



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

January 23, 2002

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Senate Legal Counsel  
United States Senate  
Room 642  
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Washington, D.C. 20510-7250

Re: Adverse Judicial Decisions Regarding Constitutionality  
of 8 U.S.C. 1226(c)

Dear Ms. Bryan:

I am writing to inform you about a number of judicial decisions holding 8 U.S.C. 1226(c) unconstitutional on due process grounds.

Section 236(c) of the Immigration and Nationality Act, which is codified as 8 U.S.C. 1226(c), requires the Attorney General to detain aliens who have committed specified offenses and are removable from the United States. Section 1226(c) prohibits release of those removable aliens except in very limited circumstances. Two courts of appeals and district courts in various circuits have held in habeas corpus proceedings that Section 1226(c) violates due process (at least with respect to particular aliens) because it does not provide for individualized bond hearings.

The Department of Justice is defending the constitutionality of mandatory detention under Section 1226(c) in a number of pending cases. We have successfully defended the constitutionality of Section 1226(c) in the Seventh Circuit. See Parra v. Perryman, 172 F.3d 954 (1999). The Third Circuit and the Ninth Circuit, however, have found Section 1226(c) violative of due process as applied. See Patel v. Zemski, 2001 WL 1636227 (3d Cir. Dec. 19, 2001); Kim v. Ziqlar, 2002 WL 21987 (9th Cir. Jan. 9, 2002). Petitions for rehearing en banc in Patel and Kim would be due within 45 days of the panel's decision in each case, while petitions for certiorari would be due within 90 days of the court of appeals' decisions. The Department currently has other appeals pending to defend the constitutionality of Section 1226(c), including in the Second Circuit (Zgombic v. Farguharson, No. 00-6165 (supplemental brief filed Oct. 2001)), and Gutierrez-Para v. Ashcroft (notice of appeal from the Connecticut district court (Civ. No. 3:01CV1183) filed Dec. 3,

Patricia Mack Bryan, Esq.  
January 23, 2002  
page 2

2001)); Fourth Circuit (Welch v. Ashcroft, No. 00-7665 (argued June 5, 2001), and other cases); Sixth Circuit (Danesh v. Jenifer, No. 01-1735 (brief filed Aug. 2001)); and Tenth Circuit (Sosa v. Greene, No. 00-1339, and other cases (all argued Jan. 16, 2002)).

The Department appealed from additional adverse district court decisions in cases that became moot for various reasons. A case may become moot, for example, when the alien obtains relief from the underlying criminal conviction that triggered detention under Section 1226(c), or when the alien's removal proceedings are completed. When a case becomes moot an appellate court cannot rule on the merits of the appeal. The most it can do is vacate the judgment of the lower court. In the mooted appeals, we have filed motions requesting that the appellate court vacate the adverse district court judgment and remand the case to the district court with instructions to dismiss the case as moot. We have been successful in obtaining such a vacatur and remand order in only a few cases. In other cases the courts of appeals have simply dismissed the appeal.<sup>1</sup>

Up to this point, the Department has followed the practice of filing motions to request vacatur and remand in the mooted Section 1226(c) cases because the adverse district court rulings affect the constitutionality of a federal statute. I have decided, however, not to continue that practice in all Section 1226(c) cases that become moot pending appeal.

Equitable principles govern a court of appeals' determination of whether to order remand and vacatur in a mooted case. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 28-29 (1994); United States v. Munsingwear, 340 U.S. 36 (1950). The government accordingly has found it necessary to provide a fact-

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<sup>1</sup> In one moot case, Thai v. INS, No. 00-35824 (9th Cir.), the Department did not file a motion for vacatur and remand because the appeal was misidentified as involving detention under 8 U.S.C. 1231(a)(6), which governs detention of an alien under a final order of removal following expiration of the removal period. Because of the misidentification, the Ninth Circuit held the appeal in abeyance pending the Supreme Court's review of Ma v. Reno, 208 F.3d 815 (9th Cir. 2000), which was consolidated and decided with Zadvydas v. Davis, 121 S. Ct. 2491 (2001). In Zadvydas, the Court held that Section 1231(a)(6), "read in light of the Constitution's demands," 121 S. Ct. at 2498, limits detention after the alien's removal period to a period reasonably necessary to effectuate the alien's removal. After Zadvydas, the Thai case was dismissed because it had been held in abeyance and the government did not file a motion for vacatur and remand.

Patricia Mack Bryan, Esq.  
January 23, 2002  
page 3

intensive analysis of the cause of the mootness. In many cases, that has entailed an examination of the history of the alien's administrative removal proceedings, the federal court litigation of the detention issue, and any other litigation relating to the alien's underlying conviction or grounds for removal. Filing such motions involves a significant expenditure of government resources that, I believe, often may not be warranted. Entry of a vacatur order merely vacates a single district court order that has become moot with respect to the particular alien seeking relief from detention, and that has no binding effect in other cases. Furthermore, several courts of appeals have now issued decisions addressing the constitutionality of Section 1226(c) and others are expected to do so soon. Individual district court decisions in cases that have become moot thus will be of diminishing significance even on their own terms.

I therefore write to inform you of my determination that, as a general matter, the Department henceforth will not routinely file a motion for vacatur and remand in all Section 1226(c) appeals that become moot. The Department will, however, file such a motion when the adverse district court ruling has unusual, ongoing significance that justifies the motion or other circumstances warrant that course. Likewise, and for similar reasons, I have determined as a general matter not to seek further review of court of appeals' orders denying a government motion to vacate an adverse district court judgment in a moot Section 1226(c) case.

I also wish to advise you that I determined not to pursue an appeal in Vang v. Ashcroft, 149 F.Supp.2d 1027 (N.D. Ill.). The district court in that case held, notwithstanding the Seventh Circuit's decision in Parra v. Perryman, that Section 1226(c) violated due process as applied to three aliens who had "demonstrated at least some hope" that they ultimately would be found not removable from the United States. Id. at 1038. The Vang case was moot at the time of judgment as to two of the three aliens because their removal proceedings already had been completed. (Petitioner Yakobashvile had been found removable; petitioner Vue had been granted asylum.) With respect to those two aliens, the Department has moved in the district court for relief from the judgment under Fed. R. Civ. P. 60(b). An immigration judge granted the third alien, Mireles, cancellation of removal and he has been free on his own recognizance since April 1999. Although the INS has appealed the immigration judge's ruling on Mireles's removal, I have determined that the administrative cancellation of removal and Mireles's longstanding freedom from detention together make his case an unsuitable vehicle for appellate consideration of the

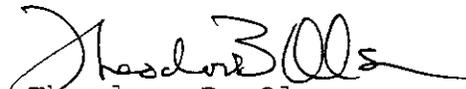
Patricia Mack Bryan, Esq.  
January 23, 2002  
page 4

constitutionality of mandatory detention under Section 1226(c). A copy of the Vang decision is enclosed.<sup>2</sup>

Finally, I have determined not to pursue an appeal in Acaiturri v. Ashcroft, No. CV-01-1369 (CPS) (E.D.N.Y.). In that Section 1226(c) case, the government moved in the district court under Federal Rule of Civil Procedure 59(e) to vacate an adverse judgment as moot. The district court did not vacate its unpublished decision (which is attached), but it did relieve the government from the operation of its judgment. Thus, the decision has no continuing effect.

Please let me know if you have any questions about this matter.

Very truly yours,

  
Theodore B. Olson  
Solicitor General

Enclosures

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<sup>2</sup> In a letter dated August 24, 2000, former Solicitor General Waxman explained that he had made a case-specific determination not to pursue appeal in another case (Starobinets v. Greene, No. B-00-B-211 (D. Colo.)) in which the district court ruled that mandatory detention under Section 1226(c) was unconstitutional. I recently learned of another adverse district court decision addressing the constitutionality of Section 1226(c) that the government did not appeal. See Szeto v. Reno, 2000 WL 630869 (N.D. Cal.). The various governmental components involved in Szeto in the district court all agreed that no appeal should be pursued because of the particular circumstances of that case and the case was inadvertently not brought to the attention of this office within the time allowed for an appeal. In addition, the government's appeal in Baidas v. INS, No. 01-1239 (6th Cir.), was mistakenly dismissed based on the erroneous belief that the case was moot, and the government's notice of appeal in Sharma v. Ashcroft, No. 01-1231 (E.D. Pa.), was denied because of a mistake in filing the notice of appeal.