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Immigration-Related Detention: Current Legislative Issues

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Alison Siskin
Specialist in Immigration Policy
Domestic Social Policy Division

Congressional Research Service

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Summary

The attacks of September 11, 2001, have increased interest in the authority under statute to detain noncitizens (aliens) in the United States. Under the law, there is broad authority to detain aliens while awaiting a determination of whether the noncitizen should be removed from the United States. The law also mandates that certain categories of aliens are subject to mandatory detention (i.e., the aliens must be detained). Aliens subject to mandatory detention include those arriving without documentation or with fraudulent documentation, those who are inadmissable or deportable on criminal grounds, those who are inadmissable or deportable on national security grounds, those certified as terrorist suspects, and those who have final orders of deportation. Aliens not subject to mandatory detention may be detained, paroled, or released on bond. The priorities for detention of these aliens are specified in statute and regulations. FY2007, on an average day, 30,295 noncitizens were in Department of Homeland Security (DHS) custody.

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

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

The 108th Congress passed P.L. 108-458, the Intelligence Reform and Terrorism Prevention Act of 2004, directing the Secretary of DHS to increase the amount of detention bed space by not less than 8,000 beds for each year, FY2006 through FY2010. In the 110th Congress, bills have been introduced covering a range of provisions and perspectives concerning the detention of noncitizens. Several bills — including S. 1639, H.R. 2954, and H.R. 4065 — would codify and modify the regulations governing the review of post-removal order detention cases. Other bills (such as S. 850, H.R. 750, and H.R. 1355) would mandate that DHS increase the amount of detention space. In addition, other bills (e.g., H.R. 2954) would make additional categories of aliens subject to mandatory detention. Furthermore, S. 844 would establish detention procedures for unaccompanied minors, while S. 2074/H.R. 3531 would establish procedures for those arrested in workplace raids. This report will be updated as legislative action occurs.

Contents

List of Figures

Immigration Related Detention: Current Legislative Issues

Introduction

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

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

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

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

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

Overview of Noncitizen Detention

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

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

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

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

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

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[3] INA §236(a).

[4] P.L. 107-296 §441.

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

[6] P.L. 107-296, signed into law on November 25, 2002.

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

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

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

The Attorney General has final say in matters of immigration law that come before EOIR.[9] For example, on April 17, 2003, the Attorney General released a decision[10] that instructs immigration judges to consider "national security interests implicated by the encouragement of further unlawful mass migrations ..." in making bond determinations for unauthorized migrants who arrive in "the United States by sea seeking to evade inspection." In the decision, the Attorney General states that he retains the authority to detain or authorize bond for aliens, but the authority is "shared" with the Secretary since DHS' officials make the initial determination whether an alien will remain in custody during removal proceedings.[11]

Statutory Authority for Detention

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

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

[10] 23 I&N December 572 (A.G. 2003).

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

[12] INA §236(a).

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

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

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

In October 1998, the former INS issued a memorandum establishing detention guidelines consistent with the changes made by IIRIRA.[17] According to the guidelines, detainees are assigned to one of four detention categories: (1) required; (2) high priority; (3) medium priority; and (4) lower priority.[18] Aliens in required detention must be detained[19] while aliens in the other categories may be detained depending on detention space and the facts of the case. Higher priority aliens should be detained before aliens of lower priority.[20]

Additionally, the U.S.A. Patriot Act[21] amended the INA to create a new section (236A) which requires the detention of an alien whom the Attorney General certifies as someone who the Attorney General has "reasonable grounds" to believe is involved in terrorist activities or in any other activity that endangers national security. The Attorney General must initiate removal proceedings or bring criminal charges within seven days of arresting the alien or release the alien. An alien who is detained solely as a certified terrorist, who has not been removed, and who is unlikely to be removed in the foreseeable future may be detained for periods of up to six months

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

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

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

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

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

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

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

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

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

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

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

[23] INA §287(a)(2).

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

[25] INA §241(a)(1)(A).

[26] INA §241(a)(6).

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

Local Law Enforcement.[28] The INA contains both criminal and civil violations. Historically, the authority for state and local law enforcement officials to enforce immigration law has been construed to be limited to the criminal provisions[29] of the INA. The enforcement of the civil provisions,[30] which includes apprehension and removal of deportable aliens, has strictly been viewed as a federal responsibility, with states playing an incidental supporting role.

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

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[28] For more information on the role of state and local law enforcement, see CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Blas Nuñez-Neto, Michael John Garcia, and Karma Ester. (Hereafter cited as CRS Report RL32270, *Enforcing Immigration Law*.)

