TRINH V. HOMAN: THE INDEFINITE DETENTION OF VIETNAMESE REFUGEES IN THE 21ST CENTURY

TRINH TRUONG*

TABLE OF CONTENTS

I. INTRODUCTION 416
II. VIETNAMESE REFUGEES 421
A. SOUTHEAST ASIAN DETENTION AND REMOVAL EFFORTS ARE HAPPENING BUT NO ONE IS TALKING ABOUT IT 421
B. THE INDEFINITE DETENTION OF VIETNAMESE REFUGEES 424
III. THE DELICATE BALANCE BETWEEN GOVERNMENTAL INTEREST AND IMMIGRANTS' DUE PROCESS RIGHTS ... 429
A. DUE PROCESS VERSUS PLENARY POWER IN IMMIGRATION LAW 429
1. Substantive Due Process 433
2. Procedural Due Process 435
B. CAMBODIA'S *NAK KIM CHHOEUN V. MARIN*: A CASE STUDY ... 437
C. INTERNATIONAL LAW: A GUIDE FOR IMMIGRATION LAW IN AMERICA 439
IV. CRIMMIGRATION 443
A. CRIMMIGRATION DISPROPORTIONATELY AFFECTS SOUTHEAST ASIANS 444
B. PHILIPPINE'S *SESSIONS V. DIMAYA* 446
C. SOMALIA: *ADEN V. NIELSEN* 447

---

* Staff Editor, *Southern California Review of Law and Social Justice*, Volume 29; J.D. Candidate 2021, University of Southern California Gould School of Law; B.A. Economics and Minor in Political Science 2017, University of California, Irvine. This Note was written with direction from Sidney M. and Audrey M. Irmas Endowed Clinical Professor of Law and Immigration Clinic Director Niels Frenzen. The author dedicates this Article to the Vietnamese boat people like her parents and grandmother who survived refugee camps, the boat journey, poverty, and racism to find a better life in America.

V. INDEFINITE DURATION 448
VI. CONCLUSION: JUDICIAL ACTION IS NECESSARY TO DETER FUTURE VIOLATIONS 450

I. INTRODUCTION

> Remember, remember always, that all of us, and you and I especially, are descended from immigrants and revolutionists.
> Franklin D. Roosevelt
>
> Forty-three years ago . . . the Southeast Asian communities and Vietnamese communities fled their countries and their homeland due to the war, which the U.S. was involved in, fleeing for their safety and the safety of their families. The U.S. would do well to remember that.
> Kevin Lam, Director of the Asian American Resource Workshop
> Charles Dunst & Krishnadev Calamur, *Trump Moves to Deport Vietnam War Refugees*

When Nam Nguyen was eight years old, he and his nine-year-old brother escaped Vietnam by boat.[1] For two years, the boys stayed at a refugee camp in Indonesia before arriving in the United States in 1985.[2] Nguyen lived in foster homes throughout Orange County, California, where he fell into the wrong crowd, and by seventeen years old, he had a felony on his record.[3] Now, he has a steady job and a family who are all American citizens[4], yet because of his felony charges, he lives in constant fear of deportation.

Nguyen's story is not unique. After the Vietnam War, many young Vietnamese who arrived in the United States without their parents were easy

---

[1] Max Boot, *Trump's Plan to Deport Vietnamese Refugees Betrays a Sacred American Principle*, WASH. POST, Jan. 2, 2019, https://www.washingtonpost.com/opinions/global-opinions/trumps-plan-to-deport-vietnamese-refugees-betrays-a-sacred-american-principle/2019/01/02/6cd00c84-0eac-11e9-831f-3aa2c2be4cbd_story.html [https://perma.cc/7FTK-ZKSY].
[2] *Id.*
[3] *Id.*
[4] *Id.*

prey for gang recruiters.[5] Bullied for being outsiders, many young Vietnamese refugees sought protection from street gangs, only to learn later in life that the crimes committed in their youth could lead to their deportation.[6] Under U.S. immigration law, immigrants may be deported if they are convicted of either a "crime of moral turpitude" or an "aggravated felony."[7] According to a 2015 report, Southeast Asian immigrants are three to four times more likely than other immigrants to be deported for old convictions.[8] Additionally, the Trump administration has broadened what constitutes a deportable offense,[9] a policy that has affected more than the 8,000 Vietnamese immigrants already eligible for deportations as of November 2018.[10]

On the other end of the legal spectrum, the Fifth Amendment of the U.S. Constitution protects all persons present in this country—whether lawfully or unlawfully, temporarily or permanently—from governmental abuse of power.[11] This protection includes the right of notice and freedom from indefinite detention.[12] Yet, indefinite detention and other violations of undocumented immigrants' due process rights are not new phenomena in the United States. In 1953, the Supreme Court ruled that a stateless non-citizen, who had been excluded from the country because he was a suspected communist, could be detained because his reentry would constitute a national security threat.[13] In the 1980s, the Immigration and Naturalization Service ("INS") detained thousands of Cubans who were

---

[5] David Reyes, *Vietnamese Gang Trend Has Orange County Worried*, L.A. TIMES, Apr. 4, 1988, https://www.latimes.com/archives/la-xpm-1988-04-04-me-314-story.html [https://perma.cc/G9EQ-BAH7].

[6] Associated Press, *The Prison-Deportation Pipeline for Southeast Asian Refugees in the United States*, S. CHINA MORNING POST, Apr. 8, 2016, https://www.scmp.com/news/world/united-states/article/1934578/prison-deportation-pipeline-southeast-asian-refugees-united [https://perma.cc/N648-MBQ5].

[7] Immigration and Nationality Act (INA) § 237, 8 U.S.C. § 1227(a)(2) (2018); INA § 101, 8 U.S.C. § 1101(a)(43) (aggravated felony).

[8] Associated Press, *supra* note 6.

[9] Jennifer Medina, *Trump's Immigration Order Expands the Definition of 'Criminal,'* N.Y. TIMES, Jan. 28, 2017, at A9.

[10] Charles Dunst, *Trump Administration Quietly Backs Off on Deporting Vietnamese Immigrants*, N.Y. TIMES, Nov. 23, 2018, at A10.

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

[12] *Id*.

[13] *See* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215–16 (1953) (stating "we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right.").

seeking entry into the United States as part of the Mariel boat-lift.[14] When Cuba refused to accept the Cuban nationals, they were indefinitely detained.[15] This trend extends into modern case law as well.

In 2017, the U.S. Immigration and Customs Enforcement ("ICE") began deporting Vietnamese refugees from the United States, starting with people convicted of criminal offenses, detaining these individuals for up to eleven months.[16] On February 22, 2018, seven Vietnamese men filed a national class action lawsuit against the United States.[17] The case, *Trinh v. Homan*, challenged ICE's detention of Vietnamese refugees on the grounds of violation of due process rights, as well as violations of statutory law.[18] The detainees had fled to the United States before 1995 as refugees of the Vietnam War.[19] One plaintiff arrived in the United States when he was three years old.[20] All of the men became lawful permanent residents, but had lost their green cards based on criminal convictions, and were ordered to be removed from the United States as a result.[21] The government then detained the men for several months under post-removal orders.[22] Some were needlessly detained for almost a year,[23] waiting for a removal that would never come.

The removal of Vietnamese refugees like the plaintiffs in *Trinh v. Homan* is highly unlikely to occur in the foreseeable future due to a 2008 diplomatic agreement between the United States and Vietnam.[24] The

---

[14] *See* Yvette M. Mastin, Comment, *Sentenced to Purgatory: The Indefinite Detention of Mariel Cubans*, 2 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 137, 140–42 (2000) (detailing the continued plight of Mariel Cubans detained by the INS and calling for expanded due process protections for detainees).

[15] *See* Chi Thon Ngo v. U.S. Immigr. & Naturalization Serv. [INS], 192 F.3d 390, 395 (3d Cir. 1999) (". . . . [M]any of the Mariel Cubans—approximately 1,750—still remain in INS detention . . . .").

[16] Esther Yu Hsi Lee, *Despite Binational Repatriation Agreement, ICE Is Trying to Deport Vietnamese Refugees*, THINKPROGRESS (Feb. 28, 2018, 5:20 PM), https://thinkprogress.org/vietnamese-refugees-ice-f88882297172/ [https://perma.cc/QXP7-VSFS].

[17] Trinh v. Homan, 333 F. Supp. 3d 984, 986–87 (2018).

[18] *See id*. at 987–988; *see also* Charles Dunst, *Protections Fall for Vietnamese Immigrants as Trump Pushes Deportations*, JUST SEC. (Aug. 29, 2019) [hereinafter Dunst, *Protections*], https://www.justsecurity.org/66015/protections-fall-for-vietnamese-immigrants-as-trump-pushes-deportations/ [https://perma.cc/2V55-FXD8].

[19] Lee, *supra* note 16.

[20] Trinh, 333 F. Supp. 3d at 989.

[21] *Id*. at 987.

[22] *Id*.

[23] *See Id*. at 988–89.

[24] *Id*. at 992.

agreement states that "Vietnamese citizens are not subject to return to Vietnam under this agreement if they arrived in the United States before July 12, 1995."[25] Yet, in December 2018, the Trump administration reinterpreted this agreement, deeming all non-citizen pre-1995 arrivals as eligible for deportation, as opposed to including only those with criminal convictions.[26] The administration stated that the agreement "does not explicitly preclude the removal of pre-1995 cases."[27] According to ICE reports, 122 Vietnamese immigrants were deported in 2018,[28] a significant uptick compared to the 71 and 35 that were deported in 2017 and 2016, respectively.[29]

Though this isn't the first time in political history that the United States has targeted Southeast Asian refugees, the Trump administration currently pursues an aggressive strong-arming tactic to force recalcitrant countries like Laos, Vietnam, and Cambodia to accept deportees.[30] In 2017, the Trump administration issued visa sanctions on high-ranking Cambodian officials for refusing to accept deported citizens who had fled during the Vietnam War and the Khmer Rouge genocide.[31] According to an ICE Enforcement and Removal Operations Report, there was a 279 percent increase in the number of Cambodian nationals who were deported from the United States in 2018 compared to the previous year.[32] Vietnam, on the other hand, had agreed to accept a dozen pre-1995 Vietnamese deportees to maintain diplomatic relations with the United States, as China becomes

---

[25] *See* Agreement Between the United States of America and Vietnam, Viet.-U.S., Jan. 22, 2008, 08 U.S.T. 322, https://www.state.gov/wp-content/uploads/2019/02/08-322-Vietnam-Repatriations.pdf [https://perma.cc/2FR4-NURD].

[26] Dunst, *Protections*, *supra* note 18.

[27] Dunst, *Protections*, *supra* note 18.

