

Chief Magistrate Judge Theresa L. Fricke

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KAE A. SAELEE,

Petitioner,

v.

PAMELA BONDI, *et al.*,

Respondents.

Case No. 2:25-cv-02677-TLF

FEDERAL RESPONDENTS'¹
RESPONSE TO PETITIONER'S
SUPPLEMENTAL BRIEF

Noted for Consideration:
January 26, 2026.

This Court requested supplemental briefing on habeas corpus remedies under the *Mathews* (Due Process) framework to determine whether the governing administrative procedures at issue in this case provide the procedural process constitutionally due to Petitioner.

If the Court believes that Federal Respondents have failed to show that there is a significant likelihood of removal in the reasonably foreseeable future to justify Petitioner's re-detention, as required under 8 CFR § 241.13(i)(2), then the appropriate remedy is for the Court to order Petitioner's immediate release from custody. But this Court should not require a pre-detention hearing and a finding by an immigration judge that the government has shown by clear and

¹ Respondent Bruce Scott is not a Federal Respondent and is not represented by the U.S. Attorney's Office.

1 convincing evidence that an Order of Supervision (OSUP) can be revoked, because the relevant
2 revocation provisions, 8 CFR §§ 241.4(l), 241.13(i), comport with procedural due process under
3 the *Mathews* factors.

4 The analytical framework established in *Mathews v. Eldridge* generally controls the
5 analysis of claims seeking additional procedural protections under the Constitution, though the
6 doctrine has already been applied in this context (*i.e.*, an alien subject to an order of removal) when
7 the Supreme Court examined the constitutionality of these detention statutes. *See Demore v. Kim*,
8 538 U.S. 510, 527-528 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

9 Under *Mathews*, a court must consider three factors in assessing whether a given
10 procedural framework affords due process: (1) the private interest that will be affected by the
11 official action; (2) the risk of an erroneous deprivation of such interest through the procedures
12 used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the
13 government’s interest, including the function involved and the fiscal and administrative burdens
14 that the additional or substitute procedural requirements would entail. 424 U.S. 319, 335 (1976).
15 Any analysis of these factors in the immigration context must “weigh heavily” the fact that “control
16 over matters of immigration is a sovereign prerogative, largely within the control of the executive
17 and the legislature.” *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

18 In determining what process is due in immigration proceedings, “it must weigh heavily in
19 the balance that control over matters of immigration is a sovereign prerogative, largely within the
20 control of the executive and the legislature.” *Landon*, 459 U.S. at 34. “[A]ny policy toward aliens
21 is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of
22 foreign relations, the war power, and the maintenance of a republican form of government.”
23 *Mathews*, 426 U.S. at 81 n.17 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)).

24 “Congress has repeatedly shown that it considers immigration enforcement—even against

1 otherwise non-criminal [noncitizen]s—to be a vital public interest.” *Miranda*, 34 F.4th at 364. It
2 is thus clear that, in the removal process, “the government interest includes detention.” *Id.* And the
3 Supreme Court has stated removal proceedings “would be vain if those accused could not be held
4 in custody pending the inquiry into their true character.” *Wong Wing v. United States*, 163 U.S.
5 228, 235 (1896). Further, “[t]here is always a public interest in prompt execution of removal
6 orders: The continued presence of an alien lawfully deemed removable undermines the streamlined
7 removal proceedings [Congress] established, and permit[s] and prolong[s] a continuing violation
8 of United States law.” *Nken v. Holder*, 556 U.S. 418, 436 (2009); see *Landon*, 459 U.S. at 34 (“The
9 government’s interest in efficient administration of the immigration laws . . . is weighty.”).
10 Detention following entry of a final removal order remedies this risk by “increasing the chance
11 that, if ordered removed, the alien[] will be successfully removed.” *Demore*, 538 U.S. at 528.

12 A correct application of the *Mathews* test demonstrates that the OSUP revocation
13 provisions satisfy procedural due process.

14 ***1. Private Interest***

15 With respect to the first factor—the private interest at stake—it is true as a general matter
16 that freedom from physical restraint “lies at the heart of the liberty that [the Due Process] Clause
17 protects.” *Zadvydas*, 533 U.S. at 690. At the same time, however, as “an illegal alien present within
18 the country,” Petitioner may claim only a “limited liberty interest.” *Wilson v. Zeithern*, 265 F.
19 Supp. 2d 628, 635 (E.D. Va. 2003) (detention of inadmissible alien pending removal did not violate
20 due process); see *Demore*, 538 U.S. at 522 (explaining that aliens’ “liberty rights . . . are subject
21 to limitations and conditions not applicable to citizens”) (quoting *Zadvydas*, 533 U.S. at 718
22 (Kennedy, J., dissenting)).

