THE RIGHT TO BE HEARD AFTER TRANSFER: WHY CHARLOTTE IMMIGRATION COURT JUDGES ARE OBLIGATED TO HOLD BOND HEARINGS FOR TIMELY REQUESTORS

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On January 3, 2018, Jesus Eduardo Cardenas Lozoya was arrested and taken into custody by Immigration Customs Enforcement ("ICE"),[1] the enforcement arm of the immigration division of the Department of Homeland Security ("DHS").[2] Cardenas Lozoya, a native of Mexico, had previously been residing in Clayton, North Carolina.[3] He was placed at the Wake County Detention Center in Raleigh where, the day after his arrest, he requested a bond hearing with the Charlotte Immigration Court.[4] In the request, he waived his right to appear before an immigration judge and authorized his attorney to represent him at the hearing.[5] Weeks later, Cardenas Lozoya was incarcerated at the Stewart Detention Center in Lumpkin, Georgia, having not received the bond hearing that he requested at the beginning of January.[6]

As one of two named plaintiffs in a class action suit against three Charlotte Immigration Court judges and members of the Department of Justice, Cardenas Lozoya alleges that it is "the policy and/or practice of three of four Charlotte [immigration judges] . . . to refuse to conduct bond hearings and the failure of

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1. Complaint at 5, Palacios v. Sessions, No. 3:18-cv-00026 (W.D.N.C. Jan. 18, 2018).
2. *See id.* at 7.
3. *Id.* at 5.
4. *Id.* at 12.
5. *Id.*
6. *Id.* at 5, 12–13.

the Executive Office for Immigration Review ("EOIR") to take corrective action."[7] His named co-plaintiff, Jorge Miguel Palacios, was similarly charged, but had not yet been transferred and, at the time of the Complaint, was residing in the Mecklenburg County Jail Central in Charlotte, North Carolina.[8] Palacios entered the suit the day after he filed his bond request; the rest of the proposed class contains members who have already been denied bond hearings by the Charlotte Immigration Court.[9] Collectively, the class ("Plaintiffs") asserts that the government is violating its "statutory, regulatory, and constitutional obligation to conduct bond hearings as expeditiously as possible after depriving someone of their liberty."[10]

The suit, *Palacios v. Sessions*, was brought on behalf of the Plaintiffs in part by the American Immigration Counsel and the Capital Area Immigrants' Rights Coalition. The suit addresses the situation that Cardenas Lozoya is currently in and that Palacios anticipates being in shortly: a scheduled, requested bond hearing was denied by a Charlotte Immigration Court immigration judge either because he or she "declines to exercise jurisdiction" or because a DHS attorney asserts the detainee has been moved out of the Carolinas.[11] In Cardenas Lozoya's case, Judge Theresa Holmes-Simmons claimed she "could not hear the case and pretermitted consideration of the merits of the bond motion."[12] Judge Holmes-Simmons further declined to exercise jurisdiction because Cardenas Lozoya was no longer physically incarcerated in North Carolina.[13] The other two immigration judges implicated in the action, Judge V. Stuart Couch and Judge Barry J. Pettinato, are alleged to have physically "rubber stamped" their denial to hear requested bond hearings on the form.[14] The stamp simply states that "[t]he Court declines to exercise its authority."[15]

As immigration judges under the purview of the Immigration and Naturalization Act ("INA"), Holmes-Simmons, Pettinato, and Couch are employed as "attorneys whom the

7. *Id.* at 2.
8. *Id.* at 5.
9. *Id.* at 11–12, 19.
10. *Id.* at 2.
11. *Id.* at 13–14.
12. *Id.* at 12.
13. *Id.* at 12–13.
14. *Id.* at 2, 14.
15. *Id.* at 14.

