Immigrant Rights Clinic

PRACTICE ADVISORY[*]
November 18, 2015

Understanding *Lora v. Shanahan* and the Implementation of Bond Hearings for Immigrants in Prolonged Detention

This practice advisory discusses the Second Circuit's decision in *Lora v. Shanahan*, No. 14-2343, -- F.3d -- , 2015 WL 6499951 (2d Cir. Oct. 28, 2015). In *Lora*, the Second Circuit held that immigrants subject to mandatory detention must be provided a bond hearing within six months of detention. *Id.* at *12 (holding that "an immigrant detained pursuant to [8 U.S.C. §] 1226(c) must be afforded a bail hearing before an immigration judge *within six months* of his or her detention" (emphasis added)). *Id.* The decision also held that at that bond hearing, the individual is entitled to release on bond "unless the government establishes by clear and convincing evidence that the alien poses a risk of flight or a risk of danger to the community." *Id.* (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013)).

This practice advisory is divided into two sections. The first section discusses the *Lora* case and its holding. The second section addresses its application in various contexts.[1]

I. THE SECOND CIRCUIT'S HOLDING IN *LORA*

Alexander Lora is a longtime lawful permanent resident with a U.S. citizen family in New York, where he has lived for twenty-five years. *Id.* at *3. On November 22, 2013, Mr. Lora was placed into removal proceedings based on an old criminal conviction for drug possession. *Id.* Despite the fact that the conviction occurred in 2009 and he received no jail time, Immigration and Customs Enforcement ("ICE") came to Mr. Lora's neighborhood early in the morning, arrested him, and subsequently detained without bond at Hudson County Correctional Center in Kearny, New Jersey. *Id.* His mandatory detention cost him his job, his ability to provide for his family, and his two-year-old son, who was then placed in foster care. *Id.* at *12. Although Mr. Lora was ultimately found eligible to pursue a form of discretionary relief from deportation (cancellation of removal), he was never permitted to have a bond hearing. *Id.* at *3. ICE argued that Mr. Lora's mandatory detention was authorized by 8 U.S.C. § 1226(c), a provision of the Immigration and Nationality Act ("INA") that mandates detention without bond for individuals who are removable for certain types of criminal offenses when they are released from criminal custody for those offenses. *Id.* at *1. Under ICE's interpretation of the statute, no judge was

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[1] If you have questions or are planning to file any habeas litigation related to these issues, please reach out to Professor Alina Das of the Immigrant Rights Clinic at New York University School of Law, at alina.das@nyu.edu.

allowed to consider whether Mr. Lora should be released from detention based on his lack of flight risk or dangerousness to the community, no matter how long ago his conviction was or how long he would remain in detention while his immigration case was processed. *Id*. at *9.

On March 26, 2014, about four months after he was first detained, Mr. Lora filed a petition for habeas corpus in the Southern District of New York after the immigration judge denied him a bond hearing. *Id.* at *2. Mr. Lora raised several statutory and constitutional arguments. First, he argued he was not covered by 8 U.S.C. § 1226(c) both because he was not detained at the time of any release from criminal custody and because he had never been released from any criminal incarceration to begin with. *Id.* at *5–6. Second, he argued that his detention without bond raised serious constitutional concerns, both because it had become and would be prolonged, and because it was arbitrary in light of the gap between any release from criminal custody and his immigration detention and because of his substantial challenge to his deportation. *Id.* at *9. His petition was granted by Magistrate Judge Peck on April 29, 2014, who determined that Mr. Lora was not properly subject to mandatory detention under § 1226(c) based on his statutory arguments (and thus did not need to reach the constitutional questions). *Id.* at *2. On May 8, 2014, Mr. Lora received a bond hearing before an immigration judge where ICE agreed to release him on a $5,000 bond, waiving administrative appeal of the stipulated bond order. *Id.* at *2, 12 n.24. He had been detained approximately five and a half months at the time of his release. *Id.* at *2 n.11.

