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Proposing a One-Year Time Bar for 8 U.S.C. § 1226(c)

Jenna Neumann
University of Michigan Law School

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NOTE

Proposing a One-Year Time Bar for 8 U.S.C. § 1226(c)

Jenna Neumann[*]

Section 1226(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) requires federal detention of certain deportable noncitizens when those noncitizens leave criminal custody. This section applies only to noncitizens with a criminal record ("criminal noncitizens"). Under section 1226(c), the Attorney General must detain for the entire course of his or her removal proceedings any noncitizen who has committed a qualifying offense "when the alien is released" from criminal custody. Courts construe this phrase in vastly different ways when determining whether a criminal noncitizen will be detained. The Board of Immigration Appeals (BIA) and the Fourth Circuit read "when the alien is released" to mean "any time after the alien is released," allowing the government to detain and deport criminal noncitizens years or decades after their release from criminal custody. A majority of district courts as well as the First Circuit, however, have interpreted the clause to mean "immediately upon the alien's release." Under this construction, immigration enforcement can detain a criminal noncitizen for deportation and detention only shortly after her release from criminal custody. This Note argues that in light of recent legal and policy changes, the latter interpretation of section 1226(c) offers the correct understanding of the statute. It further contends that a universal one-year time bar should be implemented for detentions occurring under section 1226(c) to respect due process concerns.

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[*] J.D. Candidate, May 2017, University of Michigan Law School. I would like to thank those who helped me see this project to completion. In particular, I would like to thank the Notes Office for their positive feedback during the editing phase. My parents also deserve a special and heartfelt thank you. They have been by far my biggest supporters throughout law school.

Introduction

Maria came to the United States in 1995 and married a United States citizen in 1998, claiming lawful permanent resident status the following year.[1] Her husband abused her later in their marriage, but when she tried to seek help in 2001, her husband told the police Maria had threatened him with a butcher knife.[2] The police arrested Maria and charged her with felony assault.[3] On the advice of her defense attorney, Maria pled guilty to the charge in exchange for eighteen months of probation and one year in the county jail, which was to be suspended so long as she served her probation term.[4] Maria accepted the plea bargain so she could return to care for her children as soon as possible.[5]

Six years later, the police pulled Maria over for failing to completely stop at a stop sign.[6] When running her name through police records, the police found her 2001 assault conviction.[7] The police arrested and brought her to the county jail, where Immigration and Customs Enforcement (ICE) officers then took her into custody.[8] ICE deemed Maria deportable under two different sections of the Immigration and Nationality Act (INA) and denied her release on bond.[9]

Cases like Maria's happen because of courts' interpretations of five words in section 1226(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)—"when the alien is released."[10] Courts construe

1. Maria Theresa Baldini-Potermin, *Mandatory Detention: It's Time to Return the Authority to Redetermine Custody to the Immigration Court*, 86 Interpreter Releases 2909, 2914 (2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. 8 U.S.C. § 1226(c) (2012).

this provision in two distinct ways. Some, like the Fourth Circuit and the Board of Immigration Appeals (BIA) read the clause to mean any time after the alien is released.[11] According to that construction, when a noncitizen who committed a crime is released from custody, she could be subjected to mandatory detention for removal proceedings days, months, or even years after her release into the community.[12] The First Circuit[13] and a majority of district courts,[14] however, have interpreted the clause to mean immediately upon the alien's release.[15]

Section 1226(c) mandates federal detention, without the possibility of bond, for criminal noncitizens when they are released from other custody.[16] This section references only noncitizens with a criminal record.[17] Section 1226(c) stems from the IIRIRA, which was enacted in 1996 to overhaul immigration law.[18] The IIRIRA requires the Attorney General to detain noncitizens with previous criminal arrests and convictions who are deportable for having committed certain offenses.[19] During deportation proceedings, the individual may be held without bond or the right to present her case to the immigration judge for redetermination of custody status.[20] This applies to lawful permanent residents and to noncitizens deemed deportable for misdemeanor offenses that occurred years or even decades previous.[21]

The BIA's interpretation of "when released" in *In re Rojas* indicates that people like Maria could be subjected to mandatory detention for removal proceedings because they had once committed a punishable offense, even if they were released from criminal custody years prior. This interpretation affords the Department of Homeland Security (DHS) personnel generous leeway to initiate removal proceedings against those arrested or convicted at a delayed date.[22] Delayed proceedings are administratively easier because they eliminate the need for constant communication between local authorities and the DHS regarding the arrest or conviction of every noncitizen nationwide, while also ensuring and expediting the removal of noncitizens with criminal convictions.[23] Moreover, the Immigration and Naturalization

11. *See* Hosh v. Lucero, 680 F.3d 375, 379–80 (4th Cir. 2012); *In re* Rojas, 23 I. & N. Dec. 117, 120–24 (B.I.A. 2001) (interim decision); *infra* Section I.B.

12. *Rojas*, 23 I. & N. Dec. at 129 (Moscato, J., concurring in part and dissenting in part).

13. Castañeda v. Souza, 810 F.3d 15, 19 (1st Cir. 2015) (plurality opinion).

14. *E.g.*, Araujo-Cortes v. Shanahan, 35 F. Supp. 3d 533, 535–36 (S.D.N.Y. 2014); Baquera v. Longshore, 948 F. Supp. 2d 1258, 1262 (D. Colo. 2013); *see also infra* Section I.C.

15. *Araujo-Cortes*, 35 F. Supp. 3d at 542–43.

16. *See* 8 U.S.C. § 1226(c) (2012).

17. *See id.*

18. Gerald Seipp & Sophie Feal, *The Mandatory Detention Dilemma: The Role of the Federal Courts in Tempering the Scope of the INA § 236(c)*, Immigr. Briefings, Jul. 2010, at 1, 1–2.

19. *See* 8 U.S.C. § 1226(c) (listing the offenses found in 8 U.S.C. § 1182(a)(2), 8 U.S.C. § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), and (D) as deportable offenses).

20. *See* Baldini-Potermin, *supra* note 1, at 2910.

21. *See id.*

22. *See In re* Rojas, 23 I. & N. Dec. 117, 127 (B.I.A. 2001) (interim decision).

23. *See* Seipp & Feal, *supra* note 18, at 12–13.

Service (INS)[24] preferred this arrangement because the INS could not detain all noncitizens during their deportation proceedings due to limited space in detention facilities.[25] As a result, approximately 20 percent of noncitizens absconded.[26] Forgoing a temporal limitation on detaining criminal noncitizens after their release back into the community provided a way to address this problem.[27] Under this approach, however, someone who has been productively contributing to society for years after her release may be later detained and removed, causing upheaval for families and loved ones who are left behind as well as imposing restraints on the noncitizen's personal liberties.[28]

This Note argues that interpreting section 1226(c) as immediately "after an alien's release" is the correct understanding of the statute and that courts should read a one-year time bar into section 1226(c). Part I analyzes section 1226(c) and contends that the majority of district courts, as well as the First Circuit, correctly interpret section 1226(c). Part II examines the recent legal and policy changes curtailing mandatory detention and concludes that "mandatory" detention may not be all that mandatory. Part III proposes a one-year time bar on the ability to redetain an individual for deportation without bond in order to balance the legitimate security concerns of the statute with respect for personal liberties.

I. Interpreting the Words "When an Alien Is Released"

Courts' differing interpretations of when an alien is released demonstrate the overarching confusion regarding the meaning of section 1226(c). The BIA, as well as the Third and Fourth Circuits, read the phrase to mean any time after the alien is released,[29] while several district courts and the

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24. ICE is an agency under the DHS created to take on the law enforcement functions of its predecessor, the INS. U.S. Dep't of Homeland Security, *History: Who Joined DHS*, https://www.dhs.gov/who-joined-dhs [https://perma.cc/5QHE-N2ZZ] (last updated Sept. 15, 2015).

25. Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 Harv. C.R.-C.L. L. Rev. 601, 620 (2010).

