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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SAAK AVAKYANTS, Defendant.	NO. CR 10-299-MMM **NOTICE OF MOTION; MOTION TO ORDER UNITED STATES MARSHAL TO RELEASE DEFENDANT PURSUANT TO UPON POSTING OF BAIL NOTWITHSTANDING IMMIGRATION DETAINER; MEMORANDUM OF POINTS AND AUTHORITIES** Hearing Date: June 7, 2010 Hearing Time: 1:15 p.m.

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TO: ANDRE BIROTTE, JR., AND ASSISTANT UNITED STATES DOROTHY KIM:

PLEASE TAKE NOTICE that on June 7, 2010, at 1:30 p.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Margaret M. Morrow, United States District Judge, defendant Saak Avakyants will bring on for hearing the following motion:

MOTION

Defendant Saak Avakyants, by and through his attorney of record, Deputy Federal Public Defender Carlton F. Gunn, hereby moves this Honorable Court for an order directing his release once he satisfies the conditions of bond previously set by the Honorable Patrick J. Walsh on March 12, 2006. Additionally, defendant requests an order clarifying that, unless the government provides timely notice that it intends to take him into ICE custody solely for the purpose of executing a presently existing removal order, the United States Marshal's Service is to immediately release Mr. Avakyants on bond notwithstanding the immigration detainer that has been lodged. This motion is made pursuant to the Bail Reform Act of 1984 and the Due Process Clause of the United States Constitution and is based upon the attached memorandum of points and authorities, all files and records in this case, and such additional evidence and argument as may be presented at the hearing on this motion.

Respectfully submitted,

SEAN K. KENNEDY
Acting Federal Public Defender

DATED: May 10, 2010

By /s/
CARLTON F. GUNN
Deputy Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

On March 12, 2010, United States Magistrate Judge Patrick J. Walsh ruled, pursuant to 18 U.S.C. § 3142(c), that Mr. Avakyants is entitled to be released on bail pending trial, provided that he complies with the conditions outlined in the order setting bond. Mr. Avakyants' family is prepared to post that bond.

The defense brings this motion before posting the bond because it believes that even if Mr. Avakyants satisfies the conditions of his bail as set by this Court, the government will nonetheless attempt to continue his detention. Specifically, the government plans to continue Mr. Avakyants' detention pending his criminal trial through a transfer into immigration custody pursuant to an immigration detainer which has been lodged based on a presently existing order that Mr. Avakyants be "removed" (or, as put in more common prior terminology, deported). This continued custody will not be for purposes of effectuating the removal order, however; rather, the defense believes that the immigration authorities will stay removal and simply hold Mr. Avakyants pending resolution of the criminal case and service of any sentence that may be imposed.

The government's continued attempt to detain a criminal defendant based on a removal order which it is not proceeding to enforce violates the Bail Reform Act and the Defendant's constitutional due process rights under the Fifth Amendment of the United States Constitution. The continued detention is also not authorized – and certainly not required – by immigration law and therefore is nothing more than a

pretextual detention used to contravene the order setting bond and effectively deny immigrant criminal defendants their statutory right to bail.

The United States Attorney's Office cannot effect the continued detention of Mr. Avakyants, in contravention of the bail order, by simply shifting him to a different arm of the federal government. Although the immigration authorities may attempt to remove Mr. Avakyants from the United States in accordance with applicable immigration statutes and regulations, they may not lawfully detain him when they have no intention of effecting his removal expeditiously, but intend instead to delay removal proceedings pending the instant criminal prosecution.

Accordingly, the defense requests that this Court order that unless the government provides written notice within 48 hours of its intention to transfer Mr. Avakyants into ICE custody solely for the purpose of immediately proceeding to implement the outstanding removal order, Mr. Avakyants must be released immediately upon his posting of bond, and the United States Marshals Service be directed to release him notwithstanding any immigration detainer that has been lodged.

II.
STATEMENT OF FACTS

On March 12, 2010, the government moved for detention of Mr. Avakyants pursuant to 18 U.S.C. § 3142(e) and 18 U.S.C. § 3142(f), based on an allegation that Mr. Avakyants posed a risk of flight. At the detention hearing, the court, United States Magistrate Judge Patrick J. Walsh, analyzed the evidence proffered by each party, and weighed the bail factors outlined in 18 U.S.C. § 3142(g). The defense pointed to several factors it suggested supported setting a bond rather than ordering

detention, including, most significantly, the fact that Mr. Avakyants has no prior record whatsoever and that he has extremely strong ties to the community, including a common law wife and two small children who are American-born citizens. The government noted that it believed an immigration detainer was going to be placed on Mr. Avakyants but the defense pointed out that that did not go to the question of flight. It also noted that Mr. Avakyants is not a native of a nearby country such as Mexico to which he might want to return to avoid prosecution and to which he could easily flee but is from the Russia/Armenia/Azerbaijan region which is in a completely different continent and not a region to which immigrants typically want to return, especially if it will mean leaving a wife and small children behind.

Judge Walsh considered these arguments and compromised between the government request for detention with no bond at all and the defense request for a bond secured by only unjustified affidavits of surety. He set a $25,000 bond to be secured by property and/or a corporate surety bond. *See* Exhibit A.

Mr. Avakyants' family is now prepared to post the bond set by the Judge Walsh – in the form of a corporate surety bond. The immigration authorities have lodged an immigration detainer, however, *see* Exhibit B, apparently based on a removal order already entered against Mr. Avakyants, *see* Exhibit C. Based on previous experience, it is the understanding of counsel that the government will not release Mr. Avakyants if he posts the bond, but instead will seek to transfer him to immigration custody for continued detention pending trial. *See* Declaration of Carlton F. Gunn.

III.
JURISDICTION

There are several bases for finding that this Court has the authority to grant the

relief requested in this motion. First, the Court has jurisdiction pursuant to its statutory role under the Bail Reform Act. In enacting the Bail Reform Act, Congress granted federal courts the exclusive power to decide whether a defendant awaiting trial in a criminal case shall be released or detained. Pursuant to the Bail Reform Act, a district court has inherent jurisdiction to order the immediate release of the defendant and, indeed, bail decisions are a core judicial function. *See generally* 3B Charles Alan Wright, Nancy J. Klein, and Susan R. Klein, *Federal Practice and Procedure: Criminal* § 768 (3d ed. 2004) (courts have inherent power to grant bail and issue orders with respect to custody of persons properly within their jurisdiction); *see also United States v. Salerno*, 481 U.S. 739, 742, 107 S. Ct. 2095, 2099 (1987) (providing that "§ 3141(a) of the Act requires a judicial officer to determine whether an arrestee shall be detained").

Second, this Court has jurisdiction over the instant motion pursuant to Federal Rule of Criminal Procedure 57(b) and the Court's inherent power to issue orders to insure the proper administration of justice. *See, e.g.*, *Wright v. Henkel*, 190 U.S. 40, 63, 23 S. Ct. 781, 787 (1903) (stating that the Court is "unwilling to hold that the circuit courts posses no power in respect to admitting to bail other than as specifically vested by statute"); *Wheeler v. United States*, 640 F.2d 1116, 1123 (9th Cir. 1981) (finding district court had the inherent power after sentencing to order the Attorney General not to permit a prisoner to have contact with a witness); *United States v. Armstrong*, 621 F.2d 951, 954-55 (9th Cir. 1980) (order granting inspection of premises owned by a third party might properly have been based on Rule 57(b) and the inherent power of the court); *United States v. Wade*, 489 F.2d 258, 259 (9th Cir. 1973) (although statute did not permit psychiatric examination to determine competency, court had inherent power to order such an examination); Fed. R. Crim. P. 57(b) ("A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district."). Third, this Court also has jurisdiction

to order the relief requested pursuant to federal law allowing this Court to order the United States Marshals Service to comply with federal court orders. *See* 28 U.S.C. § 566(a) ("It is the primary role and mission of the United States Marshals Service . . . to obey, execute, and enforce all orders of the United States District Courts . . .").

Nothing in the immigration laws trumps the jurisdiction of this Court, moreover. Although 8 U.S.C. § 1226(e) limits judicial review of the Attorney General's decisions regarding the detention or release of noncitizens, that statutory limitation on judicial review only applies to decisions made to detain a noncitizen "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). In this case, the United States Attorney's Office has instituted a criminal prosecution against Mr. Avakyants, so if ICE takes custody of Mr. Avakyants, it will not be able to effect removal until after the criminal prosecution has been resolved. In light of this Court's release order and the pending criminal case, ICE would not be taking custody of Mr. Avakyants for purposes of removal or, in the words of 8 U.S.C. § 1226(e), "for purposes of this section [relating to ICE custody pending removal]."

IV.
ARGUMENT

A. THE GOVERNMENT'S ATTEMPT TO CONTINUE MR. AVAKYANTS' DETENTION VIOLATES THE BAIL REFORM ACT.

In the instant case, a federal court has already ruled, pursuant to the Bail Reform Act, that Mr. Avakyants is entitled to pretrial release under certain conditions. As set forth in detail below, the language of the Bail Reform Act makes clear that Congress chose not to exclude deportable aliens from consideration for release or

detention in criminal proceedings. The ruling that Mr. Avakyants may be released pending trial, despite his noncitizen status, recognizes this important aspect of the Bail Reform Act. The government's continued attempt to detain Mr. Avakyants, by attempting to transfer him to immigration custody without initiating removal proceedings, violates this tenet of the Bail Reform Act.

The structure and language of the Bail Reform Act demonstrate that Congress intended noncitizens, with one exception not applicable here, to be treated like any other defendant for purposes of bail. In general, the Bail Reform Act provides that a federal judicial officer *shall* issue one of four alternative orders regarding detention of a criminal defendant, after holding a hearing: (1) release the defendant on personal recognizance or unsecured bond; (2) release the defendant on a condition or combination of conditions; (3) detain the defendant if no condition or combination of conditions will reasonably assure the appearance of the defendant as required, and the safety of any other person and the community; or (4) under two limited circumstances set forth below, *and* in the event that the judicial officer determines that the defendant may flee or pose a danger to another person or the community if released, the judicial officer may order the *temporary* detention of the defendant for up to 10 business days. 18 U.S.C. § 3142(a), (d).

This fourth option under the Bail Reform Act applies only to a defendant who is on conditional release or who is not a citizen of the United States. *Id.* § 3142(d).[1]

[1] Section 3142(d) provides in its entirety as follows:

> (d) Temporary detention to permit revocation of conditional release, deportation, or exclusion – If the judicial officer determines that –
> (1) such person –
> (A) is, and was at the time the offense was committed, on –
> (i) release pending trial for a felony under Federal, State or Local law;
> (ii) release pending imposition or execution of sentence, appeal or sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or
> (iii) probation or parole for any offense under Federal, State, or local law;

However, § 3142(d)'s 10-day temporary detention provision, which also requires a judicial finding that the defendant may flee or pose a danger, does *not* apply to Mr. Avakyants, as this Court has already found that he does not pose a flight risk or danger to the community. Section 3142(d) also does not apply here[2] because, by its own terms, it is only applicable to noncitizens to permit "deportation or exclusion," which would not be the purpose of the detention here, as is also discussed further below.

Significantly, § 3142(d) contains the only reference to alienage in the Bail Reform Act. Thus, it encompasses the whole of Congress's intent as to the treatment of noncitizens in bail proceedings in federal court. Accordingly, by including § 3142(d) in the Bail Reform Act, Congress demonstrated that it was aware that in limited situations the need would arise for the government to seek transfer of a noncitizen into immigration custody. Congress therefore specifically outlined a narrow set of conditions under which such a transfer could take place. Specifically, § 3142(d) provides that the district court may order that a noncitizen who, unlike Mr.

