JENNINGS V. RODRIGUEZ AND THE FUTURE OF IMMIGRATION DETENTION

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Introduction

Immigration detention will likely play a central role in the Trump administration's efforts to increase deportations.[1] Despite the President's broad authority to detain, the U.S. Supreme Court will have an opportunity to limit that authority via a case that will be heard for a second time before the Court. In *Jennings v. Rodriguez*, the Court will consider both statutory and constitutional challenges to the government's ability to detain certain individuals without providing them the opportunity to be released on bond. Not only does the Court's decision in *Jennings* have the potential to restrict the government's use of immigration detention, but it could simultaneously chip away at the plenary power doctrine, which traditionally accords Congress and the President broad authority to enact, administer, and enforce immigration law without judicial oversight.

The questions presented by the *Jennings* case are numerous: How will the Court approach the first major post-9/11 immigration detention case since 2003? Will President Trump's directives to increase the use of immigration detention have any effect on the Court's decision? How will the Court's prior decisions in *Zadvydas v. Davis* and *Demore v. Kim* affect its reasoning? Does the Court's recent decision to hear the case a second time signal a previously deadlocked Court in which Justice Gorsuch may now cast the tiebreaking vote? If so, will the respondents be able to persuade Justice Kennedy (who often provides the swing vote on an ideologically split Court)? Will the Court rule on constitutional grounds or statutory grounds or both? Will the plenary power remain intact, or will the Court carve out a limited exception in the context of prolonged immigration detention?

This article will opine on some of these questions while explaining the implications of the Court's decision in *Jennings* depending on a range of potential outcomes. First, the article will analyze the current legal landscape of immigration detention by examining the Court's prior decisions in

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[1] On January 25, 2017, President Trump announced an end to so-called "catch and release" signaling the administration's intention to use its detention authority to the fullest extent. *See* Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements, *archived at* https://perma.cc/Z2J5-48FY.

Zadvydas v. Davis and *Demore v. Kim* to show when and how the Court has limited the government's use of detention. The cases may also provide insight into how today's justices may decide the issues in *Jennings*—particularly Justice Kennedy who is again poised to be the key swing vote. Then, the article will review the *Jennings* litigation including an examination of last term's oral argument, the Court's subsequent request for further briefing, and the recent decision to re-calendar the case for argument again next term. The article will conclude with a discussion of how the Court's decision in *Jennings* may affect the detention regime and possibly the political branches' plenary authority in implementing and enforcing U.S. immigration laws.

I. Today's Immigration Detention System

The United States has the world's largest immigration detention regime with approximately 380,000 to 482,000 individuals detained each year.[2] Nearly two-thirds of all detainees are held without the opportunity to request release via a custody hearing in which they could argue that their detention is not justified because they are neither a danger to the community nor a flight risk.[3] Furthermore, some detainees are held for the duration of their removal proceedings, which can last many months or years as cases wind through an overburdened immigration court system that is struggling to handle a backlog of nearly 520,000 cases.[4]

President Trump's ramped-up immigration enforcement initiatives will undoubtedly place further strains on the enforcement and detention systems. On January 25, 2017, the President ordered immigration officials to take "appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings" and to end "the practice commonly known as 'catch and release,' whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law."[5] Then, Department of Homeland ("DHS") Secretary John Kelly issued an internal DHS memoran-

[2] *See Immigration Detention Map & Statistics*, CIVIC, http://www.endisolation.org/resources/immigration-detention/, *archived at* https://perma.cc/F3WF-4M3Y (last visited May 18, 2017). Taxpayers spent about $2 billion dollars in 2015 maintaining nearly 200 immigration detention facilities throughout the United States. *Id.* Approximately 60% of the detention facilities are privately-run. *Id.* For a more thorough discussion of the U.S. immigration detention system and the private prison industry's influence on that system see Philip L. Torrey, *Rethinking Immigration Detention's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody,"* 48 Mich. J. L. Ref. 879 (2015).

[3] Dora Schriro, Dep't of Homeland Sec., Immigration Detention Overview and Recommendations 2 (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf, *archived at* https://perma.cc/Z676-5GWM (noting that on September 1, 2009, 66 percent of ICE detainees were subject to mandatory detention).

[4] *See* Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, N.Y. Times (Dec. 1, 2016), https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html, *archived at* https://perma.cc/U6Q2-LUQT. The government would need to hire more than 500 new immigration judges to relieve the backlog of cases. *Id.*

[5] Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

dum implementing the President's directives to increase the number of noncitizens in detention during their removal proceedings because "[a]liens who are released from custody pending a determination of their removability are highly likely to abscond and fail to attend their removal hearings."[6]

The executive branch's power to detain individuals it seeks to remove from the United States is quite broad. Several provisions of the Immigration and Nationality Act ("INA") grant immigration officials the power to detain, including provisions mandating the detention of noncitizens who have been convicted of certain crimes and newly arriving noncitizens, many of whom are seeking humanitarian protection from persecution.[7] Although the Supreme Court has previously analyzed statutory and constitutional challenges to the executive's detention authority, it has been largely reluctant to curtail the executive's wide-ranging power because of the plenary power doctrine.[8]

