# Challenges to Mandatory Detention Under U.S. Immigration Law

By Margaret W. Wong

*Mandatory detention of aliens facing removal proceedings is becoming more prevalent. This provision of the law provides that certain classes of aliens, mainly those with criminal records, are subject to detention without an opportunity for bond during removal proceedings. This is true despite the fact that the person may be eligible for relief that would allow him or her to remain in the United States. The impact is often devastating as aliens are often detained significant distances from their lawyers and families, making it difficult to present their cases to an immigration judge. There are many ways in which aliens can challenge the mandatory detention provision of the immigration law and obtain a bond hearing.*

When an alien (that is, a person who is not a U.S. citizen or national) is subjected to removal proceedings, either upon attempting to enter the United States or after his or her entry, it is always possible that he or she will be detained until the completion of removal proceedings. Most aliens (not including the so-called arriving aliens[1]) subject to these proceedings have the right to a custody redetermination hearing—commonly referred to as a "bond hearing"—before an immigration judge, who may order the alien's release on his or her own recognizance or a monetary bond, if the judge concludes that the alien is not a flight risk or a danger to the community.

A large category of the so-called criminal aliens is subject to "mandatory" detention, pursuant to § 236(c) of the Immigration and Nationality Act (INA), also codified at 8 U.S.C. § 1226(c). This provision was added by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[2] which was signed into law on Sept. 30, 1996, in order to assure and expedite the deportation of aliens who are allegedly removable based on "aggravated felony," possession of a controlled substance, offenses involving firearms, and other criminal grounds, as well as certain grounds related to subversive activities. Thus, under IIRIRA provisions, the following categories of removable aliens are subject to mandatory detention:

- aliens who are *inadmissible* by reason of having committed any offense covered in 8 U.S.C. § 1182(a)(2), INA § 212(a)(2) (for example certain crimes involving moral turpitude, controlled substance violations, multiple criminal convictions, prostitution, and money laundering) as well as certain aliens involved in serious criminal activity who have asserted immunity from prosecution and foreign government officials who have committed severe violations of religious freedom and traffickers in persons;
- aliens who are *deportable* by reason of having committed any offense covered under 8 U.S.C. § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D), INA § 237(a)(2)(A)(ii), (A)

(iii), (B), (C), or (D) (including multiple criminal convictions, aggravated felonies, controlled substances violations, certain firearm offenses, espionage, sabotage, or treason with a penalty of imprisonment for five years or more; threats against the President; violations of the Neutrality Act, Military Selective Service Act, or Trading with the Enemies Act; travel control crimes; and importation of aliens for immoral purposes);
- aliens who are deportable on the basis of having committed a crime of moral turpitude with a sentence of at least one year of imprisonment; and
- aliens involved in terrorist activities.

The law provides that the attorney general must take certain criminal aliens into custody after they are released, without regard to whether the alien is released on parole, supervised release, or probation and without regard to whether the alien may be arrested or imprisoned again for the same offense.[3]

The IIRIRA, true to its symbolic title, also expanded the categories of aliens subject to removal and significantly restricted the former relief options. Many of these draconian provisions are retroactive, as permitted by the U.S. Constitution, because deportation proceedings are civil cases not criminal cases in nature. The actual implementation of the mandatory detention regime was deferred until Oct. 9, 1998. Thus, only persons who are "released after" that date are subject to mandatory detention, whereas those released before that date were eligible for a bond.[4]

Although, from a practical standpoint, the U.S. Department of Homeland Security (DHS), through its Immigration and Customs Enforcement (ICE) Division, may choose not to enforce § 236(c) of the INA, once the decision is made to detain the alien, no recourse is available, other than to request a ruling by the immigration judge that the law does not apply or to petition for habeas corpus relief in the federal district court to advance any argument regarding the scope of this provision. An immigration court hearing to determine whether the alien is properly included in the mandatory detention category is commonly referred to as a *Joseph* hearing, based on a decision made by the Board of Immigration Appeals (BIA) in 1999. In *Matter of Joseph*, the BIA determined that an immigration judge may decide that an alien "is not properly included" in the mandatory detention category only if the DHS is "substantially unlikely to establish, at the merits hearing, the charge or charges that subject the alien to mandatory detention." However, even if the immigration judge finds that the respondent is not properly included in the mandatory detention category and orders the alien released, ICE may still obtain an automatic stay of the judge's order by filing a Notice of Intent to Appeal Custody Determination within one business day of the order.[5] Many courts have deemed this provision to be a violation of due process.[6]

In recent years, there has been a smattering of district court decisions and a few circuit court decisions that have at least ameliorated the expansive construction of § 236(c) by the DHS and the U.S. Department of Justice through decisions issued by its Board of Immigration Appeals.

### Challenges Based on Prolonged Detention

In 2003, the U.S. Supreme Court, in *Demore v. Kim*,[7] upheld the constitutionality of mandatory detention, by a 5-4 vote. However, the Court qualified its opinion by remarking that the restriction of liberty resulting from mandatory detention was justified because of the rapid pace of most removal proceedings involving the affected criminal aliens. The Court cited statistics revealing that, in 85 percent of the cases involving detained aliens, the average number of days it took to complete the removal proceeding was 47. In *Ly v. Hansen*,[8] the Sixth Circuit Court of Appeals seized on this language to invalidate a detention lasting more than 18 months. The Ninth Circuit and several district courts have issued similar rulings.[9] However, some district courts have denied habeas relief in cases in which the courts reasoned that the alien's aggressive litigation strategies were responsible for prolonging the detention—such as the case in *Miller v. Shanahan*.[10] In this case, the district court pointed out that the petitioner did not dispute that he was removable for his criminal offense but was pursuing discretionary relief to avoid his removal. In the opinion of this writer, the rationale for that ruling is suspect, because the court recognized that Miller was merely vindicating his legal rights, which had indeed been frustrated by ineffective representation by his first attorney.

### Challenges Based on Application of Mandatory Detention Following Arrests for Nonremovable Conduct

In a rather remarkable decision handed down in *Matter of Saysana,*[11] the BIA construed § 236(c) of the INA as a provision that applies to aliens who just happen to have found themselves detained by criminal authorities for matters that have no relevance under the immigration laws, if the alien is considered removable for an offense for which he or she was released from criminal custody before the law's effective date of Oct. 9, 1998. Saysana was actually detained in 2005 following his release after an arrest for failing to register as a sex offender, even though this arrest did not result in conviction. The removal charge was based on a 1990 conviction for indecent assault and battery, and he had been released from criminal confinement on this matter well before Oct. 9, 1998. Even a lay person would find this type of strained interpretation to be suspect.

In fact, the BIA recently overruled the *Saysana* decision. In *Matter of Garcia-Arreola*,[12] the BIA finally recognized the faulty interpretation of the mandatory detention provision in *Saysana*, which had long been universally rejected by federal district courts. Indeed, the First Circuit Court of Appeals affirmed a district court decision that directly reversed the BIA's ruling in *Saysana*. The BIA followed suit and recently held specifically that mandatory detention applies only if the alien is released from non-DHS custody after Oct. 9, 1998, and the release is "directly tied" to the basis for detention under INA §§ 236(c)(1)(A)–(D). Garcia-Arreola was a permanent resident, who was taken into ICE custody and held in mandatory detention after being arrested and charged with assault in 2002 and 2009. These charges were ultimately dismissed. Garcia-Arreola had a prior drug conviction from 1989. The immigration judge distinguished his case from the *Saysana* ruling and held that the respondent was not subject

to mandatory detention. The DHS appealed that decision, stating that the immigration judge had erred by ignoring the *Saysana* decision, but then filed a supplemental brief requesting that the BIA revisit *Saysana*. The BIA reviewed this question of law de novo and overruled *Saysana*. Even though the BIA did not agree with the First Circuit that the "when released" language in § 236(c) of the INA is clear and unambiguous on its face, the board did hold that a narrow reading of the statutory language was unwarranted.

### Challenges Based on Delays Between Release from Criminal Custody and Subsequent Apprehensions by ICE

The "when released" language in § 236(c) of the INA remains the focus of considerable litigation involving the application of mandatory detention. In a 2001 decision in *Matter of Rojas*,[13] the BIA held that mandatory detention applies even if ICE fails to assume custody of an alien *immediately* upon release, because the term "when released" does not refer to the timing of release but rather to the fact that ICE may detain an alien after release from criminal custody. *Matter of Rojas* remains good law, even though it has been challenged by a number of federal district court decisions, which are discussed below. This decision shows that the BIA continues to interpret the mandatory detention provision restrictively in a manner that hampers the immigration judge's ability to exercise discretion in custody redetermination hearings.

The obvious legislative intent behind § 236(c) is to facilitate the prompt removal of dangerous criminal aliens before they are permitted to assimilate back into the community at large. The practice introduces a risk that more crimes will be committed and/or that those aliens will become fugitives and thus frustrate the efforts of the DHS to remove them back to their native countries. However, in real life, it often takes several months or years before ICE becomes aware that a particular alien may be subject to removal for a past criminal offense. Often, the "criminal alien" comes to the attention of the DHS as a result of a good faith filing for naturalization for U.S. citizenship or at a port of entry upon the alien's return from a trip abroad.

