Scrutinizing National Security: A Call for Clear and Convincing Evidence in § 1226(a) Prolonged Detention Cases

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ABSTRACT

A noncitizen detained under 8 U.S.C. § 1226(a) may be detained indefinitely until her removal order is finalized. Detainees have challenged prolonged detention following a detainee's bond hearing on Fourteenth Amendment Due Process grounds, leading to a circuit split. Courts generally apply the Mathews test when hearing these challenges, which requires balancing the individual's liberty at stake against the government's interest in limiting that liberty. The government's asserted interests in these cases are frequently grounded in national security arguments, which courts rarely scrutinize. Instead, courts generally give great deference to the way the executive branch characterizes national security concerns, often casting aside the significant individual interests at stake.

This Comment argues that a more complete evaluation of national security implications will more accurately capture the full scope of proffered government interests. Currently, courts often automatically defer to the executive branch's national security determinations, rarely reaching the merits of those determinations as a result. This can be accomplished with a requirement that the government prove by clear and convincing evidence both the existence of the national security interest and a direct connection between the interest and the detention at issue. A more standardized approach will reduce the extreme deference given to the executive branch in its national security determinations.

I. INTRODUCTION

Enacted in 1996, 8 U.S.C. § 1226(a) vests the U.S. Attorney General with authority to detain noncitizens "pending a decision on whether the alien is to be removed."[1] While the statute grants a

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[1] 8 U.S.C. § 1226(a).

detainee an initial bond hearing, if her request for bond is denied, she may be detained indefinitely until her removal order is finalized.[2] Individuals have challenged their prolonged detentions following their respective bond hearings on Fourteenth Amendment Due Process grounds, leading to a nuanced circuit split.[3] The Third, Fourth, and Ninth Circuits have found that § 1226(a) provides sufficient due process to detainees,[4] while the First and Second Circuits have held that more process is required.[5]

When evaluating these Due Process challenges, courts have almost uniformly applied a test enumerated by the Court in *Mathews v. Eldridge*,[6] which requires balancing the individual's private liberty at stake against the government's interest in limiting that liberty.[7] Though the *Mathews* test was developed to assess Social Security benefits rights outside the immigration context, it has since been applied many times where noncitizens have challenged the immigration procedures they were afforded.[8] In these cases, the government's proffered interests are frequently grounded in national security arguments, since the U.S. Supreme Court has acknowledged a broad connection between immigration enforcement and national security objectives.[9] However, courts rarely engage in detailed analysis of these national security arguments.[10] Instead, courts give great deference to the way the executive branch characterizes national security concerns, thereby clearing the way for their pretextual use to disguise other, perhaps illegitimate, ends.[11]

This Comment therefore argues that courts should evaluate the nuances of national security implications when applying the *Mathews* test to more accurately capture the extent of private and governmental interests at play, rather than allowing the government to simply assert that national security concerns are implicated with no further scrutiny.

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[2] *See* Velasco Lopez v. Decker, 978 F.3d 842, 849 (2d Cir. 2020).

[3] *See, e.g.*, Miranda v. Garland, 34 F.4th 338, 347–48 (4th Cir. 2022); *Velasco Lopez*, 978 F.3d at 846–48.

[4] *See* Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 279 (3d Cir. 2018); *Miranda*, 34 F.4th at 365; Rodriguez Diaz v. Garland, 53 F.4th 1189, 1208–10 (9th Cir. 2022).

[5] *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 41 (1st Cir. 2021); *Velasco Lopez*, 978 F.3d at 855.

[6] 424 U.S. 319 (1976).

[7] *See id.* at 335.

[8] *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982).

[9] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) ("[A]ny 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.").

[10] *See, e.g.*, Miranda v. Garland, 34 F.4th 338, 364 (4th Cir. 2022); Rodriguez Diaz v. Garland, 53 F.4th 1189, 1208 (9th Cir. 2022).

[11] *See* Trump v. Hawaii, 585 U.S. 667, 728–29 (2018) (Sotomayor, J., dissenting).

Imposition of a clear and convincing burden of proof—requiring the government to prove by clear and convincing evidence both the existence of the national security interest and a direct connection between the interest and the detention at issue—will ensure that courts adequately perform this analysis. The clear and convincing standard has been applied elsewhere in the context of immigration, which supports its application to prolonged detention cases. The government, when arguing that national security concerns justify continued detention under § 1226(a), must therefore prove that these concerns are both clearly present and implicated by the detention at issue.

Because this is a stringent standard, courts should routinely reject the government's argument that any given detention furthers national security ends. National security arguments tend to be loose and broad, and so courts should rarely find that a given § 1226(a) detention can be justified by broad appeals to national security. Under the balancing portion of the *Mathews* test, courts should therefore find that many of these detentions do not satisfy due process if they do not meet the standard of proof required. This points to a resolution of the circuit split in favor of the First and Second Circuits. The government will likely grow accustomed to this burden of proof, resulting in stronger arguments and a greater likelihood that detentions will be upheld over time.

This Comment first outlines the statutory scheme that governs administrative procedures surrounding prolonged detention. It then proceeds into a discussion of the history of due process case law, beginning with the development of the *Mathews* test and followed by courts' applications of the *Mathews* test in both the immigration and national security contexts. This Comment also examines attempts by the courts and other government bodies to define national security, ultimately rejecting these definitions as unworkable. Lastly, this Comment argues that when applying the *Mathews* test to prolonged detention cases, courts should require that the government prove its asserted interest by clear and convincing evidence. This new test will require the government to shore up its national security arguments, ensuring that courts do not give the government undue deference to assert broad national security interests that bear little relationship to the detention at issue.

II. BACKGROUND

A. Administrative Procedures Surrounding Prolonged Detention

The statutory floor for administrative procedures governing the removal of noncitizens is provided by 8 U.S.C. §§ 1225(b), 1226(a),

1226(c), and 1231(a)[12]. Sections 1226(a) and 1226(c) most directly pertain to the issue of discretionary (as opposed to mandatory) detention as discussed in this Comment.

1. Section 1225(b)

Section 1225(b) is a logical starting point in the timeline of deportation proceedings. When a noncitizen has arrived in the United States but has not yet been admitted, she is deemed an "applicant for admission" under § 1225(b).[13] She is thus subject to expedited removal if she (1) lacks a valid entry document, (2) has not "been physically present in the United States continuously" for a two-year period, and (3) has been designated by the U.S. Secretary of Homeland Security for expedited removal.[14] If she is deemed "inadmissible" under those criteria, then she must be immediately removed "without further hearing or review."[15]

2. Section 1226(a)

A noncitizen who is a "lawful permanent resident[ ]," has "lawful status," or lacks "full legal status but with deferred enforcement protections" meets the conditions for removal under § 1226(a).[16] Grounds for removal may include inadmissibility,[17] failure to register a change of address,[18] falsification of documents,[19] or emergence as a "public charge from causes not affirmatively shown to have arisen since entry."[20]

Under § 1226(a), the Attorney General is permitted—but, importantly, not required—to arrest and detain the noncitizen "pending a decision on whether the alien is to be removed."[21] After the noncitizen is detained, she receives an initial bond hearing at which she carries the burden of proof.[22] She will remain in detention unless she is able to show "to the satisfaction of the Immigration Judge that . . . she merits release on bond."[23] Some of the factors that can be considered during a

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[12] 8 U.S.C. §§ 1225, 1226, 1231.

[13] 8 U.S.C. § 1225(b).

[14] *Id.* at § 1225(b)(1)(A)(i), (iii)(I)–(II); *see* Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 109 (2020).

[15] 8 U.S.C. § 1225(b)(1)(A)(i).

[16] Velasco Lopez v. Decker, 978 F.3d 842, 849 (2nd Cir. 2020).