Attorney General appoints as administrative judges within the Office of the Chief Immigration Judge to conduct specified classes of proceedings."[16] The other defendants to this class action are members of the Department of Justice who provide oversight to immigration proceedings.[17] While this portion of the suit is undoubtedly important, this Note will focus on the specific harms alleged to have been suffered due to the Charlotte Immigration Court's refusal to conduct bond hearings.[18]

Part I of this Note discusses the arguments being asserted by the Plaintiffs. Part II explains the procedure and purpose of immigration bond hearings. Part III reviews the Charlotte Immigration Court's history and policy on bond hearings. Finally, Part IV proposes why the Charlotte Immigration Court is obligated to exercise jurisdiction and hear bond hearings from detainees who have timely requested one, regardless of whether the detainee is still incarcerated in the Carolinas. Part V concludes this Note with a summary of the above-mentioned arguments and findings.

I. ISSUES OF THE CASE

There is no specific immigration detention center in the Carolinas.[19] As such, the majority of immigration detainees from North and South Carolina are automatically transferred to Stewart Detention Center ("Stewart") in Lumpkin, Georgia.[20] Over two hours away from Atlanta and run by the for-profit corporation Corrections Corporation of America, "the first and largest prison corporation in the country," Stewart is reported to be an isolated place for its immigration detainees.[21] It regularly faces allegations

16. *Id.* at 6; 8 C.F.R. § 1003.10(a) (2018).

17. *Supra*, note 1, at 5–7 (stating that the defendants sued include Jeff Sessions as US Attorney General and head of the DOJ, James McHenry as Acting Director of EOIR, MaryBeth Keller as Chief Immigration Judge with EOIR, Deepali Nadkarni as Assistant Chief Immigration Judge within EOIR, Charlie Peterson as Warden of Stewart Detention Center, T.E. White as Facility Commander of Mecklenburg County Jail Central, and Sean Gallagher as Field Office Director for Atlanta Field Office of ICE).

18. *Id.* at 17–19.

19. *See* U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, *Detention Facility Locator*, https://www.ice.gov/detention-facilities (last visited Feb. 25, 2018).

20. PENN STATE LAW CTR. FOR IMMIGRANTS' RIGHTS CLINIC, IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS 26 (2017), https://pennstatelaw.psu.edu/sites/default/files/pictures/Clinics/Immigrants-Rights/Imprisoned_Justice_Report.pdf.

21. *Id.* at 26 (noting that "the remoteness . . . cuts detained immigrants off from legal counsel and family members").

of due process violations, impeded access to legal counsel, lack of basic necessities for its detainees, lack of access to functioning phones, and lack of access to mental and medical health care.[22]

For example, in May of 2017, detainee JeanCarlo Jimenez Joseph killed himself in his solitary confinement cell at Stewart.[23] Jimenez had been placed there for nineteen days as "punishment for what his sister would tell investigators was an earlier suicide attempt."[24] After an investigation into Jimenez's death, it was discovered that Stewart officials had not been monitoring his increasingly concerning behavior and he was not on suicide watch.[25] In December 2017, the Homeland Security Inspector General released a report that Stewart was one of four facilities where "detainees' rights, their humane treatment, and provision of a safe and healthy environment" were not being met.[26]

The Plaintiffs assert that the involuntary transfer of detainees out of the Carolinas should not be a basis on which a Charlotte Immigration Court ("CIC") immigration judge ("IJ") can refuse to conduct timely requested bond hearings.[27] Whether the IJ is physically rubber-stamping a denial to hear the case or verbally expressing that he or she will not exercise discretion, the class argues this policy violates detainees' rights on four separate bases.[28] First, the class asserts the refusal to conduct bond hearings results in unnecessarily prolonged incarceration in Stewart.[29] Second, the class alleges the practice impedes the immigration detainees' access to counsel, and increases future attorney's fees when detainees must seek out a second bond hearing. This allegation appears to be based on Stewart's rural location and alleged lack of working telephones.[30] Third, the class states that refusing bond hearings "impedes access to vital witnesses who are

22. *Id.* at 27–36.

23. Robin Urevich, *Investigation Finds ICE Detention Center Cut Corners and Skirted Federal Detention Rules*, PRI'S THE WORLD (Mar. 15, 2018), https://www.pri.org/stories/2018-03-15/investigation-finds-ice-detention-center-cuts-corners-and-skirted-federal.