26. Demore v. Kim, 538 U.S. 510, 519 (2003) (upholding the legality of 8 U.S.C. § 1226(c)).

27. *Id.* at 528.

28. *See* Cecilia Menjívar & Leisy Abrego, Ctr. for Am. Progress, Legal Violence in the Lives of Immigrants: How Immigration Enforcement Affects Families, Schools, and Workplaces 2 (2012), http://cdn.americanprogress.org/wp-content/uploads/2012/12/MenjivarLegalViolenceReport.pdf [http://perma.cc/YCV5-8MBU]; Lutheran Immigration and Refugee Serv., Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy 18 (2012), http://lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf [http://perma.cc/G2CA-9RTU].

29. *See* Desrosiers v. Hendricks, 532 F. App'x 283, 285–86 (3d Cir. 2013); Sylvain v. Attorney Gen., 714 F.3d 150, 161 (3d Cir. 2013); Hosh v. Lucero, 680 F.3d 375, 379–80 (4th Cir. 2012); *In re* Rojas, 23 I. & N. Dec. 117, 120–24 (B.I.A. 2001) (interim decision).

First Circuit interpret it to mean upon the alien's release.[30] This Part provides background on the debate over section 1226(c) by examining the relevant statute and the different courts' analyses.

A. *Statutory Context*

By passing the IIRIRA, Congress significantly changed the process a criminal noncitizen faces once detained.[31] Section 1226(c) provides certain conditions under which an immigration judge may detain a noncitizen and deny bond. The provision states:

> (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
>
> (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.[32]

This provision applies to a criminal noncitizen who has already served out his or her sentence in a local jail or state prison and has subsequently

30. *E.g.*, Castañeda v. Souza, 810 F.3d 15, 19 (1st Cir. 2015) (plurality opinion); Araujo-Cortes v. Shanahan, 35 F. Supp. 3d 533, 542–43 (S.D.N.Y. 2014); Baquera v. Longshore, 948 F. Supp. 2d 1258, 1262 (D. Colo. 2013).

31. *See* Seipp & Feal, *supra* note 18, at 2–3.

32. 8 U.S.C. § 1226(c) (2012).

been released.[33] If the crime an individual committed reflects an inadmissible[34] or deportable offense, the section then instructs the Attorney General to detain the individual for deportation.[35] Relevant deportable or inadmissible offenses referenced by section 1182(a)(2), section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) in this provision include crimes involving moral turpitude (other than purely political offenses) or attempts or conspiracies to commit such crimes, charges of prostitution, human trafficking, money laundering, aggravated felonies, possession of controlled substances, and firearms offenses.[36] If the noncitizen committed one of these offenses, then under section 1226(c)(1)(D), the Attorney General may take her into custody "when the alien is released" from other custody.[37] The provision applies only to a certain subset of crimes and noncitizens.[38]

B. *The BIA's Interpretation of the "When Released" Clause*

The BIA's opinion in *In re Rojas* provided a legal basis for detaining criminal noncitizens at any point after their release into the community.[39] In that case, a New Hampshire state court had convicted Rojas—a lawful permanent resident—of an aggravated felony and sentenced him to prison.[40] Rojas qualified for parole supervision in 2000 and was released from prison the same year.[41] The INS, however, took custody of Rojas two days after his release.[42]

The court concluded that when a noncitizen who committed a crime leaves custody, she may be subjected to mandatory detention by the INS days, months, or even years after her release.[43] No temporal limitation exists.[44] Analyzing the objectives and policy of the statutory scheme to resolve the issue, the court found that section 1226(c)'s predecessor provisions[45] relating to the removal process placed no importance on the timing of when

33. *See, e.g.*, Saysana v. Gillen, 590 F.3d 7, 18 (1st Cir. 2009) ("[T]he statute contemplates mandatory detention following release from non-DHS custody for an offense specified in the statute . . . .").

34. Inadmissible noncitizens are those ineligible to apply for visas or admission into the United States. 8 U.S.C. § 1182(a) (2012 & Supp. 2013).

35. *See* 8 U.S.C. § 1226(c)(1) (2012).

36. *Id.* § 1182(a)(2); *id.* § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), (D).

37. *Id.* § 1226(c)(1).

38. *Id.*

39. *In re* Rojas, 23 I. & N. Dec. 117, 127 (B.I.A. 2001) (interim decision).

40. *Id.* at 118.

41. *Id.* at 119.

42. *Id.* at 118.

43. *See id.* at 127.

44. *See id.* at 124–25.

45. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991).

a criminal noncitizen could be taken into custody.[46] There was no "connection in the Act between the timing of an alien's release from criminal incarceration, the assumption of custody over the alien by the Service, and the applicability of any of the criminal charges of removability."[47] The court therefore held that "the amendments made by the IIRIRA cover criminal aliens regardless of when they were released from criminal confinement and regardless of whether they had been living within the community for years after their release."[48] The court interpreted the statute to allow for mandatory detention any time after the alien's release.[49]

The Third and Fourth Circuits have upheld the BIA's reasoning.[50] In *Hosh v. Lucero*, the Fourth Circuit found the provision in section 1226(c) ambiguous and held the BIA's construction permissible.[51] *Hosh* concerned whether a deportable criminal noncitizen who was not *immediately* taken into custody by the INS upon his release was exempt from section 1226(c)'s mandatory detention provision and entitled to a bond hearing.[52] The court found the word "when" ambiguous because it can mean an "action or activity occurring 'at the time that' or 'as soon as' [an]other action has ceased or begun."[53] Alternatively, it can "mean the temporally broader 'at or during the time that,' 'while,' or 'at any or every time that.' "[54] The court therefore found that no temporal limitation existed within the statute and denied bond.[55]

C. *An Alternative Interpretation:* Araujo-Cortes

Not all courts agree with the BIA's interpretation in *In re Rojas*.[56] Many district courts have interpreted section 1226(c) to be unambiguous.[57] *Araujo-Cortes v. Shanahan*, a case from the Southern District of New York,

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46. *Rojas*, 23 I. & N. Dec. at 122–23.

47. *Id.* at 122.

48. *Id.*

49. *Id.* at 127.

50. *See* Desrosiers v. Hendricks, 532 F. App'x 283, 285–86 (3d Cir. 2013); Sylvain v. Attorney Gen., 714 F. 3d 150, 161(3d Cir. 2013); Hosh v. Lucero, 680 F.3d 375, 379–80 (4th Cir. 2012).

51. *Hosh*, 680 F.3d at 378.

52. *Id.* at 377.

53. *Id.* at 379 (quoting Waffi v. Loiselle, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007) (internal quotation marks omitted)).

54. *Id.* at 380 (quoting *When*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/when [http://perma.cc/R6PQ-APF8]).

55. *Id.* at 379–82, 384.

56. *See, e.g.*, Castaneda v. Souza, 952 F. Supp. 2d 307, 316 n.6 (D. Mass. 2013); Baquera v. Longshore, 948 F. Supp. 2d 1258, 1263 (D. Colo. 2013).

57. *See* Ortiz v. Holder, No. 2:11–CV–1146 DAK, 2012 WL 893154, at *3–4 (D. Utah Mar. 14, 2012); Harris v. Lucero, No. 1:11–CV–692, 2012 WL 603949, at *3 (E.D. Va. Feb. 23, 2012), *abrogated by* Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012); Rianto v. Holder, No. CV–11–0137–PHX–FJM, 2011 WL 3489613, at *3 (D. Ariz. Aug. 9, 2011); Gonzalez v. Dep't of Homeland Sec., No. 1:CV–10–0901, 2010 WL 2991396, at *1 (M.D. Pa. July 27, 2010);

best represents this approach.[58] There, ICE had arrested and detained Araujo-Cortes, a lawful permanent resident of the United States, due to a 2009 conviction for the criminal possession of a weapon for which Araujo-Cortes had not been sentenced to a prison term.[59]

The court concluded that "Congress did not intend the mandatory detention provision of § 1226(c) to apply to individuals plucked out of the communities they have reintegrated into."[60] ICE subjected Araujo-Cortes to detention not upon his release in 2009, but five years after the fact.[61] Looking expressly at the language of the statute, the court concluded that section 1226(c)(2) "places limits on when the government may release "alien[s] described in § 1226(c)(1). It does not provide for the arrest and detention of an alien who is not in custody."[62] The court criticized the BIA's interpretation, stating that if Congress meant to adopt the BIA's interpretation of "when released" to allow for the deportation of all criminal noncitizens regardless of their release from criminal custody, Congress could have explicitly done so by employing language such as, "after the alien is released" or "regardless of when the alien is released."[63] Given that Congress did not include this language, the court concluded that Congress did not intend to allow criminal noncitizens to be detained and deported for convictions long after they occurred.

