A095-748-786

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

MATTER OF AGUILAR-AQUINO

Respondent

In Custody Proceedings

Request to Certify to the Attorney General

BRIEF OF AMICUS, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, SUPPORTING ATTORNEY GENERAL CERTIFICATION

AMERICAN IMMIGRATION LAWYERS ASSOCIATION
1331 G STREET NW, SUITE 300
WASHINGTON DC 20005

Counsel listed on following page

Counsel for Amicus

Stephen W Manning
IMMIGRANT LAW GROUP PC
PO Box 40103
Portland OR 97204
503.241.0035

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Introduction[1]

When is a noncitizen in immigration custody? With nearly 400,000 noncitizens held in immigration detention, the answer might seem obvious. *See* American Civil Liberties Union, *Securely Insecure: The Real Costs, Consequences & Human Fact of Immigration Detention* (2012) *available at http*://www.acluga.org/our-work/immigrants-rights-project/immigrants-rights-fact-sheet. The administrative agencies charged with managing the immigrant detention scheme have long assumed that custody at INA § 236 only means confinement in jail. Indeed, this assumption has led to the almost complete privatization of the detention system. *Id.* This assumption is a root cause of many of the ills plaguing the detention system, including lack of adequate mental and physical health care, sexual abuse, and in some cases, even death

[1] AILA gratefully acknowledges Megan Kent and Michael Cowgill, law students at Lewis & Clark Law School, for their research and writing assistance in preparing this brief.

because it results in mass incarceration of individuals for whom incarceration is unnecessary. *Id.; see also* Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. Times, May 5, 2008, at A1[2]. This assumption was alluded to in *Matter of Aguilar-Aquino*. In *Matter of Aguilar-Aquino*, the Board of Immigration Appeals held that the term "custody"—at least as used in 8 C.F.R. § 1236.1(d)(1)—means "actual physical restraint or confinement within a given space." *Matter of Aguilar-Aquino*, 24 I&N Dec. 747, 752 (BIA 2009).

This assumption that custody *is* confinement, though, is plainly wrong. The BIA's micro-focus on 8 C.F.R. § 1236.1(d)(1) overlooked the statutory context and statutory language of INA § 236 and, critically, failed to recognize the importance of the Supreme Court's defining opinion in *Reno v. Koray*. In *Koray*, the Supreme Court held that

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[2] *Available at* http://www.nytimes.com/2008/05/05/nyregion/05detain.html?ref=incustodydeaths&_r=0

custody determinations turn on whether the individual is subject to complete government control. The physical manifestations of that control are irrelevant. *Reno v. Koray*, 515 U.S. 50, 62–63 (1995).

In this brief, Amicus, the American Immigration Lawyers Association, writes to explain that *custody* for INA detention purposes equates with *complete* government control.[3] Confinement (particularly as described in *Aguilar-Aquino*) is a red herring, because the physical manifestations of control imposed are irrelevant to custody determinations. The statutory language and the statutory context plainly provide that any noncitizen over whom the Department of Homeland Security (DHS) maintains complete control *is* in custody. Section 236(c) does *not* mandate confinement. The statutory structure defines custodial power through the mechanism of release. Accordingly,

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[3] In this brief, we use "custody" and "detention" interchangeably because, as the BIA held, Congress used them interchangeably. *Matter of Aguilar-Aquino*, 24 I. & N. Dec. 747, 752 (BIA 2009).

DHS maintains custody of noncitizens under both § 236(a)(1) and § 236(c)(1) when it exercises complete power over the noncitizen regardless of whether the individual is confined to a jail or under house arrest.[4] The decision in *Aguilar-Aquino* should be modified accordingly by the Attorney General and published as a controlling interpretation of the INA.[5]

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[4] For instance, if a noncitizen is in custody under § 236(a)(1), then the Government can both summarily decide the control mechanisms to impose (e.g., institutional detention, house arrest, or electronic ankle monitoring) *and* whether to change those conditions. On the other hand, if the noncitizen is released under § 236(a)(2), the Government no longer exercises complete control over the noncitizen because it can not summarily decide to change the terms of release. We explain more *infra*.