> or
> (B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in Section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and
> (2) the person may flee or pose a danger to any other person or the community;
> such judicial officer shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, the person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

18 U.S.C. § 3142(d).

[2] Additionally, the government has not moved to detain Mr. Avakyants pursuant to § 3142(d).

Avakyants, is found to pose a flight risk or a danger to the community, be temporarily detained "for a period of not more than ten days" to permit "revocation of conditional release, deportation, or exclusion." 18 U.S.C. § 3142(d).

Although § 3142(d) does not apply here, the statute is nonetheless instructive. Under § 3142(d), even an alien who is found to be a flight risk and/or a danger to the community is entitled to be treated like any other defendant, if immigration authorities elect not to take him into custody within 10 days of the court's order of temporary detention. During the statutory 10-day detention period under 18 U.S.C. § 3142(d), the federal court may direct the attorney for the government to contact the "appropriate official of the Immigration and Naturalization Service"[3] to secure the custodial transfer. *Id.* However, if the immigration authorities do not take the individual into custody within the 10-day time period, the Act mandates that "such person shall be treated in accordance with the other provisions of this section, *notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.*" *Id.* (emphasis added). That is, if the government chooses not to take a defendant into custody for purposes of immigration proceedings (namely, deportation or exclusion) within a 10-day period of time, the Bail Reform Act trumps other laws that might otherwise apply to a noncitizen defendant, including detention provisions in the Immigration and Nationality Act, such as 8 U.S.C. § 1226, which is discussed below.

Those noncitizens – like Mr. Avakyants – who are not temporarily detained pursuant to 18 U.S.C. § 3142(d), must have their custody status determined under the

[3] Pursuant to the Homeland Security Act of 2002, 116 Stat. 2135, Pub. L. 107-296, codified at 6 U.S.C. § 101, *et seq.*, alien detention, deportation, and removal functions were transferred from the Department of Justice to the Department of Homeland Security ("DHS") on March 1, 2003. *See* 6 U.S.C. § 251 (2002). Within the DHS, the former Immigration and Naturalization Service ("INS") was reorganized into three bureaus serving separate functions. The Bureau of Immigration Customs and Enforcement ("ICE") is responsible for removal proceedings and investigations.

other provisions of the Bail Reform Act, "notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings." 18 U.S.C. § 3142(d). If the federal court determines that the noncitizen defendant is entitled to bail pursuant to the Bail Reform Act, and the defendant complies with the conditions for his release, the defendant must be released forthwith, in spite of any attempt by immigration authorities to issue a detainer. This is especially true here, where any transfer to immigration custody would be pretextual, for the purposes of criminal prosecution, rather than to initiate removal proceedings.

In *United States v. Adomako,* 150 F. Supp. 2d 1302 (M.D. Fla. 2001), the only published federal decision that has considered the Bail Reform Act under these circumstances, the district judge held that his order setting conditions for the release of a noncitizen criminal defendant would apply equally to any federal custody – whether by the Attorney General for purposes of criminal prosecution, or by immigration authorities for purposes of removal proceedings. The *Adomako* court ordered a defendant released on conditions. *Id.* at 1302. However, as in the instant case, the government refused to release the defendant because of a detainer filed by immigration authorities. The court in *Adomako* held that its release order was binding against the federal government, no matter which agency was the custodian and no matter which purpose the government proffered to support its custody over the defendant.[4] Specifically, *Adomako* holds that 18 U.S.C. § 3142 directs a district court "to disregard the laws governing release in INS deportation proceedings when it determines the propriety of release or detention of a deportable alien pending trial." *Id.* at 1307 (citing 18 U.S.C. § 3142(d)). Thus, the court in *Adomako* ordered the United States Attorney's Office to file and serve notice as to whether the INS intended to take the

[4] The district court in *Adomako* also rejected the government's argument that the court had no jurisdiction to hear the defendant's argument concerning bail in light of the immigration detainer. *Id.* at 1307 ("The government's argument regarding lack of jurisdiction is illogical, and would frustrate Congress' express intent."); *see* discussion of jurisdiction, *supra* Sec. III.

defendant into custody "to permit deportation, and whether the INS intends to deport [the defendant] before trial. . . ." The court further ordered that if the INS did not take custody within the deadline set by the court, the Marshals Service could only detain the defendant until he met the previously set release conditions. And finally, the court ordered that, if the defendant were to meet the release conditions, "[t]he Attorney General *(in his capacity as head of both the United States Marshals Service and the INS)* shall release the defendant so that he may comply with the conditions set for his release pending trial." *Id.* at 1308 (emphasis added). The court in *Adomako* thus deemed its bail order applied equally to the federal government in its capacity as criminal prosecutor and as immigration enforcer. Once the defendant met the court's release conditions, he would be released for both purposes.

In a subsequent decision in the Central District of California, United States Magistrate Judge Fernando M. Olguin applied the reasoning of the *Adomoko* court to a motion brought in similar circumstances to the motion presently before this Court. In *United States v. Abdon Martinez Banuelos*, No. 06-547M, the court reviewed a motion brought by a defendant who was granted bail pursuant to certain conditions. *See* Exhibit D. Upon being informed that an immigration detainer had been filed against Mr. Martinez Banuelos, but that no removal proceedings had yet been instituted, the defendant brought a motion pursuant to the Bail Reform Act to allow his release notwithstanding the immigration detainer. Rather than disagreeing with the defendant's motion, however, "the government appear[ed] to agree with defendant that detention by ICE for any purpose other than removal proceedings is improper." *Id.* at 4. In particular, the government explained in its brief as follows:

> [The government] has not sought, nor does it intend, to detain defendant for this criminal prosecution through the civil detention mechanism available to ICE. Rather, the government has asked defendant be detained by the USMS. Continued detention by ICE

> would contravene ICE's statutorily-prescribed mission of removal of criminal aliens from the country. It would also contravene the statutes governing ICE's operation. ICE is directed to effect the physical removal of individuals ordered removed within the statutorily specified 90-day "removal period" 8 U.S.C. 1231(a)(1)(A). Moreover, ICE is only permitted to detain aliens for a reasonable time after the propriety of their removal has been adjudicated. . . . Because [defendant] will likely be removed from this country based on the charges of removability, defendant will be rendered unable to attend further criminal proceedings.

Id. at 4-5 (directly quoting government brief at 8, 9). Accordingly, as the court noted, the government acknowledged "that if defendant is released to ICE custody to effect his removal, it will not be able to proceed with the instant prosecution." *Id*. at 5.

The court in *Martinez Banuelos* concluded that, in light of the Bail Reform Act and the government's admissions regarding the limited role of ICE detention, it was proper to enter an order similar to that in the *Adomoko* decision. Specifically, as clarified in a subsequent order, the court gave the United States Attorney's Office three court days[5] to file a Notice Re: Removal Proceedings Against Defendant "stating whether and when ICE intends to take defendant into custody to commence removals. The Notice shall be accompanied by a declaration from an ICE official providing all relevant information pertaining to the commencement and completion of the removal

[5] At oral argument, the parties agreed that the ten-day period of § 3142(d) did not apply. Among other reasons, the government had not moved to detain the defendant pursuant to this section. Furthermore, the defense pointed out that the United States Marshals would not be allowed to hold the defendant for more than 48 hours beyond his compliance with bail conditions. 8 C.F.R. § 287.7(d) ("Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department."). However, in Mr. Martinez Banuelos' case, because the defendant had not yet complied with the conditions of bail, the court gave the government three court days to provide the required Notice.

proceedings." *Id.* at 5-6. The order further provided that "If ICE does not intend to take defendant into custody and the government has not timely filed the Notice and declaration required . . . [o]nce the United States Marshal is notified by the court that defendant has posted bond and/or complied with all other conditions of release, the United States Marshal shall release defendant so that he may comply with the conditions set for release pending trial." *Id.* at 6 (as modified by April 14, 2006 Clarification). Finally, the court ruled that if ICE took defendant into custody for purpose of his removal proceedings and "the United States Marshal then obtains custody again of defendant for any matters relating to the instant criminal prosecution," then "the United States Marshal shall release defendant immediately, notwithstanding any 'immigration detainer.'" *Id.*

Subsequently, in the case of *United States v. Saul Luna-Gurrola*, No. 07-1755M, Judge Olguin applied *Martinez Banuelos* and *Adomoko* in circumstances even more similar to the present case – to a defendant who had an immigration detainer based on an actual removal order. In a lengthy opinion which, with a subsequent modification, which is attached as Exhibit E, Judge Olguin held that the reasoning of *Martinez Banuelos* and *Adomoko* extended, because ICE's authority for holding an alien pursuant to an actual removal order is also limited to detention for immigration purposes, to wit, the actual removal of the defendant pursuant to the removal order. *See* Exhibit E, at 6-8. Indeed, Judge Olguin found the defense argument even more compelling when an actual removal order existed. He explained:

> In some respects, this case is more compelling than Banuelos. Banuelos, unlike defendant here, challenged whether he could be transferred into ICE's custody because he had not been formally served with a Notice to Appear, although one had been drafted. Because no Notice to Appear had been served on Banuelos, there was no basis to detain him and the court ordered the government to

> respond on what ICE intended to do with respect to Banuelos. The government acknowledged that "if defendant is released to ICE custody, ICE must be permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court.
>
> Here, unlike Banuelos, there is a final order of removal which is not contested by the defendant. However, ICE has stated that it will not execute the removal order, but will nevertheless maintain custody over defendant for purposes of criminal prosecution. To the extent defendant is not in removal proceedings, defendant's position is no different than in Banuelos. Whereas in Banuelos ICE had the ability to serve the Notice of Detainer and obtain proper custody over Banuelos, here – because there was a final order of removal – ICE had the authority to detain defendant for removal purposes, but has chosen not to exercise its removal authority, apparently recognizing that if it takes custody of defendant for removal purposes, "ICE must be permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court."

Exhibit E, at 13 (emphasis in original) (citations to record omitted).

This Court should adopt the reasoning of the *Adomoko* court, as well as the recent decisions in *Martinez Banuelos* and *Luna-Gurrola*, and enter an order consistent with that entered by the federal court in *Martinez Banuelos* and *Luna-Gurrola*.

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B. THE IMMIGRATION AND NATIONALITY ACT AND ICE REGULATIONS ARE CONSISTENT WITH AND DO NOT PRECLUDE RELEASE UNLESS THE GOVERNMENT INDICATES IT IS GOING TO FOREGO CRIMINAL PROSECUTION.

Immigration statutes and regulations are consistent with – and certainly do not preclude – an order that Mr. Avakyants be released unless the government indicates it is going to remove Mr. Avakyants in lieu of proceeding with the criminal case. The one potentially applicable statutory provision is 8 U.S.C. § 1231,[6] which governs the detention of an alien who has already been ordered removed from the United States. Subsection (a)(2) of § 1231 does state in its first sentence that ICE "shall detain the alien" during a 90-day "removal period," but goes on to state in the immediately following sentence that "[u]nder no circumstances during the removal period shall the Attorney General release an alien who has been found inadmissible under section 212(a)(2) or 212(a)(3) or deportable under section 237(a) or 237(a)(4)(B)," which are provisions setting forth criminal or national security grounds for exclusion or deportation that do not apply to Mr. Avakyants. The implication of this second sentence is that the Attorney General *may* release an alien who is not inadmissible or deportable on the listed grounds, and that is in fact ICE's interpretation of the statute. *See* 8 Charles Gordon, Stanley Mailman, and Stephen Yale-Loeder, *Immigration Law and Procedure* 108-22 & n.110 (2009 rev. ed.) (citing Memorandum from Bo Cooper, INS General Counsel, to all regional counsels, *Detention and Release of Aliens with Final Orders of Removal* (Mar. 16, 2000), *reproduced in* 77 Interpreter Releases 649 (May 15, 2000) (copy attached as Exhibit F).

