*Fordham International Law Journal*

*Volume* 14, *Issue* 3 1990 *Article* 7

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**Abstract**

This Note argues that the INS may obtain custody over aliens for habeas corpus purposes by filing detainers with their respective prisons. Part I traces the history of habeas corpus and the expanding meaning that U.S. courts have given the term "custody." Part I also illustrates the difficulty of defining a detainer for custodial purposes. Part II sets forth the approaches that courts use to determine the custodial effects of INS detainers. Part III submits that courts should review the intent behind the filing of an INS detainer to ascertain properly a detainer's custodial effect. This Note concludes that a court should base its interpretation of an INS detainer's meaning on the intent and understanding of the authorities that file and process the detainer.

# CUSTODY BATTLE: THE FORCE OF U.S. IMMIGRATION AND NATURALIZATION SERVICE DETAINERS OVER IMPRISONED ALIENS

## *INTRODUCTION*

A writ of habeas corpus gives a person facing a restraint on his liberty the right to an immediate hearing to determine the restraint's legality.[1] This right originated in England[2] and has existed in the United States since the creation of the U.S. judiciary.[3] Under current U.S. law, a person invoking the writ must be "in custody" of a federal or state authority.[4]

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1. *See* Peyton v. Rowe, 391 U.S. 54, 58 (1968); 39 C.J.S. *Habeas Corpus* § 6 (1976). Habeas corpus literally means "to have the body." Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 CANADIAN B. REV. 92, 110 (1938).

2. *See Peyton*, 391 U.S. at 58; *see also* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 108-25 (1926); Cohen, *supra* note 1, at 94; *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970) [hereinafter *Developments*].

3. U.S. CONST. art. 1, § 9, cl. 2. The U.S. Constitution provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*; *see Developments*, *supra* note 2, at 1045.

4. 28 U.S.C. § 2241 (1988). This statute provides federal courts the general power to grant writs of habeas corpus. *Id.* Specific provisions regarding the writ's applicability in reviewing the legality of criminal convictions obtained in federal and state courts appear in sections 2254 and 2255 of title 28 of the U.S. Code. *Id.* §§ 2254-2255. Other statutes address additional evidentiary and procedural issues surrounding the writ. *See id.* §§ 2242-2253. The habeas corpus statute concerning the power to grant the writ states:

> (a) Writs of habeas corpus may be granted by the [U.S.] Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
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> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless -
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> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

*Id.* § 2241.

A U.S. authority may obtain custody over a prisoner not in its immediate physical control by filing a detainer with the prisoner's holding institution.[5] A detainer, defined as a restraint,[6] may have one or two purposes. First, it may notify the institution of actions that the filing authority has taken, or may take, concerning the prisoner.[7] Second, it may direct an institution to hold a prisoner for the filing authority.[8]

In recent years, several imprisoned aliens have sought habeas corpus relief against the Immigration and Naturalization Service (the "INS") after the INS filed detainers with the aliens' respective prisons.[9] These detainers either requested that a prison notify the INS of an alien's pending release,[10] or ordered an alien to appear at a deportation hearing and notified the prison of that order.[11] The aliens under the detainers claimed that the detainers put them in INS custody and, therefore, entitled them to immediate deportation or exclusion hearings.[12]

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5. *See, e.g.*, Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973).

6. BLACK'S LAW DICTIONARY 449 (6th ed. 1990) (defining detainer as "restraint of a man's personal liberty against his will; detention").

7. *See infra* notes 88-103 and accompanying text (discussing definitions of and components of detainers).

8. *See, e.g.*, *Braden*, 410 U.S. at 498-99 (finding that Alabama warden's acting as "agent" of Kentucky in holding petitioner established custody); Rose v. Morris, 619 F.2d 42, 44 (9th Cir. 1980) (finding that detaining authority's intent to "retake" prisoner established custody); *see infra* notes 90-93 and accompanying text (discussing conflicting definitions of detainers).

9. *See, e.g.*, Guti v. INS, 908 F.2d 495 (9th Cir. 1990); Vargas v. Swan, 854 F.2d 1028 (7th Cir. 1988); Campillo v. Sullivan, 853 F.2d 593 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989); Fernandez-Collado v. INS, 644 F. Supp. 741 (D. Conn. 1986), *aff'd*, 857 F.2d 1461 (2d Cir. 1987).

10. INS Form I-247 (Rev. 3-1-83) [hereinafter Standard INS Detainer]. The standard INS detainer is reproduced as Appendix A to this Note. For a discussion of specific components of the standard INS detainer, see *infra* notes 94-98 and accompanying text.

11. INS Form I-221 (Rev. 7-1-73) [hereinafter Order to Show Cause]. The order to show cause is reproduced as Appendix B to this Note.

12. *See Guti*, 908 F.2d at 495; *Vargas*, 854 F.2d at 1029-30; *Campillo*, 853 F.2d at 594; *Fernandez-Collado*, 644 F. Supp. at 742-43. Some aliens have challenged INS detainers in habeas corpus by alleging that the filing of a detainer deprived them of specific liberties. *See* Mohammed v. Sullivan, 866 F.2d 258, 259 (8th Cir. 1989) (alien alleged that prison increased his security classification after INS filed detainer); Soler v. INS, 749 F. Supp. 1011, 1012 (D. Ariz. 1990) (alien alleged that detainer affected his confinement status). Other aliens have alleged that the mere existence of a detainer entitles aliens to relief. *See* Gonzalez v. INS, 867 F.2d 1108, 1109 (8th Cir. 1989) (alien sought writ of mandamus, not writ of habeas corpus, to challenge de-

Recently, in *Campillo v. Sullivan*,[13] the U.S. Court of Appeals for the Eighth Circuit rejected such a claim for habeas corpus relief.[14] Similarly, most federal courts have found that an INS detainer over an alien does not constitute INS custody over the alien.[15] The U.S. Court of Appeals for the Seventh

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tainer's existence); *Fernandez-Collado*, 644 F. Supp. at 742 (alien alleged that filing of detainer was sure to result in his detention by INS upon completion of his imprisonment).

The Code of Federal Regulations contains the INS's general and permanent rules concerning the agency's apprehension, custody, and detention of aliens. 8 C.F.R. § 242.2 (1990). Section 242.2 states that "[d]etainers may only be issued in the case of an alien who is amenable to exclusion or deportation proceedings under any provision of law." *Id.* § 242.2(a)(1); *see infra* notes 121 & 170 (discussing proposal to amend this rule to clarify INS intent in filing detainers).

An alien illegally entering or attempting to enter the United States for the first time is typically subject to exclusion. *See* Landon v. Plasencia, 459 U.S. 21, 25 (1982); *Vargas*, 854 F.2d at 1029. In contrast, an alien who has entered and "establish[ed] the necessary presence" in the United States, but whose presence violates immigration laws, is typically subject to deportation. *See* Leng May Ma v. Barber, 357 U.S. 185, 187 (1958); *Vargas*, 854 F.2d at 1029; 8 U.S.C. § 1101(a)(13) (1988) (defining "entry" of alien into United States); *id.* § 1251 (describing alien classes subject to deportation).

Federal law identifies classes of aliens subject to exclusion or deportation. *See id.* § 1182 (describing classes of aliens subject to exclusion); *id.* § 1251 (describing classes subject to deportation). Although the standard INS detainer refers to deportation, one court recognized its utility as a detainer in the exclusion context. *Vargas*, 854 F.2d at 1028-34; *see* Standard INS Detainer, *supra* note 10. Accordingly, the distinctions between excludable aliens and deportable aliens are generally not relevant in this context. *See* Prieto v. Gluch, 913 F.2d 1159, 1163 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 976 (1991); *see also Landon*, 459 U.S. at 25-27 (discussing differences between excludable aliens and deportable aliens); Note, *Habeas Corpus and Immigration: Important Issues and Developments*, 4 GEO. IMMIGR. L.J. 503, 503-08 (1990) (discussing differences between excludable aliens and deportable aliens). *Prieto* concluded that the reasoning in *Vargas*, which concerned a potentially excludable alien, was "inconsistent" with the reasoning in *Campillo v. Sullivan*, which concerned a potentially deportable alien. *Prieto*, 913 F.2d at 1163. *But see Campillo*, 853 F.2d at 595.

13. 853 F.2d 593 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989).

14. *Id.* at 595.

15. *See Prieto*, 913 F.2d 1159; Orozco v. INS, 911 F.2d 539 (11th Cir. 1990) (per curiam); Gonzalez v. INS, 867 F.2d 1108 (8th Cir. 1989); Mohammed v. Sullivan, 866 F.2d 258 (8th Cir. 1989); Ganem v. INS, 825 F.2d 410, 1987 U.S. App. LEXIS 10499 (6th Cir. Aug. 5, 1987); Roberts v. Matthews, No. 88-3014-O, 1990 U.S. Dist. LEXIS 16494 (D. Kan. Nov. 30, 1990); Soler v. INS, 749 F. Supp. 1011 (D. Ariz. 1990); Garcia v. INS, 733 F. Supp. 1554 (M.D. Pa. 1990); Ganem v. Gluch, No. 88-CV-71258-DT, 1989 U.S. Dist. LEXIS 4638 (E.D. Mich. Apr. 18, 1989); Cabezas v. Scott, 717 F. Supp. 696 (D. Ariz. 1989); D'Ambrosio v. INS, 710 F. Supp. 269 (N.D. Cal. 1989); Pita v. INS, No. 88-2267, 1988 U.S. Dist. LEXIS 10667 (E.D. La. Sept. 14, 1988); Fernandez-Collado v. INS, 644 F. Supp. 741 (D. Conn. 1986), *aff'd*, 857 F.2d 1461 (2d Cir. 1987); Martinez v. INS, No. 85-C-9674 (N.D. Ill. Apr. 25, 1986) (LEXIS Immig library, Courts file).

Circuit, however, suggested a different approach in *Vargas v. Swan*.[16] The *Vargas* court held that an INS detainer that effects the "holding" of a prisoner for a deportation or exclusion hearing or investigation could constitute INS custody over the prisoner for habeas corpus purposes.[17]

This Note argues that the INS may obtain custody over aliens for habeas corpus purposes by filing detainers with their respective prisons. Part I traces the history of habeas corpus and the expanding meaning that U.S. courts have given the term "custody." Part I also illustrates the difficulty of defining a detainer for custodial purposes. Part II sets forth the approaches that courts use to determine the custodial effects of INS detainers. Part III submits that courts should review the intent behind the filing of an INS detainer to ascertain properly a detainer's custodial effect. This Note concludes that a court should base its interpretation of an INS detainer's meaning on the intent and understanding of the authorities that file and process the detainer.

## I. *HABEAS CORPUS, THE SCOPE OF CUSTODY, AND DETAINERS*

The mere filing of an INS detainer does not necessarily provide an imprisoned alien with a right to challenge the detainer in a habeas corpus proceeding.[18] To exercise this right, an alien must demonstrate that the detainer creates INS custody.[19] The development of the habeas corpus doctrine and the expansion of the meaning of the concept of "custody," however, leave the reach of a detainer undefined,[20] and an

16. 854 F.2d 1028 (7th Cir. 1988).

17. *Id.* at 1032; *see* Guti v. INS, 908 F.2d 495, 496 (9th Cir. 1990) (restating *Vargas* holding). The *Vargas* holding applied to any "future custodian who has evidenced an intent to retake or to decide the prisoner's future status at the end of his or her current confinement." *Vargas*, 854 F.2d at 1032.

18. *See* Campillo v. Sullivan, 853 F.2d 593, 595 (8th Cir. 1988) (holding that filing of standard INS detainer alone does not justify availability of habeas corpus relief), *cert. denied*, 490 U.S. 1082 (1989). *But see Vargas*, 854 F.2d at 1032-34 (suggesting that alien's habeas corpus action may lie).

19. *See supra* notes 13-17 and accompanying text (noting cases that addressed aliens' habeas corpus claims).

20. *See infra* notes 22-103 and accompanying text (discussing habeas corpus, custody, and detainers).

alien's right to challenge an INS detainer unclear.[21]

### A. *Habeas Corpus in English and U.S. Legal History*

Historians are uncertain about the origin of the writ of habeas corpus.[22] The words "habeat corpora," however, appear in a 1220 order that directed an English sheriff to produce parties to a trespass action.[23] Early English courts used habeas corpus to procure the appearance of unwilling parties in court.[24]

By the end of the sixteenth century, courts employed many forms of habeas corpus.[25] One form, *habeas corpus ad subjiciendum*, the writ used in criminal confinement cases,[26] be-

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21. *See supra* note 18 (discussing cases that conflict on alien's right to challenge INS detainer).