24. *Id.*

25. *Id.*

26. U.S. DEP'T. OF HOMELAND SECURITY, DHS OIG HIGHLIGHTS: CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES BY THE OFFICE OF THE HOMELAND SECURITY INSPECTOR GENERAL (Dec. 2017), https://www.oig.dhs.gov/sites/default/files/asset s/2017-12/OIG-18-32-Dec17.pdf.

27. *Supra*, note 1, at 2.

28. *Id.* at 2.

29. *Id.* at 17–18.

30. *Id.* at 18.

unable to travel . . . out-of-state" to testify at the bond hearings of their incarcerated loved ones.[31]

Lastly, the class alleges that DHS has been allowed to "unilaterally manipulate the forum of bond proceedings," which is outside of its jurisdiction.[32] As the Complaint states, DHS controls the physical location of detainees, but EOIR controls the bond hearings.[33] As such, the Plaintiffs assert that DHS should not be allowed to control the bond hearing process by simply asserting IJs do not have jurisdiction because a detainee has been transferred or is in the process of being transferred out of the Carolinas.[34] The Plaintiffs argue that their above-mentioned harms violate INA statutory provisions, the Administrative Procedure Act ("APA"), and the Due Process Clause of the Fifth Amendment of the U.S. Constitution.[35]

II. THE PROCESS AND PURPOSE OF BOND HEARINGS

ICE makes the initial decision regarding custody when it arrests a person for an immigration violation.[36] Its agents have the authority to make this determination: "an IJ determines whether the individual can be released on bond, recognizance, or other conditions."[37] The individual, if forced to remain in custody, is then entitled to review of ICE's decision before an IJ at a bond hearing.[38]

Bond hearings are "separate and apart from, and . . . form no part of any deportation or removal hearing or proceeding."[39] They exist to provide a pathway for temporary release before the respondent's case comes before an immigration court.[40] Conducting these hearings is a right specifically entrusted to the Attorney General, but he or she has delegated that duty to IJs around the country.[41] Thus, an IJ ultimately determines if a

31. *Id.* at 19.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 4.
36. *Id.* at 7.
37. *Id.* at 8.
38. 8 C.F.R. § 1003.19(c)(1) (2018).
39. *Id.* § 1003.19(d).
40. *Supra*, note 1, at 9.
41. 8 U.S.C. § 1101(b)(4) (2012); 8 C.F.R. § 1003.10(a) (2018).

detainee may be released on bond.[42] Decisions made by the IJ are appealable to the Board of Immigration Appeals ("BIA").[43] BIA decisions are subject to the EOIR's purview, which is considered "the highest administrative body for interpreting and applying immigration laws."[44] BIA decisions are further reviewable by any federal court or the Attorney General.[45]

Immigration detainees seeking to request a bond hearing in front of an IJ must file an application to the court "having jurisdiction over the place of detention," to the court "having administrative control over the case," or "to the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court."[46] The Plaintiffs assert that this regulation indicates a person "must file a request for a bond hearing in the immigration court with authority over their place of detention *at the time of filing*."[47]

The bond hearing itself is an opportunity for the immigration detainee or his or her attorney to "demonstrate to the satisfaction" of the IJ that "release would not pose a danger to property or persons," and that "the individual is likely to appear for any future proceeding."[48] In opposition, an attorney for DHS argues why the detainee should remain incarcerated until his or her immigration proceedings.[49] It is at this stage of the process that the Plaintiffs allege DHS is permitted to state that a detainee has been moved or is in the process of being moved out of the Carolinas, without providing any hard evidence as to why that is relevant to the bond hearing or that the transfer is even taking place at all.[50] For Cardenas Lozoya, this suggestion on the part of the DHS resulted in the IJ refusing to hear his case, and his family members being denied the chance to testify on his behalf.[51]

III. THE CHARLOTTE IMMIGRATION COURT AND BOND

42. 8 C.F.R. § 1003.19(d) (2018).

43. *Id.*; § 1003.19(f); 8 C.F.R. § 1003.38(a) (2018).

44. *Board of Immigration Appeals*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals (last visited Feb. 25, 2018).

45. *Id.*

46. 8 C.F.R. § 1003.19(c) (2018).

