UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

MATTER OF PROLONGED DETENTION CASES

In Custody Proceedings

Appeals from Decisions of Immigration Judges

BRIEF OF AMICUS, AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

Table of Contents

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

Table of Authorities

CASES

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

IMMIGRATION & NATIONALITY ACT

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, PUB. L. NO. 104-132

REGULATIONS

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

OTHER AUTHORITIES

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

Introduction[1]

How long may a noncitizen be detained without an adequate hearing before an immigration judge? As far as the Board of Immigration Appeals and the Department of Homeland Security is concerned, the answer is for a long, long time. The BIA says that immigration judges have *no* role to play under many of the detention statutes, e.g., 235(b) (with respect to arriving aliens), *Matter of Oseiwusu*, 22 I&N Dec. 19, 20 (BIA 1998) and § 236(c), *see Matter of Joseph*, 22 I&N Dec. 799, 802 (BIA 1999). The DHS says that § 241 authorizes detention without interference from the immigration judges and the BIA has long-acquiesced to this interpretation. *See* 8 C.F.R. § 1236.1(d), *Matter of Valles-Perez*, 21 I&N Dec. 769 (BIA 1997).

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[1] AILA gratefully acknowledges Bonnie Sailer and Leland Baxter-Neal, law students at Lewis & Clark Law School, for their research and writing assistance in preparing this brief.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

Detention under these statutes, in the view of the BIA and DHS, categorically never ends.

But that view cannot be correct, of course. Congress could not have intended INA §§ 235(b), 236, or 241 to authorize prolonged detention because that would almost certainly be unconstitutional. *See, e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127, 1137–38, 1144 (CA9 2013) (collecting cases). Neither the Attorney General nor the BIA has written directly on the issues of prolonged detention. Since 1996, the constitutional constraints binding the Government's immigrant detention power have become clear and plentiful. It is now time for the Attorney General to catch up.[2]

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[2] This brief is being filed simultaneously in at least ten different cases pursuant to the BIA's order for supplemental and amicus briefing and is publically available at AILA InfoNet Doc. No. 14050791. InfoNet documents may be accessed at: http://search.aila.org and entering the Document Number. The question posed by the BIA in its order is whether the holding of the Ninth Circuit's decision in *Rodriguez v. Robbins*, 715 F.3d 1127, applies outside the Central District of

In this brief, amicus, the American Immigration Lawyers Association, explains why the Attorney General should adopt a uniform, nationwide, pragmatic rule regulating detention for all noncitizens whose detention is now prolonged.[3] AILA explains that the *only* rule which adheres to the constitutional need for individualized hearings and is pragmatic enough to be implemented now is also the *simplest* rule: Detention is prolonged when it reaches six-months and none of the general detention statutes authorizes prolonged detention without a prolonged detention hearing.

(continued...)

California, as the class is defined in the case. The American Civil Liberties Union and the American Civil Liberties Union Foundation filed briefs in these cases explaining why the holding in *Rodriguez* applies circuit-wide in the Ninth Circuit.

[3] This brief addresses only the Attorney General's authority to detain under the general detention statutes which we define as §§ 235(b), 236(a), 236(c), and 241(a).

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

The detention statutes provide dynamic authority that distinguishes between authority to initially detain and authority to continue to detain. Whenever detention reaches a prolonged period under the mandatory pre-order statutes, §§ 235(b) and 236(c), the authority for any continued detention shifts to § 236(a). Under the post-order detention statute, § 241(a)(6), whenever detention reaches a prolonged period, the statute is construed to provide for a prolonged detention hearing. A prolonged detention hearing under § 236(a) or § 241(a)(6) requires the DHS to clearly and convincingly demonstrate to an immigration judge (and on appeal to the BIA) that detention is required to prevent flight risk or danger to the community and that there are no alternatives to confinement that would adequately mitigate these concerns, if present.[4]

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[4] AILA has filed a request with the Attorney General to decide these cases and any other case raising the same issue. A copy of the letter is

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

This approach will avoid the need for ongoing federal judicial intervention. Importantly, this approach is consistent with existing authorities. It is pragmatic in its implementation so that it can be immediately put into effect and it will directly address the constitutional inadequacies of the present system.

Statement of Interest of Amicus

The American Immigration Lawyers Association ("AILA") is a national association with more than 14,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and

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attached and is available at AILA InfoNet Doc. No. 14050790. Accordingly, we address this brief to the Attorney General.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and Supreme Court.

Argument

In **Section (A)**, we explain the four ground rules that must form the basis of any approach to prolonged detention that the Attorney General adopts. **Section (B)** describes an approach that perfectly addresses each of the legal principles articulated in the ground rules and explains why this approach is the only approach that is pragmatic in a busy administrative tribunal system.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

A. The Ground Rules

The Government's mass prolonged incarceration of immigrants isn't working. It's expensive. *See* National Immigration Forum, *The Math of Immigration Detention* (Aug. 2013) at 2-4 (collecting authorities & sources)[5]. It's inhumane. *See* Nat'l Immigration Law Center, *A Broken System: Confidential Reports Reveal Failures In U.S. Immigrant Detention Centers* (2009)[6]. It's irrational. *See* Human Rights Watch, *Costly and Unfair: Flaws In US Immigration Detention Policy* (2010).[7] And, as explained below, it is a system built on a premise with a grave constitutional flaw.

