

1 JUSTICE KAGAN: I'm a little bit surprised
2 that you answered the question that way, because it
3 seems to me that it's quite obvious what the court below
4 thinks as to the constitutional question where did they
5 get this from, except as an understanding of what the
6 Constitution required.

7 MR. ARULANANTHAM: Yes, Your Honor. The
8 court, I think --

9 CHIEF JUSTICE ROBERTS: Well, maybe they
10 didn't have the courage of their convictions. I mean,
11 if they do think it's unconstitutional, they could have
12 said so rather than stretching the principles of
13 constitutional avoidance to the length they did.

14 MR. ARULANANTHAM: Your Honor, I won't
15 pretend to understand what was in the heads of the --
16 the Ninth Circuit judges, except that they had seen
17 prolonged detention problems for years. They had
18 decided in 2005 that mandatory detention applied only to
19 expeditious removal proceedings, and there continued to
20 be cases floating up, individual habeas cases, four
21 years.

22 I had a client four and a half years
23 detained by the government, was appealing seven years,
24 and that was part of why the court thought we needed a
25 -- a system, whether -- I would suggest even if it's on

1 due process grounds, you need a system that is
2 administrable.

3 And, you know, the person doesn't even know
4 -- the judge doesn't know when to pull the case off the
5 shelf and look at whether or not to conduct the inquiry,
6 Justice Alito, that you were talking about, unless you
7 have some kind of trigger that allows them to do that.

8 And the time periods -- and if you look at,
9 say, the Third Circuit experience, right, they said in
10 2011 that it had a reasonableness limit as a statutory
11 matter, and that then there should be an inquiry into
12 whether or not the detention remains permissible. And
13 they say we reject the time period because of Demore --
14 in a -- it would be inconsistent with Demore.

15 JUSTICE SOTOMAYOR: So why is the
16 Zadvydas -- this went -- the Ninth Circuit remedy went a
17 lot further than Zadvydas did. Zadvydas just created a
18 presumption, or did away from -- with a presumption.
19 Here the court is actually requiring --

20 MR. ARULANANTHAM: But, Your Honor, it's
21 requiring -- Zadvydas requires release. This is just
22 the inquiry. So it's actually quite similar.

23 You know, what we're saying is unless
24 removal is imminent -- okay, it's just a presumption --
25 unless removal is imminent, there -- there's a two-week

1 window to conduct the hearing under the injunction, you
2 should look into conduct an inquiry to see whether or
3 not danger or flight risk actually justifies the
4 continued detention of this person. It's not -- it's
5 not a cap on detention at all. And as I said, many
6 people don't get out. So I think it's quite consistent
7 with the approach that the Court took in Zadvydas.

8 But you know, going back to the question of
9 habeas, you know, versus the constitutional rule, Your
10 Honor, in the Third Circuit, four years later, they are
11 still seeing individual habeases. There's massive
12 disagreement in the lower courts, and amongst the
13 immigration judges, about, you know, how you count this
14 or how you count that. And then they say, you know,
15 maybe it would be good to have a nine-month, 12-month
16 window.

17 The Eleventh Circuit does the same thing in
18 the supra decision. They say, we want to give some
19 guidance, because it can't be that you have to file a
20 habeas petition just to get the inquiry that the
21 statutes -- whether -- and it might even -- the Due
22 Process should require.

23 And so having some kind of guide, even if
24 it's not as fixed as you have to do it within two weeks
25 or six months, you know, some kind of temporal limit so

1 that the person can go directly to the immigration
2 judge, not to try to get to Federal court, which most of
3 them can't do, go directly to the immigration judge and
4 say, can you please now conduct an individualized
5 inquiry --

6 CHIEF JUSTICE ROBERTS: Of course, the
7 problem is that that looks an awful lot like drafting a
8 statute or a regulation. And it -- it seems to me that
9 that's quite a leap.

10 We -- our job is to read the statute, and if
11 it presents -- if it's unconstitutional, that's our job.
12 But we can't just write a different statute because we
13 think it would be more administrable.