Although the government did not appeal the bond set in Mr. Lora's case, it did appeal the district court's legal determination that Mr. Lora was entitled to a bond hearing. On appeal, Mr. Lora defended the district court's decision on both the statutory and constitutional grounds. **On October 28, 2015, the Second Circuit ruled in favor of Mr. Lora on the basis of his prolonged detention argument, and established a bright-line rule that requires the government to give individuals a bond hearing before an immigration judge within six months of the start of their detention.** *Id.* at *12. The court concluded that its ruling was necessary in light of the Supreme Court's precedent in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Demore v. Kim*, 538 U.S. 510 (2003). *Id.* at *11. The Second Circuit also adopted the bright-line rule in order to facilitate uniform administration of the rule and to limit the "real-life consequences" for immigrants and their families facing continued detention. *Id.* at *11–12.[2] **Moreover, at that bond hearing, the government must meet the burden of showing "clear and convincing evidence" that those individuals are flight risks or dangers to the community, otherwise the detained individuals are presumptively entitled to bond.** *Id*. The Second Circuit cited the Ninth Circuit's decision in *Rodriguez v. Robbins*, which held that the government must bear the burden of establishing flight risk and dangerousness to protect

[2] The Second Circuit specifically discussed its decision to implement a bright-line rule instead of the "fact-dependent inquiry" adopted by the Third and Sixth Circuits. *Lora*, 2015 WL 6499951, at *10 (citing *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469 (3d Cir 2015) and *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011)). Among various reasons, the Second Circuit highlighted the importance of placing the burden on the government to provide a bond hearing rather than requiring individual petitioners to seek a habeas petition in order to receive a bond hearing, the latter of which did not necessarily lead to all petitioners receiving bond hearings. *Lora*, 2015 WL 6499951, at *11 ("Adopting a six-month rule ensures that similarly situated detainees receive similar treatment. Such a rule avoids the random outcomes resulting from individual habeas litigation in which some detainees are represented by counsel and some are not, and some habeas petitions are adjudicated in months and others are not adjudicated for years.").

immigrants from an erroneous deprivation of liberty. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1136 (9th Cir. 2013) (quoting *Diouf v. Napolitano*, 634 F.3d 1081, 1091-92 (9th Cir. 2011)).[3]

Thus, as a result of the *Lora* decision, immigrants subject to prolonged detention in the Second Circuit are entitled *Lora* bond hearings before immigration judges within six months of their detention; and such individuals are entitled to release on bond unless the government can meet its clear and convincing burden of proving flight risk and dangerousness.[4]

II. *LORA* & ITS APPLICATION: QUESTIONS & ANSWERS

Q. What does* Lora *hold?
A. Immigrants subject to mandatory detention are entitled to a bond hearing within six months of their detention and must be released on bond unless the government meets its burden of proving by clear and convincing evidence that the individual is a flight risk or danger to the community.

In *Lora*, the Second Circuit made two key holdings on prolonged detention:

- The Court construed 8 U.S.C. § 1226(c), to authorize mandatory detention for only six months in order to avoid the serious constitutional concerns. Therefore, an individual detained under 8 U.S.C. § 1226(c) must receive a bond hearing before an immigration judge within six months of his or her detention. *Lora*, 2015 WL 6499951, at *2, 9, 12.
- At such *Lora* bond hearings, the individual "must admitted to bail unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community." *Id*. at *12.

Q. Why are* Lora *bond hearings required?
A. Lora *hearings are required to avoid the serious constitutional concerns associated with indefinite detention, i.e., to prevent noncitizens from being erroneously, arbitrarily, or punitively deprived of their liberty for prolonged periods of time.*

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[3] Of note are multiple Ninth Circuit decisions related to *Rodriguez v. Robbins*. The Second Circuit in *Lora* cites the Ninth Circuit's 2013 ruling. *Rodriguez v. Robbins*, 715 F.3d 112 (9th Cir. 2013). On October 28, 2015, the same day as the *Lora* decision, the Ninth Circuit issued another opinion in *Rodriguez v. Robbins*, No. 13-56706, -- F.3d. --, 2015 WL 6500862 (9th Cir. Oct. 28, 2015), reaffirming and expanding its earlier ruling requiring individualized bond hearings in prolonged detention.

