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Innocent Until Proven Mentally Incompetent.

Jade Smith

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INNOCENT UNTIL PROVEN MENTALLY INCOMPETENT

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*Juris Doctorate Candidate at St. Mary’s University School of Law, May 2023. B.A., Texas A&M University-Corpus Christi, 2019. I write this piece out of concern for the fate of people like my dear grandparents—the growing population of elderly people who do not have the faculties to care for themselves. As the federal statutory scheme stands today, this growing, vulnerable population cannot rely on the promise of their constitutional rights if they are to stray into criminal conviction. I write this comment to be a mouthpiece for a population seemingly deprived of constitutional protections because of their mental incompetency—a population that can hardly be expected to comprehend the injustices being done to them by their own government. I hope my analysis prevents at least one ill person from being lost to an abyss of an absence of logic, compassion and equality, and keeps one permanently incompetent person in the care of their family and treating physicians. I want to thank God for opening the doors necessary to allow me the opportunity to study the law and write this piece. Additionally, I want to thank my husband, Mark Misenhimer, for showing me unwavering support and love—adopting my goals and success as his own. I also want to thank my daughter, Addison Misenhimer, for lending me her mind in crafting the legal analysis herein; two minds are always better than one. I also want to thank St. Mary’s University School of Law Professor Michael Ariens for teaching me the landscape of constitutional law and helping facilitate both my understanding and passion for its doctrine. Lastly, I wish to thank Volume 24 of *The Scholar* for inviting me to join this group of intelligent and brave legal scholars who seek to serve as a voice for the voiceless, and *The Scholar*, Volume 25 for their efforts in preparing this piece for publication.

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INTRODUCTION

“[A]lthough he has been charged with a criminal offense, he has not yet been convicted. To impose more onerous burdens upon him solely because of outstanding charges runs counter to the fundamental American precept that an accused is presumed innocent until proven guilty.”

—Mark I. Steinberg¹

The American criminal justice system is one where “every person is presumed innocent until proven guilty beyond a reasonable doubt . . .”² For centuries, the United States Supreme Court has deemed the presumption of innocence to be a “bedrock ‘axiomatic and elementary principle’ whose ‘enforcement lies at the foundation of the administration of our criminal law.’”³ This foundational principle resides at the core of American law and society, so much so that it has transformed into a catchy layman’s term utilized as a title for movies,⁴ books,⁵ and countless law review articles.⁶ The Due Process Clause of the Fifth Amendment—

1. See Marc. I. Steinberg, *Summary Commitment of Defendants Incompetent to Stand Trial: A Violation of Constitutional Safeguards*, 22 ST. LOUIS U. L. J. 1, 12 (1978) (recognizing how the injustices addressed in this comment contradict constitutional and fundamental guarantees of the American legal system for a growing class of vulnerable and overlooked individuals).

2. See *Estelle v. Williams*, 425 U.S. 501, 518 (1976) (Brennan J. dissenting) (disagreeing with the Court’s holding that forcing a criminally accused defendant to stand trial in front of a jury in distinctly marked prison clothing was a harmless and irreversible Fourteenth Amendment infringement); see also Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L. J. 723, 724–25 (2011) (establishing the “presumption of innocence is one of the most familiar maxims in criminal law” before analyzing the modern diminution on that principle).

3. See *In re Winship*, 397 U.S. 358, 362–63 (1970) (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895) (emphasizing the importance of the presumption of innocence).

4. See INNOCENT UNTIL PROVEN GUILTY (HBO Signature Double Exposure Documentary Oct. 17, 1999) (utilizing the American legal principle as a documentary title); see also GUILTY UNTIL PROVEN INNOCENT (Cosgrove/Meurer Productions Sept. 22, 1991) (reversing the American catchphrase to document injustices).

5. See Duane Gundrum, *Innocent Until Proven Guilty* (2001) (depicting a murder-mystery under the premise that every individual retains a presumption of innocence); see also Sandra Pavloff-Conner, *Innocent Until Proven Guilty: Simon Stone Detective Series* (2017) (naming a detective series after a core principle of the American criminal justice system).

6. See Tim Gallagher, *Innocent Until Proven Guilty? Not for Bar Applicants*, 31 J. OF THE LEGAL PROF. 297, 299-300 (2007) (comparing the legal maxim to a not so favorable presumption offered to bar applicants); see also Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106, 108 (2003) (discussing the beginnings of the idea that the criminally accused is innocent until proven guilty); see also Leah Hoodridge & Helen Strom,

reading, no person shall be “deprive[d] [] of life, liberty, or property, without due process of law”⁷—requires the government, in a criminal trial, to prove every element of that offense beyond a reasonable doubt.⁸ The Fourteenth Amendment extends that constitutional duty and burden to the state governments.⁹

The Ninth Circuit, in *Gibson v. Ortiz*, recognized the importance of preserving the value captured in this catchphrase.¹⁰ It did so by extending this explicit constitutional mandate to be reflected in its jury instructions.¹¹ The absence of jury instructions to that effect is a deprivation of due process.¹² Procedural due process is a guarantee

Innocent Until Proven Guilty: Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity, 8 DUKE F. L. & SOC. CHANGE 1 (2016) (wondering why the legal principle does not apply to the immediate action taken by public housing authorities as soon as one of its tenants are accused of criminal activity—facing eviction before the tenant has their day in court); see also Terese L. Fitzpatrick, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175, 176 (1991) (arguing that “legislative intervention” and the “easing of evidentiary requirements specific to child victim/witness” have made innocence in a child sexual abuse case “difficult, if not impossible” to prove—skewing the principle that the accused is innocent until proven guilty).

7. See U.S. CONST. amend. V (commemorating both substantive and procedural liberty).

8. See *Gibson v. Ortiz*, 387 F.3d 812, 820 (9th Cir. 2004) (citing *In re Winship*, 397 U.S. 358, 364 (1970) in its interpretation of the constitutional mandate as indicated in the Due Process Clause of the Fourteenth Amendment for criminal proceedings).

9. See U.S. CONST. amend. XIV (requiring the States to protect the due process rights of individuals in their jurisdictions and thereby accommodating due process claims brought by individuals against a state government).

10. See *Gibson*, 387 F.3d at 820 (requiring that jury instructions “convey both that a defendant is presumed innocent until proven guilty and that he may only be convicted upon a showing of proof beyond a reasonable doubt”).

11. See *id.* (citing *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (reasoning that a failure to instruct the jury of the presumption of innocence that stands until one’s guilt is proven beyond a reasonable doubt to be a deprivation of due process).

12. Compare *id.* (citing *Middleton v. McNeil*, 541 U.S. 433, 436 (2004) (stating that “the State must prove every element of [a criminal] offence, and a jury instruction violates due process if it fails to give effect to that requirement.”) and *Taylor v. Kentucky*, 436 U.S. 478, 485–86 (1978) (discussing that it “has long been recognized that an instruction on the presumption [of innocence] is one way of impressing upon the jury the importance of [the accused’s] right” “to have his guilt or innocence determined solely on the basis of evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial”) and *Coffin v. United States*, 156 U.S. 432, 459–61 (1895) (analyzing the foundational differences between the presumption of innocence and the reasonable doubt principle, concluding a jury instruction that failed to state the presumption of innocence was a fundamental and legal error); with William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 391 (1995) (referencing jurisprudential recognition of the legal insignificance of a jury instruction regarding the presumption of innocence as long as jury instruction on the reasonable doubt rule is given).

rooted in one's liberty interest and is not determinative by race, gender, socioeconomic status, mental capacity, or criminal accusations against a person.¹³ The United States Constitution, American jurisprudence, society, and pop-culture recognize a "constitutionally rooted presumption of innocence."¹⁴ The presumption of innocence is undoubted law that is "ingrained within our history and national psyche," and preserved by due process afforded to all.¹⁵ Why then are those criminally accused with dementia, a degenerative mental disease, deprived of such a liberty?¹⁶

Dementia is a condition that causes a person to experience a progressive loss of memory and declined cognitive function initiated by physical changes in the brain.¹⁷ The most common form of dementia is Alzheimer's disease, which robs individuals of the elementary ability to have a conversation or respond to their environment.¹⁸ Alzheimer's disease—just one form of dementia—is the seventh-leading cause of

13. See generally *Swarthout v. Cooke*, 562 U.S. 216, 219–220 (2011) (analyzing actions of the State of California against due process requirements in two steps: initially, determining whether a liberty or property interest has been deprived, and if so—subsequently asking whether the state complies with fair, and constitutionally required, procedures).

14. See *Cool v. United States*, 409 U.S. 100 (1972) (reversing a criminal conviction made by the court below it, which effectively found "that in a criminal trial, the jury may be instructed to ignore defense testimony unless it believes beyond a reasonable doubt that the testimony is true . . ." The Court thereby held that "such a requirement is plainly inconsistent with the constitutionally rooted presumption of innocence . . .").

15. See *United States v. Karper*, 847 F.Supp.2d 350, 358 (2011) (performing a due process analysis on the Bail Reform Act of 1984, allowing the detention of an individual released on bail during the pendency of prosecution).

16. See *Jackson v. Indiana*, 406 U.S. 715 (1972) (reviewing Indiana's practice of permanent institutionalization and thereby an unending deprivation of liberty—on the basis of outstanding charges and unfit mental capacity—of a criminal defendant not yet accused, but found mentally incompetent to stand trial); cf. *United States v. Shawar*, 865 F.2d 856, 863 (7th Cir. 1989) (reversing the district court's refusal to commit a mentally incompetent defendant on the basis that his mental condition was irreversible; holding that a court has no discretion to *not* commit a permanently incompetent defendant); cf. *United States v. Ferro*, 321 F. 3d 756, 762 (8th Cir. 2003) (failing to find further commitment of a defendant permanently mentally incompetent to not be absurd; justifying that commitment by dismissing the potential perils of that reasoning: "the miracles of science suggest that few conditions are truly without the possibility of improvement", while failing to consider or account for circumstances where that is the case).

17. See *Types of Dementia*, ALZHEIMER'S ASS'N, <https://www.alz.org/alzheimers-dementia/what-is-dementia/types-of-dementia> [<https://perma.cc/2V9Y-Y972>] (defining dementia as "a general term for loss of memory and other mental abilities severe enough to interfere with daily life. It is caused by physical changes in the brain.").

18. See *What is Alzheimer's Disease?*, ALZHEIMER'S ASS'N, <https://www.alz.org/alzheimers-dementia/what-is-alzheimers> [<https://perma.cc/H96A-7LX7>] (discussing Alzheimer's disease and its effects on the individual diagnosed).

death in the United States, claiming at least 121,499 lives in the United States in 2019.¹⁹ Alzheimer's disease is progressive, meaning its symptoms and effects worsen over time—so much so that individuals with Alzheimer's disease, on average, only live four to eight years post-diagnosis.²⁰ Sadly, the shortened life-expectancy, decaying mental health, and loss of independence caused by this progressive disease cannot be avoided by certain care or treatment; the consensus amongst physicians, scientists, and academics is—and has been for a long time—that there is no cure for dementia, nor is there a cure in sight.²¹

Dementia comprises several diseases caused by differing physical changes to the brain; thus, the symptoms can vary per individual.²² Common signs that an individual has dementia can materialize as experiencing difficulty with communicating, “coordination and motor functions,” “reasoning or problem-solving,” “handling complex tasks,” and “planning and organizing.”²³ The abnormal brain changes that occur

19. See *Leading Causes of Death*, NAT'L CTR. FOR HEALTH STAT., CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/fastats/leading-causes-of-death.htm> [<https://perma.cc/RKR7-ETU8>] (attributing over 134,000 deaths in the United States throughout the year 2020 to Alzheimer's disease); see also *Types of Dementia*, *supra* note 17 (listing the different types of dementia, including: Creutzfeldt-Jakob Disease, Lewy Body Dementia, Frontotemporal Dementia, Huntington's Disease, Mixed Dementia, Normal Pressure Hydrocephalus, Posterior Cortical Atrophy, Parkinson's Disease Dementia, Vascular Dementia, and Korsakoff Syndrome).

20. See *What is Alzheimer's Diseases?*, *supra* note 18 (illustrating the effects of dementia on those suffering over time).

21. See Patsri Srisuwan, *Primary Prevention of Dementia: Focus on Modifiable Risk Factors*, 96 J. OF THE MED. ASS'N OF THAI. 251 (2013) (focusing on the prevention measures because “there is no cure for dementia”); see also Wendy Moyle, *The Promise of Technology in the Future of Dementia*, 15 NATURE REVIEWS NEUROLOGY 353 (2019) (highlighting the comfortability current technological advances can provide to individuals with dementia to support the position that these technological advances need to be more affordable and available, as there is “no cure in sight” for those with dementia); see also Lotte Berk ET AL., *Mindfulness Training for People with Dementia and Their Caregivers: Rationale, Current Research, and Future Directions*, 9 FRONTIERS IN PSYCH. 982 (2018) (describing the circumstance individuals with dementia find themselves in: one suffering from a disease with “no cure [and a] progression of symptoms with no hope of improvement”).

22. See *Dementia Overview*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/dementia/symptoms-causes/syc-20352013> [<https://perma.cc/6ZC4-XBMM>] (breaking down what is commonly known as dementia and listing the common symptoms across all forms of dementia, including: memory loss, confusion, disorientation, personality changes, depression, anxiety, inappropriate behavior, paranoia, agitation, and hallucinations).

23. See *id.* (mentioning the cognitive difficulties individuals with dementia often experience).

can result in any one of the collective diseases commonly known as dementia, causing decay in cognitive skills and impairing the patient's ability to independently function.²⁴ Because of the overlapping changes that occur in the brain due to varying kinds of dementia, individuals suffering from various forms of dementia often exhibit similar symptoms—making the disease difficult to diagnose.²⁵ Obtaining a diagnosis can also be untimely and require the performance of various tests in differing stages to pinpoint the problem.²⁶ However difficult to diagnose, it is evident that the diseases collectively referred to as dementia physically and cognitively impair the individual suffering from those changes.²⁷

Dementia is, unfortunately, a prevalent disease, as more than six million people in the United States suffer from just one form of dementia.²⁸ By 2050, one in five Americans, age sixty-five and older, could have dementia—totaling almost thirteen million people.²⁹ Thus, making the proper and constitutional handling of the criminally-accused dementia patient an extremely pressing issue; one that the American criminal justice system is running out of time to sort out.³⁰

24. See *What is Dementia?*, ALZHEIMER'S ASS'N, <https://www.alz.org/alzheimers-dementia/what-is-dementia> [<https://perma.cc/2V9Y-Y972>] (describing the consequences of the physiological changes that occur in all individuals with dementia).

