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HIDING THE BALL: THE NEED FOR ABANDONING THE IMMEDIATE CUSTODIAN RULE FOR WRITS OF HABEAS CORPUS FILED BY IMMIGRANT DETAINEES

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The tragic events of September 11, 2001, and the subsequent American response to threats posed by global terrorist networks have caused the United States to reconsider its domestic laws. Perhaps no other area of domestic policy has been as affected as immigration law.[1] While the Executive and Legislative branches exercise plenary power over immigration law in peacetime,[2] they have nearly unfettered control over this area of law during periods of war.[3] As a result, there is greater potential for governmental abuse of its power over immigration law.

Notwithstanding the government's increased power over immigration law in wartime, immigrants are still entitled to basic protections from abuse of this power under the U.S. Constitution. One of these basic protections is the writ of habeas corpus. Since the dawn of the Republic, the writ of habeas corpus has safeguarded a prisoner's right to a judicial inquiry into the lawfulness of his or her detention.[4] If a prisoner's detention is deemed unlawful, the writ offers remedies to the prisoner, such as release or a new hearing.[5] The writ also

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1. *See, e.g.*, Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002).
2. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.

Id.

3. *See* Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (noting that in cases of "terrorism or other special circumstances . . . special arguments might be made . . . for heightened [judicial] deference to the judgments of the political branches with respect to matters of national security.").
4. The writ of habeas corpus is explicitly provided for in Article I of the U.S. Constitution. U.S. CONST. art. I, § 9 cl. 2.
5. 39 AM. JUR. 2D *Habeas Corpus and Postconviction Remedies* §§ 6, 65 (2004).

ensures prisoners' adequate procedural due process under the test articulated in *Mathews v. Eldridge*.[6]

A writ of habeas corpus must be directed "to the person having custody of the person detained."[7] To determine who has "custody," courts have devised the "immediate custodian rule." However, the way in which the immediate custodian rule is currently applied in the immigration context significantly limits immigrant detainees' ability to challenge their detention and infringes on their due process rights. Evidence shows that the immediate custodian rule, combined with the Department of Homeland Security's unfettered discretion in the transfer of detainees to contractor rural jails, places immigrants at a significant disadvantage in pursuing legitimate habeas corpus claims.[8] As a result of the rule, habeas corpus petitions are heard in courts that bear no relation to the jurisdictions in which the grounds for removal were first determined, and the immigrant detainee is often heard without the assistance of counsel, leaving the immigrant at a distinct disadvantage in any proceedings she might obtain and largely stripping those proceedings of their meaning.[9]

This article seeks to demonstrate that the "immediate custodian rule" must be abandoned in the case of immigrant detainees[10] seeking to file habeas corpus petitions. Instead, the Attorney General should be identified as the appropriate respondent-custodian in petitions for writs of habeas corpus brought by immigrant petitioners. Part I of this article will briefly explain the history and function of the writ of habeas corpus in American jurisprudence. Part II will describe the immediate custodian rule this article argues should be overturned with respect to immigrant detainees. In Part III, this article will compare *Roman v. Ashcroft*[11] and *Armentero v. I.N.S.*,[12] two divergent federal appellate cases addressing the issue of the proper respondent in cases in which immigrant petitioners file writs of habeas corpus. Finally, in Part IV, this article will assert that the decision in *Armentero* reaches

6. 424 U.S. 319, 335 (1976) (stating that the test involves three factors: the petitioner's interest, the protection provided by the added procedure against erroneous deprivation of that interest, and the government's interest against providing the additional procedure).

7. 28 U.S.C. § 2243 (2000).

8. *See* discussion *infra* Part IV.

9. *Id.*

10. This Article argues solely for the abandonment of the Immediate Custodian rule with respect to immigrants and will not focus on the rule's application regarding non-immigrants.

11. 340 F.3d 314 (6th Cir. 2003), *cert. denied en banc*, No. 02-3253, 2004 U.S. App. LEXIS 1951 (6th Cir. Jan. 14, 2004).

12. 340 F.3d 1058 (9th Cir.2003).

the proper conclusion on the issue that should be followed when considered in light of the due process test set forth in *Mathews*. In concluding, this article will emphasize the need for abandoning the immediate custodian rule and for allowing immigrant detainees to file writs of habeas corpus against the Attorney General, regardless of the deference accorded the political branches of government during times of war.

I. AN EXPLANATION OF THE WRIT OF HABEAS CORPUS

The right to the protection of physical liberty guaranteed by the writ of habeas corpus has been heralded as "[t]he most important human rights provision in the Constitution."[13] Therefore, when approaching the question of whether an immigrant detainee may file a writ against the Attorney General as respondent-custodian, thereby abandoning the immediate custodian rule, one should not fail to heed the significance that the writ of habeas corpus holds in the Anglo-American legal system.

The writ of habeas corpus is explicitly protected under Article I of the U.S. Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[14] The writ of habeas corpus is a procedure that provides a judicial inquiry into the lawfulness of detention[15] and awards remedies, such as release or a new hearing, if the detention is found to be unlawful.[16] The current statute authorizing the issuance of writs of habeas corpus states that the writ is to be directed "to the person having custody of the person detained."[17]

The foundation of the writ of habeas corpus pre-dates the establishment of the United States and the adoption of the U.S. Constitution. The writ has its roots in England, where it acquired an association with the principle of due process of law derived from the Magna Carta.[18] In England, the writ of habeas corpus was considered a vehicle for bringing a person before a court to facilitate proceedings

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13. Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952).

14. U.S. CONST. art. I, § 9, cl. 2.

15. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 969 (1998).

16. 39 AM. JUR. 2D *Habeas Corpus and Postconviction Remedies* §§ 6, 65 (2004).

17. 28 U.S.C. § 2243 (2000).

18. IX SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 111-12 (3d ed. 1944).

in which his presence was required.[19] Important for the purposes of this article, the writ was used in England to enable the court to "require a custodian to produce a detained person and explain the reason for the detention so that the court could decide whether the detention was lawful."[20]

Four states had already provided for habeas corpus guarantees in their constitutions before the U.S. Constitution was ratified in 1787.[21] Although the North Carolina Constitution of 1776 did not name the writ explicitly, it provided "[t]hat every freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed."[22] The Massachusetts Constitution of 1780, on the other hand, asserted one's right to the writ of habeas corpus and supplied "the most direct model for the federal Suspension Clause,"[23] by stating:

> [t]he privilege and benefit of the writ of habeas corpus shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months.[24]

The writ of habeas corpus has always been looked upon as a "human right," [25] not merely a right held by citizens of a particular state. England never restricted the use of the writ to the King's subjects, nor has the United States limited its use to citizens.[26] Although the federal government has nearly limitless control over immigration law,[27] Article III courts remain resolute in their position that immigrants should be able to file a writ of habeas corpus in federal courts.[28] Therefore, although most immigration-related issues

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19. R.J. SHARPE, THE LAW OF HABEAS CORPUS 1-2 (1976).

20. Neuman, *supra* note 15, at 971 (citing Rollin C. Hurd, TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 144 (1st ed. 1858).

21. *Id.* at 972.

22. N.C. CONST. of 1776 (Declaration of Rights) art. XIII.

23. Neuman, *supra* note 15, at 972.

24. MASS. CONST. of 1780 (Part the Second) ch. VI, art. VII.

25. Chafee, *supra* note 13, at 144.

26. Neuman, *supra* note 15, at 989.

27. Chae Chan Ping v. U.S., 130 U.S. 581, 609 (1889).

28. Neuman, *supra* note 15, at 989.

are adjudicated by the executive branch,[29] the writ is available to immigrants and may be filed in the courts of the judicial branch,[30] thus demonstrating the importance of habeas corpus in our constitutional system.

