

IS THE ATTORNEY GENERAL THE CUSTODIAN OF AN INS DETAINEE? PERSONAL JURISDICTION AND THE “IMMEDIATE CUSTODIAN” RULE IN IMMIGRATION-RELATED HABEAS ACTIONS

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Habeas corpus, the “Great Writ,” allows those in government custody to challenge the legality of their confinement.¹ Individuals may petition federal courts for writs of habeas corpus to review such diverse forms of custody as state court criminal sentences, military draft orders, and orders of deportation. For those in the custody² of the Immigration & Naturalization Service (INS),³ the

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1. A petition for a writ of habeas corpus may be brought by anyone “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3) (2000). The habeas corpus statute grants the federal courts jurisdiction to review the legality of the detention and, if warranted, to order the release of the petitioner.

2. Courts have recognized as being “in custody” not only those physically detained by the INS, but all those subject to the restraints of final orders of exclusion or deportation. See RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 42.2, at 1777 (4th ed. 2001). In 1997, exclusion and deportation proceedings were collectively renamed “removal” proceedings. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, § 304(a)(3), 110 Stat. 3009-546, 3009-589 (1996) (codified at Immigration and Nationality Act (INA) § 240, 8 U.S.C. § 1229a (2000)). This article uses the prior terms because they are more generally understood and better reflect the nature of the proceedings.

3. Shortly before this article went to press, Congress effected the most sweeping reorganization of the federal government to take place in the last half-century, abolishing the INS in the process. The Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135, signed into law on November 25, 2002, establishes a new Department of Homeland Security (DHS), headed by the Secretary of Homeland Security, which will encompass the border and domestic security functions formerly performed by twenty-two federal agencies. See Austin T. Fragomen, Jr. & Steven C. Bell, *Immigration and Naturalization Under the Homeland Security Act: An Analysis of What Will Replace the INS*, IMMIGR. BUS. NEWS & COMMENT, Jan. 1, 2003, available at 2003 WL 17059; *President Signs Homeland Security Measure*, 70 INTERPRETER RELEASES 1733 (2002). Under Title IV, Subsection D, § 441 of the HSA, authority for detention, removal, and related INS enforcement will be transferred to the Under Secretary for Border and

writ holds particular significance. Congress has severely curtailed judicial review of most immigration matters, leaving habeas corpus as the only way for many INS detainees to be heard by a federal court.⁴ The Supreme Court has recently reaffirmed the central importance of habeas corpus as a means of challenging deportation orders.⁵

A related question, however, remains unanswered: in *which* court(s) may a petitioner bring such an action? For someone who is taken into custody in an urban center such as New York or Los Angeles or Miami, and then transferred from state to state within the constellation of INS detention facilities,⁶ the answer to this question can have enormous consequences. Say, for instance, that a resident of Brooklyn, New York, who has been ordered deported based on a New York state criminal conviction, is detained by the INS pending deportation. This individual, who was represented by one New York attorney in his criminal proceedings and another New York attorney in his immigration proceedings, is then transferred to detention facilities in New Jersey, Pennsylvania, and

Transportation Security. According to a reorganization plan issued by the Bush administration, the transfer of authority will take place on March 1, 2003. See *Administration Issues Reorganization Plan for Homeland Security Department; Effective Dates, Reporting Deadlines Summarized*, 79 INTERPRETER RELEASES 1777 (2002). This bureaucratic sea change raises questions about the propriety of naming the Attorney General as respondent to an immigration-related habeas action. However, it does not affect the argument that lies at the heart of this article: that national decision-makers rather than local wardens are in most cases the appropriate respondents to such actions. Thus, this article's discussion of the issues, although based on a prior administrative structure, will apply in large measure to the new DHS structure as well.

4. Section 2241 was the jurisdictional basis for judicial review in the earliest immigration cases to be brought before United States courts. Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1420 (1997). It continued to be the principal method of testing the legality of immigration orders until Congress enacted the INA in 1952, Pub. L. No. 82-414, ch. 447, 66 Stat. 163. Because the INA was adopted after the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946), the Supreme Court held that passage of the INA also created a right to declaratory judgment actions and judicial review under APA § 10, 5 U.S.C. § 1009 (repealed). *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955). The INA was amended in 1961, establishing a basic grant of judicial review through petitions for review of final deportation orders to the circuit courts of appeals and writs of habeas corpus in the district courts for exclusion orders and to challenge detention. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651-53 (codified at former INA § 106(a), 8 U.S.C. § 1105a(a) (repealed 1996)). In 1996, Congress severely restricted judicial review of immigration determinations under the INA, and § 2241 once again became the chief means of challenging immigration orders. See *infra* notes 28, 229 and 250 and accompanying text; see also Gerald N. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 Harv. L. Rev. 1963, 1975-76 (2000) (summarizing these restrictions). For a detailed account of the evolution of judicial review of immigration orders, see Benson, *supra*, at 1419-79.

5. *INS v. St. Cyr*, 533 U.S. 289, 304 (2001) (“[T]o conclude that the writ is [unavailable] in this context would represent a departure from historical practice in immigration law. The writ of habeas corpus has always been available to review the legality of executive detention.”).

6. See Julie Sullivan, *Illegal Immigrants are Dumped into a Secretive Prison Network Driven by Ineptness and Severe Immigration Reforms*, THE SUNDAY OREGONIAN, Dec. 10, 2000, at A1 (noting that INS “[f]arms out more than half the 20,250 people it jails daily to a haphazard network of 1,940 private state prisons and county jails,” and that detainees are frequently transferred among these facilities without notice to themselves or their families or attorneys).

Alabama. By the time he files a petition for habeas corpus, raising constitutional and statutory claims regarding his immigration proceedings, he is in Tangipahoa Parish County Jail in Amite, Louisiana.

If, as some courts have held, the only proper forum for a habeas petition is the district of confinement⁷—in this case, the Eastern District of Louisiana—the petitioner’s New York City-based immigration attorney will probably be unable to represent him.⁸ If he is in a rural area, he may have no access to the pro bono immigration lawyers who might be available in areas with large immigrant communities. He will likely have little access to witnesses and documents helpful to his case (for example, evidence relating to the underlying criminal offense that forms the basis for his deportation order). He may encounter lengthy delays if the district he is in has a high concentration of INS detainees and consequently a large number of habeas petitions.

Faced with these obstacles, some detainees have sought habeas review outside the district of confinement. This practice began in the early 1990s, when a flood of habeas petitions from detainees at the INS facility in Oakdale, Louisiana overwhelmed the docket of the Western District of Louisiana.⁹ In desperation, Oakdale inmates began petitioning for review in federal courts elsewhere in the country, typically in the districts in which they resided.

Courts have decided whether or not they may hear such petitions based on the following analysis: Under the federal habeas statute, a petitioner must bring a habeas action against his custodian.¹⁰ Under well-settled principles of personal jurisdiction, a court will have jurisdiction over that custodian only if she resides in the state in which the court is located or has significant contacts with that state.¹¹ While any federal district court in the country will have jurisdiction over a national figure such as the Attorney General,¹² a court in New York (to return to our hypothetical) will probably not have jurisdiction over the warden of the Tangipahoa Parish County Jail. Thus, whether the court may hear a petition will turn on the question of who is the petitioner’s custodian. The habeas statute does

7. *See infra* Part III.A.2.

8. *See infra* Part I.

9. *See Emejulu v. INS*, 989 F.2d 771, 772 (5th Cir. 1993) (describing delays in processing habeas petitions in the Western District of Louisiana).

10. 28 U.S.C. § 2243 (2000) (“The writ, or order to show cause shall be directed to the person having custody of the person detained.”).

11. *See infra* note 70.

12. The jurisdiction of the district courts over the Attorney General has not been disputed. *See, e.g., Roman v. Ashcroft*, 162 F. Supp. 2d 755, 764 (N.D. Ohio 2001) (“As there is no question regarding the Attorney General’s amenability to service of process from this Court, this Court also finds that it has personal jurisdiction over him.”). *See also* FED. R. CIV. P. 4(i) (providing for service of Attorney General by registered or certified mail). Some petitions have named the INS Commissioner as respondent. *See Arias-Agramonte v. Comm’r of INS*, No. 00 CIV 2412, 2000 WL 1059678 (S.D.N.Y., Aug. 1, 2000) at *7 n.6 (noting that INS Commissioner can be deemed the custodian of an INS detainee under same reasoning of cases holding Attorney General to be a respondent/custodian). The majority of cases have addressed the possibility of the Attorney General as custodian; therefore, this article focuses on that question.

not answer this question, leaving courts to decide it on their own. In the context of INS detention, the possibilities that have been considered include local figures such as the warden of the detention facility and the INS district director, and national figures such as the INS Commissioner and the Attorney General.

Courts that have held the warden to be the only proper custodian have done so by invoking the “immediate custodian” rule. This rule, first articulated by the Circuit Court of Appeals for the District of Columbia in 1948 in a criminal habeas case¹³ and since adopted in a variety of habeas contexts, holds that the custodian is the warden of the facility in which a prisoner is confined or, in the military context, a petitioner’s commanding officer. However, although the immediate custodian rule has been described as a “solid wall of authority” outside the immigration context,¹⁴ the Supreme Court has shown a “marked reluctance”¹⁵ to articulate a corresponding rule for INS detainees and lower courts remain divided. The First Circuit, which is the only circuit to have squarely decided the issue, held in *Vasquez v. Reno*¹⁶ that the immediate custodian rule applies to INS detainees and that the Attorney General thus cannot be named as a respondent.¹⁷ In *Henderson v. INS*,¹⁸ the Second Circuit devoted considerable attention to both sides of the question but ultimately avoided answering it. The Third Circuit has rejected the possibility in dicta.¹⁹ A number of district courts around the country, particularly in the Eastern and Southern Districts of New York, have held the Attorney General to be the custodian of INS detainee petitioners,²⁰ while others have reached the opposite conclusion.²¹

This article argues that the immediate custodian rule has no place in the adjudication of immigration-related habeas actions. I propose that in place of this rule, courts should require only that an appropriate respondent, which may include the Attorney General, be served within the court’s jurisdiction; after that, the proper forum should be determined through a venue analysis that considers factors such as the location of witnesses, the location of evidence, and convenience to the parties. Part I provides a brief overview of the use of habeas corpus petitions by INS detainees. Part II situates the custodian debate within relevant developments in habeas corpus jurisprudence over the past half-century. In Part III, I introduce the immediate custodian rule and describe two distinct

13. *Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945).

14. *Vasquez v. Reno*, 233 F.3d 688, 691 (1st Cir. 2000).

15. *Henderson v. INS*, 157 F.3d 106, 124 (2d Cir. 1998) (referring to *Ahrens v. Clark*, 335 U.S. 188, 193 (1948)).

16. 233 F.3d at 697.

17. The Ninth Circuit has recently reached the same conclusion in an unpublished decision. *See Bermudez-Cardiel v. Sonchik*, D.C. No. CV-00-01798, 2002 WL 31001847 (9th Cir. Sept. 5, 2002).

18. 157 F.3d at 124–28.

19. *Yi v. Maugans*, 24 F.3d 500, 507 (3d Cir. 1994).

20. *See infra* Part III.A.2.

21. *See infra* Part III.B.2.

lines of cases, one following the rule and the other departing from its formalism in favor of a more functional approach. Part IV considers and responds to the arguments that the First Circuit relied on in applying the immediate custodian rule to bar INS detainees from naming the Attorney General as a respondent. Part V proposes that courts replace the immediate custodian rule with an “appropriate respondent” rule and use venue factors to decide whether to hear a particular case.

I.

HABEAS CORPUS AND INS DETENTION

In 1996, Congress enacted sweeping changes to the Immigration and Nationality Act (INA).²² The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)²³ and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)²⁴ greatly expanded the types of criminal convictions defined as deportable offenses.²⁵ The changes also eliminated a commonly granted form of discretionary relief from deportation,²⁶ and mandated that the INS detain non-citizens with criminal convictions during their immigration proceedings and until their deportation.²⁷ Because the 1996 legislation elimi-

22. The INA is codified as amended at 8 U.S.C. §§ 1101–1537 (2000).

23. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 and 18 U.S.C.).

24. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40 and 42 U.S.C.).

25. See generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000). A single “aggravated felony” conviction now triggers mandatory deportation, and terms such as “aggravated felony,” “conviction,” and “sentence” have been redefined so inclusively that a crime not resulting in a day of jail can now be a deportable offense. *Id.* at 1939–43. Mary Ann Gehris, for example, was convicted of battery for pulling a woman’s hair. Under the 1996 sentencing charges, her crime was a “crime of violence” and her suspended sentence of one year made her subject to mandatory deportation. *Id.* at 1943. Many of the people who have been caught in the sweep of the 1996 legislation are long-time legal residents with minor convictions dating back years and in some cases decades. *Id.* at 1942, 1948.

26. The relief allowed lawful permanent residents with criminal convictions an opportunity to prove to an immigration judge that they were rehabilitated and that their ties to the United States were sufficient to outweigh the negative aspects of their convictions. See INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996). See also *INS v. St. Cyr*, 533 U.S. 289, 296 n.5 (2001) (citing statistics indicating that 51.5% of the applications for which a final decision was reached between 1989 and 1995 were granted). AEDPA restricted eligibility for § 212(c) relief, and IIRIRA eliminated the provision entirely. AEDPA § 440(d), 110 Stat. at 1277; IIRIRA § 304(b), 110 Stat. at 3009-596–97.

27. Virtually all non-citizens who have criminal convictions and who were released from sentences after October 9, 1998 are subject to detention without bond. See INA § 236(c), 8 U.S.C. § 1226(c) (2000). The Third, Ninth, and Tenth Circuits have held that mandatory detention under § 236(c) is unconstitutional. *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002); *Kim v. Ziglar*, 276 F.3d 523 (9th Cir.), cert. granted, 122 S. Ct. 2696 (2002); *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001). The Seventh Circuit has upheld the constitutionality of the provision. *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999). The Supreme Court heard arguments on the issue on January 15, 2003. See Transcript of Oral Argument, *Demore v. Kim* (No. 01–1491), available at 2003 WL 147701.

nated judicial review of most removal orders²⁸ and of decisions regarding bond and detention,²⁹ habeas petitions under 28 U.S.C. § 2241 have become the primary vehicle for challenging such policies.³⁰

Partly as a result of these changes, rates of deportation and detention have dramatically increased in recent years. Deportations based on criminal convictions more than doubled between 1994 and 2001, and the average daily population of those detained due to such proceedings quadrupled.³¹ While the majority of INS detainees are immigrants with criminal convictions who are either in removal proceedings or have received final orders of removal and are awaiting deportation,³² those detained also include, for example, asylum seekers who arrive without proper entry documents,³³ those caught in workplace raids, and those detained in the wake of the September 11 attacks.³⁴ Overall, in Fiscal Year 2000, the INS detained more than 188,000 people. In Fiscal Year 2001, there were, on average, approximately 20,000 people in INS detention on any given day.³⁵

When an individual is taken into INS custody, she may find herself transferred almost immediately to another location, often hundreds or even

28. IIRIRA §§ 309(c)(1), 309(c)(4), 110 Stat. at 3009-625, 3009-626-27 (codified at INA § 242(a), 8 U.S.C. § 1252(a) (2000)).

