3-1-1987

Detention of Aliens

Paul Wickham Schmidt

Follow this and additional works at: https://digital.sandiego.edu/sdlr
Part of the Immigration Law Commons

Recommended Citation
Available at: https://digital.sandiego.edu/sdlr/vol24/iss2/4

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego Law Review by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
Detention of Aliens

PAUL WICKHAM SCHMIDT*

Detention of aliens has become a controversial issue in the debate over immigration policy. This Article examines general principles relating to detention of aliens in exclusion and deportation situations. It also surveys the legal issues in noteworthy areas of the detention controversy. Finally, the Article explores how the Immigration and Naturalization Service can most effectively utilize detention in the future.

INTRODUCTION

The authority to arrest and detain aliens for civil law violations makes the Immigration and Naturalization Service (INS) unique among federal law enforcement agencies. While a number of federal agencies have the authority to impose various civil penalties upon individuals, such as fines, forfeitures, and loss of licenses, the INS stands alone in its authority to incarcerate individuals who neither have been charged with, nor have been convicted of, crimes. It is not surprising that the use of this authority by the INS has become the subject of controversy and a substantial amount of litigation. Nevertheless, the authority of the government to detain aliens in connection with the enforcement of the immigration laws is well estab-
lished,¹ and predates the Immigration and Nationality Act of 1952 (INA).²

The use of detention has varied over the years. At one time, most immigrants, legal and illegal, arrived from Europe by boat at a limited number of major seaports.³ Detention for "screening and determination of admissibility to the United States was the norm."⁴

In the years following World War II, the source of immigration shifted to the Western Hemisphere and Asia. Airports and land borders replaced seaports as the principal places of arrival.⁵ During these years, the use of detention also declined.⁶ Ellis Island, where once the majority of all aliens arriving in the United States were detained for inspection, was closed in 1954. A policy was announced of "paroling" potentially inadmissible aliens into the United States, unless they appeared likely to abscond.⁷

With recent increases in illegal immigration⁸ and well-publicized incidents such as the Cuban flotilla of 1980 illustrating the vulnerability of our borders, the government has had to resort to detention in an increasing number of cases. Detention raises a number of related issues, such as the location of detention facilities, access to counsel, use of nonfederal and nongovernmental facilities, conditions of confinement, length of detention, detention of asylum applicants, detention of minors, no-work bond conditions, use of detainers, and judicial review.⁹ This Article addresses these issues.

4. Id.
5. Id. at 10-13.
6. Id. at 7-11.
7. Id. at 11. This change in the policy applicable to arriving aliens was described by Justice Clark as reflecting "the humane qualities of an enlightened civilization." Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).
9. For a report critical of current immigration detention policies, see LAWYERS COMMITTEE FOR HUMAN RIGHTS/Helsinki Watch, Mother of Exiles (1986).
DETENTION OF ALIENS

Deportable Aliens

A deportable alien is one who has "entered" the United States, and either has entered illegally or has committed some type of misconduct prohibited by the immigration laws following entry. The INA authorizes the Attorney General to take aliens into custody pending deportation proceedings to be conducted before an immigration judge.\(^{10}\) Pending the determination of deportability, the Attorney General may continue to detain the alien without bond, release the alien on a bond of not less than 500 dollars, or conditionally release the alien on his own recognizance.\(^{11}\)

The authority of the Attorney General to detain aliens has been delegated to district directors and other comparable officials of the INS.\(^{12}\) A custody determination then is made by the district director or other official at the time a warrant is issued.\(^{13}\)

An alien who is dissatisfied with the custody determination made by the district director may apply to that official for release or amelioration of the conditions of custody.\(^{14}\) The alien also may request a de novo determination of custody and bond by an immigration judge.\(^{15}\) Immigration judges are quasi-judicial officers who are independent from the INS. They serve under the Executive Office for Immigration Review (EOIR), a separate branch of the Department of Justice.\(^{16}\) In connection with a bond redetermination, an immigration judge exercises the same authority as can a district director to detain, release, or set bond.\(^{17}\)

An appeal from the immigration judge’s decision may be taken to the Board of Immigration Appeals (Board) by either the alien or the INS.\(^{18}\) The Board is a quasi-judicial body which also is part of the EOIR.\(^{19}\) In certain situations, a direct appeal can be taken to the

---

11. Id.
12. 8 C.F.R. § 242.2 (a) (1986).
13. Id.
14. Id.
15. Id. § 242.2(b).
17. 8 C.F.R. § 242.2(b).
18. Id. §§ 3.1(b)(7), 242.2(b). The taking of an appeal does not delay compliance with the custody order. Id. § 242.2(b).
19. Id. § 3.1(a).
Board from the custody determination of a district director, thus bypassing the immigration judge. The standards for detaining aliens pending deportation proceedings are related to those set forth in decisions of the Board that are binding on the INS. The Board has stated that in a deportation context “[a]n alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk . . . .” A “poor bail risk” generally characterizes an alien who is likely to abscond.

The authority to detain an alien continues after an order of deportation is issued. The law permits the Attorney General to maintain custody of a deportable alien for a period of up to six months following the entry of a final order of deportation so as to effect that order. This has been construed as permitting the Attorney General six “unhampered” months to achieve deportation. Therefore, this does not include periods when the deportation was prevented by court actions filed by the alien, or when the deportation was prevented by the alien’s failure to surrender.

The law specifically provides that judicial review and revision of an alien’s custody pending deportation proceedings may be had “upon a conclusive showing in habeas corpus proceedings that the

20. Id. § 242.2(b). For discussions of how these jurisdictional provisions are applied, see In re Vea, 18 I. & N. Dec. 171 (BIA 1981); In re Sio, 18 I. & N. Dec. 176 (BIA 1981); In re Chew, 18 I. & N. Dec. 262 (BIA 1982).
21. 8 C.F.R. § 3.1(g).
22. In re Patel, 15 I. & N. Dec. 666 (BIA 1976); see also Carlson v. Landon, 342 U.S. 524 (1952), reh’g denied, 343 U.S. 985 (1952) (discussing the Attorney General’s authority to detain aliens on national security grounds). In considering whether an alien presents a national security risk, the immigration judge and the Board may consider classified information which is not made available to the alien or his counsel. United States ex rel. Barbou v. District Director, 491 F.2d 573 (5th Cir.), cert. denied, 419 U.S. 873 (1974).
24. INA § 242(e), 8 U.S.C. § 1252(e). The more logical view appears to be that this section applies following a final administrative order of deportation. United States ex rel. Cellau v. Shaughnessy, 117 F. Supp. 473 (S.D.N.Y.), aff’d on opinion below, 209 F.2d 959 (2d Cir. 1954). However, the District of Columbia Circuit has found section 242(e) to be inapplicable during a period of judicial review of a final administrative order of deportation; instead, the District of Columbia Circuit indicates that detention during such period should be premised on INA § 242(a), 8 U.S.C. § 1252(a). Rubinstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953), aff’d per curiam by an equally divided court, 346 U.S. 929 (1954). One court has found that detention during such period can be sustained under both section 242(a) and section 242(e). Bartholomeu v. District Director, 487 F. Supp. 315, 321 (D. Md. 1980).

308
Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.\textsuperscript{27} A similar provision relating to custody after the entry of a final order of deportation provides that judicial review may be had "upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six month period."\textsuperscript{28}

The Sixth Circuit has held that these specific provisions for habeas corpus relief are the sole statutory remedies for an alien who is unlawfully detained.\textsuperscript{29} Therefore, that court refused to imply a private statutory remedy for damages under the INA for an alien who claimed unlawful detention.

Although the foregoing statutory provisions suggest that habeas review of a custody determination is limited to an examination of whether the Attorney General and his delegates are proceeding with due speed in the case, courts have looked somewhat more broadly into the overall justification for the detention or the amount of bond set in order to determine whether the discretion to detain has been abused.\textsuperscript{30} The alien, however, bears the heavy burden of establishing that the detention or bond amount is improper.\textsuperscript{31} The administrative decision will be reversed only upon a showing of a lack of "any basis in fact" for the decision, or that the decision "was without reasonable foundation."\textsuperscript{32} The Third Circuit recently concluded that when a district court grants a stay of deportation to a detained alien, that court nevertheless lacks jurisdiction to release the alien on bond, and must remand the case to the district director to determine custody.\textsuperscript{33}

There is support for the view that an alien may not seek judicial review of a detention decision unless he has exhausted available ad-

\textsuperscript{27} INA § 242(a), 8 U.S.C. § 242(a).
\textsuperscript{28} Id. § 242(c), 8 U.S.C. § 242(c).
\textsuperscript{29} Chairez v. INS, 790 F.2d 544 (6th Cir. 1986).
\textsuperscript{30} United States \textit{ex rel.} Yaris v. Esperdy, 202 F.2d 109 (2d Cir. 1953).
\textsuperscript{33} In re Ghalamsiah, 806 F.2d 68 (3d Cir. 1986).
ministrative remedies. However, the Ninth Circuit held that the exhaustion requirement of the Act applies only to final orders of exclusion and deportation, and not to conditions placed on bonds prior to such orders.

**Excludable Aliens**

Aliens are subject to exclusion if they have not “entered” the United States as that term is used in the immigration laws. An alien whose admissibility to the United States is questioned at a land border, a seaport, or an airport has not “entered” the United States, and may be held for exclusion proceedings.

Detention of excludable aliens differs in a number of significant ways from the detention of deportable aliens. While the deportation statutes mention the Attorney General’s detention authority in permissive terms, the detention language of the exclusion statute is mandatory:

Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section [relating to security risks] and in section 273(d) [relating to stowaways], who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer [immigration judge].

The exception to the general statutory provision for detention of arriving inadmissible aliens is contained in the statutory authority of the Attorney General and his delegates to “parole” inadmissible aliens. The Act provides:

The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergency reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien.

34. Massoumi-Demaghi v. Weiss, 631 F. Supp. 1525 (D. Conn. 1986). This decision does not purport to establish an absolute requirement of exhaustion in a bond situation, but rather applies the preclusion when the issue is one which “can reasonably be reviewed by the BIA.” Id. at 1526.


