Bond Hearings for Immigrants Subject to Prolonged Immigration Detention in the Ninth Circuit

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This advisory discusses Ninth Circuit case law ordering bond hearings for certain immigrants subjected to long-term immigration detention. In October 2015, the Ninth Circuit held in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) (*Rodriguez III*), that noncitizens detained pending their removal cases are entitled to an automatic bond hearing before an Immigration Judge ("IJ") at ***six months of detention***, where the government bears the burden of justifying their continued imprisonment. The Court also required that the hearing be accompanied by several procedural safeguards. The Court thus reaffirmed and expanded upon its prior decision in *Rodriguez*, 715 F.3d 1127 (9th Cir. 2013) (*Rodriguez II*). Although the *Rodriguez* decisions specifically address an injunction governing immigration detention in the Los Angeles area, the decision applies across the Circuit.[1]

This advisory is intended for attorneys and advocates who work with immigrants detained in the Ninth Circuit. It explains who qualifies for a prolonged detention bond hearing after six months of detention under Ninth Circuit case law and the procedural safeguards that should accompany a prolonged detention hearing. The advisory proceeds in three parts. Part I provides background on *Rodriguez* and a related case on prolonged detention, *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011). Part II discusses which groups of immigrants are entitled to a bond hearing at six months under Ninth Circuit law. Part III discusses the special procedural safeguards that must be provided at that hearing and other issues.

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[1] *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (holding that all published opinions constitute "law of the circuit" and thus "binding authority which must be followed unless and until overruled by a body competent to do so").

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I. Background on *Rodriguez v. Robbins* and *Diouf v. Napolitano*

Rodriguez v. Robbins is a class action lawsuit filed on behalf of immigrants detained six months or longer in the Central District of California pending their removal cases. The class as certified by the district court includes:

> all noncitizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified.

See Rodriguez III, 804 F.3d at 1066. The district court also approved subclasses, which correspond to each of the four general detention statutes under which the class members were detained: 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a). *See id*.[2]

Rodriguez III builds on a series of cases in the Ninth Circuit recognizing that prolonged immigration detention without a bond hearing raises serious due process concerns and construing the immigration statutes to require a constitutionally adequate bond hearing over such detention.[3] In September 2012, the district court granted a preliminary injunction for two of the subclasses—i.e., Sections 1225(b) and 1226(c). The injunction required that the government "'provide each [detainee] with a bond hearing" at six months and to "release each Subclass member on reasonable conditions of supervision . . . unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight.'" *Id*. In April 2013, the Ninth Circuit affirmed. *See Rodriguez II*, 715 F.3d 1127.

In August 2013, the district court granted summary judgment and entered a permanent injunction on behalf of the entire class. The Ninth Circuit affirmed in part and reversed in part in October 2015. *See Rodriguez III*, 804 F.3d at 1071, 1090-91. The Court required the government to provide an automatic IJ bond hearing at six months of detention, where the government bears the burden of justifying continued detention by clear and convincing evidence. The Court further required that the IJ consider releasing individuals on reasonable conditions of supervision and the length of the individual's detention in making its custody decision. Finally, the Court ordered

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[2] The individuals who fall in each subclass are explained in more detail below. Under the original certification orders, the only immigration detainees who do not fall within the *Rodriguez* class are: (1) individuals with administratively final orders of removal and no stay of removal, such that the government has present authority to remove them; and (2) individuals detained on terrorism related grounds under 8 U.S.C. §§ 1226A and 1537, who are subject to specialized custody review processes. Nonetheless, there is some ambiguity about the extent to which there remains a class of detainees held under Section 1231.

[3] *See Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008); *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1078-79 (9th Cir. 2006).

periodic bond hearings, every six months, for detainees who are not released after their first hearing. *See id.* at 1087-89.

The Ninth Circuit reversed the district court as to the Section 1231(a) subclass on the grounds that the class by definition excluded such individuals.[4] However, prior to *Rodriguez III*, the Ninth Circuit had held, in *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (*Diouf II*), that individuals detained under Section 1231(a) are entitled to a bond hearing at six months, where the government bears the burden of proof. *Id*. at 1082. *Rodriguez III* in no way purports to limit *Diouf*; indeed, the Court relied on *Diouf II* throughout the opinion.[5] Thus, although *Rodriguez III* does not apply to Section 1231(a), individuals held under that statute are still entitled to a bond hearing at six months under *Diouf II*.

