Pulling Teeth: The State of Mandatory Immigration Detention

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INTRODUCTION

During the three years that Mohammad Azam Hussain was in the custody of the Department of Homeland Security ("DHS"), he lost three teeth. The dentist who pulled those teeth suggested that Hussain would keep losing teeth until he received periodontal surgery. Hussain had developed gum disease while in DHS custody—a condition he blamed on poor nutrition and a lack of real toothbrushes in one of the jails at which he was housed. But the Division of Immigrant Health Services would not pay for surgery to address the underlying gum disease—it would only pay for extraction.

DHS may have preferred a stopgap measure like pulling teeth to dental surgery because it considers immigration detention to be short-term—a form of preventative, not punitive, custody designed to assure the appearance of immigrants who might otherwise fail to show up for their supposedly fast-track removal proceedings. In fact, an increasing number of immigrants are subject to "mandatory detention," meaning that they are ineligible for bond because they are subject to removal on certain grounds.[1] This practice is in tension with case law that generally requires special procedural safeguards for civil detention.[2] However, when the Supreme Court last considered the constitutionality of mandatory immigration detention, the government assured the Court that it processed the vast majority of removal cases in one and a half months, and the minority of cases in which the immigrant appeals in five months.[3] The Court upheld mandatory detention, in large part based on this premise.[4]

* Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago. I would like to thank Lisa Palumbo, Judy Rabinovitz, and the staff of the Harvard Civil Rights-Civil Liberties Law Review for their invaluable assistance. This article is dedicated to Mohammad Azam Hussain.

[1] *See* 8 U.S.C. § 1226(c) (2006) (requiring certain categories of immigrants to be detained during removal proceedings). Sixty-six percent of current detainees are considered subject to mandatory detention. DORA SCHRIRO, DEP'T OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION, OVERVIEW AND RECOMMENDATIONS 6 (Oct. 6, 2009), *available at* http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

[2] *See* Kansas v. Hendricks, 521 U.S. 346, 368 (1997); Foucha v. Louisiana, 504 U.S. 71, 84 (1992).

[3] Demore v. Kim, 538 U.S. 510, 530 (2003).

[4] *Id.* at 531.

It might be expected that in an immigration detention system as large as that of the United States[5] a tooth will be pulled here or there, even if detention is short-term; but Hussain's *three* pulled teeth belie the notion that immigration detention is always quick. While it is true that the majority of detainees are removed quickly, a significant minority—about 2100 per year—languish in detention for a year or more while they pursue legal challenges.[6] Hussain was in detention for nearly three years.[7] Some might argue that this is an appropriate result in cases against individuals with tenuous claims, who are likely to be deported. Hussain's claims were not tenuous, however. In fact, he ultimately won relief under the Convention Against Torture ("CAT").[8] Moreover, Hussain's case is not anomalous—over the past eight years, thousands of immigrants who eventually won their cases spent long periods of time in immigration custody.[9]

There are fundamental problems with holding individuals in long-term custody under conditions designed for the short term. While Hussain was losing approximately a tooth per year, other immigrants were dying while in detention. From 2003 to the present, at least 107 detainees have died in

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[5] In 2007, DHS detained approximately 311,000 individuals. DHS ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2007 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf. DHS detains more than 30,000 immigrants each day. U.S. GOV'T ACCOUNTABILITY OFFICE, ALIEN DETENTION STANDARDS: OBSERVATIONS ON THE ADHERENCE TO ICE'S MEDICAL STANDARDS IN DETENTION FACILITIES 1 (2008), *available at* http://www.gao.gov/new.items/d08869t.pdf.

[6] According to the Schriro Report, "On average, an alien is detained thirty days. The length of detention however, varies appreciably between those pursuing voluntary removals and those seeking relief. As much as 25% of the detained population is released within one day of admission, 38% within a week, 71% in less than a month, and 95% within four months. Less than 1% of all admissions, about 2,100 aliens, are detained for a year or more." SCHRIRO, *supra* note 1, at 6. Another recent report by the Migration Policy Institute ("MPI") provides a different picture. The MPI report analyzed data concerning 18,690 persons in immigration detention pursuant to removal proceedings on a single day in January 2009. According to its analysis, the average length of detention was eighty-one days; 74% of the detainees had been detained for less than ninety days; 13% for between ninety days and six months; 10% for between six months and one year; and 3% for more than one year. DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POL'Y INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES 16 (2009), http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf. The chief discrepancy between the Schriro data and the MPI findings probably relates to MPI's focus on immigrants in removal proceedings. Schriro's data, in contrast, appears to have encompassed individuals who were not entitled to removal proceedings or who voluntarily stipulated to their removal.

[7] *See* Mark Brown, *Immigrant Still in Jail, Even though Judge Let Him Go Free*, CHI. SUN TIMES, Mar. 20, 2007, at 2.

[8] *See* Hussain v. Mukasey, 518 F.3d 534 (7th Cir. 2008).

[9] According to data obtained by the ACLU from DHS throughout a Freedom of Information Act request, from November 14, 2001 to September 30, 2009, DHS terminated charges against or awarded waivers of deportation to 5829 persons who were held in detention for six months or more (note that this number does not include individuals who, like Hussain, won CAT relief). Of these individuals, 1424 were held for more than one year, six persons were held for more than five years, and one person was held for nearly eight years. *See* American Civil Liberties Union Freedom of Information Act request data (on file with author) [hereinafter ACLU FOIA Data].

immigration custody.[10] The current administration has responded to multiple media exposés regarding detention conditions by promising to reform the system.[11] The Government's proposed reforms focus on improving both the physical space of detention and the quality of medical care.[12] While these proposed reforms are a step in the right direction, there is reason to be skeptical that a system designed to serve short-term detainees can ever provide adequate health care for individuals like Hussain, who spend years in custody. Hussain's case suggests that as long as the majority of immigrants are detained for short periods of time, the government's managed care apparatus will favor short-term medical solutions, like pulling teeth.

Some lawyers who represent long-term detainees have responded to this problem by bringing legal challenges. Although the Supreme Court initially upheld mandatory detention, a growing number of lower courts have become convinced that prolonged mandatory detention raises a set of troubling constitutional issues that the Supreme Court did not have occasion to address.[13] Several circuits have carved out their own exceptions to mandatory detention, which allow certain detainees to seek release through habeas corpus proceedings or an immigration judge ("IJ") bond hearing.[14]

Unfortunately, litigation is unlikely to be a viable solution for most immigrants in prolonged detention. After six years of litigation, only three circuits have issued precedential decisions acknowledging some right to challenge mandatory detention during removal proceedings, and these decisions offer inconsistent solutions to the problem.[15] The reason for the lack of guidance from courts is clear: it is logistically difficult to bring a habeas petition. Federal litigation is complex, resource-intensive, and time-consuming. Moreover, the legal framework for mandatory detention is a fluid network of statutes, and courts are apt to deem cases moot when the legal authority for detention shifts from one statute to another.[16] While class actions sometimes provide a means for creating a uniform rule of law where the issues are difficult to litigate in an individual case, efforts to certify a

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[10] Susan Caroll, *Immigrant Facilities Subpar: Chronicle Review Shows ICE Not Enforcing Its Own Standards of Care*, HOUS. CHRON., Feb. 5, 2010.

[11] For an account of the government's initial efforts to keep news of detainee deaths quiet, see Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, at A1. For information concerning DHS's reform plans, see Press Release, Dep't of Homeland Security, Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives (Oct. 6, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1254839781410.shtm [hereinafter DHS Press Release].

[12] DHS Press Release, *supra* note 11.

[13] *See, e.g.*, Alli v. Decker, 644 F. Supp. 2d 535, 539 (M.D. Pa. 2009) (finding that there is a "growing consensus within this district and, indeed it appears throughout the federal courts, that prolonged detention of aliens under § 1226(c) raises serious constitutional concerns.").

[14] *See* Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 950–51 (9th Cir. 2008); Hussain v. Mukasey, 510 F.3d 739, 743 (7th Cir. 2007); Ly v. Hansen, 351 F.3d 263, 269–70 (6th Cir. 2003).

[15] *Id.*

[16] *See Hussain*, 510 F.3d at 742 (finding the appeal moot after the issuance of a final administrative removal order).

class of mandatory detainees have so far had mixed results.[17] Even if the Supreme Court were to enter the fray, there is reason to doubt that it can adequately resolve this issue, given the tangled history of immigration detention litigation.[18]

In this article I contend that the current framework for mandatory detention is unfair and inefficient. Persons are deemed subject to mandatory detention based on a complicated categorical analysis that does not consider the individual facts of a case. This approach, which prioritizes abstract legal categories over case-specific facts, does a poor job of assessing whether a person is actually a flight or security risk. Requiring the detained immigrant to prove that the government is substantially unlikely to win its case in order to defeat mandatory detention exacerbates the problem of unfairness.[19] The burden of proof in the proceeding is placed on the party with the least resources—the detainee—who is usually unrepresented and lacking the legal education necessary to comprehend the esoteric nuances of immigration law.[20] Detainees often have difficulty making a phone call, let alone conducting legal research or gathering evidence.[21] To make matters worse, detainees may receive videoconference hearings, which are plagued by technical defects and problems related to interpretation, credibility assessment, presentation of evidence, and access to counsel.[22]

If Immigration and Customs Enforcement ("ICE") is to adequately reform immigration detention, it must do more than improve the physical infrastructure of detention facilities; it must also make changes to its legal process that governs detention so that detainees are not held for years without possibility of bond. A host of recent studies document the problems with detention conditions and make recommendations regarding how to im-

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[17] *Compare Alli*, 644 F. Supp. 2d at 546 (finding that the court lacked jurisdiction to enter class-wide relief), *with* Rodriguez v. Hayes, 578 F.3d 1032, 1051 (9th Cir. 2009) (reversing the District Court's denial of class certification).

[18] *See infra* Part II.A.

[19] *See* Tijani v. Willis, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring).

[20] From 2004 to 2008, between 35% and 45% of immigrants have been represented by counsel in removal proceedings. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK G1 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf. The number of detainees represented in removal proceedings is much smaller; a recent study shows that in 2007, 84% of detainees represented themselves pro se. NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM 1 (2008), *available at* http://www.vera.org/download?file=1780/LOP%2BEvaluation. For a discussion of the crisis in representation of immigrant detainees, see Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 541–46 (2009).

[21] *See* JACOB CHIN ET AL., ATTORNEYS' PERSPECTIVES ON THE RIGHTS OF DETAINED IMMIGRANTS IN MINNESOTA (2009), *available at* http://www.mcaa-mn.org/docs/2009/20091204121228744.pdf.

[22] *See Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1181, 1186–88 (2009).

prove such conditions.[23] For the most part, this article will not address these recommendations because I contend that reforms geared towards improving conditions for a population of predominately short-term detainees will be inadequate to address the needs of the small, but significant population of long-term detainees. The best solution to the problems raised by prolonged detention is to reform the legal structure.

