No. 19-897

In the Supreme Court of the United States

MATTHEW T. ALBENCE, ET AL., PETITIONERS

v.

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.

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

BRIEF FOR THE PETITIONERS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
SCOTT G. STEWART
Deputy Assistant Attorney General
VIVEK SURI
Assistant to the Solicitor General
LAUREN E. FASCETT
BRIAN C. WARD
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 8 U.S.C. 1231(a) or 8 U.S.C. 1226 governs the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal.

PARTIES TO THE PROCEEDING

Petitioners (appellants below) are Matthew T. Albence, Deputy Director and Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement (ICE); William P. Barr, Attorney General of the United States; Russell Hott, Field Office Director, ICE; and the Department of Justice Executive Office for Immigration Review (EOIR).*

Respondents (appellees below) are Rogelio Amilcar Cabrera Diaz, Jennry Francisco Moran Barrera, and Rodolfo Eduardo Rivera Flamenco, on behalf of themselves and all others similarly situated; and Maria Angelica Guzman Chavez, Danis Faustino Castro Castro, and Jose Alfonso Serrano Colocho.

Yvonne Evans, Field Office Director, ICE, and Brenda Cook, Court Administrator, EOIR, Baltimore Immigration Court, were respondents in the district court. Christian Flores Romero and Wilber A. Rodriguez Zometa were petitioners in the district court.

---

* Former Attorney General Jefferson B. Sessions III was a respondent in the district court and an appellant in the court of appeals. He was replaced in the court of appeals by Acting Attorney General Matthew G. Whitaker and then by Attorney General William P. Barr. Former Acting Director of ICE Thomas D. Homan was a respondent in the district court and an appellant in the court of appeals. He was replaced in the court of appeals by Acting Director Ronald D. Vitiello, then by Acting Director Matthew T. Albence, then by Acting Director Mark A. Morgan, and again by Acting Director Albence. After the petition for a writ of certiorari was filed, Acting Director Albence ceased to be Acting Director and became Senior Official Performing the Duties of the Director of ICE.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Treaties, statutes, and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 19-897

MATTHEW T. ALBENCE, ET AL., PETITIONERS

v.

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.

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

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 940 F.3d 867. A memorandum opinion of the district court (Pet. App. 45a-72a) is reported at 280 F. Supp. 3d 835. An additional memorandum opinion of the district court (Pet. App. 73a-91a) is reported at 297 F. Supp. 3d 618.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2019. On December 30, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 7, 2020. The petition was filed on January 17, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-79a.

STATEMENT

A. Legal Background

This case concerns the interaction of three areas of immigration law: (1) removal of aliens, (2) protection of aliens from removal to countries where they face persecution or torture, and (3) detention of aliens. We begin by describing the relevant provisions in each area.

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, authorizes the removal of certain classes of aliens from the United States. 8 U.S.C. 1182, 1227. The full process for removal can include a hearing before an immigration judge, an appeal to the Board of Immigration Appeals, and review in a federal court of appeals. 8 U.S.C. 1229a, 1252. Many aliens facing removal also have an opportunity in the proceedings to apply for relief or protection from removal. See, *e.g.*, 8 U.S.C. 1158 (asylum); 8 U.S.C. 1229b(a) (cancellation of removal); 8 U.S.C. 1229b(b) (adjustment of status).

Congress has established a streamlined process for removing aliens who have previously been removed from the United States under a final order of removal, and have then reentered the country unlawfully. If the Department of Homeland Security (DHS) "finds that an alien has reentered the United States illegally after having been removed * * * under an order of removal, the prior order of removal is reinstated from its original date." 8 U.S.C. 1231(a)(5). DHS may "at any time" effectuate removal "under the prior order." *Ibid.* The re-

instated order "is not subject to being reopened or reviewed," and the alien "is not eligible and may not apply for any relief" from the reinstated order of removal. *Ibid.*[1]

2. Congress has enacted provisions for determining the country to which an alien is to be removed. See 8 U.S.C. 1231(b)(1)-(2); *Jama* v. *ICE*, 543 U.S. 335, 338-341 (2005). Possible countries of removal can include a country designated by the alien, the alien's country of citizenship, the alien's previous country of residence, the alien's country of birth, the country from which the alien departed for the United States, and, if all other options fail, any country willing to accept the alien. See 8 U.S.C. 1231(b)(2); *Jama*, 543 U.S. at 341.

As relevant here, Congress has left open two avenues for an alien to avoid removal to a particular country where he faces persecution or torture. First, the alien may seek statutory withholding of removal under 8 U.S.C. 1231(b)(3), which prohibits the removal of an alien to a country where he would face persecution because of his "race, religion, nationality, membership in a particular social group, or political opinion." *Ibid.* Second, the alien may seek withholding or deferral of removal under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85—a treaty that addresses the removal of aliens to countries where they would face

---

[1] Many of the provisions at issue in this case refer to the Attorney General, but Congress has separately transferred the enforcement of those provisions to the Secretary of Homeland Security. *Nielsen* v. *Preap*, 139 S. Ct. 954, 959 n.2 (2019); see 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1) and (g), 1551 note.

torture. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822; 8 C.F.R. 208.31, 241.8(e).

Statutory withholding and CAT protection provide only country-specific protection from removal. A grant of statutory withholding means only that the alien is "presently protected" from removal to the particular country covered by the grant; it "would not prevent" the alien's removal to "any other hospitable country." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987) (citation omitted). Similarly, a grant of CAT protection "means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country"; "the noncitizen still 'may be removed at any time to another country where he or she is not likely to be tortured.'" *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1691 (2020) (quoting 8 C.F.R. 1208.17(b)(2)).

Even an alien subject to a reinstated removal order may seek statutory withholding and CAT protection. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 35 n.4 (2006). Those forms of protection are consistent with the bar to reopening, reviewing, or granting relief from a reinstated removal order, see 8 U.S.C. 1231(a)(5), because, as just explained, they do not abrogate the removal order itself; rather, they just preclude DHS from carrying out the order to a particular country until the protection is terminated.

Federal regulations set out procedures for deciding whether an alien with a reinstated removal order should receive statutory withholding or CAT protection. If an alien subject to a reinstated removal order expresses a fear of returning to the country of removal, an asylum officer determines whether the alien has a "reasonable

fear" of persecution or torture there, and an immigration judge reviews an adverse determination. 8 C.F.R. 208.31(b) and (f). If the alien fails to establish a reasonable fear, DHS may remove the alien without further administrative review. 8 C.F.R. 208.31(g)(1). But if the alien does establish a reasonable fear, the alien is placed in "withholding-only" proceedings in which an immigration judge determines the ultimate merits of his statutory withholding or CAT claim, subject to review by the Board of Immigration Appeals. 8 C.F.R. 208.16, 208.31(e), 1208.16. In accordance with the reinstatement provision's bar to review of the removal order, aliens in withholding-only proceedings "are prohibited from raising or considering any other issues, including * * * admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief." 8 C.F.R. 1208.2(c)(3)(i).

3. Congress has enacted a number of statutory provisions authorizing the detention of aliens in connection with their removal. Two of those statutes are relevant here: 8 U.S.C. 1226 and 8 U.S.C. 1231(a).

Section 1226 authorizes the detention of an alien "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). In general, Section 1226(a) makes detention discretionary; it provides that the government "may" detain an alien pending a decision on whether the alien is to be removed. *Ibid.* A separate provision, Section 1226(c), makes an exception to that general rule, providing that the government "shall" take into custody and not release certain criminal aliens. 8 U.S.C. 1226(c).

Section 1231(a), meanwhile, governs detention once an alien has been "ordered removed." 8 U.S.C. 1231(a) (caption) (emphasis omitted). Section 1231 directs the

government to secure the alien's removal within the "removal period"—a period that begins when the removal order becomes "administratively final" or when certain other criteria are satisfied, and that usually lasts for 90 days. 8 U.S.C. 1231(a)(1). Section 1231(a)(2) provides: "During the removal period, [the Secretary of Homeland Security] shall detain the alien. Under no circumstance during the removal period shall the [Secretary] release [certain criminal aliens]." 8 U.S.C. 1231(a)(2). Section 1231(a)(6), in turn, provides that DHS "may" detain aliens "beyond the removal period" if the alien is "a risk to the community," "unlikely to comply with the order of removal," inadmissible, or removable under certain provisions of law. 8 U.S.C. 1231(a)(6); see Pet. App. 41a-42a (Richardson, J., dissenting) (noting that an alien with a reinstated order is inadmissible under 8 U.S.C. 1182(a)(9)).

Section 1226 and Section 1231(a) differ in a number of ways. To summarize a few salient differences:

- *Applicability.* Section 1226 authorizes detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). Section 1231(a), by contrast, applies once an alien has been "ordered removed." 8 U.S.C. 1231(a)(1)(A).

- *Bond.* Section 1226 provides, with respect to aliens subject to discretionary detention under Section 1226(a), that the government may at any time "release the alien on * * * bond." 8 U.S.C.

1226(a)(2)(A). In contrast, Section 1231(a) contains no express reference to bond.[2]

- *Supervised release.* Section 1226(a) allows, but does not require, the imposition of conditions of release for aliens released on bond. See 8 U.S.C. 1226(a)(2)(A). Section 1231, by contrast, requires the supervision of released aliens who do not leave the country and are not removed within the removal period. See 8 U.S.C. 1231(a)(3) and (6).

The two provisions differ in additional ways, because different regulations govern detention under each provision. See 8 C.F.R. 236.1 (detention under Section 1226); 8 C.F.R. 241.4 (detention under Section 1231).

B. Proceedings Below

1. Respondents are aliens who have previously been removed from the United States under final orders of removal. Pet. App. 6a-7a. They illegally reentered the United States, were apprehended, and had their previous orders of removal reinstated. *Id.* at 7a. They expressed a fear of persecution or torture in their countries of removal, immigration officers found that fear to

---

[2] One court of appeals has held—correctly, in our view—that Section 1231(a) does not entitle a detained alien to a bond hearing before an immigration judge. See *Martinez* v. *LaRose*, No. 19-3908, 2020 WL 4282158, at *7 (6th Cir. July 27, 2020). Two courts of appeals have held—erroneously, in our view—that Section 1231(a)(6) implicitly entitles an alien to a bond hearing before an immigration judge after six months of detention. See *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208, 219-227 (3d Cir. 2018); *Diouf* v. *Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011); see Pet. at 7-14, *Albence* v. *Arteaga-Martinez*, No. 19-896 (filed Jan. 17, 2020). Even on the latter view, Section 1226(a) differs from Section 1231(a), because it allows an alien to obtain a bond hearing at any time rather than just after six months.

be reasonable, and they were placed in withholding-only proceedings before immigration judges. *Ibid.* After they were detained, they sought individualized bond hearings in accordance with Section 1226(a). *Ibid.* The government denied them such hearings on the ground that their detention was governed by Section 1231(a) rather than Section 1226. *Ibid.*

Respondents filed two separate suits—*Romero* v. *Evans*, No. 17-cv-754 (E.D. Va. June 29, 2017), and *Diaz* v. *Hott*, No. 17-cv-1405 (E.D. Va. Dec. 7, 2017)—challenging the denial of their requests for bond hearings. Pet. App. 8a & n.2. They sought writs of habeas corpus, declarations that their detention is governed by Section 1226 rather than Section 1231(a), and injunctions requiring bond determinations under Section 1226. *Id.* at 8a. In *Diaz*, the district court certified a class of aliens who are under reinstated removal orders, are in withholding-only proceedings, and are detained in Virginia. *Ibid.*

The district court awarded summary judgment to the *Romero* respondents in November 2017 and to the *Diaz* respondents in February 2018. Pet. App. 45a-72a, 73a-91a. In *Romero*, the court stated that this case "presents a difficult question of statutory interpretation" and that the government's arguments "have some force." *Id.* at 65a, 71a. The court concluded, however, that Section 1226 rather than Section 1231(a) governs respondents' detention. *Id.* at 65a-71a. The court observed that Section 1226 governs the detention of an alien "detained pending a decision on whether the alien is to be removed from the United States." *Id.* at 66a (quoting 8 U.S.C. 1226(a)). The court reasoned that, "until the government determines that there is a country to

which [respondents] can legally be removed, the decision on whether they are 'to be removed' remains 'pending.'" *Ibid.* The court adopted similar reasoning in *Diaz*. *Id.* at 73a-91a.

2. The court of appeals consolidated *Romero* and *Diaz*. Pet. App. 11a. A divided court affirmed, holding that the detention of an alien in withholding-only proceedings is governed by Section 1226 rather than Section 1231. *Id.* at 1a-44a.

