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CHALLENGING IMMIGRATION DETENTION PENDING THE REMOVAL CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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5. District court decisions from other jurisdictions.

District courts that have rejected *Rojas.*

- *Hamama v. Adducci*, --- F. Supp. 3d ----, 2018 WL 263037 (E.D. Mich. 2018) (order granting bond hearings to nationwide class of detained Iraqi Christians)
- *Mudhallaa v. BICE*, No. 15-10972, 2015 WL 1954436 (E.D. Mich. Apr. 29, 2015)
- *Rosciszewski v. Adducci*, 983 F. Supp. 2d 910 (E.D. Mich. 2013)
- *Rosario v. Prindle*, No. 11–217, 2011 WL 6942560 (E.D. Ky. Nov. 28, 2011) (R&R), 2012 WL 12920 (E.D. Ky. Jan. 4, 2012) (order adopting R&R)
- *Khodr v. Adduci*, 697 F. Supp. 2d 774 (E.D. Mich. 2010)

District courts that have deferred to *Rojas* either as a holding or in dicta:

- *Khan v. Whiddon*, No: 2:13-cv-638-FtM-29MRM, 2016 WL 4666513 (M.D. Fl. Sept. 7, 2016)
- *Deacon v. Shanahan*, No. 4:15-cv-00407-CLS-HGD2016 WL 1688577 (N.D. Al. Apr. 1, 2016) (R&R), 2016 WL 1639899 (N.D. Al. Apr. 25, 2016) (order adopting R&R)
- *Cortez v. Lynch*, H-15-3306, 2016 WL 1059532 (S.D. Tex. Mar. 17, 2016)
- *Gjergi v. Johnson*, No. 3:15-cv-1217-J-34MCR, 2016 WL 3552718 (M.D. Fl. June 30, 2015)
- *Hernandez v. Prindle*, No. 15-10-ART, 2015 WL 1636138 (E.D. Ky. Apr. 13, 2015)
- *Orozco-Valenzuela v. Holder*, No. 1:14 CV 1669, 2015 WL 1530631 (N.D. Ohio Apr. 6, 2015)
- *Cisneros v. Napolitano*, No. 13–700 (JNE/JJK), 2013 WL 3353939 (D. Minn. July 3, 2013)
- *Khetani v. Petty*, 859 F. Supp. 2d 1036 (W.D. Mo. 2012)
- *Silent v. Holder*, No. 4:12–cv–00075–IPJ–HGD, 2012 WL 4735574 (N.D. Ala. Sept. 27, 2012)
- *Garcia-Valles v. Rawson*, No. 11–C–0811, 2011 WL 4729833 (E.D. Wis. Oct. 7, 2011)
- *Serrano v. Estrada*, No. 3–01–CV–1916–M, 2002 WL 485699 (N.D. Tex. Mar. 6, 2002)

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C. Your client is not "deportable" or "inadmissible" on one of the specified grounds.

1. Your client has not been charged as "deportable" or "inadmissible" under one of the specified grounds.

Matter of Leybinski, A73 569 408 (BIA Mar. 2, 2000) (unpublished) (copy attached)

But see Matter of Kotliar, 24 I. & N. Dec. 124 (BIA 2007) (noncitizen need not be charged with the ground that provides the basis for mandatory detention)

2. Your client is not actually "deportable" or "inadmissible" on the ground that triggers mandatory detention.

Under BIA precedent, an individual is properly subject to INA § 236(c) unless he can show that the government is "substantially unlikely to prevail" on the ground of deportability or inadmissibility that triggers the statute.

Matter of Joseph, 22 I. & N. Dec. 799 (BIA 1999).

There is a strong argument that the *Joseph* standard raises serious constitutional concerns. The Supreme Court in *Demore v. Kim*, 538 U.S. 510 (2003), upheld the mandatory detention of only a noncitizen who *conceded* deportability and who was not eligible for relief from a removal order. *Demore* did not resolve the constitutionality of imposing mandatory detention when someone raises a substantial challenge to removability.