The First Circuit adopted a similar analysis in *Castañeda v. Souza*.[64] In that case, two foreign nationals petitioned for writs of habeas corpus.[65] Each challenged his mandatory detention during removal proceedings and requested a bond hearing.[66] The First Circuit considered in part whether Congress intended section 1226(c) to apply only to criminal noncitizens detained immediately upon release or at a reasonable time afterward.[67] After examining Congress's intent, a three judge plurality did "not believe Congress intended that the executive could fail to pick up an alien within a reasonable time and then, despite that unexplained delay, deny that alien the chance to seek bonded release notwithstanding that alien's years of living freely."[68] The plurality thus held that the two foreign nationals were not taken into immigration custody "when [they were] released" from criminal custody because they had been released from criminal custody years before

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Bromfield v. Clark, No. C06-757RSM, 2007 WL 527511, at *3–4 (W.D. Wash. Feb. 14, 2007); Alikhani v. Fasano, 70 F. Supp. 2d 1124, 1130–31 (S.D. Cal. 1999).

58. Araujo-Cortes v. Shanahan, 35 F. Supp. 3d 533 (S.D.N.Y. 2014).

59. *Id.* at 538.

60. *Id.* at 536.

61. *Id.* at 535.

62. *Id.* at 542.

63. *Id.* at 543 (internal quotation marks omitted).

64. Castañeda v. Souza, 810 F.3d 15, 36–43 (1st Cir. 2015) (plurality opinion).

65. *Id.* at 18–19.

66. *Id.*

67. *Id.* at 36–43.

68. *Id.* at 42.

their immigration custody even started.[69] Even if the court did not articulate a time limit between release and detention, the plurality acknowledged that multiple years between release and detention was too long.[70]

Different courts have reached different interpretations of "when an alien is released." Accordingly, whether plaintiffs feel a sense of closure in their understanding that they will not be detained depends on which court decides their case. Part II demonstrates that *In re Rojas*'s conclusion is untenable in light of policy and legal changes that place a temporal limit on mandatory detention.

II. Progressing Toward a More Conservative Detention System

Courts are not beholden to the BIA's interpretation of section 1226(c) under administrative law principles or in light of recent policy and legal changes. Section II.A argues that courts should not defer to the BIA's interpretation of "when released" because, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[71] the results are illogical and unreasonable. Section II.B.1 explains how the transition from Secure Communities (S-Comm), a deportation program that relied on a partnership between federal, state, and local law enforcement, to the new Priority Enforcement Program (PEP), replaces detention mandates with requests that an individual be detained. Section II.B.2 discusses how, in recent months, courts have held mandatory detention provisions unconstitutional.[72] Section II.B.3 argues that, given the lack of legislative history surrounding the passage of section 1226(c), the statute should be construed narrowly so as to not attribute due process violations to Congress. Although these factors alone are not dispositive, when taken together, they reveal a trend toward a more moderate immigration system.

A. *Under* Chevron*, Courts Are Not Bound by the BIA's Interpretation*

Courts should not defer to the BIA's determination of "when released" in *In re Rojas* because, under *Chevron*, it is unclear whether Congress intended to delegate the authority to interpret section 1226(c) to the Attorney General or the BIA.[73] Courts have applied *Chevron* in the immigration context because immigration cases generally concern a petition for review of an agency decision—here, a BIA decision—in interpreting a statute.[74] While *Chevron* affords a deferential review of agency decisions, its analysis should not apply. The BIA cannot even pass the *Chevron* "step zero" test, where

69. *Id.* at 19 (alteration in original).

70. *See id.* at 37–43.

71. Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837 (1984).

72. *See* Miranda-Olivares v. Clackamas Cty., No. 3:12–cv–02317–ST, 2014 WL 1414305 (D. Or. 2014).

73. *See* Gerard Savaresse, *When Is When?: 8 U.S.C. § 1226(c) and the Requirements of Mandatory Detention*, 82 Fordham L. Rev. 285, 322–23 (2013).

74. *See, e.g*, INS v. Aguirre-Aguirre, 526 U.S. 415 (1999); *see also Chevron*, 467 U.S. 837.

courts must determine whether Congress delegated authority to the agency generally to make rules carrying the force of law.[75] Even when courts do not conduct an analysis under step zero, their interpretations have resulted in illogical results where the word "release" is not afforded its ordinary meaning.[76]

Chevron developed a two-step test to determine how much deference courts should give to agency interpretations of statutes. The fundamental inquiry is whether Congress left ambiguities in legislation for an agency to resolve.[77] The court must first determine whether it owes deference to an agency's interpretation of an ambiguous statute under *Chevron*.[78] To do so, the court must analyze the plain language of the statute and apply the "traditional tools of statutory construction"[79] to determine if the intent of Congress is clear. If Congress's intent is clear, the court must recognize the unambiguously expressed intent of Congress.[80] If the intent of Congress is not clear, however, courts proceed to the second step of *Chevron*. Under that step, the court must determine if the agency's interpretation of that statute is reasonable.[81] If it is, then the court must defer to the agency's interpretation.[82]

Although *Chevron* mandates a deferential inquiry, the analysis should not even apply because the BIA cannot pass what is called a "step zero" analysis. Under that inquiry, the court must determine whether Congress delegated authority to the agency generally to make rules carrying the force of law.[83] The relevant inquiry is whether "Congress delegated authority to the agency to provide interpretations of, or to enact rules pursuant to, the statute at issue—interpretations or rules that carry with them 'the force of law.'"[84] To answer this question, courts ask whether Congress delegated interpretive authority to the agency in question and whether the agency is exercising that delegated interpretive authority.[85] The BIA's interpretations of mandatory detention provisions, specifically section 1226(c), should not

75. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

76. *See, e.g.*, Desrosiers v. Hendricks, 532 F. App'x 283, 285–86 (3d Cir. 2013) (noting that completing a probationary sentence can fulfill the "release" requirement under section 1226(c)); Sylvain v. Attorney Gen., 714 F.3d 150, 161 (3d Cir. 2013) (noting that a conditional discharge can also fulfill the "release" requirement under § 1226(c)).

77. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

78. *Id.* at 843.

79. *Id.* at 843 n.9.

80. *Id.* at 842–43.

81. *Id.* at 843 (referring to a "permissible construction of the statute").

82. *Id.* at 843–46.

83. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

84. *See* City of Arlington. v. FCC, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring in part and concurring in judgment) (quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001)).

85. *Mead*, 533 U.S. at 226–27.

be given *Chevron* deference because those interpretations do not pass step zero.

Nothing demonstrates that Congress meant to delegate authority to the BIA to decide detention questions.[86] Notably, courts have not engaged in step zero in the detention context, and so have failed to question whether Congress intended to delegate its lawmaking authority regarding statutory detention questions. The Supreme Court came closest to addressing this question in *INS v. Aguirre-Aguirre*, which concerned an immigration *deportation* challenge.[87] The Court deferred to the BIA's interpretation of a crime provision at issue, stating that the Attorney General had issued regulations that "vested the BIA with power to exercise the 'discretion and authority conferred upon the Attorney General by law' in the course of 'considering and determining cases before it.' "[88] Congress vested interpretive authority in the Attorney General,[89] who then delegated such authority to the BIA.[90] Since the transfer of interpretive power implicated the authority of an agency, this delegation required *Chevron* deference.

