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Immigration-Related Detention: Current Legislative Issues

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Immigration-Related Detention: Current Legislative Issues

Abstract
[Excerpt] As Congress considers reforming the nation's immigration system, the detention of noncitizens in the United States will likely be an issue. Under the law, there is broad authority to detain aliens while awaiting a determination of whether the noncitizen should be removed from the United States. The law also mandates that certain categories of aliens are subject to mandatory detention (i.e., the aliens must be detained). Aliens subject to mandatory detention include those arriving without documentation or with fraudulent documentation, those who are inadmissable or deportable on criminal grounds, those who are inadmissable or deportable on national security grounds, those certified as terrorist suspects, and those who have final orders of deportation.

Aliens not subject to mandatory detention may be detained, paroled, or released on bond. The priorities for detention of these aliens are specified in statute and regulations. In FY2008, on an average day, 31,244 noncitizens were in Department of Homeland Security (DHS) custody.

There are many policy issues surrounding detention of aliens. The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) increased the number of aliens subject to mandatory detention, and raised concerns about the justness of mandatory detention, especially as it is applied to asylum seekers arriving without proper documentation. Additionally, the increase in the number of mandatory detainees has raised concerns about the amount of detention space available to house DHS detainees. Some contend that decisions on which aliens to release from detention and when to release aliens from detention may be based on the amount of detention space, not on the merits of individual cases.

Another issue is the Attorney General's role in the detention of noncitizens. The creation of DHS moved the administration of detention of noncitizens from the Department of Justice's Immigration and Naturalization Service (INS) to DHS's Bureau of Immigration and Customs Enforcement (ICE). Nonetheless, it can be argued that the language in the Homeland Security Act of 2002 (P.L. 107-296; HSA) has left the Attorney General with concurrent authority over immigration law, including the authority to arrest, detain, and release aliens.

The 108th Congress passed P.L. 108-458, the Intelligence Reform and Terrorism Prevention Act of 2004, directing the Secretary of DHS to increase the amount of detention bed space by not less than 8,000 beds for each year, FY2006 through FY2010. Although Congress increased the bed space between FY2006 and FY2010, the number of beds has only increased by approximately 12,000.

In the 111th Congress, bills have been introduced covering a range of provisions and perspectives concerning the detention of noncitizens. Several bills—including S. 1505, H.R. 994, H.R. 2406, and H.R. 3308—would mandate that DHS increase the amount of detention space. In addition, other bills (e.g., H.R. 1215 and S. 1594) would codify certain policies at detention facilities, such as access to telephones and medical care, and expand the alternatives to detention program. Other bills, such as H.R. 264, would eliminate the mandatory detention of asylum seekers in expedited removal. This report will be updated as legislative action occurs.

Keywords
immigration, reform, Congress, detention, illegal immigrants, public policy

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Congressional Research Service

Immigration-Related Detention: Current Legislative Issues

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Summary

As Congress considers reforming the nation's immigration system, the detention of noncitizens in the United States will likely be an issue. Under the law, there is broad authority to detain aliens while awaiting a determination of whether the noncitizen should be removed from the United States. The law also mandates that certain categories of aliens are subject to mandatory detention (i.e., the aliens must be detained). Aliens subject to mandatory detention include those arriving without documentation or with fraudulent documentation, those who are inadmissable or deportable on criminal grounds, those who are inadmissable or deportable on national security grounds, those certified as terrorist suspects, and those who have final orders of deportation. Aliens not subject to mandatory detention may be detained, paroled, or released on bond. The priorities for detention of these aliens are specified in statute and regulations. In FY2008, on an average day, 31,244 noncitizens were in Department of Homeland Security (DHS) custody.

There are many policy issues surrounding detention of aliens. The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) increased the number of aliens subject to mandatory detention, and raised concerns about the justness of mandatory detention, especially as it is applied to asylum seekers arriving without proper documentation. Additionally, the increase in the number of mandatory detainees has raised concerns about the amount of detention space available to house DHS detainees. Some contend that decisions on which aliens to release from detention and when to release aliens from detention may be based on the amount of detention space, not on the merits of individual cases.

Another issue is the Attorney General's role in the detention of noncitizens. The creation of DHS moved the administration of detention of noncitizens from the Department of Justice's Immigration and Naturalization Service (INS) to DHS's Bureau of Immigration and Customs Enforcement (ICE). Nonetheless, it can be argued that the language in the Homeland Security Act of 2002 (P.L. 107-296; HSA) has left the Attorney General with concurrent authority over immigration law, including the authority to arrest, detain, and release aliens.

The 108th Congress passed P.L. 108-458, the Intelligence Reform and Terrorism Prevention Act of 2004, directing the Secretary of DHS to increase the amount of detention bed space by not less than 8,000 beds for each year, FY2006 through FY2010. Although Congress increased the bed space between FY2006 and FY2010, the number of beds has only increased by approximately 12,000.

In the 111th Congress, bills have been introduced covering a range of provisions and perspectives concerning the detention of noncitizens. Several bills—including S. 1505, H.R. 994, H.R. 2406, and H.R. 3308—would mandate that DHS increase the amount of detention space. In addition, other bills (e.g., H.R. 1215 and S. 1594) would codify certain policies at detention facilities, such as access to telephones and medical care, and expand the alternatives to detention program. Other bills, such as H.R. 264, would eliminate the mandatory detention of asylum seekers in expedited removal. This report will be updated as legislative action occurs.