The court of appeals began by analyzing Section 1226, which authorizes detention "pending a decision on whether the alien is to be removed from the United States." Pet. App. 18a (citation omitted). The court read Section 1226 "to focus on" the "practical question whether the government has the authority to execute a removal," rather than on "'whether the alien is *theoretically* removable.'" *Id.* at 18a-19a (citation omitted). The court reasoned that, although an alien in withholding-only proceedings is "'clearly removable,'" the "practical" decision whether that alien "'is to be removed'" remains pending. *Id.* at 19a (citations omitted).

The court of appeals then concluded that Section 1231 confirmed that reading. Pet. App. 19a. The court was of the view that Section 1231's detention provisions are triggered "only when the 'removal period' begins." *Ibid.* (quoting 8 U.S.C. 1231(a)(2)). The court then reasoned that, "until withholding-only proceedings conclude, the removal period has not begun and § 1231's detention provisions do not apply." *Id.* at 22a. The court rejected the government's request for deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), stating that "[t]he regulations cited by the government do not actually specify which section—§ 1226 or § 1231—authorizes

detention of noncitizens subject to reinstated removal orders who have been placed in withholding-only proceedings." Pet. App. 30a.

Judge Richardson dissented. Pet. App. 33a-44a. He concluded that "[b]oth the plain language and the structure of the Immigration and Nationality Act compel the conclusion that § 1231, not § 1226, governs the detention of aliens with reinstated orders of removal." *Id.* at 33a. He observed that "Section 1231 applies 'when an alien is ordered removed.'" *Ibid.* He then explained that, because respondents' prior orders of removal had been "reinstated," and because those removal orders are "'not subject to being reopened,'" respondents "have, once and for all, been ordered removed." *Id.* at 33a-34a (citation omitted). He further explained that the aliens' placement in withholding-only proceedings does not change that analysis, because "withholding does not address whether an alien is ordered removed—that has already been determined. It only addresses how, and more specifically where, the removal will occur." *Id.* at 36a.

3. At the time this Court granted review, the Second Circuit and (in the decision below) the Fourth Circuit had both held that Section 1226 governs the detention of aliens in withholding-only proceedings. See *Guerra* v. *Shanahan*, 831 F.3d 59, 62-64 (2d Cir. 2016); Pet. App. 31a-32a. In contrast, the Third and Ninth Circuits had held that Section 1231(a) governs the detention of such aliens. See *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208, 213-219 (3d Cir. 2018); *Padilla-Ramirez* v. *Bible*, 882 F.3d 826, 829-837 (9th Cir. 2017), cert. denied, 139 S. Ct. 411 (2018). After the Court granted review, the Sixth Circuit joined the Third and Ninth Circuits in holding that Section 1231(a) applies in

these circumstances. See *Martinez* v. *LaRose*, No. 19-3908, 2020 WL 4282158, at *2-*7 (July 27, 2020).

SUMMARY OF ARGUMENT

A. Section 1231(a) governs respondents' detention. As a general matter, Section 1231(a) governs the detention of an alien who has been "ordered removed" from the United States. 8 U.S.C. 1231(a)(1). Because respondents' removal orders have been "reinstated," 8 U.S.C. 1231(a)(5), they have, by definition, been "ordered removed." That is so even though respondents seek statutory withholding and CAT protection. A statutory withholding or CAT order prevents the removal of the alien to a particular country, but it neither reverses the order of removal nor prevents the execution of the order. It thus does not change the reality that the alien has been "ordered removed."

Section 1226 does not govern respondents' detention. That provision authorizes detention before an alien is ordered removed, while "a decision on whether the alien is to be removed from the United States" is still "pending." 8 U.S.C. 1226(a). Because respondents' removal orders have been reinstated, decisions on whether they are to be removed from the United States are no longer pending; to the contrary, the decisions have already been made. Once more, that is so even though respondents seek withholding and CAT protection. A decision on withholding or CAT protection is not a "decision on *whether* the alien is to be removed from the United States," *ibid.* (emphasis added); rather, it affects only *where* and *when* removal may occur.

B. The court of appeals' contrary reasoning lacks merit. The court read Sections 1226 and 1231 "to focus on * * * the *practical* question of whether the govern-

ment has the authority to execute a removal," with Section 1226 applying before the government acquires that practical ability and Section 1231 taking over after the government acquires that practical ability. Pet. App. 18a-19a (emphasis added). But the text of Sections 1226 and 1231 makes plain that the applicability of those provisions depends on the making of the legal decision to remove the alien, not on the attainment of the practical ability to carry out that decision.

C. At a minimum, this Court should defer to the government's interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which holds that a court owes deference to an agency's reasonable interpretation of an ambiguous statute that the agency administers. *Id.* at 843-844. The Departments of Justice and Homeland Security, the agencies that administer the immigration provisions at issue here, have adopted regulations that expressly state that the "detention" of an alien with a "reinstated order of removal" must be "administered in accordance with" Section 1231—not Section 1226. 8 C.F.R. 241.8(f), 1241.8(f). That interpretation is, at a minimum, reasonable, and thus warrants the Court's deference.

ARGUMENT

A. Respondents' Detention Is Governed By Section 1231(a) Rather Than Section 1226

As a general matter, Section 1231(a) governs the detention of an alien who has been ordered removed from the United States, while Section 1226 governs the detention of an alien who is awaiting a decision on whether he is to be removed from the United States. Respondents are subject to reinstated orders of removal and thus have already been ordered removed from the

United States. Their requests for withholding of removal and CAT protection may affect where and when the government may execute the removal orders, but they do not affect the validity or finality of the removal orders themselves. Respondents' detention is thus governed by Section 1231(a), not Section 1226.

1. The text of Section 1231(a) shows that it governs respondents' detention

The text of Section 1231(a) (set forth in full at App., *infra*, 8a-13a) makes clear that it governs the detention of aliens who have been "ordered removed" from the United States. In particular:

- Section 1231 as a whole bears the heading "Detention and removal of aliens *ordered removed*." 8 U.S.C. 1231 (caption) (emphasis altered).
- Subsection (a) bears the heading "Detention, release, and removal of aliens *ordered removed*." 8 U.S.C. 1231(a) (caption) (emphasis altered).
- Paragraph (a)(1) states that, "when an alien is *ordered removed*, the [Secretary of Homeland Security] shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." 8 U.S.C. 1231(a)(1)(A) (emphasis added).
- Paragraph (a)(2), in turn, provides that, "[d]uring the removal period, the [Secretary of Homeland Security] shall detain the alien" and that "[u]nder no circumstances during the removal period" shall the Secretary release "an alien" who is inadmissible or deportable on specified criminal grounds. 8 U.S.C. 1231(a)(2). The terms "the alien" and then "an alien" refer back to the alien

identified in the preceding paragraph: the "alien [who] is *ordered removed*." 8 U.S.C. 1231(a)(1)(A) (emphasis added).

- Finally, paragraph (a)(6) provides that "[a]n alien *ordered removed* who is [inadmissible or removable under certain provisions] or who has been determined by the [Secretary of Homeland Security] to be a risk to the community or unlikely to comply with *the order of removal*, may be detained beyond the removal period." 8 U.S.C. 1231(a)(6) (emphasis added).

In short, the captions and the operative provisions together establish that Section 1231(a) governs the detention of an alien who has been "ordered removed."

Respondents have been "ordered removed." In ordinary English, a person has been "ordered removed" if he is subject to an order of removal. Respondents satisfy that condition, because their "prior order[s] of removal" have been "reinstated," their prior orders are "not subject to being reopened or reviewed," they are "not eligible and may not apply for any relief" from those orders, and they "shall be removed under the prior order[s] at any time." 8 U.S.C. 1231(a)(5). It would be a contradiction in terms to say that respondents' orders of removal have been reinstated, but that respondents nonetheless have not been "ordered removed."

Respondents remain "ordered removed" even though they seek statutory withholding and CAT protection. A grant of statutory withholding does not affect the validity of a final order that the alien is to be removed. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987). It "bars [removing] an alien to a particular country," but leaves the removal order intact and leaves

the government free to remove the alien to a different country. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419 (1999). So too, a grant of CAT protection "does not disturb the final order of removal" and "does not affect the validity of the final order of removal." *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1691 (2020). A grant of CAT protection instead "means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country"; "the noncitizen still 'may be removed at any time to another country.'" *Ibid.* (citation omitted).

In this case, respondents have not even been granted statutory withholding or CAT protection; they have merely asked for it, and are awaiting adjudication of their requests. Given that even a grant of statutory withholding or CAT protection does not change the fact that an alien subject to a reinstated removal order has been "ordered removed," a mere request certainly does not do so.

2. The text of Section 1226 shows that it does not govern respondents' detention

Section 1226, the provision under which respondents claim to be detained, provides as follows:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. * * * [P]ending such decision, the Attorney General * * * may continue to detain the arrested alien.

8 U.S.C. 1226(a). Section 1226(c) provides that the Secretary "shall" take specified criminal aliens into custody and may release such aliens only in narrowly specified

circumstances. That provision focuses on the decision "*whether*" to remove the alien—not the decision where, when, or how to carry out the removal. *Ibid.* (emphasis added). The text also refers to "a decision on whether the alien is to be removed *from* the United States"—not a decision on whether the alien is to be removed *to* a particular country. *Ibid.* (emphasis added).

For respondents, the "decision on whether the alien is to be removed from the United States" is no longer "pending." 8 U.S.C. 1226(a). To the contrary, the decision has already been made and is final. Under the reinstatement provision, respondents' "prior order[s] of removal" have been "reinstated"; the orders are "not subject to being reopened or reviewed"; respondents are "not eligible and may not apply for any relief" from those orders; and respondents "shall be removed" under those orders "at any time." 8 U.S.C. 1231(a)(5). The reinstated removal order is itself the "decision on whether the alien is to be removed from the United States"; that decision is in no sense still "pending." 8 U.S.C. 1226(a).

All of that remains true even though respondents seek statutory withholding and CAT protection. As just explained, a grant of such protection precludes the government from removing the alien to a particular country, but leaves the underlying removal order intact and leaves the government free to remove the alien to another country. See *Nasrallah*, 140 S. Ct. at 1691; *Cardoza-Fonseca*, 480 U.S. at 428 n.6. The decision specified in the statute (*whether* the alien is to be removed from the United States) thus differs from the decision made in the withholding-only proceedings (*where* the alien may be sent). Put differently, Section 1226 applies while an alien is awaiting "a decision on whether

the alien is to be removed *from* the United States," 8 U.S.C. 1226(a) (emphasis added), but the "purpose of [withholding-only] proceedings is instead to determine whether the alien is to be removed *to* a particular country," *Padilla-Ramirez* v. *Bible*, 882 F.3d 826, 835 (9th Cir. 2017), cert. denied, 139 S. Ct. 411 (2018).

3. Context and structure confirm that Section 1231(a), not Section 1226, governs respondents' detention

a. This Court has explained that "Congress's structural choices"—for instance, a "'decision to locate * * * a provision in one subsection rather than another'"—is a guide to statutory meaning. *Nken* v. *Holder*, 556 U.S. 418, 431 (2009) (citation omitted). Here, Congress chose to place the provision addressing reinstatement of removal orders, 8 U.S.C. 1231(a)(5), in Section 1231(a)—rather than in Section 1226 or in a standalone section. Congress also chose to place the provision addressing statutory withholding, 8 U.S.C. 1231(b)(3), in Section 1231—again, not in Section 1226, nor in its own section.

Those structural choices are relevant here in two ways. First, Congress's decision to locate both the reinstatement and the statutory-withholding provisions in Section 1231 suggests that Congress meant for the detention of aliens who have reinstated removal orders and who are in withholding-only proceedings to be governed by that section. Second, as already noted, Section 1231 as a whole concerns aliens who have been ordered removed and, indeed, bears the heading "Detention and removal of aliens ordered removed." 8 U.S.C. 1231 (emphasis omitted). Congress's decision to locate the reinstatement and statutory-withholding provisions under that heading confirms that aliens who have reinstated

removal orders and who are in withholding-only proceedings have indeed been "ordered removed"—the prerequisite for detention under Section 1231(a).

b. The organization of the statute as a whole likewise shows that Section 1231(a), not Section 1226, governs respondents' detention. Sections 1226 and 1231 both appear within a part of the statute that bears the caption "Inspection, Apprehension, Examination, Exclusion, and Removal." Pet. App. 43a (Richardson, J., dissenting). As that heading implies, the sections in that part address, in sequence, various events related to an alien's admission into and removal from the United States. See *ibid.* In particular, Sections 1221 to 1224 address the arrival of aliens, and Section 1225 addresses applicants for admission. Next, Section 1226 authorizes the detention of certain aliens awaiting decisions on removal. Sections 1227 to 1229c, in turn, set forth the grounds of deportability, the structure of removal proceedings, and relief from removal. Finally, Section 1230 explains what happens if the alien gains admission, while Section 1231 explains what happens if the alien is ordered removed. The sequential organization of the statute indicates that, once an alien is ordered removed in accordance with the sections up to Section 1229c and the removal order is reinstated under Section 1231(a)(5), the alien's detention is governed by the surrounding provisions of Section 1231(a). The organization suggests that the alien cannot force the government to "go back in time, so to speak," to Section 1226. *Id.* at 44a.