II. THE IMMEDIATE CUSTODIAN RULE[31]

The U.S. statute detailing the proper use of the writ of habeas corpus asserts that the writ is to be directed "to the person having custody of the person detained."[32] This language is confusing, as it is not clear how "custody" is to be defined. Since a court only has jurisdiction over a habeas corpus petition if it has personal jurisdiction over the petitioner's custodian, the designation of "custody" is of great importance.[33] In order to determine who is the proper custodian—and thus the proper respondent in a habeas suit—courts have historically analyzed who "has power over the petitioner."[34]

The "immediate custodian" rule has been used to determine who, in fact, has "power over the petitioner."[35] In *Vasquez v. Reno*,[36] the First Circuit articulated how the immigrant custodian rule is applied in the immigration context, explaining that the proper

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> [T]he Supreme Court preserved habeas inquiry into the lawfulness of exclusion and deportation orders in the face of congressional efforts . . . to confer finality on those orders. The constitutionally required scope of review, thus preserved, governed habeas inquiry into exclusion and deportation orders until judicial review was expanded under the Administrative Procedure Act in the 1950s.

Id. (footnote omitted).

29. *Id.* at 988.

30. 28 U.S.C. § 2241 (2000) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.").

31. The following description of the immediate custodian rule is not intended to provide an exhaustive analysis of the rule's problems and how it negatively affects the justice given to detained immigrants filing writs of habeas corpus. Instead, the purpose of the section is to give the reader an understanding of the immediate custodian rule so that she will have a stronger appreciation for the discussion of why the rule should be abandoned.

32. 28 U.S.C. § 2243 (2003).

33. "The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494-95 (1973) (citing Wales v. Whitney, 114 U.S. 564, 574 (1885)). *See also* 28 U.S.C. § 2241 (2000).

34. Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998). Courts have also considered the convenience of the parties and the court. *Id.*

35. Vasquez v. Reno, 233 F.3d 688, 693 (1st Cir. 2000).

36. *Id.* at 696.

respondent in a habeas suit is "the individual having day-to-day control over the facility in which [the immigrant] is being detained."[37] The First Circuit held that the proper respondent was the immigrant's "true custodian" – the Immigration and Naturalization Service's ("INS") district director for Louisiana, and not the Attorney General.[38] The immediate custodian rule, therefore, only recognizes the proper respondent in a habeas suit as the individual who is the immediate or direct custodian of the petitioner because he is the "person having custody" over the petitioner under the habeas statute.[39]

Many courts also seem to favor the immediate custodian rule over a broader interpretation of who should qualify as a "person having custody" because of judicial efficiency. For example, in *Vasquez*, the First Circuit said that the immediate custodian rule "is clear and easily administered."[40] Courts suggest that the adjudication of habeas corpus petitions filed by detained immigrants would "become considerably more difficult to administer" if the courts were to adopt a broader definition of the word custodian.[41]

These words, though seemingly innocuous, discount the realities of how detained immigrants are treated.[42] Since the immediate custodian rule generally requires immigrants to file their writs of habeas corpus against either their warden or the DHS District Director, it inevitably restricts the judicial forum to the district in which the petitioner is imprisoned.[43] Furthermore, it appears that the Attorney General is using the immediate custodian rule as a means to alienate immigrant detainees from fair and equitable access to the justice system because prospective petitioners may, only file the writ against the warden of their prison while having virtually no access to a capable immigration attorney. In light of the deplorable treatment of these detained immigrants seeking to have their claims heard in a fair and equitable manner, it is questionable whether courts can continue to

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37. *Id.*

38. *Id.* at 690.

39. Vasquez v. Reno, 233 F.3d 688, 691 (1st Cir. 2000) ("[W]e consider it settled beyond cavil that when a prisoner petitions for a writ of habeas corpus . . . he must name as the respondent the superintendent of the facility in which he is being held.").

40. *Id.* at 693.

41. Roman v. Ashcroft, 340 F.3d 314, 322 (6th Cir. 2003), *cert. denied en banc*, No. 02-3253, 2004 U.S. App. LEXIS 1951 (6th Cir. Jan. 14, 2004).

42. *See* discussion *infra* Part IV.A.

43. *Vasquez*, 233 F.3d at 691 (agreeing with other courts' reasoning that writs of habeas corpus are "more logically directed to the person who does have day-to-day control and actual physical custody, namely, the warden").

justify the immediate custodian rule in the interest of judicial expediency.

Fortunately, the courts have conceded that there may be "extraordinary circumstances in which the Attorney General appropriately might be named as the respondent to an alien habeas petition."[44] Unfortunately, there are few cases enunciating what, in fact, constitutes "extraordinary circumstances." In *Demjanjuk v. Meese*,[45] the D.C. Circuit found an "extraordinary circumstance" when the petitioner's attorneys did not know the location of the petitioner.[46] As a result, the D.C. Circuit asserted that it was appropriate for the writ to be filed against the Attorney General.[47] In *Chavez-Rivas v. Olsen*,[48] the U.S. District Court of New Jersey found an "extraordinary circumstance" in the Immigration and Naturalization Service's (INS) ability to deny detained immigrants access to habeas relief by transferring aliens to other jurisdictions as soon as they filed habeas actions in a particular jurisdiction.[49] Proving this type of "extraordinary circumstance" is difficult; many courts seem to require detainees to show that the government has used its transfer power in a clear effort to frustrate habeas petitions, and are not willing to infer as much from mere statistics about rates of transfer.[50]

III. COMPARING *ROMAN* AND *ARMENTERO*

The recent decisions in *Roman v. Ashcroft* [51] and *Armentero v. I.N.S.*[52] provide opposing answers to the question of whether the

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44. *Vasquez*, 233 F.3d at 696.

45. 784 F.2d 1114 (D.C. Cir. 1986).

46. *Id.* at 1115-1116.

47. *Id.* at 1116.

48. 194 F. Supp. 2d 368 (D.N.J. 2002), *writ of habeas corpus granted, in part*, 207 F. Supp. 2d 326 (D.N.J. 2002).

49. *Id.* at 374.

50. Roman v. Ashcroft, 340 F.3d 314, 326 (6th Cir.2003), *cert. denied en banc*, No. 02-3253, 2004 U.S. App. LEXIS 1951 (6th Cir. Jan. 14, 2004).

> Regardless of whether either Roman or the government can provide convincing statistics about the caseload of the Western District of Louisiana, we do not believe that the possibility of an alien's removal prior to the adjudication of his habeas corpus petition amounts to an effective denial of the petitioner's opportunity to seek meaningful habeas corpus relief.

Id. at 327.

51. 340 F.3d 314 (6th Cir. 2003), *cert. denied en banc*, No. 02-3253, 2004 U.S. App. LEXIS 1951 (6th Cir. Jan. 14, 2004).

52. 340 F.3d 1058 (9th Cir. 2003).

Attorney General is the proper respondent-custodian when a habeas petition is filed by a detained immigrant. These diverging conclusions by the Courts of Appeals for the Ninth and Sixth Circuits may not necessarily go to the U.S. Supreme Court for resolution.[53] However, these cases do illustrate the perspectives on each side of the debate. Upon summarizing these cases, the appropriate analytical framework will be in place for this article to cogently assert that the Ninth Circuit correctly concluded that the Attorney General is the proper respondent-custodian in petitions for writs of habeas corpus brought by immigrant petitioners and that the immediate custodian rule should be abandoned.