Since the Government first opined on the meanings of the general immigrant detention statutes, its big-fisted, broadly asserted authority

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[5] Available at http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf

[6] Available at http://www.nilc.org/document.html?id=9

[7] Available at http://www.hrw.org/sites/default/files/reports/usimmigration0510webwcover.pdf

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

has been repeatedly scaled back by the federal courts that have instructed that the proper mode of statutory interpretation requires less muscle and more constitutional insight. The list of cases continues to grow: *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Demore v. Kim*, 538 U.S. 510 (2003); *Ly v. Hansen*, 351 F.3d 263 (CA6 2003); *Tijani v. Willis*, 430 F.3d 1241 (CA9 2005); *Clark v. Martinez*, 543 U.S. 371 (2005); *Nadarajah v. Gonzales*, 443 F.3d 1069 (CA9 2006); *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (CA9 2008); *V. Singh v. Holder*, 638 F.3d 1196 (CA9 2011); *Diouf v. Napolitano*, 634 F.3d 1081 (CA9 2011); *Alli v. Decker*, 650 F.3d 1007 (CA3 2011); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (CA3 2011); *Leslie v. Attorney General of the United States*, 678 F.3d 265 (CA3 2012); *Rodriguez v. Robbins*, 715 F.3d 1127 (CA9 2013).

Nearly all of the federal courts to address immigrant detention have firmly rejected the Government's position that it can detain noncitizens

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

for an unlimited time without access to a constitutionally adequate hearing. The courts have taken different approaches to fix the constitutional problem caused by prolonged detention and these fixes take different shapes across the country. For example, *Rodriguez* compels prolonged detention hearings throughout the Ninth Circuit for all individuals detained for more than six months without a bond hearing under § 235(b) or § 236(c), and the Ninth Circuit's decision in *Diouf* requires the same for all individuals detained more than six months under § 241.[8]

In the Third Circuit and Sixth Circuits, prolonged detainees are filing habeas petitions under *Ly*, *Leslie*, and *Diop*, requiring the district court to engage in an ad hoc analysis to determine if detention has

[8] Following the Ninth Circuit's decision in Rodriguez, the District Court has entered a permanent injunction requiring bond hearings for all class members detained for more than six months under INA 235, 236 or 241. See *Rodriguez v. Holder*, 2013 U.S. Dist. LEXIS 135479 (C.D. Cal. Aug. 6, 2013).

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

exceeded the reasonable period of time authorized by the mandatory detention statute, 236(c). Other circuits will soon address the issue. *See, e.g., Reid v. Donelan*, 2014 WL 105026 (D. Mass. 2014) (in class certification order, adopting *Rodriguez*'s six-month definition of prolonged detention hearings and reading § 236(c) to authorize a bond hearing).

What should the Attorney General do? Continuing operations under the *status quo* is not feasible or possible. The constellation of federal court fixes makes for difficult nationwide administration of the immigration system. Yet, the constitutional (and moral) inadequacies of the present system cannot persist. AILA suggests that the path forward is defined by four ground rules against which the Attorney General can fashion a uniform approach. The first three rules are legal principles drawn from the U.S. Constitution, the INA, and the court decisions interpreting them. The fourth rule recognizes the unique role and

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

burdens of the immigration judge corps in adjudicating immigration claims. We set forth those ground rules here.

1. Detention Without An Adequate Hearing Is Authorized Only In Limited Circumstances

The Constitution tolerates detention without an adequate hearing only in limited circumstances. *Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 526. *Zadvydas* and *Demore*, as applied by the courts of appeals, explain that these limited circumstances are two: (1) detention without a hearing must be time-limited—it cannot be without end or foreseeable endpoint; and (2) such detention must be reasonably related to its purpose of removal. Any implementation of an immigration detention scheme must uphold these principles or it runs afoul of the constitutional limits outlined in *Zadvydas* and *Demore*.

Detention without a hearing must be time-limited. In upholding a constitutional challenge to § 236(c), the *Demore* decision "hinged" on the brevity of detention. *Casas-Castrillon*, 535 F.3d at 951. The

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

Supreme Court expressly limited the reach of the opinion to upholding "brief" detention under the statutes. *Demore*, 538 U.S. at 513. Indeed, the Supreme Court described detention under § 236(c) as tending to be "very limited", *id.* at 529 n12, "temporary," *id.* at 538, and of "much shorter duration" than the "indefinite and potentially permanent" detention under § 241(a)(6) considered in *Zadvydas*, *id.* at 567. The Supreme Court based its ruling on a finding that "in the vast majority of cases," detention lasts "roughly a month and a half," while the minority of cases last "about five months." *Id.* at 529-30.[9] And in characterizing the Supreme Court's "longstanding view" on immigrant detention, *Demore* said: "the Government may constitutionally detain

