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Deportability, Detention and Due Process: An Analysis of Recent Tenth Circuit Decisions in Immigration Law

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DEPORTABILITY, DETENTION AND DUE PROCESS: AN ANALYSIS OF RECENT TENTH CIRCUIT DECISIONS IN IMMIGRATION LAW

INTRODUCTION

Immigration Law encompasses a substantial number of sub-topics, ranging from determinations of asylum status to judicial jurisdiction to hear appeals to consular access.[1] Plenary power over immigration belongs to Congress under Article I of the United States Constitution, which grants the federal legislature the power "to establish an uniform Rule of Naturalization . . . throughout the United States."[2] Congress's authority over immigration and naturalization has faced little challenge throughout the nation's history, as the United States Supreme Court has held that the right to exclude aliens is a "fundamental act of sovereignty."[3] However, because the Supreme Court has repeatedly held "that all individuals within U.S. borders enjoy constitutional protection,"[4] Congress's actions as they relate to aliens in America must be consistent with Due Process.[5]

Because of the massive scope of Immigration and Naturalization Law, the following survey will focus only on two major sub-topics: the aggravated felony category and the detention of lawful permanent residents. Part I addresses the aggravated felony category, which may be applied to aliens in two ways – first, by making a lawful permanent resident deportable,[6] and, second, by increasing the sentence of a previously deported alien found to have illegally entered the United States after deportation.[7] Part II will discuss the detention of aliens, under the Illegal

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1. For an updated discussion of developments in the full range of Immigration Law, *see Federal Court Update: Summaries of Recent Immigration Decisions*, 78 No. 36 INTER. REL. 1485 (Sept. 2001). West Group releases these updates, containing a report and analysis of immigration and nationality law, monthly.

2. U.S. CONST. art. I, § 8, cl. 4

3. United States ex rel. Knauff v. Shaugnessy, 338 U.S. 537, 542 (1950). For a general discussion of Congress's plenary power over immigration law, *see* Daniel R. Dinger, *When We Cannot Deport, Is It Fair to Detain?: An Analysis of the Rights of Deportable Aliens Under 8 U.S.C. § 1231(a)(6) and the 1999 INS Interim Procedures Governing Detention*, 2000 B.Y.U. L. REV. 1551, 1555-63 (2000) (discussing the intersection of Congress's plenary power over immigration with the Fifth Amendment's Due Process provision); *see generally* Melinda Smith, *Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Cases*, 33 AKRON L. REV. 163 (1999) (examining both the sociological and legal history of immigration in America).

4. Lisa Cox, *The Legal Limbo of Indefinite Detention: How Long Can You Go?*, 50 AM. U. L. REV. 725, 742 (2001).

5. *See id.* at 742-43.

6. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2001) (classifying as deportable "any alien who is convicted of an aggravated felony at any time after admission").

7. *See* 8 U.S.C. § 1326 (2001) (making it a crime to re-enter the United States following a deportation). Sentencing Guidelines § 2L1.2(b)(1)(A) allow a sixteen-level increase in base offense

Immigration Reform and Death Immigrant Responsibility Act of 1996 ("IIRIRA"), which provides for the detention of an alien pending removal as an aggravated felon, prior to the completion of such removal proceedings.[8]

I. THE AGGRAVATED FELONY REQUIREMENT: 8 U.S.C. § 1227(a)(2)(A)(III)

A. *Background: The Evolution of the Aggravated Felony Definition*

The aggravated felony penalty as applied to aliens first appeared in a 1988 anti-drug law, reflecting a Congressional effort to rid the nation of its least desirable aliens.[9] Although the original aggravated felony category included only murder, drug-trafficking and firearms trafficking,[10] the categorical definition has expanded with virtually every major crime and immigration act since then.[11] Both the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA")[12] and the IIRIRA[13] greatly expanded the category.[14]

Today, the category includes a lengthy list of crimes, ranging from the original offenses of the 1988 act to prostitution and pornography offenses, from fraud and forgery to a repeat conviction for drug possession.[15] Perhaps the most significant expansion of the category was accomplished by reducing the minimum sentencing requirement.[16] While the category formerly included offenses receiving a five-year minimum sentence, today the category includes offenses with only one-year minimum sentences; "[t]he effect of this is to render virtually all non-regulatory felonies aggravated felonies . . ."[17] Notably, the definition re-

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level for an alien who re-enters after deportation based on a conviction for an "aggravated felony." U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2001).

8. *See* 8 U.S.C. § 1226(c)(2) (2001) (allowing the Attorney General to release an alien deportable under § 1227 only if that release is necessary for the purposes of a separate criminal investigation, provided that "the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding").

9. *See* 1988 Anti Drug Abuse Act, Pub. L. 100-690 § 7342 (hereinafter 1988 Act). For a general overview of the evolution of the Aggravated Felony category, *see* Kari Converse, *Criminal Law Reforms: Defending Immigrants in Peril*, 21 AUG. CHAMPION 10, 11-12 (1997); Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisited*, 11 GEO. IMMIGR. L.J. 507, 515-20 (1997).

10. *See* 8 U.S.C. § 1226(c)(2) (2001).

11. *See* McWhirter, *supra* note 9, at 518.

12. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (hereinafter AEDPA).

13. Pub. L. No. 104-302, 110 Stat. 3656 (1996) (hereinafter IIRIRA).

14. *See* McWhirter, *supra* note 9, at 515-20.

15. *See* 8 U.S.C. § 1101(a)(43) (2001).

16. *See* Converse, *supra* note 9, at 11-12.

17. *Id.* at 11.

ceives retroactive application, with potentially devastating consequences for some resident aliens.[18]

In the years since the passage of the 1996 acts, many lawful permanent residents have faced deportation proceedings, including several whom Congress most likely would not have considered undesirable or deportable.[19] Some of these aliens may have received only suspended sentences at a time when their offenses were not considered aggravated felonies for deportation purposes, and have lived in the United States for several years since their convictions, with no further criminal activity.[20]

Consider Xuan Wilson, who came to America from Vietnam at age four, wrote a forged check for $19.83 in 1989, and "now faces deportation to a homeland she hardly remembers, as well as a permanent bar against any future re-entry into the United States."[21] Likewise, Sokhom Oeur, a Cambodian refugee who arrived in the States as a teenager, now faces deportation based on an assault conviction, for which he received only a suspended sentence, stemming from his self-defensive use of a weapon when threatened by a group of young men in 1995.[22] By greatly expanding the aggravated felony category, and by applying it retroactively, "Congress cast a big net, and they're catching some dolphins in it."[23]

This survey will focus on two categories of crimes used by the INS as a basis for invoking deportation proceedings. First, this survey will address the transportation of aliens as a potential "aggravated felony." While the IIRIRA refers to an offense "relating to alien smuggling,"[24] the courts have recently had an opportunity to determine if the offense includes the transportation of aliens strictly within American borders.[25] Both the Tenth Circuit and the Fifth Circuit have held that the transportation of aliens falls within an aggravated felony category for deportation purposes, and have, thus, further expanded the category from its original form in 1988.[26]

Second, the survey will address another frequent conviction that may result in deportation, driving under the influence. The Tenth Circuit has disagreed with all other circuits in its interpretation of the "crime of violence" sub-category within the aggravated felony category, particu-

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18. *See* Smith, *supra* note 3, at 194 (discussing the potential of AEDPA to "put legal resident aliens in jeopardy of removal for even minor offenses which may have been committed years ago").

