IN THE UNITED THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION



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| JALAL HMAIDAN, *et al.*, Petitioners, vs. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*, Respondents. | JUDGE JAMES B. ZAGEL<br>No. 02 C 5097 |



**NOTICE OF FILING**

To: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on this 10th day of September, 2002, we filed **PETITIONERS AMENDED PETITION FOR A WRIT OF HABEAS CORPUS, BOTH INDIVIDUALLY AND ON BEHALF OF A CLASS, AND AMENDED CLASS ACTION COMPLAINT**, in the United States District for the Northern District of Illinois, Eastern Division, copies of which are attached and served upon you.



Respectfully submitted, JALAL HMAIDAN, MURAD AL-HNITIN, MOHAMMED AIDOUNI, MAITHAM ALZEHRANI, NHAT TRAN, KEOVONGSACK PONGPHRACHANXAY AND DEN SON

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## CERTIFICATE OF SERVICE

I, Jeffrey A. Soble, an attorney, certify that I served a copy of **PETITIONERS AMENDED PETITION FOR A WRIT OF HABEAS CORPUS, BOTH INDIVIDUALLY AND ON BEHALF OF A CLASS, AND AMENDED CLASS ACTION COMPLAINT**, via Hand Delivery to:

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on September 10, 2002, before the hour of 5:00 p.m.

Jeffrey A. Soble

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| JALAL HMAIDAN, MOHAMMED AIDOUNI, MAITHAM ALZEHRANI, KEOVONGSACK PONGPHRACHANXAY AND DEN SON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,<br><br>Petitioners,<br><br>vs.<br><br>JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, BRIAN PERRYMAN, AS CHICAGO DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,<br><br>Respondents. | ) | JUDGE JAMES B. ZAGEL<br><br>No. 02 C 5097<br><br>DOCKETED<br>SEP 12 2002 |

FILED
SEP 10 2002
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

**PETITIONERS AMENDED PETITION FOR A WRIT OF HABEAS CORPUS, BOTH INDIVIDUALLY AND ON BEHALF OF A CLASS, AND AMENDED CLASS ACTION COMPLAINT**

Petitioners, Jalal Hmaidan, Mohammed Aidouni, Maitham Alzehrani, Keovongsack Pongphrachanxay and Den Son (collectively hereinafter referred to as "Petitioners" or "Plaintiffs"), by their attorneys, and for their Amended Petition for a Writ of Habeas Corpus, Both Individually and on Behalf of a Class of Individuals Similarly Situated, and Amended Class Action Complaint against Respondents, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice (collectively

hereinafter referred to as the "Government", "Respondents" or "Defendants"), state as follows:

## STATEMENT OF THE CASE

1. This action is brought by the Petitioners individually and also on behalf of a class of individuals similarly situated. Pursuant to 28 U.S.C. § 2241 *et seq.*, the Petitioners individually petition this Court for a Writ of Habeas Corpus because they are currently being held in contravention of the United States Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491 (2001).

2. Pursuant to 28 U.S.C. § 2241 *et seq.*, the Petitioners, on behalf of themselves and a class of all others similarly situated, petition this Court for a Writ of Habeas Corpus because they are currently being held pursuant to rules and regulations of the INS that violate the Petitioners Substantive and Procedural Due Process granted in the Fifth Amendment. U.S. CONST. amend. V ("No person shall...be deprived of life, liberty, or property without due process of law...")

3. Additionally, the Petitioners seek declaratory and injunctive relief, on behalf of themselves and a class of all others similarly situated, to rectify the unconstitutional rules and regulations under which the Immigration and Naturalization Service (the "INS") reviews the detention of individuals subject to final orders of removal. The INS' rules and regulations violate both the substantive and procedural due process rights of the class members, both as written and as applied.

4. Finally, the INS' rules and regulations also violate the Administrative Procedures Act, because, among other things, the INS' action are arbitrary, capricious, and not in accordance with the law. 5 U.S.C. §701, *et seq.*

5. The Petitioners are detained by the INS. The INS ordered them removed from the United States; but the INS is unable to remove them to their countries of origin. Each Petitioner has been detained for longer than six months after entry of the final order of removal. *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505 (six-month detention is presumptively reasonable).

6. The Supreme Court has held that the Attorney General and the INS have no statutory authority to detain aliens where there is no reasonable likelihood of removing them from the United States. *Zadvydas*, 533 U.S. at 689, 121 S.Ct. at 2498.

7. Subsequent to the *Zadvydas* decision, the Attorney General and INS adopted procedures that delay, ignore, or hinder the release of individuals whom the INS has no authority to detain, practically forcing detainees to bring suit in Federal Court in order to obtain their liberty. The Attorney General's procedures place decisions to continue detention in the hands of a faceless bureaucracy, without setting any deadlines, providing for any hearing, ordaining any review by an impartial adjudicator, permitting any administrative appeal of a negative decision, or instituting any other procedures designed to safeguard the liberty interests of indefinite detainees.

## JURISDICTION

8. This Court has jurisdiction pursuant to 28 U.S.C. §2241, the general grant of habeas authority to the District Courts; Art. I, §9, cl. 2 of the United States Constitution, 28 U.S.C. § 1361 (mandamus authority), 28 U.S.C. § 1331(a) (federal action), and 5 U.S.C. §§ 701-706 (Administrative Procedures Act). This Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and FED. R. CIV. P. 57 and 65. Petitioners are being indefinitely, if not permanently, detained under or by color of the authority of the United States

and such detention is not only without express authority of any law, but also in violation of the Constitution of the United States.

9. Statutory limitations on the Court's ability to grant injunctive relief, 8 U.S.C. §1252(f)(1), are inapplicable to this claim. Petitioners do not seek to restrain the "operation of the provisions of part IV" of the INA, but rather, to limit the Attorney General's ability to continue a form of detention that the Supreme Court held is not authorized by statute. Petitioners do not contest the INS' start of removal proceedings against them, the adjudication of those proceedings, or the INS' execution of removal orders against them. Petitioners contest their continued detention and the rules and regulations under which the INS operates.

**VENUE**

10. Venue lies in the United States District Court for the Northern District of Illinois, Eastern Division pursuant to 28 U.S.C. 1391(e) in that this is a civil action commenced against an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority and this is a judicial district in which the Respondent in the action resides. The Northern District of Illinois is also the District where the proceedings against Petitioners occurred and where the INS will attempt to remove petitioners should it ever attempt to do so. This district is also where the continuing decision to detain Petitioners is being made. This district is also where Petitioners' custodian, Brian Perryman, Chicago District Director of the Immigration and Naturalization Service, resides and has his place of business.

## THE PARTIES

11. Petitioner Jalal Hmaidan, is a native of Kuwait City, Kuwait, and of Palestinian descent. He is detained by and under the authority of the INS Chicago District Director, Brian Perryman, and the Attorney General of the United States.

12. Petitioner Mohammed Aidouni is a native and citizen of Algeria. He is detained by and under the authority of the INS Chicago District Director, Brian Perryman, and the Attorney General of the United States.

13. Petitioner Maitham Alzehrani, is a native and citizen of Iraq. He is detained by and under the authority of the INS Chicago District Director, Brian Perryman, and the Attorney General of the United States.

14. Petitioner Keovongsack Pongphrachanxay, is a native and citizen of Laos. He is detained by and under the authority of the INS Chicago District Director, Brian Perryman, and the Attorney General of the United States.

15. Petitioner Den Son is a native and citizen of Vietnam. He is detained by and under the authority of the INS Chicago District Director, Brian Perryman, and the Attorney General of the United States.

16. Respondent John Ashcroft is the Attorney General of the United States. He has implemented regulations that have the effect of obstructing and hindering the Supreme Court's decision in *Zadvydas*. His agents continue to detain the Petitioners; Petitioners are detained under authority of the Attorney General.

17. Respondent Brian Perryman is the Chicago District Director for the Immigration and Naturalization Service. He is the legal custodian of the Petitioners.

18. Respondent Immigration and Naturalization Service is an agency of the United States Department of Justice and is the agency responsible for enforcing the immigration laws.

19. Respondent United States Department of Justice is a department of the executive branch of the United States government and is responsible for enforcing the immigration laws.

**FACTS COMMON TO ALL COUNTS**

20. The Attorney General is authorized by statute to detain individuals ordered removed during the 90 day period after the final removal order, which is called the "removal period." 8 U.S.C. §1231(a)(1). The length of the removal period may be extended if the detainee refuses to cooperate in securing his or her travel documents. 8 U.S.C. §1231(a)(1)(C).

21. Prior to 2001, the INS interpreted 8 U.S.C. §1231(a) (a.k.a. INA § 241(a)), enacted in 1996, as permitting the indefinite detention of any immigrant whom it could not remove from the country. 8 C.F.R. §241.4(b) (1997). By regulation, the INS created a presumption of detention for individuals ordered removed on certain criminal grounds. 8 C.F.R. §241.4(a) (1997). *See*, 62 Fed. Reg. 10312, 10378 (March 6, 1997). This presumption could only be disproved by "clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk." 8 C.F.R. §241.4(a) (1997).

22. This regulation created a class of individuals known as 'lifers' who were unable to meet this standard of proof. Consequently, the INS detained these individuals until death or deportation, whichever came first. It was not uncommon for the INS to detain people for years. *See e.g. Zadvydas*, 533 U.S. at 684, 121 S.Ct. at 2496 (petitioner Zadvydas detained

since 1994; petitioner Ma detained since 1997).

23. Numerous lawsuits followed. Many detainees argued that the statute and regulations violated the Due Process Clause of the Fifth Amendment. The circuits split on the issue. *Compare, Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999) (finding Due Process not violated because deportation was not "impossible") *and Kim Ho Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000) (holding statute did not authorize detention past a "reasonable time" after 90 day removal period).

24. The Supreme Court granted certiorari to resolve the split and in rejecting the Government's argument, held that the statute does not authorize indefinite detention. *Zadvydas*, 533 U.S. at 689, 121 S.Ct. 2498 ("the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention.") The Court held that 8 U.S.C. §1231(a)(1) does not grant the Government authority to detain individuals longer than reasonably necessary to secure deportation or removal. *Id.* The Supreme Court held that a six month period of detention was presumptively reasonable. *Id.*, 533 U.S. at 701, 121 S.Ct. 2505. The Court further held that the statute does not authorize detention where there is no reasonable likelihood of removal in the foreseeable future or a compelling state interest. *Id.*, 533 U.S. at 689, 121 S.Ct. 2498.

25. The Petitioners and all class members have been detained longer than six months since the INS issued their final order and removal. The INS is unable to remove the Petitioners and all class members to their countries of origin.

26. The Attorney General publicly attacked the Supreme Court's decision. "Absent prompt action on our part, the [*Zadvydas*] decision could result in the release of thousands of dangerous criminal aliens onto the streets of America over the next several months...The result of the Supreme Court's ruling is that criminal aliens will be released from detention onto the streets of America." Attorney General Prepared Remarks, Long-term INS Detainees/Colorado Safe Neighborhoods Event, July 19, 2001, http://www.usdoj.gov/ag/speeches/2001/071901insdetaineescoloradosafe.htm. "The Supreme Court's ruling will inevitably result in anomalies in which individuals who have committed violent crimes will be released from detention simply because their country of origin refuses to live up to its obligations under international law." 66 Fed. Reg. 38433-38434 (July 24, 2001).

