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United States District Court,
N.D. California.

Hyung Joon KIM, Petitioner,
v.
Thomas SCHILTGEN and Janet Reno,
Respondents.

No. C 99–2257 SI. | Aug. 11, 1999.

Attorneys and Law Firms

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Opinion

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

ILLSTON, J.

***1** On August 6, 1999, the Court heard argument on Hyung Joon Kim's petition for a writ of habeas corpus challenging the constitutionality of the mandatory detention provisions of INA § 236(c). Having carefully considered the arguments of the parties and the papers submitted, the Court GRANTS Kim's petition and orders the government to provide a bail hearing as specified herein. To the extent that Kim seeks immediate release from INS detention during the pendency of his deportation proceedings, Kim's petition is DENIED.

BACKGROUND

Petitioner Hyung J. Kim ("Kim"), a citizen of Korea, is confined by the federal government pending the conclusion of his removal proceedings. Kim was born in Seoul, Korea, on December 10, 1977, and entered the United States as a non-immigrant on March 10, 1984 at the age of six. He became a legal permanent resident of the United States on March 26, 1986 at age 8. He is now twenty-one, and has lived in the United States for fifteen years.

On July 8, 1996, at age 18, Kim was convicted in California state court of first degree burglary. On April 23, 1997, at age 19, he was convicted in California state court of petty theft with priors, and on October 8, 1997, he was sentenced to three years in state prison. His estimated release date was February 1, 1999.

On December 16, 1998, the Immigration and Naturalization Service ("INS") issued a notice to appear, placing Kim in removal proceedings under the Immigration and Nationality Act ("INA" or "the Act"). The notice to appear charged Kim with deportability pursuant to § 237(a)(2)(A)(iii) of the INA, as an alien convicted of an aggravated felony as defined in § 101(a)(43) of the Act. 8 U.S.C. § 1227(a)(2)(A)(iii). Under this section, theft offenses for which the sentence is to at least one year imprisonment are defined as aggravated felonies. Kim's conviction for petty theft with priors, for which he received a three-year sentence, thus met the definition of an aggravated felony.

At the same time the notice to appear was issued, the INS determined that Kim would be held without a bond hearing, because the INA prohibited his release from custody. The notice to appear was served on Kim on February 2, 1999, after he had completed his prison sentence, and Kim was accordingly taken into INS custody. Kim remains a legal permanent resident until a final finding of his deportability is made.

Section 236(c)(1) of the INA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, states that the Attorney General "shall take into custody any alien who" is removable as an aggravated felon under INA § 1227(a)(2)(A)(iii). This section thus mandates the detention of criminal aliens during their removal proceedings. A person taken into custody under § 236(c)(1) may only be released if the person is a participant in the federal witness protection program and can show that he is not a flight risk or a danger to the community. As Kim is not a member of the witness protection program, § 236(c)(1) results in his mandatory detention pending his deportation proceedings. Because under the statute he cannot be released on bail, he has not been granted a bail hearing.

***2** Kim filed this petition for a writ of habeas corpus on May 17, 1999. Kim asserts that by mandating his detention without a bail hearing, § 236(c)(1) violates his constitutional right to due process as guaranteed by the Fifth Amendment to the United States Constitution. Kim seeks a declaration of this Court that § 236(c)(1) of the INA is unconstitutional on its face as violative of procedural and substantive due process rights. Kim also requests an order directing Thomas Schiltgen, District Director of the San Francisco INS, to release Kim from

custody.

LEGAL STANDARD

A writ of habeas corpus may be issued when a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3), 2245(a). A request for federal habeas corpus relief must be based on a violation of federal law. *See Moore v. Calderon,* 108 F.3d 261, 264 (9th Cir.1997)

A federal statute is presumed constitutional unless shown otherwise. *Martinez v. Greene,* 28 F.Supp. 1275, 1281 (D.Colo.1998). To prevail on a facial challenge to the constitutionality of a statute, the petitioner "must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

DISCUSSION

1. Jurisdiction.
The government does not contest this Court's jurisdiction under 28 U.S.C. § 2241 to entertain challenges to the constitutionality of § 236(c). *See* opposition, 5:10–11; *see also, Parra v. Perryman,* 172 F.3d 954, 957 (7th Cir.1999).

