DEPARTMENT OF JUSTICE

Immigration and Naturalization Service and Executive Office for Immigration Review

8 CFR Parts 3 and 236

[INS No. 1855–97; AG Order No. 2152–98]

RIN 1115–AE88

Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review

AGENCY: Immigration and Naturalization Service, and Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: This rule amends the regulations of the Immigration and Naturalization Service (Service) and the Executive Office for Immigration Review (EOIR), establishing a regulatory framework for the detention of criminal aliens pursuant to the Transition Period Custody Rules (TPCR) set forth in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). This rule is necessary to provide uniform guidance to Service officers and immigration judges (IJs) regarding application of the TPCR.

DATES: This rule is effective June 18, 1998.

FOR FURTHER INFORMATION CONTACT: Brad Glassman, Office of the General Counsel, Immigration and Naturalization Service, 425 I Street NW., Room 6100, Washington, DC 20536, telephone (202) 305–0846.

SUPPLEMENTARY INFORMATION:

Background

On October 9, 1996, the Commissioner of the Immigration and Naturalization Service (Service) notified Congress that the Service lacks the detention space and personnel necessary to comply with the mandatory detention provisions of section 440(c) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 110 Stat. 1214, and section 236(c) of the Immigration and Nationality Act (INA or Act), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104–208, Div. C, section 303(a), 110 Stat. 3009. By operation of law, *see* IIRIRA section 303(b)(2), the notification resulted in the temporary replacement of these mandatory detention provisions with the Transition Period Custody Rules (TPCR) set forth in IIRIRA section 303(b)(3). A second notification on September 29, 1997, continued the TPCR in effect for an additional year. The TPCR provide for the detention, *inter alia*, of specified classes of criminal aliens, and allow some of these aliens to be considered for release in the exercise of the Attorney General's discretion.

The Department of Justice (Department) published a proposed rule to implement the TPCR on September 15, 1997, at 62 FR 48183, with written comments due by October 15, 1997. The proposed rule established three categories of criminal aliens for purposes of detention and release under the TPCR. Aliens in the first category were subject to mandatory detention. Aliens in the second category were subject to mandatory detention except in the case of lawful permanent resident aliens and certain other lawfully admitted aliens who had remained free of crimes, immigration violations, and the like for a 10-year period. Aliens excepted from the second category and aliens in the third category could be considered for release on a case-by-case basis, in the exercise of discretion.

The proposed rule also established procedures for the Service to obtain a stay of an immigration judge's custody decision in conjunction with an appeal of the custody decision to the Board of Immigration Appeals (Board). In providing explicit authority for the Service to seek an emergency stay, the rule codified a long-standing administrative practice. The rule departed from present practice, however, in providing for an automatic stay in certain criminal cases where the Service appeals the redetermination of a bond set at $10,000 or more (including an outright denial of bond).

The Department has received a number of public comments recommending modifications of the proposed rule. Because several of the comments overlap or endorse the submissions of other commenters, the following discussion will address the comments by topic rather than by response to each comment individually.

General Rules Versus Ad Hoc Adjudication

Several commenters objected to the establishment of categories of non-releasable deportable and inadmissible criminal aliens based on factors strongly indicating a poor bail risk. The commenters expressed a preference for case-by-case custody determinations in all situations, criticizing categorical rules as burdensome with respect to the Service's detention resources, less flexible and nuanced than case-by-case consideration, invasive of immigration judges' bond redetermination authority, contrary to the TPCR, and, in the case of permanent resident aliens, unconstitutional.

The Department has carefully considered the views of the commenters, and will retain the basic structure of the proposed rule, with certain modifications. This rule implements an important component of a congressional and executive policy to ensure the swift and certain removal of aliens who commit serious crimes in this country. The success of this policy, in the estimation of both Congress and the Department, significantly affects the well being of the United States and its law-abiding citizen, residents, and visitors.

Congress' near-complete power over immigration transcends the specific grant of authority in Article 1, Section 8 of the Constitution, and derives from the ''inherent and inalienable right of every sovereign and independent nation'' to determine which aliens it will admit or expel. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893); *see also, e.g,. Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) (''[T]he power to admit or exclude aliens is a sovereign prerogative,''); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766–67 (1972) (' 'Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government.' '' (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); *Flemming* v. *Nestor*, 363 U.S. 603, 616 (1960) (describing ''power of Congress to fix the conditions under which aliens are to be permitted to enter and remain in this country'' as ''plenary''); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587–88 (1952) (Power to remove even permanent resident aliens is ''confirmed by international law as a power inherent in every sovereign state.''); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924) (describing as ''unquestioned'' the power of Congress ''to rid the country of persons who have shown by their career that their continued presence here would not make for the safety or welfare of society''). More than a century ago, the Supreme Court upheld detention

> as part of the means necessary to give effect to the provisions for the exclusion of expulsion of aliens * * *. Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.

Wong Wing v. *United States*, 163 U.S. 228, 235 (1896); *see also Carlson* v. *Landon*, 342 U.S. 524, 538 (1952) (''Detention is

necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.''). It is therefore ''axiomatic'' that an alien's interest in being at liberty during the course of immigration proceedings is ''narrow'' and ''circumscribed by considerations of the national interest.'' *Doherty* v. *Thornburgh,* 943 F.2d 204, 208, 208, 209 (2d Cir. 1991), *cert. dismissed* 503 U.S. 901 (1992),

The detention of removable criminal aliens during proceedings serves two essential purposes: Ensuring removal by preventing the alien from fleeing, and protecting the community from further criminal acts or other dangers. The stakes for the Government are considerable in this context. The apprehension of a criminal alien who absconds during the removal process is expensive, time-consuming, and, in many cases, dangerous both to Government personnel and to civilians. Failure to recover such an alien for removal means not only scores of hours wasted by immigration judges, Service attorneys, interpreters, immigration officers, and clerical and support staff, but also a fugitive alien criminal beyond the control of lawful process and at large in the community. Released aliens who abscond calculate—correctly—''that the INS lacks the resources to conduct a dragnet.'' *Ofosu* v. *McElroy*, 98 F.3d 694, 702 (2d Cir. 1996). As further discussed below, abscondment by criminal aliens subject to removal has become disturbingly frequent.

