June 22, 2011

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University of Southern California
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Dear Mr. Moorman:

This responds to your Freedom of Information Act request dated December 2, 2009. We have searched the files of the Office of Legal Counsel and have found one document that is responsive to your request. The document is protected by FOIA Exemption Five, 5 U.S.C. § 552(b)(5), but we are releasing it as a discretionary matter. Enclosed is the document.

Sincerely,

Paul P. Colborn
Special Counsel

Enclosure
MEMORANDUM FOR T. ALEXANDER ALENIKOFF
GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

From: Walter Dellinger
Assistant Attorney General

Re: Whether the Interdiction of Undocumented Aliens
Within United States Territorial Waters Constitutes an "Arrest"
Under Section 287(a)(2) of the Immigration and Nationality Act

The Immigration and Naturalization Service ("the INS" or "the Service") has
requested us to consider further the conclusion of our Memorandum for the Attorney General
from Walter Dellinger, Assistant Attorney General, re: Immigration Consequences of
Undocumented Aliens' Arrival in United States Territorial Waters (Oct. 13, 1993) (the
"Territorial Waters Memorandum"). In that memorandum, we concluded that undocumented
aliens who have been interdicted within United States territorial waters, as defined in
103 Stat. 2981 (1988), 3 C.F.R. 547 (1989), are not, without more, entitled to an exclusion
The INS has informally suggested a new argument, not proposed at the time we were
preparing the Territorial Waters Memorandum, for a different conclusion.

First, the INS refers to INA § 287(a)(2), 8 U.S.C. § 1357(a)(2), which empowers any
INS officer or employee authorized by regulation to make a warrantless arrest of "any alien
who in his presence or view is entering or attempting to enter the United States in violation
of any law or regulation made in pursuance of law regulating the admission, exclusion, or
expulsion of aliens ... but the alien arrested shall be taken without unnecessary delay for
examination before an officer of the Service having authority to examine aliens as to their
right to enter or remain in the United States." The INS suggests that under this statute, if
INS officers "apprehend" aliens within the territorial waters who are entering or attempting
to enter the United States, they are obligated to bring them to a port of entry for the
initiation of administrative proceedings.
Second, the INS refers to 14 U.S.C. § 2 and § 89, which relate, respectively, to the primary duties and to the law enforcement powers of the United States Coast Guard. Subsection 89(a) of title 14 authorizes the Coast Guard to "make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." Subsection 89(b) of title 14 adds:

The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

The INS suggests that the Coast Guard must be deemed to be acting as an agent of the INS when it interdicts vessels within territorial waters for purposes of enforcing the INA and, if so, whether in such cases the Coast Guard is bound to bring the interdicted aliens on those vessels to INS officials for administrative proceedings.

For purposes of this memorandum only, we shall assume, arguendo, that when the Coast Guard interdicts aliens at sea in order to assist in enforcing the INA, it is acting solely as the agent of the INS under 14 U.S.C. § 89.1 (Accordingly, any reference in what follows to "the INS" should be understood, where appropriate, to mean or to include the Coast Guard.) Accordingly, we shall focus exclusively on the INS's first question. For the reasons given below, we conclude that section 287(a)(2) does not entail that, merely by interdicting aliens within the territorial waters, the INS is required to initiate administrative proceedings against those aliens.2

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1 We note that one court has stated that the powers of Coast Guard boarding officers as agents of other agencies under 14 U.S.C. § 89 "are in additionable to and not a limitation on their powers to enforce laws as Coast Guard Officers." United States v. One (1) 43 Foot Sailing Vessel, 405 F. Supp. 879, 882 (S.D. Fla. 1975). aff'd, 538 F.2d 694 (5th Cir. 1976).

2 We do not discuss in this memorandum the scope of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150. (We briefly considered that subject in the Territorial Waters Memorandum at 13-15.) Should the INS desire a more expanded treatment of the issue, we would be pleased to provide one; however, we would welcome having INS's assistance in that matter, including references to the parts of the negotiating record of the Convention that INS considers most pertinent. We note, however, that a leading authority on the Convention has written that "[t]he core meaning of non-refoulement requires states not to return refugees in any manner whatsoever to territories in which they
Warrantless Arrests

In providing authority to make a warrantless administrative arrest, INA § 287(a)(2) resembles the traditional criminal law rule that "a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest." United States v. Watson, 423 U.S. 411, 418 (1976). 3 Similarly, section 287(a)(1)'s requirement that one so arrested "be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter... the United States" corresponds, at least to some extent, to the procedure traditionally followed in criminal prosecutions. In such cases, "an arrested person [would] be brought before a justice of the peace shortly after arrest... The justice of the peace would 'examine' the prisoner and witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody." Gerstein v. Pugh, 420 U.S. 103, 114-15 (1975). 4 These rules, fashioned with criminal law enforcement purposes in mind, do not apply in a mechanical way to the INA actions that are at issue here. 5 Nevertheless, concepts and

face the possibility of persecution. But states may deny admission to bona fide asylum-seekers in ways not obviously amounting to breach of the principle. For example, stowaways and refugees rescued at sea may be refused entry; [or] refugee boats may be towed back out to sea and advised to sail on... [S]everal options are open to the state where those [asylum-seekers] rescued arrive; it may refuse disembarkation absolutely and require ships' masters to remove them from the jurisdiction, or it may make disembarkation conditional upon satisfactory guarantees as to resettlement, care and maintenance... Once again, a categorical refusal of disembarkation cannot be equated with breach of the principle of non-refoulement, even though it may result in serious consequences for asylum-seekers." Guy S. Goodwin-Gill, The Refugee in International Law 84. 87 (1983). See also P. Weis, Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees, 30 Brit. Y.B. Int'l L. 478, 482 (1953) (discussing negotiating history).