II. Who Is Entitled to a Prolonged Detention Hearing?

***All* immigrants detained under the general immigration detention statutes are entitled to a prolonged detention bond hearing after six months of detention**. *Rodriguez III* applies to individuals detained six months or longer under Sections 1226(a), 1226(c), and 1225(b). Moreover, *Diouf II* requires bond hearing at six months for individuals detained under Section 1231(a).

Individuals detained under Section 1226(a)

Section 1226(a) generally authorizes detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). The statute authorizes release on "bond of at least $1,500" or "conditional parole." *Id*. § 1226(a)(2). Following an initial custody determination by the Department of Homeland Security ("DHS"), a noncitizen may apply for a redetermination by an IJ, and that decision may be appealed to the Board of Immigration Appeals ("BIA"). *See* 8 C.F.R. §§ 1236.1, 1003.19. At the bond hearing, the detainee bears the burden of establishing "that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006).

Rodriguez III holds that individuals who had a bond hearing at the outset of their cases under Section 1226(a) but remain detained are automatically entitled to another bond hearing after six months of detention, where the government bears the burden of justifying their continued detention by clear and convincing evidence. *See Rodriguez III*, 804 F.3d at 1085.

[4] *See Rodriguez*, 804 F.3d at 1086 (concluding that because the class includes only "non-citizens who are detained pending completion of removal proceedings, including judicial review," it "by definition excludes any detainee subject to a final order of removal" and that "[s]imply put, the § 1231(a) subclass does not exist").

[5] *See, e.g.*, *Rodriguez*, 804 F.3d at 1069-70, 1077-78, 1088-89.

Individuals detained under Section 1226(c)

Section 1226(c) imposes mandatory detention on individuals who are "deportable" or "inadmissible" due to their criminal history while their cases are pending before the IJ or BIA. Such individuals are not entitled to an IJ bond hearing at the outset of their cases. Instead, the only review they may request is a hearing, under *In Re Joseph*, 22 I. & N. Dec. 799 (BIA 1999), and 8 C.F.R. § 1003.19(h)(2)(ii) to determine if they are "properly included" under the terms of the statute.

Rodriguez holds that Section 1226(c) authorizes detention for only six months, at which point the authority for detention shifts to Section 1226(a), and the person is entitled to a bond hearing before the IJ. Moreover, at that hearing, the government bears the burden of justifying the individual's continued detention by clear and convincing evidence. *Rodriguez III*, 804 F.3d at 1079-81.

Individuals detained under Section 1225(b)

Section 1225(b) applies to "applicants for admission" who are stopped at the border or a port of entry, or who are "present in the United States" but "ha[ve] not been admitted." 8 U.S.C. § 1225(a)(1). The statute provides that asylum seekers "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." *Id*. § 1225(b)(1)(B)(iii)(IV). As to all other applicants for admission, "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained" for removal proceedings. *Id*. § 1225(b)(2)(A). Prior to the *Rodriguez* decisions, noncitizens detained pursuant to Section 1225(b) were generally not eligible for a bond hearing. *See* 8 C.F.R. § 1236.1(c)(2). However, the Attorney General has discretion to parole the noncitizen into the United States if there are "urgent humanitarian reasons or significant public benefit[s]" at stake, and individual presents neither a danger nor a risk of flight. 8 U.S.C. § 1182(d)(5)(A).

Rodriguez III holds that Section 1225(b) authorizes detention for only six months, at which point the authority for detention shifts to Section 1226(a), and the person is entitled to a bond hearing before the IJ. Moreover, at that hearing, the government bears the burden of justifying the individual's continued detention by clear and convincing evidence. *Rodriguez III*, 804 F.3d at 1082-84.