29. IIRIRA § 303(a), 110 Stat. at 3009-585 (codified at INA § 236(e), 8 U.S.C. § 1226(e) (2000)).

30. In *St. Cyr*, the Supreme Court held that AEDPA and IIRIRA did not strip the courts of 28 U.S.C. § 2241 habeas jurisdiction over such claims:

If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept the INS' reading of § 1252. But the absence of such a forum, coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions. Accordingly, we conclude that habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA.

533 U.S. at 314 (citation omitted).

31. *A Review of DOJ Immigration Detention Policies: Hearing Before the House Comm. on the Judiciary, Subcomm. On Immigration and Claims*, 107th Cong. 1 (2001) (statement of Joseph Greene, Acting Deputy Executive Associate Commissioner for Field Operations, INS, and Edward McElroy, District Director, New York INS) [hereinafter Greene & McElroy] (average daily population of detained "criminal aliens" increased from approximately 3300 to 13,210; number of "criminal aliens" removed by INS increased from 32,512 to 70,873).

32. *Id.* at 1 (approximately 65% as of December, 2001).

33. Under the INA, all arriving aliens seeking asylum must be detained if they do not possess a visa or proper entry documents. Although INS guidelines favor release on parole of those who pass a credible fear screening, release policies vary from district to district and many asylum seekers have been detained for months or years while pursuing their claims. Donald Kerwin, *Looking for Asylum, Suffering in Detention*, HUM. RTS., Winter 2001, at 3.

34. See Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002) (discussing detention of Arab and South Asian Muslims following September 11); Alisa Solomon, *Detainees Equal Dollars*, VILLAGE VOICE, Aug. 20, 2002, at 46 (discussing increase in detentions following September 11 and boom in INS detention generally).

35. Greene & McElroy, *supra* note 31, at 1.

thousands of miles away.³⁶ Over half of INS detainees nationwide are held in local facilities, typically county jails, under contract to the INS.³⁷ Those who remain in detention for extended periods often find themselves transferred several times over the course of their detention.³⁸ For example, Antoni Andrzej Rumierz, who immigrated to the United States from Poland in 1980, was taken into custody in Boston in April 1995 on the basis of two criminal convictions that made him deportable.³⁹ He was then detained in Manchester, New Hampshire (August 1995–April 1998); Brentwood, New Hampshire (April 1998–February 2000); Hawley, Pennsylvania (February 2000–June 2000); and Cranston, Rhode Island (June 2000–July 2000), where he petitioned for habeas corpus, challenging the constitutionality of his indefinite detention.⁴⁰ By the time a judge in the District of Rhode Island considered his petition in December 2000, he had been transferred to New Jersey. Relying on the immediate custodian rule, the judge dismissed the petition for lack of jurisdiction over Rumierz’s New Jersey-based custodian.⁴¹

Held far from home, INS detainees face multiple barriers to bringing legal challenges. Many detention facilities are in remote areas far from the pro bono attorneys on whom many detainees depend.⁴² Although INS regulations permit

36. Note, *INS Transfer Policy: Interference with Detained Aliens’ Due Process Right to Retain Counsel*, 100 HARV. L. REV. 2001, 2001 (1987). The Attorney General has broad discretion over detention-related matters:

The Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

INA § 236(e), 8 U.S.C. § 1226(e) (2000).

37. Sullivan, *supra* note 6.

38. *Id.* (reporting 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.”).

39. *Rumierz v. INS*, 2000 U.S. Dist. LEXIS 19025, at *2 (D.R.I., Dec. 27, 2000).

40. *Id.* at *3–*4.

41. *Id.* at *8–*9.

42. As one author notes:

INS policies do not encourage detention in places where detainees are likely to have access to family support and legal services. Many INS detention facilities are in isolated locations, far away from major population centers. INS officers routinely send aliens to these remote facilities (sometimes without notification to the attorney of record) without regard to the potential impact of such dislocation on their access to counsel and their ability to develop a claim for relief.

Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1669 (1997). See also Note, *supra* note 36, at 2006 (noting that representation of aliens is largely pro bono, and most pro bono attorneys cannot afford to travel to remote detention facilities to appear at hearings or meet with the clients). One example of the hardships that can result from INS transfers is provided by the example of Max Ogando, a deaf immigrant from the Dominican Republic who communicates only in Spanish sign language. Ogando was taken into INS custody in New York. Although he had a free immigration attorney and a Spanish sign language interpreter in New York, he was transferred to Etowah County Jail in Alabama. He appeared before an immigration judge in Atlanta without an attorney

attorneys to appear telephonically for immigration proceedings,⁴³ even someone detained relatively close to home may encounter difficulties in being represented by her attorney in a habeas petition brought in federal court in the district of confinement. For instance, a New Yorker who is taken into custody and held just across the Hudson River in New Jersey may be relatively accessible to her New York-based attorney. Yet, the rules of the District of New Jersey will not allow the attorney, even if admitted *pro hac vice*, to file papers or enter an appearance.⁴⁴ Detainees who raise factual questions are additionally burdened by being far from records and witnesses.

Julio Roman, for example, was convicted in Ohio of counterfeiting visas and misusing a Social Security number and was sentenced to a term of fifteen months.⁴⁵ He was transferred from Ohio to Louisiana and appeared there before an immigration judge, who ordered him removed. After the Board of Immigration Appeals affirmed the judge's decision and denied Roman's timely motion to reopen, Roman petitioned for habeas corpus in the Northern District of Ohio. Roman argued that he was deprived of procedural due process at his removal hearing because the judge did not permit him to testify to facts that would show that he made or used the counterfeit immigration documents only to benefit his immediate family (a fact that would have established that his crime was not a deportable offense).⁴⁶ The court, holding that it had jurisdiction to hear the petition,⁴⁷ then proceeded to consider whether Ohio was a proper forum to litigate Roman's claim. It first observed that the records relating to the underlying criminal conviction were in the district.⁴⁸ The court then noted that Roman's argument on the merits was intertwined with the facts of the criminal case because his habeas claim was based on the contention that he could have shown at the removal hearing that his conduct was within an exception to the INA definition of "aggravated felony" and was thus not an offense that rendered him deportable.⁴⁹ Finally, the court noted that Roman's lawyer practiced in the District of Ohio, making it a convenient forum for the petitioner, and that litigating in Ohio rather than Louisiana did not appear to present any inconvenience to the Attorney General.⁵⁰

and was ordered deported. Sullivan, *supra* note 6.

43. 8 C.F.R. § 3.25(c) (2002).

44. N.J.L. Civ. R. 101.1(c)(3).

45. Roman v. Ashcroft, 162 F. Supp. 2d 755 (N.D. Ohio 2001).

46. *Id.* at 757.

47. *Id.* at 758-62.

48. *Id.* at 765.

49. *Id.*

50. *Id.* See also Barton v. Ashcroft, 152 F. Supp. 2d 235 (D. Conn. 2001). In *Barton*, an Oakdale detainee petitioned for a writ of habeas corpus in the District of Connecticut challenging his removal order, the denial of his claim of derivative citizenship, and the constitutionality of his mandatory detention without bail. The petitioner, Andre Barton, came to the United States from Jamaica as a permanent resident in 1992, at the age of thirteen. In April of 2001, he was ordered removed based on a 1996 conviction for larceny and a 1999 conviction for unlawful use of a credit

Roman succeeded in obtaining habeas review in his home district because the court to which he petitioned held the Attorney General to be his custodian, on that basis held that it had jurisdiction to hear the petition, and was thus able to proceed to a venue analysis that took into account issues such as convenience to the parties and the location of evidence. Had the court applied the immediate custodian rule, however, it would have had no choice but to dismiss Roman's petition or transfer it to a district having jurisdiction over the warden of the Oakdale facility or the local INS district director—most likely the Western District of Louisiana.

II.

HOW THE IDENTITY OF THE CUSTODIAN CAME TO MATTER SO MUCH: PERSONAL JURISDICTION UNDER § 2241

The preceding section describes the practical effects of the immediate custodian rule on INS detainees. In this section, I take a step back, tracing the evolution of Supreme Court doctrine on habeas jurisdiction in order to show how the question of the custodian's identity became the key to jurisdiction.

Under the general federal habeas corpus statute, courts may grant writs of habeas corpus "within their respective jurisdictions."⁵¹ Courts have struggled over the years with the precise meaning of this phrase. In 1948, in *Ahrens v. Clark*,⁵² the Supreme Court ruled that a district court could hear a habeas petition only if the petitioner was within the court's territorial jurisdiction. Reversing this holding in 1973 in *Braden v. 30th Judicial Circuit Court of Kentucky*,⁵³ the Court shifted the focus to the court's jurisdiction over the *respondent* and held that the petitioner's absence from the district was irrelevant to the jurisdictional inquiry. Between these two landmark cases, Congress made its own contribution to the debate, defining habeas jurisdiction for many state and federal prisoners not by the location of the parties but by the location of the

card. Barton asserted that his admission in 1992 was based upon his father's petition, as a naturalized United States citizen, to have his son join him, a claim which the INS denied in 1998. The court, holding the Attorney General to be Barton's custodian, examined the equities of the case in considering whether venue was proper in Connecticut. It noted that the petitioner was a resident of Bridgeport, Connecticut. The court also noted that the determination regarding the petitioner's entitlement to derivative citizenship was made in Connecticut, and that the records relating to that claim would thus be in the district as well. It observed that other than his detention and removal hearings, the petitioner had no connection to Louisiana, but that the INS, on the other hand, had a presence in both districts and had "certainly been well represented in [the] district." *Id.* at 241. Weighing the evidentiary issues and the convenience to the parties, the court deemed venue to be proper in Connecticut. *Id.*

51. 28 U.S.C. § 2241(a) (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.").

52. 335 U.S. 188 (1948).

53. 410 U.S. 484 (1973).

sentencing court. This section traces the evolution of the jurisdictional inquiry over this period.

A. Ahrens v. Clark: Jurisdiction lies in the district of confinement

In *Ahrens v. Clark*, 120 German citizens being held at Ellis Island pending deportation petitioned for habeas corpus in the District Court of the District of Columbia, naming the Attorney General as respondent. Affirming dismissal of the petition, the Supreme Court held that the habeas jurisdiction of the district courts was limited to inquiries into the causes of restraints of liberty of those “confined or restrained within the territorial jurisdictions of those courts.”⁵⁴ The Court reasoned that although the writ is directed to the person in whose custody the party is detained, it is not sufficient that the jailer or custodian alone be found in the jurisdiction because the statutory scheme⁵⁵ contemplates a procedure which may bring the prisoner before the court:

It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, [and] the administrative burden of such an undertaking negate such a purpose. These are matters of policy which counsel us to construe the jurisdictional provision of the statute in the conventional sense, even though in some situations return of the prisoner to the court where he was tried and convicted might seem to offer some advantages.⁵⁶

B. Congress steps in: From the district of confinement to the sentencing court

Ahrens’ “narrow and rigid territorial limitation”⁵⁷—limiting jurisdiction to the district in which the petitioner was confined—began to erode almost as soon as it had come into existence. Shortly after *Ahrens* was decided, Congress added a new section to the Judicial Code making *Ahrens* inapplicable to federal prisoners collaterally attacking criminal judgments.⁵⁸ Section 2255 of Title 28 created a new remedy, analogous in substance to habeas corpus,⁵⁹ to challenge

54. *Ahrens*, 335 U.S. at 190.

55. At the time *Ahrens* was decided, the substantive provisions of what is now § 2241 were divided among three U.S. code sections, at 28 U.S.C. §§ 451–53 (1940) (repealed). Four days after the decision, the sections were consolidated with minor amendments. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 964 (codified as amended at 28 U.S.C. § 2241).

56. *Id.* at 191.

57. *Id.* at 194 (Rutledge, J., dissenting).

58. Act of June 25, 1948, 62 Stat. at 967 (codified as amended at 28 U.S.C. § 2255 (2000)).

59. See HERTZ & LIEBMAN, *supra* note 2, § 41.1, at 1708 (“When Congress enacted section 2255 in 1948, it intended the new procedure to ‘afford federal prisoners a remedy identical in scope to federal habeas corpus.’”) (citing *Davis v. United States*, 417 U.S. 333, 343 (1974)).

the legality of federal court convictions.⁶⁰ The statute designates the United States as the respondent, and provides that the movant must file the pleading in the district court that imposed the sentence, regardless of where the petitioner is confined.⁶¹ Perhaps in answer to the policy concerns expressed in *Ahrens* regarding the difficulties of transporting prisoners, § 2255 provides that the court may “entertain and determine such [a] motion without requiring the production of the prisoner at the hearing.”⁶² In the same year that it enacted § 2255, Congress also amended the general habeas statute to allow courts adjudicating other types of habeas petitions (those remaining under § 2241) to do so without the petitioner present.⁶³ In 1966, Congress amended the habeas statute once again, this time allowing state prisoners contesting convictions in states with more than one federal district to bring petitions in either the district of confinement or the district in which the sentencing court is located.⁶⁴ Thus by 1966, the two largest categories of claims—those challenging federal and state convictions—were statutorily removed from *Ahrens*’ purview.

C. Braden: *Jurisdiction follows the respondent*

Although challenges to state and federal convictions were no longer governed by *Ahrens*, other types of federal habeas claims (including some that became newly available as the Court expanded the definition of “custody”

60. 28 U.S.C. § 2255 (2000). Pursuant to § 2255, a federal prisoner may file a motion to vacate, set aside or correct a federal sentence upon the ground that “the sentence was imposed in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose the sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” See generally LARRY W. YACKLE, POST-CONVICTION REMEDIES § 46 at 195 (1981) (describing statutory overruling of *Ahrens* for certain types of petitioners).

61. § 2255. The United States Judicial Conference designed the new remedy “as a case management device to divert most . . . federal prisoner petitions away from the district of incarceration and into the district in which the federal prisoner was originally tried and sentenced.” HERTZ & LIEBMAN, *supra* note 2, § 41.2a, at 1710. See also *United States v. Hayman*, 342 U.S. 205, 212–14 (1952) (explaining motivations behind passage of § 2255).

62. § 2255.

63. Act of June 25, 1948, 62 Stat. at 965 (codified as amended at 28 U.S.C. § 2243 (2000)). (“Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.”).

64. Act of Sept. 19, 1966, Pub. L. No. 89-590, 80 Stat. 811. The amended statute provides:

Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in the furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2241(d) (2000).

during this period)⁶⁵ remained under § 2241.⁶⁶ These included prisoner cases not involving challenges to the legality of the sentence (for example, challenges to parole board decisions or to conditions of confinement), military cases (both challenges to court-martial convictions and petitions for release from the military), extradition cases, immigration cases, and interstate detainers.⁶⁷ All of these cases continued to be subject to *Ahrens*' territorial limitation.