That structural inference carries particular force in the context of reinstated removal orders. The whole point of "reinstat[ing]" the "prior order of removal,"

8 U.S.C. 1231(a)(5)—as opposed to requiring the government to start over and obtain a fresh removal order—is to ensure that, when an alien unlawfully reenters the country, the government may simply pick up where it left off after issuance of the prior removal order. It would be particularly incongruous to allow an illegal reentrant to force the government to "go back in time" to an earlier section of the statute. Pet. App. 44a (Richardson, J., dissenting).

4. Statutory purposes confirm that Section 1231(a), not Section 1226, governs respondents' detention

Congress adopted the current reinstatement statute in 1996 in reaction to serious practical problems that arose under the previous regime. *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 34-35 (2006). Before 1996, an alien who was deported after deportation proceedings—which could have included bond hearings, consideration of applications for relief, deportation hearings, administrative appeals, and judicial review—could, simply by reentering the country illegally, force the government to go back to square one and start all over again. "An objective observer would have asked, and Congress did, just what was the purpose of all of that procedure, all of those punctilious niceties, which can take years to complete, if the person could just step back into the country a few days later and have the roundelay go on?" *Castro-Cortez* v. *INS*, 239 F.3d 1037, 1054 (9th Cir. 2001) (Fernandez, J., dissenting).

Against that backdrop, Congress sought to achieve two main objectives through its adoption of the current reinstatement statute in 1996. First, by providing for reinstatement of prior removal orders and preventing reinstated orders from "being reopened or reviewed,"

Congress sought to streamline the procedure for removing illegal reentrants. 8 U.S.C. 1231(a)(5). Second, by providing that "the alien shall be removed under the prior order" and that "the alien is not eligible and may not apply for any relief," Congress sought to ensure that illegal reentrants subject to orders of removal are actually removed. *Ibid.*

Applying Section 1231(a) to respondents' detention advances those congressional objectives. It enables DHS to detain aliens with reinstated removal orders under the relatively streamlined procedures adopted by DHS under Section 1231(a). That detention, in turn, ensures that such aliens do not abscond to avoid removal. And where DHS exercises its discretion to release the alien, applying Section 1231(a) ensures that the alien remains subject to conditions of supervision, again reducing the risk of flight and increasing the likelihood of removal. See 8 U.S.C. 1231(a)(3).

In contrast, applying Section 1226 to respondents' detention would thwart Congress's objectives. It would mean that, notwithstanding Congress's insistence on streamlining the removal of aliens who reenter the country unlawfully, respondents could (1) obtain an initial bond determination from an immigration officer, (2) demand a bond redetermination hearing before an immigration judge, and (3) file an appeal from that redetermination with the Board of Immigration Appeals. See 8 U.S.C. 1226(a); 8 C.F.R. 236.1, 1236.1(d). It also would mean that respondents would have an opportunity to gain release—even though they have strong incentives to abscond in order to avoid execution of the removal order and even though they have already demonstrated their willingness to disregard the immigration laws and a prior removal order by reentering

the country illegally after the prior removal. Those who win release would not necessarily be subject to conditions of supervision; although Section 1226(a) allows bond conditions, it does not require them. And because the Executive Office for Immigration Review (EOIR) has a longstanding policy of expediting and prioritizing cases involving detained aliens, aliens who win release could remain in the United States for an extended period while awaiting the outcomes of their cases. See James R. McHenry III, Director, EOIR, *Memorandum re: Case Priorities and Immigration Court Performance Measures* 2 (Jan. 17, 2018). In short, Congress enacted the reinstatement statute to simplify procedure and to facilitate removal, but applying Section 1226 would complicate procedure and hinder removal.

B. The Contrary Arguments Lack Merit

1. The court of appeals misinterpreted Section 1226 and Section 1231

The court of appeals read Sections 1226 and 1231 to "invok[e] the practical question of whether the government has the authority to execute a removal," so that Section 1226 governs detention before the government obtains the practical ability to execute the removal order, while Section 1231 applies after the government acquires that ability. Pet. App. 19a. The court then concluded that the government lacks the "practical" ability to execute removal orders "while withholding-only proceedings are ongoing," and that, as a result, Section 1226 governs the detention of aliens in such proceedings. *Id.* at 18a-19a.

That rationale is incorrect. The line between detention under Section 1226 and detention under Section 1231 depends on whether the government has made the

legal decision to remove the alien, not on whether it has the practical ability to carry out the decision. Thus, Section 1226 governs detention before the government has made that legal decision; Section 1231 governs detention after the government has done so, while the government tackles the practicalities of removal.

a. Section 1226—which authorizes detention while a "decision" on whether the alien is to be removed is still "pending," 8 U.S.C. 1226(a)—focuses on the legal decision to remove the alien, not the practical ability to carry out the decision. A "decision" is a "judicial or agency determination after consideration of the facts and the law." *Black's Law Dictionary* 511 (11th ed. 2019). And the word "pending" means "remaining undecided; awaiting decision." *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) (brackets and citation omitted). A reinstated removal order is a "decision," but the acquisition of the practical ability to carry out the order is not. And while the word "pending" applies comfortably to the legal determination whether to remove the alien, it would be unnatural to say that an agency's attainment of the practical ability to carry out an order can be "pending." "Pending a decision on whether the alien is to be removed" does not mean "until it becomes practicable to remove the alien"; nor does it mean "until the government decides that it is practicable to remove the alien."

The court of appeals emphasized that Section 1226 "applies 'pending a decision on whether the alien *is to be removed*,'" rather than a decision on "'whether the alien is *theoretically* removable.'" Pet. App. 18a-19a (citations omitted). The court was correct in perceiving a

difference between deciding that an alien is "removable" and deciding that an alien is "to be removed," but that difference is not relevant in the context of reinstated removal orders. Outside the context of reinstated removal orders, aliens who are "removable" may, if eligible, still obtain various forms of relief from the order of removal. See, *e.g.*, 8 U.S.C. 1229b(a) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien" satisfies specified criteria.). In the context of a reinstated removal order, however, "the alien is not eligible and may not apply for any relief" from the order, "and the alien shall be removed under the prior order at any time." 8 U.S.C. 1231(a)(5). A reinstated removal order thus is more than a decision that the alien is "theoretically removable"; it is a decision that the alien "is to be removed." Pet. App. 18a-19a (citations and emphasis omitted).

b. The text of Section 1231 underscores the error in the court of appeals' "practical" interpretation. Section 1231(a) applies when an alien is "ordered removed," 8 U.S.C. 1231(a)(1)(A). The phrase "ordered removed" focuses on the legal question whether there is an order directing the alien's removal, not on the practical question whether the government has the ability to carry out the order. In fact, one of the clauses in Section 1231(a) states that "[n]o alien *ordered removed* shall be eligible to receive authorization to be employed * * * unless * * * (A) the alien *cannot be removed* due to the refusal of all countries * * * to receive the alien, or (B) the removal of the alien is *otherwise impracticable*." 8 U.S.C. 1231(a)(7) (emphases added). That clause provides direct textual evidence that an alien can be "ordered removed"—and thus be subject to Section 1231—even

if the alien's removal is "impracticable" and even if the alien "cannot be removed." *Ibid.*

Further, Section 1231 contains numerous provisions that expressly refer to the practicalities of removal, including the practicalities associated with identifying the country to which the alien is to be removed:

- One clause, just discussed, allows an "alien ordered removed" to receive employment authorization if "the alien cannot be removed due to the refusal of all countries * * * to receive the alien" or if "the removal of the alien is otherwise impracticable." 8 U.S.C. 1231(a)(7).
- One clause allows removal of an alien to any country that "will accept" him if "removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible." 8 U.S.C. 1231(b)(1)(C)(iv).
- One clause allows removal of an alien to a country that "will accept the alien" if it is "impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph." 8 U.S.C. 1231(b)(2)(E)(vii).
- One clause allows removal of an alien to alternative countries if "it is impracticable, inadvisable, inconvenient, or impossible to remove an alien [to the otherwise appropriate countries] because of [a] war." 8 U.S.C. 1231(b)(2)(F).
- One clause requires certain aliens to be removed on particular vessels or aircraft, unless "it is impracticable to remove the alien on one of those vessels or aircraft within a reasonable time." 8 U.S.C. 1231(c)(1)(A).

- One clause permits the Secretary to stay removal if "immediate removal is not practicable or proper." 8 U.S.C. 1231(c)(2)(A)(i).

Those provisions of Section 1231 show that Congress meant for the government to address the practicalities of removal—including the identification of the country to which the alien is to be removed—under Section 1231, not under Section 1226. In fact, the very purpose of Section 1231(a)'s 90-day removal period, see 8 U.S.C. 1231(a)(1)(A), is to give the government time, after the alien has been ordered removed, to resolve practical issues relating to removal. And the very purpose of Section 1231(a)'s provisions for detention and supervised release after the removal period, see 8 U.S.C. 1231(a)(3) and (6), is to enable the government to continue to address those practical issues if the 90-day period proves insufficient.

c. This Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), further undercuts the court of appeals' reading. In *Zadvydas*, the government detained two aliens under Section 1231 after they had been ordered removed, but could not effectuate their removal because the designated countries of removal refused to accept them. *Id.* at 684-686. Even though the government had not yet identified countries to which the aliens could be removed, the Court accepted that the aliens were detained under Section 1231(a)(6), and that the government could continue to hold the aliens under that section while attempting to remove them to other countries. *Id.* at 688-689, 699-701. *Zadvydas* thus confirms that, once an alien is ordered removed, the government may detain him under Section 1231 even if it lacks the practical ability to carry out the removal because it has

not yet definitively identified the country to which it will send the alien.

The Court in *Zadvydas* also set out a procedure to address cases in which aliens remain detained under Section 1231(a), but removal to *any* country proves impracticable. 533 U.S. at 699-701. In particular, the Court concluded that detention of an alien under Section 1231(a) remains "presumptively reasonable" for a period of "six months." *Id.* at 701. After that period, if the alien "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must either "respond with evidence sufficient to rebut that showing" or release the alien. *Ibid.* That procedure allows the government to detain an alien under Section 1231(a) for at least six months, and in some cases longer, while it attempts to resolve practical issues such as identifying the country to which the alien is to be removed. That procedure would make no sense in the case of a reinstated removal order if the government were required to resolve those practical issues *before* detaining an alien under Section 1231.

2. The court of appeals misinterpreted the provisions governing the removal period

a. Seeking to reconcile its "practical" reading with the text of Section 1231, the court of appeals did not dispute that an alien subject to a reinstated removal order has been "ordered removed," but stated that the words "ordered removed" do "not control the outcome here." Pet. App. 19a. The court instead reasoned that, because Section 1231(a)(2) authorizes detention "'during the removal period,'" and Section 1231(a)(6) authorizes detention "'beyond the removal period,'" detention under Section 1231 may occur "only when the 'removal period'

begins." *Ibid.* (quoting 8 U.S.C. 1231(a)(2) and (6)) (brackets omitted). In the court's view, the removal period begins only when the withholding-only proceedings end. *Id.* at 19a-20a.

The court of appeals erred in concluding that the removal period begins only when withholding-only proceedings end. Section 1231 provides that "[t]he removal period begins on the latest of the following": (1) "[t]he date the order of removal becomes administratively final," (2) if a court stays the removal order pending judicial review, "the date of the court's final order," and (3) if the alien is already detained for independent non-immigration reasons, "the date the alien is released from detention." 8 U.S.C. 1231(a)(1)(B). That list of triggering events says nothing about withholding-only proceedings.

The court of appeals relied on the provision stating that the removal period begins (under one alternative) once the removal order becomes "administratively final," reasoning that a reinstated removal order becomes administratively final only when withholding-only proceedings end. Pet. App. 25a (quoting 8 U.S.C. 1231(a)(1)(B)(i)). That is incorrect. Another provision of the INA states that an "order of deportation" (in modern terminology, an order of removal) "shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. 1101(a)(47). Respondents' original removal orders became final when first issued, upon affirmance by the Board or expiration of time to seek review by the Board. The reinstatement provision simply *reinstates* those already final orders;

it does not create new orders that need to become final again. "The order was final then and is final now." Pet. App. 37a (Richardson, J., dissenting).

