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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

JESS MUSTANICH, aka JESS WILLIAM ALFARO,  
  
Petitioner,  
  
vs.  
  
ALBERTO GONZALES, et al.,  
  
Respondents.

CASE NO. 07CV1100 WQH (LSP)  
  
ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS IN PART

HAYES, Judge:

Pending before the Court is Petitioner Jess Mustanich’s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. (Doc. # 1).

**BACKGROUND**

Born in El Salvador on August 15, 1978, Petitioner Jess Mustanich was adopted by United States citizens shortly after his birth and moved to the United States. Petition for Writ of Habeas Corpus (Pet.), ¶ 15. On February 22, 1979, the United States admitted Petitioner, age six months, as a lawful permanent resident. Pet., ¶ 15.

In 1988, Petitioner’s father met with and telephoned officers of the Department of Homeland Security in an attempt to secure United States citizenship for Petitioner pursuant to 8 U.S.C. § 1433.<sup>1</sup>

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<sup>1</sup> Pursuant to 8 U.S.C. § 1433, “a citizen of the United States may apply to the Attorney General for a certificate of citizenship on behalf of a child born outside the United States,” and the Attorney General “shall issue such a certificate” if statutory conditions are fulfilled.

1 Pet., ¶ 9; Return, Ex. C at 4-6. Petitioner's father also sought the help of a juvenile court. Return, Ex.  
2 C at 4-6. However, Petitioner's father was unsuccessful in timely completing the paperwork necessary  
3 to secure citizenship for Petitioner. Pet., ¶ 9. Petitioner alleges that the United States Government's  
4 neglect and error resulted in Petitioner's application for citizenship not being processed before  
5 Petitioner's eighteenth birthday. Pet., ¶ 9; Return, Ex. C at 4-6.

6 On April 15, 1997, Petitioner was convicted of two counts of residential burglary, in violation  
7 of California Penal Code §§ 459 and 460(a). Pet., ¶ 16. On December 21, 1998, Petitioner was  
8 convicted of being a prisoner in possession of a sharp instrument, in violation of California Penal  
9 Code § 4502(A). Pet., ¶ 16.

10 On July 10, 2003, Respondents took Petitioner into custody and initiated removal proceedings  
11 against him pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), which provides for the removal of an alien  
12 convicted of an aggravated felony. Pet., ¶ 17; Return, Ex. B. On February 10, 2004, an Immigration  
13 Judge (IJ) denied Petitioner's request for termination of removal proceedings and ordered Petitioner  
14 removed to El Salvador. Pet., ¶ 17; Return, Ex. C. Petitioner argued unsuccessfully to the IJ that the  
15 United States Government delayed and wrongfully impeded Petitioner's father's attempt to secure  
16 citizenship for Petitioner. Pet., ¶ 15; Return, Ex. C. On July 29, 2004, the Bureau of Immigration  
17 Appeals (BIA) affirmed the IJ's administrative order of removal. Pet., ¶ 17; Return, Ex. D.

18 On August 26, 2004, Petitioner filed a Petition for Review of the BIA decision in the Court  
19 of Appeals for the Ninth Circuit. Pet., ¶ 6; Return, Ex. H (Docket, Court of Appeals for the Ninth  
20 Circuit Case No. 04-74290). Petitioner also filed a motion to stay deportation. Return, Ex. H. On  
21 August 27, 2004, the Court of Appeals for the Ninth Circuit ordered Respondents to respond to  
22 Petitioner's motion to stay deportation and to file the administrative record on or before October 26,  
23 2004. Return, Ex. H. Respondents did not comply with the Court of Appeals' order. On November  
24 3, 2004, Respondents requested an additional three months to file the administrative record and a  
25 response to Petitioner's motion to stay deportation. Return, Ex. H. On November 8, 2004, the Court  
26 of Appeals for the Ninth Circuit granted Respondents' request for an extension of time, and ordered  
27 Respondents to file the administrative record and a response to Petitioner's motion to stay deportation  
28 on or before January 25, 2005. Return, Ex. H. Respondents once again did not comply with the order

1 of the Court of Appeals. Return, Ex. H. On January 28, 2005, Respondents filed the administrative  
2 record. Return, Ex. H.

3 On February 7, 2005, the Court of Appeals accepted Respondents' late filing of the  
4 administrative record, but noted that Respondents had "failed to file a response to the motion for a  
5 stay." Return, Ex. H. The Court of Appeals ordered that "within 21 days from the date of this order,  
6 [respondents] shall file a response to the motion for stay. In light of this delay, if [respondents] [fail]  
7 to comply with this order, the court will construe [respondents'] failure to respond as a [statement]  
8 of non/opp to the stay motion." Return, Ex. H.

9 Respondents did not file a response to Petitioner's motion to stay deportation within 21 days  
10 of the Court of Appeals' February 7, 2005, order. Return, Ex. H. On March 10, 2005, the Court of  
11 Appeals ordered that, "[i]n light of this [court's] Feb. 7, 2005 order, [respondents'] failure to respond  
12 to the motion to stay removal is construed as a statement of non/opp to the stay motion." Return, Ex.  
13 H. The Court of Appeals granted Petitioner's motion for stay of deportation, and set a briefing  
14 schedule with respect to Petitioner's Petition for Review of the BIA's decision. Return, Ex. H.

15 On May 19, 2005, Petitioner filed the opening brief in the Court of Appeals. Return, Ex. H.  
16 Thereafter, on June 17, 2005, Respondents sought an extension of time to file an answering brief.  
17 Return, Ex. H. On July 6, 2005, the Court of Appeals granted Respondents' motion for an extension,  
18 and ordered Respondents to file an answering brief on or before July 29, 2005. Return, Ex. H.  
19 Respondents filed an answering brief on August 4, 2005. Return, Ex. H.

