

FLIGHT RISK OR DANGER TO THE COMMUNITY? *RODRIGUEZ* AND THE PROTECTION OF CIVIL LIBERTIES IN THE U.S. IMMIGRATION SYSTEM

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INTRODUCTION

As Lady Liberty stands guard on Liberty Island, NY, welcoming foreign nationals to our shores, thousands upon thousands of aliens hoping to secure legal status in the United States sit behind bars. Some have committed crimes deemed egregious enough to warrant removal from the United States, while others were held at the border because they declared their intentions to file for asylum and remain in the United States permanently for fear of persecution in their home country. The Supreme Court is scheduled to address this very issue in the upcoming case *Jennings v. Rodriguez*.¹ Respondent Rodriguez represents a class made up of individuals incarcerated under several different statutes including 8 U.S.C. §§ 1226(c),² 1225(b),³ and 1226(a),⁴ all of whom have been in prolonged custody without having any type

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1. 136 S. Ct. 2498 (2016).

2. See 8 U.S.C. § 1226(c) (2012) (“[S]ubjects certain aliens who are deportable or inadmissible on account of their criminal history to mandatory detention pending proceedings to remove them from the United States.”). See also *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013).

3. See 8 U.S.C. § 1225(b) (2012) (providing that any “alien seeking admission [that] is not clearly and beyond a doubt entitled to be admitted . . . shall be detained” in preparation for removal). This includes asylum seekers held only because they declared that they wanted to remain in the United States because they fear persecution if returned to their home country. See 8 U.S.C. § 1101(a)(42) (2012). These aliens are alleged to have suffered persecution due to their race, nationality, religion, political beliefs, or membership in a particular social group. See *id.*

4. 8 U.S.C. § 1226(a) (2012) is a catch-all which provides the government with general authority to arrest and detain any alien “pending a decision on whether the alien is to be removed from the United States.”

of bond hearing before a neutral adjudicator.⁵ All of these individuals are in full removal proceedings, meaning that they intend to contest their deportation.⁶ There is no timetable for the adjudication of their cases,⁷ and on average, they have spent thirteen months in custody.⁸ These statutes have no built in time limitation on the length of detention permitted, and no provision for habeas corpus-style hearings, no matter how long an alien has been in detention.⁹

Respondents won several victories in the district and circuit courts, which included a permanent injunction that forces the Government to provide any alien incarcerated under the above statutes with mandatory bond hearings.¹⁰ In these proceedings, the Government must prove that the alien in question poses either a flight risk or a danger to the community by clear and convincing evidence; if it fails to do prove either, it must release the alien.¹¹ Now, the Government appeals both the required hearings, the shifting of the burden of proof, and the heightened standard of proof.¹² Given President Trump's zealous hardline stance against immigration, it is unlikely that his new appointee, Neil Gorsuch, a historically conservative Court of Appeals judge,¹³ would support increased protections for aliens. If the President's new appointee is confirmed and allowed to vote on this case, the Ninth Circuit's decision will likely be reversed. If the new nominee abstains or is not confirmed in time, the Court will likely split 4-4, confirming the Ninth Circuit's ruling without setting precedent.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent Rodriguez entered to removal proceedings after being found guilty of joyriding and drug possession, and is therefore a

5. Brief for Respondents at 8–9, *Jennings v. Rodriguez*, 136 S. Ct. 2498 (2016) (No. 15-1204) [hereinafter Brief for Respondents].

6. *Id.* at 1.

7. *Id.* at 6.

8. *Id.* at 8.

9. See 8 U.S.C § 1226(c) (2012); 8 U.S.C § 1225(b) (2012); 8 U.S.C § 1226(a) (2012).

10. *Rodriguez v. Robbins (Rodriguez II)*, 715 F.3d 1127, 1133 (9th Cir. 2013); see also *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060, 1066 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

11. *Rodriguez III*, 804 F.3d at 1090.

12. Brief for Petitioner at 10, *Jennings v. Rodriguez*, 136 S. Ct. 2498 (2016) (No. 15-1204) [hereinafter Brief for Petitioners].

