No. 00-1001

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PHUONG PHUC LE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service (INS), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-2a) is unreported. The orders of the district court adopting findings and recommendations regarding release conditions (App., *infra*, 3a-14a), denying a motion to alter or amend the order (App., *infra*, 15a-22a), and granting the petition for writ of habeas corpus with conditions (App., *infra*, 23a-25a) are unreported. The magistrate

judge's report and recommendation (App., *infra*, 26a-58a) which was adopted by the district court in its order granting habeas relief, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1231(a) of Title 8 of the United States Code provides in relevant part:

> **Detention and removal of aliens ordered removed**
>
> **(a) Detention, release, and removal of aliens ordered removed**
>
> **(1) Removal period**
>
> **(A) In general**
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> * * * * *
>
> **(2) Detention**
>
> During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or

1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(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 officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric 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; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the

> Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

STATEMENT

1. a. Respondent is a native and citizen of Vietnam. App., *infra*, 27a. He entered the United States as a refugee on June 3, 1982. *Ibid.*[1]

On March 19, 1997, the INS served respondent with an order to show cause, charging respondent with being subject to deportation from the United States under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998), because he had been convicted of an aggravated felony, which includes a crime of violence for which the term of imprisonment imposed was one year or more. Alien file A25345343 (A-file) 117-121. That charge was based on respondent's conviction in state court on January 13, 1995, of voluntary manslaughter, for which he was sentenced to six years' imprisonment. *Ibid.*

That conviction arose out of criminal charges that were initially filed on January 14, 1994, against respondent and a co-defendant, charging both defendants with the murder of one person and the attempted murder of two other persons on October 20, 1993. A-file 143-144; App., *infra*, 27a. The complaint also charged that respondent personally used a firearm in the commission of those offenses and that he inflicted great bodily

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[1] The record is unclear regarding whether respondent ever was a lawful permanent resident, but the district court proceeded on the assumption that respondent had that status. App., *infra*, 24a, 27a n.1.

injury on the two victims who were not murdered. A-file 144. On November 8, 1994, respondent entered a plea of guilty to count five of an amended criminal complaint that charged him with voluntary manslaughter. *Id.* at 135, 176. In the written plea agreement signed by respondent, respondent stated that he "assisted and encouraged the shooting" of the victim, with the "intent to kill." *Id.* at 147. When respondent was sentenced on January 13, 1995, the other counts were dismissed. *Id.* at 135, 137-138. Respondent also was previously convicted of misdemeanor assault in 1992, of forgery and resisting or delaying a police officer in 1993, and of driving while intoxicated on more than one occasion. App., *infra*, 27a-28a n.2; see also A-file 68.

Upon completion of his sentence on his manslaughter conviction, respondent was released in March 1997 to the custody of the INS. App., *infra*, 28a. Respondent was denied bond pending his removal proceedings and, on April 15, 1997, an immigration judge denied respondent's request for a bond redetermination. A-file 108, 112. The immigration judge denied two additional bond requests on July 11, 1997. *Id.* at 78-79.

b. On August 28, 1997, an immigration judge found that respondent was subject to deportation as charged. A-file 11. The immigration judge denied respondent's requests for asylum and withholding of deportation. *Ibid.*; App., *infra*, 28a. The immigration judge ordered respondent removed to Vietnam. A-file 11. Respondent did not appeal that order to the Board of Immigration Appeals, and thus his deportation order became final. App., *infra*, 28a.

c. On April 17, 1997, the INS requested travel documents for respondent from the Embassy of Vietnam. App., *infra*, 28a; A-file 125. The government of Vietnam has not responded to the request, and therefore

the INS has been unable to effectuate respondent's removal. App., *infra*, 28a. The INS continued to detain respondent and, on January 25, 1999, respondent, through counsel, requested that the INS review his custody status. 1/25/99 Letter from Oliver Vallejo, Assistant Federal Defender, to Nancy Boswell, INS District Supervisor. An INS officer conducted a review of respondent's custody status and submitted a recommendation to the assistant district director that the INS continue to detain respondent at that time in light of the seriousness of his criminal record, his tendency toward violence and use of firearms, and the danger he would therefore pose to the community if released. 3/12/99 Memorandum from Richard Ortega, Deportation Officer, to Robert Mangie, Assistant District Director. On March 18, 1999, the INS informed respondent, through his counsel, that the decision was to continue respondent in custody at that time, but that his custody status could be reassessed in the future. 3/18/99 Letter from Mangie to Vallejo. The letter also notified respondent of his right to appeal the decision to the Board of Immigration Appeals and that "[a]ny appeal must be filed with this office within 10 days of [the] decision." *Ibid.* Respondent filed a notice of appeal, but it was dismissed as untimely.

2. a. Meanwhile, on October 7, 1998, respondent had filed a petition for habeas corpus relief under 28 U.S.C. 2241 in the United States District Court for the Eastern District of California, challenging the constitutionality of his continued detention. App., *infra*, 23a.

On March 2, 2000, the district court entered an order (App., *infra*, 23a-25a) adopting, with one exception not relevant here (see *id.* at 24a), the findings and recommendations of a magistrate judge (*id.* at 26a-58a). The district court concluded that there is "no firm prospect

that [respondent] will be removed in the foreseeable future" and that "continuing custody in these circumstances violates [respondent's] fundamental right as a former permanent resident alien to be free from arbitrary bodily restraint under the substantive due process clause of the Fifth Amendment." *Id.* at 24a-25a. The court granted respondent's habeas corpus petition on condition that respondent post a bond and agree to abide by conditions of supervision set forth in 8 C.F.R. 241.5, as the INS deems necessary. *Id.* at 25a. On March 27, 2000, the court denied the government's motion to alter or amend its order (*id.* at 15a-22a) and, on April 26, 2000, the court entered an order adopting the magistrate judge's recommendations regarding release conditions (*id.* at 3a-14a).

b. On April 10, 2000, the Ninth Circuit issued its decision in *Ma* v. *Reno*, 208 F.3d 815, holding that the INS lacked authority as a statutory matter under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the initial 90-day removal period described in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998), notwithstanding that the Attorney General had continued to detain the alien because he posed a risk to the community, the alien's detention was subject to periodic administrative review, and the country to which the alien was ordered removed (Cambodia) is engaged in ongoing negotiations with the United States concerning a process for the return of its nationals ordered removed by the INS. The Ninth Circuit in *Ma* did not reach the constitutional grounds on which the district court had relied.

c. On September 18, 2000, the court of appeals entered an order summarily affirming the district court's judgment in this case on the basis of its decision in *Ma*. App., *infra*, 1a-2a.

ARGUMENT

This case presents the question whether the Attorney General is authorized to continue to detain an alien beyond the initial 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review. The court of appeals summarily affirmed the judgment of the district court in light of its holding in *Ma* v. *Reno*, 208 F.3d 815 (9th Cir. 2000), that the INS lacks such authority.

On October 10, 2000, this Court granted the petition for a writ of certiorari in *Reno* v. *Ma*, 121 S. Ct. 297, to review that decision of the Ninth Circuit. On the same date, the Court also granted the petition for a writ of certiorari in *Zadvydas* v. *Underdown*, 121 S. Ct. 297, to review a decision of the Fifth Circuit (185 F.3d 279 (1999)) that rejected a constitutional challenge to continued detention under Section 1231(a)(6), without questioning the statutory authority of the Attorney General to detain an alien in such circumstances. Because the question presented in this case is already before the Court in *Ma* and *Zadvydas*, the petition for a writ of certiorari should be held pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Reno* v. *Ma*, No. 00-38, and *Zadvydas* v. *Underdown*, No. 99-7791, and then be disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16095

DC# CV-98-6139-AWI
Eastern California
(Fresno)

PHUC LE, PETITIONER-APPELLEE,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLANT

[Filed: Sept. 18, 2000]

ORDER

Before: WALLACE, BEEZER and FERNANDEZ,
Circuit Judges

The court has received and reviewed appellant's response to this court's order to show cause why summary disposition is not appropriate in light of *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3086 (U.S. July 5, 2000) (No. 00-38). Appellant's motion to hold this appeal in abeyance pending the United States Supreme Court's disposition

of appellant's petition for writ of certiorari in *Ma* is denied.

Pursuant to *Ma*, the court sua sponte summarily affirms the district court's judgment.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV F 98-6139 AWI DLB P

PHUC PHUONG LE, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

[Filed: Apr. 26, 2000]

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS RE PETITIONER'S MOTION FOR RELEASE, REASONABLE RELEASE CONDITIONS, AND BOND

On March 2, 2000, the court entered an order adopting the findings and recommendations of the Magistrate Judge issued June 1, 1999, and granting the petition for writ of habeas corpus with conditions.[1] Specifically, the court ordered that, "Petitioner's application for a writ of habeas corpus is GRANTED ON CONDITION that he (a) post a bond in a reasonable amount to be agreed

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[1] At lines 8 through 9 of page 1 of its objections filed April 13, 2000, Respondent incorrectly states that the Magistrate Judge recommended that the petition be denied.

upon by INS and Petitioner, and (b) agree to abide by the conditions of supervision set forth at 8 C.F.R. § 241.5 insofar as they are deemed necessary by the INS." Order Adopting Findings and Recommendations and Granting Petition with Conditions filed March 2, 2000, 2:23-36.