19. *See generally* Terry Coonan, *Dolphins Caught in Congressional Fishnets – Immigration Law's New Aggravated Felons*, 12 IMMIGR. L.J. 589 (1998).

20. *See id.* at 590-92.

21. *Id.* at 591.

22. *See id.*

23. *Id.* at 589 (quoting Russ Bergeron, INS spokesman).

24. *See* 8 U.S.C. § 1101(a)(43)(N) (2001).

25. *See* United States v. Salas-Mendoza, 237 F.3d 1246 (10th Cir. 2001); Ruiz-Romero v. Reno, 205 F.3d 837 (5th Cir. 2000).

26. *See Salas-Mendoza*, 237 F.3d at 1248; *Ruiz-Romero*, 205 F.3d at 840.

larly as it applies to drunk-driving convictions.[27] The definition of aggravated felony includes "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year."[28] While four other circuits have considered the issue and determined that a DUI conviction does not constitute an aggravated felony,[29] the Tenth Circuit recently concluded that a DUI conviction constitutes a "crime of violence," and, therefore, satisfies the aggravated felony requirement for the institution of deportation proceedings.[30]

B. *Transportation of Aliens as an Aggravated Felony*

1. Tenth Circuit: *United States v. Salas-Mendoza*[31]

a. Facts

In *United States v. Salas-Mendoza*, the defendant, Leobardo Salas-Mendoza, was convicted of one count of re-entry of a removed alien in violation of 8 U.S.C. § 1326(a).[32] The district court, in sentencing him to 84 months imprisonment, increased his base offense level by 16 points as required by U.S.S.G. § 2L1.2(b)(1)(A).[33] The Sentencing Guidelines require that where a defendant is initially deported based upon an aggravated felony, his base sentence be increased by 16 points.[34] Salas-Mendoza was previously convicted of transporting aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii).[35] Salas-Mendoza challenged the court's finding that a conviction for the transportation of aliens constituted an aggravated felony for sentencing purposes, noting the distinction between "alien smuggling," which necessarily requires cross-border movement, and mere transportation, which involves only intra-country movement.[36]

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27. *See* Tapia Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001).

28. 8 U.S.C. § 1101(a)(43)(F). Title 18, section 16, defines "crime of violence" as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16 (2001).

29. *See* United States v. Chapa-Garza, 243 F.2d 921 (5th Cir. 2001); Dalton v. Ashcroft, 257 F.3d 200 (2nd Cir. 2001); United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001); Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001).

30. *See* Tapia Garcia v. INS, 237 F.3d 1216, 1222 (10th Cir. 2001).

31. 237 F.3d 1246 (10th Cir. 2001).

32. *See Salas-Mendoza*, 237 F.3d at 1246.

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.* at 1247.

b. Decision

Salas-Mendoza's claim that the definition of "aggravated felony" as found in 8 U.S.C. § 1101(a)(43)(N), which includes "an offense described in paragraph (1)(A) or (2) of §1324(a) of this title (*relating to alien smuggling*)," is limited by the parenthetical text, was rejected by the Tenth Circuit.[37] The court expressly rejected the defendant's claim that the "smuggling of aliens, by definition, requires the movement of aliens across the border between Mexico and the United States whereas transportation of aliens involves the movement of aliens solely within the United States."[38] The Tenth Circuit's analysis relied on case law from the Fifth Circuit, which ruled that the parenthetical "relating to alien smuggling" served to describe, rather than to limit, the offenses listed in § 1324(a).[39]

The court further found a clear relationship between the transportation and smuggling of aliens based on both the language of the statute and congressional intent.[40] The court noted that the enumerated offenses listed in § 1324(a) all involve "the transportation, movement and hiding of aliens whether crossing into or within the United States."[41] It bolstered this reading by contrasting the parenthetical in § 1101(a)(43)(N) with those parentheticals elsewhere in § 1101 that expressly limit offenses.[42] Additionally, the court inferred from Congress's continuing expansion of § 1324 since its initial passage an intent to include the act of transportation within the anti-smuggling laws.[43] Having determined that the transportation of aliens fell within the offenses listed in the aggravated felony category, the Tenth Circuit affirmed Salas-Mendoza's increased sentence.[44]

2. Fifth Circuit: *Ruiz-Romero v. Reno*[45]

a. Facts

Less than a year prior to the Tenth Circuit's decision in *Salas-Mendoza*, the Fifth Circuit had the occasion to consider the same issue in *Ruiz-Romero v. Reno*. Here, the defendant, who had achieved lawful permanent resident status in 1990, was convicted of transporting eight

37. *See id.* at 1246 (emphasis added).
38. *Tapia Garcia*, 237 F.3d at 1247.
39. *See id.* (citing United States v. Monjares-Castaneda, 190 F.3d 326, 331 (5th Cir. 1999)).
40. *See id.*
41. *Id.* at 1247.
42. *See id.* at 1248.
43. *See id.* at 1247.
44. *See Tapia Garcia*, 237 F.3d at 1248.
45. 205 F.3d 837 (5th Cir. 2000).

Mexican aliens within the state of New Mexico alone, in violation of § 1324(a)(1)(A)(ii).[46] The law penalizes:

> [Any person who] knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law.[47]

Ruiz-Romero was consequently facing deportation proceedings pursuant to 8 U.S.C. § 1227(a)(2)A)(iii).[48] The defendant moved to terminate the deportation proceedings on the ground that his conviction for the transportation of aliens did not constitute an "aggravated felony."[49] After the immigration judge denied the motion, and the Board of Immigration Appeals ("BIA") upheld that order, the defendant appealed to the Fifth Circuit.[50]

b. Decision

As in *Salas-Mendoza*, the Fifth Circuit was faced with the issue of whether the parenthetical phrase found in § 1101(a)(43)(N) ("relating to alien smuggling") limited or described the statutory definition of aggravated felony preceding it.[51] Here, the court relied on its own precedent of *United States v. Monjaras-Castaneda*,[52] which held in a sentencing-guidelines context that the parenthetical phrase served only a descriptive, rather than restrictive, purpose.[53] Reaffirming the statutory construction found in *Monjaras-Castaneda*, the Fifth Circuit upheld the BIA's finding that the transportation of aliens within American borders constituted an aggravated felony for deportation proceedings.[54]

3. Analysis

The combined rulings of the Tenth Circuit, in *Salas-Mendoza*, and the Fifth Circuit, in *Ruiz-Romero*, suggest that the transportation of aliens within American borders constitutes an aggravated felony for both sentencing and deportation purposes.[55] However, the broad definition and sweeping categorical approach applied by the courts may result in some extremely harsh consequences for some aliens. Consider the following hypothetical. A lawful permanent resident lives in a tight-knit immigrant

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46. 8 U.S.C. § 1324(a)(1)(A)(ii) (1997).
47. *Id.*
48. *See Ruiz-Romero*, 205 F.3d at 838.
49. *See id.*
50. *See idd.*
51. *See id.*
52. 190 F.3d 326 (5th Cir. 1999).
53. *See Monjaras-Castaneda*, 190 F.3d at 329.
54. *See Ruiz-Romero*, 205 F.3d at 839.
55. *See Salas-Mendoza*, 237 F.3d at 1246-47; *Ruiz-Romero*, 205 F.3d at 839.

community in San Antonio, Texas. He agrees to drive a group of his neighbors to Dallas, Texas. Not having determined the legal status of any of his passengers, the lawful permanent resident, through his "reckless disregard" for the illegal status of his neighbors, has committed an aggravated felony and will be subject to deportation proceedings for his neighborly act. Surely, this is not the sort of activity that Congress intended to target.

