PRACTICE ADVISORY:

Making Constitutional Arguments in the Second Circuit to Challenge Prolonged Mandatory Detention after *Jennings* and *Lora*[1]

May 9, 2018

This Practice Advisory discusses *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), with a focus on individuals with criminal convictions in removal proceedings in the Second Circuit. In *Jennings*, the Supreme Court held that several immigration detention statutes cannot be interpreted to provide for a bond hearing when detention becomes prolonged, reversing a Ninth Circuit decision. It left open the question of whether the Constitution permits prolonged immigration detention without a bond hearing.

Below, this practice advisory first summarizes the majority and dissenting rationales in *Jennings*. It then discusses Second Circuit case law concerning prolonged immigration detention, including pending class actions *Sajou v. Decker*, 1:18-cv-02447 (S.D.N.Y. Mar. 19, 2018) and *Abdi v. Nielsen*, 287 F. Supp. 3d 327 (W.D.N.Y. 2018). It also describes additional arguments for a constitutional right to a bond under Second Circuit law, other appellate law, and in legal scholarship. Finally, the advisory lists supplemental resources for practitioners, including an American Civil Liberties Union (ACLU) national practice advisory and model habeas petition for individuals in prolonged detention (hereinafter "ACLU Practice Advisory") and a companion IDP and NYU Immigrant Rights Clinic Practice Advisory: Making Statutory Arguments in the Second Circuit on the Meaning of "When…Released" and "Released" in U.S.C. § 1226(c) To Challenge Mandatory Detention After *Jennings* and *Lora*.

I. The *Jennings* Decision

A. Brief Summary of the Case

Jennings v. Rodriguez is a class action lawsuit from the Ninth Circuit filed by the American Civil Liberties Union. The suit challenges the government's detention of noncitizens for prolonged periods without a bond hearing under several statutes in the Immigration and Nationality Act. Each of the challenged statutes provide for detention of different classes of noncitizens.

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[1] The practice advisory was prepared by Anthony Enriquez, former Equal Justice Works Fellow at the Immigrant Defense Project. Practice Advisories identify select substantive and procedural immigration law issues that attorneys, legal representatives, and noncitizens face. They are based on legal research and may contain potential arguments and opinions of the authors. Practice Advisories do NOT replace independent legal advice provided by an attorney or representative familiar with a client's case.

This summary focuses on the statutes used to detain noncitizens due to prior contact with the criminal law system: 8 U.S.C. § 1225(b)(2), applied to lawful permanent residents (LPR) seeking admission at a port of entry and suspected or convicted of previous criminal activity that renders them inadmissible; § 1226(a), applied to all noncitizens accused of being a danger to the community, often but not exclusively due to prior contact with the criminal law system; and § 1226(c), applied to all noncitizens accused of removability due to specified criminal convictions or terrorist activity. Of those provisions, § 1225(b)(2) and § 1226(c) authorize mandatory detention (detention without possibility of a bond hearing), while § 1226(a) permits at least one bond hearing upon request by the detained individual.

Class representative Alejandro Rodriguez is an LPR who was detained without a bond hearing for longer than six months under § 1226(c) due to prior criminal convictions. He and class representatives detained under additional statutes argued that to avoid constitutional concerns caused by prolonged detention without judicial review, §§ 1225(b)(2), 1226(c), and 1226(a) must be interpreted to provide an automatic bond hearing before an immigration judge within six months of detention. The district court entered a permanent injunction requiring bond hearings with specified procedural protections for all class members, within six months of detention. In *Rodriguez v. Robbins*, 804 F. 3d 1060 (9th Cir. 2015), the Court of Appeals largely affirmed. It found that prolonged mandatory detention would cause serious constitutional due process concerns. It then held that as a matter of constitutional avoidance, detention without a bond hearing under §§ 1225(b) and 1226(c) must be limited to six months. After six months, detention must take place under § 1226(a), which the Ninth Circuit also interpreted to provide mandatory bond hearings before an immigration judge (IJ) every six months. At those hearings, the government was required to justify further detention by clear and convincing evidence of flight risk or danger and the IJ was to consider overall length of detention as militating against further confinement. The government appealed to the Supreme Court.