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

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

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

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

Mandatory Detention

The law requires the detention of

- criminal aliens;[33]
- national security risks;[34]
- asylum seekers, without proper documentation, until they can demonstrate a "credible fear of persecution";
- arriving aliens[35] subject to expedited removal (see below);
- 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.[36]

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

Indefinite Detention. The mandatory detention provisions created in IIRIRA led to some aliens being in indefinite administrative custody. These aliens had been ordered removed from the United States, but were detained because the aliens could not obtain travel documents to another country or the immigration officials refused

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[33] 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 five years or more; (4) drug trafficking; (5) prostitution and commercialized vice; and (6) receipt of immunity from prosecution for serious criminal offenses (INA §212(a)). An alien is deportable for the following offenses: (1) crimes of moral turpitude; (2) aggravated felonies; (3) high speed flight; (4) controlled substance violations; (5) certain firearm offenses; and (6) crimes of domestic violence, stalking, and child abuse (INA §237(a)(2)). Any alien who is found in the United States who is 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 sentenced to less than one year; (2) aliens convicted of high speed flight; and (3) aliens convicted of crimes of domestic violence, stalking, and child abuse or neglect.

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

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

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

[37] INA §236(c)(1).

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

In a 5-4 decision in Zadvydas v. Davis (2001),[40] the U.S. Supreme Court held that a statute permitting indefinite detention would raise serious constitutional problems because the Due Process Clause of the Fifth Amendment prohibits depriving any person, including aliens, of liberty without due process of law. Therefore, in keeping with principles of statutory construction and the absence of clear congressional intent for indefinite detention, the Court read an implicit limitation into the post-removal detention statute, such that detention is limited to a period "reasonably necessary" to achieve an alien's removal. The Supreme Court established six months after the removal order as the presumptively reasonable period within which to effect removal. After this period, once an alien shows that there is good reason to believe that "there is no significant likelihood of removal in the reasonably foreseeable future," the government must rebut that showing with sufficient evidence. The Court emphasized that its holding does not mean that all aliens must be released in six months nor that an alien may not be held until it has been determined that "there is no significant likelihood of removal in the reasonably foreseeable future." The Court suggested that special arguments could be made for a statutory scheme of preventive detention for terrorists or other aliens in special circumstances and for heightened judicial deference for executive and legislative branch decisions regarding national security matters.

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[38] Most indefinite detainees were from countries that lack normal diplomatic relations with the United States (e.g., Cuba, Iran, or North Korea). (The majority of "lifers" were Cubans who came during the Mariel boatlift. The Mariel boatlift was an influx of asylum seekers during a seven-month period in 1980 when approximately 125,000 Cubans and 25,000 Haitians arrived by boat to South Florida. About 10% of the Mariel Cubans had histories of mental illness or violent crime.) Other indefinite detainees were 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 could not be determined. Other indefinite detainees were from countries that refused 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 have been indefinitely detained because the alien had strong ties to the United States, and only attenuated connections to their country of origin. For example, an alien may be brought by his parents to the United States as a two-year old, and live in the United States for 40 years without naturalizing. If the person commits a crime and is removable, his birth country may refuse to take him. For more on the Mariel Cubans see, U.S. House of Representatives, Committee on Appropriations, A report on the Department of Justice's management and operation of programs dealing with the detention, medical care, and outplacement of Mariel Cubans, April 1991.

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

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

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.[41] Subsequently, Chief Immigration Judge Michael Creppy issued a memorandum on the Immigration Court's policy regarding these regulations. The regulations and the memorandum establish four categories of aliens whose removal from the United States is not foreseeable, but whom the Attorney General may continue to detain. These "special circumstances" include:

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

Of these four categories, only the fourth requires the involvement of the Immigration Court; the other three remain under DHS discretion.[42] Between November 14, 2001, and March 9, 2005, only 17 aliens whose removal was not foreseeable had been detained under the "special circumstances." Two aliens were detained because of serious adverse foreign policy consequences, and 15 were detained because they were determined to be specifically dangerous.[43]

In *Clark v. Martinez*,[44] the Court held that the rationale it applied in *Zadvydas* to aliens who had been admitted to the United States and were deportable also applied to aliens who had not been legally admitted into the United States, were found inadmissible and ordered removed, and were being detained beyond the statutory removal period although removal was not reasonably foreseeable.[45] Accordingly, the six-month presumptive detention period applied. In *Zadvydas*, the Court 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

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

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

[43] Unpublished data from DHS.

