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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

THONG HOANG,  
  
                    Petitioner,  
  
          v.  
  
ERIC HOLDER, Attorney General,  
et al.,  
  
                    Respondents.

Case No. 1:13-cv-01375-AWI-SKO-HC

FINDINGS AND RECOMMENDATIONS TO DISMISS PETITIONER'S FIRST THREE CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION, TO DISMISS PETITIONER'S FOURTH CLAIM WITHOUT LEAVE TO AMEND, AND TO REFER THE MATTER BACK TO THE MAGISTRATE JUDGE FOR FURTHER PROCEEDINGS ON THE REMAINING CLAIMS (DOC. 1)

**OBJECTIONS DEADLINE:**  
**THIRTY (30) DAYS**

Petitioner is a federal prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 through 304. Pending before the Court is the petition, which was filed on August 26, 2013.

I. Screening the Petition

The Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules) are applied to 28 U.S.C. § 2241

1 proceedings. Habeas Rule 1(b). Habeas Rule 4 requires the Court to  
2 make a preliminary review of each petition for writ of habeas  
3 corpus. The Court must summarily dismiss a petition "[i]f it  
4 plainly appears from the petition and any attached exhibits that the  
5 petitioner is not entitled to relief in the district court...."  
6 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990);  
7 see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas  
8 Rule 2(c) requires that a petition 1) specify all grounds of relief  
9 available to the Petitioner; 2) state the facts supporting each  
10 ground; and 3) state the relief requested. Notice pleading is not  
11 sufficient; the petition must state facts that point to a real  
12 possibility of constitutional error. Rule 4, Advisory Committee  
13 Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at 420 (quoting  
14 Blackledge v. Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in  
15 a petition that are vague, conclusory, or palpably incredible are  
16 subject to summary dismissal. Hendricks v. Vasquez, 908 F.2d at  
17 491.  
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21 The Court may dismiss a petition for writ of habeas corpus  
22 either on its own motion under Habeas Rule 4, pursuant to the  
23 respondent's motion to dismiss, or after an answer to the petition  
24 has been filed. Advisory Committee Notes to Habeas Rule 8, 1976  
25 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir.  
26 2001). A petition for habeas corpus, however, should not be  
27 dismissed without leave to amend unless it appears that no tenable  
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1 claim for relief can be pleaded were such leave granted. Jarvis v.  
2 Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

3         Petitioner alleges he is an inmate of the Taft Correctional  
4 Institution (TCI) serving a sentence for narcotics trafficking with  
5 a probable release date of July 1, 2016. (Pet., doc. 1, 2.)

6  
7 Although Petitioner does not allege he is an alien, he alleges his  
8 crime has subjected him to imminent deportation. (Id.) Petitioner  
9 alleges he requested that the Bureau of Prisons (BOP) commence his  
10 deportation proceedings and complete the administrative process  
11 pursuant to 8 U.S.C. § 1228(a)(3)(A); however, the BOP failed to  
12 conduct deportation proceedings in a timely manner. Petitioner  
13 seeks an order directing the BOP to commence deportation  
14 proceedings, including a hearing, and to complete the administrative  
15 process within the time prescribed by statute before his release  
16 date. (Id. at 6.)

17  
18         Petitioner has included a memorandum from the TCI warden dated  
19 August 1, 2013. In response to Petitioner's request for enforcement  
20 of 8 U.S.C. § 1228(a)(3), the warden states that Petitioner, against  
21 whom an Immigrations and Customs Enforcement (ICE) detainer has been  
22 lodged, is subject to a provision in § 1228(a)(3)(B) which should  
23 not be construed as requiring the Attorney General to effect the  
24 removal of any alien sentenced to actual incarceration before  
25 release from the penitentiary or correctional institution where the  
26 alien is confined. (Doc. 1, 8.) The warden further noted that  
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1 Petitioner's case was being monitored for his ultimate assignment to  
2 an institution at which immigration hearings are conducted, although  
3 no bed space was then available. (Id. at 9.)