Consider the following actual scenario. One resident alien, originally from Canada and married to a United States citizen, was ruled deportable for what most would consider a harmless exercise of poor judgment.[56] In 1985, Gabriela Dee, at the age of twenty, sought to help her Israeli boyfriend sneak across the Canadian border into the States.[57] The brief legal proceeding that followed imposed only a $25 fine for her "alien smuggling" conviction.[58] Eleven years later, when the INS was reviewing Dee's application for permanent residency, they discovered the conviction, "retroactively applied the new aggravated felon provisions to Dee's case, and commenced deportation proceedings against her."[59]

In both of these situations, a seemingly innocent (or at least relatively harmless) act renders the actor, an otherwise lawful and upstanding American resident, subject to deportation proceedings. But these actors are not committing the heinous crime most of us imagine when we refer to "alien smuggling." Contrast their actions with the 1993 "Golden Venture" tragedy, where a dilapidated freighter carrying approximately 285 illegal Chinese immigrants washed upon the shore of the Rockaway Peninsula in Queens, New York, resulting in the death of at least six passengers.[60] More recently, Jesus Lopez-Ramos plead guilty to alien smuggling charges after smuggling in dozens of illegal immigrants across the Mexican border, leaving 14 of them to die in the Arizona desert.[61] Surely these are the sorts of criminal acts Congress envisioned when it added the offense of "alien smuggling" to the aggravated felony requirement.[62] By construing the "alien smuggling" category so broadly, the courts have expanded its scope with unintended consequences for countless resident aliens.

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56. *See* Coonan, *supra* note 19, at 590-91.

57. *See id.* at 591.

58. *See id.*

59. *Id.*

60. *See* Samuel Pyeatt Menefee, *The Maritime Slave Trade: A 21st Century Problem?*, 7 ILSA J. INT'L & COMP. L. 495, 501 (2001).

61. *See Man Admits Alien Smuggling*, ORLANDO SENTINEL, Oct. 19, 2001, at A, *available at* 2001 WL 28417985.

62. *See* 8 U.S.C. § 1101(a)(43)(N).

C. *Driving Under the Influence: Aggravated Felony?*

In the past year, several circuits have addressed the issue of whether a drunk driving conviction (either a DUI or a DWI) constitutes a "crime of violence" so as to fall within the aggravated felony category,[63] thereby resulting in either deportation or an increased sentence following an illegal reentry into the United States.[64] Out of the five circuits addressing the issue, only the Tenth Circuit found that a drunk driving conviction constitutes a "crime of violence" as intended by the Immigration and Nationality Act as defined in 18 U.S.C. § 16(b).[65] The remaining circuits all construed the "crime of violence" definition as excluding drunk-driving offenses, based not only on a reading of the definition itself, but also on the distinction between the definition as found at 18 U.S.C. § 16(b) and as found in the Sentencing Guidelines.[66]

1. Tenth Circuit: *Tapia Garcia v. INS*[67]

a. Facts

Jose G. Tapia-Garcia was a Mexican citizen but a legal permanent resident of the United States when he received a conviction for driving under the influence in Idaho in 1998.[68] Tapia-Garcia served only two months of his five year sentence before being released, and the INS subsequently commenced deportation proceedings against him based on his conviction for an "aggravated felony" pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii).[69] An immigration judge concluded that Tapia-Garcia's DUI offense satisfied the "crime of violence" category of the "aggravated felony" conviction, and ordered Tapia-Garcia's removal to Mexico.[70] The BIA affirmed the judge's finding, dismissing Tapia-Garcia's appeal and issuing a final removal order that resulted in Tapia-Garcia's deportation to Mexico.[71]

b. Decision

The central issue before the court was whether Idaho's DUI offense constituted an "aggravated felony," and therefore rendered Tapia-Garcia

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63. *See Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *United States v. Chapa-Garza* 243 F.3d 921 (5th Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *Dalton v. Ashcroft* 257 F.3d 200 (2d Cir. 2001); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001).

64. *See* discussion regarding the significance of an aggravated felony conviction *supra* Part I-A.

65. *See* Tapia Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001).

66. *See* discussion *infra* Part I-C, 2 –5.

67. 237 F.3d 1216 (10th Cir. 2001).

68. *See Tapia Garcia*, 237 F.3d at 1217.

69. *See id.*

70. *See id.*

71. *See id.*

subject to deportation proceedings pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii).[72] In order to determine the issue, the court looked to the definition of aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which included "crime of violence" as described in 18 U.S.C. § 16.[73]

Tapia-Garcia claimed that Idaho's DUI offense did not constitute a crime of violence "because it does not 'by its nature involve a substantial risk that physical force . . . may be used in the course of committing the offense,'" as required by 18 U.S.C. § 16(b).[74] Rather, argued the defendant, the statute was written broadly, so as to encompass both violent and nonviolent crimes.[75]

The Tenth Circuit, however, rejected the defendant's argument, declining to consider the DUI offense in light of the particular facts of the defendant's case, and instead applying a "categorical approach that considers only the generic elements of the offense."[76] The court's analysis relied upon BIA precedent, which called for a categorical approach to the "crime of violence" analysis, requiring that "'the nature of the crime – as elucidated by the generic elements of the offense – is such that its commission would ordinarily present a risk that physical force would be used against the property of another' irrespective of whether the risk develops or harm actually occurs.'"[77] Moreover, the court invoked another BIA decision, which held that a state DUI offense constituted a "crime of violence," so long as the offense was considered a felony under state law, and which noted that "the statutory definition of crime of violence in 18 U.S.C. § 16(b) did not require intentional conduct."[78]

Finally, the court looked to federal precedent, including its own, which held that driving under the influence constituted a "crime of violence" for purposes of the Sentencing Guidelines.[79] Based on the categorical approach to the "crime of violence" analysis, and the federal Sentencing Guidelines precedent, the Tenth Circuit concluded that an Idaho DUI offense constituted a "crime of violence" within the aggravated felony definitions, and therefore rendered the defendant subject to deportation proceedings.[80]

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72. *See id.*

73. *See id.* at 1221.

74. *Tapia Garcia*, 237 F.3d at 1221.