47. *Supra*, note 1, at 8 (emphasis added).

48. 8 C.F.R. § 1236.1(c)(8) (2018).

49. *See supra*, note 1, at 14 (emphasis added).

50. *Id.* at 19.

51. *Id.*

HEARINGS

The CIC, which opened in November of 2008, has not historically faced allegations of conducting a "policy and/or practice" of refusing to grant bond hearings for timely requestors.[52] Previously, IJs regularly conducted bond hearings without requiring the detained individual's presence, so long as the detainee requested the hearing before being transferred to an outside detention center, such as Stewart.[53] Thus, detainees have often "waive[d] presence at their bond hearings in the Charlotte Immigration Court so that an IJ can consider their requests for release on bond sooner than if they wait to file their bond motions in another immigration court after they are transferred out of the Carolinas."[54]

Sometime after November of 2008, IJs at the CIC allegedly "began to routinely refuse to conduct bond hearings anytime DHS transferred the person out of the court's assigned geographical area (i.e., North Carolina or South Carolina) before the hearing took place, claiming that, in these cases, they lacked jurisdiction under 8 CFR § 1003.19(c)."[55] Most appeals to the BIA on the issue of a refusal to hear have resulted in dismissal under the argument of mootness.[56] In other words, by the time the appeal reaches the BIA, the detainee has likely already requested another bond hearing in a different court or proceeding with his or her immigration case.[57] The issue of refusal to hear bond hearings has a timeliness factor that other appealable issues to the BIA do not.[58]

However, the BIA addressed this policy in the case *Matter of Armando Cerda Reyes*,[59] which rejected Judge Holmes-Simmons' interpretation of 8 CFR § 1003.19(c) as a jurisdictional rule.[60] The Complaint here points out that this case was not "designated as a precedent decision," but that counsel and *amicus* briefs found the issue compelling enough to warrant having the finding

52. *Id.* at 3.
53. *Id.*
54. *Id.* at 11.
55. *Id.* at 13 (citing 8 C.F.R. § 1003.19 (c) (2018)).
56. *Id.*
57. *See id.*
58. *See id.*
59. Matter of Armando Cerda Reyes, 26 I&N Dec. 528 (BIA 2015).
60. *Id.* at 530.

published.[61] Thus, the BIA is on record as holding that "transfer out of the Carolinas prior to a bond hearing does not deprive IJs of jurisdiction to conduct the hearing."[62] After the *Cerda Reyes* case was published, Judges Couch, Pettinato, and Holmes-Simmons "began to 'decline to exercise' their jurisdiction to conduct bond hearings."[63] They continued their "policy and/or practice" of denying bond hearings to timely requestors,[64] with Judges Pettinato and Couch physically rubber-stamping their declination to act,[65] and Judge Holmes-Simmons terminating bond hearings when DHS provided "unverified and undocumented representations" that an immigration detainee is being transferred.[66] The Plaintiffs state that detainees continue to be denied these hearings based on an IJ declining to exercise his jurisdiction, instead of firmly denying he or she has jurisdiction in the first place.[67] These detainees face the same refusal to act, regardless of whether the immigration detainee has formally "waiv[ed] his or her presence at the hearing," is represented by counsel, or "there are witnesses present at the court to testify on the requestor's behalf."[68]

The Plaintiffs underline the fact that their requested relief is to address the refusal to conduct timely requested bond hearings.[69] They do not request to be released from custody, but rather ask the Court to compel IJs to cease refusing to hold bond hearings in Charlotte on the grounds that it violates the INA, administrative regulations, and the U.S. Constitution.[70] The Plaintiffs also ask that the IJs provide bond hearings to any Plaintiff or class member, who has not been afforded one and to vacate their prior decisions refusing to conduct bond hearings.[71]

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61. *Supra*, note 1, at 13.
62. *Id.* at 14.
63. *Id.*
64. *Id.* at 2.
65. *Id.*
66. *Id.* at 14.
67. *Id.* at 16–17.
68. *Id.* at 15.
69. *Id.* at 4, 24–25.
70. *Id.* at 4, 24.
71. *Id.* at 4, 24–25.