Beginning with the Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. 100–690, 102 Stat. 4181, continuing with the Immigration Act of 1990 (Immact), Pub. L. 101–649, 104 Stat. 4978, and culminating with the recent enactment of AEDPA and IIRIRA, successive legislation over the past decade has mandated increasingly severe immigration consequences for aliens convicted of serious crimes, and has imposed restrictive detention conditions on such aliens during removal proceedings. Congress' concern with criminal aliens who flee or commit additional crimes is plainly evident in the detention provisions of the ADAA and Immact, as amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102–232, 105 Stat. 1733 *See* 8 U.S.C. section 1252 (a)(2) (1995) (mandating detention of aliens convicted of an aggravated felony except upon demonstration of lawful entry and lack of threat to community and flight risk); 8 U.S.C. section 1226(e) (1995) (mandating detention of aliens convicted of an aggravated felony who seek admission to the United States except when home country refuses to repatriate and alien demonstrates lack of threat to community). The legislative history of former section 242(a)(2) and IIRIRA section 303 also reflects these concerns. *See* S. Rep. No. 48, 104th Cong., 1st Sess., 1995 WL 170285 (Apr. 7, 1995); 141 Cong. Rec. S7803, 7823 (daily ed. June 7, 1995) (statement of Senator Abraham); *see also Davis* v. *Weiss*, 749 F. Supp. 47, 50 (D. Conn. 1990); *Morrobel* v. *Thornburgh,* 744 F. Supp. 725, 728 (E.D. Va. 1990) (Legislators reasonably deemed mandatory detention necessary because aggravated felons ''are likely to abscond before the completion of the deportation proceedings.'').

These concerns motivated some of the basic procedural reforms embodied in IIRIRA. *See, e.g.,* INA section 236(a)(2) (raising minimum bond during proceedings from $500 to $1,500); 236(c) (mandating detention of criminals during proceedings); section 236(e) (barring judicial review of discretionary custody determinations); 241(a) (requiring detention of aliens during 90-day ''removal period'' after final order). Congress has specifically addressed the detention of removable criminal aliens by greatly increasing Service detention resources over several years, and by expressing in IIRIRA a clear intention that aliens removable from the United States on the basis of a crime be detained, except in very limited circumstances, *see* INA section 236(c)(1), (2) (permanent provisions mandating detention during proceedings of most aliens removable on criminal grounds); section 241(a)(2) (''Under no circumstances during the removal period shall the Attorney General release an alien who has been found'' removable on criminal or terrorist grounds.). Discretion remains under the statute only by virtue of transitional rules enacted to ease the burden of mandatory detention on the Service's detention resources.

Indeed, section 236(c) of IIRIRA would now bar the release during proceedings of most aliens removable on criminal grounds, were it not for the Service's notification to Congress invoking the TPCR. Having invoked the TPCR on the basis of insufficient detention resources, the Department remains responsible for exercising its temporary discretion in conformity with congressional intent. In the Department's judgment, a carefully crafted regime incorporating both case-by-case discretion and, where appropriate, clear, uniform rules for detention by category, best achieves that goal.

The Department has retained the structure of the proposed rule, including its mandatory detention categories, despite the commenters' concern that the rule encroaches on the authority of immigration judges and lacks the flexibility of a universal case-by-case approach. The final rule preserves a wide area of discretion for Service and EOIR decision makers, but defines limited situations in which a criminal alien's conduct warrants a *per se* rule of detention. Case-by-case discretion remains overwhelmingly the general rule. Per se rules are drawn narrowly, and only where, in the carefully considered judgment of the Attorney General, the danger of an erroneous release is sufficiently grave, and the danger of unwarranted detention during proceedings sufficiently minimal, as to tip the balance in favor of such a rule. *See Fook Hong Mak* v. *INS*, 435 F.2d 728, 730 (2d Cir. 1970) (Agency appropriately exercises discretion where it ''determines certain conduct to be so inimical to the statutory scheme that all persons who have engaged in it shall be ineligible for favorable consideration, regardless of other factors that otherwise might tend in their favor.'').

The Department disagrees with comments suggesting that the TPCR require case-by-case adjudication for all ''lawfully admitted'' criminal aliens. The TPCR, by their terms, grant discretion to the Attorney General to consider certain categories of criminal aliens for release. It does not specify that that discretion be exercised by adjudication rather than by rulemaking. ''It is a well-established principle of administrative law that an agency to whom Congress grants discretion may elect between rulemaking and ad hoc adjudication to carry out its mandate.'' *Yang* v. *INS,* 70 F.3d 932, 936 (9th Cir. 1996) (citing *American Hosp. Assoc.* v. *NLRB,* 499 U.S. 606, 611–13 (1991); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)). Agencies may resolve matters of general applicability through the promulgation of rules ''even if a statutory scheme requires individualized determination * * * unless Congress has expressed an intent to withhold that authority.'' *American Hosp.*, 499 U.S. at 613; *see also Fook Hong Mak*, 435 F.2d at 731 (''(I)t is fallacious to reason that because Congress *prevented* the Attorney General from exercising any discretion in favor of those groups[] which Congress had found to have abused the privileges accorded them, it meant to *require* him to exercise it in favor of everyone else on a case-by-case basis even if experience should convince him

of the existence of another group with similar potentialities or actualities of abuse.'' (emphasis in original)).