[9] The noncitizen in *Demore* had been detained for six months, which the court noted was longer than average. The Supreme Court never reached the statutory interpretation questions presented here and which the federal courts have endorsed under the constitutional avoidance doctrine because the noncitizen in *Demore* conceded before the immigration court that he was subject to the mandatory detention statute. *Demore*, 538 U.S. at 513-14.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

deportable aliens during *the limited period necessary for their removal proceedings...*" *Demore*, 538 U.S. at 526 (emphasis added). *See also Rodriguez*, 715 F.3d at 1137 (summarizing prevailing view that "while mandatory detention under [INA § 236(c)] is not constitutionally impermissible *per se*, the statute cannot be read to authorize mandatory detention of criminal aliens with no limit on the duration of imprisonment.").[10]

Civil immigrant detention must be reasonably related to the purpose of removal. To describe it in a different way: does detention serve the Government's interest in preventing flight risk and danger to

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[10] Justice Kennedy's separate concurrence in *Demore*, necessary to form the majority, made this point explicit. He stated that "since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore* 538 U.S. at 532, citing *Zadvydas*, 533 U.S. at 684-686 and 721. Finding no unreasonableness on the facts before the court in *Demore,* Justice Kennedy joined the majority.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

the community? *See Casas-Castrillon*, 535 F.3d at 948-950. If not – *e.g.* because removal is impractical for want of a repatriation agreement; because the individual is not, in fact, a flight risk or a danger; or, because alternatives to confinement exist that mitigate the risks or danger – then, a noncitizen's liberty interest would normally outweigh the Government's interest in detention.

2. The Plain Language of the General Detention Statutes Do Not Authorize Prolonged Detention.

Where Congress has authorized indefinite or prolonged detention, it has said so clearly and its intent has been plain to see. Here, the plain language of the general detention statutes does not authorize prolonged detention because Congress has not expressly provided for it. *See, e.g., Zadvydas*, 533 U.S. at 697. ("[I]f Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."). Absent a clear statement of intent, the Attorney General cannot assume such authority, because to do so would

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

raise serious constitutional questions and violate his charge to interpret statutes in accordance with the Constitution. *Cf. Nadarajah*, 433 F.3d at 1076 ("Congress cannot authorize indefinite detention in the absence of a clear statement[.]"); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

It is apparent that the language in §§ 235(b) and 236(c) does not specify that the Attorney General may detain a noncitizen for a prolonged period. A plain language reading of INA § 235(b) demonstrates that it does not contain any express authorization for prolonged detention. Section 235(b), which applies to "applicants for admission," states that, "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

doubt entitled to be admitted, the alien shall be detained for [removal proceedings]." INA § 235(b)(2)(A). While "shall" connotes a mandatory nature to initially take a noncitizen into custody, the statute notably contains no time element or language authorizing prolonged or indefinite detention.

After *Zadvydas*, the lack of limiting language cannot mean detention has no limit. *Zadvydas*, 533 U.S. at 697–99 (holding that a lack of statutory language limiting the authority to detain did not authorize indefinite detention, and the Court will not assume such an intent without a clear statement from Congress). A plain text reading of "shall be detained" simply means that the individual shall be taken into custody. How long the person is to be held is not specified anywhere in this statute.

Section 236(c) is also devoid of any authorization for prolonged detention. Section 236(c) instructs the Attorney General to "take into

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

custody any alien who" is inadmissible or deportable under certain enumerated sections of the INA. INA § 236(c)(1). The statute also states that the Attorney General "may release an alien described in paragraph (1)" under limited circumstances related to criminal investigations. INA § 236(c)(2). Like INA § 235, this statute contains no language either limiting the period of detention or authorizing prolonged detention. Rather, *Demore* explained that Congress intended INA § 236(c) detention to last only during the "brief period necessary" to effectuate removal. *Demore*, 538 U.S. at 513.

For these same reasons, § 241(a)(6) does not authorize prolonged detention. Its plain language never authorized indefinite detention. *Zadvydas*, 533 U.S. at 701. In circumstances where removal is actually possible (and therefore not of an indefinite character, *Diouf v. Mukasey*, 542 F.3d 1222, 1234 (CA9 2008)) its plain language does not expressly provide for prolonged detention. *Diouf II*, 634 F.3d at 1086. The statute

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

"provides the Attorney General with the authority either to detain an alien beyond the removal period or to release him subject to the terms of supervision specified" in the statute. *Id.*; INA § 241(a)(6). Nowhere does it specify the length of detention authorized.

Where Congress has intended to authorize prolonged detention of noncitizens, it used language not present in any of the general detention statutes and included much greater procedural protections. For example, in INA § 236A, Congress unmistakably provided for prolonged detention of certain terrorist-designated noncitizens. In creating this statutory authority, Congress stated that these designated noncitizens "may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."