[17] *See* 8 U.S.C. § 1227(a)(1).

[18] *See id.* at § 1227(a)(3)(A).

[19] *See id.* at § 1227(a)(3)(B).

[20] *See id.* at § 1227(a)(5).

[21] 8 U.S.C. § 1226(a).

[22] *See* In re Guerra, 24 I.&N. Dec. 37, 40 (B.I.A. 2006).

[23] *Id.*

hearing include "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."[24] At least three federal courts have held that once detention becomes "prolonged," the detainee must receive an additional bond hearing, during which the government possesses the burden to prove by clear and convincing evidence that continued detention is justified.[25] Courts have noted that although the length of detention under § 1226(a) is unspecified, it is often prolonged because it lasts until all appeals and proceedings have been finalized.[26] While the average detention is 44.6 days, as of May 2023, more than one thousand people had been detained for more than six months, and nearly 250 people had been detained for over two years.[27]

Congress passed § 1226 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[28] The enactment effectively replaced the provisions in the Immigration and Nationality Act of 1952 (INA)[29] concerning exclusion and deportation, requiring that noncitizens must have *lawfully* entered the country to be deemed admissible.[30] Under the pre-existing framework, any non-citizen who had physically entered the country was admissible, regardless of whether she had done so lawfully.[31] In signing IIRIRA into law, President Bill Clinton stated that a goal was to "crack[ ] down on illegal immigration . . . without punishing those living in the United States legally."[32]

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[24] Gerard Savaresse, *When Is When?: 8 U.S.C. § 1226(c) and the Requirements of Mandatory Detention*, 82 FORDHAM L. REV. 285, 297 (2013).

[25] *See* Singh v. Holder, 638 F.3d 1196, 1203 (9th Cir. 2011) ("[T]he government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond."); Lett v. Decker, 346 F. Supp. 3d 379, 389 (S.D.N.Y. 2018) ("[T]he government must prove by clear and convincing evidence that Petitioner's continued detention is justified."); Cortez v. Sessions, 318 F. Supp. 3d 1134, 1147 (N.D. Cal. 2018) ("Mr. Solano is entitled to a bond hearing at which DHS must justify his continued detention by establishing by clear and convincing evidence that he is a flight risk or a danger to the community.").

[26] *See, e.g.*, Velasco Lopez v. Decker, 978 F.3d 842, 852 (2nd Cir. 2020).

[27] *See Locked Away: The Urgent Need for Immigration Detention Bond Reform*, NAT'L IMMIGRANT JUST. CTR. (May 4, 2023), https://immigrantjustice.org/research-items/policy-brief-locked-away-urgent-need-immigration-detention-bond-reform [https://perma.cc/5XEC-7L6G]. Forty-one percent of those subject to prolonged detention are not mandatorily detained. Reasons for prolonged detention under § 1226(a) may be highly individualized. Some examples include delay in receiving an initial bond hearing, length of ongoing proceedings and appeals, and denial of asylum application. *See Prolonged Detention Fact Sheet*, ACLU, https://www.aclu.org/sites/default/files/assets/prolonged_detention_fact_sheet.pdf [https://perma.cc/BSY2-8LWV].

[28] Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

[29] Pub. L. No. 82-414, 66 Stat. 163 (1952).

[30] *See* Pub L. No. 104–208 § 304, 110 Stat. at 587–88 (codified at 8 U.S.C. §§ 1229, 1229a).

[31] *See id.* §§ 212(a), 241(a); *see also* HILLEL R. SMITH, CONG. RSCH. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW (2019).

[32] Presidential Statement on Signing the Omnibus Consolidated Appropriations Act, 1997, 2 Pub. Papers 1729–32 (Sept. 30, 1996), https://www.presidency.ucsb.edu/documents/statement-

3. Section 1226(c)

If a noncitizen has committed one of a designated set of crimes rendering her removable, § 1226(c) dictates that "[t]he Attorney General *shall* take [her] into custody."[33] This set of crimes includes crimes of moral turpitude,[34] aggravated felony,[35] and association with a terrorist organization.[36] The Attorney General may only release the detainee if she decides that (1) release is necessary to protect a witness; and (2) release will not create a danger to the community.[37] Several courts have deferred to the Board of Immigration Appeals' (BIA) determination that the Department of Homeland Security (DHS) may take noncitizen offenders into custody at any time after they are released from criminal custody.[38]

Section 1226(c) offsets the discretion afforded to the Attorney General in determining whether to detain noncitizens pursuant to § 1226(a). It was enacted in response to congressional concerns that the Immigration and Naturalization Service (INS) had failed to control the rising rates of crime committed by noncitizens.[39] Since then, the Supreme Court has affirmed the right of the Attorney General to detain criminal noncitizens for a brief period prior to removal proceedings.[40] As of March 2023, 59% of noncitizens detained by Immigration and Customs Enforcement (ICE) were subject to mandatory detention.[41]

4. Section 1231(a)

Finally, § 1231(a) authorizes the government to detain noncitizens after they have been ordered removed from the United States.[42] The government has ninety days to secure removal of the noncitizen after

signing-the-omnibus-consolidated-appropriations-act-1997 [https://perma.cc/TBM4-BK8U].

[33] 8 U.S.C. § 1226(c)(1)(A)–(D) (emphasis added).

[34] *See id.* at § 1226(c)(1)(B) (citing 8 U.S.C. § 1227(a)(2)(A)(ii)). Moral turpitude has been defined as "evidenced by an act of baseness, vileness or depravity in the private and social duties which according to the accepted standards of the time a man owes to his fellowman or to society in general." U.S. *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Penn. 1947).

[35] *See id.* (citing 8 U.S.C. § 1227(a)(2)(A)(iii)).

[36] *See id.* at § 1226(c)(1)(D).

[37] *See id.* at § 1226(c)(2).

[38] *See, e.g.*, Hosh v. Lucero, 680 F.3d 375, 380 (4th Cir. 2012) (deferring in keeping with Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

[39] *See, e.g.*, *Criminal Aliens in the United States: Hearings before the Permanent Subcomm. on Investigations of the S. Comm. on Gov't Aff.*, S. REP. NO. 104-48 (1995).

[40] *See* Demore v. Kim, 538 U.S. 510, 528 (2003) (holding that "[s]uch detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to . . . their removal proceedings."). The Court did not describe its intention with respect to this "brief period" of detention.

[41] *See* NAT'L IMMIGRANT JUST. CTR., *supra* note 27.

[42] *See* 8 U.S.C. § 1231(a); *see* Johnson v. Arteaga-Martinez, 596 U.S. 573, 573 (2022).

entering a final order of removal.[43] Criminal and terrorist noncitizens "shall" be detained during the ninety-day removal period; DHS has no discretionary authority here.[44] Most notably, § 1231(a)(6) outlines the categories of noncitizens whom the government "may" detain after expiration of the removal period: noncitizens who are (1) "inadmissible"; (2) "removable"; (3) "a risk to the community"; and (4) "unlikely to comply with the order of removal."[45] In other words, once the ninety-day removal period has expired, DHS has discretionary authority to continue detaining noncitizens who fall into one of the above categories. The removal period is extended if the noncitizen fails to secure necessary travel documents.[46]

B. The History of Due Process Case Law

The Due Process Clause of the Fifth Amendment prescribes that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[47] Historically, the Court has understood this general directive to grant individuals faced with any of these deprivations "the right to be heard."[48] However, while one's right to be heard "must be granted at a meaningful time and in a meaningful manner,"[49] it need not be granted at a specific time in relation to the deprivation (i.e., before the deprivation occurs).[50] Rather, it is flexible and should be applied in a way that comports with the specific situation and nature of the deprivation.[51]

1. Development of the *Mathews* test

Before the 1960s, the Court employed no objective framework when evaluating whether an administrative procedure grants adequate due process, simply referencing the clause's flexibility and making case-by-case determinations.[52] However, the Court later began to carve out a

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[43] *See* 8 U.S.C. § 1231(a)(1)(A).

