

2013

When Is When?: 8 U.S.C. § 1226(C) and the Requirements of Mandatory Detention

Gerard Savaresse

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Gerard Savaresse, *When Is When?: 8 U.S.C. § 1226(C) and the Requirements of Mandatory Detention*, 82 Fordham L. Rev. 285 (2013).

Available at: <https://ir.lawnet.fordham.edu/flr/vol82/iss1/7>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

WHEN IS WHEN?: 8 U.S.C. § 1226(C) AND THE REQUIREMENTS OF MANDATORY DETENTION

Gerard Savaresse*

Over the past several decades, immigration law has come to resemble criminal law in a number of ways. Most significantly, the current statutory regime allows the U.S. Attorney General (AG) to detain noncitizens during their removal proceedings. Ordinarily, the AG may detain noncitizens subject to removal so long as the AG provides an individualized bond hearing to assess whether the noncitizen poses a flight risk or a danger to the community. Pursuant to 8 U.S.C. § 1226(c), however, the AG must detain and hold without bond any noncitizen who has committed qualifying offenses “when the alien is released” from criminal custody throughout his removal proceedings.

Courts disagree as to whether § 1226(c) requires the AG to detain noncitizen offenders immediately, or whether the AG may allow a noncitizen to return to the community for months, or even years, before effecting detention and still retain the authority to detain the noncitizen without a bond hearing. The question exists in the intersection between criminal law and immigration law and the overlap between an agency’s power to interpret statutes and the court’s obligation to do so. This Note examines the timing question that § 1226(c) presents and offers a solution that seeks to balance the liberty interests of detainees with the government’s interests in protecting the community and ensuring removal.

TABLE OF CONTENTS

INTRODUCTION.....	287
I. CRIME, IMMIGRATION, AND MANDATORY DETENTION.....	290
A. <i>The Intersection Between Crime and Immigration</i>	290
1. Enforcement Agencies and the Role of Courts.....	291
a. <i>Department of Homeland Security</i>	291
b. <i>Department of Justice</i>	291
c. <i>Federal Courts</i>	292
2. Removal and Relief from Removal	293
a. <i>Removal</i>	293
b. <i>Relief from Removal</i>	294

* J.D. Candidate, 2014, Fordham University School of Law; B.A., New York University. I would like to thank my advisor, Professor Clare Huntington, for her guidance and support. For my wife, Katherine Herrmann, and my mother, Annie Savaresse.

3. Crime and Immigration.....	294
<i>a. Crimes Involving Moral Turpitude</i>	294
<i>b. Aggravated Felonies</i>	295
4. Immigration Detention.....	296
<i>a. Nonmandatory Detention</i>	296
<i>b. Mandatory Detention</i>	297
i. Text of § 1226(c).....	297
ii. Legislative History and Purpose of § 1226(c).....	299
iii. A Constitutional Challenge to § 1226(c):	
<i>Demore v. Kim</i>	300
<i>c. Detention: Process and Procedural Safeguards</i>	302
i. Custody Determinations and the Notice To	
Appear.....	302
ii. <i>Joseph</i> Hearings	303
B. <i>Judicial Review of Agency Action</i>	304
1. The Administrative Procedure Act	305
2. <i>Chevron</i> : Judicial Deference to Agency Interpretation.....	306
<i>a. Whether Congress Has Spoken to the Precise Issue</i>	306
<i>b. Whether the Agency’s Interpretation Is</i>	
“Permissible”	306
C. <i>Step Zero and Its Consequences</i>	307
D. <i>Chevron and the Rule of Lenity</i>	308
II. THE CASES AND POLICY ISSUES AT PLAY	309
A. <i>The BIA’s Interpretation of “When Released”</i>	310
1. <i>Garvin-Noble & Pastor-Camarena</i>	310
2. <i>In re Rojas</i>	311
<i>a. Rojas’s Structural Argument</i>	312
<i>b. The Overall Statutory Context</i>	312
<i>c. Legislative Purpose</i>	312
<i>d. Predecessor Provisions</i>	313
<i>e. The Dissenting Opinion in Rojas</i>	313
B. <i>Courts Agreeing with the BIA</i>	314
C. <i>Courts Disagreeing with the BIA</i>	317
1. Section 1226(c) Is Unambiguous	317
2. The Reasonableness of the BIA’s Interpretation	318
3. <i>Rojas</i> Distinguished	319
4. <i>Saysana</i> : A Narrow Exception or a Binding Decision?....	319
5. The Keep Our Communities Safe Act	321
III. WHEN MEANS WHEN: IMMEDIATE DETENTION AND	
REASONABLENESS.....	322
A. <i>Rojas Is Not Entitled to Deference</i>	322
1. Step Zero Inquiry	322
2. Section 1226(c) Requires Immediate Detention	323

a. *The Text of the Statute Requires Immediate Detention* 324

b. *The BIA’s Interpretation Is Unreasonable and Is Not Supported by the Purposes of § 1226(c)*..... 325

c. *Legislative History and Predecessor Provisions*..... 325

d. *Congress’s Failure To Specify a Consequence Does Not Support the BIA’s Interpretation of § 1226(c)*.... 326

e. *Windfall to the Petitioner* 328

f. *The Rule of Lenity* 328

B. *Reasonableness Considerations* 329

CONCLUSION 329

INTRODUCTION

Roman Gomez, a forty-three-year-old man from the Dominican Republic, has lived in the United States as a lawful permanent resident (LPR) for over twenty years.¹ He has spent the last twenty-one months of them in immigration detention. When he was younger, Mr. Gomez pled guilty to several petit larceny charges.² In 2009, he was arrested for rape and held in pre-trial confinement at Rikers Island for over fourteen months.³ The rape charge was dropped upon the discovery of exculpatory evidence, and Mr. Gomez was released on February 24, 2011.⁴ Four days later, however, the Department of Homeland Security (DHS) took him into custody and held him without bond under 8 U.S.C. § 1226(c),⁵ a provision that calls for the mandatory detention of noncitizens convicted of certain crimes “when the alien is released” from criminal custody.⁶ Mandatory detention in these circumstances is justified by the government’s need to ensure safety and to prevent noncitizen offenders from absconding during their removal proceedings.⁷

According to DHS, Mr. Gomez’s petit larceny convictions were crimes of moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(ii).⁸ As such, Mr.

1. Opening Brief and Appendix of Appellant at 3, *Burgos v. Napolitano*, No. 11-2682 (2d Cir. Aug. 12, 2011), 2011 WL 3675820, at *3.

2. *Id.* at 3–4.

3. *Id.* at 5 & n.4.

4. *See id.* at 5 & n.4, 6.

5. *See id.* at 6–7.

6. 8 U.S.C. § 1226(c) (2006). For the full text of § 1226(c), see *infra* Part I.A.4.b.i.

7. *See Demore v. Kim*, 538 U.S. 510, 513 (2003) (“We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.”). Critics of mandatory detention look to the lowered Due Process protections available to immigrants, the heightened attachments and expectations of LPRs, the deficiencies in the data concerning the noncitizen offenders’ dangerousness and risk of flight, and the adequacy of bond hearings to protect the government’s interests. *See generally* Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in *IMMIGRATION STORIES* 343 (David A. Martin & Peter H. Schuck eds., 2005).

8. In addition to challenging his detainability, Mr. Gomez also challenged his removability by arguing that DHS’s inclusion of petit larceny as a crime of moral turpitude

Gomez was not only subject to removal, but the government also maintained that § 1226(c) authorized Immigration and Customs Enforcement (ICE) Officers to detain him without the possibility of a bond hearing, even though he had not committed a qualifying offense in many years.⁹ In support of its arguments, the government referred to a decision by the Board of Immigration Appeals (BIA) that held that § 1226(c) permits DHS to detain noncitizen offenders at any time after they are released from criminal custody.¹⁰

Mr. Gomez filed a petition for a writ of habeas corpus in the Southern District of New York, challenging DHS's authority to detain him under § 1226(c).¹¹ He argued that § 1226(c) authorizes DHS to detain without bond only those individuals who are detained immediately upon release from criminal custody for a removable offense.¹² Because Mr. Gomez had not committed a removable offense since 2004, he argued that he is not within the ambit of § 1226(c).¹³ Consequently, the AG may provide him with an individualized bond hearing pursuant to 8 U.S.C. § 1226(a). After months battling in court, the Second Circuit dismissed Mr. Gomez's petition as moot.¹⁴

The issue of whether § 1226(c) requires immediate detention is not unique to Mr. Gomez, and the consequences for him, and those similarly situated, can be severe.¹⁵ Current data suggest that noncitizens held in mandatory detention who contest their cases "commonly spend months, and sometimes over a year, in detention because of enormous immigration court backlogs."¹⁶ According to a January 25, 2009 report by the American Civil Liberties Union, ICE detained at least 4,170 individuals for six months or

was contrary to Second Circuit precedent. Opening Brief and Appendix of Appellant, *supra* note 1, at 6. He is also challenging his second petit larceny conviction for ineffective assistance of counsel under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), arguing that he was not notified of the potential immigration consequences of a guilty plea. Opening Brief and Appendix of Appellant, *supra*, at 4.

9. *Gomez v. Napolitano*, No. 11 Civ. 1350(JSR), 2011 WL 2224768, at *1 (S.D.N.Y. May 31, 2011).

10. *In re Rojas*, 23 I. & N. Dec. 117, 125–26 (B.I.A. 2001).

11. Opening Brief and Appendix of Appellant, *supra* note 1, at 2.

12. *Id.* at 30.

13. *Id.* at 4–5.

14. The district court denied Mr. Gomez's petition for habeas relief on May 31, 2011. *Gomez*, 2011 WL 2224768, at *5. He filed an appeal with the Second Circuit and argued the case on December 14, 2011. Order of Dismissal at 2, *Gomez v. Napolitano*, No. 11-2682-cv (2d Cir. June 5, 2012). In the intervening months, an immigration judge (IJ) issued a final order of removal, and the government moved to have the appeal dismissed because Mr. Gomez was being held under different authority. *Id.* The Second Circuit dismissed Mr. Gomez's appeal as moot on June 5, 2012. *Id.*

15. See generally Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601 (2010) (describing the poor conditions of confinement at detention facilities).

16. Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 81 (2012).

longer, and of those, 1,334 had been detained for over a year.¹⁷ Some individuals had been detained for over five years.¹⁸ Detainees are also subject to transfers that both prolong detention and potentially impact the ability to retain effective assistance of counsel.¹⁹

Despite the serious consequences that the BIA's broad interpretation of § 1226(c) may have for noncitizen offenders, there is a paucity of controlling precedent evaluating the validity and reasonableness of the BIA's interpretation.²⁰ As the case of Mr. Gomez makes clear, once DHS has finalized a removal order, courts may dismiss the case as moot because DHS may detain the noncitizen under a different provision.²¹

This Note discusses whether § 1226(c) requires DHS to immediately detain a noncitizen offender who has committed a qualifying offense "when the alien is released" from criminal custody. If so, the Note then considers whether DHS's failure to take a noncitizen offender immediately into custody precludes DHS from effecting detention under § 1226(c) and requires instead that DHS detain such individuals pursuant to § 1226(a). Under § 1226(a), DHS retains the authority to detain noncitizen offenders and retains the discretion to provide a noncitizen with an individualized bond hearing to assess whether he presents a danger to the community or a flight risk.²²

The BIA has interpreted the "when released" language to enable DHS to take noncitizen offenders with qualifying convictions into custody at any time after they are released from criminal custody.²³ Applying the framework for agency deference announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁴ several federal courts, including the Fourth Circuit, have given deference to the BIA's interpretation, finding that § 1226(c) is ambiguous and that the BIA's interpretation is a permissible construction.²⁵ However, the majority of federal courts have found that the plain meaning of § 1226(c) requires immediate detention.²⁶

17. ACLU IMMIGRANTS' RIGHTS PROJECT, ISSUE BRIEF: PROLONGED IMMIGRATION DETENTION OF INDIVIDUALS WHO ARE CHALLENGING REMOVAL 4 (2009), available at http://www.aclu.org/files/assets/prolonged_detention_issue_brief.pdf.

18. *Id.*

19. Noferi, *supra* note 16, at 66.

20. See Gerald Seipp & Sophie Feal, *The Mandatory Detention Dilemma: The Role of Federal Courts in Tempering the Scope of INA § 236(c)*, IMMIGR. BRIEFINGS, July 2010, at 1.

21. Federal courts are only empowered to adjudicate actual, ongoing controversies, and controversies which are no longer ongoing are said to be moot. *Honig v. Doe*, 484 U.S. 305, 317 (1988). However, a court may still adjudicate controversies that would otherwise be moot if they are "capable of repetition, yet evading review." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (internal quotation marks omitted).

22. 8 U.S.C. § 1226(a)(2)(A) (2006) (providing that the AG may release a noncitizen on "bond of at least \$1500 with security approved by, and containing conditions prescribed by, the Attorney General").

23. *In re Rojas*, 23 I. & N. Dec. 117, 125 (B.I.A. 2001).

24. 467 U.S. 837 (1984); see also *infra* Part I.B.2 for a more comprehensive discussion of the *Chevron* framework.

25. See, e.g., *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012).

26. See, e.g., *Davis v. Hendricks*, No. CIV. 12-6478(WJM), 2012 WL 6005713, at *1 (D.N.J. Nov. 30, 2012); *Castillo v. ICE Field Office Dir.*, 907 F. Supp. 2d 1235 (W.D. Wash.

Several courts have also found that the BIA's interpretation is unreasonable because the result is too attenuated from the justifications for mandatory detention: ensuring community safety and preventing removable noncitizens from avoiding removal.²⁷

Part I of this Note discusses the increasing overlap between crime and immigration, and the complicated statutory and regulatory regime that governs the immigration detention of noncitizen offenders. This Part also explains the role of the federal courts in reviewing agency determinations in the immigration context. Part II explores in more detail the conflict between the BIA's interpretation of the "when released" language, and those courts that find that § 1226(c) unambiguously mandates DHS to detain noncitizen offenders immediately upon their release from criminal custody. Part III argues that § 1226(c) requires immediate detention. Recognizing the practical difficulties this interpretation may present, Part III also argues that the immediacy requirement should be understood to allow DHS a reasonable time after the noncitizen is released from criminal custody in which to effect detention. This approach balances the government's interests in protecting the community and securing removal against a noncitizen's liberty interests.

