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*[1]

May 9, 2018

Introduction

Following the Supreme Court's recent decision in *Jennings v. Rodriguez*, noncitizens in the Second Circuit will again be subject to indefinite and prolonged detention without an opportunity for a hearing. 138 S. Ct. 830 (2018). On April 5, 2018 The American Civil Liberties Union, New York Civil Liberties Union, and Brooklyn Defender Services filed a class action challenging the constitutionality of this practice. *Sajous v. Decker*, No. 18-cv-2447 (AJN) (S.D.N.Y. 2018).

As the class action litigation makes its way through the court, attorneys should continue to file habeas petitions arguing for their individual clients' release from detention. These petitions can raise several constitutional and statutory arguments. This practice advisory centers on a subset of those 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. Other arguments available to noncitizens detained under § 1226(c) include that detention of a noncitizen with substantial defense to removal is outside the scope of the statute and/or unconstitutional, and that prolonged detention itself is unconstitutional as applied. For a practice advisory on the latter constitutional arguments for challenging prolonged detention, see companion IDP Practice Advisory entitled "Making Constitutional Arguments in the Second Circuit to Challenge Prolonged Mandatory Detention after *Jennings* and *Lora*."

The Supreme Court is set to consider the "when…released" issue in *Nielsen v. Preap*, No. 16-1363 (Mar. 19, 2018), but in the intervening time before that case it is decided, advocates can continue to press these arguments in district courts within the Second Circuit. The many

[1] The practice advisory was prepared by Sarah Taitz of the NYU Immigrant Rights Clinic, under the supervision of Professor Nancy Morawetz. 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.

noncitizens who are detained under § 1226(c) in violation of both the statutory language and the Constitution cannot wait for Supreme Court action to resolve their cases.

Background

U.S.C. § 1226(c) authorizes the mandatory detention of certain categories of noncitizens without a hearing. For years, immigration advocates have opposed this unconstitutional and inhumane policy, and sought to limit its scope.

Section 1226(c) authorizes detention "when the alien is released[.]" Despite this language, Immigration and Customs Enforcement ("ICE") has used this statute to detain noncitizens years after their criminal convictions and even when they were never subject to confinement. For years, advocates successfully argued against this over-broad interpretation. Many District Court judges in the Second Circuit granted habeas petitions on the grounds that a noncitizen was not detained by ICE immediately "when…released" from criminal custody. *E.g.*, *Antoniou v. Shanahan*, 112 F. Supp. 3d 1 (S.D.N.Y. 2015); *Minto v. Decker*, 108 F. Supp. 3d 189 (S.D.N.Y. 2015); *Rodriguez v. Shanahan*, 84 F. Supp. 3d 251 (S.D.N.Y. 2015); *Sutherland v. Shanahan*, 108 F. Supp. 3d 172 (S.D.N.Y. 2015); *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533 (S.D.N.Y. 2014); *Martinez-Done v. McConnell*, 56 F. Supp. 3d 535 (S.D.N.Y. 2014); *Louisaire v. Muller*, 758 F. Supp. 2d 229 (S.D.N.Y. 2010); *Garcia v. Shanahan*, 615 F. Supp. 2d 175 (S.D.N.Y. 2009). These decisions disagreed with a previous decision from the Board of Immigration Appeals ("BIA"), which deferred to ICE in interpreting "when…released" more broadly after conceding that the statute was ambiguous. *Lora v. Shanahan*, 15 F. Supp. 3d 478, 479 (S.D.N.Y. 2014), aff'd, 804 F.3d 601 (2d Cir. 2015), cert. granted, judgment vacated, No. 15-1205, 2018 WL 1143819 (U.S. Mar. 5, 2018). (rejecting the BIA's reading of the statute in *In Re Rojas*, 23 I. & N. Dec. 117 (BIA 2001) and noting that the majority of district courts to address the issue had done the same).