[5] Concurrently with this filing, AILA has filed a letter with the Attorney General seeking certification of *Aguilar-Aquino*. The letter is available at http://search.aila.org by entering the Document No. 14050790. Certainly, if the Attorney General orders the case certified, then it is so. 8 C.F.R. § 1003.1(h)(1)(i). Alternatively, the BIA may refer the matter to the Attorney General. 8 C.F.R. § 1003.1(h)(1)(ii). Or, it may, consistent with the arguments expressed in this motion, modify the reasoning in *Aguilar-Aquino* on its own and publish the decision. In a separate, related filing, AILA requested the Attorney General to decide an important and fundamental interpretation question involving

To explain why this is so, we first describe with precision the three operative subsections of § 236: § 236(a), § 236(b), and § 236(c). Section 236(b) is described at length at the beginning of section V, in order to underscore the importance of the release mechanism within the statutory scheme. Second, we provide a definition of "custody" apparent from the face of the statutory scheme and embedded in the release mechanism of § 236(a) and § 236(b) that defines "custody" as the government's complete exercise of power. Third, we explain how, in operation, § 236 does *not* differentiate between the Government's custodial power under § 236(a) or § 236(c). That is, a noncitizen within the Government's custodial power under § 236(a) is in no different a position than a noncitizen within the Government's custodial power under § 236(c). Next, we highlight the highly persuasive value of the

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his detention authority and the pervasive incidence of prolonged detention. *See* AILA InfoNet Doc. No. 14050791.

overlooked Supreme Court decision, *Reno v. Koray*, to conclude that Congress intended custody determinations turn on whether the noncitizen is "completely subject to [DHS] control." *Koray*, 525 U.S. at 63. Then, we highlight Congress's consistent understanding and use throughout the INA of "confinement" as a distinct concept from "custody."

Statement of Interest of Amicus

The American Immigration Lawyers Association ("AILA") is a national association with more than 14,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing

in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and Supreme Court.

Argument

In passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress never limited "custody" to mean only "confinement". *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208 110 Stat. 3009-546, tit. III, § 301 (effective April 1, 1997). The overall purpose of IIRIRA was to "enable the prompt admission of those who are entitled to be admitted, the prompt exclusion or removal of those who are not so entitled, and the clear distinction between these categories." H.R. Rep. 104-469, at 110–11 (1996). To fulfill this purpose, Congress permitted,

and in some cases required, immigration agencies to detain noncitizens if they were deemed to be a danger to the community and to ensure that they reported to future immigration proceedings. INA §§ 236(a), (c); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

This purpose and the means used to achieve it do *not* (and never did) require confinement. Congress's decision to broaden the scope of the detention statute does not indicate that Congress intended to limit custody to confinement. Yet, somehow, the administrative agencies charged with administering the immigration detention statute leapt to the conclusion that custody *only* includes confinement. This assumption runs contrary to Congressional intent.

Rather, the language and context of § 236 establish that Congress plainly intended that a custody determination turn on whether a noncitizen is completely subject to DHS control—not on the physical manifestations of the control imposed. "[T]he meaning of statutory

language, plain or not, depends on context." *Matter of Arrabelly & Yerrabelly*, 25 I&N Dec. 771, 775 (BIA 2012) citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The context in which "custody" is used in § 236 is plain and tells us exactly that Congress never meant it to mean only confinement.

Congress' use of the terms "custody" and "release" within the context of the detention provision establishes that whether a noncitizen is in custody turns on whether he is completely subject to DHS control—the physical manifestations of the control imposed are irrelevant in making that determination. We first explain why this is so by detailing how the statutory context and structure of § 236(a) and § 236(c) defines DHS's complete control over noncitizens through the mechanism of release. That is, the complete control versus released dichotomy is the section's central operating mechanism.

A. Detention and Release Under § 236(a).

The statutory context of § 236(a) compels the conclusion that Congress intended a noncitizen would be in custody when he is completely subject to DHS control. There are three sections in 236(a). The first grants DHS authority to arrest and then detain the noncitizen, the second grants DHS authority to continue to detain the noncitizen, and the third grants DHS authority to release the noncitizen.

To begin, we explain how the first and second provisions give DHS complete control over noncitizens who are in custody. We then explain how the third provision, which addresses the release process, defines custody by limiting the extent of DHS control over noncitizens who have been released. That is, noncitizens who are released are not subject to *complete* DHS control and thus are not in custody.