75. *See id.*

76. *Id.* at 1221-22.

77. *Id.* at 1222 (quoting *Matter of Magallanes-Garcia*, Interim Decision 3341, 1998 WL133301 (BIA Mar. 19, 1998) (quoting *Matter of Alcantar*, 20 I. & N. Dec. 801 (BIA 1994), *available at* 1994 WL 232083).

78. *Id.* (citing *Matter of Puente-Salazar*, Interim Decision 3412, 1999 WL 770709 (BIA Sept. 29, 1999).

79. *See Tapia Garcia*, 237 F.3d at 1222-23.

80. *See id.* at 1223.

2. Fifth Circuit: *United States v. Chapa-Garza*[81]

a. Facts

In *United States v. Chapa-Garza*, the Fifth Circuit considered the consolidated appeals of five defendants separately convicted of unlawful presence in the United States after being deported.[82] All defendants faced increased sentences upon a finding that their prior removal from the United States was based upon an "aggravated felony."[83] As in *Tapia Garcia*, the court's decision turned upon whether a conviction for a state drunk driving felony, here a Driving While Intoxicated ("DWI") charge, constituted a "crime of violence" as defined in 18 U.S.C. § 16(b).[84]

b. Decision

The Fifth Circuit's analysis set forth three reasons for determining that the DWI does not constitute a "crime of violence," and therefore is not an aggravated felony that would result in increased sentences for the defendants.[85] First, the court declined to interpret the "crime of violence" language of 18 U.S.C. § 16(b) to include the same offenses as the definition set forth in Sentencing Guideline § 4B1.2(a)(2), which includes "any offense that involves 'pure recklessness,' i.e. a conscious disregard of a substantial risk of injury to others."[86] Instead, the court relied upon an alternative reading of § 16(b), which "applies only when the nature of the offense is such that there is a substantial likelihood that the perpetrator will intentionally employ physical force against another's person or property in the commission thereof."[87] In reaching this decision, the court distinguishes Sentencing Guideline § 4B1.2(a)(2), which considers the effect of the defendant's conduct, from 8 U.S.C. § 16(b), which considers the conduct itself.[88] Moreover, the court noted that the definition of crime of violence found in the Sentencing Guidelines was changed in 1989 from a reference to 18 U.S.C. § 16(b) to the new, broader definition currently found there.[89] The Fifth Circuit then concluded that this change in definition suggests that the two standards must be interpreted differently.[90]

The second reason given by the Fifth Circuit for its holding was that the relevant language of 18 U.S.C. § 16(b), "'substantial risk that physi-

81. 243 F.3d 921 (5th Cir. 2001).
82. *See Chapa-Garza*, 243 F.3d at 923.
83. *See id.*
84. *See Chapa-Garza*, 243 F.3d at 923.
85. *See id.* at 924.
86. *Id.* at 925.
87. *Id.*
88. *See id.*
89. *See id.* at 926.
90. *See Chapa-Garza*, 243 F.3d at 926.

cal force . . . may be used' contemplates only reckless disregard for the probability that *intentional* force may be employed."[91] The court viewed this construction, which favors a requirement of intentional conduct on the part of the defendant, as opposed to requiring only an "accidental, unintended event," as the most reasonable interpretation of the phrase "may be used."[92]

Finally, the Fifth Circuit stated, "the physical force described in § 16(b) is that 'used in the course of committing the offense,' not that force that could result from the offense having been committed."[93] Again, the focus is on the intent of the perpetrator and on the conduct itself, as opposed to the unintended effects that may result from such conduct. Based on these factors, the Fifth Circuit determined that force is not intentionally "used" against another person by the perpetrator of a DWI, and, therefore, a DWI felony does not constitute a "crime of violence," as defined by 18 U.S.C. § 16(b).[94]

3. Seventh Circuit: *Bazan-Reyes v. INS*[95]

a. Facts

In *Bazan-Reyes v. INS*, the Seventh Circuit addressed the consolidated appeals of three resident aliens facing removal based on state drunk driving offenses under Indiana, Illinois, and Wisconsin law.[96] Defendant Bazan-Reyes, a Mexican citizen, had been a legal resident in the United States for eleven years prior to his Indiana DWI conviction.[97] Defendant Maciasowicz, a Polish citizen, had been a lawful permanent resident for nearly five years when he pled guilty to two counts of homicide by intoxicated use of a vehicle under Wisconsin law.[98] The third defendant, Gomez-Vela, was a Mexican citizen admitted as a lawful permanent resident in 1971.[99] After twenty-five years of residence, Gomez was charged with aggravated driving under the influence based on two prior DUI convictions in Illinois.[100]

b. Decision

The Seventh Circuit faced the question of whether state drunk driving offenses constituted "aggravated felonies" for deportation purposes, as all three defendants had received removal orders from the INS based

91. *Id.* at 924 (emphasis in original).
92. *See id.* at 926.
93. *Id.* at 924.
94. *See id.* at 927.
95. 256 F.3d 600 (7th Cir. 2001).
96. *See Bazan-Reyes*, 256 F.3d at 602.
97. *See id.*
98. *See id.* at 603.
99. *See id.*
100. *See id.*

on their convictions.[101] The court ultimately rejected decisions by the INS and the BIA, which had ruled that state drunk driving offenses constituted aggravated felonies because they were crimes of violence, as defined by 18 U.S.C. § 16.[102]

Relying on its own precedent, the Seventh Circuit concluded that their prior "finding that the word 'use' requires volitional conduct prohibits a finding that drunk driving is a crime of violence under §16(a)."[103] Additionally, the Seventh Circuit, like the Fifth Circuit in *Chapa-Garza*, distinguished between "crime of violence" as defined in § 16 and as defined in the Sentencing Guidelines.[104] Accordingly, the court held that a "crime of violence" finding, for aggravated felony purposes, "is limited to crimes in which the offender is reckless with respect to the risk that intentional physical force will be used in the course of committing the offense."[105] The court then applied a categorical approach to the drunk driving statutes, and determined that "intentional force" is almost never used to commit such offenses.[106] The court concluded, therefore, that the drunk-driving offenses did not constitute crimes of violence, and that the defendants were therefore not convicted of aggravated felonies for removal purposes.[107] In reaching its decision, the court specifically rejected the Tenth Circuit's contrary determination that drunk driving is a crime of violence.[108]

4. Second Circuit: *Dalton v. Ashcroft*[109]

a. Facts

In *Dalton v. Ashcroft*, the Second Circuit reviewed the decision of the BIA, which upheld an immigration judge's order of removal based on a resident alien's DWI conviction.[110] The petitioner, Thomas Anthony Dalton, although a citizen of Canada, had been living in the United States as a lawful permanent resident since 1958, prior to his first birthday.[111] Dalton's parents and siblings were also residing in the United States at the time of his deportation proceedings.[112] In 1998, Dalton pled guilty to a DWI offense, and based on two previous convictions within the pre-

