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Immigration-Related Detention: Current Legislative Issues

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Summary

The attacks of September 11, 2001, have increased interest in the authority under statute to detain noncitizens (aliens) in the United States. Under the law there is broad authority to detain aliens while awaiting a determination of whether the noncitizen should be removed from the United States. The law also mandates that certain categories of aliens are subject to mandatory detention (i.e., the aliens must be detained). Aliens subject to mandatory detention include those arriving without documentation or with fraudulent documentation, those who are inadmissible or deportable on criminal grounds, those who are inadmissible or deportable on national security grounds, those certified as terrorist suspects, and those who have final orders of deportation. Aliens not subject to mandatory detention may be detained, paroled, or released on bond. The priorities for detention of these aliens are specified in statute and regulations. As of March, for FY2004, on an average day, 22,812 noncitizens were in Department of Homeland Security (DHS) detention.

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

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

Bills introduced in the 108th Congress cover a range of provisions and perspectives concerning the detention of noncitizens, but none of the bills has received action. H.R. 47 would allow judicial review of bond and detention determinations, legislate the six-month post-removal-order custody determination, and allow for *de novo* review of post-removal-order detention. H.R. 47 and several other bills (H.R. 184, H.R. 3309, H.R. 3115, and H.R. 3918) would make changes to the mandatory detention provisions codified in IIRIRA. Other introduced bills (H.R. 1238, H.R. 2235, H.R. 2671, H.R. 3522, H.R. 3534, S. 1906, and S. 1024) would increase funding for detention space or provide reimbursement to local entities for the cost of detaining aliens. Additionally, H.R. 2671, H.R. 3522, and S. 1906 address issues of the authority to apprehend and detain aliens. This report will be updated as legislative action occurs.

Contents

Introduction	1
Overview of Noncitizen Detention	2
Changes in Authorities with the Creation of the Department of Homeland Security	2
Statutory Authority for Detention	3
Local Law Enforcement	6
Mandatory Detention	7
Indefinite Detention	7
Expedited Removal and Detention	9
Release on Parole and Bond	10
Rights of the Detained	11
Detention Statistics	11
Detention Population	11
Detention Space and Cost	13
Alternatives to Detention	13
Legislation in the 108 th Congress	14
Increase Discretionary Flexibility and Reviews	14
Detention Authority	15
Local Law Enforcement	15
New Detention Requirements	15
Resources	16

List of Figures

Figure 1. Average Daily Population in Detention: FY1994-FY2004	12
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Immigration Related Detention: Current Legislative Issues

Introduction

The attacks of September 11, 2001, have increased interest in the authority under the Immigration and Nationality Act (INA) to detain noncitizens (aliens)¹ in the United States. The law provides broad authority to detain aliens while awaiting a determination of whether they should be removed from the United States, and mandates that certain categories of aliens are subject to mandatory detention (i.e., the aliens must be detained) by the Department of Homeland Security (DHS). Aliens not subject to mandatory detention may be detained, paroled, or released on bond. “Enemy combatants” at the Guantanamo U.S. military base in Cuba are not under the authority of DHS, nor are noncitizens incarcerated in federal, state, and local penitentiaries for criminal acts.

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

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

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

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

Overview of Noncitizen Detention

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

The INA provides the Attorney General with broad authority to detain aliens while awaiting a determination of whether they should be removed from the United States,³ but the creation of DHS moved the administration of detention of noncitizens from the Department of Justice's Immigration and Naturalization Service (INS) to DHS' Under Secretary of Border and Transportation Security.⁴ While current regulations vest all authorities and functions of the DHS to administer and enforce the immigration laws with the Secretary of Homeland Security (hereafter the Secretary) or his delegate,⁵ it can be argued that the language in the Homeland Security Act of 2002 (HSA)⁶ has left the Attorney General with concurrent authority over immigration law.⁷ The Ninth Circuit in *Armentero v. Immigration and Naturalization Service*, for example, appeared to struggle with determining who should be the correct respondent in a *habeas* petition filed by an INS detainee. The Ninth Circuit stated:

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

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

In addition, both DOJ, through the Executive Office of Immigration Review (EOIR), and DHS have authority for determining bond for aliens. Officials within DHS also make bond determinations that may or may not subsequently come before

³ INA §236(a).