[44] *Id.* at § 1231(a)(2).

[45] *Id.* at § 1231(a)(6).

[46] *See id.* at § 1231(a)(1)(C).

[47] U.S. CONST. amend. V.

[48] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) ("[T]he right to be heard . . . is a principle basic to our society.") (Frankfurter, J., concurring); *see also* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[49] *Armstrong*, 380 U.S. at 552.

[50] *See* Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 894–95 (1961).

[51] *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

[52] *See, e.g.*, Federal Communications Commission v. WJR, The Goodwill Station, Inc., et al., 337 U.S. 265, 276 (1949) ("[T]he right of oral argument as a matter of procedural due process varies

discrete analysis—one that weighed the government's interest against the individual's private interest. While its new analytical method arguably did little to cabin the Court's discretion, it nevertheless provided more transparency in how it reached due process decisions.

The seeds of this balancing test were sown in Justice Felix Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*,[53] in which the petitioner challenged its inclusion on the Attorney General's List of Subversive Organizations.[54] Frankfurter found that an individual's right to be heard is implicated before he is "condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction."[55] However, the new framework materialized in *Cafeteria and Restaurant Workers Union v. McElroy*,[56] in which an employee at a military facility sought reinstatement of her identification badge.[57] The Court sorted out the commonalities in precedential due process evaluations and decided that analysis first required "a determination of the precise nature of the government function involved," followed by a determination "of the private interest that has been affected by governmental action."[58]

Acknowledging the reasoning in *McElroy*, the Court applied the new standard to the welfare context in *Goldberg v. Kelly*.[59] There, the Court determined that the welfare recipient's "interest . . . in uninterrupted receipt of public assistance" was clearly weightier than "the State's competing concern to prevent any increase in its fiscal and administrative burdens."[60] The Court also credited the lower court's conclusion that depriving the welfare recipient of knowledge of the case against him would create too great a "possibility for honest error or irritable misjudgment."[61]

In *Mathews v. Eldridge*,[62] the Court outlined its clearest test yet for determining whether the Due Process Clause requires additional procedure that goes above and beyond what is prescribed by a statute.

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from case to case in accordance with differing circumstances, as do other procedural regulations."); Hannah v. Larche, 363 U.S. 420, 442 (1960) ("[The] exact boundaries [of 'due process'] are undefinable, and its content varies according to specific factual contexts.").

[53] 341 U.S. 123 (1951).

[54] *See generally* Robert Justin Goldstein, *The Grapes of* McGrath*: The Supreme Court and the Attorney General's List of Subversive Organizations in* Joint Anti-Fascist Refugee Committee v. McGrath *(1951)*, 33 J. SUP. CT. HIST. 68 (2008).

[55] *Id.* at 168 (Frankfurter, J., concurring).

[56] 367 U.S. 886 (1961).

[57] *Id.* at 888–89.

[58] *Id.* at 895.

[59] 397 U.S. 254 (1970).

[60] *Id.* at 266.

[61] *Id.* (quoting Kelly v. Wyman, 294 F. Supp. 893, 904–05 (1968)).

[62] 424 U.S. 319 (1976).

The plaintiff in *Mathews* challenged the loss of his social security benefits for his disability after the Social Security Administration (SSA) determined it had ceased.[63] After terminating his benefits, the SSA informed the plaintiff that he had the right to reconsideration within six months.[64] Instead of filing for reconsideration, the plaintiff sued the SSA, alleging that *Goldberg* required that he be granted an evidentiary hearing prior to the revocation of his benefits.[65] The lower court and the Fourth Circuit agreed that the plaintiff's due process rights had been violated.[66]

In reversing the lower courts' decisions, the Court distinguished the plaintiff's circumstances from those in *Goldberg*.[67] Further, the Court synthesized a new test to determine "whether due process ha[s] been [met] in an administrative proceeding."[68] The resulting *Mathews* test requires the balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[69]

The new factors were designed to fit the flexible, case-specific approach to due process that is the Court envisioned when assessing the sufficiency of a given administrative procedure.[70]

At the time, the change in due process jurisprudence marked by *Goldberg* and *Mathews* was viewed as an immediate victory for recipients of government benefits, as it resulted in a concrete framework for evaluating whether they had received a fair hearing.[71] More broadly, it was also praised as a means for holding government actors accountable, having bolstered judicial review of administrative procedures.[72] Nevertheless, the decisions were not without criticism—legal positivists such

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[63] *Id.* at 320.

[64] *Id.*

[65] *Id.* at 325.

[66] *Id.* at 326.

[67] *Id.* at 340–46.

[68] Sharon Shaji, *The Due Process Owed to Noncitizens: Standardizing the Burden in § 1226(a) Bond Hearings With the Help of Hernandez-Lara and Velasco Lopez*, 44 CARDOZO L. REV. 1635, 1646 (2023).

[69] *Mathews*, 424 U.S. at 335.

[70] *See id.* at 334.

[71] *See* Jason Parkin, *Adaptable Due Process*, 160 U. PENN. L. REV. 1309, 1326 (2012).

[72] *See id.* at 1329.

as Judge Frank Easterbrook argued that the expansion of judicial review of administrative proceedings was not "a legitimate power or function of the Court."[73]

2. The *Mathews* test and immigration law

Commentators have noted the shift from *Goldberg* to *Mathews* as a "low point" in due process jurisprudence due to its explicit positioning of individual liberties against broad government interests.[74] However, scholars have argued that the "*Mathews*ization" of due process rights in the immigration context in particular has surprisingly led to greater protections for noncitizens because of its individualized approach.[75] Before *Mathews*, courts analyzed immigration questions through a formalistic and categorical lens.[76] For example, in *United States ex rel. Knauff v. Shaughnessy*,[77] Ellen Knauff, a German citizen married to a U.S. citizen, sought to be naturalized under the War Brides Act.[78] Upon her arrival in the United States, she was detained and denied a hearing to challenge her exclusion.[79] Rather than inquiring as to Knauff's individual liberties, the Court simply treated the case as if it were brought by an anonymous immigrant, refusing to reckon with Knauff's individual private interest.[80] To the contrary, the Court gave extreme deference to Congress' admissibility standard, noting that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[81] The Court's blatant disregard for Knauff's particular circumstances was condemned even at the time.[82]

In stark contrast to *Knauff*, the Court's application of *Mathews* in later immigration cases highlighted its embrace of individual

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[73] Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125.

[74] *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Separate Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 58 (1976).

[75] Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 U. CONN. L. REV. 879, 882 (2015).

[76] *See id.* at 897; *see, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 216 (1953) ("[R]espondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."); Harisiades v. Shaughnessy, 342 U.S. 580, 587–88 (1952).

[77] 338 U.S. 537 (1950).

[78] *Id.* at 539–40.

[79] *Id.*

[80] *See id.* at 546 ("[A]side from the enumerated relaxations of the immigration laws she must be treated as any other alien seeking admission.").

[81] *Id.* at 544.

