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Detention of Noncitizens in the United States

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Summary

The events following the attacks of September 11 have increased interest in the authority of the Attorney General to detain noncitizens (aliens) in the United States. The Attorney General has broad authority to detain aliens (noncitizens) 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 inadmissable or deportable on criminal grounds, those who are inadmissable or deportable on national security grounds, those certified as a terrorist suspect, 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.

In FY2001, the Immigration and Naturalization Service (INS) detained 20,429 noncitizens. On average the noncitizens spent 42.5 days in detention with a median time of 15 days. During the same period, 6,808 juveniles were detained and of these 4,675 were unaccompanied. The majority of the unaccompanied juveniles were male with an average age of 15. However, 50% of the unaccompanied juveniles were 16 years of age or older. The majority of unaccompanied juveniles were released in under 30 days. During FY2001, INS budgeted $1,477,650 for detention purposes.

There are many policy issues surrounding detention of aliens, including several recent court cases seeking to address issues of detention. The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) increased the number of aliens subject to mandatory detention, increasing the number of aliens in detention from 9,011 in 1996 to 19,409 in 2002, and raised concerns about the justness of mandatory detention, especially as it is applied to asylum seekers arriving without proper documentation. Prior to IIRIRA, some aliens used fraudulent asylum claims as a way to illegally enter the country, thus, the law was changed such that asylum seekers are now subject to mandatory detention prior to a credible fear hearing. Additionally, the increase in the number of mandatory detainees has raised concerns about the amount of detention space available to house INS detainees. Some contend that decisions on which aliens to release from detention and when to release the aliens from detention may be based on the amount of detention space, not on the merits of an individual case. Concerns have also been raised about the treatment of certain groups of people in INS custody, including juveniles, administrative detainees who are held with criminals, and those detained as part of the investigation into September 11.

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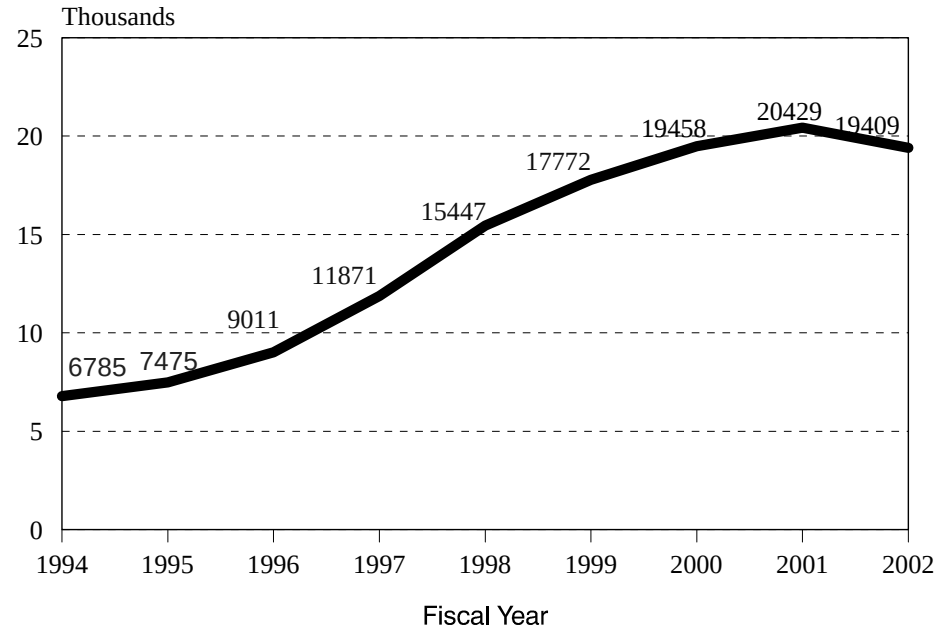
The events following the attacks of September 11 have increased interest in the authority of the Attorney General through the Immigration and Naturalization Service (INS) to detain noncitizens (aliens)[1] in the United States. The Attorney General has broad authority to detain aliens (noncitizens) while 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 by INS. Aliens subject to mandatory detention include those arriving without documentation or with fraudulent documentation, those who are removable on criminal grounds, those who are removable on national security grounds, those certified as a terrorist suspect, 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. Al-Quaeda prisoners at the Guantanamo U.S. military base in Cuba are not under the authority of INS.

[1] An alien is "any person not a citizen or national of the United States" and is synonymous with noncitizen.

Figure 1. Average Daily Population in Detention: FY1994-FY2002



Source: CRS presentation of INS data.
Note: FY2002 is the average daily population in detention through April 7, 2002

As **Figure 1** shows, between FY1994 and FY2002 the average size of the INS daily detention population increased steadily. The size of the daily population increased by 115%, from 9,011 to 19,409, between FY1996, when IIRIRA was enacted, and FY2002. The largest increase occurred between FY1997 and FY1998, the year that all the provisions of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[2] became enforceable.

Both the House and Senate legislation to create a Homeland Security Department would move authority over detention to the new department as part of the enforcement jurisdiction in that department. Since immigration-related detention is civil and not criminal in nature, this transfer of authority would not appear to have implications with regard to the criminal law enforcement authority of the Attorney General, assuming that administrative authority over immigration detention is properly transferred to the Secretary of Homeland Security.[3]

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[2] Subtitle C of the Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, signed into law on September 30, 1996.

[3] S. 2452, the Senate Homeland Security bill, as marked up by the Senate Governmental Affairs Committee on July 24-25, 2002, provides for a transfer of authority over immigration matters, including detention, from both the Attorney General and the INS Commissioner to the Secretary of Homeland Security and the Under Secretary of Homeland Security for Immigration Affairs, respectively (§1111). However, H.R. 5005, the House

(continued...)

Overview of INS Detention

Statutory Authority for Detention

The Immigration and Nationality Act of 1952 (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.[4] IIRIRA amended the INA, 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. For aliens not subjected to mandatory detention, the Attorney General determines which aliens can be paroled,[5] released on bond,[6] or continue to be detained. The Attorney General's decision is not subject to review. The authority to detain aliens has been delegated to the Commissioner of INS.

In October 1998, INS issued a memorandum establishing detention guidelines consistent with the changes made by IIRIRA.[7] According to the guidelines, INS assigns detainees to one of four detention categories: (1) required; (2) high priority; (3) medium priority; and (4) lower priority.[8] Aliens in required detention must be detained[9] while aliens in the other categories may be detained depending on detention

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[3] (...continued)
Homeland Security bill, as passed by the House of Representatives, expressly transfers the functions of the INS Commissioner with regard to detention to the Under Secretary for Border and Transportation Security, but does not expressly transfer the functions of the Attorney General (§411). It does provide that the Secretary of Homeland Security shall be responsible for immigration enforcement functions "vested by statute in, or performed by" the INS Commissioner, thus appearing to cover functions that by current statute are referred to the Attorney General, but are actually delegated to and performed by the Commissioner (§401(3)).

[4] INA §236(a).

[5] "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.

[6] The minimum bond amount is $1,500.

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

[8] 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 before the INS.

[9] There are some very limited exceptions to mandatory detention. An alien subject to (continued...)

space and the facts of the case. Higher priority aliens should be detained before aliens of lower priority.[10]

Additionally, the U.S.A. Patriot Act[11] 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 7 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 6 months only if his release would pose a danger to national security or public safety. The Attorney General must review the terrorist certification every 6 months.[12]

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."[13] If the INS arrests an alien without a warrant, it has 48 hours to decide whether 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 INS with more flexibility in detaining aliens prior to determining whether to charge or release the alien. The interim regulation extended the period that the INS may detain an alien, 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.[14]

Additionally, after a removal order has been issued against an alien, the law provides that the Attorney General shall remove an alien subject to a final removal

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[9] (...continued)
mandatory detention may only be released 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.

[10] Pearson, Michael A. INS Detention Guidelines, October 7, 1998. Reprinted in *Bender's Immigration Bulletin*, v. 3, no. 21, November 1, 1998. p. 1111.

[11] P.L. 107-56 signed into law on October 26, 2001.

[12] Habeas corpus proceedings are the avenue for judicial review of certification and detention.

[13] INA §287(a)(2).

[14] *Federal Register*, September 20, 2001 v. 66, no. 184, p. 48334-48335; 8 C.F.R. Part 287. Of the people taken into INS custody during the investigation of the September 11 attacks, in 17% of the cases INS took more than 7 days to file charges. In 2% of the cases, INS filed charges after more than 30 days. Edwards, Jim. Data Show Shoddy Due Process for Post-Sept. 11 Immigration Detainees. *New Jersey Law Journal*, February 6, 2002.

order within 90 days, except as otherwise provided in the statute.[15] 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 ...."[16] This provision was interpreted by the Attorney General as permitting indefinite detention where removal was not reasonably foreseeable, but the U.S. Supreme Court in *Zadvydas v. Davis*, discussed below, interpreted it as only permitting detention for up to six months where removal was not reasonably foreseeable.