22. *See* 9 W.S. HOLDSWORTH, *supra* note 2, at 104-12; *see also Developments*, *supra* note 2, at 1042.

23. *See Developments*, *supra* note 2, at 1042.

24. *See* R.P. SOKOL, FEDERAL HABEAS CORPUS 4-5 (1969); *Developments*, *supra* note 2, at 1042. Until the sixteenth century, English courts used the writ to expand their jurisdictions at the expense of rival courts. *See* 9 W.S. HOLDSWORTH, *supra* note 2, at 109. In medieval England, local and franchise courts waged battle over their respective jurisdictions. *See id.* By the fifteenth and sixteenth centuries, the battle extended to such rival central courts as the Admiralty, the Chancery, and the Council and Star Chamber. *Id.*; *see Developments*, *supra* note 2, at 1042.

25. *See Developments*, *supra* note 2, at 1043. William Blackstone identified five common law forms of habeas corpus writs. 3 W. BLACKSTONE, COMMENTARIES *129-32. The first is *habeas corpus ad subjiciendum*, which directed a person detaining another to produce the body of the prisoner. *Id.* at *131; *see infra* notes 26-28 and accompanying text (discussing this habeas writ). The second form of the writ is *ad respondendum*, which effected the removal of a prisoner from one court to another. 3 W. BLACKSTONE, *supra*, at *129. The third form of the writ is *ad satisfaciendum*, which effected the bringing of a prisoner who has had judgment against him to a higher court, so that the plaintiff could charge him with process of execution. *Id.* at *129-30. The fourth form of the writ is *ad prosquendum, testificandum, deliberandum*, which effected the removal of a prisoner "in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the act was committed." *Id.* at *130. The final common law form of the writ is *ad faciendum et recipiendum*, which effected the removal of a case and a prisoner to a superior court that had jurisdiction. *Id.*

Courts still use some of these writs today. *See Developments*, *supra* note 2, at 1043 n.8. Federal judges may issue writs of *habeas corpus ad testificandum* to bring a prisoner into court to testify or for trial. *See* 28 U.S.C. § 2241(c)(5) (1988) (stating that writ shall extend to prisoner if "[i]t is necessary to bring him into court to testify or for trial"); *see also Developments*, *supra* note 2, at 1043 n.8. The U.S. Supreme Court has also upheld the use of a writ of *habeas corpus ad prosquendum* to deliver a New York prisoner to California for trial. Carbo v. United States, 364 U.S. 611, 612-13 (1961).

26. *See Developments*, *supra* note 2, at 1043.

came the most important of the writs.[27] The term "habeas corpus," standing alone, generally refers to this writ.[28]

Initially, the habeas corpus writ proved ineffective against the Crown's power.[29] During much of the seventeenth century, Parliament and the Crown battled over the Crown's abuses of its power to arrest, leaving the status of the writ uncertain.[30] Finally, in 1679, Parliament adopted the forerunner of all habeas corpus acts, the Habeas Corpus Act of 1679 (the "1679 Act").[31] This act strengthened the power of common law courts to grant habeas corpus relief to prisoners seeking review of their confinements.[32] The 1679 Act, however, specifically excluded from its coverage convicted criminals who sought to challenge their confinements.[33]

England never extended the 1679 Act to its American col-

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27. *See id.* (noting that "[b]y the close of the sixteenth century there were many forms of habeas corpus of which the most important was *habeas corpus ad subjiciendum*").

28. *See* Ex parte Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.); *Developments, supra* note 2, at 1043 n.9. The habeas corpus writ is "perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement." Secretary of State for Home Affairs v. O'Brien, [1923] App. Cas. 603, 609 (H.L.); *see* Fay v. Noia, 372 U.S. 391, 400 (1963) (quoting *O'Brien*).

29. *See Darnel's Case*, 3 Cobbett's St. Tr. 1 (1627) (available in Library, Columbia University School of Law, Treasure Room); *see also Developments, supra* note 2, at 1043. *Darnel's Case* was perhaps the most celebrated early habeas corpus case. *See* R.P. SOKOL, *supra* note 24, at 9; *Developments, supra* note 2, at 1043 n.11. King Charles I, hard-pressed financially, sought to compel his subjects to lend him money. *See* R.P. SOKOL, *supra* note 24, at 9. The King imprisoned Darnel and four other knights for refusing to make loans to him. *See id.* Rejecting the knights' claims for habeas corpus relief, the King's Bench concluded that habeas corpus was a state matter, beyond the court's authority. *See Developments, supra* note 2, at 1043 n.11.

30. *See Developments, supra* note 2, at 1044.

31. 31 Car. 2, ch. 2 (1679) [hereinafter 1679 Act]; *see* Jones v. Cunningham, 371 U.S. 236, 239 (1963); *Developments, supra* note 2, at 1044.

32. 1679 Act, 31 Car. 2, ch. 2; *see Developments, supra* note 2, at 1045. The 1679 Act

> made the writ of *Habeas Corpus ad subjiciendum* the most effective weapon yet devised for the protection of the liberty of the subject, by providing both for a speedy judicial inquiry into the justice of any imprisonment on a criminal charge, and for a speedy trial of prisoners remanded to await trial.

9 W.S. HOLDSWORTH, *supra* note 2, at 118.

33. 1679 Act, 31 Car. 2, ch. 2, § 3; *see* 9 W.S. HOLDSWORTH, *supra* note 2, at 118; *Developments, supra* note 2, at 1045. Convicted criminals had to resort to habeas corpus at the common law. *Id.* For a discussion of the 1679 Act's major strengths and weaknesses, see 9 W.S. HOLDSWORTH, *supra* note 2, at 117-21.

onies.[34] When the first U.S. Congress passed the Judiciary Act of 1789,[35] however, it empowered federal courts to issue writs of habeas corpus to prisoners in federal custody.[36] A court considering a habeas corpus claim, however, could inquire into only a prisoner's "cause of commitment," not the nature of a prisoner's custody.[37] The Judiciary Act of 1789 used custody solely to limit a federal court's jurisdiction to prisoners in federal custody, rather than state custody.[38] Consistent with this view, the common law continued to limit the purposes for which a prisoner could invoke the writ.[39] A prisoner could invoke federal habeas corpus only to challenge insufficient legal process in nonjudicial detentions, or to challenge the jurisdiction of a court to confine.[40]

These limitations, however, diminished after the Civil War.[41] Changes in federal-state relations in the Reconstruction era helped spur new interest in protecting individual liberty against state power, resulting in a more expansive role for the federal judiciary in inquiring into federal and state detentions.[42] In 1867, Congress passed a habeas corpus bill (the "1867 Act")[43] in part to enlarge the scope of habeas corpus

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34. *See Developments*, *supra* note 2, at 1045.

35. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82 [hereinafter Judiciary Act of 1789].

36. *Id.* The Judiciary Act of 1789 stated:

> That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, . . . and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. *Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

*Id.*

37. *Id.*; *see* Brief for Respondents at 36, Peyton v. Rowe, 391 U.S. 54 (1968) (No. 802) [hereinafter *Peyton* Brief].

38. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82; *see Peyton* Brief, *supra* note 37, at 36.

39. *See* Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.).

40. *See* Ex parte Watkins, 28 U.S. (3 Pet.) 193, 201 (1830).

41. *See* Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1027 (1985).

42. *See id.*

43. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 [hereinafter 1867 Act]. The act

and to extend federal courts' jurisdiction to hear habeas corpus petitions.[44] The 1867 Act permitted federal courts to entertain state prisoners' habeas corpus petitions.[45] Moreover, it changed the subject of a court's inquiry from "cause of commitment" to construction of the phrase "restrained of [one's] liberty."[46] Consequently, courts began to identify the degrees of restraint necessary to constitute "custody."[47]

### B. *The Scope of Custody*

U.S. habeas corpus statutes have never defined custody, the key measure of restraint.[48] As a result, for many years federal courts turned to U.S. and English common law to deter-

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amended the Judiciary Act of 1789. *See id.*; *supra* notes 35-38 and accompanying text (discussing Judiciary Act of 1789).

44. Fay v. Noia, 372 U.S. 391, 415-18 (1963). Congress passed the 1867 Act "to enlarge the privilege of the writ of *habeas corpus*, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty." CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866) (statement of Rep. Lawrence); *see Fay*, 372 U.S. at 417 (quoting Rep. Lawrence). The 1867 Act states that

> the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . . Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person . . . .

1867 Act, ch. 28, § 1, 14 Stat. 385; *see infra* note 75 (discussing meaning of "within their respective jurisdictions").

45. 1867 Act, ch. 28, § 1, 14 Stat. 385; *see Developments*, *supra* note 2, at 1048.

46. 1867 Act, ch. 28, § 1, 14 Stat. 385; *see Peyton* Brief, *supra* note 37, at 37.

47. *Fay*, 372 U.S. at 415; *see Developments*, *supra* note 2, at 1048 n.48. "[C]ustody in the sense of restraint of liberty is a prerequisite to habeas . . . ." *Fay*, 372 U.S. at 427 n.38.

The 1867 Act survives, except for some changes in wording, in the current habeas corpus statute. *See Fay*, 372 U.S. at 415. *Compare* 28 U.S.C. § 2241 (1988) *with* 1867 Act, ch. 28, § 1, 14 Stat. 385.

48. *See* Jones v. Cunningham, 371 U.S. 236, 238 (1963); McNally v. Hill, 293 U.S. 131, 136 (1934); Wales v. Whitney, 114 U.S. 564, 571 (1885); *see also Developments*, *supra* note 2, at 1072. The *Wales* Court proposed a reason for the absence of a statutory definition of custody. *Wales*, 114 U.S. at 571. The Court noted that the framing of a definition "can hardly be expected from the variety of restraints for which it is used to give relief." *Id.* This observation would prove quite prescient. *See infra* notes 54-84 (discussing expansion of scope of custody).

mine the meaning of custody.[49] For nearly one hundred years after passage of the 1867 Act, most U.S. courts considered custody to involve "physical restraint."[50] In *Wales v. Whitney*,[51] the U.S. Supreme Court required "actual confinement" as opposed to mere "moral restraint."[52] Thereafter, U.S. courts used the same narrow concept of custody to reject habeas corpus challenges to criminal convictions in a variety of circumstances.[53]

In 1950, the U.S. District Court for the Western District of Pennsylvania became the first U.S. court to make an exception

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49. *See McNally*, 293 U.S. at 136; *see also Jones*, 371 U.S. at 238.

50. *See Developments*, *supra* note 2, at 1073 n.6 (noting that in all cases testing criminal convictions in habeas corpus, petitioners had to demonstrate physical custody). More recently, however, the Supreme Court suggested that "something less than close physical confinement" had been necessary for the writ to be a proper remedy. *Jones*, 371 U.S. at 238. The *Jones* Court relied on English cases that found habeas corpus remedies in child custody cases, and U.S. cases that found habeas corpus remedies available to aliens seeking entry into the United States. *Id.* at 238-40. The petitioners in these cases faced no imprisonment, but each petitioner faced a restraint in movement sufficient to warrant habeas corpus relief. *Id.*

51. 114 U.S. 564 (1885).

52. *Id.* at 571-72. The opinion in *Wales*, however, suggested that something less than close physical confinement might suffice for custody. *Id.* at 571. The Court stated that

> [w]ives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus*. Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed.