See Gonzalez v. O'Connell, 355 F.3d 1010 (7th Cir. 2004) (noting that this "important" constitutional issue was left open in *Demore*)

When construed to avoid constitutional concerns, INA § 236(c) should not apply where the client has a substantial challenge to the ground of deportability or inadmissibility. This claim is particularly strong if the IJ has already rejected the government's charge, even if the government has appealed the decision to BIA.

See Tijani v. Willis, 430 F.3d 1241, 1246-47 (9th Cir. 2005) (Tashima, J. concurring)

Demore v. Kim, 538 U.S. 510, 577-78 (2003) (Breyer, J, dissenting)

Casas v. Devane, No. 15-cv-8112, 2015 WL 7293598 (N.D. Ill. Nov. 19, 2015) (holding mandatory detention of person with good faith challenge to removal

unconstitutional; petitioner sought post-conviction relief from guilty plea due to ineffective assistance of counsel)

But see Gayle v. Johnson, 81 F. Supp. 3d 371 (D.N.J. 2015), *rev'd and remanded* 838 F.3d 297 (3d Cir. 2016) (holding that an individual is "deportable" for purposes of INA § 236(c) where the government merely has probable cause that he or she is subject to a criminal ground of deportability)

Moreover, even if the client concedes deportability or inadmissibility on a ground that triggers mandatory detention, INA § 236(c) should not apply where the client has a substantial claim to *relief* from a removal order (e.g., INA § 212(c), cancellation, adjustment, asylum, U-visa, etc.). This argument is particularly strong if IJ has already granted such relief, even if the government has appealed the grant to the BIA.

See Papazoglou v. Napolitano, No. 1:12-cv-00892, 2012 WL 1570778 (N.D. Ill. May 3, 2012) (holding mandatory detention of LPR whom IJ had granted new adjustment of status to lawful permanent residence unconstitutional)

Cf. Krolak v. Ashcroft, No. 04-C-6071 (N.D. Ill. Dec. 1, 2004) (holding mandatory detention under INA § 236(c) unconstitutional as applied to an individual who had a bona fide citizenship claim) (copy attached)

But see Gayle v. Johnson, 4 F. Supp. 3d 692 (D.N.J. 2014), *rev'd and remanded* 838 F.3d 297 (3d Cir. 2016) (holding that the term "deportable" in INA § 236(c) refers only to whether individuals are properly charged under a criminal ground of deportability).

NB: this argument would not apply to withholding or CAT, because these claims do not bar entry of a removal order.

3. If INA § 236 cannot be construed to prohibit the mandatory detention of individuals with substantial challenges to removal, it violates due process.

See, e.g., *Papazoglou v. Napolitano*, No. 1:12-cv-00892, 2012 WL 1570778 (N.D. Ill. May 03, 2012).

D. When to request a *Joseph* hearing (*Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999))

1. To exhaust and preserve issues for federal court review. This is unnecessary where the issue is foreclosed by BIA precedent and thus exhaustion is futile.

2. If circumstances change, e.g.,

- Detention becomes prolonged.

- The IJ finds detainee non-removable as a threshold matter or grants relief from removal that renders your client non-deportable/non-inadmissible.

- New case law or post-conviction relief supports argument that convictions are not aggravated felonies or crimes of moral turpitude, and therefore do not trigger mandatory detention.

II. CHALLENGES TO PROLONGED DETENTION WITHOUT A BOND HEARING

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

1. Supreme Court

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

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

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

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

- **Second Circuit:** *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015)

- **Sixth Circuit:** *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (requiring release when mandatory detention exceeds a reasonable period of time)

- **Ninth Circuit:** *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub. nom. Jennings v. Rodriguez*, No. 15-1204; *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013)

- **Eleventh Circuit**: *Sopo v. Attorney General*, 825 F.3d 1199 (11th Cir. 2016)

2. Third Circuit

The Third Circuit has held as a *constitutional* matter that due process prohibits mandatory detention for only an unreasonable period of time. Where detention has become unreasonable, the person must receive a custody hearing where government bears the burden of justifying continued detention based on flight risk or danger.