25. See *Dementia Diagnosis & Treatment*, MAYO CLINIC (Oct. 12, 2022), <https://www.mayoclinic.org/diseases-conditions/dementia/diagnosis-treatment/drc-20352019> [<https://perma.cc/2XG4-KSNH>] (discussing the various tests a doctor can perform to diagnose dementia-like symptoms, including cognitive tests to evaluate “thinking ability,” neurological evaluation to “evaluate memory, language, visual perception, attention problem-solving . . .”, brain scans in search of evidence of a stroke, bleeding, or patterns of brain activity indicative of dementia, laboratory tests capable of detecting physical deficiencies, and psychiatric evaluation).

26. See *When you Should Have an Assessment for Dementia*, Dementia Tests and the Assessment Process, ALZHEIMER'S SOC'Y, <https://www.alzheimers.org.uk/about-dementia/symptoms-and-diagnosis/diagnosis/assessment-process-tests?documentID=260> [<https://perma.cc/F4RD-RSA7>] (describing “what happens when someone has an assessment to find out if they have dementia”).

27. See *Dementia Overview*, *supra* note 22 (listing the cognitive changes and psychological changes those with dementia commonly suffer from).

28. See *Alzheimer's and Dementia: Facts and Figures*, ALZHEIMER'S ASS'N, <https://www.alz.org/alzheimers-dementia/facts-figures> [<https://perma.cc/ZT4D-HGB>] (“More than 6 million Americans are living with Alzheimer's.”).

29. See *id.* (projecting that nearly 13 million people will be suffering from Alzheimer's by the year 2050).

30. See J. Vincent Aprile III, *Advocacy and the Age-Related Mental Health Issues of the Older Client*, 35 CRIM JUST. 27 (2020) (pressing that the projected dementia population of the

If one is unable to hold conversations, easily confused, or cannot respond to their environment, then how can they be expected to have a “rational understanding” of the criminal proceedings against them, consult with their counsel regarding that understanding, or aid in the crafting of their defense?³¹ How can we expect an individual who suffers from a progressive and currently incurable disease to stand competent at trial or to regain that competency at a later date?³²

This comment will bring to light this pre-trial denial of constitutional rights to the vulnerable and supposedly protected elderly class—crippled with dementia and at the mercy of a justice system too swift to uphold the United States Constitution for all.³³ To lay the foundation for the subsequent discussion, section I briefly describes the definition of incompetency to stand trial.³⁴ This comment will then provide a historical narrative regarding the handling of those deemed incompetent to stand trial.³⁵ That historical overview begins by highlighting the idea that one should be competent to confront and able to defend oneself against criminal charges properly.³⁶ Next, the United States’

United States in 2050 “reveal that this nation’s criminal justice will have to address the impact of the growing number of 65 and older individuals participating in . . . the administration of justice and the reality that many of those individuals may unfortunately suffer from some form of dementia.”).

31. See Soumya Hedge & Ratnavalli Ellajosyula, *Capacity Issues and Decision-making in Dementia*, 19 Supplement 1 ANNALS OF INDIAN ACAD. OF NEUROLOGY, S35 (2016) (citing a study conducted by DC Marson, finding that “nearly all patients with mild-moderate Alzheimer’s disease (AD) were impaired at decision-making”).

32. See *Jackson*, 406 U.S. at 715 (holding that an individual committed due to their pretrial determination of mental incompetency “cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.”); see also Lotte Berk ET AL., *supra* note 21 (“Unfortunately, there is no cure for dementia. The progression of symptoms with no hope of improvement” is the decaying reality dementia patients face.”).

33. See generally Melissa L. Cox & Patricia A. Zapf, *An Investigation of Discrepancies Between Mental Health Professionals and the Courts in Decisions About Competency*, 28 L. & PSYCH. R. 109, 112 (2004) (discussing the importance of being competent to stand trial and how it is implicated in a defendant’s Sixth Amendment right).

34. See generally *id.* at 110 (defining competency to stand trial, within the context of criminal proceedings, as a mechanism that accommodates the delay of those proceedings due to “mental or physical disorder or mental retardation.”).

35. See Section II.c (using *Jackson v Indiana* to explain the precedent for incompetency); see generally *Jackson*, 406 U.S. at 715 (establishing the precedent for how courts deal with individuals that are deemed mentally incompetent).

36. See Section II.c; see generally *Jackson*, 406 U.S. at 715 (demonstrating how the Court handled the first impression of the mentally incompetent).

jurisprudential and statutory treatment of those incompetent to stand trial will be explored, structured around milestone United States Supreme Court opinions that shaped history and the codified framework that followed.³⁷ Section II will analyze the implications of that jurisprudence and the unconstitutionality of the process as it stands today through procedural and substantive due process lenses.³⁸ Finally, section III proposes a solution to constitutionalize the handling of the criminally accused with degenerative mental diseases.³⁹ This solution requires revision of federal statute⁴⁰ to provide for time restrictions on the duration in which one can be constitutionally civilly committed due to mental incompetency, a narrowing of the population of persons that may be civilly committed, or provide additional discharge options for individuals with degenerative diseases that will never regain mental competency.⁴¹

I. HISTORY

A. *Incompetency to Stand Trial, Generally*

In the context of criminal proceedings, incompetency refers to the defendant's mental state at the time of trial.⁴² Competency to stand trial, as set forth by the United States Constitution and interpreted by American jurisprudence, requires the defendant have a “rational as well as factual understanding of the proceedings against him’ [and] ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational

37. See Section II.c; see also Section II.d; see also 18 U.S.C. § 4241 (proving that codification through case law does not always protect the intended persons as intended by statute).

38. See Section III (highlighting this process with specific examples in case law and statutes); see also *United States v. Comstock*, 560 U.S. 126, 163 (2010) (Thomas, J. dissenting) (“No enumerated power in Article I, § 8, expressly delegated to Congress the power to enact a civil-commitment regiment . . . nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power.”).

39. See Section IV (pondering who could remedy the issue at hand through different proposals); see generally MICHAEL S. ARIENS, *AMERICAN CONSTITUTIONAL LAW AND HISTORY* at 369 (Carolina Academic Press, 2d. ed. 2016) (laying a foundation to work off when advancing a solution).

40. See 18 U.S.C. § 4241.

41. See Section IV.

42. See AM. BAR ASS’N, *Competency to Stand Trial*, 34 ANN. R. CRIM. PROC. 400, n. 1355 (2005) (differentiating between incompetency and insanity as defenses to criminal charges).

understanding.”⁴³ The United States Supreme Court analogized trying a mentally incompetent person to trying a defendant in his or her absence.⁴⁴ Under this competency standard, “it ‘has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.’”⁴⁵

There are many purposes behind the incompetency doctrine, ranging from protecting the individual defendant and their rights, to maintaining public confidence and trust in the criminal justice system.⁴⁶ The incompetency doctrine protects the individual’s ability to make critical and autonomous decisions in the face of criminal charges.⁴⁷ Further, prohibiting an incompetent defendant from participating in their own defense ensures the integrity of the criminal trial, which may require that defendant to communicate with counsel or the court.⁴⁸ Not only is the integrity of the individual trial preserved, but the criminal justice system and criminal process—in its entirety—is bolstered by only trying those with the mental capacity to understand the nature of the proceedings and to participate.⁴⁹

In federal proceedings, counsel on both sides and the court sua sponte may move for a hearing to determine the defendant’s mental

43. See *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (citing *Dusky v. United States*, 362 U.S. 402 (1960) to define the standard for competency).

44. See *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (reviewing the history of courts refraining from trying a mentally incompetent individual, being rooted in common-law “absentia”).

45. See *Edwards*, 554 U.S. at 170 (citing *Drope*, 420 U.S. at 171 in utilizing precedent to “frame the question presented” to the Court).

46. See *Drope*, 420 U.S. at 171 (noting that the common-law prohibition against trying a defendant unable to defend himself, the very foundation of the modern incompetency doctrine, is “fundamental to an adversary system of justice.”); see also Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 574–76 (1995) (discussing the multitude of purposes served by the incompetency doctrine).

47. See *Winick*, *supra* note 46, at 576 (listing the many important decisions—such as whether to plead guilty, waive his or her right to a jury trial, and whether to testify—that a defendant would want to, and should be able to, participate in making).

48. See *id.* at 575 (noting the strategy implemented by counsel in modern criminal trials, that may be impaired by a defendant who is “unable or unwilling to communicate critical facts to counsel or the court.”).

49. See *id.* (considering the legitimacy and confidence in the criminal justice system established by implementing and abiding by the incompetency doctrine).

competency.⁵⁰ The governing provision, 18 U.S.C. § 4241, grants the Court no discretion to deny the motion if there is reasonable cause to believe the defendant's mental competency is questionable.⁵¹ A licensed or certified psychiatrist or psychologist must examine the defendant in preparation for the hearing.⁵² To accommodate that examination, 18 U.S.C. § 4241(b) allows the defendant to be committed under the custody of the Attorney General for placement in a suitable facility for a period of no more than thirty days.⁵³ Additionally, the director of the facility, who is determined by the Attorney General, may extend the commitment period for a maximum of fifteen days.⁵⁴ After such an evaluation, the court conducts a hearing to review the findings, allows the defendant to testify, and presents evidence on his or her behalf.⁵⁵ Both the conviction of an accused that is determined to be legally incompetent, and the failure of a court to cause an adequate determination of competency are an

50. See 18 U.S.C. § 4241(a) ("At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense"); see also *Sua sponte*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/sua_sponte [<https://perma.cc/698Q-HSU>] (translating the Latin term, *sua sponte*, to mean "of one's own accord; voluntarily" and applying it to the law to "indicate that a court has taken notice of an issue on its own motion without prompting or suggestion from either party.").

51. See 18 U.S.C. § 4241(a) ("The court shall grant the motion or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.") (emphasis added).

52. See *id.* § 4247(b) ("A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner.").

53. See *id.* ("For the purposes of an examination pursuant to an order under section 4241 . . . the court may commit the person to be examined for a reasonable period, but not to exceed thirty days . . . to the custody of the Attorney General for placement in a suitable facility.").

54. See *id.* ("The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under Section 4241 . . . upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.").

55. See *id.* § (d) ("At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and . . . shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.").

uncontended violation of that individual's due process rights.⁵⁶ Illogically, there has yet to be a wide recognition that detaining a mentally incompetent individual for an undefined "reasonable period," violates one's due process rights.⁵⁷

B. The Historical Handling of Those Incompetent to Stand Trial in the United States

Modern incompetency doctrine is a derivative of the ban against trials in absentia at common law.⁵⁸ Although Blackstone recognized centuries ago that "one who became 'mad' after the commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought,'" American jurisprudence delayed its implementation of such a principle.⁵⁹ The Court of Appeals for the Sixth Circuit was the first American court to recognize "[i]t is not 'due process of law' to subject an insane person to trial upon an indictment involving liberty or life."⁶⁰

In *Dusky v. United States*, the United States Supreme Court established a two-part test to establish a criminal defendant's competency to stand

56. See *Competency to Stand Trial*, *supra* note 42, at 400 (citing *Drope*, 420 U.S. at 178–83 in holding the "trial court's failure to make sufficient inquiry into defendant's competence and to give adequate weight to defendant's suicide attempt and other irrational behavior" to violate due process); see also *Pate v. Robinson*, 383 U.S. 375, 385–86 (1966) (finding the trial court's mere failure to provide a competency hearing, considering the defendant's irrational behavior, to be a violation of due process).

57. See 18 U.S.C. § 4241(d) (codifying the ability of the Attorney General to deprive a mentally incompetent person accused in federal court of their liberty—for an indefinite period of time which is conditioned on the defendant's ability to regain competency even if medically and scientifically impossible).

58. See *Drope*, 420 U.S. at 171 (considering the historical origin and importance of competency to stand trial); see also *Winick*, *supra* note 46, at 574 (exploring the historical origins of the incompetency doctrine to illustrate the distinctively different purpose it served at common law).

59. See *id.* (quoting Blackstone to support the contention that "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

60. See *Youtsey v. United States*, 97 F. 937, 941 (6th Cir. 1899) (reviewing a trial court's dismissal of defense counsel's continuous objection that the defendant was of "nonsane mind and memory" at his trial).

trial.⁶¹ The inquiry first asks “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding;” and then proceeds to ask “whether [the defendant] has a rational as well as factual understanding of the proceedings against him.”⁶² In reversing the judgment of the Court of Appeals below and remanding the case for a new hearing to “ascertain [the] petitioner’s present competency to stand trial,” the Court expressly stated that it is “not enough for the district judge to find that ‘the defendant (is) oriented to time and place and (had) some recollection of events’ . . .”⁶³ Six years later, the United States Supreme Court recognized it to be a violation of due process to fail to inquire into a defendant’s mental incompetency after evidence at trial calls their competency into question.⁶⁴ The Court then extended this due process obligation into a continuous one: “[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.”⁶⁵

In *Drope v. Missouri*, the Court considered the difficult and fact-intensive nature of determining the accused’s competence to stand trial and discussed legal counsel’s obligation to bring any mental competency issue to the court’s “focus.”⁶⁶ In response to this obligation, “prosecutors

61. See *Dusky v. United States*, 362 U.S. 402 (1960) (clarifying what information must be established to determine a defendant’s competency to stand trial in the face of a record that did not afford the district judge below enough information to determine competency).

62. See *id.* (contrasting the erroneously insufficient burden satisfied in the district court—“that ‘the defendant [was] oriented to time and place and [had] some recollection of events’”—with the proper test that should have been utilized in the court below).

63. See *id.* (discussing the insufficient showing made by the record to “support the findings of competency to stand trial”).

64. See *Pate*, 383 U.S. at 386 (determining a criminal defendant’s due process rights to have been abridged by “his failure to receive an adequate hearing on his competence to stand trial”).

65. See *Drope*, 420 U.S. at 180–81 (finding a defendant who attempted suicide on the second day of his trial and was thereafter hospitalized and unable to be present for the remainder of his criminal trial to be incompetent, as he was “absent for a crucial portion of his trial [which bore] on the [competency] analysis in two ways: first, it was due to an act which suggests a rather substantial degree of mental instability contemporaneous with the trial . . . [and] second, as a result of [his] absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him.”).

66. See *id.* at 176–77 (stating “it is nevertheless true that judges must depend to some extent on counsel to bring issues to focus”).

raised competence more often than defense attorneys, to secure incarceration without having to go to trial or to effect preventative detention.”⁶⁷ In a study conducted by Arvanites in 1988, the criminally accused found incompetent in California, Massachusetts, and New York comprised 12% of all hospitalized mental patients throughout the nation from 1968 to 1978.⁶⁸ In that same period, the admission of mentally incompetent defendants to mental hospitals increased by twenty percent.⁶⁹ A tool intended to be a procedural guarantee of a criminal defendant’s due process rights became utilized as a strategic scapegoat—made possible by the weak and ambiguous statutory guidance around the commitment of the mentally incompetent, criminally accused.⁷⁰

C. Jackson v. Indiana—the Court’s Failed Attempt to Shine a Light in These Murky Waters

We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed at trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment

67. See Robert D. Miller, *Hospitalization of Criminal Defendants for Evaluation of Competence to Stand Trial or for Restoration of Competence: Clinical and Legal Issues*, 21 BEHAV. SCI. & L. 369, 371 (2003) (discussing the historical trends of the institutionalization of criminal defendants incompetent to stand trial); see also Bruce J. Winick, *Restructuring Competency to Stand Trial*, 22 UCLA L. R., 922, 933 (1985) (listing the strategic uses of initiating an incompetency evaluation of a defendant, including “to effect hospitalization that might not otherwise be possible under the state’s civil commitment statute . . .”).

68. See Miller, *supra* note 67, at 371 (citing Arvanites, T. M. in quantifying the effects of changing judicial standards, coupled with ambiguous statutory guidance, had on the liberties of the mentally incompetent and criminally accused into a numerical value).

69. See *id.* (citing Arvanites, T.M., while alluding to the fact that the minimal obligations imposed upon officers of the court had little effect on protecting the accused).

70. See Winick, *supra* note 67, at 933 (“Several studies have concluded that the vast majority of defendants inappropriately are referred for competency evaluation, and have suggested that the competency process is often invoked for strategic purposes: by both sides to obtain delay; by prosecutors to avoid bail or an insanity acquittal, or to effect hospitalization that might not otherwise be possible under the state’s civil commitment statute; by defense attorneys to obtain mental health recommendations for use in making an insanity defense, in plea bargaining, or at sentencing.”).

proceeding that would be required to commit indefinitely any other citizen, or release the defendant.⁷¹

One could assume that such a mandate from the Supreme Court would remedy the constitutional injuries the criminally accused and mentally incompetent have suffered, especially as applied to those who will not regain competency in the foreseeable future, such as the sizeable population of individuals with dementia.⁷² Unfortunately, the Supreme Court's only attempt at protecting the delicate liberty interests of individuals who are forever mentally incompetent to stand trial was responded to by Congress with the drafting of ambiguous statutory language and a slew of circuit courts taking advantage of that ambiguity.⁷³

The Supreme Court set forth the minimum standard regarding the detention of mentally incompetent individuals in its *Jackson v. Indiana* decision.⁷⁴ The Court conducted both an equal protection and due process analysis of the State of Indiana's commitment of a criminally accused individual "until such a time as [the Indiana] Department [of Mental Health] should certify to the court that 'the defendant [was] sane.'" ⁷⁵ The Petitioner argued his commitment equated to a "life sentence" without his ever having been convicted of a crime" and feared that he would never "attain a status which the court might regard as 'sane'

71. See *Jackson*, 406 U.S. at 738 (striking down a state law, extremely similar to the federal statute scrutinized in this comment).

72. See *id.* at 734 (declaring the "practice of automatic commitment with release condition solely upon attainment of competency [to have] been decried on both policy and constitutional grounds.").

73. See Section II.d (describing the legislative response to the Court's holding in *Jackson* 406 U.S. at 715; see also Section III.a (raking the circuit courts over the coals for their error-ridden application of 18 U.S.C. § 4241)

74. See *Jackson*, 406 U.S. at 715 (holding that the detention of individuals pursuant to a finding of incompetence requires the provision of treatment that carries a probability of restoration in the *undefined* foreseeable future).

75. See *id.* at 719 (holding the state of Indiana's indefinite pretrial commitment of an incompetent criminal defendant was a violation of that defendant's due process rights. The Court set forth that such a detainment can only be for "reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.").

in the sense of competency to stand trial.”⁷⁶ The State argued that “because the record fail[ed] to establish affirmatively that [the criminally accused and committed would] never improve [his mental competency], his commitment ‘until sane’ [was] not really an indeterminate one.”⁷⁷ The Court found little merit to the State’s argument, finding that “nothing in the record even point[ed] to any possibility that [the criminally accused’s] present condition [could] be remedied at any future time.”⁷⁸ In concluding that it is not necessary to detain criminally-charged individuals for more than a “reasonable period of time necessary to determine whether there is a substantial probability that they will attain that capacity in the foreseeable future,” the Court considered situations where the various states went awry in handling that sensitive situation.⁷⁹

In conclusion, the Court found a “[d]enial of due process [to be] inherent in holding pending criminal charges indefinitely over the head

76. *See id.* (undergoing a comprehensive review of the circumstances presented by the record, being that defendant was a “mentally defective deaf mute with a mental level of a pre-school child [who could not] read, write, or otherwise communicate except through limited sign language” and who was evaluated by two court-appointed psychiatrists and ultimately found to be “unable to understand the nature of the charges against him or to participate in his defense.”).

77. *See id.* at 725 (stating the State made such an argument in reliance on “the lack of ‘exactitude’ with which psychiatry can predict the future course of mental illness” and that a court’s decision on competency is a factually intensive and circumstantial inquiry).

78. *See id.* at 726 (conducting a fact intensive analysis of Indiana’s commitment statute as applied to the defendant, which considered the defendant’s likelihood of being committed under the State’s civil commitment statutes, the danger posed by the defendant, and the defendant’s need—or lack thereof—of custodial care evidence through his work history and living situation. This analysis led the Court to deduce that the only ground in which the defendant was committed was his inability to stand trial—an insufficient reasoning in and of itself for indefinite confinement during under the pendency of criminal charges. The Court thereby refuted the state’s argument that “because the record fail[ed] to establish affirmatively that [the criminally accused and committed would] never improve, his commitment ‘until sane’ [was] not really an indeterminate one”).

79. *See id.* at 735–38 (considering United States *ex rel.* Wolfersdorf v. Johnston, 317 F.Supp. 66 (S.D.N.Y. 1970) where an eighty-six-year-old defendant was committed for almost twenty years due to his finding of incompetency to stand trial pursuant to state murder and kidnapping charges. The defendant, in response to his federal habeas corpus petition, was found not dangerous and suitable for civil commitment. Thereafter, the District Court granted relief, holding his “incarceration in an institution for the criminally insane constituted cruel and unusual punishment”); *see also* People *ex rel.* Myers v. Briggs, 263 N.E.2d 109 (Ill. 1970) (where a criminally indicted deaf mute was ordered to not be released from civil commitment where he was confined for four years because of a finding of his incompetency to stand trial due to his inability to communicate).

of one who will never have a chance to prove his innocence.⁸⁰ Although *Jackson* elevated the previously minimal requirements a court must follow to deprive a criminally accused individual who lacks legal competency to stand trial, the vague and undefined “reasonableness” standard provided by the Court arguably left too much room for the states and courts below to interpret such a standard.⁸¹ *Jackson* proved to leave the impending threat that mentally incompetent individuals initially faced—a loss of their freedom if criminally *charged*—in the hands of the states.⁸² A survey conducted in 1993 “revealed that a large number [of states] have ignored or circumvented *Jackson*’s requirements.”⁸³ The vagueness of the ‘heightened’ standard set forth in *Jackson* codified itself into an equally vague statutory standard, allowing state and federal courts too much room for interpretation.⁸⁴

80. See *Jackson*, 406 U.S. at 740 (citing *People ex rel. Myers*, 263 N.E.2d at 112-13 discussing the dismissal of charges against an incompetent defendant); see also *United States ex rel. Wolfersdorf*, 317 F.Supp. at 68 (recognizing that a criminally accused and detained mentally incompetent defendant, incarcerated amongst the criminally insane for twenty years, retains his presumption of innocence but is confined as if he is being punished); see also *United States v. Jackson*, 306 F.Supp. 4, 6 (N.D.Cal. 1969) (stating that “the government [cannot] confine a person who has not been judged guilty of any crime in a facility similar to a prison where he will not receive true medical treatment.”).

81. See *Miller*, *supra* note 67, at 372 (discussing the different interpretations that a California appeals court, the First Circuit, and Wisconsin Supreme Court, took in defining what is a reasonable period of time for confinement of an incompetent individual during the pendency of criminal charges).

82. See *id.* (citing Morris, G. H., & Meloy, J. R., *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants* 27 *UNIV. OF CAL. DAVIS L. REV.* 1, 9 (1993) in surveying different approaches the states have taken pursuant to *Jackson* precedent).

83. See *id.* (finding states to have understood *Jackson*’s implications to be of little consequence in establishing a “reasonable” confinement period, as “fifteen states imposed a lengthy treatment period, tied the maximum commitment of the sentencing available for the crimes charged, or created special classes of incompetent defendants with different commitment or release criteria. Statutes in another fourteen states permitted indefinite commitment of permanently incompetent defendants.”).

84. Compare *Jackson*, 406 U.S. at 733 (reviewing jurisprudential decisions that have “imposed a ‘rule of reasonableness’” that one may only be committed for a “‘reasonable period of time’ necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future.”) with 18 U.S.C. § 4241(d) (“The Attorney General shall hospitalize the [incompetent] defendant for treatment in a suitable facility for such a reasonable period of time . . .”).

D. The Subsequent Statutory Guidance, or Lack Thereof

18 U.S.C. § 4241 codifies the federal procedures to be followed if a defendant's mental competency is called into question in a federal trial, prior to sentencing, or after the commencement of probation or supervised release—that procedure being a motion for a competency hearing, made by counsel or the court sua sponte.⁸⁵ A court rules on such a motion using the ambiguous *reasonable* standard.⁸⁶ Under that standard, if the court finds it *reasonable* to believe the defendant is “unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense” due to the possible mental disease or defect, the court must grant the motion.⁸⁷ Before the hearing, the court may order the psychiatric or psychological evaluation of the defendant by a licensed or certified psychiatrist or psychologist.⁸⁸ Those findings are reviewed by the court at the ordered hearing.⁸⁹ If the court finds by a preponderance of the evidence that the defendant suffers from a mental disease or defect that renders them legally incompetent to understand the nature of the proceedings against them or to properly assist counsel in their defense, the court may then commit that defendant to the custody of the Attorney General for treatment for a *reasonable* period of treatment.⁹⁰

The code states that the commitment period is not to exceed four months; however, the second subsection of that code affords the Attorney General the ability to detain that incompetent defendant “for an additional reasonable period until his mental condition improves so that trial may

85. See 18 U.S.C. § 4241(a) (allowing for either counsel or the court in a federal proceeding to move for a hearing to “determine the mental competency of the defendant” any time prior to sentencing or any time after the commencement of probation or supervised release, but prior to the completion of that probation or supervised release).

86. See *id.* (requiring the court to grant the motion “if there is *reasonable* cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent . . .”) (emphasis added).

87. See *id.* (requiring a federal judge to make a preliminary and impromptu psychiatric evaluation to open the door to a defendant's constitutional due process rights).

88. See *id.* at § 4241(b) (governing the psychiatric or psychological examination and report), see also *id.* § 4247(b) (establishing the requirements for that examination).

89. See *id.* at § 4247(d) (codifying the process required by a hearing ordered under *id.* § 4241).

90. See *id.* at § 4241(d) (awarding the Attorney General with great discretion in determining a suitable facility and appropriate duration for the defendant's treatment).

proceed.⁹¹ Herein lies the issue at hand: a federal defendant, found incompetent by a preponderance of the evidence but not found guilty beyond a reasonable doubt, is detained by the Attorney General for an undefined reasonable period codified to end when that defendant regains competency. As the Court failed to consider it squarely, the statute fails to address or consider the fate of a defendant with an irreversible and degenerative mental disease where it is scientifically *reasonable* to believe that defendant will never regain competency.⁹²

II. ANALYSIS

A. *Current Statutory Scheme and the Judicial Response*

“No enumerated power in Article I, § 8, expressly delegated to Congress the power to enact a civil-commitment regime . . . nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power.”

—Justice Clarence Thomas⁹³

1. The Comprehensive Crime Control Act of 1984: A Nine-year Legislative Effort to Blur the Liberty Interests of the Mentally Incompetent

Alarmingly, the current, ambiguous governing procedures to be followed when a court encounters a defendant who may *reasonably* be mentally incompetent is a culmination of a nine-year effort to overhaul the federal criminal code.⁹⁴ The Comprehensive Control Act of 1984,

91. *See id.* (indicating that because of the loose parameters and powers granted to the Attorney General, individuals, while not convicted but found incompetent, can be detained for extensive periods of time).

92. *See* Morris, G. H., & Meloy, J. R, *supra* note 82, at 8 (acknowledging that the Supreme Court, in its most recent and relevant decision, failed to address what is a reasonable amount of time to commit a defendant for treatment or if it is reasonable at all to commit a defendant who cannot regain competency).

93. *Comstock*, 560 U.S. at 163 (disagreeing with the majority’s holding of the enactment of 18 U.S.C. § 4248—allowing for the potentially indefinite commitment of sexually dangerous persons already in the custody of the bureau of prisons or committed to the custody of the Attorney General under § 4241(d)—to be within Congress’ “Necessary and Proper” powers).

94. *See* Daniel J. Sears, *Synopsis of the Comprehensive Crime Control Act of 1984*, 14 COLO. L. 183 (1985) (discussing the historical background of the Comprehensive Control Act of 1984, which began as an effort by the United States Senate in 1975 to recodify the federal criminal code).

coined as a radical alteration of federal criminal law, accomplished this overtaking.⁹⁵ For purposes of this comment, the relevant portion of the Comprehensive Crime Control Act of 1984 is Title IV: The Insanity Defense Reform Act of 1983.⁹⁶ While the legislative focus in revising this portion of the federal criminal code concerned the insanity defense, other minor changes muddied the waters of the procedures for handling the criminally accused and mentally incompetent.⁹⁷

2. 18 U.S.C. § 4241—The Gatekeeper to a Criminally-accused, Mentally Incompetent Person’s Hell

The current code, 18 U.S.C. § 4241, “gives the court discretion to order a competency hearing to determine the mental competency of the defendant,” whereas previously, as codified in 18 U.S.C. § 4244, it required the court to hold a hearing when the report of an examining psychiatrist indicates a concern for mental incompetency.⁹⁸ In grappling over federal criminal code reform, which culminated in drafting an act that spans over four-hundred pages, Congress saw fit to deprive vulnerable populations—such as the mentally incompetent—of

95. See Steven R. Marino, *Are You Sufficiently Competent to Prove Your Incompetence? An Analysis of the Paradox in the Federal Courts*, 6 SETON HALL CIR. REV. 165, 170 (2009) (reviewing the legislative history of 18 U.S.C. § 4241).

96. See *id.* (focusing on Chapter 313 title 18 of the United States Code, or the Insanity Defense Reform Act of 1983, which relates to “the procedure to be followed by federal courts with respect to offenders who are currently suffering from a mental disease or defect”; see also *United States v. Nichols*, 661 F. Supp. 507, 508 (W.D. Mich. 1987) (grappling with the changes made to procedures to be followed in handling defendants requesting a competency hearing and a psychiatric examination).

97. See Marino, *supra* note 95, at 171 (comparing the current provision, 18 U.S.C. § 4241, with its previous version 18 U.S.C. § 4244 (1949), noting that “although both Sections allow a psychiatric examination before an actual competency hearing, § 4244 required the examination, while § 4241 affords judicial discretion”).