It is not clear whether, by extension, courts should apply *Chevron* deference to the BIA's interpretation of ambiguity in *detention* provisions. Conferring authority on the Attorney General does not automatically resolve the issue. The Attorney General serves as only one of the multiple agencies vested with general lawmaking authority.[91] Where multiple agencies have the power to interpret a statute, deference to one agency's decision is not necessarily warranted under *Chevron*.[92] In detention cases, "Congress gave no such similar indication that it contemplated the Attorney General's adjudication of the scope of its detention power."[93] Moreover, nothing affirmative exists to imply that Congress envisioned that the BIA would be answering detention questions, especially provided its failure to recognize any mechanism for adjudication in the detention context.

Moreover, Congress may not have wanted the BIA to decide detention questions for practical reasons. The "major questions" doctrine undermines allowing the BIA to decide detention questions. Under that doctrine, courts

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86. See the statutory language of 8 U.S.C. § 1226(c) (2012) in Section I.A to see the absence of any language referring to the BIA.

87. INS v. Aguirre-Aguirre, 526 U.S. 415, 418 (1999).

88. *Id.* at 425 (quoting 8 C.F.R. § 3.1(d)(1)(1998)).

89. *Id.* at 419.

90. *Id.* at 425.

91. After the creation of the DHS, the wording of the INA changed:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers . . . .

See 8 U.S.C. § 1103(a)(1) (2012).

92. *See* Gonzales v. Oregon, 546 U.S. 243, 274 (2006).

93. Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. Rev. 143, 178–79 (2015).

may forgo deference to agency decisions that implicate questions of major economic and political importance.[94] As the Supreme Court explained, "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[95] Since detention impinges upon personal liberties, Congress likely would not have authorized an agency to decide questions of such significance. Thus, deference might well be inappropriate.[96]

Yet even accounting for these practical concerns, courts continue to apply the traditional two-step *Chevron* test.[97] In the immigration context, many federal courts have stopped at step one, finding the statute unambiguous and rejecting the BIA's interpretation.[98] Others have continued to step two, deferring to the agency after finding the statutory provision ambiguous.[99] "When released" cannot be reasonably construed as "any time after release" under step two, however, because it produces irrational outcomes when the word "release" is not understood by its usual meaning.[100]

Even if the "reasonableness" standard under step two is an extraordinarily lenient standard in practice,[101] applied in the immigration context, it leads to illogical results where the word "release" is not afforded its ordinary meaning. In *Sylvain v. Attorney General* and *Desrosiers v. Hendricks*, the Third Circuit deferred to the BIA's interpretation of "released" in *Matter of Kotliar* and *Matter of West*.[102] Each Third Circuit case involved a lawful permanent resident who was not sentenced to incarceration for the offense that later led to his mandatory detention.[103] The petitioners argued it was impossible for them to have been "released" from criminal custody since they were never incarcerated.[104] In each case, "the Third Circuit rejected the petitioners' arguments by deferring to the BIA's interpretation that release from an

94. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

95. *Id.* at 133.

96. *See* Das, *supra* note 93, at 185.

97. *Id.* at 165–66.

98. *See, e.g.*, Nabi v. Terry, 934 F. Supp. 2d 1245, 1248 (D.N.M. 2012); Valdez v. Terry, 874 F. Supp. 2d 1262, 1274–76 (D.N.M. 2012); Khodr v. Adduci, 697 F. Supp. 2d 774, 778–80 (E.D. Mich. 2010).

99. See *supra* Part I for an explanation of the court's rationale in such cases. *See also* Desrosiers v. Hendricks, 532 F. App'x 283 (3d Cir. 2013) (deferring to *In re* West, 22 I. & N. Dec. 1405 (B.I.A. 2000)); Hosh v. Lucero, 680 F.3d 375, 378–79 (4th Cir. 2012) (deferring to *In re* Rojas, 23 I. & N. Dec. 117 (B.I.A. 2001) (interim decision)).

100. *See* Savaresse, *supra* note 73, at 322–29.

101. *See* Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 612 (2014) (quoting Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009)) ("[I]f Congress has directly spoken to an issue [at step one] then any agency interpretation contradicting what Congress has said would be unreasonable [at step two].").

102. *See Desrosiers*, 532 F. App'x 283 (deferring to *In re* West, 22 I. & N. Dec. 1405 (B.I.A. 2000)); Sylvain v. Attorney Gen., 714 F. 3d 150, 156–61 (3d Cir. 2013) (deferring to *In re* West, 22 I. & N. Dec. 1405 (B.I.A. 2000), and *In re* Kotliar, 24 I. & N. Dec. 124, 125 (B.I.A. 2007)).

103. *Desrosiers*, 532 F. App'x at 284; *Sylvain*, 714 F.3d at 152–53.

104. *Desrosiers*, 532 F. App'x at 285; *Sylvain*, 714 F.3d at 153.

initial arrest prior to conviction constituted a release under the statute at Chevron step-two with little to no analysis under *Chevron* step one."[105] Under this analysis, those who were never incarcerated still could be considered "released" from custody. Perhaps defendants should not pass *Chevron* step two if it allows the BIA to conceptualize a "release" when no physical release occurred. Rather, detention upon immediate release offers a more rational interpretation. It appropriately tracks the underlying purpose and intent of the statute, ensuring community safety while also balancing respect for the noncitizen's personal liberties.[106]

B. *Recent Policy and Legal Changes Reinforce the* Araujo-Cortes *Conclusion*

Section 1226(c) should be read to avoid harsh results, consistent with current policy and legal changes. Recent modifications indicate the need for an immigration system that prioritizes respecting individual liberties over privileging detention. A closer look at the legislative history behind the passage of section 1226(c) only serves to reinforce this current trend.

1. The Demise of the Secure Communities Program and the Rise of the Priority Enforcement Program

Changes in federal detention policies indicate a shift away from mandatory detention. The move away from S-Comm to PEP as an enforcement mechanism for mandatory detention structures detention notices as "requests."[107] Such language confirms the government's intention to temporally limit the mandatory detention of noncitizens. PEP's more moderate approach discourages redetention of criminal noncitizens long after their release.

Recent policy changes in the procedure governing ICE holds also weigh against concluding that there is no temporal limitation on "when released." When the DHS learns of a foreign national in state or federal custody, it may place an "ICE hold" on the individual.[108] The hold notifies the facility not to

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105. Das, *supra* note 93, at 165–66.

106. *See id.* at 290.

107. *See* Dep't of Homeland Sec., DHS Form I-247D, Immigration Detainer – Request for Voluntary Action (referring to notice of detention as a "request"), https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF [http://perma.cc/595Z-K4SN]; Dep't of Homeland Sec., DHS Form I-247N, Request for Voluntary Notification of Suspected Priority Alien (same), http://trac.syr.edu/immigration/reports/402/include/I-247N.pdf [http://perma.cc/8DHL-8F56]; *see also Priority Enforcement Program: Overview*, U.S. Immigr. & Customs Enforcement, http://www.ice.gov/pep [http://perma.cc/F2ZZ-C56Y]; *Priority Enforcement Program: How Is PEP Different from Secure Communities?*, U.S. Immigr. & Customs Enforcement, http://www.ice.gov/pep [http://perma.cc/F2ZZ-C56Y] ("Under PEP . . . . rather than issue a detainer, ICE will instead *request* notification . . . of when an individual is to be released." (emphasis added)).