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Introduction

As Congress considers reforming the nation's immigration system, the detention of noncitizens (aliens)[1] in the United States will likely be an issue. Congressional interest in the policy of detaining noncitizens in the United States while determining whether noncitizens should be removed tends to be varied. For example, while some want to increase the categories of aliens who are detained and increase the amount of detention space, others want to create alternatives to detention and exempt asylum seekers from mandatory detention. The Immigration and Nationality Act (INA) provides broad authority to detain aliens while awaiting a determination of whether they should be removed from the United States and mandates that certain categories of aliens are subject to mandatory detention (i.e., the aliens must be detained) by the Department of Homeland Security (DHS). Aliens not subject to mandatory detention may be detained, paroled, or released on bond. "Enemy combatants" at the Guantanamo U.S. military base in Cuba are not under the authority of DHS, nor are noncitizens incarcerated in federal, state, and local penitentiaries for criminal acts.

Any alien can be detained while DHS determines whether the alien should be removed from the United States. The large majority of the detained aliens have committed a crime while in the United States, have served their criminal sentence, and are detained while undergoing deportation proceedings. Other detained aliens include those who arrive at a port-of-entry without proper documentation (e.g., fraudulent or invalid visas, or no documentation), but most of these aliens are quickly returned to their country of origin through a process known as expedited removal.[2] The majority of aliens arriving without proper documentation who claim asylum are held until their "credible fear hearing," but some asylum seekers are held until their asylum claims have been adjudicated.

There are many policy issues surrounding detention of aliens, including concerns about the number of aliens subject to mandatory detention and the justness of mandatory detention, especially as it is applied to asylum seekers arriving without proper documentation. Some have raised concerns about the length of time in detention for aliens who have been ordered removed. Additionally, issues have been raised about the amount of detention space available to house DHS detainees. Another area of uncertainty is the Attorney General's role in the detention of noncitizens, since the creation of DHS.

Overview of Noncitizen Detention

Changes in Authorities with the Creation of the Department of Homeland Security

The INA provides the Attorney General with broad authority to detain aliens while awaiting a determination of whether they should be removed from the United States,[3] but the creation of

[1] An *alien* is "any person not a citizen or national of the United States" and is synonymous with *noncitizen*.

[2] Karen Musalo, et al., *The Expedited Removal Study Releases Its Third Report*, 77 Interpreted Releases 1189, 1191 (August 21, 2000).

[3] INA §236(a).

DHS moved the administration of detention of noncitizens from the Department of Justice's Immigration and Naturalization Service (INS) to DHS's Under Secretary of Border and Transportation Security.[4] While current regulations vest all authorities and functions of the DHS to administer and enforce the immigration laws with the Secretary of Homeland Security (hereafter the Secretary) or his delegate,[5] it can be argued that the language in the Homeland Security Act of 2002 (HSA)[6] has left the Attorney General with concurrent authority over immigration law.[7] The Ninth Circuit in *Armentero v. Immigration and Naturalization Service*, for example, appeared to struggle with determining who should be the correct respondent in a *habeas* petition filed by an INS detainee. The Ninth Circuit stated:

> Because the Homeland Security Act transfers most immigration law enforcement responsibilities from the INS, a sub-division of the Department of Justice, to the BTS [Directorate of Border and Transportation Security], a sub-division of the Department of Homeland Security, the extent of the Attorney General's power to direct the detention of aliens is unclear.[8]

The court further concluded that "[u]ntil the exact parameters of the Attorney General's power to detain aliens under the new Homeland Security scheme are decisively delineated, we believe it makes sense for immigration habeas petitioners to name the Attorney General *in addition* to naming the DHS Secretary as respondents in their habeas petitions."

In addition, both DOJ, through the Executive Office of Immigration Review (EOIR), and DHS have authority for determining bond for aliens. Officials within DHS also make bond determinations that may or may not subsequently come before EOIR. The Board of Immigration Appeals (BIA), the appellate body within EOIR, hears appeals from matters decided by immigration judges. The BIA has jurisdiction to consider appeals of various decisions now made by immigration officials in DHS, including the granting of bond.

The Attorney General has final say in matters of immigration law that come before EOIR.[9] For example, on April 17, 2003, the Attorney General released a decision[10] that instructs immigration judges to consider "national security interests implicated by the encouragement of further unlawful mass migrations" in making bond determinations for unauthorized migrants who arrive in "the United States by sea seeking to evade inspection." In the decision, the Attorney General states that he retains the authority to detain or authorize bond for aliens, but the authority is "shared" with the Secretary since DHS's officials make the initial determination whether an alien will remain in custody during removal proceedings.[11]

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[4] P.L. 107-296 §441.

[5] 8 C.F.R. §2.1. ("The Secretary, in his discretion, may delegate any such authority or function to any official, officer, or employee of the DHS or any employee of the U.S. to the extent authorized by law.") This regulation was authorized, in part, by §103 of the INA, which was amended by the Homeland Security Act of 2002 (P.L. 107-296) to charge the Secretary of DHS with the administration and enforcement of the INA.

[6] P.L. 107-296, signed into law on November 25, 2002.

[7] David A. Martin, "Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements," *Migration Policy Institute Insight*, vol. 1, April 2003.

[8] *Armentero v. Immigration and Naturalization Service*, 340 F.3d 1058, 1072 (9th Cir. 2003).

[9] For more information, see CRS Report RL31997, *Authority to Enforce the Immigration and Nationality Act (INA) in the Wake of the Homeland Security Act: Legal Issues*, by Stephen R. Vina.

[10] 23 I&N December 572 (A.G. 2003).

[11] See INA §103(a), as amended; 8 C.F.R. §§236.1(c), 236.1(d), 287.3(d). For more information on this decision See (continued...)