98. Compare *Nichols*, 661 F. Supp. at 510 (noting that while the current version of the code requires the court grant a motion for a hearing to determine competency upon a reasonable belief that it is of concern, it provides the court with discretion to order a psychological or psychiatric hearing prior to that hearing); with 18 U.S.C. § 4247(b) (requiring that any examiner be designated by the court; effectively leaving the constitutionally preserved opportunity for the defendant’s mental competency to be properly examined to the sole discretion of the—hopefully—reasonable court).

procedural certainties by utilizing vague, *reasonable* “guarantees” of procedural due process.⁹⁹

Congress’ ambiguous drafting of 18 U.S.C. § 4241 and its sister provisions was a response to the United States Supreme Court’s declaration of setting flexible, “reasonable” standards for the lower courts to apply when evaluating the federal commitment of a mentally incompetent defendant.¹⁰⁰ Although the United States Supreme Court charged the courts with the mandate that a criminal defendant “committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain capacity in the foreseeable future,” the circuit courts have run away with the *reasonableness* afforded to them and consequentially, infringe upon the inherent liberty interest of a vulnerable class of persons.¹⁰¹ It can be inferred from the Supreme Court’s charge to the lower courts that there can be no reasonable period of commitment required to determine if a defendant can regain competency if it is uncontested that they cannot scientifically do so.¹⁰² However, the circuit courts have overwhelmingly held to the contrary under their *reasonable* discretion—found in subsection (d) of Section 4241.¹⁰³

99. *See generally* Comprehensive Crime Control Act of 1984, S. 1762, 98th Congress, 2d Sess. (1984) (using vague procedural terms which can target vulnerable populations such as the mentally incompetent).

100. *See Jackson*, 406 U.S. at 738 (holding that “a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the *reasonable* period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future”) (emphasis added).

101. *Compare id.* (requiring that a state only commit a criminal defendant, who has been deemed mentally incompetent to stand trial, for the purposes of determining whether it is likely that the defendant will regain competency within the foreseeable future); *with* *United States v. Dalasta*, 856 F.3d 549, 554 (8th Cir. 2017) (reasoning that the limited commitment of a defendant, who was medically deemed unrestorable, complied with due process and the mandates set forth in *Jackson*).

102. *See Jackson*, 406 U.S. at 738 (requiring that a criminal defendant suffers from unrestorable mental incompetency to either be committed as a dangerous person or be released).

103. *See Shawar*, 865 F.2d at 859 (disregarding the Supreme Court’s mandatory and binding precedent and instead inferring a legislative intent to require that all mentally incompetent defendants be committed); *and* *United States v. Donofrio*, 896 F.2d 1301, 1303 (11th Cir. 1990) (following the Seventh Circuit in holding that the requirement for a defendant who is mentally incompetent is the defendant’s automatic commitment to the custody of the Attorney General); *and* *United States v. Filippi*, 211 F.3d 649, 652 (1st Cir. 2000) (relying on the Seventh and Eleventh Circuit’s error-ridden reasoning to be evidence that the automatic commitment of a mentally

3. The Tangled Web of § 4241 Misapplication and Manipulation Spun by the Circuit Courts

a. Seventh Circuit

The Seventh Circuit was seemingly the first Circuit Court to deem a court's commitment of an individual who was mentally incompetent to be a non-discretionary, mandatory function under 18 U.S.C. § 4241.¹⁰⁴ To reach such a conclusion, the Seventh Circuit hung its hat on Congress' use of the word "shall" in the statutory language to conclude that Congress intended for a court's absence of discretion in determining whether or not to commit a defendant after that defendant is determined to be mentally incompetent.¹⁰⁵ That reading of the statute crafted by the Seventh Circuit, however, clearly contradicts the very shallow pool of mandatory precedent provided by the Supreme Court, reading "[t]he federal statute . . . provides that a defendant found incompetent to stand trial *may* be committed . . ."¹⁰⁶ Grasping at straws, the Seventh Circuit

incompetent defendant under section 4241(d) is constitutional); *and Ferro*, 321 F.3d at 761 (believing a court to have no discretion in committing a mentally incompetent defendant because the Seventh Circuit said so); *and United States v. Magassouba*, 544 F.3d 387, 404 (2d Cir. 2008) (interpreting section 4241 to be facially unambiguous in requiring that a defendant be automatically committed, regardless of the surrounding circumstances, once he is found mentally incompetent); *and United States v. Dalsata*, 856 F.3d 549, 553 (8th Cir. 2017) (expressly considering the case of a defendant who, undisputedly, cannot be restored to competency and the continuing effort to find a mandatory duty on the court to commit such a defendant to the custody of the Attorney General); *and United States v. Anderson*, 679 Fed. Appx. 711, 712–13 (10th Cir. 2017) (understanding section 4241 to be "unambiguous"—not because of the statutory language or due to its own analysis of the statute, but because many circuit courts have held it to be so); *and United States v. McKown*, 930 F.3d 721, 728 (5th Cir. 2019) (agreeing with the conclusion of all other circuit courts—that section 4241(d) is constitutional because it is inherently limited by its, undefined, reasonable time limitation on commitment); *and United States v. Quintero*, 995 F.3d 1044, 1052 (9th Cir. 2021) (finding automatic commitment of a mentally incompetent defendant to be consistent with due process because it has been held as such since *Shawar*).

104. *See Shawar*, 865 F.2d at 859 ("Congress clearly mandates that a defendant found to be incompetent be placed in a mental hospital for observation.").

105. *See id.* at 860 (concluding that 18 U.S.C. § 4241 "plainly states that 'the court *shall* commit the defendant to the custody of the Attorney General [who] shall hospitalize the defendant for treatment' . . . The plain meaning of this phrase is, and we hold it to be, that once a defendant is found incompetent to stand trial, a district judge has no discretion in whether or not to commit him.") (emphasis in original).

106. *Compare id.* (finding Congress' use of the word "shall" in the federal statute to mandate the commitment of those deemed mentally incompetent by the court); *with Jackson*, 406 U.S. at 731 (comparing the federal statutory scheme to Indiana's commitment statute—deemed unconstitutional—stating that "the federal statute is not dissimilar to the Indiana Law" and tellingly

inferred a “crucial distinction” made by Congress: that it intended for the Attorney General to automatically be given “authority over defendants declared incompetent by the district judge . . .”¹⁰⁷ The court, in passing, argues that this distinction provides for the appropriate separation of power between the court and the Attorney General and confirms its understanding of the court’s commitment of a mentally incompetent defendant to the custody of the Attorney General to be mandatory.¹⁰⁸ However, such an inference is contrary to its reasoning; the Seventh Circuit relies on the statute’s plain meaning to find mandatory commitment necessary yet chooses to ignore the statute’s plain meaning by assuming an automatic transfer of authority from the court to the Attorney General.¹⁰⁹ Although, the statute clearly states that the court has to first commit the defendant to the Attorney General’s custody for such a transfer of authority to occur.¹¹⁰ Congress would have openly stated if, as reasoned by the Seventh Circuit, it intended for the Attorney General to be automatically awarded authority over all deemed mentally incompetent to stand trial.¹¹¹

The Seventh Circuit did not believe that the defendant’s receipt of three differing diagnoses, describing his mental incompetency to be irreversible, should have any bearing on the mandatory commitment of the defendant to the Attorney General for the purpose of attaining the capacity to stand trial.¹¹² Once again, the Seventh Circuit’s reasoning—

utilizing the word “may” to describe the likelihood of a mentally competent defendant being committed for treatment under the Attorney General).

107. *See Shawar*, 865 F.2d at 860–61 (injecting automatic authority to the Attorney General over those deemed mentally incompetent but failing to provide the text of the statute or congressional material the court relied on in making that “crucial decision”).

108. *See id.* (discussing the plain meaning of § 4241(d) to describe a mandatory commitment of mentally incompetent defendants to the Attorney General, whereas such an understanding is purported to be supported by an inference that Congress intended for the Attorney General to automatically be conferred with authority over all determined to be mentally incompetent).

109. *See id.* at 860 (finding Congress to have “given authority over defendants declared incompetent by the district judge to the Attorney General”).

110. *See* 18 U.S.C. § 4241(d) (requiring that the court commit the defendant to the custody of the Attorney General before such a transfer of authority can occur).

111. *See Shawar*, 865 F.2d at 860 (demonstrating that relying on the plain meaning of the statute to infer that Congress intended for all defendants to be under the authority of the Attorney General is ineffective).

112. *See id.* at 861 (finding error in the district judge’s failure to commit the mentally incompetent defendant based upon the Government’s failure to present even a shred of evidence

or lack thereof—directly contradicts Supreme Court precedent and the statute’s plain language, both of which require considering the defendant’s likelihood of recovery.¹¹³ Unfortunately, the Seventh Circuit’s detrimental missteps in *Shawar* paved the way for other circuit courts’ resounding misunderstanding and misapplication of the law.¹¹⁴

b. Eleventh Circuit

A year later, the Eleventh Circuit followed the Seventh Circuit’s lead in holding that a court’s commitment of a mentally incompetent defendant is a mandatory and non-discretionary function and should occur without regard to evidence that the defendant will never regain or

that such commitment could improve the defendant’s condition in any way, stating that “likelihood of recovery is not something to be considered by the district court in deciding whether to commit the defendant for the evaluation period”).

113. Compare 18 U.S.C. § 4241(d) (allowing for the commitment of a mentally incompetent defendant only to (1) “determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward” and (2) for an undefined reasonable period of time to allow the defendant to regain mental competency) and *Jackson*, 406 U.S. at 733–38 (finding improper the commitment of defendants “whose chance of attaining competency to stand trial is slim” and holding “that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future); with *Shawar*, 865 F.2d at 861 (stating that the “likelihood of recovery is not something to be considered by the district court in deciding whether to commit the defendant for the evaluation period” in reversing a district court’s refusal to commit a defendant that was thrice medically determined to forever suffer from irreversible mental retardation).

114. See *Donofrio*, 896 F.2d at 1303 (blindly agreeing with the Seventh Circuit’s holding that “the statute clearly provides that once a finding of incompetence to stand trial has been made, a defendant must be committed to the custody of the Attorney General”); see also *Filippi*, 211 F.3d at 652 (finding the conclusion reached by *Shawar* and *Donofrio*—that Section 4241(d) comports with the requirements set forth by the Supreme Court in *Jackson* to be conclusory of its constitutionality); see also *Ferro*, 321 F.3d at 761 (citing the faulty inference made in *Shawar*, that Congress intended for mandatory commitment to the Attorney General under Section 4241(d), to be settled law); see also *Anderson*, 679 Fed. Appx. at 712–13 (finding strength in the number of circuit courts that have followed the reasoning of *Shawar* to find the statutory mandate to be “unambiguous and mandatory”); see also *Dalasta*, 856 F.3d at 553 agreeing with the Seventh Circuit that the “plain meaning of the statute” requires mandatory commitment “once a defendant is found incompetent to stand trial”); see also *McKown*, 930 F.3d at 721 (citing to *Shawar* on five separate occasions for support); see also *Quintero*, 995 F.3d at 1052 (rejecting the argument that mandatory commitment under Section 4241(d) violates substantive due process rights, citing to *Shawar* because of its rejection of that argument decades before).

recover mental competency.¹¹⁵ Dedicating an entire paragraph of an eight-paragraph opinion to the arguments made and conclusions reached in *Shawar*, the Eleventh Circuit found solace in the Seventh Circuit's faulty reasoning.¹¹⁶ The Eleventh Circuit attempted to justify its, and the Seventh Circuit's, understanding of Section 4241 with the Supreme Court's mandatory precedent in *Jackson*.¹¹⁷ The court found the mandatory commitment of a mentally incompetent defendant to determine whether a substantial probability exists that he will regain competency without regard to the evidence presented to the court that the defendant will never regain competency, to satisfy the requirements of due process.¹¹⁸ The Eleventh Circuit viewed that understanding of the statute to comport with both the Constitution and the requirements defined in *Jackson* because the statute limits such a confinement period to a "reasonable" period of time with a hard limit of four months.¹¹⁹

The Eleventh Circuit's conveniently botched reading of the statute ignores the possibility that a defendant may be held beyond the four months, for an "additional reasonable period of time until" that defendant's mental condition has improved enough to allow the trial to move forward or until the charges against that defendant are dropped.¹²⁰ Unfortunately, there is no statutory limitation on the period of time in

115. *See Donofrio*, 896 F.2d at 1303 (affirming the commitment of a defendant by the district court below, without regard for the permanency of the defendant's condition).

116. *See id.* (stating the Seventh Circuit "held that [Section 4241] clearly provides that once a finding of incompetence to stand trial has been made, a defendant must be committed to the custody of the Attorney General. We agree with the holding of the Seventh Circuit.").

117. *See id.* (referencing the "due process requirements of *Jackson*").

118. *See id.* (acknowledging the flaws of the mandates at hand by recognizing the commitment order of the court below could "prolong confinement beyond the statutory mandate," and yet resting the constitutionality of the statute—as understood by the Eleventh and Seventh Circuit—in its reasonable time limitation that was proven, in the immediate case, to be easily circumventable).

119. *See id.* ("The due process requirements of *Jackson* are met because the statute itself requires that the period of commitment be 'reasonable' for that purpose. The statute limits confinement to four months, whether more time would be reasonable or not.").

120. *Compare* 18 U.S.C. § 4241(d)(2) (allowing for the Attorney General to "hospitalize the [mentally incompetent] defendant for treatment in a suitable facility . . . for an additional period of time [beyond the initial four months expressly allowed for in subsection (d)(1)] until his mental condition is so improved that trial may proceed . . . or the pending charges against him are disposed of according to law; whichever is earlier."); *with id.* (advantageously ignoring the possibility that a defendant be held for an additional period of time pursuant to Section 4241(d)(2), absent a finding that such an additional period of time will accommodate the regaining of that defendant's mental competency).

which a defendant may be held in the custody of the Attorney General to regain competency; likewise, there is no statutory or jurisprudential exception for those scientifically certain to be unable to reach such a day.¹²¹ Effectively the federal statute, in application under the circuit courts' understanding, can be likened to the blatantly unconstitutional Indiana statute that codified the indefinite term in which the mentally incompetent, criminally-accused could be detained.¹²²

c. First Circuit

Without stating its reasoning or support for its assumption, the First Circuit assumed “*arguendo* that the statute [gives] the district court no discretion in the matter and must commit the defendant for an initial period of up to four months after finding him incompetent to stand trial.”¹²³ The First Circuit recognized the detainment of an individual yet to be tried was certainly a threat to that individual's liberty; however, the court found the *ideally* temporary nature of the incarceration to be sufficient to satisfy the narrow tailoring Congress must accommodate when infringing upon such liberties.¹²⁴ In finding Section 4241 facially constitutional and its application to the defendant consistent with both due process and *Jackson*, the First Circuit favorably cited *Shawar* and *Donofrio*—both reaching the same conclusion rested upon less than solid ground.¹²⁵

121. See *Donofrio*, 896 F.2d at 1303 (recognizing the commitment order in the immediate case could extend beyond a reasonable period of time, as required by the statute).