108. See Seipp & Feal, *supra* note 18, at 17–18 for a discussion on the mechanics of the process.

release the person but instead to transfer him or her to federal custody at the end of the jail term.[109] According to the applicable regulations,[110] upon the DHS's request, as communicated via a detainer form,[111] a criminal justice agency "shall maintain custody of the alien, for a period not to exceed 48 hours . . . in order to permit assumption of custody by the Department."[112] In theory, the state or local law enforcement agency should release the individual if ICE does not detain her after forty-eight hours; in practice, if ICE has not responded, law enforcement agencies continue to detain the individual beyond the forty-eight-hour timespan.[113]

To strengthen immigration enforcement, ICE administered S-Comm beginning in 2008 and codified the system of using an ICE hold in order to facilitate the detention process.[114] Using fingerprint data gathered by state and local law enforcement officials, S-Comm employed an automatic procedure wherein any time an individual was arrested and jailed, ICE automatically ran his or her fingerprints through its electronic immigration database.[115] The program devolved immigration enforcement to local law enforcement, while also maintaining discretionary control to arrest at the federal level.[116]

Although the Obama Administration announced the end of S-Comm in November 2014, it soon thereafter replaced S-Comm with PEP.[117] Under that program, once an arrest occurs at the state or local level for a criminal violation, local authorities submit the individual's fingerprints to both the FBI and to ICE.[118] As outlined in Secretary Jeh Johnson's 2014 memorandum defining the program, PEP prioritizes enforcement and possible detention under a descending hierarchy of three categories: Priority One addresses threats to national security, border security, and public safety; Priority Two deals with misdemeanants and new immigration violators; and Priority Three covers other immigration violations.[119]

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109. *Id.*

110. 8 C.F.R. § 287.7(d) (2011).

111. *Priority Enforcement Program: Overview*, *supra* note 107.

112. 8 C.F.R. § 287.7(d).

113. *See* Seipp & Feal, *supra* note 18, at 17.

114. *See* Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 Am. U. L. Rev. 1259, 1260, 1265–71 (2015).

115. *Id.* at 1260.

116. *Id.* at 1271.

117. *Id.* at 1265.

118. *Priority Enforcement Program: Overview*, *supra* note 107; *see also* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't et al. 1, 3 (Nov. 20, 2014) [hereinafter PEP Memo from Jeh Johnson], http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [http://perma.cc/RYT5-BFL7].

119. PEP Memo from Jeh Johnson, *supra* note 118, at 3–4. Under PEP, ICE may not transfer a noncitizen from nonfederal to ICE custody unless the individual meets "either the higher of PEP's priority levels or a high-level official's determination that the noncitizen pose[s] a national security risk." Stumpf, *supra* note 114, at 1283.

The shift from S-Comm to PEP marked a noteworthy change in mandatory detention law, since fewer criminal noncitizens qualify as "priorities" under PEP and thus are not subjected to mandatory detention.[120] Although S-Comm intended to prioritize the most dangerous criminal noncitizens, it ultimately processed everyone who appeared to be a noncitizen.[121] In contrast, PEP marks a turn away from enforcement by defining its categories to exclude large numbers of noncitizens.[122]

Secretary Johnson's PEP memorandum limited mandatory detention. Under PEP, immigration detainers are no longer mandatory orders for nonfederal authorities to hold noncitizens until ICE takes custody.[123] Secretary Johnson changed the detainer's obligatory language by directing ICE to replace detention mandates with "requests" that the state or local criminal authorities notify ICE of an individual's pending release.[124] With PEP, ICE may only issue detainers under limited circumstances, primarily when ICE indicates the individual's status is an enforcement priority and when probable cause exists.[125] ICE can no longer seek transfer of individuals with civil immigration offenses or those charged with, but not yet convicted of, criminal offenses.[126] Rather, ICE may seek transfer only under the limited auspices listed as Priority One, Two, and Three enforcement concerns explicitly enumerated by PEP. These directives reduce the likelihood that a noncitizen will be placed directly into an ICE hold.

PEP ushered in changes in the detainer form's language that further corroborate the intention to temporally limit mandatory detention. Before PEP, the DHS used detainer form I-247 (Immigration Detainer—Notice of Action) to allow criminal justice agencies to take custody of a noncitizen.[127] Under PEP, the DHS no longer uses Form I-247, but rather employs two new forms: Form I-247N, Request for Voluntary Notification of Release of

120. *See* Stumpf, *supra* note 114, at 1281 (describing the PEP hierarchy, which includes strict guidelines for prioritizing noncitizens for removal).

121. *Id.* at 1269 ("Secure Communities took advantage of [FBI and DHS] databases in a different way and used them to check all arrestees across the nation to identify removable noncitizens.").

122. Senator Jeff Sessions, Chairman, Subcomm. on Immigration and the Nat'l Interest, News Release: Judiciary Senators Decry New DHS Plan to Free Criminal Aliens: 'Will Endanger the American People' (July 8, 2015), http://www.sessions.senate.gov/public/index.cfm/2015/7/judiciary-senators-decry-new-dhs-plan-to-free-criminal-aliens-will-endanger-the-american-people [http://perma.cc/JBB6-F25B].

123. Stumpf, *supra* note 114, at 1283 ("Secretary Johnson overtly demoted the detainer from a federal mandate to a request . . . .").

124. *Priority Enforcement Program: How Is PEP Different from Secure Communities?*, *supra* note 107.

125. PEP Memo from Jeh Johnson, *supra* note 118.

126. *See id.*; *Priority Enforcement Program: How is PEP Different from Secure Communities?*, *supra* note 107.

127. *See Priority Enforcement Program: Overview*, *supra* note 107.

Suspected Priority Alien, and Form I-247D, Immigration Detainer—Request for Voluntary Action.[128] Form I-247N "requests" the receiving law enforcement agency to notify ICE of a suspected priority individual's pending removal at least 48 hours prior to release.[129] ICE must identify the enforcement priority of the individual.[130] The local law enforcement agency may not hold the individual beyond the point at which she is authorized for release.[131] Likewise, Form I-247D "requests" that a local law enforcement agency's custody of the individual not exceed forty-eight hours beyond the time originally scheduled for release. Again, ICE must also identify the priority placement of the individual.[132] When framed as a "request," detention becomes an option, not a command.

While local law enforcement agencies will likely comply with "requests" from the federal government, PEP's softer approach still discourages the move to redetain criminal noncitizens long after their release. Although PEP may appear similar to S-Comm, it actually applies section 1226(c) to a narrower group of people than S-Comm.[133] Reading a narrower scope into section 1226(c), as the DHS did with the PEP program, would make immigration enforcement more rational and consistent.

2. Constitutional Challenges and the Nonobligatory Nature of Mandatory Detention

Recent court decisions likewise show a shift in the law toward less draconian detention policies. A Fourth Amendment unreasonable-seizure challenge to the constitutionality of ICE holds has been upheld,[134] calling into question whether ICE holds can actually be considered mandatory. If the request that state or local officials hold an individual an additional forty-eight hours rests on tenuous constitutional grounds, it is unclear how it may be constitutional or reasonable to detain an individual years after release from federal custody.

A recent Oregon district court case, *Miranda-Olivares v. Clackmas County*, contests the constitutionality of ICE holds.[135] In this case, Miranda-

128. *Id.*

129. DHS Form I-247N, *supra* note 107 ("IT IS THEREFORE REQUESTED THAT YOU: Provide notice as early as practicable (at least 48 hours, if possible) before the subject is released from your custody to allow DHS an opportunity to determine whether there is probable cause to conclude that he or she is a removable alien.").

130. *See Priority Enforcement Program: Overview*, supra note 107.

131. *Id.*

132. DHS Form I-247D, *supra* note 107 ("IT IS THEREFORE REQUESTED THAT YOU: Serve a copy of this form on the subject and maintain custody of him/her for a period NOT TO EXCEED 48 HOURS beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody." (emphasis omitted)).

133. *See Priority Enforcement Program: How is PEP Different from Secure Communities?*, *supra* note 107.

