May 15, 2013

United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Unconstitutionality of Senator Grassley's Amendment 53 (MDM13469)

Dear Judiciary Committee Members:

As law professors and scholars of constitutional and immigration law, we urge you to oppose Senator Grassley's Amendment 53, the "Keep Our Communities Safe Act of 2013." The amendment is unconstitutional because it would require prolonged detention without a bond hearing for many people with pending immigration proceedings, and because it would permit the Department of Homeland Security to indefinitely detain many people who cannot be deported.

The deprivation of liberty inherent in civil immigration detention directly implicates the Due Process Clause of the Fifth Amendment of the U.S. Constitution. As the Supreme Court has explained, "[f]reedom from imprisonment – from Government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects."[1] Thus, the Court has required that civil detention have a "special justification"[2] and "strict procedural safeguards,"[3] such as hearings before impartial adjudicators.[4]

The Supreme Court has recognized that all noncitizens subject to civil immigration detention have a liberty interest protected by the Due Process Clause.[5] The U.S. Constitution therefore requires that immigration detention, like other civil detention, be reasonably related to its purpose and be accompanied by a strong justification and procedural safeguards. Where civil detention becomes prolonged, the deprivation of liberty increases, requiring an even stronger substantive justification and procedural protections.[6] Indefinite immigration detention raises particularly serious due process concerns.[7]

Indefinite Detention of People with Final Removal Orders

In *Zadvydas v. Davis*, the Supreme Court recognized that indefinite civil immigration detention, where removal is no longer reasonably foreseeable, raises serious due process concerns because it does not serve the core purpose of immigration detention: effectuating removal. The Supreme Court therefore construed the statute governing the detention of certain immigrants who had been ordered removed to authorize detention only for the "period reasonably necessary to secure

[1] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).
[2] *Id.* at 690 (citation omitted).
[3] *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997); *see also Jackson v. Indiana*, 406 U.S. 715, 738 (1972).
[4] *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992).
[5] *Zadvydas*, 533 U.S. at 690-91.
[6] *Id.* at 690-92; *Foucha*, 504 U.S. at 82; *see also Jackson v. Indiana*, 406 U.S. 715, 738 (1972).
[7] *Zadvydas*, 533 U.S. at 690-92; *Foucha*, 504 U.S. at 82.

removal" – presumptively six months.[8] The Court also reaffirmed that preventative detention based on dangerousness is unconstitutional unless limited to "specially dangerous" persons and accompanied by strong procedural protections.[9] In *Clark v. Martinez*, the Court applied its holding in *Zadvydas* to *all* noncitizens who are detained pursuant to the post-removal-order detention statute, including Cubans intercepted at the border who could not be removed due to the lack of a repatriation agreement with Cuba.[10]

Senator Grassley's Amendment 53 proposes precisely the type of indefinite, post-removal-order detention that the Supreme Court has found to raise constitutional concerns. Section 3720(d) would give the Department of Homeland Security the power to subject broad classes of people who have removal orders that cannot be carried out – for example, because they are stateless or because they are citizens of countries that will not accept their return – to indefinite preventive detention. These include individuals who have been convicted of a single "aggravated felony," a term that includes non-violent offenses such as theft or passing a bad check, and those who have been convicted of low-level crimes of violence such as simple assault and have a corresponding mental disability. This amendment fails to provide the strong procedural protections the Supreme Court has required. It permits indefinite detention based upon nothing more than a discretionary certification by the Secretary of Homeland Security and periodic administrative review conducted by the custodian rather than independent review by an immigration judge.

The amendment would unconstitutionally authorize extended detention for anyone convicted of one of a broad range of crimes – including minor misdemeanors and decades-old convictions – even if DHS concedes they cannot be removed. Many individuals subject to this provision would have already spent months, and in some cases years, in immigration detention prior to a final removal order.

Prolonged Detention Without Due Process for People with Pending Challenges to Removal

Senator Grassley's Amendment 53 also imposes prolonged detention without due process for many non-citizens whose deportation cases are still being decided. In *Demore v. Kim*, the Supreme Court upheld the mandatory pre-removal-order detention of a noncitizen who had conceded that he was deportable as charged, "for the brief period necessary" to complete his deportation proceedings.[11] In reaching this conclusion, the Supreme Court presumed that this brief period lasts "roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal [to the Board of Immigration Appeals]."[12] Since *Demore*, the overwhelming majority of lower federal courts, including the three circuit courts to have addressed this issue, have held that detention beyond this "brief period" without a bond hearing is impermissible because it raises serious due process concerns.[13]

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[8] *Id.* at 701.
[9] *Id.* at 690-91.
[10] *Clark v. Martinez*, 543 U.S. 371 (2005).
[11] *Demore v. Kim*, 538 U.S. 510, 513 (2003).
[12] *Id.* at 530.
[13] *See, e.g., Rodriguez v. Robbins*, --- F.3d ----, 2013 WL 1607706 (9th Cir. 2013)*; Diop v. Holder*, 656 F.3d 221 (3d Cir. 2011); *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535

Section 3720(c) would contravene these rulings. It would create a regime under which people in deportation proceedings would be mandatorily detained for years without ever having an immigration judge, nor even a DHS employee, determine whether they pose any flight risk or risk to the community. Section 3720(c)(2) would expressly authorize prolonged mandatory detention, "without limitation" of people with a very wide range of convictions, including nonviolent misdemeanors such as petty theft or marijuana possession, as well as the prolonged detention of arriving asylum seekers with no criminal records whatsoever. Section 3720(C)(3) would expand mandatory detention to those with very old convictions, most of whom are longtime lawful permanent residents with strong family ties in the United States. The amendment would authorize prolonged detention even of people who have won their cases before an immigration judge based upon factors such as hardship to U.S. citizen children, long residence in the United States, domestic violence, or fear of torture or persecution, and who are defending against government appeals, including many individuals who will ultimately win the right to remain lawfully in the United States on these grounds. Likewise, it would permit prolonged detention of individuals who have already prevailed in a challenge to removal before a federal court of appeals.

Individualized review and strong procedural protections are the bedrock of due process where detention is prolonged. Anything less is unconstitutional. For this reason, we urge you to oppose Senator Grassley's Amendment 53.

Sincerely,

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F.3d 942 (9th Cir. 2008); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); *Ly v. Hansen*, 351 F.3d 263, 267, 271-72 (6th Cir. 2003); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455 (D. Mass 2010); *Monestime v. Reilly*, 704 F. Supp. 2d 453 (S.D.N.Y. 2010); *Alli v. Decker*, 644 F. Supp. 2d 535 (M.D. Pa. 2009); *Sengkeo v. Horgan*, 670 F. Supp. 2d 116 (D. Mass. 2009); *Bourguignon v. MacDonald*, 667 F.Supp.2d 175 (D. Mass. 2009).

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