[44] 543 U.S. 371, 160 L. Ed. 2d 734 (2005). This paragraph was written by Margaret Mikyung Lee, Legislative Attorney, American Law Division.

[45] 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 right to enter or remain in the country, whereas those who are deportable do have greater protections.

entered the United States.[46] Therefore, the Court had suggested that it might reach a different conclusion for indefinite detention of inadmissible aliens from the one it reached in *Zadvydas* for deportable aliens and noted that the statutory purposes and constitutional concerns for deportable aliens were not the same for inadmissible aliens. However, in *Clark v. Martinez*, it decided that to treat inadmissible aliens differently under the removal statute would render an inconsistent interpretation of the removal statute, where the statute itself made no distinction between the treatment of inadmissible and deportable aliens. Justice Thomas criticized the Court's opinion as departing from its constitutional rationale in *Zadvydas* and its suggestion in that case that inadmissible aliens presented a different situation.[47] At the same time, Justice Thomas agreed with the Court's "fidelity to the text" of the removal statute; he believed that *Zadvydas* had been wrongly decided and should have been overruled.

Expedited Removal and Detention. Aliens who arrive in the United States without valid documentation or with false documentation are subject to a process known as "expedited removal," under which the alien is ordered removed from the United States, and the removal decision is not subject to any further hearings, reviews, or appeals.[48] Most aliens subject to this process face continuous detention. Aliens subject to expedited removal must be detained until they are removed and may only be released due to medical emergency or if necessary for law enforcement purposes. If the arriving alien expresses a fear of persecution or an intent to apply for asylum, the alien is placed in detention until a "credible fear" interview can be held. If the alien is found to have a credible fear, he may be paroled into the United States. If the credible fear is unsubstantiated, the alien is detained until the alien is removed from the United States.[49]

Asylum Seekers. As discussed earlier, the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) mandated that aliens who arrive without proper documentation and claim asylum be detained prior to their "credible

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[46] 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.

[47] 160 L. Ed. 2d at 752.

[48] INA §235(b)(1)(A)(i). For more on expedited removal, see CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

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

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.[50] False asylum claims utilize limited resources, causing those with legitimate claims to have to wait longer to have their cases processed. Thus, many argued that the only way to deter fraudulent asylum claims was to detain asylum seekers rather than releasing them on their own recognizance. Indeed some claim that the practice of detaining asylum seekers has reportedly helped reduced the number of fraudulent asylum claims.[51]

However, some contend that the policy of detaining all asylum seekers is too harsh. They argue that there is a need to inhibit fraudulent asylum claims, but mandatory detention of asylum seekers causes more problems than it solves. The position of the United Nations High Commission on Refugees is that detention of asylum seekers is "inherently undesirable."[52] Detention may be psychologically damaging to an already fragile population such as those who are escaping from imprisonment and torture in their countries. Often the asylum seeker does not understand why they are being detained. Additionally, asylum seekers are often detained with criminal aliens. Some contend that ICE should develop alternatives to detention (e.g., electronic monitoring) for asylum seekers.

Release on Parole and Bond

The Secretary has the authority to parole detained aliens who are not subject to mandatory detention. Most arriving aliens are not eligible for parole. Parole is permitted for arriving aliens with serious medical conditions, pregnant women, juvenile aliens who will be witnesses, and "aliens whose continued detention is not in the public interest."[53] In general, parole is available on a "case-by-case basis for urgent humanitarian reasons or significant public benefit."[54]

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

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

[52] 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.

[53] 8 C.F.R. §212.5(b).

[54] 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.

Aliens not subject to mandatory detention may also be released on bonds of a minimum of $1,500.[55] 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.

Rights of the Detained

The courts have ruled that detained aliens not under expedited removal[56] have the following rights:

- the right to apply for asylum;
- the right to communicate with consular or diplomatic officers of their home country;[57]
- the right to be represented by counsel (but not at government expense);[58]
- 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.[59] Custody and bond determinations can be reviewed by an immigration judge at any time before the removal order becomes final, except in certain cases.[60] Additionally, the alien may appeal the immigration judges' decision to the Board of Immigration Appeals (BIA). Nonetheless, the courts have afforded the Administration much discretion in decisions related to where aliens are detained, the management of detention facilities, and the treatment of aliens.

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

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

[57] 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))

[58] 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.

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

[60] 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.