II. The Prior Supreme Court Cases: *Zadvydas v. Davis* and *Demore v. Kim*

In 2001 and 2003, the Supreme Court took different approaches to constitutional challenges lodged against immigration officials' detention authority.[9] In 2001, the Court held in *Zadvydas v. Davis* that there was a constitutional limit on the length of time a detainee with a removal order could be held beyond the 90-day period within which immigration officials must execute that removal order.[10] Shortly after that decision, the tragic events of September 11, 2001 occurred precipitating heightened immigration enforcement efforts.[11] Two years later, in *Demore v. Kim*, the Court refused to set a constitutional limit on the length of time an individual could be detained while in removal proceedings.[12] The statutory provisions at issue in *Jennings* likewise concern the government's authority to detain an individual in removal proceedings. To understand how the Court may rule on the statutory and constitutional arguments lodged against those provisions in *Jen-*

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[6] Memorandum from Dep't of Homeland Sec., Implementing the President's Border Security and Immigration Enforcement Improvements Policies, 8–9 (Feb. 20, 2017), *available at* https://www.scribd.com/document/339935886/DHS-Memo-Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies# *archived at* https://perma.cc/E9YX-SK8F.

[7] *See* Immigration and Nationality Act 8 U.S.C. §§ 1226(c)(1), 1225(b) (2012).

[8] *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

[9] For a more in-depth discussion of these two cases and their impact on mandatory detention see Farrin R. Anello, *Due Process and Temporal Limits on Immigration Detention*, 65 Hastings L. J. 363 (2013).

[10] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[11] *See* Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 Wm. & Mary Bill Rts. J. 577, 600–02 (2012).

[12] Demore v. Kim, 538 U.S. 510, 530 (2003).

nings, it is important to examine the Court's decisions in *Zadvydas* and *Demore*.

Both *Zadvydas* and *Demore* were narrow 5-4 decisions that largely fell on ideological lines and involved only four of the Court's current eight justices.[13] In *Zadvydas*, Justice Ginsburg joined Justice Breyer's majority opinion along with Justices Stevens, O'Connor, and Souter.[14] In *Demore*, Justice Rehnquist's majority opinion was joined by current Justice Thomas along with Justices O'Connor, and Scalia.[15] Justice Kennedy's concurring opinion provided the majority's fifth vote in *Demore*.[16]

The Court's recent decision to re-calander *Jennings* to next term likely signals a split on the Court between the eight justices who heard oral argument.[17] With the addition of Justice Gorsuch, the Court is largely ideologically divided. Justice Kennedy may therefore play his familiar role as the Court's swing vote in *Jennings*. The parties would be wise to pay special attention to his positions in both *Zadvydas* and *Demore*.

A. *Zadvydas v. Davis*

In 2001, the Supreme Court held that the Fifth Amendment's Due Process Clause limited the executive's authority to detain noncitizens with removal orders beyond the statutory 90-day "removal period."[18] In *Zadvydas v. Davis*, the Court consolidated the cases of petitioners Kestutis Zadvydas and Kim Ho Ma who were both ordered removed from the United States and then held in custody the removal period while immigration officials attempted to deport them.[19] But there was nowhere to deport Zadvydas because he was deemed stateless, and Ma's home country of Cambodia refused to repatriate him.[20] Although neither removal was foreseeable, immigration officials continued to detain the petitioners.[21] Based on immigration officials' interpretation of the post-removal period statute, Zadvydas and Kim

[13] The Court in Demore v. Kim, 538 U.S. 510 (2003) held in a 6-3 decision that the Immigration and Nationality Act (INA) did not deprive federal courts of habeas jurisdiction of individuals seeking review of their immigration detention pursuant to INA 8 U.S.C. § 236(c), but simultaneously held in a 5-4 decision that pre-removal, mandatory detention was constitutional.

[14] *Zadvydas*, 533 U.S. at 681.

[15] *Kim,* 538 U.S. at 512. Justice Souter wrote a dissenting opinion, which was joined by current Justices Ginsburg and Breyer and former Justice Stevens. *See id.* at 540.

[16] *Id.* at 531.

[17] Based on Supreme Court tradition, Justice Gorsuch likely did not participate in the Court's deliberations in *Jennings v. Rodriguez* because he was not sworn in as a member of the Court and on the bench in time for oral argument in the case on November 30, 2016. *See* Michael Gryboski, *Will Trump Court Pick Gorsuch Play Role in Transgender Bathroom Case?*, The Christian Post (Feb. 10, 2017), http://www.christianpost.com/news/trump-court-gorsuch-transgender-bathroom-case-174720/#M8wY20tXIx35Ymy0.99, *archived at* https://perma.cc/7QCY-KHAZ ("[I]f Gorsuch is confirmed after oral arguments he will not be able to participate. That is the Court's long tradition." (internal quotation marks omitted)).

[18] *Zadvydas*, 533 U.S. at 690.

[19] *Id.* at 684–86.

