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CHALLENGING IMMIGRATION DETENTION PENDING THE REMOVAL CASE

This outline reviews various challenges to immigration detention pending the removal cases, with a particular focus on the right to a custody hearing before the immigration judge.

This outline is current as of February 2018. Please note the law in this area is rapidly changing. Contact Judy Rabinovitz at jrabinovitz@aclu.org or Michael Tan at mtan@aclu.org for further advice.[1]

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[1] The statements in this outline do not necessarily represent the views of ACLU. This advisory is not a substitute for independent legal advice by a lawyer who is familiar with an individual's case.

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I. CHALLENGES TO MANDATORY DETENTION UNDER INA § 236(c).

A. Your client does not have a "release" from criminal custody that triggers the statute.

1. Under Board of Immigration Appeals (BIA) precedent, you must be "released" from criminal custody:

(a) after the effective date of the statute (October 20, 1998) and

(b) from physical criminal custody—i.e., appearing for sentencing is not enough.

Matter of West, 22 I. & N. Dec. 1405 (BIA 2000); *Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999)

2. Under BIA precedent, you must be the "released" from custody that's directly tied to the basis for detention under INA § 236(c).

Matter of Garcia-Arreola, 25 I. & N. Dec. 267 (BIA 2010)

3. The BIA has held that a mere arrest satisfies the "released" requirement.

Matter of Kotliar, 24 I. & N. Dec. 124 (BIA 2007); *see also Matter of West*, 22 I. & N. Dec. 1405 (BIA 2000)

Open question: under *Kotliar*, does any post-1998 arrest satisfy the "released" requirement? What if the charges are subsequently dismissed?

The **Second Circuit** in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), declined to defer to *West* and *Kotliar*. Instead, it held that INA § 236(c) applies "once an alien is convicted of a crime described in section [236(c)(1)] and is not incarcerated, imprisoned, or otherwise detained"—regardless of whether he has been sentenced to a prison term or probation. *Id.* at 610.

The **Third Circuit** has followed *Kotliar*, albeit arguably in dicta and with no reasoning. *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013).

B. Your client was not taken into ICE custody "when . . . released" from relevant criminal custody.

1. The **BIA** has held that ICE may subject a noncitizen to mandatory detention *any time after* they are released from criminal custody—i.e., even if ICE does not take custody immediately after the individual is released.

Matter of Rojas, 23 I&N Dec. 117 (BIA 2001)

2. The **Second, Third, Fourth, and Tenth Circuits** have adopted this position, albeit on different grounds.

Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015) (deferring to *Rojas* and finding mandatory detention to apply to those not detained "when . . . released" based on the theory that officials do not lose authority to impose mandatory detention if they delay)

Sylvain v. Attorney General, 714 F.3d 150 (3d Cir. 2013) (refusing to decide the issue of deference to *Rojas* but relying on "loss of authority" cases)

Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012) (deferring to *Rojas* and also relying on "loss of authority" cases)

Olmos v. Holder, 780 F.3d 1313 (10th Cir. 2015) (same)

3. The **Ninth Circuit** has held that the government may impose mandatory detention on "only those criminal aliens it takes into immigration custody *promptly* upon their release" from criminal custody for an offense referenced in the mandatory detention statute. Individuals in states outside California and Washington who were not "promptly" detained upon their release from relevant criminal custody are entitled to a bond hearing under the Ninth Circuit's holding.

Preap v. Johnson, 831 F.3d 1193, 1207 (9th Cir. 2016) (emphasis added)

Because the Ninth Circuit declined to specify how quickly ICE must detain individuals to subject them to mandatory detention, practitioners outside California and Washington may need to seek clarification of this issue from the immigration court in individual cases.[2]

At the same time, the Ninth Circuit affirmed district courts' orders requiring bond hearings for detainees in California and Washington State who were not *immediately* detained upon their release from relevant criminal custody. Individuals in these states who have *any* gap in time between their criminal and immigration custody are entitled to a bond hearing.

Preap v. Johnson, 831 F.3d 1193, 1207 (9th Cir. 2016) (emphasis added).

[2] *See* 8 C.F.R. § 1003.19(h)(2)(ii) (permitting the respondent to "seek[] a determination by an immigration judge that the alien is not properly included" under the mandatory detention statute).