20 On June 18, 2007, Petitioner filed the pending Petition for Writ of Habeas Corpus pursuant to  
21 28 U.S.C. § 2241. (Doc. # 1). As of the date of the Petition, Petitioner had been incarcerated for three  
22 years and eleven months. Pet., ¶ 31.

23 During Petitioner's detention, Respondents internally reviewed the terms of Petitioner's  
24 detention on three occasions. Return, Exs. E-G. On February 2, 2005, Respondents concluded that  
25 Petitioner could not be released on supervision because, "you have demonstrated your inability and/or  
26 lack of respect for the laws of this country as is reflected in your criminal and immigration record."  
27 Return, Ex. E. Respondents did not interview Petitioner before the February 2, 2005, custody  
28 determination, and did not identify Petitioner as a flight risk or a danger to the community at the time.

1 Return, Ex. E. On November 1, 2005, Respondents concluded that Petitioner could not be released  
2 on supervision because he was considered a “flight risk.” Return, Ex. F. Respondents did not  
3 interview Petitioner before the November 1, 2005, custody determination, but noted that Petitioner  
4 had a place to live, close family ties, and employment prospects in the United States. Return, Ex. F.  
5 Respondents also concluded that Petitioner did not meet any of the criteria for continued detention  
6 pursuant to 8 C.F.R. § 241.14. Return, Ex. F. On November 8, 2006, Respondents concluded that  
7 Petitioner could not be released on supervision because he was considered “a threat to the  
8 community,” and a “flight risk.” Return, Ex. G. Respondents did not interview Petitioner before the  
9 November 8, 2006, custody determination. Return, Ex. G.

10 During each of the three internal custody reviews, Respondents indicated that Petitioner was  
11 being detained as an alien removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). *See* Return, Exs. E-G.

12 Petitioner has not received a bail hearing before an IJ during his more than four year detention.  
13 Pet., ¶ 31.

#### 14 DISCUSSION

15 Petitioner contends that he should be released pending resolution of his Petition for Review  
16 in the Court of Appeals for the Ninth Circuit. Petitioner contends that he is being detained indefinitely  
17 under the general detention statutes in violation of those statutes and the Constitution as articulated  
18 in *Zadvydas v. Davis*, 533 U.S. 678 (2001), *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), and  
19 *Nadarajah v. Gonzales*, 433 F.3d 1069 (9th Cir. 2006). Petitioner contends that there is no significant  
20 likelihood that he will be removed in the reasonably foreseeable future. Petitioner further contends  
21 that the sheer length of his detention—over four years as of the date of this Order—violates his right to  
22 due process. Petitioner contends in the alternative that he is entitled to a bail hearing before an  
23 immigration judge.

24 Respondents contend that Petitioner is being detained pursuant to 8 U.S.C. § 1226(a), and that  
25 *Tijani* and *Nadarajah* do not apply to discretionary detention under 8 U.S.C. § 1226(a). Respondents  
26 further contend that the delay in removing Petitioner is due to Petitioner’s Petition for Review and  
27 motion for a stay of removal in the Court of Appeals for the Ninth Circuit, and that the delay is not  
28 attributable to Respondents. Respondents contend that Petitioner’s release is reasonably foreseeable

1 and that the length of Petitioner's detention does not violate due process.

## 2 **I. Jurisdiction**

3 Pursuant to 28 U.S.C. § 2241, alien detainees can properly challenge "the extent of the  
4 Attorney General's authority" to detain a removable alien under the general detention statutes.  
5 *Zadvydas v. Davis*, 533 U.S. 678, 687-89 (2001); *see also Denmore v. Kim*, 538 U.S. 510, 516-17  
6 (2003). Whereas here, an administrative order of removal is not final, "habeas corpus jurisdiction  
7 remains in the district court . . ." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006);  
8 *see also* 8 U.S.C. § 1231(a)(1) (describing how a removal order becomes final).

## 9 **II. Respondents' Authority to Detain Petitioner**

10 Respondents contend that Petitioner is currently being detained by the Department of  
11 Homeland Security (DHS) pursuant to its discretionary authority under 8 U.S.C. § 1226(a)(1).  
12 Respondents explain that DHS detained and charged Petitioner in July of 2003 as a criminal alien  
13 subject to deportation for commission of an aggravated felony, and that Petitioner was subject to  
14 mandatory detention pursuant to 8 U.S.C. § 1226(c)(1)(B) between July 10, 2003, the original date  
15 of detention, and July 19, 2004, the date that the Bureau of Immigration Appeals (BIA) affirmed the  
16 IJ's order of removal. Return at 2-3. Respondents contend that the statutory authority to detain  
17 Petitioner changed administratively from 8 U.S.C. § 1226(c) to 8 U.S.C. § 1226(a) when Petitioner  
18 appealed the decision of the BIA to the Court of Appeals for the Ninth Circuit. Return at 4-5  
19 ("Detention authority changes administratively when the removal order becomes administratively  
20 final."). Respondents contend that an alien cannot be detained pursuant to 8 U.S.C. § 1226(c) during  
21 the time that the alien's appeal from an order of removal is pending in the Court of Appeals.

22 Petitioner does not address whether 8 U.S.C. § 1226(a) or 8 U.S.C. § 1226(c) is the proper  
23 basis for Petitioner's detention, but Petitioner acknowledges Respondents' contention that Petitioner  
24 is currently being discretionarily detained pursuant to 8 U.S.C. § 1226(a).

25 8 U.S.C. § 1226 provides for the discretionary and mandatory detention of removable aliens  
26 by the Attorney General. 8 U.S.C. § 1226(a) outlines the Attorney General's discretionary power to  
27 detain aliens, and provides that the Attorney General may arrest and detain an alien "pending a  
28 decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Those

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