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Immigration Detention: A Legal Overview

September 16, 2019

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SUMMARY

R45915

September 16, 2019

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Immigration Detention: A Legal Overview

The Immigration and Nationality Act (INA) authorizes—and in some cases requires—the Department of Homeland Security (DHS) to detain non-U.S. nationals (aliens) arrested for immigration violations that render them removable from the United States. An alien may be subject to detention pending an administrative determination as to whether the alien should be removed, and, if subject to a final order of removal, pending efforts to secure the alien's removal from the United States. The immigration detention scheme is multifaceted, with different rules that turn on several factors, such as whether the alien is seeking admission into the United States or has been lawfully admitted into the country; whether the alien has engaged in certain proscribed conduct; and whether the alien has been issued a final order of removal. In many instances DHS maintains discretion to release an alien from custody. But in some instances, such as when an alien has committed specified crimes, the governing statutes have been understood to allow release from detention only in limited circumstances.

The immigration detention scheme is mainly governed by four INA provisions that specify when an alien may be detained:

1. **INA Section 236(a)** generally authorizes the detention of aliens pending removal proceedings and permits aliens who are not subject to mandatory detention to be released on bond or on their own recognizance;
2. **INA Section 236(c)** generally requires the detention of aliens who are removable because of specified criminal activity or terrorist-related grounds after release from criminal incarceration;
3. **INA Section 235(b)** generally requires the detention of applicants for admission, such as aliens arriving at a designated port of entry as well as certain other aliens who have not been admitted or paroled into the United States, who appear subject to removal; and
4. **INA Section 241(a)** generally requires the detention of aliens during a 90-day period after the completion of removal proceedings and permits (but does not require) the detention of certain aliens after that period.

These provisions confer substantial authority upon DHS to detain removable aliens, but that authority has been subject to legal challenge, particularly in cases involving the prolonged detention of aliens without bond. DHS's detention authority is not unfettered, and due process considerations may inform the duration and conditions of aliens' detention. In 2001, the Supreme Court in *Zadvydas v. Davis* construed the statute governing the detention of aliens following an order of removal as having implicit, temporal limitations. The Court reasoned that construing the statute to permit the indefinite detention of lawfully admitted aliens after their removal proceedings would raise "serious constitutional concerns." In 2003, however, the Court in *Demore v. Kim* ruled that the mandatory detention of certain aliens *pending* their removal proceedings, at least for relatively brief periods, was constitutionally permissible. The interplay between the *Zadvydas* and *Demore* rulings has called into question whether the constitutional standards for detention prior to a final order of removal differ from those governing detention after a final order is issued. Several lower courts have interpreted *Demore* to mean that mandatory detention pending removal proceedings is not per se unconstitutional, but that *Zadvydas* cautions that if this detention becomes "prolonged" it may not comport with due process requirements.

Additionally, some lower courts have recognized constraints on DHS's detention power that the Supreme Court has not yet considered. For instance, some courts have ruled that the Due Process Clause requires aliens in removal proceedings to have bond hearings when detention becomes prolonged, where the government bears the burden of proving that the alien's continued detention is justified. In addition, a settlement agreement known as the "*Flores* Settlement," which is enforced by a federal district court, currently limits DHS's ability to detain alien minors who are subject to removal. Further, while litigation concerning immigration detention has largely centered on the duration of detention, some courts have considered challenges to the conditions of immigration confinement, generally under the standards applicable to pretrial detention in criminal cases. Some courts have also restricted DHS's ability to take custody of aliens detained by state or local law enforcement officials upon issuance of "immigration detainers."

In short, while DHS generally has broad authority over the detention of aliens, that authority is not without limitation. As courts continue to grapple with legal and constitutional challenges to immigration detention, Congress may consider legislative options that clarify the scope of the federal government's detention authority.

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Introduction

The Immigration and Nationality Act (INA) authorizes—and in some cases requires—the Department of Homeland Security (DHS) to detain non-U.S. nationals (aliens) arrested for immigration violations that render them removable from the United States.[1] The immigration detention regime serves two primary purposes. First, detention may ensure an apprehended alien's presence at his or her removal hearing and, if the alien is ultimately ordered removed, makes it easier for removal to be quickly effectuated.[2] Second, in some cases detention may serve the additional purpose of alleviating any threat posed by the alien to the safety of the community while the removal process is under way.[3]

The INA's detention framework, however, is multifaceted, with different rules turning on whether the alien is seeking initial admission into the United States or was lawfully admitted into the country; whether the alien has committed certain criminal offenses or other conduct rendering him or her a security risk; and whether the alien is being held pending removal proceedings or has been issued a final order of removal.[4]

In many cases detention is discretionary, and DHS may release an alien placed in formal removal proceedings on bond, on his or her own recognizance, or under an order of supervision pending the outcome of those proceedings.[5] But in other instances, such as those involving aliens who have committed specified crimes, there are only limited circumstances when the alien may be released from custody.[6]

This report outlines the statutory and regulatory framework governing the detention of aliens, from an alien's initial arrest and placement in removal proceedings to the alien's removal from the United States. In particular, the report examines the key statutory provisions that specify when

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[1] *See* 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers . . ."). In 2003, the former Immigration and Naturalization Service (INS) ceased to exist as an independent agency under the U.S. Department of Justice, and its functions were transferred to DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 101, 441, 451, 471, 116 Stat. 2135, 2142, 2192, 2195, 2205 (2002).

[2] *See* Demore v. Kim, 538 U.S. 510, 528 (2003) ("Such detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed."); Zadvydas v. Davis, 533 U.S. 678, 699 (2001) (noting that detention serves the purpose of "assuring the alien's presence at the moment of removal.").

[3] *See* Matter of Valdez-Valdez, 21 I. & N. Dec. 703, 709 (BIA 1997) (observing that the immigration detention provisions "were geared toward ensuring community safety and the criminal alien's appearance at all deportation hearings."); Matter of Drysdale, 20 I. & N. Dec. 815, 817 (BIA 1994) ("[I]f the alien cannot demonstrate that he is not a danger to the community upon consideration of the relevant factors, he should be detained in the custody of the Service."); Matter of Patel, 15 I. & N. Dec. 666, 666 (BIA 1976) ("An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security or that he is a poor bail risk.") (citations omitted).

[4] *See* 8 U.S.C. §§ 1225(b)(1)(B) (detention of arriving aliens and aliens who recently entered the United States without inspection, and who are subject to expedited removal), 1225(b)(2)(A) (detention of "other aliens" seeking admission who are subject to removal), 1226(a) (general detention authority over aliens subject to removal), 1226(c) (detention of aliens who have committed certain criminal offenses or engaged in other proscribed conduct), 1226a(a) (detention of suspected terrorists), 1231(a)(2) (detention of aliens following completion of removal proceedings), 1231(a)(6) (detention of aliens following completion of removal proceedings).

[5] *Id.* § 1226(a).

[6] *Id.* §§ 1225(b)(1)(B)(ii), (iii)(IV), 1225(b)(2)(A), 1226(c), 1231(a)(2).

an alien may or must be detained by immigration authorities and the circumstances when an alien may be released from custody. The report also discusses the various legal challenges to DHS's detention power and some of the judicially imposed restrictions on that authority. Finally, the report examines how these legal developments may inform Congress as it considers legislation that may modify the immigration detention framework.

Legal and Historical Background

The Federal Immigration Authority and the Power to Detain Aliens

The Supreme Court has long recognized that the federal government has "broad, undoubted power over the subject of immigration and the status of aliens,"[7] including with respect to their admission, exclusion, and removal from the United States.[8] This authority includes the power to detain aliens pending determinations as to whether they should be removed from the country.[9] The Court has predicated this broad immigration power on the government's inherent sovereign authority to control its borders and its relations with foreign nations.[10] Notably, the Court has "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens,"[11] and that "Congress may make rules as to aliens that would be unacceptable if applied to citizens."[12]

Despite the government's broad immigration power, the Supreme Court has repeatedly declared that aliens who have physically entered the United States come under the protective scope of the Due Process Clause of the Fifth Amendment, which applies "to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[13] Due process protections generally include the right to a hearing and a meaningful opportunity to be heard before deprivation of a liberty interest.[14] And one of the core protections of the Due Process Clause is the "[f]reedom from bodily restraint."[15] But while the Supreme

[7] Arizona v. United States, 567 U.S. 387, 394 (2012).

[8] *See* INS v. Delgado, 466 U.S. 210, 235 (1984) ("Congress, of course, possesses broad power to regulate the admission and exclusion of aliens, . . ."); Galvan v. Press, 347 U.S. 522, 530 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.").

[9] *See* Reno v. Flores, 507 U.S. 292, 306 (1993) ("Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings."); Carlson v. Landon, 342 U.S. 524, 533 (1952) ("Detention is necessarily a part of this deportation procedure."); Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.").

[10] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative"); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation").

[11] Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

[12] Demore v. Kim, 538 U.S. 510, 522 (2003).

[13] Zadvydas v. Davis, 533 U.S. 678, 693 (2001); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."). The Fifth Amendment's Due Process Clause provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ", U.S. CONST. amend. V.

[14] Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[15] Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)); *see also*

Court has recognized that due process considerations may constrain the federal government's exercise of its immigration power, there is some uncertainty regarding when these considerations may be consequential.

Generally, aliens seeking initial *entry* into the United States typically have more limited constitutional protections than aliens present within the country.[16] The Supreme Court has long held that aliens seeking entry into the United States have no constitutional rights regarding their applications for admission,[17] and the government's detention authority in those situations seems least constrained by due process considerations. Thus, in *Shaughnessy v. United States* ex rel. *Mezei*, the Supreme Court upheld the indefinite detention of an alien who was denied admission into the United States following a trip abroad.[18] The Court ruled that the alien's "temporary harborage" on Ellis Island pending the government's attempts to remove him did not constitute an "entry" into the United States, and that he could be "treated as if stopped at the border."[19]

Nevertheless, some courts have suggested that the constitutional limitations that apply to arriving aliens pertain only to their *procedural* rights regarding their applications for admission, but do not foreclose the availability of redress when fundamental liberty interests are implicated.[20] Thus, some lower courts have concluded that arriving aliens have sufficient due process protections against unreasonably prolonged detention, and distinguished *Mezei* as a case involving the exclusion of an alien who potentially posed a danger to national security that warranted the alien's detention.[21] Furthermore, regardless of the extent of their due process protections, detained

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Zadvydas, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.").

[16] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."). The Court, however, has held that a returning lawful permanent resident (LPR) has a due process right to a hearing before he may be denied admission. *See id.* at 33 (describing Supreme Court precedent "as holding 'that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him'") (quoting Rosenberg v. Fleuti, 374 U.S. 449, 460 (1963)).

[17] *Id.* at 32.

[18] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215–16 (1953).

[19] *Id.* at 215; *see also* United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (upholding exclusion of alien detained at Ellis Island and declaring that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"). This distinction, known as the "entry fiction" doctrine, allows courts to treat an alien arriving at the border or port of entry as though he had never entered the country, even if he is, technically, physically within U.S. territory, such as at a border checkpoint, an airport, or an immigration detention facility. *See Zadvydas*, 533 U.S. at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

[20] *See* Reno v. Flores, 507 U.S. 292, 302 (1993) (recognizing that due process includes "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (emphasis in original); Kwai Fun Wong v. INS, 373 F.3d 952, 971 (9th Cir. 2004) ("The entry fiction thus appears determinative of the *procedural* rights of aliens with respect to their applications for admission. The entry doctrine has not, however, been applied, by the Supreme Court or by this court, to deny all constitutional rights to non-admitted aliens."); Rosales-Garcia v. Holland, 322 F.3d 386, 410 (6th Cir. 2003) ("The fact that excludable aliens are entitled to less process, however, does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments."); Chi Thon Ngo v. INS, 192 F.3d 390, 396 (3d Cir. 1999) ("Even an excludable alien is a 'person' for purposes of the Fifth Amendment and is thus entitled to substantive due process.") (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896)).

[21] *See e.g., Rosales-Garcia*, 322 F.3d at 413–14 ("[T]he *Mezei* Court explicitly grounded its decision in the special circumstances of a national emergency and the determination by the Attorney General that Mezei presented a threat to national security."); Kouadio v. Decker, 352 F. Supp. 3d 235, 239–40 (S.D.N.Y. 2018) ("*Mezei* was decided in the

arriving aliens may be entitled to at least some level of habeas corpus review, in which courts consider whether an individual is lawfully detained by the government.[22]

But due process considerations become more significant once an alien has physically entered the United States. As discussed above, the Supreme Court has long recognized that aliens who have entered the United States, even unlawfully, are "persons" under the Fifth Amendment's Due Process Clause.[23] That said, the Court has also suggested that "the nature of that protection may vary depending upon [the alien's] status and circumstance."[24] In various opinions, the Court has suggested that at least some of the constitutional protections to which an alien is entitled may turn upon whether the alien has been admitted into the United States or developed substantial ties to this country.[25]

Consequently, the government's authority to detain aliens who have entered the United States is not absolute. The Supreme Court, for instance, construed a statute authorizing the detention of aliens ordered removed to have implicit temporal limitations because construing it to allow the indefinite detention of aliens ordered removed—at least in the case of lawfully admitted aliens later ordered removed—would raise "serious constitutional concerns."[26] Declaring that the government's immigration power "is subject to important constitutional limitations," the Court

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interest of national security, against a petitioner whose detention was authorized under 'emergency regulations promulgated pursuant to the Passport Act.'") (quoting *Mezei*, 345 U.S. at 214–15); Lett v. Decker, 346 F. Supp. 3d 379, 386 (S.D.N.Y. 2018) ("[T]he *Mezei* Court explicitly tailored its holding to the national security context, acknowledging that '[a]n exclusion proceeding grounded on danger to the national security . . . presents different considerations' than a typical deportation proceeding.") (quoting *Mezei*, 345 U.S. at 215–16).

[22] *See* INS v. St. Cyr, 533 U.S. 289, 305 (2001) (Noting that "[t]he writ of habeas corpus has always been available to review the legality of Executive detention."); Thuraissigiam v. Dep't of Homeland Sec., 917 F.3d 1097, 1115–17 (9th Cir. 2019) (ruling that a detained, non-admitted alien could invoke the Suspension Clause to challenge his expedited removal order because "habeas is available even when a petitioner lacks due process rights."); *compare with* Castro v. Dep't of Homeland Sec., 835 F.3d 422, 444–50 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017) (holding that "recent clandestine entrants" could not invoke Suspension Clause to challenge their expedited removal orders in habeas proceedings because they lacked sufficient constitutional protections). *See also* Boumediene v. Bush, 553 U.S. 723, 771 (2008) (holding that aliens detained as enemy combatants at Guantanamo Bay could invoke the Suspension Clause to challenge the adequacy of review under the Detainee Treatment Act).

[23] *See Zadvydas*, 533 U.S. at 693 ("But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

[24] *Id.* at 694.

[25] *See* United States v. Verdugo-Urquidez, 494 U.S. 2590 (1990) ("These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); Landon v. Plasencia, 459 U.S. 21 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n. 5 (1953) ("But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); Yamataya v. Fisher, 189 U.S. 86, 101 (1903) ("[I]t is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.").

[26] *Zadvydas*, 533 U.S. at 682 ("We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question. Based on our conclusion that indefinite detention of aliens in the former category would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review.").

has determined that the Due Process Clause limits the detention to "a period reasonably necessary to secure removal."[27]

Additionally, while the Supreme Court has recognized the government's authority to detain aliens *pending* formal removal proceedings,[28] the Court has not decided whether the extended detention of aliens during those proceedings could give rise to a violation of due process protections.[29] But some lower courts have concluded that due process restricts the government's ability to indefinitely detain at least some categories of aliens pending determinations as to whether they should be removed from the United States.[30]

In sum, although the government has broad power over immigration, there are constitutional constraints on that power. These constraints may be most significant with regard to the detention of lawfully admitted aliens within the country, and least powerful with regard to aliens at the threshold of initial entry into the United States.

Development of Immigration Laws Concerning Detention

From the outset, U.S. federal immigration laws have generally authorized the detention of aliens who are subject to removal. The first U.S. law on alien detention was the Alien Enemies Act in 1798, which subjected certain aliens from "hostile" nations during times of war to being detained and removed.[31] But Congress passed no other laws on the detention of aliens for nearly a century.[32] Starting in 1875, however, Congress enacted a series of laws restricting the entry of certain classes of aliens (e.g., those with criminal convictions), and requiring the detention of aliens who were excludable under those laws until they could be removed.[33] In construing the

[27] *Id.* at 695, 699–701.

[28] *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.").

[29] *See* Demore v. Kim, 538 U.S. 510, 513, 531 (2003) (ruling that it was "constitutionally permissible" for the government to subject certain aliens convicted of specified crimes to mandatory detention during their removal proceedings); Jennings v. Rodriguez, 138 S. Ct. 830, 842–43, 846–48, 851 (2018) (holding that the government has the statutory authority to detain aliens potentially indefinitely during their removal proceedings, but declining to address whether such indefinite detention is unconstitutional).

[30] *See e.g.*, Rodriguez v. Marin, 909 F.3d 252, 256 (9th Cir. 2018) ("We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional"); Borbot v. Warden Hudson Co. Corr. Facility, 906 F.3d 274, 278 (3d Cir. 2018) ("*Jennings* did not call into question our constitutional holding in [Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011)] that detention under § 1226(c) may violate due process if unreasonably long."); Padilla v. U.S. Immigration and Customs Enforcement, 387 F. Supp. 3d 1219, 1223 (W.D. Wash. 2019), *appeal docketed*, No. 19-35565 (9th Cir. July 5, 2019) ("It is the finding of this Court that it is unconstitutional to deny these class members a bond hearing while they await a final determination of their asylum request."); Brissett v. Decker, 324 F. Supp. 3d 444, 452 (S.D.N.Y. 2018) (ruling that detention of alien for more than 9 months without bond violated due process); Portillo v. Hott, 322 F. Supp. 3d 698, 709 (E.D. Va. 2018) (holding that alien detained for more than 14 months was entitled to a bond hearing).

[31] Alien Enemies Act, 5 Cong. ch. 66, §§ 1, 2, 1 Stat. 577 (1798); *see also* Derek C. Julius, *Land of the Free? Immigration Detention in the United States*, 64 FED. LAW. 46, 48 (2017) (noting that the Alien Enemies Act "became the first (and oldest) statute authorizing alien detention").

[32] *See* East Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1232 (9th Cir. 2018) ("The United States did not regulate immigration until 1875. Beginning in the late 19th century, Congress created a regulatory framework and categorically excluded certain classes of aliens.").

[33] *See e.g.*, Page Act of 1875, 43 Cong. ch. 141, § 5, 18 Stat. 477 (1875); Immigration Act of 1882, 47 Cong. ch. 376, § 2, 22 Stat. 214 (1882); Chinese Exclusion Act, 47 Cong. ch. 126, 22 Stat. 58 (1882); Immigration Act of 1891, 51 Cong. ch. 551, § 8, 26 Stat. 1084, 1085 (1891); An Act to Facilitate the Enforcement of the Immigration and Contract-Labor Laws of the United States, 52 Cong. ch. 206, § 5, 27 Stat. 569, 570 (1893).

government's detention authority, the Supreme Court in 1896 declared that "[w]e think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid."[34] Over the next few decades, Congress continued to enact laws generally mandating the detention and exclusion of proscribed categories of aliens seeking entry into the United States, as well as aliens physically present in the United States who became subject to removal.[35]

In 1952, Congress passed the INA, which distinguished between aliens physically arriving in the United States and those who had entered the country.[36] Aliens arriving in the country who were found ineligible for entry were subject to "exclusion," and those already present in the United States who were found to be subject to expulsion were deemed "deportable."[37] For aliens placed in exclusion proceedings, detention generally was required,[38] unless immigration authorities, based on humanitarian concerns, granted the alien "parole," allowing the alien to enter and remain in the United States pending a determination on whether he or she should be admitted.[39] In the case of deportable aliens, detention originally was authorized but not required, and aliens in such proceedings could be released on bond or "conditional parole."[40] Congress later amended the INA to require, in deportation proceedings, the detention of aliens convicted of aggravated felonies,[41] and authorized their release from custody only in limited circumstances, such as when the alien was a lawful permanent resident (LPR) who did not pose a threat to the community or a flight risk.[42]

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which made sweeping changes to the federal immigration laws.[43] IIRIRA replaced the INA's exclusion/deportation framework, which turned on whether an alien had physically entered the United States, with a new framework that turned on whether an alien had been *lawfully admitted* into the country by immigration authorities.[44] Aliens who had not been admitted,

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[34] Wong Wing v. United States, 163 U.S. 228, 235 (1896). But the Court held that aliens cannot be subject to *criminal punishment*, such as imprisonment at hard labor, without a trial. *Id.* at 237–38.

[35] *See e.g.*, Immigration Act of 1903, 57 Cong. Ch. 1012, § 21, 32 Stat. 1213, 1218 (1903); Immigration Act of 1907, 59 Cong. Ch. 1134, §§ 20, 21, 24, 34 Stat. 898, 904-06 (1907); Immigration Act of 1917, 64 Cong. Ch. 29, §§ 16, 19, 39 Stat. 874, 886, 889 (1917).

[36] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

[37] *Id.* §§ 212(a), 241(a).

[38] *Id.* §§ 235(b), 236(a).

[39] *Id.* § 212(d)(5). *See* Samirah v. O'Connell, 335 F.3d 545, 547 (7th Cir. 2003) ("Parole allows an alien temporarily to remain in the United States pending a decision on his application for admission.").

[40] Immigration and Nationality Act of 1952, Pub. L. No. 82-414 § 242(a), (b), 66 Stat. 163, 208-09 (1952). The INA also originally permitted the detention of aliens during a six-month period following a final order of deportation. *Id.* § 242(c). If the order of deportation remained outstanding after six months, the alien was subject to supervised release under regulations promulgated by the Attorney General. *Id.* § 242(d).

[41] An "aggravated felony," which serves as a ground for deportation, has been expanded over time to cover a wide range of criminal offenses, such as murder, drug trafficking, burglary, crimes of violence, and certain firearm offenses. *See* 8 U.S.C. § 1101(a)(43).

[42] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a)(4), 102 Stat. 4181 (1988); Immigration Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 4978 (1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1733 (1991). *See also infra* note 51 (noting how the Antiterrorism and Effective Death Penalty Act of 1996 expanded the range of criminal offenses that subjected aliens to mandatory detention and eliminated the government's authority to release criminal aliens on bond).

[43] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

[44] *Id.* § 304, 110 Stat. at 587-88 (codified at 8 U.S.C. §§ 1229, 1229a).

including those who may have unlawfully entered the country, could be barred entry or removed from the country based on specified grounds of *inadmissibility* listed under INA Section 212.[45] Aliens who had been lawfully admitted, however, could be removed if they fell under grounds of *deportability* specified under INA Section 237.[46] A standard, "formal" removal proceeding was established for deportable aliens and most categories of inadmissible aliens.[47] But IIRIRA created a new "expedited removal" process that applied to a subset of inadmissible aliens.[48] This process applies to arriving aliens and certain aliens who recently entered the United States without inspection, when those aliens lack valid entry documents or attempted to procure their admission through fraud or misrepresentation.[49]

IIRIRA generally authorized (but did not require) immigration authorities to detain aliens believed to be removable pending those aliens' formal removal proceedings, but permitted their release on bond or "conditional parole."[50] IIRIRA, however, required the detention of aliens who were inadmissible or deportable based on the commission of certain enumerated crimes or for terrorist-related grounds, generally with no possibility of release from custody.[51] IIRIRA also generally required the detention of "applicants for admission," including aliens subject to expedited removal, pending determinations as to whether they should be removed (such aliens, however, could still be paroled into the United States by immigration officials in their discretion).[52] This mandatory detention requirement has been applied even if those aliens were subsequently transferred to formal removal proceedings.[53] Finally, IIRIRA created a detention

[45] *Id.* § 304, 110 Stat. at 593 (codified at 8 U.S.C. § 1229a).

[46] *Id.* § 304, 110 Stat. at 589 (codified at 8 U.S.C. § 1229a).

[47] *Id.* § 304, 110 Stat. at 587-89, 593 (codified at 8 U.S.C. §§ 1229, 1229a).

[48] *Id.* § 302, 110 Stat. at 579-84 (codified at 8 U.S.C. § 1225(b)(1)(A)(i)).

[49] *Id.* Under IIRIRA, an alien who meets the criteria for expedited removal is subject to removal without a hearing or further review except in limited circumstances (e.g., the alien establishes a credible fear of persecution). *Id.* For more discussion about expedited removal, see CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*, by Hillel R. Smith.

[50] IIRIRA § 303(a) (codified at 8 U.S.C. § 1226(a)).

[51] *Id.* (codified at 8 U.S.C. § 1226(c)). Previously, the Antiterrorism and Effective Death Penalty Act of 1996 had expanded the range of criminal offenses that would subject aliens to mandatory detention and eliminated the government's authority to release such aliens on bond. *See* Pub. L. No. 104-132, § 440(c), (e), 110 Stat. 1214 (1996). Despite these restrictions, IIRIRA contained "Transition Period Custody Rules" (TPCR) that restored the discretionary authority to release many aliens convicted of criminal offenses, and the legislation provided that these rules would become effective for up to two years if the INS lacked sufficient detention space and personnel to implement the new mandatory detention scheme. IIRIRA § 303(b)(2), (3). The INS invoked the TPCR for two years from October 9, 1996, to October 9, 1998. *See* Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27,441 (May 19, 1998). Under the TPCR, aliens subject to removal on specified criminal or terrorist-related grounds were subject to detention during their removal proceedings, but could be released from custody if either (1) they were lawfully admitted to the United States and did not present a flight risk or danger to the community; or (2) they were not lawfully admitted to the United States, their designated country of removal would not accept them, and they did not pose a flight risk or danger to the community. IIRIRA § 303(b)(3); *see* Matter of Garvin-Noble, 21 I. & N. Dec. 672, 675 (BIA 1997) ("The transition rules were thus designed to give the Attorney General a 1-year grace period, which may be extended for an additional year, during which mandatory detention of criminal aliens would not be the general rule.").

[52] IIRIRA § 302(a) (codified at 8 U.S.C. § 1225(b)(1)(B)(ii), (iii)(IV), (2)(A)).

[53] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 845 (2018) ("In sum, §§ 1225(b)(1) and (b)(2) mandate detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin."). *See also* CRS Legal Sidebar LSB10343, *Is Mandatory Detention of Unlawful Entrants Seeking Asylum Constitutional?*, by Hillel R. Smith (providing an overview of how the mandatory detention requirements of INA Section 235(b) have been interpreted to apply to aliens transferred to formal removal proceedings).

scheme in which aliens with final orders of removal became subject to detention during a 90-day period pending their removal, and the government could (but was not required to) continue to detain some of those aliens after that period.[54]

A table showing the development of these immigration detention laws can be found in **Table A-1**.

Modern Statutory Detention Framework

Since IIRIRA's enactment, the statutory framework governing detention has largely remained constant.[55] This detention framework is multifaceted, with different rules turning on whether the alien is seeking admission into the United States or was lawfully admitted within the country; whether the alien has committed certain enumerated criminal or terrorist acts; and whether the alien has been issued a final administrative order of removal. Four provisions largely govern the current immigration detention scheme:

1. **INA Section 236(a)** generally authorizes the detention of aliens pending formal removal proceedings and permits (but does not require) aliens who are not subject to mandatory detention to be released on bond or their own recognizance;[56]
2. **INA Section 236(c)** generally *requires* the detention of aliens who are removable because of specified criminal activity or terrorist-related grounds;[57]
3. **INA Section 235(b)** generally *requires* the detention of applicants for admission (e.g., aliens arriving at a designated port of entry) who appear subject to removal;[58] and
4. **INA Section 241(a)** generally mandates the detention of aliens during a 90-day period after formal removal proceedings, and authorizes (but does not require) the continued detention of certain aliens after that period.[59]

While these statutes apply to distinct classes of aliens at different phases of the removal process, the statutory detention framework "is not static," and DHS's detention authority "shifts as the alien moves through different phases of administrative and judicial review."[60]

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[54] IIRIRA § 305(a)(3) (codified at 8 U.S.C. § 1231(a)(2), (6)).