Table 1 shows that overall, for the week ending December 31, 2001:

- 10 countries accounted for 64.2% of the total detention population.
- 9 of the 10 countries with the largest number of individuals in detention were from the Americas.
- Mexican nationals comprised 23.6% of the total detention population, the largest percentage of one country, and more than double the amount of people from any other country.

Although the majority of people in detention were criminal detainees, the percent of criminal detainees in detention differed significantly by country of origin. The majority of detainees from China, Guatemala, and Honduras were not criminal detainees.

- Of the10 countries with the largest number of detainees, China had the highest percent of non-criminals in detention (71.3%), followed by Guatemala (63.7%), and Honduras (62.1%).
- Some have raised concerns of unequal treatment of Haitians. Of the 10 countries with the largest number of detainees, Haiti had the 5th highest percent of non-criminals in detention (39.7%).
- Jamaica and Cuba had the largest percentage of criminal detainees of the 10 countries with the largest number of detainees (93.4% and 91.9% respectively).

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[15] INA §241(a)(1)(A).

[16] INA §241(a)(6).

Table 1. Number of Detainees by Country of Citizenship, Averages for Week Ending December 31, 2001 for Ten Countries with Largest Numbers of Detainees

Country of citizenship	Criminal offenders	Possible criminal offenders	Non-criminal	Total	% of Total detention population	% Non-criminal	% Criminal
Mexico	2,467	727	1,297	4,491	23.6%	28.9%	71.1%
Cuba	1,517	75	140	1,732	9.1%	8.1%	91.9%
El Salvador	422	75	474	971	5.1%	48.8%	51.2%
People's Republic of China	175	94	677	949	5.0%	71.3%	28.7%
Guatemala	233	98	580	911	4.8%	63.7%	36.3%
Jamaica	699	43	52	793	4.2%	6.6%	93.4%
Honduras	212	50	430	692	3.6%	62.1%	37.9%
Haiti	379	23	265	668	3.5%	39.7%	60.3%
Dominican Republic	477	40	86	603	3.2%	14.3%	85.7%
Colombia	240	26	128	394	2.1%	32.5%	67.5%
Total top 10	**6,821**	**1,251**	**4,129**	**12,204**	**64.2%**	**33.8%**	**66.2%**
Total all countries	**10,405**	**1,734**	**6,864**	**19,003**	**100.0%**	**36.1%**	**63.9%**

Source: CRS presentation of INS data.

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 INS orders the removal of the alien from the United States, and the removal decision is not subject to any further hearings, reviews, or appeals.[17] 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.[18] 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.[19] Under INS policy, unaccompanied minors are not subjected to expedited removal and must be detained.[20] From FY1997 though FY1999, 91% of aliens subject to expedited removal were Mexican nationals.[21]

Mandatory Detention

As discussed above, the law requires the Attorney General to detain:

- criminal aliens;[22]

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[17] INA §235(b)(1)(A)(i).

[18] Prior to IIRIRA, aliens who applied for asylum were often paroled into the United States upon arrival.

[19] Under the INA, expedited removal can also be applied to aliens who enter the United States without inspection and cannot establish that they have been physically present in the United States for more than 2 years, but it has yet to be applied to those who entered without inspection. INA §235(b)(1)(A)(iii).

[20] INS memorandum from Paul W. Virture, *Unaccompanied Minors Subject to Expedited Removal* (August, 21, 1997). Reproduced in 74 Interpreted Releases 1367 (September 8, 1997).

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

[22] Criminal aliens include those who are inadmissable on criminal-related grounds as well as those who are deportable due to the commission of certain criminal offences while in the United States. An alien is inadmissable for: (1) crimes of moral turpitude; (2) controlled substance violations; (3) multiple criminal convictions with aggregate sentences of 5 years or more; (4) drug trafficking; (5) prostitution and commercialized vice; and (6) aliens who have received 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 inadmissable is deportable. Only the following groups of criminal aliens who are inadmissable or deportable are not subject to mandatory detention: (1) aliens convicted of a single crime of moral turpitude who were

(continued...)

- national security risks;[23]
- asylum seekers, without proper documentation, until they can demonstrate a "credible fear of persecution";
- arriving aliens[24] subject to expedited removal;
- arriving aliens who appear inadmissable 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.[25]

The USA PATRIOT 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. The Attorney General has 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.[26]

Rights of the Detained

The courts have ruled that detained aliens not under expedited removal[27] have the following rights:

- the right to apply for asylum;
- the right to communicate with consular or diplomatic officers of their home country;[28]

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[22] (...continued)
sentenced to less than 1 year; (2) aliens convicted of high speed flight; and (3) aliens convicted of crimes of domestic violence, stalking, and child abuse or neglect.

[23] INS must detain any alien who is inadmissable or deportable for terrorist activity (INA §212(a)(3)(B) and §237(a)(4)(B)).

[24] 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).

[25] Prior to IIRIRA, only certain aliens convicted of aggregated felonies were subject to mandatory detention.

[26] INA §236(c)(1).

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

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

- the right to be represented by counsel;[29]
- 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.[30] Custody and bond determinations can be reviewed by an immigration judge at any time before the removal order becomes final, except in certain cases.[31] Additionally, the alien may appeal the immigration judges' decision to the Board of Immigration Appeals (BIA). Nonetheless, the courts have afforded the Attorney General much discretion in decisions related to where aliens are detained, the administration of detention facilities, and the treatment of aliens.[32]

Policy Issues

There are many policy issues surrounding detention of aliens, including several recent court cases seeking to address issues of detention. The Illegal Immigrant Reform and Responsibility Act of 1996 (IIRIRA) increased the number of aliens subject to mandatory detention, increasing the number of aliens in detention from 9,011 in 1996 to 19,409 in 2002, and raised concerns about the justness of mandatory detention, especially as it is applied to asylum seekers arriving without proper documentation. Prior to IIRIRA, some aliens used fraudulent asylum claims as a way to illegally enter the country, thus, the law was changed such that asylum seekers are now subject to mandatory detention. Additionally, the increase in the number of mandatory detainees has raised concerns about the amount of detention space available to house INS detainees. Some contend that decisions on which aliens to release from detention and when to release the aliens from detention may be based on the amount of detention space, not on the merits of an individual case. Concerns have also been raised about the treatment of certain groups of people in INS custody, including juveniles, administrative detainees who are held with criminals, and those detained as part of the investigation into September 11.

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[29] 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.

[30] Gordon, Charles, *et al*. Immigration Law and Procedure §108.01.

[31] 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.

[32] Gordon, Charles, *et al*. Immigration Law and Procedure §108.04[2].

Mandatory Detention

The changes in IIRIRA which have led to an increase in the categories of people subject to mandatory detention have raised both policy and legal issues including the justness of detaining asylum seekers who try to enter the country without proper documentation, and the constitutionality of mandatory detention.

Aliens in Expedited Removal. As discussed earlier, the IIRIRA of 1996 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 inadmissable aliens falsely claiming persecution to enter into the country. Most of the fraudulent claims were made by people attempting to come here for economic or family reasons, illegally rather than through legal immigration channels.[33] 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 the practice of detaining asylum seekers has reduced the number of fraudulent asylum claims.

However, others 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. From April 1, 1997 through September 30, 2001 there were 34,736 aliens in expedited removal who made a claim of credible fear. Of these, 33,551 have been detained.[34] The position of the United Nations High Commission on Refugees is that detention of asylum seekers is "inherently undesirable."[35] 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.

Haitians in Detention. As discussed above, at the discretion of the Attorney General, many asylum seekers are paroled from detention after they demonstrate a credible fear of persecution. On December 3, 2001, a boat carrying 187 Haitians was found off the coast of Miami and most of the Haitians were not paroled, raising concerns that Haitian asylum seekers are being treated differently than asylum seekers from other countries. In March 2002, a group of Haitians, represented by the Florida Immigrant Advocacy Center, filed a class-action lawsuit in federal district

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[33] CRS Issue Brief IB93095, *Immigration: Illegal Entry and Asylum Issues*, coordinated by (name redacted). This report is archived and available from the author.

[34] Phone call with Maureen Stanton, INS Congressional Affairs, August 6, 2002.

