No. 01-1491

IN THE

Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, DORIS MEISSNER, AND PAUL W. VIRTUE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

ANTHONY J. ORLER*
HOGAN & HARTSON L.L.P.
500 South Grand Avenue
Suite 1900
Los Angeles, California 90071
(213) 337-6700

* Counsel of Record

Counsel for Amici Curiae

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STATEMENT OF INTEREST

This brief *amici curiae* is filed in support of Respondents by four former high-ranking officials in the Immigration and Naturalization Service ("INS" or the "Service") who were responsible for managing enforcement actions both before and after the implementation of the mandatory detention challenged

in this action.[1] T. Alexander Aleinikoff served as General Counsel from March 1994 to July 1995 and as Executive Associate Commissioner for Programs from July 1995 to January 1997 and is currently Professor of Law at Georgetown University Law Center. David A. Martin served as General Counsel from August 1995 to January 1998, and is currently Doherty Professor of Law and Weber Research Professor of Civil Liberties and Human Rights at the University of Virginia. Doris Meissner served as Acting Commissioner in 1981, as Executive Associate Commissioner from 1982 to 1986, and as Commissioner from October 1993 to November 2000, and is currently Senior Fellow at the Migration Policy Institute. Paul W. Virtue served as Deputy General Counsel from November 1988 to January 1997, as Acting Executive Associate Commissioner for Programs from January 1997 to February 1998, and as General Counsel from March 1998 to May 1999, and is currently a Partner with the Washington, D.C. office of Hogan & Hartson, L.L.P. Because the amici have extensive experience in the administration of the detention provisions of the Immigration and Nationality Act, and worked diligently throughout their government service to improve INS practices regarding the removal of aliens with criminal records from the United States, their views have been formulated through a practical understanding and application of immigration policy and procedure. During amicus Meissner's tenure as Commissioner,andbefore the institution of a mandatory detention rule, removals of criminal aliens increased from 27,827 in FY 1993 to 55,489 in FY 1998.[2]

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties and copies of the consent letters have been filed with the Clerk.

[2] 1998 Statistical Yearbook of the Immigration and Naturalization Service.

Drawing upon their experience, amici submit this brief in order to provide a more complete context for judging the assertions in the brief for the petitioners and to offer the Court their views about the effects of mandatory custody on the fair and efficient enforcement of the immigration laws.

SUMMARY OF ARGUMENT

Detention is clearly an important element in an effective immigration enforcement system. The ruling of the Ninth Circuit does not prevent its use. Instead it simply requires an individualized determination of flight risk and dangerousness before subjecting lawful permanent residents, who are not yet the subjects of final removal orders, to sustained detention.

The government argues that the court must consider the relatively brief duration of detention in assessing the constitutionality of mandatory custody. *Brief for the Petitioners at 14*. The statistics cited by the government, however, draw no distinction between lawful permanent residents and other detained aliens. Id. At 49. Moreover, the median period of detention is misleading skewed as it is by the large number of detained aliens who concede deportability, do not apply for relief from removal and are promptly removed. When viewed in the context of an individual case the mandatory detention period can last much longer, particularly for permanent resident aliens, who because of their lawful status are more inclined than out-of-status aliens to challenge deportability and to be eligible for relief from removal.

An absolute detention requirement affecting such a broad class of aliens is both unfair and inefficient because it fails to account for the following general situations: permanent resident aliens whose circumstances present serious legal and factual issues that may take months or longer to resolve, aliens whose

ultimate removal is improbable (as in *Zavydas v. Davis*, 533 U.S. 678 (2001)), and aliens who are unlikely to abscond because of individual circumstances and who have manifested no danger to the community. Moreover, the legitimate interest in assuring the removal of criminal aliens ruled deportable can be fully served without a rigid rule requiring mandatory detention. The Court of Appeals for the Ninth Circuit held that a lawful permanent resident alien in removal proceedings must be afforded "a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community." *Kim v. Ziglar*, 276 F.3d 523, 539 (9th Cir. 2002).

Finally, the INS has ample tools available without mandatory detention to assure reaching a goal amici share with the government: reliable performance in securing actual removal, at end of proceedings, of persons ruled deportable and not given relief. In fact, steadily increasing resources and improved INS practices, such as the institutional hearing program (IHP), gradually brought about improvements in the criminal alien removal rate even before the mandatory custody provisions took effect. Combined with new measures, including penalties for failure to surrender for removal, automatic stays of custody redeterminations pending appeal, and a promising study of alternatives to detention, discretionary detention provides a fair and efficient mechanism for assuring removal in appropriate cases.

