No. 01-1491

In the Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR,
SAN FRANCISCO DISTRICT OF IMMIGRATION AND
NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HYUNG JOON KIM

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

THEODORE B. OLSON *
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

**Counsel of Record*
for Petitioners

JUDY RABINOVITZ*
LEE GELERNT
American Civil Liberties
Union Foundation
Immigrants' Rights Project
125 Broad Street
New York, New York 10004
(212) 549-2618

LUCAS GUTTENTAG
LILIANA M. GARCES
American Civil Liberties
Union Foundation
Immigrants' Rights Project
405 14th Street
Suite 300
Oakland, CA 94612
(510) 625-2010

**Counsel of Record*
for Respondent

PETITION FOR WRIT OF CERTIORARI FILED: APR. 9, 2002
CERTIORARI GRANTED: JUNE 28, 2002

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO)

No. 99-2257

HYUNG JOON KIM, PETITIONER

v.

THOMAS SCHILTGEN, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, AND JANET RENO, UNITED STATES ATTORNEY GENERAL, RESPONDENTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/17/99	1	PETITION FOR WRIT OF HABEAS CORPUS (no process) Fee status pd entered on 5/17/99 in the amount of $5.00 (Receipt No. 3301112) [3:99-cv-02257] (llm) [Entry date 05/21/91]
		* * * * *
5/28/99	2	ORDER TO SHOW CAUSE by Magistrate Judge Elizabeth D. Laporte: Respondents shall file a answer showing cause why a writ

DATE	DOCKET NUMBER	PROCEEDINGS
		of habeas corpus should not be issued no later than 6/16/99; hearing set for 10:30 7/8/99. Petitioner may file a traverse no later than 6/23/99. (cc: all counsel [3:99-cv-02257] (llm) [Entry date 06/02/99]
		* * * * *
6/2/99	3	CONSENT to proceed before magistrate judge by petitioner Hyung Joon Kim [3:99-cv-02257] (llm) [Entry date 06/03/99]
		* * * * *
6/10/99	4	DECLINATION to proceed before magistrate judge by Federal Respondents. [3:99-cv-02257] (llm) [Entry date 06/14/099]
		* * * * *
6/14/99	6	ORDER by Assignment Committee Case reassigned to Judge Susan Illston (Date Entered: 6/14/99) (cc: all counsel) [3:99-cv-02557] (llm) [Entry date 06/14/99]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
8/6/99	12	MEMORANDUM by Respondent to the Court regarding the transition period custody rules. [3:99-cv-02557] (cgd) [Entry date 8/10/99]
8/6/99	13	MINUTES: (C/R Judith Thomsen) (Hearing Date: 8/6/99): Petitioner's habeas corpus hearing – Held. Petition is taken under submission. Defendant shall inform the Court by the end of today, what, if any input INS has regarding the transitional rules. [3:99-cv-02557] (cgd) [Entry date 08/10/99]
		* * * * *
8/11/99	14	ORDER by Judge Susan Illston GRANTING Kim's habeas corpus petition [1-1] to the extent that Respondents shall promptly provide Kim with an individualized bond hearing, or otherwise as respondents may elect, to determine whether Kim is a flight risk or a danger to the community; terminating case; appeal filing ddl 10/12/99. To the extent that Kim seeks immediate release from

DATE	DOCKET NUMBER	PROCEEDINGS
		INS detention during the pendency of his deportation proceedings, Kim's petition is DENIED. (Date Entered: 8/13/99) (cc: all counsel) [3:99-cv-02257] (cgd) [Entry date 08/13/99]
10/12/99	15	NOTICE OF APPEAL by Respondents Thomas Schiltgen and Janet Reno from Dist. Court decision; Fee status waived [3:99-cv-02257] (bug) [Entry date 10/13/99]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-17373

HYUNG JOON KIM,
PETITIONER-APPELLEE

v.

THOMAS SCHILTGEN; JANET RENO, ATTORNEY GENERAL RESPONDENTS-APPELLANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
11/10/99	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 10/22/99; appellee's designation of RT is due 11/1/99; appellant shall order transcript by 11/12/99; court reporter shall file transcript in DC by 12/13/99; certificate of record shall be filed by 12/20/99; appellant's opening brief is due 1/28/00; appellees' brief is due 2/28/00; appellants' reply brief is due 14 days from service of the appellee's brief [99-17373]

* * * * *

DATE	PROCEEDINGS
2/6/01	Filed order (Deputy Clerk: jc) directing the parties to be prepared to discuss at oral argument whether the appeal is moot. [99-17373] (jc)
2/12/01	ARGUED AND SUBMITTED TO Procter R. HUG, John T. NOONAN, William A. FLETCHER [99-17373] (sa)
	* * * * *
8/13/01	FILED CERTIFIED RECORD ON APPEAL: 1 CLERK'S RECORD. (ORIGINAL) [99-17373] (sd)
	* * * * *
1/9/02	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Procter R. HUG; John T. NOONAN; William A. FLETCHER, author.) FILED AND ENTERED JUDGMENT. [99-17373] (tm)
	* * * * *
4/2/02	MANDATE ISSUED [99-17373] (tm)
	* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 99-2257

HYUNG JOON KIM, PETITIONER

v.

THOMAS SCHILTGEN, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANSICO, CALIFORNIA; AND JANET RENO, UNITED STATES ATTORNEY GENERAL, RESPONDENTS

[Filed: May 17, 1999]

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2241

Pursuant to FRCP 81(a), petitioner hereby petitions the court for a writ of habeas corpus. Petitioners states as follows:

A. Jurisdiction:

Petitioner Hyung Joon Kim (hereinafter referred to as "Kim") is imprisoned and deprived of his liberty at the Max Mead facility located at 17645 Industrial Farm Road, Bakersfield, California, in violation of the laws and the Constitution of the United States.

[2]

B. Intradistrict Assignment:

The location of factual events giving rise to this civil action is occurred in [*sic*] San Francisco County.

Therefore, this civil action is appropriately filed in the San Francisco Division of the United States District Court, Northern District of California.

C. Summary of Underlying Conviction:

1. Petitioner Hyung Joon Kim was convicted in Monterey County Superior Court for the offense of Petty Theft with Priors on October 8, 1997 (California Penal Code Section 666).

2. Sentencing Monterey County Superior Court Judge:

   The Honorable William D. Curtis

3. Scheduled Release Date:

   On or about February 1, 1999.

D. Summary of Concurrent and/or Previous Litigation:

Petitioner Kim is currently being held in custody at the Max Mead facility located in Bakersfield County pending deportation proceedings initiated by Notice to Appear dated December 16, 1998.

E. Statement of the Facts:

On October 8, 1997, Petitioner Kim was convicted of Petty Theft with Priors, and sentenced to prison with a release dated [*sic*] of February 1, 1999. On December 16, 1998, Petitioner Kim was served with a Notice to Appear alleging that Petitioner Kim was deportable as a consequence of his criminal conviction. Although Petitioner Kim's sentence was completed on February 1, 1999, the Immigration and Naturalization Service is holding him under mandatory detention provisions of Section 236(c) of the Immigration and Nationality Act,

8 USC § 1226(c), which Petitioner Kim [3] contends are violative of his due process. Under the mandatory detention provisions, a bail hearing cannot be granted Petitioner Kim.

