Prolonged Detention I: Habeas Challenges for Clients Contesting Their Deportation

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Agenda

- The Jennings v. Rodriguez ruling and next steps
- Prolonged detention around the country: the state of the case law and practical considerations
  - Detention under INA § 236(c) (detention based on criminal history)
  - Detention under INA § 235(b) ("arriving aliens")
  - Detention of clients with pending petitions for review and stays of removal
  - Detention of clients with pending motions to reopen, withholding-only proceedings, and other challenges on "collateral attack" removal defense
- Audience questions

Detention Authority

Eligible for bond hearings:

- INA § 236(a)/8 U.S.C. § 1226(a): detention of noncitizens "pending a decision on whether the alien is to be removed"

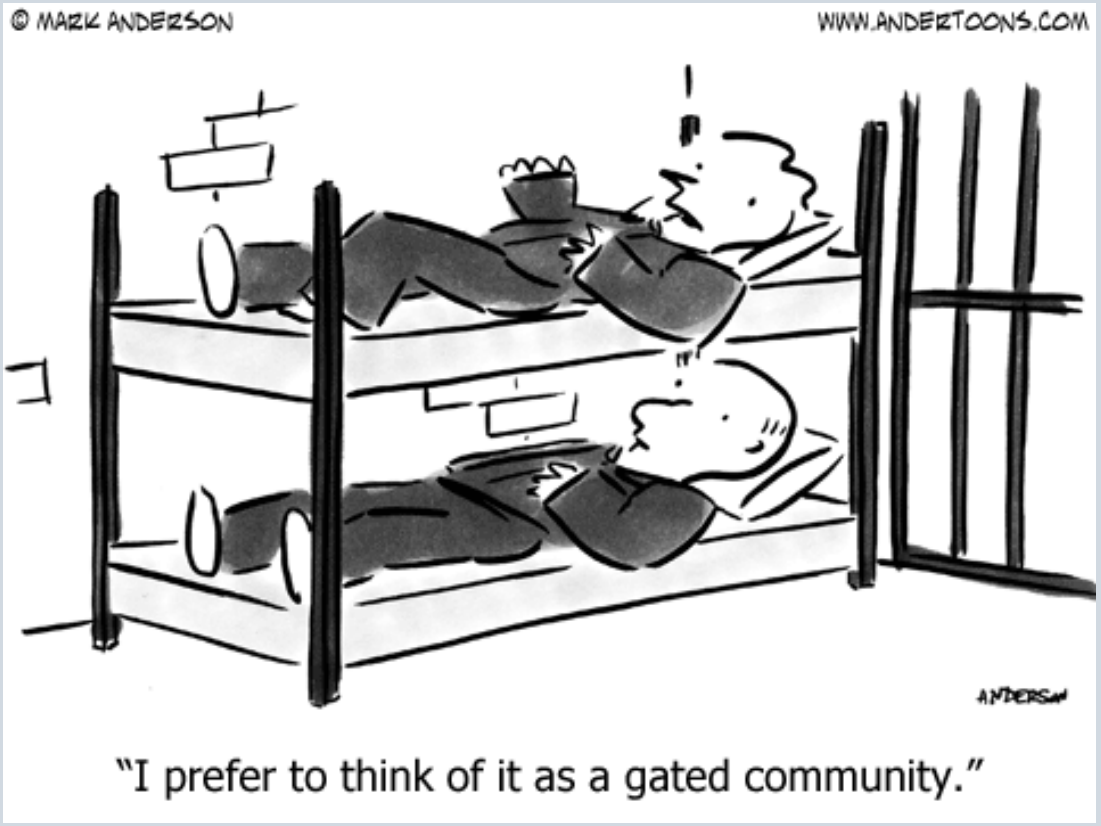
Not eligible for bond hearings:

