COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12276

COMMONWEALTH OF MASSACHUSETTS,
Respondent-Appellee,

v.

SREYNUON LUNN,
Petitioner-Appellant.

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE..1

STATEMENT OF THE ISSUES..3

STATEMENT OF THE CASE..4

I. STATUTORY AND REGULATORY BACKGROUND....................4

II. PROCEDURAL BACKGROUND....................................16

SUMMARY OF THE ARGUMENT......................................19

ARGUMENT..22

I. STATES MAY TEMPORARILY HOLD ALIENS SUBJECT TO A FINAL ORDER OF REMOVAL IN RESPONSE TO AN IMMIGRATION DETAINER...22

A. Detainers Are Voluntary...........................22

B. States Have Inherent Authority To Assist In The Enforcement Of Federal Law........................24

C. Immigration Detainers Provide Probable Cause, Such As Where The Individual Has Previously Been Ordered Removed, For State Officers To Detain Someone....31

D. State Officers May Rely Upon A Federal Officer's Determination That Probable Cause Exists That An Individual Is A Removable Alien, Such As Where The Individual Has Previously Been Ordered Removed...34

II. THE TEMPORARY DETENTION OF AN ALIEN SUBJECT TO A FINAL ORDER OF REMOVAL, PURSUANT TO AN IMMIGRATION DETAINER, DOES NOT VIOLATE THE FOURTH AMENDMENT.................39

A. There Is No Fourth Amendment Requirement That An Immigration Detainer Be Issued By A Neutral Magistrate..39

B. Fourth Amendment Criminal Procedural Requirements Have Never Been Imposed On The Civil Immigration System—And For Good Reason.......................43

III. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE CONSTITUTIONALITY OF IMMIGRATION DETAINERS WRIT LARGE 47

CONCLUSION..50

TABLE OF AUTHORITIES

U. S. Supreme Court Cases

Abel v. United States,
362 U.S. 217 (1960)...............................20, 41, 44

Arizona v. United States,
132 S. Ct. 2492 (2012)................................*passim*

Carchman v. Nash,
473 U.S. 716 (1985).......................................5

City of Los Angeles v. Patel,
135 S. Ct. 2443 (2013)...................................48

Cty. of Riverside v. McLaughlin,
500 U.S. 44 (1991).......................................41

De Canas v. Bica,
424 U.S. 351 (1976)......................................23

Demore v. Kim,
538 U.S. 510 (2003)......................................39

FERC v. Mississippi,
456 U.S. 742 (1982)......................................22

Fiallo v. Bell,
430 U.S. 787 (1977).......................................7

Florida v. Harris,
133 S. Ct. 1050 (2013)...................................45

Gerstein v. Pugh,
420 U.S. 103 (1975)..................................37, 40

Illinois v. Andreas,
463 U.S. 765 (1983)......................................32

Kleindienst v. Mandel,
408 U.S. 753 (1972).......................................7

Los Angeles Police Dep't v. United Reported Publ'g Corp.,
528 U.S. 32 (1999).......................................61

Maryland v. Pringle,
540 U.S. 366 (2003)....................................30

Miller v. United States,
357 U.S. 301 (1958)....................................21

Moody v. Daggett,
429 U.S. 78 (1976).....................................21

Nevada v. Hicks,
533 U.S. 353 (2001)....................................21

Printz v. United States,
521 U.S. 898 (1997)....................................22

R.R. Comm'n of Tex. v. Pullman Co.,
312 U.S. 496 (1941).....................................4

Reno v. Flores,
507 U.S. 292 (1993)....................................38

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947)....................................28

Tafflin v. Levitt,
493 U.S. 455 (1990)....................................22

United States v. Di Re,
332 U.S. 581 (1948)................................21, 25

United States v. Hensley,
469 U.S. 221 (1985)................................32, 33

United States v. Salerno,
481 U.S. 739 (1987)....................................45

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008)....................................48

Zadvydas v. Davis,
533 U.S. 678 (2001)....................................40

Other Federal Cases

Babula v. INS,
665 F.2d 293 (3d Cir. 1981)............................39

Bell v. City of Chicago,
835 F.3d 736 (7th Cir. 2016)..............................46

Castro v. United States Dep't of Homeland Sec.,
835 F.3d 422 (3d Cir. 2016)................................7

Chavez v. City of Petaluma,
No. 14-CV-5038, 2015 WL 6152479
(N.D. Cal. Oct. 20, 2015).................................43

Chung Young Chew v. Boyd,
309 F.2d 857 (9th Cir. 1962)...............................8

Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma,
644 F. Supp. 2d 1177 (N.D. Cal. 2009).....................11

Duamutef v. INS,
386 F.3d 172 (2d Cir. 2004)...............................14

Furrow v. U.S. Bd. of Parole,
418 F. Supp. 1309 (D. Me. 1976)............................6

Galarza v. Szalczyk,
745 F.3d 634 (3d Cir. 2013)...........................5, 20

Garcia v. Speldrich,
No. 13-CV-3182, 2014 WL 3864493
(D. Minn. Aug. 6, 2014)...................................34

Gardner v. Cal. Highway Patrol,
No. 2:14-CV-2730, 2015 WL 4456191
(E.D. Cal July 20, 2015)..................................43

Gonzales v. Peoria,
722 F.2d 468 (9th Cir. 1983)..............................23

Hodgers-Durgin v. De La Vina,
199 F.3d 1037 (9th Cir. 1999).............................23

In re Joseph,
22 I. & N. Dec. 799 (BIA 1999)............................39

In re Lehder,
15 I. & N. Dec. 159 (BIA 1975).............................8

Jean v. Nelson,
727 F.2d 957 (11th Cir. 1984).............................39

La. Forestry Ass'n, Inc. v. Sec'y U.S. Dep't of Labor,
745 F.3d 653 (3d Cir. 2014)....................................7

Liu v. Phillips,
234 F.3d 55 (1st Cir. 2000)....................................34

Marsh v. United States,
29 F.2d 172 (2d Cir. 1928).....................................23

Miranda-Olivares v. Clackamas Cnty.,
No. 3:12-cv-02317-ST, 2014 WL 1414305
(D. Or. Apr. 11, 2014)...................................13, 31

Puccini v. United States,
No. 96-2402, 1996 WL 556987
(N.D. Ill. Sept, 26, 1996)......................................43

Rhoden v. United States,
55 F.3d 428 (9th Cir. 1995)....................................40

Santos v. Frederick Cnty. Bd. of Comm'rs,
725 F.3d 451 (4th Cir. 2013)...................................26

Slavik v. Miller,
89 F. Supp. 575 (W.D. Pa. 1950).................................8

Spinella v. Esperdy,
188 F. Supp. 535 (S.D.N.Y. 1960)...............................39

United States v. Celio,
945 F.2d 180 (7th Cir. 1991)...................................33

United States v. Chaklader,
987 F.2d 75 (1st Cir. 1993).....................................6

United States v. Female Juvenile, A.F.S.,
377 F.3d 27 (1st Cir. 2004).....................................5

United States v. Garcia-Martinez,
228 F.3d 956 (9th Cir. 2000)...................................41

United States v. Janik,
723 F.2d 537 (7th Cir. 1983)...................................32

United States v. Mejia-Chicas,
287 Fed. App'x 830 (11th Cir. 2008)............................47

United States v. Mohamud,
843 F.3d 420 (9th Cir. 2016)................................46

United States v. Ovando-Garzo,
752 F.3d 1161 (8th Cir. 2014)..........................27, 30

United States v. Quintana,
623 F.3d 1237 (8th Cir. 2010)..........................27, 29

United States v. Ramirez,
473 F.3d 1026 (9th Cir. 2007)...............................34

United States v. Robinson,
536 F.2d 1298 (9th Cir. 1976)...............................33

United States v. Rodriguez,
831 F.2d 162 (7th Cir. 1987)................................33

United States v. Santana-Garcia,
264 F.3d 1188 (10th Cir. 2001)..............................23

United States v. Tejada,
255 F.3d 1 (1st Cir. 2001)..................................42

United States v. Uribe-Rios,
558 F.3d 347 (4th Cir. 2009).................................5

United States v. Williams,
627 F.3d 247 (7th Cir. 2010)................................33

United States v. Winter,
730 F.2d 825 (1st Cir. 1984).................................6

Supreme Judicial Court Cases

Commonwealth v. Carr,
464 Mass. 855 (2013)..................................5

Commonwealth v. Gullick,
386 Mass. 278 (1982).................................32

Commonwealth v. Marinho,
464 Mass. 115 (2013).................................16

Commonwealth v. Pon,
469 Mass. 296 (2015).................................45

Commonwealth v. Stewart,
469 Mass. 257 (2014)....................................30

Commonwealth v. Storey,
378 Mass. 312 (1979)....................................30

Commonwealth v. Upton,
394 Mass. 363 (1985).....................................3

Lockhart v. Attorney Gen.,
390 Mass. 780 (1984)....................................46

US Bank Nat'l Ass'n v. Schumacher,
467 Mass. 421 (2004)....................................16

Other Massachusetts Cases

Commonwealth v. Gant,
51 Mass. App. Ct. 314 (2001)............................32

Commonwealth v. Peters,
48 Mass. App. Ct. 15 (1999).............................32

Other States' Cases

Andrews v. State,
962 So. 2d 971 (Fla. Dist. Ct. App. 2007)..................6

In re Korner,
50 Cal. App. 2d 407 (1942)................................8

People v. Xirum,
993 N.Y.S.2d 627 (N.Y. Sup. Ct. 2014).................31, 35

Smith v. State,
719 So. 2d 1018 (Fla. Dist. Ct. App. 1998)................35

State v. Rodriguez,
317 Or. 27 (1993).......................................39

Public Laws

Pub. L. No. 104-208......................................11

Federal Statutes

6 U.S.C. § 202..7

6 U.S.C. § 291..7

6 U.S.C. § 557.......................................7

8 U.S.C. § 1101..................................4, 7, 8

8 U.S.C. § 1103(a)(5)...............................7, 8

8 U.S.C. § 1226.................................*passim*

8 U.S.C. § 1227......................................7

8 U.S.C. § 1229a....................................37

8 U.S.C. § 1231..............................2, 8, 14, 16

8 U.S.C. § 1252......................................7

8 U.S.C. § 1252c....................................24

8 U.S.C. § 1357.................................*passim*

28 U.S.C. § 517......................................1

Federal Regulations

8 C.F.R. § 241.4....................................16

8 C.F.R. § 242.2....................................11

8 C.F.R. § 287.5(c)...............................12, 37

8 C.F.R. § 287.7................................*passim*

8 C.F.R. § 1003.19..................................39

Federal Register

27 Fed. Reg. 8487.....................................9

47 Fed. Reg. 47168....................................9

49 Fed. Reg. 38719....................................9

53 Fed. Reg. 9281....................................11

53 Fed. Reg. 9283-84.................................11

62 Fed. Reg. 10312...................................11

62 Fed. Reg. 10392..11

Legislative History

Cong. Rec. H6716-03.......................................10

Miscellaneous

"FY 2016 ICE Immigration Removals," U.S. Immigration and Customs Enforcement, https://www.ice.gov/ removal-statistics/2016#wcm-survey-target-id (last visited Mar. 27, 2017)..42

"Infographics 2015," U.S. Dep't of Homeland Sec., https://www.dhs.gov/immigration-statistics/visualization/2015 (last visited Mar. 27, 2017)...............................42

U.S. Immigration and Customs Enforcement, Policy 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers available at https://www.ice.gov/detainer-policy (last visited March 27, 2017)..................................11

The United States submits this brief pursuant to: (a) the Court's solicitation of amicus briefs in Commonwealth v. Lunn, SJC-12276 (Feb. 8, 2017), and (b) 28 U.S.C. § 517.

INTEREST OF AMICUS CURIAE

The issues raised by this case deal directly with the Federal Government's broad power over immigration and the status of aliens. Although the Federal power to determine immigration policy is well settled, it is equally settled that in our system of dual sovereignty the Federal Government depends upon the cooperation of State and local law enforcement agencies to help identify, apprehend, and detain removable aliens in order to effectuate their removal and ensure that they do not abscond from Federal law enforcement. Immigration detainers are a vital part of this process because they request local law enforcement agencies (1) to inform Federal immigration authorities prior to the release of a removable alien from custody and (2) to hold the alien for no more than 48 hours so that Federal immigration authorities may assume custody. See 8 C.F.R. § 287.7(a), (d).

It is not uncommon under our system of governance for State and local law enforcement agencies to locate and detain removable aliens in response to Federal requests for assistance. This cooperation is necessary to preserve the

Federal Government’s ability to enforce the immigration laws and ensure that criminal aliens and those likely to abscond are promptly removed from the United States. Indeed, Congress specifically requires that certain criminal aliens be detained pending their removal from the United States. See 8 U.S.C. §§ 1226(c), 1231. Without such cooperation, criminal aliens would be released back into the communities, endangering public safety and requiring even more dangerous at-large re-apprehensions of aliens prone to criminality or flight.

This Federal-State cooperation is lawful under the laws and Constitution of the United States. This is because State officers may temporarily detain an alien--like the Petitioner-Appellant in this case--subject to a final order of removal based on the Federal Government’s direction and authorization. In this case, such authorization came through a notice within the detainer that there is probable cause to believe the Petitioner-Appellant is subject to an order of removal and, as a result, is subject to arrest and mandatory detention during a (presumptively) 90-day “removal period.” 8 U.S.C. § 1231(a)(1). Moreover, detaining such aliens for no more than 48 hours so that immigration authorities can assume

custody to effectuate their removal does not violate the United States Constitution.