F. Statement of Claims for Relief:

Petitioner seeks a declaration of this court that Section 236(c) of the Immigration and Naturalization Service [*sic*], 8 USC § 1226(c), is unconstitutional on its face as violative of procedural and substantive due process rights under the Fourth Amendment of the United States Constitution and for an order directing the District Director of the Immigration and Naturalization Service in San Francisco to conduct a bond hearing.

G. Exhaustion of Administrative Remedies:

Section 236(c) of the Immigration and Naturalization Act purports to create mandatory detention without a hearing on bond. Neither the Immigration Judge nor the Board of Immigration Appeals has the authority to consider constitutional challenges to Section 236(c). Consequently, Petitioner has exhausted his administrative remedies, and in any event, exhaustion of administrative remedies under these circumstances is not required.

H. Requested Relief:

Petitioner seeks a declaration of this court that Section 236(c) of the Immigration and Naturalization Service [*sic*] is unconstitutional on its face as violative of procedural and substantive due process rights under the Fourth Amendment of the United States Consitu-

tion and for an order directing the District Director of the Immigration and Naturalization Service in San Francisco to release Petitioner.

DATED this 13th day of May 1999.

/s/ ILLEGIBLE
Peter I. Hwang, Esq.
Attorney for Petitioner

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Custody Determination

File No.: A27 144 740
Date: August 18, 1999

KIM, Hyung Joon
(IN SERVICE CUSTODY)

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the immigration judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

☐ detained in the custody of this Service.

☒ release under bond in the amount of $_5,000.00__

Custody determination made pursuant to district court order dated August 10, 1999, case number C-99-2257 SI.___

☐ released on your own recognizance.

☒ You may request a review of this determination by the Immigration Judge.

☐ You may not request a review of this determination by an immigration judge because the Immigration and

Nationality Act prohibits your release from custody.

/s/ ILLEGIBLE
(Signature of authorized officer)
V. Tony Marian
Assistant District Director for Deportation
(Title of Authorized Officer)

San Francisco, Ca.
(INS office location)

☐ I do ☐ do not request a redetermination of this custody decision by an immigration judge.

☐ I acknowledge receipt of this notification

_____ _____
(Signature of respondent) (Date)

RESULT OF CUSTODY REDETERMINATION

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ District Director
☐ Board of Immigration Appeals

The results of the redetermination/reconsideration are:

☐ No change - Original determination upheld.
☐ Detain in custody of this Service.
☐ Bond amount reset to $_____.
☐ Release - Order of Recognizance
☐ Release - Personal Recognizance
☐ Other: _____

_____
(Signature of Officer)

U.S. Department of Justice
Immigration and Naturalization Service

SFR/DDP

---

425 I Street, N.W.
Washington, D.C. 20536

August 16, 1999

MEMORANDUM FOR FILE [5 U S C 552a(k)(2)]
[5 U S C 552(b)(7)(c)]

FROM: REDACTED
Deportation Officer

SUBJECT: Bond consideration for KIM, Hyung Joon
A27 144 740

Per conversation with ADD Tony Marian and District Counsel Ron Le Fevre, the file for the above-named alien was reviewed, pursuant to a district judge order. If the Transitional Period Custody Rules (TPCR) were still in effect, this alien would not be considered a threat, and release would be subject to flight risk consideration only. That being the case, bond would be set at $5,000.00.

DEPARTMENT OF JUSTICE
OFFICE OF THE INSPECTOR GENERAL
INSPECTION REPORT

IMMIGRATION AND NATURALIZATION SERVICE DEPORTATION OF ALIENS AFTER FINAL ORDERS HAVE BEEN ISSUED

March 1996
Report Number I-96-03

EXECUTIVE DIGEST

Current estimates of the population of illegal immigrants living in this country are around 4 million. These estimates do not include a more transient population of aliens who enter illegally for brief periods. The majority of the aliens the Immigration and Naturalization Service (INS) removes from the country are part of the transient population and are not included in the estimated 4 million illegal residents.

INS reported that in Fiscal Year (FY) 1994 it removed more than 1 million aliens who were in this country illegally. The great majority of these were Mexican nationals apprehended near the southern border who left the country voluntarily. These aliens are not part of the Detention and Deportation (D&D) program's workload and they are not considered to have been deported.

D&D's workload focuses on those illegal aliens who initially refuse to depart voluntarily. D&D reported that, at the end of FY 1994, 464,437 aliens were in some phase of the process for determining whether they should be allowed to remain in the United States, or they were in the process of being removed from the country.

Final orders for deportation are issued by the Executive Office for Immigration Review (EOIR). In FY 1994, EOIR issued 99,779 final orders and INS deported

47,434 aliens. Our inspection examined the actions taken by INS to remove aliens after EOIR had issued final deportation orders. Our May 1994 report titled Case Hearing Process in the EOIR, number I-93-03, examined the process leading to the issuance of final orders.

During the current inspection, we reviewed case files for a total of 1,058 aliens who were issued final orders at 14 locations to determine what actions INS had taken, including whether the alien had left the country as ordered.

We found INS removed almost 94 percent of the detained aliens in our sample. The aliens were deported in an average of 16 days after final orders were issued, even though problems in acquiring travel documents and limited escort and transportation resources caused delays in some cases. Detained aliens who were not deported included those of nationalities that could not be removed for political or humanitarian reasons, aliens for whom INS was unable to obtain travel documents, and aliens who had been granted administrative relief.

In contrast, only about 11 percent of the nondetained aliens in our sample left the country. Removing nondetained aliens depends largely on the voluntary surrender of the aliens when they are requested to do so. In the sample cases, D&D requested only 56 percent of the aliens to surrender. Reasons for failing to request surrender included the lack of a good address, political or humanitarian concerns raised by the alien's nationality, and the cost of [ii] removing the aliens. When surrender notices were sent, only a few aliens surrendered. When aliens failed to surrender, D&D often did not

have the resources to pursue them. When D&D reported the aliens who failed to surrender to INS Investigations, Investigations did not pursue them either, because these cases did not meet investigative priorities.

Delays by district counsel in transmitting final orders to D&D and delays by D&D in taking action may have contributed to the low percentage of nondetained aliens who were deported. Special conditions affecting certain nationalities also impaired INS' ability to remove aliens.

D&D managers in several locations expressed frustration over their inability to remove aliens in accordance with immigration laws. They attributed this inability in part to limits on personnel, funding, detention space, and related resources, and in part to the effects of political conditions. Managers confirmed that in deciding which aliens to detain, they tended to choose those who could be deported with expenditure of the fewest resources.

Although resources are a real constraint, detention is key to deportation. INS clearly could improve the effectiveness of the deportation program if more aliens could be detained. Resources permitting, INS should take more aggressive actions to remove nondetained aliens, such as taking aliens into custody at hearings when a final order is issued at the hearing; delivering surrender notices personally instead of mailing them to aliens; moving more quickly to present surrender notices; and pursuing aliens who fail to surrender.

