CHALLENGING EOIR BOND DENIALS IN FEDERAL COURT

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When immigration judges conduct bond hearings, they are authorized to order noncitizens released from detention upon determining that a noncitizen does not pose a danger to the community or an unmitigable flight risk. But what legal challenges are available where an immigration judge finds that the individual is a danger or a flight risk and denies bond? This practice advisory addresses possible federal court challenges to these findings. It focuses on the legal frameworks applicable within the Ninth Circuit Court of Appeals. This is a rapidly developing area of the law, and advocates should be sure to conduct individualized and updated research when litigating individual cases.

I. What is an Immigration Judge Bond Hearing and Who Gets One?

When Immigration and Customs Enforcement (ICE) assumes custody of an individual, an ICE officer makes the initial custody determination regarding whether that person should continue to be detained or should be released on a bond, parole, or under a supervised community custody program.[1] After ICE has made the initial custody determination, the detained noncitizen may seek review of the decision before an immigration judge (IJ).[2] An individual may request a bond hearing orally or in writing.[3]

IJs will only conduct a bond hearing when authorized by law. Whether a bond hearing is authorized in an individual case is frequently contested. Bond hearing authority depends on the statute governing an individual's detention, which in turn is determined by the individual's immigration and criminal history.[4]

The statute and regulations authorize IJs to conduct a bond hearing at the outset of detention for individuals detained under § 236(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1226(a).[5] This statutory provision covers many, but not all, individuals with pending removal proceedings in the immigration court. As discussed below, an IJ will deny a bond hearing request from an individual who is detained under separate, mandatory detention provisions of the INA. Nevertheless, federal courts sometimes order IJs to hold bond hearings for such individuals as a constitutional matter.

At a bond hearing, an IJ can lower or increase the bond which was initially set by ICE. An IJ may also set a bond when ICE did not set any bond at all, or deny bond. The minimum bond that an IJ may set is generally $1,500. There is no maximum amount. An IJ will deny bond if the IJ determines that the individual poses a danger to the community or presents a flight risk that cannot be mitigated by the payment of a bond.[6] Bond proceedings are separate from

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[1] 8 CFR §§ 236.1(d), 1236.1(d).
[2] *See* 8 CFR §§ 3.19, 236.1, 1003.19 and 1236.1.
[3] 8 CFR § 1003.19(b).
[4] *See Jennings v. Rodriguez*, 583 U.S. 281 (2018).
[5] *See* 8 CFR §§ 236.1(d)(1), 1236.1(d)(1); *Jennings*, 583 U.S. at 306.
[6] *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006); *Matter of Drysdale*, 20 I&N Dec. 815, 818 (BIA 1994) (providing that as to flight risk, IJs should set a bond amount "according to [their] assessment of the amount needed to motivate the respondent to appear"). If an IJ has denied bond in the past, the regulations permit the noncitizen to request a second bond hearing upon a showing that there has been a material change in circumstances such that they are no longer a danger or a flight risk. 8 CFR § 1003.19(e).

removal proceedings, which determine whether an individual should be removed or deported from the United States.[7]

A. Mandatory detention

Immigration judges will not conduct bond hearings for certain categories of noncitizens who are subject to "mandatory detention" under the immigration statutes and regulations. There are three INA provisions that authorize detention without a bond hearing: INA § 235(b), 8 U.S.C. § 1225(b); INA § 236(c), 8 U.S.C. § 1226(c); and INA § 241(a), 8 U.S.C. § 1231(a).[8] Whether an individual will be subject to mandatory detention under one of these provisions will depend on their immigration history and criminal history, as well as court interpretations of the statutory provisions, and agency regulations and interpretations.

Certain individuals are subject to mandatory detention based on U.S. Supreme Court interpretation of the immigration statutes. For example, an individual in removal proceedings who has been convicted of a crime that qualifies as an aggravated felony is not eligible for an IJ bond hearing because of 8 U.S.C. § 1226(c).[9] Similarly, an individual whose prior removal order has been reinstated, and who is presenting a fear-based claim in "withholding-only" proceedings in immigration court, is not eligible for a bond hearing because of 8 U.S.C. § 1231(a).[10]

Whether other categories of individuals are subject to mandatory detention without a bond hearing is the subject of dispute and ongoing litigation in the federal courts. Since January 2025, ICE and the Executive Office for Immigration Review (EOIR) have greatly expanded the scope of mandatory detention, and accordingly, many more noncitizens are being detained without access to a bond hearing before an IJ. For more information about who is subject to mandatory detention, see ILRC, *Understanding Mandatory Detention* (December 2025).[11]

If an individual subject to mandatory detention requests a bond hearing with an IJ, the IJ will deny the request on the basis that the IJ lacks authority, or jurisdiction, to conduct a bond hearing. An IJ may deny a noncitizen's request to conduct a bond hearing orally or by written order. Other times, an IJ may hold a hearing labeled a "bond hearing" or "custody redetermination hearing," and then determine during the hearing that the individual is subject to mandatory detention. When an IJ finds that a mandatory detention statute applies, the IJ typically does not determine whether the individual poses a danger to the community or a flight. Rather, the IJ simply determines that the INA prohibits them from making such a determination.[12]

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[7] 8 CFR § 1003.19(d); *see also Matter of Chirinos*, 16 I&N Dec. 276, 277 (BIA 1977) (holding that in accordance with regulations bond hearings should be held separate and apart from any "deportation hearing or proceeding" with a separate record and order).

[8] Advocates should note that in federal court, unlike in immigration court, it is customary to cite to the relevant statutory provisions using 8 U.S.C. instead of the INA.

[9] *Jennings*, 583 U.S. 281.

[10] *Johnson v. Guzman Chavez*, 594 U.S. 523, 526 (2021).

[11] Available at https://www.ilrc.org/sites/default/files/2026-01/%20Understanding-Mandatory-Detention.pdf.

[12] Sometimes, however, an IJ will make alternate findings on flight risk or danger—stating, for example, that if there were jurisdiction to hold a bond hearing, the court would deny or grant bond. If this happens,

B. Bond hearings provided by federal court order

Certain individuals subject to mandatory detention under the statute and regulations may nonetheless receive an IJ bond hearing pursuant to a federal court order. A bond hearing may be ordered by a federal judge as the result of an individual petition for a writ of habeas corpus, or it may be provided pursuant to a class action lawsuit or settlement agreement.[13] The burden of proof at such a bond hearing may be specified by the federal court and may be different from the agency's typical bond framework. For example, as explained below, IJ bond hearings conducted pursuant to agency regulations will place the burden of proof on the noncitizen, while some federal court-ordered bond hearings place the burden on the government.

A bond hearing typically occurs while the individual is in ICE custody. Sometimes, however, as a result of a habeas petition, a federal court judge will prohibit ICE from re-detaining an individual unless an IJ finds the detention authorized at a hearing that takes place while the individual is *out of custody*. These hearings are often referred to as "pre-deprivation hearings" or "pre-detention hearings" because they must occur before ICE can deprive the individual of their liberty.[14] The scope of the IJ's authority at a pre-deprivation hearing, and the applicable burden of proof, will depend upon the precise terms of the federal court's order.

If the IJ finds a noncitizen to be a danger or a flight risk at a federal court-ordered bond hearing, the individual may have grounds to challenge the determination in federal court, just as they would if the IJ had conducted a statutory bond hearing. See **Section II**. However, the nature of the federal court order providing the bond hearing may determine the challenges one can bring in federal court, and how to bring them.

C. Agency framework for immigration judge determinations regarding danger and flight risk at bond hearings

At a bond hearing, an IJ will consider whether to order the individual released from ICE custody upon the payment of a bond. An IJ will deny bond if they determine that the individual poses a danger to the community or an unmitigable flight risk.[15] When evaluating whether your client is a danger to the community, the primary focus is criminal history. In determining flight risk, the IJ assesses the individual's incentives and likelihood to appear at future immigration hearings and appointments. An IJ may deny bond based on a finding of danger *or* flight risk;

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advocates may need to argue in federal court *both* that the IJ was wrong about the court's inability to hold the hearing, *and* about the danger/flight risk determination, as described in Section II. Advocates should try to obtain information on the possibility of this happening prior to requesting a bond hearing before an IJ, as this might affect how and when you choose to request an IJ bond hearing, and/or bring a habeas petition.

[13] *E.g.*, *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, at *3-13 (C.D. Cal. Apr. 23, 2013) (ordering bond hearings for noncitizens subject to prolonged detention with certain mental disabilities at which the government bears the burden to justify continued detention); *Rodriguez v. Holder*, No. 2:07-cv-3239-TJH-RNB, 2013 WL 5229795, at *2 (C.D. Cal. Aug. 6, 2013) (providing for bond hearings for individuals detained more than six months within the Central District of California).

[14] *E.g., Ortega v. Bonnar*, 415 F. Supp. 3d 963, 970 (N.D. Cal. 2019); *Pablo Sequen v. Kaiser*, 800 F. Supp. 3d 998, 1012 (N.D. Cal. 2025); *Singh v. Andrews*, 803 F. Supp. 3d 1035, 1050 (E.D. Cal. 2025).

[15] *Matter of Patel,* 15 I&N Dec. 666 (BIA 1976).

they do not have to make a determination as to both. An IJ may also deny bond if the individual is determined to be a threat to national security.[16]

Bond Factors. In making danger and flight risk determinations, the IJ takes into consideration many factors, as outlined in the seminal Board of Immigration Appeals (BIA) decision on bond, *Matter of Guerra*.[17] The *Guerra* factors include, but are not limited to the following:

1. Whether the noncitizen has a fixed address in the United States;
2. The noncitizen's length of residence in the United States;
3. The noncitizen's family ties in the United States, and whether they may entitle the noncitizen to reside permanently in the United States in the future;
4. The noncitizen's employment history;
5. The noncitizen's record of appearance in court;
6. The noncitizen's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses;
7. The noncitizen's history of immigration violations;
8. Any attempts by the noncitizen to flee prosecution or otherwise escape from authorities; and
9. The noncitizen's manner of entry to the United States.

While *Matter of Guerra* identifies these nine factors, the decision also provides that IJs "ha[ve] broad discretion in deciding the factors that [they] may consider in custody determinations." Under *Matter of Guerra*, the IJ "may choose to give greater weight to one factor over others, as long as the decision is reasonable."[18]

The *Guerra* factor "most pertinent to assessing dangerousness" is the noncitizen's criminal record, including the extensiveness, recency, and the seriousness of the criminal offenses.[19] A history of gang involvement or substance abuse may also raise dangerousness concerns in a bond hearing, particularly if they led to the commission of crimes. Under BIA precedent, family and community ties generally do not mitigate dangerousness.[20] If the IJ determines the individual is a danger, the IJ will deny bond, and may not make a determination as to whether the individual also poses a flight risk.[21]

In determining flight risk, the IJ should assess the individual's incentives and likelihood to appear at future hearings, or for removal from the United States should removal become necessary. *Guerra* factors such as family ties, stable residence history, school and employment records, and history of appearance in court, should mitigate flight risk concerns.

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[16] *Matter of D-J-*, 23 I&N Dec. 572 (AG 2003) (Attorney General's discretion to detain not limited to danger and flight risk; justifying detention of Haitian asylum seekers based on the government's asserted national security interest in deterring mass migration of Haitians by boat). *See also Matter of Khalifah*, 21 I&N Dec. 107 (BIA 1995) (deeming person a terrorist where person facing serious criminal charges in another country in a proceeding whose fairness is in doubt).
[17] *Matter of Guerra*, 24 I& N Dec. at 40.
[18] *Id.*
[19] *Singh*, 638 F.3d at 1206.
[20] *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018).
[21] *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009).

Under BIA precedent, IJs may consider the strength of an individual's claim for relief from removal[22] as well as whether the individual has a "bond sponsor."[23]

For more information about the *Guerra* factors and how to present a strong bond case to the IJ, see ILRC, *How to Address Evidentiary Issues in Bond Proceedings* (Dec. 2019).[24]

Burden of Proof. Under BIA precedent, at bond hearings authorized by agency regulations, the "burden is on the [noncitizen] to show to the satisfaction of the [IJ] that he or she merits release on bond."[25] In other words, noncitizens bear the burden of proving that they do not pose a danger to the community or a flight risk, and ICE does not carry any burden of proof, at an IJ bond hearing.[26] Although sometimes ICE submits criminal records, Forms I-213, or other evidence in bond proceedings to attempt to persuade the IJ to deny bond, an IJ may deny bond even in the absence of any evidentiary submissions from ICE.

Importantly, as discussed in **Section II**, some federal courts have rejected *Matter of Guerra*'s assignment of the burden of proof, and have held that the Constitution requires the government to prove by clear and convincing evidence that a noncitizen is a danger or a flight risk such that their detention is required.

D. Administrative review at the BIA

BIA jurisdiction. By regulation, the BIA has appellate jurisdiction to review IJ bond denials.[27] Under those regulations, either the noncitizen or ICE can appeal an IJ's bond determination.[28]

It is unclear whether the BIA will exercise, or has, jurisdiction to review IJ bond decisions where the bond hearing occurred because of a federal court order. The regulations granting the BIA appellate review over IJ bond determinations are linked to the IJ's regulatory authority to hold bond hearings.[29] A federal court may order that a bond hearing is constitutionally required, even where the regulations do not authorize an IJ bond hearing. Nevertheless, the BIA has ruled on the merits of bond appeals filed by noncitizens and DHS where the underlying bond hearing was ordered by a federal court.[30]

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[22] *Matter of Ellis*, 20 I&N Dec. 641 (BIA 1993) (upholding denial of bond where respondent had no relief available and is, therefore, a flight risk, and has a serious criminal history rendering him a threat).
[23] *Matter of Dobrotvorskii*, 29 I&N Dec. 211 (BIA 2025) (reversing an IJ's grant of bond and holding, for the first time, that "the existence of a valid, reliable, and credible sponsor" is relevant to the determination of flight risk).
[24] *Available at* https://www.ilrc.org/sites/default/files/resources/evidentiaryissuesinbondproceedings-final.pdf.
[25] *Matter of Guerra*, 24 I&N Dec. at 40; 8 CFR §§ 236.1(c)(8), 1236.1(c)(8). *See also Matter of Urena*, 25 I&N Dec. at 141 (stating that an immigration judge may not release a person on bond who has not met his burden of demonstrating that his "release would not pose a danger to property or persons"); *accord Matter of Adeniji*, 22 I&N Dec. 1102, 1112 (BIA 1999).
[26] *Guerra*, 24 I&N Dec. at 40; *see also Patel*, 15 I&N Dec. 666.
[27] 8 CFR §§ 1003.1(b)(7), 1003.19(f), 1003.38, 1236.1(d)(3)(i). *See also* Board of Immigration Appeal Practice Manual 6.2(b).
[28] 8 CFR § 1236.1(d)(3)(i).
[29] *See* 8 CFR § 1003.1(b)(7) (granting the BIA appellate authority over bond determinations "as provided in 8 CFR part 1236, subpart A"). *See also* 8 CFR § 1236.1(d).
[30] For example, in *Martinez v. Clark*, the BIA considered and denied on the merits a noncitizen's appeal of an IJ's dangerousness finding, where a federal judge had ordered the bond hearing since the person was

In addition, be aware that if an individual is subject to an administratively final removal order, the BIA may lack authority to rule on a bond appeal.[31] The BIA Practice Manual states that the BIA "does not have the authority to review a bond decision" for an individual who has been "denied relief from removal by the Board."[32]

As discussed in **Section III**, advocates should explore arguments that a BIA appeal is not required in order to challenge an IJ bond denial in federal court.

Appeal Procedure.[33] A bond appeal must be filed on its own Notice of Appeal (Form EOIR-26).[34] The BIA must receive the notice of appeal within 30 days of the IJ's decision.[35] There is no filing fee for a bond appeal. As of this writing, the BIA has issued an Interim Final Rule that would overhaul of the regulations governing how it processes appeals, much of which has been stayed in federal court litigation.[36] Those regulations, which are the subject of federal court review, do not alter the basic structure of bond appeals.

Under the BIA Practice Manual, bond appeals are processed in the same manner as appeals of IJ removal decisions, except that bond proceedings are not routinely transcribed.[37] The BIA

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subject to mandatory detention under 8 U.S.C. § 1226(c). *See* 124 F.4th 775, 780 (9th Cir. 2024). In *Matter of Dobrotvorskii*, 29 I&N Dec. 211, the BIA considered and granted ICE's appeal of an IJ's decision granting release on bond where the IJ had conducted a bond hearing pursuant to a federal court injunction in effect within the Ninth Circuit.

[31] *See, e.g.*, *Matter of Nasseb Khader Aburajab*, 2009 WL 331195, at *1 (BIA Jan. 23, 2009) (unpublished) ("This Board's authority to set bond conditions on appeal from an Immigration Judge's order derives from the Immigration Judge's underlying authority to redetermine conditions of custody. Neither an Immigration Judge nor this Board has authority to set bond conditions because a final order of removal has been entered in the respondent's case."); *Matter of Joseph*, 22 I&N Dec. 660, 672 (BIA 1999); *Matter of Valles-Perez*, 21 I&N Dec. 769, 771 (BIA 1997). *See also, e.g., Hogarth v. Santacruz et al*, No. 5:25-CV-09472-SPG-MAR, 2025 WL 3211461, at *10 (C.D. Cal. Oct. 23, 2025) (recounting an unpublished BIA ruling in which it held that, because the noncitizen's removal case was pending at the circuit court, "neither an Immigration judge, nor this Board, has regulatory authority to set bond conditions because a final administrative order has been entered in the respondent's removal case," even where the IJ bond hearing had been ordered by a federal judge); *Julio F.V. v. Chestnut et al*, No. 1:25-cv-01432-KES-SKO, 2026 WL 381535, at *1 (E.D. Cal. Feb. 11 2026) (noting that the BIA dismissed noncitizen's bond appeal as moot because his withholding-only proceedings had completed).