13. Robert Barnes, *Trump Picks Colo. Appeals Court Judge Neil Gorsuch for Supreme Court*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/politics/trump-picks-colo-appeals-court-judge-neil-gorsuch-for-supreme-court/2017/01/31/2b08a226-e55e-11e6-a547-5fb9411d332c_story.html?utm_term=.d6fb110d5fea.

member of the section 1226(c) subclass.¹⁴ He is a lawful permanent resident of the United States, along with his parents, siblings, and three young children.¹⁵ Until 2003, his record was clean beyond a conviction for joyriding.¹⁶ In 2003, however, he was convicted of possession of a controlled substance, and sentenced to five years of probation.¹⁷ Upon learning of these convictions, Immigration and Customs Enforcement (“ICE”) initiated removal proceedings.¹⁸ In 2004, an immigration judge (“IJ”) ruled that the joyriding conviction was an aggravated felony and ordered Rodriguez to be removed from the United States.¹⁹ Because of the aggravated felony determination, Rodriguez was ineligible for relief from deportation (in the form of cancellation of removal).²⁰ He appealed the order to the Board of Immigration Appeals (“BIA”), and then to the Ninth Circuit, where the Government moved in 2005 to forestall any decision in the case until the Supreme Court decided a separate case.²¹

Rodriguez’s case remained in abeyance from 2005 until 2007.²² During that time, Rodriguez was the subject of four custody hearings at ICE; the agency decided each time that he should remain incarcerated until his case was decided on the merits.²³ Rodriguez instituted a habeas petition while he was still in ICE custody.²⁴ When he applied for class certification in mid-2007, the Government released him and attempted to argue that his release “mooted the case and made him an unfit Class representative.”²⁵ By that point, he had been in jail for 1,189 days.²⁶

In 2008, the Ninth Circuit ruled that driving a stolen car was not an aggravated felony.²⁷ The removal proceeding related to the joyriding charge was vacated, and the case was remanded to the BIA to resolve

14. Brief for Respondents, *supra* note 5, at 5–6.

15. *Rodriguez III*, 804 F.3d at 1073.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* (writing that the Ninth Circuit agreed to hold the case in abeyance until the resolution of *Gonzales v. Penuliar*, 549 U.S. 1178 (2007)).

22. *Id.*

23. *Id.*

24. *See id.*

25. Brief for Respondents, *supra* note 5, at 6.

26. *Rodriguez III*, 804 F.3d at 1073.

27. *Penuliar v. Mukasey*, 528 F.3d 603, 614 (9th Cir. 2008).

the drug possession charge.²⁸ He was successfully able to apply for and win cancellation of removal and retain his lawful permanent status, over seven years after his case began.²⁹ During this time, he spent over three years in jail, his family struggled to make ends meet without him, and he missed the birth of his daughter.³⁰

On average, class members have been incarcerated for thirteen months.³¹ Twenty percent have been incarcerated for over 18 months, and ten percent for over two years.³² The Ninth Circuit heard Rodriguez's case three times, first in 2009 after the district court refused to certify the class.³³ The Court of Appeals reversed.³⁴

The case came back before the Ninth Circuit in 2013 after the district court granted Rodriguez a preliminary injunction with regard to the section 1225(b) and 1226(c) subclass members.³⁵ The Ninth Circuit ordered the Government to "provide each [detainee] with a bond hearing" before an IJ and to "release each Subclass member on reasonable conditions of supervision . . . unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight."³⁶ The Ninth Circuit affirmed the preliminary injunction.³⁷

Most recently, the case returned to the Ninth Circuit in 2015 after the district court entered a permanent injunction against the Government.³⁸ The court extended the preliminary injunction protections to include the section 1226(a) subclass, and ordered the Government to provide detainees with automatic recorded hearings by the 195th day of incarceration.³⁹ The district court refused to order IJs to consider length of detainment or the odds a detainee would actually be deported during the hearings.⁴⁰

28. *Rodriguez III*, 804 F.3d at 1073.

29. *Id.*

30. Brief for Respondents, *supra* note 5, at 6–7.

31. *Id.* at 8.

32. *Id.*

33. *Rodriguez v. Hayes (Rodriguez I)*, 591 F.3d 1105, 1111 (9th Cir. 2010).

34. *Id.* at 1126.

35. *Rodriguez v. Robbins (Rodriguez II)*, 715 F.3d 1127, 1133 (9th Cir. 2013).

36. *Rodriguez III*, 804 F.3d 1060, 1066 (9th Cir. 2015).

37. *Rodriguez II*, 715 F.3d at 1133.

38. *Rodriguez III*, 804 F.3d at 1071–72.

39. *Id.*

40. *Id.*

II. LEGAL BACKGROUND

The authority to incarcerate class members comes from § 1225(b), § 1226(c), and § 1226(a). These statutes, however, remain silent with regard to any limits on the amount of time an individual in removal proceedings can be detained without some type of bond hearing.⁴¹ Section 1226(a) does provide that an individual may request a bond hearing, but there is no requirement that the Government grant any request.⁴² The Supreme Court and Ninth Circuit both have extensive case law dealing with the issue of civil detention.⁴³ In interpreting these statutes, the courts have been careful to abide by the doctrine of constitutional avoidance, which states that courts should decide issues on non-constitutional grounds and only base rulings on the Constitution as a last resort.⁴⁴