[82] *See id.* at 550 (Jackson, J., dissenting) ("This woman was employed by our European Command and her record is . . . highly praised by her superiors.").

circumstances. In *Landon v. Plasencia*,[83] Plasencia was a lawful permanent resident who had briefly left but returned to the United States and thus faced deportation.[84] The Court stated that Plasencia's private interest was "without question, a weighty one" because she faced the loss of her right to live and work in the United States and to be reunited with her family.[85] However, Justice O'Connor acknowledged that the Court was not tasked with conducting the *Mathews* test because the facts presented mostly concerned Plasencia's private interest and not the government's interest or risk of erroneous deprivation.[86] Thus, the case was remanded to the Court of Appeals for the Ninth Circuit for application.[87] While the Court had recognized individual rights in previous immigration cases, *Plasencia* marked an important shift in the Supreme Court's inclination to explicitly apply an individualistic mode of analysis.[88]

3. The *Mathews* test and national security

Consistent deference to executive judgments on national security issues—justified on both practical and constitutional grounds—has withstood the evolution of national security law.[89] However, when faced with issues of procedural due process, the Court has shown an implicit willingness to bypass executive judgment.[90] Legal commentators have noted that this confidence stems from the Court's relative expertise on procedural questions, as compared to factual questions about the efficacy of a given substantive policy.[91] Thus, in the post-September 11 era

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[83] 459 U.S. 21 (1982).

[84] *Id.* at 23–25.

[85] *Id.* at 34.

[86] *See id.* at 37.

[87] *See id.*

[88] *See* Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("[T]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); Rosenberg v. Fleuti, 374 U.S. 449, 460–61 (1963) ("[A]n alien like Fleuti . . . would seldom be aware that he was possibly walking into a trap, for the insignificance of a brief trip to Mexico or Canada bears little rational relation to the punitive consequence of subsequent excludability.").

[89] *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010) (noting that courts lack competence in the area of national security); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (noting a refusal to find standing "in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.").

[90] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion); Boumediene v. Bush, 553 U.S. 723 (2008).

[91] *See* Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 395 (2010) ("[O]n a deeply divided Court, some of the Justices appear to have believed that the domain within which they can most confidently displace executive with judicial judgment is that of procedural fairness."); Landau, *supra* note 75, at 892.

marked by executive disregard for human rights, the *Mathews* test provided an unexpected opportunity for the Court to act as a protector of individual liberties.[92]

The Court most notably applied the *Mathews* test in the national security context in *Hamdi v. Rumsfeld*.[93] Hamdi, an American citizen, was captured in Afghanistan as an enemy combatant under the 2001 Authorization for the Use of Military Force (AUMF),[94] an act authorizing the President to "use all necessary and appropriate force" against people who were determined to have been involved in the September 11 attacks.[95] Hamdi's father filed a habeas petition on Hamdi's behalf.[96] The Fourth Circuit held that it was neither necessary nor proper for Hamdi to receive a factual inquiry or evidentiary hearing because he had conceded that he was captured in an active combat zone; this fact alone provided sufficient grounds for constitutional detention under the President's war powers.[97]

To determine the due process rights of an American citizen disputing his enemy-combatant status, Justice O'Connor applied the *Mathews* test.[98] Under the first prong, Hamdi's "private interest"—"the interest in being free from physical detention by one's own government"—was deemed paramount.[99] Interestingly, Justice O'Connor went further and affirmed that Hamdi's private interest in his physical freedom was not compromised "by the circumstances of war or the accusation of treasonous behavior," as the purpose of detention was deemed irrelevant to a finding of substantial liberty interest.[100]

The Court also recognized the substantial governmental interests at play when the prospect of armed conflict lingers in the background of state action.[101] One such interest is the assurance that detained individuals who have fought as enemy combatants will not return to fight against the United States in the future.[102] The government argued that if it afforded more procedure to alleged enemy combatants, the burden of an extensive trial-like process would dangerously divert attention

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[92] *See* Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035, 1037 (2016).

[93] 542 U.S. 507 (2004) (plurality opinion).

[94] Pub. L. No. 107-40, 115 Stat. 224 (2001).

[95] *Hamdi*, 542 U.S. at 510 (quoting Pub. L. No. 107-40, 115 Stat. 224 (2001)).

[96] *Id.* at 511.

[97] *Id.* at 514.

[98] *Id.* at 529.

[99] *Id.*

[100] *Id.* at 530 (citing Jones v. United States, 463 U.S. 354, 361 (1983)).

[101] *See id.* at 531–32.

[102] *See id.* at 531.

and resources from national security efforts.[103] However, Justice O'Connor emphasized the heightened potential for "erroneous deprivation" during a time of conflict as "an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."[104] The Court therefore held that Hamdi's factual circumstances warranted an opportunity for him to challenge his enemy combatant status before a third party, while also leaving space for amending such proceedings to account for the dynamic nature of military conflict.[105]

The *Hamdi* dissents, meanwhile, illuminate the controversy of the new *Mathews* application. Justice Scalia was incredulous that the *Mathews* test, derived from a case evaluating the revocation of Social Security benefits, should be applied to a matter as significant as national security.[106] Justice Thomas outright rejected the balancing of Hamdi's liberty interests against the federal government's overarching war powers.[107] Nevertheless, Justice O'Connor's departure from pre-September 11 national security decisions, which were largely ignorant of the specific circumstances faced by an individual detainee, signaled the Court's consequential recognition that the individual rights of detainees should not be discarded, even in times when national security concerns are at their highest.

The Court surprisingly went even further four years later in *Boumediene v. Bush*.[108] The *Boumediene* Court was not tasked with applying the *Mathews* test. Rather, the relevant question was whether foreign detainees held at Guantánamo Bay could invoke the protections of the Suspension Clause, which disallows the federal government from suspending the habeas corpus privilege.[109] Still, the Court effectively endorsed *Mathews*' applicability in the national security context.[110] Most notably, the *Boumediene* Court expanded *Hamdi*'s application to *all* executive detentions — "'enemy' or 'friendly,' citizen or non-citizen, on or off U.S. shores."[111] *Hamdi* and *Boumediene* exist in stark contrast

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[103] *See id.* at 531–32.

[104] *Id.* at 530.

[105] *See id.* at 533–34.

[106] *See id.* at 575 (Scalia, J., dissenting); *see also* Landau, *supra* note 75, at 910.

[107] *See id.* at 579 (Thomas, J., dissenting).

[108] 553 U.S. 723 (2008).

[109] *See id.* at 732; U.S. CONST. art. I § 9 cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended.").

[110] *See* Boumediene v. Bush, 553 U.S. 723, 781 (2008) ("The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context.").

[111] Landau, *supra* note 75, at 911; *Boumediene*, 553 U.S. at 804 (Roberts, C.J., dissenting) (disagreeing with the Court's conclusion that *Hamdi*, a case concerning a U.S. citizen, provided the applicable framework for evaluating detention of a noncitizen).

to an apparent formalistic default in which deference to the Executive on issues of national security is constitutionally required. Rather, these post-September 11 cases reflect a different reality—that the Court's confidence in addressing questions of due process often results in a *lack* of deference given to the executive, even in situations where national security is clearly paramount.

III. STATUS OF CURRENT LAW

Currently, there is a circuit split on the issue of whether the minimum procedure required by § 1226(a) is constitutionally adequate. The Third, Fourth, and Ninth Circuits have upheld the existing procedure, while the First and Second Circuits have required the addition of more procedure. Generally, these courts have applied the *Mathews* test to answer this question, with varying levels of acknowledgement of the implicit national security concerns implicated by the detention at issue.