- *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011)
- *Leslie v. Attorney General*, 678 F.3d 265 (3d Cir. 2012)
- *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (3d Cir. 2015)

Because the Third Circuit has required custody hearings on constitutional grounds, and not only statutory grounds, its cases remain good law after *Jennings*.

B. Detention pending judicial review of a removal order where removal has been stayed

1. What Statute Applies: INA § 236 or INA § 241?

Courts that have analyzed the issue have held that INA § 236 continues to apply.

- **Second Circuit**: *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003)

- **Third Circuit***: Leslie v. Attorney General*, 678 F.3d 265 (3d Cir. 2012)

- **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) (holding that INA § 241 does not authorize detention pending judicial stay of removal).

- **Ninth Circuit***: Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008); *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008).

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

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

- In *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), the **Ninth Circuit** held that INA § 236(c) does not apply to an individual whose removal is stayed pending judicial review of his removal order. The court concluded that the mandatory detention statute applies only pending administrative removal proceedings. Thus, in the court's view, once proceedings are concluded before the BIA, the authority for detention shifts to INA § 236(a), and the person is entitled to a bond hearing. This holding in *Casas* arguably survives the Supreme Court's decision in *Jennings*.
    - **NB:** The court in *Casas* also construed INA § 236(c) to authorize mandatory detention only where removal proceedings are "expeditious" and therefore does not authorize mandatory detention after remand for the court of appeals for further removal proceedings. However, that holding was abrogated by the Supreme Court in *Jennings*.
- The Ninth Circuit also has held that due process requires that the government bear the burden of justifying an individual's detention by clear and convincing evidence at *Casas* hearings. *See Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011).
- By contrast, the **Third Circuit** in *Leslie v. Attorney General*, 678 F.3d 265 (3d Cir. 2012), while not explicitly discussing the issue, appears to have assumed that INA § 236(c) continues to apply where removal is stayed. The Court subjected the detention of an individual with a stay of removal to the same analysis for prolonged mandatory detention under INA § 236(c) set forth in *Diop*. *See Desrosiers v. Hendricks*, 532 Fed. Appx. 283 (3d Cir. Jul 24, 2013).

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

- *Compare Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008) *with Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir. 2008).
- *But see Enoh v. Sessions*, 236 F. Supp. 3d 787 (W.D.N.Y. 2017) (rejecting *Diouf*); *Kudishev v. Aviles*, No. 15-2545 (MCA), 2015 WL 8681042 (D.N.J. Dec. 10, 2015) (same).

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

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

- *See Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (construing INA § 241(a)(6) to require a bond hearing before the IJ at six months where the government bears the burden of proof; holding the post-order custody review process to be inadequate to protect against unlawful prolonged detention).
    - **NB:** The Ninth Circuit has held that due process requires that the government bear the burden of justifying an individual's detention by clear and convincing evidence at prolonged detention hearings. *See Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011).
- *See also Hamama v. Adducci*, --- F. Supp. 3d ----, 2018 WL 263037 (E.D. Mich. 2018) (ordering bond hearings for a nationwide class Iraqi Christians subject to detention under INA § 241(a)(6) for six months, unless the government presents evidence that the class member has extended their detention through bad faith or frivolous litigation tactics or other factors why that detainee should not receive a bond hearing).

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

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

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

Challenges to Denial of Parole

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases holding that INA § 236(a) applies:

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

Cases holding that INA § 241 applies:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. DETENTION OF INDIVIDUALS ON ORDERS OF SUPERVISION

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

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

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

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VIII. OTHER ISSUES

A. Challenge to Detention Based on General Deterrence

The Attorney General has held that INA § 236(a) permits detention for the purpose of deterring migration to the United States.

