

FCLS Habeas Series Webinar 4: Prolonged Detention II

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Agenda

Challenges to detention of noncitizens with final orders of removal
(under *Zadvydas*)

- Evidentiary issues regarding likelihood of removal or cooperation with ICE
- Filing a *Zadvydas* habeas prior to 6 months

Challenges to detention of noncitizens granted CAT or withholding of removal prior to 6 months

Bond eligibility for noncitizens with final orders

Challenges to a bond denial on the merits

Legal Framework

8 U.S.C. § 1231(a)(2): the noncitizen “shall” be detained during the 90-day “removal period” ← MANDATORY.

When does the removal period begin? *See* 8 U.S.C. § 1231(a)(1)(B). The latest of the following:

- The date that the removal order becomes administratively final.
- If PFR filed and stay granted, the date of the federal court’s order.
- The date the person is released from criminal custody.

Removal period can be tolled if the person fails to cooperate with efforts to carry out removal. 8 U.S.C. § 1231(a)(1)(C).

Legal Framework (continued)

8 U.S.C. § 1231(a)(6): certain people, including people who are removable based on criminal convictions, “may” be detained beyond the 90-day removal period ← DISCRETIONARY.

Regulations provide for periodic “post-order custody reviews” (POCR) where ICE should consider danger to the community, likelihood of compliance with an order of supervision, among other things.

Numerous courts have questioned whether the POCR process satisfies due process.

Legal Framework (continued)

Zadvydas v. Davis, 533 U.S. 678 (2001). SCOTUS interprets § 1231(a)(6) as containing an implicit “reasonable time” limitation because indefinite detention raises serious constitutional concerns.

- Six months of post-order detention is presumptively reasonable.
- After six months, if the person provides good reason to believe that removal is not reasonably foreseeable, the government must rebut that showing or release the person.

Clark v. Martinez, 543 U.S. 371 (2003). SCOTUS extends *Zadvydas* to noncitizens who were never admitted into the United States.

Evidentiary Issues

Evidentiary issues re likelihood of removal/cooperation

Final Orders of Removal – Calculating the 180 days

Obtaining a stay of removal may toll the commencement of the removal period. The clock is also tolled if the detainee refuses to cooperate.

Under the Second Circuit's approach, a stay order recharacterizes all the previous post-order detention time as pre-order detention. Thus, the clock restarts when ICE re-detains the noncitizen pursuant to a final order of removal.

Other courts combine noncontinuous periods of post-order detention, so the noncitizen receives credit for prior time served post-final order.

Zadvydas Challenges Prior to 6 Months

The six-month presumption of reasonableness is rebuttable!

- However, few district court cases say so.

Presumptions are generally rebuttable. *Zadvydas* cites *County of Riverside*, which created a rebuttable presumption.

Zadvydas does not give ICE six months of entirely unchecked detention authority.

What happens if the person files early but has reached 6 months by the time the court decides the case?

Zadvydas Challenges Prior to 6 Months

Example 1: A repatriation agreement *expressly bars* the person's repatriation, or it is otherwise obvious at the outset that removal is nearly impossible.

Example 2: The person has been re-detained by ICE after previously being held in post-order detention.

CAT and Withholding Grants

If IJ/BIA grants withholding of removal under INA or withholding/deferral of removal under the CAT – there is a final order of removal but execution of the order is withheld or deferred as to a specific country

ICE may detain or continue to detain under 8 U.S.C. § 1231 while it tries to execute order to a third country

File habeas before end of 180 days because removal unlikely and detention just punitive?

Bond Hearings for Post-Order Individuals

Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011) – entitled to bond hearing before IJ, burden on ICE to prove noncitizen poses a risk of flight or danger to the community.

Singh v. Holder, 638 F.3d 1196 (9th Cir. 2011) – Clear and convincing evidence standard.

Aleman-Gonzalez v. Sessions, No. 3:18-cv-01869 (N.D. Cal.). Filed 3/27/2018.

https://www.aclunc.org/docs/20180327_AlemanGonzalez_V_Sessions_Complaint.pdf

Impact of *Jennings v. Rodriguez*

Does not apply to *Zadvydas* challenges to prolonged detention under 1231.

See e.g., *Mercado-Guillen v. Nielsen*, No. 18-cv-00727 (N.D. Cal. Apr. 19, 2018); *Higareda-Frutos v. Sessions*, No. 2:18—cv-00491 (Az. Apr. 5, 2018); *Banos v. Asher*, No. C16-1454 (W.D. Wash. Apr. 4, 2018)

Challenging a Bond Denial in District Court

Questions? Ideas?

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