A. The Third, Fourth, and Ninth Circuits Have Upheld Existing Procedures Under Section 1226(a)

The Third, Fourth, and Ninth Circuits have all held that existing procedures under § 1226(a) are constitutionally adequate.[112] Further, the Fourth and Ninth Circuits have accepted the government's arguments that immigration policy enforcement is a weighty interest warranting little scrutiny, implicitly displaying the common theme of national security deference.[113] The Third Circuit did not engage in *Mathews* test interest-balancing.[114]

In *Borbot v. Warden Hudson County Correctional Facility*,[115] the Third Circuit heard a challenge to a prolonged detention pursuant to § 1226(a). Borbot, a Russian citizen, overstayed a six-month tourist visa, and ICE detained him for fraud while he was in unlawful status.[116] Borbot applied for and was denied bond.[117] He filed a habeas petition, arguing that his three-month detention violated due process absent a showing that he posed a flight risk or a danger to the community.[118] The Third Circuit held that § 1226(a) is distinct from § 1226(c) in that a due process challenge to § 1226(c) "seeks to compel a bond hearing where

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[112] *See* Borbot v. Warden Hudson County Correctional Facility, 906 F.3d 274, 280 (3d Cir. 2018); Miranda v. Garland, 34 F.4th 338, 365 (4th Cir. 2022); Rodriguez Diaz v. Garland, 53 F.4th 1189, 1213 (9th Cir. 2022).

[113] *See Miranda*, 34 F.4th at 364; *Rodriguez Diaz*, 53 F.4th at 1208.

[114] *See Borbot*, 906 F.3d at 280.

[115] *Id.* at 274.

[116] *Id.* at 275.

[117] *Id.* at 276.

[118] *Id.*

there has been none," whereas a challenge to § 1226(a) "seeks to compel a *second* bond hearing despite *alleging no constitutional defect in the one he received*."[119] The Third Circuit affirmed the district court's order, with no application or mere mention of the *Mathews* test.[120]

The Fourth Circuit heard a similar challenge in *Miranda v. Garland*.[121] In that case, Miranda argued that the process leading to his detention under § 1226(a) violated his due process rights because the government should have carried the burden of proof and because the immigration judge should have been required to consider alternatives to detention or his ability to pay bond.[122] Here, the court applied the *Mathews* test, first finding that while Miranda had a strong interest in his freedom from detention, the Court's holding in *Demore v. Kim*[123] directs that noncitizens "are due less process when facing removal hearings than an ordinary citizen would have."[124] The court found that the second factor also weighed against Miranda because his evidence of the likelihood of erroneous deprivations under the current proceedings was unconvincing.[125] Finally, the court deemed limitations on judicial review of deportation proceedings consistent with Congress' repeated affirmation of the government's vital interest in immigration enforcement.[126] While not explicitly referring to national security concerns, the Fourth Circuit nevertheless noted that immigration policies are "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power."[127]

The Ninth Circuit decided the final case on this side of the circuit split in *Rodriguez Diaz v. Garland*.[128] There, Rodriguez Diaz contended that while he received an initial bond hearing, his prolonged detention after he was denied bond violated the Due Process Clause because he was entitled to another bond hearing in which the government must show that clear and convincing evidence justified his detention.[129] Interestingly, the court noted that a detainee is entitled to request a second bond hearing, but only when he "experiences a material change in

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[119] *Id.* at 279 (emphasis added).

[120] *See id.* at 280.

[121] 34 F.4th 338 (4th Cir. 2022).

[122] *Id.* at 358.

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

[124] *Miranda*, 34 F.4th at 359–61; *Demore*, 538 U.S. at 521 ("[In the context of] immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

[125] *See Miranda*, 34 F.4th at 363.

[126] *See id.* at 364–65.

[127] *Id.* at 364.

[128] 53 F.4th 1189 (9th Cir. 2022).

[129] *Id.* at 1193.

circumstances."[130] Rodriguez Diaz argued that his vacated drug conviction and rehabilitation constituted such a material change, but the Immigration Judge found that he had not made the necessary showing because he had lied about gang membership in the past; a determination that the Ninth Circuit upheld.[131]

The court applied the *Mathews* test, first finding Rodriguez Diaz's private interest in ending his fourteen-month detention to be strong.[132] However, it noted that circuit precedent generally refers to "prolonged" detentions in situations where the individual had not been granted a bond hearing at all.[133] Rodriguez Diaz had been granted a bond hearing two months after he was initially detained, and the extension of his detention was mostly due to the fact that he chose to challenge his removal order.[134] The court determined that the government's interest in "preventing aliens from 'remain[ing] in the United States in violation of our law'" outweighed Rodriguez Diaz's private interest.[135] Finally, the court found that the initial bond hearing, combined with the possibility that detention would not have been prolonged had he not challenged his removal order, provided adequate procedure that "mitigated the risk of erroneous deprivation."[136] As the Fourth Circuit had stated in *Miranda*, the Ninth Circuit stated that, in reference to § 1226(c), "[t]he government has an obvious interest in 'protecting the public from dangerous criminal aliens,'" implicitly recognizing that national security concerns underpin the government's substantial interest in enforcing immigration law at large.[137]

B. The First and Second Circuits Have Rejected as Inadequate Existing Procedures Under Section 1226(a)

The First and Second Circuits are on the other side of the circuit split. In marked divergence from the Third, Fourth, and Ninth Circuits, these courts have displayed a reduced willingness to accept the government's blanket assertions that prolonged detention under § 1226(a) serves legitimate ends. Rather, both the First and Second Circuits scrutinized the government's interests, giving these interests and the detainee's interests equal attention.

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[130] *Id.* at 1197.

[131] *See id.* at 1195.

[132] *See id.* at 1207.

[133] *Id.*

[134] *See id.*

[135] *See id.* at 1208 (quoting Demore v. Kim, 538 U.S. 510, 518 (2003)).

[136] *Id.* at 1209–13.

[137] *See id.* at 1208 (quoting *Demore*, 538 U.S. at 515).

In *Hernandez-Lara v. Lyons*,[138] the First Circuit held that prolonged detention under § 1226(a) requires an additional hearing at which the government bears the burden of proof to show that the detainee is dangerous or poses a flight risk, either by clear or convincing evidence or by a preponderance of the evidence.[139] In applying the *Mathews* test, the court concluded that when evaluating the government's interest in executing removal orders, the relevant consideration is "who should bear the burden of proving noncitizens pose a danger or a flight risk."[140] The court held that the government was not permitted to detain all those who *may* present those concerns.[141] This line of reasoning marks a major shift in how courts assess the third *Mathews* factor. While the Third, Fourth, and Ninth Circuits seemed to accept the government's asserted interest in enforcing immigration at face value, the First Circuit was less willing to allow action based on that interest without limitation.[142]

Finally, in *Velasco Lopez v. Decker*,[143] the Second Circuit adopted *Hamdi*'s weighty consideration of the plaintiff's substantial liberty interests, noting that he had spent "nearly fifteen months incarcerated . . . where he was held alongside criminally charged defendants and those serving criminal sentences."[144] The court also emphasized that, in contrast to detentions governed by other immigration statutes, detentions governed by § 1226(a) tend to be much longer; in the present case, Velasco Lopez's incarceration was ten times longer than the majority of detentions under § 1226(c).[145] The court deemed Velasco Lopez's private interest to outweigh the government's interest in avoiding the administrative burdens of shifting the burden of proof.[146] In fact, a burden-shifting framework was more likely to serve the government's interest "in minimizing the enormous impact of incarceration in cases where it serves no purpose."[147]

The varying approaches that the circuits have taken to applying the *Mathews* test to prolonged detention under § 1226(a)—and their varying results—suggest a need for a more standardized approach to balancing the detainee's private interest against the government's

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[138] 10 F.4th 19 (1st Cir. 2021).

[139] *See id.* at 41.

[140] *Id.* at 32.

[141] *Id.*

[142] *See id.* ("The government fails to explain why its proffered interest in securing appearance at removal proceedings and for deportation holds sway where a noncitizen is not a flight risk.").

[143] 978 F.3d 842 (2d Cir. 2020).

[144] *Id.* at 851.

[145] *See id.* at 852.

[146] *See id.* at 854–55.