- INA § 236(c)/8 U.S.C. § 1226(c): "mandatory" detention of noncitizens convicted of certain offenses
- INA § 235(b)/8 U.S.C. § 1225(b): detention of noncitizens seeking admission ("arriving aliens")
- INA § 241(a)/8 U.S.C. § 1231(a): detention of noncitizens with administratively final orders of removal during and after the removal period

An Introductory Note

- We use “prolonged detention,” “prolonged incarceration” or “prolonged imprisonment” to refer to challenges based on the length of detention time while removal litigation is on-going
- Prolonged incarceration is not the only basis for a habeas petition for a detained immigrant. Other claims could include:
  - TVPRA violation
  - 8th Amendment excessive bail violation
  - Due process language access violation
  - Statutory challenge to initial mandatory detention (e.g., “when released,” “substantial defense”)
  - And more: 5th webinar is on creative uses of habeas

It’s not really jail….right?



Jennings v. Rodriguez (aka Rodriguez IV)

HALF OF A LOSS

To explain what happened in Jennings, we have to flash back a bit…

Supreme Court Rulings Prior to Rodriguez IV

Supreme Court upheld "mandatory" detention for *brief* detentions of individuals *who conceded removability* while proceedings pending in *Demore v. Kim*, 538 U.S. 510 (2003).

- Court assumed (incorrectly) that average detention was 1½ months in most cases and 5 months in cases involving appeals.

Supreme Court held statute did not authorize *prolonged*, "potentially permanent" detention *after proceedings complete* in *Zadvydas v. Davis*, 533 U.S. 678 (2001).

- Court construed Section 241(a)(6) to authorize detention for only presumptively reasonable six month period.

Case Law on Prolonged Imprisonment of Arrivings pre-Rodriguez IV.

- In CA9, arriving noncitizens held under § 235(b) were entitled to bond hearings after six months as statutory matter. *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015).
- No other circuit had reached the issue.
- Ruling largely based on:
  - constitutional avoidance grounds as to returning LPRs, not most arrivings.

- N.B.: *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005) (holds that individuals held under Section 1225(b)(1)(B)(ii) apprehended shortly after entry are entitled to bond hearings once they have passed the credible fear interview).

Case Law on Prolonged Mandatory Imprisonment pre-Rodriguez IV

For people detained under INA 236(c):

- CA9 and CA2 defined 6 months or more as "prolonged," triggering right to bond hearing as statutory matter, although rationale driven largely by constitutional avoidance. *Rodriguez III*; *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015).
- Two other circuits (CA1, CA11) had multi-factor tests for when mandatory incarceration becomes "unreasonable," thereby triggering need for bond hearing. Both also based on statutory grounds. *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Sopo v. U.S. Att'y Gen*., 825 F.3d 1199 (11th Cir. 2016).

Case Law continued…

- CA3 also adopted multi-factor reasonableness test, but arguably on pure constitutional grounds. *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011). *See also Leslie v. Att'y Gen*., 678 F.3d 265 (3d Cir. 2012); *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 470, (3d Cir. 2015).
- CA6 adopted multi-factor reasonableness test on statutory/avoidance grounds, but authorized district court to apply factors to grant release, rather than bond hearings, if imprisonment was no longer reasonable. *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003).

Burden of Proof Law

In CA9, all prolonged incarceration hearings authorized under Rodriguez framework were subject to these rules:

- government bears burden of proof by clear and convincing evidence;
- hearing must be recorded for transcription;
- IJ should consider length of past detention in assessing danger and flight risk;
- IJ should consider whether alternatives to detention can satisfy government's purposes;
- Hearings should occur periodically every six months

N.B.: All of those rulings probably constitutional. *See V. Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011); *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011).