37. INA § 235(b), 8 U.S.C. § 1225(b) (emphasis added). Security risks, crewmen, and stowaways are also subject to detention, but are not entitled to exclusion hearings before immigration judges. INA §§ 235(c), 252(a), 273(d), 8 U.S.C. §§ 1225(c), 1282(a), 1323(b).
alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall be dealt with in the same manner as that of any other applicant for admission to the United States.48

Current INS regulations make detention mandatory for aliens who arrive at the border without any documentation or with facially false documentation.49 Aliens who arrive with documentation, but nevertheless appear to be inadmissible, may be detained or paroled.40 Detention of documented arrivals who appear to be inadmissible depends upon whether the inspecting officer determines that they would be likely to abscond or pose a security risk if paroled.41 These INS regulations have been upheld against a number of attacks, including claims that they are discriminatory and that they lack a rational basis.42

Regulations previously provided that detained aliens who arrived by certain international carriers could be placed in the custody of the carrier.43 However, enactment of the Department of Justice Appropriations Act for fiscal year 1987 repealed the provision of the Act relating to carrier custody.44 Therefore, the INS has assumed custody of excludable aliens who formerly were placed in carrier custody.45

Unlike the situation of deportable aliens, no statutory provisions

39. 8 C.F.R. § 235.3(b) (1986).
40. Id. § 235.3(c).
41. Id.
43. 8 C.F.R. § 235.3(d).
44. INA § 233, 8 U.S.C. § 1223 formerly made the carrier which brought an alien to the United States responsible either for detaining such alien until the immigration inspection process was completed, or for paying the costs of detention if the alien were taken into INS custody. This provision was repealed, effective October 18, 1986, by section 206 of the Continuing Appropriations Act, Fiscal Year 1987, Title II, Department of Justice, Pub. L. No. 99-591, 100 Stat. 3341-56 (1986). Section 205 of that same act created a fund, paid for by user fees charged to airline passengers, to reimburse the INS for detention and removal expenses, as well as to defray other INS costs relating to the immigration inspection process. The user fee provision is codified as section 286(d) of the INA.
provide for the setting of bond or the release on recognizance of aliens detained for exclusion proceedings. Any release must be obtained through the Attorney General’s parole authority which has been delegated to INS district directors. There are no regulations giving a detained excludable alien recourse to an immigration judge or the Board regarding custody status.

INS regulations provide seven categories of detained excludable aliens who may be considered for parole: (1) aliens with serious medical conditions; (2) pregnant women; (3) certain juveniles; (4) aliens with close relatives in the United States who have filed a visa petition for the detainee; (5) aliens who are needed as witnesses in administrative, judicial, or legislative proceedings; (6) aliens being brought to the United States for prosecution; and (7) aliens whose continued detention is not in the public interest as determined by the district director. This last category is a catch-all which can encompass a number of factors not specifically listed, such as the lack of suitable detention space, health problems, prolonged detention, lack of ability to remove the alien, and unusual humanitarian factors.

The INS parole regulations pertaining to excludable aliens also have been upheld against attacks based upon constitutional, statutory, and international law grounds. For example, one district court found that even if an alien had a relative placing him within the category eligible for release, it was not an abuse of discretion for the INS to deny parole where the alien previously had absconded.

The district director may impose reasonable conditions upon an alien paroled under the regulations. Such conditions may include a bond or a periodic reporting of whereabouts. In determining the

46. 8 C.F.R. § 212.5(a) (1986). District directors are INS field management officials who exercise authority delegated from the Commissioner of Immigration and Naturalization and perform both informal and adjudicative and law enforcement functions under the Act. Id. § 103.1(n).
47. 8 C.F.R. § 212.5(a).
50. 8 C.F.R. § 212.5(c).
51. Id. § 212.5(c)(1), (3).
necessity for a bond, or the proper amount of the bond, the district director usually considers the paroled alien's ties to family and community. Unlike a deportable alien, a paroled excludable alien who is dissatisfied with the amount of the bond or the conditions of release has no recourse to an immigration judge or the Board. Neither the immigration judges nor the Board has been given the power to exercise the Attorney General's authority to parole excludable aliens.

The situation of detained excludable aliens following a final order of exclusion also contrasts with that of deportable aliens following a final order of deportation. The exclusion statute speaks of "immediate deportation" unless the Attorney General "in his discretion, concludes that immediate deportation is not practicable or proper." There is, however, no statutory six-month limitation on the detention of excludable aliens following the entry of a final order of exclusion. The Supreme Court and two circuit courts of appeals have supported the government's position that such detention may be indefinite. However, one appellate court has suggested that detention following an order of exclusion should be limited to a reasonable period of time during which the government is making bona fide efforts to remove the alien.

52. Id. § 212.5(c)(2).
54. INA § 237(a), 8 U.S.C. § 1227(a). In a curious holding that went beyond the position asserted by the government, the Eleventh Circuit ruled that this provision narrowly limited the INS district director's authority to grant a stay of removal to an excludable alien to situations involving difficulty in making travel arrangements, or the need of the alien to serve as a witness as provided in section 237(d). Zardui-Quintana v. Richard, 768 F.2d 1213 (11th Cir. 1985). Thus, the court ruled that the district director had no jurisdiction to consider or grant stays of exclusion for detained Mariel Cubans who wished to move to reopen their exclusion proceedings before the immigration judge in order to apply for asylum. Id. The court stated that such stays, however, could be granted by the immigration judge considering the motion to reopen. Id. at 1220. The court did not explain how the immigration judge could derive more authority from the statute than could the district director who, under 8 C.F.R. § 237.1 (1986), appears to have been granted all of the Attorney General's authority to stay deportation under section 237 of the INA. Judge Vance, concurring in the result, would have found jurisdiction in the district director and would have upheld his denial of stays on the merits. Id. at 1220-23 (Vance, J., concurring).
The government's greater latitude in the treatment of excludable aliens is based upon the traditional view of the courts that aliens at the border of the United States have no constitutional rights with respect to the immigration process, and therefore are limited to whatever rights Congress specifically confers by statute. On the other hand, aliens who have "entered" the United States have due process rights with respect to the procedures for deportation.

Consistent with the foregoing view, the scope of judicial review of detention decisions for excludable aliens is very narrow. The government has argued that there should be no judicial review of the merits of the decision to detain or refuse to parole an excludable, or potentially excludable, alien. Recently, courts have found that the decision to detain or refuse to parole such an alien may be reviewed in habeas corpus proceedings for abuse of discretion. The Eleventh Circuit has concluded that no abuse of discretion can be found as long as the government's decision is supported by a "facially legitimate and bona fide reason." This standard was enunciated by the Supreme Court in 1972 in Kleindienst v. Mandel.

The "entry" distinction between excludable and deportable aliens has been criticized by commentators. Indeed, that distinction might suggest that an excludable alien would improve his position with respect to the immigration laws by escaping from detention during the pendency of exclusion proceedings and claiming to have "entered."


59. See, e.g., Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982). In Palma, the court declined to reach the argument advanced by the government that review was limited to whether the applicant was a citizen or alien and whether statutory procedures relating to exclusion had been followed. Id. at 105.


62. 408 U.S. 753 (1972) (reviewing the denial of a nonimmigrant waiver for an alien inadmissible to the United States because of his advocacy of the doctrine of world communism).

Rejecting this notion, however, the Board held that an excludable alien who escapes from detention during the pendency of exclusion proceedings remains subject to exclusion when apprehended.\textsuperscript{64}

\textit{Specific Detention Issues}

Use of Non-INS Detention Facilities

The INA gives the Attorney General specific authority to "arrange for appropriate places of detention for those aliens whom he shall take into custody and detain . . . ."\textsuperscript{65} It further specifically provides for the acquisition of land and the construction of buildings for the detention of aliens.\textsuperscript{66}

In accordance with this authority, the INS has acquired, through purchase or lease, the physical premises for a number of INS-run detention facilities, known as Service Processing Centers. These processing centers are currently located in Boston, Massachusetts; New York, New York; Miami, Florida; Los Fresnos, Texas; El Paso, Texas; Florence, Arizona; and El Centro, California. In Oakdale, Louisiana, a Federal Detention Center is run by the Bureau of Prisons for the INS. This 1000-bed capacity center is the largest in the INS system devoted to the detention of general alien populations. However, in October 1986 the INS announced that the Oakdale facility temporarily would be converted to an additional long-term facility for excludable Mariel Cubans who have committed serious crimes in the United States or Cuba.\textsuperscript{67} The Atlanta Federal Penitentiary is run by the Bureau of Prisons and also is devoted solely to the detention of excludable Mariel Cuban criminals.

The needs of the INS for detention space cannot be met entirely through the existing Service Processing Centers. Since many of the aliens are apprehended some distance from the nearest Service Processing Center, short-term custody is needed until transfer can be arranged. Moreover, the limited number of beds in the INS system often cannot accommodate the number of aliens in INS custody. Since the INS centers are basically minimum-to-medium security

\textsuperscript{64} In re Lin, 18 I. & N. Dec. 219 (BIA 1982). But see In re Ching & Chen, Interim Dec. No. 2984 (BIA 1984) (aliens who were denied admission by immigration officer, accepted decision, and escaped from carrier custody while awaiting removal, "entered" the United States and were entitled to a deportation hearing).

\textsuperscript{65} INA § 242(c), 8 U.S.C. § 1252(c).

\textsuperscript{66} Id.

facilities, they are inappropriate for confining aliens who have been involved in violent criminal activities, or aliens requiring specialized medical care, or juveniles. For these and other reasons, the INS must secure additional detention space.

Some of the additional space can be obtained from the Bureau of Prisons. However, the INS interprets its authority as permitting contracts for the detention of aliens with state and local governments and private entities. A number of these "contract facilities" are utilized by the INS around the country. The largest contract facility is in Houston, Texas. The aliens detained at contract facilities are considered to be the responsibility of the INS. As part of the contracting process, the contractor must agree to comply with certain conditions and standards set by the INS.

One district court held that the detention of aliens is a federal responsibility and that the INS may not avoid responsibility for what happens to a detained alien when that alien is placed by a carrier into the custody of a private guard service. However, that case involved a unique situation because the alien was a stowaway. Under specific provisions of the Act, the detention of alien stowaways is the responsibility of the carrier which brought them to the United States. In the particular case, the INS asserted that it was the responsibility of the carrier, not the INS, to arrange for an adequate guard service. Accordingly, the INS had not entered into a contractual relationship with the guard service. Normally, however, when an alien is taken into custody by the INS, the INS ultimately is responsible for the well-being of that alien, regardless of whether the alien is detained in an INS or non-INS facility.