[4] Although the Second Circuit held that Mr. Lora was entitled to a bond hearing, it rejected some of his statutory arguments. First, the court rejected Mr. Lora's argument that he was not subject to mandatory detention because he had not been released from a custodial sentence for his underlying conviction. The court stated that once an individual has a qualifying conviction under § 1226(c)(1), he or she is subject to mandatory immigration detention at any point in the future as long as he or she is "not incarcerated, imprisoned, or otherwise detained" by other authorities. *Id* at *6. Second, the court rejected Mr. Lora's argument that he was not subject to mandatory detention because ICE did not detain him at the time of any release from criminal custody. *Id.* at *6–9. The court deferred to a Board of Immigration Appeals decision that indicated that ICE can detain individuals with qualifying convictions after their release from criminal custody. *Id*. The court arguably did not need to reach these two statutory issues in light of its holding that Mr. Lora was entitled to bond because of the constitutional concerns poised by prolonged detention, and thus the statutory portion of its analysis is arguably dicta, but individuals in detention should be aware of this discussion in the court's opinion and consider preserving these arguments if applicable when challenging their mandatory detention on other grounds.

The Second Circuit required bond hearings in order to avoid the serious constitutional concerns raised by indefinite detention. As the court explained, "indefinite detention of a non-citizen 'raise[s] serious constitutional concerns' in that '[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Lora*, 2015 WL 6499951, at *2 (quoting *Zadvydas v. Davis,* 533 U.S. 678, 682, 690 (2001)). In addition to drawing upon the concerns in *Zadvydas*, the opinion cites the constitutional concerns raised by the Supreme Court in *Demore v. Kim*, 538 U.S. 510 (2003), which concluded that "for detention under the statute to be reasonable, it must be for a brief period of time." *Lora*, 2015 WL 6499951, at *9 (citing *Demore*, 538 U.S. at 528). The Second Circuit also noted that neither the petitioner nor the government advocated for indefinite detention or were against imposing "an implicit time limitation" on the application of § 1226(c) detention. *Id*.

After an analysis on how the Third, Sixth and Ninth Circuits have imposed time limits on the length of mandatory detention, the Second Circuit ultimately decided to adopt the Ninth Circuit's six-month bright-line rule, citing to *Rodriguez*, 715 F.3d 1127. Ordering bond hearings around the six-month constitutional mark would provide the district courts below with clear guidelines and avoid "pervasive inconsistency and confusion" that case-by-case determinations would create. *Id*. at 11. A six-month deadline for a bond hearing also prevents mandatory detention from becoming erroneous, arbitrary, or punitive as time passes. *Lora*, 2015 WL 6499951, at *12 (citing *Demore*, 538 U.S. at 532–33 (J. Kennedy, concurring)). Most importantly, the Second Circuit recognized the "real-life consequences for immigrants and their families" when there is no six-month rule, where individuals instead face "endless months of detention . . . often caused by nothing more than bureaucratic backlog." *Id*.

Q. When must a* Lora *bond hearing occur?
A. Bond hearings are required within six months of detention.

The Second Circuit held that the government must give bond hearings to any individual mandatorily detained under § 1226(c) "*within* six months of his or her detention." *Lora*, 2015 WL 6499951, at *12 (emphasis added). Any individual whose detention is approaching six months (or of course those whose detention has already met or exceeded six months) would be immediately eligible for a bond hearing under *Lora*.

In addition, those individuals who are likely to be detained for six months or longer should be eligible for a *Lora* bond hearing as soon as it becomes clear that detention will be prolonged. This could depend on when their next hearing date might be, the nature of immigration relief sought, whether there is likely to be an appeal, and whether a quick decision from the Immigration Judge or the Board of Immigration Appeals ("BIA") is likely. If, given all the individual's circumstances, he or she will likely remain in detention for or past the six-month mark, a *Lora* bond hearing should be held immediately, rather than forcing the individual to wait until the six-month mark approaches.

This principle is established in the Second Circuit's application of *Lora* to the facts of Mr. Lora's own case. While the *Lora* decision established the bright-line rule at the six-month mark, Mr. Lora had filed a habeas claim for a bond hearing after only four months in detention, and was

granted bond five-and-a-half months later. *Lora*, 2015 WL 6499951, at *12 n.24. The Second Circuit reasoned that since he had already been detained for five-and-a-half months, "it is certain that, were he to be returned to custody, his total period of detention would exceed six months." *Id*. at *2 n.11. This principle also aligns with other cases in which federal courts have recognized that prolonged detention challenges must consider the likelihood of prospective detention. *See, e.g.*, *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011) (noting that DHS should not wait six months to hold a bond hearing if "it has already become clear that the alien is facing prolonged detention"); *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 549 (S.D.N.Y. 2014) (considering the likelihood that "detention may continue for a long time while he pursues relief from removal" in concluding that detention was prolonged); *Gordon v. Shanahan*, No. 15-CV-261 (JGK), 2015 WL 1176706 at *5 (S.D.N.Y. Mar. 13, 2015) ("Nor is there any evidence that Mr. Gordon's removal proceedings will end soon. . . . Mr. Gordon had applied for relief from removal. And the immigration judge's eventual order will be subject to review by the Board of Immigration Appeals and potentially by a court of appeals.").

