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IN THE

Supreme Court of the United States

OCTOBER TERM, [TERM YEAR]

No. 01-1491

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

Petitioners,

v.

HYUNG JOON K

in this action.[1]

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

SUMMARY OF ARGUMENT

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

The government argues that the court must consider

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

Finally, the INS has ample tools available without mandatory detention to assure reaching a goal amici share with the government: reliable performance in securing actual removal, at end of proceedings, of persons ruled deportable and not given relief. In -5.25 f-0.1875 Tnd actual rem

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

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

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

detain and release aliens who are subject to removal proceedings. The initial decision of whether to detain, to release, or to release on bond or other appropriate conditions is made on a case-by-

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

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

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

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

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

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

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

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

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

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

Furthermore, mandatory detention ignores the critical practical concerns underlying bonded release: resource limitations. Detention space available to INS, despite

South Texas in the late 1980s.[9]

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

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

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

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

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

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

[13] 8 U.S.C. § 1227(a)(1)(C).

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

[15] 8 U.S.C. § 1227(a)(2).

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

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

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

B. POLICY HISTORY

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

As acknowledged at various points throughout the Government's brief, the fundamental difficulties confronting the Service with regard to removals during the early 1990s were resource-driven. INS lacked the detention space necessary to hold even those individuals who were believed to be a flight risk or a potential danger to society. Congress responded by appropriating funds for the expansion of detention facilities and from 1995 to 1998, for example, overall bed space for detained aliens increased almost three-fold. *See* Andrew I. Schoenholtz and & Thomas F. Muther, Jr., *Immigration and NationalityI. S13.5 0.240802875 , (TT and 2 Na Tw three Tw (-) Tj 22.5 0*

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

First, the INS's lack of detention space was widely known in the time period leading up to section 236(c)'s passage. An influential Senate Report, created under the direction of Senator Roth and issued shortly before the enactment of section 236(c), noted the "chronic lack of detention space" in the immigration system. S. REP. 104-48, at 23 (1995); *see also id.* at 32 (labeling limited detention space a "fundamental problem confronting the INS"); H.R. REP. 104-469, pt. 1, at 123 (1996) ("A *chief* reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through the course of their deportation proceedings.") (emphasis added). "The lack of adequate detention space puts extreme pressure on the INS to release, rather than detain, criminal aliens." S. REP. 104-48, at 23. The upshot of this situation, the Report explained, was that logistical resource issues play

in fact found to be appropriate. The problems included that many non-

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

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

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

[17] IIRIRA, Section 303(b).

contributed to a dramatic improvement in removal rates.
In 1997, the INS removed 51,141 criminal aliens, which
represented an increase of *thirty-seven* percent ovet0wc (-) Tj 4.5 0 TD -0

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

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

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

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

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

conviction constituted a "crime of violence" as defined

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

2. Improbable Removals

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

3. Not Dangerous and Unlikely to Abscond

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

4. Alternative Mechanisms are Available to Assure Criminal Removals

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

decision of the Ninth Circuit would not undermine its importance. Indeed, the increased resources made available for detention and removal during the last ten years make individualized determinations of risk less dependent on the availability of detention space and more consistent with fair and efficient enforcement of the immigration laws. The regulatory provisions discussed above for a stay of a redetermination of custody by an immigration judge provide a meaningful safeguard against arbitrariness in the process.

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