Location of Detention and Access to Counsel

Somewhat related to the issue of the use of non-INS detention facilities are the issues of the location of detention facilities and access to counsel. Allegations have been made in various lawsuits that

---

68. The normal assumption that INS detention centers, other than the Atlanta Penitentiary, need not have high security levels because of the noncriminal nature of the detainees has been questioned in connection with the INS Varick Street facility in New York City. The New York Times reported that 116 of the 173 detainees in Varick Street in April 1986 had criminal records, including 77 who had been convicted of violent crimes. Alien Detention Center Held Inadequate, N.Y. Times, Aug. 1, 1986, at B4, col. 1. 25 escapes from Varick Street were reported between June 1985 and June 1986. Id.

69. Memorandum from Maurice C. Inman, Jr., General Counsel, INS, to Hugh G. Brien, Assistant Commissioner, Detention and Deportation, INS, Concerning Contracting Out for Detention Facilities (March 23, 1984) (General Counsel Opinion No. 84-8) (on file with author).

70. Id.

71. Id.


73. INA § 273(d), 8 U.S.C. § 1323(d).
the INS purposely transfers detained aliens to remote locations where they will be unable to obtain counsel. Claims also have been made that apprehended aliens have a right to remain in a particular location so that they may avail themselves of free legal representatives who have a particular area of expertise, for example in presenting Central American asylum claims. In response, the INS has asserted that there are compelling governmental reasons for transferring aliens, such as overcrowding, institutional security, availability of immigration judges, cost savings, and ease of making travel arrangements for the removal of aliens found excludable or deportable.

No court ruling on the merits has sustained a claim of bad motive on the part of the government in arranging transfers of detained aliens. The Ninth Circuit has concluded that the government generally has wide latitude in deciding the place of detention. However, in a case in which an alien had been transferred nearly 3000

74. See, e.g., Roshan v. Smith, 615 F. Supp. 901 (D.D.C. 1985) (action to prevent completion and operation of Oakdale alien detention center dismissed for lack of ripeness, lack of standing, and failure to state a claim under first amendment). Since the opening of the Oakdale facility in March 1986, several suits have been filed challenging the transfer policy. Bonilla v. Nelson, No. CV-86-2353 (E.D.N.Y. filed July 21, 1986); Velasquez v. Nelson, No. 86-1262-CIV-RYSKAMP (S.D. Fla. filed June 12, 1986). In Velasquez, the district judge declined to prohibit the holding of hearings at Oakdale. However, the judge did enter an order for a limited preliminary injunction requiring the government to file change of venue motions in deportation cases of detained aliens who were transferred from the Krome facility in the Miami district to Oakdale following a disturbance on May 28, 1986 which partially destroyed the men's dormitories at Krome. A claim of denial of first amendment rights in connection with access to detained Haitians was raised by the plaintiffs, but was not finally adjudicated by the courts, in Jean v. Nelson, 727 F.2d at 983. As mentioned earlier, see supra text accompanying note 67, the INS now is using the Oakdale facility for Mariel Cuban detention, rather than general detention.

75. Such a claim was rejected by the district court in Committee of Cent. Am. Refugees v. INS, No. C-85-2167-JPV (N.D. Cal. Sept. 30, 1985), aff'd, 795 F.2d 1434 (9th Cir. 1986) (order denying preliminary injunction).

76. Following the Mariel boatlift in 1980, exclusion hearings were held for detained Cubans at various federal detention facilities. One of these facilities was the McNeil Island Federal Penitentiary, operated by the Bureau of Prisons. Many of the Cubans detained at McNeil Island were represented by pro bono counsel provided by the local bar association. For various budgetary and management reasons, it became necessary for the Bureau of Prisons to close the McNeil Island facility. The government proposed to transfer the Cubans to other federal facilities. In an unpublished decision, a federal district judge entered an order granting a preliminary injunction prohibiting the government from moving certain plaintiffs who were represented by pro bono counsel in the exclusion proceedings, finding that the hardship to the plaintiffs if deprived of counsel outweighed the inconvenience to the government. Chavez-Galen v. Turnage, No. C80-485T (W.D. Wash. Feb. 3, 1981) (order granting preliminary injunction).

77. Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985).
miles removing him from his only friend in the United States, had a limited education, spoke only Spanish, and was generally unfamiliar with the legal system, the same court held that a grant by an immigration judge of two continuances for a total of two working days in order to obtain counsel was insufficient and constituted a denial of due process.78

The remoteness, or perceived remoteness, of an INS facility apparently can be an influential factor with courts in determining the reasonableness of INS actions with respect to counsel. In a case involving the INS Los Fresnos facility, located approximately twenty miles from Brownsville, Texas, and thirty miles from Harlingen, Texas, the district court considered the remote location of the facility in preliminarily enjoining the INS from prohibiting visits by attorneys after 3:30 p.m.79 The court also found that the remote location of the facility made it necessary that attorneys be allowed to utilize paralegals and legal assistants to interview detainees, and required the INS to permit such individuals access to the detainees.80 However, the court found that the INS could permissibly bar paralegals and legal assistants who were neither United States citizens nor lawful permanent resident aliens.81

In 1981, in the context of an application for a preliminary injunction, a federal district judge criticized the government for moving a number of detained Haitian aliens out of the Krome North facility in Miami, Florida, to various federal detention facilities throughout the country.82 That judge, however, did not order the INS to return the aliens to Miami. Following an extensive trial in that case, another federal district judge, although critical of the manner in which the transfer was carried out, found that the transfer was necessary in light of the government’s representations to the court in another suit brought by the State of Florida about overpopulation in the Krome facility.83

Perhaps the most difficult situations involve the transfer of aliens

---

78. Id.
80. Nunez, 537 F. Supp. at 582.
81. Id.
82. Louis v. Meissner, 530 F. Supp. 924, 926-27 (S.D. Fla. 1981). In Louis, the district judge enjoined the INS from holding exclusion hearings for a class consisting of unrepresented Haitians in detention. The case later was transferred to another district judge who modified the injunction to permit the holding of exclusion hearings if the aliens were individually represented by pro bono counsel. Louis v. Meissner, 532 F. Supp. 881, 884-85 n.6, 892-93 (S.D. Fla. 1982). For the subsequent history of this procedurally complex case which later reached the Supreme Court on another issue, see infra note 83.
who already are represented by counsel in a particular locality.\textsuperscript{84} In a 1985 case involving the transfer of detained excludable aliens who were represented by counsel, a district court found that no denial of rights occurred in the absence of a showing that the transfer was intended to deprive the aliens of representation.\textsuperscript{85} That case involved a group of Cubans who arrived in New York with counterfeit travel documents and consequently were detained for exclusion proceedings. They were placed in the custody of airline carriers. Most of the aliens retained New York counsel. Before the exclusion proceedings actually commenced, thirteen of the fifty-two detained aliens escaped. Another four escaped during the pendency of proceedings. Thereupon, the INS transferred most of the remaining aliens to an INS facility in El Paso. Legal services, both retained and free, were available to the aliens.

The aliens claimed that the transfer deprived them of their statutory right to counsel and their fifth amendment right to due process. The court rejected both of these claims, finding that the INS was justified in seeking to transfer the aliens in light of the escapes and the lack of suitable facilities available in New York. The court also found that the aliens could obtain counsel in El Paso, or in the alternative, their New York counsel could travel to El Paso. The court characterized the aliens as seeking "an unqualified right to representation by particular counsel" which would exceed the sixth amendment right of an individual charged with a crime.\textsuperscript{86}

It is unclear what the scope of this ruling might be as applied to other detention situations. It could be viewed as generally allowing the government to transfer detained represented aliens so long as an administrative justification exists for the transfer. On the other hand, the ruling could be viewed as limited by the facts: the plaintiffs were excludable aliens, there was a demonstrable escape problem, and retained or free legal counsel was available in the El Paso location.

A federal district court in California has rejected an attempt to preliminarily enjoin the INS from transferring detained Central American asylum applicants out of the INS San Francisco District.\textsuperscript{87} The plaintiffs claimed that such transfers deprived those

\textsuperscript{84} See supra note 76 and accompanying text.
\textsuperscript{86} Id. at 682.
\textsuperscript{87} Committee of Cent. Am. Refugees v. INS, No. C-85-2167-JPV (N.D. Cal. Sept. 20, 1986) (order denying preliminary injunction), aff'd, 795 F.2d 1434 (9th Cir. 1986). In an earlier order in the same case, upon which the court based its September 20, 1986 order denying the preliminary injunction, the court stated:
aliens of expertise in the presentation of asylum claims which was available from free legal services groups operating in the San Francisco area. In affirming the district court, the Ninth Circuit noted that no on-going attorney-client relationship had been established. Thus, it is difficult to discern what importance, if any, the appellate court would attach to the fact that the aliens to be transferred are represented.

A suit was filed prior to the opening of the Oakdale facility to enjoin the transfer of aliens to Oakdale on the ground of lack of availability of legal representation; it was dismissed because no plaintiff actually had been transferred. Prior to the conversion of the Oakdale Facility for use by Mariel Cuban criminals, the INS had developed a transfer policy with respect to the Oakdale facility, which stated in pertinent part:

Aliens who establish a bonafide local attorney-client relationship . . . may be retained at their present location. If, notwithstanding such attorney-client relationship, it is determined that the best interests of the government would be served by his/her transfer, application should be made to EOIR; for change of venue in cases where the proceedings document has already been submitted to EOIR; or the prompt transfer of the alien and the relating documents to EOIR in Oakdale in cases where the proceedings document has not yet been submitted to EOIR.

A detained alien who is dissatisfied with his place of hearing is not without administrative remedy. Under the current law, a detained deportable alien may apply to an immigration judge for a change of venue which may be granted or denied in the exercise of the judge's discretion. Paroled excludable aliens also may seek a change of venue. The Board had held that an immigration judge lacked jurisdiction to consider a motion for change of venue for an alien who has

The right to assistance of counsel as provided in the Immigration and Nationality Act does not support the conclusion that detention outside of the San Francisco area amounts to a denial of due process. See 8 U.S.C. §§ 1252(b), 1362. The government simply is not obligated to detain aliens where their ability to obtain representation is at its greatest.