In *Lora v. Shanahan*, the Second Circuit rejected the District Court's finding that the phrase "when…released" required detention immediately upon release from post-conviction incarceration, but upheld the grant of habeas on other grounds. *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015), *cert. granted, judgment vacated*, No. 15-1205, 2018 WL 1143819 (U.S. Mar. 5, 2018). The Court did not consider constitutional avoidance to interpret "when…released" and "released" but did use constitutional avoidance to hold that a noncitizen detained under § 1226(c) must be afforded a hearing within six months of her detention. *Id.* at 609–616. After the Second Circuit's 2015 decision, hundreds of noncitizens in the Second Circuit received "Lora" bond hearings. *See* Vera Institute of Justice, *Analysis of Lora Bond Hearing Data: New York Immigrant Family Unity Project* (Oct. 14, 2016), http://www.law.nyu.edu/sites/default/files/upload_documents/Vera%20 Institute_Lora%20Bond%20Analysis_ Oct%20%202016.pdf. The government petitioned for certiorari, and the case was held for consideration of similar issues in *Jennings v. Rodriguez*, another prolonged detention case arising in the Ninth Circuit.

On February 27, 2018, the Supreme Court reached a decision in *Jennings v. Rodriguez*, rejecting the Ninth Circuit's reading of § 1226(c), which, like *Lora*, had interpreted the statute to require a hearing within six months of detention so as to avoid constitutional concerns. 138 S. Ct. 830 (2018). The Court held that the constitutional avoidance canon could not be used to insert a

requirement for hearings within six months because that reading of the statute was "implausible." *Id.* at 836. The Supreme Court then issued an order granting the government's petition for writ of certiorari in *Lora*, vacating the Second Circuit's judgment, and remanding the case ("GVR") for reconsideration in light of *Jennings*.[2] *See Shanahan v. Lora*, 2018 WL 1143819, at *1 (2018).

In the time between the 2015 *Lora* decision and the 2018 Supreme Court *Lora* GVR, Alexander Lora was granted cancellation of removal. This created an unusual posture where the Second Circuit was explicitly ordered by the Supreme Court to reconsider its decision but the facts of the case had evolved such that the panel was not able to do so. On March 30, 2018, the Second Circuit issued a brief order stating that "the appeal is dismissed as moot." *Lora v. Shanahan*, No. 14-2343, 2018 WL 1545596, at *1 (2d Cir.). The Supreme Court's decision in *Jennings*, its vacatur of the judgment in Lora and the Second Circuit's subsequent dismissal of the appeal in *Lora* open the door for arguments based on "when…released" in the Second Circuit once again.

Consequences of the *Lora* Dismissal for "When…Released" Arguments

Now that the Supreme Court has vacated the judgment in Lora and the Second Circuit has dismissed the *Lora* appeal as moot, its pre-*Jennings* 2015 opinion carries no binding precedential weight. It is unusual for appellate courts to dismiss appeals after they have already rendered an opinion, but it happens occasionally, for example, when the court learns that the case was already moot when it made its decision. *See Indep. Living Ctr. of S. California, Inc. v. Maxwell-Jolly*, 590 F.3d 725, 728 (9th Cir. 2009) ("[D]ismissing an appeal after rendering our decision is an exercise within our discretion."). The consequence of such a dismissal is that the opinion is no longer a binding precedent. *See City Ctr. W., LP v. Am. Modern Home Ins. Co.*, 749 F.3d 912, 914 (10th Cir. 2014) (dismissing an appeal after learning the case had been moot at the time of the appellate decision, but declining to "depublish" the opinion "because such action would not have additional legal effect and the opinion may be useful to someone in the future simply as a description of the course of this case").

Because the appeal was dismissed as moot, the Circuit had no opportunity to reconsider its analysis of the issues in light of the intervening change in law, as a court would normally do upon GVR. *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013) ("The present GVR order requires us to consider…whether [the intervening Supreme Court decision] has any effect on our Rule 23 analysis"). The Second Circuit's entire decision was premised on its belief that the correct statutory interpretation of § 1226(c) required a bond hearing within six months, a view the Supreme Court has now rejected, casting the issues in a new light. *See Lora*, 804 F.3d 601 at 606; *Jennings*, 138 S. Ct. at 830. Therefore, the now-

[2] A GVR directs a lower court to re-examine its decision in light of an intervening change in the law. *See Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (explaining that a GVR "indicate[s] that we [find the intervening precedent] sufficiently analogous and, perhaps, decisive, to compel reexamination of the case"); Robert L. Stern, et al, Supreme Court Practice 314, 319 (8th ed. 2002) (explaining that a GVR is an instruction "to reconsider the entire case in light of the intervening precedent - which may or may not compel a different result.").

vacated 2015 Second Circuit *Lora* opinion should not be relied on as a persuasive authority regarding the meaning of "when…released" and "released" in § 1226(c).