[55] *See id.* §§ 302(a), 303(a), 305(a)(3) (codified at 8 U.S.C. §§ 1225(b)(1)(B)(ii), (iii)(IV), 1225(b)(2)(A), 1226(a), 1226(c), 1231(a)(2), 1231(a)(6)). Congress in 2001 passed the USA PATRIOT Act, which established a detention scheme for suspected terrorists. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272 (2001) (codified at 8 U.S.C. § 1226a(a)). Under this framework, if there are reasonable grounds to believe that an alien is inadmissible or deportable based on certain security-related and terrorist grounds, the Attorney General may certify that the alien should be detained until his removal from the United States or until the alien is determined not to be removable, in lieu of employing the detention authority found in other INA provisions, unless the Attorney General determines that the alien no longer presents a national security or public safety threat. *Id.* Nevertheless, this detention authority has not been used in practice, presumably because other INA provisions adequately authorize the detention of aliens who have committed specified criminal or terrorist-related offenses. *See* Adam Klein, Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 143 (2011) ("The other immigration detention authorities are themselves so robust that it apparently has not been necessary.").

[56] 8 U.S.C. § 1226(a).

[57] *Id.* § 1226(c).

[58] *Id.* § 1225(b)(1)(B)(ii), (iii)(IV), (2)(A).

[59] *Id.* § 1231(a)(2), (6).

[60] Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 945 (9th Cir. 2008).

This section explores these detention statutes and their implementing regulations, including administrative and judicial rulings that inform their scope and application. (Other detention provisions in the INA that apply to small subsets of non-U.S. nationals, such as alien crewmen, or arriving aliens inadmissible for health-related reasons, are not addressed in this report.[61])

A table providing a comparison of these major INA detention statutes can be found in **Table A-2**.

Discretionary Detention Under INA Section 236(a)

INA Section 236(a) is the "default rule" for aliens placed in removal proceedings.[62] The statute is primarily administered by Immigration and Customs Enforcement (ICE), the agency within DHS largely responsible for immigration enforcement in the interior of the United States.[63] Section 236(a) authorizes immigration authorities to arrest and detain an alien pending his or her formal removal proceedings.[64] Detention under INA Section 236(a) is discretionary, and immigration authorities are not required to detain an alien subject to removal unless the alien falls within one of the categories of aliens subject to mandatory detention (e.g., aliens convicted of specified crimes under INA Section 236(c), discussed later in this report).[65]

If ICE arrests and detains an alien under INA Section 236(a), and the alien is not otherwise subject to mandatory detention, the agency has two options:

1. it "may continue to detain the arrested alien" pending the removal proceedings; or
2. it "may release the alien" on bond in the amount of at least $1500, or on "conditional parole."[66]

[61] *See e.g.,* 8 U.S.C. §§ 1222(a) (requiring detention of aliens arriving at ports of entry who are inadmissible for having certain types of diseases or mental or physical disabilities, or because they come from countries where such diseases are prevalent), 1282(b) (authorizing the detention and removal of alien crewmen in certain circumstances).

[62] Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018).

[63] Enforcement and Removal Operations (ERO) is the component within ICE that is charged with the arrest, detention, and removal of aliens. *See Enforcement and Removal Operations*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/ero (last updated July 31, 2018).

[64] 8 U.S.C. § 1226(a). The statute and regulations provide that the alien may be arrested upon issuance of an administrative warrant (Form I-200). *Id.*; 8 C.F.R. § 236.1(b)(1). In some cases, however, an immigration officer may arrest an alien *without* a warrant (e.g., if the officer has reason to believe that an alien is present in the United States in violation of any law or regulation and is likely to escape before a warrant can be obtained for his arrest). 8 U.S.C. § 1357(a)(2).

[65] *See Casas-Castrillon*, 535 F.3d at 948 (describing INA Section 236(a) as the "general, discretionary detention authority"). For more discussion about the INA's mandatory detention provisions, *see infra* at 17-31.

[66] 8 U.S.C. § 1226(a)(1), (2); *see also* 8 C.F.R. 236.1(c)(8) ("Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act . . . "). Conditional parole means that the alien is released on his own recognizance (rather than on bond) subject to certain conditions, such as reporting requirements. Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1115 (9th Cir. 2007). Conditional parole is distinct from humanitarian parole under INA Section 212(d)(5)(A), which refers to the release from custody of arriving aliens *seeking admission* into the United States "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); *see* Delgado-Sobalvarro v. Att'y Gen. of the United States, 625 F.3d 782, 786–87 (3d Cir. 2010); *Ortega-Cervantes*, 501 F.3d at 1115–20; Matter of Castillo-Padilla, 25 I. & N. Dec. 257, 260–63 (BIA 2010), *aff'd*, 417 Fed.Appx. 888, 2011 WL 880846 (11th Cir. Mar. 15, 2011) (holding that conditional parole is a distinct procedure from being paroled into the United States).

Generally, upon release (whether on bond or conditional parole), the alien may not receive work authorization unless the alien is otherwise eligible (e.g., the alien is an LPR).[67] And ICE may at any time revoke a bond or conditional parole and bring the alien back into custody.[68]

In the event of an alien's release, ICE may opt to enroll the alien in an Alternatives to Detention (ATD) program, which allows ICE the ability to monitor and supervise the released alien to ensure his or her eventual appearance at a removal proceeding.[69]

Initial Custody Determination and Administrative Review

Following the arrest of an alien not subject to mandatory detention, an immigration officer may, at any time during formal removal proceedings, determine whether the alien should remain in custody or be released.[70] But when an alien is arrested without a warrant, DHS regulations provide that the immigration officer must make a custody determination within 48 hours of the alien's arrest, unless there is "an emergency or other extraordinary circumstance" that requires "an additional reasonable period of time" to make the custody determination.[71] DHS has defined "emergency or other extraordinary circumstance" to mean a "significant infrastructure or logistical disruption" (e.g., natural disaster, power outage, serious civil disturbance); an "influx of large numbers of detained aliens that overwhelms agency resources"; and other unique facts and circumstances "including, but not limited to, the need for medical care or a particularized compelling law enforcement need."[72]

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[67] 8 U.S.C. § 1226(a)(3). DHS regulations list specific categories of aliens who are authorized to work in the United States or who may apply for work authorization, including LPRs, asylum applicants, and aliens who have been paroled pending determinations as to whether they should be admitted into the United States. 8 C.F.R. § 274a.12.

[68] 8 U.S.C. § 1226(b) ("The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien."); 8 C.F.R. § 236.1(c)(9) ("When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time . . . in which event the alien may be taken into physical custody and detained.").

[69] *See* U.S. Gov't Accountability Office, GAO-15-26, Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness (2014). ICE's Intensive Supervision Appearance Program III (ISAP III) is the current version of its ATD program that was started in 2004 (previous iterations include ISAP I, ISAP II, and the separate Family Case Management Program (FCMP)). *Id.* at 9; *see also U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised)*, Dep't of Homeland Sec. Office of Inspector Gen. (Feb. 4, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf. ICE considers various factors in deciding whether an alien should be placed in ATD, including the alien's age (the alien must be at least 18), criminal history, community and family ties, compliance history, and humanitarian concerns. GAO-15-26, *supra*, at 8-10. Those enrolled in ATD are typically supervised by a contracting service that ensures the alien's appearance in immigration court through various means, such as GPS monitoring (e.g., ankle bracelets), unannounced home visits, telephonic or in-person meetings, and scheduled office visits with a case manager. *Id.* at 9-10. Aliens in ATD are also required to report to ICE periodically. *Id.* at 7. For further information about ATD, see CRS Report R45804, *Immigration: Alternatives to Detention (ATD) Programs*, by Audrey Singer.

[70] 8 C.F.R. § 236.1(g)(1) ("At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, an immigration official may issue a Form I-286, Notice of Custody Determination."); *see also id.* § 236.1(c)(8) (authorizing release of alien on bond or conditional parole), (d)(1) (indicating that ICE will make an "initial custody determination . . . including the setting of a bond").

[71] *Id.* § 287.3(d). The 48-hour window does not apply if the alien has been granted voluntary departure by an IJ. *Id.* Voluntary departure is a form of relief from removal that allows an alien to depart the United States at his own expense in lieu of removal if he meets certain statutory requirements. 8 U.S.C. § 1229c(a)(1), (b)(1).

[72] Memorandum from Asa Hutchinson, Undersecretary, Border and Transportation Security, to Michael J. Garcia, Assistant Secretary, U.S. Immigration and Customs Enforcement, Robert Bonner, Commissioner, U.S. Customs and Border Protection, Guidance on ICE Implementation of Policy and Practice Changes Recommended by the Department of Justice Inspector General (Mar. 30, 2004).

After ICE's initial custody determination, an alien may, at any time during the removal proceedings, request review of that decision at a bond hearing before an immigration judge (IJ) within the Department of Justice's (DOJ's) Executive Office for Immigration Review.[73] While the alien may request a bond hearing, INA Section 236(a) does not require a hearing to be provided at any particular time.[74] If there is a bond hearing, regulations specify that it "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding."[75] During these bond proceedings, the IJ may, under INA Section 236(a), determine whether to keep the alien in custody or release the alien, and the IJ also has authority to set the bond amount.[76] Following the IJ's custody decision, the alien may obtain a later bond redetermination only "upon a showing that the alien's circumstances have changed materially since the prior bond redetermination."[77]

Both the alien and DHS may appeal the IJ's custody or bond determination to the Board of Immigration Appeals (BIA), the highest administrative body charged with interpreting federal immigration laws.[78] The filing of an appeal generally will not stay the IJ's decision or otherwise affect the ongoing removal proceedings.[79] The BIA, however, may stay the IJ's custody determination on its own motion or when DHS appeals that decision and files a motion for a discretionary stay.[80] Moreover, if ICE had determined that the alien should not be released or had set bond at $10,000 or greater, any order of the IJ authorizing release (on bond or otherwise) *is automatically stayed* upon DHS's filing of a notice of intent to appeal with the immigration court within one business day of the IJ's order, and the IJ's order will typically remain held in abeyance pending the BIA's decision on appeal.[81]

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[73] 8 C.F.R. §§ 1003.19(a) ("Custody and bond determinations made by [ICE] pursuant to 8 CFR part 1236 may be reviewed by an Immigration Judge pursuant to 8 CFR part 1236."), 1236.1(d)(1) (providing that the alien may "request amelioration of the conditions under which he or she may be released"). An IJ, however, may not determine an alien's custody status upon his own motion. *See* Matter of P-C-M-, 20 I. & N. Dec. 432, 434 (BIA 1991) (noting that the regulations "only provide authority for the immigration judge to redetermine custody status upon application by the [alien] or his representative"). In addition, if the alien has been released from custody and seeks to challenge ICE's conditions of release, he must file an "application for amelioration of the terms of release" before the IJ within seven days of release from ICE custody. 8 C.F.R. § 1236.1(d)(1). After expiration of that seven-day period, the alien may request review of the conditions of his release with ICE officials. *Id.* § 1236.1(d)(2). The alien may subsequently appeal ICE's decision to the Board of Immigration Appeals within 10 days of the decision. *Id.* § 1236.1(d)(3)(ii).

[74] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 847 (2018) (rejecting Ninth Circuit's conclusion that INA Section 236(a) requires periodic bond hearings every six months in which DHS must prove by clear and convincing evidence that the alien's continued detention is justified).

[75] 8 C.F.R. § 1003.19(d).

[76] *Id.* § 1236.1(d)(1). The IJ's custody determination may be based on any information available to the IJ or that is presented by the alien or ICE. *Id.* § 1003.19(d). The IJ's decision "shall be entered on the appropriate form at the time such decision is made and the parties shall be informed orally or in writing of the reasons for the decision." *Id.* § 1003.19(f).

[77] *Id.* § 1003.19(e). Additionally, if ICE seeks to change an alien's custody status during the removal proceedings (e.g., changing the custody location, releasing the alien from custody, or taking the alien into custody), the agency must immediately notify the immigration court in writing. *Id.* §§ 1003.19(g), 1236.1(f).

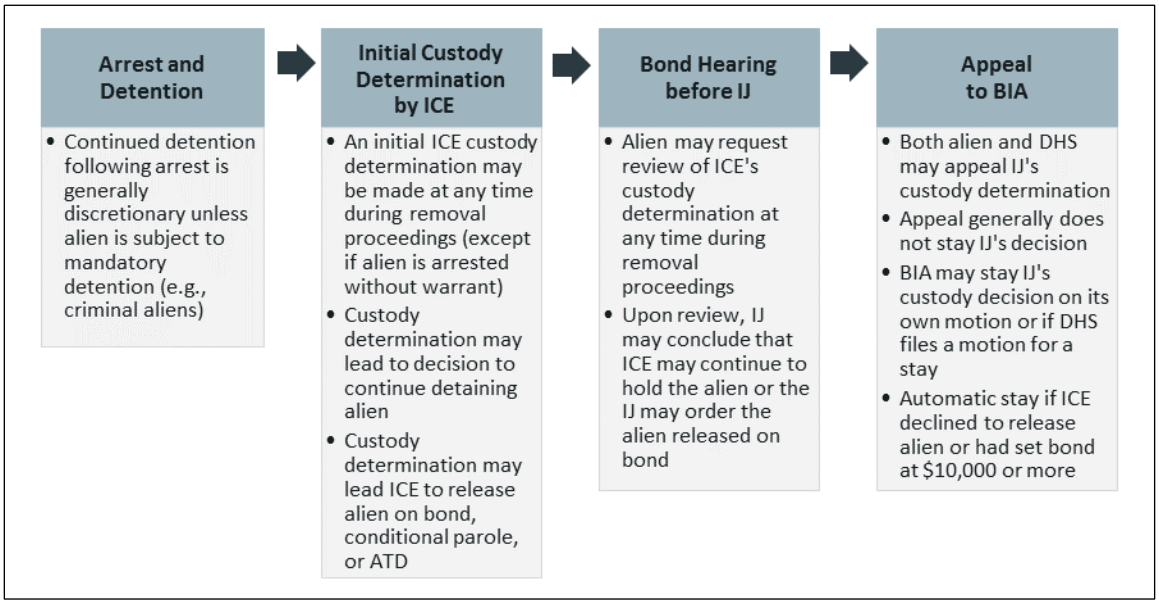
[78] *Id.* §§ 1003.1(d)(1), 1236.1(d)(3)(i); *see also* R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 172 (D.D.C. 2015) ("[T]he alien has the options of requesting a custody redetermination from an [IJ] within the Department of Justice and appealing an adverse redetermination decision to the [BIA]").

[79] 8 C.F.R. § 1236.1(d)(4).

[80] *Id.* § 1003.19(i)(1).

[81] *Id.* § 1003.19(i)(2). But to preserve the automatic stay, DHS must file an appeal to the BIA within 10 business days of the IJ's order. *Id.* § 1003.6(c)(1). In addition, when DHS invokes an automatic stay of the IJ's order, the IJ must prepare a written decision explaining the custody determination within five business days after being advised that DHS

Figure 1. Detention and Review Process Under INA Section 236(a)



Sources: 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(c)(8), (d)(1), (g)(1), 287.3(d), 1003.1(d)(1), 1003.19(a), (i)(1), (i)(2), 1236.1(d)(1), (3)(i), (4).

Standard and Criteria for Making Custody Determinations

Following the enactment of IIRIRA, the DOJ promulgated regulations to govern discretionary detention and release decisions under INA Section 236(a).[82] These regulations require the alien to "demonstrate to the satisfaction of the officer that . . . release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding."[83] Based on this regulation, the BIA has held that the alien has the burden of showing that he or she should be released from custody, and "[o]nly if an alien demonstrates that he does not pose a danger to the community should an [IJ] continue to a determination regarding the extent of flight risk posed by the alien."[84]

filed its notice of appeal (or, in exigent circumstances, as soon as practicable thereafter, but not to exceed five additional business days). *Id.* § 1003.6(c)(2). If the BIA has not yet issued a decision, the automatic stay will expire 90 days after the filing of the appeal (unless the BIA grants the alien's motion for an extension of the briefing schedule, in which case the BIA's order will toll the IJ's order for an additional 90 days). *Id.* § 1003.6(c)(4). If the BIA does not issue a custody decision within the period of the automatic stay, DHS may still request a discretionary stay of the IJ's order. *Id.* § 1003.6(c)(5).

[82] *See* Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,360 (Mar. 6, 1997) (codified at 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8)). *See also* Matter of D-J-, 23 I. & N. Dec. 572, 575 (A.G. 2003) (recognizing that "section 236(a) does not give detained aliens any *right* to release on bond," and that the statute simply gives the government authority to release an alien if it determines "in the exercise of broad discretion, that the alien's release on bond is warranted.") (emphasis in original).

[83] 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8). This regulatory standard also applies to custody determinations by IJs at bond hearings. *See* Matter of Adeniji, 22 I. & N. Dec. 1102, 1112 (BIA 1999), *abrogated on other grounds by* Pensamiento v. McDonald, 315 F. Supp. 3d 684 (D. Mass. 2018)).

[84] Matter of Urena, 25 I. & N. Dec. 140, 141 (BIA 2009); *see also* Matter of Fatahi, 26 I. & N. Dec. 791, 793 (BIA 2016) ("An alien who seeks a change in custody status must establish to the satisfaction of the Immigration Judge and the Board that he is not 'a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk.'") (quoting Matter of Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006)).

Some federal courts, however, have held that if an alien's detention under INA Section 236(a) becomes prolonged, a bond hearing must be held where the burden shifts to the *government* to prove that the alien's continued detention is warranted.[85] For example, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit[86]) has reasoned that, given an individual's "substantial liberty interest" in avoiding physical restraint, the government should prove by clear and convincing evidence that the detention is justified.[87] The Supreme Court has not yet addressed the proper allocation of the burden of proof for custody determinations under INA Section 236(a). On the one hand, the Court has held that the statute does not itself require the government to prove that an alien's continued detention is warranted or to afford the alien a bond hearing.[88] On the other hand, the Court has not decided whether due process considerations nonetheless compel the government to bear the burden of proving that the alien should remain in custody if detention becomes prolonged.[89]

While INA Section 236(a) and its implementing regulations provide standards for determining whether an alien should be released from ICE custody, they do not specify the factors that may be considered in weighing a detained alien's potential danger or flight risk.[90] But the BIA has instructed that an IJ may consider, among other factors, these criteria in assessing an alien's custody status:

- whether the alien has a fixed address in the United States;
- the alien's length of residence in the United States;
- whether the alien has family ties in the United States;
- the alien's employment history;
- the alien's record of appearance in court;
- the alien's criminal record, including the extent, recency, and seriousness of the criminal offenses;

[85] *See* Singh v. Holder, 638 F.3d 1196, 1203 (9th Cir. 2011) ("[W]e hold that the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond"); Padilla v. U.S. Immigration and Customs Enforcement, 387 F. Supp. 3d 1219, 1232 (W.D. Wash. 2019), *appeal docketed*, No. 19-35565 (9th Cir. July 5, 2019) (ordering government to require DHS to prove that unlawful entrants should remain detained pending consideration of their asylum applications); Lett v. Decker, 346 F. Supp. 3d 379, 389 (S.D.N.Y. 2018) ("[T]he Government must prove by clear and convincing evidence that Petitioner's continued detention is justified."); Cortez v. Sessions, 318 F. Supp. 3d 1134, 1147 (N.D. Cal. 2018) ("Mr. Solano is entitled to a bond hearing at which DHS must justify his continued detention by establishing by clear and convincing evidence that he is a flight risk or a danger to the community."); *Pensamiento*, 315 F. Supp. 3d at 692 ("[T]his Court holds that the Constitution requires placing the burden of proof on the government in § 1226(a) custody redetermination hearings. Requiring a noncriminal alien to prove that he is not dangerous and not a flight risk at a bond hearing violates the Due Process Clause.").

[86] This report references a number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Ninth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[87] *Singh*, 638 F.3d at 1203. Under the "clear and convincing evidence" standard, a party must present evidence showing that its factual contentions are "highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984).

[88] Jennings v. Rodriguez, 138 S. Ct. 830, 847–48 (2018).

[89] *See* Darko v. Sessions, 342 F. Supp. 3d 429, 434–35 (S.D.N.Y. 2018) ("Thus, while the Supreme Court held that § 1226(a) does not mandate that a clear and convincing evidence burden be placed on the government in bond hearings, it left open the question of whether the Due Process Clause does.").

[90] *See* Matter of D-J-, 23 I. & N. Dec. 572, 576 (A.G. 2003) ("[T]he INA does not limit the discretionary factors that may be considered by the Attorney General in determining whether to detain an alien pending a decision on asylum or removal."); *see also* Carlson v. Landon, 342 U.S. 524, 540–41 (1952) (holding that an IJ's custody determination must simply have a "reasonable foundation").

- the alien's history of immigration violations;
- any attempts by the alien to flee prosecution or otherwise escape from authorities; and
- the alien's manner of entry to the United States.[91]

The BIA and other authorities have generally applied these criteria in reviewing custody determinations.[92] In considering an alien's danger to the community or flight risk, "any evidence in the record that is probative and specific can be considered."[93] The BIA has also instructed that, in deciding whether an alien presents a danger to the community and should not be released from custody, an IJ should consider both direct and circumstantial evidence of dangerousness, including whether the facts and circumstances raise national security considerations.[94] In addition, although bond proceedings are "separate and apart from" formal removal proceedings,[95] evidence obtained during a removal hearing "may be considered during a custody hearing so long as it is made part of the bond record."[96]

Limitations to Administrative Review of Custody Determinations

Under DOJ regulations, an IJ may not determine the conditions of custody for classes of aliens subject to mandatory detention.[97] In these circumstances, ICE retains exclusive authority over the alien's custody status.[98] These limitations apply to

- arriving aliens in formal removal proceedings (including arriving aliens paroled into the United States);

[91] Matter of Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006), *abrogated on other grounds by* Pensamiento v. McDonald, 315 F. Supp. 3d 684 (D. Mass. 2018)) (citing *Matter of Saelee*, 22 I. & N. Dec. 1258 (BIA 2000); *Matter of Drysdale*, 20 I. & N. Dec. 815, 817 (BIA 1994); Matter of Andrade, 19 I. & N. Dec. 488, 489 (1987)). The BIA has determined that the IJ "may choose to give greater weight to one factor over others, as long as the decision is reasonable." *Id. See also* Prieto-Romero v. Clark, 534 F.3d 1053, 1066 (9th Cir. 2008) (stating that an IJ should consider the factors set forth in *Matter of Guerra* in deciding whether to release an alien on bond).

[92] *See e.g.*, Matter of Fatahi, 26 I. & N. Dec. 791, 795 (BIA 2016) (evidence that alien had entered the United States with a passport stolen by terrorist groups demonstrated that he posed a danger to the community); *Matter of D-J-*, 23 I. & N. Dec. at 579–81 (ruling that alien who unlawfully entered the United States by sea and evaded law enforcement presented a flight risk and that his release would encourage "unlawful mass migrations" and threaten national security); *Matter of Saelee*, 22 I. & N. Dec. at 1262–63 (history of violent criminal offenses and lack of remorse militated against alien's release from custody); *Matter of Drysdale*, 20 I. & N. Dec. at 818 (upholding $20,000 bond determination where alien had moved from his parental home, committed a serious drug trafficking crime, and was ineligible for any relief from deportation).

[93] *Matter of Guerra*, 24 I. & N. Dec. at 40–41.

[94] *Matter of Fatahi*, 26 I. & N. Dec. at 794–95. *But see* Singh v. Holder, 638 F.3d 1196, 1206 (9th Cir. 2011) ("[N]ot all criminal convictions conclusively establish that an alien presents a danger to the community, even where the crimes are serious enough to render the alien removable. For example, some orders of removal may rest on convictions for relatively minor, non-violent offenses such as petty theft and receiving stolen property. Moreover, a conviction could have occurred years ago, and the alien could well have led an entirely law-abiding life since then. In such cases, denial of bond on the basis of criminal history alone may not be warranted.").

[95] 8 C.F.R. § 1003.19(d).

[96] Matter of Adeniji, 22 I. & N. Dec. 1102, 1115 (BIA 1999), *abrogated on other grounds by* Pensamiento v. McDonald, 315 F. Supp. 3d 684 (D. Mass. 2018)).

[97] 8 C.F.R. §§ 1003.19(h)(2)(i), 1236.1(c)(11); *see* Matter of X-K-, 23 I. & N. Dec. 731, 731 (BIA 2005) ("Immigration Judges have custody jurisdiction over aliens in [formal] removal proceedings, with specifically designated exceptions."), *overruled on other grounds by* Matter of M-S-, 27 I. & N. Dec. 509 (A.G. 2019).

[98] *Matter of X-K-*, 23 I. & N. Dec. at 732.

- aliens in formal removal proceedings who are deportable on certain security and related grounds (e.g., violating espionage laws, criminal activity that "endangers public safety or national security," terrorist activities, severe violations of religious freedom); and
- aliens in formal removal proceedings who are subject to mandatory detention under INA Section 236(c) based on the commission of certain enumerated crimes.[99]

Although aliens who fall within these categories may not request a custody determination before an IJ, they may still seek a redetermination of custody conditions from ICE.[100] In addition, aliens detained under INA Section 236(c) based on criminal or terrorist-related conduct may request a determination by an IJ that they do not properly fall within that designated category, and that they are thus entitled to a bond hearing.[101]

Judicial Review of Custody Determinations

An alien may generally request review of ICE's custody determination at a bond hearing before an IJ, and the alien may also appeal the IJ's custody decision to the BIA.[102] INA Section 236(e), however, expressly bars *judicial* review of a decision whether to detain or release an alien who is subject to removal:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.[103]

Even so, the Supreme Court has determined that, absent clear congressional intent, INA provisions barring judicial review do not foreclose the availability of review in habeas corpus

[99] 8 C.F.R. § 1003.19(h)(2)(i); *see* Matter of Joseph, 22 I. & N. Dec. 799, 802 (1999) ("The regulations generally do not confer jurisdiction on Immigration Judges over custody or bond determinations respecting those aliens subject to mandatory detention, such as aggravated felons."). The regulations also include, among the classes of aliens over whom IJs lack custody jurisdiction, aliens in pre-IIRIRA exclusion proceedings (i.e., arriving aliens who were denied admission before April 1, 1997), and aliens in pre-IIRIRA deportation proceedings (i.e., aliens physically present in the United States who were charged with deportability before April 1, 1997) who were subject to mandatory detention based on an aggravated felony conviction. 8 C.F.R. 1003.19(h)(2)(i). In addition, the BIA has held that aliens who have been admitted into the United States under the visa waiver program (VWP) (a special program that allows aliens from certain designated countries to enter the United States for a period of up to 90 days without first obtaining a visa), *see* 8 U.S.C. § 1187(a), and who are placed in asylum-only proceedings after being found subject to removal, are ineligible for bond hearings because such aliens are not placed in formal removal proceedings. Matter of A-W-, 25 I. & N. 45, 46-47 (BIA 2009). Federal district courts, though, have split as to whether VWP entrants may be released on bond if they are detained pending efforts to remove them. *Compare e.g.,* Szentkiralyi v. Ahrendt, No. 17-1889, 2017 WL 3477739, *4-*5 (D.N.J. 2017) (ruling that IJ had authority to conduct bond hearing for VWP entrant), *with* Kim v. Obama, No. EP–12–CV–173–PRM, 2012 WL 10862140, *2 (W.D. Tex. 2012) (ruling that IJ lacked jurisdiction to consider bond for VWP entrant).

