



**Defending Liberty
Pursuing Justice**

**A LEGAL GUIDE FOR
INS DETAINEES:**

***PETITIONING FOR RELEASE
FROM INDEFINITE
DETENTION***

**American Bar Association
Commission on Immigration Policy, Practice and Pro Bono
740 15th Street, NW, 9th Floor
Washington, DC 20005-1022**

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PREFACE

Welcome to *A Legal Guide for INS Detainees: Petitioning for Release from Indefinite Detention*. The American Bar Association's Commission on Immigration Policy, Practice and Pro Bono created this manual. The manual is for INS detainees interested in understanding the administrative process of obtaining review of continued custody and the procedure for seeking release in federal court.

This manual is intended for educational and informational purposes only. Nothing contained in this book is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own attorneys. This booklet was not prepared by the Immigration and Naturalization Service ("INS"), or by any other part of the United States government. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be considered as representing the official policy of the American Bar Association.

This manual details how to seek release from indefinite detention. It explains how to petition for administrative review of your custody, how to seek release in federal court if you are not released after your custody review, how to file motions for appointment of counsel and how to have any filing fees waived if you do not have the means to pay for them (*i.e.* proceeding *in forma pauperis*). It also addresses the special cases of Mariel Cubans. In the appendices of this handbook you will find sample forms, addresses of the U.S. District Courts, and a list of resources where you might seek additional assistance. Before filing any petition for release with a court, you should attempt to contact the assistance of one of the organizations listed in the appendix to help you in the process.

At any time during this process, you should feel free to send your questions or concerns to: American Bar Association, Attn. Commission on Immigration Policy, Practice and Pro Bono, 740 15th Street, NW, 9th Floor, Washington, DC 20005-1022, tel. 202-662-1008, fax 202-638-3844, or by email at nugentc@staff.abanet.org. **PLEASE DO NOT SEND ORIGINAL DOCUMENTS. NO COLLECT CALLS PLEASE.**

C. POSSIBLE INS ARGUMENTS IN OPPOSITION TO YOUR HABEAS PETITION, AND SAMPLE RESPONSES

After filing your habeas petition, the Judge assigned to your case will forward the petition to the attorneys for the INS. The INS's attorneys will then file a "Return" or an "Opposition" to your habeas petition. They will attempt to have your habeas petition dismissed by raising certain arguments. We have listed several arguments that the INS's attorneys may raise.

In response to the INS's Return or Opposition, you may file what's called a "Traverse" or a "Reply" (these terms are interchangeable). We will explain, after each possible INS argument, how you might respond in your Traverse or Reply. Note that the INS may raise arguments different from those covered here. Unfortunately, this manual cannot address every argument that the INS may raise in a case.

Argument 1: **Petitioner Failed to Exhaust Administrative Remedies**

The INS may argue that you, the Petitioner, failed to exhaust administrative remedies before filing the habeas petition. If INS attorneys raise this argument, it probably means you filed your habeas petition before waiting for a decision from INS Headquarters (HQPDU). Because there are no limits on how long HQPDU may take to render a decision on your request for release under the Zadvydas standard, it is logical and, indeed, advisable to file the habeas petition after waiting a reasonable amount of time for HQPDU to make a decision. "Administrative remedies" refers to the fact that HQPDU has its own administrative mechanism for determining whether or not to release you under Zadvydas. The INS may argue that because it has not had a chance to make its own decision in your case, your habeas petition should be dismissed until HQPDU makes a decision.

Sample Response:

Petitioner need not exhaust his administrative remedies. The statute in question, 8 U.S.C. § 1231(a)(6), has no exhaustion requirement. Exhaustion is required only when Congress specifically mandates it. McCarthy v. Madigan, 503 U.S. 140, 144 (1992). In all other instances, "sound judicial discretion governs." Id.