TABLE OF CONTENTS

[1] INTRODUCTION

We have completed an assessment of whether Immigration and Naturalization Services (INS) removes deportable aliens promptly from the United States after the issuance of final deportation orders.

Our focus was on INS processes and actions. We conducted field work at INS Headquarters, nine district offices and six detention centers. Because immigration judges or the Board of Immigration Appeals in the Executive Office for Immigration Review (EOIR) issue the final orders, we also interviewed officials at EOIR.

We reviewed applicable laws, regulations, policy, and written procedures relating to the removal of aliens from the United States. We interviewed appropriate personnel at all locations visited and also examined various kinds of relevant documents at each location.

We selected field locations that included three of the largest INS districts; large and small districts with dention facilities; smaller districts without an INS or contract detention facility; and a Bureau of Prisons facility for criminal aliens. These locations included district offices in Baltimore, MD; Denver, CO; Los Angeles, CA; Miami, FL; New Orleans, LA; New York, NY; San Francisco, CA; Seattle, WA; and Washington, DC; and detention centers in Denver, Krome, FL; Oakdale, LA; Seattle; Terminal Island, CA; and Varick Street, NY.

At each location visited, we reviewed a random sample of case files relating to aliens who had been issued final orders by EOIR. We reviewed a total of 1,058 case files. The files were selected from EOIR's data base by means of a computerized random number generator.

Cases involving nondetained aliens were randomly selected from final orders issued in the period April 1993 through September 1993, and cases involving detained aliens were from the period January 1994 through July 1994.

BACKGROUND

Legislative Basis for Detention and Deportation

The Immigration and Nationality Act (Act) provides statutory authority for determining whether aliens may enter or remain in the United States, and for removing aliens who violate immigration law. INS has the authority to detain any alien who does not clearly appear to be admissible on arrival, and to arrest and detain any individual suspected of being in the United States illegally.

Program Responsibilities

Within INS, the Detention and Deportation (D&D) program's responsibilities are the detention, exclusion, removal, parole, and deportation of aliens. D&D's goal is to ensure that deportable or excludable alien cases are processed [2] expeditiously, and that the aliens are removed from the country promptly.

Proceedings and Final Orders

The Act establishes proceedings, conducted by immigration judges, to determine whether an alien should

be allowed to enter or be deported. During the proceedings, aliens may be held in custody, released on bond, or released on parole.

The Act gives certain rights of appeal from an adverse decision by an immigration judge. The alien is allowed to file an appeal with the Board of Immigration Appeals (BIA). If they receive an adverse decision from the BIA, aliens may petition Federal district or appellate courts for judicial review of final deportation orders.

An order of deportation becomes final and the alien subject to removal by INS when:

- an immigration judge enters an order of deportation without granting voluntary departure or other relief, and the alien waives the right to appeal; or
- the BIA enters an order of deportation on appeal, without granting voluntary departure or other relief.

If an alien petitions a Federal court for review, the order becomes final if and when the court affirms the order of deportation. As used in this report, final orders are those issued by immigration judges, BIA, and Federal courts that were not appealed to a higher level. If voluntary departure was granted as part of the order, we considered the order to be final when the time for voluntary departure expired. In some cases we reviewed, decisions from Federal courts were pending.

Exclusion, Deportation, and Voluntary Departure

In processing aliens who are in this country illegally, the Act distinguishes between those who require

formal proceedings resulting in final orders before removal and those who depart voluntarily.

Exclusion—The Act provides for inspection of aliens at port of entry, and requires aliens who do not appear clearly entitled to enter to be detained for further inquiry. If, upon further inquiry, the alien is not permitted to enter the country, the alien is excluded.

Funds used to pay for the cost of care and transportation of excluded aliens are derived from user fees that are collected from transportation companies and passed on to international travelers as an addition to the cost of their tickets.

Deportation—Aliens may be deportable in three circumstances: (1) if they enter the United States illegally; (2) they enter legally but violate a condition of entry; or (3) they are convicted of certain crimes. Unless stated otherwise, as used in [3] this report the term "deportation" includes both deportations and exclusions.

Voluntary Departure—Aliens who admit deportability may be permitted to depart voluntarily or they may voluntarily accept removal by the government under safeguards. These aliens may not require deportation proceedings and they are not considered to have been deported.

Aliens Apprehended and Expelled

The total number of aliens in the United States illegally is unknown. INS and the Urban Institute, a nonprofit policy research organization, estimate that the population of illegal immigrants living in the country is approximately 4 million. These estimates do not include a more transient population of aliens who enter

illegally for brief periods. The majority of the aliens INS removes from the country are part of the transient population and are not included in the estimated 4 million illegal residents.

INS reported that, in Fiscal Year (FY) 1994, it apprehended 1,094,643 aliens, and expelled 1,077,896 aliens. Of the aliens INS expelled, 1,031,668 were apprehended by the Border Patrol. The great majority consisted of Mexican nationals apprehended near the southern border. Border Patrol agents processed these aliens for removal, and most of them left the country under voluntary conditions without EOIR proceedings. These aliens are not part of D&D's deportation workload.

In FY 1994, according to INS reports, 1,030,462 illegal aliens departed voluntarily, 40,905 were deported, and 6,529 were excluded from the country.

D&D's workload focuses on those illegal aliens who initially refuse or are unable to depart voluntarily. D&D reported 464,437 aliens under "docket control" at the end of FY 1994. "Docket control" means that these aliens were in some phase of the process for determining whether they should be allowed to remain in the United States, a process generally including EOIR proceedings, or they had been found deportable and their departure was pending.

In FY 1994, EOIR issued 99,779 final orders and INS deported 47,434 aliens. About 45 percent of the final orders were issued to detained aliens. Of the 54,779 final orders for nondetained aliens, 47 percent were issued in absentia when the aliens failed to appear at hearings.

Our May 1994 report titled Case Hearing Process in the EOIR, number I-93-03, examined the process leading to the issuance of final orders. This current review was limited to actions taken by INS to remove aliens after EOIR had issued final orders.

[4] RESULTS OF THE INSPECTION

REMOVAL OF DETAINED ALIENS

INS removed most detained aliens promptly after final orders were issued. In our sample, we found that INS successfully deported almost 94 percent of the detained aliens, with an average deportation time of 16 days. Problems with acquisition of travel documents and limited resources to escort and transport detained aliens sometimes affected their deportation.

We reviewed 402 detained alien case files. INS deported 376, or almost 94 percent of the aliens. The 26 aliens not deported included 13 of nationalities that could not be deported for political or humanitarian reasons, 4 for whom INS was unable to obtain travel documents, 2 pending travel arrangements, 2 who had been granted administrative relief, 2 who had been released on bond and then absconded, 1 with a Federal appeal pending, 1 pending prosecution for illegal entry after a previous deportation, and 1 who had been indicted for murder and turned over to the local police department.

INS detains aliens according to priorities, funding sources, and facility and resource limitations. As required by law, aliens convicted of aggravated felonies are the first priority, followed by other aliens convicted of criminal behavior, with administrative deportation cases given the lowest priority. District officials confirmed that aliens who could be deported easily were more likely to be detained, to make the most effective

use of INS detention space. The availability of User Fee funds to cover detention costs also affects which aliens INS can detain. User Fees may allow INS offices to detain aliens in exclusion proceedings, when funds are unavailable for other deportation cases.