[32] BIA Practice Manual 6.2(c), available at https://www.justice.gov/eoir/policy-manual-eoir/part-III/bia/chapter-6-2. If an individual becomes subject to a final order of removal while the BIA bond appeal is pending, the BIA may deem the appeal moot. BIA Practice Manual 6.4.

[33] The regulations allow ICE to unilaterally and automatically stay an IJ's decision granting bond—thus preventing the noncitizen from being released—while the government appeals the bond decision to the BIA. *See* 8 CFR § 1003.19 (i)(2). Numerous district courts throughout the country have found this provision unconstitutional. *E.g., Herrera v. Knight*, 798 F. Supp. 3d 1184, 1192 (D. Nev. 2025); *Otilio B.F. v. Andrews*, 809 F. Supp. 3d 1038, 1055 (E.D. Cal. 2025); *Sampiao v. Hyde*, 799 F. Supp. 3d 14, 29-34 (D. Mass. 2025).

[34] BIA Practice Manual 6.3; *Matter of Chirinos*, 16 I& N Dec. at 277 ("There is no right to a transcript of a bond redetermination hearing.").

[35] 8 CFR §§ 236.1(d)(3)(i), 1003.19(f), 1003.38; BIA Practice Manual 6.3(a)(2).

[36] EOIR, *Appellate Procedures for the Board of Immigration Appeals*, 91 Fed. Reg. 5267 (Feb. 6, 2026); *see also Amica Ctr. For Immigrant Rights, et al. v. EOIR*, __ F. Supp. 3d. __, 2026 WL 662494 (D.D.C. Mar. 8, 2026).

[37] BIA Practice Manual 6.3(b), (b)(2).

may transcribe bond proceedings "at the discretion of the Board."[38] To request a transcript from the BIA, an individual should "send correspondence with a cover letter labeled 'REQUEST FOR TRANSCRIPTION,'" and "should briefly state the reasons for the request." The BIA will set a briefing schedule for bond appeals.[39] Because the BIA will not delay a briefing schedule for transcript processing, a request for transcription should be included with the Notice of Appeal. Parties may also obtain digital audio of recordings of hearings.[40]

Standard of Review. The BIA reviews dangerousness and flight risk determinations de novo, meaning the BIA looks at the determination anew and does not give deference to the IJ's assessment. But the BIA applies "clear error" review to the IJ's factual findings underlying the judgment, meaning it will only overturn the IJ's factual findings if they were clearly wrong.[41] The BIA will not disturb on appeal an IJ custody redetermination that has a "reasonable foundation."[42]

II. Federal Court Challenges to EOIR Determinations on Danger to the Community and Flight Risk

The Ninth Circuit Court of Appeals has held that federal district judges sitting in habeas have jurisdiction to review BIA decisions denying release on bond.[43] This reasoning should extend to similar decisions made by IJs.[44] Federal courts will review dangerousness and flight risk determinations for abuse of discretion, which is a deferential standard. In addition, federal courts can review IJ bond determinations for legal error under a de novo standard of review.

A. Federal courts have jurisdiction to review bond denials

In *Martinez v. Clark*, 124 F.4th 775 (9th Cir. 2024), the Ninth Circuit confirmed that federal district judges have jurisdiction to review BIA decisions denying bond based on dangerousness, because whether an individual poses a danger to the community is a mixed question of law and fact.[45] The same reasoning applies to IJ flight risk determinations.[46]

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[38] *Id.* 3.2(f).
[39] *Id.* 6.3(b)(1), 3.2(f).
[40] *Id.* 3.2(f)(2).
[41] 8 CFR § 1003.1(d)(3)(i)–(ii). *See also Matter of Dobrotvorskii*, 29 I&N Dec. at 212. For additional background about BIA standard of review, see American Immigration Council, *Standards of Review Applied by the Board of Immigration Appeals* (Apr. 22, 2020), https://www.americanimmigrationcouncil.org/practice-advisory/standards-review-applied-board-immigration-appeals.
[42] *Matter of Guerra* 24 I&N Dec. at 39-40.
[43] *Martinez v. Clark*, 124 F.4th 775 781-83 (9th Cir. 2024).
[44] *See Y.S.G. v. Andrews*, No. 2:25-cv-1884-SCR, 2025 WL 2979309, at *9 (E.D. Cal. Oct. 22, 2025) (applying *Martinez* to an IJ's decision to deny bond).
[45] The same panel of judges at the Ninth Circuit had previously held the opposite. However, the Supreme Court vacated the judgment and remanded for further consideration in light of *Wilkinson v. Garland*, 601 U.S. 209 (2024). *See Martinez v. Clark*, 36 F.4th 1219 (9th Cir. 2022), *vacated by Martinez v. Clark*, 144 S. Ct. 1339 (2024).
[46] *See N.A. v. Warden, Adelanto Detention Facility*, No. 5:25-CV-03007-CV-MBK, 2026 WL 734587, at *6 (C.D. Cal. Feb. 20, 2026), *report and recommendation adopted,* No. 5:25-CV-03007-CV-MBK, 2026 WL 734585 (C.D. Cal. Mar. 12, 2026).

Martinez involved a former lawful permanent resident who, in 2000, was convicted of conspiracy to distribute cocaine and sentenced to 20 months in prison. Twelve years after his release from prison, in 2013, he was again convicted for trafficking cocaine and sentenced to 60 months in prison. He had a successful several months of conditional release before sentencing, and while serving his sentence, he earned his GED, took vocational classes, attended Bible studies, and participated in drug treatment and counseling. After completing his criminal sentence, he was transferred to ICE custody and subjected to mandatory detention. Martinez filed a habeas petition challenging his detention without a bond hearing, and a federal judge ordered an IJ bond hearing. At the IJ bond hearing, ICE carried the burden to prove by clear and convincing evidence that Martinez was a danger to the community or a flight risk. The IJ denied Martinez bond as a danger and a flight risk. Martinez appealed to the BIA. The BIA found that Martinez's two convictions for conspiracy to distribute cocaine, thirteen years apart, "provided compelling evidence that [Martinez] was a danger to the community."[47] Martinez challenged this determination in federal court.

In *Martinez*, the Ninth Circuit rejected the government's argument that INA § 236(e), 8 U.S.C. § 1226(e), strips federal courts of jurisdiction to hear challenges to IJ bond determinations. Section 1226(e) provides:

> The Attorney General's discretionary judgment regarding the application of [§ 1226] shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

The Ninth Circuit affirmed that this provision does not strip federal courts of "traditional habeas jurisdiction."[48] Although § 1226(e) restricts federal court jurisdiction with respect to EOIR's "exercise of its *discretion*," the Court held that the agency's "discretionary judgement does not include constitutional claims or questions of law."

In *Martinez*, the Ninth Circuit explained that *Matter of Guerra* requires IJs to weigh nine factors, and apply a legal standard to a given set of facts.[49] Thus, an IJ's determination that an individual is a danger is a mixed question of law and fact that remains reviewable in federal court as a "question of law."[50] The court underscored that "[e]ven though what constitutes 'dangerousness' is malleable and *involves* agency discretion," it is not a discretionary determination because *Matter of Guerra* still provides a legal standard against which federal courts can "assess whether an IJ correctly applied the statutory standard to a given set of facts."[51]

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[47] 124 F.4th at 785.

[48] *Id.* at 781 (quoting *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011) ("[C]laims that the discretionary process itself was constitutionally flawed are cognizable in federal court on habeas because they fit comfortably within the scope of § 2241.") (internal citations and quotations omitted)).

[49] *Martinez*, 124 F.4th at 783 (citing *Guerra*, 24 I& N Dec. at 40).

[50] *Id.* at 779.

[51] *See also Wilkinson* (holding that the "exceptional and extremely unusual hardship" requirement for cancellation of removal is reviewable in federal court as a question of law notwithstanding § 1252(a)(2)(B)(i), which similarly strips federal courts of jurisdiction to review "judgements regarding the granting of

B. Standard of review in federal court for danger and flight risk determinations: abuse of discretion

In *Martinez v. Clark*, the Ninth Circuit held that federal courts in habeas may review the agency's dangerousness determination for abuse of discretion. The abuse of discretion standard of review is "deferential," particularly because judicial review requires close review of factual findings by the agency.[52] Under an abuse of discretion standard, a federal court "cannot reweigh evidence" but can "only determine whether the BIA applied the correct legal standard."[53]

The *Martinez* court looked at the agency bond record and assessed whether the IJ and BIA had properly applied the *Guerra* factors. Applying the "abuse of discretion" standard, the court concluded that the agency had a reasonable basis for its conclusion that Martinez presented a danger to the community, and that his rehabilitation efforts did not outweigh the evidence of danger. While the outcome in *Martinez* was ultimately unfavorable—the federal court did not require the agency to release him—the case nevertheless confirms that federal courts have authority to review agency bond decisions to determine if they are based on a proper application of the law.