This Court should not require Petitioner to exhaust his administrative remedies. First, the Supreme Court has recognized that courts should not require exhaustion when there is an unreasonable or indefinite timeframe for administrative action. Id. at 1047. Here, HQPDU is not required to issue a decision within any particular length of time. 8 C.F.R. § 241.13(g). The custody

review regulations do not provide any other administrative method of obtaining or appealing a custody review decision. See id. § 241.13(g)(2). Petitioner has petitioned for HQPDU review of his indefinite detention, and has already waited a reasonable time for a decision. However, HQPDU has failed to make a decision. In light of the fundamental right to liberty at stake, the lack of any statutory requirement that a decision be rendered in any particular time-frame whatsoever, and the resulting extreme prejudice to Petitioner's liberty interest, Petitioner should not be required to wait *indefinitely* for an HQPDU decision on his continued indefinite detention. Exhaustion is not appropriate where "plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim." Id. Petitioner has a constitutionally-protected liberty interest in freedom from government custody. Zadvydas, 121 S. Ct. at 2498-2501. Petitioner's unlawful indefinite detention constitutes irreparable harm. See Seretse-Khama v. Ashcroft, - F. Supp.2d --, 2002 WL 1711751, *14-15 (D.D.C. 2002) (ordering release under Zadvydas on preliminary injunction based on substantial likelihood of success and finding that continued unlawful detention constitutes irreparable harm).

Second, exhaustion is not required where the Petitioner challenges the constitutionality of the agency procedure itself, "such that the question of the adequacy of the administrative remedy is for all practical purposes identical with the merits of the plaintiff's lawsuit." McCarthy, 503 U.S. at 148 (internal brackets omitted). In this case, Petitioner is challenging the constitutionality of the procedures by which INS reviews the custody status of aliens who cannot be removed within six months, and whose removal is not significantly likely to occur in the reasonably foreseeable future. The administrative remedy is inadequate to address this constitutional grounds for recovery.

Finally, exhaustion is not required where the administrative remedy is inadequate due to agency bias. Id. at 148. Numerous courts have recognized the bias inherent in the INS custody review process. See Phan v. Reno, 56 F. Supp. 2d 1149, 1157 (W.D. Wash. 1999) ("We have . . . concerns about the quality of the review afforded by the INS to the Petitioners. Indeed, our review of the record confirms that the INS does not meaningfully and impartially review the Petitioners' custody status."); Rivera v. Demore, No. C 99-3042 TEH, 1999 WL 521177, *7 (N.D. Cal. Jul. 13, 1999) (procedural due process requires that alien release determination be made by impartial adjudicator due to agency bias); Ekekhon v. Aljets, 979 F. Supp. 640, 644 (N.D. Ill. 1997); St. John v. McElroy, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) ("Due to political and community pressure, the INS, an executive agency, has every incentive to continue to detain aliens with aggravated felony convictions, even though they have served their sentences, on the suspicion that they may continue to pose a danger to the community."). Because the INS custody review process is inherently biased, Petitioner should not be required to languish in detention awaiting a decision by HQPDU.

Argument 2: Petitioner Has Failed to Cooperate

The INS may argue that you are not cooperating enough with their efforts to remove you. They may argue that because you are not cooperating, they can suspend the removal period pursuant to 8 U.S.C. § 1231(a)(1)(C), and continue to hold you without being subject to any time constraints until you prove that you are cooperating.

The law only supports the INS's argument if you have refused to apply for travel documents or if you have provided untruthful information to the INS about, for example, your place of birth, citizenship, date of entry, etc. If you have applied for travel documents, and have provided the INS with truthful information about your place of birth, etc., then INS should not be able to argue that you have failed to cooperate. Even if you initially provided false information about your place of birth, if you later tell the truth, then the INS may no longer treat you as "noncooperating."

Sample Response:

INS cannot seriously contend that Petitioner is not cooperating. The relevant statutory provision provides that the 90-day removal period may be extended beyond 90 days and the alien may remain in detention during that period only "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." 8 U.S.C. § 1231(a)(1)(C). This statutory provision cannot be applied to Petitioner. Petitioner has made a timely application in good faith for travel documents from the [fill in your country's name] Consulate. Petitioner also has provided truthful information to the INS concerning his place of birth and citizenship.

