



STATEMENT OF

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U.S. IMMIGRATION AND NATURALIZATION SERVICE

BEFORE THE

**HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION AND CLAIMS**

REGARDING

**A REVIEW OF DEPARTMENT OF JUSTICE
IMMIGRATION DETENTION POLICIES**

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Mr. Chairman and Members of the Subcommittee,

I am pleased to have the opportunity today to testify on "The Department of Justice Immigration Detention Policies". Strengthening the nation's capacity to detain and remove criminal and other deportable aliens is a key component of the Immigration and Naturalization Service's (INS) comprehensive strategy to deter illegal immigration and protect public safety. We believe that with the strong support from the Congress, INS has increased its effectiveness in the apprehension, detention and removal of criminal aliens and violators of immigration laws from the United States.

General Overview of INS Detention Policy

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress expanded the number of crimes that made people subject to removal. It also eliminated INS' discretion to release certain aliens by requiring that virtually any non-citizen subject to removal on the basis of a criminal conviction, as well as certain categories of non-criminal aliens, be detained without bond. As a result of IIRIRA, INS is required to detain a much larger number of people.

The provisions in IIRIRA requiring mandatory detention, along with the rise in sophisticated smuggling operations, and the increase in the number of criminal aliens have resulted in the need for significantly more detention space. From Fiscal Year (FY) 1994 to FY 2001, the average daily detention population has more than tripled from 5,532 to 19,533. In FY 2000 alone, INS admitted more than 188,000 aliens into detention. In fact, the average daily population of criminal aliens in detention between FY 1994 and FY 2001 more than tripled from approximately 3,300 to 13,210. At the same time, the number of criminal aliens removed by INS more than doubled from 32,512 in FY 1994 to 70,873 in FY 2001.

Currently, there are approximately 20,000 aliens detained by the INS while in immigration proceedings or awaiting removal after being issued a final order of removal. Of the aliens currently being detained, sixty-five percent are criminal aliens. INS detainees are housed in a variety of facilities across the country. The INS has access to 21,304 beds to detain aliens either at INS-owned and operated facilities or in state, local or FY 2001 was 40 days while the median length of stay was 14 days. Since FY 1995, total removals have increased 155 percent to nearly 176,000 in FY 2001. The Detention and Removal program currently employs 212 Detention and Deportation Officers, 617 Deportation Officers and 1,797 Detention Enforcement Officers.

INS detention policy sets forth guidelines for determining priorities in which aliens should be detained. This policy sets forth four major categories of aliens and classifies these individuals as required detention, high priority, medium priority and lower priority.

The four categories are:

- Category I- mandatory detention;
- Category II- includes security and related crimes, other criminals not subject to mandatory detention, aliens deemed to be a danger to the community or a flight risk and alien smugglers;
- Category III - includes inadmissible non-criminal aliens (not placed in expedited removal), aliens who committed fraud or were smuggled into the United States, worksite apprehensions; and,

- Category IV - includes non-criminal border apprehensions, other aliens not subject to mandatory detention, aliens placed in expedited removal referred to Full 240 procedures.

When an alien is apprehended at or near the border by a Border Patrol Agent (BPA), the alien is usually transported to the Border Patrol Station by the apprehending agent. Once the Border Patrol decides to proceed with the administrative or criminal processing of an alien, the detention process begins. There are three reasons INS detains an alien: risk of flight, risk of danger to the community, and requirement of law (such as mandatory detention of certain aliens). Once charged, aliens detained by the INS are either in proceedings before an Immigration Judge to determine whether or not they are eligible to remain in the United States, or they already received final removal orders and are awaiting removal from the United States.

Mandatory Detention Provisions

Detained aliens primarily fall into two general categories -- those being detained during immigration proceedings and those that have already been issued removal orders and are waiting to be removed. Many aliens currently detained by INS are subject to mandatory provisions under the Immigration and Nationality Act (INA). There are two major categories of aliens subject to mandatory detention -- arriving aliens placed in expedited removal proceedings (section 235 of the INA) and aliens subject to mandatory detention under section 236(c) of the INA. The latter group includes all aliens chargeable as terrorists and virtually all aliens who are chargeable as criminals. Additionally, aliens subject to final orders of removal as criminals or terrorists are also required to be detained in order to effectuate their removal from the United States.

Bond/Parole Determinations:

Once arrested, an alien who will be placed in removal proceedings must be transported from the point of arrest to a processing center or District Office to be processed into custody. If there is no legal requirement for mandatory detention, significant risk of flight or danger to the community, an alien may be released on his or her own recognizance, bonded out (see INA section 236(a) for general bond authority), or paroled into the community. Aliens who are eligible for bond are also eligible for a bond redetermination hearing before an Immigration Judge. In general, detention determinations are based on the danger posed by the alien to the community and the likelihood that he or she will appear for all scheduled hearings. Factors that the INS considers in making this determination include: prior criminal history, the severity of the crimes for which the alien was convicted, history of failure to appear for court, equities in the United States and evidence of ties to the community, availability of relief from removal and the likelihood of relief being granted, and prior immigration violation history. These factors have been repeatedly upheld by Immigration Judges and the Board of Immigration Appeals (BIA). In cases where an arriving alien asserts an asylum claim, INS policy favors release from custody if the alien is found to have a credible fear of persecution. (8 CFR 235.3).

In a bond redetermination proceeding, the Immigration Judge reviews the previous INS determination as to the alien's dangerousness and the possibility that he or she may not appear for hearings if released. The Immigration Judge may base that determination on any information that is available or that is presented by either party. Both the INS and the alien have the right to present evidence and witnesses to the Immigration Judge. The bond hearing is separate and apart from the removal proceeding. At the conclusion of the bond hearing, the alien or the INS may appeal the Immigration Judge's bond decision to the BIA.

