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U.S. Immigration and Customs Enforcement
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VOLUNTARY DEPARTURE CHEAT SHEET – REMOVAL PROCEEDINGS

(See INA § 240B; 8 CFR § 1240.26)

	240B(a) VD (up to 120 days)	**240B(b) VD (up to 60 days)**
MAXIMUM PERIOD	120 days	60 days
ARRIVING ALIENS/PHYSICAL PRESENCE BAR?	R may not be an arriving alien (but there is no required period of physical presence).	R must have been physically present in the U.S. for at least one year immediately preceding service of the NTA (potentially may include some arriving aliens).
TIMING OF REQUEST	R must make request for VD prior to or at master calendar hearing at which case is initially scheduled for a merits hearing.	R may make request up until conclusion of proceedings.
STAGE OF PROCEEDINGS	Proceedings must not have progressed beyond 30 days after the master calendar hearing at which the case was initially scheduled for a merits hearing.	R may make request up until conclusion of proceedings.
PLEADING AND APPEAL REQUIREMENTS	R must concede removability, must forego all additional requests for relief, and must waive appeal of all issues.	R may contest removability, litigate additional requests for relief, and reserve appeal on all issues.
DEPARTURE AT OWN EXPENSE	Not necessarily. See Matter of Arguelles, 22 I&N Dec. 811, 817 (BIA 1999); INA § 241(e)(3)(C).	8 CFR § 1240.26(c)(1)(iv) requires R to prove that he has the means to depart immediately. But see INA § 241(e)(3)(C).
TRAVEL DOCUMENT	R must present a valid travel document (unless DHS already has R's travel document, or travel document is not required by country to which departing). IJ's order may provide for presentation of travel document within no more than 60 days.	R must present valid travel document for inspection by the DHS *before* VD is granted.
BOND/OTHER CONDITIONS	IJ, in her discretion, may impose a bond. R also must satisfy any other conditions that the IJ imposes to ensure timely departure.	IJ must impose a VD bond of at least $500, to be paid within 5 business days of entry of VD order. R also must satisfy any other conditions that IJ imposes to ensure timely departure.
DISCRETION	R must merit a favorable exercise of discretion.	R must merit a favorable exercise of discretion.
AGGRAVATED FELONY BAR	R is barred if removable per INA § 237(a)(2)(A)(iii) (aggravated felony).	R is barred if removable per INA § 237(a)(2)(A)(iii) (aggravated felony).
SECURITY BAR	R is barred if removable per INA § 237(a)(4) (security and related grounds) (regs contain more inclusive bar than statute).	R is barred if removable per INA § 237(a)(4) (security and related grounds).
GMC BAR?	No express GMC requirement (but GMC issues may be relevant to discretion).	R must demonstrate GMC for at least five years immediately preceding the VD application.
PREVIOUS VD BAR	R is barred if previously afforded VD in removal proceedings after having been found inadmissible per INA § 212(a)(6)(A) (i.e., as a PWAP).	R is barred if previously afforded VD in removal proceedings after having been found inadmissible per INA § 212(a)(6)(A) (i.e., as a PWAP).
BY STIPULATION?	Yes, but only for purposes of overcoming problems with timing of request or stage of proceedings, and only with DCC approval.	No.
ALTERNATE ORDER OF REMOVAL	IJ must enter an alternate order of removal.	IJ must enter an alternate order of removal.

Alfred, Angela A

From: (b)(6), (b)(7)(C) @dhs.gov]
Sent: Friday, November 14, 2008 1:32 PM
To: (b)(6), (b)(7)(C)
Subject: NTA-requierment, Special Circumstances and Prosecutorial discretion

Chapter 2
Immigration Proceedings

2.2 Notice to Appear

I. INTRODUCTION

Removal proceedings, conducted under section 240 of the Immigration and Nationality Act (INA) to determine the deportability or inadmissibility of an alien, are commenced by the filing of a Notice to Appear (Form I-862) with the Immigration Court. 8 C.F.R. §§ 1003.14(a), 1239.1(a); Jimenez-Angeles v. Ashcroft, 291 F.3d 594, 600 (9th Cir. 2002) (filing of NTA, not service on the alien, commenced removal proceedings); Morales-Ramirez v. Reno, 209 F.3d 977, 981-82 (7th Cir. 2000); see generally John J. Dvorske, Annotation, *Commencement of Deportation Proceedings Under the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)*, 185 A.L.R. FED. 221 (2003). The NTA gives the alien notice of the charges of removability against the alien under the Immigration and Nationality Act and the allegations of fact that make the alien removable as charged.

II. PROSECUTORIAL DISCRETION

The Government's decision whether to institute removal or other proceedings and what charges to bring involves the exercise of prosecutorial discretion. Carranza v. INS, 277 F.3d 65 (1st Cir. 2002); Chapinski v. Ziglar, 278 F.3d 718, 720-21 (7th Cir. 2002); Medina v. United States, 259 F.3d 220, 227 (4th Cir. 2001); Cabasug v. INS, 847 F.2d 132, 1324 (9th Cir. 1988); Johns v. Dept. of Justice, 653 F.2d 884, 890 (5th Cir. 1981); Matter of Bahta, 22 I&N Dec. 1381, 1391-1392 (BIA 2000); Memorandum from the General Counsel to the Commissioner on INS Exercise of Prosecutorial Discretion (HQCOU 90/16-P). The Government is not required to advance every conceivable basis for removability in the Notice to Appear. See De Faria v. INS, 13 F.3d 422, 424 (1st Cir. 1993).

Prosecutorial discretion is strongest when the matter involves the enforcement of immigration laws. Harisiades v. Shaughnessy, 342 U.S. 580, 596-597 (1952). The Supreme Court has emphasized that the defense of selective prosecution is generally unavailable in removal proceedings. The Court stated, "As a general matter, ... an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 491-492 (1999). The Board of Immigration Appeals has repeatedly held that the decision whether to institute proceedings involves the exercise of prosecutorial discretion that neither the Immigration Court nor the Board shall review. See Matter of Bahta, 22 I&N Dec. 1381, 1391-1392 (BIA 2000); Matter of G-N-C-, 22 I&N Dec. 281, 284 (BIA 1998); Matter of U-M-, 20 I&N Dec. 327, 333 (BIA 1991); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505 (BIA 1980); Matter of

Marin, 16 I&N Dec. 581, 589 (BIA 1978); Matter of Geronimo, 13 I&N Dec. 680, 681 (BIA 1971).

The Government may cancel an NTA in its exercise of prosecutorial discretion before jurisdiction vests with the Immigration Court. See Cortez-Felipe v. INS, 245 F.3d 1054 (9th Cir. 2001) (dismissing petition to reinstate OSC served on alien but not filed with Immigration Court); Morales-Ramirez v. Reno, 209 F.3d 977, 980-82 (7th Cir. 2000) (same); Matter of G-N-C-, 22 I&N Dec. 281, 283-284 (BIA 1998) (harmless error to terminate removal proceedings without considering the alien's arguments); 8 C.F.R. § 1239.2(a). Once the Notice to Appear is filed with the Immigration Court, jurisdiction vests with the court and removal proceedings commence. The Government then may move to dismiss proceedings pursuant to applicable regulations. Id.; 8 C.F.R. § 1239.2(c).

There is no statute of limitations as to when deportation or removal proceedings may commence. Asika v. Ashcroft, 362 F.3d 264, 268 (4th Cir. 2004) (no INA provision refers "to any time limitation on deportation at all"); Biggs v. INS, 55 F.3d 1398, 1401 (9th Cir. 1995) ("Deportation in fact has no statute of limitations."); Costa v. INS, 233 F.3d 31, 38 (1st Cir. 2000) ("There is no set time either for initiating a deportation proceeding or for filing a served OSC. Indeed, as we already have remarked, the INS has virtually unfettered discretion in such respects."); Matter of S-, 9 I&N Dec. 548, 553 (AG 1962) (INA has no statute of limitations); cf. Dipeppe v. Quarantillo, 337 F.3d 326, 333-334 (3rd Cir. 2003) (dismissing regulatory violation alleged in 8-year delay between service of OSC and placing alien case before an Immigration Judge with an NTA, because in INA § 239(d)(2) Congress declared: "Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person."); Campos v. INS, 62 F.3d 311, 314 (9th Cir. 1995) (INA provision, prohibiting construction of amendment to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person, denied alien standing to seek mandamus relief to obtain expedited deportation hearing before targeted date of release from incarceration).

Moreover, the Government may not be estopped from seeking the deportation or removal of an alien merely because of its delay. See INS v. Miranda, 459 U.S. 14, 18-19 (1982) (18-month delay by INS in processing application for permanent residency did not estop INS); Montana v. Kennedy, 366 U.S. 308, 314-315 (1961) (failure to issue passport to pregnant mother did not estop Government to deny citizenship to child born in Italy) ; Lopez-Urenda v. Ashcroft, 345 F.3d 788, 793 (9th Cir. 2003) (an alien can have no settled expectations of being placed in deportation rather than removal proceedings); Vasquez-Zavala v. Ashcroft, 324 F.3d 1105, 1108 (9th Cir.2003) (any expectation of being placed in deportation proceedings that the alien might have had "could not support a sufficient expectation as to when it would commence"); Uspango v. Ashcroft, 289 F.3d 226, 230 (3d Cir.2002) (no entitlement to being placed in deportation rather than removal proceedings); Cortez-Felipe v. INS, 245 F.3d 1054 (9th Cir. 2001) (same); Costa v. INS, 233 F.3d 31 (1st Cir. 2000) (same); Morales-Ramirez v. Reno, 209 F.3d 977, 980-82 (7th Cir. 2000) (same); Santamaria-Ames v. INS, 104 F.3d 1127, 1133 (9th Cir. 1996) ("Mere file processing delay alone is insufficient to estop the government."); United States v. Ullyses-Salazar, 28 F.3d 932, 937 (9th Cir. 1994), cert. denied, 514 U.S. 1020 (1995) ("The mere passage of time is insufficient."); Hamadeh v. INS, 343 F.2d 530, 532-533 (7th Cir. 1965) (four-year delay in commencing deportation proceedings did not estop INS). In order for the Government to be estopped from deporting alien because of delays involved in its investigation, the alien must show that Government's conduct amounted to affirmative misconduct and must show that misconduct was prejudicial to him. Mendoza-Hernandez v. INS, 664 F.2d 635, 638 (7th Cir. 1981).

III. CONTENTS OF A NOTICE TO APPEAR

A. Legal Sufficiency of a Notice to Appear

The Notice to Appear is designed to satisfy the due process requirement that the alien receive notice of removal proceedings and an opportunity to be heard. See Landon v. Plasencia, 459 U.S. 21, 32-33 (1982); Hirsch v. INS, 308 F.2d 562, 567 (9th Cir. 1962). Charging documents are required to inform aliens of the charges and allegations against them with enough precision to allow them to properly defend themselves. Xiong v. INS, 173 F.3d 601, 608 (7th Cir. 1999); Macleod v. INS, 327 F.2d 453 (9th Cir. 1964); Takeo Tadano v. Manney, 160 F.2d 665, 667 (9th Cir. 1947); Matter of Raqueno, 17 I&N Dec. 10 (BIA 1979). However, "administrative pleadings are to be liberally construed." Villegas-Valenzuela v. INS, 103 F.3d 805, 811 (9th Cir. 1996). Harmless clerical errors in the NTA do not affect removability. Chowdhury v. INS, 249 F.3d 970, 973 n. 2 (9th Cir. 2001) (error in the NTA in citing the statute that made the alien deportable).

Under section 239 of the Act, a Notice to Appear must specify:

- The nature of the proceedings against the alien
- The legal authority under which the proceedings are conducted.
- The acts or conduct alleged to be in violation of law.
- The charges against the alien and the statutory provisions alleged to have been violated.
- The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel and (ii) a current list of counsel who may be able to represent the alien at little or no cost (commonly referred to as the "List of Legal Service Providers")
- The requirement that the alien must immediately provide a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 240.
- The requirement that the alien must immediately provide a written record of any change of address or telephone number.
- The consequences under section 240(b)(5) of the Act for failure to provide address and telephone information.
- The time and place at which the proceedings will be held and the consequences under section 240(b)(5) of the Act of the failure, except under exceptional circumstances, to appear at removal proceedings.

See INA § 239(a)(1); 8 C.F.R. § 1003.15.

Some of these requirements are satisfied in the boilerplate language found on the Notice to Appear. For example, an alien's right to be represented by an attorney or individual authorized to represent persons before EOIR is clearly stated on the back of a Notice to Appear. The allegations and charge of removability will satisfy the remaining requirements set forth in §239(a)(1) of the Act. Additionally, the Service is required to provide certain administrative information to the Immigration Court. 8 C.F.R. § 1003.15(c).

When determining whether a Notice to Appear is legally sufficient keep in mind the following: (a) Are the charges appropriate and accurate? (b) Do the factual allegations support the charge of removability? and (c) Is there evidence to establish the factual allegations and charge of removability? If the Service alleges the alien has been admitted but is now removable, there should be an allegation setting forth the alien's admission. Conversely, if the alien is present in the United States without having been admitted or paroled there should be an allegation detailing the method of entry into the United States.

Practice Tip: Is the alien charged under the correct section of law? Arriving aliens and aliens present in the United States who have not been admitted or paroled should only be charged under section 212 of the Act. Conversely, aliens who have been admitted but are now deportable should only be charged under section 237 of the Act.

B. Officers Authorized to Issue a Notice to Appear

Only those officers specifically authorized by regulation may issue a Notice to Appear. 8 C.F.R. § 1239.1. Any immigration officer performing an inspection of an arriving alien at a port-of-entry may issue a Notice to Appear to such an alien. Id. In addition, the following officers (or officers acting in such capacity) may issue a Notice to Appear:

- District directors (except foreign);
- Deputy district directors (except foreign);
- Chief patrol agents;
- Deputy chief patrol agents;
- Assistant chief patrol agents;
- Patrol agents in charge;
- Assistant patrol agents in charge;
- Field operations supervisors;
- Special operations supervisors;
- Supervisory border patrol agents;
- Service center directors;
- Deputy service center directors;
- Assistant service center directors for examinations;
- Supervisory district adjudications officers;
- Supervisory asylum officers;
- Officers in charge (except foreign);
- Assistant officers in charge (except foreign);
- Special agents in charge;
- Deputy special agents in charge;
- Associate special agents in charge;
- Assistant special agents in charge;
- Resident agents in charge;
- Supervisory special agents;
- Directors of investigations;
- District directors for interior enforcement;
- Deputy or assistant district directors for interior enforcement;
- Director of detention and removal;
- Field office directors;
- Deputy field office directors;
- Supervisory deportation officers;
- Supervisory detention and deportation officers;

- Directors or officers in charge of detention facilities;
- Directors of field operations;
- Deputy or assistant directors of field operations;
- District field officers;
- Port directors;
- Deputy port directors; or
- Other officers of employees of the Department of Homeland Security or of the United States who are delegated the authority as provided by 8 C.F.R. § 2.1 to issue notices to appear.

8 C.F.R. § 1239.1.

The issuing officer's signature is found in the lower right corner of the front of the Notice to Appear. Ideally, the officer's name and title should be listed to ensure an authorized individual has issued the document.

C. Asylees and Refugees

Removal proceedings should not commence against an alien who has received asylum, withholding of removal, or refugee status, and still has that status, until procedures to revoke the status have begun. 8 C.F.R. §§ 207.9, 1208.24. The Government should give notice of intent to terminate asylum, withholding or refugee status before, or simultaneous with, the filing of any NTA. Id. The Asylum Office issues the notice of intent to terminate if it had granted the status. 8 C.F.R. § 1208.24. If an Immigration Court granted the alien asylum or withholding, no NTA may be filed but a motion to reopen proceedings should be filed with a notice of intent to terminate status.

D. Temporary Resident Aliens

The Ninth Circuit has explained that the Government need no longer terminate a respondent's temporary resident status under INA § 245A before commencing removal proceedings:

> In Matter of Medrano, the BIA held that, as a condition precedent to the commencement of a deportation proceeding, the INS was required to terminate the temporary resident status of an alien who commits a deportable offense after acquiring temporary resident status.
>
> However, this requirement has been eliminated by 8 C.F.R. § 245a.2(u)(2)(ii), which became effective on May 31, 1995. This section provides for the institution of deportation proceedings and the automatic termination of temporary resident status upon the entry of a final order of deportation in certain cases, including those where the basis for deportation is an aggravated felony conviction. See 8 U.S.C. § 1251(a)(2)(A)(iii) (providing for the deportation of convicted aggravated felons).

Perez v. INS, 72 F.3d 256, 258 n. 2 (2d Cir. 1995).

E. Members of U.S. Armed Forces

The Special Agent in Charge (SAC) must request authorization from Marco Salazar, Interim Chief, Public Safety, HQ, before issuance of an NTA against current members of the United States armed forces. John Clark signs off on the request. Former Section 14.2(d)(7) of the Special Agent's Field Manual (M-490), former Standard Operating Procedures for Enforcement Officers (SOP) § V.D.7. and

former Operating Instructions (O.I.) § 242.1(a)(18) restricted issuance of an NTA against current or former members of the U.S. armed forces. The O.I.'s were rescinded effective June 24, 1997. See generally Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 484 n. 8 (1999) (noting that "internal INS guidelines ... were apparently rescinded on June 27, 1997"). Current policy is that an NTA should not issue against an alien who is a current or former member of the U.S. military and who is eligible for naturalization under sections 328 or 329 of the NTA, notwithstanding removability. The character of military service and the basis for removal should be considered before issuance of the NTA. See Memorandum from the Acting Director of the ICE Office of Investigations entitled "Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service" (June 21, 2004).

F. Diplomats

Section 14.2(d)(.87) of the Special Agent's Field Manual (M-490) restricts issuance of an NTA against aliens who appear to have diplomatic status:

> Processing diplomats. Before you may issue a Notice to Appear against an alien who may have diplomatic status, you must contact the State Department to ensure that diplomatic status no longer exists and that there is no diplomatic immunity from legal process. Contact the State Department by completely filling out Form I-566 and sending it by facsimile, or relay the information by telephone and record the response.

This provision does not necessarily create a judicially enforceable right. See Pasquini v. Morris, 700 F.2d 658, 662 (11th Cir.1983) (holding that "[t]he internal operating procedures of the INS are for the administrative convenience of the INS only"); Dong Sik Kwon v. INS, 646 F.2d 909, 918-19 (5th Cir.1981) (stating that INS operations instructions "do not have the force of law"); but see Nicholas v. INS, 590 F.2d 802, 806 (9th Cir.1979) (determining that INS guideline "far more closely resembles a substantive provision for relief than an internal procedural guideline").

III. ADDITIONAL LODGED CHARGES

The Government may lodge additional charges during removal proceedings. 8 C.F.R. §§ 1003.30, 1240.10(e); Hirsch v. INS, 308 F.2d 562, 567 (9th Cir. 1962); Crain v. Boyd, 237 F.2d 927, 931 (9th Cir. 1956); Galvan v. Press, 201 F.2d 302, 307 (9th Cir. 1953), aff'd, 347 U.S. 522 (1954); U. S. ex rel. Sollazzo v. Esperdy, 187 F.Supp. 753, 755 (S.D.N.Y. 1960), aff'd, 285 F.2d 341 (2d Cir. 1961), cert. denied, 366 U.S. 905 (1961). The alien may be granted a reasonable continuance to respond to the lodged charge(s) or allegation(s) contained in the Form I-261. Id. Due process is violated if removal is based on a ground of removability of which the Government fails to give the alien adequate notice. Chowdhury v. INS, 249 F.3d 970 (9th Cir. 2001); Xiong v. INS, 173 F.3d 601, 608 (7th Cir. 1999). But there is no set rule about the period of notice required.

When a possible ground of excludability developed during the course of an exclusion hearing, the Immigration Court could rule upon the ground if the alien was informed of the issue at some point during the hearing and the alien was given a reasonable opportunity to respond. Matter of Salazar, 17 I&N Dec. 167, 169 (BIA 1979), cited in, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); see also Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100-102 (1903) (oral notice of grounds of deportability satisfied due process); Siniscalchi v. Thomas, 195 Fed. 701 (6th Cir. 1912) (deportation lawfully based on ground of deportability that developed during hearing). Nevertheless, the best practice is to amend the charging document by serving the alien with a Form I-261 and lodging it with the Immigration Court a reasonable period of time before the hearing. See 8 C.F.R. §§ 1003.30,

1240.10(e); Snajder v. INS, 29 F.3d 1203 (7th Cir. 1994) (IJ erred in failing to re-advise alien of right to counsel after INS lodged additional charge).

IV. SERVICE OF THE NOTICE TO APPEAR

A. Generally

Due process requires that aliens receive notice of their removal hearings that is reasonably calculated to reach them. See Dobrota v. INS, 311 F.3d 1206, 1210 (9th Cir. 2002). Section 239 specifies how service of the Notice to Appear is to be made. INA § 239(a), (c); Matter of G-Y-R-, 23 I&N Dec. 181 (BIA 2001). The NTA must be given in person to the alien, or if personal service is not practicable, [1]

through service by mail to the alien or the alien's counsel of record, if any. Id. Notice to the alien's counsel or representative is deemed notice to the alien. See INA § 240(b)(5)(A); 8 C.F.R. § 1292.5(a); Garcia v. INS, 222 F.3d 1208, 1209 (9th Cir. 2000) (notice was adequate where served only upon petitioners' attorney); Wijeratne v. INS, 961 F.2d 1344, 1347 (7th Cir. 1992) (notice received by alien's accredited representative was sufficient); Sewak v. INS, 900 F.2d 667, 670 n. 6 (3d Cir. 1990); Reyes-Arias v. INS, 866 F.2d 500, 503 (D .C. Cir. 1989) (service of a notice of hearing to an alien's counsel is sufficient to afford notice to the alien); Chang v. Jiugni, 669 F.2d 275, 277 (5th Cir. 1982); Matter of Rivera-Claros, 21 I&N Dec. 599, 602 (BIA 1996).

Notice is sufficient if it is provided by mail to the most recent address provided by the alien. INA § 240 (b)(5)(A); 8 C.F.R. § 1003.26(d).

> The rule is well settled that if a letter properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.

Busquets-Ivars v. Ashcroft, 333 F.3d 1008, 1009 (9th Cir. 2003), quoting Rosenthal v. Walker, 111 U.S. 185, 193 (1884). However, a sworn affidavit of nonreceipt from the addresse can rebut the presumption. Salta v. INS, 314 F.3d 1076, 1079 (9th Cir. 2002). If the notice is sent using an incorrect zip code, there is no presumption of proper delivery. Busquets-Ivars v. Ashcroft, 333 F.3d 1008 (9th Cir. 2003).

The Government may use certified mail to gain a stronger presumption of delivery. See Salta v. INS, 314 F.3d 1076, 1079 (9th Cir.2002); Matter of Grijalva, 21 I&N Dec. 27, 32 (BIA 1995) (allowing an alien to be charged with receipt when the certified mail receipt has been signed "by the respondent or a responsible person at the respondent's address"). If the Government cannot produce a return receipt for the mailed notice, any presumption of delivery disappears. See Busquets-Ivars v. Ashcroft, 333 F.3d 1008, 1009 (9th Cir. 2003) (cases cited therein); Matter of G-Y-R-, 23 I&N Dec. 181 (BIA 2001). However, the alien's refusal to accept delivery of certified mail does not invalidate service of the NTA. See Fuentes-Argueta v. INS, 101 F.3d 867, 871 (2nd Cir.1996) (concluding in absentia deportation allowed if notice of hearing sent by certified mail was returned unclaimed); Matter of M-D-, 23 I&N Dec. 540, 542 (BIA 2002) (same). "An alien does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied." Farhoud v. INS, 122 F.3d 794, 796 (9th Cir. 1997) (receipt of certified mail by someone other than the alien at the address he provided was sufficient); Tapia v. Ashcroft, 351 F.3d 795, 798 (7th Cir. Dec 16, 2003) (same).

Service of a Notice to Appear automatically terminates parole. See 8 C.F.R. § 1212.5(e)(2)(i) ("When a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified."). Service of the NTA also stops accrual of continuous residence or continuous physical presence for cancellation of removal. See INA 240A(d)(1); Matter of Mendoza-Sandino, 22 I&N Dec. 1236 (BIA 2000).

B. Juveniles

Special care must be taken in the case of juveniles under age 14 because they cannot be personally served with the NTA. See 8 C.F.R. §§ 1103.5a(c)(2)(ii), 1236.2(a) (providing that service on an alien under 14 years of age shall be made on the person with whom the minor resides). Usually service of the NTA must be made on their parents:

> The regulations governing service of a notice to appear on a minor respondent do not explicitly require service on the parent or parents in all circumstances. If a minor respondent's parents are not present in this country, service on an uncle or other near relative accompanying the child may suffice. However, when it appears that the minor child will be residing with her parents in this country, as in this case, the regulation requires service on the parents, whenever possible, in addition to service that may be made on an accompanying adult or more distant relative. Therefore, under the facts in this case, we find that the Immigration Judge correctly determined that the Service failed to demonstrate clear, unequivocal, and convincing evidence of proper service of the Notice to Appear.

Matter of Mejia-Andino, 23 I&N Dec. 533, 536-537 (BIA 2002) (footnotes omitted).

The U.S. Court of Appeals for the 9th Circuit has concluded that the any adult who receives custody of a minor alien from DHS must be served with the charging document and hearing notice, despite 8 C.F.R. § 1103.5a(c)(2)(ii) that only requires this service if the minor is under the age of 14. Flores-Chavez v. Ashcroft, 362 F.3d 1150, 1156-1157
(9th Cir. 2004).

Service of an NTA issued against a minor may properly be made on the director of a facility in which the minor is detained. See 8 C.F.R. §§ 103.5a(c)(2)(ii), 1236.2(a); Matter of Amaya, 21 I&N Dec. 583, 584-585 (BIA 1996).

C. Confined and Mentally Incompetent Aliens

Service of the NTA on confined aliens is on the alien and his custodian, except where the confined alien is mentally incompetent service is only on the custodian:

> If a person is confined in a penal or mental institution or hospital and is competent to understand the nature of the proceedings initiated against him, service shall be made both upon him and upon the person in charge of the institution or the hospital. If the confined person is not competent to understand, service shall be made only on the person in charge of the institution or hospital in which he is confined, such service being deemed service on the confined person.

8 C.F.R. § 103.5a(c)(2)(i).

Personal service, or service by mail if personal service is not practicable, of the NTA is to be made on the custodian of the confined or mentally incompetent alien. Compare 8 C.F.R. §§ 103.5a(c)(2)(ii) and 1239.1(b) with INA §239(a)(1). "In case of mental incompetency, whether or not confined in an institution, … service shall be made upon the person with whom the incompetent or the minor resides." 8 C.F.R. § 103.5a(c)(2)(ii).

D. Initial Hearing after NTA Served

Unless requested by the alien, no hearing will be scheduled earlier than ten days from the date of service of the NTA. The delay is to allow the alien the opportunity to obtain counsel. INA § 239(b). Should the alien seek a prompt hearing, the alien should execute the section entitled "Request for Prompt Hearing." If an alien is not properly served with the NTA but he appears in court, the NTA may be served on him or her at that time, but the alien may have ten days to prepare and to obtain counsel. See INA § 239(b)(1).

E. Consequences of Improper Service of the NTA

If an alien is not properly served with the NTA, jurisdiction never vests with the Immigration Court. If the alien fails to appear after improper service, the Immigration Judge will dismiss or terminate proceedings. Matter of Lopez-Barrios, 20 I&N Dec. 203 (BIA 1990). The Service will have to effect proper service at a later time. When an alien properly served with an NTA fails to appear at removal proceedings, the Immigration Judge shall enter an in absentia order of removal if the alien is removable. See INA § 239(b)(5)(A); 8 C.F.R. § 1003.26(c).

In Matter of G-Y-R-, 23 I&N Dec. 181 (BIA 2001), the Board held that in absentia order of removal is inappropriate where the alien did not receive the NTA served by certified mail and the alien's address of record was several years old. An alien who is ordered removed without receiving proper service of the NTA may move to reopen proceedings. See INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii). The alien who alleges improper service of the NTA shall not be removed during pendency of his or her motion to reopen. INA § 240(b)(5)(C).

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[1]

The BIA held that, for EOIR notice purposes, in-person-service was not practicable if the alien was not present in court. See Matter of Grijalva, 21 I&N Dec. 27, 34-35 (BIA 1995).

IMMIGRATION CONSEQUENCES OF CONVICTIONS SUMMARY CHECKLIST*

GROUNDS FOR DEPORTATION [apply to lawfully admitted noncitizens, such as a lawful permanent resident [LPR] – greencard holder]

Aggravated Felony conviction

➢ *Consequences* (in addition to deportability):
- Ineligibility for most waivers of removal
- Ineligibility for voluntary departure
- Permanent inadmissibility after removal
- Subjects client to up to 20 years of prison if s/he illegally reenters the U.S. after removal

➢ *Crimes covered* (possibly even if not a felony):
- Murder
- Rape
- Sexual Abuse of a Minor
- Drug Trafficking [probably includes any felony controlled substance offense; may include misdemeanor marijuana sale offenses and 2nd misdemeanor possession offenses]
- Firearm Trafficking
- Crime of Violence + 1 year sentence**
- Theft or Burglary + 1 year sentence**
- Fraud or tax evasion + loss to victim(s) > $10,000
- Prostitution business offenses
- Commercial bribery, counterfeiting, or forgery + 1 year sentence**
- Obstruction of justice offenses + 1 year sentence**
- Certain bail-jumping offenses
- Various federal criminal offenses and possibly state analogues [money laundering, various federal firearms offenses, alien smuggling, etc.]
- Attempt or conspiracy to commit any of the above

Controlled Substance conviction

➢ EXCEPT a single offense of simple possession of 30g or less of marijuana

Crime Involving Moral Turpitude [CIMT] conviction

➢ For crimes included, see Grounds of Inadmissibility

➢ An LPR is deportable for 1 CIMT committed within 5 years of admission into the U.S. and for which a sentence of 1 year or longer may be imposed

➢ An LPR is deportable for 2 CIMT committed at any time "not arising out of a single scheme"

Firearm or Destructive Device conviction

Domestic Violence conviction or other domestic offenses, including:

➢ Crime of domestic violence

➢ Stalking

➢ Child abuse, neglect or abandonment

➢ Violation of order of protection (criminal or civil)

GROUNDS OF INADMISSIBILITY [apply to noncitizens seeking lawful admission, including LPRs who travel out of US]

Conviction or *admitted commission* of a **Controlled Substance Offense**, or DHS (formerly INS) has reason to believe individual is a drug trafficker

➢ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)

Conviction or *admitted commission* of a **Crime Involving Moral Turpitude** [CIMT]

➢ This category covers a broad range of crimes, including:
- Crimes with an *intent to steal or defraud* as an element [e.g., theft, forgery]
- Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act [e.g., murder, rape, some manslaughter/assault crimes]
- Most sex offenses

➢ *Petty Offense Exception*—for one CIMT if the client has no other CIMT + the offense is not punishable > 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months

Prostitution and Commercialized Vice

Conviction of **2 or more offenses** of any type + **aggregate prison sentence of 5 years**

INELIGIBILITY FOR U.S. CITIZENSHIP

Certain convictions or admissions of crime will statutorily bar a finding of good moral character for up to 5 years:

➢ **Controlled Substance Offense** [except in case 30g of marijuana]

➢ **Crime Involving Moral Turpitude**

➢ **2 or more offenses** of any type + **aggregate prison sentence of 5 years**

➢ **2 gambling offenses**

➢ **Confinement** to a jail for an aggregate period of 180 days

Aggravated felony may bar a finding of moral character forever, and thus may make your client *permanently* ineligible for citizenship

INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL

➢ Aggravated Felony Conviction

➢ Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the U.S.

INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL

"Particularly serious crimes" make noncitizens ineligible for asylum and withholding. They include:

➢ Aggravated felonies
- All will bar asylum
- Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding
- Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding

➢ Other serious crimes—no statutory definition [For sample case law determinations, see Appendix F in NYSDA Immigration Manual]

CONVICTION DEFINED

"A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where:
(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND
(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."

THUS:
- A drug treatment or domestic violence counseling alternative to incarceration disposition could be considered a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
- A deferred adjudication disposition without a guilty plea (e.g., NY ACD) will not be considered a conviction
- A youthful offender adjudication will not be considered a conviction if analogous to a federal juvenile delinquency disposition (e.g., NY YO)

*This summary checklist was originally prepared by former NYSDA Immigrant Defense Project Staff Attorney Sejal Zota. Because this checklist is frequently updated, please visit our Internet site at <http://www.nysda.org> (click on Immigrant Defense Project page) for the most up-to-date version.

**The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.] (5/03)

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

October 24, 2005

MEMORANDUM FOR: All OPLA Chief Counsel

FROM: William J. Howard
Principal Legal Advisor

SUBJECT: Prosecutorial Discretion

As you know, when Congress abolished the Immigration and Naturalization Service and divided its functions among U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (CIS), the Office of the Principal Legal Advisor (OPLA) was given exclusive authority to prosecute all removal proceedings. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 442(c), 116 Stat. 2135, 2194 (2002) ("the legal advisor * * * shall represent the bureau in all exclusion, deportation, and removal proceedings before the Executive Office for Immigration Review"). Complicating matters for OPLA is that our cases come to us from CBP, CIS, and ICE, since all three bureaus are authorized to issue Notices to Appear (NTAs).

OPLA is handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board), and 12,000 motions to reopen each year. Our circumstances in litigating these cases differ in a major respect from our predecessor, the INS's Office of General Counsel. Gone are the days when INS district counsels, having chosen an attorney-client model that required client consultation before INS trial attorneys could exercise prosecutorial discretion, could simply walk down the hall to an INS district director, immigration agent, adjudicator, or border patrol officer to obtain the client's permission to proceed with that exercise. Now NTA-issuing clients or stakeholders might be in different agencies, in different buildings, and in different cities from our own.

Since the NTA-issuing authorities are no longer all under the same roof, adhering to INS OGC's attorney-client model would minimize our efficiency. This is particularly so since we are litigating our hundreds of thousands of cases per year with only 600 or so attorneys; that our case preparation time is extremely limited, averaging about 20 minutes a case; that our caseload will increase since Congress is now providing more resources for border and interior immigration enforcement; that many of the cases that come to us from NTA-issuers lack supporting evidence like conviction documents; that we must prioritize our cases to allow us to place greatest emphasis on our national security and criminal alien dockets; that we have growing collateral duties such as

assisting the Department of Justice with federal court litigation; that in many instances we lack sufficient staff to adequately brief Board appeals or oppositions to motions to reopen; and that the opportunities to exercise prosecutorial discretion arise at many different points in the removal process.

To elaborate on this last point, the universe of opportunities to exercise prosecutorial discretion is large. Those opportunities arise in the pre-filing stage, when, for example, we can advise clients who consult us whether or not to file NTAs or what charges and evidence to base them on. They arise in the course of litigating the NTA in immigration court, when we may want, among other things, to move to dismiss a case as legally insufficient, to amend the NTA, to decide not to oppose a grant of relief, to join in a motion to reopen, or to stipulate to the admission of evidence. They arise after the immigration judge has entered an order, when we must decide whether to appeal all or part of the decision. Or they may arise in the context of DRO's decision to detain aliens, when we must work closely with DRO in connection with defending that decision in the administrative or federal courts. In the 50-plus immigration courtrooms across the United States in which we litigate, OPLA's trial attorneys continually face these and other prosecutorial discretion questions. Litigating with maximum efficiency requires that we exercise careful yet quick judgment on questions involving prosecutorial discretion. This will require that OPLA's trial attorneys become very familiar with the principles in this memorandum and how to apply them.

Further giving rise to the need for this guidance is the extraordinary volume of immigration cases that is now reaching the United States Courts of Appeals. Since 2001, federal court immigration cases have tripled. That year, there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000. The lion's share of these cases consists of petitions for review in the United States Courts of Appeal. Those petitions are now overwhelming the Department of Justice's Office of Immigration Litigation, with the result that the Department of Justice has shifted responsibility to brief as many as 2,000 of these appellate cases to other Departmental components and to the U.S. Attorneys' Offices. This, as you know, has brought you into greater contact with Assistant U.S. Attorneys who are turning to you for assistance in remanding some of these cases. This memorandum is also intended to lessen the number of such remand requests, since it provides your office with guidance to assist you in eliminating cases that would later merit a remand.

Given the complexity of immigration law, a complexity that federal courts at all levels routinely acknowledge in published decisions, your expert assistance to the U.S. Attorneys is critical.[1] It is all the more important because the decision whether to

[1] As you know, if and when your resources permit it, I encourage you to speak with your respective United States Attorneys' Offices about having those Offices designate Special Assistant U.S. Attorneys from OPLA's ranks to handle both civil and criminal federal court immigration litigation. The U.S.

proceed with litigating a case in the federal courts must be gauged for reasonableness, lest, in losing the case, the courts award attorneys' fees against the government pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412. In the overall scheme of litigating the removal of aliens at both the administrative and federal court level, litigation that often takes years to complete, it is important that we all apply sound principles of prosecutorial discretion, uniformly throughout our offices and in all of our cases, to ensure that the cases we litigate on behalf of the United States, whether at the administrative level or in the federal courts, are truly worth litigating.

* * * * * * * * * *

With this background in mind, I am directing that all OPLA attorneys apply the following principles of prosecutorial discretion:

1) Prosecutorial Discretion Prior to or in Lieu of NTA Issuance:

In the absence of authority to cancel NTAs, we should engage in client liaison with CBP, CIS (and ICE) via, or in conjunction with, CIS/CBP attorneys on the issuance of NTAs. We should attempt to discourage issuance of NTAs where there are other options available such as administrative removal, crewman removal, expedited removal or reinstatement, clear eligibility for an immigration benefit that can be obtained outside of immigration court, or where the desired result is other than a removal order.

It is not wise or efficient to place an alien into proceedings where the intent is to allow that person to remain unless, where compelling reasons exist, a stayed removal order might yield enhanced law enforcement cooperation. See Attachment A (Memorandum from Wesley Lee, ICE Acting Director, Office of Detention and Removal, Alien Witnesses and Informants Pending Removal (May 18, 2005)); see also Attachment B (Detention and Removal Officer's Field Manual, Subchapters 20.7 and 20.8, for further explanation on the criteria and procedures for stays of removal and deferred action).

Examples:

- **Immediate Relative of Service Person**- If an alien is an immediate relative of a military service member, a favorable exercise of discretion, including not issuing an NTA, should be a prime consideration. Military service includes current or former members of the Armed Forces, including: the United States Army, Air Force, Navy, Marine Corps, Coast Guard, or National Guard, as well as service in the Philippine Scouts. OPLA counsel should analyze possible eligibility for citizenship under

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Attorneys' Offices will benefit greatly from OPLA SAUSAs, especially given the immigration law expertise that resides in each of your Offices, the immigration law's great complexity, and the extent to which the USAOs are now overburdened by federal immigration litigation.

sections 328 and 329. See Attachment C (Memorandum from Marcy M. Forman, Director, Office of Investigations, Issuance of Notices to Appeal, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service (June 21, 2004)).

- **Clearly Approvable I-130/I-485**- Where an alien is the potential beneficiary of a clearly approvable I-130/I-485 and there are no serious adverse factors that otherwise justify expulsion, allowing the alien the opportunity to legalize his or her status through a CIS-adjudicated adjustment application can be a cost-efficient option that conserves immigration court time and benefits someone who can be expected to become a lawful permanent resident of the United States. See Attachment D (Memorandum from William J. Howard, OPLA Principal Legal Advisor, Exercising Prosecutorial Discretion to Dismiss Adjustment Cases (October 6, 2005)).

- **Administrative Voluntary Departure**- We may be consulted in a case where administrative voluntary departure is being considered. Where an alien is eligible for voluntary departure and likely to depart, OPLA attorneys are encouraged to facilitate the grant of administrative voluntary departure or voluntary departure under safeguards. This may include continuing detention if that is the likely end result even should the case go to the Immigration Court.

- **NSEERS Failed to Register**- Where an alien subject to NSEERS registration failed to timely register but is otherwise in status and has no criminal record, he should not be placed in proceedings if he has a reasonable excuse for his failure. Reasonably excusable failure to register includes the alien's hospitalization, admission into a nursing home or extended care facility (where mobility is severely limited); or where the alien is simply unaware of the registration requirements. See Attachment E (Memorandum from Victor Cerda, OPLA Acting Principal Legal Advisor, Changes to the National Security Entry Exit Registration System (NSEERS)(January 8, 2004)).

- **Sympathetic Humanitarian Factors**- Deferred action should be considered when the situation involves sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. DHS has the most prosecutorial discretion at this stage of the process.

2) Prosecutorial Discretion after the Notice to Appear has issued, but before the Notice to Appear has been filed:

We have an additional opportunity to appropriately resolve a case prior to expending court resources when an NTA has been issued but not yet filed with the immigration court. This would be an appropriate action in any of the situations

identified in #1. Other situations may also arise where the reasonable and rational decision is not to prosecute the case.

Example:

- **U or T visas**- Where a "U" or "T" visa application has been submitted, it may be appropriate not to file an NTA until a decision is made on such an application. In the event that the application is denied then proceedings would be appropriate.

3) Prosecutorial Discretion after NTA Issuance and Filing:

The filing of an NTA with the Immigration Court does not foreclose further prosecutorial discretion by OPLA Counsel to settle a matter. There may be ample justification to move the court to terminate the case and to thereafter cancel the NTA as improvidently issued or due to a change in circumstances such that continuation is no longer in the government interest.[2] We have regulatory authority to dismiss proceedings. Dismissal is by regulation without prejudice. See 8 CFR §§ 239.2(c), 1239.2(c). In addition, there are numerous opportunities that OPLA attorneys have to resolve a case in the immigration court. These routinely include not opposing relief, waiving appeal or making agreements that narrow issues, or stipulations to the admissibility of evidence. There are other situations where such action should also be considered for purposes of judicial economy, efficiency of process or to promote justice.

Examples:

[2] Unfortunately, DHS's regulations, at 8 C.F.R. 239.1, do not include OPLA's attorneys among the 38 categories of persons given authority there to issue NTAs and thus to cancel NTAs. That being said, when an OPLA attorney encounters an NTA that lacks merit or evidence, he or she should apprise the issuing entity of the deficiency and ask that the entity cure the deficiency as a condition of OPLA's going forward with the case. If the NTA has already been filed with the immigration court, the OPLA attorney should attempt to correct it by filing a form I-261, or, if that will not correct the problem, should move to dismiss proceedings without prejudice. We must be sensitive, particularly given our need to prioritize our national security and criminal alien cases, to whether prosecuting a particular case has little law enforcement value to the cost and time required. Although we lack the authority to sua sponte cancel NTAs, we can move to dismiss proceedings for the many reasons outlined in 8 CFR § 239.2(a) and 8 CFR § 1239.2(c). Moreover, since OPLA attorneys do not have independent authority to grant deferred action status, stays of removal, parole, etc., once we have concluded that an alien should not be subjected to removal, we must still engage the client entity to "defer" the action, issue the stay or initiate administrative removal.

- **Relief Otherwise Available**- We should consider moving to dismiss proceedings without prejudice where it appears in the discretion of the OPLA attorney that relief in the form of adjustment of status appears clearly approvable based on an approvable I-130 or I-140 and appropriate for adjudication by CIS. See October 6, 2005 Memorandum from Principal Legal Advisor Bill Howard, supra. Such action may also be appropriate in the special rule cancellation NACARA context. We should also consider remanding a case to permit an alien to pursue naturalization.[3] This allows the alien to pursue the matter with CIS, the DHS entity with the principal responsibility for adjudication of immigration benefits, rather than to take time from the overburdened immigration court dockets that could be expended on removal issues.

- **Appealing Humanitarian Factors**- Some cases involve sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this, as noted above, include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. OPLA attorneys should consider these matters to determine whether an alternative disposition is possible and appropriate. Proceedings can be reinstituted when the situation changes. Of course, if the situation is expected to be of relatively short duration, the Chief Counsel Office should balance the benefit to the Government to be obtained by terminating the proceedings as opposed to administratively closing proceedings or asking DRO to stay removal after entry of an order.

- **Law Enforcement Assets/CIs**- There are often situations where federal, State or local law enforcement entities desire to have an alien remain in the United States for a period of time to assist with investigation or to testify at trial. Moving to dismiss a case to permit a grant of deferred action may be an appropriate result in these circumstances. Some offices may prefer to administratively close these cases, which gives the alien the benefit of remaining and law enforcement the option of calendaring proceedings at any time. This may result in more control by law enforcement and enhanced cooperation by the alien. A third option is a stay.

4) **Post-Hearing Actions**:

Post-hearing actions often involve a great deal of discretion. This includes a decision to file an appeal, what issues to appeal, how to respond to an alien's appeal, whether to seek a stay of a decision or whether to join a motion to reopen. OPLA

[3] Once in proceedings, this typically will occur only where the alien has shown prima facie eligibility for naturalization and that his or her case involves exceptionally appealing or humanitarian factors. 8 CFR §1239.1(f). It is improper for an immigration judge to terminate proceedings absent an affirmative communication from DHS that the alien would be eligible for naturalization but for the pendency of the deportation proceeding. Matter of Cruz, 15 I&N Dec. 236 (BIA 1975); see Nolan v. Holmes, 334 F.3d 189 (2d Cir. 2003) (Second Circuit upholds BIA's reliance on Matter of Cruz when petitioner failed to establish prima facie eligibility.).

attorneys are also responsible for replying to motions to reopen and motions to reconsider. The interests of judicial economy and fairness should guide your actions in handling these matters.

Examples:

- **Remanding to an Immigration Judge or Withdrawing Appeals**- Where the appeal brief filed on behalf of the alien respondent is persuasive, it may be appropriate for an OPLA attorney to join in that position to the Board, to agree to remand the case back to the immigration court, or to withdraw a government appeal and allow the decision to become final.

- **Joining in Untimely Motions to Reopen**- Where a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is legally eligible to be granted that relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1003.23, strongly consider exercising prosecutorial discretion and join in this motion to reopen to permit the alien to pursue such relief to the immigration court.

- **Federal Court Remands to the BIA**- Cases filed in the federal courts present challenging situations. In a habeas case, be very careful to assess the reasonableness of the government's detention decision and to consult with our clients at DRO. Where there are potential litigation pitfalls or unusually sympathetic fact circumstances and where the BIA has the authority to fashion a remedy, you may want to consider remanding the case to the BIA. Attachments H and I provide broad guidance on these matters. Bring concerns to the attention of the Office of the United States Attorney or the Office of Immigration Litigation, depending upon which entity has responsibility over the litigation. See generally Attachment F (Memorandum from OPLA Appellate Counsel, U.S. Attorney Remand Recommendations (rev. May 10, 2005)); see also Attachment G (Memorandum from Thomas W. Hussey, Director, Office of Immigration Litigation, U.S. Department of Justice, Remand of Immigration Cases (Dec. 8, 2004)).

- **In absentia orders.** Reviewing courts have been very critical of in absentia orders that, for such things as appearing late for court, deprive aliens of a full hearing and the ability to pursue relief from removal. This is especially true where court is still in session and there does not seem to be any prejudice to either holding or rescheduling the hearing for later that day. These kinds of decisions, while they may be technically correct, undermine respect for the fairness of the removal process and cause courts to find reasons to set them aside. These decisions can create adverse precedent in the federal courts as well as EAJA liability. OPLA counsel should be mindful of this and, if possible, show a measured degree of flexibility, but

only if convinced that the alien or his or her counsel is not abusing the removal court process.

5) **Final Orders- Stays and Motions to Reopen/Reconsider**:

Attorney discretion doesn't cease after a final order. We may be consulted on whether a stay of removal should be granted. See Attachment B (Subchapter 20.7). In addition, circumstances may develop whether the proper and just course of action would be to move to reopen the proceeding for purposes of terminating the NTA.

Examples:

- **Ineffective Assistance**- An OPLA attorney is presented with a situation where an alien was deprived of an opportunity to pursue relief, due to incompetent counsel, where a grant of such relief could reasonably be anticipated. It would be appropriate, assuming compliance with Matter of Lozada, to join in or not oppose motions to reconsider to allow the relief applications to be filed.
- **Witnesses Needed, Recommend a Stay**- State law enforcement authorities need an alien as a witness in a major criminal case. The alien has a final order and will be removed from the United States before trial can take place. OPLA counsel may recommend that a stay of removal be granted and this alien be released on an order of supervision.

* * * * * * * * * *

Prosecutorial discretion is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship. It is clearly DHS policy that national security violators, human rights abusers, spies, traffickers both in narcotics and people, sexual predators and other criminals are removal priorities. It is wise to remember that cases that do not fall within these categories sometimes require that we balance the cost of an action versus the value of the result. Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.

Official Use Disclaimer:

~~This memorandum is protected by the Attorney/Client and Attorney Work product privileges and is for Official Use Only. This memorandum is intended solely to provide legal advice to the Office of the Chief Counsels (OCC) and their staffs regarding the appropriate and lawful exercise of prosecutorial discretion, which will lead to the efficient management of resources. It is not intended to, does not, and may not be relied upon to create or confer any right(s) or benefit(s), substantive or procedural, enforceable at law by any individual or other party in~~

~~removal proceedings, in litigation with the United States, or in any other form or manner~~. ~~Discretionary decisions of the OCC regarding the exercise of prosecutorial discretion under this memorandum are final and not subject to legal review or recourse. Finally this internal guidance does not have the force of law, or of a Department of Homeland Security Directive.~~

ATTACHMENT A

Office of Detention and Removal Operations
U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: All Field Office Directors

MAY 18 2005

FROM: Wesley Lee, Acting Director
Office of Detention and Removal

SUBJECT: Alien Witnesses and Informants Pending Removal

Purpose

The Office of Detention and Removal Operations (DRO), in consultation with the Office of Investigations (OI) and the Office of the Principle Legal Advisor, is issuing this guidance for cases of aliens pending removal from the United States for whom there is an interest from another law enforcement agency (LEA). The interest may be for any of the following:

- An alien on behalf of which an application for an S-visa has been filed by a federal or state LEA;
- An alien for whom the Department of Justice (DOJ), Office of Enforcement Operations (OEO) has indicated possible placement in the Witness Protection Program;
- For use of the alien as an informant by another LEA.

Discussion

Frequently, DRO field offices receive requests from LEAs to stay the removal of an alien who may be needed as an informant or a witness in a criminal matter. The majority of these cases involve aliens who have been convicted of serious crimes and are subject to mandatory detention. As the mission of DRO is to remove aliens and detention is used for the purpose of effecting removal, the liability for not removing aliens for which a travel document is available rests with DRO. In addition, DRO must follow congressional mandates and statutes to remove criminal aliens. As such, DRO will seek to obtain a removal order for all categories of aliens mentioned in this memorandum prior to any release or transfer of custody to another agency. The possibility of issuing a stay of removal or deferred action may be considered only when compelling reasons exist. Cases of

detained aliens for which removal is not foreseeable are to be handled under the established Post Order Custody Review procedures. Disposition of aliens who have not been placed in removal proceedings will be made by OI based on the specifics of the case.

Action

Effective immediately, the below procedures are to be followed by all field offices in these types of cases:

Aliens Pending an 'S' Visa

Federal and state LEAs may request an S-visa on behalf of an alien through DOJ/OEO, when there is a need for information provided by the alien witness or informant in criminal or counter-terrorism matters. Before the application is sent to OEO, it requires the approval of the local United States Attorney, as well as the headquarters of the LEA. Once the application is certified by OEO, it is sent to ICE for a final decision pursuant to 8 CFR § 214.2(t). When HQOI is notified of the filing of an S-visa for a particular alien, HQOI will issue written notification to HQDRO and coordinate the issuance of deferred action for the alien. If the alien is detained, HQDRO will coordinate the transfer of custody of the alien to the appropriate LEA with the local Field Office Director. The LEA is to sign receipt of the alien. The LEA filing the S-visa application will assume responsibility for the alien while the alien remains in the United States and is required to provide periodic reports to HQOI as to the whereabouts and activities of the alien.

Aliens Authorized for the Witness Security Program by OEO

Aliens may be granted relocation services or some form of "limited services" by DOJ/OEO. One such limited service may be if OEO considers that the alien's life may be in danger outside the United States. Once OEO provides written notification to DRO that the alien has been approved for the Witness Security Program under 18 USC 3521, OEO will identify the LEA who will be picking up the individual from DRO custody, if the alien is detained. DRO will ensure that custody of the individual is transferred to the LEA at a pre-arranged time. The LEA is to sign receipt of and assume full responsibility for the alien. HQOI will coordinate with HQDRO for the issuance of deferred action by HQOI. The LEA will provide periodic reports to HQOI as to the whereabouts and activities of the alien.

In cases where no LEA is willing to assume custody of the alien, and the alien has been ordered removed, HQDRO will make a final determination regarding execution of the removal order and advise the local field office. OEO's request not to remove in and of itself may not be sufficient to postpone or cancel the removal. HQDRO will notify OEO two weeks prior to any anticipated removal of the alien. If OEO or an LEA requires the presence of an alien who was removed from the United States, they may request that the alien be paroled back into the United States under INA § 212(d)(5). This may be accomplished by the LEA coordinating with the Office of International Affairs, Parole and Humanitarian Assistance Branch.

Other Detained Alien Informants

For any other alien for whom an LEA is seeking to use an informant, usually for a temporary time-period, a letter from the appropriate LEA headquarters management official to HQDRO is required.

The letter must address the following: specific reasons for the request to postpone the removal, timeframe for which the alien will be needed, that the LEA agrees to take custody of and be responsible for the alien, and that the LEA will return the alien to DRO at the conclusion of the timeframe noted on the request. Once this information is provided, the final decision will be coordinated between HQDRO, HQOI, and local DRO. If the request is approved, the LEA is to sign receipt of and assume full responsibility for the alien. HQOI will coordinate the issuance of a deferred action notice and will be provided periodic reports as to the whereabouts and activities of the alien from the LEA.

Conclusion

The disposition of informants and witness cases pending removal are to be coordinated closely with HQDRO. As soon as the local field office is notified regarding an interest in the alien from another agency, HQDRO is to be notified. HQDRO will also work closely with HQOI in order to protect the interests of ICE. DRO offices are to ensure that the appropriate documentation involving the transfer of custody is maintained in the alien's A-file. It is important that DRO offices ensure that files, DACS records, and documentation from OEO or other LEAs in such cases are properly safeguarded, as they are law enforcement sensitive.

Any questions may be addressed to John Tsoukaris or Todd Thurlow, HQDRO Custody Determination Unit.

ATTACHMENT B

Chapter 20: Removal Process: Relief From Removal

References:

INA: 101, 208, 212, 236, 237, 240A, 241, 242, 244, 245, 248, 249

Regulations: 8 CFR 10
03.43, 208, 1240.20, 1240.21, 1240.33, 1240.34, 241.6, 245, 249, 274A

20.1 Relief from Removal.

Aliens in removal proceedings and those with final orders of removal may be eligible for certain for It is important for you to be familiar with these forms of relief because aliens under your docket con eligible. You may be required to cease all removal actions on eligible detained and non-detai Additionally, certain forms of relief may require the administrative closure of removal proceedi release of aliens in custody. The Illegal Immigration Reform and Immigrant Responsibility Act of 19 eliminated some forms of relief and created others. You may encounter an alien under docket co removal proceedings were initiated prior to the enactment of IIRIRA. Therefore, you must know t relief that were available prior to IIRIRA and know what actions each Service officer should take each particular form of relief.

- First, consider the alien's immigration status and criminal history before pursuing relief from re a criminal-history check if you cannot find one conducted during the past 90 days.

  The Office of the Principal Legal Adviser reviews the contents of each "A" file before presentir to the Executive Office for Immigration Review. If the file does not contain a *current criminal his* 90 days), the attorney will not proceed with the case and inform you of the incomplete reco

then run the required criminal-history check so the Office of the Principal Legal Advisor car record and proceed with the request for relief.

20.2 Cancellation of Removal.

(a) General. Cancellation of removal is a discretionary form of relief that may be granted to an alier course of a removal hearing. A detailed description of cancellation of removal may be found at I and **8 CFR 1240.20**. Cancellation of removal applies to aliens placed in removal proceedings a 1997. Normally, cancellation of removal can be granted only by an immigration judge or by th Immigration Appeals. However, a special class of aliens, defined by section **203** of the I Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100 is eligible to have can removal (or suspension of deportation) favorably adjudicated by an asylum officer. Before IIRIF effective, suspension of deportation was the form of relief very similar to cancellation of r nonpermanent residents. The eligibility criteria for suspension of deportation can be found at **8 CF** This regulation refers to section **244(a)** of the Act, as in effect prior to April 1, 1997.

(b) Eligibility Criteria. An eligible alien may apply for cancellation of removal on **Form EOIR-42A**, for Cancellation of Removal for Certain Permanent Residents, or **Form EOIR-42B**, App Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents. Eligibility permanent residents may be found in section **240A(a)** of the Act. Eligibility criteria for non- residents may be found in section **240A(b)** of the Act.

(c) Closing Actions. Once a decision to grant cancellation of removal has been rendered, and th becomes final, the case must be closed in DACS. Departure Cleared Status code "B" in DACS used to close the case.

(1) Cancellation of Removal Denied. If cancellation is denied, and voluntary departure ha granted, the deportation officer should proceed with normal removal actions, including DACS up

(2) Cancellation Granted to Permanent Resident. If cancellation of removal is granted t Permanent Resident Alien, the alien retains status and the case must be closed in DACS to relief granted. Departure Cleared Status code "B" in DACS should be used to close the case.

(3) Cancellation Granted to Nonpermanent Resident. If cancellation of removal is gra nonpermanent resident, the alien becomes eligible for adjustment of status and should be accordingly. The Deportation Branch may assist the Examinations Branch in processing these case must be closed in DACS to reflect the relief granted. Departure Cleared Status code "E should be used to close the case.

20.3 Asylum.

Asylum, pursuant to section **208** of the Act, is among the most common forms of relief sought by are in removal proceedings. Regulations governing jurisdiction, filing, employment authoriz adjudication are found in **8 CFR Part 208.** Except as otherwise provided in section 208(a)(2) asylum claims must be filed within one year of entry into the United States. Asylum claims are or adjudicated by an Asylum officer. However, once an alien is placed into removal proceedings asylum claim may also be filed with the immigration judge.

If an alien in custody indicates they would like to apply for asylum, provide them with **Form I-589**, for Asylum and Withholding of Removal, and supporting forms. You are required to advise all a availability of free legal services. [See detention standards in **Appendix 26-1** of this manual.]

Once an alien is granted asylum by an immigration judge during the course of a removal h proceedings are terminated. Once asylum is granted, employment authorization may be granted pu **CFR 274a.12(a)(5).** The case must be closed to reflect the relief granted. Departure Cleared Statu in DACS should be used to close the case.

Motions to Reopen or Reconsider. The Service is not prohibited from filing a motion to reopen or re accordance with 8 CFR 3.2 (Motions before BIA) and 3.23 (Motions before the Immigration conditions change in the country from which asylum has been granted, there was fraud in the ap other conditions exist, the BIA or an immigration judge may terminate the prior grant of asylum (**208.24**).

20.4 Withholding or Deferral of Removal.

(a) General. Other forms of relief, similar to asylum, are withholding of removal and deferral Normally, an immigration judge or the Board of Immigration Appeals makes the decision on wit deferral of removal. An alien will be considered for these forms of relief if the alien has filed For asylum in removal proceedings.

(b) Withholding of Removal Based on Protected Characteristic in the Refugee Definition. Sectio of the Act restricts the removal of an alien to a country where the alien's life or freedom would be because of the alien's race, religion, nationality, membership in a particular social group, or politi Aliens convicted of particularly serious crimes both inside and outside of the United States, aliens pose a security risk to the United States, and aliens who have participated in the persecution of ineligible for withholding of removal.

(c) Withholding of Removal under the Convention Against Torture. The United States is obligat by the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Tr Punishment (Convention Against Torture). Section **2242** of the Foreign Affairs Reform and Restru of 1998, Pub L. 105-277, provides for how the U.S. will comply with the Convention Against Tor Article 3 of the Convention Against Torture, the United States has agreed not to return a person state where he or she would be tortured. The regulations regarding claims under the Conventi Torture are found at **8 CFR 208.16, 208.17** and **208.18.** Aliens under docket control may qualify withholding under these regulations. An alien granted withholding of removal may be granted e authorization.

(d) Limitations of Withholding of Removal. The following are limitations to this form of relief:

(1) Removal to Third Country. Withholding of removal is country specific. There is no pro removing an alien to a third country where the alien would be safe from persecution or torture.

(2) Does Not Qualify an Alien for Adjustment of Status. There is no provision for an alien wh granted withholding of removal to adjust status to that of a Lawful Permanent Resident ba grant.

(3) Motions to Reopen or Reconsider. The Service is not prohibited from filing a motion to reconsider in accordance with 8 CFR 3.2 (Motions before BIA) and 3.23 (Motions before the I Judge). If conditions change in the country to which withholding of removal has been granted fraud in the application, or other conditions exist, the BIA or an immigration judge ma withholding previously granted by an immigration judge (see **8 CFR 208.24**).

(e) Deferral of Removal under the Convention Against Torture can be found in **8 CFR 208.17.** A is ineligible for withholding of removal because of criminal activity, security reasons or persecutio

may be granted deferral of removal to the country where it is more likely than not the alien would l There is no prohibition on removing an alien to a third country where the alien would be safe fr Deferral of removal does not negate or limit the application of law, regulation, or policy rela detention of the alien.

Adjustment of status is not available to an alien granted deferral of removal. Deferral of Remo terminated in accordance with **8 CFR 208.17(d)**, **8 CFR 208.17(f)** and **8 CFR 208.18(c)**. The request that deferral be terminated under **8 CFR 208.17(e)**.

20.5 Private Bills.

This subject is discussed in detail in **Chapter 23** of the Special Agent's Field Manual.

20.6 Restoration or Adjustment of Status and Waivers.

(a) General. If an alien is granted adjustment of status or relief by an immigration judge, the I Branch must close the case in DACS. Departure cleared status "B" should be used to close th Depending on local office policy, deportation officers may assist in further processing of the alien registration card if applicable.

(b) Adjustment of Status. Some aliens in or subject to removal proceedings may seek deportation through adjustment of status to permanent residency. Such adjustment may be gra immigration judge during the course of removal proceedings. Additionally, actual commencement proceedings may be deferred by the arresting or processing officer where it appears the alien may to some form of relief. **Section 245** of the Act is the principal authority for adjustment of status to resident. Occasionally, adjustment may be granted pursuant to **section 249** of the Act, Creation of Lawful Admission for Permanent Residence, or one of several other special adjustment provisi Congress from time to time.

Not all aliens, even those with an approved visa petition, are eligible for adjustment. If an al approved visa petition, but no visa number is available, he or she may not apply for adjustment. **S (a)** of the Act specifies those aliens who have immediate relative status, as well as those with status. Categories of those who are not eligible are described in detail within section **245** of the A the other special provisions also has specific conditions and restrictions.

(c) Discretionary Waivers Which May Apply in Removal Proceedings. An alien in removal proce apply for certain waivers which overcome the grounds for removal. **Section 237** of the Act contain and conditions of waivers which apply to certain classes of deportable aliens. **Section 212** of the A the terms and conditions of waivers which apply to certain classes of aliens who are inadmissil inadmissible at time of entry or adjustment of status.

(d) Reinstatement to Status and Change of Status. In some instances, an alien who has fallen o may be eligible for reinstatement to his or her original status or may be eligible for a change nonimmigrant status. Questions regarding such matters should be referred to the local Examinati for consideration.

(e) Temporary Protected Status (TPS). **Section 244** of the Act provides for "Temporary Protec for nationals of countries designated by the Attorney General, based on natural disasters, civil **Section 20.9** of this chapter contains more information on TPS. Also, you may want to view the on TPS found at **http://www.immigration.gov/graphics/services/tps_inter.htm**.

20.7 Stay of Deportation or Removal.

(a) General. A stay of deportation or removal reflects an administrative decision by the Se reviewing body that removal against an alien should not proceed. It may be granted after the com removal proceeding when the only remaining step in a case is the physical removal of the alier deportation or removal is not considered an immigration benefit or waiver because it only bestows relief from removal upon the alien.

(b) Stays Granted by the Service. If a final order has been entered based on deportability, Director has wide discretion to grant a stay of deportation or removal. If the final order has be against an inadmissible arriving alien, the District Director may stay immediate execution of th explained in **20.7(b)(2)** below.

(1) Deportable Aliens Ordered Removed. When there are compelling humanitarian factors, or v is deemed to be in the interest of the government, a District Director may grant a stay of dej removal for such period of time and under such conditions as he or she deems necessary deportation or removal under this paragraph may also be granted by a District Director upor own initiative without application being made by the alien. The detention rules found at **8 CF** are applicable to a deportable alien granted a stay of deportation or removal.

(2) Inadmissible Arriving Aliens Ordered Removed. **Section 241(c)(2)** of the Act allows th General to stay the removal of an alien arriving at a port of entry. However, a stay of remova section requires a determination either that immediate removal is not practicable or proper, or needed to testify in the prosecution of another person in a criminal trial. Aliens granted a sta their removal is impracticable or improper must be detained. Aliens who are granted a stay to criminal prosecution, however, may be released if certain conditions are met. The alien must p of at least $500, must agree to appear when required to testify and for removal, and must a other conditions prescribed by the Attorney General.

(c) Stays for Appeals or Judicial Review. Timely filed requests for post hearing reviews may st depending on the case. However, the District Director may, in his or her discretion, remove an alie filed an untimely appeal, unless the court, an immigration judge, or the BIA has affirmatively stayed

(1) Appeals to the Board of Immigration Appeals (BIA). Under 8 CFR 3.6, the timely filing of an decision by the Immigration Court will operate as an automatic stay. This applies to app decisions by the Immigration Court except an appeal of a denial of a motion reopen or reconsid of a request for a stay of deportation or removal. The Service shall take all reasonable steps with a stay granted by an immigration judge or the BIA. However, such a stay shall cease to ha granted (or communicated) after the alien has been placed aboard an aircraft or other conv removal and the normal boarding has been completed. See **8 CFR 241.6(c)**.

(2) Requests for Judicial Review. The filing of a petition seeking review in federal court does r removal of an alien unless the reviewing court affirmatively orders a stay. See **8 CFR 241.3** a **242(b)(3)(B)** of the Act.

(3) Motions to Reopen or Reconsider. The filing of a motion to reopen or motion to reconsider Immigration Court or BIA does not operate as an automatic stay of deportation or removal, removal order was issued in absentia. See **8 CFR 1003.2(f)** and **8 CFR 1003.23(b)(1)(v)**.

(d) Injunctive Relief from Removal. In conjunction with other proceedings, a U.S. District Cou other judge will sometimes issue an order that prohibits a Service action. On occasion the removal or class of aliens will be stayed by a temporary restraining order or an injunction. A temporary order is an emergency remedy of short duration. There are many kinds of injunctions and the pe

covered by an injunction may vary. Close communication with the United States Attorney and th General Counsel through your District Counsel's office is essential to insure compliance with the c court.

(e) Adjudication and Decision. Title **8 CFR 241.6** governs administrative stays of removal. An ali removed may apply for a stay of deportation or removal on **Form I-246**, Application for Stay of De Removal. The application for administrative stay of removal should be filed with the District Dire jurisdiction over where the alien resides. There are a multitude of reasons for filing for a stay reasons include the need for urgent medical treatment, disposition of property, and unre proceedings. The adjudication of a stay of deportation or removal is often delegated to a deporta Care should be exercised to verify any claimed facts, such as serious medical problems, etc. The the District Director is final and may not be appealed administratively. Neither the filing of the request nor the failure to receive notice of disposition of the request shall delay removal or relie from strict compliance with any outstanding notice to surrender for deportation or removal.

(f) Employment Authorization. There is no statutory or regulatory authority to grant e authorization to an alien based on a grant of a stay of deportation or removal.

20.8 Deferred Action.

(a) General. A District Director may, in his or her discretion, recommend deferral of (removal) ac of administrative choice to give some cases lower priority and in no way an entitlement, in appropr The deferred action category recognizes that the Service has limited enforcement resources and attempt should be made administratively to utilize these resources in a manner which will achieve t impact under the immigration laws. In making deferred action determinations, the factors listed in (b), among others, should be considered.

Deferred action does not confer any immigration status upon an alien, nor is it in any way a refle alien's immigration status. It does not affect periods of unlawful presence as defined in **section 2** the Act, and does not alter the status of any alien who is present in the United States without beinç and admitted. Under no circumstances does deferred action operate to cure any defect in status section of the Act for any purpose. Since deferred action is not an immigration status, no alien has deferred action. It is used solely in the discretion of the Service and confers no protection or bene alien. Deferred action does not preclude the Service from commencing removal proceedings a against an alien. Any request by an alien (or another party on behalf of such alien) for deferred ac be considered in the same manner as other correspondence. The alien should be advised that he not apply for deferred action, but that the Service will review the facts presented and consider defe as well as any other appropriate course of action.

(b) Factors to be Considered. The following factors, among others, should be evaluated a deferred action determination:

(1) The Likelihood That the Service Will Ultimately Remove the Alien Based on Factors Includin

- likelihood that the alien will depart without formal proceedings (e.g., minor child who will deportable parents);
- age or physical condition affecting ability to travel;
- the likelihood that another country will accept the alien;
- the likelihood that the alien will be able to qualify for some form of relief which would

indefinitely delay removal.

(2) Sympathetic Factors: The presence of sympathetic factors which, because of a desire on administrative or judicial authorities to reach a favorable decision, could result in a distortion with unfavorable implications for future cases.

(3) Priority Given to a Class of Deportable Aliens: Whether or not the individual is a member o deportable aliens whose removal has been given a high enforcement priority (e.g., dangerou alien smugglers, drug traffickers, terrorists, war criminals, habitual immigration violators).

(4) Service Cooperation with Other Agencies: Whether the alien's continued presence in desired by local, state, or federal law enforcement authorities for purposes of ongoing crim investigation or prosecution.

(c) Procedures. Normally a decision to recommend deferred action is made by the District Dire limited circumstances, the decision may be made by the Eastern Service Center Director.

(1) District Director. If the District Director recommends that removal action in an alien's case b the Director shall advise the Regional Director of such recommendation using **Form G-31** Action Case Summary. The District Director shall sign the recommendation and shall explain th his or her recommendation. The Regional Director shall consider the recommendation and whether further action on the alien's case should be deferred. The decision whether or not to d shall be communicated in writing by the Regional Director to the District Director. Upon notification of deferral by the Regional Director, the District Director shall notify the applicant, b the action taken and advise the alien that he or she may apply for employment auth accordance with **8 CFR 274a.12(c)(14)**. A decision not to defer action in such a case does not separately communicated to the alien.

(2) Center Director (Eastern). In limited circumstances, Eastern Service Center Director may d on removal of an alien. Upon approval of an **Form I-360** petition by a battered or abused spou in his or her own behalf, the director shall separately consider the particular facts of each determine if deferred action is appropriate. Although the approval of such a petition will weigh deferred action, each decision must be considered individually, based on all the facts prese factors discussed above. Upon deferral of action, the Center Director shall advise the alien, b the action taken and advise him or her of eligibility to request employment authorization. A dec defer action in such a case does not need to be separately communicated to the alien. Upon removal action, the Center Director shall include a copy of the **G-312** in the alien's A-file and file to the local Service office having jurisdiction over the alien's residence for docket control.

(d) Employment Authorization. Although deferred action is not an immigration status, an ali granted work authorization based on deferred action in his or her case, pursuant to **8 CFR 274a.12**

(e) Periodic Review. Interim or biennial reviews should be conducted by both District an Directors to determine whether deferred action cases should be continued or the alien remove deferred action category. District reviews must determine if there is any change in the circumsta case and report any pertinent facts to the Regional Director. Results of the review and a recomm continue or terminate deferred action shall be reported to the Regional Director via memora Regional Director shall endorse the memorandum with his or her decision and return it to the Distr for inclusion in the alien's file.

District Directors must also review deferred action cases within their jurisdiction which were origin by the Eastern Service Center Director. Changed circumstances in such cases must be reported to

Director for consideration of terminating the deferred action.

Regions should compare statistics among their districts to ensure consistent application of sensitive program.

(f) Termination of Deferred Action. During the course of the periodic review, or at any other District Director determines that circumstances of the case no longer warrant deferred action, he notify the Regional Director of the changed circumstances and recommend termination. The Regio shall determine if the deferred action should be terminated and notify the District Director of the de District Director shall, in turn, notify the alien of the decision by letter. The alien is not entitled to a this decision. The Eastern Service Center Director may also terminate deferred action in any cas originally granted. If the Eastern Service Center Director terminates deferred action, he or she mus decision to the Regional Director and to the appropriate District Director.

Upon termination of deferred action, any relating employment authorization must be revoked.

20.9 Exercising Discretion.

(a) Distinguishing Prosecutorial from Adjudicative Discretion. In the course of their duties, Serv are likely to encounter a variety of situations in which they may be called upon to make di decisions. The legal requirements, and the available scope of discretion, will depend upon t discretionary decision being made. There are two general types of discretion: prosecutorial (or er discretion, and adjudicative discretion.

Prosecutorial discretion is a decision by an agency charged with enforcing the law to enforce, or r the law against someone. To put it another way, a prosecutorial decision is a choice whether to e coercive power of the state in order to deprive an individual of a liberty or property interest, unde provides the agency with authority to take such an action. The term "prosecutorial" can be deceptiv the scope of decisions covered by this doctrine include decisions, such as whether to arrest a violator, other than the specifically "prosecutorial" decision whether to file legal charges against Adjudicative discretion, by contrast, involves the affirmative decision whether to grant a be adjudicative standards and procedures provided by statute, regulation or policy that provide the ag measure of discretion in determining whether to provide the benefit.

The distinction between the discretion exercised in an adjudicative decision regarding an affirmativ benefit and a prosecutorial decision is a fundamental one; yet, it is sometimes blurred and determine in the immigration context. Some decisions that may, on their face, look like a benefit g as an INS stay of removal or grant of deferred action -- really are just mechanisms for formalizing of prosecutorial discretion. Others, such as voluntary departure, include elements of both "b enforcement. Many proceedings combine both adjudicative and prosecutorial discretion, such as proceeding in which an asylum application, adjustment of status, or a request for cancellation of re issue. Officers who are in doubt about what standards may apply to a decision because of uncert what type of discretion is involved should consult their supervisor and/or Service counsel.

Service enforcement decisions involving prosecutorial discretion may involve either a liberty or interest. Decisions involving a liberty interest that are likely to be relevant to a deportation offi include:

- whom to arrest;
- whom to refer for criminal prosecution;

- whether or not to put an alien in removal proceedings, as opposed to or offering s consequence of his or her immigration violation such as voluntary departure or voluntar simply not pursuing the matter further;

- whether to place an alien in detention (but note that detention discretion has been limited such as **section 236(c)** of the Act) and

- whether to execute an order of removal.

INS prosecutorial decisions involving property interests include whether to seek a carrier fine, civi fraud or employer sanctions money penalty, or forfeiture against INA violators.

Adjudicative discretion, on the other hand, is exercised in certain specific types of benefit applic as:

- adjustment of status;
- change of nonimmigrant status;
- extension of nonimmigrant stay;
- asylum;
- cancellation of removal;
- voluntary departure
- certain employment authorization requests; and
- various waivers of inadmissibility.

Such discretionary action is specifically provided in statute or regulation for these cases. Oth adjudicative actions, such as visa petitions, may not have any discretionary component.

(b) Exercising Prosecutorial Discretion. The "discretion" in prosecutorial discretion means that p decisions are not subject to review or reversal by the courts, except in extremely narrow circums this reason, it is a powerful tool that must be used responsibly. Because the Service has resources, decisions must regularly be made concerning which cases are the most appropriate u resources. INS officers are not only authorized by law but also expected to exercise discretion in manner at all stages of the enforcement process -- from planning investigations to enforcing fin subject to their chains of command and to the particular responsibilities and authorities applica specific position. Decisions whether or not to initiate removal cases or take other enforcement acti made consistently and the officer must be able to articulate their reasoning behind their act exercise of prosecutorial discretion must consider the individual facts of the case. Arbitrary ap enforcement tools must be avoided.

For a legal opinion on the exercise and limitations of prosecutorial discretion within the Servic *Special Agent's Field Manual* **Appendix 14-5**. A memorandum from the Commissioner, dated Nov also discusses prosecutorial discretion (see *Special Agent's Field Manual* **Appendix 14-6**).

(c) Exercising Adjudicative Discretion. Each type of adjudicative benefit has specific eligibility re and includes certain restrictions. Individuals denied some benefits (such as asylum) as a discretionary decision by the Service might have further opportunities for review of the decision, discretionary decisions (such as denial of employment authorization) may not be subject to ap adjudicative decision involving an exercise of discretion, the criteria that should be applied may precedent decisions or in Service regulations. These regulations and decisions should always b for guidance. Whenever an adverse adjudicative decision involving an exercise of discretion is grounds for such denial must be given in the notice of denial. Failure to do so may result in jud

premised on an abuse of discretion. [See Jarecha v. INS, 417 F. 2nd 220 (5th Cir. 1979).] (Revised

20.10 Temporary Protected Status vs. Deferred Enforced Departure.

Section 244 of the INA contains information concerning Temporary Protected Status (TPS). Tl General of the United States, after consultation with appropriate agencies of the Government, ma nationals of any foreign state (or a part of such foreign state) as deserving of TPS. In addition to na Attorney General may also include aliens who have no nationality but last resided in the designa state. Aliens who have been granted TPS may not be removed from the United States during the protected period and qualify for work authorization. The initial period of designation is not less tha and not more than 18 months. At least 60 days prior to the expiration of the designated period, tl General must review the conditions of the designated state to determine if TPS is still warranted. of TPS designations normally are in 6 to 18 month increments at the Attorney General's Applications for TPS are made on **Form I-821**.

(a) Conditions that may warrant TPS designation for a particular state. The Attorney General TPS if there is an on-going armed conflict within the state that may cause harm to aliens that are that state. Earthquakes, floods, droughts, epidemics or other environmental disasters that wou temporary, but substantial, disruptions of living conditions may result in TPS designations. A fc being temporarily unable to handle the return of nationals of that state may also result in a c Granting a TPS designation to a particular state must not be contrary to the interests of the United S

(b) TPS Impact on Removals. Aliens who have registered for TPS may not be removed from States. Denial of TPS benefits results in the continuation of the removal process. Aliens who granted TPS benefits receive an automatic stay of removal and cannot be removed until the expir designated removal period. A grant of TPS does not affect the detention status of an alien who is mandatory detention; however, it should be considered when determining the custody of an alien w releasable. Aliens who are in removal proceedings normally have their case administratively c decision screen in DACS should be updated but the case remains open under docket control.

(c) Deferred Enforced Departure (DED). Unlike TPS, DED is not statutory and emanates from States President's constitutional powers to conduct foreign relations. TPS may be granted by tl General but DED must come from the President in the form of an Executive Order. Presidential ord are published in the Federal Register. Aliens who have been granted DED are normally gra authorization per **8 CFR 274A.12(A)(11)**. Aliens who have been granted DED may not be remove United States until the designated period of DED has expired. If an alien falls under the protection c comment screen in DACS should be updated.

20.11 Nicaraguan Adjustment and Central American Relief Act (NACARA) and Haitia Immigration Fairness Act (HRIFA).

(a) Nicaraguan Adjustment and Central American Relief Act (NACARA). The NACARA amendi through **Public Law 105-100** was signed into law on November 19, 1997. It provides various i benefits and relief from removal to certain Central Americans, Cubans and nationals of former countries. Specifically, the law provides that eligible Nicaraguans or Cubans can be considered for of status to that of a permanent resident alien. Additionally, certain Guatemalans, Salvadorans an of former Soviet bloc countries were eligible to apply for suspension of deportation or special rule c of removal under the criteria that existed for suspension of deportation prior to the enactment of IIR

(b) Nicaraguans and Cubans eligible for adjustment to lawful permanent residence (LPR). Nica Cubans who could establish they had been physically present in the United States for a continu beginning not later than December 1, 1995, and ending not earlier than the date the application for is granted, and who were not inadmissible to the United States under any provision of **Section 2**

INA except paragraphs **(4)**, **(5)**, **(6)(A)**, **(7)(A)** and **(9)(B)**, could apply for adjustment of status tc LPR. See **8 CFR 245.13(a)**. A spouse, minor child, or unmarried son or daughter of an eligib beneficiary may also apply for benefits as a dependent provided the qualifying relationship existe principal beneficiary was granted adjustment of status. Under **8 CFR 245.13(c)**, certain inadmissibility may be available to aliens who are otherwise inadmissible under section of 212 o applicable, in accordance with **8 CFR 212.7**. Pursuant to **8 CFR 245.13(c)(2)**, a regulatory wai available to aliens who are inadmissible under sections **212(a)(9)(A)** and **212(a)(9)(C)** of the Act.

(c) Benefits for Guatemalans, Salvadorans. In order to be eligible for suspension of deportatior rule cancellation of removal, Guatemalans and Salvadorans must demonstrate that they were members who had not been apprehended at the time of entry after December 19, 1990, or w application for asylum on or before April 1, 1990, either by filing an application with the Service application with the Immigration Court and serving a copy of that application on the Service. In a applicant shall not have been convicted of an aggravated felony. Such a qualifying alien may apply rule cancellation of removal by the process discussed below.