A. Civil Detention

The Supreme Court held in *Zadvydas v. Davis* that civil incarceration is only acceptable “in certain special and narrow non-punitive circumstances, where a special justification . . . outweighs the individual’s constitutionally protected interest.”⁴⁵ The Court has also determined that criminal defendants deemed unfit for trial may only be incarcerated for the “reasonable period of time necessary to determine whether there is a substantial probability that [the defendant] will attain [the] capacity [to stand trial] in the foreseeable future.”⁴⁶

It is an established principle that aliens in deportation proceedings are just as entitled to due process protections as anyone else.⁴⁷ The Court made it clear in *Zavdydas* that a statute allowing indefinite detention for aliens in removal proceedings without some type of periodic bond hearing would be constitutionally suspect given the Fifth Amendment’s requirement that no one be deprived of liberty without

41. See 8 U.S.C. §§ 1226(a), (c), and § 1225(b) (2012).

42. 8 U.S.C. § 1226(c) (2012).

43. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008).

44. See, e.g., *Rodriguez III*, 804 F.3d at 1083.

45. 533 U.S. 678, 690 (2001).

46. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

47. See *Zadvydas*, 533 U.S. at 690 (2001) (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment’s Due Process Clause forbids the Government to ‘depriv[e]’ any ‘person . . . of . . . liberty . . . without due process of law.’”)

due process.⁴⁸ The Court held that incarceration under § 1231(a)(6) was limited to the time “reasonably necessary to bring about that alien’s removal from the United States.”⁴⁹ By building in an implicit time limit, the Supreme Court was able to dispose of the case without striking down any federal law as unconstitutional.⁵⁰

Conversely, the Supreme Court has not ignored the strong governmental interest in keeping certain categories of aliens incarcerated.⁵¹ The Court recognized in *Demore v. Kim*⁵² that incarceration powers found in statutes such as § 1226(c) were enacted to combat the Immigration and Naturalization Service’s (“INS”) complete inability to keep dangerous criminals in check.⁵³ The INS’s inability to deport removable aliens placed enormous cost on taxpayers, and statistics showed deportable aliens were committing more crimes prior to being removed.⁵⁴ Congressional investigations determined that the INS was handcuffed by its inability to detain removable aliens who would often disappear and fail to appear for their removal hearings.⁵⁵

Given these considerations, the Court in *Demore* held that, given the average mandatory incarceration time of 6 weeks for aliens who do not appeal, and the average incarceration time of 5 months for aliens who do appeal, mandatory incarceration is not unconstitutional.⁵⁶ The Court in *Demore* was clear to base its decision on the limited nature of the incarceration times and remained silent on the constitutionality of incarcerations lasting longer than six months.⁵⁷ Further, in *Shaughnessy v. United States ex rel. Mezei* (“*Mezei*”),⁵⁸ the Court found that the 21-month incarceration of an alien at Ellis Island as he awaited exclusion did not violate his constitutional rights.⁵⁹ The Court in *Shaughnessy*

48. *Id.*

49. *Id.* at 689.

50. *See id.*

51. *Demore v. Kim*, 538 U.S. 510, 518 (2003).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 518–519.

56. *Id.* at 531.

57. *See id.* at 530–531 (finding that the lengths of detention at stake in the current case “last roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal”).

58. 345 U.S. 206 (1953).

59. *Id.* at 216.

characterized the alien's situation not as incarceration awaiting removal proceedings, but simply continued exclusion from the shores of the United States.⁶⁰

B. Defining "Reasonably Necessary"

With regard to specific temporal limitations, the Supreme Court has held that six months is the presumptive upper limit of "reasonable" incarceration without additional evidence.⁶¹ Considering the Court's decision in *Zadvydas*, the Ninth Circuit determined that an incarceration becomes "prolonged" if it has lasted six months and is expected to continue.⁶² The court characterized the situation at that point as one where "the private interests at stake are profound," and "the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decision maker is substantial."⁶³ In *Rodriguez II*, the Ninth Circuit ruled that to avoid these "constitutional concerns, § 1226(c)'s mandatory language must be construed 'to contain an implicit reasonable time limitation.'"⁶⁴ The court reasoned that the Government's incarceration power under § 1226(c) ended after a reasonable period.⁶⁵ After this point, the power instead came from § 1226(a), which itself had a mandatory bond hearing requirement.⁶⁶

Also in *Rodriguez II*, the Ninth Circuit extended the protections espoused in *Casas-Castrillon v. Department of Homeland Security* against prolonged incarceration without bond hearings to persons incarcerated under § 1225(b).⁶⁷ The court found that incarceration under § 1225(b), much like § 1226(c), was time limited.⁶⁸ After the six month mark, the "mandatory incarceration" requirement espoused in the statute expired, and § 1225(b) no longer governed aliens' incarceration; that authority shifted to § 1226(a), which, as noted above, has been interpreted by the Ninth Circuit to contain mandatory bond hearings every six months.⁶⁹

60. *Id.* at 215.

61. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

62. *Diouf v. Napolitano*, 634 F.3d 1081, 1092 n.13 (9th Cir. 2013).

63. *Id.* at 1092.

64. *Rodriguez II*, 715 F.3d 1127, 1138 (9th Cir. 2013) (quoting *Zadvydas*, 533 U.S. at 682).

65. *Id.* at 1144 (citing *Zadvydas*, 533 U.S. at 680).

66. 535 F.3d 942, 947 (9th Cir. 2008).

67. *Rodriguez II*, 715 F.3d at 1137–38 (citing *Casas*, 535 F.3d at 951).

68. *Id.* at 1144.

69. *Id.*

C. Proposed Remedy to Constitutional Concerns

The Ninth Circuit held in *Rodriguez II* that “the prolonged detention of an alien [under either § 1225(b) or § 1226(c)] *without an individualized determination* of his dangerousness or flight risk would be constitutionally doubtful.”⁷⁰ The court also determined, given the serious nature of the consequences of the hearing, that the Government was required to prove by clear and convincing evidence that the alien was a danger to the community or a flight risk.⁷¹

III. HOLDING

In *Rodriguez v. Robbins* (“*Rodriguez III*”), the Ninth Circuit clarified that the reasoning and decision in *Rodriguez II* was still controlling law with regard to the incarceration of aliens under § 1225(b) and § 1226(c), and decided the remaining questions under the same theories of due process.⁷²

A. § 1226(c) and § 1226(a) Subclasses

With regard to § 1226(c) class members, the court affirmed *Rodriguez*’s summary judgment motion as well as the permanent injunction against the Government.⁷³ The court ordered that any alien imprisoned under this statute for six months or more was entitled to an individual hearing where the Government was forced to prove that the alien was either a flight risk or a danger to his community by a preponderance of the evidence.⁷⁴ The Ninth Circuit reasoned that, since § 1226(c) contains an implicit “reasonable time limitation” to an alien’s incarceration, § 1226(c) does not afford the Government the right to hold anyone for more than six months.⁷⁵ Instead, at the six month mark, the Government’s power to incarcerate comes from § 1226(a), which itself contains an implicit requirement that every alien held over six months be afforded a bond hearing.⁷⁶

70. *Id.* at 1137–38 (quoting *Casas*, 535 F.3d at 951) (emphasis added).

71. *Singh v. Holder*, 638 F.3d 1196, 1203–04 (9th Cir. 2011) (citing *Addington v. Texas*, 441 U.S. 418, 427 (1979)).

72. *Rodriguez III*, 804 F.3d 1060, 1080 (9th Cir. 2015).

73. *Id.* at 1090.

74. *Id.*

75. *Id.* at 1079–1080.

76. *Id.*

B. § 1225(b) Subclass

The Ninth Circuit also affirmed the district court's decision regarding Rodriguez's summary judgment motion and permanent injunction ordering the Government to provide aliens detained under § 1225(b) mandatory bond hearings every six months.⁷⁷ The court again held that incarcerations under § 1225(b) are implicitly time limited, and that any alien incarcerated over the six month period is no longer legally incarcerated under § 1225(b), but instead under § 1226(a).⁷⁸ These subclass members are protected by the Fifth Amendment's Due Process Clause and thus are entitled to bond hearings.⁷⁹ Applying the doctrine of constitutional avoidance, the Ninth Circuit read-in an implicit bond hearing requirement instead of striking down the statute.⁸⁰

C. Procedural Requirements

The Ninth Circuit affirmed the district court's ruling that the Government must prove an alien is either a flight risk or a danger to his community by clear and convincing evidence.⁸¹ In making this determination, the court relied heavily on *Singh v. Holder*, which cited the substantial interests at stake in prolonged deprivations of liberty.⁸² The court reasoned that "when the period of detention becomes prolonged, 'the private interest that will be affected by the official action' is more substantial; greater procedural safeguards are therefore required."⁸³

The court also ordered IJs to take into account length of detention and likelihood of successful removal in the future in their determinations.⁸⁴ Relying on *Diouf*, the court reasoned that the longer an individual was incarcerated or was to be incarcerated in the future, the more substantial his due process argument becomes: "a non-citizen detained for one or more years is entitled to greater solicitude than a non-citizen detained for six months."⁸⁵ In balancing the interests

77. *Id.* at 1082.

78. *Id.*

79. *Id.* at 1074.

80. *Id.* at 1082–1083.

81. *Id.* at 1087.

82. *Id.* (citing *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011)).

83. *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2013) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

84. *Rodriguez III*, 804 F.3d at 1089.