On March 21, 2000, Petitioner filed a motion to release petitioner forthwith under reasonable conditions. The Magistrate Judge held a hearing on the matter and on April 3, 2000, entered findings and recommendations. The Magistrate Judge recommended, among other things, that Petitioner's cash bond be set at $5,000.00. Both parties have objected to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 73-305, the court has carefully reviewed the entire file. The court finds the findings and recommendations to be supported by the record and by proper analysis. The court separately addresses the objections of each party below.

Petitioner's Objections

Petitioner objects to the findings and recommendations based on the recent decision in *Ma v. Reno*, __F.3d __, 2000 WL 358445 (9th Cir. April 10, 2000), in which the court held in part as follows:

> We hold that the INS lacks authority under the immigration laws, and in particular under 8 U.S.C. § 1231(a)(6), to detain an alien who has entered the United States for more than a reasonable time beyond the normal ninety day statutory period authorized for removal. More specifically, in cases

> like Ma's, in which there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, we hold that it may not detain the alien beyond that statutory removal period.

Id. at *3963. The court further held:

> We stress that our decision does not leave the government without remedies with respect to aliens who may not be detained permanently while awaiting a removal that may never take place. All aliens ordered released must comply with the stringent supervision requirements set out in 8 U.S.C. § 1231(a)(3). Ma will have to appear before an immigration officer periodically, answer certain questions, submit to medical or psychiatric testing as necessary, and accept reasonable restrictions on his conduct and activities, including severe travel limitations. More important, if Ma engages in any criminal activity during this time, including violation of his supervisory release conditions, he can be detained and incarcerated as part of the normal criminal process.

Id. at 3987. Petitioner argues that this section sets forth the supervisory conditions that might be imposed on Petitioner. Petitioner notes correctly that absent from this list is the requirement of a bond. Petitioner therefore requests that the court grant him immediate release without a bond.

The court is unconvinced that the above-quoted language from *Ma* precludes the imposition of a bond. The defect in Petitioner's argument to the contrary is that 8 U.S.C. § 1231(a)(3) (emphasis added) provides as follows:

> (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 officer periodically for identification;
>
> (B) to submit, if necessary, to a medical and psychiatric 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; and
>
> (D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

Thus, 8 U.S.C. § 1231(a)(3) expressly provides that these aliens shall be subject to supervision under regulations prescribed by the Attorney General, and while the statute lists some provisions which must be in the regulations, it does not provide that these are the *only* provisions which may be included. The regulations prescribed by the Attorney General on this topic include 8 C.F.R. §§ 241.4 and 241.5, both of which are set forth below in connection with respondent's objections. These sections deal with continued detention of aliens beyond the 90-day removal period and conditions

of release after the removal period, and both sections refer to the posting of a bond in connection with release.

The statute relied upon by the Ninth Circuit in *Ma* therefore expressly provides for the promulgation of regulations, and those regulations provide for the posting of a bond, among other conditions. In light of this fact and the fact that the Ninth Circuit was silent on the topic of a bond in *Ma* and also did not state that the list of conditions it was giving was exclusive, the court concludes that the quoted language from *Ma* does no preclude the requirement of a bond.

Respondent's Objections

Respondent contends that the Attorney General has the sole statutory authority to set bonds for aliens ordered removed from the United States. Respondent claims that by setting the bond for Petitioner in an amount other than that "set" by Respondent, the Magistrate Judge has usurped the Attorney General's exclusive authority. Respondent claims that the district court has likewise usurped the Attorney General's exclusive authority by imposing a bond to be agreed upon by the parties.

In support of its claim that the Attorney General has exclusive authority to set bonds for aliens ordered removed from the United States, Respondent relies on 8 U.S.C. § 1231 and 8 C.F.R. § 241.5 and § 241.4. The primary statute in question, U.S.C. § 1231, provides in pertinent part as follows:

(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 officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric 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; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 C.F.R. § 241.4 (emphasis added) provides as follows:

> 241.4 Continued detention beyond the removal period.
>
> (a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of non-compliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, *including bond in an amount sufficient to ensure the alien's appearance for removal*. The district may consider, but is not limited to considering, the following factors:
>
> (1) The nature and seriousness of the alien's criminal convictions;
>
> (2) Other criminal history;
>
> (3) Sentence(s) imposed and time actually served;
>
> (4) History of failures to appear for court (defaults);
>
> (5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) Continuation of custody for other aliens. Any alien removable under any section of the Act other than section 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

8 C.F.R. § 241.5 (emphasis added) provides as follows:

241.5 Conditions of release after removal period.

(a) Order of supervision. An alien released pursuant to § 241.4 shall be released pursuant to an order of supervision. A district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer in charge may issue an order of supervision on Form 1-220B. The order shall specify conditions of supervision including, but not limited to, the following:

(1) A requirement that the alien report to a specified officer periodically and provide relevant information under oath as directed;

(2) A requirement that the alien continue efforts to obtain a travel document and assist the Service in obtaining a travel document;

(3) A requirement that the alien report as directed for a mental or physical examination or examinations as directed by the Service;

(4) A requirement that the alien obtain advance approval of travel beyond previously specified times and distances; and

(5) A requirement that the alien provide the Service with written notice of any change of address on Form AR-11 within ten days of the change.

(b) *Posting of bond. An officer authorized to issue an order of supervision may require the posting of a bond in an amount determined by the officer to be sufficient to ensure compliance with the conditions of the order, including surrender for removal.*

(c) Employment authorization. An officer authorized to issue an order of supervision may, in his or her discretion, grant employment authorization to an alien released under an order of supervision if the officer specifically finds that:

(1) The alien cannot be removed because no country will accept the alien; or

(2) The removal of the alien is impracticable or contrary to public interest.

The court finds that while these authorities support Respondent's authority to require bonds when it exercises its discretion to release an alien, they do not address the issue of the exclusiveness of that authority. In the present case, it is the court, and not Respondent, which is releasing Petitioner. The court therefore will not decline to adopt the Magistrate Judge's findings and recommendations based on Respondent's contention.

Relatedly, Respondent contends that the authority to detain or release an alien in immigration detention is committed to the sole discretion of the Attorney General and her delegate, the INS. Respondent contends that this court therefore has "no authority to release outright an alien from detention, even an alien who has received a grant of his or her petition for writ of habeas corpus. The grant of the writ pertained only to the lawfulness, or lack thereof, of custody without opportunity for release on bond; it did not reach the conditions upon which release would be conferred." Objections, 5:1-6. As the sole authority for its contention, Respondent cites 8 U.S.C. § 1231(a)(6), with provides as follows:

> (6) Inadmissible or criminal aliens
>
> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

The court finds that this statute, which pertains to release of persons by the Attorney General, is insufficient to justify Respondent's extreme assertion that this court has no authority to release an alien outright from detention. As set forth in the Magistrate Judge's original findings and recommendations, and subsequently adopted by the undersigned, this court has jurisdiction pursuant to 28 U.S.C. § 2241 to review Petitioner's claims concerning his indefinite confinement. Findings and Recommendations filed June 1, 1999, 4:22 - 8:5.

The court therefore rejects Respondent's contention.

Respondent contends at length that in setting the bond at the amount he did, the Magistrate Judge subverted the whole purpose of the bond, which is to prevent Petitioner from absconding. The court finds no merit to this argument or the proposition that only a bond in an amount which an incarcerated person is unable to pay is sufficient to prevent that person from absconding. Indeed, for the court to set a bond in such an amount would subvert this Court's own order that Petitioner be released.

Finally, Respondent contends that the Magistrate Judge "has conflated (i) the District Court's determination that the INS cannot continue to detain Petitioner on the ground that the INS believes that he may engage in future criminal conduct and pose a threat to the community with (ii) the purpose of an INS bond: protecting society and ensuring that the alien does not abscond." In so arguing, Respondent ignores the realities of this case, in which the court granting the petition on two conditions, the first of which was that

Petitioner "post a bond in a reasonable amount to be agreed upon by INS and Petitioner." Respondent has presented no evidence that it made any attempt to agree upon a bond amount with Petitioner, or that Petitioner's assertion regarding the amount of bond he and his family can possibly put up is inaccurate. The court finds, therefore, that Respondent has failed to demonstrate that the bond amount it requested is reasonable, as required by the court's order.

Accordingly, it is HEREBY ORDERED that the findings and recommendations issued by the Magistrate Judge on April 3, 2000, are adopted in full.

DATED: April 25, 2000 /s/ ANTHONY W. ISHII
ANTHONY W. ISHII
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV F 98-6139 AWI DLB P

PHUC PHONG LE, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

[Filed: Mar. 27, 2000]

ORDER DENYING MOTION TO ALTER OR AMEND ORDER AND DENYING STAY PENDING CONSIDERATION OF MOTION
[Doc. 25]

Petitioner is an alien challenging his detention by the Immigration and Naturalization Service ("INS") on the ground that it is in violation of his Fifth Amendment right to substantive due process because his confinement will be indefinite. Petitioner has brought the issue to this court through a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. On March 2, 2000, the court entered an order granting the petition with conditions. Judgment was entered on March 3, 2000.