There are various routes by which legal reform may be accomplished. Ideally, the Immigration and Nationality Act ("INA") should be amended to return discretion to immigration judges ("IJs") to grant bond to persons whom they deem to be a low flight risk.[24] Alternatively, ICE could accomplish various reforms by issuing new guidance or regulations. For example, ICE might interpret the immigration statutes to authorize mandatory detention for only a limited period, as several courts have done, or to only authorize detention of persons with no colorable challenge to their removal.[25] ICE might also use electronic monitoring as an alternative solution for some immigrants who are currently held in prolonged mandatory detention.

During his three years in immigration custody, Hussain was subject to many of the statutes and regulations governing immigration detention and was exposed to multiple detention facilities. Therefore, I use Hussain's story to illustrate the process of immigration detention and its considerable problems. In the prologue, I explain how Hussain came to be held in detention. In Part I, I describe the legal framework for detention and the conditions of custody using Hussain's story as a case study. In Part II, I describe the legal challenges to mandatory detention, including those made by Hussain. In Part III, I set out DHS's proposed reforms to detention conditions and contend that neither these changes nor detention litigation are likely to result in a satisfactory solution to the problems raised in cases like Hussain's. I argue for restoration of due process for persons who would otherwise suffer for years under custody conditions designed for a maximum period of weeks.

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[23] *See, e.g.*, CHIN ET AL., *supra* note 21; SW. INST. FOR RESEARCH ON WOMEN, UNIV. OF ARIZONA, UNSEEN PRISONERS: A REPORT ON WOMEN IN IMMIGRATION DETENTION FACILITIES IN ARIZONA (2009), *available at* http://sirow.arizona.edu/files/UnseenPrisoners.pdf; FLA. IMMIGRANT ADVOCACY CTR., DYING FOR DECENT CARE: BAD MEDICINE IN IMMIGRATION CUSTODY 10–27 (2009), *available at* http://www.fiacfla.org/reports/DyingForDecentCare.pdf; NEW ORLEANS WORKERS' CTR. FOR RACIAL JUSTICE, DETENTION CONDITIONS AND HUMAN RIGHTS UNDER THE OBAMA ADMINISTRATION: IMMIGRANT DETAINEES REPORT FROM BASILE, LOUISIANA (Jul. 2009), *available at* http://www.nowcrj.org/wp-content/uploads/2009/07/detention-conditions-report.pdf.

[24] For a history of immigration bond provisions, see *infra* Part I.A.

[25] *See, e.g.*, Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 947–48 (9th Cir. 2008) (construing the mandatory detention statute to authorize detention only for a reasonable period); Gonzalez v. O'Connell, 355 F.3d 1010, 1020 (7th Cir. 2004) (noting that the court has left open the question of "whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable"); Ly v. Hansen, 351 F.3d 263, 269–70 (6th Cir. 2003).

Prologue: Flight and Refuge

Mohammad Azam Hussain was born in one of the most violent cities in the world—Karachi, Pakistan. His parents were "Mohajirs," or refugees, who traveled to Pakistan from India when the two countries were carved out of former British colonial India.[26] The partition of India was a bloodbath with an estimated death toll as high as one million.[27] Like many Mohajirs, Hussain's family eventually settled in Karachi, in the province of Sindh.[28] Today approximately six million residents of Karachi identify as Mohajirs.[29]

In 1985, Hussain joined a party called the "Mohajir Qaumi Movement" ("MQM").[30] MQM was founded the year before by a group of friends who had met in Karachi educational institutions. Dedicated to a platform of Mohajir rights, the party expanded rapidly during the 1980s, a turbulent period of transition from military rule to the restoration of democracy in 1988. During this period, several political parties violently competed for power on the streets and campuses of Karachi.[31]

Hussain, who handed out pamphlets for MQM and organized the student "ladies' wing," was a victim of this political violence—his brothers were tortured, he was beaten so badly he had to be hospitalized for his injuries, and his father's shop was burned. At his family's request, Hussain temporarily ceased political work and concentrated on his studies. However, when Hussain took his final college exam, a group of Punjabi students assaulted him because of his ethnicity, so that he was unable to complete his education. After this incident, Hussain became convinced that "MQM was the only solution for people like me," and returned to the party, which was destined for a meteoric rise and a paradoxical role in Pakistani politics.[32]

MQM is full of contradictions. It is a progressive party with a liberal agenda; however, it is also a group with a well-earned reputation for thuggery. MQM may be based in the same part of the world as the September 11th hijackers, but it is a far cry from Al-Qaeda; it is a decidedly secular political organization and one of the most potent foes of Islamic fundamentalism in Pakistan today. MQM cannot be easily pigeonholed—to understand the party and its thousands of members, one must first understand the tumultuous dynamics of a country unfamiliar to most Americans.

Hussain's role in MQM was also complicated. In late 1990 there was a schism in the party, and Hussain remained loyal to ousted members who left Pakistan for the United States. The remaining MQM members assaulted

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[26] *See* Brief for Petitioner at 3, Hussain v. Mukasey, 518 F.3d 534 (7th Cir. 2008) (No. 07-3688) [hereinafter Hussain Brief].

[27] *See* Stanley Wolpert, A New History of India 348 (1993).

[28] Hussain Brief, *supra* note 26, at 3.

[29] Oskar Verkaaik, Migrants and Militants: Fun and Urban Violence in Pakistan 2 (2004).

[30] Hussain Brief, *supra* note 26, at 3–4.

[31] Verkaaik, *supra* note 29, at 66.

[32] Hussain Brief, *supra* note 26, at 4.

Hussain and his family, and kidnapped Hussain and tortured him for two days. He was only released after he agreed to sign a loyalty pledge to MQM's leader, Altaf Hussain.[33] After being released, Hussain fled to India for several months.

The MQM members who left for the United States eventually returned to Pakistan and formed a new party called MQM-H ("H" for *Haqiqi*, meaning "original"). Hussain also returned to Pakistan and joined MQM-H, heading a neighborhood office for approximately two years. He made speeches, took community complaints, campaigned for MQM-H candidates and worked to improve infrastructure and create new jobs in his community.[34]

Hussain continued to fear for his safety, however. During this time, members of the two factions engaged in violence against each other. Government security forces also attacked members of both groups. Eventually, Hussain came to fear that he would be assassinated like many of his colleagues. Thus, in 1994 he fled to the United States using a "humanitarian parole" document that he obtained from a government official in Pakistan. About a week after his arrival, Hussain learned that his former office had been attacked, and that seven of the workers, including the person who had been sitting in his office space, had been killed.[35]

Hussain settled in the Chicago area. He married his wife, Patricia, on June 10, 1996.[36] Like many immigrants, Hussain pursued a variety of occupations, including chef, cab driver, and construction worker. He made many friends in Chicago's South Asian community, and in his spare time played soccer, ping-pong, and came to be highly regarded as a singer at weddings and other events. In 1997, Hussain's wife petitioned for him to become a lawful permanent resident.[37] The application was granted on August 6, 1999, and the following year the couple had a daughter, Alishia Hussain.[38]

In 2003, Hussain applied for naturalization. With his application still pending, he received a premature recognition of his citizenship—a "Citizen Appreciation Award" from the Des Plaines Police Department for helping apprehend the armed robbers of a gas station. Hussain and his wife observed a robbery as they drove home one night. They quickly tracked down a police officer and brought him back to the crime scene. According to Des Plaines Mayor Anthony Arredia, "As a private citizen, his actions were out-

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[33] *Id.* at 7–8.
[34] *Id.* at 8–10.
[35] *Id.* at 10–12.
[36] *Id.* at 12.
[37] As legal authority for the adjustment, Hussain relied on a provision that allowed certain applicants who had failed to follow correct immigration procedures to adjust status anyway, if they paid a $1000 fine. *See* 8 U.S.C. § 1255(i) (2006).
[38] Hussain Brief, *supra* note 26, at 15.

standing. His quick thinking led to the arrest of three armed offenders and possibly saved the life of a gas station attendant."[39]

It must have seemed to Hussain that he was on the verge of achieving the American Dream. Things took a sharp turn for the worse, however, when Hussain returned to the United States from a trip to Pakistan in July 2004, where he was visiting his sick mother and dying sister-in-law for the second time that year.[40] After Hussain got off the plane, immigration authorities held him for lengthy questioning. Two months later, the FBI arrived at his house and arrested him for making false statements on his citizenship application.[41] DHS had scoured Hussain's naturalization application and found that he had responded to a question asking if he had ever been a member of any political or social group by checking the box indicating that he had not. DHS knew this was untrue because Hussain had previously disclosed on his green card application that he had been a member of MQM.[42]

The Government charged Hussain with violating one federal statute relating to misrepresentation and another barring the unlawful procurement of citizenship.[43] Because of Hussain's association with MQM, DHS sought to have him held without bond. Hussain drew Judge Samuel Der-Yeghiayan for his bond hearing, a former roommate of Attorney General John Ashcroft who spent much of his legal career as a chief immigration prosecutor and IJ in Chicago.[44] Judge Der-Yeghiayan denied bond, finding that Hussain was a flight risk: "It appears likely that Hussain will eventually be deported regardless of whether or not he is convicted in the United States. Hussain therefore has no incentive to remain in the United States and face prosecution and is likely to flee and seek haven in Karachi, Pakistan."[45] Judge Der-Yeghiayan, who is an Armenian immigrant, stated further that he found Hussain's actions "an insult to the law abiding immigrant community."[46]

The Government quickly touted the Hussain case in the media as an example of its success in the War on Terror.[47] Nonetheless, it was initially unable to convict Hussain—Hussain's trial ended on January 13, 2005, and

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[39] *Id.* at 16–17.

[40] *Id.* at 17.

[41] *Id.*

[42] *Id.* at 15.

[43] *See* 18 U.S.C. § 1425(a) (2006) (procurement of citizenship unlawfully); 18 U.S.C. § 1001(a)(2) (2006) (false statements).

[44] Carol Marin, *What Makes a Good Judicial Nominee?*, CHI. SUN-TIMES, Mar. 4, 2007, at B6.

[45] United States v. Hussain, No. 04 CR 839-1, 2004 WL 2325745, at *6 (N.D. Ill. Oct. 8, 2004) (mem. opinion). As a former IJ, Judge Der-Yeghiayan should have been well aware that despite a conviction, Hussain would have still been eligible for CAT and other forms of immigration relief that would allow him to remain in the United States.

[46] *Id.*

[47] *See* Matt O'Connor, *Pakistani Denied Bail as Founder of Terror-Group*, CHI. TRIB., Oct. 8, 2004, at 4.

resulted in a hung jury.[48] Afterwards, the Government filed a superseding indictment with an additional charge.[49] The prosecutors had uncovered Hussain's mortgage applications, in which a box had been checked stating that Hussain was a United States citizen.[50] On June 13, 2005, Hussain was convicted after a second trial and sentenced to nine months of incarceration, time that he had already served in pretrial detention. Hussain appealed this conviction, represented by the appellate advocacy clinic at the University of Chicago Law School. DHS did not wait for Hussain's appeal to be resolved. On July 27, 2005, DHS took Hussain into immigration custody and began removal proceedings against him.[51]

Part I: A Profile of Immigration Detention

The legal framework for immigration detention is extraordinarily complicated. At least three statutes authorize the detention of immigrants: 8 U.S.C. § 1225(b) for inadmissible "arriving aliens," 8 U.S.C. § 1226 for immigrants in the United States who are placed in removal proceedings, and 8 U.S.C. § 1231(a) for immigrants who have been ordered removed and who are awaiting deportation.[52] There are two federal agencies—DHS and the Department of Justice—that administer the detention statutes. Two separate sub-agencies of DHS, ICE and Customs and Border Protection ("CBP"), make decisions about "parole" from custody for "arriving aliens."[53] ICE makes initial custody decisions for immigrants it apprehends and places in

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[48] Hussain Brief, *supra* note 26, at 17.

