THE LAW OF ARREST, SEARCH, AND SEIZURE
FOR IMMIGRATION OFFICERS

M-69

January 1993 Edition

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Immigration and Naturalization Service
Office of the General Counsel
425 Eye St., N.W.  Rm. 6100
Washington, D.C.  20536
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INTRODUCTION

The Immigration and Naturalization Service (INS or the Service) is charged with the administration and enforcement of the Immigration and Nationality Act (the Act) and other laws relating to the immigration and naturalization of aliens. The methods that the INS uses to enforce the immigration laws enacted by Congress must conform to constitutional and statutory limitations as well as INS regulations. This is an update of the M-69, last updated in January 1983. It outlines the statutory and constitutional boundaries of an INS officer’s authority. The enforcement activities of the INS involve both border operations (conducted along the border and its functional equivalents and at ports of entry) and operations conducted in the interior of the United States.

Questions regarding search and seizure requirements should be referred to supervisors or legal counsel. Counsel should be consulted before conducting any enforcement activities that might result in litigation, media attention, or public controversy. Early consultation will ensure the best possible legal support for the enforcement operation and permit timely legal advice to avoid potential problems.

The M-69 is intended for the daily use of INS officers. It is not a law textbook. It does not cover all aspects of the law of arrest, search, and seizure, but is limited to recurring circumstances where the authority of INS officers may be challenged.

Citations of authority are located at the end of the text. The authorities cited may be obtained from the district or regional counsel.
CHAPTER I

SOURCES OF AUTHORITY

The primary sources of authority granted to officers of the INS are the Act, found in Title 8 of the United States Code, abbreviated as, “8 U.S.C.,” and other statutes relating to the immigration and naturalization of aliens. The secondary sources of authority are: (1) administrative regulations implementing those statutes (primarily those found in Title 8 of the Code of Federal Regulations, abbreviated as “8 C.F.R.”); (2) judicial decisions; and (3) administrative decisions of the Board of Immigration Appeals.¹

The Constitution of the United States protects the rights of the people of the United States. All authority exercised by INS officers must conform to constitutional limitations, such as the fourth amendment. For example, while section 287(a)(3) of the Act appears to authorize officers to make warrantless vehicle stops in border areas, the Supreme Court in United States v. Brignoni-Ponce² concluded that the fourth amendment precluded stopping a vehicle to question the occupants concerning their immigration status on less than a reasonable suspicion that the vehicle may contain aliens illegally in the United States, except at the border or its functional equivalents. See Chapter III(B)(5), infra.

A. THE FOURTH AMENDMENT

The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The amendment consists of two clauses. One clause prohibits unreasonable searches and seizures. The other requires that warrants be issued only upon a showing of probable cause and upon meeting certain other conditions regarding the place to be searched and the persons or things to be seized.
B. THE IMMIGRATION AND NATIONALITY ACT

Subject to constitutional limitations, INS officers may exercise the authority granted to them in the Act. The following statutory provisions relate to enforcement authority:

(1) Section 287(a)(1) [8 U.S.C. § 1357(a)(1)] -- provides authority, without a warrant, to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.

(2) Section 287(a)(2) [8 U.S.C. § 1357(a)(2)] -- provides authority to make an arrest of an alien who in the officer's presence or view is entering or attempting to enter the United States in violation of the immigration laws, or who the officer has reason to believe (judicially construed to be the equivalent of probable cause under the fourth amendment) is in the United States in violation of the immigration laws and is likely to escape before an arrest warrant can be obtained.

(3) Section 287(a)(3) [8 U.S.C. § 1357(a)(3)] -- provides authority within a reasonable distance of any external boundary of the United States to board without a warrant any vessel within the territorial waters of the United States and any railroad car, aircraft, or vehicle and search for aliens; and authority to enter private lands (but not dwellings) within 25 miles of the border for purposes of patrolling the border to prevent illegal entry of aliens.

(4) Section 287(a)(4) [8 U.S.C. § 1357(a)(4)] -- provides authority to arrest without a warrant for felonies which have been committed and which are cognizable under the federal criminal laws regulating the admission, exclusion and/or expulsion of aliens where the officer has reason to believe (probable cause) that the person arrested is guilty of such felony and is likely to escape before a warrant may be obtained, provided that the person arrested is taken without unnecessary delay before a magistrate for arraignment.