5 For example, contrary to what one would expect if section 287(a)(1) were fully analogous to the procedure in criminal cases, aliens arrested for entering or attempting to enter the country illegally need not be promptly presented to an immigration judge. Rather, under INS regulations implementing the statute, such aliens "shall be examined... by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him/her, may examine the alien." 8 C.F.R. § 287.3 (1993); see also Flores v. Galvez-Maldonado v. Meese, 934 F.2d 991, 1010 (9th Cir. 1990). The case may then be referred to an immigration judge if the "examining officer is satisfied that there is prima facie
procedures drawn from the criminal law can provide helpful analogies in construing the immigration statute.

Pivotal for the analysis is the concept of an "arrest." As we understand the INS's position, it maintains that an interdiction at sea will constitute an "arrest" under section 287(a)(2), at least when INS officers take the occupants of a vessel into custody or subject them to actual restraints. The INS apparently concludes that aliens in such cases must be afforded, at a minimum, the inspection procedure called for by INS regulations. Moreover, as a practical matter, in many or most such cases, such aliens would in INS's view also be entitled to the exclusion hearing provided by those regulations.

While conceding that such an argument is plausible, we do not find it persuasive. In the criminal context, an arrest normally "eventuate[s] in a trip to the station house and prosecution for crime." Terry v. Ohio, 392 U.S. 1, 16 (1968). More generally, an "arrest" is not simply any deprivation of liberty under color of law; rather, it is a seizure and subsequent detention of the person arrested for the purpose of instituting some form of legal process against that person. See United States v. Seslar, 996 F.2d 1058, 1060 (10th Cir. 1993) (arrests "are seizures characterized by highly intrusive or lengthy detention"); United States ex rel. Spero v. McDermick, 266 F. Supp. 718, 724 (S.D.N.Y. 1967), aff'd, 409 F.2d 181 (2d Cir. 1969) ("[a]n arrest requires an intent on the part of the arresting officer to bring a person into custody to answer for a crime charged"); United States v. Cooperstein, 221 F. Supp. 522, 526 (D. Mass. 1963) (Wyzanski, J.) (an arrest "is merely an order holding a person in custody until he answers a complaint"). As we discuss below, INS evidence establishing that the arrested alien was entering or attempting to enter the United States in violation of the immigration laws." 8 C.F.R. § 287.3.

Support for such a contention can be found in certain criminal law cases. See, e.g., Henry v. United States, 361 U.S. 98, 103 (1959) (on facts of case, arrest took place when federal agents stopped car); Douglas v. Buder, 412 U.S. 430, 431-32 (1973) (per curiam) (under State law, "arrest" required either taking into custody or actual restraint). See also Oliver v. Union Insurance Co., 16 U.S. (3 Wheat.) 183 (1818) (arrest within meaning of maritime insurance policy implied dispossession of shipmaster).

See 8 C.F.R. § 287.3.

8 C.F.R. § 287.3 provides that if the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering or attempting to enter the country illegally, that officer "shall refer the case to an immigration judge for further inquiry in accordance with Parts 235 and 236 of this chapter or take whatever other action may be appropriate or required under the laws or regulations applicable to the particular case."

See also Dunaway v. New York, 442 U.S. 200, 212 (1979) (prisoner's detention was "indistinguishable from a traditional arrest" when he "was taken from a neighbor's home to a police car, transported to a police station, . . . placed in an interrogation room [and] never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody"). But see Illinois v. Lafayette, 462 U.S. 640, 645 (1983) ("[a]n arrested person is not invariably taken to a police station or confined; if an arrestee is taken to the police station, that is no more than a continuation of the custody inherent in the arrest status.").
interdictions of aliens within the territorial waters do not involve taking aliens into custody and holding them for further legal proceedings, and are thus not "arrests" as that term is naturally understood.

"Arrests" Under Section 287(a)(2) Case Law

Unfortunately, several of the most common techniques of statutory construction prove unhelpful in interpreting INA § 287(a)(2). Neither the statutory text nor the regulations under it provide significant guidance. The case law is, at best, marginally instructive. There is, to our knowledge, no legislative history on the point at issue. Ultimately, therefore, the analysis will turn on an account of the purposes of the section, and on harmonizing it with other INA provisions.

The definitional section of the INA, section 101, 8 U.S.C. § 1101, does not include a definition of "arrest." Nor do the INS regulations in 8 C.F.R. Pt. 287 (1993) provide one.\textsuperscript{10} The case law, reviewed below, also fails to clarify whether the interdiction of aliens within the territorial waters constitutes an arrest.