2. Statutory history.
Congress addressed the deportability of criminal aliens in § 241 of the Immigration and Nationality Act of 1952. Under the old INA, an alien was subject to deportation if convicted of a "crime involving moral turpitude" and if the crime was committed within five years after entry into the United States. INA § 241(a)(4)(A). An alien convicted of violating drug or firearm laws was also deportable. INA § 241(a)(4) and (11). Release pending deportation was placed within the discretion of the Attorney General. INA § 223.[1]

[1] Section 223 of the INA provided that: "pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on condition of parole."

In 1988, Congress amended the criminal alien provisions of the INA in the Anti–Drug Abuse Act of 1988 (ADAA). The ADAA established a new category of deportable alien, "aggravated felon." Aggravated felonies were defined as murder, drug trafficking crimes, or illicit trafficking in firearms or destructive devices, and any attempt or conspiracy to commit such acts in the United States. INA § 101(a). The ADAA required the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence and barred the Attorney General from releasing the alien. INA § 242(a)(2).

The ADAA's mandatory detention of aggravated felons was immediately challenged as violative of due process, and was declared unconstitutional by the majority of courts which considered it. *See, e.g., Leader v. Blackman,* 744 F.Supp. 500 (S.D.N.Y.1990); *Kellman v. INS,* 750 F.Supp. 625 (S.D.N.Y.1990); *Probert v. INS,* 750 F.Supp. 252 (E.D.Mich.1990), *affd. on other grounds,* 954 F.2d 1253 (6th Cir.1992); *Paxton v. INS,* 745 F.Supp. 1261 (E.D.Mich.1990); *Agunobi v. Thornburgh,* 745 F.Supp. 533 (N.D.Ill.1990). *But see Davis v. Weiss,* 749 F.Supp. 47 (D.Conn.1990); *Morrobel v. Thornburgh,* 744 F.Supp. 725 (E.D.Va.1990). In the wake of these successful constitutional challenges, Congress amended the INA in 1990 and 1991 "to permit release of those aggravated felons who were lawfully admitted to the United States, and who could demonstrate that they were not a threat to the community and were likely to appear for their hearings." *Martinez,* 28 F.Supp.2d at 1279–80.

***3** In April 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104–132, Stat. 1214 ("AEDPA"). AEDPA created automatic mandatory detention without eligibility to apply for bond for aggravated felons and other non-citizens with criminal convictions. AEDPA § 440(c), INA § 242(a)(2). Five months after AEDPA, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104–208, 110 Stat. 1570 ("IIRIRA"). IIRIRA expanded the definition of an "aggravated felony" to include new crimes, *see* INA § 101(a)(43), and replaced AEDPA's mandatory detention provision for criminal aliens with the provision at issue in the instant case, INA § 236(c).[2]

[2] Section 236(c) governs the custody of criminal aliens pending their removal proceedings:
(1) *Custody.* The Attorney General shall take into custody any alien who
(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2);
(B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),
(C) is deportable under section 237(a)(2)(A)(I)

> on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
> (D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B), 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.
> (2) *Release.* The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

Subdivision (1) of § 236(c) requires the mandatory detention of certain criminal aliens during the pendency of their removal proceedings. Subdivision (2) provides a single exception to the mandatory detention provisions of subdivision (1) for participants in the federal witness protection program.[3]

[3] Because of its concerns regarding insufficient detention space and INS personnel, the INS requested that the mandatory detention provisions of § 236(c) be held in abeyance for two years. During that time, the Transition Period Custody Rules ("TPCR") provided by IIRIRA § 303(b)(3) controlled the detention of criminal aliens. *See* Commissioner's Letter Invoking Temporary Period Custody Rules for FY 1998, Sept. 26, 1997, Respondents' Explanation Re: TPCR. Under the TPCR, a criminal alien was entitled to a bond hearing before an Immigration Court, at which the alien could show that he or she did not present a substantial risk of flight or threat to the community. The Immigration Court then had the discretion to grant bond for the duration of the alien's deportation proceedings. *See* IIRIRA § 303(b)(3).