(5) Section 287(a)(5) [8 U.S.C. § 1357(a)(5)] -- provides authority to make general arrests without a warrant for crimes cognizable under federal law, to carry firearms, and to execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States. Section 287(a)(5)(A) provides that an INS officer may arrest for offenses against the United States committed in his or her presence. A person arrested must be taken without unnecessary delay before a magistrate for arraignment. Section 287(a)(5)(B) provides that an INS officer may arrest for any felony cognizable under the laws of the United States if the officer has reason to believe (probable cause) that the person to be arrested has committed or is committing such a felony.

To exercise authority under section 287(a)(5)(A) or (B), the officer must be performing duties relating to the enforcement of the immigration laws at the time of the arrest and there must be a likelihood the person will escape before an arrest warrant can be obtained. The officer also must be certified as having completed a designated training program prior to making arrests under section 287(a)(5)(B). The authority contained in section 287(a)(5)(B) cannot be exercised until the Attorney General promulgates final implementing regulations. A Notice of Proposed Rulemaking for such regulations was published in the Federal Register on October 14, 1992.

(6) Section 287(b) [8 U.S.C. § 1357(b)] -- provides authority to administer oaths and consider evidence concerning the privilege of any person to enter, re-enter, pass through, or reside in the United States, or any other matter which is material and relevant to the enforcement of the Act.

(7) Section 287(c) [8 U.S.C. § 1357(c)] -- provides authority to search without a warrant persons and personal effects of applicants for admission for evidence which may lead to the individual’s exclusion from the United States on grounds set forth in the Act.

(8) Section 287(e) [8 U.S.C. § 1357(e)] -- requires an immigration officer to obtain a warrant or the consent of the owner (or his agent) to enter the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person’s right to be or to remain in the United States.

(9) Section 235(a) [8 U.S.C. § 1225] -- provides authority at the border to board and search any vessel, aircraft, railway car, or other conveyance in which an immigration officer believes aliens are being brought into the United States. This section also empowers officers to administer oaths and take and consider evidence regarding any suspected alien’s right to enter, re-enter, pass through or reside in the U.S. or any other matter which is relevant and material to the enforcement of the Act.

(10) Section 274(b) [8 U.S.C. § 1324(b)] -- provides authority to seize vehicles, vessels, or aircraft where there is probable cause to believe that the conveyance has been used in violation of section 274(a) (Alien smuggling, transporting, harboring, etc.).

(11) Section 274(c) [8 U.S.C. § 1324(c)] -- provides authority to arrest individuals for violations of section 274(a).

(12) Section 274A [8 U.S.C. § 1324a] -- provides authority to investigate and assess a civil money penalty to any person or entity for the unauthorized employment of aliens and failure to comply with the employment verification requirements in violation of the Act.

(13) Section 274C [8 U.S.C. § 1324c] -- provides authority to investigate and assess a civil money penalty to any person or entity involved in civil document fraud related to any requirements under the Act.
C. OTHER STATUTORY SOURCES OF AUTHORITY

1. **Title 18 of the United States Code**

   There are several provisions under Title 18 that specifically relate to enforcement of the immigration and nationality laws. These provisions are listed in *The INS Investigator's Handbook*, Appendix 5-5A (1985) or *INS Border Patrol Handbook*, Appendix 19-A (1985).4

2. **Title 19 of the United States Code; Customs Cross-Designation**

   INS officers who have been specifically cross-designated under 19 U.S.C. § 1401(i) may make such customs arrests, searches, and seizures as delineated by Customs Form 55 and the Customs/Border Patrol Memorandum of Understanding, dated July 21, 1986.

3. **Title 21 of the United States Code; DEA Cross-Designation**

   INS officers who have been specifically cross-designated under 21 U.S.C. § 878 may make such limited arrests, searches, and seizures as delineated by the Drug Enforcement Administration’s (DEA) delegation of authority to the named agent and the DEA/INS Memoranda of Understanding of November 29, 1973, and August 1986.