In general, section 287 distinguishes between an officer's right to "interrogate" a suspected illegal entrant and the officer's right in certain cases to "arrest" such an entrant. The case law under section 287 recognizes this distinction,\textsuperscript{11} and considers certain

\textsuperscript{10} The regulations do, however, define what is meant by section 287(d)(1)'s reference to "an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances." "The term 'arrested,' as used in section 287(d) . . . means that an alien has been -- (1) Physically taken into custody for a criminal violation of the controlled substance laws; and (2) Subsequently booked, charged or otherwise officially processed; or (3) Provided an initial appearance before a judicial officer where the alien has been informed of the charges and the right to counsel." 8 C.F.R. § 287(g). It would be mistaken to assume that this regulatory definition also explains what is to count as an "arrest" under section 287(a)(2). Section 287(a)(2) concerns the right of an alien who has been taken into custody to a prompt examination before a disinterested officer. The statute, insofar as it is analogous to criminal statutes and advances constitutional policy, reflects the importance of protecting individuals from arbitrary treatment and prolonged confinement at the hands of law enforcement personnel without review of the matter soon thereafter by another official. Consequently, the "arrest" that causes the loss of liberty and so triggers the right to such review should not be understood in a highly formalistic manner. Conversely, section 287(d) lays down conditions in which certain "arrested" aliens may be detained. In that context, both the need for efficient and consistent administration of the law, and the desire to prevent unreasonable deprivations of individual liberty, justify a formalistic definition such as that given in the regulation. Cf. Carroll v. United States, 267 U.S. at 159.

\textsuperscript{11} See United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (Border Patrol's border-area stops accompanied by brief detention and questioning may in proper cases "be justified on facts that do not amount to the probable cause required for an arrest"); see also Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) ("'Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.'" (quoting United States v. Carroll, 267 U.S. at 154)); United States v. Galindo-Hernandez, 674 F. Supp. 979, 984 (E.D.N.Y. 1987) (even assuming that INS interrogatory stop constituted a seizure of aliens, it was not a "functional arrest").
interferences with liberty as mere "investigatory stops" (for which probable cause is not required) rather than as "arrests" (which would require either probable cause or a warrant). Other than exploring the distinction between investigatory stops and arrests, however, the cases do little to explain what constitutes a section 287(a)(2) arrest.

Although it is not directly relevant to our question, the Supreme Court’s decision in INS v. Delgado, 466 U.S. 210 (1984), cannot be overlooked. There the Court upheld an INS "factory survey" against the challenge that the INS’s questioning of factory workers violated the Fourth Amendment because the agents lacked a reasonable basis to suspect individual workers of violating the INA. The Court "rejected[ed] the claim that the entire work forces of the two factories were seized for the duration of the surveys when the INS placed agents near the exits of the factory sites ... Respondents argue ... that the stationing of agents near the factory doors showed the INS’s intent to prevent people from leaving. But there is nothing in the record indicating that this is what the agents at the doors actually did. The record indicates that the INS agents’ conduct in this case consisted simply of questioning employees and arresting those they had probable cause to believe were unlawfully present in the factory." Id. at 218. Because the Court had found that "there was no seizure of the work forces by virtue of the method of conducting the factory surveys," it concluded that there was no need for the INS to have been able to show that it had a reasonable suspicion with respect to each individual questioned that that person was an illegal alien, unless the person questioned had in fact been seized or detained (as, the Court found, none were). Id. at 219. Delgado ruled that certain INS conduct did not constitute a "seizure" under the Fourth Amendment; it does not address the question of what would constitute an "arrest" under section 287(a)(2).

We note two other appellate decisions, and a decision of the Board of Immigration Appeals (BIA). Babula v. INS, 665 F.2d 293 (3d Cir. 1981), involved another factory survey in which several INS agents remained at the factory exits while other INS agents interrogated suspected illegal aliens inside. Several aliens were arrested and taken to the local INS office. After being ordered deported, several of the aliens sought review, alleging that the INS agents had violated the limits of section 287(a) and the INS’s regulatory requirements that certain warnings be given to arrested aliens. The court rejected the plaintiffs’ claim that they were under arrest at the time the INS surrounded the factory. Id. at 297. It held that under section 287(a)(2) and the corresponding regulation, 8 C.F.R. § 287.3, "'arrest' means an arrest upon probable cause, and not simply a detention for purposes of interrogation. Not only does this construction give 'arrest' its normal meaning, but we believe that this is the only interpretation of that statute and regulation that makes

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sense... The interpretation urged by petitioners would preclude INS agents from interrogating suspected aliens without arresting on probable cause... In short, although surrounding the factory and preventing any escape did lead to arrest, petitioners were not in fact arrested until they had answered the [INS agents'] three questions, at which time the arresting agent had probable cause. Id. at 298.

Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971), cert. denied, 404 U.S. 864 (1971), decided the question "whether the immigration officer may detain an individual, reasonably believed to be an alien, against his will for the purpose of questioning." Id. at 223. It held that "immigration officers, in accordance with the Congressional grant of authority found in Section 287(a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country." Id. Applying that standard to the particular case before it, and acknowledging that "[t]he point is not without difficulty," id. at 225, the court ruled that an "arrest" without probable cause had not been made, even though the INS officer had attempted to question the suspected aliens after they proved unable to start their car, took their car keys away when he found that he was unable to communicate with them, asked a nearby hospital guard to watch the car until he returned, and came back five to seven minutes later, halting his car in front of the aliens'.