⁴ P.L. 107-296 §441.

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

⁶ P.L. 107-296, signed into law on Nov. 25, 2002.

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

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

EOIR. The Board of Immigration Appeals (BIA), the appellate body within EOIR, hears appeals from matters decided by immigration judges. The BIA has jurisdiction to consider appeals of various decisions now made by immigration officials in DHS, including the granting of bond.

The Attorney General has final say in matters of immigration law that come before EOIR.⁹ For example, on April 17, 2003, the Attorney General released a decision¹⁰ that instructs immigration judges to consider “national security interests implicated by the encouragement of further unlawful mass migrations ...” in making bond determinations for unauthorized migrants who arrive in “the United States by sea seeking to evade inspection.” In the decision, the Attorney General states that he retains the authority to detain or authorize bond for aliens, but the authority is “shared” with the Secretary since DHS’ officials make the initial determination whether an alien will remain in custody during removal proceedings.¹¹

Statutory Authority for Detention

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

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

¹⁰ 23 I&N Dec. 572 (A.G. 2003).

¹¹ See INA §103(a), as amended; 8 C.F.R. §§236.1(c), 236.1(d), 287.3(d). For more information on this decision See CRS Congressional Distribution Memorandum, *Policy Implications of Department of Justice Ruling on Bond Determinations for Unauthorized Aliens in Detention*, by Alison Siskin. Available from the author.

¹² INA §236(a).

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

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

paroled,¹⁵ released on bond,¹⁶ or continue to be detained. Decisions on parole made by the Secretary and bond decisions made by the Attorney General are not subject to review.

In October 1998, the former INS issued a memorandum establishing detention guidelines consistent with the changes made by IIRIRA.¹⁷ According to the guidelines, detainees are assigned to one of four detention categories: (1) required; (2) high priority; (3) medium priority; and (4) lower priority.¹⁸ Aliens in required detention must be detained¹⁹ while aliens in the other categories may be detained depending on detention space and the facts of the case. Higher priority aliens should be detained before aliens of lower priority.²⁰

Additionally, the U.S.A. Patriot Act²¹ amended the INA to create a new section (236A) which requires the detention of an alien whom the Attorney General certifies as someone who the Attorney General has “reasonable grounds” to believe is involved in terrorist activities or in any other activity that endangers national security. The Attorney General must initiate removal proceedings or bring criminal charges within seven days of arresting the alien or release the alien. An alien who is detained solely as a certified terrorist, who has not been removed, and who is unlikely to be removed in the foreseeable future may be detained for periods of up to six months

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

¹⁶ The minimum bond amount is \$1,500.

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

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

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

²⁰ Michael A. Pearson, *INS Detention Guidelines*, Oct. 7, 1998. Reprinted in *Bender's Immigration Bulletin*, vol. 3, no. 21, Nov. 1, 1998, p. 1111. (Hereafter cited as Pearson, *INS Detention Guidelines*.)

²¹ P.L. 107-56 signed into law on Oct. 26, 2001.

only if his release would pose a danger to national security or public safety. The Attorney General must review the terrorist certification every six months.²²

Under the INA, the Attorney General also has the authority to arrest and detain aliens without a warrant if he has “reason to believe that the alien ... is in the United States in violation of any [immigration] law and is likely to escape before a warrant can be obtained.”²³ Functionally, DHS is responsible for arresting and detaining aliens. If an alien is arrested without a warrant, a decision must be made within 48 hours to detain or release the alien. Aliens paroled or released on bond may be rearrested at any time. On September 20, 2001, the Department of Justice (DOJ) issued an interim regulation to provide more flexibility in detaining aliens prior to determining whether to charge or release them. The interim regulation extended the period that an alien may be detained, pending the determination of whether to arrest, from 24 hours to 48 hours or — in the event of emergency or extraordinary circumstances — within an “additional reasonable period of time.” The regulation took effect on September 17, 2001.²⁴

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

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

²³ INA §287(a)(2).

