Noel Saleh, Respondent's Counsel
ACLU OF MICHIGAN
60 W. Hancock St.
Detroit, MI 48201
(313) 578-6800, ext. 810

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of: PARLAK, IBRAHIM In Removal Proceedings	File No. A71 803 930

SUPPLEMENTAL BRIEF SUPPORTING RESPONDENT'S BOND APPEAL

Of Counsel:

John Smietanka
Anne Buckleitner
SMIETANKA LAW OFFICE
0-152 44th St., SW, Suite 1
Grandville, MI 49418
(616) 667-2217

Geoffrey Gilbert
19530 Beaver Dam Rd.
Galien, MI 49113
(269) 545-2006

David Foster
John J. Marhoefer
LATHAM & WATKINS LLP
233 S. Wacker, Suite 5800
Chicago, IL 60606
(312) 876-7700

INTRODUCTION

On September 29, 2004, this Board had before it the appellate briefs of both DHS and Respondent Ibrahim Parlak on the issue of the Immigration Judge's ("IJ's") denial of Mr. Parlak's bond. The IJ's bond decision was based upon two premises. The first premise was that Mr. Parlak was an alien "described in" INA §237(a)(4)(B) and thus subject to mandatory detention pursuant to 8 C.F.R. §1003.19(h)(2)(i). The second premise was that Mr. Parlak was a flight risk, primarily because he was deportable as an aggravated felon. The original appellate brief filed by DHS essentially parroted its bond brief and the IJ's decision. Mr. Parlak's appeal carefully demonstrated that both of the IJ's premises for denying bond were indefensible.

As explained in that brief, the IJ's first premise collides head-on with INA §236A, which allows only the Attorney General or his Deputy to detain an alien for suspicion of terrorism without charging the alien first. This non-delegable duty, enacted as part of the USA PATRIOT act, also requires the Attorney General to charge the alien for terrorism, either as a criminal or as a deportable alien, within seven days after detention commences. If no charge is filed, then the alien must be released. Mr. Parlak's brief demonstrated that the DHS's reliance on 8 C.F.R. §1003.19(h)(2)(i), in light of the subsequent enactment of the Patriot Act, was indefensible. See Respondent Appeal Brief at 7-11.

Mr. Parlak's brief also demonstrated that his detention based on the purported aggravated felony charge was unjustifiable. There is simply no good faith basis for asserting that Mr. Parlak's Kurdish separatism conviction occurred at any time other than March 19, 1990—well before his admission to the United States. Because this conviction was pre-admission, Mr. Parlak was not deportable as an aggravated felon. See id. at 19-22. With both grounds for

mandatory detention negated,[1] the broad and uncontroverted evidence of Mr. Parlak's ties to his community, as well as his perfect record of appearing at his immigration hearings, demonstrated beyond all doubt that Mr. Parlak was not a flight risk. See id. at 25-32.

Rather than admit error and release Mr. Parlak—a man who never should have been detained in the first place—DHS has now attempted to salvage its position by belatedly charging Mr. Parlak with deportability for terrorism. On October 14, 2004—twelve days before Mr. Parlak's scheduled removal hearing—the DHS issued new charges claiming that Mr. Parlak was deportable as someone who had "engaged in" terrorist activity pursuant to INA §237(a)(4)(B). See DHS Reply Brief, Exhibit 1. These new charges were not based upon new information. Instead, as the DHS's Reply Brief references repeatedly, the "new" terrorism charges were based upon three old things: (1) Mr. Parlak's 13-year-old asylum application, in which he disclosed his involvement with Kurdish independence and the PKK; (2) Mr. Parlak's testimony at his February 11, 2004 removal hearing; and (3) a series of documents from the Turkish security courts that DHS had in its custody since July of this year, when DHS filed its aggravated felony charges. All of this information had been available to DHS for months if not years.

The next day, DHS filed its supplemental reply brief before this Board claiming that its new terrorism charges made moot Mr. Parlak's appeal from the denial of bond. But Mr. Parlak's bond appeal is anything but moot. The government's latest charges are every bit as indefensible a basis for mandatory detention as were their earlier charges. Accordingly, this Board should vacate the IJ's decision denying bond and allow Mr. Parlak to return home to his community and seven year-old daughter.

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[1] The elimination of the aggravated felony charge at that time would have made multiple forms of relief from removal available to Mr. Parlak, including waiver of inadmissibility, withholding of deportation, cancellation of removal, and the Convention against Torture ("CAT").

ARGUMENT

A. The DHS has no answer to INA §236A.

The DHS does not even attempt to defend its flouting of INA §236A, which permits *only* the Attorney General or his Deputy to detain an alien on suspicion of terrorism without charging the alien first. It instead argues only that its violation of §236A can be ignored on mootness grounds in light of the eleventh-hour addition of terrorism charges. See DHS Reply Brief at 12. However, the DHS fails to grasp that its misconduct would be "capable of repetition, yet evading review" were the Board to ignore it. S. Pac. Ry. Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911). This is impermissible.