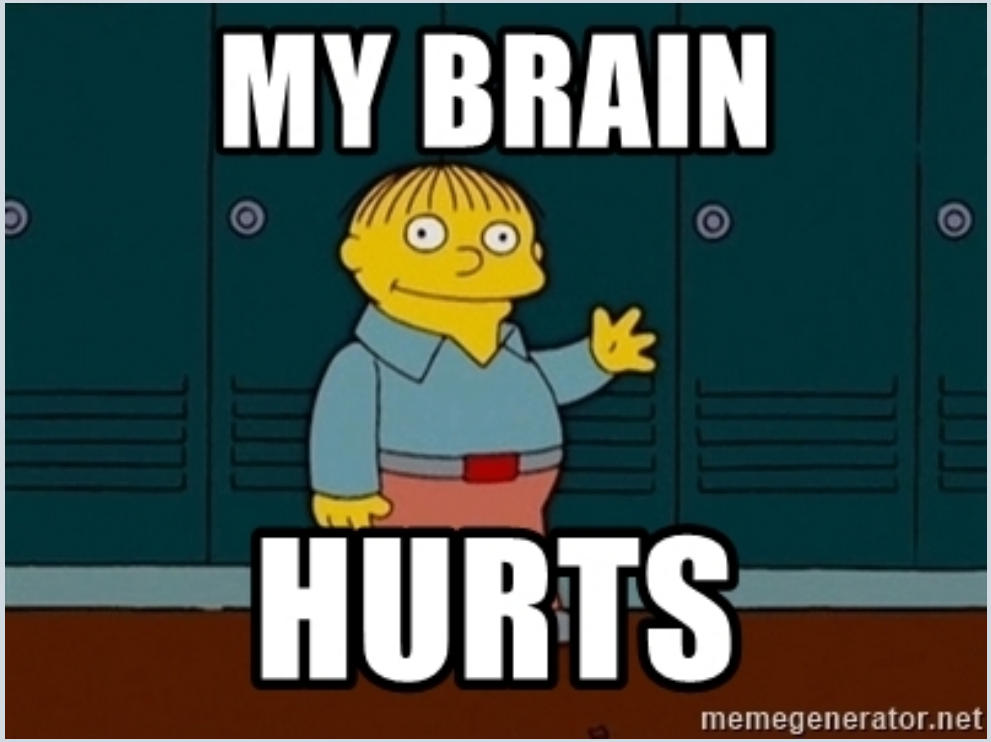
Burden of Proof (cont.)

In CA2, government bears burden by clear and convincing evidence. *Lora*, 804 F.3d at 616.

In CA3, government bears burden of proof, but standard not specified. *Diop*, 656 F.3d at 233.

In CA1 and CA11, normal 1226(a) bond hearing standards apply.*See Reid*, 819 F.3d at 492 (citing *Reid v. Donelan*, 22 F.Supp.3d 84, 92-93 (D.Mass. 2014); *Sopo*, 825 F.3d at 1220.

No problem right?



The Rodriguez IV Ruling

In split decision of eight justices (3-2-3), majority rejected all statutory arguments as "implausible." Because the text of the statutes did not authorize bond hearings or any of the attendant procedural protections, constitutional avoidance doctrine was inapplicable.

Court then remanded for Ninth Circuit to consider constitutional questions in the first instance. Majority said nothing whatsoever about the constitutionality of prolonged mandatory immigration detention.

Court also suggested that Ninth Circuit consider a) jurisdictional issues on remand (including applicability of Section 1252(f)(1)'s limit on injunctive relief) and b) propriety of class action in this context.

More on Rodriguez IV…

Three other important features of Rodriguez IV:

- Court (reluctantly) reaffirmed Zadvydas, thereby implying that Section 241(a)(6) could be read to authorize bond hearings.

- Extensive discussion of constitutional issues, including citations to record evidence, in Justice Breyer's dissent.

- Fairly involved jurisdictional discussion re Section 1252(b)(9), already being used (and misread) by both immigrants' rights lawyers and the Government.