Reviewing courts have upheld the Department's rulemaking in this area in light of these principles of administrative law. For example, in *Reno* v. *Flores*, 507 U.S. 292 (1993), the Supreme Court upheld a rule categorically precluding the release of detained juveniles not able to have either a legal guardian or one of several listed relatives assume custody. The Court held the rule to be a permissible exercise of the Attorney General's discretion, because it rationally advanced a legitimate governmental objective. *Id.* at 306. Similarly, in *Yang*, the Ninth Circuit upheld a rule categorically denying asylum, as a matter of discretion, to aliens ''firmly resettled'' prior to arrival in the United States. In *Fook Hong Mak*, the Second Circuit upheld a regulation barring, again in the exercise of the Attorney General's discretion, any alien transiting the United States without a visa from adjusting status under section 245 of the Act. *Cf. Anetekhai* v. *INS*, 876 F.2d 1218, 1223 (5th Cir. 1989) (Congress may require all aliens who marry citizens after the institution of deportation proceedings to reside outside United States for 2 years without opportunity to demonstrate bona fides of marriage.)

''There is not doubt that preventing danger to the community is a legitimate regulatory goal.'' *United States* v. *Salerno*, 481 U.S. 739, 747 (1987). Preventing abscondment by removable criminal aliens, and doing so in a way that minimizes waste of the Service's scarce enforcement resources and promotes consistent application of the law, are also legitimate goals. This rule exercises a well-established rulemaking authority of the Attorney General, in an area of ''sovereign prerogative, largely within the control of the executive and the legislative, '' *Landon* v. *Plasencia,* 459 U.S. 21, 34 (1982).

General Rules Versus Ad Hoc Adjudication for Permanent Resident Aliens

Several commenters emphasized the special status of permanent resident aliens. That status entails certain rights with regard to removal proceedings, *see Landon* v. *Plasencia, supra,* but does not prohibit Congress or the Attorney General from establishing categories of criminal or terrorist permanent resident aliens whose crimes or conduct evidence a danger to the community or a flight risk sufficiently serious to require detention.

Nevertheless, the Department has long maintained, and continues to maintain, a policy of special care with regard to procedural protections for permanent resident aliens. This rulemaking does not depart from that tradition. Permanent resident aliens retain the full panoply of rights and privileges in removal proceedings. The final rule affords a full discretionary custody determination to nearly all permanent resident aliens during such proceedings, and makes exceptions only in the extreme circumstances specified in § 236.1(c)(5).

The circumstances covered by § 236.1(c)(5) of the proposed rule uniformly present compelling indicia of flight risk and danger to the community. First, to be subject to the TPCR, an alien must have a serious criminal conviction constituting a basis for removal from the United States. (Indeed, not all crimes constituting grounds for removal trigger the TPCR.) Second, in order to be subject to mandatory detention, a permanent resident alien must either (1) have escaped or attempted to escape from a prison or other lawful government custody; (2) have fled at high speed from an immigration checkpoint; or (3) have been convicted of one of the crimes specified in § 236.1(c)(5)(i)(A). The specified crimes include murder, rape, sexual abuse of a minor, trafficking in firearms, explosives, or destructive devices, certain other explosive materials offenses, kidnaping, extortion, child pornography, selling or buying of children, slavery, treason, sabotage, disclosing classified information, and revealing the identity of undercover agents.

Further, to address the concerns raised by commenters concerning procedural protections for permanent residents, the Department has also modified the final rule in three ways as it applies to permanent residents. First, the final rule requires that an alien, including one admitted as a nonimmigrant, receive a sentence (or sentences in the aggregate) of at least 2 years, not including portions suspended, in order to trigger the requirements of § 236.1(c)(5). Permanent residents with less than the required sentence of 2 years will be eligible for an individualized custody determination; other lawfully admitted aliens with less than the required sentence will be considered under § 236.1(c)(4). Second, the final rule will exempt from § 236.1(c)(5) permanent residents who have remained free of convictions, immigration violations, and the like for an uninterrupted period of 15 years prior to the institution of proceedings (not including any periods of incarceration or detention).

Finally, the final rule has been revised to provide an individualized custody determination to former permanent residents subject to the TPCR who have lost that status through a final order of deportation under former section 242 of the Act, and have been in Service custody pursuant to the final order for six months. The district director's decision may be appealed to the Board of Immigration Appeals under existing procedures. It is expected that releases in this category of final-order criminal cases will be rare, but the authority has been incorporated for use in compelling circumstances. Similar authority exists under section 241 of the Act for removal cases commenced on or after April 1, 1997. These three modifications will further ensure adequate procedural safeguards for the custody of permanent resident aliens (and aliens challenging the loss of such status through the prescribed jurisdictional channels).

It is only within the extremely narrow range of offenses specified in the proposed rule, further narrowed by the aforementioned modifications, that the final rule requires detention of permanent resident aliens without discretionary release consideration. The constitutional concerns expressed by the commenters focus, therefore, on this very limited class of cases, and generally rest on the claim that due process prohibits Congress and the Attorney General from mandating the detention of *any* class of permanent resident aliens, regardless of the character of their criminal or terrorist offenses. The Department disagrees with this position.

The Supreme Court has affirmed much broader administrative authority over detention of convicted criminals even in areas of law not informed by the ''plenary power'' doctrine. Individuals convicted of a crime have necessarily received all the process required by the criminal justice system; they have been convicted on the basis of either a voluntary guilty plea or a finding of guilt beyond a reasonable doubt, with opportunity for appeal and collateral habeas corpus challenge. In this context, the Supreme Court has upheld a general congressional delegation of sentencing authority to an independent agency within the Judicial Branch. *Mistretta* v. *United States*, 488 U.S. 361 (1989). If it is permissible for an agency to subject a U.S. citizen, upon conviction, to a mandatory sentence without individualized discretionary consideration, it would seem even more clearly permissible for the Attorney General to require custody of a narrow

class of convicted criminal aliens without individualized discretionary consideration during the ensuing proceedings to effect their removal. *Cf. Jone* v. *United States*, 463 U.S. 354, 364–65 (1983) (''The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.'') (Approving civil commitment, based on insanity plea in criminal proceeding, for 50 days without individualized hearing). Indeed, the power upheld in *Mistretta* is far broader than that asserted here, applying to U.S. citizens and criminal defendants, both of whom enjoy extensive constitutional rights and procedural protections beyond those afforded to criminal aliens in civil removal proceedings. *See Mathews* v. *Diaz*, 426 U.S. 67, 79–80 (1976) (''In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.''); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039–40 (1984) (cataloguing constitutional procedural protections guaranteed to criminal defendants but not to aliens in deportation proceedings).