As of the date of publication of this practice advisory, a few district courts in California have found that IJs abused their discretion when denying noncitizens bond on danger or flight risk. As the agency continues to improperly deny noncitizens bond, we expect more judges to do the same.

In *Y.S.G. v. Andrews*, the district court granted a motion to enforce its previous order and found that, after holding a pre-deprivation bond hearing pursuant to the district court's previous order, the "IJ abused her discretion by failing to meaningfully apply the clear and convincing standard and by committing other legal error to the proper implementation of the standard."[54] The district court identified two errors as to dangerousness: (1) the IJ failed to "make a meaningful determination as to present dangerousness" by focusing on "stale" convictions and not properly considering "petitioner's post-release evidence of rehabilitation, and (2) the IJ relied "on sparse record evidence concerning petitioner's new misdemeanor charges."[55] With respect to flight risk, the district court also found the IJ's analysis wanting—relying on old evidence that had already been considered by an IJ prior to petitioner's original release from detention.[56] The IJ had "failed to meaningfully discuss the probative evidence submitted demonstrating his significant ties to the community."[57] As to remedy, the district court ordered the petitioner released but allowed for a subsequent hearing before an IJ at which the

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discretionary relief" of cancellation of removal, since § 1252(a)(2)(D) restores judicial review for "constitutional claims or questions of law" involved in cancellations of removal).

[52] *See Martinez*, 124 F.4th at 784.

[53] *Id.* (quoting *Konou v. Holder*, 750 F.3d 1120, 1127 (9th Cir. 2014)).

[54] No. 2:25-cv-1884-SCR, 2025 WL 2979309, at *9 (E.D. Cal. Oct. 22, 2025).

[55] *Id*. at *9-10.

[56] *Id*. at *11.

[57] *Id.*

government could once again try and make its case for detention in a pre-deprivation bond hearing.[58]

In *Hossein Miri v. Bondi*, the district court granted a temporary restraining order and found an IJ abused its discretion in denying a noncitizen bond on danger and flight risk grounds.[59] The district court found that the IJ failed to "consider and address in its entirety the evidence submitted by [the] petitioner and to issue a decision that fully explains the reasons for" the denial.[60] The IJ did not describe which bond "factors were considered, if any, or what evidence was relied on."[61] Like the district court in *Y.S.G.*, the court ordered the release of the petitioner, but allowed the government to "remedy the procedural deficiencies at issue."[62]

In *N.A. v Warden, Adelanto Detention Facility*, the district court likewise found that the IJ abused its discretion by finding that the government met its burden to establish dangerousness based solely on a tattoo that the IJ found "matches a tattoo common among members of the transnational terrorist organization Tren de Aragua," where the petitioner denied any connection to Tren de Aragua and explained that his tattoo commemorated his grandmother.[63] The court also found the IJ's dangerousness determination to be infected by reliance on inapposite BIA case law.[64] The district court further found that IJ had abused its discretion in finding the noncitizen a flight risk solely on the basis that his claim for relief was "speculative" and his length of residence in the United States was short. The court noted that the IJ had not cited facts specific to N.A.'s case, and that these facts are "true of virtually every asylum seeker apprehended at the border, many of whom the Government releases on bond."[65]

Outside the bond context, the Ninth Circuit has regularly found that the BIA has abused its discretion. As a general matter, "[t]he BIA abuses its discretion when it acts arbitrarily, irrationally, or contrary to law, and when it fails to provide a reasoned explanation for its actions."[66] The Ninth Circuit commonly reverses the Board when it (1) fails to consider arguments or evidence[67], or otherwise (2) fails to provide a reasoned explanation for its actions.[68] When IJs make these errors in the context of bond proceedings, advocates can draw from this existing Ninth Circuit case law.

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[58] *Id.*
[59] No. 5:26-cv-00698-MEMF-MAR, 2026 WL 622302, at *7-9 (C.D. Cal. Mar. 5, 2026).
[60] *Id.* at 8 (cleaned up).
[61] *Id.* at *9.
[62] *Id.* at *11.
[63] No. 5:25-CV-03007-CV-MBK, 2026 WL 734587, at *7 (C.D. Cal. Feb. 20, 2026), *report and recommendation adopted,* No. 5:25-CV-03007-CV-MBK, 2026 WL 734585 (C.D. Cal. Mar. 12, 2026).
[64] *Id.*
[65] *Id.* at *8.
[66] *Tadevosyan v. Holder*, 743 F.3d 1250, 1252-53 (9th Cir. 2014).
[67] *See, e.g.*, *Szonyi v. Barr*, 942 F.3d 874, 896 (9th Circ. 2019).
[68] *See, e.g.*, *Hernandez-Galand v. Garland*, 996 F.3d 1030, 1034 (9th Cir. 2021).

C. Claims of legal error in immigration judge danger and flight risk determinations

1. The Ninth Circuit also held in *Martinez v. Clark* that federal district courts have jurisdiction to review legal challenges to BIA bond denials.[69] Legal challenges are reviewed de novo in district court.
2. In *Martinez*, the petitioner claimed that the BIA committed legal error in its bond denial by applying the wrong burden of proof at his bond hearing, and by failing to review all the evidence in the record. The Ninth Circuit acknowledged that these were legal claims over which federal courts have de novo review. However, the court rejected his legal challenges on the merits.[70]
3. Other individuals have been successful before district courts in challenging IJ bond determinations for legal error. In the wake of *Martinez*, several district courts have concluded that IJs abused their discretion in part due to legal errors. See **Subsection B**.
4. **Subsections 1 through 7**. identify possible claims of legal errors in IJ bond determinations that may be subject to de novo review in habeas. Whether such a claim is viable in a particular case will depend on the particular facts and record.

1. The IJ incorrectly placed the burden of proof on the noncitizen

EOIR regulations and *Matter of Guerra* provide that, at bond hearings, the detained noncitizen bears the burden to establish that he is not a danger or flight risk, and that he should be released from detention.[71] Noncitizens may challenge this burden allocation as unconstitutional in federal court.

The Ninth Circuit held in *Singh v. Holder* that when a noncitizen has been held in prolonged immigration detention—generally defined as a period of six months or more[72]—the Constitution requires the government to justify detention by clear and convincing evidence.[73] Thus, if the IJ held a prolonged detention hearing but placed the burden of proof on the noncitizen rather than the government, the noncitizen may raise a claim of legal error in federal court.

In addition, advocates may argue that the Constitution's Due Process Clause requires the government to bear a heightened burden of proof at bond hearings even outside the prolonged detention context. While there is no controlling Ninth Circuit decision on point, there are ample district court decisions extending *Singh*'s due process analysis to individuals who have not

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[69] *See also Singh*, 638 F.3d at 1207 n.6.
[70] *See Martinez*, 124 F.4th at 785-86.
[71] See Section I.
[72] *Diouf v. Napolitano* (*Diouf II*), 634 F.3d 1081, 1091 (9th Cir. 2011).
[73] *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011). *See Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1202 n.4 (expressly declining to abrogate *Singh*); *Rodriguez Diaz v. Garland*, 83 F.4th 1177, 1179 (9th Cir. 2023) (Paez, J., dissenting from denial of rehearing en banc) ("*Singh*'s constitutional holding ... remains binding law of our court."). *See also Aleman Gonzalez v. Barr*, 955 F.3d 762, 781 (9th Cir. 2020), *rev'd on other grounds*, 142 S. Ct. 2057 (2022) (holding that *Singh*'s burden-of-proof rule was a constitutional due process holding that survives the Supreme Court's statutory interpretation holding in *Jennings v. Rodriguez*, 583 U.S. 281 (2018)).

faced prolonged detention.[74] Indeed, in many areas of the law in which the government seeks to hold individuals in civil detention, the Supreme Court has imposed a heightened burden of proof on the government because of the substantial individual interests at stake.[75] Where the "possible injury to the individual" is so significant, the individual should not "share equally with society the risk of error."[76]

Thus, if the IJ placed the burden on the noncitizen at the bond hearing, always consider bringing a claim of legal error with respect to the burden of proof. When doing so, be prepared to explain why the IJ's burden allocation prejudiced your client.[77]