85. *Id.*

involved, IJs are instructed to add extra weight where the alien has been incarcerated for an especially prolonged period of time or where it is likely that the alien will remain in custody for an extended period.⁸⁶

IV. ARGUMENTS

A. *The Government's Arguments*

The Government argues that the Ninth Circuit erred in holding that § 1226(c) and § 1225(b) contain an implicit reasonable time limit on incarcerations authorized under these statutes.⁸⁷ The Government argues that both statutes plainly and unambiguously *require* aliens held under their authority to be incarcerated, and that such an interpretation is supported by Congress's intent and the purposes of the statutes.

In considering § 1225(b), the Government turns first to the statute's language, arguing that the language stating that any alien who is "not clearly and beyond a doubt entitled to be admitted . . . *shall be detained*" pending a proceeding to determine removability clearly shows that the government has the authority they claim.⁸⁸ The Government further argues that this mandate includes aliens claiming asylum: any alien intending to apply for asylum "*shall be detained*" until a "credible fear" determination can be made, and if that alien is found to have a credible fear, that alien "*shall be detained*" until final consideration of their asylum claim.⁸⁹ The Government argues that the word "shall" does not leave any room for discretion on any IJ's part, and that it is a requirement that any alien fitting the above description be incarcerated.⁹⁰ The Government concedes an exception to this requirement in the form of a grant of parole by the Attorney General, but only in cases of "urgent humanitarian reasons or significant public benefit."⁹¹ The Government argues that "where Congress . . . enumerates . . . exceptions . . . [,] additional exceptions are not to be implied, in the absence of a contrary legislative intent,"⁹² and that no such contrary purpose exists here. This argument is bolstered by federal

86. *Id.*

87. Brief for Petitioner, *supra* note 12, at 10.

88. 8 U.S.C. § 1225(b)(2)(A) (2012) (emphasis added).

89. *Id.* §§ 1225(b)(1)(A)(i), (B)(ii), (iii)(V) (emphasis added).

90. *Kingdomware Tech. v. United States*, 136 S. Ct. 1969, 1977 (2016).

91. 8 U.S.C. §§ 1182(d)(5)(A), (B) (2012).

92. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

regulations, which state that IJs have no power to hold bond hearings for “arriving aliens in removal proceedings.”⁹³

Turning to Congressional intent, the Government argues that affirmation of the Ninth Circuit’s decision would contravene Congress’s purpose in enacting § 1225(b). Citing *Demore*, the Government argues the purpose of these statutes was to ensure that aliens unfit for entry were actually barred from entering and kept in custody to effectuate their removal.⁹⁴ The Government also points to statistics regarding flight and absence from removal hearings as evidence that bond hearings would seriously impair the authorities’ ability to control the border.⁹⁵ Finally, the Government argues that the Ninth Circuit’s ruling would create perverse incentives for arriving aliens, motivating them to extend their cases beyond six months in the interest of release into the general population.⁹⁶ Once released, these aliens would disappear.⁹⁷

The Government contends that this reading of § 1225(b) poses no constitutional issue because Congress has plenary power to determine the process by which aliens are admitted to this country free from the judiciary’s influence. This power has been confirmed repeatedly by the Supreme Court.⁹⁸ The Government points to decisions such as *Mezei* and *Landon v. Plasencia*,⁹⁹ which bolster Congress’s power in the field of immigration control.

The Government’s argument regarding § 1226(c) is similarly structured; it begins with the statutory language, which it argues is clear, unambiguous, and constitutional on its face. Next, the Government examines congressional intent and statutory purpose, which it also finds to be clearly in favor of plenary power to incarcerate. The Government again points to the directive that it “shall take into custody” aliens convicted of certain crimes to argue that there is no room for IJs to exercise any discretion with regard to bonds.¹⁰⁰ It also makes another *TRW* argument, writing that there is only one exception to § 1226(c)’s

93. 8 C.F.R. § 1003.19(h)(2)(i)(B) (2012).

94. *Demore v. Kim*, 538 U.S. 510, 523 (2003).

95. *Id.* at 519–520.

96. *Id.*

97. *Id.*

98. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

99. 459 U.S. 21, 32 (1982) (holding that an alien seeking admission has no constitutional protections regarding his admission).