A. Roman v. Ashcroft

Julio E. Roman, a 46-year old native and citizen of the Dominican Republic, had been a lawful permanent resident of the United States since October 29, 1996, was married and had six U.S. citizen children.[54] Roman pleaded guilty in the Northern District of Ohio to fraud and misuse of visas and social security numbers on September 30, 1999.[55] He was sentenced to fifteen months of imprisonment for these crimes, of which he served thirteen months.[56] The INS later charged Roman with being removable from the United States because of his federal convictions, and Roman was transferred from a federal prison in Kentucky to an INS detention facility in the Western District of Louisiana.[57]

In July 2000, an Immigration Judge (IJ) found Roman removable and statutorily ineligible for discretionary relief under the Immigration and Nationality Act (INA).[58] The Board of Immigration Appeals affirmed the IJ's decision on appeal.[59] Subsequently, Roman filed a habeas petition, arguing that parts of the INA violated the Fifth Amendment Equal Protection Clause.[60] Rather than filing his petition in the Western District of Louisiana, where he was detained at the time of his filing, Roman filed his petition in the Northern District of Ohio,

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53. As of this writing, no writs of certiorari have been filed in either case.

54. *Roman*, 340 F.3d at 316.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* (stating that the immigration judge found Roman ineligible for relief under § 212(h) of the INA, 8 U.S.C. § 1182(h)).

59. *Id.*

60. *Roman,* 340 F.3d at 316. "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976).

where he formerly resided and where he was convicted of the crimes that led to his removal.[61] Furthermore, Roman named the Attorney General and various INS officials as the respondents in his petition.[62] The Northern District of Ohio concluded that it had personal jurisdiction over the Attorney General and granted Roman a writ of habeas corpus.[63] On appeal, a three-judge panel of the Sixth Circuit asserted that "Roman's action must be brought in the district court having jurisdiction over 'the person having custody of the person detained,'" and it vacated the district court's decision to grant habeas corpus relief.[64]

In reaching its decision, the Sixth Circuit confined its analysis to whether the Northern District of Ohio erred by finding personal jurisdiction over the Attorney General, thereby enabling the Attorney General to be named the appropriate respondent-custodian in Roman's petition for a writ of habeas corpus.[65] In order to resolve this issue, the court considered the immediate custodian rule and whether the case introduced any "extraordinary circumstances" that would justify a departure from the immediate custodian rule, thus affirming the Northern District of Ohio's ruling to exercise personal jurisdiction over the Attorney General.[66]

Upon reviewing the immediate custodian rule, the Sixth Circuit asserted that "a detained alien filing a habeas corpus petition should generally name as respondent the person exercising daily control over his affairs."[67] The court stated that the person exercising daily control over the affairs of a detained immigrant is either the warden of the facility where the immigrant is detained, or the INS District Director of the district where the immigrant is being detained.[68] Whereas, Roman asserted that the immediate custodian rule should not be applied to immigrants filing writs of habeas corpus, thereby enabling them to file against the Attorney General instead, the Sixth Circuit said that it saw "no reason to apply a different rule for identifying a petitioner's custodian depending on whether the petitioner is an alien or a prisoner."[69] In support of its decision, the court analyzed the

61. *Roman*, 340 F.3d at 316.
62. *Id.* at 317.
63. *Id.*
64. *Id.* at 316 (quoting 28 U.S.C. §2243).
65. *Id.* at 318.
66. *Roman*, 340 F.3d at 325.
67. *Id.* at 320.
68. *Id.*
69. *Id.* at 321.

language of the habeas statute, which asserts that the writ "shall be directed to the person having custody of the person detained,"[70] and suggested that, from the language of the statute, it was clear that a petitioner did not have a choice as to whom to name as a respondent; in fact, only one person could hold such status.[71]

In addition to relying upon the language of the habeas statute to support its use of the immediate custodian rule, the Sixth Circuit also asserted that the rule ensures the swift administration of justice. In other words, by confining the potential respondent-custodians to a smaller number through the immediate custodian rule, the courts would not be burdened by so many of these petitions.[72] Otherwise, according to the court, a "regime" would be established in which several jurisdictions would have personal jurisdiction over an immigrant's "'custodians.'"[73] In the court's view, such a "regime" would inevitably create the fertile ground for vast amounts of forum-shopping by potential petitioners.[74]

In *Roman*, the Sixth Circuit endorsed the use of the immediate custodian rule as applied to detained immigrants, but recognized that this rule could not be too rigid due to the nature of immigrant detention and the relationship immigrants have with the Attorney General.[75] The court stressed that the rules treating the immediate custodian as the only proper respondent have not been applied in a rigid fashion and that, furthermore, most courts using the rule have noted exceptions to it as they have adopted it.[76] The court discussed two exceptions to the immediate custodian rule: first, the "Attorney General as [c]ustodian,"[77] and, second, "[e]xtraordinary [c]ircumstances."[78]

In the case of the Attorney General as custodian, the court said it recognized that the Attorney General's relationship to prisoners differs significantly from his relationship to detained immigrants.[79]

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70. 28 U.S.C. § 2243 (2003).
71. *Roman*, 340 F.3d at 321.
72. *Id.* at 322.
73. *Id.*
74. *Id.*
75. *Id.* at 323-25.
76. *Roman*, 340 F.3d at 322.
77. *Id.* at 323-25.
78. *Id.* at 325-27.
79. *Id.* at 324 ("Thus, the Attorney General continues to be in complete charge of the proceedings leading up to the order directing the[ ] removal [of aliens] from the country and has complete discretion to decide whether or not removal shall be directed.") (alteration in original) (quoting Henderson v. INS, 157 F.3d 106, 126 (2d Cir. 1998)).

Therefore, according to the court, there were special occasions during which the Attorney General would be the properly named custodian in a writ filed by a detained immigrant when he otherwise would not be if the petitioner were an ordinary prisoner.[80] Regardless of the court's willingness to recognize this exception, it did nothing to explore or describe it. Instead, the court merely said that the exception did not apply to the case.[81]

The Sixth Circuit also discussed the "extraordinary circumstances" exception to the immediate custodian rule. In *Roman*, the district court had determined that the naming of the Attorney General as respondent-custodian was justified under the circumstances because of the prospect that the petitioner could be removed to the Dominican Republic before his habeas petition could be heard on the merits.[82] The Sixth Circuit recognized that "[u]nder certain extraordinary circumstances it may be necessary to depart from the immediate custodian rule in order to preserve a petitioner's access to habeas corpus relief."[83] The court said that "[s]uch circumstances may arise where a detainee does not have a realistic opportunity for judicial review of his executive detention."[84] These circumstances could arise when the immigrant is at an undisclosed location and the lawyers for the petitioner did not know where to find him,[85] or when the INS attempts to deny immigrants "any meaningful opportunity" to seek habeas corpus relief by transferring immigrants any time they file habeas corpus petitions.[86]

In the latter situation, the Attorney General could be named the appropriate respondent-custodian because such a case "could be adjudicated without interruption in the event of a transfer."[87] The court said that it might also allow the Attorney General to be the respondent-custodian when excessive transfers occurred in an attempt to quash justice.[88] However, the court asserted that it was not interested in any of Roman's statistics relating to transfers into the

80. *Id.* at 324-25.