27. On November 14, 2001, the Respondents published post-*Zadvydas* regulations governing the continued detention of individuals ordered removed. 66 Fed. Reg. 56967 (Nov. 14, 2001), codified at 8 C.F.R. §§ 241.4, 241.13, 241.14.

28. Under these regulations, the initial determination to continue to detain an individual ordered removed is made by the INS District Office at the end of the statutory 90 day removal period. 8 U.S.C. § 1231(a)(1). For this initial determination, it is not enough to show that removal is not likely in the reasonably foreseeable future; a detainee must show all of a number of other factors, including that he or she is a "non-violent person." 8 C.F.R. § 241.4(e).

29. If release is not ordered in the initial review stage, the "Headquarters Post-order Detention Unit" ("HQPDU") conducts a second level of custody review. *See* 8 C.F.R. §241.13. Only the HQPDU can consider release under *Zadvydas* – though the custodian of given detainees remains the various District Directors. 8 C.F.R. §241.4(c)(2).

30. The HQPDU has "discretion" to wait until the expiration of the removal period before considering release. 8 C.F.R. § 241.13(d)(3). On information and belief, the HQPDU generally does not decide to release a detainee until they have been detained six months after their final order of removal.

31. Under the current procedures, there is no evidentiary hearing regarding the individual case of an individual whom the INS determines to detain due to the possibility of that individual being removed to their country of citizenship; nor is there a hearing where an individual has allegedly failed to cooperate with efforts to secure removal.

32. The current procedures permit a role for an impartial adjudicator only in cases involving "special circumstances," where the INS acknowledges that a given individual cannot be removed from the United States, but believes that release into the community should not be permitted. *See*, 8 C.F.R. § 241.13(e)(6) (2000) (providing for "special circumstances" of continued detention); 241.14(a) (2002) (providing limited jurisdiction for Immigration Judges and the Board of Immigration Appeals to exercise a review function). However, these special circumstances do not apply to the Petitioners or the class. 8 C.F.R. § 241.14(1) ("This section [241.14] does not apply to aliens who are not subject to the special review provisions under § 241.13.") Thus, no impartial adjudicator issues any determination in a case involving an individual in the class.

33. The regulations provide for no appeal, administrative or otherwise of an INS agent's determination (1) that an individual has not cooperated in securing their own return, or (2) that there is still a possibility of removal.

34. The regulations provide no timeframe within which an INS agent's determinations are to be made. At no point does an INS failure to make a determination trigger review by any other impartial or review body, or trigger release.

35. Although required by regulation to give 30 days notice to the detainee of any review by the HQPDU, 8 C.F.R. §241.4(k)(2)(i) and (ii), such notice is not meaningfully given. Indeed, it is routinely not given. Alternatively, in the rare case where such notice is given, it does not comport with the regulatory requirements.

36. The INS pattern and practice is to take in excess of six months to determine whether to release a given individual from detention.

37. The HQPDU had a pattern and practice of sending letters to detainees, stating that it was "suspending" their removal period until they could show additional efforts to secure their own removal, even where that individual has never failed to cooperate with removal efforts. The INS has now stated that it intends to abandon that practice. *See* Aff. of Michael Rozos, ¶ 5, attached hereto as Exhibit F..

38. The INS habitually misstates to detainees when it will engage in a file review of a detainee's case.

39. The HQPDU has a pattern and practice of requiring members of the Plaintiff class to make an affirmative showing of "cooperation". However, detainees have often made that same showing during the 90-day removal period and that information has already been given to the INS. The HQPDU also requires an affirmative showing of "cooperation" even when it knows that any efforts by the detainee or the INS would clearly be futile. This is common in cases where the detainee is a citizen of a country for which the Respondents know it

is impossible to obtain travel documents.

40. These procedures have prompted a flood of Petitions for a Writ of Habeas Corpus brought *pro se* by detainees and through *pro bono* counsel. On information and belief, there are currently pending more than 80 such Petitions for a Writ of Habeas Corpus pending just in the United States District Court For The Northern District Of Illinois Eastern Division.

41. Since the INS provides detainees almost no information except form letters, if that, detainees have no information with respect to the status of their requests for release. Since the class has by definition been detained at least six months – many have been detained for 12 months or longer – there is a high rate of indigence for the plaintiff class. These individual *pro se* habeas actions have not resulted in resolution of the Plaintiff class's procedural claims.

42. None of the Petitioners or class members have been granted any kind of administrative hearing in which an impartial adjudicator has determined that there is any likelihood of their being removed or deported in the foreseeable future.

43. All of the Petitioners and class members have effectuated an "entry" into the United States. An entry is defined as (1) physical presence within the United States, (2) either inspection and authorization by a government official, or actual and intentional evasion of inspection, and (3) freedom from restraint within this country. *Matter of Pierre*, 14 I&N Dec. 467 (BIA 1973).

44. The INS actions with regard to each of these cases have been arbitrary and capricious.

## EXHAUSTION

45. There is no formal administrative review of Petitioners' requests for release. Petitioners' only course of action is to seek release informally by letter(s) to the INS. Petitioners have done this. These letters ask Respondents to release Petitioners pursuant to the United States Supreme Court decision in *Zadvydas*. These attempts have not yet been successful; several were not answered until litigation was initiated.

46. The United States Supreme Court has stated that "[section] 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." *Zadvydas*, 533 U.S. at 689, 121 S.Ct. at 2498.

47. Petitioners cannot undertake any additional steps prior to judicial review because the rules and regulations of the INS provide no further review of the INS' decision to continue to detain Petitioners or class members.

48. It would also be unreasonable to expect any further exhaustion, in light of the Government's habitual failure to conduct these reviews as required by regulation. For example, Mr. Hmaidan was detained for 10 months without any decision to continue detention being made in his case (though one was required within three months); in Aidouni's and Pongphrachanxay's case, the "three month review" took place after seven months. Son has never received a "three month review," because the INS lost his file for a year.

## CLASS ALLEGATIONS

49. Pursuant to FED. R. CIV. P. 23(a) and 23(b)(1) and (b)(2), Petitioners seek relief on behalf of themselves and all other similarly situated individuals. The class consists of:

> Individuals who have "entered" the United States, other than those detained pursuant to 8 C.F.R. § 241.14 (2002), or any other regulation or law relating to terrorism or national security, who have been or will have been detained by and under the authority of the Chicago District of the INS for more than six months after the entry of an administratively final order of removal.

50. The class is so numerous that joinder of all members is impracticable. The number of individuals within the Chicago District who are detained by the INS more than six months after a final order of removal is not known with precision, and is believed to fluctuate. However, there are currently pending, on information and belief, more than 80 separate habeas actions in the Northern District of Illinois, brought by individuals who are, or claim to be, class members. In addition, Plaintiffs seek to define the class to include future class members, so that the actual number will continue to increase.

51. There are a number of common questions of law and fact, including (1) whether the procedures employed by the INS for class members are facially violative of Procedural or Substantive Due Process; (2) whether Due Process is violated as applied to the Plaintiff class; and (3) whether INS sub-regulatory agency actions, in administering these regulations are arbitrary and capricious actions violative of the Administrative Procedures Act. The rules, regulations and procedures are identical for each class member.

52. The claims of the Petitioners are typical of the class. Each named Petitioner is a non-citizen with an administratively final order of removal, who has been detained for more than six months after that order was entered. Each has been detained unreasonably and without lawful justification by the Defendants, and each has either failed to receive a timely decision whether to continue or cease detention, or received a decision which is unreasonable and incorrect. Respondents have applied their unlawful practices to each named Petitioner.

53. Petitioners know of no conflict between their interests and those of the class they seek to represent. In defending their own rights, the individual Petitioners will defend the rights of all proposed class members.

54. The individual Petitioners are adequate representatives of the class because they have been adversely affected by Respondents' statutory and constitutional violations.

55. Petitioners' attorneys from the Midwest Immigrant and Human Rights Center and Foley and Lardner are experienced attorneys who have the resources to represent the class as a whole. The Midwest Immigrant and Human Rights Center is the only agency which actively visits the jails in the Chicago District in which the INS detains individuals. Foley and Lardner, appearing here in a *pro bono* capacity, is a well-known and respected law firm with both the resources and expertise to represent Petitioners.

56. Defendants have acted on grounds generally applicable to each member of the class, insofar as they have failed to release the Petitioners despite their inability to remove them to any other country, and have applied statutorily and constitutionally inadequate procedural protections to each.

## COUNT ONE

### (PETITION FOR WRIT OF HABEAS CORPUS FOR JALAL HMAIDAN)

57. Hmaidan adopts and realleges Paragraphs 1 through 48 as if fully set forth herein.

58. This Count One is brought individually by Petitioner Hmaidan.

59. Hmaidan entered the United States in 1976 after the death of his mother. Ex. A(1). His aunt, a United States citizen, adopted him in 1978, at the age of twelve. He is of Palestinian ethnicity. He was born in Kuwait, but is not a citizen of Kuwait. He has had a Jordanian passport, but this passport does not make him a citizen of Jordan. Ex. A(2) at p. 11 and A(3) at p. 2. He is effectively stateless.

60. As Hmaidan was permitted by the Respondents to enter and to reside in the United States, he effectuated an "entry" into the United States.

61. Due to a January 1998 conviction for possession with intent to deliver, Ex. A(1), he was placed into removal proceedings. *Id.*

62. On October 5, 2000, while Hmaidan was still in state custody, an Immigration Judge ordered him removed. Ex. A(4). The Board of Immigration Appeals denied Petitioner's appeal on August 8, 2001. Ex. A(5) at p. 5. The Board's decision constitutes an administratively final order of removal.

63. Hmaidan was then released from his criminal jail sentence. Respondents have detained him since September 28, 2001.

64. Hmaidan has a mother, brother, and grandmother living in the United States, all of whom are United States Citizens or Lawful Permanent Residents. His eleven-year-old daughter is a United States Citizen. He has been living in the United States for over 25 years.

65. Hmaidan has diligently requested travel documents from both the Jordanian and Kuwaiti consulates. His counsel sent letters requesting travel documents to both consulates by certified mail on February 4, 2002. Ex. A(6) and A(7). Hmaidan followed up with handwritten letters on February 18, 2002. Ex. A(8) and A(9). Neither responded.

66. The Government has also requested travel documents on several occasions. Ex. A(17) and A(18). The Government has not requested travel documents from the consular general of Jordan since October 29, 2001. Ex. A(17). On information and belief, there has been no response.

67. On March 22, 2002, Hmaidan's Attorney requested his release from the HQPDU, with supporting documents. Ex. A(11) at pp. 1-33.

68. On April 29, 2002, Hmaidan was served, by hand-delivery, a Notice to Alien of File Review, to be conducted by the Chicago District Office on May 30, 2002. Ex. A(12). A copy was also mailed to counsel. He was invited to submit documents in support of his release, pursuant to 8 C.F.R. §241.4.