3. Violation of due process.

Kim claims that he has been denied due process of law, in violation of the Fifth Amendment, because he has not had, and in fact by statute cannot have, a bail hearing to determine whether he is a suitable candidate for release pending his removal proceedings.[4] Kim argues that this mandatory detention under § 236(c) violates criminal aliens' rights to both substantive and procedural due process.

[4] From Kim's moving papers, the Court has been unable to determine if Kim is contesting the applicability of § 236(c)(1) to him. However, as Kim argues that § 236(c) is facially unconstitutional, the Court need not examine the particulars of Kim's own case.

a. Substantive due process.

A petitioner's right to substantive due process prevents the government from conduct that "shocks the conscience." *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Violations of substantive due process occur when the government interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319, 325–26, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

In evaluating whether § 236(c) violates aliens' substantive due process rights, Kim argues this Court should adopt the standard of review delineated in *United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The *Salerno* standard involves a two step analysis. First, the court determines whether the statute at issue is "impermissible punishment or permissible regulation." *Salerno,* 481 U.S. at 747. If it qualifies as a permissible regulation, the court then examines whether the statute is an excessive means of achieving the permissible goal. If it is excessive, then the statute violates the petitioner's substantive due process rights. *See id.* Kim argues this standard should govern this Court's examination of § 236(c).

Respondents contend that the *Salerno* test is overly strict and therefore inappropriate. Citing Congress' broad authority over immigration, respondents argue the Court must defer to Congress' judgment, and restrict its examination of § 236(c) to the rational review test. Respondents suggest the "(unexacting) standard of rationally advancing some legitimate governmental purpose," a standard applied in *Reno v. Flores,* 507 U.S. 292, 305, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

***4** It is clear that lawful resident aliens possess substantive due process rights during deportation proceedings. *See Landon v. Plasencia,* 459 U.S. 21, 33, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982) ("Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."); *see also Flores,* 507 U.S. at 306 ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Mathews v. Diaz,* 426 U.S. 67, 96 S.Ct.

1883, 48 L.Ed.2d 478 (1976).

While lawful resident aliens do enjoy substantive due process rights, Congress has the power to limit those rights. Congress' power over immigration is plenary, and it may accordingly promulgate rules for aliens "that would be unacceptable if applied to citizens." *Fiallo v. Bell,* 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977). It has been stated that "over no conceivable subject is the legislative power of Congress more complete" than over immigration. *Id.* The effect of this extraordinary breadth of Congressional power is to curtail judicial review of immigration policy. As the Supreme Court has stated, "[o]ur cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments, largely immune from judicial control." *Shaughnessy v. Mezei,* 345 U.S. 206, 210, 73 S.Ct. 625, 97 L.Ed. 956 (1953).

Despite Congress' plenary authority over immigration, however, there is a distinction between substantive immigration policy and the procedures by which that policy is implemented. While courts must defer to Congress' authority when reviewing substantive immigration policy, there is no such restriction to their review of the rules that implement or enforce that policy. Specifically, Congress' decisions about the admissibility and deportability of aliens must be accorded deference by the courts, but the courts may require Congress to "respect the procedural safeguards of due process" in the *implementation* of those decisions. *Fiallo,* 430 U.S. at 792 n. 4. The Supreme Court has recognized this distinction between the level of review appropriate for substantive versus procedural immigration legislation. In *INS v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), for example, the Court, while reviewing a challenge to the constitutionality of a section of the INA, stated that

> [t]he plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is *whether Congress has chosen a constitutionally permissible means of implementing that power.* As we made clear in *Buckley v. Valeo:* "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *so long as the exercise of that authority does not offend some other constitutional restriction."*

Chadha, 462 U.S. at 940–41 (emphasis added) (internal citations omitted). Courts therefore may examine the procedural means by which Congress reaches its substantive immigration ends under a stricter standard than pure deference.