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

court in Florida challenging the policy and seeking release from detention.[36] In May 2002, Judge Lenard dismissed the lawsuit, citing judicial deference to INS policy.[37] The case is pending on appeal from the dismissal.[38] The INS has moved female detainees from a maximum-security county jail to a less restrictive work-release facility,[39] and reportedly was weighing an offer from Barry University President Jeanne O'Laughlin to find community sponsors for the detainees.[40]

Constitutionality of Mandatory Detention. Questions have been raised about the constitutionality of the mandatory detention provisions in the INA. As a result, there have been several court cases challenging the constitutionality of these provisions. Recent federal appellate court rulings in the Third, Fourth, Ninth, and Tenth Circuits generally found that the mandatory detention of criminal aliens pending removal proceedings was unconstitutional as applied to lawful permanent resident aliens; they disagreed with an earlier decision in the Seventh Circuit (*Parra v. Perryman*) which upheld mandatory detention. The U.S. Supreme Court has granted *certiorari* to hear one of these cases. There was also a significant analytical difference among the circuits that did not uphold mandatory detention of lawful permanent residents.

- In *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999), decided before the *Zadvydas* case discussed below with regard to indefinite detention, the U.S. Court of Appeals for the Seventh Circuit upheld mandatory detention[41] as an exercise of Congress' broad, plenary power over immigration matters and found that aliens have no liberty interest once removal proceedings have begun. The *Zadvydas* case found that congressional plenary power was still subject to the due process rights afforded to all persons, including aliens.
- In *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001), the U.S. Court of Appeals for the Third Circuit held that mandatory detention constituted a violation of the due process rights of a permanent resident alien because there was no individualized hearing to determine whether he posed a danger to the public and was a flight risk. The court found that Patel had a liberty interest triggering a strict scrutiny analysis of his due process rights, which is a higher standard for government action to satisfy compared to judicial

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[36] *Moise v. Bulger*, No. 02-CV-20822 (S.D. Fla. filed Mar. 15, 2002). After a couple of the named plaintiffs were removed, it appears that the name may have changed to *Jeanty v. Bulger*; Jody A. Benjamin, *INS Says New Policy Prevents Exodus; Advocates For Haitians Sue, Seek Freedom*. Sun-Sentinel, March 20, 2002. p. 1B.

[37] *Judge Rejects Lawsuit Filed For Haitians*, N.Y. Times, May 19, 2002. p. A27, col. 3.

[38] Figueras, Tere. *U.S. Move to Deport Haitians Protested; 25 Held by INS Sent Back to Homeland*. The Miami Herald, July 30, 2002. p. B1.

[39] Santana, Sofia. *Haitian Detainees Removed From Jail*. Miami Herald, August 27, 2002. p. B4.

[40] Benjamin, Jody A. *INS Chief, Politicians Visit Jailed Haitians*. Sun-Sentinel, July 16, 2002. p. 1B.

[41] Under §236(c) of the INA.

deference to congressional plenary power. Strict scrutiny analysis means that the policy of mandatory detention of criminal aliens had to be narrowly tailored to serve the governmental interest in removing criminal aliens and preventing dangerous criminal aliens from endangering the community and not appearing at removal hearings. Mandatory detention of criminal aliens raises an irrebuttable presumption of dangerousness and flight risk resulting in the detention of all removable criminal aliens. The court held that mandatory detention violates due process because the federal government did not show that all removable criminal aliens are dangerous and flight risks, e.g., Patel was a non-violent felon and not likely to flee because he had strong ties to the community and a chance for cancellation of removal.

- In *Hoang v. Comfort*, 282 F. 3d 1247 (10th Cir. 2002), the Tenth Circuit found that mandatory detention was not justified for lawful permanent resident aliens without an individualized bail determination. Congressional plenary power over immigration matters is still subject to due process constitutional limitations. Like the Third Circuit in *Patel v. Zemski*, the Tenth Circuit adopted a strict scrutiny analysis of the statute. Section 236(c) raises an irrebuttable presumption that all aliens subject to mandatory detention under that section are dangerous and pose flight risks, which is not justified by the range of aliens to which it applies. It also noted that, although §236(e) prohibits review of the Attorney General's judgment, courts retain habeas jurisdiction over constitutional challenges and that exhaustion of remedies is not required before filing a petition for habeas review because the Board of Immigration Appeals is not empowered to grant relief. On May 3, 2002, a petition for certiorari was filed in the U.S. Supreme Court under the name *Comfort v. Hoang*, No. 01-1616.
- In *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002), the Ninth Circuit also held that mandatory detention of criminal aliens (§236(c)) violated the due process rights of lawful permanent resident aliens, because it provides for no individualized determination of dangerousness and flight risk. However, the court explicitly declined to find that mandatory detention (§236(c)) was unconstitutional on its face, because the court did not find that it would be unconstitutional in all situations where it might apply. It noted that the plenary power of Congress over immigration matters was subject to constitutional limitations on the method of implementing policy and that aliens are entitled to the protections of due process. The Ninth Circuit did not adopt a strict scrutiny analysis. Instead, it chose to follow the Supreme Court analysis in the *Zadvydas* case, noting that lawful permanent residents are a favored category of aliens who have the right to reside here permanently until a final removal order is entered; therefore they have a strong liberty interest. Under due process, civil detention is permitted only in certain special and narrow, non-punitive circumstances. Removal proceedings are civil, thus detention during such proceedings is permitted only in special circumstances. The court held that the governmental reasons for mandatory detention did not constitute sufficiently strong "special

justification." On June 28, 2002, the U.S. Supreme Court granted certiorari to this case under the name *Demore v. Kim*, No. 01-1491 to be heard in the upcoming term.

- In *Welch v. Ashcroft*, 293 F. 3d 213 (4th Cir. 2002), the Fourth Circuit followed the Ninth Circuit in using a "special justification" analysis with regard to mandatory detention of lawful permanent residents under §236(c), and similarly held that it violated the due process rights of lawful permanent resident aliens because it did not provide for an individualized bail hearing.

Additionally, district courts in other circuits have also considered the validity of mandatory detention of criminal aliens (§236(c)), with the majority finding it unconstitutional, at least as applied to lawful permanent resident aliens, but with some upholding the statute. Although apparently the cases generally involve lawful permanent residents and the circuit decisions discussed above addressed the rights of lawful permanent residents, in at least one case mandatory detention (§236(c)) was found to be unconstitutional as applied to an illegal alien. In an unpublished opinion, the Third Circuit upheld a district court which had held that due process required an individualized hearing even for an illegal alien.[42] A district court in the Third Circuit recently criticized the INS for apparently attempting to circumvent the requirement of the *Patel* decision when it effectively halted the release of a lawful permanent resident alien who had been granted release on bond under *Patel*'s required hearing for mandatory detention (§236(c)) by appealing the bond decision then requesting inaction on the appeal.[43] The court ordered the release of the alien.

Since the new §236A of the INA (mandatory detention of certified terrorists) provides that an alien detained as a certified terrorist cannot be held indefinitely unless a determination is made that the alien is a danger to the public and a flight risk, it appears to avoid the constitutional problems of §236(c), mandatory detention of criminal aliens.

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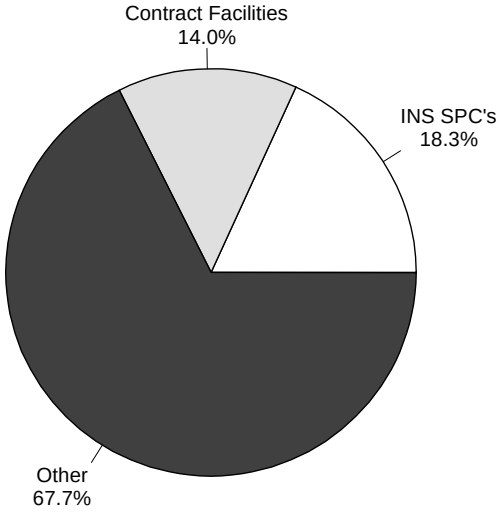
[42] *United States ex rel. Radoncic v. Zemski*, 28 Fed. Appx. 113 (3d Cir. 2001).

[43] *Almonte-Vargas v. Elwood*, No. 02-CV-2666 (E.D. Penn. June 28, 2002).

Figure 2. Type of Facility Housing INS Detainees as of January 7, 2002



Source: CRS analysis of INS Data
Note: Other refers to city, county, local, state, and federal facilities used under the Intergovenmental Service Agreement. The INS detainee population varies daily

Detention Space

Many contend that INS 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. For example, there are 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. 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.[44]

Types of Facilities. The majority of INS detainees are not held in INS facilities, raising concerns about the treatment of these detainees. There are four types of facilities where detainees can be held: INS Service Processing Centers (SPC's), privately run facilities contracted by INS, Bureau of Prisons, and state and local jails. INS has its own internal detention guidelines which provide uniform

[44] 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, INS does have explicit procedures for choosing between two mandatory detainees if there is not enough bed space.

standards regarding detention of aliens.[45] Nonetheless, these standards only apply at INS SPC's and INS contract facilities, and do not cover state and local jails where on January 7, 2002, approximately 68% of detainees were held. (See **Figure 2**.) There are few guidelines for state and local jails.[46] Since INS has a statutory obligation to use existing facilities before building new bed space,[47] much of the expansion of INS bed space will likely occur in state and local jails.