4. **Local Law**

   Some states accord “peace officer” status to INS officers stationed in that state. The nature and extent of such “peace officer” authority depends entirely upon applicable state law. INS personnel should contact legal counsel for information regarding the extent of any authority granted by state law.

D. **ADMINISTRATIVE REGULATIONS**

   Title 8 of the Code of Federal Regulations, in particular Part 287, further delineates the enforcement authorities of INS officers. Section 287.3 of the regulations governs the disposition of cases of aliens arrested without a warrant. Section 287.4 governs procedures for executing, serving, and enforcing subpoenas. Section 287.5 gives any immigration officer the power and authority to administer oaths in or outside the United States. Section 287.7 provides that immigration detainers may be issued by an immigration officer as defined in section 101(a)(18) of the Act, 8 U.S.C. § 1101(a)(18), and only in the case of an alien who is amenable to exclusion or deportation proceedings under any provision of law. In response to Congressional mandate in section 287(a)(5) of the Act, 8 U.S.C. § 1357(a)(5), Part 287 will be subject to substantial revision in conjunction with the assumption of general arrest authority by immigration officers. As noted above, a proposed rule to this effect was published on October 14, 1992.
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DETNERS

Section 287(d) of the Act mandates that the INS make a prompt determination whether to issue a detainer when an alien is arrested by Federal, State or local law enforcement officers for a controlled substances violation. The provisions of this section are triggered if the official:

1. has reason to believe that the alien may not have been lawfully admitted into the United States, or is otherwise not lawfully present in the United States;
2. expeditiously informs an appropriate INS officer of the arrest and of facts concerning the status of the alien; and
3. requests a prompt determination.

If a detainer under these provisions is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General must expeditiously take custody of the alien.

Detainers may also be placed against any other alien who is amenable to exclusion and deportation proceedings under any provision of the law. Detainers may only be issued by immigration officers pursuant to 8 C.F.R. §§ 242.2 and 287.7. A detainer is lodged by filing Form I-247 “Immigration Detainer - Notice of Action by Immigration and Naturalization Service.” This document is merely a notice to the institution and a request for thirty (30) days notice prior to release of the alien from custody. It does not limit the institution’s discretion in any decision affecting the offender’s classification, work and quarters assignment or other treatment which he would otherwise receive, and this is specifically stated on the face of the notice. Unlike detainers issued pursuant to section 287(d) of the Act, these notices do not require the INS to take custody of the alien upon release from custody.

The provisions of 8 C.F.R. § 242.2(a) also authorize detainers to be issued in two other circumstances. Telephonic detainers may be placed by officers. These detainers must be confirmed in writing within twenty-four (24) hours of issuance. These detainers must contain substantially the same language in the Form I-247. They are also merely a notice to the institution and a request that INS be notified prior to release of the individual. This provides INS officers the opportunity to question the individual prior to release to determine whether he or she is a deportable alien who should be arrested.
Temporary detention of an alien can be obtained at the Service request. This “detainer” is unlike those previously discussed because it is not a mere notice and request for information prior to release. This section applies only when the individual is no longer subject to detention by the criminal justice agency. It authorizes the alien to be maintained in custody for “a period not to exceed forty-eight hours, in order to permit assumption of custody by the Service.” A detainer placed under this subsection is an arrest which must be supported by probable cause. These detainers should be followed by an Order to Show Cause. Since it is difficult to establish that these aliens are likely to abscond before a warrant can be obtained to support an arrest without warrant under section 287(a)(2) of the Act, a warrant of arrest should be issued and served upon the alien. Except as provided in 8 C.F.R. § 242.2(a)(4), a detainer does not bind the INS to any fiscal responsibility until custody is actually assumed by the Service.

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POSSIBLE CONSEQUENCES OF IMPROPER ACTIONS BY IMMIGRATION OFFICERS
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1. See 8 C.F.R. § 3.1(g).


4. For an extensive and substantive discussion on criminal prosecutions of immigration violations, see THE UNITED STATES ATTORNEYS’ MANUAL, title 9, chap. 73 (Oct. 1, 1988).
199. 8 C.F.R. § 242.2(a).

200. 8 C.F.R. § 242.2(a)(3).

201. 8 C.F.R. § 242.2(a)(4).