The question involved—whether DHS can mandatorily detain aliens for terrorism without charging them first, pursuant to 8 C.F.R. §1003.19(h)(2)(i)—is continuing and capable of repetition. Without judicial review of this question, *nothing* prevents DHS from repeating this same abuse of its prosecutorial discretion in other cases. DHS would be free to incarcerate lawful permanent residents on mere suspicion of terrorism, keep them in jail for months, and formally charge them with removability for terrorism only after a respondent raised the §236A argument. If such conduct were sanctioned in this case by dismissing this appeal as moot, DHS would be free in future cases to disregard the Patriot Act's mandate—that the alien be charged with terrorism within seven days after detention begins or be released—and claim mootness on an unfettered basis and with impunity. This would be contrary to well-settled Supreme Court precedent. See, e.g., Moore v. Olgivie, 394 U.S. 814, 816 (1969) (allowing an action for declaratory judgment regarding state election nominating practices even though the election had already been held); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 178-79 (1968) (allowing challenge of an injunction even though the injunction had expired).

Moreover, Mr. Parlak's §236A argument remains ripe because reversing the IJ's decision that Mr. Parlak is "properly included" as "described in" §237(a)(4)(B) leaves INA §236(c)(1) as the only basis for Mr. Parlak's detention. As we explain below, basing mandatory detention solely on §236(c)(1) grounds creates an entirely new set of issues. The DHS's eleventh-hour terrorism charges do not foreclose judicial inquiry into these issues—they *require it*.

B. Denying bond to Mr. Parlak on the basis of §237(a)(4)(B), as applied to §236(c)(1), would be unconstitutional.

In its Reply Brief, DHS contends that "Parlak's argument that 237(a)(4)(B) only applies to terrorist activity engaged in after admission is preposterous." See DHS Reply Brief at 20. DHS is confusing the very distinct issues of mandatory detention and removability based upon §237(a)(4)(B)'s applicability. From a constitutional perspective, these two issues are apples and oranges: subjecting an alien to mandatory detention implicates the Fifth Amendment in a way that classification of deportable aliens does not. The only "preposterous" interpretation of §237(a)(4)(B), as it applies to §236(c)(1), would be one that deprived Mr. Parlak of his substantive due process rights. Such an interpretation by the Board would be unconstitutional and thus impermissible under INS v. St. Cyr, 533 U.S. 289 (2001).

The plenary power of Congress to legislate substantive immigration laws—relating to which classes of aliens are admissible and deportable—does not extend to its legislation of rules implementing those laws, which must be constitutionally permissible. INS v. Chada, 462 U.S. 919, 940-41 (1983). For example, it is well established that lawful permanent residents of the United States receive the full protection of the Fifth Amendment, and may not be deprived of life, liberty or property without due process of law. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953)(footnote omitted); Mathews v. Diaz, 426 U.S. 67, 96 (1976). A lawful permanent

resident in removal proceedings retains these rights until an administratively final order of removal deprives him of that status. Matter of Mendoza-Sandino, 22 I.&N. 1236, 1251 (BIA 2000). Under the Fifth Amendment, one of these rights is to be free of arbitrary confinement during removal proceedings. Doherty v. Thornburgh, 943 F.2d 204, 209 (2nd Cir. 1991); see also 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 from arbitrary governmental action"). For this reason, mandatory detention on the basis of rigid interpretation of §236(c)(1) has been held to deprive an immigrant of a fundamental liberty interest. See e.g., Danh v. Demore, 59 F. Supp. 2d 994, 1000 (N.D. Cal. 1999); Small v. Reno, 127 F. Supp. 2d 305, 319 (D. Conn. 2000). Subjecting Mr. Parlak to mandatory detention based on §236(c)(1) as "informed" by DHS's eleventh-hour terrorism charges thus implicates a fundamental liberty interest and is subject to strict scrutiny. Reno v. Flores, 507 U.S. 292, 302 (1993).

As a matter of strict scrutiny, the crucial question is whether mandatory detention of Mr. Parlak on the basis of §237(a)(4)(B) charges is narrowly tailored to serve a compelling government interest. Specifically, "the challenged statute must be regulatory, not punitive, and if the statute is regulatory, it must not appear excessive in relation to the purpose behind the statute." United States v. Salerno, 481 U.S. 739, 747 (1987). Immigration proceedings are regulatory, not punitive, which satisfies the first prong of the Salerno test. Carlson v. Landon, 342 U.S. 524, 537 (1952). Turning to Salerno's second prong, subjecting Mr. Parlak to mandatory detention on the basis of §237(a)(4)(B) is clearly excessive to that statute's purposes.