B. Supreme Court Holding: Sections 1225(b), 1226(a), and 1226(c) Do Not Implicitly Give a Right to Periodic Bond Hearings

The Supreme Court disagreed with the Ninth Circuit's interpretation of the detention statutes. It reversed the Ninth Circuit's decision and remanded for proceedings to consider the constitutionality of prolonged detention under those statutes. Justice Alito delivered the Court's opinion, joined by Chief Justice Roberts and Justice Kennedy in full and Justice Sotomayor in part. Justice Thomas, joined by Justice Gorsuch, delivered a concurring opinion denying jurisdiction of the case but agreeing with the Court's resolution of the merits. Justice Breyer dissented, joined in full by Justices Ginsburg and Sotomayor. Justice Kagan recused herself from the case due to prior work she had undertaken as the Solicitor General.

1. Jurisdiction

The Court first held that jurisdiction for federal courts to consider the questions before it was not barred by 8 USC §§ 1252(b)(9) or 1226(e). Section 1252(b)(9) requires "judicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States . . . [to be] available only in judicial review of a final order under this section." The Court's analysis of that provision turned on interpretation of the words "arising from." It found that a capacious interpretation of the phrase to bar judicial review

of detention until a final order of removal would be "absurd," in part because it would deprive a detainee of any meaningful chance for review of her detention. Slip Op. at 9.

Section 1226(e) bars challenges to "[t]he Attorney General's discretionary judgment regarding the application of [§ 1226]." The Court reaffirmed its prior holding in *Demore v. Kim*, 538 U.S. 510, 516 (2003), that §1226(e) does not bar challenges to the extent of the government's detention authority under the statutory framework as a whole. Slip Op. at 11-12.

2. Merits

On the merits of the case, the Court reasoned that the Ninth Circuit had misapplied the statutory interpretation canon of constitutional avoidance by implausibly interpreting the statutes to provide bond hearings and associated procedural protections. Slip Op. 2. The Court's analysis of the merits began by noting that constitutional avoidance only comes into play if a statute is plausibly susceptible to more than one interpretation. Slip Op. 12. It then found that §§ 1225(b) and § 1226(c) could only plausibly be read to authorize detention until the end of removal proceedings, regardless of their duration. Similarly, § 1226(a) could not plausibly be read to provide any of the procedural protections that the Ninth Circuit had imposed when detention becomes prolonged. *Id.*

a. Section 1225(b)

The Court's opinion looked to the language of the statutes to determine whether the Ninth Circuit's readings were plausible. It found that the most natural reading of § 1225(b)(2) authorized detention until the conclusion of removal proceedings and that nothing in the statutory text placed a limit on the length of detention or gave a right to a bond hearing. *Id.* at 13. Instead, a plain reading of § 1225(b)(2), which requires detention "for a proceeding," requires detention until removal proceedings have concluded. *Id.* at 16.

Further, the use of the word "for" a proceeding, as contrasted with the word "pending" a proceeding, did not require that § 1225(b) detention terminate once a removal proceeding has been initiated. *Id.* at 17-18. Instead, the word "for," when read in the context of the statutory scheme as a whole, must be interpreted to mean "during or throughout." *Id.* at 18. Under the class members' interpretation, for example, an individual held in § 1225(b) must then be rearrested on a warrant under § 1226(a) in order for detention to be continued. The Court found such an interpretation to make "little sense." *Id.* It also found that "for" had historically been used in an older version of § 1225(b) to authorize detention "for further inquiry" into admissibility, rather than only until the start of that inquiry. *Id.* at 19.