4         Petitioner also alleges that only employees of the BOP or  
5 Federal Prison Industries, Inc., have authority to enforce federal  
6 law, including responding to Petitioner's request for the initiation  
7 and completion of deportation proceedings. (Id. at 10.) Petitioner  
8 alleges that Taft prison staff, including the warden, are employees  
9 of a private management corporation and thus lack legal authority to  
10 determine his placement; he contends a determination of his  
11 placement made by employees of a private corporation violated his  
12 right to due process of law. (Id.)

15         II. Absence of Subject Matter Jurisdiction pursuant to  
16         28 U.S.C. § 2241

17         Because the petition was filed after April 24, 1996, the  
18 effective date of the Antiterrorism and Effective Death Penalty Act  
19 of 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.  
20 Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484,  
21 1499 (9th Cir. 1997).

22         A federal court may not entertain an action over which it has  
23 no jurisdiction. Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir.  
24 2000).

25         A. Custody

26         Habeas corpus relief extends to a person in custody under the  
27 authority of the United States if the petitioner can show he is "in  
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1 custody in violation of the Constitution or laws or treaties of the  
2 United States.” 28 U.S.C. § 2241(c)(1) & (3). A habeas corpus  
3 action is the proper mechanism for a prisoner to challenge the fact  
4 or duration of his confinement. Preiser v. Rodriguez, 411 U.S. 475,  
5 485 (1973); Tucker v. Carlson, 925 F.2d 330, 332 (9th Cir. 1990)  
6 (holding in a Bivens<sup>1</sup> action that a claim that time spent serving a  
7 state sentence should have been credited against a federal sentence  
8 concerned the fact or duration of confinement and should have been  
9 construed as a petition for writ of habeas corpus pursuant to  
10 § 2241, but a claim seeking damages for civil rights violations  
11 should be construed as a Bivens action); Crawford v. Bell, 599 F.2d  
12 890, 891-892 (9th Cir. 1979) (upholding dismissal of a petition  
13 challenging conditions of confinement and noting that the writ of  
14 habeas corpus has traditionally been limited to attacks upon the  
15 legality or duration of confinement); see, Greenhill v. Lappin, 376  
16 Fed. Appx. 757, 757-58 (9th Cir. 2010) (unpublished) (appropriate  
17 remedy for a federal prisoner's claim that relates to the conditions  
18 of his confinement is a civil rights action under Bivens; but see,  
19 Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989) (habeas  
20 corpus available pursuant to § 2241 for claims concerning denial of  
21 good time credits and increased restrictions of liberty, such as  
22 disciplinary segregation, without due process of law); Cardenas v.  
23 Adler, 2010 WL 2180378 (No.1:09-cv-00831-AWI-JLT-HC, May 28, 2010)  
24 (petitioner's challenge to the constitutionality of the sanction of  
25 disciplinary segregation and his claim that the disciplinary  
26 proceedings were the product of retaliation by prison staff were

27 \_\_\_\_\_  
28 <sup>1</sup> The reference is to Bivens v. Six Unknown Named Agents of Federal Bureau of  
Narcotics, 403 U.S. 388 (1971).

1 cognizable in a habeas proceeding pursuant to § 2241).

2 In this district, claims concerning various prison conditions  
3 brought pursuant to § 2241 have been dismissed for lack of subject  
4 matter jurisdiction with indications that an action pursuant to  
5 Bivens is appropriate. See, e.g., Dyson v. Rios, 2010 WL 3516358,  
6 \*3 (E.D.Cal. Sept. 2, 2010) (claim challenging placement in a  
7 special management housing unit in connection with a disciplinary  
8 violation); Burnette v. Smith, 2009 WL 667199 at \*1 (E.D.Cal. Mar.  
9 13, 2009) (petition seeking a transfer and prevention of retaliation  
10 by prison staff); Evans v. U.S. Penitentiary, 2007 WL 4212339 at \*1  
11 (E.D.Cal. Nov. 27, 2007) (claims brought pursuant to § 2241  
12 regarding a transfer and inadequate medical care).