[28] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT [ICE], FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 18 (2018) [hereinafter ICE 2018 ENFORCEMENT REPORT], https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf [https://perma.cc/8YUY-8WNB].

[29] ICE, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 16 (2017) [hereinafter ICE 2017 ENFORCEMENT REPORT], https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [https://perma.cc/929H-SY77].

[30] Kimberly Yam, *Asian Caucus: End Deportations of Southeast Asians Who Came to U.S. as Refugees*, HUFFPOST (Dec. 21, 2018, 5:41 PM), https://www.huffpost.com/entry/asian-caucus-demands-end-of-deportation-of-southeast-asians-who-came-to-us-as-refugees_n_5c1bd09ee4b05c88b6f61769? [https://perma.cc/U7X4-FPUJ].

[31] *Id*.

[32] ICE 2018 ENFORCEMENT REPORT, *supra* note 28, at 14.

increasingly assertive in Southeast Asia.[33] However, Vietnam has since failed to issue travel papers for pre-1995 Vietnamese immigrants,[34] effectively rendering the would-be-deportees undeportable.

A Cambodian class action lawsuit, *Nak Kim Chhoeun v. Marin*, was filed in October 2017, in response to the government's unconstitutional re-detention and removal orders of Cambodian nationals who had prior criminal convictions.[35] On March 4, 2020, the Central District Court of California granted the Cambodian class' motion for summary judgment, finding that the government had denied the Cambodians' due process rights when it had re-detained the nationals and re-issued removal orders without providing notice.[36] At the time this Note is published, the court in *Trinh v. Homan* denied petitioners' motion for partial summary judgment in substantial part and granted respondents' cross-motion in substantial part.[37] The most recent court filing was the plaintiff's notice of withdrawal of their motion for reconsideration on August 4, 2020.[38] As the case progresses, ICE has admitted that while the removal of pre-1995 Vietnamese immigrants is generally unlikely, it still "maintains its right to resume its practice of detaining [them] for prolonged periods of time whenever it wishes."[39]

This Note will examine indefinite detention, with a focus on how the United States' aspirations to be a global leader affects the due process rights of deportable aliens. I argue that there should be major policy changes regarding the converging criminal and immigration courts that handle immigrants with convictions, with an emphasis on broad judicial discretion and an individualized approach when analyzing whether an immigrate deserves to be deported. Part II discusses Southeast Asians in American

---

[33] Dunst, *Protections*, *supra* note 18.

[34] Memorandum of Points and Authorities in Support of Petitioners' Motion for Partial Summary Judgment at 4–8, Trinh v. Homan, No. 8:18-cv-00316 (C.D. Cal. Mar. 6, 2020) [hereinafter Petitioners' Partial Summary Judgment Motion], ECF no. 119.

[35] Nak Kim Chhoeun v. Marin, 306 F. Supp. 3d 1147, 1151 (C.D. Cal. 2018).

[36] Order Granting Petitioners' Motion for Summary Judgment and Denying Respondents' Cross-Motion for Summary Judgment at 26–27, Nak Kim Chhoeun v. Marin, No. 8:17-cv-01898 (C.D. Cal. Mar. 4, 2020) [hereinafter Chhoeun Order on Cross-Motions for Summary Judgment], ECF no. 319.

[37] *See generally* Order Granting Respondents' Motion for Partial Summary Judgment in Substantial Part and Denying Petitioners' Cross-Motion for Partial Summary Judgment in Substantial Part, Trinh v. Homan, No. 8:18-cv-00316 (C.D. Cal. June 11, 2020) [hereinafter Order on Cross-Motions for Partial Summary Judgment], ECF no. 146.

[38] *See generally* Petitioner's Notice of Withdrawal of Motion for Reconsideration, Trinh v. Homan, No. 8:18-cv-00316 (C.D. Cal. June 11, 2020), ECF no. 155.

[39] Petitioners' Partial Summary Judgment Motion, *supra* note 34, at 1.

immigration law and provides a factual background to *Trinh*. Part III provides the legal background for the due process rights of immigrants and discusses the Cambodian case as indication of a trend toward favorable case outcomes for Southeast Asian deportations. Parts IV and V consider the history of crimmigration and indefinite detention statutes, as well as recent removal cases, before concluding with Part VI.

II. VIETNAMESE REFUGEES

A. SOUTHEAST ASIAN DETENTION AND REMOVAL EFFORTS ARE HAPPENING BUT NO ONE IS TALKING ABOUT IT

Immigrants from South and East Asia combined account for 28 percent of all United States immigrants, a share greater than that of immigrants from Mexico (25 percent).[40] More Asian immigrants have arrived in the United States than Hispanic immigrants in most years since 2009, likely due to a decline in immigration from Latin America following the Great Recession of 2008.[41] Asians are projected to become the largest immigrant group in the United States by 2055, projecting at 38 percent of all immigrants by 2065.[42] Since the creation of the federal Refugee Resettlement Program in 1980, about 3 million refugees have resettled in the United States.[43]

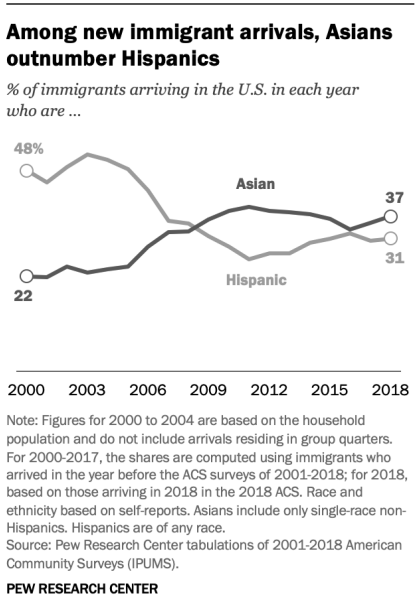
---

[40] Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants [https://perma.cc/Y7WV-FE5C].

[41] *Id.*

[42] *Id.*

[43] *Id.*



Budiman, *supra* note 40 (percentage of Asian and Hispanic immigrants arriving in the U.S. annually).

For almost two decades, immigration enforcement has been separating immigrant families through detention and deportation.[44] Immigration has become increasingly visible within the mainstream political agenda, especially after the summer of 2018, when immigration enforcement at the U.S.-Mexican border separated thousands of children from their parents.[45] Yet, despite the spotlight on immigration, the Asian American community remains constantly overlooked in conversations about immigration policy and reform. In 2015, China and India ranked among the top ten countries whose nationals were apprehended by immigration authorities.[46] Asian American immigrants suffer disproportionately low rates of application to the Deferred Action for Childhood Arrivals ("DACA") program due to a lack of outreach.[47] Although a high number of Asian American children

[44] NAT'L ASIAN PAC. AM. WOMEN'S F. [NAPAWF] & SE. ASIA RES. ACTION CTR. [SEARAC], DREAMS DETAINED, IN HER WORDS 2 (Jaclyn Dean ed., 2018), https://www.searac.org/wp-content/uploads/2018/09/dreams_detained_in_her_words_report-2.pdf [https://perma.cc/6WDR-ZVV4].

[45] *Id*.

[46] *Id*.

[47] *Id*.

have achieved academic success (an accomplishment that has become publicized by widespread use of the term "model minority"), a "disproportionate number [of Southeast Asian children] have found it difficult to succeed academically."[48] For example, many Vietnamese immigrant youth enrolled into school shortly after arriving in the United States with no English ability or preparation,[49] resulting in truancy or dropout and ultimately, gang membership.

Most importantly, the U.S. general population remains unaware that Southeast Asians, most of whom are lawful permanent residents (LPRs) who arrived the United States as refugees, have been quietly detained and deported in large numbers under the Trump administration. In April 2018, U.S. immigration enforcement executed the largest deportation of Cambodians in history.[50] The Laotian community has also been affected by deportation in smaller numbers due to a lack of repatriation understanding with the United States.[51] In July 2018, the Department of Homeland Security ("DHS") announced the implementation of visa sanctions for Laotian and Burmese nationals as a direct result of the countries' refusal to accept deportees.[52] Precedent suggests that another 75,000 Southeast Asians may be subjected to social injustices, unaddressed trauma from resettlement, and subsequent flaws of the current U.S. criminal justice and immigration systems.[53]

---

[48] KaYing Yang, *Southeast Asian American Children: Not the "Model Minority,"* 14 FUTURE OF CHILD. 127, 127 (2004).

[49] *See generally* DU & RICARD, THE DREAM SHATTERED: VIETNAMESE GANGS IN AMERICA (1996) (discussing firsthand accounts from Indochinese and Vietnamese youths and their participation in gangs).

[50] *See* NAPAWF & SEARAC, *supra* note 44, at 2.

[51] *Id*. at 3.

[52] *Id*.

[53] *See* Haidee Chu, *'Crimmigration': How the Intermingling Criminal Justice and Immigration Systems Disproportionately Affect Southeast Asians*, BADGER HERALD (Oct. 23, 2018), https://badgerherald.com/features/2018/10/23/crimmigration-the-intermingling-criminal-justice-and-immigration-systems-disproportionately-affect-southeast-asians [https://perma.cc/ES2M-5AJG].

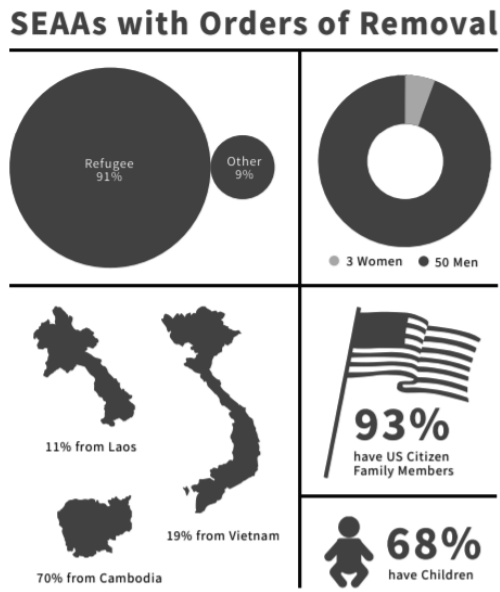


Figure 1: *SEAA Removal Orders (graphic credit: Alyssa Shea)*
Source: 2017 SEARAC Advocacy Data Collection Forms. Figures are based on a subset of over 50 SEAA respondents who sought support and are not a representative sample of all Asian Americans and Pacific Islanders with deportation orders nationwide.

NAPAWF & SEARAC, *supra* note 44, at 3.

B. THE INDEFINITE DETENTION OF VIETNAMESE REFUGEES

After the Vietnam War, the North Vietnamese government established the current Socialist Republic of Vietnam. Thousands of South Vietnamese officers who couldn't escape were sentenced to re-education camps, and subjected to backbreaking labor, extreme deprivation, and Marxist indoctrination.[54] Starting in 1975, more than 1.5 million Vietnamese refugees risked their lives by escaping the country by boat[55] to avoid persecution and imprisonment under the new socialist regime.

Many of the Vietnamese who arrived in the United States prior to 1995 were refugees from the Vietnam War who had sided with American and

---

[54] Thomas Maresca, *40 Years Later, Vietnam Still Deeply Divided Over War*, USA TODAY, Apr. 28, 2015, https://www.usatoday.com/story/news/world/2015/04/28/fall-of-saigon-vietnam-40-years-later/26447943 [https://perma.cc/GM2F-ZNU7].

[55] Thanh Tan, *What Do Vietnamese-Americans Think of 'The Vietnam War'?*, N.Y. TIMES, Oct. 3, 2017, https://nyti.ms/2xSqZUQ [https://perma.cc/B9CX-YU2S].

South Vietnamese forces.[56] The current regime, the Socialist Republic of Vietnam, imputes anti-regime beliefs of those who opposed the North Vietnamese Communist forces during the Vietnam War, marking pre-1995 Vietnamese expatriates as undesirable in their home country. Due to the political turmoil in Vietnam resulting from Communist takeover, many Vietnamese fleeing the country had no time to prepare for relocation.[57]

Today, the political tension between the "homeland" Vietnamese and the "overseas" Vietnamese, the "Việt Kiều," remains strong[58] despite a symbiotic economic relationship between wealthy overseas Vietnamese returning to the motherland.[59] For example, in "Subtle Viet Traits," a sub-group of the "Subtle Asian Traits" Facebook Group[60], administrators need to block community posts or disable comments that reference remnants of the Vietnam War. Some examples include images that use the post-war, red star Vietnam flag as opposed to the pre-war, yellow flag with three red stripes that is still proudly flown in overseas Vietnamese communities, or inferring that the traditional cherry blossom of the North is the better flower to decorate one's house with during Lunar New Year.[61] Additionally, the Vietnamese government has spread propaganda that America started the

---

[56] *See* Jun Song Hong, *Understanding Vietnamese Youth Gangs in America: An Ecological Systems Analysis*, 15 AGGRESSION & VIOLENT BEHAV. 253, 254 (2010) ("Many [of the first-wave of refugees] were also Vietnamese who feared persecution by the Viet Cong . . . because of their ties with the United States and the American military.").

[57] *Id.*

[58] *See generally* Khanh Ta, *Subtle Viet Traits Bringing a Sense of Belonging to Vietnamese Community All Around*, VIETCETERA (Jan. 8, 2020), https://vietcetera.com/en/subtle-viet-traits-bringing-a-sense-of-belonging-to-vietnamese-community-all-around [https://perma.cc/3SZU-MVEP].

[59] *See* Ivan V. Small, *How Vietnamese-Americans and Other 'Viet Kieu' Fuel Capitalist Dreams with Remittances*, S. CHINA MORNING POST, July 27, 2019, https://www.scmp.com/week-asia/opinion/article/3020310/how-vietnamese-americans-and-other-viet-kieu-fuel-capitalist [https://perma.cc/CL7Z-CGY5]. More than a million overseas Vietnamese increasingly return to Vietnam to work, live, and retire there. *See id.* There are also shorter-term returns, especially around Lunar New Year, which are almost always accompanied by sums of money and gifts. *See id.* In 2008, the Vietnamese government amended the Vietnamese National Law to allow overseas Vietnamese to hold dual citizenships. *See id.*

[60] *See generally* Isabella Kwai, *How 'Subtle Asian Traits' Became a Global Hit*, N.Y. TIMES, Dec. 11, 2018, https://nyti.ms/2GcRfkF [https://perma.cc/H3R3-89CP] (discussing the popularity of the "Subtle Asian Traits" Facebook Group); *see also* Ta, *supra* note 58 (discussing the creation of the "Subtle Viet Traits" Facebook Group).

[61] *E.g.*, Chi Nguyen, *Subtle Viet Traits*, FACEBOOK (Jun. 13, 2020), https://www.facebook.com/groups/893341384364359/permalink/1142557262776102/ [https://perma.cc/2U32-WRRV]; Ann Brister, *Subtle Viet Traits*, FACEBOOK (Jan. 23, 2020), https://www.facebook.com/groups/893341384364359/permalink/1031679547197208/ [https://perma.cc/S7PC-YTCW].

war to help France imperialize Vietnam once again,[62] painting the South Vietnamese as traitors and terrorists.[63] If the United States is successful in its Vietnamese deportation efforts, these South Vietnamese nationals are bound to face backlash in their home countries for their political beliefs.

In a 2008 bilateral agreement ("the Agreement"), the United States and Vietnam decided to bar the deportation of Vietnamese people who arrived in the United States before July 12, 1995.[64] It is not uncommon for Southeast Asian countries to deny deportees entry. Because the United States was at war with many of these countries just a few decades ago, Southeast Asian nations did not accept deportees until the United States entered into repatriation agreements following the passage of ratification laws in 1996, which will be addressed later in the Note.[65] Additionally, the United States had a longstanding practice of detaining pre-1995 Vietnamese immigrants subject to removal orders for no longer than ninety days.[66] Recognizing that pre-1995 Vietnamese immigrants are "not subject to return to Vietnam" under the repatriation agreement, "ICE has typically released these immigrants on orders of supervisions within 90 days of their removal orders becoming final."[67]

In 2017, the Trump administration unilaterally decided to reinterpret the Agreement between the United States and Vietnam.[68] ICE suddenly began deporting Vietnamese refugees who came to the United States prior to 1995, starting with those who had criminal convictions, and were detaining these individuals for as long as eleven months, despite the unlikely move for deportation.[69] ICE also began re-arresting Vietnamese immigrants, without notice, who were released years ago and currently

---

[62] Elisabeth Rosen, *How Young Vietnamese View the Vietnam War*, ATLANTIC, Apr. 30, 2015, https://www.theatlantic.com/international/archive/2015/04/youth-vietnam-war-fall-saigon/391769 [https://perma.cc/BGE6-7U7A].

[63] *See generally Australian Man Jailed for 12 Years in Vietnam on Terrorism Charges*, BBC NEWS (Nov. 11, 2019), https://www.bbc.com/news/world-asia-50380660 [https://perma.cc/3B2J-6CCD] (discussing a case in which an Australian man who had escaped during the Vietnam War returned to Vietnam and was accused, charged, and jailed for terrorist charges and trying to overthrow the Communist government).

[64] Agreement Between the United States of America and Vietnam, *supra* note 25.

[65] *See id.*; Dunst, *Protections*, *supra* note 18.

[66] Trinh v. Homan, 333 F. Supp. 3d 984, 987 (C.D. Cal. 2018).

[67] First Amended Habeas Corpus Class Action Petition and Class Action Complaint for Declaratory and Injunctive Relief at 1, Trinh v. Homan, No. 8:18-cv-00316 (C.D. Cal. May 11, 2018) [hereinafter First Amended Petition], ECF no. 27.

[68] Dunst, *Protections*, *supra* note 18.

[69] Trinh, 333 F. Supp. 3d at 987–89.

living peaceably on orders of supervision.[70] The lawsuit, *Trinh*, demands that ICE immediately release all pre-1995 Vietnamese immigrants and give people an opportunity to be released on bond.[71]

The named plaintiffs in *Trinh v. Homan* have similar backgrounds. Hoang Trinh entered the United States as a four-year-old refugee.[72] He worked in his family's bakery growing up, and now owns a family-run Vietnamese sandwich shop of his own.[73] His wife, two children, parents, and six sisters are all U.S. citizens.[74] He was ordered removed following his incarceration for alleged possession of a marijuana plant, and was detained for more than 180 days after the removal order without a bond hearing.[75] Vu Ha escaped Vietnam when he was nine and entered the United States as a refugee at ten-years-old.[76] His parents, sister, and daughter are all U.S. citizens.[77] As a young adult, he was arrested three times, once for robbery.[78] In 2017, he was arrested and detained for failure to pay a citation he received for driving without a license.[79] In May 2017, he was transferred to ICE custody, and was then ordered removed on September 19, 2017, and subsequently detained for more than 180 days without a bond hearing.[80] Long Nguyen entered the United States when he was an eleven-year-old refugee.[81] His wife and children are all U.S. citizens, and he works at a nail salon that his wife manages.[82] In 2006, he was convicted of a nonviolent felony drug offense, and in 2010 or 2011, he was detained after travelling abroad, ordered removed in April 2012, and was under orders of supervision until 2017, when he was detained for more than ninety days after a traffic stop.[83] Ngoc Hoang entered the United States when he was sixteen.[84] Hoang married a U.S. citizen and has four children and works at a nail

---

[70] *Id*. at 987–88.
[71] *Id*. at 991; *see also* First Amended Petition, *supra* note 67, at 21.
[72] Trinh, 333 F. Supp. 3d at 988.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] First Amended Petition, *supra* note 67, at 7.
[77] Trinh, 333 F. Supp. 3d at 988.
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] Trinh, 333 F. Supp. 3d at 988.
[84] *Id*.

salon.[85] He pled guilty to check fraud in 1994 and was placed on probation for simple assault and battery in 2010.[86] On December 12, 2012, he was ordered removed and was subsequently released on an order of supervision.[87] However, in 2017, he was unexpectedly re-arrested by ICE officers at his home and detained for more than ninety days after his removal order.[88] Sieu Nguyen entered the United States when he was three years old; his parents and seven siblings are all U.S. citizens.[89] In 2007, Sieu was convicted of robbery and in 2010, for burglary and receipt of stolen property.[90] He was ordered removed on December 19, 2017 and detained for more than ninety days without a bond hearing.[91] Lastly, Dai Diep entered the United States as a refugee in 1995 and his mother, father, step-father, and step-siblings are all U.S. citizens.[92] In 2015, he pled guilty to second-degree robbery, second-degree burglary, and vandalism for which he was sentenced to two years of imprisonment.[93] He was then ordered removed on October 26, 2017 and was detained for more than 180 days without a bond hearing.[94]

On September 6, 2018, the District Court of California denied the government's motion to dismiss because the plaintiffs had alleged sufficient facts to state a claim that their removal was not reasonably foreseeable in the future.[95] Since then, the parties proceeded to discovery, and by April 2020, the parties filed cross-motions for partial summary judgment.[96] On June 11, 2020, the court denied the plaintiffs' and granted the government's motions in substantial part.[97]

---

[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] *See id*.
[89] *See* Trinh, 333 F. Supp. 3d at 989.
[90] *Id*.
[91] *See* First Amended Petition, *supra* note 67, at 9, 27.
[92] Trinh, 333 F. Supp. 3d at 988.
[93] *Id*.
[94] *Id*. at 989; *see also* First Amended Petition, *supra* note 67, at 19–20.
[95] *Id*. at 994–96.
[96] *See generally* Petitioners' Partial Summary Judgment Motion, *supra* note 34.
[97] *See generally* Order on Cross-Motions for Partial Summary Judgment, *supra* note 37.