Another example is § 507 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. There,

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

Congress granted explicit authority for prolonged detention of terrorist aliens ordered removed: "[i]f no country is willing to receive such an alien, the Attorney General may, notwithstanding any other provision of law, *retain the alien in custody*." AEDPA § 507 (emphasis added). Further, the law as a whole indicates the intention to authorize prolonged detention by providing additional procedural protections in the form of periodic review: "at least every 6 months [The Attorney General] shall provide to the attorney representing the alien at the removal hearing a written report on the Attorney General's efforts [to find a nation willing to accept the alien]." *Id.*

When compared to the clear grant of authority in INA § 236A or AEDPA § 507, none of the general detention statutes – 235, 236, or 241 – expressly authorize prolonged detention. To the extent that they can be read to authorize such detention, they do so only after an individualized showing at an adequate hearing.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

3. Prolonged Detention Is Authorized Only When Individually Justified After An Adequate Hearing.

Where detention extends beyond the brief period reasonably necessary to fulfill its purpose (removal), that detention must be individually justified. Otherwise, it runs the risk of encompassing individuals who are not actually a flight risk or danger to the community, as the statute assumes. While *Demore* held, that for brief periods of detention, the risk is outweighed by the government interests at stake, 538 U.S. at 528, 530-31, when detention exceeds a reasonable length, the government interests grow weaker while the individual's strengthen. *Zadvydas*, 533 U.S. at 690

It is at that point that a rigorous process is required to continue the detention. The risk of the deprivation of the individual's strengthening liberty interest is too great for this process to be anemic. *See, e.g., Diop*, 656 F.3d at 231 (holding that INA § 236(c) "implicitly authorizes detention for a reasonable amount of time, after which the

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes"); *Casas-Castrillon*, 535 F.3d at 1091–92 ("When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Further, the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decision maker is substantial."); *Ly*, 351 F.3d at 273 (holding that individuals may not be detained under INA § 236(c) "beyond a reasonable period required to conclude removability proceedings" unless the government shows a "strong special justification" for detention "that overbalances the alien's liberty interest").

An adequate hearing is a hearing before an immigration judge that uses a rigorous procedure to determine whether continued detention is justified. Two particular features are necessary at a minimum in prolonged detention hearings to prevent the

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

implementation of the statute from being unconstitutional. *See V. Singh*, 638 F.3d at 1203-10. First, the government must carry the burden of proving by clear and convincing evidence that further detention is necessary because the noncitizen is a flight risk or danger. *Id.* Second, a contemporaneous record of the hearing must be available to the noncitizen, allowing him or her to adequately appeal an adverse decision. *Id.*

4. The approach must be pragmatic.

The three ground rules above must be tempered by a constitutional pragmatism: to make them a reality (as they must be), the approach the Attorney General adopts must be consistent nationwide and manageable in application. An unwieldy, piecemeal approach would burden the already complicated job of immigration judges and fail to protect individuals' constitutional rights.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

The requirement of a uniform, nationwide policy regarding immigration matters is dictated by the Constitution, statutes, and decisions of the federal courts and the Board. It guides us towards a rule that reduces uncertainty and confusion through consistent, nationwide application. This is important to agency officials tasked with enforcing the law and individuals who come in contact with the immigration system.

The Attorney General's resolution of the constitutional difficulties created by prolonged detention also must be manageable in practice. Immigration judges should not be required "to engage in an extraordinarily burdensome and imprecise" analysis in order to adhere to the statute, the regulations, and bedrock constitutional principles. *Matter of Abdelghany*, 26 I&N Dec. 254, 271 (BIA 2014). From an agency perspective, this concept is important not only for the broad policy reasons discussed above but also for very practical reasons.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

Immigration judges already do a lot with very little. A precise and easy-to-administer rule would benefit the system dramatically. *Id.* (adopting precise, easy to apply bright-line rule to assist immigration judges in making eligibility determinations).

B. A Proposed Rule To Resolve Prolonged Detention[11]

AILA suggests the Attorney General adopt this approach: detention is prolonged when it reaches six months, after which a prolonged detention hearing takes place to determine whether continued detention is necessary. This rule recognizes that none of the general detention statutes authorizes prolonged detention without a prolonged detention hearing.

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[11] In a related filing, AILA proposes that the Attorney General withdraw the BIA's decision in *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009), and adopt an interpretation of "custody" that includes alternatives to confinement. Such an interpretation would go a long way to resolving the problem of prolonged detention. The brief is available at AILA InfoNet Doc. No. 14050792.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

The detention statutes provide dynamic authority that distinguishes between authority to initially detain and authority to continue to detain. The statutory avenues to the required prolonged detention hearing differ depending on whether the initial detention authority resides in the statutes governing detention prior to a removal order or in the post-order statute. They lead, however, to the same requirement of a prolonged detention hearing. Whenever detention reaches a prolonged period under the mandatory pre-removal order statutes, §§ 235(b) and 236(c), the authority for any continued detention shifts to § 236(a). Under the post-order detention statute, § 241(a)(6), whenever detention reaches a prolonged period, the statute is construed to provide for a prolonged detention hearing.

A prolonged detention hearing under § 236(a) or § 241(a)(6) requires the DHS to clearly and convincingly demonstrate to an immigration judge (and on appeal to the BIA) that detention is required

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

to prevent flight risk or danger to the community and that there are no alternatives to confinement that would adequately mitigate these concerns, if present.

This approach echoes the Ninth Circuit's holdings in *Rodriguez* and in *Diouf,* and perfectly adheres to each of the four ground rules discussed above. It does so better than the ad hoc approaches utilized by the Third and Sixth Circuits. The proposed rule supplies the protection the Constitution demands. And it puts the power to provide this protection in the hands of immigration judges, whose expertise puts them in the best position to make the required custody determinations.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

1. Detention is Prolonged at Six Months

The proposed approach defines *prolonged detention* at the bright line of six months. Why six months? There are two reasons. First, this definition heeds the Supreme Court's repeated reminders that statutory interpretation of the detention statutes is constitutionally limited, *see* Ground Rule 1, *supra*, and second, it fulfills the need for any high-volume adjudicative process to be effectively administered, *see* Ground Rule 4.