Statutory Authority for Detention

The INA gives the Attorney General the authority to issue a warrant to arrest and detain any alien in the United States while awaiting a determination of whether the alien should be removed from the United States.[12] As a result of the HSA, the daily responsibility for detaining aliens resides with the Under Secretary of Border and Transportation Security whose authority is exercised by the Bureau of Immigration and Customs Enforcement (ICE),[13] but under law the Attorney General may still retain the authority to arrest and detain aliens. The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[14] amended the INA, effectively specifying levels of detention priority and classes of aliens subjected to mandatory detention. Mandatory detention is required for certain criminal and terrorist aliens who are removable, pending a final decision on whether the alien is to be removed. No bail is available and only a hearing can determine whether the alien qualifies as a criminal or terrorist alien. Aliens not subjected to mandatory detention can be paroled,[15] released on bond,[16] or continue to be detained. Decisions on parole made by the Secretary and bond decisions made by the Attorney General are not subject to review.

In October 1998, the former INS issued a memorandum establishing detention guidelines consistent with the changes made by IIRIRA.[17] According to the guidelines, detainees are assigned to one of four detention categories: (1) required; (2) high priority; (3) medium priority; and (4) lower priority.[18] Aliens in required detention must be detained[19] while aliens in the other categories may be detained depending on detention space and the facts of the case. Higher priority aliens should be detained before aliens of lower priority.[20]

(...continued)

CRS Congressional Distribution Memorandum, *Policy Implications of Department of Justice Ruling on Bond Determinations for Unauthorized Aliens in Detention*, by Alison Siskin. Available from the author.

[12] INA §236(a).

[13] The two main parts of the Directorate of Border and Transportation Security in DHS are the Bureau of Immigration and Customs Enforcement and the Bureau of Customs and Border Protection (CBP).

[14] Subtitle C of the Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, signed into law September 30, 1996.

[15] "Parole" is a term in immigration law which means that the alien has been granted temporary permission to enter and be present in the United States. Parole does not constitute formal admission to the United States and parolees are required to leave when the parole expires, or if eligible, to be admitted in a lawful status. Section 402 of the HSA states: "The Secretary [of the Department of Homeland Security], acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following: ... (4) Establishing and administering rules, ... governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States."

[16] The minimum bond amount is $1,500.

[17] Memorandum from Michael Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional Directors, *Detention Guidelines Effective October 9, 1998*.

[18] High priority are aliens removable on security related or criminal grounds who are not subject to required detention, and aliens who are a danger to the community or a flight risk. Medium priority detainees are inadmissible, non-criminal arriving aliens not in expedited removal and not subject to mandatory detention. Low priority detainees are other removable aliens not subject to required detention, and aliens who have committed fraud while applying for immigration benefits with DHS.

[19] There are some very limited exceptions to mandatory detention. An alien subject to mandatory detention may be released only if release is necessary to protect an alien who is a government witness in a major criminal investigation, or a close family member or associate of that alien, and the alien does not pose a danger to the public or a flight risk.

[20] Michael A. Pearson, *INS Detention Guidelines*, October 7, 1998. Reprinted in *Bender's Immigration Bulletin*, vol. 3, (continued...)

Additionally, the U.S.A. Patriot Act[21] amended the INA to create a new section (236A) which requires the detention of an alien whom the Attorney General certifies as someone who the Attorney General has "reasonable grounds" to believe is involved in terrorist activities or in any other activity that endangers national security. The Attorney General must initiate removal proceedings or bring criminal charges within seven days of arresting the alien or release the alien. An alien who is detained solely as a certified terrorist, who has not been removed, and who is unlikely to be removed in the foreseeable future may be detained for periods of up to six months only if his release would pose a danger to national security or public safety. The Attorney General must review the terrorist certification every six months.[22]

Under the INA, the Attorney General also has the authority to arrest and detain aliens without a warrant if he has "reason to believe that the alien ... is in the United States in violation of any [immigration] law and is likely to escape before a warrant can be obtained."[23] Functionally, DHS is responsible for arresting and detaining aliens. If an alien is arrested without a warrant, a decision must be made within 48 hours to detain or release the alien. Aliens paroled or released on bond may be rearrested at any time. On September 20, 2001, the Department of Justice (DOJ) issued an interim regulation to provide more flexibility in detaining aliens prior to determining whether to charge or release them. The interim regulation extended the period that an alien may be detained, pending the determination of whether to arrest, from 24 hours to 48 hours or—in the event of emergency or extraordinary circumstances—within an "additional reasonable period of time." The regulation took effect on September 17, 2001.[24]

Additionally, after a removal order has been issued against an alien, the law provides that the alien subject to a final removal order be removed within 90 days, except as otherwise provided in the statute.[25] Certain aliens subject to a removal order "may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision."[26] This provision had been interpreted as permitting indefinite detention where removal was not reasonably foreseeable, but in 2001, the U.S. Supreme Court in *Zadvydas v. Davis*,[27] interpreted it as only permitting detention for up to six months where removal was not reasonably foreseeable.

(...continued)

no. 21, November 1, 1998, p. 1111. (Hereafter cited as Pearson, *INS Detention Guidelines*.)

[21] P.L. 107-56 signed into law on October 26, 2001.

[22] Habeas corpus proceedings are the avenue for judicial review of certification and detention.

[23] INA §287(a)(2).

[24] *Federal Register*, September 20, 2001, vol. 66, no. 184, pp. 48334-48335; 8 C.F.R. Part 287. Of the people taken into INS custody during the investigation of the September 11 attacks, in 17% of the cases INS took more than seven days to file charges. In 2% of the cases, INS filed charges after more than 30 days. Jim Edwards, "Data Show Shoddy Due Process for Post-September 11 Immigration Detainees," *New Jersey Law Journal*, February 6, 2002.

[25] INA §241(a)(1)(A).

[26] INA §241(a)(6).

[27] 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). For a full discussion of *Zadvydas v. Davis*, see CRS Report RL31606, *Detention of Noncitizens in the United States*, by Alison Siskin and Margaret Mikyung Lee.