81. *Id.* "The nature and scope of [these] circumstances remains to be determined." *Id.* at 325.

82. *Roman*, 340 F.3d at 325.

83. *Id.*

84. *Id.*

85. *Id.* (citing Demjanjuk v. Meese, 784 F.2d 1114, 1116 (D.C. Cir. 1986)).

86. *Id.* at 325-326 (citing Chavez-Rivas v. Olsen, 194 F. Supp. 2d 368, 374 (D.N.J. 2002), *writ of habeas corpus granted, in part*, 207 F. Supp. 2d 326 (D.N.J. 2002)).

87. *Id.* at 326.

88. *Roman*, 340 F.3d at 326.

Western District of Louisiana.[89] Therefore, although the court said that it might provide relief in the case of repeated transfers for obstructionist purposes, its reluctance to consider Roman's evidence seemed to slam the door on any way of proving such activity.[90] Because the Sixth Circuit did not believe any exceptions to the immediate custodian rule existed, it vacated the district court's granting of habeas relief to the Roman and stated that the Attorney General was not the proper respondent-custodian in the case.[91]

B. Armentero v. INS

Luis Armentero, a citizen of Cuba, arrived in the United States in 1980 and, five years later, was convicted of rape by force in California.[92] An IJ later held that Armentero was excludable from the United States and ordered him deported.[93] Because the INS was unable to deport Armentero,[94] he was, essentially in government detention for over ten years awaiting deportation.[95] In 2001, Armentero filed a writ of habeas corpus petition in the U.S. District Court for the Central District of California, asserting that he was being indefinitely detained in violation of the Due Process clause of the Fifth Amendment[96] and that the conditions of his detention amounted to punishment that violated the Constitution.[97] Armentero named the INS as the only respondent.[98]

At the time Armentero filed his petition, he was located a detention facility in San Pedro, California.[99] The INS subsequently transferred him to a federal penitentiary in Terre Haute, Indiana.[100] The U.S. District Court for the Central District of California then

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89. *Id.* at 327.
90. *Id.*
91. *Id.* at 329.
92. Armentero v. INS, 340 F.3d 1058, 1060 (9th Cir. 2003).
93. *Id.*
94. *Id.* ("The INS was apparently unable to deport Armentero. In the ensuing years, Armentero was released to a halfway house; detained once again by the INS after a new conviction; paroled again; convicted of yet another crime; and detained once more by the INS.").
95. *Id.*
96. U.S. CONST. amend. V. ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ..").
97. *Armentero*, 340 F.3d at 1060.
98. *Id.* at 1059.
99. *Id.* at 1060.
100. *Id.*

denied Armentero's petition without prejudice.[101] Armentero appealed the court's decision to the Ninth Circuit, in which neither party raised the issue of whether Armentero had properly named the INS as respondent in his habeas petition.[102]

Similar to the Sixth Circuit in *Roman*, the Ninth Circuit first considered the habeas statute in order to determine against whom Armentero could file his writ. The Ninth Circuit concluded that "[t]he statute does not specify that the respondent named shall be the petitioner's immediate physical custodian."[103] The court stated that in order to better understand who the respondent should be in habeas cases, it needed to look to the appropriate U.S. Supreme Court jurisprudence.[104] Supreme Court case law, read as a whole, indicated to the Ninth Circuit that the "concept of custodian is a broad one that includes any person empowered to end restraint of a habeas petitioner's liberty, not just the petitioner's on-site, immediate physical custodian."[105]

The court then analyzed the pertinent Ninth Circuit case law. It noted that although a petitioner's immediate custodian is generally the proper respondent in habeas petitions,[106] there are cases in which the custodian requirement may be "flexibly interpreted to encompass other custodians when it is efficient to do so."[107] The court insisted that its lack of case law on the matter—and the fact that the available cases were so specific—enabled the court to make a determination without being bound by any precedent.[108]

As a result of the lack of binding case law on the issue at hand in *Armentero*, the court considered out-of-circuit cases addressing immigration detainees.[109] The court first looked to *Vasquez v. Reno*,[110] in which the First Circuit held that the Attorney General was not an appropriate respondent in a habeas action brought by an immigrant detained in an INS detention facility in Oakdale, Louisiana.[111]

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101. *Id.*
102. *Id*
103. *Armentero*, 340 F.3d at 1061.
104. *Id.* Interestingly, for the purpose of comparison, the court in *Roman* did not seem to consider the U.S. Supreme Court's interpretation of "immediate custodian" when it construed the term as rigidly as it did.
105. *Id.* at 1064.
106. *Id.*
107. *Id.* at 1064.
108. *Id.* at 1065.
109. *Armentero*, 340 F.3d at 1065.
110, Vasquez v. Reno, 233 F.3d 688 (1st Cir. 2000).
111. *Armentero*, 340 F.3d at 1065.

Although the *Vasquez* court acknowledged the backlog of habeas petitions filed by immigrants in the Western District of Louisiana, it observed that Congress, not the courts, should redefine "custodian" under the habeas statute to increase efficiency.[112] The First Circuit also rejected the argument that the Attorney General was the proper respondent in habeas cases simply because of his unique position as the ultimate authority in matters of immigration.[113]

The *Armentero* court also considered the Second Circuit's decision in *Henderson v. INS*.[114] In *Henderson*, the Second Circuit did not take a particular side on the issue of who was a proper respondent, but did indicate that it is often appropriate for the Attorney General to be named as such in the immigration context.[115] In *Henderson*, the Second Circuit said that the Attorney General could be named the proper custodian because of "Congress' statutory designation of the Attorney General as legal custodian of criminal aliens and the Attorney General's broad statutory power to detain aliens."[116] This enabled the court to assert that the Attorney General could be named the proper respondent.

The *Armentero* court concluded that although a petitioner's immediate physical custodian is typically a proper respondent in traditional habeas petitions, the custodian requirement is "sufficiently flexible to permit the naming of respondents who are not immediate physical custodians if efficiency, practicality, and the interests of justice so demand."[117] The court said that the varied circumstances surrounding the detention of aliens demanded judicial flexibility because detainees are held in a "host" of institutions ranging from federal penitentiaries to county jails.[118] When the detainees are in state and local jails, it is inefficient for a writ of habeas corpus to be directed to a warden because his control over the immigration detainees is merely contractual and the warden does not have the power to release the detainees.[119]

In rejecting the notion that the immediate custodian rule should be applied rigidly, the court pointed to the high rate of transfer of immigration detainees among detention centers across the country,

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112. *Id.* at 1066.
113. *Id.*
114. 157 F.3d 106 (2d Cir. 1998).
115. *Armentero*, 340 F.3d at 1067.
116. *Id.*
117. *Id.* at 1068.
118. *Id.*
119. *Id.*.

which renders the immediate custodian rule impractical and against the interests of justice because a detainee has to restart his filing process each time he moves to a new institution.[120] Furthermore, the high rate of transfer, according to the court, makes it difficult for detainees to have effective access to counsel.[121] Lastly, unlike the Sixth Circuit in *Roman*, the Ninth Circuit took note of statistics that indicated that certain district courts in areas with immigration centers have been "flooded" with detainee habeas petitions.[122] The court stated that this surge in petitions could threaten the ability of certain districts to consider habeas petitions in a "reasonably prompt manner."[123]

Due to the court's perceptions of the problems associated with the immediate custodian rule in the context of immigration, it said that the rule should not be applied to immigrant detainees.[124] It held that the most appropriate respondent to petition for a writ of habeas corpus brought by immigrant detainees, such as Armentero, is the "individual in charge of the national government agency under whose auspices the alien is detained"[125] or, in other words, the Attorney General.