101. *See id.* at 604.
102. *See Bazan-Reyes*, 256 F.3d at 605.
103. *Id.* at 609.
104. *See id.*
105. *Id.* at 612.
106. *See id.*
107. *See id.* at 612.
108. *See Bazan-Reyes*, 256 F.3d at 610.
109. 257 F.3d 200 (2d Cir. 2001).
110. *See Dalton*, 257 F.3d. at 203.
111. *See id.* at 202.
112. *See id.*

ceding ten years, Dalton's crime and sentence were increased to a class D felony under New York law.[113]

Subsequently, while Dalton was serving his prison sentence, the INS began removal proceedings against him as an alien convicted of an aggravated felony.[114] An immigration judge ordered Dalton removed without the opportunity to request relief, and the BIA affirmed.[115] The BIA's decision relied on its own precedent, as well as a Fifth Circuit opinion which was later withdrawn, in determining that a DWI conviction under New York law constituted a "crime of violence," and therefore fell within an aggravated felony category.[116]

b. Decision

The Second Circuit applied a categorical approach to its statutory interpretation of the New York DWI statute.[117] In doing so, the court relied upon recent language of the New York Court of Appeals regarding the statute, which noted the "sweeping" nature of conduct covered by the statute.[118] The court noted the many situations in which a person could be convicted under the New York statute, including situations where an intoxicated person is found asleep at the wheel of a car that is neither in motion nor running.[119] Comparing the broad range of conduct covered by the New York statute to the federal "crime of violence" definition, the court concluded that a New York DWI conviction did not necessarily involve the "use of physical force" as required by the "crime of violence" definition.[120] The Second Circuit, like the Fifth Circuit in *Chapa-Garza*, distinguished between the "risk of injury" and a risk of the "use of physical force," thereby focusing on intent and conduct, rather than potential and unintended effects.[121]

5. Ninth Circuit: *United States v. Trinidad-Aquino*[122]

a. Facts

In *United States v. Trinidad-Aquino*, the Ninth Circuit considered whether a prior deportation based on a California DUI conviction should result in an elevated sentence due to the aggravated felony penalty.[123] The defendant, Trinidad-Aquino, received a 1994 conviction for driving un-

113. *Id.*
114. *See id.* at 203.
115. *See id.*
116. *See Dalton*, 257 F.3d at 203.
117. *See id.* at 204.
118. *See id.* at 205.
119. *See id.*
120. *See id.* at 206.
121. *See id.* at 207.
122. 259 F.3d 1140 (9th Cir. 2001).
123. *See Trinidad-Aquino*, 259 F.3d at 1142.

der the influence of alcohol with bodily injury under California law and was subsequently deported.[124] Five years later, Trinidad-Aquino pled guilty to illegally re-entering the United States following a deportation order.[125] Under the Sentencing Guidelines, if a defendant was previously deported after receiving an "aggravated felony" conviction, a sixteen-level increase in base offense will be applied to his sentence.[126] The district court, ruling that Trinidad-Aquino's prior DUI conviction did not satisfy the "aggravated felony" definition, refused to apply this sentencing increase.[127] The government appealed.[128]

b. Decision

The Ninth Circuit upheld the determination of the district court that, because the DUI conviction required merely "a negligence mens rea" under California law, the offense was not a "crime of violence" and therefore did not constitute an aggravated felony for sentencing purposes.[129] In reviewing the district court's finding, the Ninth Circuit applied a categorical approach, based on the statutory definition of the crime.[130] Following its own precedent of *United States v. Baron-Medina*,[131] the court ruled that, because "'[c]rime of violence' is not a traditional common law crime . . . it can only be construed by considering the ordinary, contemporary, and common meaning of the language Congress used in defining the crime."[132] The court relied on the word "use" in the statutory definition for a "crime of violence," holding that the word "use" as commonly understood involves a "volitional requirement absent from negligence."[133] In applying this understanding of the "crime of violence" to the case at bar, the court considered not the specific facts of Trinidad-Aquino's crime, which may have involved a mens rea above negligence, but only the DUI statute as a whole, which allows a conviction for mere negligence.[134] Accordingly, the Ninth Circuit ruled that a DUI conviction under California law was not sufficient to result in an elevated sentence for Trinidad-Aquino.[135]

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124. *See id.*
125. *See id.*
126. *See id.*
127. *See id.*
128. *See id.* at 1142.
129. *See Trinidad-Aquino*, 259 F.3d at 1146.
130. *See id.* at 1143.
131. 187 F.3d 1144 (9th Cir. 1999).
132. *Trinidad-Aquino*, 259 F.3d at 1144.
133. *Id.*
134. *See id.* at 1146.
135. *See id.*

6. Analysis

In the last year, five circuits considered the precise issue of whether a drunk driving violation could constitute an aggravated felony for purposes of both removal proceedings and sentence enhancements after being convicted of illegal reentry.[136] Four circuits found that such an offense cannot constitute an "aggravated felony."[137] Only the Tenth Circuit has determined within the last year that a DUI is a "crime of violence," and therefore an aggravated felony for immigration law purposes.[138] However, because the Tenth Circuit issued its decision on January 19, 2001, while the other circuits issued their decisions in March, July and August of 2001,[139] it is questionable whether the Tenth Circuit ruling will stand, should the same issue arise again.

II. THE MANDATORY DETENTION REQUIREMENT: 8 U.S.C. § 1226(C)

A. *Background*

1. Generally

IIRIRA provides for the detention of an alien pending removal as an aggravated felon, prior to the completion of such removal proceedings.[140] IIRIRA amended the Immigration and Nationality Act ("INA") to include § 236(c), which requires the Attorney General to "take into custody any alien who . . . is deportable by reason of having committed" an aggravated felony, as expanded under IIRIRA.[141] The 1996 amendment was not Congress's first attempt at such a stringent detention provision. The 1988 Anti-Drug Abuse Act ("ADAA") provided a similar detention requirement for those aliens who had committed "aggravated felonies"[142] – albeit under a much narrower definition of "aggravated felony."[143] The majority of courts who reviewed the ADAA's mandatory detention provision declared it unconstitutional as violating due process.[144] Consequently, Congressional amendments in 1990 and 1991 allowed for the discretionary release of lawful aliens who could demonstrate that they posed neither flight nor public safety risks.[145] The current mandatory de-

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136. *See* cases cited *supra* notes 66, 80, 94, 108, 121.

137. *See* cases cited *supra* notes 80, 94, 108, 121.

138. *See* Tapia Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001).

139. *See* cases cited *supra* notes 66, 80, 94, 108, 121.

140. *See* 8 U.S.C. § 1226(c)(2) (allowing the Attorney General to release an alien deportable under § 1227 only if that release is necessary for the purposes of a separate criminal investigation, provided that "the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding").

141. 8 U.S.C. § 1226(c)(1)(B).

142. ADAA § 7343(a).

143. *See supra* notes 8 – 17 and accompanying text.

144. *See* Ellis M. Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593, 2597 (2001).

145. *See id.*

tention provision represents a Congressional response to a growing public perception of the danger of criminal aliens.[146]

The ongoing debate over the rights of lawful permanent resident aliens within the United States, and the mandatory detention of an alien prior to a final removal order, has become extremely relevant in light of the recent terrorist attacks on America and the subsequently enacted legislation.[147] On October 26, 2001, President Bush signed the USA Patriot Act, a stark piece of anti-terrorism legislation swiftly drafted and passed in response to the September 11th terrorist attacks on America.[148] A key provision of the new law allows "the attorney general to hold foreigners considered suspected terrorists for up to seven days before charging them with a crime or beginning deportation proceedings."[149] The provision was a compromise insofar as the administration had initially sought the authority to detain immigrants suspected of terrorism indefinitely.[150]

Whether the seven-day limit included in the bill will place any actual restraints on the government's treatment of immigrants is questionable. The executive branch detained some 700 to 800 immigrants in the weeks following the attacks,[151] and has invoked a variety of justifications for doing so.[152] First, the government may hold people as material witnesses if "they are thought to have pertinent information and prosecutors want to depose them or get them to testify before a grand jury. A material witness has a right to a hearing but can be held without bail if he is considered a flight risk."[153]

A second group involves individuals detained by the government on immigration charges, who "can be held virtually indefinitely once deportation proceedings have begun."[154] Although the period of time be-

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146. *See id.* at 2596-97.

147. *See* Robin Toner & Neil A. Lewis, *House Passes Terrorism Bill Much Like Senate's, But With 5-Year Limit*, N.Y. TIMES, Oct. 13, 2001, *available at* 2001 WL-NYT 0128600053. The legislation requires the Attorney General to release suspects after seven days, or to charge them with a criminal or immigration violation. *See id.*

148. *See Bush Signs Sweeping New Laws to Combat Terrorism*, Oct. 26, 2001, *at* http://news.findlaw.com/politics/s/20011026/attackbushdc.html (last visited Oct. 26, 2001).

149. *Id.*

150. *See* Adam Clymer, *Senate Passes Anti-Terror Bill to Expand Government's Powers*, Oct. 26, 2001, N.Y. TIMES NEWS SERV., *available at* 2001 WL-NYT 0129900024.

151. *See* Mae M. Cheng, *Detentions Raise Legal Concerns: Some Immigrants held for long periods*, NEWSDAY, Oct. 22, 2001, *available at* 2001 WL 9257317; Laurie P. Cohen, *The Response to Terror: Material-Witness Warrants in U.S. Draw Criticism*, ASIAN WALL ST. J., Oct. 23, 2001, at 12, *available at* 2001 WL-WSJA 22059219.

152. *See* Judy Peres, *War on Terror: The Detained*, CHI. TRIB., Oct. 16, 2001, at 8, *available at* 2001 WL 4126317.

153. *Id.*

154. *Id.* The authority to detain these immigrants virtually indefinitely is discussed in Part II of this survey. *See also* Anita Ramasastry, *Indefinite Detention Based Upon Suspicion: How the Patriot Act Will Disrupt Many Lawful Immigrants' Lives*, *at* http://writ.news.findlaw.com/commentary/

tween detention and the decision to commence deportation proceedings was traditionally regulated at 48 hours, Attorney General Ashcroft recently expanded it to "48 hours except in emergencies or extraordinary circumstances, where you can be detained for any reasonable time."[155] With the authority to invoke the current state of "emergency" facing the country, the Attorney General may effectively detain immigrants guilty of even the slightest immigration infringements for an unlimited period of time.

Civil rights groups and attorneys have reacted with great concern over the detention of immigrants following the September 11th attacks.[156] Some of the common concerns include the federal government's failure to release information regarding "the nationality or ethnicity of many of the detainees, the criteria authorities are using to pick them up, what kind of access they have been given to attorneys or how many people have been released."[157] So far, a great deal of anecdotal evidence has emerged to reinforce these concerns.[158] Some of the more egregious examples include the beating of a Pakistani student being held in a Mississippi jail,[159] the holding of a Middle Eastern man for two weeks without allowing him to contact his attorney,[160] and, for a Saudi man in Texas, the denial of "an attorney, a mattress, a blanket, a drinking cup and a clock to remind him when to say his Muslim prayers."[161]

2. 8 U.S.C. § 1226(c)

Under section 1226(c), the Attorney General is authorized to release such "deportable" aliens only if such release:

> is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness , or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a

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20011002_ramasastry.html (last visited Nov. 11, 2001) (discussing the potential for detention based on secret evidence as a serious threat to the constitutional rights of lawful permanent residents living in the U.S.).

155. Peres, *supra* note 152.

156. *See* Toner & Lewis, *supra* note 147; Editorial, *Protect Public, Constitution*, SUN SENTINEL, Oct. 25, 2001, 28A, *available at* 2001 WL 22763920; William Carlsen, *Rights Violations, Abuses Alleged by Detainees: Beatings,Lack of Legal Representation Cited*, S.F. CHRON., Oct. 19, 2001, A12, *available at* 2001 WL 3417445; Cheng, *supra* note 151.

157. Cheng, *supra* note 151.

158. *See* Cheng, *supra* note 151; Sun Sentinel Editorial, *supra* note 156; Carlsen, *supra* note 156.

159. *See* Carlsen, *supra* note 156.

160. *See* Cheng, *supra* note 151.

161. Sun Sentinel Editorial, *supra* note 156.

> danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.[162]

Thus, section 1226(c) presents a two-fold problem for so-called "deportable" aliens: (1) it deprives them of an individual consideration of whether they ought to be detained or ought to be released on bond, prior to any actual decision that a removal order will result; and (2) by omitting any mention of a time limit for such detention or for the determination of whether to issue a removal order, it places them in jeopardy of a potentially unlimited detention, without any hearing.[163]

Once an alien has received a final removal order, their detention and deportation is governed by 8 U.S.C. § 1231.[164] However, many aliens facing removal orders are unable to be deported, "either because their foreign citizenship cannot be clearly established or because their country of origin is unwilling to accept them."[165] In *Ho v. Greene*,[166] the Tenth Circuit considered the detention of a removable alien under 8 U.S.C. § 1231(a)(6), and found statutory authority to indefinitely detain an alien who cannot be removed within the ninety-day removal period and who the Attorney General determines to present either a flight risk or a security risk.[167] In upholding the constitutionality of such indefinite detention, the Tenth Circuit determined that an alien who has been ordered removed retains no liberty interest, and therefore has not been deprived constitutional Due Process.[168]

The Supreme Court recently addressed this issue in *Zadvydas v. Davis*,[169] and rejected the authority of the INS to indefinitely detain these "un-deportable" aliens.[170] In reaching this conclusion, the Supreme Court expressly overturned both the Fifth and Ninth Circuits, finding that the indefinite detention of a resident alien facing a final removal order raises serious Fifth Amendment Due Process issues.[171] The Supreme Court held that the post-removal detention period of an "un-deportable" alien under § 1231 must contain an implicit reasonableness limitation, and that the presumptive limit would be six months.[172] In light of the Supreme Court's

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162. 8 U.S.C. § 1226(c)(2) (1999).
163. *See* § 1226(c)(2).
164. 8 U.S.C. § 1231 (2001).
165. Barry J. Lipson, *Federally Speaking*, 3 NO. 18 LAW. J. 6, 6 (2001). *See generally* Victoria Cook Capitaine, *Life in Prison Without a Trial: The Indefinite Detention of Immigrants in the United States*, 79 TEX. L. REV. 769, 773-74 (2001) (discussing the plight of the so-called "stateless" aliens, those without citizenship of any country, who therefore cannot be deported).
166. 204 F.3d 1045 (10th Cir. 2000).
167. *See Ho*, 204 F.3d at 1056.
168. *See id.* at 1058-59.
169. 121 S.Ct. 2491 (2001).
170. *See Zadvydas*, 121 S.Ct. at 2505.
171. *See id.* at 2498.
172. *See id.* at 2505.

decision in *Zadvydas*, the Tenth Circuit's decision in *Ho* likely carries little precedential value.