Finally, amicus would like to inform the Court of new developments governing the issuance of immigration detainers. Even though they are not dispositive for this specific case, amicus believes these changes indicate that a facial ruling on the constitutionality of Federal immigration detainers would be imprudent at this time.

STATEMENT OF THE ISSUES

Amicus will address issues related to this Court's solicitation for amicus briefs. Specifically, (1) whether a State may temporarily hold an alien subject to a final order of removal[1] upon release from State custody in response to a Federal immigration detainer indicating that the alien is removable and requesting the State temporarily hold the alien for Federal immigration authorities; (2) whether the brief detention of an alien subject to a Federal immigration detainer indicating that he is subject to a final order of removal violates any Federal constitutional rights;[2] and (3)

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[1] While there are other bases for immigration detainers (as set forth on the detainer form) that provide probable cause, the United States believes (discussed below) that this Court should limit its decision to the circumstances at issue in this case--an alien subject to a final order of removal.

[2] Amicus acknowledges that art. 14 of the Declaration of

whether this case, which is moot as to Petitioner-Appellant, is appropriate for addressing immigration detainers' constitutionality for individuals not similarly situated.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

An "immigration detainer" is a document by which the U.S. Department of Homeland Security ("DHS") provides notice of its intent to assume custody of a removable alien detained in the custody of another law enforcement agency.[3] See 8 C.F.R. § 287.7(a); see also U.S.C. § 1101(a)(3) (an "alien" is any person who is neither a citizen nor a national of the

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Rights "provides more substantive protection to *criminal* defendants than does the Fourth Amendment," Commonwealth v. Upton, 394 Mass. 363, 373 (1985) (emphasis added), and that this Court "ha[s] a duty to come to its own conclusion about the meaning of [the Commonwealth's] Constitution," Commonwealth v. Gonsalves, 429 Mass. 658, 681 (1999) (Fried, J., dissenting). As the United States' relevant expertise lies with the Fourth Amendment and Federal immigration law, this brief is limited to a discussion of those topics. Cf. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941) (emphasizing the importance of avoiding "needless friction with state policies").

[3] On March 24, 2017, DHS's component agency, U.S. Immigration and Customs Enforcement ("ICE"), released new procedures regarding ICE's issuance of immigration detainers. See U.S. Immigration and Customs Enforcement, Policy 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers (Mar. 24, 2017), available at https://www.ice.gov/detainer-policy. These were accompanied by a revised immigration detainer form. See id. As described in more detail below, these changes make this case a poor vehicle for addressing the constitutionality of immigration detainers writ large.

United States). According to federal regulations, the detainer "serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7(a). As that regulation explains, an immigration detainer is a request--not a directive--for other Federal, State, local, or tribal law enforcement agencies to inform DHS of a pending release date for the alien in question, and to hold the alien for up to 48 hours to allow ICE to assume custody.[4]

DHS's standard detainer form (known as a "Form I-247") sets forth the basis for the agency's determination that it possesses probable cause to believe that the subject is a

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[4] See Galarza v. Szalczyk, 745 F.3d 634, 643 (3d Cir. 2013) (finding that an immigration detainer is in the nature of a "request," rather than a mandate, and Tenth Amendment concerns are therefore not implicated); United States v. Uribe-Rios, 558 F.3d 347, 350 n.1 (4th Cir. 2009) (same)(citing 8 C.F.R. § 287.7(d)); United States v. Female Juvenile, A.F.S., 377 F.3d 27, 35 (1st Cir. 2004) (same); see also Carchman v. Nash, 473 U.S. 716, 719 (1985)(defining a criminal detainer as "a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent"); Commonwealth v. Carr, 464 Mass. 855, 862 (2013) (describing Boston police officers' use of a criminal detainer); Black's Law Dictionary 543 (10th ed. 2014) (defining detainers as "request[s] ... to a prison, jail, or asylum requesting either that a certain inmate be held for the agency or that the agency be notified a reasonable time before the inmate is released").

removable alien. For example, and most relevant to this case, the Form I-247D, which was in effect at the time DHS lodged it with Commonwealth authorities as to Mr. Lunn, indicated that a final order of removal had already been entered against him. See R.A. 35. Other federal agencies also use detainers as a way to hold individuals arrested by state or local law enforcement until they can be taken into custody. Such circumstances range from being absent without leave from the armed forces, see, e.g., Andrews v. State, 962 So. 2d 971, 973 (Fla. Dist. Ct. App. 2007)(recounting how a DD Form 553 was issued for the desertion of a military officer and Federal agents enlisted local police in the search of his residence and arrest), to parole and probation violations, see, e.g., United States v. Chaklader, 987 F.2d 75, 77 (1st Cir. 1993) (per curiam); Furrow v. U.S. Bd. of Parole, 418 F. Supp. 1309, 1312 (D. Me. 1976) (prisoner was granted parole by State board but not delivered into Federal custody pursuant to Federal detainer until four days later), to major felony offenses, see, e.g., United States v. Winter, 730 F.2d 825, 826 (1st Cir. 1984) (prisoner held by State pursuant to Federal detainer from December 14, 1981, when State granted prisoner parole, until January 21, 1982, when he was released to Federal custody).

ICE and the legacy Immigration and Naturalization Service ("INS")[5] have long issued detainers pursuant to the country's sovereign power to police its borders and exclude or deport aliens. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 765-66 & n.6 (1972)(collecting cases and noting how "the Court's general reaffirmations of this principle have been legion"); Castro v. DHS, 835 F.3d 422, 439 (3d Cir. 2016). Congress codified and consolidated this power in the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 et seq., which: (1) provides the Secretary of Homeland Security with the authority to enforce the immigration laws and "the power and duty to control and guard the borders and boundaries of the United States against the illegal entry of aliens," id. at § 1103(a)(1), (5); (2) establishes certain categories of aliens who are barred from admission to the United States, id. at § 1182, or may be removed from the United States after their admission, id. at § 1227; (3) grants immigration

[5] The INS was part of the Department of Justice. In 2002, however, Congress abolished the INS and transferred jurisdiction to implement the INA to the Secretary of Homeland Security. See 6 U.S.C. §§ 202, 291, 557; La. Forestry Ass'n, Inc. v. Sec'y U.S. Dep't of Labor, 745 F.3d 653, 659 (3d Cir. 2014). Accordingly, INA directives to the "Attorney General" now generally pertain to the Secretary of Homeland Security, with limited exceptions not relevant to issuance of an immigration detainer. See id.

officials broad discretion as to their enforcement priorities, id. at § 1252; (4) instructs the Secretary of Homeland Security to "establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the INA, id. at § 1103(a)(3); and (5), provides specific authority to arrest and detain certain aliens, id. at §§ 1226, 1231, 1357.

In light of this statutory backdrop, the Federal Government has regularly used detainers as a means of obtaining custody of aliens for purposes of removal (previously referred to as "deportation") since at least the 1940s. See, e.g., In re Korner, 50 Cal. App. 2d 407, 408–09 (1942) (mentioning that INS had issued a detainer to state authorities). For example, in a 1950 decision, a federal district court addressed a challenge to the legality of a deportation order for an alien who was the subject of an immigration detainer requesting his delivery "to the custody of the immigration authorities at the time sentence is fulfilled in the state institute." Slavik v. Miller, 89 F. Supp. 575, 576 (W.D. Pa. 1950), aff'd, 184 F.2d 575 (3d Cir. 1950) (per curiam); see also Chung Young Chew v. Boyd, 309 F.2d 857 (9th Cir. 1962) (INS issued detainer to federal

prison authorities); In re Lehder, 15 I. & N. Dec. 159 (BIA 1975) (INS detainer requested that federal prison notify INS at least 30 days prior to his release). Federal Register notices throughout this time period also referenced "immigration detainers." See Dep't of Justice, Prescribing Regulations of the United States Board of Parole and Youth Correction Division of the Board, 27 Fed. Reg. 8487 (Aug. 24, 1962) (referring to "immigration detainers"); Dep't of Justice, Bureau of Prisons, Control Custody, Care, Treatment, and Instruction of Inmates, 47 Fed. Reg. 47168 (Oct. 22, 1982) (referring to "deportation detainers"); Dep't of Justice Office of Justice Assistance, Research & Stats., State Reimbursement Program for Incarcerated Mariel-Cubans, 49 Fed. Reg. 38719 (Oct. 1, 1984) (referring to Form I-247, "Immigration Detainer Notice").

These cases and regulations illustrate the regular use of immigration detainers prior to 1986 to request that a law enforcement agency transfer an alien to INS custody at the completion of the alien's criminal sentence and notify INS prior to the alien's release. ICE today relies upon similar partnerships with state law-enforcement agencies to identify certain removable aliens.

In 1986, Congress enacted the Anti-Drug Abuse Act, which, among other things, amended the INA to codify the longstanding use of immigration detainers by federal immigration officers, in part, for aliens arrested for "violation[s] of any law relating to controlled substances." 8 U.S.C. § 1357(d). Rather than define immigration detainers or limit their contemporaneous usage, Congress instead mandated that immigration officers must promptly determine whether to issue a detainer for an individual who has been arrested for a controlled substance violation by a Federal, State, local, or tribal law enforcement agency if there was "reason to believe" that the individual arrested "may not have been lawfully admitted ... or is not lawfully present in the United States." Id. at § 1357(d)(1)-(3).

Although this statutory mandate spoke specifically to arrests for controlled substance violations, it also presupposes the existence of the Federal Government's general detainer authority, which is broader. In fact, this provision was added at the insistence of law enforcement officials who were agitated that the INS was not always filing detainers to take custody of aliens charged with drug-related offenses. See, e.g., 132 Cong. Rec. H6716-03 (daily ed. Sept. 11, 1986) (statement of Rep. Ackerman as read by Rep. Smith), at 1986

WL 790075 (stating how the Act's purpose, among other things, was to address "local law enforcement complaints concerning the INS' inability to issue a judgment on a suspect's citizenship status fast enough to allow the authorities to continue to detain him"); see also Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma, 644 F. Supp. 2d 1177, 1199 (N.D. Cal. 2009) ("[N]othing in the statute ... purports to limit the issuance of immigration detainers to cases where an alien is arrested ... for a violation of any law relating to controlled substances.").

The INS subsequently issued regulations governing the issuance of immigration detainers.[6] Those regulations codified the agency's existing authority to request other law enforcement agencies to temporarily maintain custody of the alien in order to permit assumption of custody by the INS. See 53 Fed. Reg. 9281, 9283-84 (Mar. 22, 1988).

The current regulations, promulgated after Congress rewrote much of the INA through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),

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[6] INS and DHS have amended those regulations on a number of occasions. See, e.g., Dep't of Justice, INS, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, Interim Rule, 62 Fed. Reg. 10312, 10392 (Mar. 6, 1997); 8 C.F.R. §§ 242.2, 287.7 (1988).

Pub. L. No. 104–208, 110 Stat. 3009-546 (Sept. 30, 1996),[7] provide that "[a]ny authorized immigration officer may at any time issue a Form I-247 ... to any other Federal, State, or local law enforcement agency," 8 C.F.R. § 287.7(a), and identify the personnel who may issue immigration detainers (such as deportation officers or immigration inspectors), 8 C.F.R. § 287.7(b)(1)-(8). These personnel are, under certain conditions, authorized to make warrantless arrests for violations of federal immigration law.[8]

The regulations also request that other agencies provide DHS with "all documentary records and information" related to the alien's status; limit the period for which aliens may be held at ICE's request so that they may assume custody to 48

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[7] Among other things, Congress clarified through IIRIRA that nothing in the INA should be construed as preventing state or local officers "to cooperate ... in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." IIRIRA, Pub. L. No. 104–208, § 133, 110 Stat. 3009-564, codified in 8 U.S.C. § 1357(g)(10)(B).

[8] See 8 U.S.C. § 1357(a)(2) ("Any officer or employee ... authorized under regulations prescribed by the [Secretary of Homeland Security] shall have power *without warrant ...* to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any ... law or regulation [governing the admission, exclusion, expulsion, or removal of aliens] and is likely to escape before a warrant can be obtained for his arrest[.]" (emphasis added)); see also 8 C.F.R. § 287.5(c) (listing immigration officers with authority to make warrantless arrests); 8 C.F.R. § 287.7(b) (listing immigration officers with authority to issue detainers).

hours (excluding weekends and federal holidays);[9] and specifies that DHS is not financially responsible for an alien's detention unless it issues a detainer for, or assumes custody of, the alien. See 8 C.F.R. § 287.7(c)-(e). The immigration detainer thus enables ICE to notify other Federal, State, or local agencies that it has determined that there is probable cause to believe the subject is a removable alien based upon: (1) a final order of removal against the alien; (2) the pendency of ongoing removal proceedings against the alien; (3) biometric confirmation of the alien's identity and a records match in federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks lawful immigration status or, notwithstanding such status, is removable under Federal immigration law; or (4) where the alien's voluntary statements to an immigration officer, or other reliable evidence, indicate that the alien either lacks lawful immigration status or, notwithstanding such status, is removable. See generally R.A. 16–20.[10]

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[9] The Form I-247D used in Mr. Lunn's case (as well as the Form I-247A) only requested his detention up to 48 hours, including weekends and Federal holidays.