[49] Third Superseding Indictment, United States v. Hussain, No. 04 CR 839-1, 2005 WL 5704122 (N.D. Ill. Apr. 27, 2005).

[50] The Government's additional charge was pursuant to 18 U.S.C. § 911 (2006), which prohibits false attestations of United States citizenship.

[51] Hussain Brief, *supra* note 26, at 18.

[52] *See* Rodriguez v. Hayes, 578 F.3d 1032, 1040 (9th Cir. 2009).

[53] Immigrants who are deemed inadmissible upon arrival at a port of entry are subject to detention and expedited removal. *See* 8 U.S.C. § 1225 (2006). "Parole," in this context, is a term of art that refers both to the discretionary authority of DHS to allow an otherwise inadmissible "arriving alien" into the United States without granting her the rights that would come with a more formal "admission," *see* 8 U.S.C. § 1182(d)(5)(A) (2006); 8 C.F.R. § 212.5 (2009), as well as the discretion of DHS to not detain such an arriving alien, *see* 8 U.S.C. § 1226(a)(2)(B) (2006). Recently, parole has been used to informally admit various categories of immigrants, ranging from persons who are granted "deferred inspection" to obtain necessary evidence of their admissibility, to Haitian orphans admitted after the January 2010 earthquake. *See* 8 C.F.R. § 235.2 (2009) (deferred inspection of certain arriving aliens); Press Release, Dep't of Homeland Security, Secretary Napolitano Announces Humanitarian Parole Policy for Certain Haitian Orphans (Jan. 18, 2010), *available at* http://www.dhs.gov/ynews/releases/pr_1263861907258.shtm. One significant category of immigrants who are eligible for parole is arriving asylum seekers. *See* Human Rights First, U.S. Detention of Asylum Seekers Seeking Protection, Finding Prison 47 (2009), *available at* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf. In recent history, very few asylum seekers have been granted parole. *Id.* at 31. However, in December 2009, DHS released revised parole guidelines, which should make it much easier for asylum applicants to be released. *See* ICE, Revised Parole Policy for Arriving Aliens with Credible Fear Claims (Dec. 17, 2009), *available at* http://www.ice.gov/pi/news/factsheets/credible-fear.htm.

removal proceedings in the United States. IJs, who are part of the Executive Office for Immigration Review of the Department of Justice, have jurisdiction to review some, but not all detention decisions made by ICE.[54]

A dense web of regulations and legal interpretations come into play at different stages in the process. There is one standard for making bond determinations for immigrants in removal proceedings who are not charged with a ground of mandatory detention and a different standard for immigrants who are alleged to be ineligible for bond.[55] A third set of rules governs the "post-order custody review" process for immigrants who have been ordered removed but cannot be deported.[56] Each of these standards applied at some point in Hussain's case.

A. Bond Eligibility

Historically, immigrants involved in removal proceedings were not detained unless they were found to be a flight or security risk.[57] Even then they were eligible for release on bond.[58] The first mandatory detention provision was enacted in 1988 as part of the Anti-Drug Abuse Act.[59] The Act created a new ground for deportation of persons convicted of an "aggravated felony," which it defined to include murder, drug trafficking, and firearms trafficking.[60] The Act further subjected immigrants convicted of an aggravated felony to mandatory custody without possibility of bond.[61] Most courts that considered the constitutionality of this provision held that it violated immigrants' right to due process.[62]

In the wake of the 1995 Oklahoma City bombing, Congress passed two laws that toughened deportation provisions and immigration detention. The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") greatly expanded both the definition of "aggravated felony" and the categories of immigrants subject to mandatory detention.[63] After the passage of AEDPA, immigrants who had been convicted of multiple crimes involving moral turpitude, controlled substances offenses, firearms offenses, and certain national security-related offenses became subject to detention during removal proceedings without possibility of bond.[64]

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[54] 8 C.F.R. § 1003.19(h)(2)(i) (2009) (barring IJs from reviewing DHS's custody determinations with respect to various categories of detained immigrants).

[55] *Cf.* Matter of Adeniji, 22 I. & N. Dec. 1102, 1111–12 (BIA 1999) (general bond standard); Matter of Joseph, 22 I. & N. Dec. 799, 806 (BIA 1999) (standard for immigrants alleged to be subject to mandatory detention).

[56] 8 C.F.R. § 241.4(a) (2009).

[57] *See* Matter of Patel, 15 I. & N. Dec. 666, 666 (BIA 1976).

[58] *Id.*

[59] Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

[60] *Id.* § 7342.

[61] *Id.* § 7343(a)(4).

[62] *See, e.g.*, Kellman v. INS, 750 F. Supp. 625, 626 (S.D.N.Y. 1990).

[63] Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1277 (1996).

[64] 8 U.S.C. § 1226(c)(1) (2006).

Soon after the passage of AEDPA, Congress passed another law that expanded the scope of mandatory detention: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[65] IIRIRA expanded the increasingly bloated aggravated felony category, and thus mandatory detention, to encompass still more types of crimes.[66] After the passage of IIRIRA, Congress codified the immigration detention provision at 8 U.S.C. § 1226.

Section 1226(a) authorizes the detention of immigrants during proceedings, but also provides for their release on either "conditional parole" or with a bond of at least $1500.[67] Section 1226(c) contains the mandatory custody provision, which requires detention without bond for immigrants who are "deportable" or "inadmissible" for a litany of statutory grounds, including multiple "crimes involving moral turpitude."[68] "Moral turpitude" is a long-standing, but fairly amorphous category of crimes that are considered by courts to be "morally reprehensible and intrinsically wrong."[69]

In the "Notice to Appear" for removal proceedings that ICE served on Hussain, it charged that he was removable for having been convicted of a "crime involving moral turpitude," obtaining admission and other immigration benefits by fraud, and making false claims to United States citizenship.[70] It was unclear whether Hussain's crime involved moral turpitude or subjected him to mandatory detention. Nonetheless, ICE informed Hussain that it had chosen to deny him bond, and that he could appeal the decision to an IJ.[71] Hussain appealed, and IJ George Katsivalis denied him bond as a matter of discretion.[72]

B. Bond Procedures in Mandatory Detention Cases

Had DHS taken the position that Hussain was subject to mandatory detention, he would have had the burden of proving to the judge that DHS was wrong. Instead of a bond hearing, he would have had a "Joseph" hearing, named after the Board of Immigration Appeals ("BIA") decision in *Matter of Joseph*,[73] in which the BIA first stated the bond standard for

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[65] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[66] Pub. L. No. 104-208, § 321, 110 Stat. 3009-627 (1996). For example, IIRIRA created a new aggravated felony category for crimes involving sexual abuse of a minor, and reduced the sentence necessary to make a theft or crime of violence an aggravated felony from five years to one year. *Id.*

[67] 8 U.S.C. § 1226(a) (2006).

[68] *Id.* § 1226(c).

[69] *See* Mei v. Ashcroft, 393 F.3d 737, 739 (7th Cir. 2004).

[70] Hussain Brief, *supra* note 26, at 18.

[71] DHS makes initial custody decisions for aliens involved in proceedings, but IJs have the authority to review DHS's initial determination upon an oral or written request made by the alien. *See* 8 C.F.R. §§ 236.1(c)(8), 1003.19 (2009).

[72] *See* Memorandum Opinion and Order, *In re* Mohammad Azam Hussain, A070-921-157 (Chi. Immigr. Ct. Feb. 23, 2006) [hereinafter Bond Memo].

[73] 22 I. & N. Dec. 799 (BIA 1999).

mandatory detainees. Under *Matter of Joseph*, an immigrant charged with a ground of mandatory detention will only receive a bond hearing if she can prove that DHS is substantially unlikely to prevail on its charge.[74]

The *Matter of Joseph* process eventually did come into play in Hussain's case. Hussain disputed the charges against him and sought various forms of relief from removal including asylum, withholding of removal, and relief under the Convention Against Torture ("CAT").[75] His "merits" hearing consisted of several proceedings that took place between December 15, 2005 and April 28, 2006, after which the IJ took his case under advisement.[76] As of October 11, 2006, the IJ still had not reached a decision in Hussain's case. Hussain filed a new motion for release on bond, arguing that the sheer length of his time in detention (over fourteen months) constituted a changed circumstance meriting reconsideration of the IJ's original order denying bond.[77]

Not long afterwards, the U.S. Attorney called Hussain's criminal attorneys to tell them something extraordinary—the Government wished to vacate Hussain's conviction and dismiss the indictment against him. According to the U.S. Attorney, the prosecutors realized that they possessed relevant evidence that they had failed to disclose in Hussain's criminal trial. The U.S. Attorney would not say what the evidence was or admit that it would have made a difference in the case. However, according to the motion that the U.S. Attorney later filed, the "information provides, in the context of this case, a ground for a new trial."[78]

On November 9, 2006, District Court Judge James Zagel vacated Hussain's convictions, and on December 21, 2006, after viewing the Government's evidence, the District Court dismissed the indictment against Hussain.[79] For the next two months we pressed IJ Katsivalis for a decision on bond.

DHS opposed Hussain's motion, arguing that his involvement with MQM constituted material support of a terrorist organization which made him ineligible for bond. Historically, the BIA had held that immigrants were only subject to mandatory detention when *charged* with a ground of removal that triggered mandatory detention.[80] DHS claimed, however, that a terrorism charge was unnecessary in Hussain's case and that its mere say-so precluded the IJ from considering bond.[81] DHS based this argument on language in the regulations that deprived IJs of jurisdiction to hold bond

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[74] *See id.* at 806.

[75] *See* 8 U.S.C. § 1158 (2006) (asylum); 8 U.S.C. § 1231(b)(3) (2006) (withholding of removal); 8 C.F.R. § 208.18 (2009) (Convention Against Torture).

[76] Hussain Brief, *supra* note 26, at 18–20.

[77] *Id.* at 20.

[78] *Id.*

[79] *Id.*

[80] Matter of Joseph, 22 I. & N. Dec. 799, 806 (BIA 1999).

[81] Brief for Appellant on Appeal of Immigration Judge's Redetermination of Bond, *In re* Hussain, A070-921-157 (BIA Mar. 29, 2007).

hearings for various types of cases, including those involving immigrants "described in" the terrorism grounds.[82] Essentially, DHS argued that "described in" was not limited to formally alleged terrorists and could include immigrants that DHS informally described as terrorists.

On February 20, 2007, IJ Katsivalis issued a decision finding that Hussain was eligible for bond because DHS had not charged him with a terrorism ground of removal.[83] Enthused by this positive development, Hussain's friends mobilized to raise a $40,000 bond for his release. However, DHS refused to accept the money when they attempted to pay the bond. DHS appealed the IJ's bond order to the BIA, invoking a regulation that allows DHS to obtain an automatic stay of the bond order by filing a notice of intent to appeal within one business day.[84] Despite having finally convinced a judge to let him out, Hussain seemed stuck in jail.