88. Committee of Cent. Am. Refugees v. INS, 795 F.2d 1434 (9th Cir. 1986).
89. Roshan v. Smith, 615 F. Supp. 901 (D.D.C. 1985). The court characterized the first amendment claim that the government was required to "provide them with clients in their locality, or otherwise make access to such clients as geographically convenient as possible," as having "absurd" implications. Id. at 907.
90. Memorandum concerning Oakdale Federal Alien Detention Center, U.S. Immigration and Naturalization Service, Policy and Procedures, reprinted in 63 Interpreter Releases 333-34 (1986). As noted earlier, see supra text accompanying note 67, the INS temporarily has converted the entire Oakdale facility for the use of detaining excludable Mariel Cubans.

been detained pending exclusion proceedings. The rationale for this rule was that such change of venue would interfere with the exclusive jurisdiction conferred by the regulations on INS district directors to detain or parole aliens subject to exclusion proceedings. However, final rules of procedure recently adopted by the EOIR changed this rule, and detained aliens in exclusion proceedings are now allowed to seek changes of venue.

Whatever the outcome of pending litigation, it seems likely that the scope of the government’s authority to transfer aliens, especially those represented by counsel, will remain an issue of contention.

Conditions of Detention

The Supreme Court has not ruled on the conditions applicable to detained aliens. Since aliens being detained for civil immigration purposes are not being incarcerated for crimes, the eighth amendment’s prohibition of cruel and unusual punishment is inapplicable. Thus it is not clear what conditions, if any, may be constitutionally required, and whether the conditions which must be provided to detained excludable aliens can differ from those which must be provided to detained deportable aliens. As a practical matter, in all facilities except the Atlanta Penitentiary, which is limited to excludable Mariel Cubans, the INS intermingles deportable and excludable aliens without any distinction as to the conditions of confinement.

In the absence of definitive Supreme Court guidance, lower courts have assumed that the conditions of confinement for detained aliens are governed by the criteria established by the Supreme Court in Bell v. Wolfish. That case, which involved pretrial detainees in the Metropolitan Correctional Center in New York City, held that the judiciary should give broad deference to prison administrators, so long as such officials were acting in a manner reasonably related to the orderly operation of the facility, and were not seeking to impose “punishment” upon the pretrial detainees.
In 1981 the INS entered into a stipulated settlement of a major suit concerning conditions at the former INS Service Processing Center in Brooklyn.\textsuperscript{97} Without any admission of wrongdoing, the INS agreed to make a number of changes in the physical plant, medical procedures, recreation, visitation, intake orientation, search procedures and disciplinary procedures. A court-appointed monitor reviewed compliance with the agreement until the spring of 1984, when the Brooklyn facility officially was closed and the INS facility was relocated.\textsuperscript{98}

Since 1981, the INS has developed extensive guidelines for the operation of detention centers.\textsuperscript{99} The Operational Manual For Service Processing Centers, originally issued in 1983, deals with a wide range of subjects, such as intake, grievances, mail, attorney and media access, religious and medical services, library facilities, recreational and other programs, visitation, and other procedures. These guidelines were developed, to a large extent, from model standards of the American Correctional Association.\textsuperscript{100}

In 1982, in connection with proceedings for preliminary injunctions concerning the INS facilities in Los Fresnos, Texas, and in El Centro, California, two federal district courts found shortcomings in the procedures relating to attorney and paralegal access, access to legal materials, access to telephones, access to writing materials, and disciplinary procedures.\textsuperscript{101} No final decision on the merits has been


\textsuperscript{98} Man Chung Lam v. Smith, No. CV-79-795 (E.D.N.Y. June 22, 1984) (stipulation of dismissal). The service processing center in Manhattan is in a different judicial district.


\textsuperscript{100} See AMERICAN CORRECTIONAL ASS'N, STANDARDS FOR ADULT LOCAL DETENTION FACILITIES (2d ed. 1981 & Supp. 1986). The American Correctional Association is a professional association of administrators, managers, and practitioners working in concert to improve overall conditions for staff and inmates of correctional facilities in the United States. The INS currently intends to seek accreditation from the American Correctional Association for the El Centro facility.


The INS policy on attorney access is as follows:

Each SPC [Service Processing Center] shall establish visiting hours to allow attorneys to meet with detainees who are their clients, to the maximum extent possible. But, these hours shall not unreasonably interfere with the normal and necessary routines of the facility or compromise security.


The INS policy on paralegals is as follows:

Paralegals may interview detainees, complete forms and deliver papers without the attorney being present . . . . Each paralegal must have a letter from the employer-attorney identifying him or her and stating that he or she is employed and supervised by the attorney. Paralegals must be a [sic] citizen of the United States or an alien lawfully admitted for permanent residence to the United States.

322
rendered in either of these cases.

In another 1982 case, a district court in Colorado found that aliens arrested during "Project Jobs" were taken to an INS detention facility where they were held for several days without adequate food, water, bathing, or sleeping facilities. The court held that while the eighth amendment did not apply to the civil deportation process, fifth amendment due process did apply and had been violated in the case. The court noted that although the facility would be adequate for the ordinary brief INS detention, it was inappropriate for the lengthier type of detention which had taken place.

In a 1984 case in the Southern District of Texas concerning the detention of aliens in a carrier custody, the district court concluded that immigration detention must provide adequate space, one bed per person, recreation facilities, and proper meals. The court found that the detention of the aliens in that case violated those minimum standards.

On the other hand, in a 1985 suit involving conditions in local jails utilized by the INS Border Patrol in a twenty-eight county area of Texas, another district court concluded after lengthy hearings that no violations of statutory or constitutional rights had occurred. The court noted that the INS had initiated a process of developing uniform standards for non-INS detention facilities as early as 1979. The court found that guidelines, modeled on those of the United States Marshals Service, and setting forth minimum requirements in the areas of supervision, safety, food service, and medical care, had been issued in 1982, and that such issuance was not in response to the lawsuit. Applying the Wolfish test, the court stated:

The conditions of detention were mildly uncomfortable, and Border Patrol procedures were slightly inconvenient. They certainly were not violative of any constitutional rights since they were closely related to legitimate governmental interests and were not imposed in an attempt to punish.

On appeal the Fifth Circuit adopted a different approach. The court found that under the Supreme Court's recent rulings in Daniels v. Williams and Davidson v. Cannon, mere allegations of

---

102. Garcia v. INS, No. 82-680 (D. Colo. Nov. 4, 1982).
105. Id. at 45.1.
106. Ortega v. Rowe, 796 F.2d 765 (5th Cir. 1986).
negligence are not cognizable under the due process clause. The court noted that a claim under the Wolfish analysis could be made "[o]nly if the evidence suggests that the appellees knew of the jails' conditions or intended to force the detainees to endure such conditions." Since the court concluded that the appellant was alleging "nothing more than negligent supervision," the appeal was dismissed for failure to state a constitutional claim.

Another issue related to conditions of detention is the payment of detainees for voluntary labor performed in the detention facility. Statutory provisions limit INS payments to alien detainees to one dollar per day. Attempts to raise this limit have failed. In 1986 a class of present and former detainees filed a suit claiming that the one dollar per day limitation violated the Fair Labor Standards Act.

Finally, third parties have unsuccessfully attempted to challenge the "unsafe" operation of INS detention facilities. The United States District Court for the Southern District of Florida recently dismissed on standing grounds a suit brought by a United States Senator, the Governor of Florida, Dade County, and local homeowners claiming that the INS operated the Krome detention facility in a "manifestly unsafe manner."

In the absence of a Supreme Court definition of which standards are applicable to civil immigration detainees, it appears that the lower courts will apply the Wolfish criteria to require the Service to meet certain minimum standards, especially in the areas of attorney access and access to legal materials. However, the Fifth Circuit has now suggested that Wolfish may not even be applicable unless the claims against the INS are based upon intentional, rather than merely negligent, conduct on the part of INS officials. The Service has been working toward developing uniform standards for both INS and non-INS detention facilities. At the same time, the private bar will continue to litigate in order to establish more definite statements from the courts as to the standards the INS is legally required to meet.

Length of Detention

At one time it might have been assumed that most immigration detention would be strictly short-term. Aliens would be detained for

109. Ortega, 796 F.2d at 767-68.
110. Id. at 768.
111. Id. at 768-69.
brief periods while arranging for bond, or being processed for voluntary departure or deportation. Indeed, the bulk of INS detention is still short in nature. However, a number of factors in recent years have led to an increase in the number of aliens being held by the INS for longer periods of time.

First, the Cuban boatlift of 1980 brought to the United States several thousand dangerous criminals who, even though found excludable, could not be returned to Cuba because the Cuban government refused to accept them. Second, the establishment of a detention policy for aliens arriving in the United States without documentation increased the number of such aliens in detention. Many such arrivals were applicants for asylum, thereby increasing the amount of time required for hearings on excludability.

Third, there has been an increase in the number of excludable aliens arriving through third countries. Some of these aliens, principally Afghans, cannot be returned to their home countries because of the provisions of section 243(h) of the Act, relating to withholding of deportation because of persecution. Arrangement of the return of such aliens to third countries sometimes has been difficult. Finally, the heavy workload of the immigration court system, and the backlogs in some areas, have had an impact upon the length of detention.

As mentioned earlier in this Article, the detention of deportable aliens following a final order of deportation is limited by statute to six months. No such statutory limit has been placed upon the detention of excludable aliens. Therefore, much of the litigation regarding the length of detention has focused upon excludable aliens.

In the 1953 case of Shaughnessy v. United States ex rel. Mezei, the Supreme Court considered the situation of a former lawful permanent resident of the United States who had been excluded on security grounds without hearing. No country would accept him, and he was detained on Ellis Island for a period of twenty-one months. Mezei petitioned for habeas corpus, and the lower courts granted that application, finding that continued detention without any realistic possibility of removal constituted a denial of due process. The Supreme Court reversed, concluding that because of Mezei's position as an excludable alien, no statutory or constitutional basis for his release existed.