It has been reported that in local jails, administrative detainees (i.e., those who are detained while they are applying for asylum, or those who overstayed visas without committing a criminal offense) are often held with criminals serving sentences or awaiting trial, and are often treated in the same manner (e.g., leg shackling, strip searches) as the criminally convicted.[48] Also, local jails often lack the language interpretation services needed by many detainees. Additionally, sometimes detainees are sent to facilities far from their families, lawyers, and ethnic communities increasing the need for jail-sponsored interpretation services and making it difficult for detainees to meet with their lawyers.

Cost. The overall increase in the number of noncitizens in INS detention has raised questions about the cost of detaining noncitizens. INS budgets $75 a day for each detainee held in detention. This cost does not include transportation or the cost of deporting the alien. In FY2000, INS budgeted $1,390,125 for 18,535 beds of detention space. For FY2001, the INS budget included $1,477,650 for 19,702 beds. Lastly, in FY2002 INS budgeted $1,583,025 for 21,107 beds.[49]

Release on Parole and Bond

The Attorney General 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, juveniles aliens who will be witnesses, and "aliens whose continued detention is not in the public interest."[50] In general, parole is available on a "case-by-case basis for urgent humanitarian reasons or significant public benefit."[51]

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[45] For more information on INS Detention Standards, see: [http://www.ins.usdoj.gov/graphics/lawsregs/guidance.htm].

[46] The state and local jails must adhere to four basic standards: 24-hour supervision, conformance with safety and emergency code regulations, food service, and emergency medical care. (8 C.F.R. §235.3(e))

[47] INA §241(g)(2).

[48] For specific examples see, Gordon, Charles, *et al*. Immigration Law and Procedure §108.04[5][b].

[49] Unpublished INS data obtained from Mark Schaffer, INS Office of Congressional Affairs, August 29, 2002.

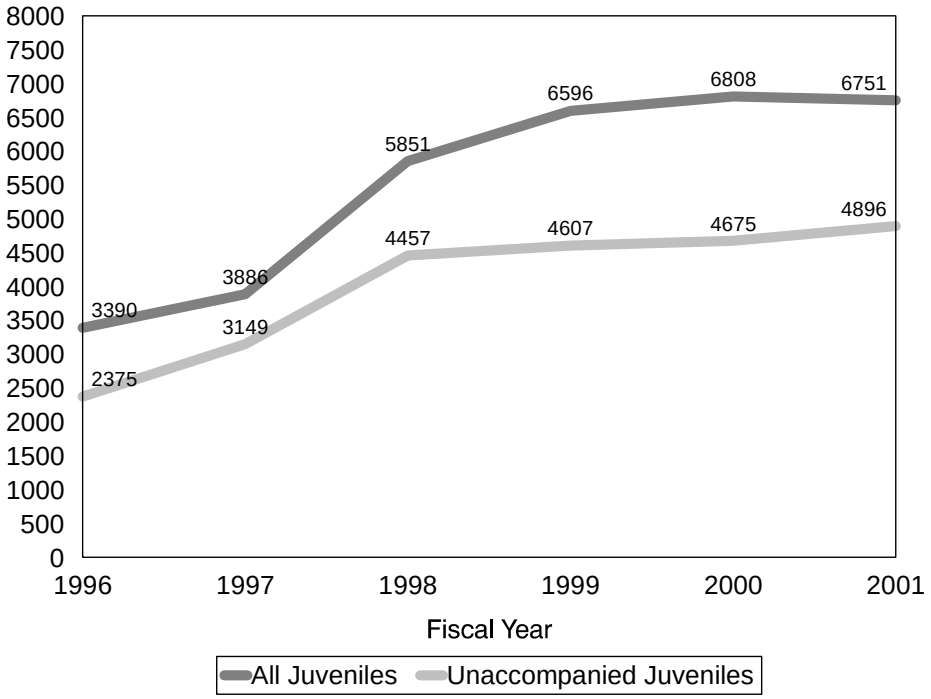
[50] 8 C.F.R. §212.5(b).

[51] 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.

The Attorney General may also release aliens not subject to mandatory detention on bonds of a minimum of $1,500.[52] 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.

In practice, release decisions are made by INS district directors. Although in theory these directors follow the same standards for release, concern has been raised that aliens with similar cases in different districts are treated differently in terms of being eligible for release. Some contend that there is wide discrepancy throughout the country in decisions regarding bond, and parole.[53]

Figure 3. Number of Juveniles in INS Custody: FY1996-FY2001



Source: CRS Presentation of Unpublished INS Data.

Unaccompanied Juveniles

INS defines a juvenile as an alien under the age of 18.[54] As shown in **Figure 3**, the number of unaccompanied juveniles[55] arriving in the United States has increased

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[52] IIRIRA raised the minimum bond amount from $500 to $1,500. INA §236(a)(2)(A).

[53] Kerwin, Donald, and Charles Wheeler. All Locked Up and Nowhere to Go: Challenges to INS Detention. *Bender's Immigration Bulletin*, v. 5 no. 1. p. 3.

[54] Individuals under the age of 18 who have been emancipated or convicted and incarcerated as an adult are considered adults for INS purposes.

[55] An unaccompanied juvenile is a juvenile whose parents or legal guardians are not present at entry.

106% since 1996 while the total number of juveniles in detention increased 99.1% over the same period. **Table 2** shows that in FY2001 most of the unaccompanied juveniles were males and the average age was 15. Absent reliable documentation the INS determines the age of the individual, but there are no procedures to challenge an incorrect age determination.[56]

Table 2. Age on Last Date in Custody and Gender of Unaccompanied Minors in Custody, FY2001

Age in years	Number in custody
Less than 1	42
1 to 5	251
6 to 10	348
11 to 12	204
13 to 14	454
15	638
16	1,155
17	1,543
18+	261
Total	**4,896**
Median Age	**16 years**
Average Age	**15 years**
Male	**3,540 (72.3%)**
Female	**1,356 (27.7%)**

Source: CRS presentation of INS data.
Note: For those not released in FY2001, their age was calculated as of March 31, 2001. Those over the age of 18 were juveniles when they were first placed in detention.

INS policy states that juveniles should be placed in the "least restrictive setting appropriate" to their age and needs, that will protect the juvenile and the public and assure that the juvenile will appear at court hearings.[57] INS policy is that unaccompanied juveniles are to be separated from unrelated adults while in custody. Juveniles are to be released if possible to family members or a legal guardian.[58] They

[56] INS uses dental and wrist x-rays to determine age. There is some controversy surrounding the accuracy of these techniques.

[57] 8 C.F.R. §236.3(a).

[58] In order of preference, juveniles are to be released to: (1) a parent; (2) legal guardian; (3) (continued...)

can also be released to an adult designated by the parents or legal guardians or a licensed child-care facility (e.g., foster or group homes). INS does not operate any such facilities, and thus must contract for detention space for juvenile detainees with nonprofit, state, and local organizations. Educational classes are provided to all juveniles in INS custody.[59]

Table 3. Time in Custody for Unaccompanied Juvenile Custody Events, FY2001

Time in custody	Secure	Non-secure	Total
72 hours or less	400	384	784
4 to 7 Days	298	653	951
8 to 14 Days	237	772	1,009
15 to 21 Days	128	399	527
22 to 30 Days	126	295	421
Total 30 days or less	1,189	2,503	3,692
31 to 60 Days	211	523	734
61 to 90 Days	105	238	343
91 to 119 Days	79	117	196
120 to 179 Days	54	125	179
180 to 269 Days	90	75	105
270 to 365 Days	16	39	55
More than 356 Days	31	48	79
Held over 72 hours	**1,316**	**3,285**	**4,601**
Held over 30 days	**527**	**1,166**	**1,693**
Total	**1,716**	**3,669**	**5,385**

Source: CRS analysis of INS data.

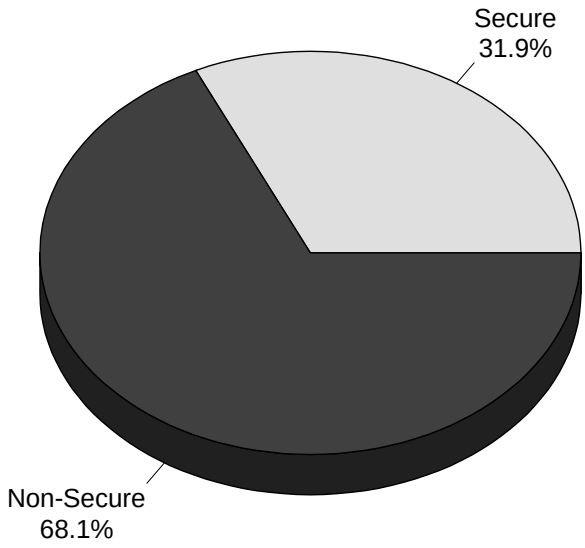
Note: In computing statistics related to juveniles in INS custody, INS tracks "custody events." Sometimes a juvenile is re-apprehended or moved to another facility — each counts as a custody event. Consequently, the number of custody events is always higher than the number of individual juveniles brought into custody.

[58] (...continued)
an adult relative (i.e., sibling, grandparent, aunt). (8 C.F.R. §236.3(b)(1)).

[59] INS' Juvenile Detention and Shelter Care Program, on [http://www.ins.usdoj.gov]. Last revised September 7, 2000.

As shown in **Table 3**, in 2001, INS detained 5,385 unaccompanied juveniles. 4,601 or 85% were detained for more than 72 hours. Nonetheless, 69% of the juveniles were detained for 30 days or less, and 68% of those detained for under 30 days were detained in non-secure facilities. Non-secure facilities include foster homes, shelters, group homes, hospitals, and hotels. Overall, as shown in **Figure 4**, 68% of the juveniles were detained in non-secure facilities. On average, they spent 1 month in custody.[60]

Figure 4. Facility Security for Juveniles: FY2001



Source: CRS presentation of INS data.

Legal Challenges to the Conditions of Juveniles in Custody. A couple of law suits have led to the promulgation or proposal of regulations establishing certain rights of juveniles in custody. As a result of the 1985 district court decision in the class-action law suit *Perez-Funez v. INS*,[61] INS is required to:

- advise unaccompanied minors of their right to an attorney, a hearing and to apply for asylum, before presenting them with a voluntary departure form;
- inform unaccompanied minors from Mexico and Canada who are apprehended near the border that they may speak by phone to a relative, friend, or pro-bono attorney;

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[60] Thompson, Cheryl. *INS Creating Office to Oversee Juveniles in Custody*. Washington Post, February 2, 2002. p. A9.

[61] 619 F. Supp. 656 (C.D. Cal. 1985).

- ensure that other unaccompanied minors speak by phone to a relative, friend, or pro-bono attorney;
- present unaccompanied minors with a list of pro-bono attorneys that the juvenile can contact; and,
- obtain a signed acknowledgment from unaccompanied minors that the INS has provided the required notices, information, and phone access.

In a recent federal district court ruling that was part of a class-action challenge to the INS policy of not providing children with lawyers when they are facing deportation in immigration proceedings, the judge ordered the federal government to hire a lawyer for a child in INS detention.[62] INS has not responded directly to the ruling, but INS maintains that the INA prohibits the government from paying for attorneys for the children.

Another lawsuit concerning release of juveniles from INS custody led to a U.S. Supreme Court decision and proposed regulations which are still pending. In 1984, the INS first adopted a policy, eventually formally promulgated as a regulation, which required detention of unaccompanied minors unless there was an adult relative or legal guardian available to assume custody, even where there was another responsible adult willing and able to care for the minor and able to ensure his or her attendance at a deportation hearing. In 1985, four juveniles filed a class-action suit asserting that the federal Constitution and immigration statutes required their release into the custody of responsible adults and challenging the INS policy as a violation of their due process/equal protection rights under the Fifth Amendment. The U.S. District Court for the Central District of California[63] and the U.S. Court of Appeals for the Ninth Circuit *en banc*[64] each held that the juvenile detention policy implicated constitutional rights of the plaintiffs. The Department of Justice petitioned the U.S. Supreme Court for certiorari, which it granted. The respondents alleged that they had a fundamental right to freedom from physical restraint under substantive due process; that their procedural due process rights were violated and that even if the INS regulation did not violate their constitutional rights, it exceeded the Attorney General's statutory authority.

In its opinion for *Reno v. Flores*,[65] the U.S. Supreme Court reversed the lower courts and upheld the regulation governing the detention policy. It held that the best interests of the child was not the absolute and exclusive standard for judging the exercise of governmental custody of a minor. It further held that minors have no fundamental right to freedom from government detention which would implicate due process rights, because minors are always subject to custody of some type, if not parental custody, then state custody. Procedural due process rights did not require an individual custody determination; a regular removal hearing before an immigration judge provided adequate opportunity to raise a custodial issue. Finally,

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[62] *Machado v. Ashcroft*, No. CS-02-0066-FVS (E.D. Wash. March 5, 2002).

[63] *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal 1988).

[64] *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1991).

[65] 507 U.S. 292 (1993).

the Court found that the Attorney General had broad authority and discretion under the immigration statutes to determine detention policies for juveniles.

A settlement between the respondents in *Flores* and the Department of Justice has led to the proposal of regulations in 1998 which would codify the settlement.[66] However, the final implementation of these regulations is still pending, apparently delayed by consideration of regulations necessitated by the major amendments made by IIRIRA that increased the categories of people subject to mandatory detention.[67] The proposed regulations would make several changes to existing regulations by (1) clarifying that the advisory of rights and other voluntary departure procedures pursuant to *Perez-Funez* applies only to minors who are unaccompanied and not arriving at a port-of-entry or via maritime interdiction; (2) setting time limits on proper placement of minors; (3) establishing guidelines for agreements between the INS and custodians of minors and for suitability assessments of custodians; (4) requiring that all possessions and legal papers shall accompany a minor whenever a minor is transferred from one placement to another; and (5) requiring notice to counsel representing a minor of any transfer except in certain specified circumstances.

Inspector General Report on Unaccompanied Juveniles. In September 2001, the Inspector General released a report that reviewed the treatment of unaccompanied juveniles in INS custody.[68] The report specifically focused on the implementation of policies developed in response to *Flores*. The report found that although INS had made improvements in its Juvenile Program there were still problems with INS treatment of unaccompanied juveniles. The investigation found that INS does not segregate non-delinquent and delinquent juveniles once the juveniles are placed in a secure facility. The report also noted that although INS policy prohibits the use of restraints on non-delinquent juveniles, facilities in four districts used restraints when transporting these juveniles. Additionally the report observed that while *Flores* requires INS to place all juveniles in an appropriate juvenile facility within 5 days of being apprehended, INS did not always meet this requirement. Furthermore, the investigation revealed that some districts were not complying with the INS policy requirement that district juvenile coordinators meet weekly with each unaccompanied minor.

Issues of Juveniles in Custody. Advocates for children's rights criticize the current immigration system for not adequately addressing the special needs of unaccompanied, unlawfully present juvenile aliens who are in detention pending asylum or removal proceedings. The issues concerning the detention of unaccompanied minors have led to the court decisions discussed above, proposed regulations, and proposed legislation to establish an office within the DOJ but outside of the INS which would be dedicated to ensuring the welfare of unaccompanied juveniles in the immigration system. Some contend that INS treats juveniles as aliens

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[66] 63 Fed. Reg. 39759 (1998).

[67] 67 Fed. Reg. 33221, 33276 (2002).

[68] Office of the Inspector General. *Unaccompanied Juveniles in INS Custody*. Report Number I-2001-009, September 28, 2001. (Hereafter referred to as Inspector General Report).

first, and children as an afterthought. Detained children are placed in immigration removal proceedings which are administrative and adversarial. Many argue that detained children should not be treated as adults since they have special needs as children. Many of these children have experienced separation from primary care givers. Some of the children have been used in human trafficking schemes, and others are fleeing from persecution and war. These children may be retraumatized by their confinement. Advocates also note that INS is still not fully separating non-delinquent and delinquent juveniles, as well as separating juveniles from non-related adults in custody.[69] Conversely, others note that most unaccompanied juveniles are between 15 and 18 years of age and that some have criminal histories.

Additionally, some contend that INS refuses to release some juveniles from custody and uses them as bait to get family members who are illegally in the country to turn themselves in. INS denies this practice.[70] On February 1, 2002, INS Commissioner James Ziglar announced that he was creating an office, the Office of Juvenile Affairs (OJA), to oversee the protection of juveniles in INS custody. The OJA will review shelter care standards for minors, seek alternatives to detaining juveniles, and work to reunite juveniles with their families. The OJA will also coordinate services to juveniles by INS field offices, and ensure that juveniles who are removed from the United States are removed in a safe manner.[71] The INS issued a final regulation on June 7, 2002, which transferred daily oversight of certain functions related to juveniles in custody to the Director of OJA. The new rule gives the Director of OJA the sole authority to determine issues of detention and release of juveniles including parole. This authority was previously exercised by district directors.[72]

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 INS refuses to release them. These detainees are often referred to as "lifers" or "unremovables."[73] Many of these

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[69] Inspector General Report.