13 Petitioner asserts a statutory right pursuant to 8 U.S.C. §  
14 1228(a)(3)(A) to have removal proceedings initiated, which he  
15 alleges was violated by Respondent's failure to designate Petitioner  
16 to be placed in an IHP hearing site, a designation that would permit  
17 the initiation of Petitioner's removal proceedings before his  
18 federal sentence expires. Petitioner contends that the failure to  
19 initiate removal proceedings will result in an increase in his  
20 federal sentence because his removal proceedings will not be  
21 completed before his sentence expires, and he will spend more time  
22 in custody than the statutory scheme governing immigration  
23 contemplates.

24 However, the length of Petitioner's present federal sentence  
25 will not be affected by the initiation of removal proceedings or the  
26 failure to initiate them; rather, it is the legality or duration of  
27 his future confinement pursuant to the authority of the ICE, which  
28 will commence after he completes his present sentence, that will be

1 affected. Petitioner, who has an ICE detainer pending against him,  
2 is not yet in the custody of the ICE for habeas corpus purposes  
3 because a bare detainer letter alone is insufficient to place an  
4 alien in ICE custody for the purpose of habeas corpus. Campos v.  
5 INS, 62 F.3d 311, 314 (9th Cir. 1995).

6 In sum, Petitioner is seeking to litigate the legality or  
7 duration not of his present confinement, but rather of possible or  
8 potential future confinement by the ICE. He is not in custody with  
9 respect to the ICE detainer, and thus he cannot show his present  
10 custody is unlawful.

11 Because of an absence of custody with respect to the  
12 immigration process, the Court lacks subject matter jurisdiction,  
13 and the petition should be dismissed.

14 B. Discretion of the BOP

15 The Court must determine whether it has jurisdiction to  
16 consider whether Petitioner's present conditions of confinement are  
17 contrary to federal law. See, e.g., Rodriguez v. Smith, 541 F.3d  
18 1180, 1187 (9th Cir. 2008) (in habeas proceeding brought pursuant to  
19 § 2241, regulations concerning the BOP's discretionary placement  
20 decisions were invalid because they conflicted with the intent of  
21 Congress that underlies 18 U.S.C. § 3621(b).)

22 Petitioner argues that the BOP's failure to initiate and  
23 complete deportation proceedings will result in his detention for at  
24 least an additional ninety days after the completion of his federal  
25 sentence, and that such a result contravenes both the letter and  
26 spirit of 8 U.S.C. § 1228(a)(3)(A), which concerns the Attorney  
27 General's duty to provide removal proceedings for federal prisoners.  
28 Petitioner argues he is entitled to enforcement of the Attorney

1 General's duty to provide for expedited removal proceedings before  
2 his release from service of his federal sentence. Petitioner  
3 further challenges Program Statement 5111.04, the authority pursuant  
4 to which the BOP informed Petitioner that it "designates non-U.S.  
5 citizens with an undetermined deportation status to facilities  
6 designated as IHP sites whenever possible depending on other factors  
7 such as security needs, available bed space, and population  
8 management concerns." (Doc. 1, 8.) Warden Benov's response to  
9 Petitioner's request for enforcement of the statute expressly stated  
10 that as a low-security prisoner who is a citizen of Vietnam,  
11 Petitioner had been designated to a facility commensurate with his  
12 security and programming needs, and his case was being monitored  
13 through the IHP Case Management Activity assignment. (Id. at 9.)  
14 Further, the warden stated the following:

15 Due to the lack of bed space availability at IHP  
16 hearing sites, the DSCC is no longer processing transfers  
17 for the purpose of IHP hearings. Program Statement 5100.08  
18 does not require the Warden or the Bureau of Prisons  
19 to refer you for a transfer. Furthermore, per Program  
20 Statement 5111.04, ICE will process inmates who were not  
21 redesignated to a hearing site at sentence expiration.

22 (Id.)

23 Petitioner argues that this demonstrates the BOP has no  
24 intention of even attempting to complete the administrative  
25 deportation process before his release from the present federal  
26 sentence. He contends that even though the warden has discretion  
27 over the transfers, the program adopted by the BOP at TCI makes it  
28 impossible to complete administrative appeals before his release  
date. Thus, the program at TCI is contrary to the statute, and it  
has not been shown to be necessary. (Id. at 4-6.)