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Khoury v. Asher, No. 14-35482, 2016 WL 4137642 (9th Cir. Aug. 4, 2016) (unpublished)

Note that the United States has petitioned the Supreme Court for a writ of certiorari in *Preap* and *Khoury*.

***See Duke v. Preap*, No. 16-1363, http://www.scotusblog.com/case-files/cases/kelly-v-preap/.**

For more information, see this practice advisory on *Preap* and *Khoury*:

https://www.aclu.org/other/bond-hearings-immigrants-under-preap-v-johnson-and-khoury-v-asher

4. The **First Circuit**, in a decision by an evenly divided en banc court, affirmed the judgments of the district courts rejecting *Rojas* and holding that INA § 236(c) does not apply to people whom ICE fails to detain upon release from relevant criminal custody.

Castaneda v. Souza, 810 F.3d 15 (1st Cir. 2015) (*en banc*)

The First Circuit subsequently vacated a ruling of U.S. District Court for the District of Massachusetts prohibiting the government from subjecting individuals to mandatory detention in Massachusetts if it failed to detain them within 48-hours after their release from relevant criminal custody (excluding weekends and holidays). The Court remanded so that the district court could consider what constitutes a "reasonable" gap in custody for purposes of INA § 236(c).

Gordon v. Lynch, 842 F.3d 66, 71 (1st Cir. 2016)

However, pursuant to a grant of interim relief by the district court, the 48-hour rule remains in place in Massachusetts pending conclusion of proceedings on remand. **Thus, detainees in Massachusetts are presently entitled to a bond hearing if ICE does not detain them 48-hours after their release from relevant criminal custody (excluding weekends and holidays).**

Gordon v. Napolitano, 3:13-cv-30146-MAP (D. Mass. Feb. 10, 2017) (ECF 199) (order granting interim relief)

48 h 以內 detain from criminal, 不用 bond hearing.

- Detention becomes prolonged.
- The IJ finds detainee non-removable as a threshold matter or grants relief from removal that renders your client non-deportable/non-inadmissible.
- New case law or post-conviction relief supports argument that convictions are not aggravated felonies or crimes of moral turpitude, and therefore do not trigger mandatory detention.

II. CHALLENGES TO PROLONGED DETENTION WITHOUT A BOND HEARING

A. Challenges to prolonged detention under INA §§ 235(b), 236(a), and 236(c).

1. Supreme Court

In *Jennings v. Rodriguez*, --- S.Ct. ----, 2018 WL 1054878 (2018), the Supreme Court reversed a decision by the Ninth Circuit interpreting the INA to provide a custody hearing to individuals detained pending their removal cases for six months. The Court held that INA §§ 235(b) and 236(c) authorize detention until the conclusion of removal proceedings and individuals detained under those provisions have no statutory right to a custody hearing before an immigration judge. The Court also held that INA § 235(a) does not entitle individuals to a periodic bond hearing every six months. However, the Court remanded to the Ninth Circuit to address whether the Due Process Clause requires a custody hearing over prolonged detention.

In *Demore v. Kim*, the Supreme Court upheld mandatory detention under INA § 236(c) for the "brief period necessary for removal proceedings"—a period the Court described as averaging 45 days for those who do not appeal an IJ order, and 5 months for those who do. 538 U.S. 510, 513 (2003). *Demore* did not address the constitutionality of prolonged mandatory detention.

Jennings abrogates the rulings of six circuit courts construing INA § 236(c) to authorize mandatory detention for only a reasonable period of time. However, detainees can still seek a custody hearing over their prolonged detention on due process grounds. Moreover, because the circuit court decisions concluded that prolonged detention without a hearing would raise serious due process concerns, they remain strong persuasive authority for those due process claims.

- **First Circuit**: *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016)

But see Akinwale v. Ashcroft, 287 F.3d 1050 (11th Cir. 2002) (per curiam) (assuming, without analysis, that a stay serves to "suspend" the removal period, and that detention pending a judicial stay is therefore governed by INA § 241(a)(2))

2. If INA § 236 applies, is it INA § 236(a) or INA § 236(c)?

- In *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), the **Ninth Circuit** held that INA § 236(c) does not apply to an individual whose removal is stayed pending judicial review of his removal order. The court concluded that the mandatory detention statute applies only pending administrative removal proceedings. Thus, in the court's view, once proceedings are concluded before the BIA, the authority for detention shifts to INA § 236(a), and the person is entitled to a bond hearing. This holding in *Casas* arguably survives the Supreme Court's decision in *Jennings*.
    - **NB:** The court in *Casas* also construed INA § 236(c) to authorize mandatory detention only where removal proceedings are "expeditious" and therefore does not authorize mandatory detention after remand for the court of appeals for further removal proceedings. However, that holding was abrogated by the Supreme Court in *Jennings*.

- The Ninth Circuit also has held that due process requires that the government bear the burden of justifying an individual's detention by clear and convincing evidence at *Casas* hearings. *See Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011).

- By contrast, the **Third Circuit** in *Leslie v. Attorney General*, 678 F.3d 265 (3d Cir. 2012), while not explicitly discussing the issue, appears to have assumed that INA § 236(c) continues to apply where removal is stayed. The Court subjected the detention of an individual with a stay of removal to the same analysis for prolonged mandatory detention under INA § 236(c) set forth in *Diop*. *See Desrosiers v. Hendricks*, 532 Fed. Appx. 283 (3d Cir. Jul 24, 2013).

The Ninth Circuit has distinguished between detention where removal is stayed pending a petition for review of a removal order (INA § 236), and detention where removal is stayed pending a petition for review of a denial of a motion to reopen (INA § 241).

- *Compare Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008) *with Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir. 2008).

- *But see Enoh v. Sessions*, 236 F. Supp. 3d 787 (W.D.N.Y. 2017) (rejecting *Diouf*); *Kudishev v. Aviles*, No. 15-2545 (MCA), 2015 WL 8681042 (D.N.J. Dec. 10, 2015) (same).

3. To the extent that INA § 241 applies, does that statute authorize prolonged detention of an individual absent a constitutionally adequate custody hearing?

The Supreme Court in *Jennings* did not address whether INA § 241(a)(6) requires a custody hearing over prolonged detention. Several courts have so held.

- *See Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (construing INA § 241(a)(6) to require a bond hearing before the IJ at six months where the government bears the burden of proof; holding the post-order custody review process to be inadequate to protect against unlawful prolonged detention).
    - **NB:** The Ninth Circuit has held that due process requires that the government bear the burden of justifying an individual's detention by clear and convincing evidence at prolonged detention hearings. *See Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011).

- *See also Hamama v. Adducci*, --- F. Supp. 3d ----, 2018 WL 263037 (E.D. Mich. 2018) (ordering bond hearings for a nationwide class Iraqi Christians subject to detention under INA § 241(a)(6) for six months, unless the government presents evidence that the class member has extended their detention through bad faith or frivolous litigation tactics or other factors why that detainee should not receive a bond hearing).

4. Is a challenge to mandatory detention under INA § 236(c) mooted by a BIA removal order and the 90-day post-order custody review?

- *Compare Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) (rejecting government's argument that habeas was moot) *with Hussain v. Mukasey*, 510 F.3d 739 (7th Cir. 2007) (holding that a habeas challenge to detention pending completion of removal proceedings was mooted by BIA order, even though stayed).

III. CHALLENGES TO THE DETENTION OF ARRIVING ALIENS UNDER INA § 235(b)

Challenges to Denial of Parole

- Arriving aliens who are referred for removal proceedings may seek release on humanitarian parole. *See* 8 U.S.C. § 1182(d)(5); *see also* 8 C.F.R. §§ 212.5(b)(5), 235.3(c).

- **The statute and regulations require ICE to "make individualized determinations of parole."** *Jean v. Nelson*, 472 U.S. 846, 857 (1985). Several courts in cases construing predecessor parole statute and regulations have held that the immigration authorities may not "decide[ ] parole applications on the basis of broad, non-individualized policies," but instead must base its decisions on individualized assessments of flight risk and danger. *Marczak v. Greene*, 971 F.2d 510, 515 (10th Cir. 1992); *accord Diaz v. Schiltgen*, 946 F. Supp. 762, 764-65 (N.D. Cal. 1996); *Gutierrez v. Ilchert*, 702 F. Supp. 787, 790 (N.D. Cal. 1988).[3]

- The **ICE Parole Directive** generally provides for the parole of asylum seekers with a credible fear where they establish their identity and the fact that they pose no danger or flight risk.

    - *See* ICE Directive 11002.1: Parole of Arriving Asylum Seekers Found to Have a Credible Fear of Persecution or Torture.[4]

- One federal district court has held ICE is required to follow its own Parole Directive.

    - *Abdi v. Duke*, --- F. Supp. 3d ----, 2017 WL 5599521 (W.D.N.Y. 2017) (applying *Accardi* doctrine).

IV. CHALLENGES TO DETENTION WITHOUT BOND HEARING PENDING "WITHHOLDING-ONLY" PROCEEDINGS.

The **Second Circuit** has held that INA § 236(a), as opposed to INA § 241, governs the detention of individuals in "withholding-only" proceedings because they do not yet have a final order of removal; therefore they are entitled to a custody hearing before the immigration judge.

- *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016)

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[3] *But see Amanullah v. Nelson*, 811 F.2d 1 (1st Cir. 1987); *Jeanty v. Bulger*, 204 F. Supp. 2d 1366 (S.D. Fl. 2002), *aff'd Moise v. Bulger*, 321 F.3d 1336 (11th Cir. 2003); *Bedredin v. Sava*, 627 F. Supp. 629, 633 (S.D.N.Y. 1986); *Singh v. Nelson*, 623 F. Supp. 545 (S.D.N.Y. 1985); *Ishtyaq v. Nelson*, 627 F. Supp. 13 (S.D.N.Y. 1983) (all upholding detention of arriving asylum seekers based on general deterrence).

[4] *Available at* https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf. DHS has reaffirmed that the Parole Directive remains in "full force and effect." Memorandum from John Kelly, Implementing the President's Border Security and Immigration Enforcement Improvements Policies ("Kelly Memo"), at 9-10 (Feb. 20, 2017), https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies.

The **Ninth Circuit** has rejected this view, holding that INA § 241 governs the detention of individuals in "withholding-only" proceedings, and they are not entitled to a custody hearing before the immigration judge.

- *Padilla-Ramirez v. Bible*, 862 F.3d 881 (9th Cir. 2017)

NB: However, individuals in the Ninth Circuit who detained for six months under INA § 241 are entitled to a custody hearing pursuant to *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011).

- *See also Baños v. Asher*, 2:16-cv-01454-JLR (W.D. Wa. Jan. 23, 2018) (ordering government to provide *Diouf* hearings to class of immigrants detained six months or longer pending "withholding-only" proceedings)

The **district courts** are split on whether INA § 236(a) or INA § 241 governs detention pending "withholding-only proceedings."

Cases holding that INA § 236(a) applies:

- *Diaz v. Hott*, --- F.Supp.3d ----, 2018 WL 1042800 (E.D. Va. 2018) (ordering bond hearings for class of detainees in Virginia)
- *Romero v. Evans*, --- F. Supp. 3d ----, 2017 WL 5560659 (E.D. Va. 2017)
- *Mendoza-Ordonez v. Lowe*, --- F.Supp.3d ----, 2017 WL 3172739 (M.D. Pa. 2017)
- *Rafael Ignacio v. Sabol*, No. 1:CV-15-2423, 2016 WL 4988056 (M.D. Pa. Sept. 19, 2016);
- *Sisiliano-Lopez v. Sabol*, No. 1:16-CV-1793, 2017 WL 3613982 (M.D. Pa. Aug. 4, 2017) (R&R) & 2017 WL 3602037 (M.D. Pa. Aug. 22, 2017) (order adopting R&R).
- *Guerrero v. Aviles*, No. 14-4367, 2014 WL 5502931 (D.N.J. Oct. 30, 2014)
- *Uttecht v. Napolitano*, No. 8:12-CV-347, 2012 WL 5386618 (D. Neb. Nov. 1, 2012)
- *Pierre v. Sabol*, No. 1:11-cv-02184, 2012 WL 1658293 (M.D. Pa. May 11, 2012)

Cases holding that INA § 241 applies:

- *Flores v. Doll*, No. 1:17-CV-01717, 2017 WL 5496620 (M.D. Pa. Nov. 16, 2017)
- *de Souza Neto v. Smith*, 272 F. Supp. 3d 228 (D. Mass. 2017)
- *Smith v. Sabol*, No. 3:CV-16-2226, 2017 WL 4269410 (M.D. Pa. Sept. 25, 2017)
- *Quintana Casillas v. Sessions*, No. 17-01039-DME-CBS, 2017 WL 3088346 (D. Colo. July 20, 2017)
- *Bucio-Fernandez v. Sabol*, No. 1:17-cv-0195, 2017 WL 2619138, at *3 (M.D. Pa. Jun. 16, 2017)

- *Crespin v. Evans*, 256 F. Supp. 3d 641 (E.D. Va. 2017)
- *Pina v. Castile*, No. 16–4280 (KM), 2017 WL 935163 (D.N.J. Mar. 9, 2017)
- *Barrera-Romero v. Cole,* No. 1:16-CV-00148, 2016 WL 7041710 (W.D. La. Aug. 19, 2016)
- *Reyes v. Lynch*, No. 15–cv–00442–MEH, 2015 WL 5081597(D. Colo. Aug. 28, 2015)
- *Dutton–Myrie v. Lowe*, No. 13–2160, 2014 WL 5474617 (M.D. Pa. Oct. 28, 2014)

V. CONSIDERATION OF ABILITY TO PAY BOND AND ELIGIBILITY FOR RELEASE ON ALTERNATIVES TO DETENTION

The **Ninth Circuit** has held that due process requires that ICE and immigration judges consider individual's ability to pay when setting bond and also consider them for release on alternatives to detention.

- *See Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017) (affirming injunction for class of individuals detained under INA § 236(a)).

For more information on *Hernandez*, see this ACLU practice advisory:

https://www.aclu.org/other/practice-advisory-bond-hearing-and-ability-pay-determinations?redirect=other/practice-advisory-bong-hearing-and-ability-pay-determinations

VI. DETENTION PENDING THE REMOVAL CASE WHERE REMOVAL IS NOT REASONABLY FORESEEABLE

Your client's removal is not significantly likely in the reasonably foreseeable future and therefore he should be released.

1. **Your client is from a country without a repatriation agreement with the United States or is unlikely to be removed to his home country.**

- *See Owino v. Napolitano*, 575 F.3d 952 (9th Cir. 2009) (remanding to district court to determine whether detainee "faces a significant likelihood of removal to [Kenya] once his judicial and administrative review process is complete.").

2. **Your client has won withholding or deferral of removal.**

- *See Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (holding, in case of client who had won CAT relief, that general detention statutes do not authorize detention beyond a presumptively reasonable six month period unless removal is significantly likely in the reasonably foreseeable future).

3. Removal proceedings will not conclude in a foreseeable period of time.

Some courts have held that where someone raises a substantial challenge to removal, and faces removal proceedings for an indefinite period of time, his removal is not reasonably foreseeable, and he is entitled to release.

- *Nunez v. Edwards*, No. 5:15-cv-00263 (E.D. Pa. Apr. 2, 2015) (R&R), (E.D. Pa. May 29, 2015) (order adopting R&R)
- *D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368 (W.D.N.Y. 2009)
- *Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747 (M.D. Pa. 2004)

- *But see, e.g.*, *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008) (holding that detention pending the removal case is not indefinite because removal proceedings have a definite end point).

VII. DETENTION OF INDIVIDUALS ON ORDERS OF SUPERVISION

Several district courts recently have granted habeas petitions challenging the detention of individuals with final orders of removal upon revocation of their orders of supervision ("OSUP").

- *Rombot v. Souza*, No. 17-11577-PBS, 2017 WL 5178789 (D. Mass. Nov. 8, 2017) (ordering release where ICE violated its own regulations governing the revocation of an OSUP and violated the individual's due process rights by detaining him without advance notice, a hearing, or an interview, and denying him an opportunity to prepare for an orderly departure)

- *Ragbir v. Sessions*, No. 18-cv-236 (KBF), 2018 WL 623557 (S.D.N.Y. Jan. 29, 2018) (ordering the release of long-term resident who was detained after ICE obtained a travel document and revoked his order of supervision; holding that due process recognizes a "freedom to say goodbye" and that individuals living in the community on long-term orders of supervision have a due process right against "unnecessary detention" and a right to an "orderly departure").