[70] Levy, Marc. *INS Youth Handling Under Scrutiny*. Washington Post Online: [www.washingtonpost.com] February 14, 2002.

[71] Thompson, Cheryl. *INS Creating Office to Oversee Juveniles in Custody*. Washington Post, February 2, 2002. p. A9.

[72] *Federal Register*, v. 67, no. 110, Friday June 7, 2002. p. 39255-39260. The district directors retain authority concerning detention and release of adults in custody.

[73] Most indefinite detainees are from countries that lack normal diplomatic relations with the United States (e.g., Cuba, Iran, North Korea). (The majority of "lifers" are Mariel Cubans.) 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

(continued...)

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 INS detention for a longer time period than their criminal incarceration. In 2000, INS estimated that it had 5,000 aliens in indefinite administrative custody.[74]

In a 5-4 decision in *Zadvydas v. Davis*[75], 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 6 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 6 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." With regard to civil matters, government detention may be consistent with due process in certain special and narrow non-punitive cases where special factors outweigh the individual's liberty interest. Post-removal detention is civil and non-punitive; the Court found that the goals of post-removal detention are not strong enough to justify indefinite detention as administered under the statute. The Court suggested that special arguments could be made for a statutory scheme of preventive detention for terrorists or other aliens in special circumstances and for heightened judicial deference for executive and legislative branch decisions regarding national security matters.

In response to this decision, the Attorney General issued regulations governing the review of post-removal order detention cases for a determination of foreseeability of removal. The Attorney General issued regulations, effective November 14, 2001, concerning the continued detention of aliens subject to final orders of removal that are consistent with the *Zadvydas* decision.[76] 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:

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[73] (...continued)
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 2-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.

[74] Conversation with Tim Huagh, INS Congressional Affairs.

[75] 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).

[76] 66 Fed. Reg. 56967 (2001); 8 C.F.R. at §§241.4, 241.13 and 241.14.

- 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 INS discretion.[77]

A recent Ninth Circuit appellate decision, *Lin Guo Xi v. U.S. Immigration and Naturalization Service*,[78] embodies the emerging issue of whether the *Zadvydas* holding applies to inadmissible aliens as well as to deportable aliens.[79] The opinion of the court notes that, although the *Zadvydas* case involved two deportable permanent resident aliens, the detention provision in the removal statute at issue applies to both inadmissible and deportable aliens, therefore the U.S. Supreme Court's construction of a time limit likewise applies to both categories of aliens. The dissent in *Lin Guo Xi* argues that the limit on post-removal order detention does not apply to inadmissible aliens and notes that the U.S. Supreme Court in *Zadvydas* explicitly let stand an older decision which distinguished between the indefinite detention of an excludable alien (similar to inadmissible alien under current law) who sought to enter the United States and a deportable alien who had entered the United States.[80] Some scholarly commentators have also considered the scope of *Zadvydas*, contrasting the potentially bifurcated approach of some of that opinion's language with its statutory construction apparently covering all aliens in post-removal detention.[81]

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[77] Creppy, Michael. Operating Policies and Procedures Memorandum November 19, 2001. Reprinted in *Interpreted Releases* January 14, 2002. p. 74-83.

[78] 298 F.3d 832 (9th Cir. 2002).

[79] Inadmissible aliens have not yet been admitted to the United States after inspection and are ineligible to be admitted legally. Deportable aliens have been inspected and admitted to the United States, but subsequently have become ineligible to remain and are subject to removal. Those who are physically in the United States but who entered without inspection, i.e., illegally, are also considered inadmissible. Long-standing legal doctrine, commonly known as the "entry fiction," holds that those who are inadmissible have no substantive due process right to enter or remain in the country, whereas those who are deportable do have such rights.

[80] Prior to IIRIRA, aliens ineligible to enter the country were "excludable," rather than "inadmissible," and were subject to exclusion proceedings, while deportable aliens were subject to deportation proceedings. After IIRIRA, exclusion and deportation proceedings were consolidated into removal proceedings, but certain aliens are subject to expedited removal. The salient difference between excludable and inadmissible aliens is that aliens who entered without inspection were not considered excludable, whereas such aliens are now considered inadmissible, which means they are not entitled to the same level of rights in removal proceedings. This change was made as a disincentive to entering illegally, since formerly, the entry fiction worked in favor of those who entered illegally.

[81] Pistone, Michele R. *A Times Sensitive Response to Professor Aleinikoff's Detaining Plenary Power*, 16 Geo. Immigr. L.J. 391 (2002); Aleinikoff, T. Alexander. *Detaining*
(continued...)

September 11 Detainees

In the wake of the September 11 attacks many noncitizens who resemble the ethnic, national origin and religious description of the attackers have been detained or removed from the United States. The Department of Justice (DOJ) has not released the names of the detainees and has chosen to close immigration hearings for some of the detainees. Civil and human rights advocacy groups, including Amnesty International and the Center for Constitutional Rights, have alleged that the constitutional rights of the detainees have been violated and that they have been subjected to human rights abuses while in detention. Consequently, several law suits have been filed challenging the non-disclosure of individual detainee information, the closed hearings, and the detention conditions.

A DOJ memorandum to Senate Investigations Subcommittee Chairman Carl Levin, dated July 3, 2002,[82] indicates that a total of 752 persons have been detained in INS custody at some point since September 11, 2001, in connection with the terrorist attack investigation. Of this number, 81 persons remained in INS custody as of the date of the DOJ memorandum. Of these remaining detainees, 73 have had a removal hearing and 38 of these have final removal orders.

The aliens being detained by the INS likely do not represent all aliens being detained in connection with the investigation into the September 11 attacks. Some perhaps number among those individuals charged with federal crimes in connection with the September 11 terrorist attacks or among those held on material witness warrants.[83] Also, aliens being detained in Guantanamo Bay, Cuba, are not in INS

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[81] (...continued)
Plenary Power: The Meaning and Impact of Zadvydas v, Davis, 16 Geo. Immigr. L.J. 365 (2002).

[82] Memorandum from Daniel J. Bryant, Assistant Attorney General, to Senator Carl Levin, Chairman of the Investigations Subcommittee of the Senate Committee on Governmental Affairs (July 3, 2002). (Hereafter cited as *Levin Memorandum*.)

[83] According to the *Levin Memorandum*, as of June 28, 2002, the Criminal Division of the Department of Justice had charged 129 persons with federal crimes in connection with the investigation into the September 11 terrorist attacks. Of that number, three were fugitives, while the rest had been arrested and had a hearing, of whom 76 remained in custody. The Department of Justice declined to disclose information regarding material witnesses, citing potential adverse impact on ongoing investigations. Two federal district court decisions in New York disagree as to whether the Department of Justice may detain material witnesses for a grand jury investigation. In *United States v. Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) and *United States v. Awadallah*, 202 F. Supp. 2d 82 (S.D.N.Y. 2002), Judge Scheindlin found that the arrest and detention of a material witness in the context of a grand jury investigation was not authorized by statute and, even if it were, possibly violated constitutional rights where a cooperative witness was detained for a prolonged, indefinite period. On the other hand, in *In re the Application of the United States for a Material Witness Warrant, pursuant to 18 U.S.C. §3144, for John Doe*, No. 01 M. 1750 (MBM) (S.D.N.Y. July 11, 2002), Judge Mukasey disagreed with the *Awadallah* decisions, upholding the detention of a material witness for a grand jury investigation in accordance with long-standing use of the material witness statute for such a purpose and judicial
(continued...)

custody; they are in the custody of the U.S. Military as unlawful combatants captured and detained outside the United States.

Thus, while some aliens have been detained after September 11 for lengthy periods prior to release, as noted in the *Turkmen* law suit discussed below, it appears that such detention may be pursuant to different authorities, including detention as an alien charged with a federal crime or detention as a material witness,[84] as well as pursuant to the pre- and post-removal detention provisions discussed above.

Among those aliens in INS custody, some may have been detained pursuant to regulatory changes issued by the INS Commissioner, effective September 20, 2001,[85] which have been criticized by some as enabling indefinite and mandatory detention beyond the scope of constitutional or statutory authority.[86] The changes were made with the intent to give law enforcement more flexibility to investigate terrorist attacks. Before amendment, the regulations[87] provided that, after the arrest of an alien without warrant by INS officers, unless voluntary departure[88] is granted, the INS must make a determination within 24 hours about whether to initiate removal proceedings and issue a warrant, and whether to release the alien on bond or cognizance or to continue detention. The amendments extended the time period for the determination to 48 hours after arrest, except in the event of "an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time." The regulation did not define "emergency or other extraordinary circumstance" nor establish what would be "an additional reasonable period of time." Therefore, critics of the regulations suggested that they permitted indefinite detention of an alien, who is not certified as a terrorist, without charging an immigration or other violation in undefined "extraordinary circumstances," contrary to constitutional standards and the new §236A of the INA, which requires the Attorney General to charge a certified terrorist within 7 days.