Finally, we note Matter of Yau, Interim Dec. # 2272, 14 I. & N. Dec. 630 (BIA 1974). There the suspected illegal alien was handcuffed, placed in an INS vehicle, and detained between 5 and 10 minutes to await interrogation through an interpreter. The BIA majority concluded that because there had been "only a brief detention" and not a "full-blown arrest without a warrant," the procedural rights accorded by INS regulations to aliens arrested without warrants had not been denied. Id. at 634.

At a minimum, these cases establish that not every stop or encounter for questioning or detention amounts to an "arrest." Moreover, some non-trivial intrusions on aliens' liberties (stationing INS agents at factory exits, removing car keys) have been held not to be "arrests." The cases do not, however, shed direct light on the question whether interdictions of seaborne vessels carrying illegal aliens constitute "arrests" of those aliens.

Two other cases in a related area provide some -- if again limited -- help in considering whether interdiction at sea constitutes an "arrest" under section 287(a)(2). The cases involving the Coast Guard's exercise of its authority under 14 U.S.C. § 89(a).

In the first case, a district court held that the seizure of a vessel is not, as such, an arrest of the vessel's crew. "Even assuming that a seizure of the JOSE GREGORIO occurred on March 21, that seizure did not constitute an arrest of the defendants. The Coast Guard

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13 The interrogation then went forward, but was made possible only because a passer-by agreed to act as an interpreter; after the interpreter discovered that the aliens were in the country illegally, they were arrested.
officers did not restrain them physically, curtail their liberty aboard the JOSE GREGORIO, or conduct a search of their persons. No arrest of the defendants occurred on March 21." See United States v. Egan, 501 F. Supp. 1252, 1268 (S.D.N.Y. 1980). In the court's view, arrests did occur, despite the lack of any formal announcement, when the Coast Guard boarded the vessel and placed two of the defendants under guard. Id. at 1274.

In the second case, a district court ruled that no arrest of an individual had occurred when Coast Guard officers, after brandishing a shotgun and ordering a ship to heave to, boarded the vessel with the gun and other arms; rather, the arrest occurred only after the suspect was discovered behind a curtain belowdecks, standing in front of numerous bales of marijuana. See United States v. Whitmore, 536 F. Supp. at 1288-89, 1300.

The Coast Guard cases suggest that law enforcement officials may stop a vessel, board it with arms, and even search it, without thereby arresting those who are aboard it. Again, however, the cases do not directly decide whether or when an interdiction is an "arrest."

Legislative History of Section 287(a)(2)

The legislative history of section 287(a)(2), so far as we have been able to discover, is unilluminating on the question presented here. The present section is derived from a 1925 amendment to an appropriation for the Bureau of Immigration, as the INS then was called. See Pub. L. No. 68-364, 43 Stat. 1014, 1049 (1925). As the amendment's sponsor explained, it was primarily designed "to make very clear that [agents of the Bureau of Immigration] have no right to make [an] arrest except on sight of a violation of the immigration law as to illegal entry. They have no right to go into an interior city and pick up aliens in the street and arrest them, but it is just at the border where they are patrolling that we want them to have this authority." 66 Cong. Rec. 3202 (1925) (remarks of Sen. Reed). The provision was intended to apply only to aliens "who are seeking to get in clandestinely . . . who are caught in the act of getting in." Id. (colloquy between Sens. McKellar and Reed). The amendment further provided that aliens so arrested "shall be immediately taken before an immigration inspector for hearing," id. (remarks of Sen. Reed). An alien denied admission after the hearing was not to be transported back at the government's expense; rather, "[t]hey are transported back to the nearest port in their home country at the expense of the carrier which brought them. If they cross the river on their own legs, as they can do most of the year on the Mexican border, they are merely put back into Mexico." Id. (remarks of Sen. Reed). The colloquy did not address whether an interdiction at sea was an arrest, nor whether the border patrol could preclude an alien from entering illegally without first having to place the alien under arrest and bring the alien before an immigration officer for a hearing.

officers and employees of the Immigration and Naturalization Service," and noting that the section had been twice amended "to make a very carefully considered distinction between powers which may be exercised without a warrant and such where a warrant will be required." H.R. Rep. No. 1365 at 55 (82d Cong. 2d Sess.) (1952). The amendments in question, however, are not relevant here: they addressed section 287(a)(3), not 287(a)(2). 98 Cong. Rec. 4399-4400 (April 24, 1952) (remarks of Rep. Walter). Other amendments apparently changed the section to allow only the warrantless interrogation of aliens, rather than of all persons. See 98 Cong. Rec. 5787 (May 22, 1952) (remarks of Sen. Morse). The scope of the term "arrest" was apparently not debated on the floor or considered in the legislative reports.

The Purposes of Section 287(a)(2)

In the absence of any statutory definition, regulatory construction, significantly helpful case law, or controlling legislative history, the most instructive approach in construing section 287(a)(2) is to consider its purpose. The relevant part of the section states that "the alien arrested [without a warrant] shall be taken without unnecessary delay before an officer of the Service having authority to examine aliens as to their right to enter ... the United States." On its face, the statute is designed to ensure that aliens whom the INS has detained for further administrative examining are not deprived of their liberty without having prompt access to a disinterested official who can pass judgment on the validity of the warrantless arrest. It is not designed to guarantee procedural rights to illegal aliens whom the INS turns back from this country before they have arrived.