IV. CIC IJS MAY NOT REFUSE TO CONDUCT BOND HEARINGS FOR TIMELY REQUESTING DETAINEES

Under the Due Process Clause of the U.S. Constitution and codified immigration laws, CIC IJs are obligated to exercise their jurisdiction and conduct bond hearings for immigration detainees who have timely requested them.[72] The unofficial policy of refusing to hear on bond, as is currently being carried out by Judges Holmes-Simmons, Pettinato, and Couch, is inappropriate, regardless of whether a detainee is still incarcerated in the Carolinas or has been involuntarily transferred.[73] Refusing to conduct bond hearings violates immigration detainees' explicit statutory rights to be heard and constitutional procedural due process rights.[74]

A. INA Provisions and Administrative Regulations

Codified immigration law, in its many forms, requires that CIC IJs are to conduct bond hearings for immigration detainees who have timely requested one.[75] The Plaintiffs assert that under the relevant INA statutory provisions and administrative regulations, the IJs are obligated to exercise their jurisdiction in this way.[76] The following laws explain the procedure by which a detained immigrant is to be legally processed.

Under 8 U.S.C. § 1226(a), a provision of the INA, the Attorney General is authorized "to conduct . . . bond hearings to consider release on appropriate conditions pending the resolution of an individual's immigration case."[77] This section further explains that, pending an official decision, the Attorney General "may continue to detain the arrested alien; and may release the alien on bond . . . or conditional parole."[78] Relevant regulations on "Aliens and Nationality" further this grant of authority by acknowledging the Attorney General has delegated the duty to conduct bond hearings to IJs.[79]

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72. *Id.* at 22.
73. *Id.* at 23.
74. *Id.* at 22.
75. *Id.*
76. *Id.* at 2, 24.
77. *Id.* at 8 (citing 8 C.F.R. § 1003.19 (c) (2018)).
78. 8 U.S.C. § 1226(a) (2018).
79. 8 C.F.R. § 1003.10 (2018).

> Applications for the exercise of authority to review bond determinations shall be made to one of the following offices, in the designated order: (1) If the respondent is detained, to the Immigration Court having jurisdiction over the place of detention; (2) To the Immigration Court having administrative control over the case; or (3) To the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court.[80]

This statutory framework has been interpreted in multiple ways that suggests it compels IJs to exercise their jurisdiction and hold timely requested bond hearings.[81]

First, prolonged incarceration for immigration detainees under 8 U.S.C. § 1226(a) has been challenged in federal circuit courts, as demonstrated by *Diop v. ICE/Homeland Security*.[82] In that case, the Third Circuit found that the Attorney General, through the IJs, had violated the Plaintiff's rights by detaining him for two years, eleven months, and five days without any hearing whatsoever.[83] The court's determination was partially based on the argument that "any purported authority to detain him for a prolonged period of time without a bond hearing would be unconstitutional."[84] It asserted that the statute "authorizes only detention for a reasonable period of time. After that, the Due Process Clause . . . requires that the Government establish that continued detention is necessary to further the purposes of the detention statute."[85]

Second, this argument was expanded on appeal to the BIA; the appeal speaks directly to the matter at hand: CIC IJs refusing to conduct bond hearings.[86] In *Cerda Reyes*, the IJs claimed they did not have the jurisdiction to conduct bond hearings once detainees were transferred to Stewart.[87] However, the BIA disagreed, and interpreted 8 C.F.R. 1003.19(c)(1) as a rule of

80. *Id.* § 1003.19(c).
81. *See infra* notes 82–101 and accompanying text.
82. Diop v. ICE/Homeland Sec., 656 F.3d 221, 223 (3d Cir. 2011).
83. *Id.*
84. *Id.* at 229–30.
85. *Id.* at 223.
86. *In re* Armando Cerda Reyes, 26 I&N Dec. 528 (BIA 2015).
87. *Id.* at 529.