C. The Conditions of Confinement

Initially, Hussain was detained at the Kenosha County Detention Center ("Kenosha"), which is a county jail near Milwaukee, Wisconsin. Kenosha holds immigration detainees pursuant to an intergovernmental service agreement ("IGSA") that it negotiated with the U.S. Marshal. DHS now detains approximately 50% of immigration detainees in 240 county jails like Kenosha, which mix immigration detainees with criminals.[85] The other 50% of the detained population is held in twenty-one "dedicated" facilities that are solely reserved for immigration detainees.[86] Among these facilities are seven "Service Processing Centers" owned by DHS and operated by the private sector, seven dedicated "Contract Detention Facilities" owned and operated by the private sector, and seven IGSA county jail facilities that only house immigration detainees.[87]

This sprawling network of county and private jails has grown to become the largest prison system in the country.[88] In the past four years, Congress has doubled the annual budget for ICE detention and removal operations to $2.4 billion, with nearly 70%—or $1.7 billion—devoted to "custody operations."[89] Private and public entities, large and small, have benefited from budgetary increases. The GEO Group and the Corrections Corporation of America, the nation's two largest private prison companies,

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[82] 8 C.F.R. § 1003.19(h)(2)(i)(C) (2009).
[83] Bond Memo, *supra* note 72, at 2.
[84] *See* 8 C.F.R. §§ 1003.6(c), 1003.19(i) (2009).
[85] SCHRIRO, *supra* note 1, at 10.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 6.
[89] *See* HUMAN RIGHTS FIRST, *supra* note 53, at 47.

have reported a sunny outlook in their earnings reports.[90] Among the smaller players who have profited from this growing funding stream is a native Alaskan tribe, which owns a controlling share in the Varick Street Detention Center in Greenwich Village.[91]

It stands to reason that private companies and cash-strapped counties might cut corners to maximize their profits from immigration detention. A number of recent news reports have shown this to be the case. Detainees housed at the Varick Street facility, for example, repeatedly complained of "frigid temperatures, mildew and meals that leave detainees hungry and willing to clean for $1 a day to pay for commissary food."[92] Since 2003, at least 107 individuals have died in immigration detention, and in many of these cases, poor medical care seems to have been a contributing factor.[93] Mentally ill persons fare particularly poorly in detention—either going untreated or receiving "one size fits all" medication, and sometimes being placed in solitary confinement.[94] The standards that govern ICE detention were derived from criminal standards,[95] but many facilities fail to follow even these rudimentary standards concerning recreation and access to counsel, legal materials, and telephones.[96]

Initially, most detainees are held in custody close to where they were first detained. However, ICE often transfers detainees to remote detention centers, far from detainees' family members and attorneys. From 1999 to 2008, 1.4 million detainee transfers occurred.[97] These transfers make it difficult for detainees to secure legal representation or work effectively with their

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[90] Renee Feltz, *Focus on "Criminal Aliens" Increases Demand for Immigrant Detention Business*, HUFFINGTON POST, Nov. 5, 2009, http://www.huffingtonpost.com/renee-feltz/focus-on-criminal-aliens_b_347303.html.

[91] Nina Bernstein, *Immigrant Jail Tests U.S. View of Legal Access*, N.Y. TIMES, Nov. 2, 2009, at A1. On January 14, 2010, ICE announced that it intends to suspend use of the Varick Street facility. Press Release, Immigration and Customs Enforcement, ICE to Suspend the Use of Varick Facility to House Detainees (Jan. 14, 2010), *available at* http://www.ice.gov/pi/nr/1001/100114newyork1.htm (last visited Jan. 23, 2010).

[92] *Id.*

[93] *See* Nina Bernstein, *Hurdles Shown in Detention Reform*, N.Y. TIMES, Aug. 20, 2009, at A21; Nina Bernstein, *Piecing Together an Immigrant's Life the U.S. Refused to See*, N.Y. TIMES, Jul. 6, 2009, at A1; Amy Goldstein & Dana Priest, *In Custody, In Pain: Beset by Medical Problems as She Fights Deportation, A U.S. Resident Struggles to Get the Treatment She Needs*, WASH. POST, May 12, 2008, at A1; Dana Priest & Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, the Detainees in Their Care Often Pay a Heavy Cost*, WASH. POST, May 11, 2008, at A1.

[94] Nina Bernstein, *Mentally Ill and in Immigration Limbo*, N.Y. TIMES, May 4, 2009, at A17; Dana Priest & Amy Goldstein, *Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*, WASH. POST, May 13, 2008, at A1.

[95] SCHRIRO, *supra* note 1, at 16.

[96] Anna Gorman, *Immigration Detention Centers Failed to Meet Standards, Report Says*, L.A. TIMES, July 29, 2009, at A14.

[97] HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 1 (2009), *available at* http://www.hrw.org/sites/default/files/reports/us1209web.pdf.

attorneys.[98] They also exact a personal toll on detainees and their family members, who may have difficulty visiting them in faraway detention centers. Hussain was transferred so many times that he eventually completed a circuit of every single detention center that was then under the jurisdiction of the Chicago ICE office. He therefore had an opportunity to observe and compare a wide range of facilities.

Relative to other facilities, the Kenosha County Jail where Hussain was first held had some positive aspects. At Kenosha, Hussain and the other detainees were allowed outside for recreation for about one to two hours daily. He was also able to visit with his wife and daughter once per week for about thirty minutes, although they were separated by a clear partition.

In time, however, Hussain began to experience problems at Kenosha, especially related to his religion. Unlike Christian detainees, the Islamic detainees at Kenosha were not allowed to gather together for a group "congregational prayer." When the holy month of Ramadan commenced in October, Hussain was not easily able to fast. Islam mandates that adherents fast from sunrise to sunset during Ramadan. Thus, a Muslim person will eat three meals during Ramadan, but the meals should be before sun-up, immediately after sunset, and at approximately eleven o'clock at night. The Kenosha staff served all three meals to Hussain cold, sometimes late, and oftentimes frozen. Moreover, the meals frequently contained non-Halal meat and the staff did not allow him to brush his teeth after eating, which was technically a violation of his fast. Finally, the Kenosha guards forbade Hussain from praying late (midnight or so).[99]

The guards also came up with a series of derogatory nicknames for Hussain. They called him "Saddam Hussein," "Al Qaeda," or "Osama bin Laden." They might say, "Hey, Al Qaeda, your mail is here. Come get your mail, Al Qaeda." Perhaps the guards were joking, but on one occasion, when Hussain was taken from Kenosha to Chicago for an immigration hearing, one of the ICE guards asked him, with utter seriousness, where Osama bin Laden was hiding.

In late 2005, ICE moved Hussain about an hour outside Chicago to the McHenry County Jail. He did not find it much easier to practice Islam at McHenry. Although Muslim detainees were allowed congregational prayer, they could not visit imams for religious counseling. While at McHenry, Hussain repeatedly requested that he be placed on the Kosher diet, which he considered to be an acceptable alternative to Halal under the circumstances. McHenry insisted, however, that it would only provide the Kosher diet to

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[98] *Id.*

[99] E-mail from Geoffrey Heeren, Senior Attorney, Legal Assistance Fund of Metropolitan Chicago, to Glenn Triveline, U.S. Department of Homeland Security (Oct. 28, 2005 10:09 CST) (on file with author).

Jewish detainees. Thus, Hussain opted for the vegetarian diet, which usually consisted of leftover mashed potatoes and sweet beans on a tray.[100]

Hussain experienced other problems at McHenry as well. At Kenosha, Hussain had at least been able to see his wife and daughter in person, even if they were separated by a partition. At McHenry, on the other hand, he could only see them via videoconference. Likewise, at Kenosha, Hussain had been able to go outside every day; at McHenry there was no outdoor recreation. In fact, there was no recreation of any kind, and the only equipment in the "gym" was a pull-up bar. McHenry also did not give detainees an actual toothbrush to brush their teeth. Instead, the jail provided them with a rough-bristled brush attached to a ring. The brush was so hard it injured Hussain's gums, and so small that he once almost choked on it.

On about June 18, 2006, DHS moved Hussain from McHenry to the Dodge County Jail in southern Wisconsin. At Dodge, Hussain was given a technically Halal but unappetizing diet of processed, fried fish. During Ramadan at Dodge, Hussain experienced some of the same problems that he had endured at Kenosha. He only received small portions of cold food, often late, and with stale bread. He complained on one occasion that he was given bologna instead of fish and that sometimes in the morning there was no food, or that there was only spoiled fruit.[101]

On or about August 28, 2007, ICE moved Hussain about six hours south of Chicago to the TriCounty Detention Center in Ullin, Illinois. This completed Hussain's tour of every ICE detention center in the region. After his attorneys complained about this relocation, ICE moved Hussain back to Dodge almost immediately, but failed to transfer his commissary account from TriCounty.[102]

The media has reported widely on the problems with detainee medical care[103] that also plagued Hussain during his detention. Although Hussain had always been healthy, he developed gum disease while detained. Unlike the medical problems that some detainees have faced, periodontal disease is painful, degenerative, and expensive to treat, but not life threatening.

For well over a year, we unsuccessfully sought, through a chain of inmate request forms, e-mails, letters, and phone calls, to get Hussain treatment. At a number of points we were told that Hussain's problems had been

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[100] Greg Trotter, *A mission shared, a flock divided*, MEDILL REPS., *available at* http://news.medill.northwestern.edu/chicago/govt/story.aspx?id=156797.

[101] E-mail from Christopher McDaniels, Supervisory Detention and Deportation Officer, U.S. Department of Homeland Security, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Oct. 16, 2006, 16:19 CST) (on file with author).

[102] I complained about the loss of Hussain's commissary funds, and they were eventually returned to him in October 2007. E-mail from Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago, to Charles Scoles, Supervisory Detention and Deportation Officer, U.S. Department of Homeland Security (Sept. 27, 2007, 15:16 CST) (on file with author); E-mail from Charles Scoles, Supervisory Detention and Deportation Officer, U.S. Department of Homeland Security, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Oct. 2, 2007, 11:04 CST) (on file with author).

[103] Bernstein, *supra* note 10.

or would be taken care of, but it always turned out that there had been some miscommunication. For example, after we filed a habeas petition in March 2007, the U.S. Attorney told me that Hussain had recently had a tooth pulled, which she said should take care of his dental needs.[104] Hussain was bewildered when I mentioned this to him, however, as he had not had a tooth pulled. After I passed this information along to the U.S. Attorney, she investigated and learned that ICE had provided her with incorrect information.[105]

Similarly, an ICE supervisor, Charles Scoles, informed me in July 2007 that Dodge had no record that Hussain made any recent dental requests, but when I assured him that this was untrue, he investigated further and learned that his information had been incorrect. Scoles also provided me with a possible explanation for Hussain's inability to access dental treatment. The Dodge County staff apparently informed him that the Division of Immigrant Health Services ("DIHS"), which pays for detainee health care, does not cover surgery for gum disease. Scoles suggested that if I disagreed with this policy, I should contact Captain Philip Jarres, a head DIHS official in Washington, D.C.