***5** Several courts have recently held that § 236(c) is a procedural statute, rather than one embodying substantive immigration policy. "Indefinite detention of aliens ordered deported is not a matter of immigration policy; it is only a means by which the government implements Congress' directives." *Phan v. Reno,* 56 F.Supp.2d 1149, 1999 WL 521980 (W.D.Wash.1999). The court in *Martinez v. Greene,* 20 F.Supp.2d 1275, 1281 (D.Colo.1998), in examining a facial challenge to § 236(c) identical to the case at bar, characterized the petitioner's case as "challeng[ing] the method by which the immigration statutes are implemented," rather than implicating Congress' plenary authority over substantive immigration policy.

The Court agrees that § 236(c) is not substantive immigration legislation. The statute does not determine which aliens are deportable and which are not, nor does it confer or deny entitlements. Such determinations and categorical "line-drawing" are the hallmarks of immigration policy legislation. *See Fiallo,* 430 U.S. at 797–98. In contrast, § 236(c) simply delineates the procedure for detaining aliens already determined by Congress to be deportable. As Judge Smith stated in *Danh v. Demore,* —— F.Supp.2d ——, Slip Op. C 99–1531 FMS (N.D.Cal.1999), "[m]andatory detention with no possibility of bond is not a simple ... policy decision that a system of ordered liberty can entrust solely to the political branches of government. It is only ancillary to substantive immigration policy and, as such, does not escape searching judicial review." *Danh,* —— F.Supp.2d at ——, Slip Op. at 12:9–14. Since § 236(c) is only "a method by which the immigration statutes are implemented," and accordingly not entitled to deferential review, the Court applies the *Salerno* standard. *Martinez,* 28 F.Supp.2d at 1281.

Respondents' reliance on the standard used in *Flores* is accordingly inapposite. In *Flores,* juvenile aliens brought a class action suit against the INS for violations of substantive due process. The juvenile aliens were detained under INS regulations preventing their release unless they could show they could be released to the custody of a parent or legal guardian. *Flores,* 507 U.S. at 294–98. In determining which standard of review to apply, the Supreme Court rejected a strict scrutiny standard because a fundamental liberty interest was not at stake. *See id.* at 299–300, 305–306. First, as juveniles, the petitioners were always in some form of custody, and accordingly had no fundamental right to be released into a non-custodial setting. *See id.* at 301–03. Second, the petitioners were not being detained in jail or prison, but in low-security facilities meeting "state licensing requirements for shelter care, foster care ... and related services to dependent children." *Id.* at 298. Finally, as aliens, the petitioners were subject to Congress' plenary authority over immigration, and accordingly possessed a lesser right to substantive due process.

***6** *Flores* is distinguishable from the present case. Unlike

the juvenile aliens in *Flores,* criminal aliens detained by § 236(c) are adults, with a full interest in being free from custody, and are in fact detained in jail, rather than in surroundings approximating foster care. Nor is Congress' plenary authority over immigration dispositive, since the regulations at issue here reflect not substantive immigration policy, but rather procedural implementation of it.