mandatory action, not a jurisdictional one.[88] On similar facts facing the Plaintiffs in *Cerda Reyes*, Plaintiffs here asserted that the plain language of the regulation authorizes IJs to exercise the INA's preexisting delegation of authority to them to hear bond hearings.[89] The BIA further stated that 8 C.F.R. 1003.19(c)(3) "permits applications to be filed with the Office of the Chief Immigration Judge . . . for designation of an appropriate Immigration Court," speaking to the "non-jurisdictional nature of the regulation."[90]

Third, further evidence that the provision's purpose aligns with the Plaintiffs' argument is found in the regulation's record.[91] The rule's supplementary information provides that the regulation is intended to "maximize the prompt availability of Immigration Judges for respondents applying for custody/bond redeterminations while at the same time causing an equitable distribution of the caseload among Immigration Judges."[92] *Matter of Chirinos*[93] underlined this assertion by stating that the BIA's "primary consideration in a bail determination is that the parties be able to place the facts as promptly as possible before an impartial arbiter."[94]

Last, a persuasive argument in favor of the Plaintiffs comes from the Immigration Court Practice Manual,[95] which is a guidance document released by the EOIR that "sets forth uniform procedures, recommendations, and requirements for practice before the Immigrations Courts."[96] While these guidelines do not limit an individual IJ, they are considered "binding on the parties who appear before the Immigration Courts."[97] The Manual's section on bond hearings states that after an IJ has received a timely request, "the Immigration Court schedules the hearing for the earliest possible date."[98] Further, bond hearings are generally

88. *Id.* at 530.

89. *Id.*

90. *Id.*

91. Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges, 52 Fed. Reg. 2931 (Jan. 29, 1987) (to be codified at 8 C.F.R. pt. 242).

92. *Id.* at 2932.

93. *In re* Chirinos, 16 I. & N. Dec. 276 (BIA 1977).

94. *Id.* at 277.

95. U.S. DEP'T. OF JUST., IMMIGRATION COURT PRACTICE MANUAL (2016) https://www.justice.gov/eoir/page/file/1084851/download.

96. *Id.*

97. *Id.*

98. *Id.* § 9.3(d).

"held at the Immigration Court where the request for bond redetermination is filed."[99] This argument asserts that detainees are entitled to prompt access to bond hearings by IJs, reflecting the Plaintiffs' belief that they are entitled to these hearings regardless of being located in the Carolinas or at Stewart.[100]

B. Procedural Due Process

The requirements of procedural due process obligate CIC IJs to conduct bond hearings for timely requesting detainees.[101] "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[102] The Fifth Amendment states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[103]

In *Palacios*, the procedural requirements of the Due Process Clause are of concern, as opposed to substantive due process requirements.[104] The Plaintiffs argue that their right to be heard is a procedural due process right.[105] They do not ask that the IJs grant them a decision or argue that the bond hearing process is inherently improper.[106] Instead, they assert they are owed the "minimal requirement" of a guaranteed hearing.[107]

The United States Supreme Court created a balancing test in *Mathews v. Eldridge* to determine what kind of process is due to an individual in an administrative proceeding.[108] The Court stated that "resolution of the issue [of] whether the administrative procedures provided . . . are constitutionally sufficient requires analysis of the governmental and private interests that are

99. *Id.* § 9.3(e)(i).

100. *Supra*, note 1, at 13–15.

101. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

102. *Id.*

103. U.S. CONST. amend. V.

104. *Substantive Due Process*, BLACK'S LAW DICTIONARY (10th ed. 2014).

105. *Supra*, note 1, at 24.

106. *See id.* at 20.

107. *Id.* at 3.

108. *See* Cornel Marian, *Balancing Transparency: The Value of Administrative Law and Mathews-Balancing to Investment Treaty Arbitrations*, 10 PEPP. DISP. RESOL. L.J. 275, 287 (2010); Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1783 (2010).

affected."[109] In addressing this concern, the Court balanced three factors: "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,"[110] and third, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[111] Referred to now as the *Mathews v. Eldridge* factors, the balancing test has been employed in all aspects of administrative law,[112] including those involving immigration.[113]