The opening clause of § 236(a) provides that "on a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."

INA § 236(a). This clause gives the Attorney General, by way of DHS, discretionary authority to arrest a noncitizen, and then detain her. As we explain below, if DHS decides to detain the noncitizen, then DHS retains complete control to effectuate the detention.

While the initial clause deals with both arrest and detention processes, § 236(a)(1) addresses just detention. It provides that while the removal decision is pending, the Attorney General "may continue to detain the arrested alien." INA § 236(a)(1). The regulations further provide that if DHS continues to detain the noncitizen, then the noncitizen may receive a bond hearing before an Immigration Judge. 8 C.F.R. § 1236.1(d)(1). During the hearing, the IJ may "exercise the authority in section 236 of the Act . . . to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released." *Id.*

For example, if a noncitizen receives a bond hearing pursuant to 8 C.F.R. § 1231(d)(1), and the IJ orders that the noncitizen continue to be detained under INA § 236(a)(1), then DHS continues to exercise complete control over the noncitizen because it can summarily decide how to effectuate the detention. The same is true if the noncitizen does not request a bond hearing and DHS continues to detain under INA § 236(a)(1); DHS has complete control over the noncitizen to effectuate the detention however it sees fit. This is so because DHS can not only choose how to control the noncitizen, whether it be with confinement, house arrest, or reporting requirements, but it can also summarily decide to change those control mechanisms.

Section 236(a)(2) provides a structural definition of "custody" by limiting the extent of DHS control over noncitizens who have been released. Noncitizens who are released are not subject to *complete* DHS control and, thus, are not in custody. Section 236(a)(2) provides that

while a removal decision is pending, the Attorney General "may release the alien on (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole." INA § 236(a)(2). When DHS releases noncitizens under section 236(a)(2)(A) or (B), they are no longer in "custody" because they are no longer completely subject to DHS control. Unlike § 236(a)(1), under § 236(a)(2) DHS cannot summarily alter the terms of release. The terms of release are fixed at the moment of release and DHS may not modify them unless it first revokes the release pursuant to § 236(b).

B. Detention and Release Under § 236(c)

INA § 236(c) operates in a substantially similar manner as § 236(a) because it also requires that custody determinations turn on whether DHS has complete control over the noncitizen. Section 236(c) provides that "[t]he Attorney General shall take into custody an alien who" is inadmissible or deportable for having committed certain enumerated

offenses. INA § 236(c). Much like § 236(a)(1), § 236(c)(1) gives DHS authority to take into custody certain noncitizens.[6] And like noncitizens in detention under § 236(a)(1), noncitizens in detention under § 236(c)(1) are subject to complete DHS control. *Koray*, 515 U.S. at 58 (explaining how it is a basic canon of statutory construction that "identical terms within an Act bear the same meaning). This means that DHS can not only chose how to control the noncitizen in order to effectuate its custodial power, but it can also summarily decide to change those control mechanisms.[7]

Noncitizens who are released pursuant to § 236(a)(2) are not subject to *complete* DHS control and thus are not in custody. Much like § 236(a)(2), § 236(c)(2) gives the Attorney General authority to release

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[6] The primary difference between the two sections is that under § 236(c)(1), DHS must detain whereas under § 236(a)(1), detention is discretionary.

[7] We explain *infra* how this concept operates in practice.

certain noncitizens. It provides that "[t]he Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to" the federal witness protection program that release is necessary. INA § 236(c)(2). If a noncitizen is released under § 236(c)(2), then the government is no longer exercising complete power over her because it cannot summarily change the terms of release. In other words, the terms of release are fixed and can only be altered if the government invokes its revocation power found at 8 C.F.R. 1236.1(c)(9).

C. Revocation of release under § 236(b)

The plain language of § 236(b) allows for revocation of release to ensure that those ordered release may be returned to custody when necessary. INA § 236(b) is titled "Revocation of bond or parole." It provides that "[t]he Attorney General at any time may revoke a bond or parole authorized under subsection (a) of this section, rearrest the alien under the original warrant, and detain the alien."