On March 17, 2000, Respondent filed a motion pursuant to Rule 59(e), Federal Rules of Civil Procedure, to alter or amend the court's order conditionally granting the petition. Specifically, Respondent asks the court to reconsider its conclusions that "there is no firm prospect that Petitioner will be removed in the foreseeable future" and that Petitioner's continued detention pending deportation "violates Petitioner's fundamental rights as a former permanent resident alien to be free from arbitrary bodily restraint under the substantive due process clause of the Fifth Amendment." Order of March 2, 2000, 2:11-14. In support of its motion, Respondent presents two arguments. First, Respondent claims that recent diplomatic efforts point to significant progress being made in negotiating a repatriation agreement. Second, Respondent claims that under recent decisions, aliens whose final orders of deportation have stripped them of lawful permanent resident status have no fundamental right to be at liberty in the United States and Petitioner's detention pending deportation is not arbitrary.

Recent Factual Developments

Respondent contends that new developments show that Petitioner's detention will not be indefinite because Petitioner's country of origin will soon accept Petitioner's return. Respondent attaches several declarations of James G. Hergen, Assistant Legal Advisor for Eastern Asian and Pacific Affairs, Office of the Legal Advisor, United States Department of State. Mr. Hergen states that on April 13, 1998, Department of State officials met with the Vietnam Ambassador to discuss the return of Vietnamese nationals who were ordered deported and he "listened politely to their proposal, and explained that his country would only

consider a more formal international agreement." Similar informal responses were given by Cambodian and Laotian officials when the INS sought to obtain travel documents for aliens ordered removed. In light of these statements, the INS and Department of State created a draft agreement. According to Mr. Hergen, on July 15, 1999, final comments and clearances on the proposed draft agreement had been given by the INS and Department of Justice. On July 19, 1999, the Deputy Secretary of State approved negotiations. On September 1, 1999, United States representatives presented the draft agreement to the Ambassadors of Vietnam and Laos. On September 2, 1999, United States representatives presented the draft agreement to the Ambassador of Cambodia. In November, 1999 United States representatives followed up with a cable to the United States' Embassies and instructed them to request the host governments to receive a United States delegation early in the New Year. Respondent claims that U.S. delegations went to Cambodia, Vietnam and Laos to conduct further negotiations on repatriation agreements in late February and early March of 2000. Respondent states that details of those meetings are not available.

Respondent contends that this new evidence shows that the court incorrectly found that Petitioner will not be removed to his country of origin in the near or foreseeable future. Respondent's evidence shows that Respondent and the Department of State have taken several additional steps to make a formal agreement with Petitioner's country of origin for the return of aliens in Petitioner's situation. However, the Court's prior finding that Petitioner would not be removed to his country of origin in the foreseeable future was not

based only on the United States's failure to take steps to solve this problem. Now that the draft agreement has been presented, Respondent has no description of what efforts the United States government may employ in the future. The entire matter appears now to rest with Petitioner's country of origin. Except for taking the draft agreement when it was given and implying that would discuss it in the future, Petitioner's country of origin has done nothing to indicate that it will change its current, long term position of not accepting the return of its nationals. There simply is still no evidence to show that Petitioner's country of origin is now accepting the return of its nationals who have been ordered deported from the United States or is about to do so. Despite the efforts described by Mr. Hergen, the INS has been unable to receive travel documents for any Vietnamese national for many years. Respondent still has no timetable for Petitioner's deportation. While Respondent hopes that negotiations will take place soon, an agreement will be reached, and Petitioner will actually be removed to his country of origin, Respondent has no idea if this will happen. Respondent's position is still what it has always been—that the INS is actively seeking to resolve this problem and is confident that Petitioner's country of origin will accept Petitioner's return in the near future. The court therefore finds Respondent's arguments insufficient to justify altering or amending its prior order.

Recent Court Decision

Respondent contends that recent cases support Respondent's position that the issuance of a final order of deportation against Petitioner resulted in a loss of his substantive due process protection against indefinite detention.

The Fifth Circuit has found that an alien who had been ordered deported had only the same protections against indefinite confinement as aliens who have been ordered excluded. In *Zadvydas*, 986 F.Supp. 1011 (E.D. La. 1997), the court reviewed a case involving a petitioner ordered deported who had been born in Germany but whom Germany had refused to accept. *Id.* at 1023. The Fifth Circuit found that the petitioner's confinement was not permanent because the petitioner could be released if he could show that he was not a threat to the community or a flight risk and it was also possible Lithuania, Germany, Russia, or the Dominican Republic might allow the petitioner entry after the INS explored all possibilities. *Zadvydas v. Underdown*, 185 F.3d 279, 291-94 (5th Cir. 1999). The Fifth Circuit reasoned that the government's interest in removing both classes of aliens is the same. *Zadvydas*, 185 F.3d at 294-97. While the Fifth Circuit found that both aliens ordered excluded and aliens ordered deported have some protections under the Fourteenth Amendment, *see id.* at 289, 296, their rights are constrained accordingly to the government's interests in effectuating deportation. *See id.* at 294-95. The Fifth Circuit then concluded that the INS may detain an alien who is subject to a final order of deportation "based on either danger to the community or risk of flight while good faith efforts to effectuate the

alien's deportation continue and reasonable parole and periodic review procedures are in place." *Id.* at 297.

The Tenth Circuit has adopted a similar position. In *Ho v. Greene*, __ F.3d ___, 2000 WL 228755 (10th Cir. Feb. 29, 2000), the Tenth Circuit reviewed the cases of an alien who had been ordered excluded and an alien who had been ordered deported, neither of whom Vietnam would not [*sic*] allow to return. *Id.* at *1. The Tenth Circuit found that the final removal order stripped the petitioners of "any heightened constitutional status either may have possessed prior to the entry of the final removal order." *Id.* at *12. The Tenth Circuit found that the petitioners had no greater constitutional rights than an alien seeking admission into the United States. *Id.* The Tenth Circuit concluded that the petitioners had no liberty interest in being released pending their physical removal. *Id.* at 13.

This Court respectfully declines to adopt the reasoning of the Fifth and Tenth Circuits. Denial of constitutional rights to an alien ordered excluded is the result of legal fiction which is based upon the fact that the excludable alien never legally entered the United States. *See Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995). Once an alien such as Petitioner is admitted legally into the United States, the premise underlying the "entry fiction" is absent. Petitioner's presence in this country for many years established the ties to the United States which grant the additional constitutional rights as described in *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 330 (1982). The constitutional rights Petitioner had as a resident alien cannot all vanish with an order of deportation. *See Vo*

v. Greene, 63 F.Supp.2d 1278, 1283 (D. Colo. 1999). Petitioner is not seeking the privilege of admission into the United States; he has been admitted to the United States, developed ties to the United States, and has constitutional rights. *See Phan v. Reno*, 56 F. Supp.2d 1149, 1154 (W.D. Wash. 1999). While the order of deportation revoked the privilege Petitioner had already been given, basic constitutional rights must apply until Petitioner is physically deported. Thus, the Court does not find the cases cited by Respondent require the Court to change its prior holding that Petitioner has substantive due process protections in addition to those possessed by an alien who has been order excluded.

Ngo v. Immigration and Naturalization Service, 192 F.3d 390, 393 (3rd Cir. 1999) is also not persuasive. *Ngo* involved a refugee, not a lawful permanent resident, who committed an aggravated felony and was ordered excluded and deported. *Id.* at 392. The Third Circuit found that an alien with a criminal record may be detained for lengthy periods when appropriate provisions for parole are available. *Id.* at 397. The court remanded the case with instructions to release the petitioner unless the INS began reviewing the petitioner's case under the Pearson Memoranda. *Id.* at 399. *Ngo* is not directly on point because the petitioner was ordered excluded. Further, *Ngo* found that INS could not repeatedly deny release solely because of the petitioner's criminal offense. *Id.* at 398. Similarly, this Court found that the INS cannot continue to detain Petitioner merely because the INS believes Petitioner is a danger to society. To the extent *Ngo* also stands for the position that aliens ordered deported have no constitutional right against indefinite confinement, the

Court disagrees for the reasons cited above. Thus, the Third Circuit's opinion in *Ngo* does not persuade this Court to reverse its earlier findings.

In conclusion, the court remains satisfied that there is no firm prospect that Petitioner will be removed in the foreseeable future, and that continuing incarceration violates Petitioner's fundamental right as a former permanent resident alien to be free from arbitrary bodily restraint under the substantive due process clause of the Fifth Amendment.

Accordingly, it is HEREBY ORDERED that Respondent's motion to alter or amend the order conditionally granting the petition for writ of habeas corpus is DENIED. Respondent's motion for a stay pending resolution of its motion to alter or amend is DENIED as moot.

DATED: 3-24-00 /s/ ANTHONY W. ISHII
ANTHONY W. ISHII
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV F 98-6139 AWI DLB P

PHUC PHONG LE, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

[Filed: Mar. 2, 2000]

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS AND GRANTING PETITION WITH CONDITIONS

Petitioner is an alien challenging his detention by the Immigration and Naturalization Service ("INS") on the ground that it is in violation of his Fifth Amendment right to substantive due process because his confinement will be indefinite. Petitioner has brought the issue to this court through a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302(c)(17).

On June 1, 1999, the Magistrate Judge filed findings and recommendations herein. These findings and recommendations were served on the parties and contained notice to the parties that any objections to the findings and recommendations were to be filed within ten court days. Respondent filed objections on June 21, 1999. On June 30, Petitioner filed a supplemental brief and response to Respondent's objections. On October 6, 1999, Petitioner lodged a request for an order allowing to expand the record in this case, which the court granted. On December 16, 1999, Petitioner supplemented the record with interrogatory responses submitted in *Inthasom Siehanh v. INS*, CV F 98-6567 AWI DLB P.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis with one exception. The court declines to adopt the language found at page 17, lines 10 through 11, of the findings and recommendations, comprising the sentence beginning with the word "Petitioner" and ending with the word "origin." The court does adopt footnote number 7.