[6] 8 U.S.C. § 1226(a) does not apply because it grants the Attorney General the authority to detain an alien "pending a decision on whether the alien is to be removed from the United States." Here, as discussed, there is already a removal order.

Further, § 1231 provides that the 90-day "removal period" begins on "the latest of the following:

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

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

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

8 U.S.C. 1231(a)(1)(B) (emphasis added). Unless the government indicates that ICE will immediately move to implement the removal order without delaying it during the pendency of the criminal case, the government will be holding Mr. Avakyants not for purposes of "an immigration process," but for purposes of *criminal prosecution* – and so the 90-day removal period will not have begun to run. Section 1231(a)(1)(B) provides that the removal period only begins to run when the government actually is in a position to carry out the removal of the alien, with a default rule that the 90-day removal period begins to run once a removal order is administratively final – *unless* the removal nonetheless will not take place as a matter of fact, either because the alien is challenging the removal in court and has obtained a stay of removal, or because the alien is in some other type of government custody. The latter situation applies here if, as is to be expected, the U.S. Attorney's Office prevents any action upon the removal order so that it can continue with the instant criminal prosecution, and § 1231 will not apply if that is what the government does.

This leads to the other immigration law provision which applies in this case – 8 C.F.R. § 215.3(g). That regulation provides that ICE officials *must* delay removal when it is "deemed prejudicial to the interests of the United States," which includes a removal when the alien "is a witness in, or a party to, any criminal case pending in any criminal court proceeding." Under this regulation, a party to a criminal case – which of course includes a defendant – *cannot* be removed without "the consent of the

prosecuting authority." *Id.* Whether the removal order will not be implemented by ICE is thus in the control of the U.S. Attorney's Office, and so the Court can ascertain by inquiring of the U.S. Attorney whether any immigration custody will be for the purpose of removal. Further, as Judge Olguin recognized in *Luna-Gurrola*, 8 C.F.R. § 215.3(g) does not independently authorize detention and so it cannot override the Bail Reform Act provisions in 18 U.S.C. § 3142.

C. DETENTION PENDING CRIMINAL PROSECUTION WITHOUT MOVING FORWARD TO IMPLEMENT THE REMOVAL ORDER WOULD VIOLATE THE DUE PROCESS CLAUSE.

Finally, detention pending criminal prosecution by ICE would violate Mr. Avakyants' rights under the Due Process Clause. The Supreme Court has held repeatedly that the federal government may detain an alien for purposes of deportation or removal. Here, however, the Defendant would not be held for purposes of removal, but rather to assist in a criminal prosecution in contravention of the bail order.

Even if removal proceedings were formally initiated, moreover, ICE's power to detain is strictly curtailed under the Constitution to "the limited period necessary for [the alien's] removal proceedings." *See Demore v. Kim*, 538 U.S. 510, 526, 123 S. Ct. 1708, 1719 (2003). The Supreme Court has held that immigration detention violates the Due Process Clause if it exceeds a time period "reasonably necessary to secure the alien's removal." *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 699, 121 S. Ct. 2491 (2001)). In *Demore v. Kim*, the Court upheld the mandatory detention provision, 8 U.S.C. § 1226(c), against a due process challenge, on the ground that the detention was "pending . . . removal proceedings." *Id.* at 526-28; *see also id.* at 530 ("Detention *during removal proceedings* is a constitutionally permissible part of that [removal] process.") (emphasis added). The Supreme Court's recent due process jurisprudence

thus holds that ICE may detain an alien only *during* removal proceedings, and even then, only as long as reasonably necessary to carry out the removal proceedings.

Therefore, unless ICE provides a sworn declaration from an ICE agent indicating that it intends to immediately move to implement the removal order, and the U.S. Attorney's Office indicates it will permit that, ICE detention would violate the Due Process Clause, as it would not be for purposes of carrying out removal. It has already been determined that Mr. Avakyants will not pose a flight risk or danger to the community under the release conditions set, and the government cannot trump that determination by shifting Mr. Avakyants to a different arm of the federal government.

V.
CONCLUSION

Bail is basic to our system of law. Doubts about whether it should be granted or denied should always be resolved in favor of the defendant. *Herzog v. United States*, 75 S. Ct. 349, 351 (1955); *see also ABA Standards for Criminal Justice* § 10-1.1 (2d ed. 1980) ("Deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt has not yet been judicially established to economic and psychological hardship, interferes with their ability to defend themselves, and, in many cases, deprives their families of support.") This traditional right to freedom before conviction permits the uhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction. *Hudson v. Parker*, 156 U.S. 277, 285 (1895).

Further, Congress has made clear that the right to bail applies equally to citizens and noncitizens. The government must choose between moving the removal process forward and moving the criminal process forward, and if it chooses the latter, the rules

of the criminal process, including the bail rules, control. Accordingly, it is respectfully requested that the Court issue an order consistent with the orders issued in the *Adomako*, *Martinez Banuelos*, and *Luna-Gurrola* cases.

Respectfully submitted,

SEAN K. KENNEDY
Acting Federal Public Defender

DATED: May 10, 2010

By /s/
CARLTON F. GUNN
Deputy Federal Public Defender

DECLARATION OF COUNSEL

I, Carlton F. Gunn, hereby state and declare as follows:

1. I am a Deputy Federal Public Defender in the Central District of California appointed to represent Mr. Avakyants in the above-entitled action. I am an attorney in good standing admitted to practice in California and in the Central District of California.

2. As reflected in the memorandum of points and authorities to which this declaration is attached, the immigration authorities have placed an immigration detainer on Mr. Avakyants.

3. Based on previous experience representing immigrant criminal defendants, it is my understanding that even if Mr. Avakyants posts the bond set in this case, the government will not release him, but instead will seek to transfer him to immigration custody for continued detention pending trial.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: May 10, 2010

/s/
CARLTON F. GUNN
Deputy Federal Public Defender

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,

vs.

Saak Avakyants

Defendant.

Western Division

Case Number: 2:10-MJ-00500-1
Initial App. Date: 03/12/2010

Complaint & Warrant
Initial App. Time: 2:00 PM

Date Filed: 03/12/2010
Violation: 18:1029(b)(2), (a)(1): 2
CourtSmart: CS 3/12/2010

PROCEEDINGS HELD BEFORE UNITED STATES MAGISTRATE JUDGE: Patrick J. Walsh

CALENDAR/PROCEEDINGS SHEET LOCAL/OUT-OF-DISTRICT CASE

PRESENT: Anglon-Reed, Celia (*Deputy Clerk*) Dorothy Kim (*Assistant U.S. Attorney*) None (*Interpreter/Language*)

- ☑ INITIAL APPEARANCE NOT HELD - CONTINUED
- ☑ Defendant informed of charge and right to: remain silent; appointment of counsel, if indigent; right to bail; bail review and ☑ preliminary hearing OR ☐ removal hearing / Rule 20.
- ☐ Defendant states true name ☐ is as charged ☐ is _____
- ☑ Defendant advised of consequences of false statement in financial affidavit. ☐ Financial Affidavit ordered **SEALED**.
- ☑ Attorney: Carl Gunn, DFPD ☑ Appointed ☐ Prev. Appointed ☐ Poss. Contribution (see separate order)
  - ☐ Special appearance by: _____.
- ☑ Government's request for detention is: ☐ GRANTED ☐ DENIED ☐ WITHDRAWN ☐ CONTINUED
- ☐ Defendant is ordered: ☐ Permanently Detained ☐ Temporarily Detained (see separate order).
- ☑ BAIL FIXED AT $ 25,000 AB **(SEE ATTACHED COPY OF CR-1 BOND FORM FOR CONDITIONS)**
- ☐ Government moves to UNSEAL Complaint/Indictment/Information/Entire Case: ☐ GRANTED ☐ DENIED
- ☐ Preliminary Hearing waived.
- ☐ Class B Misdemeanor ☐ Defendant is advised of maximum penalties
- ☐ This case is assigned to Magistrate Judge _____. Counsel are directed to contact the clerk for the setting of all further proceedings.
- ☐ **PO/PSA WARRANT** ☐ Counsel are directed to contact the clerk for District Judge _____ for the setting of further proceedings.
- ☑ Preliminary Hearing set for 3/24/2010 at 4:30 PM Duty
- ☑ PIA set for: 3/29/10 at 8:30 AM in LA; ~~at 9:30 AM in Riverside~~; at 10:00 AM in Santa Ana
- ☐ Government's motion to dismiss case/defendant _____ only: ☐ GRANTED ☐ DENIED
- ☐ Defendant's motion to dismiss for lack of probable cause: ☐ GRANTED ☐ DENIED
- ☐ Defendant executed Waiver of Rights. ☐ Process received.
- ☐ Court ORDERS defendant Held to Answer to _____ District of _____
  - ☐ Bond to transfer, if bail is posted. Defendant to report on or before _____
  - ☐ Warrant of removal and final commitment to issue. Date issued: _____ By CRD: _____
  - ☐ Warrant of removal and final commitment are ordered stayed until _____
- ☐ Case continued to (Date) _____ (Time) _____ AM / PM
  Type of Hearing: _____ Before Judge _____ /Duty Magistrate Judge.
  Proceedings will be held in the ☐ Duty Courtroom _____ ☐ Judge's Courtroom _____
- ☑ Defendant committed to the custody of the U.S. Marshal ☐ Summons: Defendant ordered to report to USM for processing.
- ☐ Abstract of Court Proceeding (CR-53) issued. Copy forwarded to USM.
- ☐ Abstract of Order to Return Defendant to Court on Next Court Day (M-20) issued. Original forwarded to USM.
- ☐ RELEASE ORDER NO: _____
- ☐ Other: _____

☑ **PSA** ☑ **FINANCIAL** ☑ **READY**

Deputy Clerk Initials CA

_____ : 1:15

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. Saak Avakyants Defendant/Material Witness.	CASE NUMBER: 10-500M
	COMPLAINT: / INDICTMENT / INFORMATION:
	VIOLATION OF TITLE: 18 / SECTION: 1029(b)(2),(a)(1),2

☐ PERSONAL RECOGNIZANCE (Signature only - no dollar amount)
☐ UNSECURED APPEARANCE BOND IN THE AMOUNT OF $ _____ RELEASE No. _____
☒ APPEARANCE BOND IN THE AMOUNT OF $ 25,000
☐ WITH CASH DEPOSIT (AMOUNT OR %) _____
☐ WITH AFFIDAVIT OF SURETY NO JUSTIFICATION (Form CR-4)
☐ RELEASE TO PRETRIAL ONLY
☐ FORTHWITH RELEASE
☐ ALL CONDITIONS OF BOND SHALL BE MET AND BOND POSTED BY: _____ *Date*
☒ WITH AFFIDAVIT WITH JUSTIFICATION OF SURETY (Form CR-3)
☐ WITH DEEDING OF PROPERTY
☐ COLLATERAL BOND IN AMOUNT OF (Cash or Negotiable Securities) $ _____
☒ CORPORATE SURETY BOND IN AMOUNT OF (Separate Form Required) $ $25,000
☐ ADDITIONAL REQUIREMENTS: _____
☐ BAIL FIXED BY COURT _____ ☐ ALL REQUIREMENTS HAVE BEEN MET: _____
Deputy Clerk *Deputy Clerk*

PRE-CONDITIONS TO RELEASE

☒ Bail is subject to Nebbia hearing which is a hearing to inquire about the source of the collateral.
☐ The Nebbia hearing can be waived by the government.

