Detention and Bond: Applying Ninth Circuit Case Law to the Mandatory Detention Statutes of the Immigration and Nationality Act

By Carlos R. Juelle, Michael Kaufman, and Jonathan D. Montag

Aliens detained by the Department of Homeland Security (DHS) while undergoing removal proceedings and appeals or while awaiting removal are often subject to mandatory detention statutes. Detention can become prohibitively lengthy. Litigation has led to court decisions giving aliens the opportunity to seek release from detention when detention exceeds or is likely to exceed six months.

I. Pre-Removal Mandatory Detention

On September 30, 1996, President Bill Clinton signed into law the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (IIRIRA). IIRIRA included numerous amendments to the U.S. immigration laws, one of which was an amendment that dictated the mandatory detention of individuals convicted of certain crimes. This amendment was codified at INA §236(c). The effective date of IIRIRA was April 1, 1997.

Implementation of INA §236(c) was delayed until October 8, 1998, because also included within IIRIRA were Transitional Period Custody Rules which permitted one-year delays in the implementation of the mandatory custody provision and the release of lawfully admitted non-citizens if the Attorney General notified Congress of a lack of detention space. The INS Commissioner notified the House Committee on the Judiciary on October 9, 1996, and again on October 9, 1997, of a shortage of detention space, thus delaying implementation of the mandatory custody law. This delay in the implementation of INA §236(c) means that only individuals released from non-DHS custody after October 9, 1998, are subject to mandatory detention. The Board of Immigration Appeals (BIA) held as such in *Matter of Adeniji*.[1]

INA §236(c) mandates the detention of all individuals who are subject to removal from the United States for having been convicted of: (1) an offense under INA §212(a)(2); (2) 2 or more crimes involving moral turpitude, an aggravated felony, a drug offense, a firearms offense, or a crime listed in INA §237(a)(2)(D); (3) a crime involving moral turpitude for which the sentence of imprisonment is at least one year; or (4) individuals involved in terrorist activities.

Under INA §236(c)(1), the Attorney General, now DHS, is to take the alien into custody when the alien is released from custody, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

The timing of when an individual must be taken into custody in order to be subject to mandatory detention is unsettled. The BIA has held that in order for mandatory detention to apply, the individual must be taken into custody when released from non-DHS custody for a mandatory-

---

[1] I&N Dec. 3417 (BIA 1999).

detention crime.[2] The BIA has also held, interpreting the statutory language,"when the alien is released from custody," broadly that mandatory detention applies regardless of how long after the alien was released from non-DHS detention as long as the non-DHS release was after October 9, 1998.[3] Numerous district courts, including courts in the Ninth Judicial Circuit, have disagreed with the BIA, though two circuit courts have agreed with the BIA.[4]

Immigration judges retain jurisdiction to review whether an individual is subject to the mandatory detention provision.[5] In *Matter of Joseph*,[6] the BIA established the standard under which immigration judges make the determination. The BIA held that a lawful permanent resident will not be considered "properly included" in a mandatory detention category when an immigration judge or the BIA finds, on the basis of the bond record as a whole, that it is substantially unlikely that DHS will prevail on a charge of removability specified in INA § 236(c)(1).

While INA § 236(c) discusses mandatory detention, INA §§ 235(b)(1)(B)(IV) and 235(b)(2) discuss the detention of arriving aliens, including the mandatory detention of arriving aliens. Further, INA § 236(a) discusses the detention and release scheme for aliens who are not subject to mandatory detention.

Practice Pointer: Carefully determine whether your client is subject to mandatory detention. Certain grounds, such as INA 237(a)(2)(A)(I)(II), can apply because of criminal convictions that are not charged in the Notice to Appear and others, such as a crime covered by INA § 237(a)(2)(A)(i) with a sentence of at least year requires reviewing the sentencing documents for the conviction. As both of these grounds require that the crimes be crimes of moral turpitude, analysis is necessary as to whether the crimes are indeed crimes of moral turpitude. Similar analysis is necessary to determine if your client's crime has the necessary elements of a mandatory-detention crime. Then, you must know if the crimes occurred before or after the effective date for the mandatory detention conviction and if your client was released from non-DHS detention before being taken into DHS custody. Asking for a bond when your client is ineligible for one is a waste of time and, often, your client's money. Assuming your client is subject to mandatory detention when he or she is not, and not pursuing a bond hearing or arguing pursuasively at the bond hearing, is a huge disservice to your client.

---

[2] *Matter of Garcia Arreola*, 25 I&N Dec. 267 (BIA 2010).

[3] *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).

[4] *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012); *Sylvain v. Attorney General of the United States*, 714 F.3d 150 (3d Cir. 2013).

[5] 8 CFR §1003.19(h)(2)(ii).

[6] 22 I&N Dec. 799 (BIA1999).

II. Post-Removal Mandatory Detention

After a final order of removal has been entered against an individual, the Department of Homeland Security (DHS) shall have only 90 days to effect removal of the individual.[7] Under INA §241(a)(2), the Attorney General shall detain said individual during the 90 day removal period and under no circumstances shall the Attorney General release from custody an alien who has been found to be inadmissible under 212(a)(2) or 212(a)(3)(b), or removable under 237(a)(2) or 237(a)(4)(b).

According to statute,[8] DHS may continue to detain an individual beyond the 90 day removal period if he or she has been found inadmissible under INA §212, or is subject to removal from the United States for: (1) having violated their non-immigrant status or condition of entry;[9] (2) having committed a crime covered under the Act;[10] (3) having been engaged in security terrorist or foreign policy matters;[11] or (4) the Attorney General has determined the individual is a risk to the community or unlikely to comply with an order of removal.[12]

III. Challenges to mandatory detention

The Supreme Court reviewed the constitutionality of the mandatory detention statute in *Demore v. Kim*.[13] The Supreme Court found the statute to be constitutional based on this "fact finding":

> Under [236](c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas.*[14] The Executive

---

[7] INA §241(a)(1).

[8]INA §241(a)(6).

[9]INA §237(a)(10)(C).

[10]INA §237(a)(2).

[11]INA §237(a)(4).

[12]INA §237(a)(4).

[13]538 U.S. 510 (2003).

[14] *Zadvydas v. Davis*, 533 U.S. 678 (2001), a mandatory detention case for an alien who had a final order of removal and accomplished entry into the United States, addressed an individual that could not be removed from the United States because no country would take him. The Supreme Court held that six months was a presumptively reasonable period of time to effect removal without creating constitutional problems based on an individual's liberty interest. In a

> Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to [INA § 236(c)], removal proceedings are completed in an average time of 47 days and a median of 30 days. Brief for Petitioners 39–40. In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter.

Because the reality was and is that aliens are routinely held in DHS custody beyond six months, detained aliens have been challenging their prolonged detentions since the *Demore v. Kim* decision, arguing that their detentions have exceeded the six-month limit. These case have made important evolutionary changes in the mandatory detention scheme. Notable cases on the Ninth Circuit are *Tijani v. Willis*[15], *Nadarajah v. Gonzales*[16], *Owino v. Napolitano*[17], *Casas-Castrillon v. Department of Homeland Security*,[18] 2011 *Singh v. Holder*[19], and 2011 *Diouf v. Napolitano*[20]. Because of the specificity of their holdings, *Casas-Castrillon* and *Diouf* have created change in mandatory detention law in the Ninth Circuit. Recently, in *Rodriguez v. Robbins*,[21] the Ninth Circuit has shown that it either has or is poised to go from an evolution to a revolution in mandatory detention law.

A. *Casas-Castrillon v. DHS*

In *Casas-Castrillon v. DHS*, the Ninth Circuit held that an individual is eligible for a bond determination if a petition for review is pending before the Court of Appeals and a stay of removal has been granted, or the individual's case has been remanded by the court of appeals for further administrative proceedings.

B. Eligibility for a bond hearing under the *Casas-Castrillon* decision

---

companion case, *Clark v. Martinez*, 543 U.S. 371 (2005), the Supreme Court prohibited the indefinite detention of arriving aliens.

[15]430 F.3d 1241 (9th Cir. 2005)

[16]443 F.3d 1069 (9th Cir. 2006).

[17]575 F.3d 952 (9th Cir. 2009).

[18]535 F.3d 942 (9th Cir. 2008).

[19]638 F.3d 1196 (9th Cir. 2011).

[20]634 F.3d 1081 (9th Cir. 2011).

[21]715 F.3d 1127 (9th Cir. April 16, 2013).

(1) The alien subject to mandatory detention under § 1226(c).

(2) The alien's immigration case is at one of the following procedural stages:
- After receiving a decision from the immigration judge, the alien appealed to the BIA, and then appealed the BIA decision to the Ninth Circuit, and the case is currently pending before the Ninth Circuit;
- The Ninth Circuit has remanded the case to the BIA or to an immigration judge for further evaluation or proceedings;
- The alien lost his or her petition for review with the Ninth Circuit and is currently seeking a rehearing from the panel, an *en banc* rehearing, or review through a writ of certiorari from the United States Supreme Court; or
- The alien won his or her petition for review with the Ninth Circuit, but remains detained while the government is seeking rehearing in front of the Ninth Circuit or a writ of certiorari from the United States Supreme Court, and

(3) The alien received a stay of removal from the Ninth Circuit.

While the detainee in the original *Casas-Castrillon* case was a permanent resident, the decision did not depend on this fact. Therefore, anyone who meets the requirements listed above should be eligible for a bond hearing under *Casas-Castrillon* regardless of whether or not the person is a lawful permanent resident.

C. Diouf v. Napolitano

In *Diouf v. Napolitano*, the Ninth Circuit held that individuals subject to mandatory detention who have been detained for six months or longer after entry of a final order of removal are entitled to a bond hearing. At this hearing, the government bears the burden of proof that the individual is a danger to the community or a flight risk. *Diouf* eliminated the *Casas-Castrillon* requirement that a petition for review be pending and that a stay of removal be in place. Furthermore, under *Diouf*, it can be argued that if an individual is facing prolonged detention, even before he or she has been detained for six months, he or she is entitled to a bond hearing.

