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Developments in Civil Detention: Circuit Approaches to the Reasonableness of Prolonged Detention and Interpretations of the "When Released" Clause

by Margot Kniffin and Sarah Martin

Historically, changing approaches to civil immigration detention have reflected the social and political forces of the time.[1] Current immigration detention statutes were amended and added to the Immigration and Nationality Act in 1996 through passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Division C of Pub. L. No. 104–208, 110 Stat. 3009-546. At that time, Congress was presented with growing public safety concerns stemming from the Government's perceived inability to effectively identify and deport criminal aliens. *See* S. Rep. No. 104-48 (1995). Congress thus introduced stricter detention statutes, including mandatory detention, as a means of expediting the removal of criminal aliens and addressing these public safety concerns. *Id.*

In the years since the passage of IIRIRA, however, the landscape of immigration in the United States has shifted. Due in part to IIRIRA's expanded definition of criminal aliens, as well as a rise in immigration rates, the number of aliens taken into custody pending their removal proceedings has dramatically increased.[2] Many aliens now remain detained for a much longer period than they did when Congress passed the amended detention statutes in 1996. Prolonged detention periods have raised questions as to whether the statutes serve their intended purpose of ensuring an expedited process for identifying and removing criminal aliens. Aliens in recent years have presented both constitutional and statutory challenges to the Government's authority to impose mandatory detention for a prolonged period without a bond hearing.

Update: As noted in the article, the Supreme Court has granted certiorari in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, --- S. Ct. ----, 2016 WL 1182403 (U.S. June 20, 2016) (No. 15-1204).

The Supreme Court has addressed the constitutionality of prolonged immigration detention in two landmark decisions. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court held that the Government could not indefinitely detain a removable alien pursuant to section 241(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6).[3] The aliens in this case had been ordered removed, but their home countries would not accept them.[4] *Id*. at 684. Concluding that a statute that allowed for indefinite detention would raise constitutional concerns under the Fifth Amendment Due Process Clause, the Court established 6 months as the "presumptively reasonable" period of detention after which judicial review was appropriate to review the likelihood that the alien would be removed in the "reasonably foreseeable future." *Id*. at 701.

Later, in *Demore v. Kim*, 538 U.S. 510 (2003), the Court reviewed the constitutionality of provisions contained in section 236(c) of the Act, 8 U.S.C. § 1226(c), requiring the mandatory detention of certain aliens. The alien in this case argued that the mandatory detention requirement violated due process because it allowed the Attorney General to detain an alien indefinitely without a finding that the alien was a danger to the community or a flight risk.[5] *Id*. at 514.

Relying on *Zadvydas*, the Court rejected the alien's argument and concluded that aliens detained under section 236(c) could be constitutionally held "for the brief period necessary for their removal proceedings." *Id*. at 513. The Court noted that Congress adopted section 236(c) because of a "wholesale failure by the [Government] to deal with increasing rates of criminal activity by aliens." *Id*. at 518. Furthermore, the Court cited statistics showing that detention in the majority of cases lasted less than 90 days, while most removal cases were completed in a few months. *Id*. at 529. The Court held that detention under section 236(c) was not facially unconstitutional for the "limited period of . . . removal proceedings." *Id.* at 531.

In a concurring opinion that was necessary for the decision reached by the majority, Justice Kennedy agreed that due process had been satisfied in the case before the Court, but he stated that constitutional concerns might arise if an alien's detention became unreasonable or unjustified. *Id*. at 532 (Kennedy, J., concurring) ("[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.").

Thus, Supreme Court precedent has discussed prolonged detention with an eye to reasonableness. Since that time, the Federal circuit courts and the Board of Immigration Appeals have been presented with cases that question when and for how long an alien can be detained pursuant to the Act's detention statutes. In the coming term, the Court will revisit the issue of prolonged civil detention. *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, --- S. Ct. ----, 2016 WL 1182403 (U.S. June 20, 2016) (No. 15-1204).[6]

The following article offers an overview of two issues in civil detention. It first describes the varied approaches taken by circuit courts of appeals that have considered what may constitute a "reasonable period" that an alien can be detained without a bond hearing. It then examines the meaning and reach of the "when released" clause of section 236(c), which dictates which aliens should be held pursuant to this statute.

Prolonged Detention

In the years since the Supreme Court issued *Zadvydas* and *Demore*, courts have taken up the issue of whether mandatory detention becomes "prolonged" at a certain point. Six circuit courts of appeals have stated that an alien can only be held in detention without a bond hearing for a limited period of time. Of these six courts, the Ninth and Second Circuits have defined this limited period as "6 months/180 days," while four courts, the First, Third, Sixth, and Eleventh Circuits, have taken a "reasonable period" approach.

Six Months/180 Days

The Ninth and Second Circuits have concluded that after 6 months (or 180 days) an alien who is otherwise subject to mandatory detention must be given a bond hearing. *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, --- S. Ct. ----, 2016 WL 1182403 (U.S. June 20, 2016) (No. 15-1204); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *petition for cert. filed*, --- S. Ct. ---, 84 U.S.L.W. 3562 (U.S. Mar. 25, 2016) (No. 15-1205).[7] In general, the circuit courts cite certainty and predictability for this numerical boundary. *See Lora*, 804 F.3d at 615. Efficiency

of adjudication also affects the calculation, given the greater number of immigration appeals arising in these circuits.[8] When aliens are afforded a hearing after the 6-month period, the case law within these jurisdictions places the burden on the Government to show flight risk or danger to the community by clear and convincing evidence. *See id.* at 616.

The Ninth Circuit's recent line of cases addressing prolonged detention begins with *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005). There, the court held that the detention under section 236(c) of a lawfully admitted resident alien subject to removal for over 32 months was "constitutionally doubtful." *Id.* at 1242 (citing *Zadvydas*, 533 U.S. at 690). A divided panel of the Ninth Circuit avoided deciding the constitutional issue, instead interpreting the authority conferred by section 236(c) as applying to expedited removal of criminal aliens and held that "[t]wo years and eight months of process is not expeditious." *Id*. The court remanded the petition to the district court with directions to grant a writ of habeas corpus unless the Government provided a bond hearing within 60 days. *Id*.

Three years later, in *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), the Ninth Circuit addressed the habeas corpus petition of an alien, detained nearly 7 years without a bond hearing, who had been issued a final removal order but awaited adjudication of his petition for review.[9] *Id*. at 945. The court held that this type of prolonged detention must be accompanied by appropriate procedural safeguards, including a hearing in which the Government bears the burden of establishing that the alien would pose a danger to the community or a flight risk if released. *Id*. at 950–51 (citing *Zadvydas*, 533 U.S. at 690); *see also Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008). The court later clarified that the Government is held to a clear and convincing evidence standard of proof in this context. *See Singh v. Holder*, 638 F.3d 1196, 1205–06 (9th Cir. 2011).[10] Although the court did not outline a specific duration beyond which detention becomes unreasonable, it stated that the alien's nearly 7-year detention "certainly qualifie[d] as prolonged by any measure." *Casas-Castrillon*, 535 F.3d at 948.