If at first you don't succeed…

What Happens Next

- We made two arguments, lost on one of them. So now we pursue the other.
- Litigators around the country encouraged to bring "straight" constitutional challenges to prolonged imprisonment without review
- ACLU practice advisory: Prolonged Detention Challenges After Jennings v. Rodriguez (Mar. 21, 2018)

Prolonged Imprisonment Around the Country

Imprisonment under INA § 236(c) (criminal history)

INA § 236

INA § 236, 8 U.S.C. § 1226(c) mandates detention during removal proceedings for individuals who have certain criminal grounds of removability (all criminal grounds of inadmissibility + most criminal grounds of deportability.

Not a prolonged incarceration topic, but related – Supreme Court has granted cert in Nielsen v. Preap, ____ , ____on the reach of § 1226(c) to noncitizens who are not detained promptly after release from criminal custody.

In general…

Rodriguez IV abrogated holdings in at least 5 circuit courts construing 8 U.S.C. § 1226(c) to only authorize immigration detention without a bond hearing for a reasonable period of time (whether defined based on a six month bright line rule or instead a multi-factor reasonableness test).

But, the discussion of the serious due process concerns raised by prolonged imprisonment without review in all those cases remain persuasive authority for new challenges arguing prolonged detention violates the Due Process Clause. *See, e.g.*, *Lora* at 613.

Cite comparable language from whatever the applicable jurisdiction is.

9th Circuit

Rodriguez injunction remains in place in the C.D. Cal. (except for the periodic hearings rule), but is gone elsewhere in the Ninth.

We encourage people to file individual habeas petitions. We anticipate further class litigation as well.

1st Circuit

The ruling in Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016) is abrogated, but the class-wide injunction in Reid v. Donelan, 22 F. Supp. 3d 84 (D. Mass. 2014) is still in effect within the District of Massachusetts unless vacated, requiring bond hearings at 6 months.

2nd Circuit

In Lora v. Shanahan, CA2 dismissed Lora as moot as Mr. Lora had won cancellation, but did not specifically vacate the judgment. There are dozens of cases at CA2 that were held for Lora/Jennings. We expect some case(s) to go forward on the constitutionality of § 1226(c) this year.

In the meantime, Lora hearings have stopped in New York and noncitizens will need to file individual petitions raising the constitutional claim. A class action was filed last week in SDNY in Sajous v. Decker.

Several district courts have previously found § 1226(c) detention to violate the Due Process Clause.

Other Circuits

- Third Circuit: At least part of the ruling in Diop v. ICE/Homeland Security, 656 F.3d 221, 232-33 (3d Cir. 2011) **was on constitutional grounds and remains good law.**
  - Even before Rodriguez IV, the enforcement mechanism in CA3 was through individual habeas petitions to obtain bond hearings, so people should be filing those.
  - Whether Rodriguez IV abrogated Diop is now presented in multiple cases in the Third Circuit. We have filed amicus briefs in those.
- Sixth Circuit: Jennings abrogates Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003), which applied a case-by-case analysis to prolonged imprisonment on statutory grounds. Several district courts had previously found § 1226(c) detention to violate the Due Process Clause.

Other Circuits

- Eleventh Circuit: Rodriguez IV abrogates Sopo v. Attorney General, 825 F.3d 1199 (11th Cir. 2016), which applied a case-by-case analysis to prolonged imprisonment.

- All other circuits: No circuit court rulings yet, but district courts in CA4, CA5, and CA8 had applied constitutional avoidance to limit prolonged incarceration under § 1226(c). We are aware of some cases now before CA4.
- If you are aware of others, please let us know!!!

Bright-Line Rule vs. Individualized Analysis

- Pre-Rodriguez IV, courts had split on whether mandatory incarceration was unreasonable after six months as a general rule, or whether to conduct a case-by-case analysis of that petitioner's imprisonment (reasons for delay, good faith defenses, likely length of continued incarceration, etc).

- Advocates should make both arguments in future challenges: a) incarceration is unreasonable because it has exceeded 6 months or will certainly do so, and b) incarceration is unreasonable under the particular facts of this case.

- Also consider a hybrid approach: hearing required at six months unless government makes showing that detainee has engaged in dilatory tactics. *See Hamama v. Adduci*, 285 F. Supp. 3d 997 (E.D. Mich. 2018).

A Note on Dilatory Tactics vs. Good Faith Defenses

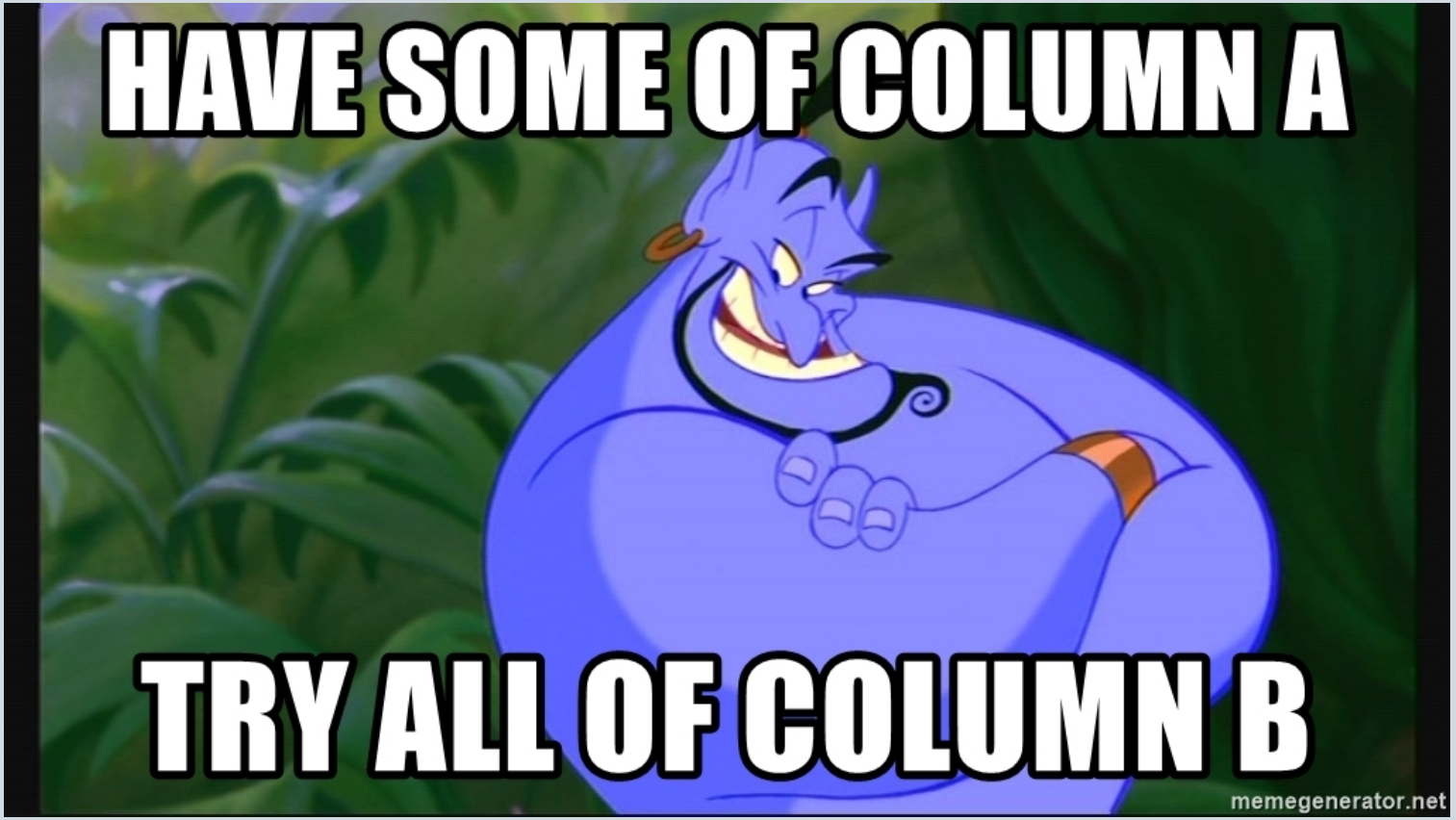
- In circuits where courts recognize a right to a bond hearing *at some point*, locus of dispute may turn on two issues: a) whether prisoners get a hearing to determine how to "count" their time; and b) how to "count" time spent pursuing good faith defenses.

- Re the former, key to stress that a neutral decisionmaker should decide how to classify any time that is allegedly dilatory

- Re the latter, purpose of hearing is to assess danger and flight risk. It's not a speedy trial determination. Time litigating a good faith defense should not count against someone. The lengthy imprisonment of people pursuing substantial defenses often does not serve the statute's purpose.

- Every court of appeals to consider it has rejected Govt's draconian view that all detention remains reasonable if the delay is caused by the time needed for individuals to litigate their cases. *Sopo*, 825 F.3d at 1218; *Ly*, 351 F.3d at 272; *Chavez-Alvarez*, 783 F.3d at 476; *Reid*, 819 F.3d at 500 n.4 (1st Cir. 2016).

In short, make all arguments that survive Jennings and fit your client's case.



Incarceration under INA § 235(b) (arriving aliens)

Returning LPRs vs. Arriving Asylum Seekers

§ 1225(b) detainees include different kinds of noncitizens detained without bond whom the due process case law may treat differently:

- Arriving asylum seekers who pass credible fear interviews and are referred to full removal proceedings (INA § 235(b)(1)(B)(ii))
- "Other aliens" (INA § 235(b)(2)(A)) including:
  - Returning LPRs charged as seeking admission under INA § 101(a)(13)
  - Those who are detained after travel on advance parole based on TPS, AOS, DACA etc. – ICE may charge them as "arriving aliens".

LPRs have the strongest due process case law on their side but challenges can and should be brought for all clients above.

District Court Challenges

- No circuit court besides the 9th had ruled on the prolonged incarceration of noncitizens detained under § 1225(b)
- District courts in CA2, CA3, and CA9 have ruled that the prolonged incarceration of returning LPRs without a bond hearing raises due process concerns or violates due process, given strong due process rights of LPRs
- Systemic district court challenges to lack of bond hearings/inadequacy of parole process: *Abdi v. Duke*, 280 F. Supp. 3d 373 (W.D.N.Y 2017) (now at CA2); *Damus v. Nielsen*, ___ (D.D.C.).

Related Circuit Law on Arrivings

- CA3 and CA6 ruled, prior to Demore, that excludable noncitizens ordered removed have due process rights against indefinite confinement: Rosales-Garcia v. Holland, 322 F.3d 386, 408-15 (6th Cir. 2003) (en banc); Ngo v. INS, 192 F.3d 390, 397-98 (3d Cir. 1999)

- Some district courts (many in CA3) have ruled that due process requires bond hearings for arriving asylum seekers and parolees.

Other Circuits

In other circuits, there is often caselaw with loose bad language, and in some cases holdings generally denigrating the constitutional rights of arrivings. See, e.g., CJLG v. Sessions, ___ F.3d ___, n.6 (9th Cir. January 29, 2018); Angov v. Lynch, 788 F.3d 898 (9th Cir. 2013).

But see Papa v. US, 281 F.3d 1004, 1010-11 (9th Cir. 2002) (excludable had right against deliberate indifference to personal safety). See also Hernandez v. U.S., 757 F.3d 249, 271-72 (CA5) (Fifth Amendment protects noncitizen injured outside U.S. by border patrol agent in U.S.).

§1225(b) Challenges in Practice

- Same as with § 1226(c) cases - advocates should make both arguments in future challenges under § 1225(b): a) incarceration is unreasonable because it has exceeded 6 months or will certainly do so, and b) incarceration is unreasonable under the particular facts of this case.
- Since parole is technically available to arriving aliens, may need to apply for parole to show exhaustion (bonus: ICE might parole client to moot out your habeas)
- And argue why parole is not a substitute for due process (is in ICE's unreviewable discretion; many field offices denying all parole

Imprisonment during a pending petition for review

9th Circuit

- *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008) held that individuals imprisoned pending judicial review of a removal order who obtain a stay of removal are held under 1226(a).

- *Casas* also held that individuals remanded for further IJ or BIA proceedings after such review are also held under 1226(a).

- First aspect of *Casas* likely remains valid after *Rodriguez IV*. "the conclusion of removal proceedings . . . Marks the end of the Government's detention authority under Section 1226(c)." *Rodriguez IV*, 138 S.Ct. at 846.

- Second aspect of *Casas* may be harder now, at least on statutory grounds.

Other Circuits

Second Circuit: Several district courts have ruled that a person with a pending PFR and either a judicial stay or CA2's "forbearance policy" for having a pending stay motion means that the noncitizen is incarcerated under INA 236(a), and thus is due a bond hearing. See, e.g., *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003); *Argueta Anariba v. Shanahan*, 190 190 F. Supp. 3d 344 (S.D.N.Y 2017); *Enoh v. Sessions*, 236 F. Supp.3d 787 (W.D.N.Y. 2017)

Third Circuit: *Leslie v. Attorney General*, 678 F.3d 265 (3d Cir. 2012) (holds individuals held pending judicial review of motion to reopen are held under Section 1226(a));

Sixth Circuit: *Bejjani v. INS*, 271 F.3d 670, 689 (6th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006).

But see Eleventh Circuit: *Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002).

Imprisonment during "collateral" review (e.g., motions to reopen, withholding-only proceedings)

What Statute Governs?

Ninth Circuit: Says WH-only individuals are held under INA 241(a). *Padilla-Ramirez v. Bible*, No. 16-35385 (9th Cir. July 6, 2017). Therefore entitled to bond hearing only when incarceration becomes prolonged. (under *Diouf II*). *But see Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012) (no final order until WOR-only proceedings complete).

Following *Diouf II*, Several district courts have now held that individuals incarcerated pending withholding-only proceedings are entitled to bond hearings when detention exceeds six months. *See, e.g.*, *Cortez v. Sessions*, 2018 WL 1510187 (N.D. Cal. March 27, 2018).

What Statute Governs?

Second Circuit: *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016), holds that a person in withholding-only proceedings does not have a final, executable order of review and is thus held under INA 236, not INA 241 and may be bond-eligible immediately. This is not a prolonged detention case and is not affected by *Jennings*.

Habeas challenges may bring statutory (which statute governs) and constitutional prolonged imprisonment claims.

Resources and Tips

- See ACLU Practice Advisory for case law and sample petition for pro se detainee that can be expanded in your cases.

- Consider filing habeas petition when client has been detained for 6 months or just before 6 months (since the habeas litigation itself takes a while), making several claims in any order:

I. Possible statutory claims not affected by Jennings

II. Prolonged incarceration of 6 months or more violates due process ("bright line" claim)

III. Prolonged incarceration as applied to this client has become unreasonable and violates due process

Practice Tips continued…

Individualized factors include:

- Length of detention
- Likely timeframe of future detention (next steps in removal proceeding, likely appeals)
- Existence of good faith defenses to removal (litigation of non-frivolous defenses should not be held against detained person)
- Delay/errors by the government
- Comparison of detention time to any prior criminal sentences
- Other special factors that show this detention is punitive, has become unmoored from purposes of civil immigration detention (harsh jail conditions, client medical/mental health hardship)

IV. Other constitutional claims you may have

These issues are far from resolved and this litigation is a team effort. Good luck and please reach out for collaboration and advice.

Questions? Ideas?