23 This is especially true in this context where there is a final order of removal. When DHS
24 is unable to deport someone who has a final order of removal during the legally prescribed period,

1 it will release the person on an OSUP. But the general liberty interest to be free from detention
2 should not equate to a separate or heightened liberty interest in the continuation of conditional
3 release pursuant to an OSUP.² Petitioner has always been aware that he was subject to a final order
4 of removal and that he was placed on the OSUP solely because the government could not timely
5 remove him to Laos. If because of changed circumstances there is a significant likelihood of
6 removal in the reasonably foreseeable future, his liberty interest should be evaluated in the context
7 of those changed circumstances.

8 ***2. Risk of an erroneous deprivation of interest***

9 Regarding the second *Mathews* factor, applicable statutes and regulations already provide
10 extensive protections to all aliens detained pursuant to 8 U.S.C. § 1231. There is no basis in law
11 for imposing yet more procedures that neither Congress nor the relevant agencies have adopted.

12 As it applies to Petitioner, the revocation regulations set out a set of “special review
13 procedures” derived from *Zadvydas*. 8 CFR § 241.13(a). Under those procedures, an eligible alien
14 “may submit a written request for release,” together with “whatever documentation” he wishes “in
15 support of the assertion that there is no significant likelihood of removal in the reasonably
16 foreseeable future.” *Id.* § 241.13(d)(1). Adjudicators at ICE headquarters must then review the
17 alien’s case, allow the alien to respond to the government’s evidence, allow the alien to submit
18 additional relevant evidence, allow the alien to be represented by an attorney, and, ultimately,
19 “issue a written decision based on the administrative record.” *Id.* § 241.13(g); *see id.* §§ 241.13(d)-
20 (e).

21 Upon further review of the Petitioner’s Traverse (Dkt. 11 at pg. 2), the government agrees
22 that the notice of revocation he received provided him with incorrect information and thus
23

24 ² Federal Respondents acknowledge that courts in this District have found that noncitizens have a liberty interest in their release on OSUP but respectfully disagree with those decisions.

insufficient notice of the reason for his revocation as required by 8 CFR § 241.13(i)(3). As applied to Petitioner, this Court may determine that his current detention is not justified under the applicable revocation regulations. But this error alone does not demonstrate that the regulations on their face are constitutionally deficient or that Petitioner is required to more process than what is provided in the current regulations.

By way of background, in response to the Supreme Court’s decision in *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001), the legacy Immigration and Naturalization Service amended the regulatory framework in 8 CFR §§ 241.4 and 241.13. See <https://www.federalregister.gov/documents/2001/11/14/01-28369/continued-detention-of-alien-subject-to-final-orders-of-removal> (last accessed Jan. 22, 2025). Thus, the government’s failure to comply with “the due process requirements of 8 CFR §§ 241.1(i)(1) and 241.13(i)(3),” *Delkash v. Noem*, No. 25-cv-1675, 2025 WL 2683988, at *5 (C.D. Cal. Aug. 28, 2025), presumes that compliance with the regulations satisfies procedural due process. See also *Garcia Uranga v. Barr*, No. 20-3162-JWL, 2020 WL 4334999, at *8 (D. Kan. July 28, 2020) (finding that petitioner has not demonstrated that due process requires that a post-order custody review by an unbiased and neutral arbitrator and denying habeas relief on that ground) (citing other cases); *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 165-66 (W.D.N.Y. 2025) (regulations requiring notice and an opportunity to be heard constitute sufficient procedural due process).³

3. *The Government’s interest*

As the third *Mathews* factor, Petitioner is incorrect when he asserts that the government would face only a minimal burden in holding a hearing before revoking his OSUP and re-detaining

³ To support the second *Mathews* factor, Petitioner also references “multiple grounds” to reopen his immigration proceedings including legal improprieties in his criminal proceedings, waiver eligibilities, and vacated crimes that led to his final order of removal. Dkt. 14 at pg. 5. Petitioner has presented no evidence to support these assertions that he is “likely not removable,” and they should be given no weight to the Court’s consideration of the appropriate habeas remedy here.

1 him. Dkt. 14 at pg. 5.

2 As an initial matter, the relief Petitioner seeks in the form of a pre-detention hearing in
3 immigration court is not available to him under the current regulatory scheme. Pursuant to 8 CFR
4 § 1003.10(b), an immigration judge can exercise only the powers and duties given to them by the
5 Immigration and Nationality Act (INA) and the Attorney General through regulation. 8 CFR
6 § 241.4(c) specifically delegates the Attorney General's authority to make custody determinations
7 under 8 U.S.C. § 1231(a)(6) when there is a final order of removal to DHS. That authority is
8 exercised through the regulation. If DHS determines that release is appropriate under 8 U.S.C.
9 § 1231(a)(6), the regulations give DHS the authority to determine which conditions should be
10 imposed on release, "including but not limited to the conditions of release noted in...241.5." 8
11 CFR § 241.4(j); *see also* 8 U.S.C. § 1231 (a)(3). Revocation of release authority is delegated by
12 regulation to DHS. *See* 8 CFR § 241.4(l)(2); § 241.13(i).