ADDITIONAL CONDITIONS OF RELEASE

In addition to the GENERAL CONDITIONS of RELEASE, as specified on other side, the following conditions of release are imposed upon you:

☒ Defendant shall submit to: ☒ Pretrial Supervision. [ ] Intensive Pretrial Supervision.
☒ Surrender all passports to the Clerk of Court, or sign a declaration no later than, _____ and not apply for the issuance of a passport during the pendency of this case.
☒ Travel is restricted to: CD/CA _____
☒ Do not enter premises of any airport, seaport, railroad, or bus terminal which permits exit from the Continental U.S. or area of restricted travel without Court permission.
☒ Reside as approved by PSA and do not relocate without prior permission from PSA. _____
☒ Maintain or actively seek employment and provide proof to PSA.
☐ Maintain or commence an educational program and provide proof to PSA.
☒ Avoid all contact, directly or indirectly, with any person who is or who may become a victim or potential witness in the subject investigation or prosecution, including but not limited to: co-defendants
☒ Not possess any firearms, ammunition, destructive devices, or other dangerous weapons. [ ] In order to determine compliance, you will agree to submit to a search of your person and/or property by Pretrial Services in conjunction with the US Marshal.
☒ Not use/possess any identification other than in your own legal name or true name. [ ] In order to determine compliance, you will agree to submit to a search of your person and/or property by Pretrial Services in conjunction with the U.S. Marshal.
☐ Not use alcohol.
☒ Not use or possess illegal drugs. [ ] In order to determine compliance, you will agree to submit to a search of your person and/or property by Pretrial Services in conjunction with the US Marshal.
☐ Submit to drug [and/or] alcohol testing and outpatient treatment as directed by PSA. You shall pay all or part of the cost for testing and treatment based upon your ability to pay as determined by PSA.
☐ Participate in residential drug [and/or] alcohol treatment as deemed necessary by PSA. You shall pay all or part of the cost for treatment based upon your ability to pay as determined by PSA. [ ] **Release to PSA only.**
☐ Participate in mental health evaluation, and/or counseling and/or treatment as directed by PSA. You shall pay all or part of the costs based upon your ability to pay as determined by PSA.

X **Defendant Initials** SA X **Date** 03/12/10

ORIGINAL - YELLOW COPY PINK- PRETRIAL SERVICES WHITE - DEFENDANT COPY

SAAK AVAKYANTS 10-500

Defendant/Material Witness.

☐ Participate in one of the following home confinement program components and abide by all requirements of the program which [ ] **will** or [ ] **will not** include electronic monitoring or other location verification system. You shall pay all or part of the cost of the program based upon your ability to pay as determined by PSA.

[ ] **Curfew**. You are restricted to your residence every day: [ ] from _____ to _____. [ ] as directed by PSA. [ ] **Release to PSA only**.

[ ] **Home Detention**. You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court-ordered obligations; or other activities as pre-approved by PSA. [ ] **Release to PSA only**.

[ ] **Home Incarceration**. You are restricted to your residence at all times except for medical needs or treatment; religious services; and court appearances as pre-approved by PSA. [ ] **Release to PSA only.**

☐ Not possess or have access to, either in the home, the workplace, or any other location, any device which offers Internet access, except as approved by PSA. [ ] In order to determine compliance, you will agree to submit to a search of your person and/or property by Pretrial Services in conjunction with the US Marshal.

☐ Not associate or have verbal, written, telephonic, or electronic communication with any person who is less than the age of 18 except in the presence of another adult who is the parent or legal guardian of the minor.

☐ Not loiter/be found within 100 feet of any school yard, park, playground, arcade, or other place primarily used by children under the age of 18.

☐ Not be employed by, affiliate with, own, control, or otherwise participate directly or indirectly in conducting the affairs of any daycare facility, school, or other organization dealing with the care, custody, or control of children under the age of 18.

☐ Not view or possess child pornography or child erotica. [ ] In order to determine compliance, you will agree to submit to a search of your person and/or property, including computer hardware and software, by Pretrial Services in conjunction with the US Marshal.

☐ Other conditions: _____

_____

X 12/03/10 X _____ (818)6795361

Date *Defendant/Material Witness' Signature* *Telephone Number*

X L.A. CA. 91606.

City, State And Zip Code

☐ **Check if interpreter is used**: I have interpreted into the _____ language all of the above conditions of release and have been told by the defendant that he or she understands all of the conditions of release.

_____ _____

Interpreter's signature *Date*

Approved: _____ _____

United States District Judge / Magistrate Judge *Date*

If Cash Deposited: Receipt # _____ For $_____

(This bond may require surety agreements and affidavits pursuant to Local Criminal Rules 46-3.2 and 46-6)

ORIGINAL - YELLOW COPY PINK- PRETRIAL SERVICES WHITE - DEFENDANT COPY

G2O U.S.GOVERNMENT PRINTING OFFICE 2005-785-040

U.S.GOVERNMENT PRINTING OFFICE 2005-785-040

EXHIBIT B

Department of Homeland Security
U.S. Immigration and Customs Enforcement

Immigration Detainer - Notice of Action

File No.
A96 059 399
Date: March 11, 2010

To: (Name and title of institution)	From: (INS office address)
C: Marshalls ATTN: Booking/Warrants Detainer to follow to any subsequent Law Enforcement Correctional facility.	ICE Investigation Duty Agent 501 West Ocean Blvd Long Beach, CA 90802

Name of alien: **AVAKYANTS, SAAK**
BOOKING #: _____ BOOKING Name: _____
Date of birth: 10/13/1976 Nationality: **ARMENIA** Sex: **MALE**

You are advised that U.S. Immigration and Customs Enforcement concerning the above-named inmate of your institution have taken the action noted below:

☒ Investigation has been initiated to determine whether this person is subject to removal from the United States.

☐ A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on _____ (Date).

☐ A warrant of arrest in removal proceedings, a copy of which is attached, was served on _____ (Date).

☐ Deportation or removal from the United States has been ordered.

It is requested that you:

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and quarters assignments, or other treatment, which he or she would otherwise receive.

☒ Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for ICE to assume custody of the alien. You may notify ICE by calling [illegible] during business hours or 213 [illegible] after hours in an emergency.

☐ Please return a signed copy via facsimile to

☐ Please complete and sign the bottom block of the duplicate of this form and return it to this office.

213 [illegible]

☒ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.

☒ Notify this office in the event of the inmate's death or transfer to another institution.

☐ Please cancel the detainer previously placed by this office on _____

[illegible]
(Signature of ICE official)

Special Agent, DHS - I.C.E.
(Title of ICE official)

Receipt acknowledged:

Date of latest conviction: _____ Latest conviction charge: _____
Estimated release date: _____

Signature and title of official: _____

Form I-247 (Rev. 4-15-97)N

EXHIBIT C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAAK AVAKYANTS,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

No. 05-73463

Agency No. A96-059-399

ORDER

Before: GOODWIN, McKEOWN and FISHER, Circuit Judges.

The Clerk shall file respondent's reply received October 30, 2006. We have reviewed the parties' responses to this court's September 11, 2006 order to show cause. Petitioner's motion for leave to file a late petition for review is denied. *See Singh v. INS*, 315 F.3d 1186, 1188 (9th Cir. 2003) ("[The] time limit is mandatory and jurisdictional, and cannot be tolled."). A claim of ineffective assistance of counsel that arises after the Board of Immigration Appeals ("BIA") has ruled may be raised with the BIA by filing a motion to reopen. *See Lata v. INS*, 204 F.3d 1241, 1245-46 (9th Cir. 2000).

05-73463

This petition for review, filed June 10, 2005, is untimely to challenge the BIA's December 20, 2004 order. *See* 8 U.S.C. § 1252(b)(1); *Sheviakov v. INS*, 237 F.3d 1144 (9th Cir. 2001). Accordingly, the petition for review is dismissed.

All pending motions are denied as moot. The temporary stay of removal confirmed by Ninth Circuit General Order 6.4(c) shall continue in effect until issuance of the mandate.

DISMISSED.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A96-059-399 - LOS ANGELES

Date: AUG 24 2004

In re: AVAKYANTS, SAAK

IN REMOVAL PROCEEDINGS

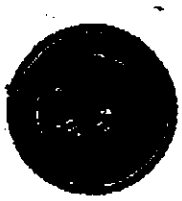
APPEAL

ON BEHALF OF RESPONDENT: Mahdessian, Rita, Esq.,

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FOR THE BOARD



U.S. Department of

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Mahdessian, Rita, Esq.,
535 North Brand Blvd.
Suite 270
Glendale, CA 91203-0000

Office of the District Counsel/LO
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: AVAKYANTS, SAAK **A96-059-399**

Date of this notice: 06/30/2004

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

F.F.K.

Frank Krider
Acting Chief Clerk

Enclosure

Panel Members:
SCIALABBA, LORI L.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A96 059 399 - Los Angeles

Date: JUN 30 2004

In re: SAAK AVAKYANTS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Rita Mahdessian, Esquire

By Direction of the Board,

We find the reason stated by the respondent insufficient for us to accept the untimely brief in our exercise of discretion. 8 C.F.R. § 1003.3(c)(1). Therefore, the motion to accept the untimely brief is denied. Accordingly, the brief is returned. The Board will not consider any additional motions to accept the late filed brief in this matter.

Lori Scialabba

FOR THE BOARD

IMMIGRATION COURT
606 SOUTH OLIVE ST., 15TH FL.
LOS ANGELES, CA 90014

In the Matter of

AVAKYANTS, SAAK
Respondent

Case No.: A96-059-399

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Jun 10, 2003. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to [redacted] Russia or in the alternative to Azerbaijan

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to

[X] Respondent's application for asylum was ( )granted (X)denied ( )withdrawn.

[X] Respondent's application for withholding of removal was ( )granted (X)denied ( )withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( )granted ( )denied ( )withdrawn or ( )other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( )granted ( )denied ( )withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: CAT denied.

Date: Jun 10, 2003

Appeal: ~~Waived~~ Reserved by Respondent

Appeal Due By: July 10, 2003

Renée L. Renner
RENEE L. RENNER
Immigration Judge

JEB

ALIEN NUMBER: 96-059-399 ALIEN NAME: [illegible] ITS, SAAK

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [P] ALIEN's ATT/REP [P] INS

DATE: 6/10/03 BY: COURT STAFF _____

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Q6

EXHIBIT D

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FAX DELIVERY ON PLAINTIFF/DEFENDANT (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT FAX NUMBER OF RECORD IN THIS ACTION ON THIS DATE.

DATE April 13, 2006

Vanessa DeLucio

DEPUTY CLERK

FILED
CLERK, U.S. DISTRICT COURT
APR 12 2006
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Priority
Send
Enter
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only ✓

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ABDON MARTINEZ EANUELOS,

Defendant.

NO. 06-0547M (FMO)

ORDER Re: DEFENDANT'S MOTION TO ORDER UNITED STATES MARSHALS TO IMMEDIATELY RELEASE DEFENDANT PURSUANT TO THIS COURT'S BAIL ORDER NOTWITHSTANDING THE "IMMIGRATION DETAINER"

Having reviewed and considered all the briefing and oral argument presented to the court with respect to defendant's Motion to Order United States Marshals to Immediately Release Defendant Pursuant to this Court's Bail Order Notwithstanding the "Immigration Detainer" ("Motion"), the court concludes as follows.

BACKGROUND

Defendant is charged with illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a) & (b)(2). Defendant made his first appearance before the court on March 23, 2006. During that proceeding, the court appointed counsel for defendant who requested that the hearing on the government's request for detention be continued to March 27, 2006. On March 23, 2006, the United States Immigration and Customs Enforcement ("ICE") placed an immigration detainer (Form I-247) on defendant pursuant to 8 C.F.R. § 287.7(a). (Government's Opposition to

Defendant's Motion to Order United States Marshals to Immediately Release Defendant Pursuant to this Court's Bail Order Notwithstanding the "Immigration Detainer" ("Opposition") at 4 & Exh. I).

