by U.S. Citizenship and Immigration Services. What happens when DHS doesn't detain asylum seekers making fraudulent claims? The lesson from the past is clear—nondetained asylum seekers who are later denied asylum simply abscond. The Inspector General of the Department of Justice issued a report that looked at the INS's success in removing nondetained asylum seekers who were denied asylum. The INS was only able to remove three percent of these nondetained aliens. *See* Office of the Inspector General, U.S. Department of Justice, *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders* 16 (Feb. 2003). Similarly, a DHS report found that of those aliens who filed for asylum with an asylum officer in 2000, were never detained and were then denied asylum and ordered removed, less than one percent were removed by April 2003 (41 out of 9,772); of those claiming a credible fear of persecution at ports of entry who were never detained and were then denied asylum and ordered removed, only 19% were removed (15 out of 80). *See* ICE, U.S. Department of Homeland Security, *Detained Asylum Seekers: Fiscal Year 2000* tables 10a, 10b (undated).

criminal and terrorist grounds "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."

Some Federal courts have interpreted section 236(c)'s mandatory detention not to apply to criminal aliens whom DHS does not detain immediately after they were released from incarceration upon the conclusion of their criminal sentences. For instance, a Federal district court in Virginia ruled that section 236(c) "does not apply to an alien . . . who has been taken into immigration custody well over a month after his release from state custody."[83]

And some Federal courts have interpreted section 236(c) to not apply to criminal aliens whom DHS detains following criminal incarceration for crimes other than the crimes that make them subject to mandatory detention under section 236(c). For instance, the 1st Circuit asked the question of "whether [section 236(c)] applies only when an alien is released from a criminal custody the basis for which is one of the offenses [subjecting an alien to mandatory detention under section 236(c)] or, alternately, whether it applies whenever an alien, previously convicted of [such] an offense . . . is released from *any* criminal custody regardless of the reason for that detention."[84] The court ruled that section 236(c) applies only in the former case.[85]

Putting aside the proper reading of section 236(c), these decisions make little policy sense. As Justice Kennedy has stated, "[a]ny suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist. . . ."[86] The dual purposes for the mandatory detention of criminal aliens are to protect the American public and to ensure that removal orders can be effectuated. It makes no difference for purposes of achieving these goals whether a criminal alien was placed in DHS detention immediately after being released from criminal incarceration or years after being released from criminal incarceration; it makes no difference whether a criminal alien was placed in DHS detention after incarceration for the crime making them removable or after incarceration for another crime; in fact, it makes no difference if they were ever incarcerated.

The Keep Our Communities Safe Act

The bill makes clear that aliens are subject to mandatory detention under section 236(c) regardless of whether there has been an intervening period since they were released from criminal custody or whether they were last released from incarceration for a crime other than the crime that makes them subject to mandatory detention. In both cases, the aliens are still subject to mandatory detention under section 236(c). The bill provides that a criminal alien is subject to section 236(c) at "any time after the alien is released, without regard to whether an alien is released related to any activ-

[83] *Waffi v. Loiselle,* 527 F. Supp. 2d 480, 488 (E.D. Va. 2007). *See also, e.g., Scarlett v. DHS,* 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009).
[84] *Saysana v. Gillen,* 590 F.3d 7, 8 (1st Cir. 2009) (emphasis in original).
[85] *See id.* at 28. *See also, e.g., Louisaire v. Muller,* 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010).
[86] *Zadvydas,* 533 U.S. at 714 (Kennedy, J., dissenting).

ity, offense, or conviction [making them subject to mandatory detention under section 236(c)]. . . .''

Hearings

The Committee's Subcommittee on Immigration Policy and Enforcement held one day of hearings on H.R. 1932 on May 24, 2011. Testimony was received from Gary Mead, Executive Associate Director for Enforcement and Removal Operations, ICE, Department of Homeland Security; Thomas Dupree, Partner, Gibson Dunn & Crutcher; Police Chief Douglas Baker, Tampa, Florida Police Department; and Ahilan Arulanantham, Deputy Legal Director, American Civil Liberties Union of Southern California.

Committee Consideration

On July 14, 2011, the Committee met in open session and ordered the bill H.R. 1932 favorably reported with an amendment, by a roll call vote of 17 to 14, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 1932.

1. An amendment by Rep. Chu failed by a vote of 13–18. The amendment would have stricken the provisions of the bill that amend sections 235 and 236 of the INA as to the detention of arriving aliens and aliens pending and during removal proceedings.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams			
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Total	13	18	

2. An amendment by Rep. Jackson Lee failed by a vote of 13–21. The amendment would have stricken the provisions of the bill that provide for detention of aliens after the removal period and would have substituted a civil commitment process for aliens who pose a special danger to others.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz			
Total	13	21	

3. An amendment by Rep. Conyers failed by a vote of 12–17. The amendment would have stricken the provisions of the bill that amend section 235 of the INA as to the detention of arriving aliens.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez	X		
Ms. Wasserman			
Total	12	17	

4. An amendment by Rep. Chu failed by a vote of 13–16. The amendment would have stricken provisions of the bill that amend section 235 of the INA as to the detention of arriving aliens and would have substituted alternate provisions.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams			
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz			
Total	13	16	

5. An amendment by Ms. Jackson Lee failed by a vote of 14–15. The amendment would have stricken a provision of the bill that requires the detention by DHS of certain removable criminal aliens at any time after they are released from serving their criminal sentences.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz			
Total	14	15	

6. Motion to report H.R. 1932 favorably, as amended. Passed 17–14.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.			
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Lungren	X		
Mr. Chabot	X		
Mr. Issa	X		
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan	X		
Mr. Poe			
Mr. Chaffetz	X		
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman		X	
Mr. Nadler			
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Quigley		X	
Ms. Chu		X	
Mr. Deutch		X	
Ms. Sánchez		X	

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Ms. Wasserman Schultz			
Total	17	14	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1932, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 8, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1932, the "Keep Our Communities Safe Act of 2011."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1932—Keep Our Communities Safe Act of 2011.

CBO estimates that implementing H.R. 1932 would have no significant costs to the Federal Government. Enacting H.R. 1932 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. H.R. 1932 contains no intergovernmental or private-sector mandates as defined in the Unfunded

Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

H.R. 1932 would clarify numerous provisions in current laws and regulations relating to the detention of aliens who are ordered removed from the United States. The bill also would clarify many procedural issues in the appeals process that are available to aliens who contest their detention or removal. In addition, H.R 1932 would authorize the Department of Homeland Security (DHS) to detain such aliens for longer than 6 months under certain circumstances.

According to DHS, most aliens who receive a final order of removal are removed from the United States well within 6 months. In many cases under current law, DHS detains aliens only as long as necessary to determine whether the individual, upon removal, would be accepted by his home country or by another country. If such acceptance is deemed unlikely, then generally the detainee is released. CBO anticipates that this policy will continue under the provisions of H.R. 1932 because the legislation would not require DHS to hold aliens for a certain length of time. Thus, we do not expect a large increase in the number of detainees who are held for long periods of time, and we estimate that H.R. 1932 would not significantly increase DHS detention costs.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1932 allows for the continued detention of dangerous aliens who cannot be removed and strengthens the Department of Homeland Security's ability to detain criminal aliens in removal proceedings.

Constitutional Authority Statement

The Committee finds the authority for this legislation in article I, section 8, clause 4 of the Constitution.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1932 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Section 1:

Short Title

Section 2(a)(1):

Consistent with the formation of the Department of Homeland Security, this provision clarifies that DHS has the power to detain, release and remove an alien ordered removed.

Section 2(a)(2):

Current law provides that an alien must generally be removed within 90 days of being ordered removed ("the removal period"). This provision clarifies that in cases where the alien is confined other than by DHS at the time the order becomes final, the removal period begins on the date the alien is released and placed into DHS custody.

Section 2(a)(3):

This provision provides that the removal period shall be extended beyond 90 days if the alien does not comply with efforts to remove them or an immigration judge, the BIA, or a court issues a stay of the alien's final removal order, or custody of the alien is transferred to another agency.

The removal period begins again when the alien complies with removal efforts, the stay is no longer in effect or the alien is returned to DHS custody.

Section 2(a)(4):

This provision allows DHS to continue supervision of an alien who is not detained under paragraph 6 (below). It expands supervision to include reasonable restrictions to prevent aliens from absconding, protect the community, and enforce immigration laws.

Section 2(a)(5):

This provision clarifies that DHS has the discretion to order the removal of an alien before the term of imprisonment has ended pursuant to the Public Health Service Act and in some circumstances when the alien is a nonviolent criminal offender.

Section 2(a)(6):

This provision provides a review process for DHS to determine whether an alien who is not subject to mandatory detention and has cooperated in removal efforts should be released or detained beyond the removal period. The review process requires that DHS consider any available evidence, including that submitted by the alien and state or Federal officials.