On this account, the purposes of section 287(a)(2) mirror those behind criminal procedures "requiring that arrested persons be promptly taken before a committing authority," McNabb v. United States, 318 U.S. at 342. In McNabb, a murder conviction rested largely on confessions obtained after the defendants had been held for prolonged periods and subjected to extensive questioning. The prisoners had apparently not been brought before a commissioner before confessing. The Court, "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," id. at 341, excluded the evidence obtained from the confessions. The Court emphasized the "impressively pervasive requirement of criminal procedure" that arrested persons be taken promptly before a judicial officer. Id. at 343. It explained (id. at 343-44):

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14 As explained immediately above, the specific intent of the 1925 legislation was to prevent the border patrol from arresting aliens except when they saw them making or attempting to make illegal entries. Apart from that specific aim, the statute has more general purposes. Such purposes can often be identified by considering the text of the statute and the legal background to its enactment. See Rowland v. California Men's Colony, 113 S. Ct. 716, 726 n.12 (1993); see also United States v. Sischy, 262 U.S. 165, 167 (1923) (Holmes, J.) (purpose of statute shown "by the plain reason of the thing").

15 But see McNabb v. United States, 142 F.2d 904 (6th Cir.), cert. denied, 323 U.S. 771 (1944).
Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard -- not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.

Analogous purposes are served by section 287(a)(2)’s requirement of a prompt examination by an INS official other than the arresting officer. First, the statute guards against warrantless arrests that are founded only on suspicion, rather than on the grounds specified by the statute. Second, it ensures that wrongfully arrested persons have the opportunity to regain their liberty promptly. Third, it protects even those who have been validly arrested from being detained for unreasonably long periods at the sole discretion of the arresting officer. Fourth, it deters unfair or oppressive methods of questioning of those whom the INS has taken into custody.

These objectives are relevant to cases in which the INS takes custody of an alien as a step towards further administrative inquiry into the alien’s right to enter the country. They are not implicated, however, when the INS encounters ships that are transporting illegal aliens into the United States and bars their way to reaching land, ejects them from this country’s territorial waters, or seizes and forcibly returns them to the place from which they embarked (or to some other accessible foreign port). To be sure, incursions on liberty may occur in such cases -- as, for example, when the INS takes a vessel in tow and steers it, contrary to the wishes of its crew and passengers, to a foreign destination rather than to the United States. Even in such cases, however, the object of the interdiction is not to ensure that the crew and passengers are available for later administrative examination, but to make certain that they do not reach, or again attempt to reach, the United States, or to ensure their safety by bringing them to an accessible foreign shore. In general, there is little risk that INS officers who have interdicted a vessel will detain its crew and passengers for an

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16 As noted above, the regulations allow the arresting officer to conduct the examination in certain limited circumstances. See 8 C.F.R. § 287.3.

17 Cf. Ex parte Eguchi, 58 F.2d 417 (S.D. Cal. 1932) (confinement of alien for six days incommunicado without arrest warrant on suspicion he was not telling truth regarding entry denied due process).

18 See Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("detention, or temporary confinement, as a part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be 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."); United States v. Sing Tuck, 194 U.S. 161, 169 (1904) ("[t]he detention [of persons seeking admission] during the time necessary for investigation was not unlawful").
indefinite period; rather, even when a vessel is forcibly towed to a foreign port, the INS will retain control of the vessel only for as long as is needed to bring it to that destination. (Indeed, if there were some means of ensuring that the vessel would not attempt to reach the United States after being interdicted, it is most unlikely that the INS would take possession of it and tow it away.) Moreover, when a vessel is seized in such cases, it is also unlikely that the INS will engage in abusive questioning of its crew and passengers, with a view of obtaining evidence that can be used against them in an administrative proceeding.

In short, the dangers against which section 287(a)(2)'s requirement of a prompt examination is designed to guard are unlikely to arise when the INS interdicts a vessel transporting illegal aliens into the United States. Because the reasons for the protections are inapplicable in such cases, the statute should be not be construed to extend to them.19

Construction With Other INA Provisions

Section 287(a)(2) should also be construed in the manner that best accords with other provisions of the INA. Two such provisions, both of which have been invoked as authority to interdict Haitian flag vessels on the high seas, see Proposed Interdiction of Haitian Flag Vessels, 5 Op. O.L.C. 242 (1981), are especially pertinent here. The first is INA § 212(f), 8 U.S.C. § 1182(f):

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

The second provision, INA § 215(a)(1), 8 U.S.C. § 1185(a)(1), states:

Unless otherwise ordered by the President, it shall be unlawful --

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders,

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19 See, e.g., Apex Hosiery v. Leader, 310 U.S. 469, 489 (1940) (statute is to be construed by reference to evils it was designed to avert); United States v. Smith, 197 U.S. 386, 393 (1905) (purpose of Congress not served by construing term "waters of the United States" to include Philippine Islands' waters, because Philippines had not been acquired at time of statute's enactment and because such construction would impair powers of commanders of naval forces at remote stations).
and subject to such limitations and exceptions as the President may prescribe.\(^{20}\)