1 Congress has mandated that the BOP, under the direction of the  
2 Attorney General, shall have charge of the management and the  
3 regulation of all federal penal and correctional institutions. 18  
4 U.S.C. § 4042(a)(1). Further, Congress has delegated to the BOP the  
5 authority to designate the institution of confinement. Title 18  
6 U.S.C. § 3621(b) provides in pertinent part as follows:

7 (b) The Bureau of Prisons shall designate the place of  
8 the prisoner's imprisonment. The Bureau may designate  
9 any available penal or correctional facility that meets  
10 minimum standards of health and habitability established  
11 by the Bureau, whether maintained by the Federal  
12 Government or otherwise and whether within or without  
13 the judicial district in which the person was convicted,  
14 that the Bureau determines to be appropriate and  
15 suitable, considering—

- 16 1) the resources of the facility contemplated;
- 17 2) the nature and circumstances of the offense;
- 18 3) the history and characteristics of the prisoner;
- 19 4) any statement by the court that imposed sentence—
  - 20 A) concerning the purposes for which the  
21 sentence to imprisonment was determined to be  
22 warranted; or
  - 23 B) recommending a type of penal or correctional  
24 facility as appropriate; and
- 25 5) any pertinent policy statement issued by the  
26 Sentencing Commission pursuant to section 994(a)(2)  
27 of title 28.

28 In designating the place of imprisonment or making transfers  
under this subsection, there shall be no favoritism given  
to prisoners of high social or economic status. The Bureau  
may at any time, having regard for the same matters, direct  
the transfer of a prisoner from one penal or correctional  
facility to another.

18 U.S.C. § 3621(b).

1           In Reeb v. Thomas, 636 F.3d 1224 (9th Cir. 2010), a federal  
2 prisoner brought a Section 2241 claim contending that the BOP had  
3 abused its discretion in expelling him from a residential drug abuse  
4 program (RDAP). The petitioner sought re-admission into the RDAP  
5 and a twelve-month reduction in sentence upon successful completion  
6 of the program. The court held that 18 U.S.C. § 3625 precludes  
7 judicial review of discretionary, individualized RDAP determinations  
8 made by the BOP pursuant to 18 U.S.C. § 3621, which gave BOP the  
9 discretion to determinate RDAP eligibility and entitlement to  
10 sentence reductions for program participation. The court noted that  
11 5 U.S.C. § 702, a portion of the Administrative Procedure Act (APA),  
12 provided a cause of action for persons suffering legal wrong or  
13 adverse effect from agency action. The court stated that agency  
14 actions can be unlawful if "arbitrary, capricious, an abuse of  
15 discretion, or otherwise not in accordance with law." 5 U.S.C. §  
16 706(2) (A). The court cited to the portion of the APA that withdrew  
17 the cause of action to the extent that the pertinent statute  
18 "preclude[s] judicial review" or the "agency action is committed to  
19 agency discretion by law." Reeb v. Thomas, 636 F.3d at 1226  
20 (discussing 5 U.S.C. § 701(a)). The court further relied on 18  
21 U.S.C. § 3625, which stated in pertinent part that the provisions of  
22 5 U.S.C. §§ 701 through 706 "do not apply to the making of any  
23 determination, decision, or order under this subchapter." Reeb, 636  
24 F.3d at 1226 (quoting 18 U.S.C. § 3625). The court interpreted the  
25 statute as follows:

26           There is no ambiguity in the meaning of 18 U.S.C. § 3625.  
27           The plain language of this statute specifies that the  
28           judicial review provisions of the APA, 5 U.S.C. §§ 701-706,  
          do not apply to "any determination, decision, or order"  
          made pursuant to 18 U.S.C. §§ 3621-3624. The BOP has

1 authority to manage inmate drug treatment programs,  
2 including RDAP, by virtue of 18 U.S.C. § 3621. To find  
3 that prisoners can bring habeas petitions under 28 U.S.C.  
4 § 2241 to challenge the BOP's discretionary determinations  
5 made pursuant to 18 U.S.C. § 3621 would be inconsistent  
6 with the language of 18 U.S.C. § 3625. Accordingly, any  
7 substantive decision by the BOP to admit a particular  
8 prisoner into RDAP, or to grant or deny a sentence  
9 reduction for completion of the program, is not reviewable  
10 by the district court. The BOP's substantive decisions to  
11 remove particular inmates from the RDAP program are  
12 likewise not subject to judicial review.