ARGUMENT

A. THE DETENTION AND REMOVAL PROCESS

A sound understanding of the nature of the detention and removal process is a useful place to start in assessing the present controversy. With such an understanding one can gain a better perspective on the

situation Congress faced in the early 1990s, leading up to enactment of mandatory custody, and of alternative ways to achieve the goal of removing criminal aliens, without the severe impairment of individual liberty interests entailed by mandatory detention.

The process under which aliens are detained prior to an order of removal is governed by the terms of section 236 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1226, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-536. Under the current provisions, aliens charged with being inadmissible or deportable are subject to uniform proceedings to determine their removability *vel non*. 8 U.S.C. § 1229a. While these removal proceedings are pending, INA § 236 gives the Attorney General discretion to arrest, detain and release aliens who may be subject to removal, 8 U.S.C. § 1226 (a), but mandates that the Attorney General detain without bail certain aliens who have committed crimes. 8 U.S.C. § 1226 (c). The statute further directs the Attorney General to develop a coordinated system to identify and transfer such aliens from the custody of federal, state, and local law enforcement agencies to INS custody. 8 U.S.C. § 1226 (d).

Traditionally, the INA has authorized the Attorney General, in his discretion, to detain suspected deportable aliens found in the United States in order to ensure availability for proceedings and removal and to limit the risk of danger to the community. *See* 8 U.S.C. § 1252 (1994). In enacting section 236, Congress preserved the Attorney General's discretionary detention authority for noncriminal aliens found in the United States. Aliens who are in removal proceedings, but who do not fall under the mandatory detention framework of INA § 236(c) are subject to a less arbitrary, though no less effective, detention procedure. Under 8 U.S.C. § 1226(a), the Attorney General has the authority to arrest,

detain and release aliens who are subject to removal proceedings. The initial decision of whether to detain, to release, or to release on bond or other appropriate conditions is made on a case-by-case basis by the District Director and is ordinarily completed within twenty-four hours of the arrest. 8 C.F.R. § 236.1(d)(1). An alien (other than an arriving alien) may appeal the District Director's determination to an Immigration Judge, *id.*, who considers the matter in a streamlined "bond redetermination" procedure that may be conducted orally or by telephone. 8 C.F.R. § 3.19(b). The immigration judge may consider any information presented by the INS or the alien, or independently available to the Immigration Judge. 8 C.F.R. § 3.19(d). The judge may approve the release conditions, modify them, or order release on recognizance. 8 C.F.R. § 236.1(d)(1). The decision of the Immigration Judge, in turn, may be appealed to the Board of Immigration Appeals ("BIA") by either party, and such appeals are likewise generally handled in expedited and less formal fashion than merits appeals. 8 C.F.R. § 236.1(d)(3).

This procedure allows for an individualized assessment of the danger and flight risk posed by a noncitizen. As a result, it permits optimal use of detention space, reserving it for persons who otherwise might abscond or commit further crimes upon release, and also recognizes the significant liberty interest possessed by a person whose removability has not been finally determined. There are strict safeguards in place today, moreover, that prevent the arbitrary release of aliens from INS detention. On any INS appeal, the BIA has authority to stay the decision of the Immigration Judge, and in cases where the district director has denied release or set bond of $10,000 or more, any order of the immigration judge authorizing release is automatically stayed pending an appeal by the INS to the BIA. 8 C.F.R. § 3.19(i). Furthermore, if the Board authorizes release (on bond or otherwise) in such cases, that order is automatically stayed for five days during which the

INS Commissioner may certify the Board's decision to the Attorney General for review under 8 C.F.R. § 3.1(h). If the Commissioner does so, the decision remains stayed pending the decision of the Attorney General. *Id.*

This approach is consistent with bail proceedings in the criminal context. In criminal law,[3] federal courts detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversarial hearing that no release conditions "will reasonably assure…the safety of any other person and the community." *United States v. Salerno*, 481 U.S. 739, 741 (1987). Such a determination is performed to balance the due process rights of the accused against the safety of the community. *Id.* at 742-743. Such a determination is made by a judicial officer, and the outcome of that determination must be in writing and must be supported by clear and convincing evidence to deny bail for arrestees. *Id.*; *see also* 18 U.S.C. §3142(f) and (i).

