



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

August 20, 2002

Patricia Mack Bryan, Esq.
Senate Legal Counsel
United States Senate
Room 642
Senate Hart Office Building
Washington, D.C. 20510-7250

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

Dear Ms. Bryan:

I am writing to update information provided in my letter to you dated January 23, 2002, which discussed 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. Four courts of appeals (and district courts in various circuits) have now held in habeas corpus proceedings that Section 1226(c) violates due process with respect to particular aliens because it does not provide for individualized bond hearings. See Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001); Radoncic v. Zemski, 28 Fed. Appx. 1113 (3d Cir. 2002), petition for cert. pending, No. 01-1459 (filed Apr. 4, 2002); Welch v. Ashcroft, 293 F.3d 219 (4th Cir. 2002); Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002), petition for cert. granted sub nom. DeMore v. Kim, No. 01-1491 (June 28, 2002); Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002), petition for cert. pending, No. 01-1616 (filed May 3, 2002). The Seventh Circuit, however, upheld the constitutionality of Section 1226(c) in Parra v. Perryman, 172 F.3d 954 (1999). The Department of Justice currently has other appeals pending to defend the constitutionality of Section 1226(c), including Zgombic v. Farquharson, No. 00-6165 (2d Cir.) (to be argued Sept. 3, 2002), and Ly v. Hanson, No. 01-3016 (6th Cir.) (argued July 31, 2002).

As part of the Department's defense of Section 1226(c), I have filed petitions for writs of certiorari in several cases, including Radoncic, Kim, and Hoang. On June 28, 2002, the Supreme Court

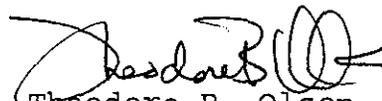
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granted the government's certiorari petition in Kim. That case should be argued before the Supreme Court next fall or winter. The Supreme Court has not acted upon the government's other petitions involving the constitutionality of Section 1226(c).

I also am writing to advise you that I have decided not to pursue review of a non-moot federal district court decision that overrode the mandatory detention requirement of Section 1226(c). See Jerez v. Ashcroft, No. 3:CV-01-2263 (M.D. Pa. Jan. 10, 2002). The United States Attorney's Office conceded in the district court in Jerez that the case was controlled by the Third Circuit's decision in Patel, and requested that the matter be remanded to the immigration court for a bond determination consistent with Patel. In an unpublished order issued on January 10, 2002, the district court -- citing the government's concession that the case was controlled by Patel -- dismissed the alien's habeas corpus petition without prejudice and remanded the case to the immigration court for a custody determination. On January 31, 2002, an immigration judge granted the alien bond, and on February 22, 2002, the alien posted bond and was released. Because the Jerez case was resolved consistent with the government's recommendation to the district court, it apparently was not regarded as an adverse decision and I was not timely notified of the decision to consider it for possible appeal. The Third Circuit, however, has already addressed the question of the constitutionality of Section 1226(c) in Patel and Radoncic, so an appeal would have served only to maintain proceedings in this particular case for the time being until the Supreme Court rules in Kim. A copy of the Jerez decision is attached.

Please let me know if you have any questions about these matters.

Very truly yours,


Theodore B. Olson
Solicitor General

Enclosure