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Detention and Deterrence: Insights from the Early Years of Immigration Detention at the Border

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ABSTRACT: Throughout the past several years, in the Trump and Obama Administrations alike, federal immigration authorities have advanced the use of detention as a deterrent to dissuade immigrants from seeking refuge in the United States. That detention often lasts for months, and even years, causing some immigrants to give up their cases, while others fight on despite the obstacles detention poses. This Essay takes a step back and returns to the late 1800s and early 1900s, when immigration detention was first employed primarily to detain and inspect noncitizens arriving from Asia. Despite the xenophobia and racism that characterized that era, such detention remained limited in purpose and duration, unlike the prolonged, deterrence-based detention that faces many who arrive at or cross U.S. borders today. The Essay argues that this history matters when assessing the due-process rights of noncitizens in immigration detention—a question that federal courts are actively considering and that is likely to return to the Supreme Court. These early practices call into question the constitutionality of today's detention system and suggests that stronger limits on its use and duration are needed to respect noncitizens' due-process rights.

INTRODUCTION

Immigration detention may be the single most powerful tool the executive branch wields to achieve desired immigration policy goals. It is a particularly powerful weapon against noncitizens arriving at the border, often dashing their hopes for entry into the United States. In the past several years, administrations of both parties have used such detention to attempt to deter arriving noncitizens and those who cross the border—and in particular, asylum seekers—in an effort to control an influx of arrivals.[1]

1. Throughout this Essay, I use the term "arriving noncitizens" as a technical term for those who present themselves at a port of entry seeking admission to the United States. *See* 8 U.S.C. § 1225(b)(1) (2018). The constitutional concerns that this Essay discusses with regard to such

The tremendous hardships immigration detention imposes on those subjected to it is not new. The walls of the Angel Island Immigration Station—which features prominently in this Essay and is one of the country's oldest detention centers—contain poems written by arriving Chinese noncitizens lamenting detention nearly a century ago. One poem reads:

> Imprisoned in the wooden building day after day,
> My freedom withheld; how can I bear to talk about it?
> I look to see who is happy, but they only sit quietly.
> I am anxious and depressed and cannot fall asleep.
> The days are long and the bottle constantly empty; my sad mood, even so, is not dispelled.
> Nights are long and the pillow cold; who can pity my loneliness?
> After experiencing such loneliness and sorrow,
> Why not just return home and learn to plow the fields?[2]

During my year as a *Yale Law Journal* Fellow and practicing attorney at the Northwest Immigrant Rights Project, I heard these same sentiments expressed by those facing months of detention while they fought their cases. The prospect of lingering in jail-like conditions for many months, facing highly uncertain odds of success, caused many to consider giving up—and some in fact to give up—their claims for relief.

But detaining arriving noncitizens for months on end to serve deterrence goals is a historical anomaly. Beginning in the 1870s, and for the first several decades that immigration detention became common for arriving noncitizens, detention was a short-term measure justified only as a means to determine an individual's admissibility. This comparatively short detention occurred despite immigration policies grounded in hate, xenophobia, and explicit racism—strikingly similar to the treatment some politicians, pundits, and others direct toward immigrants today.

Early immigration detention—which was typically brief and unmotivated by deterrence—informs whether today's detention of asylum seekers (and other immigrants crossing the border) for months, or even years, violates their right to due process. Indeed, when Congress *did* try to use deterrence to prevent migration—by passing a law that imposed hard labor for immigration violations by

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noncitizens apply with even greater force to those already present in the United States, especially those with significant connections to this country. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

2. HIM MARK LAI, GENNY LIM & JUDY YUNG, ISLAND: POETRY AND HISTORY OF CHINESE IMMIGRANTS ON ANGEL ISLAND 1910-1940, at 82 (2d ed. 2014).

Chinese immigrants — the Supreme Court struck that law down.[3] The Court has often looked to historical practice in defining rights under substantive due process, and has also made clear that even noncitizens who cross the border unlawfully have such rights. It is therefore critical that federal courts understand that today's prolonged detention and its deterrence rationale and effects are anomalous by historical standards. Indeed, instead of months or years in detention, immigrants during the era this Essay examines typically spent days or perhaps weeks detained, and courts exhibited concern for long detentions. This historical practice calls into question the constitutionality of the detention system facing noncitizens at the border, crossing the border, and inside the country today.

Because of its constitutional importance, this Essay focuses on the historical practice of short-term detention. In Part I, I review why this Essay is necessary, briefly noting recent policies and proposals that use deterrence-based, long-term immigration detention to achieve anti-immigration goals. Part II examines the historical record of immigration detention during the era of Chinese exclusion. This utterly shameful and repugnant period was nevertheless characterized primarily by short detention, which itself was justified only by the brief window required to determine an individual's admissibility. In Part III, I tie these two threads together by examining the constitutional implications of these early norms for today's immigration detention system.

I. CURRENT AND RECENT POLICIES: DETERRENCE AND PROLONGED DETENTION AT THE BORDER

A. Recent Developments: The Trump Administration and Deterrence

The past two years have been characterized by increasingly extreme policies intended to deter noncitizens who have recently crossed or arrived at the U.S. southern border. The most well-known of these policies was an effort to deter asylum-seeking families by separating parents and their children at the border, prosecuting the parents, placing the children into federal custody, and then detaining the parents for immigration proceedings.[4] A federal court issued a preliminary injunction suspending the family-separation portion of this practice.[5]

3. Wong Wing v. United States, 163 U.S. 228 (1896).

4. Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133, 1136-37 (S.D. Cal. 2018).