Respondents also contend that since *Salerno* was a criminal case, and deportation proceedings are classified as civil proceedings, the *Salerno* standard is inapposite. Respondents argue that as criminal defendants are afforded procedural safeguards to which aliens are not entitled, such as the presumption of innocence and the right to a speedy trial, a standard of review that evolved from a criminal case cannot be applicable to aliens. The Court finds this argument unpersuasive. What is at stake is not the presumption of innocence or right to a speedy trial, but the right to be free from bodily restraint. While aliens may not possess rights to the former, they certainly enjoy a right to the latter. *See Wong Wing v. United States,* 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896) ("all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments."); *see also Harisiades v. Shaughnessy,* 342 U.S. 580, 586–87 n. 9, 72 S.Ct. 512, 96 L.Ed. 586 (1952) (immigrants stand "on an equal footing with citizens" under the Constitution with respect to protection of personal liberty). As the court stated in *Danh,* "[i]t strains the imagination that individuals detained because of criminal activity should have more rights than those held simply for regulatory purposes." *Danh,* ––F.Supp.2d at ––––, Slip Op. at 13:9–11. The fact that the *Salerno* standard emerged from a criminal case does not obviate its relevance here. Indeed, the *Salerno* test has been used by all courts reviewing the constitutionality of § 236(c) but one. *See Diaz–Zaldierna v. Fasano,* 43 F.Supp.2d 1114 (S.D.Cal.1999), *Van Eeton v. Beebe,* 49 F.Supp.2d 1186, 1999 WL 312130 (D.Or.1999), *Martinez,* 28 F.Supp.2d 1275, *Danh,* –– F.Supp.2d ––––, Slip. Op. C 99–1531 FMS; *but see Parra,* 172 F.3d 954.

In applying the *Salerno* test,[5] a court must first determine whether the infringement on liberty at issue is "impermissible punishment or permissible regulation." *Salerno,* 481 U.S. at 747. The Supreme Court has held that deportation is regulatory, not punitive. *See INS v. Lopez–Mendoza,* 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984); *see also Carlson v. Landon,* 342 U.S. 524, 537, 72 S.Ct. 525, 96 L.Ed. 547 (1952). As for the legitimacy of the regulation, in its enactment of IIRIRA, which amended the INA to include § 236(c), Congress referred to several valid motivations. Congress wished to prevent criminal aliens from absconding during their removal proceedings, as at the time twenty percent of criminal aliens released on bond did not return for deportation. Congress was also motivated by the need to protect the public from potentially dangerous criminal aliens, and to restore public confidence in the immigration system. *See* S.Rep. No. 48, 104th Cong., 1st Sess. (1995) (1995 WL 170285 (Leg.Hist.) at 1–6, 9, 18–23). These are legitimate and permissible goals, well within Congress' plenary power over immigration policy. Accordingly, § 236(c) passes the first prong of the *Salerno* test as permissible regulation.

5 At oral argument, the Court inquired of government counsel what the result in this case should be if the *Salerno* test were applied to § 236(c), and counsel responded that petitioner Kim would get his bail hearing. However, since respondent's briefing suggests to the contrary, the Court will analyze the statute in light of *Salerno.*

***7** The next step is to determine whether the infringement on liberty is "excessive in relation to the regulatory goal Congress sought to achieve." *Salerno,* 481 U.S. at 747. Respondents argue that in light of a twenty percent abscondence rate, mandatory detention for all criminal aliens pending deportation is not excessive. The Court disagrees. To obtain its goals regarding a relatively small minority of criminal aliens, section 236(c) applies to *every* criminal alien an irrebuttable presumption that they pose a flight risk and/or a danger to the community. In *Carlson,* the Supreme Court stated that such blanket presumptions, with no safeguards to protect due process rights, are impermissible. In that case, the Supreme Court affirmed the detention of Communist aliens, but specifically cited the Attorney General's discretion to grant bond as a factor in its decision. The Court stated, "[o]f course purpose to injure *could not be imputed generally to all aliens subject to deportation." Carlson,* 342 U.S. at 538 (emphasis added). Yet this is precisely what § 236(c) does. While the government's goals are valid, § 236(c) simply paints with too broad a brush. That twenty percent of criminal aliens do not return for deportation cannot justify mandatory detention without a bail hearing for the remaining eighty percent. As the *Martinez* court stated, "Due process demands more." *Martinez,* 28 F. Supp 2d at 1283. Less excessive means exist for accomplishing Congress' goals, such as having individualized bail hearings. Section 236(c) accordingly fails the second prong of the *Salerno* test, as an excessive infringement of criminal aliens' rights to substantive due process.