However, another procedural due process test that has been invoked that speaks more directly to the concern of detainees being denied bond hearings: the "meaningful right to be heard."[114] This test was argued as an appropriate evaluation of procedural due process when Attorney General Michael Mukasey reviewed BIA decision *Silvo-Trevino* and unilaterally "rewr[ote] longstanding precedent governing 'crimes involving moral turpitude.'"[115] Mukasey acted without the issue being "questioned by either of the parties, and the Attorney General neither gave notice that he planned to reconsider it nor provided the parties an opportunity to brief or argue the issue, even though it had not been addressed below."[116] When his decision was appealed, based "in part on due process grounds,"[117] Mukasey stated "there is no entitlement to briefing when a matter is certified for Attorney General review."[118]

While the *Mathews v. Eldridge* factors are the standard balancing test in addressing questions of procedural due process,[119] commentators on the Mukasey decision noted that his

109. Mathews v. Eldridge, 424 U.S. 319, 334 (1976).
110. *Id.* at 335.
111. *Id.*
112. *See* Marian, *supra* note 108, at 287.
113. *See* Trice, *supra* note 108, at 1783.
114. *Id.* at 1779–80.
115. *Id.* at 1766.
116. *Id.* at 1767.
117. *Id.*
118. *Id.*
119. *Id.* at 1783.

due process violation stemmed from denying the *Silvo-Trevino* parties any meaningful right to be heard.[120]

> Fundamental fairness is the touchstone of procedural due process, and the central meaning of this protection is that a party to an adjudicatory proceeding who may be deprived of a protected interest has a constitutional right to notice and a meaningful opportunity to be heard. Moreover, 'when the absence of procedural due process is egregious—when, for example, the government affords no notice . . . and the claimant's interest is momentous,' a court can find a procedural due process violation without weighing the *Mathews v. Eldridge* factors or comparing the procedures afforded in other contexts.[121]

Similarly, in *Palacios*, the Plaintiffs' absence of procedural due process is an egregious instance of the government declining to provide notice to parties in a case.[122] Immigration detainees have a compelling and significant interest in having their timely requested bond hearings conducted by the IJs who are obligated to perform them.[123] Denying these detainees a meaningful opportunity to be heard, and refusing to apply "meaningful procedural safeguards implicates serious due process concerns."[124]

The Supreme Court recently declined to address how much due process is owed to immigration detainees in *Jennings v. Rodriguez*.[125] While *Jennings* concerned itself specifically with prolonged immigration detention,[126] as opposed to a policy of not holding timely requested bond hearings, *Jennings*'s lack of resolution in these overlapping due process issues indicates that

120. *Id.* at 1799.

121. Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102:18 IOWA L. REV. ONLINE 18, 37–38 (2016).

122. *Supra*, note 1.

123. *See* Trice, *supra* note 109, at 1781–82.

124. *Id.* at 1768.

125. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

126. *Id.* at 833.

ongoing litigation of these types of issues will remain contentious.[127]

In *Jennings*, non-citizen plaintiffs argued that their prolonged detention without hearings and determinations to justify the detentions violated their procedural due process rights.[128] "The non-citizens at issue are asylum seekers, persons who have finished serving a sentence of confinement (for a crime), or individuals who, while lacking a clear entitlement to enter the United States, claim to meet the criteria for admission."[129] The Court was asked whether the Ninth Circuit acted appropriately in "[r]elying heavily on the canon of constitutional avoidance"[130] and construing the INA to provide that "an alien must be given a bond hearing every six months and that detention beyond the initial six-month period is permitted only if the Government proves by clear and convincing evidence that further detention is justified."[131]

The Court decided to reverse and remand the case back to the appellate court,[132] finding that "the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here,"[133] and that it misapplied constitutional avoidance.[134] "The majority reads the relevant statute as prohibiting bail and hence prohibiting a bail hearing."[135] It further adheres to the belief that due process is bendable and "calls for such procedural protections as the particular situation demands."[136]

However, in a sharp dissent, Justice Breyer concluded that "the relevant constitutional language, purposes, history, tradition,

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127. *See, e.g.*, United States v. Silva, 313 F. Supp. 3d 660 (2018); Ortega-Rangel v. Sessions, 313 F. Supp. 3d 993 (2018); Vetcher v. Sessions, 316 F. Supp. 3d 70 (2018).

