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4 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
5 AT SEATTLE  
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7 YUSUF ALI ALI,  
8 Petitioner,

No. C02-2304P

9 v.

10 JOHN D. ASHCROFT,  
11 Respondent.

ORDER ON MOTION FOR  
RELEASE FROM INDEFINITE  
DETENTION BY CLASS  
MEMBER AWAD GARAD

12 \_\_\_\_\_  
Petitioner is a native and citizen of Somalia who is being detained by U.S.

13 Immigration and Customs Enforcement (“ICE”) pursuant to a final order of removal to that country.

14 On July 30, 2004, he filed a Petition for Writ of Habeas Corpus under 28 U.S.C. §2241, in the  
15 District Court of Oregon. This writ challenged, *inter alia*, the constitutional and statutory authority  
16 of ICE to detain him any further, due to the unlikelihood of his removal from this country in the  
17 reasonably foreseeable future.  
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19 In an August 23, 2004, hearing before Judge Panner of the District Court of Oregon the writ  
20 was denied and that court found that Petitioner was not a member of the class established by this  
21 Court’s January 17, 2003 Order (Dkt. #44) because the Petitioner desired to return to Somaliland.  
22 To avoid any possible legal hurdles that would hinder Mr. Garad’s expeditious removal, counsel for  
23 Petitioner filed an unopposed motion before this Court to exclude Mr. Garad from the class. (Dkt.  
24 No. 89). Petitioner’s decision not to oppose deportation was based on representations by U.S.  
25 Attorney Kenneth C. Bauman that ICE had obtained a Somali passport for Petitioner and could  
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1 effectuate the removal expeditiously and without transit through the city of Mogadishu, where  
2 Petitioner fears for his life.

3           This Court granted oral argument on this motion for September 30, 2004. Mr. Garad's  
4 counsel informed the Court that her client had recently been transferred from custody in Oregon to  
5 the Northwest Detention Center in Tacoma, Washington, thus falling within the jurisdiction of this  
6 Court. At this hearing counsel for the Petitioner represented to the Court that she had recently  
7 received information from U.S. Attorney Greg Mack that ICE could not effectuate Mr. Garad's  
8 removal as expeditiously or as securely as the Government had previously represented in the  
9 proceedings before Judge Panner. Additionally, when questioned by the Court about the origins of  
10 the Mr. Garad's Somali "passport," Mr. Mack could not provide the Court with a satisfactory answer  
11 about what governmental authority in Somalia or Somaliland was responsible for the issuance of this  
12 document to ICE on Mr. Garad's behalf. The Court granted Respondents thirty (30) days to provide  
13 the Court with this information. However, the affidavits of Leonard Kovensky that the government  
14 submitted in response to the Court's query do not answer this question, and instead merely state that,  
15 "[t]he passport was issued in Mogadishu on May 22, 2004." (Kovensky Decl. 1, ¶13, Kovensky  
16 Decl. 2, ¶12).

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18           On the basis of this new information, Petitioner withdrew his motion for exclusion from the  
19 class at the September 30 hearing and filed the instant motion for release from indefinite detention  
20 before this Court. Citing changed circumstances, Judge Panner vacated his previous Order on  
21 November 5, 2004 and transferred the case to this Court for proceedings. Accordingly, this Court  
22 GRANTS Petitioner's Motion for Release from Indefinite Detention under Zadvydas v. Davis, 533  
23 U.S. 678 (2001), and imposes conditions of release in accord with 8 C.F.R. § 241.5.  
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1 BACKGROUND

2 Petitioner was born in Mogadishu, Somalia on July 1, 1964. On August 29, 1997, Petitioner  
3 was admitted to the United States in New York City on a B-2 visa as a visitor for pleasure. On  
4 September 12 of that year Mr. Garad filed an Application for Asylum and Withholding of Removal,  
5 Form I-589, with the Asylum Office in San Francisco, CA.  
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7 Mr. Garad was convicted of Attempted Sexual Abuse in the First Degree on July 10, 2000,  
8 and served approximately four years and ten months in the custody of the State of Oregon. During  
9 this custody, the Immigration and Naturalization Service (now ICE) issued a notice to appear and  
10 placed Mr. Garad in removal proceedings. They also placed a detainer on Mr. Garad. Accordingly,  
11 upon Petitioner’s release from Oregon State custody, he was transferred to ICE custody. On April  
12 21, 2004, Mr. Garad appeared before an Immigration Judge and withdrew his application for asylum.  
13 The Judge entered a final order of removal. Petitioner has been in ICE custody since that time.  
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15 DISCUSSION

16 A. Release

17 On July 9, 1999, this court, in a Joint Order involving five cases, ruled that indefinite  
18 detention violated substantive due process. See Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash.  
19 1999). The Ninth circuit Court of Appeals in Ma v. Reno, 208 F. 3d 815 (9<sup>th</sup> Cir. 2000) affirmed the  
20 Joint Order, but on different grounds. The court determined that the Immigration and Naturalization  
21 Service lacked the statutory authority to detain deportable aliens beyond a ninety (90) day removal  
22 period if there was no reasonable likelihood of removal in the foreseeable future.  
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24 In Zadvydas v. Davis, 533 U.S. 678 (2001), the United States Supreme Court affirmed Ma’s  
25 general holding that indefinite detention is unauthorized. The Court stated that “in light of the  
26 Constitution’s demands, . . .an alien’s post-removal-period detention [is limited] to a period

1 reasonably necessary to bring about the alien’s removal from the United States.” Zadvydas, 533 U.S.  
2 at 689. The Supreme Court then adopted a “presumptively reasonable period of detention” of six  
3 months. Id. at 701.

