

Outline of Advanced “Burden of Proof” (“BOP”) Arguments To Raise in Bond Appeals and Habeas Petitions

- I. 8 U.S.C. § 1226(a) implicitly assigns the BOP to the government, requiring it to establish non-citizen detainee’s ineligibility for release because she poses a danger or flight risk.**
- a. Statutory history and context indicate Congress did not intend detainees to bear the BOP
 - b. § 1226(a) is silent on BOP. Three reasons silence should be as interpreted as placing burden on government:
 - i. Where Congress has wished to allocate BOP to immigrant in INA it has done so expressly.
 - 1. See, e.g., § 1226(c): the AG “may release” a **mandatory** detainee “if the alien satisfies the AG that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled hearings.”
 - 2. See also Nken v. Holder, 556 U.S. 418, 443 (2009) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).
 - ii. By replacing 8 U.S.C. § 1252(a) in 1996 with the nearly identical § 1226(c), Congress adopted presumption against detention established by In re Patel, 15 I&N Dec. 666 (BIA 1976)
 - 1. “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” Lorillard v. Pons, 434 U.S. 575, 580 (1978).
 - iii. Doctrine of constitutional avoidance dictates BOP be assigned to government
 - 1. See I.N.S. v. St. Cyr, 533 U.S. 289, 306–07 (2001) for discussion.
- II. Requiring detainees to bear the BOP violates due process.**
- a. Supreme Court recognizes civil detention must be carefully limited as it represents a serious form of government restraint. See Foucha v. Louisiana, 504 U.S. 71, 80 (1992), United States v. Salerno, 481 U.S. 739, 755 (1987), Addington v. Texas, 441 U.S. 418, 425 (1979).
 - i. Applies particularly in immigration context:
 - 1. Zadvydas v. Davis, 533 U.S. 678, 692 (2001) stresses the inadequacy of a custody review procedure in which “the alien bears the burden of proving he is not dangerous.”
 - 2. Non-citizens possess unique vulnerabilities and limited constitutional protections.

- b. Standard of proof on gov't must be "clear and convincing" evidence.
 - i. The significant possible injury of deprivation of liberty requires high level of protection. Addington v. Texas, 441 U.S. 418, 427 (1979).
 - ii. Compare to similar criminal court circumstances where government must provide "clear and convincing" evidence. 18 U.S.C. § 3142(f)(2)
- c. Demore v. Kim, upholding mandatory detention for particular class of detainees, has narrow reach and does not justify shifting BOP to noncitizens in § 1226(a) bond hearings.
 - i. Departure from due process principles in hearings is not justified by the use of categorical rules to detain a "limited class" of criminal detainees.
- d. The government carrying the BOP satisfies the three-part due process balancing test in Mathews v. Eldridge, 424 U.S. 319 (1976):
 - i. The private interest of liberty is immense
 - ii. Risk of erroneous deprivation of liberty is high because it is difficult for a detained alien to gather evidence for his defense.
 - iii. Granting fuller due process protections would not impede the government's ability to prosecute its case

III. The practice of placing BOP on non-citizen detainees in § 1226(a) bond hearings rests on *invalid agency interpretation of a regulation*.

- a. In re Adeniji, 22 I&N Dec. 1102 (BIA 1999) erroneously placed the BOP on detainees for three reasons:
 - i. BIA applied 8 C.F.R. § 236.1(c)(8), which actually places BOP on non-citizens during initial arrest and processing by ICE, not at bond hearing.
 - 1. Bond hearing is actually a redetermination of custody, after the initial determination made by officer, so controlling regulation should instead have been 8 C.F.R. § 236.1(d)(1) (which is silent on BOP).
 - ii. BIA actions were "arbitrary and capricious" by shifting BOP to detainee in § 1226(a) bond hearings → should not receive Chevron deference
 - 1. Even if Adeniji did create a general rule for bond redeterminations, BOP shift must be invalid as an unjustified rule change.
 - 2. Broke away from three decades of precedent (Patel) without being compelled by any regulations to shift the BOP onto the immigrant during bond hearings.
 - iii. "Even if Adeniji were a valid agency pronouncement, to interpret the decision as anything more than a one-time solution to an anomalous situation would be arbitrary and capricious."
 - 1. Adeniji was in a unique position of facing unduly lenient bond standards due to the contemporaneous transition in custody policy, so BIA crafted solution.