[20] *See id.*

[21] *See id.* at 686.

had no right to a hearing to determine whether their continued detention was justified.[22]

The *Zadvydas* and *Ma* cases were decided differently by the Fifth Circuit and Ninth Circuit, respectively, creating a circuit split.[23] In *Zadvydas*, the federal district court held that potential indefinite detention violated the Constitution, but the Fifth Circuit reversed because deportation was not "impossible," which validated prolonged detention as long as immigration officials continued to make good faith efforts to deport Zadvydas and periodically reviewed their decision to continue his detention.[24] In *Ma*, the federal district court similarly held that prolonged detention was constitutionally impermissible, but in contrast to the Fifth Circuit, the Ninth Circuit agreed with the lower court's ruling.[25] The Supreme Court subsequently granted certiorari in the two cases and consolidated them.[26]

Writing for the Court's five-justice majority, Justice Breyer held that indefinite post-removal period detention raised "a serious constitutional problem."[27] Specifically, the Court was concerned about detaining someone for removal when that removal was not foreseeable.[28] Relying on cases like *United States v. Salerno* and *Foucha v. Louisiana*, the Court reasoned that post-removal period detention required adequate Fifth Amendment Due Process protections similar to those accorded to individuals facing criminal detention.[29] In *Zadvydas*, the detainees' procedural rights did not meet that standard.[30] For example, the Court noted that it was the detainees' burden to show that their release was justified, and there was limited judicial review of immigration officials' decision to detain.[31] Using the canon of constitutional avoidance, the Court interpreted the detention statute to include a rebuttable presumption that custody beyond six months was impermissible.[32]

Justice Kennedy wrote a dissenting opinion in *Zadvydas*, which was joined, in part, by Justice Thomas.[33] In his dissenting opinion, Justice Kennedy criticized the majority for effectively re-writing the statute to include an exception for detainees held longer than six months:

> One can accept the premise that a substantial constitutional question is presented by the prospect of lengthy, even unending, detention in some instances; but the statutory construction the Court adopts . . . has no basis in the language or structure of the INA and

[22] *See id.* at 684.
[23] *See id.* at 686.
[24] *See id.* at 685.
[25] *See id.* at 686.
[26] *Id.*
[27] *Id.* at 690.
[28] *See id.*
[29] *See id.*
[30] *Id.* at 692.
[31] *Id.*
[32] *Id.* at 701 ("After this 6–month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.").
[33] *Id.* at 705 (Kennedy, J., dissenting).

> in fact contradicts and defeats the purpose set forth in the express terms of the statutory text.[34]

Justice Kennedy seemed particularly concerned with how the Court's ruling would result in "releasing into our general population at least hundreds of removable or inadmissible aliens who have been found by fair procedures to be flight risks, dangers to the community, or both."[35] Justice Kennedy was similarly concerned with allowing "excludable aliens detained at the border be set free in our community."[36] According to Justice Kennedy there was no need for additional custody hearings because "substantial procedural safeguards" were already accorded the detainees in their removal proceedings.[37] Although Justice Kennedy considered the majority's six-month requirement as improperly focused on the state of the detainee's repatriation negotiations, he was open to the possibility of reviewing "a single, discrete case deciding whether there were fair procedures and adequate judicial safeguards to determine whether an alien is dangerous to the community so that long-term detention is justified."[38]

B. Demore v. Kim

Two years after *Zadvydas*, the Court again considered a challenge to an INA detention provision in *Demore v. Kim*. This time, the Court refused to place a constitutional limit on prolonged, pre-removal immigration detention.[39] The Court's shift from *Zadvydas* may partly be explained by the subsequent terrorist attacks on September 11, 2001.[40] Like *Zadvydas*, *Demore* was a 5-4 decision. Justice Kennedy provided the swing vote.

In *Demore v. Kim*, petitioner Hyung Joon Kim challenged the mandatory detention statute under which he was held, claiming that it violated substantive due process because it required detention without the opportunity to request release on bond.[41] Kim was a lawful permanent resident who entered the United States when he was six-years old.[42] He was later convicted of first-degree burglary and "petty theft with priors."[43] The convictions prompted immigration officials to seek his removal and he was sub-

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[34] *Id.* at 706–07.

[35] *Id.* at 705.

[36] *Id.* at 716.

[37] *See id.* at 718.

[38] *Id.* at 725. Notably, Justice Kennedy did concede that "[i]n a later case the specific circumstances of a detention may present a substantial constitutional question." *Id.* at 718.

[39] Demore v. Kim, 538 U.S. 510, 530.

[40] For a discussion of how September 11, 2001 affected the judiciary's willingness to second-guess the President's authority in enforcing immigration laws see Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, *in* Immigration Stories (David A. Martin & Peter H. Schuck eds., 2005).

[41] *Kim*, 538 U.S. at 514.

[42] *Id.* at 513.