[10] Prior versions of the Form I-247 indicated that ICE had initiated an investigation to determine whether the alien was subject to removal, rather than had probable cause to believe

Most relevant here, where "an alien [ha]s [been] ordered removed, the [Secretary of Homeland Security] shall remove the alien from the United States within a period of 90 days," referred to as the "removal period." 8 U.S.C. § 1231(a)(1)(A). Thus, in order to ensure prompt removal, Congress made clear that an alien subject to a final order of removal *shall* be detained pending effectuation of that order. See 8 U.S.C. § 1231(a)(2)("During the removal period, the [Secretary of Homeland Security] shall detain the alien."). Congress did not wish to interfere with Federal or State criminal processes, however, see, e.g., Duamutef v. INS, 386 F.3d 172, 179 (2d Cir. 2004), and thus "the [Secretary of Homeland Security] may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment," 8 U.S.C. § 1231(a)(4)(A). Accordingly, Congress required the agency to take custody of such aliens *after* their release from confinement, at which time, as relevant here, the "removal period" begins to run. Id. at § 1231(a)(1)(B)(iii) ("removal period begins ... [on] the

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the alien was already subject to removal. See, e.g., Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9-11 (D. Or. Apr. 11, 2014). However, those versions of the Form I-247 that are still operative (that is, the Form I-247A, Form I-247D, Form I-247N, and Form I-247X) no longer use this language.

date the alien is released from detention or confinement"); see also 8 U.S.C. § 1226(c)(1) (providing that the Secretary of Homeland Security is to take certain deportable aliens into custody "when the alien is released").

Finally, on March 24, 2017, per Secretary Kelly's direction, ICE directed the retirement of Form I-247D, Form I-247N, and Form I-247X to be replaced with a consolidated detainer form, Form I-247A, effective on April 2, 2017 (attached as Exhibit A). This consolidated detainer form, as did the prior Form I-247D, requests that recipient law enforcement agencies (1) notify DHS as early as practicable before a removable alien is released from criminal custody and (2) maintain custody of the alien for a period not to exceed 48 hours beyond the time he would otherwise have been released to allow DHS to assume custody (without any exception for Saturdays, Sundays, and holidays). In addition, Form I-247A, as did the prior Form I-247D, sets forth the basis of the issuing immigration officer's probable cause to believe that the subject is a removable alien and advises that a copy of the form must be served on the alien in order for the detainer to take effect,. Furthermore, ICE Policy No. 10074.2, also released March 24, 2017, directs that all immigration detainers issued to removable aliens must now be

accompanied by either a Form I-200 (Warrant for Arrest of Alien), signed by an authorized immigration officer, or a Form I-205 (Warrant of Removal), signed by an authorized immigration officer. See U.S. Immigration and Customs Enforcement, "Detainer Policy" and accompanying hyperlinks (Mar. 24, 2017), available at https://www.ice.gov/detainer-policy.

II. PROCEDURAL BACKGROUND

Petitioner-Appellant Sreynoun Lunn was issued a final order of removal on June 25, 2008.[11] In re Lunn (Imm. Ct. June 25, 2008) (attached as Exhibit B). On October 16, 2008 he was released from ICE custody on an order of supervision pending his removal because his country of origin declined to provide travel documents. See 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 241.4. Nearly ten years later, Mr. Lunn was arrested on charges of robbery in violation of Massachusetts law. See R.A. 37-38; see also R.A. 10. The same day of the arrest, ICE lodged an immigration detainer with relevant State authorities. R.A. 35. That detainer indicated that "probable

[11] This Court "may take judicial notice of the court papers filed in related cases." US Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 425 n.8 (2004); see also Commonwealth v. Marinho, 464 Mass. 115, 140-41 n.12 (2013) (Duffly, J., concurring in part and dissenting in part) (noting how "court[s] may take judicial notice of Federal immigration statutes and ... decisional law").

cause exists that [Mr. Lunn] is a removable alien" based on: (1) "a final order of removal against the subject" and (2) "biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicated, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law." Id.

This version of the Form I-247D at issue requested that local law enforcement: (1) serve a copy of the detainer form on Mr. Lunn, (2) "as early as possible prior to the time you otherwise would release [Mr. Lunn]" to notify ICE, and (3) "maintain custody of [Mr. Lunn] for a period NOT TO EXCEED 48 HOURS beyond the time [he] would otherwise have been released from your custody to allow [ICE] to assume custody." Id. The form further clarified that the request would be operative only if local law enforcement "serve[d] a copy of this form on [Mr. Lunn]." The record appears to reflect that such service occurred. R.A. 38. Thereafter, Mr. Lunn declined to post bail and remained in county custody pending trial. Id.

On October 24, 2016, Mr. Lunn was arraigned in the Central Division of the Boston Municipal Court on charges of

unarmed robbery. See R.A. 10-11. The criminal charges against Mr. Lunn were dropped on February 6, 2017 for lack of prosecution. R.A. 12. Mr. Lunn filed a state habeas petition requesting that the trial court order his release and not honor the immigration detainer lodged against him October 23, 2016. Ibid. The trial court declined to do so, ordering that he be held in custody pursuant to the immigration detainer.[12] Ibid. "[S]everal hours" after Mr. Lunn was to be released from state custody following dismissal of the charges against him, ICE took him into custody. R.A. 14.

On February 7, 2017, Mr. Lunn filed an emergency petition for relief with this Court, asking to be released. R.A. 50. Justice Lenk issued an order reserving and reporting the matter to the full Court, observing that while the matter was moot as to Mr. Lunn given his release from state custody, "the case raises important, recurring, time-sensitive issues that will likely evade the full [C]ourt's review in future cases" and anticipated that the full Court would address the

[12] While here, the trial court, rather than State or local law enforcement officials, relied upon the immigration detainer, it would be contrary to federal immigration law to construe 8 C.F.R. § 287.7 as *requiring* submission by DHS of a detainer to a State trial court. A contrary conclusion would present serious federal preemption issues. See Arizona v. United States, 132 S. Ct. 2492, 2506 (2012).

legality of Mr. Lunn's brief detention prior to his transfer to immigration custody "despite its mootness." R.A. 71.

Petitioner-Appellant's brief contends (1) that Massachusetts law does not authorize the Commonwealth to hold him in custody after the expiration of his criminal custody and that Federal law cannot authorize such a detention either; (2) that, notwithstanding that his Form I-247D indicated probable cause existed regarding how he had already been ordered removed, his detention violated the Fourth Amendment because detainers are not issued by neutral or detached magistrates, and (3) that the form is insufficiently detailed to support any such finding of probable cause. Br. of Pet.-App. at 14-44. On February 8, 2017, the full court requested amicus briefs. R.A. 72.

SUMMARY OF THE ARGUMENT

In our system of dual sovereignty, the United States' ability to enforce immigration law depends upon the cooperation of State sovereigns and their municipal law enforcement agencies. Since at least the 1940s, the linchpin of this cooperation has been the Federal immigration detainer, a request that local law enforcement inform immigration authorities prior to releasing removable aliens

from custody and to hold them for no more than 48 hours so that Federal immigration authorities may assume custody.

It is settled law that the United States Constitution does not preclude State officers from cooperating with Federal authorities by taking a suspect into temporary custody for violating Federal law--including immigration law. So long as State officers exercise their inherent arrest authority in response to *requests* for assistance from the Federal Government, such cooperation is permitted. Furthermore, State officers may rely on immigration officers' determinations of probable cause that an alien is removable.

The fact that an immigration detainer does not comply with the more rigorous Fourth Amendment requirements applicable in the criminal context does nothing to alter this outcome. As the Supreme Court explained nearly sixty years ago, there is "overwhelming historical legislative recognition of the propriety of administrative arrest[s] for deportable aliens[.]" Abel v. United States, 362 U.S. 217, 233 (1960). The requirement of a finding of probable cause by a neutral magistrate has thus *never* applied to immigration detention, regardless of whether that detention is prompted by an immigration detainer or some other basis.

A conclusion to the contrary--ignoring the extensive history of the limited nature of the Fourth Amendment in the immigration context--would completely undermine any effective immigration enforcement system, which must process the hundreds of thousands of aliens arrested for immigration violations each year. Such similar considerations undergird other forms of legal process that authorize temporary detentions, including detainers or holds issued by non-judicial entities, in numerous contexts, and are a necessary component of any effective civil immigration enforcement scheme.

Finally, although the parties ask the Court to issue a sweeping ruling addressing the legality of the use of detainers in *any* context, the sole issue before the Court is a detainer issued to a criminal alien subject to a final order of removal. As the detainer policy and underlying statutes at issue have applications in many circumstances not at issue in this appeal, the Court should decline the parties' invitation and, to the extent it views the case as justiciable, limit its ruling to aliens similarly situated to Mr. Lunn.

ARGUMENT

I. STATES MAY TEMPORARILY HOLD ALIENS SUBJECT TO A FINAL ORDER OF REMOVAL IN RESPONSE TO AN IMMIGRATION DETAINER

No party or amicus disputes that immigration detainers are voluntary requests, rather than mandatory commands. As explained below, Petitioner-Appellant points to no affirmative Massachusetts law restricting the Commonwealth's law enforcement agencies' authority to cooperate with such requests and to detain removable criminal aliens under their own inherent authority to enforce Federal law at the request or direction of the Federal Government. Just as State police officers are allowed to cooperate with another State's request to detain a criminal temporarily to enable the other State to take custody in an orderly manner, State officials may cooperate with the Federal Government's requests to briefly detain aliens (such as Mr. Lunn) who have already been ordered removed from this country, and thereby to enable the Federal Government to take custody in an orderly and peaceful manner.

A. Detainers Are Voluntary.

Although the parties and other amici devote much of their briefing to the question of whether detainers are mandatory or voluntary, the Court need not dwell on that issue. The United States agrees that immigration detainers

are not mandatory. Rather, as the governing regulation and case law indicate, they are "requests" upon State law enforcement to voluntarily assist Federal immigration authorities. The regulation provides that a detainer "serves to *advise* another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7(a) (emphasis added).[13] In light of this language, courts have construed immigration detainers to be no more than a request. See, e.g., Galarza, 745 F.3d at 644 ("[R]eading § 287.7 to mean that a federal detainer filed with a state or local [agency] is a command to detain an individual on behalf of the federal government, would violate the anti-commandeering doctrine of the Tenth Amendment."); see supra n.4; cf. Moody v. Daggett, 429 U.S. 78, 80 n.2 (1976) (noting in the context of criminal detainers that where, as here, "two autonomous jurisdictions are involved, ... a detainer is a matter of comity").

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[13] While it is true that 8 C.F.R. § 287.7(d) includes "shall" language that could be read as binding, this actually defines the maximum length of time that an alien with an immigration detainer may be held. It does not require local law enforcement agencies to hold anyone.

B. States Have Inherent Authority To Assist In The Enforcement Of Federal Law.

The Supreme Court has long recognized that the United States Constitution does not preclude State officers from cooperating with Federal authorities by taking a suspect into custody for violating Federal law. See United States v. Di Re, 332 U.S. 581, 589 (1948)("authority of State officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of State law"); Miller v. United States, 357 U.S. 301, 305-06 (1958) (lawful for "state peace officers" to make "an arrest for violation of federal law"). The Judiciary Act of 1789 even recognized the authority of a state court to "arrest[] and imprison[]" a person suspected of a Federal offense, to be held for later trial by an appropriate Federal court. See Act Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91; Di Re, 332 U.S. at 589 n.8 (quoting Judiciary Act provision); Nevada v. Hicks, 533 U.S. 353, 366-67 (2001) ("'Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States' [.]" (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990))).

Contemporaneous writings suggest, for example, that the Framers envisioned the Federal Government making use of state officials generally and, in particular, to enforce tax laws. See Printz v. United States, 521 U.S. 898, 910 (1997) (discussing The Federalist Nos. 27, 36, 45 and noting "The Federalist's more general observations that the Constitution would 'enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws'"). The Court explained that such statements "appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government ... an assumption proved correct by the extensive mutual assistance the States and Federal Government voluntarily provided one another in the early days of the Republic[.]" Id. at 910 (citing FERC v. Mississippi, 456 U.S. 742, 796, n.35 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part)).

The United States Constitution has therefore always been understood to permit States to assist in Federal Government's enforcement of Federal law, including with the arrest or detention of Federal immigration violators in cooperation with the Federal Government. See, e.g., United States v. Santana-Garcia, 264 F.3d 1188 (10th Cir. 2001);

Gonzales v. Peoria, 722 F.2d 468, 474 (9th Cir. 1983) (holding that Federal law does not preclude local enforcement of the criminal provisions of the INA), overruled on other grounds by Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999); United States v. Janik, 723 F.2d 537, 548 (7th Cir. 1983) (Posner, J.); see also Marsh v. United States, 29 F.2d 172, 174 (2d Cir. 1928) (L. Hand, J.) ("[I]t would be unreasonable to suppose that [the Federal Government's] purpose was to deny itself any help that the states may allow."). And this understanding comports with, and is reflected by, the long history of immigration detainers being sent to State and local law enforcement agencies (as discussed above).