- *Matter of D-J-*, 23 I. & N. Dec. 572 (2003)

A district court has rejected in this view.

- *See RILR v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015) (entering preliminary injunction in nationwide class action on behalf of mothers and children held at family detention centers)

B. Challenge to arbitrary discretionary detention (i.e., absent evidence of danger or flight risk).

Courts have sustained constitutional challenges to detention under INA § 236(a) in extreme circumstances, where the detention appeared to lack any regulatory purpose.

- *See Kambo v. Poppell*, No. 07-800, 2007 WL 3051601 (W.D. Tx. Oct. 18, 2007) (ordering release of petitioner where DHS had sought stay of his initial bond determination, had then refused tender of bond, and had subsequently appealed IJ decision granting him adjustment of status)

- *Parlak v. Baker*, 374 F. Supp. 2d 551 (E.D. Mich. 2005), *vacated as moot*, No. 05-2003, 2006 WL 3634385 (6th Cir. Apr. 27, 2006) (reviewing bond determination notwithstanding INA § 236(e))

IX. JURISDICTION, EXHAUSTION, ETC.

A. Does INA § 236(e) bar judicial review?

1. Courts have held that INA § 236(e) applies only to review of the Attorney General's discretionary judgment, and not to review of constitutional claims or questions of law.

- *Demore v. Kim*, 538 U.S. 510 (2003)
- *Saint Fort v. Ashcroft*, 329 F.3d 191 (1st Cir. 2003)
- *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013)
- *Al-Siddiqi v. Achim*, 531 F.3d 490, 494 (7th Cir. 2008)

- *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011)
- *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015)

2. The Ninth Circuit has held that INA § 236(e) bars review of the IJ's discretionary decision to set a particular bond amount.

- *See Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008).

- *But see Shokeh v. Thompson*, 369 F.3d 865 (5th Cir. 2004), *vacated as moot*, 375 F.3d 351 (5th Cir. 2004) (holding that a post-removal order bond that "has the effect of preventing an immigrant's release because of inability to pay and that results in potentially permanent detention is presumptively unreasonable"

3. Should I appeal the IJ's custody decision to the BIA prior to filing a habeas?

- There is no statutory exhaustion requirement. Exhaustion is required, if at all, as a prudential matter alone, and the traditional exceptions to such exhaustion apply.

- *See McCarthy v. Madigan*, 503 U.S. 140, 146-49 (1992), *superseded by statute on other grounds as stated in Booth v. Churner*, 532 U.S. 731 (2001) (the traditional exceptions include where exhaustion would cause "undue prejudice to the subsequent assertion of a court action" or "irreparable harm" to the petitioner, there is "some doubt as to whether the agency was empowered to grant effective relief," or it would be futile because "the administrative body is shown to be biased or has otherwise predetermined the issue before it" (internal citations and quotation marks omitted)).

- Check your jurisdiction's case law on exhaustion. *See, e.g.*, *Leonardo v. Crawford*, 646 F.3d 1157, 1161 (9th Cir. 2011) (holding that habeas petitioners should typically exhaust their administrative remedies by appealing the IJ's custody determination to the BIA).

A73 569 408 - New York City

Date: MAR - 2 2000

GERMAN LEYBINSKY a.k.a. Drobb Kohobsob a.k.a. Alex Muxaulob

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Irwin J. Berowitz, Esquire
Bretz & Associates
299 Broadway, Suite 810
New York, New York 10007

APPLICATION: Change in custody status

The respondent appeals the Immigration Judge's April 9, 1999, order denying the respondent's request for a change in custody status. The Immigration Judge found that the respondent was ineligible for bond pursuant to section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c). The respondent filed a timely appeal of this decision. The appeal is sustained; and the record is remanded for further proceedings.