On March 27, 2006, after a full hearing pursuant to 18 U.S.C. § 3142(f), the court denied the government's motion to detain defendant. The court found that there was a combination of conditions that would reasonably assure the appearance of defendant. Among other conditions, the court set bail for defendant in the amount of $490,000 with a justified affidavit of surety by defendant's wife for $300,000 and $190,000 from defendant, with the deeding of their respective properties. The court ordered the United States Marshal ("USM") to hold defendant in custody until notified by the court's clerk that defendant has complied with all the conditions for release, including the deeding of the property.

On March 29, 2006, defendant filed the instant Motion. The government filed its Opposition on April 7, 2006, and defendant filed his Reply on April 11, 2006.

DISCUSSION

I. THE BAIL REFORM ACT.

Under the Bail Reform Act, 18 U.S.C. § 3142(b), Congress has mandated that a judicial officer shall order the pretrial release of the person "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b).

The Act "requires the release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required and the safety of the community." United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991) (citing 18 U.S.C. § 3142(c)(2)); see also United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985). According to the Gebro court:

> Only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in the defendant's favor. On a motion for pretrial detention, the government bears the burden of showing by a preponderance of the evidence that the defendant poses a flight risk, and

by clear and convincing evidence that the defendant poses a danger to the community.

Gebro, 948 F.2d at 1121 (internal citations omitted). "[T]he statute neither requires nor permits a pretrial determination of guilt." Id. (citing United States v. Winsor, 785 F.2d 755, 757 (9th Cir. 1986) (per curiam) and Motamedi, 767 F.2d at 1408).

If the judicial officer determines that a person is not a citizen of the United States or lawfully admitted for permanent residence and that he may flee or pose a danger to the community, the judicial officer shall order temporary detention for not more than ten days and direct the attorney for the government to notify the appropriate immigration official. 18 U.S.C. § 3142(d)(1)(B).

If the judicial officer determines that the individual may flee or pose a danger and the immigration official does not take custody within ten days, the statute directs the Court to apply the normal release and detention rules to deportable aliens without regard to the laws governing release in ICE deportation proceedings:

> If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.

18 U.S.C. § 3142(d). Thus, Congress has directed the courts to apply the normal release and detention rules to a deportable alien (i.e., "[S]uch person shall be treated in accordance with the other provisions of this section."). Id.; see also United States v. Xulam, 84 F.3d 441, 442-43 (D.C. Cir. 1996) (per curiam) (deportable alien not a flight risk where conditions could be imposed to ensure return to court); United States v. Adomako, 150 F.Supp.2d 1302, 1306-07 (M.D. Fla. 2001) (defendant "is not barred from release because he is a deportable alien;" immigration status is one factor that the court weighs in the flight risk analysis).

II. DEFENDANT'S MOTION.

Defendant asserts that the "government's continued attempt to detain [him], by attempting to transfer him to immigration custody, violates . . . the Bail Reform Act." (Motion at 6). Defendant argues that detention by ICE is only proper for purposes of a removal proceeding. (Id. at 13)

("where any transfer would not be for purposes of removal, the detainer cannot justify continued detention"). According to defendant, because the United States Attorney's Office ("USAO") has instituted a criminal prosecution against him, "it is clear that if transferred to ICE custody, the government would not truly be holding [defendant] for purposes of removal proceedings, but in actual fact would be detaining him, pretextually and contrary to this Court's bail order, for purposes of a criminal prosecution." (Id.); (see also id. at 2) (ICE "may not lawfully detain [defendant] when it has no intention of effecting his removal expeditiously, but instead would only delay removal proceedings pending the instant criminal prosecution").

Defendant's Motion relies on Adomako, which held that 18 U.S.C. § 3142(d) directs a district court "to disregard the laws governing release in INS deportation proceedings when it determines the propriety of release or detention of a deportable alien pending trial[.]" 150 F.Supp.2d at 1307. The Adomako court ordered the USAO to file and serve notice as to whether the INS intended to take the defendant into custody pursuant to § 3142(d)'s ten-day deadline "to permit deportation, and whether the INS intends to deport [the defendant] before trial[.]" Id. at 1308. The Adomako court further ordered that if the INS did not take custody within the deadline, the USM could only detain the defendant until he met the court's previously set release conditions. Id. Finally, the court ordered that if the defendant were to meet the release conditions, "the Attorney General (in his capacity as head of both the United States Marshals Service and the INS) shall release the defendant so that he may comply with the conditions set for his release pending trial[.]" Id.

The government's Opposition did not mention or discuss the Adomako decision. (See, generally, Opposition at 1-12). However, the government appears to agree with defendant that detention by ICE for any purpose other than removal proceedings is improper. Specifically, the government states that it:

> has not sought, nor does it intend, to detain defendant for []his criminal prosecution through the civil detention mechanism available to ICE. Rather, the government has asked defendant be detained by the USMS. Continued detention by ICE would contravene ICE's statutorily-prescribed mission of

> removal of criminal aliens from the country. It would also contravene the statutes governing ICE's operation. ICE is directed to effect the physical removal of individuals ordered removed within the statutorily specified 90-day "removal period." 8 U.S.C. § 1231(a)(1)(A). Moreover, ICE is only permitted to detain aliens for a reasonable time after the propriety of their removal has been adjudicated.

(Id. at 8). The government acknowledges that if defendant is released to ICE custody to effect his removal, it will not be able to proceed with the instant prosecution:

> Because [defendant] will likely be removed from this country based on the charges of removability, defendant will be rendered unable to attend further criminal proceedings.

(Id. at 9) (see also id.) ("if defendant is released to ICE custody, ICE must be permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court").

In light of the government's position that it does not intend to detain defendant for his pending criminal proceedings through ICE and its acknowledgment that it will likely not be able to prosecute defendant once removal proceedings have commenced, the court believes that the orders (with the modifications noted below) entered by the Adomako court are sufficient to address the parties' concerns. In other words, the court will give the USAO ten days to state whether ICE has taken defendant into custody and initiated removal proceedings. If the USAO does not state that ICE taken defendant into custody and initiated removal proceedings within the ten-day period, then the USM shall release defendant once he has satisfied all the conditions of release.

Based on the foregoing, IT IS ORDERED THAT:

1. Defendant's Motion to Order United States Marshals to Immediately Release Defendant Pursuant to this Court's Bail Order Notwithstanding the "Immigration Detainer" **(Document No. 9)** is **granted and denied in part**.

2. No later than **April 17, 2006**, the government shall file and serve a Notice Re: Removal Proceedings Against Defendant Banuelos ("Notice") stating whether and when ICE intends to take

defendant into custody to commence removal proceedings. The Notice shall be accompanied by a declaration from an ICE official providing all relevant information pertaining to the commencement and completion of the removal proceedings.

3. If ICE has not taken defendant into custody and the government has not timely filed the Notice and declaration required by paragraph two above, the United States Marshal shall otherwise keep defendant in custody until notified by the court that defendant has posted bond and/or complied with all other conditions for release. Once the United States Marshal is notified by the court that defendant has posted bond and/or complied with all other conditions of release, the United States Marshal shall release defendant so that he may comply with the conditions set for release pending trial.

4. In the event that: (i) ICE takes custody of defendant for purposes of his removal proceedings; and (ii) the United States Marshal then obtains custody again of defendant for any matters relating to the instant criminal prosecution; and (iii) defendant has satisfied the bond conditions set by this court, the United States Marshal shall release defendant immediately, notwithstanding any "immigration detainer."

Dated this 12 day of April, 2006.

Fernando M. Olguin
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

CASE NO.: CV 06-0547 M (FMO) DATE: April 14, 2006

TITLE: UNITED STATES OF AMERICA v. ABDON MARTINEZ BANUELOS

DOCKET ENTRY:

PRESENT:

Hon. Fernando M. Olguin, United States Magistrate Judge

Vanessa Del Rio — Deputy Clerk

- - - — Court Reporter / Tape No.

COUNSEL PRESENT FOR PLAINTIFF(S): Not present

COUNSEL PRESENT FOR DEFENDANT(S): Not present

PROCEEDINGS: **Order Clarifying the Court's Order Re: Defendant's Motion To Order United States Marshals To Immediately Release Defendant Pursuant To This Court's Bail Order Notwithstanding The "Immigration Detainer."**

The court hereby clarifies its Order Re: Defendant's Motion To Order United States Marshals To Immediately Release Defendant Pursuant To This Court's Bail Order Notwithstanding The "Immigration Detainer" ("Order") filed on April 12, 2006. Specifically, page 5, lines 18-21 are hereby amended to state, "In other words, the court will give the USAO until **April 17, 2006,** to state whether ICE intends to take defendant into custody and initiate removal proceedings. If the USAO does not state that ICE intends to take defendant into custody and initiate removal proceedings by the deadline set forth below, then the USM shall release defendant once he has satisfied all the conditions of release." Such amendment comports with paragraph 2 of the Order. (See Court's Order of April 12, 2006, at 5, ¶ 2).

In addition, page 6, line 4 is hereby amended to state, "If ICE does not intend to take defendant into custody and the government has not timely filed the Notice and declaration required by paragraph two above, the United States Marshal shall otherwise keep defendant in custody until notified by the court that defendant has posted bond and/or complied with all other conditions for release."

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FAX DELIVERY ON PLAINTIFF/DEFENDANT (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT FAX NUMBER OF RECORD IN THIS ACTION ON THIS DATE.

DATE: 4/14/06

Vanessa Del Rio
DEPUTY CLERK

EXHIBIT E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SAUL LUNA-GURROLA, Defendant.	NO. 07-1755M **ORDER Re: DEFENDANT'S EX PARTE APPLICATION FOR HEARING RE BAIL ORDER OF OCTOBER 23, 2007**

Having reviewed and considered all the briefing and oral argument presented to the court with respect to defendant's Ex Parte Application for Hearing Re Bail Order of October 23, 2007 ("First Ex Parte Application") and defendant's Ex Parte Application to Exonerate Bond and Return Defendant into Federal Custody ("Second Ex Parte Application"), the court concludes as follows.

BACKGROUND

Defendant is charged with illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a) & (b)(2). On October 23, 2007, the United States Immigration and Customs Enforcement ("ICE") placed an immigration detainer (Form I-247) on defendant pursuant to 8 C.F.R. § 287.7(a). (Government's Opposition to defendant's First Ex Parte Application ("Opposition") at 4 & Exh. A). On the same day, defendant made his first appearance before the court. After a full hearing pursuant to 18 U.S.C. § 3142(f), the court appointed counsel for defendant and denied the

government's motion to detain defendant pending trial. The court found that there was a combination of conditions that would reasonably assure the appearance of defendant. Specifically, the court set bail for defendant in the amount of $160,000, with a justified affidavit of surety for $150,000, to be secured by the deeding of property, and $10,000 to be secured by cash. The court also ordered that defendant be subject to pre-trial supervision, electronic monitoring and surrender his passport. Finally, the court ordered the United States Marshal ("USM") to hold defendant in custody until notified by the court's clerk that defendant has complied with all the conditions for release.

On October 31, 2007, defendant complied with the final requirements of his bail conditions. On the same day, defendant filed the First Ex Parte Application. On November 1, 2007, the duty Magistrate Judge approved defendant's release to pre-trial services on bond. Due to the immigration detainer, however, defendant was released to the custody of ICE, where he presently remains.

On November 7, 2007, defendant received a Departure Control Order from ICE that his departure would be temporarily prevented pursuant to 8 C.F.R. § 215.3(g), because the United States Attorney's Office ("USAO") filed criminal charges against him and his presence is required in the United States until the criminal case is concluded. (See Government's Supplemental Opposition ("Govt.'s Supp. Opposition"), Exh. A ("Departure Order")). Thus, defendant was ordered not to depart the United States until he received notice from ICE revoking the Departure Order. (See id.).