Individuals detained under Section 1231(a)

Section 1231(a) authorizes the detention of individuals subject to a final order of removal. 8 U.S.C. § 1231(a). It requires detention during the 90-day removal period for noncitizens ordered removed on criminal or terrorist grounds after entry of a final order. 8 U.S.C. § 1231(a)(2). If the noncitizen is not removed during the removal period, Section 1231(a)(6) authorizes continued detention at the discretion of the Attorney General. By regulation, individuals detained under Section 1231 do not receive a bond hearing before an IJ, but rather only periodic post-order custody reviews ("POCRs") by DHS. *See* 8 C.F.R. § 241.4.4.

As explained above, *Rodriguez III* holds that the Section 1231 subclass "does not exist." It is unclear how this statement would apply to detainees who apparently are held under that provision, such as those who have a stay and are detained pending review of a denied motion to reopen. While the meaning of the Court's holding on this issue is unclear, prior to *Rodriguez III*, the Ninth Circuit held in *Diouf II* that individuals held under Section 1231 are entitled to a bond hearing after six months of detention, where the government bears the burden of justifying their continued imprisonment. *Diouf II*, 634 F.3d at 1082.[6] Notably, the Court found the POCR process to fail to provide adequate safeguards against unlawfully prolonged detention.[7]

Individuals detained pending judicial review

The Ninth Circuit has also addressed what detention statute applies when **removal is stayed pending judicial review** in the removal case. The Court has held that Section 1226(a) governs detention when an individual has moved for a stay of removal or obtained a stay of removal pending a petition for review of a removal order.[8] In contrast, the Court has held that Section 1231(a) applies where removal is stayed pending judicial review of a denied motion to reopen.[9] However, for purposes of obtaining a bond hearing over prolonged detention, the distinction does not matter, since the Ninth Circuit has construed *all* the general immigration detention statutes to require a bond hearing at six months.

Individuals with reinstated orders of removal who are seeking withholding of removal

There is a dispute in the courts about what detention statute applies **pending a reasonable fear determination and/or withholding-only proceedings**: Section 1226 or Section 1231. Regardless of which detention statute applies, an individual in withholding-only

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[6] The government has argued that a *Diouf* hearing is required only once the individual has been subject to six months of detention *under Section 1231*—and not six *total* months of detention. This position is contrary to Ninth Circuit case law, which has focused on the due process problems presented by *prolonged* detention without a bond hearing, as opposed to the periods of detention under each respective detention statute. *See Diouf II*, 634 F.3d at 1091-92 (holding that "[w]hen *detention* crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound" (emphasis added)); *see also Tijani*, 430 F.3d at 1242, 1246 (Tashima, J., concurring) (characterizing detention as having lasted for two years and eight months, even though 20 of those months were for detention during removal proceedings before the IJ and BIA, and the rest while removal was stayed pending a petition for review); *Casas-Castrillon*, 535 F.3d at 948 (characterizing detention as lasting nearly seven years while case passed through different phases of proceedings).

[7] *See id.* at 1091 (explaining that "[t]he regulations do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge.").

[8] *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059-60 & n.5 (9th Cir. 2008); *Casas-Castrillon*, 535 F.3d at 947.

[9] *Diouf v. Mukasey ("Diouf I")*, 542 F.3d 1222, 1229-30 (9th Cir. 2008).

proceedings should be entitled to a prolonged detention bond hearing after six months of detention.

The Ninth Circuit held in *Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012), that individuals do not have a "final" order of removal for purposes of judicial review until the conclusion of reasonable fear and withholding-only proceedings. *Id*. at 958. Citing *Ortiz-Alfaro*, several district courts have concluded that detention pending such proceedings must be authorized by the pre-final order detention statute, Section 1226.[10] By contrast, the government generally has taken the position that individuals in withholding-only proceedings are detained under Section 1231. But even assuming Section 1231 applies, the distinction is irrelevant with respect to prolonged detention, as *Diouf II* establishes that noncitizens detained under Section 1231 are entitled to a bond hearing after six months of detention.