69. This local custody review was scheduled for seven months after Hmaidan's final order of removal. This is four months later than the regulations provide for such a custody review. 8 C.F.R. §241.4(h)(1).

70. Through counsel, Hmaidan replied to the INS's invitation to submit documentation in support of release. On May 3, 2002, he again submitted this documentation, as well as additional documentation. Ex. A(13) at pp. 4-8.

71. On May 8, 2002, the HQPDU replied to Hmaidan's request for release, asking Hmaidan to provide copies of correspondence and other documentation to show his good faith effort to secure his own removal. Ex. A(14). As stated above, Hmaidan had previously submitted this information.

72. The May 8, 2002, letter also informed Hmaidan that the removal period would be "held in suspense" until such period as he provides this information. *Id.* No statute, rule or regulation supports such a position by the INS.

73. On May 24, 2002, Hmaidan responded to the INS's letter of May 8, 2002, including – for the third time – proof that he was cooperating with attempts to secure his own removal. Ex. A(15).

74. Hmaidan has been in Respondents' custody for eleven months and they have been unable to effectuate his removal. Respondents are unable to remove Petitioner to Kuwait, his country of origin, or Jordan, which issued him a passport.

75. Subsequent to the filing of this lawsuit, the INS Chicago District Office decided to continue the detention of Hmaidan. Ex. A(16). The decision included no indication that the INS based its decision on a purported ability to effectuate Hmaidan's removal.

76. The HQPDU has yet to issue any decision regarding Hmaidan's detention, though he has been detained for eleven months after his administratively final removal order.

77. Under *Zadvydas*, after the end of the six month "presumptively reasonable" period of post-order detention, Zadvydas, 533 U.S. at 701, 121 S.Ct. at 2504-05, Hmaidan may obtain review of his detention if he provides the Court with "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* Once Hmaidan provides "good reason" to believe removal unlikely, the Government must then respond "with evidence sufficient to rebut that showing." *Id.* As the length of post-order detention increases, removal must be likely within a correspondingly briefer period, "for the detention to remain reasonable." *Id.*

78. Hmaidan has been detained in excess of six months since his final administrative order.

79. There is good reason to believe that removal is unlikely in the reasonably foreseeable future. Hmaidan has been detained by the INS for nearly one year without any travel documents being issued in his case. Hmaidan has not delayed the issuance of such travel documents by failing to cooperate. The difficulty or impossibility of arranging for removal is occasioned by Hmaidan's status as a stateless Palestinian. Ex. A(2) at p. 11 and A(3) at p. 2.

80. Hmaidan is not a citizen of either Jordan or Kuwait. *Id.* It is substantially unlikely that either country will accept his removal to within their borders.

81. Because Hmaidan can show that he has been detained for a significant length of time without travel documents being issued, that this is not due to his failure to cooperate, and that the explanation for this failure is his stateless status, a status unlikely to be altered in the near future, he has shown "good reason to believe" that he will not be removed in the reasonably foreseeable future.

82. Because Hmaidan has given the Court "reason to believe" that he cannot be removed in the reasonably foreseeable future, his detention is not authorized by statute unless the Government can rebut that showing.

83. A writ of habeas corpus should therefore issue, requiring the Defendants Brian Perryman and John Ashcroft, to show cause why there is a significant likelihood that the Petitioner Jalal Hmaidan can be removed in the reasonably foreseeable future, such that his detention remains reasonable and authorized by statute; and to show cause why he should not be released from detention immediately, subject to appropriate conditions.

WHEREFORE, Petitioner, Jalal Hmaidan, requests that this Court grant his Petition for a Writ of Habeas Corpus and order Respondents, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice, to release Jalal Hmaidan from his unlawful custody immediately and for such further and other relief as this Court deems just and appropriate.

## COUNT TWO

### (PETITION FOR WRIT OF HABEAS CORPUS FOR MOHAMMED AIDOUNI)

84. Aidouni adopts and realleges Paragraphs 1 through 48 as if fully set forth herein.

85. This Count Two is brought individually by Petitioner Mohammed Aidouni.

86. Aidouni entered the United States as a stowaway in 1991, fleeing from Algeria. Ex. B(1).

87. Because Aidouni successfully entered and resided in the United States, he effectuated an "entry" into the United States, under the legal meaning of that term, despite the fact that he entered as a stowaway. *Matter of A-*, 9 I&N Dec. 356, 358 (BIA 1961).

88. Some years after his entry, Aidouni was convicted of retail theft, and sentenced to incarceration for one year. Ex. B(1). The INS then began proceedings to remove Aidouni from the country with a Notice of Intent to Issue a Final Administrative Removal Order, on June 10, 1999. *Id.* The INS alleged that Aidouni had been convicted of an aggravated felony, and had entered the United States as a stowaway on or about September 26, 1991. Since

Aidouni did not contest the facts therein, the INS issued a Final Administrative Removal Order against Aidouni on August 10, 1999. Ex. B(2).

89. Because Aidouni was afraid to return to Algeria, he sought "Withholding of Removal" to Algeria, and protection under the Convention Against Torture. The INS did not act on Aidouni's case for 10 months before finally holding a hearing June 26, 2000. Ex. B(3). At the hearing, Aidouni testified before an Asylum Officer regarding his fear of returning to Algeria. The Asylum Officer determined that there was a "reasonable possibility" that Aidouni would be tortured or persecuted if returned to Algeria, and referred his case to an Immigration Judge for adjudication of his application. *Id.* at p. 5.

90. The Immigration Judge determined that Aidouni could not show that it was "more likely than not" that Aidouni would be tortured or persecuted if returned. He therefore denied Aidouni's application for Withholding of Removal or Deferral of Removal under the Convention Against Torture. Aidouni appealed the Judge's decision, to the Board of Immigration Appeals, which finally denied his claim on October 11, 2001. Ex. B(4) at p. 4. This is the final decision in Aidouni's case.

91. Aidouni has had an administratively final order of removal since August 10, 1999, and the Government has sought to remove him since that date. Ex. B(5), B(6), B(7), B(8) and B(13). Aidouni was seeking protection under the Convention Against Torture, and the Respondents were legally prevented from removing him; this definitively ceased with the final administrative order of October 11, 2001, denying that protection.

92. The INS has detained Aidouni for nearly three years since the entry of an administratively final order of removal. The INS has detained Aidouni for almost ten months since the Board's order denying relief under the Convention Against Torture removed all obstacles to his removal from the U.S.

93. The Government has been seeking travel documents for Mr. Aidouni for approximately three years, without success. Ex. B(5), B(6), B(7) and B(8). The reason for this appears to be Mr. Aidouni's lack of identity documents. Ex. B(7) and B(8).

94. The INS had previously told Aidouni that a file review would be conducted on January 28, 2000. Ex. B(9). On February 4, 2000, Perryman informed Aidouni that "the issuance of a travel document is still pending." Ex. B(10). On November 6, 2001, the INS again informed Aidouni that it would conduct a file review in his case on December 6, 2001. Ex. B(11).

95. Over five months later, on May 16, 2002, the INS finally decided to continue to detain Aidouni, stating "[y]ou were convicted of robbery and possession of a weapon." Ex. B(12)

96. Under *Zadvydas*, after the end of the six month "presumptively reasonable" period of post-order detention, *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2504-05, Aidouni may obtain review of his detention if he provides the Court with "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* Once Aidouni provides "good reason" to believe removal unlikely, the Government must then respond "with evidence sufficient to rebut that showing." *Id.* As the length of post-order detention increases, removal must be likely within a correspondingly briefer period, "for the detention to remain reasonable." *Id.*

97. Aidouni has been detained in excess of six months since his final administrative order.

98. There is not a significant likelihood that Aidouni can be removed from the United States in the reasonably foreseeable future.

99. Although it has been more than ten months since the final administrative decision in his case, the INS HQPDU has yet to correspond with Aidouni or to issue any decision regarding his detention.

100. Aidouni has cooperated and is cooperating with efforts to secure his removal from the country. His removal is difficult because he lacks identity documents, and cannot prove his Algerian nationality to the satisfaction of that country's embassy.

101. There is good reason to believe that removal is unlikely in the reasonably foreseeable future. Aidouni has been detained by the INS for three years without any travel documents being issued in his case, despite the government's efforts over the past three years. Ex. B(5), B(6), B(7), B(8) and B(13). While Aidouni is a citizen of Algeria, that country has shown itself unlikely to accept his return.

102. Given the Government's inability to obtain travel documents for the past three years, and the reason for the Algerian government's unwillingness to issue travel documents, it is unlikely that the situation will change in the reasonably foreseeable future. Moreover, in light of the length of time since his order of removal, and the length of time that the Government has been seeking travel documents, his removal would have to be imminent for his continued detention to remain reasonable. Since his removal is not imminent, Aidouni has shown "good reason to believe" that he will not be removed in the reasonably foreseeable future.

103. Because Aidouni has given the Court "reason to believe" that he cannot be removed in the reasonably foreseeable future, his detention is not authorized by statute unless the Government can rebut that showing.

104. A writ of habeas corpus should therefore issue, requiring the Defendants Brian Perryman and John Ashcroft, to show cause why there is a significant likelihood that the Petitioner Mohammed Aidouni can be removed in the reasonably foreseeable future, such that his detention remains reasonable and authorized by statute; and to show cause why he should not be released from detention immediately, subject to appropriate conditions.

WHEREFORE, Petitioner, Mohammed Aidouni, requests that this Court grant his Petition for a Writ of Habeas Corpus and order Respondents, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice, to release Mohammed Aidouni from his unlawful custody immediately and for such further and other relief as this Court deems just and appropriate.

## COUNT THREE

### (PETITION FOR WRIT OF HABEAS CORPUS FOR MAITHAM ALZEHRANI)

105. Alzehrani adopts and realleges Paragraphs 1 through 48 as if fully set forth herein.

106. This Count Three is brought individually by Petitioner Maitham Alzehrani.

107. Alzehrani entered the United States on August 18, 1993, as a refugee, fleeing persecution in Iraq. Ex. C(1). He thereafter became a Lawful Permanent Resident, on June 16, 1996. *Id.*

108. Because Alzehrani was permitted by the Respondents to enter and to reside in the United States, he effectuated a legal "entry" into the United States.

109. On December 15, 2000, the Respondents issued a Notice to Appear against Petitioner. Ex. C(1). The Respondents alleged that Alzehrani was removable for committing crimes involving moral turpitude, for committing an aggravated felony, and under 8 U.S.C. §1227(a)(2)(E)(i) for a crime involving domestic violence. The bases for these charges were convictions for unlawful restraint and domestic battery in 1997, and criminal sexual assault in 1998. *Id.* Pursuant to these charges, Alzehrani was ordered removed on August 20, 2001. Ex. C(2). He did not appeal and the order thus became a final administrative order of removal.

110. Alzehrani has been detained by the Respondents since April 13, 2001. At this point, the INS has detained him for fourteen months, more than a year of which is subsequent to the entry of the order of removal against him.