The doctrine of plenary power bolsters this conclusion. '' 'For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.' '' *Flores*, 507 U.S. at 305 (quoting *Mathews* v. *Diaz*, *supra*, at 81); *accord United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) (''The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government.''). '' '(O)ver no conceivable subject is the legislative power of Congress more complete.' '' *Flores*, 426 U.S. at 305 (*quoting Fiallo* v. *Bell*, 430 U.S. 787, 792, (1977); *Oceanic Steam Navig. Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)).

Accordingly, an immigration law is constitutional if it is based upon a ''facially legitimate and bona fide reason.'' *Fiallo*, 430 U.S. at 794–95; *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972); *Garcia* v. *INS*, 7 F.3d 1320, 1327 (7th Cir. 1993). ''Once a facially legitimate and *bona fide* reason is found, courts will neither look behind the exercise of discretion, nor test it by balancing its justification against the constitutional interest asserted by those challenging the statute.'' *Campos* v. *INS*, 961 F.2d 309, 316 (1st Cir. 1992) (citing *Fiallo*, 430 U.S. at 794–95). Courts have applied this deferential test to sustain the constitutionality of one of the TPCR's predecessor mandatory detention statutes as applied to permanent residents, *Davis*, 749 F. Supp. at 50; *Morrobel*, 744 F. Supp. at 728, and the Supreme Court has applied a similar test in its most recent case addressing mandatory detention, *Flores*, 507 U.S. at 306 (upholding juvenile alien detention regulation as ''rationally advancing some legitimate governmental purpose'').

Congress' plenary power over immigration extends to all non-citizens, including permanent resident aliens. Aliens

> [w]hen legally admitted * * * have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land * * *. So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.

Carlson, 392 U.S. at 534 (upholding immigration detention of permanent resident alien); *accord Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) (affirming detention of returning permanent resident alien); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587–88 (1952) (''That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien [,] and we leave the law on the subject as we find it.'').

Carlson v. *Landon*, 342 U.S. 524 (1952)—''the leading case involving a test of the legality of detention under immigration laws, ''*Duldulao* v. *INS*, 90 F.3d 396, 400 (9th Cir. 1996)—squarely addresses the detention of permanent resident aliens. The Supreme Court in *Carlson* upheld the Attorney General's detention of permanent residents under the Internal Security Act based solely on evidence of their Communist Party membership and support, without requiring any individualized inquiry into whether such aliens had ever engaged in specific acts of sabotage or subversion. 342 U.S. at 541. In essence, the Court allowed active membership in the Communist Party and espousal of its ideology to be used as proxies for an alien's dangerousness. The present rule, by contrast, relies on actual egregious crimes or conduct of convicted criminals as proxies for danger to the community and flight risk. *Cf. Morrobel*, 744 F. Supp. at 728 (''If there was no abuse of discretion in detaining alien communist in *Carlson*, it can hardly be improper for Congress, having determined that aliens convicted of aggravated felonies * * * are a danger to society, to direct the Attorney General to detain them pending deportation proceedings.''); *Davis*, 749 F. Supp. at 51 (analogizing mandatory detention of aggravated felons to detention upheld in *Carlson*).

The Supreme Court has recently applied the principles of *Carlson* to a regulations mandating immigration detention of certain juveniles by category. *Flores* v. *Reno*, 507 U.S. 292 (1993). *Flores* recognizes the power of Congress and the Attorney General to establish detention rules that single out classes of aliens for differing treatment, without providing for an individualized determination as to whether each member of the class warrants such treatment. When Congress or the Attorney General does so, the only process due is a determination of whether the alien in fact belongs to the class at issue.

Hence, the Court in *Flores* held that the Service could, without violating procedural or substantive due process, enforce a regulation generally barring the release of juvenile alien detainees, other than those able to have a legal guardian or certain specified close relatives take custody. The Court rejected arguments that the Service had impressibly employed a ''blanket presumption'' that other custodians were unsuitable, and that the Service must conduct ''fully individualized'' hearings on their suitability in each case. *Id.* at 308, 313–14 & n.9. The Service was not required, the Supreme Court stated, to ''forswear use of reasonable presumptions and generic rules.'' *Id.* at 313. The Service needed only make such individual determinations as were necessary for accurate application of the regulation, such as ''is there reason to believe the alien deportable?'', ''is the alien under 18 years of age?'', and does the alien have an available adult relative or legal guardian?'' *Id.* at 313–14.

Like the regulation upheld in *Flores*, the final rule provides for an individualized hearing on whether an alien in custody actually falls within a category of aliens subject to mandatory detention. In determining or redetermining custody conditions, the district director or IJ necessarily asks such individualized questions as ''is this person an alien?'', ''is there reason to believe that this person was convicted of a crime covered by the TPCR?'', and ''is there reason to believe that this person falls within a category

barred from release under applicable law?'' If the district director or IJ resolves these individualized questions affirmatively, and thus ascertains that the alien belongs to a class of convicted criminals barred from release, ''(t)he particularization and individuation need go no further than this,'' *id.* at 314. Under *Flores*, the IJ or district director may validly enforce the regulatory policy of detaining those classes of aliens whose release has been determined by Congress or the Attorney General to present unacceptable risks. *Cf. Davis*, 749 F.Supp. at 52 (''The most effective procedures are those already built into (one of the TPCR's predecessors), namely those procedures which ensure that the alien is rightfully an 'aggravated felon' under the (INA) and is properly subject to mandatory detention.'').