Considering the length of past detention and the high probability of continuing detention in the future, the court is satisfied that there is no firm prospect that Petitioner will be removed in the foreseeable future. The court concludes that continuing custody in these circumstances violates Petitioner's fundamental right as a former permanent resident alien to be free from arbitrary bodily restraint under the substantive due

process clause of the Fifth Amendment. Accordingly, the court will adopt the Magistrate Judge's Findings and Recommendations, grant the petition for writ of habeas corpus, and release Petitioner on the conditions set forth below.

Accordingly, it is HEREBY ORDERED that:

The findings and recommendations issued by the Magistrate Judge on June 1, 1999, are adopted in full with the sole exception set forth above; and

Petitioner's application for a writ of habeas corpus is GRANTED ON CONDITION that he (a) post a bond in a reasonable amount to be agreed upon by INS and Petitioner, and (b) agree to abide by the conditions of supervision set forth in 8 C.F.R. § 241.5 insofar as they are deemed necessary by the INS.

Petitioner shall remain in custody pending his satisfaction of the above conditions.

DATED: March 1, 2000 /s/ ANTHONY W. ISHII
ANTHONY W. ISHII
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV F 98-6139 AWI DLB P

PHUC PHUONG LE, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

[Filed: June 1, 1999]

FINDINGS AND RECOMMENDATION
RE: PETITION FOR WRIT OF HABEAS CORPUS

Petitioner is one of several aliens challenging his detention by the Immigration and Naturalization Service (INS) on the grounds that it is indefinite and in violation of his Fifth Amendment right to substantive due process. Petitioner has brought the issue to this court through a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner was a lawful resident of the United States, but has been ordered deported due to his conviction for an aggravated felony. He is now subject to a final order of deportation. However, petitioner's country of origin has yet to accept his

return or the return of any other similarly situated persons. As a result, petitioner remains in the custody of the INS. Petitioner requests that the Court grant his petition for writ of habeas corpus and order the INS to release him from custody on the INS's supervisory conditions and requests that the Court order him released pending the outcome of the petition.

BACKGROUND

Petitioner was born in Vietnam on February 7, 1966. Petitioner's family fled Vietnam and lived in a refugee camp in Hong Kong for about one year. Then, on June 3, 1982, petitioner immigrated to the United States with his family as a refugee.[1]

In October 1993, petitioner was arrested and an information was filed charging petitioner with one count of murder in violation of California Penal Code § 187 and two counts of attempted murder in violation of California Penal Code §§ 187/664 and alleging various enhancements. On January 13, 1995, petitioner pled guilty to one count of manslaughter in violation of California Penal Code § 192(a). The trial court sentenced petitioner to six years incarceration in state prison.[2]

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[1] It is unclear if petitioner was ever made a lawful permanent resident. There is no document concerning petitioner's change of status from refugee to lawful permanent resident in petitioner's A-File. However, various documents pertaining to petitioner's deportation indicate petitioner was a lawful permanent resident.

[2] This was not petitioner's first criminal offense. In 1992, petitioner was convicted of misdemeanor assault in violation of California Penal Code § 245(a)(1). In 1993, petitioner was convicted of forgery in violation of California Penal Code § 470 and resisting/delaying a peace officer in violation of California Penal Code § 148. Petitioner also was convicted of several violations of

After completing his state sentence, petitioner was released into the custody of the INS in March 1997. On March 13, 1997, the INS served petitioner with an order to show cause and a notification of deportation hearing. On August 28, 1997, an Immigration Judge ordered petitioner deported to Vietnam. Petitioner's requests for asylum and with holding of deporting were denied. Petitioner did not file an appeal, and it appears a final order of deportation was entered on August 28, 1997.

On April 17, 1997, the INS wrote a letter to the Embassy of Vietnam in Washington D.C. requesting travel documents for petitioner. The INS has yet to receive travel documents or a response to its request. The INS has not received travel documents in any of the many cases involving similarly situated individuals.

On January 25, 1999, petitioner, through counsel, requested that the INS review his custody status.

On October 7, 1998, petitioner filed a petition for writ of habeas corpus in this Court. On November 4, 1998, the Court granted petitioner's request for counsel and ordered the Federal Defender to represent petitioner. On February 17, 1999, petitioner filed a brief in support of his habeas corpus petition. On March 17, 1999, respondent filed a return to the petition.

California's Vehicle Code, including three convictions for driving while intoxicated in violation of California Vehicle Code § 23152. *See* A-File at 68.

BASIS FOR PETITIONER'S DETENTION

Petitioner has been ordered deported. However, the INS did not effectuate petitioner's removal in the 90 day removal period after petitioner's order of deportation became final. Under 8 U.S.C. § 1231(a)(6), the INS can continue to detain aliens, such as petitioner, who have been ordered deported but who have not been removed within the normal 90 day removal period. Section 1231(a)(6) specifically allows the INS to continue to detain aliens who have been convicted of aggravated felonies or who the INS determines are a risk to the community or unlikely to comply with the order of removal. *See* 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 241.4(a). Under the regulations, the INS District Director may release such an alien from custody, in his discretion, if the alien can demonstrate "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). At this time, petitioner is being detained pursuant to section 1231(a)(6) and the District Director has not considered whether to release petitioner.

EFFORTS TO OBTAIN TRAVEL DOCUMENTS FOR PETITIONER

Petitioner contends that his incarceration is indefinite because Vietnam has not accepted his return, nor has it permitted the return of many other individuals in similar situations whom the INS has sought to return. Petitioner also argues that he is possibly stateless because his parents are Chinese, and as such, Vietnam may not consider him a national. Respondent concedes that Vietnam has yet to accept the return of citizens and nationals of Vietnam whom the United States has

sought to deport. However, respondent maintains that diplomatic efforts in this regard continue and the situation could change with time.

Petitioner asserts because Vietnam is not permitting the return of any of its nationals who have been ordered deported from the United States, he not likely to ever be removed to Vietnam, or at best, it may be years before Vietnam permits his return. The INS has attempted at least once to receive travel documents for petitioner, but the INS's request has been ignored. In addition, petitioner has attached a memorandum to his petition concerning "Western Region Long-Term detention Strategy for FY98." This document was distributed by the Western Regional Director for INS to the District Directors and it discusses long term detention strategies for aggravated felon aliens, non-removable aliens, and non-releaseable final order aliens. The memo list aliens from Cambodia, Laos, Cuba, North Korea, Somalia, and Vietnam as non-removable. Finally, petitioner's counsel contacted the Embassy of Vietnam and requested information concerning the repatriation of nationals who have been ordered removed from the United States. Petitioner's counsel was informed that there had been two attempts to negotiate repatriation, but there currently was no schedule to resume talks.

While conceding that Vietnam is not currently accepting the return of its nationals, respondent states that it believes petitioner will be removed to Vietnam in the future. In his declaration filed in support of respondent's answer, Patrick O'Reilly, a staff officer for the INS, states that Vietnam has not honored requests from the INS for travel documents in any

case. However, Mr. O'Reilly states that the INS "is actively seeking to resolve this problem and to establish a procedure to obtain travel documents for persons from Vietnam." Exhibit A attached to answer. Mr. O'Reilly notes that Vietnam agreed to accept the repatriations of over 100,000 ethnic Vietnamese from Hong Kong and in 1995 agreed with Canada for the repatriation of deported Vietnamese nationals. Mr. O'Reilly states that the INS continues to request the repatriation of Vietnamese nationals.

JURISDICTION

In general, habeas corpus relief is appropriate when a person "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208 (enacted September 30, 1996) amended the Immigration and Nationality Act to restrict federal courts' review over actions taken by INS. Title 8 U.S.C. § 1252(g) reads:

> Exclusive Jurisdiction. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) also affected judicial review of INS cases. Pub. L. No. 104-132, § 440 (enacted April 24, 1996). Under the AEDPA and IIRIRA, any order of

deportation against an alien who has been ordered deported because he committed an aggravated felony shall not be subject to review by any court. *See* 8 U.S.C. § 1252(a)(2)(c); 8 U.S.C. § 1105a(a)(10) (1996).[3]

The United States Supreme Court has recently interpreted 8 U.S.C. § 1252(g) narrowly, finding that it applies only to three discrete actions taken by the Attorney General: "her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936, 943 (1999), *quoting*, 8 U.S.C. § 1252(g). The Supreme Court determined that Congress meant to preclude judicial review in these three areas because the INS's decision to proceed with deportation or exclusion proceedings at these three distinct stages had caused considerable litigation in the federal courts. *Id.* at 943-44.

Petitioner alleges that his continued detention violates his substantive due process rights because he will be indefinitely confined. Section 1252(g) does not withdraw habeas jurisdiction on this collateral constitutional issue because petitioner's request for release pending execution of the final order of deportation does not involve INS's decision to commence proceedings, adjudicate cases, or execute removal orders. *See American-Arab Anti-Discrimination Comm.*, 119 S.Ct. at 934-44. Respondent contends that petitioner's release from custody may make it difficult for INS to remove him if

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[3] The AEDPA codified this section at 8 U.S.C. § 1105a(a)(1). However, on April 1, 1997, section 1105a(a)(10) was repealed and this provision was replaced with a similar provision at 8 U.S.C. 1252(a)(2)(c).

it is able to obtain travel documents in the future. However, judicial review of petitioner's claim of indefinite confinement does not implicate the INS's decision to execute a removal order when and if appropriate travel documents are ever obtained for petitioner. The three specific decisions of the INS described in section 1252(g) are not a "shorthand way of referring to all claims arising from deportation proceedings." *Id.* at 943. Thus, section 1252(g) does not bar this Court's consideration of petitioner's claims.