5. *Id.* at 1149. Since the *Ms. L.* preliminary injunction, the Trump Administration has pursued its deterrence-focused immigration policies through other means, such as attempts to suspend the right to seek asylum, *see* E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219 (9th Cir. 2018) (affirming preliminary injunction that enjoined policy barring asylum to noncitizens who unlawfully entered the United States between ports of entry on the southern border); E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922 (N.D. Cal. 2019) (enjoining

But as many pointed out, the Trump Administration's solution was to call for more detention of families.[6] Similarly, the current Administration is in the midst of an effort to dismantle a long-standing consent decree governing the detention of minors that it claims has "effectively prevented the Government from using family detention for more than a limited period of time" and created "a powerful incentive for adults to bring juveniles on the dangerous journey to the United States."[7] In other cases, too, the Administration has sought to eliminate "incentives" for noncitizens seeking refuge by subjecting them to detention without the opportunity for a bond hearing.[8] Reading between the lines in these cases and proposals is not difficult: the Trump Administration wants to detain even more arriving noncitizens and recent entrants for more than a "limited period" to deter others from coming to the United States.[9]

B. Prior Administrations and the Expansion of Immigration Detention

The Trump Administration, however, is not alone in embracing long-term, deterrence-based detention. The Obama Administration heralded such policies as well. In 2014, the Department of Homeland Security opened a new detention center that was billed as an "effective deterrent" to continued family migration.[10] Under President Obama, Immigration and Customs Enforcement (ICE) took

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policy that seeks to deny asylum to noncitizens who failed to apply for asylum in another country prior to seeking asylum in the United States), *stay issued pending appeal*, Barr v. E. Bay Sanctuary Covenant, 2019 WL 4292781 (Sept. 11, 2019), and an attempt to force asylum seekers to remain in Mexico while applying for asylum, *see* Innovation Law Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019).

6. Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018).

7. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392, 44,403 (Aug. 23, 2019) (codified at 8 C.F.R. pts. 212 & 236 & 45 C.F.R. pt. 410) [hereinafter Custody of Alien Minors]; *see also* Muzaffar Chishti & Sarah Pierce, *Trump Administration's New Indefinite Family Detention Policy: Deterrence Not Guaranteed*, MIGRATION POL'Y INST. (Sept. 26, 2018), https://www.migrationpolicy.org/article/trump-administration-new-indefinite-family-detention-policy [https://perma.cc/3PJG-GKDD] (noting the Trump Administration's efforts to employ "mass family detention" as a deterrent to further migration); Miriam Jordan, Caitlin Dickerson & Michael D. Shear, *Trump's Plans to Deter Migrants Could Mean New 'Voluntary' Family Separations*, N.Y. TIMES (Oct. 22, 2018), https://www.nytimes.com/2018/10/22/us/migrant-families-crossing-border-trump.html [https://perma.cc/R85A-MEZJ].

8. *E.g.*, Brief for Appellants at 32, Padilla v. U.S. Immigration & Customs Enf't, No. 19-35565 (9th Cir. July 31, 2019), ECF No. 19-1.

9. Custody of Alien Minors, *supra* note 7, at 45,493.

10. Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html [https://perma.cc/L3FY-GT6D].

that rationale a step further, citing deterrence as a reason to justify families' continued detention during bond hearings where those families sought release.[11] A federal court eventually enjoined the use of deterrence as a rationale for long-term detention of asylum seekers.[12] The court reasoned that because of the constitutional concerns associated with deterrence-based detention, it would not read the Immigration and Nationality Act — and specifically, 8 U.S.C. § 1226(a) — to authorize detention based on deterrence.[13] While the Trump Administration has not sought to reimplement that policy, it has instead pursued deterrence by other means: eliminating the right to a bond hearing,[14] limiting parole for recent entrants seeking asylum,[15] and separating families, among others.[16]

The scale of this detention system — and many of the problems associated with it — is a relatively new phenomenon. As recently as 1995, the federal government had bed space for fewer than 7,500 immigrants nationwide.[17] Since then, first the Immigration and Naturalization Service, and later, the Department of Homeland Security, rapidly expanded this detention capacity under the Bush and Obama Administrations.[18] For example, in fiscal year 2018, ICE's average daily detention population reached 40,520, a level that Congress agreed to continue funding — but not expand — in 2019.[19]

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11. R.I.L-R. v. Johnson, 80 F. Supp. 3d 164, 175-76 (D.D.C. 2015).

12. *Id.* at 186-91.

13. *Id.* at 188-90.

14. *See* Matter of M-S-, 27 I. & N. Dec. 509, 509-10 (A.G. 2019) (eliminating the right of asylum seekers who establish a bona fide claim to asylum to seek release through a bond hearing). *But see* Padilla v. U.S. Immigration & Customs Enf't, 387 F. Supp. 3d 1219, 1222-23, 1232 (W.D. Wash. 2019) (enjoining *Matter of M-S-*). The author, along with others from the NWIRP, the American Immigration Council, and the ACLU, serves as counsel for the class in *Padilla*.

15. *See, e.g.*, Damus v. Nielsen, 313 F. Supp. 3d 317, 325 (D.D.C. 2018).

16. Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133, 1136-40 (S.D. Cal. 2018).

17. Dora Schriro, *Immigration Detention Overview and Recommendations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT 2 (Oct. 6, 2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [https://perma.cc/548G-WVAS].

18. *See* J. Rachel Reyes, *Immigration Detention: Recent Trends and Scholarship*, CTR. FOR MIGRATION STUD. (Mar. 26, 2018), https://cmsny.org/publications/virtualbrief-detention/ [https://perma.cc/5U65-PM8L].

19. *Id.*; *see also* H.R. REP. NO. 115-239, at 28 (2017) (recommending full funding for fiscal year 2018); Sarah Ferris et al., *Negotiators Reach Deal 'In Principle' to Avert Shutdown*, POLITICO (Feb. 11, 2019), https://www.politico.com/story/2019/02/11/shutdown-congress-border-security-1163824 [https://perma.cc/WR72-C2BV] (describing the 2019 compromise of 40,520 beds). ICE nevertheless detains far more noncitizens than Congress authorizes — as of August 10, 2019, it had nearly 50,000 people in its facilities. *See Detention Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Oct. 26, 2019), https://www.ice.gov/detention-management [https://perma.cc/U6DY-ABUC].