I. CRIME, IMMIGRATION, AND MANDATORY DETENTION

Those unfamiliar with modern immigration law and enforcement are confronted by a vast and confusing array of statutes, regulations, and enforcement agencies. Part I of this Note provides context for the timing question that § 1226(c) presents by exploring the immigration consequences of criminal conduct, as well as the legislative and legal history of § 1226(c). Additionally, because the timing issue of § 1226(c) requires courts to consider whether the BIA's interpretation of the statute is entitled to deference, the last section of Part I explains the appropriate framework for judicial review of agency action.

A. *The Intersection Between Crime and Immigration*

The United States has factored criminal conduct into the calculus of its immigration policy since the beginning years of the nation.²⁸ Although criminal acts have long served as a basis for removal, recent decades have seen a significant expansion of the grounds for removal based on criminal convictions, as well as a corresponding increase in the number of immigrants removed for criminal conduct.²⁹ For the entire period spanning

2012); *Bogarín-Flores v. Napolitano*, No. 12CV0399 JAH(WMC), 2012 WL 3283287, at *1 (S.D. Cal. Aug. 10, 2012).

27. *See, e.g., Saysana v. Gillen*, 590 F.3d 7, 17–18 (1st Cir. 2009); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 238 (S.D.N.Y. 2010).

28. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 380 (2006). However, early restrictions focused primarily on the exclusion of individuals with criminal records, not their removal from the country once admitted. *See id.* at 381.

29. *Id.* at 382–84.

from 1908 until 1980, immigration authorities removed approximately 56,000 immigrants as a result of criminal convictions.³⁰ In contrast, more than 88,000 individuals were removed for criminal convictions in 2004 alone.³¹

The intersection between crime and immigration law is central to determining whether § 1226(c) applies to noncitizen offenders who already have been returned to the community after being released from criminal custody. However, before moving on to a more comprehensive discussion of the immigration consequences of criminal conduct, it is necessary to outline the roles of the various agencies and departments charged with enforcement of the immigration laws.

1. Enforcement Agencies and the Role of Courts

A number of different agencies enforce immigration laws.³² Although other agencies play a significant role in the immigration scheme, the following is a brief introduction to those agencies most relevant to understanding whether § 1226(c) requires DHS to detain qualifying offenders immediately upon release from criminal custody.

a. Department of Homeland Security

Currently, DHS maintains several immigration-related responsibilities divided among a number of different bureaus. Of particular importance is ICE, the agency charged with interior enforcement, including locating and detaining individuals during and after removal proceedings.³³ ICE also represents the government during removal proceedings in immigration court.³⁴

b. Department of Justice

The most significant department within the Department of Justice (DOJ) for immigration purposes is the Executive Office of Immigration Review (EOIR). The EOIR houses the corps of Immigration Judges (IJs) and the BIA.³⁵ IJs are primarily responsible for presiding over removal

30. *Id.* at 386 (citing U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2004 YEARBOOK OF IMMIGRATION STATISTICS tbl.45 (2004), available at www.dhs.gov/yearbook-immigration-statistics (follow "2004 Yearbook files" hyperlink)).

31. *Id.* (citing MARY DOUGHERTY ET AL., U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2004, at 1 (2005), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf>).

32. In 2002, Congress enacted legislation that consolidated a number of federal agencies into one department, dividing the responsibilities of the former Immigration and Naturalization Service amongst several departments of the Department of Homeland Security. THOMAS ALEXANDER ALENIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 269 (6th ed. 2008).

33. *Id.* at 272–73.

34. *Id.* at 272.

35. *Id.* at 279–80.

proceedings, and may exercise the discretion delegated to the AG for waivers and applications of relief from removal.³⁶

The BIA has appellate jurisdiction over the decisions of IJs.³⁷ The BIA is a multimember review body of AG appointees.³⁸ Currently, the BIA is authorized to have fifteen members.³⁹ Although the BIA has existed for decades, it has never been recognized by statute and is solely a creature of regulation.⁴⁰ Nevertheless, “the [BIA] is the highest administrative body for interpreting and applying [U.S.] immigration laws.”⁴¹ As such, the BIA has the authority to issue final determinations in removal proceedings and to set precedent for future proceedings.⁴² However, the BIA does not have the authority to decide constitutional questions relating to immigration law.⁴³ Although single member review is available for certain appeals, precedential decisions must be heard en banc or adopted by a majority of the board.⁴⁴

c. Federal Courts

The role of the courts is sharply circumscribed in the arena of immigration.⁴⁵ Although 8 U.S.C. § 1252 grants the courts the power to review a final order of removal, most exercises of discretion delegated to the AG, including relief from removal, are not reviewable.⁴⁶ Moreover, 8 U.S.C. § 1252(a)(2)(C) provides that “no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense.”⁴⁷ Courts, however, have asserted jurisdiction to resolve constitutional questions and “pure questions of law” through habeas review.⁴⁸ Congress has now explicitly recognized the court’s jurisdiction over such matters in 8 U.S.C. § 1252(a)(2)(D).⁴⁹

36. *Id.* at 278–80.

37. 8 C.F.R. § 1003.1(b) (2013).

38. ALEINIKOFF ET AL., *supra* note 32, at 281; *see also* 8 C.F.R. § 1003.1(a).

39. There are presently fourteen full-time members serving on the BIA, as well as a number of temporary members. *Board of Immigration Appeals Biographical Information*, U.S. DEP’T JUSTICE, <http://www.justice.gov/eoir/fs/biabios.htm> (last updated May 2012). Temporary members may adjudicate cases to which they are assigned, but may not vote in en banc, precedential decisions. *See* 8 C.F.R. § 1003.1(a)(4).

40. ALEINIKOFF ET AL., *supra* note 32, at 281.

41. *Board of Immigration Appeals*, U.S. DEP’T JUSTICE, <http://www.justice.gov/eoir/biainfo.htm> (last updated Nov. 2011).

42. ALEINIKOFF ET AL., *supra* note 32, at 282–83.

43. *In re Rojas*, 23 I. & N. Dec. 117, 138 (B.I.A. 2001) (Rosenberg, J., dissenting).

44. 8 C.F.R. § 1003.1(g).

45. *See* 8 U.S.C. § 1252(a)(2)(C) (2006). *See generally*, Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000).

46. 8 U.S.C. § 1252(b); *see also infra* Part I.A.2.b (noting that relief from removal is often the only recourse available to noncitizens in removal proceedings).

47. 8 U.S.C. § 1252(a)(2)(C).

48. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 304–05 (2001).

49. Courts may also assert jurisdiction over agency action under the Administrative Procedure Act. *See, e.g.*, *Judulang v. Holder*, 132 S. Ct. 476, 483 (2011).

The courts have treated § 1226(c)'s timing question as a pure question of law.⁵⁰

2. Removal and Relief from Removal

The basis for immigration detention in American immigration law is directly related to a noncitizen's removability or inadmissibility. Thus, any discussion of immigration detention must reference the grounds for removal, and the manner in which noncitizens may obtain relief from removal.

a. Removal

The grounds for removal are codified at 8 U.S.C. § 1227, and include inadmissibility,⁵¹ criminal offenses,⁵² failure to register and falsification of documents,⁵³ other security based grounds including "terrorist activities,"⁵⁴ and becoming a "public charge."⁵⁵ Upon initiating removal proceedings, the DHS must issue a Notice to Appear specifying, among other things, the nature of the proceeding, the grounds for removal, and the conduct said to be in violation of the law.⁵⁶ IJs preside over removal proceedings,⁵⁷ which are subject to appeal to the BIA.⁵⁸ A federal court of appeals may review an administratively final order of removal,⁵⁹ but courts are precluded from reviewing several kinds of matters, including any exercise of discretion by the AG.⁶⁰ This also includes review of removal determinations predicated on a conviction of an aggravated felony, or two or more crimes involving moral turpitude (CIMT).⁶¹

50. *See, e.g.*, *Mendoza v. Muller*, No. 11 CIV. 7857(RJS), 2012 WL 252188, at *2 (S.D.N.Y. Jan. 25, 2012) (citing *Demore v. Kim*, 538 U.S. 510, 516–17 (2003)).

51. 8 U.S.C. § 1227(a)(1). Inadmissible aliens are those "who are ineligible to receive visas and ineligible to be admitted to the United States." *Id.* § 1182(a); *see also* ALEINIKOFF ET AL., *supra* note 32, at 693.

52. 8 U.S.C. § 1227(a)(2).

53. *Id.* § 1227(a)(3).

54. *Id.* § 1227(a)(4)(B).

55. *Id.* § 1227(a)(5) ("Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.").

56. *Id.* § 1229(a)(1). Section 1229 also provides that removal proceedings may not commence before ten days after service of the Notice to Appear to ensure that the noncitizen has sufficient time to secure counsel. *Id.* § 1229(b)(1). However, the government will not provide counsel for a noncitizen in removal proceedings. *Id.* § 1229a(b)(4)(A).

57. *Id.* § 1229a(a)(1).

58. 8 C.F.R. § 1003.1(b) (2013).

59. 8 U.S.C. § 1252(a)(1).

60. *Id.* § 1252(a)(2)(B).

61. *Id.* § 1252(a)(2)(C); *see supra* Part I.A.3.

b. Relief from Removal

Surprisingly, the most important issue in most removal proceedings is not the basis for removal itself, but rather the noncitizen's application for relief from removal.⁶² Most grounds for removal are relatively straightforward, and frequently it makes little sense to challenge them.⁶³ Relief from removal is subject exclusively to the discretion of the political branches either through prosecutorial and adjudicatory discretion, deferred action, a stay of removal, or cancellation of removal.⁶⁴ Notably, individuals convicted of an "aggravated felony" are not eligible for a cancellation of removal.⁶⁵

3. Crime and Immigration

Because the determination of whether a noncitizen has committed an aggravated felony or two or more CIMT is essential to the government's authority to detain noncitizens under § 1226(c), this section will discuss the contours of those two categories of noncitizen offenders.

a. Crimes Involving Moral Turpitude

The term "moral turpitude" has been a part of the immigration laws since 1891.⁶⁶ Despite the serious immigration consequences of committing a CIMT, Congress has not provided any guidance for determining what constitutes a CIMT.⁶⁷ Rather, the determination of whether a crime constitutes a CIMT is made on a case-by-case basis.⁶⁸ The BIA has set forth its understanding of what kinds of crime will be considered a CIMT as those involving "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."⁶⁹ The BIA has found a number of very different crimes to be CIMT.⁷⁰

62. ALEINIKOFF ET AL., *supra* note 32, at 775.

63. *Id.*; *see also* Taylor, *supra* note 7, at 356–57.

64. ALEINIKOFF ET AL., *supra* note 32, at 775–93.

65. 8 U.S.C. § 1229b(a).

66. Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of §§ 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. §§ 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. FED. 480, § 2(a) (2013).

67. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908 (9th Cir. 2009).

68. *Id.*

69. *In re Perez-Contreras*, 20 I. & N. Dec. 615, 618 (B.I.A. 1992); *see also In re Danesh*, 19 I. & N. Dec. 669, 670 (B.I.A. 1988).

70. As one circuit judge complained, "The BIA has designated offenses ranging from the knowing possession of child pornography, to the sale of 'a number of packages of oleomargarine labeled as butter' . . . as 'morally reprehensible' conduct, without specifying with any clarity what 'the nature of th[ose] act[s]' have in common." *Marmolejo-Campos*, 558 F.3d at 923 (Berzon, J., dissenting) (citations omitted) (quoting *In re Fualaau*, 21 I. & N. Dec. 475, 477 (B.I.A. 1996)); *see also* Adriane Meneses, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending*

Fortunately, this Note need not attempt to define what Justice Jackson once called an “undefined and undefinable standard.”⁷¹ It is sufficient to note that the CIMT category embraces a number of different, and seemingly unrelated, crimes. As one district court judge opined, jumping a turnstile in the New York City subway system may even be considered a CIMT.⁷² Indeed, in 2007, ICE detained and sought removal of Edward Lloyd Johnson, a Jamaican national and LPR, for violating New York Penal Law § 165.15 when he failed to pay his subway fare.⁷³ Johnson was detained for three years before the Third Circuit heard his appeal,⁷⁴ remanding for further supplementation of the record.⁷⁵

b. Aggravated Felonies

Determining precisely which crimes will constitute an aggravated felony, and hence which crimes will result in removal and mandatory detention, is no less difficult than determining whether a crime is one involving moral turpitude.⁷⁶ Courts typically employ a categorical approach to determine whether a state conviction qualifies as an aggravated felony.⁷⁷ Under the categorical approach, a reviewing court will compare the elements of a state crime to determine whether they are analogous to a federal felony.⁷⁸ Thus, the inquiry focuses on the category of the crime and not on the specific facts of the underlying criminal conduct.⁷⁹ Other courts also employ a “modified categorical approach.”⁸⁰ The modified categorical approach involves a fact-intensive review to determine whether the criminal *conduct* would satisfy the elements of a federal felony.⁸¹

Clearly, the determination of whether a crime constitutes an aggravated felony is a complex one. As the Supreme Court recently noted, the analysis is complicated by the fact that several different agencies and courts interpret the statute.⁸² As with CIMT, critics have argued that the expanded provisions calling for mandatory detention and removal for aggravated

Retroactivity, and Recognizing Deportation As Punishment, 14 SCHOLAR 767, 800 (2012) (noting that crimes such as knowingly issuing a check without funds, petit larceny, and lewdness have all been held to be CIMT).

71. *Jordan v. De George*, 341 U.S. 223, 235 (1951) (Jackson, J., dissenting).

72. *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).

73. *Johnson v. Holder*, 413 F. App'x 435, 437 (3d Cir. 2010).

74. Detainees may file habeas petitions only in the jurisdiction in which they are detained. *Valdez v. Terry*, 874 F. Supp. 2d 1262, 1271 (D.N.M. 2012) (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004)).

75. *Johnson*, 413 F. App'x at 436; see also Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 648 (2012) (“[C]ourts should find the term CIMT in deportation law is void for vagueness, notwithstanding the *Jordan* decision.”).

76. See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1489 (2010) (Alito, J., concurring).

77. See, e.g., *Moncrieffe v. Holder*, 662 F.3d 387, 391 (5th Cir. 2011), cert. granted, 132 S. Ct. 1857 (2012); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002).

78. *Moncrieffe*, 662 F.3d at 391.

79. *Id.*

80. *Randhawa*, 298 F.3d at 1152.

81. *Id.*

82. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1489 (2010) (Alito, J., concurring).

felonies are overinclusive.⁸³ One commentator notes that “the list of offenses that qualify as aggravated felonies is too long and the list of remedies available to immigrants convicted of aggravated felonies seeking to forestall their deportation is too short.”⁸⁴ Although this Note does not seek to determine if, or how, the noted overinclusiveness should be remedied, the concern is relevant when considering whether Congress intended all noncitizens potentially convicted of such felonies to be mandatorily detained irrespective of when they were released from criminal custody.

4. Immigration Detention

The capacity of the United States to detain immigrants to facilitate removal is long established. In *Wong Wing v. United States*,⁸⁵ the U.S. Supreme Court held that detention in the removal context is not punishment, but a form of “temporary confinement” necessary to effect removal or exclusion.⁸⁶ The following sections discuss the two detention provisions most relevant to this Note: nonmandatory detention, as codified in § 1226(a), and mandatory detention, § 1226(c).

a. Nonmandatory Detention

Today, under § 1226(a), “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”⁸⁷ The AG has discretion to release the noncitizen on bond or conditional parole.⁸⁸ However, the Attorney General retains the authority to rearrest an individual under the original warrant.⁸⁹ Bond hearings are conducted before an IJ, who may release a noncitizen offender on bond if she is satisfied that the noncitizen does not pose a danger, a flight risk, or a threat

83. See Andrew David Kennedy, *Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, 60 VAND. L. REV. 1847, 1873–74 (2007); Natalie Liem, *Mean What You Say, Say What You Mean: Defining the Aggravated Felony Deportation Grounds To Target More Than Aggravated Felons*, 59 FLA. L. REV. 1071, 1090 (2007) (discussing how courts have ignored the lower-limit threshold contemplated by Congress while expanding the kinds of crimes considered aggravated felonies under the categorical approach).

84. Kennedy, *supra* note 83, at 1873–74.

85. 163 U.S. 228 (1896).

86. *Id.* at 235. However, in *Wong Wing*, the Court struck down a portion of an 1892 statute that provided for the imprisonment and forced labor of illegal Chinese immigrants. *Id.* at 237 (“But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.”). Thus, immigration detention that serves the interest of facilitating exclusion or removal is constitutionally valid, while detention that serves a punitive function is not. *Id.*

87. 8 U.S.C. § 1226(a) (2006).

88. *Id.*

89. *Id.*

to national security.⁹⁰ The BIA has outlined several factors that should be taken into consideration during bond hearings, including, among others, whether the noncitizen has a fixed address, employment history, the extent of the criminal conduct, and the existence of family ties in the United States.⁹¹

b. Mandatory Detention

Congress passed the first mandatory detention provision in 1988.⁹² The Anti-Drug Abuse Act of 1988 established deportability for persons convicted of aggravated felonies and directed the government to detain “any alien convicted of an aggravated felony upon completion of the alien’s sentence for such conviction.”⁹³ On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act (AEDPA), expanding the definition of aggravated felonies, as well as the criteria for crimes of moral turpitude.⁹⁴ Just a few months later, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), of which § 1226(c) is a part. In addition to expanding the grounds for mandatory detention significantly, the IIRIRA further redefined aggravated felonies, expanded grounds for removability, and limited judicial review.⁹⁵ The following sections discuss the text, legislative history, and constitutionality of § 1226(c).

i. Text of § 1226(c)

The full text of § 1226(c) provides:

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or

90. DAN KESSELBRENNER & LORY D. ROSENBERG, *IMMIGRATION LAW AND CRIMES* 578 (Maria Baldini-Potermine ed., Summer 2012 ed. 2012).

91. *Id.*

92. *In re Rojas*, 23 I. & N. Dec. 117, 122–23 (B.I.A. 2001).

93. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a)(4), 102 Stat. 4181, 4470.

94. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; *see also* IRA J. KURZBAN, *KURZBAN’S IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL* 8 (12th ed. 2010).

95. KURZBAN, *supra* note 94, at 8–9.

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

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.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 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 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.⁹⁶

The statute is divided into two paragraphs. Paragraph (1) provides a description of individuals subject to mandatory detention, and paragraph (2) provides that, absent certain limited circumstances, the AG may not release “an alien described in paragraph (1).”⁹⁷ Paragraph (1) contains four subparagraphs, each referring to a different section of Title 8, detailing the circumstances in which a noncitizen must be mandatorily detained.⁹⁸ Subparagraph (A) provides that the AG shall detain any noncitizen who is inadmissible for having committed a crime involving moral turpitude or any law of the United States or a foreign country involving a controlled substance.⁹⁹ Subparagraphs (B) and (C) concern deportable noncitizens, including LPRs.¹⁰⁰ The provisions in Subparagraph (B) include any noncitizen who has committed two or more crimes involving moral turpitude,¹⁰¹ and any noncitizen who has committed an aggravated felony.¹⁰² The statute does not anywhere define either crimes of moral turpitude or aggravated felony.¹⁰³ Subparagraph (C) provides that the AG must detain any noncitizen who has committed one CIMT for which she was convicted and sentenced to a term of one year or more. Finally, subparagraph (D) adds that the AG must detain any noncitizen who is inadmissible,¹⁰⁴ or deportable,¹⁰⁵ as a result of a noncitizen’s membership

96. 8 U.S.C. § 1226(c)(2) (2006).

97. *Id.*

98. *Id.* § 1226(c)(1).

99. *Id.* § 1226(c)(1)(A) (citing *Id.* § 1182(a)(2)).

100. *Id.* § 1226(c)(1).

101. *Id.* § 1226(c)(1)(B) (citing *Id.* § 1227(a)(2)(A)(ii)).

102. *Id.* (citing *Id.* § 1227(a)(2)(A)(iii)).

103. *See supra* Part I.A.3.

104. 8 U.S.C. § 1226(c)(1)(D) (citing *Id.* § 1182(a)(3)(B)).

105. *Id.* (citing *Id.* § 1227(a)(4)(B)).

or association with a terrorist organization.¹⁰⁶ The AG is required to detain each such noncitizen “when the alien is released” from criminal custody.¹⁰⁷

ii. Legislative History and Purpose of § 1226(c)

A 1995 Senate Report suggests that, by enacting § 1226(c), Congress sought to curtail the “serious and growing threat to public safety” posed by criminal noncitizens.¹⁰⁸ According to the report, “While the term ‘criminal aliens’ is not specifically defined statutorily, it applies mainly to aliens convicted of ‘aggravated [sic] felonies’ or crimes involving moral turpitude.”¹⁰⁹ At the time of the report, there were an estimated 450,000 such individuals in the criminal justice system at any given time.¹¹⁰ The report also noted a strong connection between illegal entry and criminal activity, as those who enter “illegally have no legitimate sponsors and are prohibited from holding jobs . . . [c]riminal conduct may be the only way to survive.”¹¹¹

Of the estimated 450,000 noncitizens in the criminal justice system, the report noted that only 19,000 such individuals were deported in 1993.¹¹² The Committee calculated that it would take twenty-three years to deport all existing criminal noncitizens at the current rate.¹¹³ The Committee noted the impact on law enforcement, the danger posed to the community by the presence of criminal noncitizens, and the drain on public resources.¹¹⁴ Although there was much debate about how to attack the problem of crime in America, the Committee stated that there was “a consensus” within the nation about how to approach criminal noncitizens: “[T]here is just no place in America for non-U.S. citizens who commit criminal acts here. America has enough criminals without importing more.”¹¹⁵

The Committee identified a number of factors contributing to the poor rate of deportation, the most significant of which for purposes of this Note was the release of noncitizen offenders on bond.¹¹⁶ More than 20 percent of undetained noncitizen offenders failed to report for their removal proceedings, and still more absconded after having been issued a final order of removal.¹¹⁷ To remedy this problem, the Committee recommended that “Congress should consider requiring that all aggravated felons be detained

106. *Id.*

107. *Id.* § 1226(c)(1).

108. S. REP. NO. 104-48, at 1 (1995).

109. *Id.* at 5.

110. *Id.* at 5.

111. *Id.* (citations omitted) (internal quotation marks omitted).

112. *Id.*

113. *Id.*

114. *Id.* at 6.

115. *Id.*

116. *Id.* at 13–14.

117. *Id.* at 2, 23–24. *But see* Demore v. Kim, 538 U.S. 510, 562–63 (2003) (Souter, J., dissenting); Taylor, *supra* note 7, at 348–54 (disputing the accuracy of the figures).

pending deportation. Such a step may be necessary because of the high rate of no-shows for those criminal aliens released on bond.”¹¹⁸

Congress deferred full implementation of § 1226(c) for two years to allow immigration authorities sufficient time to adapt to the new regime.¹¹⁹ Congress provided the Transition Period Custody Rules (TPCR) to cover the intervening years.¹²⁰ The TPCR allowed for individualized bond hearings for noncitizens convicted of certain crimes fitting within the newly expanded CIMT and aggravated felony classifications.¹²¹ The TPCR expired in 1998, and § 1226(c) became effective.¹²²

iii. A Constitutional Challenge to § 1226(c): *Demore v. Kim*

In *Demore v. Kim*,¹²³ the Supreme Court heard a challenge to the constitutionality of § 1226(c).¹²⁴ The respondent, Hyung Joon Kim, an LPR since the age of six and a citizen of South Korea, successfully argued before the Ninth Circuit that, as an LPR, he was entitled to a determination of whether he posed either a danger to society or a flight risk. Section 1226(c), he argued, violated his substantive due process rights by requiring his detention without such a determination.¹²⁵ The Supreme Court, in a five-to-four decision, reversed, holding that Congress “may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.”¹²⁶ The Court did not announce what standard of review it applied.¹²⁷

In holding as it did, the Court reached several significant conclusions. First, the Court found that in failing to challenge his inclusion in the

118. S. REP. NO. 104-48, at 32 (1995).

119. *Saysana v. Gillen*, 590 F.3d 7, 10 n.2 (1st Cir. 2009); *In re Garvin-Noble*, 21 I. & N. Dec. 672, 674–75 (B.I.A. 1997).

120. *Garvin-Noble*, 21 I. & N. Dec. at 674–75.

121. *Saysana*, 590 F.3d at 10 n.2.

122. *Id.*

123. 538 U.S. 510 (2003).

124. At the age of eighteen, Mr. Kim was convicted of burglary for breaking into a tool shed with his high school friends. *See Taylor, supra* note 7, at 343. He served a short jail term, but after his release from prison, he was later caught shoplifting on two separate occasions. *Id.* California authorities prosecuted his second shoplifting offense as “a petty theft with priors,” and he was sentenced to three years in prison. *Id.* at 344. He was released in less than two years on good behavior. *Id.* One day after he was released, immigration authorities took him into custody under § 1226(c), stating at first that he was subject to mandatory detention for having committed an aggravated felony, and later, for having committed two CIMT. *Id.*

125. *Demore*, 538 U.S. at 514.

126. *Id.* at 513.

127. Without further explanation, the majority stated that the government was not required to employ the least burdensome means of achieving its goals. *Id.* at 528; *see also* Brian Smith, Charles Demore v. Hyung Joon Kim: *Another Step Away from Full Due Process Protections*, 38 AKRON L. REV. 207, 238 (2005). The dissenters in *Demore* argued that, because LPRs have historically enjoyed the same due process protections as citizens, the Court should have applied heightened scrutiny review, in which the government must demonstrate that the challenged law is narrowly tailored and serves a compelling government interest. *Demore*, 538 U.S. at 549 (Souter, J., dissenting).

mandatory detention categories Kim had conceded his removability.¹²⁸ While recognizing that “the Fifth Amendment entitles aliens to due process of law in deportation proceedings,”¹²⁹ the Court stated that “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”¹³⁰ Because long-standing precedent allowed for detention as a permissible part of the removal process,¹³¹ and because Kim had conceded his removability, the Court concluded that Kim could be detained “for the limited period of his removal proceedings.”¹³² Justice Kennedy’s concurrence is noteworthy, as it leaves open the possibility for as-applied challenges to the length of individual detention.¹³³

Although the impact of § 1226(c)’s legislative history on the outcome of *Demore* is unclear, the Court did engage in an extended discussion of the circumstances surrounding the enactment of § 1226(c). The Court ultimately concluded that Congress was “justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers.”¹³⁴ The Court noted, for example, “Criminal aliens were the fastest growing segment of the federal prison population,”¹³⁵ and that “[t]he [immigration authorities’] near-total inability to remove deportable criminal aliens imposed more than a monetary cost on the Nation.”¹³⁶ The Court also found that, because “more than 20% of deportable criminal aliens failed to appear for their removal hearings,”¹³⁷ the agency’s failure to detain noncitizens during detention proceedings was a major cause of the agency’s failure to remove deportable criminal noncitizens.¹³⁸ Finally, the Court observed that Congress made “incremental changes to the immigration

128. *Id.* at 522–23, 531 (majority opinion).

129. *Id.* at 523 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)).

130. *Id.* at 522 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952)). Professor Margaret Taylor notes that the majority’s approach represented a departure from then-current Supreme Court decisions, which appeared to recognize greater procedural protections for noncitizens. Taylor, *supra* note 7, at 366. She argues that the terrorist attacks on September 11, 2001 had an undeniable effect on the contraction of these protections and caused the Court’s “retreat[] to a strong version of plenary power deference that some observers thought had been buried by the *Zadvydas* decision.” *Id.* at 365.

131. *See, e.g.*, *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

132. *Demore*, 538 U.S. at 531.

133. *Id.* at 532–33 (Kennedy, J., concurring) (noting that where deportation proceedings are unreasonably delayed, it may become necessary to inquire whether the detention is to incarcerate for other reasons, rather than to facilitate deportation or protect against risk of flight or dangerousness).

134. *Id.* at 513 (majority opinion).

135. *Id.* at 518.

136. *Id.*

137. *Id.* at 519. The dissent noted that these statistics are misleading because they failed to account for the potential differences between LPRs and other noncitizen offenders, and because the bond grant was frequently a function of limited bed space—not a determination of the noncitizen offenders’ flight risk. *See id.* at 562–64 (Souter, J., dissenting).