Instead of relying on the provision specifically defining when a removal order becomes final, the court of appeals relied on the "general definition of administrative finality." Pet. App. 27a. But "[w]hen a statute includes an explicit definition," as the INA does for finality of removal orders, a court "must follow that definition," *Digital Realty Trust, Inc.* v. *Somers*, 138 S. Ct. 767, 776 (2018) (citation omitted)—not resort to some other "general definition," Pet. App. 27a. In any event, a reinstated removal order is final even under the general definition of administrative finality. Under that definition, an agency action is final if it "mark[s] the 'consummation' of the agency's decisionmaking process" and is "one by which 'rights or obligations have been determined.'" *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997) (citations omitted). A reinstated removal order marks the consummation of the decisionmaking process on whether the alien is to be removed; and as the reinstatement provision itself states, the reinstated order "is not subject to being reopened or reviewed." 8 U.S.C. 1231(a)(5). A reinstated removal order also determines the alien's rights and the government's obligations; the reinstatement provision provides that, once the order is reinstated, "the alien shall be removed under [that] order at any time." *Ibid.*

In addition to lacking a sound textual basis, the court of appeals' analysis directly contradicts this Court's recent decision in *Nasrallah*. In *Nasrallah*, the Court stated repeatedly that an order granting CAT protection is distinct from, and does not affect, a final order of

removal: "[A] CAT order does not disturb the final order of removal." 140 S. Ct. at 1691. "[T]he immigration judge's or the Board's ruling on a CAT claim does not affect the validity of the final order of removal." *Ibid.* "[Certain statutory provisions] simply establish that a CAT order may be reviewed together with a final order of removal, not that a CAT order is the same as, or affects the validity of, a final order of removal." *Ibid.* And "a CAT order is distinct from a final order of removal and does not affect the validity of the final order of removal." *Id.* at 1692. *Nasrallah* thus forecloses the court of appeals' conclusion that an alien's request for protection resets the finality of a reinstated removal order.

All in all, the court of appeals' reading of Section 1231 is wrong. Respondents' withholding-only proceedings affect neither the administrative finality of their removal orders, nor the start of the removal periods, nor the applicability of Section 1231 to their detention.

b. The court of appeals also offered a structural rationale for reading Section 1231 not to apply to respondents' detention. The court observed that Section 1231 provides that the government "*shall* remove the alien from the United States" during the 90-day removal period. Pet. App. 14a (quoting 8 U.S.C. 1231(a)(1)(A)). The court stated that if Section 1231(a) applies to aliens in withholding-only proceedings, "agency officials regularly and predictably will find themselves unable to meet the 90-day removal deadline," because "'withholding-only proceedings take substantially longer than 90 days.'" *Id.* at 21a-22a (citation omitted). The court was "reluctant to adopt a construction" that would put immigration officials "in dereliction of their statutory duties." *Id.* at 22a.

That argument is incorrect. The provision on which the court of appeals relied states: "*Except as otherwise provided in this section*, * * * the [Secretary of Homeland Security] shall remove the alien from the United States within a period of 90 days." 8 U.S.C. 1231(a)(1)(A) (emphasis added). The remainder of "this section" in turn makes clear that removal remains permissible even beyond the 90-day removal period. For example, Section 1231 provides for supervised release "pending removal" "[i]f the alien does not leave or is not removed within the removal period." 8 U.S.C. 1231(a)(3). Section 1231 also authorizes detention "beyond the removal period." 8 U.S.C. 1231(a)(6). This Court has explained that the purpose of that continued detention is "effectuating an alien's removal." *Zadvydas*, 533 U.S. at 697. Further, this Court has found it "doubt[ful] that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time." *Id.* at 701. In short, effectuating removal after 90 days "is no dereliction of statutory duties." Pet. App. 42a (Richardson, J., dissenting). The provisions concerning the removal period thus cannot justify the court of appeals' reading of Section 1231.

3. The court of appeals' decision rests on a mistaken view of statutory withholding and CAT protection

The court of appeals accepted that, "theoretically," statutory withholding and CAT protection prohibit removal only to a particular country. Pet. App. 18a (emphasis omitted). Yet the court discounted that principle when interpreting Sections 1226 and 1231 because it believed that, "as a practical matter," "noncitizens who prevail in withholding-only proceedings are only very rarely removed to [alternative] countries." *Id.* at 24a-

25a n.9. That approach to statutory interpretation lacks merit.

a. To begin, the court of appeals' approach conflicts with the statutes and regulations governing statutory withholding and CAT protection. An Act of Congress prescribes the legal effect of statutory withholding: The government "may not remove [the] alien *to a country* if the Attorney General decides that the alien's life or freedom would be threatened *in that country* because of the alien's [protected traits]." 8 U.S.C. 1231(b)(3)(A) (emphasis added). And federal regulations prescribe the legal effect of CAT protection: A grant of protection does not "prevent the [government] from removing an alien to a third country other than the country to which removal has been withheld or deferred," 8 C.F.R. 1208.16(f), and "the alien may be removed at any time to another country," 8 C.F.R. 1208.17(b)(2). Those provisions are binding law, and a court has no authority to ignore the law based on its own characterization of such dispositions as merely "theoretical."

To be sure, DHS has the authority to consider "practical and geopolitical concerns" in deciding whether, where, when, and how to carry out a removal order. *Jama* v. *ICE*, 543 U.S. 335, 344 (2005). And once an alien receives statutory withholding or CAT protection, practical and geopolitical concerns may well preclude the alien's removal to any alternative country. Even when that is so, however, any inability to remove the alien from the United States is a result of those practical and geopolitical considerations. It is not a legal consequence of the grant of statutory withholding or CAT protection. In the eyes of the law, an alien who receives such protection has still been "ordered removed,"

8 U.S.C. 1231(a)(1)(A), regardless of whether practical or geopolitical concerns prevent that order from being carried out at that time.

b. The court of appeals' approach also conflicts with this Court's precedents on statutory withholding and CAT protection. Consider *Cardoza-Fonseca*, where this Court held that the standard for granting asylum differs from the standard for granting statutory withholding. 480 U.S. at 423-424. The Court's reasoning rested in significant part on the understanding that "[a]sylum and withholding of deportation are two distinct forms of relief," because asylum gives an alien the right to remain in the United States, while statutory withholding "is 'country specific'" and "would not prevent" the alien's "exclusion and deportation" to "any other hospitable country." *Id.* at 428 n.6 (citation omitted). Unlike the court of appeals here, the Court in *Cardoza-Fonseca* did not discount that distinction between asylum and withholding as merely "theoretical."

Or consider *Nasrallah*, where this Court held that a federal statute that precludes judicial review of factual challenges to removal orders does not also preclude judicial review of factual challenges to CAT orders. 140 S. Ct. at 1687-1688. The Court explained that "a CAT order is distinct from a final order of removal" and "is not merged into a final order of removal." *Id.* at 1692-1693. "An order granting CAT relief," the Court emphasized, "means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country"; "the noncitizen still 'may be removed at any time to another country.'" *Id.* at 1691 (citation omitted). Contrary to the court of appeals' approach here, the Court in *Nasrallah* did not ignore all

of those points on the ground that, "as a practical matter," a CAT order could have the effect of precluding removal altogether.

Cardoza-Fonseca and *Nasrallah* are representative of a wide range of cases in which this Court relied on the legal principle that statutory withholding and CAT protection shield aliens from removal to particular countries, but not from removal itself. We are unaware of a single case in which this Court ignored that legal principle on the ground that, "as a practical matter," aliens who obtain those forms of protection may end up avoiding removal. See, *e.g.*, *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1965 n.5 (2020) ("[H]e would not avoid removal, only removal to Sri Lanka."); *Aguirre-Aguirre*, 526 U.S. at 419 ("Whereas withholding only bars deporting an alien to a particular country or countries, a grant of asylum permits an alien to remain in the United States."); *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 159-160 (1993) ("If the proof shows that it is more likely than not that the alien's life or freedom would be threatened in a particular country * * * , under [the withholding provision] the Attorney General must not send him to that country.").

c. Finally, the court of appeals' "practical" view of statutory withholding and CAT protection makes little sense in practice. The legal effect of statutory withholding or CAT protection is the same for every alien: It precludes the removal of the alien to a particular country under particular conditions, but it does not preclude the removal of the alien to other countries. By contrast, DHS's practical ability to remove an alien who has been granted statutory withholding or CAT protection differs for each alien, depending on the "practical and ge-

opolitical concerns" associated with that alien's removal. *Jama*, 543 U.S. at 344. Under the court's "practical" view, therefore, the applicability of Section 1226 or Section 1231 would seemingly vary from alien to alien, and Section 1226 would apply to the aliens in this case only because "the government has not shown that there are * * * third countries to which [these particular aliens] could be removed were they to succeed in their withholding-only proceedings." Pet. App. 24a-25a.

Such an approach—under which the source of the government's detention authority would vary from alien to alien, and under which the government would have to analyze alternative countries of removal in order to know which detention provision applies—is patently unworkable. Adopting that case-by-case approach would fail to "take appropriate account" of the "serious administrative needs and concerns inherent in the necessarily extensive [DHS] efforts to enforce this complex statute." *Zadvydas*, 533 U.S. at 700. A case-by-case approach also would needlessly add to the burdens that are already "overwhelming our immigration system." *Thuraissigiam*, 140 S. Ct. at 1966 (citation omitted).

4. Respondents retain substantial protection under Section 1231(a)

Although the court of appeals did not rely on the argument, respondents suggest (Br. in Opp. 19-20) that aliens detained under Section 1231(a) receive inadequate protection. That argument lacks merit. In reality, aliens detained under Section 1231(a) retain substantial protection from unwarranted detention.

To start, Section 1231(a)(6) provides that DHS "may" detain the alien beyond the 90-day removal period. 8 U.S.C. 1231(a)(6). Federal regulations establish a framework for DHS's exercise of that discretion. See

8 C.F.R. 241.4. Under that framework, a field office of U.S. Immigration and Customs Enforcement (ICE) conducts an initial review at the outset of detention, and a review panel at ICE headquarters periodically conducts further reviews. 8 C.F.R. 241.4(i)(3) and (k)(1)-(2). During those reviews, officials must decide whether to release or detain the alien on the basis of both "[f]avorable factors" (such as "close relatives residing here lawfully") and unfavorable factors (such as the likelihood that "the alien is a significant flight risk" or that he would "[e]ngage in future criminal activity"). 8 C.F.R. 241.4(f)(5), (7), and (8)(iii). The alien may submit information that he believes provides a basis for release; may be assisted by an attorney or other representative; and may, if appropriate, seek a government-provided translator. 8 C.F.R. 241.4(h)(2) and (i)(3).

Separately, this Court held in *Zadvydas* that Section 1231 "does not permit indefinite detention." 533 U.S. at 689. It concluded that, if detention lasts for more than six months and "the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701. Federal regulations set out special procedures for implementing that holding—separate from the regulatory framework just discussed governing the exercise of discretion to detain or release aliens. See 8 C.F.R. 241.13. Under those special procedures, an eligible alien "may submit a written request for release," together with "whatever documentation" he wishes "in support of the assertion that there is no significant likelihood of removal in the reasonably foreseeable future." 8 C.F.R. 241.13(d)(1). Adjudicators at

ICE headquarters must then review the alien's case, allow the alien to respond to the government's evidence, allow the alien to submit additional relevant evidence, allow the alien to be represented by an attorney, and, ultimately, "issue a written decision based on the administrative record." 8 C.F.R. 241.13(g); see 8 C.F.R. 241.13(d)-(e). The regulations expressly provide that these special review procedures supplement, rather than supplant, the regulatory framework discussed in the preceding paragraph. 8 C.F.R. 241.13(b).

Section 1231 and its implementing regulations thus already provide respondents robust procedural protections: criteria to guide the discretionary decision to detain the alien beyond the 90-day removal period, initial reviews by ICE officials at the outset of such detention, periodic reviews by a panel at ICE headquarters as detention continues, special reviews by adjudicators at ICE headquarters in accordance with *Zadvydas*, and opportunities to present argument and evidence in all of those reviews. Given the substantial procedural protections that respondents already enjoy, there exists no sound reason to stretch Section 1226 to accord respondents even more procedural rights.

C. At A Minimum, The Government's Interpretation Of The Statute Deserves Deference

1. In *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court held that a court owes deference to an agency's reasonable interpretation of an ambiguous statute that the agency administers. *Id.* at 843-844. The Court has since explained that *Chevron* deference is "especially appropriate in the immigration context where officials 'exer-

cise especially sensitive political functions that implicate questions of foreign relations.'" *Aguirre-Aguirre*, 526 U.S. at 425 (citation omitted).

The government's interpretation of Sections 1226 and 1231 appears in regulations adopted by the Departments of Justice and Homeland Security, the agencies charged with carrying out the immigration laws. Each part of those regulations implements a different section of the INA. For instance, 8 C.F.R. Part 236 implements Section 236 of the INA (Section 1226 in the U.S. Code); 8 C.F.R. Part 241 implements Section 241 of the INA (Section 1231 in the U.S. Code); and so on. See 8 C.F.R. 236.1-236.18, 241.1-241.33.