Given Congress's pre-eminent authority over immigration matters vis-à-vis the States, see, e.g., De Canas v. Bica, 424 U.S. 351, 354-55 (1976), Congress has preempted state activity with regard to certain provisions of immigration law, by carefully circumscribing when state officials may "perform the functions of an immigration officer" in other circumstances, Arizona v. United States, 132 S. Ct. 2492, 2506 (2012). See also 8 U.S.C. § 1103(a)(10)(permitting extension of DHS immigration authority to State officers in the event of an "imminent mass influx of aliens off the

coast of the United States”); id. at § 1252c (permitting State officers to have authority to arrest and detain aliens unlawfully present after being convicted of a felony and being deported or leaving the United States (after confirming their status with DHS), until DHS can assume custody); id. at § 1324(c) (providing that “all other officers whose duty it is to enforce criminal laws” may make arrests for violating bar on bringing in and harboring certain aliens)).

However, contrary to the view advanced by Mr. Lunn, see, e.g., Br. of Pet.-App. at 22-23, the existence of these explicit statutory authorities in the INA does not mean that states *lack* inherent authority to make arrests based on federal immigration law in cooperation with the Federal Government. Indeed, the Supreme Court’s decision in Arizona emphatically rejects that view. 132 S. Ct. at 2509-10. There, the Court discussed Section 1357(g)(10)(B), which permits State and local officers to cooperate with the Federal Government, without a written agreement, “in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” Arizona, 132 S. Ct. at 2507.

Section 1357(g) describes the enforcement authority of immigration officers, and elsewhere permits the Federal Government and States to voluntarily enter into written agreements whereby State officials may perform the functions of Federal immigration enforcement officials. See 8 U.S.C. § 1357(g)(1). Congress was careful to avoid the mis-impression that States could not assist immigration enforcement in cooperation with the Federal Government, see, e.g., Di Re, 332 U.S. at 589-91, absent a formal agreement to do so, by explicitly providing:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State ... to cooperate with the [Department of Homeland Security] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10)(B). The Arizona majority opinion gave examples of such cooperation, including "provid[ing] operational support in executing a warrant," "allow[ing] federal immigration officials to gain access to detainees held in state facilities" and "responding to requests for information about when an alien will be released from their custody." 132 S. Ct. at 2507 (citation omitted). These forms of cooperation are to be distinguished from the Arizona statute that was at issue in that case, which permitted

"state officers to arrest an alien for being removable *absent* any *request, approval, or other instruction from the Federal Government*," and held that such unilateral State enforcement did not fall within the cooperative enforcement authority contemplated by section 1357(g). See 132 S. Ct. at 2507 (emphasis added).

Since Arizona, Federal appellate courts have held that State officials' engaging in the brief detention of suspected immigration-law violators, even absent a written agreement, is lawful and consistent with Arizona where such officers "arrest aliens for civil immigration violations" at the "direction or authorization by federal officials."[14] Santos v. Frederick Cnty. Bd. of Comm'rs, 725 F.3d 451, 466-67 (4th Cir. 2013) (recognizing how local police may detain and transport an alien *after* they have received express direction from federal officials). For example, in United States v. Ovando-Garzo, the Eighth Circuit held that a state trooper's identification of unlawfully present aliens, communication with the U.S. Border Patrol (another DHS component agency), and detention of those aliens at the

[14] And, at the very least, jurisdictions that have signed a written agreement under 8 U.S.C. § 1357(g) to have their officers perform functions of Federal immigration officers can honor ICE detainer requests.

request of the Border Patrol until it could take them into custody, were not unilateral and did not exceed the scope of the "cooperation" authority under Section 1357(g)(10)(B). 752 F.3d 1161, 1164-65 (8th Cir. 2014) (citing Arizona's discussion of Section 1357(g)(10)). Similarly, in United States v. Quintana, the court held that a State officer was authorized under Section 1357(g)(10)(B) to detain an alien at DHS's behest who could not produce identity documentation and thus was suspected of being unlawfully present, until DHS could take him into custody the following day. 623 F.3d 1237, 1242 (8th Cir. 2010).

As Arizona and its progeny make clear, Federal law does not preempt a State's inherent authority to make arrests based on violations of civil immigration law, so long as such arrests respond to *requests* for assistance from the Federal Government and are not otherwise preempted.[15] See 132

[15] ICE relies upon numerous partnerships with State law-enforcement agencies to identify certain removable aliens. Specifically, State and local arrestees' fingerprints are voluntarily sent to the Federal Bureau of Investigation's ("FBI") National Crime Information Center, which uses its Integrated Automatic Fingerprint Identification System to send those fingerprints to ICE's Automated Biometric Identification System. This automatically notifies ICE whenever the fingerprints of a State or local arrestee match those of a person previously encountered and fingerprinted by immigration officials. It also notifies ICE when the individual's fingerprints do not match fingerprint records in ICE records. ICE will then review other databases to

S. Ct. 2507 (discussing examples). And that is precisely what a State or local law enforcement officer does when he or she voluntarily complies with the Federal Government's requests contained in an immigration detainer. Many States have consequently chosen to work with the Federal Government by sending biometric information (such as fingerprints) of all persons booked in their local jails, allowing local enforcement agencies to better understand whom they are detaining. See supra n.14. Under such circumstances, unless a State government has affirmatively cabined its own police power, its officers may help the Federal Government with immigration arrests. Arizona, 132 S. Ct. at 2501 ("In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

C. Immigration Detainers Provide Probable Cause, Such As Where The Individual Has Previously Been Ordered Removed, For State Officers To Detain Someone.

Again, Mr. Lunn was issued a final order of removal on June 25, 2008. See Exhibit B. Under these circumstances, the detainer provided the Commonwealth with probable cause to

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determine whether the person is an alien present in the United States illegally or is otherwise removable.

believe that he was a removable alien because an Immigration Judge had already entered a final order of removal against him almost a decade ago. Ibid. Simply put, that is probable cause under the Fourth Amendment. See Commonwealth v. Storey, 378 Mass. 312, 321 (1979) ("[P]robable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense.").

This Court and the Supreme Court have repeatedly noted how probable cause is a fluid, fact-intensive inquiry that is "incapable of precise definition," but all conceptions of probable cause boil down to a requirement of "a reasonable ground for belief of guilt" that "must be particularized with respect to the person to be searched or seized." Maryland v. Pringle, 540 U.S. 366, 370-71 (2003)(internal quotation marks and citations omitted); Commonwealth v. Stewart, 469 Mass. 257, 262 (2014). ICE only issues detainers when there is probable cause to arrest an individual on the basis that he is a removable alien.[16] That standard was met in this case.

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[16] Beginning on April 2, 2017, all ICE detainers will be issued with a warrant under 8 U.S.C. § 1226. Nevertheless, the statutory standard for immigration enforcement--including

The amount of particularized evidence in this case equals, if not surpasses, the evidence supporting the valid probable-cause determinations upheld by the Eighth Circuit in both Ovando-Garzo and Quintana. In Ovando-Garzo, a State officer relied upon the aliens' admission of unlawful presence, but did not yet have any final orders of removal against them. 752 F.3d at 1162-64. And in Quintana, a State trooper validly detained the alien until DHS officers could arrive solely on the basis of the trooper and the DHS agent's immediate inability to verify the alien's identity and immigration status on the basis of his proffered identification document. 623 F.3d at 1238.

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state officers upon written agreement or in cooperation with federal authorities, see 8 U.S.C. § 1357(g)--to arrest someone for an immigration offense without a warrant requires that the officer have "reason to believe" that (1) "the alien so arrested is in the United States in violation of any such law or regulation" concerning the admission, exclusion, expulsion, or removal of aliens, (2) "is likely to escape before a warrant can be obtained for his arrest," and (3) the alien is taken without delay for examination by DHS. See id. at § 1357(a)(2) & (d) (providing for detention by State official who has "reason to believe" alien is unlawfully present and "expeditiously informs" DHS, which decides to issue a detainer); 8 C.F.R. § 287.7(a) ("The detainer is a request that [a local law enforcement] agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.") "Because the Fourth Amendment applies to arrests of illegal aliens, the term 'reason to believe' in § 1357(a)(2) means constitutionally required probable cause." Quintana, 623 F.3d at 1239 (collecting cases).

In a similar vein, other courts have ruled that a final order of removal against an alien establishes probable cause. For example, the Court in Clackamas Cnty.--a case upon which the parties and amici rely heavily--specifically explained that probable cause exists "when a[n alien] is ... subject to a warrant for arrest or an order of removal or deportation." 2014 WL 1414305, at *11; accord People v. Xirum, 993 N.Y.S.2d 627, 630 (N.Y. Sup. Ct. 2014) ("[A]n order of removal or deportation provides the [State corrections department] with probable cause to hold [the] defendant for DHS.").

D. State Officers May Rely Upon A Federal Officer's Determination That Probable Cause Exists That An Individual Is A Removable Alien, Such As Where The Individual Has Previously Been Ordered Removed.

Commonwealth officers also may rely upon Federal officers' communications that probable cause exists for an alien's removability. Specifically, the information DHS obtained concerning Mr. Lunn's unlawful status may be imputed to State officers under a straightforward application of the "fellow officer" or "common knowledge" doctrine, which courts have uniformly extended to the immigration enforcement context.

Under this principle, the validity of a search or seizure "turns on whether the officers who issued the flyer

[identifying the suspect] possessed probable cause to make the arrest. It does not turn on whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance." United States v. Hensley, 469 U.S. 221, 231 (1985) (citing Whiteley v. Warden, 401 U.S. 560, 564, 568 (1971)). "[W]here law enforcement authorities are cooperating ... the knowledge of one is presumed shared by all." Illinois v. Andreas, 463 U.S. 765, 772 n.5 (1983); accord Commonwealth v. Gullick, 386 Mass. 278, 283 (1982) (probable cause formed on the basis of collective observations of police); Commonwealth v. Gant, 51 Mass. App. Ct. 314, 318 (2001) ("Both officers were engaged in a cooperative effort ... [and] we may consider the complete picture."); Commonwealth v. Peters, 48 Mass. App. Ct. 15, 19 (1999) (observations of trooper communicated to another, and even if not communicated, are imputed to the other).

This doctrine recognizes that effective law enforcement requires that officers be able to "'act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information.'" Hensley, 469 U.S. at 231

(quoting United States v. Robinson, 536 F.2d 1298, 1300 (9th Cir. 1976)). Thus, searches and seizures by local officers at the request of federal Drug Enforcement Agency investigators are regularly upheld against Fourth Amendment challenges where the "DEA agents asked local law enforcement officers to stop a specifically-identified vehicle, and the local officers had no knowledge of the facts underlying the DEA's probable cause." United States v. Williams, 627 F.3d 247, 253 (7th Cir. 2010); United States v. Celio, 945 F.2d 180, 183 (7th Cir. 1991) (even though state police's stop and search of a vehicle was based only on "bald assertion" by DEA that "they suspected drug trafficking," DEA's sufficient basis for probable cause could be imputed to cooperating local officials); United States v. Rodriguez, 831 F.2d 162, 165-66 (7th Cir. 1987) (although officer who made the stop had no knowledge of the factual basis and DEA offered only a "skeletal" request for assistance, the "state trooper was ... acting as an extension or agent of the DEA agent and she could act on the DEA agent's suspicions"). As the Ninth Circuit has explained, "[t]he accepted practice of modern law enforcement is that an officer often makes arrests at the direction of another law enforcement officer even though the arresting officer himself lacks actual,

personal knowledge of the facts supporting probable cause." United States v. Ramirez, 473 F.3d 1026, 1037 (9th Cir. 2007) (citation omitted)(holding that officer had probable cause for arrest based on information concerning alleged drug activity shared by officers collectively on narcotics task force).

Courts have uniformly extended the "fellow officer" rule to the immigration context. For example, in Liu v. Phillips, the First Circuit upheld qualified immunity for a local officer who arrested an alien at the direction of an INS officer for a suspected violation of the immigration laws. 234 F.3d 55, 57-58 (1st Cir. 2000) (Boudin, J.) (observing how "a police force could not function without reasonable reliance on the statements and efforts of others," and finding nothing "untoward in [the local officer's] behavior in assisting" the INS agent with the arrest). In Garcia v. Speldrich, the court similarly held that qualified immunity applied for two State conservation officers who detained several individuals based on information provided by ICE officers who had interrogated the individuals. No. 13-CV-3182, 2014 WL 3864493, at *8-9 (D. Minn. Aug. 6, 2014). And in Smith v. State, the Third District Court of Appeal of Florida upheld a stop by local

police based on the reasonable suspicion provided by an immigration officer that the defendant was in the country illegally. 719 So. 2d 1018, 1022 (Fla. Dist. Ct. App. 1998); accord United States v. Mejia-Chicas, 287 Fed. App'x 830 (11th Cir. 2008) (unpublished) (upholding a traffic stop and detention by a State police officer based on a request and information from an ICE officer).

In this case, the "fellow officer" rule permits DHS's probable cause to believe that Mr. Lunn was removable (and, in fact, had already been ordered removed) to be imputed to the Commonwealth's officers. See Xirum, 993 N.Y.S.2d at 631, ("Similar to the fellow officer rule that permits detention by one police officer acting on probable cause provided by another, the [State] had the right to rely upon [a detainer issued by] the very Federal law enforcement agency charged under the law with 'the identification, apprehension, and removal of illegal aliens from the United States.'" (quoting Arizona, 132 S. Ct. at 2500)). Based on the fact that ICE had communicated its determination that probable cause existed to believe Mr. Lunn was removable (as evidenced by his past order of removal in Exhibit B), the Commonwealth was legally permitted to assist DHS in both his detention and transfer, and had more than sufficient probable cause to

detain him until ICE could arrive to take him into federal custody.