(d) Former Soviet Bloc Nationals. Aliens who have not been convicted of a aggravated felon entered the United States on or before December 31, 1990, applied for asylum on or before De 1991, and, at the time of filing the asylum application, were nationals of the Soviet Union, Russia, a of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungar Albania, East Germany, Yugoslavia or any former state of Yugoslavia, may apply for special rule c of removal by the process discussed section 20.11(e).

(e) Application Process for Special Rule Cancellation of Removal. Special rule cancellation of adjudicated under the same standards that existed for suspension of deportation prior to enactmen In order to be eligible, an alien may not have been convicted of an aggravated felony. A principal a special rule cancellation of removal (an alien described in paragraphs **(a)(1)** or **(a)(2)** of 8 CFR 2 be presumed to have established that deportation or removal from the United States would result hardship to the applicant or to a qualifying relative. See **8 CFR 240.64(d)**. The Service car presumption of extreme hardship by proving that it is more likely than not that neither the appl qualifying relative would suffer extreme hardship if the applicant were deported or removed from States. See **8 CFR 240.64(d)(2)** and **(3)**. Where an application is filed with the Service, if the pres hardship is rebutted, the application can be dismissed and the case can be referred to the Immigr where the applicant can have another review of the application. If the Immigration Court dete extreme hardship will not result from deportation or removal from the United States, the applica denied. The applicant has the burden of also proving that he or she has been continuously physic in the United States for a period of not less than 7 years immediately preceding the date the appl filed, and that s/he has been a person of good moral character during that period.

(f) Derivative Applicants for Special Rule Cancellation of Removal. An alien who is the spous unmarried son or daughter of an individual described in **8 CFR 240.61(a)(1)**, **(2)**, or **(3)**, at the time is made to suspend the deportation or cancel the removal of that individual may also apply for su deportation or special rule cancellation of removal. Such derivative applicants do not get the pres extreme hardship, and accordingly have the burden of proving that their deportation or removal wo extreme hardship to themselves or to a qualifying relative. The applicant has the burden of also p he or she has been continuously physically present in the untied States for a period of not less th immediately preceding the date the application was filed, and that s/he has been a person of character during that period.

(g) Detention and Removal actions regarding NACARA applicants. Although the deadline fc applications expired on March 31, 2000, 8 CFR 3.43 allowed certain aliens to file a motion to re section **203(c)** of Public Law 105-100. The deadline for filing the motions to reopen expired on Jun Regardless of the expired deadlines, you may encounter aliens who still have pending appli

benefits under NACARA. If you encounter an alien who claims to have a NACARA application p should check all applicable Service databases to determine whether the application is still p addition, criminal record checks must be conducted to determine if the alien is subject to mandator If the alien has no criminal record and the NACARA application is still pending, s/he should not b The following are three scenarios involving aliens whose applications have been denied and the a should be taken in each case:

(1) Removal proceedings have never been initiated. In this case, the alien's application has b and the alien should be referred to Investigations for the processing of a **Form I-862**, Notice to /

(2) Removal proceedings were initiated at one time but were administratively closed to allow t opportunity to apply for NACARA benefits. The Service should file a motion to recalend Immigration Court to allow the hearing process to continue. Custody determinations should b each case individually using existing custody determination guidelines and the guidance fc December 18, 1997 memorandum signed by the Executive Associate Commissioner, Offi Operations. See "Interim Guidance – Nicaraguan Adjustment and Central American Relief Act".

(3) The alien has a pre-existing Order of Removal that was held in abeyance due to the application. Custody determinations should be made on a case-by-case basis utilizing existi determination guidelines and the guidance found in the December 18, 1997 memorandum sig Executive Associate Commissioner, Office of Field Operations. The Service must complete a (c) and serve it on the Immigration Court. The court will make the determination if the NACA was properly denied. If the court determines the benefit was properly denied, the removal a proceed. If the determination is made that the denial was not proper, the court will adj application.

Aliens who had been ordered deported were eligible to apply for adjustment under the NACARA. an application automatically held the removal of the alien in abeyance. If an alien was a mandator case, the filing of the application did not affect the alien's custody.

Additional information about NACARA § 203 rules may be found in **8 CFR 240.60** and 8 CI questions arise involving NACARA applicants, consult the District Counsel's office or the Ex branch.

(h) Haitian Refugee Immigration Fairness Act (HRIFA). The HRIFA became law on Octobe under Public Law L. 105-277. **Division A, Title IX** of the law dealt specifically with HRIFA. Sectior HRIFA provided for the adjustment of status to that of lawful permanent resident for certain Haitiar wishing to apply for adjustment of status under HRIFA must have submitted their applications on F Application to Register Permanent Residence or Adjust Status using I-485 Supplement C, HRIFA S to Form I-485 Instructions, prior to March 31, 2000. Although the deadline has passed, office encounter Haitians who have applications pending for this relief.

(i) Detention and Removal actions regarding applicants for benefits under HRIFA. The removal who were clearly eligible for adjustment under HRIFA was held in abeyance. Officers encountering claim to have a HRIFA application pending should check all applicable Service databases to whether the application is still pending. In addition, criminal record checks must be conducted to c the alien is subject to mandatory detention. If the alien has no criminal record and the HRIFA ap still pending, s/he should not be detained. The following are three scenarios involving ali applications have been denied and the actions that should be taken in each case:

(1) Removal proceedings have never been initiated. In this case, the alien's application has b and the alien should be referred to Investigations for the processing of a **Form I-862**, Notice to /

(2) Removal proceedings were initiated at one time but were administratively closed to allow t opportunity to apply for HRIFA benefits. The Service should file a motion to recalend Immigration Court to allow the hearing process to continue. Custody determinations should b each case individually using existing custody determination guidelines and the guidance fc December 22, 1998 memorandum signed by the Executive Associate Commissioner, Offi Operations. See "Interim Guidance – Haitian Refugee Immigration Fairness Act of 1998 (HRIF/

(3) The alien has a pre-existing Order of Removal that was held in abeyance due to application. Custody determinations should be made on a case-by-case basis utilizing existi determination guidelines and the guidance found in the December 22, 1998, memorandum sig Executive Associate Commissioner, Office of Field Operations. The Service completes a Form order to certify the denial of HRIFA benefits to the Immigration Court. The court then determin HRIFA adjustment was properly denied.

The filing of an application automatically held the removal of the alien in abeyance. If an a mandatory detention case, the filing of the application did not affect the alien's custody. Additional about HRIFA rules may be found in Section **902** of the HRIFA and **8 CFR 245.15**. If questions aris HRIFA applicants, consult the District Counsel's office or the Examinations branch.

20.12 Voluntary Departure.

Voluntary departure may be granted by the INS or an immigration judge under the conditions s **section 240B** of the Immigration and Nationality Act. See **Chapter 13** of this Manual for an exp voluntary departure.

Go to the N

ATTACHMENT C

Office of Investigations
U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

JUN 21 2004

MEMORANDUM FOR: ALL SPECIAL AGENTS IN CHARGE
ALL RESIDENT AGENTS IN CHARGE
ALL RESIDENT AGENTS

FROM: Marcy M. Forman
Acting Director, Office of Investigations

SUBJECT: Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service

This memorandum amends the current ICE policy requiring Headquarters authorization to issue a Notice to Appear (NTA) in the case of a current or prior member of the United States military. It also provides guidance regarding the exercise of prosecutorial discretion in the issuance and service of a Notice to Appear (NTA), a Final Administrative Removal Order (Administrative Order), or a Reinstatement of a Final Removal Order (Reinstatement) upon an alien with service in the United States military. This includes service in the United States Army, Air Force, Navy, Marine Corps, Coast Guard, or National Guard, as well as service in the Philippine Scouts during World War II.

The former Immigration and Naturalization Service (INS) previously recognized that military service should be considered in determining whether or not to issue and serve an NTA upon an alien who was discharged from one of the military branches. INS Interim Enforcement Procedures, dated June 5, 1997, titled "Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing and Removal" state in Section V, Subsection D (8): "Current or former members of Armed forces. A Notice to Appear shall not be issued against any current or former member of the armed forces without prior approval from the regional director. Also, such an alien must also be advised, prior to the issuance of the Notice to Appear, of any discretionary relief which may be available." The abolition of the INS and its regional offices makes it appropriate to revisit the procedures for issuance of NTAs, Administrative Orders, and Reinstatements in cases involving military service by aliens.

The authority to approve issuance of an NTA, Administrative Order, or Reinstatement in these cases will now rest with the Special Agent in Charge (SAC) in each field office. This decision will, at a minimum, take into consideration the circumstances in each case as identified below, and requires a memorandum from the SAC to the A-file with a brief overview of the facts considered and specifically authorizes issuance of the NTA, Administrative Order, or Reinstatement.

Importantly, a thorough review to determine eligibility for United States Citizenship under sections 328 and 329 of the Immigration and Nationality Act (INA) must be completed in these cases because those sections contain special naturalization provisions for members of the military and, under certain circumstances, an order of removal does not preclude their naturalization. Accordingly, ICE should not initiate removal proceedings against aliens who are eligible for naturalization under sections 328 or 329 of the INA, notwithstanding an order of removal.[1]

In cases involving military service where the alien is not eligible for naturalization under sections 328 or 329 of the INA, the issuing official should consider the alien's overall criminal history, as well as any evidence of rehabilitation, family and financial ties to the United States, employment history, health, community service, specifics of military service, and other relevant factors. When looking at military service, an ICE official should consider factors related to that service, such as duty status (active or reserve), assignment to a war zone, number of years of service, and decorations awarded. Additionally, when analyzing the criminal history in the case, crimes involving violence, aggravated felonies, drug trafficking, or crimes against children are to be viewed as a threat to public safety and normally the positive factors of any military service will not deter the issuance of an NTA. An honorable discharge by no means serves to bar an alien from being placed in removal proceedings.

Although possible adverse publicity may be a factor in considering whether to issue an NTA, Administrative Order, or Reinstatement, it should not be the determining factor. The decision not to issue an NTA, Administrative Order, or Reinstatement is an exercise of prosecutorial discretion; as such it does not convey any right upon the alien or his or her representative. There is no application to submit, nor any explanation owed to the alien as to why a decision was made to issue an NTA, Administrative Order, or Reinstatement regardless of military service. There is no right to review the decision to initiate proceedings before any administrative appeal unit, an immigration judge, nor the federal courts. The special agent interviewing an alien should, as much as possible, put the responsibility on the alien to substantiate the discharge, decorations won, length of service, etc.

Officers charged with processing aliens for NTAs, Administrative Orders, or Reinstatements should be periodically reminded to inquire about military service during such processing in all cases where such service may be a possibility. However, when an alien's prior military service does not come to the attention of ICE until after issuance of the NTA, Administrative Order, or Reinstatement, appropriate action should be taken to comply with this guidance.

In cases in which an alien is still on active duty when ICE seeks to serve an NTA, Administrative Order, or Reinstatement, SACs should consider the implications of placing an active duty alien in

[1] All aliens eligible for naturalization under section 329 of the INA can be naturalized notwithstanding an order of removal. In contrast, not all aliens eligible for naturalization under section 328 of the INA can be naturalized notwithstanding an order of removal. Under section 328 of the INA, only those aliens who are serving in the armed forces and who, prior to filing the application, appear before a representative from U.S. Citizenship and Immigration Services, may be naturalized notwithstanding an order of removal.

proceedings. While ICE policy does not preclude the placement of an alien on active duty into proceedings, factors regarding successful service of the NTA, Administrative Order, or Reinstatement should be considered prior to authorization of the NTA for service. Such factors may include: (1) whether coordination with the enforcement arm or administration of that branch of the service in which the alien is serving is possible; (2) whether the alien is likely to abscond if he/she is discharged prior to being placed into proceedings; and (3) whether service of the NTA, Administrative Order, or Reinstatement can be coordinated so that the alien can be served immediately upon discharge. Whenever possible, the alien should be served upon discharge.

This policy provides some, but not all, of the factors to consider when deciding whether or not to exercise prosecutorial discretion in the issuance of an NTA, Administrative Order, or Reinstatement against an alien who has served in the United States military. In all cases, the factors considered and the decision made in each specific case must be entered into a memorandum of investigation, G-166C, in ENFORCE and a copy placed in the alien's A-file. This G-166C will be referenced on the Form I-213 that is completed for the case. As in all cases, the SAC should seek assistance from the Office of the Chief Counsel as necessary.

Any questions related to this memorandum can be directed to Jeff Broadman, Program Manager/IRP at 202-353-3611.

ATTACHMENT D

Office of the Principal Legal Advisor
U.S. Department of Homeland Security
425 I Street N.W., Room 6100
Washington, DC 20536

U.S. Immigration and Customs Enforcement

OCT 6 2005

MEMORANDUM FOR: Chief Counsels

FROM: William J. Howard
Principal Legal Advisor

SUBJECT: Exercising Prosecutorial Discretion To Dismiss Adjustment Cases

PURPOSE:

To set forth the criteria and procedures by which an Immigration and Customs Enforcement (ICE) Office of the Chief Counsel (OCC) may join in or file a motion to dismiss proceedings without prejudice when the ICE OCC determines adjustment applications currently pending before EOIR would be appropriate for approval by Citizenship and Immigration Services (CIS).

The basis for this policy is to reallocate limited ICE resources to priority cases by dismissing appropriate cases where it appears in the discretion of the ICE OCC that relief in the form of adjustment of status appears clearly approvable.

CRITERIA:

Motions to Dismiss Proceedings Without Prejudice pursuant to this memorandum should be predicated on the following threshold criteria.

- EOIR must have jurisdiction to adjudicate the application for adjustment.
- The respondent must demonstrate prima facie eligibility for adjustment of status based on a properly filed application for adjustment under the Immigration and Nationality Act (including but not limited to sections 209, 245, 249, or section 1 of the Act of November 2, 1966). Where the application for adjustment is predicated on a visa petition, the case may be dismissed where the visa petition is approved and immediately available or the record establishes a long-term relative relationship where approval of an immediately available petition is likely.

- Adjustment applications must support a discretionary determination by the ICE OCC that the applications appear clearly approvable.

- There is no asylum application pending adjudication before the Immigration Judge.

- ICE OCC should not generally join in a Motion to Dismiss Without Prejudice or so move sua sponte in removal proceedings involving threats to national security, human rights violators, criminal convictions or conduct necessitating a 212(h) waiver (e.g. Operation Community Shield, Operation ICE Storm, Operation Cornerstone or Operation Predator), immigration fraud necessitating a 212(i) waiver (e.g. Operation Jakarta), or detained aliens. With the approval of the Chief Counsel, dismissal may be permitted in the above cases based upon unique or special circumstances including but not limited to the extent and/or seriousness of criminal conduct, recency and/or significance of immigration fraud, or national security interests. While this is not an exhaustive list, the policy outlined herein should ordinarily be followed absent a competing enforcement interest.

PROCEDURE:

A Motion to Dismiss Without Prejudice must be predicated on the respondent demonstrating prima facie eligibility through an application for adjustment before EOIR. When applicable, the respondent or his/her representative must contact the ICE OCC representing DHS before the Immigration Court to request ICE OCC consent to dismiss proceedings. ICE OCC may require that such request be made in writing, be supported by a true and complete copy of the adjustment application pending before EOIR, and be supported by any other evidentiary material including, but not limited to, a copy of the current DOS Visa Bulletin showing current priority date and respondent's FBI Identification Record accessible at http://www.fbi.gov/hq/cjisd/fprequest.htm. (FAQ's accessible at http://www.fbi.gov/hq/cjisd/faqs.html.)

The ICE OCC may join in a Motion to Dismiss without Prejudice or move sua sponte for dismissal without prejudice if the ICE OCC determines that the respondent's application for adjustment is likely to be granted.

Where appropriate, ICE OCC may request revisions to a proposed motion be made as a precondition for giving its consent. ICE OCC should strive to reply in a timely manner to requests for dismissal of proceedings for adjustment before CIS.

ICE OCC should specifically request that a decision of the Immigration Judge dismissing proceedings will expressly state that dismissal of the matter shall be without prejudice to the Department of Homeland Security (DHS) so that the record will be clear that the re-commencement of removal proceedings will not be barred by the doctrines of res judicata or collateral estoppel. If the Immigration Judge dismisses removal proceedings without prejudice, the OCC should route the administrative file(s) through DRO to CIS for

adjudication of adjustment applications and update the General Counsel Electronic Management System (GEMS) including entering "DFA" (Dismissed for Adjustment) within the events note portion of the events tab in GEMS cases manager until "Dismissed for Adjustment" is incorporated as a dropdown order option within the events tab. While the applicant bears the burden of satisfying CIS filing and eligibility requirements, should the immigration court grant a joint request to forward the original adjustment application to the ICE OCC at the time of dismissal of proceedings, the original adjustment application should be placed in the administrative file prior to routing the administrative file to CIS.

Use

This memorandum is intended solely for the guidance of DHS personnel in the performance of their duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or equity by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner. Discretionary decisions of the ICE OCC regarding the exercise of prosecutorial discretion under this memorandum are final and not subject to legal review or recourse.

ATTACHMENT E

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
425 I Street, N.W. Room 6100
Washington, DC 20536

U.S. Immigration and Customs Enforcement

JAN - 8 2004

MEMORANDUM FOR ALL CHIEF COUNSEL

FROM: Victor X. Cerda
Acting Principal Legal Advisor

SUBJECT: Changes to the National Security Entry Exit Registration System (NSEERS)

On December 2, 2003, the Department of Homeland Security published an interim rule amending the regulations contained at 8 C.F.R. section 264.1(f), relating to special registration of aliens. *See* 68 FR 67578. This rule significantly alters, but does not discontinue, the registration program.

The December 2nd rule suspends the automatic 30-day and annual re-registration requirements for aliens who had previously registered under the NSEERS program. However, under this rule, aliens who previously registered, either at a Port of Entry (POE) at the time of admission or as part of the domestic "call-in" registration program, continue to have an obligation to register their departure. Additionally, NSEERS registered aliens may now be subject to continuing registration interviews at the discretion of the Assistant Secretary for U.S. Immigration and Customs Enforcement, or his designee. Aliens subject to the continuing registration requirements will be notified of their registration obligations in writing.

The December 2nd rule expressly states that it does not excuse past registration violations. If an alien was or is required to appear for a required NSEERS registration interview and willfully fails to do so, the alien remains amenable to removal proceedings. Thus, removal proceedings should continue or may be initiated for the following groups of aliens:

(1) Aliens who were originally registered at a POE or as part of the domestic registration program on or before November 21, 2002, and who willfully failed to appear for their annual re-registration interview on or before December 1, 2003;

(2) Aliens registered upon admission who entered the United States on or before October 22, 2003, and who willfully failed to appear for a 30-day continuing registration interview on or before December 1, 2003;

(3) Aliens who were subject to domestic registration, as noticed in the federal register, and who willfully failed to appear and be registered;

(4) Aliens who, following the December 2, 2003 rule, are given written notice of the requirement that they appear for a continuing registration interview and who willfully fail to appear.

As you are aware, the willful failure to comply with NSEERS registration provisions constitutes a violation of non-immigrant status. Such cases should be carefully evaluated to determine whether the alien's failure to comply with registration requirements was knowing and voluntary. If the Chief Counsel determines that termination of a case is appropriate because there is insufficient evidence that the alien's failure to register was willful, or if a case is terminated by an Immigration Judge based upon a failure of U.S. Immigration and Customs Enforcement to meet its burden of proof as to the willfulness of the violation, please coordinate with your local Office of Investigations to ensure that the alien's registration record is updated.

Any questions regarding this policy or individual cases may be directed to Rachel Silber, Associate Legal Advisor, at (202) 353-3447.

ATTACHMENT F

Appellate Counsel
Office of the Principal Legal Advisor, USICE
U.S. Department of Homeland Security
5113 Leesburg Pike, Suite 200
Falls Church, VA 22041

U.S. Immigration and Customs Enforcement

(rev. 5/10/05)

U.S. ATTORNEY OFFICE REMAND RECOMMENDATIONS

When U.S. Attorney Offices determine that it is appropriate to move to remand a federal court immigration case back to the Board of Immigration Appeals,[1] it would be appreciated if the following process is followed when seeking concurrence from U.S. Immigration and Customs Enforcement's Office of the Principal Legal Advisor (ICE OPLA).

- ICE OPLA requests that U.S. Attorney Office remand recommendations be directed to the local ICE Chief Counsel Office that litigated the case before the Executive Office for Immigration Review. The pertinent ICE Chief Counsel Office can be determined by the location of the Immigration Court where the case was decided, as listed on the Immigration Court and BIA decisions in the certified record.
    - Please see the attached chart for local Chief Counsel contact information. If, for whatever reason, there is difficulty in contacting local Chief Counsel, ICE's Office of Appellate Counsel should be contacted for assistance: (703) 756-6257.
- Further, when recommending remand to an ICE Chief Counsel Office, it would be very helpful if the following procedures are used:
    - Please send the remand recommendation in e-mail form. (This will help speed the review process as there often is a need for consultation between ICE field and HQ components as well as with other DHS components.)
    - For sake of uniformity and ease of identification, please use the following format for the subject line of the e-mail: "US Attorney Remand Request: Alien Name / A-number."
    - Please try to send the remand recommendations at least seven (7) days in advance of the briefing deadline, especially if all extensions have already been exhausted with the court. (This will permit adequate time for the ICE Chief Counsel office to retrieve the A-file, review the remand request, consult with ICE HQ and other DHS components (if necessary), provide a response to the remand request, AND still allow time for a brief to be drafted, if necessary).

[1] The Civil Division's Office of Immigration Litigation will provide remand advice to a U.S. Attorney Office upon request.

- In order to assist the ICE Chief Counsel office in making an informed decision, it would be very helpful if the remand request included the following key information:
  - A summary of the facts and issues of the case, and an explanation of why remand is sought. (In this regard, a short pro/con litigation risk analysis would be helpful.)
  - An outline of the proposed arguments to be made in a brief assuming the case is to be litigated before the federal court.
  - Verification that the remand recommendation has received all necessary internal approvals, such as from the pertinent Civil Chief.
  - Copies of the IJ and BIA decisions (as well as any other documents from the certified record necessary to assess the remand request). These documents can either be attached to the e-mail via PDF or faxed.

- Finally, it would be helpful if a draft of the remand motion could be provided to the ICE Chief Counsel Office for review / comment before filing with the court.

Chief Counsel Office (+ Sub-Office(s))	Chief Counsel	E-mail Address	Telephone Number
Arlington	Javier Balasquide	Javier.Balasquide@dhs.gov	(202) 307 1579
Atlanta	Terry Bird	Terry.Bird@dhs.gov	(404) 331 6831
Baltimore	George Maugans	George.Maugans@dhs.gov	(410) 962 0773
Boston (+ Hartford)	Frederick McGrath	Frederick.Mcgrath@dhs.gov	(617) 565 3140
Buffalo (+ Buffalo Federal Detention Facility)	James Grable	James.Grable@dhs.gov	(716) 551 4741 ext. 3200/3281/3285
Chicago (+Kansas City)	Karen Lundgren	Karen.Lundgren@dhs.gov	(312) 385 7317
Dallas	Paul Hunker	Paul.Hunker@dhs.gov	(214) 905- 5780
Denver (+ Helena)	Corina Almeida	Corina.Almeida@dhs.gov	(303) 371 4711
Detroit (+ Cleveland + Cincinnati)	Kathleen Alcorn	Kathleen.Alcorn@dhs.gov	(313) 568 6033
El Paso	Guadalupe Gonzalez	Guadalupe.Gonzalez@dhs.gov	(915) 225 1803
Honolulu	David Roy	David.Roy@dhs.gov	(808) 532-2149
Houston (+ Huntsville)	Gary Goldman	Gary.Goldman@dhs.gov	(281) 774 4746
Los Angeles (+Las Vegas + San Pedro + Mira Loma)	John Salter	John.Salter@dhs.gov	(213) 894 8627
Miami (+Krome)	Riah Ramlogan-Seuradge	Riah.Ramlogan@dhs.gov	(305) 400 6160
Newark (+Elizabeth Detention Center)	Charles Parker	Charles.Parker@dhs.gov	(973) 645 2318
New Orleans (+ Oakdale + Memphis)	Joseph Aguilar	Joseph.Aguilar@dhs.gov	(504) 599-7823
New York (+Varick, +Downstate, +Ulster, +Wackenhut)	Brian Meyers	Brian.Meyers@dhs.gov	(212) 264 - 5916
Orlando (+Bradenton)	Daniel Vara	Daniel.Vara@dhs.gov	(407) 282 - 0145
Philadelphia	Kent Frederick	Kent.Frederick@dhs.gov	(215) 656 7146

(+York County Prison)			
Phoenix (+Florence, +Eloy, Tucson)	Patricia Vroom	Patricia.Vroom@dhs.gov	(602) 379 3164
St. Paul (+Omaha)	Richard Soli	Richard.Soli@dhs.gov	(952) 853 2970
San Antonio (+Harlingen, +Port Isabel)	Gregory Ball	Gregory.Ball@dhs.gov	(210) 967 7050
San Diego (+ El Centro + East Mesa Detention Facility)	Martin Soblick	Martin.Soblick@dhs.gov	(619) 557-5578
San Francisco	Ronald Le Fevre	Duty-Attorney.Sfr@dhs.gov	(415) 705 4486
San Juan	Vivian Reyes-Lopez	Vivian.ReyesLopez@dhs.gov	(787) 706 2352
Seattle (+Anchorage + Portland)	Dorothy Stefan	Dorothy.Stefan@dhs.gov	(206) 553 2366

ATTACHMENT G

Department of Homeland Security Performance Plan and Appraisal

General Information

This section allows the employee or Rating Official to enter the rating cycle and complete the employee, Rating Official, and Reviewing Official information. Please use the tab key to navigate from field to field.

Employee Information

	-		
	Rating Period Start - End		
Last Name	First Name		Middle Initial
Employee Identification Number (consult component for specific use)	Pay Plan	Occupational Series	Grade
Organization	Position Title		Duty Location

Rating Official Information

Last Name	First Name	Middle Initial
Organization		Position Title

Reviewing Official Information

Last Name	First Name	Middle Initial
Organization		Position Title

PRIVACY ACT STATEMENT: Authority: 49 U.S.C. § 114(n). Principal Purpose(s): This information will be used to document your performance appraisal and to certify that the rating official has discussed your performance appraisal with you. Routine Use(s): This information may be shared in response to a request for discovery or for appearance of a witness, information that is relevant to the subject matter involved in a pending judicial or administrative proceeding, or for routine uses identified in the Office of Personnel Management's system of records, OPM/GOVT-2 Employee Performance File System Records. Disclosure: Voluntary.

Core Competencies

This section allows you to view the pre-established core competencies, behaviors, and associated performance standards. You cannot update or modify any of the information in this section. Please use the tab key to navigate through the competencies. Please refer to the Annual Appraisal and Rating of Record section of this document to view the rating given to each competency.

Each core competency is weighted equally and, together, makeup 40% of the overall performance rating. The performance goals makeup the other 60% of the overall performance rating and appear under the Performance Goals section of this document.

- 5 – Achieved Excellence. The employee performed as described by the "Achieved Excellence" standards.
- 4 – Exceeded Expectations. The employee performed at a level between "Achieved Excellence" standards and the "Achieved Expectations" standards.
- 3 – Achieved Expectations. The employee performed at as described by the "Achieved Expectations" standards.
- 1 – Unacceptable. The employee performed below the "Achieved Expectations" standards; corrective action is required.

Core Competency 1: Communication

Actively listens and attends to nonverbal cues when responding to the questions, ideas, and concerns of others. Communicates in an influential or persuasive manner, as appropriate. Writes in a clear and concise manner. Orally communicates in a clear and concise manner. Tailors communication (e.g., language, tone, level of specificity) to the audiences' level of understanding and to the communication medium.

Performance Standards

- **Achieved Expectations** Applies effective listening skills and appropriately responds when communicating with others. Solicits, shows respect for, and carefully considers others ideas, comments, and questions within scope of work. Effectively explains or defends viewpoint when necessary. Independently prepares and delivers communications that are clear, concise, and timely. Writes communications that generally require few substantive or editorial revisions.
- **Achieved Excellence** Additions at the Achieved Excellence level: Accurately reads and assesses more ambiguous situations and responds effectively. Effectively explains or defends viewpoint to audiences who hold opposing views. Independently and effectively tailors communication style (e.g., language, tone, and level of specificity) and customizes communications to the audience.

Core Competency 2: Customer Service

Communicates with customers to understand their needs. Works with customers to set expectations and keeps them informed of issues or problems. Provides timely, flexible, and responsive services to customers.

Performance Standards

- **Achieved Expectations** Reaches out to customers to gather information about their requirements and needs; develops and delivers products or provides services to meet those needs in a timely manner. Discusses expectations with customers, keeps customers informed of problems that could impede progress, and suggests workable solutions. Responds to questions or requests from customers within reasonable time frames. Displays flexibility in responding to changing customer needs.
- **Achieved Excellence** Additions at the Achieved Excellence level: Independently develops creative and useful ideas that add significant value to products and services. Anticipates customer needs and resolves or avoids potential problems, maximizing customer satisfaction.

Core Competency 3: Representing the Agency

Represents the agency and its interests in interactions with external parties. Ensures that interactions with and information provided to outside parties reflect positively on the agency. Enhances trust and credibility in the agency and its mission through effective professional interactions with others outside the organization. Deals professionally and tactfully with external parties in difficult, tense, or emergency situations.

Performance Standards

- **Achieved Expectations** Presents a professional image of the agency when interacting with others, fostering trust and credibility. In unpredictable situations, stays calm and handles somewhat difficult, tense, or emergency situations with good judgment and professionalism. Takes effective steps to defuse or resolve confrontational situations in a manner that reflects positively on the agency.
- **Achieved Excellence** Additions at the Achieved Excellence level: Takes action to effectively manage difficult, tense, or emergency situations. Engages with others in a manner that earns their respect and helps to advance the Agency's goals and objectives.

Core Competency 4: Teamwork and Cooperation

Makes positive contributions to achieving team goals. Develops and maintains collaborative working relationships with others. Builds effective partnerships that facilitate working across boundaries, groups, or organizations. Respects and values individual differences and diversity by treating everyone fairly and professionally. Works constructively with others to reach mutually acceptable agreements to resolve conflicts.

Performance Standards

- **Achieved Expectations** Contributes to achieving goals by working collaboratively with others and building effective partnerships across organizational boundaries. Independently offers assistance and provides support to advance goals. Deals with everyone fairly, equitably, and professionally, respecting and valuing individual differences and diversity. Effectively handles disagreements or conflicts, resolving them in a constructive manner. Consults with senior team members or supervisors when appropriate and makes viable recommendations for resolving differences.
- **Achieved Excellence** Additions at the Achieved Excellence level: Collaborates beyond what is expected resulting in high-impact contributions. Contributes to a climate of trust and skillfully develops productive relationships and networks that advance goals. Anticipates situations with potential for conflict and takes effective steps to minimize escalation. Considers all sides of issues and develops effective compromises or resolutions.

Core Competency 5: Technical Proficiency

Demonstrates and applies relevant knowledge and skills to perform work in accordance with applicable guidelines. Uses appropriate and available technology or tools to perform work activities. Acquires, develops, and maintains relevant and appropriate job skills through training or other opportunities for learning and development. Stays up-to-date on developments related to own work. Demonstrates an understanding of the organization's mission, functions, and systems. Collects relevant information that is needed to identify and address problems or issues. Analyzes and integrates information to identify issues and draw sound conclusions. Identifies and evaluates alternative solutions to problems.
Makes sound, well-informed, and timely decisions or recommendations. Identifies and utilizes innovative or creative methods and solutions to accomplish work, as appropriate. Maintains an awareness of available resources and the process for acquiring resources. Identifies and advocates for resources required to accomplish work activities or projects. Makes effective and efficient use of available resources. Safeguards available resources to prevent fraud, waste, and abuse.

Performance Standards

- **Achieved Expectations** Successfully applies knowledge and skills (including use of technology and tools) to independently perform a full range of assignments; seeks guidance as appropriate. Uses formal or informal feedback on own performance to develop job skills that facilitate achieving results. Demonstrates an understanding of the applicable organizations mission, functions, and values, the interrelationships between various units and organizations, and relevant policies/procedures (to include, as appropriate, responsibilities toward the protection of classified national security information); uses this knowledge to carry out a full range of work assignments. Demonstrates working knowledge of the resources available to perform work; identifies and acquires needed resources, and ensures that use of resources is efficient and consistent with the planned project or activity. Effectively gathers complete and relevant information from appropriate sources to address issues or problems. Effectively analyzes information to identify issues, weigh alternatives, and draw logical conclusions; anticipates and resolves a full range of problems or issues. Makes well-reasoned, timely decisions and recommendations affecting own work.
- **Achieved Excellence** Additions at the Achieved Excellence level: Successfully applies depth and breadth of knowledge to independently perform even highly complex or varied assignments at this level. Accomplishes tasks in a highly efficient and effective manner and makes high impact contributions. Continually broadens and enhances expertise, resulting in performing more complex work activities. Takes initiative to expand knowledge about resources available and makes useful suggestions that increase efficiency. Identifies and uses effective methods to gather information in a highly efficient manner. Regularly and correctly identifies key issues; anticipates and identifies alternative solutions for problems that have a variety of viable solutions. Seeks opportunities to participate in addressing more complex problems.

Performance Goals

This section allows entry for up to 5 Performance Goals for the employee. If more than 5 goals need to be added, please use the Additional Goals/Comments section located on the last page of this document. Please use the tab key to navigate from field to field. Please refer to the Annual Appraisal and Rating of Record section of this document to view the rating given to each goal.

Each performance goal must be assigned a share to equal 100% and, together, makeup 60% of the overall performance rating. For example, if the employee has 3 goals, they might be weighted as follows: 25%, 25%, and 50%. The core competencies makeup the other 40% of the overall performance rating and appear under the Core Competencies section of this document.

- 5 – Achieved Excellence. The employee performed as described by the "Achieved Excellence" standards.
- 4 – Exceeded Expectations. The employee performed at a level between "Achieved Excellence" standards and the "Achieved Expectations" standards.
- 3 – Achieved Expectations. The employee performed at as described by the "Achieved Expectations" standards.
- 1 – Unacceptable. The employee performed below the "Achieved Expectations" standards; corrective action is required.

For each goal performance standard, describe the level of performance at the Achieved Expectations and Achieved Excellence level by using such terms as quality, quantity, timeliness, and cost effectiveness.

Performance Goal 1 (Outcomes/Results): Develop a mechanism to help ensure that agents and officers are consistently provided with updates regarding legal developments within the scope of their assignments.

Insert the higher level goal, objective, or mission of the organization and/or of the supervisor to which this goal aligns:

Weight: %

Achieved Expectations:

Achieved Excellence:

Performance Goal 2 (Outcomes/Results): Increase efficiency of removal process, including through vertical prosecution and standardization of the stipulated removal process. Establish a baseline of the average number of days to complete a removal case and put measures in place to begin reducing the numbers.

Insert the higher level goal, objective, or mission of the organization and/or of the supervisor to which this goal aligns:

Weight: %

Achieved Expectations:

Achieved Excellence:

Performance Goal 3 (Outcomes/Results): Realign attorney resources so that more attorneys are available to provide support and provide assistance on ICE initiated criminal prosecutions and special operations.

Insert the higher level goal, objective, or mission of the organization and/or of the supervisor to which this goal aligns:

Weight: %

Achieved Expectations:

Achieved Excellence:

Performance Goal 4 (Outcomes/Results): Realign resources so that more attorneys are available to provide legal support to operational components in administering their programs.

Insert the higher level goal, objective, or mission of the organization and/or of the supervisor to which this goal aligns:

Weight: %

Achieved Expectations:

Achieved Excellence:

Performance Goal 5 (Outcomes/Results): Enhance the integrity of the data collected in General Counsel Electronic Management System (GEMS) so that it more comprehensively and accurately measures OPLA's workload and performance.

Insert the higher level goal, objective, or mission of the organization and/or of the supervisor to which this goal aligns:

Weight: %

Achieved Expectations:

Achieved Excellence:

Performance Plan Acknowledgements & Comments

This acknowledges the start of the performance plan. Please complete this section once the plan has been developed, reviewed and approved by the Rating Official and discussed with and given to the employee.

I have discussed my performance plan with my Rating Official.

Employee Signature _____ Date _____
Employee Comments:

I certify that these goals have been reviewed and approved by the Reviewing Official.

Rating Official Signature _____ Date _____
Rating Official Comments:

Mid-Cycle Review Acknowledgements & Comments

At least one formal mid-cycle review is required during the appraisal period.

I certify that the formal mid-cycle progress review and discussion occurred.

Employee Signature _____ Date _____
Employee Comments:

Rating Official Signature _____ Date _____
Rating Official Comments:

Progress Review Acknowledgements & Comments

This section is provided for any additional progress reviews that may occur throughout the performance cycle.

I have provided my progress review.

Employee Signature _____ Date _____
Employee Comments:

Rating Official Signature _____ Date _____
Rating Official Comments:

Interim Evaluation Acknowledgements & Comments

An Interim Evaluation is defined as a narrative description of an employee's performance as measured against the performance expectations set forth in a Performance Plan or Statement of Performance Expectations. Under certain circumstances supervisors will prepare "Interim Evaluations" of performance prior to the last 90 days of the rating cycle. See Appendix B in Chapter 43, Instruction 255-03-001 for an explanation of when Interim Evaluations are to be prepared. Interim Evaluations will be considered by employees' permanent supervisors when preparing a Ratings of Record. If a Statement of Performance Expectations was completed, please attach a copy to this document.

An Interim Evaluation discussion occurred.

Employee Signature _____ Date _____
Employee Comments:

Rating Official Signature _____ Date _____
Rating Official Comments:

Annual Appraisal and Rating of Record Acknowledgements & Comments

Please manually enter below from the Ratings Calculator the individual and overall rating for the core competencies, weights and ratings for the individual and overall rating for goals and overall performance rating. Note: Rating Officials must provide a full written justification to support an 'Unacceptable' summary rating of overall performance. Please consult your Component HR point of contact for more information regarding these circumstances.

Core Competency Ratings (40% of overall rating)	
Competency 1:	Rating:
Competency 2:	Rating:
Competency 3:	Rating:
Competency 4:	Rating:
Competency 5:	Rating:
Overall Competency Rating:	

Performance Goal Ratings (60% of overall rating)			
Performance Goal 1	Weight:	%	Rating:
Performance Goal 2	Weight:	%	Rating:
Performance Goal 3	Weight:	%	Rating:
Performance Goal 4	Weight:	%	Rating:
Performance Goal 5	Weight:	%	Rating:
Performance Goal 6	Weight:	%	Rating:
Performance Goal 7	Weight:	%	Rating:
Performance Goal 8	Weight:	%	Rating:
Performance Goal 9	Weight:	%	Rating:
Performance Goal 10	Weight:	%	Rating:
Overall Performance Goal Rating:			

Overall Performance Rating
Overall Performance Rating:

The Annual Appraisal discussion occurred.

Reviewing Official Signature _____ Date _____
Reviewing Official Comments:

Employee Signature _____ Date _____
Employee Comments:

Rating Official Signature _____ Date _____
Rating Official Comments:

Additional Goals/Comments

This section shall be used for any overflow throughout the document (i.e. performance goals, comments). If additional performance goals are entered here, please use the format below.

Performance Goal # (Outcomes/Results):

Insert the higher level goal, objective, or mission of the organization and/or of the supervisor to which this goal aligns:

Weight: %

Achieved Expectations:

Achieved Excellence:

U.S. DEPARTMENT OF HOMELAND SECURITY **Performance Appraisal Record**
Bureau Immigration and Customs Enforcement

DISCLOSURE STATEMENT: This information is personal. It must be appropriately safeguarded from improper disclosure and it should only be made available for review by appropriate management levels having a need to know.

Part A - Employee Information			
Name of Employee		**Social Security Number**	
Position Title	**Assistant Chief Counsel**	**Pay Plan, Series, Grade**	**GS-905-**
Rating Period (from/to)		**Office Location**	

Part B - Development, Discussion, and Approval of Performance Work Plan		
Rating Official's Signature	**Reviewing Official's Signature**	**Employee's Signature**
Date	**Date**	**Date**

Part C - Progress Review	
Rating Official's Signature	**Employee's Signature**
Date	**Date**

Part D - Rating of Individual Performance Elements			
Critical Performance Elements		**Rating Level (check one)**	
		Meets Expectations	**Fails to Meet Expectations**
1	**Advocates for/Represents the Agency**		
2	**Provides Legal Advice**		
3	**Conducts Legal Research and Writing**		

Part E - Overall Rating Level (check one)			
Meets Expectations		**Unacceptable**	

Part F - Rating of Record Review and Approval					
Appraisal Type (check one)	**Annual**		**Interim**		
Rating Official's Signature		**Reviewing Official's Signature**		**Employee's Signature**	
Date		**Date**		**Date**	

PERFORMANCE APPRAISAL RECORD INFORMATION

Part A - Employee Information

The rating cycle for attorneys is from July 1st through June 30th.

Part B - Development, Discussion, and Approval of Performance Work Plan

1. **The Rating Official develops the Performance Work Plan (PWP) at the beginning of each appraisal period by identifying the performance elements and performance standards. Participation of the employee in developing the PWP is optional, but strongly encouraged.**
2. **The Reviewing Official reviews the PWP to ensure that the elements and standards are sufficient to fulfill management expectations and organizational goals and objectives. The reviewing official also ensures that the PWPs within the organizational unit are generally consistent.**
3. **The employee acknowledges receipt and understanding of the PWP.**

Part C - Progress Review

At least one formal progress review -- either oral or written -- must be conducted, normally near the mid-point of the rating cycle, to assess the extent to which the elements and standards of the PWP remain appropriate, and to discuss the employee's progress toward meeting the performance goals. Progress reviews should be documented by the signatures of the Rating Official and the employee on the Performance Appraisal Record (PAR).

Part D - Rating of Performance Elements

The Rating Official completes the appraisal record by assigning tentative rating levels for each performance element and recording these determinations on the PWP and the PAR. Each element will be rated at one of the following two levels:

Meets Expectations	**Performance meets or exceeds the established standards criteria.**
Fails to Meet Expectations	**Performance is below established element standards and is deficient in terms of quality, quantity, timeliness of work, and/or manner of performance. Performance at this level for a critical element *requires* that administrative action be taken, and results in an overall rating of Unacceptable.**

Part E - Overall Rating Level

The Rating Official assigns the overall rating Level based on the following:

Meets Expectations	**No critical elements are rated at the Fails to Meet Expectations level.**
Unacceptable	**Performance on any critical performance element fails to meet established standards, i.e., is rated at the Fails to Meet Expectations level. Administrative action must be taken based on a rating at the Unacceptable level.**

Part F - Rating of Record Review and Approval

1. **The Rating Official assigns tentative performance element rating levels and the overall rating level, and signs the PAR. Upon approval by the Reviewing Official, the Rating Official provides the approved PAR to the employee and discusses the evaluation.**
2. **The Reviewing Official approves or adjusts the Rating Official's tentative ratings, and signs the PAR.**
3. **The employee signs the PAR indicating that the rating was issued and discussed. The signature does not constitute agreement with the rating assigned or forfeit any rights to grieve the rating.**

DISCLOSURE STATEMENT: This information is personal. It must be appropriately safeguarded from improper disclosure and it should only be made available for review by appropriate management levels having a need to know.

Part A - Employee Information			
Name of Employee		**Social Security Number**	
Position Title	**Assistant Chief Counsel**	**Pay Plan, Series, Grade**	**GS-905-**
Rating Period (from/to)		**Office Location**	

Part B - Performance Elements

Performance Element #1	**Advocates for/Represents the Agency:** Represents the Department of Homeland Security at meetings, conferences, and other forums; reviews, prepares, and presents cases for trial and on appeal.

Performance Standards for "Meets Expectations":

1. Dealings with courts, clients, and others, oral and written, are conducted in a courteous, diplomatic, cooperative, and forthright manner; communications take place in a timely manner; keeps informed about, and attends on time, relevant meetings, conferences, and briefings, and contributes when appropriate; anticipates foreseeable problems, and alerts supervisor, when necessary, in a timely manner.
2. When possible, negotiations result in agreements or settlements containing the important objectives of the government; negotiations are timely concluded; relations with operating divisions, opposing counsel, litigating divisions, and other agencies are professional; preparation for negotiations is thorough; to the extent possible, ensures that he or she has knowledge of the relevant facts and understands the goals and objectives of the government; presents government's position clearly; acts in a manner that warrants the respect of the operating divisions, opposing counsel, litigating divisions, and other agencies; conducts negotiations without the need for continuing supervision; exercises competent judgment in reserving issues for review by supervisor.
3. [When incumbent appears in court:] Demonstrates proper courtroom decorum; is familiar with case facts and applicable law by the time of the hearing; presents evidence in an organized, clear, and logical fashion; examines and cross-examines witnesses effectively; communicates clearly and understandably; argues persuasively; adopts appropriate case strategies to advance calendar while achieving goals and protecting the record; demonstrates familiarity with rules of evidence and procedure.
4. [When incumbent appears in court:] Maintains control of assigned case docket; returns calls timely; contacts needed witnesses in advance of hearing date when possible; reviews files for needed material and makes best efforts to ensure it is obtained in advance of hearing date; writes notes to file that reflect procedural posture of the case, are legible, and convey necessary information to other Department personnel.

Rating Level (check one). Note: A narrative summary is required for performance assessed at the Fails to Meet Expectations level.

Meets Expectations		**Fails to Meet Expectations**	

Comments:

Part B - Performance Elements (continued)

Performance Element #2	**Provides Legal Advice**: Provides litigation support, legal assistance, and legal advice to the U.S. Attorneys' Offices and the operational units of the Department of Homeland Security.

Performance Standards for "Meets Expectations":

1. Provides accurate and timely responses to inquiries; identifies options; distinguishes between viable and non-viable options; presents arguments for and against viable options; makes logical and supportable recommendations; deals tactfully, diplomatically, professionally, and courteously when responding to inquiries.
2. Demonstrates a solid knowledge of the relevant statutes, regulations, case law, agency legal positions, and policies.
3. Completes assignments on time, allowing sufficient opportunity for supervisory review and adjustment; works independently within guidelines established by supervisor.

Rating Level (check one). Note: A narrative summary is required for performance assessed at the Fails to Meet Expectations level.

Meets Expectations		Fails to Meet Expectations	

Comments:

Part B - Performance Elements (continued)

Performance Element #3	**Conducts Legal Research and Writing:** Researches legal and policy issues; writes memoranda, briefs, legal opinions, letters, reports, and other documents.

Performance Standards for "Meets Expectations":

1. Demonstrates a solid working knowledge of immigration and nationality laws and other relevant areas of law; finds the applicable law; is aware of the full range of resources and utilizes them appropriately; demonstrates knowledge of and proficiency in computer-assisted legal research; arrives at supportable legal conclusions; considers viable legal options.
2. Written work product addresses relevant substantive and procedural issues in a well-organized manner; states the operative facts and applicable law completely and persuasively, with appropriate citation and in conformance with office and court rules; presentation is fair, clear, concise, and reflective of thorough analysis; written work is free of significant errors in style, spelling, grammar, or punctuation.
3. Sets realistic project and assignment goals and implements them accordingly; adjusts to changes in assignments and workload; notifies supervisor in advance of any inability to meet major deadlines or to achieve major goals; submits written work by the established due date, with sufficient time for review and editing.
4. Memoranda, briefs, legal opinions, letters, reports, and other documents are written in clear, precise language appropriate to the intended reader, free of significant errors of fact or omission, are technically correct, reflect thorough analysis, and are properly formatted; distinguishes relevant and important information from that which is irrelevant or unimportant.

Rating Level (check one). Note: A narrative summary is required for performance assessed at the Fails to Meet Expectations level.

Meets Expectations		Fails to Meet Expectations	

Comments:

U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

March 2, 2005

ACTION

MEMORANDUM FOR: Field Office Directors
Special Agents in Charge
Chief Counsel

FROM: (b)(6), (b)(7)(C)
Acting Chief of Detention and Removal Operations

Marcy M. Forman
Director of the Office of Investigat

William J. Howard
Principal Legal Advisor

SUBJECT: Preliminary Guidance on "Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals" Regulations

Purpose

The Executive Office for Immigration Review (EOIR) recently published a rule on background checks, which will go into effect on April 1, 2005. *See* 70 Fed. Reg. 4743 (January 31, 2005). These regulations will prevent Immigration Judges and the Board of Immigration Appeals (BIA) from granting benefits to aliens before DHS confirms that all background and security checks have been completed. These regulations will have a substantial impact on Detention and Removal Operations (DRO), Offices of Investigations (OI), and Offices of the Chief Counsel (OCC). As such, this memorandum will provide some preliminary guidance on how ICE Operating Units will implement and comply with the "Background and Security Investigations" regulations.

Background

DHS is currently developing a uniform, national policy on law enforcement and security investigations for all aliens issued charging documents and all aliens in immigration court. The "Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals" regulations will provide substantial assistance to ICE in achieving the goal

of insuring that law enforcement and security investigations are completed before immigration judges and the BIA grant benefits to aliens. While more specific field guidance on the regulations is being developed, this memorandum will provide some preliminary guidance on what policies and procedures will be forthcoming.

Discussion

The preamble to the "Background and Security Investigations" regulations and the regulations themselves makes clear that DHS has the sole authority "to determine what identity, law enforcement, and security investigations and indices are required . . . and when those investigations are complete." ICE has decided that the FBI fingerprint checks and IBIS checks will be the required checks for purposes of the new regulations. In addition, ICE has decided that the FBI fingerprint checks will be considered current if they were conducted within fifteen (15) months of a grant of benefits by an immigration judge, whereas the IBIS checks will be considered current if they were conducted within one hundred and eighty (180) days of a grant of benefits by an immigration judge. The new regulations at 8 C.F.R. 1003.47(b), specifically state which applications for benefits are covered the by the new procedures. They include: asylum, adjustment of status under section 209 and 245 of the Act, conditional permanent resident status or the removal of the conditional basis of such status under section 216 or 216A of the Act, waivers of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act, cancellation of removal under section 240A of the Act, suspension of deportation, and 212(c) relief, withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture, registry under section 249 of the Act, and conditional grants relating to applications such as asylum pursuant to section 207(a)(5) of the Act and cancellation of removal in light of section 240A(e) of the Act.

Pursuant to the November 10, 2004, memorandum titled "Interagency Border Inspection System (IBIS) Pilot Project," all local Field Office Directors, Special Agents in Charge, and Chief Counsels met and devised their own IBIS Standard Operating Procedures (SOPS) on how to run, resolve, and record IBIS background checks for all aliens seeking benefits in Immigration Court. Since December 1, 2004, 10 cities have participated in the IBIS Pilot. We are now directing the Pilot cities to continue with their IBIS procedures; however, the tracking requirements will cease and the final tracking reports will be due on March 7, 2005. We are now directing the cities that have not participated in the Pilot to prepare to implement the procedures contained within their IBIS SOPs on April 1, 2005, the date when the "Background and Security Investigations" regulations go into effect. Additional guidance on IBIS checks will be forthcoming.

Conclusion

All ICE field operational groups should plan to conduct FBI fingerprint checks and IBIS checks for all aliens seeking the benefits specified in 8 C.F.R. 1003.47(b), by April 1, 2005. Please refer any questions about upcoming regulations and procedures to your operational groups designated representative. Below is a list of each operational group's designated representatives:

Field Office Directors –

Supervisory Detention and Deportation Officer, DRO
(202) 616-

Special Agents in Charge – Susan Lane
Chief, National Security and Threat Protection Unit
(202) 305-(b)(6), (b)(7)c

Offices of the Chief Counsel – David Orland
Associate Legal Advisor, National Security Law Division
(202) 514-(b)(6), (b)(7)

Rules and Regulations

Federal Register
Vol. 70, No. 19
Monday, January 31, 2005

DEPARTMENT OF JUSTICE

8 CFR Parts 1003 and 1208

[EOIR No. 140I; AG Order No. 2755–2005]

RIN 1125–AA44

Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends Department regulations governing removal and other proceedings before immigration judges and the Board of Immigration Appeals when a respondent has applied for particular forms of immigration relief allowing the alien to remain in the United States (including, but not limited to, asylum, adjustment of status to that of a lawful permanent resident, cancellation of removal, and withholding of removal), in order to ensure that the necessary identity, law enforcement, and security investigations are promptly initiated and have been completed by the Department of Homeland Security prior to the granting of such relief.

DATES: *Effective date:* This rule is effective April 1, 2005.

Comment date: Written comments must be submitted on or before April 1, 2005.

Request for Comments: Please submit written comments to MaryBeth Keller, General Counsel, Executive Office for Immigration Review (EOIR), 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference RIN No. 1125–AA44 on your correspondence. You may view an electronic version of this rule at *http://www.regulations.gov*. You may also comment via the Internet to EOIR at *eoir.regs@usdoj.gov* or by using the *http://www.regulations.gov* comment form for this regulation. When submitting comments electronically, you must include RIN No. 1125–AA44 in the subject box. Comments are available for public inspection at the above address by calling (703) 305–0470 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: MaryBeth Keller, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305–0470.

SUPPLEMENTARY INFORMATION: An immigration judge or the Board of Immigration Appeals (Board) may grant relief from removal under a variety of provisions of the Immigration and Nationality Act (Act). Among the common forms of relief are adjustment of status to lawful permanent resident (LPR) status, asylum, waivers of inadmissibility, cancellation of removal, withholding of removal, and deferral of removal under the Convention Against Torture.[1] In considering an application for relief the applicant bears the burden of establishing his or her eligibility for the relief sought and, for discretionary forms of relief, that he or she merits a favorable exercise of discretion. For almost all forms of relief from removal, it must be established that the applicant has not been convicted of particular classes of crimes, and that he or she is not otherwise inadmissible or ineligible under the relevant standards.

The Department of Homeland Security (DHS) conducts a variety of identification, law enforcement, and security investigations and examinations to determine whether an alien in proceedings has been convicted of any disqualifying crime, poses a national security threat to the United States, or is subject to other investigations. Since September 11, 2001, DHS and its predecessor agencies have expanded the scope of identity, law enforcement, and security investigations and examinations before granting of immigration status to aliens. Moreover, because circumstances are subject to change over time, DHS may be required to update the results of its background investigations if the current determinations have expired. As the National Commission on Terrorist Attacks upon the United States (''9/11 Commission'') has emphasized, ''[t]he challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected.'' *The 9/11 Commission Report*, ed. W.W. Norton & Co. (2004), at 383. The Attorney General agrees with the Secretary's determination that the expanded background and security checks on aliens who seek to come to or remain in this country are essential to meet this challenge, regardless of whether the alien applies affirmatively with DHS or seeks immigration relief during removal proceedings within EOIR's jurisdiction.

In general, these investigations and examinations can be completed in a timely fashion so as to permit the adjudication of adjustment and other applications before the immigration judges without delay. Because DHS initiates the immigration proceedings, in most cases DHS has ample time to undertake the necessary investigations if it has obtained the alien's biometric [2] and other biographical information [3] prior to or at the time of filing of the Notice to Appear (NTA). In the instance when an NTA has been issued without biometrics and other biographical information having been taken at all (such as when DHS's U.S. Citizenship and Immigration Services (USCIS) issues the NTA upon denial of a petition or application for change of nonimmigrant status at a service center

[1] Withholding of removal under 241(b)(3) of the Act and CAT deferral are not forms of ''relief from removal'' per se, but instead are restrictions on or protection from removal of an alien to a country where he or she would be threatened or tortured. In this **SUPPLEMENTARY INFORMATION**, the Department uses the term ''relief from removal,'' and appropriate variations, to include withholding and CAT deferral, for the ease of the reader.

[2] Biometrics currently include digital fingerprints, photographs, signature, and in the future may include other digital technology that can assist in determining an individual's identity and conducting background investigations.

[3] Other biographical information refers to data which may include such items as an individual's name; address; place of birth; date of birth; marital status; social security number (if any); alien registration number (if any); prior employment authorization (if any); date of last entry into the United States; place of last entry; manner of last entry; current immigration status and eligibility category. Currently, such biographical information is required by the DHS Form I–765, Application for Employment Authorization, or other DHS or EOIR forms. In the future, other information may be required by DHS in order to complete identity, law enforcement, or security investigations or examinations.

or when an applicant fails to appear for a scheduled biometrics fingerprinting appointment with USCIS), this rule contemplates that DHS will be given the opportunity to obtain respondent's biometrics and other biographical information from the respondent before a merits hearing. In addition, particularly when substantial time may have elapsed during the pendency of immigration proceedings, the validity of a fingerprint response received by USCIS may have elapsed and, under current arrangements with outside law enforcement and investigative agencies, fingerprints may need to be taken again by DHS to complete updated background checks.

When an alien in proceedings files an application for relief, such as an application for asylum or adjustment of status, DHS is on notice that further inquiry into criminal and national security records may be required. Because the immigration judges schedule in advance the date of the hearing on the merits of the alien's application, a time that is ascertainable from the hearing notices served on the government counsel, DHS is routinely on notice of the date by which these inquiries, investigations and examinations must be completed in time for a final decision by the immigration judge on the pending applications for relief. When an alien files an application in immigration proceedings for relief from removal, the immigration judge ordinarily will be able to consider the time that DHS indicates it will likely require to conduct the background and security inquiries and investigations before setting the date for the merits hearing. The immigration judge also can take into consideration that DHS's ability to obtain full results from the law enforcement and intelligence agencies that are not within its control may require additional time beyond that initially indicated by the government.

There are, as noted, occasions where an investigation being conducted or updated by DHS requires additional time. Historically, DHS has had the ability to file a motion for a continuance under the rules applicable to proceedings before immigration judges, 8 CFR 1003.29, but that general provision leaves numerous questions unanswered in the complicated area of criminal history checks and national security investigations. The current regulations are also unclear as to the scope of an immigration judge's authority to act to grant relief in situations where a background investigation is ongoing.

The national security requires that immigration judges or the Board should not grant applications for adjustment to LPR status, asylum, or other forms of immigration relief without being advised by DHS of the results of the investigations, including criminal and intelligence indices checks. The Department and DHS recognize the need for coordination of processes so as to permit these appropriate identity, background, and security investigations to be completed by DHS prior to the granting of immigration relief that is within the jurisdiction of the immigration judges and the Board. This rule provides a means to ensure that the immigration judges and the Board will not grant relief before DHS has completed its investigations.

The Department and DHS also recognize that the need to protect national security and public safety must be balanced against the desire for law abiding aliens to have their requests for immigration relief adjudicated in a prompt and timely fashion. However, there have been instances when aliens in removal proceedings were granted some form of immigration relief but USCIS did not automatically and immediately learn about their need for an immigration document. Furthermore, DHS determined that in some cases the law enforcement checks were not completed prior to the grant. Since USCIS must run background checks on any alien who will receive an immigration document reflecting the alien's immigration status or authorization to work, this process creates a waiting period for aliens that in most cases could have been avoided. This process also is not acceptable to the grantees, some of whom have been named or represented in litigation against the government complaining of delays. Recent cases include *Santillan* v. *Ashcroft*, No 04–2686 (N.D. Cal.) (requesting relief for proposed nationwide class); *Padilla* v. *Ridge*, No. M–03–126 (S.D. Tex.) (requesting relief for proposed class of aliens in three districts of Texas). The Department and DHS have determined that the best method for avoiding these delays is to run law enforcement checks prior to immigration relief being granted. Further, these checks should be conducted in advance of any scheduled merits hearing before the immigration judge wherever possible.

This rule enables and requires immigration judges to cooperate with DHS in: (1) Instructing aliens on how to comply with biometric processing requirements for law enforcement checks; (2) considering information resulting from law enforcement checks; and (3) instructing aliens who have been granted some form of immigration relief regarding the procedures by which to obtain documents from DHS. This rule also creates a more efficient process, saving time for the immigration judge, respondent, and others, by implementing a process that enables the Department to adjust its hearing calendars when the required law enforcement checks have not been completed prior to a scheduled hearing. This improvement to the system is immediately necessary to reduce the time that grantees must wait to receive their documents after the completion of immigration proceedings, and decrease the chances that an alien who is a danger to public safety or national security will be granted relief from removal.

Systems Utilized To Conduct Identity, Background and Security Checks

There is no need for this rule to specify the exact types of background and security checks that DHS may conduct with respect to aliens in proceedings. DHS and other agencies are actively involved in streamlining and enhancing the systems of information that contain information on terrorist and other serious criminal threats.

Generally, however, the majority of required checks are returned in a matter of days or weeks. Yet there are instances where another agency may inform DHS that a check reveals some sort of positive ''indicia'' on an individual, and it may take a longer period of time for those agencies to complete their investigations and convey this information to DHS for a determination of relevancy under the immigration laws. Additional time may be required if it is necessary to obtain additional fingerprints. In other instances, the ''indicia'' may require that DHS obtain or provide notice to the individual that he or she must obtain and present DHS with all records of court proceedings. A longer period of time may also be necessary to complete background checks where individuals have common names that may require individualized reviews of the records of all similarly named individuals or where there are variations in the spelling of names due to translation discrepancies. Finally, there may be demands on DHS to conduct a disproportionate number of investigations in a short time based upon current events, such as an emergent mass migration, that may have an impact on various agencies' capacity to conduct identity, background and security investigations in a timely manner.

Requirement for Aliens in Proceedings To Provide Biometrics and Other Biographical Information

The Act imposes a general obligation on aliens who are applicants for admission to demonstrate clearly and beyond doubt that they are entitled to admission and are not inadmissible under section 212(a) of the Act (8 U.S.C. 1182(a)). Almost all of the various forms of relief from removal require the applicant to demonstrate either that he or she is admissible under applicable legal standards, or that he or she has not been convicted of certain disqualifying offenses or engaged in other specified conduct. The results of the DHS background and security checks are obviously quite relevant to a determination of an alien's admissibility or eligibility with respect to the requested immigration relief. Moreover, an applicant for any form of immigration relief in proceedings bears the burdens of proof—*i.e.*, the burden of proceeding and the burden of persuasion—in demonstrating that he or she is eligible for such relief and, if relevant, that he or she merits a favorable exercise of discretion for the granting of such relief. 8 CFR 1240.8(d); *see, e.g., Matter of Lennon*, 15 I&N Dec. 9, 16 (BIA 1974), remanded on other grounds sub nom. *Lennon* v. *INS*, 527 F.2d 187 (2d Cir. 1975) (adjustment of status to that of a lawful permanent resident).

For adjustment of status, section 245(a) of the Act requires that an applicant meet three conditions in addition to a favorable exercise of discretion: (1) He or she must make an application for adjustment of status; (2) he or she must be eligible to receive a visa and be admissible for permanent residence; and (3) an immigrant visa must be immediately available at the time of application. Thus, it is first and foremost the applicant's responsibility to file a complete application for adjustment of status (DHS Form I–485) and submit the required supporting documentation (including the respondent's biometric and other biographical information) to establish eligibility to receive a visa and admissibility to the United States. Other forms of relief such as asylum, withholding of removal, or cancellation of removal also place the burden of proof on the alien, and require the alien to file the proper application for relief and submit all of the necessary supporting documentation in the proceedings before the immigration judge, as provided in 8 CFR 1240.8(d).[4]

The rule therefore specifically provides that applicants for immigration relief in proceedings before the immigration judges have the obligation to comply with applicable requirements to provide biometrics and other biographical information.

For aliens who are not in proceedings and who seek to apply for asylum or for adjustment of status or some other status, the alien files the appropriate form directly with USCIS, and USCIS then informs the alien when and where the alien (and any covered family members) should go to provide biometrics and other biographical information. Fingerprints normally are taken by USCIS at an Application Support Center (ASC).

However, a different approach is needed where the respondent in proceedings applies for asylum, adjustment of status, or other forms of relief that are available in removal proceedings, such as cancellation or withholding of removal. In these instances, where the immigration proceedings have already begun, respondents file the appropriate application forms and related documents in the proceedings before the immigration judge, rather than with USCIS.

At a master calendar hearing or other hearing at which the immigration judge addresses issues relating to whether a respondent is removable, the immigration judge normally reviews with the respondent possible forms of relief from removal, including asylum, adjustment of status, cancellation of removal, or other forms of relief or protection, if the respondent is potentially eligible. 8 CFR 1240.11. At that hearing, or at a subsequent master hearing, the immigration judge normally establishes a date by which the application must be filed with the immigration judge and served on DHS, and a later date for a hearing at which the immigration judge will consider the application.

This rule provides that applications for adjustment of status, cancellation or withholding of removal, or other forms of relief covered by this rule will be deemed to be abandoned for adjudication if, after notice of the requirement to provide biometrics or other biographical information to DHS, the applicant fails without good cause to provide the necessary biometrics and other biographical information to DHS by the date specified by the immigration judge. As noted, in many cases, the alien will already have provided biometrics or other biographical information in connection with the removal proceedings prior to the master calendar hearing or other hearing at which the alien indicates an intention to seek immigration relief. However, in those instances where the respondent has not yet provided biometrics or other biographical information to enable DHS to conduct those checks or where DHS notifies the immigration judge or the Board that checks have expired and need to be updated, it is clear that the application cannot be granted by the immigration judge or the Board.

In those instances, until the respondent and any covered family members appear at the appropriate location to provide DHS their biometrics or other biographical information, the application cannot be granted or may be found to be abandoned if there is a failure to comply without good cause by the date specified by the immigration judge. Thereafter, once the biometric and other biographical information is provided as required, DHS should be allowed an adequate time to complete the appropriate identity, law enforcement, and security investigations before the application is scheduled for decision by the immigration judge.

This approach clearly places the responsibility for taking the initiative to provide biometrics or other biographical information in a timely manner on the respondent who is seeking relief, consistent with the respondent's burdens of proceeding and persuasion. By requiring the respondent to provide biometrics or other biographical information to DHS in a timely manner or risk a finding that the application has been abandoned, this rule will facilitate the prompt adjudication of cases.

In general, aliens in proceedings who are obligated to provide biometrics or other biographical information can do

[4] For asylum applicants, the current regulations at 8 CFR 1208.10 and the instructions to the Form I–589, Application for Asylum and for Withholding of Removal, already provide notice that an individual and any included family members 14 years of age and older cannot be granted asylum until the required identity, background, and security checks have been conducted. The regulations at 8 CFR 1208.10 and the instructions to the Form I–589 at Part 1, IX, page 9, clearly notify asylum applicants before an immigration judge that failure to comply with fingerprint and other biometrics requirements will make the applicant ineligible for asylum and may delay eligibility for work authorization. The regulations at 8 CFR 1208.3 (Form of application) and the Form I–589 Instructions, Part 1, sections V, VI, VII, X, XI and XII at pages 5 through 10, also specify what constitutes a complete application for asylum and for withholding of removal or protection under the Convention Against Torture. The results of the background and security checks are relevant for an alien's eligibility for withholding of removal, and for determining whether an alien seeking protection under the Convention Against Torture is eligible only for deferral of removal under 8 CFR 1208.17.

so by making appropriate arrangements with local DHS offices. In many cases, this will involve visiting an ASC, the same place to which an applicant would be directed if he or she had filed an affirmative application for asylum or adjustment of status directly with USCIS.

Upon the applicant's filing of an application for relief with the immigration court or USCIS's referral of the application to an immigration judge, unless DHS informs the immigration judge that new biometrics are not required, DHS will provide the alien with a standard biometrics appointment notice prepared by an appropriate DHS office. USCIS District Directors and Immigration and Customs Enforcement Counsel, in consultation with the Office of the Chief Immigration Judge, will develop scheduling procedures and standardized appointment notices for each location. The DHS fingerprint notice will be hand-delivered to the alien by DHS and the notice may be used for multiple family members, but the notice must contain at least the alien registration number, receipt number (if any), name, and the form number pertaining to the relief being sought for each person listed. Locally established procedures will ensure that applicants for relief from removal receive biometrics services in a time period compatible with DHS resources and the scheduled immigration proceedings. The immigration judge shall specify for the record when the respondent receives the notice and the consequences for failing to comply with biometrics processing. On the other hand, aliens who are currently in detention—either immigration custody under section 236 of the Act (or other provision of law) during the pendency of the removal proceedings, or in a federal, state, or local correctional facility based on a criminal conviction—will not have such flexibility. In the case of any detained alien, DHS will make the necessary arrangements to obtain biometrics and other biographical information if that has not already been collected in a manner that can be re-used by DHS for updating checks.

Failure To File a Complete Application for Relief in a Timely Fashion

The rule also codifies the existing Board precedent that failure to file or to complete an application in a timely fashion constitutes abandonment of the application. Where an immigration judge has set a deadline for filing an application for relief, the respondent has already in fact appeared at a hearing. His statutory right to be present has been fulfilled. The Board has long held that applications for relief under the Act are properly denied as abandoned when the alien fails to timely file them. *See Matter of Jean*, 17 I&N Dec. 100 (BIA 1979) (asylum), *modified, Matter of R-R-*, 20 I&N Dec. 547 (BIA 1992); *Matter of Jaliawala*, 14 I&N Dec. 664 (BIA 1974) (adjustment of status); *Matter of Pearson*, 13 I&N Dec. 152 (BIA 1969) (visa petition); *see also Matter of Nafi*, 19 I&N Dec. 430 (BIA 1987) (exclusion proceedings). Accordingly, the rule specifies that the immigration judge shall issue an appropriate order denying or pretermitting the requested relief if the application is not timely filed or is not completed in a timely manner.

With respect to a failure to provide biometrics or other biographical information, the rule allows an immigration judge to excuse the failure to comply with these requirements within the time allowed if the applicant demonstrates that such failure was the result of good cause. This language is taken from the current provision in 8 CFR 1208.10 pertaining to applications for asylum and is consistent with the general obligation placed on the alien to satisfy this requirement. For detained aliens, though, it is the obligation of DHS to obtain the necessary biometrics and other biographical information.

Covered Forms of Immigration Relief

The Department notes that current law prohibits the immigration judges from granting asylum to any alien prior to the completion of identity, law enforcement, and security investigations. Section 208(d)(5)(A)(i) of the Act (8 U.S.C. 1158(d)(5)(A)(i)), expressly provides that

> asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General [or the Secretary of Homeland Security] and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum.

Since the applicants have the obligation to submit a complete application and supporting documentation for the requested immigration relief, as discussed above, and the results of the DHS background and security checks are obviously of great relevance in evaluating issues relating to admissibility, qualifications, and discretion, the Attorney General has concluded that it is sound public policy to impose the procedural requirements of this rule relating to submission of biometric and other biographical information and completion of the DHS background and security checks prior to the granting of adjustment to LPR status, cancellation or withholding of removal, or other forms of relief permitting the alien to remain in the United States. Granting permanent resident status is an important step with substantial benefits that has special procedures for rescinding such status under section 246 of the Act (8 U.S.C. 1256). Other forms of relief allow the alien to remain legally in the United States and should not be granted, as a matter of sound public policy, until the applicant has complied with applicable requirements relating to biometrics and other biographical information, and until DHS has had the opportunity to complete the necessary identity, law enforcement, and security investigations that are relevant to a determination of whether the alien should be granted the requested immigration relief.

Accordingly, the rule provides a procedural requirement that the immigration judges or the Board may not grant any form of immigration relief allowing the alien to reside in the United States without ensuring that DHS has completed the identification, law enforcement, and security investigations and examinations first. This will ensure that the results of such background checks or other investigations have been reported to and considered by the immigration judges or the Board before the issuance of any order granting an alien's application for immigration relief that permits him or her to remain in the United States. The rule does not expand the circumstances in which the immigration judges or the Board have authority to grant relief, but is applicable in any case to the extent they do have such authority. Section 1003.47(b) identifies the principal forms of immigration relief covered by this rule, including:

- Asylum under section 208 of the Act;
- Adjustment of status to that of an LPR under section 209 or 245 of the Act (8 U.S.C. 1159, 1255) or any other provision of law; [5]

[5] Section 245 of the Act is the principal provision relating to adjustment of status, but section 209 provides the exclusive procedure for adjustment of status for refugees and asylees. *See* 8 CFR 1209.1, 1209.2; *Matter of Jean*, 23 I&N Dec. 373, 376 n.7, 381 (A.G. 2002). Among the other laws relating to adjustment of status are the following, although the immigration judges do not exercise authority at present over all of them: Cuban Adjustment Act, Public Law 89–732, §§ 1–5, 80 Stat. 1161 *et seq.* (Nov. 2, 1966); Indochinese Adjustment Act, Public Law 95–145, §§ 101–107, 91 Stat. 122 (Oct. 28, 1977); Virgin Islands Adjustment Act, Public Law 97–271, 76 Stat. 1157 (Sept. 30, 1982); Soviet and Indochinese Parolees Adjustment Act, Public Law 101–167, § 599E, 101 Stat. 1263 (Nov. 21, 1989); H–1 Nonimmigrant Nurses Adjustment Act, Public

• Conditional permanent resident status or the removal of the conditional basis of such status under section 216 or 216A of the Act (8 U.S.C. 1186a, 1186b);
• Waivers of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act (8 U.S.C. 1159, 1182, 1227) or other provisions of law;
• Cancellation of removal under section 240A of the Act (8 U.S.C. 1229b), suspension of deportation under former section 244 of the Act, relief from removal under former section 212(c) of the Act, or any similar form of relief; [6]
• Withholding of removal under section 241(b)(3) of the Act (8 U.S.C. 1231) or withholding or deferral of removal under the Convention Against Torture;
• Registry under section 249 of the Act (8 U.S.C. 1259); and
• Conditional grants relating to the above, such as for applications seeking asylum pursuant to section 207(a)(5) of the Act or cancellation of removal in light of section 240A(e) of the Act.

In addition to those provisions specifically listed, this rule covers any other form of relief granted by the immigration judges or the Board that allows the alien to remain in the United States.

Allowing Time for DHS To Complete Background Checks and Investigations

The Department wishes to avoid unnecessary delays that may frustrate the timely adjudication of any case simply because of a failure to conduct or complete the investigations or indices checks. This rule provides a means to ensure that DHS will have an appropriate opportunity to conduct the necessary investigations including an alien's submission of his or her biometric or other biographical information, before the application is granted by the immigration judge. This rule does not impose a unilateral definition of what the investigations and examinations will constitute in every case; it remains the province of DHS to determine what identity, law enforcement, and security investigations and indices checks are required (this may vary over time and from case to case) and when those investigations and indices checks are complete. After providing a reasonable period of time for DHS to initiate the necessary investigations and to await the results from other law enforcement and intelligence agencies, as necessary, the immigration judge will then be able to address the requested forms of immigration relief on the merits. The Department recognizes that DHS cannot always know the exact period of time that will be required to complete all checks and investigations because the information often is within the control of non-DHS agencies, such as the Federal Bureau of Investigation or the Central Intelligence Agency. The national security of the country and public safety of its residents depend on swift responses, as does the efficient administration of the immigration laws.

If, for any reason, DHS is not ready to present the results of its identity, law enforcement, and security investigations by the time of the scheduled final hearing, then it will be up to DHS to make a request for a continuance (in advance of the hearing if possible) and to explain, to the extent practical, the time needed for completion. In some cases for example, where DHS is conducting an ongoing investigation of the respondent's identity or issues raised by other law enforcement agencies who may themselves have pending investigations, or indicates that a United States Attorney is presenting evidence to a grand jury concerning the respondent, multiple continuances would be justified by the ongoing criminal process into which neither DHS nor the immigration judge can intrude. This process contemplates that, if DHS indicates that it is unable to complete the identity, law enforcement, or security investigation because of a pending investigation of the respondent—either by DHS or by any other agency—then DHS will be able to obtain a further continuance to complete the pending investigation.

The Attorney General has delegated authority to immigration judges in the past to close cases administratively in certain contexts, particularly in those cases where DHS, rather than the immigration judge, has substantive authority over a particular form of relief. *See* 8 CFR 1240.62, 1245.13, 1245.15, 1245.21. However, the regulations do not authorize the immigration judge to close cases administratively solely because the respondent is subject to investigation or indices checks. Administrative closure causes a case to fall out of the regular calendar, undermining an assurance that the case will be resolved in a timely manner. Instead, this rule contemplates that cases awaiting the completion of an identity, law enforcement, or security investigation should remain on an active calendar and should be on schedule for a hearing on a particular date. Instead of administrative closure, the Department anticipates that the continuance process described in this rule will deal with the necessary delays inherent in completing identity, law enforcement, and security investigations and examinations for certain respondents.

The Department recognizes the importance of completing the investigations and indices checks in advance and allowing an adequate opportunity for DHS or other agencies to complete the necessary steps regarding the background investigations. On occasion, immigration judges have attempted to ''order'' DHS to complete investigations by a specific date, an authority that was never delegated by the Attorney General when the functions of the former Immigration and Naturalization Service were a part of the Department of Justice, and an authority that the Attorney General does not now delegate to immigration judges.

However, the Department believes that it is also important for the immigration judge to be able to move cases toward completion. The Department believes that the rule properly balances the respective and competing interests in that very small number of affected cases where DHS is not able to complete the necessary identity, law enforcement, and security investigations of the alien in time for the scheduled hearing on the merits of the alien's application for immigration relief.

In some cases, the continuance of a merits hearing would impose significant burdens on the court, the respondent, or witnesses, and this rule does not prohibit an immigration judge from proceeding with a merits hearing in the absence of a report from DHS that all background investigations are complete. In such cases, the immigration judge may hear the case on the merits but may not render a decision granting any covered form of relief. Instead, the immigration judge should schedule an additional master hearing on a date by which investigations are expected to be completed.

Procedures for Cases on Appeal Before the Board

This rule also provides new procedures codified at § 1003.1(d)(6) to

Law 101–238, § 2, 103 Stat. 2099 (Dec. 15, 1989); Chinese Student Protection Act of 1992, Public Law 102–404, 106 Stat. 1969 (Oct. 9, 1992); Polish and Hungarian Parolees Adjustment Act of, Public Law 104–208, Div. C, § 646, 110 Stat. 3009–709 (Sept. 30, 1996); Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105–100, § 202, 11 Stat. 2193 (Nov. 19, 1997); Haitian Refugee Immigration Fairness Act (HRIFA), Public Law 105–277, Div. A, § 101(h) [Title IX, § 902], 112 Stat. 2681–538 (Oct. 21, 1998); Syrian Adjustment Act, Public Law 106–378, 114 Stat. 1442 (Oct. 27, 2000); and Indochinese Parolees Adjustment Act, Public Law 106–429, § 101(a), 114 Stat. 1900 (Nov. 6, 2000).

[6] This includes special rule cancellation of removal under NACARA § 203.

take account of those cases where the Board is considering relief from removal that is subject to the provisions of § 1003.47(b), to ensure that the Board does not affirm or grant such relief where the identity, law enforcement, and security investigations or examinations have not been conducted or the results of prior background checks have expired and must be updated.

In most of the currently pending cases (sometimes referred to as pipeline or transitional cases), there is no indication in the record whether or not DHS ever conducted the identity, law enforcement, and security investigations or examinations with respect to the respondent. In such cases, the Board will not be able to issue a final decision granting any application for relief that is subject to the provisions of § 1003.47, because the record is not yet complete. After consideration of the issues on appeal, the Board will remand the case to the immigration judge with instructions to allow DHS to complete the necessary investigations and examinations and report the results to the immigration judge.

In the future, though, once the provisions of § 1003.47 take effect, the Department recognizes that for those cases appealed to the Board involving applications for relief, DHS will have completed the appropriate background checks either in advance of the filing of the NTA or prior to the immigration judge's decision. The issue on appeal therefore will be whether those checks are current and whether new information has developed since completion of the initial background checks that would affect the appeal and the underlying application for relief.

Based upon the consideration that DHS will have run background checks at least once prior to the time the Board is considering an appeal, this rule provides a new limitation that the Board cannot grant an application for relief if DHS notifies the Board that the background checks have expired and need to be updated or if the background checks have uncovered information bearing on the merits of the alien's application for relief. Because DHS (not the immigration judge or the Board) determines the requirements and timing for updating previous investigations or examinations, and DHS may decide to revise such standards and requirements over time, it is appropriate to require DHS to notify the Board in those cases where DHS has determined that the results of the previous checks have expired and must be updated. However, in view of the time needed for the Board to complete its case adjudications, the Department acknowledges that in many (perhaps most) appeals the results of the previous identity, law enforcement, and security investigations or examinations will no longer be current under the standards established by DHS and must be updated before the Board has completed its adjudication process. (Under the current regulations in 8 CFR 1003.1(e), the Board is required to adjudicate cases within 90 days after the completion of the record on appeal for cases assigned to a single Board member, or within 180 days after completion of the record on appeal for cases assigned to a three-member panel. Those time frames, however, do not include the time needed to complete the record on appeal, including transcription of the proceedings before the immigration judge and completion of briefing by the parties.)

