



Is Mandatory Detention of Unlawful Entrants Seeking Asylum Constitutional?

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Non-U.S. nationals (aliens) apprehended by immigration authorities when attempting to unlawfully enter the United States are generally subject to a [streamlined, expedited removal process](#), but may be placed in “[formal](#)” [removal proceedings](#) and pursue asylum claims if found to have a credible fear of persecution. Earlier this year, Attorney General (AG) William Barr, who has [power to review](#) adjudicatory decisions of the [Board of Immigration Appeals](#) (BIA), the highest administrative body responsible for interpreting immigration laws, concluded in *Matter of M-S-* that federal law requires the continued detention of aliens screened for expedited removal who are transferred to formal removal proceedings pending adjudication of their asylum claims (additional discussion of the AG’s decision can be found [here](#)). Recently, a federal district court [held](#) in *Padilla v. ICE* that this mandatory detention scheme “violates the U.S. Constitution” because it denies aliens who have entered the United States the opportunity to seek their release on bond. As a result of the court’s ruling, unlawful entrants transferred to formal removal proceedings for consideration of their asylum applications may not be indefinitely detained by immigration authorities without a bond hearing.

Legal Background

The Immigration and Nationality Act (INA) authorizes, and in some cases requires, the Department of Homeland Security (DHS) to detain aliens who are subject to removal. The immigration detention scheme, however, is multifaceted with different rules depending on whether an alien is arriving in the United States or apprehended within the country, whether the alien has engaged in certain proscribed conduct, and whether the alien has been issued a final order of removal.

Generally, an alien who is subject to removal is placed in “formal removal” proceedings before an immigration judge (IJ) within the [Executive Office for Immigration Review](#) (EOIR) of the Department of Justice (DOJ). Under [INA § 236\(a\)](#), DHS’s Immigration and Customs Enforcement (ICE) “may” detain the alien pending those removal proceedings, *or* release the alien on bond or the alien’s own recognizance. If ICE decides to maintain custody, the alien may request review of ICE’s custody determination at a bond hearing before an IJ.

Under [INA § 235\(b\)\(1\)](#), however, arriving aliens and “certain other aliens” who recently entered the United States without inspection are subject to [expedited removal](#) if they lack valid entry documents or

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have tried to gain their admission by fraud or misrepresentation. An alien placed in expedited removal may be [ordered removed](#) without a hearing unless the alien indicates an intention to apply for asylum or a fear of persecution if removed to a particular country. [INA § 235\(b\)\(1\)](#) instructs that, if the alien is found to have a credible fear of persecution, he or she “shall be detained for further consideration of the application for asylum” in formal removal proceedings. Although detention is generally mandatory under [INA § 235\(b\)\(1\)](#), DHS [has authority](#) to [parole](#) the alien “for urgent humanitarian reasons or significant public benefit.” There is no administrative or judicial review of the parole decision.

Over the years, immigration authorities and reviewing courts have taken differing views on the interplay between the mandatory detention regime for aliens who are initially subject to expedited removal and the discretionary detention regime that generally applies to aliens placed directly in formal removal proceedings. If an alien is first screened for expedited removal, does he or she remain subject to the mandatory detention requirements of [INA § 235\(b\)\(1\)](#) if transferred to formal removal proceedings to pursue asylum claims? Or can DHS release all or some subset of these aliens on bond or their own recognizance once transferred to formal removal proceedings?

In 2005, the BIA ruled in *Matter of X-K-* that [INA § 235\(b\)\(1\)](#)’s mandatory detention scheme applied to arriving aliens (i.e., those apprehended at a port of entry) who were transferred to formal removal proceedings after being found to have a credible fear of persecution, but not to “certain other aliens” who entered the United States without inspection and were initially screened for expedited removal. The BIA reasoned that, unlike arriving aliens placed in formal removal proceedings, “certain other aliens” first screened for expedited removal do not fall within any of the classes of aliens [enumerated by DOJ regulations](#) as ineligible for bond hearings.

But in 2018, the Supreme Court in *Jennings v. Rodriguez* read [INA § 235\(b\)\(1\)](#) as “unequivocally” requiring the detention of all aliens first placed in expedited removal but then transferred to formal removal proceedings. Even so, the Court did not decide whether the indefinite detention of aliens without bond under [INA § 235\(b\)\(1\)](#) could violate the Due Process Clause—leaving it to lower courts to decide, in the first instance, whether prolonged detention under that authority may be unconstitutional.