E. Eligibility for a bond hearing under the *Diouf* decision

(1) The alien has been in immigration detention for six months or longer.

(2) The alien is currently being detained under INA § 241(a)(6). The alien is likely being detained under this subsection if:
- The alien has a final order removal entered against him or her in his or her immigration case and remained detained pending administrative adjudication of a motion to reopen before the immigration judge or the

BIA, regardless of whether or not he or she has obtained a stay of removal;

- The alien's motion to reopen his or her immigration case was denied by the BIA, and her or she is petitioning the Ninth Circuit to review the denial, regardless of whether or not he or she has obtained a stay of removal;
- The alien is petitioning for direct review of a removal order, and he or she has not obtained a stay of removal in his or her case; or
- The alien has a final order of removal entered against him or her that he or she is not challenging, but the alien remains detained while awaiting deportation. This may be the situation if the alien's country of origin is refusing to issue the alien travel documents.
- The *Diouf* decision **may** also apply to a case if you the alien is detained because of an order reinstating a prior removal and the alien is seeking relief from reinstatement either before the immigration court or the Ninth Circuit.

F. *Rodriguez v. Robbins, a revolution in detention law*

The Ninth Circuit's *Rodriguez v. Robbins* decision is a case dealing with an appeal of a preliminary injunction in a habeas corpus lawsuit in the Central District of California. The decision affirmed the district court's grant of a preliminary injunction in favor of a certified class of non-citizens who challenged their prolonged detentions. The preliminary injunction requires that the government identify those detained in subclasses pursuant to INA §§ 236(c) and 235(b) and to provide each with an individualized bond hearing before an Immigration Judge. The court held that the detained aliens were likely to succeed on the merits of their claim that mandatory detention must be construed to authorize only six months of mandatory detention, after which a bond hearing is required.

G. Eligibility for bond hearing under the *Rodriguez* decision

(1) The alien has been in immigration detention for six months or longer.

(2) The alien is currently fighting his or her immigration case before an immigration judge, the BIA, or the Ninth Circuit.

(3) The alien is subject to mandatory detention under INA § 236(c) or as an arriving alien under INA § 235(b).

***Practice Pointer*:** While the *Rodriguez* case involves a class of immigrants detained in the Central District of California, Counsel at hearings outside of the Central District of California should argue that the Ninth Circuit's decision in *Rodriguez* is not limited to the Central District and describes the law that should apply throughout the Ninth Circuit. Since September 2013, the government has begun implementing *Rodriguez* hearings outside the Central District of

California. You should analyze whether your client is eligible for a bond under *Casas-Castrillon* or *Diouf* in addition to *Rodriguez* at bond hearings, particularly at hearings outside of the Central District of California. If an immigration judge or a chief counsel argues that *Rodriguez* does not apply, should *Casas-Castrillon* or *Diouf* apply, then an argument about *Rodriguez* is one you do not need to win.

H. Rodriguez bond hearing details and procedures

Do I need to request a *Rodriguez* bond hearing, or is it scheduled automatically?

The preliminary injunction at issue in *Rodriguez* decision requires that the government automatically schedule bond hearings for everyone that qualifies in the Central District of California. Outside the Central District, the government's practices differ and you may need to affirmatively request a *Rodriguez* hearing.

Who bears the burden of proof at a *Rodriguez* hearing?

The standard at a *Rodriguez* hearing are identical to the standard for *Casas* and *Diouf* hearings: to justify continued detention, the government bears the burden of proof to demonstrate that the detainee is a danger or flight risk by "clear and convincing" evidence.

G. Recent developments in *Rodriguez v. Robbins*

Several months after the Ninth Circuit issued its decision in *Rodriguez v. Robbins*, the *Rodriguez* trial judge issued a new decision in the case.[22] The decision expands eligibility for a *Rodriguez* hearing to all people detained in the Central District of California who have been detained for six months while their immigration case remains pending, regardless of the circumstances of their case. The order also directed the government to set up bond hearings for all aliens in the Central District of California who have been detained more than six months.

H. Eligibility for a bond hearing under the August 6, 2013 ruling

(1) You have been in immigration detention for six months or longer.

(2) You are currently fighting your immigration case before either an immigration judge, the BIA.

(3) You are detained in the Central District of California.

(4) You are detained under INA §§ 235(b), 236(a), 236(c) or 241(a) .

---

[22] *Rodriguez v. Robbins*, No. 07-3239 (C.D. Cal. Aug. 6, 2013) (order granting permanent injunction).

Practice pointer: The *Rodriguez* case does not apply to aliens detained on terrorism grounds under 8 INA §§ 236A, 501-507. The decision includes people who had bond hearings at the start of their case under § 1226(a); were previously deported and the government "reinstated" the prior removal order; issued an administrative removal order under INA § 238(b); or entered through the Visa Waiver Program and are now seeking asylum. The *Rodriguez* decision requires that the government automatically schedule bond hearings for everyone who qualifies. However, don't wait. If your client has been detained for more than six months and believe he or she qualify under *Rodriguez*, you should request a bond hearing