

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-Z-2080

FLOR DE MARIA GONZALEZ-PORTILLO,

Plaintiff(s),

v.

U.S. ATTORNEY GENERAL, JANET RENO,

Defendant(s).

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
Dec. 20, 2000
JAMES R. MANSPEAKER,
CLERK

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The matter before the court is an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §2241 (“Petition”) filed by Petitioner Flor de Maria Gonzalez-Portillo on October 24, 2000. Respondents filed their Return Regarding Petitioner’s Petition for Writ of Habeas Corpus on November 22, 2000. The Petition is ripe for disposition. Also pending is Petitioner’s Motion for a Preliminary Injunction and a Temporary Restraining Order [filed October 23, 2000]. The motion for preliminary injunction is fully briefed and a hearing was held on November 21, 2000.

A Special Order of Reference under D.C.COLO.LR 72.4 referred the Petition to the undersigned magistrate judge on October 25, 2000 to issue a recommendation on disposition.

I.

Petitioner is a native and citizen of El Salvador who entered the United States at an unknown place on an unknown date, without proper documentation. (Petition, Ex. 6; Respondents’ Return, Ex. B) Her immigration status was adjusted to that of a lawful permanent resident (“LPR”) on August 25, 1989, pursuant to §245 of the Immigration and Naturalization Act (“INA”), 8 U.S.C. §1225. (*Id.*) On July 25, 2000, Petitioner pleaded guilty to two separate counts of forgery, a third

degree felony, in the district court for Cache County, Utah. (Petitioner's Ex. 7; Respondents' Ex. A) The state court sentenced Petitioner to an indeterminate term "not to exceed five years in the Utah State Prison, but suspended all but fifteen days which she served in the county jail. (*Id.*)

By Notice to Appear dated August 2, 2000, the Immigration and Naturalization Service ("INS") informed Petitioner that she was subject to deportation from the United States on two separate grounds: (1) that she had been convicted of two or more crimes involving moral turpitude and (2) that she had been convicted of an aggravated felony. (Petitioner's Ex. 6; Respondents' Ex. B) Petitioner is being detained in INS custody pending a final order of removal pursuant to INA §236(c), 8 U.S.C. §1226(c). (Petitioner's Ex. 4) Petitioner's request for a redetermination of the custody decision was denied by an Immigration Judge on August 23, 2000 for lack of jurisdiction. (Petitioner's Ex. 5; Respondents' Ex. C) On September 20, 2000, the Immigration Judge ordered Petitioner removed from the United States to El Salvador after finding that she was an aggravated felon.¹ (Respondents' Ex. D) Petitioner timely filed an appeal of the removal decision which is pending before the Board of Immigration Appeals ("BIA"). (Petitioner's Ex. 1) Petitioner's appeal challenges the INS' determination that she is removable on two grounds: that she did not commit an aggravated felony as defined by 8 U.S.C. §1101(a)(43) and that her status as an LPR immunizes her from removal. (*Id.*)

In her §2241 Petition, the Petitioner asserts a statutory claim that the mandatory detention provision provided for in INA §236(c) does not apply to her because her status as an LPR immunizes her from removal and because she did not commit an aggravated felony, as defined by 8 U.S.C. §1101(a)(43). The Petition also asserts claims that INA §236(c) is facially unconstitutional

¹The parties represented to the court during oral argument on the motion for preliminary injunction that after the immigration judge found that Petitioner was removable as an aggravated felon, the INS abandoned its other asserted ground for removal, i.e., that Petitioner had committed multiple crimes involving moral turpitude.

under the Fifth Amendment Due Process Clause and violates her Eighth Amendment right to reasonable bond. Petitioner requests a judicial order directing the INS to release her from detention pending a final decision by the INS on the order of removal, or, alternatively, order the Respondents to grant her a bond hearing and determine a reasonable bond. Petitioner further seeks damages in the amount of \$10,000 against the INS for using information contained in her application for temporary resident status against her in a removal proceeding in violation of 8 U.S.C. 1255a.

II.

Petitioner is being detained pursuant to INA §236(c)(1), 8 U.S.C. §1226(c), which states: “The Attorney General shall take into custody any alien who – (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title.”² Under 8 U.S.C. §1227(2)(A)(iii), any alien convicted of an aggravated felony, is deportable. Section 236(c) applies to Petitioner because there has been no final agency decision on the issue of Petitioner’s removal. See 8 C.F.R. §236.1(b); 8 C.F.R. §241.1(a).³

A. Jurisdiction

_____ Before addressing the merits, the court must satisfy itself that subject matter jurisdiction exists over the Petitioner’s claims under 28 U.S.C. §2241.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub.L. No. 104-208, 110 Stat. 1570, amended the INA to severely restrict the scope of judicial review of

²The Attorney General is charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens. 8 U.S.C. §1103(a). The Attorney General has delegated her authority to enforce all laws relating to the immigration and naturalization of aliens to the Commissioner of the INS, who may delegate the enforcement authority to subordinate INS officers and employees. 8 C.F.R. §2.1.

³If a final order of removal is issued by the INS, Petitioner’s detention pending removal will be governed by 8 U.S.C. §1231(a).

final orders of removal and other executive actions incident to the removal process.⁴ For example, INA §242(a)(1), 8 U.S.C. §1252(a)(1), generally provides for judicial review of final orders of removal in the Court of Appeals; however, “no court shall have jurisdiction to review a final order of removal against an alien who is removable by reason of having committed [an aggravated felony].” INA §242(a)(2)(C). Section 242(b)(9) provides that “judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.” Additionally, in the context of detention pending removal proceedings, INA §236(e), 8 U.S.C. §1226(e) states: “The Attorney General’s discretionary judgment regarding the applicability of [§236] shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.”