At least partially prompted by the High Court’s decision in *Jennings*, AG William Barr issued a decision in *Matter of M-S-* overturning the BIA’s earlier opinion in *Matter of X-K-*. (Though responsibility for administering federal immigration laws is divided among several agencies, the AG’s rulings on questions of law are [controlling](#).) The AG [ruled](#) that aliens subject to expedited removal who are placed in formal removal proceedings after a positive credible fear determination “remain ineligible for bond, whether they are arriving at the border or are apprehended in the United States.”

Padilla v. ICE: Procedural History and Preliminary Injunction

Following the Supreme Court’s decision in *Jennings* but before the AG’s ruling in *Matter of M-S-*, a group of asylum seekers who entered the United States without inspection and were placed in formal removal proceedings after establishing a credible fear of persecution brought a [class action lawsuit](#) against immigration authorities in the U.S. District Court for the Western District of Washington. The plaintiffs [claimed](#), among other things, that they were subject to excessively prolonged detention during their initial expedited removal screenings and upon their transfer to formal removal proceedings, and that this prolonged detention violated their due process rights.

The federal district court granted the plaintiffs’ motion to [certify](#) a nationwide “Bond Hearing Class” comprising “all detained asylum seekers who entered the United States without inspection” who are initially screened for expedited removal and are found to have a credible fear of persecution, and who are not provided a bond hearing within 7 days of requesting one.

Then, on April 5, 2019, the court determined that EOIR's failure to conduct bond hearings promptly likely violated the aliens' right to due process. The court [granted](#) the plaintiffs' [motion for a preliminary injunction](#) requiring EOIR to (1) conduct bond hearings for detained aliens within the "Bond Hearing Class" within 7 days of a bond hearing request, and release any alien whose detention time exceeds that 7-day limit; (2) place the burden of proof on DHS in those bond hearings to show why the alien should not be released; (3) record the bond hearing and produce a transcript; and (4) produce a written bond decision "with particularized determinations of individualized findings." Citing the BIA's decision in *Matter of X-K-*, which at the time was still controlling on immigration authorities, the court declared that asylum seekers determined to have a credible fear of persecution may "request release from custody during the pendency of the asylum process."

The Federal District Court's Amended Decision in *Padilla*

Following *Matter of M-S-*, the DOJ [moved to vacate](#) the court's preliminary injunction in *Padilla*. The DOJ argued that, because the AG overturned *Matter of X-K-*, which the court had relied on in concluding that the plaintiffs had the right to seek bond, the "entire premise" of the court's decision was no longer valid. Plaintiffs responded by filing an [amended complaint](#) and moving for a [modified injunction](#), arguing that the AG's "elimination of bond hearings" violated their constitutional right to due process. In the alternative, the plaintiffs claimed the AG's ruling violated the Administrative Procedure Act (APA) because it purported to amend DOJ regulations for bond without complying with [notice-and-comment procedures](#).

On July 2, 2019, the federal district court [modified](#) its preliminary injunction. Acknowledging that its prior order "sprang from an understanding (as a result of the ruling in *X-K-*) that the class members were entitled to a bond hearing," the court [determined](#) that the AG's ruling in *Matter of M-S-* warranted a "fresh analysis" of the plaintiffs' claims. The court considered the plaintiffs' contention that their inability to seek bond given the AG's ruling violated their right to due process, and held that they were likely to succeed on the merits of that claim. The court [reasoned](#) that the plaintiffs had a "constitutionally-protected interest in freedom from unnecessary detention," and rejected the DOJ's contention that they had no constitutional protections because they were "excludable aliens." Because the plaintiffs were apprehended within the United States, they were "entitled to due process protections." The court [concluded](#) that the plaintiffs' liberty interests, the risk of erroneous deprivation of those interests without bond hearings, and the valuable procedural safeguards provided by bond hearings outweighed the government's interest in the "efficient administration of immigration laws." The court also [noted](#) that although the Supreme Court in *Jennings* had read INA § 235(b)(1) as requiring detention without bond, the High Court did not decide whether that statutory mandate was unconstitutional.

The district court, on the other hand, determined that plaintiffs were [unlikely to succeed](#) on the merits of their claim that the AG violated the APA by changing existing regulations on bond. The court reasoned that the challenged regulations concerned the authority to release aliens on bond under INA § 236(a), but plaintiffs were subject to INA § 235(b)(1)'s provisions instead.