[43] *Id.*

sequently detained pursuant to INA § 236(c), which requires the detention of noncitizens with certain criminal convictions.[44]

In *Demore*, Kim argued that the statute was unconstitutional because it provided him no opportunity to contest his detention.[45] The federal district court agreed and ordered immigration officials to conduct an evidentiary hearing to determine whether Kim posed a danger to the community or presented a flight risk.[46] After the custody hearing revealed that Kim was neither dangerous nor a threat to abscond, he was released from custody.[47]

Affirming the federal district court's ruling, the Ninth Circuit held that the mandatory detention statute violated substantive due process as applied to Kim because he was a lawful permanent resident.[48] The appellate court reasoned that the government failed to show that a statute requiring "no-bail civil detention [was] sufficient to overcome a lawful permanent resident alien's liberty interest."[49] The court further noted that the crimes Kim had been convicted of were "rather ordinary" and failed to demonstrate why mandatory detention was justified.[50]

The Supreme Court granted the government's petition for writ of certiorari to resolve a circuit split in which the Second, Third, and Fourth Circuits agreed with the Ninth Circuit but the Seventh Circuit disagreed.[51] In reversing the Ninth Circuit's opinion, the Court noted Congress's near-absolute power to enact immigration laws and held that the mandatory detention statute did pass constitutional muster.[52] In so holding, the Court relied on government statistics demonstrating: (1) a high rate of recidivism with previously convicted noncitizens who were released in the course of their removal proceedings; (2) a high rate of noncitizens failing to attend subsequent hearings when they were released from custody during their removal proceedings; and (3) the relatively short period of time during which removal proceedings were completed for detained noncitizens.[53]

Writing for the majority, Chief Justice Rehnquist tried to distinguish *Zadvydas* by first noting that the detention in that case no longer served the purpose of effecting removal because repatriation was not possible, whereas here detention was intended to ensure attendance at subsequent removal hearings.[54] Then, the majority opinion relied on government-provided statistics showing that the detention at issue here "is of a much shorter duration"

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[44] *Id.*
[45] *Id.* at 514.
[46] *Id.* at 515.
[47] *See id.*
[48] *Id.*
[49] *Id.*
[50] *See id.* The court also rejected the government's argument that the mandatory detention statute was necessary to ensure the presence of individuals with criminal convictions at subsequent removal proceedings because not everyone subject to mandatory detention would ultimately be deported. *Id.*
[51] *Id.* at 516.
[52] *See id.*; *see also id.* at 521 (citing Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).
[53] *See id.*
[54] *See id.* at 527.

than the potentially indefinite detention that was at issue in *Zadvydas*.[55] After attempting to distinguish *Zadvydas*, the Court further reasoned that INA § 236(c) was related to the government's interest in public safety and enforcement of removal laws while not being overly burdensome to a detainee whose detention was only for the duration of removal proceedings, which the government reported were typically completed in less than two months.[56]

In his concurring opinion, Justice Kennedy stated that he would be amenable to a constitutional challenge to prolonged detention if the detention became "unreasonable and unjustified."[57] Such a scenario may arise if immigration authorities prompted an "unreasonable delay" in completing the detainee's removal proceedings.[58] An unreasonable delay, according to Justice Kennedy, may signal that the detention was for nefarious reasons unrelated to "protecting against risk of flight or dangerousness."[59]

Approximately thirteen years after the Court's decision in *Demore* and approximately two months after the Court granted certiorari in *Jennings v. Rodriguez*, Acting Solicitor General Ian Heath Gershengorn sent the Court a letter that admitted the statistics provided by the government in *Demore* were wrong.[60] Specifically, the government had underestimated the amount of a time a detainee was typically held pursuant to INA § 236(c).[61] Based on those statistics, the Court inferred that the average length of time a detainee was held in when the detainee appealed was "about five months."[62] But the letter reveals that those individuals were actually held on average for just over one year.[63] Whether these admitted errors will affect the Court's decision in *Jennings* remains to be seen.

III. The Current Supreme Court Case: *Jennings v. Rodriguez*

The Court will once again consider challenges to the executive's authority to hold individuals in prolonged, pre-removal detention. *Jennings v. Rodriguez* is a class action lawsuit in which the certified class is comprised of three subclasses of detainees held pursuant to three distinct INA provi-

[55] *Id.* at 528. "The Executive Office of Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days." *Id.* at 529.

[56] *Id.*

[57] *Id.* at 532 (Kennedy, J,, concurring) ("Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.").

[58] *Id.*

[59] *See id.* at 532–33.

[60] Letter from Ian Heath Gershengorn, Acting Solicitor General, to Scott S. Harris, Clerk of the U.S. Supreme Court (Aug. 26, 2016), *available at* http://online.wsj.com/public/resources/documents/Demore.pdf, *archived at* https://perma.cc/GXY4-K9JX.

[61] *Id.*

[62] *Id.*

[63] *Id.*

sions.[64] All of the detainees have been held in prolonged, pre-removal detention.[65] The government is asking the Court to vacate the federal appellate court's ruling granting class-members individualized and periodic custody hearings to determine whether their continued detention is warranted.[66]

The three INA provisions at issue in *Jennings* either require or authorize DHS to detain noncitizens during their removal proceedings. The first provision, INA § 235(b), mandates the detention of inadmissible noncitizens arriving at or near U.S. borders until they are removed, or until there is a finding that they have a credible fear of returning to their home country and are thus eligible to apply for asylum.[67] The second provision, INA § 236(c), is the same statute that was at issue in *Demore v. Kim* and requires the detention of certain noncitizens with specified criminal convictions.[68] The third provision, INA § 236(a), permits the detention of noncitizens in removal proceedings who are a danger to the community or flight risk.[69] INA § 236(a) is the only provision of the three that allows for the discretionary release of detainees after a custody hearing.[70]

As the Court reviews these three provisions it will determine whether prolonged, pre-removal detention without periodic review via a custody hearing is a permissible interpretation of the statute or constitutional. If class-members are entitled to custody hearings, then the Court must also determine whether the government is required to prove by clear and convincing evidence that further detention is necessary.[71] The issues in this case are far from simple and have been litigated for nearly ten years in lower federal courts before reaching the Supreme Court.

