No. 19-896

# In the Supreme Court of the United States

TAE D. JOHNSON, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

*v.*

ANTONIO ARTEAGA-MARTINEZ

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

**BRIEF FOR THE PETITIONERS**


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## QUESTION PRESENTED

Whether a noncitizen who is detained under 8 U.S.C. 1231 is entitled by statute, after six months of detention, to a bond hearing at which the government must prove to an immigration judge by clear and convincing evidence that the noncitizen is a flight risk or a danger to the community.

## PARTIES TO THE PROCEEDING

Petitioners (respondents-appellants below) are Tae D. Johnson, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement (ICE); Adam Ogle, in his official capacity as Warden, York County Prison; Simona Flores, in her official capacity as Philadelphia Field Office Director, ICE; and Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security.*

Respondent (petitioner-appellee below) is Antonio Arteaga-Martinez.

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* Acting Director Johnson, Warden Ogle, and Secretary Mayorkas are automatically substituted for their predecessors. See Sup. Ct. R. 35.3.

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## OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 2019 WL 13031922. The order of the district court (Pet. App. 3a) and report and recommendation of the magistrate judge (Pet. App. 4a-7a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 20, 2019. On November 12, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including December 18, 2019. On December 10, 2019, Justice Alito further extended the time to and including January 17, 2020, and the petition was filed on that date. The petition was granted

on August 23, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-27a.

## STATEMENT

### A. Legal Background

This case concerns the authority of U.S. Immigration and Customs Enforcement (ICE) to detain noncitizens who have been ordered removed from the United States.* That detention is currently subject, as relevant here, to three sets of legal rules: (1) requirements imposed by Congress in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*; (2) requirements imposed by the Department of Homeland Security (DHS) in regulations; and (3) additional requirements imposed by the Third and Ninth Circuits in decisions interpreting the INA. We describe each set of requirements in turn.

1. Congress has regulated the removal and detention of noncitizens in the INA. The section at issue here, 8 U.S.C. 1231, governs the detention of noncitizens who have been "ordered removed." 8 U.S.C. 1231(a)(1)(A).

Section 1231 establishes a 90-day "removal period" within which the government generally must secure removal. 8 U.S.C. 1231(a)(1)(A). The government "shall" detain noncitizens during that period, and "[u]nder no circumstances during the removal period shall the [gov-

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* This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

ernment] release" those whose removal is based on certain criminal or national-security grounds. 8 U.S.C. 1231(a)(2).

In some cases, the government is unable to secure removal within the removal period. In those cases, the government "may" continue to detain four categories of noncitizens: (1) "inadmissible" noncitizens, (2) noncitizens who are "removable" for national-security or foreign-policy reasons or for violating entry conditions, status requirements, or certain criminal laws, (3) noncitizens who pose a "risk to the community," and (4) noncitizens who are "unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6). Noncitizens who fall outside those categories (or who fall within them but are not detained) are subject to supervision upon release. 8 U.S.C. 1231(a)(3) and (6).

Section 1231(a)(6) does not expressly specify how long detention may continue after the removal period. In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court interpreted the statute to include an "implicit limitation": detention beyond the removal period may last only for "a period reasonably necessary to bring about" removal. *Id.* at 689. The Court identified six months of detention (including the 90-day removal period) as presumptively reasonable. *Ibid.* Thereafter, if a noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must rebut the showing or release the noncitizen. *Id.* at 701.

2. DHS has supplemented Section 1231 with regulations. One set of regulations governs the discretionary decision to detain noncitizens beyond the removal period. 8 C.F.R. 241.4. An ICE field office ordinarily conducts a custody review before the conclusion of the removal period, and a review panel at ICE headquarters conducts a

further review at six months of detention. 8 C.F.R. 241.4(k)(1) and (2). Thereafter, the review panel conducts a further review each year, or sooner if there has been "a material change in circumstances since the last annual review." 8 C.F.R. 241.4(k)(2)(iii). During those reviews, ICE considers both "[f]avorable factors" (such as "close relatives residing here lawfully") and unfavorable factors (such as "flight risk" and danger of "future criminal activity"). 8 C.F.R. 241.4(f)(5), (7), and (8)(iii). The noncitizen may submit evidence, use an attorney or other representative, and, if appropriate, seek a government-provided translator. 8 C.F.R. 241.4(h)(2) and (i)(3).

A second set of DHS regulations implements this Court's decision in *Zadvydas*. 8 C.F.R. 241.13. If a noncitizen who has been detained for six months provides good reason to believe that "there is no significant likelihood of removal in the reasonably foreseeable future," adjudicators at ICE headquarters review the noncitizen's case. 8 C.F.R. 241.13(d)(1). The noncitizen has the right to submit evidence, to respond to the government's evidence, to be represented by an attorney, and, ultimately, to receive "a written decision based on the administrative record." 8 C.F.R. 241.13(g); see 8 C.F.R. 241.13(d) and (e).

A third set of regulations concerns the supervision of noncitizens who are released after the removal period. 8 C.F.R. 241.5. They must report periodically to DHS and fulfill other requirements. 8 C.F.R. 241.5(a). ICE may require bond in an amount sufficient to ensure compliance with any removal order and supervised-release conditions. 8 C.F.R. 241.5(b).