Arguably, the "urgency" in removing dangerous aliens begins to dissipate with the passage of time following the alien's criminal conviction, especially if he or she has been rehabilitated. In *Burns v. Cicchi*,[14] Judge Wolfson alluded to this proposition, but it did not form the basis for her decision. She observed that other courts have held that the alien need not be secured by the DHS before leaving criminal custody.[15] Nonetheless, she ventured her opinion that § 236(c) strongly suggests that Congress' preference is for the government to obtain custody of aliens as quickly as possible following completion of their criminal proceedings relating to their removable offenses.

Several other district courts have construed § 236(c) in a manner that would prevent the government from imposing this law on aliens who are not detained by the DHS "immediately" upon their release from criminal custody[16]—or at least a reasonable time thereafter. In the case of *Scarlett v. U.S. Dep't of Homeland Security Bureau of Immigration and Customs Enforcement*,[17] the U.S. District Court for the Western District of New York ruled that the statute did not authorize an 18-month delay between the alien petitioner's release from criminal incarceration and his detention by the DHS. Moreover, Judge Richard Arcara held that the five-year detention of the petitioner while his judicial proceedings were taking their course in the Second Circuit was in violation of the Constitution's Due Process Clause. Accordingly, he ordered the writ to be issued unless the government respondents afforded the petitioner a hearing before the immigration judge within 60 days of the court's order. After this ruling on the merits, Judge Arcara went so far as to award attorneys' fees to Scarlett, pursuant to the Equal Access to Justice Act,[18] reasoning that, in light of the emerging case law, the government's position in the litigation was not substantially justified.[19]

### Validity of Continuing Detention After Completion of Administrative Proceedings and During Pendency of Petitions for Review in the Courts of Appeal

Once an alien becomes subject to a "final" removal order—that is, when the administrative proceeding has been completed—INA § 241[20] applies to the "post-removal order" detention. In *Zadvydas v. Davis*,[21] the U.S. Supreme Court, applying the principle of constitutional avoidance, construed this statute as allowing detention for up to six months if it is reasonably foreseeable that removal is likely to be accomplished. In 2006, in *Clark v. Martinez*, the Court extended this ruling to "excludable aliens," including Cubans, who cannot be deported because of the United States' strained diplomatic relations with that country.[22]

The statutory scheme is understandably confusing when it comes to aliens who have final administrative orders (that have been confirmed by the BIA) and have elected to file petitions for review in a circuit court of appeals. In some of these cases, the alien has been successful in obtaining a stay of removal from the court, whereas, in other cases, either the alien has not applied for a stay or such an application has been denied. In the absence of a stay, the DHS is not prevented from deporting the alien, in which case the alien is still permitted to proceed with the judicial appeal. The Ninth Circuit Court of Appeals[23] has ruled that, once the BIA issues a removal order, if the alien files a petition for review in the circuit court and a stay order is issued, the alien is no longer subject to mandatory detention under INA § 236(c). In addition, § 241 does not apply until the judicial proceeding has been completed. The court ruled that the general detention provision, § 236(a), controls, the alien has a right to a hearing before an immigration judge, and the DHS has the burden of proof to establish that the alien is either a flight risk or a danger to the community. At least one district court outside the Ninth Circuit—the Middle District of Pennsylvania—has adopted this understanding of the law.[24]

### Conclusion

During the past year, in particular, ICE's detention practices have come under increasing criticism in the press and from human rights groups and bar organizations.[25] On any given day, the number of immigration detainees averages

more than 33,000.[26] Of course, not all these individuals have criminal records. In addition, much of the detention work has been privatized, arguably creating an economic motive to maintain the status quo and to neglect care. (Horror stories have been written about the lack of adequate medical care, for example.[27]) Indeed, some circuit court decisions dealing with removal issues have commented unfavorably on the lengthy detention that some of the alien litigants were enduring, even though the issue of detention per se was not involved in the particular cases described.[28] Although there is no indication of an imminent legislative "fix" in this troublesome area, it is hoped that the executive branch will continue to study this matter and begin to interpret and enforce the laws more reasonably and more humanely. The administration needs to take into account the plethora of court decisions that have ruled against the government in cases involving immigration detainees. **TFL**

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**Endnotes**

[1]The term "arriving alien," as defined in 8 C.F.R. §§ 1.1(q), 1001.1(q), refers to persons entering or seeking admission into the United States at a port of entry. These arriving aliens who are apprehended at the border are not entitled to a bond hearing before an immigration judge, even if they are on parole and even if they are not seeking admission.