Detention Statistics

Detention Population

As **Figure 1** shows, between FY1994 and FY2001, the average size of the daily noncitizen detention population increased steadily. There was a slight decrease in the size of the detention population between FY2001 and FY2002, and then a steady increase between FY2002 and FY2004. The daily population decreased between FY2004 and FY2006, and then increased significantly in FY2007. As of December 31, 2007, the average daily detention population for FY2008 is larger than the FY2007 average population.[61] Between FY1996, when IIRIRA was enacted, and FY2007, the size of the daily population has more than doubled, from 9,011 to 30,295 aliens. The largest increase occurred between FY2006 and FY2007, when Congress increased bed space funding from 20,800 to 27,500 beds. Notably, for FY2007, the average daily detention population exceeded the number of beds funded.

ICE detained approximately 237,667 aliens during FY2005.[62] During that year, the average daily detention population was 19,619. Although nearly 50% of all detainees were from Mexico, they tended to have short stays in detention and, thus, they accounted for only 24% of detention bed days. The other leading countries for the percentage of detention bed days were Honduras (9%); El Salvador and Guatemala (8% each); Cuba (5%); China (4%); and Brazil, Haiti, Jamaica, and the Dominican Republic (each with 3%).[63]

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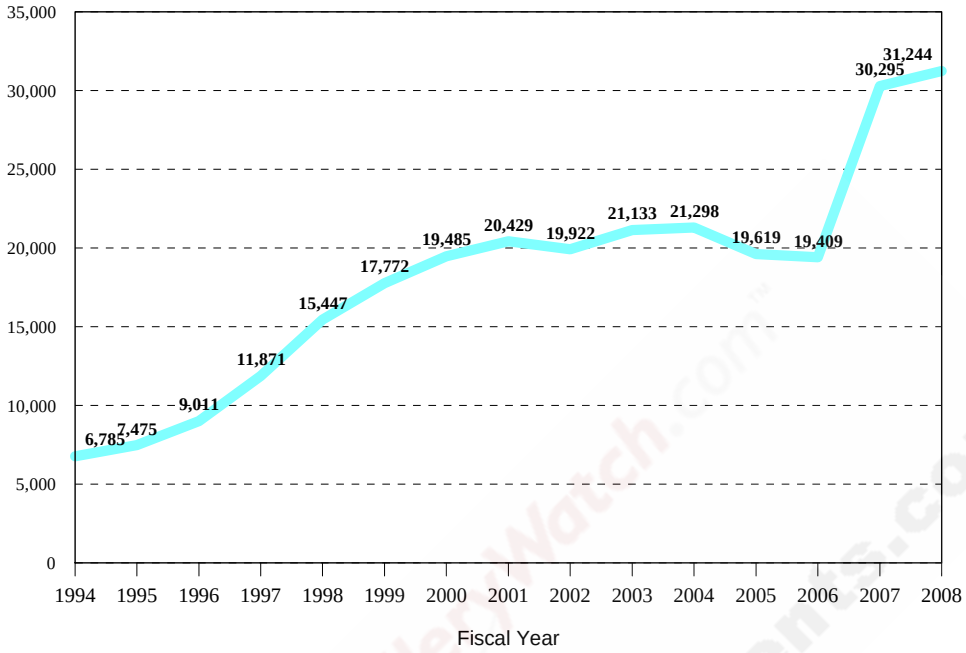
[61] Unpublished DHS data obtained from Norma Cheech, Bureau of Immigration and Customs Enforcement Office of Congressional Affairs, Department of Homeland Security, January 31, 2008.

[62] In FY2004, approximately 51% of all detained aliens had criminal records. This statistic was not available for FY2005. Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2004*, November 2005, p. 5.

[63] Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2005*, November 2006, p. 4.

Figure 1. Daily Detention Population FY1994- FY2008



Source: FY1994 through FY2005 CRS presentation of published DHS data. FY2006 through FY2008 CRS presentation of unpublished DHS data.
Note: FY2008 is the average daily population in detention through Dec. 31, 2007.

Detention Space and Cost

Many contend that DHS does not have enough detention space to house all those who should be detained. They contend that the increase in the number of classes of aliens subject to mandatory detention has impacted the availability of detention space for lower priority detainees. There are reportedly 300,000 noncitizens in the United States who have been ordered deported who have not left the country. Some argue that these 300,000 people would have left the country if they had been detained once they were ordered deported. A study done by DOJ's Inspector General found that almost 94% of those detained with final orders of removal were deported while only 11% of those not detained who were issued final orders of removal left the country.[64] Concerns have been raised that decisions on which aliens to release and when to release the aliens may be based on the amount of detention space, not on the merits of individual cases, and that the amount of space may vary by area of the country leading to inequities and disparate policies in different geographic areas.[65]