The Ninth Circuit subsequently developed its analysis by defining the scope of a "reasonable" detention period. In *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), the alien was ordered removed and had waived appeal. After failing to depart, he was detained pursuant to section 241(a)(6) of the Act, at which time he filed a motion to reopen proceedings. *Id*. at 1082–83. He was then detained for 22 months during the pendency of his motion to reopen and while the petition for review of the denial of the motion to reopen (a collateral challenge to his removal order) was pending. *Id*. at 1084.

The Ninth Circuit held that the petitioner was entitled to a bond hearing after 6 months, the point at which it deemed his detention to be "prolonged." *Id*. at 1091. Applying the canon of constitutional avoidance,[11] as in *Casas-Castrillon*, the court held as a matter of statutory interpretation that aliens detained under section 241(a)(6) of the Act should receive the same procedural safeguards accorded to aliens detained under section 236(a). *Id*. at 1086. The court employed the Supreme Court's balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine what procedures are necessary when there has been a deprivation of liberty in cases that implicate due process concerns. *Id*. at 1090. In doing so, the court found that past a 6-month threshold, where removal was not imminent, the private interests at stake in prolonged detention were profound. *Id*. at 1091–92. Furthermore, it found the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decision maker to be substantial. *Id*. at 1092. The court concluded that the burden imposed on the Government by requiring hearings before an Immigration Judge at this stage of the proceedings was a reasonable one. *Id*.

The *Rodriguez* line of cases encapsulates the Ninth Circuit's most recent stance on prolonged detention. In *Rodriguez v. Hayes*, the Ninth Circuit reviewed a district court's denial of class certification to aliens in the Central District of California who were detained pursuant to sections 235(b), 236, and 241(a) of the Act for more than 6 months during their removal proceedings without a bond hearing. *Rodriguez v. Hayes*, 578 F.3d 1032 (9th Cir. 2009), *amended by* 591 F.3d 1105 (9th Cir. 2010) (*Rodriguez I*). The court applied its *Zadvydas* "framework," developed in the cases described above, to reverse the district court's decision and recognize the class. On remand, the district court entered an order for injunctive relief directing that class members be provided bond hearings.

Subsequently, in *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) (*Rodriguez II*), the Ninth Circuit affirmed the preliminary injunction entered by the district court upon class certification. This preliminary injunction

required (1) that a bond hearing be made available to all class members detained pursuant to sections 235(b) and 236(c) of the Act, and (2) that these aliens be released on reasonable conditions of supervision unless the Government could show by clear and convincing evidence that their continued detention was justified. *Rodriguez v. Robbins*, Nos. CV 07-03239-TJH(RNBx), SA CV 11–01287–TJH(RNBx), 2012 WL 7653016 (C.D. Cal. Sept. 13, 2012).

In reaching its decision, the court highlighted its attempts to interpret the tension between the premise in *Zadvydas* that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects," and the "longstanding view" expressed in *Demore* "that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." *Id*. at 1134 (citing *Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 526). The court ultimately affirmed the district court's grant of the preliminary injunction, concluding that the major hardship that needless prolonged detention imposes on class members outweighs any alleged harm to Government interests. *Id*. at 1145.

Two years later, the Ninth Circuit considered the Government's appeal from the district court's permanent injunction in the *Rodriguez* case. *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, --- S. Ct. ----, 2016 WL 1182403 (U.S. June 20, 2016) (No. 15-1204) (*Rodriguez III*). The permanent injunction applied to all class members detained pursuant to sections 235(b), 236(a), 236(c), and 241(a) of the Act, and required that the Government provide each detainee with a bond hearing by the 195th day of detention. *Id*. at 1071.

Although the Ninth Circuit affirmed most aspects of the district court's decision, it noted several exceptions. *Id*. at 1090. First, it reversed the injunction as it applied to aliens detained pursuant to section 241(a) of the Act. *Id*. The district court described the section 241(a) subclass as "individuals detained under [section 241(a)] who have received a stay of removal from the [Board] or a court." *Id*. at 1086. The Ninth Circuit observed, however, that aliens who have received a stay of removal pending further review do not have an administratively final removal order. *Id*. The court therefore concluded that these aliens are not in fact detained pursuant to section 241(a) of the Act and, as such, this subclass "does not exist." *Id*. In addition, the court held that an Immigration Judge must consider the length of time for which a non-citizen has already been detained and also provide bond hearings every 6 months. *Id*. at 1089–90. The Supreme Court has granted a petition for certiorari in this case.

The Second Circuit followed the Ninth Circuit in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *petition for cert. filed*, --- S. Ct. ---, 84 U.S.L.W. 3562 (U.S. Mar. 25, 2016) (No. 15-1205). The lawful permanent resident in the case was convicted of drug related offenses and sentenced to probation, but not placed in immigration detention until more than 3 years after being sentenced. *Id*. at 605. After 4 months in immigration detention, he petitioned for a writ of habeas corpus. Although the Second Circuit disagreed with the petitioner's argument that the mandatory detention clause in section 236(c) of the Act did not apply to him because he had not been taken into custody "when released," *see infra* "When Released," the court agreed that prolonged detention without a bond hearing violated his right to due process. *Id*. The Second Circuit outlined the circuit split as to whether to apply a bright line test or conduct individualized examinations of the reasonableness of continued detention. It then followed the Ninth Circuit's reasoning in *Rodriguez II*, affording bond hearings to aliens detained under section 236(c) within 6 months of their detention. *Id*. at 616.

"Reasonable Period"

In contrast to the Ninth and Second Circuits' bright line approach, the First, Third, Sixth, and Eleventh Circuits have adopted a "reasonableness" interpretation in addressing the permissibility of prolonged detention.[12] Namely, these courts have found that an alien can only be held in immigration detention for a "reasonable" period without being provided a bond hearing.