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

²⁵ INA §241(a)(1)(A).

²⁶ INA §241(a)(6).

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

Local Law Enforcement.²⁸ The INA contains both criminal and civil violations. Historically, the authority for state and local law enforcement officials to enforce immigration law has been construed to be limited to the criminal provisions²⁹ of the INA. The enforcement of the civil provisions,³⁰ which includes apprehension and removal of deportable aliens, has strictly been viewed as a federal responsibility, with states playing an incidental supporting role.

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

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

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

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

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

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

Mandatory Detention

The law requires the detention of:

- criminal aliens;³³
- national security risks;³⁴
- asylum seekers, without proper documentation, until they can demonstrate a “credible fear of persecution”;
- arriving aliens³⁵ subject to expedited removal (see below);
- arriving aliens who appear inadmissible for other than document related reasons; and
- persons under final orders of removal who have committed aggravated felonies, are terrorist aliens, or have been illegally present in the country.³⁶

The USAPATRIOT Act added a new section (§236A) to the INA which provides for the mandatory pre-removal-order detention of an alien who is certified by the Attorney General as a terrorist suspect. It can be argued that the Attorney General and the Secretary both have the discretion to detain any alien who is in removal proceedings, and must detain all aliens who are charged as terrorists, and almost all aliens charged as criminals upon their release from criminal incarceration whether they are released on probation or parole.³⁷

Indefinite Detention. There are certain aliens in indefinite administrative custody who have been ordered removed from the United States, but are detained because they cannot obtain travel documents to another country and DHS refuses to

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

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

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

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

³⁷ INA §236(c)(1).

release them. These detainees are often referred to as “lifers” or “unremovables.”³⁸ Many of these detainees have criminal records, but some simply lack immigration status and the ability to return to their country of origin. Some detainees have been in immigration detention for a longer time period than their criminal incarceration. In 2000, INS estimated that it had 5,000 aliens in indefinite administrative custody.³⁹

In a 5-4 decision in *Zadvydas v. Davis* (2001),⁴⁰ the U.S. Supreme Court held that a statute permitting indefinite detention would raise serious constitutional problems because the Due Process Clause of the Fifth Amendment prohibits depriving any person, including aliens, of liberty without due process of law. Therefore, in keeping with principles of statutory construction and the absence of clear congressional intent for indefinite detention, the Court read an implicit limitation into the post-removal detention statute, such that detention is limited to a period “reasonably necessary” to achieve an alien’s removal. The Supreme Court established six months after the initial 90-day removal period expires as the presumptively reasonable period. After this period, once an alien shows that there is good reason to believe that “there is no significant likelihood of removal in the reasonably foreseeable future,” the government must rebut that showing with sufficient evidence. The Court emphasized that its holding does not mean that all aliens must be released in six months and that an alien may be held until it has been determined that “there is no significant likelihood of removal in the reasonably foreseeable future.” The Court suggested that special arguments could be made for a statutory scheme of preventive detention for terrorists or other aliens in special circumstances and for heightened judicial deference for executive and legislative branch decisions regarding national security matters.

In response to this decision, the Attorney General issued regulations governing the review of post-removal order detention cases for a determination of foreseeability of removal. The Attorney General issued regulations, effective November 14, 2001,

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

³⁹ Conversation with Tim Huagh, INS Congressional Affairs.