"These provisions make it clear that Congress has allowed the Executive Branch to exercise its broad discretion regarding alien immigration." Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1399 (D.D.C. 1985), aff'd, 809 F.2d 794 (D.C. Cir. 1987). Together with other law, these two statutes have served as authority for the Executive Orders that established and maintain the program of interdicting Haitian flag vessels on the high seas.\(^{21}\) The courts have upheld that interdiction program against challenges of several kinds. See Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549, 2567 (1993) ("[i]t is perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian immigrants the ability to disembark on our shores"); Haitian Refugee Center, Inc. v. Gracey, 809 F.2d at 838 (Edwards, J., concurring in part and dissenting in part) ("the President indubitably possessed both statutory and inherent constitutional authority to establish the interdiction program").\(^{22}\)

If interdicting a vessel transporting illegal aliens were, per se, an arrest of those aliens under section 287(a)(2), the President's power under sections 212(f) and 215(a)(1) to order operations such as the Haitian interdiction program would be severely impaired. Because section 287(a)(2) is not in terms limited to the territorial waters,\(^{23}\) a construction of that statute that treated interdictions as, per se, "arrests" would arguably make even interdictions on the high seas impossible, unless the interdicted aliens were brought to this country for administrative hearings. Thus, a major purpose of an interdiction program --

\(^{20}\) We note that Congress amended section 215(a) in 1978 to eliminate a prior limitation of this Presidential power to time of war or proclaimed national emergency. See Pub. L. No. 95-426, § 707, 92 Stat. 992 (1978).

\(^{21}\) In addition to his statutory powers under the INA, the President has been held to have inherent power to exclude illegal aliens. See Knauff v. Shaughnessy, 338 U.S. 537, 542-43 (1950); Jean v. Nelson, 727 F.2d 957, 965 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985); Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326, 1340 (2d Cir. 1992); id. at 1348 (Mahoney, J., dissenting); Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350, 1380-81 (2d Cir. 1992) (Walker, J., dissenting), rev'd, Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993); cf. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 608-09 (1889) (government may refuse to admit criminal aliens even in absence of statute). But see Note, From "Mezei" to "Jean": Toward the Exit of the Entry Doctrine, 22 San Diego L. Rev. 1143, 1158-60, 1161 (1985) (critique of claim to inherent Presidential power).


\(^{23}\) Contrast section 287(a)(3), which does impose territorial limits on the INS's authority to conduct warrantless searches at sea. See Territorial Waters Memorandum at 23-25.
preventing illegal aliens from reaching United States soil — would be defeated. A reading of section 287(a)(2) that so impaired the President’s ability to act should, if possible, be avoided.

To be sure, section 287(a)(2) could be construed to apply only within the United States and its territorial waters, and the INS would perhaps so read it. See Sale, 113 S. Ct. at 2567 ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested."). On that narrower reading, it could be argued that interdictions within the territorial waters were "arrests," even if interdictions on the high seas were not. But to characterize interdictions within the territorial waters as "arrests" would still limit the President's power to "impose on the entry of aliens any restrictions he may deem to be appropriate," INA § 212(f) — a power that the Court has held allowed the President "to establish a naval blockade that would simply deny illegal Haitian immigrants the ability to disembark on our shores." Sale, 113 S. Ct. at 2567 (emphasis added). It would also constrict the President's power to prescribe "limitations and exceptions" on the entry of aliens into the United States. INA § 215(a)(1). Finally, it would trench on any inherent constitutional authority the President has to control the borders. For these reasons, we believe that this reading of section 287(a)(2) also fails to harmonize it fully with other provisions of the INA.

Application to Various Forms of Interdiction

On the basis of the preceding discussion, we conclude that INS interdictions of illegal aliens at sea are not per se "arrests" under section 287(a)(2). The analysis cannot end there, however. It remains to consider how the INA should be applied to the various forms of interdiction in which the INS is in practice most likely to engage.

At least three different types of situations should be distinguished. First, the INS may stop a vessel bearing illegal aliens that is seeking to enter the country and, perhaps for humanitarian purposes, take the vessel in tow and bring it to shore in the United States. Second, the INS may merely prevent such a vessel from entering or penetrating further into United States territorial waters, without taking possession of the vessel or attempting to direct it to any particular destination other than merely to international waters. Third, the INS may force a vessel to sail to a particular destination outside the United States, either by escorting it there under compulsion, or by taking it in tow and leading it there, or by taking command over it and sailing it there itself. Each of these distinct factual patterns merits separate legal analysis.

(1) The INS may seize a vessel within United States territorial waters that is discovered to be transporting illegal aliens, and bring it to shore in the continental United States. This may be done, e.g., for humanitarian reasons, if the vessel is unseaworthy or if
the passengers are perceived to be in need of food or water. In such cases, the question is whether, in taking control of the vessel, the INS has arrested its occupants under section 287(a)(2) and, further, whether an alien brought to shore in such a case is entitled to an exclusion hearing.