The Court also distinguished its prior holding in *Zadvydas v. Davis*, 533 U.S. 678 (2001), which had interpreted 8 USC § 1231(a)(6) to require release from detention six months after receiving a final order of removal if the noncitizen provided good reason to believe that removal would not occur in the reasonably foreseeable future and the government did not rebut that showing. Unlike § 1225(b), the statute at issue in *Zadvydas* did not provide for detention for a specified period of time. Slip Op. at 16. Further, § 1225(b) specifies that the government "shall" detain, whereas § 1231(a)(6) stated only that the government "may" detain. *Id.* Finally, unlike the statute at issue in *Zadvydas*, § 1225(b) permits release through a specific statutory provision at 8 USC § 1182(d)(5)(A), which permits the Attorney General to temporarily parole a detained individual "for urgent humanitarian reasons or significant public benefit . . . ." That express

exception implies that there are no other circumstances in which an individual detained under § 1225(b) may be released. Slip Op. at 16-17.

b. Section 1226(c)

The Court also found § 1226(c) to explicitly mandate detention until the conclusion of removal proceedings. Section 1226(c)(2) specifies that the Attorney General "may release" an individual "only if the Attorney General decides" that doing so is necessary for witness-protection purposes and that the individual will not pose a danger or flight risk. The phrase "only if" makes clear that an individual is not entitled to be released under any other circumstances except those authorized by statute. Slip Op. at 20. Further, detention under § 1226(c) must continue "pending a decision on whether the alien is to removed from the United States." 8 USC § 1226(a). Finally, § 1226(c) is not rendered superfluous by overlapping but not entirely congruent authority for mandatory detention of terrorist suspects under the PATRIOT Act.

c. Section 1226(a)

The Supreme Court also found that nothing in the text of § 1226(a) "even remotely supports the imposition" of procedural protections against prolonged detention established by the Ninth Circuit. Slip Op. at 23. Those protections went "well beyond the initial bond hearing established by regulations" to provide periodic bond hearings every six months at which the government must prove by clear and convincing evidence that continued detention is necessary and that the length of detention must be specifically considered by the adjudicator. *Id.* This portion of the majority opinion was joined by six of eight Justices, including dissenting Justice Sotomayor.

3. Dissent

Justice Breyer, writing in dissent for three Justices, believed that an interpretation of the statutes that forbade bail would likely be unconstitutional. His decision argued that both the Fifth and the Eighth Amendment mandate a bond hearing when immigration detention becomes prolonged. Of note, the dissent briefly stated that appropriate procedural protections for a bond hearing when detention becomes prolonged should not differ from standard procedural protections in other provisional detention contexts.

The dissent based its finding that the Fifth Amendment argument prohibits prolonged mandatory detention on "the relevant constitutional language, purposes, history, tradition, and case law…" Slip Op. Dissent at 5. As for language, the Fifth Amendment states that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." A noncitizen is a person, detention is a deprivation of bodily liberty, and detention without a bail proceeding means there has been a denial of bail-related process. *Id.*

History and tradition show that the Due Process Clause mandates eligibility for bail as part of due process. *Id.* at 6. Bail is "'basic to our system of law'" *Id.* (citing *Stack v. Boyle*, 342 U.S. 1, 4 (1951)). It is a limitation on government's ability to deprive a person of liberty unless needed to protect the public or assure appearance at trial. *Id.* As related by Blackstone, the right to bail was settled in both civil and criminal cases at the time of the American Revolution. *Id.* at 8. Bail had long been available in England in any case, including detention on the personal

command of the King. *Id.* at 8-9. And the American colonists brought the practice with them; bail has figured in American law from the Judiciary Act of 1789 to the Bail Reform Act of 1966. *Id.* at 9. Thus, in American civil law, bail or bail-like procedures protect from all types of unjustified confinement, from individuals who are mentally ill to those in extradition proceedings. *Id.* at 10-12.

For the purposes of bail, there is no relevant difference between immigration detention and other types of confinement. *Id.* at 12. And in certain respects, noncitizens in mandatory detention are more likely to merit bail than criminal defendants. *Id.* Though the majority of criminal defendants lose their cases, a high percentage of noncitizens in mandatory detention win the legal right to remain in the United States. *Id.* Nor does any evidence indicate that inadmissible or deportable noncitizens are more likely than criminal defendants to threaten community safety or abscond. *Id.* at 12-13. There is no reasonable basis for denying bail hearings to immigrants with criminal records in prolonged detention, and thus treating them worse than defendants charged with a crime, worse than civilly committed citizens, worse than other noncitizens apprehended within the border and detained under § 1226(a), or worse than noncitizens for whom actual removal is not foreseeable. *Id.* at 13. Their detention without bail is therefore arbitrary.