C. *Why It Matters: Practical Implications and Emerging Constitutional Questions*

This expanded detention system often means months and even years in jail-like conditions for those seeking refuge or admission to the United States.[20] For example, a recent study involving detained families seeking asylum noted that many families regularly spend several months—and often six or more—in detention.[21] Other data similarly suggest that asylum seekers who pass an initial screening process likely face at least six months in detention, nearly a year if they lose and appeal to the Board of Immigration Appeals, and much longer if they petition for review in a federal court of appeals.[22] Voluminous individual examples also exist of arriving noncitizens facing months and years of detention while they pursue immigration relief.[23] For some, this detention undoubtedly has a deterrent effect. Clients of mine have expressed dismay when I explain that they may face several months of additional detention if they choose to appeal their case to the Board of Immigration Appeals—and much longer if they seek review in a federal court of appeals. That experience is consistent with the stories of other immigrants' rights advocates, who have similarly noted the deterrent effect of prolonged detention.[24] On the other hand, the fact that thousands of immigrants *do* choose to fight their claims despite this detention suggests that the deterrent effect has limits, as some studies have pointed out.[25]

But the point here is that, regardless of detention's actual effects, Republican and Democratic administrations alike have overseen long-term, deterrence-

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20. Jennings v. Rodriguez, 138 S. Ct. 830, 861 (2018) (Breyer, J., dissenting).

21. *See* Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 842-45 (2018).

22. Declaration of David Hausman ¶ 8, Padilla v. U.S. Immigration & Customs Enf't, No. 18-cv-00928 (W.D. Wash. May 28, 2019), ECF No. 132 (using federal data to calculate that bona fide asylum seekers who have entered the United States without inspection *average* five to six months in detention just to have their case heard before an immigration judge, and nearly a year if they appeal to the Board of Immigration Appeals).

23. *See, e.g.*, Rodriguez v. Robbins, 804 F.3d 1060, 1072 (9th Cir. 2015) (describing how noncitizens, including arriving noncitizens, are often detained for well over a year), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

24. *No End in Sight: Why Migrants Give Up on Their U.S. Immigration Cases*, SOUTHERN POVERTY L. CTR. 27, 30, 36 (Oct. 3, 2018), https://www.splcenter.org/sites/default/files/leg_ijp_no_end_in_sight_2018_final_web.pdf [https://perma.cc/8GJ2-BSAV] (describing several instances of arriving noncitizens detained well over six months who did not pursue potential appeals because of prolonged detention).

25. Chishti & Pierce, *supra* note 7; Tom K. Wong, *Do Family Separation and Detention Deter Immigration?*, CTR. FOR AM. PROGRESS (July 24, 2018, 1:30 PM), https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration [https://perma.cc/TN3C-32B6].

oriented detention of asylum seekers to stop large numbers of noncitizens from arriving and seeking asylum at ports of entry or after crossing the border. This policy's popularity across ideological lines as a rationale for detention provides reason to explore further whether such practices are constitutional. That question is especially pressing now, in light of the Supreme Court's 2018 decision in *Jennings v. Rodriguez*.[26] In *Jennings*, the Court concluded that 8 U.S.C. §§ 1225(b) and 1226(c) mandate detention without the opportunity for a bond hearing, even after the noncitizen has spent many months in detention. 8 U.S.C. § 1225(b) is critical here, as it governs the detention of arriving noncitizens and those detained shortly after crossing into the United States. However, the Court left open the question of whether long-term detention without a bond hearing is constitutional, remanding the case so that the lower courts could consider that issue.[27]

II. THE TREATMENT OF ARRIVING NONCITIZENS IN EARLY IMMIGRATION DETENTION

A. The Purpose of Immigration Detention in Its Early Years

For much of the nineteenth century, Congress saw fit to leave immigration largely unregulated. That changed as the country moved west and, in particular, as California grew rapidly. The mid- to late-nineteenth century saw large numbers of Chinese nationals immigrate to California to meet growing labor demands. But as the economic boom associated with California's gold rush dissipated, that demand quickly turned into animosity, xenophobia, and soon enough, restrictive admission policies designed to dramatically limit Chinese immigration.[28] And with the rise of those restrictive policies came Congress's first real attempts to prescribe the terms of inspection and detention at the border.

The Chinese Exclusion Act of 1882 and the restrictive policies that followed were the product of unabashed racism and nationalist fearmongering.[29] Many of those sentiments seem eerily similar to the language and rhetoric that some

26. Jennings v. Rodriguez, 138 S. Ct. 830, 852 (2018).

27. *Id.* at 851-52.

28. *See, e.g.*, LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 7-17 (1995) (detailing rising xenophobia and its sources in the mid- to late-nineteenth century, particularly in California); ERIKA LEE & JUDY YUNG, ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA 70-75 (2012) (same).

29. *See* sources cited *supra* note 28.

politicians use today with respect to immigrants.[30] As I detailed above, those sentiments are reflected in serious current policy proposals that would use detention to deter further immigration. Yet, as this Section demonstrates, even in the heated immigration environment of the West Coast in the late nineteenth and early twentieth centuries, detention was never more than a tool to secure a noncitizen's presence for a truly *brief* amount of time for inspection or to protect public safety.

1. Early Immigration Regulation: Inspection of Ships

Prior to the late nineteenth century, Congress largely regulated arriving noncitizens by requiring that incoming ships provide a manifest of passengers listing those on board, the passengers' country of origin, and whether those passengers intended to become inhabitants of the United States.[31] These early acts also regulated the ships' conditions and the number of passengers.[32] However, they did not provide for a formal inspection process or a detention scheme to aid that process. In other words, Congress used the regulation of ships to monitor entry into the United States, rather than providing a detailed inspection scheme.[33]

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30. *See, e.g.*, Eugene Scott, *Trump's Most Insulting—and Violent—Language Is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019, 3:21 PM EST), https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants [https://perma.cc/8MD7-ZM99].

31. *See* An Act Regulating Passenger Ships and Vessels, Pub. L. No. 15-46, 3 Stat. 488, 489 (1819); ROBERT E. BARDE, IMMIGRATION AT THE GOLDEN GATE: PASSENGER SHIPS, EXCLUSION, AND ANGEL ISLAND 54 (2008); SALYER, *supra* note 28, at 3.