Respondents maintain that under INA §242(g), 8 U.S.C. §1252(g), this court does not have jurisdiction to review the Attorney General’s determination that Petitioner is detainable under INA §236(c) pending a final removal order. Section 242(g) states:

[e]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999), the Supreme Court held that §242(g) applies only to three discrete, specified actions the Attorney General may take in the removal process. By its terms, §242(g) does not apply to the Attorney

⁴Because removal proceedings were instituted against Petitioner after April 1, 1997, she is subject to the permanent rules of the 1996 IIRIRA Amendments. See IIRIRA §309(c), 110 Stat. at 3009-625.

General's decision to detain an alien under INA §236(c) pending removal proceedings. The court thus finds that INA §242(g) does not bar judicial consideration of Petitioner's claims that she is being detained in violation of the Constitution and laws of the United States.

The question remains as to whether any of the other judicial review limitations imposed by the IIRIRA, and specifically INA §236(e), should be construed to divest this court of habeas corpus jurisdiction over Petitioner's constitutional and statutory claims challenging her mandatory detention under INA §236(c).

Traditionally, the writ of habeas corpus has been available to aliens to challenge the legality of their executive custody. See *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1146 (10th Cir. 1999)(recognizing that Supreme Court has consistently reaffirmed the district courts' §2241 habeas jurisdiction over detention of aliens during the Twentieth Century); *Sandoval v. Reno*, 166 F.3d 225, 233-34 (3rd Cir. 1999)("Despite repeated congressional efforts since the late nineteenth century to confer finality on the immigration decisions of the Attorney General, the [Supreme] Court has consistently recognized the availability of habeas relief to aliens facing deportation."). In *Jurado-Gutierrez v. Greene*, the Tenth Circuit held that an alien has an independent right to collateral review of the legality of his executive custody under 28 U.S.C. §2241 notwithstanding the restrictions on direct judicial review of immigration decisions imposed by the IIRIRA. *Id.* at 1146. Further, because an implied repeal of a jurisdictional statute is disfavored, a court should presume that jurisdiction under 28 U.S.C. §2241 exists over an alien's claim that she is in custody in violation of the Constitution or laws of the United States, absent an express statutory revocation of habeas corpus jurisdiction by Congress. See *Felker v. Turpin*, 518 U.S. 651 (1996); *Jurado-Gutierrez*, 190 F.3d at 1145-47; *Calcano-Martinez v. INS*, 2000 WL 1336611, **10-11 (2d Cir. 2000); *Sandoval*, 206 F.3d at 320; *Flores-Miramontes v. INS*, 212 F.3d 1133, 1137 (9th Cir. 2000); *but cf. Richardson v. Reno*, 180 F.3d 1311, 1312-13 (11th Cir. 1999)(IIRIRA provisions eliminated

habeas jurisdiction over alien's challenges to removal proceedings); *Max-George v. Reno*, 205 F.3d 194, 197-98 (5th Cir. 2000)(§2241 jurisdiction was repealed by INA §242).

Additionally, construing the IIRIRA limitations on judicial review as not repealing federal habeas corpus jurisdiction is consistent with the court's obligation to interpret statutes to avoid serious constitutional concerns. See *Webster v. Doe*, 486 U.S. 592, 603 (1988)(directing interpretation of a federal statute to avoid a serious constitutional question presented where the statute appeared to foreclose review of constitutional claims.) Article I, §9, clause 2, of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In *Swain v. Pressley*, 430 U.S. 372, 381 (1977), the Supreme Court held that Congress may divest the district courts of habeas jurisdiction without running afoul of the Constitution so long as Congress substitutes a "collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention." Because INA §242 and §236(e) remove direct judicial review of executive detention, the elimination of habeas review would deny an adequate and effective collateral remedy to an alien detained under §236(c) pending a final order determining her removability as an aggravated felon.

The court thus finds that because the IIRIRA amendments to the INA do not expressly repeal the court's jurisdiction under 28 U.S.C. §2241, or provide an adequate and effective collateral remedy to an alien seeking to challenge the legality of her executive detention, the statutory provisions do not divest this court of its jurisdiction under 28 U.S.C. §2241 to hear Petitioner's claims that her mandatory detention under INA §236(c) violates the Constitution or laws of the United States.⁵

⁵The court notes that district courts addressing the issue generally agree that INA §236(e) does not divest the federal district courts of jurisdiction under §2241 to hear challenges to the constitutionality of INA §236(c), but disagree about whether INA §236(e) precludes habeas corpus jurisdiction over an alien's statutory claim that INA §236(c) does not apply to him. See *Okeke v. Pasquarell*, 80 F.Supp.2d 635, 639 (W.D.Tex. 2000)(holding that

Petitioner's statutory claims that the mandatory provisions of §236(c) do not apply to her because she is not an "alien" and because he has not been convicted of an "aggravated felony" are cognizable under 28 U.S.C. §2241 because the statutory issues raised are purely legal. See *Calcano-Martinez v. INS*, 2000 WL 1336611 at **15-16; *Sandoval*, 166 F.3d at 238 (and cases cited therein); *Gonclaves v. Reno*, 144 F.3d 110, 124 (1st Cir. 1998)(and cases cited therein). Interpretation of the statutory terms "alien" and "aggravated felony" do not involve issues of fact within the expertise of the agency. See *Gavilan-Cuate v. Yetter*, 94 F.Supp.2d 1039, 1042(D.Minn. 2000)(holding that habeas court may interpret statutory definition of aggravated felony because the question is a legal one). Further, because Petitioner's detention under §236(c) is mandatory, the court is not called upon to impermissibly review a discretionary decision by the Attorney General.