III. What Procedural Safeguards Are Required at a *Rodriguez* Hearing?

The Ninth Circuit has held that *Rodriguez* bond hearings must be accompanied by robust procedural protections in light of the serious deprivation of liberty at stake. Although the Ninth Circuit has not directly addressed this issue, the same procedural framework should apply to *Diouf* hearings because the Court has recognized that prolonged detention under Section 1231 presents the same due process concerns.[11]

The procedures for a *Rodriguez* hearing differ in several ways than the procedures that apply to a Section 1226(a) bond hearing conducted at the outset of a person's case. For example, a noncitizen must make a request to obtain such a bond hearing and, at the hearing, the noncitizen bears the burden to demonstrate why he or she should not be detained. *See supra* Section II.

By contrast, the Ninth Circuit has required greater protections for prolonged detention bond hearings:

- The government must provide the hearing **automatically** after six months of detention, rather than at the detainee's request, *see Rodriguez III*, 804 F.3d at 1085;[12]

- The **government bears the burden** to justify continued detention **by clear and convincing evidence**, *see* *Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011);

[10] *See, e.g.*, *Lopez v. Napolitano*, No. 1:12-CV-01750 MJS (HC), 2014 WL 1091336, at *3 (E.D. Cal. Mar. 18, 2014) (holding that Section 1226 applies in these circumstances); *accord Guerra v. Shanahan*, No. 14-CV-4203 (KMW), 2014 WL 7330449, at *3-5 (S.D.N.Y. Dec. 23, 2014); *Guerrero v. Aviles*, No. 14-4367 (WJM), 2014 WL 5502931, at *3-9 (D.N.J. Oct. 30, 2014).
[11] *See Diouf II*, 634 F.3d at 1086 (finding "no basis for withholding from aliens detained under § 1231(a)(6) the same procedural safeguards accorded to aliens detained under § 1226(a)").
[12] By order of the district court in *Rodriguez*, the government must schedule and notice the bond hearing for *Rodriguez* class members prior to 180 days of detention, but the hearing need not take place until the 195th day of detention. *See Rodriguez III*, 804 F.3d at 1071.

- The IJ must consider whether the noncitizen can be released on **reasonable conditions of supervision**, *see Rodriguez III*, 804 F.3d at 1087-88;

- The IJ must take into account **the amount of time that the noncitizen has been detained** in determining whether continued detention is justified, *see Rodriguez III*, 804 F.3d at 1088-89;

- While the IJ need not consider **likelihood of removal** in all cases, the IJ should consider it in particular cases where there may be some impediment to the noncitizen's removal (e.g., he or she is stateless), *see Rodriguez III*, 804 F.3d at 1089 n.18 (citing *Owino v. Napolitano*, 575 F.3d 952, 955-56 (9th Cir. 2009));

- The government must make a **contemporaneous record of the hearing**, such that a transcript can be prepared for an appeal of the bond determination, *see Singh*, 638 F.3d at 1207;

- The government must provide **periodic hearings every six months** for individuals who remain detained for additional periods of prolonged detention, *see Rodriguez III*, 804 F.3d at 1089.

The following discussion addresses these procedural requirements in more detail.

Does my client need to request a* Rodriguez *bond hearing?

No, the government is required to **automatically** schedule a bond hearing after six months of detention and, if your client remains detained, for periodic bond hearings every six months. *See id.* at 1085, 1089. However, if you believe that your client qualifies under *Rodriguez* but has not been scheduled for a bond hearing, you should request a bond hearing by filing a motion with the immigration court that is handling your immigration case. In addition, detainees arguably held under Section 1231 should always request a hearing, as the application of *Rodriguez III* to their cases remains unclear.

What does the "clear and convincing evidence" standard mean in practice?

At the hearing, **the government bears the burden** to justify continued detention **by clear and convincing evidence** that the individual is either a flight risk or a danger to the community. If the government fails to meet its burden, the individual is entitled to release on monetary bond and/or reasonable conditions of supervision.