Initially, Captain Jarres did not respond to the letter I sent him, so in August 2007, I sent a follow-up e-mail. The next day, Captain Jarres responded that I should go through ICE channels.[106] When I replied that ICE had advised me to contact him, Jarres referred the matter to an officer within the DIHS managed care department.[107] I learned from that officer that Dodge had never even made a request to DIHS for dental surgery. When I relayed this information to Scoles, he replied that Dodge County would reevaluate Hussain.[108] In October 2007, Hussain saw a dentist who again informed him that he had severe periodontal disease and recommended surgery. Scoles informed me that Dodge subsequently contacted DIHS and re-

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[104] E-mail from Lennie Lehman, Assistant United States Attorney, Office of the United States Attorney, Eastern District of Wisconsin, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Mar. 30, 2007, 10:33 CST) (on file with author).

[105] E-mail from Lennie Lehman, Assistant United States Attorney, Office of the United States Attorney, Eastern District of Wisconsin, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Apr. 2, 2007, 09:52 CST) (on file with author).

[106] E-mail from Captain Philip Jarres, Associate Director, Division of Immigration Health Services, Headquarters Field Operations Branch, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Aug. 16, 2007, 08:07 CST) (on file with author).

[107] E-mail from Captain Philip Jarres, Associate Director, Division of Immigration Health Services, Headquarters Field Operations Branch, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Aug. 16, 2007, 12:11 CST) (on file with author).

[108] E-mail from Charles Scoles, Supervisory Detention and Deportation Officer, U.S. Department of Homeland Security, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Sept. 27, 2007, 09:15 CST) (on file with author).

quested dental work, but to my knowledge, this request was never approved.[109]

Unable to perform surgery, a dentist prescribed Hussain with a special kind of mouthwash.[110] Dodge neglected to fill the prescription, however, and I submitted numerous complaints via e-mail. ICE reacted to my complaints with a series of contradictory or unresponsive replies. First, ICE assured me that Dodge would fill the prescription.[111] Next, I was told that Dodge refused to give Hussain the mouthwash because it contained alcohol (apparently the staff was concerned about the Muslim Hussain tippling), but that ICE would assure Dodge's compliance.[112] The next week, I confirmed that the mouthwash was available; however, ICE explained that Dodge would only allow Hussain to use the mouthwash before meals when the nurse was accustomed to making her rounds, rather than after meals when it would have been most useful.[113] At that point, the ICE officer also informed me that Hussain was unable to use dental floss at Dodge due to security concerns.[114]

The exhausting history of Hussain's efforts to receive care in detention reveals the government's recalcitrance when it is called to step outside the paradigm of relatively cheap, short-term care.[115] It also shows the communication problems that develop when multiple levels of government bureaucracy are introduced into a privatized detention system. Despite the involvement of multiple lawyers, jail officials, and ICE and DIHS officers, Hussain did not receive treatment for his gum disease until after he was released from detention.

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[109] E-mail from Charles Scoles, Supervisory Detention and Deportation Officer, U.S. Department of Homeland Security, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Oct. 11, 2007, 12:27 CST) (on file with author).

[110] E-mail from Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago to Charles Scoles, Supervisory Detention and Deportation Officer, U.S. Department of Homeland Security (Mar. 20, 2008, 10:06 CST) (on file with author).

[111] E-mail from Charles Scoles, Supervisory Detention and Deportation Officer, U.S. Department of Homeland Security, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Mar. 28, 2008, 14:10 CST) (on file with author).

[112] E-mail from Charles Scoles, Supervisory Detention and Deportation Officer, U.S. Department of Homeland Security, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Apr. 3, 2008, 15:15 CST) (on file with author); E-mail from Chris McDaniels, Assistant Field Office Director, U.S. Department of Homeland Security, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (Apr. 7, 2008, 15:38 CST) (on file with author).

[113] E-mail from Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago to Chris McDaniels, Assistant Field Office Director, U.S. Department of Homeland Security (Apr. 10, 2008, 15:53 CST) (on file with author).

[114] E-mail from Chris McDaniels, Assistant Field Office Director, U.S. Department of Homeland Security, to Geoffrey Heeren, Senior Attorney, Legal Assistance Foundation of Metropolitan Chicago (May 2, 2008, 16:43 CST) (on file with author).

[115] For another example of the government's efforts to dodge paying for an expensive illness, see Bernstein, *supra* note 11 (discussing how DHS officials conferred over e-mail about options for avoiding the cost of treatment for a dying Guinean immigrant, including sending him back to his native Guinea or simply releasing him).

PART II: LEGAL CHALLENGES TO DETENTION

All told, Hussain spent about three years in immigration custody. He spent these years litigating both the merits of his deportation case and the legality of his detention. When DHS refused to release Hussain on the IJ's bond order, we filed a habeas petition in the Eastern District of Wisconsin. This detention challenge is noteworthy both because it established the controlling precedent in the Seventh Circuit on this issue and because it is illustrative of the difficulties inherent in this type of litigation.

A. A History of Detention Litigation

Hussain's habeas petition was based in large part on a reading of two Supreme Court decisions: *Zadvydas v. Davis*,[116] and *Demore v. Kim*.[117] In Zadvydas the Court considered the cases of two immigrants whom the Government had been unable to deport—Kestutis Zadvydas, who was born to Lithuanian parents in a displaced persons camp in Germany in 1948; and Kim Ho Ma, who was born in Cambodia in 1977. The Government was unable to deport Zadvydas because no country would acknowledge his citizenship.[118] It could not deport Ma because the United States had no repatriation agreement with Cambodia at the time.[119]

The INA authorizes an immigrant's release on an order of supervision if the Government is unable to deport the immigrant within a ninety-day removal period.[120] However, it also provides that the Government "may" continue to detain the alien for an unspecified period of time thereafter.[121] The Government chose to continue to detain both Zadvydas and Ma while it allegedly pursued efforts to deport them to various countries and vigorously defended its right to do so. It argued that the post-removal detention provision, 8 U.S.C. § 1231, could reasonably be interpreted to give it the power to hold removed immigrants in detention indefinitely.[122]

The Court disagreed. It noted that it would create serious constitutional problems if a statute authorized indefinite civil detention without strong procedural safeguards.[123] The Court found the statute to be ambiguous and interpreted it in such a way as to avoid a due process violation.[124] Under the Court's interpretation, § 1231 only authorized detention of removable aliens when removal was "reasonably foreseeable."[125] The Court also adopted a

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[116] 533 U.S. 678 (2001).
[117] 538 U.S. 510 (2003).
[118] *Zadvydas*, 533 U.S. at 684.
[119] *Id.* at 684–86.
[120] *Id.* at 683.
[121] *Id.* at 689.
[122] *Id.*
[123] *Id.* at 690.
[124] *Id.* at 699.
[125] *Id.*

presumption that post-removal order detention of less than six months would be constitutionally permissible.[126] In response to *Zadvydas*, the Government promulgated regulations that limit long-term post-removal detention of immigrants to situations in which special circumstances are present and particular procedural requirements are satisfied.[127]

The Court considered the constitutionality of mandatory detention during removal proceedings two years later in *Kim*. Hyung Joon Kim was a Korean lawful permanent resident who was convicted of burglary and "petty theft with priors."[128] As a result, the Government alleged that he was deportable and subject to mandatory detention due to his convictions for multiple crimes involving moral turpitude.[129] Kim conceded his deportability, but sought withholding of removal and challenged the constitutionality of his mandatory detention in federal court.[130]

In a fractured decision, the Court upheld the Government's interpretation of § 1226(c). Chief Justice Rehnquist's majority opinion principally focused upon two factors: Congress's compelling rationale in enacting § 1226(c) and the relatively short duration of detention during removal proceedings. Rehnquist first noted that Congress passed § 1226(c) "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens,"[131] and then explained that the INS's failure to deport "criminal aliens" was due, in part, to its inability to detain immigrants during their removal proceedings.[132] Although the INS had discretion to detain immigrants during their removal case, it was often swayed by a lack of detention space to release them. Once released, more than 20% of immigrants absconded.[133] The Court concluded that mandatory detention was a legitimate (if not the only legitimate) way to address this problem.[134]

Justice Rehnquist distinguished *Zadvydas* on the basis that the Court confronted indefinite detention in that case.[135] By contrast, detention during

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[126] *Id.* at 699–702. In *Clark v. Martinez*, 543 U.S. 371, 378 (2005), the Court extended its holding in *Zadvydas* to another category of immigrants: "inadmissible" persons. *See* 8 U.S.C. § 1231(a)(6) (2006). There is a distinction in immigration law, which is beyond the scope of this article, between grounds for "inadmissibility," which apply to immigrants in some circumstances, and grounds for "deportability," which apply in others. *Compare* 8 U.S.C. § 1182 (2006), *with* 8 U.S.C. § 1227 (2006). The Government had argued in *Clark* that there were constitutional and policy justifications for treating inadmissible immigrants differently than deportable immigrants, but the Court found that statutory language cannot be interpreted one way with respect to one category and a different way with respect to another. *Clark*, 543 U.S. at 377–78.

[127] *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56, 968–69 (Nov. 14, 2001).

[128] Demore v. Kim, 538 U.S. 510, 513 (2003).

[129] *Id.* at 513 n.1.

[130] *Id.* at 513–14.

[131] *Id.* at 518.

[132] *Id.* at 519.

[133] *Id.*

[134] *Id.* at 528.

[135] *Id.* at 527–28.

removal proceedings has a better-defined endpoint—the conclusion of the removal case. Justice Rehnquist noted that mandatory detention "lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal."[136]

The *Kim* decision rested on a tenuous majority. Only Justice Kennedy joined in the entirety of the opinion. Some Justices joined the portion of the opinion finding a right to judicial review but dissented as to the merits, and other Justices took the opposite approach. Given these conflicting opinions, it is easy to argue that *Kim* is a narrow decision, the precedential value of which is limited to factually similar cases. Two of the concurrences suggest that the Court might rule a different way in a case with different facts. Justice Kennedy noted that, in a case of "unreasonable delay," a court should "inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons."[137] Justice Breyer made a different, but somewhat related point: Kim had conceded his removability.[138] Thus, an immigrant "armed with a strong argument against deportability" might have a good argument that § 1226(c) does not govern his detention.[139]

Unsurprisingly, *Kim* did not end challenges to mandatory detention. Almost immediately after *Kim*, courts were confronted with cases involving immigrants who had been held in custody for periods far in excess of the five-month average detention time that the Supreme Court found reasonable in *Kim*. For example, in *Ly v. Hansen*,[140] a Vietnamese refugee was held in custody for 500 days before a district court released him on a writ of habeas corpus. The Government appealed, and in the meantime, the Supreme Court issued its decision in *Demore v. Kim*. The Sixth Circuit distinguished Ly's case from *Kim* based on two principal factors: the length of his detention and the low likelihood of his ultimate deportation to Vietnam, because it was a country with which the United States had no repatriation agreement.[141]

After *Ly*, the Ninth Circuit weighed in on prolonged detention in two cases: *Tijani v. Willis*[142] and *Nadarajah v. Gonzales*.[143] The majority opinion in *Tijani* was terse and did little to flesh out the Court's rationale. Essentially, the court interpreted "the authority conferred by § 1226(c) as applying to expedited removal of criminal aliens," and found that Tijani's two-year and eight-month-long process was far from expeditious.[144] The court

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[136] *Id.* at 530. Kim was detained for six months, a bit longer than the average, but Justice Rehnquist noted that he had requested a continuance. *Id.* at 530–31.
[137] *Id.* at 532–33 (Kennedy, J., concurring).
[138] *Id.* at 578 (Breyer, J., concurring in part and dissenting in part).
[139] *Id.*
[140] 351 F.3d 263 (6th Cir. 2003).
[141] *Id.* at 270–71.
[142] 430 F.3d 1241 (9th Cir. 2005).
[143] 443 F.3d 1069 (9th Cir. 2006).
[144] *Tijani*, 430 F.3d at 1242.

remanded the case to the district court with instructions to grant the writ unless the Government provided Tijani with a bond hearing before an IJ within sixty days.[145]

In *Nadarajah* the court gave a similar, if lengthier explanation for granting release to an immigrant who had been held in detention for five years. The court found that the general immigration detention statutes do not authorize prolonged detention, noting that the Government has other procedures available to it to indefinitely detain alien terrorists.[146] The court also held that it had authority under the Federal Rules of Appellate Procedure to order Nadarajah's immediate release from detention without any further hearing.[147] Thus, by 2007, the only two circuits to consider the issue—the Sixth and the Ninth—had held that in at least some cases, an immigrant could challenge prolonged detention during removal proceedings.

