

Is Mandatory Detention of Unlawful Entrants Seeking Asylum Constitutional?

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Non-U.S. nationals (aliens) apprehended by immigration authorities when attempting to unlawfully enter the United States are generally subject to a [streamlined, expedited removal process](#), but may be placed in “formal” [removal proceedings](#) and pursue asylum claims if found to have a credible fear of persecution. In 2019, Attorney General (AG) William Barr, who has [power to review](#) adjudicatory decisions of the [Board of Immigration Appeals](#) (BIA), the highest administrative body responsible for interpreting immigration laws, concluded in *Matter of M-S-* that federal law requires the continued detention of aliens screened for expedited removal who are transferred to formal removal proceedings pending adjudication of their asylum claims. (Additional discussion of the AG’s decision can be found [here](#).) Later that year, a federal district court [held](#) in *Padilla v. ICE* that this mandatory detention scheme “violates the U.S. Constitution” because it denies aliens who have entered the United States the opportunity to seek their release on bond. This ruling was largely [affirmed](#) by the U.S. Court of Appeals for the Ninth Circuit in March 2020, but the reasoning of these decisions—at least when applied to aliens apprehended shortly after arriving in the United States—may be in tension with the Supreme Court’s ruling in *DHS v. Thuraissigiam*, decided a few months later. The government has [petitioned the Supreme Court for review](#) of the *Padilla* decision. In any event, at present, the *Padilla* decision means that unlawful entrants transferred to formal removal proceedings for consideration of their asylum applications may not be indefinitely detained by immigration authorities without a bond hearing.

Legal Background

The Immigration and Nationality Act (INA) authorizes, and in some cases requires, the Department of Homeland Security (DHS) to detain aliens who are subject to removal. The immigration detention scheme is multifaceted with [different rules](#) depending on whether an alien is arriving in the United States or apprehended within the country, whether the alien has engaged in certain proscribed conduct, and whether the alien has been issued a final order of removal.

An alien who is subject to removal is commonly placed in “formal removal” proceedings before an immigration judge (IJ) within the [Executive Office for Immigration Review](#) (EOIR) of the Department of Justice (DOJ). Under [INA § 236\(a\)](#), DHS’s Immigration and Customs Enforcement (ICE) “may” detain the alien pending those removal proceedings, *or* release the alien on bond or the alien’s own

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recognizance. If ICE decides to maintain custody, the alien may request review of ICE's custody determination at a bond hearing before an IJ.

Under INA § 235(b)(1), however, arriving aliens and “certain other aliens” who recently entered the United States without inspection are subject to [expedited removal](#) if they lack valid entry documents or have tried to gain their admission by fraud or misrepresentation. An alien placed in expedited removal may be [ordered removed](#) without a hearing unless the alien indicates an intention to apply for asylum or a fear of persecution if removed to a particular country. [INA § 235\(b\)\(1\)](#) instructs that, if the alien is found to have a credible fear of persecution, he or she “shall be detained for further consideration of the application for asylum” in formal removal proceedings. Although detention is generally mandatory under [INA § 235\(b\)\(1\)](#), DHS [has authority](#) to [parole](#) the alien “for urgent humanitarian reasons or significant public benefit.” There is no administrative or judicial review of the parole decision. (Additionally, in response to the COVID-19 pandemic, ICE [has released aliens from custody](#) who are susceptible to severe illness, and the agency has received fewer detainees given the reduced number of immigration arrests.)

Over the years, immigration authorities and reviewing courts have taken differing views on the interplay between the mandatory detention regime for aliens who are initially subject to expedited removal and the discretionary detention regime that generally applies to aliens placed directly in formal removal proceedings. If an alien is first screened for expedited removal, does he or she remain subject to the mandatory detention requirements of INA § 235(b)(1) if transferred to formal removal proceedings to pursue asylum claims? Or can DHS release all or some subset of these aliens on bond or their own recognizance once transferred to formal removal proceedings?

In 2005, the BIA ruled in [Matter of X-K-](#) that INA § 235(b)(1)'s mandatory detention scheme applied to arriving aliens (i.e., those apprehended at a port of entry) who were transferred to formal removal proceedings after being found to have a credible fear of persecution, but not to “certain other aliens” who entered the United States without inspection and were initially screened for expedited removal. The BIA reasoned that, unlike arriving aliens placed in formal removal proceedings, “certain other aliens” first screened for expedited removal do not fall within any of the classes of aliens [enumerated by DOJ regulations](#) as ineligible for bond hearings.