Not surprisingly, the Government cites no cases in support of its position that it may indefinitely detain an alien who truthfully admits he is a national of the country to which the INS seeks to remove him, where there is no allegation that he has provided false or misleading information, who has done whatever has been asked of him to facilitate his removal. That is because the caselaw demonstrates that to constitute noncooperation, an alien must take some action that impedes the government's efforts to remove him or refuse to provide relevant assistance. See Moro v. Immigration & Naturalization Service, 58 F. Supp. 2d 854, 858 (N.D. Ill. 1999) ("Although [§ 1231(a)(1)(C)] places a burden of good-faith cooperation on aliens in securing their removal, it does not, contrary to the government's assertion, require Moro's continued detention because there is no evidence in this case that Moro has impeded the government's efforts to remove him or refused relevant assistance."); see also Powell v. Ashcroft, 194 F. Supp. 2d 209, 210-11 (E.D.N.Y. 2002) (alien who provided false name, false place of birth, and

false date of entry, was not cooperating). Petitioner has done nothing of the sort. Therefore, the INS's contention that Petitioner is not cooperating is meritless, and provides no basis for the suspension of the removal period or Petitioner's continued unlawful detention.

Moreover, to the extent that Respondents attempt to "suspend" the removal period after the removal period has already expired, the removal statute plainly does not permit such maneuvering. The Government's regulations provide that the Government must provide the alien with a "Notice of Failure to Comply' . . . before the expiration of the removal period." 8 C.F.R. § 241.4(g)(1)(C)(ii) (emphasis added). If the act that the Government now deems as noncooperation took place during the 90-day removal period, the Government had every opportunity to invoke § 1231(a)(1)(C) during the removal period itself. This it failed to do without justification. Once the removal period has run, the Government cannot retroactively suspend that period pursuant to § 1231(a)(1)(C) when the act alleged to constitute noncooperation fell squarely within the removal period. See Seretse-Khama v. Ashcroft, -- F. Supp. 2d --, 2002 WL 1711751, *14 n.19 (D.D.C. 2002).

Argument 3: Petitioner Is Likely To Be Removed In the Reasonably Foreseeable Future

The INS may also argue that its evidence shows that you are likely to be removed in the reasonably foreseeable future. It may assert that it has requested travel documents from your Consulate, and is awaiting a response. It may also offer statistics showing the number of citizens of your country that INS has successfully repatriated, or removed, in the past several years.

Sample Response:

The INS has not satisfied its burden of showing that Petitioner is significantly likely to be removed in the reasonably foreseeable future. Already, Petitioner has been detained for [number of months detained] months. This period of detention exceeds the six-month presumptively reasonable period of detention authorized by Zadvydas. Zadvydas v. Davis, 533 U.S. 678, 701 (2001). Although INS states that it has made a request for travel documents from the [your country of origin] Consulate, the fact is that no travel documents have been issued to date. Because the Consulate has not issued travel documents, and there is no evidence when, if ever, travel documents will be issued, the INS has not satisfied its burden and Petitioner must be released. See Okwilagwe v. INS, No. 3-01-CV-1416-BD, 2002 WL 356758, *2-3 (N.D. Tex. Mar. 1, 2002) (INS failed to sustain its burden of showing alien's removal to Nigeria would occur in reasonably foreseeable future where alien detained for 11 months, travel documents not issued and no certainty as to when they might be issued); see also Seretse-Khama v. Ashcroft, -- F. Supp.2d

--, 2002 WL 1711751, *11 (D.D.C. 2002) (finding that Respondents failed to meet their burden of proof under Zadvydas where they “have not demonstrated to this Court that any travel documents are in hand, nor have they provided any evidence, or even assurances from the Liberian government, that travel documents will be issued in a matter of days or weeks or even months”).