The provision allows DHS the discretion to detain an alien for 90 days beyond the removal period. It further grants DHS the discretion to authorize detention beyond this additional 90 day period if 1) there is a significant likelihood that the alien will be removed in the reasonably foreseeable future or would be removed in the reasonably foreseeable future but for the alien's failure to cooperate, 2) DHS certifies that the alien has a highly contagious disease that would be a threat to public safety, 3) DHS certifies that, based on the Secretary of State's recommendation, release of the alien is likely to have serious adverse foreign policy consequences, or 4) DHS certifies that, based on information available, there is reason to believe that release of the alien would threaten national security.

DHS may also authorize detention beyond the 90 days after certifying that the alien will threaten the safety of the community or any person and conditions of release cannot reasonably ensure their safety, and either 1) the alien has been convicted of an aggravated felony or other crimes specified by DHS (or attempts or con-

spiracies to commit such crimes if the term of imprisonment for the attempt or conspiracy is five years or more), or 2) the alien has committed a crime of violence and because of a mental condition or personality disorder and associated behavior is likely to engage in acts of violence in the future.

The provision provides also that DHS may detain the alien beyond the 90 day period following the removal period pending a certification decision as long as DHS initiates the review process no later than 30 days after the removal period expires.

DHS must renew the certification under this section every six months if it wants to continue detention. It must provide an opportunity for the alien to request and provide evidence to support reconsideration of the certification. DHS cannot delegate the authority to issue a certification below the level of the Assistant Secretary for ICE.

DHS may request that the Attorney General conduct a hearing to determine whether, due to a mental condition, an alien convicted of a crime of violence is likely to engage in acts of violence in the future.

If a Federal court or the Board of Immigration Appeals releases an alien from detention or if an immigration judge orders a stay of removal, DHS may impose conditions on the alien's release.

DHS has the discretion to re-detain an alien if removal becomes likely in the reasonably foreseeable future, the alien does not comply with conditions or release, or if DHS determines that the alien can be detained beyond the removal pursuant to this section.

Section 2(a)(7):

This provision provides that judicial review of challenges to detention pursuant to this section is available exclusively in habeas corpus proceedings in the United States District Court for the District of Colombia. It requires that an alien first exhaust administrative remedies before pursuing a habeas corpus claim.

Section 2(b)(1):

This is a clerical amendment to recognize the creation of the Department of Homeland Security.

Section 2(b)(2):

This provision clarifies that there is no limit to the length of time an alien may be held in custody pursuant to section 235 (regarding arriving aliens), and such detention has no affect on the removal period under section 241. However, aliens detained pursuant to the non-mandatory detention provisions of section 235 can apply to an Immigration Judge for release from custody (bond hearing).

It also provides that judicial review of challenges to detention pursuant to section 235 is available exclusively in habeas corpus proceedings in the United States District Court for the District of Colombia. It requires that the alien first exhaust administrative remedies before pursuing a habeas corpus claim.

Section 2(b)(3):

This provision provides that judicial review of challenges to detention under section 236 is available exclusively in habeas corpus proceedings in the United States District Court for the District of

Colombia. It requires that an alien first exhaust administrative remedies before pursuing a habeas corpus claim.

Section 2(b)(4):

The provision clarifies that there is no limit to the length of time an alien maybe held in custody pursuant to section 236 and such detention has no affect on the removal period under section 241. However, aliens detained pursuant to the non-mandatory detention provisions of section 236 can apply to an immigration judge for release from custody (bond hearing).

Section 2(b)(5):

This provision clarifies that a criminal alien is subject to mandatory detention under section 236(c) and shall be taken into custody by DHS even if they had been released at some prior time from serving a criminal sentence, were released from serving a sentence for a crime other than the crime that subjects them to mandatory detention, or never served a criminal sentence.

Section 2(b)(6):

This provision limits the Executive Office for Immigration Review's review of DHS's custody determination under section 236 to whether the alien may be detained, released with no bond, or released on bond of at least $1,500.

The Executive Office for Immigration Review's review of DHS's custody determinations for aliens in certain classes is limited to whether the aliens were properly included in such categories, including aliens in exclusion proceedings, arriving aliens in removal proceedings, paroled aliens, aliens removable on security and related grounds, or certain criminal aliens.

Section 2(b)(7):

This provision clarifies that DHS may release an alien pending final order of removal only on bond of at least $1500 or recognizance. Current law allows such aliens to be released on bond of at least $1500 as well as on conditional parole.

Section 2(c):

This provision provides that if any section of the bill is held to be invalid, it may be severed from the bill and will not affect the remainder of the bill.

Section 2(d)(1):

This provision provides that the amendments made by section 2(a) of the bill shall take effect on the date of the enactment of the bill. It clarifies that section 241 of the INA as amended applies to all aliens subject to a final order issued before, on, or after the date of enactment and to acts and conditions occurring or existing before, on, or after the date of enactment.

Section 2(d)(2):

This provision provides that the amendments made by section 2(b) of the bill shall take effect on the date of the enactment of the bill and sections 235 and 236 as amended shall apply to any alien

in detention under provisions of those sections on or after the date of enactment.

Section 3:

This section provides the sense of Congress that the bill should ensure that constitutional rights are upheld and protected and that it is the intention of Congress to uphold the constitutional principles of due process and that due process of law is a right afforded to all persons in the United States. Of course, as the 10th Circuit has held, "the nature of the protection an alien is due 'may vary depending upon status and circumstance.' . . . 'The fact that all persons, aliens and citizens alike, are protected by the *Due Process Clause* does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship. . . .'" [87]

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

IMMIGRATION AND NATIONALITY ACT

* * * * * * *

TITLE II—IMMIGRATION

* * * * * * *

CHAPTER 4—INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

* * * * * * *

INSPECTION BY IMMIGRATION OFFICERS; EXPEDITED REMOVAL OF INADMISSIBLE ARRIVING ALIENS; REFERRAL FOR HEARING

SEC. 235. (a) INSPECTION.—
(1) * * *

* * * * * * *

(4) WITHDRAWAL OF APPLICATION FOR ADMISSION.—An alien applying for admission may, in the discretion of the ⟦Attorney General⟧ *Secretary of Homeland Security* and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

* * * * * * *

(b) INSPECTION OF APPLICANTS FOR ADMISSION.—
(1) INSPECTION OF ALIENS ARRIVING IN THE UNITED STATES AND CERTAIN OTHER ALIENS WHO HAVE NOT BEEN ADMITTED OR PAROLED.—
(A) SCREENING.—

[87] *Hernandez-Carrera,* 547 F.3d at 1254 (*quoting Zadvydas,* 533 U.S. at 694 and *Mathews v. Diaz,* 426 U.S. 67, 78 (1976)).

(i) * * *

* * * * * * *

(iii) APPLICATION TO CERTAIN OTHER ALIENS.—

(I) IN GENERAL.—The ⟦Attorney General⟧ *Secretary of Homeland Security* may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the ⟦Attorney General⟧ *Secretary of Homeland Security*. Such designation shall be in the sole and unreviewable discretion of the ⟦Attorney General⟧ *Secretary of Homeland Security* and may be modified at any time.

* * * * * * *

(B) ASYLUM INTERVIEWS.—

(i) CONDUCT BY ASYLUM OFFICERS.—An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the ⟦Attorney General⟧ *Secretary of Homeland Security*.

* * * * * * *

(iii) REMOVAL WITHOUT FURTHER REVIEW IF NO CREDIBLE FEAR OF PERSECUTION.—

(I) * * *

* * * * * * *

(III) REVIEW OF DETERMINATION.—The ⟦Attorney General⟧ *Secretary of Homeland Security* shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

* * * * * * *

(iv) INFORMATION ABOUT INTERVIEWS.—The ⟦Attorney General⟧ *Secretary of Homeland Security* shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the ⟦Attorney General⟧ *Secretary of Homeland Security*. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

* * * * * * *

(C) LIMITATION ON ADMINISTRATIVE REVIEW.—Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the [Attorney General] *Secretary of Homeland Security* shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 207, or to have been granted asylum under section 208.

* * * * * * *

(2) INSPECTION OF OTHER ALIENS.—

(A) * * *

* * * * * * *

(C) TREATMENT OF ALIENS ARRIVING FROM CONTIGUOUS TERRITORY.—In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Attorney General] *Secretary of Homeland Security* may return the alien to that territory pending a proceeding under section 240.

* * * * * * *

(c) REMOVAL OF ALIENS INADMISSIBLE ON SECURITY AND RELATED GROUNDS.—

(1) REMOVAL WITHOUT FURTHER HEARING.—If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 212(a)(3), the officer or judge shall—

(A) * * *

(B) report the order of removal to the [Attorney General] *Secretary of Homeland Security*; and

(C) not conduct any further inquiry or hearing until ordered by the [Attorney General] *Secretary of Homeland Security*.

(2) REVIEW OF ORDER.—(A) The [Attorney General] *Secretary of Homeland Security* shall review orders issued under paragraph (1).