Plenary power confers upon Congress the undisputed authority to curtail a criminal permanent resident alien's right to remain in the United States. *See, e.g., Carlson* v. *Landon*, 342 U.S. at 534 (''The basis for the deportation of presently undesirable aliens resident in the United States is not questioned and requires no reexamination.''). Congress has exercised this power in AEDPA and IIRIRA by barring permanent residents convicted of an aggravated felony from seeking discretionary relief from removal. The elimination of relief considerably increases flight risk, *see, e.g., Bertrand* v. *Sava*, 684 F.2d 204, 217 n.16 (2d Cir. 1982) (''The fact that the petitioners are unlikely to succeed on their immigration applications * * * suggests that they pose * * * a risk (to abscond) if (released).''), and thus increases the need for detention of aliens barred in this manner from remaining in the United States.

The congressional power to compel removal includes the power to effect removal by the necessary use of detention. ''An alien's freedom from detention is only a variation on the alien's claim of an interest in entering the country.'' *Clark* v. *Smith*, 967 F.2d 1329, 1332 (9th Cir. 1992); *see also Carlson* v. *Landon*, 342 U.S. at 538; *Wong Wing*, 163 U.S. at 235; *Doherty*, 943 F.2d at 212 (''(F)rom the outset of his detention, Doherty has possessed, in effect, the key that unlocks his prison cell * * *. Because deportation was less attractive to him than his present course and because he had availed himself of the statutory mechanisms provided for aliens facing deportation, Doherty is subject to the countervailing measures Congress has enacted to ensure the protection of national interests.''). If Congress may bar specified criminal aliens from making discretionary applications to remain in the United States, it may also bar such criminals from making discretionary applications for release during removal proceedings, especially when detention is a necessary adjunct of the removal process, *Carlson* v. *Landon*, *supra*, and the elimination of relief itself creates overwhelming incentives to abscond, *Bertrand* v. *Sava*, *supra*.

Despite the broad congressional and executive authority recognized and consistently reaffirmed over the past century by the Supreme Court, several district courts have held mandatory detention statutes unconstitutional under the Due Process Clause of the Fifth Amendment. *See, e.g., St. John* v. *McElroy*, 917 F. Supp. 243, 247 (S.D.N.Y. 1996). In the Department's view, these district courts have misapprehended the law of immigration detention, and have failed to defer to Congress and the Executive in matters of immigration as required by the Supreme Court's teachings.

Some of the district court cases err in applying to immigration detention the standard for pre-trial criminal bail determinations articulated in *United States* v. *Salerno*, 481 U.S. 739, 747–51 (1987). *See Kellman* v. *District Director*, 750 F. Supp. 625, 627 (S.D.N.Y. 1990); *Leader* v. *Blackman*, 744 F. Supp. 500, 507 (S.D.N.Y. 1990). The Supreme Court, however, has rejected the extension of *Salerno* in a post-conviction context. *Hilton* v. *Braunskill*, 481 U.S. 770, 779 (1987) (''[A] successful (state) habeas petitioner is in a considerably less favorable position than a pretrial arrestee, such as the respondent in *Salerno*, to challenge his continued detention pending appeal. Unlike a pretrial arrestee, a state habeas petitioner has been adjudged guilty beyond a reasonable doubt * * *.''). Similarly, in *Doherty*, the Second Circuit determined that ''a different focus (from criminal bail standards) must govern the determination of constitutionality of pre-deportation detention.'' *Doherty*, 943 F.2d at 210 (citing *Dor.* v. District Director, INS, 891 F.2d 997, 1003 (2d Cir. 1989)). In reviewing the constitutionality of an 8-year detention, *Doherty* inquired only into the presence of any bad faith or invidious purpose in the Service's decision-making process. 943 F.2d at 210–11.

St. John and the other district court cases invalidating mandatory detention rules as applied to permanent residents generally decline to apply the ''facially legitimate, *bona fied* reason'' standard, and instead engage in a balancing of individual and governmental interests. The balancing test set forth in *Mathews* v. Eldridge, 424 U.S. 319 (1976), does not, however, apply in the context of immigration detention. The Ninth Circuit had applied the *Mathews* test in this manner in *Flores* v. Meese, 942 F.2d 1352, 1364 (9th Cir. 1991). The Supreme Court reversed, and applied a different test, requiring only that the challenged regulation ''meet the (unexacting) standard of rationally advancing some legitimate governmental purpose.'' *Flores*, 507 U.S. at 306.

Even if a balancing of interests were permitted—under governing case law, it is not—the paramount interest of the United States in removing criminal aliens and protecting its citizens form crime would outweigh any liberty interest that an alien removable from the United States on criminal grounds could claim. ''[A]n alien's right to be at liberty during the course of deportation proceedings is circumscribed by considerations of the national interest,'' and is consequently ''narrow.'' *Doherty*, 943 F.2d at 208, 209; *see also Flores* 507 U.S. at 305 (''If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles * * * who are aliens.'').

Moreover, because the TPCR apply in removal cases only during proceedings, and because the Board of Immigration Appeals expedites detained cases on its docket, the length of an alien's detention under this rule is necessarily finite. Criminal aliens with an enforceable final order of removal must be detained and removed within 90 days; if not removed within that period, such aliens become eligible for discretionary release consideration. See INA section 241(a). Criminal aliens ordered deported or removed whose home countries will not accept repatriation may be considered for release at any time in the discretion of the Service, and permanent residents who lose that status through a final order of deportation may generally be considered for release after six months. These provisions eliminate the possibility of indefinite detention without discretionary review, and thus avoid violation of any protected liberty interest.