32. *See* An Act Regulating Passenger Ships and Vessels, Pub. L. No. 15-46 § 4, 3 Stat. 488, 489 (1819)§ ; An Act to Regulate the Carriage of Passengers in Merchant Vessels, Pub. L. No. 29-16, 9 Stat. 127 (1847); An Act to Regulate the Carriage of Passengers in Steamships and Other Vessels, Pub. L. No. 33-213, 10 Stat. 715 (1855); *see also* SALYER, *supra* note 28, at 3 ("[T]he federal government assumed an accommodating and paternalistic role in the early history of immigration regulation, acting only to protect and to keep statistics on immigrants.").

33. *See* An Act to Regulate the Carriage of Passengers in Steamships and Other Vessels, Pub. L. No. 33-213, § 17, 10 Stat. 715 (1855); sources cited *supra* notes 31-32. Local officials, however, often stepped in to inspect arriving noncitizens. As Robert Barde writes, local customs officials in San Francisco—the main point of entry for arriving Chinese immigrants—would use pretextual reasons to inspect arriving Chinese citizens. BARDE, *supra* note 31, at 53-54.

2. *The Advent of Detention: Inspection of Persons*

A congressionally authorized inspection and detention system seems to have first developed with the passage of the Page Act in 1875.[34] Congress enacted the Page Act to regulate what it perceived as the problem of trafficking in Chinese and Japanese women for prostitution.[35] Specifically, the Act barred the "importation" of women from China, Japan, or other "Oriental" countries without those individuals' "free and voluntary consent."[36] The Act also more generally prohibited "the importation into the United States of women for the purposes of prostitution."[37] Importantly for this Essay's purposes, the Page Act provided for the inspection of arriving passenger ships "under the direction of the collector of the port at which it arrives," and also stated that the collector should prevent the noncitizens on board from landing if the collector identified "obnoxious persons" on the ship.[38] The passengers on board an arriving ship were to remain there until the collector certified that the arriving noncitizens' entry would not violate the Page Act.[39] Thus, in effect, the Act authorized an early form of brief detention aboard arriving passenger ships.

This practice expanded in the following years. In 1882, Congress passed the first of a series of laws enacted over the next few decades, primarily by regulating the admissions process. The first Chinese Exclusion Act in 1882 suspended the arrival of Chinese "laborers," while continuing to permit the arrival of other classes of Chinese nationals, like merchants, teachers, and diplomats.[40] Consistent with Congress's prior efforts to regulate immigration, the 1882 Act provided that passenger ship captains had to show customs officials a manifest of the individuals on board.[41] Section 9 of the Act then went on to state that "before any Chinese passengers are landed from any such vessel, the collector, or his deputy,

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34. Page Act, ch. 141, 18 Stat. 477, 477 (1875) (mandating imprisonment of Chinese and Japanese immigrants found after ship inspection to lack work permits); *see also* SALYER, *supra* note 28, at 3 (noting that "Congress did not pass any restrictive [immigration] legislation until 1875"). *See generally* Sucheng Chan, *The Exclusion of Chinese Women 1870-1943*, *in* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943, at 105-09 (1991) (discussing the effects of the Page Act).

35. *See* LEE & YUNG, *supra* note 28, at 6, 75. As Lee and Yung write, the Page Act "served as an important step toward general Chinese exclusion." *Id.* at 75.

36. Page Act § 2.

37. *Id.* § 3.

38. *Id.* § 5.

39. *Id.*

40. Chinese Exclusion Act, ch. 126, 22 Stat. 58, 59 (1882); ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA 1882-1943, at 2-4 (2003).

41. Chinese Exclusion Act § 8.

shall proceed to examine such passengers, comparing the certificates with the list and with the passengers and no passenger shall be allowed to land in the United States from such vessel in violation of law."[42]

This inspection process resulted in the detention of many arriving Chinese passengers (as well as individuals from other nations), both on board ships and on the docks of the companies transporting them. For example, immediately following the passage of the Act, customs officials began to detain arriving Chinese immigrants perceived as possibly inadmissible in the hulk of a "large[] wooden-hulled" ship in San Francisco's harbor.[43] Other abandoned ships also served as the site of immigration detention in these early years after Congress passed the Chinese Exclusion Act.[44] As historians Erika Lee and Judy Yung write, "steamship detention" was "the main system of detention for almost twenty years," as "steamship companies . . . transferred Chinese passengers from ship to ship until the final decisions in their cases were made."[45] After several years, this "makeshift detention system" began to take place on the docks in the San Francisco harbor belonging to the passenger ship companies.[46] Most importantly, "[i]n 1898, the Pacific Mail Steamship Company, one of the main transporters of goods and people across the Pacific Ocean, converted some of its general offices on Pier 40 into a detention facility, and Chinese detainees were moved there."[47] In this detention facility, Chinese citizens "awaited the outcome of their cases."[48] Conditions were crowded, unsafe, and unsanitary. The facility's obvious inadequacy helped lead Congress to fund the creation of the Angel Island Immigration Station.[49]

With the opening of the Angel Island Immigration Station in 1910, officials moved the existing ad hoc detention system into the new facility. They first screened arriving boats by boarding them, immediately clearing some

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42. Chinese Exclusion Act § 9; BARDE, *supra* note 31, at 13-14 (describing the process of initial inspection aboard arriving passenger vessels). The "certificates" that this Section references permitted certain Chinese noncitizens present in the United States prior to the Chinese Exclusion Act to leave and obtain admission to the United States using a properly-issued certificate. *See* Chinese Exclusion Act § 4.

43. BARDE, supra note 31, at 56-57.

44. *Id.*

45. LEE & YUNG, *supra* note 28, at 10; *see also* BARDE, *supra* note 31, at 59 (noting complaints among passenger-ship companies regarding the use of their ships as detention facilities).