115. See supra notes 24-26 and accompanying text.
116. See supra notes 54-56 and accompanying text.
117. 345 U.S. 206 (1953).
Jean v. Nelson, a 1984 case, involved claims of discriminatory detention of arriving Haitian aliens. The Eleventh Circuit followed Mezei, and held that such aliens had no statutory or constitutional rights with respect to the exclusion or parole process. However, the court of appeals remanded the case for a determination of whether lower level INS officials had abused their discretion by violating facially neutral regulations and policies established by their superiors. The Supreme Court ultimately affirmed Jean on narrow grounds without addressing the constitutional issues.  

Much of the litigation on the length of detention of excludable aliens has focused upon the situation of excludable Mariel Cuban criminals who have remained in long term detention because of the refusal of the Cuban government, except for a five-month period in 1985, to accept them for return to Cuba. In 1981, in Rodriguez-Fernandez v. Wilkinson, the Tenth Circuit concluded that detention of excludable aliens

is permissible during proceedings to determine eligibility to enter and, thereafter, during a reasonable period of negotiations for their return to the country of origin or the transporter who brought them here. After such a time, upon application of the incarcerated alien willing to risk the possible alternatives to continued detention, the alien would be entitled to release.

The Tenth Circuit found that there were no negotiations with Cuba or any other country to take the petitioner, and that the government had shown no reason for continued detention, and therefore ordered release. Subsequently, the Fourth Circuit distinguished Rodriguez-Fernandez and sustained continued detention in a case in which the government had made a particularized determination of the need for continued detention which had been lacking in Rodriguez-Fernandez.

The vast majority of the approximately 125,000 Cubans who arrived during the boatlift were paroled into the United States after a short period of detention for initial screening. Many have had their status regularized under the Cuban Adjustment Act. However,
those who committed serious crimes in Cuba or in the United States have been subject to continuing detention and exclusion proceedings, although it generally has not been possible to execute orders of exclusion to Cuba. Because of the location of the Atlanta Penitentiary, the principal place of immigration detention for dangerous Mariel Cubans, most cases of Cuban detainees have ended up before the Eleventh Circuit.

In a 1984 case, Fernandez-Roque v. Smith, the Eleventh Circuit found the Supreme Court's decision in Mezei, and its own decision in Jean, to be controlling, and concluded that the Cuban detainees had no constitutional rights with respect to the admission or parole process. The court therefore rejected a district court ruling which had required the Attorney General to meet certain due process considerations in making parole decisions. The court noted that unless the government had an absolute right under the Constitution to detain excludable aliens, "'[a] foreign leader could eventually compel us to grant physical admission to any aliens he wished by the simple expedient of sending them here and then refusing to take them back.'"126

In a 1986 case, Garcia-Mir v. Meese, the Eleventh Circuit considered two questions not decided in Fernandez-Roque. The court determined that detained Mariel Cubans had neither nonconstitutionally-based liberty interests, nor rights under public international law with respect to the parole process.

The court found that the public statement of former President Carter that he welcomed the Cubans with "open arms" did not place any substantive limits on the Attorney General's broad discretion to detain or parole.128 The court held that any possible international law claim by the detainees was extinguished both by the controlling executive act of the Attorney General in deciding to detain the Cubans, and by the existence of controlling judicial precedents such as Mezei. In an unusually pointed statement, the court concluded:

As both the government and the appellees concede, with today's decision we have reached the point in this longstanding controversy where we have rejected all legal theories, constitutional and otherwise, advanced by the ap-

124. 734 F.2d 576 (11th Cir. 1984).
126. 734 F.2d at 582 (quoting Jean, 727 F.2d at 975).
128. Id. at 1451-52.
129. Id. at 1453-55.
pellees. They have exhausted all claims for relief available in the federal court system at all levels save that of the Supreme Court. Accordingly it is our judgment that, unless the appellees elect to seek, and the United States Supreme Court elects to grant, a petition for a writ of certiorari, these cases have reached the terminal point and shall be dismissed.\textsuperscript{130}

The Supreme Court has denied certiorari in this case.\textsuperscript{131}

Thus, at least in the Eleventh Circuit, the way appears to be cleared for indefinite detention of excludable Mariel Cuban criminals. The American Civil Liberties Union and other groups have written to the Secretary General of the United Nations claiming human rights violations in the continued detention of Cuban criminals.\textsuperscript{132}

The Attorney General adopted a status review plan in 1981 to provide a systematic review of the cases of Mariel Cuban detainees, with parole to suitable placements for those deemed not to be dangerous to the public.\textsuperscript{133} This plan was terminated in 1985 when the return of some of the Cuban detainees was possible during a five-month period.\textsuperscript{134} The plan has not been re instituted since the breakdown of the immigration agreement with Cuba. Parole of Mariel Cubans currently is within the discretion of the INS district director, as in other exclusion situations.

It has been suggested that the status review plan should be adopted as a model for all INS long-term detention.\textsuperscript{135} However, this has not been done by the INS, since the plan was geared primarily to the unique situation of a relatively large number of potentially dangerous criminals who could not be removed from the United States.

No other jurisdiction expressly has adopted the Rodriguez-Fernandez test for continued detention of excludable aliens. In 1983 the INS issued internal guidelines permitting district directors to consider the release on parole of detained, noncriminal, excludable aliens.\textsuperscript{136}

\textsuperscript{130} Id. at 1455.
\textsuperscript{132} Letter from Ira Glasser, Executive Director, American Civil Liberties Union, and Rev. William L. Wipfier, Director, Human Rights Office, National Council of Churches of Christ in the USA, to His Excellency Javier Perez de Cuellar, Secretary-General, United Nations (May 29, 1986) (copy on file with author).
\textsuperscript{133} This plan is discussed in Fernandez-Roque, 734 F.2d at 579, and analyzed in some detail in Verkuil, A Study of Immigration Procedures, 31 UCLA L. Rev. 1141, 1161-63, 1175-78, 1203-04 (1984).
\textsuperscript{134} The plan was “temporarily suspended” in December 1984 following an agreement with Cuba to accept the return of 2746 Mariel Cubans. See Garcia-Mir v. Smith, 766 F.2d at 1481. This suspension was later made permanent. See Garcia-Mir v. Meese, 788 F.2d at 1454.
\textsuperscript{135} In 1984 the Administrative Conference of the United States considered a proposed recommendation that the status review plan procedures be modified somewhat and applied to all INS detainees. Immigration Procedures Request for Comments, 49 Fed. Reg. 9738, 9739 (March 15, 1984). No final recommendations on this subject were ever adopted by the Administrative Conference. See Verkuil, supra note 133.
aliens who have final orders of exclusion, but whose departure cannot be enforced.\textsuperscript{136} Application of these guidelines has been noted with apparent approval by lower courts.\textsuperscript{137} As previously noted, parole of the detained Cuban criminals also can take place, on a case-by-case basis, in cases in which the district director is satisfied that the danger to the community will be minimal. At least one district court, while sustaining the detention at issue, suggested that, at some point, continued detention of a potentially excludable asylum applicant without a reasonably expeditious determination of the claim may be an abuse of discretion.\textsuperscript{138}

Detention of Asylum Applicants

Another controversial area is the detention of aliens who have applied for asylum.\textsuperscript{139} It is widely misperceived that the concept of detaining asylum applicants originated with the Reagan Administration. However, the detention of asylum applicants was one of the recommendations contained in the March 1, 1981 final report of the Select Commission on Immigration and Refugee Policy,\textsuperscript{140} a commission which was composed of executive, congressional, and public members appointed during the Carter Administration.\textsuperscript{141}

The recommendation of the Select Commission, adopted by a vote of 12-3, was “that an interagency body be established to develop procedures, including plans for opening and managing federal processing centers, for handling possible asylum emergencies.”\textsuperscript{142}

In support of this recommendation, the Select Commission noted that by opening processing centers

\begin{itemize}
  \item Ineligible asylum applicants would not be released into communities
\end{itemize}

\textsuperscript{137} Id. at 562; Ishtyaq v. Sava, 627 F. Supp. 13, 14 n.1, 26.
\textsuperscript{139} For a critical view of the government’s policies in this area, see Lawyers Committee for Human Rights/Helsinki Watch, Mother of Exiles (1986).
\textsuperscript{141} The Select Commission consisted of four cabinet members (Attorney General, Secretary of State, Secretary of Labor, and Secretary of Health and Human Services), four public members appointed by the President, four Senators appointed by the President of the Senate, and four Representatives, appointed by the Speaker of the House. Although new cabinet officers had taken office prior to the submission of the report on March 1, 1981, they did not participate in the deliberations or recommendations. Id. at vii.
\textsuperscript{142} SELECT COMM’N ON IMMIGRATION AND REFUGEE POLICY, supra note 140, at 167.
where they might later evade U.S. efforts to deport them or create costs for local governments;
— A deterrent would be provided for those who might see an asylum claim as a means of circumventing U.S. immigration law. Applicants would not be able to join their families or obtain work while at the processing center.\textsuperscript{143}

On the other hand, the asylum processing centers envisioned by the Select Commission were substantially different from the existing INS detention centers. The asylum processing centers would have been limited to asylum applicants from "mass asylum" situations, and evidently would not have included other categories of detainees.\textsuperscript{144} More significantly, it was contemplated that the centers would be staffed with expert asylum adjudicators who expeditiously and uniformly could process the asylum applicants, with involvement of the United Nations High Commissioner for Refugees in the resettlement of those applicants not accepted by the United States.\textsuperscript{145}

The law enforcement considerations supporting detention of asylum applicants under certain circumstances remain valid. It should be emphasized that INS detention policies are not in any way directed against asylum applicants as a group.\textsuperscript{146} A deportable alien who wishes to apply for asylum would be detained or released in accordance with normal bond setting and release criteria applied to deportable aliens. An arriving alien who wishes to apply for asylum is subject to the detention criteria for potentially excludable aliens discussed earlier in this Article.

Because asylum applicants often may arrive without documents, or may be recent illegal entrants into the United States, it may be less likely that they will be able to meet the criteria for release or raise the money to post bond.\textsuperscript{147} Asylum hearings tend to be more complicated than other types of hearings. Often, all appellate remedies are pursued in asylum cases; therefore, the total time in detention for an asylum applicant may turn out to be substantial.

