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November 16, 2001

Richard A. Sloan
Director, Policy Directives and Instructions Branch
Immigration and Naturalization Service
425 I Street
Room 4034
Washington DC 20536

**Re: INS No. 2171-01, Custody Procedures
66 Fed. Reg. 48334 (September 20, 2001)**

Dear Mr. Sloan:

The Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York ("the Association") has reviewed the Immigration and Naturalization Service's ("INS") interim rule amending the period of time in which the INS must make a determination following an arrest without a warrant. The Association strongly urges that the interim rule not be adopted as a final rule. The standards of the interim rule are inconsistent with both the Immigration and Nationality Act ("INA") and the recently enacted "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT)" Act of 2001. Furthermore, it undermines the essential constitutional balance that is struck by these statutory provisions. Finally, it is counterproductive as a matter of policy.¹

¹The Association has been aided by the comprehensive comments prepared by the New York University Review of Law and Social Change and the New York University School of Law Immigrant Rights Clinic. Portions of those comments have been incorporated into these comments. We respectfully refer the agency to those comments for a more comprehensive discussion of the issues raised in these comments.

1. The Interim Rule Violates the INA

The interim rule violates the INA by bypassing the statutory protections for arrests without warrants. Under the INA's statutory scheme, an arrest is ordinarily made following a warrant. INA §236(a). Once the arrest takes place, the statutory provisions for detention and release on bond are activated. These provisions allow for release on bond except where the statute specifically provides for mandatory detention. INA §236. The statute recognizes, however, that there will be some situations in which it is not feasible to issue a warrant prior to an arrest. In situations where there is reason to believe that the individual "is likely to escape before a warrant can be obtained for his arrest" the statute permits a warrantless arrest. INA §287 (a)(2). As a safeguard against improper arrests, however, the statute mandates that the person arrested "be taken without unnecessary delay before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States." Under this statutory scheme, the review by an officer serves the same function as the issuance of a warrant: it serves to assure that the original arrest is based on adequate grounds. Longstanding regulations implement this statutory design by requiring that the warrantless arrest be scrutinized by an INS officer within 24 hours.

The interim rule thwarts the statutory design by eliminating timely independent scrutiny of the warrantless arrest. Instead of reviewing the grounds of the arrest, which can be done immediately after the arrest, the interim rule provides for fact investigation and preventive detention while the INS determines whether and how to charge an individual with a violation of the immigration laws. Such after-the-fact investigation is surely appropriate during the pendency of proceedings and could properly lead to an amendment of any charges. But it cannot possibly provide the basis for the original arrest - which must be supported by probable cause at the time of the arrest.

Nothing in the USA PATRIOT Act supports this delay in promptly reviewing the basis for a warrantless arrest. The USA PATRIOT Act leaves in place the requirement under INA § 287 that the basis for a warrantless arrest be scrutinized without unreasonable delay, and leaves in place the provisions for determining whether a person arrested for immigration violations is eligible for bond. The only relevant change made by the USA PATRIOT Act is that it authorizes a seven day delay in bringing proceedings *in cases where the individual has been certified as a suspected terrorist*. These provisions provide absolutely no authorization for rules that curb the rights of persons arrested by the INS who have not been certified as suspected terrorists. These persons retain the same right to have the basis of their warrantless arrest reviewed promptly. Furthermore, the USA PATRIOT Act shows that even where an individual is certified as a suspected terrorist, Congress preserved the basic right to have the charges filed within seven days. Plainly, Congress could not have intended to authorize an unlimited delay in checking the basis of a warrantless arrest, while providing a seven day limit in cases of persons who had been certified as suspected terrorists.

Delays in reviewing the original arrest can only be supported if there are specific practical difficulties in obtaining review of the original decision to make a warrantless arrest that are sufficient to outweigh the constitutional rights of the individual who has been subjected to a warrantless arrest. The interim rule, however, is not tailored to any specific need to postpone

evaluation of the arrest in particular cases. Instead, the commentary in support of the rule points to additional information that the INS might obtain regarding the individual arrested. Such additional information cannot serve as the basis for the original arrest and is therefore irrelevant to the requirement for a timely evaluation of the validity of the arrest.