[100] 8 C.F.R. § 1003.19(h)(2)(ii). Further, DHS retains the discretion to parole arriving aliens into the United States "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); *see* Matter of Castillo-Padilla, 25 I. & N. Dec. 257, 259 (BIA 2010) (describing humanitarian parole). *See also infra* at 22 (discussing the detention of arriving aliens and humanitarian parole).

[101] 8 C.F.R. § 1003.19(h)(2)(ii). *See infra* at 18 (discussing IJ's authority to review whether aliens detained under INA Section 236(c) properly fall within the scope of that statute).

[102] 8 C.F.R. §§ 1003.19(a), 1236.1(d)(1), 1236.1(d)(3)(i).

[103] 8 U.S.C. § 1226(e). *See* Darko v. Sessions, 342 F. Supp. 3d 429, 433 (S.D.N.Y. 2018) ("The sole forum for an appeal from an IJ's bond determination is the BIA.").

proceedings because "[i]n the immigration context, 'judicial review' and 'habeas corpus' have historically different meanings."[104] Thus, despite INA Section 236(e)'s limitation on judicial review, the Court has held that the statute does not bar federal courts from reviewing, in habeas corpus proceedings, an alien's statutory or constitutional challenge to his detention.[105] The Court has reasoned that an alien's challenge to "the statutory framework" permitting his detention is distinct from a challenge to the "discretionary judgment" or operational "decision" whether to detain the alien, which is foreclosed from judicial review under INA Section 236(e).[106] Lower courts have similarly held that they retain jurisdiction to review habeas claims that raise constitutional or statutory challenges to detention.[107] For that reason, although a detained alien may not seek judicial review of the government's discretionary decision whether to keep him or her detained, the alien may challenge the legal authority for that detention under the federal habeas statute.[108]

The Supreme Court has also considered whether a separate statute, INA Section 242(b)(9), bars judicial review of detention challenges.[109] That statute provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order [of removal] under this section.[110]

The Court has construed INA Section 242(b)(9) as barring review of three specific actions (except as part of the review of a final order of removal): (1) an order of removal, (2) the government's decision to seek removal (including the decision to detain the alien), and (3) the process by which

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[104] INS v. St. Cyr, 533 U.S. 289, 311 (2001); *see also* Demore v. Kim, 538 U.S. 510, 517 (2003) ("[W]here a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress' intent.").

[105] *Demore*, 538 U.S. at 517 ("Section 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the legislation authorizing his detention without bail."). *See also* Zadvydas v. Davis, 533 U.S. 678, 688 (2001) ("We conclude that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention.").

[106] *Demore*, 538 U.S. at 516–17; *see also* Jennings v. Rodriguez, 138 S. Ct. at 830, 841 (2018) (holding that challenges to "the extent of the Government's detention authority" do not fall within the scope of INA Section 236(e)'s judicial review bar).

[107] *See e.g.*, Sylvain v. Att'y Gen. of the United States, 714 F.3d 150, 155 (3d Cir. 2013) (holding that INA Section 236(e) did not bar judicial review of whether immigration officials had statutory authority to detain alien); Singh v. Holder, 638 F.3d 1196, 1202 (9th Cir. 2011) ("[C]laims that the discretionary [detention] process itself was constitutionally flawed are 'cognizable in federal court on habeas because they fit comfortably within the scope of [the federal habeas statute].'") (quoting *Gutierrez–Chavez v. INS*, 298 F.3d 824, 829 (9th Cir. 2002)); Al-Siddiqi v. Achim, 531 F.3d 490 (7th Cir. 2008) (INA Section 236(e) "strips us of our jurisdiction to review judgments designated as discretionary but does not deprive us of our authority to review statutory and constitutional challenges."); Sierra v. INS, 258 F.3d 1213, 1217–18 (10th Cir. 2001) ("We hold that § 1226(e) does not 'speak[ ] with sufficient clarity to bar jurisdiction pursuant to the general habeas statute.'") (alteration in original) (quoting *INS v. St. Cyr, 533 U.S. 289, 313 (2001)*); Pensamiento v. McDonald, 315 F. Supp. 3d 684, 688 (D. Mass. 2018) ("What § 1226(e) does not bar, however, are constitutional challenges to the immigration bail system."); Louisaire v. Muller, 758 F. Supp. 2d 229, 234 (S.D.N.Y. 2010) (considering alien's claim that ICE detained him without bond "pursuant to an erroneous interpretation of [INA] Section 236(c)").

[108] *Demore*, 538 U.S. at 516–17; *Zadvydas*, 533 U.S. at 688; *see also* Nielsen v. Preap, 139 S. Ct. 954, 962 (2019) ("As we have held, this limitation applies only to 'discretionary' decisions about the 'application' of § 1226 to particular cases.").

[109] *Jennings*, 138 S. Ct. at 841.

[110] 8 U.S.C. § 1252(b)(9).

an alien's removability would be determined.[111] But the Court has declined to read the statute as barring all claims that could technically "arise from" one of those three actions.[112] Thus, the Court has held that INA Section 242(b)(9) does not bar review of claims challenging the government's authority to detain aliens because such claims do not purport to challenge an order of removal, the government's decision to seek removal, or the process by which an alien's removability is determined.[113]

Mandatory Detention of Criminal Aliens Under INA Section 236(c)

While INA Section 236(a) generally authorizes immigration officials to detain aliens pending their formal removal proceedings, INA Section 236(c) *requires* the detention of aliens who are subject to removal because of specified criminal or terrorist-related grounds.[114]

Aliens Subject to Detention Under INA Section 236(c)

INA Section 236(c)(1) covers aliens who fall within one of four categories:

1. An alien who is inadmissible under INA Section 212(a)(2) based on the commission of certain enumerated crimes, including a crime involving moral turpitude, a controlled substance violation, a drug trafficking offense, a human trafficking offense, money laundering, and any two or more criminal offenses resulting in a conviction for which the total term of imprisonment is at least five years.
2. An alien who is deportable under INA Section 237(a)(2) based on the conviction of certain enumerated crimes, including an aggravated felony, two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, a controlled substance violation (other than a single offense involving possession of 30 grams or less of marijuana), and a firearm offense.
3. An alien who is deportable under INA Section 237(a)(2)(A)(i) based on the conviction of a crime involving moral turpitude (generally committed within five years of admission) for which the alien was sentenced to at least one year of imprisonment.
4. An alien who is inadmissible or deportable for engaging in terrorist activity, being a representative or member of a terrorist organization, being associated with a terrorist organization, or espousing or inciting terrorist activity.[115]

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[111] *Preap*, 139 S. Ct. at 962; *Jennings*, 138 S. Ct. at 841.

[112] *Jennings*, 138 S. Ct. at 840. The Court reasoned that such an "expansive interpretation" of the statute "would lead to staggering results." *Id.* The Court noted, for example, that a detained alien's claim of assault against a guard technically "arises from" DHS's decision to remove him, "[b]ut cramming judicial review of those questions into the review of final removal orders would be absurd." *Id.* Further, the Court declared, interpreting INA § 242(b)(9) as barring review of any claim literally arising from an action to remove an alien would render claims of prolonged detention unreviewable because the allegedly unlawful detention would have already occurred by the time of the final order of removal; and in some cases, a final removal order may never be entered, thus foreclosing any opportunity for judicial review of the challenged detention. *Id.*

[113] *Preap*, 139 S. Ct. at 962; *Jennings*, 138 S. Ct. at 841.

[114] 8 U.S.C. § 1226(c); *see* Zadvydas v. Davis, 533 U.S. 678, 683 (2001) ("While removal proceedings are in progress, most aliens may be released on bond or paroled."); *Jennings*, 138 S. Ct. at 837 (recognizing that INA Section 236(c) "carves out a statutory category of aliens who may *not* be released" under Section 236(a)) (emphasis in original).

[115] 8 U.S.C. §§ 1182(a)(2), 1182(a)(3)(B), 1182(a)(3)(F), 1226(c)(1), 1227(a)(2)(A)(i), 1227(a)(2)(A)(ii), 1227(a)(2)(B), 1227(a)(2)(C), 1227(a)(2)(D), 1227(a)(4)(B). The BIA has held that an alien does not actually have to

The statute instructs that ICE "shall take into custody any alien" who falls within one of these categories "when the alien is released [from criminal custody], without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."[116]

Prohibition on Release from Custody Except in Special Circumstances

While INA Section 236(c)(1) requires ICE to detain aliens who are removable on enumerated criminal or terrorist-related grounds, INA Section 236(c)(2) provides that ICE "may release an alien described in paragraph (1) only if" the alien's release "is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation," and the alien shows that he or she "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."[117] Under the statute, "[a] decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien."[118]

Without these special circumstances, an alien detained under INA Section 236(c) generally must remain in custody pending his or her removal proceedings.[119] Furthermore, given the mandatory nature of the detention, the alien may not be released on bond or conditional parole, or request a custody redetermination at a bond hearing before an IJ.[120]

Limited Review to Determine Whether Alien Falls Within Scope of INA Section 236(c)

Although an alien detained under INA Section 236(c) has no right to a bond hearing before an IJ, DOJ regulations allow the alien to seek an IJ's determination "that the alien is not properly included" within the category of aliens subject to mandatory detention under INA Section

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be charged with the ground that provides the basis for mandatory detention under INA Section 236(c) (e.g., aggravated felony) to be considered an alien who "is deportable" (or inadmissible) on that ground. Matter of Kotliar, 24 I. & N. Dec. 124, 126 (BIA 2007). For example, in *Matter of Kotliar*, the alien was only charged as deportable because he had remained in the United States longer than permitted, but was subject to mandatory detention under INA Section 236(c) because he had been convicted of theft offenses that were crimes involving moral turpitude. *Id.* at 124–26. The BIA held that, where the record reflects that an alien has committed any of the offenses enumerated in INA Section 236(c), the alien is subject to mandatory detention "without regard to whether [DHS] has exercised its prosecutorial discretion to lodge a charge based on the offense." *Id.* at 126.

[116] 8 U.S.C. § 1226(c)(1).

[117] 8 U.S.C. § 1226(c)(2); *see* Preap v. Johnson, 831 F.3d 1193, 1201 (9th Cir. 2016), *vacated on other grounds*, 139 S. Ct. 954 (2019) (observing that "§ 1226(a) provides for possible release on bond, while § 1226(c) forbids any release except under special circumstances concerning witness protection").

[118] 8 U.S.C. § 1226(c)(2).

[119] *Id.*

[120] *Id.* § 1226(a), (c)(1), (c)(2); 8 C.F.R. §§ 236.1(c)(11), 1003.19(h)(2)(i)(D), 1236.1(c)(11); *see* Sylvain v. Att'y Gen. of the United States, 714 F.3d 150, 152 (3d Cir. 2013) (stating that INA Section 236(c) requires detention of covered aliens "without any possibility of release while awaiting their removal proceedings."); Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 946 (2008) ("Unlike noncriminal aliens, who are detained under § 1226(a), aliens detained under § 1226(c) are not given a bond hearing before an IJ."). The Ninth Circuit, however, has construed the period of detention under INA Section 236(c) to end when the BIA issues a decision on appeal. *Casas-Castrillon*, 535 F.3d at 948. According to the court, if the alien remains detained pending judicial review of the BIA's decision (or pending remanded proceedings following a favorable judicial ruling), ICE only retains the authority to detain the alien under INA Section 236(a), and the alien may request a bond hearing to challenge any continued detention. *Id.* at 948–51.

236(c).[121] The BIA has determined that, during this review, the IJ should conduct an independent assessment, rather than a "perfunctory review," of DHS's decision to charge the alien with one of the specified criminal or terrorist-related grounds of removability under INA Section 236(c).[122] According to the BIA, the alien is not "properly included" within the scope of INA Section 236(c) if the IJ concludes that DHS "is substantially unlikely to establish at the merits hearing, or on appeal, the charge or charges that would otherwise subject the alien to mandatory detention."[123] If the IJ determines that the alien is *not* properly included within INA Section 236(c), the IJ may then consider whether the alien is eligible for bond under INA Section 236(a).[124]

Constitutionality of Mandatory Detention

The mandatory detention requirements of INA Section 236(c) have been challenged as unconstitutional but, to date, none of these challenges have succeeded.[125] In *Demore v. Kim*, an LPR (Kim) who had been detained under INA Section 236(c) for six months argued that his detention violated his right to due process because immigration authorities had made no determination that he was a danger to society or a flight risk.[126] The Ninth Circuit upheld a federal district court's ruling that INA Section 236(c) was unconstitutional.[127] The Ninth Circuit determined that INA Section 236(c) violated Kim's right to due process as an LPR because it afforded him no opportunity to seek bail.[128]

The Supreme Court reversed the Ninth Circuit's decision, holding that mandatory detention of certain aliens pending removal proceedings was "constitutionally permissible."[129] The Court noted that it had previously "endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens," and the Court also cited its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings, . . ."[130] The Court concluded that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and

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[121] 8 C.F.R. § 1003.19(h)(2)(ii).

[122] Matter of Joseph, 22 I. & N. Dec. 799, 800, 805 (BIA 1999).

[123] *Id.* at 806; *see also id.* at 807 ("[I]n assessing whether an alien is 'properly included' in a mandatory detention category during a bond hearing taking place early in the removal process, the [IJ] must necessarily look forward to what is likely to be shown during the hearing on the underlying removal case."). If DHS had not charged the alien with removability based on an offense enumerated in INA Section 236(c), the IJ may "look at the record to determine whether it establishes that [the alien] has *committed* an offense and whether the offense would give rise to a charge of removability included in that provision." Matter of Kotliar, 24 I. & N. Dec. 124, 127 (BIA 2007) (emphasis in original).

[124] *Matter of Joseph*, 22 I. & N. Dec. at 806, 809. In addition to permitting review of whether an alien is properly included within the scope of INA Section 236(c), DOJ regulations afford an alien detained under that provision with an opportunity to seek a redetermination of the conditions of custody before ICE. 8 C.F.R. § 1003.19(h)(2)(ii).

[125] *See* Prerna Lal, *Legal and Extra Legal Challenges to Immigrant Detention*, 24 ASIAN AM. L. J. 131, 135 (2017) ("Advocates challenged the constitutionality of mandatory detention under § 1226(c) with varied success until the Supreme Court decision in *Demore v. Kim* [upholding the provision].").

[126] Demore v. Kim, 538 U.S. 510, 513–14, 531 (2003).

[127] Kim v. Ziglar, 276 F.3d 523, 539 (2002), *rev'd sub nom.* Demore v. Kim, 538 U.S. 510 (2003).

[128] *Id.* at 526, 538–39. Apart from the Ninth Circuit, the Third, Fourth, and Tenth Circuits had also held that INA Section 236(c)'s mandatory detention requirement was unconstitutional. *See* Patel v. Zenski, 275 F.3d 299 (3d Cir. 2001), *abrogated by* Demore v. Kim, 538 U.S. 510 (2003); Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002), *abrogated by* Demore v. Kim, 538 U.S. 510 (2003); Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002), *abrogated by* Demore v. Kim, 538 U.S. 510 (2003). The Seventh Circuit, on the other hand, rejected a constitutional challenge to INA Section 236(c). Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999).

[129] *Demore*, 538 U.S. at 513, 531.

[130] *Id.* at 522, 526.

fail to appear for their removal hearings in large numbers, may require that persons such as [Kim] be detained for the brief period necessary for their removal proceedings."[131]

The Court also distinguished its 2001 decision in *Zadvydas v. Davis*, where it declared that "serious constitutional concerns" would be raised if lawfully admitted aliens were indefinitely detained *after* removal proceedings against them had been completed.[132] The Court reasoned that, unlike the post-order of removal detention statute at issue in *Zadvydas*, INA Section 236(c) "governs detention of deportable criminal aliens *pending their removal proceedings*," and thus "serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, . . ."[133] Yet in *Zadvydas*, removal was "no longer practically attainable" for the detained aliens following the completion of their proceedings, and so their continued detention "did not serve its purported immigration purpose."[134] The Court further distinguished *Zadvydas* because that case involved a potentially indefinite period of detention, while detention under INA Section 236(c) typically lasts for a "much shorter duration" and has a "definite termination point"—the end of the removal proceedings.[135]

Although the Supreme Court in *Demore* ruled that mandatory detention pending removal proceedings is not unconstitutional per se, the Court did not address whether there are any constitutional limits to the *duration* of such detention under INA Section 236(c).[136] Some lower courts, however, have construed *Demore* to apply only to relatively brief periods of detention.[137] Ultimately, in *Jennings v. Rodriguez*, the Supreme Court held that DHS has the statutory authority to indefinitely detain aliens pending their removal proceedings, but did not decide whether such prolonged detention is constitutionally permissible.[138]

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[131] *Id.* at 513.

[132] *Id.* at 527–30; *see* Zadvydas v. Davis, 533 U.S. 678, 682 (2001). For more discussion about the post-order of removal detention statute and the *Zadvydas* decision, *see infra* at 29.

[133] *Demore*, 538 U.S. at 527–28 (emphasis in original).

[134] *Id.* at 527.

[135] *Id.* at 529.

[136] *See* Tijani v. Willis, 430 F.3d 1241, 1252 (9th Cir. 2005) (Callahan, J., concurring) ("The constitutional limit, if any, to the duration of an alien's detention under § 1226, however, was left open by the Supreme Court in *Demore*."). However, in a concurring opinion in *Demore*, Justice Kennedy suggested that "since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as [Kim] could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). In a separate concurrence, Justice O'Connor similarly described INA Section 236(c)'s authority to cover the mandatory detention of a criminal alien "during the limited duration of his or her removal proceedings." *Id.* at 533 (O'Connor, J., concurring).

[137] *See e.g.*, Diop v. ICE/Homeland Sec., 656 F.3d 221, 232 (3d Cir. 2011) ("*Demore* emphasized that mandatory detention pursuant to § 1226(c) lasts only for a 'very limited time' in the vast majority of cases."); Casas-Castrillon v. Dept. of Homeland Sec., 535 F.3d 942, 950 (9th Cir. 2008) ("We are skeptical that *Demore's* limited holding that Congress could permissibly authorize 'brief' detention without procedural protections can be extended to encompass the nearly seven-year detention at issue here."); Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003) ("[T]he Court's discussion in [*Demore*] is undergirded by reasoning relying on the fact that Kim, and persons like him, will normally have their proceedings completed within in a short period of time and will actually be deported, or will be released.").

[138] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 842–43, 846–48, 851 (2018). Following *Jennings*, however, some lower courts have squarely confronted that question, ruling that the mandatory detention without bond of certain aliens pending formal removal proceedings is unconstitutional. *See e.g.*, Padilla v. U.S. Immigration and Customs Enforcement, 387 F. Supp. 3d 1219, 1228–32 (W.D. Wash. 2019) (addressing constitutionality of detaining without bond aliens who unlawfully entered the United States pending consideration of their asylum claims). For more discussion about the *Jennings* decision and the indefinite detention of aliens pending removal proceedings, *see infra* at 39.

Meaning of "When the Alien Is Released"

INA Section 236(c)(1) instructs that ICE "shall take into custody any alien" who falls within one of the enumerated criminal or terrorist-related grounds "*when the alien is released*" from criminal custody.[139] And under INA Section 236(c)(2), ICE may not release "an alien described in paragraph (1)" except for witness protection purposes.[140]

In its 2019 decision in *Nielsen v. Preap*, the Supreme Court held that INA Section 236(c)'s mandatory detention scheme covers any alien who has committed one of the enumerated criminal or terrorist-related offenses, no matter when the alien had been released from criminal incarceration.[141] The Court observed that INA Section 236(c)(2)'s mandate against release applies to "an alien described in paragraph (1)" of that statute, and that INA Section 236(c)(1), in turn, describes aliens who have committed one of the enumerated crimes.[142] The Court determined that, although INA Section 236(c)(1) instructs that such aliens be taken into custody "when the alien is released," the phrase "when . . . released" does not *describe* the alien, and "plays no role in identifying for the [DHS] Secretary *which* aliens she must immediately arrest."[143] The Court thus held that the scope of aliens subject to mandatory detention under INA Section 236(c) "is fixed by the predicate offenses identified" in INA Section 236(c)(1), no matter when the alien was released from criminal custody.[144]

The Court also opined that, even if INA Section 236(c) requires an alien to be detained immediately upon release from criminal custody, ICE's failure to act promptly would not bar the agency from detaining the alien without bond.[145] The Court relied, in part, on its 1990 decision in *United States v. Montalvo-Murillo*, which held that the failure to provide a criminal defendant a prompt bond hearing as required by federal statute did not mandate the defendant's release from criminal custody.[146] Citing *Montalvo-Murillo*, the Court in *Preap* recognized the principle that if a statute fails to specify a penalty for the government's noncompliance with a statutory deadline, the courts will not "'impose their own coercive sanction.'"[147] In short, the Court declared, "it is

[139] 8 U.S.C. § 1226(c)(1) (emphasis added). Courts have construed the term "released" to mean that the alien is simply no longer in physical custody, regardless of whether the alien was sentenced to a prison term or probation. *See* Castaneda v. Souza, 810 F.3d 15, 27 n. 15 (1st Cir. 2015); Lora v. Shanahan, 804 F.3d 601, 610 (2d Cir. 2015), *cert. granted and vacated on other grounds*, 138 S. Ct. 1260 (2018); Sylvain v. Att'y Gen. of the United States, 714 F.3d 150, 161 (3d Cir. 2013). *See also* Matter of Kotliar, 24 I. & N. Dec. 124, 125 (BIA 2007) ("[S]ection 236(c)(1) of the Act expressly states that an alien is subject to mandatory detention and shall be taken into custody when the alien is released, without regard to whether he was released 'on parole, supervised release, or probation.'") (quoting 8 U.S.C. § 1226(c)(1)).

[140] 8 U.S.C. § 1226(c)(2).

[141] Nielsen v. Preap, 139 S. Ct. 954, 971 (2019).

[142] *Id.* at 963–64.

[143] *Id.* at 965 (emphasis in original).

[144] *Id.*

[145] *Id.* at 967.

[146] *Id.* at 967–68; *see also* United States v. Montalvo-Murillo, 495 U.S. 711, 717 (1990) ("We hold that a failure to comply with the first appearance requirement does not defeat the Government's authority to seek detention of the person charged.").

[147] *Preap*, 139 S. Ct. at 967 (quoting Barnhart v. Peabody Coal Co., 537 U.S. 149, 158 (2003)) (internal quotation omitted).

hard to believe that Congress made [ICE's] mandatory detention authority vanish at the stroke of midnight after an alien's release" from criminal custody.[148]

The Court thus reversed a Ninth Circuit decision that had restricted the application of INA Section 236(c) to aliens detained "promptly" upon their release from criminal custody, but noted that its ruling on the proper interpretation of INA Section 236(c) "does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it."[149]

In sum, based on the Court's ruling in *Preap*, INA Section 236(c) authorizes ICE to detain covered aliens without bond pending their formal removal proceedings, regardless of whether they were taken into ICE custody immediately or long after their release from criminal incarceration. That said, the Court has left open the question of whether the mandatory detention of aliens long after their release from criminal custody is constitutionally permissible.

Mandatory Detention of Applicants for Admission Under INA Section 235(b)

The INA provides for the mandatory detention of aliens who are seeking initial entry into the United States, or who have entered the United States without inspection, and who are believed to be subject to removal. Under INA Section 235(b), an "applicant for admission," defined to include both an alien arriving at a designated port of entry and an alien present in the United States who has not been admitted,[150] is generally detained pending a determination about whether the alien should be admitted into the United States.[151] The statute thus covers aliens arriving at the U.S. border (or its functional equivalent), as well as aliens who had entered the United States without inspection, and are later apprehended within the country.[152]

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[148] *Id.* at 968. The Court noted that ICE could miss a judicially imposed mandatory detention deadline for various reasons, including because state and local officials might not notify ICE when an alien is released from criminal custody. *Id. See also infra* at 51 (discussing immigration detainers).

[149] *Id.* at 971–72; *see also* Preap v. Johnson, 831 F.3d 1193, 1206 (9th Cir. 2016), *rev'd*, 139 S. Ct. 954 (2019). In a dissenting opinion, Justice Breyer argued that INA Section 236(c)'s mandatory detention scheme applied only to aliens who are detained by ICE "when . . . released" from criminal custody. *Preap*, 139 S. Ct. at 978 (Breyer, J., dissenting). Justice Breyer argued that the words "take into custody . . . when the alien is released" found in INA Section 236(c)(1) also "describe" an alien subject to mandatory detention. *Id.* at 979–80 (Breyer, J., dissenting). Further, Justice Breyer argued, construing Section 236(c) to require the detention of aliens without bond, even if they "have long since paid their debt to society," would "create serious constitutional problems." *Id.* at 982, 985 (Breyer, J., dissenting) (The majority opinion had declined to construe INA § 236(c) to avoid these constitutional concerns because, in the majority's view, the statute unambiguously required detention regardless of when the alien was released from criminal custody.) Unlike the Ninth Circuit, however, Justice Breyer would have interpreted "when the alien is released" as requiring an alien's detention to occur no more than six months after release from criminal custody. *Id.* at 984 (Breyer, J, dissenting).

[150] 8 U.S.C. § 1225(a)(1). A returning LPR may also be considered an applicant for admission in some circumstances, such as when the LPR has abandoned his or her status, has been away from the United States for more than 180 days, or has committed certain criminal offenses. *Id.* § 1101(a)(13)(C).

[151] *Id.* § 1225(b)(1)(B), (2)(A). The statute provides that all applicants for admission "shall be inspected by immigration officers." *Id.* § 1225(a)(3). *See also* Matter of Rosa Isela Velasquez-Cruz, 26 I. & N. Dec. 458, 462 n. 5 (BIA 2014) ("We note that regardless of whether an alien who illegally enters the United States is caught at the border or inside the country, he or she will still be required to prove eligibility for admission.").

[152] 8 U.S.C. § 1225(a)(1), (b)(1)(B), (2)(A); 8 C.F.R. § 235.3(b), (c).

The statute's mandatory detention scheme covers (1) applicants for admission who are subject to a streamlined removal process known as "expedited removal" and (2) applicants for admission who are not subject to expedited removal, and who are placed in formal removal proceedings.[153]

Applicants for Admission Subject to Expedited Removal

INA Section 235(b)(1) provides for the expedited removal of arriving aliens who are inadmissible under INA Section 212(a)(6)(C) or (a)(7) because they lack valid entry documents or have attempted to procure admission by fraud or misrepresentation.[154] The statute also authorizes the Secretary of Homeland Security to expand the use of expedited removal to aliens present in the United States without being admitted or paroled if they have been in the country less than two years and are inadmissible on the same grounds.[155] Based on this authority, DHS has employed expedited removal mainly to (1) arriving aliens; (2) aliens who arrived in the United States by sea within the last two years, who have not been admitted or paroled by immigration authorities; and (3) aliens found in the United States within 100 miles of the border within 14 days of entering the country, who have not been admitted or paroled by immigration authorities.[156] More recently, however, DHS has expanded the use of expedited removal to aliens who have not been admitted or paroled, and who have been in the United States for less than two years (a legal challenge to this expansion is pending at the time of this report's publication).[157]

Generally, an alien subject to expedited removal may be removed without a hearing or further review unless the alien indicates an intention to apply for asylum or a fear of persecution if removed to a particular country.[158] If the alien indicates an intention to apply for asylum or a fear

[153] *Id.* § 1225(b)(1)(A)(i) ("If an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution."), (2)(A) ("[I]n the case of an alien who is an applicant for admission, if the examining officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title."). U.S. Customs and Border Protection (CBP), the DHS component with primary responsibility for immigration enforcement along the border and at designated ports of entry, typically takes the lead role in processing applicants for admission, from the initial inspection or apprehension of the alien through the issuance, if applicable, of an order of expedited removal. *See* 6 U.S.C. § 211(c) (listing functions of CBP). Within CBP, the U.S. Border Patrol is the agency component primarily charged with the apprehension of aliens unlawfully entering the United States or who have recently entered the country unlawfully away from a designated point of entry. *See id.* § 211(e)(3). ICE also regularly plays a significant role, such as when the alien seeks asylum or is placed in formal removal proceedings, and ICE takes responsibility for the alien's detention and removal. *See Immigration Enforcement*, U.S. DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/topic/immigration-enforcement-overview (last published Aug. 6, 2018); *Immigration Enforcement-Removal*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/removal (last updated Aug. 2, 2019).