Respondents argue that the court should not interfere with the agency's pending removal decision by addressing the merits of Petitioner's statutory claims that she is not subject to mandatory detention under INA §236(c). The court is mindful that the INS' characterization of Petitioner's criminal conviction as an aggravated felony provides the basis for both her detention under INA §236(c) and her removal under INA §237(a)(2), 8 U.S.C. §1127(a)(2)(A)(iii). However, because the legality of Petitioner's detention pending removal is a separate issue from the legality of any final removal decision, the court finds that Petitioner need not wait until the BIA has issued

§236(e) divests the district courts of habeas jurisdiction to review alien's challenge to his detention under §236(c) except to the extent the alien raises a constitutional claim or other challenge to the legality of the statute); *Galvez v. Lewis*, 56 F.Supp.2d 637, 640-41 (E.D.Va. 1999)(same); *Edwards v. Blackman*, 48 F.Supp.2d 477, 480 (M.D.Pa. 1999)(same), opinion vacated January 21, 2000; *Danh v. Demore*, 59 F.Supp.2d 994, 998 (N.D.Cal. 1999)(same); *Aguilar v. Lewis*, 50 F.Supp.2d 539, 543 (E.D.Va. 1999)(holding that §236(e) did not divest district courts of habeas jurisdiction to hear constitutional and statutory challenges to application of §236(c)); *Saucedo-Telley v. Perryman*, 55 F.Supp.2d 882, 884 (N.D.Ill. 1999)(same); *Grant v. Zemski*, 54 F.Supp.2d 437, 440-41 (E.D.Pa. 1999)(same). In *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999), the Seventh Circuit held that the courts retain habeas jurisdiction over constitutional claims and claims challenging the scope of INA §236(c), but that §236(e) divests the court of jurisdiction over decisions implementing INA §236(c). The court noted, however, that if the alien was claiming that he had not been convicted of one of the felonies that authorizes removal, his claim might have a judicial remedy through a writ of habeas corpus. *Id.*

a final decision on her removability to challenge the legal basis for her detention under INA §236(c).⁶

Having found no jurisdictional barriers to the Petitioner's Application for a Writ of Habeas Corpus under 28 U.S.C. §2241, the court will review the merits of Petitioner's statutory and constitutional claims.⁷

B. Applicability of INA §236(c) to Petitioner

Petitioner first argues that INA §236(c) does not apply to her because she is immunized from removal by virtue of having been deemed eligible for legal permanent resident ("LPR") status under INA Section 245A, 8 U.S.C. §1255a.⁸ Petitioner contends that her legal status cannot be revoked, even if she committed a criminal act. Petitioner's arguments are without merit. The regulations promulgated by the INS define the term "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United

⁶Respondents have not argued that Petitioner must exhaust administrative remedies before seeking habeas relief on her statutory claims. Generally, an individual seeking judicial relief from allegedly unlawful custody should first exhaust administrative remedies, even when no statute mandates exhaustion. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). The court notes that the only administrative remedy which appears to be available to Petitioner to challenge the legality of her detention pending removal proceedings is provided for in 8 C.F.R. §3.19(h)(2)(ii) which states that a detained alien may seek a redetermination by an immigration judge that she is not subject to mandatory detention under §236(c).

Exhaustion of administrative remedies may be excused when "the interests of the individual in retaining prompt access to a federal judicial forum" outweigh the interests of the agency in protecting its own authority. *Id.* at 146. Here, the statutory issues before the court present pure legal issues of statutory construction and do not implicate agency expertise or discretionary action. Thus, the agency's interest in exhaustion is minimal. In contrast, Petitioner's interest in a judicial determination as to the legality of her detention is great because of the restriction on her freedom. The court finds that exhaustion of administrative remedies should not be required under the circumstances.

⁷At the hearing on Petitioner's motion for preliminary injunction, Petitioner's counsel represented to the court that Petitioner had moved to withdraw her appeal of the immigration judge's removal order because she wanted to be released from INS detention at the earliest possible date. Petitioner's motion to withdraw her agency appeal is still pending, and, according to the unchallenged representations of Petitioner's counsel at the hearing, may not be acted upon for at least four months. Respondents argued that the Petitioner's actions have rendered her constitutional challenge moot. The court finds that because Petitioner is still being detained in INS custody under INA §236(c), her challenge to the constitutionality of that statute remains viable.

⁸INA §245A(b)(1), 8 U.S.C. §1255a(b)(1), provides that the Attorney General shall adjust the status of an alien provided lawful temporary resident status under subsection (a) to that of an alien lawfully admitted for permanent residence if the alien meets the requirements specified in §1255a(b)(1)(A)-(D).

States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.”

8 C.F.R. §1.1(p) (2000). An alien convicted of an aggravated felony at any time after admission is deportable under §1227(a)(2)(A)(iii) and is subject to mandatory detention under INA §236(c) pending removal proceedings. The immigration laws define “alien” to include “any person not a citizen or national of the United States.” INA §101(a)(3), 8 U.S.C. §1101(a)(3). Thus, notwithstanding Petitioner’s LPR status, she is properly classified as an alien and is detainable pending removal proceedings if she was convicted of an aggravated felony.