122. Compare *Jackson*, 406 U.S. at 715 (striking down an unconstitutional Indiana statute that allows for a mentally incompetent defendant to be detained for an undefined, indefinite period of time, while also accommodating the release of that person at any time—pursuant to the judgement of the superintendent of the facility in which that defendant is detained); with 18 U.S.C. § 4241 (codifying the Attorney General's ability to keep in custody a mentally incompetent defendant for an undefined, “*reasonable*,” period of time until that defendant regains competency or until the charges against that defendant are disposed of).

123. See *Filippi*, 211 F.3d at 649 (analyzing a constitutional challenge to the commitment of a criminally accused individual with vascular dementia under 18 U.S.C. § 4241, who argued that his automatic commitment was inconsistent with due process).

124. See *id.* at 651 (“The constitutional question is whether automatic commitment with substantial safeguards as to duration is a reasonable, and sufficiently ‘narrowly tailored,’ accommodation of the competing interests.”).

125. See *id.* at 652 (citing *Donofrio* and *Shawar* for support, being the only other two circuits at that time, that had found 4241(d) to be consistent with *Jackson*).

d. Second Circuit

The Second Circuit, however took a step in the right direction by declaring Section 4241(d) does not allow a court to commit a criminal defendant for longer than the initial four-month period, provided for in Subsection (d)(1), absent a finding that “circumstances warrant additional hospitalization.”¹²⁶ That promising step taken was unfortunately followed by the common misstep suffered by the other circuit courts: finding an inferred mandate within the language of Section 4241(d), requiring a court to commit a defendant to the custody of the Attorney General to make the determination as to whether there is a substantial probability that the defendant will regain the requisite mental competency to stand trial.¹²⁷ The Second Circuit’s opinion serves as a great example of how the loosely defined limits on a criminal defendant’s commitment under Section 4241(d)—the very limits that *every* circuit court cites to as evidence of the statute’s compliance with due process—can be twisted, turned, and loosely pursued to the mentally suffering, criminal defendant’s detriment.¹²⁸

The Second Circuit insightfully revisited the purpose behind the government’s longstanding authority to commit a mentally incompetent defendant—“in order to render [that defendant] competent to stand

126. See *Magassouba*, 544 F.3d at 387 (“[W]hen a defendant’s term of § 4241(d)(1) confinement expires and no § 4241(d)(2) order has yet been entered, the Attorney General lacks statutory authority to hold a defendant in further custodial hospitalization.”).

127. See *id.* at 393 (declaring that § 4241(d) “mandates the defendant’s custodial hospitalization for evaluation and possible treatment” to make the *Jackson* determination—whether the defendant will attain competency to allow the proceedings to move forward—but failing to account for a situation in which the *Jackson* determination has already been made in the negative).

128. Compare *id.* at 393–94 (stating, *clearly*, that a criminal defendant may not be detained for a period of more than four months in order to determine whether there is a substantial probability that defendant will regain competency and that thereafter the four months, the defendant must either: (1) be referred to civil commitment or be released if it has been determined that there is not a substantial probability of competency being restored, or (2) may be held for an “additional reasonable period of time” if it has been determined that the defendant has or will most likely attain the requisite mental competency in the foreseeable future); with *Magassouba*, 544 F.3d at 394–408 (finding no constitutional issue with an example directly contrary to the constitutional requirements it set forth just paragraphs before the very same opinion: a district court ordering a confinement period of no more than sixty days pursuant to an initial finding of incompetency under § 4241(d) at an October 13, 2004 hearing, whereas the criminally accused, *but not convicted*, defendant remained in custody as late as May of 2006—more than nineteen months after that ordering of his confinement for a maximum of four months—as a result of that defendant’s liberty being lost in a shuffle of government papers and a blatant disregard for that defendant’s due process).

trial”—and why the prior version of the statute was held unconstitutional: a lack of time limits on that confinement.¹²⁹ To render such commitment of mentally incompetent defendants constitutional, the Second Circuit noted the “rule of reasonableness” inflicted on the statutes after the Supreme Court’s decision in *Jackson* effectively placed a four-month limit on that period of confinement.¹³⁰ Ironically, after reciting such a history and in doing so, effectively recognizing the four-month time limit on such a confinement period to be the difference between an unconstitutional commitment and a constitutional one, the Second Circuit found no due process issue with a confinement of mentally incompetent defendant for over nineteen months.¹³¹

Although *Magassouba* is not squarely on point with the issue brought to light in this comment, it is evidence of the inadequate “limitations” on the government’s authority to commit defendants under Section 4241(d), and how those limitations are not limiting in reality.¹³² Lastly, the Second Circuit made a concession in its opinion that favors the analysis of this comment: in making its argument as to why it found the defendant’s nineteen-month period of confinement to be both reasonable and constitutional, the Second Circuit distinguished its case from the circumstances dealt with in *Jackson*.¹³³ The Second Circuit thereby

129. See *Magassouba*, 544 F.3d at 403 (looking to *Jackson*, 406 U.S. at 715 to establish the due process requirements at play when applying 18 U.S.C. § 4241).

130. See *id.* at 403 (reflecting on *Jackson*’s role in transforming unconstitutional commitment statutes—formerly 18 U.S.C. §§ 4244, 4246 (1949), providing for “no time limit on such confinement”—to “constitutional ones” with a reasonable time limit of four months).

131. See *id.* at 416 (“The nineteen-month period *Magassouba* spent in B[ureau] o[f] P[risons] custody from October 13, 2004, when he was found incompetent, to May 10, 2006, when the court entered the challenged § 4241(d)(2) order, is not insignificant. Nevertheless, we conclude that the time was not constitutionally unreasonable . . .”).

132. See *id.* at 387 (affirming the commitment of a mentally incompetent criminal defendant for over nineteen months after recognizing the importance of the statutory four-month time limit imposed on those commitments, as required by due process—serving as an example of the realized fears dictated in this comment: that the ambiguous reasonable time limitation provided by the statute serves as no bar to the prolonged detainment of an individual due solely to that defendant’s incompetency and the further aggravated due process infringements when committing the mentally incompetent, criminally accused for the very purpose of determining whether they will regain competency when it has already been determined that defendant will not, and cannot, do so due to the scientifically proven progressive and untreatable nature of the condition rendering them incompetent.).

133. See *id.* at 417 (distinguishing *Magassouba*, a defendant with a delusional disorder that “could regain competency through a course of psychotropic medication,” from the defendant brought before the Court in *Jackson*, one where the medical consensus was that his competency

implied that had Magassouba's condition to be one where "medical experts has concluded that no effort could render him competent to stand trial," his nineteen-month commitment would have transformed into an unconstitutional one.¹³⁴

e. Fifth Circuit

The prior missteps of the circuit courts, detailed above, were heavily relied on by the district court below the Fifth Circuit in *United States v. McKown*.¹³⁵ The Fifth Circuit too found a mandatory duty on behalf of the district court to commit once a defendant is found to be incompetent.¹³⁶ In setting forth the conditions of that confinement, the Fifth Circuit contradicts itself: the court first states a court must commit a defendant found mentally incompetent to the custody of the Attorney General "irrespective of the defendant's initial prognosis" and without regard to the defendant's likelihood or inability to recover.¹³⁷ However, in the very next sentence, it recites the requirements set forth by the Supreme Court in *Jackson*: a defendant may only be held to determine, or for a reasonable period of time to make that determination, "whether

could not be restored, to support the reasonableness of Magassouba's nineteen-month confinement).

134. *See id.* at 417 (arguing that the period of detention in the present case was not unreasonable under *Jackson* because the defendant suffers from a condition where "all doctors and lawyers agree that there is a substantial probability that [the defendant] can regain competency with additional hospitalization and treatment"; contrasting the immediate case from *Jackson*, who was "confined for a lengthy time despite the fact that medical experts had concluded that no effort could render him competent to stand trial . . .").

135. *See McKown*, 930 F.3d at 725 ("The district court found that McKown lacked competency to stand trial but that, with proper treatment, he likely could attain sufficient capacity in the near future. Noting that several circuit courts had already rejected constitutional challenges to § 4241(d), the court was 'persuaded that [the fifth circuit would be of a like mind.']").

136. *See id.* (describing the steps set forth by Congress in the pre-trial handling of a mentally incompetent defendant, enacted in response to the Supreme Court's holding in *Jackson*: (1) "a district court must first evaluate, by a preponderance of the evidence, whether 'the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent . . .'; (2) "[i]f, after a hearing, the defendant is found to be incompetent, 'the court shall commit the defendant to the custody of the Attorney General' . . . [whereas such] commitment is mandatory upon a finding of incapacity") (citing *Anderson*, 679 F. Appx. at 713 and *Shawar*, 865 F.2d at 861).

137. *See id.* at 727, n.6 (citing to *Shawar*, as if it was settled law, and blindly following the reasoning of the Seventh Circuit).

there is substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward.”¹³⁸

In attempting to rectify such an inconsistency, the Fifth Circuit infers that by the Supreme Court taking issue with the indefinite period of confinement allowed by the Indiana commitment statute it struck down in *Jackson*, and its failure to take issue with the mandatory nature of commitment under that statute, the Supreme Court finds mandatory commitment irrespective of likelihood of recovery to comport with due process.¹³⁹ Not only does this faulty inference ignore the Supreme Court’s traditional taking of one—usually narrow—issue at a time, it also ignores the Supreme Court’s express condemnation of automatic commitment without regard to the likelihood of that committed person’s recovery.¹⁴⁰

f. Eighth Circuit

The Eighth Circuit has blatantly turned a blind-eye to the Supreme Court’s consequential holding in *Jackson* when evaluating the due

138. Compare 18 U.S.C. § 4241 (codifying that a defendant found to be “presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable” to stand trial may only be hospitalized by the Attorney General “for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward”—making the likelihood of recovery a threshold question); and *Jackson*, 406 U.S. at 738 (holding “that a person charged [] with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future”—making the likelihood of recovery a threshold question); and S. Rep. 98-225 at 237 (1983) (describing the legislative history and intent behind the enactment of 18 U.S.C. § 4241 in response to the Court’s holding in *Jackson*, stating that “commitment under Section 4241 may only be a for a reasonable period of time necessary to determine if there exists a substantial probability that the person will attain the capacity to permit the trial to go forward in the foreseeable future”—likewise mandating the consideration of the defendant’s likelihood of recovery); with *McKown*, 930 F.3d at 727 (disregarding mandatory precedent, statutory text, and legislative intent—but instead blindly following persuasive, but incorrect circuit court precedent—by stating that the commitment of a mentally incompetent defendant is done so “irrespective of the defendant’s initial prognosis (citing to *Shawar*, 865 F.2d at 861) (“noting that the ‘likelihood of recovery is not something to be considered by the district court in deciding whether to commit the defendant . . .”).

139. See *McKown*, 930 F.3d at 729 (ignoring hundreds of years of the Supreme Court’s consistent selection of handling one of a slew of issues before the Court and inferring that it’s taking up only one issue before it is equivalent to its failure to find any other issue).

140. See *Jackson*, 406 U.S. at 734 (“The practice of automatic commitment . . . has been decried both on policy and constitutional grounds.”).

process implications of 18 U.S.C. § 4241.¹⁴¹ In *United States v. Dalasta*, the defendant was charged with unlawful firearm possession.¹⁴² In a competency hearing ordered pursuant to 18 U.S.C. § 4241(a), the physician determined the defendant suffered from depression, anxiety, and medically intractable epilepsy and concluded “it would not be possible to restore [the defendant] to a level of competency to stand trial.”¹⁴³

Unlike many circuit courts have done, the district court below the Eighth Circuit in *Dalasta* did not blindly follow the reasoning of the Seventh Circuit in *Shawar* and failed to see the commitment of the defendant to be a mandatory function.¹⁴⁴ However, the defendant was nevertheless committed to the United States Bureau of Prisons to determine whether his competency could be restored.¹⁴⁵ After taking note of the unfixable nature of the defendant’s incompetency, the District Court concluded the plain language of 18 U.S.C. § 4241(d) required he be committed to the custody of the Attorney General—regardless of the medically-proven and factually-uncontested reality that he would never regain competency.¹⁴⁶ The defendant then appealed his commitment to federal custody, arguing: (1) 18 U.S.C. § 4241(d) does not permit the commitment of an individual that has been uncontestedly determined to

141. *See Dalasta*, 856 F.3d at 551 (finding the defendant’s commitment pursuant to 18 U.S.C. § 4241(d) to be limited and therefore did not violate his due process rights).

142. *See id.* (“Dalasta was indicted for being a prohibited person in possession of [four] firearms in violation of 18 U.S.C. § 922(g)(4) and 924(a)(2).”).

143. *See id.* (proving the criminal defendant’s incompetency by a preponderance of the evidence).

144. *See id.* at 552 (noting that the district court requested briefing from the parties to “determine whether § 4241(d) required that [defendant] Dalasta be committed to the Attorney General’s custody, or permitted the court other options.”).

145. *See id.* at 549–552 (affirming the United States District Court for the Southern District of Iowa’s commitment of the defendant, who was: (1) determined in 2012 to be mentally incompetent to stand trial due to the removal of the left temporal lobe of his brain; (2) deemed, in both 2012 and 2015, to be medically unable to restore to competency because “part of his brain [was] ‘simply missing’”; (3) acknowledged by his physician to be a “waste of resources” in being transferred to federal custody because it would “not provide any new meaningful information” because his mental condition would “not improve with time.”).

146. *See id.* at 552 (reviewing the District Court’s placing of a higher value on what it interpreted to be the textual mandate of 18 U.S.C. § 4241(d) over the well-being and liberty of the criminally accused after turning a blind-eye to the evaluating physician’s caution that committing the defendant pursuant to the statute would be both a waste of resources and would be harmful to the defendant by “removing [him] from his family, who administer his medication ‘like clockwork,’ to a [federal] facility where he may receive generic drugs.”).

not be able to regain competency, and (2) that interpreting the statute to allow for such a commitment was unconstitutional as-applied to him.¹⁴⁷ Relying heavily on its previous reasoning in *United States v. Ferro*,¹⁴⁸ the Eighth Circuit found the commitment of an individual determined mentally incompetent of an unrestorable nature to not be absurd.¹⁴⁹ In doing so, the Eighth Circuit reasoned that the commitment provides the government an opportunity to determine that defendant's dangerousness and additionally found the current handling of mentally incompetent defendants to comply with due process as set forth by the Supreme Court in *Jackson v. Indiana*.¹⁵⁰

g. Tenth Circuit

The Tenth Circuit, like other circuit courts, fallaciously construed Congress' use of the word "shall" instead of "may" to be indicative the "unambiguous and mandatory" commitment of a mentally incompetent individual under Section 4241, ignoring other and more logical alternatives.¹⁵¹ Citing to *Shawar*, along with a slew of circuit courts who have too found a mandatory duty to commit a mentally incompetent defendant to the custody of the Attorney General, the Tenth Circuit upheld the lower court's commitment of the defendant despite her argument that such a commitment was not necessary—and

147. *See id.* at 551 (reciting the assertions of the defendant on appeal).