The dissent distinguished several Supreme Court cases that the government often cites for the proposition that noncitizens possess lesser constitutional rights than citizens. *Id.* at 13-17. These included *Wong Wing v. United States*, 163 U.S. 228 (1896), *Carlson v. Landon*, 342 U.S. 524 (1952), and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The dissent explained why each of these cases actually assumed the right to bail or some other type of individualized justification for detention. *Id.* at 14-17.The dissent distinguished *Demore v. Kim*, 538 U.S. 510 (2003) by explaining that it addressed short-term detention alone. *Id.* at 189

The Eighth Amendment also mandates a bail hearing. The Eighth Amendment forbids excessive bail in order to prevent the bail amount from preventing provisional release. Through this prohibition, it assures that government detention is only imposed for proper purposes. *Id.*at 6. That same rationale applies to a refusal to hold any bail hearing. *Id.*

After making its constitutional case, the remainder of the dissent discussed why § 1225(b)(2) and § 1226(c) are linguistically ambiguous enough to sustain the interpretations that the Ninth Circuit imposed. This position was not accepted by a majority of the court.

Finally, in one sentence in its conclusion, the dissent stated that prolonged detention bail hearings "should take place in accordance with customary rules of procedure and burdens of proof rather than the special rules that the Ninth Circuit imposed." Slip Op. Dissent at 32.

C. Impact on Cases in the Second Circuit

The Supreme Court's holding overruled the Ninth Circuit's holding below in *Rodriguez v. Robbins*, 804 F. 3d 1060 (9th Cir. 2015) that certain immigration detention statues must be interpreted, as a matter of constitutional avoidance, to authorize detention without a bond hearing for only six months and to mandate periodic bond hearings with certain procedural protections under § 1226(a). It also overruled the Second Circuit's decision in *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015), *cert. granted, judgment vacated*, 2018 WL 1143819 (U.S. Mar. 5,

2018), which had previously ordered bond hearings for individuals detained under § 1226(c) for six months.[2]

Two pending class actions within the Second Circuit seek or have won similar relief to that granted by *Lora*: a bond hearing before an immigration judge when detention becomes prolonged. In *Sajous v. Decker*, No. 18-cv-2447 (S.D.N.Y. March 19, 2018),[3] a class is suing for the right to a bond hearing when detention becomes prolonged under § 1226(c). The proposed class includes

> All people subject to the jurisdiction of the New York or Buffalo ICE Field Offices who have been or will be detained for six months pursuant to 8 U.S.C. § 1226(c) and who have not been afforded a bond hearing before an immigration judge where the government bears the burden of justifying further detention by clear and convincing evidence that the person poses a risk of flight or danger to the community.

At the time of this writing, the *Sajous* court has yet to rule on the petitioners' allegations for class-based relief. Practitioners or individuals litigating a detention case that may fall into the proposed *Sajous* class should contact the New York Civil Liberties Union.

Prior to the *Jennings* decision, a Western District of New York court held that individuals detained under § 1225(b) have a right to bond hearing within six months of detention. *Abdi v. Duke*, 280 F. Supp. 3d 373, 389-93 (W.D.N.Y. 2017). The same court subsequently clarified its order to hold that those bond hearings required that the immigration judge consider an individual's financial circumstances and alternatives to detention when setting bond. *Abdi v. Nielsen*, 287 F. Supp. 3d 327 (W.D.N.Y. 2018). The *Duke* decision cited "an emerging consensus among courts in this district that due process requires that individuals detained pursuant to Section 1225(b) be provided an individualized bond hearing within six months of detention[,]" though it ultimately interpreted the statute to require bond hearings. *Duke*, 280 F. Supp. 3d at 391 (citing *Galo–Espinal v. Decker*, 2017 WL 4334004 (S.D.N.Y. June 30, 2017)). The *Nielsen* decision did not rely on cases discussed in *Jennings* and so provides persuasive authority on appropriate procedural protections at a bond hearing.