46. LEE & YUNG, *supra* note 28, at 10.

47. *Id.*

48. LEE, *supra* note 40, at 124.

49. *Id.* at 126-28; *see also* BARDE, *supra* note 31, at 61-66 (describing in detail the detention shed on the docks, contemporaneous news coverage and perceptions of the shed, and complaints from detainees, immigration officials, and others); LEE & YUNG, *supra* note 28, at 11 (same).

individuals for landing, and ordering others transferred to the new detention facility for further screening.[50] This inspection reflected overt class and race dimensions: wealthy white passengers received cursory inspection and were generally permitted to land, "spar[ing] [them] . . . the exhaustive immigration inspections on the island to which most second- and all third-class and steerage passengers were subjected."[51] Some returning Chinese citizens who had their papers in order might also make direct landfall, but immigration officials detained and transported most of them (together with other less wealthy passengers) to Angel Island.[52]

3. The Legal Authority and Rationale for Early Immigration Detention

Once on the island, immigration inspectors would undertake the notorious, well-documented process of examining arriving noncitizens.[53] But our concern here is with *why* noncitizens (and in some cases, citizens) experienced this detention: Congress authorized immigration detention only for the short time necessary to examine arriving noncitizens in order to determine their admissibility.[54] The Chinese Exclusion Act of 1882 mandated inspection of arriving passenger ships, and prevented those Chinese arrivals who were subject to further inspection from landing.[55] The authority to detain for the purpose of determining admission became a feature of the immigration scheme in subsequent legislation as well. The Immigration Act of 1903 provided that immigration inspectors should "inspect all . . . aliens" on arriving passengers ships and provided that those "immigration officers may order a temporary removal of such aliens for examination at a designated time and place."[56] Congress included similar authority when it passed the Immigration Act of 1917 ten years later.[57] And decades later, the Immigration and Nationality Act of 1952 also provided some of the

50. LEE & YUNG, *supra* note 28, at 31-35; LEE, *supra* note 40, at 77-81.

51. LEE & YUNG, *supra* note 28, at 35.

52. LEE, *supra* note 40, at 80-81.

53. *See generally* LEE & YUNG, *supra* note 28, at 35-49; SALYER, *supra* note 28, at 58-68, 139-52; H. M. Lai, *Island of Immortals: Chinese Immigrants and the Angel Island Immigration Station*, 57 CAL. HIST. 88, 98-99 (1978).

54. *See infra* Part II.B (detailing the brief duration of detention during this period).

55. Chinese Exclusion Act, ch. 126 § 9, 22 Stat. 58 (1882).

56. Act of Mar. 3, 1903, Pub. L. No. 57-162, § 16, 32 Stat. 1213, 1217.

57. *See* Act of Feb. 5, 1917, Pub. L. No. 64-301, § 15, 39 Stat. 874, 885.

same basic inspection and detention authority, along with other sources of detention authority for arriving noncitizens.[58]

A secondary purpose of immigration detention—evidenced in restrictions on admissibility—was public safety, to ensure that dangerous or sick individuals could not enter (even though, as a practical matter, such concerns were unquestionably exaggerated and motivated by nativism and racist assumptions regarding those arriving from East Asia).[59] Medical examinations and diseases often served as a pretext to exclude or quarantine arriving Chinese citizens, by designating certain curable, nonthreatening diseases as a public-health concern and reason for exclusion.[60]

Late nineteenth- and early twentieth-century sources also confirm that immigration detention for arriving noncitizens existed solely for (1) the brief time required to determine admissibility; or (2) to address some security or health risk that the individual presented. For example, late nineteenth- and early twentieth-century case law conceptualized or authorized the detention of arriving Chinese citizens for a "reasonable time" while immigration authorities determined admissibility.[61] Treatises from the period also understood the detention authority granted in these acts to permit detention only for the period necessary to examine an arriving passenger's claim to entry.[62]

Most importantly, in its 1896 landmark *Wong Wing* decision,[63] the Supreme Court found unconstitutional a portion of an 1892 law that authorized the imprisonment and forced hard labor of unlawfully present Chinese noncitizens

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58. *See* Immigration and Nationality Act, Pub. L. No. 82-414, §§ 232, 235, 66 Stat. 163, 196, 198-200 (1952).

59. *See supra* note 28.

60. *See* LEE, *supra* note 40, at 81-83; *see also* LEE & YUNG, *supra* note 28, at 38 ("Both public opinion and medical theory assumed that Asians were more susceptible to dangerous diseases and therefore posed a greater health risk to the public.").

61. *In re* Chow Goo Pooi, 25 F. 77, 81 (C.C. Cal. 1884) (construing the Chinese Exclusion Act of 1882 to authorize the detention of arriving Chinese to determine their admissibility, and holding that the right of habeas corpus extended to Chinese passengers detained aboard arriving ships); *see also* United States v. Sing Tuck, 194 U.S. 161, 168-70 (1904) (upholding detention of habeas corpus petitioner alleged to be a U.S. citizen where the examination process was designed "to avoid the hardship of a long detention").

62. *See, e.g.*, CLEMENT L. BOUVE, A TREATISE ON THE LAWS GOVERNING AND THE EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 616 (1912) ("The arrest or temporary detention of an alien in such proceedings is no more than a necessary incident thereof, as part of the means required to give effect to the acts of exclusion or expulsion passed by Congress in the exercise of its constitutional right to exclude or expel . . . ."); WILLIAM C. VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 8 (1932) (noting that under the Chinese Exclusion Act of 1882, "immigration officers were empowered to remove aliens applying for admission to detention quarters while their inspection was being completed").

63. Wong Wing v. United States, 163 U.S. 228 (1896).

without a criminal trial by jury.[64] In reaching that conclusion, the Court observed that, by contrast, "detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid."[65] Thus, the decision made clear that detention was authorized for limited purposes during its early years, as Congress had otherwise recognized in defining the executive's detention authority. This is particularly true given that the Court contrasted legitimate detention — in other words, detention to determine admissibility or deportability — with policies that sought to punish. The rejection of a punishment rationale, which is closely intertwined with deterrence, therefore provides further evidence that deterrence-based detention is an illegitimate *immigration* tool, at least absent the protections afforded to criminal defendants.