Q. Who bears the burden in a* Lora *bond hearing and what showing does that burden require?

A. The government bears the burden of "clear and convincing" proof that an individual is either a flight risk or a danger to the community

Lora hearings presume the individual to be eligible for bond unless the government "establishes by clear and convincing evidence that the [individual] poses a risk of flight or a risk of danger to the community." *Lora*, 2015 WL 6499951, at *12 (citing *Rodriguez*, 715 F.3d at 1131). The "clear and convincing" evidence standard adopted by the Second Circuit was taken directly from the Ninth Circuit, which has placed the same evidentiary standard on the government in similar bond hearings. *See Rodriguez*, 715 F.3d at 1131; *see also Singh v. Holder*, 638 F.3d 1196, 1200 (9th Cir. 2011) ("We also hold that, given the substantial liberty interests at stake [at prolonged detention] hearings, the government must prove by clear and convincing evidence that continued detention is justified."). The Ninth Circuit adopted this principle based on Supreme Court decisions that repeatedly required, pursuant to due process, a heightened burden of proof on the State in civil proceedings where the individual's interest at stake was both particularly important and more substantial than the loss of money. *See Singh*, 638 F.3d at 1204 (citing *Cooper v. Oklahoma,* 517 U.S. 348, 363 (1996)). The Ninth Circuit noted that the risk of an erroneous deprivation of liberty requires that a high burden be placed on the government to justify ongoing civil detention. *Id*. at 1204 (citing *Tijani v. Willis*, 430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring) (discussing the role of burden standards in protecting against erroneous deprivations of liberty)).

The "clear and convincing" evidence standard is a higher evidentiary standard than the preponderance of the evidence standard, the latter of which only requires a showing that something is more likely than not to be true. 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, 314 (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 is highly probable" (internal 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, under *Lora*, the government has the burden to show that it is "highly probable" or "reasonably certain" that an individual would be a flight risk or danger to the community if released.[5]

Q. What does the "clear and convincing" burden on the government mean in practice? What should* Lora *bond hearings look like?

During the hearing, the government must show "clear and convincing evidence" that the detained individual is a flight risk or a danger to the community. *Lora*, 2015 WL 6499951, at *12. If the government fails to meet that burden, the individual "must be admitted to bail" – that is, the individual is entitled to release on bond if the government does nothing. *Id*. This means that at a *Lora* bond hearing, individuals or their representatives should start by stating to the immigration judge that, according to *Lora*, the *government* bears the burden of producing proof, not the individual. If the immigration judge finds that the government has not met this burden, the individual should be entitled to receive bond or conditional parole.[6]

In assessing whether the government has met its burden, the Immigration Judge should determine whether the government has demonstrated 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 probative to the extent it demonstrates that an individual is highly probable or reasonably certain to be a *future* risk of flight or danger. Moreover, "danger" is not a generalized concept, rather, it refers to an "identifiable and articulable threat to an individual or the community." *See United States v. Salerno*, 481 U.S. 739, 751 (1987).

Thus, the existence of a past criminal record is not necessarily sufficient to meet the government's burden in these bond assessments. Indeed, since everyone detained pursuant to 8 U.S.C. § 1226(c) has by definition at least one prior qualifying offense, the *Lora* court necessarily anticipated that an individual's criminal history alone would not always justify the continued detention. A past criminal record should only be considered to the extent it is indicative of future dangerousness. *See Singh*, 638 F.3d at 1205 (observing that "the recency and severity of the offenses must be considered" and 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."); *see also Chi Thon Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) ("[P]resenting danger to the community at one point by committing crime does not place them forever beyond

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[5] For more information about the "clear and convincing" standard in this context, please contact Andrea Saenz of the Kathryn O. Greenberg Immigration Justice Clinic at Cardozo School of Law at andrea.saenz@yu.edu.