3. In *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208 (3d Cir. 2018), and *Diouf* v. *Napolitano*, 634 F.3d 1081 (9th Cir. 2011), the Third and Ninth

Circuits concluded that ICE must follow a further set of procedures, over and above the requirements just discussed, when detaining noncitizens under Section 1231(a)(6). Both courts believed that "prolonged detention" under Section 1231(a)(6) would raise "serious due process concerns." *Guerrero-Sanchez*, 905 F.3d at 213, 221; see *Diouf*, 634 F.3d at 1086. Both courts invoked the canon of constitutional avoidance to construe Section 1231(a)(6) to avoid those concerns. *Guerrero-Sanchez*, 905 F.3d at 223-226; *Diouf*, 634 F.3d at 1086. The courts read Section 1231(a)(6) to impose the following rules:

- The noncitizen is entitled to a bond hearing after six months of detention. *Guerrero-Sanchez*, 905 F.3d at 226; *Diouf*, 634 F.3d at 1092.
- A bond hearing need not be held after six months if release or removal is imminent. *Guerrero-Sanchez*, 905 F.3d at 226 n.15; *Diouf*, 634 F.3d at 1092 n.13.
- The bond hearing must be held before an immigration judge in the Department of Justice (DOJ). *Guerrero-Sanchez*, 905 F.3d at 224; *Diouf*, 634 F.3d at 1091-1092.
- The government bears the burden of proving that the noncitizen poses a flight risk or danger to the community. *Guerrero-Sanchez*, 905 F.3d at 224; *Diouf*, 634 F.3d at 1092.

The Third Circuit further read Section 1231(a)(6) to require the government to prove its case by clear and convincing evidence. *Guerrero-Sanchez*, 905 F.3d at 224 n.12. The Ninth Circuit imposed the same requirement under the Due Process Clause rather than the statute. 20-322 Pet. App. 4a-5a, 36a-37a.

**B. Facts And Proceedings Below**

Respondent Antonio Arteaga-Martinez is a citizen and native of Mexico. C.A. App. 285. He admits that he has entered the United States without inspection four times. *Id.* at 12. First, he entered the United States in February 2000, was apprehended at the border, and voluntarily returned to Mexico. *Id.* at 284. Second, he alleges that he entered the United States in April 2001, but returned to Mexico ten years later. *Id.* at 12. Third, he entered the United States in July 2012, was apprehended at the border, and was removed under an expedited-removal order. *Id.* at 27, 284; see 8 U.S.C. 1225(b)(1) (authorizing expedited removal). Finally, he alleges that he entered the United States for the fourth time in September 2012. C.A. App. 14.

In May 2018, ICE arrested and detained respondent. C.A. App. 283. The INA provides that, if the government finds that a noncitizen has reentered the United States illegally after having been removed under an order of removal, "the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed." 8 U.S.C. 1231(a)(5). Applying that provision, ICE reinstated respondent's earlier removal order. C.A. App. 29.

Respondent applied for withholding and deferral of removal—country-specific forms of protection that leave the underlying removal order intact but prevent removal to a country where the noncitizen would face persecution or torture. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 35 n.4 (2006). In this case, respondent claimed that he feared violence from a criminal gang in Mexico. C.A. App. 37. The case was referred to an immigration judge for a decision. *Id.* at 30. In the

meantime, respondent remained subject to detention under Section 1231(a)(6). *Id.* at 14.

In September 2018, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, challenging his continued detention without a bond hearing while his applications for withholding and deferral of removal were pending. C.A. App. 8-24. In the district court, the government acknowledged that, under the Third Circuit's decision in *Guerrero-Sanchez*, respondent was entitled to a bond hearing as of November 4, 2018—six months after the start of his detention. Pet. App. 4a. The magistrate judge issued a report and recommendation noting the government's concession and recommending that respondent be granted a bond hearing. *Id.* at 4a-7a. The district court adopted the report and recommendation and ordered that respondent be given a bond hearing under *Guerrero-Sanchez*. *Id.* at 3a.

The government appealed and, on respondent's motion, the court of appeals, citing *Guerrero-Sanchez*, summarily affirmed. Pet. App. 1a-2a. Respondent received a bond hearing, posted bond, and was released. Pet. 6.

## SUMMARY OF ARGUMENT

The Third and Ninth Circuits have held that 8 U.S.C. 1231(a)(6) requires the government to provide a bond hearing before an immigration judge after six months of detention and to release the noncitizen if it cannot prove that he poses a flight risk or danger to the community. That reading is erroneous.

The text of Section 1231(a)(6) provides no foothold for the requirements that the Third and Ninth Circuits imposed. It simply provides that DHS may detain a

noncitizen beyond the removal period if the noncitizen is inadmissible, removable for specified reasons, a danger to the community, or unlikely to comply with the removal order. It nowhere refers to six-month cutoffs, bond hearings, or immigration judges. And imposing those requirements violates Congress's instruction not to construe Section 1231 "to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States." 8 U.S.C. 1231(h).

The Third and Ninth Circuits' bond-hearing regime also conflicts with this Court's precedents. The Court has stated that a noncitizen detained under Section 1231 "is not entitled to a bond hearing." *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2280 (2021). Further, it has rejected efforts to read bond-hearing requirements into statutes that make no mention of such requirements. See *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 847-848 (2018).

The Third and Ninth Circuits invoked the canon of constitutional avoidance and this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), but neither justifies their bond-hearing regime. Constitutional avoidance applies only when a statute is susceptible of more than one plausible reading and when one of those readings raises serious constitutional concerns. In *Zadvydas*, the Court found ambiguity as to the permissible length of detention under Section 1231(a)(6), and then invoked constitutional avoidance to resolve the ambiguity in a way that avoided serious constitutional concerns. By contrast, Section 1231(a)(6) contains no ambiguity on the point in dispute here; it plainly does not require bond hearings. Nor does applying the statute as written and as implemented by existing regulations raise any serious constitutional concerns.