The plain language of § 236(b) grants the Attorney General authority with respect to a noncitizen who was at one point in custody under § 236(a)(1), but later released under § 236(a)(2), to take back into custody that same noncitizen under § 236(a)(1). Similarly, a noncitizen released under § 236(c)(2) may be returned to custody under § 236(c)(1) through revocation under § 236(b).

The purpose of § 236(b) is to ensure that a noncitizen released under § 236(a)(2) or § 236(c)(2) may be returned to custody if appropriate. Return to custody is appropriate if the released noncitizen poses a flight risk or a danger to the community, or in the case of § 236(c)(2) their release is no longer necessary to provide protection to a witness. 8 C.F.R. § 1236.1(c)(8) (2006); *See also Matter of Guerra,* 24 I&N Dec. 37 (BIA 2006); *Matter of Adeniji,* 22 I&N Dec. 1102 (BIA 1999).

D. The Overlooked Precedent of *Reno v. Koray.*

When Roger Pauley wrote for the BIA in *Matter of Aguilar-Aquino,* he overlooked the Supreme Court's analysis of what custody means in *Reno v. Koray*. The Supreme Court's analysis in *Reno v. Koray* is spot on here in the immigration context and leaves no doubt that custody determinations turn on whether the government exercises complete control over the noncitizen. To establish why this is so, we first describe the *Koray* Court's analysis. Second, we explain why that decision is highly persuasive for custody determinations under the INA. We then highlight several important conclusions.

1. Reno v. Koray

In *Koray*, the Supreme Court analyzed the meaning of the words "official custody" and "detained" within the context of the Bail Reform Act of 1984. *Reno v. Koray*, 515 U.S. 50 (1995). A federal magistrate released defendant Koray on bail on the condition that he reside in a community treatment center during the pendency of his pre-trial

proceedings. *Id.* at 52. Later, he was sentenced to 41-months imprisonment and transferred to federal prison to serve his sentence. *Id.* The issue before the Supreme Court was whether the 150 days Koray spent at the community treatment center constituted "official detention" because if it did, it would have been credited towards his 41-month sentence. *Id.* at 52–53.

The Supreme Court found that the time Koray spent at the community treatment center was not "official detention" because a "defendant suffers detention only when committed to the custody of the Attorney General." *Id.* at 57. The Supreme Court further explained that to be "committed to the custody of the Attorney General" means that defendants are "completely subject to [Bureau of Prison] control." *Id.* at 63.

The Supreme Court used the whole act canon to determine the meaning of the term "official detention" within the context of the Bail

Reform Act. *Id.* at 56. Importantly, the analysis and conclusion were substantially similar to the contextual analysis of the INA discussed above. The Supreme Court explained that the Bail Reform Act "provides a federal court with two choices when dealing with a criminal defendant who has been charged with an offense and is awaiting trial or who has been found guilty of an offense and is awaiting imposition or execution of sentence." *Id.* at 57 (internal quotations and citations omitted). In those instances, a "court may either (1) release the defendant on bail or (2) order him detained without bail." *Id.* The *Koray* Court then explained how "[a] court may release a defendant subject to a variety of restrictive conditions, including residence in a community treatment center." *Id.* On the other hand, if a court "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person

and the community," then the court "shall order the detention of the person." *Id.*

The Supreme Court found that the difference between the two options compelled the conclusion that "under the language of the Bail Reform Act of 1984, a defendant suffers detention only when committed to the custody of the Attorney General; a defendant admitted to bail on restrictive conditions . . . is released." *Id.* at 57. Importantly, the *Koray* Court reached its decision *not* based on an analysis of the type of confinement imposed on Koray. Rather, the *Koray* Court's analysis turned on the fact that Koray was no longer "completely subject to [the Bureau of Prisons (BOP)] control" because the federal magistrate had entered a release order—thus, Koray was not in custody or "official detention." *See id.* at 56–59; 62–63.

In other words, Koray was not in custody because defendants who are in custody "*always remain subject to the control of the [BOP].*" *Id.*

(emphasis in original). They can be "summar[ily] reassign[ed]" to any other penal or correctional facility, community treatment centers or education or work release programs. *Id.* at 62–63. Since Koray was not completely subject to BOP control while at the community treatment center because he was released, the Court found he was not in "official detention." *Id.* at 57.