13 Id. at 1227. The court emphasized that the RDAP decisions  
14 challenged in that case were matters properly left to the BOP's  
15 discretion. Id. Further, the court noted that although the  
16 decisions could not be reviewed for abuse of discretion, judicial  
17 review remained available for allegations that BOP action was  
18 contrary to established federal law, violated the United States  
19 Constitution, or exceeded statutory authority. Id. at 1228.

20 This case is analogous with Reeb. Pursuant to 18 U.S.C.  
21 § 3621(b), the designation of an institution of confinement is a  
22 matter within the discretion of the BOP. Further, the terms of  
23 § 1228(a) that appear to impose a specific duty on the Attorney  
24 General are expressly qualified in a manner that unambiguously  
25 forecloses jurisdiction to review the BOP's discretionary decisions  
26 regarding particular inmates' placement.

27 Accordingly, the Court concludes that it lacks subject matter  
28 jurisdiction over Petitioner's claim concerning the BOP's  
discretionary decision concerning Petitioner's placement.

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11

1 C. Mandamus

2 Petitioner argues he is entitled to a writ of mandamus because  
3 the warden's duty is ministerial and clear, and no other remedy is  
4 available to address his entitlement to expedited removal  
5 proceedings.

6  
7 The district courts "shall have original jurisdiction of any  
8 action in the nature of mandamus to compel an officer or employee of  
9 the United States or any agency thereof to perform a duty owed to  
10 the plaintiff." 28 U.S.C. § 1361. Mandamus is available to compel  
11 an officer of the United States to perform a duty if 1) the  
12 plaintiff's claim is clear and certain, 2) the duty of the officer  
13 is ministerial and so plainly prescribed as to be free from doubt,  
14 and 3) no other adequate remedy is available. Johnson v. Reilly,  
15 349 F.3d 1149, 1154 (9th Cir. 2003). However, the jurisdiction of  
16 this Court is limited to cases and controversies. U. S. Const. art.  
17 III, § 1. For this Court to have subject matter jurisdiction, a  
18 petitioner must have standing to sue at the time the action is  
19 filed. Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 n.4  
20 (1992).  
21  
22

23 Petitioner, an incarcerated alien, lacks standing to seek  
24 mandamus to enforce a statutory provision such as §§ 1228 and 1229  
25 because all private actions, including mandamus, are abolished by  
26 the statutory language prohibiting construction of the statute to  
27 create any substantive or procedural right or benefit that is  
28

1 legally enforceable by any party against the United States or its  
2 agencies, officers, or any other person. See, Campos v. I.N.S., 62  
3 F.3d at 314. Accordingly, the Court lacks subject matter  
4 jurisdiction to proceed to consider Petitioner's claim in mandamus.  
5 Because the defect in Petitioner's standing stems from the statutes  
6 limiting enforcement of the right in question, Petitioner could not  
7 state a tenable mandamus claim even if leave to amend were granted.

9 Based on the foregoing, Petitioner's mandamus claim should be  
10 dismissed without leave to amend.

### 11 III. Excess of Statutory Authority

12 Petitioner argues he has a statutory right to placement in a  
13 hearing site. Petitioner relies on 8 U.S.C. § 1228(a)(3)(A), which  
14 provides for the expedited removal of aliens convicted of committing  
15 aggravated felonies and states the following:  
16

17 Notwithstanding any other provision of law, the  
18 Attorney General shall provide for the initiation  
19 and, to the extent possible, the completion of removal  
20 proceedings, and any administrative appeals thereof,  
21 in the case of any alien convicted of an aggravated  
22 felony before the alien's release from incarceration  
23 for the underlying aggravated felony.

24 8 U.S.C. § 1228(a)(3)(A).