## ARGUMENT

The Third and Ninth Circuits have interpreted 8 U.S.C. 1231(a)(6) to impose various procedural requirements not specified in the statutory text, including bond hearings. See *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208, 219-227 (3d Cir. 2018); *Diouf* v. *Napolitano*, 634 F.3d 1081, 1084-1092 (9th Cir. 2011). Those interpretations are wrong.

### A. The Third And Ninth Circuits' Bond-Hearing Regime Has No Basis In The Statutory Text

Section 1231 governs the detention of noncitizens who have been "ordered removed" from the United States. 8 U.S.C. 1231(a)(1)(A). Section 1231 provides that the government "shall" detain them during the 90-day removal period, 8 U.S.C. 1231(a)(2), and that it "may" detain them after that period, 8 U.S.C. 1231(a)(6). The clause that governs detention after the removal period provides:

> 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).

*Ibid.* The Third and Ninth Circuits held that the provision requires a bond hearing before an immigration judge after six months of detention (unless release or removal is imminent), and that DHS bears the burden of proving at the hearing that the noncitizen poses a flight risk or danger to the community. See *Guerrero-Sanchez*, 905 F.3d at 224-226 & n.13; *Diouf*, 634 F.3d at

1091-1092. The Third Circuit further held that the provision requires the government to prove its case by clear and convincing evidence. See *Guerrero-Sanchez*, 905 F.3d at 224. Those holdings do not just misinterpret Section 1231(a)(6), they rewrite it.

1. The most obvious problem with the Third and Ninth Circuits' interpretation is that it effectively adds words that the statute does not contain. Section 1231(a)(6) says nothing about six-month cutoffs, bond hearings, exceptions for noncitizens whose release or removal is imminent, immigration judges, or proof by clear and convincing evidence. The Third and Ninth Circuits simply "created out of thin air a requirement for bond hearings that does not exist in the statute" and "adopted new standards that the government must meet" at those hearings. *Hamama* v. *Adducci*, 912 F.3d 869, 879-880 (6th Cir. 2018) (criticizing a district court that had adopted a similar reading), cert. denied, 141 S. Ct. 188 (2020); see *Martinez* v. *LaRose*, 968 F.3d 555, 566 (6th Cir. 2020). A court, however, may not "add words to the law to produce what is thought to be a desirable result." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015).

"Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 361 (2019). For example, Congress knows how to change the rules based on the length of detention; in Section 1231(a) itself, it prescribed one set of rules for detention during the removal period, see 8 U.S.C. 1231(a)(2), and a separate set of rules after that period, see 8 U.S.C. 1231(a)(6). It knows how to require hearings before immigration judges. See, *e.g.*, 8 U.S.C. 1225(b)(1)(B)(iii)(III),

1229a(a)(1), 1232(a)(5)(D)(i). And it knows how to require proof by clear and convincing evidence. See, *e.g.*, 8 U.S.C. 1229a(c)(3)(A).

The Third and Ninth Circuits' bond-hearing regime also effectively omits words from the statute. Section 1231(a)(6) allows DHS to detain a noncitizen after the removal period when the noncitizen is (1) "inadmissible"; (2) "removable" for national-security or foreign-policy reasons or for violating status requirements, entry conditions, or certain criminal laws; (3) "a risk to the community"; or (4) "unlikely to comply with the order of removal" (*i.e.*, a flight risk). 8 U.S.C. 1231(a)(6). But on the Third and Ninth Circuits' reading, the government may detain a noncitizen for more than six months only on the third and fourth grounds—that is, only when the noncitizen poses a danger to the community or a flight risk. See *Guerrero-Sanchez*, 905 F.3d at 224 & n.12; *Diouf*, 634 F.3d at 1092. The other two grounds—inadmissibility and removability for the specified reasons—essentially evaporate at the six-month mark. "Once again, statutory construction does not work that way: A court does not get to delete inconvenient language and insert convenient language to yield the court's preferred meaning." *Borden* v. *United States*, 141 S. Ct. 1817, 1829 (2021) (plurality opinion).

The Third and Ninth Circuits also rewrote the text allocating authority within the Executive Branch. When Congress enacted Section 1231(a)(6), it authorized detention of a noncitizen "who has been determined by *the Attorney General* to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6) (emphasis added). Later, Congress transferred various functions under the INA—including implementation of Section 1231—to the Secretary of Homeland Security. See 6 U.S.C. 202(3), 251, 271(b),

542 note, 557; 8 U.S.C. 1103(a)(1), 1551 note; *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2280 n.1 (2021). In doing so, it provided that, "[w]ith respect to any function transferred" to the Secretary, "reference in any other Federal law" to another officer "shall be deemed to refer to the Secretary." 6 U.S.C. 557. Under that deeming clause, Section 1231(a)(6) authorizes detention of a noncitizen "who has been determined by [*the Secretary*] to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6).

The Third and Ninth Circuits held, however, that a noncitizen may be detained for more than six months only if an immigration judge in DOJ—not the Secretary of Homeland Security—finds that the noncitizen poses a flight risk or danger to the community. See *Guerrero-Sanchez*, 905 F.3d at 227; *Diouf*, 634 F.3d at 1091-1092. Congress transferred the power to make the necessary findings to DHS, but the Third and Ninth Circuits transferred it back to DOJ.

All in all, the Third and Ninth Circuits interpreted Section 1231(a)(6) as if it read as follows:

> 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 [Secretary of Homeland Security]~~ an immigration judge, at a bond hearing, by clear and convincing evidence, to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond ~~the removal period~~ six months and, if released, shall be subject to the terms of supervision in paragraph (3). But a bond hearing need not be held if release or removal is imminent.