Two regulations are relevant here. The first, 8 C.F.R. 241.8(f), states:

> *Execution of reinstated order.* Execution of the reinstated order of removal and detention of the alien shall be administered in accordance with this part [*i.e.*, the part implementing Section 1231].

The second regulation, 8 C.F.R. 241.4(b)(3), states:

> *Individuals granted withholding or deferral of removal.* Aliens granted withholding of removal under [8 U.S.C. 1231(b)(3)] or withholding or deferral of removal under [CAT] who are otherwise subject to detention are subject to the provisions of this part 241 [*i.e.*, the part implementing Section 1231].

Those regulations make plain that aliens subject to reinstated removal orders—including aliens granted statutory withholding or CAT protection—are subject to detention under Section 1231. For the reasons explained earlier, that interpretation constitutes by far the better reading of the statute even without regard to

Chevron. At a minimum, it constitutes a reasonable reading, and so warrants deference under *Chevron*.

2. The court of appeals did not dispute the reasonableness of the government's interpretation of Sections 1226 and 1231. To the contrary, the court stated that "[t]he statutory scheme governing [respondents'] detention . . . is not a model of clarity" and that the government's legal arguments have "some force." Pet. App. 11a-12a (citations omitted).

The court of appeals instead denied deference on the ground that "[t]he regulations cited by the government do not actually specify which section—§ 1226 or § 1231—authorizes detention of noncitizens subject to reinstated removal orders *who have been placed in withholding-only proceedings*." Pet. App. 30a (emphasis added). As just explained, however, one of the regulations states categorically that "[e]xecution of the reinstated order of removal and detention of the alien shall be administered in accordance with" regulations implementing Section 1231. 8 C.F.R. 241.8(f). That regulation contains no exception for the subset of aliens who have been placed in withholding-only proceedings. A court should take that text "at face value," not "add unwritten limits" that the text nowhere contains. *Ross* v. *Blake*, 136 S. Ct. 1850, 1857 (2016).

In addition, the second regulation cited above states that aliens who have been "granted" withholding or CAT protection remain subject to detention under Section 1231. 8 C.F.R. 241.4(b)(3); see *Wanjiru* v. *Holder*, 705 F.3d 258, 267 (7th Cir. 2013). If an alien who has been *granted* withholding or CAT protection remains subject to Section 1231, it follows *a fortiori* that an alien who (like respondents) simply *seeks* withholding or CAT protection must also remain subject to Section

1231. Otherwise, an illegal reentrant would be subject to Section 1231 when DHS reinstates his removal order, Section 1226 when DHS places him in withholding-only proceedings, and Section 1231 again when those proceedings end. "Such a transitory appearance of new rights [under Section 1226] makes no legal sense." *Reyes* v. *Lynch*, No. 15-cv-442, 2015 WL 5081597, at *4 (D. Colo. Aug. 28, 2015).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
SCOTT G. STEWART
Deputy Assistant Attorney General
VIVEK SURI
Assistant to the Solicitor General
LAUREN E. FASCETT
BRIAN C. WARD
Attorneys

AUGUST 2020

APPENDIX

1. 8 U.S.C. 1101(a)(47) provides:

Definitions

(a) As used in this chapter—

(47)(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of—

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

2. 8 U.S.C. 1182(a)(9)(C)(i) provides:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(9) Aliens previously removed

(C) Aliens unlawfully present after previous immigration violations

(i) In general

Any alien who—

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 1225(b)(1) of this title, section 1229a of this title, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

3. 8 U.S.C., Ch. 12, Subch. II, Pt. IV, §§ 1221-1232 headings provide:

PART IV—INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

1221. Lists of alien and citizen passengers arriving and departing

1222. Detention of aliens for physical and mental examination

1223. Entry through or from foreign territory and adjacent islands

1224. Designation of ports of entry for aliens arriving by aircraft

4. 8 U.S.C. 1226 provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the

alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

---

[1] So in original. Probably should be "sentenced".

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

5. 8 U.S.C. 1229a(a) provides:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

6. 8 U.S.C. 1231 provides:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this 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").

(B) Beginning of period

The 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.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

---

[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph (B),".

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

---

[3] So in original. Probably should be followed by a closing parenthesis.

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)—

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory

If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

(C) Alternative countries

If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the

alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

(i) The country of which the alien is a citizen, subject, or national.

(ii) The country in which the alien was born.

(iii) The country in which the alien has a residence.

(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible.

(2) Other aliens

Subject to paragraph (3)—

(A) Selection of country by alien

Except as otherwise provided in this paragraph—

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to

a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if—

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into the country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—

(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within an-

other period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country de-

scribed in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

(F) Removal country when United States is at war

When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien—

(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or

(ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect

to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

(c) Removal of aliens arriving at port of entry

(1) Vessels and aircraft

An alien arriving at a port of entry of the United States who is ordered removed either without a hearing under section 1225(b)(1) or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival shall be removed immediately on a vessel or aircraft owned by the owner of the vessel or aircraft on which the alien arrived in the United States, unless—

(A) it is impracticable to remove the alien on one of those vessels or aircraft within a reasonable time, or

(B) the alien is a stowaway—

(i) who has been ordered removed in accordance with section 1225(a)(1) of this title,

(ii) who has requested asylum, and

(iii) whose application has not been adjudicated or whose asylum application has been denied but who has not exhausted all appeal rights.

(2) Stay of removal

(A) In general

The Attorney General may stay the removal of an alien under this subsection if the Attorney General decides that—

(i) immediate removal is not practicable or proper; or

(ii) the alien is needed to testify in the prosecution of a person for a violation of a law of the United States or of any State.

(B) Payment of detention costs

During the period an alien is detained because of a stay of removal under subparagraph (A)(ii), the Attorney General may pay from the appropriation "Immigration and Naturalization Service—Salaries and Expenses"—

(i) the cost of maintenance of the alien; and

(ii) a witness fee of $1 a day.

(C) Release during stay

The Attorney General may release an alien whose removal is stayed under subparagraph (A)(ii) on—

(i) the alien's filing a bond of at least $500 with security approved by the Attorney General;

(ii) condition that the alien appear when required as a witness and for removal; and

(iii) other conditions the Attorney General may prescribe.

(3) Costs of detention and maintenance pending removal

(A) In general

Except as provided in subparagraph (B) and subsection (d),[4] an owner of a vessel or aircraft bringing an alien to the United States shall pay the costs of detaining and maintaining the alien—

(i) while the alien is detained under subsection (d)(1), and

(ii) in the case of an alien who is a stowaway, while the alien is being detained pursuant to—

(I) subsection (d)(2)(A) or (d)(2)(B)(i),

(II) subsection (d)(2)(B)(ii) or (iii) for the period of time reasonably necessary for the owner to arrange for repatriation or removal of the stowaway, including obtaining necessary travel documents, but not to extend beyond the date on which it is ascertained that such travel documents cannot be

[4] So in original. Probably should be subsection "(e),".

obtained from the country to which the stowaway is to be returned, or

(III) section 1225(b)(1)(B)(ii) of this title, for a period not to exceed 15 days (excluding Saturdays, Sundays, and holidays) commencing on the first such day which begins on the earlier of 72 hours after the time of the initial presentation of the stowaway for inspection or at the time the stowaway is determined to have a credible fear of persecution.

(B) Nonapplication

Subparagraph (A) shall not apply if—

(i) the alien is a crewmember;

(ii) the alien has an immigrant visa;

(iii) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States and applies for admission not later than 120 days after the date the visa or documentation was issued;

(iv) the alien has a reentry permit and applies for admission not later than 120 days after the date of the alien's last inspection and admission;

(v)(I) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States or a reentry permit;

(II) the alien applies for admission more than 120 days after the date the visa or documentation was issued or after the date of the last inspection and admission under the reentry permit; and

(III) the owner of the vessel or aircraft satisfies the Attorney General that the existence of the condition relating to inadmissibility could not have been discovered by exercising reasonable care before the alien boarded the vessel or aircraft; or

(vi) the individual claims to be a national of the United States and has a United States passport.

(d) Requirements of persons providing transportation

(1) Removal at time of arrival

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States shall—

(A) receive an alien back on the vessel or aircraft or another vessel or aircraft owned or operated by the same interests if the alien is ordered removed under this part; and

(B) take the alien to the foreign country to which the alien is ordered removed.

(2) Alien stowaways

An owner, agent, master, commanding officer, charterer, or consignee of a vessel or aircraft arriving in the United States with an alien stowaway—

(A) shall detain the alien on board the vessel or aircraft, or at such place as the Attorney General shall designate, until completion of the inspection of the alien by an immigration officer;

(B) may not permit the stowaway to land in the United States, except pursuant to regulations of the Attorney General temporarily—

(i) for medical treatment,

(ii) for detention of the stowaway by the Attorney General, or

(iii) for departure or removal of the stowaway; and

(C) if ordered by an immigration officer, shall remove the stowaway on the vessel or aircraft or on another vessel or aircraft.

The Attorney General shall grant a timely request to remove the stowaway under subparagraph (C) on a vessel or aircraft other than that on which the stowaway arrived if the requester has obtained any travel documents necessary for departure or repatriation of the stowaway and removal of the stowaway will not be unreasonably delayed.

(3) Removal upon order

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel, aircraft, or other transportation line shall comply with an order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be removed under this chapter.

(e) Payment of expenses of removal

(1) Costs of removal at time of arrival

In the case of an alien who is a stowaway or who is ordered removed either without a hearing under section 1225(a)(1)[5] or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival, the owner of the vessel or aircraft (if any) on which the alien arrived in the United States shall pay the transportation cost of removing the alien. If removal is on a vessel or aircraft not owned by the owner of the vessel or aircraft on which the alien arrived in the United States, the Attorney General may—

(A) pay the cost from the appropriation "Immigration and Naturalization Service—Salaries and Expenses"; and

(B) recover the amount of the cost in a civil action from the owner, agent, or consignee of the vessel or aircraft (if any) on which the alien arrived in the United States.

(2) Costs of removal to port of removal for aliens admitted or permitted to land

In the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien to the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

---

[5] So in original. Probably should be "1225(b)(1)".

(3) Costs of removal from port of removal for aliens admitted or permitted to land

(A) Through appropriation

Except as provided in subparagraph (B), in the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien from the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(B) Through owner

(i) In general

In the case of an alien described in clause (ii), the cost of removal of the alien from the port of removal may be charged to any owner of the vessel, aircraft, or other transportation line by which the alien came to the United States.

(ii) Aliens described

An alien described in this clause is an alien who—

(I) is admitted to the United States (other than lawfully admitted for permanent residence) and is ordered removed within 5 years of the date of admission based on a ground that existed before or at the time of admission, or

(II) is an alien crewman permitted to land temporarily under section 1282 of this title and is ordered removed within 5 years of the date of landing.

(C) Costs of removal of certain aliens granted voluntary departure

In the case of an alien who has been granted voluntary departure under section 1229c of this title and who is financially unable to depart at the alien's own expense and whose removal the Attorney General deems to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter.

(f) Aliens requiring personal care during removal

(1) In general

If the Attorney General believes that an alien being removed requires personal care because of the alien's mental or physical condition, the Attorney General may employ a suitable person for that purpose who shall accompany and care for the alien until the alien arrives at the final destination.

(2) Costs

The costs of providing the service described in paragraph (1) shall be defrayed in the same manner as the expense of removing the accompanied alien is defrayed under this section.

(g) Places of detention

(1) In general

The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities

adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from the appropriation "Immigration and Naturalization Service—Salaries and Expenses", without regard to section 6101 of title 41, amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention.

(2) Detention facilities of the Immigration and Naturalization Service

Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.

(h) Statutory construction

Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(i) Incarceration

(1) If the chief executive officer of a State (or, if appropriate, a political subdivision of the State) exercising authority with respect to the incarceration of an undocumented criminal alien submits a written request to the Attorney General, the Attorney General shall, as determined by the Attorney General—

(A) enter into a contractual arrangement which provides for compensation to the State or a political subdivision of the State, as may be appropriate, with

respect to the incarceration of the undocumented criminal alien; or

(B) take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien.

(2) Compensation under paragraph (1)(A) shall be the average cost of incarceration of a prisoner in the relevant State as determined by the Attorney General.

(3) For purposes of this subsection, the term "undocumented criminal alien" means an alien who—

(A) has been convicted of a felony or two or more misdemeanors; and

(B)(i) entered the United States without inspection or at any time or place other than as designated by the Attorney General;

(ii) was the subject of exclusion or deportation proceedings at the time he or she was taken into custody by the State or a political subdivision of the State; or

(iii) was admitted as a nonimmigrant and at the time he or she was taken into custody by the State or a political subdivision of the State has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status.