[6] For more information about the Immigration Judges' authority to order conditional parole, see this practice advisory from the Northwest Immigrant Rights Project and the American Civil Liberties Union: https://www.aclu.org/sites/default/files/field_document/09.29.15_final_updated_rivera_practice_advisory_w_logos.pdf.

redemption. Measures must be taken to assess the risk of flight and danger to the community on a current basis."). Moreover, the amount of time that has passed since the last conviction and/or evidence of rehabilitation may undercut a criminal record that would otherwise be indicative of future dangerousness. *See Singh*, 638 F.3d at 1205 (discussing evidence of changed circumstances following past convictions); *Chi Thon Ngo*, 192 F.3d at 398 ("Due process is not satisfied, however, by rubberstamp denials based on temporally distant offenses. The process due even to excludable aliens requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight."); *Rodriguez v. Shanahan*, 84 F. Supp. 3d 251, 263 (S.D.N.Y. 2015) ("'[I]t 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.'" (quoting *Saysana v. Gillen*, 590 F.3d 7, 17–18 (1st Cir. 2009)); *Martinez-Done v. McConnell*, 56 F. Supp. 3d 535, 546 (S.D.N.Y. 2014) ("As far as dangerousness is concerned, there is often very little evidence that a removable alien ever *was* dangerous, much less that he continues, years after release and reincorporation into the community, to threaten society." (internal citations omitted)).

Similarly, clear and convincing evidence of future flight risk must be individualized as to why that individual would is highly probable or reasonably certain to flee if released. *See Singh*, 638 F.3d at 1205 (holding that even the fact that a noncitizen detainee had "already been ordered removed by a final, administrative order, diminishing the incentive to appear for further removal proceedings" was a fact "common to all detainees" seeking prolonged detention bond hearings after a final order and "alone does not constitute clear and convincing evidence that [the noncitizen] presented a flight risk justifying denial of bond" (emphasis in original)). Moreover, where individualized evidence of past flight risk may exist, current evidence of length of residency in the U.S., family and community ties, a place to reside upon release, job or family commitments upon release, and possible relief from and/or defenses to deportation would undercut that evidence as well. *See Lora*, 2015 WL 6499951, at *1 (noting that factors such as "strong family and community ties" and "meritorious defenses to deportation" as factors establishing the need for release on bond); *see also Chi Thon Ngo*, 192 F.3d at 398 ("The fact that some aliens posed a risk of flight in the past does not mean they will forever fall into that category.").

Finally, under the clear and convincing evidence standard, the government should not be deemed to have met its burden based on documents that are inherently suspect or prone to error. *Cf. James v. Mukasey*, 522 F.3d 250, 257 (2d Cir. 2008) (criticizing the use of charging instruments as conclusive proof of a crime); *Francis v. Gonzales*, 442 F.3d 131, 141 (2d Cir. 2006) (discussing the problems of reliability and bias when relying on rap sheets and reports from "agencies whose jobs are to seek to detect and prosecute crimes"); *Dickson v. Ashcroft*, 346 F.3d 44, 55 (2d Cir. 2003) (holding that "factual narratives" in a pre-sentencing report cannot be used to determine the basis for a noncitizen's removability).

Neither should the government be relying on testimony from the respondent to meet its burden of proof. *See Matter of Guevara*, 20 I&N Dec. 238, 244 (BIA 1991) ("The legal concept of a 'burden of proof' requires that the party upon whom the burden rests carry such burden by presenting evidence. If the only evidence necessary to satisfy this burden were the silence of the other party, then for all practical purposes, the burden would actually fall upon the silent party

from the outset."); *see also Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971) (holding that the government could not meet its burden to prove a noncitizen's alienage by having the respondent testify).

Q. Are individuals detained under a different section of the INA from Mr. Lora entitled to a* Lora *bond hearing?

A. The principles of Lora *apply to all immigrants subject to prolonged detention and thus individuals detained pursuant to various statutes should be eligible for a bond determination.*

In deciding on a bright-line six-month rule, the Second Circuit was concerned by the serious due process concerns raised by prolonged detention without bond hearings. *See Lora*, 2015 WL 6499951, at *9–10. While the facts in *Lora* involve someone who was detained pursuant to § 1226(c), these same constitutional concerns are raised when individuals are subject to prolonged detention without bond regardless of the particular statutory authority for their detention.