II. THE TEMPORARY DETENTION OF AN ALIEN SUBJECT TO A FINAL ORDER OF REMOVAL, PURSUANT TO AN IMMIGRATION DETAINER, DOES NOT VIOLATE THE FOURTH AMENDMENT

Petitioner-Appellant and amici contend that immigration detainers violate the Fourth Amendment of the United States Constitution and Article 14 of the Massachusetts Declaration of Rights. Specifically, they note how detainers are not warrants, nor a court order, and do not themselves confer probable cause to detain an alien who would otherwise not be subject to jail or imprisonment. See, e.g., Br. of Pet.-App. at 37. But these arguments improperly attempt to impose criminal procedural requirements onto the civil administrative processes of deporting removable aliens, and in any event do not cast doubt on the detention at issue here.

A. There Is No Fourth Amendment Requirement That An Immigration Detainer Be Issued By A Neutral Magistrate.

The Fourth Amendment has long permitted civil immigration arrests and detentions notwithstanding the fact that the probable-cause determinations for such violations are made by administrative officers rather than a neutral magistrate. In the criminal context, the Fourth Amendment

requires a neutral and detached magistrate to determine whether probable cause exists for an arrest. This must occur either before the arrest (via a warrant), or promptly after a warrantless arrest, which generally means 48 hours. See Gerstein v. Pugh, 420 U.S. 103, 125 (1975). But the analysis has *always* been different in the civil immigration context.

Consequently, a neutral magistrate does not make any probable-cause determination for immigration warrants, which are issued by DHS officers--not an immigration judge. 8 U.S.C. § 1226(a); see also 8 C.F.R. § 287.5(e)(2) (listing officers authorized to issue a warrant). The only situation when a neutral magistrate might have been involved is where, as here, an alien was arrested pursuant to a final order of removal. At that point, an immigration judge has previously found not merely that probable cause exists to believe the alien is removable, but has definitively ordered that he be removed from the United States. See, e.g., 8 U.S.C. § 1229a; Exhibit B.

Like the immigration detainers at issue in this case, statutes providing for removal from the United States have historically authorized the arrest of removable aliens based upon the determination of an authorized executive official. See, e.g., Act of June 25, 1798, ch. 58, § 2, 1 Stat. 571

(signed by President Adams); Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566; Act of Mar. 3, 1903, ch. 1012, § 21, 32 Stat. 1218; Act of Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904; Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889; Act of Oct. 16, 1918, ch. 186, § 2, 40 Stat. 1012; Act of May 10, 1920, ch. 174, 41 Stat. 593; Internal Security Act of 1950, ch. 1024, Title I, § 22, 64 Stat. 1008. As the Supreme Court has put it, there is "overwhelming historical legislative recognition of the propriety of administrative arrest[s] for deportable aliens[.]" Abel v. United States, 362 U.S. 217, 233 (1960); see also Reno v. Flores, 507 U.S. 292, 309-10 (1993) (rejecting automatic review by an immigration judge of INS initial deportability and custody determinations for juvenile aliens and reversing en banc decision applying Gerstein to immigration proceedings).

In Abel, the Court addressed an analogous argument by the Defendant--a Soviet spy who was interrogated by the FBI in his Manhattan hotel room based on an administrative immigration arrest warrant. Id. at 230-34. The Defendant argued that his arrest, incidental search, and weeks-long immigration detention in Texas was invalid because it was never sanctioned by a neutral magistrate. After two rounds of oral argument and briefing on the issue, Justice

Frankfurter's opinion for the Court devoted five pages (of obiter dicta) to rejecting this claim. See also State v. Rodriguez, 317 Or. 27, 42-43 (1993) (administrative immigration arrest warrant was not "unreasonable" under Fourth Amendment); Jean v. Nelson, 727 F.2d 957, 974 n.24 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985) ("[A]liens may be arrested without a warrant for deportation ... since deportation is not considered 'punishment[.]'"); Babula v. INS, 665 F.2d 293, 298 (3d Cir. 1981); Spinella v. Esperdy, 188 F. Supp. 535, 540-41 (S.D.N.Y. 1960) (noting "the unsoundness of th[is] constitutional attack").

Regarding due process arguments, once an alien is in Federal custody and placed into immigration removal proceedings before an immigration judge, there are built-in safeguards permitting the alien to test the legality of his detention. For example, an alien can request a bond redetermination hearing, see 8 C.F.R. § 1003.19, and has an "immediate[]" opportunity to challenge his mandatory pre-removal-order detention as a criminal alien at a "Joseph" hearing. Demore v. Kim, 538 U.S. 510, 514 (2003) (citing 8 C.F.R. § 3.19(h)(2)(ii) and In re Joseph, 22 I. & N. Dec. 799 (BIA 1999)). And if the Federal Government fails to timely remove aliens who have received a final order of removal,

they may obtain release through petitioning for a writ of habeas corpus if there is no "significant likelihood" that they will be removed "in the reasonably foreseeable future." Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

B. Fourth Amendment Criminal Procedural Requirements Have Never Been Imposed On The Civil Immigration System--And For Good Reason.

Even the Gerstein decision (which Petitioner-Appellant and amici repeatedly cite for support) is clear that its requirement for a neutral and detached magistrate is specific to criminal proceedings. 420 U.S. at 125 n.27. As the Court put it, "[t]he Fourth Amendment was tailored explicitly for the *criminal* justice system.... Moreover, the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those *accused of criminal conduct*.... [C]ivil procedures ... are inapposite and irrelevant in the wholly different context of the criminal justice system." Id. (emphases added). This is an important point because it goes back to the fundamental distinction between criminal and immigration procedures: the latter has always been understood as a creature of civil law. See, e.g., Rhoden v. United States, 55 F.3d 428, 432 n.7 (9th Cir. 1995) (per curiam) (distinguishing the Fourth Amendment analysis

for detention "[i]n the context of a criminal arrest" from the analysis involved for civil immigration detentions (citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56-58 (1991))).

This explains why under the INA, warrants may be issued by DHS's own officials, 8 U.S.C. § 1226(a), and warrantless arrests are authorized to be made by DHS officials, id. at § 1357. See also United States v. Garcia-Martinez, 228 F.3d 956, 961 (9th Cir. 2000) (rejecting argument that INS enforcement employees are inherently biased adjudicators). In short, courts have "frequently ... upheld administrative deportation proceedings shown ... to have been begun by arrests pursuant to" such processes. Abel, 362 U.S. at 233-34. This "impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation" confirms that the Fourth Amendment has never been understood to require what Mr. Lunn now insists must be the case. Id. at 234; see also id. at 230 ("Statutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time. It would emphasize the disregard for the presumptive respect the Court owes to the validity of Acts of Congress, especially when confirmed by uncontested historical

legitimacy, to bring into question for the first time such a long-sanctioned practice of government[.]”); cf. United States v. Tejada, 255 F.3d 1, 3-4 (1st Cir. 2001) (holding that alien arrested and detained pursuant to 8 U.S.C. §1357(a)(2) is subject to civil detention, which “does not trigger the protections of [Federal Rule of Criminal Procedure]5(a),” and, accordingly, “[t]he requirement that a magistrate evaluate his detention within 48 hours of his arrest is therefore inapplicable”).

An effective immigration enforcement system would be egregiously undermined if the probable cause determination needed to be made by a neutral magistrate, rather than an immigration officer. Hundreds of thousands of immigration arrests are made each year.[17] Moreover, requiring such review for these apprehensions would distract magistrates from their primary duties of adjudicating cases. And the benefit of such review would be limited because the probable-cause determination is relatively straightforward in immigration

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[17] See, e.g., “FY 2016 ICE Immigration Removals,” U.S. Immigration and Customs Enforcement, https://www.ice.gov/removal-statistics/2016#wcm-survey-target-id (last visited Mar. 27, 2017) (noting that DHS apprehended 415,816 aliens in fiscal year 2016); “Infographics 2015,” U.S. Dep’t of Homeland Sec., https://www.dhs.gov/immigration-statistics/visualization/2015 (last visited Mar. 27, 2017) (showing 462,388 apprehensions in fiscal year 2015).

cases: If an alien is present in the United States, DHS can often readily determine whether he was admitted or paroled. If not, that fact will alone demonstrate probable cause. If so, DHS can often swiftly determine whether the alien has overstayed or otherwise violated the terms and conditions of his authorized period of admission or parole. Requiring review by a neutral magistrate for all cases would impose a tremendous cost on the effective administration of the immigration laws, with little benefit in terms of substantive protections for individual aliens.

These same considerations are at play when other forms of legal process authorize temporary detentions, including detainers or holds issued by non-judicial entities. See Chavez v. City of Petaluma, No. 14-CV-5038, 2015 WL 6152479, at *6, *11 (N.D. Cal. Oct. 20, 2015) (dismissing a claim for allegedly improper detention where the plaintiff failed to allege that the parole hold/detainer lodged against her in county jail (by a "parole agent") was not facially valid, and explaining that the plaintiff has "not asserted any allegations to show [the sheriff] was not acting pursuant to a facially valid detainer"); Puccini v. United States, No. 96-2402, 1996 WL 556987, at *1 (N.D. Ill. Sept. 26, 1996) (dismissing claims against defendants who held the plaintiff

in State custody while subject to a Federal criminal detainer, and explaining that the defendants were "entitled to rely upon a duly issued and outstanding federal detainer"); Gardner v. Cal. Highway Patrol, No. 2:14-CV-2730, 2015 WL 4456191, at *16 (E.D. Cal. July 20, 2015) (explaining that a county could reasonably rely on a facially valid probable-cause declaration from a highway patrol officer to detain the plaintiff in jail). There simply is no principled distinction warranting respecting detainers in other circumstances issued by non-judicial entities, but not here, particularly in these circumstances where Federal immigration interests are paramount and a final order of removal is outstanding.

III. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE CONSTITUTIONALITY OF IMMIGRATION DETAINERS WRIT LARGE

The parties ask the Court to issue a sweeping decision addressing the constitutionality of the federal immigration detainer scheme as a facial matter. The Federal Government, however, urges a more modest course. This case involves only one alien, presently subject to detention pending the execution of his nearly ten-year-old final order of removal. His arrest was thus plainly lawful under Federal law, his detainer only extended his state criminal detention by "hours," and he is subject to mandatory detention under

Federal law during a removal period of presumptively 90 days. 8 U.S.C. § 1231(a)(1)(A). The traditional rule in both Federal and Commonwealth courts is to decide particular concrete questions--not abstract questions concerning third parties. See Los Angeles Police Dep't v. United Reported Publ'g Corp., 528 U.S. 32, 38-39 (1999); Commonwealth v. Pon, 469 Mass. 296, 299-300 n.7 (2015) (courts "typically decline to decide constitutional questions unnecessarily" and observing a "practice of judicial restraint in the realm of constitutional matters"). This rule of judicial prudence is especially apt here.

First, this case involves an alien who is subject to a final order of removal. He is thus not similarly situated to an alien who is subject to an immigration detainer on other grounds. And even though "[t]here is no categorical bar to mounting a facial challenge under the Fourth Amendment, ... Plaintiffs assume a demanding burden," Bell v. City of Chicago, 835 F.3d 736, 738 (7th Cir. 2016). They must "establish that [the] 'law is unconstitutional in all of its applications,'" City of Los Angeles v. Patel, 135 S. Ct. 2443, 2449 (2013) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008)). Other courts facing such sweeping arguments have declined "challenge[s] to

[search or seizure] techniques not employed in a particular case." United States v. Mohamud, 843 F.3d 420, n.21 (9th Cir. 2016). The Court should accordingly limit its consideration to Mr. Lunn's circumstances. See United States v. Salerno, 481 U.S. 739, 745 (1987).

Second, recent changes to Federal detainer policy applying prospectively distinguish Mr. Lunn's case, and any others similarly situated, from any such case that may arise in the future. For example, ICE's new detainer policy, set to go into effect on April 2, 2017, requires all immigration detainer forms to be accompanied by either a warrant for the arrest of the alien (signed by an authorized immigration officer) or a copy of a warrant of removal/deportation (also signed by an authorized immigration officer).[18] Given these changes and the specific factual circumstances of Mr. Lunn's case, this is simply not a case "where the issue [is] one of public importance, where it was fully argued on both sides, where the question [is] certain, or at least very likely, to arise again *in similar factual circumstances*[.]" Lockhart v. Attorney Gen., 390 Mass. 780, 783 (1984) (emphasis added).

[18] Under ICE's new "Form I-247A," immigration officers must continue to establish probable cause to believe that the subject is an alien who is removable from the United States before issuing a detainer with a Federal, State, local, or tribal law enforcement agency.

Accordingly, to the extent the Court is inclined to issue a precedential decision, the United States submits that the Court should limit its decision to the facts before it on appeal, and decline the named parties' and amici's invitation to issue a broad, facial invalidation of a detainer system that no longer exists. Under such circumstances, the decision below should not be disturbed and this Court should leave further changes to Congress, DHS, and the General Court of Massachusetts in the first instance.