The Sixth Circuit in *Ly v. Hansen*, 351 F.3d 263, 267–68, 271 (6th Cir. 2003), was the first court to authorize mandatory detention for only a "reasonable" period of time, holding that the reasonable length of detention varies on a case-by-case basis. *Id*. at 272–73. In support of its holding against a bright-line detention period, the court stated that "hearing schedules and other proceedings must have leeway for expansion or contraction

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CIRCUIT COURT DECISIONS FOR APRIL 2016

by John Guendelsberger

The United States courts of appeals issued 188 decisions in April 2016 in cases appealed from the Board. The courts affirmed the Board in 173 cases and reversed or remanded in 15, for an overall reversal rate of 8.0%, compared to last month's 12.0%. There were no reversals from the Third, Fifth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for April 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	1	1	50.0
Second	38	36	2	5.3
Third	6	6	0	0.0
Fourth	14	13	1	7.1
Fifth	19	19	0	0.0
Sixth	7	5	2	28.6
Seventh	2	1	1	50.0
Eighth	7	6	1	14.3
Ninth	84	77	7	8.3
Tenth	3	3	0	0.0
Eleventh	6	6	0	0.0
All	188	173	15	8.0

The 188 decisions included 105 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 42 direct appeals from denials of other forms of relief from removal or from findings of removal; and 41 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	105	99	6	5.7
Other Relief	42	34	8	19.0
Motions	41	40	1	2.4

The six reversals or remands in asylum cases involved credibility (three cases), level of harm for past persecution, corroboration, and protection under the Convention Against Torture. The eight reversals or remands in the "other relief" category addressed application of the categorical approach (four cases), voluntary departure (two cases), marriage bona fides, and aggravated felony crimes of violence under 18 U.S.C. § 16(b). The motion to reopen case involved ineffective assistance of counsel.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	14	11	3	21.4
Sixth	23	19	4	17.4
Ninth	415	354	61	14.7
Tenth	16	14	2	12.5
Third	35	31	4	11.4
First	10	9	1	10.0
Second	150	141	9	6.0
Fourth	39	37	2	5.1
Eighth	29	28	1	3.4
Fifth	48	47	1	2.1
Eleventh	20	20	0	0.0
All	799	711	88	11.0

Last year's reversal rate at this point (January through April 2015) was 15.3%, with 574 total decisions and 88 reversals or remands.

The numbers by type of case on appeal for the first 4 months of 2016 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	445	397	48	10.8
Other Relief	178	147	31	17.4
Motions	176	167	9	5.1

CIRCUIT COURT DECISIONS FOR MAY 2016

by John Guendelsberger

The United States courts of appeals issued 165 decisions in May 2016 in cases appealed from the Board. The courts affirmed the Board in 146 cases and reversed or remanded in 19, for an overall reversal rate of 11.5%, compared to last month's 8.0%. There were no reversals from the Third, Fourth, Sixth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for May 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	5	4	1	2.0
Second	28	27	1	3.6
Third	9	9	0	0.0
Fourth	5	5	0	0.0
Fifth	21	19	2	9.5
Sixth	4	4	0	0.0
Seventh	6	4	2	33.3
Eighth	3	3	0	0.0
Ninth	75	63	12	16.0
Tenth	0	0	0	0.0
Eleventh	9	8	1	11.1
All	165	146	19	11.5

The 165 decisions included 85 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 42 direct appeals from denials of other forms of relief from removal or from findings of removal; and 38 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	85	77	8	9.4
Other Relief	42	33	9	21.4
Motions	38	36	2	5.3

The eight reversals or remands in asylum cases involved credibility (two cases), whether the government was "unable or unwilling" to prevent persecution (two cases), particular social group, evidence of "other resistance" as basis for a family planning claim, ineffective assistance of counsel, and exceptions to the 1-year deadline for filing an asylum claim. The nine reversals or remands in the "other relief" category addressed application of the categorical approach (three cases), voluntary departure (two cases), crimes involving moral turpitude (two cases), special rule cancellation of removal, and the smuggling ground for removal. The two motions to reopen cases involved ineffective assistance of counsel and removal of conditions on lawful permanent resident status.

The chart below shows the combined numbers for January through May 2016 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	20	15	5	25.0
Sixth	490	417	73	14.9
Ninth	27	23	4	14.8
Tenth	15	13	2	13.3
Third	16	14	2	12.5
First	44	40	4	9.1
Second	178	168	10	5.6
Fourth	44	42	2	4.5
Eighth	69	66	3	4.3
Fifth	29	28	1	3.4
Eleventh	32	31	1	3.1
All	964	857	107	11.1

Last year's reversal rate at this point (January through May 2015) was 15.2%, with 697 total decisions and 106 reversals or remands.

The numbers by type of case on appeal for the first 5 months of 2016 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	530	474	56	10.6
Other Relief	220	180	40	18.2
Motions	214	203	11	5.1

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Supreme Court:

Torres v. Lynch, 136 S. Ct. 1619 (2016): The Supreme Court held that a criminal conviction constituted an aggravated felony under section 101(a)(43) of the Act when the State statute under which the petitioner was convicted contained all of the elements of the comparable Federal offense except for the jurisdictional element requiring a connection to interstate commerce. The petitioner was convicted of attempted arson under New York Penal Law §§ 110, 150.10. The Board affirmed an Immigration Judge's determination that the petitioner's conviction was for an aggravated felony, as the elements of the New York statute matched those of 18 U.S.C. § 844(i) (maliciously damaging or destroying, or attempting to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce), with the exception of the Federal statute's requirement that the building or vehicle serving as the target of the arson must be used in interstate commerce. The Board held that since the Federal statute's commerce clause was jurisdictional, its absence from the State statute was not determinative. The Second Circuit affirmed the Board's decision. In its decision, the Supreme Court noted that State statutes often lack the jurisdictional element found in corresponding Federal statutes, for the simple reason that States do not need such an element to establish jurisdiction. In determining whether the lack of such jurisdictional element should be decisive, the Court looked to the language in section 101(a)(43) of the Act applying the term "aggravated felony" to offenses "described in this paragraph whether in violation of Federal or State law," as well as to foreign convictions where the term of imprisonment was completed within the past 15 years. The Court found that requiring a mirroring of the Federal jurisdictional element would eliminate State or foreign convictions (which have no need for a jurisdictional element) from aggravated felony consideration in half of the offenses listed in section 101(a)(43) of the Act, including some of the most serious offenses. The Court chose not to adopt such interpretation and also stated that "courts have often recognized—including when comparing federal and state offenses—that Congress uses substantive and jurisdictional elements for different reasons and does not expect them to receive identical treatment." Justice Sotomayor authored the dissenting opinion, in which Justices Thomas and Breyer joined.

First Circuit:

Sauceda v. Lynch, 819 F.3d 526 (1st Cir. 2016): The First Circuit granted a petition for review of a Board decision affirming an Immigration Judge's determination that the petitioner was not eligible for cancellation of removal under section 240A(b) of the Act. The petitioner's cancellation of removal application was pretermitted because the Immigration Judge found, based upon an inconclusive record of conviction, that he was convicted of a crime of domestic violence pursuant to section 237(a)(2)(E)(i) of the Act. The First Circuit held that since "all the [noticeable conviction] documents have been produced and the modified categorical approach using such documents cannot identify the prong of the divisible Maine statute under which [the petitioner] was convicted, the unrebutted *Moncrieffe* presumption applies, and, as a matter of law, [the petititoner] was not convicted of a 'crime of domestic violence.'" The Court relied on what it called the "least of the acts" presumption from *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), and concluded that where there is an inconclusive record of conviction, the *Moncrieffe* presumption stands—that is, the conviction rested upon the least of the acts criminalized. The Court vacated the Board's decision and remanded for further proceedings.