B. The Length of Early Immigration Detention

Another equally significant feature of this early form of detention for arriving noncitizens was its brevity. Immigration detention during the late 1800s and early 1900s was measured in days, or perhaps a few weeks — not the many months or even years that detention for removal proceedings requires today.[66] One estimate, based on a limited dataset before Angel Island became the primary site for detaining arriving noncitizens, suggests that Chinese detainees were held at the shed for an average of twenty-three days.[67] A more robust set of data reveals that arriving noncitizens experienced similar wait times on Angel Island from 1913 to 1918.[68] This second dataset encompasses detention at the height of Chinese exclusion, when Congress had passed its most restrictive laws and the Supreme Court had narrowed channels for judicial review of administrative

64. *Id.* at 237.

65. *Id.* at 235.

66. *See, e.g.*, Declaration of David Hausman, *supra* note 23, at ¶ 8 (noting that, according to data kept by the Executive Office for Immigration Review, asylum-seekers who recently crossed the border and were detained during their removal proceedings experienced a "median case length . . . [of] 171 days if neither the individual nor the government appealed to the BIA, or approximately five months. Where a party did appeal to the BIA, the median case length was 343 days, or more than 11 months.").

67. BARDE, *supra* note 31, at 67.

68. Robert Barde & Gustavo J. Bobonis, *Detention at Angel Island: First Empirical Evidence*, 30 SOC. SCI. HIST. 103, 113 (2006).

decisions.[69] During this period, "[l]engthy detentions were rare."[70] Instead, the average period of detention on Angel Island was only 10.2 nights.[71]

One statistic underscores this point in particular: of the 3,369 arriving noncitizens detained during this period for at least one night,[72] *only twelve* were detained for more than 180 days.[73] This number is important because several recent pre- and post-*Jennings* federal court decisions have used the six-month mark as the point at which continuing detention presumptively requires procedural protections to remain constitutional.[74] In the early 1900s, the limited data available would suggest that what courts now consider "prolonged detention" was almost entirely nonexistent. Indeed, not only was "prolonged detention" as we know it today virtually unheard of, but the average detention times bear no resemblance to today's months- or years-long detention system.

Further, detention beyond a few days was virtually unheard of at the other major arrival point for immigrants in the early twentieth century: Ellis Island, outside New York City.[75] "Most European immigrants processed through Ellis Island spent only a few hours or at most a few days there, while the processing time for Asian, especially Chinese, immigrants on Angel Island was measured in days and weeks."[76]

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69. *See, e.g.*, United States v. Ju Toy, 198 U.S. 253 (1905); SALYER, *supra* note 28, at 112-16.

70. Barde & Bobonis, *supra* note 68, at 103, 113.

71. *Id.*; *see also* Lai, *supra* note 53, at 98 ("By the mid-1920's, however, the delay averaged about two or three weeks."); SALYER, *supra* note 28, at 63 ("Most Chinese stayed from a few days to a few weeks, but some remained confined in these quarters for as long as six months.").

72. This figure excludes those who were merely inspected aboard a passenger ship and permitted to land without detention on Angel Island.

73. Barde & Bobonis, *supra* note 68, at 107. By contrast, members of the classes in *Jennings*—noncitizens in detention for over six months (many of whom were asylum seekers who arrived at the border)—"number in the thousands" and even tens of thousands. Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting); *see also* Brief of 43 Social Science Researchers and Professors as Amici Curiae in Support of Respondents at 6, 8, *Jennings*, 138 S. Ct. 830 (No. 15-1204).

74. *E.g.*, Rodriguez v. Robbins, 804 F.3d 1060, 1072 (9th Cir. 2015), *rev'd sub nom* Jennings v. Rodriguez, 138 S. Ct. at 852; Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015), *vacated sub nom* Jennings v. Rodriguez, 138 S. Ct. at 852; Rodriguez v. Nielsen, No. 18-cv-04187-TSH, 2019 U.S. Dist. LEXIS 4228, at *18 (N.D. Cal. Jan. 7, 2019); Perez v. Decker, No. 18-CV-5279 (VEC), 2018 WL 3991497, at *4 (S.D.N.Y. Aug. 20, 2018) (holding that the primary factor in determining whether continued detention requires a bond hearing is whether the noncitizen has been detained for six months); Sajous v. Decker, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *10 (S.D.N.Y. May 23, 2018) ("[D]etention that has lasted longer than six months is more likely to be 'unreasonable,' and thus contrary to due process, than detention of less than six months.").

75. *See, e.g.*, Barde & Bobonis, *supra* note 68, at 106.

76. LEE & YUNG, *supra* note 28, at 8.

Admittedly, long periods of detention did occur for a limited number of arriving noncitizens. The best-known example is that of Quok Shee, who languished in the detention center at Angel Island for nearly two years, as her case worked its way through the immigration system, the federal courts and then back through that same process again.[77] Historian Lucy Salyer also relates the story of Chinese students detained for sixteen months upon arriving in the San Francisco harbor.[78] However, the data discussed above strongly suggest that such detention was highly abnormal, and the detention of arriving noncitizens was ordinarily "measured in days and weeks."[79] Indeed, Quok Shee's detention is the "longest known" at Angel Island.[80]

The brevity of detention at the border may also reflect the fact that federal courts sometimes set bond for arriving noncitizens as an alternative to detention. For example, Quok Shee was eventually released on a bond set by a federal court.[81] Other examples of this practice also exist where detained noncitizens challenged immigration officials' decisions using petitions for writs of habeas corpus.[82] These practices suggest that federal courts were concerned about the effects of lengthy detentions, and sought to ensure that noncitizens could continue their cases free of the pressures it posed.[83] Immigration officials might also decide to allow an individual to be released on bond. This practice—which the

77. BARDE, *supra* note 31, at 49. After fighting her case for such a long period, she was released on bond and permitted to enter the United States. *Id.*