138. *See id.* at 519 (majority opinion).

laws,” while at the same time “considering wholesale reform of those laws.”¹³⁹

The dissent stressed that Kim had not, in fact, conceded his removability and that the majority cited “no statement before any court conceding removability.”¹⁴⁰ The dissent also stressed that “the immigration laws give LPRs the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen.”¹⁴¹ As such, the dissent concluded that the government could not detain a “still lawful permanent resident alien when there is no reason for it and no way to challenge it.”¹⁴²

c. *Detention: Process and Procedural Safeguards*

The immigration detention system is now the largest detention system in the United States, with far more admissions than the Federal Bureau of Prisons or any other state correctional system.¹⁴³ According to a DHS report, roughly 363,000 individuals passed through immigration detention in 2010 alone.¹⁴⁴ Immigration authorities removed 169,000 noncitizen offenders in the same period.¹⁴⁵ The report does not indicate the number of individuals who were detained under § 1226(c).

i. Custody Determinations and the Notice To Appear

ICE officials may take a noncitizen into custody pursuant to an ICE arrest, in execution of a detainer¹⁴⁶ after a local police stop, or upon completion of incarceration for a prior criminal conviction.¹⁴⁷ When ICE detains an individual without a warrant, ICE must provide that individual

139. *Id.* at 521. Professor Taylor argues that the Court’s characterization of the IIRIRA’s enactment is misleading because Congress had not taken as measured a response to the problem of crime and immigration as the Court’s opinion might suggest. Taylor, *supra* note 7, at 354. On the contrary, she suggests that “Congress circumvented the usual obstacles of the legislative process . . . and instead secured the passage of controversial immigration reform measures by appending them to larger omnibus bills that were certain to be enacted.” *Id.* Because the statute embraces minor crimes such as petty larceny, the result, she claims, was legislation that leads to a “steep human cost,” as well as a significant expenditure of government resources. *See id.* at 361–62 (noting that the former Commissioner and three former General Counsels of the INS filed an amicus brief in *Demore* arguing against the statute).

140. *Demore*, 538 U.S. at 541 (Souter, J., dissenting).

141. *Id.* at 544.

142. *Id.* at 576.

143. Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1446 n.42 (2010).

144. U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATIONS ENFORCEMENT ACTIONS: 2010, at 1 (2011), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

145. *Id.*

146. An ICE detainer advises another law enforcement agency that the agency has a noncitizen in its custody that ICE seeks to remove and requests that the agency notify ICE prior to releasing the noncitizen so that ICE may arrange for a custody transfer. *See* 8 C.F.R. § 287.7(a) (2013).

147. *See* 8 C.F.R. § 287.5 (2013).

with a custody determination within forty-eight hours,¹⁴⁸ and a Notice to Appear within seventy-two hours.¹⁴⁹ The custody determination may be made by a number of DHS officials, including an ICE detention officer,¹⁵⁰ and is often made by an individual with little or no legal training.¹⁵¹

ii. *Joseph* Hearings

Named after the precedential BIA determination, *In re Joseph*,¹⁵² the *Joseph* hearing represents the detainee's sole opportunity to challenge a DHS officer's decision that he is subject to mandatory detention.¹⁵³ Although the AG enjoys only limited discretion to release a noncitizen properly held under § 1226(c),¹⁵⁴ the BIA determined in *Joseph* that the AG may assert jurisdiction, upon a detainee's request, to ascertain whether the detainee is "properly included" within a mandatory detention category.¹⁵⁵

The hearing is conducted before an IJ, who may find that a detainee is not properly included in a mandatory detention category if the IJ is "convinced that the [government] is substantially unlikely to prevail on its charge."¹⁵⁶ If the detainee prevails, then he is entitled to a bond determination, as per § 1226(a).¹⁵⁷ Either party may appeal the IJ's determination to the BIA.¹⁵⁸ During the pendency of the appeal, DHS may invoke an "automatic stay" to prevent the detainee from being released until the BIA has decided the appeal.¹⁵⁹

Because *Joseph* hearings represent the sole opportunity for a detainee to contest whether he has committed a qualifying offense that would subject

148. *Id.* § 287.3(d).

149. See Memorandum from Asa Hutchinson, Undersecretary, Border & Transp. Sec., to Michael J. Garcia, Assistant Sec'y, U.S. Immigration & Customs Enforcement, and Robert Bonner, Comm'r, U.S. Customs & Border Prot. 3 (Mar. 30, 2004), available at <http://www.immigrationforum.org/images/uploads/ICEGuidance.pdf>.

150. 8 C.F.R. § 236.1(g)(1); see also *id.* § 287.5(e)(2).

151. See Noferi, *supra* note 16, at 83. Professor Noferi argues that the absence of legal review leads to overcharging and overdetention. *Id.* at 84. He also notes that Form I-286 (Notice of Custody Determination) requires revision because it suggests that the detainee may not request a review of the custody determination, despite the availability of a *Joseph* hearing. *Id.* at 121.

152. 22 I. & N. Dec. 799 (B.I.A. 1999).

153. See Noferi, *supra* note 16, at 63.

154. See 8 U.S.C. § 1226(c)(2) (2006).

155. See *Joseph*, 22 I. & N. Dec. at 800.

156. *Id.* at 807 ("In requiring that the Immigration Judge be convinced that the Service is substantially unlikely to prevail on its charge, when making this determination before the resolution of the underlying case, we provide both significant weight to the Service's reason to believe that led to the charge and genuine life to the regulation that allows for an Immigration Judge's reexamination of this issue." (internal quotation marks omitted)).

157. In *Joseph*, for example, an IJ ultimately found that the detainee's underlying criminal conviction for "obstructing and hindering" did not constitute an aggravated felony for purposes of § 1226(c). *Id.* at 807–08.

158. 8 C.F.R. § 1236.1(d)(3)(i).

159. *Id.* § 1003.19(i)(2); see also Raha Jorjani, *Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 109–11 (2010) (arguing that the automatic stay presents "an affront to the adversarial system" that should not be permitted).

him to mandatory detention, they have become an important defense strategy.¹⁶⁰ Indeed, the Supreme Court seemed to place great importance on the availability of the *Joseph* hearing in *Demore v. Kim*, finding that, because the petitioner had failed to request a *Joseph* hearing, he had conceded his deportability.¹⁶¹ Although the Court did not say so directly, it seems unlikely that the Court would have been as comfortable upholding the petitioner's mandatory detention had no procedure been available to prevent against the erroneous risk of deprivation.¹⁶²

Nevertheless, several commentators have suggested that *Joseph* hearings are procedurally inadequate in practice.¹⁶³ Critics note that the determination of whether an individual's criminal conviction is properly within one of the mandatory detention categories involves a complex legal analysis, yet detainees are not entitled to counsel.¹⁶⁴ Moreover, detention itself may interfere with an individual's ability to retain counsel, particularly where the detainee remains subject to frequent transfers.¹⁶⁵ Critics also note that the burden to demonstrate that removal is "substantially unlikely" is too heavy, and that the evidentiary standards favor the government.¹⁶⁶ Finally, there is no requirement that IJs produce a written determination, but rather the decision is rendered orally based on what are arguably "incomplete facts and unresolved legal questions."¹⁶⁷

B. Judicial Review of Agency Action

Because the BIA has issued a precedential decision offering the agency's interpretation of the "when released" language, this section discusses the framework that courts employ to determine whether an agency's action is entitled to judicial deference. Generally, Congress may delegate power to an executive agency to secure the effects of legislation provided that Congress supplies an "intelligible principle" to the agency to guide its efforts.¹⁶⁸ Delegation of this sort is justified by the need for the efficiency, flexibility, and expertise that specialized agencies can provide.¹⁶⁹ In

160. Taylor, *supra* note 7, at 356–57 ("For long-term lawful permanent residents facing deportation on criminal grounds, eligibility for relief today hinges on whether the conviction is properly classified as an aggravated felony.")

161. *Demore v. Kim*, 538 U.S. 510, 522–23 (2003).

162. See Taylor, *supra* note 7, at 355–57.

163. See, e.g., Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "Joseph" Hearings After Demore v. Kim*, 31 N.Y.U. REV. L. & SOC. CHANGE 51, 76–95 (2006); Noferi, *supra* note 16, at 87–88.

164. See Noferi, *supra* note 16, at 100–21. Professor Noferi also notes that although discovery is seldom permitted in immigration proceedings, IJs commonly grant adjournments to ICE attorneys to produce sufficient evidence during which time the immigrant remains detained. *Id.* at 87.

165. See *id.* at 77.

166. See Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65, 76 (2011); see also Noferi, *supra* note 16, at 87.

167. Noferi, *supra* note 16, at 87 (quoting Dona, *supra* note 166, at 12).

168. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

169. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514.

addition to challenging the constitutionality of agency action, detainees may challenge agency action under the Administrative Procedure Act¹⁷⁰ (APA), as well as the agency's interpretation of the statute the agency enforces.¹⁷¹

1. The Administrative Procedure Act

The APA outlines the manner in which agencies may act to effectuate legislation and establishes the default procedures for rulemaking, policy statements, and adjudications.¹⁷² Many of the more demanding and formal procedures that exist in the context of rulemakings are substantially relaxed in the context of adjudications.¹⁷³ Because of the flexibility they provide, the Court has long recognized that agencies may proceed through adjudications, rather than rulemaking, to set precedents and policy that have the force of law.¹⁷⁴

The APA grants federal courts the power to decide all questions of law relating to agency action, and requires courts to set aside agency action that they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."¹⁷⁵ The arbitrary and capricious standard may be used to review the procedures employed in an adjudication in the context of immigration proceedings.

In *Judulang v. Holder*,¹⁷⁶ for example, the Court held that the BIA's "comparable grounds" approach to determining whether to grant relief to a removable noncitizen pursuant to former INA 212(c) was arbitrary and capricious.¹⁷⁷ Although the role of *Judulang* is unclear, some commentators characterize the Court's ruling as an erosion of the deference typically afforded to the executive branch in the immigration context.¹⁷⁸

170. See *infra* Part I.B.1.

171. See *infra* Part I.B.2.

172. 5 U.S.C. §§ 551–559 (2006); see also JOHN F. MANNING & MATTHEW STEPHENSON, LEGISLATION AND REGULATION 582–604 (2010).

173. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (discussing the flexibility provided by an agency's adjudication powers).

174. *Id.*

175. 5 U.S.C. § 706; see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (establishing that, under the arbitrary and capricious standard, an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962))).

176. 132 S. Ct. 476 (2011).

177. See *id.* at 484 ("By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner."). For more on *Judulang* and the comparable grounds approach, see Maria Baldini-Potermin, *Lessons from a "Coin Flip": The U.S. Supreme Court and § 212(c) (Again)*, 89 INTERPRETER RELEASES 293, 294–95 (2012).

178. Baldini-Potermin, *supra* note 177, at 294; Jeffrey D. Stein, *Delineating Discretion: How Judulang Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. (forthcoming) (manuscript at 1), available at <http://ssrn.com/abstract=2103903> ("Judulang pushed back against a (perceived) history of special deference to the executive branch on immigration matters, and thus supports a reading of the executive's role in immigration law as no . . . different from its role in ordinary domestic jurisprudence.").

2. *Chevron*: Judicial Deference to Agency Interpretation

Litigants may also challenge an agency's interpretation of the statute an agency enforces. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁷⁹ the Court articulated the modern approach to reviewing an agency's interpretation of the statute it administers. When a reviewing court finds the statute at issue ambiguous, the court should defer to the agency's interpretation, provided the interpretation is reasonable.¹⁸⁰ Cass Sunstein has referred to the *Chevron* approach as "a kind of counter-*Marbury* for the administrative state," one that finds in statutory ambiguity an implicit delegation by Congress to the agency to "say what the law is."¹⁸¹ Thus, under the original iteration of the *Chevron* doctrine, a court's inquiry is two-fold: (1) the court must determine whether a statute is ambiguous; and if so (2) whether the agency's interpretation is reasonable.¹⁸²

a. *Whether Congress Has Spoken to the Precise Issue*

Under *Chevron* step one, a court reviewing an agency interpretation of a statute must first ask if Congress has spoken to the "precise question at issue."¹⁸³ The reviewing court is to employ the "traditional tools of statutory construction"¹⁸⁴ in seeking to determine "clear congressional intent."¹⁸⁵ If the court finds that the statute is unambiguous, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁸⁶ If the statute remains ambiguous after the court's interpretive pass, then the court must proceed to step two of the inquiry.¹⁸⁷

b. *Whether the Agency's Interpretation Is "Permissible"*

If the court finds that the statute is ambiguous—that is to say, that Congress has not spoken to the precise issue—then Congress is presumed to

179. 467 U.S. 837 (1984).

180. *See id.* at 842–43.

181. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006).

182. *Chevron*, 467 U.S. at 842–43.

183. *Id.* at 843.

184. *Id.* at 843 n.9. Although the precise contours of these interpretive tools have spawned debate, it is sufficient for purposes of this Note simply to recognize that no consensus exists. Compare Scalia, *supra* note 169, at 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt."), with Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2106 (1990) ("Whether there is ambiguity—the nominal trigger for deference under *Chevron*—is a function not 'simply' of text, but of text as it interacts with principles of interpretation, some of them deeply engrained in the legal culture or even the culture more generally.").

185. *Chevron*, 467 U.S. at 843 n.9.

186. *Id.* at 842–43.

187. *Id.*

have implicitly delegated interpretive authority to the agency.¹⁸⁸ So long as the agency's interpretation is reasonable, "[the] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."¹⁸⁹ Thus, the agency is not required to have chosen the same construction that the court would have.¹⁹⁰

C. Step Zero and Its Consequences

Later cases have recognized the need for a third step in the *Chevron* analysis: whether the *Chevron* framework should be applied at all.¹⁹¹ The Court sought to define this space more clearly in *United States v. Mead Corp.*¹⁹² Recognizing that agencies may act in a number of different ways, the Court acknowledged in *Mead* that not every agency interpretation should be granted *Chevron* deference.¹⁹³ As a later Court put it, "*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved."¹⁹⁴

In the Court's formulation, *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."¹⁹⁵ To determine whether Congress has delegated authority to the agency, the Court noted that when there is an "express congressional authorization[] to engage in the process of rulemaking or adjudication," then there is a very "good indicator" that Congress delegated interpretive authority to the agency.¹⁹⁶ Thus, "[t]he linchpin for deference is therefore the power to act with the force of law" in conjunction with the level of formality with which the agency has exercised that power.¹⁹⁷

In circumstances where *Chevron* deference would be inappropriate, a reviewing court is instructed to afford the agency a lesser form of deference, referred to as *Skidmore*¹⁹⁸ deference. In determining whether an agency's position is entitled to deference under *Skidmore*, the court is to consider "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."¹⁹⁹

188. *Id.*

189. *Id.* at 844.