Petitioner next argues that she is not subject to mandatory detention under INA §236(c) because she was not convicted of an aggravated felony which is defined by 8 U.S.C. §1101(a)(43)(R) to include: “an offense relating to . . . forgery . . . for which the term of imprisonment is at least one year.” Petitioner maintains that because she was sentenced to fifteen days in a county jail, her offense was not an aggravated felony.⁹

The record from the Cache Country District Court, Utah, indicates that Petitioner was convicted in a Utah state district court of two counts of forgery, a third-degree felony under Utah law. (Respondents’ Ex. B) Petitioner was sentenced on each count to an indeterminate sentence not to exceed five years. (*Id.*) The court suspended the sentence and ordered Petitioner to serve fifteen days in the county jail. (*Id.*)

The phrase “term of imprisonment” is defined at 8 U.S.C. §1101(a)(48)(B) as “includ[ing] the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.” Thus, “term

⁹ Respondents represent that Petitioner’s offense is properly characterized under 8 U.S.C. §1101(a)(43)(G) as: “a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [sic] at least one year.” Because Petitioner was convicted of forgery, the more specific language of subsection (a)(43)(R) arguably applies. Further, the distinction is without a legal difference because both subsections define aggravated felony as an “offense for which the term of imprisonment [is] at least one year.”

of imprisonment” refers to the actual term imposed by the sentencing court. See *United States v. Graham*, 169 F.3d 787, 790 (3rd Cir. 1999); *United States v. Guzman-Bera*, 216 F.3d 1019, 1020 (11th Cir. 2000); *United States v. Pacheco*, 225 F.3d 148, 153-54 (2^d Cir. 2000); *Alberto-Gonzalez v. INS*, 215 F.3d 906, 910 (9th Cir. 2000).

Petitioner argues that the term of imprisonment imposed by the Utah state court was fifteen days. Respondents maintain that the term imposed was five years. Under Utah law, the offense of forgery is a third degree felony. Utah Code Ann. §76-6-501 (forgery defined). Petitioner was sentenced, as required by Utah statute, to an indeterminate sentence “not to exceed five years.” Utah Code Ann. §76-3-203(3). An indeterminate sentence is “a sentence to imprisonment for the maximum period defined by law, subject to termination . . . at any time after service of the minimum period.” *United States v. Reyes-Castro*, 13 F.3d 377, 380 (10th Cir. 1993)(citing Black’s Law Dictionary 695 (5th ed. 1979)). Under Utah law, the court must construe Petitioner’s sentence for a term of five years. *Id.* Although plaintiff was actually sentenced to serve fifteen days in jail, the shorter sentence was due to the trial court’s suspension of the statutory sentence imposed. Accordingly, the court finds that the sentence imposed by the Utah court was for a term of at least one year. Petitioner was convicted of an aggravated felony as defined by 8 U.S.C. §1101(a)(43) and is thus subject to mandatory detention under the plain language of INA §236(c).

C. Constitutionality of INA §236(c)(1), 8 U.S.C. §1226(c)

Petitioner argues that INA §236(c) is facially invalid under the Fifth Amendment Due Process Clause because the statute does not provide any opportunity for the detainee to be released pending a final INS decision on removability. To successfully challenge the facial validity of a statute, Petitioner must demonstrate that “no set of circumstances exist under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). Further, the facial

constitutionality of a statute is presumed unless shown otherwise. *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 636 (10th Cir. 1998).

It is well established that aliens are “subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain” within the borders of the United States. *Carlson v. Landon*, 342 U.S. 524, 531 (1952)(internal citations omitted); *see, also, Harisiades v. Shaughnessy*, 342 U.S. 580, 586-91(1952); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Congress’ implementation of its authority to expel aliens must comport with the Constitution, however. *Carlson*, 342 U.S. at 532-33; *INS v. Chadha*, 462 U.S. 919, 940-41 (1983). Resident aliens are entitled to the protections of due process of law in deportation proceedings. *See The Japanese Immigrant Case*, 189 U.S. 86, 100-101(1903); *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Landon v. Plasencia*, 495 U.S. 21, 33 (1982)(“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”).

The Due Process Clause of the Fifth Amendment protects individuals against two types of governmental action. Substantive due process prevents the government from engaging in conduct that “shocks the conscience.” *Rochin v. California*, 342 U.S. 165, 172 (1952), or interferes with rights “implicit in the concept of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). The stronger the individual liberty interest, the greater is the level of judicial scrutiny of government action which infringes upon that interest. Procedural due process requires that government action which deprives a person of life, liberty or property be implemented in a fair manner. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The substantive due process inquiry begins with a “careful description” of the asserted liberty interest. *Reno v. Flores*, 507 U.S. at 302. Respondents maintain that the liberty interest implicated by detention under INA §236(c) is the limited interest of a removable criminal alien in

release from custody pending a final order of removal, not a generalized interest to be free from physical restraint. Respondents emphasize that a removable criminal alien does not possess the same liberty as a United States citizen charged with a criminal offense who has not yet been found guilty. Respondents, citing *Reno v. Flores*, contend that because the liberty interest implicated is not fundamental, the court must defer to the plenary authority of Congress to determine the terms and conditions upon which aliens may remain in the United States; thus, §236(c) must be upheld if it is rationally related to a legitimate governmental interest.