78. SALYER, *supra* note 28, at 149-50.

79. LEE & YUNG, *supra* note 28, at 8.

80. SALYER, *supra* note 28, at 26, 49.

81. BARDE, *supra* note 31, at 49.

82. *In re* Tsuie Shee, 218 F. 256, 259 (N.D. Cal. 1914) (ordering arriving Chinese passenger released pending determination of the passenger's' appeal); *In re* Chin Wah, 182 F. 256, 258 (D. Or. 1910) (holding that court had discretionary power to release noncitizen on bail during habeas corpus proceedings, and observing that "[p]rior to 1892 it was a common practice, when a Chinese person, seeking admission, but denied the right to land, was brought before a court under a writ of habeas corpus, for the court to admit him to bail pending the hearing"); *In re* Chow Goo Pooi, 25 F. 77, 78 (CC Cal. 1884) ("When his body, in obedience to the writ, is produced in court, we are also of opinion that the control of his person remains with the court, and that he may be committed to the custody of the marshal, or be held to bail to await the decision of the court."); BOUVE, *supra* note 62, at 257-58 (noting that federal appeals courts possessed the "ancient power to release a person" while habeas corpus proceedings continued, and that such courts were more likely to exercise this power where a habeas petition could not be "determined expeditiously"); *see also* MARY ROBERTS COOLIDGE, CHINESE IMMIGRATION 212 (1909) (documenting a sharp increase of habeas corpus cases in the courts from Chinese immigrants).

83. *See* sources cited *supra* note 82; *see also* United States v. Sing Tuck, 194 U.S. 161, 168-70 (1904) (upholding detention of habeas corpus petitioner alleged to be a U.S. citizen where the examination process was designed "to avoid the hardship of a long detention").

governing statutes did not explicitly provide for—may have helped to prevent frequent cases of lengthy detention among arriving noncitizens.[84]

III. CONSTITUTIONAL IMPLICATIONS

This history of the early decades of immigration detention is important today. As an advocate for immigrants during my time as *Yale Law Journal* Fellow, I experienced this firsthand when representing detained immigrants. At the forefront of their mind—along with the likelihood of success in their case—is often the question, "How much longer will I remain locked up?" For some, the answer to that question—often many months or even years—is a burden they are willing to carry, but for others, it sometimes becomes too much, and rather than pursue another appeal or fight their case, prolonged detention leads them to give up. This is especially understandable given that "the circumstances of their detention are similar . . . to those in many prisons and jails."[85] Facing such a situation, many detained noncitizens would rather abandon their cases than remain detained for months or years, especially since most struggle to find counsel, lowering the odds of success.[86]

This problem poses serious constitutional questions under the Fifth Amendment's Due Process Clause, given that the Supreme Court has repeatedly limited the length and purposes of civil detention, including in the immigration context. For example, the Court has warned that deterrence rationales cannot justify civil detention,[87] making clear that even where immigration is involved, such detention is appropriate only "in certain special and narrow nonpunitive circumstances."[88] Thus, whether this practice of prolonged detention—and the deterrence it creates—withstands constitutional scrutiny is the subject of ongoing litigation around the country, in individual habeas petitions and class actions. And it is a question the Supreme Court will almost certainly revisit.

The Court has directly considered the constitutional due-process questions related to immigration detention on two previous occasions. First, in *Zadvydas v. Davis*, the Court presumptively limited immigration detention under 8 U.S.C. § 1231(a) to six months after the ninety-day period that Congress provided for

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84. Since these early years of immigration detention, detention has remained relatively modest in scope. As noted above, its use has skyrocketed in the last two decades. *See supra* Section I.B.

85. Jennings v. Rodriguez, 138 S. Ct. 830, 861 (2018) (Breyer, J., dissenting).

86. *See* Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL 2-3 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/D856-ATYV].

87. *See* Kansas v. Crane, 534 U.S. 407, 412 (2002).

88. Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (internal quotation marks omitted).

the removal of noncitizens whose immigration proceedings are complete.[89] The Court did so to avoid the constitutional concern that indefinite detention poses, reasoning that lengthy detention was unrelated to the statute's "purpose [of] assuring the [noncitizen's] presence at the moment of removal."[90] After *Zadvydas*, in *Demore v. Kim*, the Court considered the constitutionality of mandatory detention — that is, detention without the opportunity to post bond — for certain noncitizens who committed crimes enumerated by Congress and whom Congress deemed to be categorical flight risks.[91] The Court upheld such detention, but only because Congress mandated it for the "*brief* period necessary for . . . removal proceedings."[92] The Court also reached that conclusion due only to Justice Kennedy's fifth vote. His separate concurrence noted that a noncitizen "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."[93] Litigation since *Demore* has sought to answer the question that Justice Kennedy left open, and that the Supreme Court again left unresolved in *Jennings*. Thus, the next few years are likely to see new rulings on what limits the Constitution imposes on immigration detention.[94]

Debates about due process in immigration detention involve both substantive and procedural components, and thus present two questions. First, substantive due process asks for what purpose the government may detain noncitizens and whether that purpose is related to the government's use of detention. Second, if that purpose is constitutionally sound, procedural due process asks what process is required to protect noncitizens' liberty interests and to ensure 'that detention actually relates to its purpose. Although these questions are connected, this Essay is primarily concerned with the first, substantive question. Put another way, we are concerned with whether the government may use deterrence to justify detention of those who arrive at the border or have recently crossed into the country. A closely related question is for how *long* the government may detain someone before it must accord protections that ensure detention does not

89. *Id.* at 701.

90. *Id.* at 699.

91. 538 U.S. 510 (2003).

92. *Id.* at 513 (emphasis added).

93. *Id.* at 532 (Kennedy, J., concurring).