111. On October 3, 2001, shortly after the Supreme Court's *Zadvydas* decision, Respondents issued a decision to continue to detain Alzehrani. Ex. C(3). The INS said that it was continuing to detain him because (1) he hadn't presented clear plans on where to live and how to support himself once released, (2) he had displayed an "escalating pattern of violence," and (3) he had not demonstrated that he is "no longer a threat to society." *Id.*

112. The Government's own findings at the time of the October 2001 decision to continue detention were that it was "extremely unlikely" that travel documents could be obtained for Mr. Alzehrani. Ex. C(4) at pp. 1 and 5, C(5) and C(6).

113. On May 2, 2002, the HQPDU issued a decision to continue to detention of Alzehrani. This time, the INS HQPDU denied release because "[t]he INS has had some success in securing travel documents for Iraqi nationals. A request for a travel document was sent out to the Iraqi Interest Section on December 14, 2002 [sic]. It is currently pending." Ex. C(7).

114. On May 10, 2002, Alzehrani, through counsel, renewed his request for release under *Zadvydas* with the HQPDU with supporting documentation. Ex. C(8) at pp. 1-9.

115. On June 6, 2002, the HQPDU responded by informing Alzehrani that it was holding his removal period "in suspense" pending submission – again – of evidence that he was cooperating in securing his own deportation. Ex. C(9) and C(10).

116. Alzehrani has cooperated, and is willing to cooperate with efforts to secure his removal. Ex. C(10). Through counsel, Alzehrani has contacted the Iraqi Interests Section, but without success or response. Ex. C(11).

117. Respondents are unable to remove Alzehrani to his country of origin, Iraq. Ex. C(12) and C(13) at pp. 2, 6 and 9. The United States does not have diplomatic relations with Iraq; removing an Iraqi is as difficult as removing an individual from Cambodia, Cuba, Vietnam and other countries. Ex. C(13) at pp. 2, 6 and 9. Respondents have been unable to remove Alzehrani for the past year, and will be unable remove him to Iraq for the foreseeable future.

118. In the past year, the INS sent a letter to the Iraqi Interest Section on August 22, 2001, over one year ago. The letter requested the Iraqi government's "prompt attention," explaining that he was detained at government expense. Ex. C(5). The INS has failed to repeat its request to the Iraqi Interest Section.

119. It appears that the Government also requested a travel document from the Algerian government, though this would appear to be in error. Ex. C(6).

120. As explained above, Alzehrani, has cooperated and is cooperating with efforts to secure his removal from the country. His removal is difficult, for obvious reasons; his native country of Iraq has extremely hostile relations with the United States, and generally refuses to accept repatriated individuals.

121. Because Alzehrani cannot be removed from the United States in the reasonably foreseeable future, his detention is not authorized by statute.

122. Under *Zadvydas*, after the end of the six month "presumptively reasonable" period of post-order detention, *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2504-05, Alzehrani may obtain review of his detention if he provides the Court with "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* Once Alzehrani provides "good reason" to believe removal unlikely, the Government must then respond "with evidence sufficient to rebut that showing." *Id.* As the length of post-order detention increases, removal must be likely within a correspondingly briefer period, "for the detention to remain reasonable." *Id.*

123. Alzehrani has been detained in excess of six months since his final administrative order.

124. There is good reason to believe that removal is unlikely in the reasonably foreseeable future. Alzehrani has been detained by the INS for over a year without any travel documents being issued in his case. Alzehrani has not delayed the issuance of such travel documents by failing to cooperate. Indeed, through counsel, Alzehrani has contacted the Iraqi Interests Section, but has not received a response. The difficulty or impossibility of arranging for removal thus is occasioned by Alzehrani's country of origin, Iraq, not by his lack of cooperation. Ex. C(4), C(12) and C(13) at pp. 2, 6 and 9.

125. It is substantially unlikely that Iraq will accept his removal in the reasonably foreseeable future. Indeed, the INS itself concluded that it is "extremely unlikely" that travel documents can be obtained for Mr. Alzehrani.

126. Because Alzehrani can show that he has been detained for a significant length of time without travel documents being issued, that this is not due to his failure to cooperate, and that the explanation for this failure is due to the Iraqi government's poor relations with the United States, a fact unlikely to be altered in the near future, he has shown "good reason to believe" that he will not be removed in the reasonably foreseeable future.

127. Because Alzehrani has given the Court "reason to believe" that he cannot be removed in the reasonably foreseeable future, his detention is not authorized by statute unless the Government can rebut that showing.

128. A writ of habeas corpus should therefore issue, requiring the Defendants Brian Perryman and John Ashcroft, to show cause why there is a significant likelihood that the Petitioner Jalal Alzehrani can be removed in the reasonably foreseeable future, such that his detention remains reasonable and authorized by statute; and to show cause why he should not be

released from detention immediately, subject to appropriate conditions.

WHEREFORE, Petitioner, Maitham Alzehrani, requests that this Court grant his Petition for a Writ of Habeas Corpus and order Respondents, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice, to release Maitham Alzehrani from his unlawful custody immediately and for such further and other relief as this Court deems just and appropriate.

## COUNT FOUR

### (PETITION FOR WRIT OF HABEAS CORPUS FOR KEOVONGSACK PONGPHRACHANXAY)

129. Pongphrachanxay adopts and realleges Paragraphs 1 through 48 as if fully set forth herein.

130. This Count Four is brought individually by Petitioner Pongphrachanxay.

131. Pongphrachanxay entered the United States as an immigrant on August 29, 1981. Ex. D(1). He was born in Laos, but entered the United States through Thailand, where his family and he were living in a refugee camp. Ex. D(2).

132. The INS began removal proceedings against Pongphrachanxay on November 9, 2001, because of Pongphrachanxay's 1997 conviction for Armed Robbery and his 1995 conviction for Robbery.

133. Pongphrachanxay did not contest the charges of removability against him, and was ordered removed on December 20, 2001. Ex. D(3). This decision was not appealed, and became an administratively final order of removal.

134. Because Laos does not accept deportees back into Laos, Pongphrachanxay cannot be physically removed to Laos.

135. On March 18, 2002, the Chicago District of the INS notified Pongphrachanxay that it would review his custody on April 18, 2002. Ex. D(4). It invited him to submit documents and other evidence, showing why he is not a danger to the community, and should be released.

136. Pongphrachanxay's request was apparently denied, though he was not notified of this fact.

137. The next communication received by Pongphrachanxay was a letter from the HQPDU, informing him that his removal period was being "suspended" until he submitted evidence that he was cooperating in securing his own removal to Laos. Ex. D(5). This letter was sent on May 21, 2002.

138. As the INS knows, it is impossible for individuals to be removed to Laos. Any efforts that Pongphrachanxay would make would clearly be futile.

139. Subsequent to this suit being filed, the HQPDU informed Pongphrachanxay by mail that it had concluded that his removal "does not appear reasonably foreseeable at this time." Ex. D(6).

140. However, in the same "Release Notification" letter, the INS stated that Pongphrachanxay would be released only after paying a bond of $20,000. Ex. D(6).

141. Pongphrachanxay cannot pay the bond imposed, and the INS apparently will not release him without payment of that bond. This results in his continued detention.

142. Pongphrachanxay has not been informed of the manner in which the bond amount was arrived at, nor of any means of appealing the bond. The bond was set without notice or reason. There is no reason, compelling or otherwise, for the INS to require a bond. Moreover, the INS has not stated if, when or how Pongphrachanxay may redeem the bond.

143. Pongphrachanxay has cooperated and is cooperating with efforts to secure his removal from the country. His removal is impossible because Laos refuses to accept repatriated individuals.

144. Under *Zadvydas*, after the end of the six month "presumptively reasonable" period of post-order detention, *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2504-05, Pongphrachanxay may obtain review of his detention if he provides the Court with "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* Once Pongphrachanxay provides "good reason" to believe removal unlikely, the Government must then respond "with evidence sufficient to rebut that showing." *Id.* As the length of post-order detention increases, removal must be likely within a correspondingly briefer period, "for the detention to remain reasonable." *Id.*

145. Pongphrachanxay has been detained in excess of six months since his final administrative order.

146. There is good reason to believe that removal is unlikely in the reasonably foreseeable future. Indeed, the INS has already determined that Pongphrachanxay cannot be removed in the reasonably foreseeable future. Ex. D(6).

147. A writ of habeas corpus should therefore issue, requiring the Defendants Brian Perryman and John Ashcroft, to show cause there is a significant likelihood that the Petitioner Keovongsack Pongphrachanxay can be removed in the reasonably foreseeable future, such that his detention remains reasonable and authorized by statute; and to show cause why he should not be released from detention immediately, subject to appropriate conditions.

148. Once the Government concluded, in litigation, that Pongphrachanxay could not be removed in the reasonably foreseeable future, the Government proceeded to order him released on payment of a bond of $20,000.

149. The Government's current position can find support in neither the case law, nor the statute, nor the regulations.

150. In *Shrode v. Rowoldt*, 213 F.2d 810 (8th Cir. 1954), the United States Court of Appeals for the Eighth Circuit addressed a similar statutory question. In *Shrode*, a post-final removal order alien, who apparently could not be deported during what was then a six-month removal period (as compared to 8 U.S.C. §1231(a)(1)'s present ninety-day removal period), sought to enjoin the INS from requiring him to post a bond to secure his release, and sought to have the bond posted returned/invalidated. The court in *Shrode* noted that under the statutory structure in place at that time, the Attorney General had six months to effect an order of deportation, and during that period could require an alien to post bond to secure his release. However, *at the end of that six months*, the alien was subject to supervision upon release, but Congress did not authorize bond. *Id.* at 814 The court therefore held that the Attorney General could not require an alien to post bond as a condition of release following expiration of the six-month removal period. *Id.*

151. The Board of Immigration Appeals concurred with the Eight Circuit's analysis above in *Matter of Toscano-Rivas*, 14 I&N Dec. 523, 527 (B.I.A.1972), *on reconsideration*, 14 I&N Dec. 538, 539-41 (B.I.A.1973), *aff'd on other grounds*, 14 I&N Dec. 550, 555 (A.G.1974) (Toscano-Rivas). The Board considered the INS's bond authority pursuant to then § 242(d) of the Immigration and Nationality Act, 8 U.S.C. § 1252(d) (1952) (as compared to the current 8 U.S.C. § 1231(a)(3)), holding that statutory authority to require bond as a condition of release ends upon expiration of the six-month removal period.[1] *Id.* at 541. The Board likened a district director's exercise of the power to prescribe bond, as delegated by the Attorney General, to simultaneous application of the detention power conveyed by statute. Accordingly, the Board concluded that "[w]here the power to detain ceases by time limitation, as is the case under section 242(d) of the Act, the power to require bond as a condition of enlargement ceases, too, *Shrode v. Rowoldt*, 213 F.2d 810 (C.A. 8, 1954)." *Id.*

152. Finally, while the *Zadvydas* Court permitted supervision under conditions, such that "the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions," *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2504, the Court's analysis implies that the individual would be released and then returned to detention if the conditions were violated. An individual could not be "returned" to custody if never released.