(B) If the [Attorney General] *Secretary of Homeland Security*—

(i) * * *

* * * * * * *

the [Attorney General] *Secretary of Homeland Security* may order the alien removed without further inquiry or hearing by an immigration judge.

(C) If the [Attorney General] *Secretary of Homeland Security* does not order the removal of the alien under subparagraph (B), the [Attorney General] *Secretary of Homeland Se-*

curity shall specify the further inquiry or hearing that shall be conducted in the case.

(3) SUBMISSION OF STATEMENT AND INFORMATION.—The alien or the alien's representative may submit a written statement and additional information for consideration by the [Attorney General] *Secretary of Homeland Security*.

(d) AUTHORITY RELATING TO INSPECTIONS.—

(1) * * *

* * * * * * *

(3) ADMINISTRATION OF OATH AND CONSIDERATION OF EVIDENCE.—The [Attorney General] *Secretary of Homeland Security* and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service.

(4) SUBPOENA AUTHORITY.—(A) The [Attorney General] *Secretary of Homeland Security* and any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States.

* * * * * * *

(e) LENGTH OF DETENTION.—

(1) Notwithstanding any other provision of this section, an alien may be detained under this section, without limitation, until the alien is subject to an final order of removal.

(2) The length of detention under this section shall not affect any detention under section 241.

(f) JUDICIAL REVIEW.—Without regard to the place of confinement, judicial review of any action or decision made pursuant to subsection (e) shall be available exclusively in a habeas corpus proceeding instituted in the United States District Court for the District of Columbia and only if the alien has exhausted all administrative remedies (statutory and nonstatutory) available to the alien as of right.

APPREHENSION AND DETENTION OF ALIENS

SEC. 236. (a) ARREST, DETENTION, AND RELEASE.—On a warrant issued by the [Attorney General] *Secretary of Homeland Security*, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, *the Secretary of Homeland Security or* the Attorney General—

(1) * * *

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the [Attorney General] *Secretary of Homeland Security*; or

(B) [conditional parole] *recognizance*; but

* * * * * * *

(b) REVOCATION OF BOND OR PAROLE.—The [Attorney General] *Secretary of Homeland Security* at any time may revoke a bond or [parole] *recognizance* authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) DETENTION OF CRIMINAL ALIENS.—

(1) CUSTODY.—The [Attorney General] *Secretary of Homeland Security* shall take into custody any alien who—

(A) * * *

* * * * * * *

[when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.]

any time after the alien is released, without regard to whether an alien is released related to any activity, offense, or conviction described in this paragraph; to whether the alien is released on parole, supervised release, or probation; or to whether the alien may be arrested or imprisoned again for the same offense. If the activity described in this paragraph does not result in the alien being taken into custody by any person other than the Secretary, then when the alien is brought to the attention of the Secretary or when the Secretary determines it is practical to take such alien into custody, the Secretary shall take such alien into custody.

(2) RELEASE.—The [Attorney General] *Secretary of Homeland Security* may release an alien described in paragraph (1) only if the [Attorney General] *Secretary of Homeland Security* decides pursuant to section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the [Attorney General] *Secretary of Homeland Security* that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) IDENTIFICATION OF CRIMINAL ALIENS.—(1) The [Attorney General] *Secretary of Homeland Security* shall devise and implement a system—

(A) * * *

* * * * * * *

(e) JUDICIAL REVIEW.—The [Attorney General's] *Secretary of Homeland Security's* discretionary judgment regarding the application of this section shall not be subject to review. No court may set

aside any action or decision by the [Attorney General] *Secretary of Homeland Security* under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole. *Without regard to the place of confinement, judicial review of any action or decision made pursuant to subsection (f) shall be available exclusively in a habeas corpus proceeding instituted in the United States District Court for the District of Columbia and only if the alien has exhausted all administrative remedies (statutory and nonstatutory) available to the alien as of right.*

(f) LENGTH OF DETENTION.—

(1) Notwithstanding any other provision of this section, an alien may be detained under this section for any period, without limitation, until the alien is subject to a final order of removal.

(2) The length of detention under this section shall not affect detention under section 241 of this Act.

(g) ADMINISTRATIVE REVIEW.—

(1) The Attorney General's review of the Secretary's custody determinations under section 236(a) shall be limited to whether the alien may be detained, released on bond (of at least $1,500 with security approved by the Secretary), or released with no bond.

(2) The Attorney General's review of the Secretary's custody determinations for the following classes of aliens:

(A) Aliens in exclusion proceedings.

(B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5).

(C) Aliens described in sections 212(a)(3) and 237(a)(4).

(D) Aliens described in section 236(c).

(E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Public Law 104–132); is limited to a determination of whether the alien is properly included in such category.

* * * * * * *

DETENTION AND REMOVAL OF ALIENS ORDERED REMOVED

SEC. 241. (a) DETENTION, RELEASE, AND REMOVAL OF ALIENS ORDERED REMOVED.—

(1) REMOVAL PERIOD.—

(A) IN GENERAL.—Except as otherwise provided in this section, when an alien is ordered removed, the [Attorney General] *Secretary of Homeland Security* shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

[(B) BEGINNING OF PERIOD.—The removal period begins on the latest of the following:

[(i) The date the order of removal becomes administratively final.

[(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

[(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

[(C) SUSPENSION OF PERIOD.—The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.]

(B) BEGINNING OF PERIOD.—The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the alien is not in the custody of the Secretary on the date the order of removal becomes administratively final, the date the alien is taken into such custody.

(iii) If the alien is detained or confined (except under an immigration process) on the date the order of removal becomes administratively final, the date the alien is taken into the custody of the Secretary, after the alien is released from such detention or confinement.

(C) SUSPENSION OF PERIOD.—

(i) EXTENSION.—The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if—

(I) the alien fails or refuses to make all reasonable efforts to comply with the removal order, or to fully cooperate with the Secretary's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal that is subject to an order of removal;

(II) a court, the Board of Immigration Appeals, or an immigration judge orders a stay of removal of an alien who is subject to an administratively final order of removal; or

(III) the Secretary transfers custody of the alien pursuant to law to another Federal agency or a State or local government agency in connection with the official duties of such agency.

(ii) RENEWAL.—If the removal period has been extended under clause (C)(i), a new removal period shall be deemed to have begun on the date—

(I) the alien makes all reasonable efforts to comply with the removal order, or to fully cooperate with the Secretary's efforts to establish the alien's identity and carry out the removal order;

(II) the stay of removal is no longer in effect; or

(III) the alien is returned to the custody of the Secretary.

(2) DETENTION.—During the removal period, the [Attorney General] *Secretary of Homeland Security* shall detain the alien. Under no circumstance during the removal period shall the [Attorney General] *Secretary of Homeland Security* release an alien who has been found inadmissible under section 212(a)(2) or 212(a)(3)(B) or deportable under section 237(a)(2) or 237(a)(4)(B).

(3) SUPERVISION AFTER 90-DAY PERIOD.—If the alien does not leave or is not removed within the removal period *or is not detained pursuant to paragraph (6) of this subsection*, the alien, pending removal, shall be subject to supervision under regulations prescribed by the [Attorney General] *Secretary of Homeland Security*. The regulations shall include provisions requiring the alien—

(A) * * *

* * * * * * *

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the [Attorney General] *Secretary of Homeland Security* considers appropriate; and

[(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.]

(D) to obey reasonable restrictions on the alien's conduct or activities that the Secretary prescribes for the alien, in order to prevent the alien from absconding, for the protection of the community, or for other purposes related to the enforcement of the immigration laws.

(4) ALIENS IMPRISONED, ARRESTED, OR ON PAROLE, SUPERVISED RELEASE, OR PROBATION.—

(A) IN GENERAL.—Except as provided in section 343(a) of the Public Health Service Act (42 U.S.C. 259(a)) and [paragraph (2)] *subparagraph (B)*, the [Attorney General] *Secretary of Homeland Security* may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) EXCEPTION FOR REMOVAL OF NONVIOLENT OFFENDERS PRIOR TO COMPLETION OF SENTENCE OF IMPRISONMENT.—The [Attorney General] *Secretary of Homeland Security* is authorized to remove an alien in accordance with applicable procedures under this Act before the alien has completed a sentence of imprisonment—

(i) * * *

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 101(a)(43)(C) or (E)), (II) the removal is appropriate and in the best interest of the State, and (III) submits

a written request to the [Attorney General] *Secretary of Homeland Security* that such alien be so removed.

* * * * * * *

(5) REINSTATEMENT OF REMOVAL ORDERS AGAINST ALIENS ILLEGALLY REENTERING.—If the [Attorney General] *Secretary of Homeland Security* finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

[(6) INADMISSIBLE OR CRIMINAL ALIENS.—An alien ordered removed who is inadmissible under section 212, removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).]