Prior to the passage of IIRIRA, the law specifically provided that an alien held in custody pursuant to a deportation order could obtain judicial review through habeas corpus. 8 U.S.C. § 1105a(1)(10) (1995). Prior decisions by courts considering the subject found no jurisdictional impediment to the review of writs brought by aliens who claimed to be indefinitely confined pursuant to an exclusion order. *See, e.g., Guzman v. Tippy*, 130 F.3d 64 (2nd Cir. 1997); *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995); *Gisbert v. United States Atty. Gen.*, 988 F.2d 1437 (5th Cir. 1993); *Fernandez-Roque*, 734 F.2d 576 (11th Cir. 1984). While there is currently no statute providing that aliens who have been ordered deported may seek habeas corpus review of their confinement, neither IIRIRA nor AEDPA contain language withdrawing such review. *See Henderson v. Immigration and Naturalization Service*, 157 F.3d 106, 118-29 (2nd Cir.), *cert. denied sub nom*, *Reno v. Navas*, 119 S. Ct. 1141; *Tam v. Immigration and Naturalization Service*, 14 F. Supp.2d 1184, 1187-88 (E.D. Cal. 1998). In general, a court should not find that Congress has repealed habeas corpus jurisdiction in the absence of an express statement of congressional intent. *See Felker v. Turpin*, 518

U.S. 651, 660-61, 116 S. Ct. 2333, 2338-39 (1996). Further, case law indicates that the court has jurisdiction over constitutional claims which arise from general collateral challenges to unconstitutional practices by INS, so long as they do not arise from INS's decision to commence proceedings, adjudicate cases, or execute removal orders. *See Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998); *Williams v. Immigration and Naturalization Service*, 114 F.3d 82, 84 (5th Cir. 1997); *Tam*, 14 F.Supp.2d at 1187-88.

Several circuit courts have addressed whether federal courts retain some jurisdiction pursuant to section 2241 to review constitutional claims in light of 8 U.S.C. 1105a(a)(10) (1996) and 8 U.S.C. § 1252(a)(2)(c), which prohibit judicial review of deportation orders for aliens who were ordered deported because they committed an aggravated felonies.[4] Most Circuit Courts have found that district courts retain jurisdiction under section 2241 over constitutional claims or claims affecting substantial rights of aliens. *Henderson*, 157 F.3d at 118-22; *Goncalves v. Reno*, 144 F.3d 110, 121-22, 126 (1st Cir.), *cert. denied*, 119 S. Ct. 1140; *see also Lerma de Garcia v. Immigration and Naturalization Service*, 141 F.3d 215, 217 (5th Cir. 1998); (finding some degree of judicial review under habeas corpus remains available, although not specifying scope of that review); *Mansour v. Immigration and Naturalization Service*,

[4] 8 U.S.C. § 1252(a)(2)(c) does not apply to aliens who began deportation proceedings prior to April 1, 1997. *See Sandoval v. Immigration and Naturalization Service*, 166 F.3d 225, 229 n.1; *Henderson*, at 117 n.7. Section 1105a(a)(10) (1996) applies to aliens who began deportation proceedings between April 24, 1996 and April 1, 1997. Because petitioner began deportation proceedings in March 1997, section 1105a(a)(10) applies to him.

123 F.3d 423, 426 (6th Cir. 1997) (same); *Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997) (same); *Fernandez v. Immigration and Naturalization Service*, 113 F.3d 1151, 1154 n.3 (10th Cir. 1997) (same).[5] These cases have involved some challenge to the INS's decision to deport the petitioner. For example, in *Henderson*, an alien who had been ordered deported as an aggravated felon claimed that AEDPA's section 440(d), which prohibits a waiver of deportation for aliens ordered deported on the basis of a criminal conviction, did not apply to him because his proceedings began before the IIRIRA was enacted. *Henderson*, 157 F.3d at 128-130. The Second Circuit found it had jurisdiction under section 2241 to review this statutory construction claim that affected a substantial right. *Id.* at 122, 130.

Other circuits have determined that aliens ordered deported, who are not entitled to judicial review of their deportation orders pursuant to section 1105a(a) or section 1252(a)(2)(c), because they committed certain felonies, are also not entitled to habeas corpus review pursuant to section 2241. *See LeGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998); *Richardson v. Reno*, 1998 WL 850045 *231 (11th Cir. 1998), *opinion vacated and superseded*, 162 F.3d 1338 (11th Cir. 1998). How-

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[5] The Ninth Circuit reached a similar result in *Magana Pizano v. Immigration and Naturalization Service*, 152 F.3d 1213 (9th Cir.), *cert. granted, judgment vacated, and case remanded* 119 S. Ct. 1137 (1999), but instead of finding IIRIRA did not withdraw such review, the Ninth Circuit found IIRIRA did withdraw review and that this withdrawal was an unconstitutional suspension of the writ. The Supreme Court granted review, vacated the Ninth Circuit's opinion, and remanded the case for re-hearing in light of *American-Arab Anti-Discrimination Comm. Id.*

ever, the Seventh Circuit concluded that such aliens can challenge their deportation on constitutional grounds in the Court of Appeals. *LeGuerre*, 164 F.3d at 1040.

In this case, petitioner is not challenging his order of deportation, but only his confinement pending execution of that order of deportation. Thus, cases concerning the issue of whether the Court has jurisdiction to review orders of deportation are not relevant to the Court's finding of jurisdiction in this case. Further, even if the court were to conclude confinement is not collateral to the deportation order, the majority trend is to allow habeas corpus review through 28 U.S.C. § 2241. Thus, the Court has jurisdiction pursuant to 28 U.S.C. § 2241 to review petitioner's constitutional claim concerning his indefinite confinement pursuant to *Walters*, 145 F.3d at 1052; *Williams*, 114 F.3d at 84; and *Tam*, 14 F.Supp.2d at 1187-88.

EXHAUSTION

In general, before a petitioner may file a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, he must exhaust federal administrative remedies. *McCarthy v. Madigan*, 503 U.S. 140, 144-45, 112 S. Ct. 1081, 1086-87 (1992); *Western Radio Service Co. v. Espay*, 79 F.3d 896, 899 (9th Cir. 1996); *Martinez v. Roberts*, 804 F.2d 570, 571 (9th Cir. 1986). This rule applies to aliens and "[a]bsent overriding justification, an alien must exhaust his administrative remedies prior to seeking review of a deportation order." *Vargas v. United States Dept. of Immigration*, 831 F.2d 906, 907 (9th Cir. 1987).

However, the court may at its discretion excuse a petitioner's failure to exhaust administrative remedies if exhaustion is not mandated by Congress. *McCarthy*, 503 U.S. at 144, 146, 112 S. Ct. at 1086-87; *Brown v. Rison*, 895 F.2d 533, 535 (9th Cir. 1990). In determining whether to excuse exhaustion, the court should consider the claim asserted, the agency's interest in resolving the issue, and the administrative procedure provided. *McCarthy*, 503 U.S. at 146, 112 S. Ct. at 1087; *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (9th Cir. 1987). In cases concerning immigration proceedings, the Ninth Circuit has found that due process claims may be exempted from the exhaustion requirement if they involve more than a mere procedural error that the administrative tribunal can easily remedy. *See Bagues-Valles v. Immigration and Naturalization Service*, 779 F.2d 483, 484 (9th Cir. 1985) (exempting from exhaustion requirement petitioner's claim that BIA's retroactive interpretation of "continuous presence rule" violated due process).

Respondent contends that in order to exhaust administrative remedies petitioner must have filed a formal written request for release pursuant to 8 U.S.C. § 1231(a)(6) and appealed any finding to the BIA. While petitioner's custody status has been reviewed by the District Director, respondent contends he will not have exhausted his administrative remedies until the BIA has reviewed his appeal. Respondent points out that a review system has recently been established by the INS for cases such as petitioner's and argues that the Court should require exhaustion to allow this administrative process to run its course before entertaining the petition.

The Court will excuse exhaustion in this case because petitioner's claim concerns a constitutional issue collateral to INS's decision to deport petitioner. Respondent correctly notes that INS has rules governing when, in INS's discretion, the District Director can release aliens subject to an order of deportation. *See* 8 C.F.R. §§ 236.1(c); 241.4; 241.5. Respondent has attached INS's new review guidelines for reviewing each incarcerated INS detainee's custody status, and it appears petitioner's case is being reviewed in conformity with the regulations.[6] Under the guidelines and regulations, INS should consider such factors as the seriousness of the alien's criminal conviction, criminal history, history of failures to appear, disciplinary problems, and equities in the United States. *See* 8 C.F.R. § 241.4; Exhibit B attached to answer. However, nothing in these guidelines takes into account the likely length of the alien's detention between a final order of deportation and actual deportation. Nor do these guidelines provide consideration for the likelihood of indefinite detention because of a country of origin's unwillingness to accept an alien's return. Thus, even if the Court were disposed to require exhaustion, the issue raised by this petition, the constitutionality of indefinite detention pending deportation, would not be addressed in the course of the administrative process.