Even so, because the court determined that the plaintiffs had established a likelihood of success on their due process claim, the court [affirmed](#) its previously entered injunction requiring EOIR to conduct bond hearings within 7 days of a bond hearing request by members of the "Bond Hearing Class," and to release any class members whose detention time exceeds that 7-day limit. Additionally, the court again ordered EOIR to require DHS to show why an alien should remain detained at the bond hearing, produce a transcript of the hearing, and provide a written decision. And the court [modified](#) its previous injunction to rule that INA § 235(b)(1)'s prohibition against release on bond of aliens placed in formal removal proceedings after establishing a credible fear of persecution "violates the U.S. Constitution," and that members of the "Bond Hearing Class" are "constitutionally entitled to a bond hearing before a neutral decisionmaker" pending adjudication of their asylum claims.

Future Judicial Developments

While the Supreme Court in *Jennings* ruled that DHS has *statutory* authority to detain aliens, potentially indefinitely, pending their formal removal proceedings, the Court did not address constitutional arguments against this framework. The district court in *Padilla*, however, has squarely confronted that question, [answering](#) that INA § 235(b)(1)'s mandatory detention scheme is unconstitutional because it denies aliens who have entered the United States the opportunity to challenge their detention at bond hearings. The court's decision effectively bars DHS from indefinitely detaining unlawful entrants without an opportunity to seek bond pending consideration of their asylum claims.

The DOJ [appealed](#) the federal district court's order to the U.S. Court of Appeals for the Ninth Circuit. Pending the appeal, the Ninth Circuit has stayed the lower court's injunction requiring EOIR to hold bond hearings within 7 days for members of the "Bond Hearing Class," release class members whose detention time exceeds that period, require DHS to have the burden of proof at the bond hearing, and develop a transcript and written bond decision. But the Ninth Circuit has declined to stay, pending appeal, the lower court's ruling that INA § 235(b)(1) is unconstitutional and that members of the "Bond Hearing Class" are "constitutionally entitled to a bond hearing." Thus, at this point, members of the "Bond Hearing Class" may continue to seek bond pending their formal removal proceedings.

On appeal, the DOJ may renew its [argument](#) that the members of the "Bond Hearing Class" have no constitutional protections because they were apprehended shortly after entering the United States without inspection. The Supreme Court has [long recognized](#) that aliens who have physically entered the United States, even unlawfully, are "persons" under the Fifth Amendment's Due Process Clause. Due process protections [generally include](#) the right to a hearing and a meaningful opportunity to be heard before deprivation of a liberty interest. But the Court has not squarely addressed how far these protections extend to unlawfully present aliens placed in removal proceedings. The Court has, at times, suggested that the scope of due process [may turn upon whether the alien has been admitted into the United States or developed substantial ties](#) to this country.

Yet the Court has recognized that aliens at the threshold of initial entry, including those who are detained within the United States pending determinations of their admissibility, have [less constitutional protections](#), and are generally entitled only to whatever procedures Congress provided by statute. This distinction, known as the "entry fiction doctrine," allows courts to treat an alien seeking admission as though he had never entered the country, even if he is physically on U.S. soil. For instance, in *Shaughnessy v. United States ex rel. Mezei*, the Supreme Court in 1953 upheld the indefinite detention of an alien seeking admission into the United States, concluding that the alien had not made an "entry" despite being detained on Ellis Island, and could be treated "as if stopped at the border."

In *Padilla*, the court determined that the plaintiffs were "[non-arriving aliens](#)" because they were apprehended within the territorial boundaries of the United States, and thus entitled to due process protections. But other lower courts, citing *Mezei* and the entry fiction doctrine, [have determined](#) that "recent clandestine entrants" who were apprehended within hours of entering the United States, and who had no substantial ties to this country, were "assimilated to the status of an arriving alien" and had no constitutional protections based on their physical presence alone. Conversely, some courts [have held](#) that aliens arriving in the United States have sufficient constitutional rights to challenge a potentially indefinite detention, regardless of whether they had entered the country or developed substantial ties, and distinguished *Mezei* as a case involving national security concerns.

If the Ninth Circuit affirms the *Padilla* court's decision (or the court overturns that decision and the plaintiffs seek further review), the Supreme Court may decide to reassess *Mezei* and consider the degree to which aliens seeking admission into the United States—including "recent clandestine entrants" who lack substantial ties to this country—have constitutional protections

that may prevent their prolonged detention by immigration authorities. Up until now, the Court has declined to address that issue. For example, in *Zadvydas v. Davis*, a case involving a challenge to the indefinite detention of *admitted* aliens who were ordered removed, the Court in 2001 simply distinguished *Mezei* because the earlier case involved the detention of an alien seeking admission into the United States. The *Zadvydas* Court, moreover, declined to consider whether “subsequent developments have undermined *Mezei*’s legal authority.” Given the federal district court’s decision in *Padilla* that INA § 235(b)(1)’s mandatory detention provision is unconstitutional, the Court might decide that a “fresh analysis” is warranted.

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