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

concerning the continued detention of aliens subject to final orders of removal that are consistent with the *Zadvydas* decision.⁴¹ Subsequently, Chief Immigration Judge Michael Creppy issued a memorandum on the Immigration Court's policy regarding these regulations. The regulations and the memorandum establish four categories of aliens whose removal from the United States is not foreseeable, but whom the Attorney General may continue to detain. These "special circumstances" include:

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

Of these four categories, only the fourth requires the involvement of the Immigration Court; the other three remain under DHS discretion.⁴²

Expedited Removal and Detention. Aliens who arrive in the United States without valid documentation or with false documentation are subject to a process known as "expedited removal," under which the alien is ordered removed from the United States, and the removal decision is not subject to any further hearings, reviews, or appeals.⁴³ Most aliens subject to this process face continuous detention. Aliens subject to expedited removal must be detained until they are removed and may only be released due to medical emergency or if necessary for law enforcement purposes. If the arriving alien expresses a fear of persecution or an intent to apply for asylum, the alien is placed in detention until a "credible fear" interview can be held. If the alien is found to have a credible fear, he may be paroled into the United States. If the credible fear is unsubstantiated, the alien is detained until the alien is removed from the United States.⁴⁴

Asylum Seekers. As discussed earlier, the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) mandated that aliens who arrive without proper documentation and claim asylum be detained prior to their "credible fear" hearing. Prior to IIRIRA, most aliens arriving without proper documentation who applied for asylum were released on their own recognizance into the United States (and given work authorization), a practice which enabled inadmissible aliens falsely claiming persecution to enter into the country. Most of the fraudulent claims were made by people attempting to come here for economic or family reasons,

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

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

⁴³ INA §235(b)(1)(A)(i).

⁴⁴ Under the INA, expedited removal can also be applied to aliens who enter the United States without inspection (i.e., cross the border without being inspected by an immigration inspector) and cannot establish that they have been physically present in the United States for more than two years, but it has yet to be applied to those who entered without inspection. INA §235(b)(1)(A)(iii).

illegally rather than through legal immigration channels.⁴⁵ False asylum claims utilize limited resources, causing those with legitimate claims to have to wait longer to have their cases processed. Thus, many argued that the only way to deter fraudulent asylum claims was to detain asylum seekers rather than releasing them on their own recognizance. Indeed some claim that the practice of detaining asylum seekers has reportedly helped reduced the number of fraudulent asylum claims.⁴⁶

However, some contend that the policy of detaining all asylum seekers is too harsh. They argue that there is a need to inhibit fraudulent asylum claims, but mandatory detention of asylum seekers causes more problems than it solves. The position of the United Nations High Commission on Refugees is that detention of asylum seekers is “inherently undesirable.”⁴⁷ Detention may be psychologically damaging to an already fragile population such as those who are escaping from imprisonment and torture in their countries. Often the asylum seeker does not understand why they are being detained. Additionally, asylum seekers are often detained with criminal aliens. Some contend that ICE should develop alternatives to detention (e.g., electronic monitoring) for asylum seekers.

Release on Parole and Bond

The Secretary has the authority to parole detained aliens who are not subject to mandatory detention. Most arriving aliens are not eligible for parole. Parole is permitted for arriving aliens with serious medical conditions, pregnant women, juvenile aliens who will be witnesses, and “aliens whose continued detention is not in the public interest.”⁴⁸ In general, parole is available on a “case-by-case basis for urgent humanitarian reasons or significant public benefit.”⁴⁹

Aliens not subject to mandatory detention may also be released on bonds of a minimum of \$1,500.⁵⁰ To be released on bond, the alien must prove that he is not a threat to people or property, and will appear at all future immigration proceedings.

⁴⁵ CRS Issue Brief IB93095, *Immigration: Illegal Entry and Asylum Issues*, coordinated by Ruth Ellen Wasem. This report is archived and available from the author.

⁴⁶ David A. Martin, *The 1995 Asylum Reforms: A Historical and Global Perspective*, (Washington, D.C.: Center for Immigration Studies, May 2000). Available at [<http://www.cis.org/articles/2000/back500.html>].

⁴⁷ Office of the of the United Nations High Commissioner for Refugees, *UNHRC Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Feb. 1999, p. 1.

⁴⁸ 8 C.F.R. §212.5(b).

⁴⁹ INA §212(d)(5)(A). Prior to the enactment of IIRIRA, the standard for parole was if it was in the public interest or for emergency reasons.

⁵⁰ The IIRIRA raised the minimum bond amount from \$500 to \$1,500. INA §236(a)(2)(A).

Rights of the Detained

The courts have ruled that detained aliens not under expedited removal⁵¹ have the following rights:

- the right to apply for asylum;
- the right to communicate with consular or diplomatic officers of their home country;⁵²
- the right to be represented by counsel (but not at government expense);⁵³
- the right to challenge transfers to other detention facilities that might interfere with the right to counsel;
- the right to medically adequate treatment;
- the right to access free legal service lists and telephones; and
- the right to self-help and other legal reference material.

Under the law, aliens also have the right to legally challenge their detention.⁵⁴ Custody and bond determinations can be reviewed by an immigration judge at any time before the removal order becomes final, except in certain cases.⁵⁵ Additionally, the alien may appeal the immigration judges' decision to the Board of Immigration Appeals (BIA). Nonetheless, the courts have afforded the Administration much discretion in decisions related to where aliens are detained, the management of detention facilities, and the treatment of aliens.

Detention Statistics

Detention Population

As **Figure 1** shows, between FY1994 and FY2001 the average size of the daily noncitizen detention population increased steadily. There was a very slight decrease

⁵¹ As discussed above, those under expedited removal have more limited rights than detainees not subject to expedited removal.

⁵² In accordance with U.S. constitutional considerations, customary international law, and the Vienna Convention on Consular Relations (Apr. 24, 1963, art. 36, T.I.A.S. 6820, 21 U.S.T. 77, to which the United States is a party), the regulations require notice to detained aliens of their right to communicate with consular and diplomatic officers of their home country. Additionally, certain countries have treaties with the United States that require notification of the diplomatic officers of the country when one of their nationals is detained in removal proceedings, regardless of whether the alien requests such notification and even if the alien requests that no communication be made on his behalf. (8 C.F.R. §236.1(e))

⁵³ Detained aliens have the right to obtain counsel, but since immigration procedures are considered civil, not criminal, actions, the government is not obligated to provide counsel.

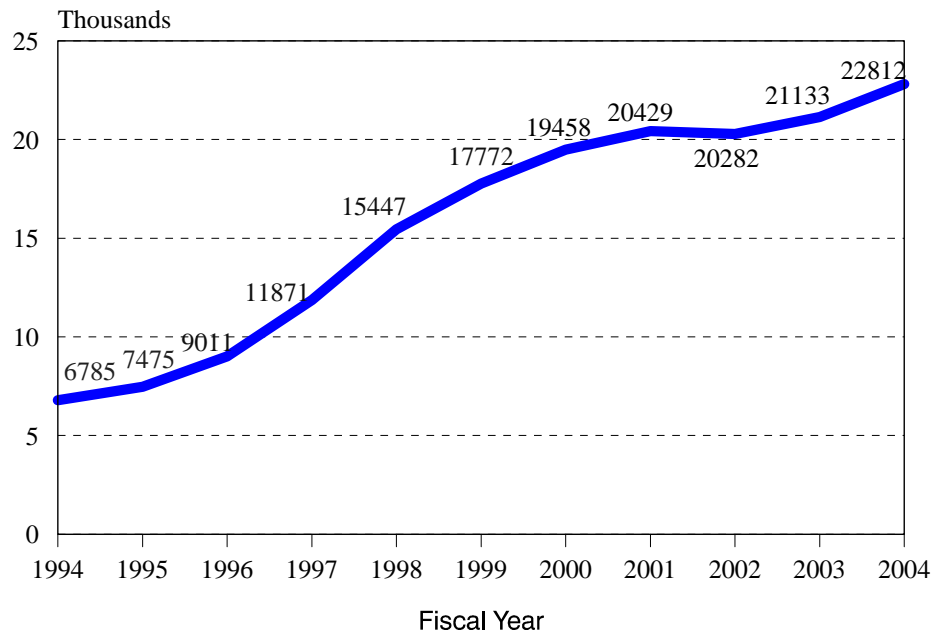
⁵⁴ Charles Gordon, et al., Immigration Law and Procedure §108.01.

⁵⁵ Immigration judges may not redetermine custody for: (1) aliens in exclusion proceedings; (2) arriving aliens; (3) aliens deportable as security threats; (4) criminal aliens; and (5) aliens in pre-IIRIRA deportation proceedings with aggravated felonies.

in the size of the detention population between FY2001 and FY2002, and then a steady increase between FY2002 and FY2004. The size of the daily population increased by 153%, from 9,011 to 22,812, between FY1996, when IIRIRA was enacted, and FY2004. The largest increase occurred between FY1997 and FY1998, the year that all the provisions of the IIRIRA became enforceable. Some argue that the size of the detained population is dependent on the amount of detention space, and, the increase in the detained population after FY1998 reflects an increase in detention space, not in the amount of people who should be detained.

The INS detained approximately 202,000 aliens during FY2002. Approximately 103,000 (51%) of these aliens had criminal records. The average daily detention population was 20,282. Although 50% of all detainees were from Mexico, they tended to have short stays in detention and, thus, they accounted for only 24% of detention bed days. The other leading countries for the percentage of detention bed days were: Cuba (9%); El Salvador (6%); Guatemala, Honduras, and China (each with 5%); Jamaica (4%); and Haiti and the Dominican Republic (each with 3%).⁵⁶

Figure 1. Average Daily Population in Detention: FY1994-FY2004



Source: FY1994 through FY2002 CRS presentation of published INS and DHS data.
FY2003 and FY2004 CRS presentation of unpublished DHS data.

Note: FY2004 is the average daily population in detention through March 20, 2004.

⁵⁶ Department of Homeland Security, Office of Immigration Statistics, *2002 Yearbook of Immigration Statistics*, Oct. 2003, p. 175.

Detention Space and Cost

Many contend that DHS does not have enough detention space to house all those who should be detained. They contend that the increase in the number of classes of aliens subject to mandatory detention has impacted the availability of detention space for lower priority detainees. There are reportedly 300,000 noncitizens in the United States who have been ordered deported who have not left the country. Some argue that these 300,000 people would have left the country if they had been detained once they were ordered deported. A study done by DOJ's Inspector General found that almost 94% of those detained with final orders of removal were deported while only 11% of those not detained who were issued final orders of removals left the country.⁵⁷ Concerns have been raised that decisions on which aliens to release and when to release the aliens may be based on the amount of detention space, not on the merits of individual cases, and that the amount of space may vary by area of the country leading to inequities and disparate policies in different geographic areas.⁵⁸

In addition, the overall increase in the number of noncitizens in DHS detention has raised questions about the cost of detaining noncitizens. For FY2004, DHS budgeted \$80 a day for each detainee held in detention.⁵⁹ This cost does not include transportation or the cost of deporting the alien. For FY2000 through FY2002 INS budgeted \$75 a day for each detainee held in detention. In FY2000, INS, DHS' predecessor, budgeted \$1,390,125 per day for 18,535 beds of detention space. For FY2001, the INS budget included \$1,477,650 per day for 19,702 beds. In FY2002 INS budgeted \$1,583,025 per day for 21,107 beds.⁶⁰

Alternatives to Detention. Due to the cost of detaining aliens, and the fact that many non-detained aliens with final orders of removal do not leave the country, there has been interest in developing alternatives to detention for certain types of aliens who do not require a secure detention setting. ICE is conducting an electronic monitoring pilot program for low-risk, non-violent offenders in three locations.⁶¹ The pilot program uses Electronic Monitoring Devices (EMD's) in the form of ankle bracelets to monitor aliens who are out on bond while awaiting hearings during

⁵⁷ Office of the Inspector General, Department of Justice. *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders*, Report I-2003-004, Feb. 2003.

⁵⁸ The decision does not usually apply to aliens who are under mandatory detention. A high priority detainee may be released to make space for a mandatory detainee. Nonetheless, DHS does have explicit procedures for choosing between two mandatory detainees if there is not enough bed space. Pearson, *INS Detention Guidelines*, p. 1116.

⁵⁹ Unpublished DHS data obtained from Betty Mills-Carilli, Bureau of Immigration and Customs Enforcement Office of Congressional Affairs, Department of Homeland Security, Apr. 8, 2004.

⁶⁰ Unpublished INS data obtained from Mark Schaffer, INS Office of Congressional Affairs, Aug. 29, 2002. More recent data on the amount of bed space are not yet available.

⁶¹ The locations are Miami, Florida; Detroit, Michigan; and Anchorage, Alaska.

removal proceedings or the appeals process.⁶² Additionally, the Administration has requested \$11 million for the alternatives to detention program.⁶³

Legislation in the 108th Congress

Bills introduced in the 108th Congress cover a range of provisions and perspectives concerning the detention of noncitizens, but none of the bills has received action.

Increase Discretionary Flexibility and Reviews

H.R. 47, introduced by Representative John Conyers on January 7, 2003, is the bill with the most expansive detention provisions. H.R. 47 would allow judicial review of bond and detention determinations. It would also give the Attorney General discretion to release criminal aliens who do “not pose a danger to the safety of other persons or of property, and [are] likely to appear for any scheduled proceeding.” The bill would also eliminate mandatory detention for those in expedited removal. H.R. 47 would legislate the six-month post-removal-order custody determination, and place the burden of proof for continued detention on the Attorney General, with an exception for aliens certified as terrorists. The bill would also allow for *de novo* review⁶⁴ by an immigration judge of the Attorney General’s decision for post-removal-order detention. Furthermore, the bill would mandate the establishment of a pilot program to examine the viability of supervision through means other than confinement in a penal setting (e.g., home monitoring) of aliens who have no criminal record or have not committed a crime of violence. Lastly, H.R. 47 would clarify that aliens have a right to counsel (at no expense to the government) during bond, custody, detention, and removal proceedings.

Additionally, several bills would make changes to the mandatory detention provisions which were codified in IIRIRA. Introduced on January 7, 2003 by Representative Jose Serrano, H.R. 184 would allow criminal aliens who served in the armed forces and were honorably discharged to be released from detention during removal hearings. Representative Bob Filner introduced H.R. 3309 on October 16, 2003, which would allow the Attorney General to release a criminal alien if the alien was lawfully admitted, or cannot be removed because the designated country will not accept the alien and the alien satisfies the Attorney General that the alien does not pose a danger to the safety of other persons or property, and is likely to appear for any scheduled proceeding.

⁶² Department of Homeland Security, U.S. Immigration and Customs Enforcement, *ICE Tests New Electronic Monitoring Program*, Aug. 8, 2003. Available at [<http://www.ice.gov/graphics/news/newsrel/articles/tether080803.htm>].

⁶³ Department of Homeland Security, *Fiscal Year 2005 Congressional Budget Justifications*.

⁶⁴ *De novo* review means that the court undertakes a new review as to issues of fact or law, as if there had not been a prior determination.

On March 9, 2004, Representative Sheila Jackson-Lee introduced H.R. 3918, which would direct the Secretary to exercise the authority to arrest, detain, and release aliens only on a case-by-case basis. It would not permit determinations to be made on the basis of group membership such as on country of origin or mode of arrival. H.R. 3918 would also eliminate mandatory detention of aliens in expedited removal.

Detention Authority

The “Safer Act” (H.R. 3522) introduced by Representative J. Gresham Barrett on November 19, 2003, would reaffirm the fact that removable aliens do not have to be taken into DHS detention while imprisoned for a criminal act. The bill states that parole, supervised release, probation, or the possibility of arrest on other charges is not a reason to defer arrest by DHS and DHS detention of removable aliens. H.R. 3522 would also amend the law to state that the Secretary of Homeland Security has the authority to arrest and detain aliens pending a decision on whether the alien is to be removed from the United States.⁶⁵

Local Law Enforcement. The “Clear Law Enforcement for Criminal Alien Removal Act of 2003” (CLEAR Act; H.R. 2671) introduced by Representative Charlie Norwood on July 9, 2003, and the “Homeland Security Enhancement Act of 2003” (S. 1906) introduced by Senator Jeff Sessions on November 20, 2003, reaffirm the authority of local law enforcement personnel to apprehend and detain aliens during the enforcement of immigration laws. While some argue that the bills simply reaffirm existing authorities, others assert that the bills would expand the authority of state and local law enforcement agencies to enforce the civil aspects of the INA, including apprehending and detaining deportable aliens.⁶⁶

New Detention Requirements

On November 19, 2003, Representative Thomas G. Tancredo introduced H.R. 3534, which would increase the minimal bond amount to release an alien from \$1,500 to \$10,000, and would specify that the Secretary shall not release an alien on his own recognizance unless so ordered by an immigration judge. This provision would reaffirm DOJ’s authority over DHS with respect to bond and release determinations. H.R. 3534 would also clarify the functions of detention and removal officers.

H.R. 3115 introduced on September 17, 2003 by Representative Vito Fossella would direct the Attorney General to take into custody any alien convicted of any federal or state offense and deportable on any ground. In addition, H.R. 3522 would also require the Secretary of Homeland Security to notify the Assistant Attorney General for the Criminal Division of DOJ when an alien who is inadmissible or

⁶⁵ The law now reads that the Attorney General has the authority to arrest and detain aliens while pending a decision on whether the alien is to be removed from the United States. INA §236.

⁶⁶ For more information on the role of local law enforcement in the apprehension and detention of aliens see RL32270, *Enforcing Immigration Law*.

removable for terrorist acts is detained so that the Criminal Division can make a determination on whether the alien should be arrested and prosecuted for a criminal offense.

Resources

Additionally, several bills would increase funding for detention space or provide reimbursement to local entities for the cost of detaining aliens. H.R. 2235, introduced by Representative Sam Graves on May 22, 2003, and H.R. 3522, the "Safer Act," would direct the Secretary to reimburse state and local law enforcement entities for the cost of detaining aliens who were awaiting transfer to federal custody. S. 1906 would authorize monies to increase detention space, and would mandate that the Secretary designate a facility within each state to serve as the central location for the state to transfer custody of aliens to DHS. S. 1906 and H.R. 2671 would provide reimbursement to states for the cost of incarcerating and transporting illegal aliens, authorizing \$500 million for the detention and removal of aliens not lawfully present in the United States for FY2004 and each subsequent year. H.R. 2671 would also authorize \$1 billion for each fiscal year to provide grants to local law enforcement agencies for equipment, technology, and facilities directly related to the housing and processing of unauthorized aliens in custody.

Similarly, H.R. 3534 would direct the Secretary by the end of FY2006 to increase the number of detention and removal officers by 2,000. H.R. 3534 would also increase the amount of detention space available, mandating that by FY2006 DHS should have twice as much space as was available in FY2001. Lastly, both H.R. 1238, introduced by Representative Rick Larsen on March 12, 2003 and S. 1024 introduced by Senator Maria Cantwell on May 8, 2003 would create a program known as the "Northern Border Prosecution Initiative" which would, under certain circumstances, provide reimbursement to state and local governments for detention costs.