Given the dismissal of the appellate *Lora* decision, the 2014 S.D.N.Y. decision is now the applicable precedent. The Second Circuit's March 30 Order does not vacate that decision. *Lora*, 2018 WL 1545596, at *1. At times, under the *Munsingwear* doctrine, an appellate court may order vacatur of a lower court judgement upon request by the parties, but "[i]f the appellate court simply dismisses the appeal as moot, the judgment of the district court remains[.]" Wright & Miller, Federal Practice and Procedure, § 3533.10 Cases Moot on Appeal (3d ed.) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)).

The *Lora* District Court decision by Magistrate Judge Andrew J. Peck held that Mr. Lora's detention was not authorized by INA § 1226(c) for the following reasons: (1) the statutory phrase "when…released" imposes a temporal limit on detention and Mr. Lora was detained more than four years after his criminal arrest, and (2) Because Mr. Lora was not sentenced to any period of incarceration, Mr. Lora was never "released" within the meaning of § 1226(c), which requires a release from post-conviction incarceration. *Lora v. Shanahan*, 15 F. Supp. 3d 478, 484–89 (S.D.N.Y. 2014), *aff'd*, 804 F.3d 601 (2d Cir. 2015), *cert. granted, judgment vacated*, No. 15-1205, 2018 WL 1143819 (U.S. Mar. 5, 2018).

Therefore, the Second Circuit's now vacated and dismissed 2015 *Lora* opinion is no longer a barrier to raising arguments on "when…released" and "released" in the Circuit. That opinion is not precedential, and is not binding in the district courts.

Arguments Against Mandatory Detention after *Jennings*

The vacatur and dismissal of *Lora* provides an opportunity to litigate issues the *Lora* panel did not address, and new questions about the implications of *Jennings* on the reach of § 1226(c). This practice advisory focuses on two statutory arguments regarding the phrase "when…released" but also introduces other arguments against mandatory detention.

1. **An individual not detained at or around the time of a release from criminal custody is not detained "when…released," and therefore is not subject to mandatory detention under § 1226(c).**

INA § 1226(c) is often arbitrarily applied to individuals who are arrested and detained by ICE because of old criminal convictions. Noncitizens may be convicted of a crime, serve their sentence (if any), and then return to their life in the community, only to suddenly, years later, be arrested by ICE and subject to mandatory detention under § 1226(c). Under the best reading of the statute, either on the basis of its plain language or the application of the constitutional avoidance canon, mandatory detention does not apply to these individuals because they are not being detained "when…released."

As has been stated by numerous courts, the plain language and ordinary usage of the phrase "when…released" indicate an action taken immediately upon release.[3] *Preap v. Johnson*, 831 F.3d 1193, 1204 (9th Cir. 2016), *cert. granted sub nom. Nielsen v. Preap*, No. 16-1363, 2018 WL 1369139 (U.S. Mar. 19, 2018) ("Congress chose words that signal an expectation of immediate action. …This word choice must be given its due weight."); *Castañeda v. Souza*, 810 F.3d 15, 38 (1st Cir. 2015) ("If Congress really meant for the duty in (c)(1) to take effect 'in the event of' or 'any time after' an alien's release from criminal custody, we would expect Congress to have said so, given that it spoke with just such directness elsewhere in the IIRIRA." (citing 8 U.S.C. § 1231(a)(5) ("[T]he alien shall be removed under the prior order at any time after the reentry."))); *Minto v. Decker*, 108 F. Supp. 3d 189, 193 (S.D.N.Y. 2015) ("[T]he language of section 1226(c) is unambiguous; that 'when the alien is released' means 'at or around the time of release[.]'); *Rodriguez v. Shanahan*, 84 F. Supp. 3d 251, 259 (S.D.N.Y. 2015) ("In everyday parlance, people routinely direct others to take action when an event occurs. In so doing, the actor is provided with the precise time to act: when the event occurs. It is never understood that the actor is, instead, free to take such action anytime thereafter, even if it means years later."); *Lora v. Shanahan*, 15 F. Supp. 3d 478, 487 (S.D.N.Y. 2014)[4] ("[T]he clear language of the statute indicates that the mandatory detention of aliens "when" they are released requires that they be detained at or near the time of release."); *Garcia v. Shanahan*, 615 F.Supp.2d 175, 182 (S.D.N.Y.2009) ("[T]he plain language of the statute ... manifests Congress' clear intent that there must be a nexus between the date of release and the removable offense"). Therefore, § 1226(c) does not apply to individuals who are detained by DHS years after their criminal convictions.

