IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VINODBHAI BHOLIDAS PATEL,	:	
	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	NO. 01-405
	:	
CHARLES W. ZEMSKI, Acting District Director Philadelphia District, Immigration and Naturalization Service; MARY ANN WYRSCH, Acting Commissioner, Immigration and Naturalization Service; UNITED STATES ATTORNEY GENERAL	:	
	:	
Respondents.	:	

M E M O R A N D U M

BUCKWALTER, J. May 10, 2001

I. INTRODUCTION

Presently before the Court is Vinodbhai Bholidas Patel's ("Petitioner") Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and the Response thereto of Charles W. Zemski, Acting District Director Philadelphia District, Immigration and Naturalization Service; Mary Ann Wyrsch, Acting Commissioner, Immigration and Naturalization Service; and the United States Attorney General ("Respondents"). Respondents concede the Court has jurisdiction under 28 U.S.C. § 2241. The Court agrees. See Bouayad v. Holmes, 74 F. Supp. 2d 471, 473-74 (E.D. Pa. 1999) (explaining district courts maintain jurisdiction over habeas petitions despite sweeping changes in immigration laws). This petition is not an attempt to litigate the merits of Petitioner's removal proceedings which will determine whether Petitioner

will be removed from the United States and returned to India. The Immigration and Naturalization Service properly conducts those proceedings and has begun the process already. Rather, Petitioner argues 8 U.S.C. § 1226(c), which mandates Respondents detain Petitioner pending the completion of his removal proceedings without opportunity for release, unconstitutionally deprives him of his right to due process of law. As explained more fully below, the Court holds § 1226(c) does not violate Petitioner's right to due process of law and Petitioner is not entitled to relief.

II. FACTUAL BACKGROUND

Petitioner is a native and citizen of India. He moved to the United States in1984 and became a lawful permanent resident of the United States in 1990. On January 10, 2000, Petitioner was convicted in the United States District Court for the Eastern District of Missouri for harboring an alien in violation of 18 U.S.C. § 1324(a)(1)(A)(iii), for which he served five months at the Allenwood Federal Prison. Upon his release from Allenwood, in January, 2001, the INS took Petitioner into custody pending the conclusion of his removal proceedings. Shortly thereafter an Immigration Judge ("IJ") conducted a bond hearing and determined Petitioner was statutorily precluded from release pursuant to § 1226(c). As a result, Petitioner has remained in custody while his removal proceedings are under way and has not been afforded a bail hearing in which his risk of flight and danger to the community could be evaluated and his release could be considered. Petitioner filed the instant habeas petition on January 25, 2001, challenging the constitutionality of the mandatory detention called for by § 1226(c). Since then, Judge Durling of the United States Immigration Court in York, Pennsylvania, issued an oral decision ordering

Petitioner removed to India and Petitioner filed a Notice of Appeal regarding that decision with the Board of Immigration Appeals.

III. CONSTITUTIONALITY OF 8 U.S.C. § 1226(c)

To understand how § 1226(c) operates in the context of this case, one must first grasp an interplay between several statutes within Title 8. First, § 1324 makes punishable the crimes of bringing in, transporting, and harboring aliens. 8 U.S.C. § 1324(a)(1)(A)(i), (ii), and (iii) (1999). Second, § 1101 proscribes that any offense described in 8 U.S.C. § 1324(a)(1)(A) or (2) is an "aggravated felony." 8 U.S.C. § 1101(43)(N) (1999).[1] Third, § 1227 provides "[a]ny alien who is convicted of an *aggravated felony* at any time after admission is deportable." 8 U.S.C. § 1227 (a)(2)(A)(iii) (1999) (emphasis added). Finally, § 1226(c) provides, in pertinent part:

> The Attorney General shall take into custody any alien who . . . 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 . . . when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense. . . .

8 U.S.C. § 1226(c)(1)(B) (1999).

In this case, Petitioner was convicted under § 1324 for harboring an alien. The chain of statutes described above leads to § 1226(c). Consequently, the INS must detain

[1] There is debate surrounding this section because a parenthetical within it, which reads "relating to alien smuggling," is arguably either descriptive or limiting. This debate is significant because certain crimes, including "harboring" aliens, would not be "aggravated felonies" if the parenthetical is considered limiting but would be "aggravated felonies" if the parenthetical is considered descriptive. For purposes of the instant habeas petition, the Court considers Petitioner's conviction an aggravated felony consistent with Judge Durling's decision. See Liang v. INS, 206 F.3d 308, 323 (3d Cir. 2000) (concluding jurisdiction over removal proceedings does lie in the district courts but not until administrative remedies are exhausted).