We do not think it necessary to consider here whether and in precisely what circumstances the INS would have made an "arrest" of such aliens. As a practical matter, we believe an INS regulation, 8 C.F.R. § 235.3(b), will often or usually be applicable in such cases. Under that regulation, any alien who appears to an inspecting officer to be inadmissible, and who arrives without documents (unless they are waived under regulation), or who arrives with false or otherwise defective documents, or who arrives at a place other than a designated port of entry, "shall be detained in accordance with section 235(b) of the Act." See 8 C.F.R. § 235.3(b); 1 Charles Gordon and Stanley Mailman, Immigration Law and Procedure § 8.09[1] at 8-20 (1993). We take it that the INS would generally provide an officer to inspect aliens brought to the continental United States in such circumstances, at least if they expressed the desire to remain in the United States. We take it also that, on being inspected, the aliens would typically appear to the INS officer to be inadmissible. Finally, we take it that one of the other criteria enumerated in section 235.3(b) (absence of documents, false or otherwise defective documents, or arrival other than at a port of entry) would ordinarily be met. On such facts, the regulation requires that the aliens "shall be detained." If detained, the aliens would then be entitled to a hearing before an immigration judge under 8 C.F.R. § 235.6(a).

24 "The duty to rescue those in distress at sea is firmly established in both general and conventional international law." Guy S. Goodwin-Gill, The Refugee in International Law at 87; see also id. at 93-95. The Coast Guard may engage in rescues both on the high seas and in the territorial waters. 14 U.S.C. § 88.

25 To the limited extent that it is relevant, the case law seems consistent with that conclusion. Several decisions suggest that illegal aliens who are towed to the United States will in fact be accorded exclusion proceedings.

In Matter of Pierre, Interim Dec. # 2238, 14 I. & N. Dec. 467 (BIA 1973), the BIA dealt with a case of aliens who had left Haiti in a small boat, fell into distress, and were towed by an American boat to West Palm Beach, a designated port of entry. They did not land but remained on board their vessel, and were inspected while on board by the INS. "Because they did not appear to the immigration officers to be clearly and beyond a doubt entitled to land, the matter was referred to the immigration judge for further inquiry in accordance with section 235(b) of the Act." Id. at 468. The BIA held that the Haitians had not "entered" the United States (since "[t]here is no entry when the alien is under official restraint", id. at 469), and so were not entitled to deportation. They were, however, held to be entitled to exclusion proceedings. (On the significance of whether an "entry" has been made, see Thomas Alexander Aleinikoff and David A. Martin, Immigration Process and Policy at 323.)

In Matter of Estrada-Betancourt, Interim Dec. # 1725, 12 I. & N. Dec. 191 (BIA 1967), three Cuban aliens had crossed into the United States by boat and were making their way inland by car when they were taken into custody by the INS. These aliens were held to have "entered" the country without inspection, and so to be correctly in deportation proceedings rather than in exclusion. Of relevance here, the BIA cited in support of its ruling an unreported 1963 district court decision, Brazil v. Ahrens, No. 63-663 Civ.-CF, 12/24/63 (S.D.
In a set of written questions on our Territorial Waters Memorandum, INS has posed two more specific questions regarding aliens whose vessels have been interdicted in the territorial waters and brought to shore on the continental United States. First, it has asked whether such aliens could be brought "in custody" to the continental United States to a "port of entry," and then repatriated without providing an opportunity to be examined by an immigration officer. Second, INS has asked whether it could take the same actions if the aliens had not been brought to a "port of entry," but to some other landing in the continental United States.

In the former case, as INS suggests, the INA itself prescribes that "[a]ll aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe." INA § 235(a), 8 U.S.C. § 1225(a) (emphasis added). We agree with the INS that this language mandates an examination.

As to the latter case, INS regulations specifically prescribe that an alien’s application to enter the United States "shall be made in person to an immigration officer at a U.S. port of entry enumerated in part 100 of this chapter." 8 C.F.R. § 235.1 (emphasis added). Under the language of this regulation, it seems plain that an alien not personally present

Fla.), which apparently held that Haitians whom the Coast Guard towed into the United States and who were then paroled into the United States were properly given exclusion, but not deportation, proceedings. (Again, they had not "entered" the United States.) See also Sannon v. United States, 427 F. Supp. 1270, 1272 (S.D. Fla. 1977), vacated, 566 F.2d 104 (5th Cir. 1978) (INS intercepted Haitian asylum-seekers "at the border of the United States," paroled them into United States, and brought exclusion proceedings against them).

26 See also id. at 100.4(c)(2) (designating ports of entry); Territorial Waters Memorandum at 5-7 (citing statute, regulations and BIA decision to support conclusion that right to an exclusion hearing does not attach unless alien seeking to enter United States is at "port.").

The Coast Guard disagrees with that conclusion of the Territorial Waters Memorandum. See Letter to Ms. Teresa Wynn Roseborough, [Deputy Assistant Attorney General, Office of Legal Counsel], from David Kantor, Captain, U.S. Coast Guard, Chief, Maritime & International Law Division, at 3-4 (Mar. 30, 1994). The Coast Guard does not affirmatively state, however, when it believes the right to an exclusion hearing does not attach. (It does not claim, for example, that arrival in the territorial waters in and of itself triggers the right to a hearing.) Further, without identifying any particular INA section or regulation, the Coast Guard asserts that "the statute plainly states [that] an arriving alien who does not appear at a port of entry will be detained and examined to determine his status." Id. at 3. (We discuss in the text above the status of interdicted aliens brought to shore but not to a port of entry.) Finally, the Coast Guard claims that this Office "based[d]" its conclusion on the district court's opinion in Haitian Refugee Center v. Gracey, supra. Id. at 4. That is incorrect. After reviewing the INA's language, structure and regulations, and citing BIA case law and expert commentary, we quoted from the Gracey opinion only to confirm the conclusion that the plain language of INS §§ 235(b) and 236(a) attached the right to an exclusion hearing to arrival at a port. See Territorial Waters Memorandum at 5-9.
before an immigration officer at a port of entry cannot apply to enter the United States. So far as we are aware, INS regulations do not elsewhere provide in terms for cases in which aliens have been interdicted in the territorial waters and brought to the continental United States, but not to a "port of entry."