In those cases where DHS advises the Board that the results of earlier investigations are no longer current under DHS's standards, the Board will not be able to issue a final decision granting or affirming any form of relief covered by § 1003.47. Except as provided in § 1003.1(d)(6)(iv) of this rule, the Board will then choose one of two alternatives in order to complete the adjudication of the case in the most expeditious manner. In many such cases, after consideration of the merits of the appeal, the Board will issue an order remanding the case to the immigration judge to permit DHS to update the results of the previous identity, law enforcement, and security investigations or examinations and report the results to the immigration judge. In the alternative, after consideration of the merits of the appeal, the Board may provide notice to both parties that in order to complete the adjudication of the appeal the case is being placed on hold to allow DHS to update biometrics and other biographical information processing requirements and any remaining identity, law enforcement, and security investigations. (The rule also includes a conforming amendment to the existing time limits for the Board's disposition of appeals). Under the provisions of § 1003.1(d)(6) and § 1003.47(e), as added by this rule, DHS is obligated to complete the investigations as soon as practicable and to advise the Board promptly whether or not the investigations have been completed and are current.

This rule does not disturb the Board's authority to take administrative notice of the contents of official documents as provided in 8 CFR 1003.1(d)(3)(iv). If there are any issues to be resolved relating to any information bearing on the respondent's eligibility (or, if the relief is discretionary, whether that information supports a denial in the exercise of discretion), DHS may file a motion with the Board to remand the record of proceedings to the immigration judge. Where the Board cannot properly resolve the appeal without further factfinding, the record may be remanded to the immigration judge.

In the short term, the Department anticipates that remanding cases to the immigration judge may be the most efficient means to complete or update results for pipeline or transitional cases, since that process will facilitate DHS's ability to obtain new biometrics from the respondent for the purpose of updating previous identity, law enforcement, and security investigations or examinations. Over time, however, as DHS is able to improve its internal procedures for updating the results of previous investigations or examinations without the need for aliens to provide a new set of fingerprints, the Department expects that the Board and DHS should be able to make much greater use of the procedure for holding pending appeals where necessary in order to allow the opportunity for DHS to update prior results without requiring a remand.

In any case that is remanded to the immigration judge pursuant to § 1003.1(d)(6), the Board's order will be an order remanding the case and not a final decision, in order to allow DHS to complete or update the identity, law enforcement, and security investigations or examinations of the respondent(s). The immigration judge will then consider the results of the completed or updated investigations or investigations before issuing a decision granting or denying the relief sought. If DHS presents additional information as a result, the immigration judge may conduct a further hearing as needed to resolve any legal or factual issues raised. The immigration judge's decision following remand may be appealed to the Board as provided by §§ 1003.1(b) and 1003.38 if there is any new evidence in the record as a result of the background investigation.

Section 1003.1(d)(6)(iv) of this rule, however, provides that the Board is not required to remand or hold a case under § 1003.1(d)(6) if the Board decides to dismiss the respondent's appeal or deny the relief sought. In any case where the results of the DHS investigations or examinations would not affect the disposition of the case—for example, where the Board determines that the respondent's appeal should be dismissed or the alien is ineligible for

the relief sought because of a criminal conviction or is unable to establish required elements for eligibility such as continuous physical presence, extreme hardship, good moral character, or past persecution or a well-founded fear of future persecution—there is no reason to delay the Board's disposition of the case. The results of the identity, law enforcement, or security investigations or examinations may be relevant to the exercise of discretion in granting or denying relief in some cases, but not in cases where the respondent is unable to establish eligibility in any event.

The Department recognizes that the implementation of this rule will mean that many cases may be continued by the immigration judges or remanded or placed on hold by the Board pending the completion or updating of the necessary identity, law enforcement, and security investigations or examinations by DHS. This is particularly true for the pipeline or transitional cases that are already pending as of the date this rule takes effect. Nevertheless, the Department has determined that the security of the United States is of the utmost importance and requires that aliens not be granted the forms of relief covered by § 1003.47 unless the identity, law enforcement, and security investigations and examinations have been conducted by DHS and are up-to-date. The Department is therefore publishing this rule as an interim rule. Moreover, after the initial implementation period, it is expected that the number of cases where immigration judges will continue a case under § 1003.47(f) or where the Board is required to hold or remand a case under § 1003.1(d)(6) will diminish over time. The Department anticipates that in the future DHS will be able to improve its procedures for conducting and updating its investigations or examinations in such a manner as to minimize the delays in the adjudicatory process.

Granting of Relief

When the immigration judge or the Board grants relief entitling respondent to a document from DHS evidencing status, the decision will include either an oral or written notification to the respondent to appear before the appropriate local DHS office for preparation of such document or to obtain required biometric and other biographical information for preparation of such document. In the past, the lack of such a notification by immigration judge and Board decisions and the ambiguity of an Immigration and Customs Enforcement counsel's responsibility to provide such instruction relating to a function of CIS have resulted in confusion on the part of the alien about the process for receiving such document. It is expected that the local DHS office will promptly direct the respondent to submit to any biometric processing necessary to prepare documents in keeping with biometric and other requirements of the law.

Conforming Amendments to Part 1208

This rule makes conforming amendments to 8 CFR part 1208 to ensure consistency with the provisions of § 1003.47 as added by this rule. The rule amends § 1208.4 to provide that an asylum application filed in proceedings before an immigration judge is considered to have been filed regardless of when biometrics are completed, as provided in § 1003.47. Failure to comply with processing requirements for biometrics and other biographical information within the time allowed will result in dismissal of the application, unless the applicant demonstrates that such failure was the result of good cause under § 1003.47(c) and (d) and amended 8 CFR 1208.10.

This rule also revises the language of § 1208.10 to eliminate confusing and unnecessary language that pertains to the processing of asylum applications by asylum officers in USCIS rather than by the immigration judges. Retention of such provisions pertaining solely to DHS's asylum office procedures—including the reference to a failure to appear for an asylum interview before an asylum officer, the waiver of the right to an adjudication by an asylum officer, and providing a change of address to the Office of International Affairs—is unnecessary and inappropriate in the Attorney General's regulations in part 1208 that now govern consideration of asylum cases by the immigration judges and the Board.[7] (Such provisions, of course, are still retained in the DHS regulations in 8 CFR part 208 relating to the consideration of asylum applications by asylum officers.)

There is no need for lengthy provisions in § 1208.10 pertaining to an alien's failure to appear for a hearing before an immigration judge because the Act already provides clear procedures for dealing with a failure to appear, including the issuance of an order of deportation or removal *in absentia* in appropriate cases, and also a process for seeking rescission of an *in absentia* order. *See* section 240(b)(5) and former section 242B(c) of the Act. There is also no need for discussion of a change of address in this context because the Act and the regulations already include clear provisions relating to the obligation of aliens to provide a current address to the Attorney General in connection with the immigration proceedings. Accordingly, after a brief reference to the consequences for an alien's failure to appear for a deportation or removal proceeding, § 1208.10 is revised to focus on the issue of a failure to comply with requirements to provide biometrics and other biographical information, consistent with the provisions of § 1003.47.

This rule also makes a conforming amendment in § 1208.14 to require compliance with the requirements of § 1003.47 concerning identity, law enforcement, and security investigations before an immigration judge can grant asylum. This change codifies the existing statutory requirement in section 208(d)(5)(A)(i) of the Act and cross-references the procedural requirements in § 1003.47.

Voluntary Departure

Section 240B of the Act (8 U.S.C. 1229c) authorizes DHS (prior to the initiation of removal proceedings) or an immigration judge (after the initiation of removal proceedings) to approve an alien's request to be granted the privilege of voluntary departure in lieu of being ordered removed from the United States. Although a grant of voluntary departure does not authorize an alien to remain indefinitely in the United States, it permits the alien to

[7] Pursuant to the Homeland Security Act of 2002, Public Law 107–296, on March 1, 2003, the functions of the former Immigration and Naturalization Service were transferred from the Department of Justice to DHS. Although the responsibility for the Asylum Officer program was transferred to USCIS, the immigration judges and the Board remained under the authority of the Attorney General and retained their preexisting authority with respect to applications for asylum and withholding of removal filed or renewed by aliens in removal proceedings. Since both the Secretary of Homeland Security and the Attorney General are vested with independent authority over asylum matters and certain other matters under the Immigration and Nationality Act, it was necessary for the Attorney General to promulgate a new set of regulations pertaining to the authority of the immigration judges and the Board, separate from the previous INS regulations. Accordingly, on February 28, 2003, the Attorney General published regulations reorganizing title 8 of the Code of Federal Regulations, creating a new chapter V for regulations of the Department of Justice, which is separate from the regulations of the new DHS that continue to be codified in 8 CFR chapter I. 68 FR 9824 (February 28, 2003); *see also* 68 FR 10349 (March 5, 2003). As a result of the shared authority over asylum matters, and in view of the limited time available to implement the necessary changes, the Attorney General's new regulations duplicated the asylum and withholding of removal regulations in part 208 into a new part 1208 in chapter V. The Department of Justice and DHS are now engaged in the process of amending their respective regulations to eliminate unnecessary provisions pertaining to the authority of the other agency.

remain in the United States until the expiration of the period of voluntary departure—generally, up to 120 days if voluntary departure is granted prior to the completion of immigration proceedings pursuant to 8 CFR 1240.26(b) and up to 60 days if granted at the conclusion of the proceedings before the immigration judge pursuant to 8 CFR 1240.26(c).

The identity, law enforcement, and security checks conducted by DHS are also relevant in connection with the granting of voluntary departure by an immigration judge, whether during the pendency of removal proceedings or at the completion of those proceedings. This is so because the results of the investigations may be relevant with respect to the exercise of discretion by the immigration judge in deciding whether or not to grant voluntary departure, and also in view of the requirement that an alien must demonstrate good moral character to obtain voluntary departure at the conclusion of removal proceedings. *See* 8 CFR 1240.26(c). A grant of voluntary departure is a valuable benefit because it allows an alien who departs the country within the allowable period to avoid the adverse future consequences under the immigration laws attributable to having been ordered removed.

On the other hand, the Department recognizes the importance of granting of voluntary departure in proper cases, whether voluntary departure is granted prior to the conclusion of immigration proceedings or in lieu of an order of removal, without causing unnecessary delays in the process. As a practical matter, the DHS background and security checks may be completed routinely in many cases in a timely manner, if DHS captures the alien's biometrics or other biographical information and initiates the necessary investigations prior to or at the time of issuing and filing the NTA, but there will be some cases as noted above where completion of the background or security checks may require a significant additional period of time.

Accordingly, this rule does not propose to require the immigration judges to wait until being advised by DHS that it has completed the appropriate identity, law enforcement, and security investigations before the immigration judges can grant voluntary departure. However, the rule recognizes that DHS may affirmatively seek additional time to complete such investigations in some cases prior to the granting of voluntary departure, and allows the immigration judges to decide such requests for a continuance on a case-by-case basis.

This rule also makes an accommodation in the existing time limits with respect to the granting of voluntary departure prior to the conclusion of removal proceedings, where the alien makes a request for voluntary departure no later than the master calendar hearing at which the case is initially calendared for a merits hearing, as provided in 8 CFR 1240.26(b)(1)(i)(A). In such a case, where the DHS investigations have not yet been completed, the immigration judge may grant a continuance to await the results of DHS's investigations before granting voluntary departure. The granting of a continuance will thereby extend the 30-day period, as currently provided in § 1240.26(b)(1)(ii), for the immigration judge to grant a request for voluntary departure prior to the conclusion of removal proceedings.

Custody Redeterminations

In view of the distinct nature of custody redetermination hearings before the immigration judges, and the exigencies of time often associated with such hearings, this rule does not propose to apply the same procedures for custody hearings as for removal proceedings. *See* 8 CFR 1003.19(d) (custody and bond hearings separate and apart from removal proceedings).

Although some background or security investigations may require weeks or months to resolve certain sensitive or difficult issues, as noted above, the initial determinations relating to holding aliens in custody during the pendency of removal proceedings against them must be made on a more expedited basis. Under its existing regulations, DHS generally must make a decision on the continued detention of an alien within 48 hours of apprehending the alien, except in the case of an emergency or other extraordinary circumstances requiring additional time. 8 CFR 287.3(d). Thereafter, unless the alien is subject to detention pursuant to section 236(c) of the Act or other special circumstances, the alien can immediately request a hearing before an immigration judge to seek a redetermination of the conditions of custody, as provided in 8 CFR 1003.19.

The Supreme Court has repeatedly ''recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process,'' *Demore* v. *Kim*, 538 U.S. 510, 523 (2003), and has recognized that ''Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General.'' *Reno* v. *Flores*, 507 U.S. 292, 306 (1993); *see also Carlson* v. *Landon*, 342 U.S. 524, 538–40 (1952). Under section 236 of the Act (8 U.S.C. 1226), an alien has no right to be released from custody during the pendency of removal proceedings, and both DHS, in making custody decisions, and the Attorney General, the Board, and the immigration judges, in conducting reviews of custody determinations, have broad discretion in deciding whether or not an alien has made a sufficient showing to merit being released on bond or on personal recognizance pending the completion of removal proceedings.

> As recognized by the Supreme Court, section 236(a) does not give detained aliens any *right* to release on bond. Rather, the statute merely gives the Attorney General the authority to grant bond *if* he concludes, in the exercise of broad discretion, that the alien's release on bond is warranted. The extensive discretion granted the Attorney General under the statute is confirmed by its further provision that ''[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review.'' Section 236(e) of the INA. Even apart from that provision, the courts have consistently recognized that the Attorney General has extremely broad discretion in determining whether or not to release an alien on bond under this and like provisions. Further, the INA does not limit the discretionary factors that may be considered by the Attorney General in determining whether to detain an alien pending a decision on asylum or removal.
>
> *Matter of D-J-*, 23 I&N Dec. 572, 575–76 (A.G. 2003) (citations omitted; emphasis in original).

The existing regulations provide that an immigration judge, in reviewing a custody determination by DHS, may consider any relevant information available to the immigration judge or any information presented by the alien or by DHS. 8 CFR 1003.19(d). There can be no doubt that the results of DHS's identity, law enforcement, and security investigations can be quite relevant with respect to a redetermination of custody conditions by the immigration judge for aliens detained in connection with immigration proceedings. The custody decisions should be made on the basis of as complete a record as possible under the circumstances, but must be made promptly in light of applicable legal standards.

Accordingly, § 1003.47(k) of the rule provides that the immigration judges, in scheduling a custody redetermination hearing in response to an alien's request under 8 CFR 1003.19(b), should take into account, to the extent practicable consistent with the expedited nature of such cases, the brief initial period of time needed by DHS to conduct the

automated portions of its identity, law enforcement, and security checks prior to a custody redetermination by an immigration judge.

This rule contemplates that DHS may have an opportunity to present at least the results of automated checks, to the extent practicable, but does not require the immigration judges to wait until being advised by DHS that it has completed all appropriate identity, law enforcement, and security investigations before the immigration judges can order an alien released on bond or personal recognizance. However, the rule specifically provides that DHS may affirmatively request that the immigration judge allow additional time to complete such investigations in particular cases prior to the issuance of a custody decision, and the immigration judge will decide such requests for a continuance on a case-by-case basis.

Allowing a brief initial period of time for DHS to complete the automated portions of its background and security checks, and providing a process for DHS to request additional time in particular cases to resolve issues in those investigations, is sound public policy in order to ensure that the immigration judges' decisions are based on as complete a record as possible under the circumstances. Moreover, this approach may also be expected to reduce the number of instances in which an immigration judge's custody decision is subject to an automatic stay pending appeal to the Board—*i.e.*, in those cases where DHS as a matter of discretion chooses to invoke the provisions of 8 CFR 1003.19(i)(2) because of concerns relating to the unresolved identity, law enforcement, or security investigations.

Under this rule, though, there will be cases where the immigration judge may issue a custody decision without waiting for DHS to complete all portions of its identity, law enforcement, or security checks, particularly where there is some delay in completing those investigations. In any case (whether through the background and security checks or otherwise) where DHS subsequently discovers information reflecting a clear change of circumstances with regard to the reasons for detaining an individual during the pendency of the removal proceedings, the Department notes that DHS is free to decide to cancel the alien's bond and take the alien back into custody under section 236 of the Act, under established procedures. *See* 8 CFR 236.1(c)(9), 1236.1(c)(9); Matter of Sugay, 17 I&N Dec. 637, 639 (BIA 1981) (finding ''without merit [the alien's] counsel's argument that the District Director was without authority to revoke bond once an alien has had a bond redetermination hearing'' before an immigration judge); *see also Matter of Valles-Perez,* 21 I&N Dec. 769, 772 (BIA 1997) (''the regulations presently provide that when an alien has been released following a bond proceeding, a district director has continuing authority to revoke or revise the bond, regardless of whether the Immigration Judge or this Board has rendered a bond decision.''). An alien whose bond has been revoked after previously being ordered released by an immigration judge can then seek a new custody determination. *See Ortega de los Angeles* v. *Ridge,* No. CV 04–0551–PHX–JAT (JI) (D. Ariz. Apr. 27, 2004).

Consistent with the district court's accurate interpretation of the existing regulatory language in *Ortega,* this rule also revises § 1003.19(e) to clarify this provision and codify the Department's interpretation that it only relates to subsequent requests for bond redeterminations made by the alien.

Good Cause Exception

The Department has determined that good cause exists under 5 U.S.C. 553(b)(B) and (d)(3) to make this rule effective April 1, 2005, for several reasons. Protecting national security and public safety has long been a focus of U.S. immigration law. Applicants for immigration benefits are always subject to some form of law enforcement check to assess their eligibility for the benefits or determine their inadmissibility to, or removability from, the United States. The September 11, 2001, attack and the 9/11 Commission's report, however, have highlighted the urgent need for immediate reforms to certain immigration processes, including the process by which the Department, DHS, and other law enforcement agencies initiate, vet, and resolve law enforcement checks.

Both the Department and DHS have expanded the number and types of law enforcement checks conducted on aliens seeking immigration benefits. However, vulnerability exists in the manner in which immigration benefits are given, particularly when an immigration status is granted or document is issued prior to completion of the required law enforcement checks or investigations by DHS, the Department, or other law enforcement agencies. The 9/11 Commission highlighted many of the dangers posed by terrorists, including their mobility, and recommended improved immigration controls that would ensure, among other things, that terrorists cannot obtain travel documents. Certain immigration statuses granted by DHS and the Department and certain documents issued by USCIS authorize aliens not only to work in the United States but also to travel freely to and from the United States. Issuance of this interim rule will enable DOJ and DHS to detect aliens who may pose a threat to the United States before they would otherwise be granted relief from removal that would permit them to continue residing in the United States and to obtain documents from DHS that permit them to board planes and other vessels or work in jobs in the U.S. that could facilitate their plans to commit terrorist acts. In addition, possession of an employment authorization document demonstrates that an alien's presence in the U.S. is ''under color of law,'' which not only can facilitate travel within the U.S., but also can cause a law enforcement officer or security official (public or private) not to follow up on an encounter with the individual.

The significance of completing law enforcement checks prior to the granting of applications for relief from removal by EOIR adjudicators or issuance of immigration documents by DHS cannot be overestimated. DHS reports that through the law enforcement check process it has discovered that certain applicants were: (1) Attempting to procure missile technology for a foreign government with terrorist ties; (2) previously deported for attempted drug smuggling; (3) serving as an executive officer of a designated foreign terrorist organization; (4) subject to outstanding warrants for rape and other aggravated felonies; and (5) escaped prisoners from Canada and other countries who were subject to extradition. If the Department had granted an application for relief from removal, such as lawful permanent resident status, without being apprised of results from law enforcement checks or investigations, it is likely that individuals such as these would have gained the freedom to move throughout the United States (and possibly travel internationally) and to further any criminal efforts or terrorist activities that could affect America's safety and threaten national security.

Congress has provided DHS and the Department with authority in certain instances to rescind, revoke, or terminate an immigration status that was illegally procured or procured by concealment of a material fact or by willful misrepresentation. *See, e.g.* sections 205, 246, and 340 of the Act (8 U.S.C. 1155, 1256, and 1451). However, the process for rescission, revocation, or termination of an immigration status or document in many instances can be prolonged for several months or years, particularly in those cases requiring

judicial review. Even when DHS places aliens in removal or rescission proceedings or seeks to terminate or revoke an immigration status previously granted, the aliens in most instances retain their immigration status, even if granted in error, while such proceedings are ongoing and until concluded. As a result, the potential for harm increases the longer an alien retains an immigration status or document that he or she is not lawfully entitled to or should not have been issued in the first instance. Therefore, it is imperative that DHS run background checks before applications for immigration relief or protection from removal are granted or immigration documents are issued.

While we expect that public comments may help the Department to improve its process, the urgency of putting a better system in place outweighs the opportunity for notice and comment before any improvement is made. Accordingly, the Department finds that it would be impracticable and contrary to the public interest to delay implementation of this rule to allow the prior notice and comment period normally required under 5 U.S.C. 553(b)(B) and (d)(3). The Department nevertheless invites written comments on this interim rule and will consider any timely comments in preparing the final rule.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. It does not have any impact on small entities as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988, Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval, any reporting requirements inherent in a final rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and function (Government agencies).

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Organization and function (Government agencies).

■ Accordingly, chapter V of title 8 of the Code of Federal Regulations is amended as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 1. The authority citation for 8 CFR part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386; 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 2. Section 1003.1 is amended by redesignating paragraph (d)(6) as paragraph (d)(7), adding a new paragraph (d)(6), and revising paragraph (e)(8)(i), to read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

* * * * *

(d) * * *

(6) *Identity, law enforcement, or security investigations or examinations.* (i) The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other immigration benefit, as provided in 8 CFR 1003.47(b), that requires completion of identity, law enforcement, or security investigations or examinations if:

(A) Identity, law enforcement, or security investigations or examinations have not been completed during the proceedings;

(B) DHS reports to the Board that the results of prior identity, law enforcement, or security investigations or examinations are no longer current under the standards established by DHS and must be updated; or

(C) Identity, law enforcement, or security investigations or examinations have uncovered new information bearing on the merits of the alien's application for relief.

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, then the Board will determine the best means to facilitate the final disposition of the case, as follows:

(A) The Board may issue an order remanding the case to the immigration judge with instructions to allow DHS to complete or update the appropriate identity, law enforcement, or security investigations or examinations pursuant to § 1003.47; or

(B) The Board may provide notice to both parties that in order to complete

adjudication of the appeal the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board.

(iii) In any case placed on hold under paragraph (d)(6)(ii)(B) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the applicant fails to comply with necessary procedures for collecting biometrics or other biographical information, DHS may move to remand the record to the immigration judge for consideration of whether, in view of the new information or the alien's failure to comply, the immigration relief should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion.

(iv) The Board is not required to remand or hold a case pursuant to paragraph (d)(6)(ii) of this paragraph if the Board decides to dismiss the respondent's appeal or deny the relief sought.

(v) The immigration relief described in 8 CFR 1003.47(b) and granted by the Board shall take effect as provided in 8 CFR 1003.47(i).

(e) * * *

(8) * * *

(i) Except in exigent circumstances as determined by the Chairman, or as provided in paragraph (d)(6) of this section, the Board shall dispose of all appeals assigned to a single Board member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel (including any additional opinion by a member of the panel).

* * * * *

■ 3. Paragraph (e) of § 1003.19 is revised to read as follows:

§ 1003.19 Custody/bond.

* * * * *

(e) After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.

* * * * *

■ 4. Section 1003.47 is added to read as follows:

§ 1003.47 Identity, law enforcement, or security investigations or examinations relating to applications for immigration relief, protection, or restriction on removal.

(a) *In general.* The procedures of this section are applicable to any application for immigration relief, protection, or restriction on removal that is subject to the conduct of identity, law enforcement, or security investigations or examinations as described in paragraph (b) of this section, in order to ensure that DHS has completed the appropriate identity, law enforcement, or security investigations or examinations before the adjudication of the application.

(b) *Covered applications.* The requirements of this section apply to the granting of any form of immigration relief in immigration proceedings which permits the alien to reside in the United States, including but not limited to the following forms of relief, protection, or restriction on removal to the extent they are within the authority of an immigration judge or the Board to grant:

(1) Asylum under section 208 of the Act.

(2) Adjustment of status to that of a lawful permanent resident under sections 209 or 245 of the Act, or any other provision of law.

(3) Waiver of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act, or any provision of law.

(4) Permanent resident status on a conditional basis or removal of the conditional basis of permanent resident status under sections 216 or 216A of the Act, or any other provision of law.

(5) Cancellation of removal or suspension of deportation under section 240A or former section 244 of the Act, or any other provision of law.

(6) Relief from removal under former section 212(c) of the Act.

(7) Withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture.

(8) Registry under section 249 of the Act.

(9) Conditional grants relating to the above, such as for applications seeking asylum pursuant to section 207(a)(5) of the Act or cancellation of removal in light of section 240A(e) of the Act.

(c) *Completion of applications for immigration relief, protection, or restriction on removal.* Failure to file necessary documentation and comply with the requirements to provide biometrics and other biographical information in conformity with the applicable regulations, the instructions to the applications, the biometrics notice, and instructions provided by DHS, within the time allowed by the immigration judge's order, constitutes abandonment of the application and the immigration judge may enter an appropriate order dismissing the application unless the applicant demonstrates that such failure was the result of good cause. Nothing in this section shall be construed to affect the provisions in 8 CFR 1208.4 regarding the timely filing of asylum applications or the determination of a respondent's compliance with any other deadline for initial filing of an application, including the consequences of filing under the Child Status Protection Act.

(d) *Biometrics and other biographical information.* At any hearing at which a respondent expresses an intention to file or files an application for relief for which identity, law enforcement, or security investigations or examinations are required under this section, unless DHS advises the immigration judge that such information is unnecessary in the particular case, DHS shall notify the respondent of the need to provide biometrics and other biographical information and shall provide a biometrics notice and instructions to the respondent for such procedures. The immigration judge shall specify for the record when the respondent receives the biometrics notice and instructions and the consequences for failing to comply with the requirements of this section. Whenever required by DHS, the applicant shall make arrangements with an office of DHS to provide biometrics and other biographical information (including for any other person covered by the same application who is required to provide biometrics and other biographical information) before or as soon as practicable after the filing of the application for relief in the immigration proceedings. Failure to provide biometrics or other biographical information of the applicant or any other covered individual within the time allowed will constitute abandonment of the application or of the other covered individual's participation unless the applicant demonstrates that such failure was the result of good cause. DHS is responsible for obtaining biometrics and other biographical information with respect to any alien in detention.

(e) *Conduct of investigations or examinations.* DHS shall endeavor to initiate all relevant identity, law enforcement, or security investigations or examinations concerning the alien or beneficiaries promptly, to complete those investigations or examinations as promptly as is practicable (considering, among other things, increased demands placed upon such investigations), and to advise the immigration judge of the

results in a timely manner, on or before the date of a scheduled hearing on any application for immigration relief filed in the proceedings. The immigration judges, in scheduling hearings, shall allow a period of time for DHS to undertake the necessary identity, law enforcement, or security investigations or examinations prior to the date that an application is scheduled for hearing and disposition, with a view to minimizing the number of cases in which hearings must be continued.

(f) *Continuance for completion of investigations or examinations.* If DHS has not reported on the completion and results of all relevant identity, law enforcement, or security investigations or examinations for an applicant and his or her beneficiaries by the date that the application is scheduled for hearing and disposition, after the time allowed by the immigration judge pursuant to paragraph (e) of this section, the immigration judge may continue proceedings for the purpose of completing the investigations or examinations, or hear the case on the merits. DHS shall attempt to give reasonable notice to the immigration judge of the fact that all relevant identity, law enforcement, or security investigations or examinations have not been completed and the amount of time DHS anticipates is required to complete those investigations or examinations.

(g) *Adjudication after completion of investigations or examinations.* In no case shall an immigration judge grant an application for immigration relief that is subject to the conduct of identity, law enforcement, or security investigations or examinations under this section until after DHS has reported to the immigration judge that the appropriate investigations or examinations have been completed and are current as provided in this section and DHS has reported any relevant information from the investigations or examinations to the immigration judge.

(h) *Adjudication upon remand from the Board.* In any case remanded pursuant to 8 CFR 1003.1(d)(6), the immigration judge shall consider the results of the identity, law enforcement, or security investigations or examinations subject to the provisions of this section. If new information is presented, the immigration judge may hold a further hearing if necessary to consider any legal or factual issues, including issues relating to credibility, if relevant. The immigration judge shall then enter an order granting or denying the immigration relief sought.

(i) *Procedures when immigration relief granted.* At the time that the immigration judge or the Board grants any relief under this section that would entitle the respondent to a new document evidencing such relief, the decision granting such relief shall include advice that the respondent will need to contact an appropriate office of DHS. Information concerning DHS locations and local procedures for document preparation shall be routinely provided to EOIR and updated by DHS. Upon respondent's presentation of a final order from the immigration judge or the Board granting such relief and submission of any biometric and other information necessary, DHS shall prepare such documents in keeping with section 264 of the Act and regulations thereunder and other relevant law.

(j) *Voluntary departure.* The procedures of this section do not apply to the granting of voluntary departure prior to the conclusion of proceedings pursuant to 8 CFR 1240.26(b) or at the conclusion of proceedings pursuant to 8 CFR 1240.26(c). If DHS seeks a continuance in order to complete pending identity, law enforcement, or security investigations or examinations, the immigration judge may grant additional time in the exercise of discretion, and the 30-day period for the immigration judge to grant voluntary departure, as provided in § 1240.26(b)(1)(ii), shall be extended accordingly.

(k) *Custody hearings.* The foregoing provisions of this section do not apply to proceedings seeking the redetermination of conditions of custody of an alien during the pendency of immigration proceedings under section 236 of the Act. In scheduling an initial custody redetermination hearing, the immigration judge shall, to the extent practicable consistent with the expedited nature of such cases, take account of the brief initial period of time needed for DHS to conduct the automated portions of its identity, law enforcement, or security investigations or examinations with respect to aliens detained in connection with immigration proceedings. If at the time of the custody hearing DHS seeks a brief continuance in an appropriate case based on unresolved identity, law enforcement, or security investigations or examinations, the immigration judge in the exercise of discretion may grant one or more continuances for a limited period of time which is reasonable under the circumstances.

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 5. The authority citation for part 1208 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1225, 1231, 1282.

■ 6. Section 1208.4 is amended by adding two new sentences at the end of paragraph (a)(2)(ii), to read as follows:

§ 1208.4 Filing the application.

* * * * *

(a) * * *

(2) * * *

(ii) * * * The failure to have provided required biometrics and other biographical information does not prevent the ''filing'' of an asylum application for purposes of the one-year filing rule of section 208(a)(2)(B) of the Act. *See* 8 CFR 1003.47.

* * * * *

■ 7. Section 1208.10 is revised to read as follows:

§ 1208.10 Failure to appear at a scheduled hearing before an immigration judge; failure to follow requirements for biometrics and other biographical information processing.

Failure to appear for a scheduled immigration hearing without prior authorization may result in dismissal of the application and the entry of an order of deportation or removal *in absentia*. Failure to comply with processing requirements for biometrics and other biographical information within the time allowed will result in dismissal of the application, unless the applicant demonstrates that such failure was the result of good cause. DHS is responsible for obtaining biometrics and other biographical information with respect to any alien in custody.

■ 8. Section 1208.14 is amended by adding a new sentence at the end of paragraph (a) to read as follows:

§ 1208.14 Approval, denial, referral, or dismissal of application.

(a) * * * In no case shall an immigration judge grant asylum without compliance with the requirements of § 1003.47 concerning identity, law enforcement, or security investigations or examinations.

* * * * *

Dated: January 26, 2005.

John Ashcroft,

Attorney General.

[FR Doc. 05–1782 Filed 1–27–05; 12:33 pm]

BILLING CODE 4410–30–P

ICE Virtual University Mandatory Trainings 2010

Description

A Culture of Privacy Awareness
ICE Ethics Orientation
Information Assurance Awareness Training
Integrity Awareness Program Training
No FEAR Act
Prevention of Sexual Harassment
Records Management Awareness Training
Violence Against Women Act

Department Subcomponents and Agencies

- Department Components
- Office of the Secretary
- Advisory Panels and Committees

Homeland Security leverages resources within federal, state, and local governments, coordinating the transition of multiple agencies and programs into a single, integrated agency focused on protecting the American people and their homeland. More than 87,000 different governmental jurisdictions at the federal, state, and local level have homeland security responsibilities. The comprehensive national strategy seeks to develop a complementary system connecting all levels of government without duplicating effort. Homeland Security is truly a "national mission."

The following list contains the major components that currently make up the Department of Homeland Security.

Department Components

The Directorate for National Protection and Programs works to advance the Department's risk-reduction mission. Reducing risk requires an integrated approach that encompasses both physical and virtual threats and their associated human elements.

The Directorate for Science and Technology is the primary research and development arm of the Department. It provides federal, state and local officials with the technology and capabilities to protect the homeland.

The Directorate for Management is responsible for Department budgets and appropriations, expenditure of funds, accounting and finance, procurement; human resources, information technology systems, facilities and equipment, and the identification and tracking of performance measurements.

The Office of Policy is the primary policy formulation and coordination component for the Department of Homeland Security. It provides a centralized, coordinated focus to the development of Department-wide, long-range planning to protect the United States.

The Office of Health Affairs coordinates all medical activities of the Department of Homeland Security to ensure appropriate preparation for and response to incidents having medical significance.

The **Office of Intelligence and Analysis** is responsible for using information and intelligence from multiple sources to identify and assess current and future threats to the United States.

The Office of Operations Coordination is responsible for monitoring the security of the United States on a daily basis and coordinating activities within the Department and with governors, Homeland Security Advisors, law enforcement partners, and critical infrastructure operators in all 50 states and more than 50 major urban areas nationwide.

The Federal Law Enforcement Training Center provides career-long training to law enforcement professionals to help them fulfill their responsibilities safely and proficiently.

The Domestic Nuclear Detection Office works to enhance the nuclear detection efforts of federal, state, territorial, tribal, and local governments, and the private sector and to ensure a coordinated response to such threats.

The Transportation Security Administration (TSA) protects the nation's transportation systems to ensure freedom of movement for people and commerce.

United States Customs and Border Protection (CBP) is responsible for protecting our nation's borders in order to prevent terrorists and terrorist weapons from entering the United States, while facilitating the flow of legitimate trade and travel.

United States Citizenship and Immigration Services is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities.

United States Immigration and Customs Enforcement (ICE), the largest investigative arm of the Department of Homeland Security, is responsible for identifying and shutting down vulnerabilities in the nation's border, economic, transportation and infrastructure security.

The United States Coast Guard protects the public, the environment, and U.S. economic interests—in the nation's ports and waterways, along the coast, on international waters, or in any maritime region as required to support national security.

The Federal Emergency Management (FEMA) prepares the nation for hazards, manages Federal response and recovery efforts following any national incident, and administers the National Flood Insurance Program.

The United States Secret Service protects the President and other high-level officials and investigates counterfeiting and other financial crimes, including financial institution fraud, identity theft, computer fraud; and computer-based attacks on our nation's financial, banking, and telecommunications infrastructure.

Office of the Secretary

The Office of the Secretary oversees activities with other federal, state, local, and private entities as part of a collaborative effort to strengthen our borders, provide for intelligence

analysis and infrastructure protection, improve the use of science and technology to counter weapons of mass destruction, and to create a comprehensive response and recovery system. The Office of the Secretary includes multiple offices that contribute to the overall Homeland Security mission.

The Privacy Office works to minimize the impact on the individual's privacy, particularly the individual's personal information and dignity, while achieving the mission of the Department of Homeland Security.

The office for Civil Rights and Civil Liberties provides legal and policy advice to Department leadership on civil rights and civil liberties issues, investigates and resolves complaints, and provides leadership to Equal Employment Opportunity Programs.

The Office of Inspector General is responsible for conducting and supervising audits, investigations, and inspections relating to the programs and operations of the Department, recommending ways for the Department to carry out its responsibilities in the most effective, efficient, and economical manner possible.

The Citizenship and Immigration Services Ombudsman provides recommendations for resolving individual and employer problems with the United States Citizenship and Immigration Services in order to ensure national security and the integrity of the legal immigration system, increase efficiencies in administering citizenship and immigration services, and improve customer service.

The Office of Legislative Affairs serves as primary liaison to members of Congress and their staffs, the White House and Executive Branch, and to other federal agencies and governmental entities that have roles in assuring national security.

Office of the General Counsel

Office of Counternarcotics Enforcement

Office of Public Affairs

Executive Secretariat

Military Advisor's Office

Advisory Panels and Committees

The Homeland Security Advisory Council provides advice and recommendations to the Secretary on matters related to homeland security. The Council is comprised of leaders from state and local government, first responder communities, the private sector, and academia.

The National Infrastructure Advisory Council provides advice to the Secretary of Homeland Security and the President on the security of information systems for the public and private institutions that constitute the critical infrastructure of our nation's economy.

The Homeland Security Science and Technology Advisory Committee. Serves as a source of independent, scientific and technical planning advice for the Under Secretary for Science and Technology.

The Critical Infrastructure Partnership Advisory Council was established to facilitate effective coordination between Federal infrastructure protection programs with the infrastructure protection activities of the private sector and of state, local, territorial and tribal governments.

The Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities was established to ensure that the federal government appropriately supports safety and security for individuals with disabilities in disaster situations.

U.S. Immigration and Customs Enforcement

Customs Law Outline
(Border Search Authority, Search and Seizure, Etc.)

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Interim Performance Objectives

Upon completion of the following blocks of instruction the student will be able to:

(**Note**, "§" refers to the section of the Law Course for Customs and Border Protection Officers that addresses a given IPO.)

1. Identify the scope of a lawful "stop" and the suspicion necessary for a "stop" to be constitutionally reasonable. § 2.212b

2. Identify the level of suspicion necessary to seize prohibited merchandise for forfeiture. § 2.223

3. Identify the requirements for a lawful plain view seizure. § 2.520

4. Identify the circumstances under which a reasonable expectation of privacy is re-established following a lawful search. § 2.332d

5. Identify the requirements for the search of a mobile conveyance. § 2.540

6. Identify the requirements for a lawful search incident to arrest. § 2.610

7. Identify the requirements for a lawful frisk. § 2.630

8. Identify the circumstances under which a government employee's workspace can be searched without a warrant. § 2.662

9. Identify the circumstances that are the functional equivalent to the border inbound and outbound. §§ 3.232-3.233d

10. Identify the circumstances that constitute the extended border. § 3.234

11. Identify the circumstances under which 19 U.S.C. § 1595(b) authorizes a Customs officer to go upon the buildings and lands of another. § 3.1000

12. Identify what building or place may <u>never</u> be searched under the border search exception to the probable cause requirement of the Fourth Amendment. § 3.1000

13. Identify the point at which an AUSA must be notified of a border detention for personal search. § 3.610

14. Select the circumstances under which the government of a detained foreign national must be notified of the detention. § 5.300

15. Identify the correct procedure to follow when confronted with a claim of diplomatic immunity while executing your lawful duties as a Customs officer. § 4.200

16. Identify the conditions necessary to read correspondence. § 3.810

17. Identify the conditions necessary to copy and/or seize documents and papers. § 3.810

18. Identify what type of documents should never be subject to a valid claim of attorney-client privilege during a border search. § 3.820

19. Identify the correct procedure to follow when making or receiving a request for assistance to or from a member of the intelligence community. § 3.1440

20. Identify the effective (constitutional) scope of the boarding and search authority conveyed by 19 U.S.C. § 1581. § 18.410

21. Identify the scope of Customs boarding and search authority with respect to vessels in inland waters and the territorial sea of the United States. § 18.414

22. Identify the scope of Customs boarding and search authority with respect to vessels on the high seas. § 18.415

23. Identify that portion of the *Comprehensive Drug Abuse Prevention and Control Act* for which the U.S. Customs Service is responsible. § 10.000

24. Identify the evidentiary objectives with respect to each element of a *Controlled Substances Act* (CSA) violation. § 10.100

25. Select from varying fact patterns those facts that establish a particular *Controlled Substances Act* (CSA) violation. § 10.100

26. Select from various factual settings those acts that constitute a violation of the *Maritime Drug Law Enforcement Act,* 46 U.S.C. § 1901-1904. § 18.510

27. Identify the elements constituting a violation of 19 U.S.C. § 1590 (Aviation Smuggling), not involving a sea transfer. § 18.521

28. Identify the elements constituting a violation of 19 U.S.C. § 1590 (Aviation Smuggling), involving a sea transfer. § 18.521

29. Identify the minimum factual circumstances which will support a forfeiture of aircraft or vessels pursuant to 19 U.S.C. §1590, (Aviation Smuggling). § 18.523

30. Identify the conditions under which Miranda warnings are required. § 6.000

31. Identify the conditions that create “custody” for Miranda purposes. § 6.200

32. Identify those circumstances in which either words or actions may constitute "interrogation" under Miranda. § 6.300

33. Identify the evidentiary value of voluntary statements made by a person in “custody” for Miranda purposes. § 6.110

34. Identify the conditions under which an officer may re-initiate contact with a person in "custody" who has invoked his right to counsel. § 6.520

35. Identify those classes of financial instruments which are defined as "monetary instruments" under the *Currency and Foreign Transactions Reporting Act*. §§ 7.210-7.215c

36. Identify the circumstances which constitute transporting monetary instruments "at one time." § 7.250

37. Identify the point at which a person must file a report when monetary instruments are exported. § 7.280

38. Identify various circumstances that create liability for a failure to file a CMIR. § 7.260

39. Given a factual scenario, identify the essential elements of proof necessary to establish a money laundering offense involving financial transactions to promote unlawful activity. §§ 9.220-9.224a

40. Given a factual scenario, identify the essential elements of proof necessary to establish a money laundering offense involving financial transactions to conceal some aspect of proceeds from unlawful activities. §§ 9.220-9.224b

41. Given a factual scenario, identify the essential elements of proof necessary to establish a money laundering offense involving financial transactions to avoid a state or federal reporting requirement. §§ 9.220-9.224c

42. Given a factual scenario, identify the essential elements of proof necessary to establish a money laundering offense involving transportation of funds in or out of the US. §9.240

43. Given a factual scenario, identify the essential elements of proof necessary to establish a money laundering offense involving a government “sting” operation. § 9.250

44. Given a factual scenario, identify the essential elements of proof necessary to establish a money laundering offense involving monetary transactions at a financial institution. §9.260

45. Identify what entities are not “customers” for purposes of the Right to Financial Privacy Act of 1978. § 13.210

46. Identify the methods by which financial records of a customer may be obtained under the Right to Financial Privacy Act. §§ 13.300-13.350, 13.810

47. Identify the lawful means of obtaining access to credit reports under the Fair Credit Reporting Act. § 8.450

48. Identify the procedure to be followed in order to seize documentary evidence from a third party engaged in public communications. § 14.500

49. Identify the extent to which the Exclusionary Rule applies in civil forfeitures. § 15.146

50. Identify the quantum of proof necessary to institute a forfeiture proceeding. §§ 15.130, 15.251a

51. Identify the quantum of proof necessary to sustain a judicial forfeiture. § 15.252

52. Select from a factual setting which property may be forfeited by administrative forfeiture proceedings. § 15.240

53. Select from a factual setting property that must be forfeited by judicial forfeiture proceedings. § 15.250

54. Identify the objectives to be met in a Petition for Remission/Mitigation investigation. § 15.152

55. Identify the significance of a defendant's criminal conviction in a criminal forfeiture proceeding. § 15.610

56. Identify the elements that constitute a violation of 18 U.S.C. § 542, Entry of Goods by False Statement. § 8.112

57. Given varying factual settings, select the facts that exemplify a violation of 18 U.S.C. § 542. § 8.112

58. Identify the point at which merchandise has been entered or introduced into the commerce of the United States. §§ 8.112a(1), 8.112a(3)

59. Identify the difference between "smuggled" or "clandestinely introduced" and "import" or "brings into" as those terms are used in 18 U.S.C. § 545. §§ 8.113a, 8.113c

60. Given varying factual settings, select the facts that exemplify a violation of 18 U.S.C. 545. § 8.113

61. Identify the definition of civil fraud under 19 U.S.C. § 1592. § 8.210

62. Identify the circumstances that establish the "prior disclosure" defense to a civil penalty action. § 8.250

63. Identify the applicable burden of proof for the government to establish each level of culpability in a 19 U.S.C. § 1592 action. §§ 8.213b-8.213d

64. Identify the appropriate limitation of action periods for negligent and fraudulent violations of 19 U.S.C. § 1592. § 8.270

65. Select from a list that which would constitute reasonable notice for the giving of testimony or producing records pursuant to issuance of a Customs summons. § 8.422c

66. Identify who may authorize and cause to be issued a Customs summons. § 8.422f(1)

67. Select from a list those persons regarded as recordkeepers for purposes of the recordkeeping requirements of 19 U.S.C. § 1508. § 8.421

68. Select from a list those persons classified as "third-party record keepers" within the meaning the 19 U.S.C. § 1509. §§ 8.423, 8.423b(1)

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I. Fourth Amendment Seizures

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, …"

A. Seizure of Objects

Government	Interference	With a Possessory Right

1. Temporary seizure of object with no suspicion

    a. Initial border detention of object to search for merchandise

2. Temporary seizure of object with reasonable suspicion

    a. "Investigative detention" is a temporary seizure of an object to investigate suspicion of criminal activity

    b. Scope: Brief investigative inquiry, officer must act with diligence to confirm or dispel suspicion of criminal activity

    c. If the officer develops probable cause that the object is contraband or evidence of a crime, the object may be permanently seized; if the officer does not develop probable cause, the object is returned

3. Permanent seizure of object with probable cause

    a. Permanent seizure of object for forfeiture or use as evidence at trial

B. Seizure of Persons

Government	Interference with Freedom of Movement	Reasonable Person Would NOT Feel Free to Leave

1. Temporary seizure of person with no suspicion

    a. Initial border detention

    b. Fixed vehicle checkpoints – BP and DUI

2. Temporary seizure of person with reasonable suspicion

    a. "Investigative detention" (sometimes called a "Terry stop") is a temporary seizure of a person to investigate suspicion of criminal activity

    b. Reasonable suspicion of criminal activity required

    c. Scope: brief investigative inquiry, officer must act with diligence to confirm or dispel suspicion of criminal activity

        1) Brief = officer must act with due diligence

        2) Investigative = purpose is to confirm or dispel suspicion of criminal activity

        3) Inquiry = ask questions, no inherent authority to search

    d. Officer may perform a "frisk" during an investigative detention only if there is reasonable suspicion that the suspect is armed/dangerous

3. Permanent seizure of person with probable cause:

    a. Arrest

    b. Any seizure of a person that exceeds the limits of a "stop" is considered an arrest

II. Fourth Amendment Searches

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, …"

A. Search – Defined

Government	Intrusion	Reasonable Expectation of Privacy

1. Government

    a. Government officer

    b. Any person acting at the direction of a government officer

2. Intrusion

    a. Physical

    b. Visual

    c. Auditory

3. Reasonable Expectation of Privacy ("REP")

    a. A subjective expectation of privacy that is

    b. Objectively reasonable (i.e., an expectation of privacy that society is prepared to recognized as legitimate under the circumstances)

4. Circumstances where there is no REP (thus, government intrusion in these circumstances is <u>not</u> a 4th Amendment search):

    a. Open fields

        1) Label used to describe area where there is no REP from physical intrusion (i.e. it is not reasonable to expect that other people will refrain from entering the area)

        2) Example: large field on a farm; open parking lot in industrial complex

    b. Open view

        1) Don't confuse with the term "*plain view*," which is a seizure authority

2) Label used to described area where there is no REP from visual intrusion (i.e. it is not reasonable to expect that other people will refrain from looking into the area)

3) Example: item sitting in picture window of home with no shades

c. Overheard conversation

1) Label used to describe conversation where there is no REP from auditory intrusion (i.e. it is not reasonable to expect that other people will refrain from listening to the conversation)

2) Applies to any conversation overheard by someone with an "unaided ear," if the listener is in a place where she is allowed to be (including all public places)

3) Example: off duty officer overhears a conversation between two criminals talking in low voices in a booth at a diner

d. Abandoned property

1) Property is "abandoned" when a person with REP in an object voluntarily discards or disavows her interest in the object and signifies there is no longer any SUBJECTIVE expectation of privacy

2) Abandonment must be *voluntary* (if property is discarded in response to a law enforcement officer's lawful conduct, then the discarded item will be considered voluntarily abandoned)

3) *Lost* property is <u>not</u> abandoned property

4) Examples:

a) Trash placed at the curb for collection

b) "That's not my suitcase" scenario

e. Things previously lawfully searched – earlier private search, border search, etc.

1) the REP in an area or a container is eliminated once it has been lawfully searched, so a subsequent intrusion by the Government **<u>will not be a search if</u>** –

a) the scope of the subsequent intrusion does not exceed the scope of the earlier search, and

b) there is a substantial likelihood that the area or contents of the container have not changed since the earlier search. Visual or electronic surveillance of the area or container may establish the substantial likelihood of no change.

5. 4th Amendment Search Analysis – Focus on the existence of REP, if any, not Technology used to overcome it

    a. For example – Use of a thermal imager to obtain information concerning the interior of a home not otherwise observable constituted a search – *United States v. Kyllo*, 533 U.S. 27 (2001)

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III. Search and Seizure Requirements

"… and no warrants shall issue, but upon probable cause, supported by oath or affirmation, …"

Once we determine that a law enforcement officer's conduct was either a search or a seizure, we must then decide whether the officer's search/seizure was *reasonable* (i.e. complies with the Fourth Amendment).

A. GENERAL RULE: SEARCHES OR SEIZURES MUST BE CONDUCTED WITH A WARRANT SUPPORTED BY PROBABLE CAUSE (P.C.).

B. EXCEPTIONS: Certain searches and seizures may be constitutionally reasonable even when conducted without a warrant or probable cause.

C. Exceptions to the Warrant Requirement – (**P.C. Required**)

1. Arrest in a Public Location:

    a. Person to be arrested is located in public or another location to which the officer has lawful access

    b. Officer has probable cause to believe that the person has committed or is committing a crime

    c. Title 19 vs. Title 8 Arrest Authority—

        1) 19 U.S.C. § 1589a:

            a) make an arrest without a warrant for any offense [felony or misdemeanor] against the United States committed in the officer's presence, or

            b) for a Federal felony committed outside the officer's presence if the officer has reasonable grounds [P.C.] that the person to be arrested has committed or is committing a felony

        2) 8 U.S.C. § 1357(a)(5) same authority as above **except** the officer must be performing duties relating to the enforcement of immigration laws at the time of the arrest and there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

2. Plain View or Touch Seizure:

a. Officer has lawful OBSERVATION of, or CONTACT with an object

b. Officer has lawful ACCESS to the object

c. Probable Cause to seize the object is *immediately* apparent

3. Exigent Circumstances

   a. People = "Hot Pursuit"

      1) Officer has Probable Cause to Arrest suspect for a Serious Crime, i.e., a felony

      2) Attempts Arrest, but

      3) Suspect Flees and

      4) Officer generally has continuous knowledge of suspect's whereabouts and in particular, P.C. to believe that suspect is in a specific premises

   b. Object = "Search to Prevent Imminent Destruction or Removal of Evidence"

      1) Probable Cause to Believe Seizable Property Within

      2) Probable Cause to Believe It is About to Be Destroyed or Removed

   c. Imminent Loss of Life or Property = "Emergency Search"

      1) Basis – reasonable belief [P.C.] that a "bona fide" emergency exists, i.e., potential loss of life or property

      2) Scope – limited to resolving the emergency. Once the emergency has passed, officers must withdraw and obtain a warrant or meet the criteria for another of the exceptions to the 4th Amendment's Warrant and Probable Cause requirements to search further

4. Mobile Conveyance:

   a. Officer has probable cause to believe that seizable property is located in the conveyance

   b. The conveyance is <u>readily mobile</u>

D. Exceptions to the Probable Cause requirement (**Reasonable Suspicion (R.S.) is required in some instances**)

1. Search Incident to Arrest (SIA): (**R.S. required for "Strip Search" only**)

    a. Purpose: To prevent arrestee's access to weapons or destruction/concealment of evidence

    b. Scope

        1) No suspicion required to search:

            a) Exterior of arrestee's clothing;

            b) Objects carried by arrestee;

            c) Area within arrestee's immediate control (includes the passenger compartment of a vehicle and any locked or unlocked containers therein)

            d) Closets and Other Spaces Immediately Adjoining Place of Arrest from Which an Attack Could Be Immediately Launched may be searched for People, Not Weapons or Evidence

        2) Reasonable suspicion that weapons or evidence are hidden underneath clothing is required to perform a strip search during SIA

2. Consent:

    a. Consent must be <u>voluntary</u> – person made a free choice among lawful options and chose to agree to the search or encounter

        1) Voluntariness measured based on "totality of the circumstances"

        2) The following are factors to be considered among the totality of circumstances (but no single factor is an absolute requirement):

            a) Knowledge of right to refuse;

            b) Written consent

            c) Presence of witnesses

d) Age and sophistication of the person giving consent

3) "Tough choice" made from lawful options is voluntary

4) Choice made in response to coercion, inducement or trick is <u>not voluntary</u>

b. Authority – who may consent to a search?

1) Actual = Person with REP in thing/place to be searched; or

2) Apparent = Person who appears to have REP in the thing to be searched

3) Joint control issues?

c. Scope: limited to terms of consent

d. Revocation – consent can be revoked at *any time*

3. Frisk/Protective Sweep: (**R.S. required**)

a. Frisk of a Person - Reasonable Suspicion of Criminal Activity AND Reasonable Suspicion Person is Armed and Dangerous

b. Protective Sweep of a Place - Reasonable Suspicion Someone Within Poses Threat to Officer(s) Who are Lawfully Present

c. Purpose - Neutralize Danger/Threat

1) Frisk – weapons only

2) Places – people only

d. Scope - Limited To Purpose

4. Inventory:

a. Purpose

1) Protect owner from loss/theft of valuables from lawfully impounded property

2) Protect agency from allegations of loss/theft of valuables from lawfully impounded property

3) Protect agency from hazardous materials in lawfully impounded property

b. Scope – Search must comport with Agency inventory search policy.

5. Regulatory Searches – Government Licensed or Regulated Activities

    a. Vessel Document Check – 19 U.S.C. § 1581

    b. Inspections of Foreign Trade Zones – 19 C.F.R. §§ 146.3, 146.10

    c. TSA Airport Security Searches – 49 U.S.C. §§ 44901(c)-(e)

6. Administrative Searches – Search of a Government Employee's Workplace (**R.S. required**)

    a. Purpose - Efficient Administration of the Public Workplace

    b. Basis

        1) Noninvestigatory work-related purpose such as to retrieve a file, or

        2) Confirm or deny work-related **misfeasance** - *O'Conner v. Ortega*, 480 U.S. 709 (1987).

            a) Misfeasance = the doing of a lawful thing in an improper manner

            b) Malfeasance = the doing of a wrongful thing

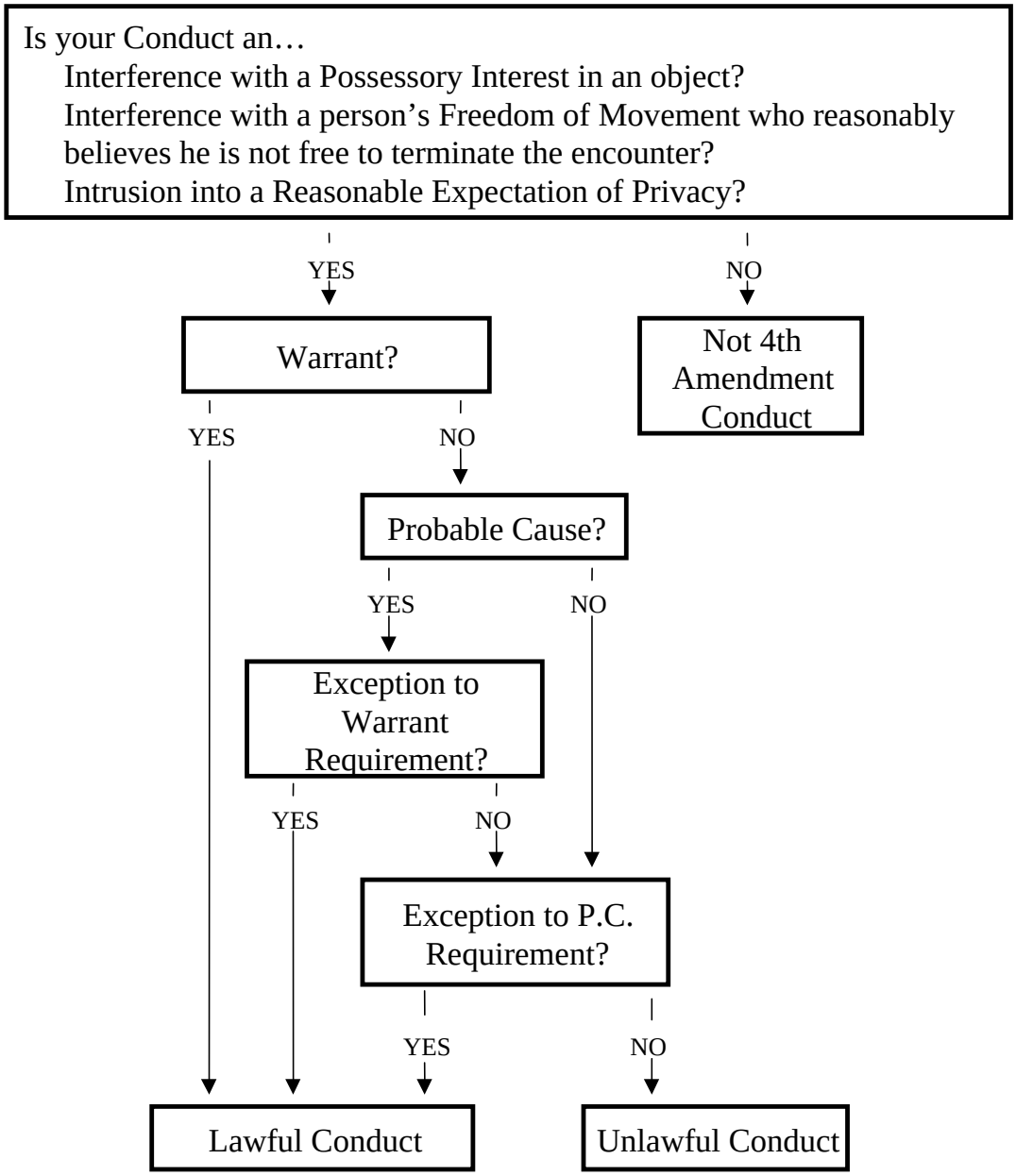
    c. Scope - Reasonable Suspicion Object Sought is in Particular Places Searched.

7. Border Search

    a. Purpose – protect nation's borders, protect revenue, prohibit importation or exportation of merchandise contrary to law

    b. Scope of a *border search* is limited to search for <u>merchandise</u> at the <u>border</u>

E. Search and Seizure Flow Chart.



IV. Border Authority

A. **Purpose for Exception**

1. Protect Revenue

2. Prohibit importation or exportation of offending merchandise

3. National Security

B. **Scope**: Limited to purposes for exception

C. **Requirements for Exception**

1. "Customs Officer [19 U.S.C. §1401(i)]

   a. Customs and Border Protection Officers and ICE Special Agents/ MEOs/AEOs

   b. Coast Guard Petty Officers and above

   c. Others Designated by Customs

   Note: 19 U.S.C. §507 distinguished

2. Searching for Merchandise [19 U.S.C. §1401(c)]

   a. Goods, wares, chattels of every description, including prohibited merchandise and monetary instruments.

   b. Correspondence is not Merchandise.

3. At the Border

   a. Nation's Border

      1) Land Border- dividing lines between Mexico and United States, and between Canada and the United States.

      2) Sea Border- along the Atlantic and Pacific Coasts, the nation's sea border is 3 nautical miles from the low mean water mark; along the coasts of Texas and Florida (Gulf of Mexico) the nation's sea border is 9 nautical miles from the low mean water mark. The remaining Gulf Coast states, Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands recognize a 3 nautical

mile sea border. The Sea Border divides the Great Lakes in half.

3) Air Border- Extends directly upward from the land or sea border.

b. Functional Equivalent of the Border (FEB- Inbound)

1) Purpose: performing a border detention/search at the nation's border is not practical in most cases, so border search authority may be exercised at places away from the nation's border, when those places *function just like the border*.

2) Elements of the FEB (Inbound)

a) Reasonable certainty that there has been a *border nexus*

i) The person or thing to be searched crossed the border, **or**

ii) The person or thing to be searched had contact with someone or something that crossed the border.

b) Reasonable certainty there has been *no material change since nexus*

i) The person or thing to be searched has not changed since border nexus, **and**

ii) Any merchandise present now was present at the time of border nexus (i.e. there has been no opportunity to acquire domestic merchandise since the border crossing).

c) *First Practicable Detention Point*- The first practicable detention point is not necessarily the first *possible* detention point

3) FEB Inbound examples

a) Port of Entry

b) Airports and Seaports

c) Mail Facilities

d) Bonded Warehouses

c. Elements of the FEB (Outbound)

1) Reasonable certainty there will be border nexus

2) Reasonable certainty there will be no material change before border nexus (i.e. any merchandise present at the time of the search will be present at the time of crossing).

3) Last Practicable Detention Point before border nexus

d. Elements of the Extended Border- conducted at some point beyond the FEB

1) Reasonable certainty there has been border nexus

2) Reasonable certainty there has been no material change since border nexus

3) Reasonable Suspicion of criminal activity

e. Note: A DWELLING MAY NEVER BE SEARCHED UNDER BORDER SEARCH AUTHORITY

f. 19 U.S.C. §1595(b)- Entry upon the buildings and lands of another permitted, but never Dwellings, as long as it involves the discharge of your official duties.

D. **Border Search Procedures**

1. Searching People

a. Searches involving people that are not Personal Searches- zero suspicion required to search in these instances

1) Baggage, containers, things brought into the United States by the person. [19 U.S.C. §§1496 and 1582]

2) Outer garments worn by the traveler, and

3) Contents of pockets (traveler agrees to remove contents).

b. Personal Searches [See CBP's Personal Search Handbook]

1) The *Personal Search Handbook* describes in great detail the policies and rules that apply to any search of a person by a Customs officer at the border

2) Six Types of Personal Searches- each Personal Search requires some level of suspicion greater than zero suspicion

a) Immediate Patdown for Weapons

b) Patdown for Merchandise

c) Partial Body Search

d) X-Ray Examination

e) Body Cavity Search

f) Monitored Bowel Movement

3) Personal Search detention exceeding 2 hours- CBP will offer to notify someone on the detainee's behalf of the delay in Customs processing. The name, relationship, and telephone number of the person to be notified will be obtained, and coordination with an ICE Agent will occur.

4) Personal Search detention exceeding 8 hours-

a) ICE Agent must notify AUSA

b) If AUSA does not find reasonable suspicion for continued detention, then the person will be released.

c) 8 hours begins upon supervisory approval for the Patdown for Merchandise.

5) DOJ Guidelines

c. Juveniles

1) Policy is to allow an accompanying adult to be present during Personal Search of juvenile, unless a reason to exclude the adult exists.

2) Coordination with the U.S. Attorney's Office regarding arrest/disposition. [18 U.S.C. §5031-5042].

d. Foreign Nationals- Arrest or detention at medical facility

1) Customs Officer must advise detainee of right to have detainee's consular official notified of arrest or detention

2) If detainee requests notification, the officer notifies consular official

3) If detainee declines, the Customs Officer must determine if detainee's home country is a treaty country.

e. Diplomats

1) Persons

2) Diplomatic Bag (pouch)

3) Consular Bag (pouch)

4) Personal luggage

5) Tactical Considerations

2. Searching Objects

a. Border Search of an object requires zero suspicion

1) 19 U.S.C. §1496- authorizes the search of baggage entered by traveler

2) 19 U.S.C. §1582- authorizes the implementation of regulations concerning baggage searches

3) 19 U.S.C. §1499- allows examination of merchandise entering the US

4) 19 U.S.C. §482- allows examination of vessels and vehicles; authorizes seizure

5) 19 U.S.C. §1581- allows non-destructive searches of vessels or vehicles to do document check

b. Searches of objects requiring a greater level of suspicion

1) **Destructive Border Searches** require reasonable suspicion merchandise is present.

2) **Inbound Mail- Border Searches of Sealed Letter Class Mail requires reasonable suspicion merchandise is present.**

3) **Outbound Mail**-

a) Border Searches of Sealed Letter Class Mail that weighs more than 16 ounces may be searched only if the officer has reasonable suspicion that the mail contains merchandise.

b) Outbound mail weighing less than 16 ounces may be searched only with a warrant supported by probable cause. [19 U.S.C. §1583]

4) Documents

a) Perform a "format glance" to separate correspondence from other documents

b) Correspondence- *Do not read*

i) may not read under border search authority

ii) authority to read correspondence may come from:

(a) Consent

(b) Warrant supported by Probable Cause

(c) Search Incident to Arrest

iii) If these options are unavailable, return the document to traveler

c) Non-Correspondence- Return to traveler unless

i) You have **Reasonable Suspicion** that the document is merchandise or related to merchandise; if so, **read/fully examine**

ii) Upon full examination, if you obtain Probable Cause to seize the document, seize the document; if not, return the document to traveler

iii) If you have Reasonable Suspicion the document is merchandise or related to merchandise, but cannot discern the content (language or technical terminology), then conduct a brief investigatory inquiry (Terry)

d) Copying Documents

i) official government identification (except certificates of naturalization) may be copied for any legitimate/official purpose

ii) If the officer has Probable Cause to seize the document, then the officer may copy the document

e) Attorney-Client Privilege claim

i) communication between attorney and client is protected

ii) communication between attorney and client will appear in the form of correspondence (written communication) at the border

iii) documents in attorney's possession may be border searched, but correspondence may not be examined during the search

f) Electronic Devices

i) The physical object is merchandise and may be searched with no suspicion under border authority

ii) The information contained within an electronic device may be border searched for merchandise (child pornography; weapons technology) or items related to merchandise

iii) Apply same method used when examining documents

iv) Cell phone numbers are information, not merchandise

v) Note: Although the examination is not prohibited, consultation with a computer forensic agent may be necessary to perform the search and to retrieve any merchandise found

3. Requests for Assistance from Intelligence Agents

    a. Intelligence Community- CIA, DIA, NSA, etc. and FBI's FCI agents. Military intelligence elements and intelligence officers of the Department of State, Treasury, and Energy

    b. Routine exchanges of information generally permitted

    c. Intelligence community requests Customs officer to do something (or vice versa)- contact supervisor

    d. Supervisor notifies Field Intelligence Unit

    e. Special Assistant (National Security) to Secretary of Homeland Security makes final decision.

V. Maritime Enforcement Rules

A. Definitions

1. **Inland Waters**- those waters that provide a vessel with ready access to the open sea (including US portion of Great Lakes)

2. **Customs Waters**- 12 nautical miles [19 U.S.C. §1401(j)]

3. **High Seas**- waters beyond 12 nautical miles

4. **Vessels "employed to defraud the revenue"**-

    a. Operating without navigational lights in Customs Waters

    b. Vessels subject to Hot Pursuit in Customs Waters

    c. Hovering Vessels [19 U.S.C. §1401(k)]

B. Authority under 19 U.S.C. §1581

1. With no suspicion, Customs may **Hail, Stop, Board, and Document Check** any vessel

    a. In Customs Waters or Inland Waters with ready access to the open sea, or

    b. "Employed to defraud the revenue" on the High Seas

2. With reasonable Suspicion of Customs violation (navigational offense, hidden compartment…), then the officers may search all non-private areas (common) of the vessel (i.e. open deck, cargo, engine room, ice holds…).

3. With Probable Cause contraband is present or with Consent Customs may examine the private quarters, containers, or personal items (*Carroll* Search).

4. Scope of §1581 Examination

    a. State registered vessels- (small craft) permitted to examine boat number, license, registration, and any logs on board

    b. Coast Guard registered vessels- permitted to examine the vessel's official number affixed to visible interior structural part of hull, or on the keel beam (main beam) and any logs, ownership or registration documents.

5. **Vessels Employed to Defraud the Revenue**

a. *Navigational Lights Violation*- any vessel not displaying navigational lights in Customs Waters allows Customs to:

1) stop, hail, and board

2) bring vessel to the most convenient port to examine cargo [19 U.S.C. §1587]

3) seize vessel for forfeiture (i.e. evidence of hidden compartment) [19 U.S.C. §1703]

b. *Hot Pursuit*- if Customs attempts to conduct a §1581 document check or a border search, Customs may pursue the vessel beyond Customs Waters and

1) Stop the vessel

2) Board the vessel, subject to the procedures outlined in Presidential Directive 27 [Note: The pursuit may not continue into the territorial waters of another nation.]

3) Bring the vessel to the most convenient port to examine cargo [19 U.S.C. §1587]

4) Seize vessel for forfeiture [19 U.S.C. §1703]

c. *Hovering Vessel*- If Customs has probable cause to believe that any vessel in Customs Waters or the High Seas is being used to introduce merchandise into the United States, Customs may

1) Stop the vessel

2) Board the vessel, subject to PD 27 and foreign nation territorial waters limitation

3) Bring the vessel to the most convenient port to examine cargo [§1587]

4) Seize the vessel for forfeiture [§1703]

d. Stateless Vessels- any vessel not registered in any country

e. Assimilated to Stateless- any vessel registered in one nation, but holding itself out as registered in another nation will be considered a stateless vessel.

C. Summary of Authorities

1. Any vessel in Customs waters or Inland waters with ready access to open sea

    a) Hail, stop, board, document check;

    b) If reasonable certainty of border nexus, etc., border search (e.g. Foreign vessel in territorial sea; U.S. vessel beyond territorial sea)

    c) If hidden compartment found, seize for forfeiture

    d) If reasonable suspicion of Customs violation, search non-private areas

    e) If probable cause contraband present, *Carroll* search

2. Vessels "employed to defraud the revenue" on the high seas or in Customs waters

    a) Bring to most convenient port and examine cargo

    b) Seize for forfeiture

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VI. Title 21 – Controlled Substances Act (CSA) and Controlled Substances Import/Export Act

A. Introduction- Subchapter 1 (21 U.S.C. §§801-904) discusses domestic acts over which DEA has jurisdiction, while Subchapter 2 (21 U.S.C. §§951-971) addresses import/export violations over which Customs has jurisdiction.

B. Analysis of Elements of Possession with Intent to Distribute- 21 U.S.C. §841(a)(1).

1. Controlled Substances

    a. cannot involve sham substances

    b. must contain testable amount

2. Possession

    a. Ability to Control

    b. Intent to Exercise Control

3. Knowing or Intentional

    a. Knowledge of

        1) Character- general knowledge sufficient

        2) Presence-

            a) Exclusive Control

            b) Joint Control

            c) Deliberate Ignorance

4. With Intent to Distribute

    a. Distribute- Any transfer (actual, constructive, or attempted) of controlled substances

    b. Evidences of Intent to Distribute

        1) Statements and Admissions

        2) Prior Distributions

3) Quantity, Purity, Value

4) Records (Score Sheets)

5) Packaging Paraphernalia

6) Proximity to Caches of Cash

C. Importation Offenses- 21 U.S.C. §§951-971

1. Elements- Importation §§952, 960

   a. Knowingly or Intentionally

   b. Brings into the United States

   c. A Controlled Substance

2. Elements- Extraterritorial Manufacture, distribution- §§959, 960

   a. Manufacturing or Distribution

   b. of a Schedule I or II Controlled Substance

   c. Intending or knowing that it will be unlawfully imported into the United States

   **** or ****

   d. Manufacturing, Distribution or Possession with the Intent to Distribute

   e. On any U.S. Aircraft

   **** or ****

   f. Manufacturing, Distribution or Possession with the Intent to Distribute

   g. By any U.S. Citizen on any Aircraft

VII. Maritime Drug Law Enforcement Act (46 U.S.C. App. §§ 1901-1904)

A. Elements [46 U.S.C. App. §§1901-1904]

1. Knowing or Intentional
2. PWID/Distribution/Manufacture
3. Controlled Substance
4. By U.S. Citizen or Resident Alien on any vessel

**** or ****

5. by Any Person on a U.S. Vessel

**** or ****

6. by Any Person on a Vessel Subject to U.S. Jurisdiction

B. U.S. Vessel

1. U.S. documented or registered vessel
2. U.S. owned vessel (in whole or part)
3. Vessel once documented under U.S. law, but
    a. sold to non-citizen in violation of U.S. law or
    b. under foreign registry or foreign flag in violation of U.S. law

C. Vessel Subject to U.S. Jurisdiction

1. Stateless Vessel
2. Assimilated to Stateless Vessel
3. Permission from Flagged Nation
4. Vessel located in territorial waters of foreign nation and receive permission from that foreign nation
5. Any vessel in Customs Waters

D. Examples

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VIII. Aviation Smuggling (19 U.S.C. § 1590)

A. Aircraft [19 U.S.C. §1590] It is unlawful for the pilot or any individual on board to

1. Knowingly or Intentionally (knowledge of Presence and Character)
2. Possess or Transport
3. Prohibited or Restricted Merchandise
4. For the Purpose of Unlawful Introduction into U.S.

B. Sea Transfers- It is unlawful for any person to

1. Transfer
2. Prohibited or Restricted Merchandise
3. Between an Aircraft and a Vessel (on the High Seas or within the Customs Waters)

    a. If the aircraft is U.S. Registered or Owned

    **** or ****

    b. If the vessel is U.S. Owned, Registered or Controlled [19 U.S.C. §1703(b)]

    **** or ****

    c. If both aircraft and vessel are foreign and the transfer is made under circumstances indicating an intent to unlawfully introduce merchandise into the U.S.

4. Without Permission of the Secretary of the Treasury

C. Penalties

1. Criminal (Maximum)

    a. Controlled Substances- 20 years/$250,000

    b. Not Controlled Substances- 5 years/$10,000

2. Forfeitures- If any of the following *Prima-facie* Acts occur within 250 miles of the territorial sea the aircraft or vessel is subject to seizure and forfeiture

a. Operating vessel or aircraft without Navigational lights where required

b. Unauthorized Auxiliary Fuel System (Aircraft)

c. Failure to correctly identify on demand

    1) vessel name/nationality

    2) aircraft tail number/nationality

d. External display of false tail numbers or vessel name

e. Presence of unmanifested prohibited or restricted merchandise

f. Presence of unmanifested controlled substances

g. Hidden compartment/fitted out for smuggling

h. Failure to stop when hailed

D. Examples

IX. Suspect's Rights

A. *Miranda* background

1. The Fifth Amendment states, in part, that "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." This means that the government may not *compel* a person to incriminate himself by pressuring the person to answer questions about his role in a crime.

2. In the famous Miranda case, the Supreme Court ruled that being interrogated while in government custody is inherently coercive (i.e. it creates pressure to answer the government's questions) and may undermine a person's wish to stay quiet. Even if the government does not "threaten" a suspect, the very act of interrogating a suspect who is in government custody may be coercive and may therefore violate the suspect's Fifth Amendment rights.

3. As a precaution, the Supreme Court decided to require the government to warn suspects in government custody about their Fifth Amendment rights before being interrogated. Specifically, the government must let suspects know that they have the right to remain silent, that anything they say may be used against them in court and that they have the right to speak to a lawyer.

4. This warning is commonly known as a Miranda warning and must be given to a suspect in government custody before there is any interrogation. It is a procedural safeguard designed to protect the suspect's Fifth Amendment right against self-incrimination. If the government does not provide the Miranda warning to a suspect who is interrogated while in government custody, then any statement made by the suspect in response to the interrogation will not be admissible as evidence in court.

B. *Miranda* Requirement

1. A person in government custody must be given a *Miranda* warning and must voluntarily waive his *Miranda* rights before being interrogated:

CUSTODY + INTERROGATION = MIRANDA WARNING REQUIRED

2. If no *Miranda* warning is given, any statements made by a person in custody in response to an officer's interrogation will be inadmissible at trial.

3. Spontaneous statements (i.e. statements that the person voluntarily blurts out) are fully admissible, whether *Miranda* warnings were given or not.

C. Custody Defined

1. Any circumstances where a reasonable person would believe he has been arrested or is about to be arrested (i.e. "arrest-like" conditions)

    a. Telling a suspect "you're under arrest"

    b. Confronting a suspect with evidence of guilt

    c. Duration, manner and scope of pressure on traveler are relevant factors

2. Border:

    a. CBP Policy: Any seizure beyond a patdown for merchandise is considered custody for *Miranda* purposes. Thus, any traveler who has been subjected to a partial body search, x-ray, body cavity search, or MBM is in custody for *Miranda* purposes by CBP policy.

    b. ICE Policy?

D. Interrogation Defined

1. Any words or conduct that an officer knows (or should know) are reasonably likely to elicit an incriminating response.

2. Routine inquiries for legitimate administrative reasons are not interrogation; e.g., name & address or questions designed to discover presence/location of imported merchandise.

3. CBP Officer's role: Generally, agents handling a criminal investigation will Mirandize and interrogate suspects. CBP Officers may be asked to administer Miranda warnings, but the decision to do so rests with the agent handling the investigation of the crime.

E. Legitimate Administrative Purpose Not Interrogation

1. Public Safety

2. Booking (Personal History) Questions

3. Questions to discover presence/location of merchandise in border setting

F. Reading the Rights

G. Waivers

1. After Suspect Has Chosen to Remain Silent
2. After Attorney Requested (Only unequivocal request triggers)
    a. Officer must show:
        1) Suspect initiated second interrogation
        2) Suspect voluntarily waived rights
    b. Problem: Suspect given to or received from another agency

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X. Bank Secrecy Act- 31 U.S.C. §§5312-5332

A. Report Requirements

1. Domestic Coin and Currency Transactions at Financial Institutions [31 U.S.C. §5313]

2. Foreign Financial Agency Transactions [31 U.S.C. §5314] (when defined by regulations)

3. Foreign Currency Transactions by U.S. Persons [31 U.S.C. §5315]

4. Any one who transports or causes the transportation of monetary instruments in excess of $10,000 at one time coming in or leaving the U.S. must report to Customs [31 U.S.C. §5316].

    a. Transports or causes another to transport

        1) Transports- physical movement

        2) Causes- have someone else physically move item

    b. Monetary Instruments

        1) Coin and Currency in circulation (not gold coins)

        2) Traveler's checks

        3) Instruments made payable to fictitious person

        4) Other Negotiable instruments in Bearer Form

    c. "in excess of $10,000"- $10,000.01

    d. "At One Time"

        1) At One Time, or

        2) In one calendar day, or

        3) Over any period, if purpose is to avoid report

e. In/Out of U.S.

1) Inbound- at time of entry

2) Outbound- at time of departure

3) Shipped Instruments

5. Examples

B. Prohibited Structuring- 31 U.S.C. §5324(a)

1. Cause a domestic financial institution to fail to file a Currency Transaction Report (CTR)

**** or ****

2. Cause a domestic financial institution to fail to file or to file an erroneous report due to improper identification

**** or ****

3. Structure transactions with one or more domestic financial institutions

C. Prohibited Structuring- 31 U.S.C. §5324(c) - If purpose is to evade the reporting requirements of 31 U.S.C. §5316 (CMIR) and

1. Fail to file or file an erroneous CMIR report under 31 U.S.C. §5316 or cause someone to do so

**** or ****

2. File a CMIR report under 31 U.S.C. §5316 that contains a material omission or misstatement of fact

**** or ****

3. Structure any importation or exportation of monetary instruments

D. Bulk Cash Smuggling- 31 U.S.C. §5332

1. Elements

a. Transportation or transfer (attempt)

b. Monetary Instruments

c. Exceeding $10,000

d. In/Out of the United States

e. Knowingly concealed

f. With intent to evade CMIR report

2. Civil Penalty- Any property involved or traceable to a violation or a conspiracy to violate may be seized and forfeited

3. Criminal Penalty

a. Imprisonment not to exceed 5 years

b. Mandatory forfeiture of all property involved in or traceable to the offense

c. If neither forfeitable property nor substitute assets are available, the court shall issue a personal money judgment for the amount otherwise subject to forfeiture

4. Property "involved in" defined

a. Monetary Instruments concealed or intended to be concealed (attempts and conspiracies)

b. Any article, container, or conveyance used or intended to be used to:

1) Conceal, or

2) transport the monetary instruments,

c. Any other property used or intended to be used to facilitate the offense

E. Customs Investigative Authority

1. To Examine Financial Institutions- 31 CFR §103.46

2. CMIR Compliance Investigations

3. CMIR Forfeiture Investigations

4. CMIR Criminal Investigations

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XI. *Money Laundering Control Act*

A. **Introduction**

1. Focus = Intent, not Act
2. Five Major Components Plus Conspiracy (18 U.S.C. § 1956 (h))
    a. 18 U.S.C. § 1956(a)(1) Domestic transactions of any nature.
    b. 18 U.S.C. § 1956(a)(2) Movement of funds into/out of U.S.
    c. 18 U.S.C. § 1956(a)(3) Government Sting Operations.
    d. 18 U.S.C. § 1957 Transactions at Financial Institutions
    e. 18 U.S.C. § 1960 Illegal Money Transmitting Businesses

B. **Analysis of Sections**

1. 18 U.S.C. § 1956(a)(1) - Domestic Financial Transactions
    a. Financial Transaction (attempt);
        1) Any *disposition* (transfer of property from one entity to another) involving:
            a) Movement of funds
            b) Monetary instruments
                i) Coin and currency
                ii) Travelers checks
                iii) Personal checks, bank checks, money orders
                iv) Other instruments in bearer form
            c) Title transfer of Real Estate or Conveyances
            d) Use of financial institution; or
        2) Any use of safe deposit box at financial institution
    b. Interstate or Foreign Commerce Affected;
    c. Proceeds of SUA;[1]

[1] Specified Unlawful Activity (SUA). All violations forming predicate acts under 18 U.S.C. 1961(1) [RICO] EXCEPT Title 31 report violations. Those which are of interest to Immigration and Customs Enforcement are: 8 U.S.C. §§ 1324, 1327, and 1328; 18 U.S.C. § 201 [Bribery]; 18 U.S.C. § 659 [Felony Theft from Interstate Shipment); 18 U.S.C. §§ 2251, 2252 [Sexual Exploitation of Children]; 18 U.S.C. §§ 2312, 2321 [Stolen Vehicles];

d. Knowledge (Belief) that Property is Proceeds from Some State, Federal, or Foreign Felony;

e. Intent (Purpose) to:

1) Promote Some Violation (SUA, in fact);

2) Conceal Some Aspect Of (SUA, in fact);

3) Avoid A Reporting Requirement.