100. 8 U.S.C. §§ 1226(c)(A), (B) (2012).

incarceration requirement,¹⁰¹ and that no other exception can be implied without contrary legislative intent, none of which can be found here.¹⁰²

The Government's § 1226(c) argument continues to track its § 1225(b) theory, positing that mandatory bond hearings are counter to Congress's intent and the purpose of § 1226(c). The Government again turns to *Demore*, arguing that Congress intended for aliens incarcerated under the statute to remain behind bars until the completion of their proceedings.¹⁰³ It argues that in enacting § 1226(c), Congress made a "categorical judgment" that aliens incarcerated under the statute were risks to the community.¹⁰⁴

The Government moves to distinguish and narrow *Zavdydas*'s effective scope regarding § 1226(c) incarceration by arguing its holding only applies to peculiar cases in which it was clear that the class in question would be permanently detained with no possibility of removal.¹⁰⁵ It argues that *Zavdydas* should be limited to such cases where aliens cannot be removed to a different country; in all other cases, *Demore* should control.¹⁰⁶ The Government takes *Demore* as an implicit blessing from the Court that such incarcerations are generally admissible, and argues that the Ninth Circuit erred in extending *Zavdydas*'s protections to aliens who have any possibility whatsoever of being removed.¹⁰⁷

Finally, the Government argues that the Ninth Circuit erred in shifting and raising the burden of proof, by requiring automatic rehearings every six months, and requiring IJs to consider the length of incarceration in their bond determinations. The Government points to § 1226(c)'s language that necessarily forces the alien to prove that he will neither flee, nor be a danger to the community.¹⁰⁸ It makes a similar

101. See *id.* § 1226(c)(1) (stating that "[t]he Attorney General shall take into custody any alien who" is inadmissible or deportable).

102. See *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress . . . enumerates . . . exceptions . . . additional exceptions are not to be implied, in the absence of a contrary legislative intent.").

103. *Demore v. Kim*, 538 U.S. 510, 520–21 (2003).

104. See *Reid v. Donelan*, 819 F.3d 486, 497 (1st Cir. 2016) ("[T]he animating force behind § 1226(c) is its categorical and mandatory treatment of a certain class of criminal aliens.").

105. See *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)) ("Where detention's goal is no longer practically attainable, detention no longer 'bear[s][a] reasonable relation to the purpose for which the individual [was] committed.'").

106. See *id.*

107. See *Demore*, 538 U.S. at 531 (holding that the six months detention of an alien in removal proceedings was authorized by § 1226(c)).

108. 8 U.S.C. § 1226(c)(2) (2012).

argument with regard to § 1225(b), given that the statute requires that an alien prove “clearly and beyond a doubt” that he is entitled to admission into the country.¹⁰⁹

The Government argues that the history and practice of § 1226(a) does not support recurring bond hearings. It cites federal regulations, which require an initial bond determination by DHS, and the opportunity, if denied, for aliens to seek a redetermination from an IJ.¹¹⁰ It argues that this bond determination and appeal procedure satisfy any due process concerns. Finally, the Government argues the alien’s flight risk and danger to the community are the only factors that should be considered during a bond determination.¹¹¹

B. Rodriguez’s Arguments

In arguing for affirmation of the Ninth Circuit’s decision, Rodriguez cites due process protections against prolonged incarceration without review, and a history of case law from both the Supreme Court and the Ninth Circuit supporting periodic hearings for incarcerated aliens. Much of Respondent’s brief tracks the same language used in the Ninth Circuit’s *Rodriguez III* opinion. He cites decisions such as *Addington v. Texas*¹¹² and *Jackson v. Indiana*¹¹³ arguing that due process requires the Government to show that anyone held without bond is either a flight risk or a danger to the community. Respondent relies heavily on *Zavdydas* to support the notion that aliens incarcerated pursuant to removal proceedings are owed mandatory and regularly occurring bond hearings regardless of Congress’s power to regulate immigration standards.¹¹⁴ Other circuits have recognized that due process protections apply not only to aliens who have already entered the United States (§ 1226(c)), but also to aliens refused entry and held at the border (§ 1225(b)).¹¹⁵

With regard to the interpretation of the statutes in question, Respondent argues that Congress intended to build in a limit to the time an alien could be incarcerated. Respondent also points to § 1226(a)(7) of the Patriot Act, which requires the Government to

109. 8 U.S.C. § 1225(b)(2)(A), § 1229a(c)(2).

110. 8 C.F.R. § 236.1(d)(1) (2012).

111. 18 U.S.C. § 3142(f)(2), § 3143(b)(1)(A) (2012).

112. *Addington v. Texas*, 441 U.S. 418, 427 (1979).

113. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

114. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

115. *Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Rosales-Garcia v. Holland*, 322 F.3d 386, 408 (6th Cir. 2003) (en banc).

incarcerate aliens right up until they are actually removed from the country.¹¹⁶ It posits that interpreting § 1226(c) to allow the Government to do the same without similar language would render that clause of the Patriot Act superfluous.¹¹⁷

With regard to § 1225(b), Respondent contends that the statute only applies from the time that an alien is apprehended up until the point removal proceedings begin.¹¹⁸ Given this language, it argues Congress clearly intended incarcerations under § 1225(b) to be time limited.¹¹⁹ Since § 1225(b) does not govern prolonged incarceration, the authority can only be found in § 1226(a)¹²⁰ which contains an implicit bond hearing requirement.¹²¹