On November 9, 2007, the government filed its Opposition. On November 13, 2007, defendant filed his Reply to the government's Opposition ("Reply"). On the same day, defendant also filed the Second Ex Parte Application. On November 14, 2007, the government filed an Application to the Criminal Duty Judge for Review of the Magistrate Judge's Bail Order ("Application for Review") and a Memorandum of Points and Authorities in Support of the Motion for Review. On the same day, the court heard oral argument from the parties regarding

defendant's Ex Parte Applications.[1] In light of the number and complexity of issues raised by the parties, the court gave the parties an opportunity to file a supplemental brief addressing all the issues that were raised in the papers or during the oral argument. On November 16, 2007, both parties filed their supplemental briefs.

DISCUSSION

I. THE BAIL REFORM ACT.

Under the Bail Reform Act, 18 U.S.C. § 3142(b), Congress has mandated that a judicial officer shall order the pretrial release of the person "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b). The Act "requires the release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required and the safety of the community." United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991) (per curiam) (citing 18 U.S.C. § 3142(c)(2)); see also United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985). According to the Gebro court:

> Only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in the defendant's favor. On a motion for pretrial detention, the government bears the burden of showing by a preponderance of the evidence that the defendant poses a flight risk, and by clear and convincing evidence that the defendant poses a danger to the community.

948 F.2d at 1121 (internal citation omitted). "[T]he statute neither requires nor permits a pretrial determination of guilt." Id. (citing United States v. Winsor, 785 F.2d 755, 757 (9th Cir. 1986) (per curiam) and Motamedi, 767 F.2d at 1408).

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[1] The court also heard argument relating to the government's Application for Review of this court's bail decision. However, the court believes that the government's Application for Review is not properly before this court and, therefore, this decision will not address the merits of the Application for Review. See 18 U.S.C. § 3145(a).

If the judicial officer determines that a person is not a citizen of the United States or lawfully admitted for permanent residence and that he may flee or pose a danger to the community, the judicial officer shall order temporary detention for not more than ten days and direct the attorney for the government to notify the appropriate immigration official. 18 U.S.C. § 3142(d). If the judicial officer determines that the individual may flee or pose a danger and the immigration official does not take custody within ten days, the statute directs the court to apply the normal release and detention rules to deportable aliens without regard to the laws governing release in ICE deportation proceedings:

> If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.

Id. Thus, Congress has directed the courts to apply the normal release and detention rules to a deportable alien (i.e., "[S]uch person shall be treated in accordance with the other provisions of this section."). Id.; see also United States v. Xulam, 84 F.3d 441, 442-43 (D.C. Cir. 1996) (per curiam) (deportable alien not a flight risk where conditions could be imposed to ensure return to court); United States v. Adomako, 150 F.Supp.2d 1302, 1307 (M.D. Fla. 2001) (defendant "is not barred from release because he is a deportable alien[;]" immigration status is one factor that the court weighs in the flight risk analysis).

II. DEFENDANT'S EX PARTE APPLICATION.

Defendant asserts that, although there is a final order of removal entered against him, his removal has been "prevented by the [USAO] . . . so that it may pursue the instant [criminal] prosecution."[2] (Reply at 2). Defendant argues that his detention by ICE is "solely for purposes

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[2] Defendant concedes that because he was released to ICE's custody within 24 hours of being released by the USM, his request that he be released from the USM's custody if not released within 48 hours of satisfying the conditions of his release is moot. (See First Ex Parte Application at 8-9 & Defendant's Supplemental Briefing Pursuant to Court Order of November 14, 2007 ("Def.'s Supp. Brief.") at 13). Defendant has also withdrawn his request to exonerate his bond. (See Def.'s Supp. Brief. at 21).

of the instant [criminal] prosecution – despite the fact that this [c]ourt has ordered him free on bond . . . [and that t]he government's actions violate basic notions of Due Process and the Bail Reform Act." (Id.). Accordingly, defendant seeks modification of the Court's Order of October 23, 2007, to order his pre-trial release from either the USM's or ICE's custody. (See Defendant's Supplemental Briefing (Def.'s Supp. Brief.") at 22).

Defendant relies on Adomako, which held that 18 U.S.C. § 3142(d) directs a district court "to disregard the laws governing release in [Immigration and Naturalization Service ("INS")][3] deportation proceedings when it determines the propriety of release or detention of a deportable alien pending trial[.]" 150 F.Supp.2d at 1307. The Adomako court ordered the USAO to file and serve notice as to whether the INS intended to take the defendant into custody pursuant to § 3142(d)'s ten-day deadline "to permit deportation, and whether the INS intends to deport [the defendant] before trial[.]" Id. at 1308. The Adomako court further ordered that if the INS did not take custody within the deadline, the USM could detain the defendant only until he met the court's previously set release conditions. Id. Finally, the court ordered that if the defendant were to meet the release conditions, "the Attorney General (in his capacity as head of both the United States Marshals Service and the INS) shall release the defendant so that he may comply with the conditions set for his release pending trial[.]" Id.

Defendant further relies on this court's holding in United States v. Abdon Martinez Banuelos, No. 06-0547M, filed April 12, 2006. In Banuelos, the court relied on Adomako to order the USM to release Banuelos, a pre-trial detainee, notwithstanding any immigration detainer, if the government did not provide the court with notice of its intention to remove the defendant before trial. See id. at 4-6.

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[3] The INS was abolished on March 3, 2003, and its functions were transferred to the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (2002).

The government disagrees with the holdings in Adomako and Banuelos.[4] (See Govt.'s Supp. Opposition at 8-9). The government argues that the instant case is distinguishable from Adomako and Banuelos because in both of those cases the defendants were in the USM's custody at the time of the decision, whereas in the instant matter, defendant is in the custody of ICE. (See id. at 9). The government maintains that the court in Adomako was "clearly endeavoring to afford the defendant reasonable opportunity to consult with his attorney and translator in preparation for his criminal trial . . . [and here,] it does not appear that defendant has had any such issues while in ICE custody." (Id.). Further, the government argues that because the INS's functions have been subsumed within the Department of Homeland Security ("DHS") since the Adomako decision, any order directing the Attorney General, both in his capacity as head of the USAO and the INS, to release the defendant "would fall short of mandating DHS or ICE's course of action." (Id. at 9-10).

Additionally, the government asserted at oral argument that because there is a final order of removal entered against defendant, ICE can detain him for up to 90 days to effectuate his removal pursuant to 8 U.S.C. § 1231(a)(1). (See Transcript of Hearing Re Defendant's Ex Parte Application ("Hearing Trans.") at 17-18 & 21-22). The government also asserts that ICE has the authority to prevent defendant's departure from the United States and that defendant cannot challenge the Departure Order because he has failed to exhaust his administrative remedies pursuant to 8 C.F.R. § 215.4. (See Govt.'s Supp. Opposition at 4-7). Finally, the government maintains that, "[w]hile the Bail Reform Act grants the [c]ourt authority to determine whether a defendant awaiting trial in a criminal case shall be released or detained, it does not authorize the [c]ourt to release him notwithstanding a lawfully-issued immigration detainer." (Id. att 7). The government states that, "[t]aking into consideration the reinstatement of defendant's prior order of deportation, coupled with the fact that he is subject to mandatory detention, it is axiomatic that

[4] The government's initial Opposition did not mention or discuss the Adomako or the Banuelos decisions. (See, generally, Opposition at 1-9).

ICE would have not only placed a detainer on defendant, but also detain him in their custody after his release from USM[]." (Id. at 7-8) (footnote omitted).

None of the government's arguments are persuasive. Indeed, some of the its arguments are seemingly inconsistent and difficult to reconcile on any logical or principled basis. For example, during oral argument, counsel for the government stated that the government's position in this case has not changed from the position it took in Banuelos. (See Hearing Trans. at 17). In other words, the government's position, as advanced in Banuelos, is that the government:

> has not sought, nor does it intend, to detain defendant for []his criminal prosecution through the civil detention mechanism available to ICE. . . . Continued detention by ICE would contravene ICE's statutorily-prescribed mission of removal of criminal aliens from the country. It would also contravene the statutes governing ICE's operation. ICE is directed to effect the physical removal of individuals ordered removed within the statutorily specified 90-day "removal period." 8 U.S.C. § 1231(a)(1)(A). Moreover, ICE is only permitted to detain aliens for a reasonable time after the propriety of their removal has been adjudicated.

(Def.'s Supp. Brief., Exh. G[5] ("Govt.'s Banuelos Opposition") at 47); (see also Govt.'s Supp. Opposition at 7) ("ICE detention . . . is an administrative tool used to facilitate civil proceedings which determine the eligibility of aliens to remain in the United States. It is not to punish the crime of unlawful entry."). In Banuelos, the government also conceded that if defendant is released to ICE custody to effect his removal, it will not be able to proceed with the instant prosecution: "Because [defendant] will likely be removed from this country based on the charges of removability, defendant will be rendered unable to attend further criminal proceedings." (Govt.'s Banuelos Opposition at 48); (see also id.) ("[I]f defendant is released to ICE custody, ICE must be

[5] Exhibit G of Def.'s Supp. Brief is an excerpt of the brief the government filed in Banuelos. In addition, the Banuelos decision quotes extensively from the government's brief.

permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court.").

After determining that the government's position had not changed from the position it took in Banuelos, the court asked government counsel to explain on what ground ICE was detaining defendant. (Hearing Trans. at 23). Counsel alternated between refusing to take a position and claiming that defendant was being detained pursuant to 8 U.S.C. § 1231(a)(1), which allows ICE to detain a person for up to 90 days to effectuate his removal. (Compare id. at 18 & 21-22 with id. at 23-25 & 33-34). Apparently realizing the inconsistency in its position relating to defendant's removal and what it would mean with respect to his criminal prosecution, the government now takes the position that "defendant is currently detained in ICE custody with a departure control order[.]" (Govt.'s Supp. Opposition at 5). However, that position is contrary to the position taken by government counsel during oral argument where counsel stated that the regulations that give ICE authority to issue departure control orders, 8 C.F.R. §§ 215.2 & 215.3(g), are not detention statutes, i.e., ICE cannot rely on those regulations to detain an alien. (See Hearing Trans. at 18 & 27).

In any event, the record, as it stands now, leaves little, if any, doubt that petitioner's detention by ICE is solely for the purposes of the instant criminal prosecution. There is no dispute that a final removal order has been entered against defendant and that defendant does not contest the order. (See Def.'s Supp. Brief, Exh. C at 33). Despite the final order of removal and defendant's waiver of any challenge to the order, ICE issued a Departure Order to defendant, explaining that it is not going to remove him until the termination of the instant criminal proceedings. (See Departure Order). The Departure Order "is based upon the United States Attorney's Office filing a criminal charge against [defendant] and [defendant's] presence is required in the United States until []his [criminal prosecution] has concluded." (Id.). Given the government's admission that "defendant is currently detained in ICE custody with a departure control order[,]" (Govt.'s Supp. Opposition at 5), and that the basis of such an order is the instant criminal prosecution, it is clear that defendant's detention by ICE for purposes of a criminal prosecution "contravene[s] ICE's statutorily-prescribed mission of removal of criminal aliens from

the country[]" as well as "the statutes governing ICE's operation." (Govt.'s Banuelos Opposition at 47).

The government's remaining arguments also are unpersuasive and illustrate further the inconsistent nature of its positions. First, the government contends that "whether an alien is in or out of custody is irrelevant to ICE's ability to issue a departure control order, provided that the alien falls within one of the enumerated provisions of Section 215.3. Thus, ICE's authority to detain defendant, or rather defendant's attempt to bypass a lawfully-issued immigration detainer, is a separate issue and should be analyzed independently." (Govt.'s Supp. Opposition at 5). This assertion simply begs the question of whether defendant is being held in ICE custody for purposes of the criminal prosecution or as "an administrative tool used to facilitate civil proceedings which determine the eligibility of [defendant] to remain in the United States." (Id. at 7). Further, as the government stated at oral argument, (see Hearing Trans. at 18 & 27), the regulations governing departure orders do not provide a basis for detention. In other words, while it is true that "whether an alien is in or out of custody is irrelevant to ICE's ability to issue a departure control order," (Govt.'s Supp. Opposition at 5), it is also true that a departure control order cannot be used to detain an alien, i.e., ICE must have an independent basis upon which to detain defendant. As government counsel stated, a Departure Order "only . . . requests that the alien also not depart the United States voluntarily." (Hearing Trans. at 18).