13 If an OSUP revocation was conducted under § 241.4(l) and DHS determines that detention
14 is warranted following the informal interview where the alien is given an opportunity to respond
15 to the reasons for revocation stated in the notification required by the OSUP revocation regulations,
16 the regulations provide that DHS will hold another custody review "which will ordinarily be
17 expected to occur within approximately three months after release is revoked." 8 CFR
18 § 241.4(l)(3). "That custody review will include a final evaluation of any contested facts relevant
19 to the revocation and a determination whether the facts as determined warrant revocation and
20 further denial of release." *Id.* "Thereafter, custody reviews will be conducted annually under [8
21 CFR § 241.4 (i), (j), (k).]" *Id.*

22 If, such as here, an OSUP was revoked under 8 CFR § 241.13(i)(2) on account of changed
23 circumstances that there is a significant likelihood that the alien would be removed in the
24 reasonably foreseeable future, the alien will then be afforded an informal interview with an

1 opportunity to submit evidence or information that there is not a significant likelihood of removal
2 in the reasonably foreseeable future. If the alien was not released following the informal interview,
3 then the regulations also provide that the provisions of 8 CFR § 241.4 govern continued detention.
4 The custody provisions of 8 CFR § 241.4 will continue to govern unless and until the alien submits
5 evidence or the record contains information providing that there is a substantial reason to believe
6 that the removal of a detained alien is not significantly likely in the reasonably foreseeable future,
7 where then the custody provisions of 8 CFR § 241.13 will apply. *See* 8 CFR § 241.4(i)(7).

8 The government is only aware of once circumstance where immigration judges review
9 custody determinations in final order cases. If DHS continues to detain an alien beyond the removal
10 period despite there being no significant likelihood that the alien may be removed in the reasonably
11 foreseeable future, and that continued detention occurs because DHS believes the alien poses a
12 special danger to the public, the regulations give an immigration judge authority to make a custody
13 determination. *See* 8 CFR § 1241.14. Under these circumstances, the regulations provide
14 immigration judges with authority to review the custody determination once DHS files a referral
15 (Form I-863). 8 CFR § 1241.14(g). Even then, the regulations provide that the immigration judge
16 and Board of Immigration Appeals only have jurisdiction to determine whether release of the alien
17 would pose a special danger to the public. 8 CFR § 12.41.14(a)(2). It does not give them
18 jurisdiction to determine if there is a significant likelihood of removal in the reasonably foreseeable
19 future. Here, DHS is not detaining Petitioner because he poses a special danger to the public. Thus,
20 this exception is inapplicable.

21 If the Court determines that DHS failed to follow the OSUP revocation procedures set out
22 in the regulations, the proper remedy is to order release and prohibit DHS from re-detaining
23 Petitioner without following those procedures. Alternatively, the Court could find that there is no
24 significant likelihood of removal in the reasonably foreseeable future and simply order Petitioner's

1 release on those grounds with the same conditions. However, to order that a hearing is required
2 prior to taking Petitioner into custody under 8 U.S.C. § 1231 for an OSUP revocation requires this
3 Court to craft new procedures that are not set forth within the regulations.

4 Furthermore, the government's interests in maintaining the existing procedures are
5 legitimate and significant. The Supreme Court has stressed that the government "need[s] . . .
6 flexibility in policy choices rather than the rigidity often characteristic of constitutional
7 adjudication" when it comes to immigration regulation. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).
8 Accepting Petitioner's position would flout this directive by injecting that very rigidity into the
9 discretionary detention regime Congress adopted.

10 Accordingly, to the extent this Court agrees with Petitioner that there is no significant
11 likelihood of removal in the foreseeable future, its remedy should be limited to ordering
12 Petitioner's release from custody on the same conditions previously imposed before his arrest, and
13 to prohibit Federal Respondents from re-detaining Petitioner unless and until he is provided with
14 adequate notice and an opportunity to be heard in compliance with 8 CFR § 241.13 to determine
15 whether re-detention is appropriate. *See, e.g., Todd v. Bondi*, Case No. 25-cv-02519-JHC, Order
16 (Dkt. 19) (ordering proposed relief); *M.S.L. v. Bostock*, No. 25-cv-01204, 2025 WL 2430267, at
17 *15 (D. Or. Aug. 21, 2025) (same).

18 DATED this 22nd day of January, 2026.

19 Respectfully submitted,

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5 I certify that this memorandum contains 2,342
6 words, in compliance with the Local Civil Rules.