Respondent claims that the procedural requirements espoused by the Ninth Circuit, including the clear and convincing standard, recurring hearings every six months, and the IJs' consideration of length of detention are all necessary to satisfy the Constitution's due process requirements. Citing *Addington*, it asserts that the deprivation of liberty is such a serious consequence that the Government should be forced to prove that the alien is either a flight risk or danger to the community by a higher standard of proof to ensure innocent people do not remain behind bars.¹²² With regard to the recurring hearings and the consideration of length of detention, Respondent argues that the interest of an incarcerated alien to gain his freedom grows each day he is behind bars.¹²³

Respondent categorically denies the Government's assertions that the Ninth Circuit's ruling contravenes the Court's opinions in *Demore* and *Mezei*. It argues that *Demore* can be easily distinguished here because the Court in *Demore* was dealing with brief detentions, averaging six weeks with a maximum of five months.¹²⁴ Respondent contends that *Mezei* only applies to aliens who have been denied entry and summarily ordered removed due to national security concerns,

116. See *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (holding that statutes must be interpreted to avoid rendering superfluous any language contained therein).

117. See 8 U.S.C. § 1226(c) (2012).

118. See 8 U.S.C. § 1225(b) (2012).

119. See *id.*

120. See 8 U.S.C. § 1226(a) (2012).

121. *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 947 (9th Cir. 2008).

122. *Addington v. Texas*, 441 U.S. 418, 427 (1979).

123. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

124. *Demore v. Kim*, 538 U.S. 510, 530–31 (2003).

which by their nature precluded them from any type of full removal proceeding.¹²⁵

Finally, Respondent argues that habeas corpus petitions do not provide nearly enough protection to satisfy the rigorous due process requirements of the Fifth Amendment. The Government argues that the only time an alien should be released is if it itself has caused unreasonable delay in adjudicating his case;¹²⁶ since the delays are very rarely unreasonably caused by the government, habeas hearings granted on a case by case basis are more than enough to protect aliens.¹²⁷ The Government suggests that few, if any, class members are ever successful in winning their release at bond hearings.¹²⁸ Respondent counters this assertion by showing that 70% of class members have been found eligible for release.¹²⁹

V. ANALYSIS

The Court should rule in favor of Rodriguez. First, the Government has failed to show any source of statutory authority to detain aliens in removal proceedings without so much as a bond hearing. While in theory this issue could be remedied by congressional action, the Government has also failed to justify the constitutionality of such power in the face of the Fifth Amendment's Due Process Clause. Although not officially confirmed, the Senate is set to vote on the nomination of the late Justice Scalia's replacement, Neil Gorsuch, whose ascension would restore the Supreme Court to its full lineup of nine justices.¹³⁰ Given Gorsuch's conservative tendencies,¹³¹ the case may turn on whether the Court delivers the opinion without rehearing, or decides to re-open the case in order to allow Gorsuch to be included in the decision. Were he allowed to vote, he would likely decide against the Ninth Circuit and in favor of the Government. If the Court goes forward without him, it will likely split 4-4 and affirm the Ninth Circuit's ruling without creating precedent.

125. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215–216 (1953).

126. *Demore*, 538 U.S. at 529.

127. Brief for Petitioners, *supra* note 12, at 40.

128. *Id.* at 26 n.7.

129. Brief for Respondents, *supra* note 5, at 11.

130. *Barnes*, *supra* note 13.

131. *Id.*

A. No Person Shall Be Deprived of Liberty Without Due Process

The Government has likely not done enough to show how a statute authorizing the prolonged detention of aliens without bond hearings can be reconciled with the protections afforded by the Fifth Amendment. The Amendment provides that “no person shall be . . . deprived of . . . liberty . . . without due process of law.”¹³² Incarceration is the ultimate deprivation of civil liberty, and any man, woman, or child under the jurisdiction of the United States is entitled to have his or her case heard by an impartial adjudicator.¹³³ The Court recognized in *Foucha v. Louisiana* that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.”¹³⁴ Courts have applied these protections to citizens and non-citizens alike, regardless of their perceived inadmissibility to the United States.¹³⁵ The Supreme Court has read-in limitations on the powers conferred to Congress, citing the constitutional avoidance doctrine.¹³⁶ The Court made sure to emphasize that it made no difference that there were constitutionally sound applications of the statutes; as long as there is some constitutional concern regarding some class of individuals governed by the law, it may be altered to avoid said constitutional concerns.¹³⁷

The granting of bond hearings would not frustrate the protections that Congress intended to establish. By definition, these bond hearings would keep any alien found to be a flight risk or dangerous behind bars. They would instead serve to avoid the arbitrary and unnecessary incarceration of individuals with established lives and extremely compelling reasons to appear at their hearings.