Petitioner without bond during the pendency of Petitioner's removal proceedings. The mandatory detention without bond is the aspect of § 1226(c) Petitioner contends violates his constitutional right to due process of law.

Federal courts are split over this issue. Several district courts, including courts in this district, have determined the mandatory detention without bond violates an alien's right to due process of law and is unconstitutional. See Radoncic v. Zemski, 121 F. Supp. 2d 814 (E.D. Pa. 2000); Juarez-Vasquez v. Holmes, No. 00-CV-4727, 2000 U.S. Dist. LEXIS 16417 (E.D. Pa. Nov. 3, 2000); Koita v. Reno, 113 F. Supp. 2d 737 (M.D. Pa. 2000); Son Vo v. Greene, 109 F. Supp. 2d 1281 (D. Colo. 2000); Welch v. Reno, 101 F. Supp. 2d 347 (D. Md. 2000); Chukwuezi v. Reno, No. 3: CV-99-2020, 2000 U.S. Dist. LEXIS 15432 (M.D. Pa. May 16, 2000); Bouayad v. Holmes, 74 F. Supp. 2d 471 (E.D. Pa. 1999); Rogowski v. Reno, 94 F. Supp. 2d 177 (D. Conn. 1999); Nhoc Danh v. Demore, 59 F. Supp. 2d 994 (N.D. Cal. 1999); Van Eeton v. Beebe, 49 F. Supp. 2d 1186 (D. Ore. 1999). Several other courts, including the seventh and eleventh circuits, have held otherwise. See e.g., Parra v. Perryman, 172 F.3d 954 (7th Cir.1999); Richardson v. Reno, 162 F.3d 1338, 1363 n.119 (11th Cir.1998); Avramenkov v. INS, 99 F. Supp. 2d 210 (D. Conn. 2000); Okeke v. Pasquarell, 80 F. Supp. 2d 635 (W.D. Tex. 2000); Reyes v. Underdown, 73 F. Supp. 2d 653 (W.D. La. 1999); Diaz-Zaldierna v. Fasano, 43 F. Supp. 2d 1114 (S.D. Cal. 1999).

I think the following analysis from Parra,[2] *supra*, is dispositive:

> Persons subject to § 1226(c) have forfeited any legal entitlement to remain in the United States and have little hope of clemency. (One is tempted to say "no" hope, but life is full of surprises, and a last-minute amendment of the immigration laws or change in policy has kept many an immigrant in this country. For current purposes "little" hope will do). Before the IIRIRA bail was available to persons in Parra's position as a corollary to the possibility of discretionary relief from deportation; now that this possibility is so remote, so too is any reason for release pending removal. Parra's legal right to remain in the United States has come to an end. An alien in Parra's position can withdraw his defense of the removal proceeding and return to his native land, thus ending his detention immediately. He has the keys in his pocket. A criminal alien who insists on postponing the inevitable has no constitutional right to remain at large during the ensuing delay, and the United States has a powerful interest in maintaining the detention in order to ensure that removal actually occurs.
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> The due process calculus under *Matthews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), requires the court to evaluate the private interest, the probability of error (and the effect of additional safeguards on the rate of error), and the government's interest in dispensing with those safeguards, with a thumb on the scale in favor of the statute's constitutionality. The private interest here is not liberty in the abstract, but liberty in the United States by someone no longer entitled to remain in this country but eligible to live at liberty in his native land; the probability of error is zero when the alien concedes all elements that require removal (as Parra has done); and the public interest is substantial given the high flight rate of those released on bail.

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[2] The Court recognizes one slight factual distinction between the instant case and the case in Parra. In Parra, the alien admitted he was guilty of the crime for which he was charged and that conviction of that crime is grounds for removal. Here, Petitioner admits guilt but argues his conviction is not grounds for removal. As explained supra, the Court does not have jurisdiction over Petitioner's removal proceedings; nonetheless, the Court considers Petitioner's argument for purposes of conducting a constitutional analysis, and believes Petitioner is hanging on to an extremely thin thread by relying on the argument that harboring an alien is not an aggravated felony to contest his removal. As in Parra, the Court here believes the probability of error is next to zero and Petitioner will be properly removed.

IV. CONCLUSION

For the reasons set forth above, Petitioner's petition will be denied.

An appropriate Order follows.

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O R D E R

AND NOW, this 10th day of May, 2001, upon consideration of Petitioner's Petition for Writ of Habeas Corpus (Docket No. 1), and Respondents' Response thereto (Docket No. 5), it is hereby **ORDERED** that the petition of Vinodbhai Bholidas Patel is **DENIED.**

BY THE COURT:

RONALD L. BUCKWALTER, J.