Detainee Information. Several suits seeking alien detainee information have been filed in federal and state courts. Immigrant and civil liberties advocacy groups have alleged that many detainees are being deprived of their right to counsel by being provided with outdated and inaccurate lists of legal aid lawyers, not being allowed to call their lawyers or only being permitted to make collect phone calls to seek legal assistance, etc. Therefore, aside from a general concern about the secrecy of

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[83] (...continued)
precedent indicating no constitutional problem.

[84] Pursuant to 18 U.S.C. §3144.

[85] 66 Fed. Reg. 48334 (2001).

[86] Cahill, Stephanie Francis. *ABA Panel Opposes INS "Incommunicado Detention,"* 1 ABA Journal eReport (2002), at: [http://www.abanet.org/journal/ereport/jy26immig.html]; Immigrant Rights Clinic, N.Y.U. School of Law, Shirley Huey *et al., Administrative Comment: Indefinite Detention without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. §287.3*, 26 N.Y.U. Rev. L. & Soc. Change 397 (2001).

[87] 8 C.F.R. §287.3(d).

[88] In lieu of removal proceedings, an alien who is not removable on criminal or terrorist grounds may be permitted to voluntarily depart from the United States within 120 days.

detention proceedings, the ACLU and other groups which are willing to provide legal representation free of charge to the detainees claim that they need information on detainees so that they can contact them to determine whether the detainees need assistance. The DOJ has declined to release the names of detainees on various grounds including the protection of potential witnesses to crimes, the need to protect information concerning on-going investigations into terrorist networks and other national security matters, the protection of public safety and national security, and the protection of the privacy interests of detainees.

The ACLU of New Jersey filed suit on January 22, 2002, in a New Jersey State court against Hudson and Passaic Counties in New Jersey seeking the names and other information concerning alien detainees housed for the INS in county detention facilities. On March 27, 2002, New Jersey Superior Court Judge Arthur D'Italia found that New Jersey statutes required public availability of the requested information and that there was no exception for such information. In the wake of this decision, the INS issued an interim rule restricting the release of information regarding INS detainees in non-federal facilities, effective April 17, 2002.[89] The rule notice emphasized that the new rule does not affect the ability of detainees to seek counsel, to identify themselves, or to communicate with others directly, but only restricts non-federal facilities from releasing information. Ultimately, the New Jersey Appellate Division reversed the Superior Court decision and upheld the authority of the INS in issuing the regulations withholding detainee information, in light of federal government authority over immigration and national security matters preempting State actions in these areas and the INS Commissioner's proper exercise of authority granted to him under the INA.[90] The New Jersey Supreme Court declined to hear the case, letting the decision stand.

Additionally, a coalition of the Center for National Security Studies and other civil liberties advocacy groups filed suit on December 5, 2001, in the federal district court in the District of Columbia seeking the disclosure of alien detainee information in federal records maintained by federal agencies under the Freedom of Information Act (FOIA, found at 5 U.S.C. §552).[91] The Department of Justice had disclosed some of the requested information, but did not release the remainder of the information for reasons noted above. On August 2, 2002, D.C. District Court Judge Gladys Kessler found that the federal government could not justify completely exempting the disclosure of the identities of the detainees or of their lawyers under various exceptions to disclosure under FOIA, including exceptions for information gathered for law enforcement purposes where disclosure would interfere with enforcement proceedings, invade personal privacy, or endanger the life or safety of any individual.[92] The government failed to show that mere disclosure of names

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[89] Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508 (April 22, 2002)(to be codified at 8 C.F.R. pts. 236 and 241).

[90] *ACLU of New Jersey v. County of Hudson*, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002).

[91] *Center for National Security Studies v. Department of Justice*, Civ. No. 01-2500 (D.D.C. filed December 5, 2001).

[92] *Center for National Security Studies v. U.S. Dept. of Justice*, 215 F. Supp. 2d 94 (D.D.C. (continued...)

would compromise the terrorism investigations. However, the court found that the privacy and safety concerns for detainees were valid and could be addressed by permitting each detainee to choose not to have his/her identity revealed. These concerns did not apply to the names of detainees' attorneys, because they had no expectation of anonymity and concerns about safety were speculative. The court further held that the government could not withhold the identities of all material witnesses under FOIA or under sealing orders of a court without further explanation. The court found that the government had properly withheld the dates and locations of arrest, detention, and release since disclosure of such information could compromise the on-going terrorism investigation and the plaintiffs were not entitled to such information under the First Amendment and federal common law. In accordance with the above findings, the court ordered the government to disclose the names of detainees and their lawyers within 15 days, with exceptions for detainees opting to withhold their identities and for material witnesses for whom the government claimed a sealing order which must be submitted for review by the court. Lastly, the court found that the government had not conducted a search adequate to comply with the plaintiffs' FOIA request for any other policy directives about disclosure of detainee information and closed hearings. Therefore, the court ordered the government to conduct a new search within 30 days. The government is appealing this decision and on August 15, 2002, the district court granted a stay of its order pending appeal.[93]

Closed Hearings. Under regulation,[94] immigration hearings, other than exclusion hearings, shall be open to the public except that "[f]or the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing." On September 21, 2001, the Chief Immigration Judge, Michael J. Creppy, pursuant to authorization by Attorney General Ashcroft, issued a memorandum directing Immigration Judges to close hearings in "special interest" cases for which the Department of Justice requires special security procedures, meaning that no visitors, no family, and no press are permitted to be in the courtroom.[95] Accordingly, immigration proceedings concerning some of the post-September 11 detainees were ordered closed to the public.[96] The restriction on information included information on scheduling of a hearing in a particular case even to the extent of neither confirming nor denying that a particular case is on the docket. Consequently, media outlets in Michigan and New Jersey filed suit against Attorney General Ashcroft to enforce their First Amendment interest in reporting on such

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[92] (...continued)
2002).

[93] *Center for National Security Studies v. U.S. Dept. of Justice*, 217 F. Supp. 2d 58 (D.D.C. 2002).

[94] 8 C.F.R. §3.27(b).

[95] Creppy, Michael. *Cases Requiring Special Procedures* (September 21, 2001), at: [http://www.aclu.org/court/creppy_memo.pdf].

[96] According to the *Levin Memo*, 611 persons have been subject to closed hearing pursuant to the directive issued by Chief Immigration Judge Michael Creppy, of whom 419 have had more than one closed hearing.

proceedings, and some of the detainees have also challenged the closing of their hearings.

Suits brought by the media outlets asserting First Amendment rights of the press to have access to the deportation hearing of Rabih Haddad in Michigan were consolidated as *Detroit Free Press v. Ashcroft*; Congressman John Conyers, Jr., ranking member of the House Committee on the Judiciary, also joined the suit. For pre-trial proceedings, this suit was further consolidated with *Haddad v. Ashcroft*, the suit filed by Haddad himself contesting the secrecy of the hearing as a violation of the Administrative Procedures Act,[97] the INA, and his right to due process under the Fifth Amendment of the federal Constitution. On April 3, 2002, District Court Judge Nancy Edmunds granted the plaintiffs' motion for a preliminary injunction for immediate access to future removal hearings for Haddad and transcripts of previous hearings and denying the defendants' motion to dismiss.[98] In granting the preliminary injunction, the court found that the plaintiffs had a strong likelihood of success on the merits. On April 18, 2002, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit denied the federal government's request for an emergency stay of the preliminary injunction, pending consideration of its appeal of the preliminary injunction.[99] The government then complied with the injunction by releasing transcripts of past hearings in the Haddad case. On August 26, 2002, the Sixth Circuit affirmed the granting of the preliminary injunction against blanket closure of deportation hearings in "special interest" cases.[100]

The circuit court analyzed the preliminary injunction under several factors, the most pertinent being the plaintiffs' likelihood of success on the merits of the case. It rejected the federal government's contention that its plenary power over immigration warranted deferential review, finding that such power is limited by the Constitution, including the First Amendment, with regard to non-substantive, procedural immigration laws. By "experience and logic," there is a First Amendment right of public access to deportation hearings. Traditionally, they have been open and public access ensures the integrity of the process. Since a First Amendment right is implicated, the governmental action in hearing closure is subject to a higher standard of judicial review than deference. The government must show that closure is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. Although the court agreed that national security was a compelling governmental interest, it found that blanket closure was not narrowly tailored to serve that interest. A case-by-case consideration of closure would still protect national security interests while also protecting the constitutional right to access. The court found that the remaining factors for analyzing a motion for preliminary injunction, also favored a grant. The plaintiffs would suffer irreparable harm if denied access to the hearings; others would not be substantially harmed by the injunction since closure could still be obtained on a case-by-case basis; and the public interest is best served by open hearings.