2. The Interim Rule Violates Constitutional Limitations on Warrantless Arrests

In addition to violating the INA, the interim rule violates minimal constitutional safeguards for warrantless arrests. The Fourth Amendment's protections against unreasonable searches and seizures applies to arrests made by the INS. See *United States v. Brignoni Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). Under these decisions, arrests by the INS must be supported by probable cause. Although the remedy of the exclusionary rule may be limited in the case of persons who lack proper immigration status, See *INS v. Lopez-Mendoza*, 413 U.S. 266 (1973), the basic requirement of probable cause for the arrest is fully applicable and enforceable.¹

Probable cause for an arrest is ordinarily evaluated at the time of the issuance of the warrant. In the case of a warrantless arrest, the Fourth Amendment requires that the on-the-spot judgment of the arresting officer be tested promptly following the arrest by a magistrate or other officer who will determine whether probable cause existed at the time of the arrest. See *Gerstein v. Pugh*, 420 U.S. 103, 124 (1975). In the context of arrests by the INS, courts have held that prompt review by an INS officer serves the function of a review by a magistrate.² Given the restraint on liberty that follows a warrantless arrest, this is the very least that the Fourth Amendment might be read to require. The proposed rule, however, fails to meet even this minimal standard. Instead it allows for prolonged detention simply because the arrest coincides with a time of general emergency.

Furthermore, the rule improperly reads the case law as allowing for 48 hour detention regardless of special circumstances. The 48 hour rule in criminal cases, however, stands only as a guidepost. In *County of Riverside v. McLaughlin*, the Supreme Court carefully explained that it did not hold "that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours." 500 U.S. 44, 56 (1991). Procedures may still be deemed unreasonably delayed if, for example, there are "delays for the purposes of

¹The absence of the exclusionary rule in no way reduces the standards that the agency must follow. It simply moves the remedy for failure to follow constitutional requirements to other realms. See, e.g., *Lopez-Mendoza*, *supra* (discussing declaratory judgment remedies).

² *Min-Shey Hung v. United States*, 617 F.2d 201, 201 (10th Cir. 1980) (finding examination by authorized INS officer "basically the same as a criminal proceeding before a magistrate on probable cause" and "sufficient to meet the constitutional safeguards and to commence the deportation proceedings."); *Arias v. Rogers*, 676 F.2d 1139, 1142 (7th Cir. 1982) (Posner, J.) ("Special inquiry officers have judicial authority, and therefore correspond to the committing magistrate in a criminal proceeding."); *Yui Fong Cheung v. INS*, 418 F.2d 460, 463 (D.C. Cir. 1969) ("[Section] 287(a)(2) of the [INA] requires that the alien be taken for examination before an officer qualified to conduct examinations. His function is not to conduct the deportation hearing, but to ascertain whether there is probable cause for detention pending the issuance of charges (in the show cause order) and conduct of the hearing."); see also, *Cervantes v. Whitfield*, 776 F.2d 556, 560 (5th Cir. 1985) (INS stipulating that pursuant to 8 C.F.R. § 287.3(d), an immigration officer "determine[s] whether there is probable cause that a person is deportable or excludable").

gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.*

The interim rule, however, makes no such distinctions. Within the first 48 hours after an arrest, the regulation authorizes delay for evidence-gathering, delay out of personal animus towards the detainee, and delay for delay's sake. Moreover, the Supreme Court further specified that only those delays attributable to "practical realities" are reasonable, and thus constitutional. Examples of practical realities cited by the *McLaughlin* Court include delays caused by transportation of arrested persons, difficulty handling late-night bookings, legitimate problems obtaining an arresting officer who may be busy "processing other suspects or securing the premises of arrest," paperwork and logistical problems, and "other everyday problems of processing suspects." *Id.* at 57.