[154] 8 U.S.C. § 1225(b)(1)(A)(i); *see also id.* § 1182(a)(6)(C), (7).

[155] *Id.* § 1225(b)(1)(A)(i), (iii).

[156] *See* Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,313–14 (Mar. 6, 1997); Notice Designating Aliens Subject to Expedited Removal under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002); Notice Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004). For more discussion about expedited removal, see CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*, by Hillel R. Smith.

[157] *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019). A lawsuit challenging DHS's nationwide expansion of expedited removal is currently pending in the U.S. District Court for the District of Columbia. *See* Complaint for Declaratory and Injunctive Relief, Make the Road New York v. McAleenan, No. 1:19-cv-02369 (D.D.C. Aug. 6, 2019). For more information about the expansion of expedited removal, see CRS Legal Sidebar LSB10336, *The Department of Homeland Security's Nationwide Expansion of Expedited Removal*, by Hillel R. Smith.

[158] 8 U.S.C. § 1225(b)(1)(A)(i). Additionally, if the alien claims to be a U.S. citizen, an LPR, an admitted refugee, or a person granted asylum, he may seek administrative review of that claim. *Id.* § 1225(b)(1)(C); 8 C.F.R. §§

of persecution, he or she will typically be referred to an asylum officer within DHS's U.S. Citizenship and Immigration Services (USCIS)[159] to determine whether the alien has a "credible fear" of persecution or torture.[160] If the alien establishes a credible fear, he or she will be placed in "formal" removal proceedings under INA Section 240, and may pursue asylum and related protections.[161]

Detention During Expedited Removal Proceedings

INA Section 235(b)(1) and DHS regulations provide that an alien "shall be detained" pending a determination on whether the alien is subject to expedited removal, including during any credible fear determination; and if the alien is found not to have a credible fear of persecution or torture, the alien will remain detained until his or her removal.[162] Typically, the alien will be initially detained by Customs and Border Protection (CBP) for no more than 72 hours for processing (e.g., fingerprints, photographs, initial screening), and the alien will then be transferred to ICE custody pending a credible fear determination if the alien is subject to expedited removal and requests asylum or expresses a fear of persecution.[163]

Under INA Section 212(d)(5), however, DHS may parole an applicant for admission (which includes an alien subject to expedited removal) on a case-by-case basis "for urgent humanitarian reasons or significant public benefit."[164] Based on this authority, DHS has issued regulations that

235.3(b)(5)(i), 235.3(b)(5)(iv), 235.6(a)(2)(ii).

[159] Reportedly, under a U.S. Customs and Border Protection program, some Border Patrol officers are being trained to conduct these initial screenings. *See U.S. Will Assign Dozens of Border Agents to Migrant Asylum Interviews*, REUTERS (May 9, 2019), http://www.reuters.com/article/us-usa-immigration/u-s-will-assign-dozens-of-border-agents-to-migrant-asylum-interviews-idUSKCN1SF2N0.

[160] 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4). The INA defines a "credible fear of persecution" as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v); *see also* 8 C.F.R. § 208.30(e)(2). A "credible fear of torture" is defined by regulation as "a significant possibility that [the alien] is eligible for [protection] under the Convention Against Torture." 8 C.F.R. § 208.30(e)(3).

[161] 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30(f), 235.6(a)(1)(ii). If the asylum officer determines that the alien does not have a credible fear of persecution or torture, the alien may request review of that finding before an IJ. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. §§ 208.30(g)(1)(i), 235.6(a)(2)(i), 1003.42(a), 1208.30(g)(2)(i). If the IJ finds that the alien has a credible fear of persecution or torture, the IJ will vacate the asylum officer's negative credible fear determination, and the alien will be placed in formal removal proceedings under INA § 240. 8 C.F.R. §§ 235.6(a)(1)(iii), 1003.42(f), 1208.30(g)(2)(iv)(B).

[162] *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); 8 C.F.R. § 235.3(b)(2)(iii) ("An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal"), (4)(ii) ("Pending the credible fear determination by an asylum officer and any review of that determination by an [IJ], the alien shall be detained."), (5)(i) (providing that an alien whose claim of being a U.S. citizen, LPR, asylee, or refugee cannot be verified "shall be detained pending review of the expedited removal order under this section").

[163] 6 U.S.C. § 211(m)(3) (describing CBP detention as "short-term detention" at a processing center); Aliens Subject to a Bar on Entry under Certain Presidential Proclamations, 83 Fed. Reg. 55,934, 55,949 (Nov. 9, 2018) (describing initial CBP and U.S. Border Patrol processing and transfer to ICE custody).

[164] 8 U.S.C. § 1182(d)(5)(A); *see also* 8 C.F.R. § 235.3(b)(2)(iii), (4)(ii), (5)(i). Parole is not considered a lawful admission into the United States or a determination of admissibility, and the decision whether to grant parole is entirely subject to DHS's discretion and may be revoked at any time. 8 U.S.C. §§ 1101(a)(13)(B), 1182(d)(5)(A).

allow parole of an alien in expedited removal proceedings, but only when parole "is required to meet a medical emergency or is necessary for a legitimate law enforcement objective."[165]

Aliens Who Establish a Credible Fear of Persecution or Torture

INA Section 235(b)(1) provides that aliens who establish a credible fear of persecution or torture "shall be detained for further consideration of the application for asylum" in formal removal proceedings.[166] The alien will typically remain in ICE custody during those proceedings.[167] As noted above, DHS retains the authority to parole applicants for admission, and typically will interview the alien to determine his or her eligibility for parole within seven days after the credible fear finding.[168] Under DHS regulations, the following categories of aliens may be eligible for parole, provided they do not present a security or flight risk:

- persons with serious medical conditions;
- women who have been medically certified as pregnant;
- juveniles (defined as individuals under the age of 18) who can be released to a relative or nonrelative sponsor;
- persons who will be witnesses in proceedings conducted by judicial, administrative, or legislative bodies in the United States; and
- persons "whose continued detention is not in the public interest."[169]

Under DHS regulations, a grant of parole ends upon the alien's departure from the United States, or, if the alien has not departed, at the expiration of the time for which parole was authorized.[170] Parole may also be terminated upon accomplishment of the purpose for which parole was

[165] 8 C.F.R. § 235.3(b)(2)(iii), (4)(ii), (5)(i).

[166] 8 U.S.C. § 1225(b)(1)(B)(ii).

[167] *See* Damus v. Nielsen, 313 F. Supp. 3d 317, 323–24 (D.D.C. 2018) (describing ICE's custody authority over aliens who have shown a credible fear of persecution).

[168] 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. §§ 208.30(f), 212.5(b); *see also Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* ¶ 4.2, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Dec. 8, 2009), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf. While DHS has broad discretion to decide whether to grant parole, some lower courts have held or otherwise declared that DHS may not consider immigration deterrence as a factor in evaluating individual parole requests. Aracely v. Nielsen, 319 F. Supp. 3d 110, 153–54 (D.D.C. 2018); *see also Damus*, 313 F. Supp. 3d at 341 (holding that DHS's practice of categorically denying parole without abiding by its own parole directives was unlawful); R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 190 (D.D.C. 2015) (holding that DHS's adoption of a "No-Release Policy" aimed at deterring mass migration was not a permissible justification for continued detention of aliens who had shown a credible fear of persecution).

[169] 8 C.F.R. §§ 212.5(b), 236.3(a). An alien's continued detention is not considered in the public interest if he establishes his identity to an immigration officer, and shows that he presents neither a flight risk nor a danger to the community. *See Parole of Arriving Aliens, supra* note 168, at ¶¶ 4.3, 8.3(2); *see also* 8 C.F.R. § 212.5(d) (providing that, in deciding whether to grant parole, agency officials may consider "relevant factors," including whether there are reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so; the alien's community ties such as close relatives with known addresses; and any agreement to reasonable conditions such as periodic reporting requirements). If parole is denied, agency guidelines instruct that the immigration officer should advise the alien that he may request reconsideration based on changed circumstances or additional evidence relating to the alien's identity, security risk, or risk of absconding. *Parole of Arriving Aliens, supra* note 168 at ¶ 8.2.

[170] 8 C.F.R. § 212.5(e)(1).

authorized or when DHS determines that "neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States."[171]

For some time, the BIA took the view that aliens apprehended after unlawfully entering the United States (i.e., not apprehended at a port of entry), and who were first screened for expedited removal but then placed in formal removal proceedings following a positive credible fear determination, were not subject to mandatory detention under INA Section 235(b)(1).[172] Instead, the BIA determined, these aliens could be released on bond under INA Section 236(a) because, unlike arriving aliens, they did not fall within the designated classes of aliens who are ineligible for bond hearings under DOJ regulations.[173] Thus, the BIA concluded, INA Section 235(b)(1)'s mandatory detention scheme "applie[d] only to arriving aliens."[174]

In 2019, Attorney General (AG) William Barr overturned the BIA's decision and ruled that INA Section 235(b)(1)'s mandatory detention scheme applies to all aliens placed in formal removal proceedings after a positive credible fear determination, regardless of their manner of entry.[175] The AG reasoned that INA Section 235(b)(1) plainly mandates that aliens first screened for expedited removal who establish a credible fear "shall be detained" until completion of their formal removal proceedings, and that the INA only authorizes their release on parole.[176] The AG also relied on the Supreme Court's 2018 decision in *Jennings v. Rodriguez*, which construed INA Section 235(b) as mandating the detention of covered aliens unless they are paroled.[177] Finally, the AG concluded, even though nonarriving aliens subject to expedited removal are not expressly barred from seeking bond under DOJ regulations, that regulatory framework "does not provide an exhaustive catalogue of the classes of aliens who are ineligible for bond."[178]

In a later class action lawsuit, the U.S. District Court for the Western District of Washington ruled that INA Section 235(b)(1)'s mandatory detention scheme is unconstitutional, and that aliens apprehended within the United States who are first screened for expedited removal and placed in formal removal proceedings following a positive credible fear determination are "constitutionally entitled to a bond hearing before a neutral decisionmaker" pending consideration of their asylum

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[171] *Id.* § 212.5(e)(2)(i).

[172] *Matter of X-K-*, 23 I. & N. Dec. 731, 732, 736 (BIA 2005), *overruled by* Matter of M-S-, 27 I. & N. Dec. 509 (A.G. 2019).

[173] *Id.* at 732, 735–36; *see also* 8 C.F.R. §§ 236.1(d)(1), 1003.19(a) (generally permitting an alien to seek an IJ's review of an initial custody determination by DHS), 1003.19(h)(2)(i) (listing classes of aliens who may not seek custody determinations before an IJ, including arriving aliens in removal proceedings). For additional discussion about limitations to administrative review of DHS's custody determinations, *see supra* at 14.

[174] *Matter of X-K-*, 23 I. & N. Dec. at 735.

[175] Matter of M-S-, 27 I. & N. Dec. 509 (A.G. 2019). The Attorney General exercised his appellate authority to review the BIA's decision under 8 C.F.R. § 1003.1(h)(1)(i), which authorizes the Attorney General to direct the BIA to refer cases to him for review. Matter of M-S-, 27 I. & N. Dec. 476 (A.G. 2018).

[176] *Matter of M-S-*, 27 I. & N. Dec. at 515–17. The Attorney General recognized that INA Section 236(a) generally permits the release of aliens on bond, but concluded that it "provides an independent ground for detention that does not limit DHS's authority [under INA Section 235(b)(1)] to detain aliens originally placed in expedited removal, who, after the credible-fear stage, 'shall be detained' either for further adjudication of their asylum claims or for removal." *Id.* at 516. Thus, INA Sections 235(b)(1) and 236(a) "can be reconciled only if they apply to different classes of aliens." *Id.* Moreover, the Attorney General determined, because the INA expressly provides for the release of applicants for admission only on parole, it "cannot be read to contain an implicit exception for bond." *Id.* at 517.

[177] *Id.* at 517–18; *see* Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) (concluding that INA Section 235(b)'s provisions "mandate detention until a certain point and authorize release prior to that point only under limited circumstances."). For further discussion of the Supreme Court's decision in *Jennings*, *see infra* at 39.

[178] *Matter of M-S-*, 27 I. & N. Dec. at 518.

claims.[179] The court thus ordered the government to (1) provide bond hearings within seven days of a bond hearing request by detained aliens who entered the United States without inspection, were first screened for expedited removal, and were placed in formal removal proceedings after a positive credible fear determination; (2) release any aliens within that class whose detention time exceeds that seven-day limit and who did not have a bond hearing; and (3) if a bond hearing is held, require DHS to prove that continued detention is warranted to retain custody of the alien.[180]

The DOJ has appealed the district court's ruling to the Ninth Circuit.[181] The Ninth Circuit has stayed the lower court's injunction pending appeal insofar as it requires the government to hold bond hearings within seven days, to release aliens whose detention time exceeds that limit, and to require DHS to have the burden of proof.[182] But the court declined to stay the lower court's order that aliens apprehended within the United States who are initially screened for expedited removal, and placed in formal removal proceedings after a positive credible fear determination, are "constitutionally entitled to a bond hearing."[183] Thus, the Ninth Circuit's order "leaves the pre-existing framework in place" in which unlawful entrants transferred to formal removal proceedings after a positive credible fear determination were eligible for bond hearings.[184]

As a result of the district court's ruling, aliens apprehended within the United States who are initially screened for expedited removal and transferred to formal removal proceedings following a positive credible fear determination remain eligible to seek bond pending their formal removal proceedings. On the other hand, arriving aliens who are transferred to formal removal proceedings are not covered by the court's order,[185] and generally must remain detained pending those proceedings, *unless* DHS grants parole.[186]

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[179] Padilla v. U.S. Immigration and Customs Enforcement, 387 F. Supp. 3d 1219, 1232 (W.D. Wash. 2019), *appeal docketed*, No. 19-35565 (9th Cir. July 5, 2019). The court reasoned that aliens who have entered the United States "are entitled to due process protections," including the "freedom from unnecessary incarceration." *Id.* at 1229 (citing Zadvydas v. Davis, 533 U.S. 678, 690 (2001); United States v. Raya-Vaca, 771 F.3d 1195, 1202 (9th Cir. 2014)).

[180] *Id.* at *10.

[181] *See* Padilla v. U.S. Immigration and Customs Enforcement, No. 19-35565 (9th Cir. July 5, 2019).

[182] Padilla v. U.S. Immigration and Customs Enforcement, No. 19-35565 (9th Cir. July 22, 2019) (order granting emergency motion for a stay in part).

[183] *Id.*

[184] *Id.*

[185] *See* Padilla v. U.S. Immigration and Customs Enforcement, 2019 WL 1056466, *1 (W.D. Wash. Mar. 6, 2019) (certifying a nationwide "bond hearing class" consisting of "all detained asylum seekers who entered the United States without inspection, were initially subject to expedited removal proceedings under INA Section 235(b), were determined to have a credible fear of persecution, but are not provided a bond hearing . . . within seven days of requesting a bond hearing.").

[186] *Matter of M-S-*, 27 I. & N. Dec. at 518–19. Generally, there is no administrative or judicial review of DHS's decision whether to grant parole. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (providing that no court shall have jurisdiction to review "any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) [asylum] of this title."); Rodriguez v. Robbins, 804 F.3d 1060, 1081 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018) ("Because parole decisions under § 1182 are purely discretionary, they cannot be appealed to IJs or courts."). But some courts have addressed constitutional and statutory challenges to the procedures and policies governing parole decisions, and distinguished such claims from challenges to individual parole determinations. *See e.g.*, Aracely, R. v. Nielsen, 319 F. Supp. 3d 110, 134–36 (D.D.C. 2018) (reviewing DHS's failure to follow parole procedures and the agency's consideration of deterrence as a factor in evaluating parole requests); Damus v. Nielsen, 313 F. Supp. 3d 317, 327 (D.D.C. 2018) ("[T]he asylum-seekers do not rest their case on a challenge to discrete parole determinations. Rather, they allege that ICE is, as a matter of general course, not complying with the policies and procedures of the Parole Directive."); Abdi v. Duke, 280 F. Supp. 3d 373, 384 (W.D.N.Y. 2017) ("Petitioners are asking that this Court ensure

Applicants for Admission Who Are Not Subject to Expedited Removal

INA Section 235(b)(2) covers applicants for admission who are *not* subject to expedited removal.[187] This provision would thus cover, for example, unadmitted aliens who are inadmissible on grounds other than those described in INA Section 212(a)(6)(C) and (a)(7) (e.g., because the alien is deemed likely to become a public charge, or the alien has committed specified crimes).[188] The statute would also cover aliens who had entered the United States without inspection, but who are not subject to expedited removal because they were not apprehended within two years after their arrival in the country.[189]

The INA provides that aliens covered by INA Section 235(b)(2) "shall be detained" pending formal removal proceedings before an IJ.[190] As discussed above, however, DHS may parole applicants for admission pending their removal proceedings, and agency regulations specify circumstances in which parole may be warranted (e.g., where detention "is not in the public interest").[191] Absent parole, aliens covered by INA Section 235(b)(2) generally must be detained and cannot seek their release on bond.[192]

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that Respondents comply with certain policies and procedures in making that parole decision—issues that are beyond the jurisdictional bar of § 1252(a)(2)(B)(ii)."). *See also supra* at 15 (Judicial Review of Custody Determinations).

[187] 8 U.S.C. § 1225(b)(2); *see also Jennings*, 138 S. Ct. at 837 (noting that 8 U.S.C. § 1225(b)(2) "is broader" and applies to applicants for admission "not covered by § 1225(b)(1)").

[188] 8 U.S.C. § 1225(b)(2)(A) (inspection of other aliens); 8 C.F.R. § 235.3(b)(3) ("If an alien appears to be inadmissible under other grounds contained in section 212(a) of the Act, and if [DHS] wishes to pursue such additional grounds of inadmissibility, the alien shall be detained and referred for a removal hearing before an immigration judge pursuant to sections 235(b)(2) and 240 of the Act for inquiry into all charges."), (5) (providing that, if a claim to LPR, refugee, or asylee status is verified, the alien is not subject to expedited removal but may be placed in formal removal proceedings if appropriate).

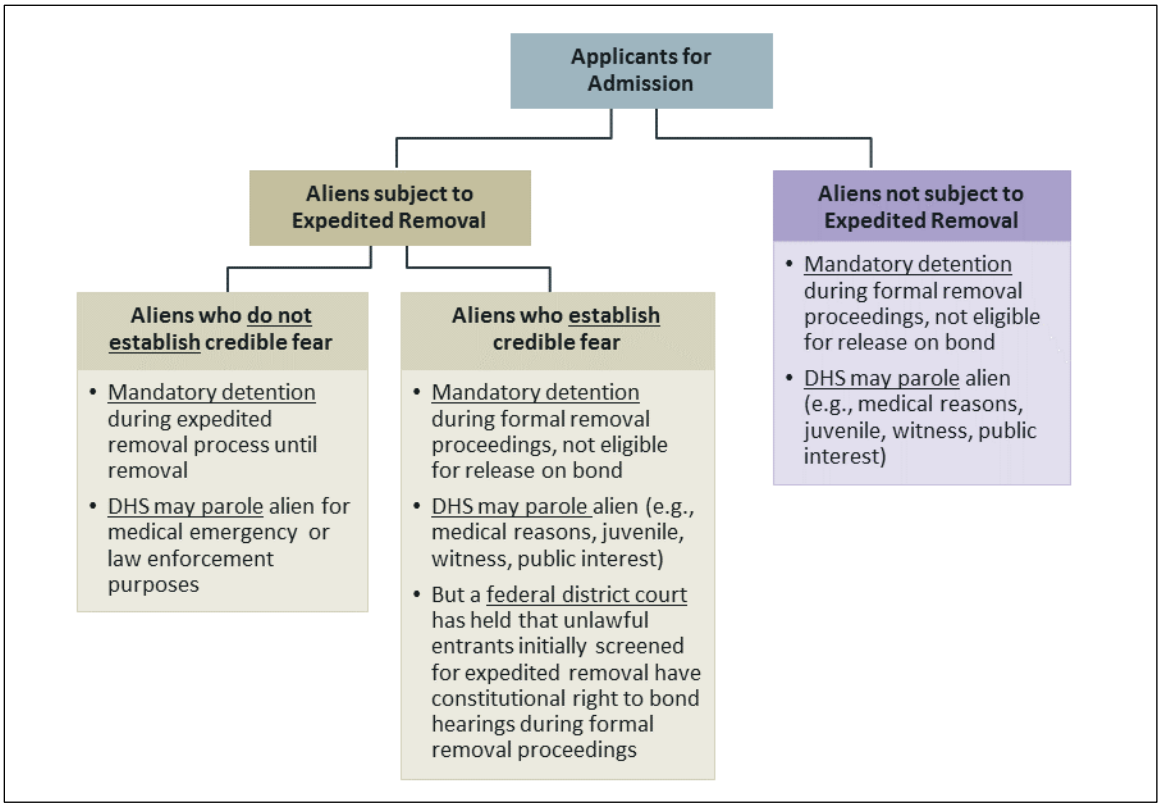
[189] *See* 8 U.S.C. § 1225(b)(2) (indicating that aliens who are not subject to expedited removal "shall be detained" pending formal removal proceedings); 8 C.F.R. § 235.3(b)(1)(ii) ("An alien who was not inspected and admitted or paroled into the United States but who establishes that he or she has been continuously physically present in the United States for the 2-year period immediately prior to the date of determination of inadmissibility shall be detained in accordance with section 235(b)(2) of the Act for a proceeding under section 240 of the Act.").

[190] 8 U.S.C. § 1225(b)(2)(A); 8 C.F.R. § 235.3(b)(3).

[191] *See* 8 U.S.C. § 1182(d)(5)(A) (parole authority); 8 C.F.R. §§ 212.5(b) (listing criteria for parole of arriving aliens placed in formal removal proceedings), 235.3(c) ("[A]ny arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the Act shall be detained in accordance with section 235(b) of the Act.").

[192] *See Jennings*, 138 S. Ct. at 842 ("Read most naturally, §§ 1225(b)(1) and (b)(2) mandate detention of applicants for admission until certain proceedings have concluded . . . [a]nd neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings."). Further, as discussed in this report, if the alien is inadmissible based on a criminal or terrorist-related offense enumerated in INA Section 212(a)(2) or 212(a)(3)(B), the alien will be subject to mandatory detention under INA Section 236(c), and may not be released from custody except for witness protection purposes. *See* 8 U.S.C. § 1226(c)(1).

Figure 2. Detention of Applicants for Admission



Sources: 8 U.S.C. §§ 1182(d)(5)(A), 1225(b)(1)(B)(ii), (iii)(IV), 1225(b)(2(A); 8 C.F.R. §§ 212.5(b), 235.3(b)(2)(iii), (3), (4)(ii), (5)(i), 235.3(c); Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Padilla v. U.S. Immigration and Customs Enforcement, 387 F. Supp. 3d 1219 (W.D. Wash. 2019).

Detention of Aliens Following Completion of Removal Proceedings Under INA Section 241(a)

INA Section 241(a) governs the detention of aliens *after* the completion of removal proceedings.[193] The statute's detention authority covers two categories of aliens: (1) aliens with a final order of removal who are subject to detention during a 90-day "removal period" pending efforts to secure their removal; and (2) certain aliens who may (but are not required to) be detained beyond the 90-day removal period.[194] The Supreme Court has construed the post-order of removal detention statute as having implicit temporal limitations.[195]

[193] 8 U.S.C. § 1231(a); *see* Zadvydas v. Davis, 533 U.S. 678, 683 (2001) (discussing post-order of removal detention statute and regulations).

[194] 8 U.S.C. § 1231(a)(2) ("During the removal period, [DHS] shall detain the alien."), (6) ("An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by [DHS] to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).").

[195] *See Zadvydas*, 533 U.S. at 682; Clark v. Martinez, 543 U.S. 371, 378 (2005).

Detention During 90-Day Removal Period

INA Section 241(a)(1) provides that DHS "shall remove" an alien ordered removed "within a period of 90 days," and refers to this 90-day period as the "removal period."[196] The statute specifies that the removal period "begins on the *latest* of the following":[197]

- The date the order of removal becomes administratively final.[198]
- If the alien petitions for review of the order of removal,[199] and a court orders a stay of removal, the date of the court's final order in the case.[200]
- If the alien is detained or confined for nonimmigration purposes (e.g., criminal incarceration), the date the alien is released from that detention or confinement.[201]

INA Section 241(a)(2) instructs that DHS "shall detain" an alien during the 90-day removal period.[202] The statute also instructs that "[u]nder no circumstance during the removal period" may DHS release an alien found inadmissible on criminal or terrorist-related grounds under INA Section 212(a)(2) or (a)(3)(B) (e.g., a crime involving moral turpitude); or who has been found deportable on criminal or terrorist-related grounds under INA Section 237(a)(2) or (a)(4)(B) (e.g., an aggravated felony conviction).[203]

The former Immigration and Naturalization Service (INS) previously issued guidance interpreting these provisions as only authorizing, but not requiring, the detention of "non-criminal aliens" during the 90-day removal period.[204] There is no indication that DHS has rescinded that policy. But according to the agency, the statute generally requires the detention during the removal period of terrorists and aliens who have committed the specified crimes enumerated in the

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[196] 8 U.S.C. § 1231(a)(1)(A).

[197] *Id.* § 1231(a)(1)(B) (emphasis added).

[198] An order of removal becomes administratively final when (1) the BIA issues a decision affirming the order; (2) the alien waives appeal of the order; (3) the period in which the alien is permitted to appeal the order to the BIA expires and the alien does not file an appeal within that time; (4) an IJ orders an alien removed in the alien's absence (e.g., because the alien failed to appear at a hearing); or (5) if an IJ issues an alternate order of removal in connection with a grant of voluntary departure, the alien overstays the voluntary departure period or fails to timely post a required voluntary departure bond. *Id.* § 1101(a)(47)(B); 8 C.F.R. § 1241.1.

[199] An alien generally may file a petition for review of a final order of removal in the judicial circuit in which the Immigration Court proceedings were completed. 8 U.S.C. § 1252(b)(1), (2). The petition must be filed within 30 days of the final order of removal. *Id.* § 1252(b)(1).

[200] *See* Prieto-Romero v. Clark, 534 F.3d 1053, 1059 (9th Cir. 2008) ("The statute makes clear that when a court of appeals issues a stay of removal pending its decision on an alien's petition for review of his removal order, the removal period begins only after the court denies the petition and withdraws the stay of removal.").

[201] 8 U.S.C. § 1231(a)(1)(B).

[202] *Id.* § 1231(a)(2); *see also* 8 C.F.R. § 241.3(a) ("Once the removal period defined in section 241(a)(1) of the Act begins, an alien in the United States will be taken into custody pursuant to the warrant of removal."). DHS regulations also provide that "[a]ny bond previously posted will be canceled unless it has been breached or is subject to being breached." *Id.* § 241.3(b). Further, "[t]he filing of (or intention to file) a petition or action in a Federal court seeking review of the issuance or execution of an order of removal shall not delay execution of the Warrant of Removal except upon an affirmative order of the court." *Id.* § 241.3(c).

[203] 8 U.S.C. § 1231(a)(2).

[204] *See* Memorandum from Bo Cooper, Gen. Counsel, Immigration & Naturalization Serv., to Reg'l Counsel for Distribution to District and Sector Counsel: Detention and Release during the Removal Period of Aliens Granted Withholding or Deferral of Removal (Apr. 21, 2000); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,967 (Nov. 14, 2001).

statute.[205] Under this policy, however, if a criminal alien subject to mandatory detention has been granted withholding of removal or protection under the Convention Against Torture (CAT), the alien may be released if the agency is not pursuing the alien's removal.[206]

While INA Section 241(a)(1) specifies a 90-day removal period, it also provides that this period may be extended beyond 90 days and that the alien may remain in detention during this extended period "if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal."[207]

INA Section 241(a)(3) provides that, if the alien either "does not leave or is not removed within the removal period," the alien will be released and "subject to supervision" pending his or her removal.[208] DHS regulations state that the order of supervision must specify the conditions of release, including requirements that the alien (1) periodically report to an immigration officer and provide relevant information under oath; (2) continue efforts to obtain a travel document and help DHS obtain the document; (3) report as directed for a mental or physical examination; (4) obtain advance approval of travel beyond previously specified times and distances; and (5) provide ICE with written notice of any change of address.[209]

Continued Detention Beyond Removal Period

Typically, an alien with a final order of removal is subject to detention during the 90-day removal period, and must be released under an order of supervision if the alien does not leave or is not

[205] *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,967 ("Section 241(a)(2) of the Act governs detention of aliens during the statutory removal period; it generally mandates detention of criminal and terrorist aliens during that period.").

[206] *See supra* note 204, Memorandum from Bo Cooper: Detention and Release during the Removal Period of Aliens Granted Withholding or Deferral of Removal. Withholding of removal and CAT protection are forms of protection for aliens who likely face persecution or torture in their home countries. *See* 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1). Generally, aliens who are statutorily ineligible for asylum (e.g., because of an aggravated felony conviction), may pursue withholding of removal (unless a statutory bar applies) or CAT protection. *See generally* 8 U.S.C. §§ 1158(a)(2), (b)(2), 1231(b)(3); 8 C.F.R. §§ 1208.13(c), 1208.16, 1208.17. But unlike a grant of asylum, which affords aliens an opportunity to pursue LPR status after one year, *see* 8 U.S.C. § 1159(b), a grant of withholding or CAT protection only precludes DHS from removing the alien to the country where he faces persecution or torture, and does not prevent the alien's removal to a third country. *See* Lin v. U.S. Dep't of Justice, 453 F.3d 99, 105 (2d Cir. 2006); 8 C.F.R. § 1208.16(f).

[207] 8 U.S.C. § 1231(a)(1)(C); *see* Diouf v. Mukasey, 542 F.3d 1222, 1230–31 (9th Cir. 2008) (concluding that alien's failure to cooperate with ICE's efforts to remove him warranted extension of 90-day removal period, and that 90-day clock restarted "following the latest date of documented obstruction"); *but see* Prieto-Romero v. Clark, 534 F.3d 1053, 1061 (9th Cir. 2008) (distinguishing "acts of obstruction" that warrant extension of 90-day removal period from "an alien's attempt to make use of legally available judicial review and remedies" that do not justify continued detention).

[208] 8 U.S.C. § 1231(a)(3). If the alien is released on an order of supervision, ICE may enroll the alien pursuant to its ATD program, which typically involves supervision by a contracting service and electronic monitoring (e.g., GPS, telephonic reporting). *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS (2014). For more information about ATD, see CRS Report R45804, *Immigration: Alternatives to Detention (ATD) Programs*, by Audrey Singer.

[209] 8 C.F.R. § 241.5(a). The regulations specify that the conditions of supervised release are not limited to these requirements. *Id.* Further, "[a]n officer authorized to issue an order of supervision may require the posting of a bond in an amount determined by the officer to be sufficient to ensure compliance with the conditions of the order, including surrender for removal." *Id.* § 241.5(b). The immigration officer may also, in his or her discretion, grant employment authorization to the alien if the alien cannot be removed in a timely manner (e.g., because of the refusal of the country of removal to accept the alien), or the alien's removal is "impracticable or contrary to the public interest." 8 U.S.C. § 1231(a)(7); 8 C.F.R. § 241.5(c).

removed within that period.[210] INA Section 241(a)(6), however, states that an alien "may be detained *beyond* the removal period"[211] if the alien falls within one of three categories:

1. an alien ordered removed who is inadmissible under INA Section 212(a) (e.g., an arriving alien who lacks valid entry documents);
2. an alien ordered removed who is deportable under INA Sections 237(a)(1)(C) (failure to maintain or comply with conditions of nonimmigrant status), 237(a)(2) (specified crimes including crimes involving moral turpitude, aggravated felonies, and controlled substance offenses), or 237(a)(4) (security and terrorist-related grounds); or
3. an alien whom DHS has determined "to be a risk to the community or unlikely to comply with the order of removal."[212]

DHS regulations provide that, before the end of the 90-day removal period, ICE will conduct a "custody review" for a detained alien who falls within one of the above categories, and whose removal "cannot be accomplished during the period, or is impracticable or contrary to the public interest," to determine whether further detention is warranted after the removal period ends.[213] The regulations list factors that ICE should consider in deciding whether to continue detention, including the alien's disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, family ties in the United States, and any other information probative of the alien's danger to the community or flight risk.[214]

ICE may release the alien after the removal period ends if the agency concludes that travel documents for the alien are unavailable (or that removal "is otherwise not practicable or not in the public interest"); the alien is "a non-violent person" and likely will not endanger the community; the alien likely will not violate any conditions of release; *and* the alien does not pose a significant flight risk.[215] Upon the alien's release, ICE may impose certain conditions, including (but not limited to) those specified for the release of aliens during the 90-day removal period, such as periodic reporting requirements.[216]

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[210] 8 U.S.C. § 1231(a)(2), (3).

[211] *Id.* § 1231(a)(6) (emphasis added).

[212] *Id.* §§ 1182(a), 1227(a)(1)(C), (2), (4), 1231(a)(6) (emphasis added); 8 C.F.R. § 241.4(a); *see also* Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (describing INA Section 241(a)(6) as "[a] special statute authoriz[ing] further detention if the Government fails to remove the alien during those 90 days.").

[213] 8 C.F.R. § 241.4(c)(1), (h)(1), (k)(1)(i). This initial custody review includes consideration of "the alien's records and any written information submitted in English" to the agency by or on behalf of the alien, as well as "any other relevant information relating to the alien or his or her circumstances and custody status." *Id.* § 241.4(h)(1). ICE officials may also interview the alien during the course of the custody determination. *Id.* The agency will send written notice to the alien 30 days before the custody review so that the alien may submit written information in support of his or her release. *Id.* § 241.4(h)(2).

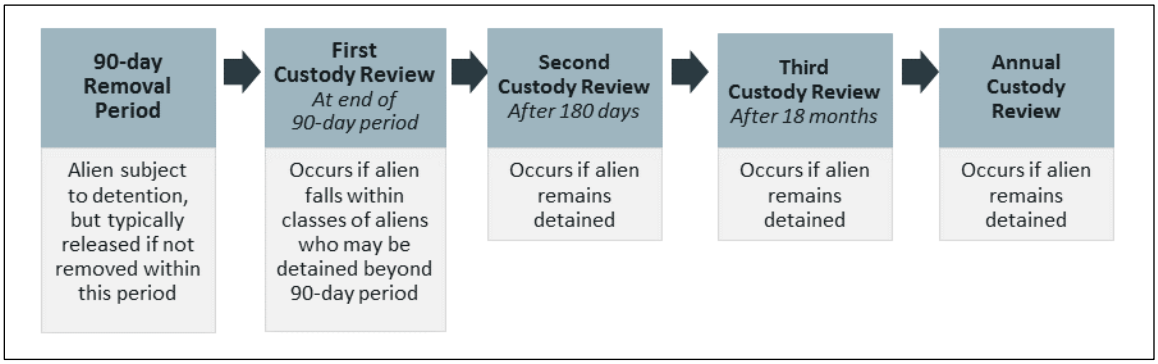
[214] *Id.* § 241.4(f), (h)(3).

[215] *Id.* § 241.4(e); *see also id.* § 241.4(d)(1) (requiring alien to show "that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States").

[216] *Id.* § 241.4(j)(1); *see also id.* § 241.5 (listing the conditions of release pursuant to an order of supervision during 90-day removal period). In addition, ICE may condition release on the alien's placement with a close relative sponsor (e.g., an LPR or U.S. citizen parent, spouse, child, or sibling), or the alien's placement or participation in an approved halfway house, mental health project, or community project. *Id.* § 241.4(j)(2). ICE may also place the alien in an ATD program. *See supra* note 208. Further, as with aliens released during the 90-day removal period, ICE may grant employment authorization to aliens released after the end of that period. 8 C.F.R. § 241.4(j)(3); *see also* 8 U.S.C. § 1231(a)(7); 8 C.F.R. § 241.5(c) (specifying circumstances in which employment authorization may be provided).

If ICE decides to maintain custody of the alien, it may retain custody authority for up to three months after the expiration of the 90-day removal period (i.e., up to 180 days after final order of removal).[217] At the end of that three-month period, ICE may either release the alien if he or she has not been removed (in accordance with the factors and criteria for supervised release), or refer the alien to its Headquarters Post-Order Detention Unit (HQPDU) for further custody review.[218] If the alien remains in custody after that review, the HQPDU must conduct another review within one year (i.e., 18 months after final order of removal), and (if the alien is still detained) annually thereafter.[219]

Figure 3. General Procedure for Post-Order of Removal Detention



Sources: 8 U.S.C. § 1231(a)(2), (3), (6); 8 C.F.R. §§ 241.3(a), 241.4(a), (c)(1), (c)(2), (h)(1), (i)(1), (k)(1), (k)(2).

Constitutional Limitations to Post-Order of Removal Detention

Although INA Section 241(a) authorizes (and in some cases requires) DHS to detain an alien after removal proceedings, the agency's post-order of removal detention authority has been subject to legal challenge, particularly when the alien remained detained indefinitely pending efforts to secure his or her removal to another country.[220] Eventually, in *Zadvydas v. Davis*, a case involving the prolonged detention of lawfully admitted aliens who had been ordered removed, the Supreme Court interpreted the statute consistently with due process principles to limit detention generally to a six-month period after a final order of removal.[221]

In *Zadvydas*, the Supreme Court considered whether INA Section 241(a)'s post-order of removal detention statute should be construed as having an implicit time limitation to avoid serious constitutional concerns.[222] The Court determined that "[a] statute permitting indefinite detention

[217] 8 C.F.R. § 241.4(k)(1)(ii).

[218] *Id.* § 241.4(c)(2), (i)(1), (k)(2)(i). The HQPDU review "will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable." *Id.* § 241.4(k)(2)(ii).

[219] *Id.* § 241.4(k)(2)(iii). The HQPDU may schedule custody reviews "at shorter intervals" if warranted, and the alien detainee may request a custody determination "[n]ot more than once every three months in the interim between annual reviews," if conditions have substantially changed since the last review. *Id.* § 241.4(k)(2)(iii), (v). Conversely, custody review may be suspended or postponed if the alien's removal is practical and imminent. *Id.* § 241.4(k)(3).

[220] *See e.g.*, Boz v. United States, 248 F.3d 1299, 1300 (11th Cir. 2001), *abrogated by* Santiago-Lugo v. Warden, 785 F.3d 467 (11th Cir. 2015) (considering constitutional challenge to indefinite detention of alien pending unsuccessful efforts to execute final order of removal); Ho v. Greene, 204 F.3d 1045, 1049–50 (10th Cir. 2000), *overruled in part by* Zadvydas v. Davis, 533 U.S. 678 (2001) (same); Chi Thon Ngo v. INS, 192 F.3d 390, 392–93 (3d Cir. 1999) (same).

[221] *See Zadvydas*, 533 U.S. 678 (2001).

[222] *Id.* at 686. The Court consolidated for review two cases involving the prolonged post-order of removal detention of LPRs with criminal records. *Id.* at 684–86. In one of the cases, the Fifth Circuit had concluded that "the government

of an alien would raise a serious constitutional problem" under the Due Process Clause.[223] The Court reasoned that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects," and found no justifications for the indefinite detention of aliens whose removal is no longer practicable.[224] While the Court recognized that a potentially indefinite detention scheme may be upheld if it is "limited to specially dangerous individuals and subject to strong procedural protections,"[225] INA Section 241(a)(6)'s post-removal period detention scheme was different because it applied "broadly to aliens ordered removed for many and various reasons, including tourist visa violations."[226] The Court thus concluded that the statute could not be lawfully construed as authorizing indefinite detention.[227]

Notably, the Court rejected the government's contention that indefinite detention pending removal was constitutionally permissible under *Shaughnessy v. United States* ex rel. *Mezei*, which, many decades earlier, had upheld the indefinite detention on Ellis Island of an alien denied admission into the United States and ordered excluded.[228] The *Zadvydas* Court distinguished *Mezei*, which involved an alien considered at the threshold of entry, because "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[229]

The *Zadvydas* Court determined there was no indication that Congress had intended to confer immigration authorities with the power to indefinitely confine individuals ordered removed.[230] Although INA Section 241(a)(6) states that an alien "may be detained" after the 90-day removal period, the Court reasoned, the statute's use of the word "may" is ambiguous and "does not necessarily suggest unlimited discretion."[231]

For these reasons, applying the doctrine of constitutional avoidance,[232] the Court held that INA Section 241(a)(6) should be construed as authorizing detention only for "a period reasonably

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may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place." Zadvydas v. Underdown, 185 F.3d 279, 297 (5th Cir. 1999), *rev'd sub nom.* 533 U.S. 678 (2001). In the other case, the Ninth Circuit had ruled that the government had the authority "to detain removable aliens only for a reasonable time beyond the ninety day removal period." Ma v. Reno. 208 F.3d 815, 830 (9th Cir. 2000), *rev'd*, 533 U.S. 678 (2001).

[223] *Zadvydas*, 533 U.S. at 690.

[224] *Id.* at 690–91.

[225] *Id.* at 691, 696 (citing Kansas v. Hendricks, 521 U.S. 346, 368 (1997)). For example, the Court determined, indefinite detention might be warranted if the individual was a suspected terrorist or had a mental illness that made him particularly dangerous. *Id.* at 691.

[226] *Id.*

[227] *Id.* at 689, 697.

[228] *Id.* at 692-93; *see* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215–16 (1953).

[229] *Zadvydas*, 533 U.S. at 693; *see also id.* ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). The Court also rejected the government's argument that the indefinite detention of aliens post-order of removal should be upheld given Congress's plenary power over immigration, noting "that power is subject to important constitutional limitations." *Id.* at 695.

[230] *Id.* at 697–98.

[231] *Id.* at 697.

[232] The doctrine of constitutional avoidance instructs that, when an ambiguous statute raises "a serious doubt" as to its constitutionality, a court should determine whether the statute may be construed in a manner that avoids the constitutional question. Crowell v. Benson, 285 U.S. 22, 62 (1932).

necessary to secure removal."[233] The Court thus construed the statute as having an implicit temporal limitation of six months following a final order of removal.[234] If that six-month period elapses, the Court held, the alien generally must be released from custody if he "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."[235]

In *Clark v. Martinez*, the Supreme Court considered whether the presumptive six-month time limitation established in *Zadvydas* applied to aliens who had not been lawfully admitted into the United States, and who were being detained after their 90-day removal periods had lapsed.[236] The Court concluded that the time limitation read into INA Section 241(a)(6) for deportable aliens in *Zadvydas* equally applied to inadmissible aliens. But unlike in *Zadvydas,* the Court did not rest its decision on matters of constitutional avoidance. Instead, the majority opinion (written by Justice Scalia, who had dissented in *Zadvydas*), relied on the principle of statutory construction that a provision should have the same meaning in different circumstances.[237] "[B]ecause the statutory text provides for no distinction between admitted and nonadmitted aliens," the *Martinez* Court reasoned, the provision should be interpreted as having the same, presumptive six-month time limit for both categories of aliens.[238]

In reaching this conclusion, the Supreme Court rejected the government's invitation to construe the detention statute differently when applied to unadmitted aliens, which the government contended was proper because of the limited constitutional protections available to such aliens.[239] The majority stated that "[b]e that as it may, it cannot justify giving the *same* detention provision a different meaning when such aliens are involved."[240]

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[233] *Zadvydas*, 533 U.S. at 699.

[234] *Id.* at 701; *see also* Akinwale v. Ashcroft, 287 F.3d 1050, 1052 n. 3 (11th Cir. 2002); Patel v. Zemski, 275 F.3d 299, 309 (3d Cir. 2001); Ma v. Ashcroft, 257 F.3d 1095, 1102 n. 5 (9th Cir. 2001) (interpreting *Zadvydas* as permitting a detention period of six months after a final order of removal, not after the 90-day removal period has ended).

[235] *Zadvydas*, 533 U.S. at 701. Following *Zadvydas*, the Third and Ninth Circuits ruled that an alien subject to prolonged detention under INA Section 241(a)(6) (i.e., after six months post-order of removal) is entitled to a bond hearing before an IJ and must be released from custody unless the government proves that the alien is a flight risk or a danger to the community, even if the alien's continued detention is otherwise permitted by the statute. *See* Guerrero-Sanchez v. Warden York Co. Prison, 905 F.3d 208, 224–26 (3d Cir. 2018); Diouf v. Napolitano, 634 F.3d 1081, 1092 (9th Cir. 2011).

[236] Clark v. Martinez, 543 U.S. 371, 378 (2005). As discussed above, INA Section 241(a)(6) specifies three categories of aliens who may be detained after the 90-day removal period, including aliens ordered removed who are inadmissible under INA Section 212(a). 8 U.S.C. § 1231(a)(6).

[237] *Id.* at 379 ("It is indeed different from the question decided in *Zadvydas*, but because the statutory text provides for no distinction between admitted and nonadmitted aliens, we find that it results in the same answer.").

[238] *Id.* at 378-79. The Court reasoned that to construe INA Section 241(a)(6) differently for each category of aliens covered by that same statute "would be to invent a statute rather than interpret one." *Id.* at 379.

[239] *Id.* at 380. *See also, e.g.,* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.").

[240] *Martinez*, 543 U.S. at 380 (emphasis in original). According to the Court, "[i]t is not unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Id.*

Post-*Zadvydas* Regulations Addressing Likelihood of Removal and Special Circumstances Warranting Continued Detention

Following the Supreme Court's decision in *Zadvydas*, the former INS issued regulations that established "special review procedures" for aliens who remain detained beyond the 90-day removal period.[241] Under these rules, an alien may "at any time after a removal order becomes final" submit a written request for release because there is no significant likelihood of removal in the reasonably foreseeable future.[242] The HQPDU will consider the alien's request and issue a decision on the likelihood of the alien's removal.[243] Generally, if the HQPDU determines that there is no significant likelihood of removal, ICE *will release* the alien subject to any appropriate conditions.[244] But if the HQPDU concludes that there *is* a significant likelihood of the alien's removal in the reasonably foreseeable future, the alien will remain detained pending removal.[245]

The regulations provide, however, that even if the HQPDU concludes that there is no significant likelihood of the alien's removal in the reasonably foreseeable future, the alien may remain detained if "special circumstances" are present.[246] The regulations list four categories of aliens whose continued detention may be warranted because of special circumstances: (1) aliens with "a highly contagious disease that is a threat to public safety"; (2) aliens whose release "is likely to have serious adverse foreign policy consequences for the United States"; (3) aliens whose release "presents a significant threat to the national security or a significant risk of terrorism"; and (4) aliens whose release "would pose a special danger to the public."[247]

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[241] *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001).

[242] 8 C.F.R. § 241.13(d)(1), (3). Although the regulation specifies that the alien may submit the request any time after a final order of removal, ICE "may, in the exercise of its discretion, postpone its consideration of such a request until after expiration of the [90-day] removal period." *Id.* § 241.13(d)(3); *see also id.* § 241.13(b)(3)(ii) (providing that the "special review procedures" do not apply to "[a]liens subject to a final order of removal who are still within the [90-day] removal period, including aliens whose removal period has been extended for failure to comply" with efforts to secure travel documents).

[243] The regulations instruct the HQPDU to consider, among other factors, the alien's efforts to comply with the order of removal, ICE's past efforts to remove aliens to the country in question or third countries, ICE's ongoing efforts to remove the alien, the reasonably foreseeable results of those efforts, and the State Department's views concerning the prospects for removal. *Id.* § 241.13(e)(2), (f). The regulations specify that the alien will remain subject to the general procedures and standards governing post-order of removal detention pending the agency's decision. *Id.* § 241.13(b)(1). ICE may, pursuant to those standards, release an alien under an order of supervision regardless of the likelihood of the alien's removal in the reasonably foreseeable future. *Id.*

[244] *Id.* § 241.13(g)(1), (h)(1). The regulations authorize ICE to return an alien to custody if the alien violates any conditions of release, or, due to changed circumstances, there is a significant likelihood that the alien may be removed in the reasonably foreseeable future. *Id.* § 241.13(i)(1), (2).

[245] *Id.* § 241.13(g)(2). The alien may submit a renewed request for release six months after ICE's last denial of release. *Id.* § 241.13(j).

[246] *Id.* §§ 241.13(e)(6), 241.14(a). In its Federal Register notice, the INS cited *Zadvydas v. Davis* in support of this "special circumstances" exception, declaring that the Supreme Court "acknowledged that there may be cases involving 'special circumstances,' such as those involving terrorists or specially dangerous individuals, in which continued detention may be appropriate even if removal is unlikely in the reasonably foreseeable future." *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,968.

[247] 8 C.F.R. § 241.14(b), (c), (d), (f). DHS regulations state that an alien presents a special danger to the public if he has previously committed a crime of violence (as defined in 18 U.S.C. § 16), he is likely to engage in acts of violence in the future due to a mental condition or personality disorder, and no conditions of release can reasonably be expected to ensure the public's safety. *Id.* § 241.14(f)(1). ICE's determination that an alien "would pose a special danger to the public" is subject to review at a hearing before an IJ, and ICE has the burden of establishing that the alien should remain in custody. *Id.* § 241.14(g), (h), (i). The IJ's custody determination is also subject to review by the BIA. *Id.* § 241.14(i)(4). Further, if the IJ or the BIA orders the alien to remain in custody, ICE must conduct periodic reviews of

Some courts, though, have ruled that the former INS exceeded its authority by issuing regulations allowing the continued detention of aliens in "special circumstances." Both the Fifth and Ninth Circuits have concluded that the Supreme Court in *Zadvydas* never created an exception for the indefinite detention post-order of removal of aliens considered particularly dangerous.[248] Instead, these courts concluded, the Supreme Court had merely suggested that it might be within Congress's power to enact a law allowing for the prolonged detention of certain types of aliens following an order of removal, not that Congress had done so when it enacted INA Section 241(a)(6), which does not limit its detention authority to "specific and narrowly defined groups."[249] The Tenth Circuit, on the other hand, has ruled that the former INS's interpretation of the statute to permit indefinite detention in special circumstances was reasonable.[250] The Supreme Court has not yet considered whether INA Section 241(a)(6) authorizes indefinite post-order of removal detention in special circumstances.

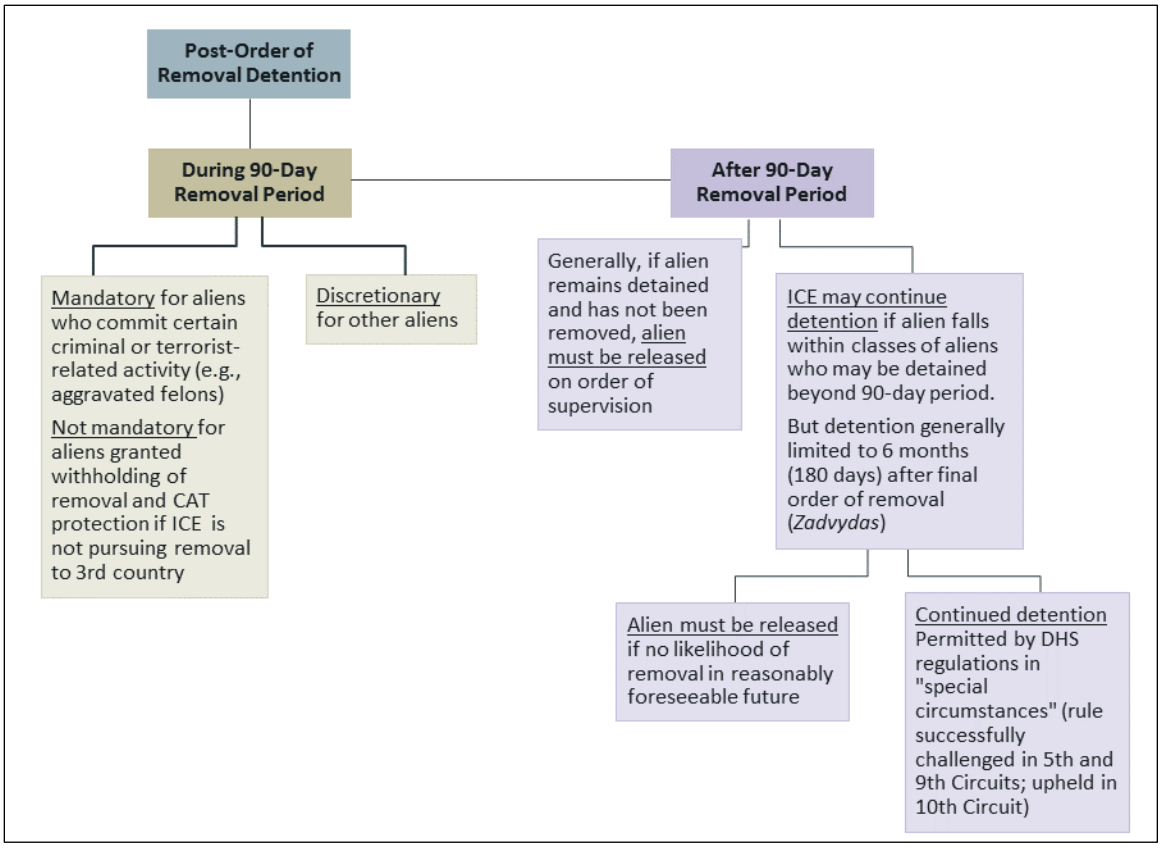
the alien's continued detention to assess whether the alien still poses a special danger to the public (which also may be subject to IJ and BIA review). *Id.* § 241.14(k). DHS regulations provide, however, that there is no IJ or BIA review of ICE's decision to detain an alien on the basis of a highly contagious disease, serious adverse foreign policy concerns, or security and terrorism-related grounds (but ICE is required to conduct ongoing reviews of those determinations). *Id.* § 241.14(a)(2).

[248] Tran v. Mukasey, 515 F.3d 478, 482–83 (5th Cir. 2008); Tuan Thai v. Ashcroft, 366 F.3d 790, 794–95 (9th Cir. 2004).

[249] *Tran*, 515 F.3d at 482–83; *Tuan Thai*, 366 F.3d at 794–95.

[250] Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1248–49 (10th Cir. 2008); *see also* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) (holding that an agency's interpretation of a statute may differ from a prior judicial interpretation of that statute unless the statute unambiguously requires the judicial construction).

Figure 4. Overview of Detention After Removal Proceedings



Sources: 8 U.S.C. § 1231(a)(2), (3), (6); 8 C.F.R. §§ 241.3(a), 241.4(a), 241.13, 241.14; Zadvydas v. Davis, 533 U.S. 678 (2001); Clark v. Martinez, 543 U.S. 371 (2005); Hernandez-Carrera v. Carlson, 547 F.3d 1237 (10th Cir. 2008); Tran v. Mukasey, 515 F.3d 478 (5th Cir. 2008); Tuan Thai v. Ashcroft, 366 F.3d 790 (9th Cir. 2004); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001); Memorandum from Bo Cooper, Gen. Counsel, Immigration & Naturalization Serv., to Reg'l Counsel for Distribution to District and Sector Counsel: Detention and Release during the Removal Period of Aliens Granted Withholding or Deferral of Removal (Apr. 21, 2000).

Select Legal Issues Concerning Detention

As the above discussion reflects, DHS has broad authority to detain aliens who are subject to removal, and for certain classes of aliens (e.g., those with specified criminal convictions) detention is mandatory with no possibility of release except in limited circumstances.[251] Further, while the Supreme Court has recognized limits to DHS's ability to detain aliens after removal proceedings, the Court has recognized that the governing INA provisions appear to allow the agency to detain aliens potentially indefinitely pending those proceedings.[252]

But some have argued that the prolonged detention of aliens during their removal proceedings without bond hearings is unconstitutional.[253] Moreover, the government's ability to detain alien

[251] *See* 8 U.S.C. §§ 1225(b)(1)(B), 1225(b)(2)(A), 1226(a), 1226(c), 1231(a)(2), 1231(a)(6).

[252] *See* Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Zadvydas v. Davis, 533 U.S. 678 (2001).

[253] *See e.g.*, Rodriguez v. Marin, 909 F.3d 252, 256 (9th Cir. 2018) ("We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional"); Padilla v. U.S. Immigration and Customs

minors, including those accompanied by adults in family units, is currently limited by a binding settlement agreement known as the *Flores* Settlement, which generally requires the release of minors in immigration custody.[254] Apart from concerns raised by prolonged detention, there has been criticism over the lack of regulations governing the conditions of confinement.[255] Additionally, for aliens detained by criminal law enforcement authorities, DHS's authority to take custody of such aliens for immigration enforcement purposes through "immigration detainers" has been subject to legal challenge.[256] The following sections provide more discussion of these developing issues.

Indefinite Detention During Removal Proceedings

In *Zadvydas v. Davis*, discussed above, the Supreme Court in 2001 ruled that the indefinite detention of aliens after the completion of removal proceedings raised "a serious constitutional problem," at least for those who were lawfully admitted, and thus construed INA Section 241(a)(6)'s post-order of removal detention provision as containing an implicit six-month time limitation.[257] In 2003, the Court in *Demore v. Kim* held that the mandatory detention of aliens *pending* removal proceedings under INA Section 236(c) was "constitutionally permissible," but did not decide whether there were any constitutional limits to the duration of such detention.[258] Later, though, some lower courts ruled that the prolonged detention of aliens pending removal proceedings raised similar constitutional issues as those raised after a final order, and, citing *Zadvydas*, construed INA Section 236(c) as containing an implicit temporal limitation.[259] In 2018,

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Enforcement, 387 F. Supp. 3d 1219, 1223 (W.D. Wash. 2019), *appeal docketed*, No. 19-35565 (9th Cir. July 5, 2019) ("It is the finding of this Court that it is unconstitutional to deny [unlawful entrants] a bond hearing while they await a final determination of their asylum request."); Allison M. Cunneen, *Demanding Due Process: Time to Amend 8 U.S.C. § 1226(c) and Limit Indefinite Detention of Criminal Immigrants*, 83 BROOK. L. REV. 1497, 1515-17 (2018) ("In the interest of justice and human rights, Congress should amend the statute so that criminal immigrants are subjected only to reasonable detention times, as required by the Constitution."); Whitney Chelgren, *Preventive Detention Distorted: Why It is Unconstitutional to Detain Immigrants without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1503-09, 1523-25 (2011) ("[T]here should be time constraints placed on pre-removal order detention because the Court has time and again held that prolonged detention is unconstitutional."); Susan Marx, *Throwing Away the Key: The Constitutionality of the Indefinite Detention of Inadmissible Aliens*, 35 TEX. TECH. L. REV. 1259, 1297–98 (2003) ("To detain inadmissible aliens indefinitely is a blatant violation of due process, and it should not be permitted under the Constitution.").

[254] Flores v. Sessions, 862 F.3d 863, 869, 874 (9th Cir. 2017). *See generally* CRS Report R45297, *The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions*, by Ben Harrington.

[255] *See e.g.*, Evangeline Dech, *Nonprofit Organizations: Humanizing Immigration Detention*, 53 CAL. W. L. REV. 219, 235 (2017) ("These detainees are subject to the same, if not worse, conditions of prisons: shackling; solitary confinement; and the denial of exercise, healthcare, and adequate nutrition."); Chelgren, *supra* note 253, at 1495, 1499 ("The lack of regulation has allowed the detention system to deteriorate to the point where the conditions of confinement are not only punitive but also inhumane."); Abigail Hauslohner, *U.S. Returns 100 Migrant Children to Overcrowded Border Facility as HHS Says It Is Out of Space*, WASH. POST, June 25, 2019, https://www.washingtonpost.com/immigration/us-returns-100-migrant-children-to-overcrowded-border-facility-as-hhs-says-it-is-out-of-space/2019/06/25/397b0cb6-96b6-11e9-830a-21b9b36b64ad_story.html (describing overcrowded conditions and lack of medical treatment, beds, private space, nutrition, and hygiene at Border Patrol facilities).

[256] *See e.g.*, City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018); Morales v. Chadbourne, 793 F.3d 208 (1st Cir. 2015); Creedle v. Miami-Dade Cty., 349 F. Supp. 3d 1276 (S.D. Fla. 2018); Abriq v. Hall, 295 F. Supp. 3d 874 (M.D. Tenn. 2018); Lopez-Aguilar v. Marion Cty. Sheriff's Dep't, 296 F. Supp. 3d 959 (S.D. Ind. 2017); Ochoa v. Campbell, 266 F. Supp. 3d 1237 (E.D. Wash. 2017); Orellana v. Nobles Cty., 230 F. Supp. 3d 934 (D. Minn. 2017); Moreno v. Napolitano, 213 F. Supp. 3d 999 (N.D. Ill. 2016).

[257] Zadvydas v. Davis, 533 U.S. 678, 690–91, 701 (2001).

[258] Demore v. Kim, 538 U.S. 510, 531 (2003).

[259] *See* Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1214 (11th Cir. 2016), *vacated*, 890 F.3d 952 (2018); Reid v. Donelan,

the Supreme Court held in *Jennings v. Rodriguez* that the government has the statutory authority to indefinitely detain aliens pending their removal proceedings, but left the constitutional questions unresolved.[260]

The *Jennings* case involved a class action by aliens within the Central District of California who had been detained under INA Sections 235(b), 236(c), and 236(a), in many cases for more than a year.[261] The plaintiffs claimed that their prolonged detention without a bond hearing violated their due process rights.[262] In 2015, the Ninth Circuit upheld a permanent injunction requiring DHS to provide aliens detained longer than six months under INA Sections 235(b), 236(c), and 236(a) with individualized bond hearings.[263] The court expressed concern that the detention statutes, if construed to permit the indefinite detention of aliens pending removal proceedings, would raise "constitutional concerns" given the reasoning of the Supreme Court in *Zadvydas*.[264] Although the Supreme Court in *Demore* had upheld DHS's authority to detain aliens without bond pending removal proceedings, the Ninth Circuit construed *Demore's* holding as limited to the constitutionality of "brief periods" of detention, rather than cases when the alien's detention lasts for extended periods.[265]

Recognizing the constitutional limits placed on the federal government's authority to detain individuals, the Ninth Circuit, as a matter of constitutional avoidance, ruled that the INA's detention statutes should be construed as containing implicit time limitations.[266] The court therefore interpreted the mandatory detention provisions of INA Sections 235(b) and 236(c) to expire after six months' detention, after which the government's detention authority shifts to INA Section 236(a) and the alien must be given a bond hearing.[267] The court also construed INA

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819 F.3d 486, 494 (1st Cir. 2016), *vacated*, Reid v. Donelan, 2018 WL 4000993 (May 11, 2018); Lora v. Shanahan, 804 F.3d 601, 606, 614–16 (2d Cir. 2015), *vacated*, 138 S. Ct. 1260 (2018); Rodriguez v. Robbins, 715 F.3d 1127, 1137–39 (9th Cir. 2013), *abrogated by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Diop v. ICE/Homeland Sec., 656 F.3d 221, 231–32, 235 (3d Cir. 2011), *abrogated by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Ly v. Hansen, 351 F.3d 263, 267–68, 273 (6th Cir. 2003), *abrogated by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018). The Second and Ninth Circuits imposed a six-month limitation to detention, whereas the First, Third, Sixth, and Eleventh Circuits concluded that the time limitation should be based on a fact-dependent analysis in each case. *Sopo*, 825 F.3d at 1215–16; *Reid*, 819 F.3d at 496; *Lora*, 804 F.3d at 616; *Rodriguez*, 715 F.3d at 1139; *Diop*, 656 F.3d at 234; *Ly*, 351 F.3d at 271–72.

[260] Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[261] Rodriguez v. Robbins, 804 F.3d 1060, 1065 (9th Cir. 2015), *rev'd sub. nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018). In its decision, the Ninth Circuit observed that the plaintiffs typically spent an average of 427 days in detention, but that one alien had been detained for 1,585 days. *Id.* at 1079.

[262] *Rodriguez*, 715 F.3d at 1132.

[263] *Rodriguez*, 804 F.3d at 1089–90.

[264] *Id.* at 1074. The Ninth Circuit recognized that reviewing courts have typically considered aliens seeking initial admission into the United States as having less due process protection than aliens within the country. *Id.* at 1082; *see also Rodriguez*, 715 F.3d at 1140 (discussing the "unique constitutional position of arriving aliens"). Nonetheless, the court believed that the constitutional concerns raised by *Zadvydas* were pertinent to INA § 235(b), notwithstanding that this provision primarily addresses aliens seeking initial entry to the United States. *Rodriguez*, 804 F.3d at 1082. The court reasoned that the statute still raised constitutional issues because it could in some circumstances apply to returning LPRs, who are entitled to more robust protections than aliens seeking initial entry into the United States. *Id.* at 1082–83; *see* 8 U.S.C. § 1101(a)(13)(C) (providing that an LPR may be treated as an applicant for admission—and thus subject to detention under INA Section 235(b)—in certain circumstances, such as when the LPR has been absent from the United States for more than 180 days).

[265] *Rodriguez*, 804 F.3d at 1079, 1088.

[266] *Id.* at 1074.

[267] *Id.* at 1079, 1082.

Section 236(a) as requiring bond hearings every six months.[268] In addition, the court held that continued detention after an initial six-month period was permitted only if DHS proved by clear and convincing evidence that further detention was warranted.[269]

In *Jennings*, the Supreme Court rejected as "implausible" the Ninth Circuit's construction of the challenged detention statutes.[270] The Court determined that the Ninth Circuit could not rely on the constitutional avoidance doctrine to justify its interpretation of the statutes.[271] The Court distinguished *Zadvydas*, which the Ninth Circuit had relied on when invoking the constitutional avoidance doctrine, because the post-order of removal detention statute at issue in that case did not clearly provide that an alien's detention after the 90-day removal period was required.[272] According to the *Jennings* Court, the statute at issue in *Zadvydas* was sufficiently open to differing interpretations that reliance on the constitutional avoidance doctrine was permissible.[273] But the *Jennings* Court differentiated the ambiguity of that detention statute from INA Sections 235(b) and 236(c), which the Court held were textually clear in generally requiring the detention of covered aliens until the completion of removal proceedings.[274] And the Court also observed that nothing in INA Section 236(a) required bond hearings after an alien was detained under that authority, or required the government to prove that the alien's continued detention was warranted after an initial six-month period.[275] According to the Court, the Ninth Circuit could not construe the statutes to require bond hearings simply to avoid ruling on whether they passed constitutional muster.[276] Having rejected the Ninth Circuit's interpretation of INA Sections 235(b), 236(a), and 236(c) as erroneous, the Court remanded the case to the lower court to address, in the first instance, the plaintiffs' constitutional claim that their indefinite detention under these provisions violated their due process rights.[277]

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[268] *Id.* at 1085, 1089. The court recognized that INA Section 236(a) already affords aliens the right to request bond hearings, but determined that bond hearings should be automatically required after six months because "[d]etainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate." *Id.* at 1085. Consequently, the court reasoned, "many class members are not aware of their right to a bond hearing and are poorly equipped to request one." *Id.*

[269] *Id.* at 1087.

[270] Jennings v. Rodriguez, 138 S. Ct. 830, 836, 842 (2018). Before reaching the merits of the case, the Court had concluded that INA Section 236(e) did not bar the plaintiffs' claims regarding their detention under INA Sections 235(b), 236(a), and 236(c) because they challenged the "statutory framework" allowing their detention without bond rather than any discretionary decision whether to detain them. *Id.* at 841. The Court further concluded that INA Section 242(b)(9) did not bar jurisdiction either because the plaintiffs did not seek to challenge an order of removal, the government's decision to seek removal, or the process by which their removability would be determined. *Id.*; *see also supra* at 15 (discussing judicial review of custody determinations).

[271] *Jennings*, 138 S. Ct. at 842.

[272] *Id.* at 843–44; *see also* 8 U.S.C. § 1231(a)(6) (authorizing, but not requiring, continued detention beyond 90-day removal period for certain classes of aliens).

[273] *Jennings*, 138 S. Ct. at 843.

[274] *Id.* at 842–44, 846–47.

[275] *Id.* at 847–48.

[276] *Id.* at 843. The Court stated, "That is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to 'choos[e] between competing *plausible* interpretations of a statutory text.'" *Id.* (quoting Clark v. Martinez, 543 U.S. 371, 381 (2005)) (emphasis in original).

[277] *Id.* at 851. In a dissenting opinion, Justice Breyer argued that INA Sections 235(b), 236(a), and 236(c) should be interpreted as requiring bond hearings after six months' detention. *Id.* at 859 (Breyer, J., dissenting). Declaring that "the Constitution does not authorize arbitrary detention" and that aliens have the right to due process (including, in Justice Breyer's view, not only aliens within the United States but also those aliens seeking initial entry), Justice Breyer argued that interpreting these INA provisions as permitting indefinite detention would likely render them unconstitutional. *Id.*

In short, the *Jennings* Court held that the government has the *statutory* authority to detain aliens potentially indefinitely pending their removal proceedings, but did not decide whether such indefinite detention is *unconstitutional*. While the Supreme Court has not yet addressed the constitutionality of indefinite detention during removal proceedings, the Court had indicated in *Demore v. Kim* that aliens may be "detained for the *brief period* necessary for their removal proceedings."[278] And in a concurring opinion in *Demore*, Justice Kennedy declared that a detained alien "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."[279]

After the *Jennings* decision, some lower courts have concluded that the detention of aliens during removal proceedings without a bond hearing violates due process if the detention is unreasonably prolonged.[280] Some courts have applied these constitutional limitations to the detention of aliens *arriving in the United States* who are placed in removal proceedings, reasoning that, although such aliens typically have lesser constitutional protections than aliens within the United States, they have sufficient due process rights to challenge their prolonged detention.[281] In reaching this conclusion, some courts have addressed the Supreme Court's 1953 decision in *Shaughnessy v. United States* ex rel. *Mezei*, which upheld the detention without bond of an alien seeking entry

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at 862–63, 876 (Breyer, J., dissenting). Given this concern, Justice Breyer argued that INA Sections 235(b), 236(a), and 236(c) should be interpreted as authorizing bond hearings when detention is prolonged because the statutes' language, purpose, context, and history were consistent with the notion that detained individuals have "the basic right to seek bail." *Id.* at 876 (Breyer, J., dissenting).

[278] Demore v. Kim, 538 U.S. 510, 513 (2003) (emphasis added); *see also id.* at 526 (noting the "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings").

[279] *Id.* at 532 (Kennedy, J., concurring) (citing Zadvydas v. Davis, 533 U.S. 678, 684–86 (2001)).

[280] *See* Rodriguez v. Marin, 909 F.3d 252, 256 (9th Cir. 2018) ("We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional"); Borbot v. Warden Hudson Co. Corr. Facility, 906 F.3d 274, 278 (3d Cir. 2018) ("*Jennings* did not call into question our constitutional holding in *Diop* that detention under § 1226(c) may violate due process if unreasonably long."); Padilla v. U.S. Immigration and Customs Enforcement, 387 F. Supp. 3d 1219, 1223 (W.D. Wash. 2019), *appeal docketed*, No. 19-35565 (9th Cir. July 5, 2019) ("It is the finding of this Court that it is unconstitutional to deny these class members a bond hearing while they await a final determination of their asylum request."); Reyes v. Bonnar, 362 F. Supp. 3d. 762, 777 (N.D. Cal. 2019) (ruling that alien's 22-month detention without a second bond hearing violated due process); Kouadio v. Decker, 352 F. Supp. 3d 235, 241 (S.D.N.Y. 2018) (holding that alien's 34-month detention without bond hearing violated due process); Pierre v. Doll, 350 F. Supp. 3d 327, 332 (M.D. Pa. 2018) (ruling that alien's 2-year detention without bond hearing was unreasonable); Lett v. Decker, 346 F. Supp. 3d 379, 387–88 (S.D.N.Y. 2018) (holding that alien's nearly 10-month detention was unreasonable); Brissett v. Decker, 324 F. Supp. 3d 444, 452 (S.D.N.Y. 2018) (detention of alien for more than 9 months without bond violated due process); Portillo v. Hott, 322 F. Supp. 3d 698, 709 (E.D. Va. 2018) (holding that alien detained for more than 14 months was entitled to a bond hearing); Mohamed v. Sec'y Dep't of Homeland Sec., 376 F. Supp. 3d 950, 957–58 (D. Minn. 2018) (holding that alien's detention for more than 15 months without bond hearing violated due process).

[281] *See e.g.*, *Kouadio*, 352 F. Supp. 3d at 241 ("The statutory framework governing those who seek refuge, and its provisions for detention, cannot be extended to deny all right to bail."); *Pierre*, 350 F. Supp. 3d at 332 ("[T]he Court agrees with the weight of authority finding that 'arriving aliens detained pre-removal pursuant to § 1225(b) have a due process right to an individualized bond consideration once it is determined that the duration of their detention has become unreasonable.'") (quoting Singh v. Sabol, No. 1:16-cv-02246, 2017 WL 1659029, *4 (M.D. Pa. Apr. 6, 2017)); *Lett*, 346 F. Supp. 3d at 386 ("[W]hen it comes to prolonged detention, the Court sees no logical reason to treat individuals at the threshold of entry seeking asylum under § 1225(b), like Petitioner, differently than other classes of detained aliens."); *cf.* Castro v. Dep't of Homeland Sec., 835 F.3d 422, 449 n. 32 (3d Cir. 2016) ("And we are certain that this 'plenary power' does not mean Congress or the Executive can subject recent clandestine entrants or other arriving aliens to inhumane treatment."); Kwai Fun Wong v. INS, 373 F.3d 952, 971 (9th Cir. 2004) ("The entry fiction thus appears determinative of the *procedural* rights of aliens with respect to their applications for admission. The entry doctrine has not, however, been applied, by the Supreme Court or by this court, to deny all constitutional rights to non-admitted aliens.").

into the United States.[282] These courts determined that *Mezei* is distinguishable because, in that case, the alien had already been ordered excluded when he challenged his detention, and the alien potentially posed a danger to national security that warranted his confinement.[283]

In addition, while the *Jennings* Court held that INA Section 236(a) does not mandate that a clear and convincing evidence burden be placed on the government in bond hearings, some courts have concluded that the Constitution requires placing the burden of proof on the government in those proceedings.[284]

At some point, whether in the *Jennings* litigation or another case, the Supreme Court may decide whether the indefinite detention of aliens pending removal proceedings is constitutionally permissible. In doing so, the Court may also reassess the scope of constitutional protections for arriving aliens seeking initial entry into the United States. The Court may also decide whether due process compels the government to prove that an alien's continued detention is justified at a bond hearing. The Court's resolution of these questions may clarify its view on the federal government's detention authority.

Detention of Alien Minors

As discussed, DHS has broad authority to detain aliens pending their removal proceedings, and in some cases detention is mandatory except in certain limited circumstances. But a 1997 court settlement agreement (the "*Flores* Settlement") currently limits the period in which an alien minor (i.e., under the age of 18) may be detained by DHS.[285] Furthermore, under federal statute, an *unaccompanied* alien child (UAC) who is subject to removal is generally placed in the custody of the Department of Health and Human Services' Office of Refugee Resettlement (ORR), rather than DHS, pending his or her removal proceedings.[286] In 2019, DHS promulgated a final rule that purports to incorporate these limitations with some modifications.[287]

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[282] *Kouadio*, 352 F. Supp. 3d at 239–41; *Lett*, 346 F. Supp. 3d at 385–86.

[283] *Kouadio*, 352 F. Supp. 3d at 241; *Lett*, 346 F. Supp. 3d at 386. *But see* Poonjani v. Shanahan, 319 F. Supp. 3d 644, 648 (S.D.N.Y. 2018) ("*Mezei*'s holding—that for aliens on the 'threshold of initial entry,' due process is whatever procedure has been 'authorized by Congress'—compels denial of the Petition here."); Aracely v. Nielsen, 319 F. Supp. 3d 110, 145 (D.D.C. 2018) ("While *Mezei* may be under siege, it is still good law, and it dictates that for an alien who has not effected an entry into the United States, '[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'") (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953)) (alteration in original).

[284] *See Padilla*, 387 F. Supp. 3d at 1232 (ordering government to require DHS to prove at bond hearings that asylum seekers who unlawfully entered the United States should not be released from custody); *Lett*, 346 F. Supp. 3d at 389 ("Courts within this district have found that imposing a clear and convincing standard on the Government is most consistent with due process.") (internal quotation omitted); *Portillo*, 322 F. Supp. 3d at 709 ("[A]t the bond hearing, the government must demonstrate that [the alien] is either a flight risk or a danger to the community by clear and convincing evidence."); Cortez v. Sessions, 318 F. Supp. 3d 1134, 1146–47 (N.D. Cal. 2018) ("The [*Jennings*] Court did not engage in any discussion of the specific evidentiary standard applicable to bond hearings, and there is no indication that the Court was reversing the Ninth Circuit as to that particular issue."); Pensamiento v. McDonald, 315 F. Supp. 3d 684, 692 (D. Mass. 2018) ("Requiring a non-criminal alien to prove that he is <u>not</u> dangerous and <u>not</u> a flight risk at a bond hearing violates the Due Process Clause.") (emphasis in original).

[285] *See* Flores v. Barr, __ F.3d __, 2019 WL 3820265, *2 (9th Cir. Aug. 15, 2019); Flores v. Sessions, 862 F.3d 863, 866, 869 (9th Cir. 2017) (discussing *Flores* Settlement).

[286] 8 U.S.C. § 1232(a)(4), (b)(3).

[287] *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Aug. 23, 2019) (to be codified at 45 C.F.R. pt. 410).

The *Flores* Settlement originates from a 1985 class action lawsuit brought by a group of UACs apprehended at or near the border, who challenged the conditions of their detention and release.[288] The parties later settled the plaintiffs' claims regarding the conditions of their detention, but the plaintiffs maintained a challenge to the INS's policy of allowing their release only to a parent, legal guardian, or adult relative.[289] In 1993, following several lower court decisions, the Supreme Court in *Reno v. Flores* upheld the INS's release rule, reasoning that the plaintiffs had no constitutional right to be released to any available adult who could take legal custody, and that the INS's policy sufficiently advanced the government's interest in protecting the child's welfare.[290]

Ultimately, in 1997, the parties reached a settlement agreement that created a "general policy favoring release" of alien minors in INS custody.[291] Under the *Flores S*ettlement, the government generally must transfer within five days a detained minor to the custody of a qualifying adult[292] or a nonsecure state-licensed facility that provides residential, group, or foster care services for dependent children.[293] But the alien's transfer may be delayed "in the event of an emergency or influx of minors into the United States," in which case the transfer must occur "as expeditiously as possible."[294] In 2001, the parties stipulated that the *Flores* Settlement would terminate "45 days following [the INS's] publication of final regulations implementing this Agreement."[295]

In 2008, Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), which "partially codified the *Flores* Settlement by creating statutory standards for the treatment of unaccompanied minors."[296] Under the TVPRA, a UAC[297] must be placed in ORR's custody pending formal removal proceedings, and typically

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[288] *See* Flores v. Lynch, 828 F.3d 898, 901–02 (9th Cir. 2016) (discussing history of *Flores* litigation). At the time of the lawsuit, there were no federal laws concerning the care and treatment of UACs. *See* Reno v. Flores, 507 U.S. 292, 295 (1993) ("For a number of years the problem was apparently dealt with on a regional and ad hoc basis, with some INS offices releasing unaccompanied alien juveniles not only to their parents but also to a range of other adults and organizations.").

[289] *Flores*, 828 F.3d at 902; *Reno*, 507 U.S. at 298-300, 302.

[290] *Id.* at 303, 312, 315.

[291] *See* Stipulated Settlement Agreement, Flores v. Reno, No.CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

[292] A qualifying adult includes, in order of preference, a parent, legal guardian, adult relative (brother, sister, aunt, uncle, grandparent), an adult individual designated by the parent or legal guardian, and an adult individual seeking custody if there is no likely alternative to long-term detention and family reunification is not a reasonable option. *Id.* at ¶ 14; *see also* 8 C.F.R. § 236.3(b) (providing that, if an alien minor is released from detention, the alien will be released to an adult available to provide custody in similar order of preference; and also authorizing DHS to simultaneously release an alien minor and a parent, legal guardian, or adult relative who is also in DHS custody "on a discretionary case-by-case basis").

[293] Stipulated Settlement Agreement at ¶¶ 12.A, 14, 19. The transfer must occur within three days if the minor was apprehended in a district in which a licensed program is located and has space available. *Id.* at ¶ 12.A. While the settlement creates a "general policy favoring release," it allows an alien minor to be detained in a secure DHS or other facility "to secure his or her timely appearance before [DHS] or the immigration court, or to ensure the minor's safety or that of others." *Id.* ¶ 14. The settlement lists various circumstances where such detention may be warranted, such as when the minor has been charged with or convicted of a crime, has been the subject of delinquency proceedings, has engaged in disruptive behavior, has threatened violence, or presents an escape risk. *Id.* ¶ 21.

[294] *Id.* ¶ 12.A. The settlement describes an "emergency" as "natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies." *Id.* ¶ 12.B. An "influx of minors" occurs when there are more than 130 minors eligible for placement in a licensed facility. *Id.*

[295] *See* Stipulation Extending Settlement Agreement and for Other Purposes, and Order Thereon, Flores v. Reno, No. CV 85-4544-RJK (Px) (C.D. Cal. Dec. 7, 2001).

[296] *Flores*, 828 F.3d at 904; *see also* TVPRA, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified in relevant part at 8 U.S.C. § 1232).