25 Although this Court lacks subject matter jurisdiction to review  
26 individualized, discretionary determinations made by the BOP  
27 pursuant to 18 U.S.C. § 3621, judicial review is available for  
28 allegations that BOP action is contrary to established federal law,  
violates the Constitution, or exceeds statutory authority. Reeb v.

1 Thomas, 636 F.3d at 1228. This Court retains jurisdiction to  
2 determine whether non-individualized BOP action is contrary to its  
3 statutory authority. Close v. Thomas, 653 F.3d 970, 973-74 (9th  
4 Cir. 2011), cert. den., 132 S.Ct. 1606 (2012).

5  
6 In Close v. Thomas, 653 F.3d 970, the court was presented with  
7 the issue of whether or not the BOP's interpretation of a statute  
8 that provided for prioritizing inmates' eligibility for entering into  
9 a residential drug abuse treatment program was contrary to its  
10 statutory authority. In analyzing this issue, the court stated as  
11 follows:

12 When we "review[ ] an agency's construction of the statute  
13 which it administers, [we are] confronted with two  
14 questions. First, always, is the question whether Congress  
15 has directly spoken to the precise question at issue. If  
16 the intent of Congress is clear, that is the end of the  
17 matter...." Chevron, U.S.A., Inc. v. Natural Res. Def.  
18 Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 81  
19 L.Ed.2d 694 (1984). If we determine that "the statute is  
20 silent or ambiguous with respect to the specific issue,  
21 the question for the court is whether the agency's answer  
22 is based on a permissible construction of the statute." Id.  
23 at 843, 104 S.Ct. 2778.

24 To determine Congress's intent, "[a]s always," the  
25 "starting point is the plain language of the statute."  
26 Greenwood v. CompuCredit Corp., 615 F.3d 1204, 1207 (9th  
27 Cir.2010) cert. granted, --- U.S. ----, 131 S.Ct. 2874, 179  
28 L.Ed.2d 1187 (2011). We have explained that "[i]f the plain  
meaning of the statute is unambiguous, that meaning is  
controlling." Id.

29 Close v. Thomas, 653 F.3d at 974.

30 Here, the terms of § 1228(a)(3)(A) do not expressly confer a  
31 right of judicial review or limit the discretion of the BOP or the  
32 Attorney General to designate institutions of confinement. Indeed,

1 § 1228(a) (3) (A) expressly qualifies the direction to complete  
2 removal proceedings by providing that the Attorney General is to do  
3 so only "to the extent possible." Further, § 1228(a) (3) (B), which  
4 also concerns expedited proceedings provides as follows:

5  
6 Nothing in this section shall be construed as requiring  
7 the Attorney General to effect the removal of any alien  
8 sentenced to actual incarceration, before release from the  
penitentiary or correctional institution where such alien  
is confined.

9 8 U.S.C. § 1228(a) (3) (B). Thus, the construction of the statute  
10 Petitioner favors, namely, that removal before release from prison  
11 is mandatory, is precluded by other express terms of the statute.  
12

13 Further review of the immediate statutory context reflects that  
14 Section 1228(a) (3) (A) is preceded by related provisions which  
15 contain significant limitations. Section 1228(a) (1) through (3)  
16 provide as follows:

17 (a) Removal of criminal aliens

18 (1) In general

19  
20 The Attorney General shall provide for the  
21 availability of special removal proceedings at  
22 certain Federal, State, and local correctional  
23 facilities for aliens convicted of any criminal  
24 offense covered in section 1227(a) (2) (A) (iii), (B),  
25 (C), or (D) of this title, or any offense covered by  
26 section 1227(a) (2) (A) (ii) of this title for which  
27 both predicate offenses are, without regard to the  
28 date of their commission, otherwise covered by  
section 1227(a) (2) (A) (i) of this title. Such  
proceedings shall be conducted in conformity with  
section 1229a of this title (except as otherwise  
provided in this section), and in a manner which  
eliminates the need for additional detention at any  
processing center of the Service and in a manner

1 which assures expeditious removal following the end  
2 of the alien's incarceration for the underlying  
3 sentence. Nothing in this section shall be construed  
4 to create any substantive or procedural right or  
5 benefit that is legally enforceable by any party  
6 against the United States or its agencies or officers  
7 or any other person.