A. The Proceedings Below

On May 16, 2007, Alejandro Rodriguez filed a petition for a writ of habeas corpus in the U.S. District Court for the Central District of California on behalf of himself and other similarly-situated noncitizen detainees claiming that his detention pursuant to INA § 236(c) was unlawful.[72] At that time, Mr. Rodriguez had been fighting his removal case for more than three years, during which time he was statutorily barred from requesting his release from

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[64] Petition for Writ of Certorari at 6, Jennings v. Rodriguez, No. 15-1204 (U.S. Mar. 25, 2016).

[65] *Id.*

[66] *Id.*

[67] *See* 8 U.S.C. § 1225(b).

[68] *See* 8 U.S.C. § 1226(c); *Kim*, 538 U.S. at 514.

[69] *See* 8 U.S.C. § 1226(a).

[70] *See* 8 C.F.R. § 236.1(c)(8) ("alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.").

[71] *See* Brief for Appellant at I, Jennings v. Rodriguez, No. 15-1204 (U.S. Nov. 30, 2016). The additional question posed for review includes "whether the length of the alien's detention must be weighed in favor of release." *Id.* Prolonged detention here is being defined as six months. *Id.*

[72] Petition for Writ of Habeas Corpus at 2, Jennings v. Rodriguez, No. 15-1204 (2016).

custody.[73] Mr. Rodriguez, a lawful permanent resident who first entered the United States when he was one-year old, was subject to mandatory detention pursuant to INA § 236(c) because of his prior criminal convictions for simple possession of a controlled substance and joyriding.[74]

Barred from receiving a custody hearing, Mr. Rodriguez instead requested a hearing in federal court to determine whether his prolonged detention was lawful.[75] The federal district court eventually certified a class of detainees consisting of several subclasses corresponding to the INA provisions under which class-members were being detained, including: INA § 236(c); INA § 235(b); INA § 236(a).[76] Notably, the class did not request release from detention, but only the opportunity to be heard on whether their continued detention was necessary.[77]

On August 6, 2013, the federal district court issued an order granting relief to all class-members.[78] The court held that noncitizens detained pursuant to one of the three INA provisions who have not previously been accorded a custody hearing must receive such a hearing every six months to determine whether their continued detention was justified.[79] In those hearings, the court further ordered DHS to bear the burden of proving by clear and convincing evidence that the detainee was either a danger to the community or a flight risk before detention could continue.[80]

On appeal, the Ninth Circuit largely affirmed the federal district court's rulings.[81] The court noted that "[s]ince *Zadvydas* and *Demore,* [it] has grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing."[82] Citing *Matthews v. Eldridge*, the court reasoned that "prolonged detention without adequate procedural protections would raise serious constitutional concerns."[83] Similar to Justice Breyer's reasoning in *Zadvydas*, the Ninth Circuit invoked the canon of constitutional avoidance in interpreting two of the relevant detention statutes to require periodic review of class-members' detention in which

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[73] *Id.*

[74] *Id.* at 7.

[75] *Id.* at 2.

[76] *Id.* The district court certified the class after its initial decision declining to grant class certification was reversed by the Ninth Circuit. *Id.* The class originally included a fourth subclass of detainees held pursuant to 8 U.S.C. § 1231(a) (noncitizens held due to a final order of removal), which was later removed by the Ninth Circuit because it did not meet the class definition of detainees held "pending completion of removal proceedings." Rodriguez v. Robbins, 804 F.3d 1060, 1086 (9th Cir. 2015).

[77] Petition for Writ of Certiorari at 6, Jennings v. Rodriguez, No. 15-1204 (U.S. Mar. 25, 2016).

[78] Rodriguez v. Holder, No. 07-3239, 2013 WL 5229795, at *3 (C.D. Cal. Aug. 6, 2013).

[79] *See id.*

[80] *Id.* In typical bond hearings the detainee must bear the burden of proof. *See* 8 C.F.R. § 1236.1(c)(8).

[81] *See* Rodriguez v. Robbins, 804 F.3d 1060, 1074 (9th Cir. 2015).

[82] *Id.* at 1077 (9th Cir. 2015) (internal quotation marks omitted).