[2]Pub. L. No. 104-208 (Sept. 30, 1996).

[3]INA § 236(c)(1); 8 U.S.C. § 1226(c)(1).

[4]*Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).

[5]8 C.F.R. § 1003.19(i)(2).

[6]*See e.g.*, *Ashley v. Ridge*, 288 F. Supp. 2d 662 (D.N.J. 2003); *Uritsky v. Ridge*, 286 F. Supp. 2d 842, 847 (E.D. Mich. 2003); *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446, 449–450 (D. Conn. 2003); *Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004). *But see Pisciotta v. Ashcroft*, 311 F. Supp. 2d 445, 453–56 (D.N.J. 2004) (upholding automatic stay as constitutional under *Demore v. Kim*, 538 U.S. 510 (2003)).

[7]*Demore v. Kim*, 538 U.S. 510, 123 S. Ct. 1708 (2003).

[8]*Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003).

[9]For example, *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); *Bouorguignon v. MacDonald*, 667 F. Supp. 2d 175 (D. Mass. 2009)

[10]*Miller v. Shanahan*, 2010 WL 481002 (S.D.N.Y. 2010).

[11]*Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008), reversed, *sub nom, Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009).

[12]*Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010).

[13]*Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).

[14]*Burns v. Cicchi*, 2010 WL 481002 (S.D.N.Y. 2010)

[15]For example, *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (W.D. Wash. 2004) (holding that an alien must be taken into DHS custody within a few months of release from criminal custody).

[16]For example, *Pastor-Camarena v. Smith*, 977 F. Supp. 1415 (W.D. Wash. 1997). In the recent case of *Khodr v. Adduci*, 2010 WL 931860 (E.D. Mich. 2010), District Judge Stephen J. Murphy III was persuaded that the phrase "when released" clearly and unambiguously requires that the alien be taken into DHS custody immediately upon release from criminal custody. At the same time, the judge acknowledged the difficulties that a literal "immediacy" requirement would pose, so he found that "immediacy" contemplates that the government has a reasonable period of time after release to take the suspect into custody. Judge Murphy declined to establish a bright line, but he determined that the four-year delay in picking up Khodr was clearly unreasonable.

[17]*Scarlett v. U.S. Dep't of Homeland Security Bureau of Immigration and Customs Enforcement*, 632 F. Supp. 2d 214 (W.D.N.Y. 2009).

[18]28 U.S.C. § 2412.

[19]*Scarlett v. U.S. Dep't of Homeland Security*, 2010 WL 55929 (W.D.N.Y. 2010).

[20]8 U.S.C. § 1231

[21]*Zadvydas v. Davis*, 533 U.S. 678 (2001).

[22]*Clark v. Martinez*, 543 U.S. 371 (2005).

[23]*Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008).

[24]*Duhaney v. U.S. Dep't of Homeland Security*, 2009 WL 3182513 (M.D. Pa. 2009).

[25]*See, e.g.*, Amnesty International, *Jailed Without Justice: Immigration Detention in the U.S.* (June 2008), available at www.amnestyusa.org.

[26]As revealed at a hearing of the U.S. House of Representatives, Subcommittee on Homeland Security conducted Dec. 10, 2009, 86 Interpreter Releases 3088 (Dec. 21, 2009).

[27]Nina Bernstein, *Lawsuits Renew Questions on Immigrant Detention*, New York Times (March 3, 2010).

[28]For example, *Aguilar-Ramos v. Holder*, 594 F.3d 701 (9th Cir. 2010). At footnote 3, the court expressed its "grave concerns" over the petitioner's four-year detention under INA § 236(c). The court remarked that this detention was unduly prolonged and actually encouraged the petitioner to file a habeas petition or request a bond hearing and also counseled that the government would bear the burden of establishing that he is a flight risk or danger to the community, citing *Casas-Castrillon, supra,* note 23; *Mustafaj v. Holder*, 2010 WL 774664 (2d Cir. 2010) (nonprecedent). The court remarked that, despite the fact that the petitioner had served a criminal sentence of only eight months for a misdemeanor committed in 1981, despite his long record of stable residence and gainful employment, and despite his having initially prevailed before the immigration judge, the petitioner had, by then, suffered a three and a half year period of DHS detention, partly as a result of an error that was conceded by the BIA.