However desirable (or not) those revisions, a court's task "is to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

2. The Third and Ninth Circuits' bond-hearing regime also violates the rule of construction in 8 U.S.C. 1231(h), which states: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." *Ibid.* The Third and Ninth Circuits did the very thing Section 1231(h) forbids: They "construed" "this section" to "create" several "procedural right[s] or benefit[s]," *ibid.*—namely, the right to a bond hearing after six months of detention, the right to have an immigration judge preside at the hearing, and the placement on the government of the burden of proving dangerousness or flight risk.

### B. The Third And Ninth Circuits' Bond-Hearing Regime Conflicts With This Court's Precedents

The Third and Ninth Circuits' bond-hearing regime also contradicts this Court's precedents—most obviously, the Court's recent decision in *Guzman Chavez*. In *Guzman Chavez*, the Court decided which section of the INA—8 U.S.C. 1226 or 8 U.S.C. 1231—governs detention of noncitizens who have had their removal orders reinstated and have applied for withholding or deferral of removal. 141 S. Ct. at 2280. The Court explained that, "[i]f the answer is § 1226," "then the alien may receive a bond hearing before an immigration judge," but "[i]f the answer is § 1231," "*then the alien is not entitled to a bond hearing*." *Ibid.* (emphasis added). And it concluded that "§ 1231 * * * governs the detention," "*meaning those aliens are not entitled to a bond*

*hearing while they pursue withholding of removal*." *Ibid.* (emphasis added). The italicized words show that the Court understood Section 1231 not to require bond hearings.

The Third and Ninth Circuits' decisions also conflict with *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), in which this Court rejected an effort to engraft a bond-hearing requirement onto 8 U.S.C. 1226(a). Section 1226(a) authorizes detention "pending a decision on whether the alien is to be removed" and provides that the government "may release the alien on * * * bond." 8 U.S.C. 1226(a)(2)(A). Federal regulations provide for bond hearings at the outset of detention under Section 1226(a). See 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). But the Ninth Circuit directed the government "to provide procedural protections that go well beyond the initial bond hearing established by existing regulations—namely, periodic bond hearings every six months in which the [government] must prove by clear and convincing evidence that the alien's continued detention is necessary." *Rodriguez*, 138 S. Ct. at 847. This Court reversed, explaining that "[n]othing in § 1226(a)'s text * * * even remotely supports * * * those requirements." *Ibid.*

Here, the Third and Ninth Circuits have repeated the interpretive error condemned in *Rodriguez*: they have required bond hearings even though "[n]othing" in the relevant text "even remotely supports" that requirement. 138 S. Ct. at 847. In fact, this case is easier than *Rodriguez*. The statute in *Rodriguez* provided that the government "may release the alien on * * * bond," 8 U.S.C. 1226(a)(2)(A), but Section 1231(a)(6) says nothing at all about bond. And, unlike the provision in *Rodriguez*, Section 1231 may not be "construed to create any * * * procedural right." 8 U.S.C. 1231(h).

If the provision in *Rodriguez* could not be read to require bond hearings, the provision here certainly cannot be.

The Ninth Circuit sought to distinguish *Rodriguez* on the ground that it involved a judicial directive to hold periodic bond hearings every six months, rather than (as here) a "single bond hearing" after the first six months. 20-322 Pet. App. 38a. But that distinction makes no legal difference. The Ninth Circuit's error in *Rodriguez* was not that it required too many bond hearings, but that it imposed a requirement that had no basis in the text. Similarly, the Third and Ninth Circuits have erred in requiring bond hearings even though Section 1231(a)(6) says nothing at all about them (single, periodic, or otherwise).

Finally, the Third and Ninth Circuits' bond-hearing regime contradicts this Court's precedents on administrative procedure. The Court has explained that, when Congress entrusts an agency with "responsibility for substantive judgments," it presumptively also entrusts the agency—not reviewing courts—with "the formulation of procedures." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Ibid.* DHS has thus granted noncitizens procedural protections that are not specified in the statutory text. See 8 C.F.R. 241.4. DHS and DOJ could choose to adopt further procedures beyond those required by the statute, including bond hearings before immigration judges. But courts may not.

### C. Constitutional Avoidance Does Not Justify Imposing The Third And Ninth Circuits' Bond-Hearing Regime

The Third and Ninth Circuits justified their bond-hearing regime by invoking the canon of constitutional avoidance. See *Guerrero-Sanchez*, 905 F.3d at 223; *Diouf*, 634 F.3d at 1086. Under that canon, a court may read a statute, if "fairly possible," to avoid a "serious doubt" about the statute's constitutionality. *Rodriguez*, 138 S. Ct. at 842 (citation omitted). But the canon has no application here.

1. Constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Rodriguez*, 138 S. Ct. at 842 (citation omitted). It helps a court "choose between competing *plausible* interpretations of a statutory text." *Id.* at 843 (brackets and citation omitted).

The Third and Ninth Circuits' reading of Section 1231(a)(6) is not plausible. As discussed above, that reading requires inserting words that Congress did not enact, deleting other words that Congress did enact, and rewriting still other parts of the statutory text. "That is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Rodriguez*, 138 S. Ct. at 843.

The Third and Ninth Circuits found their reading of Section 1231(a)(6) plausible because the statute provides that a noncitizen "may" (rather than "shall") be detained beyond the removal period. See *Guerrero-Sanchez*, 905 F.3d at 223; 20-322 Pet. App. 12a, 22a, 41a, 49a. The Ninth Circuit explained that, although a clause providing that DHS "shall" detain someone forecloses release on bond, a clause providing that it "may" detain

someone "may be construed to authorize release on bond." 20-322 Pet. App. 26a. But the question here is not whether the statute *authorizes* DHS to release someone on bond; it is whether the statute *requires* the government to hold a bond hearing after six months of detention. Section 1231(a)(6) cannot plausibly be interpreted to contain such a requirement.

2. In addition, the canon enables courts to interpret statutes "to avoid *serious* constitutional doubts," "not to eliminate all possible contentions that the statute *might* be unconstitutional." *Reno* v. *Flores*, 507 U.S. 292, 314 n.9 (1993). There is no serious doubt that Section 1231(a)(6), as implemented by existing regulations, complies with the Due Process Clause of the Fifth Amendment.

To begin, Section 1231(a)(6) satisfies the substantive component of the Due Process Clause. The Court has explained that detention is "a constitutionally valid aspect of the deportation process." *Demore* v. *Kim*, 538 U.S. 510, 523 (2003); see, *e.g.*, *Flores*, 507 U.S. at 306; *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896). Detention under Section 1231(a)(6) helps ensure the removal of noncitizens who have already been "ordered removed" from the country. 8 U.S.C. 1231(a)(6).

Nor does Section 1231(a)(6), as implemented by the existing regulations, violate the procedural component of the Due Process Clause "[w]hen detention crosses the six-month threshold." *Diouf*, 634 F.3d at 1091; see *Guerrero-Sanchez*, 905 F.3d at 225. This Court has upheld detention in connection with removal without any individualized hearings or individualized findings at all. For example, in *Carlson*, the Court held that the Due Process Clause permitted the government to detain certain deportable persons without bail or any findings of

flight risk or dangerousness. 342 U.S. at 537-542; see *Demore*, 538 U.S. at 525 (explaining that "[t]here was no 'individualized finding'" in *Carlson*) (brackets omitted). And in *Demore*, the Court rejected a facial challenge to a statute providing for the mandatory detention of criminal noncitizens, including lawful permanent residents, during the pendency of their removal proceedings, despite the lack of findings of flight risk or dangerousness. 538 U.S. at 523-531.

The Third and Ninth Circuits reasoned that "*prolonged* detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns'" under the Due Process Clause. *Diouf*, 634 F.3d at 1086 (emphasis added; citation omitted); see *Guerrero-Sanchez*, 905 F.3d at 221. Assuming for the sake of argument that that is so, existing regulations, at least as a general matter, provide adequate process for noncitizens detained under Section 1231(a)(6). The regulations generally require a custody review by the field office at the end of the removal period (*i.e.*, usually after three months of post-removal-order detention), a further review by a review panel at ICE headquarters after six months, and additional reviews by the review panel annually thereafter (sooner if circumstances materially change). 8 C.F.R. 241.4(k)(1) and (2). During those reviews, officials must consider both "[f]avorable factors" (such as "close relatives residing here lawfully") and unfavorable factors (such as " flight risk" and danger of "future criminal activity"). 8 C.F.R. 241.4(f)(5), (7), and (8)(iii). The noncitizen has the right to submit evidence, to use an attorney or other representative, and, if appropriate, to seek a government-provided translator. 8 C.F.R. 241.4(h)(2) and (i)(3).

A separate set of regulations implements this Court's holding that Section 1231(a)(6) permits detention only for "a period reasonably necessary to bring about th[e] alien's removal from the United States." *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); see 8 C.F.R. 241.13. If a noncitizen who has been detained for six months shows that "there is no significant likelihood of removal in the reasonably foreseeable future," adjudicators at ICE headquarters must review the noncitizen's case. 8 C.F.R. 241.13(d)(1). The noncitizen has the right to submit evidence, to respond to the government's evidence, and to use an attorney or other representative. 8 C.F.R. 241.13(e).

The Third and Ninth Circuits objected that the "DHS employees" who apply the current procedures might not be "neutral." *Guerrero-Sanchez*, 905 F.3d at 227; see *Diouf*, 634 F.3d at 1091-1092. The Due Process Clause does, of course, require neutral administrative adjudicators, but any claim of bias "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). To rebut that presumption, the party demanding recusal must provide a "specific reason for disqualification"—for example, a showing that the adjudicator has a pecuniary interest in the case. *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982). The mere fact that an agency combines investigative and adjudicative functions does not establish bias; in fact, agencies combine such functions all the time. See *Withrow*, 421 U.S. at 47. Here, respondent has provided no specific reason to impute bias categorically to the adjudicators at ICE headquarters who conduct custody reviews. He thus has not overcome the presumption of neutrality.

The Third and Ninth Circuits also observed that the existing regulations do not require the government to

show, by clear and convincing evidence, that detained noncitizens pose a flight risk or danger to the community. See *Guerrero-Sanchez*, 905 F.3d at 227; *Diouf*, 634 F.3d at 1091-1092. But this Court has upheld detention without any individualized findings of flight risk or dangerousness—much less findings based on clear and convincing evidence. See pp. 17-18, *supra*. In addition, in contexts where the regulations do authorize bond hearings, it is the noncitizen who has traditionally borne the burden of justifying release. See 8 C.F.R. 236.1(c)(8) (detention under Section 1226(a) pending decisions on removal).