134. *E.g.*, Miranda-Olivares v. Clackamas Cty., No. 3:12–cv–02317–ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

135. *Id.*

Olivares, a foreign national, was jailed in 2012 on a domestic violence charge.[136] The next day, ICE sent a form requesting that the county officials detain her for up to forty-eight hours, in order to allow the agency to investigate her immigration status.[137] She pled guilty to one charge of contempt of court[138] and was sentenced to an additional two days in jail.[139] Given that Miranda-Olivares had credit for time served, she would have been promptly released if not for the ICE request.[140] Instead, county officials continued to hold her for an additional nineteen hours until ICE took her into DHS custody the following day.[141]

The court reached two key conclusions pertaining to ICE holds. First, the court determined that detainers were not mandatory.[142] Interpreting the detainer regulation as mandatory would come close to violating the Tenth Amendment under the anti-commandeering principle.[143] Congress's instruction that local law enforcement agencies adopt and implement federal detainers inappropriately imposed a federal regulatory scheme upon state and local governments.[144] Second, the court held that the existence of the detainer did not provide probable cause to detain Miranda-Olivares, but rather violated her Fourth Amendment rights.[145] The court concluded that her detention ended after her arraignment.[146] Her continued stay in jail was therefore not a continuation of her initial arrest, but rather a new seizure, empty of the necessary "initial finding of probable cause for violating state law."[147] Continuing her detention based on the ICE detainer qualified as a new "prolonged warrantless, post-arrest, pre-arraignment custody."[148]

Miranda-Olivares appears to impose an unspoken temporal restraint, serving as a point of caution for those considering complying with an ICE

136. *See id.* at *1.

137. *Id.* at *1–2.

138. *Id.* at *2–3. Restraining orders under the Abuse Prevention Act, ORS 107.700 *et seq*, are enforced through contempt proceedings under ORS Chapter 33. State *ex rel.* Hathaway v. Hart, 708 P.2d 1137, 1137, 1139 (1985).

139. *Miranda-Olivares*, 2014 WL 1414305, at *3.

140. *Id.*

141. *Id.*

142. *Id.* at *4–8. The court relied in part upon the Third Circuit's decision in *Galarza v. Szalczyk,* holding that detainers are merely requests. *Id.* at *6–7 (citing Galarza v. Szalczyk, 745 F.3d 634, 640, 643 (3d Cir. 2014) ("[N]o U.S. Court of Appeals has ever described ICE detainers as anything but requests.")).

143. *Miranda-Olivares*, 2014 WL 1414305, at *6. The anti-commandeering principle prohibits the federal government from "commandeering" state governments, by compelling state governments to adopt and enforce federal regulatory programs. *See* New York v. United States, 505 U.S. 144, 170 (1992), *remanded to* 978 F.2d 705 (2d Cir. 1992) (unpublished table decision).

144. *See Miranda-Olivares*, 2014 WL 1414305, at *6.

145. *Id.* at *8–12.

146. *Id.* at *10.

147. *Id.* at *9.

148. *Id.* (quoting Pierce v. Multnomah Cty., 76 F.3d 1032, 1043 (9th Cir. 1996)).

detainer.[149] State and local officials may be more inclined to release individuals and disregard detainers in order to avoid potential constitutional claims.[150] Indeed, after *Miranda-Olivares v. Clackamas County*, many local law enforcement agencies changed their policies to limit or even eliminate compliance with ICE holds.[151] When there is a time lapse between release and detention, detention is too attenuated. The arrest is not immediate.[152] If it is problematic to detain someone like Miranda-Olivares, who had not even left the confines of the jail in which she stayed, it would be similarly unconstitutional to confine someone years after being released from his or her jail cell.

3. The Lack of Legislative History of Section 1226(c)

The legislative history of section 1226(c) provides more support for reading in a temporal limit on the phrase "when released." The recent policy and legal developments tending toward a temporal restriction on the timing question have only just begun to harmonize with the legislative history.

Given that the legislative history surrounding the passage of section 1226(c) does not speak to the timing question,[153] the statute must be construed narrowly to mitigate the harmful effects of detention without parole.[154] Congress's silence on the question obscures whether Congress actually considered the issue of temporal limits.[155] Some courts have claimed that Congress's silence denotes the intention to treat those detained immediately upon release and those detained long after release from criminal custody the same.[156] Reading in such nonexistent statutory distinctions, however, places unspoken words in Congress's mouth.[157]

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149. *See* 2014 WL 1414305.

150. *See* Immigrant Legal Res. Ctr., Is My Client Subject to Mandatory Detention: How Advances in ICE Hold Policies Will Reduce Those Subject to Mandatory Detention 1 (2014), http://www.ilrc.org/files/documents/mandatory_detention_ice_hold_policy_handout.pdf [http://perma.cc/4KB7-ZR5Q].

151. *Id.*

152. *See id.*

153. Savaresse, *supra* note 73, at 325–26.

154. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 894 (2004) ("Arguments about policy and legislative history—the full panoply of interpretive techniques—could narrow the statute's coverage, but never broaden it. If the plain text were expansive but the legislative history suggested a narrower meaning, the judge would favor the latter view."). See *infra* Section III.B for a discussion of the harmful effects of detention.

155. Savaresse, *supra* note 73, at 325–27.

156. *E.g.*, Sylvain v. Attorney Gen., 714 F.3d 150 (3d Cir. 2013); Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012). The Third and Fourth Circuits held that, because Section 1226(c) does not provide a consequence for the failure to immediately detain a noncitizen offender, Congress meant to treat individuals detained long after their release no differently from those detained immediately upon release.

157. Savaresse, *supra* note 73, at 327.

By contrast, courts may read in a one-year time bar because such a reading does not attribute the creation of potential Fourth Amendment violations to Congress.[158] Mandatory detention significantly restricts the free movement of people and infringes upon personal privacy,[159] implicating constitutional questions that Congress likely would have hoped to avoid.[160] Allowing law enforcement officials additional time to detain criminal noncitizens who pose a severe threat to society does not create the same constitutional concerns.

A more conservative reading evades the danger of attributing unwanted and unanticipated changes and constitutional violations to Congress.[161] Congress had the necessary tools to state that ICE could detain noncitizens released back into the community if it so desired, but it chose not to employ them.[162] Other options existed since, "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.' "[163] Due in part to the serious liberty restrictions and associated due process claims that result from the DHS's interpretation of section 1226(c), this statute should be construed narrowly.[164] When such grave concerns are implicated, the absence of a specific distinction does not license later lawmakers and judges to interpret these words in a way they feel best.[165]

Even if legislative history does not address the timing question, Congress has allowed courts to read in temporal limits for other provisions. The changes Congress made to previous mandatory detention provisions suggest its acquiescence to the majority of the federal district courts which have imposed a timing restriction.[166] For example, several district courts have understood a similar provision in the Antiterrorism and Effective Death Penalty Act to apply to noncitizens taken into custody "within a reasonable time

158. See *Miranda-Olivares v. Clackamas County*, No. 3:12–cv–02317–ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014), for a discussion of constitutional concerns.

159. *See* Menjívar & Abrego, *supra* note 28.

160. See F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 Notre Dame L. Rev. 1447, 1462–63 (2010), for a summary of the presumption that Congress acts in accordance with the Constitution, that is, the presumption of constitutionality.

161. *See Miranda-Olivares*, 2014 WL 1414305.

162. *See* Lisa Schultz Bressman et al., The Regulatory State 239–40 (2d ed. 2013). Congress was explicit elsewhere and could have been explicit here, too, if its intention was truly to detain criminal noncitizens years after release from criminal custody.

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

164. *See* Price, *supra* note 154, at 894; *see also infra* Section III.B.

165. *See* Savaresse, *supra* note 73, at 326–27.