Interstate detainers, in particular, presented a problem under *Ahrens*. A person in prison in one state but under a detainer for a separate offense from another state was unable to challenge the detainer because the district of confinement lacked jurisdiction over the out-of-state authority who had issued (and had the power to lift) the detainer. In 1973, in *Braden v. 30th Judicial Circuit Court of Kentucky*,⁶⁸ the Supreme Court overruled the territorial requirement of *Ahrens*, holding that the Western District of Kentucky had jurisdiction over a habeas petition challenging a Kentucky detainer, even though the petitioner was in jail in Alabama. *Braden* shifted the jurisdictional focus from the petitioner/detainee to the respondent/custodian, holding that "the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian."⁶⁹ Service of process⁷⁰ became the determining question, regardless of the location of the petitioner:

So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.⁷¹

65. The range of habeas actions that may be brought under § 2241 expanded dramatically in the 1960s and 1970s as the Supreme Court broadened the definition of "custody." See *Hensley v. Municipal Court*, 411 U.S. 345 (1973) (person released on his own recognizance is "in custody" within meaning of habeas corpus statute); *Peyton v. Rowe*, 391 U.S. 54 (1968) (prisoner serving consecutive sentences is "in custody" of Parole Board for habeas purposes under any one of the sentences); *Jones v. Cunningham*, 371 U.S. 236 (1963) (person released on parole is "in custody" for purposes of habeas corpus).

66. See HERTZ & LIEBMAN, *supra* note 2, § 41.2b, at 1713-19 (listing types of cases remaining under § 2241).

67. A detainer is a warrant filed against a person already in custody to insure that she will be available to the requesting authority. Upon the termination of the first sentence, the prisoner is available to the authority placing the detainer. See Joan B. Tuttle, *Catch 2254: Federal Jurisdiction and Interstate Detainers*, 32 U. PITT. L. REV. 489, 491 (1971).

68. 410 U.S. 484 (1973).

69. *Id.* at 495.

70. Service of process is governed by Federal Rule of Civil Procedure 4. Within a judicial district of the United States, service may be effected pursuant to the law of the state in which the district court is located. FED. R. CIV. P. 4(e). An out-of-state defendant must have sufficient contacts with the forum such that the maintenance of an action against her in that state does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

71. *Braden*, 410 U.S. at 495.

Citing the legislative history of the enactment of § 2255 and the 1966 amendments to the habeas statute, the *Braden* Court noted Congress's intent to have cases resolved in the court which originally imposed the confinement or in the court located nearest the site of the underlying controversy, and to "avoid the vastly disproportionate burden of handling habeas corpus petitions which had fallen, prior to the amendments, on those districts in which large numbers of prisoners are confined."⁷² The Court also pointed to recent cases allowing American citizens confined overseas to petition for habeas corpus although they were not within any district.⁷³ In view of these developments, the Court concluded, it could no longer view *Ahrens* as establishing "an inflexible jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of [the] decision."⁷⁴

In deciding which forum was proper, the *Braden* Court reversed the traditional order of inquiry by reviewing venue factors before reaching the question of jurisdiction.⁷⁵ Looking at the location of witnesses and records, the convenience to the parties, and the familiarity of the trial court with the applicable laws, the Court held that Kentucky provided a proper forum. Only after this inquiry did it address the respondent's jurisdictional defense. In the course of reframing the question as one of venue, the *Braden* decision also recast *Ahrens* itself as a decision about venue, noting that there was no apparent reason why the District of Columbia would have been a more convenient forum for petitioners detained in New York, and that it would have presented considerable inconvenience to the government to transport all 120 detainees to a hearing in Washington, D.C. "Under these circumstances, traditional principles of venue would have mandated the bringing of the action in the Eastern District of New York, rather than the District of Columbia. *Ahrens v. Clark* stands for no broader proposition."⁷⁶

This shift from the formalism of a narrow jurisdictional rule to the functionalism of a multi-factor venue test transformed *Ahrens*' yes-or-no question (is the petitioner confined within the district?) into an open-ended inquiry that recognized more than one possible forum for a habeas action. In making this move, *Braden* also fundamentally altered the nature of the jurisdictional question itself. Whereas the *Ahrens* Court had conceived of the question as one of subject

72. *Id.* at 497 n.13.

73. *Id.* at 498.

74. *Id.* at 499–500.

75. Jurisdiction concerns the power of a court to hear and dispose of a given case. In order to adjudicate a case, a district court must have jurisdiction over both the subject matter and the defendant. Federal venue principles are designed to ensure that litigation is lodged in a convenient forum and to protect a defendant against the possibility that a plaintiff will select an arbitrary place in which to bring suit. *See* 28 U.S.C. §§ 1404, 1406 (2000). *See also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1063 (3d ed. 2002) (describing differences between jurisdiction and venue); JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 2.1 at 8–10 (3d ed. 1999) (describing hierarchy of jurisdiction and venue).

76. *Braden*, 410 U.S. at 500.

matter jurisdiction—to be raised *sua sponte* by the court even if the respondent agreed to waive it⁷⁷—*Braden* defined it as a matter of personal jurisdiction following the ordinary guidelines of service of process.⁷⁸ This change opened up a whole new arena of debate. If service of process on the respondent is the sole determinant of jurisdiction, the logical next question arises: who is (or are) the proper respondent(s) to a habeas corpus petition?

III.

WHO IS THE PROPER RESPONDENT TO A HABEAS PETITION?

In *Braden*, the named respondent was the court that had issued the detainer. However, *Braden* did not announce any general rule regarding the custodian. In all of the types of claims that continue to fall under § 2241—prisoner cases unrelated to the legality of the sentence, military cases, extradition cases, and executive detention cases, including immigration—courts have grappled with this question. Because courts adjudicating immigration-related habeas cases have drawn heavily on non-immigration precedents, it is important to consider this broader history. In this section, I trace two approaches to deciding this next step of the jurisdictional puzzle. In the first approach, which I call the formal approach, courts have employed an “immediate custodian” rule, holding that the proper respondent to a habeas petition is the person who has day-to-day control over the petitioner, regardless of what relief the petitioner is seeking. In the case of prisoners or detainees this person is generally the warden, and in military cases the commanding officer. In the second line of cases, which I call the functional approach, courts have either bent the immediate custodian rule in the face of compelling equities, or, as in *Braden*, focused primarily on venue factors, so long as at least one appropriate custodian could be served.

77. United States district courts are tribunals of limited jurisdiction: their power to hear a case is dependent upon congressional implementation of one of the Constitution’s grants of subject matter jurisdiction. While defects of personal jurisdiction may be waived by the defendant/respondent, subject matter jurisdiction cannot be waived and must be raised by the court *sua sponte* when not raised as a defense. CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 7 at 27, 29 (6th ed. 2002). In *Ahrens*, the Attorney General was willing to waive the jurisdictional defense and allow the court to reach the merits of the case. The Court, calling the restriction one that Congress had placed on the power of the courts to act, concluded that it was a restriction that could not be waived by the parties. *Ahrens v. Clark*, 335 U.S. 188, 193 (1948).

78. See *supra* note 70.

*A. Formal approaches to the custodian question:
the “immediate custodian” rule*

I. Non-immigration cases

The habeas statute specifies that “[t]he writ, or order to show cause shall be directed to the person having custody of the person detained.”⁷⁹ In an 1885 case, *Wales v. Whitney*, the Supreme Court affirmed dismissal of a habeas petition brought by a Navy surgeon, explaining that the habeas statute “contemplate[s] a proceeding against some person who has the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.”⁸⁰

Wales has been widely cited for the proposition that the respondent must be the person having day-to-day control over the petitioner.⁸¹ In *Sanders v. Bennett*, the D.C. Circuit held that for prisoners, this person is generally the warden of the facility in which the petitioner is detained.⁸² The court specifically rejected the possibility of a federal prisoner naming the Attorney General as respondent to a habeas petition, because the Attorney General is “a supervising official rather than a jailer.”⁸³ The court concluded that “[a]n interpretation which would permit resort to the courts in the District of Columbia for writs of habeas corpus by prisoners in federal institutions all over the United States is without justification in convenience or logic.”⁸⁴

A case such as *Sanders*, in which a prisoner challenges the legality of a federal sentence, would now fall under § 2255 rather than under the habeas statute, and would, under § 2255, be heard in the sentencing court, regardless of where the petitioner’s “immediate custodian” could be served. In cases remaining under the general habeas statute, however, courts have reaffirmed the *Sanders* holding. In *Billiteri v. United States Board of Parole*, for example, a

79. 28 U.S.C. § 2243 (2000).

80. 114 U.S. 564, 574 (1885) (emphasis added).

81. See, e.g., RONALD SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS § 7, at 39 (1965) (the respondent “must be the petitioner’s immediate custodian [and] . . . must have the power to produce the body of the petitioner before the court and, ultimately, to discharge him from custody”); *Jones v. Biddle*, 131 F.2d 853, 854 (8th Cir. 1942) (citing *Wales* for the proposition that the respondent must be the person having physical custody of the petitioner). Although often recited, the immediate custodian rule has not been the subject of extensive critique in the secondary literature. *But see* Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1154, 1166–69 (1970) (describing immediate custodian rule, and arguing that if a petitioner is confined by state judicial process or executive action of the state or federal government, she should be permitted to name as respondent either the government or the official holding her in custody).

82. 148 F.2d 19, 20 (D.C. Cir. 1945). *Accord* *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992); *Blango v. Thornburgh*, 942 F.2d 1487, 1492 (10th Cir. 1991).

83. *Sanders*, 148 F.2d at 20.

84. *Id.*

prisoner serving his sentence in Lewisburg, Pennsylvania brought a petition for a writ of habeas corpus in the Western District of New York alleging that the United States Parole Board had denied him due process by failing to give an adequate reason for denying his parole request.⁸⁵ The district court directed the Parole Board to release Billiteri on parole.⁸⁶ The Second Circuit reversed on jurisdictional grounds, holding that Billiteri's custodian was the warden at the federal penitentiary in Lewisburg, who was never named as a respondent in the proceedings. The court held that

it would stretch the meaning of the term beyond the limits thus far established by the Supreme Court to characterize the Parole Board as the "custodian" of a prisoner who is under the control of a warden and confined in a prison, and who is seeking, in a habeas corpus action, to be released from precisely that form of confinement. At that point the prisoner's relationship with the Parole Board is based solely on the fact that it is the decision-making body which may, in its discretion, authorize a prisoner's release on parole.⁸⁷

The D.C. Circuit reached a similar conclusion in *Guerra v. Meese*,⁸⁸ in which seven federal prisoners who were being held in various federal facilities around the country brought habeas petitions in the District of Columbia seeking release because of allegedly illegal actions by the United States Parole Commission.⁸⁹ The petitioners named the Parole Commission as respondent, arguing that the Parole Commission had the power to release them. In a per curiam decision, the court recognized the Parole Commission's role in the petitioners' continued detention.⁹⁰ However, relying on *Sanders*, the court held that the district court lacked jurisdiction to hear the petitions. The court reasoned that the petitioners' argument, if it prevailed, would extend to any person or entity possessing some sort of power to release them; under this theory, the court warned, the Attorney General of the United States could be considered the

85. 400 F. Supp. 402 (W.D.N.Y. 1975), *rev'd*, 541 F.2d 938 (2d Cir. 1976).

86. *Id.* at 409.

87. *Billiteri v. United States Bd. of Parole*, 541 F.2d 938, 948 (2d Cir. 1976).

88. 786 F.2d 414 (D.C. Cir. 1986) (*per curiam*).

89. In 1976, Congress enacted the Parole Commission and Reorganization Act, which replaced the United States Parole Board with a United States Parole Commission: Act of Mar. 15, 1976, Pub. L. No. 94-233, § 2, 90 Stat. 219, 219-31 (originally codified at 18 U.S.C. §§ 4201-18 (repealed 1984)). I refer to *Billiteri*, *Guerra* and other such cases collectively as "parole board cases" whether they concern the Board or the Commission. The adoption of the federal Sentencing Guidelines in 1987 removed the Commission's jurisdiction over prisoners who committed their offenses on or after November 1, 1987, though the Commission continued to oversee parole decisions for prisoners who committed offenses prior to that date, and it eventually took on other functions. See generally History of the Federal Parole System, at <http://www.usdoj.gov/uspcc/history.htm> (Mar. 2002).

90. *Guerra*, 786 F.2d at 416 ("It is clear that the Parole Commission is responsible for the appellees' continued detention. Were the Commission to decide to change the prisoners' parole eligibility dates today, they might be freed.").

custodian of every prisoner in federal custody because he supervises the Federal Bureau of Prisons.⁹¹

Employing a similar logic in military cases, courts have, as a general rule, held that the proper respondent is either the petitioner's commanding officer or, in the case of someone convicted by a court-martial, the director of the facility in which the petitioner is confined. In *Monk v. Secretary of the Navy*,⁹² the D.C. Circuit held that a former Marine serving time in Kansas under a court-martial conviction could not name the Secretary of the Navy as respondent under an "ultimate custodian" theory. In *Schlanger v. Seamans*,⁹³ the Supreme Court held that an Arizona district court lacked jurisdiction to grant a writ of habeas corpus to an enlisted man assigned to a Georgia Air Force base. The petitioner, who was on temporary leave to study in Arizona, named as respondents the Secretary of the Air Force, the commander of the Georgia base, and the commander of the Air Force Reserve Officers Training Corps at Arizona State University. The Court rejected the Arizona respondent because he "had no control over [the] petitioner who concededly was not in his chain of command, since petitioner was not in the AF ROTC program, but in [another study program]."⁹⁴ The Court found that the commanding officer at the Georgia base *did* have custody and control over the petitioner; however, the district court lacked jurisdiction over him, the Court held, because he was neither a resident of Arizona nor amenable to its process.⁹⁵ Thus, the district court's jurisdiction depended on one person being able to fill both these requirements simultaneously: that is, a commanding officer amenable to process in the district.

2. *Immigration cases*

In the immigration context, a number of courts have looked to other § 2241 cases, particularly the parole board cases. Invoking the immediate custodian rule and analogizing to these other habeas contexts, they have rejected the Attorney General as a respondent. Some courts have held the petitioner's immediate cus-

91. *Id.*

92. *Monk v. Sec'y of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986). *Monk* and *Guerra* were decided in the same term. One commentator has remarked about these two cases:

The [D.C. Circuit's] reluctance to bend jurisdictional rules in habeas cases goes beyond a mere desire to follow Supreme Court precedent. Because it possesses jurisdiction over the District of Columbia—and thus the highest federal government officials—the D.C. Circuit has a strong interest in ensuring that habeas petitions are directed to prisoners' immediate custodians, not their superiors in Washington, in order to avoid a potential flood of litigation.

Michael S. Maurer, *The D.C. Circuit Review September 1985–August 1986: Habeas Corpus*, 55 GEO. WASH. L. REV. 969, 975 (1987).

93. 401 U.S. 487 (1971).

94. *Id.* at 489.