The Third Circuit further noted that an immigration judge's ruling on bond may be appealed to the Board of Immigration Appeals, while there is no appeal from a custody review. *Guerrero-Sanchez*, 905 F.3d at 227 (citing 8 C.F.R. 241.4(d)); see 8 C.F.R. 1003.1(b)(7). That is true, but it does not raise a constitutional problem. Even in criminal cases, "it is well settled that there is no constitutional right to an appeal." *Abney* v. *United States*, 431 U.S. 651, 656 (1977). Much less does the Constitution guarantee a right to an appeal in administrative proceedings such as this one. In addition, the Board's review of immigration judges' bond decisions is a creature of the regulations, not of the statute. See 8 C.F.R. 1003.1(b)(7). Perhaps the Third Circuit meant to read *both* the right to a bond hearing *and* the right to appeal into Section 1231(a)(6), but if so, that only makes its reading of the text even less plausible.

Finally, the Ninth Circuit suggested that existing regulations are inadequate because they allow detention based on written records alone. *Diouf*, 634 F.3d at 1091. That is incorrect. In some contexts, due process requires someone to have the opportunity "to state his position orally," *Goldberg* v. *Kelly*, 397 U.S. 254, 269

(1970); in others, the opportunity to submit a "written statement" suffices, *Hewitt* v. *Helms*, 459 U.S. 460, 476 (1983). But even assuming this case falls in the former category, existing regulations satisfy due process, for they *do* provide the noncitizen an opportunity to state his position orally. During the initial three-month custody review, the field office has the discretion to hold "a personal or telephonic interview" with the noncitizen. 8 C.F.R. 241.4(h)(1). And during the six-month review and subsequent reviews, ICE headquarters may decide to *release* the noncitizen based on the papers alone, 8 C.F.R. 241.4(i)(2), but continued detention requires a personal interview, 8 C.F.R. 241.4(i)(3)(i). The Ninth Circuit appeared to believe that ICE had the discretion to deny a personal interview even after six months of detention, but it conflated the regulations governing the three-month review with those governing later reviews. See *Diouf*, 634 F.3d at 1091 & n.12.

In short, existing regulations provide—at least as a general matter—all the process that the Constitution requires. To the extent exceptional cases arise, courts could consider as-applied constitutional challenges to continued detention under Section 1231(a)(6). The Third and Ninth Circuits may have believed that it "would be even better" to require formal bond hearings across the board, but a court applying the Due Process Clause is not "'a legislature charged with formulating public policy.'" *Flores*, 507 U.S. at 315 (citation omitted).

### D. *Zadvydas* Does Not Justify Imposing The Third And Ninth Circuits' Bond-Hearing Regime

The Third and Ninth Circuits rested their analysis largely on *Zadvydas*. See *Guerrero-Sanchez*, 905 F.3d at 219-221, 223-226; *Diouf*, 634 F.3d at 1087-1092. But it does not justify their bond-hearing regime.

In *Zadvydas*, this Court concluded that Section 1231(a)(6) is ambiguous as to the length of the detention authorized. 533 U.S. at 696-699. It also explained that the statute would raise serious constitutional doubts if it permitted indefinite detention of noncitizens who had been admitted to the United States and ordered removed, but whom no country was willing to accept. *Id.* at 690-696. The Court resolved the ambiguity by holding that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. The Court specified that, six months after the removal period begins, if the noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must either rebut the showing or release the noncitizen. *Id.* at 701.

This case differs from *Zadvydas* in several ways. In *Zadvydas*, the Court explained that the constitutional-avoidance canon applies only when alternative interpretations are "fairly possible." 533 U.S. at 689 (citation omitted). After reviewing Section 1231(a)(6)'s text, history, and purposes, the Court concluded that, although the statute could be read to authorize indefinite detention, it could also plausibly be read to authorize detention only as long as removal remains "reasonably foreseeable." *Id.* at 699; see *id.* at 696-699. The Court reasoned that the statute's primary purpose is "preventing flight," and that purpose is "weak or nonexistent where removal seems a remote possibility at best." *Id.* at 690. Here, by contrast, only one reading of Section 1231(a)(6) is plausible: The statute does not require bond hearings.

*Zadvydas* also explained how its reading of Section 1231(a)(6) was consistent with the rule of construction in Section 1231(h), but that explanation does not apply

here. Section 1231(h) provides that "[n]othing in this section shall be construed to create any * * * procedural right." 8 U.S.C. 1231(h). *Zadvydas* distinguished a ruling that Section 1231 confers an enforceable procedural right (forbidden by Section 1231(h)) from a ruling that a noncitizen is entitled to release on a writ of habeas corpus because the detention "is without statutory authority" (allowed). 533 U.S. at 688; see *id.* at 687-688. *Zadvydas* fell on the correct side of that line: The Court held that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. The Third and Ninth Circuits' bond-hearing regime, by contrast, falls on the wrong side of that line: On their own account, the courts "constru[ed] § 1231(a)(6) to include additional procedural protections during the statutorily authorized detention period." 20-322 Pet. App. 48a (quoting *Guerrero-Sanchez*, 905 F.3d at 221) (emphasis omitted). But construing Section 1231 to include enforceable procedural protections is exactly what Section 1231(h) unambiguously forbids.

In addition, *Zadvydas* applied the constitutional-avoidance canon only after concluding that "indefinite and potentially permanent" detention—*i.e.*, detention with "no obvious termination point"—would raise a "serious question" under the Due Process Clause. 533 U.S. at 696-697. This case, by contrast, does not involve indefinite and potentially permanent detention. After all, *Zadvydas* has already cured that potential problem by holding that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." 533 U.S. at 699; see *Diouf*, 634 F.3d at 1084 (acknowledging that the detention at issue here is "not indefinite"). This case instead involves the procedural

protections accorded to detainees. *Zadvydas*'s limitation on the length of detention does not speak to that issue. And under this Court's decisions that do address that issue, the existing regulations raise no serious constitutional doubts. See pp. 17-21, *supra*.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER 2021

## APPENDIX

1. 8 U.S.C. 1231 provides in pertinent 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").