A time-based definition is required to satisfy constitutional requirements. *Zadydas* and *Demore* require that immigration detention must be reasonably related to its purpose, and that prolonged detention must be limited. In *Zadvydas*, the Court set just such a presumptive time limit on the length of detention authorized by INA § 241(a)(6), holding that "it is practically necessary to recognize some presumptively reasonable period of detention." 533 U.S. at 700–01. The Court

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

emphasized the importance of a bright-line rule to ensure the protection of detainees' due process rights. *Id.*

The *Demore* Court similarly focused on the length of detention and emphasized that the "vast majority" of removal cases are resolved expeditiously, with average detention times ranging from 30–45 days for most individuals, and up to five months where there is an appeal to the Board. 538 U.S. at 529–30. Even as the Court approved detention in such circumstances, Justice Kennedy emphasized the importance of a limit on the authorized detention in his concurrence. *Id.* at 532.

A six-month limit is the most constitutionally appropriate and administratively efficient way to mark the end point of prolonged detention under all of the general detention statutes. As proposed, no person will be detained under §§ 235(b) or 236(c) after six months because those statutes do not permit such detention. Therefore, all pre-order matters are adjudicated under § 236(a). Every noncitizen under

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

§ 236(a) (even those whose initial detention authority arose under § 236(a) and who remain detained after six months) are entitled to a prolonged detention hearing.

As explained above, detention under these statutes must be reasonably related to its purpose—removal proceedings—and the Supreme Court and other federal courts have repeatedly "used the six-month period as the touchstone of reasonableness." *Nadarajah*, 443 F.3d at 1080 (describing the approach taken in *Zadvydas*). The *Zadvydas* Court announced 90 days as presumptively reasonable, and six months as the point at which detention becomes highly suspect. 533 U.S. at 701.

Likewise, the *Demore* Court honed in on detention lengths approaching six months, discussing average detention of up to six months. 538 U.S. at 530. Interpreting *Demore*, the Third Circuit, while declining to adopt a bright-line rule, emphasized that "the

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past those thresholds." *Diop*, 656 F.3d at 234. A six-month rule would create an important limit on the general detention statutes, constraining detention to a period reasonably related to its purpose, allowing detention to continue in the many cases in which it is appropriate, and still protecting those facing prolonged proceedings.

A time-based definition of six months is required to satisfy Ground Rule 4: adoption of an administratively practical solution to the constitutional issues underlying prolonged detention. The six months rule makes the job of immigration judges easier.

It does so in two ways. First, it eschews the ad hoc approach's need to litigate repeatedly to determine whether a particular individual's detention qualifies as prolonged, so as to entitle them to a prolonged detention hearing. Second, a bright-line rule is easy to incorporate into

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

case management systems to simplify administrative review and prosecutorial discretion decision-making. In *Ly*, the Sixth Circuit focused on measuring reasonableness and tried to assign blame in the adjudication procedure: "dilatory tactics" by noncitizens stop the "reasonableness" clock, whereas government-caused delays let it run. *Ly*, 351 F.3d at 272. This type of reasoning is plagued by a critical error: it has nothing to do with what actually happens in immigration court. As the Attorney General is well aware, every continuance that is granted by an immigration judge must be for "good cause." 8 C.F.R. § 1003.29; *see also Matter of Perez-Andrade*, 19 I&N Dec. 433, 434 (BIA 1987). Immigration judges' determinations of good cause should be respected—they are in the best position to evaluate such requests and manage their own dockets.

In fact, there isn't much to be said in favor of the ad hoc approaches of the Third and Sixth Circuits. They detract from the central

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

constitutional concern: the overall length of the detention. And they do so by creating an unhelpful blame-game: who is responsible for delays – the noncitizen or the government? The ad hoc inquiry into the *causes* of the length of detention obfuscates the real question of *when* detention has gone on too long. As the Third Circuit acknowledges, the adjudication of immigration claims takes time and that is nobody's fault. *Diop*, 656 F.3d at 223 ("individual actions... each of which takes only a reasonable amount of time to accomplish, can nevertheless result in the detention of a removable alien for an unreasonable, and ultimately unconstitutional, period of time."). This time-consuming extraneous inquiry adds nothing to the ultimate evaluation of the constitutional issues.[12]

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[12] The ad hoc approach makes for bad relations between the judiciary and the Government, too. In the ad hoc approach, federal courts have two options: order a bond hearing with an immigration judge or order release of the noncitizen outright. Ordering a bond hearing results in unnecessary duplication because, as described above, immigration

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

2. Dynamic Detention Authority

The prerogative of the Attorney General to dynamically interpret his detention authority is rooted in the proposition that the statutes do not plainly authorize prolonged detention. *See* Ground Rule 2. In order to cease the impermissible *status quo* of prolonged detention under §§ 235(b) and 236(c) and return the detention statutes to constitutional adequacy, *see* Ground Rule 1, the Attorney General has two reasonable

(continued...)

