



**Homeland  
Security**

March 30, 2004

INFORMATION

MEMORANDUM FOR: Michael J. Garcia, Assistant Secretary  
U.S. Immigration and Customs Enforcement

Robert Bonner, Commissioner  
U.S. Customs and Border Protection

FROM: Asa Hutchinson, Undersecretary  
Border and Transportation Security

SUBJECT: Guidance On ICE Implementation Of Policy And Practice Changes Recommended  
By The Department Of Justice Inspector General

On June 2, 2003, the Department of Justice (“DOJ”) Inspector General released *The September 11 Detainees: A Review Of The Treatment Of Aliens Held On Immigration Charges In Connection With The Investigation Of The September 11 Attacks* (“OIG Report”). The OIG Report contains several recommendations directed to the Department of Homeland Security (“DHS”), the Border and Transportation Security Directorate (“BTS”) and the Bureau of Immigration and Customs Enforcement (“ICE”). Well in advance of the release of the OIG Report, DHS, BTS and ICE had initiated a series of actions and policy changes that address some of the Report’s findings and recommendations. Over the past several months, we have carried out a comprehensive internal review of ICE immigration related operations and are instituting further policy and operational changes that are responsive to the OIG Report’s recommendations. This Memorandum provides guidance on the implementation of these changes in our procedures.

**I. Custody Determinations and Notices to Appear.**

Existing regulations require that, in a case involving a warrantless arrest, except in the event of an emergency or other extraordinary circumstance, a determination must be made within 48 hours of arrest whether an alien is to be continued in custody or released on bond, and whether a Notice to Appear and warrant of arrest will be issued. 8 C.F.R. § 287.3(d). Regulations also require that an alien be informed of the reasons for his arrest and his rights to representation. 8 C.F.R. § 287.3(c). This regulation does not define the phrase “emergency or other extraordinary circumstance.” Moreover, neither the Immigration and Nationality Act nor regulations require that the Notice to Appear be served upon the alien or filed with the Executive Office for Immigration Review within specified times, although it was past policy to serve a detained alien with the charging document within 72 hours of arrest. The following guidance is intended to refine and clarify existing

procedures to ensure that aliens are promptly notified of their custody status and of the immigration charges to be lodged against them, while retaining sufficient flexibility in emergency or other extraordinary circumstances.

**A. Initial determination and notification of custody status and immigration charges where there is no emergency or other extraordinary circumstance.**

1. Pursuant to 8 C.F.R. § 287.3(d), a custody determination and charging decision shall be made within 48 hours of an alien's arrest.
2. The initial custody determination will be documented on a Notice of Custody Determination (Form I-286) and the Officer making the determination will note on the Form I-286 the time and date that the determination is made.
3. The Officer will also annotate on the Form I-286 the immigration charge or charges of removal that are reasonably believed to be applicable and the provision of the Immigration and Nationality Act under which such charges are being based.
4. The completed Form I-286 will be served on the alien within 48 hours of arrest. The Officer serving the Form I-286 will note on the form the time and date of service, and will require the alien to sign the form or annotate on the form the alien's refusal to do so. In instances where the Form I-286 is not served within 48 hours, the agent will note an explanation on the Form I-286 file copy of the reasons precluding service within this period.
5. ICE has proposed modifications to Form I-286 to simplify the entry of the foregoing information. Until such modifications have been implemented, ICE Officers should handwrite on the front of the form "Date and time of custody determination \_\_\_\_\_," and "Probable charge(s) of removability \_\_\_\_\_."
6. A copy of the served I-286 will be maintained in the alien's A-file.

**B. Initial determination and notification of custody status and immigration charges where there is an emergency or other extraordinary circumstance.**

1. Pursuant to 8 C.F.R. § 287.3(d), an initial custody determination and charging decision will be made within 48 hours of an alien's arrest as outlined above unless an emergency or other extraordinary circumstance requires additional time. In such cases, every effort shall be made to make the custody determination and charging decision, and to notify the alien thereof, as soon as practicable.
2. In the event of an emergency or other extraordinary circumstance, the Officer shall follow the procedures set out in part I.A. above, except for the requirement that a custody determination and charging decision be made within 48 hours of arrest, as outlined in B.1.

3. A memorandum or other written documentation that explains in detail the emergency or extraordinary circumstance will be placed in the alien's A-file.

**C. Definition of “emergency or other extraordinary circumstance.” As used in 8 C.F.R. § 287.3(d), the phrase “emergency or other extraordinary circumstance” is construed to mean:**

1. A significant infrastructure or logistical disruption including, but not limited to, disruption caused by an act of terrorism, weather, natural catastrophe, power outage, serious transportation emergency or serious civil disturbance;
2. Whenever there is a compelling law enforcement need including, but not limited to, an immigration emergency resulting in the influx of large numbers of detained aliens that overwhelms agency resources and makes it unable to logistically meet the general servicing requirements; or
3. Individual facts or circumstances unique to the alien including, but not limited to, the need for medical care or a particularized compelling law enforcement need.
4. The official making the determination as to whether there is a “compelling law enforcement need” shall be at the level of a Special Agent in Charge, a Border Protection Chief, a Field Office Director, or an equivalent position. This official shall memorialize the decision as required in subparagraph B.3. above, and immediately forward that decision to Headquarters. A copy of this written decision will be simultaneously provided to ICE's Principal Legal Advisor.
5. Any determination that a “compelling law enforcement need” exists shall be reviewed by the official making the determination and the ICE Office of the Principal Legal Advisor no later than 30 days after such decision being made to determine whether the factors leading to such a determination continue to exist.