4) Engage in Conduct Prohibited by 26 U.S.C. §§ 7201, 7206

f. Extraterritorial Application - If transaction takes place outside of United States and is

1) conducted by an United States citizen; or

2) takes place in part in United States and involves funds or monetary instruments exceeding $10,000

2. 18 U.S.C. § 1956(a)(2) (Larger of $500,000/twice the value of funds involved and/or 20 years) - International Transportation

a. Intent (Purpose) to Promote Some Felony (SUA, in fact);

b. Import/Export Funds (attempt).

***** OR *****

c. Intent (Purpose) to Conceal Some Aspect Of (SUA, in fact);

d. Knowledge (Belief) Proceeds Are From Some Felony; ("Sting" representation will satisfy)

e. Proceeds of SUA;

f. Import/Export Funds (attempt);

***** OR *****

g. Intent (Purpose) to Avoid Reporting Requirement;

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18 U.S.C. § 2314 [Intermediate Transportation of Stolen Property]; **21 U.S.C. Drug Violations; **Violations of Foreign Drug Laws; **21 U.S.C. § 848 - Continuing Criminal Enterprise (CCE); 18 U.S.C. § 542 - False Statements; 18 U.S.C. § 545 - Smuggling; 18 U.S.C. § 549 - Removing Goods from Customs Custody; 18 U.S.C. § 2319 - Criminal Copyright Infringement; 18 U.S.C. § 2320 - Counterfeit Goods and Services; 19 U.S.C. § 1590 - *Aviation Smuggling*; 21 U.S.C. § 863 - Drug Paraphernalia; 22 U.S.C. § 2778 - *Arms Export Control Act*; 50 U.S.C. § 1702 - *International Emergency Economic Powers Act*; 50 U.S.C. App. § 3 - *Trading with the Enemy Act*; Other offenses specified in 18 U.S.C. § 1956; **Justice/Treasury MOU controls Customs Title 21 drug investigations.

h. Knowledge (Belief) Proceeds Are From Some Felony; ("Sting" representation will satisfy)

i. Import/Export Funds (attempt).

3. 18 U.S.C. § 1956(a)(3) ($250,000/20 years) - Undercover "Sting" Operations

a. Financial Transaction (attempt);

b. Property Represented By Federal Law Enforcement Officer (or his agent) To Be Proceeds of SUA;

c. Intent to:

1) Promote Some SUA;

2) Conceal Some Aspect Of Represented Proceeds;

3) Avoid A Reporting Requirement.

4. 18 U.S.C. § 1957 ($250,000/10 years) - Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

a. Proceeds of Specified Unlawful Activity;

b. Financial Institution Transaction (attempt) of more than $10,000 in funds or monetary instruments;

c. Affecting Interstate/Foreign Commerce;

d. Knowledge (Belief) Proceeds Criminally Derived;

e. Conducted in U.S. or, if not, by a "U.S. person." (U.S. National; Permanent Resident Alien; Company composed principally of U.S. Nationals or Resident Aliens; and U.S. Corporations.)

5. 18 U.S.C. § 1960 ($250,000/5 yrs) - Prohibition of Unlicensed Money Transmitting Businesses

a. Elements: (General Intent Crime – the Government does not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. § 5330 applied to the business.)

1) Conducts, controls, manages, supervises, directs, or owns;

2) An "unlicensed money transmitting business."

a) Transferring funds on behalf of the public; and

b) Is operated without a State license where the lack of such a crime is under State law;

**** OR ****

c) Fails to comply with the registration requirements for money transmitter businesses set forth in 31 U.S.C. § 5330 or regulations promulgated thereunder;

**** OR ****

d) Otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity.

b. Sample violations of 18 U.S.C. § 1960.

1) Bill and Pete receive monies from various clients and deposit the funds into an account. They thereafter wire transfer the monies to other accounts as directed by the clients without a license in a State where such unlicensed conduct is a crime.

2) Bill and Pete are licensed in Florida as money transmitters and are actually engaged in that business, however, their business is not registered in accordance with 31 U.S.C. § 5330.

3) Bill and Pete are licensed in Florida as money transmitters and registered as required by 31 U.S.C. § 5330. Bill accepts money from Sam knowing that it was criminally derived and transmits the money to another person in accordance with Sam's instructions.

6. Use the Summary Reference Chart at end of this section to analyze facts for evidence of money laundering violations.

Money Laundering Violations Summary Reference 18 U.S.C. §§ 1956, 1957						
Act:	Disposition Affecting Commerce (Movement/Monetary Inst./Titles/S.Dep. Box) [1956(a)(1)]	Import/Export [1956(a)(2)]	Import/Export [1956(a)(2)]	Import/Export [1956(a)(2)]	Any Fin Trans [1956(a)(3)]	Mon. Trans @ Fin. Inst > $10,000 [1957]
Proceeds:	SUA	ANY Source	SUA	ANY Source	Gov Rep-SUA	SUA
Knowledge:	Felon. Derived		Felon. Derived	Felon. Derived		Crim. Derived
Intent:	Promote (SUA) Conceal (SUA) Avoid Report Req't Tax Fraud	Promote (SUA)	Conceal (SUA)	Avoid Report Requirement	Promote (SUA) Conceal (SUA) Avoid Report Requirement	None

Common Customs Specified Unlawful Activities (SUA'S):

-Violations of 18 U.S.C. § 541 (Entry of Goods Falsely Classified)
-Violations of 18 U.S.C. § 542 (False Statements)
-Violations of 18 U.S.C. § 545 (Smuggling)
-Violations of 18 U.S.C. § 549 (Removing Goods From Customs Custody)
-Violations of 18 U.S.C. § 659 (Felony Theft From Interstate Shipment)
-Violations of 18 U.S.C. § 922(l) (Unlawful Importation of Firearms)
-Violations of 18 U.S.C. §§ 2251, 2252 (Sexual Exploitation of Minors)
-Violations of 18 U.S.C. § 2319 (Copyright Infringement)
-Violations of 18 U.S.C. § 2320 (Counterfeit Goods and Services)
-Violations of 19 U.S.C. § 1590 (*Aviation Smuggling*)
-Violations of 22 U.S.C. § 2778 (*Arms Export Control Act*)
-Violations of 50 U.S.C. §§ 1701-1706 (*International Emergency Economic Powers Act*)
-Violations of 50 U.S.C. App. § 3 (*Trading With the Enemy Act*)

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XII. The Right To Financial Privacy Act – 12 U.S.C. §§ 3401-3422

A. **What it does**

1. Restricts federal government's access to financial records/information at Financial Institutions

2. Gives customer notice of and right to challenge access

B. **Who are "customers"?**

1. Individuals and partnerships of five or less

2. Large partnerships and corporations not protected.

C. **What is a "financial institution"?**

1. All banking and lending-type institutions

2. Credit card issuers (Visa, American Express, etc.)

3. Consumer finance businesses (General Motors Acceptance Corporation, General Electric Credit Corporation, etc.)

D. **What is a "financial record"?**

1. Any record, or information derived from such, of a customer's relationship with financial institution held by institution

2. Does not include records not identifiable with a particular customer [§ 3413(a)]

E. **Prohibits access unless pursuant to:**

1. Consent of customer

2. Administrative subpoena or summons [§ 3405]

a. Summons' Available

1) Title 21 Controlled Substances Enforcement Subpoena

2) Customs Export Enforcement Subpoena

3) Bank Secrecy Act Summons for Civil Enforcement of Currency Reporting Act

4) Customs Summons - If probable cause records related to importation of prohibited merchandise other than drugs

b. Requirements

1) Reasonable belief records relevant to legitimate law enforcement inquiry;

2) Copy of subpoena/summons, along with statutory notice of how to challenge access, served on customer on or before date served on institution;

3) Notice must state with reasonable specificity nature of investigation pursuant to which records sought; and

4) Must wait ten days from service (14 days from mailing).

3. Search Warrant [§ 3406]

a. Probable cause records are evidence of crime

b. Notice to customer within 90 days of execution of warrant (unless delay authorized by court-180 days max.)

4. Formal Written Request [§ 3408]

a. Only if administrative subpoena or summons is unavailable;

b. Agency regulations authorize issuance;

c. Reasonable belief records relevant to legitimate law enforcement inquiry;

d. Copy of request, along with statutory notice of how to challenge access, is served on customer on or before date request to institution;

e. Notice must state with reasonable specificity nature of investigation pursuant to which records sought; and

f. Must wait ten days from service (14 days from mailing).

5. Judicial Subpoena [§ 3407]

a. Reasonable belief records relevant to legitimate law enforcement inquiry;

b. Copy of subpoena, along with statutory notice of how to challenge access, served on customer on or before date served on institution;

c. Notice must state with reasonable specificity nature of investigation pursuant to which records sought; and

d. Must wait ten days from service (14 days from mailing).

F. **Delay of Required Notice [§ 3409]**

1. Reason to believe notice will result in

a. Endangerment of life or physical safety;

b. Flight from prosecution;

c. Destruction or alteration of evidence;

d. Witness intimidation; or

e. Undue delay in or serious jeopardy to investigation

2. Not to exceed 90 days, but may be extended if circumstances warrant

G. **Certification – Officer must certify in writing compliance with all applicable provisions of RFPA**

H. **Use of Information Obtained [§ 3412]**

1. Transfers to another agency

a. Only if certificate of relevancy made;

b. Certification and statutory notice sent to customer within 14 days.

2. Transfers to Attorney General not restricted when:

a. Certified that records may be relevant to violation of fed. criminal law; and

b. Records obtained in exercise of agency supervisory or regulatory functions.

c. Used only for criminal investigative or prosecutive purposes, or 18 U.S.C. §§ 981, 982 purposes and are transferred back upon completion.

I. **Exceptions**

1. Judicial subpoena where government and Customer are parties to litigation;

2. Grand Jury Subpoena [§ 3413(i)]

a. Court may order institution to not notify customer under same circumstances as delayed notice provisions of § 3409;

b. Statutory gag if drug or money laundering investigation; [§ 3420(b)(1)]

c. Records must be actually presented to grand jury; [§ 3420(a)(1)]

d. Records may only be used for grand jury purpose; [§ 3420 (a) (3)]

e. Records must be destroyed or returned if not so used; [§ 3420 (a)(3)]

f. Records shall not be maintained, nor a description of contents maintained unless:

1) In sealed records of grand jury;

2) Used in Prosecution based on grand jury indictment; or

3) For purpose authorized by Rule 6(e), FED. R. CRIM. P.

J. **Exception to Notice Requirement [§ 3413(g)]**

1. Basic account information with respect to a particular transaction (i.e., name address, account number and type of account).

2. Must use one of five authorized methods to get, however.

K. **Sanction for Violation [§ 3417]**

1. Civil penalty against agency and/or institution;

2. Punitive damages for willful or intentional violations;

3. Disciplinary action for willful/intentional violations by agent or employee of agency.

4. Good faith reliance on government certificate of compliance is defense for institution.

5. Remedies are exclusive.

XIII. Fair Credit Reporting Act - 15 U.S.C. § 1681

A. Prohibits Access to Credit Reports Unless:

B. **Written Instructions of the Consumer**

C. **Order of Court**

D. **Grand Jury Subpoena**

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XIV. Documentary Materials in Hands of Disinterested Third Party (*Privacy Protection Act* -- 42 U.S.C. §§ 2000aa, 2000aa-5 to 2000aa-7, 2000aa-11, 2000aa-12)

A. **General Rule – A search warrant should not be used to obtain documentary materials from a nonsuspect, except where the use of a subpoena or other less intrusive means would jeopardize the availability or usefulness of the materials sought.**

B. **Definitions**

1. Documentary Materials - any materials on which information is recorded. Includes electronically or magnetically recorded material

2. Disinterested Third Party - person not reasonably believed to be a suspect nor related by blood or marriage to a suspect

C. **Contact AUSA before seizing any materials which might be covered by PPA**

1. Disinterested third party - Search Warrant must be authorized by AUSA;

2. Disinterested third party who is a physician, lawyer, or clergyman - Search Warrant must be approved by Deputy Assistant Attorney General;

3. Work product or documents of person reasonably believed to have a purpose to disseminate public communications (newspaper, book, broadcast, some BBS services etc.) - By statute warrants can only by sought under very special circumstances, e.g. person committed the crime, prevent seriously bodily harm, etc.

D. **Sanctions**

1. Civil action against Customs - $1,000 or actual damages plus attorneys' fees

2. Disciplinary actions against officer

E. **Exceptions**

1. Border Searches

2. Where other statute requires search warrant or other procedures, e.g.

   a. Stored communications (ECPA)

   b. Financial information - financial institutions (RFPA)

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XV. Asset Removal

A. **Title 19 Civil Forfeiture Concepts [Ref: Chapter 15, *LCCO*]**

1. Forfeiture defined
2. Concepts
    a. *In Rem* proceeding
    b. Title to property
    c. Relation back doctrine

B. **Title 19 Civil Forfeiture Proceedings**

1. Seizing Property
    a. Probable cause required
    b. Warrantless seizure in public place at time of offending act.
    c. Process available
        1) Criminal search warrant - Rule 41 FED. R. CRIM. P
            a) Contraband (illegally possessed)
            b) Fruits of crime (proceeds)
            c) Instrumentalities of crime (used to commit)
        2) Warrant of Arrest In Rem - Supplemental Admiralty Rules
2. Seizure Report
    a. Timeliness
    b. Matters addressed
        1) Evidence re: forfeitability
        2) Evidence re: potential defenses
3. Administrative Forfeiture
    a. Monetary instruments regardless of value
    b. Conveyances of any value involved in a controlled substance violation

c. Other property valued at no more than $500,000

4. Judicial Forfeiture

    a. Property valued above $500,000

    b. Real Estate

    c. Any other property for which a Claim & Cost Bond has been posted to preclude administrative forfeiture

5. Petitions for Remission/Mitigation of Forfeiture

    a. Purpose

    b. Investigative considerations

        1) Used While Stolen

        2) Not Used as Alleged

        3) Common Carriers

            a) Master/Owner not Involved

            b) "Highest Standard of Care" to Prevent

        4) Lienholder status

        5) Bona Fide Purchaser for value (BFP)

        6) Commercial seizures

            a) No Willful Negligence

            b) No Intent to Defraud

            c) No Intent to Violate Law

6. Standards of Proof

    a. Institution of forfeiture

    b. Prevail at trial

7. The Exclusionary Rule and Civil Forfeiture

    a. Illegally seized <u>evidence</u> precluded

    b. Illegally seized <u>property</u> still forfeitable

C. **Civil Asset Forfeiture Reform Act (CAFRA)**

1. Forfeitures pursuant to all statutes other than Title 19, I.R.C., TWEA and the Neutrality Act are subject to:

    a. New notice and timing requirement

    b. Entitlement to appointed counsel. 18 U.S.C. § 983(b).

    c. Burden of proof on the government to establish forfeitability by a preponderance of the evidence. 18 U.S.C. § 983(c).

    d. Standardized Innocent Owner defense. 18 U.S.C. § 983(d).

    e. Subject to being set aside for failure to give/receive notice. 18 U.S.C. § 983(c).

    f. Hardship release of seized property. 18 U.S.C. § 983(f).

    g. Eighth Amendment proportionality analysis. 18 U.S.C. § 983(g).

    h. Fines imposed on frivolous claimants. 18 U.S.C. § 983(h).

2. Seizures pursuant to 18 U.S.C. § 981 and 21 U.S.C. § 881(b) require a warrant or some recognized exception.

3. Establishes criminal forfeiture for any case where civil forfeiture is authorized. 28 U.S.C. § 2461.

4. Establishes a general civil forfeiture statute for any property constituting "proceeds" from any crime denominated 'specified unlawful activity' in the Money Laundering Control Act. 18 U.S.C. § 981(a)(1)(C).

5. Certificate of Probable Cause immunizes seizing officer from suit. 28 U.S.C. § 2465(a)(2).

6. Attorney fees and costs awarded to prevailing claimants. 28 U.S.C. § 2465(b)(1).

D. **19 U.S.C. § 1595a(a)**

1. Any Thing

2. Used in Any Way

3. to Aid or Facilitate

4. Importation, Bringing In, or
5. Landing, Unloading, or
6. Removal, Concealing, Harboring, or
7. Subsequent Transportation of
8. Any Article Introduced (Attempted) Contrary to Law

E. **Criminal Forfeiture Concepts [Ref: Chapter 15, *LCCO*]**

1. *In Personam* proceeding
2. Criminal conviction required
3. Standard of Proof
4. No "Relation Back" to Bona Fide Purchasers for Value

XVI. Criminal Fraud

A. **18 U.S.C. § 542 – Entry of Goods by Means of False Statement (2 years/$250,000 – both)**

False Entry

1. Enter/Introduce, Attempt Enter/Introduce

    a. Entry – begins when information is submitted to Customs, complete when goods are released;

    b. Introduction – when goods are actually landed whether or not entry has been made

2. Merchandise

3. Into commerce of U.S.

4. By MEANS of any fraudulent or false statement (written or verbal), practice or appliance (whether or not U.S. may be deprived of duties)

False Statement in Declaration

1. Makes any MATERIAL false statement

2. In any declaration

3. Without reasonable cause to believe the truth of such statement (whether or not U.S. may be deprived of duties)

Willful Acts or Omissions

1. Willful act or omission

2. Whereby U.S. **may** be deprived of duties

3. Regarding merchandise which is the subject of a false invoice, paper or statement

**** OR ****

4. On merchandise affected by such act or omission.

B. **18 U.S.C. § 545 – Smuggling Goods Into the United States (5 years/$250,000 – both)**

Smuggling or Clandestine Introduction

1. Whoever knowingly and willfully
2. With intent to defraud the U.S.
3. Smuggles or Clandestinely Introduces into U.S., including attempts
4. Uninvoiced merchandise

Passing False Documents through the Customhouse

1. Whoever knowingly or willfully
2. With intent to defraud the U.S.
3. Passes (attempts to pass) through Customhouse
4. Any false, forged or fraudulent invoice other document or paper

Importations Contrary to Law

1. Whoever fraudulently or knowingly
2. Imports or brings into the U.S.
3. Any merchandise contrary to law

Receiving, Concealing, etc., Merchandise Imported Contrary to Law

1. Whoever fraudulently/knowingly
2. Receives, conceals, buys, sells merchandise, or facilitates the transportation, concealment or sale
3. Knowing merchandise was imported/brought in contrary to law

XVII. Customs Civil Fraud Under 19 U.S.C. § 1592

A. **Elements of a § 1592 Violation**

1. Negligence, Gross Negligence, or Fraud

    a. Clerical errors or mistakes of fact are not negligence unless part of a pattern of negligent conduct

    b. Fraud requires **intent to deceive**

2. Entry, Introduction, or Attempt

    a. An entry occurs when goods are actually released into the commerce of the United States

    b. An introduction occurs when the goods are actually landed in the United States

    c. An attempt occurs when the circumstances establish that, but for an unforeseen intervention, the entry or introduction would have occurred.

3. Merchandise into the Commerce of the United States

4. By means of any document, statement or act which is material and false;

**** OR ****

4. By means of any material omission

**** OR ****

4. Any aiding or abetting of the above

B. **Examples**

1. Material Omission – An importer fails to provide Customs with the necessary visa for imported goods subject to quota requirements, and the importer attempts to enter the items as nonquota/visa merchandise. You may also have a false statement here if the articles themselves are falsely described.

2. False Act or Practice – An importer who enters goods properly marked with the correct country of origin, but who subsequently removes the country of origin marking to sell the goods as U.S. made, has engaged in a false act or practice if the evidence shows that the importer had the intent to remove the marking prior to, or at the time of entry.

C. **Culpability and Burden of Proof**

1. Levels of Culpability

    a. Negligence – The failure to exercise reasonable care and competence

    b. Gross Negligence – Acts done with actual knowledge of or wanton disregard for the facts and with indifference or disregard for the offender's obligations

    c. Fraud – Acts deliberately done with intent to defraud the revenue or otherwise violate laws of the United States

2. Burden and Standards of Proof

    a. Negligence – Preponderance of the Evidence

        1) Government establishes that the entry was materially wrong;

        2) Burden shifts to defendant to show error did not result from negligence

    b. Gross negligence – Preponderance of the Evidence

        1) Government must establish that the entry was materially wrong; and

        2) Due to gross negligence.

    c. Fraud – Clear and Convincing Evidence

        1) Government must establish that the entry was materially wrong; and

        2) Due to an intent to deceive

D. **Customs Statute of Limitations 19 U.S.C. § 1621**

1. In general - Penalties and Forfeitures - Five years from date of discovery

2. § 1592 - Penalties and Duty

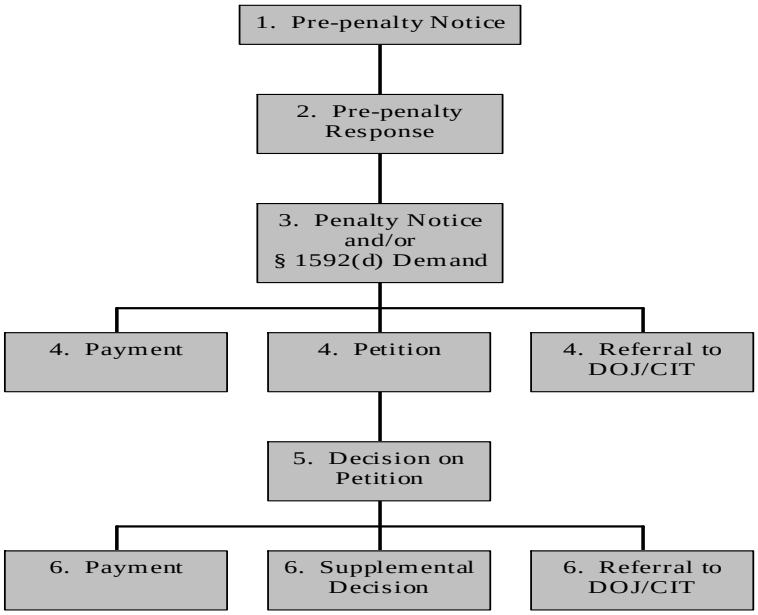
a. Negligence – 5 Years from Act

b. Fraud – 5 Years from Discovery

3. Rule of Thumb - Assume that the statute will run 5 years from each act.

4. Steps to Establish a Judicially Enforceable Claim Under § 1592

Processing Steps for § 1592 Claim



E. **Prior Disclosure**

1. "Reward" to encourage self-policing – substantial limits on penalties

2. Criteria for Asserting Prior Disclosure

a. Importer must disclose circumstances of violation prior to commencement of formal investigation; or

b. Importer must disclose circumstances of violation without knowledge of commencement of formal investigation.

NOTE: Violator has burden of proving lack of knowledge under b).

3. Commencement of formal investigation – the date recorded in writing by a Customs officer who reasonably believes there is a violation

4. Knowledge of the commencement of a formal investigation presumed when:

    a. Officer informed person of type of violation

    b. Agent requests specific book/records

    c. Prepenalty notice issued

    d. Merchandise seized

    e. Accompanying merchandise or merchandise inspected with entry - oral notification

19 U.S.C. 1592 - Penalties

Statutory Ceilings		
Fraud	**Gross Negligence**	**Negligence**
Revenue Loss: **Domestic Value of the Merchandise** **Nonrevenue Loss:** **Domestic Value of the Merchandise**	**Revenue Loss:** **Domestic Value of the Merchandise, or four (4) times the Loss of Revenue, Whichever is Less** **Nonrevenue Loss:** **40% of the Dutiable value of the Merchandise**	**Revenue Loss:** **Domestic Value of the Merchandise, or two (2) times the Loss of Revenue, Whichever is Less** **Nonrevenue Loss:** **20% of the Dutiable Value of the Merchandise**

Administrative Penalty Dispositions 19 C.F.R. Part 171, App. B(F)(2)(a)-(c)		
Revenue Loss: **Minimum of five (5) times the Loss of Duty to a Maximum of eight (8) times the Loss of Duty.** **Nonrevenue Loss:** **50% to 80% of the Dutiable Value of the Merchandise.**	**Revenue Loss:** **Minimum of 2.5 Times the Loss of Duty to a Maximum of four (4) times the Loss of Duty.** **Nonrevenue Loss:** **25% to 40% of the Dutiable Value of the Merchandise.**	**Revenue Loss:** **Minimum of .5 times the Loss of Duty to a Maximum of two (2) times the Loss of Duty.** **Nonrevenue Loss:** **5% to 20% of the Dutiable Value of the Merchandise.**

Note: A penalty may never exceed the domestic value of the merchandise.

Prior Disclosure Dispositions 19 C.F.R. Part 171, App. B(F)(2)(f)		
Revenue Loss: **100% of the Total Loss of Duty (i.e., Actual + Potential) Resulting from the Violation. No Mitigation Permitted.** **Nonrevenue Loss:** **10% of the Dutiable Value of the Merchandise. No Mitigation Permitted.**	**Revenue Loss:** **Interest on the Actual Loss of Duty Computed From Date of Liquidation to the Date of the Party's Tender of Duty Actually Lost.** **Nonrevenue Loss:** **No Monetary Penalty.**	**Revenue Loss:** **Interest on the Actual Loss of Duty Computed From Date of Liquidation to the Date of the Party's Tender of Duty Actually Lost.** **Nonrevenue Loss:** **No Monetary Penalty.**

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XVIII. Customs Civil Drawback Fraud - 19 U.S.C. § 1593a

This statute penalizes fraudulent or negligent drawback claims and provides for assessment of monetary penalties. The penalty process is parallel to 19 U.S.C. § 1592, i.e., prepenalty notice, penalty, appeals, prior disclosure, etc.

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XIX. Examination/Summons Authority - 19 U.S.C. §§ 1508-1510

A. **Examination/Summons Authority**

1. Purposes for which may conduct examination or issue summons

    a) Ascertain correctness of entry

    b) Determine liability for duty, fees, taxes

    c) Determine liability for fines/penalties/forfeitures

    d) Insure compliance with laws of U.S. administered by Customs

2. Voluntary Examination

    a) Any record or any person may be examined for any authorized purpose

    b) Compulsory examinations of person or records must be pursuant to summons or other process

3. Summons

    a) Authorized only by Port Director, Regulatory Audit Field Director or SAIC

    b) To any person

    c) To produce records

        (1) Required by § 1508; or

        (2) Regarding which there is probable cause to believe that they pertain to prohibited merchandise; and/or

    d) To give testimony relevant to any Customs investigation/inquiry

    e) Within 100 miles of place served

B. **Persons Required to Maintain Records**

1. Owner, Importer/Importer of Record, Consignee, Entry Filer;

2. Anyone who imports, files a drawback claim, transports or stores under bond;

3. Anyone whose activities require the filing of a declaration or entry;

4. Anyone who **causes** merchandise to be imported, i.e.,

    a) Controls terms or conditions of importation; or

    b) Furnishes technical data, molds, equipment, components, etc., or production assistance

    NOTE: Persons ordering in domestic transaction are not "causing" importation.

5. Anyone who signs a NAFTA Certificate of Origin for which preferential treatment under NAFTA is claimed.

C. **Records Required to be Maintained**

1. "Entry Records/(a)(1)(A)" list - Appendix Part 163 C.F.R.

    a) Must be provided on demand within 30 days

    b) Penalty for failure to comply

2. "Records" - Any Records Made **and** Normally Kept in the Ordinary Course of Business that pertain to:

    a) Any importation, declaration or entry;

    b) The transportation or storage of merchandise carried or held under bond into or from the Customs territory of the United States;

    c) The filing of a drawback claim;

    d) The completion and signature of a NAFTA Certificate of Origin;

    e) The collection, or payment to Customs, of duties, fees and taxes; or

    f) Any other activity required to be undertaken pursuant to the laws or regulations administered by Customs.

3. NOTE: May include automated record storage, (e.g., magnetic discs and tapes) as well as computer programs necessary to retrieve information in usable form.

D. **Procedures for Third Party Recordkeepers**

1. Third party recordkeeper defined:

    a) Customs broker; unless importer of record

    b) Attorney; or

    c) Accountant

2. Summons served on third party recordkeeper

3. Notice given to person whose records are sought (includes copy of summons and directions for quashing)

    Exception: No notice to person whose records sought, if on issuing officer's petition, a court finds notice may lead to obstruction of justice/flight.

4. Person whose records sought may intervene to stop enforcement of summons:

    a) Must direct third party not to comply

    b) Must give notice to "Secretary" (Notice is given to issuing Customs officer)

E. **Judicial Enforcement of Summons**

1. If after ordering enforcement person does not comply, Secretary may:

    a) Prohibit importations

    b) Withhold delivery of merchandise imported by person

    c) Auction merchandise after in contempt more than one year; and

    d) Penalties:

        (1) A willful failure to maintain, store or retrieve "a(1)(A)" records on demand can result in a penalty of $100,000 or an amount equal to 75% of the appraised value, whichever is less, while

        (2) A negligent failure can result in a penalty of $10,000 or 40% of the appraised value, whichever is less

2. Court may hold person in contempt

XX. PERSONAL LAWSUITS

A. Federal Tort Claims Act

1. Covers “employee of the government”

2. Scope of Employment – Performing the job assigned to you by the Government even if doing it wrong.

3. Negligent Acts - Failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances.

4. Exempted from the coverage are any claims arising in respect of the detention of any goods or merchandise by any officer of Customs..

B. Constitutional Torts (*Bivens*).

1. Federal officers may be personally liable if the they violate a plaintiff’s constitutional rights regardless of whether they were acting within the scope of their employment. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

2. Qualified Immunity

a. If certain conditions exist, an officer will have the affirmative defense of "qualified immunity."

b. The inquiry will be whether a reasonably well-trained law enforcement officer would have known of the duty or right which was infringed. Officers who reasonably but mistakenly believe their conduct comports with the 4th Amendment are entitled to immunity.

c. The issue of qualified immunity will be decided as early in the litigation as possible. If the District Court declines to grant qualified immunity, the issue is immediately appealable.

C. Government Representation Conditioned on:

Scope of Employment
&
Best Interest of the United States Government

1. Not automatic - must request government attorney

2. Decision to represent must await investigations where allegations of criminal conduct occur or whenever a shooting is involved.

D. Payment of Judgments - If an employee is sued for acts conducted within the scope of employment, and either the Attorney General, Commissioner of Customs, or the court has so certified, and a judgment is rendered against you, that judgment may nonetheless be paid by the government under certain circumstances. If your conduct was at the direction of a supervisor or otherwise in accord with Customs policy, federal law provides for payment of the judgement. 28 U.S.C. § 2006 (1998).

Custody and Bond Issues in Removal Proceedings

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I. DUE PROCESS REQUIREMENT

An alien detained pending a decision as to whether the alien is to be removed from the United States does not have a right to be released on bond. Matter of Guerra, 24 I&N Dec. 37, 39 (BIA 2006) (citing Carlson v. Landon, 342 U.S. 524, 534 (1952); Matter of D-J-, 23 I&N Dec. 572, 575 (AG 2003). The Supreme Court has concluded that detention is a normal and lawful part of removal proceedings: "Detention during removal proceedings is a constitutionally permissible part of that process." Demore v. Kim, 538 U.S. 510, 531 (2003). The Court has a "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." Id., at 526.

The Supreme Court has stated that Congress has broad authority to made rules for detaining aliens during removal or deportation proceedings:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Over no conceivable subject is the legislative power of Congress more complete. Thus, in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.... Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings. And ... Congress [has] eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General.

Reno v. Flores, 507 U.S. 292, 305-06 (1993) (internal punctuation and citations omitted) (upholding INS policy on release of detained juveniles).

The rules for detaining aliens are subject to the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides that no person shall be deprived of liberty without "due process of law." Id.; U.S. CONST. ART. V. "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." Flores, at 305-07. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). But it is "not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure." Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 98 (1903).

The due process that must be afforded aliens varies with the circumstances. "Due process in an administrative proceeding is not defined by inflexible rules which are universally applied, but rather varies according to the nature of the case and the relative importance of the governmental and private interests involved." Matter of Exilus, 18

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I&N Dec. 276, 278 (BIA 1982). The Supreme Court has stated that due process of law is a flexible concept that adjusts according to three factors:

> The constitutional sufficiency of procedures ... varies with the circumstances. In evaluating the procedures in any case, the courts must consider [(1)] the interest at stake for the individual, [(2)] the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and [(3)] the interest of the government in using the current procedures rather than additional or different procedures.

Landon v. Plasencia, 459 U.S. 21, 34 (1982) (citations omitted) (deciding what due process must be afforded a returning lawful permanent resident alien).

In Demore v. Kim, 538 U.S. 510, 531 (2003), the Supreme Court balanced the three due process factors in deciding to uphold section 236(c)(1) of the Immigration and Nationality Act (INA), which mandates the detention of certain criminal aliens pending the completion of removal proceedings. First, the Court emphasized that the statute was justified by the legitimate congressional interest in ensuring the removal of criminal aliens who might flee or cause harm to the public during their removal proceedings. See id., at 523-28. Second and most significantly, the Court found that the detention did not raise the constitutional concerns that might arise in the post-removal-period context, because removal proceedings, unlike the post-removal period, have a finite termination point. See id., at 527-28. The Court further concluded that, notwithstanding evidence that other courses of action were available to Congress, the Government was not obligated under the Due Process Clause "to employ the least burdensome means to accomplish its goal" in "dealing with deportable aliens." Id., at 528.

On any given day, Immigration and Customs Enforcement (ICE) detains about 21,000 aliens. More than 200,000 people are detained over the course of a year in any of three types of facilities—eight (8) run by ICE itself, six (6) run by private companies, and 312 county and municipal jails that have federal contracts and hold about 57 percent of the detainees. David Crary, *Critics Decry Immigrant Detention Push*, WASHINGTON POST, June 24, 2006.

Most detained aliens are not placed in removal proceedings, but, of the aliens who appear for removal proceedings, most are detained. According to the FY 2005 Statistical Yearbook of the Executive Office of Immigration Review (EOIR), 90,945 detained aliens appeared in removal proceedings in fiscal year 2005. This represents 56 percent of the total number of aliens who appeared for removal proceedings (163,729).

In FY 2005, 106,832 aliens failed to appear. This is 39 percent of the total number of aliens scheduled for removal hearings. Most of the aliens who failed to appear (55,913) were scheduled for removal proceedings in Harlingen and San Antonio, Texas.

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The Immigration Courts held 26,083 bond/custody redetermination hearings in fiscal year 2005. 36 percent of detained aliens who either DHS or the Immigration Courts released on bond and/or other conditions of release (7,890) did not appear.

The important immigration-related purpose of detaining aliens in appropriate cases during the pendency of removal proceedings is plainly evident from the Department of Justice Inspector General's report in February 2003, which updated and largely mirrored the results of the Inspector General's 1996 report. In the 2003 report, the Inspector General found that the former INS had successfully carried out removal orders and warrants with respect to almost 94% of aliens who had been detained during the pendency of their removal proceedings. However, in stark contrast, only 13% of final removal orders and warrants were carried out against non-detained aliens (a group that includes aliens ordered released by DHS, immigration judges, or the Board). The Inspector General specifically noted the former INS was successful in removing only 6% of non-detained aliens from countries that the United States Department of State identified as sponsors of terrorism; only 35% of non-detained aliens with criminal records; and only 3% of non-detained aliens denied asylum. Office of the Inspector General, U.S. Department of Justice, The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders, Report Number I-2003-004 (Feb. 2003).

Statistics prepared by the Executive Office for Immigration Review also substantiate that large numbers of respondents who are released on bond or on their own recognizance fail to appear for their removal hearings before an immigration judge. For the last 4 fiscal years, 37% (FY 2004), 41% (FY 2003), 49% (FY 2002), and 52% (FY 2001) of such respondents have failed to appear for their scheduled hearings, and the immigration judges have either issued in absentia removal orders or administratively closed those removal proceedings. EOIR, FY 2004 Statistical Year Book at H3 (March 2005).[1] *These numbers-- totaling over 52,000 "no-show" aliens in just the last four years after being released from custody--reflect only those respondents released from custody who fail to appear for their removal hearings before the immigration judges. (They do not include the substantial additional number of non-detained aliens who do appear for their immigration judge hearing, but then fail to surrender after their removal order becomes final and join the growing ranks of hundreds of thousands of absconders currently at large.)*

[1] These EOIR statistics for "released" aliens who are released on bond or on their own recognizance cover only those aliens who were released from custody after the initiation of removal proceedings against them. EOIR also tracks a separate category of "non-detained" aliens--including those aliens who were never taken in custody by DHS at all (such as many asylum applicants) as well as those aliens who had been apprehended but were released by DHS prior to or at the time of the initiation of removal proceedings against them. Of those "non-detained" aliens, 38% failed to appear for their removal hearings during the last 4 fiscal years--a total of almost 130,000 "no-show" aliens in just the last 4 years. FY 2004 Statistical Year Book at H2.

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II. TIME AND PLACE FOR BOND/CUSTODY HEARING

The Department of Homeland Security (DHS) initially determines whether an alien will be detained and determines the amount of bond, if any. 8 C.F.R. § 1236.1(c). This determination will be made within 48 hours of the alien's arrest. 8 C.F.R. § 287.3(d); DHS Undersecretary Asa Hutchinson, "Guidance on ICE Implementation of Policy and Practice Changes Recommended by the Department of Justice Inspector General" (March 30, 2004), reprinted in 81 *Interpreter Releases* 513, 528-32 (April 19, 2004). However, in case of "emergency or other extraordinary circumstance" the determination shall be made "within an additional reasonable period of time." Id. Reasons for the determination must be stated. Matter of Dayoush, 18 I&N Dec. 352, 353 (BIA 1982).

DHS has sole authority to determine the place of detention. See INA § 241(g)(1); Van Dinh v. Reno, 197 F.3d 427, 433 (10th Cir.1999); Committee of Central American Refugees v. INS, 795 F.2d 1434 (9th Cir.1986), as amended 807 F.2d 769 (9th Cir.1986); Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir.1985); Sasso v. Milhollan, 735 F.Supp. 1045, 1048 (S.D.Fla.1990).

If DHS decides to detain an alien, the alien may seek release on bond by submitting a formal written request to DHS stating all the reasons for the alien's release. 8 C.F.R. § 236.1(d). DHS will consider the request and issue a decision.

After the initial bond/custody determination by DHS, the detained alien or the alien's counsel or representative may apply, orally or in writing, for a bond/custody redetermination by the Immigration Court. 8 C.F.R. §§ 1003.19(b), 1236.1(d). The controlling provisions for bond/custody redetermination hearings before an Immigration Judge are found at INA § 236 and 8 C.F.R. §§ 1003.19 and 1236.1. An Immigration Court with jurisdiction to redetermine bond may either reduce or increase the amount of the bond set by DHS. See Matter of Spiliopoulos, 16 I&N Dec. 561, 562 (BIA 1978) ([W]e reject the contention advanced by the respondent that the immigration judge lacked the authority to increase the amount of bond initially set by the District Director.").

If the alien is not in DHS custody (e.g., alien is in state custody), the Immigration Court lacks jurisdiction to redetermine bond/custody. Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990); Cruz v. Molerio, 840 F.Supp. 303, 305-06 (S.D.N.Y. 1994) (alien incarcerated in state prison not entitled to immigration bond hearing). An alien who is on supervised release, such as the Intensive Supervision Appearance Program (ISAP), is not in DHS custody. See Nguyen v. B.I. Inc., 435 F.Supp.2d 1109, 1114 (D.Ore. 2006) ("I conclude that placement in ISAP is not detention. It is a form of supervision that uses no physical restraints or surveillance, both of which are typical characteristics of detention.").

A. Venue for the Bond Hearing

The application for a bond redetermination hearing is made to one of the following EOIR offices, in the following order prescribed at 8 C.F.R. § 1003.19:

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1. To the Immigration Court that has jurisdiction over the place of detention;

2. To the Immigration Court that has administrative control over the case. See 8 C.F.R. § 3.13 (2000); or,

3. To the Office of the Chief Immigration Judge (OCIJ) for designation of the appropriate Immigration Court to accept and hear the application.

The Immigration Court may hold a bond/custody redetermination hearing before the charging document is filed with the court. 8 C.F.R. § 1003.14(a). But the Immigration Court cannot make a bond determination *sua sponte*; the alien must apply for a redetermination. Matter of P-C-M-, 20 I&N Dec. 432, 434 (BIA 1992).

B. Prompt Bond Hearing

Bond proceedings should be conducted promptly after the alien requests bond redetermination by the Immigration Court. See Matter of Chirinos, 16 I&N Dec. 276, 277 (1977) ("Our primary consideration in a bail determination is that the parties be able to place the facts *as promptly as possible* before an impartial arbiter.") (emphasis in original). However, Federal Rule of Criminal Procedure 5(a)—that requires a detainee held on criminal charges be brought before a magistrate within 48 hours—does not generally apply to aliens held in civil detention, absent evidence of collusion between immigration and prosecution authorities. See United States v. Dyer, 325 F.3d 464, 70 (3d Cir. 2003), cert. denied, 540 U.S. 977 (2003) (explaining the "ruse" exception, but declining to adopt it because the defendant would not have qualified for the exception); United States v. Perez-Perez, 337 F.3d 990, 996-97 (8th Cir. 2003), cert. denied, 540 U.S. 927 (2003); United States v. Encarnacion, 239 F.3d 395, 398-99 (1st Cir. 2001), cert. denied, 532 U.S. 1073 (2001); United States v. Noel, 231 F.3d 833, 837 (11th Cir. 2000), cert. denied, 531 U.S. 1200 (2001).

C. Aliens Released by DHS

If DHS has released the alien on bond, the alien must request a bond redetermination by the Immigration Court within seven (7) days. 8 C.F.R. § 1236.1(d)(1). After the expiration of the seven-day period, the alien may request amelioration of the conditions of the alien's release only from DHS. 8 C.F.R. § 1236.1(d)(2); Matter of Chew, 18 I&N Dec. 262, 263 (BIA 1982).

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D. Aliens with a Final Order of Removal

An order of removal becomes administratively final when the alien has waived appeal or when the BIA has dismissed the alien's appeal. INA § 101(a)(47)(B); 8 C.F.R. § 3.38(b). If the alien has an administratively final order of removal or deportation, the Immigration Court lacks jurisdiction to redetermine bond/custody and the alien must request review of bond/custody by DHS. See INA § 241(a)(2); 8 C.F.R. §§ 1003.19(a), 1236.1(d)(1); Matter of Valles, 21 I&N Dec. 769, 772 (BIA 1997) ("The regulations and the Board mention only two instances where an Immigration Judge is divested of jurisdiction over a bond proceeding. The first is upon the lapse of the 7-day period following an alien's release from custody. The second is upon the entry of an administratively final order of deportation. In those cases, jurisdiction over bond proceedings vests with the district director."). The alien may seek review of DHS's bond/custody determination before the Board of Immigration Appeals by filing an appeal within ten (10) days. 8 C.F.R. § 1236.1(d)(3)(ii).

The U.S. Court of Appeals for the Ninth Circuit has ordered the Immigration Court to conduct a bond hearing when the alien's appeals have delayed the alien's removal. See Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) (per opinion of Noonan, C.J., and opinion of Tashima, C.J., concurring in judgment) (ordering bond hearing after delay of 32 months: 7 months for removal proceedings, 13 months for appeal to the BIA, and 12 months for appeal to the circuit court). One federal district court has ordered the Immigration Court to conduct a bond hearing after a final order of removal because the district court held that a written decision by DHS is insufficient to satisfy due process. Del Toro-Chacon v. Chertoff, 431 F.Supp.2d 1135, 1142 (W.D.Wash. 2006) (ordering bond hearing after delay of 8 months while the circuit court considers alien's appeal of the denial of asylum application); but see Marcello v. Bonds, 349 U.S. 302, 311 (1955) (rejecting claim that custody decision by INS special inquiry officer violates due process where INS initiates and prosecutes proceedings).

III. MANDATORY DETENTION

Beginning with the passage of the Anti-Drug Abuse Act of 1988 ("ADAA") and the Immigration Act of 1990 ("IMMACT"), and continuing on through the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress has consistently demonstrated a desire that criminal and terrorist aliens be detained during the pendency of their proceedings.

In 1988, Congress initially crafted a provision mandating the detention without bond of an aggravated felon. See ADAA § 7343. Subsequently, in IMMACT, Congress carved out an exception to mandatory detention for certain lawful permanent resident aggravated felons provided that the alien could overcome presumptions against release. See Matter of De La Cruz, 20 I&N Dec. 346 (BIA 1991). In AEDPA, Congress expanded the

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grounds subjecting an alien to mandatory detention pending the outcome of immigration proceedings and removed the exception created by IMMACT. AEDPA's requirements, however, were in effect for only a few months before they were superseded by IIRIRA's mandatory detention grounds codified at INA § 236(c)(1).

In response to concerns expressed by the Immigration and Naturalization Service, and other interested parties, that INS was fiscally unprepared to enforce the detention mandate imposed by Congress in AEDPA, Congress in IIRIRA afforded INS a transition period of up to two (2) years during which detention decisions would permit the release of certain specified criminal and terrorist aliens provided the alien could overcome statutory presumptions against release.

Thus, for well over a decade, Congress has expressed through legislation the intent that criminal and terrorist aliens should generally, if not always, be detained until the completion of their immigration proceedings. The legislation indicates that Congress views criminal and terrorist aliens as threats to persons and property in the United States who should be segregated from society until a decision can be made regarding whether they should be allowed to remain in this nation. Congress views them as poor bail risks who have little likelihood of relief from removal and who, therefore, have little incentive to appear for their hearings if they are released from custody regardless of family and community ties.

In Demore v. Kim, 538 U.S. 510 (2003), upholding the constitutionality of INA § 236(c)(1), the Supreme Court stated that mandatory detention under section 236(c)(1) "serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." Id., at 528. The BIA had previously identified the same rationale for this statute in several cases. See, e.g., Matter of Rojas, 23 I&N Dec. 117 (BIA 2001); Matter of Noble, 21 I&N Dec. 672 (BIA 1997).

The purpose of INA § 236(c)(1) is to impose a duty on DHS to continue to detain criminal and terrorist aliens pending the completion of proceedings to remove the alien from the United States once the alien is no longer in the custody of another entity. Section 236(c)(1) provides for the mandatory detention of certain enumerated aliens. It lists all aliens subject to mandatory detention except for arriving aliens, which are also subject to mandatory detention as discussed below. Compare INA § 236(c)(1), with INA § 235(b)(2)(A). Section 236(c)(1) provides as follows:

> 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) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

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> (C) is deportable under section 237(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 212(a)(3)(B) of this title or deportable under section 237(a)(4)(B) of this title,
>
> 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.

Under INA § 236(c)(1), aliens who **must** be detained during removal proceedings include those who are:

- inadmissible by reason of having committed any criminal offense covered in section 212(a)(2), such as a crime involving moral turpitude, multiple criminal convictions with aggregate sentences of five (5) years, a controlled substance violation, controlled substance traffickers, or prostitution and commercialized vice;
- deportable by reason of having committed two or more crimes involving moral turpitude after admission;
- deportable for an aggravated felony conviction;
- deportable for a controlled substance violation, drug abuse, or drug addiction;
- deportable for a firearms or destructive device offense;
- deportable for conviction of a crime involving moral turpitude with a term of imprisonment of at least one year; or
- inadmissible or deportable for terrorist activity.

See, e.g., Demore v. Kim, 538 U.S. 510 (2003) (mandatory detention for theft); Montenegro v. Ashcroft, 355 F.3d 1035, 1037-38 (7th Cir.2003) (mandatory detention for possession with intent to deliver cocaine); see also Jones v. United States, 463 U.S. 354, 364-65 (1983) (approving civil commitment, based on finding of insanity in criminal trial for petit larceny, without individualized hearing).

The regulations governing custody proceedings before the Immigration Court expressly provide that an Immigration Judge may not redetermine the conditions of custody imposed by DHS with respect to "[a]liens in removal proceedings subject to section 236(c)(1)." See 8 C.F.R. § 1003.19(h)(2)(i)(B).

Criminal aliens who are not subject to mandatory detention under section 236(c)(1) include aliens removable under INA § 237 for one crime involving moral turpitude, if they were sentenced to less than one year, and for crimes relating to domestic violence, stalking, and the abuse or neglect of children. See Michael A. Pearson, INS Executive Associate Commissioner, "Detention Guidelines Effective October 9, 1998" (October 7, 1998), reprinted in 75 *Interpreter Releases* 1508, Appendix I (Nov. 2, 1998).

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The Board of Immigration Appeals has determined that, if an alien has committed any of the offenses covered in INA § 237(a)(2)(A)(ii), (A)(iii), (B), (C) or (D), the alien is subject to mandatory detention under INA § 236(c)(1) regardless whether DHS has charged the alien with removability based on the offense. Matter of Kotliar, 24 I&N Dec. 124, 126 (BIA 2007) (citing Matter of Melo, 21 I&N Dec. 883, 885 n. 2 (BIA 1997) (the phrase "is deportable" does not require an alien to be charged with deportability as an aggravated felon for the alien to be amenable to mandatory detention under the IIRIRA transitional rules)).

A. Exceptions to INA § 236(c)(1)

An alien "described in" INA § 236(c)(1) may be released from detention "only if" the alien falls within the enumerated exceptions of INA § 236(c)(2). The exceptions provide that aliens may be released only they are part of the Witness Protection Program or whose release will protect other witnesses or their immediate family. The alien must satisfy the Attorney General that he or she will not pose a danger to the safety of other persons or of property and is likely to appear for hearings. INA § 236(c)(2). The Immigration Court has no bond/custody redetermination authority over those categories of aliens defined in INA § 236(c)(1) unless they fall within the enumerated exceptions of INA § 236(c)(2). See 8 C.F.R. § 1236.1(c)(1)(i).

B. Joseph Hearing

The Immigration Court lacks jurisdiction to redetermine bond/custody of an alien released from non-DHS custody after the expiration of IIRIRA's Transition Period Custody Rules if the alien is "properly included" in a mandatory detention category under INA § 236(c)(1). See Matter of Adeniji, 22 I&N Dec. 1102, 1107-11 (BIA 1999).

By regulation, an alien may request a hearing before an Immigration Judge to contest the DHS determination that the alien is "properly included" in a mandatory detention category. See 8 C.F.R. §§ 1003.19(h)(1)(ii), 1003.19(h)(2)(ii); Matter of Joseph, 22 I&N Dec. 660, 670-73 (BIA 1999) (hereinafter Joseph I), clarified by Matter of Joseph, 22 I&N Dec. 799, 805-07 (BIA 1999) (hereinafter Joseph II). This hearing is referred to as a Joseph hearing. See DeMore, 538 U.S. 510, 514 n. 3 (2003) (citing Joseph II); Gonzalez v. O'Connell, 355 F.3d 1010, 1013 (7th Cir. 2004). If the Immigration Court finds that the alien is not subject to INA § 236(c)(1), the court then proceeds to a regular bond hearing under INA § 236(a). See DeMore, at 532 (Kennedy, J., concurring); O'Connell, at 1013; Joseph II, 22 I&N Dec. at 806.

An Immigration Court is not bound by the charges in the NTA in determining whether an alien is "properly included" in the mandatory detention category. Joseph II, 22 I&N Dec. at 806. However, an Immigration Court's finding in removal proceedings regarding removability may properly be relied upon in custody proceedings to determine whether the mandatory detention ground applies to the alien. Id., at 803. "If this threshold bond decision is made after the Immigration Judge's resolution of the removal case, the Immigration Judge may rely on that underlying merits determination." Id., at 800.

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The BIA in Joseph II explained that, in determining whether the alien is "properly included" in a mandatory detention category under INA § 236(c)(1), before proceeding to the merits of the charges of removability, the Immigration Court considers the future likelihood that the alien will be found removable under one of the referenced mandatory detention grounds:

> [I]n assessing whether an alien is "properly included" in a mandatory detention category during a bond hearing taking place early in the removal process, the Immigration Judge must necessarily look forward to what is likely to be shown during the hearing on the underlying removal case. Thus, for example, the failure of the Service to possess a certified copy of a conviction record shortly after taking an alien into custody would not necessarily be indicative of its ability to produce such a record at the merits hearing. And the same could be true of evidence tendered by the alien during an early bond hearing.

Joseph II, 22 I&N Dec. at 807.

Due process requires that the Government show there is at least "some merit" to the charge of removability that is grounds for mandatory detention under INA § 236(c)(1). See DeMore, at 532 (Kennedy, J., concurring); Pisciotta v. Ashcroft, 311 F.Supp.2d 445, 454-55 (D.N.J. 2004) ("[T]here is at least 'some merit' to the removal charges underlying the detention here. … Therefore, consistent with the reasoning in *Demore*, this Court finds that … the ongoing detention of Petitioner, a criminal alien in pending removal proceedings, is constitutionally permissible."). The Joseph hearing on the viability of the charge of removability ostensibly satisfies due process. See DeMore, at 514 n. 3 ("Because respondent conceded that he was deportable because of a conviction that triggers [INA § 236(c)(1)] and thus sought no *Joseph* hearing, we have no occasion to review the adequacy of *Joseph* hearings generally in screening out those who are improperly detained pursuant to § 1226(c). Such individualized review is available, however, and Justice SOUTER [in dissent] is mistaken if he means to suggest otherwise.").

An alien in mandatory detention during removal proceedings may end his or her mandatory detention by demonstrating either that he or she is not an alien or that the Government is otherwise "substantially unlikely" to establish that he or she is in fact subject to mandatory detention. DeMore, 538 U.S. at 514 n. 3 (citing Joseph II); see 8 C.F.R. § 1003.19(h)(1)(ii) (providing that an alien may seek a "determination by an Immigration Judge that the alien is not properly included" within INA § 236(c)(1)); Joseph II, 22 I&N Dec. at 806 ("[W]e determine that a lawful permanent resident will not be considered 'properly included' in a mandatory detention category when an Immigration Judge or the Board is convinced that the Service is substantially unlikely to establish at the merits hearing, or on appeal, the charge or charges that would otherwise subject the alien to mandatory detention.").

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If the alien proves that he or she is not "properly included" in a mandatory detention category under INA § 236(c)(1) or if the Government fails to satisfy its "minimal, threshold burden" of showing some merit to the allegation that such a category applies, then the alien may qualify for discretionary release under INA § 236(a). See DeMore, at 532 (Kennedy, J., concurring); Gonzalez v. O'Connell, 355 F.3d 1010, 1013 (7th Cir. 2004) ("[I]f the IJ determines the alien does not fall within § 1226(c), then he may consider the question of bond."); Joseph II, 22 I&N Dec. at 806 ("A determination in favor of an alien on this issue does not lead to automatic release. It simply allows an Immigration Judge to consider the question of bond under the custody standards of section 236(a) of the Act.").

If the Immigration Court determines that section 236(c)(1) does not apply, the court must provide factual findings and analysis supporting a discretionary determination of custody/bond under INA § 236(a). See Joseph II, 22 I&N Dec. at 806, 809; Matter of Adeniji, 22 I&N Dec. 1102, 1112-16 (BIA 1999). In general, INA § 236(a) allows the alien's release, as a matter of discretion, if the alien demonstrates that he or she neither poses a danger to the community nor a flight risk. Matter of Adeniji, at 1113.

C. "When the Alien is Released" Clause in INA § 236(c)

Section 236(c)(1) provides that the Attorney General shall take into custody any alien removable on mandatory grounds of detention "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." The critical date for the application of the mandatory detention statute is the date that the alien is released from non-DHS custody, which must be after IIRIRA's Transition Period Custody Rules (TPCR) expired on October 8, 1998. Matter of Adeniji, 22 I&N Dec. 1102, 1107-11 (BIA 1999).

An alien is not subject to mandatory detention under INA § 236(c)(1) if the alien was released from his non-DHS custodial setting on or before October 8, 1998—the expiration date of the TPCR. See Matter of West, 22 I&N Dec. 1405 (BIA 2000); Matter of Valdez, 21 I&N Dec. 703, 707-14 (BIA 1997); Matter of Noble, 21 I&N Dec. 672, 677-86 (BIA 1997). If the alien was released on or before October 8, 1998, the alien's custody/bond must be determined under the TPCR. See id.; 8 C.F.R. §§ 1003.19(h)(1), 1236.1(c)(ii).

In Matter of West, 22 I&N Dec. 1405 (BIA 2000), the Board of Immigration Appeals held that an alien who was released from state custody before INA § 236(c) became effective but was convicted after that date could not be considered "released" for purposes of applying the statute's mandatory detention provision. The alien in the case was arrested in April 1997 and charged with various drug offenses, indicted and then released on bond in December of that year. In February 1999, he pled guilty and was sentenced to one year of probation for each offense. The Board held that the term "released" meant release from physical restraint, reasoning that Congress plainly intended to refer to the release of an alien from a restrictive form of criminal custody

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involving physical restraint. Because the respondent was last released from the physical custody of the state of New Jersey in December 1997, which was before the TPCR expired and INA § 236(c) became effective, the Board concluded that he was not subject to mandatory detention under the statute.

The release from non-DHS custody that triggers mandatory detention can be any form of physical restraint, such as criminal custody, civil commitment to a mental institution, and other forms of civil detention. See Matter of West, 22 I&N Dec. at 1410 ("[W]e construe the word 'released' in the last sentence of section 303(b)(2) of the IIRIRA to refer to a release from physical custody."); Matter of Adeniji, 22 I&N Dec. at 1108-11 (accepting the parties' interpretation of the "released" language of the related provision in IIRIRA as referring to "aliens who have been released from criminal (and perhaps psychiatric and other nonService) confinement"). A reading of section 236(c)(1) as a whole does not suggest that Congress intended to limit the non-DHS custody to criminal custody pursuant to a conviction for a crime that is the basis for detention under INA § 236(c)(1). "'Released' in this context can also refer to release from physical custody following arrest …." Matter of West, 22 I&N Dec. at 1410.

Where the alien is subject to mandatory detention based on removability for a non-criminal ground, there may be no requirement of physical custody at all. Under sections 236(c)(1)(A) and 236(c)(1)(D), an alien need not be convicted of any offense in order to be removable as charged. For instance, sections 212(a)(2)(A),(C), (D), (E), (G), (H), and (I), as well as section 212(a)(3)(B) and section 237(a)(4)(B), do not require a criminal conviction.

According to the BIA, an alien who is released from criminal custody after the expiration of the Transition Period Custody Rules is subject to mandatory detention even if the alien is not immediately taken into custody by the government when released from incarceration. Matter of Rojas, 23 I&N Dec. 117 (BIA 2001).

In Matter of Rojas, the BIA held that an alien was subject to mandatory detention under 236(c)(1), even though INS did not take him into custody immediately upon his release from state custody. The Board found the "when released" language not part of the description of an alien who is subject to detention but merely clarifies when the government has a duty to take the alien into immigration custody. Finding that the other statutory provisions pertaining to the removal process do not place significance on when INS takes an alien into custody, the Board concluded that "the 'when released' issue is irrelevant for all other immigration purposes." Id., at 122. The Board explained: "There is no connection in the [INA] between the timing of an alien's release from criminal incarceration, the assumption of custody over the alien by the Service, and the applicability of any of the criminal charges of removability." Id. The Board found: "The history of the statutory mandate to detain criminal aliens does not indicate to us that Congress had a different meaning in mind." Id. The Board concluded that it would not be consistent with its understanding of the INA's "design" to construe 236(c)(1) so that it "permits the release of some criminal aliens, yet mandates the detention of others

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convicted of the same crimes, based on whether there is a delay between their release from criminal custody and their apprehension by the Service." Id., at 124.

The Board took issue with the decision of the U.S. District Court for the Western District of Washington in Pastor-Camarena v. Smith, 977 F. Supp. 1415 (W.D.Wash. 1997), and the other district court decisions that held that aliens must be taken into custody for removal proceedings upon release from state custody. The Board criticized Pastor-Camarena for adopting "an incorrect 'historical'" approach based on the notion that immigration law historically distinguished between persons taken into custody from the community at large and those taken into custody directly upon release from the criminal justice system. Id., at 125-26. Pastor-Camarena and its progeny, the Board found, did not lead it "to reject the interpretation that we otherwise find appropriate in view of the statute as a whole." Id., at 126. The Board has also stated that it is not bound to follow the published decision of a federal district court even in cases arising in the same district. See Matter of K-S-, 20 I&N Dec. 715, 718-20 (BIA 1993).

The BIA's interpretation of 236(c)(1) in Matter of Rojas, 23 I&N Dec. 117 (BIA 2001), has not been adopted by most federal district courts that have considered whether 236(c)(1) applies when there is an interval between an alien's release from non-immigration custody and being taken into the custody of DHS. Most federal district courts have held that the "plain language" of 236(c)(1) dictates a temporal requirement that DHS must pick up aliens "when the alien is released" and if Congress intended another interpretation, it would have used other language. These courts are located in California, Oregon, Washington, Virginia, New Jersey and Pennsylvania. See Roque v. Chertoff, No. C06 0156 TSZ, 2006 WL 1663620 (W.D.Wash. June 12, 2006); Boonkue v. Ridge, No. CV 04-566-PA, 2004 WL 1146525, at *1-2 (D.Ore. 2004); Zabadi v. Chertoff, No. C 05-03335 WHA, 2005 WL 3157377, at *4-5 (N.D.Cal. Nov 22, 2005); Quezada-Bucio v. Ridge, 317 F.Supp.2d 1221, 1228 (W.D.Wash. 2004) ("[B]ecause Petitioner was taken into immigration custody years after he was released from state custody, as opposed to 'when [he was] released' from that custody, INA § 236(c) does not apply."), further proceedings 161 Fed.Appx. 714 (W.D.Wash. Jan. 6, 2006), appeal pending No. 04-70891 (9th Cir. 2006); Tenrreiro v. Ashcroft, 2004 WL 1354277, *2 (D.Ore. Jun 14, 2004) (relying on Quezada-Bucio), vacated and transferred on reconsideration, 2004 WL 1588217 (D.Ore. Jul 12, 2004) (vacated on jurisdictional grounds); Alikhani v. Fasano, 70 F.Supp.2d 1124 (S.D.Cal. 1999) (finding that "when" means "just after the moment that" so that mandatory detention only applies to aliens who are detained at the time of their release); Velasquez v. Reno, 37 F.Supp.2d 663, 672 (D.N.J. 1999) (holding that the plain language of the statute provides that an alien is to be taken into custody at the time the alien is released); Grant v. Zemski, 54 F.Supp.2d 437, 443 (E.D.Pa. 1999); Aguilar v. Lewis, 50 F.Supp.2d 539, 544 (E.D.Va.1999); Alwaday v. Beebe, 43 F.Supp.2d 1130, 1133 (D.Ore. 1999); Velasquez v. Reno, 37 F.Supp.2d 663, 672 (D.N.J. 1999); Pastor-Camarena v. Smith, 977 F.Supp. 1415, 1417 (W.D.Wash. 1997).

Only the federal district courts in Texas have concluded that section 236(c)(1) does not provide a temporal limitation on the authority of DHS to take aliens into mandatory

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detention upon their release from non-DHS custody. See Okeke v. Pasquarell, 80 F. Supp. 2d 635 (W.D.Tex. 2000); Serrano v. Estrada, 201 F.Supp. 714 (N.D.Tex. 2002) (holding that there is no retroactivity concern with the application of INA § 236(c)(1) to aliens taken into detention after the IIRIRA permanent rules became effective). The Ninth Circuit, however, has found that a prior version of 236(c)(1) that used the phrase "upon release" did not require INS to take aliens into custody immediately upon their release from non-immigration custody. See. California v. United States, 104 F.3d 1086, 1094-95 (9th Cir.1997) ("upon release" language of predecessor statute does not require immigration authorities to take aliens into custody immediately upon their release from state incarceration; decision of when to arrest criminal aliens is committed to agency discretion and is not reviewable), cert. denied, 522 U.S. 806 (1997).

At least two federal district courts have stated that DHS has a reasonable period of time under INA § 236(c)(1) to pick up an alien upon release from state custody. See Zabadi v. Chertoff, No. C 05-03335 WHA, 2005 WL 1514122, at *5 (N.D.Cal. 2005) ("This order holds that the Department of Homeland Security need not act immediately but has a reasonable period of time after release from incarceration in which to detain."); Grodzki v. Reno, 950 F.Supp. 339, 342 (N.D.Ga.1996) (language "upon release … from incarceration" implies custody commences within reasonable time after release from incarceration). Another court upholding mandatory detention under section 236(c)(1) has distinguished the facts of its case from other federal district court cases based on the length of delay been the alien's release from non-DHS/INS custody and the assumption of custody by DHS/INS. See Serrano v. Estrada, No. 3-01-CV-1916-M, 2002 WL 485699, at *3 (N.D.Tex. March 6, 2002) ("petitioner was taken into INS custody just six months after his release from prison").

D. Arriving Aliens

The Immigration and Nationality Act provides that aliens who are seeking admission to the United States and are subject to grounds inadmissibility must be detained if they do not appear to the inspecting immigration officer to be "clearly and beyond a doubt" entitled to enter. See INA § 235(b)(2)(A). The Immigration Court lacks jurisdiction to redetermine custody/bond for arriving aliens. 8 C.F.R. §§ 236.1(c)(11), 1003.19(h)(2)(i)(B).

Exceptions exist for crewman, stowaways and certain aliens subject to expedited removal, who may be subject to detention under other provisions of law. See INA §§ 235(b)(2)(B), 252(b) (crewmen), 235(a)(2) (stowaways), 235(b)(1)(B)(iii)(IV); Matter of X-K-, 23 I&N Dec. 731 (BIA 2005) (alien amenable to expedited removal who was found to have credible fear and placed in removal proceedings was entitled to bond hearing). Another exception exists for aliens arriving at the land border with Canada or Mexico whom DHS has returned to Canada or Mexico to await their removal hearing, rather than be detained. See INA §§ 235(b)(2)(C).

Refugees are subject to detention one year after they are conditionally admitted to the United States if they have not adjusted status to that of a lawful permanent resident alien.

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See INA § 209(a)(1); Omanovic v. Crawford, 2006 WL 2256630 (D.Ariz. Aug 07, 2006) (No. CV 06-0208-PHX); Andric v. Crawford, 2006 WL 1544184 (D.Ariz. May 31, 2006) (No. CV06-0002-PHX-SRB). Such refugees are properly detained for inspection and examination regarding admissibility. *Id.*

Detention is the norm for arriving aliens. "Congress intended that detention be the 'default' choice, and parole a discretionary exception." Barrera-Echavarria v. Rison, 44 F.3d 1441, 1446 (9th Cir. 1995) (en banc), cert. denied, 516 U.S. 976 (1995). "[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a [removal] proceeding under section 240 of this title." INA § 235(b)(2)(A) (emphasis added); see Tineo v. Ashcroft, 350 F.3d 382, 385-386 (3d Cir. 2003) (applying this provision to a returning LPR who was removable for his criminal convictions).

An arriving alien has the burden of proving that he or she is "clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212." INA § 240(c)(2), 8 C.F.R. § 1240.8(c).[2] "An alien's freedom from detention is only a variation on the alien's claim of an interest in entering the county." Clark v. Smith, 967 F.2d 1329, 1332 (9th Cir. 1992) (upholding INS detention of alien seeking entry to the United States, during INS appeal from IJ decision granting withholding).

The decision to detain or release arriving aliens on parole, pending a determination of their admissibility, is within the sole discretion of the Department of Homeland Security. See 8 C.F.R. § 212.5. In enacting IIRIRA, the House Judiciary Committee stated that parole is to be used sparingly:

> Parole should only be given on a case-by-case basis for specified urgent humanitarian reasons, such as life-threatening humanitarian medical emergencies, or for specified public interest reasons, such as assisting the government in a law-enforcement-related activity. It should not be used to circumvent Congressionally-established immigration policy or to admit

[2] The Government has the burden of proving the inadmissibility of arriving aliens with a colorable claim to lawful permanent residence, according to preexisting law. See Landon v. Plasencia, 459 U.S. 21, 35 (1982); Matter of Huang, 19 I&N Dec. 749, 754 (BIA 1988). A returning permanent resident alien is regarded as an "arriving alien" seeking admission if the alien falls within one of the following categories of INA § 101(a)(13)(C):

a. has abandoned or relinquished that status;
b. has been absent from the United States for a continuous period in excess of 180 days;
c. has engaged in illegal activity after having departed the United States;
d. has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under the INA and extradition proceedings;
e. has committed an offense identified in section 212(a)(2) of the Act, unless since such offense the alien has been granted relief under sections 212(h) or 240A(a) of the Act, or;
f. is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

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> aliens who do not qualify for admission under established legal immigration categories.

H.R. Rep. 104-469(I) March 4, 1996, 104th Cong., 2nd Sess. 1996, 1996 WL 168955, at 141 (Immigration in the National Interest Act of 1995); see also Haddam v. Reno, 54 F.Supp.2d 602, 609 (E.D.Va. 1999) (alien bears a "heavy" burden of showing that the public interest warrants parole).

The regulations governing custody proceedings before the Immigration Court expressly provide that an Immigration Judge may not redetermine the conditions of custody imposed by DHS with respect to arriving aliens in removal proceedings. See 8 C.F.R. § 1003.19(h)(2)(i)(B). The Board of Immigration Appeals has already held that an Immigration Court has no authority under the regulations over the custody and detention of arriving aliens and is without regulatory authority to consider the bond request of an arriving alien. See Matter of X-K-, 23 I&N Dec. 731, 732 (BIA 2005) ("There is no question that Immigration Judges lack jurisdiction over arriving aliens who have been placed in section 240 removal proceedings, because they are specifically listed at 8 C.F.R. § 1003.19(h)(2)(i)(B) as one of the excluded categories."); Matter of Oseiwusu, 22 I&N Dec. 19, 20 (BIA 1998).

Moreover, the BIA's decision in Matter of Joseph, 22 I&N Dec. 799 (BIA 1999), appears to be inapplicable to custody proceedings involving aliens designated by the DHS as arriving aliens because 8 C.F.R. § 1003.19(h)(2)(ii), the regulation upon which this Board relied in Joseph, does not provide authority for an Immigration Judge to make a determination that an alien is improperly included within 8 C.F.R. § 1003.19(h)(2)(i)(B).

In this regard, 8 C.F.R. §§ 1003.19(h)(2)(i)(B) and 1003.19(h)(2)(ii), prohibiting an Immigration Judge from inquiring into whether an alien is properly designated as an arriving alien for purposes of asserting jurisdiction over the custody proceeding of an alien designated as an arriving alien by the DHS, are consistent with long-standing immigration law. See Matter of Lepofsky, 14 I&N Dec. 718, 718 (BIA 1974); Matter of Conceiro, 14 I&N Dec. 278, 279-82 (BIA 1973), aff'd, Conceiro v. Marks, 360 F.Supp. 454 (S.D.N.Y. 1973).

Judicial review of the DHS or the Attorney General's decision to deny parole is a highly deferential one that need determine only whether there is a "facially legitimate and bona fide reason" supporting the decision. See Jean v. Nelson, 472 U.S. 846, 853 (1985); Fiallo v. Bell, 430 U.S. 797, 798-99 (1977); Kleindienst v. Mandel, 408 U. S. 753, 770 (1972); Haddam v. Reno, 54 F. Supp. 2d 602, 608-09 (E.D.Va. 1999) (the deferential review "requires only that the district director articulate a permissible reason for his action and identify the factual basis in the record for that reason"). "If such a reason is advanced, the denial of parole is essentially unreviewable." Nadarajah v. Gonzales, 443 F.3d 1069, 1082 (9th Cir. 2006) (citing Noh v. INS, 248 F.3d 938, 942 (9th Cir.2001)).

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VI. INDEFINITE DETENTION

Two federal circuit courts have concluded that DHS cannot detain an alien indefinitely, or for a prolonged period of time, without affording the alien an opportunity to have the Immigration Court make an individualized custody/bond determination under INA § 236(a) and 8 C.F.R. § 1003.19(d). See Nadarajah v. Ashcroft, 443 F.3d 1069 (9th Cir. 2006); Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005); Ly v. Hansen, 351 F.3d 263 (6th Cir.2003).

In these decisions, the circuit courts read the Supreme Court's five-to-four majority decision in Demore v. Kim, 538 U.S. 510, 514 (2003), as authorizing mandatory detention of removable aliens only for "the brief period necessary for their removal proceedings." See Nadarajah, 443 F.3d at 1080; Ly, 351 F.3d at 270-71. The Supreme Court had noted that removal proceedings normally proceed expeditiously:

> The Executive Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to [INA § 236(c)], removal proceedings are completed in an average time of 47 day and a median of 30 days. In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter.

Demore, 538 U.S. at 529 (internal citations omitted).

Justice Anthony Kennedy provided the fifth vote for the majority and he wrote that there exists a point at which the length of detention becomes so egregious that it can no longer be said to be "reasonably related" to an alien's removal. Id., at 532 (Kennedy, J., concurring). He stated that "since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." Id., at 532 (Kennedy, J., concurring).

In Nadarajah v. Ashcroft, 443 F.3d 1069 (9th Cir. 2006), the U.S. Court of Appeals for the Ninth Circuit, ordered the release on parole of an arriving, inadmissible alien who had been detained for nearly five years pending the completion of his removal proceedings. The case had been certified to the Attorney General for review after the BIA upheld the Immigration Court's decision granting asylum and protection under the Convention Against Torture. The Ninth Circuit held that DHS abused its decision in not granting parole, and the circuit ordered the alien's release.

The Ninth Circuit concluded that DHS cannot detain an alien indefinitely when there is no significant likelihood of his removal in the reasonably foreseeable future. The Ninth Circuit applied the six-month limitation on post-final-order detention from Zadvydas v. Davis, 533 U.S. 678 (2001), and Clark v. Martinez, 543 U.S. 371 (2005), to pre-final-

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order detention. The circuit stated: "[W]e conclude that after a presumptively reasonable six-month detention, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." 443 F.3d at 1078.

The Ninth Circuit decision in Nadarajah seems most clearly to apply to an alien detained more than six months who has been granted relief or found non-removable by the Immigration Court. But it may also affect those cases where DHS has detained an alien more than six months without a ruling on removability from the Immigration Court. In those cases, DHS might be forced to present its case in district court on a petition for writ of habeas corpus for the district court to decide whether "there is no significant likelihood of removal in the reasonably foreseeable future." Id., at 1079-80 .

The Ninth Circuit in Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005), also recognized a limitation on the duration of detention during removal proceedings. The alien had been deprived of his liberty by DHS for a period of over two years and eight months under INA § 236(c)(1). In a brief, three-paragraph opinion, a divided panel of the Ninth Circuit recognized the "substantial powers" of Congress with regard to aliens but found it "constitutionally doubtful that Congress may authorize imprisonment of such duration for lawfully admitted resident aliens who are subject to removal." Id., at 1242 (per opinion of Noonan, C.J., and opinion of Tashima, C.J., concurring in judgment). Consequently, the court remanded to the district court with directions to grant the writ of habeas corpus unless the government within 60 days provided the alien with a bond hearing before an Immigration Judge.

The Sixth Circuit in Ly v. Hansen, 351 F.3d 263, 270 (6th Cir. 2003), observed that the Supreme Court's decision in Demore "specifically indicated that [detentions pending removal] were usually relatively brief, but it did not specifically hold that any particular length of time in a specific case would be unreasonable or unconstitutional." The Sixth Circuit concluded that the proper interpretation of Demore was to "[construe] the pre-removal detention statute to include an implicit requirement that removal proceedings be concluded within a reasonable time, [thereby avoiding] the need to mandate the procedural protections that would be required to detain deportable aliens indefinitely." Ly, at 270. Therefore, the Sixth Circuit "affirm[ed] the grant of habeas corpus and the district court's finding that the incarceration for 18 months pending removal proceedings is unreasonable, [without requiring] the United States to hold bond hearings for every criminal alien detained under § 236." Id. The court stressed that Ly's case was not the norm in part because his deportation to Vietnam was not foreseeable due to that country's lack of a repatriation agreement with the United States. When actual removal is not reasonably foreseeable, deportable aliens may not be detained indefinitely without a showing of a "strong special justification" by the government that overbalances the alien's liberty interest. Id., at 273.

At least one circuit court, however, has declined to distinguish Demore and to apply the principles of Zadvydas to find prolonged detention under section 236(c) unconstitutional, regardless of the length of the alien's detention. In Soberanes v. Comfort, 388 F.3d 1305 (10th Cir.2004), the Tenth Circuit found the detention of more than two years pending

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judicial review of a final removal order "neither indefinite nor potentially permanent like the detention held improper in *Zadvydas*" but rather "directly associated with a judicial review process that has a definite and evidently impending termination point" which was more "more akin to detention during the administrative review process" upheld in Demore. 388 F.3d at 1311.

In any event, the remedy for a violation of due process by indefinite detention under INA § 236(c)(1) is a custody/bond hearing before the Immigration Court. See Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) ("We remand to the district court with directions to grant the writ unless the government within 60 days of this order provides a hearing to Tijani before an Immigration Judge with the power to grant him bail unless the government establishes that he is a flight risk or will be a danger to the community."); Ly v. Hansen, 351 F.3d 263, 265 (6th Cir.2003). Federal courts have upheld lengthy detention when the alien had been afforded a custody/bond hearing before an Immigration Court. See, e.g., Doherty v. Thornburgh, 943 F.2d 204, 209-11 (2d Cir. 1991) (upholding detention without bond of criminal alien pending deportation, even though detention was prolonged for 8 years), cert. dismissed sub nom. Doherty v. Barr, 503 U.S. 901 (1992); Agyeman v. INS Assistant District Director Coachman, 74 Fed.Appx. 691, at *1 (9th Cir. 2003) ("Even though Agyeman has been detained by the INS for over six years, his detention is constitutionally valid.").

V. DISCRETIONARY DETENTION UNDER INA § 236(a)

If a detained alien is not required to be detained under INA § 236(c)(1)'s mandatory detention provisions, INA § 236(a) "provides general authority for the detention of aliens pending a decision on whether they should be removed from the United States." Matter of Guerra, 24 I&N Dec. 37, 37-38 (BIA 2006).

The Supreme Court noted over 50 years ago that Congress placed discretion in the Attorney General to detain aliens without bond: "[D]iscretion was placed by the 1950 [Internal Security] Act in the Attorney General to detain aliens without bail." Carlson v. Landon, 342 U.S. 524, 539 (1952) (interpreting § 23 of the Internal Security Act). INA § 236(a) is "virtually identical" to the pertinent section of the 1950 Internal Security Act. United States ex rel. Barbour v. District Director, 491 F.2d 573, 577 (5th Cir. 1974) ("The wording in Section 242(a) [now Section 236(a)] is virtually identical to that in Section 23 of the Internal Security Act of 1950."). Thus, INA § 236(a) provides the same authority to detain aliens without bond that the Supreme Court recognized long ago.

On the other hand, INA § 236(a) gives the Attorney General discretionary authority to release the alien on bond if the Attorney General concludes, in the exercise of his broad discretion, that the detainee's release on bond is warranted:

> [S]ection 236(a) of the Act merely gives the Attorney General the authority to grant bond if he concludes, in the exercise of discretion, that the alien's release on bond is warranted. The courts have consistently

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> recognized that the Attorney General has extremely broad discretion in deciding whether or not to release an alien on bond.

Matter of Guerra, 24 I&N Dec. 37, 39 (BIA 2006); see also United States ex rel. Barbour v. District Director, 491 F.2d 573, 578 (5th Cir. 1974) (release on bail is a form of discretionary relief); Makarian v. Turnage, 624 F.Supp. 181 (S.D.Cal. 1985) (Attorney General has "wide discretion in determining whether and under what conditions to release person pending final deportability determination").

Immigration Judges now exercise this discretionary authority. INA § 236(a) empowers the Attorney General to delegate to Immigration Judges the discretionary authority either to continue to detain or to release an alien in removal proceedings, pending an administratively final order of removal. See INA §§ 101(b)(4), 236(a). "The Attorney General has delegated this authority to the Immigration Judges." Matter of Guerra, 24 I&N Dec. at 38; compare 8 C.F.R. § 1003.10 (IJs exercise powers assigned by the Attorney General), with 8 C.F.R. § 1003.19(a) (IJs have power to conduct bond hearings).