As a practical matter, however, we believe that the INS can provide for such cases in several ways. First, if the aliens in such circumstances wish to apply to enter the United States, the INS can accommodate them by transporting them to a convenient port of entry so that they may make such an application in accordance with 8 C.F.R. § 235.1. Alternatively, the INS may proceed against the aliens under 8 C.F.R. § 235.3(b), in the manner described above. Again, if the INS wishes to detain aliens in such circumstances for further proceedings, it may make a full-blown arrest of them under section 287(a)(2) when they reach shore, and so trigger further inspection. Finally, the INS may have the regulatory authority to interpret the statutory term "port" in a manner that would enable it to deem aliens who are brought to the continental United States in such circumstances to be at a "port of entry." Cf. Territorial Waters Memorandum at 27. Accordingly, nothing in the Territorial Waters Memorandum mandates that the INS deny further examination in such cases if the INS wishes to provide it.

(2) If the INS merely prevents a vessel transporting illegal aliens from penetrating further into United States territorial waters, and does not forcibly return the vessel, we think it has plainly not "arrested" the aliens under section 287(a)(2). Although they were not decided under that statute, the Egan and Whitmore cases, discussed above, provide indirect support for that result. So, too, does the early decision by Chief Justice John Marshall in Olivese v. Union Insurance Co., 16 U.S. (3 Wheat.) 183. There the Court considered whether a blockade preventing a neutral vessel from leaving port was an "arrest" within the meaning of a maritime insurance policy. The Court ruled that it was not, observing that the notion of an arrest "implies possession of the thing by the power which arrests or detains; and in the case of a blockade, the vessel remains in the possession of the master." Id. at 189. Merely preventing a ship from entering a port, like merely preventing it from leaving one, would not constitute an "arrest" under that standard.

(3) Finally, we think that the third form of interdiction, in which the INS forcibly ejects a ship from United States territorial waters and returns it to a foreign destination, is not in itself an "arrest" of the crew and passengers. In our view, rather than being an

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37 See 1 Charles Gordon and Stanley Mailman, Immigration Law and Procedure § 8.05[1] at 8-12 ("the alien who seeks entry to the United States must do so at a time and place prescribed; usually at a seaport, airport or border inspection station, staffed by INS and customs personnel cross-trained and designated to do one-stop inspections. Entry otherwise is a crime."). Cf. INA § 275(a), 8 U.S.C. § 1325(a) (entry of alien at improper place or time is a crime).

38 So, too, does the early decision by Chief Justice John Marshall in Olivese v. Union Insurance Co., 16 U.S. (3 Wheat.) 183. There the Court considered whether a blockade preventing a neutral vessel from leaving port was an "arrest" within the meaning of a maritime insurance policy. The Court ruled that it was not, observing that the notion of an arrest "implies possession of the thing by the power which arrests or detains; and in the case of a blockade, the vessel remains in the possession of the master." Id. at 189. Merely preventing a ship from entering a port, like merely preventing it from leaving one, would not constitute an "arrest" under that standard.

"arrest," an interdiction of this kind is intended to avoid arresting illegal entrants. In such cases, the INS is not taking aliens into custody and detaining so as to ensure their availability for further questioning and a hearing. It has therefore not "arrested" them.

As discussed above, we believe that an analysis of the statute's purposes supports this conclusion. Section 287(a)(2) imposes a procedural burden on the government if it chooses to arrest and detain aliens who are entering or attempting to enter the country illegally so that they can be subjected to further questioning; but it should not be read to deem the government to have made such arrests when it has no interest in detaining and examining the aliens, or to prevent the government from taking measures designed to place the aliens beyond its control, and thus to obviate any need to arrest them.

Conclusion

The interdiction within the territorial waters of the United States of illegal aliens entering or attempting to enter the United States is not an "arrest" of such aliens within the meaning of INA § 287(a)(2).

625 (1991). We do not consider such issues here. Nor do we consider here the international law issues that would be raised if United States public vessels entered the territorial waters of another country for domestic law enforcement purposes without that country's consent. See United States v. Conroy, 589 F.2d 1258, 1267-68 & n.13 (5th Cir. 1979); Violation of Sovereignty — Seizure in a Foreign Jurisdiction, 4 Op. Att'y Gen. 285 (1843).

As noted above, a forcible return or repatriation can have other purposes as well, including protecting passengers from abuse by smugglers, see generally United States v. Saintil, 753 F.2d 984, 987-88 (11th Cir.), cert. denied, 472 U.S. 1012 (1985) (discussing atrocities suffered by Haitians being smuggled into United States).

As discussed above, this reading of the statute also avoids impairing the President's statutory and constitutional powers.