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[1] Former INA § 242(d), 8 U.S.C. § 1252(d) (1952), is similar to 8 U.S.C. § 1231(a)(3). Section 1252(d) allowed the Attorney General to require an alien: "(1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case."

153. The statute is likewise unhelpful to the Government. Section 1231(a) of Title 8 of the United States Code deals with detention of aliens ordered removed, and states, in relevant part:

> (3) Supervision after 90-day period
>
> If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien –
>
> (A) to appear before an immigration judge periodically for identification;
>
> (B) to submit, if necessary, to a medical and physical examination at the expense of the United States government;
>
> (C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate;
>
> (D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

Section 1231(a)(6) provides that an alien who has been ordered removed due to a conviction for an aggravated felony "may be detained beyond the removal period and, if released [from INS custody], shall be subject to the terms of supervision in paragraph (3) [above]." Thus, according to the plain language of the statute, and consistent with the Supreme Court's holding in *Zadvydas*, a non-removable alien is subject to supervision under the conditions set out in §1231(a)(3). *See also Ma*, 257 F.3d 1095 (9th Cir. 2001) (enunciating supervisory conditions permissible under § 1231(a)(3)). Those conditions say nothing about giving the Attorney General or the INS the authority to impose a bond before releasing a non-removable alien. Cf. 8 U.S.C. §§ 1231(c)(2)(C)(i)-(iii) (provides for bond and conditions of release in separate subsections for alien who has a final order of deportation, but receives a stay of removal).

154. The absence of any bond provision in the statute is strongly indicative that requiring a bond is not permitted. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Congress's failure to explicitly permit the use of bond in 8 U.S.C. § 1231(a)(3) is strong evidence that it simply chose not to permit the use of bond in that provision. *Cf.* 8 U.S.C. § 1226(a)(2)(A) (permitting INS to set bond as a condition of release for aliens in deportation proceedings, pending final order of removal); 8 U.S.C. §1231(c)(2)(C) (bond authorized as a condition of release for aliens who received a final order of deportation, but then received a stay of removal).

155. Moreover, the power to impose a bond is the power to detain indefinitely. This was the conclusion of the *Shrode* Court: "When a party is required to post bail his sureties in effect become his jailers and the power to require bail connotes the power to imprison in the absence of such bail." *Id.*; *see also United States ex rel. Heikkinen v. Gordon*, 190 F.2d 16 (8th Cir. 1951) ("The rules and rights of the parties in criminal and civil bail are similar in many respects. The accused or principle in either case is released from custody of the law and placed *in the custody of keepers* of his own selection..." (emphasis added)). Thus, the *Shrode* Court concluded that upon expiration of the six-month removal period, "[the Attorney General] may not detain, he may not imprison, and hence, it is illogical to hold that he may nevertheless require the posting of bail." *Shrode*, 213 F.2d at 814.

156. The bond imposed in the case of Mr. Pongphrachanxay goes beyond the statutory and regulatory authorization, is unreasonable, and constitutes the continued detention of Mr. Pongphrachanxay by other means.

WHEREFORE, Petitioner, Keovongsack Pongphrachanxay, requests that this Court grant his Petition for a Writ of Habeas Corpus and order Respondents, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice, to release Keovongsack Pongphrachanxay from his unlawful custody immediately and for such further and other relief as this Court deems just and appropriate.

## COUNT FIVE

### (PETITION FOR WRIT OF HABEAS CORPUS FOR DEN SON)

157. Son adopts and realleges Paragraphs 1 through 48 as if fully set forth herein.

158. This Count Five is brought individually by Petitioner Son.

159. Son entered the United States as an immigrant on May 23, 1991. Ex. E(1). He came to the United States to look for his father, whom he believes to have been a soldier in Vietnam. Son is a native and citizen of Vietnam, but is Amerasian by ethnicity.

160. Because Son was permitted by the Respondents to enter and to reside in the United States, he effectuated a legal "entry" into the United States.

161. In January 1992, Son was convicted of home invasion and was sentenced to a prison. Ex. E(1) at p. 1.

162. While incarcerated, the INS began deportation proceedings against Son. *Id.* He was ordered deported on February 22, 1995, and the Board of Immigration Appeals dismissed his appeal on August 3, 1995. This is the final administrative removal order.

163. Son was then released from his state sentence and transferred to INS custody on June 8, 2001. He has been in INS custody since – 15 months.

164. On September 22, 2001, he was sent a notice, by "institutional mail," that his 90 day file review would be conducted that very day. Ex. E(2). INS Officer Anthony Figueroa signed a certificate of service to that effect on September 22, 2001. Consequently, the INS did not give Son notice of his 90 day file review.

165. The INS has detained Son for over 15 months, all of which has been after the entry of the final order of deportation.

166. On information and belief, the INS misplaced Son's file.

167. Son has cooperated, and is willing to cooperate with efforts to secure his removal. Ex. E(3). Through counsel, Son requested travel documents from his Embassy in Vietnam. Ex. E(3).

168. Son has sought release both from the Chicago INS Office and from the HQPDU. Ex. E(4) and E(5).

169. There is no reasonable likelihood that the Son can be removed from the United States in the reasonably foreseeable future as the United States has no repatriation agreement with Vietnam. Ex. C(13) at p. 10.

170. Subsequent to this suit being filed, the HQPDU informed Son that it had concluded that his removal "does not appear reasonably foreseeable at this time." Ex. E(7).

171. However, in the same "Release Notification" letter, the INS stated that Son would be released only after paying a bond of $25,000. *Id.*

172. Son has not been able to pay the bond imposed, and the INS apparently will not release him without payment of that bond. This results in his continued detention.

173. Son has not been informed of the manner in which the bond amount was arrived at, nor of any means of appealing this bond amount. The bond was set without notice or reason. There is no reason, compelling or otherwise, for the INS to require a bond. Moreover, the INS has not stated if, when or how Son may redeem the bond.

174. Because Den Son cannot be removed from the United States in the reasonably foreseeable future, his detention is not authorized by statute. A writ of habeas corpus should therefore issue, requiring the Defendants Brian Perryman and John Ashcroft, to show cause why the Petitioner Den Son's detention is authorized by statute, and why he should not be released from detention immediately, subject to appropriate conditions.

175. Under *Zadvydas*, after the end of the six month "presumptively reasonable" period of post-order detention, *Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2504-05, Son may obtain review of his detention if he provides the Court with "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* Once Son provides "good reason" to believe removal unlikely, the Government must then respond "with evidence sufficient to rebut that showing." *Id.* As the length of post-order detention increases, removal must be likely within a correspondingly briefer period, "for the detention to remain reasonable." *Id.*

176. Son has been detained in excess of six months since his final administrative order.

177. There is good reason to believe that removal is unlikely in the reasonably foreseeable future. Indeed, the INS has already determined that Son cannot be removed in the reasonably foreseeable future. Ex. E(6).

178. A writ of habeas corpus should therefore issue, requiring the Defendants Brian Perryman and John Ashcroft, to show cause there is a significant likelihood that the Petitioner Son can be removed in the reasonably foreseeable future, such that his detention remains reasonable and authorized by statute; and to show cause why he should not be released from detention immediately, subject to appropriate conditions.

179. Once the Government concluded, in litigation, that Son could not be removed in the reasonably foreseeable future (a conclusion barely disputable), the Government proceeded to order him released on payment of a bond of $25,000.

180. The Government's current position can find support in neither the case law, nor the statute, nor the regulations.

181. In *Shrode v. Rowoldt*, 213 F.2d 810 (8th Cir. 1954), the United States Court of Appeals for the Eighth Circuit addressed a similar statutory question. In *Shrode*, a post-final removal order alien, who apparently could not be deported during what was then a six-month removal period (as compared to 8 U.S.C. §1231(a)(1)'s present ninety-day removal period), sought to enjoin the INS from requiring him to post a bond to secure his release, and sought to have the bond posted returned/invalidated. The court in *Shrode* noted that under the statutory structure in place at that time, the Attorney General had six months to effect an order of

deportation, and during that period could require an alien to post bond to secure his release. However, at the end of that six months, the alien was subject to supervision upon release, but Congress did not authorize bond. *Id.* at 814 The court therefore held that the Attorney General could not require an alien to post bond as a condition of release following expiration of the six-month removal period. *Id.*

182. The Board of Immigration Appeals concurred with the Eight Circuit's analysis above in *Matter of Toscano-Rivas*, 14 I&N Dec. 523, 527 (B.I.A.1972), *on reconsideration*, 14 I&N Dec. 538, 539-41 (B.I.A.1973), *aff'd on other grounds*, 14 I&N Dec. 550, 555 (A.G.1974) (Toscano-Rivas). The Board considered the INS's bond authority pursuant to then § 242(d) of the Immigration and Nationality Act, 8 U.S.C. § 1252(d) (1952) (as compared to the current 8 U.S.C. § 1231(a)(3)), holding that statutory authority to require bond as a condition of release ends upon expiration of the six-month removal period.[2] *Id.* at 541. The Board likened a district director's exercise of the power to prescribe bond, as delegated by the Attorney General, to simultaneous application of the detention power conveyed by statute. Accordingly, the Board concluded that "[w]here the power to detain ceases by time limitation, as is the case under section 242(d) of the Act, the power to require bond as a condition of enlargement ceases, too, *Shrode v. Rowoldt*, 213 F.2d 810 (C.A. 8, 1954)." *Id.*

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[2] Former INA § 242(d), 8 U.S.C. § 1252(d) (1952), is similar to 8 U.S.C. § 1231(a)(3). Section 1252(d) allowed the Attorney General to require an alien: "(1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case."

183. Finally, while the *Zadvydas* Court permitted supervision under conditions, such that "the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions," *Zadvydas, 533 U.S.* at 701, 121 S.Ct. at 2504, the Court's analysis implies that the individual would be released and then returned to detention if the conditions were violated. An individual could not be "returned" to custody if never released.

184. The statute is likewise unhelpful to the Government. Section 1231(a) of Title 8 of the United States Code deals with detention of aliens ordered removed, and states, in relevant part:

> (3) Supervision after 90-day period
>
> If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien –
>
> (A) to appear before an immigration judge periodically for identification;
>
> (B) to submit, if necessary, to a medical and physical examination at the expense of the United States government;
>
> (C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate;
>
> (D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

Section 1231(a)(6) provides that an alien who has been ordered removed due to a conviction for an aggravated felony "may be detained beyond the removal period and, if released [from INS custody], shall be subject to the terms of supervision in paragraph (3) [above]." Thus, according

to the plain language of the statute, and consistent with the Supreme Court's holding in *Zadvydas*, a non-removable alien is subject to supervision under the conditions set out in §1231(a)(3). *See also Ma*, 257 F.3d 1095 (9th Cir. 2000) (enunciating supervisory conditions permissible under § 1231(a)(3)). Those conditions say nothing about giving the Attorney General or the INS the authority to impose a bond before releasing a non-removable alien. Cf. 8 U.S.C. §§ 1231(c)(2)(C)(i)-(iii) (provides for bond and conditions of release in separate subsections for alien who has a final order of deportation, but receives a stay of removal).