**(B) Beginning of period**

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

**(C) Suspension of period**

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

**(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.

**(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation**

**(A) In general**

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

**(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment**

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense

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[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph (B),".

(other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

**(C) Notice**

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

**(D) No private right**

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

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[3] So in original. Probably should be followed by a closing parenthesis.

**(5) Reinstatement of removal orders against aliens illegally reentering**

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

**(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).

**(7) Employment authorization**

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

* * * * *

**(h) Statutory construction**

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

* * * * *

2. 8 C.F.R. 241.4 provides:

**Continued detention of inadmissible, criminal, and other aliens beyond the removal period.**

(a) *Scope.* The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or his or her designee, the Executive Associate Commissioner for Field Operations (Executive Associate Commissioner), the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Detention and Removal Field Office or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided for in paragraph (b)(2) of this section, the provisions of this section apply to the custody determinations for the following group of aliens:

(1) An alien ordered removed who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990, Public Law 101-649, 104 Stat.

4978, 5048 (codified at 8 U.S.C. 1226(e)(1) through (e)(3)(1994));

(2) An alien ordered removed who is removable under section 237(a)(1)(C) of the Act;

(3) An alien ordered removed who is removable under sections 237(a)(2) or 237(a)(4) of the Act, including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Public Law 104-208, 110 Stat. 3009-546; and

(4) An alien ordered removed who the decision-maker determines is unlikely to comply with the removal order or is a risk to the community.

(b) *Applicability to particular aliens*—(1) *Motions to reopen.* An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) *Parole for certain Cuban nationals.* The review procedures in this section do not apply to any inadmissible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of

a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(3) *Individuals granted withholding or deferral of removal.* Aliens granted withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture who are otherwise subject to detention are subject to the provisions of this part 241. Individuals subject to a termination of deferral hearing under 8 CFR 208.17(d) remain subject to the provisions of this part 241 throughout the termination process.

(4) *Service determination under 8 CFR 241.13.* The custody review procedures in this section do not apply after the Service has made a determination, pursuant to the procedures provided in 8 CFR 241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

(c) *Delegation of authority.* The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act when there is a final order of removal is delegated as follows:

(1) *District Directors and Directors of Detention and Removal Field Offices.* The initial custody determination described in paragraph (h) of this section and

any further custody determination concluded in the 3 month period immediately following the expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director or the Director of the Detention and Removal Field Office having jurisdiction over the alien. The district director or the Director of the Detention and Removal Field Office shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective jurisdictional area.

(2) *Headquarters Post-Order Detention Unit (HQPDU).* For any alien the district director refers for further review after the removal period, or any alien who has not been released or removed by the expiration of the three-month period after the review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) *The HQPDU review plan.* The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) *Additional delegation of authority.* All references to the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, and the district director in this section shall be deemed to include any person or persons (including a committee)

designated in writing by the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, or the district director to exercise powers under this section.

(d) *Custody determinations.* A copy of any decision by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from the district director's or the Executive Associate Commissioner's decision.

(1) *Showing by the alien.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may release an alien if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section, continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) *Service of decision and other documents.* All notices, decisions, or other documents in connection with the custody reviews conducted under this section

by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall be served on the alien, in accordance with 8 CFR 103.8, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) *Alien's representative.* The alien's representative is required to complete Form G 28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) *Criteria for release.* Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a nonviolent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

(f) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to—

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) *Travel documents and docket control for aliens continued in detention*—(1) *Removal period.* (i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:

(A) the date the order becomes administratively final;

(B) If the removal order is subject to judicial review (including review by habeas corpus) and if the court has ordered a stay of the alien's removal, the date on which, consistent with the court's order, the removal order can be executed and the alien removed; or

(C) If the alien was detained or confined, except in connection with a proceeding under this chapter relating to removability, the date the alien is released from the detention or confinement.

(ii) The removal period shall run for a period of 90 days. However, the removal period is extended under section 241(a)(1)(C) of the Act if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal. The Service will provide such an alien with a Notice of Failure to Comply, as provided in paragraph (g)(5) of this section, before the expiration of the removal period. The removal period shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effect the alien's removal.

(2) *In general.* The district director shall continue to undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel document is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(3) *Availability of travel document.* In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at

any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

(4) *Removal.* The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(5) *Alien's compliance and cooperation.* (i) Release will be denied and the alien may remain in detention if the alien fails or refuses to make timely application in good faith for travel documents necessary to the alien's departure or conspires or acts to prevent the alien's removal. The detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens.

(ii) The Service shall serve the alien with a Notice of Failure to Comply, which shall advise the alien of the following: the provisions of sections 241(a)(1)(C) (extension of removal period) and 243(a) of the Act (criminal penalties related to removal); the circumstances demonstrating his or her failure to comply with the requirements of section 241(a)(1)(C) of the Act; and an explanation of the necessary steps that the alien must take in order to comply with the statutory requirements.

(iii) The Service shall advise the alien that the Notice of Failure to Comply shall have the effect of extending the removal period as provided by law, if the removal period has not yet expired, and that the Service is not

obligated to complete its scheduled custody reviews under this section until the alien has demonstrated compliance with the statutory obligations.