95. *Id.* The Court did not opine on the status of the Secretary of the Air Force as a possible custodian.

todian to be the warden of the facility in which the petitioner is detained,⁹⁶ and others the INS district director overseeing the district in which the facility is located.⁹⁷

In *Yi v. Maugans*,⁹⁸ the Third Circuit affirmed a district court judgment denying class certification to 300 Chinese asylum applicants being held at various facilities around the country. The lead plaintiff, detained in York, Pennsylvania, argued that the INS district director was a proper respondent and that the class members held outside the district were in the district director's constructive custody. Rejecting this argument, the court held that the warden of the facility was the only proper respondent under the immediate custodian rule. Although the court did not directly decide whether the Attorney General was properly named, it made its position clear in its discussion of the district director: "That the district director has the power to release the detainees does not alter our conclusion. Otherwise, the Attorney General of the United States could be considered the custodian of every alien and prisoner in custody because ultimately she controls the district directors and the prisons."⁹⁹

The most extensive argument rejecting the Attorney General and applying the immediate custodian rule can be found in the First Circuit's decision in *Vasquez v. Reno*.¹⁰⁰ Reversing a district court decision holding the Attorney General to be the custodian of a detainee held in Louisiana, the Court of Appeals held that as a general rule, "the Attorney General is neither the custodian of such an alien in the requisite sense nor the proper respondent to a habeas petition."¹⁰¹ In reaching this conclusion, the court cited the "solid wall of authority" in the prisoner context that the person who has day-to-day control over the prisoner is the only person properly named as custodian.¹⁰² Although the court conceded that the case law in the context of INS detainees is "much more sparse and far less coherent," and that "[o]n the only occasion when the question . . . surfaced in the Supreme Court, the Justices adroitly sidestepped it,"¹⁰³ it pointed to

96. See, e.g., *Vasquez v. Reno*, 233 F.3d 688 (1st Cir. 2000); *Yi v. Maugans*, 24 F.3d 500 (3d Cir. 1994); *Aphayavong v. INS*, 169 F. Supp. 2d 1194 (S.D. Cal. 2001); *Samoeun v. Reno*, 2001 U.S. Dist. LEXIS 2369 (D.R.I. Jan. 3, 2001); *Rumierz v. INS*, 2000 U.S. Dist. LEXIS 19025 (D.R.I. Dec. 27, 2000); *Chukwurah v. U.S.*, 813 F. Supp. 161 (E.D.N.Y. 1993); *Peon v. Thornburgh*, 765 F. Supp. 155 (S.D.N.Y. 1991). See also *Iheme v. Reno*, 819 F. Supp. 1192 (E.D.N.Y. 1993) (rejecting Attorney General as respondent and transferring petition to district of confinement without specifying who proper respondent is).

97. See *Santiago v. INS*, 134 F. Supp. 2d 1102 (N.D. Cal. 2001); *Williams v. Reno*, 2001 U.S. Dist. LEXIS 824 (E.D. Mich. Jan. 11, 2001); *Santos-Gonzalez v. Reno*, 93 F. Supp. 2d 286 (E.D.N.Y. 2000); *Ozoanya v. Reno*, 968 F. Supp. 1 (D.D.C. 1997); *Carvajales-Cepeda v. Meissner*, 966 F. Supp. 207 (S.D.N.Y. 1997); *Michael v. INS*, 870 F. Supp. 44 (S.D.N.Y. 1994).

98. 24 F.3d at 507, 508 (3d Cir. 1994).

99. *Id.* at 507.

100. 233 F.3d at 693-96.

101. *Id.* at 689.

102. *Id.* at 691.

103. *Id.* (referring to *Ahrens v. Clark*, 335 U.S. 188 (1948)).

several factors arguing for an extension of the immediate custodian rule to the immigration realm: the lack of a principled distinction between an alien held in a detention facility and a prisoner held in a correctional facility;¹⁰⁴ statutory language indicating that there is only one proper respondent to a habeas petition (“[t]he writ . . . shall be directed to *the person* having custody of the person detained”¹⁰⁵); and the fact that the immediate custodian is the person best able to “produce the body” of the petitioner.¹⁰⁶

B. *Functional approaches to the custodian question*

Shadowing these “immediate custodian” cases is another line of cases illustrating a more functional approach to determining the proper respondent in a § 2241 habeas action. These decisions have either explicitly rejected the immediate custodian rule or simply ignored it. In place of a formal rule, courts have looked to which respondents make sense in particular contexts. Once again, courts adjudicating immigration-related habeas actions have looked outside the immigration context for precedent, and it is thus necessary to consider this broader range of cases.

I. *Non-immigration cases*

In 1944, in *Ex Parte Endo*,¹⁰⁷ the Supreme Court held that the Northern District of California retained jurisdiction over a habeas petition brought by a Japanese-American woman challenging her wartime internment, even though the petitioner had been transferred to Utah. *Endo* was decided on the ground that the district court had acquired jurisdiction before the petitioner’s transfer, and that her subsequent absence from the district did not cause the court to lose jurisdiction.¹⁰⁸ However, the Court’s reasoning indicates a complete disregard for the immediate custodian rule:

[T]here is no suggestion that there is no one within the jurisdiction of the District Court who is responsible for the detention of appellant and who would be an appropriate respondent. We are indeed advised by the Acting Secretary of the Interior that if the writ issues and is directed to the Secretary of the Interior or any official of the War Relocation Authority (including an assistant director whose office is at San Francisco, which is in the jurisdiction of the District Court), the corpus of appellant will be produced and the court’s order complied with in all respects.¹⁰⁹

104. *Id.* at 693.

105. *Id.* (quoting 28 U.S.C. § 2243 (1994)) (emphasis and ellipsis added by court).

106. *Id.*

107. 323 U.S. 283 (1944).

108. *Id.* at 306.

109. *Id.* at 304–05.

The decision is notable both for its implicit acknowledgment that there was more than one possible respondent (“we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner”)¹¹⁰ and for its readiness to accept the Secretary of the Interior and California-based officials of the War Relocation Authority as custodians.

Relying on *Endo*, several courts adopted similarly pragmatic approaches to the custodian/jurisdiction question in a series of cases during the Vietnam War involving habeas petitions by conscientious objectors. In *Strait v. Laird*,¹¹¹ an inactive Army Reserve officer petitioned for habeas corpus in the Northern District of California, where he resided. The Ninth Circuit held that the district court lacked jurisdiction because the petitioner’s commanding officer was stationed at Fort Benjamin Harrison, Indiana.¹¹² The Supreme Court reversed.¹¹³ Distinguishing the case from *Schlanger v. Seamans*,¹¹⁴ decided only a year before, the Court reasoned that while Schlanger’s nominal custodian was wholly indifferent to Schlanger’s voluntary presence at a military training program in Arizona,¹¹⁵ Strait’s custodian had “enlisted the aid and directed the activities of armed forces personnel in California in his dealings with Strait.”¹¹⁶ Noting that virtually every face-to-face contact between Strait and the military had taken place in California, the Court concluded that “[i]n the face of this record, to say that Strait’s custodian is amenable to process only in Indiana—or wherever the Army chooses to locate its record-keeping center—would be to exalt fiction over reality.”¹¹⁷ The jurisdictional defect in *Schlanger*, the Court explained, was not merely the physical absence of the commander of the Georgia Air Force base from the District of Arizona, but the total lack of formal contacts between Schlanger and the military in that district.¹¹⁸ In other words, had Schlanger been in some sort of military program in Arizona or had other meaningful contacts with the military while he was there, the Arizona court would have had jurisdiction regardless of whether his nominal commanding officer could have been served there.

Strait was not, strictly speaking, about the identity of the custodian: instead of holding that the California-based officer was the proper respondent, the Court held that California had jurisdiction over the Indiana-based respondent.¹¹⁹

110. *Id.* at 306 (emphasis added).

111. 445 F.2d 843 (9th Cir. 1971) (per curiam), *rev'd*, 406 U.S. 341 (1972).

112. 445 F.2d at 844.

113. *Strait*, 406 U.S. at 346.

114. 401 U.S. 487 (1971).

115. *Strait*, 406 U.S. at 343–44 (noting that Schlanger “was on permissive temporary duty [in Arizona]. . . . [H]e paid his own expenses, and was as much on his own as any serviceman on leave.”).

116. *Id.* at 344.

117. *Id.*

118. *Id.*

119. *Id.* at 346.

Rather, *Strait*'s significance lies in the way it reframed *Schlanger* as an inquiry into the depth of the petitioner's contacts with the military in the district rather than an inquiry into who could be deemed the immediate custodian. The Court's stated preference for "reality" over legal fictions, its reference to the breadth of the "custodian" concept,¹²⁰ and its acknowledgment that various people in the chain of command in fact had control over the petitioner suggest a willingness to go beyond the formalism of the immediate custodian rule.

A much more direct rejection of the immediate custodian concept can be found in the D.C. Circuit's decision in another conscientious objector case, *Eisel v. Secretary of the Army*:¹²¹

[W]e find that the concept of "immediate custodianship" is largely irrelevant to determining which particular federal court may entertain habeas petitions brought by inactive reservists.

....

... Where inactive reservists may or may not bring habeas actions is better determined by analyzing the policies for and against allowing an action in a particular jurisdiction, rather than by the blind incantation of words with implied magical properties, such as "immediate custodian."¹²²

Following *Braden*'s lead, the *Eisel* court reached its determination of the proper forum through a multi-factor inquiry. It identified six distinct interests to be considered: the proximity of the forum to the records of the cases and potential witnesses; promoting a fair distribution of habeas cases among the district courts rather than concentrating the burden on a few; the convenience of the forum to the petitioner; the convenience to the government; ensuring that the forum may be easily determined; and, to the extent possible, ensuring that there is a single, exclusive forum in order to prevent forum shopping.¹²³ Applying this analysis, the court concluded that venue was proper for such cases in the petitioner's home or domicile.¹²⁴ Such a location would be close to records and witnesses, would be convenient for the petitioner, would not inconvenience the government, would promote an even distribution of cases throughout the country, and would be relatively easy to determine.¹²⁵

120. *Id.* at 345–46 ("The concepts of 'custody' and 'custodian' are sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing petitioner's claim, is in California for the limited purposes of habeas corpus jurisdiction.").

121. 447 F.2d 1251 (D.C. Cir. 1973).

122. *Id.* at 1253, 1254.

123. *Id.* at 1254.

124. *Id.* at 1265.

125. *Id.*

Even in the parole board cases, the immediate custodian rule has occasionally bent under the pressure of the circumstances at hand. Although parole board cases such as *Billiteri* and *Guerra* provide some of the clearest examples of the formalistic application of the immediate custodian rule, several other cases have held that the parole board, in certain circumstances, *can* be deemed the custodian of a habeas petitioner. The landmark Supreme Court case *Jones v. Cunningham*¹²⁶ is best known for broadening the definition of "custody" to include parole. Of more interest to the present discussion is the fact that the *Jones* Court remanded the case to the district court with orders to grant the petitioner's motion to add the members of a state parole board as respondents. Citing *Endo* for the principle that the district court did not lose jurisdiction "so long as an appropriate respondent with custody remained,"¹²⁷ the Court went on to explain with blunt simplicity what made the respondents appropriate: "[T]hey can be required to do all things necessary to bring the case to a final adjudication."¹²⁸

In *Jones*, unlike most parole cases, the petitioner was not in physical custody and there was thus no warden to be named. Yet another parole/custody configuration presented itself in *Lee v. United States*,¹²⁹ in which the petitioner had been released on parole and subsequently ended up in a federal penitentiary in Indiana due to a parole violation. The petitioner brought a habeas petition in the Eastern District of Arkansas (the court where his criminal sentence had been imposed)¹³⁰ to challenge the parole board's delay in holding a parole revocation hearing. Holding that the Eastern District of Arkansas lacked jurisdiction, the Eighth Circuit called the warden of the Indiana facility the petitioner's immediate custodian and added that the Board of Parole, in Washington, could "be called another custodian due to its procedures in detaining [the] petitioner."¹³¹

While the majority in *Lee* recognized two possible custodians, a concurring opinion by Judge Webster went even further. Judge Webster argued that under *Braden*, it was necessary only to obtain service of process upon the custodian in

126. 371 U.S. 236 (1963).

127. *Id.* at 243-44.

128. *Id.* at 244.

129. 501 F.2d 494 (8th Cir. 1974).

130. *Id.* at 496. *Lee* originally brought a pro se habeas petition in the Southern District of Indiana, but the court dismissed the petition, holding that the proper action was a motion under § 2255 in the sentencing court. *Lee* then brought a § 2255 action in the Eastern District of Arkansas. *Id.* at 497-98. The Eighth Circuit held that the claim was not cognizable under § 2255, *id.* at 499, but may have been cognizable under § 2241, *id.* at 500-01, and analyzed jurisdiction accordingly, *id.* at 498-502.

131. *Id.* at 501. *See also* *McCoy v. United States Bd. of Parole*, 537 F.2d 962, 965 (8th Cir. 1976) (holding Board of Parole to be one of petitioner's custodians where petitioner was incarcerated on parole violation); *Reese v. United States Bd. of Parole*, 498 F.2d 698, 700 (D.C. Cir. 1974) (holding that District Court for the District of Columbia had jurisdiction over habeas petition of state prisoner in Arizona who had violated federal parole and was under warrant and detainer of federal Board of Parole).

order for the district court to exercise jurisdiction, and that thereafter, traditional principles of venue applied.¹³² In his view, *Braden*'s logic was even more compelling in a federal context: while *Braden* involved a state institution, state convictions, and multiple sovereignties, the parole board case before the court involved institutions that were national in scope (the Bureau of Prisons and the Parole Board).¹³³ He argued in strong terms against the immediate custodian rule, which he described as hanging by "a very thin thread" after its abandonment by Congress in § 2255 cases:

What public interest is served by requiring that the local 'branch manager' be served before the court can consider a challenge to the action of the national board? Of what advantage is it to the system that this challenge be heard only in Indiana? . . . So long as the petitioner names as respondent a person or entity with power to release him, there is no reason to avoid reaching the merits of his petition.¹³⁴

Judge Webster's view, although not widely held, has been endorsed by the Tenth Circuit in *Dunn v. United States Parole Commission*.¹³⁵ The *Dunn* court recognized the parole board as the custodian even where the issue was not one of a parole violation, but rather (as in *Billiteri*) a prisoner who was seeking to challenge a delay in granting parole while serving his original sentence. The court suggested that the immediate custodian rule was simply an empty formality:

Although the Leavenworth warden cannot be said to be indifferent to the resolution of Mr. Dunn's challenge, only in the most formal sense does he control whether Mr. Dunn is released. Rather, just as Kentucky controlled the duration of confinement in *Braden* and Alabama merely acted as Kentucky's agent, so does the Commission directly control whether Mr. Dunn remains in custody.¹³⁶

Even the immediate custodian cases themselves have acknowledged that the rule might sometimes need to yield. *Billiteri* and *Guerra*, while affirming the immediate custodian rule in the cases before the court, both note that a broader definition of custodian may be warranted by other circumstances, such as when (as in *Lee*) a petitioner is detained because of a parole violation¹³⁷ or is out on parole.¹³⁸ In *Sanders v. Bennett*, the D.C. Circuit described its holding as "a

132. 501 F.2d at 502 (Webster, J., concurring).

133. *Id.*

134. *Id.* at 502–03.

135. 818 F.2d 742 (10th Cir. 1987) (per curiam).

136. *Id.* at 744. See also *United States v. DiRusso*, 535 F.2d 673, 676 (1st Cir. 1976) (citing Judge Webster's concurrence in *Lee* and recognizing parole board as possible alternate custodian).

137. *Billiteri v. United States Bd. of Parole*, 541 F.2d 938, 948 (2d Cir. 1976) (citing *Lee*, 501 F.2d at 501).

138. *Guerra v. Meese*, 786 F.2d 414, 417 (D.C. Cir. 1986) (citing *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)).

practical one based on common sense administration of justice,"¹³⁹ and noted that the immediate custodian rule did not bar the district court from issuing habeas writs directed at the wardens of Washington-area penal institutions located just outside the district's borders. In *Eisentrager v. Forrestal*,¹⁴⁰ the D.C. Circuit bent the immediate custodian rule to allow German citizens being held in Germany by the United States Army to bring a habeas petition naming the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the Army, and the Joint Chiefs of Staff of the United States. The court held that the naming of a higher authority was permissible if it were the only means to enforce the writ.¹⁴¹ Similarly, in *Demjanjuk v. Meese*,¹⁴² the D.C. Circuit held that the Attorney General could be named as the respondent to a habeas petition brought to stay an extradition warrant, due to the peculiar circumstances of the case. The petitioner was in the custody of a United States Marshal in a location that had not been disclosed to his lawyers.¹⁴³ Judge Bork reasoned that the petitioner's attorneys could not be expected to file in every circuit in the country, but that at the same time, the petitioner could not be denied the right to petition for a writ of habeas corpus. He therefore found it "appropriate, in these very limited and special circumstances, to treat the Attorney General of the United States as the custodian."¹⁴⁴

2. *Immigration cases*

Immigration is the area in which courts have been most willing to depart from the immediate custodian rule. The roots of courts' unease with applying the rule to immigration cases can be seen in *Ahrens* itself, which was, after all, an immigration habeas case naming the Attorney General as respondent. The *Ahrens* majority decided the case on the threshold issue of territorial jurisdiction over the petitioner¹⁴⁵ and expressly declined to reach the question of whether the

139. *Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945).

140. 174 F.2d 961 (D.C. Cir. 1949).

141. *Id.* at 967-68.

142. 784 F.2d 1114 (D.C. Cir. 1986) (Bork, J., in chambers).

143. *Id.* at 1115-16.

144. *Id.* at 1116. Another extradition case, *Gill v. Imundi*, 715 F. Supp. 592 (S.D.N.Y. 1989), provides the only example on record where the government has actively argued *against* the immediate custodian rule. In *Gill*, the government sought to transfer a habeas petition from the Southern District of New York to the District of New Jersey. Following an extradition request from India, the petitioners had been arrested in New Jersey, where a United States Magistrate ordered that they be committed to the custody of the United States Marshal for the District of New Jersey pending an extradition decision by the Secretary of State. The Marshal lodged the petitioners at the closest federal detention center, which happened to be across the state line in Manhattan. 715 F. Supp. at 593. The government argued that the petitioners, although in the immediate custody of the Metropolitan Correctional Center in Manhattan, were in the ultimate custody of the U.S. Marshal in New Jersey. *Id.* at 594.

145. *Ahrens v. Clark*, 335 U.S. 188, 190 (1948).

Attorney General was properly named as respondent.¹⁴⁶ The dissent did reach this question, however, and Justice Rutledge, joined by two other justices, advocated a pragmatic approach to determining the custodian's identity:

The same principle which forbids formulation of rigid jurisdictional limitations upon the use of this prerogative writ in other respects, inconsistent with its availability for performing its office in varying circumstances, forbids limiting those who may be called upon to answer for restraints they unlawfully impose by technical niceties of the law of principal and agent, superior or subordinate in public authority, or immediacy or remoteness of the incidence of the authority or power to restrain. Jurisdictionally speaking, it is, or should be, enough that the respondent named has the power or ability to produce the body when so directed by the court pursuant to process lawfully issued and served upon him.¹⁴⁷

Turning to the specific situation of the petitioners, Justice Rutledge concluded that "in view of [the Attorney General's] all-pervasive control over their fortunes, it cannot be doubted that he is a proper party to resist 'an inquiry into the cause of restraint of liberty' in their cases."¹⁴⁸

Several courts have followed in the footsteps of the *Ahrens* dissent, holding that the Attorney General may be named as respondent to habeas petitions by INS detainees. These cases fall into two categories. One line of cases, beginning with *Nwankwo v. Reno*¹⁴⁹ in 1993, has established a limited "special circumstances" exception to the immediate custodian rule. The other line, beginning with *Mojica v. Reno*¹⁵⁰ in 1997, has held that the Attorney General is a proper respondent to an immigration habeas action as a general rule.

a) *Nwankwo: special circumstances*

In *Nwankwo*, a petitioner who had been detained for months following the completion of his criminal sentence brought a habeas petition challenging the INS's delay in processing his deportation. Originally sentenced in the Eastern District of New York, he was confined within the INS facility in Oakdale, Louisiana.¹⁵¹ In holding that the Eastern District of New York had jurisdiction

146. *Id.* at 193.

147. *Id.* at 199 (Rutledge, J., dissenting) (emphasis added).

148. *Id.* at 200. The quoted language is from part of the then-operative habeas statute, 28 U.S.C. § 452 (1940). As discussed *supra* note 55, this section was replaced by a new § 2241 days after *Ahrens* was decided. Section 452 was identical to current § 2241(a) except for the quoted phrase, which was omitted as merely descriptive of the nature of the writ. 28 U.S.C.A. § 2241(a), Historical and Statutory Notes (West 2002).

149. 828 F. Supp. 171 (E.D.N.Y. 1993).

150. 970 F. Supp. 130 (E.D.N.Y. 1997), *aff'd in part, dismissed in part, question certified sub nom.* Henderson v. INS, 157 F.3d 106 (2d Cir. 1998).

151. *Nwankwo*, 828 F. Supp. at 176, 171.

to hear the petition, Judge Korman asserted that the Attorney General was “plainly the legal custodian” of the petitioner¹⁵² and rejected on several grounds the application of the immediate custodian rule to Nwankwo’s petition. First, he noted that § 2243 does not define “custody,” specify who the person having “custody” will be, speak of an “immediate custodian,” or suggest that an action must be instituted in the location of such an “immediate custodian.”¹⁵³ Second, he found ample justification in the legislative scheme for holding the Attorney General to be a custodian, observing that while the Attorney General had delegated to her subordinates physical custody of petitioner as well as the determination concerning his detention, she was an appropriate respondent in a habeas corpus proceeding because she had the power to direct her subordinates to carry out any order directed to her to produce or release the prisoner. In particular, he pointed to 8 U.S.C. § 1252(c), the statute pursuant to which the action was commenced, as explicitly authorizing the review of the “determination of the Attorney General concerning detention.”¹⁵⁴

Although the court held these grounds alone to be sufficient to distinguish the case from the parole board cases, it based its holding on “extraordinary additional considerations . . . that suggest[ed] that the Attorney General must be deemed to be the appropriate [custodian],” namely a “torrent” of habeas corpus petitions flowing from Oakdale to the District Court for the Western District of Louisiana and the inability of the court to process the petitions in a timely fashion.¹⁵⁵ Under these circumstances, the court found, a transfer of the case to Louisiana might have denied the petitioner any meaningful relief.

152. *Id.* at 174. Interestingly, the same judge had just four months earlier reached the opposite conclusion in *Ilheme v. Reno*, 819 F. Supp. 1192 (E.D.N.Y. 1993), a case involving similar facts. There, Judge Korman transferred the case to the Western District of Louisiana, but made clear his displeasure with having to do so, noting that the policy considerations behind the rule involved the problems inherent in the transportation of prisoners, and that in this case no facts were in dispute and there was thus no need for the petitioner to be present. Stating that he was “disturbed that in the interest of justice” the United States Attorney would not waive the jurisdictional objection, he held that he was nevertheless required to transfer the case. *Id.* at 1196.

153. *Nwankwo*, 828 F. Supp. at 174 (citing *Eisel v. Sec’y of the Army*, 477 F.2d 1251, 1258 (D.C. Cir. 1973)).

154. *Id.* (quoting former 8 U.S.C. § 1252(c) (1988)). Former § 1252(c) directed the Attorney General to effect deportations within six months of the final order, and provided that “[a]ny court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention . . . during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien’s departure from the United States within such six-month period.” This provision was eliminated in 1996. IIRIRA, Pub. L. No. 104-208, div. C, § 306(a)(2), 110 Stat. 3009-546, 607 (1996).

155. *Nwankwo*, 828 F. Supp. at 174. The *Nwankwo* court and others reaching similar conclusions have cited the Fifth Circuit’s description of this “torrent” of petitions in *Emejulu v. INS*, 989 F.2d 771, 772 (5th Cir. 1993). See *Nwankwo*, 828 F. Supp. at 173; *Roman v. Ashcroft*, 162 F. Supp. 2d 755, 762 (N.D. Ohio 2001); *Valdivia v. INS*, 80 F. Supp. 2d 326, 333 (D.N.J. 2000). In *Emejulu*, the court rejected a petitioner’s argument that filing a petition in the Western District of Louisiana did not give him a realistic possibility of relief, but noted the long delays in both

In resting its holding on these circumstances, the court in *Nwankwo* stopped short of advocating abandonment of the immediate custodian rule, noting “compelling reasons of policy why the Attorney General should not normally be regarded as the custodian of a habeas petitioner,”¹⁵⁶ namely the transportation of prisoners that would result.¹⁵⁷ Courts following *Nwankwo* have found or declined to find jurisdiction depending on whether such “special circumstances” are present, otherwise leaving the immediate custodian rule intact.¹⁵⁸ In a recent case, for instance, a New Jersey district court held the Attorney General to be the custodian of an INS detainee who petitioned for habeas corpus while confined to a New Jersey facility but, the day after the court had appointed counsel, was transferred by the INS to Tennessee.¹⁵⁹ Since the petition had been filed while the petitioner was in New Jersey, it fell under *Endo*’s holding that a subsequent transfer does not cause a court to lose jurisdiction. In addition, though, the court went beyond *Endo* to present a lengthy argument about the textual ambiguity of the custodian requirement in the habeas statute and the reasons for recognizing the Attorney General as a custodian.¹⁶⁰ Nevertheless, the decision then recited *Nwankwo*’s “compelling policy reasons why the Attorney General should not normally be deemed a custodian of a habeas petitioner,” and limited its holding to situations where not only was the transfer subsequent to filing the petition, but the petitioner’s presence was not required at a hearing.¹⁶¹

b) *Mojica: The Attorney General is a proper respondent as a general rule*

Over the past few years, another line of cases has emerged, particularly within the Eastern and Southern Districts of New York and the District of Connecticut, rejecting the special circumstances argument and holding the Attorney General to be the custodian of INS detainees as a general rule. In *Mojica v. Reno*,¹⁶² Judge Weinstein of the Eastern District of New York held that the Attorney General was the proper respondent to two habeas petitions challenging

deportations and adjudication of habeas petitions in the district. 989 F.2d at 772 & n.1.

156. *Nwankwo*, 828 F. Supp. at 173–74.

157. *Id.* at 174. Judge Korman noted that this concern was not present in the case before the court, because there was no need for an evidentiary hearing. *Id.* at 174 n.1.

158. *See, e.g., Roman v. Ashcroft*, 162 F. Supp. 2d 755, 761 (N.D. Ohio 2001) (granting petition from Oakdale detainee because “[w]hen the right to petition for habeas corpus would otherwise be denied, the immediate custodian rule must yield”); *Wang v. Reno*, 862 F. Supp. 801, 812–13 (E.D.N.Y. 1994) (petition brought by Chinese asylum applicants detained out of state distinguished from *Nwankwo* because “[p]laintiffs have not provided such compelling reasons here”).

159. *Chavez-Rivas v. Olsen*, 194 F. Supp. 2d 368 (D.N.J. 2002).

160. For instance, the court pointed to the fact that the petition challenged the imposition rather than the execution of the confinement, and thus addressed the actions of the Attorney General and the INS rather than the warden of any particular facility. *Id.* at 374.

161. *Id.* at 376.

162. 970 F. Supp. 130 (E.D.N.Y. 1997), *aff’d in part, dismissed in part, question certified sub nom. Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998).

the retroactive application of AEDPA. The petitioners, one detained at Oakdale and the other free on bond, were long-time New York City residents seeking to be considered for discretionary relief from deportation.¹⁶³

As in *Nwanwko*, the court noted that the habeas statute says nothing suggesting that the respondent must be the immediate custodian.¹⁶⁴ The court distinguished *Billiteri* on the ground that “the warden of a prison is not a delegate or agent of the Parole Board, whereas a District Director of the INS acts only pursuant to powers delegated by the Attorney General.”¹⁶⁵ Unlike *Nwanwko*, however, the court in *Mojica* did not limit its holding to special circumstances.¹⁶⁶ Rather, it held the Attorney General to be the custodian of an INS detainee as a general rule, and then proceeded to analyze venue. Noting that the habeas statute itself does not contain a venue provision applicable to such a case, the court relied on *Braden* for the proposition that traditional venue considerations should be applied, including the location where the material events took place, where records and witnesses pertinent to the claim were likely to be found, the convenience of the forum for respondent and petitioner, and the familiarity of the court with the applicable laws.¹⁶⁷ Applying these factors to the petitioner detained in Louisiana,¹⁶⁸ the court found that the witnesses and evidence necessary to establish eligibility for discretionary relief were located in New York, that the petitioner would be disadvantaged by a transfer of the proceedings to Louisiana because his attorney was located in New York and had expended extensive efforts on this matter in the Eastern District, and that as a resident of the Second Circuit for many years, he should have the case decided under Second Circuit law. On the other side of the equation, the court found that the government would not be prejudiced by having to litigate in New York, since it was well represented there.¹⁶⁹

Mojica was consolidated on appeal with several other cases, and the Second Circuit declined to rule on the Attorney General question, instead certifying to the New York Court of Appeals a related question raised by the cases regarding the district court’s jurisdiction under the New York long-arm statute over the INS Louisiana District Director.¹⁷⁰ Calling the Attorney General question “a

163. 970 F. Supp. at 136, 140, 142.

164. *Id.* at 166.

165. *Id.* at 167.

166. While the court noted that “there is also a possibility of a backlog of habeas petitions in Louisiana,” *id.* at 168, this observation reads as an afterthought rather than as the animating principle of the decision.

167. *Id.*

168. Jurisdiction and venue were not in dispute for the petitioner who was free on bond. *Id.* at 165.

169. *Id.* at 168.

170. *Henderson v. INS*, 157 F.3d 106, 124 (2d Cir. 1998). The New York Court of Appeals ultimately declined to answer the question, *Yesil v. Reno*, 705 N.E.2d 655 (N.Y. 1998), and the Supreme Court denied the government’s petition for certiorari in *Henderson*, *Reno v. Navas*, 526 U.S. 1004 (1999). The Second Circuit then requested additional briefs from the parties on the

highly complex issue that we ought not decide unnecessarily,”¹⁷¹ the court nevertheless devoted several pages of the decision to discussing the arguments on both sides. The court noted that “the extraordinary and pervasive role that the Attorney General plays in immigration matters is virtually unique,” that the Attorney General is in complete charge of the proceeding leading up an alien’s removal order, and that the Attorney General has complete discretion to decide whether or not removal shall be directed.¹⁷² Pointing to the dicta in *Billiteri* suggesting that the parole board might be deemed the custodian where it had itself caused the petitioner to be detained, the court analogized to the Attorney General, who “by her own decision” caused the petitioners to be detained.¹⁷³ Although the court echoed the concerns of the *Nwankwo* court regarding the overloaded docket in the Western District of Louisiana, it did not raise the possibility of adopting a special circumstances rule.

On the other side, the *Henderson* court cited two reasons not to recognize the Attorney General as custodian: first, that recognition in this instance could lead to claims that the Attorney General should be considered the custodian in all cases involving federal prisoners; and second, that *Billiteri* appears to bar the designation of a higher authority as a custodian when a habeas petitioner is under someone else’s day-to-day control.¹⁷⁴ The court also acknowledged the government’s argument that allowing detainees to name the Attorney General as respondent could result in forum shopping by petitioners, but suggested that this concern might be overstated in light of the venue considerations that would be employed under *Braden*.¹⁷⁵

Although the *Henderson* decision purported to present “powerful arguments on each side,”¹⁷⁶ subsequent district court decisions within the Second Circuit suggest that the court’s arguments for recognition of the Attorney General as custodian came across more powerfully than the arguments against. In a series of subsequent cases, district court judges within the Second Circuit, citing

point of personal jurisdiction, but the parties settled prior to submitting briefs, and the Second Circuit granted their joint motion to withdraw the appeal, leaving the question unsettled. *Arias-Agramonte v. Comm’r of INS*, No. 00CIV2412, 2000 WL 1059678, at *8 (S.D.N.Y. 2000).

171. *Henderson*, 157 F.3d at 124.

172. *Id.* at 126 (quoting *Ahrens v. Clark*, 335 U.S. 188, 199 (1998) (Rutledge, J., dissenting)).

173. *Id.* at 126 n.22 (citing *Billiteri v. United States Bd. of Parole*, 541 F.2d 938, 948 (2d Cir. 1976)). In noting the Attorney General’s “own decision,” the court was referring to the Attorney General’s intervention in the *Soriano* litigation at issue in the case. In *In re Soriano*, 21 I. & N. Dec. 516 (BIA 1996), the Board of Immigration Appeals (BIA) ruled that AEDPA’s bar on discretionary relief should not apply retroactively to those who had petitioned for such relief before AEDPA’s effective date. 21 I. & N. Dec. at 519–20. The Attorney General reversed the BIA and issued an opinion concluding that AEDPA should be applied retroactively to all pending cases. 21 I. & N. Dec. 533 (Op. Att’y Gen. 1997). The case is discussed further *infra* note 197.

174. *Henderson*, 157 F.3d at 126–27.

175. *Id.* at 127–28.

176. *Id.* at 128.

Henderson and *Mojica*, have for the most part held the Attorney General to be the petitioner's custodian.¹⁷⁷

IV.

SHOULD THE IMMEDIATE CUSTODIAN RULE BE APPLIED IN IMMIGRATION-RELATED HABEAS ACTIONS?

In the preceding discussion I have sought to map out two very different approaches to determining the proper respondent to a habeas action: a formal "immediate custodian" rule and a more flexible approach that looks to venue considerations as long as at least one appropriate respondent is within the court's jurisdiction. This split runs through all of the types of cases that remain under § 2241. Among immigration cases, there is a further split, between a narrow "special circumstances" exception to the immediate custodian rule and a genuine rejection of the rule.

Building on this discussion of the different approaches courts have used, I now turn to a more detailed examination of the most comprehensive defense of the immediate custodian rule's relevance in the immigration context, that presented by the First Circuit in *Vasquez v. Reno*.¹⁷⁸ Responding to the First Circuit's arguments one by one, the following section argues that neither the case law, nor the habeas statute, nor the frequently cited set of policy concerns requires the application of the immediate custodian rule in the immigration context.

A. The immediate custodian rule reconsidered

The *Vasquez* decision is premised on what the court calls the "solid wall of authority" outside of immigration cases holding that the petitioner's custodian is generally the warden of the facility in which the petitioner is confined.¹⁷⁹ However, a closer look at the case law calls this authority into question.

177. See *Martinez-Rymer v. Ashcroft*, No. 98 Civ. 5375, 2001 U.S. Dist. LEXIS 20653, at *14-*15 (S.D.N.Y. Nov. 26, 2001); *Cinquemani v. Ashcroft*, No. 00-CV-1460, 2001 U.S. Dist. LEXIS 12163, at *7-*8 (E.D.N.Y. Aug. 16, 2001); *Barton v. Ashcroft*, 152 F. Supp. 2d 235, 239-40 (D. Conn. 2001); *Halley v. Reno*, No. 99-CV-4710, 2001 WL 184571, at *2 (E.D.N.Y. Feb. 21, 2001); *Alcaide-Zelaya v. McElroy*, Nos. 99 Civ. 5102, 99 Civ. 9999, 2000 WL 1616981, at *4 (S.D.N.Y. Oct. 27, 2000); *Pena-Rosario v. Reno*, 83 F. Supp. 2d 349, 362 (E.D.N.Y. 2000); *Pottinger v. Reno*, 51 F. Supp. 2d 349, 356-57 (E.D.N.Y. 1999). See also *Barnaby v. Reno*, 127 F. Supp. 2d 322, 324-25 (D. Conn. 2001) (holding that venue was proper without addressing whether the Attorney General was a proper respondent); *Arias-Agramonte v. Comm'r of INS*, No. 00 CIV 2412, 2000 WL 1059678, at *5 (S.D.N.Y. Aug. 1, 2000) (finding jurisdiction over INS Commissioner under same reasoning applied to Attorney General in *Mojica* and *Henderson*); *Santos-Gonzalez v. Reno*, 93 F. Supp. 2d 286, 292 (E.D.N.Y. 2000) (not reaching the question whether the Attorney General was properly named as respondent but citing *Henderson* and noting favorably the broadening of the concept of custody). But see *Guerrero-Musla v. Reno*, No. 98 Civ. 2779, 1998 U.S. Dist. LEXIS 7844, at *1 (S.D.N.Y. May 27, 1998).

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

179. *Id.* at 691.

As the *Vasquez* court itself notes, the Supreme Court has never articulated the immediate custodian rule as such.¹⁸⁰ *Wales v. Whitney*, often cited as the origin of the rule, is arguably not about the custodian issue at all. The key sentence in *Wales* is: “All these provisions [of the habeas statute] contemplate a proceeding against some person who has the *immediate custody* of the person detained.”¹⁸¹ Yet the facts of *Wales* and the context of the sentence reveal that the immediacy in question in *Wales* is temporal, and related to the nature of the custody, rather than physical or related to the custodian. The petitioner in *Wales* was a Navy surgeon ordered by the Secretary of the Navy to remain in Washington, D.C. The Court’s principal concern was that a petitioner free to walk the streets was not sufficiently “in custody” for habeas corpus purposes.¹⁸² In essence, the *Wales* Court decided the case on ripeness grounds:

And though it is said that a file of marines or some proper officer could have been sent to arrest, and bring him back, this could only be done by another order of the secretary, and would be another arrest, and a real imprisonment under another and distinct order. Here would be a real restraint of liberty, quite different from the first. The fear of this latter proceeding, which may or may not keep Dr. Wales within the limits of the city, is a moral restraint which concerns his own convenience, and in regard to which he exercises his own will.¹⁸³

The Court never addressed the question of the identity of the respondent and nowhere suggested that naming the Secretary of the Navy would be improper if the order itself constituted custody.

As discussed above in Part III, the Court has hinted at a departure from the immediate custodian rule in a number of cases. Although *Schlanger v. Seamans* could be interpreted as reaffirming the immediate custodian rule, the following year the Court clarified in *Strait v. Laird* that had *Schlanger* had *some* measure of contact with the military in Arizona, that would have sufficed.¹⁸⁴ The holding of *Schlanger*, in this light, is not about a particular, nominal custodian (the commanding officer) who must be within the district, but about the court having jurisdiction over *someone* in the chain of command. In *Ex Parte Endo*, the Court looked only for an “appropriate respondent,” rather than an “immediate custodian,” within the district court’s jurisdiction, and did not hesitate to accept the Secretary of the Interior and officials of the War Relocation Authority as

180. *Id.* at 690–91 (noting that *Braden* provided limited guidance on the custodian question and that other Supreme Court precedents are “equally inscrutable on this point”).

181. *Wales v. Whitney*, 114 U.S. 564, 574 (1885) (emphasis added).

182. *Id.* at 572 (“If Dr. Wales had chosen to disobey this order, he had nothing to do but take the next or any subsequent train from the city and leave it. There was no one at hand to hinder him.”).

183. *Id.*

184. See *supra* notes 111–18 and accompanying text.

possible respondents.¹⁸⁵ In *Jones v. Cunningham*, the Court reaffirmed this aspect of *Endo* in finding the state parole board to be an “appropriate” respondent.¹⁸⁶

Thus, the Supreme Court authority for the immediate custodian rule is dubious at best. In cases such as *Strait*, *Endo*, and *Jones*, the Court has opted for a pragmatic approach rather than choosing to adopt an inflexible rule. And while there are indeed a number of appeals court decisions, such as *Sanders*, *Billiteri*, and *Guerra*, that have found the immediate custodian rule to make sense in particular situations,¹⁸⁷ others such as *Eisel*, *Lee*, and *Dunn* have reached the opposite conclusion.¹⁸⁸

B. Statutory construction

The *Vasquez* decision presents two statutory arguments. One is that the habeas statute’s provision that the respondent is “required to produce at the hearing the body of the person detained” indicates that it is the immediate custodian who should be named.¹⁸⁹ The other is that the language of the statute indicates that the petitioner must name a single respondent rather than multiple respondents.¹⁹⁰

1. Producing the body

At the root of the immediate custodian discussion in *Vasquez* and other cases is the argument that the warden is the proper respondent because the warden is best able to comply with 28 U.S.C. § 2243’s requirement to “produce at the hearing the body of the person detained.”¹⁹¹ The emphasis on physical control over the body of the petitioner derives from the name of the writ (Latin for “that you have the body”) and can be traced back hundreds of years.¹⁹² In *Braden*, the Supreme Court relied on nineteenth-century cases that refer to the writ being directed to the “jailer.”¹⁹³ But *Braden* can just as easily be read to

185. See *supra* notes 107–10 and accompanying text.

186. 371 U.S. 236, 243–44 (1963).

187. See *supra* notes 82–91 and accompanying text.

188. See *supra* notes 121–136 and accompanying text.

189. *Vasquez v. Reno*, 233 F.3d 688, 693 (1st Cir. 2000) (citing 28 U.S.C. § 2243 (1994)).

190. *Id.* (citing § 2243).

191. *Id.* (citing § 2243).

192. See R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 175 n.55 (1989) (citing 1586 English authority for the proposition that “[t]he habeas corpus shall be always directed to him who hath custody of the body”).

193. *Braden* cited *Wales* and quoted the “classic statement” of an 1867 case, *Matter of Jackson*:

The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint.

stand for the opposite proposition—there was nothing “immediate” about the 30th Judicial Circuit Court of Kentucky’s custody over Braden, who was sitting in an Alabama prison. *Braden* makes clear that physical custody of the petitioner was not a requirement for being named as respondent. For the *Braden* Court, the determining factor was not whether the Kentucky court could “produce the body” (which would arguably have been quite difficult without the aid of the Alabama warden). Rather, the *Braden* Court was concerned with the Kentucky court’s ability to free the petitioner from the constraint at issue, which was a form of legal rather than physical restraint. In this light, *Braden*’s citation to the older cases about the “jailer” must be read as merely metaphorical.¹⁹⁴

Nowhere is the connection between a warden and an inmate more tenuous than in the immigration context, where the majority of detainees are held in local facilities under contract to the INS.¹⁹⁵ Under the current structure of the INS,¹⁹⁶

Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484, 495 (1973) (quoting *Matter of Jackson*, 15 Mich. 417, 439–40 (1867)).

194. Even in run-of-the-mill prisoner cases, the “immediacy” of the custodian is somewhat of a legal fiction. The warden does not personally “produce the body.” In *Roman v. Ashcroft*, 162 F. Supp. 2d 755, 760 (N.D. Ohio 2001), the court noted:

Despite the large number of § 2255 motions filed, and despite the fact that the United States, rather than the warden of the federal prison, is named in the motion, the government is able to produce movants in court when required. Indeed, it seems that it is the responsibility of the marshal rather than the warden of the prison to bring federal prisoners into court when required by court order.

195. See Lori Montgomery, “Rural Jails Profiting from INS Detainees,” WASH. POST, Nov. 24, 2000, at A1 (INS uses more than a third of its detention budget to rent cells in about 225 jails—most of them in rural counties); Sullivan, *supra* note 6 (over half of INS detainees nationwide are held in local facilities, typically county jails).

196. The following information relates to the INS as it existed prior to March 1, 2003. The role of the INS Commissioner is laid out in 8 C.F.R. § 2.1(a) (2002):

Without divesting the Attorney General of any of his powers, privileges, or duties under the immigration and naturalization laws, and except as to the Executive Office, the Board, the Office of the Chief Special Inquiry Officer, and Special Inquiry Officers, there is delegated to the Commissioner the authority of the Attorney General to direct the administration of the Service and to enforce the Act and all other laws relating to the immigration and naturalization of aliens. The Commissioner may issue regulations as deemed necessary or appropriate for the exercise of any authority delegated to him by the Attorney General, and may redelegate any such authority to any other officer or employee of the Service.

8 C.F.R. § 100.2 (2002) in turn sets out the structure of the INS: The district directors are subject to the general supervision of the regional directors, who are themselves supervised by the Executive Associate Commissioner for Field Operations. Next up the chain of command is the Deputy Commissioner of the INS, and finally the INS Commissioner. Immigration Court—housed within the Executive Office for Immigration Review—is a separate entity from the INS, under the Attorney General’s control. IRA KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 721 (8th ed. 2002).

As of March 1, 2003, the INS will cease to exist and will be replaced by a new administrative structure within the Department of Homeland Security (DHS). See *supra* note 3. Under an organizational plan announced by DHS on January 30, 2003, immigration enforcement is to fall under the Bureau of Immigration and Customs Enforcement (BICE), to be headed by an Assistant Secretary who will report directly to the Under Secretary for Border and Transportation Security.

the Attorney General, INS Commissioner, and district directors all arguably qualify under the *Jones* definition of an appropriate respondent: one who “can be required to do all things necessary to bring the case to a final adjudication.”¹⁹⁷ The warden, however, would appear to be uniquely *un*-qualified under this definition. The INS, perhaps in recognition of this oddity, has generally argued that the local INS district director, rather than the warden, should be deemed the immediate custodian.¹⁹⁸

The government’s position, however, suffers from considerable inconsistency. At times, the government has argued that courts should recognize the

See Administration Seeks Merger of Border Functions in DHS Reorganization, 80 INTERPRETER RELEASES 149 (2003). Thus far, the district office structure that has existed under the INS remains unchanged. The Executive Office of Immigration Review (EOIR), which includes Immigration Court and the Board of Immigration Appeals, remains within the Department of Justice under the authority of the Attorney General. Homeland Security Act, Title XI, Subtitle A, § 1102, 116 Stat. 2135, 2273 (2002).

197. *Jones v. Cunningham*, 371 U.S. 236, 244 (1963). Immigration enforcement authority will transfer from the Department of Justice to the Department of Homeland Security on March 1, 2003. *See supra* notes 3 and 196. As it stands now, prior to that transfer of authority, the Department of Justice plays an unusually large role in making immigration policy. As one commentator has described it:

[P]olicy development and litigation strategy intertwine to an unusual degree in the immigration context for two reasons. First, the Department of Justice “owns” immigration policy and exercises supervisory authority over the INS and [EOIR]. These agencies must solicit input and secure approval from various DOJ components before they act. Control over immigration policy and the litigation defending it converges at the upper echelons of the Department, where the Attorney General or his top aides can command or veto a particular course of action for INS or EOIR. More routinely, in contrast to the usual separation function between DOJ litigators and their agency clients, attorneys throughout DOJ have many more opportunities to shape the development of immigration policy . . . because habeas corpus jurisdiction . . . brings DOJ litigators to the table early on and enlarges their role.

Margaret Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 273–74 (2002). One example of this peculiar combination of litigation and policy-making in the immigration arena can be seen in the Attorney General’s intervention in litigation regarding the retroactive application of AEDPA. The Board of Immigration Appeals held in *In re Soriano* that AEDPA § 440(d), which eliminated discretionary relief from removal for most criminal offenders, did not apply to cases where an individual had already petitioned for relief and was awaiting a final administrative ruling at the time that Congress enacted AEDPA. *In re Soriano*, 21 I. & N. Dec. 516, 519–20 (BIA 1996). The INS Commissioner then referred the decision to the Attorney General for review, at which point “[t]he Attorney General interceded to vacate a rare en banc decision of the BIA . . . to clear the way for the INS to assert a contrary interpretation before the Supreme Court [in another case regarding discretionary relief].” Taylor, *supra*, at 288. The Attorney General later issued her own decision holding that § 440(d) applied to all pending cases. *In re Soriano*, 21 I. & N. Dec. 516, 534 (Op. Att’y Gen. Feb. 21, 1997). The “all pending cases” interpretation was ultimately rejected by the Supreme Court in *INS v. St. Cyr*, 533 U.S. 289, 323–26 (2001). For the full story of DOJ’s involvement in policy-making and litigation regarding AEDPA retroactivity, see Taylor, *supra*, at 280–95. *See also* *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997) (describing the Attorney General’s decision in *Soriano* as *ipse dixit* and unsupported by relevant authority).

198. *See, e.g., Roman v. Ashcroft*, 162 F. Supp. 2d 755, 758 (N.D. Ohio 2001); *Mojica v. Reno*, 970 F. Supp. 130, 165–66 (E.D.N.Y. 1997).

warden as the proper respondent.¹⁹⁹ On at least one occasion, the government has changed its position midway through a case, first identifying the warden as custodian and later the district director.²⁰⁰ In cases where the forum is not in question—i.e., where the petitioner has filed in the district of confinement—the government has raised no objection to the Attorney General, the INS, or the INS Commissioner being named. (Indeed, some of the most important recent immigration cases reflect this fact, for example *INS v. St. Cyr*²⁰¹ and *Ma v. Reno*.²⁰²) The Attorney General has even gone so far as to enter an appearance when *not* named as a respondent. In *Sivongxay v. Reno*, a challenge to INS's indefinite detention policy, the court noted that “Sivongxay’s amended petition named the INS as the sole respondent, but the Attorney General and the INS District Director are proper respondents in this action, and they have appeared through counsel and have filed briefs in opposition to the petition.”²⁰³ Regardless of who is named as respondent, the United States Attorney traditionally appears. This fact, coupled with the government’s failure to object when venue is not disputed, calls into question the legitimacy of any concern regarding who is best able to produce the body.

2. *Multiple respondents or just one?*

The *Vasquez* court, in arguing for the immediate custodian rule, cites the language of the habeas statute as authorizing the naming of only one respondent: “The writ . . . shall be directed to *the person* having custody of the person detained.”²⁰⁴ Yet petitioners commonly name multiple respondents to habeas petitions. In some cases, courts have explicitly acknowledged the petitioner’s ability to bring cases against “a” custodian, or have mentioned multiple possibilities and forums.²⁰⁵ As one court has noted, “In a linguistically similar legal

199. *Valdivia v. INS*, 80 F. Supp. 2d 326, 332–33 (D.N.J. 2000); *Wang v. Reno*, 862 F. Supp. 801, 812 (E.D.N.Y. 1994).

200. *Seretse-Khama v. Ashcroft*, No. Civ. A. 020955JDB, 2002 WL 1711751 (D.D.C. July 22, 2002).

201. 533 U.S. 289 (2001).

202. 208 F.3d 815 (9th Cir. 2000), *vacated and remanded sub nom. Zadvydys v. Davis*, 533 U.S. 678, *amended by Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001).

203. 56 F. Supp. 2d 1167, 1167 (W.D. Wash. 1999). The government’s inconsistency can also be seen outside the immigration context. *See* note 144, *supra*.

204. *Vasquez v. Reno*, 233 F.3d 688, 693 (1st Cir. 2000) (quoting 28 U.S.C. § 2243) (alteration in original).

205. *See, e.g., Ex Parte Endo*, 323 U.S. 283, 306 (1944) (“[T]he court may act if there is a respondent within reach of its process who has custody of the petitioner.”) (emphasis added); *Lee v. United States*, 501 F.2d 494, 501 (8th Cir. 1974) (holding both warden and parole board to be custodians); *Sivongxay*, 56 F. Supp. 2d at 1167 (noting that INS, Attorney General, and INS district director are all proper respondents, although only the INS was named in the petition). In one of the more unusual examples of a court struggling with the question of multiple custodians, the Fifth Circuit in *Mounce v. Knighten*, 503 F.2d 967 (5th Cir. 1974), confronted the puzzle of a petitioner who spent weekends at a Texas state prison located in the Southern District of Texas but spent each week from 6:30 a.m. on Monday until 2:00 p.m. on Thursday constructing a railroad in

context, the phrase 'the custodial parent' has often been interpreted to describe either of two (or even more) parents who share custody."²⁰⁶

The custodian-jurisdiction question might be answered with regard to multiple respondents in three ways. The first possibility, as the *Vasquez* court concludes, is that only one respondent may be recognized by the court. This proposition is difficult to maintain in the face of cases such as *Endo*, *Jones*, and *Schlanger*, in which the Supreme Court has considered multiple custodians without any apparent concern.

The second possible answer is that multiple respondents are permitted, so long as the immediate custodian is within the court's jurisdiction. Under such a system, the immediate custodian rule would function essentially as a proxy for limiting jurisdiction to the district of confinement (since the immediate custodian, if defined as the warden, will almost always be located in the district where the petitioner is confined). This holding, however, was explicitly rejected by the Court in *Braden*, where the absence of the Alabama warden from the district was not fatal to the claim.

The third possibility is that multiple respondents are permitted, and the court may hear the petition so long as at least one of the respondents is within the court's jurisdiction. This is the only answer that is easily reconciled with the results of *Endo* and *Jones*, where the Court looked only for "an appropriate respondent" within the district.

A further perspective on the statutory language is provided by looking at the rules following 28 U.S.C. § 2254, the section governing habeas petitions by state prisoners.²⁰⁷ Rule 2(a) states that a petitioner presently in custody shall name as respondent "the state officer having custody of the applicant,"²⁰⁸ which, the Advisory Committee Note explains, is in the usual case "either the warden of the institution in which the petitioner is incarcerated or the chief officer in charge of state penal institutions."²⁰⁹ Rule 2(b), which applies to applicants subject to future custody (for example, someone subject to an interstate detainer, as in *Braden*), directs the petitioner to name two respondents: "the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered."²¹⁰ The Advisory Committee

the Eastern District of Texas. The court of appeals remanded the case to the district court for a determination whether the Monday-Thursday or Thursday-Sunday custodian should be named. 503 F.3d at 969. The court noted that one possibility was that both could be identified as custodians for habeas purposes, while another possibility was that the named respondent was an agent of the proper respondent, allowing the district court to exercise jurisdiction over the principal. *Id.*

206. *Chavez-Rivas v. Olsen*, 194 F. Supp. 2d 368, 375 (D.N.J. 2002) (citing eleven cases).

207. Rules Governing Section 2254 Cases in the United States District Courts, following 28 U.S.C. § 2254 (2000). See also Act of Sept. 28, 1976, Pub. L. No. 94-426, § 1, 90 Stat. 1334, 1334 (adopting rules as amended).

208. R. 2(a).

209. Advisory Committee Note to R. 2(a) (citation omitted) (emphasis added).

210. R. 2(b).

Note explains that “this is appropriate because no one will have custody of the petitioner in the state of the judgment being attacked, and the habeas corpus action will usually be defended by the [state] attorney general.”²¹¹ The Note then goes on to explain which respondents should be named in various situations that may arise; for example, if the applicant is on parole or probation, the named respondents shall be the particular officer responsible for supervising the applicant, and the official in charge of the parole or probation agency, or the state correctional agency, as appropriate. It concludes by saying that the judge may “require or allow the petitioner to join an *additional* or *different* party as a respondent if to do so would serve the ends of justice.”²¹²

Although § 2254 governs habeas petitions by individuals in state custody, and the rules are thus not determinative in federal habeas actions, the Advisory Committee Note states that the rules are patterned after the provisions relating to § 2241 claims,²¹³ suggesting that they might shed some light on the federal habeas statute’s meaning. Furthermore, Rule 1(b) provides that the rules may be applied, at the discretion of the district court, in challenges to federal custody as well as in the challenges to state custody to which they directly pertain.²¹⁴

C. *What makes sense in the immigration context?*

If multiple respondents are permitted, and if the only requirement is that at least one appropriate respondent be within the court’s jurisdiction, the immediate custodian rule is difficult to sustain in any context. Even if the rule *is* good law in the circumstances in which it has arisen, another question remains: must it be imported into the immigration context? To use the terms of the *Vasquez* decision, is there a “principled distinction”²¹⁵ between immigration and criminal habeas cases?

The parole board cases, which are the cases most often cited in immigration cases for the authority of the immediate custodian rule, reject the parole board as the custodian in the cases before the court, but leave open the possibility of finding the parole board to be the custodian under other circumstances, such as “when the Board itself has caused a parolee to be detained.”²¹⁶ In *Henderson*, the Second Circuit suggested that the immigration cases before it were “more than analogous [to the possible exception identified in *Billiteri*], for the Attorney General certainly and by her own decision ‘caused [the aliens] to be detained.’”²¹⁷

211. Advisory Committee Note to R. 2(b).

212. *Id.* (emphasis added).

213. *Id.*

214. R. 1(b).

215. *Vasquez v. Reno*, 233 F.3d 688, 696 (1st Cir. 2000).

216. *Billiteri v. United States Bd. of Parole*, 541 F.2d 938, 948 (2d Cir. 1976).

217. *Henderson v. INS*, 157 F.3d 106, 126 n.22 (2d Cir. 1998) (quoting *Billiteri*, 541 F.2d at 948).

The *Ahrens* dissent itself raised the question of the immediate custodian rule's relevance to immigration cases. In considering the Attorney General, Justice Rutledge argued that "[i]n view of his all-pervasive control over their fortunes, it cannot be doubted that he is a proper party to resist 'an inquiry into the cause of restraint of liberty' in their cases."²¹⁸ The *Ahrens* majority declined to respond to this assertion, a silence that the D.C. Circuit has deemed significant, particularly since the easiest way for the *Ahrens* majority to have affirmed the lower court's dismissal would have been to invoke the immediate custodian rule.²¹⁹ (The *Ahrens* petitioners, held at Ellis Island, were presumably in the immediate custody of someone in New York.)

Jones v. Cunningham, in which the Supreme Court allowed a state parolee to name parole board members as respondents, at first glance seems analogous to immigration habeas actions brought by people who are *not* in detention²²⁰—like the petitioner in *Jones*, they are on parole, with no warden to name. What distinguishes immigration cases from prisoner cases, though, is that no clear line separates those in INS detention from those who are paroled or out on bond. INS detainees are not serving a sentence that in the future will be subject to the discretion of the Attorney General; they are subject to the Attorney General's discretion from the moment they are taken into custody.²²¹ Noting this fact, the *Henderson* court concluded that "the extraordinary and pervasive role that the Attorney General plays in immigration matters is virtually unique."²²²

Ample statutory language demonstrates the Attorney General's control over INS detainees. In holding that the Attorney General was the proper respondent, the Northern District of Ohio cited language in INA § 236(c) directing the Attorney General to "take into custody any alien" who is deportable for one of several enumerated reasons.²²³ Similar inferences can be drawn from other

218. *Ahrens v. Clark*, 335 U.S. 188, 200 (1948) (Rutledge, J., dissenting) (quoting former 28 U.S.C. § 452 (repealed 1948)).

219. See *Eisel v. Sec'y of the Army*, 477 F.2d 1251, 1259 n.18 (1973).

220. Anyone with a final order of removal, whether or not in the physical custody of the INS, is considered sufficiently "in custody" to petition for habeas corpus. See *United States v. Jung Ah Lee*, 124 U.S. 621, 626 (1888); HERTZ & LIEBMAN, *supra* note 2, § 42.2, at 1777.

221. Authority over detention will transfer to the Department of Homeland Security on March 1, 2003. See *supra* note 3. Although it is too soon to tell whether substantive changes in detention practices will follow, there is no indication at this time that DHS discretion over immigration-related detention will be narrower than the discretion previously exercised by the Attorney General.

222. *Henderson*, 157 F.3d at 126.

223. *Roman v. Ashcroft*, 162 F. Supp. 2d 755, 763 (2001) (quoting INA § 236(c)(1), 8 U.S.C. § 1226(c)(1) (2000)). Section 236(c) also says:

The Attorney General may release an alien [described above] only if the Attorney General decides . . . that the release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity; or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

sections of the INA, for instance INA § 241, which governs detention and removal of those ordered removed. That section charges that the Attorney General “shall remove” an alien within ninety days²²⁴ and “shall detain” the alien pending removal,²²⁵ provides that any alien who cannot be removed within the ninety-day window “shall be subject to supervision under regulations prescribed by the Attorney General;”²²⁶ gives the Attorney General discretion to employ someone to accompany and care for an alien whom the Attorney General believes to be in need of help because of physical or mental impairment;²²⁷ and requires the Attorney General to “arrange for appropriate places of detention” for those detained pending removal or removal proceedings.²²⁸

Finally, and perhaps most importantly, the statutory scheme specifically contemplates the Attorney General as the respondent in actions seeking judicial review of immigration matters. INA § 242 provides that final orders of removal may be reviewed in the courts of appeals and that “[t]he respondent is the Attorney General.”²²⁹ Although AEDPA and IIRIRA bar most removal orders from review under this provision (which is why most challenges are brought as habeas corpus petitions under 28 U.S.C. § 2241), there is no apparent reason why this distinction should affect who may be considered the appropriate respondent to a § 2241 habeas action.

D. Policy concerns

The immediate custodian rule has been defended as “a practical one based on common sense administration of justice.”²³⁰ Departing momentarily from the specifics of the *Vasquez* decision, this section considers the range of policy concerns that courts have expressed over the years in cases concerning the immediate custodian rule. These concerns include the transportation of detainees, opening the floodgates to federal habeas petitions, forum shopping, and the separation of powers. This section considers each of these concerns in turn.

INA § 236(c)(2), 8 U.S.C. § 1226(c)(2).

224. INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A) (2000).

225. INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) (2000).

226. INA § 241(a)(3), 8 U.S.C. § 1231(a)(3) (2000).

227. INA § 241(f)(1), 8 U.S.C. § 1231(f)(1) (2000).

228. INA § 241(g)(1), 8 U.S.C. § 1231(g)(1) (2000).

229. INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A) (2000). Prior to 1996, this provision directed that “the action shall be brought against the Immigration and Naturalization Service, as respondent” and that “[s]ervice of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located.” Former INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3) (1994), *repealed by* IIRIRA, Pub. L. No. 104-208, div. C, § 306(b), 110 Stat. 3009-546, 3009-612 (1996).

230. *Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945).

1. *Transportation of detainees*

The possibility that a court distant from the place of confinement could have jurisdiction over a habeas petition presents potential costs and administrative difficulties for the INS.²³¹ However, there is reason to question the weight that this concern should be accorded. In 1943, the Judicial Conference Committee on Habeas Corpus Procedure recommended that federal prisoners be allowed to bring collateral attacks in the sentencing court. In a statement submitted to Congress, the Committee explained:

The main disadvantages of the motion remedy are as follows: The risk during or the expense of transporting the prisoner to the District where he was convicted; and the incentive to file baseless motions in order to have a 'joy ride' away from the prison at Government expense.

Balancing these, as well as less important, considerations, the Conference is of the opinion that the advantages outweigh and that the motion remedy is preferable.²³²

By enacting § 2255 in 1948 and amending the state habeas statute in 1966,²³³ Congress has shown its agreement with this conclusion, providing for jurisdiction in the sentencing court for state and federal prisoners challenging the legality of their sentences. If transportation does not present a problem in adjudicating such claims (where the vast majority of collateral challenges lie²³⁴), it should likewise prove unproblematic in the immigration context, particularly given the frequency with which the INS transfers detainees back and forth across the country. As one court has observed, only a "vanishingly small category of [habeas] cases" require the presence of the petitioner,²³⁵ raising doubt about how great a cost or inconvenience the transportation of detainees would really represent.

2. *Opening the floodgates*

The Third Circuit²³⁶ and D.C. Circuit²³⁷ have raised the concern that if the Attorney General is recognized as a respondent in, respectively, immigration or

231. These difficulties would presumably be much less significant if the INS did not pursue a policy of transferring detainees around the country. *See supra* note 6 (discussing frequency with which INS moves prisoners among facilities).

232. Statement submitted to Congress on behalf of the Judicial Conference Committee on Habeas Corpus Procedure, *quoted in* *United States v. Hayman*, 342 U.S. 205, 217 n.25 (1952) (emphasis added).

233. *See supra* notes 58–64 and accompanying text.

234. *See* HERTZ & LIEBMAN, *supra* note 2, § 41.2b at 1713–14 (discussing breadth of § 2255 and narrowness of claims remaining under § 2241).

235. *Roman v. Ashcroft*, 162 F. Supp. 2d 755, 760 (N.D. Ohio 2001) (noting that fewer than two percent of all habeas corpus filings result in an evidentiary hearing).

236. *Yi v. Maugans*, 24 F.3d 500, 507 (3d Cir. 1994).

237. *Guerra v. Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986).

parole board cases, the door will be open for every federal prisoner in the country to bring habeas petitions against the Attorney General.²³⁸ Once again, however, the existence of § 2255 (which contains its own venue provisions and designates the United States as respondent) casts doubt on the weight of this concern. With only narrow exceptions, federal prisoners who wish to challenge the legality of their sentences must file motions under § 2255 rather than habeas petitions.²³⁹ Such cases greatly outnumber the habeas claims that are brought under § 2241.²⁴⁰ It thus appears alarmist to suggest that recognition of the Attorney General in the immigration context will bring a flood of cases from federal prisoners. Even if there were a numerical basis for this fear, immigration-related claims are sufficiently distinguishable from prisoner claims to avoid any automatic extension of an immigration-based rule into other realms.

3. *Forum-shopping*

Another policy concern is forum-shopping. If an INS detainee may name the Attorney General as respondent, then a petitioner may in theory bring a petition in any district she chooses. Yet such a petition is unlikely to be adjudicated in a forum with which the petitioner is entirely unconnected. The fact that jurisdiction would exist does not prevent the court from transferring the case under 28 U.S.C. § 1404.²⁴¹ In *Reese v. United States Board of Parole*,²⁴² for example, the D.C. Circuit found the Parole Board to be the custodian of the petitioner, since it had issued the warrant-detainer that he was challenging. However, since the petitioner was incarcerated in Arizona and since the court found no compelling reason for considering the petition in the District of Columbia, the court remanded the case to the district court with orders to transfer the case to the District of Arizona.²⁴³

*Mojica v. Reno*²⁴⁴ makes clear that jurisdiction is just the bare minimum required to establish a proper forum. The real question is whether the forum makes sense under a venue analysis. The cases in which district courts have chosen to hear petitions from detainees held elsewhere have been cases in which the petitioners have compelling reasons to seek the particular forum—such as

238. This concern would appear to be moot if, in light of the transfer of custody to the Department of Homeland Security, *see supra* note 3, the named respondent were to change to the Homeland Security Secretary or another DHS official, rather than the Attorney General.

239. *See* 28 U.S.C. § 2255 (2000); *see also* HERTZ & LIEBMAN, *supra* note 2, § 41.2b at 1716 (noting that “the range of situations in which courts have concluded that the inadequacy of the Section 2255 remedy warrants resort to habeas corpus is narrow”).

240. *See supra* note 234.

241. 28 U.S.C. § 1404(a) (2000) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”).

242. 498 F.2d 698 (D.C. Cir. 1974).

243. *Id.* at 700–01.

244. 970 F. Supp. 130, 167–68 (E.D.N.Y. 1997), *aff’d in part, dismissed in part, question certified sub nom.* Henderson v. INS, 157 F.3d 106 (2d Cir. 1998).

longtime residence in the district, evidence or witnesses in the district, or attorneys who practice in the district. The Eastern District of New York has led the way in recognizing the Attorney General as a respondent; yet in a number of cases, the district has dismissed habeas petitions from Oakdale detainees who have no compelling connection to New York.²⁴⁵

The immediate custodian rule in fact presents the true forum-shopping problem, providing the INS with limitless power to determine the forum. The *Nwankwo* court raised this concern:

Indeed, if the position of the Attorney General is sustained, it will mean that she could seriously undermine the remedy of habeas corpus by detaining illegally a large group of persons in one facility so that the resulting "torrent of habeas corpus petitions" would overwhelm the district and magistrate judges of the local United States District Court.²⁴⁶

A related concern was raised by the D.C. Circuit in *Eisel*:

By far the greatest reason not to require actions in the jurisdiction where a reservist is ordered to report is the potential inconvenience that such a rule would impose on a reservist. With this rule the military could determine the forum virtually at will by simply ordering the reservist to a particular location. The services could, for example, select the jurisdiction for cases by issuing active duty orders to a reservist for a designated post, which might be a remote outpost far from the petitioner's home. Such a rule would also permit the military to select a jurisdiction thought to be favorable to the Government by designating it as the place to report. This rule would be both inconvenient and unfair.²⁴⁷

While venue factors may be sufficient to prevent forum-shopping by petitioners under a functional approach, under the formal approach courts would be unable to prevent forum shopping by the government, since only one district (the district of confinement) has jurisdiction under the immediate custodian rule.

245. See, e.g., *Thomas v. Ashcroft*, No. 02-CV-02341, 2002 WL 2022513 (E.D.N.Y. June 30, 2002); *Martinez v. Ashcroft*, No. 02-CV-3040, 2002 WL 1471588 (E.D.N.Y. May 30, 2002); *Sanchez v. Ashcroft*, No. 01-C-11873, 2001 WL 483476 (E.D.N.Y. Apr. 4, 2001); *Speilmann v. Reno*, No. 99-CV-7715 (E.D.N.Y. June 2, 2000); *Solomon v. Reno*, No. CV-99-7604 (E.D.N.Y. Feb. 18, 2000) (all holding that even if court had jurisdiction, transfer was proper in light of venue factors where petitioner was not resident of district and material events occurred elsewhere).

246. *Nwankwo v. Reno*, 828 F. Supp. 171, 174 (E.D.N.Y. 1993) (quoting *Emejulu v. I.N.S.*, 989 F.2d 771, 772 (5th Cir. 1993)). See also *Benson*, *supra* note 4, at 236-37 (discussing potential for INS to forum shop).

247. *Eisel v. Sec'y of the Army*, 477 F.2d 1251, 1257 (D.C. Cir. 1973).

4. *Courts or Congress?*

The *Vasquez* court's fallback position is to reason that, even if the immediate custodian rule makes little sense in immigration cases, Congress rather than the courts should address this problem.²⁴⁸ *Vasquez* uses the history of § 2255's enactment—Congress stepping in to address the disproportionate number of habeas petitions received by districts in which federal penitentiaries were located—to conclude that here, too, the courts should await a legislative solution. Yet one might just as easily draw an analogy to *Braden*, where the Court stepped in to remedy a manifest injustice that Congress, despite urging from the Court,²⁴⁹ had failed to address.

Congress has specified venue for judicial review of at least some immigration matters in the past and may do so again.²⁵⁰ In the absence of such a congressional mandate, however, courts may and should step in.

CONCLUSION

FROM THE "IMMEDIATE CUSTODIAN" TO THE "APPROPRIATE RESPONDENT"

If the traditional rationales for the immediate custodian rule—who is best able to produce the body, the inconvenience of transporting prisoners, the danger of forum-shopping—do not hold up under scrutiny, what *is* the function of the immediate custodian rule? In Judge Webster's words, "What public interest is served by requiring that the local 'branch manager' be served before the court can consider a challenge to the action of the national board?"²⁵¹ The choice of respondent appears to have no discernible effect on who actually responds to the petition; the respondent is generally represented by the U.S. Attorney's office. Nor does the choice of respondent appear to have an effect on what relief the

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

249. In *Nelson v. George*, 399 U.S. 224 (1970), a prior interstate detainer case, the Supreme Court made clear its desire for Congress to act: "It is anomalous that the federal statutory scheme does not contemplate affording state prisoners [the] remedy [afforded to federal prisoners by § 2255]. The obvious, logical, and practical solution is an amendment to § 2241 to remedy the shortcoming that has become apparent. . . . Sound judicial administration calls for such an amendment." 399 U.S. at 228, n.5. Three years later, with no action from Congress, the Court took the matter into its own hands in *Braden*. *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 495 (1973).

250. Prior to 1996, the INA provided that venue for any petition for review would be in either the circuit in which the administrative proceedings were conducted or the circuit in which the petitioner's residence was located. See former INA § 106(a)(2), former 8 U.S.C. § 1105a(a)(2) (1994), repealed by IIRIRA, Pub. L. No. 104-208, div. C, § 306(b), 110 Stat. 3009-546, 3009-612 (1996). Residence is defined in the INA as "the place of general abode . . . [the] principle, actual dwelling place in fact, without regard to intent." INA § 101(a)(33), 8 U.S.C. § 1101(a)(33) (2000). Currently, venue is in the circuit in which the immigration judge completed the proceedings. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2000). In cases involving claims of United States citizenship, the INA directs the courts of appeals to transfer the proceeding to the district court for the judicial district in which the petitioner resides, if issues of fact are involved. INA § 242(b)(5)(B), 8 U.S.C. § 1252(b)(5)(B) (2000).

251. *Lee v. U.S.*, 501 F.2d 494, 502 (Webster, J. concurring).

court may order; for instance, a court considering the retroactive application of AEDPA may order a discretionary relief hearing to be conducted by an immigration judge, although immigration judges are never named as respondents.²⁵²

With these substantive explanations ruled out, the remaining interpretation is that the immediate custodian rule is entirely about limiting jurisdiction to the district of confinement. Under this reading, the rule is just a way to keep *Ahrens* alive despite the *Braden* Court's radical departure from the *Ahrens* holding. Indeed, the policy arguments advanced for the immediate custodian rule are remarkably similar to those offered by the *Ahrens* Court in support of its holding that habeas petitions must be filed in the district of confinement²⁵³—and therefore similar to those disregarded by the Court in *Braden*.²⁵⁴ If the immediate custodian rule in fact serves such a purpose, its existence, post-*Braden*, is no longer justified.

In place of the inflexible formalism of such a rule, courts should adopt the functional, pragmatic approach of *Jones v. Cunningham*: all that is needed is for the court to have jurisdiction over a person or persons who “can be required to do all things necessary to bring the case to a final adjudication.”²⁵⁵ This article has sought to demonstrate that in the majority of cases, the Attorney General will qualify as an “appropriate” respondent under the *Jones* standard, but others—the INS district director, even the warden in a case regarding detention conditions—might as well. After the initial jurisdictional inquiry, the substantive concerns regarding the forum can be addressed, as in *Braden* and *Mojica*, through a venue analysis.

Extraordinary circumstances—the overloaded docket of the Western District of Louisiana—may have brought the custodian question to the fore, but the logic of finding the Attorney General to be an appropriate respondent to a habeas petition by an INS detainee transcends these circumstances. Only through a venue analysis can courts truly reach substantive issues such as the location of records and witnesses, convenience to the parties, and familiarity of the court with the issues. These factors, rather than the formalism of an “inflexible jurisdictional rule,”²⁵⁶ should determine where those seeking to challenge INS policies and practices may be heard.

252. See, e.g., *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997), aff'd in part, dismissed in part, question certified sub nom. *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998).

253. *Ahrens v. Clark*, 335 U.S. 188, 191 (1948) (citing production of the body of the petitioner and the difficulties of transportation as policy concerns behind holding).

254. See *supra* note 68 and accompanying text.

255. *Jones*, 371 U.S. at 244.

256. *Braden*, 410 U.S. at 499–500.