II. Questions Left Unresolved within the Second Circuit

[2] The government will likely argue that other appellate decisions are abrogated based on the holding in *Jennings*. *See Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1214 (11th Cir. 2016) ("We too construe § 1226(c) to contain an implicit temporal limitation at which point the government must provide an individualized bond hearing to detained criminal aliens whose removal proceedings have become unreasonably prolonged."); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 235 (3d Cir. 2011) ("[W]e conclude that § 1226(c) contains an implicit limitation of reasonableness: the statute authorizes only mandatory detention that is reasonable in length."); *Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003) ("Because we construe the statute to include a reasonable time limitation . . ."). (referencing "[o]ur decision to read an implicit reasonableness requirement into § 1226(c) . . ."). The First Circuit also "read an implicit reasonableness requirement into § 1226(c)" in *Reid v. Donelan*, 819 F.3d 486, 502 (1st Cir. 2016). Its mandate has been stayed pending appeal, however, so "[i]ndividuals detained six months under Section 1226(c) in Massachusetts are currently still entitled to custody hearings pursuant to the class-wide permanent injunction entered in *Reid v. Donelan*, 22 F. Supp. 3d 84 (D. Mass. 2014). The government has agreed that the injunction must remain in effect until it is vacated by the First Circuit or the district court." ACLU Practice Advisory at 10.

[3] Complaint available at https://www.nyclu.org/sites/default/files/field_documents/ecf_13_2018-04-05_amended_class_petition_and_class_complaint_00063292xb2d9a.pdf

The Supreme Court did not rule on the constitutionality of prolonged detention without a bond hearing, instead remanding to the Ninth Circuit to consider the issue as a matter of first impression. Slip Op at 29-31. The *Jennings* holding thus leaves unresolved a number of issues for advocates within the Second Circuit to raise when representing individuals in prolonged detention due to prior contact with the criminal law system. These include arguments that *Jennings* does not overrule persuasive case law in the Second and other Circuits, that prolonged mandatory detention violates the Constitution, novel constitutional arguments raised by the *Jennings* dissent and legal scholarship, and arguments that bond hearings for prolonged detention require stronger procedural protections than standard immigration court bond hearings

In addition, the Supreme Court did not address statutory arguments against mandatory detention, including arguments based on the "when released" language in § 1226(c) that the mandatory detention statute does not apply to individuals who are detained long after their criminal convictions. For advice on these statutory arguments, which are outside the scope of this advisory, see the companion IDP and NYU Immigrant Rights Clinic Practice Advisory referenced in the "Additional Resources" section below at the end of this advisory.

A. *Jennings* does not abrogate circuit law finding mandatory detention unconstitutional as applied

Second Circuit advocates should argue that *Jennings* does not abrogate appellate law that found mandatory detention unconstitutional as applied in an individual case. Although the Supreme Court vacated the Second Circuit decision in Lora after its decision in Jennings, the Second Circuit decision included reasoning on the constitutional issue not reached by the Supreme Court, and district court decisions within the Second Circuit and appellate decisions in other Circuits with similar reasoning have not been vacated or overruled and remain good law. Advocates should therefore argue that constitutional principles discussed within the overturned Second and Ninth Circuit decisions, as well as persuasive case law from other appellate courts, establish that the Constitution mandates a bond hearing when detention becomes prolonged.

The Second and Ninth Circuits both relied on constitutional reasoning when mandating bond hearings if detention becomes prolonged. *See, e.g.*, *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015) (joining the Ninth Circuit "in holding that mandatory detention for longer than six months without a bond hearing affronts due process"); *Rodriguez v. Robbins*, 804 F.3d 1060, 1082 (9th Cir. 2015) ("Because [noncitizens] are entitled to due process protections under the Fifth Amendment, prolonged detention without bond hearings would raise serious constitutional concerns.").