Second Circuit:

Nunez Pena v. Lynch, No. 15-27-ag, 2016 WL 2942931 (2d Cir. May 20, 2016): The Second Circuit dismissed the petition for review of a Board decision affirming an Immigration Judge's denial of a waiver under section 212(c) of the Act and cancellation of removal under section 240A(a) of the Act. The petitioner conceded that he was precluded from relief by the Second Circuit's holding in *Peralta-Taveras v. Attorney General*, 488 F.3d 580 (2d Cir. 2007) (holding that a pre-IIRIRA conviction for an aggravated felony remains a bar to cancellation of removal under section 240A(a) of the Act). However, the petitioner argued that the Supreme Court's decision in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), abrogated *Peralta-Taveras*. In *Vartelas*, the Supreme Court held that IIRIRA's "admission" provision, which effectively barred return after foreign travel for certain lawful permanent residents with criminal convictions, should not apply retroactively to a pre-IIRIRA guilty plea for purposes of reentry. The petitioner in the instant case had both

pre- and post-IIRIRA convictions and he sought relief under both sections 212(c) (for the former conviction) and 240A(a) (for the latter). The Second Circuit found that the holding in *Vartelas* was not applicable because the petitioner had fair notice that his prior convictions would preclude him in the future from seeking cancellation of removal after the enactment of IIRIRA and that this bar was not, as the petitioner argued, a "new disability" akin to the loss of the ability to travel abroad. The petition for review was therefore denied.

Fifth Circuit:

Mercado v. Lynch, No. 14-60539, 2016 WL 2586169 (5th Cir. May 4, 2016): The Fifth Circuit granted the petition for review from the Board's determination that convictions for indecent exposure and making terroristic threats under Texas Penal Code §§ 21.08 and 22.07 were for crimes involving moral turpitude. On appeal, the circuit court observed that the Board had applied the "realistic probability" test in its moral turpitude analysis. The court noted that while the Board and the Seventh, Eighth, Ninth, and Tenth Circuits have adopted the "realistic probability" test in assessing whether turpitude is inherent in an offense, the Fifth Circuit has not—it instead employs the "minimum reading" test. Thus, in the Fifth Circuit, a conviction is for a crime involving moral turpitude only where the minimum reading of the statute of conviction covers such conduct. The court held that it was bound to apply the "minimum reading" test because one panel cannot hold otherwise under the circuit's rule of orderliness unless there has been a change in the law. The court did not agree with the Government's argument that the Supreme Court's decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), constituted a change in law, stating that the Court's application of the "realistic probability" test in determining whether a conviction was an aggravated felony was "not an unequivocal indication" that the Court would apply the same test to a crime involving moral turpitude determination. The court therefore reversed and remanded the record for the Board to make a new moral turpitude determination utilizing the "minimum reading" approach.

Sixth Circuit:

Wang v. Lynch, No. 14-4029, 2016 WL 3034680 (6th Cir. May 27, 2016): The Sixth Circuit dismissed an appeal challenging the Board's affirmance of an Immigration Judge's denial of asylum. The Immigration Judge had based the denial on an adverse credibility finding, relying on substantial similarities between the typed statements of the petitioner and two unrelated asylum applicants. The petitioner was made aware of the similarities and given the opportunity to respond. The Immigration Judge subsequently found the petitioner to lack credibility based, in part, on "the suspicious number of highly specific similarities" with the other applications. The court found the reliance on similarities with unrelated asylum applications permissible for credibility purposes provided that the Board's procedural requirements are followed. The court continued that "the reasoning and holding of the Second Circuit in *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517 (2d Cir. 2007), and the framework subsequently laid out in *Matter of R-K-K-*, 26 I&N Dec. 658 (BIA 2015), are persuasive in reaching this conclusion." Under this framework, an Immigration Judge must: (1) provide the applicant with meaningful notice of the significant similarities; (2) provide the applicant with a reasonable opportunity to explain such similarities; and (3) consider the totality of the circumstances in reaching a credibility determination. The court found that the Immigration Judge followed these procedural requirements. The court was not persuaded by the petitioner's explanations for the similarities and further agreed with the Immigration Judge's finding that the petitioner had not provided sufficient corroboration for his claim. The court concluded that the denial was supported by substantial evidence, and the petition was therefore dismissed.

Eleventh Circuit:

Vassell v. U.S. Att'y Gen., No. 15-11156, 2016 WL 3240221 (11th Cir. June 13, 2016): The Eleventh Circuit granted the petition challenging the Board's determination that the lawful permanent resident petitioner had been convicted of an aggravated felony theft offense under section 101(a)(43)(G) of the Act. The conviction in question was for "theft by taking" under Georgia Code § 16-8-2. The circuit noted that the Act does not define a "theft offense," and therefore a determination as to whether a State offense qualifies as an aggravated felony theft offense is determined by a categorical comparison to the generic Federal definition, which is defined in part as "the taking of, or exercise of control over, property without consent." However, the language of the Georgia statute does not contain a "without consent" requirement. The court noted that the Board had added the "without consent" requirement in its precedent decision in *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008), for the purpose of distinguishing theft and fraud offenses, which are defined differently under sections 101(a)(43)(G) and (M) of the Act. The court defined "without consent"

as occurring when "the victim either doesn't know his property is being taken or he knows and can't stop it for whatever reason." By contrast, the court described fraud as involving the victim's consent obtained "through some kind of falsehood." The court agreed with the petitioner's argument that the language of the Georgia statute is broad enough to encompass taking pursuant to consent obtained through fraud or deception and that this interpretation is supported by numerous State court decisions. The court also noted that the State's jury instructions do not mention consent. The court also found it persuasive that the petitioner identified unpublished Board decisions interpreting the statute in a manner consistent with the petitioner's argument. For these reasons, the court granted the petition for review, reversing the Board's removability determination.

BIA PRECEDENT DECISIONS

In *Matter of Garza-Olivares*, 26 I&N Dec. 736 (BIA 2016), the Board held that a determination as to whether the offense of failing to appear before a court is an aggravated felony as defined in section 101(a)(43)(T) of the Act requires a two-stage approach. Of the five components described in section 101(a)(43)(T), the Board held that the initial two components—"failure to appear" and "before a court"—require a categorical analysis because they refer to elements of a generic "failure to appear" offense. The remaining components of failure to appear in court—"pursuant to a court order," "to answer to or dispose of a felony charge," and "for which a sentence of 2 years or more may be imposed"—are not formal elements but instead are limiting components that refer to "aggravating" offense characteristics that require a circumstance-specific approach as contemplated by *Nijhawan v. Holder*, 557 U.S. 29 (2009). The Board sustained the DHS's appeal of the Immigration Judge's conclusion that, because the Federal "failure to appear" statute of conviction was not a categorical match with section 101(a)(43)(T) of the Act, the respondent had not been convicted of an aggravated felony. The Board thus reinstated the removal proceedings.

In *Matter of Gonzalez Romo*, 26 I&N Dec. 743 (BIA 2016), the Board held that in the Ninth Circuit, a conviction for solicitation to possess marijuana for sale is a conviction for a crime involving moral turpitude ("CIMT"), establishing inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Thus, a returning lawful permanent resident who sustained such a conviction is properly considered an arriving alien under section 101(a)(13)(C)(v) of the Act.