(iv) The fact that the Service does not provide a Notice of Failure to Comply, within the 90-day removal period, to an alien who has failed to comply with the requirements of section 241(a)(1)(C) of the Act, shall not have the effect of excusing the alien's conduct.

(h) *District director's or Director of the Detention and Removal Field Office's custody review procedures.* The district director's or Director of the Detention and Removal Field Office's custody determination will be developed in accordance with the following procedures:

(1) *Records review.* The district director or Director of the Detention and Removal Field Office will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director or Director of the Detention and Removal Field Office will conduct a records review prior to the expiration of the removal period. This initial post-order custody review will consist of a review of the alien's records and any written information submitted in English to the district director by or on behalf of the alien. However, the district director or Director of the Detention and Removal Field Office may in his or her discretion schedule a personal or telephonic interview with the alien as part of this custody determination. The district director or Director of the Detention and Removal Field Office may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) *Notice to alien.* The district director or Director of the Detention and Removal Field Office will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director or Director of the Detention and Removal Field Office expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) *Factors for consideration.* The district director's or Director of the Detention and Removal Field Office's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director must be able to reach the conclusions set forth in paragraph (e) of this section.

(4) *District director's or Director of the Detention and Removal Field Office's decision.* The district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(5) *District office or Detention and Removal Field office staff.* The district director or the Director of the

Detention and Removal Field Office may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decisions to those persons directly responsible for detention within his or her geographical areas of responsibility. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, the assistant director of the detention and removal field office, the director of the detention and removal resident office, the assistant director of the detention and removal resident office, officers in charge of service processing centers, or such other persons as the district director or the Director of the Detention and Removal Field Office may designate from the professional staff of the Service.

(i) *Determinations by the Executive Associate Commissioner.* Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

(1) *Review panels.* The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by the two-member Review Panel shall be unanimous. If the vote of the two-member Review Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her

designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) *Records review.* Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) *Personal interview.* (i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

(4) *Alien's participation.* Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this section.

(5) *Panel recommendation.* Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be

released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) *Determination.* The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(7) *No significant likelihood or removal.* During the custody review process as provided in this paragraph (i), or at the conclusion of that review, if the alien submits, or the record contains, information providing a substantial reason to believe that the removal of a detained alien is not significantly likely in the reasonably foreseeable future, the HQPDU shall treat that as a request for review and initiate the review procedures under § 241.13. To the extent relevant, the HQPDU may consider any information developed during the custody review process under this section in connection with the determinations to be made by the Service under § 241.13. The Service shall complete the custody review under this section unless the HQPDU is able to make a prompt determination to release the alien under an order of supervision under § 241.13 because there is

no significant likelihood that the alien will be removed in the reasonably foreseeable future.

(j) *Conditions of release*—(1) *In general.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) *Sponsorship.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, condition release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship, housing, or other placement has been found for the detainee, if ordered, including but not limited to, evidence of financial support.

(3) *Employment authorization.* The district director, Director of the Detention and Removal Field Office, and the Executive Associate Commissioner, may, in the exercise of discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, withdraw approval for release of any detained alien prior to release when, in the decisionmaker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) *Timing of reviews.* The timing of reviews shall be in accordance with the following guidelines:

(1) *District director or Director of the Detention and Removal Field Office.* (i) Prior to the expiration of the removal period, the district director or Director of the Detention and Removal Field Office shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished during the period, or is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(ii) When release is denied pending the alien's removal, the district director or Director of the Detention and Removal Field Office in his or her discretion may retain responsibility for custody determinations for up to three months after expiration of the removal period, during which time the district director or Director of the Detention and Removal Field Office may conduct such additional review of the case as he or she deems appropriate. The district director may release the alien if he

or she is not removed within the three-month period following the expiration of the removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director or Director of the Detention and Removal Field Office may refer the alien to the HQPDU for further custody review.

(2) *HQPDU reviews*—(i) *District director or Director of the Detention and Removal Field Office referral for further review.* When the district director or Director of the Detention and Removal Field Office refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by the expiration of the removal period or as soon thereafter as practicable.

(ii) *District director or Director of the Detention and Removal Field Office retains jurisdiction.* When the district director or Director of the Detention and Removal Field Office has advised the alien at the 90-day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending removal or further custody review, and the alien is not removed within three months of the district director's decision, authority over the custody determination transfers from the district director or Director of the Detention and Removal Field Office to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the three-month period

after the 90-day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) *Continued detention cases.* A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) *Review scheduling.* Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) *Discretionary reviews.* The HQPDU Director, in his or her discretion, may schedule a review of a detainee at shorter intervals when he or she deems such review to be warranted.

(3) *Postponement of review.* In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt removal is practicable and proper, or for other good cause. The decision and reasons for the delay shall be documented in the alien's custody review file or A file, as appropriate. Reasonable care will be exercised to ensure that the alien's case is reviewed once

the reason for delay is remedied or if the alien is not removed from the United States as anticipated at the time review was suspended or postponed.

(4) *Transition provisions.* (i) The provisions of this section apply to cases that have already received the 90-day review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable,* February 3, 1999; *Supplemental Detention Procedures,* April 30, 1999; *Interim Changes and Instructions for Conduct of Post-order Custody Reviews,* August 6, 1999; *Review of Long-term Detainees,* October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at *http://www.ins.usdoj.gov*). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

(l) *Revocation of release*—(1) *Violation of conditions of release.* Any alien described in paragraph (a)

or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

(2) *Determination by the Service.* The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

(3) *Timing of review when release is revoked.* If the alien is not released from custody following the informal interview provided for in paragraph (1)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.