

**CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW
Foundation**

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Richard A. Sloan
Director
Policy Directives and Instructions Branch
Immigration and Naturalization Service
425 I Street, NW
Room 4034
Washington, D.C. 20536

Re: INS No. 2171-01, Custody Procedures, 66 Fed. Reg. 48334
(September 20, 2001).

Dear Mr. Sloan:

The Center for Human Rights and Constitutional Law (CHRCL) submits the following comments on the interim rule on custody procedures issued by the Immigration and Naturalization Service (INS).

The interim rule increases from 24 to 48 hours the amount of time in which the INS must make a determination whether to continue to hold an alien in custody, releases the alien on bond or recognizance, and whether a notice to appear and warrant of arrest will be issued. The interim rule also creates an exception to this 48-hour rule, "in the event of an emergency or other extraordinary circumstances," in which case these determinations will be made "within a reasonable period of time."

CHRCL condemns the horrific attacks of September 11th and supports the U.S. Government's efforts to bring to justice persons involved with the terrorist acts. However, we are deeply concerned that the interim rule will needlessly sacrifice the very rights and freedoms that are the foundation of our democracy. The interim rule goes far beyond the recently enacted provisions of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (October 26, 2001), by authorizing indefinite detention without charge and without review of custody by a neutral and detached judicial officer. This offends the most basic tenets of due process and fairness.

The Fifth Amendment to the U.S. Constitution states, "No person shall...be deprived of life, liberty, or property, without due process of law." The interim rule allows government to take away a person's liberty without affording due process: namely, prompt notice of the reasons for incarceration and a prompt opportunity to be heard by someone detached from the law enforcement function.

Under the law and regulations prior to the interim rule, detainees and their legal representatives were entitled to know the charges against the detainee and exercise their right to a hearing to determine whether the person could be released or paroled consistent with the legitimate needs of public safety.

Under the interim rule the INS may indefinitely detain an alien without any charges, reason to believe he or she is a flight risk, or reason to believe that he or she presents any substantial threat to public security. The trigger for this broad and unprecedented authority would be "emergency or other extraordinary circumstances." The interim rule makes no effort to define what constitutes either an emergency or extraordinary circumstances justifying indefinite incarceration without charge. Such broad and undefined language invites abuse. For example, does an "emergency" include a government shut down due to a budget impasse with Congress, or does it only mean emergencies related to national security? Who has the authority to declare such an emergency and what is the standard used in doing so? How is it to be determined that the emergency has subsided or extraordinary circumstances no longer exist?

The interim rule also doubles the amount of time the INS can hold a person without charge even when there exists no emergency or extraordinary circumstance or suspicion of terrorist activity or support. Former 8 C.F.R. § 287.3(d), which empowers the INS to hold a person for 24 hours before making a custody and charging determination should be left intact. Where no compelling circumstances exist, the INS should make custody and charging decisions within 24 hours of arresting a person.

The interim rule also exceeds the scope of the INS's statutory authority. Proposed 8 C.F.R. § 287.3 implements INA § 287, 8 U.S.C. § 1357. Section 287 does not authorize extended detention prior to filing a charging document to enable the Attorney General to conduct an investigation. An agency cannot exceed the scope of the authority Congress provides. This is so regardless of how well-intentioned the agency's action. *See, e.g. Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000).

The interim regulation is also inconsistent with the PATRIOT Act, which now defines the Attorney General's power to detain individuals suspected of terrorist activities for seven days prior to charging them with a crime or immigration violation. The PATRIOT Act specifically addresses the concern that purportedly spurred this interim rule: the need to detain a suspected terrorist in order to determine whether charges should be brought. The interim rule has been overtaken by subsequent legislation and should be rescinded in favor of new rulemaking implementing the PATRIOT Act. At the very least, the interim rule should be changed to conform to the PATRIOT Act.

Thank you for your time and consideration.

Sincerely,

Carlos Holguín

General Counsel