However, none of the grounds put forth by the government to justify defendant's detention are sufficient. For example, the government asserted at oral argument that because there is a final order of removal entered against defendant, ICE can detain him for up to 90 days to effectuate his removal pursuant to 8 U.S.C. § 1231(a)(1). (See Hearing Trans. at 17-18 & 21-22). As an initial matter, it appears the government has abandoned this argument, as it did not address it in its most recent 11 page supplemental memorandum, even though the court gave each party 25 pages to address all the arguments and issues that were discussed during the oral argument. (See, generally, Govt.'s Supp. Opposition at 1-11). In any event, § 1231(a) states that except as otherwise provided in that section, "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as

the 'removal period'). . . . [¶] During the removal period, the Attorney General shall detain the alien." 8 U.S.C. § 1231(a)(2). An alien who has been ordered removed, and who has been determined by the Attorney General to be "unlikely to comply with the order of removal," may be detained beyond the removal period. Id. at § 1231(a)(6). If, however, "the removal period is judicially reviewed and if a court orders a stay of the removal of the alien," the removal period begins on "the date of the court's final order." Id. at § 1231(a)(1)(B)(ii).

The purpose of § 1231 is to remove a person who has been issued a final order of removal, and to permit ICE to detain such a person while the government takes the necessary steps to effectuate removal. See 8 U.S.C. § 1231(a)(1)(A); Zadvydas v. Davis, 533 U.S. 678, 699, 121 S.Ct. 2491, 2504 (2001) (explaining that "basic purpose" of § 1231(a) is to assure "the alien's presence at the moment of removal[]"). Nothing in § 1231 permits detention of an alien for the entire 90-day "removal period," regardless of the circumstances. As the government stated in Banuelos, "ICE is only permitted to detain aliens for a reasonable time after the propriety of their removal has been adjudicated." (Govt.'s Banuelos Opposition at 47). Here, given that defendant is not contesting his removal and that removal to Mexico should be relatively easy and straightforward, it is likely that the removal could have and should have been accomplished within less than 90 days.

Nevertheless, it is clear that § 1231(a)(1) cannot be the basis of defendant's detention. If it were, defendant should have already been removed. Also, the Departure Order states that defendant will not be removed pending the criminal prosecution. (See Departure Order). Under such circumstances, it appears that defendant is no longer in removal and therefore cannot be detained for the 90-day removal period. See, e.g., Tijani v. Willis, 430 F.3d 1241, 1243-50 & n. 7 (9th Cir. 2005) (Tashima, Judge, concurring) (noting that petitioner was detained under 8 U.S.C. § 1226 because "this court has stayed his removal pending its review of the BIA's decision[]" and therefore the petitioner "has not entered his 90-day removal period under 8 U.S.C. § 1231(a)"); Kothandaraghipathy v. Dep't of Homeland Sec., 396 F.Supp.2d 1104, 1107 (D. Ariz. 2005) (holding that because the Ninth Circuit had granted petitioner a stay of removal, his "current detention is pursuant to the pre-removal order detention statute, 8 U.S.C. § 1226, rather than the

post-removal order detention statute, 8 U.S.C. § 1231[]"); 8 U.S.C. § 1231(a)(1)(B)(ii) (providing circumstances when removal period will not begin to run).

More importantly, the reason defendant cannot be in ICE custody on the basis of § 1231(a)(1) is because, as the government acknowledged in Banuelos and reaffirmed in the instant case, "if [a] defendant is released to ICE custody to effect his removal, [the government] will not be able to proceed with the instant prosecution[.]" Banuelos, No. 06-0547M, at 5; (see also Govt.'s Banuelos Opposition at 47-48). The government's position is difficult to reconcile. On the one hand, the government claims that defendant can be detained for 90 days for removal purposes under § 1231(a)(1) and, on the other hand, it claims that defendant cannot be criminally prosecuted if defendant is being detained in ICE custody for removal purposes.

The government also appears to argue that it can detain defendant on the basis of an "immigration detainer." (See Govt.'s Supp. Opposition at 10) ("[E]ven if defendant were released via the USM[] custody, the [c]ourt lacks the authority to prohibit ICE from again detaining defendant pursuant to a newly-issued immigration detainer."). However, the government provides no authority for its assertion that this court lacks the power to order defendant's pre-trial release, notwithstanding any "immigration detainer." (See id. at 7-8). An "immigration detainer" merely "serves to advise another law enforcement agency that the [DHS] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the [DHS], prior to release of the alien, in order for the [DHS] to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. § 287.7(a). That a detainer has been lodged does not require that the alien be taken into custody by the immigration authorities when released. Xulam, 84 F.3d at 442 n. 1 (citing a brief by the United States government conceding the fact that a detainer has been lodged does not mean that the government has decided a defendant will in fact be transferred into immigration custody). Indeed, in the habeas context, it is well-settled that an immigration detainer, without more, is insufficient to render the alien in the custody of ICE. See, e.g., Campos v. I.N.S., 62 F.3d 311, 314 (9th Cir.1995) (detainer letter alone does not sufficiently place an alien in INS custody for habeas purposes); Zolicoffer v. U.S. Dep't of Justice,

315 F.3d 538, 540 (5th Cir. 2003) (per curiam) ("[P]risoners are not 'in custody' for [habeas] purposes . . . merely because the INS has lodged a detainer against them."); Orozco v. I.N.S., 911 F.2d 539, 541 (11th Cir. 1990) (per curiam) (filing of detainer, standing alone, did not cause the prisoner to come within INS custody); Mohammed v. Sullivan, 866 F.2d 258, 260 (8th Cir. 1989) (filing of an INS detainer with prison officials does not constitute the requisite "technical custody" for purposes of habeas jurisdiction). Thus, absent an independent detention statute under the INA, the "immigration detainer" is insufficient to justify the detention of defendant.

Second, the government's assertion that defendant cannot challenge the Departure Order because he has failed to exhaust his administrative remedies, (see Govt.'s Supp. Opposition at 5-6), is without merit because defendant is not challenging the Departure Order in this action. Rather, he is only challenging his pre-trial detention for the purposes of the instant criminal proceedings. Moreover, as indicated above and as the government conceded at oral argument, (see Hearing Trans. at 18 & 27), 8 C.F.R. § 215.3(g) does not provide a basis for ICE detention. Rather, it is simply an Order preventing defendant's departure from the United States during the pendency of the instant criminal proceedings and, in this way, is actually consistent with the terms provided for defendant's pre-trial release in the Court's Order of October 23, 2007. (See Court's Order of October 23, 2007) (providing that one condition of defendant's pre-trial release is the surrender of his passport).

Third, the government's argument that the Adomako and Banuelos decisions are distinguishable from the instant case, (see Govt.'s Supp. Opposition at 8-10), is unpersuasive. As an initial matter, the government fails to explain why the fact that the defendants in Adomako and Banuelos were in the USM's custody (as opposed to ICE's custody) at the time of the decision makes any difference. In addition, contrary to the government's assertion, (see Govt.'s Supp. Opposition at 9), there is nothing in the Adomako decision indicating that its holding was premised solely on ensuring defendant pre-trial access to his attorney. In any event, it is clear from both decisions that the dispositive issue was whether defendant was being detained for removal purposes or for purposes of a criminal prosecution. See Adomako, 150 F.Supp.2d at 1307-08; Banuelos, No. 06-0547, at 4-6. If a defendant is in detention for purposes of a criminal

prosecution, both decisions provide that upon the completion of the terms of his bail conditions, a defendant is to be released pending trial. See id.

In some respects, this case is more compelling than Banuelos. Banuelos, unlike defendant here, challenged whether he could be transferred into ICE's custody because he had not been formally served with a Notice to Appear, although one had been drafted. (See Def.'s Supp. Brief. at 15 & Govt.'s Banuelos Opposition at 47-48). Because no Notice to Appear had been served on Banuelos, there was no basis to detain him and the court ordered the government to respond as to what ICE intended to do with respect to Banuelos. Banuelos, No. 06-0547 at 5-6. The government acknowledged that "if defendant is released to ICE custody, ICE must be permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court." (Govt.'s Banuelos Opposition at 48) (emphasis added).

Here, unlike Banuelos, there is a final order of removal which is not contested by defendant. However, ICE has stated that it will not execute the removal order, but will nevertheless maintain custody over defendant for purposes of the criminal prosecution. (See Departure Order & Declaration of Samuel Saxon in Support of the Govt.'s Supp. Opposition ("Saxon Decl.") at ¶ 7). To the extent defendant is not in removal proceedings, see supra at 9-10, defendant's position is no different from that in Banuelos. Whereas in Banuelos, ICE had the ability to serve the Notice of Detainer and obtain proper custody over Banuelos, here – because there was a final order of removal – ICE had the authority to detain defendant for removal purposes, but has chosen not to exercise its removal authority, apparently recognizing that if it takes custody of defendant for removal purposes, "ICE must be permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court." (Govt.'s Banuelos Opposition at 48).

Finally, the government argues that "in the advent of ICE being subsumed into the [DHS] since the Adomako decision, any Court order directed to the Attorney General would fall short of mandating DHS or ICE's course of action." (Govt.'s Supp. Opposition at 9-10). As an initial matter, the government did not raise this argument during the Banuelos case, even though ICE was in existence at the time and the court issued an order, directing the government to state whether ICE intends to take defendant Banuelos into custody for removal purposes. Banuelos,

No. 06-0547M. at 5-6. In any event, that the functions of the INS have been transferred to ICE, which is subsumed under the DHS, rather than the Department of Justice, does not alter this court's authority to order a criminal defendant released pending trial pursuant to the Bail Reform Act. To the extent the government claims it has custody over defendant pursuant to the removal statute, 8 U.S.C. § 1231(a)(1), the law is clear that it is the Attorney General that has responsibility for defendant's detention. 8 U.S.C. § 1231(a)(2). ("During the removal period, the Attorney General shall detain the alien."). Indeed, despite the change in the organizational location of ICE within the federal government, federal statutes continue to vest in the Attorney General the statutory power to detain aliens. See, e.g., 8 U.S.C. § 1182(d)(5)(A) (Attorney General may parole an individual alien or return him "to the custody from which he was paroled"); id. at § 1226(c) (Attorney General is required to detain and has the power to release certain aliens); id. at § 1231(a)(6) (Attorney General may determine whether to detain removable and inadmissable aliens); id. at § 1252(b)(3)(A) (designating Attorney General as respondent in petitions for review brought by aliens) & id. at § 1103(a)(1) (stating that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling[]").

Further, while it is true that the court does not ordinarily have the authority to order ICE to release an alien who is in removal proceedings, (see Govt.'s Banuelos Opposition at 48: "if defendant is released to ICE custody, ICE must be permitted to deport him to Mexico, even if the deportation puts the defendant beyond the reach of the district court[]"), here, it is clear that ICE is detaining defendant solely for the purposes of the criminal prosecution. See supra at 8. In other words, defendant is in custody pending trial, which is governed by the Bail Reform Act. See 18 U.S.C. § 3142(b).

Taking the government's argument to its logical extreme would mean that, although defendant is being held by ICE solely to be criminally prosecuted, the court would have no authority to order ICE to bring defendant to court, even though he has a constitutional right to be present at all court proceedings. Of course, the government has not taken such an extreme position. Indeed, ICE complied with the Court's Order of November 2, 2007, by bringing defendant to court for the oral argument. More importantly, ICE has stated that it "will maintain custody of

[defendant] during his court appearances as well as transport him during the pendency of his present criminal proceedings." (Saxon Decl. at ¶ 7). To the extent defendant is being held by ICE solely for purposes of the criminal prosecution, the court clearly has jurisdiction over ICE under the Bail Reform Act. However, even assuming, arguendo, that was not the case, ICE has, under the circumstances here, consented to this court's jurisdiction for purposes of the instant criminal case.