Similar inquiries are made by a judge with regard to a defendant's risk of flight from prosecution, and other important governmental interests. *In re Newchurch*, 807 F.2d 404, 408-409 (5th Cir. 1986). A person accused of a crime should not be deprived of personal liberty unless confinement is reasonably necessary to assure the defendant's presence at trial, or to protect some other important governmental interest, given the due process requirement that the government restrict freedom of individuals in the least restrictive manner. *Id.* at 408.

Section 236(c) of the INA, 8 U.S.C. § 1226(c), enumerates a broad range of crimes, the commission of which will subject an alien to mandatory detention during removal proceedings. Any alien who is deportable by reason of committing (1) a crime involving moral turpitude within five years of admission

[3] *See* 18 U.S.C. § 3142 et seq.

for which a sentence of one year or longer was imposed, (2) two crimes involving moral turpitude during any period, (3) an aggravated felony, (4) any terrorist activity, (5) any controlled substance violation other than a single offense involving possession of 30 grams or less of marijuana, (6) firearms offenses, or (7) a variety of other miscellaneous crimes, shall be detained. 8 U.S.C. § 1226(c)(1).

The broad sweep of these provisions has made aliens subject to removal for a remarkably wide range of fairly minor criminal convictions. For example, the Second Circuit reluctantly held that a misdemeanor could fall within the definition of "aggravated felony," including a misdemeanor for stealing four packs of Newports and two packages of Tylenol Cold medicine. *See United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000). Shoplifting is also considered an "aggravated felony" in the 11th Circuit. *See United States v. Christopher*, 239 F.3d 1191 (2001). Attempted possession of stolen goods was held to be an aggravated felony[4] while possession of counterfeit securities was not.[5] Admitted possession of between five and fifty grams of cocaine (actual possession was more than twice this amount) is not an aggravated felony,[6] but state misdemeanor petit larceny is.[7]

The initial determination as to whether an alien is subject to mandatory detention under this section is made by the INS District Director. 8 C.F.R. § 236.1(d)(1). An alien detained under § 236(c)(1) may appeal this determination (solely on the grounds that the section does not apply to his or her circumstances) to an immigration judge. 8 C.F.R. §§ 3.19(h)(2)(ii);

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4 *See In re Bahta*, 22 I.&N. Dec. 1381(BIA 2000).

5 *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001).

6 *See Gerbier v. Holmes*, 280 F.3d 297 (3d Cir 2002).

7 *See United States v. Graham*, 169 F.3d 787 (3d Cir 1999).

236.1(c)(10) & (d)(1); *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999). This determination (again on the limited grounds of the applicability of the section) in turn may be appealed to the BIA. 8 C.F.R. § 236.1(d)(3). Once an alien is determined to be covered by § 236(c)(1), he or she may not be released until the conclusion of his or her removal proceedings (unless such release is necessary to protect a government witness under 8 U.S.C. § 1226 (c)(2); 8 C.F.R. § 236.1 (2002)).

The mandatory detention requirements under section 236(c) amount to a wholesale rejection of the criminal law's balanced approach to bonded release determinations. No determination is made with regard to either a risk of flight for certain noncitizens, or risks to the community posed by a noncitizen subject to Section 236(c) of the INA. No clear and convincing evidence is required in support of a decision to deny release and no written record explaining why release has been denied must be generated.

Furthermore, mandatory detention ignores the critical practical concerns underlying bonded release: resource limitations. Detention space available to INS, despite significant expansion and improvement in recent years, is and will remain finite. While it might initially seem counterintuitive that INS would seek to use detention on a higher priority basis for some persons without criminal convictions, the fact is that available detention space is critical for other parts of INS's enforcement mission. For example, adequate detention space is important in planning anti-smuggling enforcement efforts[8] and is critical in responding responding to a sudden influx of undocumented migrants such as that experienced in

[8] Testimony of INS, Hearing Before the Sucomm. On Immigration and Claims of the Comm. On the Judiciary (May 13 1997).

South Texas in the late 1980s.[9] The removal of criminal aliens is always a high priority, but in fact there is great variety in personal circumstances among those covered by section 236, and some are better candidates for release, when detention space is limited than are others who have not been convicted of a crime. An individualized determination regarding flight risk and dangerousness permits INS to use resources more sensibly in service of its complete enforcement mission.

