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# Immigration-Related Detention: Current Legislative Issues

Alison Siskin

*Congressional Research Service*

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# Immigration-Related Detention: Current Legislative Issues

## Abstract

[Excerpt] As Congress considers reforms to the nation's immigration system, the detention of noncitizens (aliens) 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 from the United States 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. In addition, immigration enforcement activities affect the need for and allocation of detention resources. For example, as the Department of Homeland Security (DHS) expands programs to locate removable aliens from jails throughout the country, DHS may need additional detention beds in areas of the United States where traditionally there has not been a need for detention space.

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 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. 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 or the nationwide allocation of the space.

## Keywords

immigration, detention, illegal aliens, Congress, legislation, Immigration and Nationality Act, INA

## Comments

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# Immigration-Related Detention: Current Legislative Issues

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## Summary

As Congress considers addressing some of the problems in the nation's immigration system, the detention of noncitizens in the United States may be an issue as Congress may choose to reevaluate detention priorities (i.e., who should be detained) and resources. 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 inadmissible or deportable on criminal grounds, those who are inadmissible 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. As of December 13, 2011, on an average day in FY2012, 32,953 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, as DHS increases its ability to identify aliens who are subject to removal from local jails in more remote locations, the nationwide allocation of detention space may become an issue.

The 108<sup>th</sup> 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; a total of 40,000 beds. Although Congress increased the bed space between FY2006 and FY2010, the number of beds only increased by approximately 12,000.

One bill related to immigration detention has received Congressional action in the 112<sup>th</sup> Congress. H.R. 1932 was placed on the Union Calendar on October 17, 2011. 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. 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." 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*, interpreted it as only permitting detention for up to six months where removal was not reasonably foreseeable. Nonetheless, the U.S. Supreme Court ruled absent clear guidance from Congress. H.R. 1932 as reported by the House Judiciary Committee, would amend the Immigration and Nationality Act to allow DHS to indefinitely detain, subject to six-month reviews, aliens under orders of removal who could not be removed if certain conditions were met.

In addition, in the 112<sup>th</sup> Congress, other bills have been introduced covering a range of provisions and perspectives concerning the detention of noncitizens. Several bills—including H.R. 100 and H.R. 1274—would mandate that DHS increase the amount of detention space. In addition, other bills (e.g., H.R. 933 and S. 1258) would mandate the propagation of regulations concerning detainee care, and expand the alternatives to detention program. Other proposed legislation, such as H.R. 713, would make changes to the mandatory detention provisions, lessening the categories of aliens required to be detained.

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## Introduction

As Congress considers reforms to the nation's immigration system, the detention of noncitizens (aliens)<sup>1</sup> 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 from the United States 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. In addition, immigration enforcement activities affect the need for and allocation of detention resources. For example, as the Department of Homeland Security (DHS) expands programs to locate removable aliens from jails throughout the country, DHS may need additional detention beds in areas of the United States where traditionally there has not been a need for detention space.<sup>2</sup>

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 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.<sup>3</sup> 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 or the nationwide allocation of the space.

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<sup>1</sup> An *alien* is "any person not a citizen or national of the United States" and is synonymous with *noncitizen*.

<sup>2</sup> For more information on DHS programs to locate removable aliens in local jails, see CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel.

<sup>3</sup> Karen Musalo, et al., *The Expedited Removal Study Releases Its Third Report*, 77 *Interpreted Releases* 1189, 1191 (August 21, 2000).

## 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,<sup>4</sup> but the creation of DHS moved the administration of detention of noncitizens from the Department of Justice's Immigration and Naturalization Service (INS) to DHS.<sup>5</sup> 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,<sup>6</sup> it can be argued that the language in the Homeland Security Act of 2002 (HSA)<sup>7</sup> has left the Attorney General with concurrent authority over immigration law.<sup>8</sup> 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.<sup>9</sup>

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.

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<sup>4</sup> INA §236(a).