The purposes of the interim rule have little to do with the legitimate grounds for delay envisioned by the *McLaughlin* Court. The INS does not contend with magistrate availability. Nor will it commonly be occupied with "securing the premises of an arrest" since grounds for deportation rarely have crime scenes where evidence must be secured. Given the nature of INA violations, it seems equally unlikely that the INS handles many "late-night bookings." Instead the proposed rule seeks to justify delay based on information gathering, a purpose that has no relevance to evaluating the justification for the initial arrest.

In short, nothing in the explanatory materials accompanying the proposed rule provides any basis for expanding the time for review of warrantless arrest beyond the 24 hour standard that has long been incorporated in INS regulations.

3. Standard for Invoking "Emergency or Other Extraordinary Circumstances"

While the Association opposes an extension of the detention period from 24 to 48 hours, the interim rule stipulates that an exception to the 48-hour detention period will exist "in the event of emergency or other extraordinary circumstances." In the event such circumstances arise, the INS is free to hold a person without any specific limit, other than "a reasonable period of time." The language that triggers this broad exception in the interim rule is too vague.

What constitutes an "emergency?" Would it only apply to emergencies related to national security or other emergencies such as government shutdowns or lack of INS personnel at any given point of time? The interim rule is also silent about who would have authority to declare such an emergency.

The other proposed language "extraordinary circumstances" is even more vague. Conceivably, any INS arrest and detention after September 11, 2001, could be considered in "extraordinary circumstances" since the terrorist attack and subsequent investigation is unprecedented in U.S. history. The interim rule's language is ambiguous and would lead to unnecessary confusion and, possibly, abuses of detention power.

Furthermore, the interim rule states that in the event of emergency or other extraordinary circumstances, the INS may detain a person without charge or custody determination for a "reasonable period of time." The language defining the time limit for the exception in the

and detain indefinitely a noncitizen who has not been certified as a suspected terrorist.

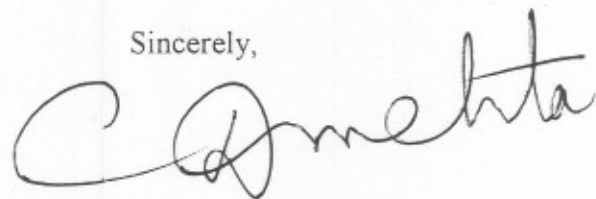
4. The Interim Rule Promotes Lawless Arrests and Undermines Trust in Law Enforcement

Careful guidelines and review procedures for warrantless arrests serve as a check on errant officers who make improper arrests. Absent such procedures, the immediate judgment of the arresting officer is left unreviewed. This can easily lead to illegal arrests, including arrests that are based on nothing more than racial profiling or the animus of the officer towards the person arrested. It may lead to the arrest of citizens who are accused on being noncitizens, or to legal residents who are not subject to removal. Prompt review of the arrest serves to curb such illegal incursions on liberty at the earliest possible time.

In addition to protecting the liberty of those who would otherwise be held illegally, timely review promotes respect and trust of law enforcement. Nothing is more erosive of trust in law enforcement than an inability to know that there is some basis for an arrest. Without knowledge that there are procedures in place to prevent illegal arrests, communities can easily conclude that their members are being arrested on no basis whatsoever. At a time when law enforcement needs the help of all in tracking down terrorists and preventing more terrorists attacks, law enforcement is ill-served by leaving communities fearful of unbridled powers by arresting officers.

Thus, irrespective of the fact that the proposed rule exceeds the agency's statutory and constitutional authority, it is simply a bad idea. Warrantless arrests, if properly conducted, can and should be subject to a prompt evaluation. The time-honored 24 hour rule meets this standard and should be retained.

Sincerely,

A handwritten signature in cursive script that reads "C. Mehta". The signature is written in black ink and is positioned above the printed name.

Cyrus D. Mehta