PRACTICE TIP: Repeat bond hearings under § 1226(a). If your client was provided a bond hearing under INA § 236(a), 8 U.S.C. § 1226(a), and continues to be detained under that provision, be prepared to distinguish the Ninth Circuit's decision in *Rodriguez Diaz v. Garland*. There, the Ninth Circuit held, based on the individualized factors of that case, that the Due Process Clause did not entitle Rodriguez Diaz to a *second* bond hearing at which the government would bear the burden by clear and convincing evidence.[78] The court's reasoning depended on certain statutory procedural protections available to § 1226(a) detainees, such as the ability to seek a changed circumstances bond hearing, and the provision of a prior bond hearing where Rodriguez Diaz was represented by counsel. Under *Rodriguez Diaz*, the question of who should carry the burden at a bond hearing is fact-specific.[79]

Following *Rodriguez Diaz*, many district courts have continued to place a heightened burden on the government at bond hearings. Courts have recognized that the Ninth Circuit's burden discussion in *Rodriguez Diaz* turned on the existence of certain statutory protections for § 1226(a) detainees that are inapplicable where an individual is subject to mandatory detention.[80] And "*Rodriguez Diaz* recognized that even where such statutory protections are

[74] *E.g.*, *Rajnish v. Jennings*, 2020 WL 7626414, at * 6 (N.D. Cal. 2020) (analyzing why general due process principles and the Ninth Circuit's decision in *Singh* lead to the conclusion that the government must bear the burden at non-prolonged detention bond hearings); *Garcia Mariagua v. Chestnut*, No. 1:25-cv-01744-DJC-CSK, 2025 WL 3551700, at *5 n.1 (E.D. Cal. Dec. 11, 2025) (collecting cases); *De La Garza v. Albarran*, No. 25-CV-10305-HSG, 2025 WL 3707049, at *2 (N.D. Cal. Dec. 22, 2025). *See also Martinez*, 124 F.4th at 780–82 (nowhere contesting district court's framing that "[t]o comply with due process" the government had to "to show by clear and convincing evidence that [the petitioner] present[ed] a flight risk or a danger to the community at the time of the bond hearing") (quotation omitted). *But see Valencia Zapata v. Kaiser et al.*, 801 F. Supp. 3d 919, 942 (N.D. Cal. 2025) (holding that in the context of discretionary detention, the noncitizen should bear the burden of demonstrating they are not a danger nor a flight risk).

[75] *See Singh*, 638 F.3d at 1204 (citing *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996)). *See also United States v. Salerno*, 481 U.S. 739, 751 (1987) (imposing such a burden as to criminal pretrial detention); *Addington v. Texas,* 441 U.S. 418, 425–27 (1979) (same as to civil commitment).

[76] *See Singh*, 638 F.3d at 1203-04 (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979).

[77] *See Rajnish v. Jennings,* 2020 WL 7626414, at *8 (finding that the IJ's unconstitutional burden-shifting plausibly prejudiced noncitizen).

[78] *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1203 (9th Cir. 2022).

[79] *Rodriguez Diaz*, 53 F.4th at 1210-11. The Court assumed without deciding that the three-part, procedural due process balancing test under *Mathews v. Eldridge*, 424 U.S. 319 (1976), applies to the constitutional question of what burden is required at an IJ bond hearing.

[80] *See, e.g., Pablo Sequen v. Albarran*, No. 25-CV-06487-PCP, 2025 WL 2935630, at *13 (N.D. Cal. Oct. 15, 2025).

available, greater protections may be constitutionally necessary in individual cases where the risk of an erroneous deprivation of liberty is particularly high."[81]

2. The IJ failed to apply the legally required burden of proof, or failed to review evidence in the record

Claims that the agency did not apply the legally required standard at a bond hearing, or that it ignored relevant and probative evidence in the bond record that favors your client, are claims of legal error over which federal courts have de novo review.[82] When considering such claims, the Ninth Circuit has explained that courts should look for "red flags" that the agency did not apply the requisite standard or ignored evidence.[83] These claims may also be used to support an argument that the IJ abused its discretion in denying bond. See **Subsection B**.

1. In *Martinez v. Clark*, the Ninth Circuit held that "in the absence of any red flags, we take the BIA at its word" that it applied the correct standard of proof. Courts will generally "accept that the BIA applied the correct legal standard if the BIA expressly cited and applied the relevant caselaw in rendering its decision."[84]
2. In *Martinez*, the Ninth Circuit rejected the claim that the BIA had applied the incorrect burden in the case. At the bond hearing at issue in *Martinez*, there was no dispute that ICE bore the burden of proof by clear and convincing evidence. In its decision denying bond, the BIA acknowledged this standard, and went on to conclude, "under the 'totality of the evidence,' that the serious nature of Martinez's convictions and his history of reoffending, even after several years of sobriety, rendered him a danger to the community."[85] The Ninth Circuit did not identify any "red flags," and concluded that the BIA had applied the correct burden of proof when it denied bond.[86]

But, as immigration advocates are aware, it is not uncommon for IJs or the BIA to misapply the burden of proof, even if they have articulated the correct standard for the record. In an en banc decision, the Ninth Circuit has described the "clear and convincing" standard as requiring "an abiding conviction that the truth of the factual contentions is highly probable."[87] Outside the bond context, the Ninth Circuit has explained that an "agency acts contrary to the law when it gives mere lip service or verbal commendation of a standard but then fails to abide the standard in its reasoning and decision."[88] Advocates should therefore carefully review the bond

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[81] *Id.* at *13 (ordering a heightened burden at pre-deprivation bond hearings for individuals arrested by ICE at their immigration court hearings).
[82] *Martinez*, 124 F.4th at 785.
[83] *Id.* at 786.
[84] *Id.* (internal quotations and alterations omitted) (citing *Mendez-Castro v. Mukasey*, 552 F.3d 975, 980 (9th Cir. 2009)).
[85] *Martinez*, 124 F.4th at 786.
[86] *Id*.
[87] *Mondaca-Vega v. Lynch*, 808 F.3d 413, 422 (9th Cir. 2015) (en banc) (cleaned up). *See also Obregon v. Sessions*, No. 17-cv-01463-WHO, 2017 WL 1407889, at *7 (N.D. Cal. Apr. 2017) (describing this as "a high burden and must be demonstrated in fact, not 'in theory'") (quoting *United States v. Patriarca*, 948 F.2d 789, 792 (1st Cir. 1991)).
[88] *See e.g.*, *Nat'l Resc's Defense Council v. Pritzker*, 828 F.3d 1125, 1135 (9th Cir. 2016).

record and, where appropriate, argue that the IJ did not actually apply the "clear and convincing" evidence standard, even if they said they did.

Likewise, if the IJ "fail[s] to mention highly probative or potentially dispositive evidence," or "misstates the record," the IJ has committed legal error.[89] This is so even if the IJ's bond decision contains a "catchall phrase" asserting that she reviewed the entirety of the evidence.[90]

Keep in mind, however, that in *Martinez v. Clark*, the Ninth Circuit stated that "in the absence of any red flags," a federal court will "take the BIA at its word" that it reviewed the evidence in the record.[91] There, for example, the court found "no red flags" where the BIA had based its dangerousness determination on the individual's drug trafficking convictions, and where the BIA had explicitly acknowledged the petitioner's mitigating evidence, including keeping a clean record while on pretrial release and in prison, the criminal court's prior decision to release him on his own recognizance, and his self-report to prison.[92]

Nevertheless, where the record indicates "something is amiss" with the IJ's review of the evidence, a federal court may invalidate it.[93] For example, if the IJ draws an inference that is clearly inconsistent with a piece of evidence in the record, this may be an indicator that the IJ did not consider that particular evidence. There are numerous Ninth Circuit cases in the petition for review context finding that the BIA ignored a noncitizen's evidence, which advocates can draw from in the bond context. [94]

The IJ's errors for failure to consider evidence may be interwoven with a claim that the IJ did not apply the clear and convincing evidence standard, and may also support an argument that the IJ abused their discretion in denying bond. Other examples of legal error relating to the standard of review or ignoring probative evidence may include:

- IJ focused on conduct from years ago but failed to consider more recent and probative conduct;[95]
- IJ entirely failed to consider the noncitizen's rehabilitative efforts;

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[89] *Martinez*, 124 F.4th at 785 (citing *Cole v. Holder*, 659 F.3d 762, 771-72 (9th Cir. 2011)).
[90] *Id*.
[91] *Id*.
[92] *Id.* at 785-86.
[93] *Martinez*, 124 F.4th at 786.
[94] *See, e.g., Cole*, 659 F.3d at 771- 72; *Parada v. Sessions*, 902 F.3d 901, 914 (9th Cir. 2018) (holding the agency failed to consider all relevant evidence in the relief from removal context); *Davila v. Barr*, 968 F.3d 1136, 1143 (9th Cir. 2020) (concluding that "the BIA's extreme selectivity in using the Country Report evidence belies any attempt" to evaluate all relevant evidence); *see also Antonio v. Garland*, 58 F.4th 1067, 1077 (9th Cir. 2023) (IJ's failure to mention certain testimony "suggests that the IJ may have failed to consider it" in the asylum context); *Flores Molina v. Garland*, 37 F.4th 626, 632 (9th Cir. 2022) (where the BIA ignored evidence and selectively cited other evidence to support its conclusion, the decision cannot stand); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1089 (9th Cir. 2020) (BIA's statement that it "consider[ed] all of the evidence," did not suffice).
[95] *Mau v. Chertoff,* 562 F. Supp. 2d 1107, 1118 (S.D. Cal. 2008) (finding that the government did not meet its burden to prove noncitizen's present and future dangerousness at an IJ bond hearing ordered by a federal court based on past DUI convictions alone); *Hayward v. Marshall*, 512 F.3d 536, 544, 546 (9th Cir.2008) (old convictions are "no evidence" that release "would unreasonably endanger public safety"); *Y.S.G. v. Andrews*, No. 2:25-cv-1884-SCR, 2025 WL 2979309, at *9 (E.D. Cal. Oct. 22, 2025).