<sup>5</sup> P.L. 107-296 §441.

<sup>6</sup> 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.

<sup>7</sup> P.L. 107-296, signed into law on November 25, 2002.

<sup>8</sup> 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.

<sup>9</sup> *Armentero v. Immigration and Naturalization Service*, 340 F.3d 1058, 1072 (9<sup>th</sup> Cir. 2003).

The Attorney General has final say in matters of immigration law that come before EOIR.<sup>10</sup> For example, on April 17, 2003, the Attorney General released a decision<sup>11</sup> 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.<sup>12</sup>

## **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.<sup>13</sup> As a result of the HSA, the daily responsibility for detaining aliens resides with the Secretary of Homeland Security, 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)<sup>14</sup> 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,<sup>15</sup> released on bond,<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> Aliens in required detention must be detained<sup>19</sup> while aliens in the other

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<sup>10</sup> 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.

<sup>11</sup> 23 I&N December 572 (A.G. 2003).

<sup>12</sup> 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 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.

<sup>13</sup> INA §236(a).

<sup>14</sup> Subtitle C of the Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, signed into law September 30, 1996.

<sup>15</sup> “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.”

<sup>16</sup> The minimum bond amount is \$1,500.

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

<sup>18</sup> 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 (continued...)

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.<sup>20</sup>

Additionally, the U.S.A. PATRIOT Act<sup>21</sup> 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.<sup>22</sup>

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.”<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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.”<sup>26</sup> This provision had been interpreted as permitting indefinite detention where removal was not reasonably foreseeable,

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(...continued)

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.

<sup>19</sup> 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.

<sup>20</sup> Michael A. Pearson, *INS Detention Guidelines*, October 7, 1998. Reprinted in *Bender's Immigration Bulletin*, vol. 3, no. 21, November 1, 1998, p. 1111. (Hereafter cited as Pearson, *INS Detention Guidelines*.)

<sup>21</sup> P.L. 107-56 signed into law on October 26, 2001.

<sup>22</sup> Habeas corpus proceedings are the avenue for judicial review of certification and detention.

<sup>23</sup> INA §287(a)(2).

<sup>24</sup> *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.

<sup>25</sup> INA §241(a)(1)(A).

<sup>26</sup> INA §241(a)(6).

but in 2001, the U.S. Supreme Court in *Zadvydas v. Davis*,<sup>27</sup> interpreted it as only permitting detention for up to six months where removal was not reasonably foreseeable.

## **Local Law Enforcement** <sup>28</sup>

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<sup>29</sup> of the INA. The enforcement of the civil provisions,<sup>30</sup> 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).<sup>31</sup> 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.<sup>32</sup>

## **Mandatory Detention**

The law requires the detention of

- criminal aliens,<sup>33</sup>

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<sup>27</sup> 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.

<sup>28</sup> For more information on the role of state and local law enforcement, see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

<sup>29</sup> Examples of criminal violations include alien smuggling, harboring of aliens, and trafficking in people, which are prosecuted in federal courts.

<sup>30</sup> 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.

<sup>31</sup> 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).

<sup>32</sup> 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 (5<sup>th</sup> Cir. 1977)).

<sup>33</sup> Criminal aliens include those who are inadmissible on criminal-related grounds as well as those who are deportable due to the commission of certain criminal offenses while in the United States. An alien is inadmissible 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 inadmissible is deportable. Only the following groups of criminal aliens who are inadmissible or deportable are not subject to mandatory detention: (1) aliens convicted of a single crime of moral turpitude who were (continued...)

- national security risks;<sup>34</sup>
- asylum seekers, without proper documentation, until they can demonstrate a “credible fear of persecution”;
- arriving aliens<sup>35</sup> subject to expedited removal (see below);
- arriving aliens who appear inadmissible 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.<sup>36</sup>

The USAPATRIOT Act added a 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 of DHS 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.<sup>37</sup>

## **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.”<sup>38</sup> 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,

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(...continued)

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.

<sup>34</sup> Any alien who is inadmissible or deportable for terrorist activity must be detained (INA §212(a)(3)(B) and §237(a)(4)(B)).

<sup>35</sup> 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).

<sup>36</sup> Prior to IIRIRA, aliens convicted of aggregated felonies who could not be removed could be released.

<sup>37</sup> INA §236(c)(1).

<sup>38</sup> 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.

which was the final year before the Supreme Court ruling limiting the time in detention for aliens who had been ordered removed, INS estimated that it had 5,000 aliens in indefinite administrative custody.<sup>39</sup>

In a 5-4 decision in *Zadvydas v. Davis* (2001),<sup>40</sup> 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.<sup>41</sup> Subsequently, then 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.<sup>42</sup> 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.<sup>43</sup>

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<sup>39</sup> Conversation with Tim Huagh, INS Congressional Affairs, April 15, 2004.

<sup>40</sup> 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).

<sup>41</sup> 66 *Federal Register*, p. 56967, 2001; 8 C.F.R. at §§241.4, 241.13 and 241.14.

<sup>42</sup> Michael Creppy, “Operating Policies and Procedures Memorandum,” November 19, 2001. Reprinted in *Interpreted Releases* January 14, 2002, pp. 74-83.

<sup>43</sup> Unpublished data from DHS.

In *Clark v. Martinez*,<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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

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

<sup>45</sup> 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.

<sup>46</sup> 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.

<sup>47</sup> 160 L. Ed. 2d at 752.

<sup>48</sup> 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.<sup>49</sup>

### *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 inadmissible 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.<sup>50</sup> 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.<sup>51</sup>

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.”<sup>52</sup> 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.”<sup>53</sup> In general, parole is available on a “case-by-case basis for urgent humanitarian reasons or significant public benefit.”<sup>54</sup>

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<sup>49</sup> 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).

<sup>50</sup> CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

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

<sup>52</sup> 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.

<sup>53</sup> 8 C.F.R. §212.5(b).

<sup>54</sup> 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.<sup>55</sup> 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<sup>56</sup> have the following rights:

- the right to apply for asylum;
- the right to communicate with consular or diplomatic officers of their home country;<sup>57</sup>
- the right to be represented by counsel (but not at government expense);<sup>58</sup>
- 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.<sup>59</sup> Custody and bond determinations can be reviewed by an immigration judge at any time before the removal order becomes final, except in certain cases.<sup>60</sup> 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.

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<sup>55</sup> The IIRIRA raised the minimum bond amount from \$500 to \$1,500. INA §236(a)(2)(A).

<sup>56</sup> As discussed above, those under expedited removal have more limited rights than detainees not subject to expedited removal.

<sup>57</sup> 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))

<sup>58</sup> 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.

<sup>59</sup> Charles Gordon, et al., *Immigration Law and Procedure* §108.01.

<sup>60</sup> 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 Conditions

Although there is consensus that detainees should be treated humanely, there is no consensus on exactly what the conditions of detention should be.<sup>61</sup> In 2000, the former Immigration and Naturalization Service (INS) created National Detention Standards for aliens in detention, which are published in the Detention Operations Manual. In late 2008, ICE published new Detention Standards in a performance-based format. The standards specify the detention conditions appropriate for immigration detainees.<sup>62</sup> In most cases, the standards mirror American Correctional Association (ACA) standards, though some of ICE's Detention Standards provide more specificity or are unique to the needs of alien detainees. The Detention Standards, however, do not have the force of law, thus detainees do not have legal recourse for violations of the standards.