Those detained under section 236(c)(1) are typically held in detention facilities under conditions that are largely indistinguishable from those in actual prisons (indeed, in many cases, detainees are held in prisons, although their confinement under section 236 is considered civil). For example, detainees are subject in some circumstances to strip searches. They are not permitted to engage in any professional or business activities or work release programs. They have limited access to their families, legal counsel and research facilities. In addition, they have extremely limited access to their personal property and are restricted in their access to telephone and mail services.[10] These circumstances can hamper their ability to prepare their cases, and they certainly interfere with any opportunity to wind up the individual's affairs, make arrangements for family, or the like, in anticipation of possible removal.

Removal proceedings to determine the inadmissibility or deportability of an alien are initiated by the filing of a notice to appear which must be served at least ten days prior to the first hearing date in the proceeding. 8 U.S.C. § 1229; 8 C.F.R. § 239.1. An alien charged with being inadmissible or deportable is permitted to be represented by counsel (not provided by the

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9 *See Asylum and Migration Issues: The Case of South Texas* February 1989, 101st Cong., 1st Sess. (S. REP.101-19), (March 1989).

10 INS Detention Operations Manual *available at* http://www.ins.usdoj.gov/graphics/lawsregs/guidance.htm.

government) in the proceedings, which are presided over by an Immigration Judge. 8 U.S.C. § 1229a; 8 C.F.R. §§ 240.1, 240.3. While the proceedings are generally not as complex as a typical trial in federal court, removal proceedings can involve the taking and defending of depositions, testimony by witnesses, and the presentation of a wide range of evidence, as well as legal and factual arguments. *See* 8 C.F.R. pt. 240. In the case of aliens, like the respondent here, who are charged with deportability, the INS must prove that they are deportable by clear and convincing evidence. 8 C.F.R. § 240.8 (a). Once an order to remove is issued by an immigration judge, an appeal of that decision may be filed within thirty days to the Board of Immigration Appeals. 8 C.F.R. § 240.53. Failure to appeal within thirty days, waiver, or a dismissal of the appeal by the BIA results in a final order of removal. 8 C.F.R. § 241.1.

In the course of removal proceedings, immigration judges determine any contested issues of inadmissibility or deportability,[11] as well as requests for relief from removal, such as cancellation of removal under 8 U.S.C. § 1229b, asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. §1231(b)(3), or protection under the Convention Against Torture, 8 C.F.R. §§ 208.16, 208.17. The close connection between baseline deportability and relief determinations is reflected in the usual sequence of the immigration proceeding. After an individual is charged, she will first appear before an immigration judge at a preliminary procedure known as master calendar.[12] Ten to thirty respondents are generally scheduled during a morning or afternoon master calendar session of immigration court. At this procedure the immigration judge takes the alien's plea to

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[11] For convenience, this brief will hereafter refer to issues of either inadmissibility under 8 U.S.C. § 1182(a) or deportability under 8 U.S.C. § 1227(a) as "baseline deportability."

[12] *See In re Eloy Arguelles-Campos*, 22 I&N Dec. 811 (BIA 1999).

the charges and also asks her whether she will be seeking any forms of relief. If so, the judge assures that the individual has the necessary application forms, and also seeks to determine, through questioning of the INS trial attorney and the alien or her attorney, how much time will be necessary for the merits hearing, coveringany contest over either baseline deportability or relief issues. (Sometimes two or more master calendar proceedings are required, either to assure an opportunity for the alien to secure counsel or to permit a better estimate of the time required for the merits hearing.) Consulting its own schedule as well as that of counsel, the court then sets a merits hearing, reserving a period of a few hours up to several days, depending on the issues and the likely number and type of witnesses indicated at master calendar.

In a substantial majority of cases, the alien concedes baseline deportability—largely because most immigration charges are quite straightforward and not readily subject to dispute. For example, an overstay charge[13] can be proved from INS records and reference to the calendar; unlawful presence without admission[14] can be shown through a certification of the absence of an INS record of admission, and deportability based on criminal convictions[15] can be demonstrated through a record of conviction, because underlying guilt or innocence cannot be retried in immigration court. Deportability could be contested, for example, if it is not clearly established whether the particular offense is properly characterized as an aggravated felony or a crime involving moral turpitude. In this particular instance, a factual hearing may not be necessary, but only briefing and argument on the legal point. But the regulations permit even those contesting deportability to

[13] 8 U.S.C. § 1227(a)(1)(C).

[14] 8 U.S.C. § 1182(a)(6)(A), 8 U.S.C. § 1227(a)(1)(B).

[15] 8 U.S.C. § 1227(a)(2).

plead to the factual allegations and require them to seek any applicable relief at the same merits hearing. *See* 8 C.F.R. § 240.10(c), (d); *In re A-P-*, 22 I.&N. Dec. 468 (BIA 1999). In any event, most merits hearings are devoted to issues of relief, not to contests over deportability. The IJ will not issue a removal order until all questions of both deportability and relief are resolved. Thus the following assertion in the government brief is highly misleading: "a removable alien who is detained while the Attorney General's delegates consider his application for discretionary relief is properly treated as removable unless and until a decision to award discretionary relief is made . . .." *Brief for the Petitioners* at 35. Particularly in the case of permanent resident aliens, the statute and case law specifically provide otherwise: the *lawful* resident status continues until an order of removal becomes administratively final. *See* 8 C.F.R. § 1.1(p); *In re Lok*, 18 I.&N. Dec. 101 (BIA 1981).

If there are no forms of relief requested (other than voluntary departure under 8 U.S.C. § 1229c), the case can be concluded at master calendar with the entry of an order. A significant number of detained aliens (particularly those who are not lawful permanent residents) choose to concede deportability and seek no forms of relief in order to end their detention through prompt deportation. This feature of immigration practice accounts for the statistics relied on frequently in the government's brief showing surprisingly short median periods of detention. *Brief for the Petitioners* at 14, 49, 59. Those statistics are greatly skewed by the significant numbers of detained aliens who have no genuine issue to tender and who wish to conclude the proceedings promptly. But such averages are irrelevant for cases like that presented by respondent Kim, a lawful permanent resident. It is precisely in these cases, which may well involve both contested deportability and issues of relief, where the mandatory detention will be longest (for the immigration court proceedings and BIA and

judicial appeals) and the impact direst—precisely because detention can hamper development and presentation of the alien's case.

B. POLICY HISTORY

The issue of how to improve the efficiency and effectiveness of criminal alien removals was among the top enforcement priorities at INS during the years preceding passage of section 236(c).

As acknowledged at various points throughout the Government's brief, the fundamental difficulties confronting the Service with regard to removals during the early 1990s were resource-driven. INS lacked the detention space necessary to hold even those individuals who were believed to be a flight risk or a potential danger to society. Congress responded by appropriating funds for the expansion of detention facilities and from 1995 to 1998, for example, overall bed space for detained aliens increased almost three-fold. *See* Andrew I. Schoenholtz and & Thomas F. Muther, Jr., *Immigration and Nationality*, 33 INT'L LAW. 517, 525 (1999) ("Compared to three years earlier, bed space nearly tripled from 6,600 beds to 16,000 beds in 1998.").

With expanded detention facilities gradually brought to bear throughout the 1990s, the Service increasingly found itself in a position to make detention decisions during removal proceedings based on factors other than available bed space. With the physical space necessary to detain aliens deemed likely to abscond or pose a danger to the community, the Service saw removal efficiency rates improve dramatically. *See id.* at 527 (noting that in 1998, "[t]he INS removed over 56,000 criminal aliens," which "represent[ed] a nine percent increase over fiscal year 1997's total of some 51,000"). Establishing an effective removal regime thus did not require a mandatory detention rule, but rather the resources to complement the Service's goal of ensuring efficient removal.

The legislative history behind section 236(c) reveals that it was enacted to a large extent in response to certain logistical problems with which the INS was continually confronted. Two of the primary areas of concern were a lack of detention space and an inability to identify deportable non-citizens upon release from state or federal custody.