8 (2) Implementation

9 With respect to an alien convicted of an aggravated  
10 felony who is taken into custody by the Attorney  
11 General pursuant to section 1226(c) of this title,  
12 the Attorney General shall, to the maximum extent  
13 practicable, detain any such felon at a facility at  
14 which other such aliens are detained. In the  
15 selection of such facility, the Attorney General  
16 shall make reasonable efforts to ensure that the  
17 alien's access to counsel and right to counsel under  
18 section 1362 of this title are not impaired.

19 (3) Expedited proceedings

20 (A) Notwithstanding any other provision of law, the  
21 Attorney General shall provide for the initiation and,  
22 to the extent possible, the completion of removal  
23 proceedings, and any administrative appeals thereof,  
24 in the case of any alien convicted of an aggravated  
25 felony before the alien's release from incarceration  
26 for the underlying aggravated felony.

27 (B) Nothing in this section shall be construed as  
28 requiring the Attorney General to effect the removal  
of any alien sentenced to actual incarceration,  
before release from the penitentiary or correctional  
institution where such alien is confined.

8 U.S.C. § 1228(a)(1)-(3) (emphasis added). Thus, although 8 U.S.C.  
§ 1228(a)(1) imposes a duty on the Attorney General to make special  
removal proceedings available for some criminal aliens, it cannot be  
construed to create a right or benefit that is legally enforceable  
against the United States, its agencies, or its officers. Section



1 1228(a)(2) further qualifies the duty of placement with other,  
2 similar aliens, by limiting its extent to the Attorney General's  
3 assessment of maximum practicality.

4         Petitioner's interpretation of the statute is also inconsistent  
5 with pertinent procedural provisions. Section 1228(a)(1) expressly  
6 provides that the Attorney General "shall provide for the  
7 availability of special removal proceedings" at certain correctional  
8 facilities for aliens committing specified criminal offenses, and  
9 that except as otherwise provided in that section, the proceedings  
10 "shall be conducted in conformity with section 1229a of this title,"  
11 and in a manner "which eliminates the need for additional detention  
12 at any processing center" and "assures expeditious removal following  
13 the end of the alien's incarceration" for the underlying federal  
14 sentence. 8 U.S.C. § 1228(a)(1).

15         Title 8 U.S.C. § 1229 addresses the same subject of removal  
16 proceedings concerning aliens convicted of criminal offenses. It  
17 provides for initiation of removal proceedings by the Attorney  
18 General as follows:  
19  
20  
21

22         (d) Prompt initiation of removal

23         1) In the case of an alien who is convicted of an  
24 offense which makes the alien deportable, the Attorney  
25 General shall begin any removal proceeding as expeditiously  
as possible after the date of the conviction.

26         2) Nothing in this subsection shall be construed to create  
27 any substantive or procedural right or benefit that is  
legally enforceable by any party against the United States  
28 or its agencies or officers or any other person.

8 U.S.C. § 1229(d) (emphasis added).

1           Although § 1228 uses mandatory language concerning the Attorney  
2 General's initiation of removal proceedings before the alien has  
3 completed his sentence, the command as to completion of removal  
4 proceedings is expressly qualified with the modifying phrase "to the  
5 extent possible." Likewise, in § 1229, the mandate to the Attorney  
6 General to initiate removal proceedings is to do so "as expeditiously  
7 as possible after the date of conviction." It is, therefore, clear  
8 from the plain language of the relevant statutes that Congress  
9 intended expedition, but only to the extent possible.  
10