The principles in *Lora* should therefore require hearings for any of the below categories of detained individuals.

1. Those detained for prolonged periods under INA § 236(a), 8 U.S.C. § 1226(a) (discretionary detention)

The principles of the *Lora* ruling should apply to individuals detained under 8 U.S.C. § 1226(a) who have already received an initial bond determination but remain detained for a prolonged period (because bond was denied or because bond was set too high to pay under the standards applicable to initial bond hearings under § 1226(a)). While *Lora* did not explicitly address its applicability in this context, the Ninth Circuit has addressed this issue in its ruling in *Rodriguez v. Robbins*, No. 13-56706, -- F.3d. --, 2015 WL 6500862 (9th Cir. Oct. 28, 2015), where it held that individuals detained pursuant to § 1226(a) who have been previously denied bond are still entitled to "automatic bond hearings after six months of detention" because individuals are vulnerable to prolonged detention even when such detention is discretionary. *Id*. at *21.

2. Those detained for prolonged periods under INA § 235(b), 8 U.S.C. § 1225(b) (as "arriving aliens")

The principles of the *Lora* ruling should apply to individuals detained under 8 U.S.C. § 1225(b) as "arriving aliens." While *Lora* did not explicitly address its applicability in this context, the Ninth Circuit has addressed this issue in *Rodriguez v. Robbins*, No. 13-56706, -- F.3d. --, 2015 WL 6500862, at *17-18 (9th Cir. Oct. 28, 2015), where it held that individuals detained pursuant to § 1225(b) are also entitled to bond hearings after six months of detention because individuals are vulnerable to prolonged detention as "arriving aliens," a label that can apply to certain noncitizens with permanent resident status as well as asylum seekers and others. *Id*. at *18-20; *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1139-44 (9th Cir. 2013) (discussing the constitutional concerns raised by the prolonged detention of "arriving aliens").

3. Those detained for prolonged periods under INA § 241, 8 U.S.C. § 1231 (post-order of removal)

The principles of the *Lora* ruling should apply to individuals detained under 8 U.S.C. § 1231 following a final order of removal. While the *Lora* decision did not explicitly address its applicability in this context, the Supreme Court has already recognized that § 1231 must be read to include a temporal limitation. *Zadvydas*, 533 U.S. at 682. The Ninth Circuit has held that individuals detained pursuant to § 1231 generally must be afforded a bond hearing at six months. *See Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011) (holding that noncitizens detained for a prolonged period pursuant to § 1231 are entitled to bond hearings in which the government bears the burden of establishing flight risk and dangerousness).

Notably, not all individuals with a final order of removal are subject to detention under 8 U.S.C. § 1231. Some of these individuals remain detained under 8 U.S.C. § 1226(c) (and thus *Lora* squarely applies on that basis). Detention under § 1226 applies "pending a decision on whether the alien is to be removed." § 1226(a). Detention authority shifts to 8 U.S.C. § 1231(a) only upon initiation of the "removal period." § 1231(a)(2). The removal period "begins on the *latest* of the following: (i) The date the order of removal becomes administratively final. (ii) *If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.* (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement." § 1231(a)(2) (emphasis added). Thus, § 1226, and not § 1231, generally governs the detention of noncitizens whose cases are pending before the Immigration Judge or the Board of Immigration Appeals, or pending before the federal circuit court and there is a judicial stay of removal or its equivalent.[7] Either way, however, the principles of *Lora* should apply.

Q. How may individuals seek proper compliance with the* Lora *decision?

A. Individuals may file a motion for a Lora *bond hearing with the immigration court. Depending on the outcome, an individual may also need to file a habeas petition, along with any administrative appeal, challenging his or her continued detention if, for example: (i) the bond hearing is not held based on a ruling that* Lora *does not apply*; *(ii) the bond hearing is held but does not comply with the proper standards under* Lora; *or (iii) the bond hearing is held but results in an excessive and punitive bond or the outright denial of bond based on legal or constitutional error.*