First, the INS's lack of detention space was widely known in the time period leading up to section 236(c)'s passage. An influential Senate Report, created under the direction of Senator Roth and issued shortly before the enactment of section 236(c), noted the "chronic lack of detention space" in the immigration system. S. REP. 104-48, at 23 (1995); *see also id.* at 32 (labeling limited detention space a "fundamental problem confronting the INS"); H.R. REP. 104-469, pt. 1, at 123 (1996) ("A *chief* reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through the course of their deportation proceedings.") (emphasis added). "The lack of adequate detention space puts extreme pressure on the INS to release, rather than detain, criminal aliens." S. REP. 104-48, at 23. The upshot of this situation, the Report concluded, was that logistical resource issues played a substantial and, in the Report's analysis, inappropriate role in the decision whether a non-citizen should be detained pending removal proceedings. *See id.* (noting that a lack of detention space "puts pressure on the INS to release criminal aliens, which greatly increases their chances of evading removal"); *see also* Peter H. Schuck, *INS Detention and Removal: A "White Paper"*, 11 GEO. IMMIGR. L.J. 667, 673 (1997) ("Indeed, it is not too much to say . . . that the availability of detention (bed) space is what drives and shapes INS enforcement at every point . . .").

The Report concluded that the release of certain non-citizens primarily due to space constraints directly contributed to dismal rates of success when removal was

in fact found to be appropriate. The problems included that many non-citizens would not appear at their removal proceedings or would abscond after being ordered removed, or else that substantial resources would be expended in locating them once removal was ordered.[16] Stated simply, the Report found that "[a]dding detention space and better use of existing space would ameliorate many problems associated with early release of criminal aliens." *Id.* at 27.

A House Report issued approximately one year after this Senate Report also highlighted the serious problems associated with the INS's lack of detention space. *See* H.R. REP. 104-469, pt. 1, at 117 (1996) ("Due to lack of detention space and overcrowded immigration court dockets, many [illegal aliens] have been released into the general population."). Like its Senate counterpart, the House Report cited the problematic situation that, "in deciding to release a deportable alien, the INS is making a decision that the alien cannot be detained given its limited resources." *Id.* at 124.

This Report noted, however, that some problems had in fact been alleviated partially as a result of increased detention space. The Report cited the decreasing

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[16] *See* S. REP. 104-48, at 21 ("The detention option is problematical because it takes up limited INS bed space and because it costs money. Release, on the other hand, is even more of a problem since large number of non-detained criminal aliens never show up for their deportation hearings. INS needs to acquire additional detention space or better utilize existing space."); *see also* 139 Cong. Rec. E705-01, at E705 (1993) (statements of Rep. Moorhead) ("One of the major flaws in our current deportation process is that the INS lacks sufficient detention space . . . ."); 138 Cong. Rec. H9759-02, at H9760 (1992) (statements of Rep. Schumer) (addressing problem of non-citizens without documents arriving in the U.S. by commercial flight and stating that "because the INS lacks sufficient detention space, the would-be immigrant is typically paroled into the community with instructions to report several months later for a hearing before an INS officer. Most simply disappear.").

number of aliens arriving without valid immigration documents at the New York and Los Angeles airports, "where detention capacity has increased and most mala fide aliens can be detained." *Id.* at 123. Increased space allowed the INS to detain more removable non-citizens, providing a more effective deterrent to potential undocumented entrants.

In addition to detention space, continuous improvements to, and increases in staffing of, the Institutional Removal Program ("IRP") contributed to a doubling of the criminal alien removal rate from 1993 to 1996. *See Testimony of Acting Exec. Assoc. Commr. for Programs, Paul W. Virtue, Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary* (July 15, 1997). Formerly known as the Institutional Hearing Program ("IHP"), the IRP is a cooperative effort among the INS, the EOIR, and federal, state and local correctional agencies to identify noncitizens who have been imprisoned for deportable offenses and to complete the immigration court hearing process prior to their release from corrective custody. *Id.* at 1. Implemented informally and on a small scale in the early 1980s, the IHP was operating in some seventy-six federal, state and county facilities by 1997. *Id.* at 2. IHP funding increases in 1995 and 1996 permitted the establishment of fifteen IHP hearing sites for the federal prison system. *Id.* at 4.

Well before section 236(c) became effective in October 1998[17], these increases in detention space and other improvements had resulted in significantly higher rates of criminal alien removals. In 1997, the INS added 2,700 beds to its detention capacity, bringing the number to 12,050. *See Statements of Cmsr. Doris Meissner Before the Senate Comm. On Approps. Subcomm. On Commerce, Justice, State, and the Judiciary* (March 3, 1998). The increase in the available detention space

[17] IIRIRA, Section 303(b).

contributed to a dramatic improvement in removal rates. In 1997, the INS removed 51,141 criminal aliens, which represented an increase of *thirty-seven* percent over 1996. *See* 1997 Statistical Yearbook of the Immigration and Naturalization Service, at167. In 1998, the INS removed 55,489 criminal aliens, "an increase of nearly 12 percent over 1997." 1998 Statistical Yearbook of the Immigration and Naturalization Service, at 6. The INS stated that this increase was 'the result of increased resources available to the program in recent years and the implementation of expedited removal procedures after April 1, 1997." *Id.* at 5-6.