190. *Id.*

191. As Professor Cass Sunstein notes, the Step Zero space has become the "location of an intense and longstanding disagreement between the Court's two administrative law specialists, Justices Stephen Breyer and Antonin Scalia." Sunstein, *supra* note 181, at 192. A fuller treatment of this disagreement is beyond the scope of this Note.

192. 533 U.S. 218 (2001).

193. *See id.* at 233–34.

194. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006).

195. *Mead*, 533 U.S. at 226–27.

196. *Id.* at 229. The Court also noted, without clarifying, that there are other circumstances where *Chevron* deference might be appropriate. *See id.* at 231.

197. Sunstein, *supra* note 181, at 214.

198. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

199. *Mead*, 533 U.S. at 228 (citing *Skidmore*, 323 U.S. at 139–40). In a vigorous dissent in *Mead*, Justice Scalia characterized the majority's opinion as "breathing new life into the

In the years since the *Mead* decision, the Court has not always been precise in defining when, and how, to properly employ the Step Zero inquiry. At times, for example, the Court has framed the issue in terms of “the interpretive method used [by the agency], and the nature of the question at issue.”²⁰⁰ In other instances, the Court has pointed to the explicitness of the congressional delegation of authority, as in *FDA v. Brown & Williamson Tobacco Corp.*: “[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”²⁰¹

These decisions appear to reflect the Court’s hesitation to defer to agency interpretations on large or fundamental issues.²⁰² Such decisions conflict with the simple, two-step solution to the problem of judicial review of agency interpretations offered by *Chevron*.²⁰³ Indeed, at least one commentator noted, “Classic *Chevron* analysis is dead,”²⁰⁴ and *Skidmore* has become “a better predictor of whether courts will uphold or overrule federal agency interpretations.”²⁰⁵ The scope of this Note precludes a fuller treatment of this rich issue. It is sufficient here to note that the Court has, subsequent to *Chevron*, expressed its concerns about deferring to agency interpretations of fundamental issues.²⁰⁶

D. *Chevron and the Rule of Lenity*

Among the traditional tools of statutory construction available to a reviewing court are the linguistic and substantive canons of construction. Linguistic canons operate as rules of thumb to aid in discerning the meaning of a particular word or phrase within a statute.²⁰⁷ Substantive canons, on the other hand, reflect normative judgments and policy preferences about how laws should be interpreted.²⁰⁸ These substantive canons include the canon of constitutional avoidance, the presumption

anachronism of *Skidmore*.” *Id.* at 250 (Scalia, J., dissenting). He argued instead that *Chevron* should operate as “an across-the-board presumption,” stating that statutory ambiguity alone is the trigger for *Chevron* deference. *Id.* at 257.

200. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

201. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

202. See Sunstein, *supra* note 181, at 193 (“[T]he Court has raised a separate Step Zero question by suggesting the possibility that deference will be reduced, or even nonexistent, if a fundamental issue is involved, one that goes to the heart of the regulatory scheme at issue.”); see also *Brown & Williamson*, 529 U.S. at 159. In *Brown & Williamson*, the Court noted that although ambiguity in a statute is ordinarily understood to be an implicit delegation from Congress, “there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” *Id.* According to the Court, important legal questions are more likely to have been decided by Congress, and not delegated to an agency to interpret. *Id.*

203. See Sunstein, *supra* note 181, at 193–94.

204. Ann Graham, *Searching for Chevron in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 239 (2008).

205. *Id.*

206. See, e.g., *supra* note 202 and accompanying text.

207. Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 7 (2006).

208. *Id.*

against retroactivity, and—of particular relevance here—the rule of lenity.²⁰⁹ The rule of lenity states that ambiguity in criminal statutes should be construed narrowly, or resolved against the government.²¹⁰ Although typically employed when interpreting criminal statutes, the rule of lenity may be employed in deportation proceedings as well.²¹¹ Generally, the rule of lenity is only invoked as a last resort, when “‘after seizing everything from which aid can be derived,’” the court still cannot discern the intent of Congress.²¹²

The extent to which *Chevron* interacts with substantive canons of construction is unclear.²¹³ In *INS v. St. Cyr*,²¹⁴ for example, the Supreme Court applied the presumption against retroactivity at the Step One phase in determining that § 1226(c) did not apply to noncitizens who had been convicted of crimes prior to enactment of the statute.²¹⁵ However, the Court has never explicitly applied the rule of lenity in a *Chevron* context, despite the increasing criminal liability imposed by agency regulations.²¹⁶ Not surprisingly, then, there is a split among the courts of appeals, with some courts holding that *Chevron* must either yield outright or be limited by the rule of lenity, and other courts holding that the rule of lenity is inapplicable in the *Chevron* context.²¹⁷ Although this Note does not seek to provide a resolution to this conflict, it is another factor that must be considered in the calculus of whether § 1226(c) is ambiguous for purposes of *Chevron* Step One, and whether the BIA’s interpretation of the statute is permissible.

II. THE CASES AND POLICY ISSUES AT PLAY

Part II of this Note outlines in greater detail the various approaches the BIA and federal courts have taken in determining whether § 1226(c) imposes a timing requirement, and what consequences would ensue should DHS fail to satisfy that requirement. The discussion begins with the BIA’s construction of the TPCR and § 1226(c), and then proceeds to *Hosh v.*

209. *Id.* at 7–8.

210. *Id.* at 4.

211. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *see also* David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 491–94 (2007).

212. *Reno v. Koray*, 515 U.S. 50, 65 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993)).

213. *See generally* Greenfield, *supra* note 207.

214. 533 U.S. 289 (2001).

215. *Id.* at 320–21 n.45 (“We only defer . . . to agency interpretations of statutes that, applying the normal ‘tools of statutory construction,’ are ambiguous. Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective . . . there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.”).

216. However, in a concurring opinion, Justice Scalia has opined that because the DOJ would be inclined to interpret a criminal statute broadly, granting *Chevron* deference “would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.” *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

217. Greenfield, *supra* note 207, at 41–47.

Lucero,²¹⁸ in which the Fourth Circuit deferred to the BIA's construction of § 1226(c) under the *Chevron* framework. The next section details the rationale of a number of federal district courts that have explicitly disagreed with the BIA and *Hosh*, finding that § 1226(c) requires DHS to detain qualifying noncitizens immediately after their release from criminal custody.²¹⁹ Finally, the last section considers an amendment proposed by the House Judiciary Committee that would, among other things, modify § 1226(c) to permit DHS to detain qualifying noncitizen offenders at any time, irrespective of whether such individuals were ever incarcerated.

A. The BIA's Interpretation of "When Released"

The BIA has interpreted the "when released" language in two separate decisions. In *In re Garvin Noble*,²²⁰ the BIA first interpreted the "when released" language in the TPCR, holding that DHS was not required to take a qualifying noncitizen immediately into custody.²²¹ In *In re Rojas*,²²² the BIA adopted this same interpretation of § 1226(c), holding that DHS could detain a qualifying noncitizen without bond at any time after his release from criminal custody.²²³

1. *Garvin-Noble & Pastor-Camarena*

The BIA's interpretation of the "when released" language was controversial before § 1226(c) even took effect. In an early decision construing a similar provision of the TPCR, the BIA held that the "when released" language "does not define the category of criminal aliens covered" by the mandatory detention provision.²²⁴ Rather, the majority held that the "when released" language "modifies the command that the 'Attorney General shall take into custody' certain criminal aliens, by specifying that it be done 'when the alien is released' from incarceration."²²⁵ Because the "when released" language does not modify the class of noncitizens subject to mandatory detention, the majority concluded that noncitizens with qualifying offenses are subject to mandatory detention "regardless of the particular alien's date of release from criminal incarceration or whether the alien was ever subject to criminal incarceration."²²⁶

But the majority of district courts who had occasion to review *Garvin-Noble* rejected it.²²⁷ For example, in *Pastor-Camarena v. Smith*,²²⁸ the

218. 680 F.3d 375 (4th Cir. 2012).

219. *Id.* at 381.

220. 21 I. & N. Dec. 672 (B.I.A. 1997).

221. *Id.* at 682.

222. 23 I. & N. Dec. 117 (B.I.A. 2001).

223. *Id.* at 127.

224. *Garvin-Noble*, 21 I. & N. Dec. at 680.

225. *Id.*

226. *Id.* at 682.

227. *See Rojas*, 23 I. & N. Dec. at 125–26 (noting that "[o]ur analysis has been rejected by several district courts," and citing eight different district court cases rejecting the interpretation espoused in *Garvin-Noble* and two decisions following it).

228. *Pastor-Camarena v. Smith*, 2012 WL 1234567 (D. Md. 2012).

Western District of Washington, relying on the plain meaning of the statute, held that the “when released” language applies only to noncitizens who are detained immediately upon release from criminal custody and not to noncitizens released many years earlier.²²⁹ Additionally, the court went on to note that the BIA’s interpretation in *Garvin-Noble* was “arbitrary and capricious.”²³⁰

2. *In re Rojas*

After the expiration of the TPCR, the BIA revisited its interpretation of the “when released” language in *Rojas*.²³¹ In *Rojas*, the BIA heard an appeal from respondent Victor Leonard Rojas, an LPR from the Dominican Republic, who was being detained under § 1226(c).²³² Rojas had previously been convicted of possession of cocaine with intent to sell in 1998.²³³ The AG brought removal proceedings against Rojas, and immigration authorities took him into custody on July 26, 2000, two days after he was released from criminal incarceration.²³⁴ The BIA, sitting en banc, held in a thirteen-to-seven decision that a noncitizen criminal offender who is released from criminal custody is subject to mandatory detention, “even if the alien is not immediately taken into custody . . . when released from incarceration.”²³⁵

Although the majority reached the same conclusion as it did in *Garvin-Noble*, *Rojas* offered a more in-depth analysis. Authored by the same member who wrote *Garvin-Noble*, the majority continued to employ the categorical framework adopted in *Garvin-Noble* to demonstrate that the timing of detention is irrelevant to the government’s authority to detain individuals under § 1226(c). That is, the BIA understood the issue to be whether the “when released” language “is a necessary part of the description of the alien in paragraph (1).”²³⁶ If so, then noncitizens not immediately detained would not be within the ambit of the statute.²³⁷ Conversely, if the “when released” language is not a part of the description of a detainable noncitizen, then such a noncitizen would be within the scope of the statute and the AG could seek detention without any temporal limitation.²³⁸

228. 977 F. Supp. 1415 (W.D. Wash. 1997).

229. *Id.* at 1417–18.

230. *Id.* at 1418.

231. *See Rojas*, 23 I. & N. Dec. at 117.

232. *Id.* at 117–18.

233. *Id.*

234. *Id.* at 118.

235. *Id.* at 117.

236. *Id.* at 119.

237. *See id.*

238. *See id.*

a. Rojas's Structural Argument

In finding that the “when released” language is not a part of the description of a noncitizen subject to mandatory detention, the majority looked primarily to the structure of § 1226(c).²³⁹ The Board noted that § 1226(c) is divided into two paragraphs: paragraph (1) details the categories of noncitizens that the AG must take into custody, and paragraph (2) speaks to the conditions under which the AG may release “an alien described in paragraph (1).”²⁴⁰ According to the majority, “The statutory reference to ‘an alien described in paragraph (1)’ seems to us most appropriately to be a reference to an alien described by one of four subparagraphs, (A) through (D),” and does not include the remaining portion of paragraph (1) where the “when released” language is found.²⁴¹ None of the cases analyzed in this Note discuss whether the “when released” language is a description of the noncitizen.

b. The Overall Statutory Context

Nevertheless, recognizing that the statute is “susceptible to different readings,” the majority in *Rojas* also considered § 1226(c) alongside other statutory provisions pertaining to removal.²⁴² The majority found that there is no connection in the INA between the timing of a noncitizen’s release from criminal custody, the timing of detention, and the applicability of criminal charges of removability.²⁴³ “Furthermore,” the majority continued, “the [INA] does not tie an alien’s eligibility for any form of relief from removal to the timing of the alien’s release from incarceration and the assumption of custody by the [INS].”²⁴⁴ As a result, the majority concluded, the “‘when released’ issue is irrelevant for all other immigration purposes.”²⁴⁵

c. Legislative Purpose

The *Rojas* majority also discussed the legislative purpose and history of § 1226(c), stating that the statute was born out of Congress’s frustration with the ability of criminal noncitizens to avoid removal if they were not actually in custody, and noting that “some criminal aliens abscond after being issued a final order of deportation.”²⁴⁶ From this the majority concluded, “Congress was not simply concerned with detaining and

239. *Id.* at 121.

240. 8 U.S.C. § 1226(c) (2006).

241. *Rojas*, 23 I. & N. Dec. at 121. It is noteworthy, however, that the “statutory reference” cited by the majority appears in paragraph (2) of § 1226 and only governs the AG’s power to release aliens already lawfully held pursuant to the statute. 8 U.S.C. § 1226(c).

242. *Rojas*, 23 I. & N. Dec. at 120.

243. *Id.* at 122.