**D. Service of the Notice to Appear.**

1. The Notice to Appear (NTA) shall be served upon the detained alien within 72 hours following arrest, taking into account such factors as infrastructure and logistical considerations, the need to obtain conviction records and other information related to the alien or immigration charges, the need for legal review, and other law enforcement requirements. If the emergency or extraordinary circumstances provisions as discussed in sections B and C above are activated, service of the NTA shall be made as soon as practicable.
2. If the detention and/or charging of an alien is on account of interest by the Federal Bureau of Investigations for reasons related to the national security, local Chief Counsel must approve any national security related NTA charges pertaining to any alien. The responsible ICE SAC office will coordinate at the earliest possible time with local Chief Counsel, to include presenting

information that may be used as evidence for sustaining the charges presented. The Chief Counsel is responsible for coordinating with the HQ National Security Law Division to clear the NTA in a manner that will meet the above time guidelines. Once approved, the NTA should be served upon the alien and the court.

3. The Notice to Appear shall be served upon the detained alien while the alien is in the custody of the SAC in whose jurisdiction the alien was first arrested. No detained alien shall be transferred to another jurisdiction prior to service of the Notice to Appear, unless exigent circumstances require the alien to be transferred prior to NTA service. In such cases, the SAC within whose jurisdiction the alien was first arrested will be responsible for ensuring that actual NTA service on the alien is completed in the new area of custody as soon as practicable. The arresting bureau shall be responsible for ensuring that the NTA is served on the Executive Office of Immigration Review.

## **II. Post-Order Custody Reviews.**

All Field Office Directors should be reminded of their requirements in ensuring the integrity of the Post Order Custody Review (POCR) process. Following the 90-day removal period that carries mandatory post-order detention, the continued detention of an alien is governed by 8 CFR § 241.4. Under this section, the Field Office Director must review the alien's case at the conclusion of the removal period and determine if the alien is to be released or remain in custody. In order to release the alien, the field director must find the alien is neither a threat to public safety, nor a flight risk. If these conditions are met, the field director should release the alien on an order of supervision. If these conditions are not met, that is the alien is deemed a flight risk or a threat to public safety, then the Field Office Director may retain authority over the case for an additional 90-days. Prior to the conclusion of the additional 90-days, the Field Office Director must again review the case to see if the alien may be released under 241.4. If the alien is not then released, the case must be referred to the Headquarters, Post-Order Detention Unit (HQPDU) who will conduct reviews under 8 CFR 241.13 and 241.14 to determine if there is a significant likelihood that the alien should be released in the reasonably foreseeable future or if the alien has a special circumstance justifying continued detention. Additionally, Field Office Directors are reminded to elevate cases involving such aliens, which will require HQ DRO's assistance to obtain travel documents at the earliest possible point in the case. I understand that at this time, the POCR process under 8 CFR 241.4 and 8 CFR 241.13 is under review for possible change that will streamline the process and allow for much quicker response by the field offices. Any changes developed to this process should be communicated to the field and training on any new procedures should be provided.

Once a case is referred to HQPDU, the case is reviewed, first, pursuant to 8 CFR 241.13 and then pursuant to 8 CFR 241.14. Under 8 CFR 241.13, if the determination is made that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future the alien must be released from custody. The only way to maintain an alien in custody is to refer the alien for further consideration under 8 CFR 241.14 due to special circumstances justifying continued detention. However, if HQPDU determines that removal is likely in the foreseeable future, the case remains governed by 8 CFR 241.4 and HQPDU reviews the case under the same criteria as outlined above.

Under 8 CFR 241.14, HQPDU can order the continued detention of an alien whose removal is not significantly likely in the reasonably foreseeable future, if the alien meets any of the following general criteria: highly contagious disease that is a threat to public safety; serious adverse foreign policy consequences; national security or terrorism concerns; or deemed to be specially dangerous.

### **III. Coordination of Handling of National Security Cases During Period of National Impact**

The OIG Report encouraged enhanced coordination between the Department of Homeland Security and the Department of Justice for handling cases in which the FBI has expressed interest on account of national security concerns. We are currently reviewing and discussing approaches on handling such cases during periods of national impact and will provide additional details on the process that will be implemented during such periods. As of today, however, the above procedures that address some of the coordination issues are effective immediately. Please disseminate to your staff and ensure that there is a full understanding of these requirements. Local SAC offices can coordinate with their Chief Counsel Office on any questions or clarifications that are required.

ICE personnel and attorneys are directed to independently review the individual circumstances of each case in which the FBI requests detention solely based upon information regarding an alien's possible association with terrorism. ICE personnel and attorneys must carefully study the underlying facts in each case and make assessments as to both the necessity for detention and the appropriate conditions of confinement in every case. This will ensure that ICE can make the proper recommendations to the immigration courts on bond, detention and removal. This independent and individualized assessment is essential because ICE attorneys are officers of the court and must have confidence in the representations made to the court.

### **IV. Limitation on the Applicability of this Guidance**

This Memorandum is intended to provide internal guidance to the operational components of the Directorate of Border and Transportation Security. It does not, is not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal.