

# **NEW DEVELOPMENTS IN REPRESENTING NONCITIZENS POST-SEPTEMBER 11**

by  
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## **1. Introduction -- New Challenges in Representing Noncitizens since 9/11**

- Criminal and immigration law enforcement targeting of noncitizens from specific countries since September 11
- Detention of noncitizens on immigration holds who would not have been held in detention prior to September 11
- New difficulties for these noncitizen detainees in seeking access to counsel
- New difficulties in getting information regarding noncitizen detainees
- New obstacles to obtaining release of a noncitizen detainee being held on an immigration or material witness hold

## **2. Background on the Grounds for Removal of Noncitizens and the Detention and Removal Process**

- Deportability and Inadmissibility Grounds -- see INA 237, 8 U.S.C. 1227 (deportability grounds) and INA 212, 8 U.S.C. 1182 (inadmissibility grounds)
  - Immigration Status-Related Grounds of Deportability – see INA 237(a)(1), 8 U.S.C. 1227(a)(1)
    - Inadmissible at time of entry or adjustment of status
    - Present in the U.S. in violation of law
    - Violated nonimmigrant status or condition of entry
    - Failure to comply with requirement to notify INS of change of address (see INA 237(a)(3), 8 U.S.C. 1227(a)(3))
  - Main Crime-Related Grounds of Deportability – see INA 237(a)(2), 8 U.S.C. 1227(a)(2)
    - Crime involving moral turpitude
    - Controlled substance offense
    - Firearm offense
    - Crime of domestic violence, stalking, crime against children, or violation of protection order
    - Aggravated felony

- Terrorism or National Security-Related Grounds of Deportability -- see INA 237(a)(4), 8 U.S.C. 1227(a)(4)
  - Engaging in any “terrorist activity” (see definition of “engage in terrorist activity” at INA 212(a)(3)(B) formerly (iii), now (iv))
  - Engaging in any activity violating any law of the United States relating to espionage or sabotage, any other criminal activity which endangers public safety or national security, or any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means
  - Secretary of State has reasonable ground to believe that the individual’s presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States
- Removal Process
  - Identification by the Immigration and Naturalization Service (INS)
  - INS Arrest without Warrant – see 8 C.F.R. 287.3(d)
  - INS Formal Initiation of the Removal Process -- Detainer, Warrant, Notice to Appear – see INA 239, 8 U.S.C. 1229
  - INS Detention during Removal Proceedings – see INA 236, 8 U.S.C. 1226
  - Removal Hearing before an Immigration Judge – see INA 240, 8 U.S.C. 1229a
  - Asylum – INA 208, 8 U.S.C. 1158
  - Cancellation of Removal – see INA 240A, 8 U.S.C. 1229b
  - Withholding of Removal – see INA 241(b)(3), 8 U.S.C. 1231(b)(3)
  - Relief under U.N. Convention Against Torture – see 8 C.F.R. 208.16-208.18
  - Voluntary Departure – see INA 240B, 8 U.S.C. 1229c
  - Administrative Appeals and Judicial Review – see 8 C.F.R. 3.1; INA 241, 8 U.S.C. 1252
  - INS Detention after Removal Order – see INA 241, 8 U.S.C. 1231

### **3. New Developments Relating to Noncitizens Targeted by Law Enforcement since September 11**

- Reassignment of law enforcement resources to “war against terrorism” post-Sept. 11 (including INS staff)
  - INS reassignment of more than half of its 2,000 investigators to searching for “suspects”
- INS interim regulation issued on September 20, 2001 -- provides for expanded general pre-charge INS detention power (published at 66 Fed Reg. 48334-48335, amending 8 CFR 287.3(d), effective September 17, 2001)

- “Disposition of cases of aliens arrested without warrant -- . . . a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest . . . will be issued.”
- Identification, apprehension, and detention of over 1,000 noncitizen “suspects” in two month period after September 11, 2001
  - Most from Middle Eastern or Muslim countries
  - Most held on immigration violations
  - Some held on federal or state criminal charges unrelated to September 11<sup>th</sup> attacks
  - Ten to fifteen held as material witnesses
- USA PATRIOT Act (*Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*) signed by President Bush on October 26, 2001 – provides for expanded pre-charge and post-charge detention power over noncitizens suspected of possible involvement with “terrorist activity” or a “terrorist organization”
  - Expands definition of “engage in terrorist activity,” for purposes of determining deportability/inadmissibility triggering detention under section 412(a) of the USA PATRIOT Act, so that the definition now includes:
    - committing, or inciting to commit, a terrorist activity,
    - preparing or planning a terrorist activity,
    - gathering information on potential targets for a terrorist activity,
    - soliciting funds for a terrorist activity or “terrorist organization” [Note that the provision does not require, as prior law required, that the individual knows, or reasonably should know, that the funds afford material support to an individual, or organization, or government in conducting a terrorist activity],
    - soliciting any individual to engage in terrorist activity, or for membership in a “terrorist organization”, or
    - committing an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons, explosives or training for the commission of a terrorist activity, or to a “terrorist organization”

**CITE:**

- USA PATRIOT Section 411(a)(1)(F), adding INA Section 212(a)(3)(B)(iv)
- Defines “terrorist organization” to include:
  - any organization so designated by the Secretary of State,
  - “a group of two or more individuals, whether organized or not, which engages in the activities described in [the first three subclauses of the definition of ‘engage in terrorist activity’]”

**NOTE:**

- could include organizations that engage in lawful charitable activities as long as they have any military component [knocking out litigation over what percent of organization’s activities had to be related to terrorist activity in order for an organization to be classified as a terrorist organization],
- “terrorist organization”-related deportability/inadmissibility under the “group of two or more individuals” clause (but not under the Secretary of State designation clauses) will not be triggered when the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further that group’s terrorist activity

**CITE:**

- USA PATRIOT Section 411(a)(1)(G), amending INA Section 212(a)(3)(B)(vi)

- Retroactively applies expanded deportability/inadmissibility grounds triggering detention under the USA PATRIOT Act to:
  - actions taken by an alien before, on, or after such date (except, for purposes of terrorist organization-related deportability/inadmissibility, there is no retroactive application to acts taken when the organization was not so designated by the Secretary of State), and
  - all aliens, without regard to the date of entry or attempted entry into the United States

**CITE:**

- USA PATRIOT Section 411(c)

- Requires detention of noncitizens whom the Attorney General (AG) has certified as a person that the AG has reasonable grounds to believe falls within various national security or terrorist-related deportability/inadmissibility grounds
  - The AG must provide notice of the immigration or criminal charges against such noncitizen within 7 days after the

commencement of such detention, or release the individual [Consider impact on interim INS detention regulation in effect since September 17]

- The AG must continue detention of such noncitizen until the individual is removed from the United States (irrespective of any relief from removal for which the individual may be eligible, or which is granted the individual), or until the individual is determined not to be removable [Note ambiguity here]
- If such noncitizen is ordered removed, but removal is unlikely in the reasonably foreseeable future, detention may be continued for additional periods of up to six months but only if the release of the individual “will threaten the national security of the United States or the safety of the community or any person” [Note nod to June 28 Supreme Court decision in *Zadvydas v. Davis*, 121 S. Ct. 2491]

**CITE:**

- USA PATRIOT Section 412(a), adding new INA Section 236A(a)
- Provides for habeas corpus review of any action or decision to detain under section 412(a) of the USA PATRIOT Act, but with a right of appeal only to the United States Court of Appeals for the District of Columbia Circuit

**CITE:**

- USA PATRIOT Section 412(a), adding new INA Section 236A(b)
- Preservation of immigration benefits for victims of terrorism