The "clear and convincing evidence" standard is a higher evidentiary standard than the "preponderance of the evidence" standard, which only requires a showing that something is more likely than not to be true. *See* Black's Law Dictionary (10th ed. 2014) (defining "clear and convincing" standard as being "highly probable" or "reasonably certain"); *see also Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (to meet the clear and convincing evidence standard, the evidence presented must "place in the ultimate factfinder an abiding conviction that the truth of

the factual contentions are highly probable") (internal quotation marks and citations omitted)). It also requires more than a showing of reasonable, substantial, and probative evidence. *See Woodby v. INS*, 385 U.S. 276, 287 (1966) (Clark, J., dissenting on other grounds) (calling the "clear, unequivocal, and convincing" standard of proof placed on the government in deportation proceedings a higher standard of proof than the "long-established 'reasonable, substantial, and probative' burden"); *cf.* 8 U.S.C. § 1229a(c)(3)(A) (specifying that "clear and convincing" evidence for establishing that a noncitizen is deportable and also requiring that the immigration judge's decisions be based on "reasonable, substantial, and probative evidence.").

Thus, to determine whether the government has met its burden, the IJ should consider whether the government has presented reasonable, substantial, and probative evidence that demonstrates that the individual is "highly probable" or "reasonably certain" to be a flight risk or a danger if released. Importantly, this analysis must be prospective in nature. In other words, ***past*** evidence of flight risk or dangerousness is only sufficient if it demonstrates that an individual is highly probable or reasonably certain to be a ***future*** risk of flight or danger.

To justify detention on dangerousness grounds, the Ninth Circuit has required that the government put forward substantial evidence that a person is highly likely to engage in criminal activity. As the Ninth Circuit has explained, "[a]lthough an alien's criminal record is surely relevant to a bond assessment, . . . criminal history alone will not always be sufficient to justify denial of bond on the basis of dangerousness. Rather, the recency and severity of the offenses must be considered." *Singh*, 638 F.3d at 1206 (discussing *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006)); *id*. ("not all criminal convictions conclusively establish that an alien presents a danger to the community, even where the crimes are serious enough to render the alien removable"). The IJ must determine that the government's asserted interest in "protecting the community from danger 'is *actually* served by detention *in [t]his case*.'" *Id*. (quoting *Casas-Castrillon*, 535 F.3d at 949) (emphasis in original). For example, in *Singh*, the Ninth Circuit found that a man convicted of several offenses including receiving stolen property, petty theft with priors, and controlled substance offenses, could be found not to be a danger to the community, even though at least one of those offenses was an aggravated felony. 638 F.3d at 1200-01, 1205.

Moreover, the Ninth Circuit has held that a past criminal record should only be considered to the extent it shows the individual will be dangerous in the future. *See id.* at 1205 (observing that even a lengthy record of prior convictions, including some past violent convictions, may not meet the standard for clear and convincing evidence of "future dangerousness" where the "impetus for his previous offenses[ ] has ceased.").

Likewise, to justify detention on flight risk grounds, the Ninth Circuit has required government to put forward substantial, individualized evidence as to why that individual is highly likely to flee if released. In *Singh*, the Ninth Circuit found that the fact that a noncitizen has a final administrative order of removal is "common" to all noncitizens who are seeking judicial review and that it "alone does not constitute clear and convincing evidence that [the noncitizen] presented a flight risk justifying denial of bond." 638 F.3d at 1205.

Is it relevant how long my client has been detained?

Yes, the Ninth Circuit has held that that IJ "must consider the length of time for which a non-citizen has already been detained" in determining whether continued detention is justified. *Rodriguez III*, 804 F.3d at 1089. As the length of detention grows, the government correspondingly must present stronger evidence to justify detention: "a non-citizen detained for one or more years is entitled to greater solicitude than a non-citizen detained for six months." *Id*.

The relevance of detention length may change over time. At the first *Rodriguez* bond hearing conducted after six months of detention, you can emphasize that your client has already been detained for a period that the Ninth Circuit has recognized as "profound," *Diouf II*, 634 F.3d at 1092, and may exceed the period that he or she served for any criminal offense. For any subsequent *Rodriguez* hearings conducted after longer periods of detention, the IJ should require that the government present more or different evidence to justify continued detention. You should argue that your client's prior criminal history is less indicative of future dangerousness as time passes, *see Singh*, 638 F.3d at 1205, and present any evidence demonstrating rehabilitation since that time.