Since INS controls the alien in detention, removal procedures primarily involve making appropriate travel arrangements. These procedures include obtaining travel documents, making specific transportation arrangements, and escorting the aliens to the transportation carrier. Our review of processing time from issuance of final order to the date the alien left the country showed an average removal time of 16 days.

The following shows the average removal time at each of the six detention centers:

[5]

At Varick Street, problems in obtaining travel documents for the aliens caused the relatively long time before removal. At Oakdale, problems both with travel documents and transportation resources caused delays. The short average time before removal at Terminal Island was due to a high percentage of Mexicans, who do not need travel documents to return to Mexico.

Travel Documents

Generally, INS cannot deport aliens to countries that have no diplomatic relations with the United States. For example, D&D has been unable to deport Vietnamese nationals because there has been no means of obtaining travel documents for them.

In addition, D&D personnel at all locations cited difficulties or delays in obtaining travel documents for nationals of some other countries, including Jamaica, the People's Republic of China (PRC), Nigeria, and India. District managers commented that most of the Jamaicans who are deported are criminal aliens, and Jamaican authorities are reluctant to take them back. D&D officers said obtaining documents for nationals of India and the PRC took a long time because authorities in those countries require a check of records in local provinces before issuing travel documents.

On the day of our visit to the Varick Street facility, we found that:

- One Jamaican had been waiting 55 days and another 40 days for travel documents. According to the D&D staff, the Jamaican consul regularly waited for a group of five Jamaicans with final orders before issuing travel documents.

- One PRC national had been detained for 201 days after receiving a final order.

Two Headquarters D&D officers have been assigned to help districts obtain travel documents in problem cases. The officers attempt to build goodwill through contacts with embassy officials and Department of State desk officers, who may be able to assist INS in obtaining documents. For the period from March 1994 through March 1995, 174 cases were referred to Headquarters for assistance. As of May 10, 1995, a travel document was issued and the alien was deported in 91 (52 percent) of the cases. Jamaicans nationals were the largest group for whom assistance was requested, with documents issued in 26 of 33 referrals. On the other hand, INS was unable to acquire documents in any of the 13 Vietnamese cases referred.

Lack of Detention and Transportation Resources

Districts reported periods when they were unable to deport due to lack of detention and transportation funds. In one district, D&D was able to locate non-detained aliens but not deport them, because removal regularly required 3 detention days and the cost of the ticket.

In some locations limits on the number of staff and lack of transportation [6] needed to deliver detained aliens to airports or escort them on foreign flights delayed their removal. This was especially evident at the Bureau of Prisons' facility in Oakdale. Alien criminals in the Bureau of Prisons' system are sent to the Oakdale facility from all over the country. District D&Ds throughout the country also transfer criminal aliens to Oakdale. Upon issuance of a final order, Oakdale D&D employees deport the aliens.

Oakdale is located in a remote area of Louisiana. The closest international airports are in Houston and New Orleans. Both involve a drive of over 3 hours. Further limitations are imposed by commercial airlines' restrictions on the number of seats available for deporting aliens on certain flights. The INS Air Operations, located in nearby Pineville, has service aircraft to transport aliens to Miami for connecting flights, but because of mechanical downtime or the other missions the aircraft are not always available for Oakdale use.

All aliens detained at Oakdale are criminals and many require D&D escorts back to their country of origin. At the time of our visit, there were 26 detention officers rotating escort duty, usually on an overtime basis. D&D travel clerks reported shortage of personnel to perform escort duties. Additionally, they said government ground transportation used to transport aliens to Houston, New Orleans, and Miami frequently broke down.

Based on our case review, we noted that Oakdale took the longest to remove detained aliens. The Oakdale average was 43 days from the date of the final order to the date of removal.

Generally, Oakdale D&D procedures for preparing detained aliens for removal were impressive. Preliminary paperwork was prepared before the alien received a final removal order and the case was ready to go. Yet limited resources caused delays in removing detained aliens from Oakdale. Longer use of detention space per alien ultimately increases detention costs and reduces the space available for detaining additional aliens.

REMOVAL OF NONDETAINED ALIENS

INS was successful in deporting only about 11 percent of nondetained aliens after final orders had been issued. Contributing to this low percentage were delays by district counsel in transmitting final orders to D&D, delays by D&D in taking action, failure to send surrender notices to aliens, failure of aliens to surrender in response to the notices, and limited efforts made by INS to pursue aliens who failed to surrender. Special conditions affecting certain nationalities also impaired INS' ability to remove aliens.

We reviewed 656 case files for aliens who were not detained when final deportation orders were issued to them. Of the 656, only 72 aliens (11 percent) left the country; 45 were formally deported and 27 others left the country on their own accord.

[7] Deportation of nondetained aliens relies largely on aliens voluntarily surrendering when INS requests them to do so. Analysis of the 656 cases in our sample showed that D&D only requested the surrender of the aliens in 372 cases. In many other cases, D&D did not have the aliens' current addresses, or the aliens were of nationalities affected by political or humanitarian concerns. When surrender notices were sent, only 40 aliens surrendered. When aliens failed to surrender, D&D often did not pursue them. When D&D reported these aliens to INS Investigations, Investigations generally did not pursue them.

Delays in Receipt of Final Orders and in D&D Initial Actions

We found D&D received some final orders from the district counsel long after they were issued. We also found that sometimes D&D did not take initial action

until long after final orders were received. In our review of the 656 sample cases for nondetained aliens, we examined each file to determine the processing times for actions after final orders were issued by EOIR. We treated as initial action any evidence of review of the case by D&D. Initial actions could be notes made by reviewing officers, clerical instruction sheets, typed forms such as warrants of deportation in the file, or other entries. The average number of days from issuance of final orders to the first action recorded by D&D in the sample case files were as follows:

Routing of Final Orders—

Final orders are provided to the INS district counsel by EOIR. D&D cannot initiate actions to remove the alien until the district counsel's office forwards the final order to D&D.

We interviewed district or assistant district counsel at seven of the locations visited. In six districts the counsel said they received final orders from immigration judges promptly, most of them on the day of the hearing. One distict reported having problems in getting copies of final orders from immigration judges.

BIA decisions are mailed directly from Falls Church, Virginia, to the district counsel controlling the case file. District counsel said as a rule they received copies of BIA decisions within a few days after the decisions were rendered.

Trial attorneys assigned to each district counsel's office maintain control of case files during the EOIR proceedings. District counsel told us there were no set guidelines for routing final orders. During our review, we observed procedures established by the district counsel to route final orders to D&D after allowing for an [8] appeal period. In general, upon learning of a decision, the trial attorneys: (1) route the case file and the decision to D&D to act, if both the alien and INS waived appeal; (2) hold the file until allotted for appeal expires, if the alien or INS reserved appeal; (3) hold the file if a final order was issued in absentia, in case the alien appears and files a motion to reopen proceedings.

In 448 of the 656 nondetained sample cases, we could not tell how long district counsel kept the final orders before routing them to D&D. In only 208 of the cases were we able to determine the times because district

counsel forwarded[ ] the final orders to D&D with transmittal memos or other notations.