[297] A UAC is defined as a child who has no lawful immigration status in the United States; has not reached the age of

must be transferred to ORR within 72 hours after DHS determines that the child is a UAC.[298] Following transfer to ORR, the agency generally must place the UAC "in the least restrictive setting that is in the best interest of the child," and may place the child with a sponsoring individual or entity who "is capable of providing for the child's physical and mental well-being."[299]

In 2015, the *Flores* plaintiffs moved to enforce the *Flores* Settlement, arguing that DHS (which had replaced the former INS in 2003) violated the settlement by adopting a no-release policy for Central American families and confining minors in secure, unlicensed family detention facilities.[300] In response, the government argued that the *Flores* Settlement did not apply to *accompanied* minors.[301] In an order granting the plaintiffs' motion, the federal district court ruled that the *Flores* Settlement applied to both accompanied and unaccompanied minors, and that accompanying parents generally had to be released with their children.[302] In a later order, the court determined that, upon an "influx of minors into the United States," DHS may "reasonably exceed" the general five-day limitation on detention, and suggested that 20 days may be reasonable in some circumstances.[303]

In 2016, the Ninth Circuit upheld the district court's ruling that the *Flores* Settlement applies to both accompanied and unaccompanied minors, but held that the settlement does not require DHS to release parents along with their children.[304] In any event, the effect of the *Flores* Settlement has been that DHS typically will release family units in their entirety pending removal proceedings, apparently because of the risks and difficulties that releasing the children only (while keeping the parents in detention) would pose, and the absence of a state licensing scheme for family detention

18; and either has no parent or legal guardian in the United States, or has no parent or legal guardian in the United States who is available to provide care and physical custody. 6 U.S.C. § 279(g).

[298] 8 U.S.C. § 1232(a)(4), (b)(3). UACs are not subject to expedited removal. *Id.* § 1232(a)(5)(D). Therefore, any UAC who is apprehended by immigration authorities must be placed in formal removal proceedings, regardless of whether the UAC is found in the interior of the United States or at the border. *Id.* However, DHS may permit a UAC to voluntarily return to his country in lieu of removal proceedings if the UAC is "a national or habitual resident of a country that is contiguous with the United States" (i.e., Mexico and Canada), and the child (1) has not been a victim of human trafficking (or is not at risk of human trafficking upon return to his native country or country of last habitual residence); (2) does not have a credible fear of persecution in his native country or country of last habitual residence; and (3) is capable of independently withdrawing his application for admission to the United States. *Id.* § 1232(a)(2)(A), (a)(2)(B), (a)(5)(D). DHS must determine whether the child meets these criteria generally within 48 hours after the child's apprehension. *Id.* § 1232(a)(4).

[299] *Id.* § 1232(c)(2)(A), (3)(A). If the child remains in ORR custody, the child may not be placed in a secure facility "absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense." *Id.* § 1232(c)(2)(A). If the child reaches the age of 18 and is transferred back to DHS (because he is no longer a UAC), DHS "shall consider placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight," including consideration of supervised release and other alternatives to detention. *Id.* § 1232(c)(2)(B).

[300] Flores v. Johnson, 212 F. Supp. 3d 864, 869–70 (C.D. Cal. 2015).

[301] *Id.* at 871–72, 882.

[302] *Id.* at 871–73, 887.

[303] Flores v. Lynch, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015). The government had argued that, when families are placed in expedited removal proceedings, the agency would typically need 20 days to complete any credible fear processing. *Id.* at 913. *See also supra* at 23 (discussing expedited removal process).

[304] Flores v. Lynch, 828 F.3d 898, 905–09 (9th Cir. 2016). The court noted that "[p]arents were not plaintiffs in the *Flores* action, nor are they members of the certified classes," and concluded that "[t]he Settlement therefore provides no affirmative release rights for parents, and the district court erred in creating such rights in the context of a motion to enforce that agreement." *Id.* at 909.

facilities.[305] Moreover, a federal district court has ruled that a "government practice of family separation without a determination that the parent was unfit or presented a danger to the child" likely violates due process.[306]

On August 23, 2019, DHS published a final rule that it claims "parallel[s] the relevant and substantive terms of the *Flores* Settlement" with some important modifications.[307] Among other things, the rule creates an alternative federal licensing scheme for DHS family detention facilities (which are not eligible for state licensing) that would enable DHS to detain minors together with their accompanying parents throughout the removal proceedings.[308] This modification arguably conflicts with the *Flores* Settlement's "general policy favoring release" of alien minors from government custody.[309] Yet DHS argues that the modification is compelled by changed circumstances, including the increased number of family unit apprehensions since 1997, and that detaining families together pending their removal proceedings "will enable DHS to maintain family unity" while enforcing federal immigration laws.[310]

Under the terms of the 2001 stipulation, the *Flores* Settlement will terminate 45 days after the government publishes final regulations "implementing the Agreement."[311] The key question in the *Flores* litigation likely will be whether the final rule "implement[s] the Agreement" within the meaning of the settlement's termination provision.[312] If the court overseeing the *Flores* Settlement concludes that the rule meets that criteria, the DHS rule will effectively supersede the *Flores* Settlement. That said, while the final rule modifies the *Flores* Settlement to some degree, it

[305] *See Flores*, 212 F. Supp. 3d at 873 (recognizing that separating an accompanied minor from a parent potentially "endangers the minor's safety").

[306] Ms. L. v. U.S. Immigration & Customs Enforcement, 310 F. Supp. 3d 1133, 1143 (S.D. Cal. 2018), *appeal filed*, No. 18-56151 (9th Cir. Aug. 27, 2018).

[307] *See generally* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Aug. 23, 2019) (to be codified at 45 C.F.R. pt. 410). The rules goes into effect on October 22, 2019. *Id.*

[308] *Id.* at 44,394. DHS argues that judicial interpretation of the *Flores* Settlement to apply to accompanied minors "has created a series of operational difficulties for DHS, most notably with respect to a state-licensing requirement for an ICE Family Residential Center (FRC) in which such parents/legal guardians may be housed together with their children during immigration proceedings, the need for custody of parents and accompanied minors as required by the immigration laws in certain circumstances, and avoiding the need to separate families to comply with the [*Flores* Settlement] when immigration custody is necessary for a parent." *Id.* at 44,393. DHS contends that, because states generally lack licensing schemes for family detention facilities, the application of the *Flores* Settlement to accompanied minors has effectively required DHS to release minors and their accompanying relatives to avoid family separation, even if governing statutes otherwise mandated their detention pending removal proceedings. *Id.* at 44,394.

[309] *See* Stipulated Settlement Agreement, Flores v. Reno, No.CV 85-4544-RJK (Px), § VI (C.D. Cal. Jan. 17, 1997).

[310] *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. at 44,393, 44,407, 44,485, 44,490.

[311] *See* Stipulation Extending Settlement Agreement and for Other Purposes, and Order Thereon, Flores v. Reno, No. CV 85-4544-RJK (Px) (C.D. Cal. Dec. 7, 2001). Under those terms, the *Flores* Settlement will terminate on October 7, 2019.

[312] *Id.*

largely incorporates the terms of that agreement.[313] Thus, if the rule is upheld, DHS's detention authority over alien minors would remain subject to some constraints.[314]

Conditions of Confinement

Although the INA describes when an alien subject to removal may be detained and released from custody, neither the INA nor its implementing regulations currently provide any specific standards for the conditions of confinement.[315] ICE, however, has developed "Performance-Based National Detention Standards" (PBNDS) governing the treatment of detained aliens.[316] These standards apply to all ICE detention facilities, contract detention facilities, and state or local government facilities used by ICE through intergovernmental service agreements.[317]

The PBNDS require, among other things, clean and safe facilities; adequate food services; access to medical care; adequate bedding and personal hygiene; reasonable disability accommodations; communication and language assistance; access to telephone and mail; visitation rights; access to recreational programs; religious accommodations; work opportunities; and access to legal materials.[318] In addition, CBP, the DHS component with primary responsibility for immigration enforcement along the border, has created similar standards governing the detention of aliens in CBP custody (e.g., arriving aliens in expedited removal proceedings).[319]

While the Supreme Court has generally addressed challenges to the *duration* of immigration detention,[320] the Court has not addressed challenges to the *conditions* of immigration

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[313] For example, the final rule requires DHS to hold alien minors "in the least restrictive setting" and in "safe and sanitary" facilities when they are initially apprehended; requires the prompt transfer of alien minors to nonsecure, licensed facilities (in the case of UACs, the rule requires prompt transfer to ORR in accordance with the TVPRA); imposes certain "family residential standards" for nonsecure, licensed ICE facilities; authorizes DHS to release minors to a parent or legal guardian, or to an adult relative (including a brother, sister, aunt, uncle, or grandparent); and authorizes bond hearings for alien minors who seek administrative review of DHS's custody determinations (to the extent the minor is in formal removal proceedings and eligible for a bond hearing). *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. at 44,525-29. The rule also imposes standards for ORR facilities and the placement of UACs with sponsors. *Id.* at 44,531-35.

[314] Conversely, if the court determines that the rule fails to implement the terms of the *Flores* Settlement, the court will likely leave the agreement in effect. *See* Flores v. Lynch, 828 F.3d 898, 903, 905 (9th Cir. 2016). For more discussion about the *Flores* Settlement and DHS's final rule purporting to implement the settlement, see CRS Report R45297, *The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions*, by Ben Harrington.

[315] However, the recently promulgated DHS regulations that purport to implement the *Flores* Settlement contain specific standards regarding the treatment of alien minors in DHS or ORR custody. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. at 44,527-29, 44,531, 44,533-34. Those rules are scheduled to go into effect on October 22, 2019.

[316] *See Performance-Based National Detention Standards 2011*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (revised Dec. 2016), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf.

[317] *Id.*

[318] *Id.*

[319] *See National Standards on Transport, Escort, Detention, and Search*, U.S. CUSTOMS & BORDER PROT. (October 2015), https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf. Under the CBP guidelines, aliens generally may not be held for more than 72 hours in CBP hold rooms or holding facilities, and they have access to, among other things, medical care, restrooms, personal hygiene items, bedding, food and beverage, and clean drinking water. *Id.*; *see also* 6 U.S.C. § 211(m)(1) ("The [CBP] Commissioner shall make every effort to ensure that adequate access to food and water is provided to an individual apprehended and detained at a United States port of entry or between ports of entry as soon as practicable following the time of such apprehension or during subsequent short-term detention.").

[320] *See* Nielsen v. Preap, 139 S. Ct. 954 (2019) (detention without bond of criminal aliens taken into custody years after

confinement.[321] Lower courts, however, have considered detained aliens' constitutional challenges to the conditions of their confinement, generally under the standard applicable to pretrial detention in criminal cases.[322] Under that standard, a detainee's conditions of confinement violate his or her right to due process if they amount to "punishment."[323] To meet that threshold, a detainee must show that prison officials intended to punish him or her, or that the conditions of detention are not reasonably related to a legitimate governmental objective.[324]

More specifically, in cases involving claims of inadequate medical treatment, courts have typically analyzed such claims under the "deliberate indifference" standard.[325] This standard looks to whether the detaining authority "knows of and disregards an excessive risk to inmate health or safety."[326]

In addition, even though aliens seeking initial entry into the United States typically have lesser constitutional protections than aliens within the United States,[327] some courts have held that aliens detained at the border have substantive due process protections, such as the right to be free

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their release from criminal incarceration); Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (indefinite detention of aliens pending their removal proceedings); Demore v. Kim, 538 U.S. 510 (2003) (detention of criminal aliens without bond pending removal proceedings); Zadvydas v. Davis, 533 U.S. 678 (2001) (indefinite detention post-order of removal).

[321] *See* Anshu Budhrani, *Regardless of My Status, I Am a Human Being: Immigrant Detainees and Recourse to the Alien Tort Statute*, 14 U. PA. J. CONST. L. 781, 793 (2012) ("The Supreme Court has not really addressed this issue, and those circuit courts that have are not in perfect alignment with one another.").

[322] *See e.g.*, Doe v. Kelly, 878 F.3d 710, 720 (9th Cir. 2017) (applying the standard for reviewing the conditions of confinement for pretrial detainees); Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000) ("We consider a person detained for deportation to be the equivalent of a pretrial detainee"); Al Najjar v. Ashcroft, 186 F. Supp. 2d 1235, 1243 (S.D. Fla. 2002) ("The constitutional standards applicable to pre-trial detention are analogous to the post-removal order, pre-deportation context, as both involve non-punitive detention.").

[323] Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

[324] *Id.* at 538–39 ("Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.").

[325] *See e.g.*, Belbachir v. Co. of McHenry, 726 F.3d 975, 979 (7th Cir. 2013) (stating that alien detainee was entitled under the Fifth Amendment to "protection from harm caused by a defendant's deliberate indifference to the detainee's safety or health"); Adekoya v. Holder, 751 F. Supp. 2d 688, 694 (S.D.N.Y. 2010) ("Deliberate indifference to the medical needs of an immigrant detainee in certain circumstances gives rise to a cognizable claim under the Due Process Clause of the Fifth Amendment."). These cases apply the "deliberate indifference" standard under the Fifth Amendment, rather than the Eighth Amendment to which it traditionally applies, because alien detainees are not being "punished" and thus are not subject to the Eighth Amendment. *See Adekoya*, 751 F. Supp. 2d 688 at 694 n. 4 ("Because Adekoya was in civil immigration detention rather than criminal detention, his deliberate indifference claims should be analyzed under the Fifth Amendment's Due Process clause rather than the Eighth Amendment's 'cruel and unusual punishment' clause.").

[326] Farmer v. Brennan, 511 U.S. 825, 837, 839–40 (1994); *see also* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment.") (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). In setting forth the standard for "deliberate indifference," the Supreme Court adopted the recklessness standard used in criminal cases, which considers whether an individual consciously disregards a substantial risk of serious harm. *Farmer*, 511 U.S. at 839–40.

[327] *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.")

from "inhumane treatment" or "gross physical abuse."[328] These cases suggest that aliens detained at the border may sometimes challenge the conditions of their confinement.[329]

In the past, some courts have rejected constitutional challenges to the conditions of immigration detention (or, in some cases, conditions of release), concluding that, while the alleged conditions may have been unpleasant or restrictive, they did not amount to a due process violation.[330] As the Supreme Court once stated in a case about pretrial detention, "[l]oss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'"[331] Other courts, however, have ruled unconstitutional conditions of immigration confinement that are particularly unreasonable, such as the deprivation of medical care and other basic necessities.[332]

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[328] *See* Castro v. Dep't of Homeland Sec., 835 F.3d 422, 449 n. 32 (3d Cir. 2016) ("And we are certain that this 'plenary power' does not mean Congress or the Executive can subject recent clandestine entrants or other arriving aliens to inhumane treatment."); Kwai Fun Wong v. INS, 373 F.3d 952, 971 (9th Cir. 2004) ("The entry fiction thus appears determinative of the *procedural* rights of aliens with respect to their applications for admission. The entry doctrine has not, however, been applied, by the Supreme Court or by this court, to deny all constitutional rights to non-admitted aliens.") (emphasis in original); Martinez-Aguero v. Gonzalez, 459 F.3d 618, 623 (5th Cir. 2006) ("There are, however, no identifiable national interests that justify the wanton infliction of pain."); Chi Thon Ngo v. INS, 192 F.3d 390, 396 (3d Cir. 1999) ("Even an excludable alien is a 'person' for purposes of the Fifth Amendment and is thus entitled to substantive due process.") (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896)); Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987) ("[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials.").

[329] In reviewing challenges by arriving aliens to the conditions of their confinement, some courts have applied more rigorous standards than those generally applicable to pretrial detainees, requiring evidence of "gross physical abuse" or "the malicious infliction of cruel treatment." *See* Adras v. Nelson, 917 F.2d 1552, 1559 (11th Cir. 1990) ("There is no allegation of 'gross physical abuse' or intentional and malicious infliction of harm by INS agents."); Medina v. O'Neill, 838 F.2d 800, 803 (5th Cir. 1988) ("The stowaways alleged neither that cruel treatment was maliciously inflicted upon them nor that they suffered gross physical abuse. They stated no claim for violation of due process rights."). *See also* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1149 (1995) ("Thus *Adras*, like *Medina*, extracted language from [the Fifth Circuit's 1987 decision in] *Lynch* to set an unusually high threshold for excludable aliens seeking to challenge the conditions of their confinement.").

[330] *See* Dahlan v. Dep't of Homeland Sec., 215 Fed.Appx. 97, 100, 2007 WL 397417 (3d Cir. Feb. 6, 2007) ("Although some of the conditions Dahlan described were undoubtedly unpleasant, he did not show that the conditions were excessive in relation to the prison's interest in maintaining security and effectuating his detention."); Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000); (holding that 15-day disciplinary segregation did not violate alien's due process rights); Nguyen v. B.I. Inc., 435 F. Supp. 2d 1109, 1115 (D. Or. 2006) (ruling that use of electronic monitoring bracelets under ATD program did not violate aliens' constitutional rights); Al Najjar v. Ashcroft, 186 F. Supp. 2d 1235, 1244 (S.D. Fla. 2002) ("While the conditions of Petitioner's previous detention may have been preferable to him, such conditions are not constitutionally required."); Preval v. Reno. 57 F. Supp. 2d 307, 312 (E.D. Va. 1999), *rev'd on other grounds*, No. 99-6950, 2000 WL 20591 (4th Cir. Jan. 13, 2000) ("Here, the loud noise, constant light, bad odor and low room temperature plaintiff cites, while undoubtedly unpleasant, cannot be characterized as 'punishment' unrelated to plaintiff's detention."); Justiz-Cepero v. INS, 882 F. Supp. 1582, 1584 (D. Kan. 1995) ("Although the conditions described by plaintiff are indeed harsh, it is apparent plaintiff's essential needs of food, clothing, shelter, and medical care were provided."); Imasuen v. Moyer, No. 91 C 5425, 1995 WL 506055, *4–*7 (N.D. Ill. 1995) (ruling that conditions of confinement did not violate due process even though food was "nothing to write home about," recreational activities were limited, and detainees were occasionally deprived of personal hygiene items and exposed to dirty mattresses).

[331] Bell v. Wolfish, 441 U.S. 520, 537 (1979).

[332] *See e.g.*, Doe v. Kelly, 878 F.3d 710, 721–22 (9th Cir. 2017) (upholding district court's preliminary injunction requiring Border Patrol agents to provide adequate bedding and personal hygiene to aliens within 12 hours of detention); Belbachir v. Co. of McHenry, 726 F.3d 975, 982–83 (7th Cir. 2013) (ruling that failure to hospitalize or

As for minors, the *Flores* Settlement provides that those apprehended by DHS may be detained only in a "safe and sanitary" facility.[333] The *Flores* Settlement also requires that state-licensed facilities comply with applicable state child welfare laws and building codes, and provide various services including routine medical care and education.[334] In a few instances, the federal district court overseeing the *Flores* litigation has ruled that DHS violated the *Flores* Settlement by exposing minors to substandard conditions.[335]

Additionally, Congress, through appropriations legislation, has imposed certain requirements on the conditions of detention. For example, Congress has directed CBP and ICE to report their compliance with applicable detention facility standards (such as the PBNDS), and to provide certain other detention-related information, including the average length of detention and any instances in which an individual has died while in DHS custody.[336]

Thus, while federal statutes or regulations generally do not specify the standards for immigration detention, there are some important legal constraints on the treatment of detained aliens.

place alien on suicide watch implicated alien's due process rights); Newbrough v. Piedmont Reg'l Jail Auth., 822 F. Supp. 2d 558, 581–82 (E.D. Va. 2011), *vacated on other grounds*, No. 3:10CV867-HEH, 2012 WL 12931710 (E.D. Va. Jan. 12, 2012) (ruling that prison official and medical staff unreasonably withheld medical treatment from alien detainee); Rosemarie M. v. Morton, 671 F. Supp. 2d 1311, 1313 (M.D. Fla. 2009) (concluding that alien likely established that ICE officials were deliberately indifferent to her serious medical condition); Haitian Centers Council, Inc. v. Sale, 823 F. Supp. 1028, 1044 (E.D.N.Y. 1993) (ruling that failure to provide access to medical treatment violated aliens' right to due process); Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1512–13 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990) (ordering former INS to provide Salvadoran detainees with legal materials, access to counsel and paralegals, and access to telephones, and barring agency from placing detainees in solitary confinement without hearing).

[333] *See* Stipulated Settlement Agreement, ¶ 12.A, Flores v. Reno, No.CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997). Specifically, "[f]acilities will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor." *Id.*

[334] *See id.* Exhibit 1. As discussed in this report, DHS has recently published regulations (set to go into effect on October 22, 2019) that purport to adopt these standards. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392, 44,527-29, 44,531, 44,533-34. (Aug. 23, 2019) (to be codified at 45 C.F.R. pt. 410). In addition, ORR, the agency responsible for the care and custody of UACs, has created its own standards for state-licensed ORR-funded facilities. *See* ORR GUIDE: CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED, http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied (published Jan. 30, 2015).

[335] *See* Flores v. Sessions, No. CV 85-4544 DMG (AGRx), 2017 WL 6060252, *12 (C.D. Cal. June 27, 2017), *appeal dismissed*, __ F.3d __, 2019 WL 3820265 (9th Cir. Aug. 15, 2019); Flores v. Johnson, 212 F. Supp. 3d 864, 882 (C.D. Cal. 2015), *aff'd in part, rev'd in part*, 828 F.3d 898 (9th Cir. 2016) (finding that minors in CBP custody were exposed to cold temperatures, overcrowded conditions, inadequate food and water, inadequate hygiene, and poor sleeping conditions). In addition to overseeing the *Flores* Settlement, the U.S. District Court for the Central District of California has presided over a separate class action lawsuit challenging the former INS's practices and procedures in the detention and removal of Salvadoran nationals seeking asylum. Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990). In 1988, the court issued a permanent injunction requiring the INS to provide detained Salvadoran aliens with, among other things, legal materials, access to counsel, and access to telephones, and barring the agency from placing aliens in solitary confinement without a hearing. *Id.* at 1511–13. In 2007, the court largely denied the government's motion to dissolve the injunction, and the Ninth Circuit upheld that decision. Orantes-Hernandez v. Gonzales, 504 F. Supp. 2d 825 (C.D. Cal. 2007), *aff'd*, 321 Fed.Appx. 625, 2009 WL 905454 (9th Cir. Apr. 6, 2009). The injunction thus remains in place to this day.

[336] *See e.g.*, H.J. Res. 31, 116th Cong. (2019) (enacted); H.R. REP. NO. 116-9, at 475-77, 479-80, 482-83 (2019).

Immigration Detainers

Generally, upon issuing an administrative warrant, ICE may arrest and detain an alien pending a determination about whether the alien should be removed from the United States.[337] But if an alien is in *criminal custody* by state or local law enforcement officers (LEOs) (e.g., if an alien is arrested by local police), ICE may take custody of the alien through the use of an "immigration detainer."[338] An immigration detainer is a document by which ICE advises the LEOs of its interest in individual aliens whom the LEOs are detaining, and requests the LEOs to take certain actions that could facilitate removal (e.g., holding the alien temporarily, notifying ICE before releasing the alien).[339]

ICE's predecessor agency, the INS, had long issued detainers for potentially removable aliens in criminal custody.[340] Eventually, in 1986, Congress enacted the Anti-Drug Abuse Act,[341] which, among other things, explicitly authorized the use of detainers for deportable aliens who were arrested for violating controlled substance laws.[342] Citing this authority, as well as its general immigration enforcement powers under the INA, the INS promulgated two separate regulations on detainers, one governing aliens arrested for controlled substance offenses, and another governing aliens arrested for other criminal offenses.[343] In 1997, the INS merged both regulations into one, and that regulation is currently codified at 8 C.F.R. § 287.7.[344] The detainer regulation, as amended, provides the following:

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[337] 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(b)(1). In some cases, the agency may arrest an alien without a warrant, including if an immigration officer has "reason to believe" that an alien is unlawfully present in the United States and likely to escape before a warrant can be obtained. 8 U.S.C. § 1357(a)(2).

[338] 8 U.S.C. § 1357(d); 8 C.F.R. § 287.7; *see* Morales v. Chadbourne, 235 F. Supp. 3d 388, 392–93 (D.R.I. 2017) (noting that state and local law enforcement agencies may receive requests to transfer prisoners to immigration authorities "because potential immigration violators are being held by them on state or local charges").

[339] 8 C.F.R. § 287.7(a).

[340] The first reference to "immigration detainers" in federal regulations appears to have been in 1962, when the DOJ issued regulations addressing the parole of prisoners subject to deportation. *See* Prescribing Regulations of the United States Board of Parole and Youth Correction Division of the Board, 27 Fed. Reg. 8487 (Aug. 24, 1962). Later regulations also refer to "deportation detainers." *See, e.g.*, Control Custody, Care, Treatment, and Instruction of Inmates, 47 Fed. Reg. 47,168 (Oct. 22, 1982). *See also Issuance of Immigration Detainers by ICE Immigration Officers* ¶ 1, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Mar. 24, 2017), https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf ("The use of immigration detainers, however, long pre-dates any reference to detainers in the statute or regulations. In fact, the former [INS] first used the [detainer] Form I-247 as early as 1952.").

[341] *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 100-690, § 1751(d), 102 Stat. 4181 (1986).

[342] 8 U.S.C. § 1357(d).

[343] *See* Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole Judicial Recommendations against Deportation Proceedings to Determine Deportability of Aliens in the United States; Apprehension, Custody, Hearing, and Appeal Field Officers; Powers and Duties: Final Rule, 53 Fed. Reg. 9281, 9283-84 (Mar. 22, 1988). In response to claims that the detainer regulations exceeded their statutory authority under INA Section 287(d) because they were not limited to aliens arrested for controlled substance offenses, the INS argued that the regulations were based on the agency's "general authority . . . to detain any individual" subject to removal. Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42,406, 42,411, 42,418 (Aug. 17, 1994). Thus, INA Section 287(d) "places special requirements on the [INS] regarding the detention of individuals arrested for controlled substance offenses, but does not delimit the general detainer authority of the [INS]." *Id.* at 42,411. *See also* Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma, 644 F. Supp. 2d 1177, 1199 (N.D. Cal. 2009) ("[The court reads the language of [INA Section 287(d)] as simply placing special requirements on officials issuing detainers for a violation of any law relating to controlled substances, not as expressly limiting the issuance of immigration detainers solely to individuals violating laws relating to controlled substances.").

[344] *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal

> Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.[345]

The regulation further instructs that, upon issuance of a detainer, the LEO "shall maintain custody of the alien for a period not to exceed 48 hours" beyond the time when the alien would have otherwise been released (excluding Saturdays, Sundays, and holidays) to facilitate transfer of custody to ICE.[346]

Although the detainer regulation instructs that LEOs "shall maintain custody" of an alien, reviewing courts have construed the regulation as being permissive rather than mandatory.[347] For example, the Third Circuit has reasoned that the regulation calls a detainer a "request," that INA Section 287(d) does not require state or local LEOs to detain aliens subject to removal, and that DHS's (and the former INS's) policy statements have construed detainers as being "requests rather than mandatory orders."[348] And the Third Circuit has also ruled that construing immigration detainers as mandatory would run afoul of the "anti-commandeering" principles of the Tenth Amendment, which prohibits the federal government from compelling state and local officials to enforce a federal regulatory scheme.[349]

As a result of judicial construction of the detainer regulation, LEOs *may* (but need not) notify ICE about an alien's release date and hold the alien pending transfer to ICE.[350] Given the permissive nature of detainers, some state and local jurisdictions have restricted compliance with detainers except in limited circumstances (e.g., the alien has been convicted of or charged with a serious

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Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,392 (Mar. 6, 1997); 8 C.F.R. § 236.1(a) ("The issuance of a detainer under this section shall be governed by the provisions of § 287.7 of this chapter.").

[345] 8 C.F.R. § 287.7(a).