In contrast to the ''narrow'' liberty interest of aliens removable on criminal grounds, ''[t]he government's interest in efficient administration of the immigration laws at the border * * * is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature.'' *Landon* v. *Plasencia*, 459 U.S. 21, 34

(1982). The Government's interest in maintaining the procedures embodied in the final rule is also ''weighty.'' The detention requirements for permanent residents single out aliens with egregious indicia of flight risk and danger to the community. The risk of recidivism and flight upon release is unquestionably great for these aliens; the risk of erroneous detention is correspondingly low. The provisions of the final rule reflect a legislative and executive judgment that, for the limited classes of criminal permanent resident aliens specified in the rule, discretionary release poses unacceptable risks.

Individualized consideration of discretionary release for these groups would also impose considerable administrative burdens on the Government. In many instances, bond hearings become an arena of protracted and costly collateral litigation in their own right, beyond and apart from the extensive administrative processes for determining removability, and the criminal justice process. Although the primary purposes of the final rule are to protect the public and to ensure the departure of aliens removable on criminal grounds, administrative costs are a legitimate consideration in determining the best means to achieve these objectives. Even under the balancing analysis prohibited by *Flores*, therefore, these governmental interests would easily outweigh the ''narrow'' interest of an alien removable on criminal grounds in making applications to remain at large during proceedings to effect removal.

The elemental error of *Kellman, St. John*, and the cases that follow them lies in their rejection of the Supreme Court's constitutional deference to Congress and the Executive in matters of immigration. The *Kellman* court acknowledges a ''significant degree'' of deference owed to Congress' substantive decisions regarding deportability, but asserts that ''the same deference is not mandated when examining the way in which that deportation is accomplished.''*Kellman*, 750 F. Supp. at 627. That assertion finds neither support nor solicitude in the jurisprudence of the Supreme Court. *See, e.g., Flores, supra; Carlson* v. *Landon, supra.* The respondents in *Flores* attempted this sort of distinction, urging the Supreme Court to require individualized discretionary custody determinations, despite the plenary power doctrine, as a matter of ''procedural due process.'' 507 U.S. at 308. The Court's response was unequivocal: ''This is just the 'substantive due process' argument recast in 'procedural due process' terms, and we reject it for the same reasons.'' *Id*.

In the Department's view, the final rule takes the least restrictive approach to the detention of permanent residents consistent with the dictates of public safety and the important public policy of removing aliens who have committed serious crimes in this country. The Department is confident that the final rule provides adequate procedural protections for the custody of permanent resident aliens, and is aware of no other means of ensuring the requisite level of protection for the public. This rule draws upon the Department's experience over time in administering the immigration laws, incorporates its careful consideration of the individual and public interests at stake, and reflects its understanding of the will of Congress. In addressing these concerns, the rule provides needed reform of current procedures for the detention of aliens, including permanent resident aliens, who have become subject to removal as a result of crimes committed in this country.

The Meaning of ''Lawfully Admitted''

For aliens in removal proceedings, the proposed rule construed the TPCR's term ''lawfully admitted'' by reference to the definition of ''admitted'' in section 101(a)(13) of the Act. Accordingly, the proposed rule treated returning permanent resident ''applicants for admission'' as not ''lawfully admitted'' under the TPCR, and hence not eligible to be considered for release. Several commenters urged that the Department reconsider this interpretation to recognize an exception for permanent residents. Permanent residents, even those returning from abroad, remain ''lawfully admitted for permanent residence'' until termination of that status by a final administrative order. 8 CFR 1.1(p). One commenter argued, therefore, as follows:

> New INA § 101(a)(13) provides that under certain limited circumstances a lawful permanent resident can be deemed to be ''seeking admission into the United States.'' But this individual nevertheless remains a lawful permanent resident who is ''lawfully admitted'' for purposes of discretionary release from detention under the TPCR. In short, the phrase ''lawfully admitted'' does not necessarily mean ''is not presently seeking admission.'' Indeed, the language of § 101(a)(13)—the very provision the INS relies on to justify its new interpretation (in the proposed rule)—keeps these concepts distinct.

The Department has carefully considered this and other similar comments, and will revise its interpretation in the final rule much along the lines recommended by the commenters.

The final rule will consider an ''arriving alien'' in removal proceedings to be ''lawfully admitted'' for purposes of the TPCR if (and only if) the alien remains in status as a permanent resident, conditional permanent resident, or temporary resident. Accordingly, such aliens may be considered for parole in the discretion of the Service.

The TPCR's term ''lawfully admitted'' will apply consistently in deportation and removal proceedings. In general, an alien who remains in status as a permanent resident, conditional permanent resident, or temporary resident will be considered ''lawfully admitted'' for purposes of the TPCR. Other aliens will be considered ''lawfully admitted'' only if they last entered lawfully (and are not currently applicants for admission).

This interpretation of the term ''lawfully admitted'' is not intended to extend beyond the limited context of the TPCR. Moreover, under this final rule, a ''lawfully admitted'' alien will in many cases remain an ''applicant for admission.'' For example, as the Board recently held in *Matter of Collado,* Int. Dec. 3333 (BIA 1997), an arriving permanent resident alien who has committed an offense described in section 212(a)(2) of the Act remains an ''applicant for admission'' unless previously granted relief under sections 212(h) or 240A(a) of the Act. The same will be true of an arriving permanent resident alien who falls within the other exceptions specified in section 101(a)(13)(C) (i)–(vi) of the Act. Although ''lawfully admitted'' for purposes of the TPCR during proceedings, such an alien remains an ''applicant for admission'' and an ''arriving alien,'' charged under section 212 of the Act, and subject solely to the parole authority of the Service.