14 MR. ARULANANTHAM: Your Honor, I think it's
15 not that different from what the Court did in a number
16 of cases, in *Riverside v. McLaughlin*, in *Schnackenberg*,
17 where the Court said six months is the maximum time that
18 you can go to prison without a jury trial.

19 Now, here, it's just a similar kind of
20 administrable rule. You know, even *Zadvydas* --

21 JUSTICE KAGAN: An administrable
22 constitutional rule, you're saying.

23 MR. ARULANANTHAM: Yeah. And these are
24 constitutional cases.

25 JUSTICE KAGAN: We're not making up a

1 statute; we're devising a constitutional limit.

2 MR. ARULANANTHAM: Correct, Your Honor.

3 These are all administrable --

4 JUSTICE KAGAN: So we're beyond --

5 MR. ARULANANTHAM: -- rules of the
6 Constitution I'm talking about. McNeil, and the civil
7 commitment context, is a constitutional rule that
8 touched some --

9 CHIEF JUSTICE ROBERTS: Well, just let me
10 make sure. So we're now in the context of deciding the
11 constitutional question, and we put the statute -- I
12 know you want us to, and that's -- that's fine. I'm
13 just saying it's pretty unusual for us to do that in the
14 first instance. But when you're talking about the
15 administrable rule, that argument is being made on the
16 assumption that it's otherwise unconstitutional.

17 MR. ARULANANTHAM: The -- the cases that we
18 cite in our brief are all constitutional administratable
19 rules that have been -- got into effect, the ones that I
20 was mentioning.

21 I actually thought that there was a
22 colorable claim that, because Congress specifically
23 authorized six months of detention, prolonged detention
24 in national security cases, you could actually read the
25 statute that way. But obviously, that doesn't seem to

1 be particularly persuasive.

2 The last things I'll say, Your Honor -- I
3 know my time must be limited -- on the relevance of
4 what --

5 CHIEF JUSTICE ROBERTS: Well, you get a few
6 extra minutes too.

7 (Laughter.)

8 MR. ARULANANTHAM: Thank you. Thank you so
9 much, Mr. Chief Justice.

10 You know, if you -- the record is replete
11 with examples where the immigration judge makes such a
12 big difference because they're just a hearing where you
13 can second-guess -- excuse me -- not second-guess,
14 assess the decision of the jailing authority.

15 So, you know, the Merida Declaration at
16 Joint Appendix page 518 is one such example. If a
17 person with a nonviolent criminal history who is
18 detained for three years, he finally gets the
19 individualized assessment, he gets out on \$5,000 bail.

20 You know, Exhibit 73 to my declaration --
21 this is this Ethiopian asylum-seeker. He has passed the
22 background check. He has passed the background check,
23 and he is found to have a significant possibility of
24 asylum. And now he is going in front of the deportation
25 officer who is conducting his parole review. And the

1 deportation officer just chooses not to believe him.

2 When he finally gets in front of an
3 immigration judge who grants him asylum, the immigration
4 judge says, but you've already passed the background
5 check, and there -- there's no question from here. And
6 we have a witness now because we are having a hearing,
7 that this person is who he says he is.

8 And that's all we are talking about, just
9 the minimal requirement of a hearing in front of a
10 neutral decisionmaker for people who have been -- had
11 very, very long periods of incarceration. And that
12 minimal requirement we think is available under the
13 statute and also under the Due Process Clause.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Four minutes, General Gershengorn.

16 REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

17 ON BEHALF OF THE PETITIONERS

18 GENERAL GERSHENGORN: Thank you, Mr. Chief
19 Justice. I'll be brief.

20 I wanted to make first a short point on the
21 Patriot Act to shore up the construction of 1226(c).

22 There are two, as Justice Alito suggested,
23 two fundamental differences with the Patriot Act. The
24 first is that it allows for a certification. It has to
25 be by the attorney general or the deputy attorney

1 general. It can't be delegated, but then that is not
2 reviewable. It's very different from the 1226(c) where
3 the alien gets a Joseph hearing and it's subject to --
4 to BIA review.