A. Classes of Aliens for which Attorney General Has Withheld Discretion to Release

The Immigration Courts are without authority to redetermine the conditions of custody for certain classes of aliens listed in the regulation at 8 C.F.R. § 1003.19(h)(2)(i)(D). See 8 C.F.R. §§ 236.1(c)(11). Some of these classes of aliens are subject to mandatory detention. See INA §§ 236(c)(1), 235(b)(2)(A). Others are not. Nevertheless, the Attorney General has, by regulation, exercised his discretionary authority under INA § 236(a) not to release those classes of aliens. See Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed.Reg. 27441, 27443 (May 19, 1998) (citing cases in support of the proposition: "Agencies may resolve matters of general applicability through the promulgation of rules even if a statutory scheme requires individualized determination unless Congress has expressed an intent to withhold that authority."); cf. Matter of D-J-, 23 I&N Dec. 572, 583 (AG 2003) ("The Attorney General is broadly authorized to detain respondent and deny his request for bond, based on any reasonable consideration individualized or general, that is consistent with the Attorney General's statutory responsibilities."). Therefore, the classes of aliens listed in 8 C.F.R. § 1003.19(h)(2) are excluded from the Immigration Courts' custody jurisdiction under INA § 236(a). Matter of X-K-, 23 I&N Dec. 731, 732 (BIA 2005).

The regulation provides as follows:

> (i) Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub.L. 104-208, [on October 8, 1998] an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

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(A) Aliens in exclusion proceedings;

(B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act;

(C) Aliens described in section 237(a)(4) of the Act ["Security and related grounds"];

(D) Aliens in removal proceedings subject to section 236(c)(1) of the Act (as in effect after expiration of the Transition Period Custody Rules) [on October 8, 1998]; and

(E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Pub.L. 104-132) [aliens convicted of an aggravated felony].

(ii) Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 1235 or 1236 of this chapter. In addition, with respect to paragraphs (h)(2)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.

8 C.F.R. § 1003.19(h)(2)(i).

The phrase "described in" in this regulation implies a broad reading of the detention ground stated in the referenced statute; the phrase does not require that the alien be charged with removability under INA § 237(a)(4). Cf. United States v. Barial, 31 F.3d 216, 218 (4th Cir. 1994) (as used in a criminal probation statute, "described in" is a "a term that necessarily calls for a broader reading" and means that "the focus is upon the type of conduct involved").

B. Burden of Proof

An alien detained pending a decision as to whether he or she is to be removed from the United States does not have a right to be released on bond. Matter of Guerra, 24 I&N Dec. 37, 39 (BIA 2006); Matter of D-J-, 23 I&N Dec. 572, 575 (AG 2003). The old legal standard for bond hearings set forth in by the BIA in Matter of Patel, 15 I&N Dec. 666 (BIA 1976), which held that there is a presumption against detention, is no longer the correct legal standard. That precedent decision involved the application of a detention statute that is no longer in effect. See Matter of Valdez, 21 I&N Dec. 703, 716-17 (BIA 1997) (discussing Matter of Patel).

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Bond hearings are now typically governed by INA § 236(a). In discretionary bond determinations under INA § 236(a), an alien in removal proceedings has the burden of demonstrating that the alien's release would not pose a danger and that the alien is likely to appear for any future hearings and possible removal:

> An alien in a custody determination under [INA § 236(a)] must establish that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight. An alien who presents a danger to persons or property should not be released during pendency of removal proceedings.

Matter of Guerra, 24 I&N Dec. 37, 38 (BIA 2006); see Matter of Adeniji, 22 I&N Dec. 1102, 1111-1112 (BIA 1999) (citing 8 C.F.R. § 1236.1(c)(8)) (an alien in removal proceedings has the burden of demonstrating that the alien's "release would not pose a danger to persons or property and that the alien is likely to appear for any future proceeding").

1. Threat to National Security

An alien who poses a threat to national security should be detained as a matter of discretion. See Doherty v. Thornburgh, 943 F.2d 204, 211 (2d Cir. 1991) ("Although Doherty does not appear to pose any direct threat to individual citizens, we already have noted that, due to his PIRA affiliation, he may constitute a more general threat to national security, [citation omitted], which is also a proper basis for detention, [citation omitted]. We believe that these considerations provide a valid basis for the continuing denial of bail under section 1252 [now INA section 236(a)], notwithstanding the unusually long detention that has resulted."), cert. dismissed, 503 U.S. 901 (1992); United States ex rel. Barbour v. INS, 491 F.2d 573, 578 (5th Cir. 1974) ("There is no question of the Attorney General's discretion under Section 242(a) [now Section 236(a)] of the Act to continue an alien in custody during deportation proceedings upon a properly-made determination that the release of an alien would be a danger to the national security of the United States.").

In matters involving national security, DHS may consider a wide range of information about the alien to determine whether the alien should be released. Such evidence may include membership in or affinity for organizations that advocate a philosophy of violence against the United States and its allies, and any law enforcement or intelligence information indicating that the alien has promoted or engaged in terrorist-related activities. See Carlson v. Landon, 342 U.S. 524, 541 (1952); Haddam v. Reno, 54 F. Supp.2d 602, 610 (E.D.Va. 1999) (upholding district director's decision to deny parole to alien who posed a national security risk and a risk of absconding; "the district director has pointed to information from the Department of State, the F.B.I., and Interpol suggesting Haddam's association with terrorism and other violent activities"). The reader should refer to ICE OPLA's National Security Law Division materials for further information about national security grounds for detention.

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2. Danger to the Community

A detained alien in removal proceedings must establish that he or she does not present a danger to persons or property before the issue of his or her flight risk, and the amount of bond necessary to ensure his or her presence at removal proceedings, become relevant. See Matter of Adeniji, 22 I&N Dec. 1102, 1113 (BIA 1999) (in bond proceedings under section 236(a) of the Act, "the alien must demonstrate that 'release would not pose a danger to property or persons'") (citing Matter of Drysdale, 20 I&N Dec. 815, 817 (BIA 1994) ("First, if the alien cannot demonstrate that he is not a danger to the community upon consideration of the relevant factors, he should be detained in the custody of the Service. [Citations omitted] However, if an alien rebuts the presumption that he is a danger to the community, then the likelihood that he will abscond becomes relevant.")). "An alien who presents a danger to persons or property should not be released during pendency of removal proceedings." Matter of Guerra, 24 I&N Dec. 37, 38 (BIA 2006).

An alien convicted of an aggravated felony who was released from criminal custody before October 8, 1998, is not subject to mandatory detention under INA § 236(c)(1) but is presumed to pose a danger to persons or property and is to be held without bond unless the alien proves otherwise. Compare Matter of Adeniji, 22 I&N Dec. 1102, 1107-13 (BIA 1999) (holding that INA section 236(c)(1) requires mandatory detention of a criminal alien only if he or she is released from criminal custody after the TPCR expired on October 8, 1998), with Matter of Drysdale, 20 I&N Dec. 815, 817 (BIA 1994) (stating presumption), and Matter of Noble, 21 I&N Dec. 672, 673-86 (BIA 1997) (same).

Danger to persons or property is not limited to the threat of violence. It includes drug trafficking. See Matter of Guerra, 24 I&N Dec. 37, 41 (BIA 2006) (upholding IJ decision to detain alien without bond based on criminal complaint that the alien was involved in an alleged controlled substance trafficking scheme); Matter of Melo, 21 I&N Dec. 883, 885 n. 2 (BIA 1997) (holding that distribution of drugs is a danger to the safety of persons that requires his detention); Matter of Drysdale, 20 I&N Dec. 815, 818 (BIA 1994) (commission of a serious drug trafficking crime presents a danger to the community). It also includes non-violent property crimes. See Jones v. United States, 463 U.S. 354, 364-65 (1983) (approving civil commitment based on finding of insanity in criminal trial for petit larceny: "The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. … We do not agree with petitioner's suggestion that the requisite dangerousness is not established by proof that a person committed a non-violent crime against property. This Court never has held that 'violence,' however that term might be defined, is a prerequisite for a constitutional commitment.").

The duty of the alien's counsel to disclose the danger posed by his client is a developing area of law. The American Bar Association (ABA) Model Code of Professional Responsibility (1969) and the ABA Model Rules of Professional Conduct (1983) permit disclosure when a client threatens to seriously injure or kill a third person, but do not require it. See ABA Model Code DR 4-101(C) ("A lawyer may reveal ... [t]he intention

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of his client to commit a crime and the information necessary to prevent the crime."); ABA Model Rule 1.6(b)(1) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary ... to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."). Most jurisdictions have enacted the ABA version of this permissive rule. However, at least a dozen jurisdictions require a lawyer to reveal client confidential information to prevent the client from inflicting serious bodily harm or death upon a third party. See Ariz. S. Ct. Rule 42 RPC 1.6(b); Conn. RPC 1.6(b); Fla. St. Bar Rule 4-1.6(b); Ill. St. S. Ct. RPC 1.6; Nev. St. S. Ct. RPC 156(2); N.J. R. RPC 1.6(b)(1); N.M. R. RPC 16-106(B); N.D. R. RPC 1.6(a); Tex. St. RPC 1.05; Va. R. S. Ct. Pt. 6 § 2, C.P.R. DR. 4-101; Wash. St. RPC 1.6(b)(1); Wis. St. RPC S.C.R. 20:1.6.

There are no reported cases where a court has imposed pecuniary liability on a lawyer for failure to warn a third party of a client's threats to seriously harm or kill the third party. See Note, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. OF GENDER AND LAW 207, 232 (2003); Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Physical Harm or Death*. 36 IDAHO L. REV. 479, 481 (2000). Courts, however, have considered the issue with respect to other professional relationships, notably the mental health therapist-patient relationship, and have found liability when the professional has failed to warn a victim when the professional learned that the client or patient intended to cause serious harm to a specific, identifiable victim. See, e.g., O'Keefe v. Orea, 731 So. 2d 680, 684-86 (Fla. Dist. Ct. App. 1st Dist. 1998), review denied, 725 So. 2d 1109 (Fla. 1998); Petersen v. State, 100 Wash.2d 421, 426-29, 671 P.2d 230, 236-37 (1983); Tarasoff v. Regents of University of California, 13 Cal.3d 177, 118 Cal.Rptr. 129, 132-33, 529 P.2d 553, 557-58 (1976). Courts could begin to impose liability on lawyers without forewarning. See State v. Hansen, 122 Wash.2d 712, 721, 862 P.2d 117, 122 (1993) ("Whether a threat is a true or real threat is based on whether the attorney has a reasonable belief that the threat is real. We hold that attorneys, as officers of the court, have a duty to warn of true threats to harm members of the judiciary communicated to them by clients or by third parties.") (distinguishing Hawkins v. King County, 24 Wash.App. 338, 602 P.2d 361 (1979), where appellate court declined to find a common law duty on the part of an attorney to warn of a client's intent to inflict serious injury on a third person).

3. Flight Risk

An alien in removal proceedings bears the burden of proving that he or she does not present a threat to the community and a risk of flight from further proceedings. See Matter of Adeniji, 22 I&N Dec. 1102, 1111-13 (BIA 1999). Whether an alien has rebutted the presumption against his or her release is a two-step analysis and, unless the alien demonstrates that he or she is not a danger to the community, the alien should be detained in DHS custody. See Matter of Drysdale, 20 I&N Dec. 815, 817 (BIA 1994). Only where the alien has rebutted the presumption that he or she is a danger to the community does the likelihood that he or she will abscond become relevant. Id.

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Detaining an alien without bond is warranted when circumstances present a "strong risk that the respondent will flee rather than appear for the deportation process." Matter of Khalifah, 21 I&N Dec. 107, 111 (BIA 1995). Illegal presence or negative immigration history is an indicator of flight risk. See, e.g., Matter of Melo, 21 I&N Dec. 883, 886 (BIA 1997); Matter of Drysdale, 20 I&N Dec. 816-17.

A number of BIA decisions have addressed the following matters that may be considered in deciding whether an alien poses a flight risk:

1. Whether the alien has had a fixed address in the United States. See Matter of X-K-, 23 I&N Dec. 731, 736 (BIA 2005) (noting that, for many aliens, "the recency of their arrival and their apprehension by immigration officials so close to our borders may prove to be an indicator that they lack a stable address and work history, family ties, or other favorable factors to support a discretionary release on bond"); Matter of P-C-M-, 20 I&N Dec. 432, 435 (BIA 1992) (noting that the alien "appears to have moved frequently since entering the country").

2. Length and circumstances of residence in the United States. See Matter of X-K-, 23 I&N Dec. at 736; Matter of Shaw, 17 I&N Dec. 177, 179 (BIA 1979) ("There is no statement as to where the respondent resided in the country, how long he lived there, or with whom he lived.").

3. Family ties in the United States, particularly family members who can confer immigration benefits on the alien. See Matter of P-C-M-, 20 I&N Dec. at 434 ("The respondent has no family in the United States and no other community ties."); Matter of Shaw, 17 I&N Dec. at 179 ("Other than an indication that he has a lawful permanent resident uncle in this country, there is in fact no evidence at all of community ties of any nature which would suggest his continuing availability for future immigration proceedings."); Matter of Patel, 15 I&N Dec. 666, 667 (BIA 1979).

4. Employment history in the United States, including its length and stability. See Matter of P-C-M-, 20 I&N Dec. at 435 (noting that the alien "has no history of steady employment"); Matter of Shaw, 17 I&N Dec. at 179 ("There is nothing of record regarding the respondent's employment history, or even an indication of whether he was employed at the time of his arrest."); Matter of Patel, 15 I&N Dec. at 667.

5. Immigration record and manner of entry, including surreptitious or fraudulent entries or subsequent conduct contrary to the terms of an alien's lawful admission such as use of aliases and false documents. See Matter of Shaw. 17 I&N Dec. at 179 n. 3 ("[A] greater bond will ordinarily be warranted in the case of a respondent who entered the United States unlawfully (through evasion of immigration authorities or use of a false identity) than in the case of a respondent, otherwise similarly situated, who has entered this country lawfully using a true identity."); Matter of San Martin. 15 I&N Dec. 167, 169 (BIA 1974) (alien "used a surreptitious method to return to the United States after deportation" that shows "disrespect for lawful process"); Matter of Moise, 12 I&N Dec. 102, 104-05 (BIA

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1967) (violating in-transit without visa privileges by remaining to accept employment).

6. Attempts to escape from authorities or other flights to avoid prosecution. Matter of Patel, 15 I&N Dec. at 666.

7. Prior failures to appear for scheduled court proceedings. See Matter of Shaw. 17 I&N Dec. at 178; Matter of San Martin. 15 I&N Dec. at 168-69 (flight to avoid criminal prosecution).

8. Criminal record, including extensiveness, recency and seriousness, indicating consistent disrespect for law and ineligibility for relief from deportation. See Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006) ("Immigration Judges are not limited to considering only criminal convictions in assessing whether an alien is a danger to the community."); Matter of Andrade, 19 I&N Dec. 488, 489-91 (BIA 1987); Matter of Shaw, 17 I&N Dec. at 178-79; Matter of Patel, 15 I&N Dec, at 667. An alien's criminal record is relevant to the setting of his bond because it is indicative of character traits that may indicate whether he is likely to abscond. Matter of P-C-M-, 20 I&N Dec. at 435 (finding that the alien's convictions "reflect adversely on his character with respect to his potential for absconding upon release"); Matter of Andrade, 19 I&N Dec. at 489-91. An alien's early release from prison on parole does not necessarily reflect rehabilitation and, therefore, such facts do not carry significant weight in determining the alien's flight risk. Matter of Andrade, 19 I&N Dec. 488, 490-91 (BIA 1987).

9. Being subject to prosecution for a serious crime in the country to which DHS seeks to remove him. See Matter of Khalifah, 21 I&N Dec. 107, 111 (BIA 1995) (upholding detention without bond of an alien wanted in Jordan for financial support of bombing attacks on cinemas that resulted in injuries).

10. Probable ineligibility for relief from removal. See Bertrand v. Sava, 684 F.2d 204, 217 n. 16 (2d Cir. 1982) ("The fact that the petitioners are unlikely to succeed on their immigration applications … suggests that they pose … a risk [to abscond] if [released]."); Matter of Drysdale, 20 I&N Dec. 815, 818 (BIA 1994) (holding that an alien's ineligibility for any form of relief from deportation is a factor that contributes to the likelihood that the alien will not appear for his deportation hearing); Matter of Ellis, 20 I&N Dec. 641, 643 (BIA 1993). An alien who is likely to be awarded relief from deportation is considered more likely to appear for deportation proceedings than one who is unlikely to be awarded relief. Matter of Andrade, 19 I&N Dec. at 491. "Some aliens may demonstrate to the Immigration Judge a strong likelihood that they will be granted relief from removal and thus have great incentive to appear for further hearings." Matter of X-K-, 23 I&N Dec. 731, 736 (BIA 2005). Where the alien has been found removable and denied relief by the Immigration Court, the alien is likely to fail to appear for removal and this justifies an increased bond. See Matter of Drysdale, 20 I&N Dec. 815, 818 (BIA 1994) (ineligibility for relief was a proper consideration in determining bond); Matter of Sugay, 17 I&N Dec. 637, 640 (BIA 1981) (fact that IJ had ordered alien deported and relief denied combined with new evidence to justify increasing the amount of bond).

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"An Immigration Judge has broad discretion in deciding the factors that he or she may consider in custody determinations. The Immigration Judge may choose to give greater weight to one factor over others, as long as the decision is reasonable." Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006) (upholding IJ's determination that evidence of serious criminal activity, even though it had not resulted in a conviction, outweighed other factors, such that release on bond was not warranted).

The Immigration Court should not consider what difficulties there may be in executing a final order of removal in redetermining bond. Matter of P-C-M-, 20 I&N Dec. 432 , 434 (BIA 1991) (IJ should not release an alien on the basis that the alien's removal to Angola appears unlikely).

C. Other Bond Factors

As stated above, to merit release under INA § 236(a), the detained alien must demonstrate that "release would not pose a danger to persons or property and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8); Matter of Adeniji, 22 I&N. Dec. 1102, 1111-1112 (BIA 1999). Such a demonstration, however, does not guarantee release because the Attorney General (or the Immigration Court via delegated authority) may deny release as a matter of discretion based on other factors:

> The courts have consistently recognized that the Attorney General has extremely broad discretion in determining whether or not to release an alien on bond. Further, the Act does not limit the discretionary factors that may be considered by the Attorney General in determining whether to detain an alien pending a decision on asylum or removal.

Matter of Guerra, 24 I&N Dec. 37, 39 (BIA 2006) (citations omitted); accord Matter of D-J-, 23 I&N Dec. 572, 575-576 (AG 2003); see also Doherty v. Thornburgh, 943 F.2d 204, 209 (2d Cir. 1991) ("It is axiomatic … that an alien's right to be at liberty during the course of removal proceedings is circumscribed by considerations of the national interest."), cert. dismissed, 503 U.S. 901 (1992).

In Matter of D-J-, the Attorney General directed the BIA and Immigration Courts to consider national security interests in bond proceedings involving an influx of illegal aliens who arrived by sea and were arrested and detained pending a decision on their removal. Citing his authority under INA § 236(a), the Attorney General determined that the release of the respondent and the other illegal aliens on bond "was and is unwarranted due to considerations of sound immigration policy and national security that would be undercut." Id., at 574. He continued, "I further determine that respondent has failed to demonstrate adequately that he does not present a risk of flight if released on bond and that he should be denied bond on that basis as well." Id. The Attorney General did not specify what factors aside from national security interests might be considered in addition to danger to the community and flight risk. Such additional factors will be determined on a case-by-case basis.

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D. Minimum Bond

For an alien in non-mandatory detention, the Immigration Court can either continue to detain the alien or else release the alien on bond of not less than $1,500.00. The Immigration and Nationality Act clearly provides that the Attorney General may not release an alien on bond less than $1500. See INA § 236(a)(2)(A). INA § 236(a) provides that, during pendency of removal proceedings against an arrested and detained alien, the Attorney General, or his delegate "(1) may continue to detain the arrested alien; and (2) may release the alien on – (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole."

There is no provision of the Immigration and Nationality Act for the release of an alien in removal proceedings on his or her own recognizance, without bond. Parole is available only to arriving aliens applying for admission or aliens who are present without admission. See INA § 212(d)(5); "Legal Opinion Discusses Parole for Persons who are not Arriving Aliens," 76 *Interpreter Releases* 1050 (July 12, 1999) (describing August 21, 1998, memorandum of INS General Counsel who concluded that the agency had the authority to parole applicants for admission who were not arriving aliens (e.g., aliens removable under INA § 212(a)(6)(A)(i)). Neither an Immigration Judge nor the BIA has authority to grant parole or to review DHS parole decisions. See Matter of Oseiwusu, 22 I&N Dec.19, 20 (BIA 1998); Matter of Matelot, 18 I&N Dec. 334, 336 (BIA 1982); Matter of Castellon, 17 I&N Dec. 616 (1981).

No effect should be given to explanatory comments to the EOIR regulation 8 CFR § 3.19 (renumbered 8 CFR § 1003.19) that suggest Immigration Judges retain authority to release aliens in removal proceedings on their own recognizance are ineffective. See 66 FR 54909-02, 54910, 2001 WL 1334025 (October 31, 2001) ("The immigration judge may then reduce the required bond amount, release the alien on his or her own recognizance, or make such other custody decision as the immigration judge finds warranted."). These comments to a regulation cannot change the statutory minimum bond requirement enacted by Congress. See Public Lands Council v. Babbitt, 529 U.S. 728, 745 (2000) (a "regulation cannot change the statute"). The regulation does not authorize the court to release an alien on his or her own recognizance. Therefore, the comment is mere dicta. An agency rule is not binding unless it is legislative in nature and conforms to certain procedural requirements. Moore v. Apfel, 216 F.3d 864, 868 (9th Cir. 2000). "To satisfy the second [requirement], it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." Id. The comment to 8 C.F.R. § 3.19 is merely an explanation of how bond proceedings generally proceed. See Peterson Builders, Inc. v. United States, 26 Ct.Cl. 1227, 1229 n. 3 (1992) ("While the court took guidance from the comments to the interim regulations, they are in no way binding upon the court."). It is not a specific grant of authority to release aliens on their own recognizance.

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The language of INA § 236(a) makes plain that ordering release on the alien's own recognizance is no longer an option. The IIRIRA regulation on bond provides that an alien may petition the Immigration Judge for "amelioration of the conditions under which he or she may be released ... [and] the Immigration Judge is authorized to exercise the authority in section 236 of the Act to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may released, as provided in § 1003.19 of this chapter." 8 C.F.R. § 236.1(d). This regulation does not change the statutory minimum bond: "While regulations may impose additional or more specific requirements, they cannot eliminate statutory requirements." Hunsaker v. Contra Costa County, 149 F.3d 1041, 1043 (9th Cir. 1998). Since the statutory command is so clear, the "if any" language has been construed as not referring to the statutory floor for release decisions but rather to the ceiling at which bond may be set, although the BIA has not yet issued a published decision.

Congress increased the minimum bond from $500 to $1,500 in section 303 of IIRIRA. Compare INA § 242(a) (1995), with INA § 236(a) (2002). Congress did so because bonds of $500 had become ineffective in assuring that aliens would appear for proceedings or deportation:

> [T]he conclusion that bond levels have often been set too low, sometimes almost ludicrously so, seems inescapable. Unsystematic analyses conducted in a number of districts demonstrate the obvious—that bond breaches decline substantially as the bond amount increases. The current bonding system was established long before the problems of illegal migration and criminal aliens became urgent ones and at a time when INS detention was not a viable option. Indeed, the statutory minimum bond level had been $500 for decades until the new section 236(a)(2)(A) raised the minimum to $1,500. Until now many aliens simply viewed the bond premium (typically only 10% of the bond amount) as a routine cost of doing business, a small price for illegal entry. In part, this pattern of low bonds reflected the fact that bonds seemed to be set at a level designed to assure public safety and aliens' appearance at hearings, whereas bonds set at a level necessary to assure their surrender for actual removal might require a higher bond level.

Peter H. Schuck, *INS Detention and Removal: A "White Paper"*, 11 GEO. IMMIGR. L.J. 667 (1997). Obviously, Congress would not increase the minimum bond to $1,500 from $500 if it wanted Immigration Judges to have the power to avoid setting bond altogether by releasing aliens on their own recognizance, without any bond.

E. Informal Hearing

A bond hearing before the Immigration Court is an informal hearing, and no hearing transcript is usually made. Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977) ("[T]here is no right to a transcript of a bond redetermination hearing. Indeed there is no requirement of a formal 'hearing.'"); Hass v. INS, No. 90 C 5513, 1991 WL 38258 at *4

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(N.D.Ill. March 15, 1991) ("The regulations do not provide for a transcript of bond redetermination proceedings. 8 C.F.R. § 242.2(d) [recodified at 8 C.F.R. § 1003.19]. Bond redetermination proceedings are informal and not of record [i.e., not recorded verbatim]. If plaintiff was concerned about the lack of a transcript, he could have requested the Court to provide a court reporter…."). "It is well settled that there is no requirement in bond proceedings for a formal hearing and that informal procedures may be used so long as no prejudice results. As there is no right to discovery in deportation proceedings, no such right exists in the less formal bond hearing procedure." Matter of Khalifah, 21 I&N Dec. 107, 112 (BIA 1995) (citation omitted). The BIA has emphasized: "Our primary consideration in a bail determination is that the parties be able to place the facts *as promptly as possible* before an impartial arbiter." Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977) (emphasis in original). The bond redetermination may be conducted by telephone at the discretion of the Immigration Judge. 8 C.F.R. § 1003.19(b).

A bond hearing is "separate and apart from, and shall form no part of, any deportation or removal hearing." 8 C.F.R. § 1003.19(d); accord Matter of Guerra, 24 I&N Dec. 37, 40 n. 2 (BIA 2006) ("Bond proceedings are separate and apart from the removal hearing."); Matter of R-S-H-, 23 I&N Dec. 629, 630 n. 7 (BIA 2003) ("We note that bond and removal are distinctly separate proceedings."). The Immigration Court and the parties must create a complete and separate record of the custody/bond proceedings:

> The parties and the Immigration Judge are responsible for creating a full and complete record of the custody proceeding. … In any bond case in which the parties or the Immigration Judge rely on evidence from the merits case, it is necessary that such evidence be introduced or otherwise reflected in the bond record (such as through a summary of merits hearing testimony that is reflected in the Immigration Judge's bond memorandum). Otherwise, it will not be part of the bond record available for our review on appeal.

Matter of Adeniji, 22 I&N Dec. at 1115.

"Information adduced during a removal hearing … may be considered during a custody hearing so long as it is made part of the bond record." Matter of Adeniji, 22 I&N Dec. 1102, 1115 (BIA 1999). Moreover, the same Immigration Court can preside at both the bond hearing and removal hearing. Flores-Leon v. INS, 272 F.3d 433, 440 (7th Cir. 2001) (court rejected recusal motion where IJ decided both bond and removability). If the Immigration Court fails to keep the bond hearing separate from the removal proceeding and the alien appeals on that basis, the alien must show that prejudice ensued from the commingling before the BIA will vacate the court's bond determination. Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977).

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F. Evidence at Bond Hearings

By regulation, a bond redetermination "may be based on any information that is available." 8 C.F.R. § 1003.19(d). The Federal Rules of Evidence are inapplicable to bond hearings. See United States v. Wadih El-Hage, 213 F.3d 74, 82 (2d Cir. 2000) ("A detention hearing need not be an evidentiary hearing. While the defendant may present his own witnesses and cross-examine any witnesses that the government calls, either party may proceed by proffer and the rules of evidence do not apply."), cert. denied, 531 U.S. 881 (2000); FED.R.EVID. 1101(d)(3) (exempting bail hearings from the evidentiary rules prohibiting the use of hearsay); cf. 18 U.S.C. § 3142(f) ("The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the [bail] hearing.").

The legal standard for admissibility of evidence in a removal hearing is that the evidence be *probative and fundamentally fair*. Lopez-Chavez v. INS, 259 F.3d 1176, 1181 (9th Cir. 2001); Felzcerek v. INS, 75 F.3d 112, 115 (2d Cir. 1996); Bustos-Torres v. INS, 898 F.2d 1053, 1055 (5th Cir.1990); Matter of Ponce-Hernandez, 22 I&N Dec. 784, 785 (BIA 1999). The evidentiary standard in bond hearings is even more relaxed than in a removal hearing. See 8 C.F.R. § 1003.19(d); Matter of Khalifah, 21 I&N Dec. 107, 112 (BIA 1995); Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977). "Any evidence that in the record that is probative and specific can be considered [at a bond hearing]." Matter of Guerra, 24 I&N Dec. 37, 40-41 (BIA 2006) (upholding IJ's reliance on criminal complaint signed by a DEA agent). This is one reason why a bond hearing is "separate and apart from, and shall form no part of, any deportation or removal hearing." See 8 C.F.R. § 1003.19(d); Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977) ("The requirement of a separate bond procedure and record is part of the effort to divorce, as far as possible, the bond matter from the deportation hearing.").

Over 20 years ago, Justice Stephen Breyer, then a circuit judge, wrote that it is a "well-established proposition of law" that detention decisions may be based on proffers of evidence and hearsay offered by the prosecution:

> [M]agistrates and judges traditionally have been permitted to base their decisions, both as to release conditions and as to possible detention, on hearsay evidence, such as statements from the prosecution or the defendants about what they can prove and how. This authority rests primarily upon the need to make the bail decision quickly, at a time when neither party may have fully marshalled all the evidence in its favor. It may also reflect the realization that at least some hearsay on some occasions may be fairly reliable, perhaps more reliable than certain direct evidence. For example, well-kept records, though hearsay, may be more reliable than eyewitness accounts of, say, a road accident on a foggy night. In any event, the need for speed necessarily makes arraignments, "probable cause" determinations, and bail hearings typically informal affairs, not substitutes for trial or even for discovery. Often the opposing

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> parties simply describe to the judicial officer the nature of their evidence; they do not actually produce it.

United States v. Acevedo-Ramos, 755 F.2d 203, 206 (1st Cir. 1985) (Breyer, J.).

Other circuits have held that federal courts have discretion to accept proffers of evidence, without witnesses, at pretrial detention hearings. See United States v. LaFontaine, 210 F.3d 125, 131 (2d Cir. 2000) ("It is well established in this circuit that proffers are permissible both in the bail determination and bail revocation contexts. … [T]his court stated that 'it would [not] be an abuse of discretion for the district court to permit the government to proceed by proffer alone.'"); United States v. Smith, 79 F.3d 1208, 1210 (D.C. Cir. 1996) ("Every circuit to have considered the matter, … permitted the Government to proceed by way of proffer [at a detention hearing]."); United States v. Gaviria, 828 F.2d 667, 669 (11th Cir. 1987) ("We hold that the government as well as the defense may proceed by proffering evidence subject to the discretion of the judicial officer presiding at the detention hearing."); United States v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986) ("As in a preliminary hearing for probable cause, the government may proceed in a detention hearing by proffer or hearsay. [Citations omitted] The accused has no right to cross-examine adverse witnesses who have not been called to testify.").

Where the proffer is disputed, however, the court might be required to allow cross-examination. The Third Circuit has held that the court has discretion to require, in an appropriate case, that the testimony of a witness be presented in person, rather than by hearsay evidence. United States v. Accetturo, 783 F.2d 382 (3d Cir. 1986). The First and Second Circuits reached similar conclusions. See United States v. Acevedo-Ramos, 755 F.2d 203, 207-208 (1st Cir. 1985); United States v. Martir, 782 F.2d 1141 (2d Cir. 1986). The Ninth Circuit has held that there is no right to cross-examine adverse "witnesses" who have not been called to testify. But when there is a proffer from defendant that the Government's proffer was incorrect, the court might be required to allow cross-examination. United States v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986).

G. Bond Decision

As required by regulation at 8 CFR § 1003.19(f), the determination of the Immigration Court on custody/bond shall be entered on the appropriate form at the time the decision is made and "the parties shall be informed orally or in writing of the reasons for the decision." Where removability is not conceded and the alien appears eligible for bond or other relief, the Immigration Judge may have to make findings of fact and conclusions of law. See Matter of A-P-, 22 I&N Dec. 468 (BIA 1999) (discussing requirements for a summary decision in removal proceedings).

VI. SUBSEQUENT BOND REDETERMINATION

After the Immigration Court has redetermined bond, any request for a subsequent bond redetermination "shall be made in writing and shall be considered only upon a showing

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that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e). There is no limit on the number of bond redetermination requests that may be filed. Matter of Valles, 21 I&N Dec. 769, 771 (BIA 1997); Matter of Uluocha, 20 I&N Dec. 133, 134 (BIA 1989) ("Bond proceedings are not really 'closed' so long as a respondent is subject to a bond."). However, the Immigration Court can decline to change its last bond decision if there has been no change in circumstances. Matter of Valles, 21 I&N Dec. at 771; Matter of P-C-M-, 20 I&N Dec. 432, 435 (BIA 1992) (finding "no change of circumstances which would warrant relief from the previous bond determination").

Alternatively, either party may submit to the Immigration Court a motion to reconsider the custody/bond decision or a motion to reopen the bond hearing. See Matter of Gordon, 20 I&N Dec. 52, 56 (BIA 1989) (referring to an "immigration judge's inherent power to reopen and reconsider his own decisions"); cf. 8 C.F.R. § 1003.23 (motions to reopen and reconsider in removal proceedings); Matter of Valles, 21 I&N Dec. at 771 ("The bond regulations, which establish unique and informal proceedings, do not specifically address motions to reopen and do not expressly limit a detained alien to one application for modification of the amount or terms of a bond."). A motion to reopen may be appropriate if the Government wants to submit additional evidence to the court that was unavailable but the alien's circumstances have not changed since the court redetermined bond.

VII. BOND REVOCATION

Immigration bond "is a privilege extended … on a contingent, nonabsolute basis, entirely subject to change." Matter of Valdez, 21 I&N Dec. 703, 713 (BIA 1997) (upholding INS rearrest and revocation of bond of an alien who had been released on bond before the Transition Period Custody Rules took effect). DHS may at any time revoke a bond or parole authorized for an alien, rearrest the alien under the original warrant, and detain the alien. INA § 236(b); 8 C.F.R. § 1236.1(c)(9). "[T]he regulations presently provide that when an alien has been released following a bond proceeding, a district director has continuing authority to revoke or revise the bond, regardless of whether the Immigration Judge or this Board has rendered a bond decision." Matter of Valles, 21 I&N Dec. 769, 772 (BIA 1997).

In Matter of Sugay, 17 I&N Dec. 637, 639-40 (BIA 1981), the Board of Immigration Appeals upheld the revocation of bond by INS based on a change of circumstances after the Immigration Court had redetermined bond and reduced it. The BIA ruled that newly developed evidence brought out at the alien's deportation hearing, combined with the fact that the Immigration Court had denied his applications for relief and ordered him deported, represented a considerable change of circumstances that justified the district director's decision to raise the amount of bond. The Board stated: "We find without merit counsel's argument that the District Director was without authority to revoke bond once an alien has had a bond redetermination hearing." Id., at 640.

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VIII. BOND APPEALS

Both DHS and the alien have the right to appeal a custody/bond decision by the Immigration Court to the Board of Immigration Appeals. See 8 C.F.R. §§ 1003.19(f), 236.1(d)(3) and 1236.1(d)(3). Either party must file the notice of appeal with the Board within 30 days of the judge's decision. See 8 C.F.R. §§ 1003.19(f). If an alien appeals a DHS decision on custody/bond, the alien must file the notice of appeal within ten (10) days. 8 C.F.R. § 1236.1(d)(3)(ii). In any case, there is no appeal fee. See Board of Immigration Appeals Practice Manual, Ch. 7, 1999 WL 33435432 (2004). The Board will set a briefing schedule, but usually it will not prepare and provide the parties with a transcript of the bond proceeding. Id.

A bond appeal and a removal decision appeal cannot be combined. The briefing schedules are independent of each other. Id. Each requires a separate brief. Combining or simultaneously filing an untimely notice of appeal or untimely brief contesting a bond decision, with a timely notice of appeal or timely brief contesting a removal decision, will not prevent the BIA from rejecting or dismissing the bond appeal. Id. The filing of an appeal does not delay compliance with bond decision nor does it stay proceedings or removal. 8 C.F.R. § 1236.1(d)(4).

When appropriate, an Immigration Judge may entertain a subsequent bond redetermination request, even when a previous bond redetermination by the Immigration Judge is on appeal to the BIA. Matter of Valles, 21 I&N Dec. 769, 771 (BIA 1997).

> In bond proceedings, an alien remains free to request a bond redetermination *at any time* without a formal motion, without a fee, and without regard to filing deadlines, so long as the underlying deportation proceedings are not administratively final. In other words, no bond decision is final as long as the alien remains subject to a bond.

Id. (emphasis added).

If a bond redetermination request is granted by an Immigration Judge while a bond appeal is pending with the BIA, any appeal filed by the party making the request is rendered moot. Id., at 773. If the Immigration Court entertains a bond redetermination request during the Government's bond appeal, the Government must notify the BIA in writing, with proof of service on the opposing party, within 30 days, if it wishes to pursue its original bond appeal. Id., at 773.

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IX. STAY OF RELEASE FROM DETENTION

If DHS appeals an Immigration Court's bond/custody decision, DHS may request an emergency stay from the BIA during the pendency of its appeal. 8 C.F.R. § 1003.19(i)(1). The BIA has discretion whether to grant the stay. Id.

In cases where DHS determined an alien should not be released on bond or where bond is set higher than $10,000 and the Immigration Court authorizes release of the alien, on bond or otherwise, the DHS can obtain a temporary automatic stay of release by filing a Notice of Service Intent to appeal Custody Redetermination (Form EOIR-43) within one day of the issuance of the Immigration Judge's order. 8 C.F.R. § 1003.19(i)(2). ICE OPLA headquarters must approve any Form EOIR-43 before it is filed. Upon filing of the form, release is automatically stayed until the BIA decides the bond appeal. Id.; Matter of Joseph, 22 I&N Dec. 660 (BIA 1999), clarified, Matter of Joseph, 22 I&N Dec. 799 (BIA 1999).

If the DHS fails to file an appeal with the BIA within ten (10) days of the Immigration Judge's decision, as required under 8 C.F.R. § 1003.38, the automatic stay expires. If the BIA authorizes the alien's release, that order is stayed automatically for five (5) business days. Within that period, DHS can certify the Board's custody order to the Attorney General, and then release is further stayed until the AG makes a decision.

The automatic stay regulation was designed to ensure removal by preventing flight during the pendency of proceedings and to protect the public from potential harm. See Ashley v. Ridge, 288 F.Supp.2d 662, 664-65 (D.N.J. 2003). In promulgating the regulation, the Department of Justice stated that the purpose of the automatic stay provision was to "allow the Service to maintain the status quo while it seeks review by the Board, and thereby avoid the necessity for a case-by-case determination of whether a stay should be granted in particular cases in which the Service had previously determined that the alien should be kept in detention and no conditions of release would be appropriate." Executive Office for Immigration Review, Review of Custody Determinations, 66 Fed.Reg. 54909 (Oct. 31, 2001). The regulation was implemented on an emergency basis and made effective on October 31, 2001.

Federal courts are divided as to whether the automatic stay provision is lawful and constitutional. Some courts have found the automatic-stay regulation both lawful and constitutional. See Pisciotta v. Ashcroft, 311 F.Supp.2d 445 (D.N.J. 2004); Chambers v. Ashcroft, No. 03-6762, 2004 WL 759645 (E.D.Pa. Feb. 27, 2004); Marin v. Ashcroft, No. 04-CV-675, 2004 WL 3712722 (D.N.J. Mar. 17, 2004); Perez-Cortez v. Maurer, No. 03-2244 (D.Colo. Nov. 20, 2003); Inthathirath v. Maurer, No. 03-2245 (D.Colo. Nov. 20, 2003); Alameh v. Ashcroft, No. 03-6205, 2004 WL 3712718 (D.N.J. Jan. 6, 2004). Other courts have held it is an unconstitutional violation of substantive and procedural due process and/or invalid as *ultra vires* to the statute. See Zabadi v. Chertoff, No. C 05-01796 WHA, 2005 WL 1514122 (N.D.Cal. 2005); Zavala v. Ridge, 310 F. Supp. 2d 1071 (N.D.Cal. 2004); Ashley v. Ridge, 288 F. Supp. 2d 662 (D.N.J. 2003); Uritsky v. Ridge,

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286 F. Supp. 2d 842 (E.D.Mich. 2003); Bezmen v. Ashcroft, 245 F. Supp. 2d 446 (D.Conn. 2003).

Past experience shows that DHS has invoked the automatic stay in only a select number of custody cases. For example, the EOIR statistics indicate that, in FY 2004, the immigration judges conducted some 33,000 custody hearings and the Board adjudicated 1,373 custody appeals. Yet, DHS sought an automatic stay only with respect to 273 aliens in FY 2004--and only 43 aliens in FY 2005.

A final rule to revise the existing interim rule authorizing DHS to invoke an "automatic stay" in custody cases in connection with DHS's appeal of an IJ order to release the alien on bond was published in the Federal Register, with an effective date of Nov. 1, 2006. "Review of Custody Determinations," 71 Fed. Reg. 57873 (Oct. 2, 2006) (http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/E6-16106.pdf).

This rule imposes new time limits on the duration of the automatic stay of IJ release orders and new procedures for the IJs and the Board to expedite the appellate process for automatic stay cases (see sections 1003.6(c) and 1003.19(i)(2)), and also clarifies the process for DHS to seek a discretionary stay (sections 1003.6(c)(4) & (5) and 1003.19(i)(1)). The final rule also provides a revised rule for Attorney General review of any BIA custody decision, which is not tied explicitly to whether DHS had invoked the automatic stay at the IJ level (see section 1003.6(d)).

X. BREACH OF BOND

"A bond is breached when there has been a substantial violation of the stipulated conditions." 8 C.F.R. § 103.6(e). DHS may breach the bond of an alien who does not timely appear for the alien's removal hearing. Matter of Arbelaez, 18 I&N Dec. 403, 405-06 (R.C. 1983). Moreover, DHS may breach the bond of an alien who fails to appear after the alien or the bond obligor receives a "bag and baggage" letter requiring the alien's appearance for removal. See Ruiz-Rivera v. Moyer, 70 F.3d 498, 501-02 (7th Cir. 1995) (failure to appear after stay of removal denied); International Fidelity Insurance Company v. INS, 623 F.Supp. 45, 46-47 (S.D.N.Y. 1985); Matter of Allied Fidelity, 19 I&N Dec. 124, 126-29 (Comm. 1984) (filing petition for writ of habeas corpus does not excuse failure to surrender). A bond breach may be appealed to the Administrative Appeals Unit (AAU). See McLean v. Slattery, 839 F.Supp. 188, 190-92 (E.D.N.Y. 1993) (requiring obligor to exhaust administrative remedies).

DHS must send notice of breach of bond to the bond obligor. 8 C.F.R. § 103.6(e); see Hrubec v. INS, 828 F.Supp. 251, 253-54 (S.D.N.Y. 1993), aff'd without opinion, 41 F.3d 1500 (2d Cir. 1994) (up to INS to determine if bond breached but, since no proper notice, appeal to AAU remained available); International Fidelity Insurance Company v. Crosland, 490 F.Supp. 446, 448 (S.D.N.Y.1980) (vacated breach of bond after finding alien inadvertently failed to appear, caused in part by the fact that no notice requiring his

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appearance had been sent to him, and his attorney thereafter contacted INS and offered to have the alien appear upon request).

"Substantial performance of all conditions imposed by the terms of a bond shall release the obligor from liability." 8 C.F.R. § 103.6(c)(3).

> Substantial performance exists where there is no willful violation of the terms or conditions of the bond, where the conditions are honestly and faithfully complied with, and where the only variance from their strict and literal performance consists of technical or unimportant occurrences. Substantial violations are those acts which constitute a willful departure form the terms or conditions of the bond, or the failure to comply or adhere to the essential elements of those terms or conditions.

Matter of Allied Fidelity, 19 I&N Dec. 124, 127 (Comm. 1984). A federal court found substantial performance where the alien's attorney had mailed a request for continuance seven days before hearing date and requested notification if there was any problem with continuance, and no showing was made of intention to evade responsibilities. Gomez-Granados v. Smith, 608 F. Supp. 1236, 1238-39 (D.Utah 1985).

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Outline of immigration law on:

Custody and Bond Issues in Removal Proceedings

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I. DUE PROCESS REQUIREMENT

An alien detained pending a decision as to whether the alien is to be removed from the United States does not have a right to be released on bond. Matter of Guerra, 24 I&N Dec. 37, 39 (BIA 2006) (citing Carlson v. Landon, 342 U.S. 524, 534 (1952); Matter of D-J-, 23 I&N Dec. 572, 575 (AG 2003). The Supreme Court has concluded that detention is a normal and lawful part of removal proceedings: "Detention during removal proceedings is a constitutionally permissible part of that process." Demore v. Kim, 538 U.S. 510, 531 (2003). The Court has a "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." Id. at 526.

The Supreme Court has stated that Congress has broad authority to make rules for detaining aliens during removal or deportation proceedings:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Over no conceivable subject is the legislative power of Congress more complete. Thus, in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens . . . . Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings. And ... Congress [has] eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General.

Reno v. Flores, 507 U.S. 292, 305-06 (1993) (internal punctuation and citations omitted) (upholding INS policy on release of detained juveniles).

The rules for detaining aliens are subject to the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides that no person shall be deprived of liberty without "due process of law." Id.; U.S. CONST. ART. V. "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." Flores, at 305-07. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). But it is "not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure." Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 98 (1903).

The due process that must be afforded aliens varies with the circumstances. "Due process in an administrative proceeding is not defined by inflexible rules which are universally applied, but rather varies according to the nature of the case and the relative importance of the governmental and private interests involved." Matter of Exilus, 18

I&N Dec. 276, 278 (BIA 1982). The Supreme Court has stated that due process of law is a flexible concept that adjusts according to three factors:

> The constitutional sufficiency of procedures ... varies with the circumstances. In evaluating the procedures in any case, the courts must consider [(1)] the interest at stake for the individual, [(2)] the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and [(3)] the interest of the government in using the current procedures rather than additional or different procedures.

Landon v. Plasencia, 459 U.S. 21, 34 (1982) (citations omitted) (deciding what due process must be afforded a returning lawful permanent resident alien).

The Supreme Court balanced the three due process factors in deciding to uphold section 236(c)(1) of the Immigration and Nationality Act (INA), which mandates the detention of certain criminal aliens pending the completion of removal proceedings. Demore v. Kim, 538 U.S. 510, 531 (2003). First, the Court emphasized that the statute was justified by the legitimate congressional interest in ensuring the removal of criminal aliens who might flee or cause harm to the public during their removal proceedings. Id. at 523-28. Second and most significantly, the Court found that the detention did not raise the constitutional concerns that might arise in the post-removal-period context, because removal proceedings, unlike the post-removal period, have a finite termination point. Id. at 527-28. The Court further concluded that, notwithstanding evidence that other courses of action were available to Congress, the Government was not obligated under the Due Process Clause "to employ the least burdensome means to accomplish its goal" in "dealing with deportable aliens." Id. at 528.

On any given day, Immigration and Customs Enforcement (ICE) detains about 21,000 aliens. More than 200,000 people are detained over the course of a year in any of three types of facilities—eight (8) run by ICE itself, six (6) run by private companies, and 312 county and municipal jails that have federal contracts and hold about 57 percent of the detainees. David Crary, *Critics Decry Immigrant Detention Push*, WASHINGTON POST, June 24, 2006.

Most of the aliens who appear for removal proceedings are detained. According to the FY 2005 Statistical Yearbook of the Executive Office of Immigration Review (EOIR), 90,945 detained aliens appeared in removal proceedings in fiscal year 2005. This represents 56 percent of the total number of aliens who appeared for removal proceedings (163,729).

In FY 2005, 106,832 aliens failed to appear. This is 39 percent of the total number of aliens scheduled for removal hearings. Most of the aliens who failed to appear (55,913) were scheduled for removal proceedings in Harlingen and San Antonio, Texas.

The Immigration Courts held 26,083 bond/custody redetermination hearings in fiscal year 2005. Thirty-six percent of detained aliens who either DHS or the Immigration Courts released on bond and/or other conditions of release (7,890) did not appear.

> The important immigration-related purpose of detaining aliens in appropriate cases during the pendency of removal proceedings is plainly evident from the Department of Justice Inspector General's report in February 2003…. In the 2003 report, the Inspector General found that the former INS had successfully carried out removal orders and warrants with respect to almost 94% of aliens who had been detained during the pendency of their removal proceedings. However, in stark contrast, only 13% of final removal orders and warrants were carried out against non-detained aliens (a group that includes aliens ordered released by DHS, immigration judges, or the Board). The Inspector General specifically noted the former INS was successful in removing only 6% of non-detained aliens from countries that the United States Department of State identified as sponsors of terrorism; only 35% of non-detained aliens with criminal records; and only 3% of non-detained aliens denied asylum. Office of the Inspector General, U.S. Department of Justice, The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders, Report Number I-2003-004 (Feb. 2003).
>
> Statistics prepared by the Executive Office for Immigration Review [EOIR] also substantiate that large numbers of respondents who are released on bond or on their own recognizance fail to appear for their removal hearings before an immigration judge. For the last 4 fiscal years, 37% (FY 2004), 41% (FY 2003), 49% (FY 2002), and 52% (FY 2001) of such respondents have failed to appear for their scheduled hearings, and the immigration judges have either issued in absentia removal orders or administratively closed those removal proceedings. EOIR, FY 2004 Statistical Year Book at H3 (March 2005).[1] These numbers—totaling over 52,000 "no-show" aliens in just the last four years after being released from custody—reflect only those respondents released from custody who fail to appear for their removal hearings before the immigration judges. (They do not include the substantial additional number of non-detained aliens who do appear for their immigration judge hearing, but then fail to surrender after their removal order becomes final and join the growing ranks of hundreds of thousands of absconders currently at large.)

[1] These EOIR statistics for "released" aliens who are released on bond or on their own recognizance cover only those aliens who were released from custody after the initiation of removal proceedings against them. EOIR also tracks a separate category of "non-detained" aliens—including those aliens who were never taken in custody by DHS at all (such as many asylum applicants) as well as those aliens who had been apprehended but were released by DHS prior to or at the time of the initiation of removal proceedings against them. Of those "non-detained" aliens, 38% failed to appear for their removal hearings during the last 4 fiscal years—a total of almost 130,000 "no-show" aliens in just the last 4 years. FY 2004 Statistical Year Book at H2.

EOIR, *Review of Custody Determinations*, 71 Fed. Reg 57873, 57878 (October 2, 2006) (commentary to final rules at 8 C.F.R. §§ 1003.6 and 1003.19).

II. TIME AND PLACE FOR BOND/CUSTODY HEARING

DHS initially determines whether an alien will be detained and determines the amount of bond, if any. 8 C.F.R. § 1236.1(c). This determination will be made within 48 hours of the alien's arrest. 8 C.F.R. § 287.3(d); DHS Undersecretary Asa Hutchinson, "Guidance on ICE Implementation of Policy and Practice Changes Recommended by the Department of Justice Inspector General" (March 30, 2004), reprinted in 81 *Interpreter Releases* 513, 528-32 (April 19, 2004). However, in case of "emergency or other extraordinary circumstance," the determination shall be made "within an additional reasonable period of time." Id. Reasons for the determination must be stated. Matter of Dayoush, 18 I&N Dec. 352, 353 (BIA 1982).

DHS has sole authority to determine the place of detention. See INA § 241(g)(1); Van Dinh v. Reno, 197 F.3d 427, 433 (10th Cir. 1999); Committee of Central American Refugees v. INS, 795 F.2d 1434 (9th Cir.1986), as amended, 807 F.2d 769 (9th Cir. 1986); Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985); Sasso v. Milhollan, 735 F.Supp. 1045, 1048 (S.D. Fla.1990).

If DHS decides to detain an alien, the alien may seek release on bond by submitting a formal written request to DHS stating all the reasons for the alien's release. 8 C.F.R. § 236.1(d). DHS will consider the request and issue a decision.

An Immigration Court has no jurisdiction to redetermine bond on an alien subject to administrative removal proceedings under INA § 238(b). 8 C .F.R. § 238.1(g); Bazaldua v. Gonzales, 2007 WL 1752771 (D.Minn. June 15, 2007):

A. Custody Redeterminations

After the initial bond/custody determination by DHS, the detained alien or the alien's counsel or representative may apply, orally or in writing, for a bond/custody redetermination by the Immigration Court. 8 C.F.R. §§ 1003.19(b), 1236.1(d). The controlling provisions for bond/custody redetermination hearings before an Immigration Judge are found at INA § 236 and 8 C.F.R. §§ 1003.19 and 1236.1. An Immigration Court with jurisdiction to redetermine bond may either reduce or increase the amount of the bond set by DHS. Matter of Spiliopoulos, 16 I&N Dec. 561, 562 (BIA 1978) ([W]e reject the contention advanced by the respondent that the immigration judge lacked the authority to increase the amount of bond initially set by the District Director.").

If the alien is not in DHS custody (e.g., alien is in state custody), the Immigration Court lacks jurisdiction to redetermine bond/custody. Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990); Cruz v. Molerio, 840 F.Supp. 303, 305-06 (S.D.N.Y. 1994) (alien incarcerated in state prison not entitled to immigration bond hearing). An alien who is on

supervised release, such as the Intensive Supervision Appearance Program (ISAP), is not in DHS custody. Nguyen v. B.I. Inc., 435 F. Supp. 2d 1109, 1114 (D. Ore. 2006) ("I conclude that placement in ISAP is not detention. It is a form of supervision that uses no physical restraints or surveillance, both of which are typical characteristics of detention.").

B. Venue for the Bond Hearing

The application for a bond redetermination hearing is made to one of the following EOIR offices, in the following order prescribed at 8 C.F.R. § 1003.19:

> 1. To the Immigration Court that has jurisdiction over the place of detention;
>
> 2. To the Immigration Court that has administrative control over the case. See 8 C.F.R. § 1003.13; or,
>
> 3. To the Office of the Chief Immigration Judge (OCIJ) for designation of the appropriate Immigration Court to accept and hear the application.

The Immigration Court may hold a bond/custody redetermination hearing before the charging document is filed with the court. 8 C.F.R. § 1003.14(a). But the Immigration Court cannot make a bond determination *sua sponte*; the alien must apply for a redetermination. Matter of P-C-M-, 20 I&N Dec. 432, 434 (BIA 1992).

C. Prompt Bond Hearing

Bond proceedings should be conducted promptly after the alien requests bond redetermination by the Immigration Court. Matter of Chirinos, 16 I&N Dec. 276, 277 (1977) ("Our primary consideration in a bail determination is that the parties be able to place the facts *as promptly as possible* before an impartial arbiter.") (emphasis in original). However, Federal Rule of Criminal Procedure 5(a)—that requires a detainee held on criminal charges be brought before a magistrate within 48 hours—does not generally apply to aliens held in civil detention, absent evidence of collusion between immigration and prosecution authorities. See United States v. Dyer, 325 F.3d 464, 70 (3d Cir. 2003), cert. denied, 540 U.S. 977 (2003) (explaining the "ruse" exception, but declining to adopt it because the defendant would not have qualified for the exception); United States v. Perez-Perez, 337 F.3d 990, 996-97 (8th Cir. 2003), cert. denied, 540 U.S. 927 (2003); United States v. Encarnacion, 239 F.3d 395, 398-99 (1st Cir. 2001), cert. denied, 532 U.S. 1073 (2001); United States v. Noel, 231 F.3d 833, 837 (11th Cir. 2000), cert. denied, 531 U.S. 1200 (2001).

D. Aliens Released by DHS

If DHS has released the alien on bond, the alien has seven (7) days to request a bond redetermination by the Immigration Court. 8 C.F.R. § 1236.1(d)(1). After the expiration

of the seven-day period, the alien may request amelioration of the conditions of the alien's release only from DHS. 8 C.F.R. § 1236.1(d)(2); Matter of Chew, 18 I&N Dec. 262, 263 (BIA 1982). The alien may seek review of DHS's bond redetermination before the Board of Immigration Appeals by filing an appeal within ten (10) days of that subsequent determination. 8 C.F.R. § 1236.1(d)(3)(ii).

E. Aliens with a Final Order of Removal

Once a deportation/removal order has become administratively "final," bond and custody decisions are no longer governed by INA § 236, but by INA § 241. Zadvydas v. Davis, 533 U.S. 678, 683 (2001). If the alien has an administratively final order of removal or deportation, the Immigration Court lacks jurisdiction to redetermine bond/custody, and the alien must request review of bond/custody by DHS. See INA § 241(a)(2); 8 C.F.R. §§ 1003.19(a), 1236.1(d)(1); Matter of Valles, 21 I&N Dec. 769, 772 (BIA 1997) ("The regulations and the Board mention only two instances where an Immigration Judge is divested of jurisdiction over a bond proceeding. The first is upon the lapse of the 7-day period following an alien's release from custody. The second is upon the entry of an administratively final order of deportation. In those cases, jurisdiction over bond proceedings vests with the district director."). An order of removal becomes administratively final when the alien has waived appeal or when the BIA has dismissed the alien's appeal. INA § 101(a)(47)(B); 8 C.F.R. §§ 1241.1, 1003.38(b).

However, some courts have found that due process requires a bond hearing by an Immigration Judge even after an alien receives an administratively final order of removal. The U.S. Court of Appeals for the Ninth Circuit has ordered the Immigration Court to conduct a bond hearing when the alien's appeals have delayed the alien's removal. See Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) (per opinion of Noonan, C.J., and opinion of Tashima, C.J., concurring in judgment) (ordering bond hearing after delay of 32 months: 7 months for removal proceedings, 13 months for appeal to the BIA, and 12 months for appeal to the circuit court). Some courts have interpreted the granting of a judicial stay of removal as reverting post-final order custody back to INA § 236 pre-order detention. See Wang v. Ashcroft, 320 F.3d 130, 147 (2d Cir. 2003); Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1223-24 (W.D. Wash. 2004); but see De La Teja v. United States, 321 F.3d 1357, 1362-63 (11th Cir. 2003) ("Because a final removal order has been entered, De La Teja is no longer being detained pursuant to [INA § 236(c)], which governs only detention prior to a final removal order."). One federal district court has ordered the Immigration Court to conduct a bond hearing after a final order of removal because the district court held that a written decision by DHS is insufficient to satisfy due process. Del Toro-Chacon v. Chertoff, 431 F.Supp.2d 1135, 1142 (W.D. Wash. 2006) (ordering bond hearing after delay of 8 months while the circuit court considers alien's appeal of the denial of asylum application); but see Marcello v. Bonds, 349 U.S. 302, 311 (1955) (rejecting claim that custody decision by INS special inquiry officer violates due process where INS initiates and prosecutes proceedings).

III. MANDATORY DETENTION

A. History

Beginning with the passage of the Anti-Drug Abuse Act of 1988 ("ADAA") and the Immigration Act of 1990 ("IMMACT"), and continuing on through the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress has consistently demonstrated a desire that criminal and terrorist aliens be detained during the pendency of their proceedings.

In 1988, Congress initially crafted a provision mandating the detention without bond of an aggravated felon. See ADAA § 7343. Subsequently, in IMMACT, Congress carved out an exception to mandatory detention for certain lawful permanent resident aggravated felons provided that the alien could overcome presumptions against release. See Matter of De La Cruz, 20 I&N Dec. 346 (BIA 1991). In AEDPA, Congress expanded the grounds subjecting an alien to mandatory detention pending the outcome of immigration proceedings and removed the exception created by IMMACT. AEDPA's requirements, however, were in effect for only a few months before they were superseded by IIRIRA's mandatory detention grounds codified at INA § 236(c)(1).[2]

For well over a decade, Congress has expressed through legislation the intent that criminal and terrorist aliens should generally, if not always, be detained until the completion of their immigration proceedings. The legislation indicates that Congress views criminal and terrorist aliens as threats to persons and property in the United States who should be segregated from society until a decision can be made regarding whether they should be allowed to remain in this nation. Congress views them as poor bail risks who have little likelihood of relief from removal and who, therefore, have little incentive to appear for their hearings if they are released from custody, regardless of family and community ties.

B. INA § 236(c)(1) – Mandatory Detention Categories

In Demore v. Kim, 538 U.S. 510 (2003), upholding the constitutionality of INA § 236(c)(1), the Supreme Court stated that mandatory detention under section 236(c)(1) "serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." Id. at 528. The BIA had previously identified the same rationale for this statute in several cases. See, e.g., Matter of Rojas, 23 I&N Dec. 117 (BIA 2001); Matter of Noble, 21 I&N Dec. 672 (BIA 1997).

[2] In response to concerns expressed by the Immigration and Naturalization Service, and other interested parties, that INS was fiscally unprepared to enforce the detention mandate imposed by Congress in AEDPA, Congress in IIRIRA afforded INS a transition period of up to two (2) years during which detention decisions would permit the release of certain specified criminal and terrorist aliens provided the alien could overcome statutory presumptions against release.

Section 236(c)(1) provides for the mandatory detention of certain enumerated aliens. The purpose of INA § 236(c)(1) is to impose a duty on DHS to continue to detain criminal and terrorist aliens pending the completion of proceedings to remove the alien from the United States once the alien is no longer in the custody of another entity, or if never in custody previously. It lists all aliens subject to mandatory detention except for arriving aliens, which are also subject to mandatory detention as discussed below. Compare INA § 236(c)(1), with INA § 235(b)(2)(A). Section 236(c)(1) provides as follows:

> 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) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 237(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 212(a)(3)(B) of this title or deportable under section 237(a)(4)(B) of this title,
>
> 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.

Under INA § 236(c)(1), aliens who **must** be detained during removal proceedings include those who are:

- inadmissible by reason of having committed any criminal offense covered in section 212(a)(2), such as a crime involving moral turpitude, multiple criminal convictions with aggregate sentences of five (5) years, a controlled substance violation, controlled substance traffickers, or prostitution and commercialized vice;
- deportable by reason of having committed two or more crimes involving moral turpitude after admission;
- deportable for an aggravated felony conviction;
- deportable for a controlled substance violation, drug abuse, or drug addiction;
- deportable for a firearms or destructive device offense;
- deportable for conviction of a crime involving moral turpitude with a term of imprisonment of at least one year; or
- inadmissible or deportable for terrorist activity.

See, e.g., Demore v. Kim, 538 U.S. 510 (2003) (mandatory detention for theft); Montenegro v. Ashcroft, 355 F.3d 1035, 1037-38 (7th Cir.2003) (mandatory detention for possession with intent to deliver cocaine); Hussain v. Gonzales, -- F.Supp.2d --, 2007 WL 1805157 (E.D.Wis. May 22, 2007) (mandatory detention on national security grounds).

The Board of Immigration Appeals has determined that, if an alien has committed any of the offenses covered in INA § 237(a)(2)(A)(ii), (A)(iii), (B), (C) or (D), the alien is subject to mandatory detention under INA § 236(c)(1) regardless whether DHS has charged the alien with removability based on the offense. Matter of Kotliar, 24 I&N Dec. 124, 126 (BIA 2007) (citing Matter of Melo, 21 I&N Dec. 883, 885 n. 2 (BIA 1997) (the phrase "is deportable" does not require an alien to be charged with deportability as an aggravated felon for the alien to be amenable to mandatory detention under the IIRIRA transitional rules)); see also Hussain v. Gonzales, -- F.Supp.2d --, 2007 WL 1805157 (E.D.Wis. May 22, 2007) ("The BIA rejected the IJ's conclusion that an alien had to be charged under 8 U.S.C. § 1227(a)(4) with removability on the ground of terrorist-related conduct in order to divest the IJ of jurisdiction over his custody status.").

Criminal aliens who are not subject to mandatory detention under section 236(c)(1) include aliens removable under INA § 237 for one crime involving moral turpitude, if they were sentenced to less than one year, and for crimes relating to domestic violence, stalking, and the abuse or neglect of children. See Michael A. Pearson, INS Executive Associate Commissioner, "Detention Guidelines Effective October 9, 1998" (October 7, 1998), reprinted in 75 *Interpreter Releases* 1508, Appendix I (Nov. 2, 1998).

C. Exception to INA § 236(c)(1)

An alien "described in" INA § 236(c)(1) may be released from detention "only if" the alien falls within the enumerated exceptions of INA § 236(c)(2). The exceptions provide that aliens may be released only if they are part of the Witness Protection Program or if their release will protect other witnesses or their immediate family. The alien must satisfy the Attorney General that he or she will not pose a danger to the safety of other persons or of property and is likely to appear for hearings. INA § 236(c)(2). The Immigration Court has no bond/custody redetermination authority over those categories of aliens defined in INA § 236(c)(1) unless they fall within the enumerated exceptions of INA § 236(c)(2). See 8 C.F.R. § 1236.1(c)(1)(i).

D. IJ Jurisdiction and the Joseph Hearing

The Immigration Court lacks jurisdiction to redetermine bond/custody of an alien released from non-DHS custody after the expiration of IIRIRA's Transition Period Custody Rules, if the alien is "properly included" in a mandatory detention category under INA § 236(c)(1). 8 C.F.R. § 1003.19(h)(2)(i)(D); see Matter of Adeniji, 22 I&N Dec. 1102, 1107-11 (BIA 1999). See also 8 C.F.R. § 1003.19(h)(2)(i)(C) (if described in INA § 237(a)(4)).

By regulation, an alien may request a hearing before an Immigration Judge to contest the DHS determination that the alien is "properly included" in a mandatory detention category. See 8 C.F.R. §§ 1003.19(h)(1)(ii), 1003.19(h)(2)(ii); Matter of Joseph, 22 I&N Dec. 660, 670-73 (BIA 1999) (hereinafter Joseph I), clarified by Matter of Joseph, 22 I&N Dec. 799, 805-07 (BIA 1999) (hereinafter Joseph II). This hearing is referred to as a Joseph hearing. See DeMore, 538 U.S. at 514 n.3 (citing Joseph II); Gonzalez v. O'Connell, 355 F.3d 1010, 1013 (7th Cir. 2004). If the Immigration Court finds that the alien is not subject to INA § 236(c)(1), the court then proceeds to a regular bond hearing under INA § 236(a). See DeMore, 538 U.S. at 532 (Kennedy, J., concurring); O'Connell, at 1013; Joseph II, 22 I&N Dec. at 806.

An Immigration Court is not bound by the charges in the NTA in determining whether an alien is "properly included" in the mandatory detention category. Matter of Kotliar, 24 I&N Dec. 124, 126 (BIA 2007); Joseph II, 22 I&N Dec. at 806; see Hussain v. Gonzales, -- F.Supp.2d --, 2007 WL 1805157 (E.D.Wis. May 22, 2007) ("Based on its interpretation on 8 C.F.R. § 1003.19(h)(2)(i)(C), the BIA concluded that it was enough if DHS had "reason to believe" that the alien was a member of a terrorist organization for the IJ to be divested of jurisdiction to redetermine his custody."). However, an Immigration Court's finding in removal proceedings regarding removability may properly be relied upon in custody proceedings to determine whether the mandatory detention ground applies to the alien. Id. at 803. "If this threshold bond decision is made after the Immigration Judge's resolution of the removal case, the Immigration Judge may rely on that underlying merits determination." Id. at 800.

The BIA in Joseph II explained that, in determining whether the alien is "properly included" in a mandatory detention category under INA § 236(c)(1), before proceeding to the merits of the charges of removability, the Immigration Court considers the future likelihood that the alien will be found removable under one of the referenced mandatory detention grounds:

> [I]n assessing whether an alien is "properly included" in a mandatory detention category during a bond hearing taking place early in the removal process, the Immigration Judge must necessarily look forward to what is likely to be shown during the hearing on the underlying removal case. Thus, for example, the failure of the Service to possess a certified copy of a conviction record shortly after taking an alien into custody would not necessarily be indicative of its ability to produce such a record at the merits hearing. And the same could be true of evidence tendered by the alien during an early bond hearing.

Joseph II, 22 I&N Dec. at 807.

Due process requires that the Government show there is at least "some merit" to the charge of removability that is grounds for mandatory detention under INA § 236(c)(1). See DeMore, at 532 (Kennedy, J., concurring); Pisciotta v. Ashcroft, 311 F.Supp.2d 445, 454-55 (D.N.J. 2004) ("[T]here is at least 'some merit' to the removal charges underlying

the detention here. … Therefore, consistent with the reasoning in *Demore*, this Court finds that … the ongoing detention of Petitioner, a criminal alien in pending removal proceedings, is constitutionally permissible."). The Joseph hearing on the viability of the charge of removability ostensibly satisfies due process. See DeMore, at 514 n. 3 ("Because respondent conceded that he was deportable because of a conviction that triggers [INA § 236(c)(1)] and thus sought no *Joseph* hearing, we have no occasion to review the adequacy of *Joseph* hearings generally in screening out those who are improperly detained pursuant to § 1226(c). Such individualized review is available, however, and Justice SOUTER [in dissent] is mistaken if he means to suggest otherwise.").

An alien in mandatory detention during removal proceedings may end his or her mandatory detention by demonstrating either that he or she is not an alien or that the Government is "substantially unlikely" to establish that he or she is in fact subject to mandatory detention. DeMore, 538 U.S. at 514 n.3 (citing Joseph II); see 8 C.F.R. § 1003.19(h)(1)(ii) (providing that an alien may seek a "determination by an Immigration Judge that the alien is not properly included" within INA § 236(c)(1)); Joseph II, 22 I&N Dec. at 806 ("[W]e determine that a lawful permanent resident will not be considered 'properly included' in a mandatory detention category when an Immigration Judge or the Board is convinced that the Service is substantially unlikely to establish at the merits hearing, or on appeal, the charge or charges that would otherwise subject the alien to mandatory detention.").

If the alien proves that he or she is not "properly included" in a mandatory detention category under INA § 236(c)(1) or if the Government fails to satisfy its "minimal, threshold burden" of showing some merit to the allegation that such a category applies, then the alien may qualify for discretionary release under INA § 236(a). See DeMore, 538 U.S. at 532 (Kennedy, J., concurring); Gonzalez v. O'Connell, 355 F.3d 1010, 1013 (7th Cir. 2004) ("[I]f the IJ determines the alien does not fall within § 1226(c), then he may consider the question of bond."); Joseph II, 22 I&N Dec. at 806 ("A determination in favor of an alien on this issue does not lead to automatic release. It simply allows an Immigration Judge to consider the question of bond under the custody standards of section 236(a) of the Act.").

If the Immigration Court determines that section 236(c)(1) does not apply, the court must provide factual findings and analysis supporting a discretionary determination of custody/bond under INA § 236(a). See Joseph II, 22 I&N Dec. at 806, 809; Matter of Adeniji, 22 I&N Dec. 1102, 1112-16 (BIA 1999). See section V. below.

E. "When the Alien is Released" Clause in INA § 236(c)

Section 236(c)(1) provides that the Attorney General shall take into custody any alien removable on mandatory grounds of detention "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." (emphasis added). The critical date for the application of the mandatory detention statute

is the date that the alien is released from non-DHS custody, which must be after the expiration of IIRIRA's Transition Period Custody Rules (TPCR) on October 8, 1998. Matter of Adeniji, 22 I&N Dec. 1102, 1107-11 (BIA 1999).

An alien therefore is not subject to mandatory detention under INA § 236(c)(1) if the alien was released from his non-DHS custodial setting on or before October 8, 1998—the expiration date of the TPCR. See Matter of West, 22 I&N Dec. 1405 (BIA 2000); Matter of Valdez, 21 I&N Dec. 703, 707-14 (BIA 1997); Matter of Noble, 21 I&N Dec. 672, 677-86 (BIA 1997). If the alien was released on or before October 8, 1998, the alien's custody/bond must be determined under the TPCR. See id.; 8 C.F.R. §§ 1003.19(h)(1), 1236.1(c)(ii).

In Matter of West, 22 I&N Dec. 1405 (BIA 2000), the Board of Immigration Appeals held that an alien who was released from state custody before INA § 236(c) became effective but was convicted after that date could not be considered "released" for purposes of applying the statute's mandatory detention provision. The alien in the case was arrested in April 1997 and charged with various drug offenses, indicted, and then released on bond in December of that year. In February 1999, he pled guilty and was sentenced to one year of probation for each offense. The Board held that the term "released" meant release from physical restraint, reasoning that Congress plainly intended to refer to the release of an alien from a restrictive form of criminal custody involving physical restraint. Because the respondent was last released from the physical custody of the state of New Jersey in December 1997, which was before the TPCR expired and INA § 236(c) became effective, the Board concluded that he was not subject to mandatory detention under the statute.

The release from non-DHS custody that triggers mandatory detention can be any form of physical restraint, such as criminal custody, civil commitment to a mental institution, and other forms of civil detention. See Matter of West, 22 I&N Dec. at 1410 ("[W]e construe the word 'released' in the last sentence of section 303(b)(2) of the IIRIRA to refer to a release from physical custody."); Matter of Adeniji, 22 I&N Dec. at 1108-11 (accepting the parties' interpretation of the "released" language of the related provision in IIRIRA as referring to "aliens who have been released from criminal (and perhaps psychiatric and other non-Service) confinement"). A reading of section 236(c)(1) as a whole does not suggest that Congress intended to limit the non-DHS custody to criminal custody pursuant to a conviction for a crime that is the basis for detention under INA § 236(c)(1). "'Released' in this context can also refer to release from physical custody following arrest …." Matter of West, 22 I&N Dec. at 1410.

When not in criminal custody

Where the alien is subject to mandatory detention based on removability for a non-criminal ground, there may be no requirement of physical custody at all. Under sections 236(c)(1)(A) and 236(c)(1)(D), an alien need not be convicted of any offense in order to be removable as charged. For instance, sections 212(a)(2)(A),(C), (D), (E), (G), (H), and (I), as well as section 212(a)(3)(B) and section 237(a)(4)(B), do not require a criminal conviction.

How soon after release?

According to the BIA, an alien who is released from criminal custody after the expiration of the Transition Period Custody Rules is subject to mandatory detention even if the alien is not immediately taken into custody by the government when released from incarceration. Matter of Rojas, 23 I&N Dec. 117 (BIA 2001).

In Matter of Rojas, the BIA held that an alien was subject to mandatory detention under 236(c)(1), even though INS did not take him into custody immediately upon his release from state custody. The Board found the "when released" language was not part of the description of an alien who is subject to detention but merely clarifies when the government has a duty to take the alien into immigration custody. Finding that the other statutory provisions pertaining to the removal process do not place significance on when INS takes an alien into custody, the Board concluded that "the 'when released' issue is irrelevant for all other immigration purposes." Id. at 122. The Board explained: "There is no connection in the [INA] between the timing of an alien's release from criminal incarceration, the assumption of custody over the alien by the Service, and the applicability of any of the criminal charges of removability." Id. The Board found: "The history of the statutory mandate to detain criminal aliens does not indicate to us that Congress had a different meaning in mind." Id. The Board concluded that it would not be consistent with its understanding of the INA's "design" to construe 236(c)(1) so that it "permits the release of some criminal aliens, yet mandates the detention of others convicted of the same crimes, based on whether there is a delay between their release from criminal custody and their apprehension by the Service." Id. at 124.

The Board took issue with the decision of the U.S. District Court for the Western District of Washington in Pastor-Camarena v. Smith, 977 F. Supp. 1415 (W.D. Wash. 1997), and the other district court decisions that held that aliens must be taken into custody for removal proceedings upon release from state custody. The Board criticized Pastor-Camarena for adopting "an incorrect 'historical'" approach based on the notion that immigration law historically distinguished between persons taken into custody from the community at large and those taken into custody directly upon release from the criminal justice system. Id. at 125-26. Pastor-Camarena and its progeny, the Board found, did not lead it "to reject the interpretation that we otherwise find appropriate in view of the statute as a whole." Id. at 126. The Board has also stated that it is not bound to follow the published decision of a federal district court even in cases arising in the same district. See Matter of K-S-, 20 I&N Dec. 715, 718-20 (BIA 1993).

The BIA's interpretation of 236(c)(1) in Matter of Rojas, 23 I&N Dec. 117 (BIA 2001), has not been adopted by most federal district courts that have considered whether 236(c)(1) applies when there is an interval between an alien's release from non-immigration custody and being taken into the custody of DHS. Most federal district courts have held that the "plain language" of 236(c)(1) dictates a temporal requirement that DHS must pick up aliens "when the alien is released," and if Congress intended another interpretation, it would have used other language. These courts are located in

California, Oregon, Washington, Virginia, New Jersey, and Pennsylvania. See Roque v. Chertoff, No. C06 0156 TSZ, 2006 WL 1663620 (W.D. Wash. June 12, 2006); Boonkue v. Ridge, No. CV 04-566-PA, 2004 WL 1146525, at *1-2 (D. Ore. 2004); Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004) ("[B]ecause Petitioner was taken into immigration custody years after he was released from state custody, as opposed to 'when [he was] released' from that custody, INA § 236(c) does not apply."), further proceedings 161 Fed. Appx. 714 (W.D. Wash. Jan. 6, 2006), appeal pending No. 04-70891 (9th Cir. 2006); Tenrreiro v. Ashcroft, 2004 WL 1354277, *2 (D. Ore. Jun 14, 2004) (relying on Quezada-Bucio), vacated and transferred on reconsideration, 2004 WL 1588217 (D. Ore. Jul 12, 2004) (vacated on jurisdictional grounds); Alikhani v. Fasano, 70 F. Supp. 2d 1124 (S.D. Cal. 1999) (finding that "when" means "just after the moment that" so that mandatory detention only applies to aliens who are detained at the time of their release); Velasquez v. Reno, 37 F. Supp. 2d 663, 672 (D.N.J. 1999) (holding that the plain language of the statute provides that an alien is to be taken into custody at the time the alien is released); Grant v. Zemski, 54 F. Supp. 2d 437, 443 (E.D. Pa. 1999); Aguilar v. Lewis, 50 F. Supp. 2d 539, 544 (E.D. Va.1999); Alwaday v. Beebe, 43 F. Supp. 2d 1130, 1133 (D. Ore. 1999); Velasquez v. Reno, 37 F. Supp. 2d 663, 672 (D.N.J. 1999); Pastor-Camarena v. Smith, 977 F. Supp. 1415, 1417 (W.D. Wash. 1997).

Only the federal district courts in Texas have concluded that section 236(c)(1) does not provide a temporal limitation on the authority of DHS to take aliens into mandatory detention upon their release from non-DHS custody. See Okeke v. Pasquarell, 80 F. Supp. 2d 635 (W.D. Tex. 2000); Serrano v. Estrada, 201 F. Supp. 714 (N.D. Tex. 2002) (holding that there is no retroactivity concern with the application of INA § 236(c)(1) to aliens taken into detention after the IIRIRA permanent rules became effective). The Ninth Circuit, however, has found that a prior version of 236(c)(1) that used the phrase "upon release" did not require INS to take aliens into custody immediately upon their release from non-immigration custody. California v. United States, 104 F.3d 1086, 1094-95 (9th Cir. 1997) ("upon release" language of predecessor statute does not require immigration authorities to take aliens into custody immediately upon their release from state incarceration; decision of when to arrest criminal aliens is committed to agency discretion and is not reviewable), cert. denied, 522 U.S. 806 (1997).

At least two federal district courts have stated that DHS has a reasonable period of time under INA § 236(c)(1) to pick up an alien upon release from state custody. See Zabadi v. Chertoff, No. C 05-03335 WHA, 2005 WL 1514122, at *5 (N.D. Cal. 2005) ("This order holds that the Department of Homeland Security need not act immediately but has a reasonable period of time after release from incarceration in which to detain."); Grodzki v. Reno, 950 F. Supp. 339, 342 (N.D. Ga.1996) (language "upon release … from incarceration" implies custody commences within reasonable time after release from incarceration). Another court upholding mandatory detention under section 236(c)(1) has distinguished the facts of its case from other federal district court cases based on the length of delay between the alien's release from non-DHS/INS custody and the assumption of custody by DHS/INS. See Serrano v. Estrada, No. 3-01-CV-1916-M, 2002 WL 485699, at *3 (N.D. Tex. March 6, 2002) ("petitioner was taken into INS custody just six months after his release from prison").

F. Arriving Aliens

The Immigration and Nationality Act provides that aliens who are seeking admission to the United States and are subject to grounds inadmissibility must be detained if they do not appear to the inspecting immigration officer to be "clearly and beyond a doubt" entitled to enter. See INA § 235(b)(2)(A). The Immigration Court lacks jurisdiction to redetermine custody/bond for arriving aliens. 8 C.F.R. §§ 236.1(c)(11), 1003.19(h)(2)(i)(B).

Exceptions exist for crewman, stowaways and certain aliens subject to expedited removal, who may be subject to detention under other provisions of law. See INA §§ 235(b)(2)(B), 252(b) (crewmen), 235(a)(2) (stowaways), 235(b)(1)(B)(iii)(IV); Matter of X-K-, 23 I&N Dec. 731 (BIA 2005) (alien amenable to expedited removal who was found to have credible fear and placed in removal proceedings was entitled to bond hearing). Another exception exists for aliens arriving at the land border with Canada or Mexico whom DHS has returned to Canada or Mexico to await their removal hearing, rather than be detained. See INA §§ 235(b)(2)(C).