Moreover, the Ninth Circuit has made clear that, "[a]t some point, the length of detention could become[] so egregious that it can no longer be said to be reasonably related to an alien's removal" and that continued detention is therefore no longer justified. *Rodriguez III*, 804 F.3d at 1089 (internal quotation marks and citation omitted).

Can my client ask to be released on conditions other than a monetary bond?

Yes, the Ninth Circuit has required IJs to consider whether the individual can be released on "**reasonable conditions of supervision**" at a *Rodriguez* hearing. *See Rodriguez III*, 804 F.3d at 1087-88. IJs have the authority to order a detainee released on their "own recognizance" without a monetary bond or conditions of supervision.[13] An IJ can also order release on conditions besides a monetary bond, including attendance in drug treatment or counseling, regular phone or in-person reporting, or electronic monitoring.

At the hearing, you should request release on appropriate, reasonable conditions. In particular, if your client cannot afford a monetary bond or it would create financial strain for your client or his or her family, the individual should request that the IJ order release on alternative conditions of supervision. *See Pugh v. Rainwater*, 572 F.2d 1053, 1057-58 (5th Cir. 1978) (en banc) (emphasizing that "[t]he incarceration of those who cannot [pay a money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements").

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[13] *See Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015). Notably, DHS has conceded in a brief to the BIA that IJs have "authority under section INA § 236(a) to release a respondent on her own recognizance and pursuant to conditional parole, as opposed to settling a monetary bond with a minimum amount of $1,500." In re V-G, DHS Br. at 3 (BIA filed Jan. 21, 2015). For more information and a copy of DHS's brief, *see* ACLU Practice Advisory on *Rivera v. Holder* (Sept. 2015), https://www.aclu.org/legal-document/rivera-v-holder-practice-advisory.

Are the Merits of My Client's Immigration Case Relevant?

The government may argue that your client is a flight risk because he or she is unlikely to win his or her immigration case (for example, if the client has already been ordered removed by an IJ). However, the Ninth Circuit has suggested that IJ generally should not consider the strength of the individual's removal case at a bond hearing. *See Rodriguez III*, 804 F.3d at 1089 (holding that "likelihood of eventual removal . . . [is] too speculative and too dependent upon the merits of the detainee's claims for us to require IJs to consider during a bond hearing."). If the IJ nonetheless considers this factor, you should explain to the judge why your client will prevail on his or her claims or on appeal.

Challenging an adverse IJ decision through a BIA appeal or in a habeas petition

If your client is dissatisfied with the IJ's bond determination, you can appeal the determination to the BIA. 8 C.F.R. 1003.19(f).

The Ninth Circuit has also recognized that the federal districts have jurisdiction to consider habeas petitions challenging immigration bond determinations in certain circumstances. In *Leonardo v. Crawford*, 646 F.3d 1157 (9th Cir. 2011), the Ninth Circuit held that habeas petitioners should typically first exhaust their administrative remedies by appealing the IJ's decision at a prolonged detention hearing to the BIA. *Id*. at 1160-61. However, 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 id*. at 1160 (citing *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); *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007)).[14]

The Ninth Circuit has held that the federal courts have jurisdiction to consider legal issues raised in a habeas petition challenging a bond decision, but lack jurisdiction over purely discretionary determinations. *See Singh*, 638 F.3d at 1202 (holding that the immigration statutes "restrict[] jurisdiction only with respect to the executive's exercise of discretion" and the federal courts retain "habeas jurisdiction over questions of law. . . including 'application of law to undisputed facts, sometimes referred to as mixed questions of law and fact,'" and constitutional claims) (quoting *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (per curiam)). *See also Prieto-Romero*, 534 F.3d at 1067; *Doan v. INS*, 311 F.3d 1160, 1162 (9th Cir. 2002).

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If you have any questions or would like further information on prolonged detention hearings, please contact *Rodriguez* Class Counsel at rodriguezclasscounsel@aclusocal.org.

[14] *See also McCarthy*, 503 U.S. at 146-49 (observing that the traditional exceptions to prudential exhaustion 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)).