Finally, the Court rejected Koray's argument that "it was improper to focus on the release/detention dichotomy" of the Bail Reform Act to construe the term "official detention" because "a defendant released on bail may be subjected to conditions . . . that are just as onerous as those faced by detained defendants." *Id.* at 62.[8] The Court recognized that "it is quite true that . . . a defendant 'released' to

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[8] Under the Bail Reform Act defendants are deemed to be in official detention when authorized to complete their sentences in community treatment center, or community corrections centers or when authorized to serve their sentences through education or work release programs. *Koray*, 515 U.S. at 62 (internal citations omitted).

a community treatment center could be subject to restraints which do not materially differ from those imposed on a 'detained' defendant. *Id.* at 62. However, the Court found that this fact "does not undercut the remaining distinction that exists between *all* defendants committed to the custody of the Attorney General on the one hand, and *all* defendants released on bail on the other." *Id.* at 63.

As explained above, the distinction turns on the fact that "[u]nlike defendants 'released' on bail, defendants who are 'detained' *always remain subject to the control of the Bureau.*" *Id.* (emphasis in original). The *Koray* Court explained how a released defendant "cannot be summarily reassigned to a different place of confinement unless a judicial officer revokes his release." *Id.*

2. *Koray* and the INA.

It was a major analytical error for the BIA not to have addressed *Koray* when it decided *Aguilar-Aquino*. *Koray* is pertinent to custody determinations under the INA for two reasons.

First, the structure and context of the INA detention schema and the Bail Reform Act are nearly identical. Both statutes provide courts and immigration agencies two choices when dealing with defendants and noncitizens who have been charged with a criminal offense or removability, and are either awaiting trial or a removal decision. A court or an immigration agency can either release the defendant or noncitizen on bail (and subject to other terms of release), or order him detained without bail. In doing so, both officials will assess the same factors—whether the defendant or noncitizen is a flight risk or a danger to the community. *Compare Matter of Adeniji*, 22 I&N Dec. at 1113 (explaining that noncitizen "must demonstrate that his release would not pose a danger to property or person, and that he is likely to appear

for any future proceeding) (internal citations committed), *with* 18 U.S.C. § 3142(e)(1) ("If, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.").

Second, because the statutes are substantially similar, *Koray* is particularly instructive because it compels the conclusion that under the INA detention provisions, a noncitizen is in custody if he is "completely subject to [DHS] control." Custody does not turn on the physical manifestation of the control that DHS imposes on the noncitizen. Noncitizens who are detained under either §§ 236(a)(1) or 236(c)(1) always remain subject to the control of DHS. *See Koray*, 515 U.S. at 63. This means DHS can summarily change the control mechanisms it uses to detain the noncitizens, just as the BOP does with

detained defendants. *See id.* at 62–63 (explaining that detained defendants are "subject to summary reassignment" to any other penal or correctional facility community treatment center or educational or work release program).

The fact that the Bail Reform Act governs criminal defendants and immigration removal proceedings are civil is inapposite. This is so because Congress regularly imports principles stemming from the criminal context to immigration detention issues. *See, generally,* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms,* 64 Wash & Lee. L. Rev. 469 (2007) (outlining how the criminal justice model has been imported into immigration law). Furthermore, Congress passed the Bail Reform Act in 1984 (before IIRIRA) and the Supreme Court decided *Reno v. Koray* in 1996, just one year before Congress passed IIRIRA. Congress was surely aware that not only did the custody versus release dichotomy

function well, but also that the Supreme Court had endorsed it—thereby providing further justification to import the concept to the INA. In fact, if Congress did not want to import the "complete control" concept into the INA, then Congress could have chosen to draft § 236 differently in order to ensure that the Board and federal courts did not interpret the statute pursuant to Supreme Court guidance.

3. The *Koray* Take-Away

When the INA is viewed through the window of the Supreme Court's reasoning in *Koray*, there are several notable and dispositive points. *First*, a noncitizen in custody under either § 236(a)(1) or §236(c)(1) could be placed under 24-hour house arrest or some similar control mechanism and still meet the statutory and regulatory requirements for custody. This is so because he is completely subject to DHS control since DHS can summarily reassign him either to a more restrictive setting like institutional confinement, or a less restrictive

setting like 12-hour house arrest. That is, DHS can change the conditions of control without a hearing or IJ oversight.