Some argue that immigration detention is civil detention and is unlike criminal incapacitation. They contend that despite the differences, the public views immigration detention as identical to criminal incarceration, and that the government wrongly manages both confined populations in the same way.<sup>63</sup> They also note that sheer number and type of detention facilities make it difficult for ICE to ensure that the national detention standards are being followed.<sup>64</sup> In 2009, the Obama Administration created The Office of Detention Policy and Planning (ODPP) in ICE with the goal of overhauling the current immigration detention system and "designing a detention system that meets the unique needs of ICE's detained population." According to their website: "ODPP will shape the future design, location and standards for civil immigration detention facilities so that ICE no longer relies primarily on existing penal models."<sup>65</sup>

Nonetheless, others contend that detained noncitizens should not receive better treatment than U.S. citizens who are arrested and awaiting trial, noting that aliens are in detention because they

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<sup>61</sup> For example, some argue that since most detainees do not have criminal records, that they should be housed in low-security settings, such as converted hotels. Others argue that in a prison system, inmates are only allowed to be in low-security settings once they have proven that they are not a risk, and that since immigration detention tends to be short-term, there is not enough time to evaluate which detainees pose a risk to officers and other detainees. Testimonies of Christopher L. Crane and Donald M. Kerwin, in the U.S. Congress, House Committee on Homeland Security, Subcommittee on Border, Maritime, and Global Counterterrorism, *Moving Toward More Effective Immigration Detention Management*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 10, 2009, H.Hrg 111-47 (Washington: GPO, 2011).

<sup>62</sup> The standards detail the policies on most aspects of detention including medical care, visitation, recreation, library and telephone access, and disciplinary policy. Immigration and Customs Enforcement, *2008 Operations Manual ICE Performance Based National Detention Standards (PBNDS)*, Washington, DC, 2008, <http://www.ice.gov/detention-standards/2008/>.

<sup>63</sup> Almost all facilities that house immigration detainees were constructed to be penal institutions. Testimony of Dr. Dora Schriro in the U.S. Congress, House Committee on Homeland Security, Subcommittee on Border, Maritime, and Global Counterterrorism, *Moving Toward More Effective Immigration Detention Management*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 10, 2009, H.Hrg 111-47 (Washington: GPO, 2011).

<sup>64</sup> There are more than 250 facilities that house immigration detainees. In addition to ICE owned and operated Service Processing Centers (SPCs), ICE contracts with contract detention facilities (CDFs) that are privately owned and operated, and federal, state and local facilities through Intergovernmental-Service Agreements (IGSAs). Statement of Representative Loretta Sanchez in the U.S. Congress, House Committee on Homeland Security, Subcommittee on Border, Maritime, and Global Counterterrorism, *Moving Toward More Effective Immigration Detention Management*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 10, 2009, H.Hrg 111-47 (Washington: GPO, 2011).

<sup>65</sup> Immigration and Customs Enforcement, "Office of Detention Policy and Planning," press release, <http://www.ice.gov/about/offices/leadership/odpp/>.

have violated U.S. law.<sup>66</sup> In addition, they observe that most noncitizens are only in detention for a short period of time.<sup>67</sup>

## Detention Statistics

### Detention Population

As **Figure 1** shows, from FY2001 to 2012, the average size of the daily noncitizen detention population increased by more than 50%, from 20,429 in FY2001 to 32,953 in FY2012. During the same time period, the number of funded beds increased from 19,702 to 34,000. The largest increase in the average daily detention population occurred between FY2006 and FY2007, when Congress increased bed space funding from 20,800 to 27,500 beds. In addition, except for two years, between FY2001 and FY2007, the number of funded beds was less than the average daily detention population. Since FY2008, the number of funded beds has exceeded the average daily detention population. Nonetheless, it is clear from **Figure 1** that the average daily detention population is closely tied to the amount of funded bedspace.

ICE detained 363,064 aliens during FY2010. During that year, the average daily detention population was 30,885. Although more than 61% of all detainees were from Mexico, they tended to have short stays in detention and, thus, they accounted for only 36% of detention bed days. The other leading countries for the percentage of detention bed days were El Salvador (11%), Guatemala (10%), and Honduras (8%).<sup>68</sup>

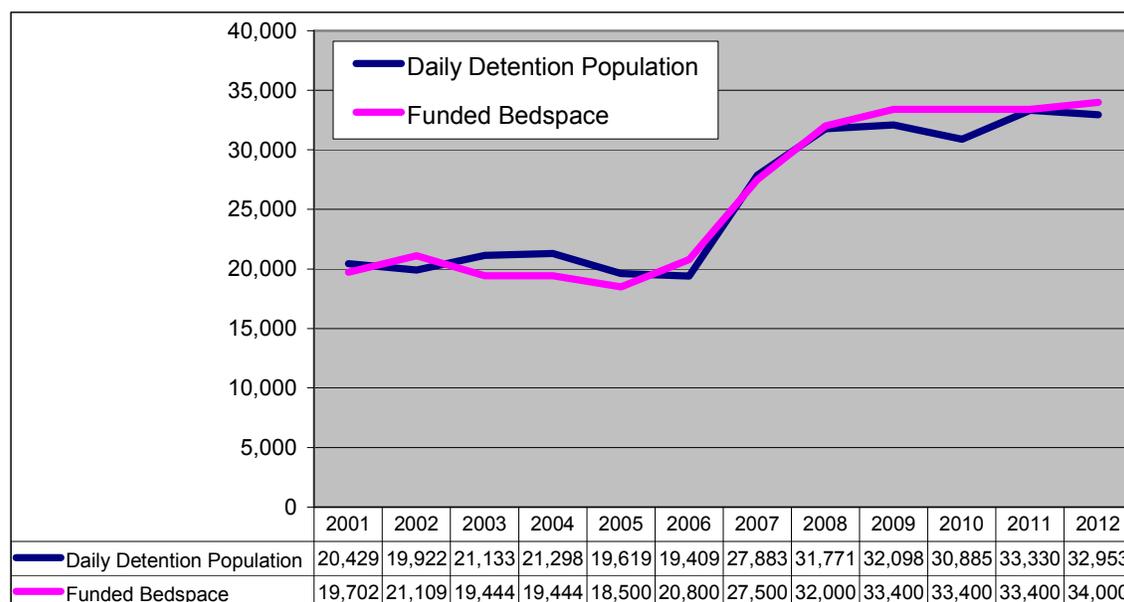
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<sup>66</sup> Statement of Representative Mark E. Souder in the U.S. Congress, House Committee on Homeland Security, Subcommittee on Border, Maritime, and Global Counterterrorism, *Moving Toward More Effective Immigration Detention Management*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 10, 2009, H.Hrg 111-47 (Washington: GPO, 2011).

<sup>67</sup> In a study from 2009, Dr. Dora Schriro, found that 25% of the detained population was released within a day, 38% within a week, 71% in less than a month, and 95% within four months. Less than 1% of all admissions (approximately 2,100 people) were in detention a year or more. Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*, Department of Homeland Security Immigration and Customs Enforcement, Washington, DC, October 6, 2009.

<sup>68</sup> Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2010*, June 2011.

**Figure I. Daily Detention Population and Funded Bedspace, FY2001-FY2012**



**Source:** CRS presentation of published and unpublished DHS data.

**Note:** FY2012 is the average daily population in detention through December 13, 2012.

## Detention Space and Cost

Some maintain that DHS detains too many people who are not a threat to public safety and that the money spent to detain such people could be better spent on other enforcement priorities.<sup>69</sup> They argue 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 and has also affected ICE’s ability to exercise discretion in determining who to detain or release.<sup>70</sup>

Others contend that DHS should be detaining more noncitizens to help effectuate removal but does not have enough detention space to house all those who should be detained. They also argue that detention is necessary to protect public safety, and to deter illegal border crossers and false asylum claims.<sup>71</sup> There are approximately 480,000 noncitizens in the United States who have been ordered deported who can not be confirmed to have left the country.<sup>72</sup> 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

<sup>69</sup> For examples of this position, see U.S. Congress, House Committee on Homeland Security, Subcommittee on Border, Maritime, and Global Counterterrorism, *Moving Toward More Effective Immigration Detention Management*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 10, 2009, H.Hrg 111-47 (Washington: GPO, 2011).