The Board rejected the respondent's argument that her offense of solicitation is not a CIMT because section 212(a)(2)(A)(i)(I) of the Act expressly references the inchoate offenses of attempt and conspiracy, but not solicitation. Citing *Matter of Vo*, 25 I&N Dec. 426, 429–30 (BIA 2011), the Board explained that it previously held that a statute's inclusion of some generic offenses like attempt or conspiracy does not indicate congressional intent to exclude other generic crimes like solicitation. Noting that the Ninth Circuit in *Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9th Cir. 2007), held that a conviction for solicitation to possess marijuana for sale was a CIMT for purposes of deportability under section 237(a)(2)(A)(i) of the Act, the Board observed that the court's reasoning included its practice of looking to the underlying offense to determine whether inchoate crimes, including solicitation, constitute CIMTs. Based on the Ninth Circuit's holding that participation in illicit drug trafficking is a CIMT and established Board jurisprudence in the CIMT context that there is no meaningful distinction between an inchoate offense and the completed crime, the Board agreed with the Ninth Circuit that looking at the substantive offense is appropriate in determining whether inchoate offenses like solicitation constitute CIMTs. The Board concluded that the respondent was inadmissible under section 212(a)(2)(A)(i)(I) of the Act and was properly considered an arriving alien under section 101(a)(13)(C)(v) of the Act.

In light of the Ninth Circuit's current position on inchoate offenses in the CIMT context, the Board withdrew from dicta in *Matter of Vo*, *supra*, which posited that the court would find section 237(a)(2)(A) to be broader in its coverage of CIMTs than section 212(a)(2)(A)(i)(I). The appeal was dismissed.

In *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016), the Board held that the circumstance-specific approach may be employed in determining whether a conviction is for a crime of domestic violence as defined in section 237(a)(2)(E)(i) of the Act. The Board clarified that a categorical analysis must first be conducted as

to whether the elements of the statute of conviction correspond to a "crime of violence" as defined in 18 U.S.C. § 16. Next, if the statute contains qualifying language referencing the specific circumstances in which a crime was committed, the inquiry progresses to a determination of the "domestic" nature of the violence. This may involve a circumstance-specific examination as outlined in *Nijhawan*. This portion of the inquiry is limited to the objective fact of the relationship between the offender and the victim. Under the circumstance-specific approach, all reliable evidence may be considered, including the conviction documents.

The Board also addressed the effect of a trial judge's subsequent order clarifying the original sentencing order. Here, the original sentencing order was ambiguous as to whether the respondent had been sentenced to straight probation or a term of imprisonment that was probated. The subsequent order expressly stated that no portion of the probationary time was subject to any term of confinement and that the entire probationary sentence was intended to be straight probation. Reasoning that the clarification order was intended to resolve the ambiguity of the original order, and that the trial judge, who issued both orders, was best situated to explain the sentence she intended to impose, the Board credited the clarification order. Since the respondent was not sentenced to any term of imprisonment, the Board held that he was not convicted of an aggravated felony under section 237(a)(2)(E)(i) of the Act. The record was remanded for the Immigration Judge to consider the respondent's applications for relief from removal.

In *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016), the Board held that the "material support bar" to inadmissibility contained in section 212(a)(3)(B)(iv)(VI) of the Act does not include an implied exception for an alien who provided material support to a terrorist organization under duress. Parsing the "language and design of the statute as a whole," the Board reasoned that if Congress had intended to provide an involuntariness or duress exception to the material support bar, it could have enacted a provision similar to section 212(a)(3)(D)(ii) of the Act, which explicitly provides an exception to the inadmissibility of an alien with membership in the Communist party if the membership was involuntary. The Board also observed that the Third, Fourth, Ninth, and Eleventh Circuit Courts of Appeals have all held that no implied duress exception exists to the material support bar.

Noting that Congress has created a waiver for deserving aliens to avoid the consequences of the material support bar, the Board cited its holding in *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006), that there is otherwise no exception to the material support bar in the context of the use of justifiable force against an illegitimate regime. There, the Board explained that the inclusion of the waiver was a means of balancing the harsh consequences of the material support bar. Based on that reasoning, the Board decided that the waiver is a further indication that Congress intentionally omitted a duress exception in section 212(a)(3)(B)(iv)(VI) of the Act. Holding that the material support bar includes no exception for duress, the Board agreed that the respondent was ineligible for the relief sought and dismissed the appeal.

Developments in Civil Detention:
continued

as the necessities of the case and the Immigration Judge's caseload warrant." *Id*. at 272.[13]

The Third Circuit adopted a similar approach in *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011) and in *Leslie v. Attorney General of U.S.*, 678 F.3d 265 (3d Cir. 2012). In *Diop*, the Third Circuit concluded that the alien's period of detention of nearly 3 years pursuant to section 236(c) of the Act was "unconstitutionally unreasonable." *Diop*, 656 F.3d at 232, 234 ("[T]he constitutionality of this practice is a function of the length of the detention . . . [T]he constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [certain] thresholds."). Moreover, the court found that numerous Immigration Judge errors and the Government's failure to timely secure evidence relating to the alien's detention caused unreasonable delay in the alien's case. *Id*. at 234. As such, the court determined that the alien's prolonged detention without a bond hearing violated the Due Process Clause. *Id.* at 234–35.

In *Leslie*, the alien had been detained for 4 years in total. *Leslie*, 678 F.3d at 266. The Third Circuit found that the alien's length of detention was unreasonably long and that the prolonged detention had resulted, in part, from his successful attempts to appeal his removal order. *Id*. at 270–71. The court then

stated that a finding that the alien's appeals rendered his length of detention reasonable would "effectively punish [him] for pursuing applicable legal remedies." *Id*. at 271 (internal quotation marks omitted). The court thus held that the alien was entitled to an individualized bond hearing. *Id*.

In *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016), the First Circuit highlighted the circuit split on this issue and outlined its rationale for siding with the Third and Sixth Circuits on a "reasonable" period approach. *Id*. at 495–97. The First Circuit acknowledged the following five disadvantages to the "reasonable" period approach: (1) inconsistent determinations; (2) the effect of increasing detention times for those least likely to actually be removed at the conclusion of their proceedings; (3) the Federal courts' potential lack of "institutional competence" to adjudicate issues such as how much time is required to bring a removal proceeding to conclusion; (4) judicial inefficiency in potentially overlapping administrative bond proceedings and "reasonableness" hearings before a Federal court; and (5) the emotional and other types of harms suffered by detainees and their families when detainees are held in prolonged detention. *Id*. at 497–98.

Notwithstanding these concerns, the court concluded that judicial review should be limited to individualized reviews of the reasonableness of continued detention under the categorical provisions of section 236(c). *Id*. at 499–502. The court found it "inappropriate" to "import the 6-month presumption from *Zadvydas* into a statute where individualized reasonableness review remains feasible," and it rejected the reasoning of the Ninth and Second Circuits in imposing the bright-line rule. *Id*. at 496.