Bond Jurisdiction of Immigration Judges

One commenter asserted that the TPCR require the Attorney General to grant immigration judges bond authority over arriving aliens in removal proceedings and over aliens in exclusion proceedings. As explained in the notice of proposed rulemaking, the TPCR do not, in the Department's view, apply in exclusion proceedings, because they replace detention provisions applicable in removal and deportation proceedings, but do not replace the analogous provision applicable in exclusion proceedings. As regards arriving aliens in removal proceedings, the TPCR simply confer discretion upon

the Attorney General, leaving it to the Department to determine which subordinate officials will exercise custody authority. The Department has determined that parole authority will remain exclusively with the Service, as in the past. *See generally Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206 (1953) (affirming Service's decision to detain returning permanent resident alien); *Marcello* v. *Bonds,* 349 U.S. 302 (1955) (rejecting claim that custody decision by Service officer violates Due Process where Service initiates and prosecutes proceeding).

Automatic Stay of Certain Criminal Custody Redeterminations To Preserve Status Quo for Appeal

The proposed rule included a provision allowing the Service to request an emergency stay of an immigration judge's order redetermining custody conditions when the Service appeals the custody decision to the Board of Immigration Appeals. The rule also provided for an automatic stay of the immigration judge's custody redetermination where the alien is subject to the TPCR, section 440(c) of AEDPA, or section 236(c) of the Act, and the district director has set a bond of $10,000 or more (including outright denial of bond). Both of these provisions were included as permanent revisions, without regard to the expiration of the TPCR.

Several commenters objected to the automatic stay provision, arguing that it encroaches on the authority of immigration judges, incorporates a criterion (initial bond amount) not adequately indicative of bail risk, and encourages district directors to set high bonds to fortify their custody decisions against reversal. The Department has carefully considered these comments, and will retain the automatic stay provision in the final rule without modification.

Even accepting that initial bond amounts are an imperfect measure of bail risk, the automatic stay does not trigger in all cases meeting the $10,000 threshold. Rather, the $10,000 threshold and the requirement of a serious criminal offense provide the basis for a considered determination by the Service to seek an automatic stay in aid of a custody appeal. Custody appeals are themselves unusual, undertaken only in compelling cases, and subject to review by responsible senior officials within the Service. It is expected that such appeals will remain exceptional, and that Service district directors will continue to set custody conditions according to their best assessment of the bail risk presented in each case.

The interests served by the automatic stay are considerable, even if the provision only occasionally comes into play. A custody decision that allows for immediate release is effectively final if, as the Service appeal would necessarily assert, the alien turns out to be a serious flight risk or a danger to the community. In such a case, the appeal provides little benefit to the agencies exerting efforts to effect removal, and less still to the community receiving the dangerous or absconding alien criminal back into its midst. The automatic stay provides a safeguard to the public, preserving the status quo briefly while the Service seeks expedited appellate review of the immigration judge's custody decision. The Board of Immigration Appeals retains full authority to accept or reject the Service's contentions on appeal.

Treatment of Criminal Aliens Not Eligible for Relief from Removal

Several commenters objected to the provision in § 236.1(c)(5)(iv) of the proposed rule requiring detention of criminal aliens under the TPCR who do not wish to pursue relief from removal, or who lack eligibility for such relief. The provision reflects the consideration that such an alien has little incentive to appear for proceedings, and hence almost always poses a serious bail risk. Nevertheless, the Department has reconsidered the inclusion of this provision in § 236.1(c)(5), and will include it instead in § 236.1(c)(4) of the final rule. Hence, permanent residents and aliens with old convictions and no subsequent indicia of bail risk will be eligible to be considered for release even where they lack or decline to pursue options for relief from removal. The Department would expect, however, only the most sparing use of this discretionary authority.

Two commenters objected that bond proceedings during the early stages of the removal process provide a poor forum to assess eligibility for relief. The Department understands this concern, and does not anticipate a conclusive showing of eligibility by the alien at this stage of proceedings. Rather, the rule reflects the practical reality that occasions do arise when plainly no relief exists or the alien does not wish to pursue relief. In those situations, discretionary release of a criminal alien is generally inappropriate.

Meaning of "when the alien is released"

One commenter asserted that the TPCR apply only to criminal aliens released directly from incarceration into Service custody. The Department has considered this comment, and rejects it for the reasons stated by the Board of Immigration Appeals in *Matter of Noble,* Int. Dec. 3301 (BIA 1997).

Limited Appearances in Bond Proceedings

One commenter requested that the final rule incorporate new provisions authorizing limited attorney appearances in bond proceedings, i.e., without obligation to represent the alien in removal proceedings. The subject matter of this comment concerns the terms of attorney representation and exceeds the substantive scope of this rulemaking. The Department remains open, however, to working with interested individuals and organizations to refine and improve its regulations in this and other areas within its authority.

Technical and Conforming Amendments

The final rule corrects 8 CFR 3.6(a) to eliminate an outdated internal cross-reference, and corrects § 3.6(a) and § 236.1(d)(4) to conform with the final rule's provisions for stays of custody redeterminations by immigration judges. The final rule also clarifies the proposed § 236.1(c)(4) by changing the placement of language excepting permanent resident aliens from the detention requirements of that paragraph.

Effect on Detention Resources

The Department has taken into consideration the effect of the final rule on Service detention resources, and expects a management impact.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities because it affects individual aliens, not small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small

Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 12612

The regulation adopted herein will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects

8 CFR Part 3

Administrative practice and procedure, Immigration, Organization and functions (Government agencies).

8 CFR Part 236

Administrative practice and procedure, Aliens, Immigration.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 is revised to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1226, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002; sec. 303(b)(3) of Pub. L. 104–208, Div. C.

§ 3.6 [Amended]

2. In § 3.6, paragraph (a) is amended by revising the reference to ''242.2(d) of this chapter'' to read ''236.1 of this chapter, § 3.19(i),''.

3. In § 3.19, paragraph (h) and (i) are added to read as follows:

§ 3.19 Custody/bond.