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[97] 5 U.S.C. §§551 et seq.

[98] *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002).

[99] *Detroit Free Press v. Ashcroft*, No. 02-1437, 30 Media L. Rep. 1767 (6th Cir. April 18, 2002).

[100] *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

Although removal proceedings for Haddad had been open since the Sixth Circuit's denial of the stay of Judge Edmunds' order in April 2002, Haddad challenged the constitutionality of his original detention/bond hearing because it had been closed under the Creppy memorandum and asked for a new, open hearing before a new immigration judge unbiased by the prior proceedings. On September 17, 2002, in *Haddad v. Ashcroft*,[101] Judge Edmunds granted the plaintiff's motion for a preliminary injunction, ordering the INS to hold a new, open bond hearing before a new immigration judge or to release Haddad within 10 days. The district court found that Haddad had a likelihood of success on the merits because he had a constitutional procedural due process right to an open bond hearing before a new immigration judge. Accordingly, a new immigration judge held a new bond hearing, but determined that a portion of the hearing should be closed to permit the introduction of evidence with national security implications. The reasons for the decision to close the hearing were not entered in the record of the proceedings and the plaintiffs' counsel were not given an opportunity to object to the closure. The news media and Haddad moved to enjoin the immigration judge to detail the reasons for the closing in the record, to allow the newspapers' counsel to be heard, to release transcripts of the closed proceedings and also a copy of the Government's brief, and to grant Haddad's counsel in his challenge to the closed hearings access to certain evidence provided to his immigration counsel. On October 7, 2002, Judge Edmunds concluded that closure was necessary to protect national security, but that the immigration judge should have made findings on the record as to why closure was necessary and that in the future the immigration judge should enter such findings and reasons on the record before closing hearings.[102] Additionally, the district court found that Haddad's counsel should have access to information given to his immigration counsel.

In *North Jersey Media Group v. Ashcroft*, the plaintiffs alleged that the policy of closing removal hearings in certain "special interest" cases pursuant to the Creppy memorandum was a violation of the First Amendment right of access by the press and public to such hearings and of the INS regulations concerning closed hearings. On May 28, 2002, District Court Judge John Bissell granted the plaintiffs' motion for a preliminary injunction prohibiting the federal government from instituting a blanket policy of closing hearings in all special interest cases and denying the defendants' motion to dismiss.[103] After the Third Circuit Court of Appeals refused to grant a stay pending appeal of the district court order to open hearings,[104] the Supreme Court reversed and granted the stay upon an emergency petition by the Attorney General to keep hearings closed pending appeal.[105]

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[101] No. 02-70605 (E.D. Mich. Sept. 17, 2002).

[102] *Detroit Free Press v. Ashcroft*, No. 02-70339 and 02-70605 (E.D. Mich. Oct. 7, 2002).

[103] *North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002).

[104] Greenburg, Jan Crawford. *Court Stops Open Deportation Hearings; A Federal Judge Had Allowed the Public to Attend*. The Philadelphia Inquirer, June 30, 2002. p. A13.

[105] *Ashcroft v. North Jersey Media Group*, 122 S. Ct. 2655, 153 L. Ed. 2d 831 (2002).

On October 8, 2002, the Third Circuit Court of Appeals, in a 2-1 decision, reversed the district court and denied the preliminary injunction.[106] Like the Sixth Circuit, the Third Circuit appellate panel found that the executive branch power over immigration proceedings is limited by First Amendment interests under the Constitution. However, unlike the Sixth Circuit, the Third Circuit found that there was no First Amendment right of public and press access to deportation hearings by "experience and logic." The court found that the tradition of open deportation hearings was "too recent and inconsistent to support a First Amendment right of access." The court rejected the newspaper plaintiffs' contention that a First Amendment right of access could be found based on the logic prong alone of the test for whether there is a First Amendment right of access. The court found that even if it were to adopt this position, the logic prong of the test was not satisfied for open deportation hearings. In the logic part of the test, the court considered whether public access played a significant positive role in deportation hearings. On balance, the threat to national security posed by open hearings outweighed the public good served by open hearings. Having found no First Amendment right of access to deportation hearings, the court did not have to consider whether blanket closures under the Creppy memorandum were narrowly tailored to protect national security and whether the national scope of the district court's injunction was too broad. Judge Scirica, the dissenter on the panel, agreed with the Sixth Circuit that there was a sufficient tradition of open deportation hearings, that there was a First Amendment right of access, and that closure should be determined on a case-by-case basis. Judge Scirica did not think that the national scope of the district court's injunction was appropriate and that federal courts in other jurisdictions should have the opportunity to decide the issues for themselves and the U.S. Supreme Court should have the chance to resolve any jurisdictional differences on the issues. The split between the Third and Sixth Circuits presents such an opportunity, causing speculation in legal, media and immigration circles about whether the Supreme Court will be petitioned to take one or the other or both cases and what the ramifications may be if the Supreme Court takes a case.

In response to litigation on blanket closure, the Attorney General implemented regulations, effective May 21, 2002, authorizing immigration judges to close hearings on a case-by-case basis and to issue protective orders for cases involving security-sensitive information upon request by federal government lawyers and noting that the new regulations were intended to complement the Creppy memorandum of September 21, 2001.[107] Subsequently, Chief Immigration Judge Michael Creppy issued a memorandum on the Immigration Court's policies and procedures regarding these regulations, citing the new regulatory criteria of substantial likelihood that the information for which protection is granted would harm national security or U.S. law enforcement interests if disclosed and establishing procedures for ensuring non-disclosure of protected information.[108]

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[106] *North Jersey Media Group v. Ashcroft,* No. 02-2524 (3d Cir. Oct. 8, 2002).

[107] 67 Fed. Reg. 36799 (2002).

[108] Creppy, Michael. *Interim Operating Policies and Procedures Memorandum 02-02* (July 16, 2002).

Detention Conditions. Immigration, civil, and human rights groups have alleged that the post-September 11 alien detainees have been subjected to constitutional and human rights abuses under the conditions of their detention. Amnesty International published a report detailing its allegations which it sent to the federal government with a memorandum. In early April 2002, DOJ announced that its Office of the Inspector General was opening an investigation into allegations of abuse at two detention facilities, the Metropolitan Detention Center in Brooklyn, which is under the jurisdiction of the federal Bureau of Prisons, and the Passaic County jail in New Jersey.

A class action suit, *Turkmen v. Ashcroft*, CV-02-2307, was filed in federal district court in New York on April 17, 2002, by the Center for Constitutional Rights on behalf of three named plaintiffs and a class described as males who are nationals of Middle Eastern or South Asian countries, are practitioners of Islam, were ordered deported or granted voluntary departure yet detained beyond the time necessary to effect removal from the United States. These plaintiffs allege violations of their rights under the First, Fourth, Fifth, and Sixth Amendments of the federal Constitution, including being prevented from practicing their religion; targeted on the basis of their religion, ethnicity and nationality; denied access to counsel; and detained longer than necessary to effect removal. Additionally, the suit alleges that rights under customary and treaty-based international law were violated when the plaintiffs were not permitted to contact their consulates or embassies for assistance and when they were subjected to cruel and inhumane treatment by their guards. This case is pending.

In addition to the *Turkmen* case, on September 9, 2002, the Lawyers' Committee for Civil Rights, representing Hady Hassan Omar, an Egyptian Muslim immigrant who was detained for 73 days last fall as part of the post-September 11 investigatory detention of non-citizens, filed a federal law suit in Louisiana against various federal officials and agencies, alleging violations of his civil rights under the First, Fourth, Fifth, and Fourteenth Amendments of the Constitution and asking $1 million in damages.[109] Some of the allegations are similar to those in the *Turkmen* case, including denial of access to counsel and being prevented from practicing the plaintiff's religion.

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[109] Matthew Brzezinski, *Hady Hassan Omar's Detention*, N.Y. Times, Oct. 27, 2002, at Magazine 50-55; *9/11 detainee lawsuit alleges abuse in prison*, Chi. Trib., Sept. 11, 2002, at News 6; Amy Upshaw, *Egyptian arrested in Arkansas sues; Mistreated by federal authorities in post-9/11 roundup, he claims*, Ark. Democrat-Gazette, Sept. 10, 2002, at A1; Bob Egelko, *Detainee sues over treatment; Egyptian immigrant contends he was repeatedly searched, harassed*, S.F. Chron., Sept. 10, 2002, at A9; Dan Eggen, *9/11 Detainee Files Lawsuit; Egyptian Arrested Sept. 12 Alleges Mistreatment*, Wash. Post, Sept. 10, 2002, at A02.