*Id.*

Dictum in *Wales* suggested that the Supreme Court intended availability of habeas corpus relief even in these limited circumstances. *See id.* at 572. In the case at bar, Mr. Whitney, the Secretary of the Navy, ordered Dr. Wales, a former Navy medical director, to remain in Washington, D.C. pending the outcome of Dr. Wales's court-martial. *Id.* at 566-68. In denying Dr. Wales's request for habeas corpus relief, the Court implied that restraint required more than a legal order. *Id.* at 572. The court stated that "[i]f Dr. Wales had chosen to disobey this order, he had nothing to do but take the next or subsequent train from the city and leave it. There was no one at hand to hinder him." *Id.*

53. *See* Stallings v. Splain, 253 U.S. 339 (1920) (denying relief to petitioner released on bail); Viles v. United States, 193 F.2d 776 (10th Cir.) (per curiam) (concerning petitioner on probation who alleged no facts entitling him to habeas corpus relief), *cert. denied*, 343 U.S. 915 (1952); *see also* Weber v. Squier, 315 U.S. 810 (1942) (denying certiorari as moot) (denying relief to paroled prisoner); *Developments*, *supra* note 2, at 1074.

to this rigid notion of custody.[54] The court considered the habeas corpus petition of a prisoner, subject to a deportation order, who faced an INS detainer.[55] The detainer required the prisoner's institution to deliver the prisoner to the INS upon completion of his sentence.[56] The district court concluded that the prisoner could seek habeas corpus relief from the deportation order after it concluded that the prisoner was in the "technical custody" of the INS.[57] Twelve years later, on similar facts, the U.S. Court of Appeals for the Ninth Circuit granted a prisoner habeas corpus relief after finding that the INS had "technical custody" over him.[58]

The following year, in *Jones v. Cunningham*,[59] the Supreme Court began its break from the traditional "physical restraint" requirement for custody.[60] Mr. Jones brought a habeas corpus petition to challenge his ten-year prison sentence.[61] The U.S. District Court for the Eastern District of Virginia dismissed Mr. Jones's petition, but the Virginia Parole Board paroled Mr. Jones pending his appeal.[62] The parole order placed Mr.

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54. Slavik v. Miller, 89 F. Supp. 575 (W.D. Pa.), *aff'd*, 184 F.2d 575 (3d Cir. 1950) (per curiam), *cert. denied*, 340 U.S. 955 (1951).

55. *Id.*; *see infra* notes 88-103 and accompanying text (discussing definitions of and components of INS detainers).

56. *Slavik*, 89 F. Supp. at 576.

57. *Id.* The court concluded that the INS did not have "actual custody" over the petitioner. *Id.* The court decided, however, that actual custody was not required for habeas corpus purposes. *Id.* The court, nevertheless, dismissed Slavik's petition on procedural grounds. *Id.* Mr. Slavik did not seek relief under a habeas corpus statute, but under the Administrative Procedure Act, which enlarged the rights to judicial review of aliens under deportation orders. *Slavik*, 89 F. Supp. at 576-77; *see* 5 U.S.C. §§ 1001-1011 (1946) (current version at scattered sections of 5 U.S.C. (1988)). The petitioner named only the Commissioner of Immigration and Naturalization as a defendant. *Slavik*, 89 F. Supp. at 576. The petitioner could not make personal service on the Commissioner in the Western District of Pennsylvania. *Id.* at 576-77. As a result, the district court found that it lacked jurisdiction, and dismissed the claim without prejudice. *Id.* at 577.

58. Chung Young Chew v. Boyd, 309 F.2d 857, 865 (9th Cir. 1962). The Ninth Circuit held that when "a warrant [for a prisoner's deportation] is obtained by the [INS] while the person named is in a penal institution, and on the basis thereof a detainer is lodged with that institution, the Service gains immediate technical custody." *Id.* Although the INS moved to reopen Chew's deportation hearings eleven days prior to Chew's release from prison, this motion did not affect the prisoner's status under the warrant. *Id.* at 860, 865.

59. 371 U.S. 236 (1963).

60. *See id.*; *see also Developments*, *supra* note 2, at 1074.

61. *Jones*, 371 U.S. at 237.

62. *Id.*

Jones in the parole board's "custody and control."[63] The U.S. Court of Appeals for the Fourth Circuit dismissed Mr. Jones's appeal as moot.[64] The Supreme Court reversed, concluding that although Mr. Jones no longer faced "immediate physical confinement," the parole conditions significantly restricted his freedom.[65] Furthermore, the Court suggested that the existence of restraints that the public does not generally share might constitute custody.[66]

Five years later, in 1968, the Supreme Court extended the meaning of custody in *Peyton v. Rowe*.[67] Mr. Rowe, serving a thirty-year sentence in a Virginia state prison, sought to attack via federal habeas corpus a twenty-year sentence to run consecutively to the thirty-year sentence.[68] The Supreme Court concluded that a prisoner serving a sentence could attack, in habeas corpus, a future consecutive sentence at the same insti-

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63. *Id.*

64. *Id.*

65. *Id.* at 237-38, 243 & 244. Justice Black explained some of these conditions:

> Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. . . . It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do.

*Id.* at 242-43.

66. *Id.* at 240. The Court concluded that "there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Id.* This language could potentially cover such restraints as are imposed by contracts, denials of licenses, and injunctions, but such a wide application "would be at odds with any reasonable purpose of the terms 'custody' and 'prisoner' repeatedly used in [28 U.S.C. § 2241]." *Developments*, *supra* note 2, at 1076-77; *see* 28 U.S.C. § 2241 (1988); *supra* note 4 (quoting section 2241).

67. 391 U.S. 54 (1968).

68. *Id.* at 55-56. The U.S. District Court for the Western District of Virginia denied the petitioner relief. *Id.* at 56. In rejecting Mr. Rowe's claim, the Court relied on *McNally v. Hill*, a Supreme Court decision that held that a prisoner may not attack a future consecutive sentence in habeas corpus because such an attack was premature. *Id.*; *see* McNally v. Hill, 293 U.S. 131, 138 (1934). Courts and commentators refer to *McNally*'s conclusions as the "prematurity doctrine." *See, e.g.*, *Peyton*, 391 U.S. at 65; *Developments*, *supra* note 2, at 1087.

On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed the district court decision, and announced that it would not follow *McNally*. Rowe v. Peyton, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968).

tution.[69] The Court found that the prisoner was in custody pursuant to a sentence that he had not yet begun to serve.[70]

In 1973, a trio of Supreme Court decisions further expanded the scope of custody.[71] The first, *Braden v. 30th Judicial Circuit Court of Kentucky*,[72] concerned a prisoner jailed in Alabama who raised a habeas corpus challenge in a Kentucky court to an indictment that Kentucky lodged against him.[73] Concluding that the petitioner was "in custody" for the purposes of the habeas corpus statute,[74] the Court held that a prisoner in one state could attack in habeas corpus an out-of-state

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69. *Peyton*, 391 U.S. at 67. The *Peyton* Court overruled *McNally v. Hill*. *Peyton*, 391 U.S. at 67; *see supra* note 68 (discussing *McNally*). The Court concluded that "in common understanding," the Virginia State Penitentiary had custody over Mr. Rowe for Mr. Rowe's entire imprisonment. *Id.* at 64. *Peyton* discarded *McNally*'s notion that a prisoner could not attack a confinement which, even if resolved in the prisoner's favor, could not have resulted in the prisoner's immediate release. *Id.* at 67; *see McNally*, 293 U.S. at 137-38.

70. *Peyton*, 391 U.S. at 67.

71. *See infra* notes 72-84 and accompanying text (discussing three Supreme Court decisions).

On the day it decided *Peyton*, the Supreme Court decided another notable case concerning habeas corpus. *See* Carafas v. LaVallee, 391 U.S. 234 (1968). *Carafas* held that a state prisoner could challenge a conviction in habeas corpus even if the prisoner's sentence for the conviction had expired while the petition was pending. *Id.* at 239. This decision overruled Parker v. Ellis, 362 U.S. 574 (1960) (per curiam). *Carafas*, 391 U.S. at 240. The *Carafas* Court concluded that

> [i]n consequence of his conviction, [Mr. Carafas] cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."

*Id.* at 237 (footnotes omitted).

A year later, the U.S. Court of Appeals for the Fourth Circuit decided *Word v. North Carolina*, the first post-*Peyton* case to decide the custodial effect of consecutive sentences in different jurisdictions. *See* Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969). Virginia and North Carolina courts had convicted and sentenced Mr. Word separately. *Id.* at 353. While Mr. Word was serving the Virginia sentence, North Carolina filed a detainer with Virginia authorities. *Id.* Mr. Word challenged the detainer in habeas corpus. *Id.* The court ruled in Mr. Word's favor, finding that Virginia's authority to detain Mr. Word was "dual." *Id.* at 355. Further, the court said that unlike the consecutive sentences in *Peyton*, "the successive sentences sought to be attacked were imposed by another sovereign, but the difference is not one of legal or practical significance." *Id.*

72. 410 U.S. 484 (1973).

73. *Id.* at 485.

74. *Id.* at 489 n.4; *see* 28 U.S.C. § 2241 (1988); *supra* note 4 (quoting section 2241).

indictment, and could demand an immediate trial or dismissal of the indictment.[75] The Court found that the demanding state, Kentucky, had custody over Braden, and that Alabama acted as Kentucky's "agent" in holding Braden.[76]

In the second case, *Hensley v. Municipal Court, San Jose-Milpitas Judicial District*,[77] the Supreme Court upheld the right of a petitioner to challenge his conviction in habeas corpus even after he won release on his own recognizance.[78] The Court relied on many lower federal court opinions that found petitioners released on their own recognizance to be "in cus-

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75. *Braden*, 410 U.S. at 500-01. The issue in *Braden* was whether the provision of the habeas corpus statute that "[w]rits of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions" prevented a Kentucky court from hearing the petitioner's application on the Kentucky indictment. *Id.* at 485-86; *see* 28 U.S.C. § 2241 (1988); *supra* note 4 (quoting section 2241). In sustaining the Alabama court's jurisdiction, the Supreme Court reviewed *Ahrens v. Clark*, which limited a district court's habeas corpus jurisdiction to cases in which the prisoner is confined within the court's territorial jurisdiction. *Braden*, 410 U.S. at 494-500; *see* Ahrens v. Clark, 335 U.S. 188 (1948). *Ahrens* relied primarily on what it saw as congressional intent in framing habeas corpus statutes. *Id.* at 191-92. The debate preceding passage of the 1867 Act does not clearly indicate that Congress wanted the phrase "within their respective jurisdictions" to apply to the location of the prisoner. *See* CONG. GLOBE, 39th Cong., 1st Sess. 4150-51; 1867 Act, ch. 28, § 1, 14 Stat. 385; *supra* note 44 (quoting 1867 Act); *see also* Brief for Petitioner at 11, Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973) (No. 71-6516) [hereinafter *Braden* Brief]. Instead, Congress may have intended the phrase to apply to "the location of the custodian and the reach of the court's process to the respondent." *See id.* at 12.

The Senator who had offered to insert "within their respective jurisdictions" in the 1867 Act thought the language redundant. *See* Cong. Globe, 39th Cong., 2d Sess. 790 (statement of Sen. Trumbull). Before the amended bill passed, one senator who favored the amendment worried aloud over judges who, otherwise, would "have a right to issue process . . . all over the Union." CONG. GLOBE, 39th Cong., 2d Sess. 790 (1867) (statement of Sen. Johnson). The Senate sent the amended bill to the House of Representatives. *See* CONG. GLOBE, 39th Cong., 2d Sess. 899; *Braden* Brief, *supra*, at 14. The bill passed with one comment: "I would ask whether anybody in this House, when he gives his vote on these amendments, knows what he is voting upon? [Laughter.]" CONG. GLOBE, 39th Cong., 2d Sess. 899 (1867) (statement of Rep. Wright).

Prior to *Braden*, congressional action and court decisions had challenged *Ahrens*'s vitality. *See Braden*, 410 U.S. at 497-99. The *Braden* Court professed only to limit sharply the *Ahrens* rule. *Id.* at 500. The decision, however, effectively overruled *Ahrens*. *See id.* at 502 (Rehnquist, J., dissenting).

76. *Braden*, 410 U.S. at 498-99 (holding that "[s]tate holding the prisoner in immediate confinement acts as agent for the demanding State"); *see infra* note 156 (discussing syllogistic nature of *Braden*'s agency test).

77. 411 U.S. 345 (1973).

78. *Id.* at 345-47.

tody" pursuant to their convictions.[79] Although the restraints on Hensley were less restrictive than those imposed on the petitioner in *Jones*, they still sufficed to create custody.[80]

Finally, in *Preiser v. Rodriguez*,[81] the Supreme Court concluded that a prisoner could challenge in habeas corpus the deprivation of good-behavior time credit toward reduction of the prisoner's maximum sentence.[82] The Court found that a writ of habeas corpus served as a prisoner's sole federal remedy in a challenge to the fact or duration of a physical imprisonment.[83] Furthermore, the Court recognized the availability of habeas corpus to attack future confinement.[84]

The expansion of the scope of custody has made the remedy of federal habeas corpus available to many classes of peti-

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79. *Id.* at 349 n.6; *see* Capler v. City of Greenville, 422 F.2d 299, 301 (5th Cir. 1970); Marden v. Purdy, 409 F.2d 784, 785 (5th Cir. 1969); Beck v. Winters, 407 F.2d 125, 126-27 (8th Cir.), *cert. denied*, 395 U.S. 963 (1969); Burris v. Ryan, 397 F.2d 553, 555 (7th Cir. 1968); United States ex rel. Smith v. DiBella, 314 F. Supp. 446 (D. Conn. 1970); Ouletta v. Sarver, 307 F. Supp. 1099, 1101 n.1 (E.D. Ark.), *aff'd*, 428 F.2d 804 (8th Cir. 1970); Cantillon v. Superior Court, 305 F. Supp. 304, 306-07 (C.D. Cal. 1969); Matzner v. Davenport, 288 F. Supp. 636, 638 n.1 (D.N.J. 1968), *aff'd sub nom.* Matzner v. Brown, 410 F.2d 1376 (3d Cir. 1969), *cert. denied*, 396 U.S. 1015 (1970); Nash v. Purdy, 283 F. Supp. 837, 838-39 (S.D. Fla. 1968); Duncombe v. New York, 267 F. Supp. 103, 109 n.9 (S.D.N.Y. 1967); Foster v. Gilbert, 264 F. Supp. 209, 211-12 (S.D. Fla. 1967).

80. *Hensley*, 411 U.S. at 348-49. Pursuant to the California Penal Code, the petitioner in *Hensley* was subject to restraints "not shared by the public generally." *Id.* at 351. The *Hensley* Court stated that the petitioner could not "come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense." *Hensley*, 411 U.S. at 351. Furthermore, as in *Peyton*, the petitioner's incarceration was not "a speculative possibility that depends on a number of contingencies over which he has no control." *Id.* at 351-52; *see* Peyton v. Rowe, 391 U.S. 54, 64 (1968).

81. 411 U.S. 475 (1973).

82. *Id.* at 487-88.

83. *Id.* at 489. In *Preiser*, the Court denied the prisoner relief. *Id.* at 500. The prisoner had challenged the deprivation of his credits under the Civil Rights Act of 1871 and petitioned for a writ of habeas corpus. *Id.* at 476 & 478; *see* 42 U.S.C. § 1983 (1988). The Court concluded that a writ of habeas corpus was the prisoner's only possible federal remedy. *Preiser*, 411 U.S. at 500. The prisoner in *Preiser*, however, could not seek a writ of habeas corpus because he had not exhausted state judicial remedies before proceeding in federal court. *Id.* at 489-97 & 500 (discussing importance of exhausting state judicial remedies and prisoner's failure to do so); *see* 28 U.S.C. § 2254(b) (1988) (requiring that person in state custody exhaust state remedies before seeking federal habeas corpus relief).

84. *Preiser*, 411 U.S. at 487 (noting that "recent cases have established that habeas corpus relief is not limited to immediate release from illegal custody, but that the writ is available to attack future confinement and obtain future releases").

tioners,[85] including prisoners who face detainers.[86] This development, however, has not resolved the question of whether a detainer necessarily effects custody.[87]

### C. *Detainers*

The absence of a statutory definition, and scant case law, make defining an INS detainer and its custodial effect difficult.[88] Moreover, attempts to define detainers in other contexts invite confusion.[89] A few courts have found that the filing of a detainer, without a warrant, gives the filing authority custody over a prisoner if the detainer contains an implied "hold order."[90] Some commentators, however, suggest that a detainer constitutes a "hold order" and a "warrant," but grants no legal authority to detain.[91] In contrast, the House and Senate Reports for the Interstate Agreement on Detainers Act explain that a criminal detainer serves only as a "notification" to

85. *See supra* notes 54-84 and accompanying text (discussing expansion of scope of custody).

86. *See* Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Chung Young Chew v. Boyd. 309 F.2d 857 (9th Cir. 1962); Slavik v. Miller, 89 F. Supp. 575 (W.D. Pa.), *aff'd*, 184 F. 2d 575 (3d. Cir. 1950) (per curiam), *cert. denied*, 340 U.S. 955 (1951).

87. *Compare* Vargas v. Swan, 854 F.2d 1028 (7th Cir. 1988) *with* Campillo v. Sullivan, 853 F.2d 593 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989).

88. *See Vargas*, 854 F.2d at 1031 (discussing difficulty of defining detainer in immigration context).

89. *See infra* notes 90-93 and accompanying text (discussing conflicting definitions of detainers).

90. *See, e.g.*, Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 498-99 (1973) (holding that Alabama warden acted as "agent" of Kentucky in holding petitioner and thus had custody over petitioner). In *Rose v. Morris*, the U.S. Court of Appeals for the Ninth Circuit found that "a detainer in the form of a communication from the Washington State Board of Prison Terms and Paroles requesting that it be notified before Rose was to be released from federal custody so that it could *retake* Rose and require him to begin serving the balance of his sentences . . . is sufficient 'custody' " for habeas purposes. Rose v. Morris, 619 F.2d 42, 44 (9th Cir. 1980) (emphasis added). Furthermore, in *Orito v. Powers*, the U.S. Court of Appeals for the Seventh Circuit found that a state request for notification of a prisoner's pending release from federal prison, so that the state could determine the prisoner's future status, constituted a "hold" because federal authorities interpreted the request as a hold. Orito v. Powers, 479 F.2d 435, 437 (7th Cir. 1973).

91. *See* Note, *Unconstitutional Uncertainty: A Study of the Use of Detainers*, 1 U. MICH. J.L. REF. 119 (1968); Note, *Interstate Detainers and Federal Habeas Corpus: Long-Arm Shortcut to Solving the Catch 22*41, 1982 WIS. L. REV. 863, 865. One student commentator has concluded that "[a] detainer, or 'hold order,' is a warrant filed against a person already in custody to ensure that he will be available to the demanding authority upon completion of the present term of confinement." *See id.*

a prisoner's institution that the prisoner faces criminal charges in another jurisdiction.[92] A fourth definition, from the Supreme Court, suggests that a detainer may constitute either a hold or a notification.[93] The definition of a detainer thus remains unclear.

The standard INS detainer has four major components.[94]

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92. H.R. REP. No. 1018, 91st Cong., 2d Sess. 2 (1970); S. REP. No. 1356, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4864, 4865. The House and Senate Reports define a detainer as "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." H.R. REP. No. 1018, 91st Cong., 2d Sess. 2 (1970); S. REP. No. 1356, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4864, 4865. The Interstate Agreement on Detainers Act does not define "detainer." *See* United States v. Mauro, 436 U.S. 340, 359 (1978).

93. *See* Carchman v. Nash, 473 U.S. 716, 719 (1985). The Supreme Court defined a detainer as "a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." *Id.* The utility of this definition in the immigration context is unclear because a deportation proceeding is a "purely civil action" and does not concern "criminal justice." *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984). The Supreme Court did not decide whether an exclusion proceeding was also a civil action. *See id.* at 1038-39.

The Supreme Court announced another definition of a detainer in Moody v. Daggett, 429 U.S. 78 (1976). The Court stated that

> [a] detainer in this context is an internal administrative mechanism to assure that an inmate subject to an unexpired term of confinement will not be released from custody until the jurisdiction asserting a parole violation has had an opportunity to act—in this case by taking the inmate into custody or by making a parole revocation determination.

*Id.* at 80-81 n.2. The court defined a detainer in the context of a parole violator warrant. *Id.* This definition's effect in the immigration context is therefore unclear. *See id.* In *Campillo v. Sullivan*, the U.S. Court of Appeals for the Eighth Circuit relied on the *Moody* Court's definition in an immigration case. Campillo v. Sullivan, 853 F.2d 593, 595 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989).

94. *See* Standard INS Detainer, *supra* note 10. The detainer form requires the INS to check off blank boxes to indicate the nature of the action that the form represents. *Id.* The actual content of the standard INS detainer thus depends on which boxes the INS checks off. *See id.*; *see also* Payo v. Hayes, 754 F. Supp. 164, 166 (N.D. Cal. 1991). This Note assumes that the INS checks off the boxes that purportedly describe a detainer's content when it files a standard INS detainer with an alien's prison. *See infra* notes 95-98 and accompanying text (describing detainer's components). In contrast to the standard INS detainer, the order to show cause, also at issue in these cases, has no optional boxes for the INS to check off. *See* Order to Show Cause, *supra* note 11.

Some courts have described the contents of the detainers that they were considering. *See* Vargas v. Swan, 854 F.2d 1028, 1032 (7th Cir. 1988); Campillo v. Sullivan, 853 F.2d 593, 594 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989); Fernandez-Collado v. INS, 644 F. Supp. 741, 742 (D. Conn. 1986), *aff'd*, 857 F.2d 1461 (2d Cir. 1987). Other courts have failed to describe the contents of the detainers that they

First, the INS identifies the document as a detainer.[95] Second, the INS may request in the detainer that the recipient accept the detainer "for notification purposes only."[96] Third, the INS may request that the recipient notify the INS of the prisoner's scheduled release date at least thirty days prior to that date.[97] Finally, the INS may notify the recipient of actions that the INS has taken concerning the prisoner.[98] One of these actions, an order of deportation, may give the INS custody over the prisoner.[99] Courts have not decided whether another of these actions, issuance of a warrant of arrest in a deportation proceed-

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were considering, and ruled on the custodial effect of INS detainers generally. *See* Mohammed v. Sullivan, 866 F.2d 258, 260 (8th Cir. 1989); Roberts v. Matthews, No. 88-3014-O, 1990 U.S. Dist. LEXIS 16494, at 2 (D. Kan. Nov. 30, 1990); Garcia v. INS, 733 F. Supp. 1554, 1555 (M.D. Pa. 1990).

In exclusion cases, the form analogous to the order to show cause is the "Notice to Applicant for Admission Detained for Hearing before Immigration Judge." INS Form I-122 (Rev. 5-4-79) [hereinafter I-122 Form]; *see* 8 C.F.R. § 299.1 (1990) (listing immigration forms); Supplemental Brief for Appellee at 5 n.6, Vargas v. Swan, 854 F.2d 1028 (7th Cir. 1988) (No 87-1769) [hereinafter *Vargas* Brief for Appellee]. The I-122 Form notifies an alien that an immigration judge has scheduled or will schedule a hearing to determine the alien's excludability. *See* Hernandez v. Cremer, 913 F.2d 230, 232 (5th Cir. 1990). The INS may "detain" certain potentially excludable aliens pursuant to the filing of an I-122 form. *See* Gallego v. INS, 663 F. Supp. 517, 519 & 524 (W.D. Wis. 1987). According to federal statute, an alien "who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry." 8 U.S.C. § 1225(b) (1988). Discussion of the issues arising in connection with the I-122 form is beyond the scope of this Note. For a discussion of a potentially excludable alien's ability to challenge in habeas corpus an order to show cause, see *infra* note 172.

95. *See* Standard INS Detainer, *supra* note 10.

96. *See id.* The INS may advise in the detainer, "It is requested that you accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and quarters assignments or other treatment which he would otherwise receive." *Id.*; *see infra* notes 177-79 and accompanying text (discussing how some institutions receiving detainers interpreted this advisory).

The order to show cause also is defined as a "notice." Order to Show Cause, *supra* note 11.

97. *See* Standard INS Detainer, *supra* note 10.

98. *See id.* The INS does not explicitly identify either the standard INS detainer or the order to show cause as a "hold." *See id.*; Order to Show Cause, *supra* note 11.

99. *See* Flores v. INS, 524 F.2d 627, 629 (9th Cir. 1975) (per curiam). The deportation order in *Flores* would have gone into force automatically after expiration of a period when the petitioners could have voluntarily departed the United States. *Id.* The court concluded that this circumstance created "sufficient immediacy of action and interference with freedom to support habeas corpus jurisdiction." *Id.*; *see* 8 U.S.C. § 1105a(a)(9) (1988) (stating that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings").

ing, creates INS custody over an imprisoned alien.[100] The custodial effects of other actions, including the commencement of an investigation into whether a prisoner is subject to deportation and the issuance of an order to show cause at a deportation hearing, remain at issue.[101]

The conflicting definitions of detainers thus provide little guidance for an analysis of the custodial effect of INS detainers.[102] Other cases, however, suggest that a detainer that contains or accompanies a "hold order" effects custody for habeas corpus purposes.[103]

## II. *THE DISPUTE AMONG U.S. COURTS OVER THE CUSTODIAL EFFECT OF INS DETAINERS*

Most aliens who have sought writs of habeas corpus to challenge INS detainers refer to the general habeas corpus statute.[104] In addition, many of the aliens seeking relief refer to statutes that require the U.S. Attorney General to determine

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100. *See* Arias v. Rogers, 676 F.2d 1139 (7th Cir. 1982). In *Arias*, the Seventh Circuit considered whether a prisoner could use habeas corpus to test the legality of his post-arrest detention *after* formal deportation proceedings had begun. *Id.* at 1141. The *Arias* court denied the petition. *Id.* at 1144. In *Arias*, an INS officer arrested the petitioner pursuant to a statute that empowers INS officers to arrest aliens whom they believe are illegally in the United States and are likely to abscond before the INS can obtain arrest warrants. *Id.* at 1141; *see* 8 U.S.C. § 1357 (1988) (describing powers of immigration officers and immigration employees to act without warrant). The *Arias* court held that even if the prisoner's arrest and subsequent imprisonment in a local jail were illegal, the immediate scheduling of deportation proceedings rendered his detention "no longer so lawless as to allow a judge to free [the prisoner] under the habeas corpus statute." *Arias*, 676 F.2d at 1143. The Seventh Circuit had no occasion to decide whether the deportation proceedings gave the INS custody over the prisoner, and the prisoner did not contest the issue in habeas corpus. *See id.* at 1141-44.

101. *See infra* notes 111-56 and accompanying text (discussing conflicting court decisions on custodial effect of INS detainers).

102. *See supra* notes 90-93 and accompanying text (discussing conflicting definitions of detainers).

103. *See, e.g.*, Vargas v. Swan, 854 F.2d 1028 (7th Cir. 1988). In *Vargas*, the Seventh Circuit relied on several cases that suggested that if a prisoner's custodial institution understood a detainer to require the hold of a prisoner, the institution filing the detainer would have custody over the prisoner. *Id.* at 1031; *see* Rose v. Morris, 619 F.2d 42 (9th Cir. 1980); Orito v. Powers, 479 F.2d 435 (7th Cir. 1973).

104. *See Vargas*, 854 F.2d at 1030; Campillo v. Sullivan, 853 F.2d 593, 595 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989); Fernandez-Collado v. INS, 644 F. Supp. 741, 742 (D. Conn. 1986), *aff'd*, 857 F.2d 1461 (2d Cir. 1987); Orozco v. INS, 911 F.2d 539, 539 (11th Cir. 1990) (per curiam); *see also* 28 U.S.C. § 2241 (1988); *supra* note 4 (quoting section 2241).

an alien's status with "reasonable dispatch" and to begin deportation hearings "as expeditiously as possible."[105] Courts have held uniformly that aliens may not seek habeas corpus relief under the statute that requires the INS to begin deportation hearings expeditiously because Congress, in passing the statute, did not intend to afford the availability of such relief.[106]

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105. *See* Prieto v. Gluch, 913 F.2d 1159, 1160-66 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 976 (1991); *Orozco*, 911 F.2d at 540; Guti v. INS, 908 F.2d 495, 496 (9th Cir. 1990); *Campillo*, 853 F.2d at 596.

The INS is a branch of the Department of Justice, whose highest official is the Attorney General. Under section 1252 of title 8 of the U.S. Code, the INS must schedule deportation hearings with reasonable dispatch. 8 U.S.C. § 1252 (1988). Clause (a)(1) of section 1252 states that

> [a]ny court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

*Id.* § 1252(a)(1). Clause (i) of the same statute states that "[i]n the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation hearing as expeditiously as possible after the date of conviction." *Id.* § 1252(i). Congress intended the Immigration Reform and Control Act of 1986 ("IRCA"), of which this section was a part, to "control illegal immigration to the [United States], make limited changes in the system for legal immigration, and provide a controlled legalization program for certain undocumented aliens." H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 45 (1986), *reprinted in* 1986 U.S. CODE. CONG. & ADMIN. NEWS 5649; *see* 8 U.S.C. § 1252(i) (1988).

106. *See Prieto*, 913 F.2d at 1164-66; *Orozco*, 911 F.2d at 541; Gonzalez v. INS, 867 F.2d 1108, 1109-10 (8th Cir. 1989); *see also* 8 U.S.C. § 1252(i) (1988); *supra* note 105 (quoting section 1252(i)).

The Supreme Court has developed a four-part test for determining whether a private remedy is implicit in a federal statute. Cort v. Ash, 422 U.S. 66, 78 (1975). The Court said:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

*Id.* (citations omitted) (emphasis in original).

Courts have found that the text and legislative history of section 1252(i) suggest that Congress did not intend to activate a private right of action in passing the statute, which requires the INS to begin deportation hearings expeditiously. *See Prieto*, 913 F.2d at 1165-66; *Gonzalez*, 867 F.2d at 1109-10; *see also* 8 U.S.C. § 1252(i) (1988). Courts have determined that Congress designed the statute primarily to expedite the

Instead, courts seem to have concluded that potentially deportable imprisoned aliens should bring suit under the "reasonable dispatch" test, in conjunction with the habeas corpus statute, when custody in fact exists.[107] Although the standard INS detainer form refers to deportation and not exclusion,[108]

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processing of aliens, not to give criminal aliens a procedural or substantive right. *See, e.g., Prieto*, 913 F.2d at 1165; *see* 132 CONG. REC. H9794 (daily ed. Oct. 9, 1986) (statement of Rep. MacKay). "The language of the section imposed a duty on the Attorney General rather than vesting a right in criminal aliens." *Prieto*, 913 F.2d at 1165. According to the Supreme Court, "there 'would be far less reason to infer a private remedy in favor of individual persons' where Congress, rather than drafting the legislation 'with an unmistakable focus on the benefited class,' instead has framed the statute simply as a general prohibition or a command to a federal agency." Universities Research Ass'n v. Coutu, 450 U.S. 754, 771-72 (1981). Congressman MacKay, who proposed section 1252(i), argued that

> [t]he policies require that deportation proceedings begin when a conviction takes place, the idea being that when the sentence is over, the person would be deported.
>
> Now, unfortunately, the very opposite is happening. These people are not being deported; the expedited procedure is not working; [and] the local and State jails are jammed up.

132 CONG. REC. H9794 (daily ed. Oct. 9, 1986) (statement of Rep. MacKay). Another congressman added, "We have had all kinds of excuses from the Immigration Service for not deporting folks. This is the time for the excuses to stop." *Id.* at H9795 (statement of Rep. McCollum). The Senate also indicated an interest in slowing the inflow of drugs, as well as relieving overcrowded prisons. 132 CONG. REC. S16,908 (daily ed. Oct. 17, 1986) (statement of Sen. Simpson).

Moreover, courts have determined that Congress, in passing section 1252(i), demonstrated no intent to create a private remedy for criminal aliens. *E.g. Prieto*, 913 F.2d at 1166. *See generally* 132 CONG. REC. at H9794-95 (daily ed. Oct. 9, 1986). The Supreme Court has said that "implying a private right of action on the basis of congressional silence is a hazardous enterprise at best." Touche Ross & Co. v. Redington, 442 U.S. 560, 571 (1979). Courts should avoid doing so when Congress's intent to create such a right is "dubious" at best. *See Cort*, 422 U.S. at 82-84.

Furthermore, courts have determined that implying a private cause of action for criminal aliens is inconsistent with the statute's legislative scheme. *See, e.g., Prieto*, 913 F.2d at 1166. The *Prieto* court found that although allowing criminal aliens to bring suit could help reduce the drug influx into the United States and relieve overcrowded U.S. prisons, "it would seem anomalous" to grant such a right when Congress designs a statute not to benefit, but to remove aliens. *Id.* Finally, though the deportation of aliens is a matter of federal law, courts have not found this factor alone sufficient to suggest that Congress intended to afford aliens a private right of action in section 1252(i). *See id.*; *Gonzalez*, 867 F.2d at 1109-10.

107. *See, e.g.*, Orozco v. INS, 911 F.2d 539, 541 (11th Cir. 1990) (per curiam); *Gonzalez*, 867 F.2d at 1110 (noting that petitioner's request could not be habeas corpus request because it was not based on any habeas corpus statute); *see also* 8 U.S.C. § 1252(a)(1) (1988) (requiring INS to begin deportation hearings "with reasonable dispatch"); *supra* note 105 (quoting section 1252(a)(1)); 28 U.S.C. § 2241 (1988); *supra* note 4 (quoting section 2241).

108. Standard INS Detainer, *supra* note 10.

an alien facing possible exclusion may challenge a standard INS detainer in habeas corpus.[109] Regardless of which context is at issue, courts have developed two lines of thought on the custodial effect of an INS detainer.[110]

### A. *The* Vargas *Approach: Custody May Be Present*

The U.S. Court of Appeals for the Seventh Circuit, in *Vargas v. Swan*,[111] considered the potentially broad custodial effect of INS detainers.[112] Mr. Vargas was serving a sentence for attempted first degree murder at the Waupun County Correctional Facility in Wisconsin.[113] The INS filed a detainer over Mr. Vargas with the Waupun facility.[114] This detainer indicated that the INS had begun an investigation to determine whether Mr. Vargas was subject to exclusion from the United States.[115] Mr. Vargas argued that the detainer placed him in

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109. *See* Vargas v. Swan, 854 F.2d 1028, 1029-30 (7th Cir. 1988); *see infra* notes 111-21 (discussing *Vargas*).

Among the cases in conflict, only *Vargas* and *Pita v. INS* considered the habeas corpus rights of potentially excludable aliens. *See Vargas*, 854 F.2d 1028; Pita v. INS, No. 88-2267, 1988 U.S. Dist. LEXIS 10667 (E.D. La. Sept. 14, 1988); *cf. Gonzalez*, 867 F.2d at 1108-09 (involving situation in which INS was investigating whether petitioner was potentially deportable or excludable, but petitioner sought only expeditious deportation proceeding). The courts in each case failed to reach the question of whether section 1252(a)(1), which requires the INS to begin deportation hearings with reasonable dispatch, mandates similarly timely commencement of exclusion hearing. *See Vargas*, 854 F.2d 1028; *Pita*, No. 88-2267, 1988 U.S. Dist. LEXIS 10667; *see also* 8 U.S.C. § 1252(a)(1) (1988); *supra* note 105 (quoting section 1252(a)(1)). In the *Vargas* case, the INS contended that section 1252 concerned the treatment only of deportable aliens. *See Vargas* Brief for Appellee, *supra* note 94, at 7. While the INS argued initially that section 1252 did not apply to excludable aliens, it also analyzed the section as though the section could apply to excludable aliens by analogy. *Id.* at 12 (recognizing possible applicability of section 1252(a) to excludable aliens) & 29-34 (discussing applicability of section 1252(a) to potentially deportable aliens and potentially excludable aliens in general as an alternative argument).

110. *Compare infra* notes 111-21 and accompanying text (discussing case suggesting that INS may obtain custody over alien by filing detainer with alien's prison) *with infra* notes 122-56 and accompanying text (discussing cases holding that INS detainer has no custodial effect).

111. 854 F.2d 1028 (7th Cir. 1988).

112. *Id.* at 1032-34.

113. *Id.* at 1029.

114. *Id.*

115. *Id.* at 1032. The INS officer who filled out Mr. Vargas's detainer form crossed out the word "deportation" and substituted "excludable." *Id.* at 1035; *see* Supplemental Brief and Appendix of Appellant at app. 11, Vargas v. Swan, 854 F.2d 1028 (7th Cir. 1988) (No. 87-1769) (reprinting detainer) [hereinafter *Vargas* Brief for Appellant]. The detainer read: "Investigation has been initiated to determine

INS custody, thus entitling him to an immediate exclusion hearing or dismissal of the detainer.[116] The U.S. District Court for the Eastern District of Wisconsin denied Mr. Vargas's application for a writ of habeas corpus.[117]

On appeal, the U.S. Court of Appeals for the Seventh Circuit remanded the case for a determination of the detainer's effect.[118] The Seventh Circuit noted that because a petitioner can challenge future confinement in habeas corpus, the district court should have inquired into whether the detainer placed a "hold" on Vargas.[119] The court suggested that a failure to "mark" the detainer form or to attach a warrant could make the detainer ineffectual as a hold.[120] Conversely, the court suggested that the institutions filing and receiving the detainer may, in practice, treat the detainer as a hold request.[121]

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whether this person is subject to excludable [sic] from the U.S." *See Vargas*, 854 F.2d at 1035; *Vargas* Brief for Appellant, *supra*, at app. 11. The *Vargas* court recognized this detainer as modified. *Vargas*, 854 F.2d at 1028-34.

116. *Vargas* Brief for Appellant, *supra* note 115, at 10; *see Vargas*, 854 F.2d at 1029-30.

117. Vargas v. Swan, No. 86-C-1327 (E.D. Wis. Apr. 13, 1987).

118. Vargas v. Swan, 854 F.2d 1028, 1032-34 (7th Cir. 1988). The court could not determine the impact of the detainer's "[a]ccept this notice as a detainer" language. *Id.* at 1032-33.

119. *Id.* at 1031-34; *see* Preiser v. Rodriguez, 411 U.S. 475, 487 (1973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 488-89 & n.4 (1973); Peyton v. Rowe, 391 U.S. 54, 67 (1968). The *Vargas* court concluded that

> [h]owever labelled, an action that has as part of its effect the "holding" of a prisoner for a future custodian who has evidenced an intent to retake or to decide the prisoner's future status at the end of his or her current confinement serves to establish custody for habeas purposes. Thus for Vargas to be deemed in custody pursuant to the INS detainer, the effect of the detainer here must be that Wisconsin places a hold on Vargas.

*Vargas*, 854 F.2d at 1032.

120. *Vargas*, 854 F.2d at 1033.

121. *Id.* An unsigned Wisconsin corrections department form suggested that the department interpreted the detainer to be a hold order. *Id.* The unsigned form stated that it "is to acknowledge that . . . I [Mr. Vargas] was notified by [prison authorities] that HOLD ORDER (Detainer) HAS BEEN FILED AGAINST ME IN BEHALF OF IMMIGRATION AND NATURALIZATION SERVICE." *Id.* (emphasis in original). Though perhaps not "tailored" to Mr. Vargas's particular detainer, the form "suggests that Wisconsin may have understood that the detainer was a hold order." *Id.*

An additional factor led the *Vargas* court to its holding. Similar to the prisoner in *Campillo v. Sullivan*, Mr. Vargas had entered the United States with about 125,000 Cubans on the "Mariel Freedom Flotilla" in 1980. *Vargas*, 854 F.2d at 1029; *see* Campillo v. Sullivan, 853 F.2d 593, 594 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989). To assure that Mariel Cubans awaiting immigration determinations were still

### B. *The Majority Approach: Custody Is Absent*

In *Fernandez-Collado v. INS*,[122] the U.S. District Court for the District of Connecticut first considered directly the custodial effect of an INS detainer that notified an alien's custodian of either an investigation into the alien's deportability or the alien's pending deportation hearing.[123] Mr. Fernandez-Collado was serving a prison sentence for cocaine distribution.[124] The INS served an "Order to Show Cause and Notice of Hearing" upon Mr. Fernandez-Collado and prison officials.[125] This order compelled the prisoner to show why his conviction should not result in his deportation.[126] The order did not contain a definite date for a hearing.[127]

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subject to exclusion, the INS placed the Mariel Cubans on "parole." *Vargas*, 854 F.2d at 1029. This "parole . . . maintain[ed] a fiction" that Mr. Vargas and others never entered the country and were still excludable. *Id.* Uncertain as to the custodial effect of this "parole," the Seventh Circuit remanded Mr. Vargas's case on this issue as well. *Id.* at 1033-34. This issue, however, remains distinct from the issue surrounding the detainer. *See id.* at 1034 (discussing "jurisdictional issues").

In 1989, the INS issued a proposal to clarify the force and effect of its detainers. *See* 54 Fed. Reg. 29,050 (1989) (to be codified at 8 C.F.R. § 242.2(a)(1)) (proposed July 11, 1989). The proposed rule, if enacted, purports to "make clear" that an INS detainer has no effect upon an alien or correctional institution until the institution releases the alien from its custody. 54 Fed. Reg. 29,050 (1989). The proposal would add the following passage to section 242.2(a)(1):

> A Service detainer should not be construed by a correctional institution as a demand that the alien's security level of confinement[,] . . . work release and related matters be affected. Such matters are within the discretion of the correctional institution in accordance with its own individual policies and procedures and do not require the concurrence of the Service. A detainer merely serves to notify the correctional institution that the Service wishes to assume custody of the alien upon the alien's release from confinement. The detainer will serve to place a "hold" on the alien only upon the alien's actual release from confinement.

*Id.* The INS has not yet adopted the proposal. For a further discussion of this proposed rule, see *infra* note 170.

122. 644 F. Supp. 741 (D. Conn. 1986), *aff'd*, 857 F.2d 1461 (2d Cir. 1987).

123. *Id.* at 742-44. Prior cases evaluated the custodial effect of a detainer over an alien that the INS filed after first issuing a deportation order against the alien. *See* Chung Young Chew v. Boyd, 309 F.2d 857 (9th Cir. 1962); Slavik v. Miller, 89 F. Supp. 575 (W.D. Pa.), *aff'd*, 184 F.2d 575 (3d Cir. 1950) (per curiam), *cert. denied*, 340 U.S. 955 (1951). For a discussion of these cases, see *supra* notes 54-58 and accompanying text.

124. *Fernandez-Collado*, 644 F. Supp. at 742.

125. *Id.*; *see* Order to Show Cause, *supra* note 11. Though this form is not the standard INS detainer, the *Fernandez-Collado* court treated the form as a detainer. *Fernandez-Collado*, 644 F. Supp. at 743; *see* Standard INS Detainer, *supra* note 10.

126. Order to Show Cause, *supra* note 11.

127. *See* Fernandez-Collado v. INS, 644 F. Supp. 741, 742 (D. Conn. 1986),

In response, Mr. Fernandez-Collado alleged that the detainer placed him in INS custody.[128] He asked the district court to command the INS to schedule him for an immediate deportation hearing or to dissolve the detainer.[129] Relying on four unpublished orders within the same district, the court rejected Mr. Fernandez-Collado's claim, finding it premature.[130]

In *Campillo v. Sullivan*,[131] the U.S. Court of Appeals for the Eighth Circuit considered a similar habeas corpus claim.[132] The U.S. District Court for the Middle District of Florida convicted Mr. Campillo of narcotics violations, and sentenced him to fifteen years in prison.[133] The INS filed a standard INS detainer with Mr. Campillo's prison, notifying the prison of an INS investigation into Mr. Campillo's deportability.[134] The prison transferred Mr. Campillo to a Minnesota federal prison, and the detainer accompanied the transfer.[135] Mr. Campillo petitioned in habeas corpus for an immediate deportation hearing or, alternatively, for the INS to expunge the detainer.[136]

The U.S. District Court for the District of Minnesota

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*aff'd*, 857 F.2d 1461 (2d Cir. 1987). The order to show cause indicated that the hearing's "date, place and time [were] to be set." *Id.* The form has a provision allowing an alien to request an immediate deportation hearing. *See* Order to Show Cause, *supra* note 11.

128. *Fernandez-Collado*, 644 F. Supp. at 743.

129. *Id.* at 742-43.

130. *Id.* at 744 (citing Hechavarria-Castellano v. INS, Civ. H-84-498 (D. Conn. Jan. 9, 1985); Martinez v. INS, Civ. B-81-515 (D. Conn. Nov. 30, 1981); Yuksel v. INS, Civ. B-81-470 (D. Conn. Nov. 19, 1981); Lehder v. Smith, Civ. B-75-8 (D. Conn. Feb. 10, 1975)).

131. 853 F.2d 593 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989).

132. *Id.* at 594. The *Campillo* opinion antedated the opinion in *Vargas* by eight days. *See* Vargas v. Swan, 854 F.2d 1028, 1028 (7th Cir. 1988); *Campillo*, 853 F.2d at 593. Other circuit courts have found that the opinions in *Campillo* and *Vargas* are irreconcilable. Prieto v. Gluch, 913 F.2d 1159, 1163 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 976 (1991); Guti v. INS, 908 F.2d 495, 496 (9th Cir. 1990). The *Vargas* opinion makes no reference to the prior *Campillo* opinion. *See Vargas*, 854 F.2d at 1028-34.

133. *Campillo*, 853 F.2d at 594; *see* Brief for Appellant at 3, Campillo v. Sullivan, 853 F.2d 593 (8th Cir. 1988) (No. 87-5335-MN) [hereinafter *Campillo* Brief for Appellant].

134. *Campillo*, 853 F.2d at 594.

135. *Id.* Neither party in *Campillo v. Sullivan* suggested that the transfer of Mr. Campillo to a new prison invalidated the detainer. *See Campillo* Brief for Appellant, *supra* note 133, at 4; Brief for Appellee, Campillo v. Sullivan, 853 F.2d 593 (8th Cir. 1988) (No. 87-5335-MN) [hereinafter *Campillo* Brief for Appellee].

136. Campillo v. Sullivan, 853 F.2d 593, 594 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989).

granted Mr. Campillo's request.[137] The Eighth Circuit, however, reversed, finding that the district court lacked jurisdiction.[138] Using *Fernandez-Collado* as the primary authority for its holding, the court found that the INS could not possibly obtain custody over Mr. Campillo until the Minnesota prison released Mr. Campillo.[139] The Eighth Circuit distinguished the prior "technical custody" cases, noting that aliens in those cases faced pre-existing deportation orders.[140]

Furthermore, the *Campillo* court found a strong analogy between the facts of *Campillo* and the facts of *Moody v. Daggett*.[141] The *Moody* Court held that a federal parolee imprisoned for a crime committed while on parole does not deserve an immediate parole revocation hearing when the U.S. government files a parole violator warrant with the parolee's prison.[142] *Moody* concluded that because the inmate's present confinement derived from the asserted parole violation, issuance of the warrant could not deprive him of any additional liberty interest unless the issuing authority executed the warrant and took custody of the inmate under the warrant.[143]

Two years after *Campillo*, the U.S. Court of Appeals for the Sixth Circuit, in *Prieto v. Gluch*,[144] also concluded that the filing of a detainer does not give the INS custody over an alien.[145] In so finding, the *Prieto* court attempted to dismantle the *Vargas* alternative by distinguishing three Supreme Court cases on

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137. *Id.* at 594-95. The district court found that the INS failed to schedule a deportation hearing as "expeditiously as possible" and to conduct such a proceeding with "reasonable dispatch." *Id.*; *see supra* note 105 and accompanying text (discussing Attorney General's statutory duty to schedule and conduct deportation hearings).

138. *Campillo*, 853 F.2d at 594-95.

139. *Id.* at 595.

140. *See id.* at 596; *see also* Chung Young Chew v. Boyd, 309 F.2d 857, 865 (9th Cir. 1962); Slavik v. Miller, 89 F. Supp. 575 (W.D. Pa.), *aff'd*, 184 F.2d 575 (3d Cir. 1950) (per curiam), *cert. denied*, 340 U.S. 955 (1951). For a discussion of the "technical custody" cases, see *supra* notes 54-58 and accompanying text.

141. 429 U.S. 78 (1976); *see* Campillo v. Sullivan, 853 F.2d 593, 595-96 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989). For *Moody*'s definition of a detainer in the context of a parole violator warrant, see *supra* note 93.

142. *Moody*, 429 U.S. at 86.

143. *Id.* at 86-87.

144. 913 F.2d 1159 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 976 (1991).

145. *Id.* at 1162. This opinion does not identify what kind of detainers the INS filed over the multiple prisoners, but the detainers informed the prisoners' prison of commencement of an investigation into the prisoners' deportability. *Id.* at 1163.

which *Vargas* relied.[146]

The *Prieto* court distinguished *Peyton v. Rowe*[147] and *Preiser v. Rodriguez*[148] by concluding that the *Prieto* prisoners, unlike the prisoners in *Peyton* and *Preiser*, were not subject to a "hold" while they served their current sentences.[149] *Peyton* permitted a prisoner's habeas corpus challenge to the second of two consecutive sentences,[150] while *Preiser* concluded that a prisoner could challenge in habeas corpus a prison's deprivation of the prisoner's good behavior credits.[151] The *Prieto* court noted that in each of those cases, unlike *Prieto*, a single institution controlled the petitioner's present and future confinement.[152]

The *Prieto* court also distinguished *Braden v. 30th Judicial Circuit Court of Kentucky*.[153] The *Prieto* court noted that *Braden* resembled *Prieto* because in each case, one institution had present custody and another had future custody over the respective prisoners.[154] Nevertheless, the *Prieto* court concluded that, unlike the Alabama prison warden in *Braden*, the prison warden in *Prieto* could not be an INS "agent" pursuant to the INS detainer.[155] The *Prieto* court reasoned that the detainer failed to claim a right of future custody and did not formally ask the warden to hold the prisoner.[156]

In summary, the split over the custodial effect of an INS

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146. *Id.*; *see* Vargas v. Swan, 854 F.2d 1028, 1031 (7th Cir. 1988).

147. 391 U.S. 54 (1968).

148. 411 U.S. 475 (1973).

149. Prieto v. Gluch, 913 F.2d 1159, 1164 (6th Cir. 1990) (concluding that "INS does not have future custody . . . in the sense that the prisons had future custody over the petitioners in *Preiser* and *Peyton*"), *cert. denied*, 111 S. Ct. 976 (1991).

150. *Peyton*, 391 U.S. at 67; *see supra* notes 67-70 and accompanying text (discussing *Peyton*).

151. *Preiser*, 411 U.S. at 489; *see supra* notes 81-84 and accompanying text (discussing *Preiser*).

152. *Prieto*, 913 F.2d at 1164.

153. 410 U.S. 484 (1973); *see supra* notes 72-76 and accompanying text (discussing *Braden*). The *Braden* Court upheld a prisoner's habeas corpus challenge to a Kentucky indictment in a Kentucky court while the prisoner was in an Alabama prison. *Braden*, 410 U.S. at 500.

154. Prieto v. Gluch, 913 F.2d 1159, 1164 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 976 (1991).

155. *Id.*

156. *Id.*; *see Braden*, 410 U.S. at 498-99 (describing how state holding prisoner acts as agent for state lodging detainer against prisoner). *Prieto*, like *Braden*, fails to define "agent." *See Prieto*, 913 F.2d at 1164. The arguments for and against applying *Braden*'s agency theory are syllogistic—agency exists when custody exists, custody does or does not exist, therefore agency does or does not exist—and add nothing to

detainer arises from courts' various interpretations of the text of a detainer.[157] Most courts have found that a detainer, by its terms, serves only as "notice" and effects no present INS custody over a prisoner.[158] Only one court found the words of a detainer ambiguous, and the court could not ascertain the detainer's custodial effect.[159]

## III. *COURTS SHOULD EXAMINE INS DETAINERS TO DETERMINE WHETHER THEY GIVE THE INS PRESENT CUSTODY OVER IMPRISONED ALIENS FOR HABEAS CORPUS PURPOSES*

Most courts have held that an INS detainer constitutes only notice and therefore has no custodial effect.[160] The weight of precedent and the absence of vital facts relevant to such a determination, however, suggest that the majority of courts have failed to scrutinize adequately the purpose of INS detainers.[161]

Courts and commentators have failed to define uniformly the term "detainer."[162] Some courts and commentators believe that a detainer necessarily involves a hold,[163] while others do not.[164] The Supreme Court takes an ambivalent view.[165] Nevertheless, most courts that have considered the custodial

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a discussion of the custodial effect of an INS detainer. *Cf. id.* (advancing proposition that agency cannot exist if custody is absent).

157. *Compare supra* notes 111-21 and accompanying text (discussing case suggesting that INS may obtain custody over alien by filing detainer with alien's prison) *with supra* notes 122-56 and accompanying text (discussing cases holding that INS detainer has no custodial effect).

158. *See supra* notes 122-56 and accompanying text (discussing cases holding that INS detainer has no present custodial effect).

159. Vargas v. Swan, 854 F.2d 1028 (7th Cir. 1988).

160. *E.g.*, Campillo v. Sullivan, 853 F.2d 593, 595 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989).

161. *See infra* notes 168-205 and accompanying text (proposing means to ascertain custodial effect of INS detainers).

162. *See supra* notes 94-98 and accompanying text (discussing definitions of and components of detainers).

163. *See supra* note 91 and accompanying text (discussing detainer as hold order).

164. *See supra* notes 92-93 and accompanying text (discussing detainer as notice).

165. *See* Carchman v. Nash, 473 U.S. 716, 719 (1985); *supra* note 93 and accompanying text (discussing *Carchman*'s view that detainer can be hold or notification).

effect of an INS detainer have ignored this dispute.[166] These courts have failed to recognize that the label "detainer" is not self-defining.[167]

### A. *A Proposal for Reviewing INS Detainers*

To discern properly a detainer's custodial effect, a court must inquire into what effect the institutions that file and receive the detainer understand the detainer to have.[168] The existence of the detainer form alone does not create possible custody.[169]

A court must make two inquiries in order to determine the custodial effect of an INS detainer. First, it must look at the intent of the jurisdiction whose prospective confinement the prisoner challenges.[170] The standard INS detainer's request

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166. *E.g.*, Prieto v. Gluch, 913 F.2d 1159, 1162-64 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 976 (1991); *see supra* note 15 (listing cases that find that INS detainer over alien does not create INS custody over alien).

167. Vargas v. Swan, 854 F.2d 1028, 1028-33 (7th Cir. 1988); *cf.* Powell v. Texas, 392 U.S. 514, 528-29 (1968) (noting that hanging on jail of sign reading "hospital" does not turn jail into hospital intended to rehabilitate alcoholics).

168. *Vargas*, 854 F.2d at 1033. *Vargas* noted that

> [i]t may very well be that some will understand the failure to mark on the form or to include a warrant means that the "detainer" here is not fully operative and is ineffectual to restrain Vargas. On the limited record before us, however, it may be just as reasonable to believe that the practice of institutions receiving such notice, or at least the practice of Waupun [County Correctional Facility, Mr. Vargas's prison], is to treat these forms . . . as being requests to hold an inmate at the end of his sentence until the INS can take him into custody.

*Id.*

169. *Id.* In *Frazier v. Wilkinson*, a federal prisoner challenged in habeas corpus a consecutive state sentence although the state prison had lodged no detainer with the federal prison. Frazier v. Wilkinson, 842 F.2d 42, 43 (2d Cir.), *cert. denied*, 488 U.S. 842 (1988). The court concluded that a prisoner may use habeas corpus in this circumstance "as long as there is a reasonable basis to apprehend that the jurisdiction that obtained the consecutive sentence will seek its enforcement. . . . It would be exceedingly technical to insist on the lodging of a detainer as evidence that a state intends to require service of a consecutive sentence." *Id.* at 45.

170. Jones v. Johnston, 534 F.2d 353, 357 n.9 (D.C. Cir.), *vacated on other grounds sub nom.* Reed v. Byrd, 429 U.S. 995 (1976). The *Jones* court explained: "We believe that where, as here, the future custodian has actually lodged a detainer against a prisoner, thereby evidencing its intent to retake him at the end of his intervening confinement, the state of custody is not ended by a later temporary withdrawal of the detainer." *Id.* The court in *Frazier* understood this test to mean that the *Jones v. Johnston* court relied on "the evident intent of the parole authorities to retake the petitioner at the conclusion of his current sentence, [and thereby indicated] that the test for 'custody' is the intention of the jurisdiction whose prospective confinement is

that the reader "[a]ccept this form as a detainer" is ambiguous.[171] Furthermore, the disclaimer that the reader treat the detainer only as notice does not refer to the degree of control that the INS plans to assert over the prisoner after the prisoner's release.[172]

Second, a court must examine the practice of processing detainers at the institution that receives the detainer.[173] An institution might interpret a detainer as a request to hold a prisoner.[174] Conversely, another institution might conclude that the detainer serves only as notice.[175]

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sought to be challenged, rather than the technical pendency of a detainer." *Frazier*, 842 F.2d at 45 n.2.

The INS's proposed addition to the Code of Federal Regulations purports to explain that the INS cannot obtain custody over an alien in a correctional institution, pursuant to a detainer, until the institution releases the alien from confinement. *See* 54 Fed. Reg. 29,050 (1989) (to be codified at 8 C.F.R. § 242.2(a)(1)) (proposed July 11, 1989); *supra* note 121 (quoting proposed rule). Even if the INS adopted this rule, however, the actual effect of the filing of an INS detainer would remain unclear. Nowhere on the standard INS detainer, or on the order to show cause, does the INS suggest that a detainer is not a hold and does not give the INS custody over an imprisoned alien. *See* Standard INS Detainer, *supra* note 10; Order to Show Cause, *supra* note 11. Furthermore, a correctional institution holding an alien may believe that the INS will retake the alien upon the conclusion of the alien's confinement, or may, in practice, disregard a detainer's instructions. *See supra* notes 168-69 and accompanying text (discussing how institution may consider detainer to be restraint); *infra* notes 174-79 and accompanying text (discussing how institutions have used filing of detainers to justify imposing restrictions on inmates).

171. *Vargas*, 854 F.2d at 1032; *see* Standard INS Detainer, *supra* note 10; *supra* note 94 (discussing this Note's assumption that INS identifies detainer as notice).

172. *See Vargas*, 854 F.2d at 1032. The order to show cause, like the standard INS detainer, also describes itself as a "notice." Order to Show Cause, *supra* note 11; *see* Standard INS Detainer, *supra* note 10. Two courts that have considered the custodial effect of an order to show cause over a potentially deportable alien found that effect to be nonexistent. *See* Cabezas v. Scott, 717 F. Supp. 696, 697 (D. Ariz. 1989); Fernandez-Collado v. INS, 644 F. Supp. 741, 744 (D. Conn. 1986), *aff'd*, 857 F.2d 1461 (2d Cir. 1987). This conclusion remains irreconcilable with the conclusions of *Vargas*. *Compare Vargas*, 854 F.2d at 1032 *with Cabezas*, 717 F. Supp. at 697 *and Fernandez-Collado*, 644 F. Supp. at 744.

On April 16, 1991, the author of this Note conducted a search of the "Courts" file in the "Genfed" library of LEXIS based on the case names and issues litigated. The search revealed that no court has published an opinion that considered a potentially excludable alien's ability to attack in habeas corpus the INS's filing of an order to show cause over the alien. Accordingly, this Note does not address that issue.

173. *See* Vargas v. Swan, 854 F.2d 1028, 1033 (7th Cir. 1988).

174. *Id.*

175. *Id.* at 1032; *see* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). In *Kennedy*, the U.S. Supreme Court considered whether Congress could divest a U.S. citizen of his citizenship because the citizen departed the United States in time of war to avoid military service. *Id.* at 146. The Court inquired into whether the congres-

The histories of some INS detainer cases demonstrate that some prisons do not follow the text of the standard INS detainer.[176] Prisons have used the filing of an INS detainer as a justification to increase a prisoner's security classification.[177] This practice disregards the INS's request that a prison accept the detainer as notice only,[178] and suggests that not all prisons interpret a detainer uniformly, or solely on its face.[179]

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sional act at issue was penal or regulatory in character. *Id.* at 168. The Court also inquired into whether the sanction "has historically been regarded as a punishment." *Id.*

The U.S. Court of Appeals for the Second Circuit also noted the importance of an institution's practices. *See* United States ex rel. Schuster v. Herold, 410 F.2d 1071, 1076 n.3 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969). In *Schuster*, a prison transferred the prisoner to a correctional mental institution. *Id.* at 1073. The prisoner challenged the transfer in habeas corpus. *Id.* at 1076. The U.S. Court of Appeals for the Second Circuit granted the petition, in part because the parole board, which retained authority to parole inmates from the mental institution, did not in practice do so. *Id.* at 1076 n.3.

176. *See infra* notes 177-79 and accompanying text (discussing prisons' disregard of detainer's request that prison accept detainer as notice only).

177. *See, e.g.*, Orozco v. INS, 911 F.2d 539, 540 (11th Cir. 1990) (per curiam); Mohammed v. Sullivan, 866 F.2d 258, 259 (8th Cir. 1989); Roberts v. Matthews, No. 88-3014-O, 1990 U.S. Dist. LEXIS 16494 (D. Kan. Nov. 30, 1990). In *Mohammed*, a prison had initially classified a prisoner at the lowest security level. *Mohammed*, 866 F.2d at 259. After the INS filed a formal detainer with the prison, prison officials reclassified him at a higher security level. *Id.* A change in a prison's security classification of a prisoner, resulting from the filing of an INS detainer over the prisoner, does not create INS custody over the prisoner. Ganem v. INS, 825 F.2d 410, 1987 U.S. App. LEXIS 10499 at 2 (6th Cir. Aug. 5, 1987); *Roberts*, 1990 U.S. Dist. LEXIS 16494 at 3; *see* Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976) (holding that adverse effects of detainer on prisoner's classification in prison do not activate due process right to challenge detainer).