[147] *Id.* at 854.

interest. At least some of the disparity in outcomes can likely be attributed to the varying degrees of deference that the circuits give to the government's proffered national security arguments. Thus, standardizing the way courts assess asserted national security interests will likely result in more predictability.

IV. COURTS APPLYING THE *MATHEWS* TEST SHOULD ADOPT THE STRINGENT CLEAR AND CONVINCING STANDARD OF PROOF

This Comment will advance one main argument: to satisfy the *Mathews* test, the government must show by clear and convincing evidence that national security concerns justify continued detention under § 1226(a). Specifically, the government must prove by clear and convincing evidence both the existence of the alleged national security interest and a direct connection between the interest and the detention at issue. Moreover, as a consequence of proper implementation of this exacting standard, the government should routinely fail to show that a specific detainee under § 1226(a) poses the kind of national security risk that a detainee under § 1226(c) does. As a result, courts should frequently hold that individual detentions under § 1226(a) violate due process, especially where those detentions are prolonged.

A. The Government Should be Required to Prove that a Relevant National Interest Justifies Detention by Clear and Convincing Evidence

Currently, when courts apply the *Mathews* test in the context of immigration or national security, they evaluate each *Mathews* factor separately to determine its respective weight.[148] After independent assessment, they issue a ruling as to whether due process has been satisfied based on the weightiness of each asserted interest.[149] Often, the court takes the proffered government interest at face value, especially when it pertains to national security.[150] The Supreme Court's extreme deference to the executive's national security arguments has often resulted in lower courts refusing to reach the merits of a claim against allegedly unconstitutional executive action, thereby depriving plaintiffs of much-needed relief.[151] Nowhere is this dilemma more salient than in the context of § 1226(a), where a detainee's right to freedom is often deemed less important than the government's generic interest in

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[148] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 528–33 (2004) (plurality opinion).

[149] *See id.* at 533–35.

[150] *See, e.g.*, Rodriguez Diaz v. Garland, 53 F.4th 1189, 1208 (9th Cir. 2022).

[151] *See* Vladeck, *supra* note 92, at 1037; *see, e.g.*, Lebron v. Rumsfeld, 670 F.3d 540, 549 (4th Cir. 2012).

"immigration enforcement."[152] But this interest is not obviously abridged by granting an additional bond hearing to a noncriminal detainee. Thus, such arguments must be cabined to limit the government's ability to raise vague national security interests that may, in reality, bear little relation to the individual detainee's detention.

Creating a clear standard by which courts should evaluate the government's alleged national security interests in *Mathews* cases will ensure that judges do not merely fall back on old habits. Under the new standard, the first two steps of the *Mathews* test remain unchanged. A court will first take stock of the detainee's private liberty at stake. Next, it will examine the risk of erroneous deprivation posed by the action. Finally, instead of the court simply noting the government's proffered interest, the government must prove by clear and convincing evidence both the existence of that interest and a direct connection between the interest and the detention at issue. Now, having already evaluated the independent strength of the government's argument, the court will conduct the usual balancing test to determine whether the government interest outweighs the private interest.

While the Supreme Court has held national security to be a compelling state interest in contexts where such concerns are readily apparent,[153] it has also consistently noted that broad, nondescript use of the term to justify constitutional violations is intolerable.[154] An elevated burden of proof is consistent with this viewpoint. It would force the government to specify—and thereby limit—its national security arguments. Courts would then accept only those arguments that reasonably relate to the detention at issue and pose a reduced likelihood of constitutional violation. A burden of proof would also still allow deference to the executive in situations where it is appropriate. For example, in times of war, the government could bring concrete evidence that the current state of affairs justifies less selective detention. It is also worth noting that national security interests are merely one category of any number of proffered government interests in § 1226(a) cases (for example, administrative interests, economic interests, or privacy interests). National security interests are simply those that courts are least likely

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[152] *See e.g.*, Miranda v. Garland, 34 F.4th 338, 364 (4th Cir. 2022); *Rodriguez Diaz*, 53 F.4th at 1206.

[153] *See* Korematsu v. United States, 323 U.S. 214, 223 (1944) (holding that Japanese internment satisfied strict scrutiny because it clearly served the war effort).

[154] *See* New York Times Co. v. United States, 403 U.S. 713, 719 (1971) (per curiam) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.") (Black, J., concurring); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Frankfurter, J., concurring); De Jonge v. Oregon, 299 U.S. 353 (1937); *see also* Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1583–84 (2011).

to scrutinize. Thus, there is no special burden on national security arguments as opposed to other kinds of arguments.

Automatic deference is the foremost problem posed by the current analytical regime, but yet another is courts' lack of transparency in granting such deference. Because courts rarely reach the merits of national security arguments, it is virtually impossible to evaluate the strength of those arguments.[155] Imposing a burden of proof would incentivize the government to put forth their best evidence and to produce more information in support of their claims. Thus, when a court rules in favor of the government, its reasons for doing so would be much clearer. More information production also benefits both plaintiffs and others reliant on *Mathews* jurisprudence in the immigration context.

The Supreme Court, in certain prior decisions, has tacitly placed a burden on the government to show that a particular immigration detention satisfies due process, paving the way for a clear burden of proof.[156] In evaluating the prolonged detention of a noncitizen in *Zadvydas v. Davis*,[157] the Court held that detention must have a "reasonable relation to the purpose" behind that detention.[158] In that case, the detainee could not possibly have been deported because the country to which he was ordered deported refused to accept him.[159] Thus, the Court found that the detention could not actually serve the asserted government purpose of flight prevention and community protection.[160] In *Demore v. Kim*,[161] the Court held that the plaintiff's mandatory detention under § 1226(c) was "reasonably related to the government's purpose" of preventing noncitizens from fleeing before they may be removed.[162] Even though *Demore* likely abridged the rights of detainees going forward, the Court's finding that the detention was *reasonably related* to the proffered evidence shows that such a burden of proof would simply codify an approach the Court has already applied to matters of detention.

The Court's frequent application of the clear and convincing standard in cases concerning procedural due process supports its extension

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[155] *See, e.g.*, *Miranda*, 34 F.4th at 364; *Rodriguez Diaz*, 53 F.4th at 1208.

[156] *See* Shaji, *supra* note 68, at 1647.

[157] 533 U.S. 678 (2001).

[158] *Id.* at 690 (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)).

[159] *Id.* at 684.

[160] *See id.* at 690–94.

[161] 538 U.S. 510 (2003).

[162] Shaji, *supra* note 68, at 1647; *Demore*, 538 U.S. at 527–28.

to the immigration context more broadly.[163] In *Addington v. Texas*,[164] which concerned an individual who had been indefinitely committed to a mental hospital, the Court unanimously *required* the clear and convincing standard when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."[165] Detainees challenging prolonged detention under § 1226(a) fit squarely in this definition. Moreover, the Court in *Addington* singled out those cases in which the individual faced "a significant deprivation of liberty" or "stigma" as ones that especially required a higher burden of proof.[166] Again, both of these losses are faced by any noncitizen detainee. Significantly, *Addington* concerned an individual who had been *indefinitely* committed to a mental hospital.[167] This situation is quite analogous to detentions arising under § 1226(a), in which detainees are often faced with indefinite detention with no means of challenging a detention order.