Moreover, outside of the § 1226 class members, the rest of the class members are not behind bars because of any criminal activity. The bond hearings will prevent arbitrary incarcerations such as the one suffered by an Ethiopian § 1225(b) subclass member who was subjected to

132. U.S. CONST. amend. V.

133. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (requiring clear and convincing evidence to justify civil commitment because “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause”).

134. *Id.*

135. *Clark v. Martinez*, 543 U.S. 371, 380 (2005); *see also* *Rosales-Garcia v. Holland*, 322 F.3d 386, 406–407 (2003).

136. *Almendarez-Torres v. United States*, 523 U.S. 224, 237–238 (1998).

137. *Clark*, 543 U.S. at 380 (“It is not at all unusual to give a statute’s ambiguous language a limiting construction called for by one of the statute’s applications, even though other of the statute’s applications, standing alone, would not support the same limitation.”).

brutal torture by the Ethiopian government, only to spend ten months in custody while his asylum case was adjudicated.¹³⁸ During his one parole hearing, he was denied release because there was a similarity amongst the stories of “Somalian detainee’s [sic] that present a paradigm of deceit.”¹³⁹ Apparently escaping the DHS officer charged with making the parole determination was that the man before him was Ethiopian.¹⁴⁰ Stories such as this highlight the need for individualized hearings before neutral arbitrators.

With the nomination of Neil Gorsuch by President Trump, and his decidedly conservative history,¹⁴¹ his availability to vote on the issue will likely determine the outcome of the case. With the return of a full nine justice lineup, the best indicators of the Court’s likely decision rest with the viewpoint of its median justice on any issue. In this case, the median justice will likely be Justice Kennedy. Given Justice Kennedy’s dissent in *Zavdydas*, it is unlikely that he shares the Ninth Circuit’s interpretation of the statutes in question. In his dissent, Justice Kennedy wrote that the lack of a time limitation in the statutes was a clear indication that Congress intended the statutes to bestow unlimited incarceration power.¹⁴² While it can be argued that the Court is bound by *stare decisis* to rule in favor of the class, there is a lot of ambiguity in the *Zadvydas* decision. The five conservative justices (assuming Gorsuch’s confirmation) could use this to distinguish it from the current case.

B. Power to Incarcerate

Due process challenges aside, the Government has also failed to show any of the statutes governing the incarceration of aliens in removal proceedings actually grant it the authority to detain aliens for a prolonged period of time. As mentioned above, in both the Ninth Circuit’s opinion in *Rodriguez III*, and Respondent’s argument, the courts take civil incarceration very seriously.¹⁴³ The Supreme Court in *United States v. Salerno*¹⁴⁴ found that in order to remand a defendant

138. Brief for Respondents, *supra* note 5, at 6.

139. *Id.*

140. *Id.*

141. Barnes, *supra* note 13.

142. *Zadvydas v. Davis*, 533 U.S. 678, 705 (2001).

143. *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (quoting *Santosky v. Cramer*, 455 U.S. 746, 756 (1982)) (“[D]ue process places a heightened burden of proof on the State in civil proceedings in which the ‘individual interests at stake . . . are both particularly important and more substantial than mere loss of money.’”).

144. 481 U.S. 739 (1987).

without bail, the government must prove by clear and convincing evidence that nothing can be reasonably done to ensure the safety of the community if the defendant were released.¹⁴⁵

Here, given that we are dealing with individuals handicapped by language and cultural barriers, and the intentionally high bar governing civil commitment, it follows that Congress should be forced to explicitly grant its agents the power to detain an alien indefinitely without bond. The idea that a silent, or at best ambiguously worded, statute should be interpreted to afford the government the right to engage in constitutionally suspect activities is inconsistent with the Fifth Amendment. Congress has enacted statutes that specifically grant its agents the right to keep certain types of aliens, namely those designated national security risks, incarcerated for as long as necessary to effectuate their removal.¹⁴⁶ To interpret these two statutes to confer the similar powers to the government would violate canons on statutory interpretation guiding courts not to render statutory language superfluous.¹⁴⁷

CONCLUSION

The Court should rule in favor of Respondent Rodriguez not only in the interest of protecting the civil liberties guaranteed everyone by the Constitution, but because the civil incarceration of an individual not found to be a risk to the community simply because he lacks an artificially created “status” is inherently unjust. There is no material difference between a citizen and legal permanent resident’s character, but for ordinary Americans, the concept that a citizen can commit a minor drug offense and be released on bail is common, while the granting of bail to an alien who may not have a single offense on their record is unpalatable. This distinction lacks reason and logic, and instead represents an arbitrary and discriminatory application of the laws.

145. *Id.* at 750.

146. 8 U.S.C. § 1226a(a)(7) (2012).

147. *See Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (holding that statutes must be interpreted to avoid rendering superfluous any language contained therein).