Argument 4: Petitioner Is Too Dangerous To Be Released

INS may argue that you cannot be released because you pose a danger to the public. It may point to the fact that you have been convicted of an aggravated felony to try to convince the court that you are too dangerous to be released.

Sample Response:

The INS cannot seriously contend that Petitioner is too dangerous to be released. Moreover, Zadvydas does not permit the INS to indefinitely detain Petitioner based on allegations of criminal dangerousness alone. In Zadvydas, the Supreme Court held that an alien under a final removal order could be held longer than the presumptively-reasonable period of six months if the alien is “specially dangerous.” Id. at 691. Having a criminal record is an insufficient reason to refuse to release an alien after the six-month removal period has expired. Id. Rather, the U.S. Supreme Court demanded that the “dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.” Id. In its analysis, the Court reiterated the need to protect an individual’s due process rights guaranteed by the Fifth Amendment. Id. at 692 (noting a “serious constitutional problem arising out of a statute that . . . permits indefinite, perhaps permanent, deprivation of human liberty”). The Court also suggested that the Constitution prohibited an administrative agency from making unreviewable decisions affecting one’s fundamental rights. Id.

To implement Zadvydas, the Government established regulations setting forth a detailed quasi civil commitment proceeding that it must follow in order to continue to detain an alien whose removal is not significantly likely to occur in the reasonably foreseeable future. See 8 C.F.R. § 241.14. These regulations establish a review procedure in Immigration Court, which the INS itself must initiate, whenever the INS seeks to indefinitely detain an alien. The INS’s regulations list only four circumstances where an alien may remain in detention even though his or her removal is not reasonably foreseeable: (1) where the alien has a highly contagious disease, (2) where serious adverse foreign policy consequences would result from the alien’s release, (3) for security or terrorism concerns, or (4) where the alien is determined to be specially dangerous. Id.

The INS cannot seriously contend that Petitioner falls into any of these categories, and it has not initiated any of the procedures required to certify Petitioner as falling into any of these categories. To the extent the INS is arguing

that it can continue indefinitely detaining Petitioner on the grounds that he is “specially dangerous,” it has not even attempted to comply with its own extensive procedures to obtain such a classification. First of all, the INS Commissioner must certify that the alien in question (1) has committed one or more crimes of violence; (2) is likely to engage in acts of violence in the future due to a mental condition or personality disorder and behavior associated with that condition or disorder, and (3) that no conditions of release can reasonably be expected to assure public safety. 8 C.F.R. 241.14(f)(1). The Commissioner’s certification must be based on the recommendation by a physician, after a full mental health evaluation, that the alien is likely to engage in future acts of violence due to the alien’s mental condition or personality disorder and behavior associated with that condition or disorder. Id., § 241.14(f)(3). All three elements must be proven by clear and convincing evidence to continue the detention of an alien who has no significant likelihood of being removed in the reasonably foreseeable future. See id. § 241.14(i)(1); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,974. The alien is then entitled to a “reasonable cause” hearing in Immigration Court, which the Government must initiate, followed by a “merits hearing.” 8 C.F.R. 241.14(g), (i). In the hearing, the alien has the right to examine the evidence against him, to present evidence on his own behalf, and to cross-examine the Government’s witnesses and the author of the mental health report. Id., § 241.14(g)(3)(iii)-(iv).

Here, the INS has not obtained a certification of the Commissioner; it has not ordered that Petitioner undergo a medical examination; and it has not initiated a reasonable cause proceeding in Immigration Court. The INS’s own regulations provide that without proving the three components of “special dangerousness” by clear and convincing evidence before an Immigration Judge, the INS does not have the ability to indefinitely detain an alien who has no significant likelihood of being removed within a six-month period. In short, the INS has not even attempted to follow its own rules, or the due process demanded by the Constitution and by Zadvydas. It follows that the INS’s assertions that Petitioner can be indefinitely detained due to his criminal record should carry no weight whatsoever in this Court’s determination.