(4)(A) In carrying out paragraph (1), the Attorney General shall give priority to the Federal incarceration of undocumented criminal aliens who have committed aggravated felonies.

(B) The Attorney General shall ensure that undocumented criminal aliens incarcerated in Federal facilities pursuant to this subsection are held in facilities which provide a level of security appropriate to the crimes for which they were convicted.

(5) There are authorized to be appropriated to carry out this subsection—

(A) $750,000,000 for fiscal year 2006;

(B) $850,000,000 for fiscal year 2007; and

(C) $950,000,000 for each of the fiscal years 2008 through 2011.

(6) Amounts appropriated pursuant to the authorization of appropriations in paragraph (5) that are distributed to a State or political subdivision of a State, including a municipality, may be used only for correctional purposes.

7. 8 C.F.R. 208.2 provides in pertinent part:

Jurisdiction.

* * * * *

(c) *Certain aliens not entitled to proceedings under section 240 of the Act*—

* * * * *

(2) *Withholding of removal applications only.* After Form I 863, Notice of Referral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any application for withholding of removal filed by:

(i) An alien who is the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act; or

* * * * *

(3) *Rules of procedure—(i) General.* Except as provided in this section, proceedings falling under the jurisdiction of the immigration judge pursuant to paragraph (c)(1) or (c)(2) of this section shall be conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR part 240, subpart A. The scope of review in proceedings conducted pursuant to paragraph (c)(1) of this section shall be limited to a determination of whether the alien is eligible for asylum or withholding or deferral of removal, and whether asylum shall be granted in the exercise of discretion. The scope of review in proceedings conducted pursuant to paragraph (c)(2) of this section shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal. During such proceedings, all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.

* * * * *

8. 8 C.F.R. 208.31(d) provides:

Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

(d) *Authority.* Asylum officers conducting screening determinations under this section shall have the authority described in § 208.9(c).

9. 8 C.F.R. 236.1 provides:

Apprehension, custody, and detention.

(a) *Detainers.* The issuance of a detainer under this section shall be governed by the provisions of § 287.7 of this chapter.

(b) *Warrant of arrest*—(1) *In general.* At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, the respondent may be arrested and taken into custody under the authority of Form I 200, Warrant of Arrest. A warrant of arrest may be issued only by those immigration officers listed in § 287.5(e)(2) of this chapter and may be served only by those immigration officers listed in § 287.5(e)(3) of this chapter.

(2) If, after the issuance of a warrant of arrest, a determination is made not to serve it, any officer authorized to issue such warrant may authorize its cancellation.

(c) *Custody issues and release procedures*—(1) *In general.* (i) After the expiration of the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3)

of Div. C of Pub. L. 104-208, no alien described in section 236(c)(1) of the Act may be released from custody during removal proceedings except pursuant to section 236(c)(2) of the Act.

(ii) Paragraph (c)(2) through (c)(8) of this section shall govern custody determinations for aliens subject to the TPCR while they remain in effect. For purposes of this section, an alien "subject to the TPCR" is an alien described in section 303(b)(3)(A) of Div. C of Pub. L. 104-208 who is in deportation proceedings, subject to a final order of deportation, or in removal proceedings. The TPCR do not apply to aliens in exclusion proceedings under former section 236 of the Act, aliens in expedited removal proceedings under section 235(b)(1) of the Act, or aliens subject to a final order of removal.

(2) *Aliens not lawfully admitted.* Subject to paragraph (c)(6)(i) of this section, but notwithstanding any other provision within this section, an alien subject to the TPCR who is not lawfully admitted is not eligible to be considered for release from custody.

(i) An alien who remains in status as an alien lawfully admitted for permanent residence, conditionally admitted for permanent residence, or lawfully admitted for temporary residence is "lawfully admitted" for purposes of this section.

(ii) An alien in removal proceedings, in deportation proceedings, or subject to a final order of deportation, and not described in paragraph (c)(2)(i) of this section, is not "lawfully admitted" for purposes of this section unless the alien last entered the United States lawfully and is not presently an applicant for admission to the United States.

(3) *Criminal aliens eligible to be considered for release.* Except as provided in this section, or otherwise provided by law, an alien subject to the TPCR may be considered for release from custody if lawfully admitted. Such an alien must first demonstrate, by clear and convincing evidence, that release would not pose a danger to the safety of other persons or of property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding (including any appearance required by the Service or EOIR) in order to be considered for release in the exercise of discretion.

(4) *Criminal aliens ineligible to be considered for release except in certain special circumstances.* An alien, other than an alien lawfully admitted for permanent residence, subject to section 303(b)(3)(A) (ii) or (iii) of Div. C. of Pub. L. 104 208 is ineligible to be considered for release if the alien:

(i) Is described in section 241(a)(2)(C) of the Act (as in effect prior to April 1, 1997), or has been convicted of a crime described in section 101(a)(43)(B), (E)(ii) or (F) of the Act (as in effect on April 1, 1997);

(ii) Has been convicted of a crime described in section 101(a)(43)(G) of the Act (as in effect on April 1, 1997) or a crime or crimes involving moral turpitude related to property, and sentenced therefor (including in the aggregate) to at least 3 years' imprisonment;

(iii) Has failed to appear for an immigration proceeding without reasonable cause or has been subject to a bench warrant or similar legal process (unless quashed, withdrawn, or cancelled as improvidently issued);

(iv) Has been convicted of a crime described in section 101(a)(43)(Q) or (T) of the Act (as in effect on April 1, 1997);

(v) Has been convicted in a criminal proceeding of a violation of section 273, 274, 274C, 276, or 277 of the Act, or has admitted the factual elements of such a violation;

(vi) Has overstayed a period granted for voluntary departure;

(vii) Has failed to surrender or report for removal pursuant to an order of exclusion, deportation, or removal;

(viii) Does not wish to pursue, or is statutorily ineligible for, any form of relief from exclusion, deportation, or removal under this chapter or the Act; or

(ix) Is described in paragraphs (c)(5)(i)(A), (B), or (C) of this section but has not been sentenced, including in the aggregate but not including any portions suspended, to at least 2 years' imprisonment, unless the alien was lawfully admitted and has not, since the commencement of proceedings and within the 10 years prior thereto, been convicted of a crime, failed to comply with an order to surrender or a period of voluntary departure, or been subject to a bench warrant or similar legal process (unless quashed, withdrawn, or cancelled as improvidently issued). An alien eligible to be considered for release under this paragraph must meet the burdens described in paragraph (c)(3) of this section in order to be released from custody in the exercise of discretion.

(5) *Criminal aliens ineligible to be considered for release.* (i) A criminal alien subject to section

303(b)(3)(A)(ii) or (iii) of Div. C of Pub. L. 104-208 is ineligible to be considered for release if the alien has been sentenced, including in the aggregate but not including any portions suspended, to at least 2 years' imprisonment, and the alien

(A) Is described in section 237(a)(2)(D)(i) or (ii) of the Act (as in effect on April 1, 1997), or has been convicted of a crime described in section 101(a)(43)(A), (C), (E)(i), (H), (I), (K)(iii), or (L) of the Act (as in effect on April 1, 1997);

(B) Is described in section 237(a)(2)(A)(iv) of the Act; or

(C) Has escaped or attempted to escape from the lawful custody of a local, State, or Federal prison, agency, or officer within the United States.

(ii) Notwithstanding paragraph (c)(5)(i) of this section, a permanent resident alien who has not, since the commencement of proceedings and within the 15 years prior thereto, been convicted of a crime, failed to comply with an order to surrender or a period of voluntary departure, or been subject to a bench warrant or similar legal process (unless quashed, withdrawn, or cancelled as improvidently issued), may be considered for release under paragraph (c)(3) of this section.

(6) *Unremovable aliens and certain long-term detainees.* (i) If the district director determines that an alien subject to section 303(b)(3)(A)(ii) or (iii) of Div. C of Pub. L. 104-208 cannot be removed from the United States because the designated country of removal or deportation will not accept the alien's return, the district director may, in the exercise of discretion, consider re-

lease of the alien from custody upon such terms and conditions as the district director may prescribe, without regard to paragraphs (c)(2), (c)(4), and (c)(5) of this section.

(ii) The district director may also, notwithstanding paragraph (c)(5) of this section, consider release from custody, upon such terms and conditions as the district director may prescribe, of any alien described in paragraph (c)(2)(ii) of this section who has been in the Service's custody for six months pursuant to a final order of deportation terminating the alien's status as a lawful permanent resident.

(iii) The district director may release an alien from custody under this paragraph only in accordance with the standards set forth in paragraph (c)(3) of this section and any other applicable provisions of law.

(iv) The district director's custody decision under this paragraph shall not be subject to redetermination by an immigration judge, but, in the case of a custody decision under paragraph (c)(6)(ii) of this section, may be appealed to the Board of Immigration Appeals pursuant to paragraph (d)(3)(iii) of this section.

(7) *Construction.* A reference in this section to a provision in section 241 of the Act as in effect prior to April 1, 1997, shall be deemed to include a reference to the corresponding provision in section 237 of the Act as in effect on April 1, 1997. A reference in this section to a "crime" shall be considered to include a reference to a conspiracy or attempt to commit such a crime. In calculating the 10-year period specified in paragraph (c)(4) of this section and the 15-year period specified in paragraph (c)(5) of this section, no period during which the

alien was detained or incarcerated shall count toward the total. References in paragraph (c)(6)(i) of this section to the "district director" shall be deemed to include a reference to any official designated by the Assistant Secretary/Director of ICE to exercise custody authority over aliens covered by that paragraph. Nothing in this part shall be construed as prohibiting an alien from seeking reconsideration of the Service's determination that the alien is within a category barred from release under this part.

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(e)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

(9) When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer in charge (except foreign), in which event the alien may be taken into physical custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and canceled.

(10) The provisions of § 103.6 of this chapter shall apply to any bonds authorized. Subject to the provisions of this section, the provisions of § 1003.19 of this chapter shall govern availability to the respondent of recourse to other administrative authority for release from custody.

(11) An immigration judge may not exercise the authority provided in this section, and the review process described in paragraph (d) of this section shall not apply, with respect to any alien beyond the custody jurisdiction of the immigration judge as provided in § 1003.19(h) of this chapter.

(d) *Appeals from custody decisions*—(1) *Application to immigration judge.* After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 1003.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.

(2) *Application to the district director.* After expiration of the 7-day period in paragraph (d)(1) of this

section, the respondent may request review by the district director of the conditions of his or her release.

(3) *Appeal to the Board of Immigration Appeals.* An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals in the following circumstances:

(i) In accordance with § 1003.38 of this chapter, the alien or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.

(ii) The alien, within 10 days, may appeal from the district director's decision under paragraph (d)(2)(i) of this section.

(4) *Effect of filing an appeal.* The filing of an appeal from a determination of an immigration judge or district director under this paragraph shall not operate to delay compliance with the order (except as provided in § 1003.19(i), nor stay the administrative proceedings or removal.

(e) *Privilege of communication.* Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the following countries require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf. When notifying consular or diplomatic officials, Service officers shall not reveal the fact that any detained alien has applied for asylum or withholding of removal.

Algeria[1]
Antigua and Barbuda
Armenia
Azerbaijan
Bahamas, The
Barbados
Belarus
Belize
Brunei
Bulgaria
China (People's Republic of)[2]
Costa Rica
Cyprus
Czech Republic
Dominica
Fiji
Gambia, The
Georgia
Ghana
Grenada
Guyana
Hong Kong[3]

---

[1] Arrangements with the countries listed in 8 CFR 236.1(e) provide that U.S. authorities shall notify responsible representatives within 72 hours of the arrest or detention of one of their nationals.

[2] Notification is not mandatory in the case of any person who carries a "Republic of China" passport issued by Taiwan. Such persons should be informed without delay that the nearest office of the Taipei Economic and Cultural Representative Office ("TECRO"), the unofficial entity representing Taiwan's interests in the United States, can be notified at their request.

[3] Hong Kong reverted to Chinese sovereignty on July 1, 1997, and is now officially referred to as the Hong Kong Special Administrative Region, or "S.A.R." Under paragraph 3(f)(2) of the March 25, 1997,

Hungary
Jamaica
Kazakhstan
Kiribati
Kuwait
Kyrgyzstan
Malaysia
Malta
Mauritius
Moldova
Mongolia
Nigeria
Philippines
Poland[4]
Romania
Russian Federation
St. Kitts and Nevis
St. Lucia
St. Vincent/Grenadines
Seychelles
Sierra Leone
Singapore
Slovak Republic
Tajikistan

U.S.-China Agreement on the Maintenance of the U.S. Consulate General in the Hong Kong Special Administrative Region, U.S. officials are required to notify Chinese officials of the arrest or detention of the bearers of Hong Kong passports in the same manner as is required for bearers of Chinese passports—i.e., immediately, and in any event, within four days of the arrest or detention.