The bond record indicates that the respondent is in removal proceedings pursuant to the issuance of a Notice to Appear (Form I-862). The Immigration and Naturalization Service (Service) has charged the respondent with removability pursuant to section 237(a)(1)(B) of the Act, as an alien who after admission as a nonimmigrant under section 101(a)(15) of the Act, has remained in the United States for a time longer than permitted. The Notice to Appear indicates that the respondent conceded that he is subject to removal under section 237(a)(1)(B) of the Act (Exh. 1, Immigration Judge's notation indicating that the respondent conceded the charge, dated April 23, 1999).

At his bond hearing, the respondent admitted and does not contest on appeal that on May 6, 1996, he was convicted of the offense of sexual abuse in the first degree, in violation of New York Penal Law § 130.65, and received an indeterminate sentence of 1 to 3 years of imprisonment (Tr. at 7; Oral Decision of the Immigration Judge at 2-3). Section 130.65 of the New York Penal Law, sexual abuse in the first degree, provides that, "[a] person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact: [1] By forcible compulsion; or [2] When the other person is incapable of consent by reason of being physically helpless; or [3] Less than eleven years old." N.Y. Penal Law § 130.65 (McKinney 1999). Based on the respondent's admissions at his bond hearing, the Immigration Judge found that the respondent was subject to the mandatory detention provision of section 236 of the Act because he had admitted that he has been convicted of an aggravated felony under section 101(a)(43)(F) of the Act, and is thus removable pursuant to section 237(a)(2)(A)(iii) of the Act.

We note that it is unclear from this record when the respondent came into the custody of the Service and whether the Service's new policy regarding the applicability of mandatory detention provisions applies to the respondent. [1]

Section 236(c) of the Act directs the Attorney General to take into custody any alien who "is inadmissible," or who "is deportable," under certain enumerated sections of the Act. We note, however, that the Service has not charged the respondent with removability pursuant to any of these specifically-enumerated sections of the Act. Instead, the Service has charged the respondent with removability under section 237(a)(1)(B) of the Act, and this ground of removability does not subject him to mandatory detention under section 236(c) the Act.

Irrespective of this circumstance, the Immigration Judge determined that the respondent is ineligible for bond pursuant to section 236(c)(1)(B), which directs the Attorney General to take into custody any alien who "is deportable" by having committed any offense covered in section 237(a)(2)(A)(iii) of the Act covering aliens convicted of aggravated felonies at any time after admission. See Oral Decision of the Immigration Judge, dated April 9, 1999. The Service has elected to proceed against the respondent on the ground that he is removable under section 237(a)(1)(B) of the Act as an alien who after being admitted remained in the United States longer than permitted. Inasmuch as the Service is treating the respondent as being subject to the grounds set forth in section 237(a)(1)(B) of the Act, and this record does not show that the Service has charged the respondent with removability under sections 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of the Act, we find it inappropriate for the Immigration Judge to find that he is subject to mandatory detention under section 236(c)(1) of the Act.

At the same time, we note that the respondent's admissions during his bond hearing indicate that the respondent was convicted of crime of violence, as defined by section 101(a)(43)(F) of the Act, and it appears that the Service could have charged him with removability under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony. Had the Service done so, the respondent would have been directly subject to the mandatory custody provisions of section 236(c) of the Act. See section 236(c)(1)(B) (directing the Attorney General to take into custody any alien who "is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)" of the Act).

The question left for decision then is whether the respondent "is deportable" for purposes of section 236(c)(1)(B) of the Act in light of his testimony admitting that he was convicted of the offense of sexual abuse in the first degree containing as an element forcible compulsion or inability to consent, but in the absence of his having been specifically charged with deportability on this basis under section 237(a)(2)(A)(iii) of the Act. We conclude that he is not subject to mandatory detention

[1] On remand, the Immigration Judge should ascertain the date of the respondent's release from criminal custody in case the information becomes important later.

because he has not been charged with removability under any of the sections of the Act specifically enumerated in section 236(c) of the Act.