III. THE DELICATE BALANCE BETWEEN THE GOVERNMENTAL INTEREST AND IMMIGRANTS' DUE PROCESS RIGHTS

A. DUE PROCESS VERSUS PLENARY POWER IN IMMIGRATION LAW

Evaluating immigration issues, such as indefinite detention, requires courts to analyze our nation's sovereignty—an inherent, executive power to control foreign affairs—and to reconcile it with the Fifth Amendment of the United States Constitution. Congress has plenary power over immigration and can decide to exclude or deport undocumented immigrants,[98] which has facilitated structural disparate impacts in immigration law.[99] This is a fundamental sovereign characteristic that is largely immune from judicial control,[100] and the U.S. Supreme Court has historically deferred to Congress in determining constitutional applicability in immigration law.[101] Meanwhile, the Fifth Amendment protects the basic and fundamental right to ensure that no person will be deprived of life, liberty, or property without due process of law.[102] The Framers of the Constitution considered deprivation of liberty to be of the utmost importance.[103] "Procedural due process requires individualized proceedings to provide adequate notice and a reasonable opportunity to respond to charges resulting in confinement."[104] Substantive due process requires the government to have a legitimate purpose in restricting one's liberty by detaining or incarcerating them.[105]

Historically, undocumented immigrants usually do not prevail under due process analysis. In the nineteenth century, the Court decided a series of Asian exclusion cases, establishing the plenary power of the legislative and executive branches to regulate immigration,[106] which the government

---

[98] While the term "alien" is in the statutory language, the Author uses the term "undocumented immigrants" in this paper, as President Biden has ordered agencies to replace "alien" with a less dehumanizing term in immigration law. Joel Rose, *Immigration Agencies Ordered Not to Use Term 'Illegal Alien' Under New Biden Policy*, NPR (Apr. 19, 2021, 2:51 PM), https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-polic [https://perma.cc/EF56-XTZD].

[99] Kleindienst v. Mandel, 408 U.S. 753, 766 (1972).

[100] Fiallo v. Bell, 430 U.S. 787, 792 (1977).

[101] *See, e.g.*, United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 547 (1950).

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

[103] Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 125 (2018).

[104] *Id*.

[105] *Id*.

[106] *See e.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

has invoked to deny aliens due process protections.[107] The originating case, *Chae Chan Ping v. United States*, upheld the political branches' ability to enact laws that abrogated rights established under earlier federal law and in violation of existing treaties between the United States and China.[108] In other words, the Court held that a non-citizen returning resident could be excluded for any reason Congress proposed, including reasons based on his or her race. In *Fong Yue Ting v. United States*, the Court noted that undocumented immigrants within U.S. borders were protected by the Constitution, though subject to deportation by Congress.[109] In other words, the Court upheld deportation on the basis of race.

Despite the anti-Chinese and anti-Communist rhetoric that bubbled beneath the development of the plenary power doctrine and the analysis of undocumented immigrants' due process rights, the Court's deference to Congress led to somewhat less discriminatory Congressional policies against certain groups, such that legislation could not be effectively battled in court. Hence, the large number of Americans of Latino and Asian descent is due to the lifting of the National Origins Quota System that had largely barred immigration from Asia and Latin America prior to 1965.[110] The Court also extended substantive due process protection to most of the rights protected in the first eight Amendments of the U.S. Constitution.[111] When determining whether a right is implicit, the Court considers: (1) the text of the Constitution and the original intent of the Framers; (2) the history and traditions of the United States; (3) the political philosophy or moral

---

[107] *See e.g.*, Rodriguez-Silva v. INS, 242 F.3d 243, 247 (5th Cir. 2001) ("[T]he governmental power to exclude or expel aliens may restrict aliens' constitutional rights when the two come into direct conflict." citing Mathews v. Diaz, 426 U.S. 67 (1976)).

[108] The Chinese Exclusion Case, 130 U.S. at 599–600.

[109] Fong Yue Ting, 149 U.S. at 724 ("But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of congress to expel them.").

[110] *See generally Chapter 1: The Nation's Immigration Laws, 1920 to Today*, PEW RSCH. CTR. (Sept. 28, 2015), https://www.pewresearch.org/hispanic/2015/09/28/chapter-1-the-nations-immigration-laws-1920-to-today/ [https://perma.cc/VZ2C-A5J6] (discussing changes in immigration laws which led to an influx of immigrants from Latinx and Asian countries).

[111] *See e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (extending the Sixth Amendment right to jury trial); Robinson v. California, 370 U.S. 660 (1962) (extending Eighth Amendment prohibition on cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (extending Fourth Amendment right to be free from unreasonable searches and seizures); Fiske v. Kansas, 274 U.S. 380 (1927) (extending First Amendment right to freedom of speech).

philosophy of society;[112] and (4) whether the rights are better protected by the courts or the legislature.[113] The Court has held that the right to be free from detention is a fundamental liberty interest.[114]

However, Congress has curtailed the Court's discretion following the 1996 immigration law reforms and the events of September 11, 2001. The debate surrounding the intermingling criminal justice and immigration systems can be traced back to the 1990s, when the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") were passed during the Clinton Administration.[115] The administration amended the statutes that cover the removal[116] and detention[117] of aliens who have committed crimes while in the United States.[118] The IIRIRA expanded the types of offenses for which aliens can be removed or deported to crimes that carry more than a one year prison sentence or involve drugs or a firearm[119] and mandated that undocumented immigrants are removed within ninety days once they are determined to be removable or deportable.[120]

INS can detain criminal undocumented immigrants once they have served ninety days of their sentence.[121] Detention becomes indefinite when

---

[112] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 438 (6th ed. 2000); *see also* Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 328 (1957) (discussing four primary sources the Court has looked to: "(1) the opinions of the progenitors and architects of American institutions; (2) the implicit opinions of the policymaking organs of state governments; (3) the explicit opinions of other American courts that have evaluated the fundamentality of [the right]; or (4) the opinions of other countries in the Anglo-Saxon tradition.").

[113] *See id*. at 439.

[114] *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (White, J.) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . . ."); United States v. Salerno, 481 U.S. 739, 750 (1987) (Rehnquist, J.) ("On the other side of the scale . . . is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right.").

[115] *See generally* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (enacted "to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes"); Illegal Immigration Reform and Responsibility Act of 1996 (IIRRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3555–3733 (codified in scattered sections of 8 and 18 U.S.C.) (establishing provisions regarding border patrol, facilitation of legal entry, interior enforcement, enforcement against smuggling of undocumented immigrants, deportation procedures, among other immigration issues).

[116] 8 U.S.C. § 1229(a) (Supp. IV 1998).

[117] *Id*. § 1231.

[118] IIRIRA §§ 321–357.

[119] *See* 8 U.S.C. § 1227(a)(2).

[120] *See Id*. § 1231(a)(1)(A).

[121] IIRIRA § 303(a), *Id*.8 U.S.C. § 1231(a) (2000).

the INS is unable to physically deport undocumented immigrants due to external forces, such as a lack of diplomatic relations with the person's country of origin.[122] The INS cannot deport undocumented immigrants to a country that will not accept them, and, in many cases, will not release the detainee based on the perceived risk that they will commit another crime.[123] Under the statute, if the removal does not occur with ninety days, the U.S. Attorney General may continue to detain an undocumented immigrant who is "a risk to the community or unlikely to comply with the order of removal."[124] The statute, however, does not address how long the Attorney General can actually detain these undocumented immigrants, saying only that these immigrants "may be detained beyond the removal period and, if released, shall be subject to supervision."[125]

The laws had, in part, "broadened the types of offenses that subjected legal immigrants to repatriation and further tied the criminal, legal, and immigration systems together."[126] The 1996 laws also prevented judicial discretion in immigration hearings, so that a judge would not be able to consider factors such as an individual's status as a caregiver, active member of society, or parent of U.S. citizens would not be examined.[127]

The detention and removal of undocumented immigrants that are ordered removed is governed by federal immigration law under 8 U.S.C. § 1231.[128] The Section provides that after an undocumented immigrant is ordered removed, the government "shall remove the alien from the United States within a period of 90 days."[129] During the ninety-day removal period, the government "shall detain the alien."[130] Once the period is over, the government may continue to detain undocumented immigrants whose criminal convictions render them removable.[131] The detainee may be

---

[122] *See Locked Away: Immigration Detainees in Jails in the United States*, 10 HUM. RTS. WATCH, no. 1, 1998, at pt.III (Legal Standards) https://www.hrw.org/legacy/reports98/us-immig [https://perma.cc/L394-5U54] (noting that Vietnam, Laos, Cuba, Iran, Iraq, and Libya are among the countries that often refuse to accept the return of their citizens).

[123] § 1231(a)(6).

[124] *Id*.

[125] *See* INA § 241(a)(6) (codified at 8 U.S.C. 1231(a)(6)).

[126] Kimmy Yam, *ICE Deported 25 Cambodian Immigrants, Most of Whom Arrived in the U.S. as Refugees*, NBC NEWS (Jan. 17, 2020, 12:01 PM), https://www.nbcnews.com/news/asian-america/ice-deported-25-cambodian-immigrants-most-whom-arrived-u-s-n1117906_ [https://perma.cc/48N6-6GZV].

[127] *Id*.

[128] *See* 8 U.S.C. § 1231(a)(2).

[129] § 1231(a)(1)(A).

[130] § 1231(a)(2).

[131] § 1231(a)(6).

released from physical detention upon demonstrating by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk.[132] To reach this determination, non-exhaustive factors the INS district director must weigh include: (1) the nature and seriousness of the undocumented immigrant's criminal convictions; (2) the sentences imposed and time actually served; (3) the detainee's history of failing to appear in court; (4) probation history; (5) disciplinary problems while incarcerated; (6) evidence of rehabilitative effort or recidivism; (7) the equities in the United States; and (8) prior immigration violations and history.[133]

1. Substantive Due Process

However, the INA does not authorize the Government to detain an undocumented immigrant indefinitely. In *Zadvydas v. Davis*, the Supreme Court held that a non-citizen with a final order of removal could not be detained indefinitely following the ninety-day removal period.[134] The case signaled the potential for due process to meaningfully apply in immigration detention contexts. Zadvydas immigrated to the United States when he was eight years old, later married, and lived a full life in America but never acquired U.S. citizenship.[135] He also had an extensive criminal history and was sentenced to sixteen years imprisonment, and after serving two years of his sentence, he earned parole.[136] Had he been a U.S. citizen, his detention would have ended then, but instead, the INS took him into custody and began his deportation proceedings.[137] For two years, the INS kept Zadvydas in jail while they tried to remove him to Germany and the Dominican Republic.[138] A federal district court granted Zadvydas's writ and ordered him released.[139] The Fifth Circuit later reversed the decision because "eventual deportation was not 'impossible,'" the United States

---

[132] 8 C.F.R. § 241.4(a); Oliva v. I.N.S., No. 98-CIV-6525-JGK, 1999 U.S. Dist. LEXIS 1269, at *14 (S.D.N.Y. Feb. 5, 1999).