Refugees are subject to detention one year after they are conditionally admitted to the United States if they have not adjusted status to that of a lawful permanent resident alien. *See* INA § 209(a)(1); Omanovic v. Crawford, 2006 WL 2256630 (D. Ariz. Aug 07, 2006) (No. CV 06-0208-PHX); Andric v. Crawford, 2006 WL 1544184 (D. Ariz. May 31, 2006) (No. CV06-0002-PHX-SRB). Such refugees are properly detained for inspection and examination regarding admissibility. *Id.*

Detention is the norm for arriving aliens. "Congress intended that detention be the 'default' choice, and parole a discretionary exception." Barrera-Echavarria v. Rison, 44 F.3d 1441, 1446 (9th Cir. 1995) (en banc), cert. denied, 516 U.S. 976 (1995). "[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a [removal] proceeding under section 240 of this title." INA § 235(b)(2)(A) (emphasis added); see Tineo v. Ashcroft, 350 F.3d 382, 385-386 (3d Cir. 2003) (applying this provision to a returning LPR who was removable for his criminal convictions).

An arriving alien has the burden of proving that he or she is "clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212." INA § 240(c)(2), 8 C.F.R. § 1240.8(c).[3] "An alien's freedom from detention is only a variation on the

[3] The Government has the burden of proving the inadmissibility of arriving aliens with a colorable claim to lawful permanent residence, according to preexisting law. See Landon v. Plasencia, 459 U.S. 21, 35 (1982); Matter of Huang, 19 I&N Dec. 749, 754 (BIA 1988). A returning permanent resident alien is regarded as an "arriving alien" seeking admission if the alien falls within one of the following categories of INA § 101(a)(13)(C):

a. has abandoned or relinquished that status;
b. has been absent from the United States for a continuous period in excess of 180 days;
c. has engaged in illegal activity after having departed the United States;

alien's claim of an interest in entering the country." Clark v. Smith, 967 F.2d 1329, 1332 (9th Cir. 1992) (upholding INS detention of alien seeking entry to the United States, during INS appeal from IJ decision granting withholding).

The decision to detain or release arriving aliens on parole, pending a determination of their admissibility, is within the sole discretion of the Department of Homeland Security. See 8 C.F.R. § 212.5. In enacting IIRIRA, the House Judiciary Committee stated that parole is to be used sparingly:

> Parole should only be given on a case-by-case basis for specified urgent humanitarian reasons, such as life-threatening humanitarian medical emergencies, or for specified public interest reasons, such as assisting the government in a law-enforcement-related activity. It should not be used to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.

H.R. Rep. 104-469(I) March 4, 1996, 104th Cong., 2nd Sess. 1996, 1996 WL 168955, at 141 (Immigration in the National Interest Act of 1995); see also Haddam v. Reno, 54 F. Supp. 2d 602, 609 (E.D. Va. 1999) (alien bears a "heavy" burden of showing that the public interest warrants parole).

No Joseph Hearing

The regulations governing custody proceedings before the Immigration Court expressly provide that an Immigration Judge may not redetermine the conditions of custody imposed by DHS with respect to arriving aliens in removal proceedings. See 8 C.F.R. § 1003.19(h)(2)(i)(B). The Board of Immigration Appeals has already held that an Immigration Court has no authority under the regulations over the custody and detention of arriving aliens and is without regulatory authority to consider the bond request of an arriving alien. See Matter of X-K-, 23 I&N Dec. 731, 732 (BIA 2005) ("There is no question that Immigration Judges lack jurisdiction over arriving aliens who have been placed in section 240 removal proceedings, because they are specifically listed at 8 C.F.R. § 1003.19(h)(2)(i)(B) as one of the excluded categories."); Matter of Oseiwusu, 22 I&N Dec. 19, 20 (BIA 1998).

Moreover, the BIA's decision in Matter of Joseph, 22 I&N Dec. 799 (BIA 1999), appears to be inapplicable to custody proceedings involving aliens designated by the DHS as arriving aliens because 8 C.F.R. § 1003.19(h)(2)(ii), the regulation upon which this Board

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> d. has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under the INA and extradition proceedings;
> e. has committed an offense identified in section 212(a)(2) of the Act, unless since such offense the alien has been granted relief under sections 212(h) or 240A(a) of the Act, or;
> f. is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

relied in Joseph, does not provide authority for an Immigration Judge to make a determination that an alien is improperly included within 8 C.F.R. § 1003.19(h)(2)(i)(B).

In this regard, 8 C.F.R. §§ 1003.19(h)(2)(i)(B) and 1003.19(h)(2)(ii), prohibiting an Immigration Judge from inquiring into whether an alien is properly designated as an arriving alien for purposes of asserting jurisdiction over the custody proceeding of an alien designated as an arriving alien by the DHS, are consistent with long-standing immigration law. See Matter of Lepofsky, 14 I&N Dec. 718, 718 (BIA 1974); Matter of Conceiro, 14 I&N Dec. 278, 279-82 (BIA 1973), aff'd, Conceiro v. Marks, 360 F. Supp. 454 (S.D.N.Y. 1973).

Judicial Review

Judicial review of the DHS or the Attorney General's decision to deny parole is a highly deferential one that need determine only whether there is a "facially legitimate and bona fide reason" supporting the decision. See Jean v. Nelson, 472 U.S. 846, 853 (1985); Fiallo v. Bell, 430 U.S. 797, 798-99 (1977); Kleindienst v. Mandel, 408 U. S. 753, 770 (1972); Haddam v. Reno, 54 F. Supp. 2d 602, 608-09 (E.D.Va. 1999) (the deferential review "requires only that the district director articulate a permissible reason for his action and identify the factual basis in the record for that reason"). "If such a reason is advanced, the denial of parole is essentially unreviewable." Nadarajah v. Gonzales, 443 F.3d 1069, 1082 (9th Cir. 2006) (citing Noh v. INS, 248 F.3d 938, 942 (9th Cir.2001)).

IV. PROLONGED PRE-ORDER DETENTION

Two federal circuit courts have concluded that DHS cannot detain an alien for a prolonged period of time without affording the alien an opportunity to have the Immigration Court make an individualized custody/bond determination under INA § 236(a) and 8 C.F.R. § 1003.19(d). See Nadarajah v. Ashcroft, 443 F.3d 1069 (9th Cir. 2006); Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003).

In these decisions, the circuit courts read the Supreme Court's five-to-four majority decision in Demore v. Kim, 538 U.S. 510, 514 (2003), as authorizing mandatory detention of removable aliens only for "the brief period necessary for their removal proceedings." See Nadarajah, 443 F.3d at 1080; Ly, 351 F.3d at 270-71. The Supreme Court noted that removal proceedings normally proceed expeditiously:

> The Executive Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to [INA § 236(c)], removal proceedings are completed in an average time of 47 day and a median of 30 days. In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter.

Demore, 538 U.S. at 529 (internal citations omitted).

Justice Anthony Kennedy provided the fifth vote for the majority, and he wrote that there exists a point at which the length of detention becomes so egregious that it can no longer be said to be "reasonably related" to an alien's removal. Id. at 532 (Kennedy, J., concurring). He stated that "since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." Id. at 532 (Kennedy, J., concurring).

In Nadarajah, the U.S. Court of Appeals for the Ninth Circuit ordered the release on parole of an arriving, inadmissible alien who had been detained for nearly five years pending the completion of his removal proceedings. Nadarajah, 443 F.3d at 1069. The case had been certified to the Attorney General for review after the BIA upheld the Immigration Court's decision granting asylum and protection under the Convention Against Torture. The Ninth Circuit held that DHS abused its decision in not granting parole, and the circuit ordered the alien's release.

The Ninth Circuit concluded that DHS cannot continue to detain an alien when there is no significant likelihood of his removal in the reasonably foreseeable future. The Ninth Circuit applied the six-month limitation on post-final-order detention from Zadvydas v. Davis, 533 U.S. 678 (2001), and Clark v. Martinez, 543 U.S. 371 (2005), to pre-final-order detention. The circuit stated: "[W]e conclude that after a presumptively reasonable six-month detention, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." 443 F.3d at 1078.

The Ninth Circuit decision in Nadarajah seems most clearly to apply to an alien detained more than six months who has been granted relief or found non-removable by the Immigration Court. But it may also affect those cases where DHS has detained an alien more than six months without a ruling on removability from the Immigration Court. In those cases, DHS might be forced to present its case in district court on a petition for writ of habeas corpus for the district court to decide whether "there is no significant likelihood of removal in the reasonably foreseeable future." Id. at 1079-80.

The Ninth Circuit in Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005), also recognized a limitation on the duration of detention during removal proceedings. The alien had been deprived of his liberty by DHS for a period of over two years and eight months under INA § 236(c)(1). In a brief, three-paragraph opinion, a divided panel of the Ninth Circuit recognized the "substantial powers" of Congress with regard to aliens but found it "constitutionally doubtful that Congress may authorize imprisonment of such duration for lawfully admitted resident aliens who are subject to removal." Id. at 1242 (per opinion of Noonan, C.J., and opinion of Tashima, C.J., concurring in judgment). Consequently, the court remanded to the district court with directions to grant the writ of habeas corpus

unless the government within 60 days provided the alien with a bond hearing before an Immigration Judge.

The Sixth Circuit observed that the Supreme Court's decision in Demore "specifically indicated that [detentions pending removal] were usually relatively brief, but it did not specifically hold that any particular length of time in a specific case would be unreasonable or unconstitutional." Ly v. Hansen, 351 F.3d 263, 270 (6th Cir. 2003). The Sixth Circuit concluded that the proper interpretation of Demore was to "[construe] the pre-removal detention statute to include an implicit requirement that removal proceedings be concluded within a reasonable time, [thereby avoiding] the need to mandate the procedural protections that would be required to detain deportable aliens indefinitely." Ly, 351 F.3d at 270. Therefore, the Sixth Circuit "affirm[ed] the grant of habeas corpus and the district court's finding that the incarceration for 18 months pending removal proceedings is unreasonable, [without requiring] the United States to hold bond hearings for every criminal alien detained under § 236." Id. The court stressed that Ly's case was not the norm in part because his deportation to Vietnam was not foreseeable due to that country's lack of a repatriation agreement with the United States. When actual removal is not reasonably foreseeable, the government may not continue to detain deportable aliens without a showing of a "strong special justification" by the government that overbalances the alien's liberty interest. Id. at 273.

At least one circuit court, however, has declined to distinguish Demore and to apply the principles of Zadvydas to find prolonged detention under section 236(c) unconstitutional, regardless of the length of the alien's detention. In Soberanes v. Comfort, 388 F.3d 1305 (10th Cir. 2004), the Tenth Circuit found the detention of more than two years pending judicial review of a final removal order "neither indefinite nor potentially permanent like the detention held improper in *Zadvydas*" but rather "directly associated with a judicial review process that has a definite and evidently impending termination point" which was more "more akin to detention during the administrative review process" upheld in Demore. 388 F.3d at 1311.

A federal district court has determined that Ly v. Hansen and Nadarajah v. Gonzales require a finding that there is no significant likelihood of the alien's removal from the United States in the reasonably foreseeable future. Hussain v. Gonzales, -- F.Supp.2d --, 2007 WL 1805157 (E.D.Wis. May 22, 2007). Absent such a finding, neither case supports a petition for habeas corpus. Id.

In any event, the remedy for a violation of due process for prolonged detention under INA § 236(c)(1) is a custody/bond hearing before the Immigration Court. See Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) ("We remand to the district court with directions to grant the writ unless the government within 60 days of this order provides a hearing to Tijani before an Immigration Judge with the power to grant him bail unless the government establishes that he is a flight risk or will be a danger to the community."); Ly v. Hansen, 351 F.3d 263, 265 (6th Cir. 2003). Federal courts have upheld lengthy detention when the alien had been afforded a custody/bond hearing before an Immigration Court. See, e.g., Doherty v. Thornburgh, 943 F.2d 204, 209-11 (2d Cir. 1991) (upholding detention without

bond of criminal alien pending deportation, even though detention was prolonged for 8 years), cert. dismissed sub nom. Doherty v. Barr, 503 U.S. 901 (1992); Agyeman v. INS Assistant District Director Coachman, 74 Fed. Appx. 691, at *1 (9th Cir. 2003) ("Even though Agyeman has been detained by the INS for over six years, his detention is constitutionally valid.").

V. DISCRETIONARY DETENTION UNDER INA § 236(a)

If a detained alien is not required to be detained under INA § 236(c)(1)'s mandatory detention provisions, INA § 236(a) "provides general authority for the detention of aliens pending a decision on whether they should be removed from the United States." Matter of Guerra, 24 I&N Dec. 37, 37-38 (BIA 2006).

The Supreme Court noted over 50 years ago that Congress placed discretion in the Attorney General to detain aliens without bond: "[D]iscretion was placed by the 1950 [Internal Security] Act in the Attorney General to detain aliens without bail." Carlson v. Landon, 342 U.S. 524, 539 (1952) (interpreting § 23 of the Internal Security Act). INA § 236(a) is "virtually identical" to the pertinent section of the 1950 Internal Security Act. United States ex rel. Barbour v. District Director, 491 F.2d 573, 577 (5th Cir. 1974) ("The wording in Section 242(a) [now Section 236(a)] is virtually identical to that in Section 23 of the Internal Security Act of 1950."). Thus, INA § 236(a) provides the same authority to detain aliens without bond that the Supreme Court recognized long ago.

On the other hand, INA § 236(a) gives the Attorney General discretionary authority to release the alien on bond if the Attorney General concludes, in the exercise of his broad discretion, that the detainee's release on bond is warranted:

> [S]ection 236(a) of the Act merely gives the Attorney General the authority to grant bond if he concludes, in the exercise of discretion, that the alien's release on bond is warranted. The courts have consistently recognized that the Attorney General has extremely broad discretion in deciding whether or not to release an alien on bond.

Matter of Guerra, 24 I&N Dec. 37, 39 (BIA 2006); see also United States ex rel. Barbour v. District Director, 491 F.2d 573, 578 (5th Cir. 1974) (release on bail is a form of discretionary relief); Makarian v. Turnage, 624 F.Supp. 181 (S.D. Cal. 1985) (Attorney General has "wide discretion in determining whether and under what conditions to release person pending final deportability determination").

Immigration Judges now exercise this discretionary authority. INA § 236(a) empowers the Attorney General to delegate to Immigration Judges the discretionary authority either to continue to detain or to release an alien in removal proceedings, pending an administratively final order of removal. See INA §§ 101(b)(4), 236(a). "The Attorney General has delegated this authority to the Immigration Judges." Matter of Guerra, 24 I&N Dec. at 38; compare 8 C.F.R. § 1003.10 (IJs exercise powers assigned by the

Attorney General), with 8 C.F.R. § 1003.19(a) (IJs have power to conduct bond hearings).

A. Classes of Aliens for which the IJ has No Jurisdiction to Redetermine Custody

The Immigration Courts are without authority to redetermine the conditions of custody for certain classes of aliens listed in the regulation at 8 C.F.R. § 1003.19(h)(2)(i)(D). See 8 C.F.R. §§ 236.1(c)(11). Some of these classes of aliens are subject to mandatory detention. See INA §§ 236(c)(1), 235(b)(2)(A). Others are not. Nevertheless, the Attorney General has, by regulation, exercised his discretionary authority under INA § 236(a) not to release those classes of aliens. See Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed.Reg. 27441, 27443 (May 19, 1998) (citing cases in support of the proposition: "Agencies may resolve matters of general applicability through the promulgation of rules even if a statutory scheme requires individualized determination unless Congress has expressed an intent to withhold that authority."); cf. Matter of D-J-, 23 I&N Dec. 572, 583 (AG 2003) ("The Attorney General is broadly authorized to detain respondent and deny his request for bond, based on any reasonable consideration individualized or general, that is consistent with the Attorney General's statutory responsibilities."). Therefore, the classes of aliens listed in 8 C.F.R. § 1003.19(h)(2) are excluded from the Immigration Courts' custody jurisdiction under INA § 236(a). Matter of X-K-, 23 I&N Dec. 731, 732 (BIA 2005).

The regulation provides as follows:

> (i) Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub.L. 104-208, [on October 8, 1998] an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:
>
> (A) Aliens in exclusion proceedings;
>
> (B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act;
>
> (C) Aliens described in section 237(a)(4) of the Act ["Security and related grounds"];
>
> (D) Aliens in removal proceedings subject to section 236(c)(1) of the Act (as in effect after expiration of the Transition Period Custody Rules) [on October 8, 1998]; and

> (E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Pub.L. 104-132) [aliens convicted of an aggravated felony].
>
> (ii) Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 1235 or 1236 of this chapter. In addition, with respect to paragraphs (h)(2)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.

8 C.F.R. § 1003.19(h)(2)(i).

The phrase "described in" in this regulation implies a broad reading of the detention ground stated in the referenced statute; the phrase does not require that the alien be charged with removability under INA § 237(a)(4). See Matter of Kotliar, 24 I&N Dec. 124, 126 (BIA 2007); United States v. Barial, 31 F.3d 216, 218 (4th Cir. 1994) (as used in a criminal probation statute, "described in" is "a term that necessarily calls for a broader reading" and means that "the focus is upon the type of conduct involved").

B. Burden of Proof

An alien detained pending a decision as to whether he or she is to be removed from the United States does not have a right to be released on bond. Matter of Guerra, 24 I&N Dec. 37, 39 (BIA 2006); Matter of D-J-, 23 I&N Dec. 572, 575 (AG 2003). The old legal standard for bond hearings set forth in by the BIA in Matter of Patel, 15 I&N Dec. 666 (BIA 1976), which held that there is a presumption against detention, is no longer the correct legal standard. Patel involved the application of a detention statute that is no longer in effect. See Matter of Valdez, 21 I&N Dec. 703, 716-17 (BIA 1997) (discussing Matter of Patel).

Bond hearings are now typically governed by INA § 236(a). In discretionary bond determinations under INA § 236(a), an alien in removal proceedings has the burden of demonstrating that the alien's release would not pose a danger and that the alien is likely to appear for any future hearings and possible removal:

> An alien in a custody determination under [INA § 236(a)] must establish that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight. An alien who presents a danger to persons or property should not be released during pendency of removal proceedings.

Matter of Guerra, 24 I&N Dec. 37, 38 (BIA 2006); see Matter of Adeniji, 22 I&N Dec. 1102, 1111-1112 (BIA 1999) (citing 8 C.F.R. § 1236.1(c)(8)) (an alien in removal proceedings has the burden of demonstrating that the alien's "release would not pose a

danger to persons or property and that the alien is likely to appear for any future proceeding").

1. Threat to National Security

An alien who poses a threat to national security should be detained as a matter of discretion. See Doherty v. Thornburgh, 943 F.2d 204, 211 (2d Cir. 1991) ("Although Doherty does not appear to pose any direct threat to individual citizens, we already have noted that, due to his PIRA affiliation, he may constitute a more general threat to national security, [citation omitted], which is also a proper basis for detention, [citation omitted]. We believe that these considerations provide a valid basis for the continuing denial of bail under section 1252 [now INA section 236(a)], notwithstanding the unusually long detention that has resulted."), cert. dismissed, 503 U.S. 901 (1992); United States ex rel. Barbour v. INS, 491 F.2d 573, 578 (5th Cir. 1974) ("There is no question of the Attorney General's discretion under Section 242(a) [now Section 236(a)] of the Act to continue an alien in custody during deportation proceedings upon a properly-made determination that the release of an alien would be a danger to the national security of the United States.").

"The Supreme Court has acknowledged … that where terrorism is a concern, 'special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.'" Hussain v. Gonzales, -- F.Supp.2d --, 2007 WL 1805157 (E.D.Wis. May 22, 2007) (quoting Zadvydas v. Davis, 533 U.S. at 696).

In matters involving national security, DHS may consider a wide range of information about the alien to determine whether the alien should be released. Such evidence may include any law enforcement or intelligence information indicating that the alien has used force or violence to oppose the U.S. government or has promoted or engaged in terrorist-related activities. See Carlson v. Landon, 342 U.S. 524, 541 (1952); Haddam v. Reno, 54 F. Supp.2d 602, 610 (E.D. Va. 1999) (upholding district director's decision to deny parole to alien who posed a national security risk and a risk of absconding; "the district director has pointed to information from the Department of State, the F.B.I., and Interpol suggesting Haddam's association with terrorism and other violent activities").

In Matter of D-J-, 23 I&N Dec. 572 (AG 2003), the Attorney General directed the BIA and Immigration Courts to consider national security interests in bond proceedings involving an influx of illegal aliens who arrived by sea and were arrested and detained pending a decision on their removal. Citing his authority under INA § 236(a), the Attorney General determined that the release of the respondent and the other illegal aliens on bond "was and is unwarranted due to considerations of sound immigration policy and national security that would be undercut." Id. at 574. He continued, "I further determine that respondent has failed to demonstrate adequately that he does not present a risk of flight if released on bond and that he should be denied bond on that basis as well." Id. The Attorney General did not specify what factors aside from national security interests might be considered in addition to danger to the community and flight risk. Such additional factors will be determined on a case-by-case basis.

The reader should refer to ICE OPLA's National Security Law Division materials for further information about national security grounds for detention.

2. Danger to the Community

A detained alien in removal proceedings must establish that he or she does not present a danger to persons or property before the issue of his or her flight risk, and the amount of bond necessary to ensure his or her presence at removal proceedings, become relevant. See Matter of Adeniji, 22 I&N Dec. 1102, 1113 (BIA 1999) (in bond proceedings under section 236(a) of the Act, "the alien must demonstrate that 'release would not pose a danger to property or persons'") (citing Matter of Drysdale, 20 I&N Dec. 815, 817 (BIA 1994) ("First, if the alien cannot demonstrate that he is not a danger to the community upon consideration of the relevant factors, he should be detained in the custody of the Service. [Citations omitted] However, if an alien rebuts the presumption that he is a danger to the community, then the likelihood that he will abscond becomes relevant.")). "An alien who presents a danger to persons or property should not be released during pendency of removal proceedings." Matter of Guerra, 24 I&N Dec. 37, 38 (BIA 2006).

An alien convicted of an aggravated felony who was released from criminal custody before October 8, 1998, is not subject to mandatory detention under INA § 236(c)(1) but is presumed to pose a danger to persons or property and is to be held without bond unless the alien proves otherwise. Compare Matter of Adeniji, 22 I&N Dec. 1102, 1107-13 (BIA 1999) (holding that INA section 236(c)(1) requires mandatory detention of a criminal alien only if he or she is released from criminal custody after the TPCR expired on October 8, 1998), with Matter of Drysdale, 20 I&N Dec. 815, 817 (BIA 1994) (stating presumption), and Matter of Noble, 21 I&N Dec. 672, 673-86 (BIA 1997) (same).

Danger to persons or property is not limited to the threat of violence. It includes drug trafficking. See Matter of Guerra, 24 I&N Dec. 37, 41 (BIA 2006) (upholding IJ decision to detain alien without bond based on criminal complaint that the alien was involved in an alleged controlled substance trafficking scheme); Matter of Melo, 21 I&N Dec. 883, 885 n. 2 (BIA 1997) (holding that distribution of drugs is a danger to the safety of persons that requires his detention); Matter of Drysdale, 20 I&N Dec. 815, 818 (BIA 1994) (commission of a serious drug trafficking crime presents a danger to the community). It also includes non-violent property crimes. See Jones v. United States, 463 U.S. 354, 364-65 (1983) (approving civil commitment based on finding of insanity in criminal trial for petit larceny: "The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. … We do not agree with petitioner's suggestion that the requisite dangerousness is not established by proof that a person committed a non-violent crime against property. This Court never has held that 'violence,' however that term might be defined, is a prerequisite for a constitutional commitment.").

The duty of the alien's counsel to disclose the danger posed by his client is a developing area of law. The American Bar Association (ABA) Model Code of Professional

Responsibility (1969) and the ABA Model Rules of Professional Conduct (1983) permit disclosure when a client threatens to seriously injure or kill a third person, but do not require it. See ABA Model Code DR 4-101(C) ("A lawyer may reveal ... [t]he intention of his client to commit a crime and the information necessary to prevent the crime."); ABA Model Rule 1.6(b)(1) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary ... to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."). Most jurisdictions have enacted the ABA version of this permissive rule. However, at least a dozen jurisdictions require a lawyer to reveal client confidential information to prevent the client from inflicting serious bodily harm or death upon a third party. See Ariz. S. Ct. Rule 42 RPC 1.6(b); Conn. RPC 1.6(b); Fla. St. Bar Rule 4-1.6(b); Ill. St. S. Ct. RPC 1.6; Nev. St. S. Ct. RPC 156(2); N.J. R. RPC 1.6(b)(1); N.M. R. RPC 16-106(B); N.D. R. RPC 1.6(a); Tex. St. RPC 1.05; Va. R. S. Ct. Pt. 6 § 2, C.P.R. DR. 4-101; Wash. St. RPC 1.6(b)(1); Wis. St. RPC S.C.R. 20:1.6.

There are no reported cases where a court has imposed pecuniary liability on a lawyer for failure to warn a third party of a client's threats to seriously harm or kill the third party. See Note, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. OF GENDER AND LAW 207, 232 (2003); Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Physical Harm or Death*. 36 IDAHO L. REV. 479, 481 (2000). Courts, however, have considered the issue with respect to other professional relationships, notably the mental health therapist-patient relationship, and have found liability when the professional has failed to warn a victim when the professional learned that the client or patient intended to cause serious harm to a specific, identifiable victim. See, e.g., O'Keefe v. Orea, 731 So. 2d 680, 684-86 (Fla. Dist. Ct. App. 1st Dist. 1998), review denied, 725 So. 2d 1109 (Fla. 1998); Petersen v. State, 100 Wash. 2d 421, 426-29, 671 P.2d 230, 236-37 (1983); Tarasoff v. Regents of University of California, 13 Cal. 3d 177, 118 Cal. Rptr. 129, 132-33, 529 P.2d 553, 557-58 (1976). Courts could begin to impose liability on lawyers without forewarning. See State v. Hansen, 122 Wash. 2d 712, 721, 862 P.2d 117, 122 (1993) ("Whether a threat is a true or real threat is based on whether the attorney has a reasonable belief that the threat is real. We hold that attorneys, as officers of the court, have a duty to warn of true threats to harm members of the judiciary communicated to them by clients or by third parties.") (distinguishing Hawkins v. King County, 24 Wash. App. 338, 602 P.2d 361 (1979), where appellate court declined to find a common law duty on the part of an attorney to warn of a client's intent to inflict serious injury on a third person).

3. Flight Risk

An alien in removal proceedings bears the burden of proving that he or she does not present a threat to the community and a risk of flight from further proceedings. See Matter of Adeniji, 22 I&N Dec. 1102, 1111-13 (BIA 1999). Whether an alien has rebutted the presumption against his or her release is a two-step analysis and, unless the alien demonstrates that he or she is not a danger to the community, the alien should be detained in DHS custody. See Matter of Drysdale, 20 I&N Dec. 815, 817 (BIA 1994).

Only where the alien has rebutted the presumption that he or she is a danger to the community does the likelihood that he or she will abscond become relevant. Id.

Detaining an alien without bond is warranted when circumstances present a "strong risk that the respondent will flee rather than appear for the deportation process." Matter of Khalifah, 21 I&N Dec. 107, 111 (BIA 1995). Illegal presence or negative immigration history is an indicator of flight risk. See, e.g., Matter of Melo, 21 I&N Dec. 883, 886 (BIA 1997); Matter of Drysdale, 20 I&N Dec. 816-17.

A number of BIA decisions have addressed the following matters that may be considered in deciding whether an alien poses a flight risk:

1. Whether the alien has had a fixed address in the United States. See Matter of X-K-, 23 I&N Dec. 731, 736 (BIA 2005) (noting that, for many aliens, "the recency of their arrival and their apprehension by immigration officials so close to our borders may prove to be an indicator that they lack a stable address and work history, family ties, or other favorable factors to support a discretionary release on bond"); Matter of P-C-M-, 20 I&N Dec. 432, 435 (BIA 1992) (noting that the alien "appears to have moved frequently since entering the country").

2. Length and circumstances of residence in the United States. See Matter of X-K-, 23 I&N Dec. at 736; Matter of Shaw, 17 I&N Dec. 177, 179 (BIA 1979) ("There is no statement as to where the respondent resided in the country, how long he lived there, or with whom he lived.").

3. Family ties in the United States, particularly family members who can confer immigration benefits on the alien. See Matter of P-C-M-, 20 I&N Dec. at 434 ("The respondent has no family in the United States and no other community ties."); Matter of Shaw, 17 I&N Dec. at 179 ("Other than an indication that he has a lawful permanent resident uncle in this country, there is in fact no evidence at all of community ties of any nature which would suggest his continuing availability for future immigration proceedings."); Matter of Patel, 15 I&N Dec. 666, 667 (BIA 1979).

4. Employment history in the United States, including its length and stability. See Matter of P-C-M-, 20 I&N Dec. at 435 (noting that the alien "has no history of steady employment"); Matter of Shaw, 17 I&N Dec. at 179 ("There is nothing of record regarding the respondent's employment history, or even an indication of whether he was employed at the time of his arrest."); Matter of Patel, 15 I&N Dec. at 667.

5. Immigration record and manner of entry, including surreptitious or fraudulent entries or subsequent conduct contrary to the terms of an alien's lawful admission such as use of aliases and false documents. See Matter of Shaw, 17 I&N Dec. at 179 n. 3 ("[A] greater bond will ordinarily be warranted in the case of a respondent who entered the United States unlawfully (through evasion of immigration authorities or use of a false identity) than in the case of a respondent, otherwise similarly situated, who has entered this country lawfully using a true identity."); Matter of San Martin, 15 I&N Dec. 167, 169 (BIA 1974) (alien "used

a surreptitious method to return to the United States after deportation" that shows "disrespect for lawful process"); Matter of Moise, 12 I&N Dec. 102, 104-05 (BIA 1967) (violating in-transit without visa privileges by remaining to accept employment).

6. Attempts to escape from authorities or other flights to avoid prosecution. Matter of Patel, 15 I&N Dec. at 666.

7. Prior failures to appear for scheduled court proceedings. See Matter of Shaw, 17 I&N Dec. at 178; Matter of San Martin, 15 I&N Dec. at 168-69 (flight to avoid criminal prosecution).

8. Criminal record, including extensiveness, recency and seriousness, indicating consistent disrespect for law and ineligibility for relief from deportation. See Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006) ("Immigration Judges are not limited to considering only criminal convictions in assessing whether an alien is a danger to the community."); Matter of Andrade, 19 I&N Dec. 488, 489-91 (BIA 1987); Matter of Shaw, 17 I&N Dec. at 178-79; Matter of Patel, 15 I&N Dec, at 667. An alien's criminal record is relevant to the setting of his bond because it is indicative of character traits that may indicate whether he is likely to abscond. Matter of P-C-M-, 20 I&N Dec. at 435 (finding that the alien's convictions "reflect adversely on his character with respect to his potential for absconding upon release"); Matter of Andrade, 19 I&N Dec. at 489-91. An alien's early release from prison on parole does not necessarily reflect rehabilitation and, therefore, such facts do not carry significant weight in determining the alien's flight risk. Matter of Andrade, 19 I&N Dec. 488, 490-91 (BIA 1987).

9. Being subject to prosecution for a serious crime in the country to which DHS seeks to remove him. See Matter of Khalifah, 21 I&N Dec. 107, 111 (BIA 1995) (upholding detention without bond of an alien wanted in Jordan for financial support of bombing attacks on cinemas that resulted in injuries).

10. Probable ineligibility for relief from removal. See Bertrand v. Sava, 684 F.2d 204, 217 n. 16 (2d Cir. 1982) ("The fact that the petitioners are unlikely to succeed on their immigration applications … suggests that they pose … a risk [to abscond] if [released]."); Matter of Drysdale, 20 I&N Dec. 815, 818 (BIA 1994) (holding that an alien's ineligibility for any form of relief from deportation is a factor that contributes to the likelihood that the alien will not appear for his deportation hearing); Matter of Ellis, 20 I&N Dec. 641, 643 (BIA 1993). An alien who is likely to be awarded relief from deportation is considered more likely to appear for deportation proceedings than one who is unlikely to be awarded relief. Matter of Andrade, 19 I&N Dec. at 491. "Some aliens may demonstrate to the Immigration Judge a strong likelihood that they will be granted relief from removal and thus have great incentive to appear for further hearings." Matter of X-K-, 23 I&N Dec. 731, 736 (BIA 2005). Where the alien has been found removable and denied relief by the Immigration Court, the alien is likely to fail to appear for removal and this justifies an increased bond. See Matter of Drysdale, 20 I&N Dec. 815, 818 (BIA 1994) (ineligibility for relief was a proper consideration in determining bond); Matter of Sugay, 17 I&N Dec. 637, 640

(BIA 1981) (fact that IJ had ordered alien deported and relief denied combined with new evidence to justify increasing the amount of bond).

"An Immigration Judge has broad discretion in deciding the factors that he or she may consider in custody determinations. The Immigration Judge may choose to give greater weight to one factor over others, as long as the decision is reasonable." Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006) (upholding IJ's determination that evidence of serious criminal activity, even though it had not resulted in a conviction, outweighed other factors, such that release on bond was not warranted).

The Immigration Court should not consider what difficulties there may be in executing a final order of removal in redetermining bond. Matter of P-C-M-, 20 I&N Dec. 432 , 434 (BIA 1991) (IJ should not release an alien on the basis that the alien's removal to Angola appears unlikely).

C. Other Bond Factors

Even if the detained alien demonstrates that "release would not pose a danger to persons or property and that the alien is likely to appear for any future proceeding," such a demonstration, however, does not guarantee release because the Attorney General (or the Immigration Court via delegated authority) may deny release as a matter of discretion based on other factors:

> The courts have consistently recognized that the Attorney General has extremely broad discretion in determining whether or not to release an alien on bond. Further, the Act does not limit the discretionary factors that may be considered by the Attorney General in determining whether to detain an alien pending a decision on asylum or removal.

Matter of Guerra, 24 I&N Dec. 37, 39 (BIA 2006) (citations omitted); accord Matter of D-J-, 23 I&N Dec. 572, 575-576 (AG 2003); see also Doherty v. Thornburgh, 943 F.2d 204, 209 (2d Cir. 1991) ("It is axiomatic … that an alien's right to be at liberty during the course of removal proceedings is circumscribed by considerations of the national interest."), cert. dismissed, 503 U.S. 901 (1992).

In Matter of D-J-, the Attorney General directed the BIA and Immigration Courts to consider national security interests in bond proceedings involving an influx of illegal aliens who arrived by sea and were arrested and detained pending a decision on their removal. Citing his authority under INA § 236(a), the Attorney General determined that the release of the respondent and the other illegal aliens on bond "was and is unwarranted due to considerations of sound immigration policy and national security that would be undercut." Id. at 574. He continued, "I further determine that respondent has failed to demonstrate adequately that he does not present a risk of flight if released on bond and that he should be denied bond on that basis as well." Id. The Attorney General did not specify what factors aside from national security interests might be considered in addition

to danger to the community and flight risk. Such additional factors will be determined on a case-by-case basis.

D. Minimum Bond

For an alien in non-mandatory detention, the Immigration Court can either continue to detain the alien or else release the alien on bond of not less than $1,500.00. INA § 236(a) provides that, during pendency of removal proceedings against an arrested and detained alien, the Attorney General, or his delegate "(1) may continue to detain the arrested alien; and (2) may release the alien on – (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole."

There is no provision of the Immigration and Nationality Act for the release of an alien in removal proceedings on his or her own recognizance, without bond. Parole is available only to arriving aliens applying for admission or aliens who are present without admission. See INA § 212(d)(5); "Legal Opinion Discusses Parole for Persons who are not Arriving Aliens," 76 *Interpreter Releases* 1050 (July 12, 1999) (describing August 21, 1998, memorandum of INS General Counsel who concluded that the agency had the authority to parole applicants for admission who were not arriving aliens (e.g., aliens removable under INA § 212(a)(6)(A)(i)). Neither an Immigration Judge nor the BIA has authority to grant parole or to review DHS parole decisions. See Matter of Oseiwusu, 22 I&N Dec. 19, 20 (BIA 1998); Matter of Matelot, 18 I&N Dec. 334, 336 (BIA 1982); Matter of Castellon, 17 I&N Dec. 616 (1981).

No effect should be given to the explanatory comments to the EOIR regulation at 8 C.F.R. § 3.19 (renumbered 8 C.F.R. § 1003.19) that suggest Immigration Judges retain authority to release aliens in removal proceedings on their own recognizance. See 66 Fed. Reg. 54909-02, 54910, 2001 WL 1334025 (October 31, 2001) ("The immigration judge may then reduce the required bond amount, release the alien on his or her own recognizance, or make such other custody decision as the immigration judge finds warranted."). These comments to a regulation cannot change the statutory minimum bond requirement enacted by Congress. See Public Lands Council v. Babbitt, 529 U.S. 728, 745 (2000) (a "regulation cannot change the statute"). The regulation does not authorize the court to release an alien on his or her own recognizance. Therefore, the comment is mere dicta. An agency rule is not binding unless it is legislative in nature and conforms to certain procedural requirements. Moore v. Apfel, 216 F.3d 864, 868 (9th Cir. 2000). "To satisfy the second [requirement], it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." Id. The comment to 8 C.F.R. § 3.19 is merely an explanation of how bond proceedings generally proceed. See Peterson Builders, Inc. v. United States, 26 Ct. Cl. 1227, 1229 n.3 (1992) ("While the court took guidance from the comments to the interim regulations, they are in no way binding upon the court."). It is not a specific grant of authority to release aliens on their own recognizance.

The language of INA § 236(a) makes plain that ordering release on the alien's own recognizance is no longer an option. The IIRIRA regulation on bond provides that an alien may petition the Immigration Judge for "amelioration of the conditions under which he or she may be released ... [and] the Immigration Judge is authorized to exercise the authority in section 236 of the Act to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may released, as provided in § 1003.19 of this chapter." 8 C.F.R. § 236.1(d). This regulation does not change the statutory minimum bond: "While regulations may impose additional or more specific requirements, they cannot eliminate statutory requirements." Hunsaker v. Contra Costa County, 149 F.3d 1041, 1043 (9th Cir. 1998). Since the statutory command is so clear, the "if any" language has been construed as not referring to the statutory floor for release decisions but rather to the ceiling at which bond may be set, although the BIA has not yet issued a published decision.

Congress increased the minimum bond from $500 to $1,500 in section 303 of IIRIRA. Compare INA § 242(a) (1995), with INA § 236(a) (2002). Congress did so because bonds of $500 had become ineffective in assuring that aliens would appear for proceedings or deportation:

> [T]he conclusion that bond levels have often been set too low, sometimes almost ludicrously so, seems inescapable. Unsystematic analyses conducted in a number of districts demonstrate the obvious—that bond breaches decline substantially as the bond amount increases. The current bonding system was established long before the problems of illegal migration and criminal aliens became urgent ones and at a time when INS detention was not a viable option. Indeed, the statutory minimum bond level had been $500 for decades until the new section 236(a)(2)(A) raised the minimum to $1,500. Until now many aliens simply viewed the bond premium (typically only 10% of the bond amount) as a routine cost of doing business, a small price for illegal entry. In part, this pattern of low bonds reflected the fact that bonds seemed to be set at a level designed to assure public safety and aliens' appearance at hearings, whereas bonds set at a level necessary to assure their surrender for actual removal might require a higher bond level.

Peter H. Schuck, *INS Detention and Removal: A "White Paper,"* 11 GEO. IMMIGR. L.J. 667 (1997). Obviously, Congress would not increase the minimum bond to $1,500 from $500 if it wanted Immigration Judges to have the power to avoid setting bond altogether by releasing aliens on their own recognizance, without any bond.

E. Informal Hearing

A bond hearing before the Immigration Court is an informal hearing, and no hearing transcript is usually made. Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977) ("[T]here is no right to a transcript of a bond redetermination hearing. Indeed there is no requirement of a formal 'hearing.'"); Hass v. INS, No. 90 C 5513, 1991 WL 38258 at *4

(N.D. Ill. March 15, 1991) ("The regulations do not provide for a transcript of bond redetermination proceedings. 8 C.F.R. § 242.2(d) [recodified at 8 C.F.R. § 1003.19]. Bond redetermination proceedings are informal and not of record [i.e., not recorded verbatim]. If plaintiff was concerned about the lack of a transcript, he could have requested the Court to provide a court reporter…."). "It is well settled that there is no requirement in bond proceedings for a formal hearing and that informal procedures may be used so long as no prejudice results. As there is no right to discovery in deportation proceedings, no such right exists in the less formal bond hearing procedure." Matter of Khalifah, 21 I&N Dec. 107, 112 (BIA 1995) (citation omitted). The BIA has emphasized: "Our primary consideration in a bail determination is that the parties be able to place the facts *as promptly as possible* before an impartial arbiter." Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977) (emphasis in original). The bond redetermination may be conducted by telephone at the discretion of the Immigration Judge. 8 C.F.R. § 1003.19(b).

A bond hearing is "separate and apart from, and shall form no part of, any deportation or removal hearing." 8 C.F.R. § 1003.19(d); accord Matter of Guerra, 24 I&N Dec. 37, 40 n. 2 (BIA 2006) ("Bond proceedings are separate and apart from the removal hearing."); Matter of R-S-H-, 23 I&N Dec. 629, 630 n. 7 (BIA 2003) ("We note that bond and removal are distinctly separate proceedings."). The Immigration Court and the parties must create a complete and separate record of the custody/bond proceedings:

> The parties and the Immigration Judge are responsible for creating a full and complete record of the custody proceeding. … In any bond case in which the parties or the Immigration Judge rely on evidence from the merits case, it is necessary that such evidence be introduced or otherwise reflected in the bond record (such as through a summary of merits hearing testimony that is reflected in the Immigration Judge's bond memorandum). Otherwise, it will not be part of the bond record available for our review on appeal.

Matter of Adeniji, 22 I&N Dec. at 1115.

"Information adduced during a removal hearing … may be considered during a custody hearing so long as it is made part of the bond record." Matter of Adeniji, 22 I&N Dec. 1102, 1115 (BIA 1999). Moreover, the same Immigration Court can preside at both the bond hearing and removal hearing. Flores-Leon v. INS, 272 F.3d 433, 440 (7th Cir. 2001) (court rejected recusal motion where IJ decided both bond and removability). If the Immigration Court fails to keep the bond hearing separate from the removal proceeding and the alien appeals on that basis, the alien must show that prejudice ensued from the commingling before the BIA will vacate the court's bond determination. Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977).

F. Evidence at Bond Hearings

By regulation, a bond redetermination "may be based on any information that is available." 8 C.F.R. § 1003.19(d). The Federal Rules of Evidence are inapplicable to bond hearings. See United States v. Wadih El-Hage, 213 F.3d 74, 82 (2d Cir. 2000) ("A detention hearing need not be an evidentiary hearing. While the defendant may present his own witnesses and cross-examine any witnesses that the government calls, either party may proceed by proffer and the rules of evidence do not apply."), cert. denied, 531 U.S. 881 (2000); FED.R.EVID. 1101(d)(3) (exempting bail hearings from the evidentiary rules prohibiting the use of hearsay); cf. 18 U.S.C. § 3142(f) ("The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the [bail] hearing.").

The legal standard for admissibility of evidence in a removal hearing is that the evidence be *probative and fundamentally fair*. Lopez-Chavez v. INS, 259 F.3d 1176, 1181 (9th Cir. 2001); Felzcerek v. INS, 75 F.3d 112, 115 (2d Cir. 1996); Bustos-Torres v. INS, 898 F.2d 1053, 1055 (5th Cir.1990); Matter of Ponce-Hernandez, 22 I&N Dec. 784, 785 (BIA 1999). The evidentiary standard in bond hearings is even more relaxed than in a removal hearing. See 8 C.F.R. § 1003.19(d); Matter of Khalifah, 21 I&N Dec. 107, 112 (BIA 1995); Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977). "Any evidence that in the record that is probative and specific can be considered [at a bond hearing]." Matter of Guerra, 24 I&N Dec. 37, 40-41 (BIA 2006) (upholding IJ's reliance on criminal complaint signed by a DEA agent). This is one reason why a bond hearing is "separate and apart from, and shall form no part of, any deportation or removal hearing." See 8 C.F.R. § 1003.19(d); Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977) ("The requirement of a separate bond procedure and record is part of the effort to divorce, as far as possible, the bond matter from the deportation hearing.").

Over 20 years ago, Justice Stephen Breyer, then a circuit judge, wrote that it is a "well-established proposition of law" that detention decisions may be based on proffers of evidence and hearsay offered by the prosecution:

> [M]agistrates and judges traditionally have been permitted to base their decisions, both as to release conditions and as to possible detention, on hearsay evidence, such as statements from the prosecution or the defendants about what they can prove and how. This authority rests primarily upon the need to make the bail decision quickly, at a time when neither party may have fully marshalled all the evidence in its favor. It may also reflect the realization that at least some hearsay on some occasions may be fairly reliable, perhaps more reliable than certain direct evidence. For example, well-kept records, though hearsay, may be more reliable than eyewitness accounts of, say, a road accident on a foggy night. In any event, the need for speed necessarily makes arraignments, "probable cause" determinations, and bail hearings typically informal affairs, not substitutes for trial or even for discovery. Often the opposing parties simply describe to the judicial officer the nature of their evidence; they do not actually produce it.

United States v. Acevedo-Ramos, 755 F.2d 203, 206 (1st Cir. 1985) (Breyer, J.).

Other circuits have held that federal courts have discretion to accept proffers of evidence, without witnesses, at pretrial detention hearings. See United States v. LaFontaine, 210 F.3d 125, 131 (2d Cir. 2000) ("It is well established in this circuit that proffers are permissible both in the bail determination and bail revocation contexts. … [T]his court stated that 'it would [not] be an abuse of discretion for the district court to permit the government to proceed by proffer alone.'"); United States v. Smith, 79 F.3d 1208, 1210 (D.C. Cir. 1996) ("Every circuit to have considered the matter, … permitted the Government to proceed by way of proffer [at a detention hearing]."); United States v. Gaviria, 828 F.2d 667, 669 (11th Cir. 1987) ("We hold that the government as well as the defense may proceed by proffering evidence subject to the discretion of the judicial officer presiding at the detention hearing."); United States v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986) ("As in a preliminary hearing for probable cause, the government may proceed in a detention hearing by proffer or hearsay. [Citations omitted] The accused has no right to cross-examine adverse witnesses who have not been called to testify.").

Where the proffer is disputed, however, the court might be required to allow cross-examination. The Third Circuit has held that the court has discretion to require, in an appropriate case, that the testimony of a witness be presented in person, rather than by hearsay evidence. United States v. Accetturo, 783 F.2d 382 (3d Cir. 1986). The First and Second Circuits reached similar conclusions. See United States v. Acevedo-Ramos, 755 F.2d 203, 207-208 (1st Cir. 1985); United States v. Martir, 782 F.2d 1141 (2d Cir. 1986). The Ninth Circuit has held that there is no right to cross-examine adverse "witnesses" who have not been called to testify. But when there is a proffer from defendant that the Government's proffer was incorrect, the court might be required to allow cross-examination. United States v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986).

G. Bond Decision

As required by regulation at 8 CFR § 1003.19(f), the determination of the Immigration Court on custody/bond shall be entered on the appropriate form at the time the decision is made, and "the parties shall be informed orally or in writing of the reasons for the decision." Where removability is not conceded and the alien appears eligible for bond or other relief, the Immigration Judge may have to make findings of fact and conclusions of law. See Matter of A-P-, 22 I&N Dec. 468 (BIA 1999) (discussing requirements for a summary decision in removal proceedings).

VI. SUBSEQUENT BOND REDETERMINATION

After the Immigration Court has redetermined bond, any request for a subsequent bond redetermination "shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e). There is no limit on the number of bond

redetermination requests that may be filed. Matter of Valles, 21 I&N Dec. 769, 771 (BIA 1997); Matter of Uluocha, 20 I&N Dec. 133, 134 (BIA 1989) ("Bond proceedings are not really 'closed' so long as a respondent is subject to a bond."). However, the Immigration Court can decline to change its last bond decision if there has been no change in circumstances. Matter of Valles, 21 I&N Dec. at 771; Matter of P-C-M-, 20 I&N Dec. 432, 435 (BIA 1992) (finding "no change of circumstances which would warrant relief from the previous bond determination").

Alternatively, either party may submit to the Immigration Court a motion to reconsider the custody/bond decision or a motion to reopen the bond hearing. See Matter of Gordon, 20 I&N Dec. 52, 56 (BIA 1989) (referring to an "immigration judge's inherent power to reopen and reconsider his own decisions"); cf. 8 C.F.R. § 1003.23 (motions to reopen and reconsider in removal proceedings); Matter of Valles, 21 I&N Dec. at 771 ("The bond regulations, which establish unique and informal proceedings, do not specifically address motions to reopen and do not expressly limit a detained alien to one application for modification of the amount or terms of a bond."). A motion to reopen may be appropriate if the Government wants to submit additional evidence to the court that was unavailable but the alien's circumstances have not changed since the court redetermined bond.

VII. BOND REVOCATION

Immigration bond "is a privilege extended … on a contingent, nonabsolute basis, entirely subject to change." Matter of Valdez, 21 I&N Dec. 703, 713 (BIA 1997) (upholding INS rearrest and revocation of bond of an alien who had been released on bond before the Transition Period Custody Rules took effect). DHS may at any time revoke a bond or parole authorized for an alien, rearrest the alien under the original warrant, and detain the alien. INA § 236(b); 8 C.F.R. § 1236.1(c)(9). "[T]he regulations presently provide that when an alien has been released following a bond proceeding, a district director has continuing authority to revoke or revise the bond, regardless of whether the Immigration Judge or this Board has rendered a bond decision." Matter of Valles, 21 I&N Dec. 769, 772 (BIA 1997).

In Matter of Sugay, 17 I&N Dec. 637, 639-40 (BIA 1981), the Board of Immigration Appeals upheld the revocation of bond by INS based on a change of circumstances after the Immigration Court had redetermined bond and reduced it. The BIA ruled that newly developed evidence brought out at the alien's deportation hearing, combined with the fact that the Immigration Court had denied his applications for relief and ordered him deported, represented a considerable change of circumstances that justified the district director's decision to raise the amount of bond. The Board stated: "We find without merit counsel's argument that the District Director was without authority to revoke bond once an alien has had a bond redetermination hearing." Id. at 640.

VIII. BOND APPEALS

Both DHS and the alien have the right to appeal a custody/bond decision by the Immigration Court to the Board of Immigration Appeals. See 8 C.F.R. §§ 1003.19(f), 236.1(d)(3) and 1236.1(d)(3). Either party must file the notice of appeal with the Board within 30 days of the judge's decision. See 8 C.F.R. §§ 1003.19(f). If an alien appeals a DHS decision on bond, the alien must file the notice of appeal within ten (10) days. 8 C.F.R. § 1236.1(d)(3)(ii). In any case, there is no appeal fee. See Board of Immigration Appeals Practice Manual, Ch. 7, 1999 WL 33435432 (2004). The Board will set a briefing schedule, but usually it will not prepare and provide the parties with a transcript of the bond proceeding. Id.

A bond appeal and a removal decision appeal cannot be combined. The briefing schedules are independent of each other. Id. Each requires a separate brief. Combining or simultaneously filing an untimely notice of appeal or untimely brief contesting a bond decision, with a timely notice of appeal or timely brief contesting a removal decision, will not prevent the BIA from rejecting or dismissing the bond appeal. Id. The filing of an appeal does not delay compliance with the bond decision, nor does it stay proceedings or removal. 8 C.F.R. § 1236.1(d)(4).

When appropriate, an Immigration Judge may entertain a subsequent bond redetermination request, even when a previous bond redetermination by the Immigration Judge is on appeal to the BIA. Matter of Valles, 21 I&N Dec. 769, 771 (BIA 1997).

> In bond proceedings, an alien remains free to request a bond redetermination *at any time* without a formal motion, without a fee, and without regard to filing deadlines, so long as the underlying deportation proceedings are not administratively final. In other words, no bond decision is final as long as the alien remains subject to a bond.

Id. (emphasis added).

If a bond redetermination request is granted by an Immigration Judge while a bond appeal is pending with the BIA, any appeal filed by the party making the request is rendered moot. Id. at 773. If the Immigration Court entertains a bond redetermination request during the Government's bond appeal, the Government must notify the BIA in writing, with proof of service on the opposing party, within 30 days, if it wishes to pursue its original bond appeal. Id. at 773.

IX. STAY OF RELEASE FROM DETENTION

If DHS appeals an Immigration Court's bond/custody decision, DHS may request a stay of release from the BIA during the pendency of its appeal or invoke the automatic stay provision. 8 C.F.R. § 1003.19(i).

A. Automatic Stays

In cases where DHS determined an alien should not be released on bond or where bond is set higher at $10,000 or more and the Immigration Court authorizes release of the alien, on bond or otherwise, the DHS can obtain a temporary automatic stay of release by filing a notice of intent to appeal custody redetermination (Form EOIR-43) within one (1) day of the issuance of the Immigration Judge's order. 8 C.F.R. § 1003.19(i)(2). ICE OPLA headquarters must approve any Form EOIR-43 before it is filed. Upon filing of the form, release is automatically stayed until the BIA decides the bond appeal. Id.; Matter of Joseph, 22 I&N Dec. 660 (BIA 1999), clarified, Matter of Joseph, 22 I&N Dec. 799 (BIA 1999).

If the DHS fails to file an appeal with the BIA within ten (10) days of the Immigration Judge's decision, as required under 8 C.F.R. § 1003.38, the automatic stay expires. 8 C.F.R. § 1003.6(c)(1). To preserve the stay, DHS must file, along with the notice of appeal, a certification by a senior legal official that the official has approved the filing and is satisfied that there is evidentiary support for continuing detention and the legal arguments are warranted. Id.

If the BIA has not acted on the custody appeal, the automatic stay lapses 90 days after the notice of appeal was filed. 8 C.F.R. § 1003.6(c)(4). The 90-day period can be extended, if the BIA grants the alien an enlargement of time to file a custody brief. Id. Before the lapse of the automatic stay period, DHS can request a discretionary stay of release. 8 C.F.R. § 1003.6(c)(5). [See next section.]

If the BIA authorizes the alien's release, denies a motion for discretionary stay, or fails to act on a discretionary stay motion before the automatic stay period ends, the alien's release is stayed automatically for five (5) business days. 8 C.F.R. § 1003.6(d). Within that period, the Secretary of DHS or designee can certify the Board's custody order to the Attorney General, and then release is further stayed for fifteen (15) days until the AG makes a decision. Id. DHS can also request a discretionary stay from the AG. Id.

The automatic stay regulation was designed to ensure removal by preventing flight during the pendency of proceedings and to protect the public from potential harm. See Hussain v. Gonzales, -- F.Supp.2d --, 2007 WL 1805157 (E.D.Wis. May 22, 2007); Ashley v. Ridge, 288 F. Supp. 2d 662, 664-65 (D.N.J. 2003). In promulgating the regulation, the Department of Justice stated that the purpose of the automatic stay provision was to "allow the Service to maintain the status quo while it seeks review by the Board, and thereby avoid the necessity for a case-by-case determination of whether a stay should be granted in particular cases in which the Service had previously determined that the alien should be kept in detention and no conditions of release would be appropriate." Executive Office for Immigration Review, *Review of Custody Determinations*, 66 Fed. Reg. 54909 (Oct. 31, 2001). The regulation was implemented on an emergency basis and made effective on October 31, 2001.

Federal courts are divided as to whether the automatic stay provision is lawful and constitutional. Some courts have found the automatic-stay regulation both lawful and constitutional. See Pisciotta v. Ashcroft, 311 F. Supp. 2d 445 (D.N.J. 2004); Chambers v. Ashcroft, No. 03-6762, 2004 WL 759645 (E.D. Pa. Feb. 27, 2004); Marin v. Ashcroft, No. 04-CV-675, 2004 WL 3712722 (D.N.J. Mar. 17, 2004); Perez-Cortez v. Maurer, No. 03-2244 (D. Colo. Nov. 20, 2003); Inthathirath v. Maurer, No. 03-2245 (D. Colo. Nov. 20, 2003); Alameh v. Ashcroft, No. 03-6205, 2004 WL 3712718 (D.N.J. Jan. 6, 2004). Other courts have held it is an unconstitutional violation of substantive and procedural due process and/or invalid as *ultra vires* to the statute. See Zabadi v. Chertoff, No. C 05-01796 WHA, 2005 WL 1514122 (N.D. Cal. 2005); Zavala v. Ridge, 310 F. Supp. 2d 1071 (N.D. Cal. 2004); Ashley v. Ridge, 288 F. Supp. 2d 662 (D.N.J. 2003); Uritsky v. Ridge, 286 F. Supp. 2d 842 (E.D. Mich. 2003); Bezmen v. Ashcroft, 245 F. Supp. 2d 446 (D. Conn. 2003).

These court decisions addressed the previous regulation under which the duration of the automatic stay was indefinite. Hussain v. Gonzales, -- F.Supp.2d --, 2007 WL 1805157 (E.D.Wis. May 22, 2007). EOIR made revisions to the automatic stay regulation in 2006. A final rule to revise the existing interim rule authorizing DHS to invoke an automatic stay was published in the Federal Register, with an effective date of November 1, 2006. The preamble to the 2006 regulation addresses the due process concerns raised by commentators. See EOIR, *Review of Custody Determinations*, 71 Fed. Reg. 57873, 57876-57881 (Oct. 2, 2006). The current regulation provides that the automatic stay will lapse 90 days after the filing of the notice of appeal. 71 Fed. Reg. 57873, 57874. Interestingly, the automatic stay provision is used infrequently:

> Past experience shows that DHS has invoked the automatic stay in only a select number of custody cases. For example, the EOIR statistics indicate that, in FY 2004, the immigration judges conducted some 33,000 custody hearings and the Board adjudicated 1,373 custody appeals. Yet, DHS sought an automatic stay only with respect to 273 aliens in FY 2004—and only 43 aliens in FY 2005.

As noted above, the final rule imposes new time limits on the duration of the automatic stay of IJ release orders and new procedures for the IJs and the Board to expedite the appellate process for automatic stay cases (see sections 1003.6(c) and 1003.19(i)(2)), and also clarifies the process for DHS to seek a discretionary stay (sections 1003.6(c)(4) & (5) and 1003.19(i)(1)). The final rule also provides a revised rule for Attorney General review of any BIA custody decision, which is not tied explicitly to whether DHS had invoked the automatic stay at the IJ level (see section 1003.6(d)). 71 Fed. Reg. at 57878 (commentary to final rules at 8 C.F.R. §§ 1003.6 & 1003.19).

B. Discretionary Stays

The Board has the authority to stay the release of an alien either when DHS appeals a custody decision or on its own motion. 8 C.F.R. § 1003.19(i)(1). DHS can seek a discretionary stay of release in connection with a custody appeal at any time. Id. This

includes during the time an automatic stay is pending. 8 C.F.R. § 1003.6(c)(5). This provision used to be referred to as an "emergency" stay. See 8 C.F.R. § 1003.19(i)(1) (2006). However, the preamble to the final rule governing stays of release makes it clear that the discretionary stay can be requested on either an emergency or non-emergency basis. See 71 Fed. Reg. at 57876.

X. BREACH OF BOND

"A bond is breached when there has been a substantial violation of the stipulated conditions." 8 C.F.R. § 103.6(e). DHS may breach the bond of an alien who does not timely appear for the alien's removal hearing. Matter of Arbelaez, 18 I&N Dec. 403, 405-06 (R.C. 1983). Moreover, DHS may breach the bond of an alien who fails to appear after the alien or the bond obligor receives a "bag and baggage" letter requiring the alien's appearance for removal. See Ruiz-Rivera v. Moyer, 70 F.3d 498, 501-02 (7th Cir. 1995) (failure to appear after stay of removal denied); Int'l Fidelity Ins. Co. v. INS, 623 F.Supp. 45, 46-47 (S.D.N.Y. 1985); Matter of Allied Fidelity, 19 I&N Dec. 124, 126-29 (Comm. 1984) (filing petition for writ of habeas corpus does not excuse failure to surrender). A bond breach may be appealed to the USCIS Administrative Appeals Office (AAO) (formerly, the Administrative Appeals Unit). See McLean v. Slattery, 839 F. Supp. 188, 190-92 (E.D.N.Y. 1993) (requiring obligor to exhaust administrative remedies).

DHS must send notice of breach of bond to the bond obligor. 8 C.F.R. § 103.6(e); see Hrubec v. INS, 828 F. Supp. 251, 253-54 (S.D.N.Y. 1993), aff'd without opinion, 41 F.3d 1500 (2d Cir. 1994) (up to INS to determine if bond breached but, since no proper notice, appeal to AAU remained available); International Fidelity Insurance Company v. Crosland, 490 F. Supp. 446, 448 (S.D.N.Y. 1980) (vacated breach of bond after finding alien inadvertently failed to appear, caused in part by the fact that no notice requiring his appearance had been sent to him, and his attorney thereafter contacted INS and offered to have the alien appear upon request).

"Substantial performance of all conditions imposed by the terms of a bond shall release the obligor from liability." 8 C.F.R. § 103.6(c)(3).

> Substantial performance exists where there is no willful violation of the terms or conditions of the bond, where the conditions are honestly and faithfully complied with, and where the only variance from their strict and literal performance consists of technical or unimportant occurrences. Substantial violations are those acts which constitute a willful departure form the terms or conditions of the bond, or the failure to comply or adhere to the essential elements of those terms or conditions.

Matter of Allied Fidelity, 19 I&N Dec. 124, 127 (Comm. 1984). A federal court found substantial performance where the alien's attorney had mailed a request for continuance

seven days before hearing date and requested notification if there was any problem with continuance, and no showing was made of intention to evade responsibilities. Gomez-Granados v. Smith, 608 F. Supp. 1236, 1238-39 (D. Utah 1985).

DEPARTMENT OF HOMELAND SECURITY
ICE

NEW ATTORNEY ORIENTATION MANUAL

VOLUME II
2007

These outlines and practice guides are intended to serve as new attorney orientation and reference materials. Although each document has been thoroughly researched and carefully prepared, please note that these documents are not intended to be a comprehensive guide to the immigration and customs laws of the United States or the policies and practices of the ICE Office of the Principal Legal Advisor. Please pay close attention to the latest revision date of each document. Laws, case authority, and Government policies change frequently, and it is important to check regularly for updated guidance.

ATTORNEY ORIENTATION INDEX

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The Nature of Foreign Governments and Removal of Aliens Under the Convention Against Torture

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Mike P. Davis, APLD Deputy Chief

Protection Law Conference
Atlanta, Georgia
May 2008

U.S. Immigration and Customs Enforcement

CAT: Failed States

Lesson Overview

- The Legal Framework for Removing Aliens to a Specific Country
- The *Jama* Case and Removal to Countries Without a Central Functioning Government
- Litigating Convention Against Torture Claims With Respect to Countries with Weak or Non-Existent Central Governments
- Surviving Judicial Review

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INA § 241

- INA § 241(b)
- “Countries to which aliens may be removed”
- INA § 241(b)(1) - Arriving Aliens
- INA § 241(b)(2) - Other Aliens

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Arriving Aliens

INA § 241(b)(1)

- (A) General Rule: arriving aliens who are placed into INA § 240 proceedings at the time of arrival shall be removed to the country where they boarded the aircraft/vessel on which they arrived in the United States.
- (B) Exception 1 -"Contiguous Territory" / "Island Adjacent" (i.e., Canada, Mexico, Caribbean): "removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island."
- Example: Brazilian national flies to Mexico City and takes bus to U.S. - Mexico border, seeking asylum at land-border port-of-entry. Removal country is Brazil, rather than Mexico.

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Arriving Aliens

INA § 241(b)(1)

- (C) Exception 2 - “Alternative Countries”: If “government of the country” designated in general rule and exception 1 “is unwilling to accept the alien into that country’s territory,” removal shall be to one of the follow
- (i) country of which the alien is citizen, subject, or national;
- (ii) country in which the alien was born;
- (iii) country in which the alien has a residence;
- or if removal to any of these is “impracticable, inadvisable, or impossible,” then to
- (iv) a country with a government that will accept the alien

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Other Aliens
INA § 241(b)(2)

- (A) General Rule: Alien designates one country to which he or she "wants to be removed" and alien shall be removed to that country.
- Consider: If an alien seeking protection designates a country, consider questioning him or her why he or she is seeking protection if he or she "wants" to be removed there. Possibly useful in asylum cases where alien entered on nonimmigrant visa which required him or her to establish that he or she had a "residence in a foreign country which he [or she] has no intention of abandoning," INA §§ 101(a)(15) & 214(b), and where "subjective genuineness" of fear is otherwise at issue.

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Other Aliens

INA § 241(b)(2)

- Two qualifications to the general rule that an alien can designate removal country of his or her choice:
- INA § 241(b)(2)(B): "Contiguous Territory" / "Island Adjacent" can only be designated by the alien if he or she is a native, citizen, subject, or national of the country, or has resided there.
- INA § 241(b)(2)(C): Alien's designation can be "disregarded" under four circumstances:
  - (i) alien fails to designate promptly;
  - (ii) government of designated country does not provide timely (i.e., within 30 days of U.S. government request) notification of acceptance;
  - (iii) government of designated country is not "willing" to accept the alien; or

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Other Aliens
INA § 241(b)(2)

… (iv) where removal of the alien to the designated country is "prejudicial to the United States"

- Who bears burden of showing prejudice? Statute does not assign burden and regulations do not address. No controlling BIA precedent, but consider *Matter of Khalifah*, 21 I&N Dec. 107 (BIA 1995) (Osama Bin Laden's brother-in-law removed to Jordan, at direction of Secretary of State and Deputy Attorney General, to face terrorism prosecution there); and *Matter of Ruiz-Massieu*, 22 I&N Dec. 833 (BIA 1999) (Secretary of State requested that alien be deported to Mexico; BIA acknowledges its own limitations and declines "to intrude into the realm of foreign policy").

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Other Aliens
INA § 241(b)(2)

- INA § 241(b)(2)(A) General Rule of Alien Designation
- INA § 241(b)(2)(B) Qualification for "Contiguous Territory" / "Island Adjacent"
- INA § 241(b)(2)(C) Disregarding Designation

How do we select the removal country if we're not following the general rule?

- INA § 241(b)(2)(D) sets forth the "alternative" country
- INA § 241(b)(2)(E) lists "additional" countries

(D) and (E) are structured to be followed in descending order.

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Other Aliens
INA § 241(b)(2)

What is the "alternative" country provided for by INA § 241(b)(2)(D)?

- "A country of which the alien is a subject, national, or citizen" unless:
  - (i) government of "alternative" country does not provide timely (i.e., within 30 days of U.S. government request) notification of acceptance; or
  - (ii) that government is unwilling to accept the alien into the country

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Other Aliens
INA § 241(b)(2)

What are the "additional" countries of INA § 241(b)(2)(E)?

- If all else fails, any of the following:
  - (i) country from which the alien was admitted to the United States
  - (ii) country where the foreign port is located from which the alien left for the United States or for a contiguous territory
  - (iii) country where the alien resided before he or she entered the country from which he or she entered the United States

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Other Aliens
INA § 241(b)(2)

- "Additional" countries of INA § 241(b)(2)(E), continued:
  - (iv) country in which the alien was born
  - (v) country that had sovereignty over the alien's birthplace when the alien was born
  - (vi) country in which the alien's birthplace is located when he or she is ordered removed, or
  - (vii) if removal to each of the preceding six countries is "impracticable, inadvisable, or impossible," another country whose government will accept the alien into that country

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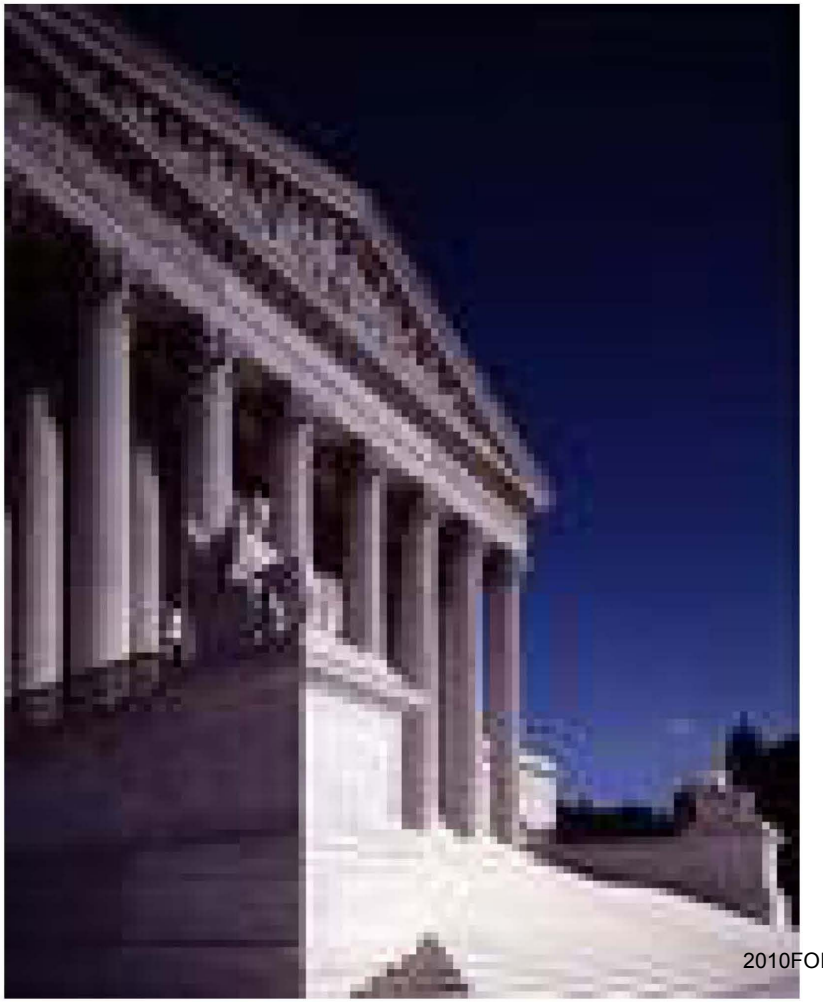
Jama v. Immigration and Customs Enforcement,

543 U.S. 335 (2005).



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Jama

- *Does INA § 241(b)(2) "prohibit[] removing an alien to a country without the explicit, advance consent of that country's government"?*
  - No: *Jama.*

- By a 5-4 majority, the Court ruled that government acceptance was not required for the removal of Keyse Jama, a Somali national previously admitted to the United States as a refugee but subject to removal based on criminal convictions.

CAT: Failed States

Basis of the Court's Analysis

(1) Statutory language and structure: "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." 543 U.S. at 341.

(2) An effort to optimize the Government's removal authority in light of the Court's recent precedent holding that aliens may not be detained beyond the period of time where there is significant likelihood of removal in the reasonably foreseeable future, *Clark v. Martinez*, 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

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Basis of the Court's Analysis

(3) Separation of powers: "To infer an absolute rule of acceptance where Congress has not clearly set it forth would run counter to our customary policy of deference to the President in matters of foreign affairs. Removal decisions, including the selection of a removed alien's destination, 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" *Mathews v. Diaz,* 426 U.S. 67, 81 (1976)." 543 U.S. at 348.

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CAT: Failed States

One Concern in *Jama*

Expressed during oral argument was the notion that the Government might simply "dump" aliens anywhere it could to effectuate their removal:

- **JUSTICE BREYER**: So you're not saying you can dump people in
  - Antarctica or
  - possibly send them to the moon.

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CAT: Failed States

Jama

- **MR. STEWART**: We're saying that -- we're saying, first, that Antarctica and Somalia are countries. It's exceedingly –
- **JUSTICE BREYER**: Antarctica is a country? So we could take all these people, send them to Antarctica. They'll live with the penguins? Is –
- **MR. STEWART**: It's extremely unlikely that -- that the -- the text of a statute could ever be satisfied because the permitted removal countries are countries such as the country in which --
- **JUSTICE SCALIA**: If they were born there -
- **MR. STEWART**: Exactly.

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CAT:
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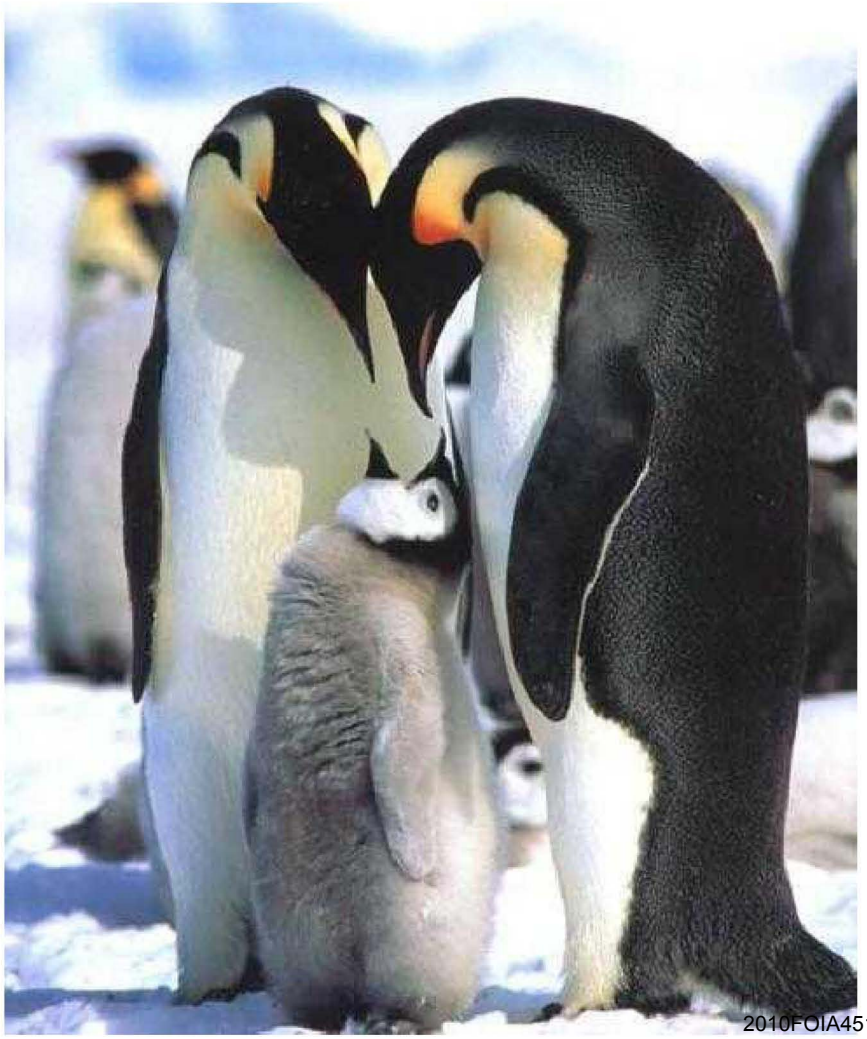
JUSTICE SCALIA:

-- raised by penguins, send them --



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Jama

- Indeed, as the statute's repeated reference to the "government of the country" of removal and the *Jama* litigation itself raise an important question: what is the relevance of a foreign *government* to our ability to remove an alien to a foreign place?

U.S. Immigration and Customs Enforcement

CAT: Failed States

Jama

- In his brief on the merits, petitioner raises the additional contention—not presented to, or decided by, the Court of Appeals—that removal to Somalia is impermissible at any step of [INA § 241](b)(2) because the lack of a functioning central government means that Somalia is not a "country" as the statute uses the term. The question on which we granted certiorari in this case, as phrased by petitioner himself, was as follows: "Whether the Attorney General can remove an alien to one of the countries designated in [INA § 241] (b)(2)(E) without obtaining that country's acceptance of the alien prior to removal." That question does not fairly include whether Somalia is a country any more than it fairly includes whether petitioner is an alien or is properly removable; we will not decide such issues today.
  - The Supreme Court declined to address that question. 543 U.S. at 352 n.13.

CAT: Failed States

What Does "Country" Mean?

- So, can a place be a "country" without a central functioning government?
- Black's Law Dictionary 377 (8th ed. 1999):
  - "1. A nation or political state; state (1). 2. The territory of such a nation or state."

- Oxford Dictionary of the English Language (2d ed. 1989):
  - "3. The territory or land of a nation; usually an independent state, or a region once independent and still distinct in race, language, institutions, or historical memories, as England, Scotland, and Ireland, in the United Kingdom, etc.).

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CAT: Failed States

What Does “Country” Mean?

- *Smith v. United States*, 507 U.S. 197, 201 (1993) (construing the Federal Tort Claims Act and stating that the "commonsense meaning" of the term "country" is "‘[a] region or tract of land[,]’" and therefore Antarctica qualified as a "country," "even thought it has no recognized government") (citing Webster’s New International Dictionary 609 (2d ed. 1945)).

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So, What is a "State"?

- Restatement (Third) of Foreign Relations Law § 201 (1987): Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.
- Antarctica?

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CAT: Failed States

"State"

- § 201 cmt. c "To be a state an entity must have a population that is significant and permanent. Antarctica, for example, would not now qualify as a state even if it satisfied the other requirements of this section."
- **Population in Antarctica:**
  - no indigenous inhabitants, but there are both permanent and summer-only staffed research stations
  - *note:* 28 nations, all signatory to the Antarctic Treaty, operate through their National Antarctic Program a number of seasonal-only (summer) and year-round research stations on the continent and its nearby islands south of 60 degrees south latitude (the region covered by the Antarctic Treaty);

CAT: Failed States

"State"

- The existence of a government is an important element of the "state" definition.
- Are there any requirements as to the nature of that government?
- § 201 cmt. d: A state need not have any particular form of government, but there must be some authority exercising governmental functions and able to represent the entity in international relations.
- § 201 Reporter's Note 2: Some entities have been assumed to be states when they could satisfy only a very loose standard for having an effective government, e.g., the Congo (Zaire) in 1960. James R. Crawford, The Creation of States in International Law 42-47 (1979). A state may continue to be regarded as such even though, due to insurrection or other difficulties, its internal affairs become anarchic for an extended period of time.

CAT: Failed States

Jama Application to Protection Law

Supreme Court specifically discussed at 348:

- Nor is it necessary to infer an acceptance requirement in order to ensure that the Attorney General will give appropriate consideration to conditions in the country of removal. If aliens would face persecution or other mistreatment in the country designated under [INA § 241](b)(2), they have a number of available remedies: asylum; withholding of removal; relief under an international agreement prohibiting torture; and temporary protected status. These individualized determinations strike a better balance between securing the removal of inadmissible aliens and ensuring their humane treatment than does petitioner's suggestion that silence from Mogadishu inevitably portends future mistreatment and justifies declining to remove anyone to Somalia.
- And, of course, "withholding of removal" is not a freestanding immigration benefit or form of "relief"—it is a restriction on removal placed directly in the removal statute at INA § 241(b)(3).

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CAT: Failed States

Removal Country Issues

- So, government acceptance is not an absolute requirement to effectuate removal, but we do have to remove someone to a "country."
- And, "countries" or "states" can continue to subsist even through prolonged periods of anarchy or ineffectual central governance.
- Article 3 of the Convention obligates a "State Party" not to "expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"
- And, as we've seen, the "torture" definition itself centers on "public officials" and persons otherwise "acting in an official capacity"
- Thus, the question that arises is how should we analyze torture claims vis-à-vis countries with no functioning government or with a government vying for control over national territory where non-governmental groups hold significant sway

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Example: Somalia

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Somalia: Brief History

- June 1960 – Britain withdraws from British Somaliland to allow its protectorate to join with Italian Somaliland and form the new nation of Somalia, which was recognized by the United Nations.
- Late 1969 – Mohammed Siad Barre, of the Marehan subclan of the Darod clan, leads coup d'etat and ushers in period of authoritarian socialist control.
- January 1991 – Siad Barre deposed by combined armed revolt of numerous primarily non-Darod opposition groups, including the Hawiye clan-led United Somali Congress (USC).
- Early 1991 – USC and allies fall into discord over who should succeed Siad Barre, with some supporting, Mohamed Farrah Aidid, and others supporting Ali Mahdi Muhammad.

CAT: Failed States

Somalia: Brief History

- May 1991 – Northern Somali clans declare an independent Republic of Somaliland, which has not been recognized as a state by the United Nations.
- 1991 – 1992 – Somalia descends into full-scale civil war and famine with local warlords asserting effective military control over their respective regions.
- 1991 – President Clinton deploys U.S peacekeeping troops to Somalia.
- October 1993 – Battle of Mogadishu; 17 U.S. service members killed.
- 1993 – 1995 – United Nations attempts to restore order and combat famine.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Somalia: Brief History

- 1998 – Autonomous region of Puntland declared in the north of Somalia, adjoining Somaliland; Puntland commits to participation in future national reconciliation efforts.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Somalia: Brief History

- 2002 – 2004 – Kenyan government helps broker peace arrangement, culminating in establishment of internationally recognized Transitional Federal Government (TFG) and election of Abdullahi Yusuf Ahmed as President; goal set for 2009 national elections.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Somalia: Brief History

- October 2006 – Islamic Courts Union (Council of Islamic Courts), an effort by businessmen and Muslim clerics to oust warlords and assume control over Somalia under shari'a law, seizes Mogadishu from warlords.
- December 2006 – Ethiopian and TFG forces wrest control of Mogadishu from Islamic Courts in October.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Is TFG a "State"?