As noted above, section 236(c) of the Act instructs the Attorney General to take into custody any alien who "is inadmissible," or who "is deportable," under certain enumerated sections of the Act. The Board has addressed the use of "is deportable" language and related issues in other contexts. For example, in Matter of T-, 5 I&N Dec. 459 (BIA 1953), the Board concluded an alien should not be held statutorily ineligible for voluntary departure based on his noncompliance with the Act's address registration requirement where he had not been ordered deported based on that ground of deportation.

In Matter of Chiang, 12 I&N Dec. 710 (BIA 1968), an applicant for suspension of deportation had two narcotic law convictions, but was not charged with deportability based on either or both of these convictions. In framing the issue presented for decision, the Board stated:

> The question before us is whether the phrase "is deportable" means that an alien is to be considered within section 244(a)(2) only if he is charged with and found deportable as an alien within one of the classes of aliens mentioned in paragraph (2) of section 244(a) or does the quoted phrase require an application for suspension of deportation to be considered under paragraph (2) where the record establishes that[,] had deportability been charged under one or more of the specified provisions of section 244(a)(2), it would have been sustained[,] but no such charge was in the warrant of arrest, the order to show cause[,] or lodged during the course of the hearing.

Id. at 712.

The Board noted in part that the federal regulations required that "an alien must be furnished with notification of the charge against him [and] must be given an opportunity to defend against it." The Board went on to conclude that the phrase "is deportable" in section 244(a)(2) of the Act relates to an alien who has been charged with and found deportable on one or more of the provisions specifically enumerated within section 244(a)(2) of the Act. Id.

Matter of Melo, 21 I&N Dec. 883 (BIA 1997), concerned the issue of the presumptions of dangerousness and flight risk for an aggravated felon in cases subject to section 242(a)(2) of the Act, 8 U.S.C. § 1252(a)(2) (1994).[3] In that case, the Board addressed the meaning of "is deportable" as used in the Transition Period Custody Rules, which were enacted by section 303(b)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208,

[3] The provisions of section 242(a)(2) of the Act are inapplicable to the custody determination in the instant removal proceedings.

110 Stat. 3009-546, 3009-586 (IIRIRA), and which were then in effect but have since expired. See Matter of Noble, 21 I&N Dec. 672 (BIA 1997). The Board stated, "[w]e are not satisfied that the meaning of the 'is deportable' language in section 303(b)(3)(A)(iii) of the IIRIRA, a bond provision, is controlled by Matter of Ching, [supra,] or Matter of T-, [supra]." Matter of Melo, supra, at 4 n.2. The Board noted that the precedent decisions cited therein involved eligibility for relief from deportation considered only after findings of deportability already had been made. In contrast, bond determinations are normally rendered before any finding of deportability is made. Id.

Most recently, the Board examined the use of the "is deportable" language in Matter of Fortiz, 21 I&N Dec. 1199 (BIA 1998). In that case, the alien had been convicted of malicious burning, but was not charged with deportability as an alien convicted of an aggravated felony. The Service argued that the alien's conviction for malicious burning constituted a conviction for an aggravated felony. As such, he was ineligible for section 212(c) relief pursuant to section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996). The Board concluded that for an alien to be barred from eligibility for a waiver under section 212(c) of the Act as one who "is deportable" by reason of having committed a criminal offense covered by one of the criminal deportation grounds enumerated in the statute, the alien must have been charged with, and have been found deportable on, such ground(s). Id. at 4 n.3. See also Choeum v. INS, 129 F.3d 29 (1st Cir. 1997); Matter of Fortiz, supra (Filppu, concurring) (contrasting Congress' use of "is deportable" and "convicted of"). But see Mendez-Morales v. INS, 119 F.3d 738 (8th Cir. 1997); Abdel-Razek v. INS, 114 F.3d 831 (9th Cir. 1997); Matter of Fortiz, supra (Jones, concurring and dissenting).