Most recently, the Eleventh Circuit adopted the "reasonable" period approach in *Sopo v. U.S. Attorney General*, No. 14-11421, 2016 WL 3344236 (11th Cir. June 15, 2016). Examining the reasoning underlying both the bright line and the "reasonable" period approaches, the court determined that a case-by-case analysis adheres more closely to legal precedent. *Id*. at *14. In doing so, the court recognized that the bright line approach provides practical advantages. Nevertheless, it ultimately concluded that these factors provide "persuasive justification" for legislative or administrative policy change, rather than a judicial decree. *Id.* (citing *Reid*, 819 F.3d at 498).

The Eleventh Circuit also offered "reasonableness" factors for courts to review when determining whether an alien's continued detention is necessary to fulfill the legislative purpose of section 236(c) of the Act. *Id*. at *15. These factors include (1) the amount of time that the alien has been detained without a bond hearing[14] and (2) the reasons that the alien's proceedings have become protracted. *Id*. The court also highlighted the following additional factors considered by other courts: (3) whether it will be possible to remove the alien after there is a final order of removal; (4) whether the alien's immigration detention exceeds the time the alien spent in prison for the crime that rendered him removable; and (5) whether the facility for immigration detention is meaningfully different from a penal institution. *Id*. at *16. The court stated that these factors do not provide an exhaustive list and emphasized that each reasonableness determination will vary depending on the circumstances of the specific case. *Id.* at *16.

"When Released"

A second emerging issue in the world of civil detention is the meaning and impact of the "when released" clause of section 236(c) of the Act. Namely, courts have examined whether this clause limits the scope of mandatory detention to aliens who are immediately detained by the Government upon their release from criminal custody.

In order to understand the judicial debate surrounding which aliens can be held pursuant to section 236(c), it is first important to understand the basic structure of the statute. Section 236(c) is divided into two paragraphs. The first paragraph requires officials to detain aliens who have committed a crime listed in one of four subparagraphs, (A) through (D). *See* section 236(c)(1) of the Act. These crimes include, *inter alia*, aggravated felonies, drug trafficking, crimes of moral turpitude, controlled substance offenses, prostitution, firearm offenses, and espionage. The first paragraph also includes a concluding paragraph, stating that the Attorney General shall detain these aliens "when [they are] released" from criminal custody. *Id.* The second paragraph then states that the Attorney General shall detain aliens "described in paragraph (1)" without a bond hearing unless a narrow witness-protection exception applies. *See* section 236(c)(2) of the Act.

Based on this language, courts have been presented with the question of whether the "when released" clause in the concluding paragraph of section 236(c)(1) imposes a requirement that the Government immediately detain aliens upon their release from criminal custody. Many aliens have argued that it does and, as such, they are not subject to mandatory detention if the Government does not immediately detain them. On the other hand, the Government contends that its authority to detain is not restricted by this clause. Accordingly, the Government alleges that aliens are subject to mandatory detention regardless of whether or not there has been a gap between the aliens' criminal and immigration detention.

Thus far, the Board and the Federal courts for the First, Second, Third, Fourth, and Tenth Circuits have examined this issue. The following section will describe the various positions that the Board and these courts have taken.

Matter of Rojas

The Board addressed the meaning of the "when released" clause of section 236(c) in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001). The alien in *Matter of Rojas* was convicted of possession of a controlled substance with intent to sell and was sentenced to a term of imprisonment. 23 I&N Dec. at 117–18. The Government took the alien into custody on the second day after his release from state custody. *Id.* at 118. The alien challenged the Government's custody determination, arguing that he was not subject to mandatory detention because he was not taken into custody immediately upon his release from state incarceration. *Id.*

The Board concentrated its analysis on the meaning of the phrase in section 236(c)(2) of the Act referring to "an alien described in paragraph (1)." *Id.* at 119. In particular, the Board examined whether this phrase includes the "when released" clause or merely refers to the four categories of aliens described in subparagraphs (A) through (D). *Id.* In doing so, it focused on whether the "when released" clause is a necessary part of the phrase "an alien described in paragraph (1)." *Id.*

Determining that the language of section 236(c)(2) is ambiguous as to whether it encompasses the "when released" clause, the Board looked to the remainder of the statutory scheme, "taking into account its objectives and policy in order to resolve the issue." *Id.* at 120. It first applied an ordinary meaning analysis and concluded that "an alien described in paragraph (1)," does not naturally appear to include the "when released" clause of section 236(c)(1). *Id.* at 121. The Board also noted that it had previously analyzed a similar issue in the context of the Transition Period Custody Rules ("TPCR"). *Id.* (citing *Matter of Noble*, 21 I&N Dec. 672 (BIA 1997)). In this context, it found that the "when released" clause of the TPCR was not a necessary part of the description of the alien. *Id.*

The Board next turned to the object and design of the Act as a whole. *Id.* at 121–22. It found that no other provision in the Act connects the timing of an alien's release from criminal custody with his removability or his eligibility for immigration relief. *Id.* at 122. The Board also noted that Congress enacted the criminal provisions of the IIRIRA, including section 236(c), based on a concern with detaining and removing *all* criminal aliens, regardless of the timing of their release from custody. *Id.* Accordingly, it determined that the purpose and overall design of the Act supports a conclusion that the "when released" clause is not a necessary part of the phrase "an alien described in paragraph (1)." *Id.*

Finally, the Board reviewed the legislative history and practical concerns over the mandatory detention provision. *Id.* at 122–24. It observed that the statute has included various versions of the "when released" clause over the years. *Id.* at 123–24. Although some of these versions were as ambiguous as the current language, it found that the version stemming from the 1990 and 1991 amendments to the statute more clearly signaled that the criminal aliens who were subject to mandatory detention were not impacted by the timing of their release from criminal custody. *Id.* The Board also noted that practical concerns support this interpretation of the statute. *Id.* at 124.

Based on these points, the Board reasoned that the phrase "an alien described in paragraph (1)" includes those aliens described in subparagraphs (A) through (D) of section 236(c)(1) of the Act, but is not conditioned upon the "when released" clause. *Id.* at 125. Accordingly, it concluded that the alien was subject to mandatory detention pursuant to section 236(c) of the Act. *Id.*

Circuit Court Precedent

In the years since the Board issued *Matter of Rojas*, several circuit courts have taken up the question of whether section 236(c) includes a timing restriction. While the Second, Third, Fourth, and Tenth Circuits have agreed with the result of *Matter of Rojas*, they have adopted various approaches to support their conclusions. The First Circuit, however, has offered a different perspective on the issue—by an equally divided en banc court, it affirmed a lower court's determination that the "when released" clause imposes a time constraint on section 236(c).[15]

No Timing Requirement

Thus far, three circuit courts have applied the two-step *Chevron* inquiry and concluded that the Board's interpretation of section 236(c) warrants deference. *See generally Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (setting forth the standard of review for an agency's interpretation of a statute it administers).[16]

Following the issuance of *Matter of Rojas*, the Fourth Circuit in *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012), was the first court to examine the meaning and effect of the "when released" clause. The alien in this matter was convicted of unlawful wounding in 2008 and placed on 2 years of supervised probation. *Id.* at 377. In 2011, the Government arrested him and placed him in removal proceedings. *Id.* at 377–78. The Immigration Judge found that the alien was subject to mandatory detention based on his conviction. *Id*. at 378.