It bears emphasis that these highly significant improvements occurred before the mandatory detention rule of section 236(c) took effect, owing to INS's invocation of the Transition Period Custody Rules, which permitted discretionary release decisions for aliens with criminal convictions through early October 1998. See Pub. L. No. 104-208, div. C., § 303(b)(3), 110 Stat. 3009-536.[18]

C. MANDATORY CUSTODY OF LAWFUL PERMANENT RESIDENT ALIENS HINDERS EFFICIENT LAW ENFORCEMENT.

Amici's collective experience at INS convinced amici that absolute rules hinder fair and efficient enforcement efforts. Mandatory detention for aliens in removal

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[18] Criminal alien removals increased again in 1999 (to 69,409), after implementation of the mandatory custody rule, 1999 Statistical Yearbook of the Immigration and Naturalization Service, at 6, but the overall statistics through the 1990s demonstrate that mandatory custody is far less important to such improvements than detention resources. Ironically, increased detention resources are indispensable if mandatory detention is to be implemented successfully, but once such resources are available, mandatory rules are largely superfluous. Thereafter, INS district directors can make release decisions based squarely on flight risk and dangerousness, without the distorting role that resource limitations played in the early 1990s.

proceedings is a paradigmatic example of this phenomenon. For example, as the number of detainees reaches the maximum number of available spaces, the obligation to detain those subject to mandatory custody could mean the release of other detainees for whom the balance of risk has tipped in favor of detention. The INS should not be forced to make that choice.

Flight rates were so high in the early 1990s not as a result of chronic discretionary judgment failures by INS in assessing which aliens might pose a flight risk. Rather, the rates were alarmingly high because decisions to release aliens in proceedings were driven overwhelmingly by a lack of detention facilities. Once those facilities were augmented and INS was able to begin making risk release decisions based on relevant factors, the absconding rates declined.

Each of the amici opposes mandatory detention for legal permanent residents in removal proceedings because of the principle set forth above. By removing the flexibility needed to address these situations on a case by case basis, section 236(c) causes certain lawful permanent residents to be detained unnecessarily (or futilely in some cases) and causes the Service to expend valuable enforcement resources that could be redirected to more productive endeavors.

1. Cases That Raise Serious Issues Going to the Merits of Deportability or Relief from Removal

It serves no cognizable enforcement interest to hold aliens whose cases involve serious legal or factual issues that are likely to lead to protracted proceedings, without evaluating their risk of flight and danger to the community. The case of Arnoldo Gomez-Vela, a lawful permanent resident since 1971, is illustrative. Mr. Gomez-Vela, a citizen of Mexico, was taken into INS custody upon completion of his sentence for a 1997 "Driving Under the Influence" ("DUI") offense. The immigration judge found, and the BIA affirmed, that his

conviction constituted a "crime of violence" as defined at 18 U.S.C. § 16(b) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). In July 2001, the Seventh Circuit Court of Appeals terminated proceedings against him, joining the Third and Fifth Circuits in holding that a DUI offense lacked the requisite intent to use force to constitute a crime of violence. Mr. Gomez-Vela spent more than twenty-three months in county jails designed for short-term incarceration, separated from his wife and three U.S. citizen children. *Bazan-Reyes v. INS*, 256 F. 3d 600, 603-04, 612 (7th Cir. 2001).[19]

Similarly, serious legal questions concerning the availability of earlier forms of relief from removal after the 1996 legislation led to protracted litigation that was ultimately settled by this Court's ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001). In the meantime, section 236(c) resulted in protracted mandatory detention for some of those who ultimately benefited from the *St. Cyr* decision.

