IMMIGRATION DETENTION AND BOND

STATUTES

8 U.S.C. § 1226. Apprehension and detention of aliens (INA § 236)

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

. . .

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence1 to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

. . .

(e) Judicial review

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.

8 U.S.C. § 1231. Detention and removal of aliens ordered removed (INA § 241)

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the “removal period”).

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such 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.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien--

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

. . .

(6) Inadmissible or criminal aliens

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 the Attorney General 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).

BOARD OF IMMIGRATION APPEALS DECISIONS

PRE-IIRIRA

Matter of Patel, 15 I&N Dec. 666 (BIA 1976)

(1) Generally, an alien 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.

(2) Where it appeared from the record that respondent was living with his wife and United States citizen child, had worked for the same employer for almost two years and had kept the Immigration and Naturalization Service informed of his address changes; and that respondent had never been arrested or convicted of any crime and had never been involved with narcotics or involved in any subversive or immoral activities, there was no reason to justify holding respondent under even a minimal bond, and respondent was ordered released from custody of his own recognizance.

Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994)

(1) In bond proceedings under section 242(a)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(B) (Supp. IV 1992), there is a presumption against the release from the Immigration and Naturalization Service's custody of any alien convicted of an aggravated felony

unless the alien demonstrates that he was lawfully admitted to the United States, is not a threat to the community, and is likely to appear for any scheduled hearings.

(2) If a lawfully admitted alien convicted of an aggravated felony cannot rebut the statutory presumption that he is a danger to the community, he should be detained in the custody of the Service.

(3) Once a lawfully admitted alien convicted of an aggravated felony rebuts the presumption that he is a danger to the community, the likelihood that he will appear for future proceedings becomes relevant in assessing the amount of bond needed to motivate the respondent to appear.

POST-IIRIRA

Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999)

(1) Section 236(c) of the Immigration and Nationality Act, 8U.S.C. §1226(c) (Supp. II 1996), does not apply to aliens whose most recent release from custody by an authority other than the Immigration and Naturalization Service occurred prior to the expiration of the Transition Period Custody Rules.

(2) Custody determinations of aliens in removal proceedings who are not subject to the provisions of section 236(c) of the Act are governed by the general custody provisions at section 236(a) of the Act.

(3) By virtue of 8 C.F.R. § 236.1(c)(8) (1999), a criminal alien in a custody determination under section 236(a) of the Act must establish to the satisfaction of the Immigration Judge and the Board of Immigration Appeals that he or she does not present a danger to property or persons.

(4) When an Immigration Judge bases a bond determination on evidence presented in the underlying merits case, it is the responsibility of the parties and the Immigration Judge to ensure that the bond record establishes the nature and substance of the specific factual information considered by the Immigration Judge in reaching the bond determination.

Matter of Urena, 25 I&N Dec. 140 (BIA 2009)

(1) Dangerous aliens are properly detained without bond pending the completion of proceedings to remove them from the United States.

(2) Only if an alien has established that he would not pose a danger to property or persons should an Immigration Judge decide the amount of bond necessary to ensure the alien's presence at proceedings to remove him from the United States.

(3) Where an Immigration Judge characterized an alien seeking release from custody as a "potential" danger to the community but ordered him released upon the posting of a bond amount, the record was remanded for the Immigration Judge to clarify whether the alien met his burden of proving that his release on bond would not pose a danger to property or persons.

Matter of Fatahi, 26 I&N Dec. 791 (BIA 2016)

In determining whether an alien presents a danger to the community at large and thus should not be released on bond pending removal proceedings, an Immigration Judge should consider both direct and circumstantial evidence of dangerousness, including whether the facts and circumstances present national security considerations.

Matter of Guerra, 24 I&N Dec. 37 (BIA 2006)

(1) In a custody redetermination under section 236(a) of the Immigration and Nationality Act, 8 U.S.C. § 1226(a) (2000), where an alien must establish to the satisfaction of the Immigration Judge that he or she does not present a danger to others, a threat to the national security, or a flight risk, the Immigration Judge has wide discretion in deciding the factors that may be considered.

(2) In finding that the respondent is a danger to others, the Immigration Judge properly considered evidence that the respondent had been criminally charged in an alleged controlled substance trafficking scheme, even if he had not actually been convicted of a criminal offense.

Matter of Joseph, 22 I&N Dec. 799 (BIA 1999)

(1) For purposes of determining the custody conditions of a lawful permanent resident under section 236 of the Immigration and Nationality Act, 8 U.S.C. § 1226 (Supp. II 1996), and 8 C.F.R. §3.19(h)(2)(ii) (1999), a lawful permanent resident will not be considered "properly included" in a mandatory detention category when an Immigration Judge or the Board of Immigration Appeals finds, on the basis of the bond record as a whole, that it is substantially unlikely that the Immigration and Naturalization Service will prevail on a charge of removability specified in section 236(c)(1) of the Act.

(2) Although a conviction document may provide the Service with sufficient reason to believe that an alien is removable under one of the mandatory detention grounds for purposes of charging the alien and making an initial custody determination, neither the Immigration Judge nor the Board is bound by the Service’s decisions in that regard when determining whether an alien is properly included within one of the regulatory provisions that would deprive the Immigration Judge and the Board of jurisdiction to redetermine the custody conditions imposed on the alien by the Service. Matter of Joseph, 22 I&N Dec. 660 (BIA 1999), clarified.

(3) When an Immigration Judge’s removal decision precedes the determination, pursuant to 8 C.F.R. § 3.19(h)(2)(ii), whether an alien is "properly included" in a mandatory detention category, the removal decision may properly form the basis for that determination.

(4) An automatic stay of an Immigration Judge's release order that has been invoked by the Service pursuant to 8 C.F.R. § 3.19(i)(2) is extinguished by the Board's decision in the Service's bond appeal from that release order.

Matter of Kotliar, 24 I&N Dec. 124 (BIA 2007)

(1) An alien who has been apprehended at home while on probation for criminal convictions is subject to mandatory detention under section 236(c)(1) of the Immigration and Nationality Act, 8 U.S.C. Â§ 1226(c) (1) (2000), regardless of the reason for the most recent criminal custody, provided it can be ascertained from the facts that he was released from criminal custody after October 8, 1998, the expiration date of the Transition Period Custody Rules.

(2) An alien need not be charged with the ground that provides the basis for mandatory detention under section 236(c)(1) of the Act in order to be considered an alien who "is deportable" on that ground.

Matter of D-J-, 23 I&N Dec. 572 (A.G. 2003)

(1) The Attorney General has broad discretion in bond proceedings under section 236(a) of the Immigration and Nationality Act, 8 U.S.C. Â§Â§ 1226(a) (2000), to determine whether to elease an alien on bond

(2) Neither section 236(a) of the Act nor the applicable regulations confer on an alien the right to release on bond.

(3) In determining whether to release on bond undocumented migrants who arrive in the United States by sea seeking to evade inspection, it is appropriate to consider national security interests implicated by the encouragement of further unlawful mass migrations and the release of undocumented alien migrants into the United States without adequate screening.

(4) In bond proceedings involving aliens seeking to enter the United States illegally, where the

Government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, Immigration Judges and the Board of Immigration Appeals shall consider such interests.

(5) Considering national security grounds applicable to a category of aliens in denying an unadmitted alien''s request for release on bond does not violate any due process right to an individualized determination in bond proceedings under section 236(a) of the Act.

(6) The denial of the respondent's release on bond does not violate international law.

(7) Release of the respondent on bond is unwarranted due to considerations of sound immigration policy and national security that would be undercut by the release of the respondent and other similarly situated undocumented alien migrants who unlawfully crossed the borders of the United States on October 29, 2002; further, the respondent failed to demonstrate adequately

that he does not present a risk of flight if released and should be denied bond on that basis as well.

SUPREME COURT DECISIONS

Zadvydas v. Kim, 533 U.S. 678 (2001)

Challenge to post-order detention under 8 USC § 1231(a); INA § 241(a). Court held six months detention "presumptively reasonable." After six months, if noncitizen provides "good reason to believe that there is no significant likelihood of removal in the reasonably forseeable future, the Government must respond with evidence sufficient to rebut that showing."

Held:

1. Section 2241 habeas proceedings are available as a forum for statutory and constitutional challenges to post-removal-period detention. Statutory changes in the immigration law left habeas untouched as the basic method for obtaining review of continued custody after a deportation order becomes final, and none of the statutory provisions limiting judicial review of removal decisions applies here. Pp. 2497–2498.

2. The post-removal-period detention statute, read in light of the Constitution's demands, implicitly limits an alien's detention to a period reasonably necessary to bring about that alien's removal from the United States, and does not permit indefinite detention. Pp. 2498–2503.

. . .

"A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person ... of ... liberty ... without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. See *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, see *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), or, in certain special and "narrow" nonpunitive "circumstances," *Foucha*, *supra*, at 80, 112 S.Ct. 1780,where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention—at least as administered under this statute. The statute, says the Government, has two regulatory goals: "ensuring the appearance of aliens at future immigration proceedings" and "[p]reventing danger to the community." Brief for Respondents in No. 99–7791, p. 24. But by definition the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best. As this Court said in *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct.

1845, 32 L.Ed.2d 435 (1972), where detention's goal is no longer practically attainable, detention no longer "bear[s][a] reasonable relation to the purpose for which the individual [was] committed." *Id.*, at 738, 92 S.Ct. 1845.

The second justification—protecting the community—does not necessarily diminish in force over time. But we have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. Compare *Hendricks, supra*, at 368, 117 S.Ct. 2072 (upholding scheme that imposes detention upon "a small segment of particularly dangerous individuals" and provides "strict procedural safeguards"), and *Salerno, supra*, at 747, 750–752, 107 S.Ct. 2095 (in upholding pretrial detention, stressing "stringent time limitations," the fact that detention is reserved for the "most serious of crimes," the requirement of proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards), with *Foucha, supra*, at 81–83, 112 S.Ct. 1780 (striking down insanity-related detention system that placed burden on detainee to prove nondangerousness). In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger. See *Hendricks, supra*, at 358, 368, 117 S.Ct. 2072."

Demore v. Kim, 538 U.S. 510 (2003)

Challenge to constitutionality of mandatory detention provision at 8 USC § 1226(c); INA § 236(c).

Held:

1. Section 1226(e)—which states that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review" and that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien"—does not deprive the federal courts of jurisdiction to grant habeas relief to aliens challenging their detention under § 1226(c). Respondent does not challenge a "discretionary judgment" by the Attorney General or a "decision" that the Attorney General has made regarding his detention or release. Rather, respondent challenges the statutory framework that permits his detention without bail. Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *E.g.*, *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632. And, where a provision precluding review is claimed to bar habeas review, the Court requires a particularly clear statement that such is Congress' intent. See *****1711*** *INS v. St. Cyr*, 533 U.S. 289, 308–309, 298, 327, 121 S.Ct. 2271, 150 L.Ed.2d 347. Section 1226(e) contains no explicit provision barring habeas review. Pp. 1713–1714.

2. Congress, justifiably concerned with evidence that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings. In the exercise of its broad power over naturalization and

immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. *Mathews v. Diaz*, 426 U.S. 67, 79–80, 96 S.Ct. 1883, 48 L.Ed.2d 478. Although the Fifth Amendment entitles aliens to due process in deportation proceedings, *Reno v. Flores*, 507 U.S. 292, 306, 113 S.Ct. 1439, 123 L.Ed.2d 1, detention during such proceedings is a constitutionally valid aspect of the process, *e.g.*, *Wong Wing v. United States*, 163 U.S. 228, 235, 16 S.Ct. 977, 41 L.Ed. 140, even where, as here, aliens challenge their detention on the grounds that there has been no finding that they are unlikely to appear for their deportation proceedings, *Carlson v. Landon*, 342 U.S. 524, 538, 72 S.Ct. 525, 96 L.Ed. 547. The INS detention of respondent, a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings, is governed by these cases. Respondent argues unpersuasively that the § 1226(c) detention policy violates due process under *Zadvydas*, 533 U.S., at 699, 121 S.Ct. 2491, in which the Court held that § 1231(a)(6) authorizes continued detention of an alien subject to a final removal order beyond that section's 90–day removal period for only such time as is reasonably necessary to secure the removal. *Zadvydas* is materially different from the present case in two respects. First, the aliens there challenging their detention following final deportation orders were ones for whom removal was "no longer practically attainable," such that their detention did not serve its purported immigration purpose. *Id.*, at 690, 121 S.Ct. 2491. In contrast, because the statutory provision at issue in this case governs detention of deportable criminal aliens *pending their removal proceedings*, the detention necessarily serves the purpose of preventing the aliens from fleeing prior to or during such proceedings. Second, while the period of detention at issue in *Zadvydas* was "indefinite" and "potentially permanent," *id.*, at 690–691, 121 S.Ct. 2491, the record shows that § 1226(c) detention not only has a definite termination point, but lasts, in the majority of cases, for less than the 90 days the Court considered presumptively valid in *Zadvydas*. Pp. 1714–1722.

276 F.3d 523, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which KENNEDY, J., joined in full, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined as to Part I, and in which O'CONNOR, SCALIA, and THOMAS, JJ., joined as to all but Part I. KENNEDY, J., filed a concurring opinion, *post*, p. 1722. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA and THOMAS, JJ., joined, *post*, p. 1722. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 1726. BREYER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 1746.