148. *See Ferro*, 321 F.3d at 762 (holding: (1) although the medical reports presented in the underlying action established that the defendant suffered from dementia and his mental incompetency was permanent, 18 U.S.C. § 4241 provides the Attorney General with time to explore medical options; (2) under the statutory scheme, commitment to the Attorney General is *mandatory*—and does not provide the court discretion to not commit a mentally incompetent defendant—after the defendant is deemed mentally incompetent; (3), the limited time period of hospitalizations ordered under the statute is not inconsistent with due process; and (4), the government is guaranteed a dangerousness hearing under 18 U.S.C. § 4246 prior to a defendant's release due to their mental incompetency to stand trial).

149. *See Dalasta*, 856 F.3d at 553 (finding a mandatory duty on part of the court, where the judge has "no discretion in [deciding] whether or not to commit him . . . even if there is undisputed medical evidence that the defendant cannot be restored to competency").

150. *See id.* at 553–54 (relying heavily on case law to legitimize the District Court's determination and deny the defendant's appeal on all counts).

151. *See Anderson*, 679 Fed. Appx. at 711 (affirming the District Court's commitment of a defendant deemed mentally incompetent to the custody of the Attorney General, regardless of progressive nature of her condition).

unconstitutional—due to the improbability of her improvement.¹⁵² The Tenth Circuit argued that after its revision, in response to the outcome of *Jackson*, the statute became surprisingly compliant the Court’s requirements.¹⁵³ However, that argument is overbroad and ignores the unconstitutional nature of the statute when applied to individuals who will never regain competency.¹⁵⁴

h. Ninth Circuit

The Ninth Circuit recently ignored the Supreme Court’s mandate as well, finding the statute afforded the court no discretion in determining whether to abstain from committing a criminal defendant found to be mentally incompetent.¹⁵⁵ In *United States v. Quintero*, the defendant levied due process and equal protection challenges against 18 U.S.C. § 4241, both facially and as applied to her, after being placed in the custody of the Attorney General upon being diagnosed with unrestorable mental incompetency after suffering severe traumatic brain injury.¹⁵⁶ In response, the court found the statutory language to be “unambiguous” in denying the court discretion to commit a defendant to the custody of the Attorney General after being found mentally incompetent.¹⁵⁷ Although the defendant was previously deemed mentally incompetent without the possibility of regaining competency, the Ninth Circuit lazily inserted its

152. *See id.* at 713 (disagreeing with the appellant’s argument that if the statute is to require a mandatory commitment, then the blanket and unexceptional requirement violates her due process—and the due process of all that are unable to improve upon their mental incompetence—because the ability to improve is needed to preserve due process under *Jackson*).

153. *See id.* (making a hasty generalization, the Tenth Circuit concludes that the statute is constitutional as written and in application solely because the statute was revised in response to the only mandatory Supreme Court precedent addressing the statute—that precedent being *Jackson*).

154. *Cf. Shawar*, 865 F.2d at 858, 863 (holding in the face of a permanently incompetent defendant that a court has no discretion to *not* commit him); *cf. Ferro*, 321 F.3d at 762 (relying on “the miracles of science” to justify the commitment of a permanently incompetent defendant).

155. *See Quintero*, 995 F.3d at 1050 (surveying the language used by Congress in 18 U.S.C. § 4241 and its sister provisions to require—regardless of the circumstances—the commitment of a criminal defendant too incompetent to stand trial).

156. *See id.* at 1049 (listing the various challenges the appellee raised due to her “mandatory inpatient commitment under § 4241(d)).

157. *See id.* at 1048–1050 (“The statute is clear that upon finding a defendant mentally incompetent to stand trial, “the court shall commit the defendant to the custody of the Attorney General” and that “[t]he Attorney General shall hospitalize the defendant for treatment in a suitable facility.”).

holding in a prior decision and assumed such holding applied to all circumstances without exception.¹⁵⁸

i. The Supreme Court's Missed Opportunity to Detangle the Web

Recently, the Supreme Court, in *United States v. Comstock*, reviewed a challenge to the constitutionality of 18 U.S.C. § 4248—a sister statute to that analyzed in this comment, which pertains to the civil commitment of sexually dangerous persons.¹⁵⁹ Respondents contended Congress exceeded its powers under the Necessary and Proper Clause in enacting the statute because it permits the Government to civilly commit an individual for an indefinite period of time beyond the date that defendant would otherwise be released.¹⁶⁰ Unfortunately, the Supreme Court tiptoed around evaluating the due process implications of 18 U.S.C. § 4248 on its face or as-applied.¹⁶¹ Instead, the Court narrowly focused on the “breadth of the Necessary and Proper Clause, [] the long history of federal involvement in this arena, [] the sound [Governmental] interest in safeguarding the public from dangers posed by those in federal custody, [] the statute’s accommodation of state interests, and [] the statute’s narrow scope” to affirm Congress’s connotational power source to enact 18 U.S.C. § 4248.¹⁶²

The Court, in an attempt to paint constitutional makeup onto the pig that is 18 U.S.C. § 4248, discussed the illusions of procedural safeguards set forth by the statute; such as requiring accused, mentally incompetent individuals be “represented by counsel” and have the opportunity to

158. *See id.* at 1054 (relying on its previous decision in *United States v. Strong*, the court reasserted its conclusion reached in an entirely separate case presenting differing circumstances, and blanketly concluding that Section 4241(d) does not violate substantive due process).

159. *See* 18 U.S.C. § 4248 (treating those that are sexually dangerous very similar to those that are mentally incompetent); *see also Comstock*, 560 U.S. at 149 (holding the civil detainment of an individual, due to their mental incompetency, beyond the date in which they are sentenced to be released from prison, to be constitutional).

160. *See id.* at 146 (arguing that the civil commitment of an individual solely for reasons relating to their mental condition is too far removed from a specifically enumerated power to be considered constitutional legislation under the Necessary and Proper Clause).

161. *See id.* at 133 (assuming, but not deciding, that the Due Process Clause does not impede upon Congress’s powers under the Necessary and Proper Clause to enact the statute challenged).

162. *See id.* at 146–49 (stating that the “implied power to punish” allows the Court to infer “both the power to imprison . . . and [] the federal civil-commitment power.”)

confront the Government and its witness(es) at a hearing.¹⁶³ In finding constitutional solace in these requirements set forth by Congress, the Court seemingly forgot—or perhaps, overlooked—the very reason why an individual is subject to such a provision and in the custody of the Government.¹⁶⁴ That reason being that the defendant was deemed mentally incompetent and therefore unable to stand trial, consult with that defendant’s attorney, understand the proceedings against them, and/or confront witnesses in trial.¹⁶⁵ Illogically, the Justices found the procedural safeguards that the defendant was too incompetent to take advantage of to be indicative of the statute’s constitutional power source.¹⁶⁶ Further, although the analysis in *Comstock* applied Section 4248 to an individual in the custody of the Bureau of Prisons pursuant to a plea of guilty to a crime, the Court failed to consider the dangerous precedent it set in declaring the constitutionality of 18 U.S.C. § 4248, codifying the twice removed and inferred power to commit any criminally accused individual in a federal courthouse civilly.¹⁶⁷

163. *See id.* at 130 (citing 18 U.S.C. § 4248) (discussing the hoops the Government must jump through to *indefinitely* detain an individual under 18 U.S.C. § 4248).

164. *Compare id.* at 133 (establishing the Court will not analyze the due process implications of the statute); *with supra*, at 140 (basing the law’s constitutionality on the “various [due process] procedural safeguards” in place; however, neglecting to analyze or question those safeguards).

165. *See* 18 U.S.C. § 4248 (applying to individuals in the “custody of the Attorney General pursuant to Section 4241(d)”).

166. *See Comstock*, 560 U.S. at 130 (holding that “the Constitution grants Congress the authority to enact § 4248 as ‘necessary and proper for carrying into Execution’ the powers ‘vested by’ the ‘Constitution in the Government of the United States.’”) *but see* *United States v. Comstock*, 551 F.3d 274, 278–80 (5th Cir. 2009), *rev’d*, 560 U.S. 126 (2010) (reviewing Congress’s exercise of power under the Necessary and Proper Clause and prohibiting Congress from solely relying on the Necessary and Proper Clause as a Congressional power source because it “creates no constitutional power; rather, it merely permits Congress ‘[t]o make all Laws which shall be necessary and proper for carrying unto Execution . . . all . . . Powers vested by this Constitution . . .’”; turning to the Government’s supplemental reliance on Congress’ Commerce Clause powers to validate its enactment of 18 U.S.C. § 4248).

167. *See Comstock*, 560 U.S. at 146–47 (stating the federal power to civilly commit individuals found to be mentally incompetent is derived from the implied power to punish, that accommodates an additional inference of the power to imprison) (analogizing such leaps and bounds to its jurisprudence regarding federal spending and effectively quantifying an individual’s freedom and guarantees of due process—a protection of the individual from the government inscribed into the Bill of Rights—to be the equivalent of paying taxes—ironically, a contribution an individual makes in exchange for the government’s guarantee of those protections set forth in the Bill of Rights, along with other guarantees).

B. Due Process analysis

The Due Process Clause of the Fifth Amendment protects against two forms of government action: invasions of substantive due process and violations of procedural due process.¹⁶⁸ Substantive due process sets forth a general prohibition on the government to refrain from “engaging in conduct that shocks the conscience [of the court], or interferes with rights implicit in the concept of ordered liberty.”¹⁶⁹ Comparatively, procedural due process requires government action “be implemented in a fair manner.”¹⁷⁰ Some courts concede that “commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”¹⁷¹ The United States Supreme Court has recognized that “indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial” is inconsistent with constitutional due process guarantees.¹⁷² In recognizing the due process interests at stake when committing a mentally incompetent and criminally-accused individual, the Court was cognizant of both the procedural and substantive nature of those constitutionally guarded interests.¹⁷³

The Fifth Circuit aptly recognized the liberties at stake in detaining the mentally incompetent and criminally accused:

The government’s “power to bring an accused to trial is fundamental to a scheme of ordered liberty and prerequisite to social justice and peace.” *Magassouba*, 544 F.3d at 402–03 (collecting authority); *see also Sell*, 539 U.S. at 180, 123 S.Ct. 2174. Congress may authorize the custody of persons awaiting trial, provided such commitment proceedings

168. *See United States v. Salerno*, 481 U.S. 739, 746 (1987) (reviewing a challenge to the Bail Reform Act on due process grounds).

169. *See Quintero*, 995 F.3d at 1051 (laying the foundation to review the defendant’s substantive and procedural due process claims against 18 U.S.C. § 4241(d)).

170. *See generally Salerno*, 481 U.S. at 746 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (defining the requirements of the Due Process Clause of the Fifth Amendment).

171. *See Dalasta*, 856 F.3d at 554 (citing *Revels v. Sanders*, 519 F.3d 734, 740 (8th Cir. 2008)) (addressing the defendant’s claim that his commitment to federal custody pursuant to 18 U.S.C. § 4241, despite the physician that performed the incompetency evaluation cautioning the court that federal commitment would be detrimental to his health and could not possibly result in a restoration of competency).

172. *See Jackson*, 406 U.S. at 731 finding Indiana’s indefinite commitment of mentally incompetent defendants to be noncompliant with due process so required by the Fifth Amendment and extended to the states through the Fourteenth Amendment).

173. *See id.* at 720 (referencing the procedural and substantive requirements under the commitment statute before the Court).

comport with due process. *See Greenwood v. United States*, 350 U.S. 366, 375, 76 S.Ct. 410, 100 L.Ed. 412 (1956). The Due Process Clause of the Fifth Amendment circumscribes federal prosecutorial power in two relevant respects. First, it proscribes “the criminal trial of an incompetent defendant.” *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (citations omitted). Second, it recognizes “a substantial liberty interest in avoiding confinement in a mental hospital. Because “commitment for any purpose constitutes a significant deprivation of liberty,” *Zinnermon*, 494 U.S. at 131, 110 S.Ct. 975 (citation omitted), the government must advance a “sufficiently compelling” interest to justify pretrial detention.¹⁷⁴

1. Procedural Due Process

Procedural due process requires the government to “follow certain procedures before it takes a person’s life, liberty or property.”¹⁷⁵ Such procedures can be narrowed down to two requirements: first, that the defendant has notice of the charges against him, and second, that the defendant has an opportunity to be heard.¹⁷⁶ The Court has recognized the vital importance in ensuring procedural due process is upheld:

‘The history of American freedom is, in no small measure, the history of procedure.’ But, in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. ‘Procedure is to law what ‘scientific method’ is to science.’¹⁷⁷

A court’s evaluation of a procedural due process claim requires it to initially consider “whether governmental action has deprived an

174. *See McKown*, 930 F.3d at 726 (setting the stage for its review of the constitutionality of 18 U.S.C. § 4241, pursuant to the defendant’s contention that “the district court violated his substantive due process rights by ordering his commitment despite the doctor’s testimony that it was unnecessary to determine the likelihood of recovery.”).

175. *See ARIENS*, *supra* note 39, at 367 (describing procedural due process under the Fifth Amendment of the United States Constitution).

176. *See id.* (listing the components of procedural due process).

177. *See In re Gault*, 387 U.S. 1, 21 (1967) (reviewing the different procedural treatment of a juvenile defendant and an adult defendant under Arizona law).

individual of a constitutionally protected interest.”¹⁷⁸ Such an interest is clear here—the government purports to take away the liberty of the mentally incompetent and criminally accused.¹⁷⁹ If the court finds a constitutionally protected interest at stake, it must evaluate whether the procedures provided were constitutionally sufficient.¹⁸⁰ To determine whether the procedures used were adequate to provide an individual defendant proper notice and an opportunity to be heard, a court will consider: (1) the private interest affected by the government action; (2) the risk of erroneous deprivation of such interest through the procedures used; (3) the value of any additional or substitute safeguard used to maintain due process procedure; and (4) the burden that may be placed on the government and its interest by requiring of it those additional or substitute procedural safeguards.¹⁸¹

Although the Supreme Court has declined to hear any challenges to 18 U.S.C. § 4241, including due process claims, the Court did consider such a challenge to an analogous statute.¹⁸² Section 3142 of the Comprehensive Crime Control Act, otherwise known as the Bail Reform Act¹⁸³—allowed for the indefinite detainment of an individual with pending criminal charges if the “government prove[d] by clear and convincing evidence after an adversary hearing that no bail conditions ‘will reasonably assure . . . the safety of any other person and the community’”—was brought before the United States Supreme Court, in a challenge to its constitutionality under the Due Process Clause of the Fifth Amendment.¹⁸⁴

178. See *McKown*, 930 F.3d at 730 (laying the foundation for its review of procedural due process claim under 18 U.S.C. § 4241(d)).

