

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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Thomas Van Ess:

This draft raises some constitutional questions. The U.S. Supreme Court has found that aliens, even aliens whose presence in this country is unlawful, are guaranteed due process of law by the 5th and 14th Amendments to the U.S. Constitution. See for example, *Plyler v. Doe*, 457 U.S. 202, (1982). Thus the state may not be able to mandate pre-trial detention of all people who are in the country illegally and charged with violent felonies. Due process may instead require that states provide aliens who are in the country illegally individualized determinations of flight risk or threat to the community before denying pre-trial release.

However, the U.S. Supreme Court has also stated that Congress, in the exercise of its broad power over naturalization and immigration, may make rules that would be unacceptable if applied to citizens. For example, in 2003 the Supreme Court upheld a federal law requiring that aliens who have already been found removable based on conviction of certain crimes be detained pending their removal proceedings. *Demore v. Kim*, 538 U.S. 510. This resolution is distinguishable from the scenario in *Demore*, because it affects persons who have not been convicted of a crime. Also, states do not have the same authority as Congress to make laws affecting aliens.

I have not found any case law that explicitly addresses the constitutionality of prohibiting pre-trial release of people who are in the country illegally.

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