Local Law Enforcement [28]

The INA contains both criminal and civil violations. Historically, the authority for state and local law enforcement officials to enforce immigration law has been construed to be limited to the criminal provisions[29] of the INA. The enforcement of the civil provisions,[30] which includes apprehension and removal of deportable aliens, has strictly been viewed as a federal responsibility, with states playing an incidental supporting role.

Although there is debate with respect to state and local law enforcement officers' authority to enforce civil immigration law, it is permissible for state and local law enforcement officers to inquire into the status of an immigrant during the course of their normal duties in enforcing state and local law. For example, when state or local officers question the immigration status of someone they have detained for a state or local violation, they may contact an ICE agent at the Law Enforcement Support Center (LESC).[31] The federal agent may then place a detainer on the suspect, requesting the state official to keep the suspect in custody until a determination can be made as to the suspect's immigration status. However, the continued detention of such a suspect beyond the needs of local law enforcement, and solely designed to aid in enforcement of federal immigration laws, may be unlawful.[32]

Mandatory Detention

The law requires the detention of

- criminal aliens;[33]
- national security risks;[34]

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[28] For more information on the role of state and local law enforcement, see CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Karma Ester, and Michael John Garcia. (Hereafter cited as CRS Report RL32270, *Enforcing Immigration Law*.)

[29] Examples of criminal violations include alien smuggling, harboring of aliens, and trafficking in people, which are prosecuted in federal courts.

[30] Examples of civil violations include being present in the United States without a valid immigration status, or working without employment authorization which may lead to removal through administrative proceedings through the Executive Office of Immigration Review.

[31] Under current practice in most jurisdictions, state and local law enforcement officials can inquire into an alien's immigration status if the alien is being questioned by an officer as a result of a criminal investigation or other related matters (i.e., traffic violation).

[32] Charles Gordon, et al., *Immigration Law and Procedure*, §72.02[2][b], at 72-27 (Matthew Bender & Co., Inc. 2000) (citing *Abel v. United States*, 362 U.S. 217 (1960); *United States v. Cruz*, 559 F.2d 30 (5th Cir. 1977)).

[33] Criminal aliens include those who are inadmissable on criminal-related grounds as well as those who are deportable due to the commission of certain criminal offences while in the United States. An alien is inadmissable for (1) crimes of moral turpitude; (2) controlled substance violations; (3) multiple criminal convictions with aggregate sentences of five years or more; (4) drug trafficking; (5) prostitution and commercialized vice; and (6) receipt of immunity from prosecution for serious criminal offenses (INA §212(a)). An alien is deportable for the following offenses: (1) crimes of moral turpitude; (2) aggravated felonies; (3) high speed flight; (4) controlled substance violations; (5) certain firearm offenses; and (6) crimes of domestic violence, stalking, and child abuse (INA §237(a)(2)). Any alien who is found in the United States who is inadmissable is deportable. Only the following groups of criminal aliens who are inadmissable or deportable are not subject to mandatory detention: (1) aliens convicted of a single crime of moral turpitude who were sentenced to less than one year; (2) aliens convicted of high speed flight; and (3) aliens convicted of crimes of domestic violence, stalking, and child abuse or neglect.

[34] Any alien who is inadmissable or deportable for terrorist activity must be detained (INA §212(a)(3)(B) and (continued...)

- asylum seekers, without proper documentation, until they can demonstrate a "credible fear of persecution";
- arriving aliens[35] subject to expedited removal (see below);
- arriving aliens who appear inadmissable for other than document related reasons; and
- persons under final orders of removal who have committed aggravated felonies, are terrorist aliens, or have been illegally present in the country.[36]
- The USAPATRIOT Act added a new section (§236A) to the INA that provides for the mandatory pre-removal-order detention of an alien who is certified by the Attorney General as a terrorist suspect. It can be argued that the Attorney General and the Secretary both have the discretion to detain any alien who is in removal proceedings, and must detain all aliens who are charged as terrorists, and almost all aliens charged as criminals upon their release from criminal incarceration whether they are released on probation or parole.[37]

Post-removal Order Detention

Prior to 2001, the mandatory detention provisions created in IIRIRA had led to some aliens being in indefinite administrative custody. These aliens had been ordered removed from the United States, but were detained because the aliens could not obtain travel documents to another country or the immigration officials refused to release them. These detainees were often referred to as "lifers" or "unremovables."[38] Many of these detainees had criminal records, but some simply lacked immigration status and the ability to return to their country of origin. Some detainees had been in immigration detention for a longer time period than their criminal incarceration. In 2000, which was the final year before the Supreme Court ruling limiting the time in detention for aliens

(...continued)

§237(a)(4)(B)).

[35] The regulations define an arriving alien as an applicant for "admission to or transit through the United States." 8 C.F.R. §1.1(q).

[36] Prior to IIRIRA, aliens convicted of aggregated felonies who could not be removed could be released.

[37] INA §236(c)(1).