In the Second Circuit, prior to *Lora*, district courts routinely ordered bond hearings where an individual in prolonged detention under § 236(c) brought an "as applied" constitutional challenge to the statute. *See Bugianishvili v. McConnell*, 2015 WL 3903460, at *9 (S.D.N.Y. June 24, 2015) ("[C]ourts in this Circuit that have granted writs of habeas based on prolonged detention have ordinarily done so on the basis of constitutional, rather than statutory reasoning.") (*citing Minto v. Decker*, 2015 WL 3555803, at *5 (S.D.N.Y. June 5, 2015); *Gordon v. Shanahan*, 2015 WL 1176706, at *5; *Araujo–Cortes v. Shanahan*, 35 F.Supp.3d at 550, 533 (S.D.N.Y. 2014); *Fuller v. Gonzales, 2005* WL 818614, at *6 (D.Conn. Apr. 8, 2005)).

Decisions from other appellate courts have found that the Constitution mandates a bond hearing when detention becomes prolonged. In *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232 (3d Cir. 2011), the Third Circuit found that "[a]t a certain point, continued detention becomes

unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community." *See also id.*at n.10 ("In other words, Congress did not violate the Constitution when it passed the law, but the Executive Branch might violate the Constitution in individual circumstances depending on how the law is applied.)." In *Ly v. Hansen*, 351 F.3d 263, 269 (6th Cir. 2003) the Sixth Circuit emphasized "the constitutional limitations" of mandatory detention, writing that "Congress's plenary control must still be exercised within the bounds of the Constitution." The Eleventh Circuit found that "§ 1226(c) may become unconstitutionally applied if a criminal alien's detention without even a bond hearing is unreasonably prolonged." *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1213 (11th Cir. 2016).

B. Prolonged Detention without a Bond Hearing Violates the Fifth Amendment's Due Process Clause

Even if circuit law finding mandatory detention unconstitutional as applied is deemed abrogated for now, Supreme Court decisions, appellate law, and legal scholarship support arguments that the Due Process Clause requires a bail hearing when detention becomes prolonged. The *Jennings* dissent explained why the "Constitution's language, its basic purposes, the relevant history, our tradition, and many of the relevant cases" support a Fifth Amendment right to bail from prolonged detention. *Jennings Dissent*, Slip Op. 19. Justice Kagan's questioning at the *Jennings* oral arguments indicates her agreement.[4] Justice Kennedy's previous opinions on the matter provide evidence that a five-person majority of the Court believes that "since the Due Process Clause prohibits arbitrary deprivations of liberty, [a noncitizen] could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore v. Kim*, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring).

Appellate decisions have already found that prolonged detention without a bond hearing violates the Due Process Clause. *See e.g. Reid v. Donelan*, 819 F.3d 486, 502 (1st Cir. 2016) (citing "the constitutional imperatives of the Due Process Clause" to affirm grant of a bond hearing); *Rodriguez v. Robbins*, 804 F.3d 1060, 1082 (9th Cir. 2015) ("Because [noncitizens] are entitled to due process protections under the Fifth Amendment, prolonged detention without bond hearings would raise serious constitutional concerns."); *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015) (holding "that mandatory detention for longer than six months without a bond hearing affronts due process"); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) ("When detention becomes unreasonable, the Due Process Clause demands a hearing at which the Government bears the burden of proving that continued detention is necessary"); *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1221 (11th Cir. 2016) (holding length of petitioner's mandatory detention "a violation of the Due Process Clause.").

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[4] Jennings Tr., *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/15-1204_m6hn.pdf. At page 17 of the transcript, Justice Kagan questions the government, "Okay. So -- but they do have some constitutional rights, not to be tortured, not to be placed in hard labor. Why isn't it -- it pretty close to that, not to be placed in arbitrary confinement, arbitrary detention?" At page 18, Justice Kagan continues "'Arbitrary' means that nobody gave them an individualized hearing, and so we don't know whether they're being held for any good reason. Nobody's made that decision. So, usually, in our -- you know, usually in our constitutional law, we think that that's a problem." On page 24, Justice Kagan states "that class of aliens, we are talking about people who have been in this country, who clearly do have various constitutional rights."