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

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

In addition, the overall increase in the number of noncitizens in DHS detention has raised questions about the cost of detaining noncitizens. For FY2004, DHS budgeted $80 a day for each detainee held in detention.[66] This cost does not include transportation or the cost of deporting the alien. For FY2000 through FY2002, INS budgeted $75 a day for each detainee held in detention.[67]

Division E of the Consolidated Appropriations Act, 2008 (P.L. 110-161) appropriated $2,381 million for DRO, an increase of $397 million (20%) over the FY2007 appropriation.[68] ICE reports that this will fund 32,000 beds.[69] For the previous fiscal year, The Department of Homeland Security Appropriations Act, FY2007 (P.L. 109-295),[70] appropriated $1,984 million for DRO, 46% more than the FY2006 appropriation of $1,358 million.[71] The Conference report (H.Rept. 109-699) stated that with the new DRO funding, ICE would be able to sustain an average bed space capacity of 27,500, as proposed by the President.[72]

Alternatives to Detention. Due to the cost of detaining aliens, and the fact that many non-detained aliens with final orders of removal do not leave the country, there has been interest in developing alternatives to detention for certain types of aliens who do not require a secure detention setting. On June 21, 2004, ICE began a pilot program for low-risk, non-violent offenders in eight locations.[73] The program, the Intensive Supervision Appearance Program (ISAP), provides less restrictive alternatives to detention, using such tools as electronic monitoring devices (e.g., ankle bracelets), home visits, work visits, and reporting by telephone, to monitor aliens who are out on bond while awaiting hearings during removal proceedings or

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

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

[68] For more information on FY2008 appropriations see, CRS Report RL34004, *Homeland Security Department Appropriations: FY2008*, coordinated by Jennifer Lake and Blas Nuñez-Neto.

[69] Unpublished DHS data obtained from Norma Creech, Bureau of Immigration and Customs Enforcement Office of Congressional Affairs, Department of Homeland Security, January 31, 2008.

[70] Signed into law on October 4, 2006. For more information on FY2007 appropriations see, CRS Report RL33428, *Homeland Security Department Appropriations: FY2007*, coordinated by Jennifer Lake and Blas Nuñez-Neto, pp. 45-52.

[71] P.L. 109-90, signed into law on October 18, 2005.

[72] DHS FY2007 Congressional Budget Justifications, p. ICE-S&E-4. For FY2006, the funded number of beds was 20,800. CRS Report RL33351, *Immigration Enforcement in the United States*, coordinated by Alison Siskin.

[73] The locations are San Francisco, California; Denver, Colorado; Miami, Florida; Baltimore, Maryland; St. Paul, Minnesota; Kansas City, Missouri; Portland, Oregon; and Philadelphia, Pennsylvania. An earlier pilot using Electronic Monitoring Devices was conducted in Anchorage, Alaska; Miami, Florida; and Detroit, Michigan.

the appeals process.[74] Department of Homeland Security Appropriations Act for FY2007 appropriated $44 million for alternatives to detention, including the ISAP.

September 11, 2001, Detainees

In the wake of the September 11, 2001 attacks many noncitizens who resemble the ethnic, national origin and religious description of the attackers were detained or removed from the United States. The Department of Justice (DOJ) did not release the names of the detainees and chose to close immigration hearings for some of them. Civil and human rights advocacy groups, including Amnesty International and the Center for Constitutional Rights, alleged that the constitutional rights of the detainees were violated and that they were subjected to human rights abuses while in detention. Consequently, several law suits were filed challenging the non-disclosure of individual detainee information, the closed hearings, and the detention conditions.[75]

Not all aliens arrested in connection with the investigation into the September 11 attacks have been detained in INS custody. Some are likely to have been included among those charged with federal crimes in connection with the September 11 terrorist attacks or among those held on material witness warrants.[76] Aliens being detained in Guantanamo Bay, Cuba, are not in INS custody; they are in the custody of the U.S. Military as unlawful combatants captured and detained outside the United States.

One of the recommendations in *The 9/11 Commission Report* is that the United States should engage its friends to develop a common coalition approach towards the detention and humane treatment of captured terrorists. The report also states that the United States should be able to reconcile its views on how to balance humanity and security with our nation's commitment to these same goals, and allegations that the United States abused prisoners in its custody make it harder to build needed diplomatic, political, and military alliances.[77] Although the report specifically refers to those who are not being held under a specific country's criminal laws, rather than

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[74] Department of Homeland Security, U.S. Immigration and Customs Enforcement, "Public Security: ICE Unveils New Alternative to Detention," *Inside ICE*, vol. 1, no. 5, June 21, 2004, available at [http://www.ice.gov/graphics/news/newsreleases/insideice/insideice_062104_web3.htm].

[75] For a full discussion of those detained as part of the investigation into the attacks of September 11, 2001, see CRS Report RL31606, *Detention of Noncitizens in the United States*, by Alison M. Siskin and Margaret Mikyung Lee.

[76] Memorandum from Daniel J. Bryant, Assistant Attorney General, to Sen. Carl Levin, Chairman of the Investigations Subcommittee of the Senate Committee on Governmental Affairs (July 3, 2002). According to this 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 these, 76 remained in custody. The DOJ declined to disclose information regarding material witnesses, citing potential adverse impact on ongoing investigations.

[77] *The 9/11 Commission Report*, pp. 379-380.

those detained for immigration violations in the United States, some may question if the Commission's recommendation for coalition guidelines should be extended to others detained during investigations into terrorist activities.

Legislation in the 110th Congress

Detention Provisions in the Senate's Comprehensive Immigration Reform Bills

S.Amdt. 1150, the bipartisan compromise proposal for immigration reform, was proposed by Senator Edward Kennedy as an amendment in the nature of a substitute to S. 1348. S. 1348, the Comprehensive Immigration Reform Act of 2007, was introduced by Senate Majority Leader Harry Reid as the marker for Senate debate on comprehensive immigration reform; it is based on S. 2611, as passed by the Senate in the 109th Congress (discussed above). S.Amdt. 1150, as proposed and printed in the *Congressional Record*[78] contains several provisions relating to the detention of noncitizens in the United States. The Senate began consideration of S.Amdt. 1150 to S. 1348 in late May 2007, and after several failed cloture votes, S. 1348 was withdrawn from floor debate on June 7, 2007.

S. 1639, introduced by Senator Kennedy on June 18, 2007, was placed on the Senate calender on June 19, 2007. It was debated on the Senate floor, and pulled ,on June 28, 2007, when cloture was not invoked.[79] The bill is based on but not identical to S.Amdt. 1150, as amended.

S.Amdt. 1150 and S. 1639. Both S.Amdt. 1150 and S. 1639, contain several provisions related to the detention of aliens in the United States. S.Amdt. 1150, as amended by S.Amdt. 1172, and S. 1639 would specify that for many of the guest worker and legalization provisions in the bills to go into effect, that DHS' Immigration and Customs Enforcement (ICE) must have enough bed space to detain 31,500 aliens per day. According to ICE, for FY2007, the agency can detain 27,500 aliens per day.[80]

In addition, similar to H.R. 4437 and S. 2611 in the 109th Congress, S.Amdt. 1150 and S. 1639 would codify and modify the regulations governing the review of post-removal order detention cases for alien who were lawfully admitted. As under current regulations,[81] the bills would allow for the continued detention of aliens with highly contagious diseases, whose release would cause serious adverse foreign policy consequences, or who are detained for security or terrorism reasons. However the

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[78] The text of S.Amdt. 1150 appears in "Text of Amendment Submitted Monday, May 21, 2007," *Congressional Record*, daily edition, vol.153 (May 24, 2007), pp. S6625-S6687.

[79] The Senate voted 46 to 53 not to invoke cloture. (Record vote number 235.)

[80] Email response from Ricardo Velazquez, Congressional Relations, Immigration and Customs Enforcement , May 21, 2007.

[81] 8 C.F.R. §214.14.

bills would require that the Secretary of DHS certify in writing the reason for continued detention. Both bills would also expand the current definition in regulation of aliens subject to continued detention because they pose a special danger to the public, allowing for the continued detention of:

- aliens convicted of one or more aggravated felonies, or of one or more attempts or conspiracies to commit an aggravated felony where the aggregate term of imprisonment was at least 5 years;
- aliens who have committed a crime of violence and because of mental illness or personality disorder are likely to engage in acts of violence in the future; and
- aliens whose release will threaten the safety of the community or any person, conditions of the release cannot reasonably ensure the safety of the community or person, and has been convicted of at least one aggravated felony for which the alien was sentenced to an aggregate term of term of imprisonment of not less than one year.