[133] 8 C.F.R. § 241.4(f).

[134] Zadvydas v. Davis, 533 U.S. 678, 690–702 (2001).

[135] *Id.* at 684.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 685.

continued its efforts to remove him in good faith, and his detention was subject to periodic administrative review.[140]

The court also consolidated Zadvydas's case with Kim Ho Ma's.[141] Ma was born in Cambodia but fled to the United States after staying in refugee camps in Thailand and the Philippines.[142] At the age of seventeen, he "was involved in a gang-related shooting, convicted of manslaughter, sentenced to thirty-eight months' imprisonment before being released to INS custody."[143] Due to his "aggravated felony" conviction, he was ordered removed.[144] Even after the ninety-day removal period expired, the INS continued to detain Ma since it could not conclude that Ma would "remain nonviolent and not violate the conditions of release."[145]

Based on constitutional grounds, the Court held that (1) detention beyond the ninety-day removal period was limited to what is reasonably necessary to effectuate removal and (2) detention past six months was presumptively invalid.[146] Essentially, even though § 241(a)(6) of the INA generally permits the detention of aliens who are under an order of removal, this detention must only be for a period reasonably necessary to bring about the undocumented immigrant's removal from the United States.[147] If, after six months, the non-citizen provides "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must then provide sufficient evidence to rebut the non-citizen's showing of indefinite detention.[148] The court provided two special justifications to detain an individual beyond six months, which are (1) the risk of flight and danger to the community, which the court admitted to be "weak or nonexistent where removal seems a remote possibility at best," and (2) "some special circumstance, such as mental illness, that helps to create the danger."[149] Overall, the court upheld the INA statute but placed a temporal limitation on the government's end.[150]

---

[140] Zadvydas, 533 U.S. at 685.
[141] *Id*. at 690–702.
[142] *Id*. at 685.
[143] *Id*.
[144] *Id*.
[145] *Id*. at 685–86.
[146] Zadvydas, 533 U.S. at 699–702.
[147] *See* INA § 241, 8 U.S.C. § 1231(a)(6)).
[148] Zadvydas, 533 U.S. at 680.
[149] *Id*. at 690–91.
[150] *Id*. at 701.

The practical holding emphasizes the Supreme Court's favorable attitude toward judicial oversight in immigration. The test to judge whether a particular detention is statutorily authorized depends on a judicial inquiry into the likelihood of repatriation, and not simply to defer to the government's stance on a given repatriation.[151] Two months after the *Zadvydas* decision, roughly 50 percent of all administrative reviews resulted in the release of an undocumented immigrant; approximately 829 immigrants were released.[152] However, the Court made few determinative constitutional decisions regarding indefinite detentions in this case.

2. Procedural Due Process

While the Supreme Court has held that no undocumented immigrant has a substantive constitutional right to remain in the United States,[153] the Court does recognize that aliens under some circumstances have a right to procedural due process. Over the last century, Supreme Court holdings have resulted in a sharp divide between the procedural rights of undocumented non-citizens inside and outside U.S. borders. For the purpose of this Note, I will focus only on the rights of undocumented immigrants already inside the United States.

Those inside the country, as opposed to immigrants who have yet to enter, are entitled to procedural due process in immigration proceedings, known as the "entry doctrine."[154] The Court has consistently maintained that an undocumented immigrant who has gained admission develops stronger ties with the United States because of their residency.[155] In 1892,

---

[151] *See id*. ("[A]n alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.").

[152] Laurie Joyce, *INS Detention Practices Post-Zadvydas v. Davis*, INTERPRETER RELEASES, May 2002, at 809.

[153] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (" . . . [T]he power to admit or exclude aliens is a sovereign prerogative.").

[154] There is a plethora of case law on this doctrine. *See e.g*., *id*.; Chew v. Colding, 344 U.S. 590 (1953) (holding that resident aliens cannot be denied due process); Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206 (1953) (asserting only lawful resident aliens are entitled to due process, regardless of length of residence in the United States); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (holding that additional restrictions on immigration during a national emergency does not violate due process); Ekiu v. United States, 142 U.S. 651 (1892) (holding that immigrants do not have a constitutional right to enter a substantive due process challenge); Chun v. Sava, 708 F.2d 869, 876–77 (2d. Cir. 1983) (stating that excludable aliens have "very limited" inherent rights regarding their asylum applications).

[155] INS v. Errico, 385 U.S. 214, 220 (1966).

the Supreme Court decided *Ekiu v. United States*,[156] the first significant case governing the procedural rights of undocumented immigrants. Although the Court found that an imprisoned undocumented immigrant could obtain a writ of habeas corpus to evaluate the validity of the imprisonment, it also held that the judiciary has no power to review an administrative determination of that immigrant's excludability.[157] However, in the landmark 1903 case, *Yamataya v. Fisher*, the Court held that the government could not deport an undocumented immigrant without affording his procedural due process protections.[158] In the mid-1900s, exemplified by the holdings in *Knauff* and *Mezei*,[159] the Court acknowledged that deportation yields harsh consequences upon the lives of immigrants.[160]. it was not until *Goldberg v. Kelly*, however, that the Court applied a broader interpretation of procedural due process to include statutory entitlements such as welfare benefits.[161] In 1976, the Court established a balancing test in *Mathews v. Eldridge* that focused on three factors: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail."[162] This balancing test is used to examine whether and administrative procedure meets the prerequisites of due process. The Court did not apply the *Mathews* test in immigration law until 1982 in its ruling in *Landon v.*

---

[156] Ekiu, 142 U.S. 651.

[157] *Id.* at 660.

[158] *See* Yamataya v. Fisher, 189 U.S. 86, 101 (1903).

[159] *See* Mezei, 345 U.S. at 227; Knauff, 338 U.S. at 546.

[160] *See, e.g.*, Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (". . . [D]eportation is a drastic measure and at times the equivalent of banishment or exile."); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."); Bridges v. Wixon, 326 U.S. 135, 147 (1945) (". . . [A]lthough deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling." (citations omitted)); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (stating that deportation may result in "loss of both property and life, or of all that makes life worth living").

[161] *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970) (establishing a broader interpretation of procedural due process).

[162] Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

Plasencia.[163] Still, procedural due process remains limited for immigrants due to the individualized nature of the test.[164]

B. CAMBODIA'S *NAK KIM CHHOEUN V. MARIN*: A CASE STUDY

Fortunately, in March 2020, using the *Mathews* test, the Central District Court of California decided that the INS could not, without notice, re-detain or re-issue removal orders for Cambodian refugees with criminal convictions who had lived in the United States for years.[165] In 1970, many Cambodians fled their home country as young children to escape the Khmer Rouge regime, similar to the Vietnamese diaspora during and after the Vietnam War, took refuge in the United States, and have lived here for many years.[166] Some of these individuals accrued criminal convictions and were subject to orders of removal.[167] However, "Cambodia refused to accept their repatriation," leading ICE to release these individuals from custody.[168] Since then, these Cambodian immigrants have lived peacefully in the United States as productive members of society.[169]

However, in October 2017, ICE suddenly began a series of raids in an attempt to detain Cambodians without notice after the Cambodian government told ICE that it would consider relaxing previous requirements.[170] Many Cambodian immigrants were issued final removal orders.[171] In response, a class action suit was filed, challenging these removals and the government's detention practices.[172] The plaintiffs argued that the government had violated the due process clause of the Fourteenth Amendment of the U.S. Constitution, along with several immigration regulations and statutes, when it re-detained them without notice and

---

[163] Landon v. Placencia, 459 U.S. 21, 34–35 (1982).

[164] *See, e.g.*, Washington v. Harper, 494 U.S. 210, 228–36 (1990); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 319–34 (1985); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 22–32 (1981); Dixon v. Love, 431 U.S. 105, 112–15 (1977).

[165] Nak Kim Chhoeun v. Marin, 442 F. Supp. 3d 1233, 1251 (C.D. Cal. 2020).

[166] *See e.g.*, Charles Dunst, *Cambodian Deportees Return to a 'Home' They've Never Known*, ATLANTIC Jan. 16, 2019, https://www.theatlantic.com/international/archive/2019/01/america-deports-cambodian-refugees/580393 [https://perma.cc/HF7P-PNW7].

[167] *Id*.

[168] Chhoeun, 306 F. Supp. 3d at 1150.

[169] Dunst, *supra* note 166.

[170] Chhoeun, 306 F. Supp. 3d at 1150.

[171] *Id*.

[172] *Id*. at 1150–51.

without an opportunity to challenge their removal.[173] Using parallel reasoning to *Trinh v. Homan*, the attorneys argued that it was "unrealistic and illegal" for the United States to detain these Cambodian nationals since it was possible the Cambodian government would not allow deportees to return, "given [the] diplomatic dispute over repatriations"[174] and "humanitarian concerns."[175] Many in the Cambodian community who face deportation have long avoided any contact with the criminal justice system and have established families and careers in the United States.[176] In almost all the cases at issue, the crime was committed decades ago.[177] Since then, most of these people have demonstrated that they have changed their lives, started families and are essential members of their communities.[178]

On March 4, 2020, the Central District of California granted the plaintiff's motion for summary judgment.[179] The court examined the procedural protections demanded by due process by balancing three factors from the *Mathews* test.[180]

In consideration of the first prong of the *Mathews* test, the District Court concluded the plaintiffs had a "strong liberty interest in remaining in this country to live, work, and raise families."[181] Many of the plaintiffs had lived in this country since they were small children, and the extent of their relationships with their jobs and family superseded the government's argument that the plaintiffs were living on "borrowed time" and had "the opportunity to personally prepare their affairs."[182]

Upon examining the second prong, the Court held "that the risk of erroneous removal and the value of the additional safeguard of notice [were] both high" due to the exceptional circumstances of long dormant removal orders and consideration of the fact that plaintiffs had been detained without

---

[173] *Id*.

[174] Andrew Edwards, *Lawsuit Filed Over Detentions of Cambodian Refugees, Including Long Beach Man*, PRESS-TELEGRAM (Nov. 1, 2017, 3:48 PM), https://www.presstelegram.com/2017/11/01/lawsuit-filed-over-deportations-of-cambodian-refugees-including-long-beach-man/ [https://perma.cc/S2KR-V6MD].