The precedent decisions discussed above, relating to the term "is deportable," provide guidance in deciding the question now before us. The reasoning employed in Matter of Ching, supra, that an alien must be furnished with notification of the charge against him and must be given an opportunity to defend against it, is persuasive. The reasoning found in both Matter of T-, supra, and Matter of Fortiz, supra, that an alien must be charged with and be found deportable on the disqualifying ground of deportation before he can be found to be statutorily ineligible for relief based on that ground of deportation, also is persuasive. In addition, we find relevant the distinction noted in Matter of Melo, supra, regarding the context of bond determinations vis-a-vis other immigration proceedings. See Matter of Fortiz, supra (Filppu, concurring); 8 C.F.R. § 3.19(d) (1998). Normally, an Immigration Judge's bond redetermination decision is made near the beginning of an alien's immigration proceedings. Thus, at the time the Immigration Judge is making the bond decision, it is frequently the case that no finding of inadmissability, deportability, or removability has been made.

Given the context of an Immigration Judge's bond redetermination decision, we find that there need not have been an actual finding of deportability under section 237(a)(2)(A)(iii) of the Act before the mandatory detention provisions of section 236(c)(1)(B) of the Act could be applied in the respondent's case. At the same time, however, we find that at the very least the respondent herein must have been put on notice that his criminal conviction formed a basis for his removal, such as

through a charge of removability under section 237(a)(2)(A)(iii) of the Act, before he can be found to be ineligible for bond pursuant to section 236(c)(1)(B) of the Act.[3] See Briseno v. INS, __F.3d__, 1999 WL 812942 (9th Cir. 1999) (considering meaning of jurisdictional provision barring review for an alien deportable "by reason of having committed" an aggravated felony).

Because the respondent has not been charged with removability pursuant to any of the sections of the Act specifically enumerated in section 236(c) of the Act, or even put on notice that his conviction is at issue with respect to removability, questions regarding his custody and eligibility for bond are not governed by section 236(c) of the Act, as the Immigration Judge concluded. Rather, such questions are governed by section 236(a) of the Act.

Accordingly, the record is remanded for consideration of the respondent's request for change in custody status and bond determination based on the provisions of section 236(a) of the Act.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FOR THE BOARD

[3] We also note that, in such a situation, there must be some evidence in the record to support the charge, lest we leave aliens vulnerable to "empty" charges.

(Reserved for use by the Court)

ORDER

Petitioner Szymon Krolak seeks an order requiring that he be given a bond hearing.

Respondent Deborah Achim contends that this court does not have subject matter jurisdiction over this case because petitioner has not exhausted his administrative remedies and the exceptions the Seventh Circuit has recognized to the exhaustion requirement do not apply. In addition, respondent contends that petitioner is not entitled to relief on the merits of the claims he has made.

Where as in this case there is not a mandatory statutory exhaustion requirement, the discretionary judicial exhaustion doctrine applies. See Gonzalez v O'Connell, 355 F3d 1010, 1015 (7th Cir 2004). The Seventh Circuit has held that exhaustion is to be excused when:

> (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite timeframe for administrative action; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where substantial constitutional issues are raised.

Gonzalez v O'Connell, 355 F3d 1010, 1016 (7th Cir 2004), quoting Iddir v INS, 301 F3d 492, 498 (7th Cir 2002). Since the filing of the petition for writ of habeas corpus, the BIA affirmed the decision with respect to bond, and stated that "[t]he decision below is, therefore, the final agency decision."