In *Flores*, the Supreme Court addressed the constitutionality of a regulation permitting detained juvenile aliens, who were arrested on suspicion of being deportable, to be released only to their parents, legal guardians, close relatives, or to other approved custodians. See 8 C.F.R. §242.24 (1992). If the juvenile is not released to the custody of an approved custodian, he is placed in a facility that meets “state licensing requirements for the provision of shelter care, foster care, group care and related services to dependent children.” 507 U.S. at 298. The Supreme Court found that the liberty interest asserted by the juvenile aliens was not fundamental because a juvenile is “always in some form of custody”; thus, the Court applied a deferential standard of review in determining the constitutionality of the regulation authorizing the detention of juvenile aliens suspected of being deportable. *Id.* at 302 (internal quotation omitted). The Court determined that the INS regulation, which infringed upon the limited right of juvenile aliens to be free from the custody of a government-operated or government-owned child-care institution, where the conditions of such custody are decent and humane, need only be rationally related to the government’s legitimate interest in “preserving and promoting the welfare of the child.” *Id.* at 303. The Court distinguished the juvenile alien’s liberty interest from a fundamental liberty interest such as “freedom from physical restraint” in the sense of a barred cell. *Id.* at 302. *Flores* reaffirmed that when a fundamental liberty interest is implicated, the Fifth Amendment Due Process Clause

precludes the government from infringing upon that liberty interest “unless the infringement is narrowly tailored to serve a compelling state interest.” *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987)).¹⁰

The court rejects Respondents’ assertion that the rational relationship standard of review applies here. The detention of an alien pending finalization of removal proceedings infringes upon the alien’s fundamental liberty interest in freedom from physical restraint and is akin to the incarceration of a defendant pending trial or other disposition of a criminal charge. *Martinez v. Greene*, 28 F.Supp.2d 1275, 1281 (D.Colo. 1998)(citing *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1982)(“Detention pending deportation seems properly analogized to incarceration pending trial or other disposition of a criminal charge, and is, thus, justifiable only as a necessary, temporary measure.”); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)(“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.”); *Vo v. Greene*, 63 F.Supp.2d 1278, 1283 (D.Colo. 1999)(stating that legal resident aliens have a fundamental liberty interest in freedom from incarceration under the Fifth Amendment); *Phan v. Reno*, 56 F.Supp.2d 1149, 1154 (W.D.Wash. 1999)(same). Accordingly, to comport with the requirements of substantive due process, Respondents must demonstrate that the detention of

¹⁰In *Salerno*, the Supreme Court addressed the constitutionality of the Bail Reform Act of 1984 which authorizes pre-trial detention if the government demonstrates by clear and convincing evidence at an adversary hearing that no conditions of release “will reasonably assure . . . the safety of any other person and the community.” 18 U.S.C. §3142(e). The statute was challenged as facially unconstitutional under the Fifth Amendment Due Process Clause. The Supreme Court concluded that the Act did not violate substantive due process because the arrestee’s fundamental liberty interest in freedom from physical restraint was outweighed by the government’s compelling interest in preventing the commission of additional crimes by arrestees. 481 U.S. at 749-51. The Court found that the Act was narrowly tailored to meet the statutory goals because the Act applied only to individuals arrested for specified extremely serious offenses and Congress had found that such individuals were more likely to commit dangerous acts in the community after arrest. *Id.* at 750. The Court further determined that the authorized pretrial detention was not excessive in relation to Congress’ regulatory goals because the arrestee is entitled to a prompt hearing adversary hearing to determine his eligibility for release, the burden was on the government to show that pre-trial detention was necessary, and the length of pre-trial detention was limited by the constitutional right to speedy trial. *Id.* at 747. The Court also held that the Act comported with the requirements of procedural due process because the procedures for evaluating the likelihood of future dangerous were designed to ensure an accurate judicial determination. *Id.* at 751.

aliens without opportunity for release pending finalization of removal proceedings is narrowly tailored to serve a compelling government interest.

To determine whether an infringement of a fundamental liberty interest is narrowly tailored to serve a compelling governmental interest, the court evaluates whether the infringement (1) is impermissible punishment or permissible regulation; and (2) is excessive in relation to the regulatory goal Congress sought to achieve. *Martinez*, 28 F.Supp.2d at 1282; *Salerno*, 481 U.S. at 747.

Deportation is a permissible regulation. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Carlson*, 342 U.S. at 537. Respondents emphasize that mandatory detention under INA §236(c) is closely related to the regulatory goals which Congress sought to achieve in enacting the 1996 IIRIRA Amendments, including: protecting the public from potentially dangerous criminal aliens; enhancing the INS' ability to ensure that removal actually occurs; correcting the deficiencies in prior bond procedures which failed to secure the presence of criminal aliens during deportation proceedings; and, improving the integrity of the country's immigration system which was in "disarray" because of problems associated with the government's inability to speedily detain and remove criminal aliens. See, generally, S.Rep. No. 48, 104th Cong., 1st Sess. 1995 (1995 WL 170285 (Leg. History)). Respondents emphasize that INA §236(c) is an integral part of the IIRIRA's statutory structure which was designed to expedite removal of certain targeted categories of criminal aliens on a "fast track." Under the IIRIRA amendments, aliens subject to §236(c) lack eligibility for discretionary removal, have no viable defenses to removal, and final orders of removal entered against them are not subject to direct judicial review. See 8 U.S.C. §1158(b)(2)(B)(i), §1229b(a)(3), §§1229c(a)(1) and (b)(1)(C), §1228(c), and §1252(a)(2)(C). Mandatory detention allows the removal of criminal aliens to be effected efficiently and expeditiously, whereas releasing them prior to removal presents significant barriers to effectuating their removal from this country.