(6) ADDITIONAL RULES FOR DETENTION OR RELEASE OF CERTAIN ALIENS.—

(A) DETENTION REVIEW PROCESS FOR COOPERATIVE ALIENS ESTABLISHED.—For an alien who is not otherwise subject to mandatory detention, who has made all reasonable efforts to comply with a removal order and to cooperate fully with the Secretary of Homeland Security's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or other documents necessary to the alien's departure, and who has not conspired or acted to prevent removal, the Secretary shall establish an administrative review process to determine whether the alien should be detained or released on conditions. The Secretary shall make a determination whether to release an alien after the removal period in accordance with subparagraph (B). The determination shall include consideration of any evidence submitted by the alien, and may include consideration of any other evidence, including any information or assistance provided by the Secretary of State or other Federal official and any other information available to the Secretary of Homeland Security pertaining to the ability to remove the alien.

(B) AUTHORITY TO DETAIN BEYOND REMOVAL PERIOD.—

(i) IN GENERAL.—The Secretary of Homeland Security, in the exercise of the Secretary's discretion, may continue to detain an alien for 90 days beyond the removal period (including any extension of the removal period as provided in paragraph (1)(C)).

(ii) SPECIFIC CIRCUMSTANCES.—The Secretary of Homeland Security, in the exercise of the Secretary's discretion, may continue to detain an alien beyond the 90 days authorized in clause (i)—

(I) until the alien is removed, if the Secretary determines that there is a significant likelihood that the alien—

(aa) will be removed in the reasonably foreseeable future; or

(bb) would be removed in the reasonably foreseeable future, or would have been removed, but for the alien's failure or refusal to make all reasonable efforts to comply with the removal order, or to cooperate fully with the Secretary's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or other documents necessary to the alien's departure, or conspires or acts to prevent removal;

(II) until the alien is removed, if the Secretary of Homeland Security certifies in writing—

(aa) in consultation with the Secretary of Health and Human Services, that the alien has a highly contagious disease that poses a threat to public safety;

(bb) after receipt of a written recommendation from the Secretary of State, that release of the alien is likely to have serious adverse foreign policy consequences for the United States;

(cc) based on information available to the Secretary of Homeland Security (including classified, sensitive, or national security information, and without regard to the grounds upon which the alien was ordered removed), that there is reason to believe that the release of the alien would threaten the national security of the United States; or

(dd) that the release of the alien will threaten the safety of the community or any person, conditions of release cannot reasonably be expected to ensure the safety of the community or any person, and either (AA) the alien has been convicted of one or more aggravated felonies (as defined in section 101(a)(43)(A)) or of one or more crimes identified by the Secretary of Homeland Security by regulation, or of one or more attempts or conspiracies to commit any such aggravated felonies or such identified crimes, if the aggregate term of imprisonment for such attempts or conspiracies is at least 5 years; or (BB) the alien has committed one or more crimes of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) and, because of a mental condition or personality disorder and behavior associated with that

condition or disorder, the alien is likely to engage in acts of violence in the future; or

(ee) that the release of the alien will threaten the safety of the community or any person, conditions of release cannot reasonably be expected to ensure the safety of the community or any person, and the alien has been convicted of at least one aggravated felony (as defined in section 101(a)(43)); or

(III) pending a certification under subclause (II), so long as the Secretary of Homeland Security has initiated the administrative review process not later than 30 days after the expiration of the removal period (including any extension of the removal period, as provided in paragraph (1)(C)).

(C) RENEWAL AND DELEGATION OF CERTIFICATION.—

(i) RENEWAL.—The Secretary of Homeland Security may renew a certification under subparagraph (B)(ii)(II) every 6 months, after providing an opportunity for the alien to request reconsideration of the certification and to submit documents or other evidence in support of that request. If the Secretary does not renew a certification, the Secretary may not continue to detain the alien under subparagraph (B)(ii)(II).

(ii) DELEGATION.—Notwithstanding section 103, the Secretary of Homeland Security may not delegate the authority to make or renew a certification described in item (bb), (cc), or (ee) of subparagraph (B)(ii)(II) below the level of the Assistant Secretary for Immigration and Customs Enforcement.

(iii) HEARING.—The Secretary of Homeland Security may request that the Attorney General or the Attorney General's designee provide for a hearing to make the determination described in item (dd)(BB) of subparagraph (B)(ii)(II).

(D) RELEASE ON CONDITIONS.—If it is determined that an alien should be released from detention by a Federal court, the Board of Immigration Appeals, or if an immigration judge orders a stay of removal, the Secretary of Homeland Security, in the exercise of the Secretary's discretion, may impose conditions on release as provided in paragraph (3).

(E) REDETENTION.—The Secretary of Homeland Security, in the exercise of the Secretary's discretion, without any limitations other than those specified in this section, may again detain any alien subject to a final removal order who is released from custody, if removal becomes likely in the reasonably foreseeable future, the alien fails to comply with the conditions of release, or to continue to satisfy the conditions described in subparagraph (A), or if, upon reconsideration, the Secretary determines that the alien can be detained under subparagraph (B). This section shall apply to any alien returned to custody pursuant to this subparagraph, as if the removal period terminated on the day of the redetention.

(7) EMPLOYMENT AUTHORIZATION.—No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the [Attorney General] *Secretary of Homeland Security* makes a specific finding that—

(A) * * *

* * * * * * *

(8) JUDICIAL REVIEW.—Without regard to the place of confinement, judicial review of any action or decision pursuant to this section shall be available exclusively in habeas corpus proceedings instituted in the United States District Court for the District of Columbia, and only if the alien has exhausted all administrative remedies (statutory and regulatory) available to the alien as of right.

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Dissenting Views

I. INTRODUCTION

The Due Process Clause of the Fifth Amendment to the Constitution states: "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law."[1] For more than 120 years, the Supreme Court has recognized that this provision "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[2]

The Supreme Court, in *Zadvydas v. Davis,* observed that "[f]reedom from imprisonment—from government custody, detention or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."[3] In discussing the serious constitutional concerns that would be raised if a statute permitted the indefinite detention of civil immigration detainees, the Court in that case noted that it has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."[4] The Court further observed, "In cases in which preventive detention is of potentially indefinite duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger."[5]

Rather than heed the Supreme Court's constitutional warnings, H.R. 1932, the "Keep Our Communities Safe Act of 2011," authorizes the indefinite and possibly permanent detention of civil immigration detainees with little or no procedural protections. At the Committee's markup of this legislation, the majority recognized that portions of H.R. 1932 may contravene the Supreme Court's reasoning in *Zadvydas,* but cynically welcomed a constitutional challenge to the bill in light of the justices who now comprise the

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[1] U.S. Const. amend. V.

[2] Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[3] *Id.* at 690.

[4] *Id.* at 691.

[5] *Id.* at 692.

Court.[6] Without question, H.R. 1932 is a direct attack on this decision and on the long-standing body of constitutional law that supported the Court's holding. Moreover, although the chief complaint of the bill's sponsors is that certain countries refuse to accept, or unreasonably delay the return of, their nationals, the bill does absolutely nothing to solve that problem.

Additionally, although the bill's sponsor claims that "the point of the bill is to detain dangerous and violent illegal immigrants and those who are a threat to our national security,"[7] H.R. 1932 goes much further than that, as evidenced by the debate at the Committee's markup.[8] H.R. 1932 clearly authorizes, and in some cases mandates, the prolonged detention of asylum seekers, lawful permanent residents, aliens who entered without inspection, and other immigrants who pose no danger to the public, with no limit in time and few procedural protections. Authorizing or mandating prolonged detention of persons who pose no danger to the public is a waste of scarce resources. Moreover, because our detention capacity is vast, but finite, expanding detention to such populations will interfere with our ability to detain persons who pose an actual danger to the public and will make us less safe.

Finally, the legislation ignores traditional rules governing *habeas corpus* petitions and consolidates virtually all such petitions filed by immigration detainees into the U.S. District Court for the District of Columbia. According to the Judicial Conference of the United States, the American Bar Association, and the Courts, Lawyers and Administration of Justice Section of the District of Columbia Bar, such a move will seriously undermine the ability of persons to challenge the lawfulness of their detention and will bring the already overburdened D.C. District Court to its knees.[9]

H.R. 1932 is opposed by a broad cross section of constituencies, including constitutional law scholars, religious organizations, civil liberties and human rights groups, and refugee and immigrants right advocates.[10]

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[6] Unofficial Tr. of Markup of H.R. 1932, the Keep Our Communities Safe Act of 2011, by the H. Comm. on Judiciary, 112th Cong. 73–78 (2011) [hereinafter Markup Transcript], available at http://judiciary.house.gov/hearings/pdf/7%2014%2011%20HR%201932%20HR%202480%20HR%201002.pdf.

[7] *Id.* at 25 (statement of Rep. Lamar Smith (R–TX)).

[8] *See* Markup Transcript at 107.

