AMERICAN IMMIGRATION LAWYERS ASSOCIATION

May 6, 2014

The Honorable Eric H. Holder, Jr.
The Attorney General
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Dear Mr. Attorney General:

Currently pending before the Board of Immigration Appeals (BIA) are cases raising fundamental interpretative questions about the administration of the immigrant detention system with regard to prolonged detainees. Concurrently with this letter, the American Immigration Lawyers Association (AILA) has filed amicus briefs in those cases as well as an amicus brief in the related case of *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009), related to the question of the definition of "custody" under the Immigration & Nationality Act.

These two exceptionally important issues impact fundamental values of the constitutionality of our present immigrant detention system and merit your attention. On behalf of AILA, we respectfully request that you decide these cases in published opinions that provide controlling guidance.

AILA asserts that prolonged detention was never authorized by INA §235 or §236 and that "custody" or "detention" under either statute is not limited to only confinement. AILA's briefs are publically available at http://search.aila.org and entering the document numbers: 14050791 and 14050792.

AILA urges you to decide these cases for three reasons. *First*, by adopting the interpretations suggested in the accompanying briefs, you would greatly resolve the detention crisis facing the administration by reducing the costly and needless detention of thousands of people. In the last two decades, immigration detention has grown about five-fold with more than 400,000 being detained annually at a cost of about $2 billion. While the rate of imprisonment for those under Department of Homeland Security (DHS)/Immigration and Customs Enforcement (ICE) supervision has skyrocketed, conditions in institutional detention facilities are marked by severe deficiencies that have been well chronicled. Many detainees are held for prolonged periods—without ever receiving a custody hearing before a judge—despite the fact that they have families and jobs and pose no threat to public safety. Locking up individuals facing civil immigration charges should be a last resort, used only when other means of supervision are not feasible. There are many effective alternatives to jail detention, such as bond, supervised release, or electronic monitoring, that DHS should be using.

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The only way to solve the detention crisis is to focus detention resources solely on those who ought to be confined for public safety or flight risk. The suggested interpretations would permit the government to keep in confinement only those who ought to be confined and, through the use of alternatives to confinement, maintain custody of those for whom jail detention is unnecessary.

Second, these cases are adequate vehicles for addressing the recurring legal questions. Though in most matters it would be beneficial and appropriate to await a BIA decision before deciding a matter, 8 C.F.R. §1003.1(h)(1), time is of the essence in prolonged detention cases and an authoritative, comprehensive decision is necessary. You may decide these cases under your statutory authority to determine the law, being mindful of the requirements of 8 C.F.R. §1003.1(h)(2).[1]

The legal framework for adjudicating claims of prolonged detention is crystallized and the choices that must be made are policy choices as much as legal choices. As you know, prolonged detention hearings *are already* taking place throughout the Ninth Circuit. In the District of Massachusetts, prolonged detention hearings are likely to take place soon. In the Third Circuit, the federal district courts are grappling with numerous habeas petitions in prolonged detention challenges. It is not a question, really, of whether these hearings will happen; instead, it is a question of *how* these hearings will happen. Your determination of this legal and policy question is important and timely.

Third, without your prompt involvement, the legal issues at the administrative level may recur without resolution (and thereby continue to funnel the legal and policy questions to the federal courts). As you can see from the record of proceedings, the BIA has requested supplemental and amicus briefing in the prolonged detention cases only to have DHS file motions to dismiss the custody proceedings asserting mootness. The Attorney General is not bound by a strict application of the mootness doctrine and may decide the important questions fairly raised by the parties in these cases. *E.g.*, *Matter of Garcia-Garcia*, 25 I&N Dec. 93, 94 n2 (BIA 2009) ("we are not bound by 'case or controversy' limitations applicable to Article III courts, and because the jurisdictional question is an important and recurring one, we choose to decide it.").

Matter of Aguilar-Aquino represents an alternative vehicle for resolving the detention crisis. By adopting the suggested interpretation of custody, you would restore maximum flexibility to the enforcement arms of DHS. Instead of being hobbled by an underdeveloped BIA panel decision that overlooked key statutory language and a Supreme Court opinion, you could realign detention resources with smart enforcement priorities. In *Aguilar-Aquino*, the removal

[1] Whenever the Attorney General decides a matter, the process should be transparent with a robust opportunity for the parties and interested individuals to participate. *See* Memorandum of Law of AILA, et al, *Matter of Silva-Trevino* (filed Dec. 5, 2008) at 7-11, available at AILA InfoNet Doc. No. 08120961 (posted 12/9/08) (discussing problems when certification is invoked without regard to due process concerns). Here, these concerns are satisfied.

proceedings are pending though they have been administratively closed. You may direct the BIA to refer this matter to you under 8 C.F.R. §1003.1(h)(1)(i). If you adopt the interpretation suggested in the accompanying brief, you will correct the BIA's faulty legal reasoning and bring the interpretation of the detention statutes in line with Congress's intent, though the ultimate disposition for Mr. Aguilar-Aquino will not change.

Attached is a list of cases in which AILA requests your review.

Sincerely,

T. Douglas Stump
President

Crystal Williams
Executive Director

Cc:
Tony West, Associate Attorney General
Juan Osuna, Director, Executive Office for Immigration Review

Jeh Johnson, Secretary, Department of Homeland Security
Alejandro Mayorkas, Deputy Secretary, Department of Homeland Security

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