Assuming *arguendo* that there is some ambiguity to the meaning of "when…released," the constitutional avoidance canon should be applied to come to the plausible reading that "when…released" requires that detention be at or near the time of release. The constitutional avoidance canon must be applied if there is "a serious doubt…raised about the Constitutionality of an act of Congress" and "after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." See *Jennings*, 138 S. Ct. at 842. (articulating this test for applying the canon).

There is serious doubt about the constitutionality of detaining individuals with old criminal convictions who have been living and working peacefully in the community for years. *See Rodriguez v. Shanahan*, 84 F. Supp. 3d 251, 265 (S.D.N.Y. 2015) (applying constitutional avoidance to "when…released" because detaining petitioner seven years after his conviction "raises constitutional concerns that would not have been present had he been apprehended "when ... released.") In *Demore v. Kim*, the Supreme Court concluded that, in general, detention during removal proceedings is constitutional as a facial matter, but Justice Kennedy's concurrence noted that the detention of a specific individual may be impermissible "[w]ere there to be an

[3] As noted above, the Supreme Court will be considering the statutory meaning of "when…released" in *Nielsen v. Preap*, No. 16-1363 (Mar. 19, 2018). Individuals currently detained have a pressing need for their cases to be heard immediately and should not be required to wait for the Court's decision.

[4] While the appellate decision in *Lora* was vacated and the appeal dismissed, this district court decision was not vacated. *Lora v. Shanahan*, No. 14-2343, 2018 WL 1545596, at *1 (2d Cir.).

unreasonable delay by the INS in pursuing and completing deportation proceedings[.]." 538 U.S. 510, 532–33 (2003) (Kennedy, J., concurring).

To determine the constitutionality of detention, courts employ a balancing test weighing the government's regulatory interest against the individual's liberty interest. *United States v. Salerno*, 481 U.S. 739, 748 (1987); *see also Mathews v. Eldridge*, 424 U.S. 319 (1976). There is no pressing public safety justification requiring detention of individuals who have lived safely in the community for years. *See Rodriguez v. Shanahan*, 84 F. Supp. 3d 251, 265 (S.D.N.Y. 2015) (noting that petitioner, "by virtue of being in his community for seven years, rebutted Congress's otherwise acceptable presumption of dangerousness, recidivism, and flight risk."); *Saysana v. Gillen*, 590 F.3d 7, 17–18 (1st Cir. 2009) ("It is counter-intuitive to say that aliens with potentially longstanding community ties are, as a class, poor bail risks…By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.")

Where an individual has been living and working peacefully in the community for years after a conviction, her liberty interest is increased. *See, e.g., Ragbir v. Sessions*, No. 18-CV-1226(c) (KBF), 2018 WL 623557, at *3 (S.D.N.Y. Jan. 29, 2018) (finding a due process violation where "a man we have allowed to live among us for years, to build a family and participate in the life of the community was detained, handcuffed, forcibly placed on an airplane, and today finds himself in a prison cell"); *Chhoeun v. Marin*, 2018 WL 566821, at *9 (C.D. Cal. Jan. 25, 2018) (finding a strong liberty interests for individuals who "have grown up in our communities, obtained gainful and productive employment, and raised families of their own"); *see also Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 550 (S.D.N.Y. 2014) ("With his family and community ties, [Petitioner, a noncitizen with an old conviction] is differently situated from the criminal aliens who are taken into custody "when ... released" considered by the Supreme Court in *Demore*."); *Gordon v. Johnson*, 991 F. Supp. 2d 258, 266 (D. Mass. 2013), *aff'd sub nom. Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015) ("In the time since his release from custody for the original offense, Plaintiff has had a son, purchased a home, and developed a successful business…While he may have fit the category of individuals Congress was concerned with when he was first released, at this point he falls far outside it.")

This heightened liberty interest and decreased government safety interest skews the balancing test in favor of the liberty interest for individuals who are detained on the basis of old convictions. To avoid this constitutional problem, courts should not adopt a reading of "when…released" which allows DHS to have free reign in mandatorily detaining individuals who have lived in our communities for years without incident.

Where there is both ambiguity and a serious doubt about the constitutionality of one reading of the statute, the constitutional avoidance canon should be applied first, before turning to other canons such as *Chevron* deference to the agency. *See generally, Jennings*, 138 S. Ct. at 830 (analyzing the application of the constitutional avoidance canon without any mention in the entire opinion of Chevron deference to agency.). Therefore, courts should not defer to the interpretation of "when…released" adopted by the BIA in *In Re Rojas*, 23 I. & N. Dec. 117, 120 (BIA 2001). Courts that interpreted "when…released" as not requiring any immediacy, including the Second Circuit panel in its now-vacated decision, have found the language ambiguous and deferred to the BIA without applying constitutional avoidance. *Lora v. Shanahan*, 804 F.3d 601,

606 (2d Cir. 2015) *cert. granted, judgment vacated*, No. 15-1205, 2018 WL 1143819 (U.S. Mar. 5, 2018) (interpreting "when…released" without constitutional avoidance); *see also Lora*, 15 F. Supp. 3d at 486 ("Most courts that have adopted the duty-triggering construction have found the "when ... released" clause ambiguous, and held that the BIA's Rojas decision is a reasonable interpretation entitled to Chevron deference."). This approach of applying *Chevron* before constitutional avoidance does not comply with *Jennings*, which suggests that constitutional avoidance takes precedence. *See generally, Jennings*, 138 S. Ct. 830; *see also Clark v. Martinez*, 543 U.S. 371, 385 (2005). The constitutional avoidance canon resolves the potential ambiguity in the statute without needing to turn to the agency's interpretation, and moreover, establishes that the agency's interpretation is unreasonable. The constitutional avoidance canon counsels in favor of adopting the plausible reading that the statute only applies to individuals detained at or around the time of release from criminal custody.

2. An individual who never served a custodial sentence for her criminal conviction has not been "released" from custody, and therefore is not within the purview of §1226(c)(1).

U.S.C. § 1226(c) is also often arbitrarily applied to individuals who never served a criminal sentence to begin with. For example, Alexander Lora served a solely probationary sentence. An individual like Mr. Lora was never "released" from an enumerated offense because he was never confined on the basis of his conviction of such an offense. Therefore, the mandatory detention statute does not apply.

The structure and purpose of the statute make evident that "release" must refer to a release from post-conviction criminal custody. *See, e.g., Martinez-Done v. McConnell,* 56 F. Supp. 3d 535, 543 (S.D.N.Y. 2014) ("If detention under section 1226(c) must wait for a conviction, but 'release' precedes conviction, why would the Attorney General be commanded to take aliens into custody 'when [they are] released'?) *Straker v. Jones*, 986 F. Supp. 2d 345, 357 (S.D.N.Y. 2013) ("The statute's text…naturally fits the paradigm in which the alien (1) is convicted of an [enumerated] offense…, (2) serves a prison sentence for such a conviction, and thereafter (3) is released to DHS. But, by definition, an alien who is (1) arrested, (2) released, and only later (3) convicted of and sentenced for a covered offense, is not and cannot be eligible to be taken into DHS custody pursuant to the mandatory detention statute at the moment of his release.").

The statute's reference to parole, supervised release, and probation further indicate that the word "released" in § 1226(c) means released from a period of post-conviction incarceration. *See* § 1226(c). In *Matter of Kotliar*, the BIA suggested that a mere arrest can result in a "release" from custody for purposes of triggering mandatory detention. 24 I. & N. Dec. 124, 125 (BIA 2007); *see also Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015) *cert. granted, judgment vacated*, No. 15-1205, 2018 WL 1143819 (U.S. Mar. 5, 2018) (holding that a person subject only to probation could be detained under § 1226(c)). This conclusion, adopted by the BIA and the Second Circuit in a now-vacated, pre-*Jennings* decision, is contrary to the plain language of the statute, which clearly points to releases from post-conviction custody.