judges will need to re-analyze many of the same factors in making a custody determination. This ad hoc approach conflates the right to a bond hearing with the outcome of that hearing. *Reid v. Donelan*, No. 13-CV-30125-MAP, 2014 WL 105026, at *5 (D. Mass. Jan. 9, 2014). Ordering release of the noncitizen, on the other hand, disrupts the systematic approach that incorporates the custody decision into the removal proceedings process and determines whether a noncitizen can be released based on dangerousness and flight risk. A time-based rule triggering a custody determination keeps custody decisions in the hands of immigration judges, keeps the attention on the purpose of the detention and removal statutes, and reduces the need to litigate repeatedly over the reasonableness of the amount of time spent in custody.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

interpretive possibilities available to him. He could interpret the text of those two statutes to authorize bond hearings whenever detention is prolonged. *See, e.g., Diop*, 656 F.3d at 234-235; *Ly*, 351 F.3d at 273; *Bourguignon v. MacDonald*, 667 F.Supp.2d 175, 181 (D. Mass. 2009); *Madrane v. Hogan*, 520 F.Supp.2d 654, 669 (M.D. Penn. 2007). Or he could read the collection of detention statutes together to recognize the dynamic quality they confer on detention authority. *See Casas-Castrillon*, 535 F.3d at 945-46; *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 (CA9 2008); *Diouf I*, 542 F.3d at 1228-1229; *Rodriguez*, 715 F.3d at 1134-36. Both interpretive roads lead to the same prolonged detention hearing, but the second interpretation – the dynamic interpretation – is better for several reasons.

While the first interpretative approach makes the statutes constitutionally adequate, it introduces a pragmatic question for the agency, namely, how an immigration judge would exercise jurisdiction

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

in a prolonged detention hearing in light of 8 C.F.R. § 1236.1(c)? Even though the Attorney General would "read into" the statute a hearing requirement, actually implementing that hearing requirement is tougher when the present interpretation of the regulations indicate an immigration judge has no jurisdiction over detainees within § 235(b) or § 236(c).[13]

The better interpretative choice affirmatively acknowledges the dynamic nature of the detention authority by delineating when detention authority ends under §§ 235(b) and 236(c) and shifts to § 236(a) once detention exceeds six months. This delineation is important because "[w]here an alien falls within this statutory scheme can affect whether his detention is mandatory or discretionary, as well

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[13] To be sure, section 235(b) in spite of its frequent characterization as being "mandatory" is, in fact, not. As the BIA has already recognized, not all individuals covered by § 235(b) are denied custody redetermination hearings. *Matter of X-K-*, 23 I&N Dec. 731, 731-32, 734-35 (BIA 2005).

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

as the kind of review process available to him if he wishes to contest the necessity of his detention." *Casas-Castrillon*, 535 F.3d at 945 (alteration in original). The Ninth Circuit has endorsed this approach in *Casas-Castrillon*, *Diouf*, and most recently, in *Rodriguez*.

There are several important pragmatic benefits for adopting the dynamic interpretation of detention authority. *One*, it solves any implementation difficulties because it fits plainly within the current regulatory structure. Under this dynamic interpretation, § 235(b) and § 236(c) apply for the limited period of time to effectuate their purpose and then, when continued detention becomes prolonged, detention authority shifts to § 236(a). *Cf. Casas-Castrillon*, 535 F.3d at 947-48 (recognizing shift from § 236(c) to § 236(a)).

Two, under a dynamic interpretation of detention authority, the statutory detention authority does not shift to § 241 until a final order of removal becomes immediately executable. Recognizing this proper

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

interpretation of the statutory detention scheme results in retaining the immigration judge's jurisdiction to hold a prolonged detention hearing because under this interpretation the existence of a "final administrative order" is inapposite to the jurisdiction of an immigration judge under 8 C.F.R. § 1236.1(d) to hold a prolonged detention hearing.[14] After an order of removal becomes immediately amenable to execution, the Attorney General's detention authority shifts to § 241.

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[14] The BIA has interpreted the "final order" requirement in the custody redetermination regulations as meaning the date the BIA enters an order disposing of the removal order or when the period of time to seek BIA review of an Immigration Judge order lapses. *See*, e.g. *Matter of Chew*, 18 I&N Dec. 262, 263-264 (BIA 1982) (interpreting identical predecessor regulation). Under the dynamic interpretation, until detention authority shifts to § 241, the only authority for detention is at § 236(a) for which there is no doubt that an immigration judge can hold a prolonged detention hearing. As an aside, we note that in *Matter of Joseph*, 22 I&N Dec. 660, 668 (BIA 1999), the BIA in reference to INA § 241 alluded to there being "a separate statutory and regulatory scheme which controls the detention and release of aliens after an administratively final order." There are many errors in *Matter of Joseph* and this dicta is but one of them. Even then, obviously, the Attorney General is not bound by the BIA's decision.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

See INA § 241(a)(1); *Diouf*, 634 F.3d at 1085 "At all times before the removal period begins and mandatory detention is authorized by § 241(a)(2), the alien is subject to discretionary detention under § 236(a)." *Id.* This post-order detention authority may shift to § 236(a) in those instances where the order of removal is no longer immediately executable because it was judicially or administratively stayed, was judicially vacated or was administratively reopened. *Cf. Casas-Castrillon*, 535 F.3d at 945 (finding § 236(a) authority because judicial stay in place).