166. *In re* Rojas, 23 I. & N. Dec. 117, 135–37 (B.I.A. 2001) (Rosenberg, J., dissenting); Savaresse, *supra* note 73, at 313–14 (explaining that the *Rojas* dissenters would interpret Congress's imposition of a reasonable time requirement in the AEDPA as supportive of a similar imposition of temporal restrictions in § 1226(c)); *see also supra* Part I.

after release from incarceration."[167] Congress's silence and inaction in response to this narrative in federal district courts demonstrates its acquiescence to this interpretation.[168]

In the legislative history that does exist, legislators express a desire for the statute to mitigate potential public safety concerns caused by criminal noncitizens.[169] This further corroborates the *purpose* of the statute—namely, to reduce the serious threat criminal noncitizens pose to public safety.[170] A 1995 Senate Report cites the strong connection between illegal entry and criminal activity, stating that those who enter "illegally have no legitimate sponsors and are prohibited from holding jobs . . . [C]riminal conduct may be the only way to survive."[171] The report noted that of the estimated 450,000 noncitizens in the criminal justice system, only 19,000 such individuals were deported in 1993.[172] In addition, according to the report, it would take an estimated twenty-three years to deport all such individuals if this rate continued.[173] Although the Senate Report suggested numerous reasons for the low deportation rate, it focused on the release of noncitizens on bond as a predominant cause. The Committee recommended that Congress "consider requiring that all aggravated felons be detained pending deportation. Such a step may be necessary because of the high rate of no-shows for those criminal aliens released on bond."[174]

Yet several factors undercut this logic. First, attributing such a measured response to the public safety concern to Congress places idealism above realism. Congress passed the IIRIRA and other controversial immigration-reform measures by attaching them to larger omnibus bills, the passage of which remained virtually certain.[175] This leaves the question of whether the IIRIRA enjoyed broad public support unanswered. Second, the public safety argument loses some of its vigor given that the individuals ICE seeks to remove are often productive members of society.[176] Criminal noncitizens generally pose a negligible threat to public safety, as many fall under this

167. *In re* Rojas, 23 I. & N. Dec. at 135 (citing Grodzki v. Reno, 950 F. Supp. 339, 342–43 (N.D. Ga. 1996)).

168. *See* BRESSMAN, *supra* note 162, at 239–40.

169. *See* S. REP. NO. 104–48, at 1 (1995) (suggesting that Congress meant 8 U.S.C. § 1226(c) to curb the threat posed by criminal noncitizens).

170. *Id.*

171. *Id.* at 5.

172. *Id.*

173. *Id.*

174. *Id.* at 32.

175. *See* Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343, 348–54 (David A. Martin & Peter H. Schuck eds., 2005).

176. More than half of the immigrants removed in 2009 and 2010 had no criminal histories, and among those who did, almost 20 percent committed only traffic-related offenses. *See* U.S. Immigration and Customs Enf't, *Immigration Enforcement Actions: 2010*, U.S. DEPARTMENT OF HOMELAND SECURITY: ANNUAL REPORT, June 2011, at tbls. 2–4, http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf [http://perma.cc/VD8T-ZHZ7].

category only for having committed an immigration offense.[177] Substantial evidence demonstrating that criminal noncitizens are disproportionately violent repeat offenders does not exist. Detaining criminal noncitizens contributes nothing substantive to the underlying purpose of section 1226(c), thus lending more support for a temporal limit on the phrase "when released."[178]

In light of the more tolerant changes addressed in Part II, allowing for the detention of criminal noncitizens to continue without a temporal limit would create profound inconsistencies within immigration enforcement. Unreasonable interpretations should not be advocated with the pretext of Congress's approval. Unfortunately, the one court that has continued to apply *Chevron* did not abide by this principle.[179] Additionally, if, as in *Miranda-Olivares*,[180] even a forty-eight-hour detention period may be unreasonable, detaining an individual months or years after she has reintegrated into the community should not be reasonable. Rather, these policy changes indicate a move toward a more lenient and transparent detention system respectful of individual civil liberties. Section 1226(c) should be interpreted consistently with these changes.

III. Proposing a One-Year Time Bar

This Note proposes a one-year time bar after which ICE may no longer detain a noncitizen subsequent to her release under section 1226(c). Section III.A explains that although the Third and Ninth Circuits have adopted approaches that intend to place durational limits on section 1226(c), these courts do not apply the correct temporal analysis. Section III.B examines the associated social costs of detaining an individual who has reintegrated into society. Part III concludes by discussing how a one-year time bar would mitigate the social costs while also staying true to the object and purpose behind section 1226(c).

A. *One-Year Time Bar for Mandatory Detention*

The phrase "when an alien is released" poses a statutory dilemma for courts across the country. To provide a solution, the Ninth and Third Circuits adopted approaches intended to place durational limits on section 1226(c). These courts address the question of how long a noncitizen may be detained without a bond hearing while awaiting deportation. The Ninth Circuit created a six-month maximum to detain the noncitizen without bond until she can be deported.[181] The Third Circuit imposed a reasonableness requirement to determine how long one should be detained.[182] Nonetheless,

177. *Id.*

178. *See supra*, notes 169–174 and accompanying text.

179. *See* Sylvain v. Attorney Gen., 714 F.3d 150, 156–61 (3d Cir. 2013).

180. *See* No. 3:12–cv–02317–ST, 2014 WL 1414305, *11 (D. Or. Apr. 11, 2014).

181. *See* Rodriguez v. Robbins, 715 F.3d 1127, 1132–33 (9th Cir. 2013).

182. *See* Diop v. ICE/Homeland Sec., 656 F.3d 221, 234–35 (3d Cir. 2011).

both approaches fall short of addressing the underlying question: whether the noncitizen should initially be brought into custody and detained after her release at all.

The Ninth Circuit in *Rodriguez v. Robbins* concluded that detention under section 1226(c) without a bond hearing is limited to six months.[183] In that case, a class of noncitizens had been detained longer than six months.[184] The detainees argued that denying them bond hearings conducted by a neutral arbiter violated the due process clause.[185] The district court entered a preliminary injunction granting each detainee an individualized bond hearing before an immigration judge.[186] On appeal by the government, the Ninth Circuit affirmed the lower court's ruling. The court "conclude[d] that, to avoid constitutional concerns, 8 U.S.C. § 1226(c)'s mandatory language must be construed 'to contain an implicit 'reasonable time' limitation [for detention], the application of which is subject to federal-court review.'"[187] Detention without bond should be only as long as necessary to effectuate removal. Such detention becomes "prolonged at six months."[188]

In contrast to the Ninth Circuit's bright-line six-month rule, the Third Circuit adopted a case-by-case approach.[189] In *Diop v. ICE/Homeland Security*, the Third Circuit stated:

> Reasonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case. That being said, we note that the reasonableness of any given detention pursuant to § 1226(c) is a function of whether it is necessary to fulfill the purpose of the statute.[190]

A case-by-case approach provides an analysis, consistent with, and considerate of, the government's limited resources.[191] As stated by the Sixth Circuit in *Ly v. Hansen,* which also embraced the reasonableness requirement, adopting a universal, six-month rule across all courts may burden administrative resources and judges.[192] Hearing schedules and other procedural requirements would often make it difficult, if not impossible, to meet the six-month rule.[193] This summer in *Jennings v. Rodriguez,* the Supreme Court

183. *See Rodriguez*, 715 F.3d at 1144.

184. *Id.* at 1130–31.

185. *See id.* at 1132.

186. *Id.* at 1130–31.

187. *Id.* at 1138 (quoting Zadvydas v. Davis, 533 U.S. 678, 682 (2001)).

188. Zadvydas v. Davis, 533 U.S. 678 (2001). *See also* Michelle Firmacion, Note, *Protecting Immigrants from Prolonged Pre-Removal Detention: When "It Depends" is No Longer Reasonable*, 42 HASTINGS CONST. L.Q. 601, 607 (2015).

189. *See* Diop v. ICE/Homeland Sec., 656 F.3d 221, 234 (3d Cir. 2011). The Sixth Circuit in *Ly v. Hansen*, 351 F.3d 263, 267–68 (6th Cir. 2003), used the same approach.

190. 656 F.3d at 234.

191. *See* Firmacion, *supra* note 188, at 616–17.

192. *See* 351 F.3d at 271–73.