244. *Id.*

245. *Id.*

246. *Id.* (citing S. REP. NO. 104-48, at 23 (1995)).

removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens.”²⁴⁷

d. Predecessor Provisions

The majority in *Rojas* also grounded its analysis in the history of mandatory detention statutes, the first of which was the Anti-Drug Abuse Act of 1988 (ADAA). The ADAA provided: “The Attorney General shall take into custody any alien convicted of an aggravated felony *upon completion of the alien’s sentence for such conviction*.”²⁴⁸ The provision was amended in 1990 to read, “The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien.”²⁴⁹ Like § 1226(c), the 1990 amendment had a second paragraph that provided, “The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony.”²⁵⁰ The majority reasoned that paragraph one commanded the AG to take all criminal noncitizens subject to mandatory detention into custody, and that the AG could not release such individuals unless certain conditions were met.²⁵¹ Taken together, the BIA found that the two provisions are “strong evidence that Congress was not attempting to restrict mandatory detention to criminal aliens taken immediately into [ICE] custody at the time of their release from a state or federal correctional institution.”²⁵²

e. The Dissenting Opinion in Rojas

The dissent took issue with the majority opinion in a number of ways. First, the dissenters argued that the “when released” language is “part of the statutory *description* identifying the aliens whom the Attorney General must take into custody and may not release.”²⁵³ Next, the dissenters turned to the plain meaning of the “when released” language, noting that “when” means “just after the moment that.”²⁵⁴ From this the dissenters concluded that the clear language of the statute required immigration authorities to take noncitizen offenders into custody “at the time of release.”²⁵⁵

The dissenters also argued that, because the majority of federal district courts interpreted that a similar provision in the AEDPA only applied to noncitizens who were taken into custody “within a reasonable time after release from incarceration,”²⁵⁶ then Congress should be understood to have

247. *Id.*

248. *Id.* at 123 (quoting 8 U.S.C. § 1252(a)(2) (2006)).

249. *Id.*

250. *Id.*

251. *Id.* at 123–24.

252. *Id.* at 124.

253. *Id.* at 130 (Rosenberg, J., dissenting).

254. *Id.* at 132 (quoting *Alikhani v. Fasano*, 70 F. Supp. 2d 1124, 1130 (S.D. Cal. 1999) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2602 (3d ed. 1976))).

255. *Id.* (quoting *Alikhani*, 70 F. Supp. 2d at 1130).

256. *Id.* at 135 (citing *DeMelo v. Cobb*, 936 F. Supp. 30, 36 (D. Mass. 1996)).

acquiesced to that interpretation.²⁵⁷ Finally, the dissent noted that in light of the serious liberty interests that mandatory detention entails, the statute should be given a narrow construction.²⁵⁸

B. Courts Agreeing with the BIA

Several courts have followed the BIA's determination in *Rojas*. Most notably, in *Hosh v. Lucero*,²⁵⁹ the Fourth Circuit became the first circuit court to directly address the timing issue presented by § 1226(c).²⁶⁰ Hosh Mohamed Hosh, a citizen of Somalia, arrived in the United States as a derivative asylee in 1999.²⁶¹ He was granted LPR status in 2007.²⁶² The following year, he was convicted of "unlawful wounding" and grand larceny in the state of Virginia, and was released on supervised probation for a period of two years.²⁶³ On March 21, 2011, ICE officials arrested him and detained him under § 1226(c).²⁶⁴

Hosh did not contest that he was removable, but questioned the government's authority to detain him without bond because ICE failed to take him into custody upon his release from criminal custody.²⁶⁵ The district court, relying on prior decisions from the Eastern District of Virginia, granted Hosh's habeas petition, holding that § 1226(c) only applies when the AG has acted in full compliance with the statute.²⁶⁶ In other words, the district court found that the government must detain the noncitizen immediately upon release from criminal custody.

The Fourth Circuit reversed, holding that § 1226(c) is ambiguous, and that the BIA's construction expressed in *Rojas* was a permissible one.²⁶⁷ In determining that § 1226(c) is ambiguous, the court noted that "when" can be given the meaning "action or activity occurring 'at the time that' or 'as soon as' other action has ceased or begun."²⁶⁸ But the court noted that "'when' can also be read to mean the temporally broader 'at or during the time that,' 'while,' or 'at any or every time that.'"²⁶⁹ As a result, the court found that § 1226(c) is ambiguous.²⁷⁰

257. *Id.* at 136.

258. *Id.* at 138 (Rosenberg, J., dissenting).

259. 680 F.3d 375 (4th Cir. 2012).

260. For a discussion of the related First Circuit decision in *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009), see *infra* Part II.D.

261. *Hosh*, 680 F.3d at 377.

262. *Id.*

263. *Id.*

264. *Id.* at 377–78.

265. *Id.* at 378.

266. *Id.*

267. *Id.* at 384.

268. *Id.* at 379 (quoting *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007)).

269. *Id.* at 380 (quoting *When*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/when> (last visited Sept. 20, 2013)).

270. The court also referred to the concurring opinion in *Rojas*, which noted, "It is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of [ICE] to appear at the jailhouse door to take custody of an alien at the precise moment of release." *Id.* (quoting *In re Rojas*, 23 I. & N. Dec. 117, 128 (B.I.A. 2001) (Moscatto, J., concurring)).

The court next held that the BIA's construction of the statute is a permissible one.²⁷¹ The court grounded its analysis of the reasonableness of *Rojas* in the justifications for the mandatory detention scheme as expressed in the Supreme Court's decision in *Demore*.²⁷² The court concluded,

[W]e agree that Congress's command to the Attorney General . . . connotes some degree of immediacy, [but] we cannot conclude that Congress clearly intended to exempt a criminal alien from mandatory detention and make him eligible for release on bond if the alien is not *immediately* taken into federal custody.²⁷³

The court took its analysis one step further by holding that *even if* the statute required the government to immediately detain a criminal noncitizen upon release from criminal custody, the court would still conclude that a noncitizen detained after release would not be able to escape mandatory detention.²⁷⁴ The court looked to *United States v. Montalvo-Murillo*,²⁷⁵ a decision in which the Supreme Court held that the government was not required to release a suspect simply because it failed to provide a bail hearing "immediately upon the [suspect's] first appearance before the judicial officer."²⁷⁶ The Supreme Court reasoned, "Although the duty is mandatory, the sanction for breach is not loss of all later powers to act."²⁷⁷ The Fourth Circuit stressed the same rationale expressed by the Supreme Court in *Montalvo-Murillo*: the negligence and human error of officers or other administrators cannot be allowed to undermine public safety and thwart congressional intent.²⁷⁸

Finally, the court declined to apply the rule of lenity. The court acknowledged, "In immigration cases, the rule of lenity stands for the proposition that ambiguities in deportation statutes should be construed in favor of the noncitizen."²⁷⁹ Recognizing that there is some tension between the rule of lenity and *Chevron* deference, the court found that the rule of lenity did not apply in this case because the rule operates only as "a last resort, not a primary tool of construction."²⁸⁰ Although the court conceded that § 1226(c) was ambiguous, the ambiguity was not "grievous" such that

271. *Id.* at 380.

272. *Id.* at 380–81.

273. *Id.* at 381.

274. *Id.*

275. 495 U.S. 711 (1990) (holding that the Government's failure to comply with the Bail Reform Act's prompt hearing provision did not require release of an arrestee). It should be noted here that the precise issue presented by the timing question of § 1226(c) is not whether noncitizen offenders must be released if they are not immediately detained, but whether they are entitled to a bond hearing. *See, e.g.,* *Castillo v. ICE Field Office Dir.*, 907 F. Supp. 2d 1235, 1239 (W.D. Wash. 2012).

276. *Montalvo-Murillo*, 495 U.S. at 714.

277. *Id.* at 718.

278. *Hosh*, 680 F.3d at 382–83.

279. *Id.* at 383 (citing *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9–10 (1948)).

280. *Id.* (quoting *United States v. Ehsan*, 163 F.3d 855, 858 (4th Cir. 1998)) (internal quotation marks omitted).

application of the rule was required.²⁸¹ The court also expressed its doubts that the justifications for the rule of lenity, which it described as relief from the drastic measure of deportation, were present here.²⁸² “After all,” the court concluded, “a criminal alien in Hosh’s position would be subject to deportation proceedings whether or not § 1226(c) existed; the provision merely withdraws the Attorney General’s discretion to release such an alien on bond pending those proceedings.”²⁸³

In *Sylvain v. Attorney General of the United States*²⁸⁴ the Third Circuit recently joined the Fourth Circuit in determining that the failure to detain noncitizen offenders immediately after release from incarceration does not alter the government’s ability to detain such individuals for the duration of their removal proceedings without bond.²⁸⁵ Interestingly, the court found that it was unnecessary to conduct a *Chevron* inquiry.²⁸⁶ Rather, relying on the *Montalvo-Murillo* line of cases discussed above, the court held that, irrespective of whether the statute imposes a timing requirement, failure to comply would not deprive DHS of the authority to detain noncitizen offenders without a bond hearing.²⁸⁷

The Third Circuit recognized that *Montalvo-Murillo* was distinguishable: in *Montalvo-Murillo* the government would have been deprived of the ability to detain dangerous criminals altogether, while here, the government would merely be required to conduct a bond hearing.²⁸⁸ Nevertheless, the court held that “in the ways that matter, the cases are alike.”²⁸⁹ The statute, the court concluded, was intended to protect the public, and mandated detention, “no matter the perceived flight risk or danger.”²⁹⁰

Several district courts have found the Third Circuit’s reasoning unpersuasive.²⁹¹ These courts agree that the Third Circuit’s reliance on the *Montalvo-Murillo* line of cases was misguided because requiring the government to provide a bond hearing when it fails to immediately detain noncitizen offenders does not deprive the government of the power to

281. *Id.* at 383 (quoting *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998)).

282. *Id.* at 384.

283. *Id.*

284. 714 F.3d 150 (3d Cir. 2013).

285. *Id.* at 161. Prior to the *Sylvain* decision, the overwhelming majority of district courts in the Third Circuit concluded that failure to effect immediate detention required the government to provide noncitizen offenders with a bond hearing. *See, e.g.*, *Christie v. Elwood*, No. 11-7070, 2012 WL 266454, at *1 (D.N.J. Jan. 30, 2012); *Parfait v. Holder*, No. 11-4877, 2011 WL 4829391, at *9 (D.N.J. Oct. 11, 2011); *Beckford v. Aviles*, No. 10-2035, 2011 WL 3515933, at *1 (D.N.J. Aug. 9, 2011); *Sylvain v. Holder*, No. 11-3006, 2011 WL 2580506, at *1 (D.N.J. June 28, 2011), *rev’d*, 714 F.3d 150 (3d Cir. 2013).

286. *Sylvain*, 714 F.3d at 157.

287. *Id.*

288. *Id.* at 160.

289. *Id.*

290. *Id.* at 159.

291. *See, e.g.*, *Castaneda v. Souza*, No. CIV.A. 13-10874-WGY, 2013 WL 3353747, at *1 (D. Mass. July 3, 2013); *Baquera v. Longshore*, No. 13-CV-00543-RM-MEH, 2013 WL 2423178, at *1 (D. Colo. June 4, 2013); *Deluis-Morelos v. ICE Field Office Dir.*, No. 12CV-1905JLR, 2013 WL 1914390, at *1 (W.D. Wash. May 8, 2013).

detain the noncitizen offender.²⁹² Rather, the government may still detain the noncitizen offender upon a finding that he is dangerous to the public or a flight risk.²⁹³

C. Courts Disagreeing with the BIA

Not all courts have agreed with *Rojas*. Working within the *Chevron* framework, the majority of federal courts have found that the statute is unambiguous and that DHS is not permitted to detain individuals long after those individuals are released from criminal custody. Other courts have also held that the BIA's interpretation of the statute is unreasonable. Finally, a few courts have found that *Rojas* is factually or legally distinguishable.

1. Section 1226(c) Is Unambiguous

Numerous district courts have held that § 1226(c) is unambiguous, and that the statute only authorizes the detention of individuals immediately upon their release from criminal custody. In *Louisaire v. Muller*,²⁹⁴ for example, the Southern District of New York heard a habeas petition filed by Jean Louisaire, a citizen of Haiti and an LPR. In October 2010, ICE detained Louisaire pursuant to § 1226(c) claiming that he had committed an aggravated felony.²⁹⁵ Louisaire argued that the predicate offense that formed the basis for his detention, a seventh degree misdemeanor drug conviction, happened several years prior to his detention.²⁹⁶ He argued that, as a result, ICE could not detain him under § 1226(c).

Citing to *Rojas*, the government took the position that the delay was irrelevant for purposes of determining whether an individual is detainable under § 1226(c).²⁹⁷ The court vehemently disagreed with the government's position, finding *Rojas* "wrong as a matter of law and contrary to the plain meaning of the statute."²⁹⁸ The court held that the statute clearly expressed the intent to create "a nexus between the date of release and the removable offense."²⁹⁹ Therefore, the court concluded that DHS must take a noncitizen into custody immediately after he is released from criminal custody.

As noted, many district courts have reached similar conclusions in finding that the plain meaning of § 1226(c) requires immediate detention.³⁰⁰

292. See, e.g., *Castaneda*, 2013 WL 3353747, at *11 ("Because no power or authority is lost when the Attorney General fails to detain an alien immediately upon release, this Court must reject the analysis that concludes that such a failure does not affect whether the alien is subject to mandatory detention.").

293. See *id.*

294. 758 F. Supp. 2d 229 (S.D.N.Y. 2010).

295. *Id.* at 231–33.

296. *Id.* at 233.

297. *Id.* at 236.

298. *Id.*

299. *Id.* (quoting *Garcia v. Shanahan*, 615 F. Supp. 2d 175, 182 (S.D.N.Y. 2009)).

300. At least one district court has also found that the broad reading of § 1226(c) endorsed by the BIA would render the "when released" language unnecessary, and hence

In *Quezada-Bucio v. Ridge*,³⁰¹ the Western District of Washington held that “the clear language of the statute indicates that the mandatory detention of aliens ‘when’ they are released requires that they be detained at the time of release.”³⁰² In *Khodr v. Adduci*, the Eastern District of Michigan noted, “If Congress wished to permit the Attorney General to take custody of criminal aliens at any time after being released from criminal confinement, it could have done so using the phrase ‘at any time after the alien is released.’”³⁰³ Interestingly, the court in *Khodr* also acknowledged that a “literal immediacy” requirement would pose difficulties for immigration authorities, and held that “immediacy contemplates that the Attorney General has a reasonable period of time after release in which to take the suspect alien into custody.”³⁰⁴

2. The Reasonableness of the BIA’s Interpretation

The courts that reject *Rojas* have unanimously found that § 1226(c) unambiguously requires the immediate detention of noncitizen offenders when those individuals are released from criminal custody. Therefore, very few district court cases have reached the reasonableness of the BIA interpretation under *Chevron* Step Two. However, several courts seem to incorporate reasonableness concerns into their analysis of the meaning of § 1226(c).³⁰⁵ In *Quezada-Bucio*,³⁰⁶ for example, the court noted that the petitioner had lived in the community for years after being released from criminal custody without committing additional crimes and without attempting to elude immigration authorities.³⁰⁷ The court suggested that

surplusage, an occurrence courts should seek to avoid. *Valdez v. Terry*, 874 F. Supp. 2d 1262, 1267–68 (D.N.M. 2012).