B. Hussain's Detention Challenge

It was against this promising backdrop that Hussain brought his petition for habeas corpus. In addition to challenging his prolonged detention and lack of appropriate procedural safeguards, he also challenged DHS's authority under the automatic stay regulation to nullify the IJ's bond order. We had some reason to be optimistic here as well, as five district courts had found a prior version of the regulation unconstitutional.[148] Finally, Hussain's personal circumstances had become increasingly dire and compelling. Without Hussain's income, his wife had been unable to keep up with the couple's mortgage payments and their home had gone into foreclosure.[149] Further, in addition to developing gum disease—which by that point had resulted in the loss of two teeth—Hussain had lost nearly forty pounds. He now also had another aching, carious tooth.

For the habeas hearing, we were assigned Judge William Griesbach, a recent Bush appointee who served in Green Bay, Wisconsin. After the parties briefed the case, Judge Griesbach set it for hearing on May 4, 2007.

In the meantime, DHS aggressively pursued its bond appeal. It had reason to be hopeful about its chances. In 2002, then-Attorney General Ash-

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[145] *Tijani*, 430 F.3d at 1243.

[146] *Id.* at 1079.

[147] *Id.* at 1083–84.

[148] *See, e.g.*, Zabadi v. Chertoff, No. 05-1796, 2005 WL 1514122 (N.D. Cal. June 17, 2005); Zavala v. Ridge, 310 F. Supp. 2d 1071 (N.D. Cal. 2004); Ashley v. Ridge, 288 F. Supp. 2d 662 (D.N.J. 2003); Uritsky v. Ridge, 286 F. Supp. 2d 842 (E.D. Mich. 2003); Bezmen v. Ashcroft, 245 F. Supp. 2d 446 (D. Conn. 2003).

[149] *See* Washington Mutual Bank v. Hussain, 2006-CH-21229 (Cir. Ct. Cook County Ill. Oct. 6, 2006), *available at* http://www.cookcountyclerkofcourt.org/?section=CASEINFOPage&CASEINFOPage=2400 (enter Case Year "2006," then enter Division Code "CH," then enter Case Number "21229," then select "Search Now"). Another attorney at the Legal Assistance Foundation of Metropolitan Chicago, David Yen, filed a bankruptcy that allowed Hussain to stave off foreclosure. *See In re* Patricia Eng Hussain, No. 07-10011 (Bankr. N.D. Ill. June 4, 2007).

croft fired seven of the eighteen members of the BIA—all Clinton administration appointees.[150] Among those fired were BIA members who had written decisions favorable to immigrants, who had once represented immigrants, and who had taught immigration law in law schools.[151] Those remaining came primarily from the ranks of the former INS, other law enforcement agencies, and the staffs of Republican members of Congress.[152]

Regarding the BIA appeal, DHS initially sought to replace the "automatic stay" that Hussain had challenged in his habeas petition with an "emergency" discretionary stay, which would be less vulnerable to constitutional attack.[153] We received a copy of DHS's motion on April 2, 2007, and received a three-sentence-long faxed order from the BIA, granting the DHS request one hour later.

DHS's bond appeal argument received a boost in March 2007, when the BIA issued its decision in *Matter of Kotliar*.[154] In *Kotliar*, the BIA considered whether an immigrant who had been convicted of multiple crimes involving moral turpitude, but not charged as deportable on that ground, was subject to mandatory detention. The BIA concluded that an IJ can find an immigrant ineligible for bond if DHS could have charged him with a ground of removal that would subject him to mandatory detention, even if DHS did not actually do so.[155] It was unclear whether this decision applied to Hussain's case, however, since in *Kotliar* there was clear evidence of criminal convictions that subjected the immigrant to mandatory detention.[156] In Hussain's case, the BIA had only DHS's informal allegations that Hussain provided material support to a terrorist organization. Nonetheless, the *Kotliar* decision provided an additional reason to be skeptical of the outcome in the bond appeal.

On May 1, 2007—just over one year after Hussain's last immigration hearing and exactly three days before the hearing before Judge Griesbach on Hussain's habeas petition—IJ Katsivalis issued a decision in Hussain's immigration case. IJ Katsivalis found that Hussain was subject to removal for having entered the United States using a fraudulent parole document.[157] He found that MQM met the INA's broad definition of "terrorist organization" and that Hussain had provided material support to MQM which made him ineligible for asylum and withholding of removal.[158] However, the IJ also found that Hussain would likely be tortured if returned to Pakistan and there-

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[150] *See* DAVID NGARURI KENNEY AND PHILIP G. SCHRAG, ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA 169 (2008).
[151] *Id.*
[152] *Id.*
[153] *See* 8 C.F.R. § 1003.19(i)(1) (2009).
[154] 24 I. & N. Dec. 124 (BIA 2007).
[155] *Id.* at 127.
[156] *Id.* at 124–25.
[157] Hussain Brief, *supra* note 26, at 21.
[158] *Id.* at 22.

fore granted his application for deferral of removal under the Convention Against Torture.[159] Both sides appealed the decision.

On May 4, 2007, I drove to Green Bay, Wisconsin for the habeas hearing before Judge Griesbach. While en route, the U.S. Attorney faxed a copy of the Board's decision on Hussain's bond appeal that was issued that morning. The decision relied on *Kotliar* to find that Hussain could be subject to mandatory detention based on terrorism without ever having been charged with a ground of removal related to terrorism.[160] The Board remanded the case to give Hussain a chance to request a *Joseph* hearing, but the remand was a mere formality, since IJ Katsivalis had found the week before that Hussain was ineligible for asylum and withholding of removal because of his alleged material support for a terrorist organization. IJ Katsivalis's earlier ruling on the terrorism issue made Hussain ineligible for bond.

During the habeas hearing, Judge Griesbach appeared concerned that the two recent decisions made our claims moot. I argued that he continued to have jurisdiction because both sides were appealing IJ Katsivalis's merits decision and because there was no definite time period for resolution of the appeal. Moreover, I noted that Hussain had been granted relief under CAT, making his ultimate removal to Pakistan highly unlikely.

On May 22, 2007, Judge Griesbach issued a decision denying Hussain's petition.[161] He dismissed Hussain's challenge to his prolonged detention, finding that his ultimate removal to Pakistan was more likely than the removals in *Nadarajah* and *Ly*.[162] He also noted that although Hussain had been granted relief under CAT, DHS had appealed and suggested that DHS might have a strong case on appeal.[163] Moreover, he noted that even if DHS lost, it could still attempt to deport Hussain to another country or seek "diplomatic assurances" from Pakistan that it would not torture him.[164] Finally, Judge Griesbach suggested that national security concerns weighed against granting relief.[165] Hussain appealed Judge Griesbach's decision to the Seventh Circuit.

On October 15, 2007, the BIA issued a decision on Hussain's case. It affirmed both the IJ's removal order and his grant of CAT.[166] DHS filed a motion to reconsider this decision (which the BIA later denied), and I filed a petition for review of Hussain's removal order to the Seventh Circuit. Hussain chose to appeal the BIA decision because he was concerned that CAT provided him little security; as Judge Griesbach had noted, DHS could continue to try to deport him to countries other than Pakistan or even try to

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[159] *Id.*

[160] Decision of the Board of Immigration Appeals on Bond Appeal, *In re* Mohammad Hussain, A070-921-157 (BIA May 4, 2007) (on file with author).

[161] Hussain v. Gonzales, 492 F. Supp. 2d 1024, 1036 (E.D. Wis. 2007).

[162] *Id.* at 1035.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] Hussain Brief, *supra* note 26, at 22–23.

deport him to Pakistan if Pakistan gave "diplomatic assurances" that it would not torture him. For the same reasons, Hussain filed a motion with the Seventh Circuit to stay his removal, which the Court granted.[167]

On November 29, 2007, Iris Bennett of Jenner & Block argued Hussain's habeas appeal in the Seventh Circuit. The panel of judges included Judges Richard Posner, Terence Evans, and Richard Cudahy. Judge Posner dominated the argument with a series of questions about why the case was not moot given the fact that the administrative removal case was essentially over. Ms. Bennett argued that there was no telling when Hussain's detention would end, since the Seventh Circuit could take a long time to issue a decision on his appeal and because such decision could result in a remand to the Agency.

On December 18, 2007, the court issued a decision, written by Judge Posner.[168] Judge Posner essentially found that Hussain's case was moot.[169] He noted that in a case of "inordinate delay," a court might be justified in granting a habeas petition;[170] but he determined that Hussain filed his case too late: "By delay in seeking habeas corpus he allowed his case for release pending the completion of the proceeding to become moot."[171] He pointed out that the court had expedited review of his removal order, and that by the time the court finished reading the "167 pages of contentious briefing" in the habeas filings, it would have resolved the larger question of whether he was deportable.[172]

On February 13, 2008, I argued Hussain's appeal of his removal order before the same Seventh Circuit panel that had heard his habeas petition. The appeal involved complicated questions about how to interpret "material support" to a "terrorist organization." Judge Posner again dominated the argument, this time proposing a series of hypothetical questions about Hamas that I tried to argue were not relevant to MQM, a very different type of organization. The court issued a decision less than a month later. Again the author, Judge Posner affirmed the BIA's order.[173]

After the Seventh Circuit appeal was over, the authority for Hussain's detention shifted to the post-removal order statute.[174] Under that statute, DHS had ninety days to effect Hussain's removal. If it was unable to deport him within that timeframe, it was required to consider him for release. It

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[167] Hussain v. Mukasey, 510 F.3d 739, 741–42 (7th Cir. 2007) (decision concerning the habeas appeal).

[168] *Id.* at 739.

[169] *Id.* at 742.

[170] *Id.* at 743.

[171] *Id.*

[172] *Id.*

[173] Hussain v. Mukasey, 518 F.3d 534 (7th Cir. 2008) (decision concerning the merits appeal).