[38] Most indefinite detainees were from countries that lack normal diplomatic relations with the United States (e.g., Cuba, Iran, or North Korea). (The majority of "lifers" were Cubans who came during the Mariel boatlift. The Mariel boatlift was an influx of asylum seekers during a seven-month period in 1980 when approximately 125,000 Cubans and 25,000 Haitians arrived by boat to South Florida. About 10% of the Mariel Cubans had histories of mental illness or violent crime.) Other indefinite detainees were stateless people (e.g., Palestinians and persons from the former Soviet Union who do not meet the citizenship requirements for any of the newly independent states) or persons whose nationality could not be determined. Other indefinite detainees were from countries that refused to accept the return of their nationals (e.g., Vietnam, Laos, Cambodia, and the People's Republic of China) or from countries experiencing immense upheaval. Others may have been indefinitely detained because the alien had strong ties to the United States, and only attenuated connections to their country of origin. For example, an alien may be brought by his parents to the United States as a two-year old, and live in the United States for 40 years without naturalizing. If the person commits a crime and is removable, his birth country may refuse to take him. For more on the Mariel Cubans see, U.S. House of Representatives, Committee on Appropriations, A report on the Department of Justice's management and operation of programs dealing with the detention, medical care, and outplacement of Mariel Cubans, April 1991.

who had been ordered removed, INS estimated that it had 5,000 aliens in indefinite administrative custody.[39]

In a 5-4 decision in *Zadvydas v. Davis* (2001),[40] the U.S. Supreme Court held that a statute permitting indefinite detention would raise serious constitutional problems because the Due Process Clause of the Fifth Amendment prohibits depriving any person, including aliens, of liberty without due process of law. Therefore, in keeping with principles of statutory construction and the absence of clear congressional intent for indefinite detention, the Court read an implicit limitation into the post-removal detention statute, such that detention is limited to a period "reasonably necessary" to achieve an alien's removal. The Supreme Court established six months after the removal order as the presumptively reasonable period within which to effect removal. After this period, once an alien shows that there is good reason to believe that "there is no significant likelihood of removal in the reasonably foreseeable future," the government must rebut that showing with sufficient evidence. The Court emphasized that its holding does not mean that all aliens must be released in six months nor that an alien may not be held until it has been determined that "there is no significant likelihood of removal in the reasonably foreseeable future." The Court suggested that special arguments could be made for a statutory scheme of preventive detention for terrorists or other aliens in special circumstances and for heightened judicial deference for executive and legislative branch decisions regarding national security matters.

In response to this decision, the Attorney General issued regulations governing the review of post-removal order detention cases for a determination of foreseeability of removal. The Attorney General issued regulations, effective November 14, 2001, concerning the continued detention of aliens subject to final orders of removal that are consistent with the *Zadvydas* decision.[41] Subsequently, Chief Immigration Judge Michael Creppy issued a memorandum on the Immigration Court's policy regarding these regulations. The regulations and the memorandum establish four categories of aliens whose removal from the United States is not foreseeable, but whom the Attorney General may continue to detain. These "special circumstances" include

- aliens with a highly contagious disease that poses a threat to public safety;
- aliens whose release would cause serious adverse foreign policy consequences;
- aliens detained for security or terrorism reasons; and
- aliens determined to be specifically dangerous.

Of these four categories, only the fourth requires the involvement of the Immigration Court; the other three remain under DHS discretion.[42] Between November 14, 2001, and March 9, 2005, only 17 aliens whose removal was not foreseeable had been detained under the "special circumstances." Two aliens were detained because of serious adverse foreign policy consequences, and 15 were detained because they were determined to be specifically dangerous.[43]

[39] Conversation with Tim Huagh, INS Congressional Affairs, April 15, 2004.

[40] 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).

[41] 66 *Federal Register*, p. 56967, 2001; 8 C.F.R. at §§241.4, 241.13 and 241.14.

[42] Michael Creppy, "Operating Policies and Procedures Memorandum," November 19, 2001. Reprinted in *Interpreted Releases* January 14, 2002, pp. 74-83.

[43] Unpublished data from DHS.

In *Clark v. Martinez*,[44] the Court held that the rationale it applied in *Zadvydas* to aliens who had been admitted to the United States and were deportable also applied to aliens who had not been legally admitted into the United States, were found inadmissible and ordered removed, and were being detained beyond the statutory removal period although removal was not reasonably foreseeable.[45] Accordingly, the six-month presumptive detention period applied. In *Zadvydas*, the Court explicitly let stand an older decision which distinguished between the indefinite detention of an excludable alien (similar to inadmissible alien under current law) who sought to enter the United States and a deportable alien who had entered the United States.[46] Therefore, the Court had suggested that it might reach a different conclusion for indefinite detention of inadmissible aliens from the one it reached in *Zadvydas* for deportable aliens and noted that the statutory purposes and constitutional concerns for deportable aliens were not the same for inadmissible aliens. However, in *Clark v. Martinez*, it decided that to treat inadmissible aliens differently under the removal statute would render an inconsistent interpretation of the removal statute, where the statute itself made no distinction between the treatment of inadmissible and deportable aliens. Justice Thomas criticized the Court's opinion as departing from its constitutional rationale in *Zadvydas* and its suggestion in that case that inadmissible aliens presented a different situation.[47] At the same time, Justice Thomas agreed with the Court's "fidelity to the text" of the removal statute; he believed that *Zadvydas* had been wrongly decided and should have been overruled.

Expedited Removal and Detention

Aliens who arrive in the United States without valid documentation or with false documentation are subject to a process known as "expedited removal," under which the alien is ordered removed from the United States, and the removal decision is not subject to any further hearings, reviews, or appeals.[48] Most aliens subject to this process face continuous detention. Aliens subject to expedited removal must be detained until they are removed and may only be released due to medical emergency or if necessary for law enforcement purposes. If the arriving alien expresses a fear of persecution or an intent to apply for asylum, the alien is placed in detention until a "credible fear" interview can be held. If the alien is found to have a credible fear, he may be

[44] 543 U.S. 371, 160 L. Ed. 2d 734 (2005). This paragraph was written by Margaret Mikyung Lee, Legislative Attorney, American Law Division.

[45] Inadmissible aliens have not yet been admitted to the United States after inspection and are ineligible to be admitted legally. Deportable aliens have been inspected and admitted to the United States, but subsequently have become ineligible to remain and are subject to removal. Those who are physically in the United States but who entered without inspection, i.e., illegally, are also considered inadmissible. Long-standing legal doctrine, commonly known as the "entry fiction," holds that those who are inadmissible have no right to enter or remain in the country, whereas those who are deportable do have greater protections.