CONCLUSION

For these reasons, the United States respectfully asks that this Court consider this amicus brief and: (1) hold that State and local law enforcement in the Commonwealth may temporarily detain an alien subject to a final order of removal in response to a Federal immigration detainer indicating that the alien is subject to such an order, (2) hold that the brief detention of such an alien does not violate any Federal constitutional right he may have, and (3) limit the scope of its holding to the factual circumstances of this case (or to those similarly situated), reserving the abstract, facial issues raised by the parties for resolution in a case actually raising those issues in the context of the currently operative Federal immigration detainer policy.

Dated: March 27, 2017

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CERTIFICATE OF SERVICE

I certify that on this 27th day of March, 2017, I caused true and accurate copies of the foregoing brief to be filed conditionally herewith in the office of the Clerk of the Supreme Judicial Court and served upon the all counsel of record via e-mail and first-class mail.

MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I, Joshua S. Press, certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including Rules 16-20.

STATUTORY ADDENDUM

CONTENTS

U.S. Constitutional Provisions

U.S. Const., Amend. IV.......................... Add. 3

U.S. Const., Amend. X........................... Add. 3

U.S. Const., Amend. XIV, § 1.................... Add. 3

Massachusetts Constitutional Provisions

Mass. Declaration of Rights, art. XII........... Add. 3

Mass. Declaration of Rights, art. XIV........... Add. 4

Federal Statutes

6 U.S.C. § 202.................................. Add. 4

6 U.S.C. § 291..................................Add. 5

6 U.S.C. § 557.................................. Add. 5

8 U.S.C. § 1101(a)(3)........................... Add. 6

8 U.S.C. § 1226................................. Add. 6

8 U.S.C. § 1227................................. Add. 10

8 U.S.C. § 1229a................................Add. 21

8 U.S.C. § 1231(a)..............................Add. 31

8 U.S.C. § 1252.................................Add. 35

8 U.S.C. § 1252c................................ Add. 19

8 U.S.C. § 1357.................................Add. 36

28 U.S.C. § 517................................. Add. 44

Federal Regulations

8 C.F.R. § 241.4................................ Add. 44

8 C.F.R. § 287.5(c)............................ Add. 62

8 C.F.R. § 287.7............................... Add. 67

8 C.F.R. § 1003.19.............................. Add. 68

Massachusetts Rules

MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K)... Add. 73

EXHIBITS

Sample Form I-247A ....Exhibit A

Immigration Court Order of Removal...............Exhibit B

U.S. CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S.**Const. Amend XIV, Section 1**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS CONSTITUTIONAL PROVISIONS

Mass. Decl. of Rights, art. XII

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty,

or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Mass. Decl. of Rights, art. XIV

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

FEDERAL STATUTES

TITLE 6 OF THE UNITED STATES CODE

SECTION 202 Border, maritime, and transportation responsibilities

The Secretary shall be responsible for the following:

(1) Preventing the entry of terrorists and the instruments of terrorism into the United States.

(2) Securing the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to the Department at ports of entry.

(3) Carrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the date on which the transfer of functions specified under section 251 of this title takes effect.

(4) Establishing and administering rules, in accordance with section 236 of this title, governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.

(5) Establishing national immigration enforcement policies and priorities.

(6) Except as provided in part C of this subchapter, administering the customs laws of the United States.

(7) Conducting the inspection and related administrative functions of the Department of Agriculture transferred to the Secretary of Homeland Security under section 231 of this title.

(8) In carrying out the foregoing responsibilities, ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce.

SECTION 291 Abolishment of INS

(a) In general

Upon completion of all transfers from the Immigration and Naturalization Service as provided for by this chapter, the Immigration and Naturalization Service of the Department of Justice is abolished.

(b) Prohibition

The authority provided by section 542 of this title may be used to reorganize functions or organizational units within the Bureau of Border Security or the Bureau of Citizenship and Immigration Services, but may not be used to recombine the two bureaus into a single agency or otherwise to combine, join, or consolidate functions or organizational units of the two bureaus with each other.

SECTION 557 Reference

With respect to any function transferred by or under this chapter (including under a reorganization plan that becomes effective under section 542 of this title) and exercised on or after the effective date of this chapter, reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall be deemed to

refer to the Secretary, other official, or component of the Department to which such function is so transferred.

TITLE 8 OF THE UNITED STATES CODE

SECTION 1101(a)(3) Definitions

(a) As used in this chapter--

(. . .)

(3) The term "alien" means any person not a citizen or national of the United States.

SECTION 1226 Apprehension and detention of aliens

a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--

(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; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(a) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the

alien.

(b) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(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.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall

take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(c) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system--

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available--

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(d) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

SECTION 1227 Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was

changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182(g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is

seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Repealed. Pub.L. 104-208, Div. C, Title VI, § 671(d)(1)(C), Sept. 30, 1996, 110 Stat. 3009-723

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if--

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien

establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who--

(i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility

directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of Title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of Title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional

pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate--

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) [now 50 U.S.C.A.§ 3801 et seq.] or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.) [now 50 U.S.C.A. § 4301 et seq.]; or

(iv) a violation of section 1185 or 1328 of this title, is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that

involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted--

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of Title 18 (relating to fraud and misuse of visas, permits, and other entry documents), is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in--

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is deportable.

(B) Terrorist activities

Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Participated in the commission of severe violations of religious freedom

Any alien described in section 1182(a)(2)(G) of this title is deportable.

(F) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of Title 18 is deportable.

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

(6) Unlawful voters

(A) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.

(B) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such violation.

(7) Waiver for victims of domestic violence

(A) In general

The Attorney General is not limited by the criminal court record and may waive the application of

paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and (ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship--

(i) upon a determination that--

(I) the alien was acting is[3] self-defense;

(II) the alien was found to have violated a protection order intended to protect the alien; or

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime--

(aa) that did not result in serious bodily injury; and

(bb) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

(B) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

[. . .]

SECTION 1229a Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place--

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted

through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General--

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided

at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only--

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation--

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing--

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is--

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien--

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or

falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections1 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply--

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,2 section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an

alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title3 pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term “exceptional circumstances” refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term “removable” means--

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

SECTION 1231(a) Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney

General. The regulations shall include provisions requiring the alien--

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a) of Title 42 and paragraph (2)1, the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment--

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title2 and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the

incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that--

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

SECTION 1252(a) Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

[. . .]

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

SECTION 1252c Authorizing State and local law enforcement officials to arrest and detain certain illegal aliens

(a) In general

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who--

(1) is an alien illegally present in the United States; and

(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

(b) Cooperation

The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) is made available to such officials.

SECTION 1253 Penalties related to removal

(a) Penalty for failure to depart

(1) In general

Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who--

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined under Title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

(2) Exception

It is not a violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.

(3) Suspension

The court may for good cause suspend the sentence of an alien under this subsection and order the alien's release under such conditions as the court may prescribe. In determining whether good cause has been

shown to justify releasing the alien, the court shall take into account such factors as--

(A) the age, health, and period of detention of the alien;

(B) the effect of the alien's release upon the national security and public peace or safety;

(C) the likelihood of the alien's resuming or following a course of conduct which made or would make the alien deportable;

(D) the character of the efforts made by such alien himself and by representatives of the country or countries to which the alien's removal is directed to expedite the alien's departure from the United States;

(E) the reason for the inability of the Government of the United States to secure passports, other travel documents, or removal facilities from the country or countries to which the alien has been ordered removed; and

(F) the eligibility of the alien for discretionary relief under the immigration laws.

[. . .]

SECTION 1357 Powers of immigration officers and employees

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant--

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion,

expulsion, or removal of aliens, or to arrest any
alien in the United States, if he has reason to

believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and

(5) to make arrests--

(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or

(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony,

if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States. The authority to make arrests under paragraph (5)(B) shall only be effective on and after the date on which the Attorney General publishes final regulations which (i) prescribe the categories of officers and employees of the Service who may use force (including deadly force) and the circumstances under which such force may be used, (ii) establish standards with respect to enforcement activities of the Service, (iii) require that any officer or employee of the Service is not authorized to make arrests under paragraph (5)(B) unless the officer or employee has received certification as having completed a training program which covers such arrests and standards described in clause (ii), and (iv) establish an expedited, internal review process for violations of such standards, which process is consistent with standard agency procedure regarding confidentiality of matters related to internal investigations.

[. . .]

(d) Detainer of aliens for violation of controlled substances laws

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a

violation of any law relating to controlled substances, if the official (or another official)--

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

[. . .]

(g) Performance of immigration officer functions by State officers and employees

(1) Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function

under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and sections 2671 through 2680 of Title 28 (relating to tort claims).

(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to

enter into an agreement with the Attorney General under this subsection.

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

[. . .]

TITLE 28 OF THE UNITED STATES CODE

SECTION 517 Interests of United States in pending suits

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

FEDERAL REGULATIONS

Title 8 of the Code of Federal Regulations

Section 241.4 Continued detention of inadmissible, criminal, and other aliens beyond the removal period.

(a) Scope. The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or his or her designee, the Executive Associate Commissioner for Field Operations (Executive Associate Commissioner), the Deputy

Executive Associate Commissioner for Detention and Removal, the Director of the Detention and Removal Field Office or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided for in paragraph (b)(2) of this section, the provisions of this section apply to the custody determinations for the following group of aliens:

(1) An alien ordered removed who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978, 5048 (codified at 8 U.S.C. 1226(e)(1) through (e)(3)(1994));

(2) An alien ordered removed who is removable under section 237(a)(1)(C) of the Act;

(3) An alien ordered removed who is removable under sections 237(a)(2) or 237(a)(4) of the Act, including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Public Law 104-208, 110 Stat. 3009-546; and

(4) An alien ordered removed who the decision-maker determines is unlikely to comply with the removal order or is a risk to the community.

(b) Applicability to particular aliens—

(1) Motions to reopen. An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) Parole for certain Cuban nationals. The review procedures

in this section do not apply to any inadmissible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(3) Individuals granted withholding or deferral of removal. Aliens granted withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture who are otherwise subject to detention are subject to the provisions of this part 241. Individuals subject to a termination of deferral hearing under 8 CFR 208.17(d) remain subject to the provisions of this part 241 throughout the termination process.

(4) Service determination under 8 CFR 241.13. The custody review procedures in this section do not apply after the Service has made a determination, pursuant to the procedures provided in 8 CFR 241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

(c) Delegation of authority. The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act when there is a final order of removal is delegated as follows:

(1) District Directors and Directors of Detention and Removal Field Offices. The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the 3 month period immediately following the expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director or the

Director of the Detention and Removal Field Office having jurisdiction over the alien. The district director or the Director of the Detention and Removal Field Office shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective jurisdictional area.

(2) Headquarters Post-Order Detention Unit (HQPDU). For any alien the district director refers for further review after the removal period, or any alien who has not been released or removed by the expiration of the three-month period after the review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) The HQPDU review plan. The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) Additional delegation of authority. All references to the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, and the district director in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, or the district director to exercise powers under this section.

(d) Custody determinations. A copy of any decision by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from

the district director's or the Executive Associate Commissioner's decision.

(1) Showing by the alien. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may release an alien if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section, continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) Service of decision and other documents. All notices, decisions, or other documents in connection with the custody reviews conducted under this section by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall be served on the alien, in accordance with 8 CFR 103.8, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) Alien's representative. The alien's representative is required to complete Form G-28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) Criteria for release. Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

(f) Factors for consideration. The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional

progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to—

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) Travel documents and docket control for aliens continued in detention—

(1) Removal period.

(i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:

(A) The date the order becomes administratively final;

(B) If the removal order is subject to judicial review (including review by habeas corpus) and if the court has

ordered a stay of the alien's removal, the date on which, consistent with the court's order, the removal order can be executed and the alien removed; or

(C) If the alien was detained or confined, except in connection with a proceeding under this chapter relating to removability, the date the alien is released from the detention or confinement.

(ii) The removal period shall run for a period of 90 days. However, the removal period is extended under section 241(a)(1)(C) of the Act if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal. The Service will provide such an alien with a Notice of Failure to Comply, as provided in paragraph (g)(5) of this section, before the expiration of the removal period. The removal period shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effect the alien's removal.

(2) In general. The district director shall continue to undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel document is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(3) Availability of travel document. In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody

review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

(4) Removal. The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(5) Alien's compliance and cooperation.

(i) Release will be denied and the alien may remain in detention if the alien fails or refuses to make timely application in good faith for travel documents necessary to the alien's departure or conspires or acts to prevent the alien's removal. The detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens.

(ii) The Service shall serve the alien with a Notice of Failure to Comply, which shall advise the alien of the following: the provisions of sections 241(a)(1)(C) (extension of removal period) and 243(a) of the Act (criminal penalties related to removal); the circumstances demonstrating his or her failure to comply with the requirements of section 241(a)(1)(C) of the Act; and an explanation of the necessary steps that the alien must take in order to comply with the statutory requirements.

(iii) The Service shall advise the alien that the Notice of Failure to Comply shall have the effect of extending the removal period as provided by law, if the removal period has not yet expired, and that the Service is not obligated to complete its scheduled custody reviews under this section until the alien has demonstrated compliance with the statutory obligations.

(iv) The fact that the Service does not provide a Notice of Failure to Comply, within the 90-day removal period, to an alien who has failed to comply with the requirements of section 241(a)(1)(C) of the Act, shall not have the effect of excusing the alien's conduct.