[4] Consular communication is not mandatory for any Polish national who has been admitted for permanent residence in the United States. Such notification should only be provided upon request by a Polish national with permanent residency in the United States.

Tanzania
Tonga
Trinidad and Tobago
Tunisia
Turkmenistan
Tuvalu
Ukraine
United Kingdom[5]
U.S.S.R.[6]
Uzbekistan
Zambia
Zimbabwe

(f) *Notification to Executive Office for Immigration Review of change in custody status.* The Service shall notify the Immigration Court having administrative control over the Record of Proceeding of any change in custody location or of release from, or subsequent taking into, Service custody of a respondent/applicant pursuant to § 1003.19(g) of this chapter.

(g) *Notice of custody determination*—(1) *In general.* At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings

---

[5] United Kingdom includes England, Scotland, Wales, Northern Ireland and Islands and the British dependencies of Anguilla, British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

[6] All U.S.S.R. successor states are covered by this agreement. They are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. Although the U.S.S.R. no longer exists, the U.S.S.R is listed here, because some nationals of its successor states may still be traveling on a U.S.S.R. passport. Mandatory consular notification applies to any national of such a state, including one traveling on a U.S.S.R. passport.

are completed, an immigration official may issue a Form I-286, Notice of Custody Determination. A notice of custody determination may be issued by those immigration officials listed in 8 CFR 287.5(e)(2) and may be served by those immigration officials listed in 8 CFR 287.5(e)(3), or other officers or employees of the Department or the United States who are delegated the authority to do so pursuant to 8 CFR 2.1.

(2) *Cancellation.* If after the issuance of a notice of custody determination, a determination is made not to serve it, any official authorized to issue such notice may authorize its cancellation.

10. 8 C.F.R. 241.4 provides:

Continued detention of inadmissible, criminal, and other aliens beyond the removal period.

(a) *Scope.* The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or his or her designee, the Executive Associate Commissioner for Field Operations (Executive Associate Commissioner), the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Detention and Removal Field Office or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided for in paragraph (b)(2) of this section, the provisions of this section apply to the custody determinations for the following group of aliens:

(1) An alien ordered removed who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978, 5048 (codified at 8 U.S.C. 1226(e)(1) through (e)(3)(1994));

(2) An alien ordered removed who is removable under section 237(a)(1)(C) of the Act;

(3) An alien ordered removed who is removable under sections 237(a)(2) or 237(a)(4) of the Act, including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Public Law 104-208, 110 Stat. 3009-546; and

(4) An alien ordered removed who the decisionmaker determines is unlikely to comply with the removal order or is a risk to the community.

(b) *Applicability to particular aliens*—(1) *Motions to reopen.* An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) *Parole for certain Cuban nationals.* The review procedures in this section do not apply to any inad-

missible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(3) *Individuals granted withholding or deferral of removal.* Aliens granted withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture who are otherwise subject to detention are subject to the provisions of this part 241. Individuals subject to a termination of deferral hearing under 8 CFR 208.17(d) remain subject to the provisions of this part 241 throughout the termination process.

(4) *Service determination under 8 CFR 241.13.* The custody review procedures in this section do not apply after the Service has made a determination, pursuant to the procedures provided in 8 CFR 241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

(c) *Delegation of authority.* The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act

when there is a final order of removal is delegated as follows:

(1) *District Directors and Directors of Detention and Removal Field Offices.* The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the 3 month period immediately following the expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director or the Director of the Detention and Removal Field Office having jurisdiction over the alien. The district director or the Director of the Detention and Removal Field Office shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective jurisdictional area.

(2) *Headquarters Post-Order Detention Unit (HQPDU).* For any alien the district director refers for further review after the removal period, or any alien who has not been released or removed by the expiration of the three-month period after the review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) *The HQPDU review plan.* The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) *Additional delegation of authority.* All references to the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, and the district director in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, or the district director to exercise powers under this section.

(d) *Custody determinations.* A copy of any decision by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from the district director's or the Executive Associate Commissioner's decision.

(1) *Showing by the alien.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may release an alien if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section,

continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) *Service of decision and other documents.* All notices, decisions, or other documents in connection with the custody reviews conducted under this section by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall be served on the alien, in accordance with 8 CFR 103.8, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) *Alien's representative.* The alien's representative is required to complete Form G-**28,** Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) *Criteria for release.* Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a nonviolent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

(f) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) *Travel documents and docket control for aliens continued in detention*—(1) *Removal period.* (i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:

(A) the date the order becomes administratively final;

(B) If the removal order is subject to judicial review (including review by habeas corpus) and if the court has ordered a stay of the alien's removal, the date on which,

consistent with the court's order, the removal order can be executed and the alien removed; or

(C) If the alien was detained or confined, except in connection with a proceeding under this chapter relating to removability, the date the alien is released from the detention or confinement.

(ii) The removal period shall run for a period of 90 days. However, the removal period is extended under section 241(a)(1)(C) of the Act if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal. The Service will provide such an alien with a Notice of Failure to Comply, as provided in paragraph (g)(5) of this section, before the expiration of the removal period. The removal period shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effect the alien's removal.

(2) *In general.* The district director shall continue to undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel doc-

ument is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(3) *Availability of travel document.* In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

(4) *Removal.* The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(5) *Alien's compliance and cooperation.* (i) Release will be denied and the alien may remain in detention if the alien fails or refuses to make timely application in good faith for travel documents necessary to the alien's departure or conspires or acts to prevent the alien's removal. The detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens.

(ii) The Service shall serve the alien with a Notice of Failure to Comply, which shall advise the alien of the following: the provisions of sections 241(a)(1)(C) (extension of removal period) and 243(a) of the Act (criminal penalties related to removal); the circumstances demonstrating his or her failure to comply with the require-

ments of section 241(a)(1)(C) of the Act; and an explanation of the necessary steps that the alien must take in order to comply with the statutory requirements.

(iii) The Service shall advise the alien that the Notice of Failure to Comply shall have the effect of extending the removal period as provided by law, if the removal period has not yet expired, and that the Service is not obligated to complete its scheduled custody reviews under this section until the alien has demonstrated compliance with the statutory obligations.

(iv) The fact that the Service does not provide a Notice of Failure to Comply, within the 90-day removal period, to an alien who has failed to comply with the requirements of section 241(a)(1)(C) of the Act, shall not have the effect of excusing the alien's conduct.

(h) *District director's or Director of the Detention and Removal Field Office's custody review procedures.* The district director's or Director of the Detention and Removal Field Office's custody determination will be developed in accordance with the following procedures:

(1) Records review. The district director or Director of the Detention and Removal Field Office will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director or Director of the Detention and Removal Field Office will conduct a records review prior to the expiration of the removal period. This initial post-order custody review will consist of a review of the alien's records and any written information submitted in English to the district director by or on behalf of the alien. However, the district director or Director of the Detention and Removal Field Office may in his or her discretion schedule

a personal or telephonic interview with the alien as part of this custody determination. The district director or Director of the Detention and Removal Field Office may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) *Notice to alien.* The district director or Director of the Detention and Removal Field Office will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director or Director of the Detention and Removal Field Office expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) *Factors for consideration.* The district director's or Director of the Detention and Removal Field Office's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director must be able to reach the conclusions set forth in paragraph (e) of this section.

(4) *District director's or Director of the Detention and Removal Field Office's decision.* The district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to

be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(5) *District office or Detention and Removal Field office staff.* The district director or the Director of the Detention and Removal Field Office may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decisions to those persons directly responsible for detention within his or her geographical areas of responsibility. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, the assistant director of the detention and removal field office, the director of the detention and removal resident office, the assistant director of the detention and removal resident office, officers in charge of service processing centers, or such other persons as the district director or the Director of the Detention and Removal Field Office may designate from the professional staff of the Service.

(i) *Determinations by the Executive Associate Commissioner.* Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

(1) *Review panels.* The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by the two-member Review Panel shall be unanimous. If the vote of the two-member Review

Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) *Records review.* Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) *Personal interview.* (i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

(4) *Alien's participation.* Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this section.

(5) *Panel recommendation.* Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) *Determination.* The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(7) *No significant likelihood or removal.* During the custody review process as provided in this paragraph (i), or at the conclusion of that review, if the alien submits, or the record contains, information providing a substantial reason to believe that the removal of a detained alien is not significantly likely in the reasonably foreseeable future, the HQPDU shall treat that as a request for review and initiate the review procedures under § 241.13. To the extent relevant, the HQPDU may consider any information developed during the custody review process under this section in connection with the determinations to be made by the Service under § 241.13. The Service shall complete the custody review under this section unless the HQPDU is able to

make a prompt determination to release the alien under an order of supervision under § 241.13 because there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.

(j) *Conditions of release—(1) In general.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) *Sponsorship.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, condition release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship, housing, or other placement has been found for the detainee, if ordered, including but not limited to, evidence of financial support.

(3) *Employment authorization.* The district director, Director of the Detention and Removal Field Office, and the Executive Associate Commissioner, may, in

the exercise of discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, withdraw approval for release of any detained alien prior to release when, in the decisionmaker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) *Timing of reviews.* The timing of reviews shall be in accordance with the following guidelines:

(1) *District director or Director of the Detention and Removal Field Office.* (i) Prior to the expiration of the removal period, the district director or Director of the Detention and Removal Field Office shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished during the period, or is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(ii) When release is denied pending the alien's removal, the district director or Director of the Detention and Removal Field Office in his or her discretion may retain responsibility for custody determinations for up to three months after expiration of the removal period,

during which time the district director or Director of the Detention and Removal Field Office may conduct such additional review of the case as he or she deems appropriate. The district director may release the alien if he or she is not removed within the three-month period following the expiration of the removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director or Director of the Detention and Removal Field Office may refer the alien to the HQPDU for further custody review.

(2) *HQPDU reviews*—(i) *District director or Director of the Detention and Removal Field Office referral for further review.* When the district director or Director of the Detention and Removal Field Office refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by the expiration of the removal period or as soon thereafter as practicable.

(ii) *District director or Director of the Detention and Removal Field Office retains jurisdiction.* When the district director or Director of the Detention and Removal Field Office has advised the alien at the 90-day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending removal or further custody review, and the alien is not removed within three months of the district director's decision, authority over the custody determination transfers from the district director or Director of the Detention and Re-

moval Field Office to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) *Continued detention cases.* A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) *Review scheduling.* Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) *Discretionary reviews.* The HQPDU Director, in his or her discretion, may schedule a review of a detainee at shorter intervals when he or she deems such review to be warranted.

(3) *Postponement of review.* In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt removal is practicable and proper, or for other good cause. The decision and reasons

for the delay shall be documented in the alien's custody review file or A file, as appropriate. Reasonable care will be exercised to ensure that the alien's case is reviewed once the reason for delay is remedied or if the alien is not removed from the United States as anticipated at the time review was suspended or postponed.

(4) *Transition provisions.* (i) The provisions of this section apply to cases that have already received the 90-day review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable,* February 3, 1999; *Supplemental Detention Procedures,* April 30, 1999; *Interim Changes and Instructions for Conduct of Post-order Custody Reviews,* August 6, 1999; *Review of Long-term Detainees,* October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at *http://www.ins.usdoj.gov*). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in

accordance with the procedures in paragraph (i) of this section.

(1) *Revocation of release*—(1) *Violation of conditions of release.* Any alien described in paragraph (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

(2) *Determination by the Service.* The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

(3) *Timing of review when release is revoked.* If the alien is not released from custody following the informal interview provided for in paragraph (l)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.

11. 8 C.F.R. 241.8 provides:

Reinstatement of removal orders.

(a) *Applicability.* An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such

circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

(1) Whether the alien has been subject to a prior order of removal. The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien.

(2) The identity of the alien, *i.e.,* whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal. In disputed cases, verification of identity shall be accomplished by a comparison of fingerprints between those of the previously excluded, deported, or removed alien contained in Service records and those of the subject alien. In the absence of fingerprints in a disputed case the alien shall not be removed pursuant to this paragraph.

(3) Whether the alien unlawfully reentered the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of Service data systems available to the officer.

(b) *Notice.* If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall

consider whether the alien's statement warrants reconsideration of the determination.

(c) *Order.* If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

(d) *Exception for applicants for benefits under section 902 of HRIFA or sections 202 or 203 of NACARA.* If an alien who is otherwise subject to this section has applied for adjustment of status under either section 902 of Division A of Public Law 105-277, the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), or section 202 of Public Law 105-100, the Nicaraguan Adjustment and Central American Relief Act (NACARA), the provisions of section 241(a)(5) of the Immigration and Nationality Act shall not apply. The immigration officer may not reinstate the prior order in accordance with this section unless and until a final decision to deny the application for adjustment has been made. If the application for adjustment of status is granted, the prior order shall be rendered moot.

(e) *Exception for withholding of removal.* If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture pursuant to § 208.31 of this chapter.

(f) *Execution of reinstated order.* Execution of the reinstated order of removal and detention of the alien shall be administered in accordance with this part.

12. 8 C.F.R. 241.13 provides:

Determination of whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future.

(a) *Scope.* This section establishes special review procedures for those aliens who are subject to a final order of removal and are detained under the custody review procedures provided at § 241.4 after the expiration of the removal period, where the alien has provided good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future.

(b) *Applicability to particular aliens*—(1) *Relationship to § 2 4 1. 4.* Section 241.4 shall continue to govern the detention of aliens under a final order of removal, including aliens who have requested a review of the likelihood of their removal under this section, unless the Service makes a determination under this section that there is no significant likelihood of removal in the reasonably foreseeable future. The Service may release an alien under an order of supervision under § 241.4 if it determines that the alien would not pose a danger to the public or a risk of flight, without regard to the likelihood of the alien's removal in the reasonably foreseeable future.

(2) *Continued detention pending determinations.* (i) The Service's Headquarters Post-order Detention Unit (HQPDU) shall continue in custody any alien described in paragraph (a) of this section during the time the Service is pursuing the procedures of this section to determine whether there is no significant likelihood the

alien can be removed in the reasonably foreseeable future. The HQPDU shall continue in custody any alien described in paragraph (a) of this section for whom it has determined that special circumstances exist and custody procedures under § 241.14 have been initiated.

(ii) The HQPDU has no obligation to release an alien under this section until the HQPDU has had the opportunity during a six-month period, dating from the beginning of the removal period (whenever that period begins and unless that period is extended as provided in section 241(a)(1) of the Act), to make its determination as to whether there is a significant likelihood of removal in the reasonably foreseeable future.

(3) *Limitations.* This section does not apply to:

(i) Arriving aliens, including those who have not entered the United States, those who have been granted immigration parole into the United States, and Mariel Cubans whose parole is governed by § 212.12 of this chapter;

(ii) Aliens subject to a final order of removal who are still within the removal period, including aliens whose removal period has been extended for failure to comply with the requirements of section 241(a)(1)(C) of the Act; or

(iii) Aliens who are ordered removed by the Alien Terrorist Removal Court pursuant to title 5 of the Act.

(c) *Delegation of authority.* The HQPDU shall conduct a review under this section, in response to a request from a detained alien, in order to determine whether there is no significant likelihood that the alien will be removed in the reasonably foreseeable future. If so, the HQPDU shall determine whether the alien

should be released from custody under appropriate conditions of supervision or should be referred for a determination under § 241.14 as to whether the alien's continued detention may be justified by special circumstances.

(d) *Showing by the alien*—(1) *Written request.* An eligible alien may submit a written request for release to the HQPDU asserting the basis for the alien's belief that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future. The alien may submit whatever documentation to the HQPDU he or she wishes in support of the assertion that there is no significant likelihood of removal in the reasonably foreseeable future.

(2) *Compliance and cooperation with removal efforts.* The alien shall include with the written request information sufficient to establish his or her compliance with the obligation to effect his or her removal and to cooperate in the process of obtaining necessary travel documents.

(3) *Timing of request.* An eligible alien subject to a final order of removal may submit, at any time after the removal order becomes final, a written request under this section asserting that his or her removal is not significantly likely in the reasonably foreseeable future. However, the Service may, in the exercise of its discretion, postpone its consideration of such a request until after expiration of the removal period.

(e) *Review by HQPDU—(1) Initial response.* Within 10 business days after the HQPDU receives the request (or, if later, the expiration of the removal period), the HQPDU shall respond in writing to the alien, with a

copy to counsel of record, by regular mail, acknowledging receipt of the request for a review under this section and explaining the procedures that will be used to evaluate the request. The notice shall advise the alien that the Service may continue to detain the alien until it has made a determination under this section whether there is a significant likelihood the alien can be removed in the reasonably foreseeable future.

(2) *Lack of compliance, failure to cooperate.* The HQPDU shall first determine if the alien has failed to make reasonable efforts to comply with the removal order, has failed to cooperate fully in effecting removal, or has obstructed or hampered the removal process. If so, the HQPDU shall so advise the alien in writing, with a copy to counsel of record by regular mail. The HQPDU shall advise the alien of the efforts he or she needs to make in order to assist in securing travel documents for return to his or her country of origin or a third country, as well as the consequences of failure to make such efforts or to cooperate, including the provisions of section 243(a) of the Act. The Service shall not be obligated to conduct a further consideration of the alien's request for release until the alien has responded to the HQPDU and has established his or her compliance with the statutory requirements.

(3) *Referral to the State Department.* If the HQPDU believes that the alien's request provides grounds for further review, the Service may, in the exercise of its discretion, forward a copy of the alien's release request to the Department of State for information and assistance. The Department of State may provide detailed country conditions information or any other information that

may be relevant to whether a travel document is obtainable from the country at issue. The Department of State may also provide an assessment of the accuracy of the alien's assertion that he or she cannot be returned to the country at issue or to a third country. When the Service bases its decision, in whole or in part, on information provided by the Department of State, that information shall be made part of the record.

(4) *Response by alien.* The Service shall permit the alien an opportunity to respond to the evidence on which the Service intends to rely, including the Department of State's submission, if any, and other evidence of record presented by the Service prior to any HQPDU decision. The alien may provide any additional relevant information to the Service, including reasons why his or her removal would not be significantly likely in the reasonably foreseeable future even though the Service has generally been able to accomplish the removal of other aliens to the particular country.

(5) *Interview.* The HQPDU may grant the alien an interview, whether telephonically or in person, if the HQPDU determines that an interview would provide assistance in reaching a decision. If an interview is scheduled, the HQPDU will provide an interpreter upon its determination that such assistance is appropriate.

(6) *Special circumstances.* If the Service determines that there are special circumstances justifying the alien's continued detention nowithstanding the determination that removal is not significantly likely in the reasonably foreseeable future, the Service shall initiate the review procedures in § 241.14, and provide written notice to the alien. In appropriate cases, the Service

may initiate review proceedings under § 241.14 before completing the HQPDU review under this section.

(f) *Factors for consideration.* The HQPDU shall consider all the facts of the case including, but not limited to, the history of the alien's efforts to comply with the order of removal, the history of the Service's efforts to remove aliens to the country in question or to third countries, including the ongoing nature of the Service's efforts to remove this alien and the alien's assistance with those efforts, the reasonably foreseeable results of those efforts, and the views of the Department of State regarding the prospects for removal of aliens to the country or countries in question. Where the Service is continuing its efforts to remove the alien, there is no presumptive period of time within which the alien's removal must be accomplished, but the prospects for the timeliness of removal must be reasonable under the circumstances.

(g) *Decision.* The HQPDU shall issue a written decision based on the administrative record, including any documentation provided by the alien, regarding the likelihood of removal and whether there is a significant likelihood that the alien will be removed in the reasonably foreseeable future under the circumstances. The HQPDU shall provide the decision to the alien, with a copy to counsel of record, by regular mail.

(1) *Finding of no significant likelihood of removal.* If the HQPDU determines at the conclusion of the review that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future, despite the Service's and the alien's efforts to effect removal, then the HQPDU shall so advise the alien. Unless there are special circumstances justifying continued

detention, the Service shall promptly make arrangements for the release of the alien subject to appropriate conditions, as provided in paragraph (h) of this section. The Service may require that the alien submit to a medical or psychiatric examination prior to establishing appropriate conditions for release or determining whether to refer the alien for further proceedings under § 214.14 because of special circumstances justifying continued detention. The Service is not required to release an alien if the alien refuses to submit to a medical or psychiatric examination as ordered.

(2) *Denial.* If the HQPDU determines at the conclusion of the review that there is a significant likelihood that the alien will be removed in the reasonably foreseeable future, the HQPDU shall deny the alien's request under this section. The denial shall advise the alien that his or her detention will continue to be governed under the established standards in § 214.4. There is no administrative appeal from the HQPDU decision denying a request from an alien under this section.

(h) *Conditions of release*—(1) *In general.* An alien's release pursuant to an HQPDU determination that the alien's removal is not significantly likely in the reasonably foreseeable future shall be upon appropriate conditions specified in this paragraph and in the order of supervision, in order to protect the public safety and to promote the ability of the Service to effect the alien's removal as ordered, or removal to a third country, should circumstances change in the future. The order of supervision shall include all of the conditions provided in section 241(a)(3) of the Act, and § 241.5, and shall also include the conditions that the alien obey all laws, including any applicable prohibitions on the possession or

use of firearms *(see, e.g.,* 18 U.S.C. 922(g)); and that the alien continue to seek to obtain travel documents and provide the Service with all correspondence to Embassies/Consulates requesting the issuance of travel documents and any reply from the Embassy/Consulate. The order of supervision may also include any other conditions that the HQPDU considers necessary to ensure public safety and guarantee the alien's compliance with the order of removal, including, but not limited to, attendance at any rehabilitative/sponsorship program or submission for medical or psychiatric examination, as ordered.

(2) *Advice of consequences for violating conditions of release.* The order of supervision shall advise an alien released under this section that he or she must abide by the conditions of release specified by the Service. The order of supervision hall also advise the alien of the consequences of violation of the conditions of release, including the authority to return the alien to custody and the sanctions provided in section 243(b) of the Act.

(3) *Employment authorization.* The Service may, in the exercise of its discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The Service may, in the exercise of its discretion, withdraw approval for release of any alien under this section prior to release in order to effect removal in the reasonably foreseeable future or where the alien refuses to comply with the conditions of release.

(i) *Revocation of release*—(1) *Violation of conditions of release.* Any alien who has been released under an order of supervision under this section who violates any of the conditions of release may be returned to custody and is subject to the penalties described in section 243(b) of the Act. In suitable cases, the HQPDU shall refer the case to the appropriate U.S. Attorney for criminal prosecution. The alien may be continued in detention for an additional six months in order to effect the alien's removal, if possible, and to effect the conditions under which the alien had been released.

(2) *Revocation for removal.* The Service may revoke an alien's release under this section and return the alien to custody if, on account of changed circumstances, the Service determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future. Thereafter, if the alien is not released from custody following the informal interview provided for in paragraph (h)(3) of this section, the provisions of § 241.4 shall govern the alien's continued detention pending removal.

(3) *Revocation procedures.* Upon revocation, the alien will be notified of the reasons for revocation of his or her release. The Service will conduct an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification. The alien may submit any evidence or information that he or she believes shows there is no significant likelihood he or she be removed in the reasonably foreseeable future, or that he or she has not violated the order of supervision. The revocation custody review will include an evaluation of any contested facts relevant to the

revocation and a determination whether the facts as determined warrant revocation and further denial of release.

(j) *Subsequent requests for review.* If the Service has denied an alien's request for release under this section, the alien may submit a request for review of his or her detention under this section, six months after the Service's last denial of release under this section. After applying the procedures in this section, the HQPDU shall consider any additional evidence provided by the alien or available to the Service as well as the evidence in the prior proceedings but the HQPDC shall render a *de novo* decision on the likelihood of removing the alien in the reasonably foreseeable future under the circumstances.

13. 8 C.F.R. 1208.16(f) provides:

Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(f) *Removal to third country.* Nothing in this section or § 1208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.

14. 8 C.F.R. 1208.17(b)(2) provides:

Deferral of removal under the Convention Against Torture.

(b) *Notice to alien.*

(2) The immigration judge shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured.

(c) *Detention of an alien granted deferral of removal under this section.* Nothing in this section shall alter the authority of the Service to detain an alien whose removal has been deferred under this section and who is otherwise subject to detention. In the case of such an alien, decisions about the alien's release shall be made according to part 241 of this chapter.

(d) *Termination of deferral of removal.* (1) At any time while deferral of removal is in effect, the INS District Counsel for the District with jurisdiction over an alien whose removal has been deferred under paragraph (a) of this section may file a motion with the Immigration Court having administrative control pursuant to § 1003.11 of this chapter to schedule a hearing to consider whether deferral of removal should be terminated. The Service motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would be tortured in the country to which removal has been deferred and that was not presented at the previous hearing. The Service motion shall not be subject to the requirements for reopening in §§ 3.2 and 3.23 of this chapter.

(2) The Immigration Court shall provide notice to the alien and the Service of the time, place, and date of the termination hearing. Such notice shall inform the alien that the alien may supplement the information in his or her initial application for withholding of removal under the Convention Against Torture and shall provide that the alien must submit any such supplemental information within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail). At the expiration of this 10 or 13 day period, the Immigration Court shall forward a copy of the original application, and any supplemental information the alien or the Service has submitted, to the Department of State, together with notice to the Department of State of the time, place and date of the termination hearing. At its option, the Department of State may provide comments on the case, according to the provisions of § 1208.11 of this part.