[9] Letter from Samuel W. Seymour, President, New York City Bar Association, to Rep. John Boehner & Rep. Nancy Pelosi (Sept. 20, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff); Letter from Fritz Mulhauser, Co-Chair, & Sean Staples, Co-Chair, Courts, Lawyers and the Administration of Justice Section, District of Columbia Bar, to Rep. Lamar Smith *et al.* (Aug. 3, 2011) [hereinafter DC Bar Letter] (on file with the H. Comm. on the Judiciary, Democratic Staff); Letter from Stephen N. Zack, President, American Bar Association, to Rep. Lamar Smith & Rep. John Conyers, Jr. (June 30, 2011) [hereinafter ABA Letter] (on file with the H. Comm. on the Judiciary, Democratic Staff); Letter from James C. Duff, Secretary, Judicial Conference of the United States, to Rep. Lamar Smith & Rep. John Conyers, Jr. (June 1, 2011) [hereinafter Judicial Conference Letter] (on file with the H. Comm. on the Judiciary, Democratic Staff). Although Chairman Smith agreed after the bill's markup to remove all three *habeas corpus* consolidation provisions from H.R. 1932 before any further action is taken on the legislation, the reported version of the bill still includes the objectionable provisions. As a result, these views will discuss the reasons such provisions are objectionable and must not become law.

[10] Michael Tan, *Locking Up Immigrants Forever; The "Keep Our Communities Safe Act" (H.R. 1932)*, Immigration Policy Center (Sept. 2011), *available at* http://www.immigrationpolicy.org/special-reports/locking-immigrants-forever-keep-our-communities-safe-act%E2%80%9D-hr-1932; Letter from Human Rights Watch, *et al.*, to Rep. John Boehner & Rep. Nancy Pelosi (Sept. 30, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff); *Keep Our Communities Safe Act of 2011: Hearing on H.R. 1932 Before the H. Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary,* 112th Cong. (2011) [hereinafter H.R. 1932 Hearing] (statement of the American Immigration Lawyers Association); *id.* (joint statement of Human Rights Organizations); *id.* (statement of Human Rights First); *id.* (statement of Lutheran Immigration and Refugee Services); DC Bar Letter, *supra* note 9; Letter from Faith-Based Organiza-

For these reasons, and those discussed below, we respectfully dissent and urge our colleagues to reject this dangerous and unconstitutional legislation.

II. BACKGROUND

In the context of civil immigration detention, courts have separately addressed the problems of "indefinite detention," which refers to individuals who are subject to final orders of removal, but who are not likely to be removed in the reasonably foreseeable future, and "prolonged detention," which refers to the lengthy detention of individuals who are not yet subject to final orders of removal. H.R. 1932 amends the Immigration and Nationality Act (INA) to expand both forms of detention without meaningful procedural protections and to restrict the ability of civil immigration detainees to challenge the legality of their detention in Federal court.

A. Indefinite Detention

In *Zadvydas v. Davis,* the U.S. Supreme Court held that indefinite detention of a non-citizen who has been ordered removed, but whose removal is not significantly likely to occur in the reasonably foreseeable future, would raise serious constitutional concerns. The Court held further that preventive detention based on dangerousness is authorized only when limited to specially dangerous persons and only when accompanied by strong procedural protections. The Court noted that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent," and that "[f]reedom from imprisonment—from government custody, detention or other forms of physical restraint—lies at the heart of the liberty that Clause protects." [11]

To avoid reaching that constitutional question, the Court construed the immigration laws to authorize detention only to the point where "removal is no longer reasonably foreseeable." [12] The Court held that for persons who have been ordered deported, immigration authorities have a presumptively reasonable 6-month period in which to accomplish all removals. If, after 6 months, the

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tions and Faith Leaders, to Members of Congress (July 12, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff); ABA Letter, *supra* note 9; Judicial Conference Letter, *supra* note 9; Letter from Victoria Méndez, President, Cuban American Bar Association, to Rep. Lamar Smith & Rep. John Conyers, Jr. (May 23, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff); Letter from Antonio M. Ginatta, Advocacy Director, U.S. Program, Human Rights Watch, to Rep. Elton Gallegly & Rep. Zoe Lofgren (May 23, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff); Letter from Immigration and Constitutional Law Professors and Scholars, to Rep. Lamar Smith and Rep. John Conyers, Jr. (May 23, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff); Letter from America's Voice Education Fund, *et al.* to Rep. Elton Gallegly & Rep. Zoe Lofgren (May 23, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff); Letter from Mary Meg McCarthy, Executive Director, National Immigrant Justice Center, to Rep. Elton Gallegly & Rep. Zoe Lofgren (May 23, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff); Letter from Doua Thor, Executive Director, Southeast Asia Resource Action Center, to Rep. Elton Gallegly & Rep. Zoe Lofgren, May 23, 2011 (on file with the H. Comm. on the Judiciary, Democratic Staff); Letter from Mason C. Clutter, Counsel, Rule of Law Program, The Constitution Project, to Rep. Lamar Smith & Rep. John Conyers, Jr. (May 23, 2011) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff); Letter from Vincent Cochetel, Regional Representative, United Nations High Commissioner for Refugees, to Rep. Elton Gallegly & Rep. Zoe Lofgren (May 23, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff); Letter from Emily Tucker, Director of Policy and Advocacy, Detention Watch Network, to Rep. Elton Gallegly & Rep. Zoe Lofgren (May 23, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff).

[11] *Zadvydas,* 533 U.S. at 693, 690. The Court extended the holding in *Zadvydas* to persons ordered removed on grounds of inadmissibility in *Clark v. Martinez,* 543 U.S. 371 (2005).

[12] *Zadvydas,* 533 U.S. at 699.

government determines that the detainee's removal is not significantly likely to occur in the reasonably foreseeable future, the Department of Homeland Security (DHS) must release the detainee on conditions of supervision.[13]

The Supreme Court's decision in *Zadvydas* reversed a long-standing policy of indefinitely detaining persons from countries that have historically obstructed our efforts to remove their nationals from the United States. This included Laos, Vietnam, Cuba, Cambodia, and several other countries. It also affected stateless persons such as Kestutis Zadvydas, who was born of Lithuanian parents in a displaced persons camp in Germany in 1948 and was a citizen of neither Lithuania, nor Germany.[14]

In the aftermath of *Zadvydas,* DHS promulgated regulations requiring post-order custody reviews. Under these regulations, if DHS cannot remove a person within the 90-day removal period established in the INA,[15] the government must provide a post-order custody review to determine if the person can be released.[16] If the person remains in detention 6 months after the removal order becomes final, another custody review must be conducted.[17] The regulations provide for notice and an opportunity to submit written materials in support of release. A separate provision in the law also allows DHS to continue holding a person if that person is obstructing the government's efforts to facilitate removal.[18]

The Ninth Circuit Court of Appeals recently held that the Due Process Clause requires more robust procedural protections than those provided in the regulations.[19] The regulations do not require an in-person hearing before a neutral arbiter, such as an Immigration Judge, and they require the detainee to prove that he or she is not a flight risk or a danger to the community, rather than requiring DHS to prove that continued deprivation of liberty is justified.

If a person cooperates in the government's removal efforts, the regulations permit preventive, indefinite detention beyond the point when civil immigration detention no longer serves its purpose of helping to effectuate removal only in limited circumstances involving threats to national security and public safety.[20] If DHS invokes such grounds based upon a finding that the alien is "specially dangerous," the detainee must have a hearing before an Immigration Judge at which DHS bears the burden of proving by clear and convincing evidence the appropriateness of continued detention.[21]

The Supreme Court has not yet ruled on whether the regulations permitting indefinite detention on these special grounds are permissible, but the circuit courts are split on that question. Although the Tenth Circuit Court of Appeals has approved the regulations, the Fifth and Ninth Circuits have struck them down.[22]

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[13] *Id.* at 701.
[14] *Id.* at 684.
[15] INA § 241(a)(1).
[16] 8 C.F.R. § 241.4.
[17] *Id.*
[18] *Id.*
[19] Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011).
[20] 8 C.F.R. § 241.14.
[21] 8 C.F.R. § 241.14(f), (g), (h), (i).
[22] *Cf.* Hernandez-Carrera v. Carlson, 547 F.3d 1237 (10th Cir. 2008) *with* Tran v. Mukasey, 515 F.3d 478 (5th Cir. 2008); Thai v. Ashcroft, 366 F.3d 790 (9th Cir. 2004).

B. Prolonged and Mandatory Detention

Under the current mandatory detention statute, Federal immigration officials are required to detain certain persons during their removal proceedings and cannot authorize their release on bond.[23] Mandatory detention is an exception to the general rule, which gives U.S. Immigration and Customs Enforcement (ICE) officials the discretion to detain people in removal proceedings and the discretion to release them on bond or conditional parole pending the completion of their removal proceedings.[24] Under the general rule, the amount of bond will be determined based on the person's risk of flight or danger to the community, and the person has the right to a bond hearing before an Immigration Judge on this issue. People subject to mandatory detention under section 236(c) of the INA do not get a bond hearing. Instead, they must remain in detention while their removal case is pending, even if they present no danger to the community or risk of flight.

The Supreme Court has affirmed the constitutionality of mandatory detention under section 236(c), holding that detention can be required for certain persons for "the brief period necessary" for the conclusion of removal proceedings."[25] The record before the Court at that time indicated that 85 percent of cases involving mandatory detention under section 236(c) are completed within an average of 47 days.[26]

Based upon the Court's holding, lower courts have considered whether the prolonged detention of persons detained far beyond the "brief period necessary" for completion of removal proceedings raises serious constitutional concerns.[27] In *Nadarajah v. Gonzales,* for instance, the Ninth Circuit granted a *habeas corpus* petition and ordered release of a Sri Lankan survivor of torture who requested asylum upon arriving in the United States.[28] The man was detained for almost five years, notwithstanding the fact that an asylum officer found that he possessed a credible fear of persecution; an Immigration Judge twice granted his request for asylum and relief under the Convention Against Torture; and the Board of Immigration Appeals affirmed the Immigration Judge's grant of asylum. Similarly, Baskaran Balasundaram was a farmer in Sri Lanka who fled his homeland after suffering torture and persecu-

[23] INA § 236(c).
[24] INA § 236(a).
[25] Demore v. Kim, 538 U.S. 510, 513 (2003).
[26] *Id.* at 529.
[27] *See, e.g.,* Diop v. ICE/Homeland Security, No. 10–1113, slip op. at 16, 20 (3d Cir. Sept. 1, 2011) (holding that three-year long detention without a bond hearing violated due process and construing INA § 236(c) as only authorizing detention "for a reasonable amount of time" before the government bears the burden of proving the necessity of continued detention at an individualized bond hearing; Casas-Castrillon v. DHS, 535 F.3d 942, 950 (9th Cir. 2008); Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) (both construing INA § 236(c) as only authorizing detention for "expeditious" removal proceedings in order to avoid the serious constitutional problem of prolonged mandatory detention); Ly v. Hansen, 351 F.3d 263, 271–72 (6th Cir. 2003) (construing INA § 236(c) as only authorizing mandatory detention for the period of time reasonably needed to conclude proceedings promptly); Welch v. Ashcroft, 293 F.3d 213, 224 (4th Cir. 2002) (holding that "[f]ourteen months of incarceration . . . of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights" to be impermissible); Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455, 468–71 (D. Mass. 2010) (construing INA § 236(c) to implicitly require that removal proceedings be completed within a reasonable period of time; if not, detention can only continue after an individualized determination of flight risk and dangerousness); Alli v. Decker, 644 F. Supp. 2d 535, 539 (M.D. Pa. 2009) (noting "the growing consensus . . . throughout the federal courts" that prolonged mandatory detention raises serious constitutional problems).
[28] Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006).

tion at the hands of the Tamil Tigers.[29] Detained upon his arrival in the country, Mr. Balasundaram was detained for 7 months before an Immigration Judge granted him asylum. Nevertheless, his detention continued for 17 more months while ICE pursued an administrative appeal of his case.[30] Both men remained detained long after the grant of asylum only because DHS appealed their victories, and under the regulations it was DHS, rather than the Immigration Judge, who had authority to grant release.

Prolonged detention affects not only arriving asylum seekers, but also longtime lawful permanent residents. Warren Joseph, a lawful permanent resident and the father of five United States citizen children, is a decorated veteran of the first Gulf War.[31] After struggling with Post Traumatic Stress Disorder, Mr. Joseph was convicted in 2001 of unlawfully purchasing a handgun. He fully cooperated with the Federal investigation and was given no jail time for this offense, but two years later he violated his parole by moving into his mother's house without providing notice to his probation officer. Upon completing his 6-month sentence, he was placed in removal proceedings and transferred to ICE custody. For more than three years, Mr. Joseph was detained by ICE pursuant to INA section 236(c), and was never provided a bond hearing or any independent review of the appropriateness or necessity of his continued detention. It was only when a Federal judge ordered a hearing on the appropriateness of his detention and the Immigration Judge granted relief than ICE decided to release him from custody.[32]

III. DESCRIPTION OF THE BILL

A. Indefinite Detention—Section 2(a)

Section 2(a)(6) of H.R. 1932 authorizes indefinite, and possibly permanent, detention of persons who have been ordered removed and have cooperated with efforts to remove them. Unlike existing regulations that already authorize the continued detention of persons who are "specially dangerous" based upon a past conviction for a crime of violence and the existence of a mental condition that makes future acts of violence likely, section 2(a)(6) applies broadly even to persons who are not "specially dangerous." The bill authorizes indefinite detention for persons who have been convicted of a single aggravated felony, which can include minor, non-violent offenses. Moreover, whereas the regulations attempt to provide the strong procedural protections required by the Supreme Court for such preventive detention, section 2(a)(6) requires nothing more than a discretionary certification of dangerousness by the Secretary of Homeland Security and periodic administrative review.

Section 2(a)(7) requires that all *habeas corpus* petitions challenging the legality of post-order detention be filed in the U.S. District Court for the District of Columbia. In general, *habeas corpus*

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[29] H.R. 1932 Hearing (statement of Ahilan Arulanantham, Deputy Legal Director, American Civil Liberties Union of Southern California), *supra* note 10.

[30] Maria Sacchetti, *Man Held As Security Risk Released; Says He was Tortured in Sri Lanka,* BOSTON GLOBE, July 10, 2010.

[31] Tina Kelley, *Veteran Facing Deportation Wins Hearing for Freedom,* N.Y. TIMES, May 23, 2007; *see also* H.R. 1932 Hearing (statement of Ahilan Arulanantham, Deputy Legal Director, American Civil Liberties Union of Southern California), *supra* note 10.

[32] H.R. 1932 Hearing (statement of Ahilan Arulanantham, Deputy Legal Director, American Civil Liberties Union of Southern California), *supra* note 10.

petitions traditionally have been brought in the district court where the detainee is located.

B. Prolonged and Mandatory Detention—Section 2(b)

Although the sponsor of H.R. 1932 states that it is intended only to protect Americans from "dangerous criminal immigrants,"[33] section 2(b)(2) of the bill authorizes the prolonged detention throughout removal proceedings of arriving asylum seekers and aliens who entered without inspection who have committed no crime and who pose no danger to the public and lawful permanent residents with minor convictions who are returning from foreign travel.[34] Section 2(b)(2) also provides that the time an arriving alien spends in detention during removal proceedings "shall not affect" any determination about the reasonable length of detention following a final order of removal.

Sections 2(b)(2) and 2(b)(3) limit challenges to the lawfulness of pre-order detention to *habeas corpus* proceedings filed in the U.S. District Court for the District of Columbia.

Section 2(b)(4) makes a significant change to INA section 236, the general pre-order immigration detention statute. As amended, section 2(b)(4) provides that all non-citizens subject to detention under INA § 236 "may be detained . . . without limitation, until the alien is subject to a final order of removal."

Section 2(b)(5) amends INA section 236(c), the mandatory detention statute, to require detention "any time after the alien is released, without regard to whether the release is related to any activity, offense, or conviction described in this paragraph." This expands the scope of mandatory detention to include persons who have been at liberty for years and leading productive lives on the basis of old criminal offenses, rather than applying mandatory detention to non-citizens at the time of their release from sentences for designated crimes. It also adds a new provision stating that "[i]f the [criminal] activity . . . does not result in the alien being taken into custody," DHS "shall" take custody "when the presence of the alien in the United States is brought to the attention of [DHS] or when [DHS] determines it is practical to take such alien into custody." In addition, section 2(b)(5) amends INA section 236(c) such that, in certain instances, mere "activity" will trigger mandatory detention, regardless of whether that "activity" gives rise to a formal charge, much less a conviction and criminal custody.

Section 2(b)(6) restricts the Attorney General's review over custody under INA section 236(a) to three issues: "whether the alien may be detained, released on bond . . . or released with no bond." This provision prohibits Immigration Judges from setting conditions of release such as electronic monitoring, supervision appointments, curfews, and travel restrictions.

Section 2(b)(6) also amends INA section 236 largely to codify regulations restricting the Attorney General's review of custody for certain classes of individuals to "a determination of whether the alien is properly included in such category." The provision expressly bars Immigration Judges from making bond determinations for persons "described in" the mandatory detention statute and im-

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[33] H.R. 1932 Hearing (statement of Rep. Lamar Smith), *supra* note 10.

[34] *See* 8 C.F.R. § 1001.1(q); § 235.3(b)(5) (classifying lawful permanent residents who return from foreign travel as "arriving aliens").

plicitly bars Immigration Judges from making bond determinations for asylum seekers and other arriving aliens detained pursuant to INA section 235.