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[6] The new review policy, however, is not mandated by any regulation or code section. Normally, when courts have required exhaustion of administrative remedies, regulations were in place by which the petitioner could present his claims to the agency. *See Martinez*, 804 F.2d at 571 (describing procedure for bringing claims to prison administration); *Lyle v. Sivley*, 805 F.Supp. 755, 757 (D. Ariz. 1992) (same).

Petitioner's constitutional claims of indefinite confinement weigh heavily when compared to the INS's interest in completing the process of administrative review, because by its own guidelines the INS will not reach the very question raised in this petition. This is especially true because the petition does not request review of the order of deportation. *See Wang v. Reno*, 81 F.3d 808, 814 (9th Cir. 1996); *Hermonowski v. Farquharson*, – F.Supp.2d —, 1999 WL 111520 (D.R.I. March 1, 1990); *Tam*, 14 F.Supp. at 1189; *see also Abedi-Tajrishi v. Immigration and Naturalization Service*, 752 F.2d 441, 443 (9th Cir. 1985) (because administrative review does not apply when the challenged conduct is outside deportation proceeding, exhaustion is not required). It is true that should the INS decide to release petitioner, it would moot petitioner's claim. But, such a decision would only resolve petitioner's custody status and not the underlying constitutional claim of this petition—that petitioner's indefinite confinement is in violation of substantive due process. Thus, the Court will not require petitioner to exhaust all available administrative remedies on the issue of his custody status before reaching petitioner's claim that his indefinite confinement while awaiting execution of the deportation order violates his substantive due process rights.

SUBSTANTIVE DUE PROCESS

"'[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.'" *Reno v. Flores*, 507 U.S. 292, 305, 113 S. Ct. 1439, 1449 (1993), *quoting*, *Matthews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 1892 (1976). As such, de-

cisions concerning immigration and naturalization are often immune from judicial intervention. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 628 (1953).

The Due Process Clause of the Fifth Amendment states that "no person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." Substantive due process prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209 (1952), or interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-326, 58 S. Ct. 149 (1937). Substantive due process forbids the government from infringing on certain "fundamental" liberty interests "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 1447 (1993); *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068 (1992); *Bowers v. Hardwick*, 478 U.S. 186, 191, 106 S. Ct. 2841, 2844 (1986).

A. Petitioner's Constitutional Rights

Because petitioner is not an American citizen, respondent contends he is entitled to few, if any, constitutional protections. However, it is clear that petitioner and others who share his status enjoy the protection of some constitutional rights, including substantive due process rights. Aliens do not enjoy all of the rights given to citizens. *See Flores*, 507 U.S. at 305-06, 113 S. Ct. at 1449; *Matthews*, 426 U.S. at 78, 96 S. Ct. at 1890. In exercising its broad power over immigration, Congress can make rules applicable to aliens which would not be acceptable if applied to citizens.

Fiallo v. Bell, 430 U.S. 787, 792, 97 S. Ct. 1473, 1478 (1976). However, both legal and illegal aliens are entitled to the due process protections of the Fifth Amendment and are protected from deprivations of their life, liberty, or property without due process of law. *Plyler v. Doe*, 457 U.S. 202, 210-12, 102 S. Ct. 2382, 2391 (1982); *Mathews*, 426 U.S. at 80, 96 S. Ct. at 1891; *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 981 (1896).

Aliens may enjoy different rights depending upon their status in this country. Courts have distinguished between aliens who are requesting admission to the United States and those who have been within the United States either legally or illegally. An alien seeking admission is ordered excluded if the INS denies admission. If the INS decides to remove an alien already legally or illegally within the United States, he is ordered deported.

> [A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional states changes accordingly.

Landon v. Plasencia, 459 U.S. 21, 32, 103 S. Ct. 321, 330 (1982) (citations omitted).

For example, in 1953 the United States Supreme Court reviewed the case of a man who was stuck on Ellis Island because he had been ordered excluded, but no other country would take him. *Mezei*, 345 U.S. at 208-09, 73 S. Ct. at 627. The Supreme Court found that

his continued detention on Ellis Island did not violate the Constitution. *Id.*, at 215, 73 S. Ct. at 631. Relying in part on this case, later courts have concluded that any excluded alien's rights should be reviewed under an "entry fiction." In other words, while an excluded alien is present in the United States, her case is viewed as though she is still standing at the boarder and as though she never entered the country. *Barrera-Echavarria*, 44 F.3d at 1451. On the other hand, the Supreme Court has held that aliens within the United States are entitled to constitutional protections, even if the alien's presence in unlawful, involuntary, or transitory. *Plyler*, 457 U.S. at 210-12, 102 S. Ct. at 2391-92; *Mathews*, 426 U.S. at 77, 96 S. Ct. at 1890; *Wong Wing*, 163 U.S. at 237-38, 16 S. Ct. at 981.

Respondent contends that the issuance of a final order of deportation against petitioner resulted in a loss of his substantive due process protection against indefinite detention. The final order of deportation extinguished petitioner's lawful permanent resident status and his right to legally remain in the United States. *See Foroughi v. Immigration and Naturalization Service*, 60 F.3d 570, 575 (9th Cir. 1995); *Ghassan v. Immigration and Naturalization Service*, 972 F.2d 631, 637 (5th Cir. 1992). Thus, respondent argues that petitioner's rights are reduced to only those afforded to excludable aliens (aliens who were never legally present in the United States). There is, however, no authority for the proposition that an alien losses all constitutional rights as a result of a final order of deportation. It appears that each court which has reviewed this issue has found that substantive due process applies to incarcerated aliens who have been ordered deported, they only differ on whether substan-

tive due process has been violated. *See, e.g., Hermanowski*, 1999 WL 111520; *Tam*, 14 F.Supp.2d 1184; *Zadvydas v. Caplinger*, 986 F.Supp. 1011 (E.D. La. 1997); *Tran v. Caplinger*, 847 F.Supp. 469 (W.D. La. 1993).

Finally, petitioner's presence in this country for over fifteen years has established the ties to the United States which grant the additional constitutional rights described in *Landon*, 459 U.S. at 32, 103 S. Ct. at 330. Thus, petitioner has substantive due process protections.

B. Substantive Due Process

Substantive due process forbids the government from infringing on fundamental liberty interests unless the infringement is narrowly tailed to serve a compelling governmental interest. *Flores*, 507 U.S. at 301-02, 113 S. Ct. at 1439. The "analysis must begin with a careful description of the asserted right." *Flores*, 507 U.S. at 301-02, 113 S. Ct. at 1447; *Collins*, 503 U.S. at 125, 112 S. Ct. at 1068. In general, commitment for any purpose is a deprivation of liberty that requires due process protection. *Kansas v. Hendricks*, 117 S. Ct. 2072, 2080 (1997); *Foucha*, 504 U.S. at 80, 112 S. Ct. at 1785. However, substantive due process does not grant all persons who have not been convicted of a crime the absolute right to be free from detention. *See, e.g., United States v. Salerno*, 481 U.S. 739, 748, 107 S. Ct. 1780, 1785 (1987) (government's interest in community safety can outweigh an individual's liberty interest to bail pending trial); *Schall v. Martin*, 467 U.S. 253, 281, 104 S. Ct. 2403, 2418 (1984) (allowing the pretrial detention of juveniles); *Jones v. United States*, 463 U.S. 354, 361, 103 S. Ct. 3043, 3044 (1983) (allowing the confine-

ment of mentally ill if showing by clear and convincing evidence they are mentally ill and dangerous to society).

In reviewing cases that do not affect a fundamental liberty interest, the Court must determine if the detention is punishment, and if it is not, whether it is rationally connected to some other alternative purpose. *Schall*, 467 U.S. at 269, 104 S. Ct. at 2412; *Alvarez-Mendez v. Stock*, 941 F.2d 956, 996 (9th Cir. 1991). The Court must then determine if the detention is excessive in relation to the alternative purpose. *Schall*, 467 U.S. at 269, 104 S. Ct. at 2412; *Alvarez-Mendez*, 941 F.2d at 996.

Respondent suggests that the Court's review of petitioner's substantive due process claim is even more limited. Respondent contends that once the INS gives a facially legitimate and bono fide reason justifying its actions and/or interpreting an immigration law, the Court may not look behind the INS's exercise of discretion nor balance the INS's justification for its actions against the constitutional interest asserted by those challenging the actions. *See Campos v. Immigration and Naturalization Service*, 961 F.2d 309, 316 (1st Cir. 1992), *quoting*, *Fiallo*, 430 U.S. at 794-95, 97 S. Ct. at 1479. However, both *Fiallo* and *Campos* concerned constitutional challenges to immigration laws pertaining to aliens seeking admission into the United States or seeking an exception to the law under which they were ordered deported. *Fiallo*, 430 U.S. at 788-90, 97 S. Ct. at 1476-77 (finding no equal protection violation in immigration law which declined to grant immigration preferences to illegitimate child seeking preference by virtue of relationship with natural father); *Campos*, 961

F.2d 309, 315-316 (finding no equal protection violation for immigration law's distinguishment between firearm offenses in determining who is removable). Petitioner's constitutional challenge concerns his indefinite confinement, not the statue under which he was ordered deported. The appropriate test is to weigh the government's legitimate interests against petitioner's constitutional rights to substantive due process.