It is reasonable to expect the INS, just like any criminal prosecutor, occasionally to test the limits of the law. The DUI litigation and *St.* Cyr are but two examples. Testing the limits, however, should not come at the expense of the legitimate liberty interests of a long-term permanent resident or his U.S. citizen children. See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 Sup. Ct. Rev. 37, 92-109 (2002) (describing the heightened constitutional protection due to aliens who have been admitted as lawful permanent residents, owing to the legitimate roots they have established in the community). When the alien's family or economic ties to the community are such that flight is improbable and when the past criminal

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19 *See also* Arnaldo Gomez Story, *available at* http://www.micahempowers.org/im.html

conduct is of a nature that belies future danger to that community, mandatory custody serves no legitimate law enforcement purpose.

2. Improbable Removals

When ultimate removal is unlikely because the alien's home country government has previously rejected U.S. attempts to return similarly situated individuals, mandatory detention during removal proceedings is counterproductive. For aliens who do not present a flight risk or a danger to the community, mandatory detention serves only one purpose: to drain INS resources. Even if a removal order is secured,the alien very likely will have to be released after six months. *See Zavydas v. Davis*, 533 U.S. 678 (2001). To hold such individuals throughout that period, with no individualized assessment or risk of flight or danger, serves no discernible enforcement interest and calls into question issues of fairness.

3. Not Dangerous and Unlikely to Abscond

Even for aliens with untenable challenges to removal, mandatory detention is an overbroad rule. Individuals with strong family or other ties to a community who have posted a substantial bond and convinced the Service that they pose no danger to the community, should be permitted to wrap up their affairs in the United States and prepare for removal. Denying such individuals this opportunity can create substantial hardship for the family members, sometimes U.S. citizens, left behind. Moreover, if they are found in an individualized hearing to be unlikely to abscond, it wastes limited INS resources to detain them unnecessarily.

4. Alternative Mechanisms are Available to Assure Criminal Removals

Detention remains an important element in an effective immigration enforcement system. Affirming the

decision of the Ninth Circuit would not undermine its importance. Indeed, the increased resources made available for detention and removal during the last ten years make individualized determinations of risk less dependent on the availability of detention space and more consistent with fair and efficient enforcement of the immigration laws. The regulatory provisions discussed above for a stay of a redetermination of custody by an immigration judge provide a meaningful safeguard against arbitrariness in the process. Continued emphasis on the IRP, moreover, will mean fewer aliens will reach the conclusion of their criminal custody without a resolution of their immigration status.

In addition, INS has proposed new regulations under which all aliens who are subject to a final order of removal must surrender to the INS within thirty days of such an order. *See* 67 Fed. Reg. 31157, 31161-31164 (proposed May 9, 2002) (to be codified at 8 C.F.R. pts. 3, 236, 240, and 241). Failure to surrender, under the proposed rule, subjects an alien to criminal and civil proceedings and results in the automatic denial of most forms of discretionary relief from removal. *Id.* at 31163 (to be codified at 8 C.F.R. § 241.18). Further, such failure to surrender eliminates the possibility of reopening or reconsideration of the removal order unless an alien can show that exceptional circumstances led to the failure to surrender. *Id.* at 31161 (to be codified at 8 C.F.R. § 3.2,3.23). Existing law also imposes monetary penalties of as much as $500 per day for failure to depart the United States as required by an order of removal. 8 U.S.C. § 1324d. The INS has not yet implemented this provision, but it holds significant potential for inducing released individuals to submit to removal once an order is final.

Finally, the INS should continue to explore alternatives to custody as a means of ensuring appearance at hearings and for removal. In 1996, INS asked the Vera Institute of Justice ("Vera") to establish a

supervised release program for aliens in removal proceedings in New York City. The purpose of the project, called the Appearance Assistance Program ("AAP"), was to evaluate community supervision as an alternative means of improving appearance and compliance rates without relying on detention. The test program that Vera implemented in February of 1997 ran until March 2000 and involved the supervision of more than 500 aliens. Among the most significant findings contained Vera's report is the fact that criminal aliens who were released on their own recognizance with regular supervision appeared 92% of the time.[20] This test project serves to demonstrate that effective alternatives to mandatory detention exist. Moreover, such alternatives are better tailored to balance all of the interests at stake in these situations.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

ANTHONY J. ORLER*
HOGAN & HARTSON L.L.P.
500 South Grand Avenue
Suite 1900
Los Angeles, California 90071
(213) 337-6700

* Counsel of Record

Counsel for Amici Curiae

[20] S*ee* Christopher Stone, *Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project*, 14 Geo. Immigr. L.J. 673 (2000).