[83] *Id.*

the government must bear the burden of showing that continued detention is warranted.[84]

The Ninth Circuit's opinion systematically discussed why interpretation of the statutory provisions and its own precedents required class-members to receive a custody hearing every six months.[85] Although the court found that INA § 236(c) mandated detention for class-members with certain criminal convictions, it simultaneously held that the provision did not mandate detention indefinitely.[86] The court also gave weight to the fact that members of INA § 236(c) subclass were held for particularly long periods of time that had "no relationship to the seriousness of class members' criminal history."[87]

Turning to the subclass detained pursuant to INA § 235(b), which included class-members stopped at a port of entry of near the U.S. border, the court noted that the subclass had fewer constitutional protections than those who have been admitted to the United States.[88] But the court then reasoned that "even if the majority of prolonged detentions under [INA § 235(b)] are constitutionally permissible" there were certain lawful permanent residents with greater constitutional protections who may be caught at a port of entry and detained pursuant to INA § 235(b), which would raise constitutional concerns.[89] Thus, the court held that all subclass members—regardless of immigration status—were entitled to periodic review of their detention because "the Supreme Court has instructed that, where one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance."[90]

The final subclass of individuals held pursuant to INA § 236(a) is different than the other two subclasses because their detention was not required by the statute, but instead imposed at the discretion of immigration officials.[91] The Ninth Circuit avoided engaging in a constitutional avoidance analysis and simply held that the subclass was controlled by its own precedents, which required "automatic bond hearings after six months of detention."[92] In doing so, the court noted that the government should provide periodic bond hearings because detainees face obstacles that prevent them from requesting such hearings on their own, including lack of counsel, lack of access to legal resources, and lack of English proficiency.[93]

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[84] *Compare Rodriguez*, 804 F.3d at 1074 *with Zadvydas*, 533 U.S. at 701.
[85] *Rodriguez*, 804 F.3d at 1074.
[86] *See id.* at 1079.
[87] *Id.*
[88] *See id.* at 1081–83.
[89] *Id.* at 1082.
[90] *Id.* at 1083 (citing Clark v. Martinez, 543 U.S. 371, 380 (2005)). The government argued that the statute could be interpreted to avoid its application to lawful permanent residents. *Id.* at 1083. But, the court rejected that argument because it was not raised in the proceedings below, but further noted that it would nonetheless conflict with the language of a separate statute governing the admission of lawful permanent residents. *See id.* at 1083–84.
[91] *See id.* at 1085.
[92] *See id.* (citing Casas-Castrillon v. DHS, 535 F.3d 942, 944 (9th Cir. 2008))
[93] *Id.*

Perhaps in anticipation of Supreme Court review, the Ninth Circuit directly addressed Justice Kennedy's positions in both *Zadvydas* and *Demore*. First, the court noted that Justice Kennedy's dissenting opinion in *Zadvydas* recognized that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary and capricious."[94] The court also noted that Justice Kennedy further reasoned that despite the government's authority to detain individuals who are dangerous or a flight risk, "due process requires adequate procedures to review their cases, allowing persons once subject to detention . . . no longer present special risks or danger if put at large."[95] The Ninth Circuit later cited Justice Kennedy's concurring opinion in *Demore* in which he reasoned that a detainee's mandatory detention pursuant to INA § 236(c) could be reviewed "if the continued detention became unreasonable or unjustified."[96]

B. The Supreme Court Proceedings

In the conclusion of its opinion, the Ninth Circuit noted that its "[d]ecision flows from the Supreme Court's . . . own precedent bearing on the constitutional implications of our government's prolonged civil detention of individuals, many of whom have the legal right to live and work in our country."[97] The Supreme Court will consider whether it agrees with how the Ninth Circuit interpreted its precedent in *Zadvydas v. Davis* and *Demore v. Kim*. In so doing, the Court will decide whether prolonged, pre-removal detention warrants the procedural protections that the Ninth Circuit has granted to the *Jennings* class-members.

The litigants' arguments at the Supreme Court are similar to those made in the proceedings below. In its petition for writ of certorari, the government relied heavily on *Demore*.[98] It also reminded the Court of Congress's nearly unreviewable power to enact immigration-related laws.[99] But the government further argued that the statutes are rational. According to the government, Congress weighed all interests in enacting the three provisions at issue and that the Ninth Circuit cannot rewrite the statute using the canon of constitutional avoidance because it disagrees with how Congress weighed those interests.[100]

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[94] *Id.* at 1067.
[95] *Id.* at 1067–68.
[96] *See id.* at 1068.
[97] *Id.* at 1089–90.
[98] Petition for Writ of Certorari at 20, Jennings v. Rodriguez, No.15-1204 (U.S. Mar. 25, 2016) ("*Demore* leaves no room for the view that Section 1226(c) itself mandates a bond hearing by the six-month mark—or that the detention of a criminal or terrorist alien for six months without a bond hearing gives rise to a serious constitutional problem that Congress implicitly avoided: The alien in *Demore* was himself detained 'for six months' without a bond hearing.").
[99] *Id.* at 10 ("[T]he political Branches have plenary control over which aliens may physically enter the United States and under what circumstances.").
[100] *Id.* at 25.