1. ***Findings of Courts Concerning Confinement of Aliens Ordered Deported***

Neither the Supreme Court nor the Ninth Circuit have addressed whether aliens who have been ordered deported have a substantive due process right protecting them from indefinite confinement. Several District Courts, however, have addressed this issue in cases brought by aliens who have been ordered deported but whose countries of origin would not accept their return. These courts have found that such aliens do have a substantive due process right which protects them from not being indefinitely confined.

In *Tran*, 847 F.Supp. 469 (W.D. La. 1993), the petitioner had been ordered deported to Vietnam. *Id.* at 471. Because INS was not able to remove the petitioner, the petitioner remained in the INS's custody. The petitioner filed a habeas corpus petition on the ground that he had been detained for a prolonged period and requested the district court to review his custody status. *Id.* at 471-72. The court applied a substantive due process analysis to the petitioner's case and concluded that the petitioner's detention was designed to serve a legitimate and compelling government interest. *Id.* at 474-75. In determining that the governmental purpose allowed the continued incar-

ceration of the petitioner, the court looked to the Fifth Circuit's opinion in *Gisbert v. U.S. Attorney General*, 988 F.2d 1437 (5th Cir. 1993). While the court recognized that *Gisbert* had dealt with the continued incarceration of an excluded alien and the petitioner had constitutional rights that an excluded alien did not, the court found that the government's interest in continued incarceration was the same. In balancing the governmental interest against the alien's rights, the court concluded that substantive due process had been satisfied. *Tran*, at 476.

In *Zadvydas*, 986 F. Supp. 1011 (E.D. La. 1997), the court reviewed a similar case involving a German citizen who had been ordered deported but whom Germany had refused to accept. *Id.* at 1023. As in *Tran*, the court determined that the petitioner was entitled to substantive due process rights under the Constitution. *Id.* at 1025. The Court also recognized the government's interest in protecting the community from aggravated felons and preventing the petitioner from absconding before deportation. *Id.* at 1026. However, the court found:

> The particularly troublesome aspect of petitioner's detention is its duration to date and its potential, if not certainty, for indefinite duration in the future. Detention is intended for the sole purpose of effecting deportation, and once it became evident that deportation is not realizable in the future, the continued detention of the alien loses its raison d'etre.

Id.

Based on this rational and the fact that courts in the past have released aliens who have been ordered deported and held in custody for more than a few

months, the court found the petitioner's continued incarceration was an excessive means to accomplishing the purpose of deportation and ordered the petitioner released. *Id.* at 1027-28.

In *Tam*, 14 F.Supp.2d 1184 (E.D. Cal. 1998), the court reviewed the substantive due process claim of a Vietnamese national who had been ordered deported but remained incarcerated because Vietnam would not accept his repatriation. *Id.* at 1186-87. The court applied a substantive due process analysis, and relying in part of *Zadvydas*, determined that the government's interest in incarcerating the petitioner was absent because the detention was no longer temporary and the government was not able to deport the petitioner. *Id.* at 1191-92. The court, however, did not grant the petition and instead granted the petitioner's request for release pending a final order on the petition. *Id.* at 1193.

In *Cholak v. United States*, 1998 WL 24922 (E.D. La. May 15, 1998), the court reviewed the case of a national of Iraq who had been ordered deported, but whom Iraq refused to allow to return. *Id.* at *1. The court applied a substantive due process analysis, but determined that the petitioner's continued incarceration did serve a legitimate government interest as articulated in *Gisbert* and *Tran*. *Id.* at *9. The court concluded that the petitioner's confinement would not be indefinite because the reason the INS could not deport the petitioner was due to an uncertain status between the United States and Iraq which could change, unlike *Zadvydas* where the petitioner was "stateless." *Id.* at *9-*10.

Finally, in *Hermanowski*, 1999 WL 111520 (D.R.I. March 1, 1999), the court reviewed the case of a Polish national who had been ordered deported, but who remained incarcerated because Poland refused to accept his return. *Id.* at *1-*2. The court found that the petitioner had a substantive due process right to be free from indefinite confinement. In balancing the petitioner's rights against the governmental interest, the court took into account several factors including, the length of past detention, the likelihood of deportation, the potential length of detention in the future, and the likelihood that release will frustrate deportation. *Id.* at *10-*11. In applying a substantive due process analysis, the court determined that the government's interest in protecting society from the petitioner was slight and the unlikelihood Poland would ever accept the petitioner's return made the government's interest in preventing the petitioner from absconding slight. *Id.* at *12-*13. In balancing the petitioner's interest in avoiding a lengthy detention against the government's interest, the court found that the petitioner's confinement violated substantive due process and granted the habeas corpus petition. *Id.* *13-*15.

B. Petitioner's Incarceration Violates His Substantive Due Process Rights

Petitioner remains in INS custody pursuant to 8 U.S.C. § 1231(a)(6), which provides for the continued detention of deportable aliens who have not been removed. Petitioner contends that because his country of origin is not accepting the return of any Vietnamese nationals ordered deported from the United States, he is subjected to indefinite confinement. Respondent contends that petitioner's confinement will not be inde-

finite because Vietnam may accept his return in the future or INS, in its discretion, can release petitioner.

Petitioner's detention is not for the purpose of punishment. Federal courts have consistently held that deportation is not a criminal proceedings, and is not punitive in purpose. *See Immigration and Naturalization Service*, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 3483 (1984); *Carlson v. Landon*, 342 U.S. 524, 537-38, 72 S. Ct. 525, 533 (1952). The Supreme Court has specifically authorized detention prior to a final order of deportation and pending the outcome of deportation proceedings in order to facilitate the proceedings. *Carlson*, 342 U.S. at 538, 72 S. Ct. at 533. Continued detention after a final order of deportation can serve legitimate government purposes. Detention can ensure speedy deportation and ensure that the alien will not abscond. *Hermanowski*, 1999 WL 111520 *10; *Zadvydas*, 986 F.Supp. at 1026; *Tran*, 847 F. Supp. at 475. Continued detention can protect the community from the criminal behavior of an alien who is being deported because he is an aggravated felon. *Hermanowski*, 1999 WL 111520 *10; *Zadvydas*, 986 F. Supp. at 1026. The issue, of course, is whether these legitimate governmental purposes outweigh petitioner's constitutional right to substantive due process, i.e. to be free of confinement, especially indefinite confinement, absent the due process rights which normally apply in confinement cases.

Petitioner argues that he has a strong interest in being free from confinement because Vietnam's refusal to accept his return makes his detention indefinite and he has already been confined for a lengthy period when considering the purpose of his confinement. At this

time, Vietnam is not accepting the return of its nationals who have been ordered deported from the United States. Despite continuing efforts, the INS has been unable to receive travel documents for any Vietnamese national for many years. The INS has not received travel documents for this petitioner in spite of the fact that a final order of deportation was entered over a year and a half ago. While this is a political situation that could, and in fact probably will, change at some point in the future, *see Cholak*, 1998 WL 24922 *9-*10, respondent has no idea when this change will occur. Respondent has no timetable for petitioner's deportation and only a limited description of the efforts the United States government may employ in the future. *See Hermanowski*, 1999 WL 11520 *12. The current situation with respect to deporting aliens from the United States and returning them to Vietnam has been at its current stalemate since before petitioner came to the United States and there is no reason to believe that it will change soon. Petitioner has became a prisoner of the political and diplomatic relations, or lack of them, between the United States and his country of origin.[7] No change appears imminent. It appears unlikely petitioner will be removed to his country of origin in the near or foreseeable future.

Respondent also contends that petitioner's confinement will not be indefinite because petitioner can request the INS to review his case for release. Re-

[7] Because petitioner was admitted legally into this country, respondent's concern that releasing petitioner at this stage would cause other countries to "dump" their citizens on the United States is misplaced. *See Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984) (discussing political problem of county sending citizens to United States if court released excludable aliens from custody).

spondent argues that the procedures in place within the INS are adequate to protect whatever constitutional rights petitioner may have. The INS has the discretion to release petitioner from custody. *See* 8 U.S.C. § 1231(a)(6). The INS has specific regulations concerning what criteria will be applied in determining whether an alien who has been ordered deported can be released on parole. *See* 8 C.F.R. §§ 236.1(c); 241.4; 241.5. The alien must demonstrate by clear and convincing evidence that his release will not pose a danger to the community and he is not a flight risk. 8 C.F.R. § 241.4.[8] The INS regulations, however, do not take into account the length of petitioner's confinement or the likelihood that the confinement may be indefinite. Nor do the regulations consider the status of relations between the United States and the alien's country origin. The regulations and guidelines fail to take into account the basic constitutional issues presented by this petition concerning indefinite confinement. Without consideration of these issues, the INS's regulations and guidelines cannot protect petitioner's constitutional interests. Given the unlikelihood that petitioner will actually be deported in the near or foreseeable future, petitioner is facing extended confinement of indefinite duration.[9] Coupled with the inadequacy of the INS's

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[8] Under the regulations, INS should consider the nature and seriousness of the alien's criminal conviction, other criminal history, sentences imposed and the time served, history of failures to appear, probation history, disciplinary problems while incarcerated, evidence of rehabilitative effort or recidivism, equities in the United States, and prior immigration violations and history. 8 C.F.R. § 241.4.

[9] In the cases of aliens ordered excluded, the INS's review of the petitioners' cases was found to be an important factor. *See, e.g., Guzman*, 130 F.3d 64; *Barrera-Echavarria*, 44 F.3d 1441;

administrative proceedings, petitioner has a strong liberty interest in not being detained. Thus, the Court must weight this liberty interest with the government's interests in detaining petitioner.