Post-Order Detention & Release Determinations

Section 241(a) of the INA authorizes the Attorney General to detain aliens who are subject to final orders of removal in order to effectuate their removal from the United States. While detention following a final order is often discretionary, the INA provides for mandatory detention of

criminal and terrorist aliens with a final order of removal. Section 241(a)(1) of the INA provides, as a general rule, that an alien with final orders shall be removed within 90 days. Following the 90-day removal period, the Attorney General has the authority to continue detention of certain aliens, including those determined to be a danger to the community or unlikely to comply with a removal order. The standards for determination of release for aliens subject to a final order of removal are set forth in 8 CFR 241.4. That regulation provides for automatic administrative custody review procedures for non-mandatory detention aliens at multiple levels and at periodic intervals. This review process provides the alien with numerous opportunities to provide evidence in support of release.

In *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001), the U.S. Supreme Court held that under section 241(a)(6), the INA generally permits detention of aliens under a final order of removal only for a period reasonably necessary to carry out their removal from the United States. The Supreme Court held that detention of such aliens beyond the statutory removal period for up to six months after entry of a final removal order is presumptively reasonable. (121 S.Ct. at 2504-05). After six months, if an alien can demonstrate that there is good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must rebut the alien's showing in order to continue detention of the alien. Additionally, the Supreme Court recognized that there may be special circumstances, such as those involving terrorists or especially dangerous individuals, in which continued detention may be appropriate even if removal is unlikely in the reasonably foreseeable future. (Id. At 2505). The Court's decision does not apply to arriving aliens -- those still technically at our borders and paroled in (including groups such as Mariel Cubans who are treated as still seeking admission). Based on the Supreme Court's decision, the INS recently issued regulations implementing the decision and setting forth the new review process. (66 FR 56967, November 14, 2001)

Immigration Hearings and Removal

When an apprehended alien decides to exercise his or her right to a hearing, the alien must await proceedings before an Immigration Judge. This process takes place under the auspices of the Executive Office for Immigration Review (EOIR). There are a number of potential outcomes to these hearings. If the alien is eligible for a bond redetermination hearing, that will be held first. Once a decision on the bond is made, another hearing is typically held to consider the removal charge. The most common outcome of the removal proceeding is a final order of removal. In such instances, the Immigration Judge has determined that an individual is removable from the United States or ineligible for admission into the United States.

During the removal hearing process, an alien may be granted relief, such as asylum, as a result of the facts presented at his or her hearing, the alien may be permitted to withdraw his or her application for admission, or the case may be terminated outright if it is determined that the removal charge is not sustainable or evidence comes to light that the alien is lawfully present.

An alien who has been ordered removed may pursue an appeal of the Immigration Judge's decision. Appeals of immigration hearings are the jurisdiction of the BIA. The BIA decisions may be appealed by aliens to the U.S. Courts of Appeals, thus moving from the administrative law process in the Executive Branch to the U.S. Courts for a final decision. The final authority for immigration appeals is the U.S. Supreme Court. The time it takes to proceed through the appellate process can be significant and often places a burden on INS to provide long-term detention. Another avenue for effecting an alien's removal is by reinstating a prior final order of removal. When an alien previously removed from the United States re-enters illegally, Sec.241(a)(5) provides for reinstatement of the removal order.

Release Policy in New York District

INS policy requires a case-by-case custody determination for aliens determined to have passed the credible fear threshold. This policy balances the need to detain people in order to

protect the public safety and ensure appearance for immigration hearings, and humanitarian concerns such as family reunification and medical history.

The decision of how to achieve this balance takes into consideration many national and local factors. The danger to the community, availability of appropriate detention space, the alien's identity, and family or community support, etc., are some or all of the factors considered in determining whether an alien will comply with the terms of their release from custody. The New York District Office, as do all District Offices, examines these factors in each individual case before reaching their conclusion. The New York District is unique as compared to other INS districts in that it has two contract detention facilities dedicated solely to asylum seekers. As a result, almost all aliens are available for immigration proceedings and can be easily removed upon the issuance of a final order of removal. In September 2000, the General Accounting Office (GAO) issued a report on the expedited removal process. As part of that report, GAO determined that 42 percent of aliens who claimed credible fear and were released subsequently failed to appear at their immigration hearing and were issued an order of removal in absentia (termed "absconders"). The New York District has an absconder rate of 28 percent for this class of aliens. GAO recommended that INS analyze the characteristics of aliens claiming credible fear who appear for hearings and those who are absconders and use these results to re-evaluate existing policy on releasing aliens who claim credible fear. INS has contracted with a private company to accomplish this task. This analysis will examine the same database as that was used for the GAO Report and will then expand the database to look at many variables to determine which, if any, affect the rate at which an alien absconds. The results from the GAO study are disturbing. However, INS is taking into account GAO's recommendations in the study currently being conducted, and will make adjustments to the INS release policy as appropriate.

Commissioner Ziglar recently announced an initiative to enter the names of all aliens with final orders who fail to appear for removal into the Federal Bureau of Investigation's National Crime Information Center (NCIC). Previously, INS had only entered the names of criminal aliens and deported felons into NCIC. Entering the names of all absconders into NCIC will allow for increased identification and apprehension of those who fail to comply after completing the judicial process and receiving a final order of removal.

In conclusion, INS, with the help of Congress, has made great strides in the effective enforcement of our immigration laws. I stand ready to work with you as the INS continues to protect public safety while providing safe and humane treatment to all individuals in our custody.

Thank you for the opportunity to appear, Mr. Chairman. I look forward to your questions.