However, neither the *Zadvydas* decision, nor the Tenth Circuit ruling in *Ho*, is directly binding upon whether the mandatory detention of aliens who have yet to receive a final removal order is constitutional.[173] With neither binding Supreme Court nor Tenth Circuit precedent as to the matter of the mandatory detention provision of § 1226(c), it is not surprising that the district courts are split as to the constitutionality of the provision.[174] This survey examines the split within the Tenth Circuit as to this issue, and discusses the Seventh Circuit decision that directly considered and upheld the constitutionality of the mandatory detention provision.[175]

B. *Current Confusion under § 1226(c)*

1. Tenth Circuit Split: Mandatory Detention as Unconstitutional

a. *Son Vo v. Greene*[176]

i. Facts

In *Son Vo v. Greene*, the District Court considered the detention, without bond, of Son Dien Vo, a lawful permanent resident facing potential deportation due to his conviction for Bank Fraud and aiding and abetting in violation of 18 U.S.C. § 1344 and 18 U.S.C. § 2.[177] Vo, a native of Vietnam, had been living in Denver as a lawful permanent resident of the United States at the time of his conviction.[178] Vo appealed the immigration judge's determination that Vo was statutorily ineligible for bond as an aggravated felon, claiming that the mandatory statutory detention requirement violated both his procedural and substantive Due Process rights.[179]

ii. Decision

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173. Although the Supreme Court briefly addressed section 1226(c) in dicta, it specifically limited its holding to those aliens already facing removal orders but who are nonetheless "undeportable," stating that "the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States." *Id.* at 2503.

174. *See* Son Vo v. Greene, 109 F. Supp. 2d 1281, 1283 (D. Colo. 2000); Gonzalez-Portillo v. Reno, 172 F.3d 954 (7th Cir. 1999); Kwon v. Comfort, 174 F. Supp. 2d 1141 (D. Colo. 2001).

175. *See* Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999). Despite the continuing disagreement as to the constitutionality of the provision, no other Circuit has directly confronted this issue since. *See* Son Vo v. Greene, 109 F. Supp. 2d 1281, 1283 (D. Colo. 2000).

176. 109 F. Supp. 2d 1281 (D. Colo. 2000).

177. *See Son Vo*, 109 F. Supp. 2d at 1281.

178. *See id.*

179. *See id.* at 1282.

In assessing the constitutionality of the provision, Judge Kane rejected the reasoning of three prior bench decisions, which followed the Seventh Circuit decision in *Parra v. Perryman*[180] upholding the constitutionality of § 1226(c).[181] Judge Kane distinguished *Parra*, where the alien was fully deportable to Mexico, with the case at bar, where Vo could not be deported to Vietnam even if he received a final removal order.[182] Judge Kane, in enjoining the INS from applying § 1226(c) to Vo, held that the mandatory provision "deprived [Vo] of his liberty without due process of law," concluding that "due process requires that a person 'charged' with being an aggravated felon be afforded the opportunity to present evidence establishing that he is not what he is merely 'charged' to be."[183]

b. *Gonzalez-Portillo v. Reno*[184]

i. Facts

A few months after Judge Kane's decision in *Son Vo*, Federal Magistrate Judge Coan considered the detention of a lawful permanent resident facing deportation proceedings based on her convictions for multiple crimes of moral turpitude and for her aggravated felony conviction.[185] The petitioner, Gonzalez-Portillo, although a citizen of El Salvador who originally entered the United States as an undocumented alien, obtained lawful permanent resident status in 1989.[186] Eleven years later, Gonzalez-Portillo pled guilty to two counts of forgery, a third degree felony.[187] She received a sentence of an indeterminate term, not to exceed five years, but served only fifteen days in county jail.[188]

Subsequently, the INS initiated removal proceedings.[189] Gonzalez-Portillo challenged her removability, claiming that her status as a lawful permanent resident provided her with immunity from removal, that she did not commit an aggravated felony for deportation purposes, and that the mandatory detention provision of § 1226(c) violates her Fifth Amendment right to Due Process and her Eighth Amendment right to reasonable bond.[190]

ii. Decision

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180. 172 F.3d 954 (7th Cir. 1999). *See* discussion, *infra*, Part II.B.2.a.
181. *See Son Vo*, 109 F. Supp. 2d at 1283.
182. *See id.*
183. *Son Vo*, 109 F. Supp. 2d at 1283-84.
184. 2000 WL 33191534 (D. Colo. 2000).
185. *See Gonzalez-Portillo*, 2000 WL 33191534, at *1.
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*

After rejecting her first two claims, the court considered Gonzalez-Portillo's claim of the unconstitutionality of the mandatory detention provision.[191] First, the court determined that a strict scrutiny standard must be applied to the government's provision, requiring that the INS "demonstrate that the detention of aliens without opportunity for release pending finalization of removal proceedings is narrowly tailored to serve a compelling government interest."[192] Next, having determined that the Congress has a compelling interest in preventing the flight of criminal aliens and the commission of additional crimes, the court considered whether section 1226(c)'s detention requirement was excessive in relation to that interest.[193]

Here, the court considered the mandatory nature of the provision, which "does not afford the Attorney General any discretion to make an individualized determination about whether the reasons justifying Congress' enactment of the detention statute apply to a particular alien."[194] Additionally, the court noted the indefinite nature of the requirement, as the provision failed to provide any specific time limit for the issuance of a final removal order.[195] Based on both the inflexible nature of the provision, and the potentially indefinite detentions that it authorized, the magistrate deemed § 1226(c) unconstitutional and ordered that the INS must provide Gonzalez-Portillo with an individualized bond hearing "to determine whether she presents a substantial risk of flight or a threat to persons or property."[196]

c. Mandatory Detention as Constitutional: *Kwon v. Comfort*[197]

i. Facts

In *Kwon*, a Colorado district court considered the mandatory detention provision of IIRIRA as it addressed an appeal from a lawful permanent resident facing immigration proceedings pursuant to his conviction for an aggravated felony.[198] The petitioner, a Korean citizen but a lawful permanent resident of the United States, was convicted of second and third degree sexual assault and received a sentence of nine months in jail

191. *See id.* at *5.