We found that only 55 of the 208 cases had been forwarded to D&D in a timely way. We used as criteria for timeliness 15 days for final orders issued by immigration judges (allowing for appeal and routing) and 10 days for BIA final orders (allowing for mail). Over 90 days elapsed before 53 of the cases were routed to D&D, and 24 of those took more than 180 days.

We also found that for 29 of the cases, or 4 percent of our sample, D&D had not received the final order and the case file held no record of its issuance.

D&D Initial Actions—After D&D receives a final order, generally an officer reviews the case and instructs a clerk to prepare the required documents. These include a warrant of deportation for issue by the district director and two forms to mail to a nondetained alien. The first form states the alien has been ordered deported to a specified country and warns of penalties for unauthorized reentry. The second form instructs the alien to surrender by reporting to the local district office with baggage on a specified date and time.

District D&D staff cited detained aliens and aliens released on bond as their priority cases. Other nondetained cases were worked as time allowed. In New York, which had the longest times from issuance of final orders until initial action, deportation officers were frequently detailed from the District Office to Varick Street to assist with detained aliens.

Failure to Send Surrender Requests

The surrender request is an integral part of the removal process, because it establishes a date for the alien to appear for deportation.

We found that district D&Ds failed to request surrender in 36 percent of our sample cases (237 cases). An additional 7 percent of the cases (47 cases) required no surrender notice for administrative reasons, such as pending federal court review, status adjustment based on marriage pending with the district examinations section, or because the alien had already left the country.

Some surrender requests were not sent because D&D had not received the final orders (29 cases), D&D did not have good addresses for the aliens (106 cases), the aliens were of nationalities handled under special conditions (73 cases), and other reasons such as a lack of detention or travel funds. For example:

[9]

- New York did not request surrender in 66 out of the 107 cases reviewed. The majority of the aliens failed to appear at EOIR hearings and D&D did not have good addresses.

- In Miami, certain nationalities (Cuban, Nicaraguans, and Haitians) were not processed for removal. This accounted for 58 out of 110 cases reviewed having no evidence of a surrender request.

- Washington did not request surrender in 45 of 89 cases reviewed. A D&D officer commented that frequently surrender request were not mailed out

because there were no funds available to detain or deport the aliens if they surrendered.

Failure of Nondetained Aliens to Surrender

Few aliens report to the district offices after receiving the surrender notices. D&D officers throughout the country refer to the notices as the "run letter." Most aliens who receive the notices either ignore them or move away with no forwarding address. Based on our case review, only 40 aliens surrendered in response to the 372 surrender notices. The following number of aliens surrendered in response to surrender notices sent out at each district:

As reflected in the above chart, our sample found that New York D&D sent out 41 notices to nondetained aliens to surrender for removal. No one surrendered. Miami D&D sent out 27 notices and 2 aliens surrender; but one was pending adjustment of status and the other was a Cuban placed on an order of supervision. Therefore, neither was removed or detained.

In addition to our sample, New York D&D had compiled data on the number of surrender notices mailed to nondetained aliens between October 1993 and August 1994. D&D found that 3,025 surrender notices were mailed and only 74 aliens, or 2 percent, actually surrendered. Only 48 of the 74 alens who surrendered were removed. The remaining 26 aliens were not removed pending further actions.

The same type of data was compiled by Miami D&D during FY 1993, when Miami scheduled 1,340 aliens for surrender. Only 75, or 6 percent, actually did so and 68 of the 75 aliens who surrendered were removed.
[10]

Failure to Pursue Abscondees

Nondetained aliens who do not comply with a surrender request are rarely pursued actively. Within INS, aliens who failed to appear for proceedings or for deportation after issuance of final orders are called "abscondees". District D&D personnel may be assigned to try to locate abscondees. In a program referred to as Bag and Baggage, officers in D&D sections search for aliens who have failed to appear. Since these aliens have final deportation orders, the D&D officers can pick up any aliens they locate, detain them briefly, and deport them. Each district makes a determination on whether to use their resources to perform the searches.

Seven of the nine district offices we visited had Bag and Baggage programs. New York and Washington did not, due to lack of resources. Baltimore D&D squads conducted weekly searches and reported locating 62 aliens from July 1993 to June 1994. Los Angeles conducted the searches, but one D&D supervisor noted that they are time-consuming and often take needed personnel away from the office for several hours. The Bag and Baggage program was popular with most officers who participated in it, and D&D managers agreed that it improved the officers' morale.

Bag and Baggage searches located a relatively small number of aliens. For example, Los Angeles reported that 22 aliens were located from January through June 1994. Due to limited staff resources, the Bag and Baggage programs usually target criminal aliens who have failed to surrender. The scope of these programs is additionally limited by resources, focusing on certain nationalities that require little or no effort to obtain travel documents and minimal costs to remove. If there is no known last home or work address for the alien, searches are frequently not practical, according to the D&D officers. Other than a Bag and Baggage program, district D&Ds do not actively pursue aliens with final removal orders.

Some districts used credit bureau and state motor vehicle data systems to search for nondetained aliens. The District Director in Miami, along with D&D managers elsewhere, noted that access to nationwide motor vehicle and credit bureau data bases, as well as access to Social Security data, would help to locate aliens.

Failure to Investigate Abscondees

On both a national and district level, INS Investigations has given D&D abscondee cases low priority. Headquarters and district managers said it has been national policy for Investigations not to work abscondee cases, unless an abscondee comes to their attention as part of a broader investigation. D&D cases are given low priority because of the shortage of investigative resources and because other investigations have a higher priority.

During our field visits, we noted that:

- In New York, if aliens fail to appear for their hearings or fail to respond to the surrender notice, D&D routes the file to district Investigations [11] with a memo requesting Investigations to locate the alien.

- Investigations will add another memo to the file, noting receipt but stating the case will not be accepted. New York D&D mangers told us that while abscondee cases continued to be referred routinely, Investigations had not accepted a D&D case for several years.

- In Baltimore, the D&D staff told us they do not refer cases to Investigations because it is time-consuming and pointless. An Investigations manager confirmed that under current priorities Investigations did not work D&D abscondee cases.

Closing Abscondee Cases

If aliens were not located, district D&Ds closed the abscondee cases, using a schedule adapted from a Headquarters policy memo issued in August 1982. Specifically, the memo instructed field offices converting from the manual docket control system to the automated Deportable Alien Control System (DACS) not to enter certain inactive cases into DACS. These included cases where INS had no contact for a year or more with aliens who failed to appear for proceedings; aliens with criminal backgrounds who failed to surrender for deportation within 5 or more years of the last contact; and noncriminal aliens who failed to surrender for deportation after 3 or more years of no contact. District D&Ds used these time frames as criteria for closing inactive cases in DACS in an effort to weed out cases likely to prove unproductive.

After closing cases in DACS, district D&Ds no longer maintain the record or track the case. Unless one of these aliens somehow comes to INS's attention, it is unlikely the final removal order will ever be executed.

Special Conditions Affecting Certain Nationalities

Removal of aliens to certain countries may be delayed or prevented altogether by special conditions relating to those countries.

The Act outlines conditions under which the Attorney General (AG) may, on humanitarian grounds, designate for temporary protection nationals of countries undergoing an extraordinary temporary event. Such events include ongoing armed conflict or a natural disaster threatening the aliens' personal safety if they were required to return to their countries. Temporary protected status (TPS) may be granted to eligible aliens

for a specified period and aliens under TPS cannot be removed.

Other national groups not designated for TPS have been given special handling from time to time out of humanitarian concerns. For these groups, including most notably Nicaraguans and PRC nationals in recent years, a special review required after the issuance of final orders may interrupt the deportation process.

Officials in a number of the districts we visited stressed the influence of the [12] political climate on internal policies and the effects on D&D's work. For example, under a longstanding Department of Justice policy, D&D was required to submit files for Nicaraguans with final orders for further review before deporting them. This procedure was started in January 1987 and continued, with modifications, until December 1993. The review was conducted by the Office of the Deputy AG (DAG) and initially required the complete INS file to be forwarded. The Office of the DAG review resulted in a recommendation to the AG who reviewed each case before notifying INS to deport or not deport the person.

D&D field officials described the review process as extremely slow, and in many cases they received no response. In Baltimore, D&D officers said their experience of the Nicaraguan review procedure was that it took 2- to 3-years after files were forwarded through INS Headquarters to the DAG/AG to decide whether an alien could be deported.

District managers and D&D officials in several districts discussed the special conditions and review procedures from their perspective of being responsible for field operations. The special procedures often

created large populations of aliens, many of whom remained in the country for years outside normal immigration controls.

The procedures tended to continue as field practice, through inertia and the lack of a coherent policy, potentially long after the conditions giving rise to them changed significantly.

Another example of special procedures involves PRC nationals. District counsel told us they began implementing procedures in August 1994 for processing PRC nationals who present claims for relief from deportation based on enforced family planning practices. District counsel noted that the proceedings frequently use up considerable staff resources and time.

In some districts, the special conditions account for many of the aliens D&D has not attempted to remove. For example, in Miami the Nicaraguan population (over 19,000) contributes to the disproportionate number of cases pending execution of final orders. Miami also has large Cuban and Haitian populations, two major national groups INS has been unable to deport. In our Miami sample, of 107 aliens with final orders pending execution, 70 percent belonged to these three national groups: 31 aliens were Nicaraguan, 25 were Haitians, and 19 were Cuban. The Miami docket also included Guatemalans and El Salvadorans who qualified for TPS.

CONCLUSIONS

Based on the overall data, INS only removes about half the aliens who have been issued final deportation orders. EOIR issued 99,799 removal orders in FY 1994 and INS deported 47,434 aliens; 45,000 of the removal orders were for detained aliens and 54,799 were for nondetained aliens. Based on the results of our sample

of 1,058 cases, it is clear that most of the aliens actually deported were detained, and few of the nondetained aliens were deported. Detention is key to effective deportation.

[13]

Efficient use of detention resources affects the number of aliens INS can deport. The sooner INS turns cases over, the sooner the detention space can be reused. Each additional day of detention after the issuance of a final removal order prevents turnover of the limited bedspace to allow detention of additional aliens. Our review showed that, on the whole, INS was doing a good job of removing detained aliens.

At all points in the process of enforcing immigration laws, INS managers necessarily exercise their discretion–in determining which aliens to bring into proceeding, which aliens to detain, and which aliens to pursue if they abscond. These determinations are based on a number of considerations, including INS priorities and available resources. Once an alien is detained, the case is given priority in EOIR proceedings and D&D tracks the case and tries to move it along. Nondetained cases also are treated according to priorities. Limited D&D resources are used to search for a few aliens, most of them criminals, who have absconded after receiving final orders. If INS has no address and is unable to locate abscondees, after a period of time the cases are closed.

Limits imposed by personnel, funding, detention space, and related resources affected how soon, and how many aliens were removed. District managers and D&D officers in several locations expressed frustration over their inability to remove aliens with final orders.

They attributed this inability in part to the workload and the resources for handling it and to humanitarian and political conditions and pressures interfering with carrying out immigration laws. District officials noted that in making choices about whom to detain, they tended to detain the aliens who can be removed most easily.

Too many factors affect the removal of aliens to identify an exact correlation between delays in taking actions and the deportation rate. However, it seems logical that the sooner INS tries to locate the aliens, the better the chance is that INS will be able to deport them.

Although resources impose real constraints, INS could improve the effectiveness of deportations by detaining more aliens who are undergoing proceedings.

INS could also improve the effectiveness of deportations by changing its current removal procedures for nondetained aliens. Of the final orders for nondetained aliens, while 25,976 were issued in absentia, in 28,803 cases final deportation orders were issued to aliens who were present at the hearings. INS should consider taking aliens into custody at the hearings when the final orders are issued at the hearings. INS should also consider personal delivery of surrender notices to aliens and taking them into custody at that time, rather than mailing the surrender notices to the aliens.

RECOMMENDATIONS

Since detention is key to deportation, INS needs to increase detention or develop a better strategy for [14] nondetained aliens. In the interim, we recommend that INS take more aggressive actions to remove nondetained aliens, such as:

— moving more quickly to present surrender notices to aliens after receiving final orders;

— delivering surrender notices instead of mailing them to aliens;

— taking aliens into custody at hearings when final orders are issued at hearings;

— pursuing aliens who fail to appear and reviewing procedures for closing cases for aliens who fail to appear;

— coordinating with other governmental agencies to make use of all data bases available for tracking aliens who fail to appear.

APPENDIX I

ABBREVIATIONS

Act	Immigration and Nationality Act
AG	Attorney General
BIA	Board of Immigration Appeals
DACS	Deportable Alien Control System
DAG	Deputy Attorney General
D&D	Detention and Deportation
EOIR	Executive Office for Immigration Review
FY	Fiscal Year
INS	Immigration and Naturalization Service
PRC	People's Republic of China
TPS	Temporary Protected Status

Memorandum APPENDIX II

[Seal Omitted]

Subject	Date
DRAFT INSPECTION REPORT: Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued; Report I-94-08	JAN 22 1996

To Mary W. Demory
Acting Assistant Inspector General for Inspection
Department of Justice

From Office of the Commissioner
Immigration and Naturalization Service

Attached is the response from the Executive Associate Commissioner for Programs addressing your memorandum dated August 30, 1995. I have reviewed the response and concur with the comments.

We have partially concurred with the finding related to removal of non-detained aliens. Specifically, we note confusion as to the definition of "final orders." The report suggests that you consider it to be an order issued by the Executive Office of Immigration Review. There are several situations where an Immigration Judge issues a final order that is not executable. The Executive Associate Commissioner for Programs has discussed this in detail on pages 1 and 2 of the attached response.

We have also partially concurred with recommendations 2, 3, and 4. Although we agree that we should

take more aggressive actions to remove non-detained aliens, legal and resource constraints factor into full implementation of these recommendations. These constraints are discussed on pages 2 - 5 of the Executive Associate Commissioner for Programs' response. My staff is pursuing solutions to these constraints, and I believe the deportation rate will improve as appropriate changes occur.

If you have any questions, please contact Kathleen Stanley, Audit Liaison, at (202) 514-8800.

/s/ CHRIS SALE FOR
DORIS MEISSNER
Commissioner

Attachment

cc: Vickie Sloan, DOJ Audit Liaison

Memorandum APPENDIX II

[Seal Omitted]

Subject	Date
DRAFT INSPECTION REPORT: Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued; Report I-94-08	DEC 26 1995

To Doris Meissner
Commissioner

From Office of
Programs
(HQPGM)

FINDING 1 (page 5):

REMOVAL OF DETAINED ALIENS

INS removed most detained aliens promptly after final orders were issued. In our sample, we found that INS successfully deported almost 94 percent of the detained aliens, with an average deportation time of 16 days. Problems with acquisition of travel documents and limited resources to escort and transport detained aliens sometimes affected their deportation.

INS POSITION: Concur.

FINDING 2 (page 8):

REMOVAL OF NON-DETAINED ALIENS

INS was successful in deporting only about 11 percent of non-detained aliens after final orders had been issued. Contributing to this low percentage were delays by district counsel in transmitting final orders to D&D, delays by D&D in taking action, failure to send

surrender notices to aliens, failure of aliens to surrender in response to the notices, and limited efforts made by INS to pursue aliens who failed to surrender. Special conditions affecting certain nationalities also impaired INS' ability to remove aliens.

INS POSITION: Concur in Part.

The OIG report identified delays in the transmission and execution of "final orders." The report defines final orders as "those issued by EOIR." Report, at 2. It is not clear what is meant by this definition. Under the regulations, an immigration judge's (IJ) order of deportation, *including an alternate order of deportation coupled with an order of voluntary departure*, becomes final "upon dismissal of an appeal by the Board of Immigration Appeals (BIA), upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken." 8 C.F.R. § 243.1 (emphasis added). Furthermore, a BIA order is final "as of the date of the Board's decision." *Id.*
[2]
However, simply because and order is final does not mean that it is subject to execution. In particular, an IJ or BIA alternate order of deportation coupled with an order of voluntary departure, is not subject to execution until after the period for voluntary departure has expired. 8 C.F.R. § 243.3(a)(1). The period granted for volutary departure is frequently between 30 to 90 days. During this period, an order of deportation that may be final pursuant to 8 C.F.R. § 243.1 cannot be executed. Such an order can be executed only subsequent to the expiration of the authorized period of voluntary departure. While the OIG Report allowed for appeal and routing (of IJ decisions) and mailing (for BIA decisions) in determining timeliness of transmittal of final orders

to D&D and of subsequent D&D action, the Report did not take into account the existence of deportation orders coupled with orders granting voluntary departure. Because such deportation orders cannot be executed during the voluntary departure period, the timing of transmittal to D&D and of D&D action can be affected.

Also in cases where an alien reserves the right to appeal, it is often difficult and time-consuming for district counsel offices to determine whether a notice of appeal in fact has been filed with the Office of the Immigration Judge. If the INS is not served with the notice, district counsel offices often must attempt to verify whether the IJ office received the notice of appeal. Time-consuming searches and transmittal delays also arise in cases where the IJ decision is not issued at the conclusion of the hearing.

Furthermore, petitions for review filed in federal court can also require resource-intensive tracking and engender delays. In cases where judicial review of the deportation order is sought, the order is subject to execution only after "[a] federal district or appellate court affirms [the order] in a petition for review or habeas corpus action." 8 C.F.R. § 243.3(a)(4).

RECOMMENDATION 1 (page 18): We recommend that INS take more aggressive actions to remove non-detained aliens, such as: moving more quickly to present surrender notices to aliens after receiving final orders.

INS RESPONSE: Concur. The INS has been concerned for some time about the problems of removing non-detained aliens with final orders of deportation. The INS is currently working with the EOIR to establish an

EOIR data interface that will inform the INS when a final order of deportation has been entered. The INS will continue to collaborate with EOIR so that an effective notification system regarding final orders of deportation can be implemented.

In July 1995, INS through the National Institute of Justice, commissioned a project to be undertaken by the Vera Institute of Justice. The goal of the project is for Vera to design, implement, and assess a demonstration program that will increase the effectiveness and efficiency of adjudication, release, reporting, and removal of non-detained illegal aliens.
[3]
The first phase of the two phase project, delivery of a draft program plan, is scheduled for completion by October 31. The plan should be revised, refined and final by December 31. Phase two, the implementation of the plan at several test sites, will begin implementation in January 1996. The completion date depends on the specific structure of the plan and so is not available at this writing. However, it is anticipated that the test of the plan will take at least 12 months. The INS is hopeful that Vera may develop some innovative strategies to increase the rate of appearance by non-detained aliens scheduled for removal.

Furthermore, in the last quarter of FY 1995 INS conducted a pilot program in the Philadelphia district under which all aliens with final orders of deportation, and all alien abscondees were targeted for removal. Factoring in the limited duration of the pilot, this was determined to be a successful strategy. Further field tests comprising different office sizes and population mixes will need to be conducted before a probative

determination can be made whether or not to adopt this strategy nationwide.

RECOMMENDATION 2 (page 18): We recommend that INS take more aggressive actions to remove non-detained aliens, such as: delivering surrender notices instead of mailing them to aliens.

INS RESPONSE: Concur in part. This strategy has much to commend it and INS is addressing it as part of a policy paper designed to modify the focus of field offices with regard to issues surrounding the removal on non-detained aliens. The policy paper is expected to be completed by April 1, 1996. The difficulty of such a policy, however, is that it is resource intensive, particularly in terms of the personnel necessary to implement it. In relation to recommendation 2, the OIG report states that the INS should consider taking aliens into custody at the time of personal delivery of surrender notices to them. Report, at 17. The INS response to recommendation 3 below addresses this issue.

RECOMMENDATION 3 (page 18): We recommend that INS take more aggressive actions to remove non-detained aliens, such as: taking aliens into custody at hearings when final orders are issued at hearings.

INS RESPONSE: Concur in part. Under INA § 242(a)(1), the Attorney General can detain any alien arrested pursuant to the INA, pending a final determination of deportability. In lieu of detention, the Attorney General may release the alien under specific conditions or bond. *Id.*; 8 C.F.R. § 242.2(c)(2). Subsequent to the issuance of a final order of deportation, the Attorney General may also detain an alien for a 6-month period from the date of such order or may

release the alien under specific conditions or bond. INA § 242(c).

[4]

When an alien has been released from INS custody under bond, such bond can be revoked by the district director pursuant to 8 C.F.R. § 242.2(e) but only based upon "a change of circumstances." *Matter of Sugay*, 17 I&N Dec. 637, 640 (1981). As such, INS must be able to justify any revocation decision, future detention or release condition. The determination of the district director is subject to review by an immigration judge and/or the Board of Immigration Appeals. 8 C.F.R. § 242.2(b).

The current custody determination process assesses the likelihood that the alien will appear for the deportation process, including surrendering for deportation. *Matter of Khalifah*, I&N Dec. (BIA Oct. 5, 1995) (scheduled interim decision). Furthermore, the existing bond contract requires the obligor to produce the alien until deportation proceedings are finally terminated or the alien is actually accepted for detention or deportation. INS Form I-352, Immigration Bond. Thus, current INS procedures treat detention or release as durational, from arrest through removal, and not episodic (from arrest to final order to removal).

If recommendation 2 and 3 were implemented, aliens would be taken into custody at hearings where final orders are issued and at the time of delivery of surrender notices. The taking of aliens into custody would require a custody redetermination based upon the likelihood of the aliens appearing for deportation. In practice, some aliens would likely still be released pending deportation, in light of resource and detention space limitations. Also, some case law casts doubt on

the notion that the entry of a final order of deportation alone (without any newly developed evidence) would constitute a changed circumstance sufficient to justify the taking of an alien into custody. *Cf. Noorani v. Smith*, 810 F. Supp. 280, 283-84 (W.D. Wash. 1993) (involving a challenge to district director's denial of parole to alien who had exhausted administrative relief). As such, the implementation of recommendations 2 and 3 could require revisions to the bond determination process and significant resource expenditures in addressing bond matters and related litigation.

This recommendation is one that INS has tried at various times and with varying degrees of success. The INS' current focus is on the removal of criminal aliens. Most nondetained aliens are not criminals. The INS is constantly expanding the amount of detention space available to it, but these spaces are chiefly to support its criminal alien removal initiatives. Furthermore, taking aliens into custody at hearing could encourage aliens not to accept a final order of deportation at the hearing by reserving appeal and then filing an appeal. These actions would necessarily delay the removal of such aliens. Still, the issue raised by this recommendation is one being studied by the Vera Institute of Justice at INS' behest.

RECOMMENDATION 4 (page 18) We recommended that INS take more aggressive actions to remove nondetained aliens, such as: pursuing aliens who fail to appear and reviewing procedures for closing cases for aliens who fail to appear.
[5]
INS RESPONSE: Concur in part. INS will revisit its policy on closing cases, both by Detention and Deportation and Investigations, of aliens who fail to appear. If

necessary this policy will be updated to reflect current policy and priorities.

INS expects to receive an FY 96 budget enhancement of $11.2 million dollars and 142 positions specifically intended to support Service efforts to locate and remove aliens who have been ordered deported and who have absconded. INS' primary enforcement efforts will focus on those who represent a danger to the public safety and security. Part of this effort entails an increase in INS bedspace devoted to abscondees.

INS does not have the manpower to search for and/or attempt to locate significant numbers of abscondees, but does initiate specific enforcement actions on abscondees based on INS' broad based interior enforcement strategy within the context of limited resources and established program priorities. That strategy of enforcement actions include (1) Employer Sanctions; (2) Anti-smuggling; (3) Fraud; (4) Violent Gang Task Force (VGTF); and (5) Organized Crime Drug Enforcement Task Force (OCDETF).

INS has recently reviewed, and is restructuring, its Investigative Case Management System to enhance its flexibility as a method of more effectively organizing its investigation workload in accordance with the Service's priorities.

RECOMMENDATION 5 (page 18) We recommended that INS take more aggressive actions to remove non-detained aliens, such as: coordinating with other governmental agencies to make use of all data bases available for tracking aliens who fail to appear.

INS RESPONSE: Concur in part. INS recognizes the need to use all available resources to track alien abscondees. These include the data systems and indices

of other agencies. Currently each INS district office independently contacts other agencies within its area. The policy memo expected to be completed by April 1, 1996, addresses the need to have, where possible, nationwide standardization of methods and procedures for coordinating searches with other governmental agencies.

Using FY '96 enhancements, the INS will emphasize the following activities to efficiently remove non-detained aliens who have been ordered deported:

(1) Establishment of abscondee removal teams in areas with the highest illegal alien populations. These teams will concentrate on cases with sufficiently recent leads to ensure a high degree of success. Careful screening to select cases with factors such as travel document availability and low probability of further administrative procedures or judicial challenge will minimize length of stay in detention and associated cost and free up detention beds for other cases.
[6]

(2) Entry of warrants and orders of deportation into the National Crime Information Center (NCIC). Aided by enabling legislation contained in the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322), the INS will expand its usage of the NCIC system to locate aliens who fail to appear for deportation.

(3) Increase capability to share information externally and internally to identify abscondees, using interfaces with state Departments of Motor Vehicles, NCIC, Social Security Administration, and the Internal Revenue Service.

(4) Develop an automated list of criminal abscondees and circulate within the law enforcement community; use LETN, public TV/radio, etc., to publicize.

Point of Contact: **Micheal J. Manual, Detention and Deportation, 202-616-7788**

/s/ [ILLEGIBLE]
T. ALEXANDER ALEINIKOFF
Executive Associate
Commisioner

APPENDIX III

OFFICE OF THE INSPECTOR GENERAL'S ANALYSIS OF MANAGEMENT'S RESPONSE

The INS response stated that they would take action on each of the report's recommendations. We consider all recommendations resolved and will close them when INS' proposed actions are completed.

The INS response addressed the report's two major findings and five recommendations. Our analysis includes INS' position in response to the two findings, as well as to the five recommendations. In response to comments on the second finding, we made one minor revision in the report. Specifically, we clarified our use of the term "final order."

Finding Number:

1. Removal of Detained Aliens. INS concurs.

2. Removal of Nondetained Aliens. INS concurs in part. The INS response cautions that final orders may be coupled with an order of voluntary departure, and cannot be executed until the voluntary departure period expires. The response also states that if judicial review of final orders is sought, the order is subject to execution only after the Federal court affirms it. We considered any grant of voluntary departure or petition to Federal courts in reviewing our sample cases. If voluntary departure was granted, we did not consider the order to be final until the time for voluntary departure had expired. If judicial review was sought, the date of the Federal court decision replaced the date of the final order issued by an

immigration judge or a BIA decision. If a judicial decision was pending, we deleted the case from our sample. We should note that we found approximately 3 percent of the nondetained aliens in our sample had departed voluntarily under an alternate final order. These aliens were included among the 11 percent of the nondetained aliens we reported as having been removed from the country.

Recommendation Number:

1. Resolved-Open. We agree with the actions proposed. We will close this recommendation when the data interface with EOIR has been implemented and when the assessment of the demonstration project has been completed. Please notify us when the data interface has been implemented and provide us with a copy of the assessment.

2. Resolved-Open. We agree with the discussion and will close this recommendation when INS provides us with a copy of the policy paper, if it adequately addresses the issue of taking more aggressive actions to remove nondetained aliens.
[2]

3. Resolved-Open. We agree with the discussion and will close this recommendation when INS provides us with a copy of the Vera Institute of Justice study and advises us of the actions taken in response to the study.

4. Resolved-Open. We will close this recommendation when INS provides us with a copy of the revised policy on closing cases of aliens who fail to

appear, as updated to reflect current policy and priorities.

5. Resolved-Open. We agree with the actions proposed and will close this recommendation when INS: (i) provides us with the policy memo expected by April 1, 1996, addressing standardization of methods and procedures for coordinating searches with other governmental agencies; and (ii) notifies us that abscondee removal teams have been established in areas with the highest illegal alien populations.