* * * * *

(h)(1)(i) While the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub. L. 104–208 remain in effect, an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

(A) Aliens in exclusion proceedings;

(B) Arriving aliens in removal proceedings, including persons paroled after arrival pursuant to section 212(d)(5) of the Act;

(C) Aliens described in section 237(a)(4) of the Act;

(D) Aliens subject to section 303(b)(3)(A) of Pub. L. 104–208 who are not ''lawfully admitted'' (as defined in § 236.1(c)(2) of this chapter); or

(E) Aliens designated in § 236.1(c) of this chapter as ineligible to be considered for release.

(ii) Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 235 or 236 of this chapter. In addition, with respect to paragraphs (h)(1)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.

(2)(i) Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub. L. 104–208, an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

(A) Aliens in exclusion proceedings;

(B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act;

(C) Aliens described in section 237(a)(4) of the Act;

(D) Aliens in removal proceedings subject to section 236(c)(1) of the Act (as in effect after expiration of the Transition Period Custody Rules); and

(E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Pub. L. 104–132).

(ii) Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 235 or 236 of this chapter. In addition, with respect to paragraphs (h)(2)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.

(3) Except as otherwise provided in paragraph (h)(1) of this section, an alien subject to section 303(b)(3)(A) of Div. C of Pub. L. 104–208 may apply to the Immigration Court, in a manner consistent with paragraphs (c)(1) through (c)(3) of this section, for a redetermination of custody conditions set by the Service. Such an alien must first demonstrate, by clear and convincing evidence, that release would not pose a danger to other persons or to 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 or interview.

(4) Unremovable aliens. A determination of a district director (or other official designated by the Commissioner) regarding the exercise of authority under section 303(b)(3)(B)(ii) of Div. C. of Pub. L. 104–208 (concerning release of aliens who cannot be removed because the designated country of removal will not accept their return) is final, and shall not be subject to redetermination by an immigration judge.

(i) Stay of custody order pending Service appeal: *(1) General emergency stay authority.* The Board of Immigration Appeals (Board) has the authority to stay the order of an immigration judge redetermining the conditions of custody of an alien when the Service appeals the custody decision. The Service is entitled to seek an emergency stay for the Board in connection with such an appeal at any time.

(2) *Automatic stay in certain cases.* If an alien is subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Pub. L. 104–132), section 303(b)(3)(A) of Div. C of Pub. L. 104–208, or section 236(c)(1) of the Act (as designated on April 1, 1997), and the district director has denied the alien's request for release or has set a bond of $10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon the Service's filing of a Notice of Service Intent to Appeal Custody Redetermination (Form EOIR–43) with the Immigration Court on the day the order is issued, and shall remain in

abeyance pending decision of the appeal by the Board of Immigration Appeals. The stay shall lapse upon failure of the Service to file a timely notice of appeal in accordance with § 3.38.

PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

3. The authority citation for part 236 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1362; sec. 303(b) of Div. C of Pub. L. No. 104–208; 8 CFR part 2.

4. Section 236.1 is amended by:

a. Revising paragraphs (c)(1) and (d)(4);

b. Redesignating paragraphs (c)(2) through (c)(5), as paragraphs (c)(8) through (c)(11) respectively and by revising newly redesignated paragraph (c)(11); and by

(c) Adding new paragraphs (c)(2) through (c)(7), to read as follows:

§ 236.1 Apprehension, custody, and detention.

* * * * *

(c) * * *

(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 release 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 Commissioner 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.

* * * * *

(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 § 3.19(h) of this chapter.

(d) * * *

(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 § 3.19(i)), nor stay the administrative proceedings or removal.

* * * * *

Dated: May 12, 1998.

Janet Reno,

Attorney General.

[FR Doc. 98–13178 Filed 5–18–98; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–ANE–30–AD; Amendment 39–10527; AD 98–10–15]

RIN 2120–AA64

Airworthiness Directives; AlliedSignal Inc. Model TFE731–40R-200G Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to AlliedSignal Inc. Model TFE731–40R–200G turbofan engines. This action requires replacing the fuel line between the main fuel pump and the motive flow pump with a serviceable assembly and adding a supporting bracket and clamp. This amendment is prompted by a report of a cracked fuel line between the main fuel pump and the motive flow pump causing the spraying of fuel on and around electrical components. The actions specified in this AD are intended to prevent fuel spraying on and around electrical components due to a cracked fuel line, which could result in an engine fire.

DATES: Effective May 19, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 19, 1998.

Comments for inclusion in the Rules Docket must be received on or before July 20, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–ANE–30–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may also be sent via the Internet using the following address: ''9-ad-engineprop@faa.dot.gov''. Comments sent via the Internet must contain the docket number in the subject line.

The service information referenced in this AD may be obtained from AlliedSignal Aerospace Services Attn: Data Distribution, M/S 64–3/2101–201, P.O. Box 29003, Phoenix, AZ 85038–9003; telephone (602) 365–2493, fax (602) 365–5577. This information may be examined at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; telephone (562) 627–5246, fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: The Federal Aviation Administration (FAA) has received a report of a cracked fuel line between the main fuel pump and the motive flow pump causing the spraying of fuel on and around electrical components on an AlliedSignal Inc. Model TFE731–40R–200G turbofan engine. While taxiing after flight, the ground crew noted a fuel leak from the right hand engine of an Israel Aircraft Industries, LTD. (IAI) Astra SPX aircraft. The fuel line, part number (P/N) 3061191–1, between the main fuel pump and the motive flow pump, was found cracked at the weld of the elbow fitting. The right-hand engine had accumulated 8 operating hours. The investigation revealed that during manufacturing of the fuel line between the main fuel pump and the motive flow pump, inadequate weld penetration was created by an orbital weld operation. The lack of penetration was not identified by the post-weld X-ray inspection. The fracture of the fuel line was due to high cycle fatigue which initiated at the localized area of incomplete weld penetration. This condition, if not corrected, could result in fuel spraying on and around electrical components due to a cracked fuel line, which could result in an engine fire.

The FAA has reviewed and approved the technical contents of AlliedSignal Inc. Alert Service Bulletin (ASB) No. TFE731–A73–5111, dated April 16,