The Court also applied the clear and convincing standard in the context of immigration in *Woodby v. Immigration and Naturalization Service*.[168] There, the Court concluded that "no deportation order may be entered" unless it can be shown by "clear, unequivocal, and convincing evidence that the facts alleged as ground for deportation are true."[169] While *Woodby* concerned deportation itself and not *detention* prior to deportation, its holding nonetheless supports imposing a similar burden of proof in the § 1226(a) context. Both situations involve a substantial risk that the individual will be deprived of "life, liberty, or property."[170] Further, the government's arguments brought in support of prolonged detention are likely to be more character-based than arguments in favor of deportation, which supports a higher burden of proof for the former kind of argument. In *Woodby*, the petitioner faced deportation "upon the ground that he had re-entered the United States . . . following a trip abroad, without inspection as an alien."[171] Conversely, arguments for prolonged detention under § 1226(a) generally allege that the detainee poses some danger to the community.[172] It is

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[163] *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979); Santosky v. Kramer, 455 U.S. 745, 748 (1982) (holding that the state must prove by clear and convincing evidence that a child has been "permanently neglected" before terminating parental rights).

[164] 441 U.S. 418 (1979).

[165] *Id.* at 424.

[166] *Id.* at 425–26.

[167] *Id.* at 420.

[168] 385 U.S. 276 (1966).

[169] *Id.* at 286.

[170] U.S. CONST. amend. V.

[171] *Woodby*, 385 U.S. at 277–78.

[172] *See, e.g.*, Rodriguez Diaz v. Garland, 53 F.4th 1189, 1193 (9th Cir. 2022) (noting that

reasonable for the government to bear a higher burden when proving a quality as stigmatized as dangerousness than simple failure to comply with a given immigration procedure. At the very least, *Woodby* reveals the Court's implicit recognition of the severe loss of liberty that individuals subject to removal proceedings are faced with, and that more can be done to limit such loss.

In contrast, a lesser standard such as preponderance of the evidence—which would only require the government to show that it is more likely than not that national security concerns are implicated—will likely exacerbate the deference issues that currently exist. Because the preponderance of the evidence standard is relatively easy to meet, and thus relatively malleable, courts will easily find a way to align their current holdings with the new burden. The Third, Fourth, and Ninth Circuits could easily find that the government's asserted interests outweigh the individual liberties at stake; the reverse is true of the First and Second Circuits. Likewise, a higher standard, such as requiring the government to prove that a detention implicates national security concerns beyond a reasonable doubt, is simply impractical. Because many national security arguments are likely to be broad or somewhat speculative, they will almost never be able to be proven beyond a reasonable doubt. This standard would also be overinclusive; courts would be forced to reject arguments that may in fact justify detention due to a lack of evidence.

1. Implementing a burden of proof is consistent with *Mathews* jurisprudence

One counterargument to this proposal is that it effectively replaces the balancing test that *Mathews* requires *after* the court has independently assessed the individual and government interests. However, the effect of adding a burden of proof is not to substitute the balancing test, but rather to limit the kinds of arguments the government is likely to bring to justify a particular detention. Currently, the government need not strengthen its own arguments because it assumes that the court will not scrutinize them. A clear and convincing burden of proof will disincentivize arguments that are only marginally related to the detention at issue because the government will expect the argument to be closely examined.

Importantly, this is not an explicit, *per se* bar on the kinds of arguments the government is permitted to bring in *Mathews* cases. Rather, the aim of this proposal is to incentivize governments only to put forth

Rodriguez Diaz was denied release because his extensive criminal history and gang affiliation suggested dangerousness).

those arguments which can be proven by clear and convincing evidence. For example, if the government can prove by clear and convincing evidence that there has been a sudden and significant increase in the number of noncitizens committing crimes in the United States, the court could then find that that issue justifies detention in the case at hand. Even if the detainee is not shown to be one of the criminals committing such crimes, the government could likely show that detention of that specific individual is related to the interest, since there may be a preliminary difficulty in determining which kinds of noncitizens pose the greatest risk. Of course, this conclusion could only be reached after completion of the *Mathews* balancing test and a finding that the government interest outweighs the individual interest.

2. The clear and convincing standard constrains judicial discretion

Second, it might be argued this proposal potentially expands judicial discretion, which in many contexts is disfavored for leading to a greater disparity in outcomes. However, this proposal will actually *constrain* judicial discretion. Currently, the Court's approach to evaluating the government's asserted interest is highly informal. Final determinations about an interest's weightiness might as likely be attributed to a judge's mood on any given day as to close scrutiny of the proffered interest. A burden of proof will require judges to clearly articulate that they are preserving a government interest based on the weight of the evidence rather than other, intangible factors. This will increase accuracy, transparency, and external legitimacy. Moreover, the directive to closely scrutinize the arguments made by both the detainee and the government is squarely in line with the purposes of the Due Process Clause. Questions about procedural constitutionality are at the core of the Court's role.[173]

While many legal commentators agree that the executive should not be granted *automatic* deference on national security issues, its unlikely that those commentators would argue that executive determinations on national security issues are *never* correct. Basic constitutional principles seem to suggest that national security questions should *stem* from the executive, even if they don't end there. Raising the burden of proof would therefore still allow the court to defer to the executive on the question of whether, for example, immigration *implicates* national security concerns. The court's role there would be simply to evaluate whether that implication justifies detention in the case at bar.

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[173] *See* Fallon, *supra* note 91, at 395 ("[Procedural fairness] is a sphere of special judicial expertise.").

3. Deference to the executive on issues of national security is not constitutionally required

Perhaps the strongest counterargument to this proposal is that revisiting the deference question is incompatible with the current status of national security jurisprudence. The Court has often justified this deference to the executive on constitutional grounds, stating that national security determinations are squarely within the executive's domain.[174] Proponents of this view argue that the Constitution's Take Care[175] and Commander in Chief[176] Clauses vest the Executive with the primary power to act on issues of national security.[177] To realize these directives, the executive thus "needs the flexibility to act quickly, possibly in situations where congressional consent cannot be obtained in time to act on the intelligence."[178]

However, there are reasons to think that default deference to the executive on national security questions is not constitutionally required. In response to the government's arguments to the contrary, the *Hamdi* Court refused to implement a rule that would bind the Court to defer to the executive on issues of national security.[179] Rather, the Court noted that while the Constitution clearly grants the Executive Branch certain duties "in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[180] The decision makes clear that, at least where an individual's due process rights are implicated, the Constitution mandates no blanket limitation on judicial review of an executive decision. *Hamdi* also dealt with a detention that was directly related to the September 11 attacks.[181] Thus, total deference to the executive in the § 1226(a) context seems

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[174] *See* Shirin Sinnar, *Courts Have Been Hiding Behind National Security for Too Long*, BRENNAN CTR. FOR JUST. (Aug. 11, 2021), https://www.brennancenter.org/our-work/analysis-opinion/courts-have-been-hiding-behind-national-security-too-long [https://perma.cc/2LG3-7C69]; *see also* Trump v. Hawaii, 585 U.S. 667, 708 (2018); Dep't of Navy v. Egan, 484 U.S. 518, 529 (1988); United States v. Nixon, 418 U.S. 683, 710 (1974).

[175] U.S. CONST. art. II § 3 ("[H]e shall take Care that the Laws be faithfully executed.").

[176] U.S. CONST. art. II § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States.").

[177] *See* Aziz Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 895 (2012).

[178] John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 820 (2004); *see* Huq, *supra* note 177, at 896.

[179] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (plurality opinion) ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."); *see also* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1369 (2009).

[180] *See Hamdi*, 542 U.S. at 536.

[181] *See id.* at 510.

even less justified than it might have seemed in *Hamdi*, where national security concerns were much more salient.