The respondents, on the other hand, argued that due process requires interpreting the provisions to mandate periodic review of prolonged detention.[101] Their argument relies on the assumption that *Demore* should have limited applicability in this case because (1) the government's admittedly false statistics, which were relied upon by the majority in *Demore*, showing that pre-removal detention was relatively brief, and (2) the detainee in *Demore* admitted that he was removable, unlike class-members here who are fighting their removal with viable claims of relief and are thus detained for much longer than the detainees in *Demore*.[102] The respondents also rely on *Zadvydas* for the assertion that statutes permitting indefinite detention of an alien would cause a serious constitutional problem.[103] That constitutional problem can be alleviated not by releasing detainees, but by providing a custody hearing at which the government must defend its decision to continue detention.[104]

After the parties' initial briefs were filed, the Court heard oral argument on November 30, 2016. It was the litigants' first glimpse into how the Court would view the issues in *Jennings* and how its prior decisions in *Demore* and *Zadvydas* should effect the current proceedings. At oral argument, the Court appeared divided on ideological lines as both sides were clearly vying for Justice Kennedy's swing vote.

During oral argument, the Justices asked questions about interpreting the statutory provisions and the constitutionality of those provisions. Justices Breyer, Kagan, and Sotomayor seemed particularly concerned with the constitutional problems inherent in prolonged detention, while Chief Justice Roberts and Justice Kennedy questioned whether the Court could reach the constitutional issues when those issues had not been squarely decided in the first instance by lower courts.[105] Justice Breyer's statement concerning INA § 236(c) is illustrative: "As a lawyer, [INA § 236(c)] produces an odd statute. As a person who tries to interpret the Constitution, I'd say what happened to the notion that you do let people out on bail when, in fact, they're not a flight risk."[106] On the other hand, Chief Justice Roberts was concerned that interpreting the provisions to require periodic review when there was no explicit language authorizing such a practice "looks an awful lot like drafting a statute or regulation. And it—it seems to me that that's quite a leap."[107] Although the government conceded that the Court could place a constitutional limit on detention, some justices seemed apprehensive about doing so.[108] The respondents' statutory interpretation arguments were also

[101] *See* Respondent's Brief at 33-47, Jennings v. Rodriguez, No. 15-1204 (U.S. Oct. 17, 2016).
[102] *See id.* at 8, 13.
[103] *See id.* at 33.
[104] *See id.*
[105] *See* Transcript of Oral Argument at 46, 63, Jennings v. Rodriguez, No. 15-1204 (U.S. Nov. 6, 2016) (Roberts, C.J.) ("it's pretty unusual for us to do that in the first instance").
[106] *Id.* at 30.
[107] *Id.* at 62.
[108] *See id.* at 24-25.

unconvincing to some justices because they seemed to be thinly veiled constitutional arguments, which were underdeveloped according to some members of the Court.[109]

Approximately two weeks after oral argument, the Court requested supplemental briefing from the parties on the constitutional arguments.[110] In their supplemental briefing, the respondents emphasized the limited scope of the lower court's order in simply requiring custody hearings at six month intervals for class-members.[111] The argument further noted that to allow prolonged detention without such periodic review would run afoul of the Fifth Amendment's Due Process Clause.[112] The petitioners argued that sufficient due process was already provided the class-members and that the lower court's "rigid, one-size-fits-all rule" takes a sledgehammer to the statute when individualized review would be more appropriate.[113] Echoing Chief Justice Robert's and Justice Alito's concern during oral argument, petitioners instead suggest that constitutional challenges to prolonged detention should be addressed in individual habeas petitions rather than a facial rewriting of the detention provisions.[114]

On June 26, 2017, the Court restored *Jennings* to the calendar for another round of argument next term.[115] Justice Gorsuch will now participate in the rehearing of *Jennings* and the Court's decision on the merits. Legal experts suggest that the Court's decision to rehear the case signals a split among the eight justices who heard oral argument, although no reasoning was provided for the Court's decision to re-calendar the case.[116]

Conclusion

It is unclear how critical Justice Gorsuch's vote will be in the *Jennings* decision. If the Court is split along ideological lines—as many experts believe—then Justice Gorsuch's tiebreaking vote will likely tip the scales in

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[109] *See, e.g., id.* at 33–34 (Alito, J.) ("Constitutional avoidance isn't just sort of, well, we really don't think we can interpret the statute this way, but we don't have the guts to say that it's unconstitutional. So we're going to put the two things together and say, well, by constitutional avoidance—").

[110] Order in Pending Case, Jennings v. Rodriguez, No. 15-1204 (U.S. Dec. 15, 2016).

[111] *See* Respondent's Supplemental Brief at 2, Jennings v. Rodriguez, No. 15-1204 (U.S. Jan. 31, 2017).

[112] *See id.* at 1.

[113] *See* Petitioners' Supplemental Brief at 1, Jennings v. Rodriguez, No. 15-1204 (U.S. Jan. 31, 2017).

[114] *See* Transcript of Oral Argument at 16, 22, Jennings v. Rodriguez, No. 15-1204) (U.S. Nov. 6, 2016).

[115] Kevin Johnson, *No Decision In Two Immigration-Enforcement Cases*, SCOTUSBLOG (Jun. 26, 2017), http://www.scotusblog.com/2017/06/no-decision-two-immigration-enforcement-cases/, *archived at* https://perma.cc/C5E7-PEA9.