IV. *ARMENTERO* PROPERLY ABANDONS THE IMMEDIATE CUSTODIAN RULE AS REQUIRED BY THE DUE PROCESS TEST IN *MATHEWS V. ELDRIDGE*

In its most basic form, the Ninth Circuit's analysis of the immediate custodian rule in *Armentero* is one of procedural due process, although the Ninth Circuit did not necessarily label it as such.[126] Meaningful access to the full power of the writ of habeas corpus adds an indispensable layer of procedural safeguard to a process in which an individual's freedom is at stake. When the immediate custodian rule in the immigration context is analyzed under the procedural due process test articulated in *Mathews v. Eldridge*,[127] the need for abandoning the immediate custodian rule as a necessary

120. *Armentero*, 340 F.3d at 1069.
121. *Id.*
122. *Id.*
123. *Id.* at 1069.
124. *Id.* at 1071.
125. *Armentero*, 340 F.3d at 1071.
126. "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons in the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." Zadvydas v. Davis, 533 U.S. 678, 698 (2001) (citation omitted).
127. 424 U.S. 319 (1976).

alteration to the procedural due process protections already guaranteed to immigrant detainees becomes clear.

First, the *Mathews* test requires an examination of the detainees' interest at stake in the detention and removal process.[128] In the immigration context, the interests are the swift adjudication of immigrant detainee claims, the right to be free from indefinite detention (in the United States or, after removal, in their country of origin), and the risk of erroneous deprivation of that right. The second prong of the *Mathews* test requires the identification of the government's interest in requiring the application of the immediate custodian rule apply.[129] In the immigration context, the government has articulated an interest in preventing the expense of Department of Homeland Security (DHS) resources on more proceedings prior to removal.[130] This interest, however, appears minor when compared to the basic interest of freedom that hangs in the balance. Finally, the proposed alteration to the process is analyzed to determine its value in ensuring that the adjudication of the detainees' interest is just.[131] Permitting the detainee to name the Attorney General as the respondent to her habeas corpus petition would alleviate the potential for the DHS to effectively force the detainee to file his or her petition for habeas relief in a less favorable forum, especially when implemented in conjunction with conventional venue considerations.

When viewed in light of the *Mathews* test, it becomes clear that the Ninth Circuit correctly concluded in *Armentero* that the immediate custodian rule should be abandoned in the immigration context. Whereas, the decision by the *Roman* court did not adequately weigh the requisite factors prior to reaching its determination, the *Armentero* court properly recognized the need for further process and protections to afford adequate process. The requirement that an immigrant detainee name her immediate custodian is of marginal benefit to the government, but significantly compromises an immigrant's ability to challenge her detention. Furthermore, these realities when combined with the DHS's penchant for swift and frequent transfer often result in detainees being ignorant of the identity of the appropriate respondent

128. *Id.* at 335.

129. *Id.*

130. *See, e.g.*, Kahn v. Elwood, 232 F. Supp. 2d 344, 351 (D. Pa. 2002) (responding to a motion for a stay of removal pending appeal, the Immigration and Naturalization Service argued that the stay would cause it to suffer "substantial injury," given that it "ha[d] expended considerable time and expense to schedule [the] Petitioner's removal" and further delay would increase expenses).

131. *Mathews*, 424 U.S. at 335.

to their habeas petition, which, in turn, creates a drain on judicial resources as courts consider flawed petitions.

After considering the factors enumerated in *Mathews v. Eldridge* in light of the current state of immigrant detention, the only reasonable conclusion is that the use of the immediate custodian rule for the writs of habeas corpus filed by immigrant detainees does not contribute to the assurance of justice in detention proceedings. Because habeas corpus is a necessary check on the power of the DHS to detain immigrants, its meaning and purpose must be maintained through the abandonment of the immediate custodian rule in the immigration context, as held by the Ninth Circuit in *Armentero*.

The following sections of this article will analyze the interests held by the immigrant detainees and their weight in relation to the interests held by the government. As required under the *Mathews* test, these articulated interests will be balanced against each other. The result reveals that the perceived hardship borne by the government is slight in comparison to the protection afforded for the significant rights of the immigrant detainees at stake in detention scenarios.

A. First Mathews Factor – Immigrant Detainee Interests

Many of the immigrants bringing habeas corpus petitions challenging final orders of removal are long-time permanent residents who, because of convictions for certain crimes, are precluded from seeking direct appellate review of their final orders under the INA..[132] Therefore, a habeas corpus petition is often an immigrant detainee's last opportunity to attempt to remain in this country. Requiring an immigrant detainee to name the warden of his or her detention center as immediate custodian instead of the Attorney General fails to account for the fact that a substantial percentage of the immigrants currently in DHS custody are held in local jails and private industry prisons, often in remote locations, that are only affiliated with the DHS or the Attorney General by contract. Furthermore, the immediate custodian rule ignores the reality that the DHS frequently uses its power to transfer immigrant detainees to the point of abusing it, and unjustly vests the government with complete discretion regarding the forum for habeas review. Finally, the immediate custodian rule

132. *See, e.g.*, Smalley v. Ashcroft, 354 F.3d 332, 339 (5th Cir. 2003) (holding that because the crime was one involving moral turpitude the court lacked jurisdiction to hear the appeal under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)).

impinges on the right to counsel and frustrates practical access to habeas review.

1. Detention in Remote, Contracted Facilities

The number of immigrants in detention has increased rapidly in recent years.[133] In 2002, there were approximately 21,000 immigrants in detention on an average day.[134] The DHS, formerly the Immigration and Naturalization Service, uses several types of facilities to hold immigrant detainees, including DHS owned and operated facilities known as Service Processing Centers (SPC); centers owned by private corrections companies; Bureau of Prisons facilities; and local jails throughout the nation.[135] Pursuant to section 241(g)(2) of the Immigration and Nationality Act, DHS is required to utilize existing detention facilities before it may add additional space.[136] The DHS uses this statutory provision to justify its contracts with private prisons and rural jails.

More than 60% of the detainees in DHS custody are held in county jails and state prisons around the country.[137] As of 2000, "the [DHS] use[d] more than a third of its $800 million dollar budget to "rent cells in about 225 jails—most of them in rural counties where costs are low and there are beds to spare."[138] For example, in 1995,

133. Rachel E. Rosenbloom, *Is the Attorney General the Custodian of an INS Detainee? Personal Jurisdiction and the "Immediate Custodian" Rule in Immigration –Related Habeas Actions*, 27 N.Y.U. REV. L. & SOC. CHANGE 543, 548 (2001-02) (discussing increased rates of detention and deportation in light of statutory changes).

134. Christopher Nugent, *The INS Detention Standards: Facilitating Legal Representation and Humane Conditions of Confinement for Immigration Detainees*, IMMIGR. CURRENT AWARENESS NEWSL. (Nat'l Immigr. Project & Nat'l Lawyers Guild), Feb. 3, 2003, WESTLAW, 2003 NIP-ICAN 2.

135. Armentero v. INS, 340 F.3d 1058, 1068 (9th Cir. 2003) ("[I]mmigration detainees are physically detained in a host of institutions, ranging from specialized immigration detention centers to federal prisons to state and local prisons and jails."); HUMAN RIGHTS WATCH, LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES 17 (Sept. 1998) [hereinafter LOCKED AWAY]; Julie Sullivan, *Prisons: Conditions Severe Even for Jails*, OREGONIAN, Dec. 10, 2000 at A1 (explaining that the INS "farms out more than half the 20,050 people it jails daily to a haphazard network of 1,940 private state prisons and county jails"), *available at* http://www.oregonlive.com/printer/printer.ssf?/special/current/ins/in_12sside10.frame (last visited May 26, 2004).

