# Defense-Relevant Immigration News

**by Manuel D. Vargas***

**INS Announces New Policy of Release on Bond in Some Instances for Noncitizens Released from Criminal Custody Prior to 10/9/98**

The Immigration and Naturalization Service (INS) has announced that it will no longer take the position that criminally convicted noncitizens released from criminal custody prior to October 9, 1998 are subject to the new mandatory INS detention provisions in the immigration laws. Under the mandatory detention provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the INS is required to take most noncitizens convicted of deportable offenses into INS custody, without the possibility of release on bond, as soon as the noncitizen is released from criminal custody. Numerous INS detainees had questioned in habeas corpus petitions the application of IIRIRA's mandatory detention provisions to individuals released from criminal custody prior to October 9, 1998, the final effective date of these provisions. See the *Backup Center REPORT* Vol. XIV, #2, at pp. 8-9, and #5, at p. 9.

After several recent federal district court rulings finding that noncitizens released from criminal custody prior to October 9, 1998 were not subject to mandatory detention, *see, e.g., Velasquez v Reno*, 37 FSupp2d 663 (D NJ 4/5/99), the INS announced on July 12, 1999 that it will now consider such individuals for release. Specifically, the INS field memorandum states:

> Any alien, regardless of status, who (a) completed a criminal sentence, on or before 10/8/98, based on a conviction which constitutes a removable offense; (b) is currently in INS custody or comes into INS custody in the future; and (c) has not yet been issued a final order of removal, is eligible for a custody determination.
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> *INS July 12, 1999 Memorandum for Regional Directors re: Field Guidelines for applying Revised Interpretation of Mandatory Custody Provisions.*

According to the INS memorandum, in cases of such individuals, the INS was to have conducted custody reviews by July 19, 1999, considering factors such as the person's likelihood of danger to the public, flight risk, health factors, equities, family ties, etc. Such individuals will also be provided the opportunity to request a redetermination of custody conditions by an immigration judge. A copy of the INS memorandum is available from the Defense Immigration Project page on NYSDA's website at http://www.nysda.org or from the Backup Center.

Noncitizens released from criminal custody on or after October 9, 1998 are not affected by the new INS position. Such individuals may challenge mandatory detention on constitutional grounds. *See, e.g., Martinez v Greene*, 28 F Supp 2d 1275 (D Colo 1998); *Van Eeton v Beebe*, 1999 WL 312130 (D Ore 4/13/99); *Nguyen v Beebe*, CV 99-340-HV (D Ore 4/13/99); *Danh v Demore*, 1999 WL 219718 (ND Cal 5/28/99); Magistrate's Report and Recommendation in *Chamblin v INS*, 98-97-JD, 1999 US Dist LEXIS 8533 (D NH 6/8/99); *but see Parra v Perryman*, 172 F3d 954 (7th Cir 3/24/99); *Diaz-Zaldierna v Fasano*, 1999 WL 199110 (SD Cal 3/16/99); *Aguirre-Garcia v Fasano*, 99-0629-IEG (SD Cal 5/17/99) (but also found that 236(c) does not apply to persons released from criminal custody prior to October 9, 1998); *Aguiniga-Junes v Reno*, 99-0471JM (JAH) (SD Cal 5/25/99); *Edwards v Blackman*, 1999 WL 350122 (MD Pa 5/27/99); *Galvez v Lewis*, 99-488-A (ED Va 7/7/99). For assistance or guidance in bringing a habeas challenge to mandatory INS detention under IIRIRA, contact the American Civil Liberties Union, Immigrants' Rights Project, 125 Broad Street, New York, New York 10004.

**2nd Circuit Issues Several Decisions Relating to Federal Prosecutions of Noncitizens on Illegal Reentry Charges**

In recent months, the U.S. Court of Appeals for the 2nd Circuit has issued several decisions on sentencing issues arising in federal prosecutions of noncitizens for illegally reentering the country after being deported. Two particularly notable decisions were:

- *United States v Galvez-Falconi, No. 97-1614* (2d Cir 4/12/99) — The Court held that, in exceptional circumstances, a district court has the authority under USSG 5K2.0 to grant a downward departure in sentencing on the basis of a defendant's consent to deportation even in the absence of the government's consent to such a departure.
- *United States v Pornes-Garcia*, No. 98-1335 (2d Cir 3/26/99) — The Court held that the test it had applied in the past to determine whether a prior conviction was an aggravated felony for purposes of the USSG 2L1.2(b)(1) (A) sixteen-level sentencing enhancement for illegal reentry into the United States was not altered by its 1996 decision in *Aguirre v INS*, 79 F3d 315 (2d Cir 1996), where the Court ruled that "aggravated felony," as defined in the Immigration and Nationality Act, excludes drug offenses that are state, but not federal, felonies.

**Updated Checklist of Defenses in Removal Proceedings Available Online**

The NYSDA Criminal Defense Immigration Project has updated a checklist of removal defense arguments and strategies for lawyers counseling or representing noncitizens in removal proceedings based on criminal charges. The updated *Removal Defense Checklist in Criminal Charge Cases* is available from the Defense Immigration Project page on NYSDA's website at http://www.nysda.org or from the Backup Center. ⚖

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