[346] *Id.* § 287.7(d); *see also* DEP'T OF HOMELAND SEC., IMMIGRATION DETAINER—NOTICE OF ACTION (Form I-247), *available at* https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

[347] *See* Galarza v. Szalczyk, 745 F.3d 634, 640–42 (3d Cir. 2014); Ortega v. U.S. Immigration & Customs Enf't, 737 F.3d 435, 438 (6th Cir. 2013); Liranzo v. United States, 690 F.3d 78, 82 (2d Cir. 2012); United States v. Uribe-Rios, 558 F.3d 347, 350 n. 1 (4th Cir. 2009); United States v. Female Juvenile, A.F.S., 377 F.3d 27, 35 (1st Cir. 2004); Zolicoffer v. U.S. Dep't of Justice, 315 F.3d 538, 540 (5th Cir. 2003) (citing Giddings v. Chandler, 979 F.2d 1104, 1105 n. 3 (5th Cir. 1992)). With respect to INA Section 287(d)'s detainer authority, the Supreme Court has construed that statute as permissive rather than mandatory, observing that "[s]tate officials can also assist the Federal Government by responding to *requests* for information about when an alien will be released from their custody." Arizona v. United States, 567 U.S. 387, 410 (2012) (emphasis added).

[348] *Galarza*, 745 F.3d at 640–42.

[349] Id. at 643–44. For more discussion about the Tenth Amendment and the anti-commandeering doctrine, see CRS Report R44795, *"Sanctuary" Jurisdictions: Federal, State, and Local Policies and Related Litigation*.

[350] *See* Morales v. Chadbourne, 793 F.3d 208, 214–15 (1st Cir. 2015) ("Thus, the sole purpose of a detainer is to request the continued detention of an alien so that ICE officials may assume custody of that alien and investigate whether to initiate removal proceedings against her.").

crime).[351] Despite these restrictions, ICE generally issues detainers "[r]egardless of whether a federal, state, local, or tribal [LEO] regularly cooperates" with the detainer request.[352]

While DHS regulations authorize immigration detainers for removable aliens in criminal custody, courts have addressed legal challenges to the continued detention of aliens who would have otherwise been released from criminal custody (e.g., on bail, upon completion of sentence), but who remain detained pending their transfer to ICE.

For example, in the past, ICE issued detainers so long as there was "reason to believe" the alien was subject to removal.[353] But some courts have invalidated, on statutory or constitutional grounds, the use of detainers that are based only on ICE's representations about an alien's removability or the initiation of an investigation into the alien's immigration status.[354] In *Moreno v. Napolitano*, a federal district court ruled that ICE's issuance of a detainer without an administrative arrest warrant exceeded its statutory authority under the INA absent a determination that the alien was likely to escape before a warrant could be obtained.[355] In *Morales v. Chadbourne*, which involved the detention of a naturalized U.S. citizen, the First Circuit held that a detainer constitutes a new arrest under the Fourth Amendment, and must be supported by probable cause of the alien's removability.[356] And in *Orellana v. Nobles County*, a federal district court held that a detainer claiming a "reason to believe" that an alien is subject to removal "does not provide a constitutionally sufficient basis" to detain an alien absent a "particularized assessment" of the alien's likelihood of escaping.[357]

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[351] *See e.g.*, CAL. GOV'T CODE §§ 7282.5(a), 72844.6(a)(1) (West 2019) (barring compliance with detainer requests unless alien has been convicted of certain enumerated crimes); CHICAGO, ILL., MUN. CODE §§ 2-173-05, 2-173-042 (2012) (barring compliance with detainers unless alien has been convicted of a felony, has a felony charge pending, has an outstanding criminal warrant, or is a known gang member); SAN FRANCISCO, CAL., ORDINANCE ch. 121, § 121.3 (2013) ("A law enforcement official shall not detain an individual on the basis of an immigration detainer after that individual becomes eligible for release from custody."); King County, Wash., Ordinance 17706, § 2 (Dec. 2, 2013) (honoring detainer requests only for "individuals who have been convicted of a violent or serious crime" and specifying the types of crimes); *compare with* FLA. STAT. ANN. § 908.105 (West 2019) (requiring compliance with detainer requests). For further discussion about "sanctuary jurisdictions" that limit cooperation with federal immigration authorities in general, see CRS Report R44795, *"Sanctuary" Jurisdictions: Federal, State, and Local Policies and Related Litigation*.

[352] *See Issuance of Immigration Detainers by ICE Immigration Officers*, *supra* note 340, at ¶ 2.3.

[353] *See* Memorandum from John Morton, Director, Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel Regarding Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems (Dec. 21, 2012), https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf. In addition, the alien must have had felony or certain specified misdemeanor convictions, had a previous history of immigration violations (e.g., unlawful reentry into the United States), or otherwise posed a significant risk to national security or public safety (e.g., suspected terrorists, gang members). *Id.*

[354] *See e.g.*, Morales v. Chadbourne, 793 F.3d 208, 216–18 (1st Cir. 2015); Orellana v. Nobles Cty., 230 F. Supp. 3d 934, 945–46 (D. Minn. 2017); Moreno v. Napolitano, 213 F. Supp. 3d 999, 1008–09 (N.D. Ill. 2016).

[355] *Moreno*, 213 F. Supp. 3d at 1008–09. The court determined that being detained pursuant to an immigration detainer constitutes an arrest, and that a potentially removable alien held pursuant to a detainer could not be deemed likely to evade ICE to justify the arrest without a warrant. *Id.* at 1005–08; *see also* 8 U.S.C. §§ 1226(a) (generally requiring warrant for an alien's arrest and detention), 1357(a)(2) (exception to warrant requirement if alien is likely to escape).

[356] *Morales*, 793 F.3d at 216–18. The court construed the "reason to believe" standard for a warrantless arrest under 8 U.S.C. § 1357(a)(2) as being the equivalent of the constitutional requirement of probable cause. *Id.* at 216.

[357] *Orellana*, 230 F. Supp. 3d at 945–46 (D. Minn. 2017); *see also* Miranda-Olivares v. Clackamas Cty., No. 3:12-cv-02317-ST, 2014 WL 1414305, *11 (D. Or. Apr. 11, 2014) (ruling that probable cause was not established where I-247 form stated only that an investigation had been initiated to determine whether alien was subject to removal); *compare with* Lopez-Lopez v. Cty. of Allegan, 321 F. Supp. 3d 794, 800 (W.D. Mich. 2018) (ruling that no Fourth Amendment violation occurred because detainer form set forth probable cause that alien was removable and the form was

In response to these court rulings, ICE in 2017 created new immigration detainer guidelines.[358] Among other things, ICE officers "must establish probable cause to believe that the subject is an alien who is removable from the United States before issuing a detainer."[359] And the detainer must come with either an administrative arrest warrant or a warrant of removal (if the alien has been ordered removed) signed by an authorized ICE officer.[360]

Despite ICE's revised detainer policy, some courts have held that, under the Fourth Amendment, immigration detainers supported by probable cause that an alien is removable still do not justify the alien's continued detention by state or local LEOs unless there is probable cause that the alien has committed a *criminal* offense giving those LEOs a basis to detain the alien for criminal prosecution.[361] These rulings are largely informed by the Supreme Court's 2012 decision in *Arizona v. United States*, which held that a state statute authorizing police officers unilaterally to arrest an alien suspected of being removable was preempted by federal law, which exclusively gave the authority to enforce civil immigration laws to federal immigration officers.[362] So these courts reason, because state and local LEOs generally lack the authority to enforce civil immigration laws, they may not hold an alien under an immigration detainer unless there is an independent basis—such as probable cause of a crime—to justify the continued detention.[363]

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accompanied by an administrative arrest warrant).

[358] *See Issuance of Immigration Detainers by ICE Immigration Officers*, *supra* note 340.

[359] *Id.* at ¶ 2.4. The probable cause must be based on (1) the existence of a final order of removal against the alien; (2) the pendency of removal proceedings against the alien; (3) biometric confirmation of the alien's identity and a records match in federal databases indicating that the alien is subject to removal; or (4) the alien's voluntary statements and other reliable evidence showing that the alien is removable. *Id.* at ¶ 5.1. ICE "may not issue a detainer based upon the initiation of an investigation to determine whether the subject is a removable alien." *Id.* at ¶¶ 2.6, 5.1. Further, probable cause is not established "solely based on evidence of foreign birth and the absence of records in available databases" of the alien. *Id.*

[360] *Id.* at ¶¶ 2.4, 5.2. However, "[i]f it becomes apparent that ICE cannot assume custody of the alien within 48 hours of when he or she would otherwise be released, the ICE immigration officer should immediately cancel the detainer." *Id.* at ¶ 2.7.

[361] *See* Creedle v. Miami-Dade Cty., 349 F. Supp. 3d 1276, 1304 (S.D. Fla. 2018) ("'[K]nowledge that an individual has committed a civil immigration violation does not constitute reasonable suspicion or probable cause of a criminal infraction' and therefore cannot justify a Fourth Amendment seizure.") (quoting Lopez-Aguilar v. Marion Cty. Sheriff's Dep't, 296 F. Supp. 3d 959, 977–78 (S.D. Ind. 2017)); Abriq v. Hall, 295 F. Supp. 3d 874, 880 (M.D. Tenn. 2018) ("[T]he 'seizure' of aliens for known or suspected immigration violations can violate the Fourth Amendment when conducted under color of state law, because the predicate for a seizure is probable cause that the arrestee is committing or has committed a crime, and it is not a crime for a removable alien to remain present in the United States."); *Lopez-Aguilar*, 296 F. Supp. 3d at 976 ("But even in cases where ICE has or supplies probable cause to believe a noncitizen is deportable for a civil immigration violation, such probable cause, without more, does not justify the seizure of a person under color of state law."); Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1256 (E.D. Wash. 2017) ("[T]he predicate for stopping someone, let alon[e] detaining a person, is absent when police stop a person based on nothing more than possible removability from the United States."); *cf.* People *ex rel.* Wells v. DeMarco, 88 N.Y.S.3d 518, 529 (N.Y. App. Div. 2018) (holding that there was no state law authority "to effectuate warrantless arrests for civil immigration law violations."); Lunn v. Commonwealth, 78 N.E.3d 1143, 1160 (Mass. 2017) (same).

[362] *See* Arizona v. United States, 567 U.S. 387, 410 (2012) ("Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, § 6 creates an obstacle to the full purposes and objectives of Congress.").

[363] *See Lopez-Aguilar*, 296 F. Supp. 3d at 973–74 ("Such detention exceeds the 'limited circumstances' in which state officers may enforce federal immigration law and thus violates 'the system Congress created.'") (quoting *Arizona*, 567 U.S. at 408); *Ochoa*, 266 F. Supp. 3d at 1253–54 ("Communication and cooperation between federal, state, and local officials on immigration matters is clearly permissible, but the role state and local officials can take in such matters is limited.") (citing *Arizona*, 567 U.S. at 411–12); *Lunn*, 78 N.E.3d at 522 ("Significantly, the administrative proceedings brought by Federal immigration authorities to remove individuals from the country are civil proceedings, not criminal

In *City of El Cenizo v. Texas*, however, the Fifth Circuit held that state and local LEOs do not need probable cause of a crime to hold an alien pursuant to an immigration detainer.[364] The court reasoned that many state laws permit seizures without probable cause of a crime, such as those relating to mentally ill individuals, and that "civil removal proceedings necessarily contemplate detention absent proof of criminality."[365] The circuit court also distinguished *Arizona* because that case "involved unilateral status-determinations [by the state] *absent federal direction*," while a detainer "always requires a predicate federal request before local officers may detain aliens for the additional 48 hours."[366]

Courts are thus divided over whether immigration detainers are permissible under the Fourth Amendment. Some courts have held that a detainer need be supported only by probable cause of an alien's removability to avoid constitutional violations, while other courts require probable cause of criminal activity before an alien may be held pending transfer to ICE. Given that ICE considers detainers to be integral to its efforts to arrest and remove aliens convicted of specified crimes, the split in court opinion on the circumstances when detainers may be honored could have significant consequences for ICE's enforcement policies in different jurisdictions.[367]

Conclusion

DHS generally has substantial authority to detain aliens who are subject to removal. But the governing laws on detention may differ depending on the circumstances, including (1) whether the alien is seeking initial admission into the United States or had been lawfully admitted into the country; (2) the type of removal proceedings in which the alien is placed; (3) whether the alien has committed specified criminal or terrorist-related activity; (4) whether the alien is a UAC or falls within some other category subject to special rules for detention; and (5) whether the alien is being held for formal removal proceedings or has been ordered removed and is awaiting effectuation of the removal order.[368]

Typically, DHS may detain aliens who are placed in formal removal proceedings, but may release the alien on bond, on his or her own recognizance, or under an order of supervision pending the outcome of those proceedings.[369] In some cases, such as those involving aliens who have

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prosecutions."). In *Arizona*, the Supreme Court noted that "[f]ederal law specifies limited circumstances in which state officers may perform the functions of an immigration officer," and cited some examples, including 8 U.S.C. § 1357(g), which authorizes DHS to enter into formal written agreements with states to perform certain immigration enforcement functions—including the detention of aliens. *Arizona*, 567 U.S. at 408–09. Some lower courts have suggested that immigration detainers may be permissible, even absent probable cause of a crime, if the state or local LEOs are acting pursuant to such agreements, and thus under "color of federal authority." *See e.g., Creedle*, 349 F. Supp. 3d at 1303–04; *Lopez-Aguilar*, 296 F. Supp. 3d at 973, 977–78.

[364] City of El Cenizo v. Texas, 890 F.3d 164, 188 (5th Cir. 2018).

[365] *Id.* at 188. The court noted, moreover, that Texas law explicitly authorized and required state LEOs to comply with ICE detainer requests. *Id.*

[366] *Id.* at 188–89 (emphasis in original); *see also* Tenorio-Serrano v. Driscoll, 324 F. Supp. 3d 1053, 1066 (D. Ariz. 2018) ("Arrests based on probable cause of removability—a civil immigration violation—have long been recognized in the courts.") (citing *City of El Cenizo*, 890 F.3d at 187).

[367] *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *ICE Detainers: Frequently Asked Questions* (last updated June 2, 2017) ("Q: Why does ICE issue detainers? A: Detainers are critical for ICE to be able to identify and ultimately remove criminal aliens who are currently in federal, state or local custody. ICE relies on the cooperation of our state and local law enforcement partners in this effort.").

[368] 8 U.S.C. §§ 1225(b)(1)(B)(ii), (iii)(IV), 1225(b)(2)(A), 1226(a), 1226(c), 1231(a)(2), 1231(a)(3), (a)(6); 1232(a)(4), (b)(3).

[369] *Id.* § 1226(a).

committed specified crimes, or aliens arriving in the United States who are placed in expedited removal proceedings, detention is mandatory and the alien may not be released from custody except in limited circumstances.[370] Furthermore, DHS generally must detain aliens who have received final orders of removal for up to 90 days while their removal is effectuated, and the agency retains the discretion to detain certain classes of aliens after that 90-day period has lapsed.[371]

However, there are some constraints on DHS's detention power. The Supreme Court has determined that the indefinite detention of aliens after formal removal proceedings would raise "serious constitutional concerns," at least for those who were lawfully admitted into the United States and became subject to removal.[372] And while the Court has recognized that governing statutes confer broad authority to DHS to detain aliens without bond pending their removal proceedings,[373] some lower courts have held that due process requires the government to provide detained aliens with bond hearings after prolonged periods of detention and to prove that any continued detention is justified.[374] Furthermore, DHS's ability to detain family units pending their proceedings remains constrained by the *Flores* Settlement, which limits the length of detention of alien minors.[375] In addition, while detention litigation has largely centered on the duration of detention, detained aliens have also sometimes brought challenges to the conditions of their confinement.[376] And more recently, some courts have imposed restrictions on DHS's ability to take custody of aliens in state or local law enforcement custody through immigration detainers.[377]

As courts continue to grapple over the scope of DHS's detention power, Congress may consider legislative proposals that would either limit or expand that authority. For instance, some recent bills would end mandatory detention entirely, afford all aliens the opportunity to be released on bond pending removal proceedings, and require DHS to prove that any continued detention is warranted.[378] Certain bills would also require DHS to promulgate regulations for detention facilities; require the periodic inspection of those facilities; or impose standards governing the conditions of detention, such as requiring medical screenings and access to food, water, shelter, and hygiene.[379] As for custody determinations, some bills would require DHS to consider ATD programs instead of bond or conditional parole, and require placing some aliens in such programs

[370] *Id.* §§ 1225(b)(1)(B)(ii), (iii)(IV), 1225(b)(2)(A), 1226(c).

[371] *Id.* 1231(a)(2), (a)(6)

[372] Zadvydas v. Davis, 533 U.S. 678, 699–701 (2001).

[373] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 836, 851 (2018); Demore v. Kim, 538 U.S. 510, 531 (2003).

[374] *See e.g.*, Padilla v. U.S. Immigration and Customs Enforcement, 387 F. Supp. 3d 1219, 1222–23, 1232 (W.D. Wash. 2019), *appeal docketed*, No. 19-35565 (9th Cir. July 5, 2019); Pierre v. Doll, 350 F. Supp. 3d 327, 332 (M.D. Pa. 2018); Lett v. Decker, 346 F. Supp. 3d 379, 387–88 (S.D.N.Y. 2018); Pensamiento v. McDonald, 315 F. Supp. 684, 692 (D. Mass. 2018).

[375] *See generally* Flores v. Sessions, 862 F.3d 863, 866, 869 (9th Cir. 2017).

[376] *See e.g.*, Doe v. Kelly, 878 F.3d 710, 720 (9th Cir. 2017); Belbachir v. Co. of McHenry, 726 F.3d 975, 979–80 (7th Cir. 2013); Al Najjar v. Ashcroft, 186 F. Supp. 2d 1235, 1244 (S.D. Fla. 2002).

[377] *See e.g.*, Morales v. Chadbourne, 793 F.3d 208, 216–18 (1st Cir. 2015); Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1256 (E.D. Wash. 2017).

[378] *See* Dignity for Detained Immigrants Act of 2019, H.R. 2415, 116th Cong. § 7 (2019); Dignity for Detained Immigrants Act of 2018, S. 3112, 115th Cong. § 7 (2018).

[379] *See* Humanitarian Standards for Individuals in Customs and Border Protection Custody Act, H.R. 3239, 116th Cong. §§ 2-5, 11 (2019); Stop Cruelty to Migrant Children Act, H.R. 3918, 116th Cong. § 4 (2019); Short-Term Detention Standards Act, H.R. 3670, 116th Cong. §§ 2-3 (2019); Dignity for Detained Immigrants Act of 2019, H.R. 2415, 116th Cong. §§ 2, 3 (2019).

(e.g., asylum applicants).[380] Other bills would generally require the release of aliens considered "vulnerable," such as those who are detained with children, and limit the amount of any bond.[381] In addition, some bills would create time limitations for an IJ to conduct bond hearings, and require periodic bond hearings while an alien remains in custody.[382]

Conversely, some bills would specify that an alien may be detained for an indefinite period pending removal proceedings, and require the alien to prove by clear and convincing evidence that he or she is not a flight or escape risk in order to be released.[383] Some bills would also expand the classes of aliens subject to mandatory detention to include aliens present in the United States without inspection, criminal gang members, and aliens arrested for (but not yet convicted of) specified crimes.[384] Other bills would override the *Flores* Settlement effectively to extend INA Section 235(b)(1)'s mandatory detention scheme governing applicants for admission to family units.[385] Finally, some bills would clarify DHS's detainer authority to provide that ICE may issue detainers so long as there is probable cause that an alien is removable.[386]

In short, as reviewing courts continue to test the outer limits to DHS's detention authority, Congress may consider additional legislative options that inform the scope of that authority.

[380] Alternatives to Detention Act of 2019, H.R. 532, 116th Cong. § 2 (2019); PROFILED Act, S. 748, 115th Cong. § 203 (2017).

[381] *See* REUNITE Act, H.R. 1012, 116th Cong. §§ 5, 11 (2019); PROFILED Act, S. 748, 115th Cong. § 203 (2017).

[382] *See* Dignity for Detained Immigrants Act of 2019, H.R. 2415, 116th Cong. § 7 (2019); Immigration Courts Bail Reform Act, H.R. 6097, 114th Cong. § 2 (2016).

[383] *See* Keep Our Communities Safe Act of 2017, S. 36, 115th Cong. § 3 (2017); No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. § 4 (2017).

[384] *See* Criminal Alien Gang Member Removal Act, H.R. 98, 116th Cong. § 2 (2019); Grant's Law, H.R. 74, 116th Cong. § 2 (2019); No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. § 4 (2017); Stop Catch and Release Act of 2015, H.R. 2942, 114th Cong. § 2 (2015).

[385] *See* Protect Kids and Parents Act, S. 3091, 115th Cong. § 2 (2018).

[386] *See* No Sanctuary for Criminals Act, H.R. 1928, 116th Cong. § 3 (2019).

Appendix.

The following tables provide (1) an overview of the development of U.S. immigration detention laws, and (2) a comparison of the various detention regimes under current law.

Table A-1. Development of Immigration Detention Laws: Major Legislative Enactments

Legislation	Major Categories of Covered Aliens[a]	Nature of Detention	Release from Custody
Alien Enemies Act (1798)	Aliens who came from enemy countries during times of war	Covered aliens were "liable" to being detained and removed	No provision for release from custody
Immigration Act of 1891	Arriving aliens who were excludable	Mandatory	No provision for release from custody
Immigration Act of 1917	Arriving aliens who were excludable; aliens physically present in the United States who were subject to removal	Generally mandatory	Authorized release of aliens present in the United States on bond (no less than $500) Also permitted release on bond for certain arriving aliens
Immigration and Nationality Act (1952)	Arriving aliens in exclusion proceedings; aliens physically present in the United States in deportation proceedings; aliens subject to final orders of removal	Mandatory for arriving aliens in exclusion proceedings; discretionary for aliens in deportation proceedings and aliens subject to final orders of removal (for six-month period after final order)	Authorized release of aliens in deportation proceedings on bond (no less than $500) or conditional parole Required release on supervision of aliens subject to final orders of removal after six months Authorized parole of arriving aliens
Anti-Drug Abuse Act (1988)	Aliens convicted of aggravated felonies (upon completion of sentence)	Mandatory	No provision for release from custody
Immigration Act of 1990	Aliens convicted of aggravated felonies (upon release from criminal incarceration)	Mandatory	Authorized release of LPRs on bond or other conditions if they did not pose threat to community or flight risk
IIRIRA (1996)	Aliens in formal removal proceedings	Generally discretionary	Authorized release on bond (at least $1500) or conditional parole

Legislation	Major Categories of Covered Aliens[a]	Nature of Detention	Release from Custody
	Aliens placed in formal removal proceedings who committed specified crimes or terrorist-related offenses (upon release from criminal incarceration)	Mandatory	Only for certain witness protection purposes
	Applicants for admission	Mandatory	Authorized parole by immigration officials
	Aliens who have been ordered removed	Generally mandatory during initial 90-day period following removal order, discretionary afterwards for certain aliens	May be released on order of supervision after 90 days if not yet removed
USA PATRIOT Act (2001)	Suspected terrorists	Mandatory	Only if determined not to present national security threat

Sources: Alien Enemies Act, 5 Cong. ch. 66, §§ 1, 2, 1 Stat. 577 (1798); Immigration Act of 1891, 51 Cong. ch. 551, § 8, 26 Stat. 1084, 1085 (1891); Immigration Act of 1917, 64 Cong. Ch. 29, §§ 16, 18, 19, 20, 21, 39 Stat. 874, 886, 888, 889, 891 (1917); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 212(d)(5), 235(b), 242(a), 242(c), 242(d), 66 Stat. 163, 188, 199, 208, 209, 210, 211 (1952); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a)(4), 102 Stat. 4181 (1988); Immigration Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 4978 (1990); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 302(a), 303(a), 305(a)(3), 110 Stat. 3009-546 (1996); USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272 (2001).

a. This table addresses the generally applicable detention provisions of the enacted legislation. In some cases, these enactments may have also included more specific provisions dealing with comparatively smaller or distinct categories of aliens (e.g., alien crewmen, arriving aliens believed to be inadmissible on health- or security-related grounds).

Table A-2. Comparison of Major Detention Provisions in Current Statute

Statute	Covered Aliens	Type of Detention	Release Options	Availability of Bond Hearings and Appeal	Availability of Judicial Review
INA Section 236(a)	Aliens placed in formal removal proceedings	Generally discretionary	ICE generally may release alien on bond, conditional parole, or under ATD program if alien is not a flight or security risk	If detained, alien generally may request bond hearing before IJ, and appeal IJ's decision to BIA	No judicial review of custody decision. But alien may seek habeas review of statutory or constitutional challenge to detention
INA Section 236(c)	Aliens subject to removal who have committed specified criminal or terrorist-related offenses	Mandatory	Alien may be released only for witness protection purposes	No bond hearings or appeal Alien may request IJ review of whether alien committed enumerated offense requiring detention	No judicial review of custody decision. But alien may seek habeas review of statutory or constitutional challenge to detention
INA Section 235(b)	Applicants for admission who are subject to removal (expedited removal or formal removal proceedings)	Mandatory	ICE may parole alien for humanitarian reasons or significant public benefit	Generally no bond hearings or appeal But federal district court injunction currently requires unlawful entrants initially screened for expedited removal to have access to bond hearings pending formal removal proceedings	No judicial review of custody decision, but alien may seek habeas review of statutory or constitutional challenge to detention

Statute	Covered Aliens	Type of Detention	Release Options	Availability of Bond Hearings and Appeal	Availability of Judicial Review
INA Section 241(a)(2)	Aliens with final orders of removal	Generally mandatory during 90-day removal period	During 90-day period: ICE may release alien if alien is not removable on criminal or terrorist-related grounds (or if alien has been granted withholding of removal or CAT protection and ICE is not pursuing removal to third country) After 90-day period: ICE generally must release alien on order of supervision if not removed	No bond hearings or appeal	No judicial review of custody decision, but alien may seek habeas review of statutory or constitutional challenge to detention
INA Section 241(a)(6)	Aliens with final orders of removal who fall within certain classes of inadmissible or deportable aliens	Discretionary after 90-day removal period	If alien has not been removed, ICE may release alien on order of supervision if travel documents are unavailable or removal is not practicable; alien is nonviolent; alien will not violate conditions of release; and alien is not a flight risk Alien may also request release on basis that there is no significant likelihood of removal in reasonably foreseeable future	No bond hearings or appeal If alien requests release on basis of no significant likelihood of removal in reasonably foreseeable future, ICE must conduct review	No judicial review of custody decision, but alien may seek habeas review of statutory or constitutional challenge to detention

Sources: 8 U.S.C. §§ 1182(d)(5)(A), 1226(a), (b)(1), (2), (c), (e), 1231(a)(2), (3), (6); 8 C.F.R. §§ 212.5, 235.3, 236.1, 241.3, 241.4, 241.13, 241.14, 1003.1, 1003.19, 1236.1; Jennings v. Rodriguez, 138 S. Ct. at 830 (2018); Clark v. Martinez, 543 U.S. 371 (2005); Demore v. Kim, 538 U.S. 510, 517 (2003); Zadvydas v. Davis, 533 U.S. 678, 688 (2001); Padilla v. U.S. Immigration and Customs Enforcement, 387 F. Supp. 3d 1219, 1232 (W.D. Wash. 2019); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,967 (Nov. 14, 2001); Memorandum from Bo Cooper, Gen. Counsel, Immigration & Naturalization Serv., to Reg'l Counsel for Distribution to District and Sector Counsel: Detention and Release during the Removal Period of Aliens Granted Withholding or Deferral of Removal (Apr. 21, 2000).

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