136. 8 U.S.C. § 1231(g)(2) (2000).

137. LOCKED AWAY, *supra* note 135, at 4.

138. Lori Montgomery, *Rural Jails Profiting From INS Detainees: Immigrant Advocates Object as Counties Like Md.'s Wicomico Contract with U.S.*, WASH. POST, Nov. 24, 2000, at A1.

Maryland's Wicomico County[139] needed to raise $65,000 in thirty days.[140] To acquire the money in time, the warden of the local jail, John Welch, "'picked up the phone and called the [DHS] and said, "Send me 70 inmates." And it was done.'"[141] This is but one example of the network of rural jails currently contracting with DHS.[142]

One can only assume that as the number of immigrant detainees has risen, so has the need for utilizing the space at local and private jails and prisons. This symbiotic relationship between the local county jails, private industry prisons and the DHS results in ill-gotten gains and promotes the frequent transfer of detainees to "needy" jails.[143] The relationship also results in placing individuals removable for minor criminal violations "in jail with local criminals accused of rape, robbery or murder."[144] Furthermore, due to the increase in detention, DHS facilities, as well as contracted private and rural jail spaces, suffer from "[p]oor staffing, obstructed access to counsel and the courts, inhumane living conditions, inadequate medical care, and physical and sexual assault ...."[145]

As illustrated above, placement at rural and understaffed facilities results in immigrant detainees being placed at a disadvantage in pursuing their cases in court, being placed in potentially dangerous situations due to their detention with criminals, and having a lack of meaningful standards for their treatment.

2. The Transfer of Detainees and the Immediate Custodian Rule Unjustly Vest the Government with Complete Discretion Regarding the Fora for Habeas Review

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139. Wicomico County is located on Maryland's Eastern Shore, and consists of mostly of farmland.

140. Montgomery, *supra* note 138.

141. *Id.* (quoting Warden John Welch).

142. Others include the St. Mary's Correctional Facility in Leonardtown, Maryland, the Nacogdoches County Jail in Nacogdoches, Texas, and Salem County Correctional Facility in Woodstown, New Jersey. *See* LOCKED AWAY, *supra* note 135, at 17 n.21. The DHS has become a major force in the private jail industry, resulting in the commodification of detained immigrants. Michael Welch, *The Role of the Immigration and Naturalization Service in the Prison-Industrial Complex*, SOC. JUST., Sept. 22, 2000, at 73. As it becomes less committed to the review of individual claims, DHS' treatment of detainees is increasingly similar that of the criminal justice system, which uses an actuarial approach to assess and control the risks of specific subpopulations, such as drug offenders. *Id.* at 74-75. Detainees are no longer viewed as treated as individuals, but rather are seen as merely part of groups, such as, Haitians, Nigerians, or Cubans. *Id.* Furthermore, the DHS has also increasingly emphasized detention over its role in providing social service, mirroring developments in criminal justice. *Id.* at 83.

143. *See generally* Montgomery, *supra* note 138.

144. *Id.*

145. Welch, *supra* note 142, at 76.

Under the immediate custodian rule, immigrant detainees must litigate their habeas corpus actions in the jurisdiction in which they are held,[146] regardless of the fact that the immigrant's only connection to the jurisdiction is that he or she was transferred or detained there. There can be no reasonable grounds to justify forcing immigrant detainees to litigate their claims in an arbitrary forum chosen by the government. Rather, in most instances, the most convenient forum would be in the district where the underlying grounds for removal occurred, because the writ for habeas is expected to be inextricably entwined with the substantive grounds for the original removal order.[147]

Once an immigrant is in custody, the DHS may, at any time, transfer an immigrant detainee to another detention facility without any explanation or advance notice to the immigrant detainee or her attorney.[148] Transfer may be motivated by any number of influences, some of which include the availability and cost of bed space in local jails,[149] security reasons,[150] a desire to punish detainees or to quell their complaints,[151] or simply through a request of a detention facility in need of financial assistance.[152] The DHS has stated that, "every bed regardless of where it is situated is national, and it may therefore transfer detainees anywhere, at anytime."[153] According to an attorney formerly associated with the Florida Immigrant Advocacy Center, "'[i]t's not unusual to see detainees . . . transferred up to 10 times.'"[154]

Under the present immediate custodian rule, the government is able to abuse its unqualified discretion in transferring detainees to determine the forum for review of habeas petitions. It has been noted

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146. *See* discussion *supra* Part II.

147. *See* Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 493-99 (1973) (applying traditional venue considerations to determine appropriateness of forum in a §2241 habeas action).

148. *See generally* Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 HARV. L. REV. 2001, 2001 (1987) [hereinafter *INS Transfer Policy*].

149. LOCKED AWAY, *supra* note 135, at 5.

150. Panel Discussion, *Perversities and Prospects: Whither Immigration Enforcement and Detention in the Anti-Terrorism Aftermath?*, 9 GEO. J. POVERTY L. & POL'Y 1, 7 (2002) [hereinafter Panel Discussion].

151. Sullivan, *supra* note 135; Elizabeth Llorente, *Palestinian Detainee Moved From Passaic Jail to Pa.*, REC., Feb. 21, 2003, at L04 (noting that various civil rights groups have charged that the INS transfers detainees who complain about their detention).

152. Montgomery, *supra* note 138.

153. Robyn Blumner, *INS Transfers Mean Detainees Don't Get Legal Help*, CAP., Jan. 3, 2003, at A1.

154. *Id.*.

that the DHS appears to be transferring detainees to one prison in particular - the Oakdale facility in Louisiana.[155] This large number of detainees being aggregated to this one facility in the Western District of Louisiana has frustrated the immigrant detainees' access to the courts through the writ of habeas corpus. The Fifth Circuit in *Emejulu v. INS*[156] noted that "the administrative delays in processing deportations produces an atypical and unanticipated volume of habeas petitions that is beyond the capability of the district court to process in a timely fashion."[157] Furthermore, "[c]ompounding the expenditures that Congress was concerned with is the expense being borne by the Western District of Louisiana in processing the flood of habeas petitions being filed by [the] detainees . . .."[158]

In addition to creating a backlog of habeas petitions, there may be another, more sinister, reason behind the numerous transfers to Oakdale. The First Circuit has noted that the Fifth Circuit, where Oakdale is located, , has set precedents which weigh heavily in the government's favor,[159] and therefore has seemingly taken a position against immigrant detainees. According to the court, "[t]he Fifth Circuit has determined that IIRIRA effectively revoked the district courts' jurisdiction to entertain habeas petitions brought by detained aliens pursuant to 28 U.S.C. § 2241."[160] The Fifth Circuit highlighted the concern that because the DHS has complete authority to transfer detainees at will, there is the potential for the government to transfer a detainee seeking habeas corpus review to a jurisdiction where the law is less favorable to his or her position. The DHS's unfettered control over the forum in which the petition is heard demands that a check be placed on that power through increased accountability via its recognition as an appropriate respondent in habeas petitions.

Opponents may argue that naming the Attorney General as a respondent in a habeas petition could lead to forum-shopping by

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155. *See, e.g.*, Vasquez v. Reno, 233 F.3d 688, 690 (1st Cir. 2000) (observing that the petitioner was first detained in Boston, then transferred by the INS to the Federal Detention Center in Oakdale); Nwankwo v. Reno, 828 F. Supp. 171, 172 (D.N.Y. 1993) (noting that the petitioner, after serving his sentence in New York, was transferred to the Federal Deportation Center in Oakdale); Roman v. Ashcroft, 340 F.3d 314, 317 (6th Cir. 2003) (noting that the petitioner served his prison sentence in Ohio, was transferred to the Lexington Federal Medical Center in Lexington, Kentucky, and finally was transferred to the Oakdale facility), *cert. denied en banc*, No. 02-3253, 2004 U.S. App. LEXIS 1951 (6th Cir. Jan. 14, 2004).

156. 989 F.2d 771 (5th Cir. 1993).

157. *Id.* at 772.

158. *Id.* at n.1.

159. Vasquez v. Reno, 233 F.3d 688, 694 (1st Cir. 2000).

160. *Id.* at n.5 (citing Max-George v. Reno, 205 F.3d 194 (5th Cir. 2000)).

immigrant petitioners. Both the Second and the Ninth Circuits, however, have concluded that application of venue considerations would alleviate this concern.[161] The considerations listed in section 1391 of the U.S. Code[162] include the recognition that venue is appropriate in the judicial district in which a "substantial part of the events or omissions giving rise to the claim occurred."[163] The section applicable to venue also provides that an alien may be sued in any district.[164] However, with respect to proceedings addressing habeas corpus writs containing claims about issues arising from the criminal charges that led to the decision to remove the immigrant, the judicial district that was the forum for those underlying proceedings would clearly be in the best position to fully assess the validity of those claims. Venue was not designed to give one party to an action an unfair advantage over the other through an abuse of their position. Therefore, the immediate custodian rule must be rejected for a more flexible one that recognizes the need to prevent future forum shopping by the government.[165]

3. Applying the Immediate Custodian Rule to Immigration Detainees Impinges on the Right to Counsel and Frustrates Practical Access to Habeas Review

Because it forces detainees to file habeas petitions in the district where they are imprisoned, the immediate custodian rule causes immigrant detainees to face numerous barriers to obtaining

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161. *See* Armentero v. INS, 340 F.3d 1058, 1070 (9th Cir. 2003) ("A more flexible approach toward naming a respondent need not open the door to forum shopping by petitioners. District courts may use traditional venue considerations to control where detainees bring habeas petitions.") (citing Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 493-94 (1973); Henderson v. INS, 157 F.3d 106, 128-29 (2d Cir. 1998) ("Accordingly, there is reason to think that strict application of 'traditional principles of venue' in alien habeas cases might adequately control the forum shopping in which aliens might try to engage were the Attorney General to be designated an appropriate respondent.") (quoting *Braden*, 410 U.S. at 493-94).

162. 28 U.S.C. § 1391 (2000).

163. 28 U.S.C. § 1391(a)(2).

164. 28 U.S.C. § 1391(d).

165. *See* Megan A. Ferstenfeld-Torres, *Who Are We to Name?: The Applicability of the "Immediate-Custodian-As-Respondent" Rule to Alien Habeas Claims Under 28 U.S.C. § 2241*, 17 GEO. IMMIG. L. J. 431, 467-68 (2003) ("[B]ecause the INS has unequivocal authority to transfer detainees in the first instance, it has almost absolute power to engage in *de facto* manipulation of the identity of the immediate custodian of any given alien, and thus preempt his or her ability to select a forum."); Rosenbloom, *supra* note 133, at 584 ("The immediate custodian rule in fact presents the true forum-shopping problem, providing the INS with limitless power to determine the forum.").

representation, which limits the efficacy of habeas review. Under the first factor in the *Mathews* test, access to counsel certainly rises to the level of a right worthy of added procedural protection. Absent meaningful access to counsel, the remaining procedure granted to immigrant detainees is rendered void of any real meaning.

When held in rural jails and private industry prisons, immigrant detainees often have restricted access to and limited ability to retain counsel.[166] If an immigrant detainee has family in the country, those family members usually retain counsel on behalf of the detainees and act as intermediaries between the detainee and counsel.[167] However, when detainees are transferred to rural jails outside of their states of residence, they lose their family-based support network that would otherwise assist them in retaining counsel.[168] It is difficult for immigrant detainees to retain counsel on their own, since immigration attorneys are usually based in urban areas, close to immigrant communities, but far away from the rural facilities where immigrants are detained. Even if they manage to retain private counsel, immigrant detainees have limited ability to meet consult with their attorneys because of the policies of their particular detention facilities.

Those immigrant detainees who are separated from their support system and unable to retain private counsel are often left at the mercy of an overburdened pro bono system, which is generally too remote to be of any real help. Typically, detainees cannot afford private counsel, absent help from family members not in custody, and most pro bono immigration legal services are concentrated in urban areas near the immigration courts, usually a prohibitive distance from the rural jails in which the detainees are housed.[169] The largest

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166. *See generally INS Transfer Policy, supra* note 148, at 2002 (discussing the difficulties of obtaining counsel while detained in isolated detention facilities); Panel Discussion, *supra* note 150, at 11 (noting concern expressed by the United Nations High Commissioner on Refugees' regarding "frequent transfers . . . , detention in remote locations . . . , inadequate law libraries, limited access to outdoor recreation and lack of interpretation.").

167. LOCKED AWAY, *supra* note 135, at 66.

> Incarceration far from friends and family who can locate and pay for lawyers, frequent transfers from facility to facility, restrictive visitation policies, and limited telephone access create significant obstacles to adequate representation. The remote location of local jails—sometimes hundreds of miles away from an urban center—permits only infrequent visits by attorneys of record for interviews and case preparation.

Id.

168. *Id.*; Sullivan, *supra* note 135 (noting that the INS "[s]hunts people from one jail to another, often without forwarding their mail, legal paperwork, and personal possessions and without informing their attorneys or families").

169. LOCKED AWAY, *supra* note 135, at 66.

obstacle in receiving such access is the transfer of detainees to remote rural jails, where there are virtually no pro bono legal services.[170] For example, the aforementioned detention center in Wicomico County is 116 miles from Washington D.C., and 110 miles from Baltimore, leaving detainees, who often speak limited or no English, without the lawyers they need to navigate the complicated deportation procedure.[171]

The problem of limited legal resources, however, is not only an issue in rural jails and private prisons. Many DHS detention centers are placed far away from urban centers, located in areas where pro bono legal services hardly exist. At the DHS detention facility at Oakdale, Louisiana, there is rarely "more than one attorney available at any given time to represent the hundreds of immigrants detained at the facility on a pro bono basis."[172] In 1986, a legal services clinic opened at Oakdale with volunteers working fourteen to sixteen hours a day, seven days a week.[173] Within one month of its opening, the office had only been able to visit half of those needing representation; by the second month, conditions worsened and resulted in asylum applications being filed with only minimal information.[174] Ultimately, only two months after opening, the Oakdale legal services office could no longer accept new clients.[175] Detainees were left to seek assistance from pro bono legal service organizations located in New Orleans, approximately 200 miles away.[176]

Detainees who had counsel in their removal proceeding and were later transferred face a different set of difficulties. A pattern of transfers, often without notice to counsel and always without notice to the detainees' families, can frustrate attorney-client communications.[177] Also, as the *Armentero* court observed, a jurisdiction's *pro hac vice*[178] rules may hinder an out-of-state

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170. *See generally INS Transfer Policy, supra* note 148.