[116] *See, e.g.*, *id.* (noting that the Court was "apparently deadlocked" on *Jennings*); Kelcee Griffis, *Justices in Likely Deadlock Push Two Immigration Cases to Fall*, LAW360 (Jun. 26, 2017, 11:21 AM), https://www.law360.com/articles/938299/justices-in-likely-deadlock-push-2-immigration-cases-to-fall, *archived at* https://perma.cc/F5ND-KN8D (noting that many assume the re-calendaring of *Jennings* signaled a split amongst the justices).

favor of the conservative justices' position. That does not bode well for the respondents' argument that immigration detention should be limited by the Constitution. If the Court is not deadlocked and instead has decided to allow all nine justices to weigh in on the increasingly important issue of immigration, then Justice Gorsuch's vote will perhaps play less of a deciding role.

The fact that the Court seems to be seriously considering the respondents' constitutional arguments may signal its willingness to revisit the plenary power doctrine. For decades, scholars have examined the courts' reluctance to review immigration statues because of the plenary power doctrine.[117] The *Jennings* case gives new hope to those who think that immigration's constitutional exceptionalism is unwarranted.[118] As Professor Kevin Johnson recently noted, the Court's immigration-related decisions over the last decade have moved immigration law closer to "the constitutional mainstream."[119] If any modern scenario were to cast doubts on Congress's unfettered power to regulate noncitizens in our country one would think that detention of individuals for years without the opportunity to have a custody hearing might be it—especially given the current administration's desire to increase the use of detention. But Justice Gorsuch, who is considered a strict originalist, is likely not amenable to adjusting over a century of case law proclaiming that the Constitution vests near-absolute authority in the political branches to legislate and enforce immigration laws. He is more likely to agree with Justice Roberts' comment during oral argument that a court-imposed periodic review of detention decisions would be judicial overreach.[120]

Despite the current political climate, it is difficult to see how an eight justice Court will find consensus in *Jennings v. Rodriguez*. Respondents' arguments reflect a rapidly-evolving reality in which the country's immigration detention system that is growing and is now a centerpiece of the Trump administration's increased immigration enforcement efforts. The Court has an opportunity to chip away at the political branches' plenary power by affirming the Ninth Circuit's ruling and lending some oversight to a massive immigration detention system. On the other hand, the Court may be reluctant to upend the political branches' traditionally broad authority on immigration matters. In a post-9/11 era, some courts view the political branches ability to regulate the United States borders as critical to public safety and national security. Indeed, the Court recently allowed sections of the Presi-

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[117] *See, e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (analyzing the development of plenary power since the late nineteenth century); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Exceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L. J. 257, (2000) (describing immigration's plenary power jurisprudence in cases challenging discriminatory congressional acts as consistent with domestic decisions to discriminate during the same time period).

[118] For a thorough discussion of the concept of "constitutional exceptionalism" in immigration law see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996).

[119] Johnson, *supra* note 115.

[120] *See infra* Part III.B.

dent's travel ban that block the entry of individuals from certain countries without a "bona fide" relationship to a person or entity within the United States.[121] In that case, Justice Gorsuch joined Justice Thomas's partial dissent in which he stated that the ban should be allowed to proceed in full while the case is briefed because the government is likely to win on the merits and has a compelling interest in providing national security.[122]

If the case were to be decided on ideological lines then Justice Kennedy will likely provide the vote between a split court and at least a partial affirming of the Ninth Circuit's decision. If Justice Kennedy concludes that class-members prolonged and mandatory detention is "unreasonable and unjustified" then he may be amenable to a constitutional challenge as he noted in his concurring opinion in *Demore*.[123] On the other hand, Justice Kennedy's dissenting opinion in *Zadvydas* suggests that he is not amenable to limiting statutory provisions—even pursuant to the canon of constitutional avoidance—if the limitation has no basis in the statute's text or if it thwarts the statute's intent.[124] Furthermore, he noted in *Zadvydas* that he would be open to a review of whether adequate process was accorded detainees, but such a review would have to be limited to a single discrete case.[125] That concern likely resonates with Chief Justice Roberts and Justice Alito who suggested in the *Jennings* oral argument that the correct vehicle for challenging immigration detention was a habeas corpus petition rather than a class action lawsuit.[126]

Ultimately, the Supreme Court has the opportunity to affirm relief for a large class of noncitizen detainees while simultaneously restructuring the constitutional balance of power between the political branches and the judiciary at a critical moment in history. What the Court does with that opportunity remains to be seen.

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[121] *See* Trump v. Int'l Refugee Assistance Project, 137 S.Ct. 2080, 2088–89 (2017) (per curiam).

[122] *See id.* at 2090 (Thomas, J., concurring in part and dissenting in part).

[123] *See* Demore v. Kim, 538 U.S. 510, 538 (2003).

[124] *See* Zadvydas v. Davis, 533 U.S. 678, 706–07 (2001).

[125] *Id.* at 725.

[126] *See* Transcript of Oral Argument at 16, 22, Jennings v. Rodriguez, No. 15-1204 (U.S. Nov. 6, 2016).