179. See U.S. CONST. amend. V (“[N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .”); see also *id.* at 731 (acknowledging the deprivation of liberty that occurs when a criminal defendant is committed pursuant to 18 U.S.C. § 4241); see also *ARIENS*, *supra* note 39, at 368 (stating that the relevance of procedural due process is clear when the government seeks to imprison a person—“(taking his liberty)”).

180. See *McKown*, 930 F.3d at 730 (discussing the step-by-step jurisprudential analysis of procedural due process claims).

181. See *Eldridge*, 424 U.S. at 335 (listing procedural due process considerations).

182. See generally *Salerno*, 481 U.S. at 739 (reviewing the Bail Reform Act—allowing for pretrial detention due to future dangerousness—against a due process challenge).

183. See 18 U.S.C. § 3142 (1982) (governing the release of a defendant pending trial).

184. See *id.* (governing the release of a defendant pending trial), but see David O. Stewart, *PRETRIAL DETENTIONS UPHOLD*, 73 A.B.A. J. 54 (1987) (criticizing *Salerno*).

The United States Supreme Court held that statute to be facially constitutional because the detention of the criminally accused did not serve as punishment, but as a solution to the “pressing societal problem of crimes committed by persons on release.”¹⁸⁵ The Court went on to explain the narrowly tailored nature of the law preserves its constitutionality; asserting it solely affects arrestees for certain “extremely serious offenses.”¹⁸⁶ Lastly, the Court found the Bail Reform Act to be facially constitutional under the Fifth Amendment’s Due Process requirements because it included “extensive procedural safeguards” accompanied by detailed congressional guidance in determining which arrestees should be detained pursuant to this statute.¹⁸⁷ Those determinations should be made under the consideration of “the nature and seriousness of the charges, the substantiality of the Government’s evidence against the arrestee, the arrestee’s background and characteristics, and the nature and seriousness of the danger posed by the suspect’s release.”¹⁸⁸ However, the statute at issue here does not provide for any considerations or determinations to be made in discerning whether a mentally incompetent defendant should be committed.¹⁸⁹ Likewise, circuit courts have found no discretion whatsoever in making that determination—effectively paving a one-way toll between mental incompetency prior to a criminal trial and a deprivation of liberty, regardless of the circumstances at hand.¹⁹⁰ Even if such considerations

185. *See Salerno*, 481 U.S. at 739 (weighing the criminally accused’s interest in liberty against the Government’s interest in public safety).

186. *See id.* at 740 (rationalizing that an individual criminally *accused*—but not convicted and therefore not guilty—of extremely serious offenses assumably poses a danger so great to the public safety that their constitutionally commemorated Due Process rights are outweighed).

187. *See id.* at 742 (finding comfort in the fact that a judicial officer is not given “unbridled discretion” in determining who should be detained pursuant to the statute).

188. *See id.* at 742–43 (favoring the statute’s broad grant of discretion to the judicial officer) (requiring that judicial officer to conduct an impromptu bench trial in determining whether to detain or release an arrestee) (asking the officer to consider the charge against the merits of the evidence to make such a determination. Notably, this evidence is reviewed by a judicial officer prior to passing any of the procedural safeguards of due process in a criminal trial.).

189. 18 U.S.C. § 4241(d) (requiring the defendant be found to be “presently suffering from a mental disease or defect rendering him mentally incompetent” by a preponderance of evidence in order for the court to “commit the defendant to the custody of the Attorney General.”).

190. *See* Section III.a.iii (analyzing the illogical interpretation the circuit courts have adopted of Section 4241 in light of the Supreme Court’s precedent in *Jackson*); *see also Jackson*, 406 U.S. at 715 (striking down a statute that allows a mentally incompetent defendant to be detained for an undefined period of time, but also accommodating the release of that person at any time; *but*

were provided for in Section 4241, certain members of the Court would not have been swindled, as seen in Justice Marshall and Justice Brennan's blatant dissent of the Court's disregard for guaranteed Constitutional rights, arguing that

a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.¹⁹¹

Other courts have found the rebuttable presumption presented by the Bail Reform Act of 1984¹⁹² to be inconsistent with the government's burden of persuasion to establish all elements of that crime beyond a reasonable doubt before that defendant may indefinitely be detained.¹⁹³ Similarly, 18 U.S.C. § 4241 allows the Attorney General to detain an individual "suffering from a mental disease or defect rendering [that person] mentally incompetent to the extent that [the person] is unable to understand the nature and consequences of the proceedings against [that person] or to assist properly in [that person's] defense, the court shall commit the defendant to the custody of the Attorney General."¹⁹⁴

see McKown, 930 F.3d at 730 (allowing detainment when a defendant's mental competency is being questioned).

191. *See Salerno*, 481 U.S. at 755–56 (Marshall, J., dissenting) (dictating his disagreement with the majority opinion that upholds the very governmental acts this nation and its founding documents are predicated upon outlawing).

192. *See id.* at 748–49 (piecing case precedent together to craft a rebuttable presumption that the defendants who committed violent crimes and are deemed a present danger to the community" must be detained until proven otherwise).

193. *See Karper*, 847 F. Supp. 2d 350 at 355 (holding various provisions of the Bail Reform Act unconstitutional); *see also* *United States v. Laurent*, 861 F. Supp. 2d 71, 91 (2011) (commenting that an individual "may [] be subject to pre-trial release condition that infringe upon his constitutional rights" under the Bail Reform Act of 1984).

194. *See* 18 U.S.C. § 4241(d) (granting the Attorney General the authority to hospitalize the defendant until "the pending charges against him are disposed of" if "the court finds that there is a

While evaluating procedural due process under 18 U.S.C. § 4241(d), the Fifth Circuit found the initial hearing provided under § 4241(a)—which determines incompetency—provided sufficient notice, as required by procedural due process.¹⁹⁵ The Fifth Circuit quickly moved on to refute the second consideration of procedural due process—holding that because the Appellee conceded he was mentally incompetent and because the purpose of confinement under the statute is to evaluate him rather than restoring his condition, “limited pretrial commitment under § 4241(d) is ‘within the range of conditions’ to which an incompetent defendant might reasonably be subject.”¹⁹⁶ In evaluating any alternative procedural safeguards, the Fifth Circuit determined the government’s “substantial interest in pursuing a correct diagnosis and in prosecuting trials in a fair and timely manner” outweighed the interest of granting another hearing.¹⁹⁷ However, the opinion failed to consider how granting a hearing to determine the best course of action for evaluating and treating mentally incompetent defendants—as required under the former version of 18 U.S.C. § 4241, § 4244—would inhibit that heightened government interest rather than protect mentally incompetent individuals from liberty deprivation.¹⁹⁸

The Fifth Circuit found that a preliminary hearing, in and of itself, is sufficient to provide that defendant notice and opportunity for his grievances to be heard; however, the sole purpose of the hearing is to determine mental incompetency and provide grievances based on the

substantial probability that within [an unspecified and potentially indefinite] period of time he will [not] attain the capacity to permit the proceedings to go forward . . .”).

195. See *McKown*, 930 F.3d at 731 (disagreeing with the Appellee’s claim that he received “no meaningful process concerning the nature, duration, and necessity of confinement . . .” and refuting his demand that he be provided an additional hearing to address his concerns regarding his automatic commitment. The Fifth Circuit stated simply that § 4241 complied with *Jackson* and due process and consequently found Appellee’s position to “rest on the false predicate that he cannot be automatically committed upon a mere finding of incapacity”).

196. See *id.* at 732 (attempting to distinguish the issue at hand from the Supreme Court’s finding of a procedural due process violation in *Vitek v. Jones*, 445 U.S. 480 (1980)).

197. See *id.* (analyzing the final prong of the procedural due process).

198. Compare *id.* (holding the initial incompetency hearing required under the current version of 18 U.S.C. § 4241 to be sufficient to satisfy procedural due process requirements); with *Marino*, *supra* note 95, at 171 (finding a lack of procedural certainty in the current code, 18 U.S.C. § 4241, in comparison to its previous version, 18 U.S.C. § 4244 (1949)) (noting that the current version affords the court judicial scrutiny to order a psychiatric examination prior to the mandated incompetency hearing; whereas the previous version required it—giving a greater effect to the notice and opportunity to be heard provided by that hearing).

outcome, defeating the sole purpose of the hearing.¹⁹⁹ Since the lower court conducted a hearing, the Fifth Circuit illogically established that the defendant received the constitutional opportunity to be heard; however, it failed to consider that the grievances were not identifiable until the hearing came to an end.²⁰⁰ The Fifth Circuit's dismissive reasoning in *United States v. McKown* serves as direct evidence of the danger that ambiguous statutes pose—especially when rights with such gravity, such as those realized in procedural due process, are hanging in the balance.²⁰¹

2. Substantive Due Process

Substantive due process protects implicit constitutional rights recognized by the Supreme Court as fundamental.²⁰² Once a right is declared to be fundamental, a government seeking to invade those rights must have a compelling reason to do so and must do so by employing the least restrictive means.²⁰³ The inherent requirement is that all legislation, both state and federal, be reasonable.²⁰⁴ Jurisprudential analysis of an alleged deprivation of substantive due process usually requires the court to consider: (1) the purpose of the statute, (2) whether that purpose serves a compelling governmental interest, (3) whether the means used to further that interest is closely related to the purpose to be accomplished, and (4) whether the means utilized are the least restrictive.²⁰⁵

199. See *McKown*, 930 F.3d at 732 (holding that “McKown’s custody under § 4241 therefore conforms to due process.”).

200. See *id.* at 727 (failing to mention a defendant’s procedural due process right to be heard outside of its recitation of procedural due process requirements).

201. See *id.* (reciting the facts of the case, describing the mental condition of the mentally incompetent defendant, describing the proceedings of the court below, outlining the governing federal statute—18 U.S.C. § 4241—, setting forth procedural due process requirements and considerations, performing a procedural due process analysis, and reaching its conclusion in less than eleven pages. Perhaps the Fifth Circuit had a busy docket in July of 2019 and perceived the defendant’s procedural due process rights to be deserving of a less than underwhelming and cohesive analysis).

202. See *ARIENS*, *supra* note 39, at 369 (introducing substantive due process and its requirements).

203. See *id.* (setting forth high standards the government must meet if it seeks to enact laws that infringe upon one’s substantive due process rights).

204. See Steinberg, *supra* note 1, at 2 (laying the foundation of substantive due process requirements).

205. See *id.* at 3 (breaking down the factors considered by a court when a substantive due process challenge is before it); see also *ARIENS*, *supra* note 39, at 401 (illustrating the decisions that must be considered and made by a court when substantive due process is at issue).

It is uncontested that “commitment for any purpose constitutes a significant deprivation of liberty, that requires due process protection” and thereby places the liberty interest at issue in this comment squarely within those implicit rights coveted by substantive due process.²⁰⁶ It has also been established that the government has an interest in its ability to detain the mentally ill to protect its property and the safety of its citizenry.²⁰⁷ Since the reasonable purpose of the statute has been declared, the uncontestably compelling government interest has been confirmed, and the right at stake has been implied to be fundamental by the Supreme Court, one question remains: is the government using the least restrictive means of furthering that interest?²⁰⁸

The requirement to utilize the least restrictive means if a law burdens a fundamental rights requires the law be stricken as unconstitutional if “‘less drastic means for achieving the same basic purpose’ are available.”²⁰⁹ Under such a standard, 18 U.S.C. § 4241 cannot survive.²¹⁰ A statute that not only allows for, but is interpreted by the circuit courts to demand the involuntary commitment of individuals for an ambiguous period of time, irrespective of the circumstances is not reasonable—much

206. See *McKown*, 930 F.3d at 726 (“Congress may authorize the custody of persons awaiting trial, provided such commitment proceedings comport with due process.”); see also *Dalasta*, 856 F.3d at 554 (quoting *Revels*, 519 F.3d at 740 (“[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”); see also *Jackson*, 406 U.S. at 738 (“At the least, due process requires that the nature and the duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”).

207. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (establishing Congress’s authority under its police powers to protect the community from dangerous tendencies of some who are mentally ill).

208. See *ARIENS*, *supra* note 39, at 401 (coining this question to be the last of the constitutional analysis, whereas answering such a question in the negative leads to a conclusion that the government action is unconstitutional in the face of substantive due process); see also Steinberg, *supra* note 1, at 12–3 (citing to Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108 (1972) (advocating for the least restrictive means to be applied to substantive due process deprivations due to the involuntary commitment of the mentally ill).

209. See Steinberg, *supra* note 1, at 11 (outlining the burden a government must carry under substantive due process analysis (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

210. Cf. *State v. Caralluzo*, 228 A.2d 693, 695 (N.J. 1967) (condemning statutes that provide “blanket authorizations to commit persons with any condition of mental illness or mental retardation” and making note of the care and narrow-tailoring such laws must exhibit to withstand constitutional muster because such statutes “authorize[] the confinement of a person and loss of his freedom [so] the courts must be careful to see that the statute is not used as a catch-all devise to punish persons under indictment without an adjudication of guilt at a criminal trial.”).

less the least restrictive alternative.²¹¹ Initially, this ‘reasonable’ period is limited to four months but may be extended by simple request, or delayed due to the confining authority’s blatant disregard for the constitutional rights of these vulnerable persons.²¹²

There are a handful of readily available alternatives to the involuntary commitment and confinement of the mentally ill that also preserve the government’s interest in evaluating and confirming a defendant’s condition that renders them mentally ill and incompetent.²¹³ Such alternatives include: outpatient evaluation, treatment by private psychiatrists or psychologists, or remaining at home to continue receiving the routine care the defendants had grown accustomed to—of which their relative health and livelihood may depend.²¹⁴ These alternatives would allow the government to periodically evaluate the defendant’s condition while allowing the defendant to maintain their fundamental interest in his or her liberty.²¹⁵ In some cases, the treating professional called to testify on the defendant’s ongoing condition, and/or the evaluating professional appointed by the court in response to a request for a competency hearing, have both requested one of these least restrictive alternatives to preserve the health of the incompetent defendant.²¹⁶ Courts routinely deny such requests due to their perceived lack of discretion, citing the “mandate” to

211. See 18 U.S.C. § 4241 (codifying an infringement of the substantive due process rights of individuals that are scientifically proven to lack the ability to regain competency).

212. See *id.* (codifying an infringement of the substantive due process rights of individuals that are scientifically proven to lack the ability to regain competency).

213. Cf. Steinberg, *supra* note 1, at 13 (presenting two least restrictive, and more just, alternatives to “summary confinement for those defendants who are incompetent to stand trial).