- IJ found dangerousness based on an arrest alone, without a conviction;[96]
- IJ found dangerousness based on an uncorroborated police report or Form I-213;[97]
- ICE did not present any evidence or examine witnesses at a bond hearing in which the government carried the burden;
- IJ found flight risk based solely on an individual's unlawful presence in the U.S.;[98]
- IJ did not conduct an individualized balancing test according to the factors articulated in *Matter of Guerra*,[99] or otherwise applied inapposite case law;[100]
- IJ considered factors untethered to danger or flight risk;[101]
- IJ used positive *Guerra* factors, such as family ties or a long history of residence in the United States, to find that the individual is a flight risk.

3. Challenges to recent BIA bond precedent decisions

Since January 20, 2025, the BIA has issued a cascade of published BIA decisions, nearly all of them adverse to noncitizens.[102] Several decisions purport to vastly expand the scope of mandatory detention,[103] or reverse IJ bond grants on flight risk and danger grounds, seemingly in service of the Executive's detention and deportation agenda.[104] Many of these decisions

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[96] *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d 993, 1004-05 (N.D. Cal. 2018).
[97] *Picado v. Hyde*, No. 26-CV-065-JJM-PAS, 2026 WL 352691, at *7 (D.R.I. Feb. 9, 2026) ("Without more, an uncorroborated police report is simply not clear and convincing evidence sufficient for a finding of dangerousness."); *Gil Epsana v. Nessinger*, No. 26-cv-014-JJM-PAS (D.R.I. Mar. 25, 2026) (same with respect to Form I-213).
[98] *Melchor-Melchor v. Kristi Noem et al.*, No. 5:26-CV-00766-SSS-BFM, 2026 WL 760058 (C.D. Cal. Mar. 16, 2026) (finding it was "dubious" for an IJ to find that a Form I-213 showing noncitizen's 23 years of presence in the United States established clear and convincing evidence of flight risk); *N.A. v. Warden, Adelanto Detention Facility*, 2026 WL 734587, at *7, *report and recommendation adopted,* 2026 WL 734585.
[99] *Hossein Miri v. Bondi,* 2026 WL 622302, at *7-9.
[100] *N.A. v. Warden, Adelanto Detention Facility*, 2026 WL 734587, at *7, *report and recommendation adopted,* 2026 WL 734585.
[101] *See, e.g., Hernandez*, 872 F.3d at 990 (any detention incidental to removal must "bear[] [a] reasonable relation to [its] purpose") (quoting *Zadvydas*, 533 U.S. at 690).
[102] For an ongoing catalog of these decisions, *see* National Immigration Project, *The BIA and AG's Systemic Destruction of Noncitizens' Rights in Removal Proceedings* (Feb. 19, 2026), https://nipnlg.org/work/resources/bia-and-ags-systemic-destruction-noncitizens-rights-removal-proceedings.
[103] *E.g. Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025) (holding that an individual who entered without inspection is subject to mandatory detention under INA § 235(b)(2), even if they have lived in the United States for many years before the apprehension); *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025) (holding that an individual who entered the United States without inspection and was apprehended about five miles from a port of entry and 100 yards north of the southern border was subject to mandatory detention under INA § 235(b)(2)(A) even while in removal proceedings under INA § 240).
[104] *E.g.*, *Matter of Dobrotvorskii*, 29 I&N Dec. 211 (BIA 2025) (reversing an IJ's grant of bond and holding, for the first time, that "the existence of a valid, reliable, and credible sponsor is relevant to the determination of flight risk); *Matter of Akhmedov*, 29 I&N Dec. 166 (BIA 2025) (vacating IJ's grant of release on bond, and holding that no amount of bond could mitigate flight risk where DHS argued that the noncitizen had presented inconsistent evidence regarding his address history); *Matter of C-M-M-*, 29 I&N Dec. 141 (BIA 2025) (vacating IJ's grant of release on bond, and holding that no amount of bond could mitigate flight risk where noncitizen had previously been removed from and then illegally re-entered the United States, and finding that a noncitizen in "withholding-only proceedings" by definition has only a "speculative" claim for relief from removal); *Matter of Choc-Tut*, 29 I&N Dec. 48 (BIA 2025) (vacating IJ's grant of release on bond,

were originally unpublished and subsequently designated as precedent, and some were cases in which the noncitizen was unrepresented at their bond hearing. Although federal courts have generally approved of the *Matter of Guerra* framework, many of these new precedential BIA decisions regarding danger and flight risk have not been reviewed by federal courts. If the IJ or BIA denies bond by citing to a recent BIA precedent decision, consider bringing a challenge to that precedential decision in federal court. Advocates may consider asking that the district court set aside these BIA decisions under the APA.[105]

4. BIA reversals of IJ bond orders

Individuals released on bond may still be subject to a bond denial if ICE appeals the bond grant, and then the BIA grants ICE's appeal. Sometimes, if ICE does not invoke the automatic stay provision at the time of appeal[106], individuals may post bond, be released, and enjoy their freedom for months or years before the BIA reverses an IJ's grant of bond.

In this situation, in addition to challenging the BIA's holdings as to danger and flight risk, advocates should consider arguing that your client is entitled to some process prior to being re-detained. Noncitizens have had success arguing that due process entitles them to a new hearing before a neutral adjudicator, that, at a minimum, considers their conduct during their period of release, before ICE can re-detain them.[107]

5. The IJ failed to consider alternatives to detention for noncitizens found not to be a danger

"Alternatives to detention" or "ATD" refer to ways that ICE can monitoring noncitizens while their immigration cases are ongoing, short of detention. ATD may include a GPS ankle monitor, enrollment in the Intensive Supervision Appearance Program (ISAP), or other in-person or virtual reporting requirements. Courts and ICE's own data have found such programs highly effective in ensuring that individuals in immigration proceedings do not abscond.[108]

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and ordering noncitizen detained without bond, after state court judge found the noncitizen to not be a danger); *Matter of Salas Pena*, 29 I&N Dec. 173 (BIA 2025) (vacating IJ's grant of bond and finding an individual to be a danger where criminal cocaine trafficking charges were pending).

[105] See 5 U.S.C. § 706(2). While APA Claims are outside the scope of this practice advisory, advocates can consult these two practice advisories provide an introduction to APA claims: Capital Area Immigrants' Rights (CAIR) Coalition and Immigration Impact Lab, *Bringing Administrative Procedure Act (APA) Claims to Challenge Immigration Actions*, (October 2020), https://amicacenter.org/app/uploads/2024/05/APA-Practice-Advisory.pdf; American Immigration Council, *Immigration Lawsuits and the APA: The Basics of a District Court Action*, (September 2021), https://www.americanimmigrationcouncil.org/practice-advisory/immigration-lawsuits-and-apa-basics-district-court-action/.

[106] See Footnote 33.

[107] *See, e.g.*, *Jorge M.F. v. Jennings*, 534 F. Supp. 3d 1050 (N.D. Cal. 2021); *Hogarth v. Santacruz*, 5:25-cv-09472-SPG-MAR, 2025 WL 3211461 (C.D. Cal. Oct. 23, 2025); *but see Uc v. Kaiser*, 22-cv-04369-CRB, 2022 WL 9496434 (N.D. Cal. Oct. 14, 2022).

[108] *See, e.g., Hernandez v. Sessions*, 872 F.3d at 991 (recognizing that ISAP "resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings"); *see also Doe II*, 2024 WL 2340779, at *12.

When an IJ has denied bond on dangerousness grounds, the Ninth Circuit has held that "due process does not require immigration courts to consider conditional release when determining whether to continue to detain" a noncitizen.[109]

However, where the IJ has denied bond solely based on flight risk, an individual may have a viable claim that the IJ was required to consider ATD as a mechanism to mitigate concerns about the individual's risk of flight. Under BIA precedent, when an IJ finds an individual does not pose a danger, she should decide the amount of bond necessary to ensure the noncitizen's presence at future hearings and to ensure the noncitizen will report for removal if ordered to do so.[110] As such, advocates may consider bringing a claim in federal court that due process requires an IJ to evaluate whether non-custodial ATD, such as a GPS monitor or phone check-ins, would suffice to mitigate flight risk concerns.[111]

6. Immigration judges and BIA members are not neutral adjudicators

The Ninth Circuit has held that a "neutral judge is one of the most basic due process protections."[112] Given the politicization of EOIR—including the mass firings of IJs and BIA members—advocates should consider arguing that IJs and the BIA are not neutral.