94. *See, e.g.*, Rodriguez v. Marin, 909 F.3d 252, 256 (9th Cir. 2018). How the Supreme Court will address these questions remains to be seen. Since Justice Kavanaugh's confirmation to the Court, it has addressed only a question of statutory interpretation regarding immigration detention, and not any constitutional questions. *See* Nielsen v. Preap, 139 S. Ct. 954 (2019). In a concurrence in that case, Justice Kavanaugh suggested that Congress enjoys broad power to order the mandatory detention of noncitizens, but also noted the case did not address how long noncitizens may be detained before constitutional concerns arise. *Id.* at 972-73.

arbitrarily deprive persons of their liberty and does not act simply to deter noncitizens pursuing lawful claims to remain in the United States.[95] The historical practices discussed above matter in answering these questions. That is because the Supreme Court teaches us that "history and tradition are the starting point . . . of the substantive due process inquiry."[96] And while history is not the "ending point" for the constitutional debate, it certainly provides an important lens for examining whether prolonged, deterrence-based immigration detention is constitutionally acceptable.

Other cases involving immigration buttress the conclusion that this history of brief detention for limited purposes matters. Indeed, several members of the current Supreme Court have made clear that they consider historical practice relevant to the constitutional questions that immigration detention poses.[97] In addition, courts have used history to analyze whether noncitizens can challenge the legality of their detention using habeas corpus. In *INS v. St. Cyr*, the Court looked to historical practice to assess the scope of judicial review that habeas corpus and the Suspension Clause require.[98] It examined not only pre-Founding habeas practice in England and the American colonies, but also the precise era at issue here—the late 1800s and early 1900s.[99] The Court relied heavily on the availability of the writ of habeas corpus in this era, observing that "to conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law. The writ of habeas corpus has always been available to review the legality of Executive detention."[100] Lower federal courts have since applied these same principles in the context of habeas corpus rights for arriving noncitizens, again relying on habeas practice during the Chinese Exclusion era to determine the writ's scope.[101] History is, of course, particularly important in questions involving habeas corpus, as "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"[102] But the

95. *Zadvydas*, 533 U.S. at 690-91.

96. Lawrence v. Texas, 539 U.S. 558, 572 (2003) (alteration omitted) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

97. Jennings v. Rodriguez, 138 S. Ct. 830, 863-65 (2018) (Breyer, J., dissenting).

98. 533 U.S. 289, 301-08 (2001).

99. *Id.* at 306-07.

100. *Id.* at 305.

101. *See, e.g.*, Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1115 (9th Cir. 2019) ("Because in the finality era the Court permitted even arriving noncitizens to invoke habeas review, we conclude that Thuraissigiam, who was arrested within the United States, may invoke the Suspension Clause.").

102. *St. Cyr*, 533 U.S. at 301 (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996)).

Court made clear that historical practice *after* the Constitution was adopted still matters to confirm what the Constitution requires.[103]

Other decisions too, support the conclusion that the historical limits on immigration detention matter for constitutional purposes. For example, the Supreme Court has frequently examined historical practice in answering constitutional questions on issues like the separation of powers,[104] the First Amendment,[105] the Sixth Amendment,[106] and most significantly, the Due Process Clause.[107] In short, the historically limited purpose and scope of immigration detention should inform the constitutionality of today's prolonged, deterrence-based detention system.

These conclusions might matter for any number of detention issues reaching the Supreme Court. For example, after *Jennings*, the question of whether the Department of Homeland Security may subject arriving noncitizens to prolonged detention remains to be decided.[108] Similarly, many courts are now addressing the question left open in *Demore*, regarding whether noncitizens who have committed certain enumerated crimes are constitutionally entitled to a bond hearing after six months in detention.[109] Although the historical evidence presented here primarily concerns *arriving* noncitizens, the limits on detention and their implications for due process may apply with even greater force to those who have lived in this country for many years, as have many who are subject to mandatory detention under 8 U.S.C. § 1226(c). Finally, as noted above, the Attorney General recently issued a decision eliminating bond hearings for noncitizens who have crossed the border and demonstrated a significant possibility of establishing a claim to asylum.[110] The historical evidence presented here calls into question the constitutionality of that decision. Indeed, the Attorney General's decision has the effect of requiring detention of certain asylum seekers for many months and even years. Yet as we saw above, over a century ago, detention for *arriving* noncitizens—who likely have fewer due-process rights than those affected by the

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103. *See id.* at 305.

104. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); *see also* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091-94 (2015).

105. Marsh v. Chambers, 463 U.S. 783, 790 (1983); Walz v. Tax Comm'n, 397 U.S. 664, 677-78 (1970).

106. Oregon v. Ice, 555 U.S. 160, 168-69 (2009).

107. *See, e.g.*, Medina v. California, 505 U.S. 437, 460 (1992) (Blackmun, J., dissenting); Schad v. Arizona, 501 U.S. 624, 640-43 (1991) (plurality opinion); Patterson v. New York, 432 U.S. 197, 202 (1977); Roe v. Wade, 410 U.S. 113, 129-47 (1973).

108. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018).

109. *E.g.*, Reid v. Donelan, 390 F.Supp.3d 201, 216-19 (D. Mass. July 9, 2019); Rodriguez v. Nielsen, No. 18-cv-04187-TSH, 2019 U.S. Dist. LEXIS 4228, at *18 (N.D. Cal. Jan. 7, 2019).

110. *See supra* note 14.

Attorney General's decision—lasted only days or weeks, and federal courts sometimes intervened to shorten detention when noncitizens sought relief in federal court.

CONCLUSION

In sum, the early history of immigration detention countenanced neither deterrence-based goals nor long stays in detention facilities. As both a legal matter and a matter of practice, detention was closely tied to the brief period necessary to assess a noncitizen's admissibility to the United States. Detention beyond six months was virtually unheard of—an important marker for today's debates over how long the government may hold any person, including arriving noncitizens. Instead, detention typically lasted days or weeks, a far cry from the months and years of detention arriving noncitizens, recently entered noncitizens, and even long-time residents of this country experience today. Federal courts after last year's decision in *Jennings* are now actively debating under what circumstances and for how long the government may detain noncitizens. Because historical practice informs what due process requires, courts and policy-makers would do well to heed the limitations on detention's purpose and length evident in the immigration history of the late nineteenth and early twentieth century.

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