214. See *United States v. Klein*, 325 F.2d 283, 285–86 (2d. Cir. 1963) (reversing a district court’s order of a mentally incompetent defendant into involuntary commitment for treatment, in lieu of his treating physician’s—who treated him for the better part of thirty years—testified that his mental retardation would prevent him from regaining competency and the best course of treatment would be to remain at home to receive the care he has grown accustomed to; whereas any alternative would fail to restore his competency and present a danger to his health. The circuit court found that such a decision by the district court was “prying [him] away from a course of treatment which had enabled him, during his period of remission, to conduct business and maintain social intercourse without the necessity of institutionalization.”).

215. See *id.* at 286 (resolving the appeal before it by striking such a balance).

216. See *Dalasta*, 856 F.3d at 554 (arguing that “‘forcing [his] commitment to the BOP, far from home, for evasive evaluations, for up to four months, when physicians say it would be detrimental to his health (and completely futile)’ violates his liberty interest under the Due Process Clause.”).

commit any and all defendants found incompetent under § 4241.²¹⁷ As the Second Circuit demonstrated more than fifty years ago, a least restrictive alternative is available—which can serve as a safer, more compassionate “solution acceptable to all concerned.”²¹⁸ In order to preserve the embedded American principle that *all* are innocent until proven guilty, either the governing statute must be revised, or the federal courts must take it upon themselves to rewrite years of unjust and illogical applications of 18 U.S.C. § 4241.²¹⁹

Although the focus of this comment is federal infringement of the substantive due process rights unreasonably stripped from those criminally accused who have presented to the court with scientific certainty that they cannot regain that competency, the Supreme Court saw fit to capture the most shocking treatment of these individuals across the various states.²²⁰ After taking note of the vital substantive due process rights at stake and canvassing the messy statutory landscape the states have enacted to handle such fragile matters, the Supreme Court found it “remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.”²²¹ Perhaps these individuals

217. *See id.* (disagreeing with the Appellees’ contention in citing to the “mandate [for] a limited commitment to the Attorney General” after the court has found the defendant to be incompetent to stand trial).

218. *See Klein*, 325 F.2d at 286 (reversing the district court’s order of involuntary commitment due to mental incompetency and formulizing least restrictive alternatives like treatment by private psychiatrists while the indictment remains outstanding pursuant to periodic visitation of the defendant’s condition).

219. *Compare* Section III.a (discussing the many missteps made by the circuit courts in applying 18 U.S.C. § 4241—allowing for the involuntary commitment of mentally incompetent defendants, which at times, have lasted years); *with* Steinberg, *supra* note 1, at 12 (“Like all others involuntarily confined, the criminally incompetent defendant suffers a grievous denial of liberty. Further, although he has been charged with a criminal offense, he has not yet been convicted. To impose more onerous burdens upon him solely because of outstanding charges runs counter to the fundamental American precept that an accused is presumed innocent until proven guilty.”).

220. *See Jackson*, 406 U.S. at 736–37 n.19 (describing the “drastic” variance amongst the states’ “substantive limitations on the exercise of” their power to commit the criminally accused, mentally ill—noting that “a few States had no statutory criteria at all, presumably leaving the determination to judicial discretion.”).

221. *See id.* at 737 (comparing the “number of persons affected”—citing to a finding that in 1961, “it was estimated that 90% of the 800,000 patients in mental hospitals in this country had been involuntarily committed”—with the unreliable variance presented by the states’ statutory approaches to their infringement of the mentally incompetent’s substantive due process rights, to arrive at the surprising conclusion that the obviously unconstitutional treatment of these individuals are not constantly trudging up the courthouse steps).

are too mentally vulnerable to understand that their government is abandoning its time-honored promise to refrain from depriving them of life, liberty, or property without utilizing the least restrictive means of doing so.²²² The lack of statutory challenges do not indicate constitutional compliance, especially when the targeted population is too mentally cognizant of assisting in their own defense.²²³ Are we to expect those individuals, too incoherent to stand proceedings instituted against them, to conjure up the competency to initiate constitutional challenges?²²⁴ Such an expectation is as facially absurd as the statutes wielded against this vulnerable population.²²⁵

III. SOLUTION

A. *Who can Clean up this Mess?*

The perpetrator currently holding the due process rights of hundreds of thousands of vulnerable and, likely elderly, Americans hostage resides in the Chapter 313 of Title 18 of the United States Code.²²⁶ The hostage-keeper of that Chapter is Section 4241, specifically governing: the mere motion made to determine competency of the defendant, the proper examination of a defendant's mental state, and the subsequent hearing.²²⁷

222. See ARIENS, *supra* note 39, at 369 (instructing that “[s]ubstantive due process means that, as a matter of substantive constitutional law, certain rights may not be infringed through federal or state legislation or other governmental action unless the government has a compelling reason for doing so and has used the least restrictive means available to do it.”).

223. See 18 U.S.C. § 4241 (codifying the government's ability to detain a criminally accused individual for an undefined period of time if “the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequence of the proceedings against him or to assist properly in his defense . . . [.]”).

224. See *generally id.* (“The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense[.]”).

225. Cf. Steinberg, *supra* note 1, at 2–3 (“Statutes which provide for summary commitment of incompetent defendants without a provisional trial on the outstanding charges are patently unreasonable, and violate substantive rights guaranteed by the Constitution.”).

226. See 18 U.S.C. §§ 4241–4248 (comprising Chapter 313 of Title 18 of the United States Code, governing offenders with mental disease and defect).

227. See *id.* at § 4241(a)–(c) (referencing to other sections within Chapter 313 to, in further detail, govern the procedures to be followed in examining the defendant and in holding the hearing to present the findings of that examination to the court).

Section 4241(d) addresses a court's determination, and is arguably the most error-ridden and detrimental subsection of the statute: codifying the Attorney General's ability to detain a criminally-accused—but not convicted—mentally incompetent defendant for an undefined period of time.²²⁸

The root of the problem lies within the imbalance demonstrated in the ambiguity of the codified text as opposed to the gravity of the liberties those ambiguities purport to least restrictedly govern.²²⁹ Although the legislature traditionally codifies statutes ambiguously to avoid difficulties in application difficulties, or they may simply arise as a result of a legislative compromise, the courts must interpret the ambiguity formed.²³⁰ Unfortunately, the federal courts have exacerbated the problem by interpreting the statute as illogical and unconstitutional while simultaneously misconstruing the single shred of Supreme Court precedent provided on this issue.²³¹ A Supreme Court opinion reviewing Section 4241 would likely be insufficient to combat the overhaul of the due process rights of disabled and vulnerable Americans with dementia, as the precedent set by *Jackson v. Indiana* has served as a twisted standard to the convenience of the circuit court charged with review.²³² Soon, the

228. See *id.* at (d) (allowing for the commitment of a defendant to the custody of the Attorney General “for such a reasonable period of time, [initially] not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and for an [unlimited and undefined] additional period of time until his mental condition is so improved that trial may proceed . . . [.]”).

229. See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

230. See Valerie C. Brannon, CONG. RSCH. SERV. REPORT, R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS at 1–2 (2018) (describing why statutory provisions may be drafted ambiguously and placing the responsibility on the courts to “interpret the law, ambiguous or not.”).

231. See *Shawar*, 865 F.2d at 860 (“The plain meaning of this phrase is, and we hold it to be, that one a defendant is found incompetent to stand trial, a district judge has no discretion in whether or not to commit him[.]”); see also Section III.a.iii (surveying the circuit court’s stumbling through interpretation of Section 4241, especially as applied to individuals that are medically certain to be unable to regain mental competency).

232. See *Jackson*, 406 U.S. at 738 (setting the precedent which became the root of the problem for circuit courts) (1972); see also n. 109 (revealing the inconsistency between the Court’s holding in *Jackson* and the Seventh Circuit’s interpretation of the analogous federal statute); see also n. 116 (listing circuit courts that have blindly followed the illogical precedent set by the Seventh Circuit); see also n. 121 (citing the Eleventh Circuit’s faulty reconciliation of its understanding of Section 4241 and the due process requirements established in *Jackson*); see also

due process rights of nearly one in every five Americans could lie in the hands of Section 4241's ambiguous language.²³³

B. How can Disorder of Such Gravity be Remedied?

There is a straightforward answer to restore due process to the vulnerable and seemingly forgotten population of the criminally accused individual with dementia: Congress must revise the ambiguous statute to prevent the courts from elongating its erroneous thirty-year track record.²³⁴ In effect, Congress should primarily focus on revising Section 4241(d) of the United States Code.²³⁵ First, Congress must codify the due process requirements set forth by the Supreme Court in *Jackson v. Indiana*.²³⁶ To do so, Congress should allow a defendant to be committed pursuant to Section 4241(d), so long as at the competency hearing there is a failure to demonstrate, by a preponderance of the evidence, the defendant is scientifically or medically certain never to regain competency.²³⁷ Congress should codify the disposition of those individuals to compensate for the governmental interest in continuing to monitor those individuals deemed uncommittable.²³⁸ Congress could look to suggestions posed by academics and the Second Circuit almost

n. 127 (demonstrating the First Circuit's reliance on the Seventh and Eleventh Circuit's precedent—not its own reasoning or Supreme Court standards—to support its contention that 4241 complies with due process); see also n. 129 (exposing the unreasoned thought process of the Second Circuit in committing a defendant that is found to never regain competency allows the Court to make the determination mandated by *Jackson*); see also n. 135 (conceding if the defendant could not restore competency, their commitment is considered unconstitutional under *Jackson*).

233. See *Alzheimer's and Dementia: Facts and Figures*, supra note 28 (foreseeing that nearly 13 million people will suffer from just one form of dementia by 2050).

234. Cf. Brannon, supra note 230 (revealing that most judges today try to act as "faithful agents" of the legislature—suggesting that the legislature is the appropriate body to lead the way in rectifying the democratic wrong that is the focus of this comment).

235. See 18 U.S.C. § 4241(d) (governing the determination and disposition of defendants found mentally incompetent).

236. See *Jackson*, 406 U.S. at 738 (delineating that "a person charged with a criminal offense who is committed solely on his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future[.]").

237. See 18 U.S.C. § 4241(d) (providing a court with the authority to commit any defendant, proven by a preponderance of the evidence, to be mentally incompetent).

238. See *Addington*, 441 U.S. at 418 (establishing the government's compelling interest in protecting the community from dangers posed by the mentally ill and to properly disposing of proceedings against this population).

sixty years ago to constitutionally balance the government's interest against disabled individuals' liberty and well-being.²³⁹ As this population rapidly grows, hopefully this injustice does not need to deprive millions of Americans their constitutional guarantee in order for Congress to open its eyes—Americans, even disabled ones, are innocent until proven *guilty*, not until proven *mentally incompetent*.²⁴⁰

CONCLUSION

This Nation was founded upon and has long stood for the guarantee of due process to *all*.²⁴¹ Section 4241 has eroded that foundation for the vulnerable population of individuals that stand criminally accused but medically certain to be unable to regain mental competency.²⁴² Today, 18 U.S.C. § 4241 remains good law; the mentally ill enjoy a redacted Constitution with the Fifth Amendment carved into oblivion.²⁴³

In a few decades, one in every five Americans will not only surrender their cognitive and physical freedom to the physiological prison of dementia; but also surrender their due process rights if they stray into a criminal conviction.²⁴⁴ These vulnerable people are faced with the reality

239. See *Klein*, 325 F.2d at 285–86 (reversing the commitment of a mentally incompetent defendant in part due to the resulting deprivation of the treatment of his regular physician, who preserved his health for almost thirty years, and recognizing the best course of treatment to be the defendant remaining at home where the government could periodically visit and further confirm the irreversible nature of his incompetency to satisfy its government interest); see also Steinberg, *supra* note 1, at 13 (proposing “outpatient therapy and treatment by a private psychiatrist or psychologist” in lieu of voluntary commitment of mentally incompetent defendants).

240. *Alzheimer's and Dementia: Facts and Figures*, *supra* note 28 (projecting it will only take thirty-years for one in five Americans to suffer from Alzheimer's).

241. See U.S. CONST. amend. V (guaranteeing due process rights to all persons).

242. See 18 U.S.C. § 4241(c) (allowing only an initial hearing to be had to determine mental incompetency and failing to provide for the defendant's procedural due process right to have his or her grievances heard; whereas such grievances would arise as a result of the disposition of that defendant performed *after* the hearing); see also *supra*, at § 4241(d) (requiring only that a criminally-accused defendant be found mentally incompetent by a preponderance of the evidence to allow the Attorney General to have custody over that defendant for an undefined, “reasonable” amount of time—depriving the defendant of his or her substantive due process rights to retain his or her life and liberty until he or she has received due process of law).

243. Compare U.S. CONST. amend. V (prohibiting the states from depriving individuals of “life, liberty, or property, without due process of law”), with Section III.a.iii (demonstrating the circuit courts' failure to uphold the Fifth Amendment for the mentally incompetent who are criminally accused).

244. *Alzheimer's and Dementia: Facts and Figures*, *supra* note 28 (predicting that one in every five Americans will suffer from Alzheimer's by the year 2050); see also *Dementia Overview*,

that they could be robbed from their families, treating physicians, and routine medical care that upholds the integrity of their health and quality of life post dementia diagnosis, to be traded for possibly indefinite detainment in a facility approved by the Attorney General.²⁴⁵ Imprisoned due to their mental incompetency, proved by a preponderance of the evidence—not due to their criminal guilt proved beyond a reasonable doubt—this suffering and forgotten population will be left awaiting the day they transform into a medical miracle and become the first person to recover from dementia so that they may finally have their constitutionally guaranteed day in court.²⁴⁶ The due process rights—that every person is innocent until proven guilty, *not* until proven mentally incompetent—of soon to be one in every five Americans are in the hands of the United States Congress.²⁴⁷ Will they pick up the pen and write the Fifth Amendment back into the Constitution upheld for the mentally incompetent and criminally accused?

supra note 22 (listing common symptoms of dementia, including: memory loss, confusion, disorientation, personality changes, depression, anxiety, inappropriate behavior, paranoia, agitation, and hallucinations).

245. See *Alzheimer's and Dementia: Facts and Figures*, *supra* note 28 (predicting that one in every five Americans will suffer from Alzheimer's by the year 2050); see also *Dementia Overview*, *supra* note 22 (listing common symptoms of dementia, including: memory loss, confusion, disorientation, personality changes, depression, anxiety, inappropriate behavior, paranoia, agitation, and hallucinations).

246. Compare *Jackson* 406 U.S. at 715 (allowing for a criminally accused individual detained solely due to their mental incompetency to only be held for a reasonable amount of time to make the determination as to whether that defendant will reasonably regain competency in the foreseeable future, and for the time required to soon regain that competency); with *Lotte Berk, ET AL.*, *supra* note 21 (discussing the progressive nature of dementia and its symptoms, as well as the unfortunate fact that there is no cure for the disease).

247. See *Alzheimer's and Dementia: Facts and Figures*, *supra* note 28 (warning that approximately one out of every five Americans is projected to suffer from Alzheimer's, just *one* form of dementia, by 2050).