The weight of the government's interest in preventing petitioner from absconding is dependent in great part on the likelihood that petitioner will actually be deported in the foreseeable future. As pointed out by

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Gisbert, 988 F.2d 1437; *Fernandez-Roque*, 734 F.2d 576; *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982); *Cruz-Elias v. United States Attorney General*, 870 F.Supp. 692 (E.D. Va. 1994). Most of these cases focused on Mariel Cubans, who were a group of approximately 125,000 Cuban nationals who came to the United States in 1980. Most were ordered excluded. However, because Cuba would not take the Mariel Cubans back, many were released on "parole." A string of cases arose concerning the excluded Mariel Cubans who had never been released on parole and other excluded Mariel Cubans who had been released on parole, committed crimes, and were detained by the INS after serving their sentences. The petitioners argued that they were being subjected to indefinite incarceration because Cuba would not allow them to return. The Ninth Circuit specifically found that the Mariel Cubans were not being subjected to indefinite or permanent detention, but also noted that INS reviewed their cases each year and each year they could present evidence on why they should be released. *Barrera-Echavarria*, 44 F.3d at 1150. Under the Cuban Review Plan, 8 C.F.R. § 212.13, detained, excluded Cubans' cases are reviewed yearly and they can yearly plead their case for parole. *Barrera-Echavarria*, 44 F.3d at 1450; *see also Fernandez-Roque*, 734 F.2d at 579-80 (explaining Cuban Review Plan); *Cruz-Elias*, 870 F.Supp. at 698 (same). Each court considering the confinement of excluded aliens mentioned the fact that the INS yearly reviewed the cases when finding that continued incarceration did not violate the Constitution. *See, e.g.*, *Guzman*, 130 F.3d at 66; *Barrera-Echavarria*, 44 F.3d at 1450; *Palma*, 676 F.2d at 104; *Gisbert*, 988 F.2d at 1446; *Fernandez-Roque*, 734 F.2d at 583-84. Thus, without some mandated review procedure, respondent's claim that petitioner will not be subject to indefinite confinement is weak.

the courts in *Zadvydas* and *Hermanowski*, once it appears that deportation is not possible, the legitimate purpose for detention can be afforded little, if any, weight. As discussed above, it appears unlikely that petitioner will be removed in the near future.

The government also argues that petitioner poses a danger to society, and it has a legitimate interest in detaining him to prevent danger to society. Petitioner, of course, has a criminal record. If he did not have one, he would not find himself in his current difficulties. While not insignificant, the government's determination that a person is a danger to the community, alone, is not a sufficient basis to justify detaining a person indefinitely. *Hendricks*, 117 S. Ct. at 2080. In *Hendricks*, the Supreme Court upheld a Kansas civil commitment statute only because it narrowed the persons eligible for confinement to those who were dangerous and had a mental abnormality or personality disorder. *Id.* Similarly, in *Foucha*, the Supreme Court found that the petitioner's liberty interest could not be defeated only by a finding of dangerousness without a finding that the petitioner was mentally ill. *Foucha*, 504 U.S. at 82-84; 112 S. Ct. at 1782-83. The Supreme Court stated:

> The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for metal illness, incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law.

Id. 504 U.S. at 82-83, 112 S. Ct. at 1787.

Further, even if a finding a dangerousness were sufficient to detain an individual, such a finding is not sufficient to justify indefinite detention. *See*, *e.g.*, *Salerno*, 481 U.S. at 747, 107 S. Ct. at 2101 (allowing confinement before trial, but such confinement is limited); *Schall*, 467 U.S. at 270, 104 S. Ct. at 2403 (approving post-arrest regulatory detention of juveniles because it is limited in time); *Jackson v. Indiana*, 406 U.S. 715, 738-39, 92 S. Ct. 1845, 1858 (1971) (finding state must institute civil commitment or release the defendant).[10] Finally, continued detention based upon danger in the absence of basic procedural due process rights is contrary to the Constitution. The Court does not address the question of whether petitioner is a danger to society or whether petitioner is likely to commit a future crime. Simply stated, under the Constitution, the fear a person may commit crimes in the future is not sufficient to detain them indefinitely.

CONCLUSION

There is no support for respondent's contention that petitioner, as an alien who has been ordered deported, does not have substantive due process rights. While he may not have the same constitutional rights as a citizen, petitioner is protected by substantive due process against indefinite confinement. When balancing the government's interest in confining petitioner against

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[10] The Court does note that in the case of excludable aliens, the Ninth Circuit did find protecting society from potentially dangerous aliens was an acceptable purpose to detain the alien. *Alvarez-Mendez*, 941 F.2d at 962. However, petitioner is distinguishable because he has been ordered deported, not excluded, and has more constitutional rights than the petitioner in *Alvarez-Mendez*.

petitioner's liberty interest it is clear that petitioner's substantive due process rights outweigh the government's interest in continuing to detain him. Petitioner's confinement is not subject to any definite end because his country of origin will not likely accept his return in the near future. The INS's interest in assuring that petitioner does not abscond and is readily available for deportation should Vietnam reverse its present course and accept his return is insubstantial when compared to petitioner's rights. Indefinite confinement on the grounds that petitioner poses a danger to society is simply unconstitutional under the circumstances. The Supreme Court has never allowed confinement for a long period of time based on dangerousness alone.

Accordingly, the Court RECOMMENDS that the petition for writ of habeas corpus be GRANTED.

RELEASE PENDING DECISION ON PETITION'S MERITS

Petitioner also requests that this Court order him released pending the further determination of this petition. Respondent contends that this Court lacks the authority to grant release because such release would be like injunctive relief and a Magistrate Judge does not have power to grant such relief under 28 U.S.C. § 636.

It appears a Magistrate Judge has jurisdiction over bail proceedings in habeas corpus cases. *See Land v. Deeds*, 878 F.2d 318 (9th Cir. 1989). In *Land*, a Magistrate Judge denied bail pending the outcome of a state prisoner's petition. The Ninth Circuit found no error in a Magistrate Judge hearing such a motion. *Id.* In addition, Local Rule 72-302(b)(17) regarding habeas actions indicates that insofar as a motion is "nondis-

positive" it is within the Magistrate Judge's jurisdiction.

Federal courts reserve bail pending resolution of a habeas corpus petition to "extraordinary cases involving special circumstances" and where there is a high probability of the petitioner's success. *United States v. Mett*, 41 F.3d 1281, 1282 (9th Cir. 1994), *quoting*, *Land v. Deeds*, 878 F.2d 318, 318-319 (9th Cir. 1989). Thus, petitioner must show that there is a substantial question presented in the petition. *Aronson v. May*, 85 S. Ct. 3, 5 (1964) (Douglas, Circuit Justice, in chambers); *Benson v. California*, 328 F.2d 159, 162 (9th Cir. 1964); *see also*, *e.g.*, *Calley v. Callaway*, 496 F.2d 701, 702 (9th Cir. 1974); *Glynn v. Donnelly*, 470 F.2d 95, 98 (1st Cir. 1972). As discussed above, there are substantial questions presented in the habeas corpus petition, and it appears that there is a substantial likelihood petitioner will ultimately succeed on the merits.

Further, petitioner has shown some circumstances making him exceptional and especially deserving of special treatment in the interests of justice. *See Aronson*, 85 S. Ct. at 5; *Benson v. California*, 328 F.2d 159, 162 (9th Cir. 1964). Exceptional circumstances have been found, in the court's discretion, when (1) the petitioner's health is seriously deteriorating, *Woodcock v. Donnelly*, 470 F.2d 93 (1st Cir. 1972); *Johnston v. Marsh*, 227 F.2d 528 (3rd Cir. 1955), (2) there is an extraordinary delay in processing the petitioner's petition, *Glynn*, 470 F.2d at 95, or (3), the petitioner's sentence would be completed before meaningful collateral review could take place. *Boyer v. Orlando*, 402 F.2d 966 (5th Cir. 1968). In this case, petitioner has been confined for over a year and a half awaiting

execution of the final order of deportation; he has completed the sentence imposed upon him by the state court for his criminal conviction before deportation proceedings began and presumably will remain on parole and subject to state jurisdiction if released.

In addition, the court must also consider petitioner's risk of flight and the danger to the community if petitioner is released. *See Marino v. Vasquez*, 812 F.2d 499, 508-09 (9th Cir. 1987). As discussed above, the risk of absconding is not a strong governmental interest in a substantive due process analysis because of Vietnam's refusal to accept petitioner's return. However, the Court must give some deference to INS's recent findings that petitioner is dangerous and a flight risk.

In light of this Court's recommendation that the petition be granted, it is unnecessary to address petitioner's arguments concerning release pending the petition's outcome. Any arguments on this issue can be raised to the District Court in the parties' objections to the findings and recommendation or replies to the objections.

RECOMMENDATION

The Court RECOMMENDS that the petition for writ of habeas corpus be GRANTED and petitioner be released from INS's custody on conditions to be mandated by the INS.

These findings and recommendation is submitted to the Honorable Anthony W. Ishii, United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and Rule 72-304 of the Local Rules

of Practice. Within (10) *court* days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within ten (10) *court* days after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: 6/1/1999

/s/ DENNIS L. BECK
DENNIS L. BECK
UNITED STATES MAGISTRATE JUDGE