Administrative remedies have most certainly been exhausted with respect to Counts I and III of the petition. In Count I, petitioner contends that language in the INA stating "the Attorney General shall take into custody any alien when the alien is released" from custody for a conviction for which he may be deported mans that the alien must be taken into custody as soon as he is released. The "when" in this provision could mean what petitioner claims; that the alien must be taken into custody immediately. It could alternatively mean "after" rather than "immediately." The language is thus ambiguous, and this court will therefore defer to the BIA's interpretation. See Saucedo-Tellez v Perryman, 55 F Supp 2d 882, 885, (N D Ill 1999). Petitioner is therefore not entitled to habeas relief on the basis of Count I. Count III claims petitioner was not convicted of a predicate offense that would require him to be held without a bond hearing. The statute at issue provides: "The Attorney General shall take into custody any alien who—. . . (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title[.]" 8 USC § 1226(c)(1). The referenced section provides in part: "Any alien who at any time after admission has been convicted of . . . any law . . . of a State . . . relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 USC § 1227(a)(2)(B)(1). Petitioner's conviction was for two offenses involving possession of marijuana. (The court notes that this resolution does not require a determination of whether petitioner's conviction was for an aggravated felony, which remains an open question.) Therefore, the statute provides for his detention without a bond hearing.

In Count II petitioner contends that it is required that he be an alien to be detained without a bond hearing under the statute. Petitioner's premise is essentially that he should have been naturalized. However, he was not naturalized. The issue of whether he will be naturalized has not yet been adjudicated administratively–i.e., administrative remedies have not been exhausted with respect to this issue–so it will not be ruled upon by this court. Suffice it to say that at present petitioner remains an alien, and so Count II fails on its own terms.

In Count IV petitioner contends that he has a "colorable claim that he is not in fact deportable," and therefore the statute providing for detention without a bond hearing is unconstitutional as applied to him. Taking out of consideration the question of whether he should have been naturalized, there is no question on the basis of what is before this court that he is deportable as an alien convicted of two offenses of possession of marijuana. See 8 USC § 1227(a)(2)(B)(1). Thus, the only basis on which he could have a colorable claim would be his claim that he should have been naturalized. That issue turns on the actions of the agency with respect to his parents's applications for citizenship. What is indisputable is that by the time his own application was determined, petitioner was over the age of 18 and so ineligible for the automatic citizenship for which he was applying. Petitioner contends that certain procedures to expedite his application should have been used, and that he was entitled to automatic citizenship under a statutory provision he did not apply under. Thus, petitioner's constitutional question is in fact premised on this question involving statutes and agency regulations, and the currently pending administrative proceedings in this matter concern this underlying issue. This is thus a colorable and good faith claim that petitioner is not in fact deportable. The Supreme Court has stated: "Detention during removal proceedings is a constitutionally permissible part of the process. See Demore v Kim, 538 US 510, 123 S Ct 1708, 1721-22 (2003). However, the Court's determination was premised on the detainee in Kim conceding deportability. This court is of the opinion that when an alien has a colorable claim that he is not in fact deportable, detention without a bond hearing is violative of due process, and therefore the statute in question is unconstitutional as applied to petitioner. Therefore, on the basis of Count IV the court grants petitioner's petition for writ of habeas corpus.

George W. Lindberg

Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	George Lindberg	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	04 C 6071	DATE	12-1-04
CASE TITLE	Szymon Krolak vs. Deborah Achim		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] The court, sua sponte, dismisses John Ashcroft and Tom Ridge as respondents because Deborah Achim is the only proper party respondent in this action. Szymon Krolak's petition for writ of habeas corpus [1] is granted. Judgment granting Szymon Krolak's petition for writ of habeas corpus shall be set forth on a separate document and entered in the civil docket. FRCP 58(a)(1), (b)(2(A), 79(a).

(11) ■ [For further detail see order on the reverse side of the original minute order.]

	No notices required, advised in open court.		number of notices / Document Number
	No notices required.		date docketed
	Notices mailed by judge's staff.		docketing deputy initials
	Notified counsel by telephone.		date mailed notice
	Docketing to mail notices.		
	Mail AO 450 form.		
	Copy to judge/magistrate judge.		
slb	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing deputy initials