Legal scholarship offers additional arguments that the Due Process Clause protects against prolonged mandatory detention. One law review article describes how universal principles of due process applied both in immigration and other detention contexts support the right to individualized review of the need for detention.[5] Another argues that the original meaning of constitutional due process, ascertained from the historical context, requires independent review of the executive's decision to detain.[6] Another sets out case law that supports a six-month limit on detention without a bond hearing.[7]

C. Prolonged Detention without a Bond Hearing Violates the Eight Amendment's Excessive Bail Clause

As explained in the *Jennings* dissent, the Eighth Amendment protects against excessive bail to prevent bail amount from preventing provisional release. "That rationale applies *a fortiori* to a refusal to hold any bail hearing at all." Dissent Slip Op. at 6.

D. Prolonged Detention without a Bond Hearing is an Unreasonable Seizure under the Fourth Amendment

Advocates can argue that the Fourth Amendment's prohibition against unreasonable seizures protects against the unreasonable immigration detention practice of prolonged mandatory detention. Professor Michael Kagan, in *Immigration Law's Looming Fourth Amendment Problem*, 104 Geo. L.J. 125, 154 (2015), finds similar principles at work in Supreme Court detention case law in both the immigration and criminal contexts. He cites to language and citations within *U.S. v. Salerno*, 481 U.S. 739 (1987), a case examining the constitutionality of pretrial criminal detention, to explain how the Court views pretrial criminal confinement, immigration detention, and involuntary confinement based on mental illness as examples of "regulatory" confinement subject to the same constitutional restraints. Practitioners can thus invoke the Fourth Amendment for additional support when arguing that prolonged detention without a bond hearing is unconstitutional.

E. Prolonged Detention Bond Hearings Require Procedural Protections

Advocates should argue that procedural protections at standard immigration court bond hearings, which require the detained individual to bear the burden of persuading the immigration judge that she should be released, are constitutionally insufficient. Professor Mary Holper's *The Beast of Burden in Immigration Bond Hearings*, 67 Case W. Res. L. Rev. 75, 96-107 (2016), describes standards of proof in other civil detention contexts and why procedural protections in immigration court bond hearings should not be different. In *Jennings*, four Justices in dissent agreed with that proposition; the other five did not address the question directly. Borrowing from Holper, advocates can argue that the Constitution demands that the government bear the burden of continued confinement by clear and convincing evidence because of the value our society places on individual liberty. *Id.* at 129 (citing *Addington v. Texas*, 441 U.S. 418, 431-33 (1979)).

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[5]David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003 (2002).
[6] Anthony R. Enriquez, *Structural Due Process in Immigration Detention*, 21 CUNY L. Rev. 35 (2018).
[7] Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 390 (2014).

Advocates should also cite to *Abdi v. Duke*, discussed *supra* I.C, for support that immigration judges must consider financial circumstances and alternatives to detention when setting bond.

III. Additional Resources

A model habeas petition, with post-*Jennings* arguments, is available in the American Civil Liberties Union, Practice Advisory: Prolonged Detention Challenges After Jennings v. Rodriguez. The petition may be downloaded at https://www.aclu.org/other/practice-advisory-prolonged-detention-challenges-after-jennings-v-rodriguez.

In addition, IDP and the NYU School of Law Immigrant Rights Clinic have issued a companion Practice Advisory: Making Statutory Arguments in the Second Circuit on the Meaning of "When…Released" and "Released" in U.S.C. § 1226(c) To Challenge Mandatory Detention After *Jennings* and *Lora*. This practice advisory provides advice on statutory arguments regarding the detention of noncitizens with old criminal convictions and noncitizens who never served a custodial sentence. We argue that these individuals are not within the meaning of the words "when…released" and "released" in U.S.C. § 1226(c), and furthermore that the statute's application to such individuals is unconstitutional. IDP's practice advisories can be downloaded at https://www.immigrantdefenseproject.org/practice-advisories-listed-chronologically/.