(h) District director's or Director of the Detention and Removal Field Office's custody review procedures. The district director's or Director of the Detention and Removal Field Office's custody determination will be developed in accordance with the following procedures:

(1) Records review. The district director or Director of the Detention and Removal Field Office will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director or Director of the Detention and Removal Field Office will conduct a records review prior to the expiration of the removal period. This initial post-order custody review will consist of a review of the alien's records and any written information submitted in English to the district director1 by or on behalf of the alien. However, the district director or Director of the Detention and Removal Field Office may in his or her discretion schedule a personal or telephonic interview with the alien as part of this custody determination. The district director or Director of the Detention and Removal Field Office may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) Notice to alien. The district director or Director of the Detention and Removal Field Office will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director or Director of the Detention and Removal Field Office expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) Factors for consideration. The district director's or Director of the Detention and Removal Field Office's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director must be able to reach the conclusions set forth in paragraph (e) of this section.

(4) District director's or Director of the Detention and Removal Field Office's decision. The district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(5) District office or Detention and Removal Field office staff. The district director or the Director of the Detention and Removal Field Office may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decisions to those persons directly responsible for detention within his or her geographical areas of responsibility. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, the assistant director of the detention and removal field office, the director of the detention and removal resident office, the assistant director of the detention and removal resident office, officers in charge of service processing centers, or such other persons as the district director or the Director of the Detention and Removal Field Office may designate from the professional staff of the Service.

(i) Determinations by the Executive Associate Commissioner. Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

(1) Review panels. The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise

provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by the two-member Review Panel shall be unanimous. If the vote of the two-member Review Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) Records review. Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) Personal interview.

(i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

(4) Alien's participation. Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this section.

(5) Panel recommendation. Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) Determination. The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(7) No significant likelihood or removal. During the custody review process as provided in this paragraph (i), or at the conclusion of that review, if the alien submits, or the record contains, information providing a substantial reason to believe that the removal of a detained alien is not significantly likely in the reasonably foreseeable future, the HQPDU shall treat that as a request for review and initiate the review procedures under § 241.13. To the extent relevant, the HQPDU may consider any information developed during the custody review process under this section in connection with the determinations to be made by the Service under § 241.13. The Service shall complete the custody review under this section unless the HQPDU is able to make a prompt determination to release the alien under an order of supervision under § 241.13 because there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.

(j) Conditions of release—

(1) In general. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall impose such conditions or special

conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) Sponsorship. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, condition release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship, housing, or other placement has been found for the detainee, if ordered, including but not limited to, evidence of financial support.

(3) Employment authorization. The district director, Director of the Detention and Removal Field Office, and the Executive Associate Commissioner, may, in the exercise of discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) Withdrawal of release approval. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, withdraw approval for release of any detained alien prior to release when, in the decision-maker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) Timing of reviews. The timing of reviews shall be in accordance with the following guidelines:

(1) District director or Director of the Detention and Removal Field Office.

(i) Prior to the expiration of the removal period, the

district director or Director of the Detention and Removal Field Office shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished during the period, or is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(ii) When release is denied pending the alien's removal, the district director or Director of the Detention and Removal Field Office in his or her discretion may retain responsibility for custody determinations for up to three months after expiration of the removal period, during which time the district director or Director of the Detention and Removal Field Office may conduct such additional review of the case as he or she deems appropriate. The district director may release the alien if he or she is not removed within the three-month period following the expiration of the removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director or Director of the Detention and Removal Field Office may refer the alien to the HQPDU for further custody review.

(2) HQPDU reviews—

(i) District director or Director of the Detention and Removal Field Office referral for further review. When the district director or Director of the Detention and Removal Field Office refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by the expiration of the removal period or as soon thereafter as practicable.

(ii) District director or Director of the Detention and Removal Field Office retains jurisdiction. When the district

director or Director of the Detention and Removal Field Office has advised the alien at the 90-day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending removal or further custody review, and the alien is not removed within three months of the district director's decision, authority over the custody determination transfers from the district director or Director of the Detention and Removal Field Office to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) Continued detention cases. A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) Review scheduling. Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) Discretionary reviews. The HQPDU Director, in his or her discretion, may schedule a review of a detainee at shorter intervals when he or she deems such review to be warranted.

(3) Postponement of review. In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt removal is practicable and proper, or for other good cause. The decision and reasons for the delay shall be documented in

the alien's custody review file or A file, as appropriate. Reasonable care will be exercised to ensure that the alien's case is reviewed once the reason for delay is remedied or if the alien is not removed from the United States as anticipated at the time review was suspended or postponed.

(4) Transition provisions.

(i) The provisions of this section apply to cases that have already received the 90-day review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable, February 3, 1999; Supplemental Detention Procedures, April 30, 1999; Interim Changes and Instructions for Conduct of Post-order Custody Reviews, August 6, 1999; Review of Long-term Detainees, October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at http://www.ins.usdoj.gov). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

(l) Revocation of release—

(1) Violation of conditions of release. Any alien described in paragraph (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of

release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

(2) Determination by the Service. The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

(3) Timing of review when release is revoked. If the alien is not released from custody following the informal interview provided for in paragraph (l)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the

alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.\

SECTION 287.5 Exercise of power by immigration officers

[. . .]

(c) Power and authority to arrest—

(1) Arrests of aliens under section 287(a)(2) of the Act for immigration violations. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(2) of the Act and in accordance with 8 CFR 287.8(c):

(i) Border patrol agents;

(ii) Air and marine agents;

(iii) Special agents;

(iv) Deportation officers;

(v) CBP officers;

(vi) Immigration enforcement agents;

(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(viii) Immigration officers who need the authority to arrest aliens under section 287(a)(2) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner

of CBP, the Assistant Secretary/Director of ICE, or the Director of the USCIS.

(2) Arrests of persons under section 287(a)(4) of the Act for felonies regulating the admission or removal of aliens. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(4) of the Act and in accordance with 8 CFR 287.8(c):

(i) Border patrol agents;

(ii) Air and marine agents;

(iii) Special agents;

(iv) Deportation officers;

(v) CBP officers;

(vi) Immigration enforcement agents;

(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(viii) Immigration officers who need the authority to arrest persons under section 287(a)(4) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, the Assistant Secretary/Director of ICE, or the Director of the USCIS.

(3) Arrests of persons under section 287(a)(5)(A) of the Act for any offense against the United States. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(5)(A) of the Act and in accordance with 8 CFR 287.8(c):

(i) Border patrol agents;

(ii) Air and marine agents;

(iii) Special agents;

(iv) Deportation officers;

(v) CBP officers;

(vi) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(vii) Immigration officers who need the authority to arrest persons under section 287(a)(5)(A) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, or the Assistant Secretary/Director of ICE.

(4) Arrests of persons under section 287(a)(5)(B) of the Act for any felony.

(i) Section 287(a)(5)(B) of the Act authorizes designated immigration officers, as listed in paragraph (c)(4)(iii) of this section, to arrest persons, without warrant, for any felony cognizable under the laws of the United States if:

(A) The immigration officer has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony;

(B) The immigration officer is performing duties relating to the enforcement of the immigration laws at the time of the arrest;

(C) There is a likelihood of the person escaping before a warrant can be obtained for his or her arrest; and

(D) The immigration officer has been certified as successfully completing a training program that covers such arrests and the standards with respect to the immigration enforcement activities of the Department as defined in 8 CFR 287.8.

(ii) The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(5)(B) of the Act and in accordance with 8 CFR 287.8(c):

(A) Border patrol agents;

(B) Air and marine agents;

(C) Special agents;

(D) Deportation officers;

(E) CBP officers;

(F) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(G) Immigration officers who need the authority to arrest persons under section 287(a)(5)(B) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary/Director of ICE.

(iii) Notwithstanding the authorization and designation set forth in paragraph (c)(4)(ii) of this section, no immigration officer is authorized to make an arrest for any felony under the authority of section 287(a)(5)(B) of the Act until such time as he or she has been certified as successfully completing a training course encompassing such arrests and the standards for enforcement activities are defined in 8 CFR 287.8. Such certification will be valid for the duration of the immigration officer's continuous employment, unless it is suspended or revoked by the Commissioner of CBP or the Assistant Secretary/Director of ICE, or their respective designees, for just cause.

(5) Arrests of persons under section 274(a) of the Act who

bring in, transport, or harbor certain aliens, or induce them to enter.

(i) Section 274(a) of the Act authorizes designated immigration officers, as listed in paragraph (c)(5)(ii) of this section, to arrest persons who bring in, transport, or harbor aliens, or induce them to enter the United States in violation of law. When making an arrest, the designated immigration officer shall adhere to the provisions of the enforcement standard governing the conduct of arrests in 8 CFR 287.8(c).

(ii) The following immigration officers who have successfully completed basic immigration law enforcement training are authorized and designated to exercise the arrest power conferred by section 274(a) of the Act:

(A) Border patrol agents;

(B) Air and marine agents;

(C) Special agents;

(D) Deportation officers;

(E) CBP officers;

(F) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(G) Immigration officers who need the authority to arrest persons under section 274(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary/Director of ICE.

(6) Custody and transportation of previously arrested persons. In addition to the authority to arrest pursuant to a warrant of arrest in paragraph (e)(3)(iv) of this section, detention enforcement officers and immigration enforcement agents who have successfully completed basic immigration law enforcement training are hereby authorized and designated to

take and maintain custody of and transport any person who has been arrested by an immigration officer pursuant to paragraphs (c)(1) through (c)(5) of this section.

SECTION 287.7 Detainer provisions under section 287(d)(3) of the Act.

(a) Detainers in general. Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer- Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

(b) Authority to issue detainers. The following officers are authorized to issue detainers:

(1) Border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Deportation officers;

(4) Immigration inspectors;

(5) Adjudications officers;

(6) Immigration enforcement agents;

(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(8) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the USCIS.

(c) Availability of records. In order for the Department to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Department of a conviction or act that renders an alien inadmissible or removable under any provision of law shall provide the Department with all documentary records and information available from the agency that reasonably relates to the alien's status in the United States, or that may have an impact on conditions of release.

(d) Temporary detention at Department request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

(e) Financial responsibility for detention. No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

SECTION 1003.19 Custody/bond.

(a) Custody and bond determinations made by the service pursuant to 8 CFR part 1236 may be reviewed by an Immigration Judge pursuant to 8 CFR part 1236.

(b) Application for an initial bond redetermination by a respondent, or his or her attorney or representative, may be made orally, in writing, or, at the discretion of the Immigration Judge, by telephone.

(c) Applications for the exercise of authority to review bond determinations shall be made to one of the following offices, in the designated order:

(1) If the respondent is detained, to the Immigration Court having jurisdiction over the place of detention;

(2) To the Immigration Court having administrative control over the case; or

(3) To the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court.

(d) Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding. The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service.

(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.

(f) The determination of an Immigration Judge with respect to custody status or bond redetermination shall be entered on the appropriate form at the time such decision is made and the parties shall be informed orally or in writing of the reasons for the decision. An appeal from the determination by an Immigration Judge may be taken to the Board of Immigration Appeals pursuant to § 1003.38.

(g) While any proceeding is pending before the Executive Office for Immigration Review, the Service shall immediately advise the Immigration Court having administrative control over the Record of Proceeding of a change in the respondent/applicant's custody location or of release from Service custody, or subsequent taking into Service custody, of a respondent/applicant. This notification shall be in writing and shall state the effective date of the change in custody location or status, and the respondent/applicant's current fixed street address, including zip code.

(h)(1)(i) While the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub.L. 104-208 remain in effect, 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 persons paroled after arrival pursuant to section 212(d)(5) of the Act;

(C) Aliens described in section 237(a)(4) of the Act;

(D) Aliens subject to section 303(b)(3)(A) of Pub.L. 104-208 who are not "lawfully admitted" (as defined in § 1236.1(c)(2) of this chapter); or

(E) Aliens designated in § 1236.1(c) of this chapter as ineligible to be considered for release.

(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)(1)(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.

(2)(i) Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub.L. 104-208, 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;

(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); 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).

(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.

(3) Except as otherwise provided in paragraph (h)(1) of this section, an alien subject to section 303(b)(3)(A) of Div. C of Pub.L. 104-208 may apply to the Immigration Court, in a manner consistent with paragraphs (c)(1) through (c)(3) of this section, for a redetermination of custody conditions set by the Service. Such an alien must first demonstrate, by clear and convincing evidence, that release would not pose a danger to other persons or to property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding or interview.

(4) Unremovable aliens. A determination of a district director (or other official designated by the Commissioner) regarding the exercise of authority under section 303(b)(3)(B)(ii) of Div. C. of Pub.L. 104-208 (concerning release of aliens who cannot be removed because the designated country of removal will not accept their return) is final, and shall not be subject to redetermination by an immigration judge.

(i) Stay of custody order pending appeal by the government—

(1) General discretionary stay authority. The Board of Immigration Appeals (Board) has the authority to stay the order of an immigration judge redetermining the conditions of custody of an alien when the Department of Homeland Security appeals the custody decision or on its own motion. DHS is entitled to seek a discretionary stay (whether or not on an emergency basis) from the Board in connection with such an appeal at any time.

(2) Automatic stay in certain cases. In any case in which DHS has determined that an alien should not be released or has set a bond of $10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination (Form EOIR-43) with the immigration court within one business day of the order, and, except as otherwise provided in 8 CFR 1003.6(c), shall remain in abeyance pending decision of the appeal by the Board. The decision whether or not to file Form EOIR-43 is subject to the discretion of the Secretary.