Under a dynamic interpretation, the dividing line between §§ 235 and 236 versus § 241 is the existence of an order of removal that is amenable to immediate execution. *See* INA § 241(a)(1) (defining the removal period); *cf. Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (CA9 2012) (construing judicial review provisions as triggered when an order of removal is executable); *Diouf II*, 634 F.3d at 1085. Using this as a

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

dividing line recognizes the Attorney General's authority to mandate prolonged detention hearings before immigration judges even after a removal order could be considered administratively final under 8 C.F.R. § 1236.1(d).

The regulations that govern custody redeterminations, 8 C.F.R. § 1236.1(d) and 8 C.F.R. § 1003.19(h), do not bar this dynamic interpretation. Those regulations were not promulgated in anticipation of prolonged detention hearings and therefore cannot be descriptive of the Attorney General's power to remedy the constitutional inadequacies of the *status quo*. As we describe in more detail below, a prolonged detention hearing is not a custody redetermination and therefore is not governed by 8 C.F.R. § 1236.1(d). Certainly, the regulations do not

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

prohibit a prolonged detention hearing, and a constitutional statutory interpretation requires one.[15]

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[15] The regulations indicate a general authority for the immigration judge to make de novo custody determinations for prolonged detainees. Parts 1003.19(d), (e) and (f) broadly acknowledge an immigration judge's power to determine custody status. None of these sections limits an immigration judge's jurisdiction over *prolonged detention hearings.* The government has already recognized that immigration judges indeed have the authority and jurisdiction to conduct this type of hearing. *Mau v. Chertoff*, 562 F. Supp. 2d 1107, 1113 (S.D. Cal. 2008) (describing the government's argument that the Immigration Judge appropriately conducted a bond hearing for an individual in prolonged detention).

Part 1003.19(h)(2)(i), which prohibits an immigration judge from exercising jurisdiction in some circumstances does not, in fact, apply to prolonged detention hearings. The regulation states that immigration judges "may not redetermine conditions of custody... with respect to" several groups of noncitizens, including "arriving aliens in removal proceedings" and "aliens in removal proceedings subject to section 236(c)." The plain language of the regulation applies only to *redeterminations* of custody conditions. But prolonged detention hearings are not custody redeterminations as explained above.

The regulations' broad acknowledgement of immigration judges' authority to determine custody status and the lack of any applicable exceptions to that power compels the conclusion that immigration judges are authorized to conduct prolonged detention hearings for noncitizens detained under § 236(a).

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

Whereas a custody redetermination hearing appears not to be authorized in post-order matters because of the existence of a final administrative order of removal, *Matter of Valles-Perez*, 21 I&N Dec. at 771, under the dynamic interpretation of the detention authority, a prolonged detention hearing for post-order matters is certainly permissible because the statute *itself* vests the detention authority with the Attorney General. *See* INA § 241(a)(6).[16]

Three, a dynamic reading prevents the possibility of repeated instances of prolonged detention. Once §§ 235(b) or 236(c)'s initial detention authority lapses, it does not revive. That is to say that §§ 235(b) and 236(c) are *initial* detention statutes and do not provide authority for continued detention past the prolonged period of six-months. For example, in *Casas-Castrillon*, Mr. Casas was detained for

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[16] We explain *infra* how the Attorney General may publish an order that delegates his authority under § 241(a)(6) to the immigration judge corps.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

seven years. After he won his petition for review that resulted in a remand to the BIA, the authority for his detention did not return to § 236(c) because his detention was already prolonged. The Ninth Circuit held that § 236(c) did not countenance an additional "mandatory, bureaucratic" period of detention. *Casas-Castrillon*, 535 F.3d at 948.

3. Prolonged Detention Hearings

The proposed approach to solving the constitutional inadequacies of the *status quo* requires the Attorney General to establish and describe a prolonged detention hearing that provides rigorous process. The Attorney General is authorized by the INA to do so and the regulations are consonant with the concept of a prolonged detention hearing.

The authority to create prolonged detention hearings is plainly prescribed in the Attorney General's inherent authority under the general detention statutes – §§ 235(b), 236(a), 236(c), 241(a)(6) – and his

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

special authority to determine all questions of law arising under the INA through adjudication, § 103(a)(1).

A prolonged detention hearing is different than a custody redetermination under 8 C.F.R. § 1236.1(d). While there are several similarities, the distinctions are critical to ensuring the rigorous process required to adequately protect the constitutional interests at stake when detention has become prolonged. *See* Ground Rule 3.