Both bills would allow an alien to seek a review by the Attorney General (AG) of the decision to extend detention, and the AG could require that the alien be released. S. 1639 and S.Amdt. 1150 would allow but not mandate that the Secretary of DHS apply the new rules for post-removal order custody determinations to aliens who have not effected entry. Otherwise, under the bills, post-removal order custody determinations for these aliens would be governed by 8 *C.F.R.* §241.4. Under both bills, all judicial reviews of continued detention would be instituted in U.S. District Courts.

In addition, similar to S. 2611 (discussed above), S.Amdt. 1150 and S. 1639, would require the Secretary of DHS to contract or acquire 20 detention facilities in the United States that have the capacity to detain at least 20,000 aliens. Both bills would also specify that if the head of a law enforcement entity of a state or political subdivision of the state submits a request to the Secretary of DHS that an alien should be taken into federal custody, and if the alien is not lawfully present in the United States, that the alien shall be taken into federal custody within 72 hours. The bills would also authorize $850 million each year for detention and transportation of such unauthorized aliens from state or local law enforcement to federal custody.

Furthermore, S. 1639 would create a set of policies and procedures for detention facilities (e.g., access to telephones, procedures governing transfers, standardized quality of medical care) and require the Secretary of DHS to ensure that the standards are implemented and enforced at the facilities. The bill would also establish, within DHS, an Office of Detention Oversight which would be responsible for inspecting detention facilities, developing a complaint procedure for detainees, and reporting to the Secretary of DHS, the Assistant Secretary of DHS for ICE, and Congress all findings of noncompliance with the standards, and actions taken to rectify the instances of noncompliance. S. 1639 would also require the Secretary of DHS to establish a nationwide "secure alternatives" program under which a detained alien may be released under enhanced supervision to prevent the alien from absconding,

and ensure the alien's appearance at immigration hearings and compliance with removal orders.[82]

In addition, S. 1639 would require, that to the extent possible, the Secretary of DHS to construct "secure but less restrictive" detention facilities for aliens who are detained more than 72 hours. These are facilities where the detainees have minimally restrictive movement between indoor and outdoor areas; ready access to social, psychological, and medical services, frequent access to programs and recreations, contact visits with legal representatives and family members; and there are special facilities for families with children.

Other Senate Legislation

S. 330. Senator Johnny Isakson introduced S. 330 on January 18, 2007. S. 330 would require as of October 1, 2008, that all aliens attempting to illegally enter the United States who do not withdraw their applications and depart immediately or are granted parole, be subject to mandatory detention until the alien is either removed or granted admission. (This provision is similar to provisions in several bills in the 109th Congress, including H.R. 4437 and S. 2611.) In addition, similar to S. 1639, S. 330 would modify and codify the post-removal order custody determinations and require the Secretary of DHS to construct or acquire 20 new detention facilities to hold not less than 20,000 individuals.

S. 844. S. 844 introduced by Senator Diane Feinstein on March 12, 2007, would set conditions of detention for unaccompanied alien children and require the release of unaccompanied alien children into the least restrictive setting possible. The bill would specify the order of preference for the types of custody arrangements for unaccompanied alien children. The order would be (1) licenced foster homes; (2) small group homes; (3) juvenile shelters; (4) residential treatment centers; (5) secure detention.

S. 850/H.R. 1355. H.R. 1355 was introduced by Representative Sue Myrick on March 6, 2007, and the companion bill, S. 850, was introduced by Senator Richard Burr on March 13, 2007. The bills would require within 90 days of enactment, that the Secretary of DHS submit a report to Congress describing the formula for allocation of federal detention facilities for aliens pending removal or a decision on removal under INA 241(g). The bills would also require the Secretary of DHS to the greatest extent practicable, to construct new detention facilities in or near areas which have been determined to have a high concentrations of unauthorized aliens.

S.Amdt. 849/S.Amdt. 850 to S. 372. Senator John Cornyn offered these amendments to the Intelligence Authorization Act for FY2007. Neither amendment was voted on. S.Amdt. 849/S.Amdt. 850 would codify and modify the post-removal-order custody determinations in a manner similar to S. 1639.

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[82] These provisions are identical to S.Amdt. 1191 to S.Amdt. 1150, submitted by Senator Joseph Lieberman and agreed to by Unanimous Consent on June 6, 2007.

S. 2074/H.R. 3531. H.R. 3531, introduced by Representative Ginny Brown-Waite on September 14, 2007, and S. 2074, introduced by Senator John Kerry on September 20, 2007, would require DHS to detain all unlawfully present aliens apprehended by state or local law enforcement officers, and to reimburse state and local governments for the detention of such aliens until they are transferred to federal custody.

S. 2366/S. 2368/H.R. 4088. On November 15, 2007, Senator David Vitter introduced S. 2366 and Senator Mark Pryor introduced S. 2368. H.R. 4088 was introduced by Representative Heath Shuler on December 5, 2007. All three bills would establish a border relief grant program to provide funding to sheriff and police departments within 25 miles of the Southwest border for several purposes, including the transfer of unauthorized aliens to federal custody. The bills would authorize $200 million a year for these grants. In addition, S. 2366, S. 2368, and H.R. 4088 would require DHS to increase detention space by 8,000 beds and to construct another family facility with at least 500 beds.

Legislation in the House of Representatives

H.R. 750. H.R. 750, introduced by Representative Sheila Jackson-Lee on January 31, 2007, would mandate that DHS make available 100,000 additional beds — some rented and others constructed — for aliens in custody. The bill would also specify, subject to appropriations, that DHS' Office of Civil Rights and Civil Liberties monitor all facilities that are being used to hold detainees for more than 72 hours. H.R. 750 would also direct DHS to develop a secure alternatives to detention program under which eligible aliens would be released to the custody of suitable individual or organizational sponsors who would supervise them to prevent them from absconding and ensure that they make required appearances. The program would be available on a voluntary basis to aliens under "expedited" removal proceedings under INA §236.

H.R. 842. H.R. 842 introduced by the late Representative Charlie Norwood on February 6, 2007, would require the Secretary of DHS to construct or acquire 20 new detention facilities with at least 500 beds per facility.

H.R. 2388. H.R. 2388, the Violence Against Immigrant Women Act of 2007, was introduced by Representative Janice Schakowsky on May 17, 2007. Unless the alien is subject to mandatory detention as a terrorists or a criminal, H.R. 2388 would prohibit the detention of an alien who had an approved application: (1) under the Violence Against Women Act (VAWA); (2) for a T (trafficking victim) visa; (3) for U (crime victim) visa; or (4) under cancellation of removal.

H.R. 2954. Under H.R. 2954, introduced by Representative Peter King on July 10, 2007, not later than 90 days after enactment, an alien attempting to enter the United States illegally and who is apprehended at or between a port of entry would be subject to mandatory detention until the alien is either removed or granted admission, unless the alien withdraws his application and departs immediately or is granted parole. (This provision is similar to S. 330). In addition, similar to several other bills in the 110th Congress, including S. 1639, H.R. 2954 would codify and

modify the regulations on post-removal order custody determinations. The bill would also require mandatory detention of aliens who are suspected members criminal street gangs.

H.R. 3064. H.R. 3064 would require the Secretary of DHS to reimburse state and local law enforcement for cost incurred for the detention, emergency medical care, housing, and transportation to federal custody of any alien who is removable. H.R. 3064 was introduced on July 17, 2007, by Representative Sam Graves.

H.R. 3494. Similar to H.R. 842, The Charlie Norwood CLEAR Act of 2007 (H.R. 3494), introduced by Representative Marsha Blackburn on September 7, 2007, would require the Secretary of DHS to construct or acquire 20 new detention facilities with at least 500 beds per facility. H.R. 3494 would also require that if a state or local law enforcement agency requests that DHS take an unauthorized alien who was apprehended into federal custody, that DHS take the alien into custody within 48 hours or request the law enforcement agency to temporarily incarcerate or transport the alien.

H.R. 3980. Representative Hilda Solis introduced H.R. 3980 on October 25, 2007. H.R. 3980 would establish arrest and detention procedures to be used during any workplace enforcement operation which is reasonably calculated to or apprehends at least 50 aliens.

H.R. 4065. H.R. 4065 contains provisions similar to H.R. 4437 in the 109th Congress. H.R. 4065 was introduced by Representative James Sensenbrenner on November 7, 2007. The bill would authorize state and local law enforcement officers to hold an unauthorized alien for 14 days after the completion of his criminal sentence to effectuate the transfer of the alien to federal custody or to issue a detainer to allow such an alien to be detained until DHS could take custody of the alien. H.R. 4065 would also require that as of October 1, 2008, all aliens attempting to illegally enter the United States who did not withdraw their applications and depart immediately or were granted parole, be subject to mandatory detention until the alien was either removed or granted admission. In addition, the bill would authorize and establish selection criteria for the Secretary of DHS to contract with private entities to provide transportation to detention facilities and other locations for aliens apprehended along the border by DHS's Bureau of Customs and Border Protection. Furthermore, H.R. 4065 would codify and modify the regulations governing the review of post-removal order detention cases for alien who were lawfully admitted.