4           The Court stated that a “habeas court must [first] ask whether the detention in question  
5 exceeds a period reasonably necessary to secure removal.” Id. In the case at hand, Mr. Garad has  
6 been in ICE custody since April 21, 2004—longer than the six month presumptive period adopted in  
7 Zadvydas. If a petitioner’s removal is not reasonably foreseeable, “the court should hold continued  
8 detention unreasonable and no longer authorized by statute.” Id. The Court noted, however, that a  
9 habeas court should “listen with care” when the Executive’s foreign policy decisions are at issue, and  
10 should give “appropriate leeway when its judgment rests upon foreign policy issues.” Id. at 700.

11           This Court’s January 17, 2003 Order creates a permanent injunction that prevents the  
12 government from removing any Somali citizen to Somalia, or any area formerly encompassed by  
13 Somalia, until there is a recognized government that can accept the individual. In the instant case,  
14 Petitioner argues that ICE cannot predict with certainty any time in the future that petitioner will be  
15 removed to Somalia lawfully. The government has not been able to provide consistent time frames  
16 for and assurances of secure travel, nor has the political landscape changed to create a government in  
17 Somalia that can accept petitioner. Counsel for ICE argues that the issue of whether a recognized  
18 government must exist to accept a deportee from the U.S. has just been argued before the Supreme  
19 Court in Keyse v. Jama, argued October 12, 2004. Neither Respondents nor this Court know when  
20 the Supreme Court is likely to hand down such a decision, nor do we know what the result of that  
21 decision might be.

22           As Petitioner points out in his motion, the law of the Ninth Circuit mandates that ICE, as well  
23 as the Federal Courts of this circuit, must follow binding law in this circuit until such time as it is  
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1 overturned by the Supreme Court. The fact that a case is on appeal does not give any government  
2 authority the ability to delay action pending the high court's decision. Yong v. INS, 208 F. 3d 1116,  
3 1119 (9<sup>th</sup> Cir. 2000). Here, the Ninth circuit has affirmed this Court's injunction. See Ali Ali v.  
4 Ashcroft, 346 F. 3d 873 (9<sup>th</sup> Cir. 2003). This Court is also bound by Zadvydas. The Court,  
5 therefore, must grant Petitioner's request.

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7 B. Conditions of Release

8 The Court asked Respondents and Petitioner to prepare briefs regarding conditions of release  
9 for Mr. Garad. The Supreme Court in Zadvydas acknowledged Congress' right to subject deportable  
10 aliens who cannot be removed to conditions of supervision. However, these conditions may not serve  
11 a punitive purpose—as conditions imposed on an individual's freedom outside the protections of a  
12 criminal trial with full process, they must only be restrictive enough to allow ICE to keep track of a  
13 person so that he may be removed should circumstances change to allow removal. Zadvydas, 533  
14 U.S. at 690.

15 In light of the fact of Mr. Garad has been assessed as a flight risk, the Court imposes the  
16 following conditions of release on Petitioner:

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- 18 • Bi-weekly reporting in person to ICE, as directed by ICE;
  - 19 • Periodic telephonic call-in to ICE, as directed by ICE;
  - 20 • Compliance with all local, State, and Federal laws, including compliance with any laws  
21 concerning his conviction as a sex offender and any restriction placed on Petitioner's ability to  
22 travel by the state of Oregon, e.g., registration, monitoring, parole or probation requirements;

23 The Court has considered Respondents' request that Petitioner Garad be required to post  
24 bond, as well as Petitioner's objection the imposition of bond. In Doan v. Immigration and  
25 Naturalization Service, the Ninth Circuit observed that the Supreme Court specifically approved of  
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1 bond as a possible condition of release in Zadvydas. 311 F.3d 1160, 1162 (9<sup>th</sup> Cir. 2002). The  
2 Zadvydas Court cited the attorney general’s regulations concerning release of aliens in detention,  
3 including the posting of bond, at 8 CFR §241.5 as appropriate conditions under which an alien may  
4 be granted supervised release. 533 U.S. at 696. However, the Doan court cautioned that a bond set  
5 so prohibitively high that it effectively prevents an immigration detainee’s release would raise “serious  
6 questions.” 311 F. 3d at 1162. Having reviewed the documentation submitted in this case regarding  
7 Mr. Garad’s financial status, the Court has determined that any bond imposed would effectively  
8 prevent Petitioner’s release. Accordingly, this Court finds that Mr. Garad may be released without a  
9 requirement that he post bond.  
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12 Dated this 16th day of November, 2004.

13 /s/Marsha J. Pechman  
14 Marsha J. Pechman  
15 United States District Judge  
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