MASSACHUSETTS RULES OF APPELLATE PROCEDURE

Rule 16(k)Required Certification; Non-complying Briefs.

The last page of each brief shall include a certification by counsel, or, if a party is proceeding pro se, by the party, that the brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers). A brief not complying with these rules (including a brief that does not contain a certification) may be struck from the files by the

appellate court or a single justice.

Exhibit A

DEPARTMENT OF HOMELAND SECURITY (DHS)

IMMIGRATION DETAINER – NOTICE OF ACTION

Subject ID:
Event #:

File No:
Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (DHS Office Address)

Name of Alien: ____

Date of Birth: ________________ Citizenship: ______________________ Sex: __________________

1. DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON *(complete box 1 or 2)*:
☐ a final order of removal against the alien;
☐ the pendency of ongoing removal proceedings against the alien;
☐ biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
☐ statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

2. DHS TRANSFERRED THE ALIEN TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION *(complete box 1 or 2).*
☐ Upon completion of the proceeding or investigation for which the alien was transferred to your custody, DHS intends to resume custody of the alien to complete processing and/or make an admissibility determination.

SAMPLE

IT IS THEREFORE REQUESTED THAT YOU:

- **Notify DHS** as early as practicable (at least 48 hours, if possible) before the alien is released from your custody. Please notify DHS by calling ☐ U.S. Immigration and Customs Enforcement (ICE) or ☐ U.S. Customs and Border Protection (CBP) at ______________________________. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-6020.
- **Maintain custody** of the alien for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. The alien **must be served with a copy of this form** for the detainer to take effect**.** This detainer arises from DHS authorities and should not impact decisions about the alien's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters.
- If the alien is transferred to another law enforcement agency, this detainer is to be relayed to the new agency with custody of the alien.
- Notify this office in the event of the alien's death, hospitalization or transfer to another institution.

☐ If checked: Please cancel the detainer related to this alien previously submitted to you on ___________ (date).

______________________________ ______________________________

(Name and title of Immigration Officer) (Signature of Immigration Officer)

Notice: If the alien may be the victim of a crime or you want the alien to remain in the United States for a law enforcement purpose, notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE ALIEN WHO IS THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing, or faxing a copy to ____________________.

Local Booking/Inmate #: ___________ Est. release date/time: ____________ Date of latest criminal charge/conviction: __________

Latest offense charged/convicted: ____

This form was served upon the alien on ____________________, in the following manner:

☐ in person ☐ by inmate mail delivery ☐ other (please specify): ______________________________.

______________________________ ______________________________

(Name and title of Officer) (Signature of Officer)

NOTICE TO THE DETAINEE

The Department of Homeland Security (DHS) has placed an immigration detainer on you. An immigration detainer is a notice to a law enforcement agency that DHS intends to assume custody of you (after you otherwise would be released from custody) because there is probable cause that you are subject to removal from the United States under federal immigration law. DHS has requested that the law enforcement agency that is currently detaining you maintain custody of you for a period not to exceed 48 hours beyond the time when you would have been released based on your criminal charges or convictions. **If DHS does not take you into custody during this additional 48 hour period, you should contact your custodian** (the agency that is holding you now) to inquire about your release. **If you believe you are a United States citizen or the victim of a crime, please advise DHS by calling the ICE Law Enforcement Support Center toll free at (855) 448-6903.**

NOTIFICACIÓN A LA PERSONA DETENIDA

El Departamento de Seguridad Nacional (DHS) de EE. UU. ha emitido una orden de detención inmigratoria en su contra. Mediante esta orden, se notifica a los organismos policiales que el DHS pretende arrestarlo cuando usted cumpla su reclusión actual. El DHS ha solicitado que el organismo policial local o estatal a cargo de su actual detención lo mantenga en custodia por un período no mayor a 48 horas (excluyendo sábados, domingos y días festivos) tras el cese de su reclusión penal. **Si el DHS no procede con su arresto inmigratorio durante este período adicional de 48 horas, usted debe comunicarse con la autoridad estatal o local que lo tiene detenido** (el organismo policial u otra entidad a cargo de su custodia actual) para obtener mayores detalles sobre el cese de su reclusión. **Si usted cree que es ciudadano de los Estados Unidos o que ha sido víctima de un delito, infórmeselo al DHS llamando al Centro de Apoyo a los Organismos Policiales (Law Enforcement Support Center) del ICE, teléfono (855) 448-6903 (llamada gratuita).**

SAMPLE

Avis au détenu

Le département de la Sécurité Intérieure [Department of Homeland Security (DHS)] a émis, à votre encontre, un ordre d'incarcération pour des raisons d'immigration. Un ordre d'incarcération pour des raisons d'immigration est un avis du DHS informant les agences des forces de l'ordre que le DHS a l'intention de vous détenir après la date normale de votre remise en liberté. Le DHS a requis que l'agence des forces de l'ordre, qui vous détient actuellement, vous garde en détention pour une période maximum de 48 heures au-delà de la période à la fin de laquelle vous auriez été remis en liberté par les autorités policières de l'État ou locales en fonction des inculpations ou condamnations pénales à votre encontre. **Si le DHS ne vous détient pas durant cette période supplémentaire de 48 heures, sans compter les fins de semaines et les jours fériés, vous devez contacter votre gardien** (l'agence des forces de l'ordre qui vous détient actuellement) pour vous renseigner à propos de votre libération par l'État ou l'autorité locale. **Si vous croyez être un citoyen des États-Unis ou la victime d'un crime, veuillez en aviser le DHS en appelant le centre d'assistance des forces de l'ordre de l'ICE [ICE Law Enforcement Support Center] au numéro gratuit (855) 448-6903.**

AVISO AO DETENTO

O Departamento de Segurança Nacional (DHS) emitiu uma ordem de custódia imigratória em seu nome. Este documento é um aviso enviado às agências de imposição da lei de que o DHS pretende assumir a custódia da sua pessoa, caso seja liberado. O DHS pediu que a agência de imposição da lei encarregada da sua atual detenção mantenha-o sob custódia durante, no máximo, 48 horas após o período em que seria liberado pelas autoridades estaduais ou municipais de imposição da lei, de acordo com as respectivas acusações e penas criminais. **Se o DHS não assumir a sua custódia durante essas 48 horas adicionais, excluindo-se os fins de semana e feriados, você deverá entrar em contato com o seu custodiante** (a agência de imposição da lei ou qualquer outra entidade que esteja detendo-o no momento) para obter informações sobre sua liberação da custódia estadual ou municipal. **Se você acreditar que é um cidadão dos EUA ou está sendo vítima de um crime, informe o DHS ligando para o Centro de Apoio à Imposição da Lei do ICE pelo telefone de ligação gratuita (855) 448-6903**

THÔNG BÁO CHO NGƯỜI BỊ GIAM GIỮ

Bộ Quốc Phòng (DHS) đã có lệnh giam giữ quý vị vì lý do di trú. Lệnh giam giữ vì lý do di trú là thông báo của DHS cho các cơ quan thi hành luật pháp là DHS có ý định tạm giữ quý vị sau khi quý vị được thả. DHS đã yêu cầu cơ quan thi hành luật pháp hiện đang giữ quý vị phải tiếp tục tạm giữ quý vị trong không quá 48 giờ đồng hồ ngoài thời gian mà lẽ ra quý vị sẽ được cơ quan thi hành luật pháp của tiểu bang hoặc địa phương thả ra dựa trên các bản án và tội hình sự của quý vị. **Nếu DHS không tạm giam quý vị trong thời gian 48 giờ bổ sung đó, không tính các ngày cuối tuần hoặc ngày lễ, quý vị nên liên lạc với bên giam giữ quý vị** (cơ quan thi hành luật pháp hoặc tổ chức khác hiện đang giam giữ quý vị) để hỏi về việc cơ quan địa phương hoặc liên bang thả quý vị ra. **Nếu quý vị tin rằng quý vị là công dân Hoa Kỳ hoặc nạn nhân tội phạm, vui lòng báo cho DHS biết bằng cách gọi ICE Law Enforcement Support Center tại số điện thoại miễn phí (855) 448-6903.**

对被拘留者的通告

美国国土安全部（DHS）已发出对你的移民监禁令。移民监禁令是美国国土安全部用来通告执法当局，表示美国国土安全部意图在你可能从当前的拘留被释放以后继续拘留你的通知单。美国国土安全部已经向当前拘留你的执法当局要求，根据对你的刑事起诉或判罪的基础，在本当由州或地方执法当局释放你时，继续拘留你，为期不超过 48 小时 。**如果美国国土安全部未在不计周末或假日的额外 48 小时期限内将你拘留，你应该联系你的监管单位**（现在拘留你的执法当局或其他单位），询问关于你从州或地方执法单位被释放的事宜。**如果你相信你是美国公民或犯罪被害人，请联系美国移民及海关执法局的执法支援中心（ICE Law Enforcement Support Center），告知美国国土安全部。该执法支援中心的免费电话号码是 (855) 448-6903。**

SAMPLE

Exhibit B

UNITED STATES IMMIGRATION COURT
8915 MONTANA AVENUE
EL PASO, TX 79925

IN THE REMOVAL CASE OF
LUNN, SREYNUON
RESPONDENT

CASE NO.: [redacted]

ORDERS

[X] This is a memorandum of the Court's Decision and Orders entered on June 25, 2008. This memorandum is solely for the convenience of the parties. The oral or written Findings, Decision and Orders is the official opinion in this case. ( ) Both parties waived issuance of a formal oral decision in the case.

[X] The respondent was ordered REMOVED from the United States to Cambodia ( ) in absentia.

[ ] Respondent's application for VOLUNTARY DEPARTURE was DENIED and respondent was ordered removed to ______, in the alternative to ______.

[ ] Respondent's application for VOLUNTARY DEPARTURE was GRANTED until ______, upon posting a voluntary departure bond in the amount of $______ to DHS within five business days from the date of this Order, with an alternate Order of removal to ______ or ______. Respondent shall present to DHS within ( ) thirty days ( ) sixty days from the date of this Order, all necessary travel documents for voluntary departure.

[ ] Respondent's application for ASYLUM was ( ) granted ( ) denied ( ) withdrawn with prejudice.
( ) subject to the ANNUAL CAP under the INA section 207(a)(5).
( ) Respondent knowingly filed a FRIVOLOUS asylum application.

[ ] Respondent's application for WITHHOLDING of removal under INA section 241(b)(3) was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for WITHHOLDING of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for DEFERRAL of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for CANCELLATION of removal under section ( ) 203(b) of NACARA, ( ) 240A(a) ( ) 240A(b)(1) ( ) 240A(b)(2) of the INA, was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that the DHS issue all appropriate documents necessary to give effect to this Order. Respondent ( ) is ( ) is not subject to the ANNUAL CAP under INA section 240A(e).

[ ] Respondent's application for a WAIVER under the INA section ______ was ( ) granted ( ) denied ( ) withdrawn or ( ) other ______. ( ) The conditions imposed by INA section 216 on the repondent's permanent resident status were removed.

[ ] Respondent's application for ADJUSTMENT of status under section ______ of the ( ) INA ( ) NACARA ( ) ______ was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that DHS issue all appropriate documents necessary to give effect to this Order.

CASE NUMBER: [redacted] RESPONDENT: LUNN, SREYNUON

[ ] Respondent's status was RESCINDED pursuant to the INA section 246.

[ ] Respondent's motion to WITHDRAW his application for admission was ( ) granted ( ) denied. If the respondent fails to abide by any of the conditions directed by the district director of DHS, then the alternate Order of removal shall become immediately effective without further notice or proceedings: the respondent shall be removed from the United States to ______.

[ ] Respondent was ADMITTED as a ______ until ______. As a condition of admission, the respondent was ordered to post a $ ______ bond.

[ ] Case was ( ) TERMINATED ( ) with ( ) without prejudice ( ) ADMINISTRATIVELY CLOSED.

[ ] Respondent was orally advised of the LIMITATION on discretionary relief and consequences for failure to depart as ordered.

[ ] If you fail to voluntarily depart when and as required, you shall be subject to civil money penalty of at least $1,000, but not more than $5,000, and be ineligible for a period of 10 years for any further relief under INA sections 240A, 240B, 245, and 248 (INA Section 240B(d)).

[ ] If you are under a final order of removal, and if you willfully fail or refuse to 1) depart when and as required, 2) make timely application in good faith for any documents necessary for departure, or 3) present yourself for removal at the time and place required, or, if you conspire to or take any action designed to prevent or hamper your departure, you shall be subject to civil money penalty of up to $500 for each day under such violation. (INA section 274D(a)). If you are removable pursuant to INA 237(a), then you shall further be fined and/or imprisoned for up to 10 years. (INA section 243(a)(1)).

[ ] Other: ______

Date: Jun 25, 2008

Thomas C Roepke

THOMAS C. ROEPKE, Judge

APPEAL: (✓) waived ( ) reserved by ( ) Respondent ( ) DHS (✓) Both

DUE BY:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: [ ] MAIL [ ] PERSONAL SERVICE
TO: [✓] DHS [ ] ALIEN [ ] Alien's ATT/REP [ ] ALIEN c/o Custodial Officer
DATE: 6/25/08 BY: [ ] COURT STAFF [ ] JUDGE ______

Y2