IV. PRINCIPAL CONCERNS WITH H.R. 1932

A. H.R. 1932 Would Unconstitutionally Permit Indefinite Detention of Broad Categories of Immigrants with Virtually No Procedural Protections

As explained above, the Supreme Court in *Zadvydas* reviewed the strong due process protections that would be implicated by a statute authorizing indefinite detention of immigrants with final orders of removal who are cooperating with removal efforts, but who are not likely to be removed in the reasonably foreseeable future. The Supreme Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."[35] In *United States v. Salerno,* the Supreme Court approved preventive detention of pre-trial criminal detainees under the Bail Reform Act because it involved stringent time limits, was reserved for the most serious of crimes, and required the government to prove dangerousness by clear and convincing evidence at a hearing before a Federal district court judge.[36] Moreover, where preventive detention based on dangerousness may be indefinite in duration, the Court has required more than just special dangerousness; the Court has required proof of an additional factor, such as mental illness that makes it difficult, or impossible, for the person to control his dangerous behavior.[37]

H.R. 1932 is unconstitutional because it authorizes indefinite detention for a broad set of persons without regard for special dangerousness. The bill permits ICE to indefinitely detain a person convicted of one "aggravated felony." As defined in the INA, a crime can be an aggravated felony even if it was neither aggravated, nor a felony.[38] Nearly any drug offense (including most drug possession) is an aggravated felony, and the term can include petty offenses, such as passing a bad check as well as shoplifting, with a prior conviction. Although indefinite detention on such a ground also requires the Secretary of Homeland Security or Assistant Secretary for ICE to certify that release will "threaten the safety of the community or any person" and that "conditions of release cannot reasonably be expected to ensure the safety of the community or any person," the language is so broadly written that it could unconstitutionally authorize the detention of persons who are not "specially dangerous." Moreover, the language does not require that any additional factor, such as mental illness, be present, notwithstanding the fact that such detention may be indefinite in duration.

The bill also falls woefully short of the constitutional requirements for "strong procedural protections." Under H.R. 1932, a person could be held indefinitely based upon a mere certification by a government official. The person is not entitled to a hearing before

[35] *Zadvydas,* 533 U.S. at 691.

[36] United States v. Salerno, 481 U.S. 739, 747 (1987). In *Foucha v. Louisiana,* the Court invalidated a civil commitment statute placing the burden on the detainee to prove nondangerousness at a hearing. Foucha v. Louisiana, 504 U.S. 71, 81–82 (1992).

[37] Kansas v. Hendricks, 521 U.S. 346, 358–60 (1997).

[38] *See* INA § 101(a)(43).

an Immigration Judge or even a personal interview. And although approximately 84 percent of immigration detainees are unrepresented in removal proceedings,[39] there is no requirement of appointment of counsel in connection with this preventive detention decision. As Pepperdine University School of Law Professor Bruce J. Einhorn, who was formerly an Immigration Judge and Federal prosecutor, observed when criticizing this bill, "[T]his country's fundamental notions of fairness and due process dictate that if someone is to be imprisoned, that should occur only after a full and fair hearing."[40]

And Asa Hutchinson, former Republican congressman and DHS undersecretary, made a similar point in an op-ed criticizing the bill. Hutchinson wrote: "If America stands for anything in the world (and it does), it is that our government cannot detain individuals without providing an opportunity for meaningful, independent review. This right, which belongs to the innocent and guilty alike, should also extend to the noncitizen awaiting removal to his home country."[41]

While H.R. 1932 provides no procedural protections whatsoever, current Federal law offers robust procedural protections for persons suffering from mental illness who may be involuntarily hospitalized at the end of their prison sentences on the ground that they present a danger to the public that cannot be mitigated.[42] The law provides for the appointment of counsel, requires the government to prove its case by clear and convincing evidence before a Federal district court judge, and mandates treatment if detention is warranted. States also have procedures for civil commitment and involuntary hospitalization and those procedures generally are available for persons being released from immigration detention. And as described above, current immigration regulations provide for further detention in these limited circumstances, but they require ICE to demonstrate to an Immigration Judge by clear and convincing evidence the appropriateness of further detention.[43]

While the bill's proponents would argue that the existence of *habeas corpus* provides sufficient procedural protection for persons condemned to indefinite detention by the stroke of a pen, that argument is mistaken for two principal reasons. First, as a practical matter the bill's consolidation of all immigration detention *habeas corpus* petitions into the D.C. District Court substantially diminishes the likelihood that such petitions will be handled promptly. As discussed further below, the consolidation of *habeas corpus* petitions in this bill is an attack on judicial review and it degrades The Great Writ that is protected by our Constitution and at the heart of our very democracy.

Second, because the writ of *habeas corpus* is designed to be a final stopgap to prevent the unlawful deprivation of liberty, it cannot, by itself, make constitutional an unconstitutionally designed system. For instance, the Sixth Amendment guarantees the right

[39] *The Executive Office for Immigration Review: Hearing Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary,* 111th Cong (2010) (statement of Karen T. Grisez, Chair, Commission on Immigration, American Bar Association).

[40] Bruce J. Einhorn, "Keep Our Communities Safe Act" Takes the Wrong Approach, *The Hill's Congressional Blog,* July 27, 2011.

[41] Asa Hutchinson, "Let's Use a Scalpel with Detention Bill," *Houston Chron.,* Sept. 23, 2011.

[42] 18 U.S.C. § 4246.

[43] 8 C.F.R. § 241.14

to counsel and a jury trial in certain criminal matters. If Congress enacted a law that provided for criminal punishment without the rights guaranteed by the Sixth Amendment, the fact that the prisoner would retain the right to challenge the lawfulness of his imprisonment would not save the statute from being ruled unconstitutional. Similarly, the Supreme Court has made it amply clear that preventive detention such as that authorized by H.R. 1932 is constitutional only where limited to special circumstances and only when accompanied by strong procedural protections. H.R. 1932 is unconstitutional because it falls far short of both of those requirements and the bill cannot be saved simply by the fact that detainees may still challenge their detention through writs of habeas corpus.

B. H.R. 1932 Does Absolutely Nothing To Address the Problem of Countries Who Refuse to Accept, or Significantly Delay, the Return of Persons Ordered Removed From the United States.

In addition to being unconstitutional, the bill does nothing to solve the problem that section 2(a) of the bill purports to address—namely, the problem of countries who refuse to accept, or significantly delay, the return of persons ordered removed from the United States. Except in the case of persons who are truly stateless, the issue of indefinite detention only arises when a country resists efforts to return its nationals. Some countries are worse than others in this respect. Although the United States has diplomatic relations with China and India, for instance, both countries are often very slow to help us process travel documents. Cuban nationals make up approximately one-half of all indefinite detainees in our custody at any given point and although we have returned some people to Cuba, we generally are unable to do so because we lack diplomatic ties with that country.

Current law provides only one tool by which we can influence countries that resist efforts to return their nationals. INA section 243(d) provides that if the Secretary of Homeland Security notifies the Secretary of State that a foreign government is denying or unreasonably delaying the return of one of its nationals, the Secretary of State must order consular officers to deny future immigrant visas or nonimmigrant visas, or both, until the situation is resolved.

Denying all immigrant and/or nonimmigrant visas would be an extremely serious sanction. Exercising this authority would punish Americans who have waited years to reunite with family members and businesses that have hired persons with needed skills. Because tourism is a critical industry for America, denying all nonimmigrant visas from a particular country (such as China) also would harm our Nation's economy. Finally, placing such a powerful tool in the hands of DHS—which is not principally charged with visa issuance and maintenance of diplomatic ties—raises foreign policy concerns.

At a legislative hearing on H.R. 1932 before the Subcommittee on Immigration Policy and Enforcement, we learned that ICE and the State Department recently signed a Memorandum of Agreement (MOA) that lays out a series of steps that they can take to

influence countries to accept return of their nationals.[44] Although use of INA section 243(d) is the most serious step that can be taken, the State Department can begin by issuing a démarche (a formal diplomatic statement of views) and can escalate from there. ICE testified that the MOA is already beginning to make a difference; after a recent meeting, Bangladesh processed several long-delayed cases and China has begun to make improvements.[45]

An amendment offered by Rep. Zoe Lofgren that would have provided the State Department with additional tools to address this problem, such as the authority to deny diplomatic visas to officials from recalcitrant foreign governments that refuse to timely accept return of their nationals, was ruled non-germane by the Chairman of the Judiciary Committee.[46]

C. H.R. 1932 Authorizes the Prolonged Detention—Without Even a Bond Hearing—of Aliens Who Entered Without Inspection and All Arriving Aliens, Including Asylum Seekers and Returning Lawful Permanent Residents Who Pose Neither a Danger to the Public, Nor a Flight Risk.

Although H.R. 1932 purports to be about community safety and "dangerous aliens," section 2(b) of the bill would permit the prolonged detention of persons who are neither a danger to the public, nor a flight risk. Sections 2(b)(2) and 2(b)(6) of the legislation provide that all aliens who entered without inspection and all arriving aliens may be detained without any limitation in time and that Immigration Judges shall not have jurisdiction to consider whether such aliens pose a danger to the public or a risk of flight. Under this bill, persons who request asylum at the airport and are found to have a credible fear of persecution may be detained by DHS for years without ever having an opportunity for a hearing to test the necessity or appropriateness of their detention. Such persons would still be eligible for release based on the Secretary's discretion, but they would have no right to an impartial hearing.