Second, a noncitizen who is released under §§ 236(a)(2) or 236(c)(2) may well be subject to exactly the same conditions as the noncitizen in custody if either DHS or the IJ imposed such a condition as a term of release. However, this individual would not be "in custody" because he was released under § 236(a)(2) and thus the government no longer retains complete control over him—just as the defendant *Koray* was no longer in custody because the magistrate had entered a release order and as a result, he was no longer "completely subject to BOP control." *Koray*, 515 U.S. at 63. This means DHS could not summarily reassign his conditions of control unless it revokes release under § 236(b).

It is not an anomaly that a noncitizen *released* on house arrest "could be subject to restraints which do not materially differ from those imposed on a *detained* defendant committed to the custody of the

Attorney General" and then assigned to house arrest. *See Koray*, 515 U.S. at 62–63 (emphasis added). The physical manifestation of release or custody is beside the point.

The distinction is that a noncitizen who is released is *not* in DHS custody and "cannot be summarily reassigned to a different place of confinement unless [the Attorney General] revokes his release." *See id.* A detained noncitizen, on the other hand, is "completely subject" to DHS control—a "single factor [that] encompasses a wide variety of restrictions" including summary reassignment to other detention facilities, DHS discretion to control all of the conditions of custody, including any alternative to confinement. *See id.*

Two examples will make this plain. Imagine a lawful permanent resident who is convicted of a crime involving moral turpitude rendering him deportable. He is eligible for cancellation of removal. At the conclusion of his criminal sentence, ICE exercises its INA § 236(c)(1)

mandatory arrest authority and "takes into custody" the noncitizen. ICE makes a Notice of Custody Determination on Form I-248 that would reflect that the noncitizen is subject to § 236(c)(1) and therefore is not eligible for release.

Under AILA's suggested interpretation, ICE would then make a *second* determination: what are the conditions of custody? That is, what are the most appropriate conditions of custody for this LPR noncitizen? Using factors similar to those already widely used and familiar in the § 236(a)(2) context, an ICE officer could determine that because this particular LPR noncitizen has resided in the United States for a long time and has a non-violent criminal record, confinement in a detention center is excessive and unnecessary. Instead, the ICE officer could issue an order setting forth the conditions of custody that places the LPR noncitizen on a biweekly, in-person reporting requirement, an electronic monitoring system, and a daily telephone-reporting requirement.

Should ICE later determine that the conditions of custody were overly onerous or, on the other hand, insufficient to maintain assurance, ICE could summary modify the conditions of custody by merely notifying the LPR noncitizen of the modification. In short, the individual is in custody (as he is required to be under § 236(c)), because he is "completely subject" to DHS's control.[9]

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[9] It is important to note that the analysis as to whether the noncitizen is in custody or released does not turn on the physical manifestations of control the government imposes on the noncitizen. In *Koray*, the Supreme Court addressed the "grave difficulties" that arise with fact-based inquiries to determine whether a defendant (or noncitizen) is "in custody." *Koray*, 515 U.S. at 64. The Supreme Court explained that this case-by-case determination "would require a fact-intensive inquiry into the circumstances of confinement" and that the term "jail-type confinement" is "vague and amorphous." *Koray*, 515 U.S. at 64. Determining custody based on whether a defendant has been released, on the other hand, "provides both [the government] and the defendant with clear notice of the consequences of a . . . release or detention order." *Id.* The "grave difficulties" that arise with a fact-based inquiry into custody determinations under the INA is evidenced by the Third Circuit's treatment of whether house arrest with electronic monitoring constitutes imprisonment within the INA. In *Ilchuck v. Att'y Gen. of the U.S.*, the Third Circuit held that house arrest with electronic

On the other hand, take the example of a different noncitizen who is inadmissible under INA § 212(a)(6)(A)(i) for being present without admission or parole. This noncitizen has limited family ties and a poor work history in the United States. Accordingly, he is a poor candidate for conditional parole under § 236(a)(2)(B). Instead, DHS could release him under § 236(a)(2)(A) with conditions such as a biweekly, in-person