5 The second piece of the Patriot Act that
6 makes it very different is that it overrides Zadvydas
7 and actually permits the attorney general to provide for
8 detention, even when there's no foreseeable likelihood
9 of relief.

10 And so it's -- it is a situation in which
11 there is, of course, some overlap, as one would expect
12 in a situation -- in a series of statutes dealing with
13 terrorists, but the -- there is no superfluity, and
14 they're dealing with very different things. It gives
15 extraordinary powers to the attorney general for a -- a
16 limited group.

17 I also wanted to touch base on -- to address
18 some of the statutory arguments with respect to 1225. I
19 don't believe that -- for the reasons Justice Kennedy
20 said, I don't believe that the statute really is
21 ambiguous. It says, and this is on page 152(a) of the
22 appendix to the petition, "The alien shall be detained
23 for further consideration of the application for
24 asylum." And then on 155(a) it says, "The alien shall
25 be detained for a proceeding under Section 1229(a)."

1 What Justice Kennedy said --

2 JUSTICE BREYER: Well, I wasn't -- I wasn't
3 thinking of necessarily asylum seeker. I was thinking
4 of a man who goes to a foreign country who is an alien.
5 He has a family in the United States. He comes back,
6 and he says, I want to go home. And the immigration
7 officer says, no, we're going to keep you locked up for
8 five years because there was something wrong with your
9 initial application. He says, no, there wasn't. They
10 say, yes, there was.

11 So I'm simply asking, if that human being,
12 who has a family in the United States is, in the view of
13 the government, locked up for five years without any
14 hearing whatsoever, without any opportunity for bail,
15 even though he can get out of it simply by abandoning
16 his family and returning to another country, is that the
17 position of the government as to what this statute
18 means?

19 GENERAL GERSHENGORN: So, Your Honor, the
20 position of the government is that that individual would
21 have an individualized as-applied challenge in a habeas
22 proceeding, but that is not what should drive the
23 statutory interpretation, which is principally what we
24 are talking about here.

25 And not only is it correct -- is that

1 correct for the reasons Justice Kennedy suggested about
2 his -- his Christmas visit, but that has been the
3 interpretation of the statute -- of -- of that language
4 in the statute since 1917. The "shall be detained for"
5 formulation exists -- was in the original statute in
6 1917. It was in the statute that was enacted in 1952.
7 It has always been understood --

8 JUSTICE KAGAN: It's odd language, though,
9 General. I mean, easy enough to say pending a removal
10 decision, or pending an asylum decision.

11 GENERAL GERSHENGORN: And that's the --

12 JUSTICE KAGAN: And they didn't say that.
13 They said for the consideration of an asylum
14 application. Like, why would you say that, to say
15 pending an asylum decision?

16 GENERAL GERSHENGORN: And that's precisely,
17 Your Honor, why I wanted to invoke the history. It's
18 because that is how it's been understood for a hundred
19 years, for literally 100 years or 99 years, and --
20 and -- and it has always been understood that the
21 exclusive way to get into the country while those
22 proceedings are pending is through parole.

23 Now, the government does use parole for a
24 lot of these individuals, and so they do -- the
25 government is not saying that these individuals don't

1 get any process. They actually get process. They have
2 an IJ look at their -- their credible fear
3 determination. They have -- a lot of those individuals
4 are paroled in, but we don't think you get there as a
5 matter of statutory constructs.

6 JUSTICE SOTOMAYOR: What gives you the right
7 to parole?

8 GENERAL GERSHENGORN: There is 1182(d)(5) is
9 separate parole authority, and the -- the
10 government's -- I'll just finish up with this. The
11 government's position on parole is at JA44, and it
12 explains how the government applies parole in these
13 situations. Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 The case is submitted.

16 (Whereupon, at 11:08 a.m., the case in the
17 above-entitled matter was submitted.)

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