185. The absence of any bond provision in the statute is strongly indicative that requiring a bond is not permitted. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, 107 S.Ct. 1207, 1212 (1987). Congress's failure to explicitly permit the use of bond in 8 U.S.C. § 1231(a)(3) is strong evidence that it simply chose not to permit the use of bond in that provision. Cf. 8 U.S.C. § 1226(a)(2)(A) (permitting INS to set bond as a condition of release for aliens in deportation proceedings, pending final order of removal); 8 U.S.C. §1231(c)(2)(C) (bond authorized as a condition of release for aliens who received a final order of deportation, but then received a stay of removal).

186. Moreover, the power to impose a bond is the power to detain indefinitely. This was the conclusion of the *Shrode* Court: "When a party is required to post bail his sureties in effect become his jailers and the power to require bail connotes the power to imprison in the absence of such bail." *Id.*; *see also United States ex rel. Heikkinen v. Gordon*, 190 F.2d 16 (8th Cir. 1951) ("The rules and rights of the parties in criminal and civil bail are similar in many

respects. The accused or principle in either case is released from custody of the law and placed *in the custody of keepers* of his own selection..." (emphasis added)). Thus, the *Shrode* Court concluded that upon expiration of the six-month removal period, "[the Attorney General] may not detain, he may not imprison, and hence, it is illogical to hold that he may nevertheless require the posting of bail." *Shrode*, 213 F.2d at 814.

187. The bond imposed in the case of Mr. Son goes beyond the statutory and regulatory authorization, is unreasonable, and constitutes the continued detention of Mr. Son by other means.

WHEREFORE, Petitioner, Den Son, requests that this Court grant his Petition for a Writ of Habeas Corpus and order Respondents, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice, to release Den Son from his unlawful custody immediately and for such further and other relief as this Court deems just and appropriate.

## COUNT SIX

### (PETITION FOR WRIT OF HABEAS CORPUS ON BEHALF OF PETITIONERS AND A CLASS OF ALL OTHERS SIMILARLY SITUATED – VIOLATION OF DUE PROCESS RIGHTS (CLASS ACTION))

188. Petitioners adopt and reallege Paragraphs 1 through 187 as though fully set forth herein.

189. The INS' rules and regulations as written violate the class members' substantive and procedural Due Process rights.

190. The regulatory scheme promulgated by the Government at 8 C.F.R. §§241.4, 241.5, 241.13, and 241.14, as described in detail above in paragraphs 26-38, permits the continued detention of individuals when there is no substantial likelihood that they can be removed or deported from the United States in the reasonably foreseeable future.

191. This regulatory scheme provides inadequate procedural safeguards to prevent individuals from being wrongfully detained past a point that would be reasonable and legal. Such safeguards might include review by an independent fact finder, an enforceable timeframe for decision making, or appellate review at the administrative level.

192. This regulatory scheme improperly shifts the burden of proof onto detainees to disprove a negative by requiring detainees to affirmatively show their cooperation with the removal process. While the Supreme Court requires (in the habeas context) an individual to offer some showing that they are unlikely to be removed in the reasonably foreseeable future, this does not justify requiring unnecessary and burdensome administrative acts.

193. The regulatory scheme promulgated by the Government at 8 C.F.R. §§241.4, 241.5, 241.13, and 241.14, as described above in paragraphs 26-38, improperly fails to take into account the *Zadvydas* Court's ruling that "as the period of post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Zadvydas*, 533 U.S. at 701, 112 S.Ct. at 2505.

194. The regulatory scheme promulgated by the Government at 8 C.F.R. §§241.4, 241.5, 241.13, and 241.14, as described above in paragraphs 27-38, improperly fails to account for the *Zadvydas* factors during the INS's initial determination to continue detention, which is supposed to take place at the 90 days after the final order of removal. 8 C.F.R.

§241.4(e), (f), (h). Particularly where the initial review takes place after an individual has been detained for six months since their order of removal, it is improper that the regulations require continued detention of individuals who must be released under *Zadvydas,* solely because they cannot satisfy the other requirements of 8 C.F.R. §241.4(e).

195. The consistent and foreseeable detention of individuals not authorized by statute to be detained is -- even if not intended by the framers of these regulations – a clear and unavoidable consequence of their structure.

196. Where the government provides itself with no set time frame within which to decide whether to release individuals, and when such time frame may extend into months or years, such detention may fairly be said to be indefinite.

197. The above factors, taken together, create a pattern whereby individuals are consistently and regularly detained for periods of time after the end of the "presumptively reasonable" six month period after entry of a removal order, even where there is clearly no possibility of removal from the United States. This additional, unnecessary detention is not authorized by statute.

198. It is clear that non-citizens are protected by the Due Process clause. *Yamataya v. Fisher*, 189 U.S. 86, 23 S.Ct. 611 (1903), *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 (1987). It is just as clear that lawful permanent residents have an even stronger claims to Constitutional protections. *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S.Ct. 321 (1982); *Kwang Hai Chew v. Colding*, 344 U.S. 590, 73 S.Ct. 472 (1953). Due Process includes both procedural and substantive Due Process.

A. Procedural Due Process.

199. Procedural due process requires a person to be allowed a hearing of some kind. *Mathews v. Eldridge*, 424 U.S. 319, 332-333, 96 S.Ct. 893, 901-902 (1976). The process due depends on three factors:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* 424 U.S. at 335, 96 S.Ct. at 903.

200. The private interest affected in this case is liberty. This interest is the personal, physical liberty of individuals who have entered and formed ties with the community of the United States. There can be no more important interest of a person than liberty.

201. There is a significant risk of the erroneous deprivation of rights in this case, particularly as delay in release implicates a continuing deprivation of rights.

202. The procedures adopted by regulation do not incorporate safeguards to ensure that erroneous deprivation does not occur; indeed, these regulations practically assure that erroneous deprivation will occur. There would be some cost associated with safeguarding detainees' liberty interests, but it would be fairly minimal, as the Immigration Court infrastructure already exists and is capable of weighing these matters.

203. Considered as a whole, the risk of deprivation is so great, and the procedures here so absent in any concern for that risk, that these procedures are constitutionally insufficient, and violate the Procedural Due Process prong of the Fifth Amendment.

204. The imposition of a bond also violates Procedural Due Process. The private interest affected in this case is liberty. These interests are the personal, physical liberty of individuals who have entered and formed ties with the community of the United States. There can be no more important interest of a person than liberty.

205. There is a significant risk of the erroneous deprivation of rights in this case. Bond decisions are made by individual district directors, with no involvement by an immigration judge or other impartial decision maker. "This structural situation creates a powerful potential for bias against aliens in the INS's parole determinations." *St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996). "Due to political and community pressure, the INS, an executive agency, has every incentive[3] to continue to detain aliens with aggravated felony convictions, even though they have served their sentences, on the suspicion that they may continue to pose a danger to the community." *Id. Accord, Morisath v. Smith*, 988 F. Supp. 1333, 1340 (W.D. Wash. 1997); *Ehekhor v. Aljets*, 979 F. Supp. 640, 643-44 (N.D. Ill. 1997); *Cruz-Taveras v. McElroy*, 1996 WL 455012 at *18 (S.D.N.Y.) (decrying "evidence of 'cookie cutter' parole adjudication at the INS").

206. The bond procedures do not incorporate safeguards to ensure that erroneous deprivation does not occur; indeed, these regulations practically assure that erroneous deprivation will occur. There would be some cost associated with safeguarding detainees' liberty interests, but it would be fairly minimal, as the Immigration Court infrastructure already exists and is capable of weighing these matters.

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[3] For an extensive discussion of INS incentives to continue to detain aliens in custody, rather than to consider them individually for release, *see* "Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers," 12 Harv. Hum. Rts. J. 197, 239-246 (1999). Among the incentives discussed are bureaucratic performance concerns, bureaucratic ease and individual officers' instinct for self-preservation. *Id.*

207. Moreover, the imposition of a bond violates due process by inviting arbitrary enforcement. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). There is no guidance to immigration officials regarding their decision to impose a bond condition or what amount of bond is appropriate in particular cases.

208. Considered as a whole, the risk of deprivation is so great, and the procedures here so absent in any concern for that risk, that these procedures are constitutionally insufficient, and violate the Procedural Due Process prong of the Fifth Amendment.

B. Substantive Due Process.

209. Under substantive due process, the government cannot deprive a person of his liberty "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1447 (1993). There is no relation between continued detention and the INS' goal of removing detainees from the United States. *Zadvydas*, 533 U.S. at 690, 121 S.Ct. at 2499, *quoting in part*, *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, ("...the first justification – preventing flight risk – is weak or nonexistent where removal seems a remote possibility at best...where detention's goal is no longer practically attainable, detention no longer 'bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.'")

210. The Supreme Court held in *Zadvydas* that the government interests at stake here were not compelling. The Court considered two interests asserted by the government: ensuring the alien's appearance at future proceedings, and preventing danger to the community. The first interest was held to be "weak or nonexistent" when an individual cannot be deported in

the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 690, 121 S.Ct. at 2499. The second interest, preventative detention, could only be upheld where "limited to specially dangerous individuals and subject to strong procedural protections." *Id.*, 533 U.S. at 690-691, 121 S.Ct. at 2499. Such protections, as the Supreme Court held in *Zadvydas*, are not incorporated here. *Id.*, 533 U.S. at 691, 121 S.Ct. at 2499-2500.

211. These regulations are not narrowly tailored, given the paucity of safeguards to protect liberty interests, as noted above.

212. The regulations, including the requirement of a bond, are also not narrowly tailored, in that the delays inherent in the current system makes inevitable that individuals not properly subject to continued detention fail to be released in a timely manner.

213. Even if the interests involved here are not fundamental, these regulations are not "rationally related" to a legitimate government interest. There is no legitimate interest in punishing these non-citizens; if immigration detention were punishment, the double jeopardy clause would be implicated. The only legitimate interest involved here is the government's ability to effectuate deportation, and these regulations are not rationally related to that objective, since these individuals cannot be removed from the United States.

214. As discussed, the INS' imposition of a bond bars a detainee's 'release'. *See Shrode*, 213 F.2d at 813-14; *Matter of Toscano-Rivas*, 14 I & N Dec. 523, 527 (B.I.A.1972), on reconsideration, 14 I & N Dec. 538, 539-41 (B.I.A.1973), aff'd on other grounds, 14 I & N Dec. 550, 555 (A.G.1974) (distinguishing between detention and bond release conditions). The ability to impose bond is the ability to detain.

215. The imposition of a bond violates Substantive Due Process. Individuals who have entered the United States have a protected liberty interest in not being detained, which cannot be infringed "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1447 (1993).

216. The Government can show no compelling interest here. The Supreme Court in *Zadvydas* rejected both of the regulatory goals – "ensuring the appearance of aliens at future immigration proceedings and preventing danger to the community" – proffered by the INS in support of detention. *Zadvydas*, 121 S.Ct. at 2499-2500. "[B]y definition the first justification--preventing flight--is weak or nonexistent where removal seems a remote possibility at best. As this Court said in *Jackson v. Indiana*, 406 U.S. 715[, 738] (1972), where detention's goal is no longer practically attainable, detention no longer 'bears a reasonable relation to the purpose for which the individual was committed.'" *Zadvydas*, 121 S.Ct. at 2499.