193. *Ly*, 351 F.3d at 271–73.

will rule on whether section 1226(c) requires a bond hearing if detention lasts for six months or more, officially ending this debate in the lower courts.[194]

Although both of these approaches offer notable improvements in interpreting section 1226(c), each falls short of addressing the true underlying issue. Neither the Ninth nor the Third Circuit speaks to whether the noncitizen should have even been brought back into custody initially. The question is not *how long* the individual may be detained, but rather whether the individual *should be detained at all.* If the object and purpose of section 1226(c) is to detain those who pose a security threat in order to protect society, it would only be rational to detain those who indeed pose such a threat. Since those detained under section 1226(c) are often ripped away from productive societal pursuits and family members,[195] the DHS should take extreme care.

There should be a time bar after which the government may no longer detain the individual once released from a conviction that did not result in a prison sentence. If the DHS does not move with all reasonable speed to detain the individual, the individual should be secure and justified in believing that detention no longer remains a possibility. Implementing a time bar ensures compliance with constitutional concerns, eliminating the possibility that such individuals are held arbitrarily and unreasonably without the necessary opportunity to vindicate their claim.[196] The statutory bar should be set at one year; this time frame would alleviate the individual's constant concern of potential detention, while also allowing DHS personnel the requisite time to detain those who may pose a security threat or flee to evade capture by authorities.[197] More than a year would not be necessary for the DHS. Statistics demonstrate that the agency effectively apprehends criminal noncitizens deemed to be enforcement priorities under PEP.[198] A standard with less than a year, however, might impede the DHS's ability to detain those who pose a security risk. Timelines with strict deadlines are at times necessary, especially when the lives of individuals are at stake.[199]

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194. Jennings v. Rodriguez, 136 S. Ct. 2489 (2016) (Mem.); Brief for Respondents at 34–37, Jennings v. Rodriguez, 136 S. Ct. 2489 (2016) (Mem.) (No. 15-1204).

195. *See* Menjívar & Abrego, *supra* note 28, at 2–3.

196. *See* Miranda-Olivares v. Clackamas Cty., No. 3:12–cv–02317–ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

197. *See* Immigrant Legal Res. Ctr., Limit Removal Based on Long Ago Conduct 1–2, http://www.ilrc.org/files/documents/ijn-statute-of-limitations-factsheet.pdf [http://perma.cc/ESY2-QUAH] (arguing that a statute of limitations should be applied to deportation decisions); *see also* S. Rep. No. 104–48, at 12 (1995) (lamenting the weak laws designed to prevent criminal aliens from committing more crimes or fleeing before deportation).

198. U.S. Immigration & Customs Enforcement, FY 2015 ICE Immigration Removals https://www.ice.gov/removal-statistics [http://perma.cc/3DF2-52BF].

199. *See* Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001) (noting the use of "stringent time limitations" on the deprivation of liberty as a strong procedural protection); Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 Am. Crim. L. Rev. 115, 115–19 (2008) (discussing the "fundamental arbitrariness" of limitations periods in the context of recent attempts to add exceptions to limitation periods).

Other criminal law statutes support this time bar. Statutes for misdemeanor offenses also have a one-year statute of limitations in many states.[200] Given the increasing similarity between immigration and criminal law,[201] the application of the one-year period in the immigration context appears even more appropriate. Here, a statute with a shorter time frame is appropriate when an individual's autonomy remains precariously resting in the hands of the government.[202] Any longer interval would unnecessarily compromise the dignity of human lives.[203] The one-year approach strikes a reasonable cost-benefit balance between the personal liberty interests of the potential detainee and the security concerns of the nation.

B. *Costs for the Social Contract*

Personal, social, and economic costs of detaining a noncitizen years after release also serve to further reinforce the irrationality of interpreting "when released" to mean "any time after release from custody." Mandatory detention imposes significant costs on the detainee. Adhering to a one-year time bar serves to mitigate the attendant social costs while also adhering to the underlying purpose of mandatory detention under section 1226(c).

Detention carries damaging long-term consequences for a detainee's mental and physical health, negatively impacting his or her ability to integrate into society upon release.[204] These consequences last long after release. The public then bears the costs associated with those granted relief and permitted to stay in the United States after their removal cases.[205] The costs borne by the public include funding mental and physical health and related services, as well as the services employed in helping the individual reintegrate into society.[206]

Postponed detention also imposes costs on the detainee's family members, levying societal expenses in the process. The families of detainees suffer both financially and emotionally, and some are forced to seek public assistance.[207] Oftentimes, family members lose their homes and businesses in the

200. *See, e.g.*, ALA. CODE § 15-3-2 (1975); KY. REV. STAT. ANN. § 500.050 (LexisNexis 2014); MD. CODE ANN., CTS. & JUD. PROC. § 5-106 (LexisNexis 2015).

201. The likeness exists primarily in the harshness of the punishment—detention and imprisonment—which many have considered to be synonymous. *See* Savaresse, *supra* note 73, at 329.

202. *See* IMMIGRANT LEGAL RES. CTR., *supra* note 197.

203. *See* ALINA DAS ET AL., N.Y.U. IMMIGRANT RIGHTS CLINIC, PRACTICE ADVISORY: GOVERNMENT RETREATS FROM *MATTER OF SAYSANA*'S INTERPRETATION OF MANDATORY DETENTION STATUTE 11–13 (last updated Apr. 2010) http://immigrantdefenseproject.org/wp-content/uploads/2011/02/Saysana.pdf [http://perma.cc/8CUX-HZY6] (arguing that mandatory detention violates equal protection and due process rights).

204. *See* LUTHERAN IMMIGRATION AND REFUGEE SERV., *supra* note 28, at 3.

205. *Id.*

206. *Id.*

207. Brief for Amici Curiae American Civil Liberties Union Foundation & American Civil Liberties Union Foundation of Pennsylvania at 6–7, Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011) (No. 10-1113).

process.[208] The trade-off and relatively small number of dangerous criminal noncitizens actually removed through the process calls into question the true viability of the legal standard now in place.[209] The effects of detaining even one former criminal noncitizen touches many other lives in the process. A one-year time bar would curb these effects because it would allow those who left criminal custody and continued to rebuild their families and lives to continue cultivating positive relationships and contributing to society.

Moreover, it becomes difficult for noncitizens to integrate into and contribute to the broader population when they live with the constant fear of deportation. The fear created by immigration enforcement fosters an environment for legal violence, punitive immigration laws, increased enforcement, and the disapproval of immigrants, which further harms integration.[210] Many individuals become afraid to leave their homes, to take their children to school because of potential immigration raids, and to speak out against workplace exploitation.[211] Social inclusion and economic mobility of immigrant communities would benefit all Americans.[212] When immigrants do not live in fear, they have the potential to enact positive social change and to strengthen communities and neighborhoods across the country.[213]

These considerations only serve to reinforce the *Araujo-Cortes* line of cases and the necessity of a one-year time bar. When factoring in the associated costs, the combination of individual, societal, and economic repercussions reveals the harmful nature of mandatory detention, especially for nonviolent detainees whose lives are disrupted. Detaining individuals years after they work to assimilate cripples communities and prevents individuals from remaining productive members of society.[214] Adhering to a one-year time bar serves to mitigate personal and social costs while also staying true to the underlying purpose of the mandatory detention statute.

Conclusion

Noncitizens should not have to live in continual fear of detention after their criminal cases are closed. This Note argues that the *Araujo-Cortes* court's interpretation of section 1226(c) offers the correct understanding of the statute by reading in a temporal limit to the phrase "when an alien is released." Recent policy and legal changes track the shift away from mandatory detention to a system that places greater emphasis on discretion. Imposing a temporal limit on detaining a noncitizen who has been released

208. *Id.* at 6.

209. *See* U.S. Department of Homeland Sec., *supra* note 176.

210. *See* Menjívar & Abrego, *supra* note 28, at 2, 6.

211. *Id.* at 2.

212. *Id.* at 7.

213. *Id.*

214. *See supra* notes 204–213 and accompanying text.

into the community after leaving criminal custody offers a more responsible social policy that harmonizes personal liberties with national security interests, striking a judicious balance among the competing concerns. In order to achieve this balance, a more concrete component should be added to the *Araujo-Cortes* analysis to institute a universal one-year time bar for pursuing mandatory detention under section 1226(c).