[175] Leslie Berestein Rojas, *Detained Cambodian Immigrants Sue US Immigration Officials*, S. CAL. PUB. RADIO (Nov. 1, 2017), https://www.scpr.org/news/2017/11/01/77255/detained-cambodian-immigrants-sue-us-immigration-o/ [https://perma.cc/PD86-8NEB].

[176] *See* Chhoeun v. Marin, 306 F. Supp. 3d at 1147, 1152—54.

[177] *Id*.

[178] *Id*.

[179] Chhoeun, 442 F. Supp. 3d at 1237.

[180] *Id*. at 1245.

[181] *Id*.

[182] *Id*. at 1246 (citation omitted).

notice and at risk of improper removal.[183] The Court also rejected the government's argument that existing administrative procedures are "sufficient to guard against the risk of erroneous deportation" due to the "enormous amount of effort" from plaintiffs' counsels to obtain administrative stay.[184]

Lastly, under the third prong, the Court held that the "fiscal and administrative burdens to the government of providing notice before re-detaining" plaintiffs was minimal, and "the public interest against giving notice is also low."[185] In *Mathews*, the court held that the "Government's interest, and . . . that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed."[186] However, the governmental interests in *Chhoeun* were not persuasive. First, the court cited that there was no immediate public interest in the "prompt execution of removal orders," evidenced by the years which the removal orders had remained dormant.[187] During this time, the plaintiffs had developed deep ties to their communities in the United States. Secondly, the "burden on the ICE deportation officers who . . . gather[ed] the information and prepar[ed] the notices" is minimal, as the notice is a one-page form.[188] Given the significance of the affected liberty interest and the serious risk of erroneous liberty deprivations, the Court found that even a few cases of absconding were tolerable under the *Mathews* test.[189] Overall, the burdens on the government to provide notice were minimal and did not warrant a denial of the Cambodian nationals' procedural due process rights.

C. INTERNATIONAL LAW: A GUIDE FOR IMMIGRATION LAW IN AMERICA

International law also provides a helpful legal framework to determine the lawfulness of the indefinite detention of undocumented immigrants, particularly as they derive from binding international legal norms, and have much in common with U.S. laws regarding civil detention.[190] In recent

---

[183] *Id*. at 1247–49.

[184] *Id*. at 1248.

[185] Chhoeun, 442 F. Supp. 3d at 1249.

[186] Mathews, 424 U.S. at 348.

[187] Chhoeun, 442 F. Supp. 3d at 1249 (citation omitted).

[188] *Id*.

[189] Chhoeun Order on Cross-Motions for Summary Judgment, *supra* note 36, at 26.

[190] Civil detention is confinement not imposed as punishment after a full criminal proceeding. It is also called administrative, preventive, or non-punitive detention. *See* Zadvydas 533 U.S. at 69–91; David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1006 (2002).

years, international law has slowly eroded traditions of absolute sovereignty within state territory, at least when confronted with individual rights,[191] yet it is largely ignored when it comes to the detention of immigrants. International law is derived from treaties or international agreements, international custom, and general principles common to major legal systems of the world.[192] Treaties create binding obligations between parties in international law.[193] Treaties, much like the plenary power doctrine, allow the federal government to reach beyond some of its Constitutional limitations,[194] but they do not allow the federal government to infringe on the rights guaranteed through the Bill of Rights.[195]

The United States has entered into several treaties that give rise to international obligations that potentially conflict with the indefinite detention of undocumented immigrants. The United States is obligated internationally by the terms of self-executing treaties, which are enforceable in U.S. courts.[196] Among these treaties are the United Nations Charter, which provide the "right to life, liberty, and security of person,"[197] the right

---

[191] *See* LOUIS HENKIN, THE AGE OF RIGHTS 13–15 (1990); Peter J. Spiro, *The States and International Human Rights,* 66 FORDHAM L. REV. 567, 569 (1997) (noting that "the basic premise" of human rights is "that nations cannot treat their subjects as they please" and documenting the expansion of subject matter areas touched by human rights law).

[192] RESTATEMENT (THIRD) OF THE FOREIGN REL. L. OF THE U.S. § 208 (AM. L. INST. 1987) [hereinafter *Restatement (Third)*]. Judicial decisions and the writings of scholars have also been considered a fourth source of international law. *See* Statute of the International Court of Justice art. 38, Jun. 26, 1945, 3 Bevans 1153. United States courts generally consider these factors as a means of discerning customary international law. *See generally* Stephen Breyer, *America's Courts Can't Ignore the World*, ATLANTIC, Oct. 2018 (arguing that international law, including the decisions of foreign courts, has become part of the American judicial experience).

[193] Yet, obligations in international law are traditionally viewed as arising only from the consent of states, many treaties expressly allow a state to withdraw as long as it follows certain procedures of notification. I am not arguing that the United States cannot withdraw from the Agreement, but the United States and Vietnam have not formally created a new agreement or started any concrete negotiations for one. Until then, the Agreement should still be in place, and at the very least, Vietnamese immigrants should not be unnecessarily and indefinitely detained.

[194] *See* Missouri v. Holland, 252 U.S. 416, 432–35 (1920) (holding that the need for the nation to speak with one voice in foreign affairs justified federal enforcement of a treaty that infringed on the powers reserved to the states under the Constitution).

[195] *See* Reid v. Covert, 354 U.S. 1, 17 (1957) (holding that Congressional powers are limited by the Bill of Rights and noting that treaties are also subject to this limitation).

[196] *See* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 371–72 (1985).

[197] *See* G.A. Res. 217 (III) A, at 3, Universal Declaration of Human Rights, (Dec. 10, 1948), https://www.refworld.org/docid/3ae6b3712c.html [https://perma.cc/BK68-LW27].

to personhood,[198] and the right to "equal protection of the law,"[199] and the right not to be arbitrarily detained;[200] the International Covenant on Civil and Political Rights ("ICCPR"), which provides that every person within the jurisdiction of a party state shall not be subject to arbitrary arrest or detention or deprived of liberty except in accordance with legal procedures;[201] and the Charter of the Organization of American States ("OAS"), which includes the right to be free from arbitrary imprisonment.[202] These treaties indicate customary norms that are relevant in analyzing how to treat the indefinite detention of aliens. These norms include the right to personhood, the right to liberty, the right to be free from prolonged arbitrary detention, the right to due process, and the right to equal protection. Taken as a whole, these treaties provide a framework requiring that immigration detention should be reasonable, necessary, and proportional in order to comply with international human rights obligations. International human rights law establishes detention as a last resort.[203] So, a state may not rely on detention as a primary means of immigration control. International law has made it clear that detention is allowed only as an administrative means during the process of determining immigration status or following a decision to deport.[204]

In the United States, recent growth in detention levels corresponds to political trends to "get-tough" on crime, border control, and immigration.[205] Franklin D. Roosevelt, despite his positive sentiments about immigrants, justified the Japanese Internment Camps in response to increasing military

---

[198] *Id.* at 6.

[199] *Id.* at 7.

[200] *Id.* at 9.

[201] International Covenant on Civil and Political Rights art. 9, ¶ 1, Dec. 19, 1966, 999 U.N.T.S. 171.

[202] American Convention on Human Rights art. 7, ¶ 3, Nov. 22, 1969, O.A.S.T.S., No. 36, 9 I.L.M. 673.

[203] Off. High Comm'r U.N. Human Rights, Migrant Detention Must Be "Last Resort," UN Rights Group Underlines in its Revised Deliberation on Deprivation of Liberty of Migrants (Feb. 26, 2018) [hereinafter *Last Resort*], https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22710&LangID=E [https://perma.cc/R4RW-BME7].

[204] *See, e.g., id.*

[205] *See, e.g.*, Graeme Wood, *A Boom Behind Bars*, BLOOMBERG BUSINESSWEEK (Mar. 17, 2011), https://www.bloomberg.com/news/articles/2011-03-17/a-boom-behind-bars [https://perma.cc/T3BF-KE84] (tracing increased detention due to a "get-tough approach on immigration" and noting parallels between growth in criminal and immigration detention).

and political pressure after the attack on Pearl Harbor.[206] Even the Obama administration focused heavily on immigration enforcement and high levels of immigration detention.[207] The unethical treatment of immigrants and arbitrary detention of undocumented immigrants extend across political parties and is nothing new.

Immigration detention is also big business,[208] which is another reason for its surge in growth. For-profit prison companies often carry out immigration detention and substantially increase their revenues when immigration detention expands.[209] Because detention is an important profit source, private prisons lobby Congress to continue and increase immigration detention.[210] Yet, the international human rights standards that govern immigration detention mirror the U.S. constitutional standards for civil detention outside of immigration, so it is imperative that the United

---

[206] *FDR Orders Japanese Americans Into Internment Camps*, HISTORY (Nov. 16, 2009), https://www.history.com/this-day-in-history/fdr-signs-executive-order-9066 [https://perma.cc/P3BD-BW47].

[207] *See generally* José D. Villalobos, *Promises and Human Rights: The Obama Administration on Immigrant Detention Policy Reform*, 18 RACE, GENDER & CLASS, no. 1, 2011, at 151 (evaluating the Obama administration's immigration detention policies, including use of private contractors, grouping of undocumented immigrants in holding cells, and neglect of detained immigrants in need of medical attention). Compare Obama's policies to that of F.D.R. F.D.R's immigration policies were contrary and hypocritical to his verbal acceptance of immigrants as demonstrated by the quote cited in the introduction of this Note. Under his term, President Roosevelt passed an Executive Order to establish Japanese internment camps and turned away thousands of Jewish refugees. Since then, U.S. presidents have condemned F.D.R.'s actions, but President Trump and his administration have used F.D.R.'s policies to justify racism and establish precedent. *See generally* Rachel Pistol, *Asian American Responses to Donald Trump's Anti-Asian Rhetoric and Misuse of the History of Japanese American Incarceration*, COMPAR. AMERICAN STUD. AN INT'L J., Mar. 2021, at 1, 1–16 (discussing Asian American responses to Trump's rhetoric and abuse of the history of Japanese American incarceration).

[208] Garance Burke & Laura Wides-Munoz, *Immigrants Prove Big Business for Prison Companies*, YAHOO! NEWS (Aug. 2, 2012), http://news.yahoo.com/immigrants-prove-big-business-prison-companies-084353195.html [https://perma.cc/AH9T-Q279] (explaining that the GEO Group, which cites ICE as its most lucrative client, increased its net income from US $16.9 million to US $78.6 million since 2000 and further noting that Corrections Corporation of America ("CCA") earned more than US $162 million in net income in 2011); *see* JOHN SIMANSKI & LESLEY M. SAPP, OFF. IMMIGR. STAT., U.S. DEP'T HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2011, at 1 (2012) (showing ICE detained approximately 429,000 foreign nationals, an all-time high).