Salerno and *Carlson* both support this result. In *Salerno,* the Supreme Court upheld the Bail Reform Act's pretrial detention measures, in part because "[t]he arrestee [was] entitled to a prompt detention hearing" and the Attorney General had discretion to grant bail. *Salerno,* 481 U.S. at 747. In contrast, the Attorney General has no discretion to grant either bail or a bail hearing under § 236(c), as the

statute requires mandatory detention. In the absence of that discretion, § 236(c)'s infringement on the aliens' liberty interest becomes excessive. In *Carlson,* the Attorney General had discretion to release Communist aliens on bail pending their deportation, but chose to deny bail. The Supreme Court upheld the Attorney General's decision as falling within his discretion, but pointed out that the *existence* of that discretion was crucial. *Carlson,* 342 U.S. at 538. Again, § 236(c) contains no discretionary provisions. Instead, a purpose to injure is imputed generally to all aliens subject to deportation, in direct contradiction to the Supreme Court's admonition in *Carlson.* This blanket presumption is simply excessive in relation to Congress' goals.

Other district courts have granted petitions for writs of habeas corpus based on § 236(c), but have generally restricted their analysis to the constitutionality of § 236(c) as applied to individual petitioners. *See, e.g., Van Eeton,* 49 F.Supp.2d 1186, 1999 WL 312130, *Danh,* —— F.Supp.2d ——, Slip. Op. C 99–1531 FMS, *Phan,* 56 F.Supp.2d 1149, 1999 WL 521980. The district court in *Diaz–Zaldierna* found that § 236(c) was not unconstitutional as applied to the petitioner, in part because the petitioner had a hearing scheduled to determine whether § 236(c) even applied to his case. *Diaz–Zaldierna,* 43 F.Supp.2d at 1120. Because these courts conducted as-applied analysis, they did not reach the question now before this Court, whether § 236(c) is facially unconstitutional.

***8** The two courts that have addressed this facial issue have reached different conclusions. *Martinez* held that the mandatory detention strictures of § 236(c) are excessive in light of Congress' goals, and accordingly that they violate substantive due process. *Martinez,* 28 F.Supp. at 1282. In *Parra,* the Seventh Circuit applied a purely deferential standard to its review of § 236(c), and found that it "plainly is within the power of Congress." *Parra,* 172 F.3d at 958. *Parra'* s result, however, is distinguishable. The *Parra* court did not apply the *Salerno* test, as the court deferred to Congress' plenary power over immigration and accordingly did not look beyond the rational review test.[6] As explained above, this Court has determined that § 236(c) is a procedural implementation of immigration policy, and so examination of the statute under the *Salerno* test is appropriate. Under the second prong of that test, § 236(c) is excessive in light of its goals.

[6] In addition, the *Parra* court analyzed the constitutionality of § 236(c) in reference to an abscondence rate of 90%. *Parra,* 172 F.3d at 956. The Congressional records, however, indicate a 20% abscondence rate. *See* S.Rep. No. 48, 104th Cong., 1st Sess., (1995) (1995 WL 170285 (Leg.Hist.) At 1–6, 9, 18–23. Respondents refer to the 20% abscondence rate, as did the court in *Danh. See* Respondents' Opposition, 13:19–20; *see also Danh,* —— F. Supp 2d ——, Slip Op. at 13:26–14:2.

For the reasons stated above, the Court finds that § 236(c) is unconstitutional on its face, having failed the second prong of the *Salerno* test. Mandatory detention of all criminal aliens under § 236(c) is plainly excessive in light of Congress' goals, and therefore violates substantive due process.

b. Procedural due process.