217. The second justification – protecting the community – too, must fail according to *Zadvydas*. The alien's risk of committing further crimes and posing a danger to the community should be measured by the civil confinement standard espoused by the Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). *Zadvydas*, 121 S.Ct. at 2499. *Zadvydas*, like *Hendricks*, involved proceedings that were civil, not criminal, and were non-punitive in purpose and effect. *Id.* The *Zadvydas* Court also stated that the duration of an alien's indefinite detention, like civil confinement, "is not limited, but potentially permanent. *Id.* Where the duration of civil confinement is not limited, but potentially permanent or indefinite, "[the Supreme Court] ha[s]...demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create

the danger." *Id.*, *citing*, *Hendricks*, 521 U.S. at 358, 356.

218. Even if the Court finds the Government's interest compelling, the means employed to promote and secure its interests are not narrowly tailored in order to meet strict scrutiny: "there is no question that the protection of the community could be accomplished by means that do not unduly hinder [Petitioners'] liberty [other than detention]." *Duong v. INS*, 118 F.Supp.2d 1059, 1066 (S.D. Cal. 2000). For example, the requirement that Petitioners appear in person periodically at a time and place specified, upon each and every request of the Service, is a more narrowly tailored method that serves the INS's interests while respecting Petitioners' fundamental right to liberty. *See* 8 U.S.C. § 1231(a)(3). This requirement appears to be sufficient to ensure Petitioners' appearances as the INS has not alleged that Petitioners have failed to meet this condition or violated any other conditions of release.

WHEREFORE, Petitioners, for themselves and for others similarly situated, request that this Court grant their Petition for a Writ of Habeas Corpus and order Respondents, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice, to release them from unlawful custody immediately and for such further and other relief as this Court deems just and appropriate.

## COUNT SEVEN

### (PETITION FOR WRIT OF HABEAS CORPUS ON BEHALF OF PETITIONERS AND A CLASS OF ALL OTHERS SIMILARLY SITUATED – VIOLATION OF DUE PROCESS RIGHTS (CLASS ACTION))

219. Petitioners adopt and reallege Paragraphs 1 through 218 as though fully set forth herein.

220. Even if the regulatory scheme promulgated by the Government at 8 C.F.R.

§§241.4, 241.5, 241.13, and 241.14, as described above in paragraphs 27-38, does not violate the Due Process clause as written, it violates the class members' substantive and procedural Due Process rights as applied by the INS.

221. As applied, the Government does not consider release of individuals who cannot be deported until well after the end of a presumptively reasonable period for removal. By regulation, the INS claims for itself a right to delay "in the exercise of its discretion" even initial consideration of release until the end of the removal period. 8 C.F.R. §241.13(d)(3). In practice, this delay is habitual, and results in individuals systematically being detained long after it is clear that they cannot be removed from the United States, and long after the end of the six month presumptively reasonable post-order period.

222. In practice, detainees are given no reasonable opportunity to be heard prior to an INS determination regarding their cooperation with efforts to secure removal, a determination that delays their release. Even if the absence of a pre-determination right to be heard is not a *per se* violation of Due Process, Due Process is offended when the INS ordinarily and consistently refuses to consider release of individuals due to alleged failure to cooperate with efforts to secure removal when (1) such efforts either would clearly have been futile or (2) evidence of reasonable efforts was already in possession of the Defendants.

223. The opportunity for a detainee to submit more evidence after an INS determination does not obviate or reduce the original Due Process problem. Forcing detainees to go through this futile post-determination process results in unreasonable and unnecessary delay in the release of detainees.

224. Even if it is not a *per se* Due Process violation that the INS grants no right of administrative appeal or oversight regarding this crucial determination, Due Process is offended when (1) the Defendants apply this provision to individuals after the expiration of the six month presumptively reasonable period to secure removal and (2) the Defendants apply this provision to individuals from countries which habitually refuse to accept the return of deported individuals.

225. Under the currently employed regulatory scheme at 8 C.F.R. §§241.4, 241.5, 241.13, and 241.14, as described above in paragraphs 27-38, members of the Plaintiff class are detained for unreasonable time periods even after it is clear that they cannot be removed from the United States. In such circumstances, their continued detention is without statutory authorization, and is therefore violative of Due Process.

226. Assuming *arguendo* that the absence of a fixed time frame does not constitute a per se Due Process violation, Due Process is offended where the INS ordinarily and persistently fails to release individuals whom it knows cannot be removed from the country in a timely manner.

227. With respect to bonds, the facts of the individuals before this Court amply demonstrate the arbitrary nature of the Government's bond power. The Government has given no explanation for the bonds of $20,000 and $25,000 bonds in the cases of Mr. Pongphrachanxay and Mr. Son. It has not explained its rationale in setting those bonds; why it felt such bonds were necessary; whether those individuals could take any other actions to make the bonds unnecessary; whether they could seek some reduction in the bond amounts; or what those individuals are to do if they are unable to pay the bonds.

228. The regulations, including the imposition of a bond, as currently implemented, are "excessive in relation to the regulatory goal Congress sought to achieve..." *United States v. Salerno*, 481 U.S. 739, 747, 107 S.Ct. 2095, 2101 (1987). As applied, they are not narrowly tailored to serve a compelling governmental interest.

229. Considered as a whole, the facts of these cases demonstrate that the risk of erroneous deprivation is so great, and the procedures here so absent in any concern for that risk, that these procedures are constitutionally insufficient, and violate the Procedural Due Process prong of the Fifth Amendment.

WHEREFORE, Petitioners, for themselves and for others similarly situated, request that this Court grant their Petition for a Writ of Habeas Corpus and order Respondents, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice, to release them from unlawful custody immediately and for such further and other relief as this Court deems just and appropriate.

## COUNT EIGHT

### (COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF ON BEHALF OF PETITIONERS AND A CLASS OF ALL OTHERS SIMILARLY SITUATED – VIOLATION OF DUE PROCESS RIGHTS (CLASS ACTION))

230. Petitioners adopt and reallege Paragraphs 1 through 229 as though fully set forth herein.

231. Pursuant to 28 U.S.C. §§ 2201 and 2202 and FED. R. CIV. P. 57 and 65, Petitioners, on behalf of themselves and all a class of all others similarly situated seek a declaration that the INS' rules and regulations discussed above violate the class members

procedural and substantive Due Process rights.

232. An actual and substantial controversy having arisen between the parties, and that controversy continuing to exist regarding their respective rights and duties, including without limitation the legality and constitutionality of the procedures currently employed by the Defendants, and whether the Defendants' practices and policies are arbitrary and capricious, Plaintiffs ask the Court to issue a decision regarding the respective rights and obligations of the parties.

233. Declaratory relief is necessary in that Defendants' practices go beyond the grant of statutory authority and violate the Constitution, and further, that Defendants' sub-regulatory practices are arbitrary and capricious.

234. The relief available in law is insufficient to cure the injury complained of herein, namely, continued detention without sanction of law.

235. Plaintiffs ask the Court to grant preliminary and permanent injunctive relief, ordering the Defendants to cease and desist from detaining members of the Plaintiff class after the end of the presumptively reasonable six month period after a final order of removal, pursuant to the current regulations; and ordering the Defendants to cease and desist from the sub-regulatory practices outlined above, which are arbitrary and capricious.

236. Plaintiffs ask the Court to grant Declaratory relief to the Plaintiff class, finding that the continued detention of the Plaintiff class after the end of a presumptively reasonable six month period is unauthorized by statute under the current regulatory scheme, because that scheme is violative of Due Process norms; that the Defendants' regulations and procedures are facially violative of the Due Process Clause of the Fifth Amendment; and that the

Defendants sub-regulatory policies and practices are arbitrary and capricious.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, request that this Court enter a judgment in its favor and against Defendants, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice, granting them the following relief:

A. Declaring that the continued detention of individuals past the six month "presumptively reasonable" period is beyond the authority granted to the Attorney General by statute, in the absence of constitutionally sufficient procedures;

B. Declaring that the Defendants' regulations and procedures are facially violative of the Due Process Clause of the Fifth Amendment;

C. Granting temporary and permanent injunctive relief ordering the Respondents to cease and desist from detaining members of the Plaintiff class after the end of the presumptively reasonable six month period after a final order of removal, pursuant to the rules and regulations currently enacted by the Defendants;

D. Grant preliminary and permanent injunctive relief, enjoining the Respondents from (1) failing to make a determination whether to continue detention before the expiration of 180 days after entry of the order of removal; (2) "suspending" the removal period for members of the Plaintiff class where efforts to secure removal would be futile, or where the detainee's file shows no evidence of non-cooperation; (3) refusing to consider the likelihood of removal in the reasonably foreseeable future at the first stage of the post-order detention process; (4) requiring members of the Plaintiff class to prove cooperation, where there is no evidence or indication of non-cooperation in securing removal; and (5) failing to consider the length of post-order detention in evaluating the possibility that removal can be effectuated or the effect of any purported non-cooperation in securing removal; and

E. Grant such further and other relief as this Court deems just and appropriate.

## COUNT NINE

### (COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF ON BEHALF OF PETITIONERS AND A CLASS OF ALL OTHERS SIMILARLY SITUATED – VIOLATION OF DUE PROCESS RIGHTS (CLASS ACTION))

237. Petitioners adopt and reallege Paragraphs 1 through 236 as though fully set forth herein.

238. Pursuant to 28 U.S.C. §2241, Petitioners seek a declaration that Defendants' regulations and procedures violate of the Due Process Clause as applied to the Plaintiff class.

239. An actual and substantial controversy having arisen between the parties, and that controversy continuing to exist regarding their respective rights and duties, including without limitation the legality and constitutionality of the procedures currently employed by the Defendants, and whether the Defendants' practices and policies are arbitrary and capricious, Plaintiffs ask the Court to issue a decision regarding the respective rights and obligations of the parties.

240. Declaratory relief is necessary in that Defendants' practices go beyond the grant of statutory authority and violate the Constitution, and further, that Defendants' sub-regulatory practices are arbitrary and capricious.

241. The relief available in law is insufficient to cure the injury complained of herein, namely, continued detention without sanction of law.

242. Plaintiffs ask the Court to grant preliminary and permanent injunctive relief, ordering the Defendants to cease and desist from detaining members of the Plaintiff class after the end of the presumptively reasonable six month period after a final order of removal,

pursuant to the current regulations; and ordering the Defendants to cease and desist from the sub-regulatory practices outlined above, which are arbitrary and capricious.