<sup>70</sup> For example see Rep. Bob Filner, Introductory Statement on H.R. 713, *Congressional Record*, February 18, 2011, p. E312.

<sup>71</sup> For examples of this position, see U.S. Congress, House Committee on Homeland Security, Subcommittee on Border, Maritime, and Global Counterterrorism, *Moving Toward More Effective Immigration Detention Management*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 10, 2009, H.Hrg 111-47 (Washington: GPO, 2011).

<sup>72</sup> Immigration and Customs Enforcement, *Fact Sheet: ICE Fugitive Operations Program*, Washington, DC, November 7, 2011, <http://www.ice.gov/news/library/factsheets/fugops.htm>.

the country.<sup>73</sup> In addition, in 2007, then ICE director John Torres testified that 90% of aliens released from detention did not appear for their immigration hearings.<sup>74</sup>

Furthermore, 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. The amount of space varies by area of the country, and may lead to inequities and disparate policies in different geographic areas.<sup>75</sup> In addition, moving detainees between detention facilities, often relocating them to an area far from where they were arrested, has been shown to delay hearings and increase the time a person is in detention, which increases detention costs.<sup>76</sup>

## **Appropriations for Detention Operations**

The overall increase in the number of noncitizens in DHS detention has also focused attention on cost of detaining noncitizens, especially as Congress tries to balance immigration enforcement priorities and a tight fiscal budget.<sup>77</sup> For FY2011, it cost DHS an average of \$113 a day for each detainee held in detention. This cost does not include transportation or the cost of deporting the alien, and differs by type of detention facility.<sup>78</sup> In comparison, for FY2004, DHS budgeted \$80 a day for each detainee held in detention.<sup>79</sup>

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<sup>73</sup> 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.

<sup>74</sup> U.S. Congress, House Committee on Homeland Security, Subcommittee on Border, Maritime, and Global Counterterrorism, *Crossing the Border Immigrants in Detention*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., March 15, 2007.

<sup>75</sup> 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. For an example of this argument, see U.S. Congress, House Committee on Homeland Security, Subcommittee on Border, Maritime, and Global Counterterrorism, *Moving Toward More Effective Immigration Detention Management*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 10, 2009, H.Hrg 111-47 (Washington: GPO, 2011).

<sup>76</sup> *Ibid.*, p. 7.

<sup>77</sup> U.S. Congress, House Committee on Homeland Security, Subcommittee on Border, Maritime, and Global Counterterrorism, *Moving Toward More Effective Immigration Detention Management*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 10, 2009, H.Hrg 111-47 (Washington: GPO, 2011).

<sup>78</sup> There are three main types of detention facilities, Service Processing Centers (SPCs) which are owned and operated by DHS, contract detention facilities (CDF) which are privately owned and DHS contracts for detention space, and Inter-governmental Service Agreement (IGSAs) facilities which are operated by local government and DHS contracts for detention space. Daily costs per detainee range from \$117 per day at SPCs, to \$85 at CDFs. Unpublished DHS data obtained from the Bureau of Immigration and Customs Enforcement Office of Congressional Affairs, Department of Homeland Security, December 2, 2011.

<sup>79</sup> Unpublished data obtained from ICE Office of Congressional Affairs, April 8, 2004.

**Table 1. Appropriations for ICE Enforcement and Removal Operations (ERO) and ERO Custody Operations: FY2008-FY2012**  
(in millions)

Fiscal Year	Total: Enforcement and Removal Operations (ERO)	ERO: Custody Operations
2008	\$2,381	\$1,647
2009 <sup>a</sup>	\$2,628	\$1,830
2010	\$2,545	\$1,771
2011	\$2,571	\$1,794
2012	\$2,751	\$2,051

**Source:** CRS analysis of Division D of the Consolidated Appropriations Act, 2012 (P.L. 112-74); Department of Defense and Full-Year Continuing Appropriations Act, 2011 (P.L. 112-10); The Department of Homeland Security Appropriations Act, FY2010 (P.L. 111-83); Division D of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (P.L. 110-329); and Division E of the Consolidated Appropriations Act, 2008 (P.L. 110-161).

- a. In FY2009 no money was appropriated specifically for ICE’s Management and Administration (HQ) account, while in all other years money was appropriated for that account. Thus, it is likely that the increase in appropriations from FY2008 to FY2009 was not as large as it appears, while the decline in appropriations for ERO from FY2009 to FY2010 was not a real decline, but a difference in accounting. Overall, in FY2009, ICE received \$4.9 billion in appropriations while in FY2010, Congress appropriated \$5.3 billion to ICE. For a fuller discussion of FY2010 appropriations, see CRS Report R40642, *Homeland Security Department: FY2010 Appropriations*, coordinated by Jennifer E. Lake.

As **Table 1** shows, funding for ICE’s detention operations increased between FY2008 and FY2012, even as the fiscal climate has become more constrained. In FY2010 and FY2011, Congress appropriated similar amounts for custody operations, funding 33,400 beds in both years. (See **Figure 1**.) In FY2012, Congress increased the number of beds by 600, and increased funding for custody operations by \$257 million.

### 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.<sup>80</sup> 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, work visits, and reporting by telephone, to monitor aliens who are out on bond while awaiting hearings during removal proceedings or the appeals process.<sup>81</sup> The Department of Homeland

<sup>80</sup> 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.

<sup>81</sup> 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](http://www.ice.gov/graphics/news/newsreleases/insideice/insideice_062104_web3.htm).

Security Appropriations Act for FY2012 appropriated \$72.4 million for alternatives to detention, including the ISAP.<sup>82</sup>

## Legislation in the 112<sup>th</sup> Congress

In the 112<sup>th</sup> Congress, bills have been introduced covering a range of provisions and perspectives concerning the detention of noncitizens. Several bills—including H.R. 100 and H.R. 1274—would mandate that DHS increase the amount of detention space. In addition, other bills (e.g., H.R. 933, S. 1258) would require the propagation of regulations concerning detainee care, and expand the alternatives to detention program. Other proposed legislation, such as H.R. 713, would make changes to the mandatory detention provisions, providing the administration with more discretion on who should be detained. Only one bill, H.R. 1932, has received any Congressional action.

On October 18, 2011, the House Judiciary Committee reported the Keep Our Communities Safe Act of 2011 (H.R. 1932).<sup>83</sup> Among other things, H.R. 1932 would codify and modify the conditions for post-removal order detention. The bill would allow DHS to detain indefinitely, subject to six-month reviews, an alien under orders of removal who cannot be removed if (1) there is a significant likelihood that the alien will be removed in the reasonably foreseeable future; (2) the alien would have been removed but for the alien's refusal to cooperate with the DHS Secretary's identification and removal efforts; (3) the alien has a highly contagious disease that poses a public safety threat; (4) release would have serious adverse foreign policy consequences; (5) release would threaten national security; (6) release would threaten the safety of the community, and the alien has either been convicted of one or more aggravated felonies or other designated crimes or been convicted of one or more crimes of violence and due to a mental condition or personality disorder is likely to engage in future acts of violence; or (7) release would threaten the safety of the community, and the alien has been convicted of at least one aggravated felony. The bill would limit habeas corpus reviews<sup>84</sup> of such detention and related actions or decisions to the U.S. District Court for the District of Columbia. Also, the bill would permit unlimited detention of certain aliens during pending removal proceedings.

Proponents of H.R. 1932 contend that legislation is needed to prevent criminal aliens who can not be removed to their home countries from being released and committing additional crimes.<sup>85</sup>

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<sup>82</sup> For more on FY2012 appropriations see, CRS Report R41982, *Homeland Security Department: FY2012 Appropriations*, coordinated by William L. Painter and Jennifer E. Lake.

<sup>83</sup> U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Hearing on H.R. 1932, the "Keep Our Communities Safe Act of 2011,"* 112<sup>th</sup> Cong., 1<sup>st</sup> sess., May 24, 2011, [http://judiciary.house.gov/hearings/hear\\_05242011.html](http://judiciary.house.gov/hearings/hear_05242011.html). U.S. Congress, House Committee on the Judiciary, *Full Committee Markup of H.R. 1932, the "Keep Our Communities Safe Act of 2011,"* 112<sup>th</sup> Cong., 1<sup>st</sup> sess., July 14, 2011, <http://judiciary.house.gov/hearings/pdf/7%2014%2011%20HR%201932%20HR%202480%20HR%201002.pdf>. U.S. Congress, House Committee on the Judiciary, *Keep Our Communities Safe Act of 2011*, Report to Accompany H.R. 1932, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 18, 2011, H.Rept. 112-255.

<sup>84</sup> Habeas corpus review is a legal action through which a person's detention is reviewed for legality.

<sup>85</sup> At the hearing on H.R. 1932, Chairman Lamar Smith noted that each year since 2008, 4,000 "dangerous criminal immigrants" had been released from immigration detention because they could not be removed. Statement of Chairman Lamar Smith, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Hearing on H.R. 1932, the "Keep Our Communities Safe Act of 2011,"* 112<sup>th</sup> Cong., 1<sup>st</sup> sess., May 24, 2011.

They argue that the Supreme Court in *Zadvydas v. Davis* (2001),<sup>86</sup> did not deny Congress the authority to provide for extended periods of detention. Indeed, they contend that the Court “invited” Congress to amend existing law to clarify circumstances and procedures under which extend detention would be permissible.<sup>87</sup> Nonetheless, others argue that the criminal justice and civil commitment systems already exist to keep dangerous individuals away from the public.<sup>88</sup> They also contend that H.R. 1932 would allow for the prolonged, unnecessary, and expensive detention of asylum seekers and other immigrants by preventing bond determination hearings and limiting habeas corpus review to the U.S. District Court for the District of Columbia.<sup>89</sup>

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<sup>86</sup> 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). As discussed above, in *Zadvydas v. Davis* (2001), although the U.S. Supreme Court held that a statute permitting indefinite detention would raise serious constitutional problems, the court’s ruling was a matter of statutory interpretation arguing that it was not clear that Congress had meant to authorize “long-term detention of unremovable aliens.”

<sup>87</sup> Testimony of Thomas H. Dupree Jr., U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Hearing on H.R. 1932, the “Keep Our Communities Safe Act of 2011,”* 112<sup>th</sup> Cong., 1<sup>st</sup> sess., May 24, 2011, [http://judiciary.house.gov/hearings/hear\\_05242011.html](http://judiciary.house.gov/hearings/hear_05242011.html).

<sup>88</sup> Testimony of Ahilan T. Arulanantham, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Hearing on H.R. 1932, the “Keep Our Communities Safe Act of 2011,”* 112<sup>th</sup> Cong., 1<sup>st</sup> sess., May 24, 2011, [http://judiciary.house.gov/hearings/hear\\_05242011.html](http://judiciary.house.gov/hearings/hear_05242011.html).

<sup>89</sup>Statement of Annie Soveik, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Hearing on H.R. 1932, the “Keep Our Communities Safe Act of 2011,”* 112<sup>th</sup> Cong., 1<sup>st</sup> sess., May 24, 2011.