301. 317 F. Supp. 2d 1221 (W.D. Wash. 2004).

302. *Id.* at 1230 (quoting *Alikhani v. Fasano*, 70 F. Supp. 2d 1124, 1130 (S.D. Cal. 1999)); *see also* *Kporlor v. Hendricks*, No. CIV.A. 12-2755 DMC, 2012 WL 4900918, at *6 (D.N.J. Oct. 9, 2012) (“Rather than taking the plain meaning of the statute, the government has re-written the statute.”).

303. *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010).

304. *Id.* at 780; *see also* *Zabadi v. Chertoff*, No. C 05-03335 WHA, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005) (holding that DHS need not act immediately, but must act within a reasonable time).

305. *See* *Louisaire v. Muller*, 758 F. Supp. 2d 229, 238 (S.D.N.Y. 2010) (“Even if it were ambiguous, the BIA’s interpretation of the statute in *Matter of Rojas* is unreasonable. Reading § 1226(c)(1) as authorizing mandatory detention upon *any* release from criminal custody, regardless of that release’s connection to the enumerated offenses, would produce absurd results.” (citations omitted)); *Ortiz v. Holder*, No. 2:11CV1146 DAK, 2012 WL 893154, at *3 (D. Utah Mar. 14, 2012) (“Moreover, even if Congress’s intent were ambiguous, the Board’s interpretation of the statute is not reasonable because it leads to arbitrary and manifestly unjust results.”); *see also* *Saysana v. Gillen*, 590 F.3d 7, 17–18 (1st Cir. 2009) (“By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.”).

306. *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (W.D. Wash. 2004).

307. *Id.* at 1231.

mandatory detention without an individualized bond hearing in such circumstances would be unreasonable.³⁰⁸

3. *Rojas* Distinguished

Courts have also distinguished *Rojas* on factual and legal grounds. In *Zabadi v. Chertoff*, for example, the Northern District of California held that, even if the court found § 1226(c) to be ambiguous, *Rojas* would not be entitled to deference because immigration authorities detained the petitioner in *Rojas* a mere two days after his release from criminal custody.³⁰⁹ In the instant case, DHS detained the petitioner two years after he was released from criminal custody.³¹⁰ Thus, the court concluded, “*Rojas* did not even consider and address the point of statutory interpretation controlling in this order.”³¹¹

At least one other court has determined that *Rojas* did not actually construe the “when released” language of § 1226(c), and hence the BIA did not determine the legal issue in such a way that it would be entitled to deference by a reviewing court. In *Guillaume v. Muller*,³¹² the Southern District of New York found that in construing § 1226(c), the BIA improperly severed the “when released” language from the rest of the statute.³¹³ Therefore, the court found that the BIA had failed to meet the precise statutory issue before the court, and as a result, *Rojas* was not entitled to deference.³¹⁴ Interestingly, the court ultimately reached the same conclusion as the BIA,³¹⁵ becoming the only federal court to do so outside of the *Chevron* context.

4. *Saysana*: A Narrow Exception or a Binding Decision?

Although the First Circuit has not directly weighed in on the “when released” issue, its decision in *Saysana v. Gillen*³¹⁶ is relevant to the discussion. Houg Saysana, a citizen of Laos, entered the United States in 1980 as a refugee, and was convicted in 1990 of indecent assault and battery.³¹⁷ He served three months of a five-year sentence before being released.³¹⁸ Saysana was again arrested in 2005, this time for failing to register as a sex offender.³¹⁹ The charge was dismissed, and he was

308. *Id.* at 1230–31 (“The Court is not persuaded that the legislature was seeking to justify mandatory immigration custody many months or even years after an alien had been released from state custody.”).

309. *Zabadi*, 2005 WL 3157377, at *4.

310. *Id.*

311. *Id.*

312. No. 11 CIV. 8819 TPG, 2012 WL 383939, at *1 (S.D.N.Y. Feb. 7, 2012).

313. *Id.* at *4.

314. *Id.*

315. *Id.* at *6.

316. 590 F.3d 7 (1st Cir. 2009).

317. *Id.* at 9.

318. *Id.*

319. *Id.*

released from custody.³²⁰ Two years later, ICE officers detained him pursuant to § 1226(c), maintaining that his 1990 conviction was an aggravated felony within the meaning of the statute.³²¹

In *In re Saysana*,³²² the BIA concluded that § 1226(c) applies to any noncitizen with a qualifying conviction who has been released from any criminal custody after the effective date of the IIRIRA.³²³ Recognizing that § 1226(c) does not have retroactive effect,³²⁴ the First Circuit disagreed because Saysana's qualifying offense occurred prior to the enactment of the IIRIRA.³²⁵ The court found that the BIA's interpretation of the statute would create an arbitrary distinction between individuals who had committed qualifying offenses prior to the enactment of the statute and those individuals who had committed qualifying offenses prior to the enactment of the statute and who were released from criminal custody for an unrelated charge postenactment.³²⁶

Significantly, the court discussed the reasonableness of enforcing a mandatory detention scheme against individuals who were released from criminal custody years prior to being detained. The court noted that the government's interests—preserving the public safety and deterring flight—become attenuated “the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community.”³²⁷

The court did not directly decide whether a noncitizen convicted of a qualifying offense postenactment of the IIRIRA could escape mandatory detention if ICE failed to detain him immediately upon release from custody for the qualifying offense.³²⁸ Even so, the court's language suggests that the “when released” language is subject to some limitation: “The Court is not persuaded that the legislature was seeking to justify mandatory immigration custody many months or even years after an alien

320. *Id.*

321. *Id.* at 9–10.

322. 24 I. & N. Dec. 602 (B.I.A. 2008). In light of the near uniform rejection of the BIA's interpretation, the BIA later reversed its position consistent with the First Circuit's interpretation. *In re Garcia Arreola*, 25 I. & N. Dec. 267, 269 (B.I.A. 2010) (“[W]e now withdraw from *Matter of Saysana*.”).

323. *Saysana*, 24 I. & N. Dec. at 607–08.

324. *See Saysana*, 590 F.3d at 10 (granting habeas relief).

325. *Id.* at 17.

326. *Id.* at 18.

327. *Id.* at 17–18.

328. Nevertheless, at least one district court has seized on the First Circuit's construction of § 1226(c), arguing that the court held that the statute unambiguously requires immediate detention. *See, e.g., Nimako v. Shanahan*, No. CIV. 12-4909 FLW, 2012 WL 4121102, at *1 (D.N.J. Sept. 18, 2012). However, this reliance on *Saysana*'s interpretation of the unambiguity of § 1226(c) may be misguided. The *Saysana* court focused primarily on the arbitrarily different treatment of similarly situated aliens (i.e., those who would not otherwise be within the purview of the statute because the qualifying offense occurred prior to the enactment of the IIRIRA), and not whether ICE is required to immediately detain criminal aliens when released from custody. *See Valdez v. Terry*, 874 F. Supp. 2d 1262, 1274 (D.N.M. 2012) (limiting *Saysana* and stating that any discussion of the timing of the “when released” clause is dictum).

had been released from state custody.”³²⁹ However, it remains to be seen whether, and how, the First Circuit would define such limitations.

5. The Keep Our Communities Safe Act

On May 22, 2011, House Judiciary Committee Chairman Lamar Smith introduced H.R. 1932, the Keep Our Communities Safe Act (KOCSA).³³⁰ Section 2(b)(5) of KOCSA proposes that criminal noncitizens are subject to mandatory detention “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.”³³¹

KOCSA was reported out of the House Judiciary Committee on October 18, 2011.³³² The Committee explicitly rejected the approach taken by those courts finding that § 1226(c) requires DHS to detain noncitizens immediately upon release from criminal custody.³³³ The Committee Report states, “Putting aside the proper reading of [§ 1226], these decisions make little policy sense.”³³⁴ The Report notes that the justifications for mandatory detention—“to protect the American public and to ensure that removal orders can be effectuated”—are served equally whether or not noncitizens are placed into detention immediately after incarceration.³³⁵ The section concludes that “in fact, it makes no difference if they were ever incarcerated.”³³⁶

The “Dissenting Views” section of the report explains that “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.”³³⁷ The expansion, the dissenters note, “is unwise, inefficient, and raises serious constitutional concerns.”³³⁸ During Committee voting, Representative Sheila Jackson Lee introduced an amendment that would have stricken section 2(b)(5), the provision dealing with the “when released” language, altogether.³³⁹ Representative Jackson Lee’s amendment failed by one vote, and section 2(b)(5) was reported out with the rest of the KOCSA.³⁴⁰ Congress did not enact the bill, however, and Chairman Smith reintroduced it as H.R. 1901 in May 2013.³⁴¹

329. *Saysana*, 590 F.3d at 16 (quoting *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004)).

330. H.R. 132 (112th): *Keep Our Communities Safe Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr1932#> (last visited Sept. 20, 2013).

331. H.R. REP. NO. 112-255, at 5 (2011).

332. *Id.* at 1.

333. *Id.* at 19. The Report specifically mentions the decision in *Saysana*, and rejects the premise that an alien may only be detained following incarceration for a detainable offense. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 52.

338. *Id.*

339. *Id.* at 23.

340. *Id.*

341. H.R. 132 (112th): *Keep Our Communities Safe Act of 2011*, *supra* note 330.

III. WHEN MEANS WHEN: IMMEDIATE DETENTION AND REASONABLENESS

Consistent with the majority of federal courts that have heard the question, courts should find that § 1226(c) requires the immediate detention of noncitizen offenders when they are released from criminal custody. However, because a literal immediacy requirement would be impracticable and may inadvertently subvert the purpose of the statute, courts should permit DHS a reasonable time in which to effect custody. Therefore, this Note disagrees with the BIA's approach, and agrees in part with those decisions, such as *Louisaire* and *Quezada-Bucio*, that find § 1226(c) requires immediate detention. This view is also in accord with the district court's decision in *Khodr* recognizing the impracticability of immediate detention.

A. *Rojas Is Not Entitled to Deference*

Courts should not defer to the BIA's determination in *Rojas* because, at the outset, it is unclear whether Congress intended to delegate the authority to interpret § 1226(c) to the AG. Additionally, the text of the statute, as well as its structure and overarching purpose, all appear to require DHS to detain qualifying noncitizen offenders immediately upon their release from criminal custody. There is nothing in the legislative history or in the changes from preceding detention provisions that would suggest Congress intended to permit DHS to detain individuals without bond at any time after their release from criminal custody. Finally, even if there were ambiguity in § 1226(c) that was incapable of judicial resolution, the rule of lenity would militate against the broad reading of the statute adopted by the BIA.

1. Step Zero Inquiry

As an initial matter, the Step Zero inquiry requires courts to determine whether the *Chevron* framework even applies. *Chevron* deference applies only when Congress has delegated the authority to issue a rule with the force of law and the agency interpretation was issued pursuant to that authority.³⁴² Ambiguity itself is an insufficient indicator of Congress's intent.³⁴³ Rather, the "linchpin for deference" is a formal exercise of an agency's authority to act with the force of law.³⁴⁴ Here, because Congress clearly intended to eliminate the AG's discretion, it is unlikely that Congress intended to delegate power to the AG to act with the force of law with respect to this issue.

Although several courts have noted that the BIA is generally entitled to *Chevron* deference, none of the decisions have considered whether Congress intended to delegate the authority to interpret § 1226(c) to the BIA. Even a cursory glance at § 1226(c) suggests that it is highly unlikely

342. See *supra* note 195 and accompanying text.

343. See *supra* note 197 and accompanying text.

344. See *supra* note 197 and accompanying text.

that Congress intended for the BIA to be able to determine when the agency is permitted to detain individuals under the statute. The entire function of § 1226(c) is to remove the discretion exercised by the AG with respect to qualifying criminal offenders, except in certain limited circumstances where the AG deems it necessary to protect witnesses.³⁴⁵ As the Court noted in *Demore*, § 1226(c) was born out of Congress's frustration with the immigration authorities' "near-total inability to remove deportable criminal aliens."³⁴⁶ Indeed, it would be strange if, after commanding the AG to detain all individuals who have committed qualifying offenses without the possibility of bond, Congress then intended to allow the AG to permit that same class of removable criminal noncitizens to return to their communities for years while waiting for the AG to comply with Congress's mandate.

Moreover, the Supreme Court has expressed reluctance to defer to agency interpretations affecting large issues, or those with significant consequences.³⁴⁷ Here, the detention of an individual without the possibility of parole for months, or potentially years, can hardly be considered a minor, or interstitial question. Additionally, given the significant liberty interests involved, the question seems ill-suited to the executive branch, and the AG's expertise in immigration matters are of little assistance. Indeed, although it appears that no petitioners have raised a substantive due process challenge to the BIA's broad interpretation of the class of individuals subject to mandatory detention, to the extent that the BIA's interpretation raises constitutional concerns, the BIA lacks jurisdiction to decide it.³⁴⁸ As a result, courts should find that the BIA's interpretation of the "when released" language is not entitled to *Chevron* deference. Courts should move on an expedited basis, as DHS may readily destroy a petitioner's standing, evading proper review of the BIA's interpretation of § 1226(c).³⁴⁹

2. Section 1226(c) Requires Immediate Detention

This Note joins the majority of federal courts in finding that § 1226(c) unambiguously requires immediate detention. This conclusion is supported by the text, as well as the purpose of § 1226(c). There is nothing in the legislative history, or in the predecessor provision to suggest otherwise. Contrary to the Fourth Circuit's reasoning in *Hosh*, interpreting § 1226(c) to impose a timing requirement on DHS does not result in a windfall to certain noncitizen offenders. Finally, even if § 1226(c) is found to be

345. See *supra* Part I.A.4.a.

346. *Demore v. Kim*, 538 U.S. 510, 518 (2003).