**CITE:**

- USA PATRIOT Sections 421 - 425

- INS interim regulation issued on October 31, 2001 – provides for expanded INS detention power by extending the reach of current regulatory provision granting the INS an automatic stay when it appeals an immigration judge decision to order a noncitizen’s release from custody (published at 66 Fed Reg. 54909-54912, amending 8 CFR 3.19(i)(2), effective October 29, 2001)
  - automatic stay now applies to any case in which the INS has determined that a noncitizen should not be released or has set a bond of \$10,000 or more (not only cases of noncitizens charged with criminal/terrorist-related deportability/inadmissibility)
  - automatic stay now also applies when the INS seeks AG review of a decision of the Board of Immigration Appeals to order release
- Interim BOP regulation issued October 31, 2001 authorizing the BOP or other DOJ custodians to monitor mail and other communications between

prisoners/detainees and their lawyers where the AG has certified that reasonable suspicion exists to believe that the inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism (published at 66 Fed Reg. 55061-66066 (October 31, 2001), effective October 30, 2001)

- Presidential Military Order issued on November 13, 2001 re: military custody and trial of noncitizens if there is reason to believe that the individual noncitizen:
  - is or was a member of the organization known as al Qaida;
  - “has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation thereof, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy or economy;” or
  - has knowingly harbored one or more individuals described above
  
- Law enforcement questioning of about 5,000 noncitizens mostly from Middle Eastern or Muslim countries initiated in November, 2001, and questioning of additional 3,000 such noncitizens initiated in March, 2002
  - Names compiled by investigators from INS and State Department records identifying males aged 18-33 from 20 Middle Eastern and European countries who entered the country on non-immigrant visas after January 1, 2000
  - Names also obtained by investigators from more than 200 colleges and universities contacted for information about foreign students from Arab and Islamic nations
  - Justice Department memorandum advising United States attorneys and members of the Anti-Terrorism Task Forces how to conduct the interviews instructs: “You should specifically ask to see the individual’s passport and visa, and you should take note whether he appears to be residing in the United States within the time period allowed by the visas.”
  - The Justice Department memo further directs: “[I]f you suspect that a particular individual may be in violation of the federal immigration laws, you should call the INS representative on your Anti-Terrorism task Force or the INS officials at the closest Law Enforcement Support Center. These officials will advise you whether the individual is in violation of the immigration laws and whether he should be detained.”
  - Immigration and Naturalization Service (INS) sent out its own memorandum directing its agents to detain suspected immigration violators identified by the interview project without the possibility of release on bond if they are requested to do so by federal investigators interviewing the 5,000 young men.

- Of the over 2,261 young men interviewed as of March 20, 2002, about 20 had been arrested, most for immigration violations and none on charges involving terrorism
- AG November 29, 2001 announcement of “Reasonable Cooperators Program”
  - S-Visa for a noncitizen who the federal government determines is in possession, and willing to supply, critical reliable information concerning a criminal organization or enterprise, or a terrorist organization, enterprise, or operation
  - Prosecutorial discretion for others if the annual quotas are filled
- In early 2002, DOJ Office of Legal Counsel makes an internal legal ruling clearing the way for the AG to declare that state and local police departments have the power to enforce federal immigration laws
  - If the internal legal opinion is adopted as official DOJ policy, this may encourage local police departments to consider and negotiate immigration law policing partnership with DOJ
  - Prior DOJ legal opinion, issued in 1996, had found that state and local police had legal authority temporarily to detain or arrest noncitizens for violating the criminal provisions of the Immigration and Nationality Act, but not to stop and detain a noncitizen solely on suspicion of civil deportability
  - Florida will soon become the first jurisdiction to enter into a policing partnership with DOJ; others, including New York State, are considering it
- In March 2002, DOJ announces new initiative to track down and deport an estimated 6,000 immigrants from Arab and other Muslim countries who have pre-September 11 deportation orders but who have not been deported
  - Initiative focuses on 6,000, who comprise fewer than 2 percent of the total number of 320,000 so-called “alien absconders” reported by the INS
- In April 2002, the INS announces a new interim rule putting limits on the public disclosure by any state or local government entity or by any privately operated facility of the name or other information relating to any immigration detainee being housed or otherwise maintained or provided service on behalf of the INS (published at 67 Fed Reg. 19508-19511, amending 8 CFR 236 and 241, effective April 17, 2002)
- NEW YORK STATE NOTE: *Antiterrorism Act of 2001* enacted by New York State on September 17, 2001 – provides for new criminal liability under New York State law for terrorism-related crimes by amending New York penal law and criminal procedure law in order to provide criminal penalties for a crime of

terrorism, soliciting or providing support for an act of terrorism, terroristic threats, and hindering prosecution of terrorism