Congress has articulated four reasons for enacting the mandatory detention provisions of §236(c)(1), inclusive of §237(a)(4)(B) grounds: (1) protecting the public from potentially dangerous criminal and terrorist aliens; (2) risk of flight during removal proceedings; (3)

insuring attendance at removal hearings; and (4) restoring the public's faith in the immigration system. Zgombic v. Farquharson, 89 F. Supp. 2d 200, 235 n. 13 (citing S. Rep. No. 104-48 at 1-6, 9, 18-23 (Apr. 7, 1995)). These goals are certainly reasonable and legitimate. However, *nothing* in these goals suggests that they apply to Mr. Parlak and these undisputed facts:

(1) Any alleged "terrorist activity" by Mr. Parlak on behalf of the Kurds in Turkey occurred in the 1980s—well before his admission here—and never threatened the national security of the United States. See DHS Reply Brief at 2-21 (in which, in its 19-page diatribe about Mr. Parlak's activities in Turkey, DHS *never once* claims that Mr. Parlak has been a threat to the United States);

(2) Mr. Parlak has lived lawfully and without incident in the United States since his entry to our country in 1991. See Respondent Appeal Brief at 30;

(3) Mr. Parlak has become a home owner, business owner of Café Gulistan and leader of his community in southwest Michigan, as evidenced by the dozens of affidavits and media articles supporting his release. See id. Exhibits 13-28;

(4) Mr. Parlak has dutifully attended every immigration hearing without fail. See id. at 30-31;

(5) Mr. Parlak is the loving father of a seven year-old U.S. citizen daughter. See id. at 26-28; and

(6) Mr. Parlak is vigorously contesting his removal proceedings and is eager to remain in the United States.

On these facts, to base mandatory detention on pre-admission acts that occurred over sixteen years ago and for which Mr. Parlak was imprisoned in Turkey would be excessive and

violate his substantive due process rights.[2] In fact, as noted in Mr. Parlak's bond appeal, the Board has *never* before affirmed mandatory detention on the basis of pre-admission "terrorist activity." See id. at 13-14. It is unlikely that such an application of §237(a)(4)(B) could withstand constitutional scrutiny in a *habeas* proceeding.[3]

Mr. Parlak does not ask the Board to declare his mandatory detention unconstitutional based upon the application of §237(a)(4)(B); indeed, the Board is without authority to do so. However, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [the Board is] obligated to construe the statute to avoid such problems." St. Cyr, 533 U.S. at 299-300. In his bond appeal, Mr. Parlak presented an "alternative" interpretation of §237(a)(4)(B)—that, at the time of IMMACT's enactment in 1991, the statutory language applied only to (a) pre-admission acts for aliens *already here*, and (b) post-admission acts. See Respondent Bond Appeal at 12-16. This interpretation, which creates a well-fitting congruence with §212(a)(3)(B)(i) (governing inadmissibility for pre-admission terrorist activity), would avoid the constitutional problems that

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2 Mr. Parlak in no way concedes that the DHS's §237(a)(4)(B) charges for removal are legitimate and he is contesting them vigorously. Neither Singh-Kaur v. Ashcroft, 2004 WL 2109978 (3rd Cir. 2004) and Denshvar v. Ashcroft, 355 F.3d 615 (6th Cir. 2004), which DHS cites in its Reply Brief, addressed constitutional challenges, which Mr. Parlak plans to raise at or before his removal hearing. Moreover, both cases pertain to removability, not mandatory detention, and are therefore irrelevant to this discussion.

3 Certainly, a procedural due process challenge is warranted as well, as courts have generally found both types of constitutional violations in successful *habeas* challenges to §236(c)(1) detention. See, e.g., Danh, 59 F. Supp. 2d at 1004-05; Small, 127 F. Supp. 2d at 322. "It would make little sense to interpret the fifth amendment as permitting the deprivation of an alien's liberty by the government in a manner that 'shocks the conscience,'...with the single constraint that adequate procedural safeguards be provided before subjecting the alien to such treatment." Doherty, 943 F.2d at 209.

the DHS's suggested interpretation would incur.[4] Therefore, the Board should construe §237(a)(4)(B) narrowly, as suggested by Mr. Parlak,[5] and rule that Mr. Parlak is not "properly included" within the §236(c)(1) category for terrorism.

C. The "formal judgment" of Mr. Parlak's guilt—his conviction *and* sentencing—occurred on March 19, 1990.

The tortured logic employed by DHS in its desperate attempt to "re-convict" Mr. Parlak in 2004 has one fatal flaw: even if one adopts DHS's requirement that a "formal judgment of guilt" requires sentencing, Mr. Parlak was originally sentenced for his Article 125 conviction on March 19, 1990—the same day the Turkish security court found him guilty. DHS fails to confront this dispositive point anywhere in its Reply Brief.