Critics of INS detention policies have claimed they operate to discourage aliens from asserting asylum claims as well as administrative and judicial appeals.\textsuperscript{148} A number of unsuccessful claims have been made that detention of asylum applicants violates the Constitu-

\textsuperscript{143} Id. at 168.
\textsuperscript{144} Id. at 166.
\textsuperscript{145} Id. at 168.
\textsuperscript{146} Compare LAWYERS COMMITTEE FOR HUMAN RIGHTS/HELSINKI WATCH, MOTHER OF EXILES (1986).
tion, the Refugee Act of 1980, the Administrative Procedure Act, various international instruments including the United Nations Convention Relating to the Status of Refugees (Convention), the United Nations Protocol Relating to the Status of Refugees (Protocol), and customary international law.\(^{149}\)

Claims of violation of the Convention and Protocol have centered on article 31 of the Convention, which states that contracting states shall not impose “penalties” for illegal entry or presence on “refugees,” and that the contracting states “shall not apply to the movements of such refugees restrictions other than those which are necessary . . . .”\(^{150}\) From the government standpoint, aliens are not considered to be “refugees” until they are determined to be such by the Attorney General through the proper legal process.\(^ {151}\) In addition, civil immigration detention is not considered a “penalty,” but may be considered a “necessary restriction.”

A proviso to article 31 of the Convention also requires that refugees who have entered a signatory country illegally “present themselves without delay to the authorities and show good cause for their illegal entry or presence.”\(^ {152}\) Few aliens who enter the country illegally and who later claim asylum, meet these criteria. The government has taken the position that use of fraudulent documents and other misrepresentations by aliens at the time of inspection at the border violate the proviso to article 31.\(^ {153}\)

Moreover, courts have found the Protocol to be nonself-executing.\(^ {154}\) That is, courts have concluded that the Protocol is not an

---


151. INA §§ 207(c)(1), 208(a), 8 U.S.C. §§ 1157(c)(1), 1158(a); see also United States v. Pereira-Pineda, 721 F.2d 137 (5th Cir. 1983); United States v. Elder, 601 F. Supp. 1574 (S.D. Tex. 1985).

152. Convention, supra note 150, art. 31, para. 1.


independent source of individual rights under the law of the United States and that it provides no rights beyond those which Congress has implemented through domestic law, in this case the INA, as amended by the Refugee Act of 1980.

A district court has agreed with the government’s argument that article 31 must be read literally, and that by its own terms it can apply only to refugees who come “directly from a territory where their life or freedom was threatened;” the court therefore found article 31 to be inapplicable to Afghans who had come to the United States through Pakistan and India.106

The cases of such Afghanis present some of the most interesting and highly litigated situations. Many have fled Afghanistan to refugee camps in India or Pakistan. From there, they have obtained passage to the United States through fraudulent documentation or other misrepresentations, and they apply for asylum upon arrival. This allows them to avoid the lengthy waits and limited admissions available under the United States overseas refugee program.

As arrivals with false or no documentation, the Afghanis are considered to be undocumented and therefore subject to detention pending exclusion proceedings and asylum applications. As a result of such evasive activity, many are denied asylum in the exercise of discretion.108 However, they usually are able to establish a likelihood of persecution in Afghanistan, and therefore are granted withholding of deportation to Afghanistan under § 243(h) of the INA.107 The United States then commences efforts to return them to a third country through which they came.108 The Afghanis claim that they are entitled to be released on parole pending such efforts to arrange removal. While the courts have rejected such claims of entitlement, since June 27, 1983 the INS has had a policy of permitting parole for detained excludable aliens if more than thirty days has elapsed “after a request for travel facilities to the Department of

---


155. Singh, 623 F. Supp. at 560. This view also has been endorsed by the First Circuit. Amanullah v. Nelson, No. 86-1604, slip op. at 40-41 n.10 (1st Cir. Feb. 4, 1987).

156. The BIA has held that an alien who has evaded the overseas refugee process or otherwise has engaged in subterfuge in order to get to the United States will be denied asylum, in the exercise of discretion, in the absence of countervailing equities. In re Gharadaghi, Interim Dec. 3001 (BIA 1985); In re Shirdel, Interim Dec. 2958 (BIA 1984); In re Salim, 18 I. & N. Dec. 311 (BIA 1982); cf. Amanullah v. Nelson, No. 86-1604 (1st Cir. Feb 4, 1987); Walai v. INS, 552 F. Supp. 998 (S.D.N.Y. 1982); Sarkis v. Sava, 599 F. Supp. 724, 725 (E.D.N.Y. 1984).

157. See discussion and cases cited supra note 156.

158. See Walai v. INS, 552 F. Supp. 998 (S.D.N.Y. 1982). In Walai, the court held that there was no requirement that the INS obtain the permission of the Pakistani government in advance before attempting to remove to Pakistan an Afghani who had been granted withholding of deportation to Afghanistan under § 243(h) of the INA.
The question of detention of individuals who are "refugees" under the United Nations Convention and Protocol was recently considered by the Executive Committee of the United Nations High Commissioner for Refugees. A working group was set up "with a view to arriving at a consensus on appropriate conclusions on the subject of detention . . . ." This working group, while leaving open the question of a definition of "detention," drafted conclusions which were adopted by the Executive Committee in its final report.

The final report of the Executive Committee recognized the problems caused by individuals who use fraudulent documents or unlawful means to enter or attempt to enter another country. The conclusions stated that the Executive Committee expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect the national security or public order.

The Executive Committee further "[r]eaffirmed that refugees and asylum seekers have duties to the country in which they find themselves, which require in particular that they conform to its laws and regulations as well as to measures taken for the maintenance of public order." The government believes that its current detention policies are consistent with these and the other conclusions of the Executive Committee.

165. Id. at 30.
166. Compare INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, TREATMENT OF REFUGEES WITH PARTICULAR REFERENCE TO THE PROBLEM OF DETENTION: 10TH
A recent and quite emotional issue is the detention of minors by the INS. This necessity may arise when minors are apprehended along with their parents or other adult relatives. An even more difficult issue arises when “unaccompanied minors” are apprehended without any parent or responsible adult.\textsuperscript{167}

The general INS policy is that minors will not be detained in INS facilities, and that they instead will be placed with appropriate state or private juvenile facilities.\textsuperscript{168} The INS generally follows state law in determining what constitutes a “juvenile.”\textsuperscript{169} As noted earlier in this Article, juveniles are a category which can be considered for parole under the INS parole regulations applicable to detained excludable aliens.\textsuperscript{170} In 1986 the INS issued a policy statement on the release of detained juveniles.\textsuperscript{171} This policy attempts to minimize the detention of juveniles, while ensuring that a responsible party properly will care for each juvenile, and that each juvenile will appear before the INS when required to do so.\textsuperscript{172}

\begin{flushright}
\textsc{Round Table on Current Problems in International Humanitarian Law} 2, para. 2 (San Remo Sept. 17-20, 1984), with \textit{United States Committee for Refugees, Despite a Generous Spirit: Denying Asylum in the United States} 18-22 (1986).
\end{flushright}

\begin{flushright}
In support of the government’s position on detaining asylum applicants who arrive without proper documentation, the First Circuit has recently stated:
\end{flushright}

\begin{quote}
If we are to continue to absorb refugees and asylum applicants in meaningful numbers, both the actuality and the perception of equity must persist: we must administer them fairly. By the same token, those who wish to make the United States their home must themselves fairly abide by the system and its procedures. Each applicant who puts himself above the law not only jeopardizes the process, but also threatens to usurp a place which should be filled by an aspiring immigrant who has demonstrated a willingness to play by the rules. Sanctuary cannot be built solidly upon such porous foundations.
\end{quote}

\begin{flushright}
\textsuperscript{167} The smuggling of unaccompanied minors into the United States appears to be increasing. \textit{See, e.g.,} 5-Year-Old Carlos Typifies Growing Border Problem, San Diego Union, July 24, 1986, at A12, col. 1.
\end{flushright}

\begin{flushright}
\textsuperscript{168} INS Operations Instruction § 242.6(c) (Nov. 18, 1980); 8 C.F.R. § 212.5(a)(2)(ii) (1986).
\end{flushright}

\begin{flushright}
\textsuperscript{169} INS Operations Instruction § 242.6(c) (Nov. 18, 1980); 8 C.F.R. § 212.5(a)(2)(ii) (1986).
\end{flushright}

\begin{flushright}
\textsuperscript{170} 8 C.F.R. § 212.5(a)(2)(ii). \textit{See supra} note 47 and accompanying text.
\end{flushright}

\begin{flushright}
\textsuperscript{171} Memorandum from R. M. Kisor, Associate Commissioner, Enforcement, INS, to Regional Commissioners, concerning Release of Unaccompanied Minors from Service Custody (Mar. 19, 1986) (file CO 242.4-P) (on file with author).
\end{flushright}

\begin{flushright}
\textsuperscript{172} \textit{Id.} The policy statement provides:
\end{flushright}

\begin{quote}
The policy of the Service is to minimize the detention of juveniles to the extent that goal can be attained while protecting the Service from any liability for the release of a juvenile to the custody of a person who does not properly care for the child, and while ensuring the presence of the child when administrative proceedings require it. The policy is to err on the side of caution and to restrict the release of minor to the custody of persons having a legal obligation to care for the child, those usually being a parent or legal guardian, unless some other person who seeks custody of the child presents exceptionally compelling evidence that he/she will care for the child and will guarantee the
With regard to the conditions of juvenile detention, facilities used by the INS are required to meet the same criteria in the areas of supervision, safety, food service, and medical care, as are local jails inspected under the INS program previously mentioned. The INS also is working on additional guidelines for the conditions in juvenile detention facilities. At the same time, a private organization has undertaken an independent study of problems in child welfare in immigration enforcement with an eye towards offering the INS helpful suggestions.