#### **4. Some Practical Implications for Lawyers Representing Affected Noncitizens**

- Your noncitizen client who has been taken into custody since September 11, 2001 may have difficulty contacting you
- You may encounter many obstacles to getting information regarding where and why your noncitizen client is being held
- You should warn and advise your noncitizen client regarding law enforcement questioning without counsel
- You may need to warn your client who is in custody regarding possible law enforcement monitoring of his or her communications with you
- Your noncitizen client who has been taken into custody based on presumed AG certification as a person that the AG has reasonable grounds to believe falls within various national security or terrorist-related deportability/inadmissibility grounds should not be held for more than 7 days without being notified of the criminal or immigration charges on which custody is based
- If criminal charges are lodged, your noncitizen client may encounter prosecution opposition to release on bail even where criminal charges are relatively minor (but see U.S. v. Awadallah, 2001 U.S. Dist. LEXIS 19228 (SDNY), where court found that the government failed to meet its burden of establishing that there were no conditions or combination of conditions that could be set that would reasonably assure the noncitizen detainee's appearance at trial)
- If criminal charges are lodged, you should properly advise your client of the immigration consequences of conviction
- If immigration charges are lodged, your noncitizen client who has been certified by the AG may continue to be detained by the INS without a bond determination
- Your noncitizen client may challenge his or her continued INS detention by requesting a bond hearing before an immigration judge, and appealing an adverse determination to the Board of Immigration Appeals (if only to exhaust administrative remedies), and/or by seeking review in federal habeas corpus proceedings
- Your noncitizen client may be able to challenge removability, or apply for relief from removal, in his or her removal hearing before an immigration judge, but obtaining relief may not result in your client's release as long as he or she remains certified by the AG

- If your noncitizen client has been certified by the AG, he or she may, each six-month period that he or she is held, request that the AG reconsider the certification, and may submit documents or other evidence to challenge the certification
- If your noncitizen client is ordered removed but the government is unlikely to be able to remove him or her in the reasonably foreseeable future, the government should release him or her after six months unless the government shows that release of the individual “will threaten the national security of the United States or the safety of the community or any person”

## 5. Additional Resources

- Immigration and Naturalization Service website (<http://www.ins.usdoj.gov/graphics/index.htm>)
- Terrorism Laws page of the New York State Defenders Association website ([http://www.nysda.org/Hot\\_Topics/Terrorism\\_Laws/terrorism\\_laws.html](http://www.nysda.org/Hot_Topics/Terrorism_Laws/terrorism_laws.html))
- Immigrant Defense Project page of the New York State Defenders Assn. website ([http://www.nysda.org/NYSDA\\_Resources/Immigrant\\_Defense\\_Project/immigrant\\_defense\\_project.html](http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/immigrant_defense_project.html))
- Practice manual entitled *Representing Noncitizen Criminal Defendants in New York State*, published and distributed by the New York State Defenders Association (Albany, New York, 518-465-3524) -- for general information regarding what a defense lawyer needs to know when representing a noncitizen defendant in criminal proceedings in New York State
- Article entitled “Removal Defense Checklist in Criminal Charge Cases,” available from the NYSDA website ([www.nysda.org](http://www.nysda.org)) or by contacting NYSDA at 518-465-3524 – for information regarding legal defenses that may be raised by a noncitizen and his or her legal representative in immigration removal proceedings
- Memorandum entitled “Constitutional Limits on Federal Government’s Power to Detain Immigrants Whom the Government Suspects to Be Terrorists,” available from the NYSDA website ([www.nysda.org](http://www.nysda.org)) or by contacting NYSDA at 518-465-3524