Nor does mere appeal of a sentence by the prosecution change the conviction date. For immigration purposes, it is well settled that one's conviction date remains fixed unless and until the conviction itself is overturned on appeal. Aguilera-Enriquez v. INS, 516 F.2d 565, 570 (6th Cir. 1975); accord, United States v. Garcia-Echaverria, 374 F.3d 440, 445 (6th Cir. 2004). Mr. Parlak is therefore not "properly included" within the §236(c)(1) category for aggravated felons.

D. Mr. Parlak's ties to the community are uncontroverted.

The issue of whether to grant a detained alien bond comes down to two questions: (1) would releasing the detainee present a threat to the community or the United States; and (2) is the detainee likely to abscond? Mr. Parlak has presented overwhelming evidence that the answer

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4 The DHS has elected not to charge Mr. Parlak with removal on the basis of inadmissibility under this provision.

5 In its Reply Brief, DHS asserts that charging someone with removal pursuant to 237(a)(1)(A) "would not trigger the numerous bars to relief that section 237(a)(4)(B) triggers." See DHS Reply Brief at 21. DHS completely misses the point that the superfluity that exists from a "plain reading" of the INA is between §212(a)(3)(B)(i) and §237(a)(4)(B), which both mandate removal for "terrorist activity." Generally, both grounds for removal preclude the same forms of relief—withholding of removal, waiver of inadmissibility, and asylum.

to both questions is "no." See Respondent Appeal Brief at 25-31. The evidence of his lawful residence in the United States and his substantial ties to his community remain undisputed *to this day* by DHS.

E. Continued detention of Mr. Parlak would be impermissibly punitive.

Continued incarceration of Mr. Parlak cannot be squared with the regulatory purposes §236(c)(1) is designed to serve, as Mr. Parlak does not present a threat to his community and is not a flight risk. His more than 90 days in jail (and counting) thus constitute impermissible punishment under the Constitution. "The Fifth Amendment does not permit punishment of [convicted] aliens a second time through immigration laws." Rogowski v. Reno, 94 F. Supp. 2d 177, 185 (D. Conn. 1999). Mr. Parlak served his time long ago for the political offense of Kurdish separatism, and no further punishment has been demanded by the Turkish government. See Respondent Appeal Brief at 5, 21. Imprisoning him a second time serves no regulatory purpose.

Moreover, Mr. Parlak is vigorously contesting his removal and remains statutorily eligible for at least one form of relief from deportation. His removal from the United States is by no means inevitable. In the absence of any threat by Mr. Parlak to the community or national security, continued detention can only be viewed as the DHS's attempt to coerce Mr. Parlak into foregoing his challenge to removal and accepting voluntary deportation. This is unacceptable and contrary to the preventive, regulatory nature of §236(c)(1).

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Foucha, 504 U.S. at 83. The DHS has not come close to establishing why Mr. Parlak should be the "carefully limited exception." The Board should allow Mr. Parlak to return to his community and his seven year-old daughter as he prepares his defense against removal from this country.

CONCLUSION

For the foregoing reasons, Respondent Ibrahim Parlak respectfully requests that the Board of Immigration Appeals vacate the Immigration Judge's order denying bond and order Mr. Parlak released without bail. In the alternative, the Board should reverse the Immigration Judge's order denying bond, and remand the matter with directions to issue a reasonable bond forthwith.

Dated: October 29, 2004

Respectfully Submitted,

Noel Saleh
JJM

Noel Saleh
Counsel for Respondent
ACLU OF MICHIGAN
60 W. Hancock St.
Detroit, MI 48201
(313) 578-6800, ext. 810

Of Counsel:

John Smietanka
Anne Buckleitner
SMIETANKA LAW OFFICE
0-155 44th St., SW, Suite 1
Grandville, MI 49418
(616) 667-2217

Geoffrey Gilbert
19530 Beaver Dam Rd.
Galien, MI 49113
(269) 545-2006

David Foster
John J. Marhoefer
LATHAM & WATKINS LLP
233 S. Wacker, Suite 5800
Chicago, IL 60606
(312) 876-7700

CERTIFICATION OF SERVICE

I certify that I have served a copy of the foregoing Respondent's Supplemental Brief on counsel for the Department of Homeland Security by depositing in the U.S. mail, postage prepaid, on the 29th day of October, addressed to:

Mark J. Jebson
Assistant Chief Counsel
Department of Homeland Security
333 Mt. Elliott
Detroit, MI 48201

John J. Marhoefer
Of Counsel to Respondent Ibrahim Parlak