178. Standard INS Detainer, *supra* note 10. The detainer states: "This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and quarters assignments or other treatment which he would otherwise receive." *Id.*

179. *See supra* notes 177-78 and accompanying text (discussing prisons' disregard for standard INS detainer's text). Prisons' abuse of detainers is not new. *See* Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973). The court in *Cooper* explained:

> Punitive consequences of a detainer placed on the prisoner vary from one institution to another. The generally recognized ones include the following restrictions: the inmate is . . . (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons . . .; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions . . .; (8) not entitled to preferred prison jobs . . .; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.

B. *Most Courts Have Misapplied Precedents Involving Detainers*

Most courts have not inquired properly into a detainer's true purpose. Moreover, most courts that have considered an INS detainer's custodial effect misapplied relevant case precedents in the detainer field.[180] *Moody v. Daggett*, upon which *Campillo v. Sullivan* relied, is not closely related to the cases in dispute.[181] In *Moody*, the U.S. Supreme Court refused to grant the petitioner a writ of habeas corpus to expunge the petitioner's parole violator warrant or to grant the petitioner a parole revocation hearing.[182] The Court denied habeas corpus relief because the petitioner's current confinement derived from his two homicide convictions, not the issuance of the warrant.[183] The Court also found that unless the U.S. Board of Parole executed the warrant and took the petitioner into custody, a "far from certain" prospect, the petitioner could not allege a loss of liberty interests.[184]

In INS detainer cases, however, the texts of the INS detainer forms give no hint of whether prisoners will face future confinement under the detainers.[185] Accordingly, a court should seek more information to determine whether, in a given case, the prisoner's prospect of future INS confinement is strong, or less certain.[186]

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*Id.* at 314 n.10 (citations omitted); *see* United States v. Ford, 550 F.2d 732, 737-40 (2d Cir. 1977), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978).

180. *See infra* notes 181-201 and accompanying text (proposing alternative analysis in cases involving INS detainers).

The "technical custody" cases fail to address accurately the circumstances currently in dispute. *See* Campillo v. Sullivan, 853 F.2d 593 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989); *supra* notes 54-58 and accompanying text (discussing "technical custody" cases). In those cases, the INS had already completed its deportation proceedings, and courts granted habeas corpus relief to ensure that existing deportation orders would be subject to judicial review. *Campillo*, 853 F.2d at 596. The petitioners in the INS detainer cases discussed in this note, however, sought to attack future confinement that the INS might choose not to impose. *See id.* (noting that Mr. Campillo faced no existing deportation order).

181. *Campillo*, 853 F.2d at 595-96 n.2; *see* Moody v. Daggett, 429 U.S. 78 (1976); *supra* notes 141-43 and accompanying text (discussing *Moody*).

182. *Moody*, 429 U.S. at 89.

183. *Id.* at 86-87.

184. *See id.* at 83-84, 87.

185. Standard INS Detainer, *supra* note 10; Order to Show Cause, *supra* note 11.

186. *Cf.* Vargas v. Swan, 854 F.2d 1028, 1033 (7th Cir. 1988) (concluding that INS failed to demonstrate what custodial effect detainer at issue actually had); *see supra* note 184 and accompanying text (discussing *Moody*'s requirement that for pris-

The *Moody* Court also concluded that when a federal institution or agency lodges detainers against prisoners in state custody, the detainers are matters of comity or courtesy.[187] States, however, are not likely to ignore such detainers routinely.[188] Given the *Moody* Court's view regarding future custody,[189] the prospect of future federal confinement in such circumstances is not so speculative that a court cannot assert jurisdiction over habeas corpus challenges to the detainers.[190]

Moreover, two parties that issue and receive INS detainers are, respectively, the INS and the Federal Bureau of Prisons, two branches of the U.S. Department of Justice.[191] The close relationship between the parties should eliminate the speculative nature of a prisoner's future confinement under the INS and should permit a court to inquire into that nature.[192]

Finally, the conclusions in *Braden* support the need for a court to inquire into an INS detainer's true nature.[193] In *Bra-*

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oner to challenge parole violator warrant, prisoner's likelihood of future incarceration under warrant must be greater than "far from certain").

Mr. Campillo alleged that a court could distinguish his case from *Moody* because he was "almost certain, if not certain," to remain in custody after his existing sentence expired. *Campillo* Brief for Appellee, *supra* note 135, at 21. Mr. Campillo, however, offered no evidence to this effect. *See id.* at 20-23.

187. Moody v. Daggett, 429 U.S. 78, 80-81 n.2 (1976). This comity suggests that the institution receiving a detainer will give the detainer force out of respect for and in deference to the issuing party. *See* BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

188. *See Vargas*, 854 F.2d at 1031 n.1.

189. *Moody*, 429 U.S. at 80-81 n.2. The Court found that a detainer "assure[s] that an inmate subject to an unexpired term of confinement will not be released from custody until the jurisdiction asserting a parole violation has had an opportunity to act—in this case by taking the inmate into custody or by making a parole revocation determination." *Id.*

190. Vargas v. Swan, 854 F.2d 1028, 1031 n.1 (7th Cir. 1988).

191. *Campillo* Brief for Appellee, *supra* note 135, at 22.

192. *Id.* This argument does not apply in cases in which a state prison has present physical custody over an alien.

193. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); *see supra* notes 72-76 and accompanying text (discussing *Braden*). The government in *Campillo v. Sullivan* suggested that "it is questionable whether the developments affecting habeas jurisdiction in criminal law apply to issues arising in the context of immigration law." *Campillo* Brief for Appellant, *supra* note 133, at 9. The government, however, concluded that "the instant case is controlled not by *Braden*," a criminal case, "but *Moody*," another criminal case. *Id.* at 17; *see Campillo* Brief for Appellee, *supra* note 135, at 20.

*Vargas v. Swan* cited *Braden*, *Preiser v. Rodriguez*, and *Peyton v. Rowe* as authority for its holding. *Vargas*, 854 F.2d at 1031 (citing Preiser v. Rodriguez, 411 U.S. 475 (1973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Pey-

*den*, a prisoner successfully challenged an out-of-state indictment in habeas corpus, compelling the state that filed the indictment either to secure the prisoner's presence in that state for trial within sixty days, or to dismiss the indictment.[194] The *Braden* Court recognized various considerations in *Peyton v. Rowe* that warranted prompt relief.[195]

The *Braden* decision expanded the reach of habeas corpus by permitting prisoners to invoke the writ prior to trial.[196] *Braden* thus recognized the present impact of a custody that an agency or institution *may* impose in the future.[197] The decision, however, does not conflict with *Moody*. The *Moody* Court concluded only that the petitioner did not deserve an immediate hearing, before the U.S. Board of Parole took him into custody as a parole violator.[198] The Court did not suggest that the board must take physical custody of Mr. Moody, or begin a parole revocation hearing, to obtain custody over Mr. Moody;[199] something less might have sufficed.

One distinction between the *Braden* detainer and the INS detainers requires mention. In *Braden*, Kentucky clearly intended to act upon its indictment of Mr. Braden,[200] and thus filed a detainer. The intent behind an INS detainer, however,

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ton v. Rowe, 391 U.S. 54 (1968)). The facts of *Braden* are more analogous to the facts in INS detainer cases than are the facts of *Peyton* and *Preiser*. *See* Prieto v. Gluch, 913 F.2d 1159, 1163-64 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 976 (1991). In *Peyton* and *Preiser*, the same custodian imposed the present and future confinements over the respective prisoners. *Id.* In *Braden* and INS detainer cases, however, the respective future custodians differ from the respective present custodians. *Id.* at 1164.

194. *Braden*, 410 U.S. at 485-86, 500.

195. *Id.* at 489 n.4. These considerations included court calendar congestion, the "exigencies of appellate review," federalism, and common sense. *Peyton*, 391 U.S. at 63-64.

196. *Braden*, 410 U.S. at 508 (Rehnquist, J., dissenting).

197. *Id.*

198. Moody v. Daggett, 429 U.S. 78, 80, 86-89 (1976).

199. *See id.* at 80-89. *Cf. Vargas* Brief for Appellant, *supra* note 115, at 15 (contending that *Moody* Court did not "suggest that inmate was not in 'custody' by virtue of the detainer" but, rather, "took jurisdiction of the case and resolved the issue on the underlying merits"). The Supreme Court also considered the prospect of the petitioner's future incarceration, which was "far from certain," in reaching its holding. *Moody*, 429 U.S. at 87. The Court offered no opinion on what degree of certainty of future incarceration under the parole violator warrant would have given the Board of Parole present custody over the petitioner.

200. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 486 (1973) (petitioner "was returned to Kentucky to stand trial on the indictment").

remains unclear.[201] Realistically, one may suspect that if the INS files a detainer over an imprisoned alien, the INS will attempt to deport or to exclude the alien.[202] Mere suspicion, however, should not guide a court.[203] A detainer has no commonly understood meaning.[204] The INS thus bears the responsibility of identifying that meaning.[205]

## *CONCLUSION*

An INS detainer is a general form, not tailored to the imprisonment of any particular alien or the procedures of any particular institution. Its effect, on its face, is unclear. To ensure the rights of aliens to habeas corpus review, a court should conduct a review of the INS's intent in issuing a detainer, and the INS's and recipient's understanding of a detainer's effect. Only after completing this review may a court properly divine the "holding" power of the detainer. When the detainer effects a hold, INS custody over the alien is established. In that case, the alien deserves habeas corpus relief.

*Jonathan E. Stempel* *

201. Vargas v. Swan, 854 F.2d 1028, 1032-33 (7th Cir. 1988).

202. *See id.* at 1030-31. The court concluded: "Realistically we doubt that the INS will forego an attempt to exclude or deport Vargas, but in any event that is beside the point." *Id.*

203. *Id.*

204. *See supra* notes 88-103 and accompanying text (discussing definitions of and components of detainers).

205. *Vargas*, 854 F.2d at 1032.

* J.D. Candidate, 1992, Fordham University.

# APPENDIX A

U.S. Department of Justice
Immigration and Naturalization Service

**Immigration Detainer - Notice of Action**
**By Immigration and Naturalization Service**

| File No. |
|---|
| Date |

| TO: (Name, title and institution) | FROM: (INS Office Address) |
|---|---|
| | |

| Name of Inmate | | |
|---|---|---|
| Month, Day and Year of Birth | Sex | Nationality |

**YOU ARE ADVISED THAT THE ACTION NOTED BELOW HAS BEEN TAKEN BY THIS SERVICE CONCERNING THE ABOVE-NAMED INMATE OF YOUR INSTITUTION:**

☐ Investigation has been initiated to determine whether this person is subject to deportation from the U.S.

☐ An Order to Show Cause in deportation proceedings, a copy of which is attached, was served on

_____ , 19__

☐ A warrant of arrest in deportation proceedings, a copy of which is attached, was served on

_____ , 19__

☐ Deportation from the United States has been ordered.

**IT IS REQUESTED THAT YOU:**

☐ Accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and quarters assignments or other treatment which he would otherwise receive.

☐ Please complete and sign the bottom block of the duplicate of this form and return it to this office. ☐ A self-addressed franked envelope is enclosed for your convenience.

☐ Notify this office of the time of release at least 30 days prior to release or as much in advance as possible.

☐ Notify this office in the event of death or transfer to another institution.

_____ Signature

_____ Title

Receipt acknowledged

Probable date of release:

_____ Signature

_____ Title

Form I-247 (Rev. 3-1-83)N

GPO 897-907

# APPENDIX B

**UNITED STATES DEPARTMENT OF JUSTICE**
**Immigration and Naturalization Service**

**ORDER TO SHOW CAUSE and NOTICE OF HEARING**

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No._____

In the Matter of

Respondent.

_____
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of_____
   and a citizen of _____,
3. You entered the United States at _____on
   or about _____;
   (date)

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at

_____

on _____at_____m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated:

_____
(signature and title of issuing officer)

_____
(City and State)

Form I-221 (Rev. 7-1-73)Y (over)

**NOTICE TO RESPONDENT**

**ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS**

**THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES**

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If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation, including the privilege of departing voluntarily, for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service.

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**REQUEST FOR PROMPT HEARING**

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

_____
(signature of respondent)

Before:

_____ _____
(signature and title of witnessing officer) (date)

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**CERTIFICATE OF SERVICE**

This order and notice were served by me on _____ (date) in the following manner:

_____
(signature and title of employee or officer)