CONCLUSION

In Banuelos, the government stated that:

> neither the United States Attorney's Office nor the district court may ask or instruct ICE to detain defendant for purposes of assuring his appearance before the court in this criminal matter. Indeed, if defendant is released to ICE custody, ICE must be permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court.

(Govt.'s Banuelos Opposition at 48). The court agrees with the government's statement, but the record before it establishes that "ICE [is] detain[ing] defendant for purposes of assuring his appearance before the court in this criminal matter." (Id.). Under such circumstances, the court clearly has authority to order defendant's release; indeed, the court has already ordered that defendant be released pending trial in the instant matter. Nevertheless, as set forth below, the court will give the government one last opportunity to state its position with respect to whether it is detaining defendant for removal proceedings or for the "pendency of his present criminal proceedings." (Saxon Decl. at ¶ 7).

This decision is not intended for publication.

Based on the foregoing, IT IS ORDERED THAT:

1. Defendant's Ex Parte Application for Hearing Re Bail Order of October 23, 2007 **(Document No. 9)** is **granted in part and denied in part**.

2. No later than **November 30, 2007,** the government shall file and serve a Notice Re: Removal Proceedings Against Defendant Luna-Gurrola ("Notice"), stating, at a minimum: (i) whether and when the Attorney General intends to effectuate defendant's removal; (2) if the

Attorney General does not intend to remove defendant, then the Attorney General shall set forth the detention statute upon which it relies in detaining defendant in its custody.[6] The Notice shall be accompanied by a declaration from the Attorney General's office and/or an ICE official providing all relevant information pertaining to the commencement and completion of the removal proceedings.

3. If the Attorney General does not intend to remove defendant before trial and the government has not timely filed the Notice and declaration required by paragraph two above, the Attorney General shall ensure that defendant is released forthwith, as defendant has already complied with the conditions set for release pending trial.

Dated this 20th day of November, 2007.

/s/
Fernando M. Olguin
United States Magistrate Judge

[6] As noted above, it is the Attorney General that is responsible for defendant's detention. See, e.g., 8 U.S.C. § 1231(a)(2). ("During the removal period, the Attorney General shall detain the alien."); id at § 1182(d)(5)(A) (Attorney General may parole an individual alien or return him "to the custody from which he was paroled"); id. at § 1226(c) (Attorney General is required to detain and has the power to release certain aliens); id. at § 1231(a)(6) (Attorney General may determine whether to detain removable and inadmissable aliens); id. at § 1252(b)(3)(A) (designating Attorney General as respondent in petitions for review brought by aliens)) & id. at § 1103(a)(1) (stating that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling[]").

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SAUL LUNA-GURROLA, Defendant.	NO. CR 07-1295 VBF **ORDER**

On November 20, 2007, the court issued an "Order Re: Defendant's Ex Parte Application for Hearing Re Bail Order of October 23, 2007" ("Court's Order of November 20, 2007") directing the government to file a Notice Re: Removal Proceedings Against Defendant Luna-Gurrola ("Notice"), providing, at a minimum:

> (i) whether and when the Attorney General intends to effectuate defendant's removal; (2) if the Attorney General does not intend to remove defendant, then the Attorney General shall set forth the detention statute upon which it relies in detaining defendant in its custody. The Notice shall be accompanied by a declaration from the Attorney General's office and/or an ICE official providing all relevant information pertaining to the commencement and completion of the removal proceedings.

(Court's Order of November 20, 2007, at 15-16) (footnote omitted).

On December 4, 2007, the government filed the required Notice. On the same day, defendant filed a Response to the government's Notice. On December 18, 2007, District Judge Fairbank referred the proceedings relating to defendant's detention back to the undersigned Magistrate Judge for a ruling. (See Court's Order of December 18, 2007). On the same day, the court ordered supplemental briefing from the parties. On December 19, 2007, the government filed a Supplemental Responsive Memorandum ("Govt.'s Response"). On December 20, 2007, defendant filed a Reply to the government's Response.

The government's Notice and Response do no more than restate the arguments and positions which the court addressed in its Order of November 20, 2007.[1] For example, the government asserts, again, that defendant's current detention in ICE custody is mandatory pursuant to 8 U.S.C. § 1231(a). (Notice at 5-6). However, the court rejected this argument, stating that "[t]he purpose of § 1231 is to remove a person who has been issued a final order of removal, and to permit ICE to detain such a person while the government takes the necessary steps to effectuate removal." (Court's Order of November 20, 2007, at 10). Because "ICE has stated that it will not execute the removal order, but will nevertheless maintain custody of defendant for purposes of the criminal prosecution[,]" (see id. at 13), the court concluded that § 1231(a) cannot be the lawful basis of defendant's detention. (See id. at 10-11).

Similarly, the government contends, again, that "this Court does not have authority to address defendant's challenge to his administrative detention in this criminal proceeding." (Govt.'s Response at 8). However, the court found that although it "does not ordinarily have the authority to order ICE to release an alien who is in removal proceedings," ICE's admission that it is currently detaining defendant for the purposes of criminal prosecution demonstrates that "defendant is in custody pending trial" and, thus, the court has jurisdiction over ICE under the Bail Reform Act. (See Court's Order of November 20, 2007, at 13-14). Indeed, the government's Notice makes it clear that ICE is detaining defendant solely for the purposes of the instant criminal prosecution.

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[1] The court hereby incorporates fully its decision of November 20, 2007.

(Notice at 5) (government stating that it "intends to effectuate defendant's removal from the United States if and when defendant's criminal matter is concluded.").

Finally, one last example of the government's willingness to ignore (instead of appealing) the court's findings is its implicit assertion that it has the authority to detain defendant pursuant to the Departure Control Order it issued. For example, the government states that "[o]n or about November 7, 2007, ICE served defendant with a Departure Control Order. . . . ICE has determined that defendant's departure from the United States should be temporarily prevented based upon the initiation of a criminal matter against defendant." (Notice at 4) (internal citations and footnote omitted). The government continues to take the position that Departure Control Orders are a valid basis to detain defendant even though, during oral argument, the government's counsel stated that the regulations that give ICE authority to issue departure control orders, 8 C.F.R. §§ 215.2 & 215.3(g), are not detention statutes, i.e., ICE cannot rely on those regulations to detain an alien. (See Hearing Trans. at 18 & 27).

In sum, the government has failed to demonstrate that the current detention of defendant is for any purposes other than for the instant criminal prosecution. As a result, since defendant has met all the conditions set by the court pursuant to the Bail Reform Act, the court will order that he be released as set forth below.

Based on the foregoing and the Court's Order of November 20, 2007, IT IS ORDERED THAT, no later than **January 23, 2008**, defendant shall be released from custody, as defendant has already complied with the conditions set for release pending trial.

Dated this 18th day of January, 2008.

/s/
Fernando M. Olguin
United States Magistrate Judge

EXHIBIT F

Appendix III

U.S. Department of Justice
Immigration and Naturalization Service

HQCOU 50/1.1

MAR 16 2000

MEMORANDUM FOR Regional Counsel
For Distribution to District and Sector Counsel

FROM: Bo Cooper
General Counsel

SUBJECT: Detention and Release of Aliens with Final Orders of Removal

This memorandum clarifies the Service interpretation of the detention and release provisions of the Immigration and Nationality Act (INA) for aliens with final orders of removal.

Non-Criminal Aliens

During immigration court proceedings, the INS's determination as to whether to detain or release a non-criminal alien is governed by INA § 236(a). Once the alien has an administratively final order of removal (i.e., an unappealed order of removal by an immigration judge or an order of removal by the Board of Immigration Appeals), the "removal period" begins. See INA § 241(a)(1)(B)(i). During the 90-day removal period, the INS must seek to remove the alien. See INA § 241(a)(1)(A).[1]

Once the removal period commences, the INS may – but is not required to – detain a non-criminal alien until his removal is effected. See INA § 241(a)(2) (interpreted by INS and the Office of Immigration Litigation as only mandating detention for criminals and terrorists during the removal period). If the alien delays his removal (e.g., by failing to make timely application for travel documents), the removal period is extended beyond 90 days. The INS may continue to detain or may release the alien during this extended removal period. See INA § 241(a)(1)(C).

If the alien files a petition for review (as provided under INA § 242(a)(1)), the removal period continues to run for a period of 90 days from the date of the final administrative order. However, if the court has issued a stay of the alien's removal, the court's final order on the petition, if adverse to the alien, will trigger a new 90-day removal period. See INA § 241(a)(1)(B)(ii). During the second removal period, the INS may take a previously released alien into custody under INA § 241(a)(2).

If the INS has not removed a non-criminal alien prior to the expiration of the initial removal period, it must release him under an order of supervision pending removal, unless it determines that he is a risk to the community or a flight risk and thus unlikely to comply with his removal order. See INA §§ 241(a)(3), 241(a)(6). This requirement also applies to an alien who has not been removed by the expiration of any second removal period.

[1] However, the INS must comply with any judicial stay of removal.

Appendix III, continued

Criminal and Terrorist Aliens

During immigration court proceedings, the INS is required to detain all terrorists, all aggravated felons, and almost all other criminal aliens pursuant to INA § 236(c). The only criminal aliens who are not subject to § 236(c) are those who are deportable only under § 237(a)(2)(A)(i) (if sentenced to less than one year), § 237(a)(2)(A)(iv), and/or § 237(a)(2)(E). Those few criminal aliens to whom § 236(c) does not apply are subject to detention and release under INA § 236(a) during their immigration court proceedings.

Once the alien has an administratively final order of removal (i.e., an unappealed order of removal by an immigration judge or an order of removal by the Board of Immigration Appeals), the removal period begins. See INA § 241(a)(1)(B)(i).[2] Once the removal period begins, the alien is subject to mandatory detention pursuant to INA § 241(a)(2). If the alien delays his removal (e.g., by failing to make timely application for travel documents), the removal period is extended beyond 90 days. See INA § 241(a)(1)(C). The INS must continue to detain the alien during this extended removal period pursuant to INA § 241(a)(2) (which mandates detention even though INA § 241(a)(1)(C) permits release for other aliens during the extended removal period).

If the alien seeks judicial review (whether or not barred from doing so by INA § 242(a)(2)(C)), the removal period continues to run for a period of 90 days from the date of the final administrative order. However, if the court has issued a stay of the alien's removal (or if the alien has filed a petition for a writ of habeas corpus, in which case the INS accepts a stay automatically), the court's final order on the petition, if adverse to the alien, will trigger a new 90-day removal period. See INA §§ 241(a)(1)(A), 241(a)(1)(B)(ii). During the second removal period, the alien is once again subject to mandatory detention under § 241(a)(2).

If the INS has not removed the alien during the initial removal period, it may continue to detain him, as a criminal or a terrorist, pursuant to INA § 241(a)(6), or it may release him under an order of supervision pending removal pursuant to INA § 241(a)(3).[3] INA Sections 241(a)(6) and 241(a)(3) also apply to an alien who has not been removed by the expiration of any second removal period.

Should you have any questions, please contact Deputy General Counsel David Dixon or Associate General Counsel Arthur Strathern at (202) 514-2895.

[2] Unless a stay is in effect, the INS should seek to remove the alien.

[3] Presumably, the INS would always detain terrorist aliens and would generally detain criminal aliens pursuant to INA § 241(a)(6). However, release of a criminal under INA § 241(a)(3) may be appropriate where the alien poses no risk and is not likely to be removed.