243. Plaintiffs ask the Court to grant Declaratory relief to the Plaintiff class, finding that the continued detention of the Plaintiff class after the end of a presumptively reasonable six month period is unauthorized by statute under the current regulatory scheme, because that scheme is violative of Due Process norms; that the Defendants' regulations and procedures are violative of the Due Process Clause of the Fifth Amendment as applied; and that the Defendants sub-regulatory policies and practices are arbitrary and capricious.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, request that this Court enter a judgment in its favor and against Defendants, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice, granting them the following relief:

A. Declaring that the continued detention of individuals past the six month "presumptively reasonable" period is beyond the authority granted to the Attorney General by statute, in the absence of constitutionally sufficient procedures;

B. Declaring that the Defendants' regulations and procedures are facially violative of the Due Process Clause of the Fifth Amendment;

C. Granting temporary and permanent injunctive relief ordering the Respondents to cease and desist from detaining members of the Plaintiff class after the end of the presumptively reasonable six month period after a final order of removal, pursuant to the rules and regulations currently enacted by the Defendants;

D. Grant preliminary and permanent injunctive relief, enjoining the Respondents from (1) failing to make a determination whether to continue detention before the expiration of 180 days after entry of the order of removal; (2) "suspending" the removal period for members of the Plaintiff class where efforts to secure removal would be futile, or where the detainee's file shows no evidence of non-cooperation; (3) refusing to consider the likelihood of removal in the reasonably foreseeable future at the first stage of the post-order detention process; (4) requiring members of the Plaintiff class to prove cooperation, where there is no evidence or indication of non-cooperation in securing removal; and (5) failing to consider the length of post-order detention in evaluating the possibility that removal can be effectuated or the effect of any purported non-cooperation in securing removal; and

E. Grant such further and other relief as this Court deems just and appropriate.

## COUNT TEN

### (ADMINISTRATIVE PROCEDURES ACT ON BEHALF OF PETITIONERS AND A CLASS OF ALL OTHERS SIMILARLY SITUATED (CLASS ACTION))

244. Petitioners adopt and reallege Paragraphs 1 through 243 as though fully set forth herein.

245. The Defendants have adopted the following sub-regulatory policies or procedures

(a) failing to adjudicate requests for release under *Zadvydas* in a timely manner;

(b) "suspending" or purporting to suspend removal periods and postponing release of individuals who allegedly have not shown sufficient efforts to secure their own removals, where those individuals have in fact performed all acts reasonably to be expected by Defendants;

(c) requiring detainees to submit evidence of their cooperation in securing their removal from the United States, while refusing to consider facts within the files of detainees, despite regulations authorizing review of the file; 8 C.F.R. §§241.4(i)(7), 241.13(f);

(d) requiring clearly futile efforts by individuals to secure their removal from the U.S., even where the Defendants know that the detainee's country of origin will not accept their removal; and

(e) failing to consider the length of post-order detention in evaluating the possibility that removal can be effectuated or that effect of any purported non-cooperation in securing removal.

246. These actions are, and will remain, agency actions which are arbitrary, capricious, and not in accordance with the law. Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*

247. The INS and its district and subdistrict offices are "agencies" as defined in the Administrative Procedure Act. *See* 5 U.S.C. § 701(b)(1).

248. As a direct and proximate result of the Defendants' policies and procedures, members of the Plaintiff class have suffered the injury of continued detention, even where detention is not authorized by statute since there is no reasonable likelihood of removal in the foreseeable future. The Plaintiff class will continue to suffer said injury while the current policies, procedures, and regulations are in place.

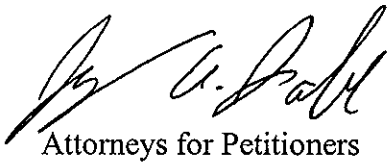
WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, request that this Court enter a judgment in its favor and against Defendants, John Ashcroft, Attorney General of the United States, Brian Perryman, as Chicago District Director, Immigration and Naturalization Service, Immigration and Naturalization Service, United States Department of Justice, granting them the following relief:

A. Declaring that the Defendants have engaged in behavior which is arbitrary, capricious, and not in accordance with law;

B. Grant preliminary and permanent injunctive relief, enjoining the Respondents from (1) failing to make a determination whether to continue detention before the expiration of 180 days after entry of the order of removal; (2) "suspending" the removal period for members of the Plaintiff class where efforts to secure removal would be futile, or where the detainee's file shows no evidence of non-cooperation; (3) refusing to consider the likelihood of removal in the reasonably foreseeable future at the first stage of the post-order detention process; (4) requiring members of the Plaintiff class to prove cooperation, where there is no evidence or indication of non-cooperation in securing removal; and (5) failing to consider the length of post-order detention in evaluating the possibility that removal can be effectuated or the effect of any purported non-cooperation in securing removal; and

E. Grant such further and other relief as this Court deems just and appropriate.

Respectfully submitted, JALAL HMAIDAN, MOHAMMED AIDOUNI, MAITHAM ALZEHRANI, KEOVONGSACK PONGPHRACHANXAY AND DEN SON

By: 
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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|---|---|---|
| JALAL HMAIDAN, MOHAMMED AIDOUNI, MAITHAM ALZEHRANI, KEOVONGSACK PONGPHRACHANXAY AND DEN SON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, | ) | |
| Petitioners, | ) | |
| VS. | ) | |
| | ) | JUDGE JAMES B. ZAGEL |
| JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, BRIAN PERRYMAN, AS CHICAGO DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, | ) | No. 02 C 509 |
| Respondents. | ) | |

**INDEX OF EXHIBITS**

EXHIBIT A PERTAINING TO PETITIONER JAMAL HMAIDAN

1) January 31, 2000, Notice to Appear
2) U.S. Department of State Human Rights Report for Jordan, 2001
3) Worldwide Refugee Information, Jordan, 2002
4) October 25, 2000, Order of Removal from the Immigration Judge
5) August 8, 2001, Written Order of the Board of Immigration Appeals denying Petitioner's appeal of his order of removal
6) February 4, 2002 Letter from Petitioner's Attorney to the Jordanian Consulate requesting travel documents on behalf of Petitioner
7) February 4, 2002 Letter from Petitioner's Attorney to the Embassy of Kuwait requesting travel documents on behalf of Petitioner
8) February 18, 2002 Letter from Petitioner to the Jordanian Consulate requesting travel documents
9) February 18, 2002 Letter from Petitioner to the Kuwaiti Embassy requesting travel documents
10) October 29, 2001 INS Request for Travel Documents to the Consulate General of Jordan
11) March 22, 2002 Letter from Petitioner's Attorney to the Post Order Detention Unit of the INS in Washington, DC requesting Petitioner's release from INS Custody and Attached Supporting Documentation
12) April 29, 2002 Notice of Custody Review from INS Chicago District
13) May 3, 2002 Letter from Petitioner's Attorney to the INS Chicago District in response to their Review Letter (and additional documentation for which see also Exhibit A(4))
14) May 8, 2002 Letter from the Post Order Detention Unit indicating that the removal period is "suspended" until Petitioner supplies evidence that he cannot be removed to Jordan.
15) May 24, 2002 Letter from Petitioner's Attorney to the Post Order Detention Unit of the INS in Washington, DC in response to their May 8, 2002 letter
16) August 6, 2002, Decision to Continue Detention
17) Post Order Custody Review Worksheet for File Review and/or Interview
18) February 4, 2002 fax from Valencia L. Ahmad to Jack Parks.

EXHIBIT B PERTAINING TO PETITIONER MOHAMMAD AIDOUNI

1) June 30, 1999, Notice of Intent to Issue an Administrative Final Removal Order & Final Administrative Removal Order
2) August 10, 1999, Final Administrative Removal Order
3) Undated Notice of Referral to Immigration Judge, Reasonable Fear Determination Worksheet and Record of Determination/Reasonable Fear Worksheet
4) October 11, 2001, Board of Immigration Appeals Decision
5) January 10, 2000, INS Request for Travel Documents to the Embassy of Algeria
6) January 24, 2000, INS Request for Travel Documents to the Embassy of Algeria
7) Undated fax to the Embassy of Algeria, Algiers, requesting assistance in the issuance of travel documents
8) November 28, 2000, Post Order Review Worksheet File Review And/or Interview
9) December 28, 1999, Notice to Alien of File Custody Review
10) February 4, 2000, Letter from Brian Perryman, District Director of the INS Chicago District
11) November 6, 2001, Notice to Alien of File Custody Review
12) May 16, 2002, Decision to Continue Detention Following Review
13) March 20, 2002 letter to Algeria from INS.

EXHIBIT C PERTAINING TO PETITIONER MAITHAM ALZEHRANI

1) December 15, 2000, Notice to Appear before an Immigration Judge
2) August 20, 2001 Order of Removal from the Immigration Judge
3) October 3, 2001 Decision to Continue Detention
4) September 27, 2001, Post Order Review Worksheet File Review And/or Interview
5) August 22, 2001, INS Request for Travel Documents to the Iraqi Interests Section
6) March 20, 2002 INS Request for Travel Documents to the Democratic and Popular Republic of Algeria
7) May 2, 2002 Decision to Continue Detention
8) May 10, 2002 Letter from Petitioner's Attorney to the Post Order Detention Unit of the INS in Washington, DC, including a December 28, 2001 Notice of Entry of Appearance as Attorney or Representative, (INS Form G-28)
9) June 6, 2002, Letter from the Headquarters Post Order Detention Unit, indicating that the removal period is "suspended" until Petitioner supplies evidence that he cannot be removed to Iraq.
10) November 5, 2001 Letter to Frank Moore, Chicago INS Officer from Petitioner indicating his willingness to cooperate
11) Letter from Petitioner's Attorney to the Iraqi Interests Section requesting travel documents for Petitioner
12) May 22, 2002 Letter from the American-Arab Anti-Discrimination Committee to the Post Order Detention Unit of the INS in Washington, DC
13) Fiscal Years 1993-1998 Chart: Aliens Removed by Criminal Status and Region and Selected Country of Nationality

EXHIBIT D PERTAINING TO PETITIONER KEOVONGSACK PONGPHRACHANXAY

1) November 9, 2001, Warrant for Arrest of Alien
2) February 14, 1981, INS Registration for Classification as Refugee Status
3) December 20, 2001, Order of Removal from the Immigration Judge
4) March 18, 2002, Notice to Alien of File Custody Review
5) May 21, 2002, Letter from Post Order Detention Unit, indicating that the removal period is "suspended" until Petitioner supplies evidence that he cannot be removed to Vietnam.
6) August 20, 2002, Release Notification upon posting of a $20,000 bond

EXHIBIT E PERTAINING TO PETITIONER DEN SON

1) May 25, 1993, Order to Show Cause
2) September 22, 2001, Notice to Alien of File Custody Review
3) June 28, 2002, Petitioner's Attorney's Letter to Embassy of Vietnam Requesting Travel Documents
4) June 28, 2002, Letter to INS Chicago District requesting release from custody
5) June 28, 2002, Letter to INS HQPDU requesting release from custody under Zadvydas v. Davis and including an April 8, 2002, Notice of Entry of Appearance as Attorney or Representative (INS Form G-28)
6) August 6, 2002, Decision to Continue Detention
7) August 20, 2002, Release Notification upon posting of a $25,000 bond

EXHIBIT F DECLARATION OF MIKE ROZOS, CHIEF OF THE LONG TERM REVIEW BRANCH IN THE REMOVALS DIVISION OF THE OFFICE OF DETENTION AND REMOVAL IN INS

SEE CASE FILE FOR EXHIBITS