[174] *See* 8 U.S.C. § 1231(a)(1)(B)(ii) (2006) (providing that in a case where a court of appeals has granted a stay of removal, the "removal period" begins on the date of the court's final order).

seemed that DHS would not meet this deadline, as it was extraordinarily unlikely to succeed in convincing another country to accept Hussain. In fact, there are very few cases where DHS has ever succeeded in deporting an immigrant to a country where she does not have citizenship.[175] Nonetheless, it appears to be DHS's policy to always hold immigrants—even those granted withholding of removal or relief under CAT—for ninety days after issuance of a removal order while it makes pro forma efforts to remove the person elsewhere.[176]

In Hussain's case, DHS had already begun making these efforts. On November 6, 2007, DHS brought Hussain to downtown Chicago, where an officer questioned him about his ties to various countries to which DHS might try deporting him, such as India. Hussain advised the officer that he had family in India and at the officer's request, he completed an Indian passport application. We all understood that the odds India would grant this passport application were small because Hussain had no basis for claiming Indian citizenship.

Since the Seventh Circuit granted Hussain's motion for a stay of removal, DHS was not required to consider him for release until ninety days after the court's final decision.[177] Oddly, however, DHS issued a decision on a "post order custody review" on February 28, 2008.[178] DHS denied Hussain release, claiming that he had failed to sufficiently cooperate with DHS's effort to obtain an Indian passport for him. It is unclear why DHS believed that Hussain failed to cooperate, since he had provided them with requested information and completed an application for the passport. In any event, DHS later released Hussain, without comment, exactly ninety days after the Seventh Circuit decision.[179]

Part III: Detention Reform

Around the time of Hussain's release, the *New York Times* and *Washington Post* began to publish a series of articles that exposed shameful conditions in immigration detention.[180] Since then, reform efforts have gathered momentum. DHS Secretary Janet Napolitano appointed a special advisor on detention, Dr. Dora Schriro, who produced a report that sets out the enormous fiscal burden of immigration detention and suggests various reforms.[181] Dr. Schriro's report includes the following recommendations:

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[175] *See, e.g.*, Tim Golden, *Chinese Leave Guantánamo for Albanian Limbo*, N.Y. Times, June 10, 2007, at A1.

[176] *See, e.g.*, Cesar v. Achim, 542 F. Supp. 2d 897, 899 (E.D. Wis. 2008).

[177] 8 U.S.C. § 1231(a)(1)(B)(ii) (2006).

[178] Immigration and Customs Enforcement, Decision to Continue Detention, *In re* Mohammad Azam Hussain, A070-921-157 (Feb. 27, 2008) (on file with author).

[179] Hussain was released on June 4, 2008 on electronic monitoring. *See* Hussain Order of Supervision (on file with author).

[180] *See supra* notes 93–94.

[181] Schriro, *supra* note 1.

- Reduce the overall number of detention facilities, centralize procurement of new facilities, and improve local and regional oversight;[182]
- Detain immigrants in the least restrictive settings consistent with their assessed risk level and monitor disciplinary practices;[183]
- Restrict the transfer of represented detainees to faraway detention centers;[184]
- Increase the use of community-based supervision strategies ("Alternatives to Detention") for those who are not subject to mandatory custody;[185]
- Establish an "integrated health care system" for medical, mental, and dental health;[186]
- Improve law library access, indoor and outdoor recreation, visitation, and religious activities;[187]
- Improve treatment of "special populations" such as families with minor children, females, unaccompanied minors, the ill and infirm, and asylum seekers;[188]
- Increase accountability by developing civil detention standards that are consistent with the goals of civil detention, appointing on-site staff to oversee detention facilities, and discontinuing the use of problematic detention facilities.[189]

Although these reforms seem salutary, they are sometimes lacking in specifics. For instance, Dr. Schriro spends less than two pages addressing the complicated question of what an "integrated health care system" for immigration detainees should look like.[190] She correctly identifies certain administrative problems with the current system, such as the lack of a central medical record-keeping system,[191] but does not consider whether DIHS's managed care standards are adequate. The current standards are arguably appropriate for the vast majority of detainees who are held for relatively short periods of time. But as Hussain's case shows, they are completely inadequate for persons who spend years in detention.

Dr. Schriro stresses that the vast majority of immigration detainees are released quickly: 25% within a day and 71% in less than a month.[192] A detention system that is designed to meet the needs of this population should, presumably, look very different than one designed to hold persons for years. It may be satisfactory to not offer outdoor recreation, comprehen-

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[182] *Id.* at 18–19.
[183] *Id.* at 21, 23.
[184] *Id.* at 24.
[185] *Id.* at 20–21.
[186] *Id.* at 5, 26.
[187] *Id.* at 24–25.
[188] *Id.* at 27–28.
[189] *Id.* 18–19, 28–29.
[190] *Id.* at 25–26.
[191] *Id.*
[192] *Id.* at 6.

sive dental, medical, and mental health care, or specialized diets to short-term detainees, but it is inhumane to withhold these allowances for months and years. Until DHS confronts this tension, it will continue to operate a system that is both inefficient and unfair.

One way to address this problem is to pursue reforms that will make it less likely that immigrants will be locked up for lengthy periods of time. The United States could both improve its human rights record and save money by releasing persons who are currently subject to mandatory detention who pose only a limited flight and security risk. Dr. Schriro openly acknowledges that every year about 2100 immigrants are held in detention for a year or more.[193] At an average cost of between $95 and $141 per detainee per day, the annual cost of detaining these individuals ranges between $73–108 million.[194]

This significant sum does not effectively serve Congress's original goal in enacting mandatory detention: finding a way to mandate custody for those categories of persons who often absconded on release by IJs and who were most likely to be deported.[195] In 1996, Congress wanted persons without bases for remaining in the United States to be detained and quickly deported. Congress likely reasoned that it could improve efficiency by rendering immigrants convicted of "aggravated felonies" and immigrants "described in" the terrorism provisions of the INA ineligible for discretionary relief from removal. Over the past eight years, however, 5829 persons who were held in detention for six months or more have won their removal case by having the charges against them terminated or by being granted a waiver of deportation.[196]

There are a number of reasons why so many persons in mandatory detention have won their cases. First, in addition to aggravated felons and terrorists, the statute mandates detention of several categories of immigrants who are eligible for discretionary relief from removal.[197] Second, the categories of detention and removal are so amorphous and elastic that immigrants charged with having been convicted of an aggravated felony or a crime involving moral turpitude may convince a court that they were improperly charged. The question of whether a crime has been properly characterized for immigration purposes involves an arcane and intensely legalistic analysis of interlocking immigration and criminal statutes, the interpretation of which continues to evolve.[198] There is a history of protracted litigation around this "categorical approach"—the Supreme Court has re-

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[193] *Id.*

[194] *Compare* HUMAN RIGHTS FIRST, *supra* note 53, at 8 ($95 per day cost of detention), *with* KERWIN & LIN, *supra* note 6, at 4 ($141 per day).

[195] Demore v. Kim, 538 U.S. 510, 518 (2003).

[196] ACLU FOIA Data, *supra* note 9.

[197] 8 U.S.C. § 1226(c)(1) (2006).

[198] *See* Nijhawan v. Holder, 129 S. Ct. 2294, 2299 (2009) (explaining the "categorical approach" to determining whether a conviction constitutes an aggravated felony for immigration purposes).

cently decided four contentious cases addressing this issue, and this year it will decide yet another.[199]

There are also those immigrants like Hussain who are found to be properly deportable and ineligible for all discretionary relief from removal, but still win CAT relief or withholding of removal. These immigrants, who fear death, imprisonment, or torture in their native countries, have a strong incentive to win their removal case. Yet, DHS detained Hussain for three years, including eleven months after he was granted CAT relief and ninety days after all his appeals were over.[200] Even if DHS believed that Hussain was a flight risk during the earlier portion of his case, it is difficult to justify his continued detention after he won at the immigration court level. At that point, the odds that Hussain would win his CAT case were very good, meaning that he would have been foolish to abscond. Hussain's unnecessary detention provides a good example of why the current system does not serve its original purpose.

Hussain's case also reveals how much power DHS has to control the detention and removal process, and how difficult it is for an immigrant to challenge DHS decisions. Initially, DHS denied Hussain bond but did not contend that he was subject to mandatory detention. It relied on Hussain's recent conviction to convince IJ Katsivalis that Hussain should be discretionarily detained without bond. But when this conviction was vacated, DHS shifted tactics, declaring that he was subject to mandatory detention as a terrorist. And when the IJ disagreed with this decision, DHS trumped the IJ with an automatic stay of his decision while it appealed.

It was only at this point, when the deck seemed fully stacked against Hussain, that he took the extraordinary step of filing a lawsuit in federal court. Federal litigation is time-consuming and complicated. There are few immigrants who will ever have the resources to litigate a habeas petition, and Hussain ultimately lost his.[201] Judge Posner's decision on Hussain's habeas appeal may have opened the door for others to pursue habeas in removal cases, but it did not make it easy to do so. On the one hand, Judge Posner's decision acknowledged that an individual who has been subjected to

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[199] *See id.*; Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007); Lopez v. Gonzales, 549 U.S. 47 (2006); Leocal v. Ashcroft, 543 U.S. 1 (2004); Carachuri-Rosendo v. Holder, 570 F.3d 263 (5th Cir. 2009), *cert. granted* 78 U.S.L.W. 3058 (U.S. Dec. 14, 2009) (No. 09-60).

[200] The fact that DHS released Hussain on the ninetieth day after the Seventh Circuit decision reveals an attitude towards detention, on DHS's part, that is excessively bureaucratic and formalistic. It should have been clear that DHS would not succeed in removing Hussain to India or any other country, but it still exercised its authority to detain him for the maximum time permissible under the regulations before the post-order custody review process kicked in. *See* 8 C.F.R. § 241.4 (2009). This last 90-day detention of Hussain, the cost of which likely exceeded $9000, was for all practical intents and purposes, pro forma.

[201] Four organizations represented Hussain over the course of his habeas: the Legal Assistance Foundation of Metropolitan Chicago; the Mandel Legal Aid Clinic at the University of Chicago; the ACLU; and Jenner & Block. Among the attorneys on the case were former Chief Judge of the D.C. Circuit Court of Appeals and President Clinton's former Chief Counsel, Abner Mikva.

unreasonably delayed proceedings can make out a claim for habeas relief; on the other, he found that Hussain filed too late since the BIA had issued its decision by the time of the Seventh Circuit oral argument. Thus, there seems to be a small window in a removal case where an immigrant's detention is neither too long nor too short. Moreover, the sudden haste the government displayed in deciding Hussain's case after he filed his lawsuit suggests that it has at its disposal the means to moot out any suit.

The Ninth Circuit has taken a different approach to challenges to mandatory detention than the Seventh Circuit. Based on its understanding of the interplay of the pre- and post-removal order detention statutes, the Ninth Circuit has held that an immigrant with a pending petition for review and stay of removal can, in most cases, ask an IJ for bond.[202] In contrast, it might be inferred from Judge Posner's decision that the best an immigrant can do in this situation is to file a motion in the circuit court to expedite review of her removal order.[203] This means that immigrants like Hussain are treated differently depending on whether they are in the Ninth or Seventh Circuit.