Critics of current INS policies claim that the release policy for juveniles is too restrictive and actually is intended to require parents of “unaccompanied minors,” who may themselves be in the country illegally, to appear at INS offices where they can be arrested and processed for deportation. In addition, claims have been made that the conditions under which juveniles in INS custody are detained do not meet appropriate legal standards for educational benefits, visitation rights, and separation from adult detainees. A class action suit on this subject as it pertains to minors detained in the INS Western Region currently is pending.\(^{173}\)

In Perez-Funez v. INS,\(^{174}\) allegations were made that the INS had a policy of coercing unaccompanied minors into accepting voluntary departure rather than seeking deportation hearings where they could seek asylum. A preliminary injunction was issued requiring the INS to give unaccompanied minors under eighteen years of age certain court-drafted advisals as to the right to a hearing, the ability to be represented by counsel, and the option of applying for asylum.

Following an extensive trial in Perez-Funez, the court indicated that the allegations of an INS policy of coercion were unfounded:

---

One of the plaintiff's principal allegations throughout this litigation has been that the INS engages in a policy of over coercion of unaccompanied minors that allegedly includes physical mistreatment and verbal abuse. However, this Court has found that allegation to be unfounded. While some of the class members testified to receiving such mistreatment, the Court simply does not believe those witnesses on this point. Moreover, the Court found the INS' rebuttal testimony on this issue to be credible. Finally, even if some isolated incidents of mistreatment occurred, these are insufficient to justify the nationwide injunctive relief plaintiffs seek [citations omitted]. Thus, in many ways, the trial vindicated the good faith efforts of the INS [footnote omitted]. This agency performs a thankless task under adverse conditions and, by and large, performs it admirably. 176

The court, however, concluded that the processing environment for unaccompanied minors was inherently coercive and therefore violated due process, notwithstanding the absence of any wrongdoing by the INS. The INS procedures made efforts to locate an appropriate representative (parent, relative, friend, or appropriate consular officer) before offering voluntary departure without a deportation hearing to an alien under the age of fourteen. Reduced efforts to locate appropriate representatives were made for fourteen through sixteen year old aliens. Their voluntary departure requests usually were honored without consultation with an adult. Different procedures applied to Canadian and Mexican juveniles apprehended in the immediate border area.

The court found that juveniles under and over age fourteen were generally incapable of understanding their rights, and therefore might be making uninformed decisions regarding the waiver of important rights. 179 The court directed the parties to prepare a simplified rights advisal to be given to the minors. The court also concluded that certain subclasses had different due process needs. For unaccompanied minors apprehended in the vicinity of the border who reside permanently in Canada or Mexico, the needs were determined to be less. In addition to the simplified advisal, the INS is required, prior to presenting the voluntary departure form, to inform such a class member of the opportunity to make a call to a parent, close relative, friend, or organization on the INS free legal services list. 177

The court determined that all other unaccompanied minors were in need of greater protections. For these minors, the court required the INS to provide access to telephones and to make its best efforts to ensure that the minor in fact has communicated, by telephone or otherwise, with a parent, close adult relative, friend, or organization found on the INS free legal services list. 178 Although the government

---

175. Id. at 661.
176. Id.
177. Id. at 670.
178. Id.
disagreed with the reasoning of the district court, no appeal was taken, and the injunction entered by the district court has become permanent.

Conditions of Release

Section 242(a) of the INA provides, in part, that release of a deportable alien may be under bond of not less than 500 dollars "containing such conditions as the Attorney General may prescribe." The INS has interpreted such language as authorizing the placing of a "no-work" condition upon the release on bond of deportable aliens.

The issue of the no-work bond condition first reached the Board of Immigration Appeals in 1972. In a 3-2 decision, the Board found that the INA granted no authority for such a condition. That decision was certified by the Board to the Attorney General for review. In a 1974 decision, *In re Toscano-Rivas*, the Attorney General disagreed with the Board's reasoning, and concurred only in the result reached, invalidating the particular employment condition in question.

After reviewing the legislative history of the INA, the Attorney General concluded that Congress had given the Attorney General wide discretion to impose bond conditions related to the various purposes of the immigration laws. The Attorney General found that "a basic purpose of the immigration laws is to protect against the displacement of workers in the United States." Therefore, the Attorney General concluded:

The pertinent statutory provisions authorize, in at least some circumstances, the inclusion in appearance-and-delivery bonds of conditions which bar unauthorized employment. However, the use of such conditions should be specifically governed by a published regulation of the Service. Because no such regulation exists, the result reached by a majority of the Board should be sustained.

179. INA § 242(a), 8 U.S.C. § 1252(a).
180. Certain cases of significant importance may be referred to the Attorney General for review of the Board's decision and the entry of a final decision by the Attorney General. 8 C.F.R. § 3.1(h). Such referral may take place at the request of the Attorney General, the Board, or the Commissioner of the INS. *Id.* In this case, the majority of the Board voted to refer the decision to the Attorney General for review. See *In re Toscano-Rivas*, 14 I. & N. Dec. 523, 550 (BIA 1973; A.G. 1974). Referral to the Attorney General is rare. In recent years, such referrals on the average have been made in less than one case per year.
182. *Id.* at 555.
183. *Id.* at 553.
Following Toscano-Rivas, the INS promulgated regulations allowing the imposition of no-work bond riders, and setting forth factors to be considered in determining whether such riders were appropriate. However, such riders required the approval of the appropriate INS regional commissioner. Another decision of the Board set forth detailed evidentiary requirements for the imposition of such riders.

Because of these constraints, no-work riders were used on a relatively infrequent basis. In addition, there was a lack of consistency between the no-work riders and the INS regulations pertaining to grants of employment authorization. It was possible, and happened quite frequently, that an alien would be released without a no-work rider being imposed, but that the alien would not necessarily be eligible to receive employment authorization under INS regulations. Such aliens would be neither forbidden nor authorized by the INS to accept employment.

In 1983 the INS attempted through rulemaking to close this gap and to make no-work riders more usable and consistent with the work authorization regulations. Following the publication of a notice of proposed rulemaking, a final rule was published, effective December 7, 1983. This rule delegated authority to impose no-work riders to INS district directors and provided that a condition barring unauthorized employment "shall be included in an appearance and delivery bond in connection with deportation proceeding(s) or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate."

A number of criteria were set forth for use in determining whether employment was appropriate, including possible eligibility for immigration benefits and the necessity for supporting a United States citizen or lawful permanent resident spouse or children. Any individual for whom a no-work rider was found inappropriate specifically would be authorized to accept employment, thus eliminating the previous "limbo" status.

A class action suit was filed challenging the revised regulations on a number of grounds. Following the grant of a preliminary injunc-

---

185. In re Leon-Perez, 15 I. & N. Dec. 239 (BIA 1975) (superseded by regulation as stated in In re Shoem, Interim Dec. 2977 (BIA 1984)).
188. 48 Fed. Reg. 51,142 (Nov. 7, 1983) (codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(2)).
189. 8 C.F.R. § 103.6(a)(2)(ii) (1986).
190. Id. § 103.6(a)(2)(iii).
191. Id. § 109.1(b)(8).
tion, a district court concluded that no-work riders were beyond the statutory authority of the Attorney General. This ruling was affirmed by the Ninth Circuit on appeal.

The Ninth Circuit found that the Attorney General’s discretion to impose release conditions must be limited to those conditions which are related to securing the alien’s presence during the deportation process. The court rejected the government’s argument that the condition was justified by the need to protect American labor, finding that the Act showed no more than a “peripheral concern” by the Congress with the employment of illegal aliens.

Somewhat incongruously, the Ninth Circuit cited the case-by-case no-work rider determinations required by previous INS regulations. The court stated: “The peripheral concern of the Act with the employment of illegal aliens is not sufficient to support the imposition of a no-employment condition in every bond.” To the extent that this may suggest that individualized no-work riders are permissible, it seems inconsistent with the court’s conclusion that no-work riders are beyond the statutory authority of the Attorney General. As a result of the court’s decision, the INS was barred from imposing any no-work riders.

**Detainers**

One of the most confusing areas of INS detention law involves the use of INS detainers lodged against potentially deportable aliens who are serving criminal sentences in local, state, or federal penal institutions. Frequently, the result of such a detainer is that the penal authorities deny the alien participation in certain vocational or

---

194. Id. at 1355-56. On November 6, 1986, Congress passed IRCA, see supra note 8. Section 101 of that Act (to be codified at 8 U.S.C. § 1324A) specifically provides civil and criminal sanctions for the unlawful employment of aliens. The court’s conclusions seem especially inappropriate in light of the new law.
195. National Center, 791 F.2d at 1355-56.
196. Id. at 1356.
work-release programs for which the alien otherwise might be eligible.

A number of such detainees have attempted to get the INS to set a bond which they believe would convince the penal authorities to allow them to participate in the programs. However, the Board has concluded that because such detainees are not in the actual physical custody of the INS, the district director lacked jurisdiction to consider the respondent's application for bond or its equivalent.198 This position has been sustained by the courts.199

In one case, the Seventh Circuit held that an INS civil detainer is not a detainer within the meaning of the Interstate Agreement on Detainers, because no criminal charges are involved in the INS detainer.200 Thus an alien cannot rely on the Interstate Agreement upon Detainers, nor can he rely upon the Speedy Trial Act, in requesting a speedy disposition of the underlying deportation charges.201 Nevertheless, the court noted that section 242(a) of the INA implicitly requires the Department of Justice to proceed with reasonable dispatch to determine deportability once deportation proceedings have been instituted.202 However, a district court recently concluded that an incarcerated alien had no right to an expeditious hearing because he was not being detained in INS custody and he had no statutory or constitutional right to participate in any programs which might be adversely affected by the INS detainer.203

The INS does not always serve an order to show cause commencing deportation proceedings on an alien subject to a detainer. The order to show cause may be issued when the alien actually is released to the physical custody of the INS. As a practical matter, the EOIR currently does not have the ability to assign immigration judges to hear cases in all prisons where potentially deportable incarcerated aliens are located. This is especially apparent in light of the fact that as many as 18,000 to 20,000 INS detainers may be outstanding at any one time.204

---

201. Id. at 387-88.
202. Id. at 388-89. The district court had ruled that under section 242(a) of the INA, the Attorney General was required to commence deportation proceedings within 90 days. Id. at 386 nn.1 & 2. This issue was not raised on appeal.
204. In fiscal year 1985 over 42,000 criminal aliens were referred to the INS for investigation by various law enforcement agencies. INS, Investigations Division, A Report to the Committee on Appropriations, United States Senate, at 23 (Sept. 1, 1986).
Issues involving INS detainers are likely to become even more significant in the future as the result of the enactment in 1986 of several new statutory provisions dealing with criminal alien felons. As part of the Immigration Reform and Control Act of 1986 (IRCA), Congress has made the federal government potentially financially responsible for the costs incurred by states for the incarceration of convicted Mariel Cubans and certain other illegal aliens. Another section of IRCA mandates that "[i]n the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of conviction." In order to carry out this provision, the Act authorizes (but does not appropriate) additional funding for the EOIR for fiscal years 1987 and 1988, presumably for the hiring of more immigration judges.