11           It is equally clear from §§ 1228(a)(1) and 1229(d)(2) that  
12 Congress did not intend the direction to begin removal proceedings  
13 as expeditiously as possible to create any substantive or procedural  
14 right or benefit that any party, including an inmate, could legally  
15 enforce against the Attorney General or any agency or officer of the  
16 United States. The predecessor to § 1229(d) -- 8 U.S.C. § 1252(i) --  
17 which mandated that the Attorney General begin any deportation  
18 proceeding as expeditiously as possible after the date of  
19 conviction, did not create an enforceable duty on the part of the  
20 Attorney General to an inmate in light of Congress's additional  
21 direction that nothing in 8 U.S.C. § 1252(i) should be construed to  
22 create any substantive or procedural right or benefit that is  
23 legally enforceable by any party against the United States or its  
24 agencies or officers or any other person. Campos v. Immigration and  
25 Naturalization Service, 62 F.3d at 313-14 (an inmate seeking  
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27  
28

1 initiation of expedited removal proceedings by the Attorney General  
2 had no standing to seek mandamus relief). The court in Campos noted  
3 that the requirement of expedited removal proceedings was enacted  
4 for the benefit of taxpayers rather than incarcerated aliens to  
5 reduce prison overcrowding caused by immigration service delays; the  
6 sole purposes of the enactment were economic. Campos, 62 F.3d at  
7 314. Thus, a system that designates inmates based on bed space and  
8 length of sentence remaining is consistent with Congressional  
9 intent.  
10

11 In sum, although this Court has jurisdiction to determine  
12 whether the BOP's program statement and program with respect to  
13 placement of criminal aliens exceeds statutory authority or is  
14 otherwise contrary to established federal law, Petitioner has not  
15 alleged facts that point to a real possibility of any excess of  
16 authority. Because the express terms of the statute are  
17 determinative, Petitioner could not state a tenable claim of excess  
18 of statutory authority even if leave to amend were granted.  
19

20 Therefore, it will be recommended that Petitioner's claim of  
21 excess of statutory authority be dismissed without leave to amend.  
22

#### 23 IV. Remaining Claims concerning Excess of Statutory Authority

24 Petitioner's final claims concern the absence of authority to  
25 make and enforce placement decisions by the warden and other  
26 employees of the privately managed corporation that Petitioner  
27 alleges runs the prison in which he is confined, and Petitioner's  
28 related due process claim. It is unclear whether the Court has  
subject matter jurisdiction over these claims, and briefing and

1 documentation concerning the pertinent statutes, regulations, and  
2 contracts would be required for the Court to address the merits of  
3 the claims.

4 Accordingly, it will be recommended that after dismissal of the  
5 other claims pursuant to the foregoing analysis, the matter be  
6 referred back to the Magistrate Judge for further proceedings on  
7 Petitioner's remaining claims concerning the authority of staff of  
8 privately managed prisons to enforce federal immigration and  
9 placement law and whether such private enforcement has violated  
10 Petitioner's right to due process of law.

11 V. Recommendations

12 In accordance with the foregoing analysis, it is RECOMMENDED  
13 that:

14 1) Petitioner's first through third claims, which involve the  
15 duration of any future confinement he serves in the custody of the  
16 ICE, the discretionary placement decision of the BOP, and  
17 enforcement of a placement duty by mandamus, be DISMISSED for lack  
18 of subject matter jurisdiction;

19 2) Petitioner's fourth claim, which concerns conduct alleged to  
20 be in excess of the statutory authority conferred by 8 U.S.C.  
21 § 1228, be DISMISSED without leave to amend for failure to state  
22 facts entitling the Petitioner to relief in a proceeding pursuant to  
23 § 2241; and

24 3) The matter be referred back to the Magistrate Judge for  
25 further proceedings on Petitioner's remaining claims.

26 These findings and recommendations are submitted to the United  
27 States District Court Judge assigned to the case, pursuant to the  
28 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local

1 Rules of Practice for the United States District Court, Eastern  
2 District of California. Within thirty (30) days after being served  
3 with a copy, any party may file written objections with the Court  
4 and serve a copy on all parties. Such a document should be  
5 captioned "Objections to Magistrate Judge's Findings and  
6 Recommendations." Replies to the objections shall be served and  
7 filed within fourteen (14) days (plus three (3) days if served by  
8 mail) after service of the objections. The Court will then review  
9 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).  
10 The parties are advised that failure to file objections within the  
11 specified time may waive the right to appeal the District Court's  
12 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: November 13, 2013

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE