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The Law of Immigration Detention: A Brief 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) who are subject to removal from the United States. This detention scheme is multifaceted, with rules that turn on several factors, such as whether the alien is seeking admission 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. This In Focus provides a brief introduction to the immigration detention framework. For a more detailed discussion, see CRS Report R45915, *Immigration Detention: A Legal Overview*, by Hillel R. Smith.

Statutory Framework

Four provisions of the INA primarily shape the immigration detention framework:

1. **INA § 236(a)** generally authorizes the detention of aliens pending a decision on whether the alien is to be removed from the United States and permits those who are not subject to mandatory detention to be released on bond or their own recognizance;
2. **INA § 236(c)** generally requires the detention of aliens who are removable because of specified criminal activity or terrorism-related grounds;
3. **INA § 235(b)** generally requires the detention of applicants for admission who appear subject to removal, including aliens arriving at a port of entry and certain other aliens who have not been admitted or paroled into the United States; and
4. **INA § 241(a)** generally requires an alien subject to a final order of removal to be held during the 90-day period when the alien's removal is effectuated, and DHS may detain an alien beyond this 90-day period if the agency is unable to effectuate removal and the alien falls within certain categories.

Discretionary Detention

INA § 236(a) authorizes the arrest and detention of an alien pending a determination on whether the alien shall be removed from the United States. Detention under this statute is discretionary, and immigration authorities need not continue to detain an alien subject to removal unless the alien is subject to mandatory detention (e.g., aliens convicted of specified crimes under INA § 236(c)).

If DHS arrests and detains an alien under INA §236(a), and the alien is not subject to mandatory detention, the agency may either (1) continue to detain the alien during the pendency of removal proceedings, or (2) release the alien on bond in the amount of at least $1,500 or on the alien's own recognizance (subject to certain conditions). In the event of an alien's release, DHS may opt to enroll the alien in an Alternatives to Detention program, which enables the agency to monitor and supervise the alien to ensure his or her eventual appearance at a removal proceeding.

INA § 236(a) permits an immigration officer, at any time during removal proceedings, to determine whether an arrested alien should remain in custody or be released. If the alien is arrested without an administrative warrant, the custody decision generally must be made within 48 hours. DHS regulations provide that to be released the alien must show that he or she is not a flight or security risk.

If the alien remains detained, he or she may request review of DHS's custody decision at a bond hearing before an immigration judge (IJ) within the Department of Justice's Executive Office for Immigration Review (EOIR). The IJ may decide whether DHS may retain physical custody or release the alien, and the IJ has authority to set the bond amount. The IJ's custody determination may be appealed to the EOIR's Board of Immigration Appeals (BIA). Federal statute generally bars judicial review of a decision whether to detain or release an alien, but courts may consider habeas corpus claims alleging that an alien's detention is unlawful.

Mandatory Detention of Criminal Aliens

While immigration officials generally have broad discretion to decide whether to detain aliens during the pendency of removal proceedings, INA § 236(c) *requires* the detention of aliens removable on specified criminal or terrorism-related grounds. These grounds include, for example, crimes involving moral turpitude, drug crimes, aggravated felonies, and membership in a terrorist organization.

INA § 236(c) states that DHS "shall take into custody any alien" who falls within one of the enumerated criminal or terrorism-related grounds "when the alien is released" from criminal custody. The Supreme Court in *Nielsen v. Preap* held that this mandatory detention scheme covers any alien who has committed a specified offense, even if not immediately taken into custody after release from criminal incarceration.

Except in limited circumstances, an alien detained under INA § 236(c) generally may not be released on bond or his or her own recognizance during removal proceedings. The alien may seek limited review by an IJ to determine whether he or she falls within one of the categories of aliens subject to mandatory detention.

Mandatory Detention of Applicants for Admission

Under INA § 235(b) applicants for admission must generally be detained for removal purposes if they do not appear clearly to be admissible. The statute defines an "applicant for admission" to include both an alien seeking

initial entry at a designated port of entry and an alien present in the United States who has not been admitted.

The detention requirements of INA § 235(b) have been construed to apply to applicants for admission regardless of whether they are subject to a streamlined "expedited removal" process (e.g., those apprehended when attempting to enter the United States without valid entry documents) or are subject to formal removal proceedings (e.g., aliens inadmissible because of engaging in certain criminal activities). This construction also applies to aliens who, though initially subject to expedited removal, were found to have a credible fear of persecution if returned to their country of origin, and then transferred to formal removal proceedings to pursue asylum or similar forms of relief.

DHS may "parole" an alien otherwise subject to detention under INA § 235(b) "for urgent humanitarian reasons or significant public benefit," enabling the alien to be released from the agency's physical custody. Unlike custody determinations under INA § 236(a), DHS's parole decisions are not subject to administrative review.

Detention of Aliens After Removal Proceedings

INA § 241(a) governs the detention of aliens subject to a final order of removal. DHS "shall detain" an alien subject to a final order of removal during a 90-day "removal period." INA § 241(a) instructs that "under no circumstance during the removal period" may DHS release an alien removable on certain criminal or terrorism-related grounds. The alien must be released on an order of supervision if not removed within the 90-day period.

INA § 241(a) also provides that DHS *may* detain an alien ordered removed beyond this 90-day removal period if the agency is unable to effectuate removal and the alien falls within certain categories (e.g., criminal aliens, inadmissible aliens). DHS regulations provide that if the agency decides to keep the alien detained, it must conduct periodic custody reviews pending efforts to secure the alien's removal. INA § 241(a) provides for no bond hearings during detention.

The Supreme Court held in *Johnson v. Chavez* that INA § 241(a) also governs the detention of aliens whose removal orders are reinstated following their unlawful reentry into the United States, including those pursuing relief on account of fear of persecution or torture in the country where they would be removed.

As discussed below, the Supreme Court has recognized constitutional constraints to post-removal order detention.

Constitutional and Other Limitations to DHS's Detention Authority

DHS has broad statutory authority to detain aliens identified for removal, but the scope of that authority may be subject to constitutional constraints, particularly if detention becomes prolonged.

In 2001, the Supreme Court in *Zadvydas v. Davis* concluded that the indefinite detention of a lawfully admitted alien ordered removed would raise "serious constitutional concerns." The Court construed INA § 241(a) as having an implicit, temporal limitation of six months post-order of removal, after which an alien typically must be released if there is no significant likelihood of removal in the reasonably foreseeable future. Following *Zadvydas*, DHS established "special review procedures" to assess the likelihood of removal for aliens who remain detained beyond the 90-day removal period. In 2005, the Supreme Court in *Clark v. Martinez* determined, as a matter of statutory construction, that the presumptive six-month time limitation read into INA § 241(a) equally applied to aliens who had not been lawfully admitted into the United States, and who were being indefinitely detained after their 90-day periods. In 2022, however, the Supreme Court in *Johnson v. Arteaga-Martinez* held that § 241(a) does not require bond hearings for aliens detained under that provision.

Whether an alien's prolonged detention during the pendency of removal proceedings raises similar constitutional concerns remains debated. In 2003, the Supreme Court in *Demore v. Kim* ruled that the mandatory detention of certain aliens without bond (e.g., criminal aliens) during removal proceedings is "constitutionally permissible," but the Court did not decide whether there are any constitutional limits to the *duration* of this detention. Some lower courts, however, have construed *Demore* to apply only to brief periods of detention, after which an alien should have an opportunity to seek release on bond.

In *Jennings v. Rodriguez*, the Supreme Court in 2018 held that DHS has the *statutory* authority to detain aliens potentially indefinitely during the pendency of removal proceedings, but did not decide whether such prolonged detention is unconstitutional. However, 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, and that the government bears the burden of proving at a bond hearing that any continued detention is justified.

In addition, a 1997 court settlement agreement known as the *Flores* Settlement currently limits the period in which an alien minor may be detained by DHS. In addition, under federal statute, an *unaccompanied* alien child who is subject to removal generally must be placed in the custody of the Department of Health and Human Services, rather than DHS, during the pendency of removal proceedings.

Apart from judicial constraints on the length of detention, DHS's detention authority may be restricted in other ways. For example, the agency has established certain standards for the conditions of detention facilities, and detained aliens have raised due process challenges to the conditions of their confinement in some cases. Some courts also have held that the Fourth Amendment limits when immigration "detainers" may be used by DHS to take custody of aliens from state and local law enforcement authorities.

Thus, although DHS generally has broad detention authority, that authority is not unfettered, and due process and other constitutional considerations may inform the duration and conditions of the alien's detention.

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