But in 2018, the Supreme Court in [Jennings v. Rodriguez](#) read INA § 235(b)(1) as “unequivocally” requiring the detention of all aliens first placed in expedited removal but then transferred to formal removal proceedings. Even so, the Court did not decide whether the indefinite detention of aliens without bond under INA § 235(b)(1) could violate the Due Process Clause—leaving it to lower courts to decide, in the first instance, whether prolonged detention under that authority may be unconstitutional.

At least partially prompted by the High Court's decision in [Jennings](#), AG Barr issued a decision in [Matter of M-S-](#) overturning the BIA's earlier opinion in [Matter of X-K-](#). (Though responsibility for administering federal immigration laws is divided among several agencies, the AG's rulings on questions of law are [controlling](#).) The AG [ruled](#) that aliens subject to expedited removal who are placed in formal removal proceedings after a positive credible fear determination “remain ineligible for bond, whether they are arriving at the border or are apprehended in the United States.”

Padilla v. ICE: Procedural History and Preliminary Injunction

Following the Supreme Court's decision in [Jennings](#) but before the AG's ruling in [Matter of M-S-](#), a group of asylum seekers who entered the United States without inspection and were placed in formal removal proceedings after establishing a credible fear of persecution brought a [class action lawsuit](#) against immigration authorities. The plaintiffs [claimed](#), among other things, that they were subject to excessively prolonged detention during their initial expedited removal screenings and upon their transfer to formal removal proceedings, and that this prolonged detention violated their due process rights.

The court initially [granted](#) the plaintiffs' [motion for a preliminary injunction](#) requiring EOIR to (1) conduct bond hearings for detained asylum seekers who entered the United States without inspection, and who were initially screened for expedited removal and found to have a credible fear of persecution, within seven days of a bond hearing request, and release any alien whose detention time exceeds that seven-day limit; (2) place the burden of proof on DHS in those bond hearings to show why the alien should not be released; (3) record the bond hearing and produce a transcript; and (4) produce a written bond decision "with particularized determinations of individualized findings." Citing the BIA's decision in *Matter of X-K-*, which at the time was still controlling on immigration authorities, the court declared that asylum seekers determined to have a credible fear of persecution may "request release from custody during the pendency of the asylum process."

Following *Matter of M-S-*, the federal district court [modified](#) its injunction. But the district court ultimately [concluded](#) that, notwithstanding the AG's ruling in *M-S-* that all aliens placed in formal removal proceedings after a positive credible fear screening are ineligible for bond, the plaintiffs had a right to bond hearings because they were apprehended within the United States, and were thus "entitled to due process protections." The court also [noted](#) that although the Supreme Court in *Jennings* had read INA § 235(b)(1) as requiring detention without bond, the High Court did not decide whether that statutory mandate was unconstitutional. Thus, the court [affirmed](#) its previously entered injunction and [ruled](#) that INA § 235(b)(1)'s prohibition against release on bond of aliens placed in formal removal proceedings after establishing a credible fear of persecution "violates the U.S. Constitution."

The government appealed to the U.S. Court of Appeals for the Ninth Circuit. On March 27, 2020, the Ninth Circuit [affirmed, in part, and vacated, in part](#), the district court's ruling. The Ninth Circuit agreed with the lower court that the plaintiffs were [constitutionally entitled](#) to a bond hearing, [declaring](#) that "once a person is standing on U.S. soil—regardless of the legality of his or her entry—he or she is entitled to due process." But the court [held](#) that there was insufficient evidence to justify imposing a seven-day time limit in which to hold a bond hearing and certain other procedural requirements, and that the district court failed to consider whether these requirements would burden the immigration courts. The court thus [directed](#) the district court to consider the appropriate procedures that must be followed with respect to the required bond hearings.