Advocates throughout the country are advancing arguments that EOIR is not a forum where neutral adjudicators weigh evidence and issue reasoned decisions on danger and flight risk. Advocates are most often bringing these claims in federal court to convince district courts to hold bond hearings themselves, rather than allow an IJ to consider bond in the first instance. With the exception of a few district courts in New York—with unique procedural postures[113]—to date, these arguments have yet to gain traction.

But, advocates should still consider making these as the evidence continues to mount that IJs and the BIA are operating as an enforcement arm of the administration. Advocacy groups are actively working on studies to demonstrate the bias of EOIR, so advocates should monitor the

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[109] *Martinez*, 124 F.4th at 786 (rejecting claim that agency is legally required to consider alternatives to detention, such as GPS monitoring, drug testing, or counseling, before denying bond on dangerousness).
[110] *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009).
[111] *See, e.g.*, *Davis v. Garland*, No. 22-CV-443-LJV, 2023 WL 1793575, at *6 (W.D.N.Y. Feb. 7, 2023) (stating that "it stands to reason that an immigration judge who does not even consider conditional release may wrongfully detain certain noncitizens who might otherwise be safely released"); *Joseph v. Barr*, No. 19-CV-565, 2019 WL 3842359, at *9 (W.D.N.Y. Aug. 15, 2019) (holding that "to sustain the prolonged detention of a[noncitizen] who has been admitted to the country and is subject to removal proceedings," a neutral decisionmaker must consider "less restrictive alternatives to detention"); *Mathurin v. Barr*, No. 6:19-CV-06885-FPG, 2020 WL 9257062, at *11 (W.D.N.Y. Apr. 15, 2020) (same); *Hechavarria v. Whitaker*, 358 F. Supp. 3d 227, 239 (W.D.N.Y. 2019) (same). *But see Cabrera Espinoza v. Becerra*, 720 F. Supp. 3d 776, 779 (N.D. Cal. 2024) (rejecting a claim that the IJ violated due process by failing to consider ATD where noncitizen had not sufficiently argued before the IJ that ATD would ensure noncitizen's appearance for removal).
[112] *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003).
[113] *See e.g.*, *L.G.M. v. LaRocco*, 788 F. Supp. 3d 401, 405 (E.D.N.Y. 2025); *see also Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36, 41 n.1 (N.D. Cal. 2020) (collecting cases for authority of district courts to hold bail hearings in connection with habeas proceedings).

latest reports.[114] Advocates should also consider trying to obtain affidavits from former employees of EOIR who can speak to the culture of fear and pressure to follow the current administration's directives.

In bringing claims of bias, advocates should consider highlighting:

- The administration's establishment of arrest quotas;[115]
- The administration's dramatic expansion of its detention capabilities by repurposing military facilities and warehouses as detention facilities;[116]
- That IJs and BIA members are employees of the Department of Justice and work for the Attorney General, and are susceptible to pressure from the administration;[117]
- IJs have been fired en masse, with nearly 100 being terminated in 2025,[118] with IJs who had higher grant rates being particular targets;[119]
- The BIA has dramatically increased the number of published opinions that it has issued—including on bond—and nearly all of them are adverse to the noncitizen;[120]
- Public campaigns recruiting new employees to EOIR describing their jobs as bringing "down the hammer on criminal illegal aliens."[121]

Be aware that if you are advancing this claim in federal court after an IJ has denied bond based on danger or flight risk, success may depend on evidence that the IJ demonstrated bias when denying bond in your client's particular case. However, the current political context may be helpful background in federal court.

In the past, the Ninth Circuit has been reticent to find that IJs are not neutral.[122] In general, derisive comments by the IJs, or summary conclusions about gangs or a noncitizen's

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[114] *See, e.g.*, *The Board of Immigration Appeals Under the Second Trump Administration: An Empirical Analysis of Grant Rates and DHS Appellate Behavior*, Jayashri Srikantiah and Raja Lukose (Mar. 23, 2026), https://law.stanford.edu/documents/research-on-bia-decision-making/.

[115] *See, e.g.*, Ted Hesson and Kristina Cooke*, DHS's Tactics Draw Criticism as it Triples Daily Arrest Targets*, Reuters, June 10, 2025, https://www.reuters.com/world/us/ices-tactics-draw-criticism-it-triples-daily-arrest-targets-2025-06-10/.

[116] Douglas MacMillan et al., *ICE Documents reveal plan to double immigrant detention space this year*, The Washington Post (August 15, 2025), https://www.washingtonpost.com/immigration/2025/08/15/ice-documents-reveal-plan-double-immigrant-detention-space-this-year/.

[117] *See, e.g.,* Karen Musalo et. al., *With Fear, Favor, and Flawed Analysis: Decision-Making in U.S. Immigration Courts*, 65 B.C. L. Rev. 2743, 2755 (2024).

[118] Anusha Mathur and Ximena Bustillo, *U.S. has a quarter fewer immigration judges than it did a year ago. Here's why*, NPR, February 23, 2026, https://www.npr.org/2026/02/23/g-s1-110911/trump-immigration-judges-dismissals-numbers.

[119] Woo-Sun Lim, *Former judge highlights legal failures in U.S. worker detentions*, The Dong-A Ilbo (Sept. 20, 2025), https://www.donga.com/en/article/all/20250920/5859412/1.

[120] *The BIA and AG's Systemic Destruction of Noncitizens' Rights in Removal Proceedings*, National Immigration Project, February 19, 2026, https://nipnlg.org/work/resources/bia-and-ags-systemic-destruction-noncitizens-rights-removal-proceedings.

[121] Hilda Gutierrez, Michael Bott & Son Vo, *'An all-out attack on immigration court:' SF immigration judges speak out after firings*, NBC Bay Area (Nov. 25, 2025), https://www.nbcbayarea.com/investigations/san francisco-immigration-judges-speak-out-firings/3986850/.

[122] *See e.g.*, *Rizo v. Lynch*, 810 F.3d 688, 693 (9th Cir. 2016) (record indicated IJ conducted hearing in an aggressive manner, but this did not amount to denial of a fair hearing); *but see Zolotukhin v. Gonzales*, 417

background may be found to be indicia of bias. However, claims will be highly fact and record dependent.

7. Failure to provide a contemporaneous bond record, and other procedural errors

At least with respect to noncitizens subject to prolonged detention, the Ninth Circuit has held that due process requires immigration courts to make contemporaneous records of bond hearings, and that a post hoc, summary bond denial is insufficient to satisfy the requirements of due process.[123] Bond hearings are not routinely transcribed, see **Section I**, but immigration courts have the ability to record them and create a "digital audio recording" ("DAR") of all hearings. The Ninth Circuit has held that Immigration Courts can satisfy the requirements of due process by creating the DAR and making it available upon request.[124] The Ninth Circuit has maintained this due process protection in subsequent decisions but has declined to require more.[125]

If the IJ has failed to keep a contemporaneous record of the bond proceedings, there may be a claim in federal court that this violated the noncitizen's due process rights, because without it, a federal court may be unable to properly evaluate whether the IJ complied with the law. When bringing such a claim, be prepared to explain why the IJ's failure to make a contemporaneous recording of the bond hearing prejudiced your client.[126] In addition, courts may be less inclined to order release as a remedy for procedural violations such as lack of a written record.[127]

III. Procedural Considerations in District court

A. Mechanisms for bringing challenges in federal court

How and when to bring a legal challenge to the agency's dangerousness or flight risk determination in federal court will depend on the history of the individual case and the nature of the agency's errors. If the bond hearing was the product of a habeas petition, you may be able

F.3d 1073 , 1075 (9th Cir. 2005) (due process violation where IJ's pre-judgment, including by excluding testimony of several key witnesses, prevented noncitizen from receiving a full and fair hearing); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058-59 (9th Cir. 2005) (due process violation where "the IJ's disbelief of Petitioner rested on personal speculation, bias, conjecture, and prejudgment" and the IJ refused to allow petitioner to challenge those views by presenting expert testimony). The Ninth Circuit Immigration Outline, available at https://www.ca9.uscourts.gov/guides/immigration-outline/, includes a thorough discussion of Due Process in Immigration Proceedings including considerations of IJ bias.

[123] *Singh*, 638 F.3d at 1200.

[124] *Singh*, 638 F.3d at 1208.

[125] *Martinez v. Clark*, 124 F.4th at 786 (discussing *Singh*, 638 F.3d at 1200).