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[7] In the Second Circuit, applications for a judicial stay of removal trigger a "forbearance policy" in which the government will not deport the noncitizen pending judicial review. *In re Immigration Petitions for Review Pending in U.S. Court of Appeals for Second Circuit*, 702 F.3d 160, 162 (2d Cir. 2012) (discussing forbearance policy). As such, courts have recognized that § 1226 applies to individuals whose cases are pending before the Second Circuit and whose removal orders are subject to the forbearance policy. *See, e.g.*, *Luna-Aponte v. Holder*, 743 F. Supp. 2d 189, 197 (W.D.N.Y. 2010) ("[For] purposes of this action, the forbearance policy is the equivalent of a court-ordered stay of removal."); *but see Mathews v. Philips*, No. 13-CV-339-JTC, 2013 WL 5288166, at *3 n.2 (W.D.N.Y. Sept. 18, 2013) (acknowledging but declining to follow *Luna-Aponte* in a pro se case). The Second Circuit has not explicitly addressed the question of which statute applies for cases triggering the forbearance policy, but notably *Lora* cites *Luna-Aponte* in its discussion of cases that have examined prolonged detention in the context of 8 U.S.C. § 1226(c). *Lora*, 2015 WL 6499951, at *11.

Individuals facing prolonged detention may file a motion for a *Lora* hearing with the immigration court. Indeed, even without such a motion, detained individuals should automatically receive a bond determination within six months of detention.

In New York, Immigration Judges have already begun holding *Lora* bond hearings and requiring at such bond hearings that the government meet its burden of proof for showing an individual's flight risk and dangerousness. There was some initial resistance from ICE counsel, who claimed that *Lora* is not yet in effect[8] – however, ICE has since withdrawn such arguments.

Any concerns about the implementation of *Lora*, including but not limited to the failure to provide a *Lora* bond hearing,[9] inadequate application of the burden standard or consideration of what constitutes "clear and convincing" evidence,[10] inappropriate continuances granted to the government,[11] and excessive and punitive bond amounts or denials of bond,[12] should be raised in immigration court when possible and, if necessary, on appeal to the BIA and through petitions for writs of habeas corpus.

Finally, if individuals already have a pending habeas petition with the district court at the time that they come under the purview of *Lora*, they should consider amending their pre-existing habeas petition to include any newly arisen *Lora* claim, should further litigation be necessary. An individual may also consider whether or not to stipulate to holding the petition in abeyance pending a *Lora* bond hearing. Notably, an agreement that *Lora* applies does not necessarily mean that the habeas proceedings are moot. District courts should retain jurisdiction over pending habeas petitions to ensure compliance with *Lora* and receive an update on the outcome of any *Lora* bond hearing.

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[8] ICE had been erroneously arguing that *Lora* was not yet in effect because the mandate had not yet issued. While it is true that the mandate does not issue until the period for petitioning for rehearing has passed, the government must still comply with *Lora* as a published, precedential decision. *See* Fed. R. App. P. 41(b); *Williams v. Aviles,* No. 15-4009 (S.D.N.Y. Oct. 30, 2015) (habeas decision applying *Lora* to order that bond hearing promptly be provided to petitioner); *see also United States v. Brutus*, 505 F.3d 80, 87 (2d Cir. 2007) ("We recognize that the law of the circuit doctrine dictates that we are 'bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.'" (quoting *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.2004)); *S.E.C. v. Amerindo Inv. Advisors, Inc.,* No. 05-5231, 2014 WL 405339, at *4 (S.D.N.Y. Feb. 3, 2014) ("The issuance of the mandate is relevant only to the transfer of jurisdiction from the Circuit to this Court [in the specific case to which the mandate applies] . . . it has nothing to do with an opinion's precedential authority and it has nothing to do with this Court's jurisdiction in *this* case." (emphasis in original)).

[9] Please refer to the sections on the applicability of *Lora* in this practice advisory, *supra*.

[10] Please refer to the sections on the "clear and convincing" standard in *Lora* in this practice advisory, *supra*.

[11] Given that the right to a *Lora* determination is tied to the prolonged amount of time spent in detention, an individual in a *Lora* hearing should object to any attempts by the government to request continuances while they attempt to meet their burden.

[12] In *Lora*, the Second Circuit states that the detained individual covered by this decision "must be admitted to bail" unless the government meets its clear and convincing burden of proof. This phrasing implies that release on bail is the default state – assuming that even when bond is set, the amount will only be set so high as to secure an individual's release. *Cf. Stack v. Boyle*, 342 U.S. 1, 3 (1951) (stating that the purpose of bail to assure the presence of an accused, and that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purposes is 'excessive' under the Eighth Amendment").