The Fourth Circuit found that the language of section 236(c) is ambiguous as to whether it imposes a requirement that an alien be immediately detained. *Id.* at 379. However, in contrast to the Board's focus on the definition of the phrase "alien described in paragraph (1)," the Fourth Circuit focused on the meaning of the "when released" clause itself. *Id.* at 379–80. The court remarked that "when" is an ambiguous term because it can either connote immediacy or have a temporally broader meaning. *Id*. at 380–81.

The court thus turned to whether the Board's interpretation was a "permissible construction of the statute." *See Chevron*, 467 U.S. at 843. Looking beyond the language to the historical context of the section's enactment, the court observed that Congress added section 236(c) to the Act as a means of limiting the ability of criminal aliens to evade their removal proceedings. *Hosh*, 680 F.3d at 380. The court concluded that, although the "when released" clause connotes some degree of urgency, Congress did not intend to exempt aliens from mandatory detention if they were not immediately detained. *Id*. The court held that the Board provided a permissible interpretation of section 236(c) and concluded that mandatory detention does not require immediate detention. *Id.* at 381.

More recently, the Second and Tenth Circuits have also followed the two-step *Chevron* inquiry to ascertain the meaning of the "when released" clause. *See Lora,* 804 F.3d at 611–13; *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015). The aliens in *Lora* and *Olmos* experienced 3-year and 6-day delays, respectively, between their release from criminal custody and their detention by immigration authorities. *Lora*, 804 F.3d at 606–07; *Olmos*, 780 F.3d at 1316.

Unlike the Fourth Circuit, which examined the "when released" phrase itself, the Second and Tenth Circuits followed the Board's approach and analyzed the meaning of the phrase "an alien described in paragraph (1)." *Lora*, 804 F.3d at 611; *Olmos*, 780 F.3d at 1318–22. Further, like the Board, these courts concluded that the phrase is ambiguous. *Lora,* 804 F.3d at 611; *Olmos*, 780 F.3d at 1318–22.

The courts thus addressed whether the Board provided a permissible interpretation of the statute. The Second Circuit found that the Board's interpretation is permissible because it follows the "loss of authority"[17] canon and accounts for "practical concerns arising in connection with enforcing the statute." *Lora*, 804 F.3d at 612–13. The Tenth Circuit, in turn, resolved that the Board's interpretation is permissible because neither the canon of constitutional avoidance nor the rule of lenity[18] suggest that Congress intended to excuse mandatory detention when there is a delay in detention. *Olmos*, 780 F.3d at 1322–24. Both courts thus concluded that aliens are subject to mandatory detention, regardless of the timing of their detention.

The Third Circuit took a different approach in *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013).

Unlike the Second, Third, and Tenth Circuits, the Third Circuit found that a *Chevron* inquiry was not necessary to decipher the meaning of section 236(c). *Sylvain*, 714 F.3d at 157. Specifically, citing the "loss of authority" doctrine, the Court determined that, regardless of the statute's ambiguity, nothing in the statute indicates that the government's authority to impose mandatory detention depends on its compliance with the "when released" clause. *Id*. at 157–58.

The Third Circuit drew a parallel between the language to the Bail Reform Act of 1984, which contains similar timing language to section 236(c) of the Act and allows the Government to detain defendants before their trial if they pose a risk of fleeing or a danger to others. *Id.* at 158–59. The Third Circuit noted that, in this context, the Supreme Court rejected the defendant's argument that the Government's failure to comply with the timing aspect of the statute stripped its authority under the Act. *Id.* (citing *United States v. Montalvo-Murillo*, 495 U.S. 711, 717–18 (1990)). Based on this precedent, and acknowledging the public interest served by detaining criminal aliens, the court agreed that mandatory detention does not require immediate detention. *Id.* at 161.

Accordingly, the Second, Third, Fourth, and Tenth Circuits have agreed with the Board's conclusion in *Matter of Rojas*, but have taken varied approaches to reaching their conclusions.

Timing Requirement Recognized

Thus far, the First Circuit is the only court to have arrived at a different result concerning the "when released" clause of section 236(c).

In 2013, the United States District Court for the District of Massachusetts concluded that aliens in two cases were not subject to mandatory detention because the Government detained them years after they had been released from criminal custody. *See Gordon v. Johnson*, 991 F. Supp. 2d 258 (D. Mass. 2013); *Castaneda v. Souza*, 952 F. Supp. 2d 307 (D. Mass. 2013). A First Circuit panel affirmed the lower court's determination in 2014, but agreed to rehear the case en banc. *See Castaneda v. Souza*, 769 F.3d 32 (1st Cir. 2014). In an equally divided en banc court, the First Circuit again affirmed the district court's decision. *Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015). Although the result of the lower court's decision was affirmed, the divided panel's decision does not carry precedential weight. *See, e.g.*, *HealthSouth Rehab. Hosp. v. Am. Nat. Red Cross*, 101 F.3d 1005, 1011 (4th Cir. 1996).

The judges voting to uphold the lower court's ruling applied the two-step *Chevro*n inquiry to determine whether to defer to the Board's conclusion in *Matter of Rojas*. *Id*. at 23. When applying the first step, however, these judges split from the other circuit courts and concluded that the statute's meaning is not ambiguous. *Id*. The judges instead found that the statute's structure and legislative history indicates that Congress expressed its plain intention that the "when released" clause is a necessary part of section 236(c)(2) of the Act. *Id*. at 23–36. Reviewing the legislative history, the applicability of the "loss of authority" canon, and the historical context of the statute's enactment, the opinion concludes that the word "when" imposes a time constraint on section 236(c), which "expires after a reasonable time." *Id*. at 43. Because the aliens were released from criminal custody years before their Government detention, the judges concluded that the aliens were not subject to mandatory detention.[19] *Id*. at 43.

Conclusion

The changing landscape of immigration in the United States since 1996 has required the circuit courts and the Board to closely examine the statute controlling the Government's authority to detain aliens under the mandatory detention provisions of the Act. With the Supreme Court's decision to grant certiorari in *Jennings v. Rodriguez*, it is possible that the divergent positions taken by the circuit courts on the reasonableness of prolonged detention will be resolved in the near future. In contrast, the Court's recent denial of a petition for writ of certiorari on the issue of the "when released" question has left the circuit courts' holdings undisturbed.