[209] *See* Burke & Wides-Munoz, *supra* note 208; Chris Kirkham, *Private Prisons Profit from Immigration Crackdown, Federal and Local Law Enforcement Partnerships*, HUFFINGTON POST (June 7, 2012), http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement_n_1569219.html [https://perma.cc/DT44-ZV5B] (reporting that "according to securities filings" the two largest private prison corporations, CCA and GEO Group, Inc., "have more than doubled their revenues" from immigration detention since 2005).

[210] *See* Burke & Wides-Munoz, *supra* note 208.

States use the international human rights standards to limit immigration detention and provide migrants with the same liberty and due process protections offered to others facing civil imprisonment. It would be ideal if the executive and legislative branches worked together to make this a reality but given the Trump administration's hard stance on immigration and Biden's administration's continued use of placing immigrant children in cages, such action is unlikely.

IV. CRIMMIGRATION

Crimmigration refers to the intersection of criminal and immigration law that began in the 1980s under the Reagan administration, which began to classify new arrivals as public safety risks.[211] Crimmigration began to expand from specific fears: first, the anti-drug hysteria of the 1980s and 1990s,[212] and later, to the anti-terrorism anxiety of the 2000s.[213] Since the plaintiffs in *Trinh* are being prosecuted because of their criminal past, it is necessary to look at the legal framework behind this phenomenon. Immigration is a civil matter, and immigration imprisonment, or detention, is authorized by immigration law rather than criminal law (although those who enter or reenter without permission can be criminally charged).[214] The legal characteristics of civil detention provide less due process protection to immigrants compared to those in criminal custody.[215]

Systematic racial bias has plagued the criminal justice system since its inception.[216] Racial bias similarly permeates the immigration system even outside of the crimmigration context.[217] The plenary power doctrine has

---

[211] *See* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458–61 (2013).

[212] *See* Erich Goode & Nachman Ben-Yehuda, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE 46 (2d ed. 2009) (describing the spike in media reports and public concern about illicit drug use starting in the 1980s).

[213] *See* RICHARD JACKSON, WRITING THE WAR ON TERRORISM: LANGUAGE, POLITICS AND COUNTER-TERRORISM 30 (2005) (describing the terrorism events of September 11, 2001 as inducing an "epistemic anxiety" in many people in the United States).

[214] *See Prosecuting People for Coming to the United States*, AM. IMMIGR. COUNCIL (Jan. 10, 2020), https://www.americanimmigrationcouncil.org/research/immigration-prosecutions [https://perma.cc/7CLU-N8X5].

[215] *Id.*

[216] *See, e.g.*, Dorothy E. Roberts, *Constructing A Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 263 (2007) (presenting "a theoretical framework aimed at shaking the racist foundations of the criminal justice system by highlighting its racial origins and antidemocratic impact").

[217] *Id.*

facilitated structural disparate impacts in immigration law,[218] and the Court's continued constitutional avoidance in deciding to recognize due process violations perpetuates this rights deficit and reinforces the criminal immigrant stereotype and continues the Chinese Exclusion Act path of ushering in the plenary power doctrine. When the plenary power doctrine is justified by the notion of sovereignty, it becomes a proxy for racism, which is how the Trump administration has managed to 'reinterpret,' or rather, ignore foreign agreements and treaties with Southeast Asian countries.

A. CRIMMIGRATION DISPROPORTIONATELY AFFECTS SOUTHEAST ASIANS

Crimmigration disproportionately affects Southeast Asian immigrants. Today, this group of immigrants is three to five times more likely to be deported based on old criminal convictions than other immigrant groups.[219] The resettlement pipeline shows that legislative actions neglect Southeast Asian immigrants who came to the United States in the aftermath of American involvement in their home countries and obtained *legal* documentation.[220] The pipeline is a process defined by "poverty, racism, and institutional barriers."[221]

Although the Office of Refugee Resettlement ("ORR") allocates funding to agencies supporting refugees,[222] the refugees are largely left to their own devices to re-start a life in a new country speaking a foreign language. "[M]any Southeast Asian immigrants are kept in low-income neighborhoods . . . that have few stable and high-income jobs, which in turn perpetuate their poverty."[223] In addition, these areas receive greater police surveillance, which subsequently leads to more frequent arrests.[224] This has created unique and somewhat isolated communities that were settled primarily by refugees (e.g., "Little Saigon" in Westminster, California and

---

[218] *See supra* notes 107–108, 114–119 and accompanying text.

[219] *Southeast Asian Americans and the School-to-Prison-to-Deportation Pipeline*, SE. ASIA RES. ACTION CTR., https://www.searac.org/wp-content/uploads/2018/04/SEAA-School-to-Deportation-Pipeline_0.pdf [https://perma.cc/8NER-PHJM].

[220] Chu, *supra* note 53.

[221] *Id.*

[222] *Refugee Support Services*, OFF. OF REFUGEE RESETTLEMENT, https://www.acf.hhs.gov/orr/refugee-support-services [https://perma.cc/FX5P-H4V4].

[223] Chu, *supra* note 53.

[224] *Id.*

"Cambodia Town" in Long Beach, CA).[225] Unfortunately, because these communities formed in an America that was unwilling to protect them, gangs are common as a means of protecting young refugees, and these refugees would ultimately be arrested.[226] In a 2017 sociology study, "non-citizens were found far more likely to be incarcerated even after accounting for criminal history and severity."[227]

After Congress passed the AEDPA and IIRIRA in 1996, the deportation of Southeast Asian refugees soared.[228] The laws retroactively expanded the definition of "'aggravated felony' under immigration law to encompass over 50 separate crimes in 21 categories," including some laws which are not considered to be "'aggravated' or 'felonies' under state criminal laws."[229] In fact, according to the Immigration Policy Center, as of 2010, 68 percent of legal permanent residents who were deported were deported for minor, non-violent crimes.[230] In addition, existing laws restrict immigration judges from considering individual circumstances before ordering deportation.[231] Even when a person clearly poses no threat to society and positively contributes to the community, judges have little power under current law to stop a deportation when the person is classified as an aggravated felon. The act of deportation has been wildly disproportionate to the actual low-level crimes that are committed by refugees and immigrants. It is consistent with the right to due process for a person to be afforded their day in court in front of a judge who can weigh the evidence for and against guilt and punishment.

---

[225] Caitlin Yoshiko Kandil, *Koreatown, Little Saigon, and South Asians: As Asian Americans Diversified, So Did Their Communities*, NBC NEWS (May 15, 2019, 6:35 AM), https://www.nbcnews.com/news/asian-america/koreatown-little-saigon-south-asians-asian-americans-diversified-so-did-n999056 [https://perma.cc/BZD5-DA6E].

[226] Chu, *supra* note 53.

[227] *Id*.

[228] *Southeast Asian Americans and Deportation Policy*, SE. ASIAN RES. ACTION CTR., https://www.searac.org/wp-content/uploads/2018/04/Southeast-Asian-Americans-and-Deportation-Policy_8.8.2013.pdf [https://perma.cc/KHL4-YZCQ].

[229] *Id*.

[230] *The Ones They Leave Behind: Deportation of Lawful Permanent Residents*, AM. IMMIGR. COUNCIL (2010), https://www.americanimmigrationcouncil.org/research/ones-they-leave-behind-deportation-lawful-permanent-residents-harm-us-citizen-children [https://perma.cc/H2GJ-JFE9].

[231] *See id*. ("The 1996 immigration laws eliminated [hearings before an immigration judge who would balance an individual's criminal convictions against their individual circumstances] for LPRs facing deportation based on convictions classified as aggravated felonies.").

B. PHILIPPINE'S *SESSIONS V. DIMAYA*

In *Sessions v. Dimaya*, the Court extended the vagueness reasoning in *Johnson v. United States* to strike down a statute because its definition of a "violent felony" was impermissibly vague and produced more unpredictability and arbitrariness than what Due Process can tolerate.[232] James Dimaya, a native of the Philippines, was a lawful permanent resident of the United States with two convictions of first-degree burglary under California law.[233] After his second offense, the Government sought to deport him as an aggravated felon.[234] The DHS initiated removal proceedings against Dimaya under the INA, arguing that burglary inherently involved substantial risk of physical force and thus was grounds for removal.[235] The immigration judge and the Board of Immigration Appeals ("BIA") held that in California first-degree burglary is a "crime of violence" under 18 U.S.C. § 16(b) and ordered his deportation.[236]

Both the Ninth Circuit and the Supreme Court reversed this decision, finding that § 16(b) as incorporated into the INA was unconstitutionally vague, similar to the provision in *Johnson*.[237] Justice Kagan noted that § 16(b)'s residual clause would require courts to employ the categorial approach, which tasks courts with "imagin[ing] an 'idealized ordinary case of the crime," rather than analyzing the specific facts of the individual case at hand.[238] Secondly, the Court held that § 16(b) created too much uncertainty as to what level of risk makes a crime violent, offering an imprecise qualitative standard.[239]

Sessions demonstrated how determining immigration statutes can be vague, but more importantly highlights the limited role of judicial review in an area of law that has historically overlooked constitutional rights of certain individuals. For migrants, a vague statute could mean the difference between life and death; it is even more precarious when paired with judges who cannot evaluate individual circumstances, unlike judges in criminal cases who are allowed far more deference.

---

[232] Sessions v. Dimaya, 138 S. Ct. 1204, 1210 (2018).
[233] *Id.* at 1207.
[234] *Id.*
[235] *Id.* at 1211.
[236] *Id.*
[237] *Id.* at 1211, 1212.
[238] Sessions, 138 S. Ct. at 1213–14.
[239] *Id.* at 1215.

C. SOMALIA: *ADEN V. NIELSEN*

Aden v. Nielsen is an even more recent removal case highlighting the intersectionality of criminal and immigration law. However, *Aden* focuses on how a robbery charge resulted in a removal order and indefinite detention. Aden "was born in a refugee camp in Kenya to Somali parents and was orphaned as an infant" before arriving in the United States as a refugee in 2007 when he was fifteen years old.[240] He applied to become a lawful permanent resident, and on May 2012, his application was approved.[241] In 2014, Aden was convicted of robbery offenses and served his sentence, after which, the DHS took him into custody and detained him.[242] On December 20, 2017, he was ordered removed to Kenya.[243]

There were some efforts from ICE Deportation Officers to deport Aden but eventually on March 30, 2018, ICE released Aden from immigration custody on an order of supervision since removal was not significantly likely in the reasonably foreseeable future.[244] However, a few months later, ICE transferred Aden to a Louisiana facility for a chartered flight to Somalia, despite the fact that Aden had never been to Somalia, nor had he been given a hearing.[245]

On October 1, 2018, Aden filed a motion for stay of removal.[246] The government then argued that the habeas petition should be dismissed since Aden's removal was likely to occur in the reasonably foreseeable future and the government had provided both notice and an opportunity to hear Aden's fear of violence, among other reasons.[247] The court disagreed, citing the Fifth Amendment and concluding that the Government had failed to provide procedural protections for Aden's right to a full and fair hearing.[248] The court held that removal proceedings would reopen for Aden to apply for relief from removal to Somalia.[249]

---

[240] Aden v. Nielsen, 409 F. Supp. 3d 998, 1002 (2019).
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.* at 1003.
[245] *Id.* at 1001, 1003.
[246] Aden, 409 F. Supp. 3d at 1004.
[247] *Id.*
[248] *Id.* at 1009–10.
[249] *Id.* at 1011.