Detaining a person who poses neither a danger to the community, nor a risk of flight, is not only poor policy, but it is also extremely costly. According to DHS's budget justification to Congress for Fiscal Year 2012, the average daily bed rate for a person in immigration custody is $122 or nearly $45,000 per year.[47] At the legislative hearing on this bill, Chairman Smith argued that the extraordinary cost of prolonged detention is justified by the added security it provides to members of the public. He said:

> [I]t just seems to me that considering the thousands of preventable crimes that occur every year, including the murder of police officers, that we ought not be so concerned about the $45,000 a year. We ought to be more concerned about the safety and lives of innocent Americans.[48]

Nevertheless, Judiciary Republicans at the Committee's markup of this bill voted down an amendment offered by Ranking Member

[44] H.R. 1932 Hearing (statement of Gary Mead, Associate Executive Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement), *supra* note 10.
[45] *Id.*
[46] Markup Transcript, *supra* note 6, at 7–13.
[47] U.S. Department of Homeland Security, Fiscal Year 2012 Congressional Budget Justification, at 938, available at http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf.
[48] H.R. 1932 Hearing, *supra* note 10.

John Conyers, Jr. that would have stricken only the portions of the bill that authorize prolonged detention of non-criminal aliens who entered without inspection and arriving asylum seekers and returning lawful permanent residents who pose neither a danger to the public, nor a risk of flight.[49]

D. H.R. 1932 Authorizes the Mandatory Detention—Without Consideration for Bond—of Lawful Permanent Residents with Old Convictions Who Pose Neither a Danger to the Public, Nor a Flight Risk

Just as Section 2(b)(2) of the bill gives DHS complete authority to detain for a prolonged period of time certain persons who are neither a danger to the public, nor a flight risk, section 2(b)(5) expands the mandatory detention of persons, without the possibility of release on bond and without consideration of whether detention is necessary. INA section 236(c), the mandatory detention statute, already applies to persons who: (1) are inadmissible or deportable on account of certain enumerated criminal grounds of removal, and (2) have been "released" from custody for such an offense. In reviewing current law, lower courts around the country have recognized that prolonged mandatory detention with no opportunity for an independent review of the appropriateness of continued detention raises serious constitutional problems.[50]

Section 2(b)(5) greatly expands the number of people subject to mandatory detention by eliminating the requirement that the release from criminal custody be tied to the offense triggering mandatory detention. This means that mandatory detention would apply to individuals who have long since been released from criminal custody for any offense listed in the statute and who are now leading productive lives in the community. The language also eliminates the requirement that there be any prior criminal custody at all; it applies mandatory detention to mere "activity," regardless of whether that "activity" gave rise to a formal charge, much less a conviction and a prison or jail sentence.

Without the legislation, such persons would still be eligible for detention if they posed a danger to the public or represented a risk of flight. Mandating their detention, without permitting ICE or an Immigration Judge to consider release on bond, is unwise, inefficient, and raises serious constitutional concerns.

E. Given Limited Resources and Available Bed Space, the Expansion of Unnecessary Detention in H.R. 1932 Will Make Us Less Safe

The stated purpose of H.R. 1932 is to protect the American public from "dangerous and violent illegal immigrants and those who are a threat to our national security."[51] The bill, however, authorizes prolonged detention of persons fleeing persecution and torture and expands the mandatory detention of people who pose neither a threat to the public, nor a risk of flight. Given the reality that our immigration detention resources are great, but limited, increasing the detention of persons who pose no threat to American society will necessarily diminish our ability to detain persons who do

[49] Markup Transcript, *supra* note 6, at 105–25.
[50] *See supra* note 27.
[51] Markup Transcript, *supra* note 6, at 25.

pose such a threat. If this bill were enacted, not only would it waste American taxpayers' money before being struck down as unconstitutional, but it actually would have the perverse effect of making us less safe.[52]

F. By Consolidating All Habeas Corpus Petitions into the U.S. District Court for the District of Columbia, H.R. 1932 Will Overwhelm the Court and Unfairly Burden Distant Litigants

The ability to petition for a writ of *habeas corpus* to challenge the legality of detention is a fundamental guarantee of the Constitution and one of the few remaining tools available to immigration detainees. In general, *habeas corpus* petitions have traditionally been brought in the district court where the detainee is located.

The legislation disrupts this rule by requiring *all* immigration detention habeas petitions challenging the legality of mandatory, prolonged, and indefinite detention to be filed in the U.S. District Court for the District of Columbia. Consolidating all immigration detention habeas petitions from around the United States into one Federal district court will overwhelm that court. In the District of Columbia, several hundred *habeas corpus* petitions filed by persons detained at the Guantanamo facility forced the court to adopt a resolution for the coordination and management of such cases.[53] Chief Judge Royce Lamberth recently stated that because of the pending *habeas corpus* petitions, "We plan to try very few civil cases this spring and summer [2011]. . . . This is as bad as I've seen it." [54]

The Courts, Lawyers and Administration of Justice Section of the District of Columbia Bar has expressed concern that enactment of this bill could funnel as many as one thousand *habeas corpus* petitions annually into the U.S. District Court for the District of Columbia, which would represent a 33% increase in the caseload of the court.[55] According to the Section, "That added volume has the potential to substantially and negatively affect the ability of the court to handle its other important business." [56]

Moreover, because immigration detainees are not entitled to government-paid counsel and are frequently housed in remote locations far from family and friends, they must already overcome significant barriers to seek *habeas* relief. Consolidating all such cases in the D.C. District Court may diminish the willingness of attorneys to represent detainees in such actions. According to the American Bar Association, "The bill's provisions would increase the expense of pursuing judicial review of detention for those who are detained in facilities far distant from the District of Columbia, and would be particularly burdensome or even prohibitive for immigrants represented by non-profit agencies or pro bono counsel." [57]

[52] As Pepperdine University School of Law Professor Bruce Einhorn observed, "[T]he bill is unwarranted and would only serve to overburden taxpayers and divert time, money, and attention from other resources that serve to actually keep our communities safe." Einhorn, *supra* note at 40.

[53] Jennifer K. Elsea & Michael John Garcia, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court,* Congressional Research Service, RL33180 at 38–39 (Apr. 5, 2010).

[54] Bill Mears, *Judicial Nominee Logjam Creates "Crisis" in Some Federal Courts,* CNN (Mar. 4, 2011), at: http://articles.cnn.com/2011–03–03/politics/arizona.judicial.logjam__1__chief-judge-john-roll-federal-courts-federal-judges?__s=PM:POLITICS.

[55] DC Bar Letter, *supra* note 9.

[56] *Id.*

[57] ABA Letter, *supra* note 9.

The Judicial Conference of the United States, the principal policy-making body for the judicial branch, similarly noted in a letter to the Committee that "individual litigants may be unfairly burdened by a system of exclusive review in a distant tribunal."[58]

An amendment offered by Rep. Jerrold Nadler that would have stricken the three provisions in the bill consolidating *habeas corpus* petitions into D.C. District Court was opposed by Chairman Smith, who argued that consolidation was necessary because "district courts around the country have applied the *Zadvydas* principles in an inconsistent manner with respect to *habeas* proceedings."[59] But differences of opinion between district courts are not resolved by consolidating cases into a single forum. Rather, such differences are meant to percolate through our judicial system, first resulting in rulings from our twelve circuit courts of appeal and then, where there are differences among the circuits, in definitive rulings from the Supreme Court. The consolidation provisions in H.R. 1932 undermine this core feature of our judicial system.

During the debate, Chairman Smith indicated his willingness to discuss Rep. Nadler's amendment before the bill moves to the House Floor.[60] Based upon this commitment, Rep. Nadler agreed to withdraw his amendment.[61] We understand that Chairman Smith has agreed to strike all three provisions of the bill consolidating *habeas corpus* petitions into the D.C. District Court before further action is taken on the bill. We appreciate the Chairman's efforts to negotiate over these provisions and are pleased with the agreement that was struck pertaining to these provisions.

V. CONCLUSION

As we began the 112th Congress, we consistently heard two main themes from the new Majority. First, we must honor the Constitution and protect basic civil liberties. Second, we need to cut the budget and exercise fiscal responsibility.

Unfortunately, H.R. 1932 achieves neither of these goals. By authorizing the prolonged and indefinite detention of persons with little or no procedural protections, the bill is a massive expansion of government authority with no respect for the constitutionally protected liberty interest. And while the bill's short title would suggest that its goal is to "Keep Our Communities Safe," expanding prolonged detention without a bond hearing to arriving asylum seekers, non-criminal aliens who entered without inspection, and other immigrants who pose no risk to the public will only make us less safe.

H.R. 1932 is an extremely costly and largely unconstitutional response to a problem that the bill does not even attempt to remedy. For all of these reasons, we respectfully dissent and urge our colleagues to reject this legislation.

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[58] Judicial Conference Letter, *supra* note 9.
[59] Markup Transcript, *supra* note 6, at 86–93.
[60] *Id.* at 94–95.
[61] *Id.* at 97.

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