171. Montgomery, *supra* note 138.

172. *INS Transfer Policy*, *supra* note 148, at 2005.

173. *Id.* at 2006 n.25.

174. *Id.*

175. *Id.*

176. *Id.* DHS utilizes a few detention facilities in urban settings such as the Varick Street Service Processing Center in New York City the Boston Service Processing Center in Boston, Massachusetts. *See* INS Detention Centers, http://www.mendozamueller.com/detention.html (last visited May. 26, 2004) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

177. LOCKED AWAY, *supra* note 135.

178. "For this occasion or particular purpose; The phrase usu. refers to a lawyer who has not been admitted to practice in a particular jurisdiction but who is admitted there temporarily

counsel's ability to represent the petitioner.[179] Moreover, travel costs and other expenses could make representation less feasible.[180]

Discontinuing the immediate custodian rule and utilizing traditional venue concerns would solve the problem of obtaining representation that results from the DHS's limitless transfer policy. The detainee's family in the jurisdiction where the removal proceeding took place would be able to assist the detainee in retaining local counsel. If the detainee were eventually transferred to a different facility, she would not face the daunting task of securing new counsel to proceed on her claims.

B. Second Mathews v. Eldridge *Factor – Governmental Interests*

When considered in light of the language of the *Mathews v. Eldridge* test, the DHS' interests in continuing the immediate custodian rule are limited. *Mathews* provides for the consideration of the "[g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[181]

DHS could argue that abandoning the immediate custodian rule would impose a burden on its already limited financial resources by requiring DHS to appear in all habeas corpus petitions filed by detainees in the United States. This argument, once examined, appears to be little more than a "red herring." The burden on the government, what little there would be, would only consist of transferring the detainee to the appropriate jurisdiction, and making an appearance in

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for the purpose of conducting a particular case." BLACK'S LAW DICTIONARY 984 (7th ed. 2000).

179. Armentero v. INS, 340 F.3d 1058, 1069; *see, e.g.*, M.D. FLA. L.R. 2.02 (out-of-state attorney must name a local member of the bar to whom all notices and papers may be served and who will proceed in the event of a default by the out-of-state attorney); W.D. LA. L.R. 83.2.6W (out-of-district attorney may not be sole signatory on pleadings "but [documents requiring signature of counsel] must bear the signature of local counsel with whom the visiting attorney is associated"); D. MASS. L. R. 83.5.3(b) (with limited exceptions, counsel cannot enter an appearance or sign any papers until *pro hac vice* application has been granted); W.D. WASH. L.R. GR 2(d) (requiring out-of-district counsel to obtain local co-counsel "who shall sign all pleadings prior to filing and comply with CR 10(e)"); N.J. L. CIV. R. 101.1(c)(3) (even if admitted *pro hac vice*, counsel is not permitted to file papers or enter an appearance).

180. LOCKED AWAY, *supra* note 135; *see also* Sullivan, *supra* note 135 (describing case in which legal aid organization could not afford to continue representing detainee after he was transferred from New York to Alabama, and could not communicate for telephone proceedings).

181. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

court. The cost of these "burdens" could be defrayed by using existing structures— the transfer system and DHS's field offices of attorneys. There would be no need to create new positions or new subdivisions to respond to habeas petitions; it would simply become another part of a DHS attorney's routine.

Furthermore, when a court grants an immigrant detainee's writ, DHS becomes involved in the ensuing legal proceedings anyway. Naming the Attorney General as respondent in habeas petitions would actually benefit DHS because DHS would be able to enter the proceedings at the outset and nip some frivolous petitions in the proverbial "bud." Abandoning the immediate custodian rule and naming the Attorney General as the respondent should not be construed as limiting DHS's ability to transfer detainees as it deems necessary. On the contrary, it would simply provide a check in the system to prevent abuse of that power.

Should the DHS argue that it should be afforded certain privileges in light of the fact that the United States is engaged in a war on terror, it still could not argue, in good faith, that permitting it to forum shop furthers its duties and role in that war. Permitting the government to abuse the system cannot be considered an interest substantial enough to outweigh the potential erroneous deprivation of the right to remain in this country.

C. Third Mathews *factor - Interest of Justice*

The need for abandoning the immediate custodian rule becomes evident when it is analyzed to determine its value in ensuring that the adjudication of the detainees' interest is just, as required by the third prong of the *Mathews* procedural due process test. As illustrated above, the requirement that an immigrant detainee name her immediate custodian is of marginal benefit to the government, but significantly compromises an immigrant's ability to challenge her detention. One must remember the right at stake in habeas corpus proceedings in the immigration context. Some immigrant detainees risked their lives to come to the United States, and many may face persecution should they be removed to their home countries. In the face of such potential negative results, permitting the immigrant detainee to name the Attorney General as the responding party to his habeas corpus petition plays an important part in ensuring the appropriate outcome in each case.

Discarding the immediate custodian rule in the immigration context simply causes the immigrant detainee to have the same rights as criminal defendants utilizing the petition. In criminal cases on the state level, the petitioner, who is usually incarcerated in the state in which the crime occurred, names his immediate custodian and his petition is then heard in the federal district court of the state in which he was previously tried, a court that is more likely to be familiar with the facts of his case and the law governing his charge. This is ideally how the operation of the immediate custodian rule should work. In the immigration context, however, the immediate custodian rule often results in the immigrant detainee appearing before a court that has no knowledge of the facts of her case, has no access to the records from the other jurisdiction, and then applies precedent that would not apply in the jurisdiction where the ground for removal occurred and was litigated. This undermines the oft-quoted interest that the judiciary has in predictability of outcomes. Fundamental fairness requires that both petitioners be afforded equal and meaningful opportunity to have the grounds of their detention re-examined.

Furthermore, these realities, combined with the DHS's penchant for swift and frequent transfer, often make it difficult for detainees to know the identity of the appropriate respondent to their habeas petition. This creates a drain on judicial resources as courts consider and dismiss flawed petitions, only to have them resubmitted again, perhaps erroneously. If the immediate custodian rule were to be held inapplicable in the immigration context, habeas corpus petitions would be adjudicated more efficiently, thereby conserving scarce judicial resources and protecting detainees from a seemingly indefinite period of incarceration.

V. CONCLUSION

Under the balancing test set forth in *Mathews*, the Ninth Circuit properly decided *Armentero*, and the requirements of procedural due process mandate the abandonment of the immediate custodian rule in the immigration context. Regardless of the increased deference given to interests of the political branches in wartime, it is imperative that immigrant detainees be able to file writs of habeas corpus against the Attorney General, thereby abandoning the immediate custodian rule. Failing to alter the rule with respect to immigrant detainees jeopardizes their ability to exercise their constitutionally protected right to seek a

writ of habeas corpus in order to obtain freedom from imprisonment, a right that "lies at the heart of the liberty that [the Due Process Clause] protects."[182]

As illustrated by the differing results in *Roman* and *Armentero*, courts are not fully engaging in an explicit *Mathews* analysis nor are they completely considering the vast amount of information concerning the plight of immigrant detainees in the United States. If they were, courts would be hard pressed not to arrive at the conclusion that the immigrant detainee rights at stake, as balanced against the competing interests asserted by the government, require the abandonment of the immediate custodian rule to ensure the exercise of meaningful habeas corpus as a final, real protection against abuse at the hands of a significantly more powerful government. Meaningful procedure not only benefits the immigrant detainee, but it also validates Americans' faith in their chosen government.

182. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).