- Does the United States recognize the TFG or any party that claims sovereignty or control over all or a part of Somalia?
- In Somalia, the TFG would appear to be the "State" government and, for CAT purposes, a "public official or other person acting in an official capacity" would arguably have to be affiliated, in some measure, with the TFG.
- But, TFG's effective control of Somalia is limited to the country's southern regions and is largely subsidized by strong Ethiopian military strength.
- Thus, an applicant could conceivably claim that he or she fears harm by entities other than the TFG in areas where the TFG does not have significant control and these other entities are quasi-governmental in nature.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Quasi-governmental Torture?

No reported U.S. judicial or administrative precedent conclusively resolving this issue.

- *Hussein v. Att'y Gen.,* 2008 WL 934056 (3d Cir. Apr. 4, 2008) (unpublished)
  - Member of Tuni clan (not affiliated with major armed clan groups) argues that he would face torture if removed to Somalia because Hawiye clansmen and Islamic groups would target him and that the TFG would turn a "blind eye" to this mistreatment.
  - Court concludes that BIA properly rejected his claim as overly generalized and cites to *Lukwago v. Ashcroft*, 329 F.3d 157, 183 (3d Cir. 2003) for the proposition that a CAT applicant is not entitled to relief if evidence shows that government is in continuous opposition to an organization's activities.

CAT: Failed States

Quasi-governmental Torture?

- *Saraj v. Gonzales*, 203 Fed.Appx. 99 (9th Cir. Oct. 16, 2006) (unpublished):
  - Afghan national challenges BIA denial of his CAT application, which sought protection based on harm from a warlord who controlled large areas of Afghanistan.
  - Case remanded by Court because it found record insufficient to address the question of:

    "whether an individual operating a de facto government in derogation of the legitimate government of a country can be said to be acting in an official capacity and of whether a government can be said to acquiesce in actions by a private individual which the government is aware of but is unable to stop."
  - Warlord now a member of the Government!

CAT: Failed States

Quasi-governmental Torture?

- *Matter of -502* (BIA Dec. 12, 2006) (unpublished):
  - DHS appeal of a Somali CAT grant based on warlord-inflicted harm;
  - BIA invokes *Matter of Linnas*, 19 I&N Dec. 302, 307 (BIA 1985), for the definition of "government" applicable in immigration proceedings: "a political organization that exercises power on behalf of the people subjected to its jurisdiction";
  - BIA also acknowledged separate opinions of Board Members Schmidt and Villageliu in *Matter of S-V-*, 22 I&N Dec. 1306 (Colombian protection claim; applicant feared harm by insurgent groups), finding the insurgent groups effectively controlled about 40 percent of Colombian territory and that the U.N. Committee Against Torture had found warring factions in Somalia to qualify as "public officials" for CAT purposes; and
  - Also notes intervening emergence of TFG and U.N. recognition thereof as intervening developments and sustains DHS appeal on basis of probability of harm.

CAT: Failed States

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  - Also notes intervening emergence of TFG and U.N. recognition thereof as intervening developments and sustains DHS appeal on basis of probability of harm.

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Sidebar: *Matter of Linnas*

- In *Linnas*, the Board construed "government" to mean a "political organization that exercises power on behalf of people subjected to its jurisdiction."
- But, relies on Second Circuit decisions more than 40 years old and involve how to address deportation of aliens to Communist China, as opposed to Taiwan or Hong Kong.
- The Supreme Court in *Jama* recognized that the Board in *Linnas* was constrained to follow Second Circuit precedent.
- *Linnas* is also of dubious value because the problems posed by deportation to China were extinguished by the United States' recognition of the People's Republic of China as the legal government of China. *See, e.g.*, *Matter of Cheung*, 16 I&N Dec 690 (BIA 1979).
- Further, lawless groups or warlords can hardly be said to "exercise[] power on *behalf* of people."

CAT: Failed States

Quasi-governmental Torture?

- But, U.S. has not agreed to recognize UNCAT as conclusive authority on CAT interpretation and has not acceded to Article 22 of the CAT, which would allow private individuals to bring CAT claims against the United States in proceedings before the UNCAT.
- "Although a party to a treaty can agree to establish a third party to render authoritative interpretations of that treaty, in this case, the United States did not agree to give the Committee such a role. While the Committee's views are entitled to respect, the Convention does not grant the Committee the authority to issue legally binding views on the nature of U.S. obligations thereunder."
  - Oral Statements by the United States Delegation To The Committee Against Torture, at 3 (May 8, 2006) (statement of John Bellinger III, Legal Advisor, U.S. Dep't of State), *available at* http://www.state.gov/documents/organization/66174.pdf.

CAT: Failed States

Quasi-governmental Torture?

- What has UNCAT said about the issue of whether an individual can qualify for CAT protection based upon opposition groups that exercise some degree of control over some part of a State's national territory?

U.S. Immigration and Customs Enforcement

CAT: Failed States

G-R-B- v. Sweden

- *G-R-B- v. Sweden*, No. CAT/C/20/D/83/1997 (May 15, 1998):
  - Peruvian torture case involving alleged fear of harm by *Sendero Luminoso* ("Shining Path"), a Maoist guerilla group.
  - Sweden argues that the "acts of Sendero Luminoso cannot be attributable to the authorities" of Peru.
  - "The Committee considers that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention."
  - Applicant's claim rejected: G-R-B- had traveled to Peru on two past occasions without being harmed by the "national authorities."

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Elmi v. Australia

- *Elmi v. Australia*, No. CAT/C/22/D/120/1998 (May 25, 1999):
  - [T]he [Somali] clans . . . have, in certain regions, fulfilled the role, or exercised the semblance, of an authority that is comparable to government authority.
  - The clans, in relation to their regions, have prescribed their own laws and law enforcement mechanisms and have provided their own education, health and taxation systems.
  - [F]or a number of years Somalia has been without a central government, [] the international community negotiates with the warring factions and [] some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration.
  - It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments."

CAT: Failed States

HMHI v. Australia

- *HMHI v. Australia*, No. CAT/C/28/D/177/2001 (May 1, 2002):
  - "[W]ith three years having elapsed since the *Elmi* decision, Somalia currently possesses a State authority in the form of the Transitional National Government, which has relations with the international community in its capacity as central Government, though some doubts may exist as to the reach of its territorial authority and its permanence.
  - Accordingly, the Committee does not consider this case to fall within the exceptional situation in *Elmi*…."

U.S. Immigration and Customs Enforcement

CAT: Failed States

What Does It All Mean?

Aliens may assert that it is more likely than not that they will be tortured by a de facto government or private groups in control of a particular region or place within a country, but such groups may not be sufficiently "governmental" to support eligibility under Article 3 of the Convention, as adopted in the applicable regulations.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Litigating Failed State Issues

- Chicago's Experiences in *Matter of A-A-A-*
- Litigation Strategies in Immigration Court
- Failed State Arguments in Federal Court

U.S. Immigration and Customs Enforcement

CAT: Failed States

Matter of A-A-A-

Brief summary of facts and procedural history:

- A-A-A- entered the United States as a derivative refugee in 1999.
- In 2001, he was convicted of substantial battery and sentenced to 11 months incarceration: A-A-A- used a box-cutter to slash another person's chin, ear, face, shoulder, chest, back, and finger.
  - The victim required 32 stitches and 10 staples.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Matter of A-A-A-

- While serving his sentence, he told a Confidential Information that while in Somalia, he learned how to make bombs and that he had stabbed an American solider.
- He also claimed that once he was released from prison, he and some of his friends were going to blow up a local mall.
- The JTTF found a note in his cell that had the picture of the American Flag with the word “martyr” written across it.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Matter of A-A-A-

- A-A-A- was placed in removal proceedings, and after many hearings and appeals to the BIA, he was found to have been convicted of a particularly serious crime, and only eligible to request deferral of removal under the CAT.
- The IJ ordered his release, and ICE filed for an automatic stay of that decision, and was successful in keeping him in custody during the pendency of proceedings.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Matter of A-A-A-

- A-A-A- applied for protection under the CAT claiming that he is from the Rahanweyn subclan and that, if he were forced to return to Somalia, he would be tortured by members of other clans, including his own.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Ligitation: *Matter of A-A-A-*

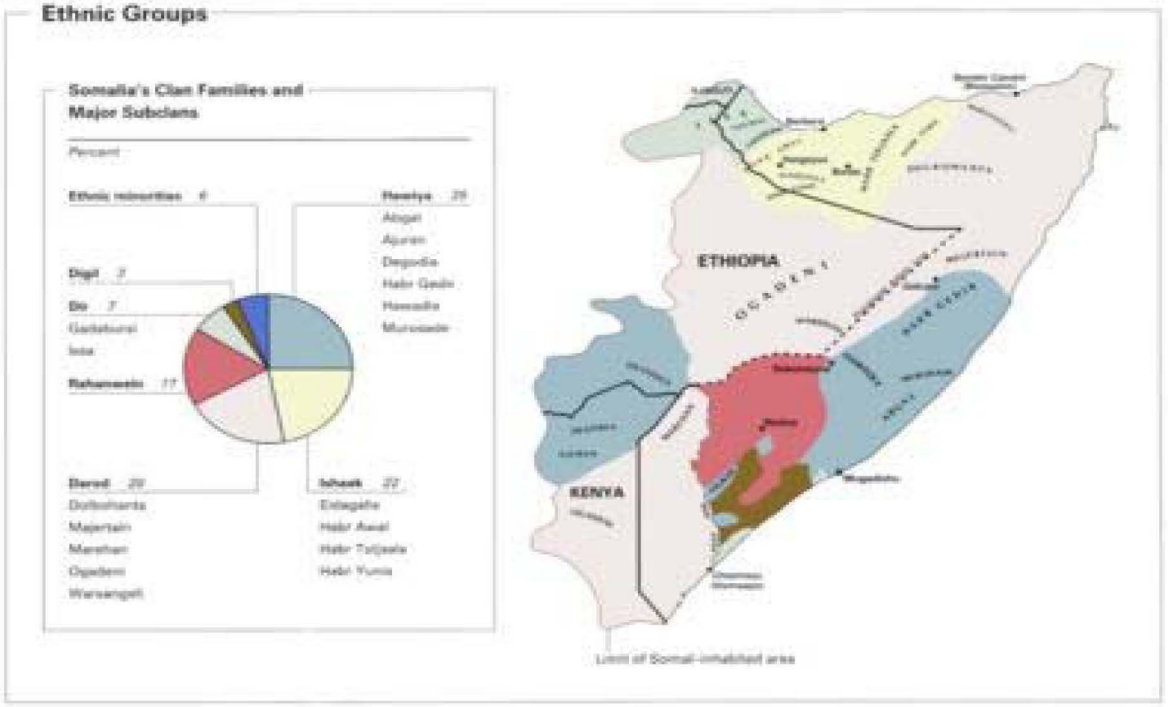
- A-A-A- presented two "expert" witnesses:
  - Professor of African History at Rutgers University, and the Executive Director of the World Organization for Human Rights USA.
  - Both claimed that there were various militias and groups in Somalia that acted as de facto governments and under "color of law," and no matter where he went in Somalia, he would be tortured by these de facto governments, or with their acquiescence.
- IJ agreed and found that while there was no central government in Somalia, these groups constituted "governments" for purposes of the CAT.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Ligitation: *Matter of A-A-A-*

- The IJ found that the alien would have difficulty reaching the area controlled by his clan because he would be forced to travel through areas controlled by rival clans and factions.



- DHS appealed.

CAT: Failed States

Ligitation: *Matter of A-A-A-*

- BIA assumed for purposes of its decision that A-A-A- would suffer harm and possibly torture in certain areas of Somalia, including TNG-controlled Mogadishu, but that he failed to establish that the threat of torture existed country-wide, effectively side-stepping the issue of whether there were any de facto governments in Somalia for purposes of the CAT.
- Additionally, the BIA found that any harm he would suffer on his way to the area controlled by his clan, or within the area controlled by his clan, would not constitute torture within the meaning of the regulations.

U.S. Immigration and Customs Enforcement

CAT: Failed States

Ligitation: *Matter of A-A-A-*

- Alien petitioned the Seventh Circuit for review, and while court upheld the BIA on the issue of particular serious crime, it remanded the case because it believed that the issue of whether there is a de facto government in Somalia for purposes of CAT protection had not been fully briefed to them.

CAT: Failed States

- (b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

Litigation Strategies

- [redacted]

U.S. Immigration and Customs Enforcement

CAT: Failed States

- [redacted]

(b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

Litigation Strategies

- (b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

- [redacted]
- [redacted]

(b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

-
-
-

(b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

Food for Thought

- (b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

More Food for Thought

- [redacted]
- [redacted]

(b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

More Food for Thought

- [redacted]

(b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

More Food for Thought

- [redacted]

(b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

More Food for Thought

And …

- [redacted]

U.S. Immigration and Customs Enforcement

CAT: Failed States

More Food for Thought

- [redacted]

(b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

More Food for Thought

- [redacted]

U.S. Immigration and Customs Enforcement

CAT: Failed States

More Food for Thought

- [redacted]

(b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

More Food for Thought

- [redacted]

U.S. Immigration and Customs Enforcement

CAT: Failed States

The Federal Court Perspective

- [redacted]

U.S. Immigration and Customs Enforcement

CAT: Failed States

The Federal Court Perspective

- (b)(5)

U.S. Immigration and Customs Enforcement

CAT: Failed States

And Remember:

U.S. Immigration and Customs Enforcement

Questions?

U.S. Immigration and Customs Enforcement

Order Code 98-958 A

CRS Report for Congress

Extradition To and From the United States: Overview of the Law and Recent Treaties

Updated August 3, 2007

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Prepared for Members and
Committees of Congress

Extradition
To and From the United States:
Overview of the Law and Recent Treaties

Summary

"Extradition" is the formal surrender of a person by a State to another State for prosecution or punishment. Extradition to or from the United States is a creature of treaty. The United States has extradition treaties with over a hundred of the nations of the world, although they are many with whom it has no extradition treaty. International terrorism and drug trafficking have made extradition an increasingly important law enforcement tool. This is a brief overview of the adjustments made in recent treaties to accommodate American law enforcement interests, and then a nutshell overview of the federal law governing foreign requests to extradite a fugitive found in this country and a United States request for extradition of a fugitive found in a foreign country.

Extradition treaties are in the nature of a contract and generate the most controversy with respect to those matters for which extradition may not be had. In addition to an explicit list of crimes for which extradition may be granted, most modern extradition treaties also identify various classes of offenses for which extradition may or must be denied. Common among these are provisions excluding purely military and political offenses; capital offenses; crimes that are punishable under only the laws of one of the parties to the treaty; crimes committed outside the country seeking extradition; crimes where the fugitive is a national of the country of refuge; and crimes barred by double jeopardy or a statute of limitations.

Extradition is triggered by a request submitted through diplomatic channels. In this country, it proceeds through the Departments of Justice and State and may be presented to a federal magistrate to order a hearing to determine whether the request is in compliance with an applicable treaty, whether it provides sufficient evidence to satisfy probable cause to believe that the fugitive committed the identified treaty offense(s), and whether other treaty requirements have been met. If so, the magistrate certifies the case for extradition at the discretion of the Secretary of State. Except as provided by treaty, the magistrate does not inquire into the nature of foreign proceedings likely to follow extradition.

The laws of the country of refuge and the applicable extradition treaty govern extradition back to the United States of a fugitive located overseas. Requests travel through diplomatic channels and the only issue likely to arise after extradition to this country is whether the extraditee has been tried for crimes other than those for which he or she was extradited. The fact that extradition was ignored and a fugitive forcibly returned to the United States for trial constitutes no jurisdictional impediment to trial or punishment. Federal and foreign immigration laws sometimes serve as a less controversial alternative to extradition to and from the United States.

This report is available in an abridged version, without quotations, citations or footnotes as CRS Report RS22702, *An Abridged Sketch of Extradition To and From the United States,* by Charles Doyle.

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Extradition To and From the United States: Overview of the Law and Recent Treaties

Introduction

"'Extradition' is the formal surrender of a person by a State to another State for prosecution or punishment."[1] Extradition to or from the United States is a creature of treaty. The United States has extradition treaties with over a hundred of the nations of the world, although there are many with whom the United States has no extradition treaty.[2] International terrorism and drug trafficking have made extradition an increasingly important law enforcement tool.[3]

Although extradition as we know it is of relatively recent origins,[4] its roots can be traced to antiquity. Scholars have identify procedures akin to extradition scattered

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[1] Harvard Research in International Law, *Draft Convention on Extradition*, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW 21 (Supp. 1935); *see also*, 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 556-57 (1986)(RESTATEMENT). In the parlance of international law nations are identified as "states." In order to avoid confusion, the several states of the United States will be referred to as "the states of the United States."

Interstate rendition, the formal surrender of a person by one of the states of the United States to another, is also sometimes referred to as extradition, but is beyond the scope of this report.

[2] The list of countries along with the citations to our treaties follow 18 U.S.C. 3181. A similar list is appended to this report, as is a list of the countries with whom we have no extradition treaty in force at the present time.

[3] Until the early 1970's, the United States received and submitted fewer than 50 extradition requests a year; by the mid 1980's the number had grown to over 500 requests a year, IV ABBELL & RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CRIMINAL ♦ EXTRADITION (ABBELL & RISTAU) 11-18 (1990).

[4] Even the term "extradition" did not appear until the late eighteenth century, BLAKESLY, TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY: A COMPARATIVE STUDY OF INTERNATIONAL LAW, ITS NATURE, ROLE, AND IMPACT IN MATTERS OF TERRORISM, DRUG TRAFFICKING, WAR, AND EXTRADITION 171 (1992). For a more extensive examination of the history of extradition, *see*, Blakesly, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 BOSTON COLLEGE INTERNATIONAL & COMPARATIVE LAW REVIEW 39 (1981); Harvard Research in International Law, *Draft Convention on Extradition*, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW 41-6 (Supp. 1935); BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (BASSIOUNI) 31-5 (4th ed. 2002); ABBELL & RISTAU at 3-11.

throughout history dating as far back as the time of Moses.[5] By 1776, a notion had evolved to the effect that "every state was obliged to grant extradition freely and without qualification or restriction, or to punish a wrongdoer itself" and the absence of intricate extradition procedures has been attributed to the predominance of this simple principle of international law.[6]

Whether by practice's failure to follow principle or by the natural evolution of the principle, modern extradition treaties and practices began to emerge in this country and elsewhere by the middle eighteenth and early nineteenth centuries.[7]

Our first extradition treaty consisted of a single terse article in Jay's Treaty of 1794 with Great Britain, but it contained several of the basic features of contemporary extradition pacts. Article XXVII of the Treaty provided in its entirety,

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[5] Ramses II of Egypt and the Hittite king, Hattusili III, entered into a pact under which they promised to extradite fugitives of both noble and humble birth, *Treaty Between Hattusili and Ramesses II*, §§11-14, transliteration and translation in, Langdon & Gardiner, *The Treaty of Alliance Between Hattusili, King of the Hittites, and the Pharaoh Ramesses II of Egypt*, 6 JOURNAL OF EGYPTIAN ARCHAEOLOGY 179, 192-94 (1920). Until fairly recently, nations seem have been happily rid of those who fled rather than face punishment. The Egyptian-Hittite treaty reflects the fact that extradition existed primarily as an exception to the more favored doctrines of asylum and banishment. Fugitives returned pursuant to the treaty received the benefits of asylum in the form of amnesty, "If one man flee from the land of Egypt, or two, or three, and they come to the great chief of Hatti, the great chief of Hatti shall seize them and shall cause them to be brought to Ramesse-mi-Amun, the great ruler of Egypt. But as for the man who shall be brought to Ramesse-mi-Amun, the great ruler of Egypt, let not his crime be charged against him, let not his house, his wives or his children be destroyed, let him not be killed, let no injury be done to his eyes, to his ears, to his mouth or to his legs . . ." §17, *id.* at 197.

[6] 1 RESTATEMENT, *Introductory Note to Subchapter 7B*, 557, citing, GROTIUS, DE JURE BELLI AC PACIS, Vol.II, ch.21, §§3-4 (Scott ed. 1925).

[7] "By the latter part of the nineteenth century that [principle] had yielded to the view that delivery of persons charged with, or convicted of, crimes in another state was at most a moral duty, not required by customary international law, but generally governed by treaty and subject to various limitations. A network of bilateral treaties, differing in detail but having considerable similarity in principle and scope, has spelled out these limitations, and in conjunction with state legislation, practice, and judicial decisions has created a body of law with substantial uniformity in major respects. But the network of treaties has not created a principle of customary law requiring extradition, and it is accepted that states are not required to extradite except as obligated to do so by treaty," ID.

From the perspective of one commentator, "The history of extradition can be divided into four periods: (1) ancient times to the seventeenth century – a period revealing an almost exclusive concern for political and religious offenders; (2) the eighteenth century and half of the nineteenth century – a period of treaty-making chiefly concerning military offenders characterizing the condition of Europe during that period; (3) 1833 to 1948 – a period of collective concern for suppressing common criminality; and (4) post 1948 developments which ushered in a greater concern for protecting human rights of persons and revealed an awareness of the need to have international due process of law regulate international relations," BASSIOUNI at 33.

> It is further agreed, that his Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of the other, provided that this shall only be done on such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed, by those who make the requisition and receive the fugitive.[8]

Contemporary U.S. Treaties

Bars to Extradition

Extradition treaties are in the nature of a contract and by operation of international law, "[a] state party to an extradition treaty is obligated to comply with the request of another state party to that treaty to arrest and deliver a person duly shown to be sought by that state (a) for trial on a charge of having committed a crime covered by the treaty within the jurisdiction of the requesting state, or (b) for punishment after conviction of such a crime and flight from that state, provided that none of the grounds for refusal to extradite set forth in [the treaty] is applicable."[9]

Subject to a contrary treaty provision, federal law defines the mechanism by which we honor our extradition treaty obligations.[10] Although some countries will extradite in the absence of an applicable treaty as a matter of comity, it was long believed that the United States could only grant an extradition request if it could claim coverage under an existing extradition treaty, 18 U.S.C. 3181, 3184 (1994).[11] Dicta in several court cases indicated that this requirement, however, was one of congressional choice rather than constitutional requirement.[12]

No Treaty.

Congress appears to have acted upon that assumption when in 1996 it first authorized the extradition of fugitive aliens even at the behest of a nation with whom

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[8] 8 Stat. 116, 129 (1794).

[9] 1 RESTATEMENT §475 at 559.

[10] 18 U.S.C. 3181 to 3196.

[11] 18 U.S.C. 3181 ("The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government"); 18 U.S.C. 3184 ("Whenever there is a treaty or convention for extradition between the United States and any foreign government . . .").

[12] *E.g., United States v. Alvarez-Machain,* 504 U.S. 655, 664 (1992) ("*Valentine v. United States ex rel. Neidecker, supra,* 299 U.S., at 8-9. . . (United States may not extradite a citizen *in the absence of a statute* or treaty obligation)" (emphasis added)).

we have no extradition treaty,[13] and then by statute making the extradition procedures applicable to requests from international tribunals for Yugoslavia and Rwanda.[14]

The initial judicial response has left the vitality of those efforts somewhat in doubt. A district court in Texas initially ruled that constitutional separation of powers requirements precluded extradition in the absence of a treaty, but the Fifth Circuit Court of Appeals upheld the constitutional validity of extradition by statute rather than treaty when it overturned the district court finding on appeal.[15]

A question has occasionally arisen over whether an extradition treaty with a colonial power continues to apply a former colony becomes independent. Although the United States periodically renegotiates replacements or supplements for existing treaties to make contemporary adjustments, we have a number of treaties that pre-date the dissolution of a colonial bond or some other adjustment in governmental status. Fugitives in these situations have sometimes contested extradition on the grounds that we have no valid extradition treaty with the successor government that asks that they be handed over for prosecution. These efforts are generally unsuccessful since successor governments will ordinarily have assumed the extradition treaty obligations negotiated by their predecessors.[16]

No Treaty Crime.

Extradition is generally limited to crimes identified in the treaty. Early treaties often recite a list of the specific extraditable crimes. Jay's Treaty mentions only murder and forgery; the inventory in our 1852 treaty with Prussia included eight

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[13] 18 U.S.C. 3181(b)("The provisions of this chapter shall be construed to permit, in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies, in writing, that – (1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title; and (2) the offenses charged are not of a political nature").

[14] 18 U.S.C. 3181 note, P.L. 104-132, §443, 110 Stat. 1280 (1996).

[15] "The Constitution calls for the Executive to make treaties with the advice and consent of the Senate. Throughout the history of this Republic, every extradition from the United States has been accomplished under the terms of a valid treaty of extradition. In the instant case, it is undisputed that no treaty exists between the United States and the Tribunal. This is so even when, the Government insists, and the Court agrees, the Executive has the full ability and right to negotiate such at a treaty. The absence of a treaty is a fatal defect in the Government's request that the Extraditee be surrendered. Without a treaty, this Court has no jurisdiction to act, and Congress' attempt to effectuate the Agreement in the absence of a treaty is an unconstitutional exercise of power," *In re Surrender of Ntakirutimana*, 988 F.Supp. 1038, 1042 (S.D.Tex. 1997), *rev'd*, *Ntakirutimana v. Reno*, 184 F.3d 419, 424-27 (5th Cir. 1999).

[16] *Hoxha v. Levi*, 465 F.3d 554, 562-63 (3d Cir. 2006); *Kastnerova v. United States*, 365 F.3d 980, 986-87 (11th Cir. 2004); *Then v. Melendez*, 92 F.3d 851, 853-55 (9th Cir. 1996), *see generally*, ABBELL & RISTAU, at 52-3, 180-81.

others;[17] and our 1974 treaty with Denmark identifies several dozen extradition offenses:

> 1. murder; voluntary manslaughter; assault with intent to commit murder. 2. Aggravated injury or assault; injuring with intent to cause grievous bodily harm. 3. Unlawful throwing or application of any corrosive or injurious substances upon the person of another. with schemes intended to deceive or defraud, or by any other fraudulent means. 4. Rape; indecent assault; sodomy accompanied by use of force or threat; sexual intercourse and other unlawful sexual relations with or upon children under the age specified by the laws of both the requesting and the requested States. 5. Unlawful abortion. 6. Procuration; inciting or assisting a person under 21 years of age or at the time ignorant of the purpose in order that such person shall carry on sexual immorality as a profession abroad or shall be used for such immoral purpose; promoting of sexual immorality by acting as an intermediary repeatedly or for the purpose of gain; profiting from the activities of any person carrying on sexual immorality as a profession. 7. Kidnaping; child stealing; abduction; false imprisonment. 8. Robbery; assault with intent to rob. 9. Burglary. 10. Larceny. 11. Embezzlement. 12. Obtaining property, money or valuable securities: by false pretenses or by threat or force, by defrauding any governmental body, the public or any person by deceit, falsehood, use of the mails or other means of communication in connection. 13. Bribery, including soliciting, offering and accepting. 14. Extortion. 15. Receiving or transporting any money, valuable securities or other property knowing the same to have been unlawfully obtained. 16. Fraud by a bailee, banker, agent, factor, trustee, executor, administrator or by a director or officer of any company. 17. An offense against the laws relating to counterfeiting or forgery. 18. False statements made before a court or to a government agency or official, including under United States law perjury and subornation of perjury. 19. Arson. 20. An offense against any law relating to the protection of the life or health of persons from: a shortage of drinking water; poisoned, contaminated, unsafe or unwholesome drinking water, substance or products. 21. Any act done with intent to endanger the safety of any person traveling upon a railway, or in any aircraft or vessel or bus or other means of transportation, or any act which impairs the safe operation of such means of transportation. 22. Piracy; mutiny or revolt on board an aircraft against the authority of the commander of such aircraft; any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft. 23. An offense against the laws relating to damage to property. 24. a. Offenses against the laws relating to importation, exportation or transit of goods, articles, or merchandise. b. Offenses relating to willful evasion of taxes and duties. c. Offenses against the laws relating to international transfers of funds. 25. An offense relating to the: a. spreading of false intelligence likely to affect the price of commodities, valuable securities or any other similar interests; or b. making of incorrect or misleading statements concerning the economic conditions of such commercial undertakings as joint-stock companies, corporations, co-operative societies or similar undertakings through channels of public communications, in reports, in statements of accounts or in declarations to the general meeting or any proper official of a company, in notifications to, or registration with, any commission, agency or officer having supervisory or regulatory authority over corporations, joint-stock companies, other forms of commercial undertakings or in any invitation to the establishment of those commercial undertakings or to the subscription of shares. 28. Unlawful abuse of official authority which results in grievous bodily injury or deprivation of the life, liberty or property of any person, [or] attempts to commit, conspiracy to commit, or participation in, any of the offenses mentioned in this Article, Art. 3, 25 U.S.T. 1293 (1974).[18]

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[17] 10 Stat. 964, 966 (1852)("murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys").

[18] Section 203 of Public Law 105-323 purports to require construction of an extradition treaty that permits extradition for kidnaping to authorize extradition for parental kidnaping as well; the impact of section 203 remains to be seen.

While many of our existing extradition treaties continue to list specific extraditable offenses, the more recent ones feature a dual criminality approach, and simply make all felonies extraditable (subject to other limitations found elsewhere in their various provisions).[19]

Military and Political Offenses.

In addition to an explicit list of crimes for which extradition may be granted, most modern extradition treaties also identify various classes of offenses for which extradition may or must be denied. Common among these are provisions excluding purely military and political offenses. The military crimes exception usually refers to those offenses like desertion which have no equivalents in civilian criminal law.[20] The exception is on relatively recent vintage.[21] In the case of treaties that list specific extraditable offenses, the exception is unnecessary since purely military offenses are not listed. The exception became advisable, however, with the advent of treaties that make extraditable any misconduct punishable under the laws of both treaty partners. With the possible exception of selective service cases arising during the Vietnam War period,[22] recourse to the military offense exception appears to have been infrequent and untroubled.

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[19] *E.g.*, *Argentine Extradition Treaty*, Art.2, ¶1, S. Treaty Doc. 105-18 (eff. June 6, 2000)("An offense shall be an extraditable offense if it is punishable under the laws in both Parties by deprivation of liberty for a maximum period of more than one year or by a more severe penalty"); *see also*, *Paraguyan Extradition Treaty*, Art. IV, ¶3, S. Treaty Doc. 106-4 (eff. Aug. 25, 2003); *Bolivian Extradition Treaty*, Art. II, ¶1, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *French Extradition Treaty*, Art.2, ¶1, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002); *Hungarian Extradition Treaty*, Art.2, ¶1, S. Treaty Doc. 104-5 (eff. Mar. 18, 1997); *Jordanian Extradition Treaty* , Art.2, ¶1, S. Treaty Doc. 104-3 (eff. July 29, 1995); and *Italian Extradition Treaty*, Art. V, ¶1, 35 U.S.T. 3027 (1984).

Where an official citation is unavailable for particular treaty, we have used the Senate Treaty Document citation along with the date upon which the treaty entered into force according the State Department's *Treaties In Force 2007*, available on July 25, 2007 at [http://www.state.gov/documents/organization/83046.pdf]. Beginning with the 104th Congress, Senate Treaty Documents are available on the Government Printing Office's website, [http://www.access.gpo.gov/congress].

[20] *E.g.*, *Italian Extradition Treaty*, Art. V, §3, 35 U.S.T. 3029 (1984) ("Extradition shall not be granted for offenses under military law which are not offenses under ordinary criminal law"). *See generally, In re Extradition of Suarez-Mason*, 694 F.Supp. 676, 702-3 (N.D.Cal. 1988)(the military offense exception covers crimes like "mutiny and desertion which are outside the realm of ordinary criminal law"); BASSIOUNI at 676-78; ABBELL & RISTAU at 116-17, 212-13.

[21] ABBELL, EXTRADITION TO AND FROM THE UNITED STATES (ABBELL) §3-2(25)(No United States extradition treaty negotiated prior to 1960 contains an express military offense exception).

[22] Even there the political offense exception was thought more hospitable, except in the case of desertion, *see generally*, Tate, *Draft Evasion and the Problem of Extradition*, 32 ALBANY LAW REVIEW 337 (1968).

The political offense exception, however, has proven more troublesome.[23] The exception is and has been a common feature of extradition treaties for almost a century and a half. In its traditional form, the exception is expressed in deceptively simple terms.[24] Yet it has been construed in a variety ways, more easily described in hindsight than to predicate beforehand. As a general rule, American courts require that a fugitive seeking to avoid extradition "demonstrat[e] that the alleged crimes were committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion."[25]

Contemporary treaties often seek to avoid misunderstandings in a number of ways. They expressly exclude terrorist offenses or other violent crimes from the definition of political crimes for purposes of the treaty;[26] they explicitly extend the political exception to those whose prosecution is politically or discriminatorily

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[23] *See generally*, BASSIOUNI, at 594-676; RESTATEMENT, §476, *Comment g.* & *Reporters' Notes* 4-8; ABBELL & RISTAU at 199-212; Phillips, *The Political Offense Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for its Future*, 15 DICKINSON JOURNAL OF INTERNATIONAL LAW 337 (1997); *The Political Offense Exception: Reconciling the Tension Between Human Rights and International Public Order*, 63 GEORGE WASHINGTON LAW REVIEW 585 (1995).

[24] *Egyptian Extradition Treaty*, Art. III, 19 Stat. 574 (1874)("The provisions of this treaty shall not apply to any crime or offence of a political character").

[25] *Kostotas v. Roche*, 931 F.2d 169, 171 (1st Cir. 1991), citing, *Eain v. Wilkes*, 641 F.2d 504, 512 (7th Cir. 1981); *Ordinola v. Hackman*, 478 F.3d 588, 596-97 (4th Cir. 2007); *Vo v. Benov*, 447 F.3d 1235, 1241 (9th Cir. 2006); *Barapind v. Enomoto*, 400 F.3d 744, 750 (9th Cir. 2005); *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980); *Sindona v. Grant*, 619 F.2d 167, 173 (2d Cir. 1980); *Quinn v. Robinson*, 783 F.2d 776, 807-9 (9th Cir. 1986); *Ornelas v. Ruiz*, 161 U.S. 689, 692 (1896).

[26] *E.g.*, *Hungarian Extradition Treaty*, Art. 2, ¶2, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996)("For purposes of this Treaty, the following offenses shall not be considered to be political offenses: a. a murder or other willful crime against the person of a Head of State of one of the Contracting Parties, or a member of the Head of State's family; . . . c. murder, manslaughter, or other offense involving substantial bodily harm; d. an offense involving kidnaping or any form of unlawful detention, including the taking of a hostage; e. placing or using an explosive, incendiary or destructive device capable of endangering life, of causing substantial bodily harm, or of causing substantial property damage; and f. a conspiracy or any type of association to commit offenses as specified in Article 2, paragraph 2, or attempt to commit, or participation in the commission of, any of the foregoing offenses"); *Polish Extradition Treaty*, Art.5, ¶2, S. Treaty Doc. 105-14 (eff. Sept. 17, 1999)(murder or other offense against heads of state or their families; murder, manslaughter, assault; kidnaping, abduction, hostage taking; bombing; or attempt or conspiracy to commit any of those offenses); *Extradition Treaty with Luxembourg*, Art.4, ¶2, S. Treaty Doc. 105-10 (eff. Feb. 1, 2002)(virtually the same); *Costa Rican Extradition Treaty*, Art.4, ¶2, S. Treaty Doc. 98-17, (eff. Oct. 11, 1991)(violent crimes against a Head of State or a member of his or her family).

motivated;[27] and/or they limit the reach of their political exception clauses to conform to their obligations under multinational agreements.[28]

Capital Offenses.

A number of nations have abolished or abandoned capital punishment as a sentencing alternative.[29] Several of these have preserved the right to deny extradition in capital cases either absolutely or in absence of assurances that the fugitive will not be executed if surrendered.[30] More than a few countries are reluctant to extradite in

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[27] *Jamaican Extradition Treaty*, Art. III, ¶2, S. Treaty Doc. 98-18 (eff. July 7, 1991) ("Extradition shall also not be granted if . . . (b) it is established that the request for extradition, though purporting to be on account of the extraditable offence, is in fact made for the purpose of prosecuting or punishing the person sought on account of his race, religion, nationality, or political opinions; or (c) the person sought is by reason of his race, religion, nationality, or political opinions, likely to be denied a fair trial or punished, detained or restricted in his personal liberty for such reasons"); *Extradition Treaty with the Bahamas*, Art. 3, ¶(1)(c), S. Treaty Doc. 102-17 (eff. Sept. 22, 1994)("Extradition shall not be granted when: . . . the executive authority of the Requested State determines that the request was politically or racially motivated"); *Extradition Treaty with Cyprus*, Art.4, ¶3, S. Treaty Doc. 105-16 (eff. Sept. 14, 1999)(politically motivated); *French Extradition Treaty*, Art.4, ¶4, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002)(prosecution or punishment on account of the fugitive's "race, religion, nationality or political opinions").

[28] *Costa Rican Extradition Treaty*, Art.4, ¶2(b), S. Treaty Doc. 98-17, (eff. Oct. 11, 1991); *Peruvian Extradition Treaty*, Art. IV, ¶¶1-3 (eff. Aug. 25, 2003); *Korean Extradition Treaty*, Art. 4, ¶2(b), S. Treaty Doc. 106-2 (eff. Dec. 20, 1999); *Indian Extradition Treaty*, Art.4, ¶2(b)-(g), S. Treaty Doc. 105-30 (eff. July 21, 1999); *Hungarian Extradition Treaty*, Art. 2, ¶2, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996)("For purposes of this Treaty, the following offenses shall not be considered to be political offenses . . . an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution"). The State Department has noted that the list of crimes subject to such international agreements includes air piracy, aircraft sabotage, crimes of violence committed against foreign dignitaries, hostage taking and narcotics trafficking, *Letter of Submittal, Id*. at VI. Unless restricted in the Treaty, the list apparently also includes genocide, war crimes, theft of nuclear materials, slavery, torture, violence committed against the safety of maritime navigation or maritime platforms, theft or destruction of national treasures, counterfeiting currency and bribery of foreign officials. BASSIOUNI at 665-66.

[29] SCHABAS, THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT, 239-45 (1997); HOOD, THE DEATH PENALTY, 240-47 (2d ed. 1996).

[30] *E.g.*, *Jordanian Extradition Treaty*, Art. 7, S. Treaty Doc. 104-3 (eff. July 29, 1995) ("when the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the Requested State may refuse extradition unless the Requesting State provides such assurances as the Requested State considers sufficient that the death penalty, if imposed, shall not be carried out"); *see also*, *Argentine Extradition Treaty*, Art.6, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Bolivian Extradition Treaty*, Art. IV, ¶1, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Hungarian Extradition Treaty*, Art. 7, ¶1, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *South African Extradition Treaty*, Art.5, S. Treaty Doc. 106-24 (eff. June 25, 2001); *Costa Rican Extradition Treaty*, Art.7, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991).

a capital case even though their extradition treaty with the United State has no such provision, based on opposition to capital punishment or to the methods and procedures associated with execution bolstered by sundry multinational agreements to which the United States is either not a signatory or has signed with pertinent reservations.[31]

Want of Dual Criminality.

Dual criminality exists when the two parties to an extradition treaty each punishes a particular form of misconduct. Historically, extradition treaties have handled dual criminality in one of three ways. They list extraditable offenses and do not otherwise speak to the issue. They list extraditable offenses and contain a separate provisions requiring dual criminality. They identify as extraditable offenses those offenses condemned by the laws of both nations. Today, "[u]nder most international agreements . . . [a] person sought for prosecution or for enforcement of a sentence will not be extradited . . . (c) if the offense with which he is charged or of which he has been convicted is not punishable as a serious crime in both the requesting and requested state. . ."[32]

On the other hand, the capital punishment mutuality provision can redound to our interests when another nation has a wider range of capital offenses than do we, *see e.g.*, S. Ex. Rept. 104-2, at 9 (1995)("The United States delegation sought this provision because Jordan imposes the death penalty for some crimes that are not punishable by death in the United States").

Some capital punishment clauses do not apply in murder cases, *see e.g., Extradition Treaty with the Bahamas*, Art. 2, ¶2, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994)("When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the competent authority of the Requested State may refuse extradition unless: (a) the offense constitutes murder under the laws in the Requested State; or (b) the competent authority of the Requesting State provides such assurances as the competent authority of the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out"); *Extradition Treaty with Thailand*, Art. 6, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Extradition Treaty with Sri Lanka*, Art.7, S. Treaty Doc. 106-34 (eff. Jan. 12, 2001); *see also, Extradition Treaty with the United Kingdom*, Art. IV, 28 U.S.T. 230 (eff. May 17, 1977).

[31] BASSIOUNI at 735-44; ABBELL & RISTAU at 117-19, 295-6; *International and Domestic Approaches to Constitutional Protections of Individual Rights: Reconciling the* Soering *and* Kindler *Decisions*, 34 AMERICAN CRIMINAL LAW REVIEW 225 (1996); *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged with a Capital Crime*, 25 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 189 (1994).

[32] 1 RESTATEMENT, §476; *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995). Examples include the *Italian Extradition Treaty*, Art II, 35 U.S.T. 3027 (1984) ("An offense, however denominated, shall be an extraditable offense only if it is punishable under the laws of both Contracting Parties by deprivation of liberty for a period of more than one year or by a more severe penalty. . ."); *see also*, *Extradition Treaty with Belize*, Art.2, ¶1, S. Treaty Doc. 106-38 (eff. Mar. 21, 2001); *Argentine Extradition Treaty*, Art.2, ¶1, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Extradition Treaty with Uruguay*, Art. 2, 35 U.S.T. 3201 (1973); *Hungarian Extradition Treaty*, Art. 2, ¶1, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Jordanian Extradition Treaty*, Art. 2, ¶1, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Bolivian Extradition Treaty*, Art. II, ¶1, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Extradition*

Although there is a split of authority over whether dual criminality resides in all extradition treaties that do not deny its application,[33] the point is largely academic since it is a common feature of all American extradition treaties.[34] Subject to varying interpretations, the United States favors the view that treaties should be construed to honor an extradition request if possible. Thus, dual criminality does not "require that the name by which the crime is described in the two countries shall be same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions."[35] When a foreign country seeks to extradite a fugitive from the United States dual criminality may be satisfied by reference to either federal or state law.[36]

Our treaty partners do not always construe dual criminality requirements as broadly. In the past, some have been unable to find equivalents for attempt, conspiracy, RICO, CCE, and crimes with prominent federal jurisdictional elements.[37] Many modern extradition treaties contain provisions addressing the problem of

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Treaty with the Bahamas, Art. 2, ¶1, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Extradition Treaty with Thailand*, Art. 2, ¶1, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Costa Rican Extradition Treaty*, Art. 2, ¶1, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991).

[33] *In re Extradition of Loharoia*, 932 F.Supp. 802, 810 (N.D.Tex. 1996) ("The principle is a general policy of extradition, and arguably applies even absent explicit inclusion in the treaty in question. *See, Wright v. Henkel*, 190 U.S. 40, 58 (1903); *Bauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980). On the other hand, there is authority suggesting that the principle does not apply unless it is expressly stated in the treaty. *See, Factor [v. Laubenheimer]*, 290 U.S. [276], at 287-90 [(1933)]").

[34] Soma, Muther, & Brissette, *Transnational Extradition for Computer Crimes; Are New Treaties and Laws Needed?* 34 HARVARD JOURNAL OF LEGISLATION 317, 324 (1997).

[35] *Collins v. Loisel*, 259 U.S. 309, 312 (1922); *United States v. Anderson*, 472 F.3d 662, 664-65 (9th Cir. 2006); *Gallo-Chamorro v. United States*, 233 F.3d 1298, 1307 (11th Cir. 2000); *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1113 (7th Cir. 1997); *LoDuca v. United States*, 93 F.3d 1100, 1112 (2d Cir. 1996); *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995); *In re Extradition of Platko*, 213 F.Supp.2d 1229, 1236 (S.D.Cal. 2002); *see generally, Test of "Dual Criminality" Where Extradition to or From Foreign Nation Is Sought*, 132 ALR FED 525 (1996 & Oct. 2006 Supp.).

[36] *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 191, 207 ("The current state of the law appears to be that if the offense is considered criminal under federal law, the law of the asylum State, or under the law of the preponderance of States, the dual criminal requirement is satisfied"); *Test of Dual Criminality Where Extradition From Foreign Nations Is Sought*, 132 ALR FED. at 539-40.

[37] The Racketeer Influenced and Corrupt Organization (RICO) provisions prohibit acquisition or operation of an interstate commercial enterprise through the patterned commission of various other "predicate" offenses, 18 U.S.C. 1961 to 1966. The Continuing Criminal Enterprise (CCE) or drug kingpin provisions, 21 U.S.C. 848, outlaw management of a large drug trafficking operation. Along with attempt, conspiracy and federal crimes with distinctive jurisdictional elements, they pose difficulties when they approximate but do not exactly matching the elements for extraditable offenses. They present a distinct problem, however, when they are based entirely on predicate offenses that are not themselves extraditable offenses. BASSIOUNI at 504-11; *RICO, CCE, and International Extradition*, 62 TEMPLE LAW REVIEW 1281 (1989).

jurisdictional elements[38] and/or making extraditable attempt or conspiracy to commit an extraditable offense.[39] Some include special provisions for tax and customs offenses as well.[40]

Extraterritoriality.

As a general rule, crimes are defined by the laws of the place where they are committed. There have always been exceptions to this general rule under which a nation was understood to have authority to outlaw and punish conduct occurring outside the confines of its own territory. In the past, our extradition treaties applied to crimes "committed within the [territorial] jurisdiction" of the country seeking extradition.[41] Largely as a consequence of terrorism and drug trafficking, however, the United States now claims more sweeping extraterritorial application for our criminal laws than recognized either in our more historic treaties or by many of

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[38] *E.g.*, *Hungarian Extradition Treaty*, Art. 2, ¶3.b., S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) ("For the purpose of this Article, an offense shall be an extraditable offense . . . whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court"); *see also*, *Lithuanian Extradition Treaty*, Art. 2, ¶3, S. Treaty Doc. 107-4 (eff. Mar. 31, 2003); *Austrian Extradition Treaty*, Art.2, ¶4(c), S. Treaty Doc. 105-50 (eff. Jan. 1, 2000); *Extradition Treaty with Belize*, Art.2, ¶3(b), S. Treaty Doc. 106-38 (eff. Mar. 21, 2001); *Korean Extradition Treaty*, Art.2, ¶3(c), S. Treaty Doc. 106-2 (eff. Dec. 20, 1999).

[39] *E.g.*, *Extradition Treaty with the Bahamas*, Art. 2, ¶2, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994)("An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, aiding or abetting, counselling, causing or procuring the commission of, or being an accessory before or after the fact to, an [extraditable] offense. . ."); *Extradition Treaty with Trinidad and Tobago*, Art. 2, ¶2, S. Treaty Doc. 105-21 (eff. Nov. 29, 1999); *Jordanian Extradition Treaty*, Art. 2, ¶2, S. Treaty Doc. 104-3 (eff. July 29, 1995)("An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, or participation in the commission of, an [extraditable] offense. . ."); *Extradition Treaty with Luxembourg*, Art.2, ¶1(a), (b), S. Treaty Doc. 105-10 (eff. Feb. 1, 2002); *Extradition Treaty with the United Kingdom*, Art. III, ¶2, 28 U.S.T. 230 (1977)("Extradition shall also be granted for any attempt or conspiracy to commit an [extraditable] offense . . .").

[40] *E.g.*, *South African Extradition Treaty*, Art. 2 ¶6, S. Treaty Doc. 106-24 (eff. June 25, 2001)("Where extradition of a person is sought for an offense against a law relating to taxation, customs duties, exchange control, or other revenue matters, extradition may not be refused on the ground that the law of the Requested State does not impose the same kind of tax or duty or does not contain a tax, customs duty, or exchange regulation of the same kinds as the law of the Requesting State"); *Austrian Extradition Treaty*, Art. 2, ¶4(B), S. Treaty Doc. 105-50 (eff. Jan. 1, 2002); *Korean Extradition Treaty*, Art.2, ¶6, S. Treaty Doc. 106-2 (eff. Dec. 20, 1999); *Polish Extradition Treaty*, Art.3, S. Treaty Doc. 105-14 (eff. Sept. 17, 1999); *but see*, *Extradition Treaty with Luxembourg*, Art. 5, S. Treaty Doc. 105-10 (eff. Feb. 1, 2002) ("The executive authority of the Requested State shall have discretion to deny extradition when the offense for which extradition is requested is a fiscal offense [*i.e.*, purely a tax, customs, or currency offense]").

[41] ABBELL & RISTAU at 64-7, 278-80.

today's governments.[42] Here, our success in eliminating extradition impediments by negotiating new treaty provisions has been mixed. More than a few call for extradition regardless of where the offense was committed.[43] Yet perhaps an equal number of contemporary treaties permit or require denial of an extradition request that falls within an area where the countries hold conflicting views on extraterritorial jurisdiction.[44]

Nationality.

The right of a country to refuse to extradite one's own nationals is probably the greatest single obstacle to extradition. The United States has long objected to the impediment[45] and recent treaties indicate that its hold may not be as formidable as

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[42] Even among countries with a fairly expansive view of the extraterritorial jurisdiction, there may be substantial differences between the perceptions of common law countries and those of civil law countries, Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 1984 UTAH LAW REVIEW 685.

[43] *E.g.*, *Peruvian Extradition Treaty*, Art. II, ¶3(c), S. Treaty Doc. 107-6 (eff. Mar. 25, 2003)("For the purposes of this Article, an offense shall be an extraditable offense, regardless of . . . (c) where the offense was committed"); *Bolivian Extradition Treaty*, Art. II, ¶3(b), S. Treaty Doc. 104-22 (eff. Nov. 21, 1996) ("To determine . . . whether an offense is punishable under the laws in the Requested State, it shall be irrelevant . . . where the act or acts constituting the offense were committed"); *Jordanian Extradition Treaty*, Art. 2, ¶4, S. Treaty Doc. 104-3 (eff. July 29, 1995) ("An offense described in this Article shall be an extraditable offense regardless of where the act or acts constituting the offense were committed"); *Austrian Extradition Treaty*, Art.2, ¶6, S. Treaty Doc. 105-50 (eff. Jan. 1, 2002); *Indian Extradition Treaty*, Art.2, ¶1(4) (eff. July 21, 1999); *Extradition Treaty with Luxembourg*, Art.2, ¶1(4), S. Treaty Doc. 105-10, (eff. Feb. 1, 2002).

[44] *E.g.*, *Hungarian Extradition Treaty*, Art. 2, ¶4, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) ("If the offense has been committed outside the territory of the Requesting State, extradition shall be granted if the laws of the Requested State provide for the punishment of an offense committed outside of its territory in similar circumstances. If the laws of the Requested State do not so provide, the executive authority of the Requested State may, in its discretion grant extradition"); *Extradition Treaty with the Bahamas*, Art. 2, ¶4, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994)("An offense described in this Article shall be an extraditable offense whether or not the offense was committed within the territory of the Requesting State. However, if the offense was committed outside the territory of the Requesting State, extradition shall be granted if the law of the Requested State provides for punishment of an offense committed outside of its territory in similar circumstances"); *Italian Extradition Treaty*, Art III, 35 U.S.T. 3028 (1984) ("When an offense has been committed outside the territory of the Requesting Party, the Requested Party shall have the power to grant extradition if its laws provide for the punishment of such an offense or if the person sought is a national of the Requesting Party"); *Extradition Treaty with Uruguay*, Art. 2, ¶2, 35 U.S.T. 3206 (1973)(". . . When the offense for which extradition has been requested has been committed outside the territory of the requesting Party, extradition may be granted if the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances"); *French Extradition Treaty*, Art. 2, ¶4, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002)("Extradition shall be granted for an extraditable offense committed outside the territory of the Requesting State, when the laws of the requested Party authorize the prosecution or provide the punishment of that offense in similar circumstances").

[45] 1 RESTATEMENT, §475, *Reporters' Note* 4.

was once the case. At one time it was fair to say that "United States extradition treaties contained generally three types of such provisions. The first does not refer to nationals specifically, but agrees to the extradition of all persons. Judicial construction, as well as executive interpretation, of such clauses have consistently held that the word 'person' includes nationals, and therefore refusal to surrender a fugitive because he is a national cannot be justified . . . . The second and most common type of treaty provision provides that 'neither of the contracting parties shall be bound to deliver up its own citizens or subjects . . . .' [Congress has enacted legislation to overcome judicial construction that precluded the United States from surrendering an American under such provision.[46]] The third type of treaty provision states that 'neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up if, in its discretion, it be deemed proper do so.'"[47]

These basic three have been joined by a number of variants. A growing number go so far as to declare that "Extradition shall not be refused on the ground that the fugitive is a citizen or national of the Requested State."[48] Another form limits the nationality exemption to nonviolent crimes;[49] a third allows a conflicting obligation

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[46] The Supreme Court in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936), held that a national exemption clause that denied an obligation to extradition denied the United States the authority to honor a treaty request to surrender an American. Congress sought to reverse the result with the enactment of 18 U.S.C. 3196 ("If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met"). At least two lower federal courts have held that the statute grants the government authority to extradite an American, *Hilario v. United States*, 854 F.2d 165 (E.D.N.Y. 1994); *Gouveia v. Vokes*, 800 F.Supp. 241 (E.D.Pa. 1992); *see also, Lopez-Smith v. Hood*, 121 F.3d 1322, 1325-326 (9th Cir. 1997)(section 3196 and a treaty provision stating that the parties "may" extradite their own nationals affords to the Secretary of State discretion).

[47] BASSIOUNI at 683-84; ABBELL & RISTAU at 67-71, 186-87, 280-81.

[48] *Argentine Extradition Treaty*, Art.3, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Extradition Treaty with Belize*, Art.3, S. Treaty Doc. 106-38 (eff. Mar. 20, 2000); *South African Extradition Treaty*, Art.3, S. Treaty Doc. 106-24 (eff. June 25, 2001); *Extradition Treaty with the Bahamas*, Art. 4, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Jordanian Extradition Treaty*, Art. 3, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Italian Extradition Treaty*, Art IV, 35 U.S.T. 3028 (1983); *Extradition Treaty with Uruguay*, Art. 4, 35 U.S.T. 3206 (1973).

[49] *Bolivian Extradition Treaty*, Art. III, ¶1(b), S. Treaty Doc. 104-22 (eff. Nov. 21, 1996) ("Neither Party shall be obligated to extradite its own nationals, except when the extradition request refers to . . . (b) murder; voluntary manslaughter; kidnaping; aggravated assault; rape; sexual offenses involving children; armed robbery; offenses related to the illicit traffic in controlled substances; serious offenses related to terrorism; serious offenses related to organized criminal activity; fraud against the government or involving multiple victims; counterfeiting of currency; offenses related to the traffic in historical or archeological items; offenses punishable in both States by deprivation of liberty for a maximum period of at least ten years; or (c) an attempt or conspiracy, participation in, or association regarding the

under a multinational agreement to wash the exemption away.[50] Even where the exemption is preserved, contemporary treaties more regularly refer to the obligation to consider prosecution at home of those nationals whose extradition has been refused.[51]

Double Jeopardy.

Depending on the treaty, extradition may also be denied on the basis of a number of procedural considerations. Double punishment and/or double jeopardy (also know as *non bis in idem*) clauses are among these.[52] The more historic clauses are likely to bar extradition for a second prosecution of the "same acts" or the "same event" rather than the more narrowly drawn "same offenses."[53] The new model limits the exemption to fugitives who have been convicted or acquitted of the same offense and specifically denies the exemption where an initial prosecution has simply been abandoned.[54]

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commission of any of the offenses described in subparagraphs (a) and (b)").

[50] *Bolivian Extradition Treaty*, Art. III, ¶1(a), S. Treaty Doc. 104-22 (eff. Nov. 21, 1996) ("Neither Party shall be obligated to extradite its own nationals, except when the extradition request refers to: (a) offenses as to which there is an obligation to establish criminal jurisdiction pursuant to multilateral international treaties in force with respect to the Parties").

[51] *E.g.*, *Hungarian Extradition Treaty*, Art. 3, ¶2, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) ("If extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its authorities for prosecution"); *Austrian Extradition Treaty*, Art.3, ¶¶1, 2, S. Treaty Doc. 105-50 (eff. Jan. 1, 2002); *Extradition Treaty with Cyprus*, Art.3, ¶¶1, 2, S. Treaty Doc. 105-16 (eff. Sept. 14, 1999); *Bolivian Extradition Treaty*, Art. III, ¶3, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Extradition Treaty with Thailand*, Art. 8, ¶2, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Costa Rican Extradition Treaty*, Art. 8, ¶2, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jamaican Extradition Treaty*, Art. VII, ¶¶2, 3, S. Treaty Doc. 98-18 (eff. July 7, 1991)(but also requiring extradition if a fugitive is a national of both the Requesting and Requested State).

[52] BASSIOUNI at 693-707; ABBELL & RISTAU at 96-100, 192-98, 290-93.

[53] *Italian Extradition Treaty*, Art VI, 35 U.S.T. 3030 (1984) ("Extradition shall not be granted when the person sought has been convicted, acquitted or pardoned, or has served the sentence imposed, by the Requested Party for the same act for which extradition is requested"); *Extradition Treaty with the United Kingdom*, Art. V, ¶1(a), 28 U.S.T. 230 (1977) ("Extradition shall not be granted if: (a) the person sought would, if proceeded against in the territory of the requested Party for the offense for which his extradition is requested, be entitled to be discharged on the grounds of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third State").

[54] *E.g.*, *Bolivian Extradition Treaty*, Art. V, ¶2, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996) ("Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested. Extradition shall not be precluded by the fact that the authorities of the Requested State have decided to refrain from prosecuting the person sought for the acts for which extradition is requested or to discontinue any criminal proceedings which have been initiated against the person sought for those acts."); *see also*, *Extradition Treaty with Sri Lanka*, Art.5, S. Treaty Doc. 106-34 (eff. Jan. 12, 2001); *Extradition Treaty with Trinidad and Tobago*, Art.5, S. Treaty Doc.

Lapse of Time.

Lapse of time or statute of limitation clauses are prevalent as well. "Many [states] . . . preclude extradition if prosecution for the offense charged, or enforcement of the penalty, has become barred by lapse of time under the applicable law. Under some treaties the applicable law is that of the requested state,[55] in others that of the requesting state;[56] under some treaties extradition is precluded if either state's statute of limitations has run.[57] . . . When a treaty provides for a time-bar only under the law of the requesting state, or only under the law of the requested state, United States courts have generally held that time-bar of the state not mentioned does not bar extradition. If the treaty contains no reference to the effect of a lapse of time neither state's statute of limitations will be applied."[58] Left unsaid is the fact that some treaties declare in no uncertain terms that the passage of time is no bar to extradition.[59]

In cases governed by American law and in instances of American prosecution following extradition, applicable statutes of limitation and due process determine whether pre-indictment delays bar prosecution[60] and speedy trial provisions govern

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105-21 (eff. Nov. 29, 1999); *Extradition Treaty with the Bahamas*, Art. 5, ¶¶1, 2, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Jordanian Extradition Treaty*, Art. 5, ¶¶1, 2, S. Treaty Doc. 104-3 (eff. July 29, 1995). Some include language to avoid confusion over whether an American dismissal with prejudice is the same as an acquittal, *Hungarian Extradition Treaty*, Art. 5, ¶1, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) ("Extradition shall not be granted when the person sought has been convicted or acquitted or the case dismissed by court order with finding and final effect in the Requested State for the offense for which extradition is requested").

[55] *E.g., Argentine Extradition Treaty*, Art.7, ¶1, S. Treaty Doc. 105-18 (eff. June 15, 2000); *French Extradition Treaty*, Art.8, ¶1, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002).

[56] *E.g., Austrian Extradition Treaty*, Art. 7, S. Treaty Doc. 105-50 (eff. Jan. 1, 2000); *Indian Extradition Treaty*, Art.7, S. Treaty Doc. 105-30 (eff. July 21, 1999); *Extradition Treaty with the Bahamas*, Art. 6, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Hungarian Extradition Treaty*, Art. 6, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Italian Extradition Treaty*, Art VII, 35 U.S.T. 3030 (1983).

[57] *E.g., Extradition Treaty with Uruguay*, Art. 5, ¶3, 35 U.S.T. 3207 (1973); *see also, Jordanian Extradition Treaty*, Art. 6, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Extradition Treaty with the United Kingdom*, Art. V, ¶1(b), 28 U.S.T. 230 (1977).

[58] 1 RESTATEMENT §476, *Comment e*; *see also*, BASSIOUNI at 707-12; ABBELL & RISTAU at 94-6, 187-90, 289-90.

[59] *E.g., Jordanian Extradition Treaty*, Art. 6, S. Treaty Doc. 104-3 (eff. July 29, 1995) ("The decision whether to grant the request for extradition shall be made without regard to provisions of the law of either Contracting State concerning lapse of time"); *Extradition Treaty with Belize*, Art.8,106-38 (eff. Mar. 21, 2001); *Extradition Treaty with Cyprus*, Art.7, S. Treaty Doc.105-16 (eff. Sept. 14, 1999).

[60] U.S.Const. Amends. V, XIV; *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977); *United States v. MacDonald*, 456 U.S. 1, 8 (1982);*United States v. Gregory*, 322 F.3d 1157, 1165 (9th Cir. 2002); *United States v. Farmer*, 312 F.3d 933, 936 (8th Cir. 2003).

whether post-indictment delays preclude prosecution.[61]

Other Features.

Expenses and Representation. Our extradition treaties, particularly the more recent ones, often have other less obvious, infrequently mentioned features. Perhaps the most common of these deal with the expenses associated with the procedure and representation of the country requesting extradition before the courts of the country of refuge. The distribution of costs is ordinarily governed by a treaty stipulation, reflected in federal statutory provisions,[62] under which the country seeking extradition accepts responsibility for any translation expenses and the costs of transportation after surrender, and the country of refuge assumes responsibility for all other costs.[63] Although sometimes included in a separate article, contemporary

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[61] U.S.Const. Amends. VI, XIV; *Doggett v. United States*, 505 U.S. 647, 651 (1992); *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. White Horse*, 316 F.3d 769, 774 (8th Cir. 2003); *United States v. Cope*, 312 F.3d 757, 777-78 (6th Cir. 2003).

[62] 18 U.S.C. 3195 ("All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority. All witness fees and costs of every nature in cases of international extradition, including the fees of the magistrate, shall be certified by the judge or magistrate before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the judiciary or the Department of Justice as the case may be. The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States").

[63] *Hungarian Extradition Treaty*, Art. 20, ¶¶2 & 3, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996)("2. The Requesting State shall bear the expenses related to the translation of documents and transportation of the person surrendered. The Requested State shall pay all other expenses incurred in that State by reason of the extradition proceedings. 3. Neither State shall make any pecuniary claim against the other State arising out of the arrest, detention, examination, or surrender of persons sought under this Treaty"); *Indian Extradition Treaty*, Art. 20, ¶2, S. Treaty Doc. 105-30 (eff. July 21, 1999); *French Extradition Treaty*, Art. 22, ¶2, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002); *Jordanian Extradition Treaty*, Art. 19, ¶¶2 & 3, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Costa Rican Extradition Treaty*, Art. 18, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Extradition Treaty with Thailand*, Art. 18, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Jamaican Extradition Treaty*, Art. XVII, ¶¶1, 3 & 4, S. Treaty Doc. 98-18 (eff. July 7, 1991)(also requesting state may be subject to a claim due to special expenses or concerning third party interests in transferred property); *Extradition Treaty with the Bahamas*, Art. 18, ¶¶2 & 3, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Italian Extradition Treaty*, Art XXI, 35 U.S.T. 3041 (1984); *but see*, *Bolivian Extradition Treaty*, Art. XVI, ¶¶3 & 4, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996)("The Requesting State shall bear expenses related to the translation of documents and the transportation of the person sought. 4. Neither Party shall make any pecuniary claim against the other arising from the arrest, detention, custody, examination, or surrender of a person sought under this Treaty")(note absence of language as to the responsibility for cost other than transportation or translation); *Extradition Treaty with Uruguay*, Art. 18, 35 U.S.T. 3216 (similar).

treaties generally make the country of refuge responsible for legal representation of the country seeking extradition.[64]

Transfer of Evidence. Contemporary treaties regularly permit a country to surrender documents and other evidence along with an extradited fugitive. An interesting attribute of these clauses is that they permit transfer of the evidence even if the fugitive becomes unavailable for extradition. This may make some sense in the case of disappearance or flight, but seems a bit curious in the case of death.[65]

Transit. A somewhat less common clause permits transportation of a fugitive through the territory of either of the parties to a third country without the necessity of following the treaty's formal extradition procedure.[66]

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[64] *Jordanian Extradition Treaty*, Art. 19, ¶1, S. Treaty Doc. 104-3 (eff. July 29, 1995)("The Requested State shall advise, assist, appear in court on behalf of the Requesting State, and represent the interests of the Requesting State, in any proceedings arising out of a request for extradition"); *Extradition Treaty with Luxembourg*, Art. 20, ¶1, S. Treaty Doc. 1-5-10 (eff. Feb. 1, 2002); *Extradition Treaty with Sri Lanka*, Art. 19, ¶1, S. Treaty Doc.106-34 (eff. Jan. 12, 2001); *Hungarian Extradition Treaty*, Art. 20, ¶1, S. Treaty Doc. 104-5; *Extradition Treaty with the Bahamas*, Art. 18, ¶1, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Costa Rican Extradition Treaty*, Art. 20, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Bolivian Extradition Treaty*, Art. XVI, ¶¶1 & 2, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Extradition Treaty with Uruguay*, Art. 18, 35 U.S.T. 3216 (1983); *Italian Extradition Treaty*, Art XX, 35 U.S.T. 3040 (1984) *Jamaican Extradition Treaty*, Art. XVII, ¶2, S. Treaty Doc. 98-18 (eff. July 7, 1991)("The Requested State shall also provide for the representation of the Requesting State in any proceedings arising in the Requested State out of a request for extradition"); *Extradition Treaty with Thailand*, Art. 18, ¶2, S. Treaty Doc. 98-16 (eff. May 17, 1991).

[65] The typical clause provides that "All articles, instruments, objects of value, documents, and other evidence relating to the offense may be seized and, upon granting of extradition, surrendered to the requesting State. The property mentioned in this Article may be surrendered even when extradition cannot be granted or effected due to the death, disappearance, or escape of the person sought. The rights of third parties in such property shall be duly respected," *Costa Rican Extradition Treaty*, Art. 18, ¶1, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *see also*, *South African Extradition Treaty*, Art.16, S. Treaty Doc. 106-24 (eff. June 25, 2001); *Extradition Treaty with Trinidad and Tobago*, Art. 13, ¶1, S. Treaty Doc. 105-21 (eff. Nov. 29, 1999); *Jordanian Extradition Treaty*, Art. 15, ¶1, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Hungarian Extradition Treaty*, Art. 20, ¶1, S. Treaty Doc. 104-5; *Extradition Treaty with the Bahamas*, Art. 16, ¶1, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Bolivian Extradition Treaty*, Art. XIV, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Extradition Treaty with Uruguay*, Art. 16, 35 U.S.T. 3215 (1983); *Italian Extradition Treaty*, Art XVIII, 35 U.S.T. 3039 (1984) *Jamaican Extradition Treaty*, Art. XVI, ¶1, S. Treaty Doc. 98-18 (eff. July 7, 1991); *Extradition Treaty with Thailand*, Art. 16, S. Treaty Doc. 98-16 (eff. May 17, 1991).

[66] *E.g.*, *Extradition Treaty with the Bahamas*, Art. 17, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994)("(1) Either Contracting State may authorize transportation through its territory of a person surrendered to the other State by a third State. A request for transit shall be made through the diplomatic channel and shall contain a description of the person being transported and a brief statement of the facts of the case. (2) No authorization is required where air transportation is used and no landing is scheduled on the territory of the Contracting State. If an unscheduled landing occurs on the territory of the other Contracting

Constitutionality

The Constitution provides that the judicial power of the United States extends to certain cases and controversies.[67] Historically, this has lead to discomfort whenever an effort is made to insert the federal courts in the midst of an executive or legislative process, such as the issuance of purely advisory opinions.[68] The fact that extradition turns on the discretion of the Secretary of State following judicial certification has led to the suggestion that the procedure established by the extradition statute is constitutionally offensive to this separation of powers. First broached by a district court in the District of Columbia,[69] subsequent courts have rejected the suggestion in large measure under the view that much like the issuance of a search or arrest warrant the task is compatible with tasks constitutionally assigned to the judiciary.[70]

Procedure for Extradition from the United States

A foreign country usually begins the extradition process with a request submitted to the State Department[71] sometimes including the documentation required

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State, transit shall be subject to paragraph (1) of this Article. That Contracting State shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing"); *see also*, *Argentine Extradition Treaty*, Art. 18, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Korean Extradition Treaty*, Art. 17, S. Treaty Doc. 106-2 (eff. Dec. 20, 1999); *Costa Rican Extradition Treaty*, Art. 19, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jordanian Extradition Treaty*, Art. 18, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Hungarian Extradition Treaty*, Art. 19, S. Treaty Doc. 104-5; *Bolivian Extradition Treaty*, Art. XV, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Extradition Treaty with Thailand*, Art. 17, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Extradition Treaty with Uruguay*, Art. 17, 35 U.S.T. 3216 (1983); *Italian Extradition Treaty*, Art XIX, 35 U.S.T. 3040 (1984).

[67] U.S. Const. Art. III, §2.

[68] *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); *Muskrat v. United States*, 219 U.S. 346 (1911); Frankfurter, *Advisory Opinions*, 37 HARVARD LAW REVIEW 1002 (1924).

[69] *Lobue v. Christopher*, 893 F.Supp. 65 (D.D.C. 1995), *vac'd on juris. grounds*, 82 F.3d 1081 (D.C.Cir. 1996).

[70] *In re Requested Extradition of Artt*, 158 F.3d 462, 469-70 (9th Cir. 1998), *redesignated after rehearing, In re Artt*, 248 F.3d 1197 (9th Cir. 2001); *LoDuca v. United States*, 93 F.3d 1100, 1105-10 (2d Cir. 1996); *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1113 (7th Cir. 1997); *see also*, *In re Extradition of Seong-I*, 346 F.Supp.2d 1149, 1154-156 (D.N.M. 2004); *Noel v. United States*, 12 F.Supp.2d 1300, 1304-305 (M.D.Fla. 1998); *In re Extradition of Lehming*, 951 F.Supp. 505, 508-9 (D.Del. 1996); *Sandhu v. Bransom*, 932 F.Supp. 822, 826 (N.D.Tex. 1996); *Werner v. Hickey*, 920 F.Supp. 1257, 1259 (M.D.Cal. 1996); *see also*, *Innocence Abroad: An Analysis of the Constitutionality of International Extradition*, 33 STANFORD JOURNAL OF INTERNATIONAL LAW 343 (1997).

[71] *Vo v. Benov*, 447 F.3d 1235, 1237 (9th Cir. 2006). "[T]hrough the diplomatic channel" seems to be the phrase favored most recently, *see e.g.*, *Hungarian Extradition Treaty*, Art. 8, ¶1, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996)("All requests for extradition shall be made through the diplomatic channel"); *Polish Extradition Treaty*, Art.9, ¶1, S. Treaty Doc. 105-14 (eff. Sept. 17, 1999); *Korean Extradition Treaty*, Art. 8, ¶1, S. Treaty Doc. 106-2 (eff.

by the treaty.[72] When a requesting nation is concerned that the fugitive will take flight before it has time to make a formal request, it informally asks for extradition and provisional arrest with the assurance that the full complement of necessary documentation will follow.[73] In either case, the Secretary of State, at his discretion, may forward the matter to the Department of Justice to begin the procedure for the arrest of the fugitive "to the end that the evidence of criminality may be heard and considered."[74]

Dec. 20, 1999); *Extradition Treaty with the Bahamas*, Art. 8, ¶1, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Jordanian Extradition Treaty*, Art. 8 ¶1, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Bolivian Extradition Treaty*, Art. VI, ¶1, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Italian Extradition Treaty*, Art. X, 35 U.S.T. 3031 (1983); *Extradition Treaty with Uruguay*, Art. 10, ¶1, 35 U.S.T. 3210 (1973).

[72] *Jordanian Extradition Treaty*, Art. 8 ¶¶2, 3, & 4, S. Treaty Doc. 104-3 (eff. July 29, 1995)("2. All requests shall contain: (a) documents, statements, photographs (if possible), or other types of information which describe the identity, nationality, and probable location of the person sought; (b) information describing the facts of the offense and the procedural history of the case; (c) the text of the law describing the essential elements of the offense for which extradition is requested; (d) the text of the law prescribing the punishment for the offense; and (e) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of this Article, as applicable."); 3. A request for extradition of a person who is sought for prosecution shall also contain: (a) a copy of the warrant or order of arrest issued by a judge or other competent authority; (b) a copy of the charging documents; and (c) such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested. 4. A request for extradition relating to a person who has been found guilty of the offense for which extradition is sought shall also contain: (a) a copy of the judgment of conviction or, if such copy is not available, a statement by a judicial authority that the person has been found guilty; (b) information establishing that the person sought is the person to whom the finding of guilt refers; (c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out; and (d) in the case of a person who has been found guilty in absentia, the documents required in paragraph 3"); *see also, South African Extradition Treaty*, Art.9, ¶¶2, 3 & 4 S. Treaty Doc. 106-24 (eff. June 25, 2001); *Extradition Treaty with Luxembourg*, Art. 8, ¶¶2, 3 & 4, S. Treaty Doc. 105-10 (eff. Feb. 1, 2002); *Hungarian Extradition Treaty*, Art. 8, ¶¶2, 3, & 4, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Extradition Treaty with the Bahamas*, Art. 8, ¶¶2, 3, & 4, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Bolivian Extradition Treaty*, Art. VI, ¶¶2-6, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996).

[73] ABBELL at §3-3(7).

[74] "Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b)[relating to the extradition from the United States of foreign nationals charged with, or convicted of, crimes of violence committed against Americans overseas, without reference to an extradition treaty], any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention . . . issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered," 18 U.S.C. 3184; *Prasoprat v. Benov*, 421 F.3d 1009, 1012 (9th Cir. 2005); *see generally*, ABBELL & RISTAU

The United States Attorneys Manual encapsulates the Justice Department's participation thereafter in these words:

> 1. OIA [Office of International Affairs] reviews . . . requests for sufficiency and forwards appropriate ones to the district [where the fugitive is found].
>
> 2. The Assistant United States Attorney assigned to the case obtains a warrant and the fugitive is arrested and brought before the magistrate judge or the district judge.
>
> 3. The government opposes bond in extradition cases.
>
> 4. A hearing under 18 U.S.C. 3184 is scheduled to determine whether the fugitive is extraditable. If the court finds the fugitive to be extraditable, it enters an order of extraditability and certifies the record to the Secretary of State, who decides whether to surrender the fugitive to the requesting government. In some cases a fugitive may waive the hearing process.
>
> 5. OIA notifies the foreign government and arranges for the transfer of the fugitive to the agents appointed by the requesting country to receive him or her. Although the order following the extradition hearing is not appealable (by either the fugitive or the government), the fugitive may petition for a writ of habeas corpus as soon as the order is issued. The district court's decision on the writ is subject to appeal, and extradition may be stayed if the court so orders.[75]

Arrest and Bail.

Although United States takes the view that an explicit treaty provision is unnecessary,[76] extradition treaties sometimes expressly authorize requests for provisional arrest of a fugitive prior to delivery of a formal request for extradition.[77]

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at 159-71. The requesting nation is usually represented in federal court by an Assistant United States Attorney or other Justice Department attorney, ABBELL at §3-3(9); Semmelman & Snell, *Defending the International Extradition Case*, CHAMPION 20, 21 (June, 2006).

[75] UNITED STATES ATTORNEYS MANUAL (USAM) §9-15.700, available on July 27, 2007 at [http://www.usdoj.gov/usao/eousa/foi_reading_room/usam/title9/15mcrm.htm].

[76] ABBELL at §3-3(7).

[77] *Extradition Treaty with Thailand*, Art. 10, ¶¶1, 2, S. Treaty Doc. 98-16 (eff. May 17, 1991)("In case of urgency, either Contracting Party may request the provisional arrest of any accused or convicted person. Application for provisional arrest shall be made through the diplomatic channel or directly between the Department of Justice . . . and the Ministry of Interior in Thailand . . . . (2) The application shall contain: a description of the person sought; the location of that person, if known; a brief statement of the facts of the case including, if possible, the time and location of the offense; a statement of the existence of a warrant of arrest or a judgment of conviction against that person . . . and a statement that a request for extradition of the person will follow"). Such provisions usually also call for the release of the fugitive upon the failure to submit a formal request within a designated period of time, *e.g.*, *id.*, Art. 10 ¶4 (60 days); *Argentine Extradition Treaty* (60 days), Art. 11, ¶4, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Korean Extradition Treaty* (two months), Art. 10, ¶4, S. Treaty Doc. 106-2 (eff. Dec. 20, 1999); *Hungarian Extradition Treaty* (60

Regardless of whether detention occurs pursuant to provisional arrest, as a consequence of the initiation of an extradition hearing or upon certification of extradition, the fugitive is not entitled to release on bail except under rare "special circumstances."[78] This limited opportunity for pre-extradition release may be further restricted under the applicable treaty.[79]

Hearing.

The precise menu for an extradition hearing is dictated by the applicable extradition treaty, but a common check list for a hearing conducted in this country would include determinations that:

1. There exists a valid extradition treaty between the United States and the requesting state;
2. The relator is the person sought;
3. The offense charged is extraditable;
4. The offense charged satisfies the requirement of double criminality;
5. There is 'probable cause' to believe the relator committed the offense charged;
6. The documents required are presented in accordance with United States law, subject to any specific treaty requirements, translated and duly authenticated . . . ; and
7. Other treaty requirements and statutory procedures are followed.[80]

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days), Art. 11, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Extradition Treaty with the Bahamas* (60 days), Art. 10, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Jordanian Extradition Treaty* (60 days with a possible 30-day extension), Art. 11, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Bolivian Extradition Treaty* (60 days), Art. VIII, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Italian Extradition Treaty* (45 days), Art. XII, 35 U.S.T. 3034-35 (1984); *Extradition Treaty with Uruguay* (45 days), Art. 11, ¶1, 35 U.S.T. 3212-213 (1973).

[78] *Wright v. Henkel*, 190 U.S. 40, 61-3 (1903)(no bail following certification absent special circumstances); *United States v. Kin-Hong*, 83 F.3d 523, 524-25 (1st Cir. 1996) (no bail during pendency of extradition proceedings absent special circumstances); *In re Requested Extradition of Kirby*, 106 F.3d 855, 863 (9th Cir. 1996) (release on bail pending the completion of extradition hearings requires special circumstances); *Borodin v. Ashcroft*, 136 F.Supp.2d 125, 128-33 (E.D.N.Y. 2001); *Hababou v. Albright*, 82 F.Supp.2d 347, 349-52 (D.N.J. 2000); *see also, In re Extradition of Sacirbegovic*, 280 F.Supp.2d 81, 83 (S.D.N.Y. 2003); *In re Extradition of Molnar*, 182 F.Supp.2d 684, 686-89 (N.D.Ill. 2002)(suggesting it may be easier to demonstrate special circumstances following provisional arrest than after a formal request has been presented); *Parretti v. United States*, 122 F.3d 758, 786 (9th Cir. 1997) (suggesting that the strong presumption against bail be abandoned), *opinion withdraw upon the flight of the respondent*, 143 F.3d 508 (9th Cir. 1998); *International Extradition and the Right to Bail*, 34 STANFORD JOURNAL OF INTERNATIONAL LAW 407 (1998).

[79] *See e.g., Costa Rican Extradition Treaty*, Art. 12, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991)("A person detained pursuant to the Treaty shall not be released until the extradition request has been finally decided, unless such release is required under the extradition law of the Requested State or unless this Treaty provides for such release").

[80] *In re Extradition of Valdez-Mainero*, 3 F.Supp.2d 1112, 1114-115 (S.D.Cal. 1998), *citing, Bassiouni*, at Ch. IX, §5.1; *see also*, ABBELL & RISTAU at 172-241; shorthand versions appear in *Cheung v. United States*, 213 F.3d 82, 88 (2d Cir. 2000)("The judicial officer's inquiry is confined to the following: whether a valid treaty exists, whether the crime charged

An extradition hearing is not, however, "in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him. . . . Instead, it is essentially a preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation. . . . The judicial officer who conducts an extradition hearing thus performs an assignment in line with his or her accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense."[81]

The purpose of the hearing is in part to determine whether probable cause exists to believe that the individual committed an offense covered by the extradition treaty. The individual may offer evidence to contradict or undermine the existence of probable cause,[82] but affirmative defenses that might be available at trial are irrelevant.[83] The rules of criminal procedure and evidence that would apply at trial have no application.[84] Hearsay is not only admissible but may be relied upon

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is covered by the relevant treaty; and whether the evidence marshaled in support of the complaint for extradition is sufficient under the applicable standard of proof"); and *Vo v. Benov*, 447 F.3d 1235, 1237 (9th Cir. 2006)("The authority of a magistrate judge serving as an extradition judicial officer is thus limited to determining an individual's eligibility to be extradited, which he does by ascertaining whether a crime is an extraditable offense under the relevant treaty and whether probable cause exists to sustain the charge"); *United States v. Lin Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997).