As its name implies, a prolonged detention hearing is a hearing triggered when detention becomes prolonged. Whenever a noncitizen is confined under the general detention statutes, § 236(a) or § 241(a)(6), for at least six-months, a prolonged detention hearing is required.[17] Its key feature is that it is an adversarial, contemporaneously-recorded

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[17] We explained *supra* that §§ 235(b) and 236(c) do not authorize prolonged detention and therefore at the six-month mark, detention authority shifts to § 236(a). Therefore, all prolonged detention hearings will take place under the statutory authority of INA § 236(a) for pre-order matters and under § 241 for post-order matters.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

hearing before an immigration judge, wherein the DHS bears the burden of demonstrating the continued detention is warranted because the noncitizen is a flight risk or danger. It is important that a prolonged detention hearing be presided over by an immigration judge. No individual subject to prolonged detention under 235(b), 236(c), or 241, has received an impartial review of his or her custody status (absent judicial intervention) because the BIA has interpreted these statutes and regulations to divest the immigration judge of jurisdiction to provide such neutral review. Even where a noncitizen initially subject to detention under 235 or 241 has received some level of administrative review by DHS – e.g., adjudication of a parole request under 235(b), or a post-order-custody-review under 241 -- these procedures are insufficient to relieve the constitutional concerns associated with prolonged or indefinite detention. *See Zadvydas*, 533 U.S. at 685 (noting Mr. Zadvydas's detention was subject to periodic administrative review and

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

proceeding to find such detention constitutionally suspect); *see also Casas-Castrillon*, 535 F.3d at 949 (holding that, despite periodic ICE review of Mr. Casas's detention, the government may not continue to detain him "without providing him a neutral forum in which to contest the necessity of his continued detention"). Thus at minimum a hearing in front of an immigration judge is necessary to satisfy the constitutional concerns raised by prolonged detention. Likewise, individuals who were initially detained under § 236(a) are entitled to a prolonged detention hearing when, at six months, their detention has become prolonged.

At a prolonged detention hearing, the burden of proving that detention is necessary must fall on the Government because at the moment detention becomes prolonged, the noncitizen's liberty interests are profound. *See* Ground Rule 2. All of the Courts of Appeals to consider this issue have agreed that at such a hearing, the burden of

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

proving the necessity of continued detention is appropriately placed on the government. *See, e.g.*, *Casas-Castrillon*, 535 F.3d at 951 ("[A]n alien is entitled to release on bond unless the 'government establishes that he is a flight risk or will be a danger to the community.'" (quoting *Tijani*, 430 F.3d at 1242); *Diop*, 656 F.3d at 235 ("[T]he [g]overnment must justify its continued authority to detain him at a hearing at which it bears the burden of proof").

The burden is clear and convincing evidence. *See V. Singh v. Holder*, 638 F.3d at 1203-4 (citing *Addington v. Texas*, 441 U.S. 418, 427 (1979)). A similarly high level of proof is required by the Sixth Circuit, which held the government must show a "strong special justification." *Ly*, 351 F.3d at 273.

Finally, the hearing must be contemporaneously recorded to allow adequate review of immigration judge decisions to ensure consistency and compliance with the constitutional demands. *See V. Singh*, 638

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

F.3d at 1200 (noting an audio recording would suffice). The EOIR has already implemented in each immigration court nationwide an advanced digital audio recording system that can, with the literal click of a mouse, capture high fidelity recordings of the proceedings. News Release, Executive Office for Immigration Review, EOIR Completes Digital Audio Recording Implementation (Sept. 2, 2010),[18].

Each of the features of rigorous process required in a prolonged detention hearing is consonant with the regulations. There is no doubt that the Attorney General can promulgate a rule through adjudication that places on the DHS the burden of proving detention is necessary. *See, e.g., Matter of Patel,* 15 I&N Dec. 666 (BIA 1976). In *Matter of Patel,* the BIA placed the burden on the government, in the absence of a national security threat, to proffer some reason why detention was

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[18] Available at http://www.justice.gov/eoir/press/2010/EOIRCompletesDAR09022010.htm

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

necessary. The respondent in *Patel* was detained by the government because he had overstayed his visa and his visa petition was denied. *Id.* at 667. The BIA held that "[t]hese factors bear little if any relevance to the issue of whether or not the respondent is likely to appear for his deportation proceeding." *Id.* And because the government proffered "no reasons...to justify holding the respondent under even a minimal bond[,]" he was ordered released. *Id.* BIA held that unless the government could proffer a valid reason why detention was necessary,

No alterations in existing precedent or regulations are necessary. First, the regulations do not prohibit the proposed approach. *See* 8 C.F.R. § 1236.1(c)(8). Part 1236.1(c)(8) describes the burden applicable when "any officer authorized to issue a warrant of arrest" exercises the discretion to release a noncitizen. Therefore, it does not, on a plain reading, apply.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

Second, the precedent decision in *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999) is inapplicable to prolonged detention hearings. In *Matter of Adeniji*, the BIA construed 8 C.F.R. § 1236.1(c)(8) to apply to immigration judges, relying on 8 C.F.R. § 1003.19(a). 22 I&N Dec. 1102, 1112. But § 1003.19(a) simply grants immigration judges the authority to review decisions made by the Service pursuant to part 236. It does not address the substantive standards to be used by immigration judges, and in any case is not relevant here, where the immigration judges are conducting prolonged detention hearings.

Conclusion

For all of the above reasons, the Attorney General should interpret the general detention statutes as not authorizing prolonged detention, at which point the government must justify continued detention in an individual hearing with constitutionally required due process protections.

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

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May 7, 2014

AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)

Certificate of Service

I, Stephen W Manning, certify that I served a copy of this brief by first class mail to the individual below on May 7, 2014.

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AILA InfoNet Doc. No. 14050791. (Posted 5/8/14)