347. See *supra* notes 200–05 and accompanying text; see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

348. See *supra* note 43 and accompanying text.

349. See, e.g., *supra* notes 20–21 and accompanying text (discussing the government's ability to alter its authority for detention, thereby destroying standing).

ambiguous, the rule of lenity militates against the broad reading endorsed by the BIA.

*a. The Text of the Statute Requires
Immediate Detention*

As the majority of district courts have held, the plain meaning of the text of § 1226(c) requires DHS to detain noncitizen offenders at the time the noncitizen is released from criminal custody.³⁵⁰ These courts correctly note that, unless reading a technical or legal term of art, courts must give words and phrases their ordinary meaning when construing a statute.³⁵¹ According to *The Oxford Dictionary of Current English*, the primary definition of the word “when” is “as soon as” or “at the time that.”³⁵² Therefore, § 1226(c) should be interpreted to mean that the AG must detain a criminal noncitizen who has committed a qualifying offense as soon as, or at the time that, the noncitizen is released from criminal custody.

Nevertheless, the BIA, and those courts following its decision in *Rojas* struggle with, or simply ignore, the ordinary meaning of the word “when.”³⁵³ In its analysis of the “ordinary meaning” of § 1226(c), the majority in *Rojas* does not even discuss the meaning of the word “when.” Rather, after conceding that the word “when” fixes the time at which the AG’s duty to detain criminal noncitizens arises, the BIA turned instead to a determination of whether the “when released” language can properly be understood as a description of “an alien described in paragraph (1).”³⁵⁴ Thus, as at least one court noted, it is not even clear that the BIA addressed the precise question at issue: what happens when the AG fails to detain a noncitizen offender at the moment when the noncitizen is released from criminal custody?³⁵⁵

None of the cases discussed followed the BIA’s “description of the alien” analysis. Instead, they found ambiguity in the text of the statute by looking to secondary definitions of the word “when.” In *Hosh*, for example, the Fourth Circuit noted that “when” can also mean “‘at or during the time that,’ ‘while,’ or ‘at any or every time that.’”³⁵⁶ However, the reading of § 1226(c) advocated by *Hosh* and *Rojas* would require the court to find that “when” means “at any time after,” and it is not immediately apparent that any of the alternative definitions cited in *Hosh* actually support this broad interpretation. Moreover, the approach taken in *Hosh* conflicts with the ordinary meaning standard typically employed by courts to construe

350. *See supra* Part II.C.

351. *See, e.g.*, *Louisaire v. Muller*, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010).

352. THE OXFORD DICTIONARY OF CURRENT ENGLISH 1046 (Della Thompson ed., 2d ed. 1993).

353. *See supra* Part II.A.2.

354. *See supra* notes 236–41 and accompanying text.

355. *See supra* notes 312–14 and accompanying text.

356. *See supra* note 269 and accompanying text.

statutory text.³⁵⁷ Because the ordinary meaning of the text clearly requires immediate detention, *Rojas* should not be accorded *Chevron* deference.

b. The BIA's Interpretation Is Unreasonable and Is Not Supported by the Purposes of § 1226(c)

As the Supreme Court held in *Demore*, the congressional mandate to detain noncitizen offenders without bail serves two interrelated purposes: (1) mandatory detention helps to protect public safety by ensuring that dangerous criminal offenders remain in custody pending their removal proceedings; and (2) mandatory detention ensures that removable criminal noncitizens appear for their removal proceedings.³⁵⁸ There is nothing to suggest that the mandatory detention of individuals who have been returned to the community serves either of these purposes.

As the First Circuit opined in *Saysana*, it is difficult to escape the conclusion that the justifications for mandatory detention seem attenuated when DHS permits an individual to return to the community after his release from criminal custody.³⁵⁹ Absent further criminal conduct, these twin justifications begin to appear increasingly strained with the passage of time, and mandatory detention seems not only unnecessary, but arbitrary, unfair, and even punitive. Moreover, the determination of whether a noncitizen has committed an aggravated felony or two or more CIMT is a highly complex legal inquiry, and because the determination to detain is frequently made by an agent with little or no legal training, there is a high risk of erroneous detention.³⁶⁰ Therefore, interpreting § 1226(c) to allow DHS to detain noncitizen offenders without bond at any time after release from criminal custody is not supported by the purpose of the statute.

c. Legislative History and Predecessor Provisions

Nothing in the legislative history suggests Congress contemplated whether individuals who were not immediately brought into immigration custody should be subject to mandatory detention.³⁶¹ Moreover, the changes Congress made over previous mandatory detention provisions suggest that Congress either acquiesced in the interpretation provided by a majority of federal district courts, or, more likely, that Congress never considered the timing question.

In *Hosh*, the Fourth Circuit seized on the purposes for mandatory detention articulated in the legislative history and in *Demore* to conclude that Congress intended mandatory detention for all noncitizens with qualifying convictions.³⁶² However, as noted above, this position is not

357. See, e.g., *Smith v. United States*, 508 U.S. 223, 228 (1993) (“When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.”).

358. See *supra* Part I.A.4.b.iii.

359. See *supra* note 327 and accompanying text.

360. See *supra* Part I.A.3.a–b; *supra* note 151 and accompanying text.

361. See *supra* Part I.A.4.b.ii.

362. See *supra* Part II.B.

supported by the purpose of the statute, and nothing in the legislative history indicates Congress ever even considered the question.

In *Rojas*, the BIA also looked, unavailingly, to predecessor provisions in support of its conclusion that DHS may assert mandatory detention at any time after a noncitizen with a qualifying conviction is released from criminal custody.³⁶³ In particular, the BIA, referring to a 1990 amendment to the INA forbidding the AG from releasing “any lawfully admitted alien who has been convicted of an aggravated felony,” concluded that this provision applies to “all aliens convicted of aggravated felonies, regardless of whether the aliens actually came into Service custody ‘upon release’ from criminal incarceration.”³⁶⁴

As the dissenters in *Rojas* noted, the BIA’s reliance on this language, however, is misguided in several respects.³⁶⁵ First, the command to the AG would only apply to individuals properly detained under the statute, and hence, it does not answer whether DHS may detain an individual without bond who was not detained “upon release” from criminal custody.³⁶⁶ Second, the majority of federal courts had interpreted this statute to require immediate detention, and Congress must be understood to have acquiesced to this interpretation.³⁶⁷

d. Congress’s Failure To Specify a Consequence Does Not Support the BIA’s Interpretation of § 1226(c)

Nearly every court to consider the question has found that the text of the statute creates a command directed at the AG to detain noncitizen offenders with qualifying convictions “when the alien is released” from criminal custody.³⁶⁸ In *Sylvain* and *Hosh*, however, the Third and Fourth Circuits held that, because the statute does not provide a consequence for the failure to immediately detain a noncitizen offender, Congress must have intended to treat individuals detained long after their release from criminal custody no differently from those detained immediately upon release from criminal custody.³⁶⁹

However, Congress’s failure to specify a consequence cannot be understood as a clear indication that Congress intended to ignore the differences between individuals who had been released from custody and were returned to the community, and those who were detained immediately. Neither the statute, nor anything in the legislative history, contemplates

363. See *supra* Part II.A.2.d.

364. *In re Rojas*, 23 I & N. Dec. 117, 124 (B.I.A. 2001).

365. See *supra* notes 253–58 and accompanying text.

366. See *supra* notes 252–54 and accompanying text.

367. See *supra* notes 256–57 and accompanying text.

368. 8 U.S.C. § 1226(c) (2006); see also *Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012) (“[W]e agree that Congress’s command to the Attorney General to detain criminal aliens ‘when . . . released from other custody connotes some degree of immediacy’”).

369. *Hosh*, 680 F.3d at 382; see also *supra* notes 274–78 and accompanying text.

anything other than immediate detention.³⁷⁰ Congress's silence is therefore more likely an indication that Congress did not consider the issue.

Absent additional statutory language, or legislative history to guide the analysis, it would be pure conjecture to speculate how Congress would have addressed the question. In such circumstances, a court is on surer ground when cleaving to the text of the statute itself rather than extrapolating from Congress's silence a rule that would subject noncitizens to detention without the possibility of parole. As *Khodr*³⁷¹ makes clear, "[i]f Congress wished to permit the Attorney General to take custody of criminal aliens at any time after being released from criminal confinement, it could have done so using the phrase 'at any time after the alien is released.'"³⁷²

Moreover, *Hosh* and *Sylvain* mistakenly rely on *Montalvo-Murillo* in holding that, even if § 1226(c) requires immediate detention, petitioners may not rely on it because it would deprive the government of its ability to act under the statute.³⁷³ *Hosh* was the first court to adopt this line of reasoning, and subsequent courts have noted the court's error: requiring the AG to immediately detain criminal offenders does not deprive the AG of the ability to act because the AG may still detain criminal offenders under § 1226(a) so long as the AG provides them with a bond hearing. Thus, the absence of an express remedy cannot be understood as a clear congressional signal to permit the AG to detain without bond noncitizen offenders irrespective of how long they have been out of criminal custody.

Finally, in relying on *Montalvo-Murillo*, the Third and Fourth Circuits stress that public safety should not be prejudiced by the government's failure to immediately detain noncitizen offenders.³⁷⁴ Although this point has a certain appeal, under the current system many noncitizen offenders have been held for nonviolent crimes.³⁷⁵ The public safety argument is further undermined by the fact that, in any given case, the government has permitted a particular noncitizen offender to return to the community for months, or even years, without the noncitizen committing additional criminal acts. Contrary to the Third and Fourth Circuits' reasoning, the public interest is served best by detaining dangerous noncitizen offenders without bond immediately upon release from criminal custody and by providing individualized bond hearings to assess the dangerousness and flight risk of noncitizen offenders who have been released to the community prior to their detention.

370. See *supra* Part I.A.4.b.i–ii.

371. *Khodr v. Adduci*, 697 F. Supp. 2d 774 (E.D. Mich. 2010).

372. *Id.* at 778.

373. See *supra* Part II.B.

374. See *supra* Part II.B; see also *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150, 159 (3d Cir. 2013).

375. For a discussion of the various kinds of crimes included under § 1226(c), including CIMT, see *supra* Part I.A.3.

e. Windfall to the Petitioner

In *Hosh*, the Fourth Circuit held that interpreting § 1226(c) to require immediate detention would result in an unacceptable windfall to individuals, and that the statute therefore permits DHS to detain noncitizen offenders at any time after their release from criminal custody.³⁷⁶ But this argument fails to take note of a key practical distinction: given an agency's finite resources, it is likely that DHS would seek to immediately detain those individuals who have been convicted of the most dangerous crimes.³⁷⁷ Thus, any windfall to noncitizen offenders not immediately detained is more likely a result of the nature of the crimes committed, rather than a chance mistake.

Furthermore, *Hosh* failed to acknowledge that all noncitizen offenders remain subject to detention pending their removal proceedings. The supposed windfall is merely a bond hearing to assess the dangerousness and flight risk of the noncitizen offender. If an IJ determines that the petitioner is in fact dangerous or a flight risk—the very justifications for mandatory detention—then he will remain in DHS custody during the pendency of his removal proceeding. Therefore, requiring immediate detention does not result in a windfall to noncitizen offenders.

f. The Rule of Lenity

Finally, even if a reviewing court finds that § 1226(c) is irreducibly ambiguous, the court should apply the rule of lenity rather than defer to the BIA's interpretation of the statute. As mentioned, although the rule of lenity traditionally operates in the sphere of criminal law, the doctrine may apply in immigration proceedings.³⁷⁸ Given the increasing similarity between criminal law and immigration law, there is a growing need for the application of the rule of lenity in the immigration context.

In *Hosh*, although the Fourth Circuit acknowledged that there is disagreement among the circuits regarding the correct application of the rule of lenity in the *Chevron* context, the court failed to decide the issue. Instead, the court held that, because the consequences of mandatory detention are not "grievous," the rule of lenity should not be applied.³⁷⁹ This approach fails to account for the significant amount of time an individual may be held in immigration custody pending his removal proceedings, the difficulty of the detained in seeking and retaining counsel, and the hardship that mandatory detention poses with respect to the

376. *Hosh v. Lucero*, 680 F.3d 375, 384 (4th Cir. 2012).

377. See, e.g., Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel 1 (Dec. 21, 2012), available at <http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf> ("These priorities ensure that ICE's finite enforcement resources are dedicated, to the greatest extent possible, to individuals whose removal promotes public safety, national security, border security, and the integrity of the immigration system.").

378. See *supra* notes 210–12 and accompanying text.

379. See *supra* notes 279–83 and accompanying text.

separation of families.³⁸⁰ Therefore, the rule of lenity should be applied to resolve the perceived ambiguity of the statute against the government.

B. Reasonableness Considerations

As a number of district courts have noted, it would be unreasonable for courts to impose a literal immediacy requirement on the DHS.³⁸¹ Therefore, courts should interpret the “when released” language to allow DHS a reasonable amount of time to detain noncitizens who have been convicted of qualifying offenses. This approach serves two additional salutary purposes. First, it permits DHS to identify and allocate resources to ensure that the agency detains the most dangerous criminal offenders. Second, it provides DHS with a moment of circumspection to conduct the difficult legal inquiry required to determine whether an individual has committed an aggravated felony or two or more CIMT. This circumspection may help to limit the risk of erroneous detention.

CONCLUSION

The question of whether, and to what extent, § 1226(c) requires DHS to immediately detain noncitizen offenders when they are released from criminal custody exists in the intersection between criminal law and immigration law, as well as the overlap between an executive agency’s authority to interpret the statutes it administers and the judiciary’s obligation to do so. Working within the *Chevron* framework, this Note argues that § 1226(c) unambiguously requires immediate detention, and further asserts that, as a practical matter, DHS may be afforded some latitude in effecting detention. This approach balances the liberty interests of detainees and the government’s interest in protecting the community safety and ensuring removal by finding that, at a certain point, the government’s interests are so attenuated that detainees should be provided an individualized bond determination.

Congress, of course, is the branch best situated to determine whether immediate detention is required, and should be encouraged to issue further legislation to clarify its mandate. To avoid future challenges, Congress should also conduct additional investigation to ascertain whether mandatory detention is sufficiently related to its purposes when an individual has been returned to his community and has been a productive member of that community. However, absent further congressional action, the approach this Note advocates represents the best solution to this perplexing problem.

380. See generally Heeren, *supra* note 15; Noferi, *supra* note 16.

381. See *supra* note 304 and accompanying text.