[81] *LoDuca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996)(internal quotation marks omitted), quoting, *Benson v. McMahon*, 127 U.S. 457, 463 (1888); *Collins v. Loisel*, 259 U.S. 309, 316 (1922); and *Ward v. Rutherford*, 921 F.2d 286, 287 (D.C. Cir. 1990); *see also, Kastnerova v. United States*, 365 F.3d 980, 987 (11th Cir. 2004); *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1112 (7th Cir. 1997); *In re Extradition of Molnar*, 202 F.Supp.2d 782, 786 (N.D.Ill. 2002).

[82] *Barapind v. Enomoto*, 400 F.3d 744, 749 (9th Cir. 2005); *Hoxha v. Levi*, 465 F.3d 554, 561 (3d Cir. 2006).

[83] *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1112 (7th Cir. 1997)(legal custodian defense to kidnaping charge), *citing, Charlton v. Kelly*, 229 U.S. 447 (1913), and *Collins v. Loisel*, 259 U.S. 309 (1922); *Lopez-Smith v. Hood*, 121 F.3d 1322, 1324 (9th Cir. 1997)(due process bar to criminal trial of incompetent defendant); *In re Extradition of Schweidenback*, 3 F.Supp.2d 113, 117 (D.Mass. 1998)(evidence related to a defense is excludable); *In re Extradition of Diaz Medina*, 210 F.Supp.2d 813, 819 (N.D.Tex. 2002).

[84] *Afanasjev v. Hurlburt*, 418 F.3d 1159, 1164-165 (11th Cir. 2005); *United States v. Kin-Hong*, 110 F.3d 103, 120 (1st Cir. 1997); *Then v. Melendez*, 92 F.3d 851, 855 (9th Cir. 1996); *In re Extradition of Fulgencio Garcia*, 188F.Supp.2d 921, 932 (N.D.Ill. 2002); F.R.CRIM.P. 54(b)(5), F.R.EVID. 1101(d)(3). Evidence offered to support an extradition request need only be authenticated, *Barapind v. Enomoto*, 400 F.3d 744, 748 (9th Cir. 2005); 18 U.S.C. 3190 ("Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required"); 22 C.F.R. §92.40 (foreign extradition requests are authenticated by the U.S. chiefs of mission).

exclusively;[85] the Miranda rule has no application;[86] initiation of extradition may be delayed without regard for the Sixth Amendment right to a speedy trial or the Fifth Amendment right of due process;[87] nor does the Sixth Amendment right to the assistance of counsel apply.[88] Due process, however, will bar extradition of informants whom the government promised confidentiality and then provided the evidence necessary to establish probable cause for extradition.[89]

Moreover, extradition will ordinarily be certified without "examining the requesting country's criminal justice system or taking into account the possibility that the extraditee will be mistreated if returned."[90] This "non-inquiry rule" is premised

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[85] *Hoxha v. Levi*, 465 F.3d 554, (3d Cir. 2006); *Afanasjev v. Hurlburt*, 418 F.3d 1159, 1165 (11th Cir. 2005); *United States v. Kin-Hong*, 110 F.3d 103, 120 (1st Cir. 1997), *citing, Collins v. Loisel*, 259 U.S. 309, 317 (1922); *In re Extradition of Platko*, 213 F.Supp.2d 1229, 1237 (S.D.Cal. 2002).

[86] *In re Extradition of Powell*, 4 F.Supp.2d 945, 951-52 (S.D.Cal. 1998); *Valenzuela v. United States*, 286 F.3d 1223, 1229 (11th Cir. 2002)(noting that even compelled statements that incriminate the fugitive under the laws of the requesting country would be admissible in an extradition hearing); *cf., United States v. Balsys*, 524 U.S. 666 (1998)(the Fifth Amendment does not prohibit compelled statements simply because they are incriminating under the laws of a foreign nation).

[87] *Yapp v. Reno*, 26 F.3d 1562, 1565 (11th Cir. 1994); *McMaster v. United States*, 9 F.3d 47, 49 (8th Cir. 1993); *Martin v. Warden*, 993 F.2d 824, 829 (11th Cir. 1993); *Bovio v. United States*, 989 F.2d 255, 260 (7th Cir. 1993); *Sabatier v. Daborwski*, 586 F.2d 866, 869 (1st Cir. 1978); *Jhirad v. Ferrandina*, 536 F.2d 478, 485 n.9 (2d Cir. 1976); *In re Extradition of Fulgencio Garcia*, 188F.Supp.2d 921, 932 (N.D.Ill. 2002)(internal citations omitted)("the Sixth Amendment right to a speedy trial and the Fifth Amendment right against undue delay are inapplicable to an extradition. Likewise, the Sixth Amendment right to effective counsel does not apply to extradition proceedings. The Supreme Court has found no constitutional infirmity where those subject to extradition proceedings have been denied an opportunity to confront their accusers. Finally, the Fifth Amendment guarantee against double jeopardy and the right to a Miranda warning are inapplicable to an extradition proceeding").

[88] *DeSilva v. DiLeonardi*, 181 F.3d 865, 868-69 (7th Cir. 1999).

[89] *Valenzuela v. United States*, 286 F.3d 1223, 1229-230 (11th Cir. 2002).

[90] *In re Extradition of Cheung*, 968 F.Supp. 791, 798-99 (D.Conn, 1997)("The rule of non-inquiry is well-established in the circuits and has been applied in extraditions to a panoply of nations. *Martin v. Warden*, 993 F.2d 824 (11th Cir. 1993)(Canada); *Koskotas v. Rocke*, 931 F.2d 169 (1st Cir. 1991)(Greece); *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986 (U.K.); *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981)(Israel); *Escobedo v. United States*, 623 F.2d 1098 (5th Cir. 1980)(Mexico) . . ."); *see also*, *Hoxha v. Levi*, 465 F.3d 554, (3d Cir. 2006); *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997); *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997); *United States v. Smyth*, 61 F.3d 711, 714 (9th Cir. 1995)(explaining the exception in the U.K. Supplementary Treaty); *see also*, Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL LAW REVIEW 1198 (1991).

Gallina v. Fraser, 278 F.3d 77 (2d Cir. 1960), declined to depart from the rule but observed that under some circumstance an extraditee might face "procedures or punishments so antipathetic to a federal court's sense of decency as to require re-examination" of the question. The courts appear to have rarely if ever encountered such procedures or punishments, *In re Extradition of Marinero*, 990 F.Supp. 1208, 1230 (S.D.Cal. 1997)("There

on the view that, "[w]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States."[91]

Nevertheless, unique irritants in the diplomatic relations between the United States and Great Britain stimulated a supplementary extradition treaty with singular characteristics.[92] "The Supplementary Treaty alters the extradition procedures in force under the 1977 Treaty in three significant ways: (1) it limits the scope of the political offense exception;[93] (2) it authorizes a degree of judicial inquiry into the factors motivating a request for extradition;[94] and (3) it creates a limited right to

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is no legal support for a judicially created 'humanitarian exception' [of the type foreseen in *Gallina*] in an extradition proceeding"); *In re Extradition of Sandhu*, 886 F.Supp. 318, 322 (S.D.N.Y. 1993)("The '*Gallina* exception' to the rule of non-inquiry has yet to be applied"); *Corneljo-Barreto v. Seifert*, 218 F.3d 1004, 1010 (9th Cir. 2000)("Our research failed to identify any case in which this [humanitarian exception] has been applied . . . .").

[91] *Martin v. Warden*, 993 F.2d 824, 829-30 (11th Cir. 1993), quoting, *Neely v. Henkel*, 180 U.S. 109, 123 (1901).

[92] "The Treaty was a response by the United States and British executive branches to several recent federal court decisions denying requests by the United Kingdom for the extradition of members of the Provisional Irish Republic Army . . . . [T]he denied requests were for PIRA members who had committed violent acts against British forces occupying Northern Ireland . . . *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986); *In re Mackin*, 668 F.2d 122 (2d Cir. 1981); *In re Doherty*, 559 F.Supp. 270 (S.D.N.Y. 1984); *In re Mullen*, No. 3-78-1099 MG (N.D.Cal. May 11, 1979)," *Questions of Justice; U.S. Courts' Powers of Inquiry Under Article 3(a) of the United States-United Kingdom Supplementary Extradition Treaty*, 62 NOTRE DAME LAW REVIEW 474, 475-76 n.8 (1987); *see also*, *Comparative Application of the Non-Discrimination Clause in the U.S.-U.K. Supplementary Extradition Treaty*, 5 TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 493 (1993).

[93] "For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character: (a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution; (b) murder, voluntary manslaughter, and assault causing grievous bodily harm; (c) kidnaping, abduction, or serious unlawful detention, including taking a hostage; (d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; (e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense," *British Supplementary Extradition Treaty*, Art. 1, S. Exec. Rep. 99-17 (eff. Dec. 23, 1986).

[94] "(a) Notwithstanding any other provision in this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions," *id.* at Art. 3(a).

appeal an extradition decision,"[95] *In re Extradition of Artt*, 158 F.3d at 465 (9th Cir. 1998), redesignated, *In re Artt*, 248 F.3d 1197 (9th Cir. 2001). The United States and the United Kingdom subsequently negotiated a more contemporary replacement[96] to which the Senate has given its advice and consent[97] but which has yet to enter into force.[98]

Some may view implementation of the Torture Convention as a second exception. In implementation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Congress enacted section 2422 of the Foreign Affairs Reform and Restructuring Act which states in relevant part, "It shall be the policy of the United States not to . . . extradite . . . any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."[99] The Secretary of State is bound to enforce the policy.[100] Although the Act asserts that the declaration of policy and its accompanying enforcement responsibilities are not intended to create a basis for judicial review, some fugitives have argued that the Secretary's decision to extradite following court certification and in the face of a challenge under the Convention or implementing legislation is subject to habeas corpus review or to review under the Administrative Procedure Act. At least as of this writing, circuit law is to the contrary.[101]

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[95] "(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for defenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process," *id*. at Art. 3(b).

[96] S. Treaty Doc. 108-23 (2004).

[97] 152 *Cong. Rec.* S10766-767 (daily ed. Sept. 29, 2006).

[98] For a more extensive discussion, see CRS Report RL32096, *Extradition Between the United States and Great Britain: The 2003 Treaty*, available in abbreviated form as CRS Report RS21633, *Extradition Between the United States and Great Britain: A Sketch of the 2003 Treaty*.

[99] Sec. 2242(a), P.L. 105-277, 112 Stat. 2681-822 (1998), 8 U.S.C. 1231 note.

[100] Sec. 2242(b), 8 U.S.C. 1231 note; 22 C.F.R. pt.95.

[101] *Mironescu v. Costner*, 480 F.3d 664, 673-77 (4th Cir. 2007); *see also, Hoxha v. Levi*, 465 F.3d 554, 565 (3d Cir. 2006)(declining to address the issue since the Secretary had not rule at the time and consequently it was not ripe for decision). The *Hoxha* court also describes the Ninth Circuit's struggles with the question: "The Ninth Circuit discussed this issue in a series of cases beginning in 2000. In *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir.2000) ("*Cornejo-Barreto I"*), the Ninth Circuit held that, under FARR and the APA, "a fugitive fearing torture may petition [through habeas corpus] for review of the Secretary's decision to surrender him" following a court certification of extraditability. *Id.* at 1014-15. Because the Secretary had not yet made an extradition decision in the case, the Court affirmed the denial of habeas relief without prejudice to a new filing should the Secretary decide to extradite the petitioner. *Id.* at 1016-17. After the Secretary made the decision to

Review.

If at the conclusion of the extradition hearing, the court concludes there is some obstacle to extradition and refuses to certify the case, "[t]he requesting government's recourse to an unfavorable disposition is to bring a new complaint before a different judge or magistrate, a process it may reiterate apparently endlessly."[102]

If the court concludes there is no such obstacle to extradition and certifies to the Secretary of State that the case satisfies the legal requirements for extradition, the fugitive has no right of appeal, but may be entitled to limited review under habeas corpus.[103] "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."[104] In this last assessment, appellate courts will only "examine the magistrate judge's determination of probable cause to see if there is 'any evidence' to support it."[105]

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extradite, the petitioner filed a second habeas petition, based on *Cornejo-Barreto I.* On appeal, the Ninth Circuit held that the conclusion in *Cornejo-Barreto I* as to the availability of APA review was non-binding dicta, because the Secretary had not yet made a decision to extradite when that case was decided. *Cornejo-Barreto v. Siefert,* 379 F.3d 1075, 1082 (9th Cir.2004) ("*Cornejo-Barreto II* "). Considering the issue anew, the Court concluded that, under the doctrine of non-inquiry, the Secretary's decision to extradite was not subject to judicial review, and FARR and the APA did nothing to change this result. *Id.* at 1087. The Ninth Circuit granted rehearing en banc in the case, but following the government's decision to withdraw its extradition claim, the case was dismissed as moot. *Cornejo-Barreto v. Siefert,* 386 F.3d 938 (9th Cir.2004); *Cornejo-Barretto v. Siefert,* 389 F.3d 1307 (9th Cir.2004). As a result, neither *Cornejo-Barreto I* nor *Cornejo-Barreto II* is binding precedent in the Ninth Circuit," 465 F.3d at 564 n.16. The view that *Cornejo-Barretto I* is no longer binding may be something of an overstatement. As a later 9th Cir. panel pointed out, "The holding in *Cornejo-Barreto I* was disapproved of by *Cornejo-Barretto v. Siefert,* 379 F.3d 1075 (9th Cir.2004)("*Cornejo-Barreto II*"). The en banc court, however, later vacated *Cornejo-Barreto II* and denied the government's request to vacate *Cornejo-Barreto I*. *Cornejo-Barretto v. Siefert*, 389 F.3d 1307 (9th Cir.2004)(en banc)," *Prasoprat v. Benov,* 421 F.3d 1009, 1012 n.1 (9th Cir. 2005).

[102] *Gill v. Imundi*, 747 F.Supp. 1028, 1039 (S.D.N.Y. 1990), citing, *In re Doherty*, 786 F.2d 491, 503 (2d Cir. 1986); *In re Extradition of Massieu*, 897 F.Supp. 176, 179 (D.N.J. 1995); *Hooker v. Klein*, 573 F.2d 1360, 1365 (9th Cir. 1978), citing *inter alia*, *Collins v. Loisel*, 262 U.S. 426 (1923); ABBELL & RISTAU at 252-54.

[103] *Ordinola v. Hackman*, 478 F.3d 588, 598 (4th Cir. 2007); *Vo v. Benov*, 447 F.3d 1235, 1240 (9th Cir. 2006); *Afanasjev v. Hurlburt*, 418 F.3d 1159, 1163 (11th Cir. 2005); *Sidali v. I.N.S.*, 107 F.3d 191, 195 (3d Cir. 1997), *citing*, *Collins v. Miller*, 252 U.S. 364, 369 (1920); ABBELL & RISTAU at 243-52.

[104] *Ordinola v. Hackman*, 478 F.3d 588, 598 (4th Cir. 2007), quoting *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Valenzuela v. United States*, 286 F.3d 1223, 1229 (11th Cir. 2002); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009-10 (9th Cir. 2000); *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1112 (7th Cir. 1997); *Sidali v. I.N.S.*, 107 F.3d 191, 195 (3d Cir. 1997); *Smith v. United States*, 82 F.3d 964, 965 (10th Cir. 1996).

[105] *United States v. Kin-Hong*, 110 F.3d 103, 116-17 (1st Cir. 1997), citing, *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Sidali v. I.N.S.*, 107 F.3d 191, 199-200 (3d Cir. 1997);

Surrender.

If the judge or magistrate certifies the fugitive for extradition, the matter then falls to the discretion of the Secretary of State to determine whether as a matter of policy the fugitive should be released or surrendered to the agents of the country that has requested his or her extradition.[106] The procedure for surrender, described in treaty[107] and statute,[108] calls for the release of the prisoner if he or she is not claimed within a specified period of time,[109] often indicates how extradition requests from

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and *Then v. Melendez*, 92 F.3d 851, 854 (9th Cir. 1996); *Valenzuela v. United States*, 286 F.3d 1223, 1229 (11th Cir. 2002).

[106] *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997)("It is then within the Secretary of State's sole discretion to determine whether or not the relator should actually be extradited. *See* 18 U.S.C. §3186 (`The Secretary of State *may* order the person committed under section 3184 . . . of this title to be delivered to any authorized agent of such foreign government . . .'"); *Executive Discretion in Extradition*, 62 COLUMBIA LAW REVIEW 1313 (1962).

[107] *E.g.*, *Extradition Treaty with Thailand*, Art. 11, ¶3, S. Treaty Doc. 98-16 (eff. May 17, 1991)("If the extradition has been granted, surrender of the person sought shall take place within such time as may be prescribed by the laws of the Requested State. The competent authorities of the Contracting Parties shall agree on the time and place of the surrender of the person sought. If, however, that person is not removed from the territory of the Requested State within the prescribed time, that person may be set at liberty and the Requested State may subsequently refuse extradition for the same offense"); *Argentine Extradition Treaty*, Art.12, ¶6, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Austrian Extradition Treaty*, Art.14, ¶¶2, 3, S. Treaty Doc. 105-50 (eff. Jan. 1, 2002); *Hungarian Extradition Treaty*, Art. 13, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Costa Rican Extradition Treaty*, Art. 13, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jamaican Extradition Treaty*, Art. IX, S. Treaty Doc. 98-18 (eff. July 7, 1991); *Extradition Treaty with the Bahamas*, Art. 13, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Bolivian Extradition Treaty*, Art. IX, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Jordanian Extradition Treaty*, Art. 12, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Italian Extradition Treaty*, Art XIII, 35 U.S.T. 3036 (1984).

[108] 18 U.S.C. 3186 ("The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged. Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty. A person so accused who escapes may be retaken in the same manner as any person accused of any offense").

[109] 18 U.S.C. 3188 ("Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered").

more than one country for the same fugitive are to be handled,[110] and frequently allows the fugitive to be held for completion of a trial or the service of a criminal sentence before being surrendered.[111]

Extradition for Trial or Punishment in the United States

The laws of the country of refuge and the applicable extradition treaty govern extradition back to the United States of a fugitive located overseas. The request for extradition comes from the Department of State whether extradition is sought for trial in federal or state court or for execution of a criminal sentence under federal or state law.[112]

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[110] *E.g.*, *Hungarian Extradition Treaty*, Art. 15, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) ("If the Requested State receives requests from the other Contracting Party and from any other State or States for the extradition of the same person, either for the same offense or for different offenses, the executive authority of the Requested State shall determine to which State it will surrender the person. In making its decision, the Requested State shall consider all relevant factors, including but not limited to: a. whether the requests were made pursuant to treaty; b. the place where the offense was committed; c. the respective interests of the Requesting States; d. the gravity of the offense; e. the nationality of the victim; f. the possibility of further extradition between the Requesting State; and g. the chronological order in which the requests were received from the Requesting States"); *Extradition Treaty with Trinidad and Tobago*, Art.12, S. Treaty Doc. 105-21 (eff. Nov. 29, 1999); *Polish Extradition Treaty*, Art. 17, S. Treaty Doc. 105-14 (eff. Sept. 17, 1999); *Extradition Treaty with Thailand*, Art. 13, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Costa Rican Extradition Treaty*, Art. 15, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jamaican Extradition Treaty*, Art. XIII, S. Treaty Doc. 98-18 (eff. July 7, 1991); *Extradition Treaty with the Uruguay*, Art. 14, 35 U.S.T. 3214-215 (1973); *Bolivian Extradition Treaty*, Art. X, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Jordanian Extradition Treaty*, Art. 14, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Italian Extradition Treaty*, Art XV, 35 U.S.T. 3037 (1984).

[111] *E.g.*, *Jamaican Extradition Treaty*, Art. XII, S. Treaty Doc. 98-18 (eff. July 7, 1991) ("If the extradition request is granted in the case of a person who is being prosecuted or is serving a sentence in the territory of the Requested State for a different offence, the Requesting State shall, unless its laws otherwise provide, defer the surrender of the person sought until the conclusion of the proceedings against that person or the full execution of any punishment that may be or may have been imposed"); *Extradition Treaty with Sri Lanka*, Art.13, ¶2, S. Treaty Doc. 106-34 (eff. Jan. 12, 2001); *French Extradition Treaty*, Art. 16, ¶2, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002); *Hungarian Extradition Treaty*, Art. 14, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Extradition Treaty with Thailand*, Art. 12, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Costa Rican Extradition Treaty*, Art. 14, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Bolivian Extradition Treaty*, Art. XI, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Jordanian Extradition Treaty*, Art. 13, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Italian Extradition Treaty*, Art XIV, 35 U.S.T. 3036-37 (1984).

[112] RESTATEMENT, §478, *Comment e* ("Requests for extradition of persons from foreign states may be made only by the Department of State. If the offense with which the person is charged or of which he has been convicted is one under federal law, the application for extradition must be submitted by the prosecutor to the Department of Justice, which will review the documents and, if satisfied of their sufficiency, transmit them to the Department of State for forwarding to the requested state. If the offense is one under [the law of any of the states of the United States], the application must be submitted by or with the endorsement of the Governor of the State, and must be reviewed by the Department of

The Justice Department's Office of International Affairs must approve requests for extradition of fugitives from federal charges or convictions and may be asked to review requests from state prosecutors before they are considered by the State Department.[113] Provisions in the United States Attorneys Manual and the corresponding Justice Department's Criminal Resource Manual sections supplement treaty instructions on the procedures to be followed in order to forward a request to the State Department.[114]

The first step is to determine whether the fugitive is extraditable. The Justice Department's checklist for determining extraditability begins with an identification of the country in which the fugitive has taken refuge.[115] If we have no extradition treaty with the country of refuge, extradition is not a likely option.[116] When there is a treaty, extradition is only an option if the treaty permits extradition. Common impediments include citizenship, dual criminality, statutes of limitation, and capital punishment issues.

Many treaties permit a country to refuse to extradite its citizens even in the case of dual citizenship.[117] As for dual criminality, whether the crime of conviction or the crime charged is an extraditable offense will depend upon the nature of the crime and where it was committed. If the applicable treaty lists extraditable offenses, the crime must be on the list.[118] If the applicable treaty insists only upon dual criminality, the underlying misconduct must be a crime under the laws of both the United States and the country of refuge.[119]

Justice before transmission to the Department of State. If the State Department is satisfied that the conditions for extradition under the applicable treaty have been met, it will request extradition in the name of the United States, and, where appropriate, will arrange for representation of the United States at the proceedings in the requested state. When extradition proceedings in the foreign state have been completed and the person sought has been certified to be extraditable, the Secretary or [her] authorized deputy may issue a warrant to federal or State officials to act as agents of the United States for the purpose of taking custody of the person in the requested state for return to the United States").

[113] "The Office of International Affairs (OIA) provides information and advice to Federal and State prosecutors about the procedure for requesting extradition from abroad. OIA also advises and provides support to Federal prosecutors handling foreign extradition requests for fugitives found in the United States. Every formal extradition request for international extradition based on Federal criminal charges must be reviewed and approved by OIA. At the request of the Department of State, formal requests based on State charges are also reviewed by OIA before submission to the Department of State," USAM §9-15.210.

[114] Criminal Resource Manual (CRM) §§601-610, available on July 27, 2007 at [http://www.usdoj.gov/usao/eousa/foi_reading_room/usam/title9/crm00601.htm]; USAM §§9-15.100 to 9-15.800.

[115] CRM §603[A].

[116] *Id.*

[117] CRM §603[B].

[118] CRM §603[C].

[119] *Id.*

Where the crime was committed matters; some treaties will only permit extradition if the offense was committed within the geographical confines of the United States.[120] Timing also matters. The speedy trial features of U.S. law require a good faith effort to bring to trial a fugitive who is within the government's reach.[121] Furthermore, the lapse of time or speedy trial component of the applicable extradition treaty may preclude extradition if prosecution would be barred by a statute of limitations in the country of refuge.[122] Some treaties prohibit extradition for capital offenses; more often they permit it but only with the assurance that a sentence of death will not be executed.[123]

Prosecutors may request provisional arrest of a fugitive without waiting for the final preparation of the documentation required for a formal extradition request, if there is a risk of flight and if the treaty permits it. The Justice Department encourages judicious use of provisional arrest because of the pressures that may attend it.[124] The Criminal Resource Manual contains the form for collection of the information that must accompany either a federal or state prosecutor's application for a Justice Department request for provisional arrest.[125]

Although treaty requirements vary, the Justice Department suggests that prosecutors supply formal documentation in the form of an original and four copies of:

> - a prosecutor's affidavit describing the facts of the case, including dates, names, docket numbers and citations, and preferably executed before a judge or magistrate (particularly if extradition is sought from a civil law country)[126]

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[120] CRM §603[F].

[121] *United States v. Blanco*, 861 F.2d 773, 778 (2d Cir. 1988); *United States v. Leaver*, 358 F.Spp.2d 255, 265 (S.D.N.Y. 2004); *cf.*, *Doggett v. United States*, 505 U.S. 647, 656-58 (1992).

[122] CRM §603[F].

[123] ABBELL at §6-2(25).

[124] USAM §9-15.230 (". . . Once the United States requests provisional arrest . . . [it] must submit as formal request for extradition, supported by all necessary documents, duly certified, authenticated and translated into the language of the country where the fugitive was arrested, within a specified time (from 30 days to three months, pending on the treaty). . . . Failure to follow through on an extradition request by submitting the requested documents after a provisional arrest has been made will result in release of the fugitive, strains on diplomatic relations, and possible liability for the prosecutor. The Office of International Affairs (OIA) determines whether the facts meet the requirement of urgency under the terms of the applicable treaty. If they do, OIA requests provisional arrest; if not, the prosecutor assembles the documents for a formal request. The latter method is favored when the defendant is unlikely to flee because the time pressures generated by a request for provisional arrest often result in errors that can damage the case . . .").

[125] CRM §604; USAM §9-15.230.

[126] USAM §9-15.240; CRM §605.

- copies of the statutes the fugitive is said to have violated, the statutes governing the penalties that may be imposed upon conviction, and the applicable statute of limitations[127]

- if the fugitive has been convicted and sentenced: identification evidence; certified documentation of conviction, sentence, and the amount of time served and remaining to be served; copies of the statutes of conviction; and a statement that the service of the remaining sentence is not barred by a statute of limitations[128]

- if the fugitive is being sought for prosecution or sentencing: certified copies of the arrest warrant (preferably signed by the court or a magistrate) and of the indictment or complaint[129]

- if the fugitive is being sought for prosecution or sentencing: evidence of the identity of the individual sought (fingerprints/photographs) and of the evidence upon which the charges are based and of the fugitive's guilt in the form of witness affidavits (preferable avoiding the use grand jury transcripts and, particularly in the case of extradition from a common law country, the use of hearsay).[130]

If the Justice Department approves the application for extradition, the request and documentation are forwarded to the State Department, translated if necessary, and with State Department approval forwarded through diplomatic channels to the country from whom extradition is being sought.[131]

The treaty issue most likely to arise after extradition and the fugitive's return to this country is whether the fugitive was surrendered subject to any limitations such as those posed by the doctrine of specialty.

Specialty.

Under the doctrine of specialty, sometimes called speciality, "a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."[132] The limitation, expressly included in many

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[127] USAM §9-15.240; CRM §607.

[128] USAM §9-15.240; CRM §609.

[129] USAM §9-15.240; CRM §606.

[130] USAM §9-15.240; CRM §608.

[131] ABBELL at §7-1(8); USAM §9-15.250.

[132] *United States v. Alvarez-Machain*, 504 U.S. 655, 661 (1992), quoting, *United States v. Rauscher*, 119 U.S. 407, 430 (1886); *see also, United States v. Anderson*, 472 F.3d 662, 671 (9th Cir. 2006); *United States v. Garrido-Santana*, 360 F.3d 565, 577 (6th Cir. 2004); *United States v. Campbell*, 300 F.3d 202, 209 (2d Cir. 2002); *United States v. LeBaron*, 156 F.3d

treaties,[133] however, is designed to preclude prosecution for different substantive offenses and does not bar prosecution for different or additional counts of the same offense.[134] And some courts have held that an offense whose prosecution would be barred by the doctrine may nevertheless be considered for purposes of the federal sentencing guidelines,[135] or for purposes of criminal forfeiture.[136] At least where an

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621, 626 (5th Cir. 1998); *United States v. Tse*, 135 F.3d 200, 204 (1st Cir. 1998); Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of* United States v. Rauscher, 34 VIRGINIA JOURNAL OF INTERNATIONAL LAW 71 (1993); *Application of Doctrine of Specialty to Federal Criminal Prosecution of Accused Extradited from Foreign Country*, 112 ALR FED. 473 (1993 & Oct. 2006 Supp.); BASSIOUNI at 511-69; ABBELL & RISTAU at 331-35.

[133] Although the wording varies, the content of these provisions roughly corresponds to those in the *Jamaican Extradition Treaty*, Art. XIV, S. Treaty Doc. 98-18 (eff. July 7, 1991)("(1) A person extradited under this Treaty may only be detained, tried or punished in the Requesting State for the offence for which extradition is granted, or (a) for a lesser offence proved by the facts before the court of committal . . . (b) for an offence committed after the extradition; or (c) for an offence in respect to which the executive authority of the Requested State . . . consents to the person's detention, trial or punishment. . . or (d) if the person (i) having left the territory of the Requesting State after his extradition, voluntarily returns to it; or (ii) being free to leave the territory of the Requesting State after his extradition, does not so leave within forty-five (45) days . . . . (2) A person extradited under this Treaty may not be extradited to a third State unless (a) the Requested State consents; or (b) the circumstances are such that he could have been dealt with in the Requesting State pursuant to sub-paragraph (d) of paragraph (1)"); *see also*, *Extradition Treaty with Belize*, Art. 14, S. Treaty Doc. 106-38 (eff. March 21, 2001); *Polish Extradition Treaty*, Art. 19, S. Treaty Doc. 105-14 (eff. Sept. 17, 1999); *Extradition Treaty with Uruguay*, Art. 13, 35 U.S.T. 3213-214 (1973); *Hungarian Extradition Treaty*, Art. 17, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Extradition Treaty with Thailand*, Art. 14, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Bolivian Extradition Treaty*, Art. XII, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Extradition Treaty with the Bahamas*, Art. 14, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Jordanian Extradition Treaty*, Art. 16, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Costa Rican Extradition Treaty*, Art. 16, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Italian Extradition Treaty*, Art XVI, 35 U.S.T. 3038 (1984).

[134] *Gallo-Chamorro*, 233 F.3d 1298, 1305 (11th Cir. 2000)("Rather than mandating exact uniformity between the charges set forth in the extradition request and the actual indictment, what the doctrine of speciality requires is that the prosecution be based on the same facts as those set forth in the request for extradition"); *United States v. Sensi*, 879 F.2d 888, 895-96 (D.C.Cir. 1989); *United States v. LeBaron*, 156 F.3d 621, 627 (5th Cir. 1998)("the appropriate test for a violation of specialty is whether the extraditing country would consider the acts for which the defendant was prosecuted as independent form those for which he was extradited"); *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994); *United States v. Levy*, 25 F.3d 146, 159 (2d Cir. 1994).

[135] *United States v. Garrido-Santana*, 360 F.3d 565, 577-78 (6th Cir. 2004); *United States v. Lazsarevich*, 147 F.3d 1061, 1064-65 (9th Cir. 1998)(also noting that the doctrine of specialty "exists only to the extent that the surrendering country wishes" and there was no evidence of a demand that the doctrine be applied).

[136] *United States v. Saccoccia*, 58 F.3d 754, 784 (1st Cir. 1995).

applicable treaty addresses the question, the rule is no bar to prosecution for crimes committed after the individual is extradited.[137]

The doctrine may be of limited advantage to a given defendant because the circuits are divided over whether a defendant has standing to claim its benefits.[138] Regardless of their view of fugitive standing, they agree that the surrendering state may subsequently consent to trial for crimes other than those for which extradition was had.[139]

Alternatives to Extradition

The existence of an extradition treaty does not preclude the United States acquiring personal jurisdiction over a fugitive by other means, unless the treaty expressly provides otherwise.[140]

Waiver.

Waiver or "simplified" treaty provisions allow a fugitive to consent to extradition without the benefit of an extradition hearing.[141] Although not universal,

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[137] *United States v. Burke*, 425 F.3d 400, 408 (7th Cir. 2005).

[138] *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995)("The question of whether a criminal defendant has standing to assert a violation of the doctrine of specialty has split the federal circuit courts of appeals"), noting decisions in favor of defendant standing, *United States v. Levy*, 905 F.2d 326, 328 n.1 (10th Cir. 1990); *United States v. Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986); and those holding to the contrary, *United States v. Burke*, 425 F.3d 400, 408 (7th Cir. 2005); *United States v. Kaufman*, 874 F.2d 242, 243 (5th Cir. 1989); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583-84 (6th Cir. 1985)); *see also, United States v. Antonakeas*, 255 F.3d 714, 719-20 (9th Cir. 2001)(defendant has standing to object to substantive but not procedural noncompliance with applicable treaty requirements); *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 167-68 (3d Cir. 1997); *The Extra in Extradition: The Impact of State v. Pang on Extraditee Standing and Implicit Waiver*, 24 JOURNAL OF LEGISLATION 111 (1998); *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship Between the Individual and the Sovereign*, 62 UNIVERSITY OF CHICAGO LAW REVIEW 1187 (1995); BASSIOUNI at 546-60.

The Ninth Circuit has held that convictions for an offense in violation of the principles of dual criminality and/or specialty must be reversed, *United States v. Anderson*, 472 F.3d 662, 671 (9th Cir. 2006).

[139] *United States v. Tse*, 135 F.3d 200, 205 (1st Cir. 1998); *United States v. Puentes*, 50 F.3d 1567, 1575 (11th Cir. 1995); ; *United States v. Riviere*, 924 F.2d 1289, 1300-1 (3d Cir. 1991); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986).

[140] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *United States v. Anderson*, 472 F.3d 662, 666 (9th Cir. 2006); *United States v. Mejia*, 448 F.3d 436, 442-43 (D.C. Cir. 2006); *United States v. Arbane*, 446 F.3d 1223, 1225 (11th Cir. 2006); *Kasi v. Angelone*, 300 F.3d 487, 493-95 (4th Cir. 2002); *United States v. Noriega*, 117 F.3d 1206, 1212-213 (11th Cir. 1997); *United States v. Matt-Ballesteros*, 71 F.3d 754, 762-63 (9th Cir. 1995).

[141] *E.g., Extradition Treaty with Thailand*, Art. 15, S. Treaty Doc. 98-16 (eff. May 17, 1991) ("If the person sought irrevocably agrees in writing to extradition after personally being advised by the competent authority of his right to formal extradition proceedings and

the provisions constitute the least controversial of the alternatives to extradition.

Immigration Procedures.

Whether by a process similar to deportation or by simple expulsion, the United States has had some success encouraging other countries to surrender fugitives other than their own nationals without requiring recourse to extradition.[142] Ordinarily, American immigration procedures, on the other hand, have been less accommodating and have been called into play only when extradition has been found wanting.[143] They tend to be time consuming and usually can only be used in lieu of extradition when the fugitive is an alien. Moreover, they frequently require the United States to deposit the alien in a country other than one that seeks his or her extradition.[144] Yet in a few instances where an alien has been naturalized by deception or where the procedures available against alien terrorists come into play, denaturalization or deportation may be considered an attractive alternative or supplement to extradition proceedings.[145]

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the protection afforded by them, the Requested State may grant extradition without formal extradition proceedings"); *see also, Extradition Treaty with Cyprus*, Art.17, S. Treaty Doc. 105-16 (eff. Sept. 14, 1999); *Austrian Extradition Treaty*, Art. 20, S. Treaty Doc. 105-50 (eff. Jan. 1, 2000); *Costa Rican Extradition Treaty*, Art. 17, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jordanian Extradition Treaty*, Art. 17, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Hungarian Extradition Treaty*, Art. 18, S. Treaty Doc. 104-5; *Extradition Treaty with the Bahamas*, Art. 15, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Bolivian Extradition Treaty*, Art. XIII, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Italian Extradition Treaty*, Art XVII, 35 U.S.T. 3039 (1984); *Jamaican Extradition Treaty*, Art. XV, ¶1, S. Treaty Doc. 98-18 (eff. July 7, 1991); *see generally*, ABBELL & RISTAU at 143-46, 306-7.

[142] *United States v. Porter*, 909 F.2d 789, 790 (4th Cir. 1990); *United States v. Rezaq*, 134 F.3d 1121, 1126 (D.C.Cir. 1998); BASSIOUNI, at 183-248; ABBELL & RISTAU §13-5-2(2) ("In recent years, it has not been uncommon for foreign officials, particularly in lesser developed countries, to put a person sought by the United States on an airplane bound for this country in the custody of either United States law enforcement agents or their own law enforcement agents. Such deportation takes place without the requested country resorting to its formal administrative or judicial deportation procedures. It occurs most frequently in narcotics cases, and generally takes place where there is a close working relationship between United States law enforcement officers posted in that country and the police authorities of that country . . . . In addition to informal deportation by airplane, there is a large volume of informal deportations from Mexico to the United States. Most of these informal deportations are based on informal arrangements among local United States and Mexican law enforcement officials along the United States-Mexico border . . ."); *see also*, USAM §§9-15.610, 9-15.640 noting the possibility of immigration exclusions and deportation as an alternative to extradition and in the case of American fugitives the prospect of revoking a fugitive's U.S. passport in aid of such an alternative.

[143] *E.g., I.N.S. v. Doherty*, 502 U.S. 314 (1992); Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 FORDHAM LAW REVIEW 317 (1992).

[144] *E.g., Kalejs v. I.N.S.*, 10 F.3d 441 (7th Cir. 1993)(deportation to Australia of a member of a German mobile killing unit in World War II who falsified immigration forms but who came to this country by way of Australia).

[145] The United States has denaturalized and deported former Nazi death camp guards who gained entry into the United States and/or American citizenship by concealing their pasts,

Irregular Rendition/Abduction.

Although less frequently employed, American use of "irregular rendition" is a familiar alternative to extradition.[146] An alternative of last resort, it involves kidnaping or deceit and generally has been reserved for terrorists, drug traffickers, and the like.[147] Kidnaping a defendant overseas and returning him to the United States for trial does not deprive American courts of jurisdiction unless an applicable extradition treaty explicitly calls for that result.[148] Nor does it ordinarily expose the United States to liability under the Federal Tort Claims Act nor individuals involved in the abduction to liability under the Alien Tort Statute.[149] The individuals involved in the abduction, however, may face foreign prosecution, or at least be the subject of a foreign extradition request.[150] Moreover, the effort may strain diplomatic relations

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e.g., *United States v. Balsys*, 524 U.S. 666 (1998); *United States v. Stelmokas*, 110 F.3d 302 (3d Cir. 1997); *see also*, *The Denaturalization and Extradition of Ivan the Terrible*, 26 RUTGERS LAW REVIEW 821 (1995); Bassiouni, at 183-232 (summarizing alternatives and criticizing their use in some instances).

[146] *See generally*, CRS Report RL32890, *Renditions: Constraints Imposed by Laws on Torture*, by Michael Garcia.

[147] *United States v. Mejia*, 448 F.3d 436 (D.C. Cir. 2006); *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

[148] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *United States v. Torres Gonzalez*, 240 F.3d 14, 16 (1st Cir. 2001); *United States v. Mejia*, 448 F.3d 436, 442-43 (D.C. Cir. 2006); *United States v. Arbane*, 446 F.3d 1223, 1225 (11th Cir. 2006); *Kasi v. Angelone*, 300 F.3d 487, 493-500 (4th Cir. 2002); *see also*, *United States v. Anderson*, 472 F.3d 662, 666 (9th Cir. 2006)("a court is deprived of jurisdiction over an extradited defendant, if either (1) the transfer of the defendant violated the applicable extradition treaty, or (2) the United States government engaged in 'misconduct of the most shocking and outrageous kind,' to obtain his presence").

[149] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699-738 (2004). Yet if the abducted defendant is an American, the individuals involved may face civil liability under *Bivens*, cf., *Id.* at 736-37.

[150] *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983); *Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnaping*, 81 CALIFORNIA LAW REVIEW 1541 (1993); *Transborder Abductions by American Bounty Hunters—The Jaffe Case and a New Understanding Between the United States and Canada*, 20 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 489 (1990).

with the country from which the fugitive is lured or abducted.[151]

Foreign Prosecution.

A final alternative when extradition for trial in the United States is not available, is trial within the country of refuge. The alternative exists primarily when extradition has been refused in because of the fugitive's nationality and/or where the crime occurred under circumstances that permit prosecution by either country for the same misconduct.[152] The alternative can be cumbersome and expensive and may be contrary to U.S. policy objectives.[153]

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[151] USAM §9-15.620 (If the fugitive travels outside the country from which he or she is not extraditable, it may be possible to request his or her extradition form another country. This method is often used for fugitives who are citizens in their country of refuge. Some countries, however, will not permit extradition if the defendant has been lured into their territory. Such ruses may also cause foreign relations problems with both the countries form which and to which the lure takes place"); USAM §9-15.630 ("A lure involves using a subterfuge to entice a criminal defendant to leave a foreign country so that he or she can be arrested in the United States, in international waters or airspace, or in a third country for subsequent extradition, expulsion, or deportation to the United States. . . . As noted above, some countries will not extradite a person to the United Stats if the person's presence in that country was obtained through the use of a lure or other ruse. In addition, some countries may view a lure of a person form its territory as an infringement on its sovereignty. . .").

[152] *See, e.g.*, *Hungarian Extradition Treaty*, Art. 3, ¶2, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) ("If extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its authorities for prosecution"); *Austrian Extradition Treaty*, Art.3, ¶¶1, 2, S. Treaty Doc. 105-50 (eff. Jan. 1, 2002); *Extradition Treaty with Cyprus*, Art.3, ¶¶1, 2, S. Treaty Doc. 105-16 (eff. Sept. 14, 1999); *Bolivian Extradition Treaty*, Art. III, ¶3, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Extradition Treaty with Thailand*, Art. 8, ¶2, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Costa Rican Extradition Treaty*, Art. 8, ¶2, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jamaican Extradition Treaty*, Art. VII, ¶¶2, 3, S. Treaty Doc. 98-18 (eff. July 7, 1991)(but also requiring extradition if a fugitive is a national of both the Requesting and Requested State).

[153] USAM §9-15.650 ("If the fugitive has taken refuge in the country of which he or she is a national, and is thereby not extraditable, it may be possible to ask that country to prosecute the individual for the crime that was committed in the United States. This can be an expansive and time consuming process and in some countries domestic prosecution is limited to certain specified offenses. In addition, a request for domestic prosecution in a particular case may conflict with U.S. law enforcement efforts to change the 'non-extradition of nations' law or policy in the foreign country. . .").

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Appendix

Countries with Whom the United States Has an Extradition Treaty

Country	Citation
Albania	49 Stat. 3313.
Antigua and Barbuda	T.Doc. 104-19 (entered into force 7/1/99)
Argentina	2159 UNTS 129
Australia	27 UST 957. 1736 UNTS 344
Austria	T.Doc. 105-50 (entered into force 1/1/00)
Bahamas	T.Doc. 102-17 (entered into force 9/22/94)
Barbados	T.Doc. 105-20 (entered into force 3/3/00)
Belgium	2093 UNTS 263
Belize	T.Doc. 106-38 (entered into force 3/27/01)
Bolivia	T.Doc. 104-22 (entered into force 11/21/96)
Brazil	15 UST 2093. 15 UST 2112.
Bulgaria	43 Stat. 1886. 49 Stat. 3250.
Burma	47 Stat. 2122.
Canada	27 UST 983. 27 UST 1017. 1853 UNTS 407 T.Doc. 107-11
Chile	32 Stat. 1850.
Colombia	TIAS __ (entered into force 3/4/82)
Congo	37 Stat. 1526. 46 Stat. 2276. 50 Stat. 1117. 13 UST 2065.
Costa Rica	T.Doc. 98-17 (entered into force 10/11/91)
Cuba	33 Stat. 2265. 33 Stat. 2273. 44 Stat. 2392.
Cyprus	T.Doc. 105-16 (entered into force 9/14/99)
Czech Republic	44 Stat. 2367. 49 Stat. 3253.
Denmark	25 UST 1293.
Dominica	T.Doc. 105-19 (entered into force 5/25/00)
Dominican Republic	36 Stat. 2468.
Ecuador	18 Stat. 199. 55 Stat. 1196.
Egypt	19 Stat. 572.
El Salvador	37 Stat. 1516.

Estonia	43 Stat. 1849. 49 Stat. 3190.
Fiji	47 Stat. 2122. 24 UST 1965.
Finland	31 UST 944.
France	2179 UNTS 341
Gambia	47 Stat. 2122.
Germany, Federal Republic of	32 UST 1485. 1909 UNTS 441
Ghana	47 Stat. 2122.
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Grenada	T.Doc. 105-19 (entered into force 9/14/99)
Guatemala	33 Stat. 2147. 55 Stat. 1097.
Guyana	47 Stat. 2122.
Haiti	34 Stat. 2858.
Honduras	37 Stat. 1616. 45 Stat. 2489.
Hong Kong	T.Doc. 105-3 (entered into force 1/21/98)
Hungary	T.Doc. 104-5 (entered into force 3/8/97)
Iceland	32 Stat. 1096. 34 Stat. 2887.
India	T.Doc. 105-30 (entered into force 7/21/99)
Iraq	49 Stat. 3380.
Ireland	TIAS 10813
Israel	14 UST 1707. 18 UST 382.
Italy	TIAS 10837.
Jamaica	47 Stat. 2122. T.Doc. 98-18 (entered into force 7/7/91)
Japan	31 UST 892.
Jordan	T.Doc. 104-3 (entered into force:7/29/95)
Kenya	47 Stat. 2122. 16 UST 1866.
Kiribati	28 UST 227.
Korea	T.Doc. 106-2 (entered into force 12/20/99)
Latvia	43 Stat. 1738. 49 Stat. 3131.
Lesotho	47 Stat. 2122.
Liberia	54 Stat. 1733.
Liechtenstein	50 Stat. 1337.
Lithuania	43 Stat. 1835. 49 Stat. 3077.
Luxembourg	T.Doc. 105-10 (entered into force 2/1/02)
Malawi	47 Stat. 2122. 18 UST 1822.

Malaysia	T.Doc. 104-26 (entered into force 6/2/97).
Malta	47 Stat. 2122.
Mauritius	47 Stat. 2122.
Mexico	31 UST 5059.
	T.Doc. 105-46 (entered into force 5/21/01)
Monaco	54 Stat. 1780.
Nauru	47 Stat. 2122.
Netherlands[154]	TIAS 10733.
New Zealand	22 UST 1.
Nicaragua	35 Stat. 1869.
Nigeria	47 Stat. 2122.
Norway	31 UST 5619.
Pakistan	47 Stat. 2122.
Panama	34 Stat. 2851.
Papua New Guinea	47 Stat. 2122.
Paraguay	T.Doc. 106-4 (entered into force 3/9/01)
Peru	31 Stat. 1921.
Philippines	1994 UNTS 279
Poland	T.Doc. 105-14 (entered into force 9/17/99)
Portugal	35 Stat. 2071.
Romania	44 Stat. 2020.
	50 Stat. 1349.
Saint Kitts and Nevis	T.Doc. 105-19 (entered into force 2/23/00)
Saint Lucia	T.Doc. 105-19 (entered into force 2/2/00)
Saint Vincent & the Grenadines	T.Doc. 105-19 (entered into force 9/8/99)
San Marino	35 Stat. 1971.
	49 Stat. 3198.
Seychelles	47 Stat. 2122.
Sierra Leone	47 Stat. 2122.
Singapore	47 Stat. 2122.
	20 UST 2764.
Slovak Republic	44 Stat. 2367.
	49 Stat. 3253.
Solomon Islands	28 UST 277.
South Africa	T.Doc. 106-24 (entered into force 6/25/01)
Spain	22 UST 737.
	29 UST 2283
	TIAS __ (entered into force 7/2/93)
	TIAS __(entered into force 7/25/99)
Sri Lanka	T.Doc. 106-34 (entered into force 1/12/01)
Suriname	26 Stat. 1481.
	33 Stat. 2257.
Swaziland	47 Stat. 2122.
	21 UST 1930.

[154] Treaty entered into force for: Kingdom in Europe, Aruba, and Netherlands Antilles.

Sweden	14 UST 1845. TIAS 10812.
Switzerland	T.Doc. 104-9 (entered into force 9/10/97)
Tanzania	47 Stat. 2122. 16 UST 2066.
Thailand	43 Stat. 1749. T.Doc. 98-16 (entered into force 5/17/91)
Tonga	47 Stat. 2122. 28 UST 5290.
Trinidad and Tobago	T.Doc. 105-21 (entered into force 11/29/99)
Turkey	32 UST 3111.
Tuvalu	28 UST 227. 32 UST 1310.
United Kingdom	28 UST 227. TIAS 12050.
Uruguay	TIAS 10850.
Venezuela	43 Stat. 1698.
Zambia	47 Stat. 2122.
Zimbabwe	T.Doc. 105-33(entered into force 4/26/00)

Countries with Whom the United States Has No Extradition Treaty

Afghanistan
Algeria
Andorra
Angola
Armenia

Azerbaijan
Bahrain
Bangladesh
Belarus
Benin

Bhutan
Bosnia
and Herzegovina*
Botswana
Brunei
Burkina Faso

Burundi
Cambodia
Cameroon
Cape Verde
Central African Republic

Chad
China
Comoros
Croatia*
Ivory Coast (Cote D'Ivoire)

Djibouti
Equatorial Guinea
Eritrea
Ethiopia

Georgia
Guinea
Guinea-Bissau
Indonesia

Iran
Kazakhstan
Korea, North
Kuwait

Kyrgyzstan
Laos
Lebanon
Libya
Macedonia*

Madagascar
Maldives
Mali
Marshall Islands**
Mauritania

Micronesia**
Moldova
Mongolia
Montenegro*
Morocco
Mozambique

Namibia
Nepal
Niger
Oman
Palau**

Qatar
Russian Federation
Rwanda
Sao Tome & Principe
Saudi Arabia

Senegal
Slovenia*
Somalia
Sudan
Syria
Taiwan

Tajikistan
Togo
Tunisia
Turkmenistan
Uganda

Ukraine
United Arab Emirates
Uzbekistan
Vanuatu
Vatican City

Vietnam
Western Samoa
Yemen, Republic of
Yugoslavia*
Zaire

* The United States had an extradition treaty with the former Yugoslavia prior to its breakup (32 Stat. 1890). Since then, it has recognized at least some of the countries which were once part of Yugoslavia as successor nations, *see e.g.*, *Arambasic v. Ashcroft*, 403 F.Supp.2d 951 (D.S.D. 2005) (Croatia); *Sacirbey v. Guccione*, 2006 WL 2585561 (No. 05 Cv. 2949(BSJ)(FM))(S.D.N.Y. Sept. 7, 2006)(Bosnia and Herzogovina).

** Although not specifically identified in the State Department's TREATIES IN FORCE (1998), the United States apparently has extradition agreements with the Republics of Palau, the Marshall Islands, and Micronesia, *cf.*, *In re Extradition of Lin*, 915 F.Supp. 206, 207 (D.Guam 1995); P.L. 99-239, 99 Stat. 1770 (1986); H.Rept. 99-188 (Pt.1) 192 (1985).

CONFIDENTIALITY PROVISIONS

I. Asylum

A. Prohibition: 8 C.F.R. § 1208.6 Disclosure to third parties:

(a) Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to §1208.30, and records pertaining to any reasonable fear determination conducted pursuant to §1208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.

(b) The confidentiality of other records kept by the Service and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure. The Service will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

(c) This section shall not apply to any disclosure to:

(1) Any United States Government official or contractor having a need to examine information in connection with:

(i) The adjudication of asylum applications;

(ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;

(iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under §1208.30 or §1208.31;

(iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or

(v) Any United States Government investigation concerning any criminal or civil matter; or

(2) Any Federal, State, or local court in the United States considering any legal action:

(i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under §1208.30 or §1208.31; or

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(ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.

B. **Waiver:**

A written waiver is required from the applicant. For example:

WAIVER OF CONFIDENTIALITY

I, _____, with A number _____, do hereby knowingly, voluntarily and willingly waive my right to the confidentiality of my asylum application under 8 C.F.R. § 1208.6 (Disclosure to Third Parties) (2006). I agree to be a witness in the above-captioned matter, knowing that this written consent will allow the information contained in my A-file to be disclosed to third parties.

_____ _____
Signature of Witness Date

C. **Overseas Investigations:**

Assistant Chief Counsel's should seek guidance from the appropriate POC, Deputy or Chief Counsel. ACC's should not contact the Department of State directly.

II. Legalization/Amnesty

LIMITED USE MATERIAL-USED IN DECISION ON LEGALIZATION/SAW APPLICATION

Introduction:

Sections 210 and 245A of the Immigration and Nationality Act provide for confidentiality of information submitted to the Government by aliens who applied for temporary resident status. INA §210 relates to Special Agricultural Workers (SAW) or Amnesty, filed on Form I-700. INA §245A relates to Legalization, filed on Form I-687.

A. Confidentiality under Sections 210(b)(6) and 245A(c)(5):

Except as provided in this paragraph, neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may-

i) use the information furnished by the applicant pursuant to an application filed under this section for any purpose other than to make a determination on the application, including a determination under subsection (a)(3)(B), or for enforcement of paragraph 7;

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ii) make any publication whereby the information furnished by any particular individual can be identified; or

iii) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with respect to application filed with a designated entity, that designated entity, to examine individual applications.

B. Purpose:

The purpose of the confidentiality provisions were to assure applicants that the legalization process was designed to regularized the status of certain undocumented aliens, and not a ruse to invite undocumented aliens to come forward only to be caught by the Government.

C. Red Sheet Form M-330:

The Red Sheet is a coversheet usually on the right side of a SAW or Legalization file. The coversheet indicates that the materials are *confidential* under the Immigration and Reform Control Act of 1986 (IRCA). Additionally, there is a limited use of information and documents submitted in connection with the application.

Files that contain legalization applications start with a 90 million number. If an A file does not contain a Red Cover Sheet for the temporary residence application the confidentiality/limited use provisions still apply.

D. Removal Proceedings:

Removal proceedings cannot be based solely upon information from a temporary residence application. For example, if an alien walks into a DHS office and inquires as to status, a records check indicates that the application was denied.

Status information may be used in the preparation of I-213s, charging documents, and proof of proceedings *after* the alien's name is obtained independently:

i) The decision on the legalization application (grant or deny);
ii) The date of the decision;
iii) The date of any subsequent adjustment.

For example, an alien is encountered in a local jail, the records check indicates that the alien's application was denied, a Notice to Appear can be issued where the alien has no status.

E. Limited Use of Information:

- A legalization file can be examined in order to determine a person's identity.

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- The confidentiality provisions remain applicable to information furnished pursuant to an application even after a grant of lawful permanent status.

- An alien may request copies of documents to the legalization application to use in pursuing other benefits.

- The confidentiality provisions can not be waived by an individual applicant.

- Information provided in an application to adjust status to a lawful temporary resident under Section 210 can not be used in a Rescission proceedings?

F. Criminal Penalties under Section 210(b)(6) and 245A(c)(5)(E):

Whoever knowingly uses, publishes, or permits information to be examined in violation shall be fined not more than $10,000.

III. Violence Against Women Act (VAWA), as amended by Violence Against Women and Department of Justice Reauthorization Act of 2005

A. Application:

Battered spouses and children may apply to self- petition by filing Form I-360. Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Prohibits Department of Justice employees from making an adverse determination of admissibility or deportability of an alien using information provided solely by:

1. a spouse or parent who has battered the alien or subjected the alien to extreme cruelty;
2. a member of the spouse's or parent's family residing in the same household as the alien who has battered the alien or subjected the alien to extreme cruelty when the spouse or parent consented to or acquiesced in such batter or cruelty;
3. a spouse or parent who has battered the alien's child or subjected the alien's child to extreme cruelty (without the active participation of the alien in the battery or extreme cruelty); and
4. a member of the spouse's or parent's family residing in the same household as the alien who has battered the alien's child or subjected alien's child to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such batter or cruelty.
5. Any adverse information received by the government from a self-petitioner's U.S. citizen or lawful permanent resident spouse or parent, or from relatives of that spouse or parent, must be independently corroborated by an unrelated

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source before the government may take adverse action based on such information. [1]

B. **Prohibition:**

Department of Justice employees are prohibited from permitting the use or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information that relates to an alien who is the beneficiary of a VAWA-based self-petition. IIRIRA §384(a)(2).

C. **Penalties:**

Anyone who willfully uses, publishes, or permits such information to be disclosed in violation of $5000 for each violation. IIRIRA §384(c).

D. **Section 817 Amendments:**

- Amends Section 384 of IIRIRA, the VAWA confidentiality provision, by explicitly applying the provision's confidentiality requirements to DHS and its agencies and bureaus.

- Further amends Section 384 of IIRIRA to prohibit DHS and the Department of Justice from making an adverse determination of "admissibility or deportability" of a VAWA self-petitioner (or a T or U visa applicant) using information furnished solely by the self-petitioner's (or applicant's) trafficker or perpetrator.

- Further amends Section 384 of IIRIRA by creating a new exception to the VAWA confidentiality requirements: specifically, to allow DHS and DOJ to disclose protected VAWA information pertaining to "closed cases" to the chairmen and ranking members of the House and Senate judiciary committees "for the exercise of congressional oversight authority." Such disclosures must be in a manner that protects the identity and confidentiality of self-petitioners and T and U visa applicants.

- Further amends Section 384 of IIRIRA by creating a new exception to the VAWA confidentiality requirements: specifically, to allow DHS and DOJ to disclose protected VAWA information to nonprofit, nongovernmental victims' services providers for the sole purpose of assisting the victims with obtaining victim services from programs with expertise working with immigrant victims. However, the applicable alien's prior written consent must be obtained before such a disclosure may occur.

[1] See Virtue, INS Office of Programs, "Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA §384", Mem.act.036 (May 5, 1997).

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- Further amends Section 384 of IIRIRA by extending the penalty provisions of the section to DHS employees who falsely certify on an alien's NTA that DHS has complied with the VAWA confidentiality provisions of Section 384 of IIRIRA if the enforcement action which resulted in the alien being placed in removal proceedings occurred at a domestic violence shelter, a rape crisis center, a victim/witness services provider, a community-based organization, at a courthouse where there alien is appearing in connection to a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty (or is eligible for a T/U visa). *See* Sec. 825(c).

- Requires DHS and DOJ to provide "guidance" to their officers and employees who have access to VAWA information, "including the provisions to protect victims of domestic violence from harm that could result from the inappropriate disclosure of covered information."

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COMMON CLASS OF ADMISSION CODES

IMPORTANT NOTE: This is only a short list of common Class of Admission codes (COAs) for aliens that are placed into the Central Index System (CIS), on Permanent Resident Cards (I-551s), and on I-94s. It is not a complete list covering every category of relief that an Immigration Judge or the BIA may grant. ICE Counsel will only need the column labeled "Adjust" for aliens in removal proceedings. If an alien has been granted relief under a category of law not covered by this short list of COAs, please either refer to the full list of COAs that accompanies the CIS or communicate with your USCIS points of contact to determine the appropriate code. COAs are relied upon by port inspectors, adjudicators, public benefit agencies, DHS immigration statisticians, and others, thus selecting the correct code is important.

Basis of eligibility upon which permanent residence granted	Immigrant Code	
	Entry	Adjust
Immediate Relative of a U.S.C. [Sec. 201(b)(2)(A)(i)]		
Parent of U.S.C.	IR5	IR0
Spouse of U.S.C.	IR1	IR6
Child of U.S.C.	IR2	IR7
Orphan adopted abroad by U.S.C.	IR3	IR8
Orphan to be adopted by U.S.C.	IR4	IR9
Widow or widower of a U.S.C.	IW1	IW6
Child of IW1 or IW6 [Sec. 201 amended by PL 103-416]	IW2	IW7
Immediate Relative of a U.S.C. - **conditional status** [Sec. 201 and Sec. 216]		
Spouse of U.S.C.	CR1	CR6
Step-child of U.S.C.	CR2	CR7
Other Relative of U.S.C. [Sec. 203]		
Unmarried son or daughter of a U.S.C. [Sec. 203(a)(1)]	F11	F16
Child of F11 or F16 [Sec. 203(d)]	F12	F17
Married son or daughter of a U.S.C.	F31	F36
Spouse of F31 or F36	F32	F37
Child of F31 or F36	F33	F38
Brother or sister of a U.S.C.	F41	F46
Spouse of F41 or F46	F42	F47
Child of F41 or F46	F43	F48
Other Relative of U.S.C. - conditional status [Sec. 203 and Sec. 216]		
Married son or daughter who is step-child of U.S.C.	C31	C36
Spouse of C31 or C36	C32	C37
Child of C31 or C36	C33	C38
Fiance adjustment [Sec. 214(d)]		
Fiance or fiancee adjustment after marriage to U.S.C.		IF1
Minor child of IF1		IF2
Fiance adjustment - **conditional status** [Sec. 214(d) and Sec. 216]		
Fiance or fiancee adjustment after marriage to U.S.C. [Sec. 214(d) and 216; PL 99-639]		CF1
Minor child of CF1		CF2
AmerAsian		
Unmarried Amerasian son or daughter of U.S.C. [Sec. 203(a)(1) and 204(g)]	A11	A16
Child of A11 or A16	A12	A17
Married Amerasian son or daughter of U.S.C. [Sec. 203(a)(3) and 204(g)]	A31	A36
Spouse of A31 or A36	A32	A37
Child of A31 or A36	A33	A38
Amerasian born in Vietnam after Jan. 1, 1962 and before Jan. 1, 1976, U.S.C. father [Sec. 584(b)(1)(A) of PL 100-202]	AM1	AM6
Spouse or child of AM1 or AM6	AM2	AM7
Mother, guardian, or next-of-kin of AM1 or AM6, and spouse or child of the mother, guardian, or next-of-kin.	AM3	AM8
Amerasian immediate relative child of U.S.C. [Sec. 201(b)(2)(A)(i) and 204(g)]	AR1	AR6
Relative of Permanent Resident [Sec. 203]		
Spouse of Permanent Resident	F21	F26
Child of F21 or F26	F23	F28
Child (under 21 years of age) of Permanent Resident	F22	F27
Unmarried son or daughter of Permanent Resident	F24	F29
Child of F24 or F29	F25	F20
Spouse of Permanent Resident (exempt from country limitations)	FX1	FX6
Child of Permanent Resident (exempt from country limitations)	FX2	FX7
Child of FX1, FX2, FX7, or FX8	FX3	FX8
Child born during temporary visit abroad of mother who is Permanent Resident or U.S. national [8 CFR 211.1]	NA3	
Relative of Permament Resident - conditional status [Sec. 203 and Sec. 216]		
Spouse of Permanent Resident	C21	C26
Step-child (under 21 years of age) of Permanent Resident	C22	C27
Child of a C21, C22, C26 or C27 alien	C23	C28
Unmarried son or daughter (21 years of age or older) who is the step-child of Permanent Resident	C24	C29
Child of C24 or C29	C25	C20
Spouse of Permanent Resident (exempt from country limitations)	CX1	CX6
Step-child (under 21 years of age) of Permanent Resident (exempt from country limitations)	CX2	CX7
Child of CX2 or CX7	CX3	CX8
Self-petitioning relative [Sec. 40701 of PL 103-322]		
Self-petition spouse of U.S.C.	IB1	IB6

Basis of eligibility upon which permanent residence granted	Immigrant Code Entry	Adjust
Child of IB1 or IB6	IB3	IB8
Self-petition child of U.S.C.	IB2	IB7
Self-petition unmarried son/daughter of U.S.C.	B11	B16
Child of B11 or B16	B12	B17
Self-petition spouse of Permanent Resident	B21	B26
Self-petition child of Permanent Resident	B22	B27
Child of B21, B22, B26 or B27	B23	B28
Self-petition unmarried son/daughter of Permanent Resident	B24	B29
Child of B24 or B29	B25	B20
Self-petition married son/daughter of U.S.C.	B31	B36
Spouse of B31 or B36	B32	B37
Child of B31 or B36	B33	B38
Self-petition spouse of Permanent Resident - exempt	BX1	BX6
Self-petition child of Permanent Resident - exempt	BX2	BX7
Child of BX1, BX2, BX6 or BX7	BX3	BX8
Workers		
Priority worker - alien with extraordinary ability [Sec. 203(b)(a)(A)]	E11	E16
Priority worker - outstanding professor or researcher [Sec. 203(b)(1)(B)]	E12	E17
Priority worker - certain multinational executive or manager [Sec. 203(b)(1)©]	E13	E18
Spouse of E11, E16, E12, E17, E13, or E18 [Sec. 203(d)]	E14	E19
Child of E11, E16, E12, E17, E13, or E18 [Sec. 203(d)]	E15	E10
Professional with advanced degree, or of exceptional ability [Sec. 203(b)(2)]	E21	E26
Spouse of E21 or E26 [Sec. 203(d)]	E22	E27
Child of E21 or E26 [Sec. 203(d)]	E23	E28
Skilled worker [Sec. 203(b)(3)(A)(i)]	E31	E36
Professional with a baccalaureate degree, or who is a member of a profession [Sec. 203(b)(3)(A)(ii)]	E32	E37
Spouse of E31, E36, E32, or E37 [Sec. 203(d)]	E34	E39
Child of E31, E36, E32, or E37 [Sec. 203(d)]	E35	E30
Soviet scientist, principal [Sec. 203(b)(2) as amended by Sec. 4 of PL 102-509	ES1	ES6
Other worker performing unskilled labor [Sec. 203(b)(3)(A)(iii)]	EW3	EW8
Spouse of EW3 or EW8 [Sec. 203(d)]	EW4	EW9
Child of EW3 or EW8 [Sec. 203(d)]	EW5	EW0
Employees of certain U.S. businesses operating in Hong Kong [Sec. 124 of PL 101-649]	HK1	HK6
Spouse of HK1 or HK6.	HK2	HK7
Child of HK1 or HK6.	HK3	HK8
Certain former H1 nonimmigrant registered nurses [Sec. 2 of PL 101-238]		RN6
Spouse or child of RN6.		RN7
Schedule-A worker [Title IV, Section 502 of the Real ID Act of 2005]	EX1	EX6
Spouse of EX1	EX2	EX7
Child of EX1	EX3	EX8
Broadcasters and International Broadcasting Bureau of the Broadcasting Board of Governors [Sec. 101(a)(27) as added by PL 106-536]		
Broadcaster to work for a grantee for the IBCB of BBG	BC1	BC6
Spouse of BC6	BC2	BC7
Child of BC6	BC3	BC8
Employment creation and Investors		
Alien who filed and was qualified with investor status prior to June 1, 1978 [Sec. 19 of PL 97-116]		NP8
Spouse or child of an NP8.		NP9
Investor Pilot Program targeted area, principal - conditional [Sec. 203(b)(5) and Sec. 610 of PL 102-395]	I51	I56
Spouse of I51 or I56	I52	I57
Child of I51 or I56	I53	I58
Investor pilot program not targeted, principal - conditional [Sec. 203(b)(5) and Sec. 610 of PL 102-395]	R51	R56
Spouse of R51 or R56	R52	R57
Child of R51 or R56	R53	R58
Employment creation immigrant [Sec. 203(b)(5)]	E51	E56
Spouse of E51 or E56.	E52	E57
Child of E51 or E56.	E53	E58
Employment creation immigrant (not in targeted area) - conditional [Sec. 203(b)(5)(A)]	C51	C56
Spouse of C51 or C56	C52	C57
Child of C51 or C56	C53	C58
Employment creation immigrant (targeted area) - conditional [Sec. 203(b)(5)(B)]	T51	T56
Spouse of T51 or T56	T52	T57
Child of T51 or T56	T53	T58
Diversity programs		
Diversity immigrant [Sec. 201 and 203(c) as amended by PL 101-649].	DV1	DV6
Spouse of DV1 or DV6.	DV2	DV7
Child of DV1 or DV6.	DV3	DV8
Diversity transition [Sec. 132 of PL 101-649]	AA1	AA6
Spouse of AA1 or AA6	AA2	AA7
Child of AA1 or AA6	AA3	AA8

Basis of eligibility upon which permanent residence granted	Immigrant Code Entry	Adjust
Asylee and Refugee adjustment		
Refugee in the United States prior to July 1, 1953 [Sec. 6 of PL 83-67]		Y64
Refugee paroled into the United States prior to Apr. 1, 1980 [Sec. 5 of PL 95-412]		R86
Refugee who entered the United States on or after Apr. 1, 1980 [Sec. 209(a)]		RE6
Spouse of RE6 (spouse entered on or after Apr. 1, 1980)		RE7
Child of RE6 (child entered the United States on or after Apr. 1, 1980).		RE8
Other members of the case regarding an RE6 (entered the United States on or after Apr. 1, 1980).		RE9
Other members of the case deriving their refugee status from the principal applicant		RE4
Asylee adjustment [Sec. 209(b)]		AS6
Spouse of AS6		AS7
Child of AS6		AS8
Syrian Jewish national adjusting independent of normal asylee limit (limited to 2000) [PL 106-378]		SY6
Spouse of SY6		SY7
Child or unmarried son or daughter of SY6		SY8
HRIFA (Haitian Refugee Immigration Fairness Act, PL 105-277)		
Haitian National adjusting status under HRIFA [Sec. 902(b)(1)(A) of PL 105-277]		HA6
Spouse of HA6.		HA7
Child of HA6.		HA8
Unmarried son or daughter of HA6.		HA9
Haitian National paroled into the U.S. prior to December 31, 1995, after having been identified as having a credible fear of persecution, or paroled for emergent reasons or reasons strictly in the public interest [Sec. 902(b)(1)(A) of PL 105-277]		HB6
Spouse of HB6		HB7
Child of HB6		HB8
Unmarried son or daughter of HB6		HB9
Haitian National who entered the U.S. as a child prior to December 31, 1995, became orphaned subsequent to arrival in the U.S., and has remained parentless [Sec. 902(b)(1)(C)(iii) of PL 105-277]		HC6
Spouse of HC6		HC7
Child of HC6		HC8
Unmarried son or daughter of HC6 [Sec. 902(b)(1)(A) of PL 105-277]		HC9
Haitian National who entered U.S. as a child prior to 12/31/1995 and became orphaned after arrival [Sec. 902(b)(1)(C)(iii) of PL 105-277]		HD6
Spouse of HD6		HD7
Child of HD6		HD8
Unmarried son or daughter of HD6		HD9
A Haitian National who entered the U.S. as a child prior to December 31, 1995 was abandoned by parents or guardians prior to April 1, 1998 and has remained abandoned [Sec. 902(b)(1)(C)(iii) of PL 105-277]		HE6
Spouse of HE6		HE7
Child of HE6		HE8
Unmarried son or daughter of HE6		HE9
IRCA and Cuban-Haitian entrant related		
Cuban-Haitian entrant[Sec. 202 of PL 99-603]		CH6
Spouse of an alien granted legalization under Sec 210, 245A, or Sec. 202 of PL 99-603 (Cuban-Haitian entrant) [Sec. 112 of PL 101-649]	LB1	LB6
Child of an alien granted legalization under Sections 210, 245A, or Sec. 202 of PL 99-603 (Cuban-Haitian entrant) [Sec. 112 of PL 101-649]	LB2	LB7
Spouse of alien granted legalization under Sec 210, 245A, or Sec 202 of PL 99-603 (Cuban-Haitian entrant) - conditional. [Sec. 112 of PL 101-649 and Sec. 216]	CB1	CB6
Child of alien granted legalization under Sec 210, 245A, or Sec. 202 of PL 99-603 (Cuban-Haitian entrant) - conditional. [Sec. 112 of PL 101-649 and Sec. 216]	CB2	CB7
Alien previously granted temporary resident status (legalization) who illegally entered the United States without inspection prior to Jan. 1, 1982 [Sec. 245A(b)]		W16
Alien previously granted temporary resident status (legalization) who entered the United States as a nonimmigrant and overstayed visa prior to Jan. 1, 1982 [Sec. 245A(b)]		W26
Alien previously granted temporary resident status (legalization) from a country granted blanket extended voluntary departure (EVD) [Sec. 245A(b)]		W36
Late amnesty applicants (IRCA) [LIFE Act (Legal Immigration Family Equity) and LIFE Act amendments of 2000		W46
SAW (Seasonal Agricultural Worker) Group 1 -worked at least 90 days during each year ending on May 1, 1984, 1985, and 1986		S16
SAW (Seasonal Agricultural Worker) Group 2 - worked at least 90 days during the year ending on May 1, 1986 [Sec. 210(2)(B)]		S26
NACARA (Nicaraguan Adjustment and Central American Relief Act, PL 105-100)		
Nicaraguan or Cuban national granted adjustment of status		NC6
Nicaraguan or Cuban national spouse of NC6		NC7
Nicaraguan or Cuban national child of NC6		NC8
Nicaraguan or Cuban national unmarried son/daughter of NC6		NC9
Northern Mariana Islands [Sec. 201(b)(2)(A)(i)and PL 94-241]		
Parent of U.S.C. presumed to be a Permanent Resident		MR0
Spouse of U.S.C. presumed to be Permanent Resident		MR6
Child of U.S.C. presumed to be Permanent Resident		MR7
VTVPA (Victims of Trafficking and Violence Protection Act, PL 106-386)		
Victim of severe form of trafficking (T1 nonimmigrant) granted adjustment of status		ST6

Basis of eligibility upon which permanent residence granted	Immigrant Code Entry	Adjust
Spouse of ST6		ST7
Child of ST6		ST8
Sibling of ST6		ST9
Parent of ST6		ST0
Victim of criminal activity (U1 nonimmigrant) granted adjustment of status		SU6
Spouse of SU6		SU7
Child of SU6		SU8
Parent of SU6		SU0
Other Special adjustment programs		
Cuban refugee [Sec. 1 of PL 89-732]		CU6
Non-Cuban spouse or child of CU6.		CU7
Alien covered by Chinese Student Protection Act [Sec. 245 as amended by PL 101-649 and PL 102-404]		EC6
Spouse of alien covered by Chinese Student Protection Act.		EC7
Child of alien covered by Chinese Student Protection Act.		EC8
Natives of Tibet who have continuously resided in Nepal or India (Displaced Tibetan) [Sec. 134 of PL 101-649]	DT1	DT6
Spouse of DT1 or DT6.	DT2	DT7
Child of DT1 or DT6.	DT3	DT8
Iraqi National - whose application for aslyum was processed in Guam between September 1,1996 and April 30, 1997, adjusting to lawful permanent residence in the U.S. [Sec. 128 of PL 105-277]		GA6
Spouse of GA6		GA7
Child of GA6		GA8
Indochinese refugee [Sec. 101 of PL 95-145]		IC6
Spouse or child of an Indochinese refugee not qualified as a refugee on his or her own.		IC7
Indochinese Parolee [Sec. 586 of PL 106-429]		ID6
Certain parolees from the Soviet Union, Cambodia, Laos, or Vietnam who were denied refugee status and paroled between Aug. 15, 1988 and Sep. 30, 1999. [Sec. 599(E) of PL 101-167]		LA6
Refugee-escapee previously admitted for lawful permanent resident status [Fair Share Refugee Act, PL 86-648]		M83
Hungarian parolee previously admitted for lawful permanent resident status [Hungarian Refugee Act, PL 85-559]		M93
Polish or Hungarian nationa paroled into U.S. between Nov. 1, 1989 and Dec. 31, 1991 [Sec. 646 as added by PL 104-208]		PH6
Special Immigrants		
Person who lost U.S. citizenship through marriage [Sec. 101(a)(27)(B) and 324(a)]	SC1	SC6
Person who lost U.S. citizenship by serving in foreign armed forces [Sec. 101(a)(27)(B) and 327]	SC2	SC7
Minister of religion [Sec. 101(a)(27)(C)(ii)(I)]	SD1	SD6
Spouse of SD1 or SD6.	SD2	SD7
Child of SD1 or SD6.	SD3	SD8
Certain employees or former employees of the U.S. government abroad [Sec. 101(a)(27)(D)]	SE1	SE6
Spouse of SE1 or SE6.	SE2	SE7
Child of SE1 or SE6.	SE3	SE8
Employee of U.S. Mission in Hong Kong [Sec. 152 of PL 101-649]	SEH	SEK
Certain former employees of the Panama Canal Company or Canal Zone Government [Sec. 101(a)(27)(E)]	SF1	SF6
Spouse or child of SF1 or SF6.	SF2	SF7
Certain former employees of the U.S. Government in the Panama Canal Zone[Sec. 101(a)(27)(F)]	SG1	SG6
Spouse or child of SG1 or SG6.	SG2	SG7
Certain former employees of the Panama Canal Company or Canal Zone Government employed on Apr. 1, 1979 [Sec. 101(a)(27)(G)]	SH1	SH6
Spouse or child of SH1 or SH6.	SH2	SH7
Foreign medical school graduate licensed to practice in the United States on Jan. 9, 1978 [Sec. 101(a)(27)(H)]		SJ6
Spouse or child of SJ6.	SJ2	SJ7
Certain retired international organization employees [Sec. 101(a)(27)(I)(iii)]	SK1	SK6
Spouse of SK1 or SK6[Sec. 101(a)(27)(I)(iv)]	SK2	SK7
Certain unmarried sons or daughters of international organization employees [Sec. 101(a)(27)(I)(i)]	SK3	SK8
Unmarried son or daughter of an employee of an international organization [Section 312 of IRCA]	SK3	
Certain surviving spouses of deceased international organization employees [Sec. 101(a)(27)(I)(ii)]	SK4	SK9
Juvenile court dependent[Sec. 101(a)(27)(J)]	SL1	SL6
Alien recruited outside the U.S. who has served, or is enlisted to serve, in the U.S. Armed Forces for 12 years (became eligible after Oct. 1, 1991) [Sec. 101(a)(27)(K)]	SM1	SM6
Spouse of an alien classified as SM1 or SM6.	SM2	SM7
Child of an alien classified as SM1 or SM6.	SM3	SM8
Alien recruited outside the U.S. who has served, or is enlisted to serve, in the U.S. Armed Forces for 12 years (eligible as of Oct. 1, 1991) [Sec. 101(a)(27)(K)]	SM4	SM9
Spouse or child of an alien classified as SM4 or SM9.	SM5	SM0
Certain retired NATO-6 civilian employees. [Sec 101(a)(27)(L)]	SN1	SN6
Spouse of SN1 or SN6	SN2	SN7
Certain unmarried sons or daughters of SN1 or SN6	SN3	SN8
Certain surviving spouses of deceased NATO-6 civilian employees	SN4	SN9
Religious worker [Sec. 101(a)(27)(C)(ii)(II) and (III)]	SR1	SR6
Spouse of SR1 or SR6.	SR2	SR7
Child of SR1 or SR6.	SR3	SR8
Born subsequent to issuance of IV [Sec. 211(a)(1)]		
Child born subsequent to the issuance of a visa. Parent is employment-based preference immigrant.	XE3	

Basis of eligibility upon which permanent residence granted	Immigrant Code Entry	Adjust
Child born subsequent to the issuance of a visa. Parent is a family-based preference immigrant.	XF3	
Child born subsequent to the issuance of a visa. Parent is not a family-based preference, employment-based preference, or immediate relative immigrant.	XN3	
Child born subsequent to the issuance of a visa. Parent is an immediate relative immigrant.	XR3	
Other		
Person presumed to have been admitted for permanent residence [8 CFR 101.1; OI 101.1]		XB3
Person granted permament residence under Sec. 249 based on entry prior to July 1, 1924.		Z33
Person granted permanent residence under Sec. 249 based on having entered U.S. after June 30, 1924 and prior to June 28, 1940.		Z03
Person granted permanent residence under Sec. 249 based on entry on or after June 28, 1940 and prior to Jan. 1, 1972		Z66
Private law, immediate relative of a U.S. citizen or special immigrant.		Z43
American Indian born in Canada (nonquota) [Sec. 289]	S13	
Foreign government official, immediate relative of a U.S. citizen or special immigrant. [Sec. 13 of PL 85-316]		Z83
Creation of record of Permanent Resident status for person born under diplomatic status in the U.S. [8 CFR 101.3]		DS1
Cancellation of removal/Suspension of Deportation		
Cancellation of removal (VAWA) - granted suspension of deportation or cancellation of removal		Z14
Cancellation of removal (NACARA) - granted suspension of deportation or cancellation of removal and permanent residence [Sec 203 of PL 105-100]		Z15
Cancellation of removal - granted suspension of deportation (other than a crewman) and adjusted as an immediate relative of a U.S.C or a special immigrant [Sec. 244[		Z13
Cancellation of removal - granted suspension of deportation after entry as a crewman on or before June 30, 1964, and adjusted as an immediate relative of a U.S.C. or a special immigrant [Sec. 244]		Z56
Cancellation of removal - granted suspension of deportation (other than crewman) and adjusted as preference or non-preference immigrant [Sec. 244(a)(5)]		Z11
Cancellation of removal - granted suspension of deportation after entry as crewman on or before June 30, 1964, and adjusted as preference or non-preference immigrant [Sec. 244]		Z57