[46] Prior to IIRIRA, aliens ineligible to enter the country were "excludable," rather than "inadmissible," and were subject to exclusion proceedings, while deportable aliens were subject to deportation proceedings. After IIRIRA, exclusion and deportation proceedings were consolidated into removal proceedings, but certain aliens are subject to expedited removal. The salient difference between excludable and inadmissible aliens is that aliens who entered without inspection were not considered excludable, whereas such aliens are now considered inadmissible, which means they are not entitled to the same level of rights in removal proceedings. This change was made as a disincentive to entering illegally, since formerly, the entry fiction worked in favor of those who entered illegally.

[47] 160 L. Ed. 2d at 752.

[48] INA §235(b)(1)(A)(i). For more on expedited removal, see CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

paroled into the United States. If the credible fear is unsubstantiated, the alien is detained until the alien is removed from the United States.[49]

Asylum Seekers

As discussed earlier, the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) mandated that aliens who arrive without proper documentation and claim asylum be detained prior to their "credible fear" hearing. Prior to IIRIRA, most aliens arriving without proper documentation who applied for asylum were released on their own recognizance into the United States (and given work authorization), a practice which enabled inadmissable aliens falsely claiming persecution to enter into the country. Most of the fraudulent claims were made by people attempting to come here for economic or family reasons, illegally rather than through legal immigration channels.[50] False asylum claims utilize limited resources, causing those with legitimate claims to have to wait longer to have their cases processed. Thus, many argued that the only way to deter fraudulent asylum claims was to detain asylum seekers rather than releasing them on their own recognizance. Indeed some claim that the practice of detaining asylum seekers has reportedly helped reduced the number of fraudulent asylum claims.[51]

However, some contend that the policy of detaining all asylum seekers is too harsh. They argue that there is a need to inhibit fraudulent asylum claims, but mandatory detention of asylum seekers causes more problems than it solves. The position of the United Nations High Commission on Refugees is that detention of asylum seekers is "inherently undesirable."[52] Detention may be psychologically damaging to an already fragile population such as those who are escaping from imprisonment and torture in their countries. Often the asylum seeker does not understand why they are being detained. Additionally, asylum seekers are often detained with criminal aliens. Some contend that ICE should develop alternatives to detention (e.g., electronic monitoring) for asylum seekers.

Release on Parole and Bond

The Secretary has the authority to parole detained aliens who are not subject to mandatory detention. Most arriving aliens are not eligible for parole. Parole is permitted for arriving aliens with serious medical conditions, pregnant women, juvenile aliens who will be witnesses, and "aliens whose continued detention is not in the public interest."[53] In general, parole is available on a "case-by-case basis for urgent humanitarian reasons or significant public benefit."[54]

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[49] Under the INA, expedited removal can also be applied to aliens who enter the United States without inspection (i.e., cross the border without being inspected by an immigration inspector) and cannot establish that they have been physically present in the United States for more than two years, but it has yet to be applied to those who entered without inspection. INA §235(b)(1)(A)(iii).

[50] CRS Issue Brief IB93095, *Immigration: Illegal Entry and Asylum Issues*, coordinated by Ruth Ellen Wasem. This report is archived and is available from the author.

[51] David A. Martin, *The 1995 Asylum Reforms: A Historical and Global Perspective*, (Washington, D.C.: Center for Immigration Studies, May 2000).

[52] Office of the of the United Nations High Commissioner for Refugees, *UNHRC Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999, p. 1.

[53] 8 C.F.R. §212.5(b).

[54] INA §212(d)(5)(A). Prior to the enactment of IIRIRA, the standard for parole was if it was in the public interest or for emergency reasons.

Aliens not subject to mandatory detention may also be released on bonds of a minimum of $1,500.[55] To be released on bond, the alien must prove that he is not a threat to people or property, and will appear at all future immigration proceedings.

Rights of the Detained

The courts have ruled that detained aliens not under expedited removal[56] have the following rights:

- the right to apply for asylum;
- the right to communicate with consular or diplomatic officers of their home country;[57]
- the right to be represented by counsel (but not at government expense);[58]
- the right to challenge transfers to other detention facilities that might interfere with the right to counsel;
- the right to medically adequate treatment;
- the right to access free legal service lists and telephones; and
- the right to self-help and other legal reference material.

Under the law, aliens also have the right to legally challenge their detention.[59] Custody and bond determinations can be reviewed by an immigration judge at any time before the removal order becomes final, except in certain cases.[60] Additionally, the alien may appeal the immigration judges' decision to the Board of Immigration Appeals (BIA). Nonetheless, the courts have afforded the Administration much discretion in decisions related to where aliens are detained, the management of detention facilities, and the treatment of aliens.

[55] The IIRIRA raised the minimum bond amount from $500 to $1,500. INA §236(a)(2)(A).

[56] As discussed above, those under expedited removal have more limited rights than detainees not subject to expedited removal.

[57] In accordance with U.S. constitutional considerations, customary international law, and the Vienna Convention on Consular Relations (April 24, 1963, art. 36, T.I.A.S. 6820, 21 U.S.T. 77, to which the United States is a party), the regulations require notice to detained aliens of their right to communicate with consular and diplomatic officers of their home country. Additionally, certain countries have treaties with the United States that require notification of the diplomatic officers of the country when one of their nationals is detained in removal proceedings, regardless of whether the alien requests such notification and even if the alien requests that no communication be made on his behalf. (8 C.F.R. §236.1(e))

[58] Detained aliens have the right to obtain counsel, but since immigration procedures are considered civil, not criminal, actions, the government is not obligated to provide counsel.