The Court has also asserted that it simply lacks the expertise to second-guess such determinations by the executive.[182] However, there is relatively little evidence that national security deference is necessary to reach an accurate result. For one, courts tend to take these kinds of arguments at face value, with little reference to the facts at hand—an approach that does little to guarantee accuracy.[183] Additionally, even though the executive branch has a larger capacity for information gathering and processing, the nature of litigation will ensure that the relevant information is brought to light by the plaintiff, who has a great incentive to produce contrary evidence.[184] There is also no real reason to think that the relative expertise of the executive branch on issues of national security should be determinative, as judges are quite well-suited to answer factual questions that are most commonly before the court in these cases.[185] Finally, while cases concerning substantive questions of national security law may justify automatic deference to the executive, cases arising under *Mathews* are concerned only with whether a given administrative procedure satisfies that Due Process Clause—a question that is firmly within the jurisdiction of the Court.[186]

There may also be a concern that *legislative* deference is constitutionally required, especially in immigration cases, an area over which Congress has broad power.[187] However, the Court has effectively shut the door on any argument requiring total deference to the legislature in this area. In *INS v. St. Cyr*,[188] the Court interpreted a provision of IIRIRA in favor of a lawful permanent resident who had been convicted of an aggravated felony, finding that repeal of statutory relief did not apply retroactively.[189] Here, the Court was transparent about its disdain for the legislature's attempts to curb judicial review, noting that the repealed provision "would raise serious constitutional problems."[190] On a final note, the Court proclaimed that "'judicial intervention in

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[182] *See, e.g.*, Dep't of Navy v. Egan, 484 U.S. 518, 529 (1988).

[183] *See* Chesney, *supra* note 179, at 1404.

[184] *See id.* at 1407.

[185] *See id.* at 1410.

[186] *See* Edward D. Re, *Due Process, Judicial Review, and the Rights of the Individual*, 39 CLEV. ST. L. REV. 1, 6 (1991).

[187] *See* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); Reno v. Flores, 507 U.S. 292, 305 (1993) ("Over no conceivable subject is the legislative power of Congress more complete.") (quotations and alterations omitted).

[188] 533 U.S. 289 (2001).

[189] *See id.* at 325–26.

[190] *Id.* at 300.

deportation cases' is unquestionably 'required by the Constitution.'"[191] *St. Cyr* thus shows the judiciary's ability to limit sweeping legislative action in the context of immigration. Conversely, in *Demore*, the Court upheld a detention under § 1226(c), finding that Congress was constitutionally permitted to prescribe an entire class of noncitizens as immediately detainable.[192] Therefore, there is still some room for doubt that courts can limit the scope of immigration legislation that falls short of the kind at issue in *St. Cyr*.

It may be argued that in the presence of pressing national security concerns, such as times of war or in the aftermath of terrorist activity in the United States, the Court should suspend the clear and convincing standard and more loosely assess the proffered national security interest. It is likely that when national security interests are urgent, the government should not be required to undergo the time and expense of producing evidence sufficient to satisfy the clear and convincing standard. However, in those situations, the Court should simply consider the presence of such conditions as independent evidence of the need for detention. Courts will certainly be aware of pressing national security concerns like war or terrorist activity, so the government will not have to produce as much evidence to convince the court of the existence of such conditions. Thus, the government should be more likely to succeed because the evidence offered in times of heightened national security concerns will almost invariably be stronger than in times where such concerns are not as severe.

B. Courts Should Routinely Hold that Prolonged Detentions Under § 1226(a) Violate Due Process

While national security is not the only kind of argument that can support an individual detention under § 1226(a), it often receives the most weight. For example, the government can and often does bring evidence of administrative costs.[193] It will likely be much easier for the government to prove the presence of an efficiency interest than a broad national security interest, but courts are unlikely to give more weight to those kind of interests than the detainee's private interest in avoiding prolonged detention.[194] Thus, courts should routinely find that prolonged detention under § 1226(a) violates due process, either because (1) the government has not proven the existence of national security interests by clear and convincing evidence; (2) the government *has*

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[191] *Id.* (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

[192] *See* Demore v. Kim, 538 U.S. 510, 519–20, 524–25 (2003).

[193] *See, e.g.*, Velasco Lopez v. Decker, 978 F.3d 842, 854–55 (2d Cir. 2020).

[194] *See id.*

proven the existence of national security interests, but those interests do not outweigh the private interest in avoiding prolonged detention; or (3) other proven government interests do not outweigh the private interest. Put differently, courts should only find that prolonged detention under § 1226(a) satisfies due process when the government interest, likely rooted in national security, is proven by clear and convincing evidence *and* that interest outweighs the private interest.

Courts should use the distinction that Congress created between § 1226(a) and § 1226(c) detainees as a guide to the analysis at the balancing stage of the *Mathews* test. The statutory language makes clear that Congress saw noncitizens falling under § 1226(c) as inherently more detainable than noncitizens falling under § 1226(a); otherwise, § 1226(c) would have also prescribed discretionary detention.[195] Thus, when compared to their § 1226(a) counterparts, § 1226(c) detainees should be viewed by courts as more likely to implicate national security risks. The upshot is that if a broad national security interest is asserted in a § 1226(a) case, courts should inquire as to why that broad interest cannot be furthered through § 1226(c) detentions alone.

This outcome could be predicted based on an actual case decided against the detainee, *Rodriguez Diaz v. Garland*.[196] The Ninth Circuit first examined Rodriguez Diaz's private interest, finding that "'freedom from prolonged detention' is [an] 'unquestionably substantial'" private interest.[197] However, because Rodriguez Diaz had a bond hearing two months after his detention began and the length of his detention was a direct result of his decision to challenge it, his interest was diminished.[198] Under the new burden of proof, this part of the inquiry remains undisturbed. The court next moved to evaluate the government's interest, which it characterized as an interest in deporting noncitizens who remained in the United States illegally.[199] This interest would be simple to prove—the government need only point to the extensive case law that establishes it.[200] It also clearly relates to Rodriguez Diaz's detention, which plainly concerned the interest in deporting a noncitizen who remained in the country illegally.[201]

The court also used the government's interest in "protecting the public from dangerous criminal aliens" implicated by § 1226(c) detentions to bolster the conclusion that the government interest in the

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[195] *See* 8 U.S.C. § 1226(c) (mandating detention for noncitizens convicted of certain crimes).

[196] 53 F.4th 1189 (9th Cir. 2022).

[197] *Id.* at 1207 (quoting Singh v. Holder, 638 F.3d 1196, 1208 (9th Cir. 2011)).

[198] *See id.* at 1207–08.

[199] *See id.* at 1208 (citing Demore v. Kim, 538 U.S. 510, 518 (2003)).

[200] *See, e.g.*, *Demore*, 538 U.S. at 518.

[201] *See Rodriguez Diaz*, 53 F.4th at 1208.

present case was significant.[202] Under the proposed new burden of proof, the court would not be permitted to engage in this kind of analysis. Rodriguez Diaz was not a § 1226(c) detainee, so the government's interest in § 1226(c) detention was entirely irrelevant to his claim. *Rodriguez Diaz* is thus a case in which the court gave great deference to the executive's power to enforce immigration law.[203] Eliminating this deference would have likely resulted in a much deeper inquiry of the government's interest without reference to other, peripheral interests in immigration enforcement, giving Rodriguez Diaz a fairer proceeding.

V. CONCLUSION

Deportation proceedings can be devastating to all they affect. The length of time that a noncitizen is detained prior to deportation substantially increases the level of trauma that detainees and their families experience.[204] As the designated protectors of procedural due process rights, courts are best positioned to intervene on behalf of noncitizens. They should therefore seek to more deeply scrutinize the government's limitations on a detainee's right to freedom absent articulable and sufficiently important reasons. A system prioritizing this goal will better serve constitutional purposes and externally legitimize immigration proceedings at large.

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[202] *Demore*, 538 U.S. at 515; *see Rodriguez Diaz*, 53 F.4th at 1208–09.

[203] *See Rodriguez Diaz*, 53 F.4th at 1208–09.

[204] *See generally* Kalina M. Brabeck, et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496 (2014).