Respondents thus argue that INA §236(c) is narrowly tailored to ensure that the IIRIRA's goals of expeditious and efficient removal of criminal aliens are satisfied.

Unquestionably, Congress has a compelling interest in preventing criminal aliens in deportation proceedings from absconding or committing additional crimes. The issue to be decided is whether §236(c) is excessive in relation to those goals.

In *Martinez v. Greene*, the district court found that INA §236(c) is not narrowly tailored to meet Congress' regulatory goals because the statute does not grant the Attorney General any discretion to determine on an individual basis whether an alien should be detained or released on bond. *Id.* at 1282. The court thus held that §236(c) is facially unconstitutional under the substantive component of the Due Process Clause. The *Martinez* court further concluded that because §236(c) fails to provide for any type of bond hearing to an alien pending a final determination of his removal status, the statute is also facially violative of procedural due process guarantees. *Id.* at 1283. Under the tripartite analysis set forth in *Mathews v. Eldridge*, the court found that: (1) an alien's interest in being free from indefinite mandatory detention pending a final determination of removability is great; (2) the risk of erroneous deprivation is substantial because INA §236(c) does not provide any procedure for determining whether an individual warrants release on bond; and, (3) the government's interest in not providing individual bond hearings was minimal because the alien is already statutorily entitled to a hearing on whether he is an "aggravated felon" and consideration of bondable factors could be incorporated into that hearing with minimal additional administrative and fiscal burdens. 28 F.Supp.2d at 1283. The *Martinez* court held that procedural due process required that an alien not be detained indefinitely under §236(c) absent an individualized determination of whether the alien posed a flight risk or a danger to the community. *Id.*

Respondents urge the court not to follow *Martinez*, arguing that under *Carlson* and *Flores*, the legislative and executive branches may exercise their plenary authority to mandate the detention of deportable aliens pending removal proceedings, based upon the aliens' membership in a particular class, without providing for individualized determinations of whether release of a particular alien presents the risk sought to be eliminated by the statute. Respondents maintain that as part of the IIRIRA amendments, Congress has made the class-based determination that aliens convicted of aggravated felonies should be subject to mandatory detention because they are a public menace and if released, will likely abscond so that the INS will be unable to execute a final order of removal. (See S.Rep. No. 48, 104th Cong., 1st Sess. (1995) (1995 WL 170285 (Leg. History) at 3, 8-9, 23).

The court finds that neither *Carlson* nor *Flores* supports the Respondents' argument that mandatory detention of criminal aliens in removal proceedings is constitutional. In *Carlson*, the alien petitioners challenged the constitutionality of their detention without bail after having been arrested under warrants charging each of them with membership in the Communist Party of the United States. Such persons were subject to deportation under the Internal Security Act of 1950. The Security Act granted the Attorney General discretion to continue the alien in custody, or release him on bond, pending a final determination of deportability. The Supreme Court held that, consistent with due process, the Attorney General could detain aliens subject to deportation without bail, at his discretion, to guard against communist activities pending a final determination of the alines' deportability. 342 U.S. at 536. In reaching its decision, the Court noted that detention is a necessary part of the deportation procedure designed to prevent aliens from harming the United States during the pendency of deportation proceedings. *Id.* at 533. The Court expressly recognized, however, that a "purpose to injure could not be imputed generally to all aliens subject to

deportation, so discretion was placed by the 1950 Act in the Attorney General to detain aliens without bail.” 342 U.S. at 533. The Court went on to state:

As the purpose of the Internal Security Act to deport all alien Communists as a menace to the security of the United States is established by the [Act itself], we conclude that the discretion as to bail in the Attorney General was certainly broad enough to justify his detention to all these parties without bail as a menace to the public interest. As all alien Communists are deportable, . . . because of Congress’ understanding of their attitude toward use of force and violence in such a constitutional democracy as ours to accomplish their political aims, evidence of membership plus personal activity in supporting and extending the party’s philosophy concerning violence gives adequate ground for detention. It cannot be expected that the Government should be required in addition to show specific acts of sabotage or incitement to subversive action. . . . There is no evidence or contention that all persons arrested as deportable under s 22 of the Internal Security Act, . . . for Communist membership are denied bail. In fact, a report filed with this Court filed by the Department of Justice. . . shows allowance of bail in the large majority of cases. The refusal of bail in these cases is not arbitrary or capricious or an abuse of power. There is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government.

342 U.S. at 541-42.

In *Carlson*, the Court found it constitutionally permissible for Congress to provide for discretionary detention of Communist aliens pending deportation proceedings based on legislative findings that the doctrine of the Communist party, which advocated the use of force and violence to accomplish political goals, presented an individious threat to the citizens of the United States which must be eliminated. The Court emphasized that the detention statute required the Attorney General to justify his refusal of bail in a particular case by reference to the legislative scheme to eradicate Communist activity in this country. *Id.* at 543. The Court held that the Attorney General’s authority to detain without bail comported with the Due Process Clause because his discretion must be exercised within the framework of the Subversive Activities Control Act to guard against Communist activities pending a deportation hearing. *Id.* at 544. Here, by contrast, INA §236(c)

does not grant the Attorney General any discretion to release a criminal alien in removal proceedings.

In *Flores*, the juvenile aliens argued that the INS juvenile custody regulation violated the statute authorizing the discretionary detention of aliens pending a final determination of deportability, 8 U.S.C. §1252(a)(1)(1988), because the INS had employed a blanket presumption that custodians other than legal guardians or certain specified close relatives were unsuitable without allowing for individualized determinations of appropriate custodianship. 507 U.S. at 313. The Supreme Court rejected the aliens' contention that they were entitled to individualized custody determinations. *Id.* at 314. The court stated that the INS was not precluded from using reasonable presumptions and generic rules in formulating immigration regulations. *Id.* at 313. The Court found that in the case of each juvenile alien, the regulation requires the INS to make some individualized findings in determining the appropriate custodian and that was sufficient. *Id.* at 313-314. The Supreme Court nonetheless acknowledged that, "in certain contexts, the Attorney General's discretion [to detain aliens pending removal proceedings], requires `some level of individualized determination.'" 507 U.S. at 313 (quoting *INS v. Nat. Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 558 (1991) and citing *Carlson*, 342 U.S. at 538).

A deportable alien has no absolute constitutional entitlement to be released pending removal proceedings. *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538. Further, under *Carlson*, Congress may, in the exercise of its plenary authority over aliens, provide for the discretionary detention of criminal aliens pending deportation proceedings based on reasonable presumptions that criminal aliens pose a risk of danger to the community and a flight risk. The problem with INA §236(c) is that it impermissibly imputes an intent to injure to all aliens convicted of aggravated felonies based on an irrefutable presumption that criminal aliens pose a risk of danger to the community and a flight risk. See *Carlson*, 342 U.S. at 533. The mandatory detention statute does

not afford the Attorney General any discretion to make an individualized determination about whether the reasons justifying Congress' enactment of the detention statute apply to a particular alien. Further, the statute authorizes indefinite detention because the INA does not specify a time period for the issuance of a final removal order. Accordingly, this court agrees with the decision and reasoning in *Martinez* and finds that INA §236(c) is facially unconstitutional under the Fifth Amendment Due Process Clause.

District Courts around the country are split as to the constitutionality of INA §236(c). See, e.g., *Koita v. Reno*, 113 F.Supp.2d 737 (M.D.Pa. 2000)(holding INA §236(c) unconstitutional); *Welch v. Reno*, 101 F.Supp.2d 347 (D.Md. 2000)(same); *Van Eeton v. Beebe*, 49 F.Supp.2d 1186 (D.Or. 1999)(same); *Danh v. Denmore*, 59 F.Supp.2d 994 (N.D.Cal. 1999)(same); *Bouayad v. Holmes*, 74 F.Supp.2d 471 (E.D.Pa. 1999)(holding INA §236(c) constitutional); *Avramenkov v. INS*, 99 F.Supp.2d 210 (D.Conn. 2000)(same); *Okeke v. Pasquarell*, 80 F.Supp.2d 635 (W.D.Tex. 2000)(same); *Reyes v. Underdown*, 73 F.Supp.2d 653 (W.D.La. 1999)(same); *Diaz-Zaldierna v. Fasano*, 43 F.Supp.2d 1114 (S.D.Cal. 1999)(same).¹¹

The Seventh Circuit is thus far the only circuit court to address the issue. In *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999), the alien petitioner was detained under §236(c) pending removal proceedings based on his conviction of an aggravated felony. The Seventh Circuit held that §236(c), as applied to the petitioner, comported with substantive and procedural due process. The court found that the petitioner was in the same position as someone who had been finally determined removable because he conceded his conviction for an aggravated felony, thereby

¹¹The court notes that six judges in the district of Colorado have addressed the constitutionality of INA §236(c). Judges Matsch, Sparr and Nottingham upheld the statute as constitutional. See *Baca v. Greene*, Case No. 99-M-1781 (D.Colo. 1999); *Gutierrez-Sanchez v. INS*, Case No. 99-N-2195 (D.Colo. 1999); *Her v. Greene*, Case No. 00-S-239 (D.Colo. 2000). Judges Babcock, Kane and Miller have concluded that the statute is unconstitutional under the Fifth Amendment Due Process Clause. See *Vo v. Greene*, 109 F.Supp.2d 1281 (D.Colo. 2000)(Kane, J.); *Martinez v. Greene*, 28 F.Supp.2d 1275 (D.Colo. 1998)(Babcock, J.); *Krueger & Sosa v. Greene*, Case Nos. 00-WM-444 and 00-WM-640 (D.Colo. 2000), currently on appeal to the Tenth Circuit.

rendering him ineligible for any relief from removal.¹² The Court concluded that an alien subject to §236(c) has forfeited any legal entitlement to remain in the United States because he has been convicted of a criminal offense that authorizes his removal; thus, that alien has no constitutional right to remain at large in the United States and may be detained indefinitely until his removal occurs, or, he can withdraw his defense to the removal proceeding and return to his native land. 172 F.3d at 958.

In *Parra*, the Seventh Circuit addressed the constitutionality of INA §236(c) as applied to the petitioner, but did not address the facial constitutionality of the statute. This court respectfully disagrees with the reasoning in *Parra*, but notes that the petitioner's circumstances in that case are illustrative of why INA §236(c) is unconstitutional on its face, i.e., there are no circumstances in which application of the statute would be constitutional. In *Parra*, the petitioner had conceded that all grounds for his removal were present, thus, the issuance of a final removal order was a foregone conclusion. The Seventh Circuit found that the petitioner's liberty interest was equal to that of an alien who had received a final order of removal. 172 F.3d at 958.

Respectfully, the Seventh Circuit's analogy mischaracterizes the alien's status under the immigration laws and, accordingly, the rights he is afforded under the Constitution. An alien who has not received a final order of removal retains, for the time being, his status as a legal resident. See 8 C.F.R. §1.1(p). Aliens who are legal residents of the United States have a fundamental liberty interest in freedom from physical restraint. See *Martinez*, 28 F.Supp.2d at 1281; *Vo*, 63 F.Supp.2d at 1283; *Phan*, 56 F.Supp.2d at 1154. Thus, §236(c) violates the due process rights of an alien who admits his removability, but is being detained indefinitely under that statute while awaiting a final order of removal, with no opportunity to apply for release on bond. In contrast, an

¹²Under 8 U.S.C. §1229b, an alien convicted of an aggravated felony is not eligible for discretionary relief from removal.

alien who has been issued a final order of removal has forfeited his legal status and has no constitutionally-protected liberty interest in being free within the borders of the United States. See *Ho v. Greene*, 204 F.3d 1045, 1058-59 (10th Cir. 2000)(stating that “final removal orders stripped [the petitioners] of any heightened Constitutional status either may have possessed prior to the entry of a final removal order.”)

The court further notes that under the INA, an alien who is detained pending execution of a final removal order is afforded greater constitutional protections than an alien who is detained pending a final decision on removability. Once a final order of removal has been issued, the alien is subject to mandatory detention under INA §241(a), 8 U.S.C. §1231(a)(2); however, if the removal of the alien is not executed within ninety days, §241(a)(6) grants the Attorney General discretion to release the alien from custody. See, also, 8 C.F.R. §241.4(b); *Ho v. Greene*, 204 F.3d 1045, 1056-60 (10th Cir. 2000)(holding that an alien may be detained indefinitely under 8 U.S.C. §1231(a)(6), at the discretion of the Attorney General, pending the execution of a final order of removal without running afoul of the Fifth Amendment Due Process Clause). Thus, while an alien who has been finally ordered removed is subject to mandatory detention for a period not to exceed ninety days, an alien for whom no final removal order has been issued, and who has greater constitutional rights than an alien who has been finally ordered removed, is subject to mandatory detention for an indefinite period of time while awaiting a final order from the INS. Congress’ interest in ensuring the availability of an alien for expeditious removal is surely greater once a final order of removal is issued than it is during the period the alien is awaiting the conclusion of removal proceedings. Accordingly, Congress’ provision for discretionary release of aliens who have received a final order of removal, but who are detained beyond the statutory ninety-day removal period, reinforces the court’s conclusion that the mandatory detention authorized by INA §236(c) is not narrowly tailored to serve the compelling governmental interests advanced by the Respondents.

The court finds that INA §236(c) is facially unconstitutional under the Fifth Amendment Due Process Clause.

D. Claim for Damages for Disclosure of Confidential Information

Petitioner also requests that she be awarded damages in the amount of \$10,000 against the INS for using information contained in her application for temporary resident status against her in a removal proceeding, in violation of 8 U.S.C. §1255a(c)(5)(E). Section §1255a(c)(5)(A) provides that information contained in an alien's legalization file is confidential and may be used only for specified purposes. Section §1255a(c)(5)(E) states: "Whoever knowingly uses, publishes, or permits information to be examined in violation of this paragraph shall be fined not more than \$10,000." The court does not reach the merits of this claim because the statute does not provide for an award of damages to the affected individual, and even if it did, a petition for habeas corpus is not the appropriate vehicle to obtain such relief. 28 U.S.C. §2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States.").

III.

For the reasons set forth above, it is

RECOMMENDED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §2241 filed by Petitioner Flor de Maria Gonzalez-Portillo on October 24, 2000 be GRANTED IN PART AND DENIED IN PART. It is

RECOMMENDED that Petitioner's statutory claims that INA §236(c) does not apply to her because her status as a legal permanent resident immunizes her from removal and because she was not convicted of an aggravated felony as defined by 8 U.S.C. §1101(a)(43) be DENIED. It is

RECOMMENDED that Petitioner's Motion for a Preliminary Injunction and a Temporary Restraining Order [filed October 23, 2000] be converted to a motion for permanent injunction. It is

RECOMMENDED that Petitioner's motion for a permanent injunction declaring INA §236(c), 8 U.S.C. §1226(c), unconstitutional on its face be GRANTED and that INA §236(c) be DECLARED unconstitutional on its face. It is

FURTHER RECOMMENDED that Petitioner's Application for a Writ of Habeas Corpus be GRANTED to the extent that Respondents shall FORTHWITH provide Petitioner with an individualized bond hearing to determine whether she presents a substantial risk of flight or a threat to persons or property.¹³

Within ten days after being served with a copy of the proposed findings and recommendation, any party may serve and file written objections to the proposed findings and recommendation with the Clerk of the United States District Court for the District of Colorado. The district court judge shall make a de novo determination of those portions of the proposed findings or specified recommendation to which objection is made. The district court judge may accept, reject, or modify, in whole or in part, the proposed findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to make timely objections to the magistrate judge's recommendation may result in a waiver of the right to appeal from a judgment of the district court based on the findings and recommendations of the magistrate judge.

Dated this ____ day of December, 2000.

BY THE COURT:

PATRICIA A. COAN
United States Magistrate Judge

¹³The court does not reach Petitioner's claim that her detention under INA §236(c) violates the Eighth Amendment's proscription against excessive bail because Petitioner has been afforded all the relief available to her in conjunction with her Fifth Amendment Due Process Claim. Petitioner has no absolute right to bail under the Eighth Amendment. *Salerno*, 481 U.S. at 754-55.