[59] Charles Gordon, et al., Immigration Law and Procedure §108.01.

[60] Immigration judges may not redetermine custody for (1) aliens in exclusion proceedings; (2) arriving aliens; (3) aliens deportable as security threats; (4) criminal aliens; and (5) aliens in pre-IIRIRA deportation proceedings with aggravated felonies.

Detention Statistics

Detention Population

As **Figure 1** shows, between FY1994 and FY2001, the average size of the daily noncitizen detention population increased steadily. There was a slight decrease in the size of the detention population between FY2001 and FY2002, and then a steady increase between FY2002 and FY2004. The daily population decreased between FY2004 and FY2006, and then increased significantly in FY2007. As of January 14, 2010, the average daily detention population for FY2009 (32,098) was slightly larger than the FY2010 average population (31,020).[61] Between FY1996, when IIRIRA was enacted, and FY2009, the size of the daily population more than doubled, from 9,011 to 32,098 aliens. In FY2010, Congress provided funding for 33,400 detention beds.[62] The largest increase occurred between FY2006 and FY2007, when Congress increased bed space funding from 20,800 to 27,500 beds. Notably, for FY2007, the average daily detention population exceeded the number of beds funded.

ICE detained a record total of 378,582 aliens during FY2008.[63] During that year, the average daily detention population was 31,771. Although more than 62% of all detainees were from Mexico,[64] they tended to have short stays in detention and, thus, they accounted for only 32% of detention bed days. The other leading countries for the percentage of detention bed days were El Salvador (11%); Honduras (10%); Guatemala (10%); Dominican Republic (3%); and Brazil, China, Haiti, and Jamaica (each with 2%).[65]

[61] Unpublished DHS data obtained from the Bureau of Immigration and Customs Enforcement Office of Congressional Affairs, Department of Homeland Security, January 14, 2010.

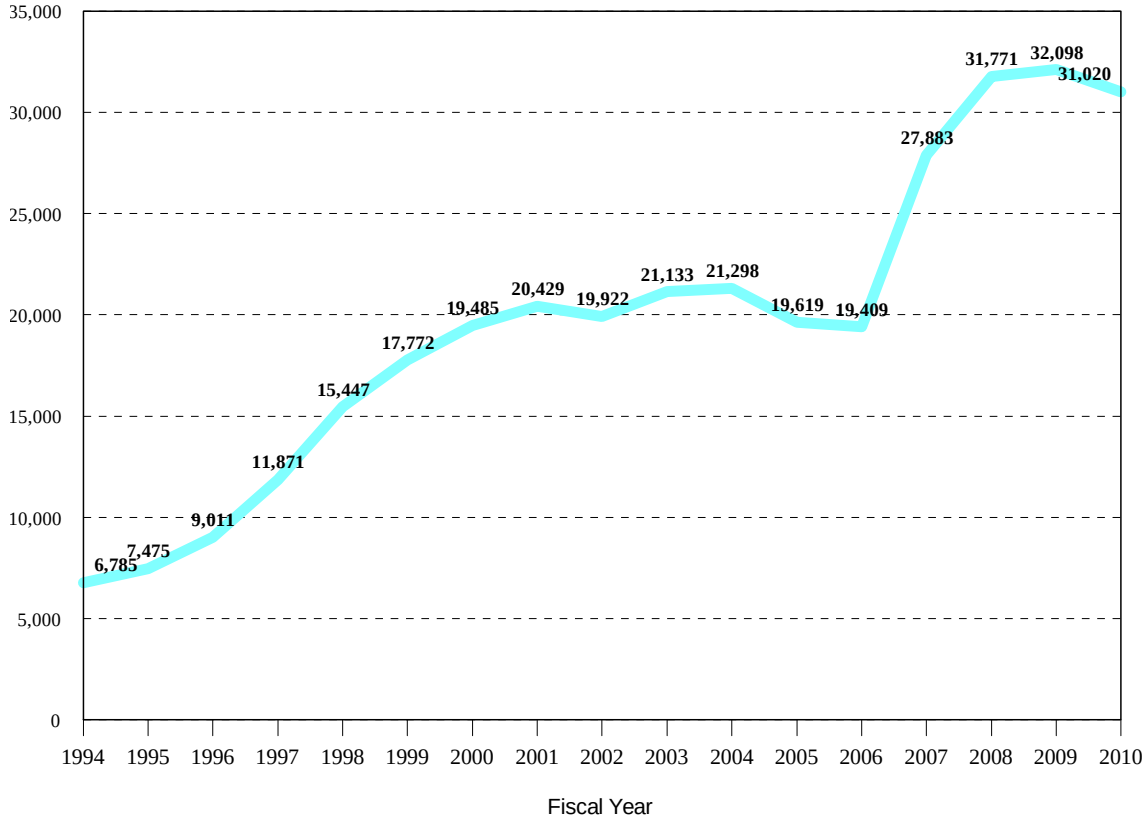
[62] For more information on detention funding, see CRS Report R40642, *Homeland Security Department: FY2010 Appropriations*, coordinated by Jennifer E. Lake and Chad C. Haddal

[63] In FY2004, approximately 51% of all detained aliens had criminal records. This statistic was not published for subsequent years. Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2004*, November 2005, p. 5.

[64] In FY2007, 49% of all detainees were from Mexico. Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2007*, December 2008.

[65] Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2008*, July 2009.

Figure 1. Daily Detention Population, FY1994-FY2010



Source: FY1994 through FY2005 CRS presentation of published DHS data. FY2006 through FY2010 CRS presentation of unpublished DHS data.

Note: FY2010is the average daily population in detention through January 14, 2010.