Another recent enactment, the Anti-Drug Abuse Act of 1986, requires that federal, state, and local law enforcement officials who arrest an alien for a violation of any law relating to controlled substances must expeditiously notify the INS if they believe that alien is unlawfully present in the United States. In such situations, the INS must expeditiously determine whether to place a detainer on the alien, and must take custody of the alien if such alien is not otherwise detained by the other law enforcement agency involved. The law also directs the Attorney General to establish a pilot program in four cities to improve the computer capability of the INS and local law enforcement agencies to respond to inquiries concerning aliens who may have violated controlled substances laws.

Taken together, these new provisions should result in more refer-

---

205. IRCA § 501(b), 100 Stat. at 3443. The payment of such reimbursement is "[s]ubject to the amounts provided in advance in Appropriation Acts." Since no such appropriation has yet been made, no money currently is available for reimbursement.
206. Id. § 701, 100 Stat. at 3345 (adding/amending INA § 242). A district court recently held that this provision required cancellation of an INS detainer on a criminal alien unless the INS executed the detainer by initiating deportation within 60 days. Gomez v. Sullivan, No. 5-86-306 (D. Minn. April 7, 1987).
207. Id. § 111(b)(2), 100 Stat. at 3381.
210. Id. § 1751(e)(1), 100 Stat. at 3207-48.

341
rals of criminal aliens to the INS and more detainers on aliens in non-INS custody being lodged by the INS. In addition, there will be more pressure on immigration judges to visit penal institutions for the purpose of holding hearings for incarcerated illegal aliens, in order to expedite the removal of such aliens, and to reduce the potential federal financial liability.

The Future of Detention

Regardless of the legal parameters of INS detention authority, the fact remains that while the INS has apprehended well over one million undocumented aliens in each of the past several years,\textsuperscript{211} the number of detention spaces available has never exceeded four thousand. Even assuming that IRCA results in an increase in INS detention capabilities, the vast majority of undocumented aliens apprehended in the United States will not spend any substantial amount of time in INS detention.

A danger exists that the disparity between apprehensions and available detention space will lead to arbitrariness in the use of detention. This raises the question of how the INS most effectively and fairly can utilize its detention authority and capacity.

One suggestion is utilizing detention space to concentrate on the cases of aliens who have final orders of exclusion or deportation, rather than utilizing the space for pre-hearing detention or detention during the hearing process. This would help the INS to solve one of its most vexing problems: the lack of ability to actually remove aliens who have gone all the way through the process and lost. Also, by concentrating on aliens who have completed at least the administrative process, the length of detention would be reduced and some of the legal arguments regarding detention of asylum applicants and other groups would be avoided.

To some extent, the INS already is moving in this direction. Recently published final rules have amended the regulations to eliminate the previous seventy-two hour "run letters" to aliens for whom final orders of deportation are outstanding.\textsuperscript{212} Under the new rules,

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{211} In fiscal year 1983 the INS apprehended 1,251,357 aliens. In fiscal year 1984 the INS apprehended 1,246,981 aliens. In fiscal year 1985, the INS apprehended 1,348,749 aliens. U.S. Dep't of Justice, Immigration & Naturalization Service, 1985 Statistical Yearbook of the Immigration and Naturalization Service 176 (1986). In fiscal year 1986, INS apprehensions rose to a record 1,770,000. U.S. Dep't of Justice, Press Release, Sept. 29, 1986. Recently, INS apprehensions have dropped significantly. See supra note 8.
  \item \textsuperscript{212} 51 Fed. Reg. 23,041 (1986) (to be codified at 8 C.F.R. § 243.3). The so-called "run letter" was a notification to an alien to surrender for deportation, served on an alien at least 72 hours prior to the scheduled deportation. According to a 1984 INS study cited in the notice of proposed rulemaking, "76 percent of those aliens ordered to surrender fail to do so, many of them after lengthy appellate procedures that have been resolved in favor of the Service." Notice of Proposed Rulemaking, 51 Fed. Reg. 3471
\end{itemize}
\end{footnotesize}
arrest and detention of those subject to removal under warrants of deportation will become the norm.\footnote{213}

Critics of INS policies can be expected to claim that by concentrating on aliens with final orders of deportation, the INS is attempting to cut off last-minute access to the courts. However, the current rules make it clear that no alien can be removed from the United States until at least seventy-two hours have elapsed since the service of the final decision in the case, during which time he can attempt to obtain a stay of deportation or to pursue any available judicial or administrative remedies.\footnote{214}

From the INS standpoint, to the extent that concentrating on post-hearing detention may reduce detention space for pre-hearing cases, it might be perceived as lessening the deterrent value that detention might have on those aliens who seek to come to the United States without any plausible claims for admissibility, simply to work and improve their economic status while here illegally. On the other hand, ensuring removal of deportable aliens can be perceived as creating a type of integrity for the hearing process that does not now exist.\footnote{215}

The enactment of IRCA also will have an impact on the future of detention. To the extent that the employer sanctions provisions of IRCA\footnote{216} are successful, it should be more difficult for aliens who are not authorized to work in the United States to utilize delay in the deportation hearing process for the purpose of obtaining employment while in the United States. Moreover, the previously-mentioned emphasis of IRCA and the Anti-Drug Abuse Prevention Act of 1986 on criminal aliens, with particular attention to alien drug offenders, indicates that future INS interior enforcement efforts will concen-

\footnote{213} 8 C.F.R. § 243.3(a) (1986), amended by 51 Fed. Reg. 23,041 (1986). See supra note 212. An exception to the general rule of custody pending execution of the final order is set forth for those same categories of aliens who would be eligible for parole in an exclusion situation, as described in 8 C.F.R. § 212.5(a). For a description of those categories, see supra note 47 and accompanying text.

\footnote{214} 8 C.F.R. § 243.3(b), amended by 51 Fed. Reg. 23,041 (1986). The alien may request a waiver of this 72-hour period.

\footnote{215} As previously discussed, see supra note 212, an INS study shows that over three-quarters of all aliens ordered to surrender for deportation failed to do so. Although INS attorneys completed over 86,000 cases during fiscal year 1985, only 20,560 aliens actually were deported in that year. U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, 1985 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 195 (1986).

\footnote{216} IRCA § 101a, 100 Stat. at 3360 (amending/adding INA § 274A).

\footnote{217} See supra notes 205-10 and accompanying text.
tate on criminal aliens, along with employment-related enforce-
ment. The availability of adequate space to detain criminal aliens
pending removal from the country will likely be a high priority for
the INS. The provisions of IRCA which authorize a fifty percent
increase in the size of the INS Border Patrol will result in more
detention resources being utilized in border areas.\footnote{218} Additionally,
IRCA specifically directs the Secretary of Defense "to provide the
Attorney General with a list of facilities of the Department of De-
defense that could be made available to the Bureau of Prisons for use
in incarcerating aliens who are subject to exclusion or deportation
from the United States."\footnote{219}

Finally, there is always the possibility of future legislative change.
A so-called "INS Efficiency Bill" which was actually passed by the
House of Representatives during the closing days of the 99th Con-
gress, contained some significant revisions in detention authority.\footnote{220}
That bill would have required that the Attorney General release
both excludable and deportable aliens, under appropriate conditions,
unless the Attorney General had reason to believe that a particular
alien \(\text{(1)}\) would pose a danger to other persons or the community; \(\text{(2)}\)
had committed certain criminal or subversive acts or had engaged in
the persecution of others; \(\text{(3)}\) was subject to exclusion or deportation
on certain grounds relating to subversion and national security; \(\text{(4)}\)
had violated previous conditions of release; or \(\text{(5)}\) was likely to ab-
scend.\footnote{221} Such legislation would eliminate the basic difference in the
standard for detaining excludable, as opposed to deportable, aliens.\footnote{222}

CONCLUSION

The legal authority of the INS to detain aliens is well established.
Barring any legislative changes, it can be expected to remain so. Re-
cent legislation has not affected the legal authority to detain, and
can be expected to result in increased use of detention in cases of
criminal aliens and to promote border control.

The exact parameters and limits of INS authority, however, have
not been as clearly defined by either statute or judicial ruling. The
INS has developed, or is in the process of developing, standards in a
number of areas to carry out its detention responsibilities in the most
enlightened and uniform way possible. Nevertheless, it can be antici-
pated that various advocacy groups will continue to believe that INS

\footnote{218}{IRCA § 111(b), 100 Stat. at 3381.}
\footnote{219}{Id. § 702, 100 Stat. at 3445.}
\footnote{220}{H.R. 4823, 99th Cong., 2d Sess. § 311 (passed by the House of Representa-
tives, Sept. 29, 1986).}
\footnote{221}{Id. §§ 311(a), (b).}
\footnote{222}{See supra text accompanying notes 10-64.}
efforts have not gone far enough, and will press for more judicial intervention and definition in the area. Ultimately, such questions are likely to require at least some resolution at the Supreme Court level.

Immigration detention has taken on a symbolic significance. Advocates of stronger immigration controls view the level of INS detention as an indication of the government's commitment to strong immigration law enforcement. Conversely, those who generally believe in less restrictive immigration policies view detention as indicative of an overall harshness caused by immigration laws.

It is obvious that no immigration control system could function with a complete absence of immigration detention. It is equally obvious that no rational immigration system could, or should, detain all illegal aliens. The challenge for the government is to chart a middle course: to use detention in a humane and rational manner that promotes the effective enforcement of the immigration laws, while eschewing overuse of detention which is both counterproductive and costly.