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monitoring constitutes imprisonment under INA § 101(a)(48), and as a result, Ilchuck had committed an aggravated felony and was therefore subject to removal. 434 F. 3d 618, 623 (CA3 2006). The court reasoned "home confinement with monitoring is a serious restriction of liberty" and that the statute's "disjunctive phrasing—'imprisonment . . . include[s] the period of incarceration *or* confinement'—suggests that [C]ongress intended for 'imprisonment' to cover more than just time in jail." *Id.* This holding runs afoul of Congressional intent evidenced by the statutory context in which the words custody, imprisonment and release arise. The Third Circuit should have found that Ilchuck's sentence constituted imprisonment because the Pennsylvania Department of Correction's exercised complete control over him because he had not been released. As importantly, the *Ilchuck* holding leads to the "grave difficulties" the Supreme Court warned of in *Koray*.

reporting requirement and an electronic monitoring system—conditions that are identical to the custodial conditions of the LPR in the previous example.

Although both individuals are subject to the same terms, the difference lies in the DHS's power to exercise complete control over the individual pursuant to INA § 236(c)(1). For the noncitizen in the second example, before a term of release could be modified (by increasing the reporting requirement, or adding additional curfew restrictions, let's say), § 236(b) would need to be invoked. Once invoked, the DHS has regained control under § 236(a)(1) and may determine the appropriate terms of release. For the first example, our LPR convicted of a CIMT, ICE could change his conditions of custody whenever and however they wish – no need to revoke his release because he was *never* released.

E. Custody and Confinement under the INA.

The difference between "custody" and "confinement" runs throughout the INA as an additional manifestation of Congress' intent to treat custody as premised on legal control, not on four-jail-walls-and-a-lock. Congress used the term confinement to address a concept distinct from custody. Other sections within the INA conform to the concept that custody turns on whether DHS exercises complete control over a noncitizen.

Congress's use of the terms custody and confinement establish that Congress meant for "custody" to be distinct from physical confinement. INA § 241(a)(1)(B)(iii) provides how to calculate the removal period for those noncitizens who have been issued a final order of removal. It explains that the removal period "[b]egins on the latest of the following three situations, including situations where "the alien is detained or

confined (except under an immigration process)." INA § 241(a)(1)(B)(iii) (emphasis added).

The use of the word "confined" indicates that Congress saw a meaningful difference between being detained and being confined (keep in mind: detention and custody are equivalents). This is so because detained and confined are separated by a disjunctive. Generally, use of the disjunctive indicates that each term must be given different meanings. *See Garcia v. United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings."). Thus, as explained above, it follows that detained means that the noncitizen is subject to complete DHS control and has not been released. Confined, on the other hand, means actual imprisonment or physical restraint. *See* Black's Law Dictionary (9th ed. 2009) (defining confinement as "[t]he act of imprisoning or restraining someone"). Of course, anyone who is confined

is also detained, but not everyone who is detained need not also be confined.

The regulations governing custody also distinguish between custody and confinement. The regulation at 8 C.F.R § 1236.1(c)(9) details the release revocation process. It provides that if a noncitizen's release order is revoked by DHS, the "alien may be taken into *physical* custody and detained." 8 C.F.R § 1236.1(c)(9). The use of the word "physical" indicates that physical custody, much like confinement, requires actual imprisonment or restraint. Importantly, the use of the word physical before custody indicates that physical custody must mean something different than custody.

Conclusion

For all of the above reasons, the Attorney General should certify *Aguilar-Aquino* to himself for a decision and interpret "custody" within

the INA detention statutes to mean complete control and not only confinement.

Submitted for the American Immigration Lawyers Association

STEPHEN W MANNING
IMMIGRANT LAW GROUP PC
PO Box 40103
Portland OR 97240

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Certificate of Service

I, Stephen W Manning, certify that I served a copy of this brief by first class mail to the individual below on May 7, 2014.

Kuyomars Q. Golparvar
Chief
Immigration Law & Practice Division
Office of the Principal Legal Advisor
ICE Headquarters
Potomac Center North
500 12th Street SW
MS 5900
Washington DC 20536

Federation for American Immigration Reform
25 Massachusetts Avenue, NW Suite 330
Washington DC 20001

STEPHEN W MANNING
IMMIGRANT LAW GROUP PC
PO Box 40103
Portland OR 97240