Future Judicial Developments

While the Supreme Court in *Jennings* ruled that DHS has *statutory* authority to detain aliens, potentially indefinitely, pending their formal removal proceedings, the Court did not address constitutional arguments against this framework. Both the Ninth Circuit and the district court in *Padilla*, however, have squarely confronted that question, [answering that](#) INA § 235(b)(1)'s mandatory detention scheme is unconstitutional because it denies aliens who have entered the United States the opportunity to challenge their detention at bond hearings. The court rulings effectively bar DHS from indefinitely detaining unlawful entrants without an opportunity to seek bond pending consideration of their asylum claims. The *Padilla* rulings call into question the extent to which unlawfully present aliens in removal proceedings have constitutional due process protections. On one hand, the Supreme Court has [long recognized](#) that aliens who have physically entered the United States, even unlawfully, are "persons" under the Fifth Amendment's Due Process Clause. Due process protections [generally include](#) the right to a hearing and a meaningful opportunity to be heard before deprivation of a liberty interest. But the Court has, at times, suggested that the scope of due process [may turn upon whether the alien has been admitted into the United States or developed substantial ties](#) to this country.

Furthermore, the Court has recognized that aliens at the threshold of initial entry, including those who are detained within the United States pending determinations of their admissibility, have [fewer constitutional protections](#) regarding their entry and removal, and are generally entitled only to whatever procedures Congress provided by statute. For instance, in *Shaughnessy v. United States ex rel. Mezei*, the Supreme

Court in 1953 upheld the indefinite detention of an alien seeking admission into the United States, concluding that the alien had not made an “entry” despite being detained on Ellis Island, and could be treated “as if stopped at the border.”

Distinguishing *Mezei*, the district court in *Padilla* determined that the plaintiffs were “non-arriving aliens” because they were apprehended within the territorial boundaries of the United States, and thus entitled to due process protections, and the Ninth Circuit [upheld](#) that conclusion. But more recently, in *DHS v. Thuraissigiam*, the Supreme Court [stated](#) that only “aliens who have established connections in this country have due process rights in deportation proceedings,” and [held](#) that an alien apprehended 25 yards from the border after entering the United States unlawfully could be “treated for due process purposes as if stopped at the border.” Other lower courts [have similarly determined](#) that “recent clandestine entrants” who were apprehended within hours of entering the United States, and lacked substantial ties to this country, were “assimilated to the status of an arriving alien” and had no constitutional protections attaching to immigration proceedings based on their physical presence alone.

Even so, some courts have held that the constitutional limitations that apply to arriving aliens seeking entry into the United States [pertain only](#) to their *procedural* rights regarding their applications for admission, but do not foreclose the availability of certain fundamental rights. Thus, some courts [have held](#) that aliens arriving in the United States have sufficient constitutional rights to challenge a potentially indefinite detention, regardless of whether they had entered the country or developed substantial ties.

The government has [petitioned the Supreme Court for review](#) of the Ninth Circuit’s *Padilla* decision. Among other things, the government [argues](#) that the Supreme Court in *Thuraissigiam* has rejected the conclusion reached by the Ninth Circuit that an alien who has set foot on U.S. soil is entitled to protections under the Due Process Clause. Citing *Thuraissigiam*, the government argues that an alien apprehended shortly after entering the United States can be treated as an alien stopped at the border who has limited constitutional protections. If the Supreme Court reviews the *Padilla* case, the Court may consider whether the Ninth Circuit’s conclusion regarding the scope of due process protections available to aliens apprehended near the border conflicts with *Thuraissigiam*.

Arguably, the Supreme Court’s decision in *Thuraissigiam* suggests that the *Padilla* plaintiffs, who were apprehended [shortly after entering the United States](#) without inspection, have limited constitutional protections and may be entitled only to those [protections Congress provided](#) by statute. Thus, the Court could conclude that the potentially indefinite detention of asylum seekers authorized by INA § 235(b)(1) is constitutionally permissible—at least as applied to aliens apprehended near the U.S.-Mexico border. But it is less certain whether these constitutional limitations would apply to unlawful entrants encountered further within the interior of the United States, given that they are more likely to have “established connections,” although the Court has not squarely assessed the nature of those “connections” for purposes of determining the protective reach of the Due Process Clause. In any case, if the Supreme Court reviews *Padilla*, the Court could clarify the extent to which unlawful entrants may constitutionally challenge their prolonged confinement pending consideration of their asylum claims.

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