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1. *See Demore v. Kim*, 538 U.S. 510, 522 (2003) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.") (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976)); *see also, e.g.*, *Carlson v. Landon*, 342 U.S. 524 (1952) (McCarthy Era deportation of communists); *Ludecke v. Watkins*, 335 U.S. 160 (1948) (removal of German enemy aliens during World War II); *Wong Wing v. United States*, 163 U.S. 228 (1896) (Chinese exclusion).

2. *See, e.g.*, Pew Research Center, Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065 (Sept. 28, 2015), http://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065.

3. Pursuant to section 241(a)(6) of the Act, certain inadmissible or criminal aliens, or aliens who have been determined by the Attorney General to be a risk to the community or unlikely to comply with their order of removal, may be detained beyond the removal period.

4. *Zadvydas* consolidated the cases of two aliens—one petitioner who was stateless and one whose home country had no repatriation treaty with the United States. 533 U.S. at 684–85.

5. As a threshold matter, the Court first addressed whether it retained jurisdiction to consider the alien's habeas petition notwithstanding the provision contained at section 236(e) of the Act limiting judicial review of the Attorney General's exercise of authority under section 236 of the Act. The Court concluded that it retained jurisdiction to address the petitioner's constitutional challenge to the detention provisions. *Demore*, 538 U.S. at 517–18.

6. Specifically, the Supreme Court will be presented with issues as to: whether aliens detained under section 235(b) of the Act must be afforded bond hearings with the possibility of release into the United States if detention lasts 6 months; whether aliens who are subject to mandatory detention under section 236(c) of the Act must be afforded bond hearings if detention lasts 6 months; and whether, in bond hearings for aliens detained for 6 months under sections 235(b) or 236 of the Act, the alien is entitled to release unless the Government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community. Additional questions may include whether the length of the alien's detention must be weighed in favor of release and whether new bond hearings must be afforded automatically every 6 months. *See id.*

7. The Supreme Court has not yet decided whether to grant the writ of certiorari filed in *Lora* with respect to the issue whether aliens who are subject to mandatory detention under section 236(c) of the Act must be afforded bond hearings if their detention exceeds 6 months. *See id.* However, the Court denied another petition for certiorari in *Lora* on the issue whether section 236(c) of the Act applies to aliens who were not detained "when released" from criminal incarceration. *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *cert. denied*, --- S. Ct. ---, No. 15-1307, 2016 WL 1626440 (June 20, 2016).

8. According to the 2015 Judicial Business report published by the Administrative Office of the United States Courts, 58 percent of petitions for review from Board appeals were filed in the Ninth Circuit and 13 percent were filed in the Second Circuit. U.S. Courts of Appeals, Judicial Business 2015, *available at* http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2015.

9. The Government argued that aliens awaiting judicial review of their petitions for review are subject to continued detention under the Attorney General's grant of authority in section 241(a) of the Act, which provides for detention "during" and "beyond" the "removal period." *Casas-Castrillon*, 535 F.3d at 947. The Ninth Circuit disagreed, stating that where an alien has filed a petition for review and received a judicial stay of removal, the "removal period" under section 241(a) does not begin until the court "denies the petition and withdraws the stay of removal." *Id.* As such, because the alien was no longer in proceedings under section 236(c) after the issuance of his final removal order, the Ninth Circuit held that his custody should properly be determined under section 236(a) of the Act, which applies generally to the detention of aliens. *Id.* at 948; *see also Prieto-Romero v. Clark*, 534 F.3d 1053, 1057–62 (9th Cir. 2008).

10. In *Singh*, the Ninth Circuit also held that the agency must produce a contemporaneous record of the bond hearing through an audio recording or transcript. 638 F.3d at 1208–09.

11. The canon of constitutional avoidance is a "cardinal principle" of statutory interpretation. *Zadvydas*, 533 U.S. at 689. "[W]hen an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

12. In a case that pre-dates the Supreme Court's decision in *Demore*, the Fourth Circuit held that 14 months of detention under section 236(c) was unconstitutional where "no clearly identifiable deadline" existed for the conclusion of proceedings. *Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002), *abrogated by Demore v. Kim*, 538 U.S. 510 (2003).

13 Judge Haynes wrote an opinion that concurred with the issuance of a writ of habeas corpus but dissented from the majority's reasonableness standard. *Ly*, 351 F.3d at 277–78 (Haynes, J., concurring in part and dissenting in part). Judge Haynes emphasized that specific time restraints should be set for the detention of lawful permanent resident aliens. *Id.* He also urged a greater reliance on *Demore* than on *Zadvydas*, drawing an analogy between the aliens in *Demore* and *Ly* as lawful permanent residents objecting to their removal and prolonged detention. *Id.*

14. The court suggested that, depending on the facts of the case, an alien's detention may become unreasonable after the 1-year mark. No. 14-11421, 2016 WL 3344236, at *15.

15. Litigation is also currently pending in the Ninth Circuit. *See Preap v. Johnson*, 303 F.R.D. 566 (N.D. Cal. 2014), *appeal pending*, No. 14-16326 (9th Cir., filed Jul. 14, 2015); *Khoury v. Asher*, 3 F. Supp. 3d 877 (W.D. Wash. 2014), *appeal pending*, No. 14-35482 (9th Cir., filed June 5, 2014).

16. Pursuant to *Chevron*, when reviewing an agency's interpretation of a statute, the court first reviews whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress has clearly spoken, "that is the end of the matter." *Id.* at 843. If the court finds that the statute is silent or ambiguous with respect to the specific issue, the court then determines "whether the agency's answer is based on a permissible construction of the statute." *Id.* A court defers to the agency's interpretation so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

17. Pursuant to the "loss of authority" canon, statutes which state that the Government "shall" act within a specified time do not, without more, set "jurisdictional limit[s] precluding action later." *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158–59 (2003).

18. Under the rule of lenity, the Supreme Court has instructed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" to the defendant. *Cleveland* v. *United States*, 531 U. S. 12, 25 (2000) (quoting *Rewis v*. *United States*, 401 U. S. 808, 812 (1971)).

19. In a concurring opinion, Judge Torruela suggested that the indefinite detention of any individual in the United States without a bond hearing violates the Due Process Clause. *Id.* at 43–45 (Torruela, J., concurring). He wrote separately to "ensure that the constitutional concerns raised by section 236(c) and the government conduct it commands—the ongoing, institutionalized infringement of the right to bail and right to due process—are formally acknowledged." *Id*.

In a separate opinion, three judges reached a different conclusion. *Id*. at 45 (Kayatta, Howard, and Lynch, JJ.). These judges found that the Board in *Matter of Rojas* provided a "straightforward, grammatically conventional" interpretation of the phrase "an alien described in paragraph (1)." *Id*. at 45–50. Further, these Judges applied the "loss of authority" doctrine to conclude that the Attorney General's delay in detaining aliens "does not render the no-release mandate inapplicable." *Id*. at 58. Finally, the Judges concluded that the Board's interpretation of section 236(c) is not impermissible under the constitutional avoidance doctrine. *Id*. at 59–62.