Assuming *arguendo* that there is ambiguity to the meaning of "released," the constitutional avoidance canon applies because the reading that "release" requires post-conviction physical custody, is at minimum, a plausible reading of the statute, and reading the statute otherwise

creates a serious constitutional problem. *See Jennings*, 138 S. Ct. at 842 (articulating this test for applying the canon).

The due process balancing test for detaining an individual who was sentenced only to probation weighs in favor of the individual's liberty interest. The government's safety interests are seriously decreased because the criminal legal system has addressed the criminal conduct without requiring incarceration, demonstrating that this individual does not need to be detained. The government's presumption that such a person would be dangerous or a flight risk rings hollow. Under the *Salerno* balancing test, detention with such a low government safety interest will not past constitutional muster. *See Salerno*, 481 U.S. at 748.

As above, *Chevron* deference to the agency is not appropriate where there is a constitutional problem requiring application of the constitutional avoidance canon, so the Court should not defer to *Matter of Kotliar*, 24 I. & N. Dec. 124, 125 (BIA 2007). Instead, the court should interpret any ambiguity in the statute in light of the serious constitutional problems posed by a reading that allows for the mandatory detention of individuals who were never sentenced to jail or prison.

3. Mandatory detention is unconstitutional as applied to an individual who is not detained at or around the time of release from a custodial sentence.

The constitutional concerns raised above counsel in favor of interpreting "when...released" to exclude noncitizens detained on the basis of old criminal convictions, and interpreting "released" to exclude noncitizens who were never sentenced to criminal confinement. In the alternative, if the statute cannot be interpreted as we have described, the statute is unconstitutional as applied to individuals detained years after a criminal conviction and/or who never served a custodial sentence. In these cases, there is a heightened individual liberty interest and a decreased government interest in detention, skewing the due process balancing test against detention. Under such circumstances, it is a Fifth Amendment due process violation to detain an individual without any finding of flight risk or dangerousness.

4. Detention of a noncitizen with substantial defense to removal is outside the scope of the statute and is also unconstitutional as applied.

Section 1226(c) permits the government to take into custody a noncitizen who "*is* deportable" or "*is* inadmissible." 8 U.S.C. § 1226(c) (emphasis added). If an individual does not yet have a final order and has substantial defenses to removal, that individual has not been conclusively found to be deportable, and therefore it cannot be said that the noncitizen "*is* deportable."

While the Supreme Court has held that mandatory detention of an individual who concedes removability may be constitutional for the brief period necessary to deport the individual, *Demore*, 538 U.S. at 532, the Court has also expressed serious due process concerns about the mandatory detention of individuals who have substantial claims challenging their removability. *Id.* at 532 (Kennedy, J., concurring) (mandatory detention is premised on noncitizen's deportability); *see also Casas Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008); *Tijani v. Willis*, 430 F.3d 1241, 1247 (9th Cir. 2005) (Tashima, J., concurring) (interpreting § 1226(c) as applying only to immigrants who cannot raise "substantial argument[s] against their removability"); *Gonzales v. O'Connell*, 355 F.3d 1010, 1020 (7th Cir. 2004) ("A wholly different case arises when a detainee who has a good-faith challenge to his deportability is

mandatorily detained"). Therefore, if there is an ambiguity in the phrase "is deportable," constitutional avoidance should be applied in this context as well, to read the statute as excluding those who have substantial defenses to removal. If constitutional avoidance is not applied, the statute, as applied to individuals with substantial defenses to removal, is in violation of the Due Process Clause of the Fifth Amendment.

5. **Prolonged detention itself is unconstitutional as applied.**

This argument is described in detail in the companion IDP Practice Advisory entitled "Making Constitutional Arguments in the Second Circuit to Challenge Prolonged Mandatory Detention after *Jennings* and *Lora*."

Conclusion

While the class action *Sajous v. Decker* is being litigated, individual detained noncitizens may continue to petition for habeas. Now that *Lora* has been dismissed, noncitizens in the Second Circuit who are detained on the basis of old criminal convictions or convictions for which they never served a jail or prison sentence have strong claims that they have not been detained "when…released" and therefore cannot be detained under § 1226(c), or that their detention is unconstitutional. Detained noncitizens can also argue that if they have substantial defenses to removal, their detention is outside the scope of the statute and/or unconstitutional, and that prolonged detention is unconstitutional.