This variance in the way detainees are treated piles unfairness onto a legal structure that is already convoluted and draconian. Immigrants can be subject to mandatory detention based on DHS discretion without any requirement that it give formal notice of its decision and without limitation on it changing its mind.[204] Detainees either have no recourse to challenge DHS's decision or face an impossibly high threshold to do so: they must prove that DHS is "substantially unlikely" to prevail, a standard that compounds what is already an overly complex inquiry in a removal case.[205] If, as Hussain did, the immigrant actually prevails in convincing an IJ that DHS has overstepped, DHS can automatically stay the IJ's bond order by filing a notice of its intention to appeal. Should the immigrant wish to challenge her detention in federal court, she will face a series of complicated jurisdictional

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[202] Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 947–48 (9th Cir. 2008). The Ninth Circuit's rationale is somewhat involved. In general, after the Board has affirmed a removal order so that it is administratively final, the authority for detention is pursuant to 8 U.S.C. § 1231 (2006). However, in *Casas-Castrillon*, the Ninth Circuit recognized, as have the majority of circuits to have considered this issue, that where a court has entered a stay of removal, the authority for detention is pursuant to § 1226. The court then considered whether detention during the course of a federal appeal should be considered to be pursuant to § 1226(c) or 1226(a). The court held that § 1226(c) can only apply during removal proceedings, which are complete as of the date that a removal order is administratively final. Thus, the Court found that the Government's detention authority for an immigrant with a pending circuit court appeal and stay of removal is under the discretionary detention provision, 8 U.S.C. § 1226(a), meaning that an immigrant in that situation can seek bond from an immigration court.

[203] Hussain v. Mukasey, 510 F.3d 739, 743 (7th Cir. 2007).

[204] *See* In re Kotliar, 24 I. & N. Dec. 124, 127 (BIA 2007) (immigrant can be subject to mandatory detention without having been charged with a ground of mandatory detention).

[205] *See* Matter of Joseph, 22 I. & N. Dec. 799, 806 (BIA 1999).

hurdles and will ultimately have her case adjudicated based on precedent that differs substantially from one circuit to another.[206]

A pro se litigant has no hope of ever understanding this bizarre framework, and in fact, few lawyers do. Furthermore, intensely legalistic questions about what constitutes an aggravated felony or a crime involving moral turpitude have little to do with whether an immigrant is a flight or security risk. Under the "categorical approach," an immigrant convicted of a shoplifting or drug possession charge in the distant past may be subject to mandatory detention. This same immigrant, who may have a home, a family, and a stable job, may also be eligible for "cancellation of removal," which would allow her to stay in the United States.[207] Conversely, an immigrant who recently entered the United States without inspection and who has no criminal conviction (or one with no immigration consequences) will not be subject to mandatory detention, but may have none of the equities that make the former immigrant a good candidate for release.

Congress expanded mandatory detention in the 1990s because it wanted to detain those immigrants who had no possibility of staying in the United States and who were therefore likely to abscond.[208] As we have seen, mandatory detention is a radically imprecise solution to this problem. Moreover, the Government has since developed better answers. The Homeland Security Act replaced the former INS with a new bureaucracy structured to prioritize immigration enforcement. Immigration and Customs Enforcement—the enforcement division within DHS—administers the National Fugitive Operations Program, which, in 2003, its first year of operation, arrested 1900 fugitives. By 2006 it had increased its number of arrests to 15,462; in 2008 it arrested more than twice that amount—34,155 absconders.[209] In addition to its fugitive operations, ICE has also developed several "alternative to detention" programs,[210] which rely on global positioning ankle bracelets, telephonic monitoring, and active case specialists to assure that non-detained immigrants in proceedings do not abscond.

These new tactics suggest that the time may be right to try a more carefully tailored detention policy. There is a broad spectrum of ways in which to accomplish this, ranging from legislative amendments to new legal interpretations. The best way to simplify and rationalize the detention provisions would be to simply eliminate the current § 1226(c) and to revise other regulations to explicitly confer jurisdiction on IJs to make custody decisions

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[206] For some of the jurisdictional bars to federal litigation, see 8 U.S.C. § 1252(a)(2) (2006).

[207] *See* 8 U.S.C. § 1229b (2006) (cancellation of removal).

[208] Demore v. Kim, 538 U.S. 510, 518 (2003).

[209] U.S. Immigration & Customs Enforcement, ICE Fiscal Year 2008 Annual Report 4 (2009), http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf.

[210] U.S. Immigration & Customs Enforcement, ICE Fact Sheet—Alternatives to Detention for ICE Detainees (2009), http://www.ice.gov/pi/news/factsheets/alternativestodetention.htm.

at all phases of removal proceedings.[211] At present, IJs' bond jurisdiction is limited not only by § 1226(c), but also by regulations that bar judges from reviewing many categories of cases, such as DHS's decisions to parole or not parole arriving aliens or to detain immigrants after removal proceedings conclude.[212] Granting the discretion to make these decisions to a single, impartial decision maker best serves the goal of detaining immigrants who pose a flight or security risk.

Alternatively, some of the problems of mandatory detention could be addressed if DHS simply adopted a more reasonable interpretation of the statute. For example, DHS could interpret § 1226(c) to only apply for six months, the duration of time reasonably necessary to conclude a removal proceeding. There is precedent for this interpretation, since a number of courts have adopted similar reasoning.[213] Similarly, DHS could interpret § 1226(c) to not apply to immigrants who have a colorable defense to the charges of removal.[214] Section 1226(c) requires the detention of immigrants who are "deportable" on various grounds, but does not define the term "deportable."[215] Thus, DHS could interpret the term to not include immigrants with good defenses to their removal.

DHS could also use electronic monitoring for persons subject to mandatory detention. Currently, DHS considers itself without legal authority to use electronic monitoring for persons who must be held in custody under the statute because it does not consider monitoring to be "custody."[216] The statute does not define this term, however, and there is precedent to consider supervision to be custody. For example, in order to have jurisdiction over a habeas petition, a court must find that the petitioner is "in custody." Courts have held that conditions of parole that limit the parolee's choices and freedom of movement satisfy this requirement.[217]

DHS could go a long way towards improving immigration detention by expanding the use of electronic monitoring, and limiting mandatory custody to persons who lack a good defense to their removal and to persons who are

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[211] *See, e.g.*, Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009, H.R. 4321, 111th Cong., § 159(j)(2) (2009) (providing for review of all detention by an IJ).

[212] *See* 8 C.F.R. § 1003.19(h)(2)(i) (2009) (barring IJs from reviewing DHS's custody determinations with respect to arriving aliens); 8 C.F.R. § 241.4(a) (2009) (granting exclusive authority to DHS to consider the release of immigrants detained after the issuance of an order of removal).

[213] *See, e.g.*, Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 947–48 (9th Cir. 2008); Ly v. Hansen, 351 F.3d 263, 269–70 (6th Cir. 2003).

[214] *See* Gonzalez v. O'Connell, 355 F.3d 1019, 1020 (7th Cir. 2004) (noting that it is an open question whether § 1226(c) should be read to apply to an individual who has raised a colorable challenge to his deportability).

[215] *See* Demore v. Kim, 538 U.S. 510, 578 (2003) (Breyer, J., concurring) (observing that § 1226(c) "literally say[s] nothing about an individual who, armed with a strong argument against deportability, might, or might not, fall within [its] terms").

[216] Unofficial Minutes from the Chicago American Immigration Lawyers Association ("AILA") Chapter ICE Liaison Meeting (Nov. 10, 2009) (on file with author).

[217] *See* Williams v. Wisconsin, 336 F.3d 576, 579 (7th Cir. 2003).

in custody for less than six months. These reforms could take effect immediately. Arguably, DHS would not even need to initiate rulemaking; it could just issue a memo outlining its new interpretations. This is not to say that policy makers should shirk a legislative fix. The detention provisions are as confusing as the rest of the immigration statute, and detention reform should be a part of any comprehensive immigration reform that Congress undertakes.

Conclusion

Mohammad Hussain came to this country seeking refuge. For almost a decade he found it, until he was caught up by post-September 11th prosecutors' new attitudes about terrorism and newfound suspicion of Muslims. Eager to show progress in an intractable war on terror, prosecutors touted their case against Hussain, even though the "terrorist organization" in his case was a political party with no known anti-American agenda. Arguably, Hussain's case fits within a lineage of cases from *Korematsu* to Guantánamo, where the rights of non-citizens have fallen sacrifice to a national preoccupation with security.[218] During good times, the United States welcomes immigrants like Hussain; during bad times, it detains them. The story of how Hussain became deportable for "terrorism" is both fascinating and troubling, despite the fact that it is mostly beyond the scope of an article about immigration detention.[219]

Mandatory detention is not a product of 9/11; it was enacted during the 1990s. Believing itself confronted with a crisis of fugitive criminal aliens and an ineffectual immigration bureaucracy, Congress stripped the agency of its power to grant bond for broad categories of immigrants that it deemed to be dangerous or likely to be deported.[220] But as we have seen, the categories of mandatory detention are imprecise and malleable. It is hard to conceive of this system as anything other than a crude and partial measure, which is too unfair, inefficient, and expensive to be sustainable.

This legal framework has been combined with a detention system crafted for short-term detainees, which dispenses stopgap solutions to its long-term detainees. While Hussain was detained, he lived under conditions designed for brief occupancy. He could not easily visit with his family, go outside, exercise, or practice his religion. When he developed a serious dental problem, detention centers pulled one tooth after another, but refused to fix the underlying problem.

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[218] *See* Korematsu v. United States, 323 U.S. 214 (1944) (concerning the constitutionality of Japanese-American internment during World War II).

[219] For a discussion of the post-September 11th use of immigration law as a tool of national security and the expansion of legal understandings of "terrorism," see David Cole, Enemy Aliens 22–35, 57–64 (2003).

[220] *Demore*, 538 U.S. at 518–19.

In this environment of half-measures, litigation is just another makeshift. Even with a team of lawyers, Hussain still could not win his habeas petition. Immigrants in other circuits may fare better, but it is unlikely that any case in the near future will achieve systemic reform. Rather, a complete solution to the problems of mandatory detention will likely have to come from legislation. Unfortunately, the ideal solution may be as politically unpopular as pulling teeth: the deletion of the mandatory detention provision.

In the meantime, however, DHS could considerably improve matters through regulatory reform or the adoption of more sensible interpretations of the current mandatory detention statute. DHS could, for example, interpret § 1226(c) to only apply for a six-month period or to only apply to persons without a colorable challenge to their removal. Likewise, DHS could interpret § 1226(c)'s requirement that it hold certain persons in "custody" to include custody through electronic monitoring. These changes would allow DHS to save money that it needs to track down fugitives and improve the detention system for those who must be detained.

It is important for any sovereign nation, even one that was founded and has been sustained by immigrants, to effectively enforce its immigration policies. Sometimes this will require detaining immigration violators who pose a risk to national security or who are likely to abscond if they are not detained. However, the current rules for immigration detention do not fairly or efficiently accomplish this goal; they result in expensive and unfair long-term detention of thousands of immigrants who could safely be released. This nation of immigrants can do better.