V. INDEFINITE DETENTION: IRAQ'S *HAMAMA V. ADDUCCI*

The debate about the intermingling of criminal justice and immigration systems can be traced back to the 1990s, when the AEDPA and the IIRIRA were passed during the Clinton Administration and amended the statutes that cover the removal[250] and detention[251] of undocumented immigrants who committed crimes while in the United States.[252] The IIRIRA expanded the offenses for which undocumented immigrants could be removed or deported to crimes that carry more than a one year prison sentence or involve drugs or a firearm[253] and mandated that undocumented immigrants be removed within ninety days once they were determined to be removable or deportable.[254]

The detention and removal of undocumented immigrants that are ordered removed is governed by federal immigration law under 8 U.S.C. § 1231, and during the ninety days the government has to deport the undocumented immigrant, they must be detained.[255] Section 1231 provides that after the immigrant is ordered removed, the government "shall remove the alien from the United States within a period of 90 days."[256] During the ninety-day removal period, the Government "shall detain the alien."[257] Once the period is over, the government may continue to detain undocumented immigrants whose criminal convictions render them removable.[258] The detainee may be released from physical detention upon demonstrating "by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk[.]"[259] To reach this determination, the INS district director must weigh several factors including: (1) the nature and seriousness of the undocumented immigrant's criminal convictions; (2) the sentences imposed and time actually served; (3) the detainee's history of failing to appear in court; (4) probation history; (5) disciplinary problems while incarcerated; (6) evidence of rehabilitative

---

[250] 8 U.S.C. § 1229(a) (Supp. IV, 1998).
[251] *Id.* § 1231.
[252] IIRIRA, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3555 (codified in scattered sections of 8 and 18 U.S.C.).
[253] *See* 8 U.S.C. § 1227(a)(2).
[254] *See id.* § 1231(a)(1)(A).
[255] *See id.* § 1231(a)(2).
[256] *Id.* § 1231(a)(1)(A).
[257] 8 U.S.C. § 1231(a)(2).
[258] *Id.* § 1231(a)(6).
[259] 8 C.F.R. § 241.4(a).

effort or recidivism; (7) the equities in the United States; and (8) prior immigration violations and history.[260]

On April 4, 2019, the Eastern District Court of Michigan denied the government's motion to re-detain Mouayed Kas Yonan pending his removal to Iraq.[261] Back in 2005, the United States Government ordered Yonan to be removed from the country.[262] He remained in the country, however, "for more than a decade under an order of supervision."[263] On September 20, 2017, Yonan voluntarily surrendered himself to ICE during a period of mass round-ups that began in June 2017.[264] From there, he remained in ICE custody until he was released on bond on April 5, 2018.[265] In August 2018, he was arrested for stealing a wallet, pled guilty, and received a custodial sentence of 220 days.[266] On January 20, 2019, ICE re-detained Yonan upon his release from custody and plans to keep him detained indefinitely.[267]

In this case, the court found that Yonan had been "detained well beyond the presumptively reasonable period of six months," as established by *Zadvydas*.[268] If there is no significant likelihood of removal within the reasonably foreseeable future coupled with a detention stretching beyond six months, as was the case here, the detention becomes "constitutionally fraught."[269] To that extent, the court noted that, "the Government has not provided the Court with evidence, such as travel documents and a travel itinerary, demonstrating that Yonan's removal will take place in the reasonably foreseeable future."[270] In fact, the BIA noted that "by clear and convincing evidence, the respondent poses a danger to persons or property such that no bond should be set."[271] Yet, this evidence was "not well detailed" in the BIA decision and the government did not explain further in its motion.[272] The only fact that militated toward a showing of 'danger' was

---

[260] 8 C.F.R. § 241.4(f).
[261] Hamama v. Adducci, No. 17-cv-11910, 2019 U.S. Dist. LEXIS 58119, at *4 (E.D. Mich. Apr. 4, 2019).
[262] *Id*.
[263] *Id*.
[264] *Id*. at 4–5.
[265] *Id*. at 5.
[266] *Id*.
[267] Hamama, 2019 U.S. Dist. LEXIS 58119, at *5.
[268] *Id*. at 5–6.
[269] *Id*. at 5.
[270] *Id*. at 6.
[271] *Id*. at 7.
[272] *Id*.

Yonan's convictions; however, all of his convictions happened prior to 2005. Therefore, the court held that decades-old convictions and a recent economic crime were not sufficient special circumstances to establish that Yonan was a danger to the community.[273]

Here, the government sought to detain a man based on the remote possibility and belief that he may commit crimes before his removal to Iraq. As the court phrased it, "the Government is seeking to incarcerate Yonan not for what he has done, but for what it fears he might do."[274] "Preventive detention in this case, without a more substantial showing by the Government, would be antithetical to the Fifth Amendment's Due Process Clause protections."[275] The court denied the government's motion to re-detain Yonan and ordered the government to release him before April 9, 2019.[276] Yonan received a happy ending, as far as happy endings go in deportation cases, but others may not be so lucky.

VI. CONCLUSION: JUDICIAL ACTION IS NECESSARY TO DETER FUTURE VIOLATIONS

The class members in *Trinh* have committed crimes in their past. However, they have lived in the United States for decades as outstanding members of society. The government needs to understand the circumstances and history of refugee resettlement before implementing policies that unfairly violate due process rights of legally residing citizens. "Southeast Asian refugees . . . were provided little support to appropriately start over in the United States and settled in poorly funded, highly policed urban centers, such as Long Beach and Stockton, California."[277] As part of the cycle, many of these refugees made mistakes while trying to survive and are constantly up against a system stacked against them. Refugees must deal with language barriers and limited access to resources such as lawyers who understand immigration consequences. Judges give wide deference to the legislative branches regarding immigration issues. It is necessary for judges to look at an individual case's circumstances before making a deportation determination. Under current law, the government does not bat

---

[273] Hamama, 2019 U.S. Dist. LEXIS 58119, at *7.

[274] *Id*. at 4.

[275] *Id*. at 8.

[276] *Id*.

[277] Kimmy Yam, *Former Vietnam War Refugee Faces Deportation to Country He's Never Visited*, NBC NEWS (Oct. 29, 2019, 10:32 PM), https://www.nbcnews.com/news/asian-america/former-vietnam-war-refugee-faces-deportation-country-he-s-never-n1073346 [https://perma.cc/GQ68-YQZ8].

an eye at individual circumstances. It does not consider whether an individual has served his or her time, if he or she has turned over a new leaf, or if the crime was committed decades ago as a young adult. The current system neglects to consider unique circumstances, which results in meaningless hearings and life-changing deportations.

This is analogous to the Trump administration's efforts to end the Flores Settlement Agreement, which could have allowed for the indefinite detention of migrant children.[278] In that situation, a judge from the Central District of California decided that terminating the settlement violated the terms of a 1997 federal court agreement, which limited the length of detention for migrant children to twenty days.[279] Like the court did in the Flores Settlement Agreement, the Central District of California should exercise its power to restrict the executive branch from deciding to end a ten-year foreign agreement at the detriment of LPRs who have lived in the country for most of their lives.

If Vietnamese refugees are deported back to Socialist-Republic Vietnam, they would be stuck in a state of limbo. Vietnam does not recognize deportees as citizens because many of them came to the United States at a young age and do not politically identify or agree with the beliefs or outcomes of the Vietnam War. Southeast Asian deportees who have arrived in their home country are dropped off at the airport without documentation. As a result, many deportees struggle with securing employment and housing.

Since 2008, Vietnam has routinely refused to issue travel documents to pre-1995 Vietnamese immigrants and has cited Article 2.2 of the Agreement as a basis for these decisions.[280] However, the government has alleged that a verbal agreement was reached in 2017 that led to the indefinite detention of Vietnamese refugees, even though Vietnam has only issued a small percentage of travel documents since.[281] The government has also failed to secure a new written agreement, while detaining Vietnamese immigrants for longer than the mandated ninety days. Although the class

---

[278] Katie Reilly & Madeleine Carlisle, *The Trump Administration's Move to End Rule Limiting Detention of Migrant Children Rejected in Court,* TIME, Sept. 30, 2019, https://time.com/5657381/trump-administration-flores-agreement-migrant-children [https://perma.cc/YY62-UW6J].

[279] *Id*.

[280] Petitioners' Partial Summary Judgment Motion, *supra* note 34, at 4.

[281] *Id*. at 5–6 (explaining that in 2017, ICE requested travel documents for forty pre-1995 Vietnamese immigrants, and Vietnam issued only nine; in 2018, ICE requested 157 documents, and Vietnam issued only 4; and in 2019, ICE requested fifty-four documents, and Vietnam issued only five).

members are no longer detained, they remain at risk of indefinite or prolonged detention at any point in the future. There are at least 8,000 to 10,000 Vietnamese immigrants with final orders of removal who are at risk of future detention and the many other Southeast Asian refugees who are still at risk.[282]

The class members of *Trinh* have already met their burdens under *Zadvydas*. The 2008 Agreement remains intact and there is no evidence that there has been any progress to revise the agreement. Therefore, there is "good reason to believe" that deportation will not happen, and the government had violated Vietnamese immigrants' rights by detaining them.[283] Due process and international law have not always seen eye-to-eye, but with outcomes such as *Nak Kim Chhoeun*, lower courts have shown a trend toward preserving due process rights for Southeast Asian immigrants. On a larger scale, courts need to look at individual circumstances in immigration law in order to preserve due process rights. As *Session v. Dimaya* has shown, INA statutes can be vague. In the context of crimmigration, vague statutes open up the possibility for even more LPRs to be deemed removable when they have lived productive lives as upstanding members of society since their convictions. Ultimately, resolving the issues faced by the Vietnamese refugees and other Southeast Asian immigrants will require the cooperation of many entities—locally, federally, and internationally.

---

[282] Petitioners' Partial Summary Judgment Motion, *supra* note 34, at 8–9.

[283] *Id.* at 14.