128. *Jennings*, 138 S. Ct. at 839.

129. *Id.* at 859 (Thomas, J., concurring).

130. *Id.* at 839 (majority opinion).

131. *Id.* Constitutional avoidance is a canon of interpretation that the Supreme Court employs when examining whether statutes are in line with the U.S. Constitution. *See id.* at 842 ("When a 'serious doubt' is raised about the constitutionality of an act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

132. *Id.* at 852.

133. *Id.* at 851.

134. *Id.* at 842.

135. *Id.* at 861 (Breyer, J., dissenting).

136. *Id.* at 852 (majority opinion) (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

and case law all make clear that the majority's interpretation at the very least would raise 'grave doubts' about the statute's constitutionality."[137] He underlines that the Due Process Clause "foresees eligibility for bail as part of 'due process.'"[138]

> It consequently limits the Government's ability to deprive a person of his physical liberty where doing so is not needed to protect the public. . .or to assure his appearance at, say, a trial or the equivalent. Why would this constitutional language and its bail-related purposes not apply to members of the classes of detained persons at issue here?[139]

The dueling opinions in *Jennings* reflect a similar dispute over due process in *Palacios*.[140] "Currently . . . detainees . . . who are eligible for a bond hearing must bear the burden of proving that they are not a danger to the community or a flight risk. The government . . . need not justify why they should remain detained."[141] The plaintiffs in *Jennings* asserted that the Due Process Clause does in fact require the government to make this justification.[142] Likewise, the Plaintiffs in *Palacios* seek bond hearings be conducted as they have timely been requested.[143] While the Plaintiffs similarly assert that their constitutional rights are being violated,[144] they also point to the specific statutory language of the INA and administrative documentation that explicitly provides CIC IJs have both the jurisdiction and obligation to conduct bond hearings.[145] Thus, instead of attempting to show that a statute can be interpreted to require hearings be conducted per the U.S. Constitution, as the plaintiffs in *Jennings* did,[146] those in *Palacios* assert that a statutory right

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137. *Id.* at 861 (Breyer, J., dissenting).

138. *Id.* at 862.

139. *Id.* (citations omitted).

140. *Supra*, note 1, at 4.

141. Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 Case W. Res. L. Rev. 75, 76 (2016).

142. *Jennings*, 138 S. Ct. at 839.

143. *Supra*, note 1, at 1.

144. *Id.* at 23.

145. *Id.* at 7–8.

146. *Jennings*, 138 S. Ct. at 841.

exists on its face for their hearings to be conducted as requested.[147]

V. CONCLUSION

Based on statutory interpretation of the INA, the BIA's appellate record, and procedural due process, CIC IJs are compelled to exercise their discretion and conduct bond hearings for timely requests by immigration detainees.[148] On the merits, it appears that *Palacios* is both factually and principally favorable to the Plaintiffs. However, as immigration attorney and appellant's counsel in *Cerda Reyes* Helen Parsonage warns, "[b]e careful what you wish for."[149]

One can imagine how the CIC might react to a judicial finding that its IJs are required to conduct hearings, when three of the four IJs clearly have no interest in doing so. *Cerda Reyes*, which many in the immigration community could have interpreted as a simple instance of misinterpretation of the law, has not made a lasting impact on the CIC's policies.[150] Instead of acting in line with the BIA's holding, Judges Holmes-Simmons, Pettinato, and Couch have continued to either rubber-stamp a flat denial on a bond hearing or chosen not to exercise discretion when a detainee is transferred to Stewart.[151] Through continuing the policy of refusing to conduct bond hearings, these IJs express their lack of interest in changing their practice now. In the case of *Palacios*, the Plaintiffs may win the case itself, but it is uncertain how much of a lasting impact the finding will have in the CIC.

147. *Supra*, note 1, at 20.

148. *See supra*, notes 72–74 and accompanying text.

149. Interview with Helen Parsonage, Immigration Attorney with EMP Law, in Winston-Salem, N.C. (Mar. 30, 2018).

150. *See supra* notes 11–15 and accompanying text.

151. *Supra*, note 1, at 10.