192. *Id.* at *7. In reaching this decision, the court relied upon the language of Reno v. Flores, 507 U.S. 292, 302 (1993), which "distinguished the juvenile alien's liberty interest from a fundamental liberty interest such as 'freedom from physical restraint' in the sense of a barred cell." *Id.* at *6.

193. *See id.* at *8.

194. *Id.* at *10.

195. *See id.*

196. *Id.* at *12.

197. 174 F. Supp. 2d 1141 (D. Colo. 2001).

198. *See Kwon*, 174 F. Supp. 2d at 1143.

followed by eight years of probation.[199] Subsequently, the INS initiated removal proceedings against Kwon as an aggravated felon.[200]

ii. Court's Reasoning

Here, the court rejected the petitioner's argument that the mandatory detention provision is unconstitutional, and instead followed the Seventh Circuit's decision in *Parra*.[201] The court's analysis focused first on Congress' "near-complete power over immigration," which stems from more than mere Constitutional authority, but also from an inherent sovereign right "to determine which aliens it will admit or expel."[202] Next, the court applied a relaxed standard for evaluating the constitutionality of the provision, requiring only that the provision be "bas[ed] upon a facially legitimate and bona fide reason."[203]

In applying this "facially legitimate" purpose test, the court concluded that the detention requirement, along with IIRIRA as a whole, serves a legitimate governmental purpose by preventing the risk of flight as well as the risk of further criminal activities through the duration of the removal proceedings.[204] Moreover, the court noted that even prior to IIRIRA, the release of an alien pending removal proceedings was a matter of discretion, rather than entitlement.[205] Finally, the court asserted that the detention under § 1226(c) "is not indefinite but is limited to the time it takes to adjudicate the removal proceedings, consider any request Petitioner makes for relief from removal . . . and, if relief is rejected, to execute the final order of removal."[206] Based on these considerations, the court in *Kwon* upheld 8 U.S.C. § 1226(c) as constitutional.[207]

2. Other Circuits

a. *Parra v. Perryman*[208]

i. Facts

In *Parra v. Perryman*, the Seventh Circuit considered and upheld the constitutionality of 8 U.S.C. § 1226(c), requiring the mandatory detention of a deportable alien pending removal proceedings.[209] Manuel Parra, a Mexican citizen convicted of aggravated criminal sexual assault,

199. *See id.*
200. *See id.*
201. *See id.* at 1146.
202. *Id.* at 1144-45.
203. *Id.* at 1146 (quoting Fiallo v. Bell, 430 U.S. 787, 794-95 (1977)).
204. *Kwon*, 174 F. Supp. 2d at 1146.
205. *See id.*
206. *Id.*
207. *See id.* at 1144.
208. 172 F.3d 954 (7th Cir. 1999).
209. *See Parra*, 172 F.3d at 958.

was held by the INS pending a final removal order.[210] In his appeal, Parra conceded both that he was an alien and that he had been convicted of an aggravated felony for removal purposes.[211] Accordingly, Parra presented no doubt as to the fact that his removal order would be made final, but only challenged whether the INS could detain him until such an order was officially issued.[212]

ii. Decision

In addressing Parra's claim, the Seventh Circuit relied both on the plain language of § 1226(c), which mandates the detention of aliens who are "deportable," and on the immediate facts before it.[213] The court noted that Parra's case, where his ultimate deportability was not in question, presented no dilemma but that there might be closer cases:

> [I]t is easy to imagine cases – for example, claims by persons detained under § 1226(c) who say that they are citizens rather than aliens, who contend that they have not been convicted of one of the felonies that authorizes removal, or who are detained indefinitely because the nation of which they are citizens will not take them back – in which resort to the Great Writ may be appropriate. Today's case presents none of these possibilities, however, for Parra concedes that he is an alien removable because of his criminal conviction, and Mexico accepts return of its citizens.[214]

After comparing Parra's liberty interest with the government's need to prevent his flight, the Seventh Circuit found no constitutional bar to Parra's detention.[215]

3. Analysis

The Seventh Circuit's holding must be construed extremely narrowly, for it evaluated the constitutionality of the mandatory detention requirement not on its face, but only as applied to these particular facts.[216] The court assessed Parra's liberty interest not as "liberty in the abstract, but liberty *in the United States* by someone no longer entitled to remain in this country but eligible to live at liberty in his native land."[217] Accordingly, the Seventh Circuit did not actually address the constitutionality of the detention as applied to a resident alien contesting either his or her legal status or the nature of the criminal conviction.[218]

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210. *See id.* at 955.
211. *See id.* at 956.
212. *See id.*
213. *See id.* at 957.
214. *Id.*
215. *See Parra*, 172 F.3d at 958.
216. *See id.* at 957.
217. *Id.*
218. *See id.* at 957.

In *Kwon v. Comfort*, the Colorado district court's reasoning is flawed in two major ways. First, in upholding the statute's detention provision, the court describes the decision to release an alien pending removal as one that has traditionally been discretionary.[219] Based on this premise, the court ultimately ends up preserving a statute that removes this traditional discretion, and instead requires a mandatory detention.[220] Second, the court's reliance on *Parra* may be misplaced. While *Parra* focused specifically on a defendant who conceded all aspects of his removability,[221] the court in *Kwon* makes no mention of whether the defendant had conceded his ultimate removability.[222]

With no on-point precedent as to the constitutionality of the mandatory detention of lawful permanent residents prior to a final removal order, the confusion within the Tenth Circuit is understandable. However, given the recent surge in INS activity as against both illegal immigrants and aliens lawfully present within the United States, the Due Process limitations on alien confinement will become increasingly important.

CONCLUSION

Throughout American history, our national crises have been reflected in our legal treatment of immigrants, from the restrictions on Japanese-Americans following the attack on Pearl Harbor[223] to the recent USA Patriot Act, passed in swift response to the September 11th terrorist attacks on America.[224] While excluding or deporting those aliens who lack any established ties to and who pose significant safety threats to American society is certainly a worthwhile goal, the achievement of this goal must be tempered with reasonableness and limited by the constitutional restraint of Due Process, particularly regarding those aliens lawfully present.

The "aggravated felony" category, as repeatedly expanded by Congress and broadly interpreted by the courts, has resulted in total upheaval for countless non-citizens who have lived peaceably in the United States for the majority of their lives. Additionally, these same non-citizens face a mandatory detention prior to any final determination of their removability, regardless of any flight or safety risk they pose. The allowance of this constitutionally questionable practice not only risks the integrity of the Due Process clause, but drains INS resources on the detention of

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219. *See Kwon*, 174 F. Supp. 2d at 1146.

220. *See id.* at 1146-47.

221. *See Parra*, 172 F.3d at 957.

222. *See id.* at 956.

223. *See generally* Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding as constitutional federal legislation placing both curfew restrictions and geographic exclusions upon all persons of Japanese ancestry, whether U.S. citizens or immigrants).

224. *See* notes 148-162, *supra*, and accompanying text.

relatively harmless individuals rather than in the pursuit of the truly dangerous elements in our society. In order to ensure a constitutional and level response to threats on our national security, the courts must be vigilant in reviewing the legal treatment of immigrants in America in the coming months.

Kathleen O'Rourke