Kim also argues that § 236(c)(1) violates criminal aliens' rights to procedural due process.[7] "[P]rocedural due process requires that [a] restriction [on liberty] be implemented fairly." *Salerno,* 481 U.S. at 746. To determine whether a given procedure, statute, or governmental conduct violates a petitioner's right to due process, courts apply the three-step analysis from *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The court must evaluate the private interest that will be affected by the official action; the risk of erroneous deprivation of the private interest, and the effect of any additional safeguards on that risk; and the government's interest in maintaining the current procedures. *See id.*

[7] Once a court finds that a petitioner's substantive due process rights have been violated, it is not strictly necessary to evaluate possible violation of his or her procedural due process rights. "Only when a restriction on liberty survives substantive due process scrutiny does the further question of whether the restriction is implemented in a procedurally fair manner become ripe for consideration." *Danh,* —— F. Supp at ——, Slip Op. at 20:11–14. However, the Court will consider petitioner's procedural due process claim, should it later be determined that § 236(c) does not violate substantive due process.

Despite respondents' contentions to the contrary, resident legal aliens are entitled to procedural due process protection under *Mathews.* Respondents argue that "[b]ecause of Congress' plenary power over immigration and its right to detain aliens as part of the removal process, all that procedural due process requires is 'some level of individualized determination' to ensure that the alien's detention pending his removal is not arbitrary." Respondents' Return and Opposition to Petition for Writ of Habeas Corpus, 15:3–6. Respondents' assertion is misplaced, as § 236(c), a procedural implementation of Congress' immigration policy, does not merit this kind of deferential review. The Court also notes that many courts have applied *Mathews* when reviewing both § 236(c) and its predecessor, ADAA § 7343(a). *See, e.g., Van Eeton,*

—— F.Supp. ——, 1999 WL 312130; *Martinez,* 28 F.Supp. at 1282; *Leader v. Blackman,* 744 F.Supp. 500, 508 (S.D.N.Y.1990); *Paxton v. INS,* 745 F.Supp. 1261, 1266 (E.D.Mich.1990). Respondents' position seems particularly untenable since *Parra,* the case upon which respondents heavily rely for many of their arguments, also applied the *Mathews* test to determine the petitioner's procedural due process rights. Accordingly, the procedural due process rights of aliens under § 236(c) must be evaluated under the *Mathews* test.

***9** The private interest at stake here is "great—the right to be free of indefinite and possible long-term detention pending a deportability determination." *Martinez,* 28 F.Supp.2d at 1283. The *Danh* court called the private interest "fundamental to any democratic society: the right to freedom from arbitrary detention." *Danh,* —— F.Supp.2d at ——, Slip Op. at 21:25–27. The risk of erroneous deprivation of that interest is substantial, since under § 236(c) no procedures exist to determine whether the given individual merits release on bond. Additional safeguards are readily available, as for example the bond hearing procedures which were in place during the transitional period under IIRIRA § 303(b)(3). Finally, the burden on the government in changing its procedures is minimal. Since criminal aliens already must come before an Immigration Judge for a determination of whether § 236(c) applies to them, the government could reinstitute bond hearings at that same time. While the government's interest in preventing alien abscondence and protecting the public is strong, it is insufficient to overrule the stronger private interest and high risk of erroneous deprivation of that private interest. Accordingly, the Court finds that § 236(c) violates criminal aliens' rights to procedural due process.

CONCLUSION

For the foregoing reasons, the Court finds and declares that § 236(c) violates criminal aliens' rights to substantive and procedural due process. The mandatory detention provision of § 236(c) fails to provide any meaningful procedure to detained aliens; accordingly, there are no circumstances under which § 236(c) could be valid. It is therefore unconstitutional on its face. Kim's application for a writ of habeas corpus is GRANTED to the extent that respondents shall promptly provide Kim with an individualized bond hearing, pursuant to IIRIRA's Transition Custody Rules, IIRIRA § 303(b)(3), or otherwise as respondents may elect, to determine whether Kim is a flight risk or a danger to the community.

IT IS SO ORDERED.