Detention Space and Cost

Many contend that DHS does not have enough detention space to house all those who should be detained. They contend that the increase in the number of classes of aliens subject to mandatory detention has impacted the availability of detention space for lower priority detainees. There are reportedly 300,000 noncitizens in the United States who have been ordered deported who have not left the country. Some argue that these 300,000 people would have left the country if they had been detained once they were ordered deported. A study done by DOJ's Inspector General found that almost 94% of those detained with final orders of removal were deported while only 11% of those not detained who were issued final orders of removal left the country.[66] Concerns have been raised that decisions on which aliens to release and when to release the aliens may be based on the amount of detention space, not on the merits of individual cases, and that the amount of space

[66] Office of the Inspector General, Department of Justice. *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders*, Report I-2003-004, February 2003.

may vary by area of the country leading to inequities and disparate policies in different geographic areas.[67]

In addition, the overall increase in the number of noncitizens in DHS detention has raised questions about the cost of detaining noncitizens. For FY2004, DHS budgeted $80 a day for each detainee held in detention.[68] This cost does not include transportation or the cost of deporting the alien. For FY2000 through FY2002, INS budgeted $75 a day for each detainee held in detention.[69]

The Department of Homeland Security Appropriations Act, FY2010 (P.L. 111-83),[70] appropriated $2,545 million for DRO, an increase of $64 million over FY2009, maintaining the number of detention beds at the FY2009 level of 33,400. Division D of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (P.L. 110-329), appropriated $2,481 million for DRO, which funded 1,400 more detention beds and support personnel than in FY2008. Division E of the Consolidated Appropriations Act, 2008 (P.L. 110-161), appropriated $2,381 million for DRO.[71] For the previous fiscal year, the Department of Homeland Security Appropriations Act, FY2007 (P.L. 109-295),[72] appropriated $1,984 million for DRO, 46% more than the FY2006 appropriation of $1,358 million.[73] The conference report (H.Rept. 109-699) stated that with the new DRO funding, ICE would be able to sustain an average bed space capacity of 27,500, as proposed by the President.[74]

Alternatives to Detention

Due to the cost of detaining aliens, and the fact that many non-detained aliens with final orders of removal do not leave the country, there has been interest in developing alternatives to detention for certain types of aliens who do not require a secure detention setting. On June 21, 2004, ICE began a pilot program for low-risk, non-violent offenders in eight locations.[75] The program, the Intensive Supervision Appearance Program (ISAP), provides less restrictive alternatives to detention, using such tools as electronic monitoring devices (e.g., ankle bracelets), home visits,

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[67] The decision does not usually apply to aliens who are under mandatory detention. A high priority detainee may be released to make space for a mandatory detainee. Nonetheless, DHS does have explicit procedures for choosing between two mandatory detainees if there is not enough bed space. Pearson, *INS Detention Guidelines*, p. 1116.

[68] Unpublished DHS data obtained from Betty Mills-Carilli, Bureau of Immigration and Customs Enforcement Office of Congressional Affairs, Department of Homeland Security, April 8, 2004.

[69] Unpublished INS data obtained from Mark Schaffer, INS Office of Congressional Affairs, August 29, 2002.

[70] Signed into law on October 4, 2006. For more information on FY2007 appropriations see, CRS Report RL33428, *Homeland Security Department: FY2007 Appropriations*, coordinated by Blas Nuñez-Neto and Jennifer E. Lake, pp. 45-52.

[71] For more information on FY2008 appropriations see, CRS Report RL34004, *Homeland Security Department: FY2008 Appropriations*, coordinated by Blas Nuñez-Neto and Jennifer E. Lake.

[72] Signed into law on October 4, 2006. For more information on FY2010 appropriations see, For more information on detention funding, see CRS Report R40642, *Homeland Security Department: FY2010 Appropriations*, coordinated by Jennifer E. Lake and Chad C. Haddal, pp. 33-39.

[73] P.L. 109-90, signed into law on October 18, 2005.

[74] DHS FY2007 Congressional Budget Justifications, p. ICE-S&E-4. For FY2006, the funded number of beds was 20,800. CRS Report RL33351, *Immigration Enforcement Within the United States*, coordinated by Alison Siskin.

[75] The locations are San Francisco, California; Denver, Colorado; Miami, Florida; Baltimore, Maryland; St. Paul, Minnesota; Kansas City, Missouri; Portland, Oregon; and Philadelphia, Pennsylvania. An earlier pilot using Electronic Monitoring Devices was conducted in Anchorage, Alaska; Miami, Florida; and Detroit, Michigan.

work visits, and reporting by telephone, to monitor aliens who are out on bond while awaiting hearings during removal proceedings or the appeals process.[76] The Department of Homeland Security Appropriations Act for FY2010 appropriated $70 million for alternatives to detention, including the ISAP.[77]

Legislation in the 111th Congress

In the 111th Congress, bills have been introduced covering a range of provisions and perspectives concerning the detention of noncitizens. Several bills—including S. 1505, H.R. 264, H.R. 994, H.R. 2406, and H.R. 3308—would mandate that DHS increase the amount of detention space. In addition, other bills (e.g., H.R. 264, H.R. 1215, H.R. 4321, and S. 1594) would codify certain policies at detention facilities, such as access to telephones and medical care, and expand the alternatives to detention program. Other bills, such as H.R. 264, would eliminate the mandatory detention of asylum seekers in expedited removal.

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[76] Department of Homeland Security, U.S. Immigration and Customs Enforcement, "Public Security: ICE Unveils New Alternative to Detention," *Inside ICE*, vol. 1, no. 5, June 21, 2004, available at http://www.ice.gov/graphics/news/newsreleases/insideice/insideice_062104_web3.htm.

[77] For more on FY2010 appropriations see, CRS Report R40642, *Homeland Security Department: FY2010 Appropriations*, coordinated by Jennifer E. Lake and Chad C. Haddal