[126] *See Singh*, 638 F.3d at 1208-09 (holding that noncitizen had a due process right to a contemporaneous record of the hearing, but that no showing of prejudice had been made).

[127] *See, e.g., Mau v. Chertoff*, 562 F. Supp. 2d at 1119 (ordering noncitizen released because the government failed to meet its burden to establish that noncitizen was a flight risk or a danger, but declining to consider whether other alleged deficiencies in the IJ proceeding, including those related to notice and/or the lack of a written record, violated due process).

to challenge the IJ's bond denial via a "motion to enforce" in the existing habeas case.[128] If the bond hearing occurred prior to any federal court action, you will file an initial habeas petition that brings challenges to the agency's danger/flight risk determinations. Consider combining those claims with any other claims you may have as to the illegality of the ICE detention.[129]

B. Remedies in federal court

Any petition for habeas corpus, including those challenging the agency's denial of bond, must include a request for a particular remedy or remedies that will cure or correct the alleged violations. Advocates should consider many factors when deciding what remedies to request, and whether to seek remedies in the alternative, including the strength of the underlying claims, how judges in the particular district have ruled in similar cases, and the judge assigned to the case.

Advocates often ask federal courts to order their client's immediate release as a remedy for their unlawful detention. This is consistent with the core function of the writ of habeas corpus[130], and several district courts have recently granted immediate release when finding that IJs erred in dangerousness and flight risk determinations, at least on a preliminary basis.[131]

An alternative remedy is an order for a new bond hearing that comports with the law, either before the IJ or the district court. A new bond hearing before an IJ can be an inadequate remedy where your client remains detained and it is dubious that the IJ will correct their past mistakes. However, district courts may prefer to give the agency the opportunity to correct their errors in the first instance. What remedy an individual is likely to be granted will depend on the federal judge hearing the case, and the nature of the legal violations at issue in the case.

Advocates should consider combining their challenge to the IJ's dangerousness/flight risk determination with a legal challenge to ICE's arrest. Doing so may lead to greater success obtaining immediate release as a remedy. For example, in cases where ICE re-arrested noncitizens who had previously been released, district courts have ordered immediate release after finding that due process required the individual to have been provided a pre-deprivation

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[128] *See, e.g., Leonardo v. Crawford,* 646 F.3d 1157, 1161 (9th Cir. 2011) ("[T]he district court ha[s] authority to review compliance with its earlier order conditionally granting habeas relief."); *see also Shillitani v. United States*, 384 U.S. 364, 370 (1966) ("[C]ourts have inherent power to enforce compliance with their lawful orders ….").

[129] For information about how to bring an initial habeas petition and a template petition, see National Immigration Litigation Alliance, *Habeas Corpus Petitions* (Jan. 2025).

[130] *See Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (finding "that the traditional function of the writ is to secure release from illegal custody").

[131] *See, e.g.*, *Y.S.G. v. Andrews*, 2025 WL 2979309, at *11 (ordering the immediate release of petitioner and a hearing before an immigration judge that comports with due process prior to any re-detention); *Hossein Miri v. Bond*, 2026 WL 622302, at * 12 (ordering release of petitioner and enjoining detention absent compliance with certain procedures). *See also Mau v. Chertoff*, 562 F. Supp. 2d at 1119.

bond hearing prior to the re-detention. There, courts have highlighted the IJ's danger and flight risk errors in the court's analysis of why the re-*arrest* was unlawful.[132]

C. Exhaustion before the BIA

The Ninth Circuit has held that administrative exhaustion is "ordinarily" required as a prudential matter for habeas petitions challenging adverse IJ bond determinations.[133] In other words, noncitizens are generally required to appeal an IJ's bond denial to the BIA before resorting to federal court.

Because the exhaustion requirement is prudential and not mandatory, a BIA appeal is not required in every case. Under the Ninth Circuit's decision in *Puga v. Chertoff*, courts generally require prudential exhaustion if "(1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review."[134] Advocates can argue why the three *Puga* factors do not require a BIA appeal in their client's case. For example, if the question before the district court is a legal one, no administrative appellate record is necessary to resolve the issue. Or, advocates may argue that administrative review is unlikely to meaningfully contribute to the court's analysis or correct error in a particular case, especially where recent agency practice suggests that agency adjudicators are not exercising independent expertise on the issue presented.

Importantly, even if the *Puga* factors counsel towards exhaustion, federal courts can waive the requirement if "administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void."[135] District courts have excused the exhaustion requirement based on the irreparable injury that an individual will suffer if forced to remain in detention while waiting for the BIA to adjudicate a bond appeal,[136] where noncitizens are seeking to enforce prior federal court orders,[137] and where the 30-day BIA appeal deadline has passed.[138] Advocates can also explore arguments that a BIA appeal would be futile because the BIA has already decided the issue in an adverse manner, or that the BIA is otherwise unlikely to correct an IJ's errors as to danger and flight risk.

PRACTICE TIP: An appeal to the BIA is futile if the BIA has no authority to hear a bond appeal. As noted in **Section I**, the Board's authority to hear bond appeals stems from regulations that

[132] *Hasratyan v. Bondi*, 2026 WL 288909 (C.D. Cal. Feb. 2, 2026) (incorporating the IJ's bond hearing errors into the *Mathews v. Eldridge* analysis of why ICE's re-detention without a bond hearing was unlawful); *Saballos Rosales v Noem*, Case 5:26-cv-00112-JWH-MBK (C.D. Cal. Mar. 16, 2026).
[133] *Leonardo,* 646 F.3d at 1160 (stating that exhaustion is ordinarily required, but not analyzing exhaustion).
[134] *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007).
[135] *Hernandez v. Sessions*, 872 F.3d at 988.
[136] *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d at 1003.
[137] *Y.S.G. v. Andrews*, 2025 WL 2979309, at *7.
[138] *Gil Epsana v. Nessinger*, No. No. 26-cv-014-JJM-PAS, (D.R.I. Mar. 25, 2026) ("It would … be futile to require Mr. España to go before the BIA because his appeal would almost certainly be dismissed as being untimely filed."); *Sales v. Johnson*, No. 16-CV-01745-EDL, 2017 WL 6855827, at *7 (N.D. Cal. Sept. 20, 2017) (excusing exhaustion for several reasons and noting that "it is too late for administrative review").

are rooted in 8 U.S.C. § 1226(a).[139] If the bond hearing was ordered as a matter of due process by a federal court, it is not clear that the BIA has jurisdiction to hear an appeal, and in such cases, advocates can consider foregoing a BIA appeal on futility grounds. In addition, a BIA appeal should not be required if the noncitizen is returning to federal court on a motion to enforce the court's prior order for a constitutionally compliant bond hearing.[140] However, not all courts have agreed, so advocates should consider carefully whether to forego a BIA appeal, and should advance numerous, alternative arguments as to why exhaustion should be excused. [141]

With respect to exhaustion, it is important to create a record that supports waiving the requirement. For example, if you aim to establish that the BIA is biased, or that it will take a long time adjudicating the appeal, consider filing recent BIA decisions or declarations from fellow attorneys describing how long their prior appeals have taken or how they have never won at the BIA when challenging an IJ denial of bond.[142]

IV. Conclusion

Advocates can challenge IJ decisions denying bond on danger or flight risk grounds in federal court by identifying abuse of discretion or legal errors in the agency's analysis, particularly where the IJ failed to apply the correct burden of proof, ignored probative evidence, relied on stale or speculative facts, or otherwise departed from governing law. Although the standards of review in federal court are deferential and the legal landscape remains unsettled, recent decisions confirm that federal courts play an important role in remedying unlawful detention and enforcing due process in bond proceedings.

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[139] *See* 8 CFR § 1003.19(f); 8 CFR § 1003.38.

[140] *See Mau v. Chertoff*, 562 F.Supp.2d 1107, 1113–14 (S.D. Cal. 2008) (holding that noncitizen was not required to exhaust at the BIA before asking the district court to enforce its judgment because "[i]t should not fall to the BIA to review [the government's] compliance with this Court's judgment"); *Sales v. Johnson*, No.16-cv-01745-EDL, 2017 WL 6855827 (N.D. Cal. Sept. 20, 2017) ("Respondents have cited no authority for the proposition that a litigant must exhaust administrative remedies before filing a motion to enforce a final judgment. Furthermore, Petitioner contends that there is no administrative agency process through which Mr. Sales can seek compliance with a federal court order.").

[141] *See, e.g., Doe v. Becerra*, No. 2:25-CV-00647-DJC-DMC, 2025 WL 1233883, at *4 (E.D. Cal. Apr. 29, 2025) (denying a motion to enforce and finding that a noncitizen must exhaust challenges to the IJ's bond denial to the BIA).

[142] *See, e.g.*, Srikantia and Lukose, *The Board of Immigration Appeals Under the Second Trump Administration: An Empirical Analysis of Grant Rates and DHS Appellate Behavior*, https://law.stanford.edu/documents/research-on-bia-decision-making/.

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